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## The impact of political party control over the exercise of the parliamentary mandate

Zdzisław Kędzia and Agata Hauser

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# The impact of political party control over the exercise of the parliamentary mandate

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## INTRODUCTION

This paper summarizes the results of a worldwide survey on political party control over the exercise of the parliamentary mandate conducted recently by the Inter-Parliamentary Union. Indeed, the relationship between the concept of a free parliamentary mandate, widely recognized as an essential condition for democracy, and party discipline as a functional premise of the party system poses one of the major challenges to the present-day concept of parliamentary system of government. The IPU decision to study the existing legal framework in this respect was therefore a much-needed step.

The notion of party control should be interpreted in a wider sense than loss of the parliamentary mandate by an MP as a result of conduct breaching party discipline. For example, it can include the application of various tools by the political party with a view to ensuring the party's unity. The analysis of this more general question would require a study of its substantive and procedural aspects. However, loss of the parliamentary seat is definitely the most severe consequence of the change of party membership or a breach of party discipline by an MP. The IPU survey therefore focused on this aspect. This paper follows the same approach, making excursions into the neighbouring areas only to the extent necessary.

The paper begins by presenting the overall framework of the survey. With a view to placing the analysis of the survey's results against a theoretical background, the paper includes an introduction to the conceptual aspects of the problem discussed. It is followed by a review of legal solutions adopted in the countries under survey for the case of the relinquishment by an MP of the party's membership or breaching the party discipline. The conclusions list the main findings and offer some basic recommendations. The Appendix contains some more detailed presentation of the relevant cases before the IPU Committee on the Human Rights of Parliamentarians.

The authors made every effort to faithfully reflect the findings of the survey. However, the views and assessments presented in this paper do not necessarily reflect those of the Inter-Parliamentary Union.

## GENERAL INFORMATION ABOUT THE SURVEY

In 2007 the IPU issued an information note entitled "Political party control over the exercise of the parliamentary mandate".<sup>1</sup> In that document the IPU stated that "the issue of political party control over members of parliament has arisen at a number of parliamentary events organized by IPU in recent months. In particular, the power of political parties to revoke the parliamentary mandate and the implications of what is often termed 'political party dictatorship' for the theory of the free representational mandate and effective parliamentary oversight are real problems, which require discussion and action".

The work of the IPU Committee on the Human Rights of Parliamentarians also shows that members of parliaments are often threatened with loss of their parliamentary mandate for, inter alia, crossing the floor.

The IPU global survey on political party control over the exercise of the parliamentary mandate, including four regional surveys, was conducted in 2009. The main purpose of that survey was to ascertain the legal framework of such control. In particular, the surveyors have been analysing legal provisions of constitutions, electoral laws, standing orders and laws on political parties stipulating that MPs lose their mandates because they:

- resign from their party and join another;
- resign from their party without joining another party;
- fail to vote along party lines;
- abstain from voting against party directives.

The IPU defined the four surveyed regions in the following manner:

It is important to note that in some cases no translations of the domestic legal acts were available. On the other hand, existing translations do not always include all amendments and relevant judgments of constitutional courts.

The regional reports and the case law of the IPU Committee on the Human Rights of Parliamentarians form the background of this final report.

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#### **AFRICA**

Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia and Zimbabwe

**53 countries**

#### **LATIN AMERICA**

Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela

**29 countries**

#### **ASIA**

Afghanistan, Australia, Bangladesh, Cambodia, Canada, China, Democratic People's Republic of Korea, India, Indonesia, Iran (Islamic Republic of), Japan, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Nepal, New Zealand, Pakistan, Palau, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Sri Lanka, Thailand, Timor-Leste, Tonga and Viet Nam

**29 countries**

#### **EUROPE**

Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Kazakhstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, and United Kingdom

**51 countries**

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## CONCEPTUAL FRAMEWORK

### 1 Introduction

Political parties are widely seen as vehicles for contemporary democracies. Many would agree with the comment that: “Conventional wisdom is correct; parties do matter. The inclusion of political parties within the political system and the existence of competitive parties can help authoritarian states to transition to democracy and facilitate the survival of democracies.”<sup>2</sup> However, there is also widespread scepticism about these organizations - “It is equally evident that, while scholars have often expressed high hopes for the central roles played in democratic society by parties, they have just as frequently been perplexed by the realities of party politics.”<sup>3</sup> Some assessments go even further, predicting the end of what once has been called the “party state” – “[...] public opinion in most democratic systems is characterized by pervasive dissatisfaction with and distrust of political parties, and there is much debate in academic circles about the obsolescence or decline of parties.”<sup>4</sup>

Are we confronted with a paradox? Without jumping to conclusions, one can say that the coincidence of the views presented does not necessarily amount to that. Nevertheless, some of the dilemmas underlying the criticism of political parties are vitally important and relate to the essence of democracy.

The relationship between party discipline and the free parliamentary mandate is of such a nature. To make it constructive and avoid its disruptive impact requires conceptual adjustments. Parameters of such an approach and relevant laws and practices across the globe have been reviewed in a project conducted under the auspices of the IPU in 2009-10, the findings of which are summarized in this paper.

### 2 Democracy and the free mandate

Conceptually, popular sovereignty is a sum of the sovereignty shares possessed by each citizen. Related to this theory, the imperative mandate involves the obligation of the MP to follow the will of the constituency, namely to receive and fulfil the recommendations of voters. Yet the fate of the imperative mandate has followed the almost universal abandonment of the popular sovereignty theory. The end of the Cold War also put an end to this type of mandate in its last stronghold, which was what were then termed the socialist countries of Central and Eastern Europe.

Since the 1789 French Revolution, parliamentary democracies have adopted the concept of national sovereignty as opposed to popular sovereignty. The nation acting as a sovereign empowers the parliament to express its will in the framework of the competencies allocated by the constitution of the country. Edmund Burke captured the normative vision of the national sovereignty by saying: “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 a member of Bristol, but he is a member of Parliament.”<sup>5</sup> Neither is the nation here perceived as a sum of individuals or a sum of constituencies nor do the MPs act as representatives of these particles. “According to the theory of national sovereignty, a parliamentarian’s mandate is thus general and representative: general because parliamentarians represent the nation as a whole and not a group of voters; representative because they cannot be bound by any order coming from the electorate.”<sup>6</sup> Condorcet, the French philosopher and politician from the time of 1789 Revolution, said “As a representative of the people, I shall do what I believe best serves their interests. They appointed me to expound my ideas, not theirs; the absolute independence of my opinions is my primary duty towards them.”<sup>7</sup>

The free mandate is recognized as integral to democracy based on the concept of national sovereignty. Its encyclopaedic features embrace the following elements:<sup>8</sup>

- An MP represents the nation as a whole and not its sectors or individual voters,
- An MP is independent of the voters/constituency – no orders or instructions for MPs are permitted from the electorate,
- An MP should act in accordance with his/her sense of what is right or wrong,
- Ties between MPs and the constituencies are of a political and not legal nature – it is for the MP to maintain contacts with the electorate or not and to follow up or not on pledges from the election campaign; nevertheless, in many countries such contacts are lively and parliamentarians play a very important role in socializing the electorate with the democratic processes,
- An MP’s mandate is irrevocable – the voters have only one instrument for holding the MP accountable and that is the next election.

The parliament based on this type of mandate is to be seen as an intermediary between the sovereign and its will because it is within the parliamentary proceedings that the will of the sovereign is being aggregated and expressed.<sup>9</sup> The free mandate leaves scope for elaborating on and adopting legal and policy solutions constituting a resultant of various currents in the society. Independence of MPs from their voters affords them a degree of flexibility conducive to seeking political compromises and solutions enjoying support within the parliament.<sup>10</sup>

The free mandate has been widely recognized as an indispensable albeit not sufficient guarantee for parliamentary democracy. However, it cannot be considered in isolation but should be contextualized by various contemporary aspects and trends of democracy. Going beyond the basic theorem of this mandate and moving to practice, one can see significant challenges to democracy understood as a system of government based on the rule of the people. The free mandate reduces the formal linkages between the MP and the

constituency and opens the door to influences from other sources, in particular but not exclusively from political parties. Consequently, if the party system and the wider political mechanism display significant shortcomings in enabling people to determine the political process, the free mandate might be dysfunctional to democracy inasmuch as it may make for disarticulation of the sovereign's political will.

The Janus face of the free mandate encompasses real dilemmas for contemporary democracies. In many instances, long parliamentary traditions help to resolve related problems. Unfortunately, other examples show that means applied to address such problems may give rise to developments endangering the principles of democracy. In anticipation of further analysis, it is to be stressed that problems related to the free mandate should not lead to questioning its already stated central value to parliamentary democracy.

### 3 The role of political parties and the MP mandate

The impact of political parties on the work of the parliament and on the conduct of its members is critical. It has to a great extent been sanctioned by law, be it at the level of the constitution or laws or the parliamentary standing orders. But, the real influence of the parties goes far beyond what is laid down in the letter of the law. In general, it derives from the spearheading role played by the parties in the country's political life.

The most frequently identified functions of political parties in the contemporary literature on the subject can be summarized as follows: <sup>11</sup>

- the aggregation of diverse basic interests represented in the society,
- the integration of voters into the democratic process not only through elections process but also other forms of participation, forging links between citizens and policymakers – termed the participatory linkage function,<sup>12</sup>
- the formulation of policy programmes and proposals for national or local agendas and setting up platforms to mobilize societal support,
- the selection of political leaderships and the wider political elites (parties are the key actors in popular elections at different levels and in creating government and some other state bodies).<sup>13</sup>

In the light of these functions, it is understandable that the political parties may take a dominant position in shaping the conduct of MPs in carrying out their mandates. The scale of this influence may differ depending on the party model and the type of the party system, as well as the standing and the position occupied by an individual MP.

Parties which rely on close links with their electorate need to respect the standing of an MP in his/her constituency. It is very often the MP with high authority at the local level who can generate voter support and help to raise financial contributions for the party. Mass parties with a strong programmatic orientation and/or parties addressing specific sectors of voters usually act along these lines.



However, party systems have greatly evolved. Mass parties have been changing their profile from an ideological to a pragmatic orientation with a view to gaining the highest possible share across the electorate (so-called “Catch-All Parties”).<sup>14</sup> Methods of seeking support other than work within and for the constituency acquire increasing value. For example, the ability of the MP to represent the party appealingly in central media sometimes becomes more appreciated than counting the votes locally. In this model, the dependence of the MP on the leadership and management of the party increases and the MP’s autonomy based on roots in the constituency diminishes.

This evolution has been further advanced with the cartelization of party systems, as diagnosed by Mair and Katz in their famous publication in 1995. The cartel system is characterized by “an ever closer symbiosis between parties and the state”.<sup>15</sup> As in the cartels of another kind, parties not only compete but also collude with each other with a view to stabilizing the party scene. Agreement covers solutions that contribute to that end, such as state subventions to parties which have succeeded in elections or rules of electoral law preferential to already established parties (e.g. a high electoral threshold). As a consequence, parties of the establishment are either in or wait to form the government. Political controversies do not emerge around ideologically motivated political programmes proposed for the nation as a holder of sovereignty but rather around cleavages concerning specific issues, in particular the so-called new political controversies, such as national minorities, migrants, and sexual preferences. Electors are invited rather to choose one or another of the options in question with a high standing in the public debate than to stick to comprehensive and consequently developed programmes.<sup>16</sup> Differences between the parties concern personalities more often than elaborated ideological visions.

Even if this picture is overstretched in one or another point, the depicted phenomena are features of the contemporary party systems in democracies. This is, in fact, a comfortable situation for all major political actors since the system provides them with a sort of safety net. It is remarkable that the evolution described has already found its way into encyclopaedic entries, as in the Concise Oxford Dictionary of Politics, which states: “The party’s role is to act as a broker between many different groups, avoiding issues of internal party democracy, ideology, and even party programme. Its role is to maximize the vote for the party. Winning elections is the only test of success.”<sup>17</sup> The political parties can thus be said to have historically moved from the position of trustees of priorities and interests of the empowered sectors of society, through the role of brokers acting as entrepreneurs in hammering out the political *modus vivendi* between society and the State, to the role of agents so closely linked with the State that they represent not only society vis-à-vis the State but also the latter in relation to society.<sup>18</sup> Of course, none of the initial roles have been entirely abandoned over time. However, contemporary parties and party systems exhibit with diversified intensity, depending on local conditions and traditions, features differing from those of some decades ago.

All this has consequences for the relationship between parties and their followers. The ties are loosening; the electorate is shuttling between the parties, attracted by their leaderships and positions taken in cleavage debates rather than by visions and programmes.<sup>19</sup> As Mair and Katz say, there is a waning of the ideological and/or policy distinctiveness of the parties and, with the emergence of a growing policy consensus, the need for and capacity to maintain a distinctive electorate becomes further undermined.<sup>20</sup> This tendency is further enhanced by the fact that the party's financial basis usually does not depend on a large membership but is established with the help of state subventions.

What is the impact of the evolution described on the internal cohesion of the party, in particular with regard to the discipline applied to MPs? It may be assumed that, despite all the changes, one of the key criteria for the standing of the party, if not the basic one, is still the party's political effectiveness, borne out not only by election results but also by the party's ability to influence decisions taken by the parliament and the government. In particular, in the case of the parliament this capability largely depends on adherence by the individual MPs to the party line, which predefines the importance of party discipline. However, the aforementioned evolution has added new dimensions to this indeed well-established mechanism. First, the need for the responsiveness of the parties to the party members and eventually to the voters diminishes, in particular with regard to the participatory linkage. Second, the weakened link between the party and its voters strengthens the ties to other actors, such as colluding parties or interest groups or State agencies with influence over the party, and so forth. The earlier strong weapon of the MP, his or her roots in the constituency, may significantly suffer as a consequence. Third, since it is the party as "an entrepreneur" that is the holder of political power, and not so much voters, the role of leadership in the party is growing immensely. The future of an individual MP in such a situation is a result less of his or her independent creativity than of the ability to accommodate party priorities set by the leadership.

One must also realize that the above processes may be further enhanced if the electoral law of the country in question provides for list-based elections. In such systems political parties submit lists of candidates for multi-mandate districts and the number of MPs elected from each list is ascertained according to the principle of proportionality. Voters therefore cast their votes primarily on the party's electoral lists and not so much on specific candidates. For that reason, list-based elections weaken the link between the MP and his/her constituency. At the same time the MP's dependence on his/her political party leadership increases since it is for the leadership to compose the lists of candidates: if an MP does not follow party lines during his/her term of office, he/she may not be submitted as a candidate in the next elections or may be ranked so low that chances of re-election become minimal. It should be noted, however, that (even in these systems) the success of a political party cannot be entirely separated from the popularity of its members of parliament. List-based electoral systems providing the possibility for electors to give preferential votes to candidates on the list reflect this reality.

The situation may be different in constituency-based elections. Although direct voting for one of the candidates can also be influenced by his/her affiliation with a certain political party, the significance of a candidate's individual merits, special position or popularity in the district is undoubtedly greater. Consequently, in those systems representatives' links to their voters, and thus the relative margin of independence from party control, may be much stronger.

Finally, "trade-off" practices sanctioned or tolerated by electoral law can also strengthen the control of political parties over MPs at the expense of the free mandate. An example of such practices is provided by the undated letter of resignation from the mandate signed by the candidate and deposited with the party as a condition of nomination. Again, parties sometimes demand of the candidates that they deposit with the party a "blank cheque" obliging MPs to refund considerable election campaign costs in the event of withdrawal from the parliamentary faction.

**To sum up** - the free mandate, as creating scope within the parliamentary process for reconciling interests and preferences existing in society regarding the overarching programmatic goals, is complementary with the aforesaid functions of political parties. It empowers MPs to participate, actively and without formal constraints imposed by the voters, in developing policy programmes for the parties. However, the changes mentioned in the political mechanism increase inconsistency between the influence of political parties/party systems and the parliamentary free mandate. To protect the latter, the power of political parties vis-à-vis individual MPs must be balanced by granting the core autonomy of the MPs.

#### 4 Party discipline and the free mandate

The contradiction between disciplined voting in parliament or other forms of party discipline and the free mandate is no new phenomenon. The domestic constitutional orders often sanction this tension by setting forth the free mandate and, at the same time, situating political parties as the main actors of the parliamentary process.<sup>21</sup> Heidar and Koole point to the fact that "Most parliaments constitutionally reflect the traditional, strong legitimacy of the individual MP (as the representative of the people) at the same time as they in practice give him/her a subordinate position to the effective power vested in the PPGs [Party Parliamentary Groups]."<sup>22</sup> Under the conditions of the present party systems, however, the average MP usually seems to be less capable than before of effectively countering or moderating the party's position if it contradicts his/her own views.

The situation may depend on the type of the party. In the case of a mass party rooted within a specific sector of society and drawing its legitimacy from the continuing support received from this constituency, the problem of party discipline is directly related to the linkage to voters. Mair and Katz say: "Each of these groups [in society] has an interest, which is articulated in the programme of 'its' party. This programme is not just a bundle of policies, however, but a coherent and logically connected whole. Hence, party unity

and discipline are not only practically advantageous, but are also normatively legitimate. This legitimacy depends, in turn, on direct popular involvement in the formulation of the party programme and, from an organizational perspective, this implies the need for an extensive membership organization of branches or cells in order to provide avenues for mass input into the party's policy-making process, as well as for the supremacy of the extra-parliamentary party, particularly as embodied in the party congress."<sup>23</sup> Other parties (cartel parties, catch-all parties) also demand discipline from their MPs but the justification is different. In this case, it is related to the political performance of the party and its management and not so much to fidelity to the voters (who are usually only vaguely defined in sociological terms).

Ultimately, the position of the MP and his/her ability to maintain autonomy vis-à-vis party pressure depends on various factors. It goes without saying that MPs with a high authority and popularity among the electorate, an influential position within the party, professional standing (knowledge and experience in substantive areas crucial to the party) enjoy, if they so wish, a larger margin of independence than the others. In any case, however, a party leadership does have a toolbox to help it enforce discipline among MPs.<sup>24</sup> This could cover incentives and penalties (see the next sub-chapter). One can ask whether such internal means are compatible with the free mandate even if they can be seen as customary in any organization which, to be effective, requires enhanced loyalty of its members. The admissibility question is much more tangible when parties attempt to apply more severe measures, including those entailing termination of the MP's mandate.

So far, party discipline and the free mandate have been juxtaposed. Moreover, the free mandate has been seen as a standard of achievement and party discipline as, to some extent at least, an interfering factor. However, party discipline is in no way a negative element by default.

What are the major advantages of party discipline? From the perspective of voters, party discipline makes these organizations more predictable and, in a way, accountable. If the party is playing the role of a broker in political life, it must also be able to ensure that this social function is performed by its members in the parliament. From the perspective of the parliament, party discipline is one of the major organizational factors that help the House to manage its work. From the perspective of political parties, internal discipline is one of the central premises of their effectiveness. Finally, from the perspective of an individual MP, party discipline may be seen as a reassuring factor, offering a feeling of safety associated with being a part of the influential team. These are only exemplary advantages which are interlinked and overlapping across the perspectives.

What are the major advantages of the free mandate in this context? From the perspective of voters, it may promise a certain political autonomy of representatives against non-local political confinements and thus open the way for enhancing the MP's linkages to the constituency. From the perspective of the parliament and the wider constitutional order, the free mandate should empower the MP to act with dedication on solutions most advantageous to the

development of the entire country and not only of his/her parts or sectors of society. From the perspective of political parties, the free mandate offers a mechanism of internal control in forming optimal policy options and decisions. From the perspective of an individual MP, the free mandate offers scope for creativity, personal engagement and career. Again, these are only exemplary advantages.

To find an appropriately weighted approach to the dilemma of “the free mandate” and “party discipline”, it is necessary to draw on the collation of advantages of both of them.

## 5 Building party unity and the free mandate

K. Heidar, R. Koole rightly state that: “In cases where the MP makes known that he or she will for some reason defy the official party line, there is a whole arsenal of means to further party unity-both carrots and sticks.”<sup>25</sup> A party may seek means to that end at four levels:

- Participatory - loyalty to the party can be achieved through the involvement of MPs in the decision-making process within the party. In many parties, this is facilitated by the fact that the decisions are taken by the party parliamentary groups. In others, where the division between the parliamentary group and “extra-parliamentary” party is stronger and the latter takes the lead, the MPs are sometimes invited, either in their capacity as members of the parliament or as party experts, to participate in the elaboration of party positions. This naturally contributes to sharing responsibility and facilitates cohesion.
- Promotional - party leaderships also use various incentives to win loyal support by MPs. The “carrots” include the designation of MPs for positions in parliamentary bodies, assignment of functions within the party parliamentary group or within the “extra-parliamentary” party structures, offering a framework for publicity, for instance by entrusting legislative initiative in subjects of particular importance or assigning some representative functions.
- Disciplinary - as a rule, parties do have some disciplinary rules and procedures that may be applied against MPs who have breached party discipline. In the worst-case scenario, MPs in some parties may be excluded from the party and the party parliamentary group.

Although the participatory approach seems to be that most suited to the nature of parliamentary democracy, all these tools are compatible with the free mandate. Contractual measures are much more controversial.

- Contractual - some parties attempt to enter into agreements with candidates for parliamentary elections on the basis of which the candidates pledge to resign from the MP’s mandate in the event of voluntary departure from the party or exclusion from it as a result of party internal proceedings. There were also instances of financial

commitments made by candidates to pay compensation in the event of the departure from the party during tenure as MP. Solely from the party perspective, such arrangements might look somehow rational but they still clearly contradict the free mandate, rooted in the will of the electorate.

## 6 Interim conclusions

The Dutch constitutional lawyer Elzinga rightly pointed out that although the “free mandate” stems from the pre-modern party period, it continues to perform a “rest function” by protecting MPs against excessive domination by the parties.<sup>26</sup> It seems that this protective function is the key to the evaluation of the topic under examination, namely the relationship between party discipline and the free mandate in the parliamentary systems. The highlighted developments show that any “either-or” approach would fail to match the criteria of realism or rationality. Political parties will not and should not disappear, at least under the foreseeable conditions of societal communication and organization. Abolition of the free mandate is equally undesirable since it makes the democratic parliamentary system work.

The answer to the question how to reconcile the two should be based on recognition that the free mandate is not only an ingredient of contemporary democracy but also an essential component of the constitutional order in democratic States. Furthermore, adopted solutions should accommodate the aforementioned “rest function” of the free mandate, namely the protection of MPs against excessive domination by the parties. Hence, keeping in mind the role of political parties and the requirements of their internal organizations, an attempt to reconcile the free mandate and party discipline should focus on the party side of the equation. The ball can be said to be primarily in the parties’ court.

## RESULTS OF THE SURVEY

The analysis of regional reports shows that legal regulations related to political party control over the parliamentary mandate are in force in 42 out of the total 162 countries surveyed (25.9%). This chapter provides information on specific solutions adopted in the countries under survey. Presentation of the rank of the relevant legal provisions is followed by a detailed summary of various situations in the context of the MP’s political association which can result in loss of the mandate.

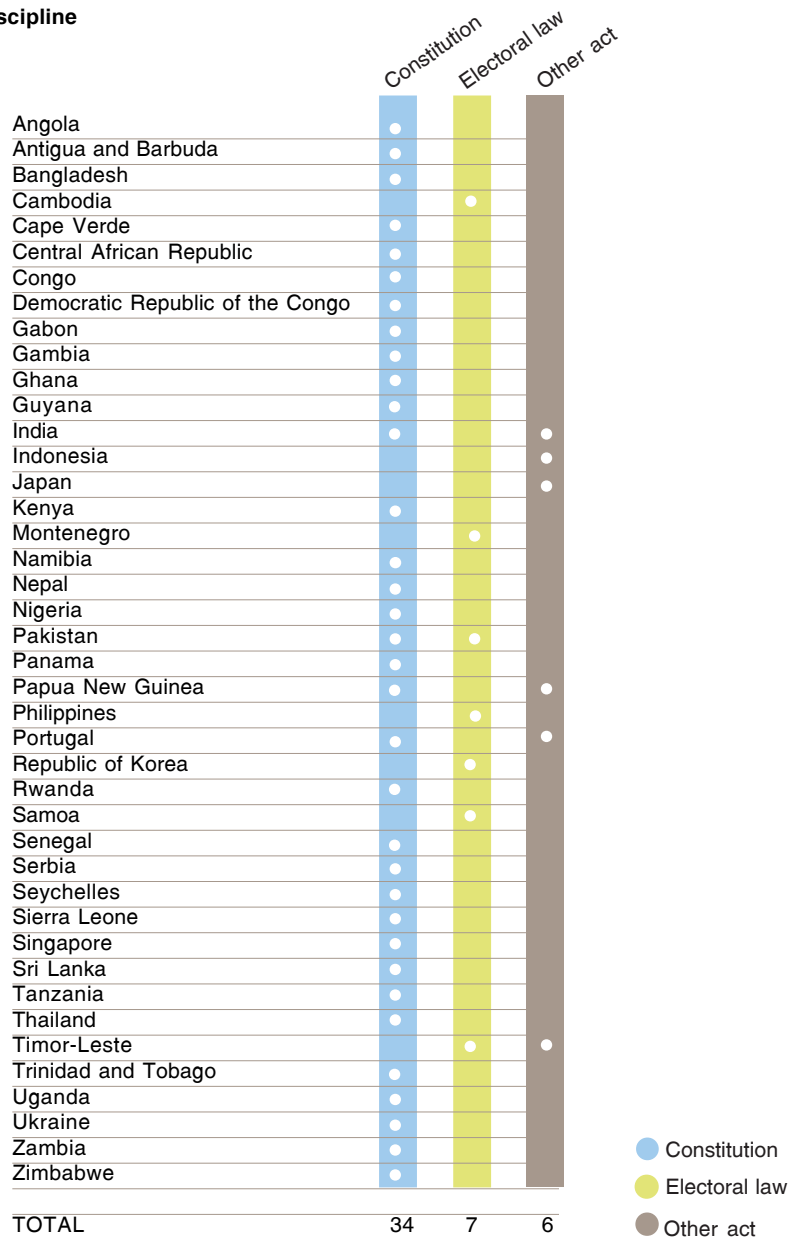
## 1 Legislative basis

Basic elements of the parliamentary mandate and the status of an MP are widely recognized as what is termed “constitutional matter” and as such should be determined in the constitution of the country or legal acts of the same rank. This is of course applicable to the stipulations providing for political party control over the parliamentary mandate and, in particular, to

possible loss of the mandate. As Table 1 below shows, a large majority of domestic legal systems follow this principle.

**Summing up:** political party control over the parliamentary mandate has its basis in the constitution itself in 34 of the 42 countries, namely in 80.95% of cases. However, in eight countries relevant provisions have been found in electoral laws or other acts (19.05%). One should also note that in four cases such provisions are placed both in the constitution and in other acts.

**Table 1 - Rank of legal acts containing provisions relevant to the free mandate and party discipline**





The relatively high percentage of countries in which the relevant legal provisions are laid down in an act possessing sub-constitutional rank is certainly worrying. Considering the constitutive significance of the parliamentary mandate and the status of the MP for the political and social order of the country, the possibility of interference with the independence of MPs must possess constitutional authorization. Moreover, the relevant constitutional stipulations should be specific enough to avoid the risk of abuse.

## 2 Loss of the parliamentary mandate due to changes of party membership or breaches of party discipline

The survey has identified 10 types of legal provisions, according to which an MP loses his/her mandate because of changes of party membership or breach of party discipline.

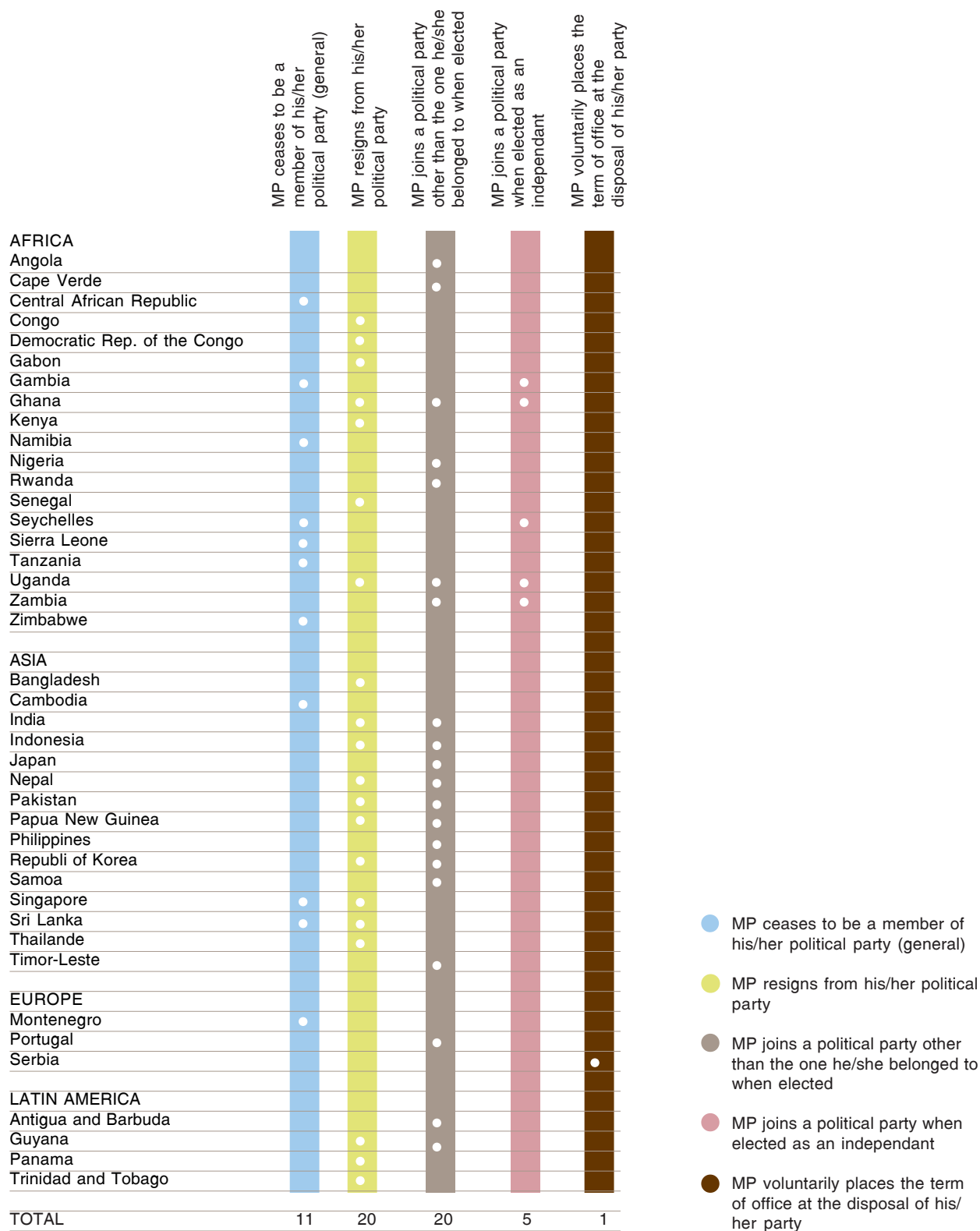
1. The MP ceases to be a member of a political party;
2. The MP resigns from his/her political party;
3. The MP is expelled from his/her political party;
4. The MP joins a political party other than the one to which he/she belonged when elected;
5. The MP joins a political party when elected as an independent;
6. The MP votes against party directives;
7. Against party directives, the MP abstains from voting;
8. The MP voluntarily places the term of office at the disposal of a party;
9. The MP fails to join the faction of his/her political party or the MP's membership in the faction is terminated;
10. The MP is revoked by his/her political party.

Both situations: the change of membership in a political party and the breach of party discipline are qualitatively different. In the former case, the MP changes his/her political affiliation with all consequences of this move. In the latter case, the MP's intention is to remain in the party while dissociating him/herself from the party line in some of its aspects. In practice, these situations may overlap. For example, a breach of party discipline may lead to the loss of membership in the party. Nevertheless, from the legal perspective this distinction is significant since loss of the mandate as a legal consequence of the former situation is often precluded by law whereas in the latter the application of sanctions against an MP rests essentially with the political party concerned. Tables 2 and 3 below duly illustrate these two situations.

The first item in the above list requires a special comment. The survey analyses the content of legal provisions. In the great majority of cases this content is specific enough. However, when the law links the loss of the parliamentary mandate by an MP with "his/her ceasing to be a member of a political party", it is not entirely clear what could be the circumstances under which the mandate can be terminated. This language may be applied to resignation of an MP from his/her political party, as well as to cases of expulsion from the party. In addition, verbal interpretation may suggest that an MP may also lose his/her mandate if the party itself ceases to exist. As a consequence, such a provision may relate to lack of loyalty and breaches of party discipline, as well as to developments beyond the MP's control. Therefore, various categorizations proposed in this paper might be further verified, subject to



**Table 2 - Loss of the parliamentary mandate due to a change of party membership by an MP**



availability of additional clarifications concerning the practice in the 11 countries whose laws provide for the legal regulation discussed.

### **Change of party membership**

The survey has identified two types of situation where change of party membership may result in loss of the mandate by an MP. These are: (a) resignation by an MP from membership in the political party which nominated him/her as a candidate for elections, and (b) an MP switching to another political party during the parliamentary term. According to the law of one country, MPs may also authorize their parties to declare the end of their mandates.

**Summing up:** Table 2 (columns 2 – 4) shows that in many countries - 33 (20.4% of 162 under the survey), a change of party membership leads to termination of the mandate of the MP concerned. In one country, an MP may voluntarily authorize his/her party to terminate the mandate. Although this measure can be applied to the MP leaving the party, its applicability is probably not confined to such a situation.

The legal sanction of loss of the parliamentary mandate as a consequence of a change by an MP of his/her political affiliation can be seen from two perspectives: (a) the relationship between the voters on the one hand and, on the other, the parliamentarians and political parties; (b) the relationship between the parliamentarians and the political parties which nominated them as candidates for elections.

A change of party membership by an MP affects the voters who cast their votes not only for a specific candidate, but also for his/her political party and its programme. Running for election on the list of a specific party or independently, the candidate tells the voters of his/her intention to represent the position of the party in the parliamentary work or not to be bound by any party ties. Withdrawing from the party or joining a political party during the electoral period contradicts such a commitment. If the election is perceived as a kind of plenipotentiary contract, such a change of party membership may be seen as a serious breach of the contract. In this context, loss of the parliamentary mandate might be acknowledged to be a logical consequence. The relatively high number (41) of countries which have followed this approach is therefore not surprising.

However, the situation is much more complicated than the analogy with contractual obligations might indicate. First of all, the concept of the free parliamentary mandate empowers (see Conceptual framework) the MP to decide what is right or wrong in the decisions under consideration by the parliament. It should protect the MP against any, not only voters', interference which would deprive the MP of the choice of how to carry out the mandate. There are also other questions, such as: (a) what an MP should do if the party departs from the programme line presented during the election campaign to the extent that the MP cannot reconcile his/her loyalty to the party with the commitment made to voters; (b) why an MP should lose the mandate if he/she reaches the conclusion that in the ranks of another parliamentary faction he/she

can better serve the country and represent the common good; (c) what an MP should do when, having been elected as an independent candidate, he/she becomes convinced, in the light of parliamentary experience, that the way to effectively contribute to the parliamentary work lies in membership of a particular parliamentary faction. Many such questions can of course be asked. National legislators should therefore carefully weigh the different interests at play. In particular, protection of the choice by voters to support a specific political party needs to be reconciled with the essence of the free parliamentary mandate.

The risk of loss of the mandate as a result of MPs' decisions to change party ranks also plays an important role in consolidating political parties. However, one can wonder whether it is the task of the State and its law to guarantee party loyalty. Nationalizing political parties is always a dangerous interference in the organization of society and the necessary spontaneity of the political process. Numerous examples from all over the world provide enough evidence that authoritarian rule and "nationalized" political parties go hand in hand. What happens, at least, is the growing "cartelization" of party systems, which constitutes another challenge to democracy (see Conceptual framework, point 3). The law should therefore not become a protector of political parties at the expense of the independence of democratically elected parliamentarians who strive to carry out their mandates honestly and in good faith.

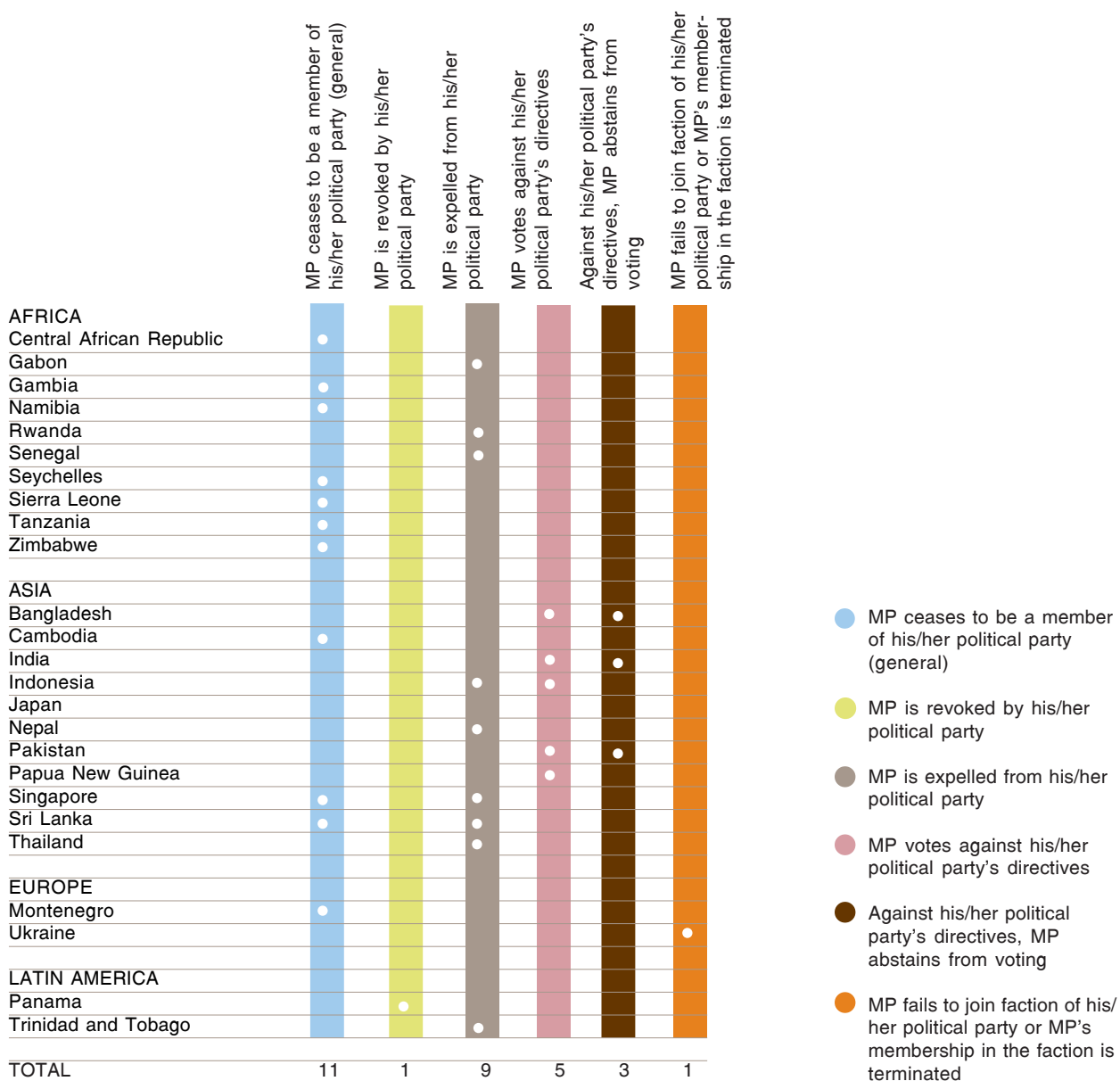
It is interesting to note in this context that the Constitutional Court of Serbia ruled Article 88 of the Serbian Law on the Elections of Representatives to be unconstitutional. That provision stipulated that the representative's mandate shall be terminated if his or her membership in the political party or coalition of parties on whose electoral list he/she was elected is terminated or if political party, or the other political organization on whose electoral list he/she was elected, removes his/her name from the register kept by its competent body.<sup>27</sup>

### **Breach of party discipline**

The survey has identified four types of situation in the context of party discipline which according to law in some countries may lead to loss of the mandate by an MP. These are: (a) revocation by the political party; (b) exclusion from a political party under its disciplinary procedure; (c) voting inconsistent with the party lines; (d) refusal by an MP to join the parliamentary faction of the party on the lists of which he/she was running for election or termination of membership in the faction.

**Summing up:** Table 3 shows that in a relatively large number of countries - 15 (9.25% of 162 under survey), a breach of party discipline leads to termination of the mandate of the MP concerned. The law specifies only two such situations in precise terms: (a) voting inconsistent with the party line; (b) the refusal by an MP to be a member of the parliamentary faction. It is to be assumed, however, that also in the case of other misconduct an MP can lose the mandate as a consequence of the party's decision to expel or revoke him/her.

**Table 3 - Loss of the parliamentary mandate due to breaches of the political party discipline**



Early termination of the mandate as a penalty when it comes to enforcing party discipline is hardly acceptable in the context either of the free mandate or of the relationship between political parties and the State. The latter has already been addressed in the comments on Table 2. The remarks on the role of law in ensuring party loyalty are *mutatis mutandis* applicable with regard to party discipline.

As already stated (see Conceptual framework, point 2), the combination of the irrevocability by voters and absence of the voters' binding instructions underlying the MP's independence is the backbone of the free mandate. Hence the great majority of countries disconnect the enforcement of party discipline and the parliamentary mandate. The latter should be protected against not only legal interference by voters but also the same kind of interference coming from other sources, particularly political parties. Accordingly, acting under the threat of loss of the parliamentary seat for political reasons denies the concept of the free mandate.

Voting inconsistent with the party line is the most spectacular form of the breach of party discipline by an MP. Resignation from the party membership is qualitatively different and cannot be qualified as such a breach. As Table 3 shows, only in five countries can an MP lose the mandate in the case of voting against the party directives (abstaining may have the same consequence in three of the five countries). Numerically, the problem is rather limited. Nevertheless, the concept itself that an MP might be excluded from the parliament solely on the basis of voting inconsistent with the party line is tangible and should be highlighted in order to sensitize lawmakers to this issue. As was emphasized regarding Table 2, the law should not protect political parties (party systems) at the expense of the free parliamentary mandate.

In a way, even more worrying is the empowerment of political parties directly to revoke an MP or deprive him/her of party membership ultimately meaning loss of the mandate. In the case of voting at least, the functioning of the parliament is at stake. Here, the law protects just the functioning of the party since the MP may lose the seat for all sorts of – let's assume severe – disciplinary misconduct, also outside the parliament. Such solutions are familiar to 10 countries (6.2% of 162 under survey).

The situations described are probably the most disputable examples of the protection by law of political parties (party systems) in areas which essentially should be a matter of the party's internal organization, subject to its autonomous governance. It is not for the law (the State) to replace parties in the enforcement of party discipline. Nor should parties be empowered to take steps changing the results of elections.

### 3 The MP's impact on early termination of the mandate

An advocate of the solutions presented may argue that early termination of the mandate in all the above situations is a direct or indirect consequence of the MP's conduct: direct if the MP takes a step that according to law automatically results in loss of the mandate (e.g. change of party membership or voting against the party position in some countries); indirect when the MP breaches the party rules and the list of penalties in disciplinary proceedings may include, for instance, exclusion from the party, statutorily resulting in some countries in loss of the mandate. In these contexts, loss of the parliamentary seat appears to be either a logical consequence in some cases or an acceptable retaliation in others, the advocate would argue.

However, there are circumstances in which the MP lacks any significant choice. For example, the party is changing its political line in a way that in the eyes of the MP is incompatible with the trust of the voters or the interests of the country. Another example, in the MP's view the matter being voted on requires a moral choice which is incompatible with the party line. Still another example is where the party leadership adopts a discriminatory attitude towards an MP.

As a consequence, in extreme situations the MP may feel obliged to either leave the party or vote against his/her party line. One can wonder whether in such "no real choice" situations, generated, in fact, by the party (party's leadership), loss of the parliamentary seat might be justified even in the eyes of those who principally accept it as a consequence of a change of party membership by an MP and/or a breach of party discipline. And again, as already mentioned, the question is whether the interests of the party and party system should here prevail over the independence of representative and the free parliamentary mandate.

### 4 Disciplinary proceedings

As emphasized in Conceptual framework, point 5, political parties possess "a whole arsenal of means to further party unity—both carrots and sticks." Essentially, the how this toolbox is used by the political party remains within the scope of the party's autonomy. However, the situation is changing when the outcome of disciplinary proceedings may lead, directly or indirectly, to the loss of the parliamentary seat by an MP. In that event, such proceedings cease to be an internal party affair only. They affect inter alia the composition of the parliament, the situation of the member of the parliament concerned, the situation of the political party involved and, finally and indirectly, the situation of the voters who elected the affected member of the parliament.

As Tables 2 and 3 show, termination of the mandate is a direct outcome of the disciplinary proceedings in the following cases: (a) the law provides for the revocation of the MP by the party; (b) expulsion of the MP from the party if the law links it with loss of the mandate; (c) the disciplinary proceedings prove that the MP violated voting discipline and the law links it with loss of the mandate; (d) the disciplinary proceedings terminate the

membership of the MP in the party parliamentary faction, which is linked with the loss of the mandate in one country.

However, disciplinary proceedings may also indirectly cause termination of the parliamentary mandate in countries where it is connected by law with a change of party membership. If the disciplinary pressure becomes unbearable, an MP may feel forced to abandon the party membership and thus to forfeit the parliamentary seat.

The fact that the situations mentioned contradict the free mandate which is, as already stressed, characterized as irrevocable, should not lead to the conclusion that disciplinary measures may not be applied by political parties to members of the parliament. Such a postulate would be not only unrealistic but also dysfunctional. The necessary balance between the tools ensuring party cohesiveness and effectiveness on the one hand and, on the other, the independence of MPs is needed. This means that political parties should: (a) impose party discipline in the parliament only when it is indispensable, (b) refrain from ruling the party discipline in matters related to highly controversial moral issues to be primarily decided according to the conscience of an individual, (c) apply disciplinary measures on the basis of proportionality, (d) ensure that the disciplinary procedures meet the requirements of due process, and (e) refrain from disciplinary measures that may interfere with the essence of the free parliamentary mandate.

## INTERPRETATIONS BY THE IPU COMMITTEE ON THE HUMAN RIGHTS OF PARLIAMENTARIANS

The results of the survey should also be interpreted in the context of the proceedings before the IPU Committee on the Human Rights of Parliamentarians. This Committee plays a crucial role in interpreting the relationship between party control and the free parliamentary mandate. For example, in one case the Committee 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.” In another case, the Committee provided a fundamental interpretation of the inconsistency of revocations of the parliamentary mandate following the exclusion of an MP from his/her political party with the free mandate. The Committee observed that: “The revocation of a parliamentarian’s mandate is a serious measure which irrevocably deprives such a member of the possibility of carrying out the mandate entrusted to him or her, and that it should therefore be taken fully in accordance with the law and only for serious reasons.” The Committee further construed that “it cannot accept, in the light of the provisions of Article 19 of the ICCPR, that mere expression of a political view can lead to such a serious sanction as loss of the parliamentary mandate”, and recognized “that a political figure may be excluded from his or her party for having expressed views deemed unacceptable by the latter, but can hardly admit that a parliamentarian who has been expelled from a party for that reason should lose his seat, in the last resort solely for having exercised his right to



freedom of speech (particularly in cases when the Constitution stipulates that any imperative mandate is considered null and void).” For more about the cases before the Committee, see Appendix.

## CONCLUSIONS

### 1 General observations

1. The parliamentary free mandate remains a cornerstone of democracy. An MP represents the nation as a whole and should act in accordance with his/her sense of what is right or wrong. No legally binding orders or instructions are permitted from the electorate to the MP. Ties between MPs and the constituencies are of a political and not legal nature. Irrevocability of an MP belongs to the core elements of the free mandate. Voters may hold MPs accountable only in the context of elections. According to the prevailing view, the principle of irrevocability should set a standard for all political relations within which an MP performs his/her duties, in particular for the relations with his/her party. Party control over implementation of their mandates by MPs, including the enforcement of party discipline, is primarily a matter of party autonomy. Legal possibilities provided by domestic law for early termination of the MP’s mandate should be consistent with the principle of irrevocability.
2. The survey shows that roughly every fourth country of the 162 under review has legal provisions establishing one or another form of control over upholding the political affiliation and/or over the observance of party discipline by MPs. In 19.1% of countries under survey the law penalizes the departure of MPs from a political party and/or their joining another party with loss of the parliamentary seat. From among this group, the law in nine countries (5.5% of the total) similarly provides for termination of the mandate if an MP is expelled from his/her political party. In addition, in 3% of countries an MP who was running as an independent candidate for elections and subsequently joins a political party loses his/her mandate, as well. Less widespread is loss of the mandate in the event of a breach of party discipline by an MP in the form of voting inconsistent with the party line (only in five countries - 3% of the total).

Given the various circumstances in which an MP may be deprived of his/her mandate in the relationship with the political party which has nominated him/her as a candidate for elections, the countries under survey can be placed in the following categories, in descending order from the most restrictive to the most liberal:

- (a) Countries where loss of the parliamentary mandate follows revocation of the MP by his/her political party in the case of serious violations of the statutes and of the ideological, political or programmatic platform of the party or of resignation from his/her party – this category concerns only one country (less than 1% of the total);<sup>28</sup>



- (b) countries where loss of the parliamentary mandate follows: (i) change of membership in the political party decided on by an MP, (ii) the expulsion of an MP from his/her political party, (iii) MPs voting against the party line – this category concerns only one country (less than 1% of the total);
  - (c) countries where loss of the parliamentary mandate follows: (i) the change of membership in the political party decided on by an MP, (ii) MPs voting against the party line – this category concerns four countries (2.5% of the total);
  - (d) countries where loss of the parliamentary mandate follows: (i) change of membership in the political party decided on by an MP, (ii) expulsion of an MP from his/her political party – this category concerns eight countries (5% of the total);
  - (e) countries where loss of the parliamentary mandate follows cessation of the party's membership decided on by an MP – in this case, the findings of the survey indicate that the relevant laws do not specify the circumstances of termination of party membership – this category concerns nine countries (5.5% of the total);
  - (f) countries where loss of the parliamentary mandate follows change of membership in the political party decided on by an MP – this category concerns 17 countries (10.5% of the total); this group includes a country in which the MP's refusal to join or withdrawal from the parliamentary faction of his/her party results in loss of the mandate.
3. The results of the survey show that the law of more than 74% of countries does not entail provisions establishing legal control of parliamentarians' compliance with their political affiliation declared at the time of election. Nevertheless, the fact that the legal systems of more than 25% of countries do contain such provisions is noteworthy and worrying. Moreover, in some regions these statistics are higher than in others. Among Asian countries, for instance, those which have introduced such control are slightly in the majority (51.7% of countries) whereas in Africa they represent a high percentage (35.8%) of all countries of the region. In 12 countries of Asia and Africa, the law provides that MPs may be excluded from parliament for both reasons: dissociation from the political party for which they stood in the elections and breach of party discipline. Much less frequently, such control has been established in countries of Europe (7.8%) and Latin America (13.8%).
4. The survey thus documents that the problem of protecting the free mandate and, as a consequence, of MPs' independence of party control has reached a dimension which requires reflection and action within the relevant national legislative bodies, political parties and, last but not least, the Inter-Parliamentary Union itself. As already mentioned, contemporary democracies must strive for a balance between the free mandate and a functional party system as a vehicle of effective governance, including the parliamentary system. While the former requires independence of MPs, the latter is largely based on loyal party membership and coherent action.

5. The multifaceted tensions that may occur between party control and the free parliamentary mandate should be resolved constructively through reconciliation and not suppression of one or another part of this relationship. While the free mandate is widely recognized as an essential component of contemporary democracy, nobody can reasonably question the essential role which the freedom to establish and join political parties plays in a democratic State. Nor can the autonomy of political parties in applying measures aimed at building their own unity be questioned.
6. As stated by the Committee on the Human Rights of Parliamentarians, MPs should enjoy human rights enabling them to carry out the parliamentary mandate.<sup>29</sup> While the Committee acknowledges that sanctions applied by the party may lead to the MP's expulsion if he/she expresses views that are unacceptable to the party, it "can hardly admit that a parliamentarian who has been expelled from a party for that reason should lose his seat [...]"<sup>30</sup>
7. All this means that the protection of the party systems by law (the State) at the expense of the independence of members of parliaments, even if felt to be absolutely necessary, must be kept within limits. On the one hand, the law should not ban disciplinary measures applied by parties to ensure party unity. On the other hand, it should not permit measures which would prevent the MP from being able to hold his/her mandate and carry it out in good faith and in accordance with his/her convictions. In this context, the loss of the mandate as a direct or indirect consequence of the change of party membership by an MP or a breach of party discipline appears to be at odds with the parliamentary free mandate as it has historically evolved. Legal independence from the voters as the ingredient of this type of the mandate must not be replaced by the disablement of MPs on account of their membership in political parties.

## 2 Basic recommendations

Analysis of the findings of the IPU survey may prompt the following recommendations:

1. The national legislature should consequently protect the basic elements of the free parliamentary mandate, in particular the MPs' responsibility to represent the entire nation, the MPs' freedom to determine their political affiliation, and their irrevocability. The national legislature should also refrain from legislation which subjects the MPs to excessive party control possibly resulting in the early termination of their mandates. In particular, direct or indirect (by means of expulsion from the party) revocation of the mandate by political parties should be avoided. Where such a possibility has been established by law, the relevant legislators should consider revisiting the issue in order to ensure conformity of the law with the principles of the free parliamentary mandate.

2. If the national legislature decides to counter the change of party membership by MPs, in no case should loss of the parliamentary mandate be automatically linked with such a change; nor should it be the only applicable measure. The relevant decision-making should be vested in independent bodies, possibly courts examining the validity of elections, and follow the principles of due process.
3. Electoral laws should seek to prevent excessive party control and, in particular, counter the “trade-off” practices making MPs hostages to arbitrary party decisions.
4. Political party control over implementation of the mandate by MPs, including the enforcement of party discipline, should be basically seen as an internal matter of political parties and their membership. The national legislature should avoid linking the relationship between MPs and their political parties with the legal status of parliamentarians. In particular, breaches of party discipline, including public statements or voting inconsistent with the party line should not be recognized by law as a sufficient basis for early termination of the MP’s mandate.
5. Political parties should apply cooperative and participatory methods in seeking the adherence of MPs to the party line.<sup>31</sup> Incentives usually produce better results than disciplinary penalties in this context. It is advisable for the parties to exercise a high degree of self-restraint in resorting to party discipline, which should basically be avoided in matters involving decisions based on conscience and moral convictions of individual MPs. Participation of MPs in party internal decision-making, recognition of MPs’ creativity and responsibility, and cautious involvement of party discipline are probably the most effective ways of resolving the dilemmas of the relationship between party control and the free parliamentary mandate.
6. Consequently, any disciplinary measures should be applied to MPs by their parties with a great deal of self-restraint since the application of disciplinary sanctions may put excessive pressure on the parliamentarians and so interfere with the implementation of the free mandate.
7. The essential elements of the parliamentary mandate, in particular those making up its free nature, should be subject to regulation under the Constitution. Any legal limitations on or exceptions from the free mandate should possess constitutional authority.

## FOOTNOTES

- 1 Proposal. IPU Issue Brief #1. *Political party control over the exercise of the parliamentary mandate*, 21.11.2007.
- 2 B. Lai, R. Melkonian-Hoover, *Democratic Progress and Regress: the Effect of Parties on the Transitions of States to and Away from Democracy*, *Political Research Quarterly*, Vol. 58/4, 2005, p. 551 et seq.
- 3 P. Webb, D. Farrell, I. Holliday (ed.), *Political Parties in Advanced Industrial Democracies*, Oxford University Press 2002, p. 1.
- 4 R. Gunther, J. Ramon Montero, J. J. Linz (ed.), *Political Parties: Old Concepts and New Challenges*, Oxford University Press 2002, p. 291.
- 5 E. Burke, *Speech at the Conclusion of the Poll*, 3 November 1774, in: P. Langford (general editor), *The Writings and Speeches of Edmund Burke*, Vol. 3: *Party, Parliament, and the American War 1774-1780*, Oxford University Press, New York 1996, p. 69.
- 6 M. Van Der Hulst *The Parliamentary Mandate. A Global Comparative Study*, Inter-Parliamentary Union 2000, p. 8.
- 7 *Ibid.* p. 8.
- 8 Compare also *ibid.*, p. 9 – 10.
- 9 A. Sajó, *Government: An Introduction to Constitutionalism*, Central European University Press, Budapest 1999, pp. 108 – 110.
- 10 M. Van Der Hulst, *ibid.*, p. 12.
- 11 See M.L. Whicker, R.A. Strickland, R. A. Moore, *The Constitution under Pressure: A Time for Change*, Praeger, New York 1987, p. 136-137.
- 12 K. Lawson, *Linkage and Democracy*; P.H. Merkl, *Linkage, or What Else? The Place of Linkage Theory in the Study of Political Parties*, in: A. Rommele, D. M. Farrell, P. Ignazi (ed.), *Political Parties and Political Systems: The Concept of Linkage Revisited*, Praeger. Westport, CT. 2005, p. 161 et seq. and p. 6 et seq. respectively.
- 13 R. Gunther and L. Diamond, *Types and Functions of Parties*, in: L. Diamond and R. Gunther (ed.), *Political Parties and Democracy*, John Hopkins University Press 2001, p. 7-8; M. L. Whicker, R. A. Strickland, R. A. Moore, *ibid.*, p. 137.
- 14 P. Mair, R. S. Katz, *Changing Models of Party Organization and Party Democracy. The Emergence of the Cartel Party*, *Party Politics*, vol. 1995, No. 1, p. 6 et seq.
- 15 P. Mair, R. S. Katz, *ibid.*, p. 6.
- 16 See A. Moreno, *Political Cleavages: Issues, Parties, and the Consolidation of Democracy*, Westview Press, Boulder 1999; compare also K. Lawson, *Five variations on a theme: Interest aggregation by party today*, in: K. Lawson, Th. Poguntke (ed.), *How Political Parties Respond: Interest Aggregation Revisited*, Routledge, New York 2004, p. 252 et seq.
- 17 L. McLean (ed.), *The Concise Oxford Dictionary of Politics*, Oxford University Press 1996, p. 364.
- 18 Compare also P. Mair, R. S. Katz, *ibid.*, p. 13.
- 19 See K. Pedersen, *From aggregation to cartel? The Danish case*, in: K. Lawson, Th. Poguntke (ed.), *ibid.*, p. 87 et. seq.

- 20 P. Mair, R. S. Katz, *ibid.*; on p. 26, they say: “Central to the earlier models [of party systems] was the idea of alternation in office - not only were there some parties that were clearly ‘in’ while others were clearly ‘out’, but the fear of being thrown out of office by the voters was also seen as the major incentive for politicians to be responsive to the citizenry. In the cartel model, on the other hand, none of the major parties is ever definitively ‘out’.
- 21 K. Heidar, R. Koole, Parliamentary party groups compared, in: K. Heidar, R. Koole (ed.), *Parliamentary Party Groups in European Democracies: Political Parties behind Closed Doors*, Routledge., London 2000, p. 252.
- 22 *Ibid.*
- 23 P. Mair, R. S. Katz,, *ibid.*, p. 7.
- 24 K. Heidar, R. Koole, *ibid.*, p. 254, 257.
- 25 *Ibid.*, p. 256.
- 26 D.J. Elzinga, De politieke partij en het constitutionele recht, *Ars Aequi*, Nijmegen 1982, quoted after K. Heidar, R. Koole, *ibid.*, p. 254-5.
- 27 For more information see the webpage of the Organization for Security and Co-operation in Europe - <http://www.osce.org/odihr/elections/serbia/24806>.
- 28 The Constitution of Panama provides the basic substantive and procedural elements of the revocation of the mandate:  
 Art. 151 – “The political parties may revoke the mandate of the Incumbent or Alternate Deputies whom they have nominated, which shall be subject to the following requirements and formalities:  
 1. The causes of revocation and the applicable procedure must be provided for in the party statutes.  
 2. The causes must refer to serious violations of the statutes and of the ideological, political or programmatic platform of the party and must have been approved by a resolution of the Electoral Court issued before the date of nomination.  
 3. The mandate of an Incumbent or Alternate Deputy shall also be revoked if he or she has been convicted of wilful wrong and finally sentenced to imprisonment of five or more years by a court of law.  
 4. The person concerned shall have the right, within his or her party, to a hearing and defence at two instances.  
 5. The decision of the party adopting revocation of the mandate shall be subject to appeal, which shall be heard in private meeting by the Electoral Court and which shall have suspensive effect.  
 6. For the application of the revocation of mandate, the political parties may, before the commencement of proceedings, establish popular consultation mechanisms with the voters of the corresponding constituency. The political parties may also, through examination proceedings, revoke the mandate of Incumbent and Alternate Deputies who have resigned from their party.”
- 29 IPU Committee on the Human Rights of Parliamentarians: “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.” – Case 1 in the Appendix.
- 30 Case 2 in the Appendix.
- 31 See sub-chapter 1.4 (General observations) of this paper.

## SUMMARY OF SELECTED CASES BEFORE THE IPU COMMITTEE ON THE HUMAN RIGHTS OF PARLIAMENTARIANS

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### **CASE 1 CONCERNING STANDING FOR ELECTIONS ON THE LIST OF OTHER PARTIES**

Six persons were elected in parliamentary elections on the “A” electoral union list, three of them being members of party A and the other three members of parties having joined the “A” electoral union.

Members of the “A” party left it three years later and the other MPs during the next electoral process upon being informed by the leadership of the coalition that its cooperation with them had ended.

In the next elections the person concerned stood as candidates on the list of other parties and were elected. The “A” electoral union bench in the Assembly requested the Speaker to replace them and he did so, having obtained the views of the Assembly’s Standing Committee. The MPs concerned had not been consulted or heard by the Standing Committee or by the Speaker.

That decision was later upheld by other bodies, one of which stated that there had been an evident breach of party allegiance and party discipline, of which their appearance on another party list had been sufficient proof.

The IPU Committee on the Human Rights of Parliamentarians stated that:

- A distinction must be made between the exercise of the parliamentary mandate and the right to stand in election;
  - MPs, when standing for election, must be treated like any other citizen and enjoy the same rights, which also means that they must be entitled to register on an electoral party list other than that on which they were elected;
  - 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.
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### **CASE 2 CONCERNING LOSS OF THE PARLIAMENTARY MANDATE AFTER EXPULSION FROM A POLITICAL PARTY**

#### **Expulsion from the political party**

After a decision taken by the Party’s Executive Committee, MP “X” was expelled from his political party of which he had been a founding member. “X” was a former Finance Minister dismissed from that post owing to his severe criticism of Government policy.

The decision of the Executive Committee to oust “X” from the party was, according to some members of the party, in breach of the Party’s Statutes and Regulations. It violated in particular the party’s rule that founding members cannot be excluded and the right of the member concerned to defend him or herself. It has also been noted that the Executive Committee, in its current composition, had to be considered illegal, and that consequently decisions taken by it had to be deemed null and void.

“X” submitted a complaint to a court requesting annulment of the decision in question, but the court ruled that it was not competent to take up the matter. The Court has not reacted to “X’s” reiterated request to take up the matter in accordance with its obligation under the Constitution.

In a bid to find a compromise, “X” later sent a letter of apology to the president of the party. However, the president reportedly did not deem its content sufficient and



demanded that “X” promise never again to criticize his government, which he refused to do.

### **Loss of parliamentary mandate**

After the expulsion of “X” the president of the political party sent a letter to the Speaker of the Assembly requesting him to strip “X” of his parliamentary mandate and to appoint someone else instead. Parliament’s Standing Committee decided to accept the request by the party president. That decision was later announced without a debate or vote in the parliament’s plenary sitting.

Some sources report that a forged document was used to persuade the Standing Committee to vote in favour of “X’s” expulsion. Several MPs have reportedly publicly stated that they never signed the declaration in support of “X’s” expulsion which was presented to the Standing Committee.

It has also been stated that a request submitted by 10 MPs, in conformity with the rules of procedure, to postpone the plenary sitting on the grounds that some of the issues to be raised required additional time for reflection, was intentionally ignored by the Speaker of the Assembly.

### **Arguments of the authorities**

It is important to note that, while the legal provisions of the country in question regarding parliamentary elections require candidates in these elections to be affiliated to a party, no legal provision makes party membership a condition to be or to remain a member of the Assembly.

The authorities nevertheless claimed, *inter alia*, that the system of proportional representation implied that membership in the parliament was tied to membership in a political party. In their opinion MPs have an obligation of loyalty towards the party leadership requiring an “unlimited faithfulness to all party leaders. Therefore, a failure to carry out this obligation must logically be sanctioned by erasing the name of the candidate from the party list or by his revocation as MP”.

In this case the IPU Committee on the Human Rights of Parliamentarians stressed that:

- The revocation of a parliamentarian’s mandate is a serious measure which irrevocably deprives such a member of the possibility of carrying out the mandate entrusted to him or her, and that it should therefore be taken fully in accordance with the law and only for serious reasons.
- It cannot, in the light of the provisions of Article 19 of the ICCPR, concede that the mere expression of a political view can lead to such a serious sanction as loss of parliamentary mandate.
- It recognizes that a political figure may be excluded from his or her party for having expressed views deemed unacceptable by the latter, but can hardly acknowledge that a parliamentarian who has been expelled from a party for that reason should lose his/her seat, in the last resort solely for having exercised his/her right to freedom of speech (particularly in cases where the Constitution stipulates that any imperative mandate is considered null and void).

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### **CASE 3 CONCERNING EXCLUSION FROM A POLITICAL PARTY**

Two MPs of political party “B” were charged with “failing to comply with their obligations” and requested to attend a disciplinary council of their party. They were not told of the reasons for their proposed exclusion from the party. Only later did they learn that the disciplinary measures had been prompted by their statements during the proceedings of a parliamentary committee.

The MPs concerned attended the meeting of the disciplinary council accompanied by lawyers. The presence of the MPs’ defenders was nevertheless strongly opposed by the chairperson of the sitting. He claimed that the meeting concerned internal affairs of the parliamentary faction and that he therefore could not allow anyone not involved in the faction to attend it. Finally, owing to the intransigent attitude of the lawyers, the character of the sitting was changed from “Disciplinary Council” to a “Hearing

Commission”. Having obtained that compromise the lawyers left the sitting. Three days later a document entitled “Report of the Disciplinary Council” was presented by the chairperson of the sitting.

It is important to note that the Constitution of the country in question provides that an MP forfeits his/her mandate upon exclusion from a political party.

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#### **CASE 4 CONCERNING BLANK LETTERS OF RESIGNATION (PENDING)**

Political party “C”, before including a name on lists for parliamentary elections, required that the future candidates sign three documents, including a typed letter of resignation addressed to the Speaker of the Assembly. The letters were not dated. Almost 30 of those candidates were elected.

Three years later a large group of MPs resigned from party “C” and formed a new political party “D”. The president of party “C” then passed the letters of resignation he had gathered to the Speaker of the Assembly.

Despite the protest of the MPs in question, the matter was referred to the Constitutional Court. The MPs affirmed that, since becoming members of parliament, they had never written or sent to the Speaker of the Assembly any letters of resignation.

The Constitutional Court of the country in question declared that the parliamentary seats of several MPs of “D” party had fallen vacant. The decision was based on letters of resignation obtained from the Speaker of the Assembly.

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