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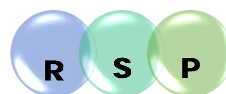

ORIGINAL PAPER

"Governance by the Rule of Law": Parliamentarism in Romania - Constitutional Traditions and Topicality

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Abstract

The present Romanian constitutional context underscores particular coordinates of the institution of Parliament and parliamentarism whose specificity is given by the democratic traditions of the Romanian state and people in the area of parliamentarism. These traditions become normative through provisions of Article 1 (3) of the Constitution according to which "Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed". The present study pursues the legal determination of the fundamental coordinates of current Romanian parliamentarism through the analysis of the role and the bicameral structure of the Parliament of Romania, as well as through the analysis of the statute of the institution of MP in our constitutional system.

Keywords: parliamentarism, democratic traditions, bicameralism, representative mandate, majority, minority

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The legislative power is, traditionally, granted to the Parliament in the different constitutional systems. The current fundamental Romanian act consecrates this too, in Article 61 (1) establishing through norm that "*the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country*". The constitutional provision, by considering its marginal designation, regulates the fundamental role of the Parliament within the system of state authorities in Romania. Nonetheless, this generic role of the Parliament stands out by means of the specific functions that it fulfils.

Firstly, by decreeing the fact that the Parliament is the supreme representative body of the Romanian people, *a function of representation of popular will* becomes distinguishable. By adding to this fact the constitutional provisions of Article 2 (1), in line with which "the national sovereignty shall reside within the Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum", results that the Parliament constitutes the "supreme" instrument in the state, whose concrete determination as a representative body is accomplished through elections, and through which the people, i.e. the electoral body, exercises sovereignty.

The expression of parliamentary will, a means of exercising sovereignty, is contoured by the representation of the will of the people, yet one must bear in mind the fact that public law representation is different from private law representation, as such being merely created a relative, and not an absolute premise of conformity between the two types of will, due to the fact that by means of election it is not the will, but only the power that is handed down (Dănișor, 2007: 96-97). The use of the attribute "supreme" in the expression of the constitution underlines, on the one hand, the extremely important role of the Parliament in the system of state authorities and induces, on the other hand, a hierarchization of the representative bodies of the state, with the legislative body at the top of the pyramid, but without this leading to an implicit subordination of the afore-mentioned bodies. Further, by establishing that the Parliament is the sole legislative authority of the country, one identifies the *lawmaking function* of the Romanian supreme representative body. The constitutional regulation seems to institute, through the use of the term "sole", the exclusivity of the Parliament in the area of lawmaking. Nonetheless, the present Romanian constitutional frame institutes for yet another state body, i.e. the Government, the possibility to exercise the competence of legislating by means of adopting simple or emergency ordinances. In order to avoid a contradiction at the level of constitutional provisions from the Fundamental Act, a nuanced interpretation of the above-mentioned aspects is required. Thus, in the sense of Article 61, the Parliament can be viewed as having exclusivity in the area of lawmaking in the context in which, on the one hand, only the Parliament is competent to decide on legislative delegation to the Government, on the basis of which the latter may adopt simple ordinances in the strictly imposed limits of the enabling law and, on the other hand, the emergency ordinances of the Government, though a result of its exclusive, spontaneous will of regulation, must be submitted to the Parliament that will decide in the sense of the adoption or rejection of these governmental legal acts.

Furthermore, by way of relating to the constitutional provisions comprised in Chapter IV – Relations between Parliament and the Government, Articles 111-114, which regulate the specific means of parliamentary control over the Government, i.e. the obligation to inform the Government, the questions, interpellations, the simple motion, the motion of censure and the assumption of responsibility by the Government, one

identifies the *function of parliamentary control* exercised by the legislative body over governmental activity. This function is equally exercised through other legal means, such as financial control and participation at the setup of Government.

The Structure of Parliament: The Tradition of Bicameralism

In accordance with Article 61 (2), from a structural point of view, the Parliament is made up of two functionally independent Chambers, the Chamber of Deputies and the Senate. The constitutional provision imposes *bicameralism* as a way of structuring the Romanian legislative body. The option of the Romanian constitution in favour of bicameralism was above all determined by the traditions of Romanian parliamentarism that, from as far as the half of the 19th century until the present day, with a few exceptions during the communist period, has known a two-chambered structure of the legislative body of the Romanian state (Vida, 2008: 600).

Though at a doctrinarian level the controversy bicameralism – unicameralism with regard to the Romanian constitutional system is still very much real and continuous – arguments with concern to *bicameralism* (for further details see Attila, 2007: 146-54; Muraru and Muraru, 2005: 1-10; Tocqueville, 1992: 136-137; Duculescu, 2000: 19-24; Sartori, 2008: 249-256) being advanced both pro, i.e. a transposition at infra-functional level of the principle of the division of powers in the state, as well as against, i.e. bicameralism is specific to federal states – we consider that the key issue resides in that the present Romanian Fundamental Act justifies bicameralism as a means of structuring the Parliament.

One should first be reminded of the recent jurisprudence of the Constitutional Court in the sense of traditions of Romanian parliamentarism (Guțan, 2013) that consecrates bicameralism and the advantages of this structure to the legislative. Thus, through Decision no. 799 from June 17th, 2011 (published in the Official Gazette no. 440 from June 23rd, 2011) on the project of law with regard to the revision of the Romanian Constitution, the Court decreed that "[One] should not ignore, [...] the tradition of the Romanian state and the advantages that the bicameral structure of the Parliament, as opposed to a unicameral one, has to offer [...]". Traditionally, the Romanian Parliament has had a bicameral structure. This structure of the legislative body, consecrated in 1864, through «the Developing Statute of the Paris Convention» of the ruler Alexandru Ioan Cuza, continued to exist under the empire of 1866, 1923 and 1938 Constitutions and was only interrupted during the period of the communist regime when the national representation was unicameral – The Great National Assembly. After the Revolution of December 1989, through the Decree-law no. 92/1990 for the election of the Parliament and the President of Romania, published in the Official Gazette of Romania, Part I, no. 35 from March 18th 1990, the act on the basis of which the elections of May 1990 were organised, the formula of bicameralism was reintroduced. The 1991 Constitution took over, with some changes, the same structure of Parliament, maintained upon the 2003 revision of the Fundamental Law.

The amendment of intercalated texts, completed upon revision, targeted only the crossover to a functional system of bicameralism. The advantages that the bicameral structure of the legislative body beholds are evident. Accordingly, the concentration of power in Parliament is avoided, due to the fact that its Chambers will impede each other from becoming the endorsement of an authoritarian regime. Moreover, debates and a frame of successive analysis of laws are ensured by two different bodies of the Parliament, which offers a greater guarantee of the quality of the legislative act. The adoption of laws

within a unicameral Parliament is completed after several successive "lectures" of a text which is otherwise being proposed in the present project of constitutional revision. Being, however, performed by the same legislative body, lectures can become an artificial formality, or be suppressed on immediacy grounds. Bicameralism determines a second lecture of the law to be always performed by another assembly, which is meant to establish an accentuated critical perception. The opportunity of a better critical cooperation, of a common and collective debate on decision-making is hence provided and, as such, amplitude is hereupon conferred to the shaping of the will of the parliamentary state. Additionally, bicameralism minimises the risk of majority domination by favouring dialogue between the majorities of the two Chambers, as well as between parliamentary groups. Cooperation and legislative supervision are thus extended, one consequently demonstrating that the bicameral system is an important form of the division of powers that functions not only between the legislative, executive and judicial powers, but also within the legislative power itself. Both tradition that defines and represents it due to its link to the being of the Romanian state, as well as the enunciated advantages constitute powerful reasons of reflection upon opting for one of the two formulae: unicameralism or bicameralism.

The regulation of the bicameral Parliament was reintroduced in Romania through the adoption of the 1991 Constitution. Though established through norm at constitutional level, in the light of the other constitutional provisions, the regulation of egalitarian bicameralism does not justify itself, more specifically the existence of a second Chamber. The two Chambers of Parliament were constituted in the same manner, through the same type of voting ballot, the same type of suffrage, for the same period of time and exercising the same competences in legislative matter. The only difference between the two Chambers consisted of the necessary minimum age for the submission of candidature as Deputy (23 years old) or Senator (35 years old).

The legislative procedure at the level of the two Chambers was hardened by their perfect equality in legislative matters. According to Article 75 of the 1991 Constitution, bills or legislative proposals adopted by one of the Chambers were sent to the other Chamber of the Parliament. If the latter rejected the bill or the legislative proposal, these were resent, for submission to a new debate, to the Chamber that had adopted them, a new rejection being definitive. Furthermore, according to Article 76, if one of the Chambers adopted a bill or a legislative proposal in a wording different from the one approved by the other Chamber, the presidents of the Chambers would initiate, by means of a parity committee, the mediation procedure. If the committee did not reach an agreement or one of the Chambers did not approve the report of the mediation committee, the divergent texts would be submitted to debate to the Chamber of Deputies and the Senate, in common session, and they would adopt the final text by means of the vote of the necessary majority in relation to the typology of the law. Presently, the constitutional revision of 2003, by maintaining the previous option of the constitution for bicameralism, operates a specialization of the two Chambers, thus partially justifying their existence – please see the contrary opinion according to which "the 2003 constitutional revision dissolved this bicameral system and placed in profound antagonism the provisions of Article 61 (2) with those of Article 75 from the Fundamental Law" (Vida, 2008: 601). We consider that, despite the fact that the manner of formation of the two Cambers has remained identical, the specialization of the Chambers partially justifies the principle of regulated bicameralism as well, and accordingly between the two constitutional provisions there is no contrariety.

Thus, according to Article 75 (1), the Chamber of Deputies has limited specific competence and, accordingly, as the first notified Chamber, it shall debate and adopt the bills and legislative proposals for: the ratification of treaties or other international agreements and the legislative measures deriving from the implementation of such treaties and agreements, as well as bills of the organic laws stipulated by Article 31 (5), Article 40 (3), Article 55 (2), Article 58 (3), Article 73 (3), e), k), l), n), o), Article 79 (2), Article 102 (3), Article 105 (2), Article 117 (3), Article 118 (2) and (3), Article 120 (2), Article 126 (4) and (5) and Article 142 (5). Other bills or legislative proposals shall be submitted to the Senate, as the first notified Chamber and that now acquires general competence, for debate and adoption.

The Constitutional Court, through Decision no. 710 from May 6th 2009 (published in the Official Gazette no. 358 from May 28th 2009) and Decision no. 1575 from December 7th 2011(published in the Official Gazette no. 908 from December 21st 2011; also for a complete analysis of the Decision see Gîrleşteanu, 2012: 101-104), confirmed the concordance of establishing through norm the principle of bicameralism with constitutional provisions which regulate the specialisation of the Chambers of Parliament, by stating that "the principle of bicameralism, as such consecrated, reflects itself not only in the institutional dualism within the frame of the Parliament, but also in the functional dualism, due to the fact that Article 75 of the Fundamental Law establishes lawmaking competences according to which each of the two Chambers has, in expressly defined cases, either the quality of first notified Chamber or that of decision-making Chamber".

Moreover, by taking into consideration the indivisibility of the Parliament as supreme representative body of the Romanian people and its uniqueness as legislative authority of the country, the Constitution does not allow the adoption of a law by one single Chamber in the absence of a debate on the bill conducted by the other Chamber. Article 75 of the Fundamental Law introduced, past its revision and republication in October 2003, the solution of the compulsoriness to notify in some matters the Senate, as the first Chamber of reflection or, as the case may be, the Chamber of Deputies and consequently regulated in the role as decision-making Chamber the Senate in some matters and the Chamber of Deputies in other matters, precisely so as not to exclude one Chamber or the other from the mechanism of law-making. However, the law ought to be the resultant of the concurring manifestation of will of both Chambers of Parliament. [...] It is true – such as the Court made a note on another occasion (Decision no. 1093 from October 15th, 2008, published in the Official Gazette of Romania, Part I, no. 710 from October 20th, 2008) – that in the course of a debate on a legislative initiative, the Chambers have their own decision-making right to it, but the principle of bicameralism can be respected only as long as both Chambers of Parliament have debated and expressed themselves with regard to the same content and the same form of the legislative initiative.

To sum up, the Court, through Decision no. 1237 from October 6th, 2010 (The Official Gazette no. 785 from November 24th, 2010), established the essential criteria for the determination of instances in which the legislative procedure infringed upon the principle of bicameralism: "a) the existence of major differences in legal content between the forms adopted by the two Chambers of Parliament; b) the existence of a special, significantly different configuration between the forms adopted by the two Chambers of Parliament".

The Mandate of the MP

According to Article 69 (1) of the Constitution, in the exercise of their mandate Deputies and Senators shall be in the service of the people. The constitutional provision practically regulates a public law contractual relation between MPs and participants at the electoral process, i.e. the voters, in the form of the representative mandate. The use in the Constitution of the phrase "in the service of the people" presupposes several specifications with regard to the representative mandate.

Firstly, for the Constitutional Court, through Decision no. 209 from March 7th, 2012 (The Official Gazette no. 188 from March 22nd, 2012), that fact that, both in the legislative process, as well as in the activity of control over the Government or in fulfilment of other constitutional obligations, the MPs, in the exercise of their mandate, are in "service of the people", implies "*the representation in the political battle in the Parliament of political debates pertaining to society, of opinions, ideas rooted in different social, political, economic or cultural categories*. Thus, the people, *the holder of national sovereignty*, exercise *sovereignty* not only throughout the elective process, but also throughout the entire period of the mandate offered to the MP who is in their service". The representative mandate, in conformity with stipulations provided by Article 2 (1) of the Fundamental Act, thus represents an indirect way for the people, the holder of sovereignty, to indirectly exercise it.

In the field of parliamentary law, the main consequence of the elective nature of the representative mandate and the political pluralism resides in the principle that the doctrine has suggestively consecrated, namely "the majority decide, the opposition express themselves". *The majority decide* due to the fact that, in virtue of the representative mandate conferred upon by the people, the predominant opinion is presumed to reflect or correspond to the predominant opinion of society. *The opposition express themselves* as a consequence of the same representative mandate that fundaments the inalienable right of the political minority to set forth political options and to constitutionally and fairly oppose themselves to the majority in power. The application of the principle "the majority decide, the opposition express themselves" ensures, on the one hand, legitimacy of governance and, on the other hand, the conditions for the realisation of alternation at governance.

This principle seeks, through the organisation and operation of the Chambers of Parliament, to ensure that the majority decide only after the opposition have expressed themselves, and that the decision which the latter adopt is not obstructed during parliamentary procedures. Thus, a series of norms pertaining to parliamentary regulations target avoidance of blocking the majority in the decision-making process (organisation of debates, limitation imposed on time span of taking the floor, regime of amendments, institution of procedural deadlines, etc.), while others are intended to secure the protection of political minorities (the makeup of permanent offices and parliamentary committees in conformity to the political configuration, the system of majorities necessary for the unfolding of workings and the adoption of measures object to debate, the possibility to notify the Constitutional Court according to stipulations of Article 146 of the Constitution, equal access to parliamentary procedural means, the exercise of the right to legislative initiative, formulation of amendments, etc.). From the point of view of the function of control exercised by the Parliament over the Executive, constitutional provisions stipulate as means of action: informing the Parliament, the procedure of questions and interpellations, the motion of censure, assumption of responsibility by the Government or the legislative delegation.

The rule of the majority necessarily implies, in the course of parliamentary procedures, avoidance of any means that might lead to an abusive manifestation from behalf of the majority or what might serve as hindrance to the normal unfolding of parliamentary procedures, and which might culminate in parliamentary boycott, abandonment of workings in parliamentary structures or withdrawal from the activity of the Chambers.

Further, *the principle "the majority decide, the opposition express themselves" entails a balance between the necessity to express the position of the political minority with respect to a certain issue and the avoidance of the use of obstruction means* with the scope of ensuring, on the one hand, the political confrontation in the Parliament, hence the contradictory character of debates and, on the other hand, the accomplishment by the Parliament of its constitutional and legal competences. In other words, members of Parliament, be they from within the majority or the opposition, must hold back from abusive exercise of procedural rights and adhere to a rule of proportionality meant to ensure the adoption of decisions as a result of a preliminary public debate.

The parliamentary debate on important issues of the state is meant to ensure abidance by the supreme values consecrated in the Fundamental Law, such as the state governed by the rule of law, political pluralism and constitutional democracy. This is the reason due to which the Constitutional Court highlights *the issue of necessity in that both parliamentary majority and minority need to exercise constitutional rights and obligations in good faith and that a conduct of political dialogue ought to be cultivated*, a type of dialogue that, regardless of different motivations, does not exclude consensus a priori when the major interest of the nation is at stake.

Secondly, the fact that the MPs are "in the service of the people" circumscribes the parliamentary mandate to a public function, a public service, with which members of Parliament are endowed through elections, that evinces a constitutionally determined content and that allows the afore mentioned to compete for the exercise of national sovereignty (Avril and Gicquel, 2010: 23).

Thirdly, the exercise of this "public service" by MPs presupposes a legal relation to the recipient of this service, i.e. the people, determined by means of election and which implies the existence of a public law mandate. In this case, one actually talks about a transposition at public law level of the theory of the private law mandate. In private law, according to Article 2009 of the New Civil Code (for a complete study of the contract of mandate in Romanian private law see Baias et al., 2012), the mandate represents the contract by means of which a party called mandatary undertakes conclusion of one or several legal acts on account of the other party called mandator. Per transposition in public law, the theory of mandate presupposes members of the Parliament, i.e. the mandatary, to express through concluded legal acts the will of the Nation, i.e. the mandator, who is also the source of state sovereignty. Nonetheless, the parallelism cannot be perfect, one being actually able to point out many major differences between the two types of mandate, the public law one and the private law one, as follows (Dănișor, 2007: 93-97; Nica, 2010: 70-79).

Distinctive Features of the Representative Mandate

Indeterminacy of the mandator in public law. If in private law the mandator is an indubitably determined person, the transposition of the theory of mandate in public law results in the impossibility to clearly determine the mandator due to the fact that, on the one hand, the latter is held to be the nation, an abstract, collective, indivisible entity, distinct from the members of whom it is comprised but that cannot express itself in the

electoral process but with the aid of an agent, i.e. the electoral body, and, more precisely, with the aid of participants at elections and, on the other hand, due to the fact that the actual mandate is obtained solely from an electoral circumscription, an abstract component of the nation as organic whole.

The public law mandate does not have an actual intuitu personae character. The private law mandate has an *intuitu personae* character due to the fact that it is conferred by the mandator on the mandatary in view of the personal qualities of the latter. In public law, this character is no longer preserved and, due to several factors such as the distinctive features of the vote, the type of voting ballot or the interposition of particular intermediary bodies, with greater influencing power over the political option, between electors and representatives the mandate is rather conferred upon in view of a particular partisan doctrine that is embodied in the person of the candidate than in view of their own qualities. Actually, the Constitutional Court made notice of this aspect by stating in Decision no. 1219 from December 18th 2007 (The Official Gazette no. 14 from February 2008) that "in the course of the electoral process mandates are obtained solely as result of votes expressed by electors in favour of political parties" and in Decision no. 305 from March 12th 2008 (The Official Gazette no. 20 from March 2008) that "electors personally vote a candidate proposed by an electoral competitor and, at the same time, they manifest their preferences for the political party [the candidate] is part of".

Irrevocability of public law mandate. Essentially revocable in private law, this type of mandate automatically presupposes that the mandator can decide cessation of legal relations of mandate with the mandatary at any time, *ad nutum*, in view of the fact that their interests are not well secured. However, the public law mandate is irrevocable on principle due to the fact that its non-imperative character transforms it into a 'free' mandate that cannot be interrupted prior to term once granted through vote (Favoreu et al., 2011: 732). This conception of dependency of the irrevocability of public law mandate on its non-imperative character must nonetheless be nuanced in the context revealed by the institutional practice of world states with regard to the introduction of particular means that can lead to expiration of the mandate of representatives prior to term through popular revocation, a fact which should not be understood as an invalidation of the previously specified rule, but rather as a possibility of coexistence between non-imperativeness and revocation.

The different manner of creating obligations through the exercise of the public law mandate. If in private law, through conclusion of legal acts by the mandatary, on behalf and account of the mandator, legal effects and obligations are created solely for the latter, the exercise of the public law mandate binds both electors as well as the mandatary. Consequently, legal acts adopted by the Parliament have binding character not only for individuals and groups of whom the state is comprised, but also for members of the legislative assembly.

Inadmissibility of substitution. If in private law, in certain cases, the mandatary can decide on the substitution of its own person with another who can conclude legal acts on his/her behalf and account and who basically acts as a mandator in relation to the new mandatary, in public law the mandate cannot be retransmitted, as a consequence of the principle *delegata potestas non delegatur*. The impossibility to re-delegate delegated power derives from the principle of the supremacy of Constitution, so that the Fundamental Act grants a certain competence to a body and it cannot transmit competence to another unless the possibility and the conditions of the re-delegation are expressly stipulated. With regard to the parliamentary mandate, in case of holiday time in course of

its exercise, the impossibility to re-delegate the mandate obtained through elections brings about the organisation of new elections for its take-up.

Power, not will, is transmitted through the public law mandate. In private law the mandatary does not express a will of his own through conclusion of legal acts, but the will of the mandator, the only one that is thus expressed considering that these acts are concluded on behalf and account of the mandator. In public law the nation, through elections at which members of the electoral body take part, does not forward its will to the body of parliamentarians, but rather just a power to legislate and control over the activity of the Government (Dănişor, 2007: 96). On the basis of this power transmitted by the nation, a distinctive will is formulated, i.e. the legislative will, that manifests itself through legal acts adopted by Parliament; thus not an absolute, but a relative type of will is instituted, one of conformity with both sorts of will. Legislative acts are presumed to express the will of the nation, but merely in a relative way, the manner of understanding leading to the admission and legitimisation of constitutional justice as a way of control over the conformity of legislative will with the will of the nation.

Non-imperativeness of public law mandate. Article 69 (2) rules that any imperative mandate is void. The constitutional provision establishes the representative character of the mandate, as a consequence of the theory of national sovereignty and interdicts any regulation that might lead to the transformation of the mandate of the parliamentarian into one that would display an imperative character.

The private law mandate is essentially imperative as it transfers a precise type of power from mandator to mandatary; consequently, the sole will that is expressed through concluded legal acts, is that of the mandator. The parliamentary mandate is a general mandate that does not involve a predetermined and binding engagement of action or decision from behalf of the parliamentarian (Favoreu et al., 2011: 731-732) and which presupposes expression of a will distinct from the popular will, namely the legislative will (Duguit, 1923: 133-137). The imperative mandate is consequently prohibited in public law, thus ensuring protection of parliamentarians from the intermediary structures that propel them at the level of the legislative assembly (Dănişor, 2007: 94).

Protection of the exercise of the parliamentary mandate under the empire of the principle of its non-imperativeness (Nica, 2011: 122-144; Nica, 2010: 73-77; Dănişor and Nica, 2007: 42-56; Bălan, 2011: 120-127) consists of the fact that the parliamentarians are free to express, for this purpose, votes and political opinions with no constraint that might stem from both the electorate who propelled them, as well as the political party whose members they are and that has endorsed them throughout the elections and from which, this point considered, they are independent. From the perspective of this freedom to exercise mandate, as a result of its non-imperative character, the cause for which a Member of Parliament, in the course of mandate, looses the quality as member of the political party that has sustained them during elections cannot be ignored (Nica, 2011: 130). The nature of the cause of loss of the quality as member of the political organisation that promotes one in a function, either involuntary and imposed, or voluntary and freely decided, constitutes in fact the essential element for the interpretation of the distinct effects of the non-imperative character of the mandate.

Thus, if on the basis of a disciplinary or political sanction the parliamentarian is excluded from a particular political party due to expressed votes and political opinions, the mandate as parliamentarian cannot be forfeited because it would hence become imperative, a matter which is prohibited. MPs become "independent" in the sense that they obtain a statute of autonomy until expiration of mandate. The conclusion hereby applies

also in view of the source of the mandate, its procurement depending not on the will of a political party or an intermediary body between citizens and state, but rather on the will of the electorate, the mandate being granted by means of elections by the people through their agent, i.e. the electoral body (Nica, 2011: 131).

For that matter, this is also the meaning of Article 2 (1) of the Fundamental Act that practically establishes through norm the manner of procurement of the quality as representative of the people, and secondarily that as parliamentarian, as effect of elections, an institutional mechanism that fundaments the establishment of the Parliament as representative body through which competences linked to sovereignty are exercised, i.e. the legislative competence, whose source lingers on in the power to vote. Automatically, the political party that has endorsed a certain parliamentarian in the course of elections will not be able to withdraw their quality as representative of the people due to the fact that the party does not grant it; what the political organisation grants is, at most, the quality as member of the associative group with political character.

If, however, MPs freely decide in the course of exercising their mandate to leave the political structure that has endorsed them during the election period and whose members they are, in the absence of any element of constraint or external pressure on them in the sense of expressing certain votes and political opinions, hence in the absence of any imperilment to the freedom to exercise the representative mandate whose legal protection is ensured by the principle of the non-imperative mandate, their mandate must automatically cease.

Voluntary renunciation of the quality as member of the political party which they were part of and that endorsed them at the time of the elections is equivalent to a "voluntary renunciation of the legitimisation obtained as result of the same elections, given that parliamentarian[s] were voted precisely because they embodied a certain political vision, specific to the political entity whose members they were and that endorsed them in the elections" (Nica, 2011: 131). Thus, the non-imperative character of the mandate cannot ensure protection to the parliamentarian in a situation such as this, "due to the fact that no external force inherent in conscience has constrained him in any way, and the constitutional norm has been adopted solely to protect him from such constraints" (Dănișor, 2007: 95).

Such a conclusion is simpler to come to in the case of the list vote used in Romania for parliamentary elections until 2008 when it was replaced with the uninominal vote. This was due to the fact that, by voting a list, the elector expressed an option for a specific political tendency which this particular list represented, and the candidates on the list were the exponents of that specific tendency.

The election and legitimisation of the parliamentarian through endorsement of a particular political party maintains itself in the context of the uninominal voting system as well, so long as, in spite of the fact that people, not lists, are elected, the conferment of the mandate is not *intuitu personae*, but in consideration of a proposed political programme, derived from the party that endorses the candidate in elections (Nica, 2010: 74-75). For that matter, this aspect was also underscored by the Constitutional Court that, in Decision no. 305 from March 12th 2008 (published in the Official Gazette no. 20 from March 2008) established the following: "the elector personally votes a candidate proposed by an electoral competitor and equally expresses preference for the political party that [the candidate] is a member of".

Nonetheless, the jurisprudence of the Constitutional Court with regard to the representative mandate and its non-imperative character proves to be deficient in that the

Constitutional Court does not operate with the necessary distinction between causes for which parliamentarians forfeit, in course of their mandate, the quality as members of the political party that has endorsed them throughout elections, with the scope of establishing the effects of non-imperativeness of the mandate.

This erroneous practice becomes explicit with Decision no. 44 from July 8th 1993 (published in the Official Gazette no. 190 from August 10th 1993), occasion on which the Court, by founding its argumentation solely on the representative character of the mandate in the detriment of its non-imperative character that brings about the necessary afore mentioned distinction, ruled that "deputies have the constitutional possibility to adhere to one or another parliamentary group according to their options, to transfer from one parliamentary group to another or to declare themselves independent from all parliamentary groups. No other judicial norm, legal or in accordance with regulations, can contravene these constitutional provisions".

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