



**REPUBLIC OF ALBANIA  
THE PRESIDENT**

**D E C R E E**

**“ON THE APPOINTMENT OF THE CONSTITUTIONAL COURT JUDGE”**

Pursuant to Articles 93, 125 paragraphs 1 and 3, 129, 149/d paragraph 1, 179 paragraphs 2 and 12 of the Constitution of the Republic of Albania, Articles 7, 7/a paragraph 4, 7/b, 8 and 86 paragraph 4, letter “c” of Law No 8577, dated 10.02.2000 “On the Organization and Functioning of the Constitutional Court of the Republic of Albania”, as amended, after administering the “Final List of Ranking of the Candidates Allowed for Candidacy and their Justification Ranking Report for completion of the vacancy in the Constitutional Court (full vacancy) announced by the President of the Republic by Decree No 11133, dated 04.03.2019”, acts approved by the Justice Appointments Council with Decisions No132, dated 21.09.2019 and 133, dated 21.09.2019; after getting acquainted with all the documentary practice of the decision-making and the evaluation of the Justice Appointments Council for the remaining candidates to complete this vacancy, initially forwarded by the Justice Appointments Council by letter No 553 Prot., dated 08.10.2019 and finally completed by the letter of this body with No 714 Prot., dated 07.11.2019; and after evaluating the candidates remaining in the race for this vacancy, after the election by the Assembly on 11.11.2019 of two members of the Constitutional Court, I finally decided to,

***D E C R E E;***

**Article 1**

Ms **Marsida Xhaferllari** is appointed as Judge of the Constitutional Court.

**Article 2**

This decree comes into force immediately.

**No of Decree 11350**

**Tirana, on 13.11.2019**

**PRESIDENT OF REPUBLIC  
ILIR META**

## REASONS

### **“ON THE SELECTION OF THE CANDIDATE, Ms MARSIDA XHA FERLLARI, TO BE APPOINTED AS JUDGE OF THE CONSTITUTIONAL COURT AND THE FOLLOWED PROCEDURE FOR COMPLETION OF THIS VACANCY”**

#### **I. Announcement of the vacancy and the submission of lists to be reviewed by the Justice Appointments Council**

The President of the Republic, after administering the notification No 620 Prot., dated 25.02.2019 of the Constitutional Court; by Decree No 11133, dated 04.03.2019, has decided “The announcement of the vacancy, as Judge in the Constitutional Court of the Republic of Albania”, a vacancy that was created because of the termination of the regular mandate of Mrs. Altina Xhoxhaj on 25.05.2019.

This vacancy was published according to the requirements of the Law since 04.03.2019 on the official website of the Institution of the President of the Republic, as well as in the Official Journal. Also, the vacancy was published in the printed media from the 7<sup>th</sup> to the 11<sup>th</sup> of March 2019 in “Panorama”, “Gazeta Shqiptare” and “Koha Jonë” newspapers.

At the end of the legal deadline for the vacancy and the administration of the applications (25<sup>th</sup> of March 2019), a total of 13 candidates applied where, for each of them, all the documentation of the application files, submitted to the Institution of the President of the Republic, were recorded.

Immediately after the deadline for application, in accordance with the provisions of Article 234 paragraph 1 of Law No 115/2016 “On the governance institutions of the justice system”, a list of 13 applicants was published on the official website of the Institution of the President of the Republic, who had expressed their interest on this vacancy. On 27.03.2019, immediately after the publication of the list of applicants, the latter accompanied by the respective submitted documentation, was forwarded to the Justice Appointments Council for verification and evaluation pursuant to the Constitution and the Law.

The Justice Appointments Council has carried out the verification, evaluation and ranking of the candidates for this vacancy with the Constitutional Court and, at the end of this process, it resulted that only **4 (four) out of 13 candidates** who expressed their interest, were allowed to run and remained in the competition.

The Justice Appointments Council, by Official Letter **No 553 Prot., dated 08.10.2019**, administered by **No 3535 Prot., dated 08.10.2019**, has forwarded to the Institution of the President of the Republic the "Final List of the Ranking of the Candidates Allowed to Run" and the "Justification Report of their Ranking for the Vacancy with the Constitutional Court, full vacancy, announced by the President of the Republic by Decree No 11133, dated 04.03.2019”.

From the preliminary examination of the file, it resulted as follows:

1. The Justice Appointments Council by Decision No 132, dated 21.09.2019, has approved the "Final List of the Ranking of the Candidates for Judge in the Constitutional Court", in vacancy, full vacancy, announced by the President of the Republic on 04.03.2019.
2. The Justice Appointments Council by Decision No 133, dated 21.09.2019, has approved the "Report on the Ranking of the Candidates allowed for the vacancy created in the Constitutional Court, full vacancy, announced by the President of the Republic on 04.03.2019".

Attached to the submitted file, JAC has forwarded the decisions made by this body for allowing the candidacy, evaluation and scoring of the four remaining candidates in the race. In the meantime, the Justice Appointments Council has also forwarded its decisions on the prohibition of **5 (five) applicants** from the competition, as well as the decisions for the termination of the verification procedure, due to the resignation of **4 (four) candidates**.

According to the Decision No 132, dated 21.09.2019, the Council has approved the "Final List of the Candidates for Judge in the Constitutional Court, in vacancy, full vacancy, announced by the President of the Republic on 04.03.2019", through this ranking:

- |                        |               |
|------------------------|---------------|
| 1. Arta Vorpsi         | 89.642 points |
| 2. Fiona Papajorgji    | 88.785 points |
| 3. Elsa Toska          | 85.428 points |
| 4. Marsida Xhaferllari | 82.000 points |

The President of the Republic, based on the preliminary examination of this practice and the documentation forwarded by the Justice Appointments Council concluded that:

- The Head of the Justice Appointments Council, Mr. Ardian Dvorani, on the same day (dated 08.10.2019) **with Official Letter No 552 Prot., dated 08.10.2019**, has forwarded to the Institution of the President of the Republic the "Final List of the Ranking of the Candidates Allowed to Run" and the "Justification Report of their Ranking for the vacancy in the Constitutional Court, (**first vacancy**), announced for application by the President of the Republic by **Decree No 10722, dated 07.02.2018**". This practice refers to completion of the vacancy created due to the end of the mandate of the former Judge, Sokol Berberi.

**In this way, it resulted that the Head of JAC, on the same date on 08.10.2019, has performed the administrative process of submitting the lists to the President of the Republic for completion of 2 (two) vacancies simultaneously, which contradicts the order indicated by the Constitution and Law No 8577/2000.**

**It resulted that JAC has not made any collegial decision on the manner and timing of submission of the lists to the appointing bodies, but this administrative action was carried out by the Head of the Justice Appointments Council, which pursuant to Article 226 paragraph 2/e, of Law No 115/2016, has the only function to sign the verification, evaluation and ranking acts and forward them to the appointing body.**

Being in front of this situation of administering simultaneously two lists, corresponding to the completion (appointment) of 2 (two) vacancies announced by the President of the Republic, by the **Official Letter No 3571 Prot., dated 10.10.2019**, the Institution of the President of the Republic requested information from the Judicial Appointments Council on whether or not this body (JAC) had forwarded to the Assembly of Albania, the final lists of the ranking of the candidates for Judge in the Constitutional Court, regarding the two vacancies announced by the Assembly on 12.02.2018 and 04.03.2019.

In this letter, the Institution of the President of the Republic, beside requiring information from the Head of JAC, informed him that the constitutional and legal provisions indicate the application of the order related to the appointment/selection of the members of the Constitutional Court, rules which are essential to be respected not only by the President and the Assembly, but also by the Justice Appointments Council (JAC) itself, as an obligation of the final administrative actions of the Head of JAC, in order to be carried out by this body.

The President of the Republic considered that this administrative verification and this preliminary information were necessary in order to:

**First**, to initiate as soon as possible the process of completion of the vacancies in the Constitutional Court;

**Secondly**, the renewal of the Constitutional Court with the new Judges should follow the chronological order indicated by the Constitution and Law where the President of the Republic shall appoint the first Constitutional Judge, only after the Assembly had administered the final list from JAC of the required number of the candidacies (not less than three);

**Third**, because respecting this chronological order of completion, apart from being a constitutional obligation, shall also serve as a basic rule for its future renewal.

**Fourthly**, in order to preserve intact the constitutionality and the progress of this entire process, because in all the current vacancies for which JAC has conducted the verification, evaluation and ranking procedure, there were applicants who were in the capacity of the candidate in both the vacancies to be completed by the President and the Assembly.

The eventual appointment of one of the applicants in the President's list necessarily affects the number of applicants on the list(s) of the Assembly.

As the Constitution provides that the Assembly must elect or administer 3 (three) candidacies, the President should have been in the position that his appointments shall not infringe the assessment area of the Assembly.

The fact that the same limited number of applicants is on the Assembly list, apart from not providing a real opportunity of selection for the appointing bodies (President-Assembly), it also complicates the exercise of the constitutional power of electing members of the Constitutional Court.

**Thus, a possible and immediate election of the President to complete both vacancies, simultaneously, at the moment when he had just administered the lists of applicants, would have been resulted to set in practice the position of JAC under the conditions of factual inability to submit to the Assembly the lists with at least three candidates for each vacancy, thereby**

**generating anomalies in the process of filling in the two vacancies to be completed by the Assembly of Albania.**

Likewise, a selection and appointment by the President without preserving the chronological order set by the Constitution and the Law would theoretically lead to the inability of the Assembly to have the necessary number of candidates in order to elect the respective members.

**The President, based on this risk assessment established by this case, requested information from the Justice Appointments Council to ensure that the Assembly administered the lists from JAC.**

**The President maintained this position based on the constitutional principle of loyalty (co-operation) between state bodies and on finding the opportunities for the Constitutional Court to be completed as soon as possible.**

In response to the request of the President of the Republic for Information, the Head of the Justice Appointments Council by Official Letter **No 655 Prot., dated 14.10.2019**, informed the President about the following content: "... Today, by Official Letter No 653 Prot., dated 14.10.2019 and by Official Letter No 654 Prot., dated 14.10.2019, JAC has forwarded and submitted to the Assembly of the Republic of Albania:

1. The Final List of the Ranking of the Candidates allowed for Candidacy and the Justification Report of their Ranking, for the vacancy with the Constitutional Court, full vacancy, announced by the Assembly of the Republic of Albania, on **12.02.2018**;
2. The Final List of the Ranking of the Candidates allowed for Candidacy and the Justification Report of their Ranking, for the vacancy with the Constitutional Court, full vacancy, announced by the Assembly of the Republic of Albania, on **04.03.2019**.

Therefore, from the forwarded information, it resulted that: JAC on **14.10.2019** (*thus after 6 days from sending two lists simultaneously to the Institution of President*) has carried out the administrative process of submitting the lists to the Assembly for the completion of the two vacancies simultaneously, which belongs to the Assembly for election.

From all the administered information, it resulted that JAC has carried out simultaneously the ranking of the candidates and the formation of 4 lists, for both institutions – the President of the Republic and the Assembly - within the same date, on 21.09.2019; where even, the enumeration of the decisions of JAC on the adoption of the lists and final evaluation reports is alternated according to the order of announcement and the filling of vacancies with the President and the Assembly.

**Meanwhile, in the acts sent to the Institution of the President of the Republic, there is no information to explain the reasons why these two lists are sent at the same time to the President, or the reasons for delaying and sending two lists simultaneously, with one-week difference to the Assembly.**

**Such administrative action of the Head of JAC does not respect neither the time of drafting the lists (*the lists were approved within the same day*), nor the order of their approval (the first list being approved is of the President, the second list is of the Assembly, the third list is of the**

President, and the fourth list is of the Assembly) and neither the mandatory chronological order set by the Constitution and Law on the vacancies.

## II. The constitutional and legal provisions for handling of the order to send and completing the vacancies in the Constitutional Court.

The Constitutional amendments which took place in the context of the Reform on the Justice System, in 21<sup>st</sup> - 22<sup>nd</sup> of July 2016, paid a great attention to the way how will be elected the members of the Constitutional Court, as well as the way in which the composition of this Court shall be renewed.

The Constitution of the Republic, in Article 125, paragraphs 1 and 2, 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.”.*

Meanwhile, the order is set out in Article 179, paragraph 2 of the Constitution, as follows:

*“**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.**”*

This amendment has been so important to the constitution-maker that, in the same provision of Article 179, in paragraph 12, the last paragraph, he has repeated this rule, specifying that:

*“12. The President of the Republic shall remain as Chairperson of the High Council of Justice until the High Judicial Council is established within 8 months from the entry into force of this law. Upon the establishment of the High Judicial Council, the President shall appoint the judges of the High Court in accordance with Article 136 of the Constitution. **The President of the Republic shall fill in the first vacancy in the Constitutional Court under paragraph 2 of this Article and Article 125 of the Constitution**”.*

According to these Constitutional provisions, the President of the Republic cannot appoint two judges simultaneously, or two judges one after the other, but only the first member, while the second member of the Constitutional Court shall be appointed by the Assembly, while the third member shall be nominated by the High Court, if the situation of filling in the vacancy would also enable this appointing body, currently under evaluation by JAC.

Meanwhile, in the actual conditions of filling in the vacancies referred to in the Constitutional provisions, the President of the Republic, after the appointment of the first Judge, could not appoint the other Judge of the Constitutional Court, in completion to the other vacancy

**belonging to the appointing body, at least without first expressing its opinion the Albanian Assembly on the election of its second judge.**

These constitutional amendments regarding the order of appointment/election have been mentioned in Law No 8577, dated 10.02.2000 “On the Organization and Functioning of the Constitutional Court of the Republic of Albania”, as amended, where it is reflected in details how these obligations shall be fulfilled.

**In Article 86, paragraph 4 of Law No 8577, dated 10.02.2000, it is stated:**

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

*a) The judges who will 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 judge who will replace the judge whose mandate expires in 2017 shall be appointed by the High Court and shall stay in office until 2025.*

*c) The judges who will 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 judge who will replace the judge whose mandate expires in 2020, shall be appointed by the High Court and shall stay in office until 2028.*

*d) The judges who will 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.**’*

In order to protect the entire process of appointing/electing new members of the Constitutional Court and respecting the order of their appointment, the Judicial Appointments Council, necessarily, in the final stage of approving and submitting the final lists, **must consider and respect the above mentioned requirements of the Constitution and the Law.**

Each of the appointing bodies, President-Assembly, has 30 days to examine and comment on the appointment/election of members of the Constitutional Court. According to the moment of submitting the lists, this deadline for the President has started since on 09.10.2019 and for the Assembly on 15.10.2019.

**Is it necessary to identify where the deadlines are set for each of the appointing bodies? For the Albanian Assembly, the 30-day deadline and the unlocking mechanism in the case that the Assembly fails to elect the Judge is provided in the Constitution, while such a deadline does not exist in the Constitution for the President of the Republic.**

The generated situation dictated by the submission of the lists by the Head of the JAC would coincide with the fact that the President would have to express himself within the date of 07.11.2019 to appoint two Judges for the Constitutional Court at the same time, **which constitutes a direct prohibition by Article 179, paragraphs 2, 12 of the Constitution and Articles 7, 7/b and 86, paragraphs 4/a /c of Law No 8577/2000.**

This unconstitutional situation was created because the Assembly may choose (*as it happened in reality*) to exercise its right to vote for the second member of the Constitutional Court, after November 7<sup>th</sup>, a moment that coincided with the end of the deadline, according to the Law on the President of the Republic.

In this way, the Head of JAC, by simultaneously forwarding the candidate lists for the two vacancies belonging to the President of the Republic, **placed the Institution of the President of the Republic in difficulty, trying to establish a state of fact**, where the President shall have to express himself within the 30-day legal deadline (*Article 7/b, item 4 of Law No 8577/2000*), even for the appointment of another Judge eventually before the Assembly to express itself on the appointment of **the second Constitutional Judge**.

**If the President of the Republic should follow the logic dictated by the administrative procedure established by the Head of JAC, then this constitutes a direct violation of the provisions of the Constitution and Law No 8577/2000, as regards the respect of the order of appointment of the Constitutional Judges.**

To make it simple, only by an administrative letter, the Head of the Justice Appointments Council, by forwarding two lists of candidates for two vacancies simultaneously, was provoking the President of the Republic to impose "a new rule", thus openly violating the Constitution and the order of appointment of new members for the Constitutional Court.

**This maneuver was unacceptable to the President of the Republic.**

Respecting the order of election, as described above, is imposed and related to another very important procedural moment.

**The Appointing Bodies (President and Assembly) have put in motion the Justice Appointments Council for the vacancies which are their competencies as Appointing Bodies, at different moments, according to a chronological order which should be respected necessarily by JAC.**

This chronological order is the same as the chronological order required by the Law. Concretely:

1. The vacancy opened because of termination of the mandate of the former Judge **Sokol Berberi (2016)**, has been announced by the President of the Republic by Decree, dated **07.02.2018** and the candidate lists have been sent to JAC by Official Letter **No 2668/2 Prot, dated 28.02.2018**.
2. The vacancy opened because of termination of the mandate of the former Judge **Vladimir Kristo (2016)**, has been announced by the Albanian Assembly on **12.02.2018** and the candidate lists have been sent to JAC by Official Letter **No 1031/2 Prot, dated 25.04.2018**.
3. The vacancy opened because of termination of the mandate of the former Judge **Altina Xhoxhaj (2019)**, has been announced by the President of the Republic by Decree dated **04.03.2019** and the lists of candidates have been sent to JAC by Official Letter **No 930 Prot., dated 27.03.2019**.
4. The vacancy opened because of termination of the mandate of the former Judge **Bashkim Dedja (2019)**, has been announced by the Albanian Assembly on **04.03.2019** and the candidate lists have been sent to JAC by Official Letter **No 1446 Prot., dated 04.04.2019**.



### **III. Appointment of the First Judge of the Constitutional Court**

Following the examination of the administered practice, referring to the constitutional provisions and the above mentioned provisions of Law No 8577/2000, the President of the Republic examined the practice and documentation forwarded on 08.10.2019 by JAC, regarding the appointment of the First Constitutional Judge and, finally by **Decree No 11313, dated 15.10.2019**, he appointed **Mr. Besnik Muçi**, as Judge in the Constitutional Court. This appointment was formally announced to the Assembly, Constitutional Court, Ombudsman, High Judicial Council, High Prosecutorial Council, Justice Appointments Council, General Prosecutor Office and Prosecution Office at the First Instance Court for Serious Crimes.

At the Institution of the President of the Republic, on 18.10.2019, 18:00, in the presence of the representatives of independent and constitutional institutions, Ambassadors, as well as the representatives of the European Union and the United States of America, it was held the oath-taking ceremony before the President of the Republic, H.E. Mr. Ilir Meta, of the First Member of the Constitutional Court, the Judge Besnik Muçi.

Mr. Besnik Muçi, after the oath ceremony before the President of the Republic, on 18.10.2019, started to exercise his duty and his mandate as a Judge of the Constitutional Court of the Republic of Albania, pursuant to Article 129 of the Constitution, which states that the Judge of the Constitutional Court starts his duty after he takes an oath in front of the President of the Republic, as well as Article 8, paragraph 3 of Law No 8577/2000 “On the Organization and Functioning of the Constitutional Court”, as amended, which states that: the mandate of a judge of the Constitutional Court begins from the date of the oath and ends on the same date of that month of the ninth year, except for the cases where the Constitution provides otherwise.

In this way, the President of the Republic met without delay the constitutional and legal obligation for the restitution of the Constitutional Court and the appointment of the **first member** of this Court, who has currently started to exercise his duty as a Judge of the Constitutional Court of the Republic of Albania.

### **IV. Suspension of the administrative process of examining the lists and documentary practice for the vacancy in the Constitutional Court, full vacancy, announced by the President of the Republic by Decree No 11133, dated 04.03.2019**

The President of the Republic, following the appointment of the **first Judge** of the Constitutional Court on 15.10.2019 and his oath ceremony on 18.10.2019, in accordance with the provisions of the Constitution and the state of the vacancies, has directly followed the developments on this matter and he has been waiting for the Assembly of Albania to demonstrate loyalty and elect **the second member of the Constitutional Court**, before the **7<sup>th</sup> of November 2019**, so that, after the Decision of the Assembly, the President would immediately express himself by Decree, by appointing the other member, as an appointing body.

Contrary to this expectation of the President, it resulted that the Committee on Legal Affairs, Public Administration and Human Rights, in the capacity of the Committee responsible for examining the case, only on **05.11.2019**, has adopted two reports on the evaluation of the candidacies for Constitutional Judge, for the two vacancies in the Assembly and, together with the documentation, it had decided to forward them to the plenary session for voting.

At this moment, according to the parliamentary practice, it was clearly identified that the Assembly of Albania had foreseen that it will express itself for the election of the member(s) of the Constitutional Court, by using in maximum the 30-day deadline, which expired on November 13<sup>th</sup> of 2019. This moment exceeded the date of November 7<sup>th</sup> of 2019, the deadline that the President should have expressed himself according to this legal deadline, which had begun to be consumed by the incorrect submission of the lists by the Head of JAC on 08.10.2019.

**Thus, it results, the Head of the Justice Appointments Council by submitting the lists for the two vacancies at the same time, on 08.10.2019, in open conflict to the requirements of the Constitution, has intended to clearly violate the constitutional competence of the President of the Republic.**

The Head of the Justice Appointments Council, through his administrative act, Official Letter No **553 Prot., dated 08.10.2019**, attempted to place the President of the Republic in front of a factual situation that the President shall express himself with a Decree at that moment (within the 7<sup>th</sup> of November) which would constitute a direct violation of two constitutional provisions simultaneously, Article 179, paragraphs 2 and 12 and some provisions of Law No 8577/2000.

**In this way, only one Official Letter from the Head of the Justice Appointments Council, No 553 Prot., dated 08.10.2019, jeopardized overturning the entire constitutional order and the President was unable to exercise his power to appoint the next Constitutional Judge, according to the order specified by the Constitution and the Law.**

**To be clear: through the administrative actions of the Head of JAC, the provisions of the Constitution of the Republic of Albania adopted by 140 votes of the Members of the Assembly on 21-22 July 2016 and the provisions of Law No 8577/2000 “On the Organization and Functioning of the Constitutional Court”, as amended, voted with 86 votes of the Members of the Assembly of Albania, those were violated and overturned by a simple administrative and personal letter of the Head of the Justice Appointments Council.**

**This situation was considered by the President of the Republic as a very serious violation.**

In such a situation where the expiry of the 30-day deadline of the President of the Republic is specified **only in Article 7/b, paragraph 4 of Law No 8577/2000** and not in the Constitution, as defined for the Assembly, **it is important to respect the constitutional provisions on the chronological order of appointment that the Constitution has determined (Article 179, paragraphs 2 and 12), but which is also exhaustively clarified by the Law No 8577/2000.**

**This constitutional and legal obligation must be applied not only by the Appointing Bodies, but must be necessarily followed in the final administrative actions of JAC.**

Referring to the Constitution where the order of completion of the vacancies of the Constitutional Court is defined, and in the Law No 8577/2000, the right of each institution to appoint/elect a constitutional judge within a **30-day** period shall take effect **only after the procedure for filling in the previous vacancy has been completed or at least started earlier in time.**

As above mentioned, aiming the regularly restitution and according to the constitutional provisions of the composition of the Constitutional Court, starting from the fact that each appointing body in this case (President, Assembly) has 30 days to express themselves for the appointment/election of a member of the Constitutional Court, the President of the Republic, as it will be clarified below in details, **has analyzed the Official Letter No 553 Prot., dated 08.10.2019, sent by the Head of JAC, in the light of the amendments of the Code of the Administrative Procedures (CAP).**

Indeed, the two bodies, President-Assembly, have the same 30-day timeline for expressing themselves respectively on appointment/election, **but each of these bodies has such a deadline determined in different legal acts.**

**The 30-day deadline for the Assembly is defined directly in the Constitution.**

**Meanwhile, the Constitution does not define a 30-day deadline for the President of the Republic or the High Court.** Regarding the President, this deadline is set out only in the Law. **No constitutional provision defines any deadline and no unlocking mechanism for the President of the Republic in the process of appointing constitutional judges.**

Specifically: The Constitution in Article 125, paragraph 2 provides:

*“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”.***

So, for the Albanian Assembly, the constitution-maker has estimated that the 30-day deadline to express itself and in case that the unlocking mechanism of the Assembly fails to elect the Constitutional Judge **is directly provided for in the Constitution, while for the President such a deadline is not provided for in the Constitution.**

While the same unblocking mechanism and the same 30-day deadline exist for the President as well, but it is set out in an act of a lower level than the Constitution, specifically in Law No 8577/2000, Article 7/b, paragraph 4, which states:

*“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 list being submitted by the Justice Appointments Council, the candidate ranked first shall be considered as appointed”.***

**Starting from the fact that the 30-day deadline for the President of the Republic is only defined in the Law, it is naturally perceived that within this deadline the President of the Republic, as a**

**public body, also performs actions and decision-making activities of an administrative character, which precede the final decision-making, which is his expression by a Decree on the Appointment of a Constitutional Judge.**

This means that within this process of examination of both, the lists and the documentation, the President, like any other public body, must or may carry out certain verifications and assessments that fall within the scope of the administrative activity which verifies the fact if, whether exist or not, any obstacle to his decision, and if so, **he must take all the precautionary measures or preliminary decisions which avoid any possibility that the final action and the decision-making of the President is not in prejudice with other legal acts or the Constitution.**

**The preliminary administrative activity of the President is closely related to the own activity of the Justice Appointments Council, which is not a judicial body, but a body that exercises its activity within the proper activity of a collegial administrative body, which is obliged to have all his actions in the function of and to provide to the appointing bodies (the *President, Assembly, Supreme Court*) the opportunity to elect the members of the Constitutional Court, only in respect to the Constitution and the Law on the Constitutional Court.**

In this administrative activity of JAC are included the final actions of the Head of the Justice Appointments Council, whose responsibility is only to forward the lists and the relevant documentation to the Appointing Bodies, **but by calculating very well the order indicated by the Constitution in appointing the Constitutional Judges, as well as the deadlines that each institution has at its disposal.**

Referring to the above, by considering the regular restitution and according to the constitutional provisions of the composition of the Constitutional Court, the President of the Republic **has analyzed the Official Letter No 553 Prot., dated 08.10.2019 sent by the Head of JAC**, in the light of the amendments of the Code of Administrative Procedure (CAP) and the Constitutional and Legal Rules described as above.

This is because pursuant to Article 3, paragraph 9 of the Code of Administrative Procedures (CAP), the process that the President of the Republic performs, after the relevant Official Letter has been submitted to him by the Head of JAC, is an entirely administrative procedure. In this provision of the CAP, it is stated that:

*“An administrative procedure is the activity of a public organ, in order to prepare and adopt concrete administrative actions, their execution and review by legal administrative means.”*

Just is in this case, the terms and proceedings start to progress and are launched from the moment that a documentary practice is formally presented by the Justice Appointments Council, which in the concrete case the Head of JAC, by the Administrative Act, the Official Letter No 553 Prot, dated 08.10.2019, has forwarded to the President of the Republic the “Final List of the Ranking of Candidates Allowed to Run” and the ‘Justification Report of their Ranking for completion of the vacancy at the Constitutional Court, full vacancy, announced by the President of the Republic by Decree No 11133, dated 04.03.2019”.

The documentary practice presented by the Head of JAC, as its final administrative activity, has itself the importance of a request to initiate this procedure within the meaning of Article 41 of the CAP, which provides that:

*“Article 41*

***Initiation of the administrative procedure***

- 1. An administrative procedure may be instituted either ex-officio or based on a request.*
- 2. The ex-officio institution of a proceeding is at the discretion of the public body. The public body shall be obliged to ex-officio initiate an administrative procedure in cases where:*
  - a) **the laws** or a sub-legal acts has provided for the initiation of the proceeding,*
  - b) the factual situation is such that requires the public body to initiate the administrative proceeding for the protection of public interest.*
- 3. The administrative proceeding shall be deemed instituted:*
  - a) with the performance of any procedural action by the public body in case of an ex-officio instituted proceeding, or*
  - b) with the submission of a request before the public body, in case of a procedure instituted upon request”.*

In this way, as the Law No 8577/2000 provides the commencement of the procedure upon the submission of the list by the Head of JAC, then the Official Letter No 553 Prot, dated 08.10.2019, according to the provisions of Article 41 of the CAP, receives the value of a request for the initiation of the above procedures.

As mentioned above, pursuant to Article 44/2 of the CAP, the Institution of the President has preliminary examined the documentary practice presented by JAC, by analyzing each of the elements provided for in this provision or by the other Laws. Specifically, in Article 44, paragraph 2, it is stated that:

- 2. The public body shall preliminary examine the request as regards the meeting of the formal-legal criteria, such as **the competence of the public organ**, locus standi, **time limit**, form and **any other criteria** provided for in **the law**, and shall at the end:*
  - a) notify in writing the requesting party that the request on the conduct of the procedure was accepted;*
  - b) notify the requesting party in writing for the correction of faults with regard to the meeting of the legal- formal criteria, by setting a reasonable deadline for that. In such a case the public organ shall actively assist the party for the fulfillment the identified faults. Failure to fulfill the faults within the set deadline shall constitute a ground for rejection of the request. Against this decision, the party may appeal according to the procedure provide for in this Code.*
  - c) **Notify the requesting party that further administrative actions are necessary before it decides on the acceptance or rejection or the request. In such a case the body shall set a reasonable deadline for the performance of further actions. ”***

Upon verification of these issues and after receiving the information from the Head of JAC, by Official Letter No 655 Prot., dated 14.10.2019, it resulted that the right of the President of the Republic to operate with the selection of a candidate and his appointment as a Judge in the Constitutional Court,

**begins and becomes operational only after another body, in this case the Assembly, exhausts the case under its competence and currently under examination;** thus, the election of the **Second Member** of the Constitutional Court who, according to the order, pertains to be elected by this body.

Only after this preliminary matter has been exhausted and resolved (the appointment of a second member by the Assembly), which by the constitutional deadline shall expire on the **13<sup>th</sup> of November 2019**, then the President of the Republic **is obliged and may exercise his constitutional right to appoint the other member of the Constitutional Court.**

**In this way, the President concluded that an examination in the merits of the proposals by the Justice Appointments Council could not be completed, because pursuant to Article 179, paragraphs 2 and 12 of the Constitution, as well as Articles 7, paragraph 2 and 86, paragraph 4/a of Law No 8577, dated 10.02.2000 “On the Organization and Functioning of the Constitutional Court of the Republic of Albania”, as amended, it was the time of the Albanian Assembly to express itself on the election of the second member of the Constitutional Court.**

The President of the Republic, following the procedures to conclude this process by a decision-making, within the time limit set out in the Law, **ascertained that he was in front of a precondition of the constitutional level that had to be met by another body, which was the Assembly, in order that the President then to follow the procedure for the appointment of the next judge.**

The President of the Republic considered that if he continued the examination, then, this would constitute, *inter alia*, **not only an infringement of the constitutional provisions, but a direct violation of them.**

Also, another identified fact during the administrative examination of the documentary practice, which was administratively communicated by the Head of JAC, resulted that pursuant to Article 44/2 letter “c” of the CAP, it was necessary to carry out other administrative actions by JAC, prior the final examination of this practice.

The Head of the Justice Appointments Council through his Official Letter **No 553 Prot, dated 08.10.2019** made available to the President of the Republic only the acts issued by the Justice Appointments Council.

For assessing certain circumstances, the President of the Republic, in application to Article 92/h of the Constitution and Article 44/2, letter “c” of the CAP, considered as necessary the completion of the practice with all the documentation administered and examined by JAC, regarding the candidacy file of each of the 4 (four) candidates allowed and listed by JAC for completion of this vacancy.

Only after completing this request, the President of the Republic would be able to objectively evaluate the list of the available candidates, after the Assembly had expressed itself for the election of the second member of the Constitutional Court.

The need to possess the full documentation was foreseen by the Justice Appointments Council itself on page 10, the penultimate paragraph of the “Final Report of the Ranking of the Candidates”, where JAC states to provide a full copy of the documentation, if required by the President of the Republic.

In relation to these findings and evaluations carried out by the President of the Republic during his administrative procedures, pursuant to Article 44/2 (c) and Article 66/1 of the CAP, it was mandatory to take a preliminary decision.

In this provision of the CAP, it is explicitly stated that:

*Article 66*

***Preliminary issues***

***1. If the public body conducting the procedure comes across an issue, the resolution of which is a precondition for the resolution of the procedure and constitutes an independent legal issue for which resolution a court or another body is competent (“preliminary issue”), the public body conducting the administrative procedure shall suspend the proceeding till a final decision is taken on the preliminary issue and notify the party thereof.”***

After the President was certain that until 05.11.2019, the Assembly of Albania had not expressed itself, nor scheduled any plenary session to carry out the voting process for the election of the second Judge of the Constitutional Court, in order to protect the constitutionality of this process; to respect the constitutional provisions of the selection order; **with the clear will to express his opinion on the appointment of the Constitutional Judge**, the President of the Republic, pursuant to Articles 4, 92, 179, paragraphs 2, 12 of the Constitution, Articles 7, paragraphs 2, 7/b, and 86, paragraph 4 of Law No 8577, dated 10.02.2000 “On the Organization and Functioning of the Constitutional Court of the Republic of Albania”, as well as article 44/2 letter “c” and 66 of Law No 44/2015 “Code of Administrative Procedures”, **through his Administrative Act No 3535/1 Prot, dated 05.11.2019, decided in advance:**

- To suspend the administrative process of examining the list and documentary practice for the vacancy in the Constitutional Court, full vacancy, announced by the President of the Republic by Decree No 11133, dated 04.03.2019, forwarded by JAC through Official Letter No 553 Prot., dated 08.10.2019, **until the election of the second member of the Constitutional Court by the Assembly of Albania or until the expiry of the constitutional term, within which the Assembly of Albania shall express itself for the election of the members of the Constitutional Court for the two vacancies, in the capacity of an appointing body; and according to the calculations, this term is due on the 13<sup>th</sup> of November 2019;**
- To require from the Justice Appointments Council only to complete the documentary practice and to submit within 5 (five) days a copy of the documentation administered and examined by JAC, included in the candidacy file of each of the 4 (four) candidates; allowed and listed by JAC for the vacancy announced by the President by Decree No 11133, dated 04.03.2019, for the purpose of continuing the examination;
- To ask the cooperation of the Albanian Assembly to assess the possibility of including for examination in a plenary session, as soon as possible, the election of the second member of the Constitutional Court, so that the President of the Republic may exercise his power, according to the order indicated by the Constitution and the Law No 8577/2000.

This act was immediately forwarded officially to the Albanian Assembly, Ombudsman and Justice Appointments Council.

**The Justice Appointments Council with Official Letter No 714 Prot, dated 07.11.2019, responded to the request of the President of the Republic, by forwarding all the documentary practice administered and evaluated by JAC for all the four candidates included in the list, which was sent to the President of the Republic.**

This preliminary decision with effect the suspension of the continuation of the administrative process for examination of the list and documentation forwarded by the Head of JAC, until the election of the second member by the Assembly (dated 13<sup>th</sup> of November 2019), has the intention firstly to respect the Constitution in the process of appointment/election of the new members of the Constitutional Court in the order indicated by the Constitution; protection of the entire process, as well as ensuring simultaneously the necessary procedural deadline in order that the President exercises his constitutional power to elect the next member of the Constitutional Court.

**As it is expressed publicly also in the suspension decision, the President of the Republic has clearly stated that in the capacity of the appointing body, the President has the will and wishes to express himself by appointing the next member of the Constitutional Court from the list of the candidates forwarded by JAC.**

**The expression of such a will by the President that he shall elect by Decree the Constitutional Judge and his administrative act No 3535/1 Prot, dated 05.11.2019, are acts which show that the unlocking mechanism in this case, provided for in Article 7/b, paragraph 4 of Law No 8577/2000, cannot be applied.**

**The President, by this preliminary decision, has also regulated an unusual situation created by the administrative activity of forwarding badly thought-out lists by the Head of the Justice Appointments Council.**

**V. The effects of the act of suspending the administrative process for the examination of the list and the documentary practice, as well as the restarting of the procedural deadlines**

The Administrative Act No 3535/1 Prot., dated 05.11.2019, by which the President suspended the administrative procedure on examining the list and the documentary practice for the vacancy in the Constitutional Court, announced by the President of the Republic by Decree No 11133, dated 04.03.2019, normally it also bring effects to the suspension of the legal deadline until the fulfillment of the condition which consist as the main reason for the suspension of the procedure by the President.

If the date 08.10.2019, the moment when the Head of JAC has forwarded the list and the accompanying documents to the Institution of the President of the Republic would be considered as the starting point from which the procedural deadlines for the President of the Republic shall run; then until 05.11.2019, the time when the President of the Republic decided for the suspension, in application to Article 56 of the Code of the Administrative Procedures, results that a total of 27 (twenty-seven) days have passed.



So, after the reason for the suspension is exhausted, which is the moment when the Albanian Assembly decides to elect the second member of the Constitutional Court, by excluding this day as the event day, the President of the Republic has **3 (three) more days** at his availability to evaluate and express by a Decree the appointment of the next Judge, before the 30-day time limit terminates.

If the moment when JAC has finally forwarded the requested accompanying documents by the President of the Republic (dated 07.11.2019), shall be regarded as the procedural moment to be considered a full administrative practice legally to be examined, then this is the moment that, the 30-day procedural deadline, set out for the President of the Republic in Article 7/b, paragraph 4 of Law No 8577/2000, shall begin.

Even if we with bad intention will assume the reason of the suspension as wrong, the President of the Republic is still within the deadline for examination of the practice.

Referring to these calculations carried out pursuant to the Code of Administrative Procedures and by taking as a reference that the reason for the suspension has expired on 11.11.2019, the day when the Albanian Assembly has expressed itself by the Decision to elect the second member of the Constitutional Court; in both the cases as above, the President of the Republic is within the legal terms to express himself through a Decree.

This is, because in the first version, the deadline of the President of the Republic expires on **14.11.2019**; and, according to the second version, the deadline of the President of the Republic expires on **6<sup>th</sup> of December 2019**.

## **VI. The activity and the decision-taking of the Judicial Appointments Council and the Assembly of Albania after the issuance of the administrative act by the President for the suspension of the process of examination of the lists as well as the invalidity of the suspension reason**

As treated above, the **Administrative Act No 3535/1 Prot., dated 05.11.2019 of the President of the Republic which decided in advance:** *“The suspension of the administrative process for examination of the list and the documentary practice for the vacancy in the Constitutional Court, full vacancy, announced by the President of the Republic by Decree No 11133, dated 04.03.2019, forwarded by JAC through the Official Letter No 553 Prot., dated 08.10.2019, until the election of the second member of the Constitutional Court by the Assembly of Albania or until the termination of the constitutional deadline within which the Assembly of Albania shall express itself for the election of the members of the Constitutional Court for the completion of the two vacancies, which belong to in the capacity of an appointing body and which, according to the calculations, this deadline ends on 13<sup>th</sup> of November 2019”*, was notified immediately to the Albanian Assembly, Ombudsman and the Judicial Appointments Council.

The Head of the Justice Appointments Council, after being aware of the act on 06.11.2019, he through e-mail, has announced the meeting of the Justice Appointments Council, on **07.11.2019, at 13.00** with the agenda *“Discussion on the position of the President of the Republic in relation to the process of*

*filling in the vacancies in the Constitutional Court."* Representatives of the President of the Republic, Ombudsman and the representative of the Speaker of the Assembly of Albania were invited and were present at this meeting.

At this meeting, the Justice Appointments Council was notified on the views of the President of the Republic expressed in his Official Letter No 3535/1 Prot., dated 05.11.2019, with the subject "*On the election/appointment of a member of the Constitutional Court according to the order indicated by the Constitution of the Republic of Albania and Law No 8577/2000*".

Following the discussion on the President's position, the members of the Council present at the meeting agreed that they could not comment on the content of the President's letter on the grounds that they had no authority to make the President's decision *anathema*, moreover, if they would do so, they would interfere to his powers and, consequently, in an institutional conflict of competencies.

In addition, the members noted that the Justice Appointments Council has closed the process of evaluating and scoring of the candidates since 21<sup>st</sup> of September 2019 and the subsequent procedures are only administrative procedures. The representative of the President of the Republic maintained in the Council the position that the President, through his preliminary decision, expresses the will that he will express himself through a Decree for the appointment of the Constitutional Judge, as soon as the condition of the suspension will expire, which is the election by the Albanian Assembly of the second member of the Constitutional Court.

Thus, under the conditions when the procedures for the verification, evaluation and ranking of candidates for four vacancies, two for each appointing body, respectively for the President of the Republic and the Assembly were finished, the Council during the meeting on 07.11.2019 without any decision-making agreed only to forward to the Institution of the President of the Republic the copies of the administered and examined documentation included in the files of each of the 4 candidates listed by JAC, for the completion of the vacancies in the Constitutional Court announced by the President of the Republic by Decree No 11133, dated 04.03.2019. The Justice Appointments Council did not discuss any other issues at this meeting.

On the same day, after the meeting of JAC ended, with the Official Letter No 714 Prot., dated 07.11.2019, JAC responded to the request of the President of the Republic by forwarding all the documentary practice administered and evaluated by JAC, for the 4 (four) candidates listed for the completion of vacancy of the President of the Republic .

**Meanwhile, surprisingly, in the Official Journal No 151, on Saturday, November 9<sup>th</sup>, 2019,** it is published in electronic form, the Decision of the Justice Appointments Council No 132, dated 21.09.2019 "On the approval of the final list of the ranking of the candidates for Judge in the Constitutional Court, in the vacancy, full vacancy, announced by the President of the Republic on 04.03.2019", exactly the Decision forwarded to the President of the Republic since 08.10.2019 by JAC.

**This issue was not raised nor discussed at the meeting of the Justice Appointments Council on 7<sup>th</sup> of November 2019.**

In relation to the publication of this act in the Official Journal of the Republic of Albania, it is necessary **to clarify the fact** that Law No 78/2014 “On the Organization and Functioning of the Official Publication Center” and Law No 115/2016 “On the Governance Institutions of the Justice System”, as amended, **does not define this type of Decision by JAC, as a publishable act in the Official Journal.**

Article 3, paragraph 1 of Law No 78/2014, provides that “Publishable Acts” are all the acts, the publication of which is mandatory under the Constitution and the legislation in force. Subsequently, in the same Article, paragraph 5, it is specified that the publication in the Official Journal **is making public, in written and electronic form, the publishable acts in accordance with the legislation in force.**

Meanwhile, Article 6, paragraph 2 of this law, states that:

*2. In the Official Journal shall be published:*

*a) Laws;*

*b) Decrees of the President of the Republic of Albania;*

*c) Normative acts of the Council of Ministers;*

*ç) Normative acts of Ministers and Heads of central institutions;*

*d) Decisions, resolutions and statements of the Assembly of the Republic of Albania;*

*dh) Decisions of the European Court of Human Rights in the cases related to Albania;*

*e) Decisions of the Constitutional Court;*

*ë) Decisions of the United Colleges of the Supreme Court on the unification or amendment of the judicial practice, which are published in the first number of the Official Journal;*

*f) All other acts, the publication of which is mandatory under the legislation in force;*

*g) The annual index of the Official Journal.*

Whereas, in Article 8, paragraphs 1 and 2 of Law No 78/2014 “On the Organization and Functioning of the Official Publication Center”, it is defined :

*“1. The publishable acts provided for in Article 6 of this Law shall be published in the Official Journal only when the final original version of the act has been signed **by the issuing body and on its request.***

*2. The text of the acts published in the Official Journal **shall be sent to the Center for Official Publications in written and electronic form by the respective state institutions that have adopted the act.** ”*

In meantime, in order to further exhaust the legal handling of this issue, it is appropriate to identify in detail whether the decision of the Justice Appointments Council **No 132, dated 21.9.2019**, is one of those acts that can be published in the Official Journal, according to a special Law. This situation is also regulated by Law No 115/2016 “On the Governance Institutions of the Justice System”, as amended, where Article 232 provides:

*Article 232*  
***Publication of acts***

1. *The list of candidates who do not fulfill the criteria to be elected along with the reasoning for their exclusion and the list of candidates who continue the competition and their ranking shall be published on the website of the High Court.*
2. *All acts of verification, assessment and the ranking for each candidate, adopted by the Justice Appointments Council shall be published on the official website of the High Court, accompanied by relevant explanations and reasoning as well as a summary minutes signed by all members participating in the meeting.*

Moreover, even the JAC Decision itself No 132, dated 21.09.2019 **which resulted that it was published without sense and in contradiction with the Law in the Official Journal, in paragraph 2**, states the following:

*“This Decision is published in the official website of the Supreme Court, in the section designated for the Justice Appointments Council.”*

Referring to the above legal basis and the identified facts, it results proved that:

- The Decision of the Justice Appointments Council No 132, dated 21.9.2019 “On the approval of the final list of candidates for the position of Judge in the Constitutional Court, in the vacancy, full vacancy announced by the President of the Republic on 04.03.2019”, **does not belong to those type of acts allowed for publication in the Official Journal;**
- The Head of the Judicial Appointments Council is the Leader of JAC, and according to the Law he is the authority responsible for submitting for publication in the Official Journal. With submission of the act for publication to the Center of Official Publications, **it is committed a serious violation of the Law No 115/2016, for which disciplinary proceedings should be initiated.** According to Article 226, paragraph 2/e, the Head signs the acts of verification, evaluation and ranking and forwards them to the appointing body, so to the President of the Republic.

Through sending this Act to the Institution of the President of the Republic on 08.10.2019 and the publishing of Decision No 132, dated 21.09.2019 on the official website of the Supreme Court, the Head of JAC has fulfilled his function.

Any other action that goes beyond the requirements of the Law and without the decision-making of JAC as a collegial body, is included in the type of activities that constitute **reasons for disciplinary proceedings** pursuant to Article 242/dh of Law No 115/2016.

- If the Head of JAC has acted in this regard, wishing to make public the idea that JAC is a body that identifies facts which bring the idea that certain candidates have been self-elected for the purpose of functioning of the unlocking mechanism, provided for by Law, this would aggravate his position in front of the disciplinary process.

This is because these actions serve only to complicate the relations between the institutions and handling of the issue of the election of the new members of the Constitutional Court, while at the same time leading to the loss of public trust in the integrity of the election process of the members of the Constitutional Court.

- This activity of submitting for publication of an Council Act that according to Law is not allowed to be published in the Official Journal, together with the other unconstitutional activity of the Head of JAC in submitting the lists to the appointing bodies, creates the conviction for the President of the Republic, that the Head of the Justice Appointments Council has carried out all these actions not carelessly, but fully conscious, in order to put before the actual fact the President of the Republic, for the latter to commit a constitutional violation in the process of selecting a member of the Constitutional Court, according to the order imposed by the Head of JAC, which is in direct contradiction with the provisions of the Constitution.
- Also, the publication of the Decision No 132, dated 21.09.2019 of JAC by the Center for Official Publications (COP), was **conducted in violation with the requirements of Law No 78/2014**, as this act is not binding for publication in the Official Journal and the COP should have refused its publication.

Even though the illegitimacy of the publication in the Official Journal has been considered as something normal by the bodies involved in this process, its publication does not bring any legal consequence for the process of appointing a Constitutional Judge by the President of the Republic.

The Decision No 132, dated 21.09.2019, has been in force since the date it was issued. If the Head of JAC wished to see a signed act by him published in the Official Journal, this was made possible by the Center for Official Publications. If he thought that by publishing it in the Official Journal, this Decision is legally empowered, then this should have been followed for all the other decisions.

**If such an opinion shall be based, then it is likely that the calculation of the 30-days deadline for the President shall start on the date of publication of this act. This would be a great legal absurdity.**

Meanwhile, after the President of the Republic forwarded to the Assembly of Albania his Decision of Suspension, No 3535/1 Prot., dated 05.11.2019, as it results from the published parliamentary practice, the Speaker of the Assembly of Albania has issued the Order No 35, dated 7.11.2019, “On the Plenary Session of the Assembly on 11.11.2019”.

According to the approved agenda, in the points 5 and 6 there were included two draft-decisions on the election of two members of the Constitutional Court for the vacancies announced by the Assembly, respectively on 12.02.2018 and 04.03.2019.

Based on this act, it resulted as proved that the Assembly of Albania did not respond to the call of the President of the Republic to vote in a plenary session only the second member, so that the President would later express himself for the appointment of the other member.

Meanwhile, during this period, from 8<sup>th</sup> of November and onwards, including the discussions at the plenary session, exponents of the parliamentary majority have unjustly anathematized one of the candidates on the lists of the Justice Appointments Council, for the vacancy for completion by the President, throwing charges against and using inappropriate vocabulary to the President of the Republic.

Members of the Albanian Assembly, during the public discussions, but also in the plenary session, publicly during live broadcasts of the plenary session, although acknowledging the fact that they were aware of the President's Decision of Suspension, they again stated without any legal basis and without any act that the first listed candidate is considered to be elected as President's vacancy.

With this argument, the Assembly of Albania, in the plenary session, excluded Ms. Arta Vorpsi, as candidate for the Constitutional Court, candidate ranked as first in the vacancies of the Assembly. This exclusion from the voting process, without any decision of the Assembly of Albania, constitutes a serious violation of human rights and fundamental freedoms of this candidate, because in this way it was unjustly denied by the Assembly her right to participate in a competition, in which she had applied pursuant to the Constitution.

The Assembly of Albania, in contradiction with any constitutional norm, considered Mrs. Arta Vorpsi *a priori* elected to the vacancy belonging to the President of the Republic, even though the Assembly in its practice had administered and was aware of the Preliminary Decision No 3535/1, dated 05.11.2019 of the President, for the suspension of the process.

Here, the question arises: are the Assembly, and much less, the Head of JAC, entitled to make an assessment of this nature and determine this fact? In this respect, it is appropriate to clarify that the Constitution of the Republic of Albania, Law No 8577/2000 "On the Organization and Functioning of the Constitutional Court", as amended, and Law No 115/2016 "On the Governance Institutions of the Justice System", do not specify in any of their provisions which constitutional body determines the fact that one of the candidates is considered elected because of unlocking the mechanism.

In this way, referring to the parliamentary practice followed for the election of the two members of the Constitutional Court, the Assembly has unjustly excluded the candidate Arta Vorpsi from the voting and continued the voting process only with the remaining candidate in the competition, for the vacancy announced by the Assembly on 12.02.2018.

With the Decision No 133, dated 11.11.2019, the Assembly has elected **Mrs. Elsa Toska**, as member of the Constitutional Court, as the only candidate remaining in the competition, for the vacancy announced on 12.02.2018.

After this voting, also for the next vacancy, the Albanian Assembly according to its assessment has remained **with only one candidate**. With the Decision No 134, dated 11.11.2019, the Assembly has elected **Mrs. Fiona Papajorgji** as member of the Constitutional Court to complete the vacancy announced by the Assembly on 04.03.2019.

In this way, it results as confirmed:

- The Assembly of Albania voted in the plenary session simultaneously two members of the Constitutional Court for the completion of the two vacancies;
- The Assembly of Albania, with its *a priori* assessments on the number and status of the candidates in the administered lists, produced a problem, because it unjustly denied to the candidate Arta Vorpsi the right to participate in the voting, to compete freely and to be elected;
- The Assembly elected the members of the Constitutional Court under the conditions where in the race for each vacancy, according to its assessment, it remained only one valid candidate to be elected;
- The level of discussions of the members of parliament in the plenary session, addressing attacks against the candidates in the competition and the President of the Republic, as well as the process followed by the Assembly, seriously infringed the public trust in the Constitutional Court;
- The Assembly violated the provisions of Article 179, paragraph 2 of the Constitution and Articles 7 and 86, paragraph 4/c of Law No 8577/2000, by voting the members of the Constitutional Court in contradiction to the designated order;
- By voting two candidates simultaneously and their election as Judges of the Constitutional Court, the Assembly has also violated the possibility of the President of the Republic to appoint, by reducing the number of candidates provided for in the Constitution from 3 to 2;
- Through its activity, the Assembly lost the chance to assist in the maintaining the integrity of the Constitutional Court, although the President of the Republic repeatedly called for it;
- Although it was requested in a written form and through public messages by the President, the Assembly again showed no sign of cooperation towards the Institution and the request of the President, under the conditions where this cooperation was important, because the fact that the candidates in the lists of both institutions were almost the same names;
- The Constitution is clear. It determines the order of selection of candidates from each institution;
- The Assembly's *a priori* assessment that the President has exceeded the 30-days deadline for selecting a candidate is unsupported by the Constitution. In the Constitution, unlike the Assembly, there is no mandatory term for the President of the Republic to express himself.

The President has sworn to abide only to the Constitution and to respect it that in this case is respecting the order of selection of the second member after the Assembly. The President, through a preliminary procedure, has suspended the examination process of the lists and documentation since 05.11.2019, until the fulfillment of this condition. Thus, the Assembly's assessment is not based to facts, in the Constitution or the Law

## **VII. The situation of the candidacies after the decision-making of the Assembly and the assessment of the established situation**

After the Assembly of Albania has expressed itself through the Decision on the election of the two Judges of the Constitutional Court during the session of 11.11.2019, it results that the current state of

play of the completion of the four vacancies (2 the President and 2 the Assembly), completed or in completion by each appointing body, is shown in the table below.

For more clarity, this table shows the former judges and the termination of their constitutional mandate, the order of the vacancy announcements and the appointment of judges, respectively by the President and Assembly of Albania, and the names of the candidates appointed/elected for each vacancy, until now.

Order of Appointment	FORMER JUDGES, WHOSE MANDATES ARE COMPLETED	YEAR OF THE END OF MANDATE	APPOINTING BODY FOR APPOINTING/ELECTION	TIME OF ANNOUNCEMENT OF THE VACANCY	APPOINTED/ELECTED CANDIDATE	DATE OF APPOINTMENT
1.	Sokol BERBERI	2016	PRESIDENT	07.02.2018	Besnik Muçi	15.10.2019
2.	Vladimir KRISTO	2016	ASSEMBLY	12.02.2018	Elsa Toska	11.11.2019
3.	Altina XHOXHAI	2019	PRESIDENT	04.03.2019		
4.	Bashkim DEDJA	2019	ASSEMBLY	04.03.2019	Fiona Papajorgji	11.11.2019

Under these circumstances, even though the Assembly has violated the order of appointment provided for by the Constitution, by appointing two constitutional judges simultaneously on 11.11.2019, moment when the Assembly has expressed its will, it results now as proved that the main reason has failed, on which the President of the Republic decided to suspend the procedure for examining of the list and the accompanying documentation for the vacancy to be completed by him.

**In this way, after 11.11.2019 when the Assembly has elected the second Constitutional Judge, the President of the Republic finds out the fail of the suspension condition, so the President continues the examination of this practice to express himself on the appointment of the Constitutional Judge, a vacancy announced for application by the President on 04.03.2019.**

As mentioned in the introduction of this justification, the Justice Appointments Council by Decision No 132, dated 21.09.2019 has approved the "Final List of the Ranking of the Candidates for Judge in the Constitutional Court, for the vacancy, full vacancy, announced by the President of the Republic on 04.03.2019", in the following order:

1. Arta Vorpsi 89.642 points
2. Fiona Papajorgji 88.785 points



- |                        |               |
|------------------------|---------------|
| 3. Elsa Toska          | 85.428 points |
| 4. Marsida Xhaferllari | 82.000 points |

The three candidates ranked in the first places on this list were also candidates on the lists of the Albanian Assembly.

After that the Assembly, in contradiction to the order indicated by the Constitution, on 11<sup>th</sup> of November 2019, elected Ms Elsa Toska and Ms Fiona Papajorgji as Judges in the Constitutional Court, we are under the situation of proceeding with the vacancy of the President. It results that in the competition for the completion of vacancy announced by the President of the Republic, there are only 2 (two) candidates left:

- **Arta Vorpsi** with **89.642 points**
- **Marsida Xhaferllari** with **82.000 points**

In these circumstances, the Assembly of Albania, by not respecting the rule to elect according to the order described by the Constitution, and by showing no sign of cooperation with the Institution of the President, by electing two judges simultaneously, has also infringed the required number of candidates that the President must have at his disposal to appoint the new Constitutional Judge.

The Constitution clearly states a simple and important rule according to which the members of the Constitutional Court are selected between the three candidates. Regardless of what action (or omission) of the President, at least until the moment that he decides to express himself by Decree on the appointment of one of them, he must have "available" 3 candidates. The Constitution sees this number as an objective number of candidacies, in order that the appointing body can exercise objectively and substantially the right to evaluate which of them is the most appropriate candidacy that can exercise the function of the Constitutional Judge, according to the assessment of the appointing body.

This rule is provided in Article 125, paragraph 1 of the Constitution<sup>1</sup>. In the second sentence of this paragraph, it is stated that "*The members shall be selected among the three first ranked candidates of the list of the Justice Appointments Council, in accordance with the law.*"

The Assembly, by electing two judges simultaneously and ignoring the President's request for respecting the order, infringed the number of candidates available to the President. If the Assembly on 11.11.2019 would have elected only the second member of the Constitutional Court, then the President shall have available 3 (three) candidates.

Also, in this procedure it is to be noted that the Justice Appointments Council has failed to meet the requirements of Article 7/b, paragraph 3 of Law No 8577/2000, as quoted:

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<sup>1</sup> 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.

*“3. The Justice Appointments Council shall, following the evaluation of the appointment conditions and criteria, within 10 days of holding the meeting, draft a final list by ranking the candidates. Where more than one vacancy exists, the Council shall draft **two separate lists**, one of which containing candidates coming from among the ranks of the judiciary...”*

**Given that the President of the Republic had two vacancies to fill in at the same time, the Justice Appointments Council could not comply with this requirement of law.**

In addition to many other elements, in view of this justification, there are two constitutional elements that serve to the President to exercise his power to appoint the member of the Constitutional Court: the first element is the objective possibility that an appointing body must have to choose **between the three candidates** and the second element is the qualitative "**candidate**" placed immediately after the figure.

These two elements, one quantitative and the other qualitative, shall be present not only at the **initial stage**, when the appointing power of the President begins to take effect (at the beginning of the 30-days deadline counting, as the Assembly has exhausted its preliminary electing competence), but necessarily until **the final moment**, so the moment of the President's decree.

Both elements are clearly understandable in their content and leave no reason for doubt, interpretation or ambiguity. The Constitution and the Law on the Constitutional Court text have reflected in details each of them.

Thus, with regard to number "3", the constitutional meaning is very clear. In any case, the President should effectively have the theoretical ability to choose between 3 alternatives (candidates), clearly distinguishable from each-other.

Related to the term "candidate", the Constitution is clear in this case as well. "Candidate" shall be considered any applicant who has first passed the verification/evaluation/ranking procedures by JAC and after that is presented as part of the complete list that JAC submits to the President.

It is comprehensible that the "candidate" must maintain this quality throughout the period until the President expresses himself for the respective appointment. But until the President is expressed, in the meantime, some events may occur that may remove this quality.

So events such as for e.g. resignation, death, loss of Albanian citizenship, verification of the conditions of "decriminalization" under the Law, etc., may occur, so that applicant shall no longer be a "**candidate**" capable to be elected.

Another similar, but also specific, is the case when the candidate in question is appointed/elected as a member of the Constitutional Court by another decision-making authority (since three authorities contribute to the appointment of members of the Constitutional Court: the President, Assembly and Supreme Court).

In fact, the Constitution has ensured that a simultaneous "competition" in the appointment/election of the members of the Constitutional Court not to occur.

It has provided the "chronological order" of the appointment, alternating the powers between the President, then the Assembly and then the Supreme Court. The reason is simple: a candidate in the list

of one decision-making authority, **if elected/appointed, no longer stands as a "candidate" in the list of the successive decision-making authority.**

Although this constitutional commandment exists, JAC in disregard of this important constitutional rule, may send in parallel the respective lists to the various decision-making authorities, which, during their 30-days period are in front of the risk that the candidate who is in its list, he is also in the list of the other authority that might have acted by appointing/electing *de facto* the same candidate.

Upon verification of this event, this applicant who is listed as a "candidate" in the list of a decision-making authority loses this quality, because she/he has already been elected as **a member of the Constitutional Court by another decision-making authority.** It would be illogical at first to consider as a "candidate" an appointed/ elected member of the Constitutional Court

These are the legal dimensions of the concept of the "candidate" that the Constitution uses in its Article 125/1.

The provision of Article 149/d paragraph 1 of the Constitution<sup>2</sup> is in function and in full harmony with the constitutional provision as above. In the last sentence of this paragraph, it is stated that “The ranking of candidates is not binding, except when it fails to make an appointment”.

**This means that the list, in terms of the three names it must necessarily contain, is not rigid.** It can be filled by the successive candidates in cases when one or more candidates from the upper 3 levels **are no longer eligible (candidates)** for various reasons.

If otherwise, the Constitution would not have this provision. **It could even claim that the list is closed and that the appointment/election should only be carried out for 3 candidates listed in the initial phase, even to foresee that only the three names of first candidates to be forwarded to the decision-making authority, while the other candidates, are not even submitted to it.**

In fact, Article 125, paragraph 1 stipulates that the list forwarded by JAC may contain the names of more than 3 candidates, but that the appointment/election should be carried out only among the 3 candidates listed above.

The list is “frozen” only in one case, but this case occurs when the decision-making authority is silenced within the 30-days time limit. Even in this case, the "frozen" list refers only to the candidate ranked first by JAC.

So, in this case, the decision-making authority has no right to hierarchically rearrange the first 3 candidates, as this would compromise the unlocking mechanism provided for by the Constitution (the first ranked is considered as appointed in the case of silent procedure).

In this way, referring to the above provisions, it results that the President of the Republic is facing this situation caused by the Justice Appointments Council and followed by the decision of the Assembly

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<sup>2</sup> Article 149/d paragraph 1 of the Constitution: “The Justice Appointments Council is responsible for verifying the fulfillment of legal requirements and assessment of professional and moral criteria of the candidates for the High Justice Inspector, as well as for the members of the Constitutional Court. The Justice Appointments Council examines and ranks the candidates according to their professional merits. **The ranking of candidates is not binding, except when the Assembly fails to make an appointment.**”

on 11.11.2019, and as a result, today the fact is that there are only 2 (two) candidates in competition to be appointed as Judge of the Constitutional Court.

Objectively assessing the whole situation created by the actions of other bodies (JAC-Assembly), which undermined the order of appointment of the Constitutional Judges, the President of the Republic has finally decided to proceed with this number of candidates, for the election of the Constitutional Judge, for the vacancy announced by him by Decree No11133, dated 04.03.2019, as there are the possibilities to elect a suitable candidate as member of the Constitutional Court.

Although the Constitution and the Law require 3 candidacies, the President of the Republic considers that in this case, the presence of two (2) alternatives guarantees the essence of the right to appoint and that the spirit of the Constitution is maintained.

For the President of the Republic, it is ensured the discretionary space of evaluation between more than one candidate; otherwise it would be an automatic appointment, so the right to appoint would be taken by another body with no constitutional competence. For these reasons, he estimates to operate with the selection between them of the candidate who shall be a member of the Constitutional Court.

#### **VIII. Reasons on the selection of the candidate, Ms. Marsida Xhaferllari, to be appointed as Judge of the Constitutional Court and the followed procedure**

The President of the Republic, after examining all the practice and documentation forwarded by the Justice Appointments Council, decided in the end to select the candidate **Marsida Xhaferllari** to be appointed as Judge of the Constitutional Court, mainly on the basis of the following reasons that have been identified and assessed even more in detail by the Justice Appointments Council in its decisions:

In 1997, Ms Marsida Xhaferllari graduated as a “Lawyer” in the Faculty of Law, University of Tirana, with excellent results.

In 2000, Ms Xhaferllari completed her studies at the School of Magistrates and graduated as a "Magistrate Judge" with a "Very Good" score.

Ms Marsida Xhaferllari has a diverse work experience of more than 20 years as a Judge, Director General of Codification, Director General of Justice Affairs at the Ministry of Justice, and since January 2013, Chief Inspector of the Inspectorate of the High Council of Justice.

Ms Xhaferllari has been a representative of the Council of Ministers in the review of over 50 cases in the Constitutional Court, as well as a representative of the High Council of Justice in cases pending before this Court.

The exercise of the duty as the Director General of Codification indicates a contribution to the harmonization of legal and sub-legal draft-acts with the Constitution and the legislation in force and of the mandatory applicable international acts.

During the period 2015–2016, Ms Xhaferllari has been an expert in the High Level Experts Group on Justice, representing the HCJ, at workshops with international and Albanian experts, in drafting legislation on the judiciary system.

Ms. Marsida Xhaferllari has also been engaged as an expert and external lecturer at the School of Magistrates, teaching the Public Right. She has also been a member of the Management Board of the Magistrates School for 5 years. Ms Xhaferllari is also author of several publications, mainly in the area of Administrative Right.

Ms Marsida Xhaferllari enjoys high moral and ethical integrity and high professional qualities, which are indispensable requirements and in coherence with the public trust, in order to be a member of the Constitutional Court. Throughout her career she has reflected decision-making and cooperation skills.

Moreover, following the building and beginning of the functioning of the transitional reassessment bodies, Ms Xhaferllari, in the position of Chief Inspector of HCJ, has demonstrated a high level of cooperation with all the newly established institutions and has positively influenced in the launch of this process.

With the professional commitment of Ms Xhaferllari, by-law acts and standard forms of the professional evaluation component for judges were drafted and approved by the Council in view of the transitional reassessment process. During the period September 2017 - November 2018 under the supervision of Ms Xhaferllari, the HCJ Inspectorate has drafted and approved more than 100 evaluation reports for the vetting process of different judges as required and led by the Independent Qualification Commission.

Regarding the conditions and criteria that a candidate should meet to be a member of the Constitutional Court, the Justice Appointments Council has clearly stated and made the relevant assessments for the candidate Marsida Xhaferllari in the Decision No 111, dated 06.08.2019 on “Allowing the candidacy of Ms. Marsida Xhaferllari for the vacant position of Judge of the Constitutional Court, announced by the President of the Republic on 04.03.2019” and in the Decision No 126, dated 10.09.2019 “On the Assessment and scoring of the candidate s. Marsida Xhaferllari for the vacancy of Judge in the Constitutional Court, announced by the President of the Republic on 04.03.2019”.

The President of the Republic, after receiving the full practice of JAC, analyzed also the attached documentation.

In addition, the representative of the President of the Republic has been present at all the meetings of the Council and got acquainted with its activities.

From the content of the documentation, it resulted clearly that the activity of JAC in relation to this candidacy was incorrectly followed and, in many cases, even with legal violations, aiming the discrimination of the candidacy in question, with the initial intent to unjustly disqualify her or even with the ultimate intent to evaluate and assess her unfairly and lower in the list, in order to eliminate the possibility of her selection.

From the provided information and the activity of JAC, it results that there was an intense correspondence between the candidate and JAC regarding this process. The President of the Republic

is careful not to intervene in the internal activity of another body, such as JAC, but in front of such situations, he takes them into consideration for the evaluation and the selection he has to undertake.

It resulted that for this candidate, two members of JAC unreasonably evaluated the candidate with 0 (zero) points. No other candidate has received such an extreme evaluation.

Only because of this discriminatory evaluation of the two members of JAC, the candidate in question was ranked 4<sup>th</sup> in the initial list.

The President of the Republic has also analyzed the documentation in the context of understanding the real causes of this behavior of some of the members of JAC. It resulted that for this candidate, it was followed a process of verification of the candidacy conditions, different from the other candidates, with strong notes of discrimination.

Again, JAC has finally assessed that Ms Marsida Xhaferllari complies with the candidacy requirements.

From a thorough examination of this issue, the President of the Republic revealed that the attitude of the candidate, in relation to the activity of JAC, has been dignified, professional and at the stature of the civil courage that should characterize a member of the Constitutional Court.

Even though the further continuation was depending on the prejudiced attitude of JAC and the discrimination trend of some members was clearly evident, she did not compromise these values.

These are fundamental values that the President of the Republic and any other authority should be guided by for the selection. The positions of the member of the Constitutional Court, as well as other important governmental positions, require such values to guide the public official.

These demonstrated values guarantee that a member of the Constitutional Court shall not be overwhelmed by state or political pressure or of any other nature, shall not make any compromise to the violation of the Constitution and shall maintain up the reputation of the Constitutional Court.

Precisely these high professional values and qualities are the ones that the justice reform has aspired to achieve through its adoption and implementation; thus the President of the Republic, without any doubt, has made this selection for the seat of the member of the Constitutional Court.

Likewise, the President of the Republic highly appreciates the fact that this candidate has decided to run only for one (1) vacancy out of 4 (four) seats that have been announced for application by the appointing bodies (President, Assembly).

This fact shows integrity and personality, since although the law does not deny the opportunity to compete in multiple vacancies; this candidate did not seize this opportunity.

By considering as very important the role and importance of the Constitutional Court for the proper functioning of the rule of law, although there is still time available, the President of the Republic has again decided to express himself without delay for the appointment of the candidate selected by him, so that the new Judges of the Constitutional Court shall start as soon as possible their duties, and to exercise their mandate, even for decisions or issues that may be examined in the colleges with three members of this Court.

In reference to the above, pursuant to Articles 93, 125 paragraphs 1 and 3, 129, 149/d paragraph 1, 179 paragraphs 2 and 12 of the Constitution of the Republic of Albania, articles 7, 7/a paragraph 4, 7/b, 8 and 86, paragraph 4, letter “c” of Law No 8577, dated 10.02.2000 “On the Organization and Functioning of the Constitutional Court of the Republic of Albania”, as amended, the President of the Republic, in the capacity of the appointing body, has decided that from the two candidates remaining in the competition, from the list of candidates forwarded by the Justice Appointments Council, to select and appoint Ms Marsida Xhaferllari, as Judge of the Constitutional Court.

**PRESIDENT OF REPUBLIC**

**ILIR META**