UNIVERSITY OF NIŠ
The scientific journal **FACTA UNIVERSITATIS**
Series: **Law and Politics** Vol.1, N° 2, 1998 pp. 137 - 146
Editor of series: Milan Petrović, e-mail: milan@prafak.prafak.ni.ac.yu
Address: Univerzitetski trg 2, 18000 Niš, YU
Tel: +381 18 547-095, Fax: +381 18 547-950

CONSTITUTIONAL AND LAW ASSUMPTIONS AND RESTRICTIONS ON THE LOCAL SELF-GOVERNMENT IN THE FEDERAL REPUBLIC OF YUGOSLAVIA

UDC: 342.25:342.4(497.1)

Aleksandar Fira

Serbian Academy of Sciences and Arts, Yugoslavia

Abstract. *The greatest portion of this paper analyzes the most important constitutional provisions of the Federal and Republic Constitutions dealing with the local self-government. Concluding considerations formulated as a suggestion for further working out and discussions contain the basic attitudes and problems the author specifically emphasizes in the subject matter:*

- In the constitutional and law system of the Federal Republic of Yugoslavia "the right to the local self-government has been proclaimed by the Constitution of FRY, thus being the category of the federal constitutionality. While organizing and accomplishing it, all those provisions of the Constitution of FRY, directly applied must be respected, which refer to the local self-government and if refer. The degree of the local self-government working out within the federal constitutionality, however, is not of that kind that the local self-government could be introduced much less to function, only on its basis, that is, on the basis of direct application of the Constitution of FRY.

- Within their sovereign rights, the member Republics organize and provide for the local self-government on their own. Then, in accordance with the constitutionality and legitimacy principle, they are obliged to do that in keeping with the Constitution of FRY and federal laws which contain more provisions directly or indirectly referring to the local self-government.

- The Constitutions of both member Republics contain more, but still only basic, provisions on the local self-government. The same concept of the local self-government basically features both Constitutions. That concept suits to the centralized state which independently and in a "sovereign" way determines which part of the power will be given to the local self-government. Clearly carried out is the thesis that the local-self government is the creation of the state and it depends upon its will.

- The weakest point of the constitutional organization of the local-self government is absence of the constitutional guarantees for the financial and material independence of the local self-government. Judging from the practice so far, this cannot be provided for

Received November 1, 1997

by referring to the laws.
- The greatest restrictions on the local self-government results from the nature of the centralized state. It is most prominent in the sphere of performance, where the assumption of competencies is, contrary to the democratic traditions and the modern trend world-wide, directed in favour of the central state organs of power and administration.
- Finally, there is no efficiently developed mechanism in the constitutional system intended for the local self-government protection.
For all these reasons, vital improvements to the local self-government are possible only through the constitutional revision, and it is advisable this meeting to come for it.

Key words: *Yugoslav and Serbian Constitutions, Constitution of Montenegro, local government*

1.

Pursuant to the constitutional status in the Federal Republic of Yugoslavia (FRY) existing in the period over which a change in the Law on the Local Self-Government is discussed, "the right to the self-government" is, under the basic provisions, guaranteed under the Federal Constitution (Constitution of FRY, Article 6, clause 4). The formulation of the provision containing the subject guarantee is such that it points to the standpoint that the "right to the local self-government" is taken as individual or, in the best case, as collective right from the human and citizen catalogue of political rights. The text of the Constitution of FRY, however, has no closer workout of this right directly, this being left to the member Republics by the Constitution framer.

The above quoted constitutional provision end is interpreted in just that way by most authors, under which its is expressly stated that the "local self-government right" must be implemented "in keeping with the member Republic Constitution". It is correctly possible, at first sight, to draw a conclusion that the member Republic Constitution in that sense is "sovereign", that is, limited by the Constitution of FRY only that it could not abolish, that is, evade introducing the local self-government. Such interpretation is supported by the explicit provision under the Constitution of FRY pursuant to which "the member Republic is sovereign in questions not stipulated under this Constitution as the competence of FRY" (Constitution of FRY, Article 6).

In my opinion, although this reasoning can be defended, there are several weak points in it, which are of great constitutional and law importance. That is why I just consider them as the assumptions or restrictions in stipulating and implementing the local self-government.

2.

Under the Constitution (Constitution of FRY, Article 77 in particular) stipulated competence of the Federal Republic of Yugoslavia, although very widely set up, is not well enough precisely defined in all points. Thus, it is already under paragraph 1 of Article 77 of the Constitution of FRY stipulated that: "Federal Republic of Yugoslavia, through its organs, stipulates the policy, passes and performs federal laws, other

regulations and general acts, provides for constitutional-court and court protection in the areas, that is, questions of: 1) freedoms, rights and duties of a man and citizen stipulated under this Constitution..." (Constitution of FRY, Article 77).

Resulting from this is, at least, one question or confusion the solution of which seriously cause suspicion of the standpoint I have presented under 1. of this contribution. Namely, if the right to the local self-government is considered as the right of a man and citizen, then a question may and must be raised if complete elimination of the federal interfering both in stipulating and implementing the right to the local self-government is in conformity with the Constitution of FRY. This, first of all, that a right guaranteed under the Federal Constitution is in question. To tell the truth, former legislative practice, all the more the practice within the scope of the executive and court power considered the standpoint to be right which calls such approach in question, for which I decide to.

3.

Even if the previously stated standpoint should be rejected, there is a postulate which in no way can be neglected and upon which the idea and practice of a state under the rule of law is based. It is the legal acts hierarchy principle, that is, first of all, the Constitution of FRY supremacy principle.

It is just that principle that is positively stipulated under the constitutional norm: "The Constitutions of the member Republics, Federal Constitution, the laws of the member Republics and all other regulations and general acts must be in conformity with the Constitution of the Federal Republic of Yugoslavia." (Constitution of FRY, Article 115). - Consistent application of this principle, which extends to all regulations, including the Constitution as well, in the member Republics positively binds the Republics on the occasion of "sovereign" stipulating, organizing, implementing and protecting the local self-governments to do this fully in conformity with all the provisions of the Federal Constitution. Here, first of all, I think that, in addition to respecting the basic provisions, all freedoms, rights and duties of a man and citizen, economic structure, competencies of the Federal Republic of Yugoslavia and constitutionality and legitimacy must be scrupulously respected (Constitution of FRY, sections II, III, IV and VI). All these, of course, to the measure and size referring to the local self-government.

The presented approach binds to a detailed analysis of the legal and realistic position of the local self-government within the complete legal structure of both the member Republics and FRY. I am certain that it is necessary that this aspect of problems should be given a far wider analysis and simultaneously to initiate systematic tracking and complex investigation of irrelevant norms and practice of their implementation. This, first of all, because it is a notorious truth that there is no democratic political system without the developed local self-government, neither that really active local self-government is possible if the whole political system positively lacks democratic character.

Being desirous, also on this occasion, to illustrate one possible form of the federal intervention in protecting the local self-governments, I would like to remind to the following. - Pursuant to Section VII of the Constitution of FRY, the Federal Constitutional Court is in position to protect the local self-government rights, first of all, through the universal general supervision of the constitutionality and legality of all the

regulations and acts, including the Constitutions of the Republics as well. Nothing is essentially changed by the circumstance that in the case against the constitutionality of the Republic's Constitution, the Federal Constitutional Court has no the right of direct cassation, but, like the solution from the previous constitutional epoch regarding the federal laws, after the 6-month delay term, of course, the Republic's Constitution is considered, if not brought into conformity with the Federal Constitution, to be terminated ex constitutione (Constitution of FRY, Article 130). Theoretically, it is possible to suppose that the local self-government rights are also protected through the constitutional complaint institution (Constitution of FRY, Article 124). Here, however, there is neither a developed practice based on which efficacy of such protection could be judged nor that complete procedure is normatively set up so as to provide adequate protection. Similar notes can also refer to some other competencies (see paragraphs 7 and 8 of Article 124 of the Constitution of FRY) of the Federal Constitutional Court.

Having in mind such status regarding the federal protection of the local self-government rights, it would be opportune to raise the question of creating a new competence of the Federal Constitutional Court. Since the Federal Constitutional Court makes decisions on the competencies conflict among the federal organs and between the Federation organs and those of the Republics, its competencies to make decisions on the competencies conflict between the local self-government but not governmental organs and republic organs could be considered. Truly, that is, in conformity with the former doctrine and even with certain legal proposals (in that sense, a Draft Law on the Local Self-Government was made by the party Nova demokratija), first of all, seen as the competence of the member Republic Constitutional Court.

Yet, it seems to me that the situation would be most clear if a particular objection on the local self-government rights protection would be institutionalized through a constitutional revision. That objection could have a political dimension to be resolved by the Parliament and the constitutional-court dimension to be resolved by the Constitutional Court.

4.

The constitutional situation of the local self-government in Serbia is stipulated under the Constitution of the Republic of Serbia preceding the Constitution of FRY and, although additionally not matched with it, conceptually it does not show essential differences. Already in the Basic Provisions, however, there is one which still is not only terminological in nature. - Thus, the Constitution of the Republic of Serbia does not stipulate the "right to the local self-government", but regulates in the Basic Provisions: "A commune is a territorial unit within which local self-government is implemented." (Constitution of the Republic of Serbia, Article 7).

There is no any provision in Chapter II on the rights and duties of a man and citizen out of which the "right to the local self-government" could be drawn. But, it is in a separate section of Chapter II that there are particular provisions on citizens' participation in the local self-government, which will be discussed later on.

5.

Although I have pointed out, in the previous discussions, that federal competence is not completely excluded in the domain of the local self-government, yet my standpoint is still that which I presented in one of my earlier papers (see A. Fira, Encyclopedia of the Constitutional Right of Former Yugoslav States, Volume II, Novi Sad, 1994). The basic constitutional and legislative regulations as well as procurement of their performance in view of the local self-government is still and positively the competence of the Republic.

The Constitution of the Republic of Serbia stated, through the same constitutional and law technique used with the competencies of the autonomous provinces, the most important competencies of the communities: "A commune, through its organs, and in keeping with the law:

1. passes development programmes, city plan, budget and closing balance sheet;
2. stipulates and provides for performance and development of public works;
3. stipulates and provides for usage of the city construction land and business space;
4. takes care of construction and maintenance of local roads and streets and other public buildings of importance to the commune;
5. takes care of meeting certain needs of citizens in the field of: culture, education health care and social security, public care of children, physical culture, public informing, handicrafts, tourism and hotel management, environmental protection and improvement and in other areas of direct interest to the citizens,
6. performs laws, other regulations and general acts of the Republic of Serbia the performance of which is entrusted to the commune, provides for performance of regulations and general acts of the commune,
7. establishes organs, organizations and services for the commune needs and stipulates their organization and operation,
8. performs other jobs stipulated under the Constitution and law as well as under the commune statute." (Constitution of the Republic of Serbia, Article 113). In addition, some other affairs under the competence of the Republic can be entrusted to the commune under the condition that appropriate funds should be transferred to the commune.

Principally, the Constitution of the Republic of Serbia stipulates a certain, although restricted, financial independence of communes, by regulating that certain income, stipulated under the law, belongs to the commune and that additional funds, based on the directly expressed will of citizens, can be collected in the commune. Those funds, earlier called voluntary contribution, must serve the needs of citizens and are collected in keeping with the law. - Such constitutional regulations create an assumption for the independent financial basis of the commune, but implementation of that assumption depends upon the legislator will. Here, namely, a legal situation is such that the legislator is under the legal obligation to provide for certain financial funds as the commune income, but what they will be and whether they will cover constitutional competencies of the commune is fully a matter of political estimation of the legislator, that is, Republic. A distinct unconstitutionality would result only if no law would provide for any source of income for the commune. But, neither in such case there are good legal means through which such a situation would be reclaimed, because none of the Republic organs, including the Constitutional Court, can order, that is, bind the Federal Parliament to pass such law. There shall remain only political means, that is, parliamentary actions, public

opinion pressure, and the like.

Somewhat more precisely stipulated situation is that relative to the funds collected from the citizens. Here, their purpose is at least principally regulated under the Constitution. Here, also, the question who estimates implementation of that purpose remains open, but that is generally connected with the influence of citizens and political parties to the local self-government functioning. Otherwise, under the conditions really existing in this country, it is hard to suppose that the majority of citizens endangered in their existential interests, will find funds, that is, express readiness to set aside additional funds for the local self-government operation.

6.

As for the administration system in the commune, the Constitution of the Republic of Serbia is in that sense rather lacking as well. Thus, explicitly stated in it is only a referendum, as a form of citizens' decision-making and the municipal council as an organ of representatives. It consists of the council members elected in the direct secret ballot election. (Constitution of the Republic of Serbia, Article 116).

It is understood that, when stipulating and implementing administration in the commune, other constitutional provisions, relating to the entirety of the constitutional system, have to be respected. It is, first of all, an obligation to the democratic character of the political system, the rule of law principle, the separation of power principle, the publicity principle, etc. In a word, a commune is a part of a unique governmental and legal system, and if nothing in particular has been stipulated for it, the Constitution must be applied on the whole and directly in the commune, naturally if those its provisions do not appear as a particular "organic law" which stipulates particular organs of the Republic.

In a wider sense, the commune administration system, when speaking about the constitutional assumptions and restrictions, includes the right and duty of the commune to have its own statute. Pursuant to the Constitution, this act is passed based on the Constitution and the laws and it "stipulates affairs of the commune and organization and operation of the commune as well as other questions of interest to the commune" (Constitution of the Republic of Serbia, Article 115). The statute is passed by the municipal council.

7.

There are two more entities in the Constitution of the Republic of Serbia itself, which at least under their competencies and also in accordance with the general position have the elements of the local self-government, although the Constitution text itself does not contain such decision. So in that way, already under the Basic Provisions, the city of Belgrade is stipulated as a "separate territorial unit" (Constitution of the Republic of Serbia, Article 7). Under a separate Article 118, the Constitution of the Republic of Serbia somewhat closer defines the constitutional position of Belgrade. It is a traditional solution existing all through the whole period of the "first" and "second' Yugoslavia.

The basic determinant is that the city of Belgrade, as a particular territorial unit,

performs the affairs of communes which, as their competencies are stipulated under the Constitution as well as the affairs entrusted to it by the Republic through the law from the framework of its rights and duties. Out of the such stipulated statute of the city of Belgrade, a conclusion should be drawn that that "territorial unit" also belongs to the system of the local self-government because its constitutional position is identical to that of the commune, which is otherwise constitutionally stipulated as a framework for implementing the local self-government. The more it is strange that such self-governmental character of the city of Belgrade is not explicitly emphasized in the constitutional text itself. The only good reason to excuse such an attitude could be found in the wish of the constitution framer to avoid "excessive" repeating. But, at the same time, it is disregarded that the entirety of the constitutional structure of the Republic of Serbia is explicitly centralistically set up, so that such "economizing" of the essential attributes may appear as an alibi for the actual restrictions of the self-governing elements in the functioning of such territorial units. After all, political disputes that shook the Republic almost during the whole year on the occasion of the local elections and functioning of the newly elected organs of the local self-government show that such fears are not groundless.

Further, the Constitution has stipulated that the statute of Belgrade defines what rights and duties the commune will perform on its territory and which of them will be performed by the communes within the city. Also, the territory of Belgrade has been stipulated by the law as well as its income, including the funds required to perform the affairs transferred by the Republic. Belgrade has the statute passed by the city council consisting of the members elected in the direct secret ballot election. This is, mainly, everything contained in the regulations on the city of Belgrade.

Seen from the above is that not a single provision under the Constitution as well as under the legislative workout covers delicate and in practice very complex problems arising from the fact that Belgrade is at the same time both the capital of the Republic of Serbia and FRY and the seat of their organs. That fact, after all, was not respected, that is, separately regulated in particular over the earlier phases of the constitutional development featured by the same duality and trinity, respectively. In my opinion, such solution will not be a long lasting one. Unnatural is the situation that in a complex state, which FRY undoubtedly is, that federal organs in any way should be under the jurisdiction of the local self-government organs. Because of that this question should be solved in a more modern way under the constitutional revision.

Finally, the Constitution of the Republic of Serbia also contains the possibility the law to stipulate that a certain commune be treated as a city with city communes on its territory (Constitution of the Republic of Serbia, Article 117).

8.

The Constitution of the Republic of Montenegro passed after the Constitution of FRY had been passed, fully and in keeping with the prevailing individualistic concept, guarantees the "right to the local self-government". It is characteristic that the constitutional provisions on the local self-government are systematically component parts of Part II of the Constitution, which fully deals with the freedoms and rights. This only

confirms the already presented thesis that the constitution framer in FRY thinks that establishing and functioning of the local self-government should be understood as implementation of one of the human freedoms and rights. Added to this, which has already been said on such approach, should only be that it is traditional and rather spread within the worldwide constitutionality. Its actual worth depends on the concrete solutions in the constitutional reality, first of all, on the relations between the state, that is, its organs and the local self-government. Just in that sense, my opinion is that the individualistic concept, in spite of certain logic and actual weak points, still represents a progress and provides for a certain space for the local self-government made free from the direct interfering of the state.

According to the Constitution of the Republic of Montenegro, the local self-government is implemented in the commune and in the capital. Principally, it is a single-degree and monotypic local self-government with the exception of the capital. The scope of the local self-government and its basic principle of administration are regulated by the Constitution of the Republic of Montenegro as follows: "Citizens in the local self-government make decisions directly and through the freely elected representatives on certain public and other affairs of direct interest to the local population" (Constitution of the Republic of Montenegro, Article 66). If for determining the level, that is, basic principles of organizing the local self-government can be said that they have been relatively precisely determined under the Constitution, it must be stated here that the constitutional formulation has remained at an unacceptably high level of abstraction. Then, having in mind the fact that the Constitution of the Republic of Montenegro does not provide for aggregately expressed and restricted scope of the republic organs, that is, that there are no stipulated rights and duties of the Republic, like those in the former constitutions, nor of the state at all, then a conclusion imposes that the constitutional and legal contents of the local self-government has neither been defined nor protected against the possible action of the state, either at the central or at the local level. That imperfection can be eliminated by sending the whole complex for legislative workout, but not necessarily, because a law is an exclusive governmental means, which cannot be directly influenced by the local self-government.

That objection cannot refer to the local self-government administration to the same extent, because the constitutional provisions, although rather general, confirm here democratic principles. They provide for that there are the council and the mayor in the commune. The Constitution does not work out the competences of the municipality council nor the competence of the mayor. Yet, from references to the forms of immediate democracy and to the representative character of the municipal council, it can be concluded that the Constitution has certain basic determinants of organizing the local self-government, at least as much as the Constitution of the Republic of Serbia.

The Republic is under the obligation to support the local self-government, but financing the local self-government neither in the Republic of Montenegro is completely stipulated under the Constitution. Also, the possibility of entrusting certain affairs of the governmental administration to the local self-government either permanently, that is, under the law or temporarily, that is, by the government act is provided for. That typical "double line" the existence of which I have also discussed under the local self-government of the Republic of Serbia is rather widespread in the comparative law. Although it is very often justified as rationalization of the governmental affairs, even as the strengthening of

the local self-government, it has more often been misused as the means of transforming the local self-government organs into simple branch organs of the central governmental power.

Finally, I would like to stress one more constitutional provision referring to the local self-government. According to it, members of the national minorities and ethnic groups, in addition to other general and particular rights, have the right to the proportional participation in the local self-government and state government (Constitution of the Republic of Serbia, Article 73).

9.

The above presented analysis of the constitutional provisions of the Federal and Republic Constitutions in the parts dealing with the local self-government point to certain conclusive considerations, which at the moment being I consider as an invitation for further workout and discussions.

- Within the constitutional and law system of FRY, the "right to the local self-government" has been proclaimed under the Constitution of FRY and is, therefore, the category of the federal constitutionality. Its stipulation and implementation must respect all those provisions of FRY directly applied and which refer, if refer, to the local self-government as well. The degree of the constitutional workout of the local self-government within the federal constitutionality, however, is not such that, based only on the direct use of the Constitution of FRY, the local self-government could be introduced, even the less to function.
- Within their sovereign rights the member Republics organize on their own, that is, stipulate and provide for the local self-government. Then, in conformity with the constitutionality and legality principle, they are under obligation to do that in keeping with the Constitution of FRY and federal laws containing more provisions directly or indirectly referring to the local self-government, than it looks at first sight. Therefore, neither the local self-government is an exclusive domain of the Republic interfering although its is so to a great extent.
- The Constitutions of both Republics contain several, but still only the basic, provisions on the local self-government. Then, although not expressly stressed, the both Constitutions basically feature the same local self-government concept. That concept corresponds to the centralized state which sovereingly and on its own determines which part of administration of the public affairs will be entrusted to the local self-government. Then, distinctly carried out is the concept that the local self-government is the creation of the state and that its real power and influence depend upon the will of the state.
- The weakest point in constitutionally stipulating the local self-government is absence of the constitutional guarantees for financial and material independence of the local self-government. In all likelihood, reference to the laws does not provide for that independence.
- The greatest restriction on the local self-government results from the nature of the centralized state. It is most distinct in the domain of performance where, in contrast to the democratic traditions and the modern trend worldwide, the competence assumption is in favour of the central organs of the state power.

• Finally, there is no sufficiently developed protecting mechanism within the constitutional system intended for the local self-government.

Because of all that, improvement in the local self-government is possible only through the constitutional revision.

USTAVNOPRAVNE PRETPOSTAVKE I OGRANIČENJA LOKALNE SAMOUPRAVE U SRJ

Aleksandar Fira

Analiza najvažnijih ustavnih odredaba Saveznog i republičkih ustava u delovima koji se odnose na lokalnu samoupravu čini najveći deo ovog priloga. U zaključnim razmatranjima koja su formulisana kao poziv na razradu i diskusiju sadržani su osnovni stavovi i problemi koje autor u toj materiji posebno ističe:

- U ustavnopravnom sistemu SRJ "pravo na lokalnu samoupravu" proklamovano je ustavom SRJ i utoliko je kategorija savezne ustavnosti. U njegovom uređivanju i ostvarivanju moraju se poštovati sve one odredbe Ustava SRJ, koje se neposredno primenjuju, a koje se i ukoliko se odnose na lokalnu samoupravu. Međutim, stepen razrade lokalne samouprave u saveznoj ustavnosti nije takav da bi se mogao na osnovu njega tj. na osnovu direktne primene Ustava SRJ uvesti, a još manje funkcionisati lokalna samouprava.

- U okviru svojih suverenih prava republike članice samostalno organizuju tj. uređuju i obezbeđuju lokalnu samoupravu. Pri tome, saglasno principu ustavanosti i zakonitosti, one su dužne da to čine u skladu sa Ustavom SRJ i saveznim zakonima, koji sadrže više odredaba koje se posredno ili neposredno odnose na lokalnu samoupravu

- Ustavi obe republike članice sadrže više, ali samo još uvek osnovnih, odredaba o lokalnoj samoupravi. Pri tome oba ustava imaju istu koncepciju lokalne samouprave. Ta koncepcija odgovara centralizovanoj državi koja samostalno i "suvereno" određuje koji će deo vlasti ustupiti lokalnoj samoupravi. Pri tome je jasno sprovedena teza da je lokalna samouprava kreacija države i da zavisi od državne volje.

- Najslabija tačka u ustavnom uređivanju lokalne samouprave je nepostojanje ustavnih garancija za finansijsku i materijalnu samostalnost lokalne samouprave. Upućivanje na zakone, sudeći po dosadašnjoj praksi, to ne obezbeđuje.

- Najveće ograničenje lokalnoj samoupravi proističe iz prirode centralizovane države. Ono je najizrazitije u sferi izvršenja gde je, suprotno demokratskim tradicijama i modernom trendu u svetu, pretpostavka nadležnosti okrenuta u korist centralnih državnih organa vlasti i uprave.

- Najzad, u ustavnom sistemu nema dovoljno razvijenog zaštitnog mehanizma lokalne samouprave.

Zbog svega toga bitna unapređenja lokalne samouprave su moguća samo kroz ustavnu reviziju, o kojoj bi bilo uputno da se izjasni ovaj skup.

Ključne reči: *Jugoslovenski i srpski Ustavi, Ustav Crne Gore, lokalna uprava*