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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ALBANIA

DRAFT OPINION

ON THE APPOINTMENT OF THE MEMBERS OF THE CONSTITUTIONAL COURT

On the basis of comments by

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I. Introduction

1. By letter of 30 December 2019, the Speaker of the Albanian Assembly, Mr Gramoc Ruçi, requested an opinion of the Venice Commission regarding the procedure for the appointment of members of the Constitutional Court of Albania. On 21 January 2020, the President of Albania, Mr Ilir Meta, requested an opinion on the same topic.

2. Mr Kask, Mr Kuijer, Mr Pinelli, Ms Nussberger, Ms Suchocka and Mr Tuori acted as rapporteurs for this opinion.

3. On 13-14 February 2020, a delegation of the Commission composed of Mr Pinelli, Ms Nussberger, Ms Suchocka and Mr Kuijer, accompanied by Mr Schnutz Dürr from the Secretariat visited Tirana and had meetings with (in chronological order) the Speaker of the Assembly, the Members of the Investigative Commission of the Assembly, the President of Albania, the Constitutional Court, the Public Protector (ombudsperson), the Justice Appointments Councils 2019 and 2020, the diplomatic community as well as with the Commission's (former) members. The Commission is grateful to the Albanian authorities and the Council of Europe Office in Tirana for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the relevant provisions of the Constitution, the Law on the Constitutional Court and the Law on Governance Institutions of the Justice System. The applicable legislation is available in English at the site of the EU programme Euralius.[1] 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 visit to Tirana. Following the cancellation of the 122nd session of the Venice Commission due to the COVID-19 disease, the present (Joint) Opinion was adopted by the Venice Commission by a written procedure on … March 2020.

II. Scope of the opinion

6. It is not the purpose of this opinion to provide a detailed and exhaustive analysis of the constitutional crisis in Albania. This opinion will focus on the (recent) appointments of members to the Constitutional Court of Albania. If this opinion remains silent on certain aspects of this issue, this is not to say that the Venice Commission implicitly agrees with such aspects or deems such aspects to be in line with existing standards and practice in the field.

7. The Venice Commission has neither the mandate nor the required competences to establish the underlying facts in case these are disputed. It cannot take a position on who are the members of the constitutional court by person. The Venice Commission cannot be an alternative for the paralysed Constitutional Court.

8. However, the Commission can take a position on the rules for nomination of the constitutional court members in principle and interpret them based on European standards. The Venice Commission is aware of the difficulty of the situation and the need to provide an interpretation of the provisions based on principles of constitutional law.

[1] Justice Reform Collection of Laws: https://euralius.eu/index.php/en/library/albanian-legislation/category/103-justice-reform-collection-of-laws (more than 600 pages). The bye-laws, including the rules of procedure of the Justice Appointments Council and the rankling methodology are available at: https://euralius.eu/index.php/en/library/albanian-legislation/category/121-justice-appointments-council.

III. Background

9. For nearly two years, until November 2019, as a result of retirements, resignations and the vetting procedure, the Constitutional Court of Albania had only one judge out of nine left, Ms Tusha. Even though her mandate had expired in 2017 she remains in office until she is replaced.

10. Depending on the interpretation of the rules on appointment, the Court has now four members since November 2019. Chambers of three members can take only admissibility decisions but cannot decide on the merits. This means that the Constitutional Court was and to a large extent still is non-operational because it has a quorum of six members to sit in plenary.

11. According to Article 125 of the Constitution, as amended in 2016, the Constitutional Court has nine members[2], one third appointed each by the President, the Assembly and the High (Supreme) Court. The High Court itself has only one judge left and cannot appoint the three members of its quota. The procedure of appointment is disputed between the other two state organs, the President and the Assembly who have diverging views as to who currently is a judge at the Court.

12. In view of the complexity of the matter, the short chronology below lists some elements that are relevant for the recent appointments of the members of the Court.

22/07/2016	The Constitution is amended and provides that the Constitutional Court is composed of 9 members, 3 appointed by the President of Albania, 3 elected by the Assembly with a 3/5 majority of all its members and 3 elected by the High Court, among the 3 highest ranked candidates presented by the Justice Appointments Council – JAC (Article 125 of the Constitution)
27/01/2017	The Assembly composes the JAC 2017 by drawing lots for the first time.
31/01/2017	The Prime Minister makes a statement complaining that non-vetted persons are members of the JAC 2017. Some members of the JAC resign, others are removed through vetting and the JAC 2017 never meets.
03/2017	The mandate of the Constitutional Court Judge, Ms Tusha, expires but she remains in office according to Article 125(7) of the Constitution, which provides that the members remain in office until the appointment of their successor. Her vacancy should be filled by the High Court.
07/12/2018	The JAC 2018 is composed by drawing lots for the second time.
19/03/2018	The JAC 2018 holds its only meeting where the Representative of the Assembly calls on the Council to limit itself to administrative functions but to refrain from ranking candidates.
2017/2018	The JAC 2017 and the JAC 2018 do not make any ranking of candidates. The JAC 2017 never meets and the JAC 2018 has only one meeting.
07/02/2018	The President announces one vacancy at the Constitutional Court.
12/02/2018	The Assembly announces one vacancy at the Constitutional Court.
04/03/2019	The President announces one vacancy at the Constitutional Court.
04/03/2019	The JAC 2019 adopts its bye-law no. 4 and decides that (in order to be able to present more candidates) persons who have passed the first instance of the vetting proceedings (Independent Qualification Commission) and whose case is pending in appeal (at the Special Appeal College) can be a candidate for the Constitutional Court.

[2] The Constitution refers both to “Members” and “Judges” of the Constitutional Court.

04/03/2019	The Assembly announces one vacancy.
2019	Several persons apply for more than one of the open vacancies.
29/09/2019	For the four open vacancies, the JAC 2019 adopts four lists, numbered in the order of the opening of the vacancies. Two proposals are for the President (nos. 128 and 132) and two for the Assembly (nos. 130 and 134). The lists adopted are the following:

Presidential vacancy of 07/02/2018 – JAC decision no. 128:	Assembly vacancy of 12/02/2018 – JAC decision no. 130:	Presidential vacancy of 04/03/2019 – JAC decision no. 132:	Assembly vacancy of 04/03/2019 – JAC decision no. 134:
1. Ms Arta Vorpsi, 2. Ms Elsa Toska, 3. Mr Besnik Muçi, 4. Ms Regleta Panajoti	1. Ms Arta Vorpsi, 2. Ms Elsa Toska 3. Mr Besnik Muçi	1. Ms Arta Vorpsi, 2. Ms Fiona Papajorgji, 3. Ms Elsa Toska, 4. Ms Marsida Xhaferllari	1. Ms Arta Vorpsi, 2. Ms Fiona Papajorgji, 3. Ms Elsa Toska

08/10/2019	The Chair of the JAC 2019 transmits two lists to the President for simultaneous appointment.
10/10/2019	The Secretary-General of the President's Office sends a letter to the Chair of the JAC 2019 drawing attention to the fact that two lists have been submitted simultaneously: *"where, at least, two institutions have the opportunity to proceed with the completion of the respective vacancies, which end at the same time […], the law has also specified the relevant chronological order according to which the relevant institutions can and should act. […] Since the expiry of the 30-day deadline set by the Constitution and law is an event outside the human will, it is important to respect the chronological order, in the order set by the Constitution and the law, which is also an obligation for the final administrative actions of JAC."*
14/10/2019	The Chair of the JAC 2019 transmits two lists to the Assembly (decisions nos. 130 and 134) for simultaneous appointment.
14/10/2019	The Chair of the JAC replies to the letter by the President that he has transmitted the lists to the Assembly on 14/10/2019 (i.e. six days after having transmitted the lists to the President). The reply does not give a substantive answer to the concerns raised by the President's Office.
15/10/2019	The President appoints Mr Muçi as a judge of the Constitutional Court (from the list in decision no. 128).
18/10/2019	The President accepts the oath from Mr Muçi.
05/11/2019	By reference to Article 179(2) of the Constitution (sequence rule) the President suspends the appointment for his second vacancy until the Assembly will have appointed its judge for its first vacancy. This act of suspension is not challenged in court.
07/11/2019	The JAC 2019 meets to discuss the position of the President. It seems that the Public Protector's question why the JAC Chair transmitted the two lists to the Assembly six days later than those sent to the President is not answered.
09/11/2019	Following the publication of all four decisions (nos. 128, 130, 132 and 134) on the website of the High Court on 22 September 2019, only decision no. 132 is also published in the Official Gazette.
11/11/2019	The President calls upon the Assembly to elect only one candidate.
11/11/2019	The Assembly elects first Ms Toska from its first list (no. JAC decision no. 130). At that moment the list had only two names left (Ms Vorpsi and

	Ms Toska) because Mr Muçi had already been appointed by the President. The Assembly considers that Ms Vorpsi had already been appointed by default according to Article 7/b of the Law on the Constitutional Court because the President had not appointed a second candidate within the 30 days deadline provided in that Article. If this was the case, the list no. 130 would have had only a single name left, Ms Toska. The Assembly then elects Ms Papajorgji from its second list (JAC decision no. 134). Depending on the view on the default appointment of Ms Vorpsi, only one or two candidates remained on that list.
13/11/2019	The President appoints Ms Marsida Xhaferllari as Judge from his second list (JAC decision no. 132).
13/11/2029	Ms Vorpsi who considers herself appointed by default signs a statement in front of a notary expressing her readiness to act as a Constitutional Court judge.
14/11/2019	The President accepts the oath from Ms Toska, Ms Xhaferllari and Ms Papajorgji.
15/11/2019	The Assembly adopts a resolution considering Ms Vorpsi a judge of the Constitutional Court appointed by default.
19/11/2019	The President files criminal proceedings against the JAC 2019 Chair, Mr Dvorani, for "abuse of duty" because of sending the organs two lists at the same time and with a difference of six days, the absence of minutes of the meetings of the JAC meeting protocols and the exclusion of the ombudsman from the selection procedure.
21/11/2019	The first candidate appointed by the President, Mr Muçi, loses his position in the vetting procedure because the Special Appeals College accepts the appeal by the Public Commissioner against the first instance decision.
22/11/2019	The Assembly extends the timeframe of the Investigative Commission on the impeachment of the President (see opinion CDL-AD(2019)019 Albania - Opinion on the powers of the President to set the dates of elections, October 2019) and includes the President's refusal to accept the oath of Ms Vorpsi as grounds for impeachment.
06/12/2019	A draft amendment is proposed in the Assembly to the Law on the Constitutional Court allowing for sending the oath in writing to the President when he refuses to accept the oath within 10 days after the "date of election, appointment or announcement of appointment".
26/12/2019	On its web-site, the Constitutional Court announces its composition as follows: 1. Vitore Tusha, Acting President 2. Elsa Toska, Member 3. Marsida Xhaferllari, Member 4. Fiona Papajorgji, Member.[3]
12/02/2019	The Assembly adopts the draft law introduced on 6 December 2019 providing for the possibility of sending the oath in writing if the President is not willing to accept it. A clause providing that the law should apply to "judges who are elected, appointed or announced as appointed, but who have not taken the oath, with the entry of this law" is removed before adoption.
13-14/02/2019	The delegation of the Venice Commission visits Tirana.

[3] http://www.gjk.gov.al/web/Composition_90_2.php

IV. Analysis

13. Due to the complex nature of the problem it is not possible to reply individually to each question of the Speaker and the President. This opinion can only address the most salient elements of this problem.

A. Model of the Constitutional Court - staggered rotation

14. Since the constitutional amendment of 22 July 2016, Article 125 of the Constitution provides for a rotation model whereby three appointing bodies, the President of Albania, the Assembly and the High Court appoint one member each of the Constitutional Court every three years.

15. This new system replaced the earlier system whereby the Constitutional Court was composed of nine members, who were appointed by the President of the Republic with the consent of the Assembly. This model had proved problematic and the new model gives the three state bodies separate appointment powers.

16. The new system reflects the separation of powers and guarantees a balanced and pluralistic composition of the Court. In its opinions on the draft constitutional amendments, the Venice Commission welcomed this mixed system providing for the election or appointment by the three main branches of power[4].

17. Given that the members of the Constitutional Court have a nine years mandate, the logic of the composition is that every three years, three members are appointed/elected by the President, the Assembly and the High Court respectively. The first composition is staggered, i.e. three members have a three years mandate, another three a six years mandate and only three have the full nine years mandate. In order to keep the system of rotation in place, if a member resigns, falls ill or dies, the member replacing him or her only takes up the mandate for the time remaining from the mandate of the member who is replaced.

18. Article 125 of the Constitution provides:
"1. The Constitutional Court shall consist of 9 (nine) members. Three members shall be appointed by the President of the Republic, three members shall be elected by the Assembly and three members shall be elected by the High Court. The members shall be selected among the three first ranked candidates by the Justice Appointments Council, in accordance with the law.
2. The Assembly shall elect the Constitutional Court judges by no less than three- fifth majority of its members. If the Assembly fails to elect the judge within 30 days of the submission of the list of candidates by the Justice Appointment Council, the first ranked candidate in the list shall be deemed appointed.
3. The judges of the Constitutional Court shall hold office for a 9 year mandate without the right to re-appointment.
[…]"
Article 7 (2) of the Law on the Constitutional Court provides:
"2. The composition of the Constitutional Court is renewed every 3 years by 1/3 of its composition. The new members shall be appointed according to the sequence, respectively by the President of the Republic, the Assembly, and by the High Court. This rule shall be followed even in the event of early termination of the mandate of the Constitutional Court member."

[4] CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, para. 23; CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 36; for Ukraine for instance, see CDL-AD(2009)024 Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine, para.97.

19. Article 127 (3) of the Constitution provides that when a vacancy arises, the same body that had appointed the outgoing member shall replace the member but only for the remainder of the mandate:
"3. Where the position of a judge remains vacant, the appointing body shall appoint a new judge, the latter staying in office until the expiry of the mandate of the outgoing judge."

20. For the first (re-)composition of the new Constitutional Court, the transitional Article 179 establishes a system whereby some of the members shall have shorter mandates to enable the staggered renewal of the Court every three years. According to this provision the mandate of each time 3 members will expire respectively in 2022, 2025 and 2028.:
"1. Members of the Constitutional Court shall continue their activity as members of the Constitutional Court, in accordance with the previous mandate.
2. The first member to be replaced in the Constitutional Court shall be appointed by the President of the Republic, the second shall be elected by the Assembly and the third shall be appointed by the High Court. This shall be the order for all future appointments after the entry into force of this law.
3. Aiming at the regular renewal of the Constitutional Court, the new judge who shall succeed the judge whose mandate will end in 2017 shall remain in office until 2025 and the new judge who will succeed the judge whose mandate will end in 2020 shall remain in office until 2028. The other Constitutional Court judges shall be appointed for the entire duration of the mandate in accordance with the law.
[…]"

21. Diverging interpretations of Article 179 (2) of the Constitution, notably as concerns the initial appointments and irregular appointments (out of the regular appointments every three years) are at the core of the problem of appointments (see further below).

22. The rotation model would mean that three mandates would run from 2016 to 2025, three from 2017 to 2028 and three from 2022 to 2031. This could result in the following table:

Date of vacancy	Previous member	Mandate expired	Institution	Nominee	term length	Date of 1st call
25.10.2016	Sokol Berberi	2016	President	Besnik Muçi/vacant	2016-2025	07.02.2018
31.07.2017	Vladimir Kristo	2016	Assembly	Elsa Toska	2016-2025	12.02.2018
Hold over	Vitore Tusha	**2017**	Supreme Court		2017-2025	
03.05.2018	Altina Xhoxhaj	2019	President	Marsida Xhaferllari	2019-2028	09.11.2018
17.12.2018	Bashkim Dedja	2019	Assembly	Fiona Papjorgi	2019-2028	24.12.2018
10.05.2018	Fatmir Hoxha	**2020**	Supreme Court		2020-2028	
31.01.2018	Besnik Imeraj	2022	President		until 2022	07.02.2018
23.03.2018	Fatos Lulo	2022	Assembly		until 2022	28.08.2018
16.07.2018	Gani Dizardi	2022	Supreme Court		until 2022	

(The Venice Commission is grateful to the US Embassy for providing this table.)

23. This table shows that two mandates (Members Berberi and Kristo) expired in 2016 – first round; two in 2019 (Members Xhoxhaj and Dedja) – second round - and three were expected

to expire in 2022 (Members Imeraj, Lulo and Dizardi) – third round. Transitional Article 179 (3) of the Constitution provides that *"[a]iming at the regular renewal of the Constitutional Court, the new judge who shall succeed the judge whose mandate will end in 2017 shall remain in office until 2025 and the new judge who will succeed the judge whose mandate will end in 2020 shall remain in office until 2028. The other Constitutional Court judges shall be appointed for the entire duration of the mandate in accordance with the law."* This means that the mandate of Member Tusha, ending in 2017, is attributed to the first round (together with the 2016 mandates of Members Berberi and Kristo, and Justice Hoxha's mandate belongs to the second round (together with the mandates of Members Xhoxhaj and Dedja).

24. In practice, with the exception of Ms Tusha, the mandates of the 'old' members were terminated prematurely due to resignations or vetting. Ms Tusha's mandate expired in 2017 but she continues to sit as a judge by virtue of Article 125 (7), which provides that *"The Constitutional Court judge shall continue to stay in office until the appointment of the successor, except for the cases provided for in Article 127, paragraph 1, subparagraph c, ç), d), and dh)."* Thus, when the first appointments were made in November 2019, nine positions needed to be filled.

25. While the model of partial renewal is in principle a reasonable model, due to delays in appointing the first members (inactivity of the Justice Appointments Councils 2017 and 2018), this system has been disturbed and additional judges with a short mandate have to be appointed. Three of the positions to be filled have become less attractive because the members would be appointed only until 2022.

B. Conditions for appointment

26. There are four – both formal and substantive - preconditions for taking up the office of a constitutional court judge in Albania:

1. Qualification
2. Proposal by the Judicial Appointment Council
3. Appointment / election by the President, Assembly or High Court
4. Taking of the oath

27. Each of these requirements is specified by the Constitution and by law. The relevant aspects in the present case can be summarized as follows:

1. Qualification

28. The criteria for qualifying as a candidate for a CC judge are set out in Art. 125 paras. 4 and 5 of the Constitution (law degree, 15 years of practical experience, no political post in the last 10 years) and further specified in Article 7/a of Law No. 8577. According to Article 7/a a candidate has to be – among other elements - *"appreciated for professional skills and ethical and moral integrity"*.

2. Proposal by the JAC

29. Article 7/b and 7/c of Law No. 8577 on the Constitutional Court set out specific formal rules for the procedure of the selection of candidates for the constitutional court. This procedure precedes the election procedure as such.

3. Appointment / election by the President / Assembly / High Court

30. According to Article 125 of the Constitution three State organs (the Assembly, the President and the High Court) have the competence to elect three members each of the Constitutional Court. The most important formal rule is contained in Article 179 para. 2. According to this rule the President, the Assembly and the Supreme Court have to take turns in electing constitutional court

members (also called the 'sequence rule'). The interpretation of this rule is at the core of the dispute between the President and the Assembly (see below).

4. Taking of the oath

31. Taking the oath before the President is a clear constitutional requirement for being validly installed as constitutional court judge (Article 129 of the Constitution).

C. Absence of the High Court

32. The main obstacle for a full composition of the Constitutional Court is the fact that following retirements, resignations and vetting, the High Court has only one judge left. Therefore, the High Court cannot appoint its three members of the Constitutional Court as foreseen by Article 125 of the Constitution. The absence of the High Court may be even more critical for the stability of Albania than the absence of the Constitutional Court. Cases from lower courts cannot be decided and Albania systematically violates the right to a fair trial within a reasonable time. In the absence of any other remedy, this is likely to lead to numerous cases ending up before the European Court of Human Rights.

33. As there is no immediate solution to the re-composition of the High Court, its absence must at least not result in blocking the re-composition of the Constitutional Court. The impossibility of the appointment by the de facto inexistent High Court must not prevent the other appointing bodies, the President and the Assembly from making their six appointments.

34. The Commission's delegation learned that the vacancy of the only member who remains from the 'old' of the Constitutional Court, Ms Tusha, is to be filled by the High Court. Amidst a very complex situation, this is relatively good news because it means that together with six members to be appointed by the President and the Assembly, the Constitutional Court can have seven members until the High Court is re-established and can make its nominations. The quorum for the plenary session of the Constitutional Court is six members and five votes are required to make a decision. It can only be hoped that among those seven members five can agree to adopt judgments on the cases that are already pending with the Court.

35. However, the Commission's delegation also learned that there are few candidates for appointments to the High Court and that this would also be due to the rigour of the vetting procedure (see below).

D. Vetting

36. Coherently, the interlocutors of the Venice Commission's delegation insisted that the vetting procedure was indispensable in Albania, even if it had led to unforeseen consequences.

37. At various stages, the Venice Commission was involved in the assessment of the so-called vetting in Albania. In 2015, the Venice Commission gave two opinions on draft constitutional amendments, which *inter alia* established the vetting procedure.[5] In 2016, upon request of the then still functioning Constitutional *Court, the Commission provided an amicus curiae brief.6 In these opinions the Commission expressed that the very radical process of vetting ("qualification assessment") of all sitting judges and prosecutors by the specially created Independent Qualification Commission, could be seen as appropriate in the Albanian context. The – widely*

[5] CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania; CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania.

[6] CDL-AD(2016)036, Albania - Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law).

shared – assumption that the level of corruption in the Albanian judiciary was extremely high and required urgent and radical measures.[7] However, the Commission insisted that this could be only an extraordinary and strictly temporary measure and the Commission made a number of recommendations for safeguards in the process.

38. It is futile to discuss whether it could have been foreseeable that the vetting process would also significantly affect the High Court and the Constitutional Court. In any event, Article 125 of the Constitution did not envisage a situation in which the Supreme Court would no longer be able to appoint Constitutional Court members.

39. The Commission's delegation learned that the vetting procedure took a long time in each individual case and that for a single person to be vetted typically files of more than 10.000 pages have to be examined because they include detailed documentation of all financial transactions over a prolonged period of time, not only of the person to be vetted but also of all his/her relatives.

40. There seem to be numerous cases in which judges and prosecutors being vetted preferred to resign rather than to submit themselves to this procedure. It seems that some persons did not pass the vetting because their spouse could not explain some revenue earned long before they married. There also seems to be an overly rigid application of procedural deadlines. Documentation has to be provided strictly within a deadline of two weeks, which is sometimes not possible, especially when certified documents have to be obtained from abroad. No extension of such procedural deadlines seems to be given, even upon justification.

41. This opinion focuses on the appointments to the Constitutional Court and the Venice Commission is not equipped to and has no mandate to examine these allegations. However, it recommends to re-evaluate the current modality of vetting, including the scope of the vetting process (in order to accelerate the procedure of vetting) and the application of procedural rules such as deadlines in a less rigid manner. The vetting has to be applied in a coherent manner.

42. Candidates from the judiciary (prosecutors and judges) have to undergo the vetting procedure by the Independent Qualification Commission and the Special Appeal College (see Articles C seq. of the Annex to the Constitution on the Transition Qualification Assessment (vetting)). For other candidates, from outside of the judiciary, the JAC performs the vetting itself.

43. The vetting of non-judicial candidates should be attributed as a priority to the specialised Independent Qualification Commission and the Special Appeal College, instead of the JAC. This would leave the JAC more time to focus on the merits of the candidates rather than examining the enormous files processed in the vetting procedure.

44. In any case, there can be no doubt, that members of the Constitutional Court have to pass the vetting and that the JAC should propose only candidates who have passed the vetting procedure.

[7] In more detail: "The Venice Commission believes that a similar drastic remedy may be seen as appropriate in the Albanian context. However, it remains an exceptional measure. All subsequent recommendations in the present interim opinion are based on the assumption that the comprehensive vetting of the judiciary and of the prosecution service has wide political and public support within the country, that it is an extraordinary and a strictly temporary measure, and that this measure would not be advised to other countries where the problem of corruption within the judiciary did not reach that magnitude." (CDL-AD(2015)045, para. 100); "With regard to the extraordinary measures to vet judges and prosecutors, the Venice Commission remains of the opinion that such measures are not only justified but are necessary for Albania to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system." (CDL-AD(2012016)009, para. 52).

E. Justice Appointments Council

1. Composition

45. According to Articles 125, 149/d and 179 of the Constitution, the JAC[8] proposes candidates for members of the Constitutional Court both to the President, the Assembly and the High Court who have a right to appoint / elect three members each.

46. In addition to the constitutional provisions, the work of the JAC is also based on Law no. 115/2016 on Governance Institutions of the Justice System which regulates the work of the JAC. In addition, the JAC 2019 adopted a number of bye-laws, which regulate its work. [9]

47. The JAC consists of nine members selected annually by lot. Article 149/d (3) of the Constitution reads *"the President of the Republic shall select by lot two judges of the Constitutional Court, one judge of the High Court, one prosecutor of the General Prosecution Office, two judges and two prosecutors from the Courts of Appeal and one judge from the Administrative Courts."* Both Articles 149/d (3) and 179 (11) of the Constitution provide that the People's Advocate (ombudsman) shall participate as an observer in the selection by lot and in the meetings and operations of the Justice Appointment Council.

48. This annual rotation is intended to ensure that no single person dominates the selection process of members of the highest judicial organs for a longer period of time.

49. In its 2015 Final Opinion, the Venice Commission found that the *"Participation of the JAC in the preselection of candidates to be appointed by the President and Assembly further reduces the risk of politically-driven appointments (Article 125)."*[10] On the other hand, the Venice Commission observed a risk of corporatism since all members come from the judiciary and the Constitutional Court.

50. The Members of the JAC serve a one-year term starting from 1 January to 31 December of each year. The Members are selected by lot by the President and if the President fails to select them by 5 December, the Speaker of the Assembly makes the selection by lot by 10 December.

51. While the composition of the JAC is quite clear, it did not function in 2017 and 2018 and valuable time was lost in order to avoid the constitutional crisis by filling new vacancies in the Constitutional Court as they came up.

52. In 2017, the JAC had been composed by lot but it seems that the executive made a statement complaining that members of the JAC had not been vetted. Some members of the JAC resigned, others were removed through vetting and the JAC 2017 never met. The JAC 2018 held only one meeting after a representative of the legislature called it to limit itself to administrative functions but not to rank candidates.

53. Calls for the JAC 2017 and 2018 not to do any ranking of candidates lack a legal basis. There is no obligation for JAC members to have been vetted already. Article 149/d is quite clear that the members shall be selected from the ranks of judges and prosecutors, who are not under disciplinary proceedings. Insisting that JAC members also have to successfully undergo the vetting process is not provided for in the Constitution nor in law.

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[8] The organisation and functioning of the JAC is also regulated in Law No 115/2016 "On the Governing Bodies of the Justice System" as amended, including provisions of Law No 8480, dated 27.05.1999 "On the functioning of the collegial bodies of the state administration and public entities".

[9] https://euralius.eu/index.php/en/library/albanian-legislation/category/121-justice-appointments-council

[10] CDL-AD(2016)009, para. 36.

2. Transparency of the operations of the JAC

54. According to the applicable legal provisions, the procedure before the JAC should be transparent. This is very important to enable the trust of the public in the appointments procedure.

55. Before it started with the ranking of candidates, the JAC 2019 adopted bye-laws on its rules of procedure and on the method of ranking (see footnote 9). Articles 149/d (3) and 179 (11) of the Constitution provide that *"[t]he People's Advocate shall participate as an observer in the selection by lot, as well as in the meetings and operations of the Justice Appointments Council."* Nonetheless, the JAC adopted its Decision no. 4 on the verification of candidates of 6 August 2019 with a Rule no. 41 that reads: *"[t]he discussions on the issue as well as the voting of the decision shall be made only in the presence of the members of the Council."* As an observer, the People's Advocate has of course no vote but Rule 41 excludes the People's Advocate from the *"discussion, voting and decision-making phase"* (Rule 40).

56. Rule 39 gives the People's Advocate only the possibility to give *„opinions and evaluations regarding the mode of the procedure followed for the verification of the candidate",* that means not on the merits of the ranking. It seems that the JAC argued that the People's Advocate might make public statements which could violate the secrecy of the JAC's proceedings. This seems not justified as the People's Advocate would also be bound by the secrecy as concerns individual cases but the People's Advocate could make public comments on the proceedings in general. As the discussions are a central part of the „operations" of the JAC, it would seem that Rule 41 is contrary to the Constitution, respective legal provisions and the aim of ensuring public trust in the procedure conducted by the JAC. The Venice Commission recommends to the JAC 2020 to change this Rule for the upcoming candidates' verification and selection procedures.

57. Article 226(2)(d) of Law no. 115/2016 on governance institutions of the justice system provides that the Chairperson of the Council shall ensure audio recordings of the meetings of the Council and that a summary of the minutes of meeting of the Council is kept and published on the website of the High Court. However, it seems that the summaries of the meetings were not published. This is particularly regrettable because the People's Advocate was excluded from the discussions pursuant to Rule 41. The Venice Commission recommends that the summaries of the minutes of the meetings of the JAC 2020 be published.

3. Ranking of candidates

58. Once the bye-laws were adopted, the JAC 2019 started to rank the candidates for the vacancies at the Constitutional Court. As the JAC had to perform the vetting for the non-judicial candidates, it had to examine huge volumes of files for each candidate. A high number of candidates was excluded during this procedure. Several of them appealed against this decision to the administrative court but their appeal was not upheld.

59. For the three vacancies belonging to the High Court, even after reopening of the application procedures on 19 April 2019, due to a lack of candidates, it was not possible to establish a list with at least 3 candidates for these vacancies. Therefore, the JAC prepared lists for four vacancies belonging to the President and the Assembly.

60. On 21 September 2019, the JAC adopted four lists for four vacancies at the Constitutional Court:

Presidential vacancy of 07/02/2018 – JAC decision no. 128:	Assembly vacancy of 12/02/2018 – JAC decision no. 130:	Presidential vacancy of 04/03/2019 – JAC decision no. 132:	Assembly vacancy of 04/03/2019 – JAC decision no. 134:
1. Ms Arta Vorpsi, 2. Ms Elsa Toska, 3. Mr Besnik Muçi, 4. Ms Regleta Panajoti	1. Ms Arta Vorpsi, 2. Ms Elsa Toska 3. Mr Besnik Muçi	1. Ms Arta Vorpsi, 2. Ms Fiona Papajorgji, 3. Ms Elsa Toska, 4. Ms Marsida Xhaferllari	1. Ms Arta Vorpsi, 2. Ms Fiona Papajorgji, 3. Ms Elsa Toska

61. Due to the paucity of the remaining candidates, on the four lists a total number of six candidates figure in various compositions. This is due to the fact that some candidates had applied for several vacancies. The relative order between the candidates is the same on all lists because the JAC had ranked the candidates by points. All candidates rank relatively closely. The highest number of points being 89.642 points and the lowest 82.000 points, i.e. with only some 9 percentage points difference.

62. According to Article 125 (1) of the Constitution the candidates are selected "among the first three ranked candidates by the JAC". While Article 7/b (4) of the Law on the Constitutional Court, seems to provide for sending the whole list (with the full number of candidates) to the President, Article 7/c (5) obliges the JAC to send the names of exactly three candidates to the Assembly.

63. In addition, Articles 7/b (3) and Article 7/c (4) of the Law on the Constitutional Court provide that *"[w]here more than one vacancy exists, the Council shall draft two separate lists, one of which shall contain the candidates coming from among the ranks of the judiciary."* This provision is hard to understand. This provision would render the default mechanism for the appointment impossible to implement. If the Assembly (or the President) did not elect/appoint a candidate within 30 days, who should be deemed appointed by default, the person on top of the 'judicial list' or from the 'non-judicial' list?

64. In practice, the JAC presented only one list for each vacancy. This is understandable given the low number of suitable candidates.

4. Transmission of the lists

65. All four lists were adopted at the meeting of the JAC on 21 September 2019. The Chairperson of the JAC sent two lists to the President by letter of 8 October 2019.

66. Following an exchange of letters with the Secretary General of the President's Office, the Chair of the JAC subsequently sent two lists to the Assembly on 14 October 2019.

67. In reply to the question by the delegation of the Venice Commission, why he sent the lists to the Assembly six days later than those sent to the President, the Chair of the JAC replied that the preparation of the full files that were sent together with the lists took longer. The members of the JAC were not informed of this way of proceeding. The Venice Commission is not in a position to examine whether the explanation given is plausible. In any case, it was clear that the date of sending out the lists would have important consequences because of the potential application of the appointment by default on the basis of the 30-days rule. The President brought criminal proceedings against the Chair of the JAC.

68. In any case, the difference of six days had the effect that at the time when the Assembly elected candidates for two vacancies on the same day, the President had appointed one member of the Constitutional Court and suspended the appointment of a second member pending the election of one member by the Assembly, referring to the sequence rule of Article 179 (2) of the

Constitution. The Assembly, however considered that both the President and the Assembly were entitled to appoint members for both vacancies simultaneously. According to this interpretation of Article 179 (2) (see below) the President would not have appointed a candidate for his second open vacancy and according to the default mechanism of Article 7/b (4) of the Law on the Constitutional Court, the first ranked candidate of the second list (no. 132) would have been appointed by default.

69. Following the President's appointment of Mr Muçi on 15 October 2019, only two candidates remained on the list under review by the Assembly, which seems not to be in line with the applicable legal framework.

70. In conclusion, JAC's modus operandi in 2019 is questionable. The combined effect of (a) sending two lists simultaneously to the President (which meant that his 30-day time period, if applied, would start to run for both lists at the same time), (b) sending out the lists to Parliament six days later making it impossible to foresee both for the President and the Parliament which of the identical candidates might be chosen from those lists at what point in time and thus not being any more available for choice and (c) sending a total of four lists with only six candidates, in combination with the decision made by the Assembly to appoint, after the expiry of the President's 30-day time period, two candidates on the same day without giving an explanation to the President, created a situation in which all appointments except the nomination of Mr Muçi were potentially made in an unconstitutional manner.

F. Default mechanisms

71. The Venice Commission has repeatedly recommended the adoption of default mechanisms for securing the full composition of constitutional courts because *"the effective and continuous functioning of the 'Guardian of the Constitution' has paramount importance for the country"*[11]. The Commission affirmed that *"default mechanisms should be put into place, in the interest of the Constitutional Court's institutional stability, and to avoid any institutional blockage. It is of the utmost importance to ensure that the position does not remain vacant for a prolonged period of time after the end of office of a judge. Rules of procedure on filling a vacant judge's position at the Constitutional Court should foresee the possibility of inaction by the nominating authority. There should either be a procedure that allows the incumbent judge to pursue his or her work until the formal nomination of his or her successor – this solution might require amendments to the Constitution – or a provision which specifies that a procedure of nomination of a new judge could start at least three months before the expiration of the mandate of the incumbent judge".*[12]

72. Albania has even two default mechanisms, namely the constitutional provision that a member whose mandate has expired remains in office until the appointment of the successor (Article 125 (7) of the Constitution), and the already mentioned 30-day deadline rule (Article 128 of the Constitution and Articles 7/b, 7/c and 7/ç of the Law on the Constitutional Court).

73. As concerns the candidate to be appointed by the Assembly, Article 125(2) of the Constitution provides that *"[t] he Assembly shall appoint the Constitutional Court judges by three-fifth majority of all its members. If the Assembly fails to appoint the judges, within 30 days of the submission of the list of candidates by the Justice Appointment Council, the first ranked candidate shall be deemed appointed."* This provision is repeated on the legislative level in Article 7/c (6) of the Law on the Constitutional Court.

74. This means that for the Assembly, a default mechanism exists on the constitutional level. If the Assembly cannot elect a member within 30 days after the submission of the list by the JAC,

[11] CDL-AD(2006)016, para. 10.
[12] CDL-AD(2017)011, Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, para. 23.

the first ranked candidate becomes member *ex lege.* The introduction of such a mechanism on the constitutional level makes sense because as a collegiate political body it may be difficult for the Assembly to find the necessary votes.

75. The Constitution does not regulate the procedure concerning the appointment by the other two bodies, i.e. the President and the High Court. However, the same default mechanism has been introduced for them on the level of ordinary legislation. As concerns the President, Article 7/b (4) of the Law on the Constitutional Court states: *"The President shall, within 30 days of receiving the list from the Justice Appointments Council, appoint the member of the Constitutional Court from the candidates ranked on the three first positions of the list. The appointment decree shall be announced associated with the reasons of selection of the candidate. Where the President does not appoint a judge within 30 days of submission of the list by the Justice Appointments Council, the candidate ranked first shall be considered as appointed."* Article 7/b (4) does not seem to be applicable in a situation where it is unclear when and if the 30-days-period starts to run. The Venice Commission recommends that, if the default mechanism for appointments by the President were deemed necessary (Article 7/b (4) of the Law on the Constitutional Court), this rule should be raised to the constitutional level, as is the case for the Assembly already.

G. Taking the oath

76. Article 129 of the Constitution adds that a judge of the Constitutional Court begins his/her duty after taking the oath before the President of the Republic. The corresponding legal basis of the oath ceremony can be found in Article 8 of Law No. 8577 of 10 February 2000 on the Organisation and Functioning of the Constitutional Court of the Republic of Albania, which reads: *"1. The term of office of a judge of the Constitutional Court starts after he/she has been sworn in by the President of the Republic. 2. The wording of the oath is: 'I solemnly swear always to be loyal to the Constitution of the Republic of Albania in fulfilling my duties'. […]"*

77. This means that a member cannot take up his/her position without the taking of the oath by the President. The oath before the President is therefore a precondition for taking up office.

78. It is unclear if this is a purely formal requirement or if it implies the competence for the President to control if the rules in appointing/electing have been applied correctly. In any case, as long as the President does not swear in a candidate s/he cannot start working.

79. This situation needs to be distinguished from that in Poland where the President of Poland did not accept the oath of any of the so-called "October judges". The Commission found that *"108. Government experts argue that this oath is decisive for the final validity of the appointment. However, in contrast to the oath by Members of The Assembly (in the presence of the Sejm, Article 104(2) of the Constitution) and members of the Government (in the presence of the President of the Republic, Article 151 Constitution), the oath of judges of the Constitutional Tribunal is regulated only in the law on the Tribunal, but not in the Constitution itself. Against this legal background, taking the oath cannot be seen as required for validating the election of constitutional judges. The acceptance of the oath by the President is certainly important – also as a visible sign of loyalty to the Constitution – but it has a primarily ceremonial function."* and "*109. It must be recalled that the judgment of 9 December 2015 held that the beginning of the judges of the Tribunal's term of office is their election by the Sejm (possibly a later date if the election process takes place before the vacancy occurs), not the solemn moment of the oath-taking. This judgment must be respected. Under the Polish Constitution, the Constitutional Tribunal and not the President is the final arbiter in cases involving the interpretation of the Constitution. The President of the Republic and the other State authorities have a responsibility to ensure the implementation of the Tribunal's judgments."*[13]

[13] CDL-AD(2016)001, para. 108-109. In footnote 25, the Commission referred to the Marbury v. Madison case. The US Supreme Court held *inter alia* that a judicial appointment is only completed "when the last

80. An important basis for that opinion was thus that the Polish Constitutional Tribunal itself had decided that the oath could not be regarded as 'the last act' required to validate an appointment. Furthermore, the regulation was only contained in a law and not in the Constitution.

81. The present situation is also different from that in Ukraine, where under the applicable law at the time, a judge of the Constitutional Court entered office from the date of swearing the judge's oath, which he or she took at a session of the *Verkhovna Rada* with the participation of the President, the Prime Minister and the Chairman of the Supreme Court no later than one month from the date of appointment. In October 2005, the term of office of ten justices of the Constitutional Court of Ukraine, including its Chairman, came to an end.

82. The *Verkhovna Rada* did not only not elect the judges of its own quota but it also did not accept the oath of candidates appointed by the President and elected by the judiciary. In that case the Venice Commission called for *"[t]he simplification of the taking of an oath by providing for a written form of taking the oath or the introduction of an internal mechanism for swearing in"*: *"18. One of the solutions in this respect could be taking the oath in a written form and submitting it to the President of Ukraine or the Speaker of the Verkhovna Rada of Ukraine. 19. Another solution could be providing for an internal mechanism to be established for swearing in. The option would consist in enabling the newly appointed judges to be sworn in by the Chairman of the Constitutional Court. In the case that the Chairman's authority has ended, the possibility to be sworn by the Chairman ad interim or oldest judge in office could be envisaged."* [14] The difference to the Albanian case is that in Ukraine the oath taking procedure was regulated on the level of ordinary law only.

83. Referring to the Ukrainian opinion, the Albanian Assembly adopted an amendment to the Law on the Constitutional Court on 12 February 2020, that allows for sending the oath in writing to the President when s/he refuses to accept the oath within 10 days after the "date of election, appointment or announcement of appointment". The draft of the amendment contained a clause foreseeing its application on pending cases, which was however removed before adoption.

84. The constitutionality of this amendment is doubtful as the Constitution clearly states that the oath should be given "before" the President. In addition, the adopted provision is very vague. What is the "announcement of appointment" and who is competent to make such an announcement? Even if it could be the Constitutional Court, the context of the situation in Albania excludes this possibility. Thus, the amendment creates uncertainty as to the legitimacy of members starting to work at the Constitutional Court without being sworn in on the basis of the procedure foreseen in the Constitution.

85. In practice, while the President accepted the oath of the candidates directly appointed by him and those elected by the Assembly, the President did not accept the oath of the candidate who the Assembly considers being appointed by default (Resolution of 15 November 2019).

86. However, the discussion on the form of oath (before the President or written) in this case is secondary when the main question arises regarding the "legality" of the *ex lege* appointment of the first ranked candidate. The real question is not whether the President accepted the oath of the first ranked candidate but whether the 30-days deadline started to run in the first place. This depends on the interpretation of Article 179 of the Constitution (see below).

act required from the person" making the appointment is completed. In that particular case this was the President's signature.

[14] CDL-AD(2006)016, para. 18-19 and 21.

H. Sequencing of appointments - Article 179 (2) of the Constitution

87. Article 179 (2) of the Constitution (transitional provision) provides a constitutional rule on the sequence of nominations by the three respective bodies and regulates a procedure of subsequent nomination of members: *"The first member to be replaced in the Constitutional Court shall be appointed by the President of the Republic, the second shall be elected by the Assembly and the third shall be appointed by the High Court. This shall be the order for all future appointments after the entry into force of this law."*

88. This provision has to be seen in the light of the system of the partial renewal of the Court every three years (see section IV.A above). In normal times, given that the mandates of the members are fixed, every three years three positions will become vacant, one of which to be filled by the President, one by the Assembly and one by the High Court. Article 7 (2) of the Law on the Constitutional Court provides that *"The composition of the Constitutional Court is renewed every 3 years by 1/3 of its composition. The new members shall be appointed according to the sequence, respectively by the President of the Republic, the Assembly, and by the High Court. This rule shall be followed even in the event of early termination of the mandate of the Constitutional Court member."*

89. As concerns the sequence of appointments, diverging lines of arguments have been developed in Albania. The *a priori* obvious interpretation (A) would be that Article 179 (2) requires a strict sequence of the appointments, one by the President, the next by the Assembly, the next by the High Court and then it would be the President's turn again. This seems to be the obvious logic of Article 179 (2) and in line with a literal interpretation of the provision.

90. However, this interpretation can be functional only when there is a regular replacement of three members of the Constitutional Court every three years. It does not provide for a solution in case the mandate of a member terminates prematurely, for instance because of resignation, illness or death of the member.

91. The premise on which the provisions on the composition of the Constitutional Court are based is that the Court includes nine members, of which each of the three institutions appoints three. Thus, there is a (quantitative) balance between members appointed by the President, the Assembly and the High Court. Interpretation (A) could – and most probably would – lead to shaking the balance and to, for instance, a situation of where, say, five of the members are appointed by the President. Thus, an interpretation of the sequence rule should be adopted which is in harmony with the basic premise – the institutional balance - which the provisions on the composition reflect.

92. In addition, interpretation (A) does not function properly when one of the State organs is dysfunctional as is currently the case with the High Court. In this situation, the President could appoint one member, the Assembly one and then the procedure would stop in the absence of the High Court. It could only be argued that in such an exceptional situation, the rule of necessity would apply and that the other two powers, the President and the Assembly, should continue with appointing their members in alternance.

93. According to another interpretation (B) of Article 179 (2), this provision determines the sequence of the right to appointment rather than the sequencing of the appointments. The sequence of the right to appointment puts the emphasis on the clause "the first member to be replaced" rather than the clause "shall be appointed" in Article 179 (2). According to this interpretation any vacancy could be filled when it comes up without having to wait for other appointing bodies.

94. According to this interpretation (B), the intention of the drafters was to create fixed 'President's positions', 'Assembly's positions' and 'High Court's positions' and to ensure, that a given position

is filled by the President/Assembly/High Court, independent from whether a position holder exhausts his/her full mandate or not.

95. Hence, Article 179(2) would aim at designating the organ to which the vacancy pertains which needs to be filled. This provision would thus guarantee that no shift of the right to appoint for the respective position can occur. Irrespective of when the mandate of the first vacancy terminates this position will always remain a 'President's position', i.e. the President has the right of appointment. This would ensure an equilibrium between the three appointment bodies.

96. If for example a member appointed by the Assembly resigns after his/her first year of mandate the interpretation (A) requiring a rotation of the appointments leads to the conclusion that that this position would have to be filled by the President who is the next in line for filling a vacancy. Interpretation (B) would lead to the conclusion that it is the Assembly again who can replace the member it had elected for the remainder of his/her mandate.

97. According to interpretation (B), the 2016 reform intended to remove the interdependence of two institutions (President and Assembly) and to allow them to appoint / elect member independently from each other.

98. However, if such a system of 'reserved' positions had been intended this could have been expressed more clearly and without referring to a sequencing of appointments. Interpretation B could in addition mean that one appointing body is compelled to appoint three candidates in a row. Such a reading would be opposite to the literal meaning of the provision.

99. Building on these arguments, the Venice Commission prefers interpretation (C) according to which the sequence rule of Article 179 (2) of the Constitution and Article 7 (2) of the Law on the Constitutional Court only applies within a given round of appointments (see section IV.A above). The constitutional rule is based on the assumption that always three positions have to be filled at the same time and the sequence therefore applies only within this round of appointments. As a consequence, the absence of the election of a member by the High Court, which comes last in each round, therefore does not block appointments for another round. Even though the High Court cannot elect its member, the President shall start afresh with an appointment of one member in another round, which is to be followed by an election of one member by the Assembly. The President and the Assembly should continue with appointing their members in alternance. Once the High Court is established it can catch up and make its outstanding elections. From then on, the regular rotations can take place and the sequence rule should be applied for all three upcoming vacancies in a given year.

100. The clear preference of the Venice Commission for interpretation (C) does not mean that the other interpretations would be unreasonable. In any case, when he appointed only one candidate, Mr Muçi, and then suspended the procedure for appointing a second candidate, the President followed an interpretation which is not unreasonable and can be argued. Under interpretation (C) the suspension of the second appointment was valid and blocked the start of the 30-days period for the second appointment so that the appointment by default did not materialise.

I. Impeachment of the President

101. Further to the recent Opinion of the Venice Commission on the powers of the President to set the dates of elections[15], this is the second opinion where the Venice Commission is called to examine a situation in which an impeachment procedure has been launched against the President of Albania. It is, therefore, worth recalling elements of that opinion.

[15] CDL-AD(2019)019.

102. The Commission found that "[t]he impeachment process involves both legal and political aspects and phases. The work of the Special Investigation Commission is mainly of a legal nature. By contrast, when the plenary Assembly decides whether to impeach the President, it may – and even should – take into account also the political repercussions of its decision."[16]

103. The Commission added that *"even if 'serious violations of the Constitution' (the Constitution uses the plural) were established, the Plenary Session also takes into account the opportunity of impeaching the President and can refrain from doing so. The Venice Commission cannot advise on this issue, but it will be for the Plenary Session of the Assembly to decide whether an impeachment would reduce or increase tensions and ultimately serve or frustrate the goal of mutual checks and balances in a situation where The Assembly and all municipalities are dominated by one party. The question therefore for the Assembly may be: would the pursuit of such an impeachment option serve the unity of the people?"*[17]

104. According to the analysis provided above, the President's actions are generally compatible with a reasonable interpretation of the Constitution. In light of the interpretation (A) of Article 179 (2) of the Constitution set out above, the actions taken by the President (and his Office) in response to the modus operandi by JAC seem reasonable. Thus, there is no basis for an impeachment of the President.

J. Loyal cooperation

105. The stalled process of appointment of the Constitutional Court's members reveals major difficulties in enforcing the Constitution and the law in force. These depend to a large extent to institutional conflicts, due to mutual distrust between the state powers and their tendency to delegitimize each other. The country's institutional system risks a paralysis going far beyond the issue of the Constitutional Court's members' appointing procedure.

106. While all actors stress their own loyalty to the Constitution, they accuse the other side of violating the constitutional provisions. Due to the non-existence of the Constitutional Court these conflicts cannot be settled by the organ competent to do so.

107. The Venice Commission cannot replace the Constitutional Court. The assistance of the Venice Commission can neither cure nor replace the lack of willingness and culture of cooperation among the Albanian institutions. For unlocking the appointing procedure, a different avenue must be chosen. Aggressive rhetoric should be avoided, and each institution should recognise the legitimacy of the other institutions in appointing the three Constitutional Court members.

108. A thorough reflection should be made by the relevant institutions with respect to the strong need for a 'bilateral disarmament' on the issue, for the sake of the Albanian democracy. There is a need for real dialogue and cooperation between institutions to guarantee constitutional loyalty.

V. Conclusion

109. It is of vital importance for Albania to restore the Constitutional Court and the High Court as quickly as possible, even more so in a time in which highly complex questions pertaining to the constitutionality of public affairs in Albania present themselves. A number of cases pending at the Constitutional Court cannot be adjudicated. To overcome this crisis, constructive interinstitutional dialogue and cooperation between the State institutions is required.

[16] Idem, para 90.
[17] Idem, para. 93.

110. The constitutional crisis in Albania has not been caused by one specific act, but is the consequence of the interplay of several factors:

- the vetting procedure had more pervasive effects than originally foreseen;
- also as a consequence of the comprehensive vetting procedure the High Court and the Constitutional Court have been rendered dysfunctional;
- there is fundamental obstruction between the Government/Assembly and the President that seems to be difficult to overcome (with an on-going impeachment procedure on the one hand and criminal complaints on the other hand);
- due to the long inactivity of the JAC in 2017 and 2018 there are many vacancies at a time. With almost no suitable candidates there is little choice for those appointing/electing the Constitutional Court members;
- the JAC's modus operandi in 2019 was questionable;
- the problems in applying ambiguous (constitutional) provisions have been aggravated by the fact that there is no Constitutional Court and by the fact that the procedure has become the subject of the fight between the Government/Assembly and the President.

111. In order to overcome the stalled situation, the Venice Commission makes the following recommendations, first as concerns the vetting:

- While the reform of the judiciary and the vetting procedure remain a priority and have to be brought to a good end it should be evaluated if the rules as applied (e.g. requiring the justification for money earned by the person concerned and all his or her family members for a period of time much longer than any tax laws require documents to be conserved) lead to good solutions or do not give too much room for political manipulation.
- In order to ensure the same standards of vetting for call candidates for membership in the Constitutional Court, the vetting of non-judicial candidates shall be attributed to the Independent Qualification Commission and the Special Appeal College instead of the JAC, as is it the case now.
- The vetting of judges and prosecutors should be accelerated by the Independent Qualification Commission and the Special Appeal College.
- On the other hand, in reasonable cases, too rigid and unrealistic time limits for providing documentation should be re-opened.

112. As concerns the procedure of the JAC:

- JAC 2020 should change Rule 41 of JAC Decision no. 4 for the upcoming candidates' verification and selection procedures.
- The summaries of minutes of all meetings of the JAC should be published.
- JAC should adopt its ranking only when the files of all candidates on the list are complete and the Chair of the JAC should then send the lists together with the files immediately to the respective state body without any further delay.
- The JAC should not propose candidates who have not yet passed the vetting.

113. As concerns the sequencing rule of Article 179 (2) of the Constitution:

- Article 179 (2) of the Constitution and Article 7 (2) of the Law on the Constitutional Court only apply within a given round of appointments. The President and the Assembly should continue with appointing their members in alternance.
- If the default mechanism for appointments by the President were deemed necessary (Article 7/b (4) of the Law on the Constitutional Court), this rule should be raised to the constitutional level, as is the case for the Assembly.

114. As concerns the oath taking procedure:

- The recently adopted but not yet enacted provisions on a default mechanism for taking the oath by sending a letter with the oath to the President in case of a refusal by the President to accept the oath should be abandoned as they seem to be unconstitutional.

115. Finally, the important legal ambiguities (first, as to the necessity of vetting for the members of the JAC, second as to the length of the mandates of the members' positions attributed to the President, the Assembly and the High Court respectively, third as to the consequences of the sequencing rule of Article 179 (2)), should be solved in the light of this opinion.

116. The main problem why the situation deteriorated is not the diverging interpretation of Article 179 of the Constitution and other provisions but the absence of dialogue and loyal cooperation. Both sides agree to this in principle but insist that only they exercise such loyalty but not the other side. Both sides should refrain from aggressive rhetoric. Many of the problems could be solved by means of cooperation between institutions, as has been pointed out several times by the Venice Commission. As the President of the Venice Commission recently insisted in respect of Armenia: "Democratic culture and maturity require institutional restraint, good faith and mutual respect between State institutions."[18]

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

[18] Public statement by the President of the Venice Commission of 3 February 2020 regarding Armenia, https://www.venice.coe.int/webforms/events/?id=2892.