

Towards recommendations and guidelines in the field of election dispute resolution

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Venice Commission is drafting a report on election dispute resolution, studying electoral legislation in all its member states. Based on this study and the ongoing conference, we may prepare some guidelines establishing international standards.

First question we should try to answer is related to the necessity for additional guidelines. Although international law (conventions) say little about how EDR should be provided, the case-law of ECtHR gives at least a general list of principles, hopefully stated in a clear manner in upcoming Grand Chamber judgement in case *Mugemangango vs. Belgium*. The Code of Good Practice in Electoral Matters (2002) gives a list on criteria an efficient EDR procedure should look like. The situation was different the guidelines on the misuse of administrative resources, as the Code of Good Practice on Electoral Matters had not discussed the main principles on what to consider as a legitimate information providing activities of the administration / government and which activities should especially be considered as giving unfair advantages. The EDR mechanisms are outlined in the Code (2002) and most problematic practice underlined by international election observation missions or in the joint opinions of Venice Commission and the OSCE/ODIHR are clearly contradictory to the criteria of the Code (2002). As the primary aim, our report should aim at reinforcing the current standards and their implementation.

In addition, as discussed earlier, the OAS has put together its checklist or criteria on EDR mechanisms. An additional guideline is thus not as necessary as guidelines have been in more unexplored areas such as campaigning or party financing in the changing world.

The aim of the conference should thus to be a better understanding whether we need just a better overview of current shortages in the implementation of the international standards or should we also clarify the criteria for EDR mechanisms. The rapporteurs have to discuss the issue after a more thorough understanding of the current situation and shortcomings.

In my opinion, at least for the procedural aspects – due process, fair proceedings, burden of proof, reasoning of the decision, level of formalism in submission of complaints and appeals – the Code of Good Practice in Electoral Matters has not provided the required clarity in international standards and should be developed further. The same applies to the issues of standing and different deadlines and time-limits, as in many countries, the overburdening of competent authorities with complaints and appeals hampers the work of the institutions and may lead to a situation where good practice could be shared. International organisations are aware that a thorough discussion on all complaints or appeals in substance is time-consuming, if the short deadlines and principle of due process are applied. A reasonable balance needs to be found. As a final judicial remedy is missing in a number of countries, although this recommendation being one of the most important ones in the Code of Good Practice on Electoral Matters, the possible future guidelines could develop the aim of it in a more detailed way.

In addition, the report should aim at providing the EMBs or other relevant authorities the best practices in auditing current EDR processes and sharing good practices such as how to provide stakeholders a thorough understanding of the EDR processes and transparency of the system.

If the guidelines will be drafted, they should contain the following:

- The EDR process should be simple, to avoid a need to study possible remedies for a large part of the time-limit provided for the voters and candidates or other persons eager to submit a complaint;
- The competent institutions should be foreseen in a clear and predictable manner. In case there are many authorities to decide on complaints, no parallel competencies should exist. The legislation has to avoid possible forum-shopping or grey areas of competencies;
- Competent bodies have to be set up in a way to ensure that all cases are discussed in detail and speedily throughout all instances. Special training and qualified staff has to be foreseen to implement the electoral law;

- A last judicial remedy is a requirement of rule of law, as independent judiciary can avoid biased decision-making. Electoral rights should not be considered as a political question as they are stipulated in law (both national and international);
- Remedies have to be efficient, obliging the (lower level) EMBs to act in a correct manner in case they have abstained or fulfil their tasks with delay;
- All voters and candidates as well as political parties should be allowed to complain at least in case the violation affects ones electoral rights. A wider standing may lead to an overburdening of the competent bodies, but a complaint mechanism could serve the aim of ensuring public trust and lawfulness of the electoral processes in case the close link between ones rights and violation are not present. Further restrictions may be imposed such as a reasonable fee, clear criteria for NGOs to have the standing in the proceedings or, as the Code of Good Practice on Electoral Matters says, a reasonable quorum. Similar cases could be considered in a joint proceedings;
- Efficiency means short, but not too short deadlines and time limits. Complainants should have the possibility to present sufficient evidence and present in in the complaint their arguments. In cases where the factual situation is complicated – evidence is not easily available (e.g. vote buying, misuse of administrative resources) or requires a lot of analysis (e.g. unequal or unfair conditions for campaigning in public media), a longer deadline than 3 days may be required. If the competent authority has not enough time, it would tend to dismiss the complaint;
- Due process has to be ensured, meaning right to be heard, transparency, reasoning of the decision on the complaint or appeal, avoidance of overly formalistic approach and coherent practice;
- Cancellation of election results has to be considered as a last recourse as it undermines the people's choice. EDR mechanisms should avoid the possibilities of cancellation of election results by giving timely access to competent decision-making. Problems related to voters' or candidates' registration or campaigning should be dealt before elections take place and a better remedy would be postponing the elections, not cancelling them afterwards;
- It should be clear what are the consequences of the cancellation (what processes have to be repeated). The competent authority (including court) should be empowered to prescribe which electoral processes have to be repeated.