Political parties, parliamentary discipline and “imperative mandate” in Ukraine (1998-2008)

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Introduction:

The constitutional reform adopted by the Ukraine’s Parliament (Verkhovna Rada) on December 8, 2004, during the Orange Revolution days, which contributed to a peaceful settlement of the popular protest mobilization against electoral fraud, introduced the institution of “representative recall” or “imperative mandate”. Contrary to the classic conception of the imperative mandate, which relies on the principle of an elected representative’s responsibility towards his/her constituents, who may remove him/her before the end of his/her term, in Ukraine this kind of mandate refers to MP’s obligation to maintain their parliamentary affiliation during the legislature’s term. In other terms, their mandates are closely linked to their affiliation to parliamentary factions of parties’ (or electoral blocs of parties) under the label of which they ran for election. Withdrawal from those party (bloc) factions (PPFs) or refusal to join them entails, in accordance with the constitutional article 81, revocation of parliamentary mandate from the deputy concerned by the concerned party (bloc of parties) leadership.

This particular type of “imperative mandate”, which ties MPs elected under the party (bloc of parties) label to that party (bloc), has been conceived as a tool for enforcing parliamentary discipline through the threat of punishment (pre-term termination of mandate upon the concerned party leadership decision) and thus for compensating the weakness of Ukrainian political parties and their incapacity to control their MPs legislative behavior. Withdrawing mandate from parliamentary defectors appears also as an effective and necessary mean for increasing transaction costs incurred in parliamentary affiliation switching. Indeed, since the mid-1990’s, Ukrainian MPs have developed an expertise in

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2 This kind of mandate is related to the theory of popular sovereignty developed by Jean-Jacques Rousseau in his seminal work *Du contrat social* (1762) and makes possible its practical realization.

3 Between 1998 and 2004, Ukraine experienced a mixed-member majoritarian electoral system, where 225 legislators were elected in single-member districts based on plurality voting, while another 225 were elected in nation-wide, closed list proportional elections with a threshold of 4% and each type of elections allocated seats independently of the other. With the new electoral law adopted in March 2004 and slightly amended in July 2005, Ukraine shifted to full proportional representation of bloced party lists with a threshold of 3%. For the analysis of electoral legislation changes in the early 2000’s, see Ioulia SHUKAN “Les réformes électorales et l’évolution des régimes politiques en Russie et en Ukraine (2004-2008)”, forthcoming (spring 2009), *Revue du Droit Public*.


switching from one faction to another and fluid faction membership undermined stability and efficiency of the Verkhovna Rada throughout 1998-2004.

To apprehend the reasons for the imperative mandate introduction and to evaluate its effects on legislators’ behavior, it seems necessary to replace it in a broader context of the December, 8, 2004 Constitutional reform that fully came into effect in March 2006. The reform in question enhanced powers of the Ukrainian Parliament at the expense of the President, granting legislators real power vis-à-vis the executive (powers over choosing Prime minister and over the cabinet nomination and dismissals) and shifting Ukraine from presidentialism to a more parliament-based form of government. It also constitutionalized governing parliamentary majority, providing thus a strong incentive to form this majority, as well as incentives for PPFs to build and maintain a majority coalition that would support and enact the government. Indeed, the article 83 of the amended Constitution stipulates that a “coalition of parliamentary factions” federating the majority of elected MPs should be formed in the Parliament within thirty days of a new sitting (or within thirty days after the ruling coalition has fallen apart). The incentive to form a coalition is as strong as the President has the right to dissolve the Parliament and to call upon new elections in case PPFs fail to form a coalition within the set period (art.90). It is finally reinforced by the powers granted to the coalition: the latter presents to the President its candidate for the office of Prime minister and then confirms this candidate; the PM supported by the majority coalition appoints all of the ministers, except two.

Under these new constitutional provisions, the capacity of action of a coalition government, as well as its survival, depend strongly on disciplined and effective parliamentary majority, able to deliver the support the government needs, and thus on disciplined and effective PPFs that form this majority. In this context, the imperative mandate appears as an effective tool for preventing faction switching and thus preserving the stability of PPFs, as well as the stability of parliamentary and government coalitions. In other words, it is supposed to grant working Parliament and working coalition government, which is crucial, as Giovanni Sartori argues, in parliament-based systems. However, Ukraine political actors are divided over such a compulsory disciplinary tool, as they seem to adhere to different conceptions of political representation and to different mandate theories.

In this paper, we will proceed in three stages. In the first place, we will trace back the history of the “representative recall” in Ukraine and we will account for reasons for its introduction. In the second place, we will examine arguments that the main political actors mobilize in favor or against such a mandate. In the third place, we will provide an account of difficulties with the imperative mandate implementation since March 2006 due to a vague definition of this mandate by the Constitution and parliamentary rules of procedure and to divergent and abusive interpretations of this mandate by the main political actors.

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7 Parliament’s limited powers in terms of PM selection and cabinet nomination and control provided no incentive for factions to coalesce so to build a stable parliamentary majority, favoring thus parliamentary fragmentation and producing an atomized Parliament. The President L. Kuchma strategies aiming to undermine legislative unity so to enhance his own authority also contributed to fluid faction membership within the Parliament. Between 2000 and 2004, parliamentary majorities were constructed only through pressure of Presidential Administration, but they were short-lived, situational and fragile. Parliamentary factions that upheld those pro-presidential majorities were often unable to deliver the vote of their MPs in favor of presidential initiatives. See Sarah WHITMORE, State-Building in Ukraine: The Ukrainian Parliament, 1990-2003, Routledge, 2004.


A/ Parliamentary switching in 1998-2004 and the « imperative mandate » history

The importance of parliamentary switching that tended to put into question stability and clarity of positions within the Verkhovna Rada and thus the Parliament’s efficiency conducted Ukrainian political actors to think over how to influence legislators’ behavior and to solve the problem of collective action within factions. With the introduction in 1998 of a mixed-member electoral system, based on combination of SMD election and of proportional representation, was put forward the idea to amend the Parliament’s rules of procedure so to tie MPs elected under a party (bloc of parties) label to that party (bloc). According to the proposed amendment, parliamentary mandate would be conditioned by obligation for an elected representative to join parliamentary faction of the party (bloc) through which he was elected and to maintain his/her affiliation to this group. The threat of pre-term termination of defectors’ parliamentary mandates was expected to enforce discipline upon members of party-based factions and to provide thus stability and clarity within the Parliament. Enforcing discipline with the help of such a compulsory tool appeared as much necessary as parties were weak, fluid and definitely not solid enough to be in control of their elected representatives. Indeed, in the late 1990’s Ukrainian party system was poorly institutionalized. Parties suffered from a volatile electoral support, had no clear ideological boundaries (with some exceptions, however, for the left and the right-wing parties). Many of them had no clear ideology and few links with constituents: built by economic interests (oligarchs), they promoted mainly their own preferences and interest and not that of their electors. Plus, instead of investing into party local structures’ development, economic interests preferred to invest in electoral campaigns. Party fluidity and especially electoral blocs fluidity was also high. In 1998, as well in 2002, many parties or blocs of parties were set up several months before the election around well-known politicians and tended to disappear by next elections. Amorphous parties were not able to conduct a rigorous selection

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10 The shift from SMD electoral system to a mixed-member aimed to solve two problems: the problem of weakness of political parties and the problem of forming a parliamentary majority on the basis of party factions. However, the new electoral system failed to tackle both problems. Indeed, parliamentary fragmentation and thus parliamentary instability persisted thought 1998-2004, as the plurality portion of the mixed system encouraged prominent individual candidates with financial assets to run election in single-member districts without seeking party support and as the proportional portion with a relatively low threshold allowed minor parties to be represented in the Parliament. On this point, see, Ioulia SHUKAN, “Les réformes électorales et l’évolution des régimes politiques en Russie et en Ukraine (2004-2008)”, op. cit. For a more general discussion about how mixed-member systems may favor party system fragmentation, see, Federico FERRARA, Erik S. HERRON, Misa NISHIKAWA, Mixed Electoral Systems. Contamination and its Consequences, Palgrave Macmillan, 2005.

11 In the aftermath of March 1998 parliamentary elections, the Verkhovna Rada rules of procedure were amended so to enhance political parties’ role within the legislature, to reduce parliamentary fragmentation and to provide stability and clarity within the Parliament. The amended rules of procedure stipulated that parties that had surmounted the threshold of 4% were the only enabled to set up parliamentary factions; factions formed on non-party basis were thus prohibited. The new rules also fixed the minimum number of MPs required to set up a faction to fourteen. However, several months later the Constitutional Court rules this provision unconstitutional recognizing in such a way the possibility to create factions on non-party basis. This decision resulted in a significant increase of parliamentary factions. See Sarah WHITMORE, “Faction Institutionalization and Parliamentary Development in Ukrainé”, op. cit.


13 For the account of tools at the disposal of legislative leaders to towards individual MPs, see Laurence D. LONGLEY, Reuven Y. HAZAN, “on the Uneasy, Delicate, yet Necessary Relations between Parliamentary Members and Leaders”, Journal of Legislative Studies, vol. 5, n°3, 1999, pp. 5-22.


of candidates: seats on electoral party lists were exchanged against financial contribution to electoral campaign, which, contributed to loosen ties between parties (their parliamentary factions) and their legislators. Consequently, defectors were pretty much sure of being able to get easily affiliated to another party (bloc) list and were thus granted nomination for re-election.

Because of weak institutionalization of political parties, transactions costs incurred by faction switching were perceived by individual MPs as very low. In this context, in 1998 and 2002 the partial use of PR, which is considered being able to increase party value in electoral arena and to strengthen ties between parties and their elected representatives (as parties may leave some individual candidates off their lists at next elections and as candidates should show their loyalty toward the party so to be placed in an eligible position on party list that grants election)\(^\text{16}\), didn’t result in an increase of transactional costs of switching. It didn’t either reduce the scale of party factions’ fluidity. Indeed, in the early 2000’s both party faction and factions built on non-party basis were experiencing defection and MPs elected via party lists didn’t feel more indebted and thus loyal to their parties, than their colleagues elected in single-member constituencies\(^\text{17}\). As ties between legislators and political parties (blocs) were very weak, there was no strong incentive for legislators to invest in their parties (especially as those parties could disappear by the next election) or to stick with them and their factions within the Parliament. Instead, they were vulnerable to vote buying, better offers of institutional positions, as well as to external pressure from the executive (blackmail)\(^\text{18}\).

If suggestions to sanction parliamentary disaffiliation by revocation of mandate were rejected in early 1998, the importance of faction switching of “parliamentary tourism” in 1999-2000, when was formed through presidential stimuli (rewards, access to resources, but also pressure, threat) the first situational parliamentary majority, brought one again the question of parliamentary defection or “tourism” to legislators’ attention. Thus, in December 2000, was registered a constitutional amendment bill entitled “Amendments to the Constitution of Ukraine (concerning the pre-term termination of mandate of representative elected through party list). The bill aimed to amend the article 81 of the Ukrainian Constitution so to extend the possibility of parliamentary mandate revocation\(^\text{19}\) to cases MPs’ elected via party (bloc) lists withdraw from PPFs of their corresponding parties (blocs) and to grant the legislature the right to decide upon pre-term mandate termination by an absolute majority vote.

Both MPs from president-oriented factions that continued to experience defections and were often unable to deliver their members voting so to back presidential initiatives, as well as opposition factions, victims of fluid membership, provided their support to the imperative mandate. As for President Kuchma, he also backed this additional possibility of mandate revocation, as it could have helped to consolidate parliamentary majority that upheld him.


\(^{17}\) Eric S. HERRON, “Causes and Consequences of Fluid Faction Membership in Ukraine”, op. cit.


\(^{19}\) Until then mandate revocation was limited to five cases: voluntary resignation from MPs’ functions, entrance into force of accusation advanced against a representative, recognition of an MP as missing person, suspension of his/her citizenship or definitive immigration abroad, and, finally, his/her death.
and his authority. Finally, the Constitution Court, to which the matter was referred in accordance with the Constitution amendment procedure, ruled in April 2001 that the “representative recall” was not associated with the risk of “infringement of citizens’ rights and liberties or rights and liberties that MPs were entitled to as citizens as long as mandate revocation concerned them only because of their specific status associated with the fulfillment of State functions”.

Successfully adopted in the first reading in July 2001, the constitutional amendment bill was not examined in the second reading at the last parliamentary session. As a result, it was registered once again with the Verkhovna Rada of a new sitting and was adopted by the majority of MPs on January 2003. It was then integrated to the project of Constitutional reform, elaborated by the Presidential Administration with the aim to transfer powers from the President to the Parliament and thus to grant the dominant position of pro-presidential parliamentary factions at the end of President Kuchma’s second term. However, provisions on mandate revocation knew two major modifications in comparison with the original text of Constitutional amendment bill: representative recall was extended to cases of refusal by MPs to join parliamentary faction of the party (bloc of parties) under the label of which they ran for election, as well as to cases of expulsion of legislators from their parliamentary groups. Besides, it was decided to grant the authority to enforce mandate revocation to parties (blocs of parties) concerned by defection and not to the parliamentary majority. Suggestions made by some MPs to entrust the independent judicial branch the right to take a final decision upon mandate withdrawal were simply rejected.

Finally, constitutional provisions related to the “representative recall” were modified through negotiations that took place during the Orange Revolution days between the President L. Kuchma and opposition forces united around Viktor Yushchenko. In the face of negotiators disagreement over the imperative mandate—negotiators from the opposition “orange” coalition were strongly against it, while representatives of the regime, as well as the Communist Party of Ukraine supported it— it was decided to restrict its scope. A provision concerning the revocation of mandate from deputies expelled from their PPFs, which was considered as dangerous from the point of view of internal democracy and pluralism of opinions within PPFs was thus abandoned. Consequently, according to the newly crafted article 81 of the Constitution into force since March 2006 (reproduced in the article 59.3 of the parliament’s rules of procedure), refusal to join their corresponding PPF or disaffiliation from those factions entail the mandate revocation in accordance with the procedure detailed by the law and upon a decision of the concerned party (bloc) leadership.

**B/ Debates over the imperative mandate: pro and contra**

The perspective of the “representative recall” introduction provoked intense debates among Ukrainian political actors. Arguments mobilized by proponents and opponents of this particular institution are very much similar to theoretical debates over political representation and especially to mandate-independence controversy that Hanna F. Pitkin traces back in her work on representation.

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20 See http://www.ccu.gov.ua/uk/doccatalog/list?currDir=8761
21 Of question here the Constitutional reform project n°4105.
22 Of question here an alternative bill on Constitutional reform n°3207-1 that was rejected.
23 We reconstitute here those arguments from transcriptions of parliamentary debates that took place in July 2001, thought 2003-2004, in January 2007 and in June 2008, from media accounts of those debates, as well as using interviews we have conducted on the ground with political actors. Transcriptions of Verkhovna Rada debates are available on the website: http://www.rada.gov.ua/zakon/new/STENOGR/index.htm.
For the imperative mandate advocates, this particular mandate is an extension of proportional representation, which was used, between 1998 and 2004, in combination with SMDs system (under the so-called mixed-member electoral system) and is fully applied since 2006. According to them, under proportional representation electoral system, citizens vote for parties (electoral blocs) rather than individuals, which implies that parliamentary mandates gained through election belong to parties (blocs of parties) and not to individual MPs. Consequently, in case representatives elected via party lists leave their party, the latter has the right to keep their parliamentary seats, by revoking them and transferring those seats to other candidates. In this perspective, MPs are seen as agents, who owe their mandates to corresponding parties (and not to constituents), are bound by campaign promises and programs of their parties (and not by their constituents’ instructions like in the case of classic imperative mandate) and thus are expected to act in accordance with them.

In the early 2000’s, the imperative mandate advocates also emphasized its capacity to enforce the respect of constituents’ electoral choices in the interval between two consecutive elections and thus to defend democracy. According to them, under PR electoral system of blocked party lists, where citizens vote for parties rather than individuals, electoral results are expressed in term of the number of seats allocated to party or electoral bloc lists. If representatives elected thanks to their parties change their parliamentary affiliation, their behavior entails a substantial revision of electoral results and of the popular will expressed through elections. In this perspective, withdraw mandates from their defectors enables parties (blocs) to enforce respect of the popular will in the interval between two elections, when citizens have no possibility to call into question their representatives’ responsibility. Consequently, the imperative mandate appears to its advocates as an appropriate mean for improving democratic accountability of elected representatives through their parties and thus for re-enforcing the link between representatives and constituents through corresponding parties (link that proportional representation tends to weaken). With the shift to a full PR system, enhanced party (blocs) control over their MPs through imperative mandate would also improve, according to advocates of this disciplinary tool, democratic accountability of political parties: controlling their representatives would enable parties to implement their promises.

This argument seems to be close to suggestions put forward by Austrian-American jurist Hans Kelsen many years earlier. According to Kelsen, political parties should be entrusted with the task of connecting parliamentarians and constituents. He argued indeed in favor of a control of constituents over their elected representatives through political parties that would revoke representatives, who would move away too far from their corresponding party’s electoral program. For Kelsen, this kind of sanction is a natural consequence of a voting system based upon proportional representation of blocked party lists: “If indeed—as it results from this system—a constituent has no more influence over the choice of deputies to be elected, if his/her vote is reduced to an act of adhesion to a certain party and if—from the standpoint of this constituent—a candidate for election receives a mandate only thanks to his membership within party chosen by the constituent, it is all natural that the deputy in question looses necessary his/her mandate in case he/she exits form the party that had sent him/her to the Parliament” (our translation). See Hans KELSEN, La démocratie, sa nature, sa valeur, Paris, Dalloz, 1998, p. 52. Contrary to Kelsen’s recommendations, it is not withdrawal from a party that is sanctioned in Ukraine by mandate loss, but refusal to join or disaffiliation from parliamentary group of a party (bloc), via the electoral list of which a representative was elected. If according to Kelsen, an impartial court should be entrusted with the right to decide upon pre-term mandate termination, concerned political parties being just granted the right to launch the procedure of revocation of a disloyal MP, in Ukraine leadership of political parties may take such a decision.

To back their argument during debates that took place in June 2001, one of the constitutional amendment bill’s authors emphasized the fact that that parliamentary factions of two parties that had reached the threshold of 4% in the 1998 parliamentary elections, fell apart by 2000 as result of fluid faction membership. Of question here were PPFS of Hromada and of Progressive Socialists of Ukraine. See transcription of debates available at the Verkhovna Rada website. For an account of faction fluidity within the Parliament between 1998 and 2002, see Sarah WHITMORE, “Fluid faction membership”, op. cit., especially table no 1, page 43.
electoral programs, which they will be judged upon in the next elections. It would thus improve reputation of political parties.

Besides, the imperative mandate supporters emphasize its capacity to remedy to the worst side effect of political representation, namely when MPs put above their personal interest above those of political parties that nominated them for election and accept to change their parliamentary affiliation in exchange of financial rewards or under coercion. In other words, dealing effectively with political corruption, at the origin of citizens’ democratic deception, entails to increase transaction costs of parliamentary defection necessarily through the treat of punishment (revocation of mandate), as all the other available tools are considered being inadequate in the context of weak parties.

Finally, by helping to enforce parliamentary discipline, the imperative mandate was expected to promote stability within the Parliament and to undermine dominant negative representations of the legislature as an instable and ineffective institution.

As for the imperative mandate opponents, their arguments are close to those of mandate independence theorists. Indeed, they emphasize the independence of mandate, which implies that MPs should be left free of any instruction (from citizens or from parties) and be granted the full right to follow their convictions and to act in accord with them. Consequently, they denounce aspiration to impose on elected representatives voting discipline and unified action through the threat of revocation as an attempt to restore the “serfdom”.

They also argue that as representatives of the whole nation (and not of some partial fragments of the nation), MPs must act in the national interest and not in the partial interests of their parties. Besides, they caution against infringement on internal democracy within parliamentary factions, as there is a risk of imperative mandate’s misuse as a tool for defeating pluralism within PPFs and for expelling dissenters. They emphasize that, from the standpoint of democracy, it would be better not to revoke the deputy, but to leave them the possibility to seat in the Parliament as independents (non-affiliated) MPs until the next election when they may be then sanctioned by citizens (under mixed-member electoral system) and parties. To provide more strength to their arguments, they evoke European standards of democracy that prohibit imperative mandate and refer to the Venice commission’s conclusions on this issue. They also argue that the example Portugal, the only country within the UE to admit some form of imperative mandate, is not worth to be followed.

Finally, the imperative mandate detractors point out that parties, as the main agents of candidate selection and candidate nomination under PR system, and especially their leaders, are the only ones to be blamed for the lack of loyalty on the behalf of their MPs. According to them, instead of addressing the problem of their weak cohesion (instilling and rewarding the sense of loyalty or teamwork) and improving their recruitment politics, party leaders prefer to rely on compulsory measure to deliver, when necessary, their MPs votes and thus to attain their specific interests at the expense of the freedom of deputy’s mandate and at the expense of the citizens.

Three years after the imperative mandate introduction, the debate over the value of this disciplinary tool is still going on in Ukraine. It continues to divide the main political actors, whose positions tend to change depending on whether they are directly concerned or not by parliamentary defection. In this perspective, the extension in January 2007 of this representative recall to regional legislatures should be apprehended only as a result of exchange of services between two main parliamentary factions: Bloc of Yulia Timoshenko,

27 It’s important to specify that in Portugal an ad hoc parliamentary commission is in charge to verify whether breaches to parliamentary rules have take place or not (unjustified absences at parliamentary sessions) and to decide upon mandate loss. See, article 3 of Rules of procedure of the Portuguese Assembly of the Republic; article 160 of the Portuguese Constitution.
whose leader is fully supportive of the imperative mandate and the Party of Regions that adopts a critical stand toward this institution28.

C/ Difficulties with the “imperative mandate” implementation

Fully into force since January 2006, the imperative mandate was expected to enforce discipline and a bloc unity within governing parliamentary coalitions and to prevent defections from those majority coalitions, which are supposed to provide full support to the coalition government. From this standpoint, the imperative mandate seems to be fully in line with the dynamic of the Ukrainian constitutional regime “parliamentarization” that the December 8, 2004 Constitutional reform contributed to materialize. Indeed, a party-dependent government implies, as Giovanni Sartori argues, party-supported government; this support requires in turn voting discipline along party lines29.

However, this disciplinary device, together with electoral factors that were also expected to reduce the scale of faction switching, as well as the number of parties within the Ukrainian Parliament30—of question here is the shift to a full PR, which tends to increase the value of political parties as electoral machines and to enhance loyalty of MPs to their parties,—failed to eradicate the problem of collective action within PPFs. Indeed, parties (blocs of parties) are still encountering difficulties with enforcing discipline within their parliamentary factions through the “representative recall”, which undermined reputation of those parties (blocs) leaders as reliable coalition partners and reliable bargainers. It also undermines stability of governing parliamentary coalitions and, consequently, of coalition governments31.

Thus, in March 2007, more then twenty deputies from opposition factions (at that moment bloc of Yulia Timoshenko and bloc Our Ukraine) were bribed away to joint individually the governing coalition under the Party of regions leadership. This “parliamentary tourism” of opposition MPs resulted in the PresidentYushchenko decree of 2 April 2007 on pre-term termination of power of the Verkhovna Rada on the grounds that the Parliament was ignoring the constitutional requirements with regard to the formation of the coalition of deputy factions32. In June 2008, two MPs from the new ruling coalition, formed

28 In exchange of the votes the Party of Regions provided in favor of the “representative recall” extension to regional legislatures, the Bloc of Timoshenko supported, in the first reading, a bill on the Cabinet of ministers that favored powers of the Prime minister at the expense of the President and that was initiated by the Party of Regions whose leader assumed at that moment the position of Prime minister. For the account on instrumental use of political institutions by the main Ukrainian actors, see Ioulia SHUKAN, “Les réformes électorales et l’évolution des régimes politiques en Russie et en Ukraine (2004-2008)”, op. cit.
29 Giovanni SARTORI, Comparative Constitutional Engineering, op. cit.
30 This last objective seems to be fulfilled and the use of a full PR favors parties and party system consolidation in Ukraine. After the March 2006 parliamentary elections, only five parties (blocs) managed to surmount the 3% threshold (electoral bloc Our Ukraine, bloc of Yulia Timoshenko, Party of regions, Socialist Party of Ukraine, Communist Party of Ukraine); they were again five (electoral blocs Our-Ukraine-Popular Auto-defense, bloc of Timoshenko, bloc of Volodimir Litvin and Communist Party of Ukraine) to attain it a year later, in the September 2007 anticipated parliamentary elections. However, instead of investing in their grass-roots organizations’ development Ukrainian prominent politicians still rely on electoral blocs built around and named after their leaders.
31 Since 2006, two different coalitions governments followed one after the other: the government of Viktor Yanukovich (August 2006-March 2007) backed by a parliamentary coalition of three party factions (Party of regions, Socialist Party of Ukraine and Communist Party of Ukraine) and the coalition government of Yulia Timoshenko (October 2007-till now) uphelded by a parliamentary coalition of two factions (bloc of Yulia Timoshenko and bloc Our Ukraine-People’s Auto-defense ; in December 2008, parliamentary faction of the bloc of Volodimir Litvin joined this coalition).
32 Indeed, according to the Constitution, only party factions ruling (and not individual MPs) are enabled to form a ruling parliamentary coalition. Tensions around this decision required three more Presidential decrees and anticipated elections took place only in September 2007.
right after the September 2007 pre-term parliamentary elections by Timoshenko bloc and “Our Ukraine-People’s Auto-defense” bloc, defected from this majority coalition on individual basis, while maintaining their affiliation to the PPFs of their corresponding blocs. Since then, they vote systematically against their blocs’ line and those blocs’ leaders have a hard time to revoke mandates from them.

According to Sartori, “the more the party has the capacity to enforce discipline, the less it actually needs to use it.” Indeed, conforming to orders is easily obtained when the alternative—non-conforming—may carry heavy penalties. The treat of loosing their mandates appears as a heavy penalty to Ukrainian MPs, unless the threat cannot be fully put into effect. It is the case with the “representative recall” in Ukraine. We may identify two main problems with its implementation:

Firstly, if the earliest versions of the constitutional amendment bill, expulsion of an elected representative from his party (bloc) parliamentary faction was supposed to put an end to his/her parliamentary mandate, this provision was abandoned in the turmoil of December 2004 negotiations. Consequently, while “representative recall” was conceived as a tool of parliamentary and party discipline enforcement, corresponding constitutional provisions do not sanction the non-compliance with instructions of party factions’ leaders. Indeed, compulsory belonging to a PPF does not forbid an individual MP from contravening to voting discipline and from voting against the party line without leaving this party parliamentary faction. As a result, ineffective from the point of view of voting discipline enforcement, the imperative mandate helps only to maintain formally a majority coalition of factions within the Parliament, granting affiliation to those factions of their MPs; this parliamentary coalition can however be unable to deliver its representatives’ votes and, thus, deliver support, a coalition government needs. The present coalition government headed by Yulia Timoshenko is experiencing such a situation since December 2008: while being formally backed by a parliamentary coalition of three factions that unite together an absolute majority of MPs (bloc Timoshenko, bloc Our Ukraine-People’s Autodefense and bloc of Vladimir Litvin), the government cannot rely on those deputies’ votes and has to negotiate support of opposition factions (Communist Party of Ukraine or Party of regions) on a case by case basis.

The second problem with the imperative mandate implementation comes from a loophole in Ukrainian legislation. The article 81 of the Ukrainian Constitution provides that “mandate revocation occurs in accordance with the procedure detailed by the law and upon a decision of the concerned party (bloc) leadership. However, Ukrainian legislators have still not voted a law detailing the implementation procedure of this constitutional provision. In the absence of a corresponding law, the main political actors propose divergent interpretations of the “representative recall” terms and, particularly, of how the notion of “disaffiliation from a PPF” should be understood. The imperative mandate advocates, among whom we find Timoshenko bloc and, to a lesser extend, Communist Party of Ukraine, provide broad

33 Their action appears also as unconstitutional as, according to the Constitution, the governing coalition in formed by parliamentary factions and not by individual MPs.
34 Giovanni SARTORI, Comparative Constitutional Engineering, op. cit., p. 191.
35 For instance in Russia, where the imperative mandate of the same kind was introduced in 2005 for MPs of the Russian Federation State Duma and was extended, a year later, to regional legislatures, parliamentary factions of United Russia, the dominant actor in legislative arenas as well as within the executive on federal and regional levels, do not need to resort to mandate revocation, as the withdrawal from those factions entails very heavy sanctions for legislative and political career of a defector.
36 According to the Verkhovna Rada rules of procedure (article 59.4) adopted in September 2008, a representative expelled from his/her faction preserves his mandate and acts as a non-affiliated (independent) deputy.
37 Since its re-establishment in 1993, Communist Party have been only marginally concerned by the problem of faction members fluidity. However, the party leaders strongly support the “imperative mandate”, which they
interpretation of this notion. For them, disaffiliation encompasses not a voluntary exit of an elected representative from his party (bloc) faction, but also disaffiliation that may result from a concerned party (bloc) decision to expel a deputy who acts (votes) regularly against the factions’ line. Moreover, Timoshenko bloc leaders argue that deputies’ regularly contravention to voting discipline, as well as other acts in breach of instructions provided by their parties (blocs), should be considered as a voluntary disaffiliation form those parties’ parliamentary faction and, consequently, be sanctioned by a pre-term revocation of MPs concerned from those functions. In this respect, voluntary withdrawal in June 2008 of two MP’s from the ruling parliamentary coalition must be considered as a defection and, thus, a voluntary disaffiliation from concerned PPFs, which should entail a mandate loss. A legislative amendment bill presented by Timoshenko bloc MPs in June 2008 in this sense was however rejected by the Parliament and their coalition partners, deputies from the faction of Our Ukraine-People’s Auto-defense bloc, failed to deliver a unified voting in favor of this bill. As for the imperative mandate opponents (mainly Party of Regions), they argue that disaffiliation should be understood only as a deputy’s voluntary decision to withdraw from a PPF.

As long as a corresponding law is not adopted, there would be problems with the imperative mandate implementation. Divergent interpretations by the main political actors of the “representative recall” terms, as well as the search by MPs for an effective way to short-circuit the imperative mandate provisions (maintain formal affiliation to a faction-member of the ruling coalition, while exiting exit from this coalition) would persist.

From this standpoint, the Ukrainian Constitutional Court, which was called upon to provide an appropriate interpretation of the constitutional article 81, helped to solve some controversies, without however providing exhaustive answers. Thus, in their decision rendered in June 2008, constitutional judges reassessed the role of parliamentary factions in promoting stability of the Parliament. They also specified that the establishment of parliamentary factions enabled corresponding parties electoral blocs of parties) to realize their electoral programs and implied, consequently, the respect of discipline by MPs affiliated to those factions. Finally, they stipulated that affiliation to a parliamentary faction should be interpreted not as the right of an individual representative, but as his/her obligation. In other words, parliamentary mandate is inseparably linked to the obligation of parliamentary affiliation to a party under the label of which a deputy ran for (re)-election, as well as to the obligation to maintain this parliamentary affiliation throughout all the legislature’s term, refusal to get an affiliation or disaffiliation giving way to mandate revocation. At the same time, the Court declared itself incompetent to provide a definition for different situations of non-affiliation or disaffiliation that may give rise to mandate withdrawal by the concerned party (bloc) leadership. According to constitutional judges, “it is to the law to define those modalities and to the Verkhovna Rada to vote a corresponding law”. As a consequence, this decision did not put an end to divergent interpretations of the notion of disaffiliation from a parliamentary group by advocates and detractors of the imperative mandate. If it seems clear that mandate revocation should be effectively implemented—here constitutional judges specified that, in the absence of a legislative provision in relation to the terms of the “representative recall”, constitution provision regarding this institution must be implemented as a constitutional norm of direct effect—there is no consensus over situations when the pre-term termination of parliamentary mandate may take place.

More generally, the imperative mandate would be unable to solve the problem of parliamentary defection as long as problems accountable for an extensive “faction hopping”

consider being able to enhance deputies’ responsibility and being close to the institution of the classic “representative recall” into force in the Soviet Union.

38 See http://www.ccu.gov.ua/uk/doccatalog/list?currDir=14244
in the early 2000’s persist. Of question here are political money (extreme overlapping of economic interests and of politics in Ukraine) and logics of candidate nomination for (re-election through party lists, which tend to loosen ties between parties and their elected representatives. With the shift to a full PR, legislative careers of individual MPs are more dependent on parties and party leaders (placement on party lists and later committee appointments are decided by those leaders). Plus, the introduction of a single constituency extended to the whole territory of Ukraine enhanced the importance of party reputation and party label for election/re-election, which could have also provided a strong incentive for party loyalty.

Candidate selection process under the tight party leaders’ control relies, however, less on solidarity, loyalty, ideological beliefs, commonly shared policy preferences or teamwork norms, but more on patronage logics. Positions on electoral party/bloc lists tend to be sold out or exchanged for different services: access to media outlets, organization and financing of party electoral campaigns in a particular region, financial support to parties. Those exchanges are as much important as public financing of political parties is weak or, more precisely, inexistent. As for public campaign financing, it seems unable to follow the substantial increase of modern campaigns’ expenses. This provides incentives to party leaders to search for money and to woo potential donors in order to win. Patronage is also extensive at lower levels of candidate selection: party central headquarters grant their donors or their prominent candidates quotas of seats to be distributed among those candidates’ own clients, which creates competing loyalties, where loyalty to the patron may be stronger then the loyalty to the party itself. These candidate selection logics tend to loosen the link between parties and their legislators and give rise to political corruption. Indeed, if electoral (full PR) and legislative factors (general incentives, such as committee appointments, or procedural ones, such as the threat of mandate revocation) should have contributed to enhance party control over elected representatives, bad recruitment practices and loose control over political money continue to undermine it. Under such conditions, it is not surprising that, even after the imperative mandate introduction, party leaders have been encountering problems with delivering united voting of their MPs, which undermines their reputation as reliable coalition partners and bargainers. At the same time, instead of tackling problems of collective action and party cohesion beforehand and of improving party candidate selection policies, some party leaders prefer to rely on the threat of mandate revocation and other more or less compulsory measures.

Conclusion:

Three years after the imperative mandate introduction, controversies about this compulsory disciplinary device and its capacity to grant a working parliament and to grant a stable support to coalition government are still going on. Positions on this issue of the main political actors tend to change depending on whether they are directly concerned or not by the problem of fluid faction membership. If some actors continue to describe the “representative

40 The law on political parties introduced this kind of financing in 2004, but the State budget laws for 2006, 2007, 2008 or 2009 didn’t make provisions for corresponding public expenses.
41 Parties (blocs of parties) that have surmounted the threshold of 3% are entitled to a refund by the public treasury of their campaign expenses equal to the amount that cannot bypass 100 000 times the minimum monthly salary (article 98.1 of the March 2004 electoral law).
42 Thus, all candidates running for election in the 2007 parliamentary elections on the bloc of Yulia Timoshenko list had to sign a pledge in which they declared that they would join the bloc’s parliamentary faction in case they were elected.
recall” as an “effective” institution, the latter appears also as a “distributive” one as it serves particular interests of parties and, especially of party leaders. Indeed, it may help parties to solve problems of collective action within their PPFs, as well as help party leaders to enhance their control over legislative behavior of their MPs and, thus, improve their reputation as coalition partners and bargainers.

However, as the imperative mandate implementation encounters serious problems, the effectiveness of such a disciplinary device is in question. In regards of this situation, we may conclude that party and parliamentary discipline and, consequently, stability of majority governing coalitions will come less from the imperative mandate, but more from the better control of parties over their electoral lists and a better party control over political money.

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References:


