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ON THE RECALL OF A MAYOR IN REPUBLIKA SRPSKA

Abstract: *In this paper, the author analyzes the institution of recall of a mayor in the legal system of the Republika Srpska by critically examining the provisions of two legislative acts: The Election Act of Republika Srpska and the Local Self-government Act of Republika Srpska. The institution of recall has a serious democratic potential because it is an instrument enabling political control of mayors by citizens. However, the current legal solutions in Republika Srpska limit this potential because they do not encourage citizens to use this instrument of political control, which is not the case with political parties. Given the fact that the decision on initiating the recall procedure depends on a local assembly, recall has very often been used as a tool for political confrontation between a local assembly and a mayor, while the citizens have remained a second-class political subject. The Election Act of Republika Srpska does not contain adequate provisions on the protection of rights of citizens and political subjects during the recall procedure. In fact, this issue is relatively unregulated or underregulated. The Local Self-government Act of Republika Srpska protects a local assembly which triggers an unsuccessful recall procedure since there is no legal guarantee that such a local assembly would be dissolved. The author proposes different solutions which should improve the regulation of this legal institute and reduce the possibility of turning it into a tool for political manipulation.*

Keywords: *recall, mayor, local assembly, local self-government, Electoral Act, Republika Srpska.*

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1. Introduction

Bosnia and Herzegovina (B&H) has no competences in the sphere of local self-government. According to Article III of the Constitution of Bosnia and Herzegovina, which regulates the issue of division of competences between the state and the entities, local self-government is an exclusive competence of the entities. Therefore, both entities in B&H have their own legislation on local self-government; in the Federation of Bosnia and Herzegovina (FB&H), cantons have their own legislation too. Local self-government is a matter of constitutional regulation in constitutions of both entities.

Although each entity is entitled to freely regulate the local self-government issues, there are no significant differences between the two systems of local self-government. The system of power at the local level is based on the principle of the separation of powers: the mayor (head of a city or municipality) is a sole holder of the executive power in local self-government units, while the local assembly (or the council in the FB&H) is a representative body which exercises the normative (“legislative”) power.

The principle of separation of powers presupposes some checks and balances which have to guarantee the control of both basic local institutions. The legal institute of recall of a mayor is one of the checks and balances which have to enable the political control of the local executive power. The purpose of this paper is to analyze this legal institute and compare it with analogous legal instruments in other legal systems.

The primary method applied in the analysis of the legislative framework on the institute of recall is the analytical method, aimed at critically assessing the strengths and weaknesses of the positive-law solutions envisaged in the Election Act and the Local Self-government Act of Republika Srpska. The idea is to examine whether the legal provisions regulate the institute of recall in the best possible manner, or whether they have serious deficiencies which limit the democratic potential and legitimacy of this legal institute.

The author also used the comparative method for the purpose of comparing the legal provision on recall of a mayor in Republika Srpska with the legal solutions in some other countries, and analyzing the observed similarities and differences. Discussion on mutual influences and “exchange” of ideas are both desirable and potentially fruitful.

The politicological (political-science) method is necessary for several reasons. First, a decision to recall a mayor is always a political decision, including a political background, motives, and consequences. Thus, the reasons for instituting and enforcing the recall procedure are necessarily political. Second, the recall

procedure is under the control of political elites almost in all its segments. Political elites decide on initiating the procedure, and control it to a significant degree. For this reason, it is important to understand the interests and conduct of political actors facing political elites.

2. Dependence of Recall on the Local Self-Government System

The institutional framework of the local self-government system in the Republika Srpska is based on two local political institutions: a local (municipal or city) assembly, and a mayor (head of the city or municipality). Both are elected directly (by popular vote in local elections); in line with the principle of the separation of powers,¹ each institution is vested with normative or executive power (respectively) at the local level.²

Legal and political positions of a mayor are marked by three features: 1) he/she is elected directly although absolute majority of votes is not necessary for the election; 2) one person can be elected to the same post as many times as he/she can win plurality of votes; 3) the whole executive power is vested in mayor's hands which means that he/she doesn't share the power with a collegial or an individual body which would also exercise the executive power.

In the Republika Srpska, the principle of strict separation of powers excludes the political responsibility (accountability) of a mayor to the local assembly.³ Principally, it excludes legal responsibility of the former to the latter. Therefore, a mechanism for mayor's responsibility has to be introduced. If a mayor with potentially strong democratic legitimacy and wide competences were not responsible to anyone, his/her political role would become dominant in the local self-government system. It is true that a mayor has legal responsibility, which means that an appropriate legal procedure may be initiated against him/her in a court of law. However, this is a usual legal responsibility (liability) or, at best, a legal responsibility which can have political consequences in case that mayor's illegal action is proven. The question remains what to do in case a

1 For an interesting analysis of institutional structure of local self-government, including the separation of powers between the representative and executive bodies, see: Moreno, 2012.

2 For more on the institutional segments of the local self-government system in Republika Srpska, see: Marković, 2021, 527–541.

3 In some countries, the principle of the separation of powers has been premised on the parliamentary system of government, where a local executive body is politically accountable to a local representative body. In Belgium, for example, a local executive body is politically accountable to a local council. A mayor is a member of a collegiate local executive body; a mayor can be removed from office for pure political reasons but only as a member of a local executive body (Bouvier, 2012: 56), which is very different from the local self-government system in Republika Srpska.

mayor's conduct is suspected to constitute a breach of law although it cannot be qualified as a criminal act? For example, a mayor may breach a provision of the Local Self-government Act, but it does not mean that he/she has committed a criminal act or a misdemeanour. If a mayor cannot be accused for an illegal act because of the legal nature of an act, there has to be an instrument for the inquiry of his/her acts. The institute of recall is a mechanism which enables both a local assembly and the citizens to have a say on a mayor's conduct and to sanction him/her although a sanction could be only a political one.

The Local Self-government Act of Republika Srpska⁴ introduces the system with strong monocephalic executive power.⁵ Firstly, the Act prescribes that the mayor has to be elected directly for a four-year term of office. This very method of election establishes a strong mayor since his/her democratic legitimacy stems from the people's confidence. On the other hand, this solution has to be strongly criticized from the point of legitimacy. If a candidate can be elected by plurality of votes, for example by only 35 or 40% of those who vote (which, depending on the number of abstainers, could be only 20 to 30% of all voters), his/her legitimacy could be seriously undermined. Nevertheless, a mayor elected by plurality and by a small margin still retains all competences prescribed by this Act. A mayor with no legitimacy or with a questionable legitimacy exercises serious local political power equally to a mayor who has been elected by a vast majority of voters.

Secondly, the Act does not prescribe any limits for re-election. A mayor may be elected as many times as he/she receives plurality of votes. This solution is probably practical because a candidate with experience and voters' confidence should be entitled to exercise the power as long as he/she is the voter's choice, particularly since a mayor is an institution of local power. The author of this paper disagrees with this argument. Each power has to be limited in order not to pervert into an abuse of power. Although a mayor is a local institution, he/she still holds a considerable amount of local power, which can be abused. One

4 The Local Self-government Act of Republika Srpska, *Official Gazette of R. Srpska*, No. 97/16, 36/19, 61/21.

5 Although the institution of a mayor is well-known in comparative local self-government systems (see: Moreno, 2012), a mayor often does not have such strong competences and power. Although this may not be the proper occasion to discuss the issue, the author of this paper advocates for another system of local self-government, which would include a local assembly as a representative body with normative power, and an executive collegiate body which would be accountable to the local assembly. In such a system, there would be no place for a mayor. There would be the president of the local assembly and a chair of the collegiate executive body. Moreover, in the local assembly system of power, the collegiate executive body would be hierarchically controlled by the local assembly. A similar system has been introduced in the Republic of Serbia (For more, see: Stanković, 2015).

of mechanisms for prevention of abuse of power is to limit the re-election to two consecutive terms. This solution is also appropriate for Republika Srpska.

The institute of recall is directly interconnected with the issue of re-election of a mayor. This institute has its justification in each local self-government system, particularly in the system which enables a mayor to hold power consecutively for 16 or 20 years, for example. Recall serves as a threat to a mayor who would act illegally or illegitimately; to such a mayor, it is an instrument of control and "punishment". A control of a mayor is particularly important in a system which gives a chance to the mayor to impose his/her political will over the local executive power and potentially over the entire local power system. Recall could be an instrument for preventing the spread of power of the mayor who otherwise could not be deposed, particularly in case he/she would serve for more than two consecutive terms and strengthen his/her control over local politics.

Thirdly, the system of local self-government in Republika Srpska is based on wide competences of the mayor who heads the local executive as a hierarchical chief of various officials and executive agencies. All of them are nominated by the mayor and are responsible to him/her. The mayor's influences on the local representative body (assembly) is also considerable. He/she is the main initiator of normative legal acts which are enacted by the local representative body; he/she proposes changes to the statute as the main legal act of a local community, drafts a budget, and proposes local policies in different areas.

The wide competences given to a mayor always entail considerable political power although its scope and content depends, among other factors, on the relationship between a mayor and the local representative body (assembly). If a mayor belongs to a political party or a coalition which controls the majority in a local representative body, there would be no any efficient means of control of the former by the latter. If a mayor belongs to a political party or a coalition which exercises control over the majority in a local assembly, the mayor cannot be efficiently controlled by the local assembly. In this case, the balance of powers between the normative and the executive power would be strongly shifted toward the latter. Thus, the institute of recall is the only possible and legally recognized means of control of the local executive power.

The institute of recall is important for another reason. A mayor cannot be removed from office by the local representative body, which means that there is no substantial and efficient control of the former by the latter. Whatever the relationship between the two is, one cannot decide on the political destiny of the other. If the institute of recall did not exist, a mayor could not be removed irrespective of his/her policies and deeds. It is true that the institute of recall

does not guarantee an efficient control of a mayor by the local representative body but, at least, it provides an opportunity for it.

The institute of recall is important as an instrument of people's control⁶ over the local executive power.⁷ If citizens elect a mayor, they should have the right to recall him/her. It is a democratic principle which, at least potentially, gives the opportunity to those who are dispossessed of political power to influence political processes at the local level. It is quite a different issue whether, how, and to what extent the citizens' decision to recall a mayor may be independent from the impact of local political elites. It is true that political parties considerably influence the very process of recall. The citizens' decision is also influenced by political parties. However, one cannot prove that citizens are unable to decide on recall without the influence of political parties in all cases. At least, there is a possibility that they would truly decide on recall independently, and this possibility justifies the very legal regulation of this institute. Whether this possibility would become a reality depends on many factors which cannot be estimated in advance.

3. The Legislative Framework on the Legal Institute of Recall

3.1. The reasons for recall

Article 45 of the Election Act⁸ prescribes that recall is one of the legal grounds for termination of a mayor's term of office.⁹ The same article enlists the reasons for starting of the recall procedure.¹⁰ Most of these reasons are implicitly political in nature while all of them are explicitly connected with breach of a law

6 Some would rightly say that it is a reactive mechanism and an *ad hoc* corrective mechanism (European Commission for Democracy Through Law/Venice Commission, 2019:18).

7 It is an instrument of direct democracy which has to function as a complement to representative democracy (Venice Commission, 2019: 17; Welp, 2018: 451).

8 The Election Act of Republika Srpska, *Official Gazette of R.Srpska*, No. 34/2002, 24/2004, 101/2004-another act, 19/2005, 24/2012, 94/2012- CCB&H decision, 109/2012, 45/2018, 18/2020;

9 The author thinks that the institute of recall is so important for potential development of direct democracy at the local level that it should be guaranteed by the Constitution. In comparative law, such a solution is envisaged in Poland, where Article 170 of the Constitution prescribes that members of a local self-governing community can decide on dismissal of a directly elected body of local power in a referendum.

10 The literature on the recall of a mayor also includes the term "recall referendum". The Election Act of Republika Srpska does not contain the term "referendum" in regulating the institute of recall although it should. The very recall procedure contains all basic features of a referendum as an institute of direct democracy, and there is no reason to avoid the right term "referendum" in the Election Act.

or a mayor's failure to exercise his/her duties and competences. The reasons for recall of a mayor are as follows: 1) failure to perform the mayor's duties in compliance with the law (EA) and other acts; 2) failure to implement the strategic documents which are significant for the Republic; 3) failure to implement the decisions and strategic developmental documents of a local representative body (assembly); 4) material damage caused by enactment or failure to enact the acts in the competence of a mayor; 5) failure to submit a report to the local assembly; 6) failure to submit a draft budget to a local assembly in a term prescribed by the law (Article 45 para.2 of the Election Act of R.Srpska).

As one could conclude, the recall procedure cannot be initiated if a local assembly has political disagreements with a mayor, or if it or the citizens disagree with his/her policies. Formally, if a mayor does not breach Article 45 of the Election Act, the recall procedure may not be started even if a local assembly or citizens have serious doubts about the legitimacy or political suitability of his/her acts and deeds.

This concept of recall has its positive and negative aspects. Its positive side is that the lawmaker has intended to define relatively precisely the reasons for starting of the procedure of recall in order to prevent the misuse of this instrument of control. If recall could be organized for every reason, those who have the right to decide on it could use it whenever they disagree with a mayor and wish to use recall in order to get rid of a mayor. However, the Election Act has not prescribed the possibility of recall for political disagreements between the local assembly and a mayor. To be more precise, this possibility exists only if a local assembly is able to justify the recall by using Article 45 of Act as a pretext. A local assembly could not decide to initiate the recall procedure by claiming that a mayor has had illegitimate or harmful policies. It can only be done by claiming that one of reasons from Article 45 of the Election Act has been fulfilled.

In the author's opinion, recall has to be possible even in cases when a local assembly finds a mayor's policies inappropriate. It means that recall has to be possible even for pure political reasons, which the author considers to be an acceptable solution. Since the mayor is directly elected by citizens, the latter should have the right to recall the mayor for any reason they find justified, including their disagreement with his/her policies. A mayor has to be responsible to those who elect him/her for all imaginable reasons, particularly including his/her policies.

This is not the case under the Election Act of Republika Srpska. Thus, if a local assembly wants to recall a mayor only for political disagreements, it has to define one or more reasons for recall in accordance with Article 45 of the Election Act. Sometimes it is not easy because mayor acts in accordance with the law and a

local assembly has to artificially define reason(s) that supposedly justify the instigation of the recall procedure.

What happens if a local assembly decides to initiate the recall procedure without specifying a reason prescribed by the Election Act? Such a decision should be proclaimed illegal and it could not be used as the legal basis for recall. However, such an outcome is neither explicitly prescribed by the Act nor it ever happens in practice. Even if it were attempted, it would be very hard to prove in court that a local assembly decided to start the recall procedure without a legal basis envisaged in Article 45 of the Election Act.

It has to be noted that the present legal provision was adopted in 2012. The original text of the Election Act prescribed that a mayor could be recalled if he did not exercise his/her functions in a lawful manner, or if he/she did not execute the decisions of a local assembly. Principally, the reasons for recall in the current Election Act, which are defined in a general manner, are substantially the same as the one which were prescribed in 2012. However, the lawmaker decided to change the approach when defining these reasons. Namely, the original legal provision defined only two general reasons for recall. A local assembly could subsume different individual reasons under one of these two general reasons. Thus, a local assembly had a relatively wide freedom to decide whether one of these two general reasons had been fulfilled. The lawmaker's intention was to stabilize the institution of a mayor. Thus, the legislator enlisted six cases in which the recall procedure could be enforced. All of them could be subsumed under the previous two general reasons for recall. The new legal solution may have a dissuasive effect; when the reasons for recall have been relatively precisely defined, it could be expected that a recall would be proposed less often.

However, the practice did not go in that direction. The fact that there has not been an efficient judicial protection from a political misuse of this instrument of direct democracy, as well as the fact that the reasons for its enforcement has been relatively widely defined, enabled political parties to decide on starting of the recall procedure whenever they found it politically opportune.

A comparative law analysis shows that the reasons or grounds for recall have not been prescribed in the widest possible manner in the Election Act. Some authors point to legislations which prescribe, for example, failure to uphold the interests of the local community or incompetence in performing duties as reasons for recall.¹¹ These reasons may be acceptable in those local self-government systems which give the right to voters to initiate a recall whenever they are politically dissatisfied with a mayor. In other words, the acceptance of

11 See: European Commission for Democracy Through Law/Venice Commission Report, 2019: 23.

these reasons depends on the concept of recall as well as on the specific local self-government system.

The author of this paper advocates for acceptance of these reasons for recall as well. It is true that they are defined very generally and widely, which potentially makes room for political manoeuvres and misuse of this institute of direct democracy. However, these reasons could contribute to achieving the principle of democratic legitimacy of the institution of a mayor and to his/her political responsibility (accountability) to voters. As the institution of a mayor is a political institution, a mayor is not only in a position to execute but also to shape local policies, and quite often has a central role in the system of local institutions. Thus, it is acceptable that he/she can be recalled for the reason of failure to uphold local interests or for incompetence in the performance of his/her duties.

The Election Act does not prescribe when recall procedure cannot be initiated. Therefore, it can be initiated at any time during the mayor's term of office. In some legal systems, recall referendum cannot be initiated during the first or the last year of the mayor's term in office.¹² These solutions have their own logic. The lawmakers obviously have intended to give the chance to a mayor to act freely during his/her first year in office in order to have enough time to fulfil his/her basic electoral promises. On the other hand, the lawmakers have thought that it would not be wise to recall a mayor in his/her last year in office since new elections would come soon anyway.

While these solutions could serve the purposes of stability and efficiency of the mayor institution, they are opposed to the democratic principle of sovereignty of popular will. Citizens may become aware of a mayor's incompetence or anti-popular policies at the very beginning or at the end of his/her term in office. They should be entitled to have a say on the mayor's policies and deeds since his/her misconduct should not be tied to the time he/she spent in office. It would be meaningless to say that a mayor should be given some time to prove his/her abilities and legitimacy if voters think that he/she has proven at the very beginning of his mandate that his/her policies would not be satisfactory and legitimate. Therefore, voters should have the right to recall a mayor at any time.

3.2. Who decides on initiating the recall procedure?

The institution of recall is prescribed in the Election Act of Republika Srpska. Although this Act prescribes the recall of the head of municipal executive, the same provisions are also applicable to the recall procedure of the head of city

¹² See: Welp, 2018: 454.

executive, considering that the city mayor is also elected directly just as the municipality mayor.

In Republika Srpska, a recall can be initiated by one-third of members of a local assembly or 10% of voters who exercise their voting right in a municipality (Article 45 para. 3 of the Election Act).¹³ The proposal has to be made in the form of an initiative which has to be justified. The local assembly discusses the initiative and decides on it by a simple majority vote of the total number of local assembly members (councilors). Thus, it is empowered to assess the validity of the reason(s) for recall (Welp, 2018:454).

The provision on the initiators of recall is adequate. It is natural that a portion of members of a local assembly shall be entitled to initiate the recall procedure; the same may be said for voters. Given that a mayor is elected by voters and that they should be entitled to recall him, voters shall also have the right to initiate his/her recall. The percentage of voters who can do it (10% of all voters in a municipality) is adequately prescribed¹⁴ because it is neither too high nor too low.¹⁵ The aim of the provision has obviously been to prevent voters from submitting initiatives too often; yet, if this percentage were higher (15 or 20

13 In Romania, for example, it is 25 % of voters. See: Council of Europe, 2014: 12. We may criticize this solution which makes this instrument of control and direct democracy almost useless for citizens.

14 In Croatia, Article 40b of the Local and Regional Self-government Act prescribes that a referendum for the recall of a mayor can be initiated by 20 % of voters or two-thirds majority of a representative body. We find these solutions unacceptable, except in one aspect. If 20% of voters initiate a referendum on recall, a representative body would decide on a referendum. Therefore, the representative body does not have the right to decide whether to call a referendum or not; its duty is to call a referendum.

15 There is an opinion that recall should be an exceptional tool, as a complement to other democratic mechanisms (European Commission for Democracy Through Law/Venice Commission, 2019: 18). If recall has to be an exceptional tool, the conditions for initiating a recall (including the percent of voters who have the right to propose it) have to be carefully formulated. In the author's opinion, such an approach to recall has to be rejected. If a recall has to be an exceptional tool, it has to be used only in exceptional circumstances, in other words, quite rarely. This is not an explicit conclusion stemming from understanding of recall as an exceptional tool, yet, it could be understood in such a way. This approach should not be accepted. If a recall were understood as an instrument which would have to be used exceptionally (i.e. rarely), the democratic potential of recall would be quite limited, or almost nonexistent. It should not be defined as an exceptional tool, and it should not be legally regulated with conditions which would aggravate its exercise. If a recall were perceived as an exceptional tool, it would be justified to prescribe a higher percentage of voters who could initiate it. The higher percentage of voters who have to collect their signatures in order to initiate a recall would probably discourage voters to do so. The author disagrees with such an approach. It is always complicated for voters to initiate a recall as they rarely have organizational, financial, mass media and other resources at their disposal. If a percentage

%), voters would be discouraged from using it since it could be too complex for them to collect such a huge number of signatures.¹⁶

While a local assembly is expected to decide on a recall procedure initiative submitted by one-third of its members, in the author's opinion, it should not have the right to decide on a recall initiative submitted by voters. Naturally, as one-third of the local assembly members cannot impose their will on the majority of the assembly members, a recall initiative has to be verified by the local assembly. The situation is different in case a recall initiative is submitted by voters. If an initiative is submitted by an informal group of citizens, an association of citizens, or one or more small political parties, it is not easy for them to collect signatures from 10% of voters in the city/municipality. They need money, organizational infrastructure, media attention (etc.) for publicity alone.¹⁷ Even if these obstacles are overcome, a local assembly may simply reject an initiative if the assembly majority supports a mayor, or for any other reason. Moreover, the question is not whether an initiative for recall is supported by "mere" 10% of voters. It may be supported by 30, 40, or even 50 % of voters. Even in such cases, a local assembly may unilaterally decide to reject a recall initiative and prevent voting. Such an outcome is legally allowed and possible. In the author's opinion, it is not democratically legitimate that a group of 16 people (or less, depending on the number of deputies in a local assembly) can reject an initiative which has been submitted by thousands or even tens of thousands of voters.

There are two legal solutions to this issue. The first one is that a local assembly should decide on starting the recall procedure if an initiative is submitted by at least 10% of voters. This means that a local assembly would not have the right to reject an initiative. The second one is that a local assembly should not have the right to reject an initiative submitted by 15% of voters, while it would have the

of voters for initiating a recall is high, it is highly unlikely that an initiative for recall could be submitted.

16 In order to reduce the number of recalls, parliaments in some countries increased the requirements for the number of signature needed to initiate the recall procedure (see: Serdult, Welp, 2017: 142). This would be counterproductive in Republika Srpska. Prior practice does not support the thesis that voters would use this mechanism even if the legislator prescribed a low number of signatures which have to be collected in order to initiate the procedure. In practice, the procedure has been proposed by local assemblies, which means that citizens have not yet had the role of an independent subject who would instigate the recall procedure independently from political parties.

17 Comparative analysis shows varied statistical data on the recall procedure. In Poland, for example, there were 195 recall votes during the 1998-2002 period; in Peru, the recall procedure was triggered in 45,4% of municipalities in the period 1997-2013; in Germany, there were 17 recall votes in the period 1993-2008; in Japan, there were 397 recall votes during the 1947-1999 period (Serdult, Welp, 2017: 142-143).

right to reject it if it is submitted by 10 to 15 % of voters. The purpose of these solutions is to prevent a negative decision of a local assembly if a considerable number of voters submitted an initiative. The democratic potential of a recall would be undermined if a local assembly would be stronger than whatever number of voters. This is the case right now, which has to be strongly criticized. The lawmaker has intended to efficiently limit the participation of citizens in the process of recall and succeeded in that endeavour, which is contrary to the principles of democratic legitimacy and popular sovereignty.

Two principles have had to be reconciled: the principle of democratic legitimacy of the institution of a mayor and the principle of its stability. On the one hand, the principle of democratic legitimacy has had to guarantee to citizens that they could recall a mayor if they were dissatisfied with his/her policies or conduct. This would be a logical end of a relationship between citizens and a mayor: as they elected the mayor, they have the right to control and eventually recall him/her. On the other hand, the institution of a mayor has to be stable. One of the presumptions for its stability is that recall is not organized often and without a good reason.

Someone has to decide whether a recall is justified, i.e. if there is a good reason for starting the recall procedure. In that regard, two problems arise. Firstly, if citizens elect a mayor and have the right to recall him, it is their sole right to decide not only whether a mayor shall be recalled or not but also whether the recall procedure shall be started. The current legal solution is contradictory: even if citizens think that a mayor has to be recalled, the recall procedure may be initiated only if a local assembly agrees. Therefore, a local assembly can prevent a recall by not giving the voters a chance to vote.

Secondly, both the local assembly and the mayor are political institutions. The local assembly's assessment of justification of a recall could be a political one, purely based on the assembly's positive or negative attitude towards a mayor, his/her political party affiliation and policies. Thus, the citizens' political wish to remove a mayor can be obstructed by a local assembly decision which may be motivated by a purely political reason. The local assembly would like to avoid a risk of losing a mayor who belongs to the same political party or acts in accordance with political programme and/or interests of the local assembly majority.

The decision to initiate the recall of a mayor is made by the local (municipal/city) assembly by a majority vote of the total number of councilors (Article 45 para.6 EA). This is important because the time limits for conducting the recall procedure start running from the moment when the local assembly decision enters into force. Financial resources for the recall procedure have to be planned, accounted for and provided from the local self-government budget (Article 45 para.7 EA)

3.3. Body responsible for conducting the recall procedure

Under the Election Act, a local assembly nominates a commission responsible for conducting the recall procedure (hereinafter: the Commission). The Commission is composed of three, five, or seven members (Article 45b para.3 EA). The number of Commission members is equal to the number of the municipal election commission members. Members of the municipal election commission may be appointed to sit in the Commission in charge of conducting the recall procedure. The Commission members have to meet the same requirements for appointment as the members of the municipal election commission (Article 45b para.5 and 6 EA).

The composition of a Commission is stipulated in relatively imprecise terms, particularly in terms of party affiliation or party preferences of the Commission members. Thus, the most important issue is how to guarantee that the Commission members will be truly independent from the influence of political parties. It is important because political parties are interested in the outcome of a recall and they may try to influence the process and thus the outcome of voting.

It is good that a particular body is responsible for conducting the recall procedure. One may argue that the process should be conducted by the local election commission, which is by its very nature connected to the issue of elections. Another argument in favour of this opinion may be supported by the fact that the Commission members have to fulfil the same membership requirements which have to be fulfilled by the members of a local election commission.

If the current legal solution were to be preserved, it would be better if the recall procedure were conducted by a permanent local (municipal/city) election commission. The term of office of such a commission is seven years. Although there are no guarantees that local election commissions would be politically independent, such a commission is still more likely to be more politically independent than a commission specifically nominated by a local assembly majority for a purpose of conducting a recall procedure.

In the author's opinion, the best possible solution would be for a local assembly to nominate a commission for conducting the recall procedure; the commission should be composed of members nominated both by the local assembly majority and minority. This commission has to be politically independent as much as possible. As it is highly unlikely to expect a fully independent commission, the legislator should prescribe that both majority and minority in the assembly shall be entitled to nominate the same number of Commission members. To be nominated, they have to meet the same requirements that are prescribed for the appointment of members of a local election commission.

3.4. *Majority necessary for rendering a decision on recall*

A mayor is recalled by a majority of all citizens who have participated in voting. Citizens decide by casting a direct secret ballot (Art. 45a, para. 2 and 3 of the Election Act). The original text of the Election Act (2002) prescribed that a majority of all voters with the voting right was necessary for recall. Therefore, even if a vast majority of those who voted expressed their will for recall, it would not be enough if this majority would not include a majority of all voters with the voting right. The original legal provision protected a mayor from recall too much because such a majority was very hard to achieve. Thus, in order to secure the failure of a recall, it was enough for a mayor and his political party to campaign for voters' abstention. The Act on the Basic Principles of Local Self-government in the Federation of Bosnia and Herzegovina prescribed the solution which was the same as the one which has been valid in Republika Srpska since 2004, and which is in force right now.¹⁸

Although the author of this paper finds that the legal provision has a clear meaning, there are different opinions on the meaning of the Election Act provision that the mayor is recalled by "the majority of the overall number of voters who voted". The Republic Election Commission of Republika Srpska (REC) contributed to the confusion by drafting the Rulebook on the Enforcement of the Procedure of Recall of a Mayor (on 4 May 2022).¹⁹ As the Secretariat for Legislation of Republika Srpska rightly found this Rulebook to be contrary to the Election Act, on the basis of the Secretariat's opinion, Article 7.7 of the Rulebook prescribed that the mandate of the mayor ends if the majority of the voters who went to the polls vote in favour of his/her recall. Article 5.4 of the Rulebook clearly prescribes that valid ballot papers are those where the voters clearly circle only one of the options (for or against), while invalid ballots include blank ballot papers, invalidated ballot papers, or ballot papers from which the voter's will cannot be determined with certainty. Therefore, the votes of those voters who participated in voting but whose ballots are invalid shall not be counted. This is contrary to Article 45a para. 3 of the Election Act, which clearly indicates that the votes of the total number of voters who participate in voting (turn out at the polls) shall be counted (including the blank and invalid ballot papers). Under the Election Act, voters are entitled to participate in voting and vote as they wish. Therefore, the blank vote is lawful and it has to be included in the voting results. Voters also have the right to invalidate their ballot papers, but their blank or invalidated ballot papers show their political stance and preference. A voter may also

18 In some legal systems, such as the German one, the recall of a mayor is possible by a qualified majority of the population voting in favour (Schefold, 2012: 243).

19 Rulebook on the Enforcement of the Procedure of Recall of a Mayor, *Official Gazette of the Republika Srpska*, No. 63/22.

leave the ballot paper blank or invalidate it because he/she is uncertain how to vote; such a vote cannot be counted as a valid vote but it may reflect the voter's intention to demonstrate his/her political will or stance.

In July 2022, the President of the Republic Election Commission of Republika Srpska expressed his view that the provision of the Election Act of Republika Srpska was problematic because it could help the mayor "survive" the recall.²⁰ In his opinion, the provision of Article 45 EA entails that invalid ballot papers are included in the total number of voters who turned out at the polls. However, the blank or invalid votes cannot be ascribed to either "for" or "against" group. In order to resolve this issue, the Rulebook introduced the rule that only valid ballots shall be taken into account (Srpskainfo, 2022).

The author of this paper disagrees with this opinion. Firstly, one has to understand that the voters have the right not to vote, i.e. to invalidate a ballot paper or to vote with a blank ballot (which is one of forms of ballot's annulment). Secondly, even a blank vote is a vote. A voter who annuls his/her ballot or decides not to vote at all (although he/she comes to a polling station) still participates in voting. The question arises why a voter decides to spoil his/her vote in a situation when he/she decides not to stay at home but comes to a polling station. The only reasonable explanation is that a voter spoils his/her vote because it is a kind of protest and expression of a political will or a political attitude towards the very process of recall and political subjects who participate in voting. Given the fact that they participate in the voting process, they are not absentees. Therefore, their votes have to be included in the final results.

The majority necessary for the final decision on recall has to guarantee stability of the institution of a mayor, but it should not protect the mayor from justified citizens' dissatisfaction. The stability is guaranteed in the legal provision which prescribes that a mayor can be recalled if a majority of voting citizens voted in favour of his/her recall. As a mayor can be elected by a relative majority of voting citizens, it is obvious that the condition for recalling a mayor is more rigorous than the condition for electing a mayor.²¹

20 Srpskainfo (2022). *Predsjednik RIK najavio odluku za Višegrad iduće sedmice* (the REC President announced the decision on appeals against the decisions of the Commission for conducting the recall procedure of the mayor of Višegrad), S. Popadić, 1 July 2022; <https://srpskainfo.com/predsjednik-rik-najavio-odluku-za-visegrad-iduce-sedmice-svaki-nacelnik-protiv-koga-je-pokrenut-opoziv-ima-blagi-vjetar-u-ledja/>

21 The author agrees with the opinion of the Constitutional Court of the Russian Federation that it would be unconstitutional to prescribe that a majority for recalling a mayor should be lower than the one for electing a mayor. See: Decision of the Constitutional Court of the Russian Federation No. 7-P of 2 April 2002: "In the case of assessing the constitutionality of certain provisions of the Law of the Krasnoyarsk Territory "On the procedure for recalling a

One may argue that a mayor could be recalled by votes of a relatively insignificant number of voters if a majority of voters who participated voted in favour of recall but only a small portion of voters actually voted at all. In other words, it is not necessary that more than 50% of all voters (or any other lower percentage of voters) participate in voting on recall. This could really be a problem as it raises the question of legitimacy of a recall decision. This problem could be resolved by prescribing that one-third of all voters shall take part in voting on recall (which is the case in Croatia, for example). In the author's opinion, a prerequisite for this prescription would be the provision that a mayor may be elected if the same percentage of voters (one-third or any other) takes part in direct election. It would not be justified to prescribe such a condition for the recall of a mayor if the same condition would not be concurrently prescribed for his/her election because, in that case, a mayor would be excessively protected from recall.²²

3.5. Protection of rights of citizens and political subjects

After the voting process, a local assembly has to adopt the Commission report and send its decision on adopting the report and the voting material to the Republic Election Commission (REC). The REC's duty is to control the legality of the local assembly's decision and the legality of the recall procedure. Then, the REC

deputy of a local government representative body", and the Law on the Name of the Russian Federation), http://cikrf.ru/law/decreed_of_court/pes_7p_02.html.

22 In some legal systems, it is prescribed that a certain number of voters shall take part in voting on recall, and this number has to be compared with the number of voters who participated in the elections when a mayor was elected. In Poland, for example, the turnout has to be higher than the minimum of three-fifths of the turnout in the previous local elections (Serdult, Welp, 2017:147). We may analyze how this requirement influenced the recall outcome in a particular case in Poland. In 2013, there was an attempt to recall the Mayor of Warsaw, who belonged to the nationally ruling party. Notably, the recall procedure was initiated by a small local citizens' group and the mayor of some Warsaw's boroughs. Although the initiative was later joined by some of the major opposition parties which helped collect enough signatures, the initiative was largely triggered by the civic sector. The reasons for the initiative were very specific (local infrastructure and public transport) and were not politically motivated (at least on the part of the civic sector). However, the process turned into a political battle between two largest political parties. In the end, the Mayor was not recalled although 94% of those who voted supported the recall. The recall failed for lack of sufficient voter participation: instead of the required 29% voter turnout, only 26% of voters went to the polls (Serdult, Welp, 2017:147). Such a requirement facilitates the position of those who are against the recall. They can always count on a considerable percentage of absentees who do not wish to participate in voting for different reasons (often unrelated to the recall question, mayor's policies and activities). The recall opponents do not need to embark on a serious campaign against the recall; they may simply campaign against participation, i.e. for abstention or boycott.

sends the report on the recall procedure to the Central Election Commission of Bosnia and Herzegovina, which has to control the legality of the expiration of a mayor's mandate (Article 45g EA). After that, the Central Election Commission of B&H calls a new election for a mayor.

The Election Act of the Republika Srpska prescribes the procedures for protection of rights of citizens and political subjects in general terms. However, the procedures have not been prescribed in detail in order to guarantee legal certainty. There are no legal provisions on the right of citizens and political subjects to protect their rights and the very legality of the recall procedure by filing legal remedies. These issues have been entirely regulated in the REC Rulebook.²³ It has to be noted that the Rulebook was enacted on the basis of the Election Act. As a legal act of lower legal force than the Election Act, the Rulebook has to regulate in more details those issues which have been generally regulated in the Election Act. As for legal remedies, these issues have not been regulated at all in the Election Act. The Republic Election Commission has taken over the role of the lawmaker by prescribing all procedural aspects related to legal remedies (objections complaints and appeals). For this reason, the legality of this Rulebook could be discussed.

The Commission in charge of the recall procedure decides on objections and complaints in the first instance. Voters as well as political subjects have the right to submit objections and complaints to the Commission (no later than 24 hours from the recorded violation), and the Commission is obliged to decide on the objection and complaint within the time limit of 48 hours. An appeal has to be submitted to the Republic Election Commission (REC), no later than 24 hours from the moment of receiving the first-instance decision. Acting as an appellate (second-instance) body, the REC has to render the final decision on appeal (Articles 8.4. and 8.5. of the Rulebook).

The Rulebook contains another general provision which prescribes the use of other provisions of the Election Act of Bosnia and Herzegovina, the Election Act of Republika Srpska, and the General Administrative Procedure Act wherever necessary.

In terms of administrative law, the REC decision is a final act. Neither the Election Act of Republika Srpska nor the Rulebook contain provisions on the possibility of further judicial protection of rights of voters and political subjects in administrative dispute proceedings. The Rulebook does not even mention the Administrative Disputes Act of Republika Srpska, which is a mistake of the REC which failed to envisage such a rule. It is also the mistake of the lawmaker which

²³ Rulebook on Enforcement of the Procedure of Recall of a Mayor, *Official Gazette of R.Srpska*, No. 63/22.

failed to regulate this possibility in the Election Act. Yet, given the fact that a REC decision is a final administrative act, it is obvious that an administrative dispute procedure may be initiated.

On the other hand, the question arises how the recall procedure can be terminated in the legally prescribed time limits if an administrative dispute proceeding is instigated in a competent court. Namely, Article 45a (para.1) of the Election Act stipulates that the recall procedure has to be carried out no later than 30 days from the date when a decision on starting the recall procedure entered into legal force. How should we understand the moment when the recall procedure is over? Is it the moment when voting for or against recall is over, or it is the moment when a decision on recall is final and irrevocable, i.e. can no longer be challenged in front of any body? In the author's opinion, the recall procedure is over when a decision on recall becomes final and irrevocable (as it is illogical to consider it terminated if there is still a legal possibility to challenge and revoke the voting results). Recall procedure could not be equated with voting at polling stations because voting is only one segment of the recall procedure; voting is neither the first nor the last phase of the recall procedure, which entails many actions that serve as precursors to voting. The voting *per se* does not mean that the recall procedure is over; in effect, once the voting results have been proclaimed, we still do not know if a mayor is recalled, if the results are legally valid and if the entire procedure has been legally valid.

Therefore, the time limits of recall procedure have to be explicitly defined in the Election Act. In cases where an administrative dispute has been instigated, it would be almost impossible to carry out the recall procedure within the prescribed 30-day period. Thus, the time limits have to be defined differently. In order to ensure that the recall procedure is conducted within the given time, it is necessary to explicitly prescribe that a court has to resolve an administrative dispute within a very short period. Under the Election Act, the REC has to wait for an administrative dispute to be resolved in order to finally declare whether a mayor has been recalled. If an administrative dispute lasted as long as "ordinary" administrative disputes, the recall procedure would last for months, which is clearly unacceptable. In practice, voting for or against a recall has to be organized no later than 30 days after the recall procedure has been started. In the author's opinion, this provision has to be more precise, by envisaging that voting shall be organized no later than 30 days after a local assembly has voted on the decision on recall. Thus, the legal provision would be clear and logical, while the commissions and courts would have time to act in order to protect the rights of voters and political subjects.

On the other hand, an administrative dispute may be started in front of the Appellate Department of the Court of Bosnia and Herzegovina against a decision of the Central Election Commission of Bosnia and Herzegovina. Although it is true that the Court of B&H has the duty to resolve a dispute in a very short period of time, the fact remains that two administrative disputes may be instigated on one and the same recall procedure.

Competence is another issue which is important for protection of the rights of citizens and political subjects in the recall procedure. The area of elections is a shared competence between the state and the entities. Thus, the matter is regulated by a number of legislative acts and by-laws. Among other laws, there are the Election Act of Bosnia and Herzegovina and the Election Act of Republika Srpska. On the basis of these legislative acts, different institutions enacted different regulatory acts in order to regulate many issues in more detail. The question is whether the regulatory acts enacted by the Central Election Commission of Bosnia and Herzegovina (on the basis of the Election Act of B&H) can be implemented in the recall procedure. If not, the Republic Election Commission of Republika Srpska has to enact its own regulatory acts.

In the author's opinion, the recall procedure cannot be instituted under the provisions of the Election Act of B&H. This conclusion rests on a number of arguments. Firstly, recall by its very nature cannot be understood as a sort of election in the strict sense. Although a recall may eventually result in the election of a new official (mayor), it does not necessarily have to be the ultimate outcome. The purpose of recall is not just to elect a new mayor but to evaluate the policies and deeds of a present mayor. It is an instrument of citizens' control of a mayor as directly elected official. In principle, the purpose of recall is different from the purpose of elections even though the final outcome may be the same – the election of a new official.

Secondly, the Election Act of B&H²⁴ does not regulate the institute of recall in more detail. This institute is mentioned in three provisions. First, Article 2.9 regulates the competences of the Central Election Commission of B&H, which is authorized to control the decision of the body on the cessation of mandate of an elected official by means of recall. The second and the third mention are contained in Article 3.1 and Article 3.7 which regulate the purposes of the central electoral register. As a matter of fact, these provisions do not regulate the institution of recall but some other issues, which are only of some technical importance for the recall procedure.

²⁴ The Election Act of Bosnia and Herzegovina, *Official Gazette of B&H*, No. 23/2001, 7/2002, 9/2002, 20/2002, 25/2002, 4/2004, 20/2004, 25/2005, 77/2005, 11/2006, 24/2006, 33/2008, 37/2008, 32/2010, 48/2011-CCBH, 63/2011-CBH, 18/2013, 7/2014, 31/2016, 54/2017-CCBH, 41/2020, 38/2022, 51/2022, 67/2022.

Thirdly, it is true that Article 64 of the Election Act of Republika Srpska prescribes that the Election Act of B&H shall be applied to all those issues which have not been regulated by the Election Act of Republika Srpska. However, it is explicitly prescribed that the Election Act B&H shall be applied only to the issues concerning the elections at all levels (including the local level), while the recall procedure has not been mentioned. Article 64 only refers to the application of the Election Act of B&H, and it is silent on the application of regulatory acts adopted by the Central Election Commission of B&H.

It is obvious that recall is an exclusive competence of the entities. It is a logical solution because recall is one of the segments of the local self-government system. Considering that the entities have an exclusive competence to regulate their respective local self-government systems, they are fully entitled to regulate the issue of recall.

4. Should a local assembly be punished in case of an unsuccessful recall?

What happens if recall is unsuccessful, i.e. in case a majority of voters do not vote in favour of a mayor's recall and he/she remains in office? From the theoretical and comparative law perspective, there are three possible outcomes. The first outcome is that both institutions (the local assembly and the mayor) will continue with their work. The second outcome is prescribed in Article 152 of the Local Self-government Act of Republika Srpska,²⁵ which envisages that, acting on the proposal of the Government of Republika Srpska, the National Assembly of Republika Srpska may dissolve a local assembly if citizens' voting did not result in the recall of a mayor. The third outcome may be that a local assembly shall be automatically dissolved.

The legal solution which has been accepted in Republika Srpska is not a good one. One has to understand the political context of a recall. In the author's opinion, the local self-government system has been envisaged in such a way that it gives wide competences and political power to the two local institutions (the mayor and the local assembly), which both claim the widest possible democratic legitimacy. In such a system, political confrontation of these institutions is quite possible, particularly in case of cohabitation. The confrontation occurs for different reasons, the most important being the fact that both institutions are elected directly as well as the fact that an assembly majority is almost always multiparty and relatively or potentially unstable. In case of cohabitation, the assembly majority tries (whenever possible) to get rid of a mayor who belongs to a political party which forms a minority in a local assembly. Therefore, recall

²⁵ Local Self-government Act of Republika Srpska, *Official Gazette of R.Srpska*, No. 97/16, 36/19, 61/21.

is most frequently initiated for pure political reasons, i.e. the endeavour of an assembly majority to institute “its own mayor”, who belongs to one of political parties from the majority.

If a local assembly has misinterpreted the citizens’ political will by wrongly estimating that they are willing to recall a mayor, the assembly has to be “punished”. The purpose of this “punishment” is to prevent the local assembly from making a decision on recall easily, without serious deliberation on the reasons for recall and consequences. If a local assembly wants to recall a mayor only for political reasons (i.e. for belonging to an opposition political party), such a recall would not be justified because it disregards the purpose of this democratic institution. Even if a local assembly has other reasons for a decision to start a recall procedure, it has to be “punished” for wrong assessment of the popular will. This conclusion rests on the fact that the law has to guarantee stability to both institutions and to give a chance to voters to control them. Therefore, the easily triggered recall procedure has to be prevented or at least aggravated.

The existing legal solution in Republika Srpska prioritizes a local assembly whose majority belongs to the same party or parties which have a majority in the National Assembly. It is highly improbable that the latter would dissolve the former when the same political party or parties have a majority in both institutions. It may be illustrated by the most recent case of the City of Bijeljina. Although the citizens rejected the idea to recall the Mayor of Bijeljina with almost 70% of votes (which means that the majority in the Assembly of the City of Bijeljina made a gross political error in assessing the citizens’ will), the National Assembly has never discussed the possibility to dissolve the City Assembly because the Government of Republika Srpska has never made such a proposal. The reason is quite obvious: the same political party is in power at the level of Republika Srpska and in the Assembly of the City of Bijeljina.

5. Conclusion

The institute of recall has a great democratic potential and it has to be preserved in both local self-government systems in Bosnia and Herzegovina. The current legal provisions do not guarantee that recall would not be used as a means for resolving political conflicts between political parties, which has already happened many times in the past. In order to protect citizens from political manipulations and misuse of the institute of recall, it is necessary to amend relevant legal provisions contained in the Election Act and the Local Self-government Act of Republika Srpska. In particular, it is important to envisage guarantees which would protect the citizens as well as a mayor from easily instituted recall procedure. As shown in this paper, the current legislation does not provide adequate

safeguards for the protection of the rights of voters and political subjects in the recall procedure.

Although legal improvements are necessary, it has to be stressed that the appropriate use of this democratic institutions largely depends on development of the democratic participatory political culture, the civic engagement and the envisaged limitations on the monopoly of political parties over political processes. If there is no political and social awareness about the importance of the institute of recall and the methods of its use, even the best legal provisions cannot guarantee an efficient and meaningful role of citizens in the process of control of elected officials.

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О ОПОЗИВУ НАЧЕЛНИКА ОПШТИНЕ И ГРАДОНАЧЕЛНИКА У РЕПУБЛИЦИ СРПСКОЈ

Резиме

Аутор анализира институт опозива начелника општине и градоначелника у правном систему Републике Српске. Сврха рада је критичко сагледавање законских одредаба два закона – Изборног закона Републике Српске (којим се скоро у цијелости уређује ова материја) и Закона о локалној самоуправи Републике Српске.

Аутор сматра да институт опозива има озбиљан демократски потенцијал јер је инструмент политичке контроле начелника општине/градоначелника од стране грађана. Начелник/градоначелник има значајна овлашћења јер је носилац цијелокупне извршне власти, коју не дијели са колегијалним органом. Осим тога, грађани га бирају релативном већином, на једнокружним изборима, а исто лице може бити бирано на ову функцију више пута узастопно. Скупштина општине односно града ограничава начелника односно градоначелника у вршењу извршне функције, али су могућности тог ограничавања скучене и махом се односе на случајеве кохабитације. У сваком случају, скупштина не може разријешити начелника/градоначелника, већ само може покренути поступак опозива.

Међутим, законске одредбе ограничавају демократски потенцијал опозива јер не подстичу грађане да користе овај инструмент политичке контроле. Иако 10% грађана уписаних у бирачки списак може иницирати покретање поступка опозива, поступак не мора бити покренут, јер одлуку треба да донесе скупштина општине/града. Ово рјешење није одговарајуће и требало

би прописати да скупштина може донијети одлуку о покретању поступка опозива ако то захтијева између десет и 15% грађана, а да ту одлуку мора донијети ако поступак опозива иницира 15% и више грађана.

Изборни закон Републике Српске садржи релативно велики број разлога за покретање поступка опозива, али они се углавном односе на случајеве када начелник/градоначелник не врши своје надлежности, не спроводи одлуке чије извршавање му је стављено у задатак или наноси штету општини/граду својим радом. Нема изричите одредбе по којој поступак опозива може бити инициран и када грађани или скупштина нису задовољни политиком начелника/градоначелника, што би требало да буде случај.

Поступак опозива спроводи комисија коју именује скупштина општине/града. Одредбе о њеном саставу су штуре и нема никаквих ограничења да већина у скупштини општине/града именује чланове који ће бити њени политички истомишљеници. Комисија треба да стручна а скупштинска већина и мањина треба да имају једнака права приликом именовања њених чланова, како би изгледу за контролом законитости поступка опозива били што већи.

Изборни закон Републике Српске не садржи задовољавајуће одредбе о заштити права грађана и политичких субјеката у поступку опозива, те треба напоменути да је ова тема релативно нерегулисана или недовољно уређена.

Конечно, Закон о локалној самоуправи Републике Српске штити локалну скупштину која покреће неуспјешну процедуру опозива јер не постоји законска гаранција да ће таква локална скупштина бити распуштена. Законом о локалној самоуправи треба прописати да ће скупштина општине/града бити распуштена уколико начелник општине/градоначелник не буде опозван.

Кључне ријечи: *опозив, Начелник општине, Градоначелник, Скупштина општине/града, Локална самоуправа, Изборни закон Републике Српске.*