

28th Annual Conference**24-26 September 2019, Ljubljana, Slovenia****“Judicial protection of electoral rights and the transparency of elections”****Intervention of Gaël Martin-Micallef****in****Plenary session 1****“Judicial Protection of Electoral Rights and Transparency – Theoretical perspectives”**

Electoral processes are made up of numerous stages. They require the involvement of several actors, primarily voters, political parties, candidates and electoral management bodies.

The adjudication of disputes arising during electoral processes is an essential aspect of a successful electoral process at all stages and needs to be ensured throughout an election cycle: before, during and after election day.

A mature democratic system can be measured, among other things, by the balance achieved between the necessity of an accessible system of election dispute resolution and a reasonable number of disputes arising during elections. A law that cannot open in practice to any electoral complaint is therefore *lex imperfecta*.

Election dispute resolution should therefore apply to the most important elements of any electoral process. This includes in particular:

- . voter and candidate registration (de-registration or refusal of registration as well);
- . the official electoral campaign and its coverage by media;
- . decisions issued or inaction by administrations, public agencies and any relevant electoral stakeholder, especially election commissions at all levels of an election administration;
- . the election day procedures (pre-opening, voting, closing and counting phases);
- . election results (tabulation, transmission, issuance).

At each of these stages, electoral management bodies are directly involved and impacted by such disputes.

Furthermore, electoral disputes do not address only electoral processes in the narrow sense but often relate to fundamental rights, especially restrictions to the freedom of expression and the freedom of association as well as restrictions on the liberty and movement of political representatives. The respect of fundamental rights also implies an independent judiciary, an effective judicial remedy and the right to a fair trial with due process. You will find more references in this respect in the Venice Commission’s Rule of Law checklist from 2016.

The issue of adjudication of electoral disputes is regularly addressed by electoral opinions of the Venice Commission and the OSCE/ODIHR as well as by international observers in their election observation missions’ reports, primarily reports from the Parliamentary Assembly of the Council of Europe and the OSCE/ODIHR.

Considering recurrent problems in the adjudication of electoral disputes, the Venice Commission has started to analyse laws and practices of its 62 member States regarding this topic and will issue a comparative report in the coming months.

The main structural problems observed in electoral laws are:

- . a lack of clear definition of the procedures in the law; or
- . on the contrary, complicated or confusing procedures, in particular concerning the competent bodies.

Such situations too often lead to inconsistent interpretation and application of the law, which leads to:

- . overly expeditious complaints and appeals' procedures;
- . a lack of impartiality or effective remedies;
- . overlapping jurisdictions or confusion regarding the admissibility of complaints and decision making at different levels; and
- . a lack of substantive judgments while dealing with complaints filed before electoral management bodies or courts.

The 16th European Conference of Electoral Management Bodies which took place in Bratislava, Slovak Republic, on 27-28 June 2019, was dedicated to this topic. I invite you to consult our website for further information (www.coe.int/EMB). My presentation today reflects elements from the conclusions of this Conference.

For this short presentation, I will go through the existing instruments and soft-law documents before going briefly through the preconditions and procedural guarantees required for a successful system of election dispute resolution.

Are there relevant instruments dealing with election dispute resolution?

Election dispute resolution is directly or indirectly guided by international instruments and international case-law, interpreted and implemented at the national level in domestic electoral legislation and case-law. These are:

- . the [Universal Declaration of Human Rights](#) of the United Nations;
- . the [International Covenant on Civil and Political Rights](#) of the United Nations;
- . for the Council of Europe member States, the [First Additional Protocol](#) to the European Convention on Human Rights dealing with the right to free elections; and
- . a developed case-law of the European Court of Human Rights.

International standards have also complemented these international instruments, especially:

- . the Venice Commission's [Code of good practice in electoral matters](#); and
- . the [OSCE 1990 Copenhagen](#) and the [1991 Moscow](#) Documents.

What are the rules and procedures necessary for a successful system of election dispute resolution?

The conformity of election dispute resolution with international standards requires the implementation of a series of rules and procedures dealing with:

- . the competency of bodies in charge of electoral disputes;
- . the grounds for complaints and the decisions open to challenge;
- . the persons or categories of persons entitled to complain;
- . the time limits to file electoral complaints and to decide on such complaints; and
- . the clarity of the decision-making process.

Competent bodies

The appeal body should be either an election commission or a court. It is recommended to provide clear and consistent complaints and appeals' procedures so as to avoid excessive complexity.

Conflicts of jurisdictions between election commissions and courts and dual ways for submitting the same complaint should be avoided. Moreover, a final appeal to a court must be possible.

In around 40 countries studied among the 62 member States of the Venice Commission, the first instance competent for deciding on electoral complaints is the higher election commission whereas in around 20 countries, all electoral disputes are dealt with by courts or parliaments. Almost all countries provide the possibility for an appeal to a court, in most cases constitutional courts or equivalent bodies for national elections. However, a few countries have appeal systems dealt with by parliaments.

Grounds for complaints and decisions open to challenge

As already said, electoral processes entail a wide range of stages, from voter registration to ballot counting and announcement of results. Decisions or inaction of relevant bodies in the electoral field should also be open to challenge whereas domestic legislation should allow for appeals on all types of errors. The states should be obliged to prevent and sanction irregularities and violations of electoral legislation.

Among the 60 countries analysed, 47 of them provide in their laws for the possibility of filing a complaint before the competent body for violation of the law during the pre-electoral period. It covers for instance voters' or candidates' registration or media coverage.

45 countries regulate appeals against election-day and post-election day operations. It covers decisions of election commissions or their inaction and, of course, the election results. We could go back to the sensitive issue of election results during our discussions as many countries do not regulate clearly the possibility of partly or fully cancelling elections.

Persons entitled to file complaints

Most countries provide the right to file electoral complaints on the right to vote and to stand as a candidate, to both voters and candidates. A few countries also provide for the possibility to other categories to challenge further electoral stages, such as election commissioners or non-partisan domestic observers. This could be envisaged to reinforce procedures with regard to the settlement of electoral disputes and increase trust in electoral processes as a whole, provided that safeguards are in place to prevent frivolous complaints aimed at blocking the relevant bodies from accomplishing their duties.

As I said before, in the vast majority of the countries, voters and candidates are able to contest phases of electoral processes. However, in most of them, they can only contest a few phases by which they are directly impacted – such as refusal of registration – and not all of them. In my opinion, voters and candidates are qualified to contest at almost any stage of an electoral process as they are citizens directly impacted by any potential “malfunction” of an electoral process.

Time-limits

Time-limits for lodging and deciding appeals must be short, as recommended by international standards. The Code of good practice in electoral matters recommends from three to five days respectively for lodging and for deciding appeals, without restricting the rights and freedoms of voters, political parties and candidates in their suffrage and candidacy rights.

A majority of the countries analysed provide for these short deadlines, both for filing a complaint and for deciding on appeals. For lodging complaints and appeals, 35 countries provide short time limits whereas 16 member States provide for longer periods. For adjudicating complaints and appeals, the proportion is the same.

Decision-making power

Regarding the decision-making power, most systems of election dispute resolution give a broad decision-making power to courts or election commissions, in particular with regard to the sensitive issue of cancellation of elections. There is room for improvement in a number of countries where the law does not necessarily provide for the possibility to cancel an entire electoral process.

The issue of election results is particularly sensitive. Most electoral laws of European countries provide for a general invalidation mechanism of election results, or for a partial one. There remain gaps as few domestic laws allow explicitly for the possibility of a general invalidation of elections.

The role of courts is therefore essential in this respect, especially when the judge appreciates to what extent infringements of the law may have influenced the results and consequently the distribution of seats in parliament. The electoral judge has therefore to base her/his judgment on a range of cumulative irregularities and/or manipulations of an electoral process. Such elements can be proven either in specific constituencies, leading to a partial annulment of elections or, on a larger scale, which should logically lead to a full cancellation of elections. However, and as I said earlier, few electoral laws provide for such a possibility.

What can be concluded at this stage of our discussions?

That clarity of law is essential to ensure an effective system of election dispute resolution

That procedural guarantees devoid of formalism are of particular importance as well as imperative preconditions for ensuring transparency and accessibility.

Additionally, trust in public administrations and in the whole electoral process, as well as the necessity of providing legal guarantees regarding evidence and the possibility of hearing parties contesting a decision in the electoral field, are essential guarantees for democratic elections. The importance of reasoned and substantive decisions must be underlined as well as the good training of electoral management bodies.

In the coming months, the Venice Commission will adopt a comparative report on election dispute resolution with the goal of addressing common problems and tendencies in the effective settlement of electoral disputes, taking into account the different existing legal systems.