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Some Comments on Representation: Theoretical Principles and Reality

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Summary

The purpose of the article is to compare the theoretical basis of representation with the real relations between the representative and the collectivity, as practiced in the functioning of the representative government. In the first part, the author focuses on explaining the modern understanding of representative democracy against the background of the classic theory of representation; the second part is devoted to the presentation of the legal aspect of the representative mandate, considering the transformation of the discussed institution in the context of European and Polish constitutional law. The third part is to present the discrepancies between the legal construction of representation and political and systemic practice of its functioning, together with an indication of the reasons for this gap. The relations between the mandate holder and the voters, and the internal system of relations between the representatives and their political groups of origin have been analysed.

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Streszczenie**Kilka uwag na temat przedstawicielstwa:
założenia teoretyczne a rzeczywistość**

Założeniem artykułu jest skonfrontowanie teoretycznych podstaw przedstawicielstwa z rzeczywistym układem stosunków pomiędzy reprezentantem a zbiorowością, występującym w praktyce funkcjonowania rządów przedstawicielskich. W części pierwszej autor koncentruje się na przybliżeniu współczesnego pojmowania demokracji przedstawicielskiej na tle założeń klasycznej teorii reprezentacji; drugą poświęcono prezentacji prawnego ujęcia mandatu przedstawicielskiego, z uwzględnieniem przekształceń omawianej instytucji na gruncie europejskiego i polskiego prawa ustrojowego. Trzecia część opracowania ma na celu przedstawienie rozbieżności pomiędzy prawną konstrukcją przedstawicielstwa a polityczno-ustrojową praktyką jego funkcjonowania, wraz ze wskazaniem przyczyn występującego rozżewu. Analizie poddane zostały relacje zachodzące pomiędzy mandatariuszem a wyborcami oraz wewnętrzny układ stosunków pomiędzy reprezentantami a ugrupowaniami politycznymi, z których się wywodzą.

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I. Introductory notes

While formulating introductory short comments on the principle of representative government, it is unavoidable to mention the positions presented by the leading representatives of philosophical thought of the period in which its beginnings were formed. J.J. Rousseau criticized the possibility of expressing the will of the collective entity of sovereignty by the elected representatives, indicating the inability to know *a priori* the position represented in all possible situations involving the fictitiousness of identifying the representative's will with the will of the represented². The creator of the modern concept of sovereignty claimed that the sovereignty of the nation (people) is contained in its "universal will", which is indivisible, that is, uniform and constituting an indissoluble whole, and inalienable, which should be understood as a command

² E. Popławska, *Zasada rządów przedstawicielskich i formy demokracji bezpośredniej*, [in:] *Zasady podstawowe polskiej Konstytucji*, ed. W. Sokolewicz, Warszawa 1998, p. 125.

for the superior authority to be directly in a sovereign's hand who is unable to give anyone his will. Therefore representation – in particular within the legislative authority – is unacceptable because the appearance of the representatives leads to the destruction of the nation, and moreover, an individual's will may be compatible with the will of the collectivity only accidentally and such compatibility will be temporary, since the goal of universal will is equality, while an individual, by nature, aspires to a personal privilege. The practical difficulties associated with implementation of Rousseau's concept in its original form (acceptable only in small communities living on a small area), led its author to admit that the direct exercise of authority by the sovereign was not realistic in conditions of his contemporary states. Consequently, Rousseau allowed the representation of the universal will by representatives, but under strict conditions: a) – a representative may not have any of his own powers, remaining – like a slave in Roman law – an *instrumentum vocale* – a speaking tool, expressing the will of the collective sovereign; b) – the granted mandate is of a binding nature, which means that it can be immediately withdrawn in the event of inconsistency of the representative with the universal will; c) – the law adopted by the parliament becomes effective only after its approval by the sovereign through a referendum³.

Differently than J.J. Rousseau who allowed representation only as the last resort and on objective grounds, the problem of representation was seen by the co-creators of the classic theory of representation with J. Burk, J.S. Mill and E. Sieyes at the fore, recognizing the nation as incapable of expressing its will by itself. The viewpoint of the first of these philosophers was that the Parliament is the assembly of the nation, interested only in the interests of the collectivity. The harmony between the universal will and the individual will is to be ensured by the representative's independence from the voters. Therefore, the imperative mandate, binding the delegate with the interests of the electoral district of origin is excluded, and the representative becomes the spokesman of the general interest⁴. J.S. Mill in "Considerations on Representative Government" noted that consistent decision taking by the nation through the institutions of direct democracy is not possible,

³ M. Granat, *Zasada suwerenności narodu*, [in:] *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2005, pp. 117–118.

⁴ M. Granat, *Zasada reprezentacji politycznej*, [in:] *Polskie prawo konstytucyjne...* p. 120.

consequently, the best form of government is the so-called representative government which should be understood as exercising the supreme authority by the sovereign through periodically elected representatives⁵. E. Sieyes in his brochure *Qu'est-ce que le tiers état?* indicated however that citizens in general who belong to the common order, are a fully-fledged representation of the entire nation, capable of speaking and decision-making on its behalf by means of elected representatives⁶. According to Sieyes “the nation cannot have another voice than the voice of its representatives, it may speak and act only through them”.

The classic concept of representation is expressed in the assumption that the collective entity of sovereignty by the way of election delegates its representatives and all decisions taken by the representative body are ascribed to the sovereign. Therefore, the essence of representation in the discussed concept is based on the fact that the role of the representative body is not forwarding the will of the nation, but formulating it “for the nation”, instead of it and on its behalf. In this way the parliament is the voice of the sovereign, obtaining the right of “willing for the nation”, which entails the legal identification of the nation and its representation⁷. Representatives are time-limited in the exercise of authority and their activities are based on responsibility and trust between representatives and voters. A mandate given to the expression of the will of the nation cannot be revoked and the representatives are not bound by the voters’ instructions during their term – the possibility of a personal change of the mandate holder is only during the next election. The classic theory of representation also assumes – differently than in Rousseau’s concept – a community of interests between the sovereign and the representatives acting on its behalf⁸. The constitutional law doctrine also stresses that the creators of the classic concept of representation did not assign the proper meaning to the fact that the purpose of representation is not only producing the nation’s will, but guaranteeing the capacity of its operation. It is therefore

⁵ L. Dubel, *John Stuart Mill*, [in:] L. Dubel, J. Malarczyk, *Historia doktryn polityczno-prawnych*, Lublin 2000, pp. 277–278.

⁶ J. Malarczyk, *Ideologia Wielkiej Rewolucji Francuskiej – jakobinizm*, [in:] L. Dubel, J. Malarczyk, op.cit., pp. 227–228.

⁷ E. Popławska, op.cit., p. 126.

⁸ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 48.

necessary to select a parliament capable of carrying out its functions effectively. Considering modern legislatures, it would not be possible to achieve the above-mentioned goal, however, if every delegate could act in any way, remaining responsible only before his/her conscience. In this case, the process to reconcile positions and make decisions by the House would be significantly difficult if not impossible – the legislature formed in such a way would lose the capacity to operate. Political parties that aim to create and maintain the majority⁹ play a key role in ensuring this capacity. What is important, it was characteristic of the classic concept of representation to minimise or even ignore the importance of political parties – there was a fictitious assumption in the electoral law rules that there was no formal group nominating candidates for the parliament, due to fears that the legalization of the faction within the legislature would jeopardize the freedom of the deputies. Today, this practice would not be possible due to the dominant importance of political parties in public life – in most cases candidates nominated by parties have an opportunity to be selected to the representative body, within the parliament representatives are subject to the party discipline and the overall conclusion is that the nation is unable to impact the course of public affairs otherwise than through political parties, which determines the disintegration of the classically understood representation¹⁰.

Currently, the constitutional principle of representation should be understood as the exercise of state authority on behalf of the nation through the constitutionally defined organs of the state, which has legal grounds. At the same time, there is an assumption that the government is obliged to “create the conditions and ensure the necessary measures to converge the prevailing social opinions with the state decisions”¹¹. The importance of the political representation principle is expressed not only in the impact of the collective entity of sovereignty on the composition of the representative body, and consequently, on its function but it is also expressed in the shaping of mutu-

⁹ Ibidem, p. 49.

¹⁰ M. Granat, *Zasada reprezentacji...*, p. 121.

¹¹ B. Banaszak, *op.cit.*, p. 49. In accordance with the position of the Constitutional Court, the infringement of the representation principle expressed in Art. 4 Para. 2 of the Constitution occurs if “all current regulations lead to lack of control of the Nation over the public authorities”. See the judgment of the CC of 31 May 2004, K 15/04, OTK-A 2004, no. 5, item 47.

al relations between the chief governing agencies of the state, reflected in the construction of the system of state organs¹².

The Constitution of the Republic of Poland¹³ establishes the principle of representative government in Art. 4 Para. 2 in accordance with which the Nation exercises the authority¹⁴ by its representatives¹⁵ or directly. Bearing in mind the classification system of the mentioned provision, it should be stated that the legislator did not put the sign of equality between these both forms of exercising the superior authority by the sovereign: putting the principle of representation to the front of the constitutional regulation does not prejudice its primacy in relation to the institutions of direct democracy, which should be granted a complementary nature¹⁶.

Giving priority to the principle of representative democracy in Art. 4 Para. 2 is reflected in the further Constitutional provisions, and particularly in the regulations relating to the Parliament – both their place in the constitutional classification system as well as the nature and impor-

¹² W. Skrzydło, *Konstytucyjne założenia systemu organów państwa i ich wpływ na kształt aparatu państwowego*, [in:] *Ustrój i struktura aparatu państwowego i samorządu terytorialnego*, Warszawa 1997, p. 11.

¹³ The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws, no. 78, item 483 as amended.

¹⁴ “The authority” referred to in Art. 4 Para. 2 should be understood as the superior authority of the Nation, resulting from the principle of sovereignty as laid down in Art. 4 Para 1 of the Constitution.

¹⁵ This wording is subject to criticism in the study of constitutional law, because the authority on behalf of the Nation is in fact exercised not so much by the representatives but by the agencies of specific governing competences whose representatives have been elected to be part of. See for instance the Z. Witkowski, *Zasada reprezentacji politycznej*, [in:] *Prawo konstytucyjne*, ed. Z. Witkowski, Toruń 2013, p. 96.

¹⁶ This position is confirmed by the case law of the Constitutional Court: in the judgment of 27 May 2003, K 11/03, OTK ZU 2003, no. 5, item 43 the CC found that “the idea of the complementary nature of direct democracy is also justified in the legal nature of referendum from the viewpoint of the entity authorised to initiate the referendum procedure. In the Polish legal system there is no citizen’s right to a referendum because the citizen (a group of citizens) has no legally effective possibility to initiate actions whose direct result is to order a referendum, while in its judgment of 3 November 2006, K31/06, OTK-A 2006, no. 10, item 147, the CC stated that: “The exercise of the authority by representatives is a principle against the background of the current constitutional system and the direct exercise of the authority by the sovereign (referendum, legislative initiative) – is an exception”.

tance of the powers conferred on representative bodies should be noted here. The fact that the text of Art. 4 Para. 2 lists no. specific institutions of representative democracy (direct democracy as well), by which the superior authority of the Nation is to be implemented, prejudices the implicit reference to further provisions of the Basic Law referring directly to the mode of composition of the two Houses of the Parliament, the powers conferred on them and their organization and mode of operation, which institutionalize the constitutional formula of the sovereign authority “by representatives”¹⁷.

Although Art. 4 Para. 2 of the Constitution does not explicitly state who should be regarded as the representatives of the Nation, it is clear that this role should be attributed to the elected representatives sitting in both Houses of the Parliament – the representative nature of deputies and senators is also prejudged in the further provisions of the Basic Law (Art. 104 Para. 1 and Art. 108)¹⁸.

¹⁷ K. Działocha, *Uwagi do Art. 4, [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. V, ed. L. Garlicki, Warszawa 2007, pp. 20–21.

¹⁸ Although the considerations on the representative nature of other bodies from the general elections (which are questionable in the context of the doctrine of the constitutional law) including the President of the Republic of Poland, the councillors of the agencies of the local government, municipality head (mayor) or MEPs remain outside the scope of the wider interest of this Article, the judgment of the Constitutional Court of 26 May 1998, K 17/98, OTK 1998, no. 4, item 48 should be mentioned. In this judgment, the Court takes the view according to which in a broad perspective, “the representatives of the Nation are also different (outside MPs and senators – the author’s note) individuals who are part of public authority and who are not elected if they are designated by the Constitution to implement the will of the Nation and their activities undergo the control of the society in a more or less direct way. Also, the local government can be considered as one of the forms of representative democracy in a broader sense.” The idea of the representative nature of the elected agencies of the local government is particularly controversial. It should be borne in mind that the right to elect the composition of the authority organs in the municipalities (it also refers to councillors) and the right to decide in the units of the basic level of the executive body, is also possessed by persons who do not have the Polish citizenship and consequently, do not fit into the concept of the Nation as defined in the preamble to the Constitution. See the position on this case by B. Banaszak, *op.cit.*, p. 48. Similarly, the election of the Members of the European Parliament does not constitute the implementation of the idea of representation since the Constitution refers to the exercise of authority in the territory of the Republic of Poland. These principles, in accordance with the opinion of the Constitutional Court (see judgment K 15/04 of 31 May

It is essential for this article to present the relation between the representative and collectivity from the viewpoint of the adopted concept of the representative mandate. The considerations will be carried out through the prism of dependencies between the mandate holder and the voters, and the impact of political parties on the deputy's activities taken in the exercise of the mandate. Two levels will be analysed: the legal one, arising from the tradition of representation and the applicable provisions; and the political one, showing the actual relation between the studied entities.

II. The representative in the light of the concept of the representative mandate

In accordance with the prevailing definition of the constitutional law, the mandate is understood as authorisation granted for a specified period, usually by the way of elections, to perform the representative function, authorising and obliging to participate in shaping and expressing the state will of the Nation by the Parliament¹⁹.

The relations of the representative with the collectivity in the context of the principle of representative government are generally a result of the adopted mandate model. In the theory of representation there are two basic concepts in this matter: The binding mandate, also called the imperative mandate and the free mandate²⁰.

2004 quoted above) “cannot be transferred directly on the functioning of other structures, outside the state, through which the Republic performs its interests”.

¹⁹ G. Kryszewski, *Mandat przedstawiciela (próba zdefiniowania)* “Państwo i Prawo” 1998, no. 3, p. 18. According to the second theoretical approach, the mandate is the totality of rights and responsibilities of the representatives, acquired by the way of elections. While the first of these definitions is focused on the relation between the representative and the represented entity, and thus is more compatible with the considerations about the representative government, the second one – also correct – is focused on the mandate as the institution of parliamentary law. See M. Granat, *Zasada reprezentacji...* pp. 121–122. The parliamentary mandate is also understood as the definition for the functions of a member of the legislature. See. L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2014, p. 213.

²⁰ See more M. Granat, *O istocie mandatu przedstawicielskiego*, [in:] *Mandat przedstawicielski w teorii, prawie i praktyce poselskiej*, ed. M. Kruk, Warszawa 2013, p. 13 ff. The Author believes that it is not fully reasonable to define the imperative mandate as the original form

The imperative mandate, showing links with the civil law concept of representation and is characteristic of mediaeval parliaments; it assumes that a representative is the representative of his/her voters²¹. In this way, there is a legal link of direct dependency between the individual and the collectivity which forces the deputy to respect fully the voters' will in the form of instructions given to the representative, to be obliged to report to the voters on the activities taken on the forum of the parliament and which expresses itself in the possibility of dismissing the representative not only in the event of misrepresentation of the issued orders but at any time and for any reason. The imperative mandate was rejected during the bourgeois revolutions in favour of the construction of free representation in order to appear for the second time in the period of the Paris Commune (1871) and in the ideology of other extreme system trends of the 19th and 20th cc. (for example of the Bolshevik movement).

A specific perspective on the binding mandate was also found in the socialist states where the construction of the imperative mandate was referred to, while this form of representation was given a different theoretical construction. The essence of the binding mandate in the socialist constitutionalism differed from its historical grounds which had been expressed in binding the representative with the voters' instructions. The vast majority of the constitutions of the real socialist states imposed on the representatives the requirement to include in their parliamentary activities not only the interests of a specific constituency or territorial unit, but also to be guided by the good of the entire nation (some constitutions provided for the straight obligation to represent the entire nation by the representatives)²². Therefore, a distinctive definition of representation was developed in the conditions of a socialist state, which connected the elements of the imperative and free mandate²³. However, the above considerations should be granted only a theoretical value

of electoral authorisation which is older than the concept of the free mandate, which is due to the tendency of joint consideration of these forms of representation.

²¹ L. Garlicki, *Uwagi do Art. 104*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, ed. L. Garlicki, Warszawa 2001, p. 2.

²² B. Zawadzka, *Model przedstawicielstwa socjalistycznego. Studium porównawcze z teorii reprezentacji*, Wrocław-Warszawa-Kraków-Gdańsk 1980, p. 341 ff.

²³ This position is held by M. Grzybowski, *Nowa ustawa o wykonywaniu mandatu posła i senatora (wybrane zagadnienia)*, "Przegląd Sejmowy" 1996, no. 5, p. 41.

because of the formulation of the will of the nation and its enforcement not by the representative body but by the hegemonic (or the only) political party, which supports recognising the direct dependence of the representatives on the voters as the illusory construct²⁴.

The free mandate finds its source in the classic idea of representation and specifically in two key determinants of this concept: the indivisibility of sovereignty and the identity of the nation's will with the will expressed by its representatives. The representative body represents the nation as a whole, from the time of determining its composition by the way of election it takes any decision by itself and its independence is a necessary condition for the implementation of the basic function – the formulation of the Nation's will²⁵. The above assumptions were also addressed to individual deputies, assuming that the representative represents the collective entity of sovereignty, not the voters, who decided on a person holding the mandate: "The representative does not represent the electoral college or citizens as such, or – in short – any sum of individuals, but the nation as the harmonized body, of a general nature, which distinguishes this body from individuals and separate groups that this body itself consists of"²⁶. The consequence of the representative mandate understood in this way is the independence of the deputy from his/her voters – since the representative represents the entire nation, there is no relationship of subordination between him/her and those who have chosen him/her²⁷. The voters cannot therefore give legally binding instructions (characteristic

²⁴ See E. Popławska, *op.cit.*, p. 129.

²⁵ *Ibidem*, p. 130. M. Kruk writes widely about the assumptions of the representative mandate, *Koncepcja mandatu przedstawicielskiego w konstytucyjnej doktrynie i praktyce*, "Przeгляд Sejmowy" 1993, no. 4.

²⁶ R. Carre de Malberg, *Contribution a la theorie generale de l'Etat*, vol. II, Paris 1929, p. 224 (quoted by E. Popławska). The Author shows that the overly restrictive treatment of such a perspective on representation could lead to rejecting the need for periodic elections for the renewal of the composition of the representative body: since the nation once considered the representatives elected to express its will as worthy of the implementation of this function, it is not necessary to elect the subsequent representatives – the more that periodic elections give an opportunity to evaluate the representatives' actions or to undermine the essence of the free mandate. Elections which give an opportunity to change the representatives lead – if reelection is allowed – to subordinating them to voters at least in part. However, this assumption is difficult to be considered as practicable in terms of the contemporary democratic systems.

²⁷ J. Zaleśny, *Posel a wyborcy*, [in:] *Mandat przedstawicielski...*, p. 244.

for the imperative mandate) to the deputy²⁸ and the effectiveness of the activities taken by him/her does not depend on the acceptance of the voters²⁹. The quintessence of the free mandate is to provide the representative with as wide freedom as possible to carry out his/her duties, assuming his/her motivation is in the general interest. In accordance with the doctrinal principles of classic representation, the actions taken by the deputy are to serve the common good, often understood differently from the particular interests of specific groups of voters. The mentioned assumptions correspond to the characteristic of the free mandate inadmissibility of the representative's dismissal by the voters before the end of the parliamentary term – a different construction of the institution would strike at the concept of indivisible sovereignty of the nation, which is characteristic for the classic concept of representation.

In the Polish conditions, the idea of representation has undergone significant changes. Resigning from the broader presentation of the imperative mandate characteristic for the period of the Republic of Nobles³⁰, restricted only by the Constitution of 3 May 1791³¹, a few words should be said about the transformation of the perspective on the representative mandate in the Polish constitutional conditions after Poland had regained its independence. The first constitution of the 20 years of the inter-war period³² was based on the classic construction of the free mandate, providing in Art. 20 that “Deputies are the representatives of the entire nation and are not restricted by any instructions of voters”. The April Constitution³³, because of the rejection of the principle of the Nation's sovereignty and the adoption in its place of a single and indivisible authority of the President, did not regulate any issues related to the representative mandate. In the period after the end of World War II the concept of the free mandate was not

²⁸ M. Granat, *O istocie...*, p. 15.

²⁹ K. Grajewski, *Odpowiedzialność posłów i senatorów na tle zasady mandatu wolnego*, Warszawa 2009, pp. 40–41.

³⁰ See M. Pisz, *Mandat przedstawicielski w polskiej tradycji ustrojowej i we współczesnym polskim prawie konstytucyjnym*, “Przegląd Prawa Konstytucyjnego” 2013, no. 3 (15), pp. 178–179.

³¹ In accordance with the provisions of Art. VI of the first Polish Constitution, the deputies were to represent the entire nation, “being the elements of universal confidence”.

³² The Law of 17 March 1921 – Constitution of the Republic of Poland, *Journal of Laws* 1921, no. 44, item 267 as amended.

³³ The Constitutional Law of 23 April 1935, *Journal of Laws* 1935, no. 30, item 227.

returned to, although some provisions of the Little Constitution of 1947³⁴ could create this feeling: in accordance with the deputy's oath under Art. 10, the deputies were obliged to "work for the good of the Polish nation according to their best understanding and in accordance with their conscience [...]"³⁵. The Constitution of the Polish People's Republic³⁶, following the Soviet solutions, adopted the imperative mandate but it took – as already indicated above – a specific form in terms of the socialist state³⁷. Art. 2 § 2 of the Constitution directly stated the principle of the deputies' responsibility before voters and the possibility of dismissing the representative, while Art. 87 provided for the obligation to report on their work and the activities of the organ to which they were elected by deputies and members of national councils. The adopted regulations, due to the role of the centre for decision-making by the Communist Party – were however different in practice³⁸. The change in the constitutional perspective on the representative mandate came with the adoption of the Small Constitution of 1992³⁹, in which Art. 6 was directly based on the concept of the free representative mandate, which contradicted with the further effective (until 1997) provision requiring the representatives to report on the activities taken by the Parliament. The Constitution of 2 April 1997 did not introduce any fundamental changes to the construction of the mandate, providing in the content of Art. 104 that members are the representatives of the Nation⁴⁰ and

³⁴ The Constitutional Law of 19 February 1947 on the system and the scope of operation of the supreme organs of the Republic of Poland, Journal of Laws 1947, no. 18, item 71 as amended.

³⁵ See L. Garlicki, *Uwagi do Art. 104...*, p. 3.

³⁶ The Constitution of the Polish People's Republic passed by the Legislative Sejm on 22 July 1952, final text, Journal of Laws of 1976, no. 7, item 36 as amended.

³⁷ See M. Kruk, *Koncepcja...*, p. 21.

³⁸ For example, up to the year 1976 no. rules of the dismissal of the deputies by the voters had been formally regulated.

³⁹ The Constitutional Law of 17 October 1992 on mutual relations between the legislative and executive power of the Republic of Poland and on the local government, Journal of Laws of 1992, no. 84, item 426 as amended.

⁴⁰ In accordance with Art. 1 § 1 of the Act of 9 May 1996 on the exercise of the deputy's and senator's mandate (final text, Journal of Laws of 2011, no. 7, item 29 as amended), the representatives' motivation to exercise the mandate is the Nation's good, and according to the deputy's oath referred to in Art 104 § 2 of the Constitution, the representatives promise "to perform their obligations towards the Nation fairly and diligently".

are not bound by the voters' instructions. Although the legislator resigned from the introduction of the prohibition of representatives' dismissal to the Basic Law, there can be no doubt that this essential determinant of the free mandate continues to apply in full extent and the lack of its mention in the Constitution is dictated by the idea that such a solution is obvious.

The characteristics of the representative mandate resulting from the provisions of the Constitution of the Republic of Poland refers to the classic doctrinal concepts, allowing to formulate three main differentiators of the relations between the representative and the sovereign.

Firstly, the mandate is general (universal), expressed in the relation of each representative with the collective entity of sovereignty in a uniform manner, regardless of the electoral system applicable to a specific House of the Parliament⁴¹, which reaffirms the principle of the equal legal position of all deputies. Deputies (senators) represent the whole Nation and not specific groups of voters or political parties and the relation of representation is reflected in the power – which is grounded in the constitutional principle of political representation – to take decisions on behalf of the sovereign. Even though the Constitution uses the term “przedstawiciel” in place of the formerly used term “reprezentant”*, the dependency between the sovereign and the deputy should be recognized as the institution inherent for public law that is not related to civil law, which was typical for the original form of the imperative mandate. The authorisation to express the Nation's will granted by the way of voting is individual, hence the obligation to exercise the mandate in person by the deputy, without the possibility of delegating powers to another person. The representation is limited in time, because according to the requirements of the rule of tenure it is necessary to renew the authorization periodically by the voters, and during its term it is stable, and guaranteed by the inadmissibility of the early dismissal of the deputy. Because the only entity represented by the deputies is the Nation, it is inadmissible to create any additional legal ties – which requires highlighting – between the mandate holder and voters or political parties⁴².

⁴¹ L. Garlicki, *Uwagi do Art. 104...*, pp. 4–5. * Both terms mean in English “representative”, although the first one is much wider and can be also translated as “agent, exponent or proxy” – translator's note.

⁴² *Ibidem*, p. 5 and K. Grajewski, *op.cit.*, p. 53.

Secondly, the parliamentary mandate distinguishes the independence of the representative from the voters who may not give him/her any orders or instructions of legally binding nature, request reports or agreements on the activities. This applies both to the deputy's (senator's) activity on the forum of the House, and is expressed in the inability to request effectively the implementation of the political programme presented at the election campaign from the representative⁴³, but in a broader perspective it also means the prohibition on any reduction *de jure* of the parliamentarian's freedom in his/her selection of the way to act that he/she considers appropriate for the implementation of the Nation's interests – also by a political party to which he/she belongs (in this perspective, it should be emphasized that it is precluded that the deputy's effectiveness is dependent on his/her parliamentary club's acceptance, that the club may act for the deputy, that a legally binding prohibition to leave the club or change club colours is established, or that the candidate is obliged to reimburse the costs of the election campaign in the event of indiscipline)⁴⁴. The independence of the representative mandate is not prevented by the duty to inform the voters by the deputies on their work and the activities of the organ to which they were elected resulting from Art. 1 Para. 2 of the Law on the Exercise of the Deputy's and Senator's Mandate, or the order to accept opinions, postulates and applications from voters and to take them into account in the parliamentary activity of the representatives, provided for in Art. 21 Para. 1 of this Law. Firstly, the mere fact of the imposition on the parliamentarians of the obligation to provide information, does not mean the need, which is a negation of independence, to comply with the instructions of the voters and secondly, the lack of any sanction for neglecting this obligation, makes the provision of Art. 1 Para. 2 legally unenforceable. In addition, it should be noted that in accordance with the instruction provided in Art. 1 Para. 2 of the Law, the obligation to inform concerns all voters, that is the entire sovereign – which is not narrowed down to the voters from the constituency in which the parliamentarian was elected, which would create a specific legal relation, contradictory with the concept of the

⁴³ W. Orłowski, *Status prawny posła i senatora*, [in:] *Polskie prawo...*, p. 237.

⁴⁴ B. Banaszak, M. Jabłoński, *Konstytucyjna koncepcja mandatu posła i senatora a gwarancje jego wykonywania na gruncie ustawy o wykonywaniu mandatu posła i senatora*, "Przeгляд Sejmovy" 2000, no. 1, p. 82 and L. Garlicki, *Uwagi do Art. 104...*, p. 13.

free mandate – between the deputy and the part of the voters from a specific area⁴⁵. In relation to the second of those provisions, the analogous reasoning appears: “taking into account” does not mean the obligation to allow the postulates of the electorate⁴⁶, and no. legal claim on the part of the voters means the lack of enforcement of the statutory order. The wording of Art. 21 Para. 1 should be interpreted in such a way that the representative has the right to decide freely, in consistence with his/her conscience, and above all without any legal obligations, which of the submitted postulates, opinions and proposals are useful and deserve to be incorporated in the activities taken by the Parliament – a different interpretation would lead to the obligation to apply electoral instructions, which would stand in opposition to the construction of the free mandate⁴⁷.

The institutions that guarantee the independence of the mandate and hinder the exertion of external pressure on the deputies (senators), and un-

⁴⁵ K. Grajewski, *Odpowiedzialność...*, p. 132.

⁴⁶ See however J. Zalesny, *Ustrojowe uwarunkowania mandatu poselskiego – od mandatu socjalistycznego ku mandatowi wolnemu*, “*Studia Politologiczne*” 2009, vol. 15, p. 49. The Author shows that Art. 21 Para. 1 requires a thorough analysis of the submitted proposals and – if they are recognised as valid – their reflection in the legislation. It should be indicated, however, apart from the inability to enforce this obligation by the voters – that the acceptance or rejection of this requirement is always at the deputy’s discretion, which does not leave the voters with the opportunity to contest the decision.

⁴⁷ K. Grajewski, *Odpowiedzialność...*, pp. 133–134. It should be borne in mind, which is rightly pointed out by the Author, that not all provisions of the Law on the Exercise of the Deputy’s and Senator’s Mandate can be assessed unambiguously positively in the light of the constitutionally defined concept of the free mandate: as pointed out in Art. 22 Para. 1 of the Law, deputies have the right to attend the sessions of the provincial councils, district and municipality councils relative to the constituency from which they have been elected or relative to the seat of the deputy’s office (which does not raise objections due to the general nature of the representative mandate it may be opened in accordance with Art. 23 Para. 2 of the Law in any selected constituency or constituencies), while Para. 2 of the quoted provision confers the same powers to senators, but only within the constituency from which they have been elected. Firstly, under this law, there is a diversity in the legal position of the representatives to both Houses of the Parliament, and secondly, the fact that in formulating the list of the parliamentary powers, the legislator uses an expression “constituency from which they have been elected”, raises doubts: the statutory stressing of the relations between specific deputies and their constituencies in which they obtained the mandates does not fit in the construction of representation adopted by the legislator.

dermine the possibility of a conflict of interest in the activities of the representatives include first and foremost the principle of incompatibility⁴⁸ and parliamentary immunities⁴⁹.

The last distinction of the concept of the representative mandate reflected in the Constitution of the Republic of Poland is the prohibition of the representatives' dismissal before the end of the term. Although unexpressed *explicitly* in the Basic Law, it does not raise any doubt on its further effect, acting as a natural determinant of the free mandate. In the study of constitutional law, the need for a broader view of the institution of dismissal inadmissibility is highlighted: as it is a guarantee of the representative mandate in its contemporary perspective; it must be related not only to the absence of the possibility of the direct withdrawal of authorization for the deputy by voters, but also to all other forms of the deprivation of the mandate which are a response to the way it is exercised by the representative. In particular it is expressed in the prohibition of the establishment of the general competence of the House to exclude a deputy (senator) from its composition, which determines the subordination of the representative's political activity to the legislature control, and results in the legally ineffective statements of waiver of the mandate *in blanco* as

⁴⁸ See for instance B. Banaszak, M. Kruk and A. Szmyt, [in:] *Opinie w sprawie niepołączalności mandatu posła albo senatora z zatrudnieniem w administracji rządowej*, "Przegląd Sejmowy" 1997, no. 6, p. 83 ff. See also D. Lis-Staranowicz, *Niepołączalność (incompatibilitas) mandatu parlamentarnego w Konstytucji RP z 2 kwietnia 1997 r.*, "Przegląd Sejmowy" 2000, no. 1, p. 31 ff.; M. Granat, D. Lis-Staranowicz, *W sprawie pojmowania zasady niepołączalności mandatu parlamentarnego w prawie konstytucyjnym*, "Przegląd Sejmowy" 2003, no. 3, p. 134 ff.; K. Grajewski, op.cit., p. 104 ff.).

⁴⁹ See more about the parliamentary immunities in e.g.: K. Grajewski, *Immunitet parlamentarny w prawie polskim*, Warszawa 2001; id., *Zakres polskiego immunitetu parlamentarnego*, "Przegląd Sejmowy" 1995, no. 3; J. Mordwiłko, *Immunitet parlamentarny (analiza krytyczna instytucji)*, Państwo i Prawo" 1996, no. 6; id., *Immunitet parlamentarny po jego dostosowaniu w roku 2003 do Konstytucji*, [in:] *Immunitet parlamentarny. Zagadnienia podstawowe*, ed. W. Odrowąż-Sypniewski, Warszawa 2007; R.A. Stefański, *Karnoprawne aspekty zgody parlamentarzysty na pociągnięcie go do odpowiedzialności karnej*, "Prokuratura i Prawo" 2002, no. 6; A. Szmyt, *Immunitet materialny posłów*, [in:] *Status posła, cz. I. Wybór ekspertyz prawnych do Art. 1–24 ustawy z 9 maja 1996 r. o wykonywaniu mandatu posła i senatora*, Studia Biura Analiz Sejmowych Kancelarii Sejmu, Warszawa 2007; M. Zubik, *Immunitet parlamentarny w nowej Konstytucji RP*, "Państwo i Prawo" 1997, no. 9.

a condition of being placed on the election lists. Such a solution would be in contradiction with the meaning of the free mandate and therefore the principle of dismissal inadmissibility must be related not only to voters' activity but also to the conduct of any other entities which aims to achieve similar effects⁵⁰.

III. A relationship between the representative and the collectivity in the light of the practice of the representative governments

This paper aims to present a relation between the doctrinal approach to the concept of representation and its actual functioning – therefore in the first place it should be pointed out that the legal characteristics of the representative mandate presented above differs significantly from the political and constitutional practice of the contemporary states, including Poland. The reasons for this situation lie in maintaining of the free mandate under the current provisions of the Constitution and at the same time abandoning its original form by the representatives. In this way the representative system constitutionally based on classic theoretical assumptions, turns into a system functioning according to the specific rules⁵¹ – “[...] the classic representation has lost its spiritual substance and legal significance and it has survived as a purely formal frame within which a new unnamed political system has developed⁵².”

The discrepancies between the classic approach to representation and its modern form result mainly from the sociological consequences of the electoral process. The creators of the classic theory of representation assumed the possibility of defining the role of the voter and the representative and the dependencies between them, having no experience in carrying out the elections to the representative bodies. The discrepancy between the theoretical assumptions of representation and the practice of its functioning was determined by the reality of the electoral process leading to the shape of the char-

⁵⁰ L. Garlicki, *Uwagi do Art. 104...*, pp. 10–12.

⁵¹ E. Popławska, *op.cit.*, p. 131.

⁵² G. Burdeau, F. Hamon, M. Troper, *Droit constitutionnel*, ed. 23, Paris 1993, p. 174 (quoted by E. Popławska).

acteristic relations between the voters and the deputies⁵³. The need for redefining the concept of the mandate in its contemporary form is due to four main reasons. Firstly, the voters were not satisfied with merely personal choice of the representative, seeking to obtain the real impact on the decisions taken by the legislature; with the freedom of choosing the deputy, they formulated specific requests on which they depended their voting. Secondly, the same attitude developed with the representatives who hoped for re-election – their conformist attitude made them put their loyalty to the voters before their freedom of exercising the mandate, resulting from the concept of independence (The obstacle in this shaping of the relations between the deputies and the electorate would be a ban on re-election, already envisaged by the developers of the first French Constitution of 1791, however this solution – as was shown in practice – was not in the interest of the voters, or the representatives, who were interested in the implementation of their own purposes). Thirdly, the role of the elections in raising the importance of political parties should be indicated, which leads to the subordination of the candidate to the group that nominated him/her and then created the dependencies between the deputy interested in obtaining the party nomination in the next parliamentary elections and the parliamentary fraction to which the deputy belongs⁵⁴. Fourthly, the departure from the traditionally recognized parliamentary mandate should be seen also in the territorial nature of the parliamentary elections, making in fact the deputies advocates of the interests of a particular constituency – a consistent ignorance of the postulates submitted by the voters within the specific territorial framework will influence the electoral chances of the candidate who during the previous term created himself/herself the exponent of the sovereign's will understood as a whole. In this way the role of the representatives, which is in a clear contradiction with the classical concept of representation, could be seen as the presentation and the desire to impose differing views, corresponding to the heterogeneous nature of the representative organ. This concept is different from the assumptions of representation in the context of the modern constitutions; in practice it does not differ from the actual relations between the deputies, voters and political

⁵³ G. Burdeau, *Traite de la science politique*, vol.V, *Les regimes politiques*, Paris 1985, pp. 228–229 (Quoted by E. Popławska).

⁵⁴ *Ibidem*.

parties⁵⁵. The adoption of the fictitious representation in the old classic perspective is due to the need to justify the unity of the authority against the variety of views and to avoid the breakage of collectivity which would prevent the development of a coherent policy⁵⁶.

Therefore, in the present political and constitutional reality the relation between the representative and the voters and the political party with which he/she is linked by the electoral process and the subsequent parliamentary activity is essential to determine the actual form of representation.

Despite the expressed constitutional principles of the free mandate in the form of general nature and independence, it is difficult to ignore the current political dependence of the representative on the voters, which is expressed in the possibility that the candidate that did not meet the expectations of the electorate in the previous term would not be granted support in the subsequent elections. The actual relation between the representative and the voters is shaped quite differently from the constitutional assumptions, leading often to produce the relation widely beyond the free mandate and more suited to the characteristics of the imperative mandate as the mandate holders interested in being re-elected, take actions to obtain the favourable attitude of the voters, which combined with the modern professionalising of the mandate (the development of the class of professional politicians), significantly modifies the constitutional perspective on representation⁵⁷. This relation is deepened by the fact that also the voters, supporting a particular candidate, naturally assume his/her activity for the constituency and any possible representative's activities in contradiction with the demands of the electorate are regarded as a betrayal and unethical conduct⁵⁸. The deputies, which is confirmed by the study, are fully aware of the voters' expectations which are geared toward the particular interests, in isolation from the basic objective pursued by the Parliament, i.e. shaping the legal order in the general inter-

⁵⁵ E. Popławska, *op.cit.*, p. 133.

⁵⁶ H. Kelsen, *O istocie i wartości demokracji*, Warszawa 1936, p. 37.

⁵⁷ W. Kraluk, *O mandacie przedstawicielskim w aspekcie politycznym* [in:] *Studia ustrojowawcze. Księga jubileuszowa Profesora Andrzeja Pułło*, ed. A. Szmyt, "Gdańskie Studia Prawnicze" 2014, vol. XXXI, p. 859.

⁵⁸ J. Szymanek, *Mandat parlamentarny (reinterpretacja ujęć klasycznych)*, "Przegląd Sejmowy" 2010, no. 5 (100), p. 132.

est, which requires the specific ties to the electorate⁵⁹. For the above reasons, the actual relations between the voters and the mandate holders are nowadays expressed in maintaining of strong bonds with the constituency by the representative and the frequent implementation of the demands expressed by his/her electorate in the parliamentary activities⁶⁰. In this way, even in the absence of instruments for withdrawal of the mandate conferred on the deputy or senator, there is no full freedom of the exercise of the representative mandate, just from the viewpoint of the responsibility borne by the representatives during the next elections. This responsibility is functional, different from the personal dependence of the mandate holder on the voters – it is expressed in bearing the consequences for failing to meet the defined criteria such as the involvement in the parliamentary activity, effectiveness, the line of political action or competence⁶¹. It is worth noting that the actual im-

⁵⁹ J. Zaleśny, *Posel a wyborcy...*, p. 312. The Author, by analysing the results of a survey of 154 deputies of the 6th term indicates that 90.9% of the members of the Polish Peasants' Party, 85.7% of the non-attached members, 83.1% of the members of the Civic Platform, 78.6% of the members of the Alliance of Democratic Left and 74.5% of the members of the Law and Justice expressed their awareness that the voters from the constituency expect that the deputies would take specific actions. What is particularly interesting, the research shows that 72.1% of the respondents indicated the differing views by the deputies and the voters on the role and competences of the deputies: these differences were expressed in assigning the representatives a definitely longer list of powers than the actual one by the electorate, as well assuming that the intervention of the deputy would have a decisive impact for the successful settlement of a specific matter. On the one hand, the indicated discrepancies lead to the voters' disappointment in the ineffectiveness of the actions taken by the representatives. On the other hand, they result in the frustration of the deputies, caused by the objective inability to meet the expectations of the electorate. *Ibidem*, pp. 312–313.

⁶⁰ K. Grajewski, *Odpowiedzialność...*, p. 117.

⁶¹ M. Granat, *Skutki prawne nowej charakterystyki konstytucyjnej mandatu przedstawicielskiego*, [in:] *Mała Konstytucja w procesie przemian ustrojowych w Polsce*, ed. M. Kruk, Warszawa 1993, p. 98. It should be emphasized that the functional responsibility implemented by the electorate at the next elections is not based on the legal grounds – the promises and declarations of the candidate (representative) submitted during the election campaign and in the course of parliamentary activity are not the public promises and may not be legally enforced. Therefore, of course only from a strict legal point of view, on the occasion of the next election the representatives bear no responsibility for the activities that they were not legally obliged to take. However, as it has been stressed in the article, the legal aspect and the sociological and political value of the mandate are two different things.

plementation of political responsibility of the representative in relation to the electorate shows strong links with the adopted electoral system. If the principle of proportionality is applicable, the implementation of functional responsibility by the candidate, who did not meet expectations during the previous term according to the voters, is conditional on the result of the constituency list of the candidates for the deputies. If the election committee has exceeded the barrier clause, it may happen that the good result of the list in the constituency determines the gain of mandates by the candidates who have won a relatively small number of votes, which can limit the effectiveness of political responsibility to a certain extent. It is possible to gain the mandate by the candidate who, despite a significant decline in the voters' support compared to the previous elections, was included in the list with a large number of votes cast⁶². What is equally important for the considerations, the proportional system, for which the institution of lists is characteristic, makes the candidates compete not only with the political opponents, but also between one another within the same constituency list. In such a situation, it is very common during the election campaign to show links with a specific constituency and highlight the initiatives taken on its behalf during the previous parliamentary term⁶³. The voters are left with wider opportunities in case of the distribution of mandates based on the majority system where, despite the political party affiliations of most of the candidates typical of the modern elections, the vote is given to a particular person. In conclusion, it should be noted that a vision of a possible failure, contrary to the legal nature of the mandate, leads to the need to maintain strong links with his/her constituency by the deputy. In this light, differently from its legally unenforceable nature, the real mean-

⁶² This is especially visible in the constituencies in which the party leaders or the leading politicians of the group that act as the "electoral locomotives" run – on such lists the number of votes required for the mandate by the other candidates strongly decreases because of the accumulation of cast votes for the leading individuality. It is worth noting, however, that this situation must also be analysed from another perspective: if the reluctance of the electorate focuses on the leader, then it is very likely that the functional responsibility will spread to the other candidates on the list, seriously limiting their possibility to obtain the mandate. See K. Grajewski, *Odpowiedzialność...*, pp. 127–129. W. Kraluk, op.cit., p. 855.

⁶³ P. Uziębło, *Głos w dyskusji*, [in:] *Zmiana ordynacji wyborczej a zmiana konstytucji. Międzynarodowa Konferencja Naukowa. Rzeszów, 3–4 marca 2008 r.*, eds. S. Grabowska, R. Grabowski, Rzeszów 2008, p. 72.

ing of the orders is shaped; for example, the orders that are expressed in already mentioned provisions of the Law on the Exercise of the Deputy's and Senator's Mandate in Art. 1 Para. 2 and Art. 21 Para. 1, according to which the representatives should inform the voters of their work and the functioning of the organ to which they were elected, and are obliged to accept and consider the voters' postulates and opinions. The consistent ignoring of these duties may to a large extent be transformed into the later electoral result of the mandate holder and – at least temporarily – exclude him/her from the composition of the Parliament.

The dependency of the deputy on the political party to which his/her activities are linked is even more clearly outlined than his/her relationship with the voters⁶⁴. These relations have their source in the dominant role of political parties in the shaping of opinions and political attitudes of citizens, expressing of the will and connecting the interests of the group members and broad social groups⁶⁵ – in particular they result from the fact that it is the political parties that aim to “influence the state policy by means of democratic methods” (Art. 11 of the Constitution of the Republic of Poland); they have become the main instruments of participation in the public life. The practice of the subsequent elections has led to the situation in which the mandate holder has actually become a client of a specific political force, which is translated into the falsification of the classic perspective on representation in which the representative expresses the universal will⁶⁶. In the first place, it should be considered that political parties in most of modern constitutional orders have the political monopoly in the political organization of the parliamentary elections⁶⁷, which is especially visible in the case of proportional electoral

⁶⁴ In the doctrine of the constitutional law there is a view that the constitutional concept of the free mandate precludes the mandate holder from being bound with the constituency voters' instructions and is not a guarantee against making the representatives dependent on the decisions of the political party leaders. See S. Bożyk, *Partie polityczne a Sejm RP*, Warszawa 2006, p. 94. K. Grajewski rightly disagrees with this position, noting that the voters may be organized and hence the constitutional ban on infringement of the independence of the mandate also includes voters' organizations, which may be political parties. K. Grajewski, *Odpowiedzialność...*, p. 139.

⁶⁵ W. Kraluk, *op.cit.*, p. 855.

⁶⁶ J. Szymanek, *op.cit.*, pp. 127–128.

⁶⁷ See L. Garlicki, *Uwagi do Art. 104...*, p. 11.

system. In this way, it is the party that decides if a candidate gets the opportunity to obtain the mandate and be re-elected during the subsequent elections by nominating (or refusing to nominate) a candidate on its election lists⁶⁸. In addition, the role of political parties in the development of the electoral programmes has led in the process of successive elections to the belief that the candidate is backed up not by the voters, but by the political party, and the elected representative has in fact two mandates: in the legal terms one from the collective entity of sovereignty, and in practical and political terms one from the political party with which he/she has remained in the formal or informal relations⁶⁹.

The parliamentary activity of political parties is pursued through the internal organs of the House and the clubs, circles and parliamentary groups⁷⁰ of the deputies and senators. Considering the dependencies between the mandate holders and political parties, the role played by the clubs and circles of the deputies (senators) should be stressed – according to the doctrine, the forms of parliamentarian organization created based on the political principle⁷¹ are not connected with representing the will of the entire nation; on the other hand, they represent the expositions of political parties and transmit the will and interests of parties representing the interests of individual electorates in the Parliament⁷². The essential importance on the impact

⁶⁸ Ibidem.

⁶⁹ J. Szymanek, *op.cit.*, p. 134.

⁷⁰ Interesting from the point of view of the independence of the mandate is the institution of the deputy and senator groups, created on the grounds other than political, in accordance with Art. 8 Para. 6 of the Sejm Regulations (Resolution of the Sejm of the Republic of Poland of 30 July 1992 – the Regulations of the Sejm of the Republic of Poland, final text M.P. 2012, item 32 as amended) and Art. 21 Para. 6 of the Senate Regulations (Resolution of the Senate of the Republic of Poland of 23 November 1990 – the Senate Regulations, final text M.P. of 2015, item 805). The criterion of the establishment of the group was very widely defined, which in practice determines the functioning of the parliamentary groups representing the interests of a specific territory, a social or professional group. In this way, parliamentary groups – contrary to the concept of the free mandate expressed in representing the whole collective entity of sovereignty – express particular postulates. See K. Grajewski, *Odpowiedzialność...*, p. 153.

⁷¹ See Art. 8 of the Sejm Regulations.

⁷² W. Kraluk, *op.cit.*, p. 863 and M. Kudej's paper, indicated by the Author, *Status prawny posła i senatora w Rzeczypospolitej*, [in:] *Założenia ustrojowe, struktura i funkcjonowanie parlamentu*, ed. A. Gwiżdż, Warszawa 1997, p. 272.

of political groups on the activities of the representative can be attributed to the intra-parliamentarian instruments, with particular regard to the club discipline. This institution of unifying the activities of the deputies belonging to the same club⁷³ presents a potential application of severe consequences if the representative disobeys the orders by the fraction leaders, and applied based on the individual parliamentary club regulations that despite the absence of the common legal force essentially affect the exercise of the representative mandate⁷⁴. The analysis of the club regulations operating in the Sejm of the 8th term indicates the presence of strong relations between respecting the fraction leaders' decisions and the situation of the deputies. For example, the provisions of the regulations of the two largest parliamentary clubs – Law and Justice and Civic Platform may be indicated. According to the regulation provisions of the Law and Justice club⁷⁵, the resolutions of the party and club leaders are binding for the party member during voting at meetings of the Sejm, the Senate and their organs and when undertaking “other political actions related to the exercise of the mandate” (Art. 3 Para. 2 and 3). The scope of the duties of a club member is clarified by Art. 6, under which a member is obliged to respect the resolutions, orders and guidelines of the fraction leaders, to act in accordance with the fundamental interests of the club, to participate in voting in the Parliament and its organs in accordance with the decisions of the club leaders, to inform the club presidium of the work of the committees on a regular basis and, what is especially worth highlighting, to remain in a constant telephone contact with the club leaders. The Law and Justice parliamentary club members form in the parliamentary commission a so-called Law and Justice commission group headed

⁷³ Apart from the comments made on the impact of the party discipline on the way of exercising the representative mandate, it should be considered that this institution has a significant influence on the possibility of implementing the government policy in the House and ensuring the stability of the parliamentary majority. See. J. Zaleśny, *Posel a partia polityczna*, [in:] *Mandat przedstawicielski...*, p. 291. It is worth noting, however, that in the study carried out among the deputies of the 6th term, although 59.1% of the respondents recognised that the party discipline is an essential precondition for the functioning of the Sejm, as many as 51.3% of the deputies were of the opinion that it limits the freedom of the individual parliamentarians. *Ibidem*, p. 274.

⁷⁴ See K. Grajewski, *Odpowiedzialność...*, p. 157.

⁷⁵ <http://kppis.pl/regulaminkppis.pdf> (2.01. 2016).

by the spokesman appointed by the president of the club, entitled to manage the discipline of presence and voting at the committee meeting (Art. 7 § 1–7). If a club member breaches the resolutions, orders and guidelines of the fraction leaders, he/she may, in accordance with Art. 9 § 7.4, be excluded, under the meeting resolution of Law and Justice club members, by an absolute majority of votes in the presence of at least half of the club members. In accordance with the Civic Platform club regulations⁷⁶, the club member is obliged to act in accordance with the interests of the club, to observe the resolutions of the council, presidium and club meeting (Art. 3.1), to vote in accordance with the voting discipline approved by the club presidium (Art. 3.6); he/she may not initiate his/her own legislation initiative without the presidium consent, or support bills, votes or resolutions proposed by other clubs without the consent of the club council (Art. 4). In addition, the club members included in a commission of deputies or senators form the club commission group, headed by a plenipotentiary, appointed by the fraction presidium (Art. 5 § 1–3). For the club indiscipline, the members, with the assumption that each indiscipline of the presence or voting constitutes a separate disciplinary misconduct, may be, apart from being punished by a wide range of other penalties, excluded from the fraction by the resolution of the club meeting, taken by an absolute majority of the votes.

Stressing again that the requirements of the club discipline may not raise legal effects in relation to specific parliamentarians⁷⁷, as they would be against the constitutional nature of the representative mandate, it is difficult to overestimate the weight of possible political sanctions related to the breach of the subordination to the club. What is more, the view presented by the major part of the doctrine that the club discipline is permissible and does not constitute a restriction of the representative independence, if it causes only political effects, is consistent with the assumption that the legal and political aspects of the parliamentary mandate may be reconciled – this concept can be considered as a hypocrisy because it assumes that in the absence of legal consequences of the club indiscipline, the representative is not dependent upon the party

⁷⁶ Civic Platform Parliamentary Club Regulations of 12 November 2015.

⁷⁷ See K. Skotnicki, *Konstytucyjne i polityczne determinanty statusu posła i senatora*, [in:] *Parlament. Model konstytucyjny a praktyka ustrojowa*, ed. Z. Jarosz, Warszawa 2006, p. 67.

leaders⁷⁸. The questionable nature of this assumption is due to the existence of a wide range of punitive measures taken by the club leaders, implemented in relation to the insubordinate parliamentarians, and the fact that this responsibility does not take the form of a legal instrument does not invalidate in any way its actual effects, binding a deputy and creating a contradictory phenomenon of double loyalty⁷⁹. The potential punishments, implemented in relation to the deputy or senator breaking the club discipline – apart from the above mentioned exclusion from the club, which significantly limits the possibility of an effective action in the House for the representative, if he/she remains non-attached after the exclusion – include: removing the deputy from the authorities or other organs of the club, limiting his/her speeches on behalf of the club, shifting to a less prestigious parliamentary committee, leaving out in case of initiatives undertaken within the club and suspending the club member rights⁸⁰. Naturally, the most painful, possible consequence to implement, is the omission of the person who has committed a breach of the club discipline, when determining the lists of candidates for the next elections. As a result of the above mechanisms, deputies and senators are treated more as the representatives of their own group, following the party leaders' instructions than as the factual representatives of the collective entity of sovereignty⁸¹ – it is difficult not to share the view presented in the doctrine that

⁷⁸ W. Kraluk, *op.cit.*, p. 867. See K. Grajewski, *Odpowiedzialność...*, p. 164 ff. According to K. Grajewski, the free mandate is maintained because neither the obligation to be a member of a political party nor to its parliamentary fraction exist under Polish law, and resolutions, recommendations or guidelines directed by the party to its members are not legally binding – hence the links of the mandate holder with the political group and possible respect to its commands is voluntary and is based on the decision of the mandate holder. Although this position is formally justified, it assumes the possibility of independent existence of two aspects of the mandate: legal and political that do not affect each other. This assumption appears to be at least controversial as ignoring the actual consequences of the party indiscipline by the mandate holder expressed in significant difficulties, if not preventing him/her to be re-elected; it seems not to consider the practical dimension of representation.

⁷⁹ See A. Szmyt, *Na marginesie problematyki dyscypliny partyjnej (klubowej) w parlamencie*, [in:] *Prawne aspekty funkcjonowania partii politycznych w państwach Europy Środkowej i Wschodniej*, eds. A. Domańska, K. Skotnicki, Łódź 2003, p. 264.

⁸⁰ L. Garlicki, *Polskie prawo...*, p. 210.

⁸¹ A. Ławniczak, *Uwagi do Art. 104*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. M. Haczkowska, Warszawa 2014, p. 287.

parties have a much greater impact on the deputies than the citizens and the connection of classic representation with the party machinery, in fact, makes the representative a subordinate of the party leader⁸².

IV. Conclusions

The above mentioned remarks allow to conclude that between the classic perspective on the free representative mandate formed in the late eighteenth and early nineteenth centuries, and the political aspect of representation which currently plays the essential role there is a substantial gap, forming the exclusive mutual dependence system⁸³: the legal aspect reflected in the constitutional assumptions of the parliamentary mandate assumes that the deputy represents the collective entity of sovereignty, in an independent manner, free from orders of specific conduct, and the political aspect binds the mandate holder, first of all, even not so much with the voters as with a specific political party⁸⁴. This condition has been maintained at least from the time the modern political parties took their shape and their role as the main actors of the elections was accepted by the transformation of the electoral law⁸⁵, therefore the concept of the parliamentary mandate as a legal and political link between the voter and the representative appears self-contradictory, and because of the substantial discrepancies between the political aspect and the legal aspect of the mandate, it is difficult to be considered as acceptable.

Bearing in mind the above problems, the study of the constitutional law undertakes attempts to redefine the relation of representation by proposing a different view on the nature of the mandate, among which the concept of the semi-imperative mandate stands out⁸⁶. The mentioned doctrinal perspec-

⁸² M. Granat, *Zasada reprezentacji...*, p. 121.

⁸³ W. Kraluk, *op.cit.*, p. 854.

⁸⁴ J. Szymanek, *op.cit.*, p. 129.

⁸⁵ M. Kruk, *Koncepcja...*, p. 15.

⁸⁶ The concept of the collective mandate that appears in the study of law, but is not widely supported, should also be noted. In this case there is a theoretical attempt to change the representative, who becomes not a single deputy, but organised structures in the form of political parties, provided that the entity represented remains a collective entity of sovereignty. This position is based on the assumption that the mandate is no longer an individual commitment of

tive in legal terms assumes maintaining the general character of the mandate, expressed in the abstract representation of the general will and in the political sense accepts the prominent role of political parties; in other words the mandate remains free in the sense that the mandate holder is not bound by the mandate granter's instructions, while underlining an increasingly close relation with his/her political party, the external form of which is the party discipline⁸⁷. The supporters of the presented concept believe following the party instructions by the deputy – in the absence of a legal obligation to respect them – is not in contradiction with the general concept of the free mandate. This perspective may be hardly seen as coherent, because it seeks to reconcile two essentially contradictory factors – the legal one that assumes no limitation of the representative with the content of the mandate, and the political one which highlights the link between the deputy and the party, without introducing a significant, innovative content. In this way the semi-imperative mandate maintains the fiction of representation, based on a free relation between the mandate holder and the voter, and legitimises the party organization as a link in this relation, which raises doubts as to the identity of the represented entity⁸⁸.

Today, representation may also be treated as-considering the views expressed by the authors of the so-called realistic concepts – as a real relation between the voters who have specific and diversified interests and the representatives, while considering the key role played by political parties today⁸⁹, which, however, remains in conflict with the legal construction of representation, held by most constitutional systems. Therefore, the current task of the doctrine of law remains the search for a concept of the representative man-

the specific parliamentarian, but it has become the impersonal collective commitment, which aims to implement the political program of the specific party. The proposals for collective recognition of the parliamentary mandate are most often rejected as standing in an apparent opposition to the classic recognition of the representative mandate for which the personal approach to representation is characteristic – the mandate is awarded to a particular person and exercised individually by that person (see J. Szymanek, *op.cit.*, pp. 141–144).

⁸⁷ J. Szymanek, *op.cit.*, p. 131.

⁸⁸ *Ibidem*, p. 131 ff.

⁸⁹ W. Orłowski, *Refleksje w sprawie charakteru mandatu parlamentarnego*, [in:] *W kręgu problematyki władzy państwa i prawa. Księga jubileuszowa w 70-lecie urodzin Profesora Henryka Groszyka*, Lublin 1996, p. 219.

date, considering the factors occurring in the political and constitutional practice which affect the important modification of the construction of representation in relation to its current, constitutional approach.

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