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The nature of the mandate of members of the Parliamentary Assembly

Report[1]
Committee on Rules of Procedure, Immunities and Institutional Affairs
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Summary

In Council of Europe member States, national parliamentarians have a representative mandate which has the distinction of being general, free and irrevocable. They are considered to be able to exercise their mandate freely and not be bound by any undertakings, orders or instructions from their voters or issued by their party or political group in the parliament.

This report takes stock of the conditions governing the exercise of the parliamentary mandate, with the focus on the issue of parliamentarians' independence and freedom of expression (and their limits), more specifically in terms of the nature of their relationship with the political parties. Party discipline is an inescapable feature of how parliamentary institutions operate today, which may lead to a kind of "imperative mandate", through pressure exerted on parliamentarians and threats of sanctions.

In the last few years, irregularities occurred in some Parliamentary Assembly delegations, bringing to light gaps and shortcomings in the internal regulations, or current practices, of the national parliaments concerned regarding the appointment of national delegations, the composition of committees and the participation of their members in Assembly sessions and committee meetings. In the exercise of their Assembly mandate, members should enjoy the protection of a status comprising recognition of a number of general principles.

1. Reference to committee: Bureau decision, Reference 4018 of 27 January 2014.

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A. Draft resolution[2]

1. The Statute of the Council of Europe (ETS No. 1) and the Rules of Procedure of the Parliamentary Assembly, which define and govern the competences of Assembly bodies and parliamentary procedures, say nothing about the status of members of the Assembly and the nature of their mandate, and merely specify that the members of the Assembly are elected within the national or federal parliament or appointed from among their members (Article 25 of the Statute of the Council of Europe and Rule 6 of the Assembly's Rules of Procedure).

2. International organisations being instruments of co-operation between States, it is common ground that their statutes govern relations between the organisation and its member States. It is therefore clear that, because of the actual legal nature of the instrument founding the Council of Europe, the members of the Assembly are considered not as individual "subjects of law", but in terms of their membership of one of the Organisation's two statutory bodies: as "Representatives to the Assembly", they enjoy the protection of a specific European statutory and treaty-based system of immunities.

3. The Rules of Procedure, supplemented by complementary texts, also comprise several provisions relating to the guarantees and rights, but also obligations, governing the exercise of their European mandate.

4. The members of the Assembly sit as members of a national delegation, but also, where the great majority of them are concerned, in respect of a political group to which they have declared their affiliation. As national elected representatives, parliamentarians are mandated by their electorate to act in the general interest, albeit with respect for the political values professed by their political party. As members of the Assembly, they undertake to adhere to the fundamental objectives and principles of the Council of Europe (Rule 6.2 of the Rules of Procedure) and, to the extent that they are affiliated to one of the five political groups of the Assembly, to promote the group's objectives, values and principles.

5. In accordance with the principle of representative democracy, in Europe national parliamentarians have a representative mandate which has the distinction of being general, free and irrevocable, and implies freedom of action, opinion and expression and an individual right to vote. The constitutional or legislative provisions governing the functioning of the parliamentary system in Council of Europe member States highlight, firstly, the non-binding or conditional nature of the mandate, in other words, from a legal viewpoint, elected representatives enjoy absolute independence vis-à-vis both their electorate and their party. Parliamentarians are considered to be able to exercise their mandate freely and not be bound by any undertakings given before their election or instructions received from voters during their mandate: they are not bound by instructions from their voters and are not obliged to follow the instructions of their party.

6. In theory, parliamentarians are free to make their own decisions, as expressed through the votes they cast, and are not obliged to support the position of their political party or group in parliament, honour their pledges to it or vote as their parliamentary group directs. In parliamentary practice, the principle that mandates are independent and irrevocable is clearly waning in the face of party discipline and compliance with voting instructions, an inescapable feature of how parliamentary institutions operate today. The importance of the party system rests firstly, at the pre-election stage, on the process of nominating candidates and secondly, after the election, on the freedom of parties and groups to expel members whose conduct is disloyal or damaging to the party or group concerned.

7. There is, then, a kind of "imperative mandate" operating in parliamentary institutions, through the threat of suspension or expulsion from one's political party or group, with the pressure placed on parliamentarians leading them to resign or face sanctions.

8. The Assembly points out that, notwithstanding the provisions of Rule 6 of its Rules of Procedure ensuring compliance with the principles of fair political representation and gender equality, the composition of national delegations and the appointment or replacement of their members are a matter for national parliaments, in accordance with their internal procedures. The same applies to the participation of members in sessions of the Assembly or meetings of its committees.

2. Draft resolution unanimously adopted by the Committee on 17 May 2016.

9. The Assembly notes that, in the last few years, irregularities occurred in Assembly delegations, often bringing to light gaps and shortcomings in the rules of procedure of the national parliaments concerned. In particular:

9.1. the rules of procedure of national parliaments have often been implicated in that they can serve as a legal front for measures imposing a disguised sanction founded on a political motive, particularly where delegation members are replaced on the pretext of individual resignations or an overall renewal of membership following elections;

9.2. the rules of procedure of national parliaments are reported to have been misused to restrict travel or prevent the participation of a delegation member in a part-session or an Assembly committee meeting.

10. It also expresses its profound concern at the serious infringements of the independence and freedom of expression of some of its members or now former members, who have been the target of disguised sanctions on the part of the parliament or their national political party.

11. In this connection, the Assembly firmly points out that the European Court of Human Rights attaches the utmost importance to freedom of expression in the context of political debate, and affords enhanced protection to it, by establishing in its case law the principle of the free expression of parliamentarians as a condition *sine qua non* for their independence in the discharge of their mandate. The Court considers it essential, in a democratic society, to "defend freedom of political debate, which is at the very core of the concept of a democratic society".

12. Moreover, the Assembly considers that although, at national level, party discipline is a prerequisite for stable parties and party coalitions and the effectiveness of their policy, such considerations are less relevant when it comes to promoting within the Parliamentary Assembly the aims and basic principles of the Council of Europe and collaborating "sincerely and effectively" in the promotion of "ideals and principles which are the [Europeans'] common heritage".

13. The Assembly considers that its members should enjoy a status comprising recognition of minimum guarantees in the exercise of their European mandate, and that there is a need to promote a certain number of principles based on a proper balance between freedom of opinion and parliamentary votes and respect for the political obligations that flow from membership of a political party or group. It calls on national parliaments and their delegations to the Assembly to recognise and take due account of the following general principles, which should regulate the conditions under which the Assembly mandate is exercised:

13.1. with regard to the guarantees and rights enjoyed by Assembly members:

13.1.1. Assembly members exercise their mandates freely and independently; they are not bound by any instructions from their delegation, their national political party or their political group in the Assembly;

13.1.2. Assembly members express their opinions freely, whether through their statements, speeches or votes, in all their activities in the Assembly and its various bodies, while complying with Rule 22 of the Rules of Procedure and rules of conduct in the Assembly;

13.2. with regard to the duties of Assembly members:

13.2.1. Assembly members shall act in accordance with the Rules of Procedure and rules of conduct; they participate in a responsible and constructive manner in the Assembly's work;

13.2.2. Assembly members have a duty of accountability to their delegation, their national political party and their political group in the Assembly; they act in compliance with the principles of transparency, honesty, integrity and trust.

14. Recalling Resolution 1640 (2008) on the use by Parliamentary Assembly members of their dual parliamentary role – both national and European, the Assembly urges national parliaments to review their rules of procedure and their practice relating to the participation of delegations in Assembly sessions and the meetings of Assembly committees and other bodies, and calls on them to revise any provisions which hinder the effective participation of members in the activities of the Assembly, in particular of substitutes when they are assigned specific functions in the Assembly and its committees.

15. In this connection, the Assembly points out that, under both the Statute of the Council of Europe (Article 25) and its own Rules of Procedure (Rule 11), following parliamentary elections, the members of the Assembly remain full members until the parliament concerned makes new appointments. Consequently, parliaments are obliged to authorise their participation in the activities of the Assembly until they have seen to

their effective replacement. The Assembly calls on the national parliaments concerned to change the rules prohibiting the participation of delegation members when parliament has been dissolved or, following elections and pending the appointment of a new delegation, the participation of those members who have not sought re-election or not been re-elected.

16. Finally, the Assembly calls on the Congress of Local and Regional Authorities of the Council of Europe to review the status of local and regional elected representatives in Europe, in particular the question of the revocation of their mandate.

B. Explanatory memorandum by Ms Nataša Vučković, rapporteur

1. Introduction

1. In recent years, some Parliamentary Assembly members have more and more openly voiced concerns over pressures put on them in their national delegation, their national parliament, their political party or their Parliamentary Assembly political group.

2. The Committee on Rules of Procedure, Immunities and Institutional Affairs, for example, has discussed several cases of political pressure being exerted on Assembly members, disclosing two types of abuse in particular:

– misuse of the rules of procedure of national parliaments to restrict travel or prevent the participation of a delegation member in a part-session or an Assembly committee meeting;

– politically motivated replacement of members of delegations which, on the pretext of individual resignations or an overall renewal of membership, might reveal a sanction in disguise.

3. At its meeting on 1 October 2013, the Committee on Rules of Procedure discussed the limits on the independence of the mandate and freedom of expression of members of the Assembly[3] and concluded that the issue merited further study. At the committee's request, on 27 January 2014 the Assembly asked the committee to prepare a report on "The nature of the mandate of members of the Parliamentary Assembly".

4. The concerns raised are more precisely illustrated by the following examples:

– During the April 2013 part-session, the Assembly held a debate on the challenge to the as yet unratified credentials of a member of the Ukrainian delegation who had been appointed to replace Mr Sergiy Vlasenko, the latter having been stripped of his national parliamentary mandate under a judicial decision which may have been politically motivated.[4]

– At the same part-session, the Monitoring Committee discussed a motion to open a monitoring procedure in respect of Hungary, on the basis of a draft opinion prepared by two co-rapporteurs, but in the absence of one who resigned on the eve of the meeting.

– The head of the Slovenian parliamentary delegation complained to the President of the Assembly about having been subjected to "considerable political pressure" in Slovenia, after a speech she made in the debate on "Corruption as a threat to the rule of law" during the June 2013 part-session.[5]

– In November 2013, the EPP/CD Group alerted the Committee on Rules of Procedure to events taking place in the Armenian Parliament which were liable to threaten the fair representation of political parties within the Armenian parliamentary delegation as well as the participation of one of its members in the Assembly's activities. Indeed, the parliamentarian in question was not reappointed to the Armenian delegation for the 2014 session.

– In January 2014, the departure and replacement of several key members of the Turkish parliamentary delegation, including its chairperson, gave rise to speculation in the context of the 2013 mass anti-government protests.

– At the November 2015 meeting of the Standing Committee, the as yet unratified credentials of the United Kingdom parliamentary delegation were challenged on the ground that three Conservative MPs belonging to the outgoing delegation had been excluded from the new delegation, following the direct intervention of the Prime Minister, for having failed to toe the government line in a vote in the House of Commons.[6]

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3. An information memorandum prepared by the secretariat (document AS/Pro (2013) 18) includes a detailed analysis concerning protection of parliamentarians' freedom of expression.

4. Serhiy Vlasenko, a lawyer well known for having handled the defence of former Prime Minister of Ukraine Yuliya Timoshenko in connection with her various judicial proceedings, was stripped of his national parliamentary mandate by the High Administrative Court of Ukraine, at the end of proceedings instituted by the President of the Verkhovna Rada. For details of the case, see the report by the Committee on Rules of Procedure, Immunities and Institutional Affairs on challenge on procedural grounds of the as yet unratified credentials of Mr Andriy Shevchenko (Ukraine, EPP/CD), Doc. 13193 and Resolution 1931 (2013). Mr Vlasenko was reinstated as a member of the Parliamentary Assembly in January 2015.

5. The ruling party demanded her resignation from her duties as Head of the delegation and requested that the Parliament's Bureau hold a discussion on her statement during the sitting, which the party considered "an abuse of power".

– In March 2016, a rapporteur for the Committee on Legal Affairs and Human Rights who was a member of the Macedonian parliamentary delegation was denied permission by her parliament to travel to Paris, two days before the meeting.

5. From an internal, Parliamentary Assembly perspective, what is clearly at stake in these various cases is members' effective participation in Assembly proceedings and committees. From a broader perspective, it is Assembly members' freedom of expression that is in jeopardy. In a democracy, parliamentarians' freedom of expression is a condition *sine qua non* for their independence in the discharge of their mandate.

6. Ultimately, there is a need to consider the issue of parliamentarians' independence and accountability, and, more specifically, the nature of their relationship with the political parties, on the one hand, and with citizens or voters on the other. The focus of this report ought to be widened, therefore, to include the functioning of national parliaments. A closer analysis of the conditions under which the parliamentary mandate is exercised thus requires preliminary consideration of the key issue of the nature of that mandate.

2. The mandate of Parliamentary Assembly members

2.1. General points

7. Unlike members of the European Parliament, who are elected by direct universal suffrage, the parliamentarians sitting in the Parliamentary Assembly of the Council of Europe – and in the other inter-parliamentary institutions – are elected in the national or federal parliaments or appointed from among the members of the latter (Article 25 of the Statute of the Council of Europe (ETS No. 1) and Rule 6 of the Rules of Procedure of the Assembly). The composition of national delegations and the appointment or replacement of their members is a matter for the national parliaments, in accordance with their internal procedures.

8. Quite logically, given the basis for the representative function of the European Parliament, Rule 2 of its Rules of Procedure on the independent mandate stipulates at the outset that "[m]embers of the European Parliament shall exercise their mandate independently. They shall not be bound by any instructions and shall not receive a binding mandate", whereas the Rules of Procedure of the Parliamentary Assembly, like the Statute of the Council of Europe, do not, any more than the rules of procedure of the other parliamentary co-operation institutions, define the nature of Assembly members' mandate.

9. Consequently, analysing the nature of the mandate of members of the Parliamentary Assembly presupposes referring to the regulations applicable to them as national parliamentarians (free mandate of a representative nature or binding mandate; professional or non-professional mandate; general mandate or otherwise), as specified by their countries' constitutions or in a legislative provision or regulation (see chapter 3 below).

10. The members of the Parliamentary Assembly sit not only as members of a national delegation, but also, where the great majority of them are concerned, in respect of a political group to which they have declared their affiliation. As national elected representatives, parliamentarians are mandated by their electorate to act in the general interest, albeit with respect for the political values professed by their political party. As members of the Assembly, they undertake to adhere to the fundamental objectives and principles of the Council of Europe (Rule 6.2 of the Rules of Procedure) and, to the extent that they are affiliated to one of the five political groups of the Assembly – and that the rules of procedure or statute of the group (where they exist) so provide – to promote the group's objectives, values and principles[7] (see chapter 2.4 below).

11. As one national parliamentarian succinctly put it during a seminar organised by the Inter-Parliamentary Union in 2005, "in order to carry out our functions, we must be able to freely express ourselves without fear of reprisal from any quarter. That is a condition *sine qua non* for ensuring the independence of the parliament itself and the separation of powers. … However, … freedom of expression, which every parliamentarian must enjoy, can be seriously limited by party discipline, which may involve sanctions, even including the loss of the parliamentary mandate. Party discipline may have the effect of preventing parliamentarians from speaking on behalf of their constituents".[8]

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6. See the report by the Committee on Rules of Procedure, Immunities and Institutional Affairs on the challenge on procedural grounds of the as yet unratified credentials of the Parliamentary Delegation of the United Kingdom (document AS/Pro (2015) 22 def of 11 December 2015).

7. See, for example, Article 4 of the Rules of Procedure of the EPP/CD group in the Parliamentary Assembly.

2.2. Existing rules in the Parliamentary Assembly

12. The Statute of the Council of Europe States that the Assembly "shall consist of representatives of each Member [State], elected by its parliament from among the members thereof, or appointed from among the members of that parliament, in such manner as it shall decide" (Article 25); additionally, the Assembly Rules of Procedure specify that "the representatives and substitutes appointed by the national parliaments of each member State shall form national delegations" (Rule 18), themselves "composed so as to ensure a fair representation of the political parties or groups in their parliaments" (Rule 6), and that representatives and substitutes "may form political groups" which "shall commit themselves to respect the promotion of the values of the Council of Europe, notably political pluralism, human rights and the rule of law" (Rule 19). The Rules therefore recognise a threefold relationship of every Assembly member towards his/her national State, through the parliamentary institution, his/her Assembly political group and his/her national political party.

13. As to committee appointments, these are the sole responsibility of the national delegations (Rules 44.2 and 44.5) – as least for six of the nine committees – and if disputed, nominations are referred to the national delegation concerned.

2.3. Regulatory provisions in national parliaments

14. The irregularities reported in the Assembly delegations often bring to light the gaps and shortcomings of the rules of procedure of the national parliaments concerned. These should therefore be examined rather more closely, particularly as regards the appointment of the national delegations, the composition of committees and participation in the proceedings. Indeed, when delegations' credentials have been challenged, the rules of procedure of the national parliaments have often been implicated in that they can serve as a legal front for measures imposing a disguised sanction founded on a political motive, particularly where the replacement of a member is concerned.[9]

15. Besides the rules of appointment of delegations, it is also important to take stock of the rules on their members' participation in Assembly sessions and meetings of its committees. In fact, the rules – or more straightforwardly the practice – of many parliaments ordain that only representatives in the Assembly (and full committee members) are entitled to participate in sessions and committee meetings, and are covered financially. Many substitutes in the Assembly belong to opposition parties, however, and, under these rules, have little opportunity to travel to Strasbourg. Further consideration should therefore be given to the question of how far national parliaments' regulations or practices regarding the rights of substitutes to attend Assembly sessions and committee meetings conform to or clash with the Statute of the Council of Europe and the Assembly's Rules of Procedure.[10]

16. Where committees are concerned, the existence of such rules governing parliamentarians' participation and defrayal of expenses raises the question of the rules possibly being used for political ends, given that appointments to committees can be made to the detriment of the opposition parties whose members would seem to be mainly assigned positions as substitutes. Making an appointment to a delegation, in the same way as to the committees, can thus be a way for the ruling political majority to control the opposition.

17. In view of their importance for the proper functioning of the Assembly, these questions are dealt with in a separate report of the Committee on Rules of Procedure on the effective representation and participation in the Parliamentary Assembly of opposition parliamentarians in the member States.[11]

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8. Seminar for Chairpersons and Members of Parliamentary Human Rights Bodies on Freedom of Expression, Parliament and the Promotion of Tolerant Societies, jointly organised by the Inter-Parliamentary Union and Article 19 (Geneva, 25-27 May 2005), summary of proceedings and recommendations presented by the rapporteur.

9. Allegations of this kind attended the aforementioned replacement of Mr Sergiy Vlasenko, member of the Ukrainian parliamentary delegation between January 2013 and January 2014, as well as that of Ms Zaruhi Postanjyan, member of the Armenian delegation belonging to the opposition party Heritage, in January 2014 (though without the delegation's credentials being challenged at that date).

10. Rule 18 of the Assembly's Rules of Procedure ("The representatives and substitutes appointed by the national parliaments of each member State shall form national delegations …"); Article 25.*c* of the Statute of the Council of Europe ("Each representative may have a substitute who may, in the absence of the representative, sit, speak and vote in his place"); Article 38 of the Statute of the Council of Europe ("Each member shall bear the expenses of its own representation in the … [Parliamentary] Assembly").

11. See the introductory memorandum prepared by the rapporteur (Mr Jordi Xuclà, Spain, ALDE), document AS/Pro (2016) 14.

18. In the framework of this report in preparation, a questionnaire was sent out to national delegations, in July 2015, on the existing rules and practices followed in national parliaments concerning the formation and functioning of delegations. The replies sent by 25 national delegations to the Assembly help gain a more detailed insight into the existence of rules and practices which may lead to abuses.

19. Effective participation in the Parliamentary Assembly's activities is governed more by practice than by rules of procedure in parliaments (except in Belgium, Denmark and Latvia).

20. The decision may be taken on a collegial basis by the delegation: this applies in San Marino, Malta (but subject to the agreement of the Speaker of Parliament) and Lithuania (the delegation draws up an annual travel programme, but the agreement of the delegation chairperson is decisive). Participation of members may depend on the decision of a parliamentary body (Steering Committee in the Czech Republic, Presidium in Latvia on the proposal of the delegation chairperson, the Board of the Seimas in Lithuania, the Speaker of the Assembly in "the former Yugoslav Republic of Macedonia", the Collegium of the President in Montenegro); in Liechtenstein, the delegation decides for part-sessions, while the Bureau decides for committees; in Poland, the chairperson of the delegation decides on the participation of delegation members in the activities of the Assembly and its committees.

21. In several parliaments, the decision lies with the speaker: in Austria (in line with the Rules of Procedure and practice); in Germany (under the guidelines for travel, and subject to approval of the member's parliamentary group; in the case of meetings held when the Bundestag is in session, members' participation is conditional upon their agreement to return to Berlin for important votes); in Greece and Ukraine (under the Rules of Procedure). In some cases, the delegation chairperson decides (Serbia). Lastly, in some other parliaments, members are free to decide their own activities (Belgium, France (without prior authorisation), Italy, Netherlands, Slovenia and Switzerland).

22. In practice, in Denmark, France and the Netherlands, all delegation members, whether representatives or substitutes, are allowed to take part in the part-sessions and the meetings of the committees of which they are members. Participation in part-sessions is possible only for representatives and the substitutes replacing them (Italy and Serbia). Participation in committees is possible for full members and alternates in the absence of the full members (Austria) or only when the committees meet in Strasbourg (Finland), unless the members are committee chairs or rapporteurs (Serbia).

23. The Committee on Rules of Procedure is aware of the budgetary problems with which several parliaments continue to contend and which directly affect the travel arrangements of members of their delegations. Several delegations acknowledge that for some years they have restricted the number of their representatives during part-sessions to the number of seats held,[12] and some have reported that they no longer send substitutes to sit in the Assembly or its committees.

2.4. Membership of political groups

24. As has been mentioned, representatives and substitutes in the Assembly "may form political groups". The rules of procedure and statutes of the political groups determine the conditions of membership of groups and, in some cases, suspension and exclusion from them:

– For instance, the Socialist Group in the Assembly "consists of members [who belong to a party having official status with the Socialist International] and associate members [who belong to another party or to no party]". Any member of the group may be temporarily suspended if his/her conduct "repeatedly violates the standards decided by the … Group", and he/she may be excluded if he/she "continues to behave in a manner contrary to the standards of conduct decided by the Group" (Article II of the Statutes).

– Members of the European People's Party Group (EPP/CD) must be members of a member, associated member or observer party of the EPP or undertake to fulfil their mandate in accordance with the aims and values promoted by the Group (Article 4).

12. The case of Mr Grigore Petrenco (Republic of Moldova, UEL) has been repeatedly mentioned in the last few years in this context. The Moldovan Parliament delegates to part-sessions up to five representatives and leaves it to each political party concerned to appoint as appropriate a substitute rather than the titular representative. Mr Petrenco, belonging to the opposition, was a substitute in the Moldovan delegation between June 2010 and January 2015 and so could only participate in the Assembly's proceedings to the extent that he replaced the titular representative in respect of his party.

– The Alliance of Liberals and Democrats for Europe (ALDE) is open to members of the Parliamentary Assembly "who are members of a political party affiliated to the European Liberal Democrat and Reform Party (ELDR) or the Liberal International (LI). Other representatives and substitutes, whose political action subscribes to the same values, may be admitted to the Group …".

– The rules of procedure of the European Conservatives Group (EC) are currently being revised. According to the previous rules, any member of the Parliamentary Assembly who wished to join this Group was required to accept its aims, objectives, constitution and rules.

– The Statute of the Unified European Left Group (UEL) states that Assembly members wishing to join the group must agree to respect the Statute (Article 6); they may be suspended or dismissed (Article 10) if they do not act in accordance with the fundamental objectives, values and principles of the Group as stipulated in Article 2 (to promote and protect human rights, the rule of law and democracy) or do not fulfil the obligations incumbent on members.

3. The national mandate of Parliamentary Assembly members

3.1. General points

25. The question of the nature of parliamentary mandates is discussed in a major global comparative study on the subject published by the Inter-Parliamentary Union in 2000.[13] Its author, Marc Van der Hulst, asserts that the imperative mandate – which is regarded by its advocates as the more progressive and democratic form because it stems directly from the theory of popular sovereignty – has now become the exception, whereas the free representational mandate – in which elected representatives are entirely independent and exercise their mandates freely – has become the rule. The European Commission for Democracy through Law (Venice Commission) notes, in a report on the imperative mandate and similar practices,[14] that liberal democratic thinking established the principle of representative democracy and its concomitant antagonism with imperative mandate, which is seen as being incompatible with democracy.

26. However, in its report on Democracy, Limitation of Mandates and Incompatibility of Political Functions,[15]the Venice Commission points out that democracy, which is based on the political principle of representation, links the representatives and the represented in such a way that the people's interests are secured and the people's views are articulated. "In a democracy, politicians are accountable first and foremost to the citizens who elect them, though often the links are tenuous. … politicians elected under systems where citizens vote for party lists rather than individual representatives tend to be accountable first to their party leadership, and only secondarily to citizens, and, third, officials appointed to leadership positions by the government in power may feel they owe their allegiance to political decision-makers, with only a distant or diffuse sense of accountability to citizens." The Venice Commission notes that "in a number of democratic countries, in spite of a really pluralistic environment, the influence of party machinery and control by the party elite is increasing" and points out that questions remain such as "what do elected people represent and when can we really say that those who were elected truly represent those who elected them?"

27. In 2014, in connection with a report on "Post-electoral shifting in members' political affiliation and its repercussions on the composition of national delegations", the Committee on Rules of Procedure looked at the nature of the relationship between parliamentarians and political parties, through the phenomenon of switches in political affiliation and their consequences in national parliaments,[16] with respect, in particular, to the requirements of transparency, integrity, accountability and trust on which the contract between elected members and voters is based. The replies received from national parliaments to a questionnaire sent out in preparation for the report through the European Centre for Parliamentary Research and Documentation (ECPRD) provide useful information on current provisions regarding the nature of elected representatives' mandate in national parliaments.[17]

13. www.ipu.org/PDF/publications/mandate_e.pdf. This study outlines the political theories and ideologies that have shaped the nature of the parliamentary mandate and their development.
14. Study No. 488/2008, document CDL-AD(2009)027 of 16 June 2009.
15. Study No. 646/2011, document CDL-AD(2012)027rev of 31 January 2013.
16. See committee report (rapporteur: Mr Jordi Xuclà, Spain, ALDE), Doc. 13666, and Resolution 2037 (2015).
17. Request No. 2417 of 8 November 2013.

28. Forty replies to the request were received from 36 national parliaments,[18] providing information on constitutional and legislative provisions, regulations (such as the rules of procedure of political parties) and political or parliamentary practices or traditions relating to the nature of the mandate of elected representatives (representative or imperative mandate) and who they represent in parliament (the people, the nation, their political party, their constituency).

3.2. General features of parliamentary mandates

29. In Europe, national parliamentarians have a representative mandate which has the distinction of being general, free and irrevocable, and implies freedom of action, opinion and expression and an individual right to vote. They are not bound by any orders or instructions received from voters or any undertakings given during the election campaign, and are under no obligation to follow instructions issued by their party. They are not accountable to those who appointed them. As Mark Van der Hulst points out in his aforementioned study, however, "the free representational mandate is not, per se, a sufficient guarantee of the democratic functioning of a parliamentary system". For while, in theory, the legal rules that govern the functioning of institutions demand that parliamentarians discharge their mandate in an independent and unhindered fashion, in practice, the discharge of the mandate is strictly supervised by the political parties and conditioned by parliamentary mechanisms and procedures. Electoral procedures, whatever their form, ensure that only candidates who run under a party banner and have the logistical and financial backing of a party have a chance of being elected. As a result, parliamentarians find themselves bound to toe the party line, even if it sometimes conflicts with their personal beliefs, and are bound to submit to the parliamentary discipline imposed by their party.[19]

3.2.1. Representative mandate: general, free and irrevocable

30. The constitutional or legislative provisions governing the functioning of the parliamentary system in member or observer States of the Council of Europe highlight, firstly, the non-binding or conditional nature of the mandate.[20] Mandates are representational, in other words, from a legal viewpoint, elected representatives enjoy absolute independence vis-à-vis their electorate. Parliamentarians are considered to be able to exercise their mandate freely and not be bound by any undertakings given before their election or instructions received from voters during their mandate. They may not defend special interests.

31. In virtually all member and observer States of the Council of Europe, imperative mandates are expressly prohibited, usually by the constitution (Andorra, Armenia, Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovak Republic, Slovenia, Spain, Switzerland). The Portuguese Constitution merely states that "deputies shall exercise their mandates freely", while under the German Basic Law, members of the Bundestag may not be bound by any orders or instructions and must act according to their conscience.[21] A similar form of words can be found in the Constitutions of the Slovak Republic, the Czech Republic, Denmark, Greece, Lithuania and "the former Yugoslav Republic of Macedonia". The Armenian Constitution, for example, states that "deputies shall be guided by their conscience and convictions", while the Finnish Constitution further stipulates that "in performing his/her duties a representative shall be bound to serve the interests of justice and truth".

32. In Canada (federal level), Cyprus, Israel, Montenegro, Norway, Sweden and Ukraine, no constitutional or legislative provisions deal specifically with the nature of the mandate of elected representatives.

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18. Andorra, Austria, Belgium (Chamber of Representatives and Senate), Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, the Czech Republic (Chamber of Deputies), Denmark, Estonia, Finland, France (National Assembly), Georgia, Germany (Bundestag and Bundesrat), Greece, Hungary, Ireland, Israel, Italy (Senate), Lithuania, Luxembourg, Montenegro, Netherlands (Tweede Kamer), Norway, Poland (Sejm and Senate), Portugal, Romania (Chamber of Deputies), Serbia, Slovak Republic, Slovenia (National Assembly), Spain (Congress of Deputies), Sweden, Switzerland, Ukraine and United Kingdom (House of Commons and House of Lords).

19. See the study on the impact of political party control over the exercise of the parliamentary mandate, by Zdzisław Kędzia and Agata Hause, published by the Inter-Parliamentary Union in 2011, www.ipu.org/conf-e/129/control-study.pdf

20. Imperative mandates were the norm in central and eastern European countries prior to 1990 under the Communist regime. Belarus has retained the imperative mandate (the people are the repository of sovereignty and exercise their power through representative bodies; deputies may be recalled by the people).

21. The mandate of members of the Bundesrat, however, is more akin to an imperative mandate: firstly, members of the Bundesrat are not elected but rather appointed by the governments of the *Länder*, which have the power to recall them, and secondly, the decision on how to vote in the Bundesrat lies not with individual members but rather with the government of each *Land*, with votes being cast *en bloc*.

33. Parliamentary mandates are general in nature, meaning that their holders, even though they were elected in a particular constituency, represent, in principle, the community as a whole. Many constitutions explicitly state that parliamentarians do not represent their electorate, their constituency or the *département* for which they are the elected representative but rather represent the nation or the nation as a whole (Belgium, France, Greece, Italy, Lithuania, Poland, Turkey), the people or the people as a whole (Finland, Germany, Netherlands, Spain) or the country (Luxembourg) or the country as a whole (Georgia, Portugal). In Romania, deputies are required "to serve the people". In a few rare countries, however, the constitution states that MPs represent their constituencies (Ireland); in the United Kingdom, members of the House of Commons are elected to represent their constituencies, while remaining free to vote as they wish. The Bulgarian Constitution states that MPs represent not only their constituencies but also the nation as a whole. Bosnia and Herzegovina is unusual in that, in the absence of any constitutional provision, the electoral law provides that "a mandate belongs to the elected office holder and not to the political party, coalition or list of independent candidates". Given the actual manner in which they are elected, however, members of the House of Representatives do in fact represent their political party and citizens, while persons elected to the House of Peoples represent their entity as well as the constituent ethnic groups.

34. Lastly, the parliamentary mandate is irrevocable and ends on its statutory expiry date. A specific provision to this effect may be included in the constitution (Article 52 of the Georgian Constitution, Article 81 of the Ukrainian Constitution, for example). Elected representatives are accountable for the manner in which they discharged their mandate and risk losing the support of their voters when they come up for re-election.

35. It follows from the principle that imperative mandates are prohibited that parliamentarians are free to exercise their mandates as they see fit and that these mandates may not be revoked. In many States, the constitution expressly provides that the parliamentary mandate is irrevocable. Parliamentarians may not be divested of their mandate by parliament, their political party or citizens. The Republic of Serbia is an exception, since under the terms of the Statute of Deputies, a deputy is free to irrevocably place his/her term of office at the disposal of the political party upon whose proposal he/she was elected as a deputy.

36. In a number of member States, the constitutional courts have ruled on the nature of the parliamentary mandate, pointing out that elected representatives do not have a binding mandate and cannot be recalled,[22] in particular by the electorate[23] or by their party.[24]

37. Parliamentary mandates come with a number of rights, but also obligations. Parliamentarians enjoy special protective status, to ensure that they have the independence and freedom of expression they need to exercise their mandate. This special protection is embodied in the principle of parliamentary immunities. The issue of developments in the protection of the parliamentary mandate in member States' national parliaments, and possible challenges to the system of immunities in some countries, is discussed in a separate Rules Committee report, which provides further analysis essential for an understanding of the nature of the parliamentary mandate.[25]

3.2.2. The limits of parliamentary independence: allegiance to the political party or group

38. While, in theory, parliamentarians are free to make their own decisions, as expressed through the votes that they cast, and are not obliged to support their political party's or group's position in parliament, the fact remains that voting instructions are an inescapable feature of how parliamentary institutions operate today. Nothing in countries' constitutions, legislation or regulations requires parliamentarians to support their parties and to honour their pledges to them, or to vote as their parliamentary group directs. The importance of the party system in parliamentary practice rests firstly, at the pre-election stage, on the process of nominating

22. Decision of the Constitutional Court of the Republic of Croatia of 10 May 2010. Elected representatives are the sole holders of their mandate which they are free to exercise as they see fit, including if they change party affiliation.
23. However, in the United Kingdom, the Recall of MPs Act 2015 introduced a recall process. If a recall petition process is triggered, signed by at least 10% of eligible electors, the Member's seat becomes vacant. The recall election process is triggered in three circumstances: if a Member is sentenced to a prison sentence of 12 months or less (MPs have to vacate their seats if they are sentenced to more than a year in prison); if a Member is suspended from the House of Commons (following a report from the Committee on Standards) for at least 10 sitting days or 14 days; or if a Member is convicted of an offence under section 10 of the Parliamentary Standards Act 2009 (offence of providing false or misleading information for allowance claims).
24. Decision of the Constitutional Court of Lithuania of 1 July 2004, case 04/04, which deals at length with the status of members of the Seimas and the concept of a free mandate.
25. See the report on "Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly", Doc. 14076 (rapporteur: Ms Liliana Palihovici, Republic of Moldova, EPP/CD).

candidates and secondly, after the election, on the freedom of parties and groups to expel members whose conduct is disloyal or damaging to the party or group concerned. The principle of free mandate has effectively shifted, therefore, towards the idea that mandates are limited by the parties.[26]

39. Political parties may, however, include provisions in their rules of procedure in order to institute a tie of allegiance or party discipline and to punish breaches thereof by expelling the members concerned (Andorra, Cyprus, Denmark, Estonia, Georgia).

40. In the majority of member States, the constitution – or other legislation – provides that parliamentarians' right to vote is to be exercised in person (for example Article 27 of the French Constitution) and cannot be delegated (for example Article 79 of the Spanish Constitution). In current parliamentary practice, however, the principle that mandates are independent and irrevocable is clearly waning in the face of party discipline and compliance with voting instructions. No matter what the constitutional provisions protecting the status of parliamentarians, those who fail to abide by the decisions and principles of the parliamentary group, and who refuse to comply with voting instructions, are liable to be sanctioned. A parliamentarian's conduct may result in his/her expulsion from a political party or parliamentary group but under no circumstances should it lead to the loss of his/her mandate. There is, then, a kind of "imperative mandate" operating in parliamentary institutions, through the threat of suspension or expulsion from one's political party or group, with the pressure placed on parliamentarians leading them to resign or switch political allegiance.[27]

41. It will be observed here that while mandates cannot be revoked in the national parliaments of member States – parliamentarians who change political allegiance or become non-registered or independent while in office remain in office until the end of their term –, the same does not apply at regional or local level (for example in certain Swiss cantons or Spanish regions). This issue could usefully be explored by the Congress of Local and Regional Authorities of the Council of Europe.

42. In order to grasp the reality of party discipline in how national parliaments operate, we must ask ourselves whether and to what extent parliamentarians today are still truly and effectively able to make decisions freely and "in all conscience". Another questionnaire sent out via the ECPRD on free parliamentary votes and party discipline provides some additional insight into the nature of the mandate of elected representatives in national parliaments and their relationship with the political parties.[28] It appears from this survey that, notwithstanding the constitutional safeguards that allow parliamentarians to make decisions freely and shield them from pressure, in practice, free votes are seldom authorised by the political parties and whenever they are, it is on a purely exceptional basis, in matters of a controversial or ethical nature. The regulations or statutes of political parties rarely recognise the principle of free suffrage. As a general rule, each political party or group agrees on a collective position, to which the members are then bound to adhere. This clearly raises the question of the sanctions that are liable to be imposed on parliamentarians who, through their vote, choose to take a different view.[29]

3.3. Political sanctions against parliamentarians

43. A new debate has recently emerged in connection with legislative attempts to introduce mechanisms for imposing disguised sanctions on national parliamentarians. One example which may be mentioned is the law passed on 16 February 2016 by the Verkhovna Rada amending the law on the election of members of the Parliament of Ukraine (Law 3700), which allows political parties to change the order of candidates on their electoral list in multi-member constituencies after the announcement of the election results, and hence to exclude a candidate from the list. The Assembly's Monitoring Committee has decided to seek the opinion of the Venice Commission on this law.

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26. The IPU Committee on the Human Rights of Parliamentarians stated that "While party loyalty and discipline are necessary for the proper functioning of a democracy, they must never impair the full and effective exercise of freedom of expression and association by any member of that party since these are overriding fundamental human rights".

27. See the aforementioned report by the Rules Committee on "Post-electoral shifting in members' political affiliation and its repercussions on the composition of national delegations".

28. Request No. 2323 of 4 June 2013. Replies were received from 35 national parliaments. "Free votes" or "conscience votes" relate to the absence of voting instructions issued by the parties, in particular when it comes to voting on draft legislation concerning ethical issues, for example banning smoking in public places, bull fighting (Spain), abortion (Belgium, Norway, Spain), gay marriage (Denmark, Finland, France, Norway, Spain), freedom of religion (Finland, Spain), euthanasia (Germany, Luxembourg), nuclear power stations (Finland), revision of the constitution (Greece).

29. A recent example is the case of Ms Hanna Hopko, the Chairperson of the Foreign Affairs Committee of the Ukrainian Verkhovna Rada, who, along with other key members of the Samopomich party, was forced to leave the party after she voted in support of the constitutional amendments on decentralisation.

44. During its meeting in Rome on 17 May 2016, the committee held a seminar on parliamentary accountability, whose discussions and conclusions call for more detailed reflection on the nature of the parliamentary mandate, in particular the notion of sanctions. This issue could lead to a subsequent report by the committee.

4. Conclusions

45. The purpose of this report is not to assess the state of representative democracy in Europe but, more simply, to consider the reality of the parliamentary function, through the conditions of office for elected representatives, both on a general level – the functioning of national parliaments – and on a more specific level – the functioning of our Parliamentary Assembly.

46. In particular, the rapporteur feels there is a need, in the light of national parliaments' rules of procedure (or the absence of such rules) regarding the appointment of national delegations, the composition of committees and the participation of their members in Assembly sessions and committee meetings, to apply a number of principles in order to promote good practice based on a proper balance between freedom of opinion and parliamentary votes and respect for the political obligations that flow from membership of a political party or group.

47. Lastly, it would be most interesting to examine the situation as regards parliamentary mandates not only at national level but also at local and regional level. The Congress of Local and Regional Authorities of the Council of Europe could be called upon to assist here.