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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPORT

ON

DEMOCRACY, LIMITATION OF MANDATES AND INCOMPATIBILITY OF POLITICAL FUNCTIONS

Adopted by the Venice Commission
at its 93rd Plenary Session
(Venice, 14-15 December 2012)

on the basis of comments by

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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).[1] 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 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th 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. This report does not intend to deal with all related issues, such as concentration of functions and mandates, which would imply national peculiarities, and in particular the political system, to be taken account of more in detail.[2]

5. This Report was examined by the Council for Democratic Elections at its 32nd meeting (Venice, 12-13 October 2012) and adopted by the Venice Commission at its 93rd plenary session (Venice, 14-15 December 2012).

II. Democracy and Representation: general notions

6. Over the past two decades, democracy and democratisation has become a central concern for everyone, ranging from ordinary citizens to politicians, as well as political scientists and policy makers over the past two decades. Following the rapid spread of democratisation around the world, which has radically transformed the international political scene, on the one hand never have so many citizens lived in democracies, however, on the other hand, experience shows that democracy is not achieving what so many hoped for. The interest in democracy and democratisation results from the strengthening of international standards which cast democracy as the best available political system.

7. "However, for many Europeans, democracy is one of the main victims of the financial crisis which started in 2008. According to the conclusions of the 2008 and 2010 Assembly debates on the state of democracy in Europe, European democracies are in a downturn and are experiencing a crisis which undermines the trust of many citizens in their political institutions. The crisis has in particular revealed the limits of the power of democracy and has aggravated public distrust in democracy. In a broad sense, it has been the consequence of some serious

[1] AS/ Pol (2010) 31.

[2] The Congress of Local and Regional Authorities of the Council of Europe is preparing a report examining and comparing the different levels of local and regional government in order to ensure better political representation in the Congress. The draft report "The interpretation and application of Article 2 of the Congress Charter" will be examined by the Congress' Group of Independent Experts of the European Charter of Local Self-Government (GIE) in September 2013. The Congress' Governance Committee will then examine this in October. At its June 2013 meeting, the Governance Committee will discuss a draft report on "Criteria for standing for local and regional elections" which includes an analysis of the limitations imposed on candidates for elections at the grassroots level.

shortcomings in the functioning of democratic institutions, which were not able to anticipate, prevent, and quickly and adequately react to it without causing hardship to the people whom they are meant to serve and protect."[3]

8. Democracy can be strengthened by deepening it at all levels of the nation state and also by constituting it at the transnational level.[4] To become strong, democracies need to make the existing representative democratic structures more representative. There is also a need for the inclusion of direct democracy which enables citizens to express their own views and interests and which creates a more politically sophisticated citizenry. This would contribute effectively to the aim that all tiers of power should be guided by the common interest rather than by particular interests.

9. The only source of legitimate political power is "popular sovereignty, said Jean-Jacques Rousseau, 300 years ago. Abraham Lincoln in his Gettysburg Address defined democracy as "government of the people, by the people, and for the people". Most theories of democracy are based on the principle of "government by the people". This implies that people participate in the making of crucial decisions that influence their lives and determine the societal environment.

10. Participation may be direct or indirect. A more common way of participating is through competitive and regular elections, based on universal franchise as a central feature of representative democracy.

11. In whatever way democracy might be developed in the future, representation will stay a key element of any democracy. As a political principle, representation is a relationship through which an individual or group stands for, or acts on behalf of a larger body of people. Representation differs from democracy: it acknowledges a distinction between government and the governed. Representative democracy, as an indirect form of democratic rule links the representatives and the represented in such a way that the people's interests are secured and the people's views are articulated. The 2010 Assembly report[5] concluded that the "crisis in representation required a different approach to the political relationship between people and authorities, in addition to the traditional forms of mandate and delegation. Without questioning representative democracy, it argued that representation could no longer be the only expression of democracy. Democracy needed to be developed beyond representation, through the introduction of more sustained forms of interaction between people and authorities in order to include direct democratic elements in the decision–making process. Participatory democracy should be enhanced as a process in which all persons are involved in the conduct of public affairs at local, regional and national level.

12. Democracy is an on-going, never-ending process. It is a set of different and dynamic elements. Democracy was never fully achieved, 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 democracy to come, as the French philosopher Jacques Derrida liked to say.

13. 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.

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[3] Draft-resolution adopted by the Committee on Political Affairs and Democracy (Rapporteur: Mr. Andreas Gross), 29 May, 2012, par. 2 and 3.
[4] Ibid, par. 20, 20.1
[5] Doc. 12279, 7 June 2010, Democracy in Europe: crisis and perspectives.

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

15. Enduring democratic systems are characterised by meaningful political participation and democratic competition, protection of the basic human rights, rule of law, and strong democratic values.

16. Efforts to provide support for democratic practices and values, therefore, focus on four broad areas: political participation, competitive elections, human rights, and rule of law.[6]

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

18. Constitutions distribute power and authority among the executive, legislative and judicial branches, and, 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.[7]

19. 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.[8]

20. 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.

21. 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 and legal dimension and practical realisation, but mainly on the model of separation of powers in that country, i.e. on whether the political system is dominantly parliamentarian, presidential or organised in the form of a mixed system. The separation of powers has also been endangered by technocratic powers claimed by governments over parliaments. In the modern era, parliaments can be classified into three categories: first, policy-making parliaments, with significant autonomy and active impact on policy (US Congress, for example); second, policy–influencing parliaments, which by reacting to executive initiatives can transform policy and third, executive dominated parliaments, with marginal influence on policy. Parliaments must defend their right to control governments and to have an active role in decision-making.

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[6] See: USAID Policy, Democracy and Governance, November, 1991, http://www.usaid.gov/policy/ads/200/demgov/demogov.pdf.

[7] 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.

[8] 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.

22. In the context of the relations between democracy and the limitation of the mandate, it is important to take into consideration a certain number of factors such as: geography, history, tradition, political culture, the state of development of the country and the way in which democracy has evolved. These factors influence political behaviour, for example, whether the holders of political offices 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 offices that one person holds.

23. Democracies are not all the same. It is true that some democratic systems foster representation better than others. Certainly, the quality of representation of citizens' interest in the politics of a given country depends widely on the accepted model of selection of the politicians and leadership in that country. American congressmen, for example, should be long-standing residents of the area in which are nominated; in many European democracies there is a tendency for representatives to have their roots in their constituencies (in France and Belgium, for example); previous experience in municipal government is a step towards a parliamentary political career; trade unions have great influence in the selection of Labour members in the British Parliament; there are also "self-starters" among politicians etc.

24. In a number of democratic countries, in spite of a really pluralistic environment, the influence of party machinery and control by the party elite is increasing and the representation of the individual interests is decreasing, concentrating the political power in the hands of the few, reminding us of the danger of the oligarchic model, described by Ostrogorski and Michels.[9]

25. Corrupted ways of influencing policy decisions as well as corruption for the purpose of political party financing have been reported in several countries in both Eastern and Western Europe.

26. Further problems which may arise in democratic systems include the marginal use of instruments of direct democracy, lack of transparency in policy–making processes, examples of government control of media and newspapers, cases of concentrated power in the hands of some media owners who have had close relations with political power holders, as well as cases of illegal practices in obtaining information.

27. Democracy and representation have been at the centre of European public debate for several years. The on-going crisis of democracy and representation requires measures to extend and increase the participatory rights of citizens, to establish new participatory and deliberative structure and to strengthen independent supervisory institutions so as to enhance political accountability and responsibility. "A democratic order can be regarded as legitimate only if citizens have the impression and belief that they can play an adequate part in democratic life and that good and fair political decisions are made", wrote German political scientist Hans Vorlader.[10]

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

28. The mandate and the issue of its (non-) limitation were, and still are a challenge not only

[9] Ostrogorski, M (1902) Democracy and the Organisation of Political Parties (London: Macmillan); Michels, R (1911) 1962) Political Parties: Sociological Study of the Oligarchical Tendencies of Modern Democracy (NewYork: Collier).
[10] Frankfurter Alligemeine Zeitung, 12 July 2011

for the theory of representation, but also for contemporary democratic practice. [11]There is no single theory of representation. Different theories are based on particular ideologies and create several models of representation (trusteeship model, delegate model, mandate model and resemblance model).[12] **The trusteeship model** is based on Edmund Burke's notion of representation. For Burke, representation is a moral duty: those with education and understanding should act in the interests of those who are less fortunate. Once elected, representatives should act independently on the grounds that the electors do not know their best interests. A similar view was expressed by J. S. Mill. His assumption was that, although all individuals have a right to be represented, not all political opinions are of equal value. He proposed a system of plural voting in which four or five votes would be given to holders of learned diplomas and degrees, two or three to managerial workers, and a single vote to ordinary workers. **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 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.

29. The theory of representation is one of the most influential theories in contemporary political thought but the representation itself still raises controversies. It is clear that the issue of who should be represented, which was popular during democracy's expansion in the 19th and 20th 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.

30. However, to identify democracy with mere representation and to narrow representation down to elections and to the vote is too simplified an approach. 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?

31. 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.

32. For some analysts, such as Joseph Schumpeter, "… democracy suggests that people have a possibility to accept or reject those who govern them".[13] In this context, democracy, as an "institutional arrangement", means that elected offices are fulfilled through competition for votes of the people who elect 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

[11] 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 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 guarantee's that ougt 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).

[12] See: Heywood, A. (2007), Politics (third edition), Palgrave, Macmillan, pp. 248-252.

[13] Schumpeter, J. (1991) Capitalism, Socialism and Democracy (London: Harvester Wheatsheaf).

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.

33. 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.

34. 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.

35. In any democratic system there are competitive political parties among which the voters decide on elections based on the political programmes they offer.[14] 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.

36. When laws and other important political decisions are passed in a given country, the holders of elected offices 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.

37. Limiting the mandate is a key issue for the holder of power with respect to his or her political responsibility.

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

38. 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.[15]

39. Already in the 4th and 5th 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.[16]

40. 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.

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[14] 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).

[15] 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).

[16] See: Benjamin, Gerald and Michael Malbin (1992) Limiting Legislative Terms, Congressional Quarterly Press, Washington D.C.

41. 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.

42. 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
- 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.[17]

43. 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 political functions (MPs, prime ministers, government ministers, mayors, etc.).

44. The Constitution of Mexico is among the rare constitutions in the world that does not foresee the possibility of a consecutive parliamentary mandate.[18]

45. 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.[19]

46. The Constitution of Portugal contains a provision that prohibits lifetime holding of any political function at the national, regional or local level.[20]

47. 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.[21]

48. In the 1994 Congressional elections, Republican candidates for the House of Representatives committed themselves as part of their campaign platform, the Contract with America, to seek a constitutional amendment limiting the number of terms anyone could serve in Congress. They argued that the Congress as an institution of professional politicians with eroded accountability and responsiveness had strayed from the founder's vision for Congress as a "citizen legislature", opening the door for political scandals, enormous national debt and deficit spending. For them politics shouldn't be a lifetime job. The US public has supported the term limits, as the most popular provisions of the Contract for America. Republicans had won the elections becoming the majority in the House. However, most Democrats, as well as some House Republicans and Republican senators opposed the term limits, explaining that they would substitute inexperienced legislators for experienced ones, giving more power to

[17] 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).

[18] Article 59 of the Constitution of Mexico – Senators and deputies in the Congress of the Union cannot be re-elected.

[19] Article 55.3 of the Constitution.

[20] Article 118 of the Constitution of Portugal – No one can perform a political function at national, local or regional level for lifetime.

[21] Article 47 of the Constitution of Liechtenstein.

unelected government officials who serve without limits and that such limitations would prevent the people from voting for whomever they wanted. Even the supporters disagreed over the scope and length of limits: three two years terms (six years), four terms (eight years) or six terms (twelve years)? More than twelve bills were introduced but failed to secure the necessary two-thirds. In 1995 the U.S Supreme Court voted to strike down the Arkansas law banning incumbents who had served six years in the House or twelve years in the Senate from appearing on the state ballot. The Court stated in its decision that the state–imposed restriction is contrary to the fundamental principle of representative democracy, embodied in the Constitution that "the people should choose whom they please to govern them".[22] It meant that term limits could be imposed only through a constitutional amendment.

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

49. 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.**

50. That is the case of the constitutions of Albania,[23] Armenia,[24] Austria,[25], Bosnia and Herzegovina,[26] Brazil,[27] Bulgaria,[28] Croatia,[29] the Czech Republic,[30] Estonia,[31] Finland,[32] France,[33] Georgia,[34] Germany,[35] Greece,[36] Hungary,[37] Ireland,[38] Kyrgyzstan,[39] Latvia,[40]

[22] U.S. Term Limits v.Thornton, 514 U.S. -, 131L Ed 2d 881, 115 Ct - (1995).
[23] 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.
[24] Article 50.3 of the Constitution of Armenia – The same person cannot be elected president of the country for more than two consecutive mandates.
[25] Article 60 of the Constitution of Austria – The federal president has a mandate of six years, with the right to only one re-election.
[26] 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.
[27] 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.
[28] 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.
[29] 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.
[30] Article 57 of the Constitution of the Czech Republic – No one can be elected President for more than two consecutive mandates.
[31] 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.
[32] 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.
[33] 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)*
[34] 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.
[35] 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.
[36] Article 30 of the Constitution of Greece – Re-election of the same person for President is possible for only one additional mandate.
[37] Article 10 of the Constitution of Hungary – The President of the Republic cannot be re-elected for more than once.

Lithuania,[41] Moldova,[42] Montenegro,[43] Poland,[44] Romania,[45] the Russian Federation,[46] Serbia,[47] Slovakia,[48] Slovenia,[49] "the former Yugoslav Republic of Macedonia",[50] Turkey,[51] and Ukraine[52] In Andorra, this limitation applies to the Head of Government.[53]

51. 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.

52. 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 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).

53. There is a similar provision in the Constitution of Mexico,[54] 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.[55]

54. An interesting case is the Constitution of Switzerland,[56] 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

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[38] Article 12 of the Constitution of Ireland – The President of the Republic performs this duty with a mandate of seven years form 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.
[39] Article 61 of the Constitution of Kyrgyzstan – The same person cannot be elected President twice.
[40] 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.
[41] 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.
[42] 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.
[43] Article 97 of the Constitution of Montenegro – The same person can be elected president of Montenegro for a maximum of two mandates.
[44] 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.
[45] Article 81 of the Constitution of Romania – No one can perform the duty of President of Romania for more than two consecutive mandates.
[46] Article 81 of the Constitution of the Russian Federation – The same person cannot perform the duty of President for more than two consecutive mandates.
[47] Article 116 of the Constitution of Serbia – No one can be elected President of the Republic for more than two mandates.
[48] Article 103 of the Constitution of Slovakia – the same person can be elected President of Slovakia for not more than two consecutive mandates.
[49] 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.
[50] 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.
[51] 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.
[52] Article 103 of the Constitution of Ukraine – the same person cannot be elected President of Ukraine for more than two consecutive mandates.
[53] Article 78 of the Constitution of Andorra – The Cap de Govern (Head of Government) cannot perform this duty for more than two consecutive mandates.
[54] Article 83 of the Constitution of Mexico.
[55] Article 3 of the 1964 Basic law of Israel on the election of the President of the state.
[56] Article 176 of the Constitution of Switzerland.

paragraph of the Constitutional Declaration sets out that the President of the Confederation cannot be elected vice-president in the following year.

55. In the U.S, the limitation of the mandate has existed since colonial times,[57] 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.
56. The mandate limitation is usually placed within the context of the "rotating system", or the principle of the "rotating service".[58]

57. 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.

58. 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.[59]

59. 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 22nd 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.[60]

60. 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).[61]

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

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

62. 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

[57] See: Alan Grant (1995), "The Term Limitation Movement in the United States", Parliamentary Affairs 48, (p. 515-530).
[58] T. H. Benton (1854), Thirty Years' View, Volume 1, (New York: Appleton).
[59] See: Edmund C. Burnett (1941), the Continental Congress (New York: Macmilian) (p.250).
[60] 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 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.
[61] Article 2, section 1, paragraph 2.

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.

63. 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.

64. 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.

65. 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.

66. 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".

67. 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 government.

68. 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.[62]

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

70. Due to the risks for the balance of powers and even for democracy as such involved in the possibility for the incumbent to be re-elected more than once, the Venice Commission reiterates its critical approach towards constitutional provisions allowing for more than one re-election of the head of state in presidential or semi-presidential systems.[63]

71. On the contrary, prohibiting re-election of parliamentarians involves the risk of a legislative branch of power dominated by inexperienced politicians. This may lead to increase the imbalance in favour of the executive, even if the head of state and possibly ministers are not re-eligible, since the executive is seconded by a permanent public service.

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[62] 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

[63] CDL-AD(2009)010, par. 8ff (Azerbaijan); CDL-AD(2004)029 (Belarus); CDL-AD(2007)045, par. 37 (Kyrgyzstan).

VII. Theoretical, constitutional and legal review of the limitation of the possibility for a simultaneous performing of different political functions/offices (incompatibility issue)

72. 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[64] and in parliamentary law.[65]

73. 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".[66]

74. This definition has remained valid over the years.

75. 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.[67]

76. 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.

77. 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.

78. It can be found in such diverse countries such as Andorra,[68] Brazil,[69] Bulgaria,[70] Portugal,[71] Switzerland,[72] Turkey,[73] Ukraine,[74] Spain,[75] "the former Yugoslav Republic of Macedonia"[76] etc.

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[64] Particularly interesting observations in the work of: Carl Schmitt (2008), Constitutional Theory, (Duke University Press).

[65] See: Avril, P./Gicquel, J. (1988), Droit parlementaire, Paris.

[66] See: Ameller, M., (1966), Parliaments, Cassell, London, p. 66.

[67] 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.

[68] 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.

[69] 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.

[70] 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.

[71] 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.

[72] 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.

[73] 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.
(3) Other functions and activities incompatible with membership in the Turkish Grand National Assembly shall be regulated by law.

[74] 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

79. 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.[77]

80. With the exception of Belgium,[78] France,[79] the Netherlands,[80] Norway[81] and Sweden,[82] in most parliamentary regimes the combination of ministerial and parliamentary duties is not only

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activities outside of working hours), or to be members of an administrative body or board of supervisors of an enterprise aimed at making profit.

[75] 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.

[76] See: **Constitution of "the former Yugoslav Republic of Macedonia", 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.

[77] Ameller, M. (1966), p. 69.

[78] The ministers in Belgium, since the 1995 general elections, have their seats restored on resigning from the cabinet.

[79] In France, the minister who leaves the cabinet finds back his/her parliamentary seat after one month.

[80] 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.
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.

[81] **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,

authorised, but actively encouraged in order to strengthen the ties between legislature (assembly) and the Executive.[83]

81. 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.[84]

82. 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…".[85]

VIII. Incompatibility vs. ineligibility

83. Incompatibility is different form the ineligibility principle, although the basis of both these legal principles lies in the principle of the separation of powers. Incompatibility is a much broader concept than ineligibility, while the first is viewed as part of parliamentary law, the second is viewed as part of electoral law.

84. 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.).

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and political advisers in government ministries may not attend meetings of the Storting as long as they hold their positions."

[82] **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 IV. 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 VI. 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.

[83] 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

[84] *Ibid, p. 44-45.*

[85] See: Burdeau, G., Hamon, F., and Troper, M. (1995), Droit constitutionnel, Paris, LGDJ, p. 569.

85. 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.

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

87. 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.[86]

88. 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.[87]

89. 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

[86] 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.

[87] 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.

See more detailed in: Ulrike Liebert, Parliamentary Lobby Regimes, Chapter 13, p. 417-418: http://www.uni-potsdam.de/db/vergleich/.../Parliaments/Chapter13.pdf.

during their four-year term. The principle of non-eligibility also refers to professional soldiers and members of the police force.[88]

90. 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.

91. 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.

92. 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.[89]

93. 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.[90]

94. 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 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.[91]

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[88] 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.

[89] 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.

[90] 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".

[91] See: Introduction in Belgian Parliamentary History:

95. 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.[92]

96. 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.[93]

97. 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

98. 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).

99. 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.

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http://www.senate.be/english/federal_parliament_en.html#T.4.1

[92] 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.

[93] 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

100. 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.

101. 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.

102. 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.[94]

103. 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.[95]

104. 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.[96]

105. 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.

106. 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.

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

108. For example, some of the constitutions of the member countries treat this issue very generally, with provisions that contain general formulations,[97] while other constitutions contain specific provisions which define in more details the economic incompatibility.[98]

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[94] See, **Constitution of Greece, Article 57**.
[95] See: Ulrike Liebert, *ibid,* p. 416.
[96] See: 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.
Law No. 64/93 of 26 August 1993.
[97] 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

109. 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.

110. 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.

111. 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.[99]

112. 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.[100]

113. 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.[101]

114. 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 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.

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and 99), Montenegro (Art. 104), Slovenia (Art. 82 and 105), "the former Yugoslav Republic of Macedonia" (Art. 67, 83 and 89).

[98] 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).

[99] See: Avril, P. & Gicquel, J., (1998) Droit Parlementaire (Paris: Montchrestien), p. 37.

[100] See: Bradley, A.W. & Ewing, K.D (2003), Constitutional and Administrative Law (London: Pearson, Longman), p. 228.

[101] 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.

115. It may also happen that the national Constitution prohibits in principle any supplementary professional activity. For example, the Constitution of the Russian Federation provides that "Deputies of the State Duma shall function on a professional permanent basis. Deputies of the State Duma cannot hold a government post, or be engaged in paid activity other than lecturing, research or any other creative activities".[102]

X. Conclusions

116. Modern democracy can only function with or through the limitations that it has set for itself as being 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.

117. The effects of the principles of limitation of mandates and incompatibility of political functions in a given country widely depend not only on their constitutional and legal dimension but mainly on the model of separation of powers in that country. The separation of powers has also been endangered by technocratic powers claimed by governments over parliaments. Government policy is more shaped by practical requirements, lobbying and pressure groups than by electoral considerations.

118. 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 many variables such as: geography, history, tradition, the way in which democracy has come about, political culture, electoral and party system, leadership, civil society, media.

119. 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 three main factors. The first factor concerns the need for an experienced legislature which has to be in a position to control the executive branch of power; the second one refers to the work of the opposition parties in parliament, and the third one to the increased openness and publicity in the work of the parliaments.

120. 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.

121. 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.

[102] Article 97.3.

122. 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 always 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 different political functions.

123. Democracy and representation have been at the centre of the European public debate for years. The on-going crisis of democracy and representation requires measures to extend and increase the participatory rights of citizens, to establish new participatory and deliberative structures and to strengthen independent supervisory institutions so as to enhance political accountability and responsibility.

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