

SERIES OF STUDIES ON ELECTION LEGISLATION

Analysis of the Protection of Electoral Rights Segments
in the OSCE Members States

Sarajevo, June 2015

CONTENT

ABBREVIATIONS.....	3
INTRODUCTION.....	4
METHODOLOGY.....	5
WHY PROTECTION OF ELECTORAL RIGHTS	6
PROTECTION OF ELECTORAL RIGHTS IN BIH LEGISLATION	7
ANALYSIS BY AREA:	
RIGHT TO FILE COMPLAINTS	8
DEADLINES FOR PROTECTION OF ELECTORAL RIGHTS	10
RESPONSIBILITY FOR VIOLATION OF ELECTION LAW.....	11
INSTEAD OF CONCLUSION.....	12

ABBREVIATIONS

BiH	Bosnia and Herzegovina
CEC BiH	Central Election Commission of Bosnia and Herzegovina
OSCE	Organization for Security and Co-operation in Europe
OSCE/ODIHR	Organization for Security and Co-operation in Europe / Office for Democratic Institutions and Human Rights

INTRODUCTION

Coalition for Free and Fair Elections 'Pod Lupom', composed of 6 civil society organizations from the whole country, has started monitoring the election process in Bosnia and Herzegovina (BiH) on July 1, 2014.

The general assessment of the Elections observed is that they were held in a democratic and fair atmosphere and in accordance with the Election Law and related rules and procedures, with a small number of irregularities and critical situations, and isolated incidents.

However, some irregularities in the electoral process were observed during fieldwork in certain legal arrangements and application of existing regulations, which suggests that there is a need for improvements in the Election Law and the implementing regulations of the CEC BiH as well as in their implementation in the field and in narrowing the space for possible abuse. In relation to this, the Coalition made a number of recommendations in its Final Report¹ on the General Elections 2014 in BiH.

After observing the implementation of the General Elections, the Coalition activities continue in the direction of contributing to the improvement of the electoral process in Bosnia and Herzegovina. In the post-election period the Coalition organized a conference in Sarajevo and three round tables in Mostar, Banja Luka and Tuzla where the relevant stakeholders, especially those who are directly participating in the electoral process, discussed the presented recommendations, and were asked to give their opinions on problems identified by the Coalition, as well as on other issues of election legislation.

With the aim of argumentation and conduct of fruitful discussions on specific topics which are identified as 'burning issues', the Coalition made a decision to form a working group composed of young researchers in April 2015 with the task of analyzing the Election Laws of the OSCE Member States. The first in the series of analyses was related to the Polling Station Committees, which were characterized as the weakest link of the electoral process in Bosnia and Herzegovina. The following one dealt with 'electoral deadlines' since one the recommendations made by the Coalition was to reduce the existing deadlines from the current 180 days to 120 days from announcing of the elections. Third in the series of analyses deals with the issue of 'protection of electoral rights' as a fundamental issue in protection of electoral rights of all actors involved in the election process and of the citizens' electoral will.

¹ Final Report is available on the following link:
<http://podlupom.org/userfiles/file/Kona%C4%8Dni%20izvje%C5%A1taj%20%20Finalna%20verzija%20za%20%C5%A1tampu%20%28BOS%29.pdf>

METHODOLOGY

Research methodology is based on a detailed study of election legislation, primarily the Election Laws of the Member States of the OSCE, 39 out of 57 of them. Due to limited capacity, as well as taking into account the relevance of the legislation in the context of BiH, the research excluded a certain number of Member States, mainly those with Anglo-Saxon legal tradition, countries outside Europe as well as the smaller European countries like San Marino, Andorra, etc.²

The survey includes the following countries: Albania, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Montenegro, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Netherlands, Croatia, Iceland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Hungary, Macedonia, Moldova, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Serbia, Spain, Sweden, Switzerland, Turkey, Ukraine and Uzbekistan.

For this research the OSCE/ODIHR database of legal regulations of the Member States of the OSCE was mainly used³. It is important to emphasize that most of the translations are unofficial and made just for research purposes. Reports of election monitoring missions by OSCE/ODIHR⁴ were used as an extra source along with other available information from organizations dealing with electoral processes⁵.

For this purpose, the Coalition 'Pod Lupom' formed a working group composed of 8 researchers/collaborators out of over 200 applicants that applied to Coalition's public call for researchers/collaborators.

The data that will be presented in this study were obtained in a way that the Coalition primarily divided the states per members of the working group. After that, working group received tasks according to areas/topics on which they had to provide adequate answers from Election Laws and regulations of countries they were researched about.

The received answers point out different legal traditions, emphasizing at the same time different levels of development of political culture, election awareness which can be assessed through the level of regulation of certain areas. So countries that can be characterized as those with highly developed awareness of the election process and the rules of conduct for the election (eg. The Scandinavian countries) very poorly define a number of questions, and give to election commissions, and sometimes even to citizens, quite wide powers to organize and conduct elections. On the other hand, countries that have in their recent past gone through a transition of their political and economic systems, and even wars, tend rather to have a very detailed regulation of all segments related to the electoral process, which again points to the

² Research did not include the following Member States:

Andorra, BiH, Greece (no available translation of the Election Law to English), Ireland, Canada, Liechtenstein, Luxembourg, Malta, Monaco, Mongolia, USA, San Marino, Tajikistan, Tunisia, Turkmenistan, United Kingdom and Vatican. The Election Law of BiH was analyzed separately and used for comparison of electoral solutions.

³ <http://legislationline.org/>

⁴ <http://www.osce.org/odihr/elections>;

⁵ <http://www.idea.int/elections/>; <http://aceproject.org/>

efforts of these countries to thus prevent potential election fraud and manipulation. This variety of regulations was a challenge in making an analysis in terms of recognizing trends and common features that can possibly serve as examples of good practice for BiH.

WHY PROTECTION OF ELECTORAL RIGHTS?

Effective protection of the electoral rights should be a priority in future discussions regarding the amendments to the existing Election Law, or possibly enact of a new one. Coalition 'Pod Lupom' in its report on the observation of the last General Elections emphasized one segment that could be improved. It is an active legitimating of the persons who have the right to object to the existing provisions of the Election Law. According to the Election Law authorized persons to submit a complaint to the protection of the electoral rights are voters and political subjects. A voter, as interpreted by the CEC of BiH, can file a complaint only when his/her personal electoral right is jeopardized which, according to the Coalition, is quite restrictive interpretation because it prevents voters, non-partisan observers and other interested parties to file official complaints, non-partisan observers and other interested parties to file a complaint when their electoral rights indirectly jeopardized. By extending this right ie unrestricted interpretation of this provision and/or adoption of a new one, citizens and other interested parties would be enabled to become actors in the electoral process and, as such, have the right to protect their vote, as well as any abuse of the electoral will of the citizens.

Also, when it comes to the protection of the electoral rights by political subjects, complaints that demand its protection can be filed by political subjects but not by candidates individually without the official support of their political subject. The Coalition believes that the circle of persons who have the right to file a complaint should be expanded for a simple reason that the eventually won mandate belongs to the candidate and not to the political subject.

Penalty provisions stipulated by the Election Law define that the maximum penalty ranges up to 10,000 BAM which in the cases of intentional obstructing of the electoral process is not a proper sanction.

More efforts by all relevant institutions and actors of the electoral process should be paid to these criminal acts in the area of the electoral process ie adequate reaction of all actors upon finding that such offenses have been committed. Much can be done in the area of education and animation of citizens, as well as other relevant actors of the electoral process (eg, agency for conservation and law enforcement), but also the electoral commissions in terms of raising awareness of the need and the obligation to report the crime of those who commit criminal offenses in the electoral process, and thus abuse the electoral will of the citizens.

Suggestions:

- *It is necessary to consider extending the circle of persons who can file a formal complaint for violation of the provisions of the Election Law (citizens, non-partisan observers, candidates, political subjects).*

- *- It is necessary to consider having more strict sanctions imposed by the Central Election Commission for the violation of the Rules of the electoral process.*
- *- It is necessary to consider increasing the fines, in particular for members of polling station committees.*
- *- It is necessary to make further efforts to raise awareness of all actors of the electoral process on criminal offenses in this field in order to reduce the abuses in this area to the lowest possible level.*

PROTECTION OF ELECTORAL RIGHTS IN BIH LEGISLATION

According to the BiH Election Law⁶ protection of electoral rights is ensured by election commissions ie local election commissions (municipality/city and Election Commission of Brčko District) and CEC BiH and the Appellate Division of the BiH Court. Regulations related to the system of complaints and claims are set out in the Election Law, Law on Administrative Procedure and Implementing Acts of the CEC⁷.

All complaints⁸ are submitted in writing on a form prescribed by the CEC BiH.⁹ A voter and political subject whose right, established by the Election Law, is violated may file a complaint with the authorized election commission within 48 hours or within 24 hours during the election period since the violation. Local election commissions have original jurisdiction in all matters that are not explicitly assigned to the CEC of BiH and the Appellate Division of the Court. CEC BiH have appellate jurisdiction to decide on the complaints lodged against decisions of election commissions¹⁰.

CEC BiH has original jurisdiction to decide on complaints filed for violation of the rules of the electoral process, electoral rights, and violations of the rules of Chapter 16 of the BiH Election Law, made by a political subject. The Appellate Division of the Court is competent to act up on appeals against decisions of the CEC BiH. Complaints are submitted to the Appellate Division of the Court within two days of receiving the decision of the CEC. The appeal is submitted by the CEC, while the Appellate Division of the Court decides upon the appeal within three days of its receipt.

In the protection of electoral rights ie when deciding on the complaints and appeals the CEC BiH has the authority to order the local election commissions, the Center for electoral roll or

⁶ Election Law of BiH, chapter 6.

⁷ Instructions on procedures for adjudicating complaints and appeals submitted to election commissions, Official Gazette, No.. 37/14

⁸ Report on the General Elections 2014., CEC BiH

<https://www.izbori.ba/Default.aspx?CategoryID=552&Lang=3>

⁹ Election Law of BiH, Article 6.2. Paragraph 1.

¹⁰ To illustrate: in the last elections conducted in October 2014, according to the information from the CEC, election commissions have received a total of 705 complaints and appeals. Most of them are related to violations of the laws in the jurisdiction of local election commissions (487) Source: Final Report of the Coalition 'Pod Lupom'. During all phases of the electoral process there have been 67 appeals to the Appellate Division of the Court, of which 66 complaints were rejected or dismissed, while the one was partially reversed, in part referring to the punishment of removing candidates from the candidates list. Source: Report on the election of 2014, CEC BiH

the polling station committees to undertake measures to remove spotted irregularities. CEC BiH also has jurisdiction for the imposition of the following sanctions: a fine not exceeding 10,000.00 BAM; removal of a candidate's name from a candidates list when it is determined that the person responsible for the violation of the Election Law; annulment of the certification of a political party, coalition, list of independent candidates or independent candidate; and prohibition to hire a certain person at a polling station, in the Center of the electoral roll, and in the local election commission.¹¹

When it comes to committing crimes related with the electoral process, such acts are defined in the Criminal Laws that are in force in BiH.¹² The legal obligation of election commissions are that, if they believe that a criminal act related to the electoral process has been committed, to report such acts to the authorized prosecution.

ANALYSIS BY AREA:

Right to file complaints

In the countries covered by this analysis, the decisions on who has the right to submit complaints are quite diverse, encompassing many categories of persons, but often restrict the right to file complaints only to certain violations of Election Law ie allow the protection only for certain questions. As for the voters, this right is often linked to the voters' register and filing complaints to it before Election Day, with political subjects for registration procedures and/or certification for participation in the elections and so on.

However, from the available data, quantitatively speaking, it can be concluded that the vast majority of countries (34 of 39), the right to file a complaint, to a lesser or greater extent provide to voters and political subjects at different stages of the electoral process. So, 17/39 state or 43.6% do so in a way that specifies the categories of voters and political subjects¹³, somewhere adding a category of observers that can file complaints related to the irregularities observed on Election Day. An identical number of countries (17¹⁴), on the other hand, broadly formulate who can file complaints at different phases of the electoral process, using terms such as 'all', 'all interested parties', and in some countries specifying in details who these persons are and under what conditions and in which violations of Election Law they can react. Austria, in this respect, stands out, in the sense that there are very few formal procedures for filing complaints and appeals are considered only after the announcement of the final results. Only 4¹⁵ of the 39 countries (10.3%) allow filing complaints only to political subjects, according to the regulations available for analysis.

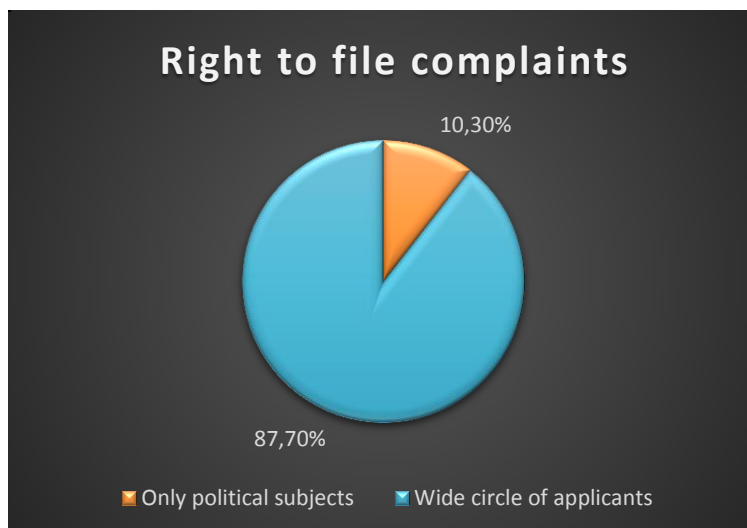
¹¹ Arapović A., Election system in BiH, p 72, Centers of Civic Initiatives (2012)

¹² There are four criminal laws in force: Criminal Law of BiH, Criminal Law of FBiH, Criminal Law of RS and Criminal Law of Brčko District.

¹³ Slovenia, Ukraine (and observers), Armenia (and observers), Hungary, Estonia, Montenegro, Serbia, Lithuania (and observers), France, Macedonia (and observers), Moldova, Slovakia, Croatia, Italy (observers and lower election commissions), Turkey (stating the category of 'witness'), Poland, Portugal

¹⁴ Georgia, Sweden, Romania, Norway, Denmark, Iceland, Germany, Switzerland, Azerbaijan, Kazakhstan. The Netherlands, Belarus, Finland, Czech Republic, Uzbekistan, Russia, Kyrgyzstan

¹⁵ Bulgaria, Latvia, Spain, Albania



Bulgaria is one of those states, and it is interesting for that the State Election Commission considers the complaints submitted by NGOs on the detected irregularities although the Election Law does not oblige them to do so. However, they do not make formal decisions on such complaints.

Filing of complaints by candidates within political subjects

Trough this research we have tried to find data in how many of the analyzed countries candidates can individually file complaints in the process of the protection of the electoral rights. Given the availability of regulations, their diversity, and the fact that most of them did not have bylaws available, data on the basis of available documents and regulations show the following: in 3 countries (7.7%) this is not allowed to candidates within the political subject (Macedonia, Turkey , Poland). In 13¹⁶/39 states or 33,3 % from available regulations this is not visible, while in the rest (23 or 58,9%) candidates can file complaints in protection of the electoral right.

The responsible authorities for the submission of complaints

When we speak about the responsible authorities to whom complaints are filed, in the majority of the states the first instance is determined according to the basis on which the complaint is filed. Mostly we talk about the election administration where lower-level electoral administration is the first instance of complaint resolution, then it goes to higher administration (central or state), after which appeals mainly are directed to the court (somewhere it is the Appellate Court, somewhere Constitutional, Supreme, etc..) pretty much the final authority of decision-making.

Interesting solutions can be found in Norway, Denmark and Iceland where the parliaments, as the highest legislative bodies, are involved in the protection of the electoral rights because

¹⁶ Georgia, Switzerland, Albania, Serbia, Lithuania, the Netherlands, Spain, Czech Republic, Slovenia, Uzbekistan, Croatia, Belarus, Germany

they are the ones to consider complaints on certain issues. In Denmark, Parliament confirms the validity of the election after consideration of appeals, the Iceland parliament decides up on the appeal on the assigned mandate to one of its members. The German Bundestag, too, confirms the validity of the elections after the completion of procedures, and on its decisions can be appealed to the Federal Constitutional Court of Germany.

Deadlines for protection of electoral rights

According to the Election Law of BiH, all complaints regarding the election must be filed within 48 hours, or 24 hours during the election period and they will be resolved within three days. These decisions can be appealed within 48 hours. The final instance¹⁷ is the Appellate Division of the Court that issues decisions on appeals within three days of receipt. During the conduct of the recent General Elections, it was noted that deadlines are often not respected by the CEC nor the court, which had the consequence that a certain number of complaints filed before the Election Day were considered after the Election Day¹⁸.

In available regulations in only 5¹⁹ of 39 states the deadlines for filing complaints are not specified or identifiable. In the other states included in this study deadlines are significantly different, generally divided into those before the Election Day and after Election

ICELAND
Deadline for filing complaints is
28 days

Day, and according to the basis for submission, or by type of electoral right which they protect. For example, those deadlines in Slovenia range from 3-15 days depending on the type of complaint and the body to which they are filed, in Hungary 3-30 days, France 1 -10 days, and so on. When it comes to the deadlines for complaints after announcement of the results, it was noted that the longest deadlines are set in the following countries: up to 10 days in Sweden and the Czech Republic, 28 days in Iceland, and 2 months in Germany.

When it comes to the deadlines for responding to complaints from the data of analyzed countries it was noted that 7 of the 39 countries do not have such clear-cut deadlines, but use mainly formulations 'as soon as possible,' 'a reasonable time', or from the available regulations such terms are not clearly identifiable.

BULGARIA
Election day – Deadline for
responding to complaints is
1hour

This is related to Sweden, Norway, Denmark, Iceland, Austria, Finland and Slovakia. Other countries set deadlines that range from solving 'immediately' up on complaints addressed during Election Day (*eg., Ukraine, Bulgaria, within 1 hour on Election Day, and before the closing of the polling station; Macedonia within 4 hours regarding violations to vote*), then 1 day of receipt (*eg, Georgia, Bulgaria, Spain*) and up to 6 weeks in the Netherlands (*with the exception of the complaint on the electoral roll when the deadline 7 days*).

¹⁷ Except in cases of violations of constitutional rights, ie the Constitutional Court accepts appeals from individuals whose fundamental rights have been violated and when all other domestic remedies have been exhausted.

¹⁸ The Final Report of the OSCE/ODHIR Election Observation Mission, October 12, 2014, p.18

¹⁹ Georgia, Norway, Austria, Slovakia, Uzbekistan

Looking at the total time necessary to solve the complaint, including the resolution of appeals on decisions where provided for, the analysis of state regulation of this study found that in the 13²⁰/39 is not possible to determine the duration of this procedure. In the other 26 states the average deadline is 11 days, noting that to calculate the average we have used the maximum deadlines for dealing with complaints, as deadlines vary by country depending on the time at which they are submitted, as well as the basis for filing them.

What was interesting to consider during the conduct of the analysis is whether the regulations of analyzed state standardized responsibility for non-compliance with deadlines in relation to the protection of the electoral rights. The result is that the majority do not emphasize this responsibility, or at least the responsibility is not visible in the available regulations. Hungary, for example, does not provide for sanctions or does not explicitly state such responsibilities, but provides that higher election commissions will annul untimely decisions of the lower election commission or make a decision themselves if the lower commission has not done it. Also, in Albania is defined the complaint on the basis of untimely solving where, if lower commission does not issue a decision within the deadline, the complaint may be addressed to the Central Election Commission.

Responsibility of violation of Election Law

The penalties provided for members of the election administration for inaction ex officio

The Election Law provides for penalties for violations of provision of the Law²¹. Those penalties are pecuniary, whereas the penalties related to criminal acts from the area of the electoral process are defined by criminal laws in force in Bosnia and Herzegovina. When it comes to election administration in BiH, the range provided for fines goes from 200 to 1000 BAM, which in the opinion of the Coalition does not represent the amount that will prevent or discourage particular deliberate attempts to abuse the electoral process.

By analyzing the regulation of states in this research, we came to the data that 56.4% (22²²/39) of them have sanctions for members of the election administration regarding violation of Election Laws or other laws in connection with official duty, 43.6% (17/39) states do not have such sanctions or regulations available to us do not clearly specify it. It is interesting to note the decision of some countries, such as Hungary - when it comes to fines for persons for certain violations of the electoral process they range from 5 to 15 minimum monthly salaries in Hungary with the deadline to pay the fine within 15 days. If it happens that a person does not pay within the given deadline, the election commission informs the IRS about it, which then takes the further responsibility for charging this debt in accordance with

²⁰ Sweden, Norway, Denmark, Iceland, Austria, Germany, Switzerland, Lithuania, the Netherlands, Finland, France, Moldova, Turkey

²¹ Election Law of BiH, Chapter 19A

²² Georgia, Ukraine, Armenia, Denmark, Iceland, Hungary, Moldova, Bulgaria, Latvia, Switzerland, Albania, Azerbaijan, Estonia, Montenegro, Kazakhstan, the Netherlands, Finland, France, Macedonia, Portugal, Spain, Turkey

tax regulations. In Portugal, on the other hand, there is a provision that a violation of election legislation by a member of the election administration is seen as 'aggravating circumstance' in future proceedings against that person.

The penalties for political subjects related to violation of the Election Law

Penalty provisions stipulated by the BiH Election Law for political subjects are pecuniary and range from 1.000 to 10,000 BAM.

This study found that the majority of countries in some way sanction violation of election legislation by political subjects. So 56,4% or 22²³/39 state define it in analyzed regulations, while 15 of them do not do it through the Election Law or other available regulations, but apply other regulations (Law on Minor Offenses, Criminal Laws, etc.) It is interesting to point out some examples of comparative solutions in terms of sanctions towards political subjects: in Albania, the penalty for rejecting to be transparent regarding financing the election campaign is from 2,000,000 ALL (around 30,000 BAM) to suspension from public funding for the period up to 5 years. The decision on this is made by the Central Election Commission. In Belarus, for similar violation, ie for spending funds in campaign that exceed the allowed limit, the Central Election Commission may, without prior notice, cancel the decision on registration of candidates for the elections. In France, the penalties include suspension of political rights, fines and imprisonment.

INSTEAD OF CONCLUSION

In the coming months, the Coalition 'Pod Lupom' will work on unifying prepared analyzes, about the polling station committees, election deadlines, protection of the electoral rights, and analysis that will deal with specific technical aspects of the electoral process on Election Day in the analyzed countries. Also, the Coalition will, on the basis of the study conducted previously, work on a lexicon of analyzed countries which will be published and available to the professional and general public and which will provide a detailed review of the electoral systems and specific legal provisions of countries included in this study.

In light of the recent appointments of Interdepartmental group for changing the electoral legislation in BiH, we hope that this and other materials that Coalition prepares will be useful in the process of preparing amendments to the Election law of BiH which should be included in the agenda in the autumn of this year in order to comply with the recommendations of the Venice Commission of not altering the Election Law in an election year.

²³ Romania, Ukraine, Norway, Denmark, Iceland, Hungary, Bulgaria, Albania, Azerbaijan, Estonia, Montenegro, Serbia, Kazakhstan, the Netherlands, Belarus, Finland, France, Macedonia, Moldova, Portugal, Spain, Poland

Analysis prepared by:

Jelena Tanasković

Researchers/collaborators:

Ilma Aljović, Nenad Bosnić, Damjan Jugović, Edita Miftari, Srđan Ostojić, Miroljub Radomirović, Stevan Salatić and Elma Tahmaz.