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ON LOCAL SELF-GOVERNMENT AND ITS CONSTITUTIONAL POSITION IN SERBIA

ABSTRACT: Local self-government is a form of decision-making and governance in local communities established on smaller parts of state territories. It is exercised either directly by its citizens, or by their elected representatives, as well as by other local bodies. The local authority, executed by local bodies, theoretically represents the government of citizens in local communities. Local self-government can be considered as the basic organization of power, and the history of constitutionalism cannot be imagined without it. In this paper, the authors first present the basic characteristics of self-government. These include: 1) the existence of a defined scope for certain local self-government activities, executed by local government bodies without interference from the central government; 2) citizens' entitlement to choose their representatives in local communities through direct elections or to be directly involved in making decisions on important topics of interest to the local community; 3) local institutions' independence in terms of their organization and personnel; 4) local self-government having its own independent financing sources (taxes, own property); 5) local autonomy protected by the constitution and laws to ensure the unobstructed work of local self-government. In this paper, the authors analyze the elements of the constitutional position of local self-government in Serbia, including its concept, the method of decision-

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making, jurisdiction, the right to self-organization, and the protection of local self-government.

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1. On local self- government

The local self-government, in the broad meaning of the term, represents the basic form of territorial organization of government. The citizens who live on its territory exercise their self-government powers in the widest sense. In this way the local community represents a principal form of citizens' self-government within which they exercise their rights and fulfill their needs. The interests and needs of the citizens are realized more successfully at the local level since the authorities are closer to residents and are the object of their constant scrutiny. Therefore, it can be said that self-government is a democratic structure. Namely, it is rooted in the citizens' direct and broad participation in exercising public activities and in the close control of local authorities. The concept of local self-government can be interpreted in different ways given the fact there are various criteria for its definition. If we look at local self-government from the point of view of the territorial organization of powers within a state, it is then defined as the basic form of the state's territorial organization. Territory is the basic principle of the government organization in any state, while the basic form which embodies this principle is local community. Local self-government can also be defined as a type of vertical division of powers between state and local communities which represents a form of restriction of central government powers. In other words, one part of affairs are executed at the central level, while the other part are realized at the local level, whereas the division of activities between central and local authorities can be based on the principle of decentralization or on the principle of deconcentration. Decentralization means that authority is dislocated and exercised from different places. "Decentralized system includes states with larger territories in terms of area. Micro states or "dwarf states" cannot have a decentralized system of powers." "When there is only municipal self-government, which is also financially constrained, the state does not cease to be centralistic. In order to have a decentralized state, it needs to have stronger, larger and more independent territorial units. There should be, as Germans would put it, *Kommunalverbände höherer Ordnung*, that is the municipal links of higher order (Kostić, 2000, p. 259).

Decentralization principle presumes that a local self-government has its own, original powers. When it comes to deconcentration of powers, this means that a local-government does not have its own powers but only those delegated by the central government. Bearing in mind that local self-government can be defined as the citizens' right to participate in the execution of public activities, they can realize these activities by taking part in referendum, local initiatives or by direct election of their representatives in local government bodies. In this way the citizens can participate in governing their local community and making decisions related to the affairs under its jurisdiction. According to theoretical points of view: "Local authorities are the closest to their citizens and local self-government is the principal social and political ambient for the realization of their rights and freedoms. In exercising their rights, the citizens come into close contact with local authorities. The citizens create their attitude towards authorities based on their personal experience at the local level. The criteria for the assessment whether authorities are successful or not (good, bad, efficient, inefficient, democratic or non-democratic) are often established based on citizens' concrete experiences at the local level when dealing with local government bodies. It is at the local level that the citizens have opportunities to witness how the authorities work..... Local communities offer *the broadest and largest possibility for the direct participation of citizens in governing the public affairs* and making decisions which can influence the fulfilment of their interests" (Pajvančić, 2008, pp. 383-384).

In constitutional systems, the status of local self-government is regulated by the provisions of the national legislation that is the constitution and relevant laws. However, the position of local community in this system is also determined by the international law as it is the case with European countries where its status is regulated by the European Charter of Local Self-Government, adopted by the Council of Europe in 1985. This international act provides the basic principles of local self-government and its nature. Constitution, as the supreme national law only defines the general issues of the position of local self-government. From the nomo-technical point of view, the status of the local self-government is usually regulated in the chapter dedicated to territorial organization. It is less common that its position is defined in the general constitutional provisions. There are several principles which outline the position of the local self-government in a constitutional system in general. They are: 1) the principle of subsidiarity, 2) the principle that the right to local self-government is guaranteed by the supreme act of the state, 3) the principle of the right of local self-government to resort to legal means in order to secure free execution of its rights, 4) the principle of

respecting local self-government postulates, 5) the principle of constitutional and legal protection of local communities' autonomy. As for the subsidiarity principle, it has been said: "If we start from the broadest understanding of this principle, embodied in the phrase "closest to the citizens", then it includes not only "vertical" subsidiarity, that is, a descent of certain jurisdictions and concrete activities to lower government levels, but also "horizontal" subsidiarity which assumes the delegation of certain government affairs to non-government subjects, including the private sector" (Milenković, 2015, p. 91).

Namely, the principle of subsidiarity refers to division of jurisdictions between central and local government bodies. Moreover, it means that the jurisdiction of higher government levels is determined by the method of enumeration, while all the affairs that can be executed at the local level should be delegated to local self-governments. This consequentially means that the decisions are made at the level of authority which is closest to citizens while the decision-making at higher government levels should be restricted. How significant is the right to self-government for one state and its society is reflected in the fact that this right is guaranteed by the supreme national law. To change the position of local self-government in a constitutional system is only possible by changing the constitution and laws, and not by changing by-laws. Also, the protection of local self-government rights is rooted in two basic guarantees. The first guarantee is the existence of legal instruments available to local communities should they decide to seek the protection in court. The second form of the protection of the right to self-government assumes the existence of procedural guarantees which ensure the participation of local self-governments in making decisions related to their status and jurisdictions. The division of powers between various levels of government also represents a form of the restriction of powers, which further assumes the existence of the instruments for ensuring citizens' direct control of government powers.

2. Types of local communities

Local communities can be classified according to the nature and character of the powers they have, according to the characteristics of the status of local communities in a constitutional system and, finally, based on the levels of the organizations of authority within vertical division of powers. As for the nature of powers vested into local communities, we can speak of decentralized local communities and the local communities based on deconcentrated authority. The first type of local communities, decentralized local-self-governments,

have their own, original jurisdiction which is not subject to restriction by higher government levels. Yet, certain restrictions are possible in exceptional cases within legally prescribed procedures where the local communities are guaranteed the legal instruments they can resort to if higher government levels violate their right to local self-government. Such a form of local self-government, the decentralized local self-government, is an example of literal application of subsidiary principle. Local self-government which does not have original jurisdiction and is void of independence, that is, autonomy in exercising delegated affairs, which is the privilege of decentralized self-governments, is the manifestation of deconcentrated authority. In this case we cannot speak of actual local self-government, but rather of a territorial unit to which the central government has delegated some powers to make decisions on behalf of the central government related to the affairs which do not take place centrally, in the capital, but at other locations.

There is also a classification of local communities to monotypic and polytypic, based on their inherent characteristics. There is no difference between monotypic local communities in terms of their status in a constitutional system. The states which have polytypic local communities make distinction between them in terms of their status, jurisdiction and local-government bodies, as well as the rights they are entitled to. The systems of local self-governments can also be classified based on the number of local government levels into one-tier, two-tier and three-tier system of local self-government. "One-tier local self-government means that there is only one level of authority (Slovenia, Switzerland, Austria, Serbia). This implies that there are central and local government bodies, and even if there is a middle level of government, it does not belong to the system of local self-government, but rather to some form of a territorial autonomy. One-tier local self-government embodies all local jurisdictions, both original and delegated" (Orlović, 2018, p. 375).

One-tier type of local self-government is the simplest form of vertical organization of powers while a two-tier form of self-government implies that it functions at two levels and in two directions. The second level of self-government comprises several local self-governments of first level, that is, besides the government on the central and local levels, here we have another level of the organization of powers, in the middle of those two. This middle level of government is, by rule, organized in the form of regions and has the authority to control the decision-making and planning process at lower level of government in the form of the supervision of second instance. The countries, such as Sweden, the Netherlands, Greece and Norway are the examples of the organization of two-tier local self-governments. On the other side,

France is the example of the most complex form of territorial organization with three-tier self-government structure where the jurisdiction of the local self-government is divided into three levels of authority which mutually collaborate on hierarchical basis. Three-tier government structure was first established in the 1980s when, within the framework of a larger reform, the Law on decentralization was passed in 1982 based on which the regions were established as self-government units (Marčetić & Giljević, 2010, p. 73). “The third level of authority is the largest unit and comprises several local self-governments of the second level of authority. The first level of organization includes the units which are the closest to the citizens and which mostly take care of communal activities. The other two higher levels of local self-government perform the tasks which require broad planning activities and larger infrastructural investments, such as communication, commercial zones, comprehensive environmental projects, inspection audits and the decision-making of second instance” (Marčetić & Giljević, 2010, p. 73).

The jurisdiction of local communities may include a number of various activities which local government bodies perform in different fields of social life. They are guaranteed by the constitution, as the supreme general law of the central government, specific sectorial laws on local self-government, as well as the statutes of local self-governments which represent “their own small constitutions”. In addition to the activities of original jurisdiction, guaranteed by the constitution, laws and statutes, local communities can perform other activities delegated by the central government taking into account the efficiency and economical viability of delegated tasks. In any case, the distribution of competences between the state and higher levels of territorial organization of governments on one side and local communities, on the other side, is executed based on the principle of subsidiarity.

As for the type of jurisdiction of local self-governments, we have already mentioned that it can be original or delegated. The original jurisdiction is autonomous, which means that the local self-government performs the activities of original jurisdiction, mostly of communal nature, without the interference of the central government bodies. The original jurisdiction is guaranteed by the constitution since the local self-government is a constitutional category. Higher levels of authority may delegate certain competences to local authority based on sectorial laws and rarely on the basis of by-laws, and in this case we speak of delegated activities. Initially, these delegated activities were in hands of higher government levels, but sometimes they decide to transfer them to lower government levels since it seems justified in terms of efficiency and cost effectiveness. It is important to note that delegated activities could be taken

away from the local self-government in the same way as they were given to it in the first place. However, there is a difference in the supervision of the performance of original and delegated affairs. The central government bodies can control the activities under original jurisdiction only in terms of their compliance with the constitution and laws. This means that the legality of a document passed by a local self-government in relation to its original jurisdiction will be assessed by the executive branch of power that is by the Government, while its constitutionality will be reviewed by the Constitutional Court or other body tasked to perform this review. In case it has been determined that such document is unconstitutional or unlawful, it will be removed by cancellation or voidance. As for the supervision of delegated activities by the central or regional government bodies, such control is comprehensive and includes all aspects of executed tasks. A document or an action adopted under delegated jurisdiction may be canceled or made void not only because they are not in compliance with the constitution and laws, but also because the central government believes that the local government has not completed its task in an efficient or economic way. Generally speaking, the jurisdiction of local self-governments is confined to the affairs related to everyday life of their residents. The comparative analysis of different types of local self-governments suggests that their jurisdictions are very similar with the common denominator being that they all enable self – government at the local level. As already discussed, their jurisdiction includes various communal activities and services aimed as satisfying the vital needs of their residents like provision of water, public transport, housing and urban affairs, collection and removal of waste, sewage, environmental protection, local education, organization of medical and social welfare services, sports activities, communal policing aimed at maintaining public order and security, etc.

In order to implement the activities from its jurisdiction, a local self-government needs to operate within established financial framework, that is, certain financial means are required for the realization of these tasks. The European Charter of Local Self-Government points to the significance of financial resources for the operational work of local communities underlining that they are entitled, within the central government's economic policy, to adequate financial resources of their own, of which they may dispose of freely within the framework of their powers. The Charter further defines the postulates of local government financing emphasizing the principle that its financial resources should be commensurate with its responsibilities as the principal guarantee of the financial basis for the local government functioning. The resources available to local communities should be sufficient to enable them to carry out the tasks from their jurisdiction which constitutes

the minimum guarantee for the efficient realization of the right to local self-government. Then, there is a principle of distinctive and flexible system of local government financing reflecting the diversity of financial resources. Local governments financing is directly linked to the scope and content of the activities they perform and the financial resources should be sufficiently diversified to keep up with the evolution of costs of carrying out these tasks. It has been said that “this principle represents the concretization of the initial postulate that local community’s financial resources must be harmonized with its competences in order to be able to execute the tasks from its jurisdiction without obstruction” (Pajvančić, 2008, pp. 392-393). The next principle is the solidarity principle. It calls for the need to equalize the differences between financially stronger and weaker local self-governments to allow weaker self-governments to complete the activities under their jurisdiction. The municipalities from rural areas do not have the same financial opportunities as those from urban areas with developed industry, production plants and financial institutions. The needs of the citizens in these municipalities cannot be satisfied in equal way. In order to reduce these differences, it is necessary to implement the measures that will correct the effects of unequal distribution of financial resources. However, these specific measures should not diminish the discretionary powers of local authorities that is the principle of solidarity should not be in conflict with the implementation of the activities under the jurisdiction of local communities. Hence, local communities are entitled to seek and receive financial resources related to the realization of their competences. Thus, they are entitled to 1) financial resources derived from collecting local taxes and charges, 2) receive funds from the central government, 3) receive funds for financing the delegated tasks, 4) have access to national capital market. Speaking of the local self-governments’ right to determine the rate and collect taxes and charges out of which they will finance the activities under their jurisdiction, they can exercise this right only within the territory of their jurisdiction. The right of local communities to determine the rate of local taxes and charges is guaranteed by the constitution and other legal acts. As already mentioned, the central government allocates one part of its financial resources for financing the activities of local self-governments, which means that local self-government are entitled to receive some financial resources from the taxes and charges collected by the state. In this way, a part of the state tax revenue is transferred to local communities’ budget. In addition, local self-governments are entitled to receive funds for financing the delegated tasks, which means that along with delegating certain affairs, the central government transfers funds for the execution of these affairs.

These funds are generated by collecting taxes and charges by higher levels of government. Also, local communities are entitled to seek loans for capital investments at national capital market in cases when such investments cannot be realized with local communities' own funds.

Finally, local self-governments are entitled to an adequate participation in the decision-making process related to the distribution of funds from higher to lower government levels. This can be achieved by carrying out the consultation with the local self-government units on the methods and criteria for the distribution of these funds.

3. Organization of local government

Local self-government units are entitled to form local authority bodies and decide on their organization. Local self-government units can realize this right based on the principles of the Charter of Local Self-Government and in compliance with the constitution and law. The institutional organization of authority in local self-government is based on the right of the local self-government units to define the organizational structure of local governing bodies based on their statutes and in compliance with the constitution and law. This right also includes free choice of the method of electing the members of these bodies, their organization, working methods, responsibilities, as well as the forms of the citizens' direct participation in making decisions on the issues under local self-government jurisdiction.

4. Local self-government bodies

The basic principles of creating the government bodies at the local level, as well as the basic forms of their institutional physiognomy are defined by the Charter of Local Self-Government. The most important local community bodies are their assemblies composed of the members freely elected by secret ballot based on general and equal voting right. Thus, the constitution, law and statute guarantee the method of electing the members of local self-government assembly, their responsibilities, internal organization, working methods and decision-making procedure. They also regulate which functions are deemed incompatible with the holding of elective office at the local level. The bodies of the executive branch of government can also be formed at the local level and they report to the assembly which controls the execution of their tasks. Also, these documents foresee the creation of local administration led by a secretary or a head of administration. The constitution and law also closely

define the election of the executive bodies at the local level, as well as their responsibilities for performing the tasks from the scope of their jurisdiction. The administrative bodies and the entire administration apparatus, consisting of professional staff are formed by local self-government bodies. The recruitment of the administrative staff for the employment in local self-government is done on the basis of merit and competence, and they are entitled to adequate training opportunities, compensation and career prospects. As for the position of the head of the municipality, comparative analysis shows that it differs from country to country. The way a mayor is elected points to the difference in their status and the organization of the local authority. There are constitutional systems in which the election of mayor is entrusted to citizens who elect him/her by direct vote, while there are systems which foresee the election of mayor by the assembly. Therefore, we can speak about two possible election models – directly by citizens' vote or indirectly by local self-government assembly. Consequently, the scope of mayor's authorities depends on the method of his/her election. Thus, in the systems which foresee the election of mayors by citizens' direct vote, he/she performs the activities of the executive authority at the local level and organizes and controls the work of local administration bodies. He/she enjoys wider autonomy than the members of the local self-government assembly. Mayor, by rule, for his work reports to those who elected him – the citizens. Thus, for example, in Croatia, "direct election of the municipality counselor, mayor or prefect has opened a new chapter in the relationship inside the municipal structures so that the focus on the collective decision-making has shifted to the citizens' votes whose legitimacy to make independent political decisions has been confirmed at local elections which have become increasingly personalized" (Klarić, 2017, p. 96). In the systems which foresee the election of mayors by assembly, the mayor usually has only protocol duties. In such systems, the mayor or head of the municipality reports to assembly which may revoke his/her appointment.

5. The supervision of local-government bodies

In all constitutional systems, even in those characterized by high level of autonomy of local self-governments, the executive authority bodies maintain the right to control the implementation of the activities from the scope of the jurisdictions of local communities and their organs. The Charter of Local Self-Government defines a general framework of the control and supervision of the local authorities' activities, while the constitution and laws regulate this issue more closely taking into consideration the state's internal circumstances.

The principles which lay the foundation for the supervision of the local authorities' bodies by the central government at the same time represent a form of protecting the right to self-government. They establish the framework for the activities of the central government bodies aimed at controlling the work of local authorities. The principles based on which the central government exercises the supervision of the work of local authorities are established by the Charter of Local Self-Government. Administrative supervision of the work of local authorities must be in compliance with the constitution and applicable laws. Thus, the supreme national act and law regulate which cases require the supervision of the work of local authorities and define the procedure for its realization. The Charter of Local Self-Government foresees that the constitution and law should regulate the situations which allow the supervision by higher authorities, as well as determine the procedure according to which it may be exercised. Regulation of these issues by the constitution and law represents a guarantee that higher levels of government will not restrict or threaten the right to local self-government. Higher authorities may control the local ones, but only for the purpose of achieving the supervision goal – to ensure the compliance of the local authorities work with the law and constitutional principles. As for the supervision of delegated activities, it can also be exercised with regard to the efficiency of their performance. There is a principle which states that the intervention of the controlling authority should be in proportion to the importance of the interest that needs to be protected. This principle basically protects the right of local community to self-government that is it prevents the central government from exercising the control which is not proportional to its goals which may lead to the restriction, endangering, or violation of the right to self-government. Yet, all local self-government systems maintain a certain level of supervision of the work of local bodies. The organizational and personnel independence of local authorities' bodies depends on whether we are speaking of the decentralization or deconcentration of their activities. The supervision only of the compliance with laws is present in those systems of local self-government based on decentralization and subsidiary principle, while the control of compliance with laws as well as of the comprehensive work of the local authorities' bodies is present in the system based on the deconcentration of the activities. Under certain circumstances, the supervision of the work of local authorities may result in the authorized action of the central government bodies exercising the right to dissolve the local community assembly and appoint an authorized person who will temporarily manage the work of the local self-government body. In case of the dissolution of the local community assembly, it is necessary to organize new elections for this assembly as soon as possible.

6. Direct participation of citizens in making decisions in local community

The level of local government offers the widest opportunity for the development of democracy by direct participation of citizens in making decisions on public affairs. Thus, in a local self-government, citizens may organize meetings and assemblies, referendum, or any other form of direct participation in decision-making process. This right is guaranteed by the principles of the Charter of Local Self-Government. Local communities' statutes regulate the types and forms of the direct participation of the citizens in managing public affairs at local level, as well as the issues under the jurisdiction of local authorities. The right of citizens to participate directly in the execution of public affairs at the local level, as well as the methods of the realization of this right, are regulated by the constitution and law. Local communities' statutes define in more details the forms and procedures of citizens' direct participation in the execution of public affairs.

7. The cooperation of local self-governments

The European Charter of Local Self-Government guarantees the right of local communities to cooperate or to form associations. This cooperation can be at the national or international level, within the framework of the constitution and law. The right to cooperation and association of local self-governments at the national level is guaranteed by law. The constitution also foresees mutual cooperation and association of local self-governments for the purpose of executing the activities of mutual interest. As for the cooperation and association of local self-governments at the international level, it is realized through the cooperation of local self-governments with those from neighboring countries, or from other countries, or as the co-operation under the auspices of various international organizations or associations of local self-governments. The conditions for the realization of the international cooperation of local self-governments is regulated by law. The Charter underlines that the right of local authorities to belong to an association for the protection and promotion of their common interests or to an international association of local authorities should be recognized in each state. The right of local authorities to cooperate with international organizations and to belong to an international association is also guaranteed by the constitution.

8. On local self-government financing

In order for a local self-government to be truly independent, it needs to have certain financial means. Local self-government's finances include own-source revenue and transfer sources from the central government budget. "State is entitled to control the spending of funds it allocates to local self-governments. There is a tendency of increasing supervision of the work of local self-governments by the state which deprives them of many aspects of autonomy" (Marković, 2014, p. 409). The European Charter of Local Self-Government regulates in details the sources of local self-governments "Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their jurisdiction. Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law. At least one part of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate. The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks. The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility. Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them. As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction. For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law".

9. Protection of the right to local self-government

Constitutional systems foresee specific protection of the right to self-government. A number of international acts also regulate basic postulates of the protection of the right to self-government, which are then elaborated in national legislation – the constitution and laws. The protection of the right

to self-government assumes the existence of different instruments available to local self-governments to guard this right. The European Charter of Local Self-Government foresees a specific procedure which is applied when making decisions on the local community boundaries, as well as on the issues of direct interest for local communities, including the allocation of financial resources. Local community must be consulted when making decisions on its territory and boundaries. The consultation may be realized by means of direct participation of the citizens or by including the local authority bodies. The Charter of Local Self-Government prefers direct form of participation in decision-making related to local self-government boundaries, by means of referendum, if possible. The constitution regulates more closely the conditions and methods for the realization of this right. There are differences from country to country related to the process of establishing new local communities, as well as the decision-making process on changing the boundaries of the territory of a local self-government unit. Majority of constitutional systems calls for public referendum on which the local residents will decide on these changes. Some countries require obtaining the opinion or consent of the local residents before making any decision on such issues, whereas such opinion or consent has not been made binding. Some countries do not require any sort of “voting” of the local community citizens on the issues of this kind. Making-decisions on changing the boundaries of local communities, as well as the procedure for creating new ones are regulated by the of constitution and specific laws. It is necessary that the central government consults with the local authorities, in due time and in an appropriate way, in relation to planning and decision-making processes for all matters which concern them and their residents directly. As a form of the protection of the right to financial autonomy, local authorities shall be consulted on the way in which redistributed resources are to be allocated to them. This is an important guarantee of the right to self-government. Local authorities have the right of recourse to a judicial remedy in order to secure free exercise of their right to self-government. The resolving of jurisdictional matters represents a specific form of the protection of the right to local self-government. It is not a seldom case that a conflict of jurisdiction arises between higher levels of authority and local authorities. The conflict of jurisdiction is usually related to a significant issue of the position of local self-government and such conflicts are resolved at the Constitutional Court since it is the matter of constitutional character. Namely, the scope and content of local self-government jurisdiction is determined by its status in the constitutional system. The jurisdiction of the Constitutional Court to

decide on such important matter ensures the constitutional protection of local communities' authority and their status in the constitutional system.

10. Constitutional position of local self-governments in Serbia

Before we start our analysis of the current constitutional position of local self-government in Serbia, we would like to underline that in the course of the development of Socialist Federal Republic of Yugoslavia, the concept of local self-government was in its prime. The first Constitution of Federal National Republic of Yugoslavia made the state entirely centralized, but each new constitution and applicable laws increased the scope of decentralized powers. Thus, according to the Constitution of the Socialist Federal Republic of Yugoslavia of 1963, municipalities represented the basic units of local self-government, as the form of the basic social and political community. In order to achieve this, the state had to establish the communal systems at the local level in 1955, after which these competences were transferred from the state to municipal level. The communal system reached its prime with the SFRY Constitution which further elaborated the position of municipalities as social and political community with defined scope of jurisdiction. Thus, the municipality assumed all the local government powers except those that were specifically designated to cities, provinces, republic and federation (Stanković, 2015, pp. 85-100).

The Constitution of the Republic of Serbia of 1990 laid the constitutional basis for establishing modern forms of local self-government. Thus, municipalities represented the basic and unique self-government units whose organization the Constitution left to legislators and each subsequent law to regulate. During the term of this Constitution, three laws on local self-government were passed – in 1991, 1999 and 2002 and each subsequent law changed the level and scope of municipalities' self-government. "Yet, it was not even close to the level of self-government competences which existed in the period of socialist Yugoslavia. In the period from 1991 to 2007, the level of decentralization, the rights of self-governments, the methods of determining the scope of local jurisdiction, the election and responsibilities of local bodies, the supervision of the central government, the right to own the property and financial resources and, the degree of autonomy, etc. – all varied to a great extent" (Orlović, 2015, p. 1660). Following the October changes of 2000, the status of local self-government in Serbia has undergone several reform processes. This was, by rule, one of many changes which occurred in a transition country. In that context, there are some common characteristics

to all transition countries in relation to the position of local self-governments: 1) all countries in transition adopted a new, “democratic” constitution. The constitution is the supreme law which guarantees the position of local self-government and regulates its jurisdiction, the relationship with the central government, the conditions and methods for establishing new local self-government units, the change of their boundaries, the instruments of the protection of their rights, as well other issues and aspects related to their constitutional status, 2) all countries guaranteed the autonomy of local self-government units, including the independence in adopting acts and decisions related to the execution of the activities under their original jurisdiction, where the central government supervision should aim only at ensuring the compliance with law and constitutional principles – the obligation of the states under the European Charter of Local Self-Government, 3) legal position of the local self-government is precisely defined by law. They are specific sectorial laws which regulate administrative and territorial division, organization of local self-government, its jurisdiction, the method of electing local representatives in its bodies, specific social affairs under the self-government jurisdiction, such as: public revenue, property, public procurement, referendum, official use of language and alphabet, administrative procedure, labor relations, etc., 4) for the purpose of executing the activities under its original jurisdiction, local self-government units obtain own-source funding while the state provides or redistributes financial means from its own budget for the execution of transferred or delegated activities under their jurisdiction, as well as for financing some of the activities from the self-governments original jurisdiction should they fail to raise sufficient funds for that purpose, which is the common case in all transition countries, 5) the citizens elect the members of the local self-government bodies and have more opportunities to directly participate in the execution of public affairs, although these instruments are not quite adjusted to real life circumstances in local communities, established practices or citizens’ needs, which corresponds with the nature of the economic relations developing in these countries” (Golić & Šoltes, 2009, pp. 69-70).

The changes of the local self-government in Serbia have been described in the following way: “New decision-makers from the political sphere of life improved the financial position of local self-governments by introducing intervention measures. Thus, the Law on local self-government was passed at the beginning of 2002 defining an appropriate, more favorable legal framework for the work of self-governments. The scopes of original and delegated jurisdiction were widened to include new competences, the organizational structure of local government bodies was improved, and new

financing system was established along with new, clearer rules governing the relationship between the central and local authorities. In addition to the possibility to elect the members of local authority bodies by direct vote, this law for the first time allowed the possibility of direct election of mayor or head of the municipality. In addition to the assembly and mayor's function, the law foresaw the presence of city council and local administration, as well as the presence of local Ombudsman ("Protector of citizens") and some other bodies whose creation was not mandatory. Serbia and Montenegro were admitted to the Council of Europe on April 3rd, 2003 which enabled the access of the representatives of local self-governments to the institutions of this organization. In September 2004, local elections were held when the members of local assemblies were elected, as well as the heads of municipalities or mayors, for the first time by direct vote.

Soon after the election, it was discovered that there were serious problems in the functioning of local self-government bodies. In more than one third of municipalities and cities, the work of their bodies was blocked due to the fact that head of the municipality or mayor belonged to one political party, while the majority of the assembly belonged to another. Thus, the idea to elect mayor by citizens' direct vote was already abandoned in 2006. The new Constitution of the Republic of Serbia stated that the head of the municipality or mayor should be elected indirectly, by the citizens' representatives. Yet, the other provisions of this Constitution laid firm foundation for further development of local self-government. Basically, the Constitution regulated the status and work of self-governments in line with the principles of the European Charter of Local Self-Government (EPLS; 1985). They also became entitled to their own property, which was more closely regulated by sectorial law. In the mid of 2006, the Law on local self-government financing was passed and in the following year the European Charter of Local Self-Government was ratified. At the end of 2007, a new set of regulations on local self-governments was adopted increasing the number of cities and widening the scope of jurisdiction of local self-government units and regulating in details the responsibilities of their bodies. Finally, after a five-year delay, the Law on public administration was passed which established which property was in the ownership of local self-government units" (Milosavljević, 2012, pp. 750-751).

In Serbia, local self-government is a constitutional category. The Constitution primarily regulates the basic aspects of the position of the local self-government in the government system. Specific laws, by-laws and the statutes of local self-government units further elaborate constitutional norms on local self-government. Local self-government can be analyzed from the

constitutional and legal point of view as the right of citizens or as a form of the organization of authorities. Thus the Constitution in its general provisions guarantees the right of citizens to local self-government. This right is defined as the right of citizens to local self-government which restricts the state powers. This means that certain public activities are not exercised by state authorities, but by local self-government. The right to local self-government is the subject of the supervision only in terms of the compliance with the law and constitutional principles. All the citizens of the Republic of Serbia are entitled to local self-government and they are all part of larger or smaller local communities. The right to local self-government, as any other human right imposes some restrictions to state authority. This means that some fields of social life which take place in the local self-government are entirely or partially exempt from the state authority. This further means that the state does not regulate these fields of social life, but leaves them to municipalities or cities, only retaining the right to supervision. Namely, the position of the local self-government, according to the Constitution, is defined by several aspects: name, territory, creation and termination of local self-government units, the participation of citizens in decision-making process, autonomy in the organization of local self-government bodies and the protection of local self-government. The Constitution regulates that in Serbia local self-government units are municipalities, cities and the city of Belgrade. Although this list of the types of local self-government units suggests that this is a polytypic form of local self-government, we can say that here we have one basic form of local self-government unit and two derived forms. The Law on local self-government and the Law on the state's capital, which define more closely the concept of municipality, city and the city of Belgrade, foresee that there is only one organizational form of local self-government units, which may have some different characteristics. The Constitution regulates that a local self-government unit has its territory and seat, while the Law on the territorial organization of the Republic of Serbia defines the boundaries of this territory and the location of the seats. This means that self-governments are not included in making decisions related to their boundaries and the location of the seats, which is done exclusively by the central government. However, the citizens are entitled to vote on the referendum on changes of the municipal or city boundaries. Yet, such form of giving opinion does not constitute decision-making process. "Direct participation through the institutions of direct democracy strengthens civic virtues, citizens' political competences, incites the feelings of solidarity and social inclusion and upholds the legitimacy of political decisions. Finally, its key significance is that it allows that the

decisions are made by those who are concerned with them most” (Radojević, 2021, p. 57).

However, the Constitution does not say whether the referendum results are advisory or mandatory, but rather defines the referendum as mandatory and preliminary. Yet, the law defines it as advisory. A referendum needs to be held before passing the final decision on “foundation, termination or the change of territory of local-government unit”. This means that on referendum, the citizens (10% of the voters) practically support the initiative of the municipality assembly to establish or terminate a local-government unit or to increase or decrease the territory of a municipality, city or the city of Belgrade. The Constitution makes the difference between the foundation and termination of the units in municipality, city or the city of Belgrade. Thus, it is the law which governs the termination of municipalities. The Constitution does not foresee the termination of cities, but lists the criteria defined by law which regulate their foundation. Local self-government is entitled by the Constitution to establish one or more municipalities on the city territory. City municipalities may be founded according to the city’s statute that is city municipalities are not regulated by laws, but by by-laws. Namely, the constitutional provision defines that city statute regulates which city activities will be delegated to its municipalities. The city of Belgrade is governed by a separate law, the Law on the capital, which, along with the city’s statute, regulates the position of this city.

The residents of local self-government exercise their right to local self-government by direct participation or via the representatives elected by free vote. “Given the fact that the theory of popular sovereignty is nowadays generally accepted, and by population we mean all citizens, this would imply that the supreme powers of the state are exercised directly by all its citizens. They can do it in various ways, the most common one being by means of referendum. This means that it is the citizens who adopt legal acts or pass political decisions directly, without relinquishing this right to their representatives” (Marković, 2021, p. 142). Thus, the participation in the referendum at the local level represents a form of citizens’ direct decision-making, although when it comes to the issue of the foundation, termination and change of the territory of local self-government, they do not make these decisions, but only give their non-binding opinion. “The basic criticism of democrats in relation to the law from 1866. was that the election of municipal bodies was conducted under police surveillance and that the central government was able to join or divide municipalities without the decision of their citizens” (Đurđev, 2007, p. 10). Today, the key place where the

citizens can make direct decisions is the voting poll at local elections where they can directly choose their representatives for municipal or city assembly. The Republic of Serbia applies, both at state and local elections, so called D'Hondt method of proportional representation, but as of 2020, the electoral threshold was decreased from 5% to 3%. Certain surveys have revealed that “the decrease of the electoral threshold did not increase overall representation, that is, the number of election lists with the candidates for local assembly was not increased, either in absolute or in effective number” (Perišić & Kaličanin, 2023, p. 189). Other forms of citizen's participation in decision-making in local community are regulated by law and local statutes. These forms of participation include citizens' initiative, citizens' meetings or assemblies and local referendum.

The Constitution prescribes the right of local self-government units to independently organize their bodies. “Further elaboration of this constitutional principle reveals that this “independent organization” practically does not exist. Independent organization of local bodies and public sectors is in compliance with the Constitution and law. This entails a logical question – what is the remaining sphere of independence (in our practice this independence is reflected in the number of assembly members within legally regulated margin, for example 19-75) (Orlović, 2015, p. 1662).

International cooperation is one of the segments from the scope of local self-government jurisdiction which is particularly emphasized in the Constitution. Namely, in the Republic of Serbia, local self-government units are entitled to cooperate with the corresponding local self-government units from another country within the foreign policy of the Republic of Serbia. This right can be exercised only by respecting the territorial wholeness and legal order of the state. The Constitution states that municipal bodies are the municipal assembly and other bodies designated by statute in accordance with law. Then, there are executive bodies whose members are elected by municipal or city assembly in accordance with law and statute. As for the organization of powers, it should be mentioned that the municipal or city assembly represents the highest body of the local self-government unit. However, the Constitution does not further elaborate this form of the organization and does not describe any other form of local bodies. The law on local self-government of 2007 regulates the position of all local government bodies stating that local self-government units cannot independently organize the organs of authority at the local level. Municipal or city assembly is in the same rank with a constitutional body since it passes the supreme legal act of the self-government unit – statute. In addition to statute, it also passes a number of other general acts,

adopts the budget and annual balance sheet, development and urban plans, initiates municipal referendum and performs all other activities designated by law and statute. Municipal assembly elects municipal executive bodies, head of the municipality or mayor and municipal counsel in accordance with law and statute. It can be concluded that municipal assembly is the highest local government body by analyzing extensive constitutional provisions on the members of a local self-government assembly. The members of assembly are freely elected by secret ballot for a four-year term of office which is again regulated by law and not by local acts or statute. As for the assembly's representation, the Constitution introduces the "positive discrimination" in regards to minorities enabling their proportional representation in accordance with law.

The majority of constitutional provisions are dedicated to the municipality, city and the city of Belgrade jurisdictions. The Constitution makes the distinction between these local self-government units. Thus, a city, in addition to the activities which are delegated to a municipality, can have other delegated activities in accordance with law. The Law on the capital foresees that the city of Belgrade can have even larger number of delegated activities which leads us to conclude that this city, as a local self-government unit, has the largest scope of jurisdiction in comparison to other units. In accordance with the Constitution, municipality has a large number of activities under its jurisdiction which are performed by its bodies as defined by law. However, its scope of jurisdiction is not limited since the Constitution prescribes that municipality can perform additional activities in accordance with law. "Here, the local jurisdiction, in terms of the constitutional right to local self-government is restricted by two things. The first one is the usefulness of making decisions at the local level related to certain matter. This means that it is the best (the easiest, fastest, most economic, most adequate and of best quality) that the decisions on certain topics are made by local authority bodies or directly by citizens. The second restriction has negative connotation and refers to the respect of hierarchy in the distribution of powers, which means that this issue is not in the state jurisdiction. These competences refer to original and not to delegated activities. Delegated tasks do not have its origin in the Constitution, but represent unilateral transfer of authority from state to local self-government level (Orlović, 2015, p. 1664).

"The municipality shall, through its bodies, and in accordance with the law: 1) regulate and provide for the performing and development of municipal activities; 2) regulate and provide for the use of urban construction sites and business premises; 3) be responsible for construction, reconstruction,

maintenance and use of local network of roads and streets and other public facilities of municipal interest; regulate and provide for the local transport; 4) be responsible for meeting the needs of citizens in the field of education, culture, health care and social welfare, child welfare, sport and physical culture; 5) be responsible for development and improvement of tourism, craftsmanship, catering and commerce; 6) be responsible for environmental protection, protection against natural and other disasters; protection of cultural heritage of the municipal interest; 7) protection, improvement and use of agricultural land; 8) perform other duties specified by the law.

The municipality shall autonomously, in accordance with the law, adopt its budget and annual balance sheet, the urban development plan and municipal development programme, establish the symbols of the municipality, as well as their use. The municipality shall see to exercising, protection and improvement of human and minority rights, as well as to public informing in the municipality. The municipality shall autonomously manage the municipal assets, in accordance with law. The municipality shall, in accordance with law, prescribe offences related to violation of municipal regulations” (The Constitution of the Republic of Serbia, 2006).

The jurisdiction of local self-government and its bodies is restricted by central government bodies. The central authority keeps for itself the right to control its activities, which is not the case with the local self-government. Even the activities under the original jurisdiction of local self-government are controlled in terms of their compliance with the law. Speaking about the control and supervision, the Constitution mentions only municipalities whose supervision is in domain of the Government, which is not the case with the cities and the city of Belgrade. Thus, Article 192 of the Constitution states: “The Government shall be obliged to cancel the enforcement of the municipal general act which it considers to be in noncompliance with the Constitution or the law, and institute the proceedings of assessing its constitutionality or legality within five days. The Government may, under the terms specified by the law, dismiss the municipal assembly. Simultaneously with the dismissal of the municipal assembly, the Government shall appoint a temporary body which shall perform duties within the competences of the assembly, taking into consideration the political and national composition of the dismissed municipal assembly (The Constitution of the Republic of Serbia, 2006). As we can see, in terms of the dismissal of assembly, the Government, as a body, is above the second constitutional body – municipal assembly, although here we actually have two bodies of two different authorities, the executive authority at the state level and a local authority body.

Speaking of the protection of the right to self-government, in theory, the following has been noted: “Namely, the realization of the right to local self-government and its autonomy can be (more or less) put into risk by certain central government actions or decisions, as well as the actions or decisions of the bodies of autonomous province. Therefore, it is vital that local self-government should protect its autonomy by being entitled to resort to certain legal instruments if it is established that some of the actions or decisions of state legislative or executive authority, or provincial government, are not in compliance with the Constitution or law” (Logarušić, 2016, p. 258).

The Constitution only regulates the protection of municipalities. Thus, Article 193 states the following: “The body designated by the statute of the municipality shall have the right to file an appeal with the Constitutional Court if an individual legal act or action by a state body or body of local self-government unit obstructs performing the competences of the municipality. The body designated by the Statute of the municipality may institute the proceedings of assessing the constitutionality or legality of the law or other legal act of the Republic of Serbia or autonomous province which violates the right to local self-government” (The Constitution of the Republic of Serbia, 2006).

11. Conclusion

Local self-government in Serbia today represents a constitutional right which restricts state authority. In these modern times, local communities in many countries, including Serbia, are entitled to self-organization and execution of activities from their original jurisdiction. Having analyzed the basic elements of the constitutional position of local self-government in our country, we have come to the following conclusions. As a result of its democratic nature, reflected in the direct participation of citizens in decision-making process, local self-government represents the source of democratic values, which has not been exhausted yet. However, the right of citizens to local self-government is restricted, at one side, by the process of strengthening the state powers (with the guaranteed protection of self-government), and at the other one side, by the process of direct participation of citizens in decision-making process which, in practice, is rare and comes down to direct voting at local elections for the members of local assemblies and indirect election of the heads of municipalities or mayors.

Local self-government cannot be imagined without its original jurisdiction. The activities from the original jurisdiction are those which the state granted

to local self-government by the Constitution. Local self-government exercises these activities in compliance with law which means that the “original” character of these activities is actually restricted. The original jurisdiction of local self-government includes the right to self-organization which is also limited by legal regulation. The way the Constitution has conceptualized the right to self-organization, makes us conclude that this right, by its legal nature, is closer to delegated competences of local self-government. The municipal assembly is the constitutional body, but also an element of the right of local self-government to self-organization. The organization of other local bodies is left to legislators. The central authority has the right to supervision or control of the activities under original jurisdiction, but only in regard to their compliance with the Constitution and law. The Constitutional Court has the jurisdiction to decide on this matter.

The right of local self-government to protection is the precondition for its secured position. In the constitutional system of the Republic of Serbia, this protection refers to both general and individual acts. Again, the Constitutional Court, as an apolitical and independent organ of the central authority, has the last word on this matter and guarantees that this protection will be efficient.

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O LOKALNOJ SAMOUPRAVI I NJENOM USTAVNO-PRAVNOM POLOŽAJU U SRBIJI

REZIME: Lokalna samouprava je vid odlučivanja i upravljanja u lokalnim zajednicama oformljenim na užim delovima državne teritorije i to neposredno od strane njenih stanovnika ili putem njihovog predstavništva, koje oni neposredno biraju, kao i drugih lokalnih organa. Za lokalnu vlast, koju vrše lokalni organi, u teoriji je navedeno da je to samo vlada građana u lokalnim zajednicama. Za lokalnu samoupravu se može konstatovati da je to osnovna organizacija vlasti. Bez lokalne samouprave ne može da se zamisli istorija konstitucionalizma. U radu se prvo iznose osnovna obeležja

lokalne samouprave. Reč je o sledećim karakteristikama: 1) postojanje ustavom i zakonom utvrđenog kruga samoupravnih lokalnih poslova, koje jedinice lokalne samouprave vrše bez mešanja centralne državne vlasti; 2) građani imaju pravo da u lokalnim zajednicama, na neposrednim izborima biraju svoje predstavničko telo ili neposredno odlučuju o bitnim temama od interesa za lokalnu zajednicu; 3) lokalne institucije su organizaciono i personalno samostalne; 4) lokalna samouprava ima samostalne izvore finansiranja (od poreza i sopstvene imovine); 5) postojanje ustavom i zakonom utvrđene zaštite lokalne autonomije, bez koje nema pravilnog funkcionisanja lokalne samouprave.

U radu se, posebno, analiziraju elementi ustavno-pravnog položaja lokalne samouprave u Srbiji i to: pojam, način odlučivanja, nadležnost, pravo na samoorganizovanje i zaštita lokalne samouprave.

Ključne reči: lokalna samouprava, ustavno-pravni položaj, obeležja, Republika Srbija.

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