# '*Blanco*' resignation as a specific way of termination the representatives` mandate in local assemblies

# -experience of the Republic of Serbia-

## BLANKO OSTAVKA KAO SPECIFIČAN NAČIN PRESTANKA MANDATA ODBORNIKA U LOKALNIM SKUPŠTINAMA

## ISKUSTVO REPUBLIKE SRBIJE

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SUMMARY

Free and fair elections and the so called "free mandate" of the deputies and other citizens` representatives in local or regional assemblies are basic criteria for evaluation of the general level of democracy of each modern state.

On the other hand, one of the essential preconditions for the exercising of any citizens' representative's free mandate is his/her right to express an opinion and vote freely, without fear of consequences.

Different mechanisms introduced in legislation may also have influence on the free mandate, sometimes even imposing certain limitations on it.

A resignation, as an expression of free will, is the generally accepted way of terminating a representative's term of office. However, experience of the Republic of Serbia shows that it is possible to transmute it into one of the most dangerous weapons against freedom of representation.

The Constitutional Court of Serbia encountered a situation in which the legislator had introduced in the legal system a specific form of resignation of representatives in the local

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assemblies, or councils (assemblies of the local self-government units – municipalities and towns) – the so called 'blanco resignation,' in comparative practice best described as 'signed but undated resignation'. In practice, at the very start of their mandates, representatives elected from an electoral list of a political party empower their party by means of written and signed, but undated, letters of resignation to activate such resignations in any given time during their mandates. This legal solution was assessed by the Constitutional Court of Serbia from the point of view of its compliance with the Constitution of the Republic of Serbia of 2006, as well as with European standards.

**Keywords:** local elections, character of a representative's mandate, blanco resignation

## 1. INTRODUCTORY NOTES

Every time a debate is held on the nature and type of political representation, including at local level, the question of the character of the mandates of citizens' representatives is opened. Dialogue of this kind began in the Republic of Serbia about a score years ago, in parallel with the introduction of political pluralism, but remains as topical as it ever was. The debating was particularly intense in the run-up to the adoption of the current Serbian Constitution (2006)[1] and work on preparing constitutional legislation. No less vocal, however, were debates on the character of a representative's mandate held in representative bodies when deciding on motions to terminate a deputy's term on account of "termination of membership in a political party' or submission of the so-called resignation, i.e., when the mandate was terminated effectively due to a breach or breaches of party discipline. Although the current Serbian Constitution is largely based on solutions also embraced by modern parliamentary states, the authors of the Serbian Constitution failed to explicitly define the character of a representative's mandate to ensure that it represent a general framework for establishing and keeping a linkage between the electorate and their representatives. Quite the contrary – certain provisions

[1] The Constitution of the Republic of Serbia took effect on 8th November 2006, and was published in the *Officicial Gazette of the RS* No. 98/06

of the new Constitution relating to the status and mandate of national deputies in the National Assembly led to a situation in which in the regulation of local elections the legislator brought into question the constitutionally clearly expressed position that representatives in 'local parliaments,' i.e., councils, act "in compliance with their conscience and responsibility for actions taken and activities concerned", on the basis of the "trust vested in them at gained at direct elections", instead defining them as mere representatives of the law, in effect the voices of their parties.

The basic principles in representative democracies u modern states for a foundation for the activities of not just citizens' representatives in parliaments, the highest representative bodies, but also those in representative bodies at lower levels of government, such as the assembles, or councils, of units of local self-government (municipalities and towns), provincial assemblies, regional assemblies, or the assemblies of other forms of territorial organisation existing in modern states – where their members are elected at general and direct elections. Although it is not possible to automatically treat the legal status of parliamentary deputies as being equal to that of citizens' representatives at lower levels of government, there does exist a common denominator between these two categories of popular representatives – the legal nature of their mandate, founded on the relationship between the electors and their representatives.

There is no doubt that in some of its elements the free mandate of people's representatives, as its founders viewed it, with the passage of time came into conflict with the concept of modern governance, in which political life is inconceivable without the existence of political parties, in which representative bodies are increasingly looking as if they are 'representative bodies of political parties' rather than 'representative bodies of prominent individuals' elected at direct elections. Of course, the free mandates of people's representatives cannot be viewed nowadays only from the point of view of whether the citizens' representatives are 'bound by the instructions of voters' or the 'instructions of their respective political parties', that is, whether they have the freedom to act in their representative bodies in compliance with their own consciences, but it is also possible to ask to what extent the citizens' representatives are accountable to their voters (citizens), and to what extent to those who nominate them, promote them and support them in the

electoral and post-electoral periods, consequently, to what form and degree of accountability it is possible to subject them.[2]

The principle of a free representative mandate, irrespective of all its weaknesses, is regarded as one of the 'pillars of the doctrine of representative democracy', on which are founded the institutions of modern democratic states. Nevertheless, it is possible to see in the constitutional practice of individual countries certain vacillations in respect of the purposefulness of this principle, and resulting corrections of the proclaimed free mandate principle. But in spite of constant demands for provisions on a stronger link between political parties and deputies, aimed at securing party discipline, be injected into constitutional texts, even a very cursory analysis of comparative legal practice shows that little heed has been paid to such demands by those who write constitutions, irrespective of the period when they were adopted. It can therefore be stated with full certainty that in European countries a free deputy's mandate, as an important constitutional principle of the functioning of democratic society, has held sway over pragmatic political needs for establishing an imperative term of office.

However, irrespective of the general acceptance of this democratic principle in modern constitutions, sometimes statutory frameworks regulating the legal status and accountability of deputies and other citizens' representatives can strike at its very roots and seriously threaten its realisation in practice. In such cases the paramount role is that of the constitutional courts, whose role of 'guardians of the constitution' in every state ruled by law is to ensure that the legislator, or his parliamentary majority, does not transform the proclaimed free mandate principle into an empty constitutional proclamation. This challenge has been faced by the Constitutional Court of the Republic of Serbia when it assessed the constitutionality of provisions of not just the Law on the Election of National Deputies and the Law on Local Elections, dating from 2004,[3] but also in 2010, in its

[2] More on this in K.v. Beyme, *Parliamentary Democracy: Democratization, Destabilization, Reconsolidation 1789-1999*, London, Macmillan Press, 2000, as well as B. Nenadić, *O parlamentarnom mandatu: primer Republike Srbije*, Anali Pravnog fakulteta u Beogradu, LVI, 1/2008, pp. 6 et al. and B. Nenadic, *Sur le mandat parlementaire: Exemple de la Serbie*, http://www.enelsyn.gr/papers/w3/Paper%20by%20Dr%20Bosa%20%20Nenadic.pdf

[3] See more in B.Nenadić, *op. cit*. p. 10 *et al*.

assessment of the compliance of the Law on Local Elections (2007)[4] with the Constitution of the Republic of Serbia and ratified international treaties.[5]

## ON THE CHARACTER OF THE MANDATE OF COUNCILLORS (LOCAL REPRESENTATIVES) ACCORDING TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

In the process of drafting the 2006 Constitution of Serbia, its authors' task was to establish in the most generalised legal act of the nation principles and solutions ensuring that it in the period that followed the Republic of Serbia developed a democratically-based parliamentary system. Proceeding from this, the basic principles and solutions of the Constitution on which Serbia's constitutional system is based are founded on standards characteristic of contemporary European constitutional law. However, the Constitution does not regulate explicitly the nature of representatives' mandates in general, including those of citizens' representatives in local self-government entities[6], but the character of their mandates can only be deduced indirectly, by analysing certain constitutional provisions.

The Republic of Serbia is defined by its Constitution as a state of the Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European standards and values.

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[4] Law on Local Elections (*Official Gazette of the RS,* No. 129/07)

[5] See Articles 16 and 194 of the Constitution of the Republic of Serbia, under which generally accepted rules of international law and ratified international agreements make up an integral part of the legal order of the Republic of Serbia, and are applied directly.

[6] Especially controversial was a provision of the Constitution of the Republic of Serbia under which "…a deputy shall be free, under terms stipulated by law, to irrevocably put his/her mandate at the disposal of the political party upon whose nomination he or she was elected a deputy" (Article 102 paragraph 2 of the Constitution of the Republic of Serbia). This provision cannot be applied directly, and neither the Law on the Election of National Deputies nor the Law on the National Assembly (*Official Gazette of the RS,* No. 9/2010 dated 26th February 2010) regulate conditions "under which this right is exercised, i.e., the freedom of the national deputy". See more on the controversy in B. Nenadic, *op. cit*. http://www.enelsyn.gr/papers/w3/Paper%20by%20Dr%20Bosa%20%20Nenadic.pdf.
The Venice Commission of the Council of Europe also pointed to this solution in its Opinion No. 405/2006 dated 19th March 2007 on the Constitution of Serbia, http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf

The basic provisions of the Constitution define the basic principles of importance for a broad view of the constitutional-law framework of the parliamentary system in contemporary Serbia, hence also representation of citizens in local self-government entities. In particular, these principles guarantee:

- that sovereignty is vested in citizens, who exercise it through referendums, people's initiatives and free elected representatives;
- that no state body, political organization, group or individual may usurp the sovereignty from the citizens, nor establish government against freely expressed will of the citizens;
- that the rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights, and that it is exercised, amongst other ways, through free and direct elections, constitutional guarantees of human and minority rights, separation of powers, an independent judiciary and observance of Constitution and Law.[7]

Furthermore, the authors of the Constitution also clearly established at the level of the fundamental principles the place and role of political parties in the constitutional and legal order of the Republic of Serbia. The Constitution guarantees and recognises the role of political parties in the democratic shaping of the political will of the citizens, but at the same time prohibits activities of political parties aimed at violent overthrow of the constitutional order, violation of guaranteed human or minority rights, or inciting racial, national or religious hatred, and prescribes that political parties may not exercise power directly, or submit it to their control.[8]

Besides the aforementioned, the Constitution guarantees every citizen of the Republic of Serbia of age and working ability the right to vote and be elected, universal and equal suffrage, free and direct elections by secret ballot in person.[9] Freedom of thought

[7] See Articles 2 and 3 of the Constitution of the Republic of Serbia.
[8] See Article 5 paragraphs 1, 3 and 4 of the Constitution of the Republic of Serbia.
[9] See Article 52 of the Constitution of the Republic of Serbia.

and expression are also guaranteed: Serbia's citizens are free to seek, receive and impart information and ideas using speech, writing, art or in other manner; freedom of expression may be restricted by law if necessary to protect the rights and reputations of others, for the purpose of upholding the authority and the objectivity of the court, protection of public health, morals of a democratic society, and the national security of the Republic of Serbia.[10]

It is important to point to the basic constitutional principles in accordance with which are exercised all human and minority rights and freedoms, including electoral rights, and which guarantee that human and minority rights guaranteed by the Constitution, as well as human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws, are exercised directly, that the manner of exercising those rights may be prescribed by statute only where explicitly provided so by the Constitution or is required for the purpose of exercising an individual right due to its nature, wherein the law may in no way influence the substance of the guaranteed right, and that the provisions on human and minority rights are interpreted so as to benefit the values of democratic society, in compliance with valid international standards of human and minority rights, and the practice of international institutions which supervise their implementation; that the guarantees of inalienable human and minority rights in the Constitution serve to preserve human dignity and exercise full freedom and equality of every individual in a just, open and democratic society based on the principle of the rule of law; that human and minority rights guaranteed by the Constitution may be restricted by law only where the Constitution permits such restriction, and for purposes allowed by the Constitution, in an extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right.[11]

Finally, state power is explicitly restricted in the Constitution by the rights of citizens to provincial authority and local self-government.[12] Unlike the vast majority of

[10] See Article 46 of the Constitution of the Republic of Serbia.
[11] See Articles 18 through 20 of the Constitution of the Republic of Serbia.
[12] See Article 12 paragraph 1 of the Constitution of the Republic of Serbia.

other constitutions, that of the Republic of Serbia: *firstly*, provides explicitly that citizens exercise their right to local self-government directly or through their freely elected representatives;[13] *secondly,* defines the representative body of local self-government units and its composition, and the manner of election of its members. Under the Constitution, the Assembly is the supreme organ of authority of local self-government, and is made up of local councillors elected to a period of four years, at direct elections, by secret ballot, in accordance with the law.[14]

It follows from the aforementioned provisions that the Constitution tasks the legislator with more clearly defining the manner of electing councillors – citizens' representatives in the local self-government assembly – but that it does not empower parliament to go outside constitutional boundaries in regulating the question. To prevent the constitutional norm of the obligation of the legislature (the National Assembly) to obey the Constitution in the performance of its function remaining nothing but empty words, the Constitution grants the Constitutional Court the task of being the guarantor of its observance and implementation by everyone, including the highest representative body in the nation - the legislative arm of government.

## 3. THE DISPUTED RESTRICTION OF COUNCILLORS' MANDATES IN THE LAW ON LOCAL ELECTIONS – 'AGREEMENT' AND '*BLANCO* RESIGNATION'

The Law on Local Elections of the Republic of Serbia adopted in 2007, amidst the process of harmonising legislation with the new Constitution and accepted international law, besides defining more closely the procedure of election and termination of mandates of local representatives, for the first time in domestic practice explicitly provided for the following: *a)* establishment of a specific legal relationship between the councillor – elected citizens' representative – and the submitter of the electoral list – political party or coalition of political parties from whose list the local councillor was elected, and *b)* introduced the

[13] See Article 176 of the Constitution of the Republic of Serbia.
[14] See Article 180 of the Constitution of the Republic of Serbia.

concept of 'blanco resignation'. Under Article 47 of the said Law, which is no longer in effect following a decision of the Constitutional Court,[15] it had been stipulated:

*One,* that the submitter of the electoral list and the candidate for councillor, or councillor, could conclude an agreement to regulate their mutual relationship and provide for the right of the submitter of the electoral list to submit, in the name of that councillor, that councillor's resignation from the function of councillor in the assembly of the local self-government unit;

*Two,* that in the process of concluding the aforementioned agreement, the candidate for councillor, or councillor, hands over to the submitter of the electoral list his/her *blanco* resignation, which is so stated in the agreement;

*Three*, the *blanco* resignation had been defined as a 'document containing a declaration of the candidate for councillor, or councillor, that he/she submits his/her resignation to the function of councillor in the assembly of the local self-government unit, as well as authorisation issued to the submitter of the electoral list to deliver the resignation in the councillor's name to the president of the assembly of the local self-government unit';

*Four,* based on the aforementioned agreement, the submitter of the electoral list gained the right to have at his free disposal the mandate of the councillor with whom the agreement had been concluded, whereby the submitter had the full freedom to decide whether to realise the authorisation acquired, and to decide the moment of doing so;

*Five,* the resignation and authorisation given in the *blanco* resignation were irrevocable;

*Six*, the councillor who had submitted a *blanco* resignation could participate in the work and decision-making of the assembly of the local self-government unit and exercise all rights proceeding from the function of councillor, until the moment the assembly of the local self-government unit determined the termination of his/her mandate on the basis of the resignation submitted, in his/her name, by the submitter of the electoral list, that is, the political party;

[15] See Decision of the Constitutional Court of Serbia IU No. 52/08, published in the *Official Gazette of the RS*, No. 34/10 dated 21st May 2010.

*Seven,* agreements were done in written form, and the signatures on them, as well as the signature on the *blanco* resignation, had to be certified in accordance with the law regulating certification of signatures;

*Eight,* the agreements, and signatures, were subject to the payment of a verification fee, whose size was determined by the ministry in charge of judicial affairs.

It proceeds from the foregoing that the legislator established a specific legal relationship between citizens' representatives in local self-government (municipal or town assemblies) and the political parties from whose lists they had been elected, either before a mandate was actually acquired, or at the very beginning of the term of office – by means of concluding an agreement whose principal objective was that the citizens' representative submit to the political party his/her *blanco* resignation in advance, and authorise that party to 'activate' the resignation at any given time during his/her term of office.

Taking into consideration the aforementioned provisions of the Constitution, the task of the Constitutional Court of Serbia was to assess whether the provisions of the law given above were in conformity with the said constitutional framework, as well as with provisions of international treaties ratified by the Republic of Serbia. In the procedure conducted in connection with a petition to assess the constitutionality of Article 47 of the Law on Local Elections, the Constitutional Court looked at the provisions primarily from the standpoint of four fundamental constitutional principles: a) the principle of sovereignty of citizens; b) the principle of the rule of law, c) citizens' right to self-government, and d) citizens' right to the direct election of their representatives to the assemblies of local self-governments. The Constitutional Court also took into account provisions of the Constitution on the role of political parties in a democratic society and those guaranteeing electoral rights.

The Constitutional Court also looked at the disputed question in relation to the provisions of the International Covenant on Civil and Political Rights under which all citizens enjoy the right and possibility, free of any discrimination and unfounded restrictions, to: *a)* participate in managing public affairs, either directly, or by way of freely elected representatives; *b)* to vote or to be elected at periodic, genuine, universal and equal elections held by secret ballot guaranteeing the free expression of the will of the

electors,[16] and in relation to the provisions of Protocol No. to the European Convention for the Protection of Human Rights and Fundamental Freedoms, revised in accordance with Protocol No. 11, under which the governments signatory thereto assume an obligation to organise at appropriate intervals free elections, with a secret ballot, under conditions guaranteeing the free expression of the opinions of the people in the election of legislative bodies.[17]

The Constitutional Court proceeded from the fact that the constitutional principles on the sovereignty of citizens and the rule of law contained in Articles 2 and 3 of the Constitution, the right of citizens to local self-government guaranteed by the provisions of Article 176 of the Constitution, as well as Article 180 paragraph 3 of the Constitution, under which councillors are elected at direct elections, represent fundamental constitutional provisions regulating the relationship of citizens with councillors in the assemblies of local self-government units, and the nature of a councillor's mandate. The Court concluded that the universal constitutional principles contained in Articles 2 and 3 of the Constitution, which determine the nature of deputies' mandates, relate to all people's representatives directly elected by citizens, including councillors as citizens' representatives in the assemblies of local self-government units, and that the provisions of Articles 176 and 180 of the Constitution are special provisions, relating directly to freely elected representatives in the assemblies of local self-government units. In the opinion of the Constitutional Court, it proceeds unequivocally from the aforementioned constitutional provisions that the citizens are holders of sovereign authority, that they also exercise their right to local self-government through their freely elected representatives, that is, councillors in assemblies of local self-government units who decide in their name and in their interest on affairs of local significance. The right of councillors to represent citizens in assemblies of local self-governments is not restricted by the Constitution, and neither does the Constitution envisage a possibility of restricting an electoral right realised at direct elections for assemblies of local self-government units. It follows, in the view of

[16] See Article 25 of the International Covenant on Civil and Political Rights, by which Serbia has been bound as of 30 January 1971.
[17] See Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, revised in accordance with Protocol No. 11.

the Constitutional Court, that councillors enjoy a constitutionally-guaranteed freedom in the representation of those who elected them. Free mandates of people's representatives represents one of the fundamental principles and values on which is founded a modern democratic state ruled by law, and under Article 1 of the Constitution, the Republic of Serbia is among other things also based on the principles of civil democracy and commitment to European principles and values.

By introducing the concept of an agreement on the basis of which the submitter of an electoral list acquires the right of have at his free disposal the mandate of a councillor, in the view of the Constitutional Court, the legislator brought into question the very essence of the constitutionally-defined status of councillor and the character of representation in local self-government units. The Court based its conclusion on the view that under the Constitution the status of councillor is acquired through direct citizens' elections and that the councillors are free in the exercise of their functions and representation of citizens in local self-government unit assemblies. However, the free mandate of councillors as citizens' representatives does not mean and cannot be interpreted to mean that councillors enjoy freedom of disposal of the mandate in the manner envisaged by the disputed provision of Article 47 of the Law, but rather the independence of councillors from external and internal influences and pressures, during voting and decision-making in local representative bodies. Having in mind that there exists no constitutionally or legally-based elector-councillor link for the duration of a councillor's mandate in the context of a legal connection in the exercise of the councillor's function, including termination of mandate (impeachment), the Constitutional Court assumed the view that it is even harder to envisage such a legally-based link between a councillor and the submitter of an electoral list, and neither can the performance of a councillor's function be made by law dependent on the will of the submitter of an electoral list. In the view of the Constitutional Court, no special rights and powers of the submitter of an electoral list towards a councillor can proceed from the fact that the submitter of an electoral list nominated the candidate for councillor on his electoral list, and neither does a possibility for the submitter to control the councillor's mandate. By introducing the concept of agreement whose subject-matter is disposal with the councillor's mandate, the

legislator indirectly revised the constitutionally-defined nature of a representative's mandate and effectively put in place a covert imperative councillor's mandate, but not in relation to those the councillor represents under the Constitution – those who elected the councillor and entrusted him/her with the mandate - but instead in relation to a political party or other authorised submitter on whose list the councillor had been nominated. In assessing the aforementioned provision, the Constitutional Court proceeded from the fact that a mandate is a public law relationship between the electors and their representatives and that a mandate cannot be the subject of an agreement between a candidate for councillor (!), or a councillor and the submitter of an electoral list. The nature of a representational mandate does not allow its exercise to be the subject of the said legal act. Therefore, the function of a councillor in a municipal assembly in the Republic of Serbia is a public function which the councillor performs on the basis of being elected by citizens, and the Constitution offers no possibility for the councillor to control the right of exercising the function by transferring that right to a third party, that is, to the submitter of an electoral list. By its legal nature, such an agreement would come under private law, and a mandate, as an expression of a public law relationship may, not be the subject of such an agreement. The subject of such an agreement is contrary to public order, that is, it contravenes the fundamental provisions of the Constitution on the sovereignty of citizens, the rule of law and the right of citizens to local self-government and the direct election of their representatives, and is as such legally unallowable.

Besides the foregoing, the concept of *blanco* resignation contained in the abrogated Article 47 of the said Law, on the basis of which the submitter of the *blanco* resignation transfers authority for submitting the resignation to the submitter of an electoral list, and the submitter of the electoral list autonomously decides whether and/or when to realise the authorisation to resign in the name of the councillor, is in the view of the Court not in accordance with the basic legal principle that a declaration of the will to resign should correspond to the real will of the holder of public office, and neither does it comply with the constitutional provision that a public office may be terminated at the personal request of its holder. The Constitutional Court is of the view that the function of councillor, like every other public office, may always be terminated of its holder's own free will, but that

will must correspond with the real will of the councillor at the moment of submittal of the resignation and must be freely expressed. In a situation where placement of a *blanco* resignation at someone else's disposal may represent a condition for someone to be nominated and where the submitter of an electoral list decides autonomously whether and/or when to activate a *blanco* resignation signed in advance, the Constitutional Court of assumed the view that such a resignation did not represent an act of free will of the councillor, but rather the very opposite.[18]

The provisions of Article 47 of the said Law, in the view of the Constitutional Court, complied neither with the constitutional prohibition of political parties exercising power directly, nor with the ban on submitting it to their control. The law authorises political parties to submit electoral lists, and in practice as a rule they are the only such submitters. However, in the view of the Constitutional Court, the right to nominate candidates at electoral lists does not allow for the establishment of instruments for the responsibility of a councillor towards the submitter of the electoral list as envisaged by the aforementioned provisions of the Law. It proceeded from that Law that a political party acquiring the right to have the mandates of their councillors at its disposal on the basis of agreements concluded with them could always decide to deprive councillors of their mandates in the event of their 'disobedience' and failure to obey party instructions, and replace them with other councillors. In this way political parties could alter the composition of local self-government assemblies without any control, thereby influencing the voting and decision-making process, in fact the functioning of the body as a whole, but also of other organs of authorities and bodies elected or appointed by the assembly. Granting political parties the legal power to have the mandates of councillors at their own disposal created a possibility of those parties taking full control of power at local level - in contravention of the Constitution - by applying provisions of Article 47 and assuming the role of the electorate, that is, the citizens' representatives themselves. For this reason the Constitutional Court concluded that the contested provisions of Article 47 of the Law on Political Parties

[18] More about resignation as an act of termination of mandate in D. Stojanović, *Pravni položaj poslanika,* Niš, 1999, p. 297 *et al*, and B.Nenadić, *op. cit*., p. 20 *at al*.

granted to political parties powers which violated the constitutionally-defined framework for their activity.

The Constitutional Court also determined that in the aforementioned provisions of Article 47 of the Law pursuant to which a submitter of an electoral list could, having the mandate of the councillor at his disposal, also decide on the duration of the councillor's term of office, that is, the termination of the mandate, the legislator had also restricted a realised electoral right of a citizen to be elected and enjoy without obstruction the mandate acquired at the elections – a right guaranteed by the provisions of Article 52 of the Constitution, Article 25 item b) of the International Covenant on Civil and Political Rights, and Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. It is the view of the Constitutional Court that citizens' constitutional right to be elected, also supported by international treaties, implies a right to keep their representatives' mandates and enjoy them without obstruction during the period to which they were elected, as well as guaranteed protection against arbitrary deprivation or termination of the mandate acquired at elections. Given that empowering submitters of electoral lists to have the mandates of their councillors at their free disposal was a *de facto* authorisation to decide arbitrarily on termination of councillors' mandates, the Constitutional Court determined that the legislator had acted in contravention of the Constitution and ratified international agreements. Furthermore, given that only the manner of exercising the electoral right may be regulated by law, and that in the view of the Constitutional Court the disputed provisions did not concern the manner of exercising that right, but instead jeopardised the very essence of the electoral right, the Constitutional Court determined that the contested provisions were also in contravention of the basic principles of human and minority rights and freedoms enshrined in the Constitution.

Taking into consideration the content of the contested provisions of Article 47 of the said Law, that is, the possibility of a termination of a councillor's mandate on account of a failure to obey an instruction issued by the submitter of the electoral list, in fact political parties, the Constitutional Court held the view that the provisions also restricted councillors' right to the freedom of thought and expression, as guaranteed by Article 46 of

the Constitution. In the view of the Constitutional Court, in exercising their representative functions councillors in local government assemblies must be free to express their opinions, that is, the speak and vote according to their convictions. Freedom of thought and expression if important for all citizens, but this constitutionally-guaranteed freedom is of particular importance for elected representatives of citizens, as they represent those citizens and their interests in their assemblies. The legislator has further protected this freedom by establishing a rule on immunity of councillors, as contained in Article 37 of the Law on Local Self-Government. Although a councillor's right, in his/her capacity of representative of the people, not to be held accountable for opinions expressed in the assembly is a universally accepted principle, under the contested provisions of Article 47 of the said Law councillors could always be held accountable, in that their *blanco* resignations could be activated if they voted or spoke out against the position of or instruction received from the political party from who lists they had been elected. In this way, in the view of the Constitutional Court, the constitutionally-guaranteed freedom of thought and expression of councillors, in their capacity of elected representatives of citizens in local self-government units, was restricted in a significant degree. In other words, the disputed provisions abrogated one of the basic preconditions of a free mandate, that citizens' representatives elected at direct elections may during their terms of office freely express their opinions and freely vote in the representative body to which they were elected, without any fear of losing their mandates as a result of those actions.

The Constitutional Court assumed its position on the legal status of councillors and character of a councillor's mandate in Decisions Nos. IU-66/02, IU-201/03 and IU-249/03,[19] assessing the conformity of particular provisions of the Law on Local Self-Government[20] and the Law on Local Elections[21] with the 1990 Constitution. On those occasions the Constitutional Court assumed the position that a candidate for councillor acquires the status of councillor by means of being directly elected by citizens, and that councillors enjoy a constitutionally-guaranteed freedom in representing those who elected them.

[19] See Const. Court Decision published in the *Official Gazette of the RS*, No. 100/03.
[20] *Official Gazette of the RS*, Nos. 49/99 and 27/01.
[21] *Official Gazette of the RS*, No. 33/02.

In deciding on the constitutionality of provisions of Article 47 of the Law on Local Elections, the Constitutional Court also took into account the case-law of the European Court of Human Rights and the practice of the European Commission for Human Rights, according to which the right to free elections, guaranteed by Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, implies the individual right of citizens to be elected, and once elected, to be a member of parliament.[22]

## CONCLUSING ASSESSMENT

Without disputing the right of every holder of public office, including directly elected representatives of citizens (at local level) to terminate their mandates of their own free will – by resigning – the Constitutional Court of the Republic of Serbia recognised in the contested provisions of the Law on Local Elections, which had legalised 'agreements' and '*blanco* resignations', a sophisticated way to transmute a resignation from a personal act of an individual into a powerful and efficient sanction for breaching 'party discipline'. Assessing the said provisions of the law as being contrary to the Constitution and relevant international agreements, the Constitutional Court once again clearly expressed its position that modern political representation in Serbia must be based on a free representative mandate. In this way once again, after five years, the Constitutional Court clearly presented its position on a dilemma, with which our parliamentary practice has been faced for some years, in respect of determining the character of a representative mandate – the search for an answer to the question whether the future of political representation in Serbia lies in increasing intermediation between the citizens and their representatives through the establishment of not just political but also legal links between citizens' representatives and their respective political parties, or whether the future lies in

[22] Relating in particular to the decision of the European Court of Human Rights in the *Gaulieder v Slovakia* case, application No. 36909/97, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Gaulieder%20%7C%20Slovakia&sessionid=60592584&skin=hudoc-en

guaranteeing a free representative mandate emplaced within a general framework of principles of citizens' sovereignty and a clear definition of the role of political parties in democratically shaping the political will of the citizens. Nevertheless, irrespective of the decision of the Constitutional Court, such debates are likely to continue for a long time in this country, in fact until the mandate of people's representatives is explicitly and clearly defined by the Constitution, thereby preventing the legislator and parliamentary political parties from bringing into question the word of the authors of the Constitution by interpreting constitutional norms.