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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

and

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

JOINT OPINION ON THE ELECTORAL LEGISLATION OF NORWAY

Adopted by the Council for Democratic Elections at its 35th meeting (Venice, 16 December 2010) and by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010)

on the basis of comments by
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I. Introduction

1. In a letter dated 31 May 2010, Mr Dag Henrik Sandbakken, Secretary of State of the Norwegian Ministry of Local Government and Regional Development (the Ministry) requested an evaluation of those aspects of the Electoral System of Norway relating to electoral dispute resolution from the European Commission for Democracy through Law (the Venice Commission). More specifically, the Commission was requested to assess "*the provisions regarding the adjudication of complaints and appeals, and approval of elections, and how these would relate to Norway's international obligations*". These provisions are notably Article 55 of the Constitution (CDL-EL(2010)026) and Chapter 13 of the Representation of the People Act (CDL-EL(2010)025).

2. The request is part of the effort by Norway to follow up to the recommendations made in the final report of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Election Assessment Mission to the 14 September 2009 parliamentary elections. Follow up activities included OSCE/ODIHR visits to present the report in Norway and a visit of the Ministry to Warsaw to discuss possible areas of reform.

3. The OSCE/ODIHR report makes the following two recommendations regarding the system of electoral dispute resolution of Norway:

- "*It is recommended that consideration be given to providing the legal right to appeal, with regard to all election related matters and election results, to a competent court as the final authority on all election matters, in line with OSCE commitments and international good practice.*[1]

- *Consideration could be given to setting specific expedited time limits for the adjudication of election related complaints and appeals by all relevant authorities including courts, the National Election Committee (NEC) and Parliament, in order to be fully consistent with paragraph 5.10 of the Copenhagen Document.*[2] Paragraph *5.10* reads: *Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.*"

4. In response to the request of Norway, and as part of their ongoing follow up activities, these two recommendations will be examined in detail in this opinion and proposals made for their implementation.

5. This opinion is based on the following legislation:

- The Constitution of Norway (electoral provisions) (CDL-EL(2010)026).

- The Representation of the People Act (The Election Act) of Norway (Act No. 57 of 28 June 2002 relating to parliamentary and local government elections) (CDL-EL(2010)025);

- The Public Administration Act;

- The Local Government Act of 1992;

[1] Norway, 2009 Parliamentary Elections, OSCE/ODIHR Election Assessment Mission Report, p. 21.
[2] IBID, p. 22.

- The Regulations Relating to Parliamentary and Local Government Elections In Norway (Representation of the People Regulations) (CDL-EL(2010)024).

6. As is regular practice for requests to review election legislation in OSCE participating States, the Venice Commission has invited the OSCE/ODIHR to join in the review.

7. This document was adopted by the Council for Democratic Elections at its 35th meeting (Venice, 16 December 2010) and by the Commission at its 85th plenary session (Venice, 17 December 2010).

II. Norwegian law relating to electoral dispute resolution

8. Chapter VI of the Public Administration Act provides that complaints against a decision of an administrative body are submitted in the first instance to that body. This applies to all decisions of electoral committees at all levels during local and parliamentary elections.[3]

9. The Election Act also guarantees the right of complaint for all persons entitled to vote on any matter related to the preparation and conduct of parliamentary and local elections. Where the complaint relates to questions concerning the right to vote, a person who has not been included in the register of electors also has the right of complaint.[4]

10. As regards the deadline for submitting complaints in writing, they must be brought within seven days after election day. A complaint against the determination of the election result must be brought within seven days after the result of the election has been determined.[5] The law does not provide time limits for a complaint to be decided upon.

11. Under the Norwegian Constitution and the Election Act, for parliamentary elections the parliament is the body for appeals concerning the right to vote.[6] The Election Act provides that the National Election Committee is the body for other appeals. The law does not provide for a right to further appeal to a court of law.

12. The Constitution states that the final validation of the parliamentary elections is within the competence of newly elected parliament itself.[7] It decides whether the election of members to the parliament was valid, in effect giving it the final authority to decide on any aspect of the election.[8] The law does not provide a right to appeal to a court of law against the decision of the parliament on the validation of an election.

13. In the course of its review, the parliament ensures that any errors are corrected that may impact on the election results. This might, for example, take the form of a recount of ballot papers, a new allocation of seats or return of members.[9] The parliament may also declare results in a municipality or county invalid and order a new vote if an error has been committed that is deemed to influence the outcome of the election. The law does not provide for the possibility to appeal to a court of law the decision to annul results and order a new vote.

14. In 1962, the Norwegian Supreme Court in a case relating to the role of the courts in election-related matters, held that complaints regarding elections are not a matter for the court,

[3] Public Administration Act of 1967: http://www.finanstilsynet.no/archive/0sto/01/02/Forva011.pdf.
[4] Election Act, Chapter 13-1 para 1, Chapter 13-2 para 1.
[5] *Ibid.*, Chapter 13-1 para 2, Chapter 13-2 para 2.
[6] Article 55 of the Constitution states in part: "*Disputes regarding the right to vote shall be settled by the Electoral Committee, whose decision may be appealed to the parliament.*"
[7] Article 64 of the Constitution states: "*The representatives elected shall be furnished with credentials, the validity of which shall be adjudged by the Storting*."
[8] Norway, 2009 Parliamentary Elections, OSCE/ODIHR Election Assessment Mission Report, p.21.
[9] Election Manual 2009, Norwegian Ministry of Local Government and Regional Development, p. 98.

unless it involves abuse of authority or serious violation of fundamental rules of procedure. While the finding suggests a role for the Supreme Court in the complaints and appeals process, in its decision the court confirmed parliament's final say as to its own composition and as the appeal authority over decisions of the National Electoral Committee on complaints and appeals. The rationale of the court for establishing this limited role of the courts was the need for a swift and final decision in election disputes.[10]

15. The Ministry has jurisdiction over all appeals to local elections, including appeals against the decisions of municipal and county councils on the results of elections. The law provides that Ministry's decisions in all appeal cases related to local elections are final and expressly states that decisions may not be brought before the courts.[11] The rationale for this is apparently the need for swift and final decisions on election cases.

16. The newly elected municipal and county councils formally approve the results of their elections. The elected or municipal councils may declare an election invalid if an error is committed that influences the results. If this occurs, a report is sent to the Ministry, which orders a new election. Appeals against the decision of the county or municipal council can be made to the Ministry. Ministry's decisions on appeals challenging the approval or invalidation of election results are final.

17. Any group of three or more members of a municipal or county council may appeal any decision of a municipal or county council to the Ministry.[12] The time limit for submitting an application for review of legality of county or municipal council resolutions approving elections is seven days from the date of the resolution. The law does not provide for an appeal to a court against the Ministry's conclusion on the legality of decisions.

III. Electoral dispute resolution: International commitments, standards and good practice

A. Role of the judiciary in complaints and appeals

18. Possibilities for judicial remedy to administrative decisions are called for in international commitments and standards and are cited as good practice.

19. Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) calls for possibilities for judicial remedy, stating that "*any person … shall have an effective remedy*…" and 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*".

20. The United Nations Human Rights Committee, General Comment No. 32 suggests that election commissions, the administrative body most often involved in the electoral process, may not meet the criteria established for a judicial body. This is because an election commission fulfils an executive function when it administers elections. Additionally, it is unlikely that an election commission would appear impartial to the reasonable observer given their role in the electoral process. Therefore, while election management bodies (and other administrative bodies) may play a role in the resolution of election disputes, administrative remedies alone cannot be considered sufficient, requiring access to a judicial tribunal at some point of proceedings.

[10] Norway, 2009 Parliamentary Elections, OSCE/ODIHR Election Assessment Mission Report, p. 22.
[11] Election Act Chapter 13-2 para 4.
[12] Provided under Article 59 of the Local Government Act of 1992: http://www.ub.uio.no/ujur/ulovdata/lov-19920925-107-eng.pdf and confirmed in the Election Act.

21. According to paragraph 5.10 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (Copenhagen Document), "*everyone*" should "*have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity*". Respect for fundamental rights as well as legal integrity make it imperative that an ultimate recourse to a court should be available to citizens. Fundamental rights cannot be left solely to administrative discretion; administrative or parliamentary decisions alone cannot provide for a legally satisfactory process. Indeed citizens should have access to "national" judicial remedies before being driven to apply to the European Court of Human Rights in Strasbourg.

22. The Document of the Moscow meeting of the Conference on the Human Dimension of the OSCE in section (18) recalls the participating States' commitment to the rule of law and provides for different aspects of effective remedy, including judicial review of administrative regulations and decisions:

> "*(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.*"

23. The Code of Good Practice in Electoral Matters drafted by the Venice Commission is more precise. It provides that "*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*" (CDL-AD(2002)023rev, II.3.3).[13] The Explanatory Report of the Code elaborates, stating that appeals may be heard by the ordinary courts, a special court or the constitutional court, or may be heard by an electoral commission, but in the latter case, some form of judicial supervision should be in place making the higher commission the first appeal level and the competent court the second. Appeal to parliament, as the judge of its own election, is sometimes provided for but only as a first instance. However, in these cases, a further judicial appeal should then possible (paras. 93-4).

24. The OSCE/ODIHR publication *Resolving Election Disputes in the OSCE Area: Toward a Standard Election Dispute Monitoring System (2000)* also outlines good principle and practice in addressing election-related disputes, setting parameters for election dispute resolution mechanisms which comply with the rule of law. It reiterates that decisions made by independent and impartial authorities which are responsible for supervising the conduct of elections and other public consultations, including the preparation and periodic revision of the electoral roll, shall be subject to appeal with an independent and impartial judicial authority (paragraph A 5). For all types of election disputes, the decisions of the higher electoral body should be reviewable by the highest body of the judiciary whose ruling should then be final (paragraph B 10). All complaints pertaining to the overall final results or the declaration of election results to be partially or fully void should be filed with the highest body of the judiciary or the Constitutional Court (paras. G 30, 36).

[13] A court must have final authority in particular over such matters as the right to vote – including electoral registers, eligibility, the validity of candidatures, proper observance of campaign rules and the outcome of the elections (Code of Good Practice in Electoral Matters drafted by the Venice Commission (CDL-AD(2002)023rev, paragraph II.3.3d). Matters such as access to the media and party funding should also be under the final jurisdiction of the courts (Code of Good Practice in Electoral Matters, Explanatory Report, paragraph 92).

B. Timely remedy to complaints and appeals

25. The right to a timely remedy in election-related appeals is integral to the broader principle of effective means of redress. When paragraph 5.10 of Copenhagen Document states that "*everyone*" should "*have an effective means of redress against administrative decisions*", the idea of "*effective redress*" includes the timely resolution of disputes. Election complaints that are not concluded in a timely manner, so as to allow their findings to be relevant to the election in question, are by their nature not effective. Effective remedy is also referred to in paragraph 13.9 of the 1989 Vienna Document, which states that States "*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*", in Article 13 of the European Convention of Human Rights, which states that "*everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority*" and, as mentioned above, in Article 2(3) of the ICCPR and paragraph 18 of the Document of the Moscow meeting of the Conference on the Human Dimension of the OSCE. Thus international commitments require timely resolution of election disputes.

26. Point II.3.3.g of the Code of Good Practice in Electoral Matters states that complaint and appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before an election and that time limits for deciding must be short (three to five days at first instance and upon appeal). This means both that the time limits for complaints and appeals must be very short and that the responsible body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings. The explanatory report to the Code (para. 95) states on this issue that two pitfalls must be avoided: first, that appeal proceedings delay the electoral process, and second, that, decisions on appeals – other than those concerning election day and the results – are taken after the elections have been held.

27. The OSCE/ODIHR publication *Resolving Election Disputes in the OSCE Area: Toward a Standard Election Dispute Monitoring System (2000)* also addresses the issue of time limits. Considering that the conduct of an election requires prompt decisions and actions within a pre-determined timeframe, the procedures governing election disputes should be different from those provided for general civil disputes. This could be reflected in shorter deadlines and a single appeal process, which can be justified as long as sufficient time is provided to file complaints and appeals. When setting time limits a balance should be struck between imperatives relating to the administration of justice in a timely manner within the electoral timeframe and the right to challenge decisions, actions or omissions of the electoral bodies in the fulfilment of their mandate. In particular, time limits should allow courts and electoral bodies sufficient time to process, review and make decisions upon the complaints and appeals submitted to them. The fact that some complaints or appeals, especially those related to election funding or campaigning, may require further investigation should also be taken into consideration. For each phase or facet of the electoral process (such as voter registration or the validity of candidatures), the electoral law should expressly and systematically set deadlines for filing complaints and appeals and by which either the courts or electoral bodies must reach a decision (paragraphs D 19, 20, 21, 23).

28. As regards the specific issue of time limits for disputes arising from election day or challenges to election results, deadlines for decisions at all levels of appeal proceedings should be short so that the election results do not remain uncertain for an unreasonable period of time. The above-noted OSCE/ODIHR publication addresses this issue and states that time limits for filing and deciding upon appeals against preliminary election results should not exceed one month, so as to enable the publication of the final election results no later than this deadline (taking into account the deadline for publication of the preliminary results). Furthermore, in

accordance with the procedural time limits prescribed by law for publication of preliminary and final results and for filing and deciding upon related challenges, all complaints and appeals should be determined once and for all within a maximum of two months (paragraphs G 35, 37).

IV. Comparative overview of a parliament's right to decide on its own composition

29. A parliament's right to decide on its own composition has a long tradition in Europe, and survives in some form in a number of countries. The tradition appears to be based on the idea of ensuring a separation of powers, and is found most commonly today in current or former constitutional monarchies.

30. In the United Kingdom, the Bill of Rights of 1688 states that "*the election of members of parliament ought to be free*", in this sense meaning free from the King's interference.[14] To ensure this, parliament itself was vested with the authority to determine who should have the right to enter the legislature. The principle of parliament's exclusive right to control its own election was generally accepted as a means of ensuring a balance of power and imitated in the evolving systems of representative government across Europe.

31. In Sweden, Article 11 of the Constitution provides: "*Appeals against elections for the Riksdag (parliament) may be lodged with an Election Review Board, appointed by the Riksdag. … There is no right of appeal against a decision of the Board*". The second paragraph of Article 7 further provides: "*Where grounds exist, the Election Review Board shall examine, on its own initiative whether a particular member or alternate member is qualified under chapter 3, Article 10* [concerning the right to vote]. *A person pronounced to be disqualified is deprived thereby of his or her mandate*".

32. In the Netherlands, in accordance with its Constitution and Elections Act, the review of complaints related to the conduct of elections or to the results is vested in the outgoing parliament and is conducted in line with the parliament's rules of procedure.[15] The outgoing parliament has the responsibility to validate the results and to settle any dispute related to the election. The parliament also has the power to order partial or full recounts or invalidation of the results with subsequent repeat elections.

33. Similarly, in Denmark, Article 33 of the Constitution states that "*the Folketing shall determine the validity of the election of any member and decide whether a member has lost his eligibility or not*".

34. Since the Second World War, a number of countries have amended their legislation to include some role for the courts. In Italy, for example, the constitution of 1947 created a dual jurisdiction between the parliament and courts for validating elections. Article 66 of the Constitution reads: "*Each House decides the qualifications for admission of its members and subsequent causes of ineligibility and incompatibility*". However, Article 65 of the Constitution states that "*the law determines cases of non-eligibility and incompatibility with the office of deputy or senator*". Although contradictory, in this way Italy maintained part of the sovereignty of parliament while at the same time recognising a role for the courts.

35. In Germany, the Basic Law of 1949 takes a similar but more complementary approach. Article 41(1) provides: "*Scrutiny of elections shall be the responsibility of the Bundestag. It shall also decide whether a member has lost his/her seat*". However Article 41(2) continues:

[14] The signing of the Bill of Rights followed the reign of King James II, who had a contentious relationship with Parliament and was accused of having interfered with elections.

[15] Constitution of the Netherlands, Article 58: "*Each House shall examine the credentials of its newly appointed members and shall decide with due reference to rules to be established by Act of Parliament any disputes arising in connection with the credentials or the election.*"

"*Complaints against such decisions of the Bundestag may be lodged with the Federal Constitutional Court*". And then Article 41(3) concludes: "*Details shall be regulated by a Federal Law*". The challenge to the German system relates more to the time frame in which a remedy through a court of law can be issued (see next section).

36. In Switzerland, the National Council (first chamber) used to have the power to decide as the last instance on the election of its members. The National Council still holds a constitutive session to confirm the validity of its election (Article 53 of the Federal Act on Political Rights). Final resolution of general electoral disputes is, however, now with the courts. In 2005, the appeal to the National Council was replaced by appeal to the Federal Court for issues related to the conduct of the elections (Article 80 of the Federal Act on Political Rights).

37. Even in the United Kingdom itself, today most elements of electoral dispute resolution are under the jurisdiction of the ordinary courts,[16] although parliament has not legislated to remove its powers over elections leading to its composition and the right of an *elected* person to take his or her seat. In line with the Representation of the People Act of 1983 and the Election Petition Rules of 1960, the outcome of an election can be challenged on the ground of an irregularity, by a voter, by someone who had the right to vote, or by an unsuccessful candidate. Petitions are heard by an 'election court' formed on an ad-hoc basis by judges for the trial of parliamentary election petitions.

38. While the Venice Commission has concluded that "*the number of countries not providing a final appeal to court is small*",[17] it is clear that the practice still exists in Europe. One can however see a prevailing tendency towards interpreting the theory of the separation of powers to mean that the adjudication of disputes, even in electoral matters, should ultimately be within the jurisdiction of the Courts. The legislative organs will still retain the right to regulate their own procedures and disciplinary measures, and in certain cases co-option, as long as there remains a final judicial appeal mechanism in the electoral process.

V. Comparative overview of time limits in electoral dispute resolution

39. In many European countries (including Austria, Cyprus, Finland, France, Germany, Greece, Liechtenstein, Malta, Sweden, Switzerland, and the United Kingdom) where the judiciary is involved in electoral dispute resolution there are no shortened time limits for reaching a final decision. In Austria, challenges to violations of electoral rights during an election are permitted only to the extent that they are based on general regulatory and legal controls and addressed according to the regular timelines and procedures prescribed in the law. In France it is not uncommon for a court to take one year to resolve a complaint. In Germany the procedure allows for most complaints to be heard only after an election[18] and some cases have extended to the point that they remained pending even after subsequent elections of the *Bundestag*. Thus one can conclude that it is not a consistent practice in Europe to institute shorter time limits for electoral cases.

40. There are States that create separate structures for the hearing of electoral disputes as a means to ensure timely remedy. As mentioned in the section above, in the United Kingdom ad-hoc "election courts" are formed when a petition is issued. Such specialised courts are formed only when a complaint is made, and focus only on elections without being distracted by other cases.

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[16] Witness the case: *Morgan and others v Simpson*, [1974] 3 A11E.R.722.

[17] Report on the cancellation of election results (CDL-AD(2009)054), para. 30. Adopted by the Council for Democratic Elections at its 31st meeting (Venice, 10 December 2009) and by the Venice Commission at its 81st plenary session (Venice, 11-12 December 2009, ch. IV; CDL-EL(2009)019.

[18] Decisions of local authorities related to voter registration and the issuance of polling cards and decisions of higher level bodies regarding candidate and list nominations can be the subject of complaint during an election.

41. In Mexico, in order to ensure effective resolution of electoral disputes, a special permanent court structure was created in 1996, with the same guarantees of independence and immovability as ordinary courts, to deal with electoral questions and complaints. The Electoral Tribunal of the Federal Judiciary acts on electoral disputes both at the first and second instance, with the benefit of specialisation and lack of distraction by urgent non-electoral cases.

VI. Conclusion

42. Norway has a long tradition of holding democratic elections which enjoy a high level of public confidence. The current Norwegian legislation on electoral dispute resolution is based on constitutional and legal traditions, maintaining a separation of powers to ensure the sovereignty of the parliament. In Norway the parliament is the final arbiter not only of the legality of the elections but of all election-related questions (in national elections). It is also important to note that election-related complaints are very rare in Norway; during the 2009 parliamentary elections only four complaints were submitted.

43. However, the system of appeals in electoral matters does diverge from international commitments and standards, as well as good practice. Norwegian citizens are left without an option of timely appeal to independent courts in matters regarding the exercise of the right to choose their local government, their national Parliament and, indirectly, their national government. Similarly, the courts do not play a role in the final validation of elections.

44. In order to meet international standards and commitments, Norway should include the judiciary in the process of electoral dispute resolution. It should provide for final appeal on all election-related complaints to a court. Furthermore, the final validation of the election should include a possibility of appeal to a high judicial body, such as the Supreme Court. This solution would entail the need for a constitutional amendment.

45. Allowing for final appeal on all electoral complaints can be achieved through various approaches: by using for appeals relevant bodies from the existing court structure, as is the case in Switzerland; by using an ad-hoc system of judicial bodies for all stages of the complaints and appeals process, as is the case in the United Kingdom; or by creating a standing specialised legal structure for complaints, as in Mexico. But international standards and commitments call for the final right of appeal to a court from decisions on all electoral matters made by the National Election Committee and Parliament of Norway, in the case of national elections, or the Ministry, in the case of local elections.

46. Additionally, the current legal framework in Norway does not set time limits for dealing with electoral appeals.[19] A comparative survey shows that the legal requirement of short time limits for the appeal procedures is not systematic in Europe. Nevertheless, it is recommended that election-related appeal procedures be developed to guarantee timely decisions on all electoral matters in dispute. Even if there were a decision to create a specialised court for election disputes to ensure an effective remedy, good practice suggests that establishing time limits for complaints and appeals would be beneficial. Reasonably short time limits at all levels of the adjudication process would also address the 1962 Supreme Court's concern that swift decisions be made in electoral matters.

47. The establishment of time limits can be implemented in various manners. One possibility is that as a general norm all electoral disputes could be considered as of an "urgent" nature, and that a Court seized of a particular electoral question, both *ex post* and *ex ante,* must deal with the case according to the provisions for matters of urgency in its national Code of Procedure.

[19] In practice, appeals in Norway are only considered after election day, except those related to candidate registration. Norway, 2009 Parliamentary Elections, OSCE/ODIHR Election Assessment Mission Report, p.22.

Where and if the terms of “urgency” are not short enough to provide for an effective remedy, the imposition of fixed time limits in a number of days could also be considered.