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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ALBANIA

DRAFT OPINION

ON ON THE APPOINTMENT OF JUDGES TO 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 Parliament, Mr Gramoz Ruci requested an opinion of the Venice Commission on "the appointments of Judges to the Constitutional Court of Albania (CDL-REF(2020)016). 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, and with the diplomatic community. 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. It was adopted by the Venice Commission on … through a written procedure which replaced the 123rd Plenary session in Venice, due to the COVID-19 disease.

II. Background

A. The constitutional and legal framework

1. The Constitutional Court

6. The Constitution of Albania was amended in 2016,[1] notably as concerns the provisions on the Constitutional Court. Article 125 of the current Constitution reads:

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.*
4. *The judges of the Constitutional Court shall have a law degree, at least 15 years of experience as judges, prosecutors, advocates, law professors or lectors, senior*

[1] Law 76/2016, dated 22/07/2016.

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employees in the public administration, with a renowned activity in the constitutional, human rights or other areas of law.

5. *The judge should not have held political posts in the public administration or leadership positions in a political party in the last past 10 years before running as a candidate. Further criteria and the procedure for the appointment and election of judges of the Constitutional Court shall be regulated by law.*
6. *The composition of the Constitutional Court shall be renewed every 3 years to one-third thereof, in accordance with the procedure determined by law.*
7. *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).*

a. Manner of appointment: the introduction of a quota system

7. Compared to the previous model under the previous version of Article 125, the manner of appointment of the members of the Court was changed: while before 2016 they were all appointed by "the President of the Republic with the consent of the Assembly", under the new Constitution the power to appoint the members is shared among the President, the Assembly and the High Court.

8. A system of quotas has therefore been introduced. Each appointing authority appoints its three members and subsequently replaces them when their mandate expires (pursuant to Article 127 § 3 of the Constitution, "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". This provision applies in all cases of vacancy.

9. The competence to select the candidates is given to the Justice Appointments Council (JAC).

10. Election by the Assembly is by a qualified majority of three-fifths, and an anti-deadlock mechanism is provided at the constitutional level: if the Assembly fails to choose between the three candidates ranked highest by the JAC within 30 days of the submission of the list, the first-ranked candidate is deemed appointed.

11. An anti-deadlock mechanism for appointments by the President and by the High Court was introduced by the amendments to the Law on the Constitutional Court in October 2016: Article 7.b/4 provides in respect of the appointment by the President that: "4. 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."

12. Article 7/ç provides in respect of election by the High Court: "For each vacancy, it shall be voted for each of the candidates ranked in the top three places of the list. The candidate obtaining 3/5 of the votes of the present judges shall be declared elected. Where no necessary majority is attained, the candidate ranked first by the Justice Appointments Council shall be considered elected."

13. Article 129 of the Constitution provides that "[a] judge of the Constitutional Court takes office after taking an oath *before* the President of the Republic (emphasis added)."

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b. The transition from the old to the new system

14. Under the new system, the members of the Constitutional Court continue to be renewed by one-third every three years (Article 125 para. 6 of the Constitution). The system of quotas of three members appointed by three different authorities had to be put in place, by allocating three positions to the quotas of each of the three appointing bodies.

15. At the time of the constitutional amendments in 2016, the Constitutional Court was composed by the following nine judges, all appointed by the President with the consent of the Assembly:

Vladimir Kristo	(end of mandate: 25.04.2016)
Sokol Berberi	(end of mandate: 25.04.2016)
Vitore Tusha	(end of mandate: 10.03.2017)
Bashkim Dedja	(end of mandate: 20.05.2019)
Altina Xhoxhaj	(end of mandate: 25.05.2019)
Fatmir Hoxha	(end of mandate: 05.07.2020)
Gani Dizdari	(end of mandate: 08.04.2022)
Besnik Imeraj	(end of mandate: 08.04.2022)
Fatos Lulo	(end of mandate: 02.05.2022)

16. Transitional Article 179 of the Constitution (introduced by Law 76/2016, dated 22/07/2016) provides three rules for the transition from the old to the new system:

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*.

17. A "sequence of appointment" was thus introduced (para. 2), that is, the order in which the vacancies would be allocated to the three appointing bodies: first to the President, second to the Assembly, third to the High Court. This sequence was proclaimed to be permanently applicable.

18. In addition, an alignment of mandates was operated: as two mandates (of Judge Tusha and of judge Hoxha: see above) did not align with the three groups, in order to be able to proceed with the renewal of one-third of the positions in the same year, the mandate of the judge to be appointed in 2017 (succeeding to Ms Tusha) was exceptionally shortened to eight years (2017-2025), and the mandate of the judge to be appointed in 2020 (succeeding to Mr Hoxha) was equally shortened to eight years (2020-2028). In this manner, paragraph 3 of Article 179 intended to recreate three groups of three judges, whose mandate would expire the same year: three in 2025, three in 2028 and three in 2031.

19. The combined operation of paragraphs 2 and 3 of Article 179 was reflected in new Article 86.4 of the Law on the Constitutional Court, introduced in October 2016 and providing as follows:

> *4. The replacement of judges of the Constitutional Court until 2022, shall take place under the following scheme:*

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a) The new judges to replace the judges whose mandate expires in 2016, shall be appointed as per the sequence, respectively by the President of the Republic and the Assembly.
b) The new judge to replace the judge whose mandate expires in 2017 shall be appointed by the High Court and shall stay in office until 2025.
c) The new judges to replace the judges whose mandate expires in 2019 shall be appointed as per the sequence, respectively by the President of the Republic and the Assembly.
ç) The new judge to replace the judge whose mandate expires in 2020, shall be appointed by the High Court and shall stay in office until 2028.
d) The new judges to replace the judges whose mandate expires in 2022, shall be appointed as per the sequence, respectively by the President of the Republic, the Assembly, and the High Court.

20. The abstract application of this sequencing order in order to determine the three quotas per appointing body, by application of this article, produces the following scheme:

First round:
Successors to Vladimir Kristo and Sokol Berberi (end of mandate 25.04.2016): First by the **President**, second by the Assembly;
Successor to Vitore Tusha (end of mandate 10.03.2017): *High Court* (until 2025);
Second round:
Successors to Bashkim Dedja (end of mandate 20.05.2019) and Altina Xhoxhaj (end of mandate: 25.05.2019): First by the **President**, second by the Assembly;
Successor to Fatmir Hoxha (end of mandate: 05.07.2020): *High Court* (until 2028);
Third round:
All three mandates ended in 2022, the mandate of justices Didzari and Imeraj on 08.04.2022 and the mandate of Fatos Lulo on 02.05.2022. The sequence of appointments of their successors is: first by the **President**, second by the Assembly, third by the *High Court*.

21. As far as early termination of mandates is concerned, Article 127 § 3 of the Constitution provides that "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". Article 7 § 2 of the Law on the Constitutional Court provides that "this rule [the sequence] shall be followed even in the event of early termination of the mandate of the Constitutional Court member", and Article 7.dh § 2 provides that "in case of an early termination of the mandate of a judge, the election of the new judge, who shall stay in office until the expiry of the mandate of the outgoing judge, shall follow the sequence envisaged for his replacement, under Article 7, paragraph 2, of this law."

22. According to the law on the Constitutional Court, the end of the mandate of a constitutional justice is declared by a decision of the Constitutional Court. No later than 3 months before the expiry of the mandate, the Chairperson of the Constitutional Court notifies the appointing body of the vacancy. The procedure of appointment must be completed no later than 60 days after the decision of the Constitutional Court declaring the end of the mandate (Article 9 paras. 2 and 3 of the Law on the Constitutional Court).

23. Justice Berberi resigned from duty on 26.10.2016, while justice Kristo was still in function. His vacancy was therefore the first to materialise in chronological order, so that, by operation of the sequence, his successor fell into the quota of the President. The successor to justice Kristo subsequently fell into the quota of the Assembly.

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2. The process of re-evaluation (vetting)

24. In 2016, a process of re-evaluation of judges was introduced in Albania. Article 179/b of the Constitution (inserted by Law 76/2016 of 22.07.2016) was added to the Constitution, providing that:

> *1. The re-evaluation system shall be established in order to guarantee the proper functioning of the rule of law, the independence of the judicial system, as well as to re-establish the public trust and confidence in these institutions.*
> *2. The re-evaluation shall be carried out on the basis of the principles of the fair trial and conducted by respecting the fundamental rights of the assessee.*
> *3. All judges, including judges of the Constitutional Court and High Court, all prosecutors, including the Prosecutor General, the Chief Inspector and the other inspectors of the High Council of Justice shall ex officio be re-evaluated.*
> *4. All legal advisors of the Constitutional Court and High Court, legal assistants of the administrative courts, legal assistants of the General Prosecution Office shall ex officio be re-evaluated. Former judges or prosecutors, and former legal advisors of the Constitutional Court and High Court with at least three years of work experience in this function may undergo upon their request the re-evaluation process, if they fulfil the criteria regulated by law.*
> *5. The re-evaluation shall be conducted by an Independent Qualification Commission, while the appeals filed by the assessees or the Public Commissioners shall be considered by the Appeal Chamber attached to the Constitutional Court. During the transition period of 9 years, the Constitutional Court shall consist of two chambers.*
> *6. The Commission and the Appeal Chamber shall be independent and impartial.*
> *7. Failure to successfully pass the re-evaluation process constitutes a ground for the immediate termination of the exercise of functions, in addition to the grounds provided for in the Constitution. Judges and prosecutors including those seconded in other positions, former judges or former prosecutors, who successfully pass the re-evaluation, shall hold the office or will be appointed judges and prosecutors. All other assessees, who successfully pass the re-evaluation shall be appointed as judges or prosecutors under the law.*
> *8. The mandate of the members of the Independent Qualification Commission and the Public Commissioner shall expire after five years from the date of commencement of their operation, while the mandate of the judges of the Appeal Chamber is nine years. After the dissolution of the Commission, pending re-evaluation cases shall be conducted by the High Judicial Council in accordance with the law. Pending reevaluation cases of the prosecutors shall be conducted by the High Prosecutorial Council in accordance with the law. After the dissolution of the Public Commissioners, their competences shall be exercised by the Chief Special Prosecutor of the Special Prosecution Office. Any appeals against pending decisions of the Commission shall be considered by the Constitutional Court.*
> *9. The Assembly shall decide on repealing this Annex after the last re-evaluation decision becomes final, following a report submitted by the Chairperson of the Appeal Chamber on the state of affairs of the pending cases or at the end of the mandate of the Special Qualification Chamber.*
> *10. Re-evaluation procedures and criteria shall be regulated in compliance with the provisions of the Annex and the law.*

3. The Judicial Appointment Council (JAC)

25. The JAC, pursuant to Article 149/d of the Constitution,[2] "is responsible for verifying the fulfilment of legal requirements and assessment of professional and moral criteria of the

[2] Inserted by the Law 76/2016, dated 22/07/2016.

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candidates for the High Justice Inspector, as well as for the members of the Constitutional Court. It examines and ranks the candidates according to their professional merits, but the ranking of candidates is not binding, except when the Assembly fails to make an appointment." The same applies in case of failure by the President to make the appointment (by application of 7.b/4 of the Law on the Constitutional Court). The JAC consists of nine members selected annually by the President of the Republic, by lot, as follows: 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.[3]

26. JAC members shall be selected from the ranks of judges and prosecutors "who are not under disciplinary measures" (Article 149/d (3)). In addition, Article 179 (11) of the Constitution provides that *"the members of the Justice Appointments Council shall be as soon as possible subject to the transitional re-evaluation of the qualification of judges and prosecutors under Article 179/b of this law [Constitution]."*

27. 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.

28. The Members of the JAC serve a one-year term starting from 1 January to 31 December of each year. Between December 1 and December 5 of each year, the President of the Republic shall select the members of the JAC of the following year, by lot. If the President of the Republic fails to select the members by December 5, the Speaker of the Assembly shall make the selection by lot before December 10 of that calendar year (Article 149/d, paragraph 3).

B. The procedure of appointment of new members of the Constitutional Court

1. The vacancies

29. Justice Berberi resigned from duty on 26.10.2016. The mandate of Justice Tusha expired on 10.03.2017, but she has remained in office pending her replacement (pursuant to Article 125 of the Constitution). Justice Kristo resigned from duty on 31.07.2017 and Justice Imeraj resigned on 31.01.2018.

30. As a result of the application of the vetting process, five members of the Constitutional Court were removed from duty:

Justice Lulo (on 17.07.2018),
Justice Hoxha (on 25.09.2018),
Justice Xhohhaj (on 24.10.2018),
Justice Dedja (on 17.12.2018) and
Justice Dizdari (on 12.02.2019).

31. The High Court, due to the vetting of its members, lacks a quorum and is not functioning. Until very recently, it had only one judge in office out of 19 judges; this judge had remained in office after the expiry of his mandate in February 2014. On 10.03.2020, three new judges of the High Court were sworn in by the President. To-date, the High Court has had no quorum to elect the three Constitutional Court members falling within its quota.

[3] In its 2015 Final Opinion (CDL-AD(2016)009, para. 36), 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)." On the other hand, the Venice Commission observed a risk of corporatism since all members come from the judiciary and the Constitutional Court.

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32. On 27.01.2017, the JAC 2017 was composed by the Speaker of the Assembly but in the course of the year some members of the JAC resigned and others were removed from office through vetting so that the JAC 2017 never met.

33. On 07.12.2017, the JAC 2018 was composed by the Speaker of the Assembly. On 19.03.2018 it held a meeting, where the Chair of the Legal Parliamentary Commission called on the Council to limit itself to administrative functions but to refrain from ranking candidates. This position was motivated by the fact that the members of the JAC had not been (all) vetted yet. Subsequently, the JAC 2018 lacked a quorum due to the vetting. It never met again.

34. On 7.12.2018, the JAC 2019 was composed by the Speaker of the Assembly. On 04.03.2019 it adopted its byelaw no. 4 and decided, in order to have more candidates, judges who had passed the first instance of the vetting proceedings (Independent Qualification Commission) and whose case was pending in appeal (at the Special Appeal College) could be candidates for the Constitutional Court.

i. The first round

35. On 07.02.2018, the President announced the opening of the application procedure for one vacancy at the Constitutional Court (successor to justice Berberi, who had resigned on 25 October 2016).

36. On 12.02.2018, the Assembly announced the opening of the application procedure for one vacancy at the Constitutional Court (successor to justice Kristo, who had resigned on 31 July 2017).

37. Justice Tusha's successor is for the High Court to elect (but the Court lacks the quorum).

ii. The second round

38. On 04.03.2019, the President announced the opening of the application procedure for another vacancy at the Constitutional Court (successor to judge A. Xhoxhaj who had left on 3 May 2018).

39. On 04.03.2019, the Assembly opened the procedure to replace Justice Dedja, who had left the Court on 17.12.2018.

40. The successor to Justice F. Hoxha, who left the Court on 10.05.2018, is in the quota of the High Court.

iii. The third round

41. On 07.02.2018 the President opened the procedure to replace Justice Imeraj, who had left on 31.01.2018.

42. On 28.08.2018, the Assembly opened the procedure to replace Justice Lulo, who had left the Court on 16.07.2018.

43. The successor to Justice Dizardi, who left the Court on 16.07.2018, is in the quota of the High Court.

iv. The procedures of appointment

44. No ranking was made by the JAC in 2017 and 2018 (see paras. 32 and 33 above).

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45. On 29.09.2019, the JAC 2019 adopted the following lists (several judges had applied for more than one position, so some of the same candidates appeared on all or more than one list):

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

46. On 08.10.2019, the Chair of the JAC 2019 transmitted two lists (decision no. 128 and decision no. 132) to the President for simultaneous appointment.

47. On 10.10.2019, the Secretary-General of the President's Office sent a letter to the Chair of the JAC 2019 drawing attention to the fact that the two lists had 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."

48. On 14.10.2019, the Chair of JAC 2019 transmitted two lists to the Assembly (decisions nos. 130 and 134) for appointment. On the same day, he informed the President of having transmitted two lists to the Assembly.

49. On 15.10.2019, the President appointed Mr Besnik Muçi as judge of the Constitutional Court (from the list in decision no. 128, first sequence), and on 18.10.2019 Mr Muçi was sworn in.

50. On 05.11.2019, the President suspended the appointment of the second judge of his quota (second round) pending the appointment by the Assembly of the first judge on its quota (first round – list from JAC decision 130).

51. On 09.11.2019, JAC decision 132 (the list for the second presidential appointment) was published in the Official Gazette (the other decisions (No. 128, 130 and 134 together with the respective lists were not published).

52. On 11.11.2019, the President called on the Assembly to elect only one judge (from the list of JAC decision 130).

53. On the same day, the Assembly elected Ms Toska from the list of JAC decision 130. After Mr Muçi's appointment by the President, there remained only two candidates on that list (Ms Vorpsi and Ms Toska). The Assembly explained in its report that it considered that Ms Vorpsi, who, in addition to being on the Assembly's list, had been ranked first on the list of JAC decision 128 for presidential appointment, had to be considered as having been appointed by the President by default, by operation of the anti-deadlock mechanism (the President had failed to appoint the second judge from his quota (second round) within thirty days of transmission of the relevant list by the JAC on 08.10.2019, see para. 11 above).

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54. The Assembly further elected Ms Papajorgji from its second list (JAC decision no. 134). Following its interpretation that Ms Vorpsi had already been appointed ex officio, Ms Papajorgi was the only candidate left on that list from the viewpoint of the Assembly.

55. On 13.11.2019, the President appointed Ms Marsida Xhaferllari as Judge from his second list (JAC decision no. 132, second sequence). On the same day, Ms Vorpsi, considering herself appointed by default, signed a statement in front of a notary expressing her readiness to take up her functions as Constitutional Court judge.

56. On 14.11.2019, Ms Toska, Ms Xhaferllari and Ms Papajorgji were sworn in by the President.

57. On 15.11.2019, the Assembly adopted a resolution entitled "Avoiding constitutional crisis aiming at the legitimacy of the Constitutional Court – an imperative task for the highest bodies of the State", considering Ms Vorpsi a judge of the Constitutional Court appointed by default, calling on the Constitutional Court to implement the constitutional order determined by JAC decision to appoint Ms Vorpsi and stating that the appointment of Ms Xhaferllari had been in open and flagrant contradiction with the Constitution and the law.

58. On 19.11.2019, the President filed a criminal complaint against Mr Dvorani, Chair of JAC 2019, for "abuse of duty", for having transmitted to the President and to the Assembly two lists of candidates each, but not at the same time, with an interval of six days between the two bodies, for failing to publish the minutes of the JAC deliberations and for excluding the People's Advocate from the procedure.

59. On 21.11.2019, Justice Muçi, the first presidential appointee, was removed from office by the Special Appeals College in the vetting procedure.

60. On 22.11.2019, the Assembly extended the timeframe of the Investigative Commission for the impeachment of the President[4] and included the President's refusal to accept the oath of Ms Vorpsi and appointment of Ms Xhaferllari as a member of the Constitutional Court as additional grounds for impeachment.

61. On 26.12.2019, the composition of the Constitutional Court was announced as follows on the Court's website: 1. Vitore Tusha, Acting President, 2. Elsa Toska, Member, 3. Marsida Xhaferllari, Member and 4. Fiona Papajorgji, Member.[5]

62. On 12.02.2020, an amendment to the Law on the Constitutional Court was adopted, allowing the submission of the oath to the President in writing, when the latter refuses to receive it. It has not been promulgated by the President to-date.

63. The JAC is finalising its assessment of candidates for two vacant posts, one of which had been reopened to substitute a judge previously appointed by the President of the Republic who eventually did not pass the vetting process.[6]

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[4] CDL-AD(2019)019, Albania - Opinion on the powers of the President to set the dates of elections.
[5] http://www.gjk.gov.al/web/Compositi.on_90_2.php
[6] https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/update-on-the-republic-of-albania.pdf

III. Analysis

A. General remarks

64. The constitutional and legislative setting of 2016, notably Article 179 of the Constitution, provided in a very detailed manner the transition from the old to the new system. An alignment of mandates was operated and the sequencing rule (President, Assembly, Supreme Court) was subsequently planned to be applied to the three groups of three members to be appointed every three years. Under these conditions of mandates expiring orderly by groups of three during the same year, it appeared possible that the sequencing rule could be applied smoothly, every three years, with no alterations. This appears to be the reason for the provision in Article 179 § 2 that "*This shall be the order for all future appointments after the entry into force of this law*" (emphasis added).

65. In its Final Opinion on the revised draft constitutional amendments on the judiciary,[7] the Venice Commission had made the following remarks on draft Article 179:

> *"81. Article 179, p. 1 a) provides that "the new members [of the CC] who are due to replace the members whose mandate expires in 2016 shall be appointed, respectively, by the President of the Republic and by the Assembly, and they shall stay in office until 2025". As the mandate of the judges is 9 years (Article 125), the reason for indicating the year when the mandate of the judges should end is not clear and may also create some confusion. Thus, the term of office may vary depending on the exact date of appointment in 2016 and may end earlier than 9 years. It may happen that the Assembly or the President will appoint judges with some delay but the term of their office will end in 2025 regardless of the actual number of years spent in office. Apart from that, there may be a controversy between this provision and the one stipulating that judges remain in office until the new appointment, as provided under Article 125 p. 6 ("the Constitutional Court judge shall continue to stay in office until the appointment of his successor, except under cases under Article 127, paragraph 1, subparagraph ç) and d)")."*

66. While the text of draft Article 179 was subsequently amended, the problem was reproduced: the end of the mandate of two judges was indicated expressly, in order to align it with the end of the mandate of the other judges. A significant degree of rigidity was thus introduced in the text of the Constitution, despite the warning by the Commission that it could create problems and that it was difficult to expect that the mandates would start and end in such an orderly, predictable manner.

67. Indeed, on account of the unexpected massive number of resignations and removals from office, and of the delays in the setting-up and functioning of the JAC, the anticipated application of the sequence rule to the future appointments of the members of the Constitutional Court was severely perturbed. As a result, the very functioning of the Constitutional Court was disrupted. For nearly two years, until November 2019, the Court only had one member out of nine, Ms Tusha. Since November 2019, the Court has four members. 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 requires a quorum of six members to sit in plenary.

68. Furthermore, following retirements, resignations and vetting, also the High Court has been non-operational, with only one judge left. Therefore, the High Court to-date has been unable to appoint its three members of the Constitutional Court as foreseen by Article 125 of the

[7] https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)009-e, para. 81

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Constitution. Three new High Court judges have very recently been sworn in by the President, which is a positive development.

69. The reduced duration of the mandate of the new justices which stems from the above-identified rigidity also poses another problem: as the Constitution indicates exactly the years of termination of each mandate, belated election entails a shortened mandate; as a consequence, some positions currently vacant are for very short – hence non attractive and possibly non meaningful – non-renewable mandates.

70. Against this backdrop, it is necessary to provide a constructive and operational interpretation of the model of constitutional justices' appointment, taking into account the prevailing circumstances in Albania (notably the on-going vetting process).

B. The interpretation of the constitutional model

71. With the constitutional amendments of 2016, Albania has opted for a model existing in a number of European States, especially among the young democracies, where the President, the legislator and the judiciary participate in the composition of the Constitutional Court. In Albania, the appointing bodies must choose from a list provided by the Justice Appointments Council (JAC), in which judges play a decisive role. The Venice Commission welcomed the introduction of this model which "limits the scope for political manipulations". This model of three appointing bodies was combined with the pre-existing rule of renewal of 1/3 of the composition of the Constitutional Court every three years ("the rotation").

72. The constitutional amendments of 2016 also introduced a (less common) mechanism: an order of appointment (which the legislation calls "the sequence rule" or "rotation") which was designed in the transitory provisions of the Constitution to be applied "for all future appointments" (Article 179). The law proclaims that the sequence rule applies "even in the event of early termination of the mandates". This sequence rule was to be applied for the first time upon the expiry of the mandates of the already sitting constitutional justices. The mandates of the sitting judges were aligned, so that the three groups of three mandates would be renewed during the same (fixed) year, respecting the sequence rule: first appointment by the President; second, by the Assembly, third, by the High Court (but the law allocated to the latter two pre-determined reduced mandates – see para.19 above).

73. The Albanian model is characterised by an extreme rigidity: the years of beginning and end of the nine-year mandates are fixed; early termination of a mandate does not result in a new full mandate of nine-years, as the new judge may only finish the original mandate of the outgoing judge. Furthermore, if for any reason the election or appointment of a judge is delayed, the length of his/her mandate is reduced accordingly. While such rigidity undoubtedly enhances legal certainty, the system also affects the attractiveness of the positions. It may also render mandates meaningless, when they are too short.

74. Art. 179 .2 of the Constitution states that "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." From this wording it follows that the sequence refers to the order of allocation of positions and not to the order of actual decisions on appointment. Even if the Assembly were to elect its member before the appointment by the President of his member, the appointment by the President would still relate to "the first member to be replaced". The necessity of the sequence rule is not straightforward: while it may have been useful to apply it once, after the entry into force of the new model, in order to allocate the positions to the three appointing authorities, the same cannot be said once the three quotas of three judges were established: such quotas could have been maintained automatically, assigning the replacement of each expired or terminated mandate to the same

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authority which had appointed the outgoing judge.[8] The application of the sequence rule in case of early renewal of mandates (see para. 21 above) is unclear: Articles 7 § 2 and 7 dh of the law on the Constitutional Court must be taken to mean that the new judge is appointed by the same authority which had appointed the outgoing judge: otherwise, the quotas would not be respected anymore, and there could be compositions of the Constitutional Court where more than three judges have been appointed by the same appointing body, which would upset the balanced composition envisaged by the Constitution.

75. With this understanding, the normal appointing scheme established by the Constitution is as follows: every three years, three positions (a round) are allocated for appointment according to the sequence, that is: first to the President, second to the Assembly, third to the High Court. As the year in which the three mandates end has been fixed but not the date of appointment during that year, the chronology is determined by the day and month of the expiry of the mandate. Early replacements are allocated to the same authority having appointed the outgoing judge.

76. According to the law, it is the responsibility of the Chairman of the Constitutional Court, no later than 3 months before the end of the mandate of a constitutional justice as well as after any early termination of a mandate, to notify "the appointing body" regarding the vacancy. The Chairperson of the Constitutional Court has thus the duty to apply the sequence, in chronological order.

77. The law regulates in detail the three different procedures for the subsequent opening of the vacancy by the appointing body, for the selection and ranking of candidates by the JAC for each specific position and for the election/appointment. In principle, once the sequence has been applied by the Chairperson of the Constitutional Court at the beginning of the procedure, and the appointing authority has been identified, the procedure follows its course autonomously. As the procedures before the three appointing bodies are rather different, as is the nature of these three bodies, their duration may vary and it may well happen that the vacancies are filled in a different order from the one in which they were opened: but the sequence required by the Constitution is nonetheless respected. The appointing procedures may co-exist in parallel. As a consequence, the absence of the election of a member by the High Court, which comes last in each round, does not block the appointments for another round. Even though the High Court cannot elect its member, the President shall start afresh with the appointment of one member in another round, which is to be followed by the election of one member by the Assembly and the JAC should send the list(s) to the Assembly as soon as the President has proceeded with his/her appointment(s), or after 30 days if s/he fails to do so without justification. 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 partial replacements can take place and the sequence rule should be applied for all three upcoming vacancies in a given year.

78. This model, however, was heavily perturbed by two main factors: the vetting process and the procedure before the JAC.

C. The influence of the vetting process

79. Besides the positive aspects, the vetting process has had adverse effects on the composition of the Constitutional Court in several respects: a) it has provoked the need to proceed with the

[8] In Italy, for example, the Constitutional Court is also composed by three appointing bodies (the President, parliament and the judiciary), but there is no sequence: when a vacancy arises, the President of the Constitutional Court immediately informs the body which had elected the relevant judge (Article 8 of the General Rules of procedure of the Constitutional Court of Italy) and has to proceed to electing the successor.

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replacement of a substantive and unexpected number of constitutional justices, due to resignations and removals from office; b) it has made the High Court inoperative, which is the body responsible for the appointment of one third of the constitutional justices; c) it has perturbed the functioning of the JAC and d) it has discouraged people from applying for positions in the judiciary. The relevance of the vetting to the issue under examination is highlighted by the fact that both requests, from the Speaker of the Assembly and the President of Albania, referred to it.

80. At various stages, the Venice Commission was involved in the assessment of the vetting in Albania. In 2015, the Venice Commission gave two opinions on draft constitutional amendments, which *inter alia* established the vetting procedure.[9] In 2016, upon request of the then still functioning Constitutional Court, the Commission provided an *amicus curiae* brief.[10] In these opinions the Commission expressed the view 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, on the basis of the – widely shared – assumption that the level of corruption in the Albanian judiciary was extremely high and required urgent and radical measures.[11] It should be noted in this respect that, 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. However, the Commission insisted that the vetting could be only an extraordinary and strictly temporary measure and the Commission made a number of recommendations for safeguards in this process.

81. The overall duration of the vetting process could not be anticipated. The Venice Commission stated it was "not in a position to indicate exactly how much time will be necessary to vet all sitting judges and prosecutors. It is conceivable that in the most complex case vetting procedures may take more than three years or even longer."[12] The Commission however had stressed, looking at a nine-year mandate for the members of the Independent Qualification Commissions (IQC) and judges of the Specialised Qualification Chamber (SQC) [as they were called in the draft examined by the Commission], that such duration was excessive because the vetting process needed to be "strictly temporary", lest the vetting structures replaced ordinary constitutional bodies. This remark is a fortiori valid when the risk is that the vetting structures paralyse ordinary constitutional bodies such as the Constitutional Court, the High Court and the JAC, and makes them inoperative.

82. During the visit, the Commission's delegation learned that some individual vetting procedures have taken a long time. The EU Commission in this regard explained that the average size of the individual files is around 800/1000 pages. According to information provided by the ombudsperson and the JAC, some files have more than 10.000 pages, and may include lengthy

[9] 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.

[10] 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).

[11] 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).

[12] CDL-AD(2016)009, para. 55.

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judgments (for judges) and indictments (for prosecutors), as well as 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 close relatives.

83. Out of the over 200 persons that have been vetted so far (some 800 persons are to be vetted in total), according to the EU Commission a small number seem to have preferred to resign rather than to submit themselves to this procedure. In Tirana, the delegation learned that difficulties were sometimes incurred into, having to provide justification for long-past revenues of spouses. It was also alleged that there was an overly rigid application of very short (two weeks) procedural deadlines, although in some cases certified documents had to be obtained from abroad. According to the EU Commission, derogations were granted upon request "most of the time", although the Venice Commission does not know on which legal basis. Furthermore, it seemed to be unclear on the basis of which criteria some decisions of the Independent Qualification Commission were appealed to the Appeal Chamber by the Public Commissioner and others not.

84. 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, for the Commission it is obvious that the vetting process must be conducted as swiftly as possible, albeit providing a fair examination of each case. Appropriate modalities must be found, and changed if necessary, for this process not to prevent the functioning of the judicial institutions of Albania. The Commission cannot but recommend speeding up and rationalising the vetting process, it being understood that the vetting on the level of the Independent Qualification Commission as well as the Special Appeal College will have to continue to be applied in a coherent manner. Coherence needs also to be ensured with the vetting procedure of candidates from outside the judiciary, performed by the JAC. The process must not result in the continued paralysis of the judicial institutions.

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

86. The unforeseen difficulties and delays in the vetting of the judges sitting on the High Court specifically resulted in its paralysis for over two years. The Commission's delegation 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.

87. The High Court has thus been unable to elect its quota of three constitutional justices. The vacancy of the only member who remains from the 'old' 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 hearing of the Constitutional Court is six members and five votes are required to make a decision.[13]

88. The Commission wishes to stress in addition that 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.

[13] See Articles 32 and 72§2 of the Law on the Constitutional Court.

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D. The influence of the Judicial Appointments Council (JAC)

89. Due to the massive resignation or removal from office of the sitting members of the Constitutional Court in 2017 and 2018 (see paras. 29 and 30 above), the need to proceed with their replacement under the new system materialised earlier and in more complex terms than envisaged in 2016. The role of the Justice Appointment Council (JAC) became crucial.

90. However, the JAC was a dysfunctional institution since the very beginning, for two main reasons: on the one hand, the vetting removed some of its members, depriving the JAC of its quorum, so that it did not function for two years, in 2017 and in 2018; on the other hand, the lack of vetting of its other members deprived the JAC of its credibility, so that its suitability to rank candidates was called into question. It seems crucial to the Venice Commission that the current and future members of the JAC should be submitted to a swift vetting procedure (if they have not yet been vetted).

91. In addition, the JAC did not work in a transparent manner. Transparency is crucial to create public trust in the appointment procedure, hence in the Constitutional Court. Yet, the JAC disregarded the constitutionally mandatory presence of the People's Advocate as an observer in the selection by lot, as well as in the meetings and operations of the JAC (Articles 149/d (3) and 179 (11) of the Constitution). Instead, pursuant to Rule 41 of JAC Decision no. 4 of 11.03.2019 on the Procedure for the Verification of Candidates for the Vacant Positions in the Constitutional Court and for High Justice Inspector, *"[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."*[14] Rule 39 of the same JC decision 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; the People's Advocate could instead make public comments on the functioning of the JAC 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, the related legal provisions and the aim of ensuring public trust in the procedure conducted by the JAC. The Venice Commission recommends that the JAC changes this Rule for the upcoming candidates' verification and selection procedures.

92. In addition, 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 summaries of the minutes of the meetings of the Council are kept and published on the website of the High Court. However, it seems that the summaries of the meetings were not published in time. 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 in 2020 be published in due time.

93. The most relevant issue caused by the decisions of the JAC in 2019 in relation to the appointments to the Constitutional Court concerns the timing of the transmission of the lists of ranked candidates to the President and to the Assembly. The JAC formed four lists of candidates (two for the President and two for the Assembly) on 29.09.2019; it subsequently sent two lists to the President on 08.10.2019 and two lists to the Assembly on 14.10.2019.This caused a major

[14] https://euralius.eu/index.php/en/library/albanian-legislation/send/121-justice-appointments-council/375-jac-decision-no-4-on-the-verification-of-candidates-2019-08-06-en

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procedural incident. 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. This modus operandi was not discussed in JAC. The Venice Commission is not in a position to examine whether the explanation given is plausible. In any case, it should have been 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. Normally, according to Arts. 7/a to 7/c of the Law on the Constitutional Court, the JAC has to respect strict deadlines in the appointment process. However, since the JAC did not function in 2018, the initial deadlines had been missed.

E. The procedural incident

94. A clear divergence of interpretation of the appointment procedure exists between the two active appointing authorities, the President of the Republic and the Assembly.

95. According to the first, the sequence imposed an order in the choice of candidates. As there were four positions to be filled, two by the President and two by the Assembly, the President deemed that after choosing his first candidate, he needed to wait for the Assembly to choose its first candidate; after that, the President would choose his second candidate, and the Assembly could proceed to choosing its own second candidate. In this way, the sequence would be respected. The Assembly, on the other hand, considered that the appointments were autonomous from each other, as for each there existed one list (and one specific procedure) per vacancy.

96. The Venice Commission is now called to give its own interpretation of this procedural incident, which resulted in two judges being arguably appointed – one by the President, the other by default on the President's quota – to the same vacancy. The Commission will thus provide its interpretation of the relevant constitutional provisions in force so that the current situation of deadlock may be overcome, but it will also formulate some recommendations on how to avoid similar incidents in the long term. In the Commission's view, as already explained before, in theory the model of appointment of Constitutional Court judges set up by the Constitution and the Law on the Constitutional Court entails the application of the sequence only at the moment of the allocation of the vacancies, upon the opening of each round of appointments. In a given 'round' it depends which vacancy happens to come up first when deciding whether it should be allocated to the President, the Assembly or the High Court. The Chairman of the Constitutional Court allocates the vacancies in the chronological order and in the order of the sequence. Once the vacancies have been allocated, the sequence does not require activation until the next round, that is until the year of expiry of the next three mandates. The ensuing appointing procedures may be carried out autonomously by each appointing authority. There should be three procedures every three years, one per appointing authority. There is no clear regulation on the application of the sequencing rule in case there were, on account of early termination of mandates, more than three procedures and two rounds of appointments would overlap. But if there is no interconnection among these procedures, in principle the JAC could send as many lists as there exist to each appointing authority, on different dates, and both the President and the Assembly (and the High Court, for that matter) could proceed to as many appointments as necessary.

97. However, the above model is based on the assumption that each procedure is autonomous: each appointing authority opens the vacancy and receives its own candidatures, which the JAC subsequently selects and ranks; as a result, each vacancy list should be autonomous from the others, and count at least three candidates (different from the three candidates of the lists of the other appointing authority). In the case in point, instead, as a result of a shortage of candidates (for all the reasons identified above), the lists for the President's appointments and those for the Assembly's appointments were made up largely of the same candidates. This amounted de facto

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to a pool of 6 candidates for four positions. In these conditions, as well as in view of the fact that overlapping procedures have not been explicitly regulated, it does not seem unreasonable for the President to deem to have to respect the order of the sequence also for the actual choice of the candidate: if the sequence exists, it must have a bearing on the order of appointment from a single list. Furthermore, in such a situation the appointment by one authority has a direct bearing on the appointments of the other authority as it changes the composition of the list of candidates at the disposal of the respective appointing body. Furthermore, had the President chosen two candidates, the Assembly would have disposed of a list of less than the minimum three candidates required by the Constitution. Reservations on account of this perspective do not seem unjustified. The President's conduct in this respect does not therefore appear to justify his impeachment.

98. At any rate, it is only logical to assume and expect that the authorities responsible for making appointments under the same procedure should understand and interpret such procedure in the same manner. All stakeholders must follow the same rules, so they all need to share their knowledge and understanding of such rules. In the present case, the President declared and made his interpretation of the order of the acts of appointment known to the Assembly. The Assembly proceeded on the basis of its own interpretation, which was clearly diverging from that of the President. It even drew the conclusion that the President had waived his right to appoint his second judge. Now, irrespective of which interpretation was the correct one, the two appointing bodies should have come together and reached a common position before continuing the procedure.

99. The President, by his Act of 5 November 2019, had suspended the appointment procedure before the expiry of the 30 days limit fixed by the law. While such suspension is not envisaged by the Law, it was a reaction to a situation of legal uncertainty, which could not be resolved in the absence of the Constitutional Court. The suspension showed that the President did still wish to exercise the appointment power he enjoys under the Constitution and this was confirmed by his appointment of a candidate shortly after the election of the Assembly's candidate. Under these circumstances, the *ratio legis* of the default clause did not apply and it seems justified to accept the belated appointment of a second candidate by the President. It therefore seems justified that the President refused to take the oath of the judge allegedly appointed by default.

100. In this respect, the Venice Commission notes that Article 129 of the Constitution provides that a judge of the Constitutional Court begins his/her duty after taking the oath *before* the President of the Republic (emphasis added). 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. […]".* While 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, it is clear that taking the oath before the President is a precondition for taking up office.[15]

[15] 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

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101. Referring to a previous Venice Commission recommendation in respect of Ukraine,[16] on 12 February 2020 the Albanian Assembly adopted an amendment to the Law on the Constitutional Court that allows to send 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". In the Commission's view, 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. If deemed necessary for avoiding a stalemate in clear cases of abuse, a more clearly formulated provision could be adopted at the constitutional level.

IV. Conclusion

102. 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 are required and are essential.

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

- the necessary vetting procedure had more pervasive effects than originally foreseen;
- as a consequence, amongst others, of the comprehensive vetting procedure, the High Court and the Constitutional Court have been rendered dysfunctional;

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

[16] In Ukraine, 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. 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: 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. 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." (CDL-AD(2006)016, para. 18-19 and 21). In Ukraine, unlike in Albania, the oath-taking procedure was regulated on the level of ordinary law only.

- there is fundamental obstruction between the 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 vetting and to the inactivity of the JAC in 2017 and 2018, there are many vacancies to be filled at the same time. With very few suitable candidates there is little choice for those appointing/electing the Constitutional Court members;
- 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 Assembly and the President.

104. In order to overcome the stalled situation, the Venice Commission makes the following recommendations:

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 are adequate and allow for a swift termination of the vetting process, especially in case the vetting of the judges leads to dysfunctional courts, notably apex ones.

105. As concerns the procedure for appointment of members of the Constitutional Court, the Venice Commission arrives at the following conclusions and makes the following recommendations:

- In principle, the sequence rule applies only at the moment of the allocation by the Chairman of the Constitutional Court of the vacancies, upon the opening of each round of appointments. Once the vacancies have been allocated to the respective appointing bodies, the sequence does not require activation until the next round, that is until the year of expiry of the next three mandates.
- However, as long as the shortage of candidates persists and the lists are made up of largely the same few candidates, in a situation where there are appointments to be made in the same period for more than one round, the President and the Assembly (and the High Court, if it starts functioning soon) have to agree on the procedure to be followed, and the JAC should conform to this agreement. Otherwise one or more of the appointing organs would risk not being able to make a choice from among 3 candidates as required by the Constitution. As soon as the Constitutional Court is set up, it should be seized of this matter. In this situation, until an agreement is reached or the Constitutional Court has pronounced itself, the JAC should send the list(s) to the Assembly as soon as the President has proceeded with his/her appointment(s), or after 30 days if he/she fails to do so without justification.
- An early vacancy should be filled by the authority which appointed the outgoing judge.
- The default mechanism for appointments by the President (Article 7/b (4) of the Law on the Constitutional Court), if deemed necessary, should be raised to the constitutional level, as is the case for the Assembly.
- The High Court should make its outstanding appointments as soon as it is functional again.

106. As concerns the procedure of the JAC:

- The JAC should change Rule 41 of JAC Decision no. 4 for the upcoming candidates' verification and selection procedures so that the People's Advocate may exercise its constitutional right to participate as an observer for the sake of transparency and public trust in the procedure.
- The summaries of minutes of all meetings of the JAC should be published in due time.
- 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.

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- The JAC should not propose candidates who have not yet passed the vetting.

107. As concerns the oath taking procedure:

- If deemed necessary for avoiding a stalemate in clear cases of abuse, the recently adopted but not yet enacted provisions on a default mechanism for taking the oath should be replaced by a more clearly formulated provision to be adopted at the constitutional level.

108. The Venice Commission is of the opinion that the constitutional model adopted in 2016 is too complex, and in the long term it would recommend simplifying it, in the first place by removing the sequence rule. The quotas of the three appointing bodies may be maintained by allocating automatically the renewal of a mandate to the same authority which had appointed the outgoing judge. Secondly, the fixed years of beginning and end of the nine-year mandates should be removed. Constitutional justices should always enjoy a full nine-year mandate, even if they have been elected with some delay or if take up a mandate which was terminated early; this amendment should not create problems once the sequence is abolished. This change would make the position of constitutional judge more attractive to qualified candidates, and also more meaningful.

109. Finally, the Venice Commission reiterates the absolute need for dialogue and loyal cooperation among state institutions. The mandate and powers of State institutions must be respected in order for them to fulfil their legitimate institutional objectives, always seeking the best benefit for the citizens of Albania. 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."[17]

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

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