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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT REPORT**

**ON**

**DEMOCRACY, LIMITATION OF MANDATES AND  
INCOMPATIBILITY OF POLITICAL FUNCTIONS**

**on the basis of comments by**

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**Table of contents**

I.	Introduction .....	3
II.	Democracy and Representation: general notions.....	3
III.	Theoretical reference to the limitation of the mandate and the right to re-election of the holders of political functions .....	5
IV.	Limitation of the mandate: from history to contemporary norm and practice.....	7
V.	Constitutional and legal aspects of the limitation of mandates and of the right to re-election of the president of the state.....	8
VI.	"Pro" or "against" the limitation of the mandates of the holders of political functions .....	11
VII.	Theoretical and constitutionally legal review of the limitation of the possibility for a simultaneous performing of several terms in different political functions (incompatibility issue) .....	12
VIII.	Incompatibility vs. ineligibility.....	15
IX.	Reference to the economic incompatibility .....	18
X.	Conclusions .....	21

## I. Introduction

1. At its meeting on 14 December 2011, the Political Affairs Committee of the Parliamentary Assembly dealt with measures to improve the democratic character of elections in the member states of the Council of Europe with the aim of having a report adopted by the Assembly on this issue in 2012. The Committee based its work on the draft report written by Mr Jean-Charles Gardetto (Monaco, EPP/CD).<sup>1</sup> Mr Jean-Claude Colliard represented the Venice Commission and presented the Commission's work on this issue. The Political Affairs Committee then requested a written contribution from the Venice Commission on this question.

2. Mr Colliard prepared document CDL (2012)007 that was adopted by the Council for Democratic Elections at its 40<sup>th</sup> meeting (Venice, 15 March 2012) and by the Venice Commission at its 90<sup>th</sup> plenary session (Venice, 16-17- March 2012).

3. The Venice Commission also received a request from the Parliamentary Assembly's Political Affairs Committee on the limitation of terms of political office, covering two aspects:

- the limitation of the duration of terms of office of elected representatives;
- concurrent offices.

4. The draft Report on "Democracy, Limitation of Mandates and incompatibility of political functions" sets out the legal rules and practices in different member states of the Council of Europe and beyond as a first step in the drafting of more concrete guidelines.

5. *This Report was adopted by the Council for Democratic Elections at its .. meeting (Venice, ...) and the Venice Commission at its .. plenary session (Venice, ...).*

## II. Democracy and Representation: general notions

6. Democracy is an unambiguous phenomenon. 'It is the worst form of government except all the other forms that have been tried from time to time', said Winston Churchill in the UK House of Commons (1947). But, democracy is the only stable principle in a post-modern political society. Most theories of democracy are based on the principle of "government by the people". This implies that people participate in the creation of crucial decisions that influence their lives and determine the societal environment.

7. Participation may be direct or indirect. A more common way of participating is through a system of competitive and regular elections, based on universal franchise as a central feature of a representative democracy. This definition of democracy is often assumed as being "western or liberal democracy". Both in theory and in practice, however, there are a number of rival models of democracy, each offering its own perception of popular rule, as well as different forms and mechanisms through which democratic rule can be applied.

8. The "democracy debate" raises many questions, among which are:

- Can citizens practice control over their own lives and destinies?
- Is the modern citizen a 'zoon politicon'?
- Is the public allowed to express its own views and needs and can elected representatives address peoples' or personal interests?
- Can political equality coexist with economic inequality?
- Why are politics and politicians often negatively and pejoratively perceived??
- How should the increasing cases of corruption and dishonesty be interpreted?

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<sup>1</sup> AS/ Pol (2010) 31.

- How could political abstention, boycotts and anti-politics be prevented and dealt with?

9. Politics is, in essence, pure power: the ability to achieve a desired outcome, through whatever means necessary.<sup>2</sup> Living in a world in which people's needs are infinite, but resources are limited, we must be aware that politicians struggle over scarce resources. Let us quote Lord Acton's (1834-1902) aphorism: "power tends to corrupt and absolute power corrupts absolutely".

10. Democracy was never fully realised, it was always to some extent unconsolidated and defective. It rested on the premise that self-correction innovation and improvement were still possible. Democracy wanted to be more than it was. It was always the democracy to come, as the French philosopher Jacques Derrida liked to say.

11. Democracy is fundamentally rooted in the proposition that political sovereignty originates with citizens. The authority of the state is anchored in the will of the people, and just and legitimate government can only be based on their explicit consent.

12. In modern democracies, this consent is mediated through representatives, chosen by means of regular, periodic free and fair elections, based on universal suffrage and a secret ballot.

13. Enduring democratic systems are characterised by meaningful political participation and democratic competition, protection of the basic human rights, lawful governance, and strong democratic values.

14. Efforts to provide support for democratic practices and values, therefore, focus on four broad areas: political participation, competitive elections, human rights, and lawful governance.<sup>3</sup>

15. Democracy in one country and the structure of governance begins with the country's constitution and the rules it establishes.

16. Constitutions distribute power and authority among the executive, legislative and judicial branches, and hierarchically, among national/federal, provincial/state, and municipal and local levels of government. The allocation of mandates for oversight, rule-making, representation, and reporting among the three branches and the various levels creates a web of checks and balances that constitutes the basic framework for democratic accountability.<sup>4</sup>

17. In a democracy, politicians are accountable first and foremost to the citizens who elect them, though often the links are tenuous. First, the elections can be a rather distant and limited accountability mechanism, second, politicians elected under systems where citizens vote for party lists rather than individual representatives tend to be accountable first to their party leadership, and only secondarily to citizens, and, third, officials appointed to leadership positions by the government in power may feel they owe their allegiance to political decision-makers, with only a distant or diffuse sense of accountability to citizens.<sup>5</sup>

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<sup>2</sup> This notion is summed up in the title of Harold Laswell's book 'Politics: Who gets, What, When, How' (1936), New York: Mc Graw-Hill.

<sup>3</sup> See: USAID Policy, Democracy and Governance, November, 1991, <http://www.usaid.gov/policy/ads/200/demgov/demogov.pdf>.

<sup>4</sup> Constitutional rules vary in how power and authority are distributed and separated. Modern governance structures fall into two broad categories: presidentialist and parliamentary. The details of checks and balances established by presidential and parliamentary systems have implications for democratic governability and political stability. See: Riggs, Fred W. (1998), "Presidentialism vs. Parliamentarism: Implications for Representativeness and Legitimacy." International Political Science Review. Vol.18, No. 3, pp. 253-278.

<sup>5</sup> See: Derick W. Brinkerhoff, (2001), Taking Account of Accountability: A Conceptual Overview and Strategic Options, March, 2001: [http://www1.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/ipc/wp-14.pdf](http://www1.usaid.gov/our_work/democracy_and_governance/publications/ipc/wp-14.pdf).

18. Modern democracy can only function with or through limitations that it had set itself as legitimate and reasonable. Of course, the limitation of mandate and the right to (re)-election of the holders of political functions, as well as the issue of political and economic incompatibility, and the issue of non-electoral status are the key principles that limit democracy, but at the same time make it possible.

19. On the other hand, the effects of these principles on the democratic institutions in a given country will widely depend not only on their constitutional dimension and practical realisation, but mainly on the model of organisation of power in that country, i.e. on whether the political system is dominantly parliamentary, presidential or organised in the form of a mixed system.

20. In that context, much importance must be given to the range of authorisations that the holders of political power have in a given country, i.e. whether, for example, the ministers and the MPs in that system have or not a procedural immunity, what the relations between the government and its ministers with parliament, the president etc. are.

21. In the context of the relations between democracy and the limitation of the mandate, the model of political culture in the country is very important, i.e. whether the given country applies a participative or a subjective model, or, in other words, whether the holders of political power in that country are more or less prepared to resign under the pressure from the public, due to the incompatibility of their functions, i.e. due to the non-ethical dimension deriving from the several functions that one person holds.

22. Democracies are not all the same. It is true that some democratic systems foster representation better than others. Certainly, the quality of representation of the citizens' interests in the politics of a given country depends widely on the accepted model of leadership in that country. It is a fact that in many democratic countries, despite the direct confrontation with the pluralistic principles, the so-called elite model of leadership is applied, based on the principle of concentration of the political power in the hands of few.

23. If we add to this the marginal use of the instruments of direct democracy, then we may conclude that quite often the inclusive model of governing is, in fact, replaced in reality by the oligarch model of governing. This conclusion inevitably leads us to a dilemma: do we need at all stricter limitations of the right to (re)-election of the holders of political functions, do we need an expansion of the list of political functions to which these limitations for a second mandate refer, and do we need the enlargement of the list of political functions that are considered incompatible on a horizontal, vertical and national-local level?

### **III. Theoretical reference to the limitation of the mandate and the right to re-election of the holders of political functions**

24. The mandate and the issue of its (non)limitation were, and still are a challenge not only for the theory of representation, but also for contemporary democratic practice. There is no single answer that applies to all the different political and ideological trends of the different models of representation (trusteeship model, delegate model, mandate model and resemblance model),<sup>6</sup> the different democratic traditions and models of governing that exist in entire different political cultures.<sup>7</sup> The first model (the trusteeship model) is based on Burke's notion of

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<sup>6</sup> Cf. Heywood, Andrew (2007), *Politics* (third edition), Palgrave, Macmillan, pp. 248-252.

<sup>7</sup> This report will not go into details about the theoretical aspects of the free and imperative mandate, however it will focus on the so-called corrections to the free mandate that are present in the contemporary constitutional states. There are, namely, certain opinions that are more and more vocal about the new "elastic" character of the parliamentary mandate, as well as considerations that the constitutional rules in the systems with traditional constitutions cannot cover or foresee all legal situations that occur in practice. Hence, the issue of perspective, i.e. acceptable level of contradictions between constitutional law on one hand and constitutional practice on the

representation. The second (the delegate model) is inspired by Thomas Paine, who believes that politicians are bound by the instructions they receive from those they represent and that there is a need for regular contact between representatives and their constituents through regular elections and short mandates. Supporters of the "delegate model" are in favour of recall/revocation as well as of people's initiatives and referendums for more control over politicians. The mandate model is based on the idea that a party gains a popular mandate that authorises it to carry out whatever programmes it supported during the election campaign. The "resemblance model" suggests that only those who come from a particular group can represent it and its interests.

25. The theory of representation is one of the most influential theories in contemporary political thought and representation itself still raises major controversies. It is clear that the issue of who should be represented, which was popular during democracy's expansion in the 19<sup>th</sup> and 20<sup>th</sup> centuries, along with the broadly accepted principle of political equality through the formally guaranteed common right to vote and the principle of "one person, one vote" can be considered as closed.

26. However, to narrow representation down to elections and to the vote is too simplified an approach, which turns politicians into mere "representatives" because they were elected. A number of questions still remain unanswered: what do elected people represent and when can we really say that those who were elected truly represent those who elected them?

27. Even though the debate on the nature of representation is on-going, everyone agrees that representation is undeniably connected to elections. It is undeniable that elections are a necessary precondition, but the question is whether they are a sufficient precondition for political activity.

28. For some analysts, such as Joseph Schumpeter, "... democracy suggests that people have a possibility to accept or reject those who govern them".<sup>8</sup> In this context, democracy, as an "institutional arrangement", means that public functions are fulfilled through competition for votes of the people who elect and dismiss their representatives in the government institutions led by specific political and other interests. This approach is based on the theory of "competitive elitism", which stresses the significance of elite rivalry. It is also associated with the "realistic" model of democracy, developed by Anthony Downs (1957) in the "economic theory of democracy". He sees politicians as entrepreneurs, fighting on the political market for governmental power, and voters as consumers, voting for those who reflect their interests.

29. Although it sounds logical that elections are a reflection of the public interest, or of what "the people said", it is hard to determine what "the people really said" and especially why people voted as they did, i.e. what their motive was when they voted, which is the matter for "psephology" as a scientific study of the voters' behaviour.

30. Having in mind the different types of elections and election systems, it is hard to generalise election functions. Still, elections on a national level have three main functions:

1. To serve as a constituting tool or mechanism of government institutions;
2. To determine the main directions of public policies, and
3. To serve as a bridge that connects those who govern and the citizens.

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other arises. The mandate is still strongly linked to the principle of political pluralism. The position of the MP (member of parliament) cannot be taken independently from the reality that exists in the party scene and vice-versa. On the other hand, the essence of the free mandate is in the guarantees that ought to be given to the MPs about their independent position vis-à-vis the party that nominated them. See: Turpin, C. (2002), *British Government and the Constitution*, (London: Butterworths LexisNexis).

<sup>8</sup> Joseph Schumpeter. (1991) *Capitalism, Socialism and Democracy* (London: Harvester Wheatsheaf).

31. In any democratic system there are contemporary and competitive political parties among which the voters decide on elections based on the political programmes they offer.<sup>9</sup> This is a key to democratic rule. However, democracy must also exist in the period between the two election processes in the state, which requires appropriate mechanisms that will provide people with a voice during that period.

32. When laws and other important political decisions are passed in a given country, the holders of government must above all take into consideration public opinion and the interest of the citizens. This means that every government institution must be open to the public, transparent in its work and accountable to the people.

33. Limiting the mandate is a key issue for the holder of power with respect to his or her political responsibility, as well as the right to be re-elected to certain functions.

#### **IV. Limitation of the mandate: from history to contemporary norm and practice**

34. The historical aspect of the limitation of the mandate points to the fact that this is not a matter of a brand new category in democratic theory, but on the contrary, that it has historical roots that can be traced back to Athens' democracy.<sup>10</sup>

35. Already in the 4<sup>th</sup> and 5<sup>th</sup> centuries B.C., the five hundred members who sat in the Athens Assembly or the Bule, had a mandate of two years, while the rotating principle was considered an important mechanism for representing different citizens' interests and a prevention from misuse of position for private purposes.<sup>11</sup>

36. The system of elected magistrates was also applied in the Roman republic. Magistrates had a mandate of one year without the possibility of being re-elected for the next ten years.

37. The modern political systems are based on these foundations, which include:

1. Government that is elected by the citizens at general, free, direct, democratic and fair elections;
2. Active participation of the citizens in the political and in the social life, or civic participation;
3. Protection of the human rights and freedoms of all citizens without exception, and
4. Rule of law with equal application of the law to all citizens.

38. The debate on and about the limitation of the mandate in academic literature is mainly focused on two aspects:

- the first aspect refers to favouring of rotations in the service and the elimination of the phenomenon of "obligatory advantage" in the service, while

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<sup>9</sup> See: Angelo Panebianco (1988), *Political Parties: Organization and Power*, (Cambridge: Cambridge University Press), Pippa Norris (1997), *Passages to Power: Legislative Recruitment in Advanced Democracies*, (Cambridge: Cambridge University Press), Richard S. Katz (2001), "The Problem of Candidate Selection and Models of Party Democracy", *Party Politics* 7, May, (p. 293).

<sup>10</sup> See: A.H.M. Jones (1986) *Athenian Democracy* (Baltimore: John Hopkins University Press), p.105, in the paper: Steven Millman, "Term Limitations: Throwing Out the Burns-Or the Baby with the Bathwater?": <http://web.mit.edu/millman/www/WPSA.html>, and: Adam Przeworski, Susan C. Stokes, Bernard Manin (1999) *Democracy, Accountability, and Representation*, Cambridge University Press, (p. 259-277).

<sup>11</sup> See: Benjamin, Gerald and Michael Malbin (1992) *Limiting Legislative Terms*, Congressional Quarterly Press, Washington D.C.

- the second phenomenon directly defends the idea of eliminating the obligation for a person to have to spend a long period of time in service to be able to gain certain rights or privileges in that service.<sup>12</sup>

39. Today, the practice of limiting the mandate and the possibility for re-election is mainly linked to the election of the President of state, but quite rarely to the re-election of the holders of other public (political) functions (MPs, local or regional advisers, prime ministers, government ministers, mayors, etc.).

40. The Constitution of Mexico is among the rare constitutions in the world that does not foresee the possibility of a consecutive parliamentary mandate.<sup>13</sup>

41. In a number of states, the President (and vice-president) of Parliament may not be re-elected. This is for example the case in Andorra.<sup>14</sup>

42. The Constitution of Portugal contains a provision that prohibits lifetime holding of any political function at the national, regional or local level.<sup>15</sup>

43. The Constitution of Liechtenstein is one of the few constitutions in the world which directly foresees the possibility for re-election of members of Parliament.<sup>16</sup>

## V. Constitutional and legal aspects of the limitation of mandates and of the right to re-election of the president of state

44. In most cases, the constitutions of the Council of Europe member countries, as well as of those countries that are not Council of Europe members, contain provisions for a time-defined limitation of the mandate of the president of the country **with the right to one re-election**.

45. That is the case of the constitutions of Albania,<sup>17</sup> Armenia,<sup>18</sup> Austria,<sup>19</sup> Bosnia and Herzegovina,<sup>20</sup> Brazil,<sup>21</sup> Bulgaria,<sup>22</sup> Croatia,<sup>23</sup> the Czech Republic,<sup>24</sup> Estonia,<sup>25</sup> Finland,<sup>26</sup>

<sup>12</sup> See: Abramowitz, Alan (1991) "Incumbency, Campaign Spending and the Decline of Competition in U.S. Elections", *Journal of Politics*, 53 (1), (p. 34-56), Ansolabehere, Stephen, Marc Hansen, Shigeo Hirano and James M. Snyder Jr. (2007) "The Incumbency Advantage in U.S. Primary Elections", *Electoral Studies*, 26(3), (p. 660-668), Lott, John R. Jr. (1986) "Brand Names and Barriers to Entry in Political Markets", *Public Choice*, 51, (p. 87-92).

<sup>13</sup> Article 59 of the Constitution of Mexico – Senators and deputies in the Congress of the Union cannot be re-elected.

<sup>14</sup> Article 55.3 of the Constitution.

<sup>15</sup> Article 118 of the Constitution of Portugal – No one can perform a political function at national, local or regional level for lifetime.

<sup>16</sup> Article 47 of the Constitution of Liechtenstein.

<sup>17</sup> Article 88 of the Constitution of Albania – The President of the Republic is elected with a mandate to serve for five years, with the right to one re-election.

<sup>18</sup> Article 50.3 of the Constitution of Armenia – The same person cannot be elected president of the country for more than two consecutive mandates.

<sup>19</sup> Article 60 of the Constitution of Austria – The federal president has a mandate of six years, with the right to only one re-election.

<sup>20</sup> Article 5 of the Constitution of Bosnia and Herzegovina – the mandate of the presidency members elected at the first elections is two years, while the mandate of the members elected later is four years. The presidency members can perform this function for only one more mandate, following which they cannot be candidates for a period of four years.

<sup>21</sup> Article 14 of the constitution of Brazil – the President of the Republic, the state governor and the governors of the federal units, the mayors and their deputies can be re-elected for only one consecutive mandate.

<sup>22</sup> Article 95 of the Constitution of Bulgaria – The President and the vice-president can be re-elected at this position for only one more mandate.

<sup>23</sup> Article 95.2 of the Constitution of Croatia – no one can be elected President of the Republic for more than two mandates. There is also a decision of the Constitutional Court of the Republic of Croatia (CRO-1997-2-027, 11.06.1997, U-VII-700/1997) regarding this constitutional provision which more precisely limits the number of consecutive mandates for the president of the Republic.



France,<sup>27</sup> Georgia,<sup>28</sup> Germany,<sup>29</sup> Greece,<sup>30</sup> Hungary,<sup>31</sup> Ireland,<sup>32</sup> Kyrgyzstan,<sup>33</sup> Latvia,<sup>34</sup> Lithuania,<sup>35</sup> Moldova,<sup>36</sup> Montenegro,<sup>37</sup> Poland,<sup>38</sup> Romania,<sup>39</sup> the Russian Federation,<sup>40</sup> Serbia,<sup>41</sup> Slovakia,<sup>42</sup> Slovenia,<sup>43</sup> “the former Yugoslav Republic of Macedonia”,<sup>44</sup> Turkey,<sup>45</sup> and Ukraine<sup>46</sup> In Andorra, this limitation applies to the Head of Government.<sup>47</sup>

46. These provisions stipulate that the person who was elected president of the state for two consecutive mandates cannot run for the presidency at the next first election, which does not exclude the possibility for that person of being nominated at some future election.

47. On the other hand, there are constitutions that expressly provide for the impossibility of the re-election of the same person for president after his/her constitutionally foreseen mandate has

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<sup>24</sup> Article 57 of the Constitution of the Czech Republic – No one can be elected President for more than two consecutive mandates.

<sup>25</sup> Article 80 of the Constitution of Estonia – The President of the Republic is elected with a mandate of five years. No one can be elected president of the Republic for more than two consecutive mandates.

<sup>26</sup> Section 54 of the Constitution of Finland – Election of the president of the Republic – the President of the Republic is elected at direct elections with mandate of six years. The President must be citizens of Finland by birth. The same person shall not be elected president for more than two consecutive mandates.

<sup>27</sup> Article 6 of the Constitution of France – The President of the Republic is elected with a mandate of five years at general and direct elections. No one can perform this duty for more than two consecutive mandates. (*paragraph deleted*)

<sup>28</sup> Article 70 of the Constitution of Georgia – the President of Georgia is elected at common, equal and direct elections with secret voting and with a mandate of five years. The same person can be elected president for only two consecutive mandates.

<sup>29</sup> Article 54, paragraph 2 of the Constitution of Germany – The mandate of the federal president is five years. Re-election is possible for only one more mandate.

<sup>30</sup> Article 30 of the Constitution of Greece – Re-election of the same person for President is possible for only one additional mandate.

<sup>31</sup> Article 10 of the Constitution of Hungary – The President of the Republic cannot be re-elected for more than once.

<sup>32</sup> Article 12 of the Constitution of Ireland – The President of the Republic performs this duty with a mandate of seven years from the day he steps in the office. The person that performs this duty, or who has performed this duty in the past, has the right to re-election for only one more mandate.

<sup>33</sup> Article 61 of the Constitution of Kyrgyzstan – The same person cannot be elected President twice.

<sup>34</sup> Article 39 of the Constitution of Latvia – The same person cannot perform the duty of President for more than eight years, which is equivalent to two consecutive mandates.

<sup>35</sup> Article 78 of the Constitution of Lithuania – the same person cannot be elected President of the Republic of Lithuania for more than two consecutive mandates.

<sup>36</sup> Article 80, paragraph 4 of the Constitution of Moldova – No one can serve as president of the Republic of Moldova for more than two consecutive mandates.

<sup>37</sup> Article 97 of the Constitution of Montenegro – The same person can be elected president of Montenegro for a maximum of two mandates.

<sup>38</sup> Article 127 of the Constitution of Poland – The President of the Republic is elected with a mandate of five years and can be re-elected for only one more mandate.

<sup>39</sup> Article 81 of the Constitution of Romania – No one can perform the duty of President of Romania for more than two consecutive mandates.

<sup>40</sup> Article 81 of the Constitution of the Russian Federation – The same person cannot perform the duty of President for more than two consecutive mandates.

<sup>41</sup> Article 116 of the Constitution of Serbia – No one can be elected President of the Republic for more than two mandates.

<sup>42</sup> Article 103 of the Constitution of Slovakia – the same person can be elected President of Slovakia for not more than two consecutive mandates.

<sup>43</sup> Article 103 of the Constitution of Slovenia – The President of the Republic is elected with a mandate of five years and can be elected for a maximum of two consecutive mandates.

<sup>44</sup> Article 80 of the Constitution – The President of “the former Yugoslav Republic of Macedonia” is elected at general and direct elections, with secret voting, with a mandate of five years. The same person can be elected President of “the former Yugoslav Republic of Macedonia” not more than twice.

<sup>45</sup> Article 101 of the Constitution of the Republic of Turkey – The mandate of the President of Turkey is five years. The President of the Republic can be elected maximum twice.

<sup>46</sup> Article 103 of the Constitution of Ukraine – the same person cannot be elected President of Ukraine for more than two consecutive mandates.

<sup>47</sup> Article 78 of the Constitution of Andorra – The Cap de Govern (Head of Government) cannot perform this duty for more than two consecutive mandates.

expired (that is the case with Article 70 of the Constitution of the Republic of Korea, which sets out that the term of the president is five years and that the president does not have the right to be re-elected).

48. There is a similar provision in the Constitution of Mexico,<sup>48</sup> which sets out that the person who was elected President of the country with a mandate of six years will not be able, under any circumstances, to perform this function again. The basic laws of Israel also provide that the President will serve for one term only.<sup>49</sup>

49. An interesting case is the Constitution of Switzerland,<sup>50</sup> which sets out that the federal Parliament elects the President and the Vice-president of the Confederation from within the members of the government (the Federal Council) of the Confederation, with a mandate of one year. These mandates cannot be renewed in the following year, which means that the same people cannot be elected for president and vice-president of the Confederation. The next paragraph of the Constitutional Declaration sets out that the President of the Confederation cannot be elected vice-president in the following year.

50. In the U.S., the limitation of the mandate has existed since colonial times,<sup>51</sup> when William Penn in his Pennsylvania Charter of Liberties first foresaw the limitation of the mandate up to three consecutive elections for the upper house of the colonial Congress.

51. The mandate limitation is usually placed within the context of the "rotating system", or the principle of the "rotating service".<sup>52</sup>

52. This principle was contained in seven out of ten constitutions of the new United States, which contained explicit provision for the need for rotation of the public servants and for the limitation of the duration of their public functions.

53. The Articles of the Confederation, adopted by the Continental Congress in 1777, also contain provisions for servants' rotations, as well as for limiting the mandate of the Congressmen to a maximum of three years.<sup>53</sup>

54. Although the 1787 U.S. Constitution does not foresee a limitation of the president's mandate, it seems that George Washington's voluntarily leaving the function of President after his second term in office had established a rule which grew into a constitutional custom, and no other president ran for a third time after that; except for Franklin Roosevelt, who during the WWII (before the U.S. joined the war) ran for a third, and in 1944 for a fourth mandate. After the war however, the practice initiated by George Washington was enshrined in the Constitution with the 22<sup>nd</sup> amendment to the U.S. Constitution, adopted on 27 February 1951. This amendment was supplemented with a reference which foresees that in the case of death or resignation of the President, the vice-president will take over the function, and if that person serves as president for more than two years, he can be re-elected only once, i.e. the person who served as president for more than six years cannot be re-elected in the next four years.<sup>54</sup>

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<sup>48</sup> Article 83 of the Constitution of Mexico.

<sup>49</sup> Article 3 of the 1964 Basic law of Israel on the election of the President of the state.

<sup>50</sup> Article 176 of the Constitution of Switzerland.

<sup>51</sup> See: Alan Grant (1995), "The Term Limitation Movement in the United States", *Parliamentary Affairs* 48, (p. 515-530).

<sup>52</sup> T. H. Benton (1854), *Thirty Years' View*, Volume 1, (New York: Appleton).

<sup>53</sup> See: Edmund C. Burnett (1941), *the Continental Congress* (New York: Macmillan) (p.250).

<sup>54</sup> In 2007, professor Larry J. Sabato from Virginia University reopened the debate about the limitation of mandate in his paper "More perfect Constitution" in which, according to him, the extraordinarily great success and popularity of the limited mandate at state level in the 1990es gave him the right to propose this model also for the Federal Congress. In that context, the professor suggests a new amendment to the US Constitution to be prepared by a special Constitutional Convention because he believed that the members of the Congress will never willingly suggest or adopt any amendment that will limit their power. Even the US Supreme Court in 1995

55. It is interesting to note that the limitation to two mandates does not apply to the vice-president or to the members of the Congress or the Senate. Nevertheless, the U.S. Constitution prohibits a member of the House of Representatives or a senator to serve as an elector (for the presidential elections).<sup>55</sup>

## **VI. "Pro" or "against" the limitation of the mandates of the holders of political functions**

56. The theory of limitation of mandate has its followers as well as its opponents.

57. The critics say that the frequent replacement of the holders of public (political) functions in the country can have a negative impact on the quality and on the continuity of the public policies in the country and that it brings about major political uncertainty. The supporters of the limited mandate believe that it is a positive aspect of the system seen through the prism of an influx of fresh ideas, pluralism in political thought, avoidance of political domination and, most importantly, avoidance of the concept of irreplaceability in the political establishment.

58. It is a fact that the effects of the non-existence of limitations for the re-election of a member of parliament are widely softened by the activities of the opposition parties in parliament, as well as by the increased transparency and publicity that the democratic parliaments demonstrate through their activities. Perhaps these two conclusions identify the main reason why most constitutions foresee an unlimited possibility for re-election of members of parliament. Consecutively, we may draw the same conclusion vis-à-vis the re-election of ministers in coalition governments, contrary to homogeneous ones.

59. Namely, unlike the homogeneous governments -most often single-party governments- the coalition governments have a greater possibility of controlling their members, as there is a stronger inter-party consensus to open the issue of political responsibility for what has been or has not been done.

60. The majority electoral model, where the election of holders of political functions is done directly by the electorate, is more likely to lead to the admissibility of an unlimited parliamentary mandate than a pure proportional model with closed lists where the political parties have the final word.

61. On the other hand, the unlimited mandate opens the door to the factual strengthening of the position of head of state in the parliamentary systems, and even more so in the semi-presidential systems. In the presidential systems, the unlimited mandate creates the danger of having a "republican monarch".

62. In countries that have no democratic tradition and that do not have a developed civil society, the unlimited mandate of the Head of state could introduce a new "Caesar" or a new "Bonaparte", regardless of the model of the rule of law or democracy.

63. The limitation of two mandates gives the possibility of verifying to what extent a political figure, such as the president or the government, really has a consolidated political power in the system.

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clearly said that the mandate of the members of the congress must be limited, in the context of the possibility for their re-election for this position. In support of this idea a number of non-governmental initiatives and public opinion polls also appeared, supporting this idea as a safeguard against political tyranny and corruption.

<sup>55</sup> Article 2, section 1, paragraph 2.

64. The arguments against the limited mandate are most often concentrated around the idea that citizens have the right to say who will govern them, and that they are the only ones who have the right to a free and absolute choice of their politicians, and when the people want one person to lead them for a longer period of time, they should be allowed to have that right.<sup>56</sup>

65. In this context, the critics say that public support usually favours those with greater political experience, which can be decisive for winning the election.

## **VII. Theoretical and constitutionally legal review of the limitation of the possibility for a simultaneous performing of several terms in different political functions (incompatibility issue)**

66. The question of incompatibility or the limitation of the possibility for the simultaneous performance of several mandates of different political functions, is a very common topic in constitutional theory<sup>57</sup> and in parliamentary law.<sup>58</sup>

67. M. Ameller defined incompatibility as “the rule that prohibits members of parliament from engaging in certain occupations during their term of office...Its object is to prevent members from becoming dependent upon either public authorities or private interests. But the rule operates in a less direct way: it does not prevent a member from being a candidate, nor can the validity of an election be questioned on that account. But a member must choose within a predetermined period, which is generally short, between membership and the occupation that is held to be incompatible with it”.<sup>59</sup>

68. This definition has remained valid over the years.

69. In general, no one should be a member of both houses simultaneously in a bicameral system. This is a logical rule in the light of the theory underlying bicameralism.<sup>60</sup>

70. The primary purpose of incompatibility has been to ensure that members’ public or private occupations do not influence their role as representatives of the nation.

71. Thus, the principle of the separation of powers is the source of the “traditional” incompatibilities in most countries between the parliamentary mandate and ministerial or judicial offices and certain public functions.

72. It can be found in such diverse countries such as Andorra,<sup>61</sup> Brazil,<sup>62</sup> Bulgaria,<sup>63</sup> Portugal,<sup>64</sup> Switzerland,<sup>65</sup> Turkey,<sup>66</sup> Ukraine,<sup>67</sup> Spain,<sup>68</sup> “the former Yugoslav Republic of Macedonia”<sup>69</sup> etc.

<sup>56</sup> Alexander Tabarrok (1994), A Survey, Critique, and New Defense of Term Limits, The Cato Journal, Vol. 14, No. 2, Fall:

<http://www.cato.org/pubs/journal/cjv14n2-9.html>

<sup>57</sup> Particularly interesting observations in the work of: Carl Schmitt (2008), Constitutional Theory, (Duke University Press).

<sup>58</sup> See: Avril, P./Gicquel, J. (1988), Droit parlementaire, Paris.

<sup>59</sup> See: Ameller, M., (1966), Parliaments, Cassell, London, p. 66.

<sup>60</sup> Incompatibility exists in Italy and Spain between membership of the national parliament and of a regional assembly. The same rule has applied in Belgium since the direct election of regional and community assemblies (1995), with the exception of the 21 appointed senators.

<sup>61</sup> Article 16.3 of the “qualified law” on the electoral regime and the referendum of 3 September 1993: « *Les membres du Conseil Général (députés) et les membres du Gouvernement sont inéligibles aux élections communales, et les membres des communes (conseillers municipaux) sont inéligibles aux élections du Conseil Général (Parlement) si au préalable ils n’ont pas démissionné de leur mandat* ». Furthermore, according to Article 18, nobody can be simultaneously a candidate to the *Conseil Général* (Parliament) and to the *Comú* (municipality) in case the elections take place on the same day.

<sup>62</sup> See: Constitution of Brazil, Article 14, paragraphs 5 and 6.

(5) The President of the Republic, the State and Federal District Governors, the Mayors and those that have succeeded them or replaced them during the six months preceding the election, are not eligible to the same offices in the subsequent term.

(6) In order to run for other offices, the President of the Republic, the State and Federal District Governors, and the Mayors shall resign from their respective offices at least six months before the election.

Article 54 [Forbidden Actions]

Representatives and Senators shall not:

I. as from the date of issue of the certificates:

a) execute or maintain a contract with a public entity, an autonomous government entity, a state owned company, a mixed capital company or a public utility company, unless the contract complies with uniform clauses;

b) accept or hold a remunerated office, function or job, including those which may be terminated "ad nutum", in the entities listed in the preceding item;

II. as from taking of office:

a) be the owners, controllers, or directors of a company which enjoys a privilege as a result of a contract with a public entity or perform a remunerated function therein;

b) hold an office or a function subject to termination "ad nutum" in the entities referred to in Item I a);

c) advocate a cause in which any of the entities referred to in Item I a), have an interest;

d) be the holder of more than one public elective position or office.

Article 55 [Cassation of Mandate]

(0) A Representative or Senator loses his or her office:

I. if he or she infringes upon any of the prohibitions established in the preceding article;

II. if his or her conduct is declared to be incompatible with parliamentary decorum.

<sup>63</sup> See: Constitution of Bulgaria, Article 68 [Incompatibility, Sleeping Mandate]

(1) A Member of the National Assembly shall not occupy another state post, nor shall engage in any other activity which the law defines as incompatible with the status of a Member of the National Assembly.

(2) A Member of the National Assembly elected as a minister shall cease to serve as a Member during his term of office as a minister. During that period, he shall be substituted in the National Assembly in a manner established by law.

Article 95 [Re-election, Incompatibility]

(1) The President and the Vice President shall be eligible for only one re-election to the same office.

(2) The President and the Vice President shall not serve as Members of the National Assembly or engage in any other state, public or economic activity, nor shall they participate in the leadership of any political party.

Article 113 [Incompatibility]

(1) A member of the Council of Ministers shall not hold a post or engage in any activity incompatible with the status of a Member of the National Assembly.

(2) The National Assembly is free to determine any other post or activity which a member of the Council of Ministers shall not hold or engage in.

<sup>64</sup> See: Constitution of Portugal, Article 157 Cases of Incompatibility

(1) A member of the Assembly who is appointed a member of the Government may not exercise his mandate while the said appointment is in force. His place is temporarily filled as provided in the foregoing article.

(2) The law determines other cases of incompatibility.

Article 163. Forfeiture and Renunciation of Mandates

(1) A member of the Assembly forfeits his mandate if he:

a) Becomes subject to any of the disabilities or incompatibilities provided by law.

<sup>65</sup> See: Constitution of Switzerland, Article 144 Incompatibilities

(1) Members of the House of Representatives, of the Senate, of the Federal Government as well as judges of the Federal Court may not at the same time be members of another of these authorities.

(2) Members of the Federal Government and full-time judges of the Federal Court may not hold another office of the Federation or a Canton, nor may they exercise another gainful activity.

(3) The Law may provide for other incompatibilities.

<sup>66</sup> See: Constitution of Turkey, Article 82 Activities Incompatible with Membership

(1) Members of the Turkish Grand National Assembly shall not hold office in state departments and other public corporate bodies and their subsidiaries; in corporations and enterprises affiliated with the state and other public corporate bodies; in the executive or supervisory organs of enterprises and corporations where there is direct or indirect participation of the state and public corporate bodies, in the executive and supervisory organs of public benefit associations, whose special resources of revenue and privileges are provided by law; in the executive and supervisory organs of foundations which enjoy tax exemption and receive financial subsidies from the state; and in the executive and supervisory organs of labour unions and public professional organisations, and in the enterprises and corporations in which the above-mentioned unions and associations or their higher bodies have a share; nor can they be appointed as representatives of the above-mentioned bodies or be party to a business contract, directly or indirectly, and be arbitrators of representatives in their business transactions.

(2) Members of the Turkish Grand National Assembly shall not be entrusted with any official or private duties involving recommendation, appointment, or approval by the executive organ. Acceptance by a deputy of a temporary assignment given by the Council of Ministers on a specific matter, and not exceeding a period of six months, is subject to the approval of the Assembly.

73. On the other hand, the incompatibility rule is basically at odds with the concept of a parliamentary regime, which is based on close collaboration between the legislature and the executive.<sup>70</sup>

74. With the exception of Belgium,<sup>71</sup> France,<sup>72</sup> the Netherlands,<sup>73</sup> Norway<sup>74</sup> and Sweden,<sup>75</sup> in most parliamentary regimes the combination of ministerial and parliamentary duties is not only

(3) Other functions and activities incompatible with membership in the Turkish Grand National Assembly shall be regulated by law.

<sup>67</sup> See: Constitution of Ukraine, Article 78. The people's deputies of Ukraine shall exercise their powers on a permanent basis. The people's deputies of Ukraine shall not have another representative mandate or be involved in the civil service or hold another office of profit or undertake other paid or entrepreneurial activity (other than teaching, research or creative activities) or be a member of a management body or a supervisory board of an enterprise or a profit making organisation. Requirements concerning the incompatibility of the mandate of the deputy with other types of activities shall be established by law.

Article 103, paragraph 4. The President of Ukraine shall not have another representative mandate, hold office in State power bodies or associations of citizens, perform any other paid or entrepreneurial activity, and shall not be a member of an administrative body or board of supervisors of an enterprise aimed at making profit.

Article 120. Members of the Cabinet of Ministers of Ukraine and heads of central and local executive power bodies shall have no right to combine their office with other work (except for teaching, research, and creative activities outside of working hours), or to be members of an administrative body or board of supervisors of an enterprise aimed at making profit.

<sup>68</sup> See: Constitution of Spain, Article 67 [Incompatibility, Free Mandate]

(1) No one may be a member of the two Chambers simultaneously nor be a member of an Autonomous Community Assembly and a Deputy to the House of Representatives at the same time.

(2) The members of the Parliament are not bound by an imperative mandate.

(3) The meetings of parliamentarians, which are held without the regulatory convocation, shall not be binding on the Chambers and they may not exercise their functions nor exercise their privileges.

Article 70 [Ineligibility, Incompatibility]

(1) The electoral law shall determine the reasons for ineligibility and incompatibility of Deputies and Senators, which shall include in any case:

a) the members of the Constitutional Court;

b) the high officers of the State Administration, as determined by law, with the exception of the members of the Government;

c) the Defender of the People;

d) the Magistrates, Judges, and Prosecutors on active duty;

e) the professional military and members of the Armed Forces, Corps of Security, and Police on active duty; and

f) the members of the Electoral Commissions.

(2) The validity of the records and credentials of the members of both Chambers shall be subject to judicial control under the terms to be established by the electoral law.

Article 98 [Composition, President, Incompatibilities]

(1) The Government is composed of the President, Vice Presidents, and in some cases the ministers and other members the law may establish.

(2) The President directs the actions of the Government and coordinates the functions of the other members of it without prejudice to their competence and direct responsibility in their activity.

(3) The members of the Government may not exercise representative functions other than those of the parliamentary mandate itself, nor any other public function which does not derive from their office, nor any professional or mercantile activity whatsoever.

(4) A law shall regulate the Statute and the incompatibilities of the members of the Government.

<sup>69</sup> See: Constitution, Article 63, paragraph (5) Cases where a citizen cannot be elected a Representative, owing to the incompatibility and ineligibility of this office with other public offices or professions already held, are defined by law.

Article 67, paragraph (3) The office of the President of the Assembly is incompatible with the performance of other public offices, professions or appointment in a political party.

Article 83, paragraph (1) The duty of the President of the Republic is incompatible with the performance of any other public office, profession or appointment in a political party.

Article 89, paragraph (2) The Prime Minister and the Ministers cannot be Representatives in the Assembly, and paragraph (5) The office of Prime Minister or Minister is incompatible with any other public office or profession.

<sup>70</sup> Ameller, M. (1966), p. 69.

<sup>71</sup> The ministers in Belgium, since the 1995 general elections, have their seats restored on resigning from the cabinet.

<sup>72</sup> In France, the substitute occupies the seat for the full term of parliament.

<sup>73</sup> In the Netherlands, parliamentarians who become ministers also lose their seats to the candidate who received the next largest number of votes on the same electoral list. Ministers who resign and are elected to one of the houses before their resignation takes effect may carry out both functions until the resignation is accepted.

authorised, but actively encouraged in order to strengthen the ties between assemblies and the Executive.<sup>76</sup>

75. On the other hand, private occupations are in principle compatible with parliamentary mandates. They are viewed as a means of preventing the exercise of a parliamentary mandate from becoming a fully-fledged profession and of enabling professional groups to be represented in parliament. However, this principle has been undermined by a series of scandals based on collusion between politics and finance and certain private occupations have, as a result, been declared incompatible with political office.<sup>77</sup>

76. Many countries, largely but not exclusively those influenced by French tradition, have introduced regulations governing plurality of mandates in addition to those governing incompatibilities in the strict sense. These restrictions are motivated largely by “the desire to ensure that parliamentarians have sufficient time at their disposal to exercise their mandates properly...”<sup>78</sup>

### **VIII. Incompatibility vs. ineligibility**

77. Incompatibility is different from the ineligibility principle, although the basis of both these legal principles lies in the principle of the separation of powers. Incompatibility is a much

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In the Constitution of Netherlands, Article 57, it is stipulated that “No one may be a member of both Chambers. A member of the Parliament may not be a Minister, State Secretary, member of the Council of State, member of the General Chamber of Audit, member of the Supreme Court, or Procurator General or Advocate General at the Supreme Court. Notwithstanding the above, a Minister or State Secretary who has offered to tender his resignation may combine the said office with membership of the Parliament until such time as a decision is taken on such resignation. Other public functions which may not be held simultaneously by a person who is a member of the Parliament or of one of the Chambers may be designated by Act of Parliament.

<sup>74</sup> In the Constitution of Norway, Article 62, it is stipulated that “Officials who are employed in government ministries, except however State Secretaries and political advisers, may not be elected as representatives. The same applies to Members of the Supreme Court and officials employed in the diplomatic or consular services.

Members of the Council of State may not attend meetings of the Storting as representatives while holding a seat in the Council of State. Nor may State Secretaries attend as representatives while holding their appointments, and political advisers in government ministries may not attend meetings of the Storting as long as they hold their positions.”

<sup>75</sup> Constitution of Sweden, Chapter 5, The Head of State, Article 2, No person who is not a Swedish citizen or who has not attained the age of eighteen may serve as Head of State. The Head of State may not at the same time be a member of the Government or hold a mandate as Speaker or as a member of the Riksdag.

Chapter 4. The work of the Riksdag.

Article 6

A member of the Riksdag or an alternate for such a member may exercise his mandate as a member notwithstanding any official duty or other similar obligation incumbent upon him.

Chapter 6. The Government.

Article 9

A minister may not have any other public or private employment. Neither may he hold any appointment or carry on any activity likely to impair public confidence in him.

<sup>76</sup> In the United Kingdom, for instance, MPs who were appointed ministers were long required to run immediately for re-election in order to have their mandate confirmed. The purpose of this rule was to have the parliamentarian's accession to ministerial office ratified by the electorate. The principle of plurality was thus officially endorsed. The rule was abolished in 1926 but echoes survive in some parliamentary regimes based on the British tradition. For example, in Fiji and Malta, ministers must be members of parliament, and in Australia and India they must either be a member of parliament or become a member within a certain period following their appointment. In Kuwait and Mali, ministers who have not been elected to parliament are deemed to be ex officio members. These rules remain the exception, but there are still many parliamentary regimes in which custom requires that ministers be members of parliament (e.g. Canada and United Kingdom) despite the absence of a legal provision to that effect. See: Marc Van der Hulst (2000), *The Parliamentary Mandate, A Global Comparative Study*, Inter-Parliamentary Union, Geneva, p. 47-48:  
[http://www.ipu.org/PDF/publications/mandate\\_e.pdf](http://www.ipu.org/PDF/publications/mandate_e.pdf)

<sup>77</sup> *Ibid*, p. 44-45.

<sup>78</sup> See: Burdeau, G., Hamon, F., and Troper, M. (1995), *Droit constitutionnel*, Paris, LGDJ, p. 569.

broader concept than ineligibility, while the first is viewed as part of parliamentary law, the second is viewed as part of electoral law.

78. Ineligibility is part of the requirement for the holders of certain public or private functions **not to be able to run at the parliamentary elections or at the elections for representative bodies at other levels of government** (federal units, regions or provinces, the local self-government etc.).

79. The effects of the ineligibility principle are much more restrictive than the consequences of parliamentary incompatibility, because they prevent certain persons from running for or participate in parliamentary elections.

80. The main goal of the ineligibility principle is to provide equality among the candidates in the elections.

81. The consequences that arise from the violation of the ineligibility principle cannot be removed during the parliamentary mandate, since they represent an absolute obstacle to the mandate and to participation in the elections. Namely, in order for these persons to be able to participate in elections, they must first resign from the public function they occupy.<sup>79</sup>

82. In the United Kingdom, the “Representation of the People Act” provides that the commitment of acts of corruption can imply either ineligibility or, ex post, the loss of the mandate for members of the House of Commons. Apart from the so-called “disqualification” concerning public office holders and employees of nationalised industries, the clergies of all churches, except for the Church of Wales and the non-conformist churches are also “disqualified” from taking up a parliamentary mandate. The same also applies in Ireland, the Netherlands and Luxembourg.<sup>80</sup>

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<sup>79</sup> In the British electoral system there are cases of so-called disqualification of certain persons who are holders of certain public functions or services and who cannot run as candidates for MPs at the parliamentary elections. There are three main reasons that serve as grounds for disqualification: a) physical inability for simultaneous performing of several services or duties; b) risk of influence of other services or functions; c) conflict between the constitutional duties. Having in mind the British regulations, the disqualification refers to the holders of judicial functions, employees in the services of the Crown, professional soldiers and members of the police force, members of the legislative bodies of any country or territory outside the Commonwealth, as well as a number of services that cover participation in committees, bodies, administrative courts, public authorities etc.

<sup>80</sup> We could distinguish four categories of countries with different regulations for registration and publication of Member's private interests.

1. At the lowest level, there are countries like Austria and Luxembourg, where registration is not public and either limited to specific categories or voluntary, or where registration is public, but on a merely voluntary basis (Belgium, Denmark);
2. A second category of relatively stricter regulations comprises the cases of France, the Netherlands, Norway and the UK, where registration of MP's interests is customary and public. In Portugal and Spain, on the contrary, registration is obligatory, but in practice public access to this information is limited. In Spain, for instance, MPs are obliged by electoral law to make a statement on their professional and economic activities and on their patrimonies.
3. The third category is composed of the cases of Germany, Italy, Greece, Switzerland and the European Parliament. Here, registration of professional interests-provided deputies earn an income therefrom-is more detailed, obligatory and public. In Italy, the register requires that MPs not only make their own incomes public but also their marital partner's and children's properties as well as all expenses and obligations incurred during the election campaign.
4. Stricter rules apply in Sweden, Finland, Iceland. In Finland, parliamentary standing orders give representatives the right to participate in a debate on a matter in which they have a personal interest, but stipulate that they must abstain from voting on these matters. The Swedish provision goes even further in requiring that a deputy with personal interests in a given matter not only abstains from deliberations in plenary but also from the respective committee meetings. In the Icelandic Althingi, no Member may vote in favour of an appropriation of funds from which he could personally benefit-but possible interests with regard to external groups are left free.



83. In Greece for example, paid state officials, state officials working in the municipal and city companies or institutions, who work in a sector of public interest cannot be nominated or elected in any district in which they have worked for at least three months in the past three years prior to the elections. The same limitation of the ineligibility principle also applies to the secretary generals in the ministries who have been in this position for at least four months during their four-year term. The principle of non-eligibility also refers to professional soldiers and members of the police force.<sup>81</sup>

84. The legal consequences of the ineligibility principle are the cancellation of the election of a given person who is covered by the prerequisites for ineligibility.

85. Unlike the ineligibility principle, incompatibility does not prevent the election of a given person, nor does it influence the legal quality of the election result.

86. The legal consequences that arise from the incompatibility surface after a given person is elected MP. In case the circumstances of incompatibility of two functions arise, the official, i.e. the person concerned by the preconditions of incompatibility can state which function he/she will keep and from which one he/she will resign.<sup>82</sup>

87. The French parliamentary law, for example, gives a period of 15 days for the MP to decide which function he/she will maintain. If he/she fails to do so within a foreseen timeframe, his/her MP mandate stops by default. So, in this case, the law assumes that the MP took the new function for which he/she was elected, appointed or nominated.<sup>83</sup>

88. In Belgium, it is up to the Members themselves to verify whether they comply with these rules and if not, to determine which office they will abandon. Certain offices are ended automatically when taking the oath as Member of Parliament. Article 233 of the Electoral Code provides, for instance, that Members of a Regional Parliament who become Senator or Representative automatically lose their office in the Regional Parliament (with the exception of Community Senators). The same rule applies the other way around. One of the most important incompatibilities is based on the separation of powers. Article 50 of the Constitution provides that a Member of Parliament who becomes a federal Minister ceases to sit in Parliament. If that individual resigns as Minister, however, he or she will get his or her parliamentary seat back. A Member of the federal Parliament cannot be a civil servant and cannot hold judicial office. A civil servant elected to the federal Parliament is, however, entitled to political leave and is not

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<sup>81</sup> Article 56 of the Greek constitution regulates the possibility for re-election of a public servant and his return to the parliament one year after he has left his position.

<sup>82</sup> See: Constitution of Slovakia, Article 77

(1) The post of deputy is incompatible with the posts of president, judge, prosecutor, member of the Police Corps, member of the Prison Guard Corps, and professional soldier.

(2) If a deputy is appointed member of the Government of the Slovak Republic, his mandate as a deputy does not cease while he is a member of the government, but is just not being exercised.

Article 103, paragraphs 4 and 5

(4) Should a deputy of the National Council of the Slovak Republic, member of the Government of the Slovak Republic, judge, prosecutor, member of the armed forces of another armed corps, or member of the Supreme Control Office of the Slovak Republic be elected president, he will cease executing his previous function from the day of his election.

(5) The president must not perform any other paid function, profession, or entrepreneurial activity and must not be a member of the body of a juridical person engaged in entrepreneurial activity.

Article 109

(1) The Government consists of the prime minister, deputy prime ministers, and ministers.

(2) A Government member must not exercise the mandate of a deputy or be a judge.

(3) A Government member must not perform any other paid office, profession, or entrepreneurial activity and must not be a member of the body of a juridical person engaged in entrepreneurial activity.

<sup>83</sup> See, also, Constitution of France, Article 23, "Membership of the Government shall be incompatible with the holding of any Parliamentary office, any position of professional representation at national level, any public employment or any professional activity".

obliged to resign as a civil servant. Federal parliamentarians may not sit in Regional or Community assemblies, except for the 21 Community Senators, who are appointed by and from the Community Parliaments. They may also not be members of a Regional or Community Government. There is also an incompatibility between the office of Member of the federal Parliament and of Member of the European Parliament.<sup>84</sup>

89. In the Czech Republic, the MPs' mandate is considered to have stopped from the day he/she took over the new position, such as the position of President of the State or a judge, for which the Czech Constitution foresees incompatibility with the MP function.<sup>85</sup>

90. According to Article 68 of the Romanian Constitution, no one can, at the same time, be Deputy and Senator, and the quality of Deputy or Senator is incompatible with the exercise of any public function of authority, except that of member of Government. The Constitution also provides that other incompatibilities be established by organic law.<sup>86</sup>

91. Should any political reasons for parliamentary incompatibility arise, the sanction by default is clear and legally formulated. The MPs' mandate stops due to the reasons that derive from the basic requirement related to the constitutional principle of the separation of powers.

## IX. Reference to the economic incompatibility

92. When it comes to economic reasons, i.e. to the economically motivated "collision of interests", we may say that there is no single perspective and no single legal solution in the European parliamentary systems. The possibilities for solving this conflict vary from moral and political sanctions due to non-disclosure of the private interest in the performing of the public functions (Italy), to systems that have clear legal sanctions. In Germany for example, members of parliament have to declare whether they are involved in activities with additional income; if they do not comply, they can be fined. Some countries also apply the principle of ineligibility for a certain period of time (France, Portugal, Italy).

<sup>84</sup> See: Introduction in Belgian Parliamentary History:  
[http://www.senate.be/english/federal\\_parliament\\_en.html#T.4.1](http://www.senate.be/english/federal_parliament_en.html#T.4.1)

<sup>85</sup> See, Constitution of the Czech Republic

Article 21 [Chamber Incompatibility]

No one may simultaneously be a member of both Chambers of Parliament.

Article 22 [Incompatibilities]

(1) The exercise of the office of the President of the Republic, the office of judges, and other functions, set forth by law, are incompatible with the post of Deputy or Senator.

(2) A Deputy's or a Senator's mandate expires the day he or she enters upon the office of the President of the Republic, or the day he or she assumes a judgeship or another post incompatible with the post of Deputy or Senator.

Article 32 [Governmental Incompatibility]

A Deputy or a Senator who is a member of the Government may not be the Chairman or Vice Chairman of the Chamber of Deputies or the Senate, or a member of Parliamentary committees, an investigatory commission, or commissions.

<sup>86</sup> The member of Parliament who finds himself or herself in one of the cases of incompatibility is bound to resign, the Deputy within 10 days, and the Senator within 30 days. The term of 10 days flows after the day when the case of incompatibility was found, and that of 30 days, after the day of the validation of the mandate, or after the day of appearance of the incompatibility. After expiry of these terms, the parliamentarian who is in one of these cases of incompatibility is declared or considered as having resigned, as the case may be. The vacant seat will be taken by the immediately following candidate on the list of the party or political formation for which he or she stood. According to the Senate's Standing Orders, people who no longer belong to the respective party or political formation are excluded from the list. The Standing Orders of the Chamber of Deputies provide in this sense that up to the validation of the substitute's mandate, the party or political formation for which he or she stood must acknowledge in writing his or her affiliation to the respective party or political formation. Changes occurring in a parliamentarian's activity during the exercise of his or her mandate are notified to the Standing Bureau within 10 days after the day of their appearance.

See: How Parliament of Romania Works:

<http://www.cdep.ro/pls/dic/site.page?id=119>

93. Stricter or conditionally enforceable forms of ineligibility and incompatibilities between an elective mandate and specific economic positions, so-called “economic incompatibilities”, have been expressly introduced in only five cases in Europe: Austria, France, Greece, Italy and Portugal.

94. In Austria, a MP holding a leading position in a joint-stock corporation or insurance company, or in the banking, industrial or commercial sector, has to disclose this position as well as his/her salary to the president of the respective chamber. The incompatibility committee must then decide whether an incompatibility exists.

95. The French National Assembly expressly prohibits meetings or the formation of groups of MPs defending private interests. Deputies are not allowed to take advantage of their mandates in private organisations or companies and, consequently, links between private interests and MPs are formally prohibited.

96. The Greek Constitution stipulates that the duties of a deputy are incompatible with activities as members of governing councils, as general directors or employees of commercial societies or enterprises that enjoy special state privileges or subventions.<sup>87</sup>

97. In Italy, there is a provision which states that private businessmen or legal representatives of private corporations or enterprises linked to the state by contracts, concessions or authorisations are ineligible as deputies. Members of parliament are not allowed to occupy offices, or exercise the functions, of administrator, president, general director or permanent legal advisor to associations or entities with public functions, to which the state contributes ordinarily, be it directly or indirectly. The same incompatibilities apply to positions in banks or “joint-stock companies” with primarily financial activities. Deputies are not allowed to advise financial or economical enterprises in their transactions with the state.<sup>88</sup>

98. In Portugal, if more than 10% of the capital of an enterprise is held by the holder of a political office, that enterprise is not permitted to respond to calls for tender for the supply of goods or services in the context of a commercial or industrial activity involving contracts with the state or any other public collective entity. Holders of public office may not act as arbitrators or experts, remunerated or otherwise, in any proceedings to which the state or any other public collective entity is a party.<sup>89</sup>

99. Belgium is one of the rare parliamentary democracies with rules of incompatibility, but not of ineligibility with respect to certain public offices. In the event of being elected, candidates holding a public office must simply choose between this or their parliamentary mandate.

100. Different bodies can determine whether there is a case of ineligibility or plurality of public and private functions. In some systems (UK, Greece), this competence is in the hands of a separate parliamentary board, while in others (Sweden, Norway) it is in the hands of the ombudsman, while in third systems it lies with the constitutional courts or even with the trial courts in cases of serious violations, such as corruption.

101. In the constitutions of the Council of Europe member countries, the issue of economic incompatibility is regulated in a different way.

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<sup>87</sup> See, Constitution of Greece, Article 57.

<sup>88</sup> See: Ulrike Liebert, *ibid*, p. 416.

<sup>89</sup> See: [http://www.parlamento.pt/const\\_leg/estatuto\\_deputados/ondex.html](http://www.parlamento.pt/const_leg/estatuto_deputados/ondex.html). Art. 4(1)(c) and (2), Art. 6(1)(c) and (2), Art. 8(1)(a) and (5), Art. 20 to 22 of the Statute of Deputies.

[http://www.parlamento.pt/const\\_leg/estatuto\\_deputados/index.html](http://www.parlamento.pt/const_leg/estatuto_deputados/index.html).  
Law No. 64/93 of 26 August 1993.

102. For example, some of the constitutions of the member countries treat this issue very generally, with provisions that contain general formulations,<sup>90</sup> while other constitutions contain specific provisions which define in more details the economic incompatibility.<sup>91</sup>

103. The French parliamentary law, for example, contains detailed rules about the conflict of interests and the incompatibility of the MP function with different forms of (economic) private functions of the parliamentarian, whereas this incompatibility is present under two forms: complete and relative.

104. The complete incompatibility of functions is applied in the case of managerial positions in the private sector: company director, president of the administrative council, general director or assistant to the general director in public companies or institutions, advisor in these companies and in other cases specified by the law.

105. A relative incompatibility exists in cases where the MP is temporarily prevented from performing certain private activities during his/her mandate as a MP. For example, the MPs who worked as lawyers cannot undertake activities within their profession in an investigative procedure in front of the courts, nor can they act as representatives of all companies and public institutions, as specified by the law, during their mandate.<sup>92</sup>

106. The Parliamentary Law of the United Kingdom contains detailed rules about the privileges and the interests of the Members of Parliament. Since 1975, the MPs are obliged to give a statement about their financial interest in affairs that are subject of discussion in Parliament or in the parliamentary committees. If a concrete financial interest of the MP is identified, that MP will be excluded from voting. However, nowadays, this rule is very rarely applied and the MPs are exempted from voting only when it is a matter of so-called private bills, i.e. this rule is not applied to the public, i.e. government's draft laws.<sup>93</sup>

107. In 1995, Parliament adopted a special Code of Conduct and Rules relating to the conduct of Members of Parliament, which established a new parliamentary committee about the standards and privileges, and whose task was to supervise the work of the clerks. Strict registration rules about the registration focusing on ten different categories and interests were designed.<sup>94</sup>

108. In cases where the parliamentary committee for standards and privileges finds a conflict of interest, it submits a report to the Lower House of Parliament with recommendations and

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<sup>90</sup> This group includes: )Albania (Art. 89 of the Constitution), Bulgaria (Art. 95), Croatia (Art. 96 and 109), the Czech Republic (Art. 22, 32 and 70), Estonia (Art. 99), Iceland (Art. 9), Luxemburg (Art. 58), Moldova (Art. 70, 81 and 99), Montenegro (Art. 104), Slovenia (Art. 82 and 105), "the former Yugoslav Republic of Macedonia" (Art. 67, 83 and 89).

<sup>91</sup> This group is composed of: the Constitution of the French Republic (Art. 23), the Constitution of Cyprus (Art. 41), the Constitution of Armenia (Art. 65 and 88), the Constitution of Azerbaijan (Art. 89 and 122), the Constitution of Finland (Art. 63), the Constitution of Georgia (Art. 53, 72 and 81.2), the Constitution of Germany (Art. 55 and 66), the Constitution of Hungary (Art. 4, 12 and 20), the Constitution of Lithuania (Art. 60, 83 and 99), the Constitution of Malta (Art. 55), the Constitution of Poland (Art. 103), the Constitution of Romania (Art. 71, 84 and 105), the Constitution of Serbia (Art. 6, 115 and 126), the Constitution of Slovakia (Art. 103 and 109), the Constitution of Spain (Art. 70 and 98), the Constitution of Turkey (Art. 82).

<sup>92</sup> See: Avril, P. & Gicquel, J., (1998) *Droit Parlementaire* (Paris: Montchrestien), p. 37.

<sup>93</sup> See: Bradley, A.W. & Ewing, K.D (2003), *Constitutional and Administrative Law* (London: Pearson, Longman), p. 228.

<sup>94</sup> This refers to the company management, employment, professional activity, different client services that derive from the MP function, also financial sponsorship, gifts, winnings or services that are in any way related with the MP function, his material property, certain forms of property etc. Also, the lower threshold for the financial interest was defined. The registration does not concern the interests that are of a value lower than 1% of the existing salary of the MP (which today is less than 550£). For immovable property, the lower threshold is a revenue not lower than 10% of the parliament member's salary (while the value that has to be registered must be 100% of the MP's salary). Sponsorship is registered if it surpasses the amount of 1,000£ for every individual case. See: Rogers, R. & Walters, R. (2004), *How Parliament Works*, (London: Longman), p. 113.

measures. The measures that can be applied in this case also involve suspension of the Member of Parliament (who also loses his/her salary for the suspension period), or cutting of his/her salary without suspension.

## **X. Conclusions**

109. A democratic political system can only function with, or be based on, limitations it has foreseen as a legal, legitimate and reasonable category. Limitations to the mandate and the right for holders of political functions to be (re) elected have an important role to play in every democratic political system, since their scope depends mostly on the democratic capacity of the political and of the legal system.

110. Even if this may sound interesting and a bit controversial, the democratic character of the political system is not, nor can it be threatened by the limitations that the system itself foresees in the field of representative democracy. Although we are talking about limitations, which by default mean restrictions on the realisation of representative democracy, they do not harm democracy. The same applies to the political and to the economic incompatibilities, as well as to the issue of ineligibility, which are key issues that limit democracy, yet they make democracy possible.

111. The democratic effects of the above-mentioned principles in a given country widely depend on their constitutional dimension and on their practical realisation, but above all, on the model of governance, on democratic tradition and the stability of political institutions, on the way politicians are recruited, on the scope of their “de jure” and “de facto” powers, as well as on the character of the policy-making and decision-making processes (inclusive or exclusive).

112. The model of governance applied in the country is of crucial importance. It is a fact that in many democratic countries, despite the direct contradiction with pluralist democracy, the elite model of governance based on the concentration of political power in the hands of a few people, *i.e.* an oligarchic trend, is present. Government policy is shaped more by practical requirements, lobbying and pressure groups than by electoral considerations. Politicians often possess talents such as charisma, oratory skills and looks, but not necessarily those that are needed to carry out their official duties.

113. While explaining the relationship between democracy and the limitation of the mandate, as well as the relationship between democracy and the right to (re) election for certain holders of political functions, significant attention has to be given to a number of factors: the type of political culture of each specific state (patriarchal, participative or subjective); the election and party system; political attitudes and values, as well as the issue of ethics in politics. Also, the character of the governing model applied in the country is of crucial importance. It is a fact that in many democratic countries, despite the direct contradiction with the pluralistic provisions, the elite model of governance based on the principle of concentration of political power in the hands of a few people, *i.e.* the oligarchic model of governing, is applied.

114. Seen through the constitutional prism of most of the Council of Europe member countries, the limitation of the mandate of the president of state is closely linked to the right to only two consecutive mandates. There are countries that deviate from this general rule (*e.g.* Azerbaijan with no limitation, Israel with only one mandate). When it comes to the function of members of parliament, however, the situation is very different, since there are in general no constitutional limitations here, not in the Council of Europe states, nor beyond, with regard to the right to (re)election, like there are for the presidential function. This comes as a result of two main factors. The first factor concerns the work of the opposition parties in parliament, while the second factor refers to the increased openness and publicity in the work of the parliaments.

115. When it comes to the incompatibility of functions, the constitutional practice is quite diverse. In most countries with a parliamentary organisation of government, the combination of ministers' and MPs' mandates is not only allowed, but it is supported, with the goal of strengthening the bonds between the legislative and the executive government.

116. Incompatibility is different from ineligibility. While ineligibility is defined as a principle which prevents the holders of certain public or private functions from running at parliamentary elections or elections for other levels of government, incompatibility is a much broader principle and refers to the holders of political functions who are already elected. Unlike ineligibility, incompatibility does not prevent the election of the same person, nor does it influence the legal quality of the election results.

117. Despite the permanent controversy about the nature of representation, there is a general agreement that the representative process is intrinsically linked to elections. Elections are a *conditio sine qua non* of democracy, but democracy cannot be simply reduced to competitive elections. In reality, elections are more of a "one – way street" than a "two-way street": they do not provide a real opportunity for mutual influence between the government and the voters. The limitation of mandates aims to strength democracy as does the incompatibility principle between political functions.

118. The Venice Commission is ready to continue studying the issue of limitation of mandates with a view of providing recommendations in this field.