

HUMAN DIMENSION IMPLEMENTATION MEETING**22 September to 3 October 2014****Warsaw, Poland****Rapporteur's report**

Wednesday, 24 September 2014

Working session 5: Rule of law II*Rapporteur: Mr. Umut Topçuoğlu, Permanent Mission of Turkey to the OSCE***No. of statements:****Delegations: 12****Civil Society: 24****OSCE Inst./Int'l Org: 0****Rights of Reply: 11**

Working Session 5 on the rule of law addressed the issues of democratic lawmaking, independence of the judiciary and the right to a fair trial.

The First Deputy Director of ODIHR, Ms. Beatriz Balbin, drew attention to the existing OSCE commitments on the abovementioned subjects. In this context she underlined that good laws must also meet the requirements of proper application, pointing out that well-made laws have good chances of being effectively implemented. She stressed that only an independent and impartial judiciary, as a prerequisite to the rule of law, can act as a guarantor of a fair trial. She pointed out that the right to a fair trial is an essential element of the rule of law.

The introducer, Mr. Nicolae Esanu, Deputy Minister of Justice of Moldova, expressed his regret that the issue of democratic lawmaking is highly underestimated. Referring to the 1990 Copenhagen and 1991 Moscow commitments, he pointed out that legislation, adopted at the end of a public procedure and accessible to everyone, is essential for the protection of inalienable rights. He stressed the need to ensure that legislation is adopted in an open process reflecting the will of the people, with an analysis of the needs of the wider public combined with an assessment of the possible impact of the proposed law. He stated that everyone, not only those affected by the law in question, should be able to participate in the lawmaking process. He emphasized that the highest quality of draft laws can only be achieved with realistic deadlines, and indicated that in practice deadlines unfortunately remain too short. Moving on to the issue of independence of the judiciary, he stated that its purpose is to guarantee that everyone has his or her case decided in a fair trial. He pointed out that the Council of Europe's Venice Commission, while respecting the variety of legal systems of different states, recommends establishing a judicial council with a pluralistic composition. He stated that probationary periods for judges could undermine their independence. He indicated that independence of the judiciary can be analyzed from both the internal and the external viewpoints and drew attention to important issues regarding internal independence, such as the allocation of cases. He

stressed that accountability of the judiciary constitutes an essential element of an efficient legal system. He emphasized that judges can only have functional immunity and that when not exercising judicial functions, they should be liable under civil, criminal and administrative law. As regards the right to a fair trial, he stressed that it constitutes a fundamental right, as also set forth in the European Convention on Human Rights. The right to a fair trial encompasses a number of elements, including but not limited to, the right to defend oneself in person or through legal assistance, free of charge for indigent defendants if the interests of justice so require, and equality of arms, including the right for the parties to call and examine witnesses

In the ensuing discussion 36 interventions were made, 24 of those by NGOs. In addition, 11 participating States used their right of reply.

A group of participating States stressed the importance of the rule of law in democratic societies, highlighted that an independent and impartial judiciary is crucial for ensuring the rule of law and guaranteeing the right to a fair trial, and indicated that the rule of law implies the need for the separation of powers. It also praised ODIHR's assistance to participating States in the area of the rule of law and expressed support for ODIHR's trial monitoring activities, stressing that ODIHR's clear and consistent methodology guaranteed impartiality and objectivity. Praise for ODIHR's work in the area of the rule of law was subsequently echoed in some other interventions by participating States as well as by NGOs.

Some participating States voiced criticisms of other participating States' standards of adherence to the rule of law and the relevant OSCE commitments. Among the issues emphasized in this context were political prisoners and their disappearance, the persecution of political activists, impunity, insufficient representation of regional interests in parliaments, excessive delays in judging court cases and pressure exerted on judges by public opinion.

Many specific allegations of commitment violations were directed towards various participating States by NGOs. These included the unlawful detention of human rights activists, government pressure on or control of the judiciary, the lack of proper legal assistance to defendants and their being hindered from taking part in court proceedings, the use of torture and ill-treatment as a method of extracting confessions, the lack of independent judicial review and the oppression of civil society by governments. Concerns were also voiced by some NGOs about corruption among members of the judiciary, the lack of transparency in judicial proceedings and low public trust in courts in some participating States. The extradition of persons to some participating States through the use of Interpol mechanisms was also criticized.

Attention was drawn by some NGOs to violations by participating States of the rights of LGBT persons during court proceedings as well as acts of violence against members of the LGBT community. In addition, one NGO emphasized the incompatibility of Sharia law with the fundamental principles underlying democracies. Another issue raised by an NGO was the insufficient attention paid to some minorities in the drafting of laws concerning national minorities.

Many speakers underlined the importance of civil society's effective participation in the lawmaking process.

Several participating States outlined their judicial reform processes and other steps being taken in their countries to further the rule of law and the independence of the judiciary.

Recommendations to the participating States:

- Promote a mentality within all state and government institutions to obey the law, similar to what is demanded of every citizen;
- Respect the separation of powers, in particular, although not limited to, the separation between judicial power and executive power;
- Make lawmaking processes as inclusive as possible;
- Make legislation accessible to all citizens;
- Ensure that legal conflict resolution mechanisms are accessible to all citizens, in particular, but not limited to, mechanisms to challenge government decisions;
- Guarantee the right to a fair trial;
- Improve civil society's involvement in legislative processes;
- Ensure that the promotion and protection of human rights are not criminalized, in line with obligations under international human rights law;
- Provide financial support to ODIHR's trial monitoring program and support ODIHR missions in participating States; apply the program in the national training of judges, prosecutors and lawyers;
- Support lawyers and human rights defenders in their trial monitoring activities and reporting;
- Strengthen professional guarantees to lawyers working in the field of human rights protection;
- Ensure that any personal liability of judges is regulated by precise and consistent laws and is compatible with the independence of the judiciary;
- Strengthen the ongoing training of all judges in the field of human rights;
- Take all appropriate measures to ensure that all provisions of the ICCPR relating to fair trials are fully respected and that the judiciary is able to function without undue influence by the executive or legislative branches of power;
- Ensure that all those who have been imprisoned solely to punish them for peacefully exercising their rights to freedom of expression, association, assembly, religion or belief are released immediately and unconditionally;
- Ensure that all other political prisoners are retried in proceedings which meet international standards on fairness;
- Ensure that all reports of intimidation, harassment, arbitrary detention, torture or other ill-treatment, and fabrication of charges against human rights defenders and other civil society activists, dissidents and opposition politicians, lawyers, journalists and bloggers are investigated promptly, impartially and thoroughly and that the perpetrators are brought to justice;
- Ensure that human rights defenders, other civil society actors, dissidents, opposition politicians, lawyers, journalists and bloggers, and religious activists are able to carry out their peaceful legitimate activities without fear or threat of reprisal, unlawful restrictions and arbitrary prosecutions;
- Explicitly state the impermissibility of torture as a method of obtaining confessions in the national criminal code;

- Encourage local organizations to undertake activities aimed at strengthening the rule of law and independence of the judiciary;
- Resist attempts to introduce elements of Sharia law into national legislation;
- Include LGBT persons in the process of lawmaking;
- Ensure that persons' human rights are protected in conflicts regardless of their sexual orientation.

Recommendations to the OSCE, its institutions and its field operations:

- The OSCE should elaborate, together with a group of participating States, appropriate tools of cooperation to ensure the best possible exchange of knowledge, competence and practice;
- The OSCE should organize a high level special session on the existence of political prisoners in Europe, inviting human rights defenders from countries where political prisoners exist, to establish the facts and to develop a decisive plan of action for a speedy resolution of the problem;
- ODIHR should draw up guidelines on referendums based on the model of one participating State.