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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPORT

ON THE IMPERATIVE MANDATE AND SIMILAR PRACTICES

Adopted by the Council for Democratic Elections at its 28th meeting (Venice, 14 March 2009)

and by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009

on the basis of comments by

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Introduction

1. In its 23rd meeting, held in Venice on 13 December 2007, the Council for Democratic Elections, following the Parliamentary Assembly Recommendation 1791(2007) and Resolution 1547(2007) on the state of human rights and democracy in Europe and the conclusions of the general rapporteurs at the Forum for the future of democracy, examined the document entitled "State of human rights and democracy in Europe – subjects for future activities" (CDL(2007)123).

2. After considering this matter the Council decided to recommend as possible area of study in 2008, among other issues, the imperative mandate. Mr Closa Montero, Member, Spain, was appointed rapporteur and, at the 26th meeting (18 October 2008), a preliminary overview was presented. Rather than taking a formally conceptual approach to the concept of imperative mandate, this study will also deal with connected elements which emerge in referring the concept to specific states. The interest of the Council of Europe Parliamentary Assembly, the Council for Democratic Elections and the Venice Commission on a notion which is widely unaccepted in democracies (imperative mandate) is not alien to the fact that certain countries have used the institution to try to deal with a specific problem (crossing the floor, party defection, party switching).

3. The present report was adopted by the Council for Democratic Elections at its 28th meeting (Venice, 14 March 2009). It will be adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009).

1. Historical and theoretical background

4. The origins of imperative mandate are to be found in Roman law. In Medieval Spain and particularly in the Kingdom of Leon and Castilla, representation of cities and towns in the Cortes (i.e. the Parliament) was based on imperative mandate.[1] Deputies from these towns were equipped with clear and detailed instructions according to the motives of the session. They were not free for departing from these. As a rule, towns required their deputies to take oaths neither to vary from their instructions, nor to overstep their mandates and this act was officially sanctioned by a public notary. Since the XVth century, Spanish kings began to indicate in their convocations the extent of the desired mandate and even though this clashed with the wishes of towns since it meant that they could not control their representatives, the Spanish monarchy successfully trumped imperative mandate and, in this form, made representatives more malleable to its own designs.

5. Liberal democratic theory provided the foundations for representative mandate in connection with a new source of legitimacy and sovereignty: the nation. The basics of the theory of representative mandate are easy and intuitive: even if elected in local constituencies, representatives do not exclusively represent their local electors but an abstract body, the nation, whose will is superior of and different from local constituencies.

6. Edmund Burke conclusively established the principle of representative democracy and its concomitant antagonism with imperative mandate in its *Speech to the electors of Bristol* (Nov. 1774).

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[1] For an excellent overview, see Holden, Alice M. (1930) The imperative mandate in the Spanish Cortes of the Middle Ages *American Political Science Review* vol. 24 no. 4, pp. 886-912.

To deliver an opinion, is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But authoritative instructions; mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience,- these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

*Parliament is not a **congress** of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a **deliberative** assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of **parliament**.*

7. Thus, liberal democratic thinking established that imperative mandate was incompatible with democracy and representative mandate, in turn, characterised this. Regardless of this trend, some constitutions in the XVIIIth century still retained imperative mandate; thus, the Constitution of Massachusetts, 1780.

[*The delegates of this commonwealth to the congress of the United States, shall, some time in the month of June annually, be elected by the joint ballot of the senate and House of Representatives, assembled together in one room; to serve in congress for one year, to commence on the first Monday in November then next ensuing. They shall have commissions under the hand of the governor, and the great seal of the commonwealth; but may be recalled at any time within the year, and others chosen and commissioned, in the same manner, in their stead*.] [Annulled by the adoption of the Constitution of the United States, July 26, 1788].

2. Imperative mandate in communist totalitarian regimes and its evolution

8. The experiment closest in time with imperative mandate happened during the Commune of Paris (1871). Delegates to the council governing Paris had to report to their electors and they could be recalled by them if they did not stand by their original mandates. Marx appreciated imperative mandate in the Commune as an element characteristic of the predominance of workers and his celebration put imperative mandate at the centre of institutional construction in communist thinking and, later, practice.

9. The experience of the Commune of Paris in 1871 provided a model for communist thinkers and for institutional development in communist countries. On 19 November 1917, Lenin issued a draft decree on the right of recall. This provided the basis for its later adoption in other communist countries although this possibility has never been exercised in Soviet systems, with the only exception of Hungary in 1989.[2]

10. The ideological basis derives from the theory of popular sovereignty which meant that powers derived from the workers (the proletariat). Soviet style regimes accommodated the notion of representation to the requirement of control of ideological orientation by means of imperative mandate (for instance, Article 67 of the Constitution of Bulgaria of 1971). The actor who administered the mandate was not the electors, but the party. Nowadays, certain communist regimes retain the imperative mandate; this is the case of North Korea,[3] Vietnam,[4]

[2] Several initiatives were launched shortly before the fall of the communist regime, none of these was finally successful but nevertheless, 18 deputies resigned on the ground of being challenged.

[3] Article 7 Const. The electors may recall the deputies they have elected if the latter are not to be trusted.

China[5] and Cuba.[6] Among these, the Cuban regulations are the most exhaustive ones linking the possibility of recall and revocation of mandate to socialist democracy. In all cases, references seem to suggest that the electors, the people, are the final arbiters in a recall process. Nevertheless, the possibility of party or other state organs intervening is an open option at least in China and Cuba. The question, though, is that recall has not been exercised in these countries.

3. Current regulation of imperative mandate and related modalities in comparative law: European experience and beyond

11. Imperative mandate is generally awkward to Western democracies. Plainly, the constitutions of a number of countries explicitly prohibit imperative mandate (Andorra, Article 53; Armenia, Article 66; Croatia, Article 74; France, Article 27; Germany, Article 38.1; Italy, Article 67; Lithuania, Article 59 – which refers to no restriction of representatives by other mandates; Romania, Article 69; Spain, Article 67.2). No European state (apart from Ukraine)[7] has imperative mandate and it is worth noticing that some former communist regimes have vigorously rejected attempts to re-introduce imperative mandate. Thus, in Lithuania, the Constitutional Court has ruled in a number of occasions that the mandate means that electors have no right to revoke a member of the *Seimas* and his/her freedom cannot be limited by parties or organisations that nominated them.[8]

12. The only case in which something similar to "imperative mandate" exists is the German *Bundesrat*, in which members of the Länder governments may be recalled by these same governments (Article 51.1) and additionally, the votes of each Land must be cast as a block (Article 51.2). It must be noticed that the German constitution prohibits "imperative" mandate in the *Bundestag* (Article 38.1).

13. In international practice, there are two institutions that are somehow related to the notion of imperative mandate in the way in which it has been understood contemporarily in some European countries. These institutions are the recall in USA and the termination of mandates because of change in party affiliation.

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4 Article 7 Const. Deputies to the National Assembly may be divested of their mandate by electors or by the National Assembly and deputies to the People's Councils may be divested of their mandate by electors or the People's Councils when they are no longer worthy of the people's confidence.

5 Article 77. Deputies to the National People's Congress are subject to the supervision of the units which elected them. The electoral units have the power, through procedures prescribed by law, to recall the deputies whom they elected.

6 Article 68. State agencies are set up to carry out their activity based on the principles of socialist democracy, which are manifested in the following regulations:

a) all members or representative bodies of state power are elected and subject to recall;

b) the masses control the activity of the state agencies, the deputies, delegates and officials;

c) those elected must render an account of their work and may be revoked at any time;

Article 85. The mandate of the deputies to the National Assembly of People's Power may be revoked at any time, in the ways and for the causes prescribed by law.

7 Under Serbian Constitution blanket letters of resignation signed by members of Parliament may be valid.

8 Constitutional Court rulings. 26 November 1993; 15 January 2001; 30 May 2003; 1st July 2004.

3.1 Institutions connected to the imperative mandate: recall

14. Recall is a characteristically American institution. It is a procedure that allows citizens to remove and replace a public official before the end of a term of office. Officials do not need to be specifically representative legislators but the term extends to other office bearers. A number of US states' constitutions (precisely; 18)[9] regulate the possibility of recalling elected officials. Recall differs from impeachment: whilst the second is a judicial proceeding against an elected officer because of some crime, recall is a political process. Only 7 out of these 18 States require specific grounds for recalling,[10] whilst in the other 11 is a general and not focussed process (normally, in form of another election). For this second group, the Michigan constitution provides an example of the typical wording: "*The sufficiency of any statement of reasons or grounds...shall be a political rather than a judicial question*." (Const. Article II § 8). It must be said, though, that recall has operated mainly at the local level (some estimates indicating that three-fourths of recall elections are at the city council or school board level). In Canada, British Columbia also allows the recall of representatives.

15. Elsewhere in America, certain countries introduced recall. Article 72 of the Constitution of Venezuela enables the recall of any elected representative, including the President. Once one-half of the term of office to which an official has been elected has elapsed, a number of voters representing at least 20% of the registered voters in the affected constituency may petition for the calling of a referendum to revoke that official's mandate. When a number of voters equal to or greater than the number of those who elected the official vote in favour of the recall, provided that a number of voters equal to or greater than 25% of the total number of registered voters vote in the recall referendum, the official's mandate shall be deemed revoked and immediate action shall be taken to fill the permanent vacancy as provided for by this Constitution and by law. In 2004, a referendum was held attempting the removal of President Hugo Chavez. In Belize, the government announced in March 2008 the introduction of a Bill on Recall. In August 2008, the government produced the Bill. Recall could not be exercised in the first 18 months after elections and, after this period, 30% of voters in a given constituency could sign a petition (which did not require specific justification) for recalling a representative. Then, a referendum would be held and 65% of voters participation plus 65% of positive votes would be required for effectively removing a representative. So far, the Bill has not been enacted by Parliament.

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9 Alaska; Arizona; California; Colorado, Georgia; Idaho; Kansas; Louisiana; Michigan; Minnesota; Montana; Nevada; New Jersey; North Dakota; Oregon; Rhode Island; Washington; Wisconsin.

10 *Alaska* (lack of fitness, incompetence, neglect of duties or corruption (AS § 15.45.510); *Georgia* (act of malfeasance or misconduct while in office; violation of oath of office; failure to perform duties prescribed by law; wilfully misused, converted, or misappropriated, without authority, public property or public funds entrusted to or associated with the elective office to which the official has been elected or appointed. Discretionary performance of a lawful act or a prescribed duty shall not constitute a ground for recall of an elected public official. (Ga. Code § 21-4-3(7) and 21-4-4(c)); *Kansas* (conviction for a felony, misconduct in office, incompetence, or failure to perform duties prescribed by law. No recall submitted to the voters shall be held void because of the insufficiency of the grounds, application, or petition by which the submission was procured. (KS Stat. § 25-4301); *Minnesota* (serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office or conviction during the term of office of a serious crime) (Const. Article VIII § 6); *Montana* (physical or mental lack of fitness, incompetence, violation of oath of office, official misconduct, conviction of certain felony offences (enumerated in Title 45). No person may be recalled for performing a mandatory duty of the office he holds or for not performing any act that, if performed, would subject him to prosecution for official misconduct. (Mont. Code § 2-16-603); *Rhode Island* (authorized in the case of a general officer who has been indicted or informed against for a felony, convicted of a misdemeanour, or against whom a finding of probable cause of violation of the code of ethics has been made by the ethics commission (Const. Article IV § 1); *Washington* (commission of some act or acts of malfeasance or misfeasance while in office, or violation of oath of office (Const. Article I § 33).

16. In Europe, Switzerland is considered as the country which inspired the notion of recall. This institution is unknown at federal level, but, in some cantons, a number of citizens may ask for the recall of the cantonal government[11] and/or Parliament,[12] or even of any cantonal or municipal elected authority.[13] However, in practice, this institution can be considered as obsolete even if an attempt has been announced recently.

3.2 Party associated mandates: modalities

17. One of the problems in modern democracies, from the point of view of parliamentary stability and fidelity to voters' choices is the practice of elected representatives abandoning parties in whose lists they were elected. Switching party (or "crossing the floor" in the Westminster tradition terminology) is not an uncommon practice. In Italy, estimations for 1996-2001 indicate that 10% of the Chamber of Deputies changed sides. In the Russian Duma, between 1993 and 1995, 31% of MPs switched sides and 40% of the Czech Parliament changed party in the period 1992-1996. What seems particular of the European scene is that party switching has not derived in constitutional or legal mechanisms for controlling it.[14] The only example can be found in Croatia, where the Croatian Democratic Union proposed in 2001 to introduce an amendment in the Constitution which would return seats to parties if the incumbent MP switched party. It was thought that some 20 MPs of the CDU itself were planning to abandon the party.[15] The amendment was not carried through and, additionally, the constitutional court argued that termination of mandate of representatives of minorities because of an alleged failure to comply with their mandate was unconstitutional since the Constitution (Article 74.1) prohibited imperative mandate.[16]

18. It is true that in proportional representation systems whereby a member of Parliament is bound to maintain party allegiance, even when his or her conscience and judgment as a people's representative would urge him/her to act otherwise, could be found in some electoral systems. In effect in these systems an MP is a representative of a party and not of the electors, as the electors had no choice between party candidates. In this sense, this type of electoral system, which denies choice could result in a rubber stamp Parliament, with a considerably diminished control of the executive by the MPs of the Parties in Government, as much as of those in opposition.

19. Whilst the Venice Commission does not express a preference for any particular type of electoral system, proportional representation systems with party lists, offering no possibility of choice between candidates.by the electors, should be subject to a more thorough scrutiny.

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[11] Berne: 30,000 signatures (Article 57 Constitution); Solothurn: 6,000 signatures (Article 28 Constitution); Thurgau: 20,000 signatures (§ 25 Constitution); Schaffhausen: 1,000 signatures (Article 26 Constitution); Ticino: 15,000 signatures (Article 44 Constitution).

[12] Berne: 30,000 signatures (Article 57 Constitution); Solothurn: 6,000 signatures (Article 28 Constitution); Schaffhausen: 1,000 signatures (Article 26 Constitution); Thurgau: 20,000 signatures (§ 25 Constitution).

[13] Uri: Arts. 27 and 29 Constitution.

[14] However there are some examples of constitutions addressing this problem. Point C of Article 160 of the Constitution of Portugal provides that an MP loses his/her mandate if he/she becomes a member of another political party which has not nominated him/her at the elections.

[15] Constitutional Watch East European Constitutional Review Vol. 10; no. 1 Winter 2001 http://www1.law.nyu.edu/eecr/vol10num1/constitutionwatch/croatia.html.

[16] The Constitutional Court adjudicated on the Constitutional Law on Human Rights and Freedoms and the Constitutional Law on the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia.

3.2.1 *Obligation of Members of the parliament to resign if they change their political affiliation – the case of Serbia*.

20. Article 84 of the law on elections of members of the parliament of Serbia allows a party to arbitrarily choose which candidates from its list become members of parliament, *after the elections*, instead of determining the order of candidates beforehand. This provision was strongly criticised by the Venice Commission and OSCE/ODIHR since it limits the transparency of the system and gives political parties a disproportionately strong position vis-à-vis the candidates.[17] Under proportional representation systems, the order on the list usually determines the allocation of mandates; otherwise, mandates are allocated on the basis of preferential votes for candidates. The system established by the law on elections of members of the parliament of Serbia results in voters not knowing which candidates are likely to be seated as a result of their support for a particular party.

21. In the initial version of the law Article 88 provided that a mandate of an elected member of parliament expired if she/he ceased to be a member of the political party or coalition on whose candidate list she/he had been elected. This rule raised obvious problems. Once elected, deputies should be accountable primarily to the voters who elected them, not to their political party. This flows from the fact that they hold a mandate from the people, not from their party. The fact that a deputy has resigned from or has been expelled from the party should therefore not entail their expulsion from parliament. This obvious contradiction with democratic standards led to the abrogation of these provisions by the Constitutional court of Serbia in 2003.[18]

3.2.2 *Parties self-regulation: the Spanish modality*

22. In Spain, cases of floor crossing at the local level were widespread in the first decades of democracy. To prevent the damaging effects, thirteen parties seating in the national parliament signed the so-called *Pacto antitrasfugismo* (Pact against floor crossing)[19] in 1998. The pact was renewed again in 2000 and 2006, in this later occasion sixteen parties signed it. Parties signing the pact commit themselves not to collaborate with representatives who cross the floor in the creation, maintenance or change of government majorities in any public body. Parties also committed themselves to reform all rules of procedure in local corporations for impeding that representatives who cross the floor may obtain in this way extra resources (for instance, by creating a new political grouping within local corporations and claiming the associated resources). Two bodies administer the pact and review the cases: the Follow-up Committee (made up of representatives from all parties) and the Committee of Independent Experts. According to the figures supplied,[20] between 1998 and 2008 there were 164 cases of floor crossing in local councils and 16 in 2008.

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17 See CDL-AD(2006)013, Joint Recommendations on the Laws on Parliamentary, Presidential and Local Elections, and Electoral Administration in the Republic of Serbia by the Venice Commission and OSCE/ODIHR adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006).

18 The Constitutional Court of Serbia decided, on 27 May 2003, that paragraphs 1 and 9 of Article 88 were unconstitutional. The Court's decision addresses the issue of whether a mandate belongs to the elected deputy or the political party of which the deputy is a member. According to the Constitutional Court's decision, supplemented by a subsequent decision on 25 September 2003 on the same issue regarding mandates in municipal assemblies, termination of membership in a political party cannot be ground for revoking an elected deputy's mandate.

19 The full name is *Acuerdo sobre un código de conducta política en relación con el transfugismo en las corporaciones locales*. http://www.map.es/prensa/notas_de_prensa/notas/2004/11/2004-11-25/parrafo/0/document_es/CodigoContraTransfuguismo.pdf.

20 El País, 5 January 2009.

3.3 Non European cases

23. Outside Europe though, several cases regulate a situation in which parties may retain the seats that their candidates obtained in the case those switch party. Candidates moving away from the so called nominated party may loose their seat. This practice is normally associated with “imperative mandate” but it is a totally different institution, since the purpose is to shield parliamentary parties against defection.

24. Nepal,[21] Nigeria[22] and Fiji[23] regulate this possibility in quite a direct way: if a deputy changes party, he/she may loose his/her seat. Then, the Constitutions of Bangladesh[24] and Pakistan[25] go a step further because to the abandoning of the party, the law adds the possibility of being expelled because of voting against the party. According to the constitution of India, a member of either House (Council of States or House of People) of the Union Parliament or of the Legislative Assembly of a state belonging to any political party shall be disqualified from being a member of the House (a) if he has voluntarily given up his membership of such a political party; or (b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs without obtaining the prior permission of such political party and such voting or abstention has not been condoned by such political party within fifteen days from the date of such voting or abstention. The effect of floor crossing was strengthening the governing party. In the time period from 1967 to 1973 2,700 elected members crossed the floor. The biggest number did this towards governing parties. From the 2,700 members who crossed the floor in India during this period, 212 became ministers in the party that they crossed to.

25. However, the most complete regulation of “floor crossing” is the South African one. The South African Constitution of 1996 was amended in 2003 to introduce the possibility that a member of the National Assembly looses his/her mandate if that person ceases to be a member of the party that nominated that person as a member of the Assembly. There are

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21 The 1990 constitution says that the seat of a MP becomes vacant if the party of which he was a member when elected provides notification in the manner set forth by law that he has abandoned the party.

22 Article 68.1 (g) A member of the Senate or of the House of Representatives shall vacate his seat in the House of which he is a member if - (g) being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected; Provided that his membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of two or more political parties or factions by one of which he was previously sponsored.

23 Section 71 Vacation of place of member of Parliament. (1) The place of a member of the House of Representatives becomes vacant if the member:

(g) resigns from the political party for which he or she was a candidate at the time he or she was last elected to the House of Representatives;

(h) is expelled from the political party for which he or she was a candidate at the time he or she was last elected to the House of Representatives and:

(i) the political party is a registered party;

(ii) the expulsion was in accordance with rules of the party relating to party discipline; and

(iii) the expulsion did not relate to action taken by the member in his or her capacity as a member of a parliamentary committee;

24 Article 70(1) "A person elected as a member of parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in parliament against that party”.

25 A member of a House (the National Assembly or the Senate) or of the Provincial Assembly shall lose his seat if he defects from a political party which nominated him, or votes contrary to any direction issued by the parliamentary party to which he belongs, or abstains from voting in the House against party policy in relation to a Bill. He however gets an opportunity to appeal and the party chief's decision is final.

two qualifications: a MP retains his/her seat if he/she alone or with other "swingers" represents more than 10% of the seats of the original nominating party. MPs also retain their seats in the event of mergers, divisions or subdivisions of the original party.[26] In this way, South Africa constitutionalised the practice of "floor crossing" or "party switching" which is allowed twice in an electoral period (the second and fourth year) in the so-called "window periods" of 15 days. The reform was challenged in front of the South African Constitutional Court, which in a judgement in 2002 held that the Constitution does not demand anti defection clauses and that prohibiting floor crossing was not essential to multi-party democracy or proportional representation.[27] Earlier, the Constitutional Court had argued that:

> *"An anti-defection clause enables a political party to prevent the defection of its elected members, thus ensuring the party under whose aegis they were elected."*
> *"It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate."*[28]

26. The dominant ANC has consistently supported "floor crossing" provisions since it has been the biggest beneficiary of party switching and, in parallel, its size protects it from swingers (given than its current size is near to 300, it would require 30 defections for making it effective). In 2008, though, the National Conference of the ANC approved to stop "crossing the floor" practices. Accordingly, three bills were introduced in parliament aiming at amending the constitution for impeding the practice.

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[26] Article 47.3 (c); [Sub-s. (3) substituted by s. 2. of Act No. 2 of 2003.]. MPs loose their seat unless that member has become a member of another party in accordance with Schedule 6A.

Retention of membership of legislature in event of change of party membership.

2. (1) Subject to item 4, a member of a legislature who becomes a member of a party (the new party) other than the party which nominated that person as a member (the nominating party), whether the new party participated in an election or not, remains a member of that legislature if that member, whether by himself or herself or together with one or more other members who, during a period referred to in item 4(l)(a) or (b), ceased to be members of the nominating party, represents not less than 10 per cent of the total number of seats held by the nominating party in that legislature.

(2) The seat held by a member referred to in sub-item (1) is regarded as having been allocated to the new party which the member represents.

Retention of membership of legislature in event of mergers, subdivision and merger of parties.

3. (1) Subject to item 4, any party (the original party) which is represented in a legislature may-

(a) merge with another party, whether that party participated in an election or not; or

(b) subdivide into more than one party or subdivide and any subdivision may merge with another party, whether that party participated in an election or not, if the members of a subdivision leaving the original party represent not less than 10 per cent of the total number of seats held by the original party in that legislature.

(2) If a party merges with another party or subdivides into more than one party or subdivides and any subdivision merges with another party in terms of sub-item (I), the members concerned remain members of that legislature and the seats held by them are regarded as having been allocated to the Party which they represent pursuant to any merger, subdivision or subdivision and merger contemplated in sub-item (1).

[27] *African National Congress v United Democratic Movement and Others* (Krog and Others Intervening) CCT43/02.

[28] South African Constitutional Court, in the case of Ex-parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 (ii) SA 744 (cc).

27. A similar case can be found in Malawi, where Section 65(1) of the Constitution establishes that *the Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly*." This section was amended in 2001,[29] adding to the former text an additional circumstance: *or has joined any other political party, or association or organisation whose objectives or activities are political in nature*."

28. These provisions became relevant in 2005 when all Cabinet Ministers except two who had been elected Members of Parliament (MPs) under the ticket of the United Democratic Front (UDF) became Independent MPs and joined the newly formed political party, the Democratic Progressive Party (DPP). Soon thereafter, several Independent MPs who had stood as independents during the elections also joined the DPP. The leader of the opposition presented to Parliament a Private Member's Bill that sought to give power to the Speaker to declare vacant the seat of any MP who, after being elected under a particular political status, chose to alter his/her status during the life of the National Assembly to which he/she was elected. The Bill failed to obtain the required number of votes for it to pass. The matter did not, however, end there. The UDF then wrote to the Speaker on 2nd October, 2005 requesting him to declare certain MPs' seats vacant, following those MPs' change of their political status. The request was based on section 65(1) of the Constitution. The Speaker announced that he would make his ruling on the said request on 31st October, 2005. The ruling was, however, not made because the Attorney General, in the interim, applied for and obtained an order from the High Court restraining the Speaker from making the ruling, until further order. Following these developments, the President of the Republic (hereinafter referred to as "the Referral Authority") issued a Fiat requesting the High Court to review the said section 65(1).

29. The ruling of the High Court established that Section 65.1 was fully constitutional and the arguments were confirmed by the Malawi Supreme Court of Appeal on the following grounds:[30] the limitation placed upon a member of the National Assembly who voluntarily ceases to be a member of the political party that sponsored him or her to the National Assembly and joins another political party is a limitation that is prescribed by law, namely section 65(1) itself. That limitation or restriction is reasonable. The limitation here in section 65(1), is recognised by international human rights standards and that it is necessary in an open and democratic society. (Whilst) anti-defection provisions do not appear in the Constitutions of older democracies like the United States of America and Australia, (…) as a matter of fact defections are allowed. It is however noted that several countries in Africa, including a large majority of countries in our Region; countries with similar historical backgrounds and legal systems to Malawi, have anti-defection clauses in their Constitutions (Similar provisions may be found in the constitutions of Tanzania, Ghana, Uganda and Zambia).

30. In other countries, practices of "floor crossing" or "party switching" has been curtailed by specific mechanisms that avoid depriving representatives from their mandates. In the Canada province of Manitoba, public concern on high-profile defections of three federal MPs prompted a reactive legislation which amended the provincial *Legislative Assembly Act*. It mandated that Members of the Legislature who quit their political party must serve out the remainder of their term as independents.

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29 Act No. 8 of 2001.

30 In the Matter of the Question of the Crossing the Floor by Members of the National Assembly (Presidential Reference Appeal No. 44 of 2006) [2007] MWSC 1 (15 June 2007).

31. In Nicaragua some major party switches occurred between 2002 and 2006 when the two major political parties, the Constitutional Liberal Party and the Sandinista National Liberation Front, formed a pact and members of both parties left to form new parties or make alliances with smaller ones.

4. The Ukrainian case. The wrongly called "imperative mandate": a case of a practice against floor crossing

32. The Constitution of Ukraine promulgated in 1996, did not initially contain provisions against the so-called "floor crossing" practices. Article 81 regulated situations for termination of mandate which can be considered standard within European practice.[31] However, parliamentary life witnessed a growing practice of switching parties. According to some sources, between the 3rd and 4th legislatures (1998-2002 and 2002-2006), about 60% of Ukrainian parliamentarians switched their party affiliation at least once. In some extreme cases, MPs changed their parliamentary group as much as 10 times. This prompted the reaction of Ukrainian legislators in several moments. In 2001, a proposal of amending the Constitution flirted for the first time with the possibility of terminating deputies' mandate because of their lack of links with the nominating party. The Venice Commission argued that:

> "[…] *the proposal to insert in Article 81 a new par. 2, as proposed would put the parliamentary bloc or group in some ways above the electorate which, in return, is unable to revoke individually a parliamentary mandate conferred through election for four years*.
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> *In particular, the establishment of a constraining link between an elected national deputy (who belongs to the electoral list of a party or bloc of parties) and his or her parliamentary group or bloc has the effect that a breach of this link (withdrawal or exclusion of a deputy belonging to a particular parliamentary group or bloc from his or her parliamentary group of bloc) would also ipso facto put an end to the parliamentary mandate of the deputy concerned. This would be contrary to the principle of a free and independent mandate. Even if the question of belonging to a parliamentary group or bloc is distinct from the question of submission to the group or bloc's discipline in concrete situations, freedom of mandate implies the Deputy's right to follow his or her convictions. The deputy can be expelled from the parliamentary group or bloc, or can leave it, but the expulsion or withdrawal from the group or bloc should not involve the loss of the Deputy's mandate. Without underestimating the importance of parliamentary groups for a stable and fruitful work, membership of a parliamentary group or bloc does not have the same status as that of deputy elected by the people. This distinction is decisive for a parliament representing the people where deputies comply with their convictions and oath. The distinction between membership of a parliamentary group or bloc and a parliamentary mandate as such is also decisive for internal democracy within the parliamentary groups or blocs, as they protect, as a last resort, the freedom of the deputy's mandate and minority*

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[31] The authority of a National Deputy of Ukraine terminates prior to the expiration of the term in the event of:

1. his or her resignation through a personal statement;
2. a guilty verdict against him or her entering into legal force;
3. a court declaring him or her incompetent or missing;
4. termination of his or her citizenship or his or her departure from Ukraine for permanent residence abroad;
5. his or her death.

groups against excessive pressure from the majority group or bloc and thus lessen the problems of possible breaches of a deputy with his group. […]"[32]

33. Despite the Venice Commission opinion, the Ukrainian Rada approved three laws reforming the Constitution in 2004. Among the changes proposed, Article 81 of the Constitution included now the termination of the mandate of a deputy in circumstances related to his/her relation with the nominating party:

> Article 81 § 2 item 6) reads as follows: "*Powers of a National Deputy of Ukraine shall terminate prior to the expiration of his or her term in office in the event of: (…) (6) his or her failure, as having been elected from a political party (an electoral bloc of political parties), to join the parliamentary faction representing the same political party (the same electoral bloc of political parties) or his or her withdrawal from such a faction*".
>
> Article 81 § 6: "*Where a National Deputy of Ukraine, as having been elected from a political party (an electoral bloc of political parties), fails to join the parliamentary faction representing the same political party (the same electoral bloc of political parties) or withdraws from such a faction, the highest steering body of the respective political party (electoral bloc of political parties) shall decide to terminate early his or her powers on the basis of a law, with the termination taking effect on the date of such a decision."*

34. The Venice Commission criticised these reforms, arguing that whilst the idea for having this provision in the Draft Law is presumably to promote stability and the effectiveness of the governing party or bloc in circumstances where fragmentation of parliamentary blocs is a problem, it would also have the effect of weakening the *Verkhovna Rada* itself by interfering with the free and independent mandate of the deputies, who would no longer necessarily be in a position to follow their convictions and at the same time remain a member of the Parliament.[33] Moreover, the Venice Commission insisted that the proposed procedure would also give the parties the power to annul electoral results. Similar concerns were voiced again in its Opinion on the Amendments to the Constitution.[34]

35. In a further extension of the application of this party related mandate, the Ukrainian *Rada* enlarged its reach to Crimea autonomous parliament and local councils. This legislation contained a variance on the former *acquis*: next to the traditional termination because of loosing party links, the deputy could be also removed by means of recall of electors. Since there are precedents in democratic countries, it would be difficult to articulate a direct criticism of this principle. Nevertheless, the Venice Commission rightly argued that the grounds for recall implied legal appreciations. The Law identified the following three situations: 1) Violation by the deputy of the Constitution and Laws of Ukraine, other legislative acts of Ukraine, the Constitution and legal normative acts of the Autonomous Republic of Crimea; 2) Improper performance of deputy's duties, defined by this law and other laws of Ukraine; 3) Use of the deputy's mandate in personal and selfish ends, systematic infringement of ethical and moral norms. These situations should be better dealt with by neutral and independent legal bodies.[35] Although this argument is coherent with

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[32] Consolidated Opinion on the Ukraine Constitutional Reform Project CDL-INF(2001)011.

[33] Opinion on three Draft Laws proposing amendments to the Constitution of Ukraine CDL-AD(2003)019. The Opinion refers to the 2nd Draft Law on amendments to the Constitution of Ukraine no. 4105 (CDL(2003)080).

[34] Opinion on the Amendments to the Constitution of Ukraine CDL-AD(2005)015; adopted by the Commission at its 63rd plenary session (Venice, 10-11 June 2005).

[35] Opinion on the Law on Amendments to the legislation concerning the status of deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea and of Local Councils in Ukraine CDL-AD(2007)018.

European standards, it is true, however, that the 7 US states which include specific requirements refer to legal appreciations (see footnote 10).

36. In 2007, the party of Prime Minister Tymoshenko presented a proposal for amending the law on the status of MPs which deprived those who did not join their nominating political party, by splitting from the party or even for the participation in activities of other parties. Moreover, the decision on whether these circumstances happened belonged to the highest body of the relevant political party.[36]

37. The opinion of the Venice Commission reiterated its earlier positions and added some further qualifications; namely, the request that People's Deputies shall not be out of any faction (Article 13 item 5) was considered a clear and blatant violation of the European tradition of the free mandate of parliamentarians, by establishing an exclusive role for parties to represent the voters.

38. Finally, the Draft Constitution of Ukraine prepared by a Working Group headed by Mr V.M. Shapoval repeated, in its Article 85, the wrongly called "imperative mandate". The Venice Commission once again repeated its criticism.[37] The complete dependence of the

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[36] Draft Amendments to the Law of Ukraine on the Status of People's Deputy of Ukraine (MP), presented by the Parliamentary Faction "Yulia Tymoshenko Bloc" CDL(2007)071. The amendments proposed to add Article 4* to the Law with the following content:

> Article 4*. The additional grounds for the early termination of powers of the People's Deputy of Ukraine.
>
> 1. Powers of the People's Deputy stop early also in case when he/she fails to join the deputy faction of political party (the electoral block of political parties) according to which list he/she was elected the People's Deputy, or split of the People's Deputy from the structure of this faction.
>
> 2. Non-joining of the People's Deputy the deputy faction of political party (the electoral block of political parties) according to which list he/she was elected the People's Deputy; - the refusal of the People's Deputy to sign the written message on formation of deputy faction of political party (the electoral block of political parties), according to which list he/she was elected the People's Deputy, or his/her refusal to participate in the activities of this faction, or actual counteraction to the activities of the faction.
>
> 3. The split of People's Deputy from structure of deputy faction of political party (the electoral block of political parties) according to which list he/she was elected the People's Deputy, - the written appeal of the People's Deputy for an output from deputy faction according to which list he/she was elected the People's Deputy, and/or actual leaving his faction without a written application, the terminations of participation in activity of this faction, any participation in the activity of other factions, including a support of the People's Deputy to the coalition contrary to the coordinated political position of deputy faction according to which list he/she was elected the People's Deputy and which has adopted a decision about refraining from the structure of a coalition of deputy factions.
>
> 4. The highest body of the relevant political party (the electoral block of political parties) considers an issue concerning presence of the circumstances as it is provided by par. 2 and 3 of this Article, and if it adopts a decision on the early termination of powers of the People's Deputy.
>
> *To add Article 5 with par. 4 and 5 with the following content:*
>
> Article 5. The order of the early termination of powers of the People's Deputy of Ukraine.
>
> 4. The decision on the early termination of powers of the People's Deputy according to Article 4* of this law is adopted by the highest body of the relevant political party (the electoral block of political parties) according to which he/she was elected the People's Deputy. In this case the powers of the People's Deputy are stopped from the date of adoption of such decision.
>
> 5. The decision of the highest body of a political party (the electoral bloc of political parties) on the early termination of powers of the People's Deputy cancels the decision of the Central Electoral Commission on registration of the corresponding person as the People's Deputy. In three-day term from the date of the adoption of such decision the Central Electoral Commission shall grant the certificate of the People's Deputy to the next candidate for People's Deputies in the list of this political party (the electoral block of political parties).

[37] Opinion on the Draft Constitution of Ukraine prepared by a Working Group headed by Mr V.M. Shapoval, CDL-AD(2008)015.

individual deputy on the party or electoral bloc is not compatible with the role a deputy has to play in a free parliamentary system. Furthermore the proposed regulation would empower the "higher leadership of the relevant political party" to counteract the voters' decisions. This would be an undemocratic move.

Conclusions

39. At present, imperative mandate *stricto sensu* and recall are unknown in practice in Europe. Moreover, there are very few countries among the Council of Europe member States which have legislation giving the power to political parties to make members of the elected bodies resign if they change their political affiliation. The mechanisms of control of individual representatives proposed in the Serbian or Ukrainian cases cannot be equalled to "imperative mandate" which is a practice forbidden in virtually all European countries. These mechanisms come closer to the model of "party administered mandate" which is or has been characteristic in countries such as India or South Africa with the objective of preventing massive turn round of voters' decision by means of party switching. Whilst in these countries these practices have considered consistent with their own constitutions, the Venice Commission has consistently argued that losing the condition of representative because of crossing the floor or switching party is *contrary to the principle of a free and independent mandate.* Even though the aim pursued by this kind of measures (i.e. preventing the "sale" of mandates to the top payer) can be sympathetically contemplated, the basic constitutional principle which prohibits imperative mandate or any other form of politically depriving representatives of their mandates must prevail as a cornerstone of European democratic constitutionalism.