

16th European Conference of the Electoral Management Bodies

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Structural trends and weaknesses observed by international observers with regard to the settlement of electoral disputes

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Ladies and Gentlemen, Distinguished Guests, Dear colleagues,

Good morning,

It is my great pleasure to attend the 16th European Conference of Electoral Management Bodies for which I would like to warmly thank the Venice Commission and the Department of Elections, Referenda and Political Parties of the Ministry of Interior of the Slovak Republic, a country that also currently holds the OSCE Chairmanship. I am confident that the two days conference will provide a valuable opportunity to exchange experiences and elaborate good practices on the implementation of international commitments and standards as well as of national legislation in the field of EDR.

On my part, I will speak about findings and trends in the field of election dispute resolution in the OSCE participating States, identified by ODIHR in the framework of its election observation activities. Before, I would like to briefly place ODIHR's observation of EDR within the specific context of the OSCE. We believe that efficient resolution of election disputes is essential, among other things, to the overall protection of fundamental rights, conflict prevention, electoral integrity and public confidence in the election process and acceptance of election results. This is why this subject matter is one of the essential elements of our election observation work.

The resolution of election disputes, like all aspects of the electoral process, is assessed against OSCE commitments and other international obligations and standards, good practice, and national legislation. Key OSCE commitments include paragraphs 5.10 and 5.11 of the 1990 OSCE Copenhagen Document, guaranteeing effective redress against administrative decisions and that such administrative decisions be fully justifiable and indicate the remedies available. Effective remedy is also embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which require that such remedy is provided for acts violating the fundamental rights granted by these documents. Article 13 of the ECHR guarantees to everyone whose rights and freedoms as set forth in the Convention are violated, an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. The existence of such remedies must be sufficiently certain, not only in theory but also in practice. More specifically, the ECtHR pointed out that the existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of democratic elections. Furthermore, in its case-law, the ECtHR pointed out that in electoral matters only those remedies which are capable of ensuring the proper functioning of the democratic process may be regarded as effective.

Judicial remedies, accountability and enforcement of decisions are also very important in the context of EDR and are provided by international law. Most specifically, paragraphs 18.2 – 18.4 and 21.2 of the 1991 OSCE Moscow document emphasise the judicial review of administrative decisions and regulations, judicial control of law enforcement acts, accountability of law enforcement personnel for such acts, and the right to due compensation. ICCPR requires ensuring enforcement of the remedies granted, as their effectiveness would otherwise be jeopardized and the ECtHR in its case-law has also stressed

the significance of judicial remedies for violations of electoral rights. By the same token, the Venice Commission Code of Good Practice recommends that a final judicial review should be available for appeals of electoral matters and that the dispute resolution process should be clearly regulated and simple while setting out good practice for the time limits in EDR. Good practice suggest also that the judicial review be available for as widely as possible.

The Commonwealth of Independent States Convention on the Standards for Democratic Elections, Electoral Rights and Freedoms provides for a direct access to either courts or election bodies for violations of electoral rights, prompt and effective adjudication of complaints within appropriate to the electoral process timeframes and ultimately restauration of the violated rights. Article 16 further states that when violations occur, “persons shall have the right and possibility to complain about the violation to, and have the violated rights restored by, courts and, in cases stipulated by laws, directly to election bodies.”

Effective EDR may not be contemplated in the absence of prerequisites such as independent judiciary, availability of effective remedies and possibility to be heard in fair trial with due process guarantees, which also constitute the core elements of any rule of law based society.

Collectively, these commitments, obligations and standards provide a rich body of guidance both to our participating States and to election observation missions.

ODIHR uses election dispute as a broad terminology that encompass any contentious electoral matter presented for resolution to a competent authority including from a civil, penal, administrative and constitutional angle. The matter is deemed election-related if it breaches the legal framework for elections or it affects the rights and interests of persons as participants in the election process and is presented to the competent authority through a complaint or as a

result of the authority's acting on its own initiative. The matter may be reviewed by an administrative authority, judiciary, law-enforcement, and parliament or by an *ad hoc* body established for the purpose of resolving contentious electoral matters. Our EDR concept applies exclusively to the election process (e.g. from the moment when the official campaign starts until the validation of election results) and does not provide for the prevention of electoral misconduct before it occurs nor it looks into alternative forms of resolving electoral violations throughout the entire electoral cycle as defined by IDEA.

Let me now turn more specifically to how ODIHR observes the resolution of electoral disputes. Complaints and appeals are an established and regular component of all of our election observation activities and are reflected in our NAM reports, Interim and Final Reports as well as statements of preliminary findings and conclusions and follow-up activities. Depending on the format of the ODIHR election observation activity, varying resources may be available for the observation of the EDR process. The legal analyst(s) is primarily responsible for assessing the legal framework for complaints and appeals, following the dispute process and analysing the implementation of procedures and substance of decisions. However, other analysts such as election, media, campaign analysts, LTOs and STOs may be equally involved in following the resolutions of election disputes in their respective areas. This permits an assessment of the extent to which the complaints and appeals process complies with the relevant OSCE commitments and international obligations and standards (those which I previously outlined) and national legislation.

The complaints and appeals section of our observation reports explain and assess the dispute resolution system in a concise manner and in a way that is understandable to a non-technical audience, but deep enough to present a

nuanced assessment. We evaluate the legal framework and EDR related procedures in order to identify positive elements but also weaknesses. We do pay significant attention to practical implementation of the legal framework. Handling of specific cases is used by our missions to illustrate the strengths and weaknesses in the system or raise key issues for the overall conduct of democratic elections. We also consider previous assessments of the country's EDR system, as well as the broader legal framework. Such analysis can be found in past ODIHR election observation reports, legal opinions issued jointly by ODIHR and Venice Commission, reports of citizen observer groups and other documents emanating from state institutions and international structures. In addition, the election observation activity constructively suggests corrections, improvements and good practices that could be incorporated into legislation, especially if the assessment finds serious shortcomings. If important complaints or appeals remain unresolved by a mission's scheduled departure date, ODIHR may extend the stay of the Legal Analyst to specifically follow these proceedings.

Importantly, the final reports of our observations missions include recommendations on how electoral processes may be strengthened, including in the field of electoral dispute resolution. In fact, only last year we made **21** recommendations related to EDR across the **14** elections observed. This makes an average of **1.5** recommendation per election. This is to say also that almost all if not all of our final reports contain a recommendation on improving the handling of election disputes.

A quick overview of these recommendations illustrates the issues that still need to be addressed in the OSCE region. Among those there are:

- Shortcomings to the legal framework pertaining to EDR. In particular, ambiguous, evasive or incomplete provisions in the election law or

related acts which may create confusion over the jurisdiction of the bodies in charge of dealing with EDR, thus affecting legal certainty. Concurrent jurisdictions and lack of established by law hierarchical process for dealing with election related complaints and appeals appear to be recurrent problems as well as provisions spread across many different legal acts as opposed to consolidated and clearly referenced requirements in one act.

- Deficiencies that do not allow for an effective remedy, such as inappropriate deadlines for submitting and resolving the complaints to election administration (usually too lengthy deadlines, particularly important in the electoral context due to the time sensitive nature and fast pace of the process), lack of procedures to complain on specific segments of the election process such as candidate registration process or campaigning.
- Problems related to the lack of transparency in the examination of complaints such as insufficient procedures to hear the complaints, hearing process conducted behind closed doors, poorly reasoned decisions and decisions not being made public. For election disputes, the public has a legitimate interest in their resolution and therefore, as a rule, both decisions of administrative bodies and the courts should be published promptly. Publication of decisions also allow the public to see how the body came to its conclusions and should alleviate any concerns of arbitrary decision-making.
- Rejection of complaints on formalistic grounds, absence of specific expedited time limits for investigation and adjudication of election related complaints in misdemeanour and criminal procedure, insufficient legal framework on how to deal with evidentiary issues or overly formalistic or strict requirements concerning their handling.

- Challenges to effective legal redress created by the absence of a judicial review of decisions made by the election administration.
- Another challenge is the accessibility of EDR. Less complaints and/or an increased number of poorly formulated complaints could be an indication that the system lacks clarity and that there is a lack of awareness raising about the EDR process and the opportunity to lodge complaints by electoral stakeholders. Women, national minorities and persons with disabilities may face additional barriers related to the accessibility to EDR structures. For example, procedures for filing complaints or appeals that require travel or the payment of filing fees may pose a greater barrier for women in societies where there is inequality of pay for equal work.

Lastly, I would also note that electoral dispute resolution is an intrinsic part of our Needs Assessment Missions that determine the areas of interest for a possible election observation activity. This is also true of our follow-up activities – such as presentation of final reports in a country or legal reviews – where we seek to assist countries in improving their elections. More on the follow-up during tomorrow’s working session that I have the pleasure to moderate.

Our methodology for observing electoral dispute resolution is clearly outlined in the 6th edition of our Election Observation Handbook. Sections related to dispute resolution are also noted in other thematic handbooks for observers, including those on campaign finance, media and voter registration. We are currently finalising a new thematic handbook on the observation of electoral dispute resolution, so as to provide greater guidance to electoral observers and state authorities interested in strengthening their EDR processes.

I thank you for your attention and I look forward to our open and constructive discussion.