



RULES OF THE GAME:

POLITICAL CONFLICT AND THE SEPARATION OF POWERS

Intervention by Michael Meyer-Resende, Co-ordinator of Democracy Reporting International, at the OSCE/ODIHR's Human Dimension Implementation Meeting, in the working session 8 on the Rule of Law, 28 September 2007

The OSCE gives welcome attention to the quality of elections in participating states. However, there could be more focus on the role that elected institutions actually play in the political system of their country, in other words: what happens after the elections?

The Copenhagen summit of 1990, best known for its commitments on democratic elections, also laid out other fundamental rules for a democratic political system, such as:

- Representative government, where the executive is accountable to the elected legislature or the electorate;
- The duty of government and public authorities to comply with the constitution and to act in a manner consistent with the law;
- A clear separation between state and political parties;
- Civil control of the military and the police;
- Legislation to be adopted at the end of a public procedure, etc.

When the CSCE transformed itself in the late 1980s/early 1990s, it created the basis of a pan-European 'public order', not only looking at issues of individual human rights, but also agreeing on rules for the organisation of a democratic state.

Is this still relevant, almost 20 years after it has been agreed on? It appears more relevant than ever, because constitutional issues are discussed if not contested in OSCE states. Last year Germany adopted a constitutional reform with the intention of clarifying and increasing the accountability of governance at the federal and the *Länder* level. Prime Minister Brown proposed in July constitutional changes to make the government "a better servant of the people". In the United States the last years have seen a struggle between the three branches of power on the extent of Presidential powers under the constitution.

In some states there have been far-reaching controversies on fundamental rules of the political game, without a consensus on the *process* of resolving such disagreements. In the cases of Ukraine and Kyrgyzstan such disagreements have resulted in cycles of institutional stalemate and political instability, affecting all aspects of the OSCE's notion of security.

In both countries a welcome increase in political pluralism has not yet resulted in a new balance of powers. Recourse to elections or referenda is often seen as the only solution to political stalemate. However, the electorate cannot become the day-to-day arbiter of political conflicts. A functioning separation of powers ensures accountability and balances conflicts over political power. In such a system each branch of power plays a meaningful role, the executive governs, the legislative passes laws and oversees the executive and an independent judiciary ensures that the rule of law is upheld. These are not matters of institutional forms only, they require substantive processes to be credible: The legislative needs to enjoy the legitimacy flowing from credible elections; its law-making must be the result of an open process, including proper public consultation; the independence and tenure of judges must be assured; the executive must act transparently (and in the case of Presidential systems be based on democratic elections); all branches of power must respect the constitutional order and laws.

OSCE commitments are clear on all these specific points; they have always stressed the substantive and procedural rather than merely formal nature of these political obligations. On the other hand OSCE commitments could be more specific on the overall philosophy of the separation of powers. It was therefore timely that the ODIHR recommended in last years' "common responsibility" report to adopt more specific commitments on the separation of powers and democratic law-making. The process of agreeing on such commitments could help foster consensus in participating states on the ground rules of democratic governance.

Democracy Reporting International (DRI) has assembled international standards on democratic governance, resulting from OSCE commitments, from the International Covenant on Civil and Political Rights and its interpretation provided by the UN Human Rights Committee, from the European Convention on Human Rights and the work of Council of Europe bodies, in particular the "Venice Commission" which has developed a substantial case load on constitutional issues. DRI's report, which has been made possible by ODIHR funding, can be found on:

www.democracy-reporting.org

It is hoped that the report helps the discussion on the issues of this working session and a process of adopting new commitments in this field.