



**Handbook**  
**for the Observation**  
**of Election Dispute**  
**Resolution**

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# Foreword

All citizens have the right to participate in government, directly or by representatives chosen through genuine democratic elections. However, conflicts can arise even in the most democratic electoral process. OSCE commitments and other international obligations and standards do not only guarantee electoral rights, but in such cases also provide guidance when electoral disputes occur.

The rules and procedures in place for any given election should allow voters to challenge violations through an effective system of election dispute resolution that addresses their concerns within reasonable deadlines and takes into consideration due process guarantees. Ensuring access to legal redress during the electoral process is important to increase public trust in elections, contribute to the legitimacy of the government, and protect voters' rights.

A robust electoral dispute resolution system affects not only the conduct of elections, but also the overall protection of human rights, including freedom of expression, assembly and association. The existence of election complaints therefore does not indicate any weakness, but on the contrary a fair and comprehensive process for resolving disputes, reflecting a strong commitment to democracy and human rights.

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) has developed a systematic and comprehensive methodology for observing elections. While assessment of election-related complaints and appeals procedures is already included in ODIHR's general election observation manuals, this handbook aims to consolidate and refine established practice for observing election dispute resolution. It provides guidance to ODIHR observers, as well as other international and citizen observer organizations, about important principles and international good practice related to the handling of electoral disputes.

I am confident that this handbook will further improve our election observation methodology and, ultimately, help improve the protection of voters, candidates and political parties from violations, errors or omissions during elections.

We acknowledge all the experts and organizations that have contributed to the handbook by providing their feedback at various stages of its development, particularly our partners who have endorsed the Declaration of Principles for International Election Observation.

*Ingibjörg Sólrún Gísladóttir*  
*ODIHR Director*



## ONE

# Introduction

### A. The Purpose of this Handbook

The purpose of this handbook is to provide better guidance to ODIHR election observation missions and teams on how to assess the resolution of election disputes as part of the overall observation of an election. While ODIHR has included assessment and observation of election-related complaints and appeals in its general election observation methodology, this handbook aims to establish a more systematic and comprehensive approach to observing what is a key part of the election process thus contributing to further protecting and promoting the fundamental rights and freedoms necessary for ensuring democratic elections.<sup>1</sup> It has been developed with extra-budgetary support as part of ODIHR's efforts to continually improve its methodology and to increase professionalism in the observation of certain specialized aspects of elections.<sup>2</sup>

<sup>1</sup> This handbook should be consulted in conjunction with other ODIHR election observation-related handbooks available at <https://www.osce.org/odihr/elections/handbooks>.

<sup>2</sup> As tasked by the OSCE participating States (Ministerial Council Decision 19/06).

The handbook applies to all types of ODIHR observation activities, such as Election Observation Missions, Limited Election Observation Missions, Election Assessment Missions and Election Expert Teams.<sup>3</sup> It is primarily addressed to legal analysts who are typically tasked to assess a country's system for the resolution of electoral disputes, as well as other mission members, including long-term and short-term observers (LTOs and STOs), who may be involved in the observation of election disputes in their respective thematic and geographic areas. This handbook can also be used by other international and citizen observer organizations in their efforts to evaluate the resolution of election disputes and provides valuable information to other audiences interested in the topic, such as election practitioners, judges, lawyers, civil society activists and academia.

This handbook combines explanations of the guiding principles and international standards for election dispute resolution (EDR) with practical advice for observers on how to assess the handling of such disputes. Useful guidance for observers is provided through key points of enquiry available at the end of each section.

## **B. The Concept of Election Dispute Resolution**

EDR is the resolution of all disputes relating to the electoral process, whether handled by the election administration, judiciary, law enforcement or any other competent institution. Disputes may concern any election-related area, such as voter and candidate registration, campaigning, conduct of election day procedures or election offences, and can be lodged against any election stakeholder, including relevant authorities, candidates, media regulatory bodies and others. 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, making this subject matter an essential element of election observation.

Challenging an election, its conduct or its results may reveal existing weaknesses in the system, but it may also be an indication of the vitality and openness of the political system. Where participants of the electoral process are aware of the opportunities to challenge election violations and those challenges are managed in respect of the principle of the rule of law, there is significantly more confidence in the electoral process. While EDR with due process provides an opportunity for remedy, access to it and the handling of cases should not be excessively burdensome and cases should be handled within a reasonable time in order to avoid undue extension of the electoral process.

It should be emphasized that other concepts, such as “electoral justice”, are used by some organizations, while ODIHR's concept of EDR focuses on the election process (i.e., from the moment when the official campaign starts until the validation of election results). “Electoral justice” additionally includes the prevention of electoral misconduct before it

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<sup>3</sup> Additional information on formats for election-related activities can be found in the ODIHR Election Observation Handbook (Sixth edition).

occurs, and looks into alternative forms of resolving electoral violations throughout the entire electoral cycle.<sup>4</sup>

### C. Terminology

This handbook uses a number of terms related to EDR processes which are defined in the following ways:

An **election dispute** is used broadly to encompass any contentious electoral matter that is presented for resolution to a competent authority, whether civil, criminal, administrative or constitutional. The matter is deemed election-related if it breaches the legal framework for elections or it affects the rights and interests of individuals 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, court, law enforcement and parliament or by an ad hoc body established for the purpose of resolving contentious electoral matters.

A **competent authority** or a "*competent body*" is any institution (election administration, media regulatory body, any other administrative authority or law enforcement body or court) that has the authority to review and take decisions on election disputes. Such decisions aim to determine the rights and obligations, liability or guilt of the parties involved.

A **jurisdiction** denotes the legal competency of a body that resolves election disputes. Such a jurisdiction may be based on the subject matter (voter registration, activities of the media, campaign finance), and/or on territory (election disputes that occur in a given administrative or electoral district, constituency, etc.).

A **legal standing** is the authority granted by law to lodge an election-related complaint or appeal.

A **complaint** is a formal communication to a competent authority that seeks action from this authority with regard to a contentious electoral matter. This term comprises all communications regardless of their name (request, petition, application, etc.). Grievances voiced publicly but not made through formal communications are not included in this definition. The term is also used in this handbook to include formal communications that do not allege wrongdoings but do request a decision on participants' rights (e.g., a voter's request to correct an inaccuracy in the voter register).

An **appeal** is a formal communication to a competent authority that seeks review of an earlier administrative or court decision taken in the election process.

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<sup>4</sup> *Electoral Justice: The International IDEA Handbook*, International Institute for Democracy and Electoral Assistance, Stockholm, 2010, <<https://www.idea.int/publications/catalogue/electoral-justice-international-idea-handbook>> .

A **judicial review** is a court review of decisions and actions related to the electoral process made by an election commission, the executive or legislative branches.

The term **ex-officio** relates to the powers of an institution that are not necessarily delegated by law, but can be expected from the institution by virtue of its functions.

## **D. How to use this Handbook**

To facilitate its use, this handbook is structured both as a complete manual and a quick reference guide:

- **Chapter One** introduces ODIHR's concept of EDR, including terminology;
- **Chapter Two** provides an overview of relevant OSCE commitments and other key international obligations and standards, as well as core EDR procedural guarantees;
- **Chapter Three** looks at general features of EDR, such as the legal framework and competent bodies;
- **Chapter Four** examines the types of EDR by subject matter in the electoral process and provides guidance for their observation;
- **Chapter Five** contains specific considerations about how EDR may particularly affect under-represented groups, including women, national minorities and people with disabilities; and
- **Chapter Six** provides guidance about the role of ODIHR missions and observers at various stages of the electoral process, such as Needs Assessment Missions (NAM), election observation activities and follow-up activities. The chapter also provides guidance on observing hearings, reviewing decisions, developing EDR recommendations and assisting in their implementation.

**Annex A** contains extracts from relevant OSCE Commitments, international and regional standards and obligation for EDR. **Annex B** lists other useful resources for the observation of election dispute resolution.



## TWO

# Relevant OSCE Commitments and Other International Obligations and Standards

The resolution of election disputes, like all aspects of the electoral process, should be assessed against OSCE commitments and other international obligations and standards, good practice and national legislation. Although there are few internationally agreed documents that directly address EDR, many provisions relevant to this area are found in international instruments pertaining to the rule of law, including standards on effective remedies, independence of the judiciary and fair-trial rights.

## A. International and Regional Obligations, Standards and Good Practice

From a geographical perspective, obligations, standards and good practice referenced in this handbook can be divided into international and regional categories, depending on the structures from which they emanate, including the OSCE, United Nations (UN), the Council of Europe, the Commonwealth of Independent States (CIS) and the Inter-Parliamentary Union (IPU). OSCE commitments are regional, politically binding instruments adopted consensually by all OSCE participating States. Treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD), form the source of obligations in international law by their legally binding nature. The European Convention on Human Rights (ECHR) and the CIS Convention on Standards for Democratic Elections, Electoral Rights and Freedoms are regional legally binding treaties.

In parallel, many treaty-based standards have been further elaborated in the jurisprudence of international and regional bodies that apply these provisions to specific election-related complaints, such as the United Nations Human Rights Committee (also known as the Committee on Civil and Political Rights or CCPR) and the European Court of Human Rights (ECtHR). The CCPR also comments on periodic reports submitted by states on the implementation of the ICCPR and issues general comments interpreting ICCPR provisions.

Along with legally binding treaties, good practice in electoral matters is developed within international organizations and often referred to as international *soft law*. Even though not legally binding, such documents may evidence a high degree of support for particular rules by the organization's members. For example, the Inter-Parliamentary Union (IPU), an international organization that brings together the world's parliaments, adopted a Declaration on Criteria for Free and Fair Elections in 1994. The European Commission on Democracy through Law (the Venice Commission), a Council of Europe body, has developed a number of guidelines and reference documents on elections, including the 2002 Code of Good Practice in Electoral Matters (Venice Commission's Code of Good Practice).<sup>5</sup>

Throughout this handbook, references made to international and regional standards do not imply their automatic applicability across the entire OSCE region. Commitments, obligations and standards undertaken by OSCE participating States are applicable regardless of the legal systems and traditions in place, but it should be emphasised that their implementation might differ in civil and common law countries. At the same time, even where certain international standards are not directly applicable in a state, they may provide valuable guidance for national good practice.

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<sup>5</sup> Code of Good Practice in Electoral Matters (Venice Commission's Code of Good Practice), The Council of Europe, Venice, 18-19 October 2002, <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e)>.

## B. Core Procedural Principles

Effective EDR is only possible when prerequisites, such as the availability of effective remedies, an independent judiciary and the possibility to be heard in a fair trial with due process guarantees are respected. These, together with other principles, constitute the core elements of any rule of law-based society.<sup>6</sup> The rule of law guides the functioning of the judiciary and law enforcement, as well as the duties of government and public authorities. OSCE participating States also reaffirmed that “democracy is an inherent element of the rule of law”.<sup>7</sup> Rule of law and democratic institutions are of particular importance when dealing with violations of electoral norms. In such cases, measures taken to punish misconduct and to restore electoral rights are crucial for the integrity of elections.

The UN and Council of Europe have developed their own concepts of the rule of law. For example, in 2012 the United Nations General Assembly adopted a declaration that recognizes rule of law as a universal principle.<sup>8</sup> In 2016, the Venice Commission elaborated a rule of law checklist that identifies, among others, independence of the judiciary, legality, legal certainty and fair-trial guarantees as essential characteristics of the rule of law.<sup>9</sup> Election observation efforts should include a thorough evaluation of the procedures for filing and handling complaints and appeals in line with the elements of the rule of law presented in this section. Observers should evaluate how these principles and procedures were respected in practice, in order to establish whether election stakeholders had genuine opportunities to challenge the process and, if so, whether the remedies provided were effective.

### Availability of an Effective Remedy

The commitment of OSCE participating States to ensuring the availability of an effective remedy is of special relevance to EDR as it entitles everyone to “have an effective means of redress against administrative decisions so as to guarantee respect for fundamental rights and ensure legal integrity”.<sup>10</sup> This commitment was further elaborated by granting “effective means of redress against administrative regulations for individuals affected thereby” and by providing “the possibility for judicial review of such regulations and decisions”. Emphasis was also put on judicial control of law enforcement

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6 In the OSCE region, the participating States affirmed their support to the advancement of a number of principles that form the basis of the rule of law in the 1990 OSCE Copenhagen Document, found here <<https://www.osce.org/odihr/elections/14304?download=true>>.

7 *Ibid*, paragraph 3.

8 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, United Nations General Assembly, 30 November 2012, <<https://www.un.org/ruleoflaw/files/ARES-67-1.pdf>>.

9 The Rule of Law Checklist, Council of Europe, Venice Commission, Strasbourg, 18 March 2016, < [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)>.

10 Paragraph 5.10 of the 1990 OSCE Copenhagen Document.



restoration 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.”<sup>17</sup>

The Inter-Parliamentary Union’s Declaration on Criteria for Free and Fair Elections also highlights the need to provide prompt determination of violations of human rights and complaints relating to the electoral process.<sup>18</sup>

Available remedies for electoral disputes in the legal framework should be examined with respect to their effectiveness. In general, to be effective, remedies should be capable of discontinuing an ongoing violation, making reparations to individuals whose rights have been violated, bringing to justice perpetrators of the violation and preventing similar infringements in the future.<sup>19</sup> It is therefore insufficient for the higher election commission or court in appeals to focus on the procedural aspects of how the complaint was considered and set aside the challenged action – it should also have the authority to instruct the administrative authority to take specific action and indicate measures to prevent future violations.

To ensure the effectiveness of the redress, EDR bodies must have sufficient options to apply discretion to the severity of the sanction, which should be proportional to the violation committed and, where appropriate, take into account possible influence on the result. In assessing an EDR process related to restrictions that impact a person’s right to vote or stand as a candidate, the legal analyst should consider whether such restrictions are justifiable and reasonable in light of suffrage rights. For example, it may be unreasonable for a candidate to be deregistered for a minor campaign violation or for exceeding campaign spending limits by a small amount. Invalidation of results may be warranted at different levels, in cases of serious violations. However, invalidation would not be the appropriate remedy, for example, if the results could have been corrected by a recount.

The enforcement of the remedies granted has a decisive impact on their effectiveness. The procedures for enforcing decisions in election disputes should be noted in the review of the legal framework and further explored in the course of election observation. Ordinary procedures employed for enforcement of judicial decisions may be too slow for the electoral context, an area which deserves assessment.

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17 Commonwealth of Independent States, Convention on the Standards for Democratic Elections, Electoral Rights and Freedoms, Strasbourg, 22 January 2007 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-EL\(2006\)031rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-EL(2006)031rev-e)>

18 Inter-Parliamentary Union’s Declaration on Criteria for Free and Fair Elections, Paris, 26 March 1994, <<https://www.ipu.org/our-work/strong-parliaments/setting-standards/declaration-criteria-free-and-fair-elections>>.

19 See UN Human Rights Committee, General comment no. 31 [80], “The nature of the general legal obligation imposed on States Parties to the Covenant”, 26 May 2004, CCPR/C/21/Rev.1/Add.13, paragraph 15 <<https://www.refworld.org/docid/478b26ae2.html>>..

## Legal Standing and Admissibility

According to good electoral practice, the rules concerning individuals legally authorised to make complaints and appeals should be inclusive.<sup>20</sup> At the same time, courts normally require those bringing the complaint or appeal to have a legal interest in the outcome of the case, or to be acting in the public interest. At a minimum, natural and legal persons whose rights are affected by administrative decisions, actions or inactions should be entitled to seek court review of these decisions.<sup>21</sup> Given the public nature of the election process, consideration should also be given to allowing complaints in the public interest by essentially permitting stakeholders to challenge any unlawful action or omission in the election process. The right to an effective remedy for encountered grievances is key in the context of elections. How the existing rules on legal standing are written and interpreted and whether they preclude administrative and judicial review of any infringements of election-related legislation should be noted in the course of observation.

Other requirements for admissibility may include sufficient *prima facie* evidence, legal representation or powers of attorney. These requirements should be noted and their impact in practice assessed as to whether they pose any significant barriers for access to EDR. Observers should consider whether technical rules of admissibility are being misused by the authorities as a means to avoid substantive determination of EDR, as a requirement that looks routine on the surface could present a formidable barrier in practice. For example, the requirement to enclose a copy of an administrative act under appeal could pose an insurmountable obstacle for the appellant if the administrative authority does not issue such copies in a timely fashion. The law should provide for the consideration of any evidence that, based on the circumstances, is sufficiently trustworthy and ensure that the interest of voters and justice will best be served by its consideration. For example, the requirement that notation of alleged violations be recorded in the polling station logbook or protocol as a required basis for any complaint may not serve the integrity of the electoral process.

In general, the EDR framework should not have overly formalistic submission requirements that may result in a disregard for the protection of suffrage rights.<sup>22</sup> Written and clear rules will help avoid potentially incorrect decisions on inadmissibility. In any case, *ex officio* powers of the highest EMB with authority to rectify or annul lower-level EMB decisions and to address violations of election rules, should derive from legislation. In such cases, election disputes and violations can be handled even in the absence of a formal complaint.

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20 Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph II.3.3.f, Explanatory Report, paragraph 99.

21 Council of Europe Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts, 15 December 2004, paragraph B.2.a, <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805db3f4>>.

22 Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph II.3.3.b.

## Timeliness

In order for the remedy of a violation to be effective, it must be provided in a timely and appropriate manner. This is particularly important in the electoral context due to the time-sensitive nature of the fast-paced process. Election disputes must be resolved within a timeframe that allows for the exercise of the affected individual's electoral rights. The timeframe should also ensure that the outcome of the election is not delayed. This helps limit the potential for civil unrest and increase trust in the process, particularly when election results are challenged in a politically tense climate.

The time allowed for election administration or court proceedings and decision-making should also be examined in the context of other election deadlines. For example, a candidate registration appeal that is still being considered well into the campaign period is incapable of fully restoring the candidate's right to stand for election. Similarly, a complaint about the allocation of free airtime must be resolved in time for the candidate or party to use the airtime, if the decision is favourable. In order to facilitate the right to vote, some complaints filed on election day may have to be dealt with immediately.

Electoral disputes should be subject to prompt review.<sup>23</sup> While there is no set standard for time limits, good electoral practice recommends three to five days, although longer deadlines may be allowed for the highest courts.<sup>24</sup> Likewise, in challenges against election results, it is advisable that the final resolution of all complaints and appeals take place within two months, maximum. At the same time, deadlines should take into account the level of the administrative body or court and the nature of the complaints, and must be long enough to allow complainants adequate time to prepare and meet legal requirements. They should also guarantee the exercise of the right to defence, provide the competent authority sufficient time for investigation and issue a fully reasoned decision.<sup>25</sup> Resolving election disputes in a timely manner contributes to the credibility of the elections. A poor case-management system in the courts or within an election administration can delay the decision-making process. All such aspects should be assessed by the legal analyst.

Deadlines for submission should be short, but long enough to allow an appeal to be lodged. They should run from the moment when the illegality came to the attention of the applicant and should not undermine the prospect of achieving a just solution to a legitimate complaint. If the deadline is too short, it can lead to injustice or circumvention of the will of the voters. Exceptions to submission deadlines are possible, in particular when the complainant could not learn about the violation in the requisite time, through due diligence.

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<sup>23</sup> Inter-Parliamentary Union Declaration on Criteria for Free and Fair Elections, *op. cit.*, note 18, paragraph 4 (g).

<sup>24</sup> Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph II.3.3.g, Explanatory Report paragraph 95.

<sup>25</sup> *Ibid.*



deadlines for review. The competent bodies with authority to investigate allegations of violations should also submit documents and evidence promptly, thoroughly and effectively.<sup>32</sup> The need to adhere to deadlines should not be a ground for not exploring a viable claim.

The legal framework should provide guidance on how to deal with evidentiary issues so that all parties know in advance what type of evidence will be considered in the adjudication. The law should allow consideration of any evidence that is sufficiently credible and enables the interests of voters and justice to be served. Overly formalistic or strict requirements concerning evidence should be avoided.

## Independence

Independence is a cross-cutting feature and a prerequisite for all EDR-competent bodies. It is reflected in the procedures related to the appointment, training, tenure, promotion and dismissal of judges, election and other administrative officials, as well as law enforcement officials. These essential elements are guarantors of the body's professionalism and should be enshrined in a country's constitution or statutory law and respected in practice.<sup>33</sup>

To ensure proper administration of the EDR process, the election administration at both the central and local levels should be free from any political interference and guided by the fair implementation of laws. Irrespective of the composition of the election administration body, its independence should be expressed in clear and transparent proceedings. The independence of the election administration is enhanced if it is composed of qualified and experienced members, nominated according to a balance of interests. The independence of an election administration body could be better guaranteed by fixed tenures in office and the possibility for its members to return to their previous employment. The secretariat of an election administration body should respond to the same requirements of independence and professionalism. Adequate training is one of the pre-requisites for an independent institution and should be conducted regularly for all staff.<sup>34</sup>

General principles for the work of other administrative authorities derive from the concepts of the rule of law and good public administration.<sup>35</sup> Independence of administrative authorities is reflected *inter alia* in the way they act and inform individuals whose rights have been violated. As a general rule, authorities must act in accordance with the law, within their competence, and may not take arbitrary decisions. They have a duty to inform private persons about their actions and decisions, including access to official

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32 General comment no. 31 [80], "The nature of the general legal obligation imposed on States Parties to the Covenant", UN Human Rights Committee, 26 May 2004, paragraph 15, <<https://www.refworld.org/docid/478b26ae2.html>>.

33 Paragraph 19.2 of the 1991 Moscow. See also Council of Europe's Recommendation 2010 (12) on judges' independence, efficiency and responsibilities.

34 Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph II.3.1.g.

35 Code of good administration appended to Council of Europe's Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, 20 June 2007, <<https://rm.coe.int/16807096b9>>.

documents. Administrative decisions should be published by notifying those affected or by making them public.<sup>36</sup>

An independent judiciary is the guarantor of impartial and fair EDR and its existence is important for ensuring the supremacy of law, fair-trial and due-process guarantees, and effective remedies for violations of human rights. Several international documents set standards for judicial independence, including equal access to a fair and public hearing by a competent, independent and impartial tribunal established by law, and the independence of judges.<sup>37</sup>

To ensure judicial independence, internationally accepted practice recommends limiting the role of the executive and legislative branches of power in the appointment, promotion and dismissal of judges. International instruments provide, *inter alia*, that judicial appointments should be merit based and managed by a judicial body or a body in which the majority of members are from the legal profession.<sup>38</sup> Furthermore, judges should have security in their position and confidence that their position will not be affected by changes in political power, which can be guaranteed through life-time appointments or clearly defined mandatory retirement ages. Equally, they should receive adequate remuneration which should be set by law. While appointments and promotions should be based on merit and objective factors to be determined by a judicial committee, causes for suspension or dismissal need to be clearly defined in law, based on established standards of judicial conduct and ensure due process.<sup>39</sup> Assignment of cases should not be subject to anyone's discretion and judges should be able to undergo continuous training to update their knowledge on specific electoral issues.

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36 *Ibid.*, Article 18.

37 The Universal Declaration of Human Rights sets the principle of non-discrimination and equality in the access to a fair and public hearing by an independent and impartial tribunal in the determination of everyone's rights and obligations. ICCPR further provides and enforces the principle of equality before courts and the right of "every citizen to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of his rights and obligations in a suit at law". See also OSCE 1989 Vienna Document, 1990 Copenhagen Document and 1991 Moscow Document.

38 The UN Basic Principles on the Independence of the Judiciary (1985) set out principles on the appointment, remuneration, tenure, promotions, suspension and dismissal of judges and assignment of cases that aim to ensure independence and the ability of the judiciary to function impartially. Specific aspects related to judicial independence have been also elaborated by ECtHR. When assessing judicial independence, the ECtHR considers, among others, the way in which judges are appointed and by whom, the duration of appointment, the existence of guarantees against outside pressure and the perception regarding the independence of the judiciary. Other Council of Europe bodies such as the Consultative Council of European Judges (CCJE) and the European Commission for the Efficiency of Justice (CEPEJ) have elaborated on important aspects of judicial independence deriving from the implementation of the Recommendation 2010 (12) on judges' independence, efficiency and responsibilities.

39 Relevant OSCE commitments call upon participating States "to respect judges' freedom of expression and association, guarantee tenure and appropriate conditions of service, and discipline, suspension, and removal of judges according to law" (Moscow 1991); "to recognize the importance of impartiality, integrity, and propriety for the proper discharge of the duties of a judge" (Brussels 2006) and "to prohibit improper influence on judges and non-discrimination in the selection of judges" (Moscow 1991). See also UN Basic Principles on the Independence of the Judiciary; Council of Europe's Recommendation CM/Rec(2010)12 of the Committee of Ministers "Judges: independence, efficiency and responsibilities"; opinions of the Consultative Council of European Judges; OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) and Venice Commission Rule of Law Checklist, II.E.1.a-b.

Independence of law enforcement bodies can be understood as external independence from political interference, legislative or executive branches of power or any other influence in the conduct of their activities, or as internal independence related to a particular hierarchical structure. Similar to judges, the recruitment, appointment, promotion, assessment, suspension, dismissal, civil and penal liability, sanctions, rights, duties, incompatibilities and wages of law enforcement officers, as well as disciplinary procedures affecting them, must be stipulated by law. In their daily work, law enforcement officers should be guided by the law and clearly defined internal rules and procedures.

## **Impartiality**

Decisions taken by EDR bodies should always be impartial. Officials dealing with EDR should act objectively and carry out their duties in an impartial manner, irrespective of their personal beliefs and interests. Measures imposed or decisions taken by EDR bodies that affect the rights and interests of all should be commensurate to the aims pursued within a democratic state. Decisions, including those of administrative nature, should be clear and state the legal and factual grounds on which they are taken.

When talking about guarantees for the impartiality of judges, ECtHR case law refers to a subjective and an objective test of impartiality.<sup>40</sup> In the first case, the personal conviction and behaviour of a particular judge should be assessed, in particular to see whether the judge was biased in a given case. In the second, the court itself should be assessed, in particular its composition and whether there are sufficient guarantees to exclude any doubt of its impartiality. Such factors may be considered during an election observation activity.

Impartiality is also one of the principles that guide the day-to-day work of law enforcement bodies.<sup>41</sup> During an election observation activity, it is important for observers to understand whether these bodies are perceived to be acting objectively and impartially when handling election disputes. Most importantly, the observation team should consider whether there are sufficient safeguards in place for law enforcement to carry out their duties without bias, such as necessary training and sufficient remuneration, and whether they perform their tasks with professionalism and without interference from executive and legislative powers, while fully co-operating with the courts. In their work, law enforcement bodies should seek to protect and respect individuals' fundamental human rights, while conducting investigations as expeditiously as possible.

## **Transparency**

Transparency is essential to maintaining trust in election administrations and judicial bodies. There are a number of ways in which competent bodies can ensure transparency in handling election disputes. First, all parties to the dispute should be properly notified as discussed above. Second, all interested parties should be informed of the decision

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40 See also Guide on Article 6 of the ECHR, Paragraph III.3.a “Criteria for assessing impartiality”.

41 See also Council of Europe Recommendation 2000(19) on the role of public prosecution in the criminal justice system.

taken in the dispute and given copies of the decision. For election disputes, the public has a legitimate interest in their resolution, and decisions of administrative bodies and the courts should therefore be published promptly. Publication of reasoned decisions also allows the public to see how the body came to its conclusion and should alleviate any concerns of biased or arbitrary decision-making. This helps to increase public confidence in the independence and impartiality of the body and EDR process. Publicly available registers of complaints could be considered to improve transparency. The right of access to official documents should be ensured, subject to personal data protection rules and other information protected by law.

As a transparency measure, standard operating procedures for handling election disputes should be adopted and published by the highest election administration and courts, outlining how complaints and appeals will be processed through these venues.

Where hearings are held, they should be open to the public, media and observers, and any exceptions should be carefully assessed. Other similar measures for election disputes may include press releases and press conferences informing the public of complaints received and the status of such complaints, with special focus on those of a politically sensitive nature. The existence of election disputes is not in itself negative or an indication of a weakness in the process, and the absence of complaints is not by default a positive indicator. Where participants (i.e., voters, contestants, election officials, observers) are aware of both substantive aspects of complaint resolution and opportunities to challenge the process (procedural aspects) and where those challenges are managed with respect to due process, there could be more confidence in the integrity of the process and more likelihood that the results will be accepted by all.

### **Legality and Legal Certainty**

International standards, obligations and commitments require states to ensure that authorities act in accordance with the law, within their competence, and refrain from taking arbitrary decisions.<sup>42</sup> Further, as a rule, competent bodies should not take retroactive decisions. When reviewing decisions on election complaints, the legal analyst should assess the competence of the body to review the complaint, the compliance with the law, including its reasonable interpretation, and whether the decisions address all legal arguments put forward and are reasoned.

Additional consideration should be given to whether complaints on similar matters are being handled in a consistent manner and whether multiple venues (with overlapping jurisdictions) are deciding on the same issue or even the same case. This can undermine the development of reasoned decisions and stable administrative and court practice for protection of electoral rights. The legal analyst should assess whether courts and/or election commissions in different regions decide differently on similar matters or lower bodies and/or courts are not following higher body and/or court decisions. Such

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42 The term “law” encompasses all documents that have a legally binding nature including national and international law, regulations, but also case law. See also Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, paragraphs 5.3, 5.5, 5.7, 5.8, <<https://www.osce.org/dihhr/elections/14304>>.

observations will help in analysing the potential impact on stakeholders' ability to obtain an effective remedy.

The highest election administration should have the power to develop instructions and guidelines on various election disputes-related matters. The election administration and high courts in the electoral field can also play a critical role in contributing to reforms of the electoral legal framework and in developing judicial practice and raising awareness about standards for consideration in election cases. The legal analyst should assess whether the election administration has and exercises the authority to adopt regulations and instructions aimed at securing a uniform interpretation and application of the election law by election stakeholders and courts. Equally, she or he should look into whether the highest court responsible for the implementation of the electoral legal framework ensures a coherent set of governing judicial precedents and provides judges with sufficient knowledge about such precedents and the reasoning behind them.

### **Accessibility**

Election dispute resolution must be accessible to all. The legal analyst should consider how clear and understandable the system is, and what efforts have been made by the authorities to raise awareness about the process and the opportunity to submit complaints. This may include information about how to lodge complaints, to which body, the legal deadlines and the evidence required. A lack of complaints or the prevalence of poorly formulated complaints could indicate that the system lacks clarity and efforts are needed to educate stakeholders and voters. Literacy may also be a factor in a participant's ability to access the dispute resolution system. Other factors affecting accessibility could be lack of election officials' knowledge of the rules and procedures for filing complaints, standards governing EDR and the scope of their responsibility. Additional barriers to filing complaints might exist in different contexts, such as intimidation or pressure and threats of repercussions, including by the authorities. It is incumbent upon election observation teams to identify them through direct observation or by verifying concerns raised by interlocutors.

Depending on the legal system in place there might be standard templates for complaints, including forms that indicate the type of information and supporting documents required. Such standard forms could help complainants, but should not be used as a premise for rejecting complaints that do not comply with the form.

The accessibility of EDR can be impacted when decisions of the election administration and courts do not indicate the remedy (appeal) available in writing, the venue and the deadline to lodge a complaint. It can also be impacted by formal requirements to file a complaint or appeal. Legal analysts, with the help of LTOs, should consider the location of EDR bodies, how far complainants have to travel if they must submit a complaint in person and whether complaints can be filed electronically or by post. Proximity may become an issue when appellants and respondents are required to travel to the capital to submit an appeal and/or appear at a hearing. Where complainants must travel to submit

their documents or present their case, this can entail additional costs for the parties, and often makes pursuing appeals unfeasible for those with professional or family responsibilities, or financial constraints.

Filing fees may present additional barriers to the EDR system. Legal analysts should enquire about the fee requirements and assess whether they are overly prohibitive. While fees are a means of preventing frivolous complaints, they may also create a barrier to the dispute process, especially for women and other under-represented groups (see Chapter Four on accessibility for under-represented groups). When considering financial implications, legal analysts should also evaluate less obvious costs related to filing complaints, such as legal fees where legal representation is required, court fees and costs of transport for witnesses.



### **THREE**

## General Features of Election Dispute Resolution

The legal framework for the resolution of election disputes may comprise different legislative acts, depending on the process and the subject matter at stake. The following sections highlight issues that deserve particular attention when assessing the legal framework, institutional structure and procedures for EDR. It also focuses on competent EDR bodies and how they may be involved in hearing election-related cases.

### **A. Legal Framework**

The resolution of election disputes is usually regulated in primary legislation, such as election law or code, law on political parties and political finance, administrative and criminal code and is regularly supplemented by rules, regulations, guidelines and instructions issued by the election administration or administrative bodies that have

election-related competencies at central, regional and local levels. Rules on complaints made to law enforcement agencies and courts are found in the legislative and regulatory acts applicable to these institutions. Depending on the legal system in place, civil or common law, consideration should be given to assessing the relevant court decisions (case law), which in common law systems form part of the legal framework and set precedents to guide future application of the law. The legal analyst should strive to obtain a good overview of all applicable legislation and case law.

Written law has the benefit of greater certainty, visibility and transparency, and enhances the consistent application of law and facilitates judicial interpretation and review.<sup>43</sup> In general, the legal framework for election dispute resolution, like all election-related legislation, should be clear and unambiguous and establish a hierarchical system of EDR that does not allow claimants to choose the appeals body to which they apply. At a minimum, it must:

- Contain a clear definition of key aspects of the system, including:
  - ✓ **actors** – who has legal standing (the right to file complaints);
  - ✓ **subject matter** – what issues are eligible for an election-related complaint;
  - ✓ **competent bodies** – which body has the authority to handle each type of complaint;
  - ✓ **deadlines** – for lodging complaints and their resolution;
  - ✓ **procedures and decision-making process** – for the filing and review of complaints and appeals (often elaborated in rules and regulations);
  - ✓ **administration of evidence** – by the courts, including the burden of proof and proper examination of submitted arguments by the parties, witnesses and expert opinions; and
  - ✓ **available remedies** – decisions or actions that may be taken by the body handling the complaint, including the authority to cancel elections.
- Be adopted and made available to the public in a timely and inclusive manner; and
- Be in line with OSCE commitments and other international obligations and standards for democratic elections.

For the EDR system to be accessible, it must be clearly understandable to all election participants such as voters, candidates, political parties, officials, observers, media and civil society. Secondary legislation, such as rules, regulations and instructions give more detail and operationalize the provisions of a law as to who exactly can file a complaint, on what basis, to what body and how that complaint or appeal will be handled. Further, the

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<sup>43</sup> For more detailed information on assessing electoral legislation, see the *OSCE/ODIHR Guidelines for Reviewing a Legal Framework for Elections*, (Warsaw: OSCE/ODIHR, 2013) <<http://www.osce.org/odihr/elections/104573>>.

legal framework should be explicit about the details of EDR, for example stating what the competent body is required to do when handling the complaint, how the complainants should be notified and how the decisions should be published.

To have an in-depth understanding of the EDR legal framework, the legal analyst should assess applicable rules and regulations. Consideration should also be given to authoritative interpretation of these rules by legal experts and the existing EDR case law. Ambiguous, evasive or incomplete provisions in the election law or related acts may generate confusion over the jurisdiction of the courts and election administration to deal with EDR. Assessment of the existence of voter/stakeholder education materials aimed at explaining the EDR system might give an indication as to its accessibility and clarity.

When reviewing EDR-related legislation, the legal analyst may discover inconsistencies in the complaints procedure. These inconsistencies should be noted for any future legal and electoral reform efforts. Similarly, the review of the legal framework for EDR may reveal gaps and points that are not sufficiently elaborated. Where these are identified, further assessment should be undertaken to explore their effect in practice: for example, whether the lack of legal provisions resulted in the denial of redress for violations or imprecise legislation led to inconsistent interpretations. Where omissions in the legal framework do not result in practical problems, election observers may decide to point them out but focus their recommendations on more critical issues.

### Points of Inquiry

- \* Is the legal framework sufficient to deal with EDR? Is it clear and simple?
- \* Have any amendments been made to the EDR legal framework since the last election, or less than one year before the election being observed? Have they been adopted in an inclusive manner?
- \* Does the law provide for the possibility to complain on any election-related matter?
- \* Who is granted the right to complain/appeal decisions? Is the right granted as broadly as possible?
- \* Are there any gaps or inconsistencies in the legislation?
- \* Does the election administration have the power to adopt regulations and instructions on EDR?
- \* Does the law clearly define the body responsible for resolving each type of election dispute? Is there any overlap of jurisdiction?
- \* Is it clear from the legal framework where a complaint or appeal should be filed?
- \* Does the law set out clear deadlines for the review of each type of complaint? Are the deadlines sufficiently flexible or too restrictive for each type of complaint? Do the deadlines allow for the resolution of disputes within a time period that facilitates the exercise of one's electoral rights? Does the law and practice allow for due process?
- \* Is a judicial review guaranteed?

- \* Does the legal framework establish the burden of proof and provide guidance on the type/amount of evidence required in EDR cases?
- \* Does the law establish effective remedies for the restoration of rights and proportionate and deterrent penalties and sanctions for violations of the law?

## B. Competent Bodies

A variety of bodies are responsible for the resolution of election disputes in the OSCE region. In certain participating States, election disputes are handled by administrative bodies, mainly the election administration, or independent commissions established to consider specific election-related disputes (e.g., disputes related to the delimitation of electoral boundaries, media coverage or the misuse of administrative resources). In other states, election disputes are under the jurisdiction of regular or special courts dealing only with electoral matters. There are also systems where disputes are handled hierarchically within the election administration with a possibility for appeal to a court. Both courts and the election administration may have jurisdiction over different election disputes, whether in first instance and/or appeal. Law enforcement agencies may also be involved in EDR concerning cases of election-related misconduct. Finally, in a few countries legislative bodies also have the authority to take final decisions on elections.

As an initial step, the legal analyst should map the competences for all types of election-related disputes, including deadlines, available remedies and avenues for appeal. This will ensure targeted and inclusive observation. The legal analyst should develop a clear understanding of the bodies that have jurisdiction over the most frequently encountered election disputes in the electoral process, discussed below in Chapter Four.

Good electoral practice advises against conflicts of jurisdiction of election administration bodies and courts.<sup>44</sup> The legal analyst should assess the legal framework to establish the subject-matter and territorial jurisdiction of the relevant dispute resolution bodies, as well as any issues that could fall under the jurisdiction of both judicial and administrative bodies.

Where the law allows for appeals to be made to concurrent jurisdictions, either to a higher election commission or to a court, further inquiry should be made about the arrangements in place to avoid conflicting decisions and prevent appellants selectively choosing where to file their appeal or adjudicating bodies refusing to consider a complaint.

In EDR systems where complaints are heard by the election administration or other administrative body, decisions should be subject to judicial review.<sup>45</sup> Purely administrative decisions at the highest level of election administration should also be subject to

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44 Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph II.3.3.c, Explanatory Report paragraph 97.

45 Under paragraph 5.10 of the 1990 Copenhagen Document, OSCE participating States have committed to ensuring effective means of redress against administrative decisions.

judicial review. The Council of Europe recommends that decisions of lower courts, which review administrative decisions, should be subject to appeal to a higher court, at least in important cases, unless the case is directly referred to a higher tribunal in accordance with the national legislation.<sup>46</sup> An argument for more than one level of review may also be made in the interests of consistency of court practice. With respect to challenges to election results, appeals should be allowed to the court level that has highest authority over the entire geographical region of the constituency.

Regardless of the institution that has the authority to consider the complaint, the legal analyst should note the formation of the competent body and the way decisions are made. OSCE participating States have made commitments and are bound by international obligations to ensure the functioning of an independent judiciary and an effective remedy against administrative decisions by a competent, independent and impartial body acting within the law.<sup>47</sup>

### Points of Inquiry

#### Competence

- \* Does the body have clear authority defined in the law?
- \* Does the body have the capacity to carry out its dispute resolution mandate, including sufficiently knowledgeable personnel and material resources?
- \* Has the body been informed of/trained on recent amendments to the legal framework?

#### Independence

- \* Is the body independent from political interference by the executive and legislative branches of power – and in the case of elections – free from interference or influence of those whose actions are under review?
- \* Is the body structurally and financially independent?
- \* Can the body make decisions without fear of repercussions for its decisions?

#### Impartiality

- \* Does the appointment procedure ensure impartiality of the body?
- \* Does the law require the body to act impartially, free from personal bias, prejudice or the promotion of political interests?

#### Transparency

- \* What measures to achieve transparency are in place? Are meetings/hearings open to the public, media and observers?
- \* Does the law require publication of decisions and are they published in practice?

<sup>46</sup> Council of Europe's Recommendation Rec(2004)20, *op. cit.*, note 46, paragraph B.4.i. <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805db3f4>>

<sup>47</sup> See Section II.B above. See also UN Basic Principles on the Independence of the Judiciary.

While most election-related complaints are typically handled by election administration at different levels, other administrative bodies such as media regulatory authorities and campaign finance oversight bodies may be called to resolve election disputes or to act *ex-officio*. Courts handle electoral disputes either as a first instance body, where the complaint is lodged, or as an appeal body for administrative or judicial decisions. Complaints to law enforcement agencies result in investigations and possible prosecutions, with courts making final decisions.

The following section provides additional considerations for assessing the legal framework for electoral complaints and appeals made to election administration and other administrative bodies, courts, law enforcement agencies, parliaments and supranational bodies.

## 1. Complaints to the Election Administration

There are specific issues to be considered by the legal analyst when reviewing the handling of complaints and appeals by the election administration. One of the safeguards for the fair and impartial handling of electoral disputes is the independence of election administration from political influence.<sup>48</sup> To assess the ability of an election administration to act independently and impartially in the resolution of disputes, the legal analyst, together with the election analyst, should consider, among other issues, the appointment system, tenure and composition of the election administration. Where complaints are initially reviewed by individual members or working groups, it should be assessed whether the possible political affiliation of those members impacts the decision-making process. The stakeholder confidence in the leadership of the election administration could also be an indication of its impartiality.

The legal framework may stipulate that complaints must meet formal requirements to be admissible for examination on their merits. While frivolous and superfluous complaints are undesirable, the rules should not allow election administration bodies to reject complaints on formalistic grounds. Where the election administration has overall supervision of the election and the implementation of election legislation, information that warrants intervention by the election administration body should prompt reaction regardless of the complaint's procedural flaws.

The election administration should be authorised to request evidence from other administrative authorities, which must be obliged to respond within appropriately short timeframes.<sup>49</sup> Whenever the action or inaction of the election administration is challenged, complainants should substantiate their claims, but the burden to prove the legality of the action should be on the administrative body. Complaints should not be rejected due

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<sup>48</sup> In the case of *The Georgian Labour Party v. Georgia* (Application no. 9103/04) the ECtHR highlighted the importance of election administration “to function in a transparent manner and to maintain impartiality and independence from political manipulation” (paragraph 101). <[https://hudoc.echr.coe.int/eng#{"itemid":\["001-80872"\]}](https://hudoc.echr.coe.int/eng#{)>

<sup>49</sup> See also paragraph 15 of the CCPR General Comment 31.

to the lack of evidence withheld by administrative bodies from the complainant. Where complaints allege violation of election law, such as campaign rules, the election administration should do its utmost to investigate the matter before making a decision.

Electoral legal frameworks commonly stipulate how the election administration should take decisions, including rules for collegial decision-making. The legal analyst should explore how these requirements apply to resolving complaints and assess whether the rules on EDR decision-making are sufficiently clear. If decisions are taken in plenary session, it should be assessed whether the rules of procedure were followed, members were provided with the relevant documents sufficiently in advance of the meeting and how the decision-making process was made. Depending on the nature of complaints, the election administration body may not be required to discuss and vote on every communication it receives in plenary sessions. If complaints are handled by individual officials or special working groups, their exercise of discretion and delegated authority should be assessed by the legal analyst especially for compliance with the principles of due process, impartiality and the obligation to provide an effective remedy. To increase transparency and accessibility of EDR, the election administration should adopt and publish standard operating procedures on handling complaints, and maintain records of complaints, such as a publicly accessible registry.

Special attention should be paid to the remedies at the disposal of the election administration. The election administration should be legally empowered to take measures that stop any ongoing infringement, restore violated rights, sanction those who violate legislation and prevent similar infringements in the future. Also, the election administration should be required by law to refer any possible criminal matters that come to its attention to the relevant law enforcement body and to forward complaints not under its jurisdiction to the relevant body. Proper and timely implementation and enforcement of decisions taken by courts and electoral bodies is critical to the effectiveness of the EDR system, including adequate sanctions for non-compliance of election administration by state institutions, mass media and state officials.

### Points of Inquiry

- \* How is the election administration body composed? What are the terms of office? What is the current composition of the body and any sub-groups handling complaints?
- \* Does the election administration have the authority to act *ex officio* on matters that warrant further consideration or intervention? Has the election administration exercised this authority?
- \* Is the election administration entitled to request information from government officials, local bodies and other administrative authorities? How does the system work in practice? Are investigations sufficient?

- \* What are the requirements for decision making stipulated in the law? How are they applied to election complaints? Are any complaints reviewed by working groups or individual members?
- \* What remedies, including sanctions, are at the disposal of election administration? Do these remedies allow the election administration to effectively exercise its supervisory authority over the election process? Are criminal matters referred to law enforcement? If complaints are improperly lodged, are they forwarded to the appropriate venue?
- \* Are decisions made within the legal deadlines? Is decision-making on election complaints consistent and in accordance with the law? Is there any evident bias towards any participants of the electoral process?
- \* What are the views of other election stakeholders regarding the independence, impartiality and transparency of the election administration?
- \* Does the election administration hold hearings on EDR? Are decisions made in writing? Are they published? What information on complaints and decisions is available to the public? Are decisions enforced?

## 2. Complaints to Other Administrative Authorities

A variety of administrative authorities – i.e. all public institutions at any level that provide a public service or act in the public interest – may be tasked with functions related to the electoral process. With respect to elections, different administrative authorities may oversee different tasks, such as delimitation of electoral boundaries, voter registration, data protection, allocation of public spaces for printed campaign materials, oversight of campaign financing rules or media conduct, and other functions. These bodies may receive complaints about their own decisions, action or inaction related to their election function and also complaints about the actions of individuals, such as the misuse of administrative resources. As with all bodies responsible for resolving election disputes, the legal framework should clearly establish the authority of the administrative bodies.

Observation of administrative authorities, specifically, should include an assessment of stakeholders' awareness of such remedies and the procedures for filing complaints. Attention should be paid to how the parties to such complaints are informed and given an opportunity to present their case, considering that complaints handled by administrative authorities are often not documented as election complaints but rather as petitions, requests or similar. Subsequently, the legal analyst, together with LTOs, should inquire about the procedures for publishing decisions and what means are available to track such cases. Administrative decisions should state available appeal procedures and time limits. A system of sanctions should be in place to ensure compliance with the decisions of administrative authorities. Enforcement of administrative decisions should be prescribed by law and include notification of those concerned about procedure and reasons for the decision.

## Points of Inquiry

- \* Is there a clear understanding of which administrative authorities have jurisdiction over each type of election-related issue?
- \* Are there clear procedures on how to file a complaint or appeal to these authorities?
- \* Are there efforts to provide public information about these complaints and appeals?
- \* Are there any overlapping jurisdictions that may result in contradictory decisions? If so, what is being done to prevent conflicts of jurisdiction?
- \* Are complaints to administrative bodies found to be inadmissible?
- \* Are decisions consistent, made in accordance with the law, within the established deadlines?

### 3. Complaints and Appeals to Courts

An assessment of an EDR system also includes a review of the courts' involvement in adjudicating election-related matters and of the application of rules of procedure in the context of elections. Depending on the country, courts may be involved in the resolution of election disputes in different ways. Frequently, disputes are initially reviewed by administrative bodies, such as the election administration, with the opportunity for complainants to appeal their final decisions to a court. Giving administrative bodies the power to make final decisions without further judicial review is at odds with OSCE commitments and other international standards, and limits the access to effective remedy against such decisions.<sup>50</sup>

In other countries, courts hear election cases in the first instance. In such instances, the appeal process usually follows the regular court system. Lower level courts are frequently involved in the review of cases related to voter registration and any criminal matters or civil cases such as libel or defamation. Depending on the type of election, in some countries the constitutional court has jurisdiction over review of constitutionality of legislation and acts as the final reviewer of election disputes. Further, in some countries special courts composed of judges of higher courts are established to hear election-related complaints or validate results.

The role of the courts in adjudicating election disputes is impacted by the independence of the judiciary, general respect for the rule of law in the country and public confidence in the courts (see Chapter Two). As a cornerstone of the rule of law, independence enables the judiciary to fulfil its function of upholding individual rights and providing fair adjudication of disputes.

While a thorough review of all the factors related to the independence of the judiciary may not be feasible in the context of an election observation activity, the legal analyst,

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<sup>50</sup> See 1990 OSCE Copenhagen Document, paragraph 5.10; Council of Europe's Recommendation Rec(2004)20, *op. cit.*, note 21, paragraph B.1.a.; Code of Good Practice in Electoral Matters, *op. cit.*, note 5, II.3.3.a.

in close co-ordination with other core team analysts, should have sufficient awareness of training on election law, as well as appointment and dismissal procedures for the relevant courts. Equally, they should ask electoral stakeholders about how cases are assigned to judges and whether there are concerns about professionalism, the appointment and tenure of the judiciary related to timeframes for hearing complaints, filing fees, due-process guarantees and decision-making process. All these should also be evaluated from the perspective of equal access and treatment of complainants.

Where necessary, further assessment may be undertaken in response to specific concerns voiced by electoral stakeholders that may arise in the course of observation, such as the lack of trust in the independent and impartial adjudication of electoral disputes by the courts. This assessment may be supplemented by authoritative reports on the relevant legislation and practice, for example by ODIHR itself, various Council of Europe bodies, or the UN Special Rapporteur on the independence of judges and lawyers.

Additional attention is also warranted where electoral disputes fall under the jurisdiction of special tribunals that are not part of the country's regular judicial system. The legal framework regulating the selection, manner of appointment and other guarantees of independence of such tribunals should be examined against the same key principles as for general courts (See Chapter Two).

### Points of Inquiry

- \* Does the legal framework provide sufficient safeguards for the independence of the judiciary? Have interlocutors raised concerns about the appointment, promotion or dismissal of judges? Do judges receive continuous training on election subjects?
- \* Is the judiciary perceived as being independent by election stakeholders?
- \* What election-related complaints can be made directly to courts? Which administrative decisions can be appealed to courts? Which courts have jurisdiction over such complaints and appeals? Are these divisions clear to stakeholders?
- \* Do court procedures provide for fair hearings of electoral complaints and appeals, including notification of parties, equal opportunities, unbiased application of evidentiary rules, transparency and reasoned judgments?
- \* What are the costs to file a complaint? Are they reasonable? Are they perceived as being prohibitive?
- \* Are court decisions published and enforced within a reasonable time?
- \* Are the courts making decisions within the legal deadlines?
- \* Are courts denying admissibility? On what grounds?
- \* Are judges knowledgeable about the election law? Are they interpreting and applying the law fairly and consistently?
- \* How are EDR cases managed and assigned to judges?

#### 4. Complaints to Law Enforcement Authorities

An assessment of the legal framework should include a review of whether election-related misconduct constitutes a criminal or lesser offense (the latter known as “misdemeanor”, “minor” or “administrative” offences in some systems). Such offences are typically defined in the criminal code and the assessment should verify whether relevant criminal provisions are consistent with the election legislation. When reviewing the legislation, the legal analyst should identify whether any commonly encountered election offenses (e.g., vote buying) are elaborated in the law and whether administrative and/or criminal liability provides for such violations. The legal analyst should also consult procedural legislation in order to establish who is the competent body dealing with such offences (e.g., law enforcement, prosecutor’s office).

Complaints alleging election-related misconduct may be submitted directly to law enforcement authorities, such as police and prosecutors, or may be referred to law enforcement by other authorities, such as election commissions.

In some instances, law enforcement agencies act on their own initiative to investigate matters and open cases on the basis of reports of election-related misconduct, including in the media. If observers note that allegations of misconduct are widely known they should inquire with law enforcement whether they are looking into the issue and observe whether the law enforcement bodies investigate the matter at their own initiative or at the initiative of administrative authorities. Observers, however, should not report any issues to law enforcement. They should assess whether citizens refrain from lodging criminal complaints due to a lack of trust in the institutions or even fear of being prosecuted.

The prosecution of election offenses may increase confidence in the integrity of the process and deter future offenses. However, for the deterrent mechanism to be effective, investigations must be conducted in a timely manner, due process guaranteed, and perpetrators prosecuted or sanctioned. To assess whether law enforcement bodies handle election offenses effectively, the legal analyst should inquire about offenses from previous elections. How many investigations were opened, how many resulting prosecutions were there, and what is the status of those prosecutions? Additionally, with the help of LTOs, the mission should assess the timeframe within which law enforcement reacts to complaints received and offenses reported in the media. At the same time, the chance of criminal investigations becoming a factor in the election should be minimized. Observers should assess whether prosecution or investigations initiated by law enforcement bodies are politically motivated and if charges made against political opponents are sufficiently substantiated. The preparedness and knowledge of law enforcement officials to investigate election offenses should also be assessed.

To the extent that it is regulated in the law, the timeline for consideration of complaints, investigation and, if applicable, prosecution of electoral offences should be clarified by the legal analyst during the review of the legal framework or through meetings with law

enforcement officials. The particular features of criminal procedure, such as the confidentiality of investigations and the presumption of innocence, should be borne in mind. In such cases law enforcement authorities are normally not bound by the same short timelines that apply to election administration and courts. The results of police investigations are frequently not known before ODIHR missions leave the country.

While finding perpetrators criminally liable for an election offense is one aspect of an effective remedy, other measures may be necessary to restore the electoral rights of the victims of a violation. For example, where offenses such as ballot box stuffing or multiple voting are established, the responsible polling officials should be held accountable. However, a recount or a repeat of polling in that location may be warranted to restore the electoral rights of candidates and voters. The same facts may therefore give rise to different proceedings by the election administration body, courts and law enforcement. In this respect, the legal analyst should inquire about how the different bodies understand their responsibilities and communicate with one another within the established legal boundaries.

With regard to lesser offenses, typically punishable by fines, the observation team should clarify which bodies have the authority to establish liability for such offenses and impose sanctions, and whether they use this authority in practice. The legal analyst must also consider whether these sanctions are subject to judicial review. The types and range of sanctions should be reviewed to assess whether they are proportional to the offenses. At the same time, sanctions should also be sufficiently dissuasive in order to have a deterrent effect.

### Points of Inquiry

- \* What election-related criminal offenses are contained in the law? Are any frequently encountered offenses not elaborated in the law (e.g., the misuse of administrative resources, vote buying)?
- \* Which law enforcement bodies are responsible for investigating and prosecuting these offences? How are matters referred to law enforcement by the election commissions and other authorities?
- \* Do law enforcement bodies act on their own initiative to open investigations?
- \* How swiftly are offenses investigated and prosecuted? Is there public confidence in the process? Are law enforcement bodies perceived as being impartial and independent? Is lack of trust or fear preventing citizens from lodging criminal complaints?
- \* Did law enforcement officials receive election-specific training?
- \* What misconduct is punishable as lesser offences? Which bodies are authorized to impose sanctions for lesser offences? Are the sanctions proportionate to the offenses? Are they sufficiently dissuasive?
- \* What was the nature of complaints made to law enforcement bodies in the previous electoral process?

- \* In relation to the previous election, how many criminal investigations were opened, how many resulted in prosecutions, and what is the status of those prosecutions?
- \* Are there any cases or allegations of abuse of criminal investigation/prosecution on the part of law enforcement?

## 5. Complaints to a Legislative Body

In some countries, in line with historical traditions, complaints regarding elections may be filed to a legislative body. In most cases, these complaints are final challenges to the results, or the legislative body is given the authority to certify the election results. Good electoral practice recognizes this option but recommends that final appeal be made to a court.<sup>51</sup>

Legal analysts should assess this complaint mechanism for its effectiveness, using the same criteria as for other remedies. In particular, the legal analysts should consider to what extent the system provides a judicial review of complaints and what protections are in place. All decisions made on challenges to the election should also be reviewed with regard to their potentially political nature. Where appropriate, attention could be drawn to the general legal principle “*nemo iudex in causa sua*” [no one should be a judge in one’s own case].

### Points of Inquiry

- \* What election-related complaints may be submitted to the legislative body?
- \* What procedures apply to such complaints?
- \* To what extent does the system incorporate judicial review of complaints before or after review by the legislative body?
- \* What are the timelines for submission of complaints and their resolution?
- \* What details of the complaints and the decisions taken are published, in what format?
- \* What remedies are at the disposal of the legislative body? Do these remedies meet the criteria of effective remedies? How often have they been used? Is there public confidence in the mechanism?

## 6. Complaints to Supranational Bodies

For some election matters there is a further opportunity for remedy through monitoring and enforcement mechanisms established by supranational bodies after exhausting all available domestic remedies. The UN Human Rights Committee provides for a complaints mechanism on alleged violations of the ICCPR concerning countries that have

<sup>51</sup> Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph II.3.3.a.

ratified the First Optional Protocol on the individual communication procedure. CRPD and CEDAW have their own monitoring bodies and complaint mechanisms. Depending on the treaty, a complaint can be filed by an individual or a group of individuals against a state. Specific deadlines and requirements apply to each treaty.<sup>52</sup>

At the regional level, citizens from Council of Europe member states can lodge a complaint with the ECtHR alleging a violation of Article 3 of Protocol No.1 to the ECHR.<sup>53</sup> As Article 3 only guarantees the right of the people in the choice of their legislature, complaints lodged to the ECtHR can only be regarding legislative elections.<sup>54</sup> Judgments are binding on the member state concerned and their execution is supervised by the Committee of Ministers of the Council of Europe.

The legal analyst should ascertain what recent and on-going election cases have been brought before the UN Human Rights Committee or the ECtHR and note any applicable decisions. It is important to inquire about the status of implementation of such decisions. As procedures require the exhaustion of domestic remedies, the timeline for lodging complaints and having matters considered by the supranational bodies is lengthy and often takes several years.

### Points of Inquiry

- \* Are there any recent election-related cases brought before the UN Human Rights Committee or the ECtHR related to the country observed?
- \* Are there any recent judgments issued by the ECtHR? Are there any recent decisions issued by the UN Human Rights Committee?
- \* Are there any election-related ECtHR judgments under execution procedure? What is their current status?

## C. Decisions

Decisions on any complaint or appeal should be in writing, clear and fully reasoned, stating the legal and factual grounds, including the evidence on which they are based. The competent body should examine all the legal and factual issues presented by the parties. While the decisions do not need to address every point raised by the parties to a complaint, arguments that would be decisive to the outcome of the case should be expressly addressed. The UN Human Rights Committee, in its General Comment No. 31, called on states to assure the effective enjoyment of the rights recognized under the ICCPR

<sup>52</sup> See also “Procedure for complaints by individuals under UN human rights treaties” and available case law.

<sup>53</sup> See also ECtHR website for ongoing applications and procedures.

<sup>54</sup> According to the case law of the ECtHR, assemblies of federate, regional or autonomous entities with legislative powers can be considered as “legislatures” in the sense of Article 3 Protocol 1. Moreover, the ECtHR does not exclude the possibility of applying Article 3 to presidential elections if the Head of State in question has the power to initiate, adopt, control the passage of legislation or censure the legislative-making authorities. At the same time, the ECtHR has ruled that it does not have jurisdiction in cases related to referenda (*Cumhuriyet Halk Partisi vs Turkey*, application no. 48818/17, §§ 33 – 34 and 37 – 38).

by making direct reference to the Covenant in court decisions.<sup>55</sup> Decisions should not merely reiterate the law and facts, but provide a thorough legal analysis. Well-reasoned decisions serve as a transparency- and confidence-building measure, and also facilitate the right to appeal to a higher body by informing the interested parties of the grounds of the decision. All decisions should state to which venue the decision may be appealed and the deadline or if the decision is final.

As previously underlined, review of decisions taken should include an assessment of the timeliness, legality and transparency of decision-making and should identify cases where the competent bodies failed to provide timely or reasoned decisions, or the decisions were not in line with the law. Particular attention should be paid to consideration of the admissibility of cases and whether this results in the rejection of complaints on formal grounds. Overly restrictive format requirements may include: paper size, number of copies, notarization, signatures of specific party/candidate representatives, or exact citation of the legal provisions in question. Election commissions and courts should duly consider the substance of all complaints that raise viable claims and impartially and thoroughly examine all relevant evidence. Any decision denying admissibility on any grounds should be well-reasoned and communicated and published in a timely manner.

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55 The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.



## FOUR

# Specific Considerations for Different Election Disputes in the Electoral Process

This chapter provides an overview of common complaints and appeals encountered at different stages of the electoral process – pre-election, election day and post-election. Since any breach of electoral legislation may lead to a complaint, this handbook does not endeavour to provide an exhaustive list of all possible grievances. This chapter thus reviews some of the more recurrent complaints and appeals in the thematic areas typically followed by an ODIHR election observation activity, and highlights specific considerations related to their resolution. The legal analyst, together with other core team members, will need to identify the most important EDR issues and concrete complaints for the mission to follow.

## A. Pre-Election Complaints and Appeals

### 1. Delimitation of Electoral Boundaries

Electoral boundaries should be determined well in advance of an election and the arrival of the observation mission. These administrative decisions made by the election administration or other administrative or legislative bodies directly impact the equality of the vote for legislative elections. They should be subject to judicial review, with legal standing granted, at a minimum, to all eligible citizens whose rights are directly affected by the decisions.

In order to prevent any bias or discrimination in the constituency boundary delimitation process, administrative authorities may create special bodies, such as working groups or commissions, to provide recommendations. The scope of judicial review should also include the appointment and mandate of such special bodies.

#### Points of Inquiry

- \* When did the last delimitation of electoral boundaries take place?
- \* Are decisions on the delimitation of electoral boundaries subject to administrative complaints? If so, is the mechanism accessible and was it used? Was there clear information on outcomes and did decisions appear to be consistent?
- \* Do complaints appear to be primarily from one political grouping?
- \* Are decisions on the delimitation of electoral boundaries subject to judicial review?
- \* What is the scope of judicial review?
- \* Have any such decisions been appealed? What were the results?
- \* Is there confidence in the judicial decisions? Were all decisions taken in a timely way? Did decisions appear to be consistent and did they consider equality of the vote and other relevant considerations such as protection of minority communities?

### 2. Voter Registration

Complaints may be filed to challenge how the voter register is compiled, maintained and updated, as well as how data privacy is ensured.<sup>56</sup> The basis for such complaints may be inaccuracies in the voter list, resulting in electors being omitted or not properly withdrawn. Depending on the stage of the electoral process, such complaints can be made to the responsible administrative authority and/or courts. Restrictions to voting rights that have a constitutional element, such as voting of prisoners or people with mental

<sup>56</sup> As provided by the CCPR General Comment No. 16 and European Union General Data Protection Regulation (GDPR).

disabilities, may also fall under voter registration and can be appealed to a court or body that has jurisdiction over constitutional rights.

The administrative authority in charge of voter registration often makes voter lists publicly available in advance of election day, enabling voters to find their names on the lists and check the accuracy of their data. Voter lists or their extracts may also be made available to electoral contestants. The responsible administrative authority should have procedures in place to handle voters' requests for changes to their entry in the voter lists.<sup>57</sup> All voters, candidates, political parties and other election stakeholders should be allowed to complain about the inclusion of ineligible voters or the exclusion of eligible voters.<sup>58</sup> These requests are frequently considered by the administrative body responsible for compiling the voter lists. Administrative decisions on requests for changes to the voter register should be subject to judicial review. Often, voter registration appeals are limited to one level of review and cannot be further appealed.

Along with the election analyst or voter registration analyst, the legal analyst should clarify the procedures for voters to request changes to the voter lists, as well as the possibilities for judicial review of administrative decisions related to the voter register. The deadlines for administrative and judicial decisions should be such as to enable eligible voters to cast their ballots on election day.

The legal analyst should also provide the core team with an overview of the procedures for complaints about any grievance related to the voter list. As the latter is often managed by local government authorities or local election administration offices, the review of their decisions is frequently under the jurisdiction of local courts. LTOs play an important role in understanding the magnitude of such cases and identifying any deficiencies in the appeal process.

### Points of Inquiry

- \* What is the procedure for requesting changes to voter lists and submitting complaints about the exclusion or inclusion of voters?
- \* To what extent are these decisions subject to appeal?
- \* Who has the authority to resolve complaints about the compilation, maintenance or updating of the voter list? Is there a register of such complaints or a means of tracking such complaints?
- \* Is the public aware of procedures for requests and complaints related to the voter register? Is the public aware of the deadlines for appealing these decisions?
- \* Are decisions concerning voter registration made within enough time to allow voters to take part in the election?
- \* Have any constitutional rights cases been brought up?
- \* Are there any barriers that make it difficult for individuals to challenge their inclusion in the voter list?

57 See also *ODIHR Handbook for the Observation of Voter Registration*, (Warsaw: OSCE/ODIHR, 2012), pp. 32-33 < <https://www.osce.org/odihr/92058>>.

58 See also Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph 99 of the explanatory report.

### 3. Candidate Registration

Universal suffrage means that every citizen has the right to participate in the public affairs of their country, including through standing for office. This right is, however, not absolute and restrictions to it may apply. Those restrictions may be reasonable (e.g., age, nationality), unreasonable or disproportionate (e.g., property, education, political views, certain excessive length of residency requirements).<sup>59</sup> Deprivation of the right to stand on the basis of a court decision related to a criminal conviction needs to be assessed against applicable international standards.

The registration of candidates, political parties or candidate lists competing in the election is most frequently handled by the election administration body, either centrally or in constituencies. If registration takes place at the constituency level, appeals are often heard either by the local administrative court or by a higher election administration body. Constitutional courts may receive complaints on violations of constitutional rights. Final review of decisions on the registration of candidates should be under the jurisdiction of the courts. The scope of this review should extend to all relevant action taken by the administrative authority in order to make the challenged decision, such as verification of supporting documents or signatures collected by the prospective candidates. The burden of proof of legality and procedural propriety of the challenged decision rests with the administrative authority.

At the same time, cancellation (“de-registration”) of candidacy is an extraordinary measure that effectively deprives eligible candidates of the right to stand in election. As such, it may only be applied for the most serious violations of the law following a fair EDR process. It is often recommended that a range of sanctions be applied proportionately to the misconduct to avoid insufficiently dissuasive or excessively harsh penalties.

The legal analyst should establish what avenues of appeal exist for decisions related to candidate registration and explore whether any such decisions have been appealed. Attention should be paid to the time limits for court judgements on appeals, as late resolution may leave little or no opportunity for contestants to campaign. Effectiveness of the remedies available to the courts should also be examined. Courts should be empowered to order the registration of candidates who have been unlawfully denied registration. Merely setting aside the administrative decision on denial of registration does not by itself ensure timely registration and therefore does not effectively restore the candidates’ rights.

As the candidate registration process may have occurred before the observation mission arrived, a review of related complaints and appeals could be advisable to reveal any weaknesses in the registration process. A better understanding of contentious issues can help the election analyst assess the process and formulate recommendations for improving the process. For example, candidate registration appeals might raise issues about the process of verifying supporting signatures. Allegations of misuse of administrative

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<sup>59</sup> See Code of Good Practice in Electoral Matters, *op. cit.*, note 5, I.1.

resources during the signature collection stage should be verified by the EDR body in order to ensure that all candidates enjoy a level playing field.

### Points of Inquiry

- \* Can decisions on candidate registration be challenged? What are the deadlines?
- \* What decisions on candidate registration are subject to judicial review? Who may appeal them?
- \* What are the deadlines for judicial review and for issuing a decision?
- \* What is the scope of judicial review?
- \* What remedies are available to the courts?
- \* Have any decisions on candidate registration been appealed? What were the results? Were any rejected prospective candidates allowed to stand following a complaint or an appeal? Were any accepted prospective candidates not allowed to stand based on a complaint or appeal? How were different parties affected by this? Was there any pattern with appeals overturning decisions of complaints?
- \* Were there any delayed decisions that prevented candidates from standing or fully participating in the campaign?
- \* Did prospective candidates have confidence in the complaints and appeals process?

## 4. Campaigning

Campaign-related complaints can be based on a wide range of issues. Many campaign activities involve the exercise of the fundamental freedoms of assembly and expression and therefore restrictions to those rights could give rise to complaints. Campaign activities are often regulated in election and/or criminal legislation and codes of conduct (or ethics). Their violation may constitute a basis for complaints. Where complaints relate to a code of conduct, the legal analyst should clarify its legal nature and whether it prescribes an internal complaints mechanism.

Failure of local authorities to fulfil their campaign duties or treat candidates equally may also give rise to complaints. Campaign violations such as incitement to hatred and violence, vote buying, pressure and intimidation of voters are usually regulated by primary legislation. Other campaign related cases, for example, concerning damage to campaign materials, their unlawful posting or mandatory imprint information, may be regulated by sub-legislative rules. Campaign complaints are also often made about the misuse of public office or administrative resources and the coverage of the campaign in the media (both discussed below).

There are often multiple bodies involved in the resolution of campaign disputes. Cases related to local authorities allocating public space for posting campaign materials or the holding of campaign events may be an issue for the local courts, whereas the breach

of campaign rules by candidates and their supporters may be an issue for the election administration or law enforcement. While allegations of offenses are typically handled by law enforcement agencies, breaches of campaign rules may be investigated by electoral commissions or other administrative bodies, with a possibility of appeal to court. The core team should find out which body has the jurisdiction to consider complaints about campaign activities on the Internet. The legal analyst might also find that there are special bodies established to consider complaints on the misuse of administrative resources or the activities of the media.

Where the same complaint may be brought to multiple bodies (for example, the election administration, campaign finance oversight body and media regulatory authority), it should be explored how the different bodies understand their respective competencies and delineate them in practice. Rejection of or a mere shuffling of complaints between institutions due to unclear or overlapping jurisdiction does not allow access to effective remedy.

It is particularly important that campaign complaints are handled impartially and electoral contestants are treated equally. This can be a challenge for politically appointed election administration bodies or local and regional authorities with connections to the contestants. If candidates and political parties complain about the behaviour of their opponents in meetings with mission members, they should inquire whether any official complaints have been filed, and if not, the reason for this.

Since many campaign complaints and appeals are heard at the local level, LTOs are frequently involved in observing the handling of cases. It is important that the legal analyst be able to give the political analyst and LTOs an overview of the different types of cases they may encounter and guide the observers in determining with whom they should meet and discuss concerning campaign complaints. LTOs should be instructed to make efforts to obtain copies of any complaints-related documents and decisions.

As part of the assessment, the political analyst, together with the legal analyst, should review the sanctions available for violations by candidates and parties. Where the competent authorities are only able to issue warnings to contestants who breach electoral law, the remedy may not be effective.

### **Vote buying**

Allegations of vote buying can be a typical feature of a campaign-related complaint. The legal analyst should assist the political analyst in identifying the proper channels for such complaints. The legal analyst should also clarify the elements of the corresponding offence(s) under criminal and/or administrative law and what requirements need to be met for successful prosecution. It is important to note whether these offences are prosecuted as a matter of public interest. An inquiry into the official complaints on vote buying made in the previous electoral cycle may reveal pre-existing challenges, e.g., that citizens are reluctant to report vote buying because selling one's vote is also a punishable offence or that the political opposition does not trust the authorities to effectively handle

such complaints. It should also be noted that vote-buying complaints often include an element of misuse of administrative resources. The legal analyst should also explore whether law enforcement bodies do not pursue prosecution due to political dependence of some kind.

### **Misuse of administrative resources**

Misuse of public or “administrative” resources to obtain an electoral advantage is another offence that may occur during the campaign period, although it may also happen at other stages of the election process. The term broadly refers to undue use of official positions, public media, connections, financial and physical resources to influence the outcome of elections.<sup>60</sup> The misuse of administrative resources may include the use of official vehicles or office space for campaign purposes, requiring public servants to participate in the campaign, using official ceremonies or events to campaign and announcing or opening publicly funded projects during the campaign. Such activities put some candidates at a disadvantage and may go as far as to blur the line between state and party, challenging paragraph 5.4 of the Copenhagen Document.<sup>61</sup> Incumbents exploiting the benefits of their position is a frequent case of misuse of administrative resources.

International good practice on preventing and responding to the misuse of administrative resources underscores the importance of respect for the rule of law and political freedoms; impartiality, neutrality and professionalism of public servants; transparency in the use of public funds; and equality of opportunity for all electoral contestants.<sup>62</sup> The legal analyst should therefore clarify whether the use of administrative resources is sufficiently regulated and whether there is a mechanism for complaining about violations. In doing this, the legal analyst may need to review the broader legal framework as other legislation may address the rules on the proper use of administrative resources and public office. In this context, the legal analyst should identify whether there is a distinction between the activities in which elected and unelected officials can engage. Where formal allegations of misuse of administrative resources are made, the legal analyst and relevant mission members should establish how effectively such claims are investigated and what measures are being taken in response. International standards and good practice should also be used to develop recommendations for improving the legal framework and practices to counter the problem.

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60 See ODIHR and Venice Commission, “Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources During Electoral Processes”, March 2014, par. 11, <<https://www.osce.org/odihr/elections/227506>>.

61 In paragraph 5.4 of the 1990 OSCE Copenhagen Document, participating States “agree to make a clear separation between the State and political parties; in particular, political parties will not be merged with the State”.

62 See ODIHR and Venice Commission *Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during Electoral Processes*, 14 March 2016, <[https://www.osce.org/odihr/elections/227506?do\\_wload=true](https://www.osce.org/odihr/elections/227506?do_wload=true)>.

## Points of Inquiry

- \* What action can be taken by complainants against infringements of campaign rules? Are these accessible?
- \* Do stakeholders have the necessary knowledge and understanding of the complaint procedures on campaign issues? Is there confidence in the process?
- \* Have complaints been made about campaign activities? If so, how were they handled? Did decisions provide for effective remedy? From which political groupings, if any, did complaints originate?
- \* Are there specific mechanisms for complaining about violations or unequal treatment by state and local authorities? Do they offer effective remedies?
- \* Are there provisions in the law aimed at preventing misuse of administrative resources? Is there a specific complaint mechanism in place? What remedies are available and how effective are they?
- \* Have any complaints alleging misuse of administrative resources been made? How were they dealt with?
- \* Are any referrals being made in regards to vote buying and other campaign-related electoral offences?
- \* What is the status of investigations of any electoral offences in the present electoral process? Are decisions enforced? Is there any overlap in law and practice between oversight bodies?

## 5. Campaign Financing

Compliance with campaign finance rules should be monitored by an independent oversight body, which should also have the power to sanction misconduct. In some countries, this authority is given to the central election administration body, while in other countries other administrative agencies are entrusted with the task.<sup>63</sup> Monitoring campaign finance may involve tracking of contributions and expenses but more frequently involves audits of campaign finance reports. In line with existing good practice, some countries require reporting during the campaign and review them prior to the election. However, final campaign finance reports are submitted only after the election.

While assessing the requisite legal framework, the campaign finance analyst should evaluate the overall quality of the law and how this impacts its practical implementation. Special attention should be accorded to the regulation of third party and in-kind contributions. If reporting requirements exist, the sanctions in place for non-reporting should be noted, as well as those for late, incomplete or inaccurate reporting, and for accepting illegal and excessive contributions.

The campaign finance analyst, together with the legal and political analysts, should also explore complaint handling and responses by the campaign finance oversight body.

<sup>63</sup> See also *ODIHR Handbook for the Observation of Campaign Finance*, pp. 51-55. <<https://www.osce.org/odihr/elections/135516?download=true>>

Allegations of improprieties may be made by different actors, e.g., voters, civil society organizations and electoral contestants. Where the supervisory body actively monitors finances and considers complaints during the campaign period, the ability of the body to demonstrate impartiality becomes particularly important. The powers of different bodies to conduct their own investigations, the timing of any investigation or any sanctioning of contestants should be reviewed by observers to ensure it is part of the regular activities of the body and not politically motivated.

Where campaign finance is monitored by an oversight body other than the election administration, there might be a different specialised means of appealing decisions. Likewise, appeals of the oversight body's decisions may follow a different timeline than other election disputes.

The campaign finance oversight body should have a range of sanctions at its disposal that are effective, proportionate and dissuasive: from warnings and fines for minor infractions to the loss of public funding (where applicable) and criminal liability for serious violations. The analysts should assess the adequacy of the legal framework and its application. However, the work of the oversight body normally continues between elections, making a full assessment difficult. Opinions of various stakeholders and past performance of the supervisory body could complement the mission's observations. Observers should also assess whether the oversight body has sufficient resources to carry out its work professionally, including effective handling of complaints and investigations into possible infractions.

### Points of Inquiry

- \* Is compliance with campaign finance rules monitored by an independent oversight body? How does this body handle complaints and conduct investigations? Does it have authority to conduct its own investigations? Is there confidence in the work of the body? Does it have the necessary capacity (e.g., forensic, external audit) to address complaints?
- \* What sanctions can the campaign finance oversight body impose? Are they effective, proportionate and dissuasive?
- \* Have complaints been made to the campaign finance oversight body? How were different political groupings affected?
- \* Are the decisions of such bodies accessible to candidates and provided in a timely manner? Can they be appealed by parties and individual candidates and civil society organizations?
- \* Do the complaints and appeals indicate any issues with the campaign finance regulations?

## 6. Election Administration

While election administration bodies are often on the receiving end of complaints, their actions (or inaction) may also become the subject matter of complaints and appeals. Action and inaction of lower level election administration bodies are usually appealed to the higher level of the election administration and to courts. Good electoral practice recommends a clear hierarchy of competence over appeals to avoid situations in which an appeal is rejected due to the lack of jurisdiction, or simultaneously considered by several bodies. The appellant should not be allowed to choose the appellate body considering their case.<sup>64</sup>

During the pre-election period, complaints and appeals could relate to any of the competences exercised by the election administration bodies, for example, the delimitation of constituency boundaries, formation of lower level election administration bodies and the registration of contestants and observers. The election analyst together with the legal analyst should clarify the existing avenues for appeal against various decisions, also noting any types of decisions that may not be appealed. As a general rule, election law should provide that all decisions, action and inaction of election administration at all levels are subject to judicial review.

In addition to individual decisions, election administration bodies may be authorised to adopt generally applicable (normative) regulations. These regulations should be subject to appeal. In some legal systems such review is possible only through the submission of a constitutional complaint. The legal analyst should determine who is eligible to file a constitutional complaint, as this right is restricted in many countries.<sup>65</sup> Still, individuals whose rights and interests are negatively affected by decisions taken on the basis of such regulations should be able to challenge the regulations themselves through an effective judicial review.

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64 Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph II.3.3.c.

65 Constitutional courts are not accessible for individual complaints in all countries and the possibility of individual constitutional complaints is not required by international law. The legal standing to address a constitutional court may be limited to specific officials and institutions. However, the ECtHR has considered it a violation of the right to effective remedy under Article 13 of the ECHR if a constitutional review is not directly accessible by the individual who claims a rights violation, in the absence of any other effective remedy (see *Petkov and others v. Bulgaria*).

## Points of Inquiry

- \* Does the election administration have an administrative complaints system? If so, is this accessible to all?
- \* Are all types of decisions, actions and inactions of election administration at all levels subject to judicial review?
- \* Has the election administration provided information on the number of complaints filed, their status and adjudications?
- \* What avenues of appeal are available against decisions, actions and inaction of election administration bodies? Where multiple forums for appeal exist, how do adjudicating bodies communicate with each other to prevent overlap or contradictory decisions? Do these efforts work? How is information provided about which specific forum to appeal to? Are there any time limits? How trusted are the different forums?
- \* Is a judicial review of regulations adopted by election administration provided for? What is the process? Are there any time limits for such reviews? Are reviews made in a timely fashion? Which political groups request judicial reviews? Is the reviewing body trusted? Does there appear to be any political pressure on the reviewing body?
- \* Have any decisions/actions/inaction of the election administration been appealed? How were these appeals handled?
- \* Are there any cases that could or did stop the election being held as scheduled?

## 7. New Voting Technologies

Special attention should be given to any legal challenges related to new voting technologies (NVT). Introduction of NVT often pursues a stated aim to strengthen public confidence in the election process and ensure reliability of voting results.<sup>66</sup> Challenges to NVT may be raised at different levels: from the constitutionality of the introduction of NVT as such, to the procurement procedures for election technologies and the admissibility of electronic evidence. The way in which complaints related to NVT are handled also impacts the overall confidence in the election process.

The legal analyst should assist the election analyst and, where present, the NVT analyst, to explore whether NVT-related disputes are handled in line with the national legal framework and applicable international standards on legal and technical requirements for NVT. A substantive assessment should establish whether the decisions made on NVT-related complaints uphold the international standards and good practices on electronic voting, including transparency, accountability, reliability and security of the system.<sup>67</sup> It should be borne in mind that NVT systems must operate in compliance with

66 See also *ODIHR Handbook for the observation of New Voting Technologies*, (Warsaw: OSCE/ODIHR, 2013) <<https://www.osce.org/odihr/elections/104939>>.

67 See also Recommendation CM/Rec(2017)5 of the Council of Europe's Committee of Ministers to member States on standards for e-voting and the accompanying Guidelines and Explanatory Memorandum.

international commitments for democratic elections, including universal, equal, free and secret suffrage.

### Points of Inquiry

- \* Are there any NVT-related disputes in this election? What is their scope?
- \* Is information on legal and technical requirements for NVT publicly available to help facilitate complaints?
- \* Are private ICT companies involved? If so, are they sufficiently informed about complaints and appeals procedures and deadlines?
- \* Do competent bodies have sufficient time, resources and expertise to manage cases related to NVT and handle electronic evidence?

## 8. Media

Freedom of expression, including freedom to impart and receive information, is one of the pillars of a genuinely democratic electoral process. Any system of dispute resolution with regard to the media must be guided by the overarching aim of preserving free and rigorous debate on matters of public concern. Heavy-handed use of sanctions against the media risks encouraging self-censorship and stifles investigative journalism. Restrictions to freedom of expression should be prescribed by law, necessary in a democratic society and should follow the principle of proportionality.<sup>68</sup> Sanctions should be commensurate with the gravity of the offence committed. Temporary suspension of broadcasts or a license should be adopted only for the most serious and repeated violations and should be subject to judicial appeal.

Public media have special duties to provide fair, balanced and impartial coverage of election campaigns. They are also frequently obliged to ensure equitable coverage of the contestants and/or provide them with free airtime or print space on an equal basis. Complaints against the media are often part of the campaign environment. Contestants, voters, observers or other stakeholders may file complaints about biased coverage of a contestant in the media. Parties and candidates may file complaints alleging excessive media coverage of their opponents. Other complaints might be about unequal treatment in access to the media and incumbency advantage, violation of electoral silence, publication of opinion polls, use of inflammatory language, and spreading of false or incomplete news. Complaints may highlight the growing use of social media and the challenges associated with its regulation.

The media analyst, with the assistance of the legal analyst, should carry out a review of the legal framework to establish the avenues open for complaints against the conduct of print, electronic or online media during the campaign. Media coverage of the

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68 See also paragraph 24 of the OSCE Copenhagen Document on proportionality of restrictions and United Nations Human Rights Committee General Comment No. 34 paragraphs 33 and 34.

campaign is usually monitored by a designated authority, which could be a permanent media regulatory body, a self-regulatory body, the election administration, or an *ad hoc* entity specifically created for the election period. In any case, the oversight body should be independent and credible, while its members should be qualified and impartial. The regulator should establish procedures to act *ex-officio*, and to receive, investigate, hear and resolve complaints about unfair or unlawful media coverage.<sup>69</sup> Any regulation of media coverage of elections issued by the election administration and/or media regulatory authorities should clearly set deadlines for filing and resolving complaints.

The media analyst, with the help of the legal analyst, must determine how defamation cases can be brought. Under international law, defamation should not be a criminal offence and defamation laws should ensure sufficient protection is available to journalists and excessive punitive measures are avoided.<sup>70</sup> All allegations of defamation by and against public officials should be handled in line with internationally recommended good practice, including the principle that public officials are subject to greater scrutiny and criticism than the average citizen.<sup>71</sup>

The legal analyst should also assist the media analyst in evaluating existing complaint mechanisms, including the capacity of a media regulator to act as an arbiter, as well as the proportionality and effectiveness of sanctions available to the regulator. Decisions of this authority should be subject to prompt and effective judicial review.

The media analyst, with the help of the legal analyst, should also consider any on-going prosecutions of journalists and media workers, as criminal cases may have been brought against them in an effort to limit their freedom of expression. Likewise, the freedom of movement and security of journalists and media workers should be considered to assess whether journalists and media workers have either been prevented from covering or harmed at a campaign event.

### Points of Inquiry

- \* How does the legal framework provide for complaints against the conduct of media professionals?
- \* Is media coverage of the campaign supervised by a designated authority? Is this authority perceived as effective, independent, impartial and professional? Does it have the necessary capacity (in terms of staff, resources, technical knowledge) to deal with complaints?
- \* What range of sanctions against the media is available to the supervisory body? Does it provide for proportionate sanctions that safeguard the freedom of the media?

69 See also *ODIHR Handbook on Media Monitoring for Election Observation Missions*, p. 27. <<https://www.osce.org/odihr/92057?download=true>>

70 United Nations Human Rights Committee General Comment No. 34 paragraph 47.

71 See *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, Article 19, 2017, available at <[https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-\(online\)-.pdf](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf)>.

- \* Have there been any complaints against the media so far in the electoral process? Who brought them and do they affect different political entities? How were the cases handled?
- \* What is the legal framework for defamation? Is it de-criminalised? What are the penalties? Do public officials enjoy special legal protection against media defamation? Are there any recent or on-going defamation cases?
- \* Have any journalists filed complaints about their access to election events or their security in such events?

## B. Election Day Complaints and Appeals

On election day itself, grievances by voters, election contestants, observers, election administration staff and other stakeholders may be voiced. Timely and effective resolution of these grievances contributes to greater confidence in the election administration and election results. There may be shorter deadlines for filing complaints and resolving disputes that arise on election day or immediately afterwards than in the pre-election period. Certain types of election-day complaints may need to be considered before polling ends or the results can be tabulated.

The legal analyst should brief short-term observers (STOs), LTOs and other core team members on the issues relevant for their observation and assessment of the election day-related complaint mechanisms.

### 1. Voter Identification and Voter Lists

Complaints related to voter identification and voter lists are usually made by voters who have been turned away for lack of proper ID or whose names were not found on the voter list, thus preventing them from exercising their right to vote. The legal framework should include procedures enabling such voters to seek legal redress by granting them the right to appeal their rejection or non-inclusion in the voter list to a local court. Voters should only be added to voter lists at polling stations on election day by a court decision.<sup>72</sup> The legal analyst should be able to provide STOs with an overview about the possibility and procedure for filing voter registration complaints on election day and any inquiries they should make.

All such mechanisms should be assessed by the legal analyst for their effectiveness and compliance with other international standards. One specific consideration for voter registration complaints on election day is the location of the court or body where a voter can submit their complaint: how far do voters have to travel to have the decision reviewed? Where judicial review on election day is possible it should be within a reasonable distance from the polling stations and expeditiously processed.

<sup>72</sup> Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph I.1.2.iv.

## 2. Violations of Election Day Procedures

Complaints about violations of election day procedures may range from minor irregularities to large-scale manipulation that may be committed by polling officials, voters, observers or party representatives. The recipient of such complaints is typically the election administration and law enforcement bodies. The legal framework should provide for prompt handling of such complaints at all levels of the election administration. Election observers should assess to what extent the handling of complaints complies with the requirements of an impartial, effective and transparent process. The election law should include special procedures and deadlines for lodging and handling election day-related complaints.

Before election day, the legal analyst should inquire whether there is a special form for the submission of complaints, whether complaints are recorded in the polling station logbook and there are procedures for notifying or forwarding complaints to a higher-level election administration body. The manual on procedures for election day itself often contains instructions to polling staff on how to receive and consider complaints on election day. STOs should be instructed to inquire about any formal complaints that have been filed at the polling station and observe those filed in their presence. They should also ask complainants present whether they are satisfied with the handling of their complaint.

Election day complaints are generally first considered by the polling station officials at which the incident occurred. As a result, officials often have to deal with complaints against their own actions or inaction. This makes the right to appeal even more important. The legal analyst should look at how polling station decisions on complaints can be appealed and the accessibility of the appeal process. Equally, the legal analyst should establish if complaints against actions or inaction of polling station officials may be filed directly to a higher-level election administration body.

Citizen observers and party representatives may play an active role in monitoring the integrity of the electoral process. They often have the right to file complaints about any violations they observe on election day; if the legal framework does not grant them this right or they are prevented from exercising it, the legal analyst should note this restriction when assessing the EDR process. STOs should see citizen observers and party representatives as a resource and ask them if there have been any formal complaints filed, in addition to inquiring with the chairperson of the polling station. STOs should note any refusal by poll workers to accept (register) them. The lack of access of observers to certain procedures, such as counting and tabulation, raises questions about the transparency and integrity of the process and might be the basis for a complaint.

Complaints about irregularities on election day may also be made to the police and other law enforcement bodies. The election observation mission should inquire about the instructions given to law enforcement agencies for handling electoral offences and how

well they are understood by personnel.<sup>73</sup> The police may also be approached to restore order in a polling station and may learn about electoral offences being committed. Complaints may also concern the actions (or inaction) of the police, itself.

### 3. Breach of Electoral Silence

Electoral silence is the prohibition of campaigning on election day or during a short period beforehand. Complaints about violation of the silence period are normally filed with the election administration or another body. If allegations concern the use of media, complaints and additional inquiries could be made with the media supervisory body. The media analyst and the legal analyst should assess the effectiveness of response and remedies provided by the competent authorities, as well as the proportionality of sanctions available and applied. As campaigning online and through social media is increasingly more prevalent, the media, political and legal analysts should consider how violations of electoral silence are treated when the content is online and the challenges this presents for regulation and enforcement. The dissemination of unsolicited text messages to groups of voters or outreach through social networks with political or campaign content prior to or on election day may constitute a breach of campaign silence provisions. It may additionally be considered a violation of provisions on personal data protection.

#### Points of Inquiry

- \* What procedures does the legal framework provide for voters who have been turned away for lack of proper ID or whose names could not be found on voter lists? How accessible are these remedies? Were they used? Were some regions affected more than others?
- \* Who may complain about irregularities observed at polling stations? What procedures apply to such complaints? How are the complaints recorded?
- \* What is the procedure for filing an appeal against a decision on a complaint by polling station officials? How accessible is the appeal process?
- \* Has the mission observed any consideration of complaints about irregularities in polling stations? How were they handled and recorded? What confidence was there in these mechanisms?
- \* Have citizen observers informed mission members about any irregularities during election day? Have citizen observers filed any official complaints? Have party representatives filed complaints?
- \* Has the election administration provided information on complaints filed, their status and adjudications?
- \* Have any complaints alleging electoral offences been made on election day? What types of offences? How were these complaints handled? Were any regions or political groups particularly affected?

<sup>73</sup> See also *ODIHR Guidelines for Public Security Providers in Elections*, (Warsaw: OSCE/ODIHR, 2017), pp. 51-54 <<https://www.osce.org/odihr/elections/339581>>.

\* What avenues are open for filing complaints about breaches of electoral silence? Have any such complaints been made or did competent authorities reacted ex-officio? How were they handled?

Complaints regarding irregularities that occurred during voting or counting of votes in polling stations on election day may, in some instances, be subsequently filed to the higher-level election administration body. As with election day complaints, there is often a shortened timeframe for the filing and review of post-election day complaints. The higher-level election administration body should consider any complaint alleging serious misconduct or a major irregularity committed on election day on its merits even if they fall short of meeting the formal admissibility requirements or miss the deadline (see also Chapter Two above).

### C. Appeals of Election Results

Confidence in the electoral process is upheld when challenges to election results are handled by an independent body, openly and transparently, within reasonable deadlines, and with due process. Election legislation often directly regulates complaints that challenge the results of an entire constituency or nationwide.

Good electoral practice suggests that the right to bring forward such challenges should be granted to all candidates and voters in the respective constituency, although a reasonable quorum may be imposed for appeals against election results filed by voters.<sup>74</sup> In practice, a number of participating States limit the right to appeal constituency or national level results to contestants. The legal analyst should review who has the right to appeal results at each level and assess whether that right is unduly restricted or balanced with the right of candidates who receive the necessary number of votes required by law to be duly installed in office.<sup>75</sup>

A number of participating States allow slightly longer timelines for the submission and review of challenges to election results. While such disputes should generally be settled quickly, there are a number of additional factors to consider given the importance of these challenges. First, deadlines should allow for the preparation of substantiated complaints and appeals that comply with the legal requirements. Second, the time for considering such complaints should be sufficient to address all allegations made, including by inspecting all material evidence and, if necessary, conducting recounts of ballots. Third, the final election results should not be established until all admitted challenges are resolved and possibilities for appeals exhausted. As a matter of good practice, the timeframe for filing and deciding challenges to preliminary results should not exceed one month, and all complaints and appeals should be resolved within two months of the election.

<sup>74</sup> Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph II.3.3.f.

<sup>75</sup> OSCE 1990 Copenhagen Document, paragraph 7.9.

The competent authority in charge of resolving post-election challenges to voting or election results should have the right to examine all evidence from one or more polling stations or counting centres, in the constituency in which the results are being challenged. The authority should be vested with powers to annul voting or election results at any level at which irregularities may have affected the outcome.<sup>76</sup> Adjudicators of post-election challenges should receive sufficient guidance in handling such challenges (i.e., under what circumstances they must order a recount or annul, partially or fully, the results). The process should be regulated by law and be subject to judicial review to the highest court, or if a lower court, with appeal to the highest court, or the equivalent. To ensure confidence in the results, voters should be informed of possibilities for redress.<sup>77</sup> As a general rule, it must be possible to annul the entire election or the results of one constituency or polling station.<sup>78</sup> Annulment of election results in specific areas should trigger a new election in these areas.

### Points of Inquiry

- \* Has the election administration provided information on complaints filed, their status and adjudications?
- \* Does the legal framework provide for appeals against results? Is legal standing granted sufficiently widely? What procedures and deadlines apply to such appeals?
- \* Does the adjudicating authority have sufficient time and resources to follow due process?
- \* Is the adjudicating authority vested with powers to examine all relevant evidence, and if necessary, order a recount of ballot material?
- \* Is the adjudicating authority vested with powers to annul voting or election results where irregularities may have affected the outcome? How well are these standards and legal procedures understood?
- \* Have there been any challenges to the election results? How were they handled? Which were the most serious?
- \* Were new elections called in the areas in which results were annulled?
- \* Is there confidence in the EDR system for challenging local-level and national-level results?
- \* What reasons were given for decisions not to file complaints and appeals?

<sup>76</sup> Code of Good Practice in Electoral Matters, *op. cit.*, note 5, paragraph II.3.3.e.

<sup>77</sup> UNHRC, GC 25, paragraph 20.

<sup>78</sup> Code of Good Practice in Electoral matters, *op. cit.*, note 5, paragraph II.3.3.e



## **FIVE**

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# Participation of Under-Represented Groups

Women, national minorities and people with disabilities remain under represented in many contexts, as candidates, voters, members of election administrations, media representatives and observers. They can face different barriers, such as access to voter or candidate registration, media, polling stations, EDR and others, as well as intersectional and multiple discrimination. The participation of these groups is mainstreamed by ODIHR throughout its election observation activities, including follow-up to electoral recommendations and reporting. General challenges about how specific outcomes of the EDR process may affect these under-represented groups are detailed in this chapter.

## A. Women

Gender equality should be assessed in the EDR process as it is in other thematic areas observed by election observation missions.<sup>79</sup> The legal analyst, together with the leading analyst on women's participation in electoral process and other mission members, should pay attention to any grievances about unequal treatment of women in the electoral process, for example, breach of gender quotas for candidate lists or unequal access to campaign opportunities or the media. The legal analyst should note if civil society groups, such as those representing women's or minority interests, lack the right to lodge complaints in the public interest.

The legal analyst should observe related complaints to assess whether they are handled in the same manner as others. The legal analyst should also take note when such grievances exist, but the women affected choose not to file official complaints. This may indicate a lack of trust in the system or an additional burden that women face when filing them. The legal analyst should assess whether in practice women face unequal conditions in accessing the EDR process. While the law might provide equal conditions, in practice procedures could disproportionately burden women. 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.

The legal analyst should consider the number of women in the dispute resolution body and note whether there is any limitation to their equal participation in questioning the parties or in discussions concerning the decision.

Working with other analysts, the legal analyst should assess to what extent the EDR system contributes to the advancement of women's participation in elections. State parties to CEDAW have a positive obligation to improve the *de facto* position of women through concrete and effective measures, and to address the persistence of gender-based stereotypes.<sup>80</sup> This obligation includes taking temporary special measures to advance the political participation of women, and such measures may also be introduced in EDR procedures.<sup>81</sup> Where observation reveals discriminatory treatment of women in the EDR system, the observation mission should also recommend taking special measures, such as gender awareness training for dispute resolution bodies.

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79 See *ODIHR Handbook for Monitoring Women's Participation in Elections*, (OSCE/ODIHR: Warsaw 2004) <<https://www.osce.org/odihr/elections/13938>>.

80 CEDAW Committee General Recommendation No. 25, art. 4.1, <<https://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>>. Also see, 2004 OSCE Action Plan for the Promotion of Gender Equality, 7 December 2004, <<https://www.osce.org/mc/23295?download=true>> paragraph 44.d.

81 For example, free legal assistance for women candidates.

## Points of Inquiry

- \* Are there any obstacles for women in accessing justice in general and any institutional and procedural obstacles for women to access EDR in particular?
- \* Have any grievances been voiced by interlocutors about unequal treatment of women in any roles in the electoral process? If so, were complaints filed?
- \* In practice, do women face any unequal conditions in accessing the EDR process?
- \* Is there any way the EDR system could be improved to advance women's participation in elections?

## B. National Minorities

OSCE participating States have committed to ensuring effective participation of national minorities in public affairs, including elections. Some election observation missions therefore include a designated national minority analyst. The legal analyst, along with the national minority analyst, should assess how national minorities are able to access the EDR system.<sup>82</sup>

In countries with geographical concentration of national minorities, there may be specific legislation about the provision of official documents in minority languages and the right to use them in official proceedings or have a translator. The legal analyst should review all relevant legislation and assess whether the election dispute procedures are in compliance. Even in the absence of such legislation, the election or legal analyst should identify the language(s) in which relevant documents and EDR educational materials are provided, and assess the extent to which the presence or lack of such materials in the minority language impacts access for the community. In countries with concentrated national minority populations, the core team should also consider the location of the institutions involved in the election dispute resolution process. Particular attention should be paid to less visible obstacles that members of minority communities may face. Filing complaints carries the risk of stigma, which puts the members of a specific group in a situation in which not only they have to balance their individual exposure, but also the exposure of their entire community to any potentially undue repercussions. Minority voters or their representatives may lodge complaints concerning measures aimed at suppressing or manipulating their votes or a lack of election materials in their native language.

The composition of the adjudicating body could potentially impact the treatment of national minorities in the EDR process and confidence in the body. The core team should consider whether there are any provisions for national minority representation in election management bodies and the courts. The legal analyst may also be well placed to observe how national minorities are treated by the EDR bodies through directly observing

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<sup>82</sup> See, *ODIHR Handbook on Observing and Promoting the Participation of National Minorities*, (Warsaw: OSCE/ODIHR, 2014) <<https://www.osce.org/odihr/elections/124067>>.

proceedings or reviewing related documents. Indications of bias or distinctions based on national minority status should be examined for potential discriminatory treatment.<sup>83</sup>

### Points of Inquiry

- \* Is there any specific legislation on the use of national minority languages?
- \* Are documents and educational materials provided in national minority languages?
- \* Are national minorities able to effectively access and use the EDR system?
- \* Are there provisions for national minority representation in the adjudicating bodies?
- \* Are there any indications of bias or potentially discriminatory treatment of national minorities in the EDR process?
- \* Do any complaints concern the right of national minorities in the election process?

## C. People with Disabilities

Assessment of the ability of people with disabilities to fully participate in the election process is mainstreamed in election observation activities and all mission members have the responsibility to take this into consideration in their thematic and geographic areas.<sup>84</sup> With respect to EDR, the legal analyst should inquire into any complaints and appeals made in this regard. Such information could be obtained from public institutions, advocacy groups and other organizations working on disability issues.

The UN Convention on the Rights of Persons with Disabilities requires that all electoral processes be made accessible to people with disabilities. This should be achieved either through proactive efforts to make services accessible for all or through reasonable accommodation to ensure that people with disabilities can exercise their rights on an equal basis with others.<sup>85</sup> Key electoral information, including on how to lodge complaints and appeals, should be made available in multiple, accessible formats, which may include Braille, large print, audio, easy-to-understand versions and sign language. The election or legal analyst should observe whether educational materials on the election dispute process are available in accessible formats and inquire with disabled people's organizations if there are specific concerns related to access to the process. The legal analyst should also be mindful of access to EDR mechanisms for people with disabilities (e.g., physical access, availability of sign language) when directly observing proceedings in courts and other facilities.

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<sup>83</sup> A finding of discrimination requires assessing whether people in relatively similar situations are treated differently without an objective and reasonable justification.

<sup>84</sup> See, *ODIHR Handbook on Observing and Promoting the Electoral Participation of Persons with Disabilities*, (Warsaw: OSCE/ODIHR, 2017). <<https://www.osce.org/odihr/elections/339571?download=true>>

<sup>85</sup> Learn more about Convention on the Rights of Persons with Disabilities (CRPD) here: <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>.

## Points of Inquiry

- \* Have any grievances been voiced in relation to the participation of people with disabilities in the electoral process, including as voters, candidates or members of the electoral administration? If so, were complaints filed?
- \* Are important documents and educational materials provided in accessible formats?
- \* Are EDR mechanisms accessible to people with disabilities, including physical access to the relevant facilities?



## SIX

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# The Role of ODIHR Missions and Observers

Election observation activities aim at assessing the extent to which a country's EDR system is implemented in practice and meets OSCE commitments and other international obligations and standards for democratic elections, as well as international good practice. This requires careful examination of constitutional requirements, laws and election regulations and a thorough observation of the EDR process. Authoritative instruments and reports on the relevant issues, such as rule of law and independence of the judiciary, should also be consulted, including those of the UN human rights bodies and special mandates, Venice Commission and other Council of Europe bodies.

Under the overall responsibility of the head of election observation activity, a number of core team members, LTOs and STOs have a role in assessing the election dispute resolution process at various stages of the electoral process. This chapter provides guidance for

the analysts and other mission members, as well as suggestions for needs assessment missions and follow-up activities.

## A. Needs Assessment Mission

Needs assessment missions (NAMs) are deployed by ODIHR to assess the needs for an election observation activity in a participating State. The NAM meets with a variety of election stakeholders to learn about the current status of election preparations and developments in the legal framework, as well as to gauge confidence in the process.

### Points of Inquiry

- \* Have there been any amendments to the EDR-related legislation or procedures?
- \* How does the interlocutor assess the legal framework for EDR? Do the deadlines provide adequate time for preparation and consideration and still allow for an effective remedy?
- \* Are there any restrictions on the right to file a complaint?
- \* What was the subject of the largest numbers of complaints (if any) during the previous election? How were the disputes resolved? Are there any concerns that decisions were not followed?
- \* Was any action taken to address previous ODIHR recommendations related to EDR? If not, what impeded the implementation of the recommendations?
- \* How were the criminal investigations from the previous election resolved?
- \* Have there been any election-related complaints since the previous election? Have any matters been brought to the UN Human Rights Council, ECtHR, UN bodies, or the European Ombudsman (whenever appropriate)?
- \* Where ODIHR is aware of a complaint to or judgments by the ECtHR in specific countries, what is the state of their implementation?
- \* Is there confidence in the election administration, the courts and other adjudicating bodies?
- \* Has the institutional independence of the courts been affected since the previous election? Do stakeholders have confidence in the independence of the judiciary?

## B. Election Observation Activity

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 is primarily responsible for assessing the legal framework for complaints and appeals, following the dispute process and analysing the implementation of procedures and the substance of decisions.

The basis for making assessments and recommendations about EDR is national legislation, OSCE commitments and other international obligations and standards for democratic elections, as outlined in Chapter Two and Annex A. Where appropriate, good practice should also be considered and referenced.

While OSCE commitments apply to all participating States, the legal analyst should also consider specific rules within a given country, as well as other relevant international obligations and standards, for example the UN, Council of Europe and CIS instruments.

The election observation activity should also consider previous assessments of the country's EDR system, as well as the broader legal framework. Such analysis may be found in past ODIHR election observation reports, legal opinions issued jointly by ODIHR and the Venice Commission, reports of citizen observer groups and other documents from state institutions and international structures. In addition, the election observation activity should constructively suggest corrections, improvements and good practices that could be incorporated into legislation, especially if the assessment identifies serious shortcomings. Even where the legal framework provides a foundation for the effective resolution of election disputes, the analyst must also assess its implementation in practice. Other core team analysts need to be aware of specific EDR issues in their respective areas and assess them in co-operation with the legal analyst.

The complaints and appeals section of an observation report should explain and assess the dispute resolution system as concisely as possible, in a way that is understandable to a non-technical audience but in enough depth to present a nuanced assessment. The evaluation of the legal framework and related procedures should be balanced and identify both positive and negative elements. Significant attention should be paid to the implementation of the legal framework in practice and include first-hand observations of the process. The substance and handling of specific cases should be used to illustrate the strengths and weaknesses in the system or raise key issues for the overall conduct of democratic elections.

The main tasks of the legal analyst are to:

- Analyse the legal framework for electoral complaints and appeals to:
  - ✓ Evaluate if the system is clearly and adequately regulated by law;
  - ✓ Assess how legislation meets international standards, OSCE commitments, and international good practice for the resolution of election disputes;
  - ✓ Identify inconsistencies and gaps in the legislation that require further elaboration; and
  - ✓ Review the timeline for the lodging and consideration of complaints and the impact it has on different phases of the election process.
- Acquire a broader understanding of the rule of law in the country and confidence in the judiciary and assess its impact on the election dispute resolution process.
- Provide the mission with a detailed description of the country's election dispute resolution system.

- Obtain a thorough grasp of the prescribed procedures for filing a complaint and how the complaints are handled procedurally by the respective authority; understand how the commissions/courts register complaints/appeals and then process them; establish contacts with the courts and commissions in order to observe the handling of complaints.
- Track all election-related complaints to have a better understanding of the nature of the complaints and assess compliance with the deadlines for submission and review.
- Observe, in person as much as possible, the handling of complaints and appeals by competent authorities; evaluate the fairness of the process, the respect for due process and the rights of the complainant and respondent.
- Analyse decisions on complaints and appeals to assess whether their justification, and to identify any inconsistencies, political bias, etc.
- Analyse the substance of complaints to assess stakeholders' competence to lodge effective complaints and to identify any patterns (e.g., geographic, issues); examine complaints rejected without review or referral to another body.
- Inquire with interlocutors about specific complaints raised, as well as trust and confidence in the EDR bodies; understand when and why a complaint is not filed.
- Inquire with interlocutors about their assessment of the election dispute resolution process, communication with the relevant EDR authorities and whether there is sufficient awareness of the process among interested parties.
- Provide guidance and direct the attention of other core team analysts, LTOs and STOs to specific aspects of electoral complaints and appeals for their observation; analyse the information supplied by LTOs and STOs.
- Assist other core team members in analysing the legal framework and practice of handling complaints and appeals in their thematic areas, including voter and candidate registration, campaigning and campaign finance, media and national minorities.
- Jointly with other core team analysts, develop recommendations for improvements to the legal framework and in the practice of handling electoral complaints and appeals.
- Collect and report on the number and nature and assess the handling of complaints, appeals and election offenses throughout the election process.
- Assess the accessibility, fairness, effectiveness and transparency of the EDR process, including for under-represented groups, such as women, people with disabilities and national minorities.
- Assess the legality/fairness/consistency of EDR decisions of election management bodies, courts and other institutions, and identify any cases of specific or systematic political bias.

- Assess the effectiveness and enforcement of remedies.

### **Other core team analysts**

- Ask political parties, candidates, media and civil society organizations met within the framework of the election observation about specific grievances, as well as trust and confidence in EDR system.
- Analyse the legal framework for handling complaints and appeals in their thematic areas, with assistance from the legal analyst.
- Inform the legal analyst about possible EDR cases in their thematic area of observation.
- Follow developments with complaints and appeals in their thematic areas and share information with the legal analyst.

### **Long-term observers**

- Observe the handling of electoral complaints and appeals in their area of observation, following guidance from the legal analyst, and provide information to the core team.
  - ✓ Are complaints being reviewed promptly, within deadlines?
  - ✓ Are EDR bodies accessible to all stakeholders?
  - ✓ Do people understand the process?
  - ✓ How are decisions on complaints made within the election administration (i.e., along political lines, or following the lead of the chairperson or a specific member)?
  - ✓ Do participants appear hesitant to complain? Why?
  - ✓ Are the decisions perceived as being fair and in accordance with the law?
  - ✓ Is the EDR process transparent?
- Enquire with interlocutors about specific grievances, as well as trust and confidence in electoral dispute resolution.
- Ensure personal presence for the resolution of complaints in order to give feedback on their handling.

### **Short-term observers**

- Collect information on complaints filed at the polling stations visited.
- Observe the handling of complaints that arise while present in the polling station or election administration office.
- Enquire with interlocutors about trust and confidence in EDR.

- Following guidance from the core team and LTOs, visit other authorities (i.e., law enforcement, courts) to inquire about election day complaints.
- Inform LTOs and core team of any observations related to the handling of electoral complaints.

### **C. Observing Hearings of Election Disputes and Reviewing Decisions**

Observing the hearings of election disputes by the election administration and the courts is an essential element of assessing the dispute resolution process.<sup>86</sup> Where possible, hearings should be observed in their entirety, in person by the legal analyst at the national level and LTOs at the local level. Physical presence at the hearings provides the legal analyst with first-hand observation of the behaviour of the EDR body in reviewing the matter, such as the thoroughness with which they examine the evidence and any indications of bias, as well as whether all parties were given an equal opportunity to present their case and introduce evidence. Observation of hearings should be based on several principles such as agreement with the host country, non-intervention in the judicial process, objectivity, impartiality, professionalism and confidentiality.<sup>87</sup>

Personal observation should be conducted regardless of any language barriers. The legal analyst will still be able to observe the tone and atmosphere of the proceeding and through the translator can follow the main points of the discussion. Through in-person observation the analyst establishes contact with the competent authority which forms the basis for drawing conclusions on the fairness of the process. This observation is also an effective means of establishing trust with the election stakeholders who are involved in disputes and exhibiting ODIHR's observation methodology.

Observers should be aware that practices in common and civil law systems might be different. In adversarial common law systems, in-person observation will also give the analyst the opportunity to observe whether either side is being disadvantaged because of procedural requirements or the quality of legal representation. The impartiality of the court or indications of bias can also be observed in how the court responds to the requests and objections of either side.

A system for independently tracking the review of complaints should be used by the legal analyst in his/her observation. The database or table will allow the analyst to make an independent assessment of compliance with deadlines for review, identify trends in the nature of complaints being submitted and the tendencies of the EDR bodies, and provide an overview of election disputes for other mission members.

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<sup>86</sup> Paragraph 8 of the Copenhagen Document states that the presence of observers, both foreign and domestic, can enhance the integrity of the electoral process. Furthermore, paragraph 12 of the Copenhagen Document acknowledges the right of observers and interested parties to be present at court hearings while calling for strict limits on the holding of court proceedings *in camera*.

<sup>87</sup> See also *Trial Monitoring: A Reference Manual for Practitioners, Revised edition* (Warsaw: OSCE/ODIHR, 2012) < <https://www.osce.org/odihr/94216>>.

The legal analyst should obtain and analyse as many decisions on complaints and appeals as possible. These can be obtained from the institutions that issue the decisions (i.e., election administration, courts) or from parties to the dispute. The decisions can be fully or partially translated or summarized by the legal analyst's assistant if necessary. The decisions should be reviewed by the legal analyst to assess whether they are well-reasoned and in accordance with the letter and spirit of the law, and to identify any inconsistencies or political bias (individual or systemic).

#### **Points of Inquiry for In-person Observation of Hearings:**

- \* Are the complainant and respondent able to fully state their case?
- \* How are competent authorities addressing and questioning each side?
- \* Are legitimate arguments discussed?
- \* Are requests for more information from election officials granted?
- \* When the complaint/appeal is against an election commission, is the election commission asked to justify their decision/action and provide supporting documentation? Is the election commission questioned on the weaknesses of their case and are those weaknesses being challenged by the court?
- \* Is the competent authority functioning professionally, and are all parties properly notified and given sufficient time to attend?
- \* Can relevant evidence be submitted or are evidentiary standards overly formal or strict?

### **D. Challenges and Constraints to Observing Election Dispute Resolution**

While the legal framework and structure of the EDR system must always be assessed as part of the observation, the personal observation of hearings and thorough tracking of disputes at all levels might not always be feasible. This may be due to the high volume of complaints and appeals, a lack of publication of written decisions, the decentralized nature of EDR processes and/or lack of transparency in the election administration and courts. When possible, complaints at the national level should be tracked and hearings attended. Where manageable, LTOs should also be involved in helping the legal analyst track cases at the local level and attend important hearings.

The legal analyst should assess both the procedural and the substantive handling of complaints and appeals. Such analysis involves a review of complaints submitted and decisions rendered, which requires proper understanding of the substance of complaints and responses by the competent authorities.

Obtaining documents may, however, not always be straightforward. While some election administration bodies and other administrative authorities are open to sharing information on complaints and decisions with ODIHR observation missions, others

are more reluctant to do so. Court appeals and decisions may therefore be more or less accessible to observers, depending on the election environment. Within the bounds of the Observer Code of Conduct, legal analysts and other mission members are encouraged to utilise all available avenues to access dispute resolution proceedings and obtain related documents. Inability to do so raises questions about the level of transparency of the EDR process, which should be reflected in the mission's report. Where authorities are unwilling to provide the mission with copies of complaints and decisions, efforts should be made to obtain them from the concerned parties. In some countries, the hearing of complaints by the election administration is not open to observation and some court hearings may be closed. The legal analyst and LTOs may also face obstacles to obtain information on the time and place of hearings and may be informed at the last minute about a hearing taking place. Any obstacles or hindrance in the observation of the EDR process should be noted. In some countries, complaints are handled informally as a matter of practice and direct observation will not be possible, though any informal or alternative dispute resolution should be noted by the analyst.

### **E. Developing Recommendations on Election Dispute Resolution**

Assessment of the election dispute system should contribute to the overall assessment of an electoral process. It is vital, therefore, that reporting on election disputes be factual, accurate and balanced. This assessment should also form the basis for any recommendations that an election observation mission may make in this area in order to assist OSCE participating States in improving their electoral processes, in line with their commitments.

EDR-related recommendations may concern improvements to the legal framework or its implementation, in order to enhance both procedural and substantive aspects of the EDR process. The electoral recommendations of the final report are the guiding benchmarks of any follow-up before the next elections. Recommendations should be supported by concrete findings detailed in the report and references to undertaken commitments, international obligations, standards and good practice.

Recommendations made by an ODIHR election observation activity have a wide audience. In addition to the stakeholders of the host country, to whom they are addressed, these recommendations are often used by other international organizations to chart their programmes and gauge progress in electoral reforms. Findings and recommendations can be and have been used by the ECtHR when dealing with complaints lodged under Article 3 of the First Protocol to the ECHR.<sup>88</sup> Citizen observer groups may rely on recommendations to advocate for changes in the electoral legislation and practice. Researchers may use them to identify shortcomings of the electoral process observed. Bearing in mind these different audiences and uses, analysts should co-operate with each other and develop recommendations that are accurate, concrete and targeted (the "ACT" rule).

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<sup>88</sup> References were made in the ECtHR case *Kerimova v. Azerbaijan* paragraph 30, and, more recently, in the case *Davydov and others v. Russia*, paragraphs 197–198.

- *Accurate* recommendations are mindful of the main shortcomings of the electoral process and seek to remedy their underlying causes. They also require listening to the prevalent concerns expressed by the local actors.
- *Concrete* recommendations should be specific about the end result to be achieved, as well as possible means of arriving at this result. The development of a concrete recommendation could include a discussion of ways by which the next ODIHR mission might be able to determine whether it had been addressed.
- *Targeted* recommendations make it clear to which stakeholder they are addressed, enabling ODIHR and other actors to undertake follow-up activities with these addressees.

While dispute resolution is an important aspect of elections, benefits of observing it consistently are not limited to this thematic area alone. Electoral complaints and appeals often point to problematic issues in the electoral process, such as the lack of integrity or trust in the election administration or between political competitors, deficiencies in specific rules and procedures, insufficient voter education, and political bias in decision-making. It is therefore important for ODIHR to encourage analysis and discussion of EDR in the post-election phase of the electoral cycle, with the aim of identifying root causes of grievances and developing measures to address them well in advance of the next election.

## **F. Follow-up to Electoral Recommendations**

Efficient follow-up to electoral recommendations depends largely on the political will of a state to improve their electoral process. The OSCE participating States have repeatedly committed themselves to following up on recommendations and emphasized ODIHR's role in assisting them.<sup>89</sup> Participating States have been increasingly reporting to OSCE bodies regarding their experiences in addressing ODIHR electoral recommendations.

Election observation is not an end in itself, but is intended to assist OSCE participating States with the implementation of their election-related commitments. An election observation activity has been of true benefit if and when the recommendations it provides are given full and serious consideration and are implemented effectively. A well-organized follow-up process can increase this likelihood. It is part of the electoral cycle and should start as soon as the final report has been published. Encouragement to adhere to the commitment to follow-up may come from other participating States, OSCE institutions and field operations, and other international and national organizations interested in improving electoral processes and supporting electoral integrity.

Following the publication of the final election observation report, ODIHR generally undertakes a visit to present it to the electoral stakeholders. These visits represent the first step in a co-ordinated follow-up process and serve as a reminder to OSCE participating States of their obligation to improve their electoral processes in line with OSCE commitments. In addition, these visits provide a better understanding about the willingness

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<sup>89</sup> See paragraph 24 of the 1999 OSCE Istanbul Document.

and ability of states to address particular issues in the future. Visits to present the final report also serve as a reminder of ODIHR's expertise and ability to assist by commenting on draft election laws or amendments that include election dispute elements, or in providing technical expertise on the impact of particular aspects of the EDR system in the electoral process.

Follow-up visits are tailored around ODIHR's assessment and are an efficient way to address past recommendations.<sup>90</sup> They can take the form of advice on how to better comply with international standards and good practice, as well as analysis of draft or final legislation, regulations or procedures aimed at improving the dispute resolution process. As always, ODIHR stands ready to assist participating States in these endeavours upon their request.

### Points of Inquiry:

- \* Are there any changes planned or ongoing which involve the election dispute resolution system? If so, what are they and are they in line with past recommendations and OSCE commitments and other international standards?
- \* Is there any scope for ODIHR to assist with the follow-up to recommendations on EDR?
- \* What form of assistance would be most suitable to support the participating State and its institutions to meet past recommendations and to bring EDR-related processes closer into line with OSCE commitments?

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<sup>90</sup> See *ODIHR Handbook on the Follow-up of Electoral Recommendations*, (Warsaw: OSCE/ODIHR 2016) <<https://www.osce.org/odihr/elections/244941>>.

## **ANNEX A**

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# Selected International Standards for Election Dispute Resolution

### **United Nations**

#### *Universal Declaration of Human Rights*

##### Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

##### Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

#### *International Covenant on Civil and Political Rights (1966)*

##### Article 2

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

##### Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or

part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

#### Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

#### *Human Rights Committee (CCPR) General Comment No. 25 (1996)*

20. An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. [...] There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes. [...] Electors should be fully informed of these guarantees.

#### *Basic Principles on the Independence of the Judiciary (1985)*

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. [...]
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

## **Organization for Security and Co-operation in Europe**

### ***Vienna Document (1989)***

[The participating States will]

(13.9) - ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, inter alia, effectively apply the following remedies:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs;

- the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;

- the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

### ***Copenhagen Document (1990)***

(5) [The participating States] solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.1) - free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;

[...]

(5.3) - the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;

[...]

(5.5) - the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured;

[...]

(5.7) - human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law;

(5.8) - legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. Those texts will be accessible to everyone;

[...]

(5.10) - everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;

(5.11) - administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;

(5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured [...].

### ***Moscow Document (1991)***

(18.2) Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.

(18.3) To the same end, there will be effective means of redress against administrative regulations for individuals affected thereby.

(18.4) The participating States will endeavour to provide for judicial review of such regulations and decisions.

(19) The participating States

(19.1) - will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, inter alia, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;

(19.2) - will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary [...].

## **Council of Europe**

### ***European Convention for the Protection of Human Rights and Fundamental Freedoms***

Article 13 Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 3 of Protocol No. 1 Right to free elections

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

***Code of Good Practice in Electoral Matters (Venice Commission, 2002)***

II.3.3. An effective system of appeal

- a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.
- b. The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.
- c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.
- d. The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.
- e. The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.
- f. 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.
- g. Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).
- h. The applicant’s right to a hearing involving both parties must be protected.
- i. Where the appeal body is a higher electoral commission, it must be able ex officio to rectify or set aside decisions taken by lower electoral commissions

## **Other**

### ***Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States (2002)***

#### Article 10 Fair Elections

1. Observance of the principle of fair elections must ensure equal legal conditions to all participants in the electoral process

2. Fair elections shall guarantee:

[...]

(e) organization of the electoral process by impartial election bodies, working openly and publicly under effective public and international observation;

(f) prompt and effective adjudication of complaints about violation of electoral rights and freedoms of citizens, candidates, political parties (coalitions) to be performed by courts and other duly authorized bodies within the time frame of the appropriate stages of the electoral process, assurance of a citizen's right to apply to international judicial bodies for protection and restoration of his electoral rights and freedoms, in a procedure established by the norms of international law.[...]

#### Article 16 Complaints About, and Responsibility for, Violation of Electoral Rights and Freedoms of Citizens

1. In the event of violation of the standards of democratic elections, electoral rights and freedoms of citizens, proclaimed in this Convention, and violation of election laws the injured person or persons shall have the right and possibility to complain about the violation to, and have the violated rights restored by, courts and, in cases and in the procedure provided by laws, election bodies.

2. Persons guilty of unlawful actions (omissions) shall bear responsibility in accordance with laws.

### ***Declaration on Criteria for Free and Fair Elections (Inter-Parliamentary Union, 1994)***

#### 2. Voting and Elections Rights

[...]

(4) Every individual who is denied the right to vote or to be registered as a voter shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.

[...]

### 3. Candidature, Party and Campaign Rights and Responsibilities

[...]

(8) Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.

[...]

### 4. The Rights and Responsibilities of States

[...]

(9) States should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the courts.

## ANNEX B

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# Additional Resources

*Compilation of Venice Commission opinions and reports concerning election dispute resolution*, Strasbourg, 9 October 2017, <[http://venice.coe.int/webforms/documents/?pdf=CDL-PI\(2017\)007-e](http://venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)007-e)>.

*Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights, Right to free elections*, 31 August 2018, <[https://www.echr.coe.int/Documents/Guide\\_Art\\_3\\_Protocol\\_1\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf)>.

*Factsheet – Right to free elections, European Court of Human Rights*, October 2016, <[https://www.echr.coe.int/Documents/FS\\_Vote\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Vote_ENG.pdf)>.

*Electoral Justice: The International IDEA Handbook*, International Institute for Democracy and Electoral Assistance, Stockholm, 2010, <<https://www.idea.int/publications/catalogue/electoral-justice-international-idea-handbook>>.

*Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections*, International Foundation for Electoral Systems, Washington DC, 2011, <[http://www.ifes.org/sites/default/files/guarde\\_final\\_publication\\_o.pdf](http://www.ifes.org/sites/default/files/guarde_final_publication_o.pdf)>.

*Handbook for Monitoring Administrative Justice*, OSCE/ODIHR and Folke Bernadotte Academy, Warsaw, 2013, <<https://www.osce.org/office-for-democratic-institutions-and-human-rights/105271>>.

*International Obligations for Elections: Guidelines for Legal Frameworks*, International Institute for Democracy and Electoral Assistance, Stockholm, 2014, <<https://www.idea.int/publications/catalogue/international-obligations-elections-guidelines-legal-frameworks>>.

*Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System*, OSCE/ODIHR, Warsaw, 2000, <<https://www.osce.org/odihr/elections/17567>>.

*Towards an International Statement of the Principles of Electoral Justice (the Accra Guiding Principles)*, 2011, <<https://integrityaction.org/sites/default/files/publication/files/Accra%20Guiding%20Principles.pdf>>.

# Core Principles for Electoral Dispute Resolution

**Availability of an Effective Remedy:** everyone should have an effective means of redress against administrative decisions, to guarantee respect for fundamental rights and ensure legal integrity.

**Legal Standing and Admissibility:** at a minimum, natural and legal persons whose rights are affected by administrative decisions, actions or inactions should be entitled to seek review of these decisions. Given the public nature of the election process, complaints in the public interest may be considered.

**Timeliness:** effective remedy must be provided in a timely and appropriate manner, within a timeframe that allows for the exercise of the affected individual's electoral rights and also ensures that the outcome of the election is not delayed.

**Independence:** bodies dealing with electoral disputes, their actions, as well as procedures related to the appointment, training, tenure, promotion and dismissal of judges, election and other administrative officials, and law enforcement officials, should be free from any political interference and guided by the law.

**Impartiality:** decisions taken by electoral dispute resolution bodies should always be objective, and officials dealing with disputes should carry out their duties in a neutral manner, irrespective of their personal beliefs and interests.

**Transparency:** parties to the dispute should be properly notified of the dispute and informed about any decision taken and decisions should be published promptly. Transparency is essential to maintaining trust in election administration and judicial bodies.

**Legality and Legal Certainty:** international standards, obligations and commitments require states to ensure that authorities act in accordance with the law, within their competence, and refrain from making arbitrary decisions.

**Accessibility:** election dispute resolution must be accessible to all, and procedures should not disadvantage any under-represented groups.

