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ITALIAN, EUROPEAN AND INTERNATIONAL CONSTITUTIONAL VIEWS BETWEEN THE PARLIAMENTARY IMPERATIVE MANDATE, ITS PROHIBITION AND THE PHENOMENON OF 'TRANSFUGHISMO'*

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Abstract. The age-old issue of the so-called "transfughismo" has sometimes particularly incisive consequences on the dynamics of democracy as well as on opposition-majority relations. "Transfughismo" is the defecting of parliamentarians, once elected in a certain parliamentary group, who then switch to another parliamentary group, usually in support of the Government. The impact of this so-called "change of uniform" undoubtedly concerns aspects of political nature, nevertheless the origin of the problem is purely constitutional. Most of the Charters, both in Europe and outside its borders, provide for the prohibition of the imperative mandate: they consider the parliamentarian to represent the entire nation. The comparative debate is leading constitutionalists and institutions to reflect on the reintroduction of the imperative mandate, that is the obligation of the deputy or senator to strictly comply with the indications of the Party or parliamentary group, under penalty of forfeiture of the positions they hold in the Parliament, including the role of parliamentarian tout court. The elected, with the introduction of the imperative mandate (as is already provided for in some Constitutions, i.e., the Portuguese one), does not represent the nation but the party that nominated him. This paper examines numerous European, American and Asian constitutions, scrutinizing their similarities and differences, thus reflecting on which path could be most consistent with the most recent law amendments, the material constitution's change and the voters' actual expectations. Particular attention will be given to the institutions of *the Popular recall*, the *Abberufungsrecht*, the *Amtsenthebungsrecht* and the *Impeachment*.

Keywords: imperative mandate; prohibition; parliamentary mobility; Portuguese Constitution; popular recall; Impeachment.

* The passages originally in a different language will also be in English for a better understanding of the text by the reader, with some necessary exceptions.

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1. INTRODUCTION: THE PROBLEM OF "TRANSFUGHISMO"

"A parliamentarian who abandons the party or violates its voting discipline to the point of being expelled from it [Curreri 2004, 7][1] – breaks that unitary relation that binds him to the voters who voted for him by reason of that political affiliation. Its representation loses its representativeness.

The problem of the so-called "transfughismo" or "parliamentary defection"[2] is as ancient as it is geographically widespread [Curreri 2004, 77]. The so-called "change of uniform" is a widespread phenomenon in the parliamentary halls, where the frequent switching of the members from one party formation to another, usually, from an opposition to a majority group, is witnessed.

While appraising this phenomenon, it is compelling to scrutinize the imperative mandate and its prohibition present in many Charters, whereas in some residual constitutional provisions there are interesting exceptions to such a prohibition.

One must therefore ask oneself – borrowing Bonacci's metaphor [Bonacci 1967, 194] – whether the parliamentarian should really be assimilated to a public means of transport's driver to which the passenger-voters, who with their vote purchased the ticket must not turn to when the driver decides to divert the route, change destination or even abandon the vehicle.

2. IMPERATIVE MANDATE AND PROHIBITION THEREOF

The *punctum dolens* is the imperative mandate and its inadmissibility within the Italian constitutional system like many other legal systems, be they – like most – bicameral, or unicameral (such as the Hungarian Országgyűlésl within the EU and, outside it, the Ukrainian Verkhovna Rada).

Article 67 of the Constitution of the Italian Republic[3] states: "Each Member of Parliament represents the Nation and carries out his duties without a binding mandate."[4] Numerous Constitutions of the Old Continent are

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[1] Along the same lines see Arce 2004, 161: "The elected person who abandons the party for which he was elected retains representation, but loses his representativeness, that is, his loyalty towards the voters."

[2] In this regard there is a vast scientific literature, for example see: Zano. 2001; Bartolini 1997; Fracanzani 2000; Scarciglia 2005.

[3] Constitution of the Italian Republic of 27 December 1947, GURI, Serie Generale, n. 298, 27.12.1947.

[4] The prohibition of the imperative mandate was already provided for in Article 41 of the Albertine Statute of 4 March 1948: "The Deputies represent the Nation in general, and not only the provinces in which they were elected. No imperative mandate can be given to them by the Electors."

similar in content.[5] The same provision is found for Italian regional councilors, generally in Article 1(5), law No. 108 of 17 February 1968[6] ("Regional councilors represent the entire Region without imperative mandate"), as well as in the individual regional statutes, unlike Article 189 The Treaty on the Functioning of the European Union[7] which defines the European parliamentarians: "Representatives of the peoples of the States brought together in the Community," introducing a bond of a territorial and not a general nature in relation to the whole of Europe.

The judges of the Constitutional Court have clarified, as well as the English, German and Spanish constitutional jurisprudence [Curreri 2004, 15ff], what is meant by the prohibition of imperative mandate as conceived by the Constituent Assembly. The judgment of the Italian Constitutional Court of March 7, 1964, No. 14,[8] in rejecting the objection of unconstitu-

[5] To name a few: Federal Constitutional Law of the Republic of Austria of 1 October 1920, StGB1, No. 450/1920: "In the exercise of their functions, the members of the National Council and the members of the Federal Council shall not be bound by any mandate" (Article 56); Constitutional Act of the Kingdom of Denmark of 5 June 1953, Gesetz Nr. 169 vom 5. Juni 1953: "The members of the Folketing are bound solely by their convictions and not by an imperative mandate of the electors" (Article 56); Constitution of the Republic of France of 28 September 1958, Journal Officiel le 5 octobre 1958, Imprimerie nationale, 1958 (p. 1-23): "The imperative mandate is null and void" (Article 27); Constitution of the Federal Republic of Germany of 23 May 1949, Federal Law Gazette, p. 1, BGBl III 100-1: "(The deputies of the Bundestag) are the representatives of the whole people, they are not bound by mandates or instructions and are subject only to their conscience" (Article 38); Constitution of the Republic of Greece of 7 June 1975, Official Gazette A 111/1975: "Members have the unrestricted right to express their opinion and to vote according to their conscience" (Article 60); Constitution of the Grand Duchy of Luxembourg of 17 October 1868, Official Gazette of the Grand Duchy of Luxembourg of 22 October 1868, A23: "Deputies shall vote without the constraint of mandate and may only look to the interests of the Grand Duchy" (Article 50); The Constitution of the Kingdom of the Netherlands of 24 August 1815, consolidated version of 22 February 2023, Stb. 2023, 62: "Members shall vote without a mandatory mandate" (Article 67); Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No.78, item 483 as amended: "The deputies represent the nation. They are not bound by instructions from the voters" (Article 104); Constitution of the Republic of Romania or 21 November 1991, Official Gazette of Romania, Part I, No. 233 of 21 November 1991, republished in the Official Gazette of Romania, Part I, No. 758 of 29 October 2003: "In the exercise of their mandate, deputies and senators shall be at the service of the people. Any imperative mandate shall be null and void" (Article 66); Constitution of the Realm of Spain of 6 December 1978, BOE n. 311, of 29/12/1978. BOE-A-1978-31229: "The members of the Cortes General shall not be bound by any imperative mandate" (Article 67).

[6] Law No. 108 of 7 February 1968 on the election of the Regional Councils of the Regions with normal statute, GURI No. 61 of 06.04.1968.

[7] The Treaty on the Functioning of the European Union of 13 December 2007, OJ EU 26.10.2012, C 326/47.

[8] Judgement of the Italian Constitutional Court of 7 March 1964, No. 14, GURI, 1st Special Series – Constitutional Court, No. 67 of 14.03.1964, ECLI:IT:COST:1964:14.

tionality of Law No. 1643 of 6 December 1962, establishes that: "Article 67 of the Constitution, placed among the rules that pertain to the order of the Chambers and not among those that govern the formation of laws, does not explain effectiveness for the purposes of the validity of resolutions, but is aimed at ensuring the freedom of members of Parliament. The prohibition of imperative mandate means that the parliamentarian is free to vote according to the guidelines of his party but is also free to escape it." The Member or Senator may free himself not only from the particular interests of his electors but also from those of the parties on whose lists he has been elected, in order to better pursue the general and supreme interests of the Community. There is political representation but not a legal one, be it direct or indirect, of a civil nature, or of an organic type in an administrative key: a political representation of the member of Parliament as separated from the representativeness relegated to the socio-political sphere.

"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" [Burke 1996, 64-70]: with his speech to the voters of Bristol on November 3, 1774, the philosopher and politician Burke, advocating the defense of the principles of representative democracy against the idea that elected officials should act exclusively in defense of their voters, formulated the theory of the "free mandate", accepted in the Declaration of Louis XVI of June 23, 1789 which banned the imperative mandate, and was then transfused into the French Constitution of 1791, as a clear break with *the Ancien Régime*[9] and in line with illustrious scholars such as Montesquieu, Saint Girons, Rossi and Moreau [Scarciglia 2005, 68].

The theory of the imperative mandate's prohibition has been absorbed into most European and non-European constitutions. As Diez-Picazo has acutely observed [Díez-Picazo y Ponce de León 1991, 138], it is the ethical and cultural basis of a people that must curb the phenomenon of "transfughismo". The elected person who has voluntarily resigned or been expelled from

[9] Robespierre too, in the Discourse on the Constitution of 10.05.1793, ideologically adhered to the maintenance of the institution of the imperative mandate. For Robespierre – who recalls Clemenceau's speech to the Chamber of Deputies on 26.06.1881 [Philipon 1882, 23]: "Tous mandats son impératif. Un mandat non impératif n'est pas un mandat") – imperativeness was considered an essential characteristic of the elective mandate, with the consequence that such an adjective was considered pleonastic. The binding nature of the legislative mandate derives from the Rousseauian approach of the *Contrat social* and is substantiated in the phrase *mandate contractuel* which indicates the obligations assumed by the candidates towards the parties that proposed their inclusion in a list.

the party and its parliamentary group would have the moral, albeit not legal, obligation to renounce his mandate out of fairness towards those who voted for him because of this political affiliation. It is, therefore, to be considered ethically and politically inappropriate, as well as legally legitimate, the permanence in office of the elected regardless of their political-party events.

Because *de facto* but actually, also *de jure*, as we will shortly see, the parliamentarian occupies – as the jurisprudence of the *Bundesverfassungsgericht* has lucidly highlighted[10] – the double position of representative of the people in its entirety and of exponent of a specific party organization.

That *Parteienstaat* ("Party State"), in relation to which Kelsen – at the antipodes of Rousseau – hoped for a control of the deputies by the groups of voters who formed the parties, since the main cause of the negative transformation of parliamentary institutions was constituted by the irresponsibility of the elected towards the voters [Kelsen 1998].

Italian voters, protected by Articles 21, 48 and 49 of the Italian Constitution, can, of course, have the freedom to change political opinion at any time, but can holders of elected public offices linked to party movements freely and without any obstacle do the same?

Manifold authors have express their thoughts on this regard and they can be summarized as follows: party switching weakens the party system; it undermines governability; negatively affects the representativeness of the decisions taken; it favors political corruption aimed at altering the electoral results and, therefore, in the relations between the majority and the opposition, sometimes benefiting the former, other times the latter; it is to the body politic what fever is to the human body; the exercise of political power without contextual assumption of responsibility constitutes a worm that over time can erode political representation and, with it, the foundations of the current mechanism of democratic participation [De Esteban 1990, 13ff; Ornaghi 1998, 12; Mannino 2001, 69ff].

3. PARLIAMENTARY REPRESENTATION

The legal level of representation cannot be separated from the sociological and political level of representativeness: a parliamentarian is actually unique and at the same time assumes the role of a member of the institutions and a member of a specific party that has welcomed him or her on its lists. A deputy and a senator are elected as they are proposed by a political formation

[10] Judgement of the German Federal Constitutional Tribunal of 23 October 1952, n. 1, BVerfG 2,2; judgement of the German Federal Constitutional Tribunal of 17 August 1956, n. 14, BVerfG 5,85, both declared the political movements *Sozialistische Reichspartei* and *Kommunisten* unconstitutional, establishing the correct relationship between Article 21 GG on the role of parties and Article 38 GG on the Bundestag and on the prohibition of imperative mandate.

admitted to the electoral competition. The member of one of the branches of Parliament represents the nation (political representation) but also in an inseparable and essential way the party that allowed his/her election (representativeness). The relation that must link the moment of political representation to that of party representativeness could be legal representation, with more or less different variations, to ensure that the deputy who decides to change party and, therefore, as his/her institutional sprout, the parliamentary group,[11] is the recipient of duly regulated disciplinary, political or institutional consequences. The need to resize, mitigate or even abolish the prohibition of the imperative mandate is increasingly compelling, especially in consideration of the increasingly stronger bond of the elected to the party, and even more so if to be included in "blocked lists." It is appropriate to ask ourselves how unified the role of the party is with that of the elected, following his inclusion in the electoral lists (especially if "blocked") and, to what extent the voter who make the preference (where provided) does so because of the desire that his "favorite" realize the program of the party that has "co-opted" him in the list of candidates.

If the party is separated from the elected-candidate, an "impenetrable oligarchy" will be created [Pitkin 1967, 195]. This is contrasted with the logic of representative democracy, as Petroni says, "to maintain that it is normal for dozens of parliamentarians to join a side against which they had presented themselves" [Petroni 2000, 5].

It is not in line with the material constitution [Giulimondi 2016] to continue to theorize the absolute freedom of the parliamentary mandate as a fundamental principle of political representation while completely ignoring the role exercised by the parties. It is thanks to the latter "that today it is possible to combine national representation and imperative mandate, overcoming their presumed mutual incompatibility. Although in the past, in order

[11] For a study on parliamentary groups including an examination of their legal nature, powers, relationship with parties and internal regulations, see Heidar and Koole 2000; without affecting the constitutional principle of the prohibition of imperative mandate, the new Italian regulatory rules ("Organic reform of the Senate's Rules") approved by the Senate of the Republic with resolution 20.12.2017, GURI, General Series, No. 15, 19.01.2018, in any case provide for tools aimed at discouraging party switching. Article 13(1-bis), Reg. Sen., indeed provides that "Vice Presidents and Secretaries who become part of a Parliamentary Group other than the one to which they belonged at the time of election shall lose their office;" a similar provision has been inserted, in relation to the Bureau of the Standing Committees, in Article 27(3-bis), Reg. Sen., according to which "the members of the Presidency office who become part of a Group other than the one to which they belonged at the time of the election lose their office." As has been pointed out by the first commentators on the reform in question [Giupponi 2018, 4], the choice to remove the President of the Senate, second office of the state and substitute for the President of the Republic pursuant to Article 86, Constitution of the Italian Republic, from such provisions, certainly seems understandable. Less clear, however, appears the choice to exclude the Police Commissioner (and not the Secretaries) from this automatic forfeiture, since both figures seem to play (albeit in different ways) a particularly delicate role within the parliamentary organization.

to represent the general interest, the elected person had to enjoy a free mandate, without being subject to any form of constraint or responsibility towards the voters, today, he/she must be bound to the voters to the extent that the voters, through the parties, do not give him specific and rigid instructions but a general political mandate for implementation, even partial, of the political program prepared by the party. The binding nature of the mandate received does not contrast, but rather enhances the representative function carried out by the elected representative" [Curreri 2004, 81ff].

Paucis verbis, in modern democracies the voter does not only vote for a party, as an abstract entity, but also chooses the candidate called upon to carry out the program and *Weltanschauung* of the party itself. The elected is such, as a candidate for the party and voted for by the voters. He/She, therefore, does not represent him/herself, but the party together with the voters who voted for that party. If, therefore, his/her political representation derives from having been nominated by the party and voted for by the voters, the decision to abandon the former entails in itself an interruption of the representative relationship between the elected and the portion of the electoral body that voted for him.

The freedom of the parliamentarian must therefore be used "inside" and not "against" the party, allowing the representation of positions divergent from the majority's official one, thus reviving its internal dialectic [Ridola 1988, 133ff].

On the contrary, political irresponsibility is often a consequence of legal irresponsibility, as those who have broken with their party and know that the possibility of a re-candidacy is significantly reduced can become a loose cannon, who offers his/her services for personal purposes without having to answer to anyone: "It is precisely respect for internal democracy that would oblige the dissident parliamentarian on the constitutional level to fight his/her battles within the group and party and to accept its decisions, rather than abandon it while retaining the seat" [Bastida, Punset, and De Otto 1980, 308].

There are two logical-legal outcomes of what has been said so far.

The first, the urgency for state legislation to introduces a basic discipline that pushes the parties towards a common regulation based on general and clear principles and rules of tangible democracy within them.[12]

Secondly, a reshaping of the institution of the imperative mandate and a rethinking of its prohibition, even at the constitutional level, in the same way as the examples that some European and non-European legal systems offer us.

An indispensable premise is the need to maintain the prohibition of the imperative mandate, which is certainly not a "constitutional fossil" [Bobbio 1976, 60], in all those cases in which the decisions of the assembly pertain

[12] For an overview of doctrinal positions *in subiecta materia*, see Santoro 2003.

to the freedom and dignity of the person, to questions of conscience or of an ethical nature, hypotheses regulated in parliamentary regulations and possibly expandable.

4. PORTUGUESE CONSTITUTION AND OTHER CONSTITUTIONS

As previously anticipated, along the way to a possible reformulation of Article 67 of the Italian Constitution and the introduction into our legal system of instruments aimed at redefining the prohibition of the imperative mandate, we are rescued by the prescriptions of *Grundnormen* born within systems that are significantly different from each other (Bangladesh, India, Panama, Portugal and, initially also South Africa[13]), as well as legal institutions, such as the American, Andean and Japanese *Popular Recall* and the Swiss *Abberufungsrecht*, capable of expressing useful food-for-thought for a drastic downsizing of the phenomenon of "transfughismo."

Article 70 of the Constitution of Bangladesh[14] unequivocally spells out the imperative mandate for the members of Parliament: "A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he – (a) resigns from that party; or (b) votes in Parliament against that party; but shall not thereby be disqualified for subsequent election as a member of Parliament." Amendment 52 adopted in 1985 and supplementing the Indian Constitution,[15] Articles 150

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[13] Interim Constitution of South Africa of 22 December 1993, Gazette 1994-01-28, No. 15466, act No. 200 of 1993, provided for the loss of his/her seat by anyone who ceased to belong to the party that had nominated him/her in the elections or designated him/her as a senator (Articles 43.b, 133. b, 48 and 51.b); the Constitution of the Republic of South Africa of 8 May 1996, amended 11 October 1996, No. 108 of 1996, G17678, maintained only the dismissal by the party of the senator designated by it as a delegate to the Provincial Assembly (Articles 62.4. c,d).

[14] The Constitution of the People's Republic of Bangladesh of 4 November 1972, P.O. No. 76 of 1972.

[15] The Constitution of India of 26 November 1949, The Gazette of India extraordinary Nov. 26, 1949, 1949-2597 – Fifty-second Amendment, Bill No. 22 of 15th February 1985: "(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule." 4. Amendment of Article 190. In Article 190 of the Constitution, in sub-clause (a) of clause (3), for the words, brackets and figures "clause (1) of article 191," the words, brackets and figures "clause (1) or clause (2) of Article 191" shall be substituted. 5. Amendment of Article 191. In Article 191 of the Constitution, (a) for the brackets, figure and words "(2) For the purposes of this article," the words "Explanation. For the purposes of this clause" shall be substituted; (b) the following clause shall be inserted at the end, namely: "(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule." 6. Addition of Tenth Schedule. After the Ninth Schedule to the Constitution, the following Schedule shall be added, namely: 6 Tenth Schedule (Articles 102(2) and 191(2)) Provisions as to disqualification on ground of defection. 1. Interpretation. In this Schedule, unless the

context otherwise requires, (a) "House" means either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State; (b) "legislature party", in relation to a member of a House belonging to any political party in accordance with the provisions of paragrap. 2 or paragrap. 3 or, as the case may be, paragrap. 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions; (c) "original political party", in relation to a member of a House, means the political party to which he belongs for the purposes of sub-paragraph (1) of paragrap. 2; (d) "paragraph" means a paragraph of this Schedule. 2. Disqualification on ground of defection. (1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House-(a) if he has voluntarily given up his membership of such political party; or(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention. Explanation. For the purposes of this sub-paragraph, (a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member; (b) a nominated member of a House shall (i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party; (ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188. (2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election. (3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188. (4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifty-second Amendment) Act, 1985, is a member of a House (whether elected or nominated as such) shall, (i) where he was a member of a political party immediately before such commencement, be deemed for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party; (ii) in any other case, be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or, as the case may be, deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragrap. 3. Disqualification on ground of defection not to apply in case of split. Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing as faction which has arisen as a result of a split in his original political party and such group consists of not less than one-third of the members of such legislature party, (a) he shall not be disqualified under sub-paragraph (1) of paragrap. 2 on the ground (i) that he has voluntarily given up his membership of his original political party; or(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorized by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority

within fifteen days from the date of such voting or abstention; and(b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragrap. 2 and to be his original political party for the purposes of this paragrap. 4. Disqualification on ground of defection not to apply in case of merger. (1) A member of a House shall not be disqualified under sub-paragraph (1) of paragrap. 2 where his original political party merges with another political party and he claims that he and any other members of his original political party (a) have become members of such other political party or, as the case may be, of a new political party formed by such merger; or(b) have not accepted the merger and opted to function as a separate group, and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragrap. 2 and to be his original political party for the purposes of this sub-paragraph. (2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger. 5. Exemption. Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under this Schedule, (a) if he, by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party; or(b) if he, having given up by reason of his election to such office his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office. 6. Decision on questions as to disqualification on ground of defection. (1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final: Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final. (2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212.7. Bar of jurisdiction of courts. Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule. 8. Rules. (1) Subject to the provisions of sub-paragraph (2) of this paragraph, the Chairman or the Speaker of a House may make rules for giving effect to the provisions of this Schedule, and in particular, and without prejudice to the generality of the foregoing, such rules may provide for (a) the maintenance of registers or other records as to the political parties, if any, to which different members of the House belong; (b) the report which the leader of a legislature party in relation to a member of a House shall furnish with regard to any condonation of the nature referred to in clause (b) of sub-paragraph (1) of paragrap. 2 in respect of such member, the time within which and the authority to whom such report shall be furnished; (c) the reports, which a political party shall furnish with regard to admission to such political party of any members of the House

and 151 of the Panamanian Constitution[16] and Article 160 of the Constitution of Portugal[17] reflect the same rationale with diametrically opposed legislative

and the officer of the House to whom such reports shall be furnished; and(d) the procedure for deciding any question referred to in sub-paragraph (1) of paragrap. 6 including the procedure for any inquiry which may be made for the purpose of deciding such question. (2) The rules made by the Chairman or the Speaker of a House under sub-paragraph (1) of this paragraph shall be laid as soon as may be after they are made before the House for a total period of thirty days which may be comprised in one session or in two or more successive sessions and shall take effect upon the expiry of the said period of thirty days unless they are sooner approved with or without modifications or disapproved by the House and where they are so approved, they shall take effect on such approval in the form in which they were laid or in such modified form, as the case may be, and where they are so disapproved, they shall be of no effect. (3) The Chairman or the Speaker of a House may, without prejudice to the provisions of Article 105 or, as the case may be, Article 194, and to any other power which he may have under this Constitution direct that any willful contravention by any person of the rules made under this paragraph may be dealt with in the same manner as a breach of privilege of the House."

16 Article 150, Constitution of the Republic of Panama: October 11, 1972 (as Amended to July 27, 2004) "Members shall act in the interest of the nation and shall represent in the National Assembly their respective political parties and their constituency voters;" Article 151: "Political parties may terminate the mandate of principal or alternate Assembly members they have nominated under the following conditions and formalities: 1. The reasons for the termination of the mandate and the applicable procedure must have been established in the party bye-laws; 2. The reasons must refer to grave violations of the by-laws and of the ideological, political or general platform of the party, and must have been approved by means of a written resolution issued by the Electoral Tribunal prior to the date of nomination; 3. The sentencing of the principal or alternate member for premeditated offense to five years or more in prison by enforceable decision of a court of law is also a cause for termination of the mandate; 4. The person concerned shall have the right to be heard by his/her Party and defend himself/herself in two different instances; 5. The Party's decision to terminate the mandate shall be subject to an appeal which can only be heard by the Electoral Tribunal and which shall have suspending effect; 6. For the application of the termination procedure, the parties may establish consultation mechanism with voters in the respective constituency prior to initiating the process. Political parties may also, by summary procedure, terminate the mandate of principal and alternate members who have left their party. The constituency voters may request the Electoral Tribunal to terminate the mandate of independent principal and alternate members they have elected, provided they fulfill the requirements and formalities established by law."

17 Article 160, Constitution of the Republic of Portugal of 2 April 1976, Diário da República n.º 86/1976, Série I de 1976-04-10: "((Loss and resignation of seat) 1. Members of the Assembly of the Republic shall lose their seat in the event that: a) They become subject to any of the disqualifications or incompatibilities provided for by law; b) They do not take up their seat in the Assembly, or they exceed the number of failures to attend laid down in the Rules of Procedure; c) They register as members of a party other than that for which they stood for election; d) They are convicted by a court of any of the special crimes for which political officeholders may be held liable, which they commit in the exercise of their functions and for which they are sentenced to such loss, or they are convicted of participating in organisations that are racist or display a fascist ideology. 2. Members of the Assembly of the Republic may resign their seat by means of a written declaration."

techniques. Last article brought us back to Europe, an isolated case among the legal systems of the Member States of the European Union, but thus not to be overlooked, as an important example also for our examination. Article 160(1), c) of the Portuguese Constitution, in sanctioning the loss of the mandate by deputies who "register as members of a party other than that for which they stood for election;"[18] establishes precisely that principle which can be deduced from what we dealt with previously: the new electoral disciplines in Italy and in the other States, the changing structure of the parties, the more stringent link between the elected and the party that expressed him/her, as well as the evolution of the Western democracies themselves towards majoritarian systems at the parliamentary level and presidential systems at the governmental level ("executive-power centrism" *versus* "legislative-power centrism"), highlight the absolute need to prevent continuous switching of parliamentarians from one group to another, from one side to another, precisely to avoid an invalidation of the executive's action and the majorities' policies that support it. *Last but not least*, the enhancement of the ethical aspect emerges here: voters will no longer be witnessers of the periodic "transhumance" of the deputies and senators that they elected for the party and had placed their hopes on, into ideologically distant territories. A further consequence of the removal from the Charters of the prohibition of the imperative mandate could be a greater incentive to go to the polls, given the conspicuous and general increase in the abstention of electoral bodies in recent decades.[19]

The Spanish attempt of contractual origin to curb "transfughismo" by virtue of the "Acuerdo sobre un código de conducta politica en relación con el transfuguismo en las corporaziones locales" of 7 July 1998,[20] renewed and supplemented on September 26, 2000[21] and May 23, 2006,[22] between the Minister of Public Administration and the representatives of the main Spanish political parties, constitutes a political way of dealing with the

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[18] Miranda and Canotilho [Miranda 1978, 404; Canotilho 1987, 564] have pointed out that there are other Portuguese constitutional provisions that do not allow a party imperative mandate to be considered *in force*, even in the absence of a prohibition of imperative mandate: Article 152, No. 3, Const. Port. which regulates the mandate in the general interest of the country; Article 154, c. 1, Const. Port. which provides for the inclusion of independent candidates in the party lists; Article 163, c), Const. Port. where the position of the independent candidate who leaves the party without defecting to another is valued.

[19] For a careful and precise analysis of the vote of Italians with detailed tables, see De Vidovich 2012-2013. It must be stressed a full-blown exception to the widespread and interstate increase in abstention in voting in the Polish presidential elections held on 18.05.2025 and 1.06.2025 with an interesting percentage of voters of 67.31% in the first round and 71.63% in the second round (data available on wybory.gov.pl).

[20] Available on www.losgenoveses.net.

[21] Available on web.psoe.es/politicamunicipal.

[22] Available on www.seap.minhap.gob.es.

problem and, as such, devoid of the binding force possessed by a constitutional norm with consequent tempered effects.

To the possible objection to the removal of the prohibition of the imperative mandate based on the totalitarian origins of the imperative mandate, one can respond without hesitation that the status of the deputy or senator and his/her "being dependent" on a political formation that got him/her elected is part of a multi-party-system and not a single party's one as in communist countries.[23]

In fact, there are instruments, outside the constitutional articles, that give voters the possibility of intervening in the event that their parliamentarian is found to be in breach of the "party and/or political mandate."

5. POPULAR RECALL

The most widespread is that of *popular recall*[24] – an institution of direct popular democracy such as the abrogative, confirmatory and consultative referendum, popular action and petition – used for the first time in the City of Los Angeles in the years 1903 and 1909 [Ronchi 2009, 18-20], then constitutionalized in fifteen states of the U.S.A. between 1908 and 1974[25]

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[23] A hypothesis of an imperative mandate in a country with real socialism can be found in Article 13.b, Czechoslovak Law No 125 of 29.2.1920 on the Electoral Tribunal (available on https://www.zakonyprolidi.cz/cs/1920-125), which conferred on that court the power to suspend first – and then to revoke (pursuant to Article 4) – the mandate of a Member of Parliament who, for futile or dishonorable reasons, had been expelled from the party on whose lists he had been elected, with his or her replacement by the first of the non-elected members on the list; it is advisable to read for an quick overview on this topic: Scarciglia 2005, 77-86; Curreri 2004, 109-11, 128-30.

[24] *Ex pluribus*, see Ronchi 2009, 1-43.

[25] The North American institution of *popular recall* has been introduced in the following Constitutions of some States of the United States as amended, with the exception of that of Louisiana where it is already provided for in the original version of the text: Article II(18), Constitution of the State of Oregon of 9 November 1857, as amended to 1908, Oregon Official Register of State, District, and County Officiers 1907, 110/907; Article II(15c), Constitution of the State of California of 7 May 1879, as amended to 1911, California Statutes of 1880; Article XXI(2), Constitution of the State of Colorado of 1 July 1876, as amended to 1912, Colorado General Assembly, "Constitution of the State of Colorado." (1877). Session Laws 1861-1900.1331; Article I(33), Constitution of the State of Washington of 1 October 1889, as amended to 1912, November 11, 1889.26 Stat. Proclamation, p. 10; Article VI(6), Constitution of the State of Idaho of 3 July 1890, as amended to 1912, Idaho Code 1890, Vol. I; Article II(9), Constitution of the State of Nevada of 14 September 1864, as amended to 1912, Section 3 to 187, inclusive, of chapter 595, Statutes of Nevada 2019, at p. 3767, title 56 of NRS; Article VIII(3), Constitution of the State of Arizona of 9 December 1911, as amended to 1912, Statutes of Arizona 2018, at p. 2278; Article II(8), Constitution of the State of Michigan of 1 April 1963, https://legislature.mi.gov/Laws/MCL?objectName=MCL-CONSTITUTION;

and taken up by the Japanese[26] Constitution and by some South American legal systems.[27]

The procedural prototype of *popular recall* is represented precisely by the one configured in Article 72 of the Constitution of Venezuela of 1999[28]: "All magistrates and other offices filled by popular vote are subject to revocation. Once half of the term of office to which an official has been elected, has elapsed, a number of voters constituting at least 20% of the voters registered in the pertinent circumscription may extend a petition for the calling of a referendum to revoke such official's mandate. When a number of voters equal to or greater than the number of those who elected the official vote in favor of revocation, provided that a number of voters equal to or greater than 25% of the total number of registered voters have voted in the revocation election, the official's mandate shall be deemed revoked, and immediate action shall be taken to fill the permanent vacancy in accordance with the provided for in this Constitution and by law. The revocation of the mandate for the collegiate bodies shall be performed in accordance with the law. During the term to which the official was elected, only one petition to recall may be filed."

Article X(26), Constitution of the State of Louisiana of 20 April 1974, 1975 Louisiana Register, Volume 1, January edition; Article IV(3), Constitution of the State of Kansas of 29 January 1861, as amended to 1914, https://sos.ks.gov/publications/kansas-constitution.html; Article III(10), Constitution of the State of North Dakota of 1 October 1889, as amended to 1920, https://ndlegis.gov/assembly/revised-codes-and-compiled-laws/1895/constitution-of-north-dakota.pdf; Article XIII(12), Constitution of the State of Wisconsin of 13 March 1848, as amended to 1926, https://archive.org/details/esrp1260851261/page/14/mode/2up; Article XI(8), Constitution of the State of Alaska of 24 April 1956, as amended to 1960, https://ltgov.alaska.gov/wp-content/uploads/PDF-Pocket-Constitution.pdf; Constitution of the State of Montana of 6 June 1972, as amended to 1976, https://courts.mt.gov/external/library/docs/72constit.pdf; Article VIII(6), Constitution of the State of Minnesota of 13 October 1957, as amended to 1974, https://www.revisor.mn.gov/constitution/.

[26] Article 15, Constitution of the Empire of Japan of 3 November 1946, The Official Gazettes, a Special Edition, 1946: "1. The people have the inalienable right to choose their representatives and officials and to dismiss them. 2. All representatives and officials are at the service of the whole community and not of any particular group of it"; Article 79(c. 1), Const. Jap.: "[…] The appointment of Supreme Court justices will be ratified by the people at the first general election of the House of Representatives following their appointment; and will again be submitted for ratification at the first general election of the House of Representatives after a 10-year term in office, and so on. In the cases mentioned in the preceding paragraph, when a majority of the voters indicate that they are in favor of the dismissal of a judge, he shall be dismissed […].

[27] Article 103, Constitution of the Republic of Colombia of 4 July 1991, Gaceta Constitucional No. 116 de 20 de julio de 1991; Articles 31, 139, n. 17, 191 and 198, Constitution of the Republic of Peru of 31 October 1993, Diario Oficial "El Peruano", 29 de diciembre de 1993; Articles 72, 197 and 233, Constitution of the Bolivarian Republic of Venezuela of 15 December 1999, Gaceta Oficial del jueves 30 de diciembre de 1999, n° 36.860.

[28] See ft. prev.

The *popular recall* is symmetrical to the elective public office, including the parliamentary one, the latter attributable to the State-Community, *id est* to the electoral body which, according to the different types of regulations, elects, chooses, indicates, appoints its own "representatives" to the parliamentary, magistrate and administrative institutions.

If the mentioned *nunci* depart from the received political and administrative mandate, the Community that insists on the territorial district concerned may request, through a reasoned collection of signatures (the number of which differs according to the legal system), the removal of the parliamentarian, official or magistrate who has exercised his or her office at least for a certain period of time. If the pre-established number of signatures is reached, a vote is held (in the form of a referendum) – varying the structural and functional quorum from legislation to legislation – thanks to which the voter can confirm or not the name whose revocation is requested, possibly – based on the Constitution or implementing legislation – indicating the name of the substitute in case the *petition* is accepted.

In some particularly detailed and guaranteeist regulations, an adversarial procedure is also provided, in compliance with rules similar to those of civil proceedings or administrative procedures and, in particular, of the adversarial principle, together with the provision, in the event of a dispute, of the possibility of appealing to the county court.

Similar to *the recall* is the Swiss cantonal *Abberufungsrecht*[29] (in French idiom *droit de révocation*), different from the *Amtsenthebungsrecht*[30] which

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[29] The Abberufungsrecht is provided for: in Article 57, Constitution of the Canton of Berna of 6 June 1993, BBI 1994 III 1883, I 40; nel &44, Constitution of the Canton of Lucerna of 17 June 2007, BBI 2008 5789, 1431; in Article 27(c. 2), Constitution of the Canton of Uri of 28 October 1984, BBI 1985 II 1343; in Article 28, Constitution of the Canton of Solothurn of 8 June 1986, BBI 1987 II 526; nel &44, Constitution of the Canton of Schaffhausen of 17 June 2002,BBl 2003 6877 3347; nel & 25, Constitution of the Canton of Thurgau of 16 March 1987, BBl 1989 III 1722 873; but not in the Federal Constitution of the Swiss Confederation of 18 April 1999, Fedlex RS 101, RU 1999 2556.

[30] Article 61, Constitution of the Federal Republic of Germany (see fn. 3): "(1) The Bundestag or the Bundesrat may impeach the Federal President before the Federal Constitutional Court for willful violation of this Basic Law or of any other federal law. The motion of impeachment must be supported by at least one quarter of the Members of the Bundestag or one quarter of the votes of the Bundesrat. The decision to impeach shall require a majority of two thirds of the Members of the Bundestag or of two thirds of the votes of the Bundesrat. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body. (2) If the Federal Constitutional Court finds the Federal President guilty of a willful violation of this Basic Law or of any other federal law, it may declare that he has forfeited his office. After the Federal President has been impeached, the Court may issue an interim order preventing him from exercising his functions"; Article 60(c. 6), Federal Constitutional law of the Republic of Austria (see fn. 3): "Before the expiration of the functional period the Federal President can be deposed by a people's referendum. The people's referendum is to be carried out if the Federal Assembly demands it. The Federal

is closer to US *impeachment*[31] or impeachment of the President of the Italian Republic.[32] The procedure followed is similar to what has been described above, even if the legal effects are considerably broader in scope due to the fact that the final purpose to be drawn on is the early dissolution of the Assembly: in this case, therefore, a qualified minority involves the entire electoral body which is called to the polls for a second time to confirm, or dissolve, before its natural expiry, the cantonal parliament.

The Italian legislator has also felt urged by this doctrinaire, legislative, constitutional and jurisprudential fervor, of European and international scope, to engage the highest value normative function in order to stop an *extra ordinem* excess of switching between the groups: "The litmus test of the unresolved contradictions of the parliamentary groups in the Italian legal system" [Merlini 2004, 14] is the enlargement of the "mixed" group which, born to accommodate those who have not been able to form one independently, has become a "Frankenstein" group, the *refugium peccatorum* of those who have left their group in disagreement with it and with the party that nominated them, completely distorting the prohibition of the imperative mandate.

As a result not only the Italian legislator – even surreptitiously through the amendment of the Senate of the Republic's rules[33] – but also the governments and assemblies of European and non-EU states are trying to provide a solution to the natural tension between the principle of parliamentary representation and the role of political parties with different formulas, taking into particular consideration Article 160 of the Constitution of Portugal,[34] which "could perform the function of coordinating constitutional provisions that are the expression of periods and conceptions differentiated over time, on the one hand the older – representative liberal model – on the other the modern – Party State" [Scarciglia 2005, 162].

Assembly is to be convoked for this purpose by the Federal Chancellor, if the National Council has passed such a motion. For a decision by the National Council the presence of at least one-half of the members and a majority of two-thirds of the votes cast is required. By such a decision by the National Council, the Federal President is prevented from the further exercise of his office. The rejection of the deposition by a people's referendum is taken to be a new election and has the consequence of a dissolution of the National Council. Also, in this case the entire functional period of the Federal President may not last more than twelve years."

31 Article II(IV), Constitution of the United States of America of 17 September 1787, https://constitution.congress.gov/constitution/: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

32 Article 90, Constitution of the Italian Republic (see fn. 1): "The President of the Republic is not responsible for the actions performed in the exercise of presidential duties, except in the case of high treason or violation of the Constitution. In such cases, the President may be impeached by Parliament in joint session, with an absolute majority of its members."

33 See fn. 9.

34 See fn. 14.

CONCLUSIONS

We can conclude with one reflection and one doubt.

The reflection is based on sovereignty of the People who exercise it in the forms and within the limits dictated by the Constitutional Charters, first and foremost of the 27 Member States of the European Union. The sovereignty conferred on the people is at the origin of all constitutional norms and is itself the first to be damaged whenever the conduct of a parliamentarian is in contrast with what is indicated by the electorate through its vote. Parties constitute intermediate bodies essential for the correct democratic dynamics of a legal system,[35] even if it is always and only the *voluntas civium* that is the primary source of legitimacy of the structural constitutional bodies of a state, starting with Parliament (unicameral or bicameral).

The doubt – necessary to create innovation (legal and normative) as Bertolt Brecht teaches us – on the other hand is substantiated in the following observation: what if it is not the parliamentarian who changes his/her political and programmatic line but the party to which he/she belongs that during the legislature, radically changes its position, behavior, posture and attitude with respect to its initial electoral program and ideal?

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[35] For an in-depth analysis of the role of parties, see Giulimondi 2020.

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