

JUDGMENT  
ON INTERPRETATION  
**of Article 68 paragraphs (1), (2) and  
Article 69 paragraph (2) of the Constitution**  
(Complaint no.8b/2012)

CHIȘINĂU

19 June 2012

## JUDGMENT ON INTERPRETATION OF ARTICLES 68.1, 68.2 AND 69.2 OF THE CONSTITUTION

In the name of the Republic of Moldova,

The Constitutional Court, sitting in the following composition:

Mr Alexandru TĂNASE, *President*,

Mr Petru RAILEAN, *judge-rapporteur*,

Mr Dumitru PULBERE,

Mr Victor PUȘCAȘ,

Mrs Elena SAFALERU,

Mrs Valeria ȘTERBET, *judges*,

and Mrs Tatiana Oboroc, *registrar*,

Considering the complaint lodged on 27 April 2012,

which was registered on that date,

Having examined the complaint in a public sitting,

Considering the acts and files of the case,

Having deliberated in a private plenary sitting,

Delivers the following Judgment:

### PROCEDURE

1. The case originated in the complaint filed with the Constitutional Court on 27 April 2012, under articles 135 paragraph (1) letter b) of the Constitution, 25 paragraph (1) letter g) of the Law on the Constitutional Court and article 38 paragraph (1) letter g) of the Code of Constitutional Jurisdiction, Members of the Parliament, Mr. Valentin Popa and Valeriu Munteanu, on:

- the interpretation of Article 68 paragraph (1): “In **the exercise of their mandate**, the Members are in the service of the people.”
- the interpretation of Article 68 paragraph (2): “Any **imperative mandate** is null.”
- the interpretation of the Article 69 paragraph (2): “The official position of the Member shall cease on the date of the legal meeting of the newly-in Parliament, in the case of resignation, **waiving the mandate**, of incompatibility or death.”

2. The authors of the referral have requested to the Constitutional Court for the interpretation of article 68 paragraphs (1), (2) and article 69 paragraph (2) of the Constitution to clarify:

- a) **The components of mandate exercise** and the existence of the connection between “being in the service of the people” and “representative of the supreme legislative power”;
- b) If the constitutional provision according to which “Any imperative mandate is null,” admits **waiving the mandate in case the Member refuses** to participate directly in the activities required for the exercise of legislative power, which is part of;
- c) If the words “waiving the mandate” mean **waiving the mandate also in cases when the legislator fully aware refuses** to exercise the national sovereignty through the legislative body, which is part of.

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3. By the decision of the Constitutional Court of 14 May 2012 the referral has been declared admissible, without prejudging the merits of the case.

4. In the examination of the appeal, the Constitutional Court requested the opinions of the Parliament, the Government, and the President's Apparatus.

5. At the plenary session of the Court the authors of the referral participated in the person. Parliament was represented by Mr. Sergiu Chirica, Senior Adviser in the Legal Directorate of the Parliament Secretariat. The Government was represented by Mr. Oleg Efrim, Minister of Justice.

### RELEVANT LEGISLATION

6. Relevant provisions of the Constitution (O. G. No. 1/1, 1994) are as follows:

#### Article 1

##### The State of the Republic of Moldova

"[. . . ] (3) The Republic of Moldova is a **democratic** rule of law, in which human dignity, citizens' rights and freedoms, the open development of human personality, justice and political **pluralism** represent supreme values and are guaranteed."

#### Article 2

##### Sovereignty and State Power

"(1) National sovereignty belongs to the people of the Republic of Moldova, who exercise it directly and through its representative bodies in the forms laid down in the Constitution.

(2) No individual, no part of the people, nor a social group, political party or other public party may exercise the State power in their own name. The usurpation of State power constitutes the gravest crime against the people."

#### Article 60

##### Parliament, the Supreme legislative and representative body

"(1) The Parliament is the Supreme representative body of the people of the Republic of Moldova and the sole legislative authority of the State.

(2) The Parliament consists of 101 members."

#### Article 68

##### **Representative mandate**

"(1) In the exercise of their mandate, the Members of Parliament are in the **service of the people**.

(2) **Any imperative mandate is null.**"

#### Article 69

##### Parliamentary Mandate

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"[...] (2) The official position of a Member of Parliament shall cease on the date of the legal meeting of the newly elected Parliament, in the case of resignation, **waiving of mandate**, incompatibility or death."

### IN LAW

7. The Court holds that the power with was vested by Article 135 paragraph (1) letter b) of the Constitution requires the establishment of genuine and full meaning of the constitutional norms, which can be done through textual interpretation or functioning, as far as it can be inferred from the text of the Constitution, given the generic nature of the regulation, specific situations which the legislator could not provide them at the time of drafting the regulation, further norms (related or even contradictory), complex situations in which the norm shall be applied etc.

8. From the contents of the referral, the Court notes that it regards in essence the possibility of termination of mandate, without the consent of the Member, in the case of his/her non-participation in meetings of the plenary or in the meetings of specialized committees of the Parliament.

9. In this regard, the Court holds that the appeal refers to a set of interconnected elements and principles with constitutional value, as the representative nature of the mandate of the MP, the nullity of the imperative mandate, the principles of democracy and political pluralism.

10. In this context, in order to elucidate the content of the provisions of articles 68 paragraph (1), (2) and 69 paragraph (2) of the Constitution, the Court will operate, in particular, with the provisions of articles 1, 2, 60, 68 and 69 of the Constitution, with its previous jurisprudence, as well as with the principles enshrined in the international law, using all the methods of legal interpretation.

11. The three questions to the Court are interdependent. Taking into account the fact that the answer to the second question influences the reasoning on the third question, these will be jointly tackled. Thus, the Court will examine: a) the content of the representative mandate, in terms of the activities covered by the Member of Parliament s mandate found "in the service of the people"; b) the nullity of the imperative mandate and irrevocability of representative mandate; c) cases of waiving the mandate of Member.

12. Also, the Court will interpret the constitutional provisions taking into account the role and the importance of the parliamentary opposition in a democratic system, within the meaning of the principles of democracy and political pluralism, sanctioned by Article 1 paragraph (3) of the Constitution.

### I. COMPONENTS OF EXERCISING THE MANDATE BY THE PARLAMENTARIANS FOUND IN "IN THE SERVICE OF THE PEOPLE"

#### A. Arguments of the authors of the referral

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13. The authors of the referral consider that the provision "*In the exercise of their mandate, the Members are in the service of the people*" from the paragraph (1) of the Article 68 of Constitution has the significance that the exercise of State power is held by the direct participation of parliamentarians in plenary session, as well as in the meetings of the specialized commissions of the Parliament.

14. In the opinion of the authors of the referral, other activities of the parliamentarian, such as meetings with voters, hearing them, addressing to different courts with complaints, petitions, appeals etc., are activities adjacent to the exercise of national sovereignty, which the lawmakers can undertake them voluntarily.

15. According to the authors, the referral is based on the circumstance that the parliamentarians of the faction of the Communist Party, under various pretexts, using parliamentary boycott for long periods of time, are not participating in the plenary sessions of the Parliament and at the meetings of the specialized commissions of the Parliament (Sep.-Dec. 2009 - 159 absences; Feb. -Sep. 2010 - 951 absences; 2011 - 623 absences; 2012 - no presence), which, in their view, it is an evasion of the exercise of national sovereignty, a right that is provided by the people in the elections and that is achieved by the passing of the regulatory framework, strategies and plans for public policy of the State in plenary sittings of the Parliament.

16. The authors of the referral consider that the absence from the plenary sessions of the Parliament and parliamentary committees sessions must be qualified as a permanent violation of legal obligations to respect the Constitution and the laws in force, liable to sanction in the form of loss of mandate.

### **B. Findings of the Court**

17. The Court holds that, in accordance with the rule of law, political power belongs to the people. If the first two defining elements of the State - the territory and the population - have an objective-material nature, the third essential element - national sovereignty - has a subjective -volitional nature and it means that the right to command belongs to the people.

18. As specified in Article 2 (1) of the Constitution, "national sovereignty belongs to the people of the Republic of Moldova, who directly exercise it and through its representative bodies in the forms laid down in the Constitution.

19. If in the case of the referendum we are in presence of a direct form of government by the people, in case of the exercise of national sovereignty through representative bodies, we can speak of an indirect or representative governance, of the people, which means that people send the right to command to delegated powers, which are legislative power, executive power and judicial power.

20. According to the Article 60 of the Constitution, the Supreme representative body of the people and the sole legislative authority of the state is Parliament, composed of 101 members.

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21. The Court holds that the parliamentary mandate defines a public office obtained by electing the parliamentarian by the electorate, for its representation in achieving Parliament's powers.

22. The contents of the parliamentary mandate is preset by Constitution, law, parliamentary regulations or on customary way, being deducted from the exercise of the powers that make up the competence of Parliament, and represents the totality of the rights and obligations of the parliamentarian, which may be of political and patrimony nature, as well as the guarantees of freedom to exercise the mandate and independence of the State.

23. The Constitution does not provide a specific description of the work of the parliamentarian, stating the general framework of the exercise of the parliamentary mandate - the exercise of powers that make up the competence of Parliament. The Court holds that, in the exercise of their mandate, Members of Parliament perform several functions: of *representation*, *decision-making*, *monitoring and control*.

24. The activities carried out by parliamentarians in the exercise of their mandate reveal that the exercise of national sovereignty or State power occurs through the legislative activity.

25. On the other hand, it is obvious that the legislative function is largely a function exercised by the majority, as party members or of parties in power, usually, has at least a simple majority of mandates in Parliament, so that individual members and minority groups and only play an indirect role in the legislative process.

26. At the same time, limiting the role of a parliamentarian to work just to attend the voting meeting is too reductive. Parliamentarian's activity in the process of decision-making is difficult to quantify. It is not enough to measure the absence of lawmakers from voting, the number of questions they formulate or of draft laws proposed.

27. Taking into account that they are representatives of the people, appointed for this purpose by the choice of voters, on the whole, within the *representation function* the lawmakers shall interpret the public opinion and to communicate the views of voters.

28. When dealing with any problems or issues related to governance, voters often address to parliamentarians. They usually receive calls and letters from citizens or citizens in the audience, in the office and in the field, with the request to address some issues related to employment insurance, social welfare, agriculture, justice, pension or financial problems. Thus, a lawmaker is to devote a considerable part of his time to direct support to the citizen's needs. Through this function of "social welfare" in the territory, the parliamentarian provides information and advice on a wide range of government programs, this being an activity inherent to his/her election within the Parliament. At the same time, this activity can serve as the MP for documentation in the exercise of his/her legislative role and Government monitoring.

29. Lawmakers also may try to influence their colleagues in the party to take certain positions and political guidelines, according to the line of thinking of their

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electoral segment, or to join forces in order to make known certain problems of citizens.

30. This activity is important for representation in the political struggle in Parliament of political debates of the society, opinions, ideas that have as source different social, political, economic or cultural categories. In this manner, the people, as a holder of national sovereignty, exercising their sovereignty, not only on the occasion of the electoral process, but for the entire duration of the mandate provided in to the Parliament that is in its service.

31. Clearly, the effectiveness with which MPs represent their voters largely depends on their position in Parliament. Thus, as members of the parliamentary majority, lawmakers are better positioned to ensure that are taken into account the interests of their voters in the development of Government policy. It is for this reason that, in the parliamentary practice, it is recommended the exercise in good faith of the constitutional rights and obligations of both the majority and minority parliamentary groups, as well as cultivating a culture of political dialogue, which does not exclude *a priori* the consensus, even if the motivations are different, when the stake is the interests of the people.

32. During the function of *monitoring and control*, the freedom of action of Government is necessarily limited by its responsibility before the legislator. The obligation to report to the Parliament is defined, in particular, through the traditional principle of ministerial accountability, individual and collective. In order to protect citizens against the arbitrariness of the Government and to ensure them the rational use of public funds, lawmakers need to monitor government work, responsibility which, as a rule, it is assumed by the opposition parties.

33. Thus, political content, both parliamentary and extra-parliamentary, of the mandate is carried out through the political rights of members, namely: the parliamentary initiative that may be manifested by the way of the right of legislative initiative, legislative proposals or amendments, the filing of motions or drafts, decisions or statements, the right to participate in collective initiatives, as the vote of no confidence for the Government's dismissal, the referral of the Constitutional Court with regard to the unconstitutionality of normative acts, demand of Parliament meeting in special session etc.; freedom of expression, specific to parliamentarians by the right to speak and the right to vote; rights related to the work of the monitoring and control of the Executive by the questions or interpellations to the Government or its members, attending the initiation of simple or of no confidence motions, inquiries, request for information; rights relating to the organization and functioning of Parliament, which refers to the right to vote and to be elected within its working bodies, in groups of friendship with other countries or parliamentary delegations.

34. In the Court's view, the parliamentary mandate expresses the relationship of the lawmaker with the whole nation, in the service of which it is found, not only with the electorate that voted for him/her, though they benefit from the parliamentarian's presence by virtue of his/her obligation to keep in touch with the voters. Thus, the phrase "being in the service of the people" from Article 68 (1) of the Constitution means that, at the time of the election and until the end of the

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mandate, each Member becomes the representative of the people in its entirety and has as mission to serve the common interest, that of the people, and not just the party s to which one belongs to. In exercising of his/her mandate, the parliamentarian shall be subject to only the Constitution, the laws and shall adopt attitudes which, according to his/her conscience, serve the public welfare.

35. In defining those interests, the option of the parliamentarian is free, even though he/she belongs to a party that he/she represents in Parliament. In accordance with Article 2 (2) of the Constitution, no individual, no part of the people, nor a social group, political party or other public party may exercise State power in their own name. In this sense, the fundamental principles of the rule of law shall be respected scrupulously in order to hinder the temptation that may have one or more political parties, which have become the majority in Parliament, to transform "the elected" in "party activists" or central or local public administration structures in "party bodies", either central or local.

36. In conclusion, the Court holds that the exercise of the mandate covers the entire political activity of the parliamentarian, both the parliamentary and the extra-parliamentary one, including the passing of laws in the plenary sittings of Parliament, attending meetings of the specialized commissions of the Parliament, other activities related directly to the legislative creation process or monitoring of governance, participation in the parliamentary delegations and at the meetings with voters.

37. The Court considered that pursuant to the provisions "in the exercise of their mandate, the parliamentarians are in the service of the people", "any imperative mandate is null" in paragraphs (1) and (2) of the Article 68 of the Constitution:

- the representative s mandate signifies the right delegated by the Moldovan people, as holder of national sovereignty, to the Members of the Parliament for the exercise of legislative power as part of the State power, on the basis of and in accordance with constitutional provisions and laws;
- the Members of Parliament exercise their mandate directly, freely and effectively, according to their beliefs, in the interests of the whole people.

## II. THE NULLITY OF THE IMPERATIVE MANDATE AND THE IRREVOCABILITY OF THE REPRESENTATIVE MANDATE

### A. Arguments of authors of the referral

38. According to the authors of the referral, the provision "Any imperative mandate is null" in paragraph (2) of the Article 68 of the Constitution applies only in the situation when the parliamentarian participates directly in the plenary sessions of the Parliament, as well as in the meetings of the specialized



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committees following in the case of non-participation at these meetings, the parliamentarian's mandate to become revocable.

### **B. Findings of the Court**

39. The nature of the parliamentary mandate, institution with deep rooted traits in the history and traditions of more or less democratic of the countries, has caused over time great debates. In essence, there are two large tendencies, diametrically opposed, based on adherence to the theory of popular sovereignty or the national sovereignty.

40. According to the theory of popular sovereignty, each citizen individually holds a fraction of sovereignty; the popular sovereignty is the sum of different fractions of sovereignty that each individual holds. This theory is in close connection with the processes of direct democracy and as corollary the official mandate is particular and imperative: particular - because it expresses the will of a group of citizens (voters in a given constituency) and imperative - because it is restricted by the mandatory instructions of the electorate. These traits lead inevitably to total dependence of the parliamentarian on the party or his/her voters.

41. At the opposite pole, national sovereignty theory enshrines the idea that sovereign power emanates from the nation (people) as an abstract entity, inseparable and distinct from individuals. This theory is based on the idea that the official mandate is general and representative: general - because lawmakers represent the entire nation, not a group of voters, and representative - because they do not have the obligation to carry out any instruction on the part of voters, holding, in legal terms, absolute independence in relation to the voters. This is the path followed by the former socialist countries of Eastern Europe in the process of democratization of the society, who have consecrated at constitutional level the prohibition on the imperative mandate. Thus, at the global level, the representative mandate has become the rule, and the imperative mandate being an exception (see the Report of the Venice Commission, CDL-AD (2009) 027 on the imperative mandate and other similar practices).

42. Following the practice of the majority of world states, the Constitution of the Republic of Moldova, by Article 68 (2), rejects any form of imperative mandate, including provisions that sanction the representativeness of Parliament's term of Office.

43. Thus, since they are not representatives of a faction of the population, parliamentarians may not be the defenders of particular interests, they are absolutely free in the exercise of their mandate and do not have the obligation to fulfill the commitments that they could undertake before the election or any eventual instructions of the voters expressed during the mandate. The elected do not have the legal obligation to support the Party or the decisions of their group in the Parliament. Furthermore, if the legislator, by his conduct, causes damage, the party or the group can exclude him/her, however, this exclusion does not entail the loss of parliamentary mandate. This, obviously, does not prevent the lawmaker,

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once elected, to honor his/her commitments and to comply with the voting discipline of the parliamentary group to which he/she is part of.

44. Consequently, the Court holds that, in the logic of free representation, the parliamentary s mandate is irrevocable: voters may not make it to stop prematurely and dismissal s practice in blank is prohibited. Voters may not, therefore, express dissatisfaction with the way in which a candidate has fulfilled the mission than by refusing to grant their votes when he/she seeks re-election.

45. The fact that the parliamentary mandate is representative does not mean, however, that once the election has been held, any link between the MP and electors disappears. The parliamentarian is always subject to the influence of public opinion, which, in turn, influences it. The independence of the mandate does not require that lawmakers may be disinterested in the overall aspirations of the people, as *per a contrario*, the principle of representation would be a mere fiction. Thus, the Parliament operates under elective control since voters, at the next election, may change their options.

46. The Court notes that the civil mandate, invoked by the authors of the referral, is governed by private law, with contents resulted from the express or presumed agreement of the parties and with imperative nature, reported only at the will of the mandator. In contrast to this, the parliamentary mandate is governed by public law, which is the result of parliamentary elections (elective basis), with default content and a representative nature of the whole electoral body (people).

47. These features give the lawmaker a special regime of protection against pressure from voters and the party with the support of which he/she entered the Parliament. Thus, once elected, the parliamentarian becomes representative of the whole people, and the content of his/her mandate is determined by his/her interests, which represent him/her, and not only of those who voted for him/her, the lawmaker being free to adopt attitudes which, according to his/her conscience, serve the public welfare, the irrevocability of the mandate being a means of protecting the freedom and independence of the parliamentarian.

48. Irrevocability of parliamentary mandate is a generally accepted principle of European democracies. In this context, in Resolution No. 1303 (2002) on the functioning of democratic institutions in Moldova, the Parliamentary Assembly of the Council of Europe has asked the Moldovan authorities "to guarantee with clarity in legislation the principle of irrevocability of parliamentary mandate".

49. In the light of the above mentioned, according to the Court, the nullity of the imperative mandate and the representative nature of the parliamentarian s mandate, established by Article 68 of the Constitution, imply the impossibility of cancellation by the voters (or party) of the mandate assigned to the lawmaker to represent them in the Parliament, even if he/she avoids, under various pretexts, from the exercise of legislative power.

### III. TERMINATION OF PARLIAMENTARY MEMBERSHIP BY "WAIVING THE MANDATE"

#### A. Arguments of authors of the referral

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50. According to the authors of the referral, "waiving the mandate" is applicable in the case of avoiding the plenary sittings of the Parliament, as well as the meetings of its special committees.

### **B. Findings of the Court**

51. According to Article 69 of the Constitution, the quality of the parliamentary mandate ceases, before the term set, in 4 cases: resignation, mandate withdrawal, incompatibility or death.

52. Waiving the mandate is **forced** termination, contrary to the will of the legislator, of his/her mandate. This constitutional norm is not developed in the present by legislative norms, which would explain and bring details on the mechanism of application.

53. The Court holds that, as follows from the constitutional rule, regulation of cases of forced termination of the parliamentary mandate is Parliament's prerogative, including the waiving of the parliamentarian's mandate in the case of his/her subterfuge from exercising the duties inherent in the office of Member of Parliament, taking into account the principles and spirit of the Constitution, democratic norms and standards and taking into consideration the practice of other countries in the field.

54. In this context, the Court holds that, in relation to the exercise of their parliamentary mandate, in the majority of Parliaments there is a formal requirement of attendance, both in plenary and in Committee.

55. In fact, there are only a few Parliaments (the Belgian Senate and the Parliamentary Assembly of the Council of Europe), which do not provide for a form of compulsory attendance and no penalty for repeated truancies. In most parliaments dealing with an obligation of attendance, the absence can be justified.

56. In many countries, Parliament has no right to exclude permanently one of its members (Cyprus, France, Gabon, Lesotho, Norway, the European Parliament, and Romania etc.). Instead, it is often used as a disciplinary measure of temporary suspension.

57. In countries where permanent exclusion is possible, the reasons for which this can occur vary quite strongly. In general, they are of three types: disciplinary sanction, loss of eligibility conditions, as well as the pursuit of an activity incompatible with the mandate of lawmaker. There are other reasons for which a member may be expelled from the Parliament, as well as insufficient knowledge of official language, which does not allow for the exercise of the parliamentary mandate, as is the case of Latvia.

58. In the practice of states there can be distinguished three cases of forced loss of the mandate of members of Parliament:

1) In some countries, the Parliament that does not voluntarily submit its resignation shall be excluded from the Parliament, if it *no longer meets the eligibility requirements or accepted an incompatible position*.

2) In some cases (typically in Anglo-Saxon countries), exclusion from Parliament can be applied as a *final disciplinary penalty*.

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Reasons for exclusion - truancy from sessions, disclosure of confidential information to third parties, disruption of order or violation of the dignity of the Parliament- are expressly included in the Law on the status of parliamentarian or in the Parliament's Regulation. The neglect of duties, in general, and the absence from meetings of the Parliament, in particular, are the most common reasons for exclusion of the lawmaker from Parliament.

In Australia, for example, a member who has not attended any meeting of the Parliament over the course of two consecutive months, without authorization, loses his/her mandate. This is also the case in Cape Verde (if the number of trancies exceeds the maximum number laid down in the Parliament's Regulation), Latvia (unjustified absence from more than half of the plenary sittings of the Parliament for a period of three months) and Senegal (for the absence from the meetings of two ordinary sessions). Unjustified absence from all meetings in one of the two sessions is also a reason for exclusion from Parliament in Niger, but it takes a decision to this effect, passed by a vote of two-thirds of the members of the Parliament, and a Supreme Court Decision. The exclusion may also occur for other reasons (whether disciplinary or not), at the request of the Permanent Bureau of the Parliament.

In India, in case if a member is absent from meetings of Parliament for sixty days or more without being approved by the Parliament, his/her mandate may be declared vacant. In Australia, the Constitution provides that the parliamentarian is excluded from Parliament in case of the absence of 21 consecutive plenary sessions, and in the case of absence during two consecutive months without the permission of the Parliament, his/her parliamentary mandate becomes vacant automatically. In Sri Lanka, the period is three months. In Seychelles, the penalty is applied when a member of the mandate holder is absent, without the permission in writing of the President, for more than 90 days, or if a member of Parliament leaves the country for more than 30 days, unless he/she has the consent of the President of the Parliamentary Assembly.

The definitive loss of the mandate in the event of repeated absence occurs also in Armenia, Austria, Japan, Thailand and Turkey. In the latter, for example, members who have been absent without a valid excuse, from five sessions over a period of a month can be excluded by a decision of the Parliamentary Assembly.

Though it is true that the exclusion from the Parliament is generally, applied in the event of repeated absence in the plenary, in some countries the repeated absence at meetings of committees may also give rise to penalties (Côte d'Ivoire, French Senate and Portugal). In Portugal, the parliamentarian which, without a valid reason, did not attend the four plenary sessions loses the mandate, while if he/she is missing from more than four sessions of the commissions, he/she loses the mandate of the Committee concerned. In the French Senate, the Senator who has three unjustified consecutive absences in the Commission is declared resigned and cannot be replaced within a year.

The exclusion is also provided in a number of States (e.g. India) in the case of any member recognized by Parliament as guilty of inappropriate behavior or other facts unworthy of a Member. Bolivia's Constitution provides that every chamber has the right to exclude (temporarily or permanently) with a two-thirds majority of the votes cast, any Member who has been found guilty of serious misconduct in the performance of his/her functions.

In the United Kingdom of Great Britain, a member of the House of Commons may also be excluded by resolution of the House of Commons, namely for violating the code of conduct or disciplinary rules. Such exclusion is possible only after an investigation and recommendation of the Committee on standards and privileges ("Select Committee on Standards and Privileges").

3) Last but not least, in some States, the parliamentarian may lose the MP mandate following a *Court Decision*.

The loss of parliamentary mandate as a result of a legal decision - generally called "decay" - is the scenario that we find in almost all States. Among the exceptions to this rule are the United States of America and the Syrian Arab Republic, the constitutions of those countries stipulating that only the House of Representatives and the Senate are competent to examine cases relating to the election and qualification of their Members.

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Therefore, it is necessary to distinguish both between the countries in which the mandate ceases to be held or not following a *Court decision*, but rather between those where the Court decision takes effects "*ipso jure*" and those that need to be followed by a Decision of the Parliament.

59. Procedures for expulsion of a Member from Parliament, also greatly vary. Often, the decision of exclusion shall be taken by the Parliament with a qualified majority or greater one (two-thirds in the United States of America, Israel, Argentina and Jordan; three quarters in Thailand; five sixths in Finland). The procedure for expulsion, most of the times, has as a starting point the recommendation of a Commission, charged with examining the case and reporting to Parliament.

60. The practice of other States denotes that only the *repeated* absence in the plenary sessions of the Parliament or of the meetings of the specialized commissions is sanctioned. Obviously, it is essential that a definitive exclusion to remain an *exceptional* procedure, a *penalty of last remedy*, which should be strictly limited to the cases provided for by law. Otherwise, it could become a dangerous weapon in the hands of the parliamentary majority against the opposition or minority groups.

61. In the same context, the Court holds that, unlike truancy, **parliamentary protest is, essentially, a politically motivated absence**, as a method of political struggle, the action of a member or group of members, as response to a specific action of the majority, by which is expressed a manifestation, without violence, of opposition against acts or decisions which are considered illegal or contrary to the common interest, in order to get a concession.

62. Thus, the Court finds that the phrase "waiving of the mandate" is not applicable to the actions of parliamentary protest within the political activity of the Member which is not connected to the process of legislative creation, if it does not come up to physical or mental violence.

63. At the same time, it is necessary to regulate the exhaustively and legally the parliamentary protest procedures, conditions and terms when the parliamentary protest may be declared, so that no doubt or confusion existed between the protest and the truancy from the sessions of Parliament. Therefore, the parliamentary protest shall be publicly notified by the concerned Member or by the head of the Parliamentary faction, by announcing the situation that determined him/her and the requirements for the cessation.

64. In this context and taking into account the principles of democracy and political pluralism, sanctioned by Article 1 (3) of the Constitution, the Court considers that it would be contrary to the spirit of the Constitution if it had been established the possibility of waiving the parliamentary mandate for the use of certain forms of parliamentary protest, a tool for political struggle related to the essence of parliamentarism, as in this way it is expressed the diversity of opinions, even if these rights can be used in an obstructionist manner to prevent or delay decision-making.

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65. The Court notes that the parliamentary protest mechanism is used, in particular, by the parliamentary minority groups. In the event of the sanction of waiving the mandate, there is a risk that the political freedom of the opposition to be obstructed by the parliamentary majority, contrary to the standards of democracy and political pluralism which require protection of opposition against the pressures of the majority (see PACE Recommendation 1601 (2008) "The procedural directives on the rights and obligations of the opposition in a democratic Parliament" and the Report of the Venice Commission, CDL-AD (2010) 025 on the role of the opposition in a democratic Parliament).

66. In any case, the *collective* deprivation of a group of Members of the parliamentary mandate is inadmissible, being contrary to the meaning of the representative mandate, so as to be considered an *individual* decision for every Member of the party.

67. Given the lack of legal norms concerning the waiving of the parliamentary mandate, this mechanism could be applied only after passing the law in this regard, taking into account the considerations outlined in this decision by the Court, the Court reserved the right to rule on additional issues within an appropriate control of constitutionality.

68. In the light of the above, for the purposes of paragraph (2) Article 69 of the Constitution, termination of Member's office by "waiving the mandate" can take place in the conditions envisaged by the Constitution, by the laws governing the organization and functioning of Parliament and defining the status of the parliamentarian.

For these reasons, pursuant to articles 140 of the Constitution, 26 of the Law on the Constitutional Court, articles 6, 61, 62 b) and 68 of the Code of Constitutional Jurisdiction, the Constitutional Court

### DECIDES:

1. For the purposes of paragraph (1) of the Article 68 of the Constitution, exercising the mandate covers the entire political activity of the Member, both the parliamentary and the extra-parliamentary one, including the passing of laws in the plenary sittings of Parliament, attending meetings of the specialized commissions of the Parliament, other activities related directly to the legislative creation process or monitoring of governance, participation in the parliamentary delegations and meetings with voters.

2. For the purposes of the provisions "in the exercise of the mandate, the lawmakers are in the service of the people", "any imperative mandate is null" in paragraphs (1) and (2) of the Article 68 of the Constitution:

- the representative mandate signifies the right delegated by the Moldovan people, as a holder of national sovereignty, to the Members of the Parliament for the exercise of legislative power as part of the State power, on the basis of and in accordance with constitutional provisions and laws;

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CONSTITUTION

- the Members of Parliament exercise their mandate directly, freely and effectively, according to their own beliefs, in the interests of the whole people.

3. Pursuant to the paragraph (2) Article 69 of the Constitution, termination of Member s office by "waiving the mandate" can take place in the conditions envisaged by the Constitution, by the laws governing the organization and functioning of Parliament and defining the status of the parliamentarian.

4. This decision is final, and cannot be subject to any appeal, and shall enter into force on the date of passing and shall be published in the Official Gazette of the Republic of Moldova.

**President**

**Alexandru TĂNASE**

*Chişinău, 19 June 2012*

*JCC no.8*

*Case no.8b/2012*