

## THE MOST IMPORTANT CHANGES IN SERBIAN SYSTEM OF TERRITORIAL DECENTRALIZATION

*UDC 35.071.55(497.11)*

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**Abstract.** *In this paper the author has studied the structure of articles that regulate territorial decentralization in the Constitution of Serbia 2006, and in three acts adopted in late 2007 (the Law on Territorial Organization, the Law on Local Government and the Law on Local Elections) in order to determine the meaning, characteristics of changes and possibilities for a further development of the Serbian system of territorial decentralization. After conducting a functional analysis of the system of territorial decentralization, he concluded that organization of decentralized units abandons the principle of division of powers, and then tried to evaluate the most important changes in relation to the previous system of decentralization, which relate to: restoring local property rights; modalities and criteria for the establishment of new provinces, cities and municipalities; rights of foreign nationals in the implementation of local self-government; authorization for creating public-private partnerships, new responsibilities in the hands of territorial decentralization units (including the right of a city to form a communal police); the position of the mayor and other local government bodies in the system of powers united in the hands of the local assembly; technical solutions which facilitate and accelerate the work of bodies of decentralized units; changes in the way of nomination and increasing the electoral threshold; controversies about the ways to end the councilor's mandate ("blank resignation") etc.*

**Key words:** *The Constitution of Serbia, territorial decentralization, local government, local elections, the right to property, parliamentary system of government, the original competences of decentralized units.*

Almost two years have passed since the enactment of the new Constitution of the Republic of Serbia, which outlined directions for further development of the territorial decentralization in Serbia and its adjustment to "the situation in the field". Since then, only several scholarly papers, which examine the latest constitutional rules on decentralization, have appeared in the public, and almost none of them have, in a comprehensive way, studied the whole system of territorial decentralization formed by the

Constitution and a set of laws enacted at the end of 2007.<sup>1</sup> It is certain that the public at large and the political climate contributed to that fact, as did numerous serious problems that the Republic of Serbia has been confronted with in 2008. It is also certain that there is a need to analyze more deeply and comprehensively the meaning, purpose and core values of local decentralization in the newly adopted Constitution and the three new Laws: on territorial organization, local self-government and local elections.<sup>2</sup>

## I

The writers of the Constitution, whilst determining the original competences of units of territorial decentralization, applied the principle of *general clause* combined with the principle of *positive enumeration*. Namely, the provisions of Article 177 of the Constitution are a reflection of the classical principle included in a large number of constitutions and international documents, the *principle of subsidiarity*, as a general assumption of jurisdiction (competences) in favor of decentralized units. On the other hand, the principle of enumeration is contained in the provisions of Article 183 (province's competences) and 190 (municipal competences) of the Constitution. Constitutional writers' decision to enumerate competences of decentralized units has been assessed as "weak" in some of the analyses.<sup>3</sup> However, the idea, or main reason for this was that the Constitution guarantees a realistic and precisely specified set of competences of the decentralized units of government, which would narrow down the possibility for "creative interpretation" and the legislator's discretion, at the same time respecting the principal traditions of European constitutionality.

On the other hand, the Constitution completely changed the model of government in decentralized units: "By saying that 'The Assembly is the highest authority ... the organization of autonomous provinces and municipalities is determined ... because all other authorities must then be subordinated to the Assembly. This is the so-called "parliamentary system of government", which is based on the unity (not division) of powers in favor of an assembly, which was present in the time of socialist Yugoslavia (1946-1992). In this system all government bodies are elected and dismissed by the Assembly, and when it comes to the municipality, it is written in the Constitution in Article 191 Paragraph 4".<sup>4</sup>

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<sup>1</sup> See: R. Marković, Ustav Republike Srbije iz 2006 – kritički pogled, *Anali PFB* (godina LIV, br. 2), Beograd, 2006. (R. Markovic, The Constitution of the Republic of Serbia in 2006 - a critical view, *Annals of Faculty of Law in Belgrade* (year LIV, no. 2), Belgrade, 2006); D. Vasiljević, Novi zakonski okvir za lokalnu samoupravu u Srbiji, *Modeli organizacije lokalne samouprave: Slovenija, Hrvatska, Bosna i Hercegovina, Makedonija i Srbija – zbornik radova*. Beograd, 2008 (D. Vasiljevic, New legal framework for local self-government in Serbia, *Models of local self-government: Slovenia, Croatia, Bosnia and Herzegovina, Macedonia and Serbia*. Belgrade, 2008); and J. Komšić, Principi evropskog regionalizma, Novi Sad, 2007 (J. Komsic, the Principles of European regionalism, Novi Sad, 2007).

<sup>2</sup> In our analysis we have willingly left out the Law on the capital city ("Off. Gazette of RS, No. 129/2007), because of its, should we say, limited area of application.

<sup>3</sup> See: Opinion on the Constitution of Serbia (No. 405/2006), European Commission for Democracy through Law (Venice Commission), adopted by the Commission at its 70th plenary session (Venice, 17<sup>th</sup> March 2007).

<sup>4</sup> R. Markovic, The Constitution of the Republic of Serbia in 2006 - a critical view ..., p. 32.

*The foundation of new autonomous regions, or provinces* (along with two already created by the constitutional rules), in accordance with the provisions of the Serbian "basic law", can be achieved by the process foreseen for Constitutional changes, but only after obtaining the consent of citizens in a referendum. On this occasion writers of the Constitution failed to clarify the following questions: whether the consent is required of all citizens of the Republic of Serbia, or only those whose residence is in the area; which procedure for changing the Constitution will be applied to the procedure of establishment, merger or abolition of autonomous regions; which type of compulsory referendum and under what conditions can be scheduled, etc. All this has left plenty of room for discretionary powers of legislature.

Local governments in the Republic of Serbia, according to the new constitutional provisions, in the future will be, as it was in the past, *monotypic and simple* (single-layered), with the municipality as the basic unit of territorial decentralization. It cannot be said that a city, if we look at its duties and position, is a unit of a higher degree of local self-government, because it performs the same tasks as municipalities do.<sup>5</sup>

The constitutional rights to property and to mortgaging of territorial decentralization units made more certain the possibility they they should make independent decisions concerning their own economic, social and economic development, although those rights are still constituted only indirectly, on the level of constitutional principles, without appropriate legal elaboration, which is unacceptable. Finally, it was necessary to find a place in the Constitution for the right to equal representation of all areas in representative and administrative bodies and agencies of the central state authority, which is significant for any "real" decentralization.

## II

When one analyzes the provisions of the Act on Territorial Organization (Official Gazette of the Republic of Serbia, No. 129/2007), one can conclude that the former territorial structure of the Republic of Serbia is only formally (not substantially) changed by the introduction of 19 more cities. Today, the territory of Serbia is constituted of: 150 municipalities, 23 cities, the city of Belgrade and two autonomous provinces.

The criteria for the establishment of a municipality are contained in the provisions of Article 11 Paragraph 1 to 3 of the Law, and are literally the same as in the Article 18 of the Law on Local Self-Government. They are very *imprecisely set* (except one, that the municipality must have at least 10,000 inhabitants), which allows that almost any area can be constituted as a territorial unit, depending on the discretion and political assessment of its current needs and interests.

The number of cities increased to 19 (beside 4 that already existed) and they can now, in the light of Article 189 paragraph 3 of the Constitution, be entrusted with new, higher competences. Unlike the municipality, the creation of a city must be based on the implementation of two criteria. The first one is the number of more than 100,000

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<sup>5</sup> The township (a city's municipality) has no capacity for local self-government, but is a part of an internal territorial organization of a city. Also, it has no original competences as the units of local self-government have, but it is on the statute of the city to delegate affairs from its jurisdiction to the township.

inhabitants and the second, that there are economic, administrative, geographic and cultural circumstances that make it a gravity basis of an area. Only in exceptional circumstances, due to special economic, historical and geographical reasons can municipalities that do not meet these rules of the minimum number of inhabitants be defined as cities. Accordingly, it is strange that by applying the general standards for creating a city there have been created nine cities, and by applying special (discretionary) standards there is a total of 10 cities.

### III

In the basic provisions of the Law on Local Self-Government (Official Gazette of the Republic of Serbia, No. 129/2007) for the first time ever there can be found that *foreign citizens* can have individual rights in the implementation of local self-government,<sup>6</sup> and, also for the first time, there can be found a competence for creating so called *public-private partnerships*. Moreover, and this is also new and very important, there is now the principle of *competing for providing public services* at the local level.

Amongst the old, explicitly listed, competences of municipalities in the provisions of Article 20 there can be found some new ones: adoption of programs and implementation of projects of local economic development; care about environmental protection; establishment and regulation of activities of institutions in the field of social protection; management of a municipal property; supporting the development of various forms of self-help for and solidarity with people with special needs; compulsory organizing of legal aid services to citizens; care about informing the local public and establishment of local television and radio stations for reporting in the language of national minorities. The number of authentic competences has increased by 4, to the total of 39 jurisdictions. Regarding the category of the scrutiny, or inspection of local activities, we have found four new areas in which municipalities are required to perform them: education, health, environmental protection and mining.

The cities have one more jurisdiction, and that is to create, in accordance with the Law, a *communal police*, and to provide and organize the performance of its activities. Pursuant to the provisions of Article 99 "A special Law on communal police shall be adopted within one year of entry into force of this Law."

A substantial innovation in the system of territorial decentralization is that now a Municipal Assembly *elects and controls local government executive*, which made real the constitutionally announced parliamentary system of the local government.<sup>7</sup> Some new powers were put in the hands of municipal assembly members: determining the rate of the

<sup>6</sup> About this topic, in principle and details, see: V. Kutlešić, Venecijanska komisija o Ustavu Srbije, Beograd 2007, ([http://www.nspm.org.yu/debate\\_2007/2007\\_kutlesic1.htm](http://www.nspm.org.yu/debate_2007/2007_kutlesic1.htm)) (V. Kutlesic, Venice Commission on Serbian Constitution, Belgrade 2007); L. Kostić, Administrativno pravo Kraljevine Jugoslavije, Beograd, 2000, str. 208 id (L. Kostic, Administrative Law in the Kingdom of Yugoslavia, Belgrade, 2000, p. 208 id); report from the roundtable "Participation of the elections" held in the organization of Venice Commission and Central Election Commission of Russia in Moscow 27 May 2005. The ([http://www.venice.coe.int/docs/2005/CDL-EL\(2005\)015-e.asp](http://www.venice.coe.int/docs/2005/CDL-EL(2005)015-e.asp)).

<sup>7</sup> Dismisses and elects municipality's Mayor, and, on the suggestion of the Mayor, elects a deputy Mayor and members of municipal councils.

authentic municipalities' income, and the ways and measures for determining the amount of local taxes and fees; and adoption of legislation on municipalities' public debt, in accordance with the law which regulates public debt. On the other hand, the authority to initiate proceedings for the protection of rights to local self-government before the Constitutional Court or to set or release from duty the Chief of Municipal Administration has been taken away from the hands of the assembly's majority, and has been given to the heads of local administration departments, on the Mayor's suggestion.

Therein can be found some new solutions which made much more difficult *the cessation of the work* of local representative bodies and, in that sense, the speaker of the local assembly is obliged to arrange a session on the request of the mayor, the municipal council, or one-third of local representative body members, within seven days from the date of application. If the assembly speaker does not arrange a session within the prescribed time, the session may be called by the applicant, and the councilor to chair it is determined by the applicant. The Speaker of the Assembly may postpone a session that was convened in the case when there is no sufficient number of councilors present needed for work and valid decision-making. In other cases, it is the Assembly that decides about the postponement of the session. Also, the Law introduced the position of the Deputy of Secretary of the Municipal Assembly, in our opinion, completely unnecessarily. On the other hand, the legislator, quite justifiably, especially emphasized the regulation of conflicts of interest and incompatibility of functions of local representative body members. Members can go to court to protect their mandates, according to election regulations that guarantee mandates' judicial protection, only during elections and the constitution of the Assembly, not during the mandate, which is not a good answer to the problems that have developed in practice.<sup>8</sup> Councilors, opposed to MPs, only have immunity or irresponsibility for opinions stated or for giving voice into a meeting.

The legal *position of the Mayor* (president of the municipality) is reduced in comparison to the previous Law. His or her authority to: immediately execute and ensure the execution of decisions and other acts of the Municipal Assembly; to propose decisions and other acts to the Assembly; care about the execution of tasks entrusted from the Republic, or from the territorial autonomy; propose appointment and dismissal of the Chief of Municipal Administration and Chief of Administration for certain areas is transferred to the Municipal Council in whose hands are placed the following new powers: the proposal of the Statute, budget and other decisions and acts passed by the Assembly; immediate execution and supervision of the execution of decisions and other acts of the Municipal Assembly; decision on temporary financing in case the Municipal Assembly does not pass the budget before the start of a fiscal year (a new power). Candidates for members of the Municipal Council propose a candidate for the Mayor. The Law defines the Municipal Council as a local executive "shoulder to shoulder" with the Mayor, who was, until recently, the only holder of decentralized government executive power, which resolved earlier concerns about the legal status of Municipal Councils. The Mayor now has a deputy elected from among Municipal Council members, and they are both permanently employed in the municipality (an imperative norm).

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<sup>8</sup> As a form of protection of members of Assembly's seats through its duration remains the constitutional complaint under Article 170 of the Constitution.

Dissolution of the local Assembly automatically ends the mandate of local government administrative bodies, but they can carry out their current activities from their jurisdiction until the the new Mayor and municipal councilors enter the office, or until this is done by the president and members of interim bodies, if the meeting ended mandate because of the Assembly dissolution.

The *municipal administration office*, is, according to the new Law, no longer a service but an administrative body, which is certainly more in line with the fact that it mostly performs administrative tasks from the jurisdiction of a municipality and that it decides on rights and duties of citizens. The head of the municipal administration and managers of certain areas are appointed by the Municipal Council on the basis of *public invitation (tender)*, for a five year period. The Statute of a municipality can allow the appointment of *assistant(s) of Mayor* in the municipal administration, which is a new solution that replaced the former municipal architect, manager, etc., in areas of economic development, urban planning, primary health care, environmental protection, agriculture etc. The Mayor appoints and dismisses the assistants himself.

In every unit of local self-government there can be established a *protector of citizens* (former civil defender, or local ombudsman), which may be formed as a common body of two or more units of territorial decentralization. The position and responsibilities of the Council for International Relations are much more regulated than before, while the Council for Development and Protection of the Local Government has ceased to exist.

#### IV

The contents of the Local Elections Law (Official Gazette of the Republic of Serbia, No. 129/2007) caused a great interest of experts and the general public before and after its adoption.<sup>9</sup>

The *deadline for holding elections* (or electoral campaign) is extended, to no less than 45 (30 days in the previous law) and no more than 90 days (60 days in the previous law) from the day of election announcement. In relation to the previous law, also new is a guarantee of proportional representation of minorities in Local Government Assembly in local communities with mixed national composition of population.

Six electoral commissions and electoral committees have the task to implement local elections, which is the same solution that existed in the previous law. From the Act on Election of Members of Parliament it is retrieved that no political party or coalition can have more than half permanent members of the electoral authorities. Electoral authorities continue to work in full capacity even if the applicants for office (i.e. political parties) do not submit names of their representatives in expanded electoral bodies, which removes the possibility to stop the work of electoral authority if an applicant abuses this right.

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<sup>9</sup> The reason for this is a public commitment of the relevant Minister, who, in the phase of negotiating the draft Law, advocated the introduction of a majority system in the Law. The Law, however, kept the current proportional electoral system and one electoral unit. The beginning of changes in the local electoral system has been announced during the writing of this paper. The local electoral system would basically remain proportional, but the elections would be held in two or more electoral units. The Ministry considers that this change will result in an electoral system in which parties would choose the best people as candidates for the office and that citizens would know for whom to vote and whom to turn to for solving their local problems.

*Running for office* is at the same time more complicated and simplified. In local government units that have less than 20,000 voters, the electoral list must be supported by the signatures of at least 200 voters, and in units where the number of voters is higher than 20,000, for each candidate there must be provided support in the form of 30 signatures of citizens in a special form and verified before the court.<sup>10</sup> The minimum number of candidates on the list is reduced to a third of the total number of councilors in order to reduce the strictness of previous criteria. Although, it is unclear why the legislator left out the solution from the previous law under which the coalition of parties as applicants had to, with the rest of the documentation for the candidacy, file a Coalition Agreement which provides a method for the distribution of seats.<sup>11</sup>

In the allocation of seats there will be included the electoral lists that receive at least 5% of the votes of voters who voted. The *threshold is increased* by 2%, in the previous law it was 3%, with the obvious aim to reduce the number of parties in local assemblies, to prevent fragmentation of the party system in local self-government units, enhance opportunities to make easier formation of a stable local parliamentary majority and the overall stability of the local self-government. The Act left out Niemeyer formula and replaced it with the D'Hondt method for allocating seats.

The part of the Act which regulates the *termination of the mandate* contains new solutions some of which are, to say the least, questionable from the legal point of view. The most questionable is the norm which provides that candidates for a local representative body member, as well as members themselves, can agree with applicants (the party which nominated them) to contractually regulate mutual obligations. These norms define the right of an applicant to resign in the name of an Assembly member ("*blank resignation*"). This clause about converting free in a party-controlled mandate is "in the spirit of" provision of Article 102 paragraph 2 of the Constitution of the Republic of Serbia, which, on the other hand, applies only to the national deputies (MPs), but not to the candidates for the position of local Assembly members. This provision is made in such a way as to directly violate the principle of inviolability of representative functions.

It is possible to declare an appeal to a district court to the decision to terminate or verify a mandate, in the case the local Assembly does not confirm it.

*Judicial protection of the local electoral rights* is transferred to the jurisdiction of district courts – unlike the previous law which put that protection in the hands of municipal courts – which can, when the nature of things and found facts allows that, completely resolve an election dispute, and replace the canceled act in all.

The Local Assembly decides on the *confirmation of the delegates' seats* in a constitutive session. A constitutive session shall be appointed by the Speaker of the Assembly from the previous convene, within 15 days (before it was 20 days) from the date of publication of election results. The constitutive session is chaired by the oldest

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<sup>10</sup> Both criteria deviate from the proclaimed standards for running the office of the OSCE and the Venice Commission, which recommended that support of voters to a lists of candidates and candidates should not exceed 1% of an electorate in the constituency. The obvious intention of legislators is to harden a participation in local elections to small parties and special groups of citizens who were very numerous in previous election cycles.

<sup>11</sup> Omission of this solution is unjustified especially because of frequent disputes in coalitions and groups of citizens - the division, moving of councilors to other parties, etc. Those disputes were the cause of blockade of a local self-government.

member, who is authorized to organize a constituent meeting if the legal deadline was not respected by the Speaker of the Assembly from the previous convene.

## **NAJBITNIJE PROMENE U SISTEMU TERITORIJALNE DECENTRALIZACIJE U REPUBLICI SRBIJI**

### **Dejan Vučetić**

*U radu koji je pred vama autor nastoji da prati arhitektoniku odredbi kojima je regulisana teritorijalna decentralizacija u Ustavu Republike Srbije iz 2006. godine i u tri krajem 2007. godine usvojena zakona (Zakona o teritorijalnoj organizaciji, Zakona o lokalnoj samoupravi i Zakona o lokalnim izborima), kako bi utvrdio smisao, karakteristike promena i mogućnosti daljeg razvoja srpskog sistema teritorijalne decentralizacije. Nakon sprovedene funkcionalne analize ukupnosti odredaba sistema teritorijalne decentralizacije, on prvo prosuđuje da je prilikom organizacije vlasti decentralizovanih jedinica napušten princip njene podele, a potom nastoji da razloži najvažnije promene u odnosu na do tada važeći sistem decentralizacije koje se odnose na: vraćanje oduzetog prava na imovinu; načine i kriterijume za ustanovljavanje novih pokrajina, gradova i opština; prava stranih državljana u ostvarivanju lokalne samouprave; ovlašćenje za stvaranje javno-privatnih partnerstava; nove nadležnosti koje su se našle u rukama jedinica teritorijalne decentralizacije (među kojima se izdvaja pravo grada da obrazuje komunalnu policiju); položaj predsednika i drugih organa lokalne vlade u sistemu skupštinskog jedinstva vlasti; tehnička rešenja kojima se olakšava i ubrzava rad organa decentralizovanih jedinica; promene u načinu kandidovanja i povećanje izbornog praga; kontroverze oko prestanka mandata odbornika („blanko ostavka“) i dr.*

**Ključne reči:** *Ustav Srbije, teritorijalna decentralizacija, lokalna samouprava, lokalni izbori, pravo na imovinu, skupštinski sistem vlasti, izvorne nadležnosti decentralizovanih jedinica.*