

**Structural trends and weaknesses observed in domestic legislation
with regard to the settlement of electoral disputes:
Findings of the Venice Commission**

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Dear colleagues,

Although international law is rather short on election dispute resolution, the case law of the European Court of Human Rights on the application of Article 3 of the First Protocol and interpretation of Article 25 of the ICCPR gives at least some principles applicable. As cited by President Gianni Buquicchio and Secretary General Thomas Markert, the Code of Good Practice in Electoral Matters (2002) contains guidance on how to solve disputes arising from organising elections. We can also refer to the Copenhagen Document. In addition to these, Venice Commission has adopted the Report on cancellation of election results (2009) and jointly with the OSCE/ODIHR many opinions on electoral legislation discussing among others the issues of complaints and appeals systems.

This year, Venice Commission intends to adopt a report on election dispute resolution. Rapporteurs have already collected data from Member States of the Council of Europe and have made an overview of the current situation. We have had the opportunity to receive a lot of information on the legislation, its application and current problems from the Election Observation Mission reports, as well.

The discussion during the conference will be a great support to our understanding of the issues and as the report is still a draft under discussion, we can benefit from the input from your side, dear participants. I will draw the main issues we have concluded until now.

1. A required final judicial remedy

Although Article 6 of the ECHR is not applicable for electoral disputes, similar principles should be applicable also for the electoral disputes. As the Code of Good Practice on Electoral Matters clearly states, there should be available a final judicial remedy, if the complaints are dealt first by other institutions. This applies both to the countries where election management bodies or other administrative bodies decide on the complaints in first instance, but also to the countries where the parliament decides on the complaints. Especially for the countries with the latter system – Denmark, Iceland, Italy, Luxembourg, the Netherlands, Norway and Belgium – a recourse to the court is missing. This may lead to situations where the decisions are not based solely on electoral law, but sometimes on political bias. In a country governed by the rule of law, the disputes on the application of law, including electoral law, should in last instance be decided by a judicial body independent from the political preferences. Only a good practice may not be enough. The European Court of Human Rights will discuss in Grand Chamber the case *Mugemangango vs. Belgium*, where the issue has been raised. Even if the court will reach a conclusion that the system is not contrary to Art 3 of the First Protocol, the good practice suggests an amendment.

2. Judicial independence

Venice Commission has had to deal with the problems related to independence of judiciary. It is not only a matter related to the electoral disputes. The independence of the judiciary is a requirement also for efficient application of the universal and equal right to vote. If the public trust towards the judiciary is low, the electoral disputes cannot be solved in a trustworthy way.

3. Multiplicity of competent bodies

In many countries, different complaints or appeals are decided based on different procedures. This is fully in accordance with the good practice and European heritage. The issues concerning voters' registration may be dealt e.g. by local election commissions and their decisions appealed to first instance courts. The issues related to nationwide campaigning, campaign financing or misconduct in voting or counting procedures in general leading to cancellation of election results have to be dealt not only urgently, but have a significant impact on the credibility of the elected institutions. Thus, an EDR system consisting of central election commission, supreme court or constitutional court is widespread.

Nevertheless, in some countries the varieties in the different procedures for complaints and appeals are too large, providing not only for some, but many different competent bodies, different deadlines for the submission of complaints or appeals as well as different procedural requirements. Even if the effective implementation of electoral legislation might be possible, it puts a hard burden to the parliament to provide for a clear distinction between competencies.

Venice Commission and the OSCE/ODIHR have noticed in these cases too often overlapping competencies, missing competencies or grey areas.

Overlapping competencies lead to a possibility to choose the institution to submit the complaint or appeal based on a predictable result. According to the Code of Good Practice in Electoral Matters, forum shopping should be avoided. It cannot guarantee the coherence in the application of the electoral legislation, will lead to disputes between competent bodies and unpredictable application of electoral rules by different election management bodies.

Missing competencies might occur when the need for an EDR mechanism is required, but no institution is competent to deal with the problem. An efficient application of the right to vote and to stand in elections obliges the parliament to provide for an EDR mechanism for all complaints.

4. Clarity and predictability

EDR system has to be predictable. The legislation has to be clear enough for the stakeholders to understand to which institution in what term to submit the complaint or appeal and what are the formal requirements to the complaint or appeal. The voters and candidates or political parties should not seek for legal assistance or study the electoral law and previous case law for days in order to understand the applicable EDR mechanism. In worst case, the application may be presented to an incompetent institution or after the termination of the deadline.

Trust in the EDR mechanism is damaged, if the procedure of the EDR mechanism is not stipulated in a clear and predictable manner. Not only the competent institution and deadlines have to be provided clearly. The procedural norms such as the burden of proof, question of the duty of the competent body to investigate the issue and collect evidence itself; formal requirements such as the task to provide all reasons already in the complaint or a right to add some elements to the dispute in a possible oral hearing of the case; the consequences if the decision-making is delayed etc. have to be addressed in a predictable manner. Deviation from this principle leads often to an *ad hoc* decision-making process and biased results diminishing the so important trust in electoral processes. The legislation in many countries is generally worded or vague, although in some cases an ordinary administrative procedure legislation or court procedure codes may be applicable.

EDR mechanisms have to be transparent. Transparency provides assurance to complainants and voters that electoral malfeasance has been corrected and serves as a potential deterrence to future misconduct. Quite often election administration organises internal audits of the EDR mechanisms, but trust in the overall system can be achieved by legislative support, such as obligatory disclosure of the decisions on complaints and appeals on special webpage, online database of complaints to central election commission and appeals. Such mechanisms ensure coherence and consistent application of the law in the EDR.

5. Deadlines and time-limits both for submission and deciding on the complaints and appeals; speediness of the EDR process

As underlined in various international guidelines, the EDR mechanism has to ensure that the electoral processes are applied based on electoral law. A repeat campaigning or repeat voting has to be avoided, as its consequence would be discrediting of the democratic processes in general. Disputes on the allocation of mandates can lead to decision-making by institutions lacking legitimacy. Thus, the EDR mechanism has to ensure wide public trust in the electoral processes in a short time. Even if the disputes may be complex and touch upon issues related to hidden financing of election campaign, unequal treatment of political parties of candidates by the public media or wide-scale vote buying requiring collection of evidence in a large amount, sometimes hearing many witnesses, democratic governance cannot function until those disputes are solved.

Based on that aim, the Code of Good Practice on Electoral Matters recommends for short time-limits, 3 to 5 days, both for submission of the complaints and appeals and for deciding on complaints by competent bodies, especially in first instance by administrative bodies. A longer time-limit may be provided for the courts (constitutional courts) after the voting.

In a large number of countries, such time-limits are either shorter, longer or – for the decision-making – missing at all. Too short deadlines lead in more complex issues to situations where the complainant does not have enough time to reason the complaint or cannot add enough evidence, so the competent authorities tend too easily to dismiss the complaints. The deadlines have to allow complainants to assess the situation, collect necessary evidence to be submitted to the authority and provide adequate reasoning. Too long deadlines lead to prolonged uncertainty over the election results. In extreme cases, the elected body can adopt legislation or make important decisions for the society while its members been still under dispute. A balance needs to be struck.

6. Excessive formalities, possibility to correct formal errors and duty to provide assistance

Many election observation missions have reported that EDR mechanisms lead to overly formalistic decision-making, finding purely formal reasons not to discuss a large percentage of complaints, sometimes submitted by political parties in opposition or NGOs, in substance. In many opinions, Venice Commission and the OSCE/ODIHR have recommended to regulate the EDR mechanisms in a way to avoid such situation. An overly formalistic approach reduces trust in the electoral processes and democratic government. Formal requirements, such as deadlines, reasoning of the complaint, duty to provide plausible evidence or duty to sign complaints, are necessary for a fair procedure and substantial discussion on the issue. These requirements have still to be proportionate and in case the complaint does not meet the formal criteria, the law has to oblige the competent authority not to dismiss the complaint or leave it unattended, but to give a (short) deadline to correct the formal deficiencies. Many electoral codes assessed by the Venice Commission do not provide for the assistance by competent bodies in EDR processes. The EDR mechanisms should not be available to provide efficient remedy for a violation of the right to vote or to be elected, but also a wider aim to guarantee the lawfulness of the electoral processes. Support in formal aspects by the election management bodies or similar institutions would strengthen this role of the EDR.

7. Standing in EDR process

The Code of Good Practice in Electoral Matters recommends that all candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections.

In most countries observed by the rapporteurs on EDR, electoral legislation foresees limitations to the right to submit complaints and appeals. In some countries, there are still excessive limitations: for instance, it happens that voters can complain on issues that relate to their individual situations, such as not being registered in voter registers, but cannot complain about other phases of an electoral process, which however impact them, such as election results. Election observers have the right to submit complaints only in a few countries. Almost none countries provide for the election commissioners the right to submit complaints.

In some cases, the voters or even political parties are denied the right to submit complaints to appeal bodies, such as constitutional court.

8. Shortage in types of complaints and appeals and range of EDR mechanisms

In many assessed countries, the complaints and appeals are possible on the decisions of the EMBs or other state institutions. In many cases, the violations of the electoral rights may be caused by inactivity or insufficient action by the authorities. This may be the case especially in campaign period, where the authorities have to ensure the fair campaigning, take measures to prevent misuse of administrative resources or illegal financing of political parties and candidates. Even in election day, passive role of EMBs may lead to fraud, violation of the secrecy of vote and election day campaigning. Thus, the efficient application of electoral law cannot be guaranteed without a possibility to submit complaints and appeals on delayed decision-making, inaction or actions in addition to the decisions (administrative acts). The Code of Good Practice in Electoral Matters underlines that the judicial supervision should at

least apply to decisions on “right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

Some countries provide for complaints against other candidates, political parties or non-state institutions. It should mainly be the task of the independent bodies such as election commissions to ensure the lawfulness of the electoral processes.

9. Fair process

Efficient EDR mechanisms have to meet the criteria of the principle of good administration and due process. The EDR mechanism cannot ensure the sufficient protection of electoral rights without the persons concerned having the rights to submit evidence, including call for witnesses, take part in the oral hearing, have access to relevant documents etc. The legislation has to provide for clear rules on the burden of proof. The competent body should have the task to collect evidence even if not provided by the complainants, to ensure the democratic nature of the electoral processes. Complainants should have the right to be represented, too.

The decisions of competent bodies in EDR mechanisms have to be reasoned. Reasoning of the decisions is time-consuming, but election authorities should do their best to fulfil this obligation stemming from the principle of good administration. Legislation in some countries leaves wide margin of appreciation to the competent bodies to decide on the form of decisions on complaints.

Such provisions on complaint procedures are too often unclear. Venice Commission has not studied the issues in detail, as at least for judicial remedies such norms are provided in court procedure codes, but electoral laws contain norms on fair and due process seldom.

10. Criteria for the cancellation of election results

Cancellation of election results has to be considered as the last solution to respond to violations in electoral processes. In general, EDR mechanisms should avoid far-reaching violations for a longer period. Violations in candidates' registration and campaigning should be addressed by efficient remedies and proper complaint mechanisms before election day. One possible option in case of outstanding breaches in campaigning should lead to postponement of elections to avoid loss of credibility of democratic decision-making in general. Cancellation of election results should still be a possible remedy.

Venice Commission has noticed in some cases that the legislation provides for strict criteria for cancellation of election results without necessary margin of appreciation for the competent body, mainly court. In some countries, the legislation has provided for a legitimate margin of fraud, which, even if it may affect the allocation of mandates (election results), does not allow cancellation of election results. The legislation has in some countries failed to stipulate clearly the possibility to cancel election results only in some constituencies or in the whole country.

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