

Legislative Decision-Making and Access Rights

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Access Initiative Information Memorandum

legislatio f (plural: *legislationes*) Noun, Latin
1. the giving of the law¹

Introduction

According to the dictionary, *legislatio* (Latin for legislation) means the giving of the law. This construction, however, suggests a rather traditional and authoritarian approach to the issue. Practitioners of access rights² believe that legislation is far more than just the “giving” of the law by a source of authority to the masses. It is a process that should be influenced by a public with relevant knowledge to enrich the output of legislation. And it is a process where procedural mechanisms should guarantee that legislators listen to the voice of the public.

The purpose of the current Information Memorandum is to collect a few good regulatory examples of legislative transparency and participation from around the world, and to put a few successful strategies adopted by access practitioners to advance legislative transparency and participation into the spotlight.

Main Questions

The main questions of legislative transparency and participation are the following:

- to what **extent** can any person get access to information on legislative preparation?
- to what extent can any person **participate** in the process by expressing opinion towards the legislators?
- which **products** of legislative preparation can be accessed and commented by the public?
- how much **time** is given for the public to comment products of legislative preparation after their existence and/or content is accessible?
- what are the **means of access** to legislative information and commenting available for the public?
- can public participation influence legislation?
- do legislators address public comments when making legislative decisions?

Main Recommendations

We had a research hypothesis that

¹ Open Dictionary, “Legislatio”, Open Dictionary, <http://open-dictionary.com/Legislatio> (accessed 15 September 2008)

² By „practitioners of access rights” we mean those activists and/or legal professionals who regularly apply legal instruments guaranteeing rights of access, e.g. to information, participation, justice. An example of such practitioners are legal aid workers.

meaningful public participation in legislative decision-making can only be achieved if drafts of all legislative preparatory documents to be enacted as binding norms are available for anybody for reading and commenting, sufficient time is provided for commenting to those willing to participate and preferably electronic access is guaranteed via the Internet

for the purposes of the current Information Memorandum.

After having completed the survey of a few positive examples, we have formulated the following recommendations for legislatures in the matter of legislative transparency and participation:

1. Public should be treated in legislative decision-making as a partner whose views, opinions and comments are not further burdens for the legislators but sources of valuable information that are to enrich the final legislative decision.
2. Drafts of at least all those legislative preparatory documents that after their enactment will become legally binding norms should be made available and open for commenting³.
3. Anybody indiscriminately, without having to ascertain affectedness or impairment of a right should be given access to information and participation in legislative decision-making, without an obligation for identification⁴.
4. Sufficient time should be provided for commenting to those willing to participate, early enough in the process of legislative decision-making, when all options are still open⁵.
5. Electronic means of access should be promoted, especially through the use of internet web sites⁶.

Guidance to the Information Memorandum (road-map)

The current Memorandum unfolds the problematic of legislative decision-making and access rights in seven steps:

first of all, a brief section is dedicated to presenting the theory of participation and legislation, discussing the role of legislative organs and the expectations towards them stemming from the concept of democracy

³ This is a minimum requirement; however, ideally the following documents should also be accessible: voting records, minutes of hearings, committee and sub-committee documents, and speeches in a written form, amendments, and motions.

⁴ Numerous laws guaranteeing rights contain affectedness or impairment of a right as pre-requisites of implementation. Being affected means that the exercise of a right (attaining either to the person or to property) has altered compared to an earlier situation, while a right being impaired means that the exercise of such right gets limited, again compared to an earlier situation.

⁵ In exceptional circumstances, immediate legislative reactions may be necessary to situations. However, this should be truly an exception and the prevailing rule should be the provision of enough time to comment.

⁶ In cases of lack of internet coverage (those being on the other edge the digital divide) all traditional means of public notification, such as TV, radio, newspapers, etc. should be applied accordingly.

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then a short oversight of the history of participation in legislative decision-making follows, with a few examples from Europe, Asia and America

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a number of country presentations follow then the introductory part, where we made an effort to create a regional balance when showing models of regulatory transparency and participation, limiting the scope of our research to TAI countries with only one exception (Argentina, Chile, Hungary, Ireland, Tanzania, and USA)

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then two distinct summaries of lawmaking are presented, the participatory regime of the European Union as an example of an intergovernmental, supranational organization, and of Switzerland, as a *quasi* extreme example of everyday direct democracy⁷

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partly using the country findings, a few examples are shown on successful strategies and actions that access practitioners used in TAI and in three TAI countries: Chile, Hungary and Tanzania

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conclusions are then made, based on the preceding findings

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recommendations then complement the findings and the conclusions

Ultimately, the Memorandum is ending with technical information, i.e. references and a list of websites accessed during the research, conforming to the Chicago Manual of Citations.

Theory of Legislative Participation

Legislative organs possess the powers to enact pieces of legislation, i.e. legally binding norms. That is the reason why it is utterly important who and how can influence such legislation, since these binding norms will govern life after their entry into force.

Democratic states are based on the authorization of citizens. This authorization establishes the requirement towards the government to continuously inform the society about their operation and activity and to acknowledge and to guarantee, in an appropriate manner the participation of members of the society in the decision-making, in all possible means and forms. Publicity – as a principle and as a practice as well – enables the participation of citizens in the decision-

⁷ By „extreme” we mean that the number of referenda in Switzerland is significantly higher than in any other country where a representative democracy operates.

making processes, and at the same time contributes to create greater legitimacy, responsibility and efficiency of the administration towards citizens in a democratic regime. Similarly, publicity contributes towards strengthening the principles of democracy and to respect fundamental rights as well. Participation of the public in decision-making, as well as transparency of legislation are very significant guarantees of effective, verifiable and democratic exercise of power.

“The constitutional structure of a country determines a legislature’s strength; it affects relationships with the executive and the public, and creates different patterns of cooperation and competition between representatives.”⁸

The supreme national legislators are most frequently called (houses of) parliaments or national assemblies; however, this may vary country by country. “Parliaments make laws and take other important decisions about government policy and public finances. In a democracy, an effective legislature relies not only on those in power, but also, almost as much, on those who sit in parliament but not as members of the opposition. In any legislatures it is the ordinary members of all parties - the “backbenchers” who are not ministers or party leaders - who have the main role in providing the bridge between leaders and public. Citizen access to the parliament is crucial to a healthy legislative branch in any country. Parliament needs to have the trust of the people, and to be a credible watchdog in overseeing government, [...]. Citizens are unlikely to participate if they do not understand why parliament is there, and why it ought to matter to them. [...] The public should have some understanding of the constraints and competing policy concerns that governments must live with. Parliament itself can encourage public participation by developing and disseminating information material and by organizing educational programs for young people. It can also encourage people to visit parliament and watch its proceedings, or encourage committees to hold open meetings and to visit all areas of the country to give local people the chance to see them in action and, on local issues, to contribute to the inquiry. Some parliaments broadcast plenary and committee proceedings and provide a parliamentary facility for responding to questions and complaints from citizens.”⁹

History of Legislative Participation

Over history there has been a continuous demand from the members of society, although to a various extent and in different ways, to be entitled – by personally or through their organizations – to take part in political decision-making, to become active participants by forming these decisions and to have access to information collected and treated by the state, by different authorities, or organizations. As a result, transparency of legislation and participation in legislative decision-making processes became basic requirements towards all the constitutional states which are based on the principles of democracy.

The right and need of participation of the public in the political decision-making itself has a broad and varied historical past and shows a remarkable diversity. From the times of the ancients until our time we can draft a colorful spectrum of public participation which altered from one constitutional form to the other, from one historical era to the other.

⁸ Freedominfo, “Legislative Transparency”, Baron, Maria. Project on Legislative Transparency, <http://www.freedominfo.org/features/legislative.htm> (accessed 15 September 2008)

⁹ (Freedominfo)

In the ancient times, even considering the establishment of the city-states of Greece or of the ancient Rome, the *comitia* has had an important role in the life of the states. Generally all free citizens were entitled to become a member, although in the groups of voting based on the origin, residence or the assets of members, not all citizens have had votes of equal value. The role of the *comitia* has also changed over time from an absolute authority to a nominal role. Consequently, in the ancient times the principle of publicity meant that citizens – though in variable extent and in variable manner – were entitled to take part directly and personally in the decision-making processes of the state.

In the mediaeval towns of Europe citizens took part in the exercise of power to a different extent; at first, local laws were created by people, later by the town council and by people together. From the beginning of modern times along with the ascending power of the town councils (and along with the rapid growth of the population) the role of legislation got finally into these bodies' hands¹⁰.

Although it may sound evident for us today, however, one of the most basic requirements regarding legislative participation is that all laws of the country should be published and available for the public as well as all government agencies should have copies of the relevant laws. There have been eras in history when even the norms to be followed were unknown for members of the public; the texts of the laws became recognizable only for certain, privileged layers of the society. „In the Mongolian empire the statute-book of Genghis Khan, the Yassa was guarded in secret archives and only the eldest members of the reigning family have had the right to know it. In the modern Japan, the legislators of the Tokugawa-era, although did not totally 'hide' the law from people's eyes, but kept back the consequences, to 'let people follow but not see the law'! In Europe in the Saxon electorate at the end of the 19th century the legislator explicitly forbade the publication of its newly released criminal statute giving a lighter punishment and the same has been done by the Habsburg king Joseph II in 1783 with his regulations concerning the rules of pardoning.”¹¹

Though the demand of the public for information and participation is continuously formed even in our time and the relating legal regulation can be regarded as being in the state of formation even today, in some counties, like in Germany, the Netherlands, Denmark and Sweden the roots of the normative regulation of the topic date back to the Middle Ages. For geographical reasons these countries had struggled and continuously have been struggling against the threats of proximity of the sea. They have had to build dams, and from time to time they had to reclaim lands taken over by the sea. These enormous works could not have been realized with central guidance alone without active contribution of people living in the areas concerned; the role of the so called Rüstinger Rules of Law from 1100 A.D. was to facilitate and put this public participation into a regulated manner.

Democracy and the right of public participation are in close relationship with each other: the right to petition (namely the right of citizens to forward their opinion and appeals freely to public authorities and to get adequate response on their petition) has been part of the first Amendment of the U.S. Constitution since 1791¹².

¹⁰ István, Kajtár, Egyetemes Állam- és Jogtörténet (Budapest-Pécs: Dialóg Campus Kiadó, 2005)

¹¹ (Kajtár 2005)

¹² Encora, “Coastal portal”, Pickaver, Alan. Public Participation legislation, http://www.encora.eu/coastalwiki/Public_participation_legislation (accessed 14 August 2008)

It is useful to look at examples from the world how countries regulate legislative transparency and public participation in lawmaking.

Country Studies on Legislative Participation

Examples of legislative transparency and participation were collected through literature review, research of publicly available explanatory memoranda and via information exchange with TAI partners.

Argentina

In Argentina, there is a legal obligation to publish the texts of Bills of the national legislature, the origin, current status and entry date of Bills, and the result of the voting sessions in Congress, just like the minutes and the agenda of Congressional sessions. Participation in legislative decision-making is somehow hindered by the lack of legal obligation to publish the list of Bills pending discussion on committees. A legal mandate to have a working link for consultations and requests for information by the public on the web pages of the Senate and House are also missing, but the existence of an office of public information in the Senate and/or House is prescribed by law.

Practice, however, shows a more favorable picture. Complying with the requirements, texts of Bills of the national legislature, the origin, current status and entry date of Bills, the result of the voting sessions in Congress, the minutes and the agenda of Congressional sessions are in fact published, similarly to the list of Bills pending discussion on committees. In spite of the lack of legal mandate, there is a working link for consultations and requests for information by the public on the web pages of the Senate and House, and both the Senate and House have an office of public information.¹³

Chile

In Chile, there is no legal obligation to publish the texts of Bills of the national legislature. Consequently, neither the origin, current status and entry date of Bills is mandatory to publish. Only the result of the voting sessions in Congress, the minutes and the agenda of Congressional sessions are compulsory to publish. Participation in legislative decision-making is hindered by the lack of legal obligation to publish the list of Bills pending discussion on committees. A legal mandate to have a working link for consultations and requests for information by the public on the web pages of the Senate and House is also missing, so is the existence of an office of public information in the Senate and/or House.

Nevertheless, practice shows a more favorable picture again and provides remedy for the shortcomings of the regulatory framework. The texts of Bills of the national legislature are published on the web pages of both the Senate and the House of Representatives. The same is true for the origin, current status and entry date of Bills. Complying with the regulatory requirements, the result of the voting sessions in Congress, the minutes and the agenda of Congressional sessions are published, just like the list of Bills pending discussion on committees. In spite of the lack of legal mandate, there is a working link for consultations and

¹³ Corporación Participa in collaboration with Acción Ciudadana and Poder Ciudadano, Regional Index of Parliamentary Transparency (2008), Antonio Chaler Bustos, e-mail message to author, 11 September 2008.

requests for information by the public on the web pages of the Senate and House, but only the House of Representatives has an office of public information.¹⁴

Hungary

In July 2005, the Hungarian Parliament passed a law on electronic freedom of information. The law prescribes the list of specific data of public interest that must be published on the internet; the publication of draft Bills, laws, and - partially - the anonymous form of court decisions; and finally, the creation of a search system that makes the published data searchable and retrievable. The law also puts an obligation on ministries and municipalities to provide a forum on their websites where users can express their opinion regarding the draft Bills published on the internet, thus allowing citizens to participate in the legislative process in an immediate manner.¹⁵

According to the law, the concepts and drafts concerning the drafting of legislation, the drafts of ministerial decrees, and proposals or technical/professional explanations attached to the drafts shall be published on the homepage of the ministry or agency in charge of preparing specific legislation. Draft legislation and other related documents published shall not be removed from the homepage of the ministry that prepared the legislation concerned for one year's time. In the course of the preparation of legislation it shall be ensured that anybody can comment on and make proposals concerning the drafts of legal regulations. Receipt of comments and proposals shall be enabled and the deadline for commenting shall be not shorter than 15 days from the date of disclosure of the draft except in urgent cases. The drafter of legislation shall consider the comments submitted and shall produce and put on its homepage a summary of the comments along with an explanation for the rejection of the comments not accepted. However, the drafter of legislation shall not have to respond to persons that have submitted comments, individually.

Ireland

One of the most important components of the Irish regulatory framework of legislative transparency and participation is the Regulatory Impact Analysis (RIA) Guidelines and the Guidelines on Public Consultation (Reaching Out) introduced in 2005. Based on this, all primary and most secondary legislation is now given a structured assessment before seeing the light of day. There are two types of RIA in this context, the Screening RIA and the Full RIA. A Screening RIA must examine and identify potential impacts on the environment of proposed regulations, and where significant negative environmental impacts are identified a Full RIA must be conducted. The RIA Guidelines state that in the Screening RIA consultation with key stakeholders should take place as early as possible in the process so that it can feed into the analysis of costs, benefits and impacts. Formal (structured) consultation is a compulsory part of a Full RIA and this should take place at an early stage in the impact analysis so that the views expressed during the consultation process can be taken into account in identifying impacts and selecting the preferred option. Formal consultation differs from informal consultation in a number of ways. It is usually based on a written document, it encompasses a wider population and it involves a specific time period for responses. The written document is based on the outcome from the Screening RIA. It should be widely

¹⁴ (Corporación Participa)

¹⁵ Freedominfo, "Hungary", [Hungary establishes electronic freedom of information regime](http://www.freedominfo.org/countries/hungary.htm), <http://www.freedominfo.org/countries/hungary.htm> (accessed 25 August 2008)

publicized through appropriate channels such as advertisements in the national media, on government websites etc. For very specialist policy issues, it may not be appropriate to publicly advertise the consultation process. However, where only a sub-section of the population is being informed about the process, the importance of ensuring that this includes all relevant interested parties is emphasized. The Guidelines also require that potential respondents should be given sufficient time to respond to the consultation process. The guidelines also require that steps must be taken to ensure that less resourced groups are in a position to respond to the consultation and that consultation methods take account of the fact that some parties may not have access to internet facilities. Care should also be taken to ensure that the views of vulnerable groups such as the elderly and disabled and those with literacy problems are reflected in the consultation process. This may necessitate the use of particular consultation methods such as public meetings, focus groups etc.¹⁶

Tanzania

In Tanzania, once the Bills are set in the legislative process, the procedure requires the document to be read in the Parliament for the first, second and third times. The first reading refers to the title of the Bill and is read by the minister responsible to notify members of Parliament about the coming law. After that the Bill is handled to the chair of the respective committee who will sit with members of the committee and make comments, then forward to the public through public hearing. No clear procedures are set for inviting members of the public to make their comments/opinion. The parliamentary committee often invites selected people/organizations, in most cases those who supports the government. In most cases hearings at the committee level are facilitated by consultants who use English/technical language which limits contribution especially from the majority of Tanzania. Sometimes Bills are circulated in short notice hence difficult to make meaningful consultation, comments. In some cases, at the time of public hearing of Bills participants are supplied with amended copies and forced to comment, without going through the amended version.¹⁷

There is limited public participation in lawmaking processes in Tanzania. The members of community who are affected by legislation are not engaged at all. And although the website of the Parliament of Tanzania¹⁸ and its subset called POLIS (Parliamentary Online Information System)¹⁹ offers a fairly good interface to reading legislative drafts, unfortunately the most recent Bill posted on the web page dates from October 2007, and the system does not allow citizens to comment on the drafts in an electronic format.

USA

The U.S. lawmaking process is a fairly open one. Out of the three branches of government (legislative, executive, and judicial) it is obviously the legislative branch that offers the public the greatest opportunity to participate in lawmaking. Under the Administrative Procedures Act²⁰ that applies to federal agencies but not to the Congress, such agencies are required to

¹⁶ Michael Ewing, e-mail to the author, 12 September 2008.

¹⁷ Elias Mwashuiya, e-mail to the author, 14 September 2008.

¹⁸ Parliament of Tanzania, "Bunge", <http://www.parliament.go.tz/bunge/bunge.asp> (accessed 15 September 2008)

¹⁹ Parliament of Tanzania, "POLIS", http://www.parliament.go.tz/POLIS/BTS/general/GENERAL_FR.asp (accessed 15 September 2008)

²⁰ National Marine Fisheries Service, "Administrative Procedures Act", <http://www.nmfs.noaa.gov/pr/pdfs/laws/apa.pdf> (accessed 17 September 2008)

keep the public informed of their work, allow the public opportunities for participation in the rulemaking process through hearings and comment periods, establish standards for rulemaking, and set standards for judicial review. As regards the Congress, staff from non-governmental organizations typically work closely with staff of House and Senate committees and members in drafting laws and in taking part in the process of discussing and refining those draft laws as they move through the House and the Senate. Draft laws or Bills are published and available through the internet for comment. Individual members of Congress also often post their own comments on their web pages. Members of Congress also often hold hearings or briefings during the drafting of controversial or major new legislation to gather information from many sources - and academics, members of the public and staff from NGOs are invited to participate.

A progressive development in legislative transparency was brought by the Legislative Transparency and Accountability Act of 2007²¹ of the U.S. Although most of this law regulates lobbying, certain provisions are dedicated to legislative decision-making and access rights. According to its Section 104, conference reports, the product of a House-Senate committee to iron out differences in a Bill, must be made available to members and the general public via the internet for at least 48 hours before its consideration. The requirement can be waived by a 3/5th vote of senators. Conference reports may not be considered if the text has been changed after the report has been signed by a majority of Senate conferees.²²

Examples for a Specific Approach: the EU and Switzerland

EU

The European Union (EU) is a political and economic union of twenty-seven member states, located primarily in Europe. The EU is based on a series of treaties. These first established the European Community and the EU, and then made amendments to those founding treaties. These are power giving treaties which set broad policy goals and establish institutions with the necessary legal powers to implement those goals. These legal powers include the ability to enact legislation which can directly affect all member states and their inhabitants. The main legislative acts of the EU come in two forms: Regulations and Directives. One of the complicating features of the EU's legal system is the multiplicity of legislative procedures used to enact legislation. The treaties leave little room for discretion in delegating the EU's powers, indicating different ways of adopting legislation for different policy areas and for different areas within the same policy areas. A common feature of the EU's legislative procedures, however, is that almost all legislation must be initiated by the Commission, rather than Member States or European parliamentarians. The two most common procedures are co-decision, under which the European Parliament can veto proposed legislation, and consultation, under which Parliament is only permitted to give an opinion which can be ignored by European leaders. In most cases legislation must be agreed by the Council.²³

²¹ The Library of Congress, "THOMAS", <http://thomas.loc.gov/cgi-bin/query/D?c110:3:./temp/~c110vk5d2s> (accessed 5 September 2008)

²² Congresspedia, "Legislative Transparency and Accountability Act", [http://www.sourcewatch.org/index.php?title=Legislative Transparency and Accountability Act of 2007](http://www.sourcewatch.org/index.php?title=Legislative_Transparency_and_Accountability_Act_of_2007) (accessed 11 September 2008)

²³ Wikipedia, "European Union", http://en.wikipedia.org/wiki/European_Union#Legal_system (accessed 5 September 2008)

The legislative process of the EU usually takes longer due to the need of harmonizing different interests on a European level. European law guarantees participation of the public in lawmaking: Article 255 of the Treaty establishing the European Community, implemented through Regulation 1049/2001 of 30 May 2001, grants a right of access to European Parliament, Council and Commission documents to any Union citizen and to any natural or legal person residing, or having its registered office, in a Member State. The aforementioned Regulation, establishing the right of access to official documents possessed by the Community institutions, emphasizes that even wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers. Institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should be made directly accessible (Art. 12 of the Regulation).

In practice, there are a number of opportunities and interfaces that serve the above purpose, amongst others the following programs and initiatives of Community institutions:

1. Openness and access to documents

(http://ec.europa.eu/transparency/access_documents/index_en.htm)

This website includes a Guide that explains how to exercise the right of access. The Register of documents helps identify documents that could be relevant for accessing. The register of internal documents will also provide access to the websites of the responsible departments. Access can be made directly via the Organization chart of the Directorates-general and other services of the Commission. Text of the legal acts can be also obtained on public access. Links have been created with the websites of the other institutions, the European Parliament and the Council, as well as to Member State rules on access. Finally, the website includes a Commission report on the results of the public consultation.

2. Commission Communication (11 December 2002) called ‘General principles and minimum standards for consultation of interested parties by the Commission’ COM(2002)704

(http://ec.europa.eu/civil_society/consultation_standards/index_en.htm)

This Communication, significantly relating not only to public access to legislative commenting but lobbying as well, reiterates the respective principle from the White Paper on European Governance²⁴:

"[The] quality of [...] EU policy depends on ensuring wide participation throughout the policy chain - from conception to implementation."

By this, the Commission expresses its commitment to an inclusive approach when developing and implementing EU policies, which means consulting as widely as possible on major policy initiatives. This applies, in particular, in the context of legislative proposals.

3. Your Voice in Europe

(http://ec.europa.eu/yourvoice/consultations/index_en.htm)

²⁴ Eur-Lex, “European Governance”, http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf (accessed 18 September 2008)

This website is a common interface where currently running consultation processes can be accessed and public opinion can be submitted accordingly. On this web page, anybody has the opportunity to give an opinion by taking part in an open public consultation or find out about the results of public consultations that have recently closed. A complete picture of consultations in various policy activities, including those aimed at more limited target groups can be obtained by selecting an activity area on the website.

4. Better Lawmaking

(http://ec.europa.eu/dgs/legal_service/law_making_en.htm)

“Better lawmaking” or “better regulation” is a key concern of the European legislator, forming part of the general issue of “governance”. The need for better regulation at European level has frequently been acknowledged. Since 1995 the European Commission has reported on steps to improve lawmaking as part of the annual reports entitled "Better lawmaking". The dialogue between the Commission and interested parties can take many forms, and methods for consultation and dialogue are adapted to different policy fields. The Commission consults through consultation papers (Green and White Papers), communications, advisory committees, expert groups, workshops and forums. These now fall within a common framework of minimum standards for consultation, and consultation is an integral element of impact assessment. Online consultation is commonly used. Moreover, the Commission may organize *ad hoc* meetings and open hearings. Often, a consultation is a combination of different tools and takes place in several phases during the preparation of a policy proposal.

Switzerland

A very developed solution though not very frequently applied elsewhere in the world is the Swiss model of Direct Democracy. Direct Democracy can be defined as a form or system of democracy giving citizens an extraordinary amount of participation in the legislation process and granting them a maximum of political self-determination. In Switzerland, Direct Democracy has a long tradition. The origins of Direct Democracy can be traced back to the late the Middle Ages: archaic forms (assemblies of the electorate discussing and deciding major political issues) have been practiced in part of the country since the founding of the Old Swiss Confederacy in 1291. The origins of Switzerland’s modern system of Direct Democracy with formalized opinion polls and frequent referendums lie in the experimental phase of democracy in the 19th century when Switzerland was surrounded by monarchies on the European continent that showed little to none enthusiasm for democracy.

The Swiss constitution defines in some detail all areas subject to federal legislation. Anything not explicitly mentioned is left to the legislation of the cantons (federal states). All federal laws are subject to a three to four step process:

- 1) A first draft is prepared by experts in the federal administration.
- 2) This draft is presented to a large number of people in a formalized kind of opinion poll: cantonal governments, political parties as well as many non-governmental organizations and associations of the civil society may comment on the draft and propose changes.
- 3) The result is presented to dedicated parliamentary commissions of both chambers of the federal Parliament, discussed in detail behind closed doors and finally debated in public sessions of both chambers of Parliament. Members of Parliament do take into account the results of step 2), because if they fail to do so, step 4) will be inevitable.
- 4) The electorate has a veto-right on laws: if anybody is able to find 50,000 citizens signing a

form demanding for a referendum within 3 months, a referendum must be held. Laws do only need to find a majority of the national electorate to pass a referendum, not a majority of cantons. Referendums on more than a dozen laws per year are not unusual in Switzerland.

Referendums on minor changes to the federal or cantonal constitutions, new or changed laws, budgets etc. are frequent. Referendums on constitutional changes are mandatory while referendums on laws are “facultative” (only if 50,000 citizens, i.e. roughly 1.2% of the electorate, demand for it). Corresponding rules apply for referendums on cantonal and communal level. While referendums concerning budgets are not possible on federal level they are common on communal level. It depends on the 26 cantonal constitutions whether they are mandatory, facultative or possible at all. The number of citizens that may demand for a cantonal or communal referendum depends on the size of the corresponding electorate, as a rule of thumb, about 1% are usual.²⁵

Strategies of Access Practitioners

Practitioners of access rights in the field of legislative decision-making have many choices how to fight for a better representation of the public voice in legislation. They can use all available forms of campaign, all means of lobbying, and can substantiate their findings by research, either produced by them or borrowed from other researchers and think tanks, on a larger or a smaller scale as they see fit. However, in a strict legal sense this range of choices shrinks to basically two: either use the existing participatory framework or try to create it if that is not present. We can see examples for each case below:

Global Research Supporting Participation

The Access Initiative

There are a number of organizations and network worldwide that research and analyze as well as promote participation in legislative decision-making. Some of them have more general focus e.g. the European Legislative Politics Research Group, some have more narrow focus. One of the latter is The Access Initiative (TAI). In fact, TAI being the world’s largest network of civil society organizations working to ensure that citizens have the right and ability to influence decisions about the natural resources that sustain their communities can be regarded as a campaign to promote – amongst others – participation in legislative decision-making. Working in their respective countries, TAI partners form national coalitions and assess the performance of their governments to provide the public with public participation also in decision-making, including of the legislature. Indicators measuring effort and effectiveness regarding public participation in legislative decision-making produce a meaningful message for those promoting transparency and participation in lawmaking. And TAI partners can use such assessments to advocate for legal, institutional and practice reforms, raise public awareness, and engage their governments in a constructive dialogue to create change within their countries concerning legislation.

Regional Research Supporting Participation

Chile

²⁵ Direct Democracy, „Switzerland’s Direct Democracy”, <http://direct-democracy.geschichte-schweiz.ch/> (accessed 20 September 2008)

Corporación Participa in collaboration with Acción Ciudadana and Poder Ciudadano has prepared in 2008 a research called Regional Index of Parliamentary Transparency (RIPT). Its objective was to design and implement a methodological instrument that would allow the readers to make a comparative analysis of the levels of transparency and access to information from the Congresses in Chile, Argentina and Guatemala, thus establishing a minimum standard of transparency in the administrative and legislative affairs of these institutions. The RIPT seeks to become a point of reference in terms of transparency for use in managing such issues by the different Congresses in the region.²⁶

Using the Existing Legal Framework

Hungary

Two CSOs from Hungary, EMLA and the Non-profit Sector Analysis (NOSZA) have started a project/program in 2006 making use of the Hungarian law on electronic freedom of information. The obligations for drafters of pieces of legislation are clear, however, the law including no sanctions for unlawful conduct shows the definite signs of a *lex imperfecta*. Civil society initiative came to at least partly remedy this situation, and launched a monthly monitoring of internet websites of government agencies of Hungary under the name www.jogalkotas.hu (www.legislation.hu). Based on this watchdog-type of activity, NOSZA produces monthly evaluations on the performance of ministries and other government bodies and posts it on the internet. This comparison strikingly reveals the shortcomings at some institutions and – in combination with fairly wide media coverage – urges state administration to improve its attitude towards legislative transparency and participation.

Holding MPs Accountable and Practicing Lawmaking

Tanzania

This example is based on the account of our colleague from Tanzania:

“In some cases, for instance at the enactment of the Terrorism Act and Prevention of Terrorism Act, [laws] were assented by the President without discussion by MPs. This urged a local NGO to promote transparency in lawmaking and further promoted the lawmaking process to start from the constituency level. [...] This pilot project was an eye opener for the community to demand matters of their interest to be taken on board in the Parliament. Community used this as a platform to blame their MPs who spend a lot of time in Dar es Salaam without briefing back the community on the proceedings that take place in the Parliament.”²⁷

Holding the individual members of the legislature accountable for their actions or omissions is one way to promote legislative transparency. This is something similar to what the internationally known initiative, the www.TheyWorkForYou.com does elsewhere. But LEAT of Tanzania has tried an additional tool: drafting of Bills themselves instead of the real legislator. Again by the account of our colleague:

²⁶ Antonio Chaler Bustos, e-mail message to author, 11 September 2008.

²⁷ Elias Mwashuuya, e-mail message to author, 14 September 2008.

“We happened once to draft a shadow Bill on Environmental Management Act, as part of forcing the government to draft framework legislation on environmental management in Tanzania. The framework Bill is available in LEAT’s website: www.lead.or.tz. Most of our views were taken on board and LEAT was engaged through its members and a then-Board member to draft the Bill.”²⁸

Creative solutions and constructive approach seemed to “pay off” for the Tanzanian CSO and could also contribute to the development of legislative transparency.

Conclusions

The traditional system of political representation is in an obvious crisis. The opportunity of the citizens to express their political will at the ballot box once every four or five years has become from a great achievement of democracy an unsatisfactory and too rare platform for enforcing public will. The increasing lack of trust even in elected state bodies including the supreme legislature must be a warning sign that something has to be done in this respect.

Direct democracy, popular initiatives and referenda seem to be better answers to the question of legitimacy. It is so even if some view these tools as unnecessarily burdensome, costly and sometimes even too democratic ways of learning public opinion.

An example from Europe, the Irish referendum on the Lisbon Treaty, illustrates well the controversy of situation. “... EU politicians, notably in the European Parliament, [who] argue that national referendums are not really democratic at all. But these zealots should be careful. Some Irish voters were indeed muddled on referendum day. But that is a slippery slope to go down. Those same folk vote in elections: are their voices invalid then?”²⁹ It is even stranger to see that such arguments come from EU institutions that obviously struggle with a major democratic deficit, being legislators without being democratically elected (the Council) and *vice versa*, lacking real legislative powers despite being elected representatives (the Parliament).

We, however, still believe in the institutions of direct democracy, and think that the following is closer to reality than those skeptical voices. „The democratic system of politics [...] may in the 21st century realize that it has so far been living, for understandable reasons, in a state of arrested development, but that those reasons no longer apply; and so democracy could set about completing its growth. ... The machinery by which this is done is the referendum, a vote of the whole people. If democracy means rule by the people, democracy by referendum is a great deal closer to the original idea than the every-few-years voting which is all that most countries have.”³⁰

Recommendations

Partly aggregating the above information but partly based on our preconception that public participation in legislative decision-making is a progressive thing, we have formulated the following recommendations:

²⁸ Elias Mwashuyu, e-mail message to author, 14 September 2008.

²⁹ The Economist, Charlemagne: Democracy in Europe, June 19th 2008, from The Economist print edition http://www.economist.com/world/europe/displaystory.cfm?story_id=11579372&CFID=22873961&CFTOKEN=20882816 (accessed 8 September 2008)

³⁰ (The Economist)

The 19th century division of society into the group of ordinary citizens as lay persons and those working for the government as experts has lost its validity. For this reason, access to legislative information as well as participation in legislative decision-making cannot be limited by subjective factors present at the side of the public. More frankly speaking, chance should be given to anybody to learn about and express an opinion regarding an ongoing legislative process. Therefore

1. Public should be treated in legislative decision-making as a partner whose views, opinions and comments are not further burdens for the legislators but sources of valuable information that are to enrich the final legislative decision.

State machinery is disproportionately more powerful than single citizens or even their CSOs. Once a piece of legislation is enacted, public has little or no impact in shaping its life-cycle. The biggest chance for influencing a future law may be present when it is still in the pipeline. For this reason

2. Drafts of at least all those legislative preparatory documents that after their enactment will become legally binding norms should be made available and open for commenting.

Legally binding norms affect an indefinite number of people, whose lives might change due to the legislative development in question. Also it cannot be precisely defined whom and how a new piece of legislation will affect. Thus the introduction of any threshold for access to information and participation in a current legislative decision-making would certainly be strikingly unfair for those who will be affected by the product of the process later. Because of this

3. Anybody indiscriminately, without having to ascertain affectedness or impairment of a right should be given access to information and participation in legislative decision-making, without an obligation for identification.

Good work requires sufficient time, and good timing is key if a decision is to be influenced. Instances of extraordinarily quick legislative decision-making may occur, however, they should be the exception and not the rule. That is why

4. Sufficient time should be provided for commenting to those willing to participate, early enough in the process of legislative decision-making, when all options are still open.

The e-tools in access rights implementation bring us an easy-to-access, to-use and to-monitor platform in legislative decision-making. Although we must acknowledge the existence of a digital divide, and legislative preparation should make sure that those not having access to internet also receive information about and chance to participate in a legislative process, internet is undoubtedly the easiest and cheapest way of learning and expressing opinion. Thus

5. Electronic means of access should be promoted, especially through the use of internet web sites.

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