Strasbourg, 9 December 2024 **CDL-AD(2024)040**

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ALBANIA

OPINION

ON THE IMPLEMENTATION BY PARLIAMENT OF CONSTITUTIONAL COURT DECISIONS

Adopted by the Venice Commission
at its 141st Plenary Session
(Venice, 6-7 December 2024)

on the basis of comments by

Mr Philip DIMITROV (Member, Bulgaria)
Mr Martin KUIJER (Member, Netherlands)
Ms Laura-Iuliana SCÂNTEI (Member, Romania)

Table of Contents

I. Introduction

1. By letter of 13 September 2024, the Speaker of the Assembly of the Republic of Albania requested an opinion of the Venice Commission on "the relationship between the representative parliamentary democracy and the binding rulings of the Constitutional Court in the context of the role of the Assembly in examining motions on the incompatibility of a Member of Parliament's (MP's) mandate".

2. Mr Philip Dimitrov, Mr Martin Kuijer and Ms Laura-Iuliana Scântei acted as rapporteurs for this opinion.

3. On 18 November 2024, Mr Kuijer and Ms Scântei, along with Mr Pierre Garrone and Ms Linnea Gullholmer from the Secretariat, had online meetings with representatives of the majority and the opposition in the Albanian Assembly as well as with representatives from civil society organisations and international stakeholders. The Commission is grateful to the Council of Europe Office in Tirana for the excellent organisation of these meetings.

4. This Opinion was prepared in reliance on the English translation of judgments and other documents provided by the Parliament of the Republic of Albania and international databases. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 18 November 2024. Following its examination by the Sub Commissions on Constitutional Justice, Democratic Institutions and Latin America on 5 December 2024 and an exchange of views with Ms Elisa Spiropali, Speaker of Parliament, it was adopted by the Venice Commission at its 141st Plenary Session (Venice, 6-7 December 2024).

II. Scope of the opinion

6. The Speaker's request was presented in the form of five questions:

1) *Based on the principles of representative parliamentary democracy*: can MPs be forced to vote in a certain way? If there are such exceptions, what are they and are they relevant to the case of motions on the compatibility with the mandate of an MP? What is the mechanism, if any, to force MPs to vote a certain way (for, against, abstention)?
2) What are the standards for determining the incompatibility with the mandate of MP by the legislative bodies of different states, and what is the role of the respective legislative body in determining the incompatibility with the mandate of MP?
3) On the basis of which standards should the relationship between the representative, non-imperative mandate that MPs enjoy and their role as members of the Assembly be interpreted in the case of considering motions on the incompatibility with the mandate of the MP?
4) What is the role of the legislative body regarding finding of incompatibility with the mandate of MP in other states and is there a judicial control over their decision-making? If so, in what relation/ratio is the competence that the legislative body has in this procedure compared to the competence of the relevant Court? Which of these bodies exercises substantial oversight of the motion to establish the incompatibility with the mandate of MP? What subject is legitimized to submit the case to the designated Court?
5) Can the Constitutional Court create a new constitutional norm, which is not related to its interpretation competence of an existing norm? Can the Constitutional Court create a new category of applying subjects different from those explicitly enlisted by the Constitution?

7. In this Opinion, the notion of *incompatibility* is understood as preventing an MP from carrying out his or her mandate due to the fact that he or she is holding a position (private or public) which

is deemed to be incompatible and conflicting with the office of MP. It focuses on the reasons to *withdraw* a mandate by application of the prohibition to hold an incompatible office.[1]

8. The Venice Commission has carried out its legal analysis in the light of European and international standards, as well as comparative material. It will not intervene in the political discussion. In particular, the Opinion of the Venice Commission is not intended at analysing or interpreting a specific decision of the Constitutional Court of Albania, not at interpreting the Albanian Constitution.

III. Background

9. The request for the present opinion derives from events taking place within the Albanian Assembly since June 2022 and from the decisions by the Albanian Constitutional Court in response to some of these events. Since the task of the Venice Commission is to address the general questions submitted by the Speaker of the Albanian Assembly, the full details of these events are not described in this Opinion. However, a summary of the main events is included below in order to provide a better understanding of the backdrop against which the request has to be understood.

10. The Constitution of the Republic of Albania contains provisions on incompatibilities of MPs. Article 70 states that:

> **Article 70**
> 1. Deputies represent the people and are not bound by any obligatory mandate.
> 2. Deputies may not simultaneously exercise any other public duty with the exception of that of a member of the Council of Ministers. Other cases of incompatibility are specified by law.
> 3. Deputies may not carry out any profit-making activity that stems from the property of the state or of local government and may not acquire the property of either of the latter.
> 4. For every violation of paragraph 3 of this article, on the motion of the Speaker of the Assembly or of one-tenth of its members, the Assembly decides on sending the case to the Constitutional Court, which decides on the incompatibility.

11. The Constitutional Court of Albania has interpreted the procedural aspects of these provisions as follows. The cases of incompatibility according to Article 70(2) are decided by the Assembly without a possibility of appeal to the Constitutional Court. Concerning Article 70(3)-(4), the Assembly shall verify the legal and formal requirements of the application and *decide* whether the issue should be sent to the Constitutional Court, which will then decide the case based on its merit.[2] The legal and formal requirements examined by the Assembly include the number of signatory members, the existence of documentation and evidence supporting the submitted motion, the verification of the moment when deputies received their mandates, the verification of whether the motion meets the constitutional criteria provided for Article 70(3) for setting the Constitutional Court in motion, and whether it complies with the parliamentary procedure as defined in the Assembly's internal regulations.[3] According to the decisions of the Constitutional Court, the Assembly has no discretion, it is therefore not a political decision. The Constitutional Court has considered Article 70 as a *lex specialis* to Article 134 which states that one-fifth of the MPs, whose total number is 140,[4] have standing before the Constitutional Court.[5] After the Constitutional Court had taken decisions to that effect (in 2016), Article 66 of the Law on the Constitutional Court was modified later in 2016, to provide that 1/5 of MPs may directly refer an

[1] Cf. Venice Commission, CDL-AD(2019)015, Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist, paras 56-59.
[2] Cf. Albanian Constitutional Court, judgment no.7/2016.
[3] Albanian Constitutional Court, judgment no.7/2016 para.29.
[4] Article 46(1) of the Albanian Constitution.
[5] Albanian Constitutional Court, judgments no. 72/2016; no. 7/2016.

issue of incompatibility in respect of an MPs mandate to the Constitutional Court. However, in a recent decision[6] the Constitutional Court – while not referring to the amended Article 66 – reiterated its position that 1/5 of MPs *cannot* make such a request under Article 70 of the Constitution.

12. The specific case which led the Assembly to ask for an opinion of the Venice Commission is, briefly, as follows. In July 2022, two motions were filed by two different groups of the Assembly (each group no less than one-tenth of the MPs) to initiate parliamentary proceedings in order to invalidate and terminate the mandate of MP Olta Xhaçka on the ground of an incompatibility between her mandate and profit-making activities according to Article 70(3). The Assembly decided not to refer the case to the Constitutional Court, by rejecting a report of the parliamentary minority and accepting a report from the parliamentary majority, considering that the conditions of Article 70(3) of the Constitution were not fulfilled.[7] In November 2022, one-tenth of the MPs (14) applied to the Constitutional Court requesting to quash the decision of the Assembly not to refer the case to the Constitutional Court. On the same day, one-fifth of the MPs (28) requested the Court to quash these decisions[8] but also to recognise the incompatibility between Ms Xhaçka's position as an MP and profit-making activities.[9] On 23 January 2023, the Court declared admissible the first request by one-tenth of the members of the Assembly against the Assembly and decided to cancel the decisions of the Assembly, holding that the Assembly should have forwarded the case to the Court.[10] As regards the second request, the Court found that[11] a case of incompatibility according to Article 70(3) falls under the jurisdiction of the Court. However, it dismissed the request to assess the incompatibility between Ms Xhaçka's position as an MP and profit-making activities because it could only be activated upon request of the Assembly (and not of one fifth of its members).[12]

13. Further to the Court's judgments, the Assembly decided for a second time *not* to refer the motion for the incompatibility of the mandate of MP Xhaçka to the Court.[13] Following this decision, a group of 44 MPs (amounting to no less than one-tenth and no less than one-fifth of the MPs), requested the Constitutional Court to provide a final interpretation of *inter alia* Article 70(1) and (4) of the Albanian Constitution.[14] The Court decided to quash the Assembly's decision not to refer MP Xhaçka's alleged incompatibility to the Court, as incompatible with the Constitution. By judgement of 10 July 2024, the Court further confirmed that the Assembly was compelled to send the motion on the incompatibility of the mandate to the Constitutional Court.[15] The Assembly has not complied with this ruling to-date.[16]

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[6] Albanian Constitutional Court, judgment no. 2/2023.
[7] The decision was *firstly* not to accept a report of the minority (decision no. 83/2022 of the Assembly) and *secondly* to accept a report of the majority (decision no. 84/2022).
[8] Decisions of the Assembly no. 83/2022 (rejecting the report of the minority) and no. 84/2022 (accepting the report of the majority).
[9] The question of competence between the Assembly and the Constitutional Court, regarding cases of incompatibility through Article 70 of the Constitution, had been elaborated in the case law of the Constitutional Court between 2011 and 2016: judgments no. 29/011; no. 44/2011; no. 7/2016; no. 32/2016; no. 93/2016 and no. 72/2016. In 2016, the Assembly passed laws with the aim to align the legislation with the case law: law no. 99/2016 "On some changes and additions to the Law no. 8577, of 10.2.2000 On the organization and functioning of the Constitutional Court".
[10] Constitutional Court, judgment no. 1/2023.
[11] The Albanian Constitutional Court, judgment no. 2/2023.
[12] The Albanian Constitutional Court, judgment no. 2/2023, para. 34.
[13] Assembly decision no. 41/2024.
[14] Constitutional Court, judgment no. 55/2024 para. 13. A request of interpretation of Articles 73(1), stating that "The deputy is not held responsible for opinions expressed in the Assembly and votes cast by him in the exercise of the function. This provision is not applicable in the case of defamation" and Article 132(1) of the Constitution, stating that "The decisions of the Constitutional Court shall be final and binding for enforcement".
[15] The Albanian Constitutional Court, judgment no. 55/2024.
[16] Cf. European Commission, SWD(2024) 690 final, *Albania 2024 Report*, p. 23; European Commission, SWD(2024) 828 final, *2024 Rule of Law Report, Country Chapter on the rule of law situation in Albania*, p. 22.

14. The Albanian Constitution makes it clear that the decisions of the Constitutional Court are of a binding nature.[17] In its comments to the draft opinion, the Assembly reiterated that it fully recognises the binding nature of the decisions of the Constitutional Court.

15. The Venice Commission will examine questions 1 and 3 regarding an MP's mandate jointly, as it will do for questions 2 and 4 regarding standards and state practice on incompatibility provisions and the role of the legislative and judiciary bodies. Question 5 will be examined separately.

IV. Analysis

A. Questions 1 and 3 regarding the mandate of an MP

Question 1: Based on the principles of representative parliamentary democracy: can MPs be forced to vote in a certain way? If there are such exceptions, what are they and are they relevant to the case of motions on the compatibility with the mandate of an MP? What is the mechanism, if any, to force MPs to vote in a certain way (for, against, abstention)?

Question 3: On the basis of which standards should the relationship between the representative, non-binding mandate that MPs enjoy and their role as members of the Assembly be interpreted in the case of considering motions on the incompatibility of the mandate of the MP?

16. Read jointly, the Venice Commission understands the two questions posed by the Speaker of the Assembly as follows: what standards regulate the mandate of an MP in a representative parliamentary democracy and under what circumstances can an MP be obliged to vote in a certain way? In particular, the Venice Commission understands the question as relating to the case where the obligation to cast a particular vote stems from a judgment of the Constitutional Court.

17. The questions submitted by the Speaker of the Assembly refer to the absence of a binding mandate or, in other words, to the prohibition of the imperative mandate, which is an essential element of the principle of the free and independent mandate of MPs. In short, the free mandate of an MP entails that the MP may change party allegiance ("cross the floor") or become independent without the risk of losing the mandate. Free mandate also implies that there is space for a dissenting vote, without definitive floor-crossing.

18. According to the modern theory of representation, even if elected in local constituencies, representatives do not exclusively represent their local electors but an abstract body, the nation, whose will is superior to that of the various local constituencies.[18] Imperative mandate *stricto sensu,* according to which MPs are bound by instructions, is unknown in Europe, at least in countries with one Chamber.[19] In Albania, the principle that MPs are free to vote according to their conviction has been confirmed by the Constitutional Court.[20]

19. The Venice Commission considers that giving the power to political parties to make MPs resign if they change their political affiliation goes against European standards. These mechanisms come closer to the model of *party administered mandate* which is or has been characteristic in countries such as India or South Africa with the objective of preventing a massive overturn of voters' decision by means of party switching. Whilst in these countries such practices have been considered consistent with their constitution, the Venice Commission has consistently argued that losing the status of representative because of

[17] Article 132 the Albanian Constitution.
[18] Venice Commission, CDL-AD(2009)027, Report on the imperative mandate and similar practices, para. 5.
[19] *Ibid*., para. 39. An exception can be found in the German Bundesrat (second Chamber)
[20] Albanian Constitutional Court, judgment no. 44/2011.

crossing the floor or switching party is *contrary to the principle of a free and independent mandate*.[21]

20. In sum, there can be no exception to the fundamental principle of representative democracy, according to which the political mandate of the MPs is free and irrevocable and the MPs cannot legally be forced to vote in a specific manner.[22] Some constitutions contain provisions according to which there can be no vote on certain issues, but this is a set limitation of the parliamentary decisions, not an imposition on voting autonomy.[23] In other words, the Constitution may exclude some matters from parliamentary decision, but if the Constitution proclaims the power of parliament to decide (i.e. to vote) on a certain matter, the content of such vote must be freely determined by each MP alone, and cannot be dictated. The Assembly argues that the latter scenario is applicable in respect of Article 70(4) of the Constitution as the provision states that the Assembly "decides" on sending the case to the Constitutional Court. However, the Commission wishes to emphasise that in this specific case the Constitutional Court of Albania has already given a ruling to the effect that the Assembly was compelled to send the motion on the incompatibility of the mandate of the specific MP to the Constitutional Court.

21. A fundamental principle of the rule of law is the supremacy of the Constitution and the respect of the binding effect of the decisions of the Constitutional Court, when there is one, by all state powers and authorities.[24] The obligation to abide by the constitution and statutory legislation, and by the judgments of the Constitutional Court, is not a form of imperative mandate, which subordinates the MPs' votes to the political will of their political party and is prohibited by the international standards.

22. As a result of the constitutional recognition of the binding nature of the decisions of the Constitutional Court, all authorities are bound to comply with these decisions and to effectively implement them. Compliance of all authorities with the decisions of the Constitutional Court is based on the *principle of constitutional loyalty* as an element of the rule of law. Such compliance should not be made conditional on the vote of a parliamentary majority, but is an essential requirement of the rule of law.[25] The very purpose of a Constitutional Court is to limit possible transgressions of the legislator or other state powers. Parliament cannot refer to the principle of separation of powers to refuse to abide by and implement the decisions of the Constitutional Court in the framework of the powers conferred on it by the Constitution.[26] In the light of the above, questions number 1 and 3 should *not* be seen as a matter of free mandate, since there can be no political discretion on whether or not to abide by and implement the judgments of the Constitutional Court. In the specific case which gave rise to this request, the Constitutional Court has rendered two decisions, and effective compliance with these decisions should not be made conditional on a vote or a parliamentary majority.[27]

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[21] Venice Commission, CDL-AD(2009)027, Report on the imperative mandate and similar practices, para. 39.
[22] On the prohibition of imperative mandate, see Venice Commission, CDL-AD(2009)027, Report on the imperative mandate and similar practices, in particular para. 39.
[23] Such a question may be on the republic versus monarchy etc.
[24] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, section II.E.3: Venice Commission, CDL-AD(2018)028, Malta – Opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, para. 77.
[25] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, sections II.A.1.i; II.E.2.d.i and II.E.3.ii.
[26] Venice Commission, Armenia – Opinion on the draft Constitutional Law on the Constitutional Court, CDL-AD(2017)011, para. 89.
[27] Article 132 of the Albanian Constitution: the decisions of the Constitutional Court shall be final and binding for enforcement.

B. Questions 2 and 4 regarding standards and state practice on incompatibility provisions and the role of the legislative and judiciary bodies

Question 2: What are the standards for determining the incompatibility of the mandate of the MP by the legislative bodies of different states and what is the role of the respective legislative body in determining the incompatibility of the mandate of the MP?

Question 4: What is the role of the legislative body regarding finding of incompatibility in the mandate of the MP in other states and is there a judicial control over their decision-making? If so, in what relation/ratio is the competence that the legislative body has in this procedure compared to the competence of the relevant Court? Which of these bodies exercises substantial oversight of the motion to establish the incompatibility of the mandate of the MP? What subject is legitimized to submit the case to the designated Court?

23. Questions number 2 and 4 relate to the *international standards* on incompatibilities and the role of the legislative and judiciary bodies, and to *state practice* on incompatibilities. The Venice Commission has decided to answer these questions jointly. It is however necessary to underline that although state practice may contribute to the definition of international standards, it does not, in and of itself, create such standards automatically.

1. Standards on incompatibility

24. In this section, the Venice Commission provides for general international standards on incompatibility. As reflected in the questions asked by the Speaker of the Albanian Assembly, the interest lies foremost with standards determining the incompatibility of the mandate of the MP, the role of the legislative body and the standards of (parliamentary or judicial) review.

25. In general, the principle of separation of state powers imposes that certain offices (functions, mandates) cannot be held by one person at the same time, thus ensuring the integrity and proper functioning of each power (legislative, executive or judiciary). While *ineligibility* to be elected prevents one from standing for election and has to be assessed before the election, an *incompatibility* forbids holding two positions simultaneously. Thus, if the position of MP is incompatible with another position, be it private of public, the MP has to choose between taking (keeping) his or her seat, or that other position.

26. An example to the above would be that holding an office within the legislative power (such as an MP) is incompatible with holding an office of the judicial power (such as being a judge). If such incompatibility were absent, the *judicial review* of a certain act could be made by the same person that once *wrote* the act. Other such situations are the incompatibility with being an MP of two different parliamentary houses at the same time (e.g. the Assembly and the Senate) and being an MP and head of state or, in some political systems, being an MP and at the same time a member of the Government. In some of these cases, the international standards provide for an *absolute* incompatibility, this is the case in respect of being an MP and, at the same time, being a judge. Other cases allow for *exceptions*. For instance, as can be seen in the section on state practice below (section IV.B.2), some states allow an MP to also be part of the Government.

27. Normally, when a person is found to have two functions which are incompatible with each other, this situation can be *repaired* by the person – usually by her or him choosing one of the offices and ending the other. However, in cases where the situation is not repaired, the usual *consequence* is that the person concerned loses her or his mandate.

28. Although the Venice Commission has not elaborated standards on incompatibilities,[28] it has emphasised that it is preferable for the grounds for incompatibilities to be set out in the constitution instead of leaving it to the ordinary laws and thus to the decision of the parliamentary majority.[29] However, some aspects relevant to the definition of incompatibilities may be regulated at a sub-constitutional level.[30] As can be understood from the section on state practice below (section IV.B.2), this is normally the case.

29. There are no clear standards on the *procedure* of deciding on incompatibility. As practice shows (see below section IV.B.2), questions regarding incompatibility may be raised by Parliament (or MPs) and then referred to a Constitutional or ordinary court. However, this cannot be seen as a generalised practice.

30. It is nevertheless clear that the protection of the parliamentary minority is essential in a democracy governed by the rule of law, not least in questions related to the mandate of an MP.[31] With regard to decisions on the withdrawal of an MP's mandate, it is therefore crucial that the opposition is involved in the decisions.[32] Apart from being involved in the process and decision-making, the rights of the parliamentary minority should be protected by clearly regulating access to judicial review. When a constitution enshrines the right of a parliamentary minority to refer certain matters to a higher authority, this is based on the principle of safeguarding the interests of the minority against potential abuses by the majority. As interpreted by the case-law of the Albanian Constitutional Court, the Albanian Constitution enables a parliamentary minority to ask the Assembly to submit to the Constitutional Court an incompatibility question in the sense of Article 70(3).[33] The Constitution also compels the Assembly to refer the case to the Constitutional Court if the requirements of Article 70(3)-(4) of the Constitution are fulfilled. This may be seen as a way to protect the parliamentary minority, in conformity with international standards.

2. State practice on incompatibility

31. In this section, the Venice Commission elaborates on state practice concerning incompatibility. As in the section on standards above (section IV.B.1), the focus is on the practice related to the determination of the incompatibility of the mandate of the MP, the role of the legislative body and the practice of (parliamentary or judicial) review.

32. For the present opinion, the Venice Commission has collected information on constitutional provisions on incompatibility in 12 of its member states and the European Union (EU).[34]

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[28] While it has this on *ineligibilities*: Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters. The Commission has however dealt with incompatibilities in its Checklist on parameters on the relationship between the parliamentary majority and the opposition in a democracy, CDL-AD(2019)015, paras 56-59.

[29] Venice Commission, CDL-AD(2009)024, Ukraine – Opinion on the draft law of Ukraine amending the constitution, para. 52; Venice Commission, CDL-AD(2019)015, Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist, para. 57. The Commission expressed this point in CDL-AD(2008)015, Opinion on the draft Constitution of Ukraine, para. 40, and its opinion CDL-AD(2009)024, Opinion on the draft law of Ukraine amending the constitution, para. 52.

[30] Venice Commission, CDL-AD(2019)015, Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist, para. 57.

[31] Cf. Venice Commission, CDL-AD(2019)015, Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist.

[32] Venice Commission, CDL-AD(2019)015, Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist, para. 56.

[33] More generally speaking, the Constitutional Court may be seized (according to Article 131 sub e) to rule on "issues bearing a connection to the electability and compliance in assuming the functions of […] MPs, […], as well as to the verification of their election." Based on Article 134.1 sub c, recourse to the Constitutional Court shall be sought upon the request of "not less than one-fifth of the members of Assembly". In addition, it is worthwhile referring to Article 77(2) of the Constitution according to which the Assembly has - upon the request of one-fourth of its members – the obligation to designate investigatory committees to review a particular issue.

[34] Cf. European Parliament, Handbook on the incompatibilities and immunity of the Members of the European Parliament, 2021.

33. Material has been collected from Austria, Czechia, France, Germany, Italy, Norway, Poland, Spain, Switzerland, Türkiye, Ukraine and the United Kingdom. The selection of states has been made to ensure geographical representation as well as to address states with different types of political systems.

34. Most of the countries provide provisions on incompatibility in their constitutions. This is the case in Austria, Czechia, France, Germany, Italy, Norway, Poland, Spain, Switzerland, Türkiye, and Ukraine. Some constitutional provisions are of more general character, while the exact cause of incompatibility is decided by the parliamentary assembly. This is the case in Italy. Specific rules regarding the structure and organisation of the parliament (but not always on incompatibilities with the office of an MP) may be found in the Rules of Procedure of the parliaments.[35] This is the case for instance in Austria, Poland, France, and Germany.

35. The substantive regulation of incompatibility in constitutions varies. The most classical incompatibilities concern holding more than one (public) office at the same time.

36. A general rule is that holding the office of an MP is incompatible with holding a judicial office. This is the case for instance in Czechia (the office of an MP is considered as incompatible with the office of a judge), France (the office of an MP is incompatible with the office of a member of the Constitutional Council), Italy and Spain (a judge cannot hold any other public office, which includes being a member of parliament). Other general rules are that a MP cannot be Head of State (*e.g.* Czechia) or, in bicameral systems, members of both Chambers at the same time (*e.g.* Italy, Poland, Spain, Switzerland).

37. A number of countries have constitutional provisions stating that the office of an MP is incompatible with being a member of the government. This is the case of France, Germany, Norway, and Switzerland. On the contrary, there is no prohibition of an MP to be a member of the Government in Poland, Spain or the United Kingdom, for example.

38. Profit-making activities in some countries also raise issues of incompatibility. For example, in Austria, university teachers can continue their activity in *inter alia* research and teaching while they are Members of the European Parliament (MEP). However, the payment may not exceed twenty-five per cent of a university teacher's salary. One of the provisions that can be considered as (materially) close to Article 70(3) of the Albanian Constitution is found in the Constitution of Poland. It states that an MP "shall not be permitted, to the extent specified by statute, to perform any business activity involving any benefit derived from the property of the State Treasury or local self-government or to acquire such property".[36] In the Republic of Moldova, the office of a Member of Parliament is incompatible with the holding of any other remunerated position, except for didactic and scientific activities.[37] A Member of the Parliament who is in one of the cases of incompatibility [...] shall resign, within 30 days from the date of validation of the mandate, from the office incompatible with the mandate of Member of the Parliament.[38] In Switzerland, there is a constitutional prohibition to exercise "gainful activity", but only for the members of the Federal Governments and the full-time judges of the Federal Supreme Court.[39] In Türkiye, holding the office of an MP (Members of the Grand

[35] Cf. European Parliament, Handbook on the incompatibilities and immunity of the Members of the European Parliament, 2021, pp. 62, 73, 103, 115, 163 and 172.
[36] Article 107 of the Constitution of the Republic of Poland.
[37] Article 70(1) of the Constitution of the Republic of Moldova.
[38] Article 5 (1) of the Law on the Statute of the Member of the Parliament. In Constitutional Court Judgment No. 21 of 24.06.2015 for the interpretation of Articles 69(2), 70(1), 99 and 100 of the Constitution of the Republic of Moldova, the Constitutional Court established that "[...] if the state of incompatibility continues to exist at the expiry of the term provided by law, in the event of inaction of the MP in a state of incompatibility, the MP shall be considered to have resigned from the office of MP *de jure*"(para. 86).
[39] Article 144(2) of the Federal Constitution of the Swiss Confederation. The statute may provide for other incompatibilities, Article 144(3).

National Assembly) is incompatible with holding office "in corporations and enterprises where there is direct or indirect participation of the State or public corporate bodies" or "in the executive and supervisory boards of public benefit associations whose private resources of revenues and privileges are provided by law".[40] In Ukraine, the MP shall not carry out "gainful or entrepreneurial activity (with the exception of teaching, scientific, and creative activities)."[41]

39. With regard to the consequences of being an MP and, at the same time, performing business activities involving any benefit from the property of the State treasury, MPs in Poland are "brought to accountability before the Tribunal of State which shall adjudicate upon forfeiture of the mandate".[42] In Türkiye, the MP who continues holding an office in, for instance, corporations and enterprises where there is direct or indirect participation of the State or public corporate bodies, can lose her or his mandate (membership) after Parliament decides "by a secret plenary vote, upon the submission of a report drawn up by the authorized commission setting out the factual situation".[43] If an MP in Ukraine carries out gainful or entrepreneurial activity, he or she must end this activity within 20 days or lodge "a personal application for divesting of People's Deputy authority".[44] If he or she fails with this, the authority of a People's Deputy of Ukraine shall terminate the office of the MP.[45]

40. A trend that can be noticed in the material examined is that the (to be) MP, before entering the mandate or during the first time of the mandate, needs to disclose the relevant information, such as office(s) being held by the (to be) MP, income revenues or memberships. The information is usually to be sent to a committee or a body that makes a first assessment of the situation. This is the case for instance in Austria, Czechia, France, Norway, Poland and Spain.

41. Regarding the *judicial control* over alleged or declared incompatibilities of an MP, Constitutional Courts have partial or full jurisdiction in Austria, Czechia, France (Constitutional Council), Germany, Poland (Supreme Court), Spain and Türkiye (annulment of decisions of the Grand National Assembly). In some countries, the judicial review can consist of a mere formal validation of the incompatibility, in others it involves a substantial evaluation (Austria and Norway). In some instances, access to Court occurs by appealing the Parliament's decision (Germany).

42. In some states there is judicial control by other courts than the Constitutional Court or the equivalent body. In Ukraine, the matter of loss of mandate of an MP because of incompatibility is decided by an ordinary court. In Spain, the annulment of the election of an MP is done by a judgment of the Supreme Court, which can be appealed before the Constitutional Court. In the United Kingdom, the Judicial Committee of the Privy Council has jurisdiction to decide matters in relation to jurisdiction under the House of Commons Disqualification Act 1975.

43. In other states, no judicial review is provided for. For instance, in Italy, the principle of self-jurisdiction of the Chambers of the Parliament prevents a judicial review of their decisions.

44. As for *locus standi*, in most states the subjects with the right to refer such cases to courts are political bodies: Austria (the Incompatibility Committee, Unvereinbarkeitsausschuss), Czechia (*inter alia* the President of one of the Chambers, a group of at least 10 senators or 20 deputies), France (the Bureau of the National Assembly, the Minister of Justice), Germany (one-tenth of the MPs of the Bundestag), Norway (the Parliament), Poland (the Chamber, after motion by the Marshal), Türkiye (another MP) and Ukraine (the Chairperson of the Parliament). In Spain,

[40] Article 82 of the Constitution of the Republic of Türkiye.
[41] Article 78 of the Constitution of Ukraine.
[42] Article 107(2) of the Constitution of the Republic of Poland.
[43] Articles 82 and 84 of the Constitution of the Republic of Türkiye.
[44] Article 78 of the Constitution of Ukraine.
[45] Article 81 of the Constitution of Ukraine

amparo proceedings may be brought before the Constitutional Court both by parliamentary groups and by other individual MPs if they consider (as would be the case) that the parliamentary decision may affect their rights to hold office under equal conditions. In some states, the MP herself or himself may appeal an incompatibility decision in front of a judicial body. This is the case in the Czechia, France, Germany and Türkiye. In the United Kingdom however, *any* person who claims that an MP in the House of Commons should be disqualified may bring a complaint for proceedings in front of the Privy Council. In other words, there is a big variety in the procedures through which the incompatibility is identified and addressed.

45. At the EU level, the membership of the European Parliament (MEP) is incompatible with *inter alia* being a member of a Government of a member state, being a member of the European Commission, or being a member of a national parliament (MP).[46] Likewise, holding the office of an MEP is considered as incompatible with holding certain positions within the European Central Bank and the Court of Auditors of the European Communities and with being an Ombudsman of the European Communities (now the European Union).[47] Following elections to the European Parliament, the national authorities have to take the necessary measures to avoid any incompatibility with the office of MEP. The absence of incompatibility with the office of an MEP needs also to be declared in writing by the elected candidates. If the identification of an incompatibility occurs, the President of the Parliament shall inform the Parliament, which then is required to ("shall") establish a vacancy. The information of the President must however be established on "facts verifiable from sources available to the public".[48]

46. The ECtHR has addressed the question of incompatibilities in several cases.[49] The case law on incompatibility, concerning for instance an MP who holds other positions, or an MP who finds herself or himself in a conflict of interest, dealt with legislation similar to the Albanian provisions.

47. In conclusion, there is no uniform approach to the issue of incompatibilities and states' practice differs depending on various factors, such as the structure of government, the number of chambers and other country specific parameters. The questions of the Speaker of the Albanian Assembly regarding state practice may therefore, with some caution, be addressed as follows. Based on the material that the Venice Commission has examined for this Opinion, the determination of an incompatibility with the mandate of an MP is – on a constitutional level – in most cases done based on what other *offices* the MP holds. In some countries, the *activities* (such as profit-making activities) of the MP may be found incompatible with the office of an MP (although this is not always regulated on a constitutional level). In most states the subjects having standing to refer a case to a judicial body are political bodies or persons part of a political body; and most often the review is made by a Constitutional Court or an ordinary court. Only in a few countries, the issue of incompatibility is decided by the legislative body as a final instance.

[46] Article 7(1)-(2) Act concerning the election of the members of the European Parliament by direct universal suffrage (the Act of 20 September 1976). Art 3(2) of the Rules of Procedure of the European Parliament. Cf. European Parliament, Handbook on the incompatibilities and immunity of the Members of the European Parliament, 2021, p. 43 f.

[47] Article 7(1) of the Act concerning the election of the members of the European Parliament by direct universal suffrage (the Act of 20 September 1976). Further offices considered as incompatible with the office of an MEP are mentioned in Article 7(1)-(2) the Act concerning the election of the members of the European Parliament by direct universal suffrage (the Act of 20 September 1976).

[48] Article 7(2) Act concerning the election of the members of the European Parliament by direct universal suffrage (the Act of 20 September 1976); European Parliament, Handbook on the incompatibilities and immunity of the Members of the European Parliament, 2021, p. 43 f.

[49] *Kokhëdima v. Albania*, 55159/16, 11 June 2024; *Seyidzade v. Azerbaijan*, 37700/05, 3 December 2009; *Lykourezos v. Greece*, 33554/03, 15 June 2006.

C. Question regarding the Constitutional Court and the creation of new constitutional norms

Question 5: Can the Constitutional Court create a new constitutional norm, which is not related to its interpretation competence of an existing norm? Can the Constitutional Court create a new category of applying subjects different from those explicitly enlisted by the Constitution?

48. The Venice Commission understands this question as follows: in principle, may a Constitutional Court create new norms?

49. The Commission has previously stated that "the principles of 'separation of powers' and 'balance of powers' demand that the three functions of the democratic state should not be concentrated in one branch but should be distributed amongst different institutions. The concept of the separation of powers is most clearly achieved with respect to the judiciary, which must be independent from the two other branches."[50] Hence, the competence of the legislator is, in general, to legislate, while the courts (the judiciary) – Constitutional Courts being part of this branch – are guarantors of justice, interpreting the law and rendering binding decisions.

50. The Venice Commission has several times underlined that the interpretation of a constitutional norm lies within the exclusive competence of the Constitutional Court.[51] In many countries, the Constitutional Court may urge the legislator to fill in a constitutional gap. This is especially the case where a gap in the legislation has occurred as a result of a declared unconstitutionality; in some countries the Constitutional Court has the power to set interim arrangements itself. This has been considered as legitimate by the European Court of Human Rights. [52]

51. The competence of the Constitutional Court, as a judicial and not a political body, should not encroach upon the domain of the constitutional legislator, which has the exclusive competence to create new constitutional norms.[53] Constitutional Courts may take into account general constitutional principles, such as access to justice, when addressing the issue of standing, in the interpretation of specific constitutional provisions.

52. The issue whether judges create law – and, if so, to what extent – or just apply it has been discussed in legal literature for ages and is not the subject of the present Opinion. At any rate, it is not possible to define *in abstracto* an exact boundary between interpreting an existing constitutional norm and creating a new constitutional norm. However, the principle of separation of powers assumes – also in order to avoid the perception of a *gouvernement des juges* – that constitutional amendments adopted by the constitutional legislator in conformity with the Constitution (in response to particular decisions of a Constitutional Court) are respected by the constitutional jurisdiction.

53. In conclusion, the power to create new constitutional norms lies with the legislative power and the power to interpret in an authoritative manner an existing constitutional norm lies with the Constitutional Court, which takes into account general constitutional principles, such as access to justice, when it interprets specific constitutional provisions. As mentioned, it is impossible to

[50] Venice Commission, CDL-AD(2013)018, Monaco – Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, paras 14-15.
[51] Cf. Venice Commission, CDL-AD(2017)011, Armenia - Opinion on the Draft Constitutional Law on the Constitutional Court, paras 89-90; Venice Commission CDL-AD(2013)014, Ukraine - Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly, paras 92-94; Venice Commission, CDL-AD(2010)039rev, Study on individual access to constitutional justice, para. 165.
[52] Cf. *Baralija v. Bosnia and Herzegovina*, application no. 30100/18, 29 January 2020, where the Constitutional Court had the power to set interim arrangements.
[53] Cf. Venice Commission, CDL-AD(2010)044, Ukraine – Opinion on the constitutional situation in Ukraine, in particular paras 35-36; CDL-AD(2010)001, Report on constitutional amendment, para. 236.

define the exact boundary between interpreting an existing constitutional norm and creating a new constitutional norm.

V. Conclusion

54. The Venice Commission has been asked by the Speaker of the Parliament of the Republic of Albania to give its opinion "on the relationship between representative parliamentary democracy and the binding rulings of the Constitutional Court in the context of the role of the Assembly in examining motions on the incompatibility with a Member of Parliament's (MP's) mandate", thus dealing with implementation of Constitutional Court decisions by Parliament.

55. This Opinion does not intend taking a stance in respect of particular decisions of the Constitutional Court, nor is it the Commission's competence to interpret the Albanian Constitution.

56. The notion of *incompatibility* is understood as preventing an MP from carrying out his or her mandate due to the fact that he or she is holding a position (private or public) which is deemed to be incompatible and conflicting with the office of MP. It focuses on the reasons to *withdraw* a mandate by application of the prohibition to hold an incompatible office.[54] One such reason might be that there is a conflict of interest between the functions.

57. The questions regarding the mandate of an MP (questions 1 and 3) are understood as follows: "what standards regulate the mandate of an MP in a representative parliamentary democracy and under what circumstances can an MP be obliged to vote in a certain way?" The following may be concluded: Compliance of all authorities with the decisions of the Constitutional Court is based on the principle of constitutional loyalty as an element of the rule of law. Such compliance should not be made conditional on the vote of a parliamentary majority, but is an essential requirement of the rule of law. When the judgment of a Constitutional Court interprets the Constitution as limiting the decision-making power of Parliament, the latter should adopt a decision aligned with the Court's judgment and vote on the limited matter as defined by the Constitutional Court, and not also on the opportunity to refer the matter to the Constitutional Court. Parliament is thus not obliged to vote in a particular way but is only able to vote on issues which fall within its competence.

58. On the questions regarding standards on incompatibility provisions and the role of the legislative and judiciary bodies (questions 2 and 4, part 1) the following may be concluded. In general, the principle of separation of state powers imposes that certain offices cannot be held by one person at the same time, thus ensuring the integrity and proper functioning of each power (legislative, executive or judiciary). In some of these cases, the international standards provide for an absolute incompatibility (for example being an MP while being a judge). In other instances, exceptions are allowed (for example an MP being part of the Government). Normally, when a person is found to have two functions which are incompatible with each other, this situation can be *repaired* by the person – usually by her or him choosing one of the offices and ending the other. However, in cases where the situation is not repaired, the usual *consequence* is that the person concerned loses her or his mandate. With regard to the *procedure* of deciding on incompatibility, there are no clear standards.

59. Regarding to state practice on incompatibility provisions and the role of the legislative and judicial bodies (questions 2 and 4, part 2), the Venice Commission has collected information on constitutional provisions on incompatibility in 12 of its member states and the European Union (EU). The findings of the analysis show that there is no uniform approach to the issue of

[54] Cf. Venice Commission, CDL-AD(2019)015, Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist, paras 56-59.

incompatibilities and states' practice differs depending on various factors, such as the structure of government, the number of chambers and other country specific parameters. The questions of the Speaker of the Albanian Assembly regarding state practice may therefore, with some caution, be addressed as follows. Based on the material that the Venice Commission has examined for this Opinion, the determination of an incompatibility with the mandate of an MP is – on a constitutional level – in most cases done based on what other *offices* the MP holds. In some countries, the *activities* (such as profit-making activities) of the MP may be found incompatible with the office of an MP (although this is not always regulated on a constitutional level). In most states the subjects having standing to refer a case to a judicial body are political bodies or persons part of a political body; and most often the review is made by a Constitutional Court or an ordinary court. Only in a few countries, the issue of incompatibility is decided by the legislative body.

60. The question on the Constitutional Court and the creation of new constitutional norms (question 5) is understood as follows: in principle, may a Constitutional Court create new norms? It can be concluded that the power to create new constitutional norms lies with the legislative power and the power to interpret in an authoritative manner an existing constitutional norm lies with the Constitutional Court, which takes into account general constitutional principles, such as access to justice, when it interprets specific constitutional provisions. However, the exact boundary between interpreting an existing constitutional norm and creating a new constitutional norm is not clear.

61. The Venice Commission remains at the disposal of the Albanian authorities for further assistance in this matter.