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THE STATUS OF THE MEMBERS OF PARLIAMENT IN RELATIONSHIP WITH THE LEGAL AND ETHICAL NORMS

Gabriela NEMȚOI[1], Oana NESTERIUC[2]

Abstract:

The notion of mandate was initially established and judicially formulated in terms of the private law. Thus, the public law uses the word mandate in the sense of a special delegated power given to a subject of law based on an official procedure which serves as a basis for exercising his authority prerogatives in order to fulfil certain general duties.As part of the constitutional law, the notion of mandate is used in several texts such as section 63 the 1st, the 2nd and the 4th paragraphs; section 69; section 70 the 1st paragraph; section 72 the 1st paragraph; section 81the 4th paragraph; section 82; section 83; section 84 the 1st paragraph; section 104 the 2nd paragraph; section 110. However, in spite of the fact that there is a fairly extensive judicial framework that specifies the mandatary's conduct, namely the quality of the members of Parliament, the debating issue refers to whether this framework is specifically deliniated in itself. Based on this approach, we will attempt to clarify whether the conduct of the members of Parliament is restrained solely by legal norms or whether their actions are influenced by their ethical actions.

Keywords:

Mandate; member of Parliament; constitutional; subject of law.

JEL Classification: K10,K39

I. INTRODUCTION

The moral code of the members of Parliament is a present-day issue. Thus, a specific trend in regards to this category of civil servants named *the ethics of the member of Paliament* [1: 181] came into being. The chapter on the professional ethics in regards to the higher dignitary refers to expressing

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moral statements on the members of Paliament and emphasizes the fact that their activity needs to be determined based not only on their own rules and norms, but also on moral criteria such as justice, liberty, honesty, tolerance, loyalty, good-faith, independence etc. The civil society requires that the members of Paliament should take on these values especially those referring to observing their election pledges that, in fact, ensured their deputy status.

The status of member of Parliament also refers to taking on certain responsibilities that are defined through ethical actions and the capitalisation of the moral, ethical and regulatory consciousness as a mandatory requirement defining the status of a member of Parliament.

It is necessary to establish certain criteria as well as some moral specific features that would determine the appropriate or innapropriate conduct in regards to a member of Parliament's activity. These criteria need to be expressed in terms of appropriate moral, ethical features that are closely connected with the political corectness status. The shift in regards to the moral conduct of the member of Parliament may lead to a shift in the moral and political situation in a specific country. [2] The status of the member of Parliament or the senator from an ethical point of view is a case in point of his authenticity when it comes to his voters, his actions as the nation's representative.

In spite of the fact that the majority of countries are governed by norms that guarantee the status of the members of Parliament, they need to adopt an ethical conduct not only based on their position but also based on their actions as public dignitaries in their relationship between themselves and the citizens etc. Thus, we refer to the House of the Representatives and the Senate of the American Congress that function on the basis of certain ethical and conduct rules, as well as the German Bundestag and France's National Assembly. The use of these types of legislative acts stem for the justified assumption that ethics is insufficient for determining the ethical behavior of a member of Parliament.

II. THE PARLIAMENTARY TERM IN RELATIONSHIP WITH NORM AND ETHICS

The notion of "mandate" was initially used in the private law in terms of an agreement when referring to the willpower that manifests itself between the contracting parties. However, the notion of "mandate" is also being used in the public law with a total different meaning namely "a special power of attorney given to a certain subject of law during a solemn procedure based on which he exercises authority in order to fulfil general interests [3: 793]. Consequently, the mandate refer, on the one hand, to the

legal framework that is stipulated through the law, and, on the other hand, to a strictly ethical aspect [4] that pertains to the ethics and behavior of the individual that occupies this position.

In the constitutional law, the word ”mandate” is used in several sections of the Constitution: section 63 the 1st, the 2nd, the 4th paragraphs; section 64 the 2nd paragraph, section 69, section 70 1st paragraph, section 72 first paragraph, section 81 4th paragraph, section 82, section 83 1st paragraph, section 84 1st paragraph, section 104 2nd paragraph, section 110. The paragraphs from the Constitution refer to different types of mandates such as: the parliamentary mandate, the mandate of the president of Romania, the Government's mandate etc.

The meaning itself of the parliamentary mandate refers to two components. In its narrow sense, it refers to the manadate of the deputies and senators. In its broad sense, the notion of mandate explains the menaing of the mandate of the House of the Representatives and the Senate as the parliamentary mandate of both Chambers.

Despite the fact that the notion of ”mandate” is based on the two elements, these ones do not stand apart from each other, yet they function in parallel.

As for the mandate that is regulated by the Constitution, the basic eloquent factor according to section 69 is that “In fulfilling their mandate, the deputies and the senators serve the people. (2) Any kind of binding mandate is declared void.” Moreover, the updated version of Law no. 96/2006 [5] regarding the status of deputies and senators defines the status of the deputies and the senators in the 1st paragraph as being ” the elected representatives of the Romanian people through whom they exert their sovereignty as stipulated in the Constitution and by the country's laws”. They ”are in the service of their people” as high rank civil servants.

The very notion of the mandate as a representation of duties or services for an individual is stated not only by the constitutional but also by the civil law. The civil mandate is established by a mutual agreement of the parties whereas the parliamentary mandate is pre-established both by the Constitution and regulations as well as by certain provisions of the Elections Law or of Law. no. 96/2006 regarding the status of deputies and senators. The authorised representative is the one who will represent the holder's rights in the civil law whereas the deputies and senators, who have the same trustee status, are elected by the votes from an electoral district. They represent the nation itself and are in its service.

The Romanian Constitution in section 69 defines the mandate of the members of Parliament as a representative one. This very aspect empahsizes the logic connection between these aspects in the sense that the people

exercise its supreme attributes either directly through the election of its deputies and senators, through a referendum, or through its representative institutions such as the Parliament, the Presidemnt or other public institutions.

There is a national representation based on the parliamentary mandate [3: 795], [9: 57-90]. The principle of the representative mandate is specific to the parliamentary democracies as members of Parliament are serve the whole nation whereas their actions should be a reflection of their activity of exercising the ruling power.

The representational mandate equates the scrutiny list where the candidates are referred by the political party whereas the voters elect according to their preferences. The representational mandate influences the even distribution of the deputies' and senators' mandates based both on the election results and the electoral threshold as referred to in the law. The validation of the deputy's or senator's mandate abolishes any form of interference from the voters. In this particular situation they do not have any possibility of revoking or withdrawing their option. The voters' only valid penalty option in regrads to its representatives refers to an unfavorable vote during the following elections.

Bright from the very moment when the manadate is validated, both the Constitution and the other special laws provide the members of Parliament a series of duties that require a certain ethical conduct. Thus, right from the very instance when they occupy the position, as it is stipulated in Law no. 96/2006 in section 4 the 3rd and 4th paragraphs, the elected deputies and senators have the duty to make a full disclosure their assets both at the beginning and the end of their mandate. This is supposed to discourage fraud and unjustified enrichment during their functioning in a public position. In spite of being a coercive measure, the voters as the trustee perceives this fact as a matter of ethics and responsibility from the representative's part.

The representative's behavior and action as an elected member of Parliament is stipulated by Law no. 96/2006, the 3rd chapter entitled "Parliamentary Principles and Rules of Conduct." This particular article of law only refers to those sanctions regarding the requirements that they infringe upon. From the point of view of a poor ehtics, the high rank dignitaries are not subject to any kind of sanction. Moreover, the Resolution no. 77/2017 regarding the deputies' and senators' ethical code -that is a reflection of the ethical behavior of the elected representative- actually enbles him to have a free choice on how to act that cannot be revoked or sanctioned in any possible way. The ethical code of the member of Parliament should not be presented in the form of a simple instruction or a

disciplinary status. On the contrary, it should represent a stimulus for displaying a right behavior, of a conscious sense of resposibility and freedom as well as for fulfilling one's professional duty. Consequently, the mandate of a member of Parliament stands for an institution governed by public law that is regulated by the Constitution and by special laws. It is a cosequence of the electoral activity which confers independence and constitutional protection to that particular individual. The length of time exercising the parliamentary mandate is specified in section 63 the 1st paragraph: "The House of the Representatives and the Senate are elected for a 4 years mandate that is legally prolonged during a seige, a war or during emergency situations untill their cessation."

The constitutional text makes the connection between the length of time of the senator's and the deputy's mandate with the one of the House of Representatives and the Senate based on the fact that those two chambers are each made of deputies and senators.

On the grounds of these terms, the constituent stated in section 70, the 1st paragraph: "Both the deputies and the senators commence their mandate on the day of the legal reunion of the chamber their part of under the provision of being elected and of swearing under oath. The oath is established through an organic law." Moreover, the deputy status ceases to exist based on section 70, the 2nd paragraph: "The deputy's or senator's status ceasses to exist at the date of the legal gathering of the two newly elected chambers or in the event of a resignation, of loss of the voting rights, incompatibility or death."

The impeachment of the deputies and senators refers to presenting a written request addressed to the president of a particular chamber. The latter will ask in a public hearing the one who handed in the written request if he will pursue with that. In the event nobody shows up, there will be a debate on that request followed by declaring that spot as a vacancy [6].

III. THE LEGAL STATUS OF THE MEMBER OF PARLIAMENT

The privileged status of the deputies and senators granted by the Constitution ensures the Parliament's independence from any sorts of outside pressures. From the point of view of the activity of each and every dignitary, the Parliament as a representative body, is meant to grant its members the chance to devote their entire time to fulfilling their parliamentary duties.

The special protection that the members of Parliament are granted refers to the deputies' and senators' incompatibility, immunity, allowance as well as

certain rules regarding their financial transparency [7: 217-224], [8: 237-244], [9: 319-336], [10: 59-72].

a. Incompatibility

Incompatibility is defined as the impossibility of an individual to run for the parliamentary elections. The judges of the Constitutional Court, the Ombudsman, the magistrates, the active members of the army, the policemen and other categories of public servants and other categories that are established by the organic law are non-eligible to run for the parliamentary elections as they are forbidden to be aprt of any political party.

Running for elections for a deputy or senator mandate in any above mentioned situations requires giving up their non-eligible status at the latest date when they submit their candidacy. The incompatibility status prevents the parliamentary representative, based on waiving his duties as the people's elected representative, to be exempted of the aim of his activity as such by doing an excellent job as a public servant in parallel with his performing as deputy or senator.

The actual wording from the Constitution in section 71, the 2nd paragraph "The status of deputy or senator is incompatible with the occupancy of any other important public position except for the one of a member of the Government" has mainly to do with the high rank public positions. The 3rd paragraph from the same section is more generous in terms of the types of incompatibilities [11][3]

Thus, section 71, the 3rd paragraph corroborated with section 82, the 1st paragraph from Law no. 161/2003 outline a series of incompatibilities. Both the deputy status and the senator status are incompatible with:

a) the positions of President, vice-president, general director, director, administrator, board member or business auditor

[3] The following laws specify certain incompatibility situations: Law no. 188/1999 regarding the status of the civil servants; Law no. 35/1997 regarding the organisation and operation of the Ombudsman's institution; the Competition Act no. 21/1996; Law no. 80/1995 regarding the status of the military personnel; Law no. 73/1993 regarding the establishment, setup and functioning of the Legislative Council; Law no. 47/1992 regarding the setup and functioning of the Constitutional Court; Law no. 215/2001 regarding the local public administration.

including the banks or other credit institutions, insurance and financial agencies as well as the public organizations;
b) the positions of CEO or secretary of the shareholders' meetings or of the shareholders's meetings of those organizations that are mentioned in suparagraph a);
c) the position of the state representative in the general meetings of the organizations that are specified in subparagraph a);
d) the position of manager or a member of the Administrative Board of the independent entities, the state-owned companies;
e) the trader position, private person
f) the status of a member of a group with certain economic interests.

As an extension of the constitutional provisions of section 71, Law 161/2003 specifies in detail these norms by stipulating in section 81, the 1st paragraph those public positions that are incompatible with the deputy or senator status. The above mentioned examples clearly show that the parliamentary incompatibility is a means to ensure the independence of the governance of those who were elected by the people.

b. Parliamentary immunity

On the basis of section 72 of the Romanian Constitution, "The deputies and senators cannot be made legally accountable for the votes and the political opinions that are made public during the time they exercise their mandate". This stands for the member of Parliament's absence of liability in regards to his activity.

Apart from section 72 of the Constitution, based on the Law no. 92/2006 regarding the status of the deputy and the senator, the lawmaker specified the ensemble of legal provisions that gurantees them a legal derogatory status from the common law in their relationship with justice itself in order to ensure their independence.

Within the 1st and 2nd paragraphs of section 72 in the Constitution, the lawmaker refers to the parliamentary immunity (that represents a form of exemption of any kind of liability regarding the votes or the political opinions that are expressed even in regards to the criminal liability) as being closely related to exercising the mandate.

The main idea that focuses on immunity refers to ensuring a special protection of the member of Parliament in case all his acts and deeds in exercising his constitutional powers. However, there is no available legal framework that specifies exctly those acts and deeds that might require the manifestation of the immunity as a protection factor.

Consequently, the chambers of Parliament are able to assess the specific facts or those acts that incriminate the practice of the mandate of a member of Parliament.

The Law no. 96/2006 regarding the status of the member of parliament and the senator emphasizes the fact that the parliamentary immunity is not susceptible of suspension and that it cannot be given up as it is imperative and public [3: 808], [10: 60].

c. Parliamentary allowance

The monthly allowance stands for a means of protecting the members of Parliament and the senators as it counteracts possible frauds. As a person that was elected by the people, it is necessary that the member of Parliamant and the senator are given an allowance for their financial independence.

The regulations of the Chambers regulate those situations when the member of Parliament does not have an allowance.

IV. CONCLUSIONS

Based on the fact that the word *mandate* was initially formulated and rendered in a judicial form in the private law, we subscribe to the idea that the public law uses the word *mandate* as a special power of attorney offered to a subject of law based on a solemn procedure. This confers authority in order to fulfill general interests. The parliamentary term is a power of attorney in itself. From a political perspective, it represents a convention among the voters and those who aspire to be elected.

The boundary separating both the judicial and the ethical norms is not clearly defined as these two aspects manifest themselves in parallel in such a way that the status of the member of Parliament cannot be defined solely from a judicial point of view.

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