



**SUPPLEMENTARY HUMAN DIMENSION
MEETING
ON
DEMOCRATIC LAWMAKING**

FINAL REPORT

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TABLE OF CONTENTS

I. EXECUTIVE SUMMARY	2
II. RECOMMENDATIONS.....	8
III. SUMMARIES OF THE SESSIONS.....	12
SESSION I: LAWMAKING IN A DEMOCRATIC SYSTEM OF GOVERNMENT: TRANSPARENCY AND EFFICIENCY	12
SESSION II: ENSURING INCLUSIVENESS IN DEMOCRATIC LAWMAKING	19
SESSION III: ACCESS TO LAW	23
IV. ANNEXES	28
ANNEX I. AGENDA	28
ANNEX II. ANNOTATED AGENDA	30
ANNEX III. KEYNOTE SPEECHES.....	36
KEYNOTE SPEECH: MRS. WALBURGA HABSBURG DOUGLAS, HEAD OF THE DELEGATION OF SWEDEN TO THE OSCE PARLIAMENTARY ASSEMBLY, VICE-CHAIR OF THE THIRD COMMITTEE.....	36
KEYNOTE SPEAKER: MRS. LARISA ALAVERDYAN, MEMBER OF THE OSCE PARLIAMENTARY ASSEMBLY, MEMBER OF THE NATIONAL ASSEMBLY, REPUBLIC OF ARMENIA.....	37
ANNEX IV. INTRODUCTORY SPEECHES TO WORKING SESSIONS	43
SESSION I: LAWMAKING IN A DEMOCRATIC SYSTEM OF GOVERNMENT: TRANSPARENCY AND EFFICIENCY	43
SESSION II: ENSURING INCLUSIVENESS IN DEMOCRATIC LAWMAKING	53
SESSION III: ACCESS TO LAW	57
ANNEX V. BIOGRAPHICAL INFORMATION ON KEYNOTE SPEAKERS, INTRODUCERS AND MODERATORS	62
ANNEX VI. OPENING AND CLOSING REMARKS BY AMBASSADOR JANEZ LENARČIČ, ODIHR DIRECTOR.....	64
OPENING REMARKS	64
CLOSING REMARKS.....	67
ANNEX VII. OPENING REMARKS BY THE OSCE CHAIRMANSHIP	69
ANNEX VIII. SIDE EVENTS	73
ANNEX IX. STATISTICS ON PARTICIPATION.....	76
ANNEX X. LIST OF PARTICIPANTS.....	77

I. EXECUTIVE SUMMARY

The Organization for Security and Co-operation in Europe (OSCE) Supplementary Human Dimension Meeting (SHDM) on Democratic Lawmaking took place in Vienna on 6-7 November 2008.¹ The meeting brought together 200 participants, including 111 representatives of 42 governmental delegations as well as 48 representatives of 41 non-governmental organizations (NGOs).² Eleven OSCE field operations were represented at the meeting. Distinguished keynote speakers, moderators and introducers from six OSCE participating States contributed to the meeting with their expertise and knowledge on democratic lawmaking.³

The meeting offered a forum for discussions on practices and challenges in the field of democratic lawmaking and allowed OSCE participating States to take stock of their progress in the implementation of commitments in this area. To this end, the active participation of civil society stakeholders, with the benefit of their field experience from throughout the OSCE region, was essential, in particular at the Civil Society roundtable during which 48 civil society representatives from 19 OSCE participating States adopted a set of recommendations which were presented at the Opening Session of the meeting and are included in this report.

The SHDM addressed the issues of transparency and efficiency of lawmaking processes and examined the methods through which legislation is adopted, and how these methods can enhance the quality of legislation and hence make it more responsive to the real needs of the wider public. Drawing upon OSCE commitments referring to democracy as the only system of government and an inherent element of the rule of law, the meeting focused on the importance of a lawmaking process rooted in a democratic system of government and managed so that it yields clear, transparent and enforceable legislation.

In addition to the Opening and Closing Sessions, the SHDM comprised three Working Sessions:

1. Lawmaking in a Democratic System of Government: Transparency and Efficiency;
2. Ensuring Inclusiveness in Democratic Lawmaking;
3. Access to Law.

The Civil Society roundtable was one of the two side events which took place on the margins of the SHDM.⁴

Speakers at the **Opening Session** included **Mr. Lauri Tarasti**, Judge of the Supreme Administrative Court (retired), Special Adviser of the Ministry of Justice, and

¹ See Annex I for the Agenda and Annex II for the Annotated Agenda of the Meeting.

² See Annex IX for Statistics on participation and Annex X for List of participants.

³ See Annex IV for texts of introductory speeches and Annex V for biographical information on the speakers.

⁴ See Annex VIII for the list and description of the side events.

Representative of the Finnish OSCE Chairmanship, and **Ambassador Janez Lenarčič**,⁵ Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

Representing the Finnish Chairmanship, **Mr. Tarasti** opened the meeting by noting that lawmaking is a comprehensive process, encompassing all stages from initiating and planning new or modified legislation, to the actual implementation of the adopted laws and legal provisions. He underlined that both the content of legislation and the methods by which it is made should reflect the internationalization which is an integral part of contemporary societies. He recognized that the quality of legislation – its effectiveness and efficiency – largely depends on the quality of the process through which it is prepared and developed.

Further, he referred to democratically elected parliaments with their crucial responsibility in lawmaking and the rule of law, which ensures justice and democracy as the primary preconditions for democratic lawmaking. Mr. Tarasti stressed that democratic lawmaking should result in the full guarantee of human rights and, when feasible and appropriate, civil society involvement in the legislative process and monitoring of implementation practices and policies. He further underlined that inclusive lawmaking and public debate guarantee transparency and accountability and allow for the effective use of best practices from other countries. In conclusion, he saw access to law as an additional crucial element for democratic lawmaking, without which legislation cannot be implemented. Such access can be guaranteed through both traditional methods and modern technologies, the objective being that all those interested can have access not only to adopted laws, but also to draft legislation, court decisions and applicable international treaties.

In his speech, **Ambassador Janez Lenarčič**, emphasized that this was the first occasion on which the OSCE was specifically looking into the cross-cutting theme of democratic lawmaking, which has ramifications across the entire spectrum of OSCE human dimension commitments, and far beyond. The focus of the meeting should be on the process of lawmaking, the process by which laws are prepared, discussed, adopted, published and monitored – irrespective of the content of the legislation. Two key OSCE commitments are relevant to the theme, enunciated in the 1990 Copenhagen document and the 1991 Moscow documents: “legislation must be formulated and adopted as the result of an open process reflecting the will of the people”, and “legislation and regulations must be published and made accessible to everyone, as a condition for their applicability”.

Three key principles were referred to as ways to enhance the democratic character of lawmaking as well as the rule of law: providing reasonable opportunities for the general public to contribute, in particular those affected by the legislation and those responsible for its enforcement; the principle that there is no good law on paper, but only good laws in practice; and finally, that democratic lawmaking entails a more open, transparent and participatory process which, in turn, increases the likelihood of new laws being well received and accepted and thus properly implemented. There are many ways in which these principles may be converted into practical measures: through far-reaching changes to

⁵ The opening remarks of Ambassador Lenarčič were read by the Head of the ODIHR Democratization Department, Robert Adams.

the system in place; changes to the laws, regulations and rules of procedure for lawmaking; or simply through changes in the practices, working habits and the legislative culture of lawmakers.

As regards the ODIHR legislative assistance activities, attention is given not only to the content of reviewed laws, but also to the root causes of shortcomings observed in the legislation. This is reflected in the assessments of legislative processes conducted by the ODIHR since 2005 at the request of a number of OSCE participating States. These assessments provide the framework for home-grown initiatives aimed at identifying legal and practical measures for strengthening the capacity of legislative systems.

The first keynote speaker, **Mrs. Walburga Habsburg Douglas**, Head of the Delegation of Sweden to the OSCE Parliamentary Assembly, Vice-Chair of the Third Committee, welcomed the opportunity to take part in a meeting on democratic lawmaking, which, as she noted, was of great importance to parliamentarians as they understand the inherent link between democratic elections and lawmaking.

She stressed that the word “transparency” was of particular relevance to the meeting’s topic and that the OSCE Parliamentary Assembly also focused its work during 2008 on the issue of transparency. The Parliamentary Assembly’s Astana Declaration contains an explicit call for transparency in lawmaking, which is particularly timely and relevant in a context of extensive lawmaking activity throughout the OSCE region. In a fast-changing world (23 new States have emerged in the OSCE region alone during the last 20 years), national policies in the newly independent states are still being shaped and the ongoing reforms in the political and legal systems are often linked to the enlargement process of the European Union with the demands of the *acquis communautaire*. This brings the risk of so-called “reform fatigue”.

While lawmaking is the prerogative of the national parliamentarians, it should be carried out in collaboration with civil society with the help of different OSCE structures and institutions, especially the OSCE Parliamentary Assembly. Among the basic criteria for democratic lawmaking are the following: input, exchange of information, transparency, and interaction of government and parliament with civil society. However, the responsibility for lawmaking must lie predominantly in the hands of parliamentarians, who have been elected and mandated to make laws. It is important therefore that this task not be taken over by civil society or international organizations or bodies, as only parliamentarians can be held accountable and they are the only ones who have the democratic legitimacy to make laws. In this regard election observation missions are essential.

The 50th anniversary of the Universal Declaration of Human Rights in 2008 provided a good opportunity to discuss the connection between democratic institutions and human rights. Therefore, she said, the decision to discuss this topic in 2008 was both timely and commendable, and the OSCE Parliamentary Assembly will continue to collaborate with all other relevant stakeholders on this issue.

In her keynote speech, **Mrs. Larisa Alaverdyan**, Member of the OSCE Parliamentary Assembly, Member of the National Assembly of the Republic of Armenia, referred to the commitment of OSCE participating States to respect the principles of the Helsinki Final Act acknowledging democracy as an inherent part of the rule of law. Democracy-building processes are essential in emerging democracies, and in this regard, it is worth stressing that laws in democratic societies are effective not only because of their content, but also as a result of the process by which they are elaborated and adopted. The principles of transparency, inclusiveness and access to law should be upheld not only during the law-drafting stage, but also during the consideration of laws in parliament and, after their adoption, during the monitoring of their implementation, when feedback on the effectiveness of laws is provided regularly and consistently.

The active participation of civil society, including NGOs, academia, experts and the general public, is critical in ensuring the inclusiveness of the lawmaking process. However, too often civil society and the general public are not involved, and the commitment to public consultations on draft legislation is mere lip service. Such consultations should be made an integral part of the policy development stage, which is often neglected in post-totalitarian societies. On the other hand, experience has shown that simple carbon-copies of model foreign laws, however effective they are in their country of origin, do not have the desired effect once transplanted in emerging democracies. Such an approach, often dictated by the will to hastily comply with international commitments, is likely to fail due to the lack of enforcement mechanisms, and the absence of public awareness campaigns or the discriminatory application of laws in practice, among other reasons. Another problem of emerging democracies is the lack of systematization of legislation.

Ultimately all these factors undermine democracy-building efforts, lead to the polarization of society and legal nihilism, and erode citizens' trust in government. There is therefore a need to boost the capacity of NGOs and academia in thwarting such cynicism. International institutions, such as the Council of Europe's Venice Commission and the OSCE should continue their activities in the countries that stand most to benefit from their advice. They should promote a dialogue with civil society and ensure that civil society experts are consulted. They should also have a coherent approach to their assistance programs.

The Opening Plenary was followed by three Working Sessions. Each working session was moderated by a separate Moderator who also served as a Rapporteur during the Closing Session.

The Working Session I was introduced by **Mr. Yves Doutriaux**, State Counsellor of France (member of the *Conseil d'Etat*). His remarks focused on challenges posed by legal inflation and ways to ensure the efficiency of lawmaking and to preserve legal certainty, one of the crucial elements of the rule of law. Impact assessments and measures enhancing legislative transparency were mentioned as effective safeguards which could prevent the passage of ineffective and non-implementable legislation. The ensuing discussion focused on differences existing throughout the OSCE region with regard to

civil society consultation mechanisms to ensure the transparency and efficiency of the lawmaking process. Generally, participants agreed that an institutionalized practice yields best results as it provides for transparency, inclusiveness, consistency, clarity and predictability. At the same time participants stressed that a formal procedure, in itself, is no substitute for genuine dialogue and interaction between civil society and all responsible authorities. Participants were of the opinion that consultations should be seen as a benefit rather than a concession, and whatever the format chosen, it should reflect the principle of the separation of powers, the diversity of views and interests in the society, and should allow for expertise offered by external actors.

The discussion in the **Working Session II** focused on ways to ensure inclusiveness in democratic lawmaking. The introductory speech was delivered by **Mr. St John Bates**, Professor, United Kingdom. The discussion focused on the rationale for consultations with civil society and on how such consultations can be made more effective. Participants sought to move beyond generalities and face the realities of a variety of possible options. There was general agreement that comments by civil society and external experts should be responded to with feedback acknowledging that the opinions have been reviewed and explaining, when rejected, the reasons why they were not taken into account. Participants highlighted the need to ensure that law-drafting, especially by parliament, includes parliamentary minorities, national minorities and women, and that the participating States should consider adopting special measures and affirmative action in order to guarantee the inclusiveness of the lawmaking process. Finally, it was noted that when relying on best practices from other OSCE participating States, due care should be exercised to avoid introducing provisions and mechanisms that are not tailor-made to fit the specifics of the country concerned. All legal innovations should undergo prior impact assessment in order to ensure they are implementable in practice, including when international standards are being incorporated into domestic legal systems.

Mrs. Mara Poliakova, Chair of the Board of Independent Expert Legal Council (NEPS) of the Russian Federation, made the introductory remarks for **Working Session III**. She reiterated the importance of access to law and information as a means of ensuring greater public involvement in matters of general concern and in order to guarantee the accountability of public authorities to their constituencies. She offered several recommendations on the safeguards which should be enshrined in a law on access to information, including an obligation for the State to make all draft and adopted legislation available to the public through both traditional means, such as the press, TV and radio, as well as new technologies, such as the Internet, which offers additional possibilities for interactivity. Comments can be submitted using the on-line regime and feedback received from the responsible authorities. Participants discussed the need for access to information laws and described existing practices in their own countries. Participants supported the idea of exploring various new technologies and formats for consultations with the general public, both in the draft stage and after approval, and agreed on the need to make updated versions of legislation available promptly. It was seen as especially important to ensure access for all those who are responsible for the implementation and interpretation of laws, such as public officials and judges. The importance of translating international treaties

and key jurisprudence of international human rights bodies in the official languages of the OSCE participating States was also acknowledged by the participants.

During the closing session, **Ambassador Lenarčič**, in his concluding remarks noted that discussions during the three working sessions underlined the importance of the topic of democratic lawmaking for the OSCE region. He thanked all civil society participants who contributed actively to the discussions at the side event that took place prior to the meeting. He stressed that recommendations adopted at this roundtable had made an important contribution to the meeting and its outcome.

He stated that the management and regulation of legislative systems would be improved if a more comprehensive and systematic approach were to be adopted in all participating States. Firstly, he observed that there was a principled agreement during the discussions that more needs to be done to foster transparency and openness. The voice of the citizens should be heard between elections, and their participation in the lawmaking process should be seen not as a concession, but as a benefit that ultimately ensures the effectiveness of the legal system. **Ambassador Lenarčič** mentioned that practical options have to be adopted in order to guarantee that civil society input is taken into account in a genuine manner, and, as borne out by the discussions, there is no one-size-fits-all solution for OSCE participating States.

Ambassador Lenarčič recapped several key recommendations made by the participants during the meeting:

- Broad consultations on key legislation should occur at all stages of the lawmaking process, including at the policy development stage;
- There needs to be access to draft legislation at the earliest possible stage. Likewise, timely access to legislative agendas is essential;
- There should be public assurances that the input of those consulted will be given serious consideration and that the outcome of the consultations will be made public;
- New policies and mechanisms should be developed to ensure that consultations with the public are predictable in their scope, time-frame and purpose, and that they are effective.

He underlined the ODIHR's readiness to support exchanges of best practices in the OSCE region, while recognizing the need for instruments and mechanisms that fit the specifics of each individual participating State's legislative system. He reminded participants of the ODIHR country studies which provide a working basis for increasing the transparency and efficiency of the lawmaking process. He expressed the hope that these ODIHR activities would be of benefit to participating States in their efforts to further democratize lawmaking, showing that transparency and efficiency are not incompatible but rather mutually reinforcing. Concluding, he highlighted the need for strong political will and determined action to put into practice all the valuable suggestions and ideas offered at the meeting.

II. RECOMMENDATIONS

This part of the report contains a selection of the wide-ranging recommendations made by delegations of OSCE participating States, OSCE field operations, international organizations, civil society and the representatives of academic institutions during the three working sessions. The recommendations are made to a variety of actors, in particular, OSCE participating States, OSCE institutions and field operations, as well as other international organizations and NGOs. These recommendations have no official status and are not based on consensus. The inclusion of a recommendation in this report does not suggest that it reflects the views or policy of the OSCE. Nevertheless, they are a useful indicator for the OSCE to reflect upon how participating States are meeting their commitments on democratic lawmaking, determining future priorities and considering possible new initiatives in this area.

General recommendations to the OSCE participating States:

- OSCE participating States should uphold their OSCE commitments according to which “legislation must be formulated and adopted as the result of an open process reflecting the will of the people”, and that it should be “adopted at the end of a public procedure”;
- OSCE participating States should acknowledge the importance of the OSCE commitments, which stipulate that all regulations must be published, that such publication is a condition for their applicability, and that all legislative texts need to be made accessible to everyone;
- OSCE participating States should adopt a clear and well-articulated strategy on promoting the development of civil society and ensure that their input in policy development and lawmaking is given proper consideration. Such a strategy can ensure better quality, more widely accepted legislation and more effective implementation of the legislation adopted;

Policy-making and the legislative drafting process

- The scope and procedural requirements for constitutional, primary and secondary legislation should be stipulated in national constitutions or organic laws. Parliaments should be the primary legislator. Laws authorizing governments to elaborate and adopt subordinate legislation through the legally established procedure should be passed by parliament, and subordinate legislation should be subject to appropriate checks and scrutiny;
- In order to respond effectively to the increasingly complex demands, needs and expectations of their citizens, OSCE participating States should harness all available potential and expertise in society throughout the processes of policy development and lawmaking;

- Prior to ratification of international treaties, consultations with relevant governmental and non-governmental experts should be held in order to ensure adequate translation of the texts into official state language(s) and ratification should be followed by prompt transposition of international standards into the national legal system;
- In OSCE participating States with state-owned media, civil society representatives should be provided access to these media so that they may express their views on draft legislation prior to its submission to parliament;
- OSCE participating States should ensure that relevant information on lawmaking is disseminated through various means, such as public hearings, emails, press releases, press conferences, broadcasting of parliamentary sittings, and public debates on draft laws.

Consideration, adoption, implementation and monitoring of legislation

- In order to ensure better public participation in the process, OSCE participating States should provide for live broadcasts of parliamentary deliberations on TV, radio or Internet.
- OSCE participating States should introduce the required secondary legislation in a timely manner to ensure the effective implementation of primary legislation. Moreover, new laws should be presented as a package with proposed amendments and addenda to all other related primary and secondary legislation;
- OSCE participating States should recognize the importance not only of the lawmaking process itself, but also of effective implementation of the legislation adopted;
- OSCE participating States should ensure effective and efficient parliamentary oversight of the implementation of legislation;
- Governments should monitor the implementation of adopted laws, assess their impact and publicly report on their findings, formulating specific recommendations for amendments, where necessary; they should consider setting up independent bodies for this purpose, if necessary;
- Laws on the lawmaking process should include provisions which clearly indicate the penalties incurred by the relevant actors for violating legislative process requirements.

Education and capacity-building

- OSCE participating States should raise the awareness of official and political actors regarding the importance of sound policy-making, underlining the strong correlation between good policy and good laws;
- OSCE participating States should enhance the capacity of legal drafting personnel in the relevant state bodies and allow for the involvement of external experts;
- OSCE participating States should develop and provide for the continuing education of government officials on impact assessment, policy formation, law-drafting and mechanisms of consultations with civil society, in co-operation with international organizations;
- OSCE participating States should facilitate the development and delivery of courses in higher educational institutions on impact assessment policy formation, as well as law-drafting, in co-operation with international organizations;
- OSCE participating States should provide financial and technical assistance in order to build the capacity of civil society to make meaningful and high-quality contributions to lawmaking processes.

Recommendations to the OSCE, its institutions and field operations, as well as other international organizations:

- The ODIHR's practice of assessing legislative processes is a valuable contribution to promoting democratic governance and a logical complement to the ODIHR's election observation; it should be further developed and expanded;
- The OSCE should develop and adopt guidelines on democratic lawmaking processes;
- The ODIHR through its www.legislationline.org database should encourage OSCE participating States to exchange their experiences and best practices in increasing the transparency and efficiency of the legislative process;
- The ODIHR should develop a resource book describing best practices in lawmaking processes and consultations with civil society across the OSCE region;
- International organizations should facilitate training programmes for civil society on public participation in the lawmaking process in order to increase the effectiveness of their contribution to legislative drafting and monitoring of the implementation of legislation;
- International organizations should support governments in improving their lawmaking systems by making available international expertise through written legal opinions, workshops, seminars and roundtables, ensuring that comments by

international experts submitted to the government are released and publicly discussed;

- The OSCE should provide advice and assistance to the OSCE participating States on various civil society-government consultation models in order to promote transparency and inclusiveness in the lawmaking process, and encourage OSCE participating States to adopt laws on access to information in order to guarantee the transparency of the lawmaking process;
- Whenever appropriate, the OSCE and ODIHR should voice their concerns on the lack of transparency in the lawmaking process and raise these concerns in the appropriate forums and meetings with government officials and parliaments;
- The OSCE and ODIHR should create a panel of legal experts to monitor observance by OSCE participating States of their international human rights commitments relating to lawmaking and the rule of law. This panel could also offer examples of best practices from the OSCE region and assist OSCE participating States in ensuring that draft laws are in compliance with the relevant human rights standards;
- OSCE Chairmanships and the ODIHR should institutionalize the practice of organizing civil society roundtables prior to the SHDMs in order to allow NGOs to prepare a set of agreed recommendations for the SHDM.

Recommendations to civil society and NGOs:

- Civil society should raise the awareness of governments concerning the necessity of reforms in the area of lawmaking and provide support in planning and implementing such reforms;
- Civil society should be proactive by following the discussions of draft legislation at all stages of the lawmaking process and submitting comments on draft legislation;
- Civil society is encouraged to use the mass media in order to broaden public discussion and awareness of draft legislation;
- Civil society should form broad coalitions and seek popular support for their contributions to the lawmaking process.

III. SUMMARIES OF THE SESSIONS

Session I: Lawmaking in a Democratic System of Government: Transparency and Efficiency

Introducer: Mr. Yves Doutriaux, State Counsellor (member of the *Conseil d'Etat*)

Moderator: Mrs. Suzana Nikodijevikj-Filipovska, Head of Sector for Policy Analysis and Co-ordination, General Secretariat of the Government, former Yugoslav Republic of Macedonia

The discussion in the **Working Session I** focused on transparency and efficiency as crucial elements of democratic lawmaking.

Introducing the topic, **Mr. Doutriaux** drew attention to the fact that the growing complexity of the law has become a major source of fragility for societies and economies; it may lead citizens to doubt the efficiency of decision-making by governments and parliaments.

He gave seven reasons for the increasing complexity of legal provisions and the “inflation” of legislation, which, he said, may pose a threat to the rule of law. They are: the lack of political will on the part of leaders to avoid complexity; the increasing number of sources of law (domestic, European law and international treaties); the evolution of new spheres and challenges which the law has to tackle as a result of scientific advances; lack of political consistency and heritage – every new party in power wants to change what the previous government did; challenges posed by the necessity and complexity of supervising activities of economic actors in a free market; legitimate attempts by legislators to protect the most vulnerable groups; and finally, pathogenic factors, such as media pressure and sensationalism, which encourage hasty lawmaking in response to incidents, such as new amendments to the criminal law in reaction to high-profile news items ranging from mad dogs to sexual recidivists.

The speaker gave examples of how European Union law, Council of Europe Conventions as well as bilateral and various multilateral treaties dictate the introduction of changes into domestic laws in France. Moreover, he pointed to situations where the state’s regulatory function is shared with other actors, such as specialized regulatory authorities, or local authorities vested with the right to adopt their own administrative rules and regulations – such legal autonomy may often affect legal efficiency.

He further described possible negative consequences of legal inflation for various actors. Parliaments get swamped by increasingly long draft laws and numerous amendments; laws adopted under emergency procedures are often not applied due to the lack of implementing regulations; for the ordinary law-user, the law appears to be unstable and inaccessible, especially when new texts fail to revoke old provisions or lack impact assessment on the existing body of laws. During the implementation stage, complex laws

are unclear for civil servants, who are forced to adopt explanatory instructions and rules that further exacerbate legal inflation. The unclear nature of the texts increases the interpretative role of judges in the face of an acceleration of legislation and the incoherence of texts, and does not leave time for jurisprudence to be established.

Mr. Doutriaux outlined measures that could be taken to address these challenges. Promoting the principle of legal certainty, as one of the foundations of the rule of law, where legal provisions are clear, intelligible and not subject to overly frequent and unpredictable changes, was suggested as an obvious solution. In order to achieve legal certainty, the form of the law should be precise, clear and prescriptive. Moreover, the law must be predictable and legal situations stable, which should not, however, clash with the principle of adaptability of laws. If legislators abide by the principle of non-retroactivity of the law, whereby acquired rights in certain circumstances are protected, and there is the use of provisions for transitional measures when the legal rule changes, then warranted legal changes will not undermine the principle of legal certainty. He referred to decisions of national and international courts establishing the principle of legal certainty and provided for its definition, highlighting that judges play an important role in sustaining legal certainty. However, he stated, they cannot fulfill this task alone.

Mr. Doutriaux explained that in France, the Council of State (*Conseil d'Etat*) is consulted on legislative proposals and verifies the quality of laws. In 2006 this institution gave explicit recognition to the principle of legal certainty and recognized that the accessibility of laws, that is to say, the availability and publication of legal documents, texts and decisions, was a public service requirement.

In order to respect the legal certainty requirement, prior to formulating legislative changes, governments should give serious consideration to all possible alternative approaches (such as codes of good conduct, financial incentives, negotiation of conventions, regulation by an independent authority or self-regulation) and carry out an impact assessment (by means of an analysis of all government agencies involved and after listening to those directly concerned); and only then adopt policy decisions and start drafting the actual legislative text.

Mr. Doutriaux illustrated how lawmaking functions in some of the OSCE participating States. In Canada, since 2000 impact assessment has been a pre-condition for submitting a draft law to the Committee of Ministers. In the United Kingdom, the Blair Government established a panel for regulatory accountability chaired by the Prime Minister with a regulatory impact unit attached to the Cabinet, which is an independent advisory body, comprising company directors, trade union officials, consumer associations and other relevant stakeholders, and its impact assessment involves calculating the costs of each proposed regulation. In the United States of America, under the Reagan administration the Presidential Task Force on Regulatory Relief was set up, and under the Clinton administration, the Government Performance and Results Act was adopted, obliging authorities to reduce the content of federal regulations by 10 per cent. In Germany, intense consultations with the *Länder* and interested parties take place before any reform is executed, as well as re-examination of the laws in force with a view to abrogation of

existing texts; and the jurisprudence of the Constitutional Court has proclaimed that regulatory impact assessment is part of the protection of fundamental human rights.

Mr. Doutriaux suggested that the OSCE and its institutions should encourage OSCE participating States to hold consultations, when deciding on the necessity to pass a new law. He suggested using the consultation mechanisms developed by the European Commission, involving lobbying and interest groups, whose activities should be regulated by law, and elaborating concept papers before taking lawmaking decisions.

In conclusion, **Mr. Doutriaux** recommended strengthening the role of parliamentary commissions whose role is not simply to draft laws but to ensure that draft laws are genuinely deliberated. He also focused on achieving an optimum division of work, under existing legislative agenda, between relevant actors in the parliament, for instance, government and opposition parliamentary groups. The speaker expressed his belief that parliaments are better placed than governments to draft laws and therefore, it was of utmost importance to ensure that parliaments have the capacity to do so. Moreover, it was necessary to strengthen parliamentary control over the implementation of laws and evaluation of public policies and encourage parliaments to make good use of commissions of inquiry, parliamentary offices, parliamentary questions, votes of no confidence and public debates.

In order to maintain close links with the public, the speaker recommended that parliaments and governments make better use of the Internet to inform citizens of reforms in preparation and to organize electronic discussion forums in order to assess legislative measures. Finally, judges should exercise their supervisory functions vis-à-vis secondary legislation that is of an imperative nature and demands immediate publication and public dissemination.

Participants from Armenia, Azerbaijan, Belarus, the former Yugoslav Republic of Macedonia, France, Germany, Kazakhstan, Kyrgyzstan, Russia, Switzerland, the United Kingdom, as well as representatives of the OSCE Parliamentary Assembly and the Council of Europe Venice Commission contributed to the discussion.

Many participants distinguished between the lawmaking process in so-called new democracies and the practices in older democracies. Recent initiatives undertaken by national authorities in some participating States were described, whereby political parties not represented in parliament could be allowed to take the floor in parliament. Similarly, civil society groups may be authorized to attend parliamentary committee sessions, while not being entitled to take the floor at these sessions. Other practices, such as submission of written comments by civil society groups or foreign experts, are commonplace in many OSCE participating States.

NGOs challenged some of the examples of consultation mechanisms described by state officials during the discussion. They mentioned several cases where promises of transparency given to international organizations were not upheld by the authorities and where working groups set up to discuss crucial laws never met or were not maintained. Civil society representatives drew attention to some OSCE participating States which

have created formal structures for consultations with civil society. Some participants questioned whether such public structures constituted a genuine platform for consultations.

There were other concerns raised by participants. The increasing amount of draft legislation initiated not only by government, but also by parliament, creates a need to strictly regulate the power to initiate legislation by civil society – strict benchmarks have to be set. Even though a consultative process may be a costly procedure, it is an OSCE commitment which should be implemented. In the end, participants stated that compliance with this commitment will ensure better co-operation between parliaments and civil society.

Some participants raised various issues which need to be addressed when implementing the consultation process with civil society. These included: budgetary implications, the need to guarantee the proper engagement of all relevant experts, the selection of the best formula for institutionalized consultation mechanisms, funding schemes for their activities, the possible self-funding of implementation monitoring, and the need to elaborate a separate law regulating consultation mechanisms with civil society.

Other participants noted that in order to make consultations effective, all those involved should see the benefit in doing so. Personal perceptions may often be a part of the problem with consultation procedures – parliaments and executives may fear that involving outside experts will be perceived as a sign of “weakness”. As for civil society, some members of civil society see themselves as the representatives of the whole spectrum of society and tend to monopolize consultations. Participants discussed whether the process of consultation should be formalized or not, but most were of the opinion that this should be a decision for each participating State. In practice, it is difficult to ensure consistent access of NGOs to draft legislation in order to allow for significant input. Participants stated that it is even more difficult to guarantee access to legislative agendas for all those interested, simply because not all lawmaking systems prescribe thorough planning and in a number of participating States there is no effective legislative agenda.

Participants argued that, when consultation with civil society takes place, it cannot be viewed as a substitute for parliament. This would be a dangerous drift from the institutional system of checks and balances and the constitutional order. Consultation procedures should be clear and unambiguous, otherwise parliaments may reject what was negotiated by government and civil society. Where most draft laws originate with the executive branch, there is a need to strengthen the capacity of parliament to initiate legislation and review legislation proposed by the government, ensuring that it has sufficient resources to contribute significantly to policy and lawmaking.

A representative of the OSCE Parliamentary Assembly recalled that limitations and restrictions of human rights can only be imposed by laws, adopted by parliament, and not by secondary legislation. In EU candidate countries and other countries aspiring to EU membership, he drew attention to the dangers of hasty implementation by governments of the *acquis communautaire* to the detriment of dialogue and consultation with civil

society. Further, he drew attention to the fact that the interaction of civil society with the authorities could present challenges. Whereas professional public-interest groups should be heard, as they indeed provide useful expertise, other types of lobbying or interest groups may exert undue pressure on lawmakers and may potentially create serious obstacles in the decision-making process. In some countries, such as the USA, the executive branch is prohibited from lobbying parliament.

Participants expressed a view that OSCE and its institutions, when carrying out their monitoring activities, should also take account of the activities of civil society and should encourage governments to receive the legislative assistance provided by experts from abroad, as well as national experts from civil society. Professional legal expertise offered by civil society could be channeled through the creation of joint working groups, where parliamentary experts are included.

Generally, there was a common agreement that all OSCE participating States should ensure that civil society involvement in the lawmaking process be based on clear-cut procedures in order to sustain balance and transparency. Switzerland was mentioned as one of the examples where a law on the consultation process provides for a list of draft laws on which consultations are required to be held within three months of their submission to the parliament and includes a requirement to issue public and reasoned decisions following each consultation. A recommendation was made to institutionalize this practice in all OSCE participating States, especially those where there is still no formal requirement to consult with civil society during lawmaking.

Germany was cited as an example of institutionalized consultations. In order to counter the inflation of legislation and determine the cost of lawmaking, a separate institution was established, as part of the legal requirement to provide access to information to the public. This body makes statements on ongoing legislative work, to which the government must respond and the parliament must examine the expert opinion and take it into account in the legislative agenda. It was recommended that such bodies could be established in other OSCE participating States.

The representative of the Venice Commission highlighted the importance of drafting national constitutions through a consultative process, and of ensuring that civil society can make meaningful contributions. Moreover, the importance of non-state actors' input in the process of adoption of international instruments was highlighted.

Finally, one of the NGOs suggested looking not only at the laws, but also at the implementation practices, and the OSCE was invited to support such a recommendation. In order to ensure better implementation, parliaments should invest more resources in overseeing the implementation of legislation and ensure regular consolidation of legislation, using modern techniques, including guillotine strategies.

The following specific recommendations were made in Session I:

Recommendations to the OSCE participating States:

- OSCE participating States should take into account that, although hyper-inflation of laws is a sign of the times and symptomatic of changes in society, measures should nevertheless be taken to avoid overregulation, which ultimately results in a lack of legal certainty. Appropriate measures are the carrying-out of regulatory impact assessments and detailed assessment of the real need for new laws or amendments;
- OSCE participating States should continue their efforts to ensure efficient lawmaking by proper management of the legislative process as a whole;
- OSCE participating States should ensure that the principle of legal certainty is embodied in their legal systems and that it is respected through clear, comprehensible and well-structured laws;
- OSCE participating States should develop comprehensive and well-articulated plans for reforming their lawmaking process and establish effective management systems of the lawmaking process. The lawmaking process as a whole and each of its stages should be clear and transparent to all stakeholders;
- OSCE participating States are encouraged to ensure that any legislative initiative is preceded by a respective policy decision taken in a public and transparent manner;
- The executives and the legislatures of the OSCE participating States should undertake detailed legislative planning at least on an annual basis. The outcome of this planning should be made public;
- OSCE participating States should introduce a requirement for regulatory impact assessments, which would include legal and cost-benefit assessment, as well as the assessment of consistency with applicable international treaties;
- OSCE participating States should ensure the consistency of existing and newly adopted legislation with applicable international human rights standards and introduce special mechanisms for verifying such consistency;
- OSCE participating States should strive to make laws more efficient by developing clearly defined rules for consultation with civil society and interest groups at the policy-making and drafting stages. OSCE participating States should give consideration to regulating the consultation process by law in order to ensure transparency;
- OSCE participating States should secure broad public acceptance of laws and their proper implementation through consultation with civil society and stakeholders at an early stage of the process, beginning with the phase at which the problem is identified and through the various policy-making and law-drafting stages. Effective consultation

processes require that sufficient resources be dedicated to allow for comprehensive analysis and provision of feedback to stakeholders;

- Parliaments should demonstrate their commitment to openness and transparency in the process of lawmaking by:
 - Ensuring access of civil society organizations, groups and individuals to legislative proposals;
 - Establishing reasonable timeframes for the submission of comments on draft legislation;
 - Providing feedback to stakeholders;
 - Inviting civil society experts to testify at parliamentary hearings, when appropriate;
 - Periodically reviewing co-operation practices with relevant stakeholders;
 - Easing legal requirements for the initiation of legislation by citizens;
- OSCE participating States should make efforts to ensure that parliaments have greater oversight of laws;
- OSCE participating States should ensure that laws are made more efficient by establishing mechanisms to monitor their implementation, for instance, by including “sunset clauses”⁶ and subjecting laws to “guillotine processes”⁷.

Recommendations to the OSCE, its institutions and field operations:

- The OSCE and ODIHR should continue providing assistance and expertise to OSCE participating States, in particular through assessment of their legislative systems by the ODIHR, resulting in recommendations to facilitate reform;
- The OSCE should continue the development of the database www.legislationline.org so that it may be used as a tool for sharing of good practices in the realm of lawmaking.

⁶ Provisions in a law stating that the law expires at a specified date, unless renewed by an act of the legislature.

⁷ A process of review of a large number of regulations with a view to eliminating those that are no longer needed without the need for lengthy, distinct and costly legal action on each regulation.

Session II: Ensuring Inclusiveness in Democratic Lawmaking

Introducer: **Mr. St. John Bates**, Professor, St John Bates Consultancy, UK

Moderator: **Mr. Denis Petit**, Chief of the Legislative Support Unit, Democratization Department of the ODIHR

Introductory notes for the Working Session II by **Mr. Bates** focused on lawmaking and policy-making as central elements of democracy. He stressed that consultations with relevant stakeholders are a means of ensuring that lawmaking is not divorced from people and their needs. Consultations with civil society, as a rule, improve the effectiveness and quality of policy and lawmaking. They alert policymakers to issues that they may have failed to notice and may also reveal the loop holes in draft legislation. He stressed that the utility of consultations with civil society is not always evident at first sight, especially in those OSCE participating States where governments face constant demands to develop and enact laws and where a systematic approach is sacrificed to the immediacy of these demands.

Mr. Bates stated that OSCE participating States tend to think decision-making can be streamlined through closed procedures, and that consultations are a luxury for less frantic times. Against these arguments, he expressed the view that consultations with civil society have real value at all stages of the lawmaking process, and therefore such consultations must be transparent, prescribed and embedded in the local system, with the allocation of adequate resources and time, and on the basis of a separate code of practice or a law to ensure consistency.

When considering who to include in consultations, OSCE participating States should strive to ensure that wide consultations are carried out whenever appropriate, and that due care is exercised in reviewing input received, as often many of the responses will be uninformed. In order to guarantee positive outcomes, consultations with specialists and the wider public should be combined.

Mr. Bates stressed another important consideration in consultations with civil society: civil society should not be limited only to organizations with headquarters conveniently located in the capital or which are ideologically close to the government. He repeated that legislation adopted without consultations is often defective and these defects are costly to remedy. Genuine consultations, on the other hand, expose all possible conflicts and ambiguities, in particular, when transposing the provisions of international standards and treaties into national law.

After the presentation made by the introducer, the floor was opened for discussion. Participants from Armenia, Azerbaijan, Austria, Belarus, Croatia, the former Yugoslav Republic of Macedonia, Georgia, Germany, Italy, Kazakhstan, Russia, Ukraine and the United Kingdom shared their views and experiences on how inclusiveness in lawmaking is ensured in their countries.

Participants discussed how governments and parliaments could be encouraged to respect the principle of inclusiveness. They noted that international standards and OSCE commitments clearly stipulate the right of civil society to take part in lawmaking if the law affects their rights and interests. Participants expressed a general view that the level of democratization can be measured by the level of maturity and professionalism of civil society and government's readiness to include civil society in policy-making and lawmaking. They noted that participation of civil society in the lawmaking process should not only be seen as a right of civil society, but as a tool to ensure the effectiveness of legislation. If consultations are effective at the problem-identification and policy-making stage, then the resulting law will be more effective and implementable.

Some participants saw a need to review the rules of procedure of governments and parliaments in order to make civil society consultations mandatory. Other participants suggested that consultations should not be seen as a panacea for laws and that whether or not to hold such consultations was best left to the parliaments themselves to decide.

Some participants described the existing mechanisms in their countries where consultation is foreseen at all stages of the legislative process. Based on their experience, participants highlighted that the best way to ensure inclusiveness of the consultation process is to combine consultations with expert groups or professional associations and the general public.

Participants noted that when foreign experts are invited to take part in law-drafting they should co-operate closely with national experts, since jointly produced recommendations are more likely to receive public acceptance and government endorsement. Moreover, it was noted that OSCE participating States should ensure that the opinions of international experts are made available to the public and are subject to public discussion.

Participants shared experiences of civil society consultations which resulted in the comments being reflected in the draft laws. However, in some OSCE participating States, consultations are often symbolic or ritualistic and the recommendations made by civil society are not seriously taken into consideration. This speaks for establishing clear criteria to measure the quality of the consultation process. Many participants argued that consultations should be institutionalized and should involve stakeholders from outside the capital. In order to ensure systematic participation, monitoring of legislation and oversight of implementation should also involve civil society.

A representative of the OSCE Parliamentary Assembly noted that democratically elected parliaments are bodies mandated to take final decisions on which laws to pass. Parliaments should not be put under undue pressure by interest groups, including foreign experts. There is a right for NGOs to have their voice heard, but no right for their demands to be reflected in the law.

Furthermore, participants stressed the importance of listening to parliamentary minorities, i.e. opposition groups represented in the parliament. OSCE participating States should enable opposition groups in parliaments to have their views heard during deliberations on

draft legislation. Any opposition group represented in parliament should be able to initiate parliamentary hearings, or to propose items for inclusion in the legislative agenda, provided they have sufficient support in parliament.

Reference was made by a few participants to examples of special measures aimed at ensuring the involvement of ethnic minorities in the lawmaking process. Examples of similar measures guaranteeing the participation of women in the lawmaking process were also mentioned by some participants.

Participants argued that exchanging best practices in the OSCE region could broaden the exposure of lawmakers to the variety of mechanisms and techniques that can be used to ensure that the lawmaking process is as inclusive as possible. However, when reviewing the experience of other countries, governments should refrain from simply translating foreign laws into their domestic legislation (so-called “legal transplants”) without prior thorough analysis of their compatibility with the domestic legal and political system.

The following specific recommendations were made in Session II:

Recommendations to OSCE participating States:

- OSCE participating States should be more proactive in supporting the participation of civil society in the lawmaking process and should ensure that the consultation process is inclusive and non-discriminatory;
- OSCE participating States should acknowledge that, ultimately, the rationale behind such consultations lies with the principle of accountability: governments and parliaments are accountable to the citizenry, and civil society has a key role to play in holding governments and parliaments accountable to the public;
- OSCE participating States should develop strategies and policies in order to guarantee a degree of formalization of the manner in which the lawmakers interact with civil society and incorporate the latter’s input into the process;
- The commitment to effective rather than formalistic consultations should be reflected in the provision of sufficient resources for consultation processes (staff, budgets, time) to allow for comprehensive analysis and provision of feedback to the stakeholders (for example, stakeholders comments can be summarized in the explanatory notes attached to the legislative drafts, and the rejection of input should be motivated in order to demonstrate that comments were actually reviewed by the law-drafters);
- Consultations with civil society and other stakeholders should primarily be concerned with legislation addressing issues of fundamental importance to the society. They should commence at the policy-making stage, prior to the actual drafting of a piece of legislation. When appropriate, working groups tasked with drafting or amending legislation should include civil society experts;

- Consultations with civil society should not be confined to discussions on individual pieces of legislation, but also extend to the overall planning process, particularly when it comes to legislation of fundamental importance to the society;
- OSCE participating States should guarantee that dialogue between state authorities and civil society be as genuine, professional and constructive as possible and that it not be limited to the phase immediately prior to the adoption of legislation but also extend to the oversight of the implementation of the legislation and its periodic review;
- OSCE participating States should not view consultations with civil society as a substitute for debate in parliament;
- OSCE participating States should develop clear definitions of “civil society”, which includes the narrower category of NGOs. This is particularly relevant with regard to the necessity to differentiate between advocacy work and lobbying activities, which may require specific regulations. In this regard, participation of civil society organizations in the lawmaking process should not be governed by laws on lobbying;
- OSCE participating States should reform their parliamentary and government rules of procedure in order to stipulate explicitly the right of civil society to participate in lawmaking, and to ensure strict adherence to such rules by all relevant national authorities. Civil society participation may for instance be enhanced with the use of public chambers or public consultation committees in the executive or legislative bodies;
- The use of expedient or urgent procedures which exclude the participation of civil society should be limited to instances where there is a motivated and demonstrable case for such action;
- OSCE participating States should consider allowing legislation to be proposed by means of popular initiative;
- Legal opinions requested from international organizations should be attached to the draft laws discussed in the parliament; justification should be provided when the recommendations of international experts are not taken on board.

Recommendations to the OSCE, its institutions and field operations:

- The OSCE and its institutions should offer greater assistance to the governments and parliaments of OSCE participating States with regard to the consultation process and its modalities. The OSCE could have an important role to play in providing guidance and facilitating the exchange of good practices;

- The OSCE should contribute to highlighting good practices in the conduct of consultations with civil society.

Session III: Access to Law

Introducer: **Mrs. Mara Poliakova**, Chair, Board of the Independent Expert Legal Council (NEPS), the Russian Federation

Moderator: **Mr. Alan Page**, Professor of Public Law at the University of Dundee, United Kingdom

The discussion in **Working Session III** focused on access to law as part of the right of access to information guaranteed by international standards and national laws in most of the OSCE participating States.

Mrs. Poliakova opened the session by referring to the fundamental international legal instruments and OSCE commitments guaranteeing access to law. She addressed the issue from the angle of freedom of access to information and freedom of expression, recalling that Article 19 of the International Covenant of Civil and Political Rights and Article 10 of the European Convention on Human Rights and Fundamental Freedoms both provide for these freedoms to be enjoyed “without interference by public authority and regardless of frontiers”, except for special circumstances when a government can impose restrictions in order to ensure legitimate objectives strictly stipulated by law, such as respect of the rights and reputation of others, protecting national security, public order, public health or morals. The speaker further referred to the Council of Europe’s Recommendations on the Protection of Personal Data and Freedom of Information which foresees the obligation of government to ensure access to information on issues of public significance.

Mrs. Poliakova mentioned that, in recent years, 40 countries have adopted legislation regulating access to official information and to legislative resources or have changed existing laws in order to reflect the development of information technologies and a general tendency towards increased transparency. It was noted that in many countries access to information is regulated by the legal provisions of a range of primary and secondary legislative acts, often lacking enforcement mechanisms and accountability rules.

Mrs. Poliakova saw a need to establish legal guarantees for access to law and information on lawmaking. Firstly, legal provisions ensuring broad access to information should be adopted. Such access should be limited only in the exceptional case of classified information. The speaker stressed that legislation and information cannot be classified if information contained therein relates to the activities or regulates the legal status of various national authorities, sets out or limits the rights, freedoms and duties of citizens or the procedures for their exercise or pertains to the issues of official budgetary

funds and the economy. She recommended the adoption of a separate law regulating the standard procedure of access to information, duties and obligations of central and local government pertaining to its implementation, including accountability.

The speaker highlighted that such a legislative act on access to law and information should guarantee access to legislation and draft legislation by means of a requirement for mandatory publication. It should clearly spell out the grounds, procedure and restrictions for classifying information as for official use only: provide for the procedure and means for state authorities to provide information on draft legislation or legislative information representing public interest or concerning personal interests of citizens. It should stipulate the responsibilities and duties of state authorities to provide information on draft legislation upon request from citizens and public associations, as well as the procedure for the provision of such information. It should foresee the liability of state officials for failing to provide the information requested, or for providing incomplete or false information.

Mrs. Poliakova added that in order to make such a law effective and operational, special mechanisms would need to be employed, such as placement of regular updates on legislation in electronic legal databases and systematic publication of compilations of legislation, posting laws in the Internet and mass media, providing citizens with an opportunity to sit in at the sessions of relevant decision-making authorities, placing information on special stands, making it available in libraries and archives, as well as providing relevant information upon written or oral request.

The speaker said that it was crucial to stipulate in such a law that when requesting information, the applicant does not have to justify the request. It is also essential that responsible authorities are provided with the resources to carry out their duties.

The need to ensure access to the jurisprudence of the European Court of Human Rights in the official languages of OSCE participating States was mentioned as one way to help judges and members of parliament to adopt laws and decisions that are compliant with the state's human rights obligations.

Mrs. Poliakova offered several examples from the Russian Federation. One of the examples described how civil society organizations were engaged in monitoring the lawmaking process and were offering legal comments on draft laws on their websites. She referred to the activities of her own organization, the Independent Expert Legal Council, which monitors how laws at the federal and local level respect human rights and freedoms. The impartiality of legal reviews prepared by this Council is ensured through its independence from authorities, its non-profit status and non-affiliation with any interest groups or corporate interests. Legal expertise is provided by prominent Russian legal experts with high academic standing and their opinions are forwarded to responsible state bodies for further consideration and also posted on the website <http://www.neps.ru>. The website is one of a number which provide information on the legislative activity of the Russian Parliament and the State Duma. Some of these sites promote feedback between constituencies and parliamentarians.

In conclusion, **Mrs. Poliakova** recommended that an independent international panel of legal experts be established from various OSCE participating States to monitor the observance of international human rights commitments by OSCE participating States in their lawmaking activities. This panel could also offer examples of best practices from the OSCE region and assist OSCE participating States in remedying their draft laws if they fall short of human rights standards.

After the introductory speech, the floor was opened for discussions. Representatives of official delegations and NGOs from Armenia, Austria, Belarus, Croatia, Estonia, the former Yugoslav Republic of Macedonia, Georgia, Germany, Poland, Russia and Ukraine made their contributions to the discussion.

Participants agreed that the right to information is an important aspect of this discussion. In the past, in some OSCE participating States, access to official information was limited, whereas currently, access to information is enshrined as a right in the relevant national laws. Some participants gave examples from their countries where there is no need for strict regulations on access to law, at least vis-à-vis the parliament, since it is already required to make all relevant information public. Access to law and all rights prescribed therein also implies the possibility of effectively exercising these rights.

Participants agreed that an essential part of democratic lawmaking is the requirement that a law comes into force only after being published. However, in practice, published laws are not comprehensible to the general public. Participants also spoke about the need to differentiate between access to information, which may be dependant on financial resources, and access to the content of the adopted laws. It was agreed during the session that laws should be published regularly, in a consolidated format and accompanied by awareness-raising campaigns for the public.

Examples from various countries described different means used to make laws accessible: Internet publication of laws, texts of draft laws posted on websites after their official registration on the parliamentary legislative agenda, provision of full records of parliamentary debates and committee discussions on special websites, transparency about interest groups involved in lobbying the law, relevant jurisprudence of the European Court of Human Rights published in the state language(s) by the government, as well as key judicial decisions, in particular, constitutional court decisions. The importance of adopting the Council of Europe's Convention on Access to Information was highlighted by several participants.

NGOs concurred during the session that no democracy can function without access to law, and that such access should only be limited, unless there are explicit legal grounds, for classified information. Other participants reminded the audience that the right to free access to information must be balanced against other rights, such as the rights to privacy or the right to intellectual property, as well as the need to protect state secrets. Some participants noted that there is a need to differentiate between access to law and access to parliamentary and administrative documentation, which may require a measure of

protection exceeding what is afforded to laws. The importance of transparency in the work of the judiciary was mentioned as an important means of ensuring access to law.

Generally, in order to guarantee better access to law, participants agreed that publishing the texts of laws on the Internet was much less expensive than printing copies. However, the use of such online databases requires some knowledge of the legal system and hence there is a need for awareness-raising campaigns for the general public. Participants encouraged the OSCE to assist national institutions in providing access to law and in developing effective awareness-raising programmes with a focus on young users and electronic media.

The following specific recommendations were made in Session III:

Recommendations to OSCE participating States:

- OSCE participating States should ensure that there is access to law at all stages of the lawmaking process, in particular when the law is under discussion prior to adoption. To that end, public access to committee and parliamentary sessions and hearings, as well as to relevant documents pertaining to all stages of the legislative proceedings should be guaranteed;
- All initial and final draft laws along with the explanatory notes attached thereto should be published prior to their consideration in parliament. Draft laws should be published at least on the website of the responsible body or through public media. When necessary, the most important draft laws should be published in the national, regional and local media;
- OSCE participating States should create a consolidated website with an outline of future and current law-drafting activities;
- Denial of access to draft or adopted legislation that is classified as state secrets should be reasoned and can be exercised only in limited circumstances where strict criteria of necessity and other human rights standards are complied with. Such denial shall not be possible if human rights and fundamental freedoms are affected by the legislation at stake;
- OSCE participating States should ensure that services providing access to law are allocated proper human and financial resources;
- OSCE participating States should ensure that access to information is provided free-of-charge unless the information requested exceeds the ordinary and/or is sought for commercial purposes;
- OSCE participating States should provide access to judgments, which interpret the law. In particular, citizens should have access to the interpretation of the highest

courts. Access to decisions bearing on interpretation of the law is as essential as access to the law in general;

- OSCE participating States should ensure that access to laws is possible in the simplest, most convenient and user-friendly way possible. For this purpose, OSCE participating States should enhance the quality and accessibility of legislative databases;
- OSCE participating States should guarantee that legislation is accessible to all groups in society, including people with disabilities and various minority groups;
- OSCE participating States should envisage periodic reviews and systemization of existing legislation; periodic inventory of legislation should also take place in order to identify and exclude legal provisions which are obsolete or non-functional or appropriate measures should be taken to create conditions for implementation of these provisions;
- OSCE participating States should ensure systematic compilation and consolidation of laws, in particular those which are subject to numerous amendments, so that laws are clear to those who are subject to them. In particular, OSCE participating States should ensure that fundamental Codes, such as Civil Codes, Criminal Codes, Administrative Codes, and Labour Codes are available in consolidated, updated and accurate versions;
- OSCE participating States should ensure that legal opinions provided by international organizations are translated into relevant languages and made available to and discussed with civil society;
- OSCE participating States should consider supporting the adoption of the Convention on Accession to Information, currently being developed by the Council of Europe.

Recommendations to the OSCE, its institutions and field operations:

- The OSCE should set up an independent international expert council to provide assistance to NGOs in monitoring lawmaking;
- The OSCE should support the bodies and associations which are working to assist citizens in accessing the law.

Recommendations to others:

- If OSCE participating States fail to make laws accessible, civil society and NGOs could provide temporary remedy by offering on-line databases.

IV. ANNEXES

ANNEX I. AGENDA

The meeting was preceded by a Side event: roundtable for Civil Society on 6 November.

Day 1

6 November 2008

15.00 - 16.00

OPENING SESSION:

Opening remarks

Mr. Lauri Tarasti, Justice, the Supreme Administrative Court (retired) , Special Adviser of the Ministry of Justice, Representative of the Finnish OSCE Chairmanship

Ambassador Janez Lenarčič, Director of the OSCE/ODIHR

Keynote speeches:

Mrs. Walburga Habsburg Douglas, Head of the Delegation of Sweden to the OSCE Parliamentary Assembly, Vice-Chair of the Third Committee

Mrs. Larisa Alaverdyan, Member of the National Assembly, Republic of Armenia

Presentation of report from the Side event: round table for Civil Society

Technical information by the OSCE/ODIHR

16.00 - 18.00

Session I: Lawmaking in a Democratic System of Government: Transparency and Efficiency

Introducer: Mr. Yves Doutriaux, State Counsellor (member of the Conseil d'Etat)

Moderator: Mrs. Suzana Nikodijevikj-Filipovska, Head of Sector for Policy Analysis and Co-ordination, General Secretariat of the Government, former Yugoslav Republic of Macedonia

Discussion

18.00	Reception by the Chairman-in-Office
Day 2	7 November 2008
09.00 - 12.00	Session II: Ensuring Inclusiveness in Democratic Lawmaking
	Introducer: Mr. St John Bates , Professor, St John Bates Consultancy, UK
	Moderator: Mr. Denis Petit , Chief of the Legislative Support Unit, Democratization Department of the ODIHR
	<i>Discussion</i>
12.00 - 14.00	Lunch
14.00 - 16.00	Session III: Access to Law
	Introducer: Mrs. Mara Poliakova , Chair, Board of the Independent Expert Legal Council (NEPS), the Russian Federation
	Moderator: Mr. Alan Page , Professor of Public Law at the University of Dundee, United Kingdom
	<i>Discussion</i>
16.00 - 16.30	Break
16.30 - 17.30	CLOSING PLENARY:
	Reports by the Working Session Moderators Comments from the floor
	<i>Closing Remarks</i>
17:30	Close of Day 2

ANNEX II. ANNOTATED AGENDA

A distinctive hallmark of the OSCE is that it is explicitly founded on the premise that “democracy is the only system of government⁸” for all of its participating States. OSCE commitments define democracy as an inherent element of the rule of law, which is itself founded on the will of the people, expressed regularly through free and fair elections. The commitment to the rule of law links the promotion of human dignity with the development of a system of rights through law.

Against this backdrop, lawmaking cannot be seen as an activity for specialists and experts only. Law is an essential element of democracy, and lawmaking can only be democratic if it is based on the free will of the people, on the one hand, and a range of checks and balances, on the other. It is essential to have a system based firmly on the rule of law, where laws are clear and transparent, apply equally to all and are designed and adopted through democratic procedures.

Everyday lawmaking is part of a historical process, embedded in the specific traditions of individual States. With the current trend to greater uniformity of law, attributable to factors such as globalization, many OSCE participating States are engaged in an unprecedented lawmaking effort and are undertaking significant overhauls of their legal structures, systems and frameworks. Legal reform in any democracy is a major endeavour replete with potential pitfalls. In younger democracies, the challenges are even greater. Concerns about the quality and impact of legislation are universal, and the way in which legislation is prepared and enacted is increasingly the object of scrutiny throughout the OSCE region. In particular, there is a developing understanding that both the content of legislation and the methods by which it is made must be more responsive to the environment in which it is to operate. Experts and practitioners are calling for improved and more systematic methods of lawdrafting.

Calls have therefore been made to develop and implement more organized regulatory frameworks for drafting legislation. Legislation should emerge as the result of a planned and co-ordinated process which is structured to provide adequate time for preparation, consultation (inside and outside government), and parliamentary consideration. Above all, the legislative process needs to be considered in its entirety, not as a series of separate processes.

Even a technically excellent lawmaking system cannot operate effectively without a culture of openness and transparency within the government. In this regard, special attention needs to be paid to the contribution of civil society. If democracy is to be measured against the yardstick of its ability to respond to the demands and needs of society at large, an effective interaction with civil society and various interest groups is essential. This requires transparency in the work of governments and parliaments. More than a proper regulatory framework, what is needed is a culture of inclusiveness, enabling the authorities to give consideration to various views and interests during policy and

⁸ Charter of Paris for a New Europe, 21 November 1990.

lawmaking processes. It is important to examine how more participatory, deliberative or direct processes of engagement can revitalize and complement existing forms of representative democracy.

In addition to a public and transparent process, it is necessary that the legislation itself be made accessible. Information is the oxygen of democracy. Only if citizens are informed about what is being done on their behalf can they meaningfully take part in the affairs of the society. In that sense, access to law and democratic lawmaking are two faces of the same coin. In modern democracies, the public authorities are under an obligation to provide for access to legal norms. In this regard, new technologies have created opportunities for sharing information, but need to be adapted to the conditions of specific OSCE participating States. Among these solutions should also feature initiatives of the international community to empower legislators by providing information on the legal solutions adopted by other participating States.

Session I: Lawmaking in a Democratic System of Government: Transparency and Efficiency

A legislative process which is transparent, predictable and responsive to the needs of the population is the best means of ensuring enforceable and effective legislation. The process whereby laws are drafted and adopted is as important as the content of these laws. There are no good laws “on paper”, but only good laws in real life. In that sense, a good law requires a participatory approach aimed at tailoring the law to the realities and ensuring the best conditions possible for effective implementation of the resulting legislation.

Yet concerns about the quality and impact of legislation are widespread across the OSCE region. Too often the enactment of legislation is seen as the end of the legislative process. This reflects an overestimation of the significance of legal norms. This situation has generated a degree of reform fatigue in many participating States, which often accompanies the equally widespread recognition of the need for further reform.

Against this backdrop, the way in which legislation is prepared and enacted has come under scrutiny in many places. There is a growing understanding that the quality of legislation – its effectiveness and efficiency – largely depends on the quality of the process through which it was prepared and developed. This has several practical implications that were emphasized in the OSCE *Copenhagen* and *Moscow documents*. The *Copenhagen document* states that legislation shall be “*adopted at the end of a public procedure*”, that “*regulations will be published, that being the condition for their applicability*” and that they “*will be accessible to everyone*”. The *Moscow document* further stipulates that “*legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*”. Consequently, democratic lawmaking requires an approach whereby both the content of legislation and the methods by which it is made are responsive to the environment in which the given law is to operate. As a result, improved and more

systematic methods of lawmaking have been adopted or recommended in a growing number of participating States. Underlying such recommendations is a recognition of the need to manage the legislative process in its entirety, as opposed to managing different phases in isolation from one another.

This Session will focus on how legislation and the regulatory framework governing lawmaking can be made more effective. Participants will examine the practical steps needed to further develop the policy capacities of governments and parliaments in OSCE participating States and to ensure that laws and programmes meet the needs of society and are effectively and efficiently designed and implemented.

Issues to be discussed:

- *Legislative policy development:* How is the need for legislation assessed? Are alternatives to legislation given consideration? What are the checks performed when considering draft legislation (regulatory checks, cost assessment, implementation checks, etc.)?
- *Legislative programming and budgeting for drafting:* What is the process for developing and approving an overall programme of legislation?
- *Drafting procedures:* What are the tools and techniques required to draft legislation and which are best suited to the needs and the local conditions? What level of specialization and expertise is required from law drafters? How are they trained?
- *Co-ordination of legislative preparation:* How can the effectiveness of relations between the legislature and the executive be improved?
- *Non-governmental consultation:* How can the lawmaking process become more transparent to affected groups? How can government be enabled to become responsive to the needs and interests of these persons or groups?
- *Access to legislation:* How can ready access to legislation be secured? How can techniques be developed which ensure the availability of legislation in a timely and responsive manner? What procedures are used for registering, archiving and authenticating legislation?
- *Monitoring the implementation of legislation:* What mechanisms are foreseen for monitoring the implementation of legislation adopted? How can these mechanisms be used to encourage or improve compliance with the legislation?
- *Best practices and lessons learned:* What legislative assistance programmes in the OSCE region have effectively provided support to home-grown legislative reform efforts aimed at increasing the efficiency and transparency of the legislative process?

Session II: Ensuring Inclusiveness in Democratic Lawmaking

Transparency requires public deliberations, and such deliberations are a necessary prerequisite for a functioning democratic government. While the ultimate test of democratic governance takes place at election time, democracy is also about the responsiveness of governments to the demands and needs of society at large, which

presupposes an effective interaction with civil society and various interest groups as well as the ability to take various views and interests into consideration in policy and lawmaking processes. In this regard, transparency in the work of the executive and legislative branches of the government is crucial to responsiveness. The more citizens understand how their government operates and makes policy, the more likely they are to give input. In turn, the more the citizen provides input to governance, the more likely governments are to be in tune with the public and to respond to its concerns and needs. New debates are emerging about whether and how more participatory, deliberative or direct processes of engagement can revitalize and complement existing forms of representative democracy.

This Session will take stock of the international assistance initiatives taken to empower civil society organizations to effectively contribute to strengthening democratic legislative processes. The discussion will also explore how representative forms of governance can be complemented with more direct citizen involvement, which, in turn, may further enhance accountability. In this respect, an overview of emerging practices, new opportunities and recurrent challenges across the OSCE region will help discern which approaches might best contribute to a more democratic lawmaking.

Issues to be discussed:

- *Interface between government and civil society:* How does government interact with civil society throughout the lawmaking process? How systematic are consultations on legislation? Are there procedures in place to this effect and established bodies permitting such consultations? How is it determined which legislation requires consultations and how are these consultations organized? What are the methods used to make draft legislation publicly accessible? In general, how can greater public acceptance of legislative proposals be developed?
- *Interface between parliament and civil society:* How do parliaments interact with civil society throughout the lawmaking process? How systematic are consultations on legislation and at which stages are they taking place? Are there procedures in place to this effect? Is the use of public hearings a well-established practice? Are committee proceedings open to the public? Are plenary sessions open to the public? Is public broadcasting of plenary sessions a useful means of increasing transparency? How is it determined which legislation requires consultations and how are these consultations organized? What are the methods used to make draft legislation publicly accessible?
- *Interface between political parties and civil society:* How do political parties interact with civil society? What consultation mechanisms and cooperation models provide a transparent, effective and fair exchange of opinions and priorities? How can political parties increase the public's trust in their work?
- *New forms of engagement:* Are there new ways and opportunities of linking citizens and states, ranging from traditional citizen consultation methods (e.g., hearings) to a vast array of more innovative forms of public participation and deliberation?

- *Best practices and lessons learned:* What legislative assistance programmes have effectively contributed to increasing transparency of the legislative processes in the OSCE region?

Session III: Access to Law

As much as the process whereby legislation is being developed must be public and transparent, also legislation itself needs to be made accessible to the public. Access to law is an essential element of a State governed by the rule of law. The public authorities are under an obligation to provide for access to legal norms. Implicit in freedom of expression is the right of the public to open access to information and in particular, to know what governments are doing on their behalf – a precondition for public participation. In the realm of the OSCE human dimension, this was formulated through the linkage established between “*the right of the individual to know and act upon his rights and duties*” and the commitment of participating States to “*publish and make accessible all laws, regulations and procedures relating to human rights and fundamental freedoms.*”⁹

Access to law and legislative transparency run parallel to one another. In this regard, the *Copenhagen document* provides that legislation shall be “*adopted at the end of a public procedure*”, that “*regulations will be published, that being the condition for their applicability*” and that they “*will be accessible to everyone*”¹⁰.

Apart from the traditional means of publicising laws such as official gazettes, information technology is now extensively used to provide wide-ranging possibilities for electronic access to legal texts. The management of the system of official legal publications, including by electronic means, accordingly constitutes a major component of the access to law policy. It is essential to promote practical solutions which can be realistically implemented in different social, political and legal systems.

Furthermore, the concept of access to law should be understood as including access by legislators to good practices and legislative precedents from other participating States. In many participating States, the challenges faced by legislators do not differ significantly, particularly when the legislation under consideration pertains to issues regulated in ratified international treaties and conventions and/or when there is no precedent in the domestic jurisdiction. However, the scarcity of legal resources available to legislators continues to constitute an impediment.

Discussion in this session will focus primarily on how public access to laws is regulated in law and practice across the OSCE region and how greater access to this information can help strengthen a culture of openness and transparency, which, in turn, bolsters citizen trust and participation in public affairs. Participants will also exchange views on

⁹ Concluding Document of the Vienna Meeting, Third Follow-up Meeting to the Helsinki Conference, Vienna 1989, Questions Relating to Security in Europe: Principles, paragraph 13.4.

¹⁰ Copenhagen document, 1990, paragraph 5.8.

the opportunities available to the lawmakers for accessing examples of good practice from other participating States.

Issues to be discussed:

- *Access to legislation and case-law:* How can laws and regulations be made publicly accessible? How can public access to draft legislation be assured? What are the experiences in giving constitutional and/or legislative recognition to freedom of information in general and access to law in particular? How can costs be reduced so as not to constitute a barrier to the access of individuals, media, interests groups and civil society to legislation? What are the systems employed in OSCE participating States to reduce such costs? How can new technologies facilitate public access to laws and regulations? What limitations to access to legislation are permissible under national and international law? How are laws and regulations made accessible in participating States where more than one language is in use? How can access to court decisions and to local government legislation be assured?
- *Access to legal solutions applied in other jurisdictions:* How can the exposure of legislators to legal solutions which have proved successful in other jurisdictions be assured? How can the legal space in which policy- and lawmakers operate be broadened? How can they be empowered through broader access to precedents and solutions in use in other participating States? How can co-operation among international organizations providing legal advice on national legislation be strengthened to avoid unnecessary duplications and the best use of resources?
- *Best practices and lessons learned:* What legislative assistance programmes have effectively contributed to increasing access to law in the OSCE region?

ANNEX III. KEYNOTE SPEECHES

Keynote Speech: Mrs. Walburga Habsburg Douglas, Head of the Delegation of Sweden to the OSCE Parliamentary Assembly, Vice-Chair of the Third Committee.

Mr. Chairman, Your Excellencies, Ladies and Gentlemen,

First of all I would like to thank you for inviting the OSCE Parliamentary Assembly to participate in this important meeting on democratic lawmaking. In addition to being a Swedish parliamentarian, and head of my country's OSCE parliamentary delegation, and after serving as Rapporteur, I was elected Vice-Chair of Third General Committee of the OSCE Parliamentary Assembly during the 2008 Annual Session in Astana. This is the Committee responsible for Human Dimension issues.

It is my pleasure to convey to you wishes for a successful meeting from the President of the Parliamentary Assembly, Joao Soares, who regrets that this important event conflicts with the calendar of the Election Observation Mission in the United States and that he has had to stay on in Washington.

In a sense, it is appropriate that I have started by touching on elections. These are two of the defining issues for parliamentarians: elections and lawmaking. We, as parliamentarians, understand the importance of democratic elections, but also the requirement that lawmaking be democratic.

“Transparency”, the foundation of democratic lawmaking, is one of the key concepts in the agenda for this meeting. Transparency has been one of the guiding principles of the work of the OSCE Parliamentary Assembly throughout 2008 and is one of the building blocks of the Parliamentary Assembly's Astana Declaration (June-July 2008). Following on from encouraging the active involvement of political parties in the administration of elections to guarantee transparency, the Declaration underlines that that “all government actions should be based on laws enacted through an open and transparent process”.

Discussion of this important subject is timely indeed. We are living in a period of enormous lawmaking activity, partly because the world has changed, and is still changing. In the OSCE area we have seen the emergence of 23 new countries in the last 20 years. These new democracies are engaged in a massive endeavour – developing political and legislative systems suited to their specific needs.

European Union enlargement is driving an unprecedented lawmaking activity in the accession states where, faced with the challenges of the *acquis communautaire* there is a real danger of so-called “reform fatigue”.

The responsibility for lawmaking lies, as Judge Tarasti has just reminded us, in the hands of the national parliamentarians of the 56 participating States of the OSCE. It goes

without saying that this responsibility should be exercised in close consultation with the representatives of civil society. The assistance offered to legislators by the OSCE, its field operations, its Institutions and especially the Parliamentary Assembly is invaluable in this task.

Keynote speaker: Mrs. Larisa Alaverdyan, Member of the OSCE Parliamentary Assembly, Member of the National Assembly, Republic of Armenia

(unofficial translation from Russian)

Democratic Lawmaking as an Instrument for Building State Governed by the Rule of Law

Introduction

OSCE participating States proclaim their commitment to democracy as an essential element of the rule of law (Paragraph 3 of the Charter of Paris for a New Europe, 21 October 1990). Moreover, in line with the Charter and fundamental documents of the OSCE, participating States incorporate in their Constitutions and legislation the relevant commitments on observance of human rights and fundamental freedoms, as well as the principles of the Helsinki Final Act.

In the first place we observe that for countries with developing democracies all these principles and rules represent a compilation of existing legislation, traditions and societal customs.

At the same time, for countries of Eastern Europe, the Baltic states, CIS and other countries that are former Republics of the USSR (so-called “transitional countries”, though to different extents) currently represent certain commitments and objectives, implementation of which required countries to develop mechanisms, change social customs, improve or lay foundations for democratic traditions and so on.

Different “starting points” can be clearly observed not only and not so much in “written” legislation, but rather in its practical implementation, in the system of governance.

Generally speaking, the issue of governance through fair and effective laws is as old as time. A Chinese poet and philosopher Shan Yan (Gunsun Yan) who lived during the Fourth Century BCE, dreamt of governing people “not with the use of wealth, but with the use of strict laws”.

With the collapse of the USSR this became a pressing issue for those countries that, at the beginning of 1990s, declared their commitment to building a state which abided by the rule of law, whose principles could not, or rather should not, be challenged.

It was expected that “transitional” countries would initiate the process of establishing and ensuring the principle of the rule of law by developing a system of rights by means of legislation.

Laws and Lawmaking

“Rights and fundamental freedoms will be guaranteed by legislation and by relevant commitments in accordance with international law” – reads paragraph 5.7 of the Charter of Paris. This paragraph establishes that rights and freedoms, as well as obligations, may only be exercised as prescribed by law. There is no doubt that laws represent the core of a country’s legal system. This has special significance and meaning in a democratic system, where the power, effectiveness and impact of legislation depends not only on the quality of its content, but also on the quality of the legislative process.

International experience has demonstrated the effectiveness of the following principles of democratic lawmaking:

- Transparency;
- Efficiency;
- Inclusiveness/participation;
- Access to legislation and draft laws.

Moreover, these principles should be established during both the process of lawmaking (development of a draft law, adoption of the law, publication of the law), and the process of its implementation (ensuring its implementation and access to legislation, monitoring implementation, ensuring feedback/improvement of lawmaking).

The most active participants of inclusive lawmaking are usually public organizations (NGOs), scientific and expert institutes, institutions and organizations, experts, as well as interested groups from the general public.

Even considering the persuasiveness and overall logic of the principles and requirements of lawmaking processes outlined in the OSCE documents (Moscow Document, Copenhagen Document, Vienna Document, Charter of Paris) the practice of individual countries is characterized by a number of distinctive features.

Special interest is attached to those features that hinder or slow down the democratization of the lawmaking process, making it less effective to the extent that, in some post-totalitarian societies, there may appear to be doubts with regard to the possibility to establishing the rule of law in the foreseeable future.

Even from a theoretical point of view, the most vulnerable elements are the concept of legislative development, methods for assessment of its efficiency and expected outcomes and overall influence on the process of democratization of society. But still some experts consider the need for such a concept arguable.

It specifically applies to countries that lack the established traditions and where legal systems still bear the imprint of the negative phenomena and customs of a State not governed by the rule of law.

But the most distressing and, at first glance, the strangest observation is that even the most successful copies of “good” legislation, borrowed from the practice of developed democracies, are often doomed to fail in “transitional” countries. The following are some of the reasons for these failures:

- Undue delay in the process of adoption of a law;
- Absence or weakness of legal institutions, as well as of the enforcement and implementation of obligations;
- Unpreparedness of civil society groups for taking part in consultations on proposed legislation;
- Disregard of explanatory work among interest groups and disregard of the principle of inclusion as such;
- Rapid pace of the adoption of laws, often under the guise of “urgency” of implementation of international commitments;
- Lack of safeguards for non-discriminatory enforcement of law, etc.

Jean-Jacques Rousseau noted: “A wise legislator will not start off from the publication of laws, but rather from the study of their relevance to this particular society”. Unfortunately, while developing legislation, the legislators often do not consider what the effect of the legislation will be in a given social context, but rather the immediate benefit for a narrow circle of people controlling the levers of power, capital and retaliatory potential – the so-called oligarchs.

When analyzing such laws one can observe the intentional incorporation of loopholes to connive with or even stimulate corruption, impunity for non-observance of the law, discrimination in the application of law etc..

Law enforcement practice and legislative efficiency

It was observed long ago that law enforcement practice is much more inertial than lawmaking. Furthermore, in the most recent period of development of independent countries, to the existing shortcomings in law enforcement practice, new ones were added, which, as a rule, were the result of a distorted perception and application of market relations in all spheres, including the sphere of relationships between the citizen and the state.

The following are the most common shortcomings of law enforcement practice in the transitional countries:

- Bureaucratic tricks for the purpose of corruption – official circumlocution, intentional delay or non-provision of answers (which may result in the petitioner

losing the opportunity to exercise their rights), hiding information or erroneous interpretation of a legislative norm.

- Inequality before the law – intimidation, exercising pressure and other illegitimate actions, privileges, non-application of mandatory norms and/or provision of benefits to certain individuals, “telephone justice”, protectionism etc.
- Impunity of corrupt or dishonest officials.

In addition, the following phenomena are among those which pose serious threats to democracy, especially in developing countries:

- Deformation of public relations;
- Polarization of society;
- Legal nihilism among the population;
- De-legitimization of power;
- Latent transformation or substitution of constitutional order;
- Demoralization, loss of ideology within a society;
- Decrease and loss of trust in international institutions;
- Weakening of international democratic society.

This underlines, once again, that lawmaking and democracy are interrelated and inter-conditioned. Legislation is more effective when the State is accountable before its citizens for violation of their legitimate rights and interests, when the society obligates authorities to execute laws in a precise manner,

From this point of view, the weakest link in lawmaking in transitional countries remains, firstly, the detachment of society from the process of the drafting and discussion of laws, and, secondly, the “decorative” manner in which attention is paid to public opinion. Public organizations, scientists and experts often find themselves weak whenever interacting with power, which, itself, discredits the idea of inclusiveness. The emerging trend towards inclusion of so-called governmental NGOs has already been observed. In the words of the Bible: “In the meantime some of them scream one thing, while others scream another thing, since the whole gathering was lacking order, and the majority of people gathered did not know why they actually were”. Acts of the Apostles, 19:32.

Systematization of regulatory documents (legislation) remains problematic, while it should be directed towards the adjustment and improvement of legislative norms. It should also be mentioned that modern legislation, in many transitional countries, only formally recognizes the regulatory creditworthiness of legal precedents and customs.

What are we not happy about?

At first, we were concerned about the pace of implemented reforms targeted at transforming the state from totalitarian to a state governed by the rule of law. Now we are

concerned about the direction in which the development of legislation and law enforcement system is heading, i.e. the recoil primarily from lawmaking processes and administrative practice, at least in some areas of the legal regulation of relationships between the state and other legal entities. Even if we consider any recoil a temporary or objective phenomenon, the problem will not resolve itself over time, but rather through proactive use of time by the stakeholders.

In our opinion, it is necessary to stimulate and promote the participation of the following actors: NGOs, scientific and higher educational institutions, international institutions, and above all the Venice Commission and the OSCE Field Missions, expert groups, and international organizations.

The following instruments for stimulating democratic lawmaking are those that are most needed:

- Positive practice and methodology;
- Norms, rules, procedures;
- Expert opinions and conclusions;
- Increasing the role of opposition in lawmaking.

Regardless of a degree of skepticism in relation to the traditional methods of co-operation in the area of lawmaking, we consider it important to continue the following:

- Publication of specialized bulletins;
- Organization of workshops;
- International exchange of experience;
- Monitoring and assessment of lawmaking and implementation of legislation;
- Specialized television programs.

It would be useful to hear the opinions of international institutions with regard to the efficiency of their activities aimed at the development of democratic lawmaking. For the uninitiated citizen, regardless of the activities of some international institutions (the Venice Commission, the OSCE/ODHR and certain projects of the EU and the Council of Europe), a common concept is lacking, as is interaction between international actors and civil society in the countries in transition.

In our opinion, the effectiveness of democratic lawmaking can only be improved by means of closer co-operation. The Document of the Moscow Human Dimension Meeting (3 October 1993) sets clear directions for such co-operation: “in the areas related to ... law ... with a view to developing legal systems based on respect for human rights, rule of law and democracy, especially in those countries where such systems are yet absent”.

Many societies consider that it is timely and necessary to correct the methodology of the OSCE Election observation missions with a view to increasing the trust of civil societies in the conclusions of these missions.

It is therefore possible to agree with the ODIHR's statement that "the necessity to observe the existing commitments has a priority over the need for development of new commitments". (Supplementary Document for Unofficial Briefing for the OSCE participating States, 22 September 2006, Vienna).

Conclusion

The key question is the following: what are the prerequisites for a successful process of democratization of the lawmaking system in "transitional" countries? There are different responses, ranging from deeply pessimistic to extremely optimistic. Let us try to outline a realistic option based on my own personal experience in Armenia.

Every year witnesses an increasingly more active participation of NGOs, experts and scientists in the discussions of draft laws, greater co-operation between state and civil society and between the state and the business sector, particularly in the area of legislation.

Considering the shortcomings common to such processes, it should be noted that, in part thanks to the stimulation of civil society by international institutions and organizations, NGOs, specialized expert groups and institutes, and in some ways scientific institutions, have become stronger both in terms of organization and in terms of professionalism and capacity.

This is demonstrated by solid legislative initiatives, monitoring of the implementation of laws, the publication of the results of a range of analytical research on legislation, the popularity of parliamentary hearings, the organization of public hearings (also in the regions) about the quality of law and its implementation.

There have been attempts to institutionalize co-operation between civil society (mainly NGOs) and the National Assembly of the Republic of Armenia, as well as co-operation with the Government of the Republic of Armenia in the area of lawmaking and implementation of legislation.

The weak responses from public authorities is not the fault but the misfortune of civil society, since the authorities have no genuine interest in involving in the lawmaking process those who have a high degree of professionalism and are willing to contribute.

That is why, as a strong supporter of peaceful transition to democracy and to the rule of law, I once again address myself to all those who cherish these values with a call to take sound actions aimed at establishing a legal order and legal relationships which ensure human rights and fundamental freedoms and secure a state governed by the rule of law where human beings and human dignity are of supreme value not only in word, but in action, and where the well-being of the individual is the purpose of governance.

ANNEX IV. INTRODUCTORY SPEECHES TO WORKING SESSIONS

Session I: Lawmaking in a Democratic System of Government: Transparency and Efficiency

Introducer: Mr. Yves Doutriaux, State Counsellor (member of the Conseil d'Etat)

(Written statement, PC.SHDM.DEL/25/08/Corr.1, English translation, original in French)

This is a vast subject, to which the Council of State (*Conseil d'Etat*), in its capacity as legal adviser to the French Government and supreme judge for disputes between public authorities and private citizens and companies, and between public authorities (the State, local authorities, public institutions), has devoted considerable work, particularly during the preparation of its annual public reports.

The first circumstance to be noted is the increasing complexity and inflation of law, which is a concern for citizens, national legislators and members of local councils, as well as enterprises, especially the smaller enterprises, which are particularly vulnerable when it comes to legal complexities.

It has often been pointed out that too much law is the enemy of justice, that the law should concentrate on essential matters and that a superabundance of laws is prejudicial to the citizen, creating an unclear and unstable legal situation.

The growing complexity of the law has become a major source of fragility for our societies and economies; it may lead citizens to doubt the efficiency of decision-making by governments and parliaments.

First part: the increasing complexity of legal provisions and the “inflation” of legislation are a threat to the rule of law

Why this legislative inflation?

- The absence of political will on the part of leaders to deal with it (see electoral programmes and the multiplication of parliamentary amendments);
- The increase in the number of sources of law (domestic and European law and international treaties);
- The appearance of new fields and new expectations with regard to the law (scientific advances and concerns, e.g., the principle of precaution and the debate on genetically modified organisms (GMOs));
- Political alternation: a new party in power often wants to change what the previous government did;
- The complexity of supervising the activities of economic operators in a free market (procedures and guarantees of independent regulatory authorities which themselves generate regulations and legal texts);

- The concern to protect the weak (cf. Henri Lacordaire: “It is freedom that oppresses and the law that sets free”);
- Pathogenic factors: media pressure and sensationalism (cf. the many amendments to the criminal law in immediate reaction to particular news items: mad dogs, sexual recidivists, and so on).

Why this increasing complexity of the law?

1. Increase in external sources of law:

- (a) European Union (EU) law: the supremacy of community law over domestic law (Costa versus the Italian National Electricity Board (ENEL) 1964); the supremacy of European law obliges each member State to disallow the application of national laws that are incompatible with European law; national judges cannot apply a law contrary to a an EU regulation; monitoring by the European Commission of subsidies granted by governments may lead to laws regarding a particular public service to be called into question; any accused person may invoke a violation of European law before a national judge, and this may be a source of legal uncertainty because a decision taken in conformity with national law may be nullified on the grounds that it does not respect European law.

The failure to incorporate a directive in national law is something for which member States can be called to account; the European Commission, as guardian of the treaties, may ask a State to demonstrate the compatibility of its national law with EU law (notice of default, reasoned opinion, referral to the European Court of Justice for non-compliance). Community law is becoming more complex; while it consisted originally of regulations for the implementation of the agricultural and fisheries policy, the single internal market later involved the adoption of increasingly detailed directives, requiring the substantial adaptation of domestic laws.

In all, 17,000 regulations, directives and decisions of the EU are in force (to be compared with 10,500 laws and 120,000 regulatory decrees in effect in France); naturally, the proportion of EU texts is greater in terms of total flow than in terms of provisions currently in force.

- (b) Council of Europe:

The European Convention for the Protection of Human Rights and Fundamental Freedoms: in 2004, 59 judgments of the European Court of Human Rights (ECHR) concerned France (in third place after Turkey and Poland), more than half of the condemnations being connected with the excessive time needed for trials to take place, in violation of article 6(1) (the right of defense and to a fair trial); national courts must ensure the correct application of the conventions of the Council of Europe, beginning with the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Council of State referred to the

Convention 11,000 times between the years 2000 and 2004: article 8 (5,600), article 3 (torture and degrading treatment, 2,300 times in connection with countries to which aliens were sent back) and then article 6(1) (fair trial: mandatory public deliberations in certain courts); the Council of State has, moreover, just reinforced some of its rules of ethics (disclaiming of competence), anticipating possible criticisms on the basis of article 6(1);

The other conventions of the Council of Europe; the fact that these conventions often have reservations attached to them by some of the contracting parties does not facilitate the understanding of the applicable rule.

(c) Multilateral and bilateral conventions:

France is bound by 7,400 treaties, of which 1,700 are multilateral agreements; 200 agreements negotiated every year; the extension of areas covered, including areas involving core State functions; the risks of inconsistencies in view of the multiplicity of negotiating forums; the risks of conflict between international agreements and political commitments, e.g., the Helsinki Final Act (OSCE) and, finally, administrative arrangements and gentlemen's agreements.

2. At the domestic level, legal complications resulting from transfers of State competence to other authorities:

(a) Independent regulatory authorities, some of which have the power to adopt normative provisions (financial markets, communications or electricity market) or contribute by their decisions to the formulation of the applicable rules (the Council on Competition);

(b) Freedom of administration by local authorities, and experimentation:

The "administrative landscape" of our countries is often difficult for the citizens to understand. For example, the French are faced with a real administrative jungle (36,000 districts, 100 *départements*, 26 regions, 18,500 groupings of districts) where competences are often fragmented (housing, town planning, education, employment, health and social measures, ...); a constitutional amendment adopted in 2003 gives local authorities the possibility to depart, on an experimental basis and for a limited period, from national legislative and regulatory provisions; this may make the law less homogeneous and therefore more complex. Is there perhaps a contradiction between local autonomy and legal efficiency?

3. At the domestic level, the development of a kind of addiction to legal regulation, constituting a source of instability and complexity:

(a) Our governments feel that they must justify their existence by relying on media communication supported by opinion polls; any subject of a prime time television

programme virtually becomes law, because the government must show that it acts and reacts quickly, without worrying about any preceding impact study;

- (b) Consequently, the laws continually change: examples are tax law and social law; security concerns in the light of miscellaneous news items; continual changes in the law to try to deal with the problem of clandestine immigration, or to enhance job security and promote full employment; the proliferation of such texts contributes towards the complexity, opaqueness, obscurity, instability and unpredictability of the rules, a factor in legal uncertainty.

Consequences of legal inflation:

- (a) For parliaments: the legislator is swamped by increasingly long draft laws and increasingly numerous amendments (the Official Journal runs to 23,000 pages annually as compared with 15,000 annually in the 1980s; the Compendium of Laws increased from 433 pages in 1973 to 3,721 pages in 2004), together with the transposition of EU directives and the ratification of international agreements. Governments make use of emergency procedures (applied to one third of all draft laws in France), yet the laws adopted under emergency procedures are not applied the next year, for lack of implementing regulations!
- (b) For society: the user gets lost: law becomes unstable, difficult to read and inaccessible. (France: a stock of 9,000 laws and 120,000 regulations in the year 2000, to which an average of 70 laws, 50 orders and 1,500 decrees are added annually; more than 10 per cent of the articles of the codes are changed each year.) The simpler citizens, less able to understand the subtleties of the law, are faced with a legal chasm. A sedimentation of texts: new texts are adopted without revoking the older provisions and without any prior evaluation of the impact of new proposals on existing texts.
- (c) For the public authorities responsible for applying the law: increasingly complex laws become more difficult for the civil servants themselves to understand; hence the proliferation of explanatory instructions and circulars (which are not published and cannot be appealed against; in France: 10,000 to 15,000 annually), which create a subterranean, inaccessible and clandestine law; the local councilors lose their way; lawyers and legal advisers prosper!
- (d) For economic operators: the cost of the complexity of laws and procedures is said to be around three to four per cent of the gross domestic product in the different countries of the Organization for Economic Co-operation and Development; the difficulty of predicting costs, recruiting and investing where the legal context is not stable; foreign investors become discouraged by the instability of the law and the cumbersomeness of procedures.
- (e) For judges: judges struggle through the forest of amendments in order to discover which law is applicable. The unclear nature of the texts increases the

interpretative role of judges in the face of an acceleration of legislation and the incoherence of texts, without there being time for any jurisprudence to be established. An increased risk of conflicts among judges or courts (increased recourse to interlocutory questions: 600 times since the establishment of the European Court of Justice at Luxembourg in the case of French courts); recourse to opinions from supreme courts on new questions of law.

Second part: what can be done?

Promoting the principle of legal certainty: legal certainty is one of the foundations of a State based on the rule of law: citizens must be able, without unreasonable efforts, to determine what the law permits or prohibits; legal provisions must therefore be clear, intelligible and not subject to overly frequent and unpredictable changes. This principle rests on the following elements:

- The form of the law: the law must be designed to prescribe, prohibit or punish and not be full of chatter or create illusions. The law must be prescriptive (in France, this is the role of the Council of State, which has to be consulted on legislative proposals and verify the quality of laws).
- The time factor: the law must be predictable and legal situations stable. There is a possible contradiction with the principle of adaptation and mutability, but the principle of legal certainty must not serve as a cloak for conservatism and the protection, on the pretext of legal stability, of established situations that may be unjust. To resolve this contradiction, recourse to the principle of non-retroactivity of the law, to measures to protect acquired rights in certain circumstances and to provision for transitional measures where a legal rule changes.

Under the influence of the German Constitutional Court, the Luxembourg and Strasbourg Courts have consecrated the principle of legal certainty or of legitimate confidence (protecting the confidence that those covered by rules are normally entitled to have in the stability, at least for a certain period of time, of situations established on the basis of those rules).

- European Court of Justice: Bosch judgment 1962: legal certainty recognized as one of the general principles of community law; invoked in a dispute on 10; “the principle of legal certainty requires that any act of the administration having legal effects must be clear and precise and must be brought to the notice of the person concerned in such a way that he or she can ascertain exactly the time at which the act comes into being and starts to have legal effects, particularly from the viewpoint of the time allowed for appeal”.
- ECHR: the principle of legal certainty has been part of ECHR law since 1979; accessibility of law and rules regarding publication strictly defined; relative vagueness of the jurisprudence of the ECHR, cf. Sunday Times 1979: the

legal provision must be formulated with sufficient precision to enable a citizen to regulate his or her conduct, seeking informed advice as necessary!

- French Constitutional Court: concerning the quality of the law: a clear and precise law meets the requirements of the Constitution; an incomprehensible and inexplicable law is affected by “negative incompetence”. The Constitutional Court has stiffened its requirements regarding the prescriptive nature of the law on the basis of article 6 of the Declaration of the Rights of Man and of the Citizen: “The law is the expression of the general will”; it follows that the task of the law is to formulate legal rules and that it must therefore have a prescriptive character, be intelligible and be accessible to the citizen; regarding the requirement for the predictability of law; article 2 of the Civil Code (1803): the law shall have no retroactive effect (however, article 8 of the 1789 Declaration of the Rights of Man gives constitutional status to non-retroactivity only in regard to criminal law).
- Council of State: Explicit recognition of the principle of legal certainty (2006): accessibility: “the availability and publication of legal documents, texts and decisions under appropriate conditions ... is by its nature a public service requirement”; rules regarding withdrawal (Ternon case); a period of four months after which the administration may no longer withdraw an individual act creating rights. KPMG 2006: the Council of State nullified a decree on the grounds that it did not provide for transitional measures to safeguard legal certainty for accused persons.

Judges can contribute towards observance of the requirement for legal certainty, but they cannot ensure such observance alone.

What governments need to do?

Before any reforms take place, it needs to be established whether a new law or regulation is actually necessary, taking into account the desired objective and alternative approaches which could be considered (such as free play of the actors concerned accompanied by a simple recommendation, code of good conduct, financial incentives, negotiation of conventions, regulation by an independent authority or self-regulation); the potential impact of the law envisaged then needs to be examined (by means of an analysis of all the government agencies involved and after listening to those directly concerned); finally, a political decision can be taken in the light of this precise evaluation.

Experience in certain OSCE participating States:

- Canada in the 1990s: the existence of an evaluation is the condition of the admissibility of a draft law in the Committee of Ministers, a compulsory precondition for any public announcement; the drafting of the texts takes place at the end of the cycle after the cabinet has reached an agreement on the principal

components of the reform. There were half as many legal texts promulgated in 2000 as in 1984.

- United Kingdom: the Blair Government established a panel for regulatory accountability chaired by the Prime Minister, a regulatory impact unit attached to the cabinet office, and an independent advisory body (consisting of company directors, trade union officials, consumer associations, etc.) to advise the Government on regulations with regard to the principles of transparency, simplicity of legal provisions, proportionality in terms of the risk that would exist in the absence of these provisions, coherence so as to avoid conflicts between provisions, and targeting to avoid collateral effects. Among other measures that were considered are the following: suggested abrogation of a volume of regulations equivalent to each new draft regulation; the calculation of the cost of the regulation (cost of the elaboration of the provisions and of monitoring compliance with them, cost borne by those to whom the regulation is directed). It was also decided to reduce by half the number of regulatory authorities.
- In the United States of America: under the Reagan administration, the Presidential Task Force on Regulatory Relief; then, under the Clinton administration, the Government Performance and Results Act; obligation on the authorities to reduce the content of federal regulations by 10 per cent.
- In Germany: intense consultations with the *Länder* and interested parties before reforms take place; re-examination of the laws in force with a view to abrogation of existing texts; the jurisprudence of the Constitutional Court considers that the evaluation of the effects of a law is part of the protection of fundamental human rights.

Points for the OSCE to consider:

- (a) As much consultation as possible when the appropriateness of a law is considered (taking inspiration from the consultation mechanisms put into place by the European Commission; transparent consultation with lobbies and pressure groups, which should, moreover, have a regulated status; a green paper or white paper before a decision is taken).

An example in France was the Grenelle Environment Round Table, which brought together government agencies, non-governmental organizations, local authorities, trade unions and business representatives between July and October 2007; elaboration of proposals for action followed by consultations with the public around the country, and lastly a plan of action and a programme.

Six working groups (on combating climate change and managing energy matters; on preserving biodiversity and natural resources; on creating an environment conducive to health; on adopting sustainable modes of production and consumption: agriculture, fisheries, food processing, distribution, forestry and

sustainable land use; on constructing a green democracy: institutions and governance; on promoting green development methods favouring employment and competitiveness).

At the end of this process, the Government announced that all the proposals that had met with consensus among the groups invited to the Round Table would be followed up; among these proposals, a word on those that concern “environmental governance”, the aim of which is to reconcile the regulations for environmental protection and enhancement with economic and social development, involving all the partners concerned:

- (i) Recognition of “environmental partners”; defining the criteria for the representativeness of environmental actors (competence, independence, mobilization capability, number of members, good management, transparency, absence of user rights in the interests defended, effective activity, experience, respect for France’s republican values, democratic functioning of the association, ability to encourage a citizens’ environmental debate); determining the rights, duties and means of action of these partners;
- (ii) Reforming the Economic and Social Council with a view to including environmental partners in the Council and strengthening its influence;
- (iii) Integrating environmental partners into regional economic and social committees;
- (iv) A national sustainable development strategy ratified by Parliament; establishing parliamentary commissions on “sustainable development”; adoption by Parliament of the national strategy; annual stocktaking; real consideration of the opinions of the Economic and Social Council and of the conclusions of national public debates (commission of inquiry open to all citizens, independent commissioner-investigator); the taking into account of the environment and sustainable development in budget indicators;
- (v) Local and regional governments: strategic role of the regions (regional development, infrastructure, intercity transport, regional climate and energy plans); roles of the *départements* and districts; idea of a conference of elected representatives (cf. the EU Committee of the Regions); increase in value of State subsidies to local authorities according to environmental criteria (greenhouse gas emissions, biodiversity policy, conservation of the natural and agricultural environment); development of responsible public procurement (overhaul of the public contracting regime); the taking into account of the environment in town-planning documents, carbon balance sheets (all greenhouse gases);

- (vi) Exemplary nature of State authorities: carbon balance sheets in all government agencies; environmentally responsible public procurement, training of senior staff, environmental criteria in the State budget; 50 per cent reduction between now and 2012 in paper used by government agencies; paper recycling; reform of public inquiries to ensure greater participation by the public; public debate (expanding the scope and possibilities for appeal, presentation of alternatives), studies of the impact of each draft law; systematic evaluation of the environmental impact of public policy tools (subsidies, taxes, fiscal relief); guaranteed access to information; independent conflict-mediation authorities on environmental assessment and alert; high-level council for environmental assessments;
 - (vii) Green governance for economic and social actors: information on sustainable development policies and responses to environmental and social risks in annual company reports; proposing to the EU that companies' global environmental and social responsibility be taken into account at a European level; dialogue within companies on sustainable development; environmental and social labeling of products; responsible company label for small and medium-sized enterprises;
 - (viii) Responsible citizens and consumers: education, training and information regarding the environment; integration of the sustainable development concept into university strategies; vocational and continuous training for farmers.
- (b) Prior impact studies: need for a high-level text within the hierarchy of legal texts which would make the presentation of a draft law dependent on a prior impact study: is the proposed draft law useful? What will it cost and what inconveniences or advantages can be expected? What would be alternative solutions? (French constitutional revision in July 2008.);
 - (c) Simplified legislative procedures for voting on a law; voting on technical texts in a commission (transposition, codification) so as to lighten the agenda of the parliament plenary, in which discussions should focus on the most important texts;
 - (d) Strengthening of the role of parliamentary commissions, in which the law must be genuinely discussed and not simply prepared; better division of the parliament's agenda between the parliament, including the opposition, and the government; strengthening of the rights of the opposition; obviously, the parliament is less well placed than the government, in technical terms, to propose a law, hence a tendency towards abuse of recourse to parliamentary amendments, sometimes without any connection with the draft law; the problem of the balance between parliamentary democracy and legal efficiency; hence the importance for the parliament to have the capacity to propose laws itself.

- (e) Strengthening parliamentary control over the implementation of laws (for example, six months after the entry into force of a law, the deputy who has been acting as the Rapporteur should present a report on the implementation of the law); over the evaluation of public policies: commission of inquiry, parliamentary offices, parliamentary questions, votes of no confidence, debates.
- (f) Informing citizens of the reforms under preparation by means of the Internet (in France, through *légifrance*); electronic discussion forums to assess the measures for implementing the law; impact studies or consideration of options prior to the elaboration of legal provisions.
- (g) Monitoring by the judge of the “subterranean” law constituted by circulars, whenever they are imperative in nature; the need for such circulars to be published.

Session II: Ensuring Inclusiveness in Democratic Lawmaking

Introducer: Professor St John Bates, Consultant, St John Bates Consultancy, UK

(Written statement in English)

Your excellencies, ladies and gentlemen,

1. Introduction

Let me begin with doctors.....

George Bernard Shaw (an Irish dramatist and social commentator) once observed (with reference to them) that: “all professions are a conspiracy against the laity”.

In those days – and perhaps more recently – doctors:

- (1) decreed regimes for healthy living; [then people went to spas to drink the mineral-rich waters...now we drink it out of plastic bottles];
- (2) adopted routine treatments for the sick [unhealthy children had their tonsils removed]; and importantly;
- (3) often treated their patient as the object rather than the subject of their professional activities.

These outcomes (occasionally of doubtful value, and often with unappreciated levels of risk) were sometimes simply the consequence of lack of human knowledge.

They were not usually the result of the medical profession being resolutely perverse, but often the result of:

- Closed decision-making;
- Pressure of work and lack of time.

Lawmaking (...and policy-making) are as central to democracy as medicine is to health ...and they share many of the same tendencies.

So how do we avoid Shaw’s “conspiracy against the laity” here? By appreciating the value of consultation and ensuring it takes place.

2. Consultation with Civil Society: Overview

2.1 Value of Consultation

Consulting civil society in policy development and lawmaking has two important advantages in strengthening democracy:

1. It engages people in the democratic process on a continuing basis – and not simply sporadically at times of elections or crisis;
2. it improves the effectiveness and quality of policy-making and of legislation by:
 - Allowing state institutions to tap the widest source of information possible; and perhaps less obviously;
 - Alerting policymakers to issues they have not identified.

An illustration:

- Many states now address domestic physical abuse of women.
- In at least one OSCE participating State, this issue was initially unidentified (because government statistics were not structured in a way which identified it) and was only recognized by people drawing it to government attention in consultations;
- One person had opened refuges for such women which were quickly filled, thus giving the government some indication of the scale of the problem. ... and
- Indeed, a similar phenomenon is now emerging in much the same way in respect of domestic abuse of the elderly.

2.2 Countervailing pressures

Consulting civil society is subject to many of the pressures that we saw in the medical analogy, and this may be particularly so in emerging democracies.

States face wide, varied, complex and constant demands to develop policy and enact the implementing legislation, which is a natural institutional response that sacrifices systems to the tasks.

Faced with these demands there is a temptation to ignore the advantages of wider consultation and to consider that decisions can be made more swiftly and cheaply by closed decision-making rather than by more inclusive open decision-making (which is clearly a more elaborate and time-consuming and expensive). It is a natural institutional response to set aside consultation until times are less frantic and there fewer demands on public finance.

3. Establishing the Consultation Process

Consultation of civil society has a real value but it is a process which has to be explained and shared, and of course adapted to local circumstances.

It works best when it is embedded within the government (and parliamentary) system and:

- Treated as the norm and not a desirable optional extra; and thus,
- Time and resources are allocated to it.

It also works best when it is recognised as a cyclical process which should be both transparent and focussed.

An illustration of a good modern consultation:

- In one OSCE participating State there has recently been a government consultation (with a three-month period for submissions) on the day of the week when elections should take place.
- In this OSCE participating State, for the past 60 years, elections have (somewhat unusually) been held on Thursdays, and a central issue was whether it would be more convenient (and increase voter turnout), if the election day were moved to the weekend (either Saturday or Sunday, or over the whole weekend).

- A number of issues were highlighted in the consultation document (with some international comparisons) – and responses sought to them:
 - a) Would it be more convenient? Or would it be an intrusion into most people’s family and leisure time?
 - b) Were there religious objections? Could these be met by postal, on-line or advance voting?
 - c) What views were there on the increased cost (e.g., paying staff weekend rates)?
 - d) Was there concern over security if elections were held over both Saturday and Sunday?
- These highlighted issues were reinforced by an (optional) questionnaire addressing them.
- The consultation document indicated that an analysis of the submissions would be considered in a “Citizen’s Summit” of a cross-section of the general public, and that the results of that would be presented to Parliament.

4. Consulting Civil Society: The Substance

What is “civil society”? [who is to be consulted?]

- Only specialists? Formally or informally recognised? Indigenous organisations? NGOs? Individuals as well? May produce informed but predictable results
- General open consultation? Will be a larger task. More appropriate for some issues rather than others? Often with a significant proportion of uninformed responses.
- Both strands? Perhaps better managed with (non-exclusive) on-line consultation. And there may be inadvertent distortions.
- It is very easy to inadvertently limit civil society to those who are geographically convenient: I had the experience years ago of working with a parliamentary committee which had inadvertently drifted into seeking evidence from organisations in or near the capital, ignoring parallel organisations in other parts of the country.

5. What can go wrong?

As a utilitarian by nature, I would like to conclude with a couple of illustration of what can go wrong where there is inadequate consultation: testing the process by the product (legislation).

- Inadequate consultation may sustain weaknesses in drafting of legislation.
An illustration:
 - It is not uncommon for criminal codes in emerging democracies to provide that where articles of the code conflict with provisions of ratified human rights treaties, the treaty provision shall prevail over the provision of the criminal code.
 - This is fine as a rule of interpretation, but often it hides a failure to analyse thoroughly whether there are conflicts, and address them.
 - Good consultation would expose specific conflicts to be addressed, thus saving subsequent time and expense – not to mention the undermining the

international standing of the state – when provisions of the code were challenged.

- Inadequate consultation may fail to reveal “black holes” where the legislation is too narrow in scope to address the issue fully.

I started with doctors; let me end with civil servants.

- A law made it an offence for a civil servant who had been dismissed or resigned to then use confidential information – obtained while a civil servant – for the benefit of others.
- But, as we all know, most civil servants are not dismissed and do not resign; they work conscientiously for 40 years and then retire – but the offence did not extend to them.

Session III: Access to Law

Introducer: Mrs. Mara Poliakova, Chair, Board of the Independent Expert Legal Council (NEPS), the Russian Federation

(Written statement, unofficial translation from Russian)

The right of access to legislation is guaranteed by fundamental international legal instruments.

In accordance with the OSCE documents, access to legislation is an inherent feature of every state governed by the rule of law. State authorities are obliged to provide access to the texts of legislative provisions. Freedom of expression also implies the right of the general public to obtain access to information, including the right to know what is done by the government on their behalf. It is an important prerequisite for proactive public participation. In the area of the OSCE human dimension, it was formulated by establishing an interrelation between “the right of individual to know and to act in accordance with his or her rights and responsibilities” and the commitment of participating States “to publish and to guarantee access to all laws and by-laws related to human rights and fundamental freedoms”.

Article 19 of the International Covenant of Civil and Political Rights talks about particular duties and responsibilities that arise through the exercise of the right to information, as well as about certain restrictions on this right that can be provided by law to respect the rights or reputations of others, and for the protection of national security or of public order, or of public health or morals. In the Article 10 of the European Convention on Human Rights and Fundamental Freedoms the right to information acts as a component in the right of freedom of expression: these rights should be exercised “without interference by public authority and regardless of frontiers”.

In the Recommendations of the Council of Europe for the Protection of Personal Data and Freedom of Information, it is underlined that democratic regimes are characterized by a maximum flow of information within the society and that rights to information set forth in the European Convention for Protection of Human Rights and Fundamental Freedoms should have a broad interpretation, implying the freedom to seek information, and, as a result, the obligation of government to ensure access to information on issues of public significance, subject to relevant restrictions.

Within the past years 40 countries have adopted legislation regulating access to State information (legislative) resources. In other countries with relevant legislative experience, existing legislation on access to information was subject to substantial changes in response to the development of information technology and a general tendency towards the increased transparency of activities of governmental institutions.

Analysis of legislation and current situation in a number of countries revealed a series of problems, including provisions governing the right to information contained in various laws, by-laws and departmental instructions. It is not uncommon for those provisions to have a declarative nature or give reference to other legislation, and, most importantly, they rarely contain specific mechanisms for implementation and accountability.

In the light of the above it is worthwhile to propose several recommendations on establishment of guarantees for access to legislation and information on lawmaking.

First of all, it is necessary to introduce relevant provisions in legislation establishing the principle of broad access to information, with limited access for only classified information as defined by law.

In order to prevent any abuse of this principle by state officials it is important to create a special list, indicating types of documented information that it *is forbidden* to classify as limited-access information. In particular, it is mandatory to provide access to the following types of information:

- Legislative acts and other regulations, establishing the legal status of state authorities, bodies of local self-governance, organizations, public associations, as well as rights, freedoms and duties of citizens, and procedures for their exercise;
- Documents containing information on the activities of state authorities and bodies of local self-governance, on the use of budgetary funds and other central and local funds, on the state of the economy and the needs of the population, with an exception made only for information classified as a state secret;
- Documents kept in libraries and public access archives, informational systems of State bodies and institutions, bodies of local self-governance, public associations, organizations, representing public interest or those required for the exercise of rights, freedoms and duties of citizens.

It is also worthwhile to recommend the adoption of a special law regulating a universal procedure of access to information, as well as the duties and obligations of central and local government pertaining to its implementation. Provisions of such a law should neither be declarative, nor make reference to other pieces of legislation. This law should contain a specific mechanism for implementation and accountability.

Such a law must consider the following issues of public access to legislative information (including information on draft legislation):

- The content of information on draft legislation subject to mandatory publication by state authorities;
- The grounds, procedure and restrictions for classifying information as for official use only;

- The procedure and means used by state authorities to provide information on draft legislation or legislative information representing public interest or concerning the personal interests of citizens;
- The responsibilities and duties of state authorities to provide information on draft legislation upon request from citizens and public associations, as well as the procedure for the provision of such information;
- The liability of state officials for the non-provision of the aforementioned information, or for the provision of incomplete information, or false information, which resulted in violation of rights of citizens.

It is worthwhile to include particular mechanisms setting out the means of guaranteeing access to information.

Such mechanisms may include:

- Immediate placement of the latest updates of legislation in electronic legal databases and published compilations of legislation (including all changes and amendments introduced by the time of publication);
- A variety of forms and means of providing information (posting on the Internet, publishing in mass media, providing citizens with an opportunity to sit in at the sessions of collegial authorities, placing information in special stands, in libraries and archives, provision of information upon written or oral request);
- Detailed descriptions of the rights and duties of both users and state authorities; for example, a user has a right not to provide a reason for requesting access to a particular piece of information on a draft law;
- Establishing organizational guarantees for ensuring access to information, for example, state bodies and officials should consider costs relating to providing access of citizens and organizations to legislative information, when planning their budget financing for a relevant financial year;
- A basic mechanism for obtaining information upon request, which is governed by detailed provisions and provided with a series of required procedures;
- If a part of a requested document contains information with restricted access, a state institute or a body of local self-governance must provide that information from the requested document which is not restricted;
- Information posted by state authorities on the Internet should be as wide as possible, and should be grouped by thematic blocks;
- Any fee for access to information should be envisaged only when the information requested is not part of free-of-charge information or the volume exceeds the minimal level determined by government;
- A combination of principles of gratuity and proactive placement of information on the Internet should be established: “if a requested piece of information ... is not placed on the official website of the state body or institution of local governance, it must be placed on the website until the deadline for consideration of a given request expires”.

The majority of OSCE participating States legally establish certain fees for provision of information depending to the nature of request. For example, if information is requested for commercial purposes, the fee may exceed the costs associated with the search for information; if information is requested for personal use, then only costs associated with search, selection and copying are covered; if information is requested by educational, non-commercial, scientific organizations or representatives of mass media, then the fee is charged only for copying requested information.

I think that it is absolutely necessary to ensure the guarantees for translation of and wide access to the Decisions of the European Court of Human Rights, since, unfortunately, members of parliaments in many countries have a vague understanding of the principles and standards developed by this Court. Many laws are adopted with no consideration of the legal provisions of European documents, and very often this is due to the erroneous interpretation of these provisions.

The same issue is present in the practice of the judiciary. The following examples are from the experience of the Russian Federation. Currently a number of public associations engage in monitoring of lawmaking and in placing draft laws and/or comment on those drafts on the Internet. For example, our non-governmental organization (Independent Council for Legal Expertise) exercises public control over observance of human rights and freedoms in the legislation at federal and local levels. The objectivity of the evaluations produced by our organization is ensured by our independence; we are not politically engaged, are non-commercial, and unrelated to any department or other corporate interests. Legal expertise is offered by prominent Russian legal experts with high academic and scientific standing.

Expert opinions are addressed to legislative bodies for consideration of the comments and proposals contained therein. The most significant newly adopted laws, draft laws, and expert opinions are placed on the website of our organization – the Independent Council for Legal Expertise (<http://www.neps.ru>).

The main goal of our website is to make access to information on the legislative activity of the Russian Parliament as simple and user-friendly as possible both for interested experts and for general public, as well as to promote feedback between constituents and the parliament.

Website visitors have an opportunity to ask any questions to website administrators as regards the content of expert opinions and draft legislation, as well as to copy it freely. Some draft laws attracted the particular attention of the general public (such as the draft Federal Law “On the introduction of changes and amendments to the Criminal Procedural Code of the Russian Federation” and the Federal Law “On operational-investigative activities” – Author: Yu. A. Kostanov), which have been accessed by website visitors 2,919 times.

Another example is a website, “legislature.ru”, the core element of which is a database of draft laws currently under consideration by the State Duma. This database contains texts

of laws, as well as information on the progress of draft laws towards adoption and a timeline for their consideration. An interesting feature of this website is that it provides for feedback and interaction between those drafting the law and the general public. With this purpose every page containing texts of draft laws has a special form, which can be filled in by website visitors who want to leave comments and feedback. Large excerpts of draft laws are available on the website of the State Duma of the Russian Federation.

It is worthwhile to establish an independent international panel of experts, which would consist of legal experts from among the OSCE participating States – to ensure expert control over the observance of international commitments of those countries in implementation of legislative policy and lawmaking process pertaining to human rights.

Such a body would inform parliaments of the success stories of relevant countries, assist in the prevention of possible violations and deviations identified in the course of legal expertise of draft laws.

Our organization is currently initiating the establishment of such a structure. We would highly appreciate any support.

ANNEX V. BIOGRAPHICAL INFORMATION ON KEYNOTE SPEAKERS, INTRODUCERS AND MODERATORS

Keynote speaker: Mrs. Walburga Habsburg Douglas, Head of the Delegation of Sweden to the OSCE Parliamentary Assembly, Vice-Chair of the Third Committee

Since 2003 she is the chairwoman of the local branch of the Swedish Moderate Party in Flen and on the board of the regional organisation of the party in Södermanland. She is the Chairman of the Swedish Parliamentary delegation to the OSCE since 2006.

Mrs. Larisa Alaverdyan, Member of the National Assembly, Republic of Armenia

Member of the OSCE Parliamentary Assembly, Member of the National Assembly (Parliament) of the Republic of Armenia (member of the Heritage Party Parliamentary fraction), former Ombudsman of the Republic of Armenia, Chair of the NGO “Foundation against Violations of the Law”

Working session I:

Introducer: Mr. Yves Doutriaux, State Counsellor (member of the Conseil d’Etat).

He is State Counsellor (member of the Conseil d’Etat) since April 2007, legal advisor to the High Council against Discriminations and for Equality (HALDE), teaching law at the University of Paris I, Minister plenipotentiary, former Ambassador of France to the OSCE in Vienna (2003-2006), Deputy representative of France to the United Nations in New-York (1998-2002), deputy Spokesperson of the French Minister of Foreign Affairs (1995-1998), General Consul of France in Toronto, Canada (1992-1998), Advisor to the French Representation to the EU in Brussels (1988-1992), Chevalier de la Légion d’Honneur

Working session II:

Introducer: Mr. St John Bates, Professor, St John Bates Consultancy, UK

He taught at the Universities of Cambridge, Sussex, Edinburgh and latterly Glasgow, where he was appointed as the first John Millar Professor of Law and Head of the Department of Public Law. During this period he also served for some years as a specialist adviser to the House of Lords Select Committee on the European Communities (now the Select Committee on the European Union). He also served Secretary of the House of Keys and Counsel to the Speaker, acting as the legal and procedural adviser to the Parliament of the Isle of Man. In 2001, he resigned his parliamentary appointment, and established his own consultancy which provides strategic advice and training, principally in EU affairs and in legislative drafting, to private and public sector clients, largely in eastern and central Europe.

Working session III:

Introducer: Mrs. Mara Poliakova, Chair, Board of the Independent Expert Legal Council (NEPS), the Russian Federation

She is also a member of the Moscow Helsinki Group, member of the Council under the President on facilitating development of civil society institutions and human rights. The Council was created in 1993 as an NGO that prepares legal reviews on laws affecting human rights, develops alternative draft laws. Legislative reviews of this Council helped remedying many flawed legislative drafts, encouraged public debate and initiated strategic litigation. Together with many human rights NGOs this Council carries out civil society control over legislative and law implementation practices in Russia.

ANNEX VI. OPENING AND CLOSING REMARKS by Ambassador Janez Lenarčič, ODIHR Director

OPENING REMARKS

Excellencies,
Ladies and Gentlemen,

It is a pleasure and honour to welcome you to this Supplementary Human Dimension Meeting on “Democratic Lawmaking”.

This is the first time ever that the OSCE has looked specifically into this cross-cutting theme which has ramifications across the entire spectrum of OSCE human dimension commitments, and far beyond.

Lawmaking of course is of direct interest to parliamentarians, and I warmly welcome the participation of the OSCE Parliamentary Assembly in this meeting: Mrs. Walburga Habsburg Douglas is one of our keynote speakers today. The contribution of parliamentarians to this topic is essential and is certainly not limited to the discussions at this meeting.

I am also grateful for the presence of representatives of governmental bodies and national institutions and agencies who domestically play a decisive role in lawmaking.

Lawmaking is a process that requires broad participation, and I therefore wish to express my appreciation to those here today who come from civil society. Civil society representatives already met this morning to discuss possible recommendations for this meeting. We will listen to these recommendations in a moment.

Ladies and gentlemen,

Democratic lawmaking has never been the subject of a human dimension meeting in its own right. But the topic is by no means new to the OSCE. It has been addressed in the context broader subjects such as democratic governance or the rule of law. It has also been discussed in connection with legal reform in specific thematic areas.

But what we have not looked at sufficiently, so far, is the importance of the lawmaking process itself. What I mean here is the process through which laws are prepared, discussed, adopted, published and monitored – irrespective of the content of the legislation.

These issues are often overlooked. They are often seen as less important. And they are not specifically addressed in international legal instruments.

Within the OSCE, we do have clear commitments on the lawmaking process. They are included in the 1990 Copenhagen document and the 1991 Moscow documents, and can be summarized as follows:

First, legislation must be formulated and adopted as the result of an open process reflecting the will of the people.

Second, legislation and regulations must be published and made accessible to everyone, as a condition for their applicability.

These commitments are uncontroversial – anybody would easily subscribe to them.

So why should we attach particular importance to looking at these commitments and their implementation now?

I believe there have been significant changes in the last two decades that make them more topical than ever.

Although lawmaking is embedded in the unique traditions of each country, there is a trend towards greater uniformity of law. This is a development that mainly affects the economic and commercial sphere, but also areas that fall under the OSCE human dimension.

In addition, many participating States have been engaged in an unprecedented lawmaking effort. They are in the process of conducting a significant overhaul of existing structures, systems and legal frameworks. This has placed considerable strain on legislative systems. As a result, concerns about the quality of legislation are widespread throughout the OSCE region.

Ladies and gentlemen,

I believe that our discussions here will be an opportunity to have a thorough exchange of views on the instruments, mechanisms and procedural arrangements available to address these concerns.

Underlying these discussions are, in my view, the following three key observations:

First – democratic lawmaking is not just about ensuring that laws are enacted by democratically elected representatives. It is also about ensuring that the public in general is given reasonable opportunities to contribute, in particular those affected by the legislation and those responsible for its enforcement.

Second – there is no good law on paper, but only good laws in practice. Therefore, the process whereby laws are prepared is as important as their content.

And thirdly, democratic lawmaking means that a more open, transparent and participatory process increases the likelihood that new laws will be well received and accepted and thus properly implemented.

These three elements are integral parts of the rule of law. How these requirements translate into concrete measures will be the main subject of our discussions.

Such measures may involve far-reaching changes to the system in place. They may be directly related to the laws, regulations and rules of procedure for lawmaking. And they may also relate to the practices, working habits and the legislative culture of lawmakers.

Too often calls for transparency are nothing more than lip service.

“Time is pressing”, we often hear, “reforms cannot wait, democracy requires changes, and changes require fast-track adoption procedures”.

There is a perception that the process does not matter as much as the end result – as if these were unrelated issues.

But we all know that the ultimate test of the quality of legislation lies with its implementation. Expeditious processes often lead to bad laws that cannot be implemented as intended and thus need to be changed over and over again.

Today there is an increased awareness of the importance of addressing these issues comprehensively and systematically. It is my hope that our discussions over these two days will reflect this trend.

For us at the ODIHR, this meeting will certainly prove useful, as legislative assistance is an integral component of many of our activities.

In recent years, we have not only reviewed laws, but have also paid increased attention to the root causes of shortcomings often observed in the legislation we comment on.

We have come to realize how essential it is to encourage and support home-grown initiatives aimed at identifying legal and practical measures for strengthening the capacity of legislative systems.

I am confident that this meeting will provide a further impetus to enhance the ODIHR’s capacity to assist participating States in implementing their commitments in this field.

I wish you all a fruitful discussion.

Thank you.

CLOSING REMARKS

Excellencies,
Ladies and Gentlemen,

This meeting is now coming to an end. It was mentioned earlier that “democratic lawmaking”, though not new to the OSCE, has never before been addressed in its own right. However, the discussions yesterday and today have demonstrated how important it really is to put these issues on our agenda. The management and regulation of legislative systems would be improved if a more comprehensive and systematic approach were taken in most, if not all, participating States.

The discussions at yesterday’s civil society round table were thorough and offered focused and detailed recommendations. These can provide the basis for further steps towards more open and transparent lawmaking processes. Our meeting has greatly benefited from this contribution.

We are also grateful for the active participation of the OSCE Parliamentary Assembly. The keynote addresses given by Mrs. Habsburg Douglas and Mrs. Alaverdyan served the purpose of this meeting remarkably well. They both pointed to the key issues and highlighted the links between democracy as an aspiration and democracy as a practice. In the same spirit, the speeches of the introducers guided and stimulated the debate, and they deserve thanks for their insightful and enlightening contributions.

I would like to make a few observations about the meeting that, hopefully, will do justice to the quality and richness of the debate.

First, beyond the diversity of perceptions and practices that were presented, there was a principled agreement that more needs to be done to foster transparency and openness. Democracy is a process that requires more than periodic elections. The voice of the citizens should be heard also between elections. Their participation in the lawmaking process must not be seen as a concession, but as a benefit. This will increase the likelihood that, once adopted, legislation is accepted and properly implemented. Their participation is a benefit since it will ultimately ensure the effectiveness of the legal system. One may say that democracy generates more democracy.

However, it is not enough to recognize the theoretical importance of civil society participation in the lawmaking process. We should also look at how this input can really be taken into account in practice. The discussions here have offered a wide range of options. There is obviously no one-size-fits-all solution. Any recommendation can only set the framework – the details have to be considered on a case-by-case basis.

However, some key issues have emerged:

- Broad consultations on key legislation should occur at all stages of the lawmaking process, including at the policy development stage;
- There needs to be access to draft legislation at the earliest stage possible. Likewise, timely access to legislative agendas is essential;
- There should be public assurances that the input of those consulted will be given serious consideration and that the outcome of the consultations will be made public;
- New policies and mechanisms should be developed to ensure that consultations with the public are predictable in their scope, timeframe and purpose, and that they are effective.

These objectives leave much discretion as to the choice of instruments and institutional arrangements. Exchanges of practices through bilateral and multilateral co-operation are essential, and ODIHR stands ready to contribute to such exchanges.

Lawmaking is a complex area. Because of the challenges faced by governments and parliaments, the ODIHR has carried out country studies upon request. These studies provide a working basis for increasing the transparency and efficiency of the lawmaking process. The case of the former Yugoslav Republic of Macedonia is exemplary in this regard, and we are hopeful that this work will result in constructive proposals for reform.

I believe that such activities can be a positive contribution to further democratize lawmaking, showing that transparency and efficiency are not incompatible but rather mutually reinforcing. The ills of democracy can only be cured with more democracy. This was the bottom line of our discussions during this meeting.

With these final words, I would like to express my gratitude to all of you for your participation, your ideas and your constructive approach. You have pointed out the way forward – what is needed next is political will and action.

Thank you.

ANNEX VII. OPENING REMARKS by the OSCE Chairmanship

OPENING REMARKS by Mr. Lauri Tarasti, Justice, the Supreme Administrative Court (retired), Special Adviser of the Ministry of Justice, Representative of the Finnish OSCE Chairmanship

It is a great honour for me to address this meeting on Democratic Lawmaking in the name of the Finnish OSCE Chairmanship. The meeting is organized jointly by the Finnish Chairmanship and the Office for Democratic Institutions and Human Rights. I would like to express the Chairmanship's deep appreciation to all who have made it possible to organize this meeting.

The OSCE's work is based on the respect for human rights and fundamental freedoms, the rule of law and democracy. The topic of this meeting accords with these values.

The meeting on Democratic Lawmaking has been aimed at government officials, OSCE delegations, non-governmental organizations and other civil society actors and international organizations. The meeting was preceded this morning by a civil society round table where civil society has had the opportunity to raise issues, discuss priorities and exchange information. Already this shows what democratic lawmaking means: wide participation by various sectors of society in lawmaking.

Lawmaking is a long process starting from the need to initiate planning of new legislation, or to change the present legislation, to the application of the new laws and articles adopted. I have myself taken part in the preparation of laws in three ministries in Finland and written about 1,000 articles included in Finnish legislation and have later applied these as a justice of the Supreme Administrative Court of Finland. I will return later to my experiences.

We have several interesting items before us in this meeting. Meetings like this usually mostly move on a theoretical level, but today our wide participation from different areas of society helps us to pay attention to practical means. I hope that the exchange of opinions, experiences and good practices give us new ideas of democratic lawmaking which we can take with us to our home countries.

Democratic election system

This Supplementary Meeting on Democratic Lawmaking addresses the subjects:

- lawmaking in a democratic system of government: transparency and efficiency;
- ensuring inclusiveness in democratic lawmaking;
- access to law.

The first clear precondition for democratic lawmaking is that parliament, which has normally the major responsibility in lawmaking, has been elected through free and fair elections i.e. it represents the will of the people. As we know, there are many ways to carry out democratic elections and this meeting will not deal with this issue. I only refer to a book *Electoral System Design* published by the International Institute for Democracy and Electoral Assistance which includes comparisons between different electoral systems in the world.

The rule of law

In addition to the precondition of a democratically elected parliament I would like to mention another background element for democratic lawmaking. It is the rule of law. A distinctive mark of the rule of law is the principle of legality. According to this, all public authority has to be based on law.

The relation between the rule of law and democracy deserves attention. Democracy usually means the rule of the people, or a state where there is a government system ruled by the people. There is a close relationship between these two principles. Equal franchise and free elections organized at regular intervals require political decisions and norms, as well as individual rights and freedoms for their support. The rule of law safeguards these rights and freedoms. Therefore, the rule of law and democracy, and their development, are interrelated. This concerns also the rule of law and democratic lawmaking.

The rule of law is not merely a formal principle. It takes on a dynamic, societal character as the number of laws increases and they gain material substance. In this sense, justice and democracy have to be viewed dynamically and in relation to each other. There is a process of interaction between public institutions, public authority and civil society. Therefore, the emphasis is laid on the citizens' perspective, the significance of fundamental and human rights, the requirements for the functioning of the system, and the expectations concerning judicial development. This interaction is in question today and tomorrow and we can examine our subjects from these points of view.

When discussing the content of the rule of law I would like to refer to a book *Prospects of the Rule of Law* (Helsinki 2005) written in English by Mr. Pekka Hallberg, President of the Supreme Administrative Court of Finland (the main parts of the book translated into Russian (1998) and Chinese (2001)).

Now I would like to present some personal comments on these three above-mentioned subjects. We will deal with these subjects in three different sessions today and tomorrow.

Session 1: Lawmaking in a democratic system of government: transparency and efficiency

Lawmaking today must be based on a much wider understanding than was the case in the past. Although lawmaking is part of each country's historical development and differs from one country to another, the current and common trend is towards greater uniformity

of law. Globalization needs common legal norms, especially in trade. Many international conventions require the same kind of laws among the parties of the conventions. Migration has spread to the whole world, bringing different cultures nearer each other, also juridically. Both the content of legislation and the methods by which it is made must be more responsive to internationalization. This is a special challenge to transparency of lawmaking. Lawmaking can happen at a further distance from civil society than previously, for example in the European Parliament or in the connection of United Nations' convention on climate change.

The quality of legislation – its effectiveness and efficiency – largely depends on the quality of the process through which it was prepared and developed. Many documents and decisions of the OSCE have emphasized this understanding. But the question is often how to combine the political process with the lawmaking process. We all know which kind of difficulties can appear. Public hearings, the participation of all parties in the legislative process, thorough discussions, the examples from other countries and best practices and so on might help in these difficulties. Transparency of lawmaking is an essential factor in these processes.

We should also pay some attention to such special situations when normal transparency and participation in lawmaking is not possible, for instance when rapid changes in taxation or economic norms require rapid revisions which cannot be published beforehand without losing their influence.

Session II: Ensuring Inclusiveness in Democratic Lawmaking

Representation of the people in parliament has been the general answer to the requirements of inclusiveness in lawmaking. The question is of representative democracy: voters elect their representatives to parliament, parties and parliament members keep permanent contact with their supporters and voters. Many interest groups and lobbyists on the other hand try to influence lawmaking in its various phases.

When drafting new laws, all parties concerned can send their statements to be taken into account, for better or for worse, in the drafting work. The government and parliament hear the most important parties and specialists. There are many ways of achieving inclusiveness. The NGOs can have an important position here by raising public awareness on significant legal issues, by enriching the debate, by providing innovative proposals and constructive criticism and by improving transparency and accountability, by disseminating information and by monitoring the implementation of policies.

Modern technology offers today new means. It is possible to allow individual opinions to be sent to the authorities through Internet. I myself answered in a special forum, on an Internet address, established by the Ministry of Justice to the questions and statements of Finnish citizens regarding the report of the electoral reform committee. 110 questions were presented and answered.

Another method for inclusiveness is transmission of the important sessions of parliament through television and radio and in Internet to the computers.

The rule of law is of importance also regarding the inclusiveness of democratic lawmaking because democratic participation often requires legal safeguards. Freedom of speech especially must be guaranteed in this connection.

Session III: Access to law

It is very clear that legislation needs to be made accessible to the public. Otherwise we cannot expect the law to be applied and the public to act as the law demands. The authorities must provide for access to legal norms. It is also a precondition for public participation in lawmaking and in fact for the whole of democratic lawmaking. The rule of law requires that everybody be able to exercise their rights and perform their duties.

An important factor in access to law is access to official documents. In Finland, we have emphasized this right in our Constitution and in a special act, "Act on the Openness of the Authorities' Activity". We have had lively discussions concerning which documents can be classified as secret on the grounds that they contain confidential, public or private information.

It is a different matter how big an impact free access to law has in reality on society. There are thousands of legal norms today and we cannot expect that most of them would draw special attention. Legislation is often poorly understood with its difficult definitions and complicated juridical wordings. All efforts to deregulate have failed, also in Finland in 1990s. However, access to law must be carried out so that everybody can get all possible information in those matters in which they are interested.

It is a big problem how access to law can be carried out effectively. We all know the traditional means of publishing laws in official journals. We also know how media can influence access to law. Today information technology has already been extensively used to provide wider possibilities for electronic access to legal texts. In this meeting we can examine how to use this technology so that we can achieve the best possible access to law.

Special questions in this connection are, for example, the arrangement of access to draft legislation, to legal solutions in courts and to international laws.

Finally, I would like to end my speech with a question: what is the aim of democratic lawmaking? Naturally it is widely accepted, effective laws. But law is the means, justice is the objective. To achieve justice is the aim of democratic lawmaking.

ANNEX VIII. SIDE EVENTS

The Helsinki Document of 1992 (Chapter IV) called for increasing the openness of OSCE activities and expanding the role of NGOs. In particular, in paragraph (15) of Chapter IV the participating States decided to facilitate during CSCE meetings informal discussion meetings between representatives of participating States and of NGOs, and to provide encouragement to NGOs organizing seminars on CSCE-related issues. In line with this decision, NGOs, governments, and other participants are encouraged to organize side meetings on relevant issues of their choice.

The opinions and information shared during the side events convened by participants do not necessarily reflect the policy of the OSCE/ ODIHR.

6 November 2008

Side Event: Roundtable for Civil Society Annotated Agenda

The main objective of the civil society side event is to formulate recommendations for the SHDM. Following the opening remarks, an introducer will highlight existing key principles and concerns regarding democratic lawmaking. A moderator will then open the floor for comments and remarks to all other participants.

The questions that could be addressed during the roundtable:

- How can participating States ensure full compliance with their commitment to the following?
 - Legislation must be formulated and adopted as the result of an open process reflecting the will of the people;
 - Legislation adopted at the end of a public procedure, and regulations, must be published, that being the condition for their applicability;
 - Those texts need to be made accessible to everyone.
- Drawing upon these commitments, what are the measures OSCE participating States need to take to ensure greater transparency and efficiency of their lawmaking systems?
- In particular, how can the lawmaking process be made more transparent and accessible to civil society, in particular groups affected by the legislation? How can government be made more responsive to the needs and interests of these groups?
- What should be the methods used by governments and parliaments to make draft legislation publicly accessible?
- How can participating States learn and apply new technologies for facilitating public access to legislation?
- What limitations to access to legislation are legitimate and what are those that are not legitimate?
- In general, how can greater public acceptance of legislative proposals be developed?

- How can lawmakers be empowered through broader access to precedents and solutions in use in other participating States? How can co-operation between international organizations providing legal advice on national legislation be strengthened and made more efficient?
- What legislative assistance programmes can better contribute to increasing the transparency of the legislative processes in the OSCE region? How can the OSCE and ODIHR assist participating States in this regard, but also in broadening exposure of their lawmakers to modern methods of management of the legislative process?

9:00 – 9:30 **Welcoming coffee**

9:30 – 9:45 **Opening remarks**

Ambassador Antti Turunen, Chairman of the OSCE Permanent Council, Head of the Permanent Mission of Finland to the OSCE

Mr. Denis Petit, Head of the Legislative Support Unit, OSCE/ODIHR

9:45 – 11:45 **Discussion and adoption of recommendations**

Moderator: Mr. Serghei Ostaf, Director of the NGO Resource Center “CReDO”, Republic of Moldova

Introducer: Ms. Tanja Trendafilovska, Legal Consultant, former Yugoslav Republic of Macedonia

11:45 – 12:00 **Closing Session**

Moderator: Mr. Denis Petit, Head of the Legislative Support Unit, OSCE/ODIHR

12:00 – 13:00 Buffet lunch offered by OSCE/ODIHR

Friday, 7 November

Title: Support to Democratic Lawmaking and Better Regulation

Convenor: OSCE Spillover Monitor Mission to Skopje

Time: 12.00 – 13.30

Venue: Bibliotheksaal

Language: English

Summary: At the request of the government, the OSCE Spillover Monitor Mission to Skopje and the ODIHR undertook in 2007 an assessment of the legislative system. This

initiative was supported by the Ministry of Justice and the General Secretariat of the Government as part of domestic efforts towards improving the efficiency of the legislative process. This was seen as crucial in the context of the EU accession process. The assessment report was eventually released in January 2008. It contains recommendations pointing to areas where progress is needed. Subsequently, the Minister of Justice has accepted the OSCE offer of assistance and co-operation in implementing these recommendations. A Board was established, whose members have been appointed by various governmental bodies and the Assembly. They will attend the side event where a presentation of the recommendations contained in the report will be made by the ODIHR expert, Professor Alan Page, who led the team who drafted it. Discussions will ensue on the implementation of these recommendations, and participants in the side event are welcome to share their thoughts and views on the various aspects addressed by the report and its recommendations.

ANNEX IX. STATISTICS ON PARTICIPATION

The SHDM was attended by a total of **200** participants, including **111 participants from 42 OSCE participating States** (Andorra, Bosnia and Herzegovina, Spain, Georgia, United Kingdom, Iceland, Liechtenstein, Malta, Monaco, Montenegro, San Marino, Switzerland, Tajikistan, and Turkmenistan did not participate with state representatives).

The Meeting was attended by eight participants from the OSCE Parliamentary Assembly's Liaison Office in Austria and 21 representatives from 11 OSCE field operations and missions (OSCE Presence in Albania, OSCE Centre in Ashgabad, OSCE Centre in Astana, OSCE Mission to Bosnia and Herzegovina, OSCE Mission to Georgia, OSCE Office in Minsk, OSCE Mission to Moldova, OSCE Mission to Serbia, OSCE Spillover Monitor Mission to Skopje, OSCE Project Co-ordinator in Ukraine, OSCE Office in Yerevan).

In addition, three representatives from three international organizations: Council of Europe, International Organization for Migration (Office in Austria), UN Office for Drug Control and Crime Prevention, were present.

Forty-eight representatives from 41 non-governmental organizations participated in the Meeting. These NGO representatives came from Belgium, France, Germany, Spain, Switzerland, United Kingdom, United States of America, Albania, the former Yugoslav Republic of Macedonia, Montenegro, Serbia, Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Turkmenistan, Belarus, Bulgaria, Hungary, Moldova, Poland, Russian Federation and Ukraine.

The list of participants can be found in Annex X.

ANNEX X.

LIST OF PARTICIPANTS

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