



ELECTION DISPUTE RESOLUTION IN THE REPUBLIC OF SERBIA

Roundtable Report

Belgrade, November 6, 2013

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ACRONYMS

EDR	Electoral Dispute Resolution
EMB	Election Management Body
ICCPR	International Covenant on Civil and Political Rights
IPU	Inter-Parliamentary Union
LEOM	Limited Election Observation Mission
NDI	National Democratic Institute for International Affairs
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Cooperation in Europe
PEC	Provincial Election Commission
REC	Republic Electoral Commission
VC	Venice Commission, European Commission for Democracy through Law, Council of Europe
UDHR	Universal Declaration of Human Rights

EXECUTIVE SUMMARY



Mr Jan Lueneburg, Head of Democratization Department of the OSCE Mission to Serbia, welcomes participants to the roundtable as Ms Eva Katinka Schmidt, Acting Chief of the Rule of Law Unit, ODIHR, Mr Tom Kelly, NDI Director, and Mr Alex Shlyk, Election Adviser, ODIHR (from right to left), listen.

The Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE is the lead agency in Europe in the field of election observation. Each election observation mission deployed by OSCE/ODIHR concludes with a Final Report that contains the main findings of the mission along with recommendations to strengthen the electoral processes and practices in accordance with OSCE commitments and international standards.ⁱ The adjudication of electoral disputes is one substantive component of these reports, as it serves to ensure protection of the electorate's and candidates' rights, and to provide effective remedies for violations of election-related legislation.

i All OSCE/ODIHR EOM Reports on the Republic of Serbia are available at: <http://www.osce.org/odihr/elections/serbia>.

Decision No. 5/03 of the OSCE Ministerial Council on Elections (Maastricht, 2003) recognized “the need for confidence by the electorate in the entire [electoral] process...”, and tasked ODIHR “to consider ways to improve the effectiveness of its assistance to participating States in following up recommendations made in ODIHR election- observation reports”.ⁱⁱ In line with this task, ODIHR organized a roundtable in Belgrade, Republic of Serbia, on 6 November 2013 to follow-up on the recommendations contained in the final report of the OSCE/ODIHR Limited Election Observation Mission (LEOM) deployed for the parliamentary and early presidential elections in May 2012. The objective of the roundtable was to support the Republic of Serbia in its efforts to address the OSCE/ODIHR LEOM recommendations related to its Election Dispute Resolution (EDR) system by identifying ways of enhancing the efficiency and transparency of the manner in which cases are handled.

OSCE/ODIHR co-organized the roundtable on EDR in close co-operation with the OSCE Mission to Serbia and the National Democratic Institute for International Affairs (NDI). The roundtable gathered over 30 experts from all institutions and several organizations involved in EDR matters in the country, including representatives of the Republic Electoral Commission (REC), Provincial Electoral Commission of the Autonomous Province of Vojvodina, Election Commission of the City of Belgrade, Constitutional and Administrative Courts, members of the National Assembly and the Assembly of the Autonomous Province of Vojvodina, as well as representatives of parliament caucus groups, civil society and academia.

The event provided an opportunity to discuss the lessons learned, and to exchange experiences and good practices among key national stakeholders as well as national and international experts in order to identify best ways to address the shortcomings identified in the last elections. Participants welcomed the OSCE/ODIHR initiative to conduct the roundtable, and acknowledged the value and timeliness of such an event that allowed discussing challenges of bringing the EDR system further in line with OSCE commitments and international standards.

The roundtable consisted of a series of presentations from international experts, representing the OSCE/ODIHR, NDI and the OSCE Mission to Serbia and national experts who gave an overview of the national EDR practices in two working sessions. One working session focused on administrative EDR procedures, while the other discussed judicial EDR procedures. A separate session was dedicated to the overview of the final report of the 2012 OSCE/ODIHR LEOM and recommendations contained therein. The OSCE/ODIHR also led a session devoted to international EDR standards and good practices. The event closed with the discussion of conclusions and recommendations.

ii Eleventh Meeting of the Ministerial Council 1 and 2 December 2003, <http://www.osce.org/mc/40533>.

The participants of the roundtable raised the following issues that may require attention with a view to improving the Serbian legislative framework regulating EDR:

- The regulatory framework on elections should be streamlined to ensure more clarity regarding procedures, deadlines and terminology in EDR. Given that the latter are regulated by law, this step requires amending the existing legislation, possibly by codifying all relevant legislation in one electoral code.
- Relations between various Election Management Bodies (EMBs), the Administrative Court and other courts should be better defined in the legislation.
- Short deadlines for filing and considering election complaints are essential to guarantee timely remedies in election disputes. At the same time, the timeframes should be long enough to allow for public hearings to be held, where this is prescribed by the Serbian legislation, and the parties to be heard and to produce the evidence in support of their allegations.
- The deadlines for submitting electoral complaints at various levels, to various EMBs and in different constituencies should be revised and harmonized to secure the integrity of the system and guarantee the right to effective remedy.
- The law should allow the REC to act *ex officio* in cases of flagrant violations, for instance by invalidating the election results in individual polling stations. This competency of the REC should be regulated by law, and the election law should be revised accordingly.

The above listed suggestions demonstrated an agreement in principles that reforms are necessary to improve the EDR system. A majority of the proposed changes require amendments to the legislative framework regulating EDR. It was also suggested that EDR reform should not be considered separately from the whole election system.

Finally it was noted that the revision of the legislation requires a broader public consultative process in order to reach a sufficient level of consensus among the relevant domestic actors.

ROUNDTABLE SUMMARY



Ms Sonja Podunavac, Member of Republic Electoral Commission, as she listens to the presentation of international standards on the right to effective remedy as she relate to election disputes.

The roundtable was a one-day event structured in three sessions. The first session consisted of a presentation of international standards and good practices in EDR, and an overview of EOM reports' findings and recommendations on EDR in Serbia. Then followed two working sessions, each moderated and thematically introduced by renowned national experts, who led the discussions on topics related to the EDR practice in Serbia. During these two working sessions, the participants had an opportunity to discuss administrative and judicial EDR procedures focusing on transparency, rights of parties in the procedure, as well as the respective deadlines and timeliness.

1. Summary of Presentations

The roundtable was opened by Ms Eva Katinka Schmidt, Acting Chief of ODIHR's Rule of Law Unit/Democratization Department. Ms Schmidt highlighted the OSCE/ODIHR role as

leading organization in Europe in the field of election observation. She further noted that through various programs the OSCE/ODIHR seeks to develop democratic institutions and promote respect for the rule of law, *inter alia* in areas of relevance to democratic elections, such as the systems for the resolution of election disputes.

Ms Schmidt emphasized that the main objective of the event was to convene an inclusive discussion involving all relevant stakeholders, namely the election administration, judiciary, academia, political parties and civil society. Such discussion would constitute a basis for progress towards implementation of the legal framework of the Republic of Serbia in the area of EDR, in a manner that is in keeping with relevant OSCE human dimension commitments, international standards, and good practices.

In his welcoming remarks, Mr Jan Lueneburg, Head of Democratization Department at the OSCE Mission to Serbia, highlighted the relevance of the event for a continued dialogue on EDR issues in Serbia, emphasizing the importance of Serbia's attempt to improve the implementation of the existing legislative framework with the goal of enhancing the quality of the country's electoral processes. He further stressed the role of national experts in the process of discussion on EDR issues, and noted the Mission's strong commitment to supporting this process. He commended the national experts for their recent work on a comprehensive study assessing the effectiveness of the EDR system in the Republic of Serbia which is in the process of completion.

NDI Senior Resident Director in Serbia, Mr Thomas Kelly, noted that three elements of democratic electoral processes are of critical importance for a democracy to flourish, namely the accuracy of the voter registry, transparency of EDR and citizen confidence in election results. In its programs, NDI has been pursuing the purpose of generating public interest in the electoral process beyond Election Day in order to address existing deficiencies in the system. Mr Kelly concluded that the current event is an attempt to make the EDR system more citizen-focused and therefore more democratic.

Following the opening remarks the floor was given to Mr Denis Petit, independent expert on democratic institutions and on election disputes more specifically, to highlight the challenges typically faced in the design of EDR systems and to outline OSCE commitments, international standards and good practices in this area. The expert noted that election disputes are inherent to electoral processes in any state. Challenging an election, its conduct or its results, should not be perceived as a reflection of weakness in the system, but as the proof of the strength, vitality and ultimately, the legitimacy of the process. That said, Mr Petit noted that without the protection by the legal and institutional framework, all rights associated with elections are of little value. Mr Petit went on emphasizing that underlying EDR systems are the guarantees built in these systems to ensure protection of the right to an "effective

remedy”, in other words - applied to elections -, the right to electoral rights. The extent to which this right is fulfilled is a yardstick against which the effectiveness of EDR systems can be measured.

The right to effective remedies must itself be understood in the broader context of what may be labelled as “good administration of electoral justice”, which points to a number of prerequisites: (1) the rule of law (including the right to effective remedy, the right to a fair trial and the principle of an independent and impartial judiciary), (2) trust in the political process involving a wide range of institutional and political actors and (3) stability (the legal framework must be in place well ahead of the elections).

While there is no legal obligation specifically on election disputes to be found in international law, Mr Petit highlighted a number of key international documents - such as the United Nations Human Rights Committee General Comments n°25 on the Right to Participate in Public Affairs and n°31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Inter-Parliamentary Union’s (IPU) Declaration on Criteria for Free and Fair Elections, the Venice Commission’s (VC) Code of Good Practice in Electoral Matters and the OSCE/ODIHR Guidelines for Reviewing a Legal Framework for Elections, highlighting their relevance to electoral disputes that provide clarifications as to how the right to an effective remedy may be understood and applied in the context of EDR systems.

An element of complexity though is that EDR systems are hybrid in nature and may involve proceedings in criminal, administrative and ordinary courts depending on the type of complaints considered. In some countries, special courts have been established to deal with election disputes. Furthermore, EMBs are often the first instance bodies called upon to resolve election disputes and because of their lack of experience in fulfilling judicial or quasi-judicial functions, the risks cannot be underestimated. Turning to the challenges inherent in EDR systems, Mr Petit stressed the need for a systematic approach to the substantive and jurisdictional matters involved, and recognition of the fact that each sequence of the electoral process deserves special consideration in particular when it comes to time-limits and deadlines. The regulatory framework should provide for clarity regarding 1) jurisdictional matters to avoid ‘forum shopping’, and 2) the timelines prescribed, including when they start running in cases of EMBs’ inaction on complaints. The EDR system should also be accessible and transparent and allow for public hearings as a rule. He finally noted that a remedy is effective if the time limits for adjudicating complaints are sufficiently long to make an appeal possible, secure proper administration of justice and due process, collect evidence and allow for a decision that is adequately reasoned and duly notified. In international practice a reasonable time limit is defined as being 3-5 days, while in Serbia it is 24 hours. Regarding the publicity of hearing and the right of parties to be heard, Mr Petit noted that parties should be able to present their case, and the complainant should be able to ask for the hearing to be public.

The OSCE/ODIHR reports from multiple election observation missions in Serbia highlighted the need for enhancing transparency in addressing election disputes, and the issue of deadlines for submitting complaints and timelines for deciding disputes related to elections. Alexander Shlyk, OSCE/ODIHR Election Adviser, focused his presentation on the findings and recommendations contained in the most recent report of the 2012 LEOM deployed for the parliamentary and early presidential elections.ⁱⁱⁱ Mr Shlyk noted that while the Serbian legal framework provides for a solid system of EDR, a combination of factors, however, compromised its effectiveness and weakened the integrity of the electoral processes. In particular, deadline (24 hours) for the submission of complaints was excessively short. Furthermore, the Republic Electoral Commission (REC) did not publish its decisions regarding complaints despite the requirement of the law on the publicity of the work of the election administration and by doing so diminished the transparency of the electoral processes. Mr Shlyk noted in this context that a lot of complaints were dismissed because they were submitted after the deadline or by unauthorized persons. The OSCE/ODIHR recommended more balanced deadlines. Extending the deadline for the submission of complaints could improve the effectiveness of remedies. Turning to the issue of transparency of EDR in Serbia, Mr Shlyk pointed out that the 2012 LEOM report highlighted that the REC should not hold meetings behind closed doors, and that making its decisions public could allow voters to challenge decisions that may have affected their rights.

In conclusion Mr, Shlyk identified two possible avenues for improving the process. Firstly, the legislative framework could be enhanced through revisions of the existing law. Any suggested amendments could be jointly assessed by the OSCE/ODIHR and the VC upon request from the Serbian authorities. Secondly, the process can be improved by enhancing implementation of the existing legal framework. Finally, Mr Shlyk emphasized that ODIHR stands ready to support the follow-up process.

2. Summary of the Working Sessions

The first Working Session was devoted to the administrative EDR procedures. It considered the transparency, rights of parties in the procedures as well as deadlines and timeliness in administrative EDR procedures. The session was moderated by Mr Vladimir Goati from Transparency Serbia, and Mr Dejan Milenković, independent expert, served as introducer to the discussion. Mr Milenković identified a number of problematic issues related to the administrative EDR procedures, including: 1) timelines for the submission of complaints and for rendering related decisions, 2) standing rights for submission of complaints, 3) the

iii PARLIAMENTARY AND EARLY PRESIDENTIAL ELECTIONS 6 and 20 May 2012
OSCE/ODIHR Limited Election Observation Mission, the final Report can be found at:
<http://www.osce.org/odihr/elections/92509>.

ability of the REC to take up cases of flagrant violations *ex officio*, and 4) transparency of the procedures.

He agreed with earlier speakers that a balance should be reached in determining timelines for submitting and deciding on complaints and appeals in EDR, however, the question is how such balance can be defined. Mr Milenković noted that there is no unified position among election administrators about the adequate length of the period for submission of complaints. He highlighted that some actors argued that short deadlines are necessary to protect the integrity of the electoral process itself which could be upset by extended electoral disputes.



Prof Dejan Milenković and Mr Dušan Ignjatović (from left to right) introducing the discussion on procedures regulating election disputes in front of Serbian election commissions and courts.

In conclusion, Mr Milenković raised the issue regarding the REC's authority to act *ex officio* invalidating election results in case no formal complaint was filed or complaints are inadmissible but flagrant violations took place. According to a 2008 decision of the Supreme Court of Serbia, the REC is not entitled to invalidate election results in selected polling places and act *ex officio* without a formal admissible complaint. In the face of a great number of inadmissible complaints, this issue continues to cause debate.

This session's discussion focused on various arguments in favour of continuing the debate and addressing the issues of short timelines and the corresponding need to increase the capacity and streamline procedures of EMBs, transparency, and the ability of the REC to act *ex officio*. One of the proposals discussed referred to reconsidering the hierarchy and overall structure of EMBs by including a medium-level EMB, which could be done without introducing a separate constituency at that level. Ms Jelena Ivanović, President of the Administrative Court, provided her view from the judicial perspective, welcoming that by means of this roundtable, a discussion among the various actors was initiated. The moderator concluded the session by encouraging that the debate be continued also without the participation of foreign experts.

The second Working Session addressed the issue of judicial EDR procedures. Mr Dejan Vučetić of the University of Niš moderated the session. Introducing the topics for the discussions, Mr Dušan Ignjatović, independent expert, further highlighted that the deadlines for submission of complaints are not only short but are also different at different levels of courts, a fact that causes additional confusion and inefficiencies in the EDR system country wide. He gave an overview of the judicial procedures of the Serbian EDR system and their hybrid nature. Mr Ignjatović echoed on recommendations of the OSCE/ODIHR EOM report regarding the necessity to hold public hearings in election related cases in Administrative courts, as courts should act in the public interest. Under the existing tight deadlines, he noted with understanding, the courts have to decide on cases in just a few hours and simply do not have time for making the proceedings public. This, said Mr Ignjatović, raised in his view the more important question of whether under such short deadlines litigation in the Administrative Court can provide for an effective remedy in EDR. He also suggested that relations between courts and EMBs with respect to their jurisdiction in EDR should be clarified. The expert highlighted that in particular the role of Constitutional Court should be reconsidered, as it differs considerably in law and in practice.

During the ensuing discussion, Ms Jelena Ivanović, President of the Administrative Court spoke in favour of rectifying the existing legal framework as opposed to making new laws. Agreeing with previous speakers during the discussion in both working sessions, she summarized the two major problems related to EDR in Serbia, firstly the issue of the REC's inability to act *ex officio*, and secondly the inability of parties to present their case, in the absence of hearings before the EMBs and courts. Explaining the Supreme Court decision on *ex officio* power of the REC, she pointed to the fact that the Law on Administrative Procedures does currently not allow for this power of initiative. Therefore, she concluded, the legislature should initiate amendments to the relevant legislation to clarify in what instances EMB can initiate procedures *ex officio*. Ms Ivanović also proposed that procedural improvements may be considered to help respecting the short deadlines, such as informing the parties by tele-

phone or email which in her opinion also required an amendment of the relevant legislation. Mr Saša Mogić, Assistant Minister of Regional Development and Local Self-Government, made an intervention noting that it is very important to harmonize procedures for the courts at various levels and make these procedures clear. On a personal note, he spoke in favour of extending the deadline for submitting complaints to allow for the implementation of the right for effective remedy in EDR. Further, on the need to amend the legislative framework, Mr Ignjatović suggested that it would be beneficial for improving EDR in Serbia to develop one single election code, and to develop it well to avoid having to change it every couple of years. He also expressed his opinion that EDR should not be addressed separately but as part of reforms of the overall election process. Ms Živana Đukanović from the Administrative Court also highlighted the need to harmonize the terminology used in the various laws, and to give *ex officio* powers to the REC in cases of flagrant violations.

In addition to the above listed suggestions, participants also mirrored some of the recommendations provided in the 2012 OSCE/ODIHR EOM report regarding the necessity to review, consolidate and harmonize the electoral framework and possibly codify the legislation into a unified electoral code.^{iv} The above listed proposals indicate that most participants view that reforms are necessary to improve the EDR system. A majority of the proposed changes would require a reform of or amendments to the legislative framework regulating EDR in the Republic of Serbia.

Finally it was noted that the revision of the legislation requires a broader public consultative process in order to reach a sufficient level of consensus among various domestic actors.

Proposals from the discussion, will serve to ascertain the best way forward in tackling remaining challenges constructively, and identify opportunities for the OSCE/ODIHR to be of assistance in this endeavour. Ms Schmidt welcomed that there was a common understanding of the challenges related to the EDR system and an overwhelming willingness among all actors to continue the dialogue and consider necessary reforms, including legislative reforms. Continuing this dialogue will ensure that stakeholders are prepared when the time comes for consolidating the legal framework.

iv PARLIAMENTARY AND EARLY PRESIDENTIAL ELECTIONS 6 and 20 May 2012
OSCE/ODIHR Limited Election Observation Mission, the Final Report can be found at:
<http://www.osce.org/odihr/elections/92509>.

ANNEXES

ROUNDTABLE ON ELECTION DISPUTE RESOLUTION IN SERBIA

*6 November 2013, Belgrade
Hotel Metropol, Bulevar kralja Aleksandra 69*

Draft Agenda

- 09:00 – 09:30 **Registration**
- 09:30 – 10:00 **Welcome and introduction**
- Ms Eva Katinka Schmidt, Acting Chief of Rule of Law Unit, ODIHR
 - Ms Karin Wagner, Head of Democratic Governance Section, OSCE Mission to Serbia
 - Mr Tom Kelly, Resident Senior Director, National Democratic Institute
- 10:00 – 10:30 **International standards and good practices on EDR**
Denis Petit, international expert, ODIHR
- 10:30 – 10:45 **Overview of Election Observation Mission Reports in Serbia**
Mr Alexander Shlyk, Election Adviser, ODIHR
- 10:45 – 11:00 Coffee break
- 11:00 – 12:30 **Overview of national EDR practice in Serbia**
Working session 1: Administrative EDR procedures
- *Transparency, rights of parties in the procedure*
 - *Deadlines and timelines (efficiency, resources)*
- Teaser: Mr. Dejan Milenković, independent expert
Moderator: Mr. Djordje Vuković, CeSID
- 12:30 – 13:30 Lunch
- 13:30 – 15:00 **Overview of national EDR practice in Serbia**
Working session 2: Judicial EDR procedures
- *Transparency, rights of parties in the procedure*
 - *Deadlines and timelines (efficiency, resources)*
- Teaser: Mr. Dušan Ignjatović, independent expert
Moderator: Professor Irena Pejić, CeSID/Law Faculty, University of Niš
- 15:00 – 15:15 **Summary of conclusions and recommendations**
(Moderators from working sessions 1+2, ODIHR)
- 15:15 – 15:30 **Closing remarks**
(ODIHR - TBC)

Листа учесника/List of participants

ОКУГЛИ СТО „РЕШАВАЊЕ ИЗБОРНИХ СПОРОВА У РЕПУБЛИЦИ СРБИЈИ“ ROUNDTABLE “ELECTION DISPUTE RESOLUTION IN SERBIA”

Београд, 6. новембар 2013. године; Belgrade, 6th November 2013.

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