



**REPUBLIC OF ALBANIA
PEOPLE'S ADVOCATE**

ACTIVITY REPORT

OF THE JUSTICE APPOINTMENTS COUNCIL

DURING 2019

March 2020ⁱ

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1. Introduction

The People's Advocate has followed with special attention and dedication the implementation of the Justice Reform in general and the activity of the Justice Appointments Council in particular. This is because the role of the People's Advocate in this case is two-fold: not only as a constitutional body envisaged for the protection and guaranteeing human rights and freedoms, but also as an institution to which the Constitution of the Republic of Albania and the Justice Reform legislation has conferred a special role and powers in this process.

The People's Advocate, as a national human rights institution, is a guarantor of the highest standards of the Rule of Law in Albania. The long-standing role of the People's Advocate in monitoring any human rights-related process has been further emphasized in light of the new constitutional changes which vested on our institution an additional specific mandate that relates precisely to the need to monitor the work of the Justice Appointments Council. That being said, it is worth noting that the Constitution of the Republic of Albania and Law no. 115/2016 "On the governance institutions of the justice system" have entrusted the People's Advocate with special observation and monitoring powers, not simply in formal terms, but with the goal to vest this institution with the necessary legitimacy (given also its proactive powers) to ensure that the highest standards are respected, in upholding the rights of applicants and the public at large.

So, Article 149/d, paragraph 3 of the Constitution stipulates that "... *The People's Advocate shall participate as an observer in the selection by lot and in the meetings and operations of the Justice Appointment Council.*" Similarly, Article 233 of Law no. 115/2016 "On governance bodies of the justice system" states that "*Meetings of the Justice Appointments Council are held in-camera. The 'People's Advocate participates in the meetings and activities of the Council...*" So, these above articles clearly sanction the lawmaker's will to ensure the presence of the People's Advocate also in the meetings where the formal and legal requirements are verified and evaluated for the candidates running for members to the Constitutional Court and the High Justice Inspector.

From the above provisions, it turns out that the lawmaker decided that the JAC must conduct the selection procedures for candidates behind closed doors, without the presence of other subjects or interested parties (including the media or civil society organizations engaged in the justice field), but it guarantees the transparency through the participation of the People's Advocate in the meetings and activities of this body.¹

Being that the JAC activity is directly relevant to the establishment and smooth operation of the Constitutional Court and the election of the High Justice Inspector, based on the legal obligations set out in the above-cited legal acts, it is the task of the People's Advocate to prepare this report.

¹ This modification was introduced in the text of the Constitution after the opinion issued by the Venice Commission. https://venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN

In order to clarify the position of our institution and the essence of powers conferred by the above legal framework, let us make a brief analysis. In contemporary literature, the notion *observation* or *observer status* is defined as *the ability to pay attention to things and to notice more about them than most people*. Usually, having an observer status at an administrative body with powers in the field of Justice (at JAC, in this case), the observation process involves several purposes. It is particularly conducted to generate empirical evidence for a broader analysis of the justice delivery system in a given country, to support efforts to reform the justice system and to communicate concerns about a matter or process.

The principles of observation include impartiality and active informed monitoring, and the constructive work with the body subject to observation (JAC), but not only. "Observation" means primarily being present at the meetings of the body being observed, by closely watching and following its administrative activity. So, it essentially entails getting acquainted with all the output of this activity, i.e. any acts produced by the body during and outside meetings. The institution entrusted with the observing duty should display the highest levels of professionalism, discretion and knowledge. This institution, namely the People's Advocate, should always be impartial and seen as impartial, especially by not imparting public comments on ongoing proceedings. Often, the *monitoring* notion overlaps with *observation*. Monitoring mainly refers to processes extended in time, which may in fact include many instances of observing the administrative activity of the body being observed.

Precisely for these reasons, reporting on the observed activity of the JAC is an important mechanism not only to present findings effectively (as indicators of the People's Advocate's successful performance of this constitutional and legal duty), but also to make key recommendations for moving forward the justice reform on the constitutional and legal tracks. This role can also serve as a valuable tool for dialogue among stakeholders and interested parties in this Reform.

The spirit conveyed by the Constitution in its provisions related to the justice reform defines and assigns *atypical* powers to the People's Advocate², directly relevant to this very important reform for the country and the consolidation of the rule of law, by combining and complementing these powers in the reforming processes to the mandate and key duties of the People's Advocate as set out in Law on. 8454 of 4.02.1999 "On the People's Advocate", as amended.

The People's Advocate must not be seen as insignificant to the implementation of this reform which entails *per se* two primary goals: combat *corporatism* and guarantee full transparency in decision-making, in order to ensure the expected and indispensable trust in the justice system in the country. It considers the restoration of confidence in the domestic justice system as vital to all Albanian society, therefore, the People's Advocate has given its contribution by monitoring many processes carried out under the Justice Reform.

² Different countries have different practices. For example, the People's Advocate in Kosovo has wider powers, because he sits as member at the Selection Commission for members to the Constitutional Court.

To understand the nature and purpose of the legal provisions governing the activity of the JAC and the constitutional role of the People's Advocate in its active and proactive observation of this activity across all its functional spectrum, we referred in this report also to the Venice Commission opinions which provide valuable guidelines for this purpose, given that the JAC as a public body must operate subject to the *check and balance* system.

Reading of this report requires a clear and correct understanding of the People's Advocate's role in observing the JAC activities, pointing out that this role construes a novelty and extra safeguard to the transparency *inter alia* of the activity of one of the newly established bodies to govern the justice system.

We take the opportunity to strongly emphasize that the current selection procedure for members to the Constitutional Court and the High Justice Inspector as provided for in the Constitution and the Law 115/2016 "On the governance institutions of the justice system" constitutes a very important step in ensuring an objective and merit-based selection. This procedure represents a significant step forward in regulating the selection of members to the Constitutional Court and the High Justice Inspector. The various aspects dealt with in this report should be read in the light of possible improvements in the implementation of these procedures in accordance with legal requirements.

2. Lot-drawing procedure for the creation of JAC in 2019

The specific duties of the People's Advocate are primarily related to monitoring the drawing of lots for the election of members to the Justice Appointments Council. Pursuant to the obligation laid down in Article 284, paragraph 6 of Law no. 115/2016 "On governance institutions of the justice system" which stipulates that "*...The procedures of the lot shall be held in the presence of the People's Advocate who drafts and publishes a monitoring report on the lot procedures*", our institution drafted and disclosed four monitoring reports, respectively for the lots drawn for the Justice Appointments Councils in December 2016, December 2017, December 2018 and December 2019.³

The report on the lot drawn for 2016 does not raise issues, whereas the reports on the lots in 2017 and 2018 raise some problems. It is worth noting that the concerns raised by our institution in the 2017 lot report do not appear to have been addressed; therefore, some of the issues identified therein were included again in the report on the lot drawn in December 2018. The key problems with these lots are summarized below:

³ <https://www.avokatipopullit.gov.al/media/manager/website/reports/Raporti%20KED%202018%20.pdf>
- <https://www.avokatipopullit.gov.al/media/manager/website/reports/Raporti%20KED%202017.pdf>
- https://www.avokatipopullit.gov.al/media/manager/website/reports/Hedhja%20e%20shortit%20te%20KED-se%20Dhjetor%202019%20final_8ubA5hf.pdf

Article 179, paragraph 11 of the transitional provisions of the Constitution stipulates that *“Within five days upon entry into force of this Law⁴, the President of the Republic shall select by lot the members of the Justice Appointments Council, pursuant to Article 149/d, paragraph 3 of the Constitution.”*

Following a public discussion in August 2016 at the President’s Office with lawyers and constitutionalists and meetings of the President of the Republic with the heads of parliamentary groups, the criteria set forth in the Constitution were considered very generic and therefore there was consensus that, the establishment of the JAC would require the adoption of a law on the governing bodies of the justice system which would set more specific criteria for candidates to be included in the lot. For this reason, the provisional JAC (provided for in the transitional provisions of the Constitution) was not established under the time-limit provided for in the Constitution.

In December, upon the entry into force of the Law no. 115/2016 “On governance institutions of the justice system”, the lot was drawn to establish the JAC. This lot created the first provisional Justice Appointments Council. This Council never convened, because its Chairperson – also a member of the High Court – renounced her magistrate status and the JAC did not hold the inauguration meeting.

In December 2017, the second lot for the selection of members to the Justice Appointments Council was withdrawn. It manifested problems in two aspects: the nature of the Council, and which body was entitled to send the lists of magistrates to be included in the lot for members to this Council. This Council convened in only one meeting where it decided to draft its own Rules of Procedure [internal regulation] in cooperation with the Euralius assistance mission⁵. The Council did not further convey, because most of its members could not successfully pass the Vetting and this inhibited the smooth operation of this Council.

Meanwhile, it should be noted that vacancies for members to the Constitutional Court started to open in 2017 and that the appointment bodies had uncertainties about how and where to submit the documentation, given that the Council was not constituted.

Conditions and criteria for inclusion in the lot for the selection of members to the Council and the selection procedures set out in Article 221, paragraph 1 of Law no. 115/2016 "On governance institutions of the justice system", are strict, while paragraph 2 of this Article contains an excluding provision. Specifically, this paragraph stipulates that: *"Candidates who do not meet one of these criteria are excluded from the lot."*

⁴ Constitutional amendments were adopted by Law no. 76/2016 dated **22.7.2016**, whereas the Law no. 115/2016 “On governance bodies of the justice system” was adopted on **03.11.2016**.

⁵ EU Technical Assistance Project, EURALIUS IV “Consolidation of the Justice System in Albania”, funded by the European Commission with IPA 2013 funds for Albania

Despite this legal provision, it was not applied either to the lot drawn in December 2016, or to the lot drawn in December 2017, nor to the lot in December 2018. The application of all the criteria set out in the Law would greatly reduce candidacies – if not totally exclude all candidates in the lot – because some represented groups would not have more than one candidate who meets all the criteria.

In many cases, interpretations of the law by the Euralius Mission upon the request of the Assembly or by the Monitoring Committee on Justice Reform, or even the parliamentary Committee on Legal Affairs, Public Administration and Human Rights were made in order not to block progress of the Reform, including the establishment of the Justice Appointments Council. But, in our view, the setting of strict criteria was the clear will of the working group that drafted the Justice Reform legislation subsequently adopted by the Assembly. The interpretation of these provisions in relation to the criteria also led to an important public statement by the former US Ambassador, Mr. Donald Lu, regarding the criteria applied by the bodies that had to submit the candidate lists for the selection of members to the JAC.

The Institution of the President of the Republic found problems in the lots drawn in December 2016, December 2017 and December 2018⁶, that, in their view, incapacitated the President to conduct the lot drawing, therefore, the Assembly drew the lot in these three years, which called the JACs resulting from these lots as ‘provisional’.

The findings of our institution for all the lot procedures conducted are detailed in the Lot Monitoring Reports made public immediately after the lot. One of the main problems identifies is that **the criteria in the law governing the compilation and submission of lists were not complied and, without any explanations, restrictive criteria were applied for some bodies and represented categories and for some others not.** The fact is that the JAC – since becoming operational in 2019 - did not have the number of 9 members stipulated in law.

Article 149/d, paragraph 3 of the Constitution provides that the JAC must consist of 9 members selected by lot among judges and prosecutors against whom there is no disciplinary sanction imposed, whereas paragraph 5 of the same article refers to additional criteria in the specific law. More specifically, these criteria are defined in Article 221 of Law no. 115/2016, whereas Article 229/1 of the same law provides that participation in JAC meetings is compulsory and when members are absent, they are replaced by substitute/alternate members.

The composition of the JAC as a public collegial body consisting of 9 members is defined in Article 220 of Law no. 115/2016 “On governance institutions of the justice system” as follows: a) two judges of the Constitutional Court; b) one judge of the High Court; c) one prosecutor of the General Prosecution Office; ç) two judges of the Courts of Appeal; d) two prosecutors of the Prosecution Offices of Appeal; and dh) one judge of the Administrative Courts. The elected members of the JAC hold office for 1 year, as of 1 January of any calendar year.

⁶ Time span corresponding to the mandates of two different presidents.

Except for the members of the Constitutional Court, the other members must have enjoyed the magistrate status for a period of 10 years and the magistrate should have graduated from the School of Magistrates. These two criteria set by Law no. 115/2016 greatly reduced the number of candidates who could be nominated by the highest bodies of the justice system, such as the High Court, the General Prosecution Office, or the Prosecution Offices of Appeal, because only a few magistrates in these bodies have graduated from the School of Magistrates; this problem exists also with the High Court members who should have been magistrates for 10 years.⁷

In the view of the People's Advocate, although the cumulative criteria for candidates for members to the JAC provided by Law 115/2016 "On governing bodies of the justice system" preclude a very large category of judges and prosecutors from the right to be candidates for election to the JAC, they should have been strictly enforced by the competent institutions as long as these criteria were established in the law.

A significant issue about the JAC members was what would happen if the number of members fell below 9 for various reasons. More problematic was the scenario where the number of members would drop below 9 during the JAC activity and it would not be addressed by the notion of substitute members.

So, should the lot be drawn again during the year to fill the number of members who lose their seat at the Council for various reasons? Is the number of members more important to the architecture of the Justice Appointments Council rather than the timing of lots, both of these parameters set out in the Constitution?

Refraining from dwelling too much on these questions in this Report, we draw the attention on an interpretation made by the Euralius Mission upon the request from the Assembly, which concludes that there may be no further lots during the one-year tenure at the JAC, even if the number of members falls below 9 and the substitute members cannot meet the purpose for which they were intended. Meanwhile, no opinion has been given as to what happens when the number of members

⁷ The High Court may consist also of non-magistrate members who come from outside the judiciary and hardly meet the requirement of being magistrates for 10 years, given that the mandate of a High Court judge is 9 years. So, the senior experts who participated in drafting the Justice Reform legal package defined these criteria that clearly restrict the number of persons eligible for the lot in 2016, when the High Court had a higher number of members in office, but none of them had 10 years in office as magistrate; therefore, we conclude that imposition of such criteria for candidates to the lot coming from the High Court, General Prosecution Office and Prosecution Offices of Appeal, was intended to exclude a lot of individuals from the lot. Alternatively, if the opinion of local experts was not taken into account and the criteria were defined by the Euralius Mission experts, then it turns out that they were not fully aware of the nature of members of these bodies. In any case, we believe that the parliamentary Commission on Legal Affairs, Public Administration and Human Rights should have noticed this anomaly in defining these criteria, because this would undermine the spirit of the Constitution on selection by lot of candidates and on providing the opportunity to always have 9 members in the Council, as compared to criteria set out in the law which inevitably lead to non-application of the lot procedure due to the number of candidates who met all the criteria in the law. This phenomenon was noticed before the Vetting process started, but became more pressing with the reduction of the members in some bodies that had to be represented in the JAC following the dismissal of some magistrates by the Vetting procedure.

falls below 5, which is the minimum number needed for decision-making.⁸ Furthermore, the possibility of electing substitute members is established by law.

*In our judgment, it would have been appropriate if the lists of candidates to be included in the lot used in December of each year had been used to select the new members who would stay in office in the position of the member who lost the mandate; this would ensure the JAC membership and also reduce potential influence on the JAC.*⁹

In conclusion, we can say that the provisions of the Constitution and those of Law no. 115/2016 "On governance institutions of the justice system" were very complex and stipulated the establishment of a number of new bodies, which had to perform a virtually-impossible job under the conditions laid down by the Constitution and the law. Extended (or permissive) interpretations to circumvent certain provisions of the law cannot solve the problem of a very complex law; and the decision to give one legal clause advantage over another does not help the newly established bodies to gain the necessary trust from the public and other stakeholders who assisted in drafting the Justice Reform. On the other hand, strict adherence to these legal provisions would make it impossible to implement the reform, not only because of not-so-small small number of mutually contradictory and conflicting provisions, but also because of the time-limits set out in the Constitution and laws which proved impossible to comply with.

So, for example, Article 221, paragraph 3 of the Law no. 115/2016 "On governance institutions of the justice system" stipulates that: *"The Constitutional Court, the High Judicial Council and the High Prosecutorial Council shall, not later than November 15 of each calendar year, verify whether the candidates for members of the Justice Appointments Council meet the requirements foreseen in paragraph 1 of this article and submit the list of eligible candidates to the President of the Republic and the Assembly"*.

Given that the Constitutional Court was dysfunctional and the other two bodies (HJC and HPC) had not yet been established, even this provision was inapplicable.

The institutional position of the People's Advocate in its role as an observer of the lot-drawing procedure is that the principles of transparency, traceability and monitoring of this process set out in paragraph 9, Article 221 of Law 115/2016 "On governance institutions of the justice system", should be effective in enabling both the designation of candidates to be lotted and the lot procedure for candidates to become members. In other words, the lot procedure cannot be considered simply the procedure of extracting the winning names from the lottery boxes, but also the procedure of inserting the names in the box – i.e. the names that correctly meet the criteria set out in the law.

⁸ According to Article 229, paragraph 3 of Law no. 115/2016: *"The Council shall decide by a majority vote in the presence of at least five members"*.

⁹ For more information, see the reasons why this formula for the establishment of the Council was designed. As for the number of JAC members and their selection opportunities, see also the preliminary opinion of the Venice Commission https://venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN

3. JAC working conditions

Since the sole meeting of JAC for 2018, the High Court's infrastructure proved to be and continues to be inadequate to cover this voluminous work. Besides, it is inflexible, due to the provisions of the same Justice Reform laws to temporarily recruit staff at the level of legal advisers to handle the work for this purpose.

For the functioning of the JAC, the People's Advocate considers that it is urgent to address the High Court's capacities to facilitate this process, as well as the right of JAC members to have their workload reduced at the Courts and Prosecution Offices where they exercise their functional duties. A persistent problem will be the membership to the Council of heads of institutions such as the Chairperson of the High Court, the Chairperson of the Constitutional Court and the Prosecutor General, because their function as JAC members will be added to their already very demanding functional duties. At the moment of preparation of this report, it turns out that there are still 5 vacancies for members to the Constitutional Court to fill, so the Council's activity in 2020 is projected to be equally demanding as in 2019.

On the other hand, it is to be commended the fact that the Council of Ministers approved a special fund to reward the work of the members of the Justice Appointments Council.¹⁰ This was the first time that the Council of Ministers approved an additional fund to reward the work of members of a new Justice Reform body which is an *ad hoc* body (so, if there are vacancies) rather than a permanent one.¹¹

However, in order to ensure long-term solutions, we recommend that funds are earmarked for the recruitment of additional human resources to cope with the workload and, besides, allocate extra funds for the existing staff. Another option is to recruit staff on temporary contracts and this would require amendments to the law, because the advisors of the High Court (from whom JAC advisors come) have a designated selection procedure as they have to already have attended the relevant training/background at the School of Magistrates.¹²

On 26 July 2019, the Special Appeal Chamber ruled to dismiss from office the Chairperson of the High Court, Mr. Xhezair Zaganjori and from that moment on, the JAC Chairperson Mr. Ardian

¹⁰ DCM no. 298 dated 10.05.2019 "On an extra fund from the State budget contingency funds for the justice system, approved for the year 2019".

¹¹ Albeit the decision selectively included only the permanent members and the support staff with remuneration, the same benefits were not awarded to the members of *ad hoc commissions* for selection of members from the civil society and lawyers to the High Judicial Council or the High Prosecutorial Council, or to the members of the preliminary verification commission for the members to the Independent Qualification Commission or the Special Appeal Chamber who coped with a heavy workload in the selection of various candidates for the new institutions/bodies of the Justice Reform.

¹² Law no. 115/2016, Article 274 – "Competition, Initial and Continuous Training of Legal Advisor of Courts and Prosecution Offices: *The applicants for candidates for legal advisors of courts and prosecution offices, who fulfil the criteria set out by law, are subject to the same exam as the applicants for judges and prosecutors.*"

Dvorani is simultaneously the Chairperson in office of the High Court, because he is the last remaining judge at the High Court.

Taking into account:

- Article 230, paragraph 2 of Law no. 115/2016 which explicitly states that: *“The chairperson of the Council in cooperation with the Chairperson of the High Court, shall assign, from among the ranks of administrative staff of the High Court, a reasonable number of administrative employees to facilitate the fulfilment of Council’s tasks”*,
- the fact that the High Court had remained with only one judge and did not conduct court proceedings,

we deem that the High Court’s administrative staff could have been used more efficiently¹³ in order to prevent such situations such as: late publication of the minutes of JAC meetings conducted in 2019, as last as 11 months,¹⁴ sending the documentation of meetings to JAC members, the People’s Advocate and other guests beyond the set time-limit, etc.

Another finding of ours is that the budget issues/problems were not set forth for discussion at the JAC. Taking into account the Article 229 (*Ways of performing the activity and decision-making*) of Law no. 115/2016 which stipulates that: *“1. The Council shall perform its activity in a collegial manner in accordance with rules and procedures provided in this chapter, which shall be supplemented, to the extent possible and with the necessary changes, by the rules laid down in the legislation on the organization and functioning of collegial bodies... 3. The Council shall decide by a majority vote in the presence of at least five members”*, we suggest that the financial issues of increasing human resources and improving technical conditions *inter alia* must be discussed also with the other JAC members, in order to ensure a better functioning of this body and would avoid these issues that the JAC has had to cope with.

On the other hand, we think that the Council should set up and use a case management system, in compliance with the legal obligation set out in Article 230, paragraph 3 of Law no.115 / 2016, in order to increase the efficiency of its activity. We note the fact that this issue - which has not yet been regulated in the activity of the KED - has not been reflected as an issue in the 2019 JAC Annual Report.

In other words, even though the manual lot has been duly conducted and guaranteed in our judgment the random selection of rapporteurs to vacancies, the fact itself does not guarantee the purpose for which the reform was undertaken, i.e. to strengthen public confidence. It is clear that the perception of the public, but also of the lawmaker, is that the inviolability of the rapporteur selection procedure is guaranteed by the electronic lot.

¹³ Legal assistants, advisors, secretaries, etc.

¹⁴ Taking for granted the explanation given by the JAC Chairperson Mr. Ardian Dvorani that the delays in the publication of minutes were due to the lack of necessary staff at JAC.

To give an overview of the discrepancies between *legal provisions* and the *situation in practice*, let us focus on the lot drawing conducted by JAC to assign the rapporteurs. Article 228 of Law no. 115/2016 stipulates that: *"1. In order to conduct preliminary verification of fulfilment of the legal requirements and evaluation of professional and moral criteria of candidates, as well as their ranking, the Justice Appointments Council shall assign by lot a rapporteur for the vacancies in each institution. 2. The lot to assign a rapporteur shall be organised through case management system of the High Court. 3 Exceptionally it may be organised manually, if the electronic system fails to work. The Council shall adopt more detailed rules in order to ensure that the procedure for the assignment of the rapporteur by lot complies with the principles of transparency, traceability and monitoring of the process..."*. Meanwhile, explanations provided several times by the JAC Chairperson during the JAC meetings in 2019 indicate that it is impossible to draw electronic lots for the assignment of rapporteurs, as required by law.

So, based on an exception provided by the lawmaker allowing the manual lot, we note that the lot was drawn manually not only in 2019, but this manual lot-drawing procedure will continue also in 2020. Regardless of the circumstances that may have led to this situation (inadequate knowledge of many issues such as the logistics and technology used by the High Court, the State Budget financial opportunities, etc.) and the fact that there are no funds allocated for this legal obligation adopted and effective over four years ago to enable the electronic drawing of lots for the case management at the High Court, we think that such situations where the exceptions become general rule do not help in enhancing public confidence in the new justice institutions.

4. JAC meetings

The JAC, as a collegial body with entirely administrative functions and fully funded by the State budget, is today one of the public bodies in the Republic of Albania and as such, its activity should be subject to and strictly adhere to the principles underlying the activity of public bodies, as provided in the Administrative Procedure Code. These principles are *per se* a form of ‘transposition’ of the affirmation and protection of human rights by public bodies in conducting their administrative activity. The functional administrative affiliation of the JAC becomes clear in paragraph 1, Article 229 of Law no. 115/2016 which explicitly states that: *"The Council shall perform its activity in a collegial manner in accordance with rules and procedures provided in this chapter, which shall be supplemented, to the extent possible and with the necessary changes, by the rules laid down in the legislation on the organization and functioning of collegial bodies..."*.

The scope of activity of this collegial public body is clearly defined in Article 217 of the above-cited law which explicitly stipulates that: *"This chapter sets out principles, rules and procedures for the organisation and functioning of the Justice Appointments Council, submission of applications for members of the Constitutional Court and the High Justice Inspector; assessment*

of applications and their ranking; submission of applications for the final recruitment to the recruiting bodies."

The JAC fulfils its functions by upholding the standards of due legal process and with the goal of ensuring the highest professional and moral quality in the composition of the Constitutional Court and the High Justice Inspector institution.¹⁵

4.a. Notice for meetings

Looking at the activity of this public body, we have ascertained that the sent notices for JAC meetings in most cases were not in compliance with the time-limit set out in the legislative framework governing its activity. More specifically, Article 10/2 of the JAC Decision no. 1, dated 8.02.2019 "On the approval of the internal regulation on the functioning of the Justice Appointments Council"¹⁶ stipulates that:

"The preceding meeting of the Council shall, before its conclusion, discuss and decide, if it deems necessary, on the agenda, day and time of the subsequent meeting", whereas Article 11/1 of the same Regulation stipulates that: "Unless otherwise decided at previous meetings of the Council, the notice for convening the meeting, which shall contain the agenda, date, time of the meeting, shall be made in writing at least 5 days before the date set for it. The meeting shall be convened and announced before this deadline, if the need arises to comply with the procedures and time-limits prescribed by the law and the by-laws adopted by the Council, as well as depending on the circumstances and the nature of the matter."

Contrary to the above, we have noted that either the notices for meetings (published on the JAC's official website), or the e-mails sent by the Chairperson informing the members and other guests about the meeting, give any information about the reasons for the failure to comply with the notice deadline provided for in the Regulation approved by the JAC itself. As it turns out, the notice deadline was almost never respected.

The People's Advocate is of the opinion that the deadline between the notice and the JAC meeting cannot be formal at all, as it relates to the time needed by the JAC members and other subjects sanctioned by law to participate as guests invited by the JAC - to review the documentation and prepare for the meeting. Given that the documents pertaining to only one candidate amounted to averagely about 1,000 pages, the lack of sufficient time to examine this voluminous documentation has in some cases put the People's Advocate in a very tight spot to give a complete and professional opinion.¹⁷

¹⁵ See second paragraph, Article 218 of Law no. 115/2016.

¹⁶ Regulation approved by this JAC.

¹⁷ We recall that the Justice Reform legislation assigned a set of duties to the People's Advocate, but did not provide for either additional budget or staff.

We believe that in the same position were also the JAC members or the guests at the JAC meetings. Thus, failure to comply with this deadline has put in significant difficulty all the relevant subjects, the JAC members and the guests to these meetings, in order to fulfil the duties assigned by the Constitution and the law.

In order to guarantee a correct and objective decision-making on matters presented at the JAC meetings, it is indispensable to define at least a minimum deadline for the notification and provision of meeting documentation to the JAC members - in line with Article 6, paragraph 2 of the Law no. 8480/1999 "On the functioning of collegial bodies of the State administration and public entities", without excluding here the simultaneous notification of the People's Advocate and other guests. We reiterate this point because the participation of the People's Advocate and other guests as subjects allowed by the law - given that the JAC meetings are closed to the public - is a mechanism prescribed by the law to enhance the transparency and accountability in the JAC operations.

This concern raised by the People's Advocate at the JAC meetings was justified by the JAC Chairperson with the pressing need to establish the new institutions. As for this reason, and as we have stated at the relevant JAC meetings, our position is that we are one of the institutions that have reiterated the ultimate need of our country to have a functional Constitutional Court or the established High Justice Inspector as soon as possible, so that the Justice Reform may yield tangible results. But we do not share the opinion that due to the notification deadlines for convening JAC meetings already exceeded several times, our institution, the JAC members and other participants invited to the meetings of this public body are placed in impossible conditions to fulfil their duty due to the "limited time".

In order to clarify this issue, our institution requested information from the JAC Chairperson to understand whether the delayed delivery of documentation occurred only with our institution, or whether this was the case also with the JAC members and other guests.¹⁸

We also requested information whether the documentation was sent to other JAC members in the same form as to our institution (i.e. by mail), or whether there was any other more effective way of communication with members, or whether they studied the documents at the JAC premises.

For none of the above questions did we receive the requested information.

We also add that the documents in the files of candidates running for judges to the Constitutional Court and for High Justice Inspector (either the files brought officially to us by the JAC, or the archived files verified by the People's Advocate staff at the JAC's registrar office in March 2020), contained no printed e-mail from the communication between the Rapporteur and the JAC Chairperson.

¹⁸ We requested information about this issue, considering that if it is very difficult for an institution like ours (which can engage more than one employee to examine the documentation) to provide a reply within a very short deadline, then for a JAC member this might be an impossible mission.

Given the powers of the JAC Chairperson provided by Article 226 of Law 115/2016, we are of the opinion that these issues should be reviewed and improved during the JAC activity in 2020. However, the People's Advocate takes due account of the fact that many procedures were carried by the JAC in 2019 for the first time and in emergency conditions.

Two other issues which we recommend to be regulated under Article 228, paragraph 5 of Law 115/2016 include: a. electronic communications of the JAC; and b. communications with other institutions.

a. For the electronic communications of the JAC during 2019, the JAC asked the National Agency for Information Society (NAIS) to open electronic addresses for all the members of the 2019 JAC and some official addresses for the JAC (keshilli1@ked.go.al, keshilli2@ked.go.al, keshilli3@ked.go.al, keshilli4@ked.go.al), which according to the explanations of the JAC Chairperson were used by the JAC's support staff – advisors or secretaries. But it turns out that during 2019, the rapporteurs did not use the individual addresses made available to them by NAIS (for reasons undisclosed to us), but the communications with candidates took place from the four above addresses. Being that the communication with candidates in compliance with Article 228, paragraph 5 of Law no. 115/2016 falls clearly under the rapporteur's duties, we recommend that communication with candidates in the future is made through the designated addresses opened to rapporteurs.

b. For communications with other institutions, during 2019, all the official letters addressed to these institutions were sent by the JAC Chairperson.

Bearing in mind: b.1. the lack of registered internal communication between rapporteurs and the JAC Chairperson (both for outgoing official letters to other institutions¹⁹ and their incoming replies²⁰); b.2. the claims of one candidate for judge to the Constitutional Court that the JAC Chairperson sent official letters without the rapporteur's knowledge, we recommend that – until the internal communication between rapporteurs and the JAC Chairperson is adjusted – the outgoing official letters be drafted by the rapporteur and the cover letter by the JAC Chairperson. As for incoming replies to these official letters by other institutions, in our view, they can be forwarded by the JAC registrar office directly to the rapporteurs (in hard copy or electronically – scanned), in compliance with Article 228, paragraph 5 of Law no. 115/2016.

4.b. Participating in meetings

The Justice Appointments Council held 39 meetings in 2019. Overall, the JAC members regularly attended the meetings; in the absence of any member, the JAC Chairperson informed the other members of the absence and its cause.

¹⁹ We were not provided any document proving that official letters were drafted by the rapporteur and forwarded then to the JAC Chairperson to send them;

²⁰ We were not provided any document proving that incoming official letters were forwarded to the rapporteurs after being initialled by the JAC Chairperson, or even by the JAC registrar office.

Below the table indicating the absences of JAC members in 2019, and relevant causes as noted in the meeting minutes.

No	Date of the meeting	Member that is absent	Absence reason	Parliament representation
1	15.01.2019			General Secretary
2	21.01.2019	Eriol Rroshi	Family tragedy	General Secretary
3	28.01.2019	Arta Marku	sudden family health problems	General Secretary
4	01.02.2019	Gurali Brahimllari	for motives of appointment in trials outside Tirana	General Secretary
5	08.02.2019			General Secretary
6	15.02.2019	Fatjona Memeçaj	waiver of discussion and approval of bylaws, due to incompatibility of marital relationship with candidate A.A.	General Secretary
7	22.02.2019	Medi Bici	due to engagement in an activity of the High Justice Council, in which he exercises the function of a member	No representation
8	01.03.2019			Legal Services Director
9	08.03.2019			General Secretary
10	11.03.2019	Klodiana Veizi	Health reasons	No representation
11	18.03.2019			No representation
12	21.03.2019	Gural Brahimllari	delegation and participation in important trials outside Tirana	No representation
13	28.03.2019	Klodiana Veizi (Mema)	family health problems	
14	29.03.2019	Gural Brahimllari	compulsory participation in criminal proceedings outside the city of Tirana, according to the act of delegation of the HJC	Legal Services Director
15	02.04.2019			Legal Services Director

16	05.04.2019	Margarita Buhali replaced by Gural Brahimllari	official engagement abroad	Legal Services Director
17	10.05.2019			Legal Services Director
18	14.05.2019	Vitore Tusha and Fatjona Memçaj	Vitore Tusha commitment long ago programmed abroad, while Fatjona Memçaj only in reviewing the findings of the case according to the ranking of the candidacy of A.A. (as she is close to her family)	No representation
19	24.05.2019	Arta Marku and Fatjona Memçaj	Arta Marku due to another very important official commitment, while Fatjona Memçaj only in reviewing the findings of the case according to the ranking of the candidacy of A.A (as she is a close person of her family)	Legal Services Director
20	31.05.2019	Arta Marku	is engaged in another important official activity and if completed on time will appear to attend the meeting of the Council	Legal Services Director
21	05.06.2019	Arta Marku	due to an official engagement will join the meeting later	No representation
22	21.06.2019	Arta Marku	engaged in other official activities related to the problems of the current situation	No representation
23	17.07.2019			Legal Services Director
24	24.07.2019			No representation
25	30.07.2019			No representation
26	02.08.2019			No representation
27	06.08.2019			No representation

28	07.08.2019	Arta Marku and Margarita Buhali	for health reasons it is impossible for them to attend today's meeting	No representation
29	09.08.2019			No representation
30	03.09.2019			No representation
31	04.09.2019			No representation
32	09.09.2019			No representation
33	21.09.2019			No representation
34	22.10.2019	Vitore Tusha and Eriol Roshi	official commitments outside of Albania	Legal Services Director
35	07.11.2019	Arta Marku	announced shortly before the start of the meeting about engaging in a very important meeting with international institutions, which could not be avoided	Legal Services Director
36	02.12.2019			No representation
37	11.12.2019	Arta Marku	it is impossible for her to be present at today's meeting due to an objective obstacle that comes from a family problem, of a health nature.	No representation
38	23.12.2019	Arta Marku	for personal reasons, from the announcements made by the chairman of KED, she has not been in office these days	Legal Services Director
39	30.12.2019	Arta Marku	has not been on duty these days, so she continues to be on vacation and finds it impossible to be present at the meeting.	No representation

We consider that the JAC members selected for 2019 have shown high commitment in fulfilling the duties assigned to them by law and that absences have been an exclusion.

Finally, we conclude that absence(s) of JAC members having no substitute (e.g. Prosecutor General in the 2019 did not have a substitute) becomes even more important, because it leaves the subjects provided for in Article 220 entirely unrepresented in the JAC.

Referring to guests in the JAC meetings, it turns out that:

- all meetings were attended by the People's Advocate (as prescribed by law, in the capacity of observer in meetings and activity) and the representative of the President of the Republic.
- the representative of the Assembly's Speaker regularly attended until the vacancies of the High Justice Inspector were announced, and the other representatives attended meetings they considered appropriate.
- meetings were attended by the Chairperson or secretary of the parliamentary Committee on Legal Affairs (in its capacity as a guest) until March 2019. As indicated in the attendance table, the representatives of the Assembly did not attend most of the meetings; and, as it appears from the documentation made available to us by the JAC, there is no communication as to the reasons of their absence, but their attendance is not mandatory given their guest status.²¹

The level of participation of the institutions prescribed above has been high:

- People's Advocate attended around 95% of the JAC operations, represented by the highest hierarchy level.
- Assembly was represented by the Secretary General and in some cases by the Legal Services Director.
- The President of the Republic was represented by his legal advisor.

- As regards the JAC communication with guests, we observed that the notices of meetings were issued via the e-mail of the JAC Chairperson. Meanwhile, for communications with the Assembly, the e-mails were sent to the addresses mimoza.arbi@parlament.al and iva.seseri@parlament.al which belong to the Legal Services Director and to the legal advisor of the parliamentary Committee on Legal Affairs, Public Administration and Human Rights respectively.

From the information made available to us by the JAC, it does not appear that the Assembly's Speaker (who under Article 233, paragraph 2 of Law 115/2016 has the right to send his representative to attend JAC meetings) has authorized the sending of notices of meeting to the Legal Services Director.

Likewise, as for the meeting invitation to two members of the parliamentary Committee on Legal Affairs, Public Administration and Human Rights,²² one of whom belongs to the opposition, from the information made available to us by the JAC, it does not appear that there is any authorization to the legal advisor of this Committee to receive the meeting notices intended for these two guests.

²¹ We have raised this also in JAC meetings. In our view, it is no coincidence that the lawmaker prescribed for their participation, because several issues came out on many occasions during JAC operations in 2019, that could have been addressed with the particular intervention of the Assembly (e.g. for legislative recommendations). The Assembly must not wait for the Annual Report to raise these issues, but must make them public and take measures to address them as soon as it identifies them.

²² Invited to participate in JAC meetings pursuant to Article 233, paragraph 2 of Law 115.2016.

4.c. Meeting minutes

Being that the JAC is a public collegial body, its meetings and decision-making are documented in the minutes. In this particular case, the minutes of the JAC meetings in 2019 were taken by the secretaries who assisted in the JAC meetings. Meetings are also recorded on the audio system.

Pursuant to Article 16/2 of Law no. 8480, dated 27.5.1999 "On the functioning of collegial bodies of the State administration and public entities", it is explicitly stated that:

"Minutes shall be taken by the secretary and shall be presented for approval to all the members at the end of the meeting or at the start of the subsequent meeting. Upon approval, the minutes shall be jointly signed by the Chairperson and the secretary".

The JAC decided in Article 17 of the Decision no. 1, dated 08.02.2019 "On the approval of the internal regulation on the functioning of the Justice Appointments Council" that:

Article 17 – Taking down the minutes

1. The Council Chairperson is responsible for ensuring that the administrative staff having been made available by the High Court shall take all necessary measures to ensure that any meeting of the Council is appropriately documented through:

- a) audio recording;*
- b) meeting summarising minutes.*

2. The Council Chairperson appoints a secretary from the support staff of the High Court administration to keep the summarising minutes of the Council meeting.

3. Depending also on the nature of the matters considered at the meeting of the Council, the minutes of the meeting shall necessarily and in a summary contain:

- a) the date and time of the start and end of the meeting;*
- b) issues considered on the agenda;*
- c) members of the Council and / or substitute members that were present;*
- ç) the People's Advocate and the representatives of the invited subjects, when they were present;*

d) other subjects summoned or invited, when they are present;

dh) the procedural actions carried out at the meeting of the Council;

e) a summary of the discussion of the People's Advocate and of the invited subjects;

ë) the voting results and the decisions of the Council regarding the procedures for the verification, evaluation and ranking of the candidates;

f) the outcome of the vote on any other decision and position held during the proceedings of the Council meeting.

*4. The summarising minutes shall be sent **immediately** for consideration to the members of the Council and the substitute members present at the meeting, who shall, not later than 48 hours from the day following the notification, notify the Chairperson if they have any objection to its content. If any of the members has doubts about the accuracy of the summarising minutes, the Council Chairperson shall immediately order that the summary be compared with the audio recording and that it be amended if the member's suspicion turns out to be justified.*

5. The summarizing minutes shall be immediately sent for review to the People's Advocate and the representatives of legal subjects invited, who, no later than 48 hours following the day of notification, if they have remarks on the summary of their respective discussions, should notify the Council Chairperson, indicating at the same time the concrete inaccuracies which they consider to be in the summary of their discussion. The Chairperson of the Council shall immediately order that the summary be compared with the audio recording and that it be amended if the remark of inaccuracy in the summary of the relevant discussion turns out to be justified.

6. The summarising minutes shall be adopted at the next meeting of the Council, signed by the members and / or substitute members attending the meeting, as well as by the person in charge of holding it.

7. The summarising minutes, immediately after being signed by the members of the Council, are made public on the official website of the High Court.

8. The summarising minutes, together with the audio recording of the meeting and its full transcript, are deposited for safekeeping under the legislation in force to the archives at the office of the secretariat, protocol and archive created specifically for the Council at the High Court."

Meanwhile, according to Article 226 of Law no. 115/2016²³, the powers of the JAC Chairperson include:

“d) make sure that the meeting of the Council is recorded through the audio recording system and that a summary of the minutes of meeting of the Council is kept and published on the website of the High Court. The summary of the minutes of meeting is made available to the members of the Council before it is published. If any of the members is not satisfied with the accuracy of the summary of the minutes of the meeting, the chairperson of the council shall order comparing it to the audio recording and change it if the claims of the member are justified;

dh) make sure the documentation of the meeting of the council and the keeping of documentation in accordance with the law on archives... ”.

Although the above normative regulatory provisions are clear, the JAC Chairperson did not respect the above obligations (for transcript of minutes and consequently failure to send them) during the first 11 months of 2019. In the situation where the meeting minutes were not being sent by the JAC Chairperson, the People's Advocate officially demanded (several times verbally, but also by official letters)²⁴ to be provided with the minutes. But, the minutes of JAC meetings were not made available and we did not receive a reply.

We add that, in view of the provision made in Article 229 of Law 115/2016, which states that *“The Council shall perform its activity in a collegial manner...”*, the People's Advocate addressed the requests for meeting minutes to all members of the Justice Appointments Council. But this issue

²³ Article which provides for the powers of the chairman of the JAC

²⁴ Enclosed the official letters of the People's Advocate prot. no. 143 dated 15.03.2019 and prot. no. 534 dated 11.12.2019.

was not forwarded for discussion to the JAC members by the Chairperson of this public body for a very long time. Also, the situation becomes more worrying given the fact that the JAC Chairperson Mr. Dvorani did not give any official reply for many months, not even giving the legal reasons for the refusal.

Concerning the explanation that the JAC Chairperson verbally gave at a JAC meeting by late 2019, stating his personal opinion that he is inhibited from addressing the above requests of the People's Advocate by the provision of Article 242, letter 'c' of Law 115/2016, we are of the opinion that:

- If we were to admit for a moment that the prohibition disclosure of the discussions of JAC members is foreseen in the legislation, this prohibition should be clearly specified in the activity regulations that the 2019 JAC approved itself to govern its work.
- The fact that such a thing did not happen (nor was it proposed even after this problem was raised and the repeated requests of the People's Advocate and the President of the Republic), is a further argument showing that the JAC lacks the legal discretion to impose such a provision.

If we assume the existence of a legal obligation prohibiting the publication of discussions of the JAC members during the meetings of this public body, we note that there is a different stance by the JAC Chairperson himself in relation to this obligation. Specifically, most of the discussions of the JAC Chairperson have been published, but, if this legal restriction existed, then this restriction should have been valid for him too, since there is no legal provision giving him the right to publish/disclosure only his own discussions and not those of other JAC members.²⁵

We add that the JAC meetings during the first months of 2019 focused on the approval of its Regulations and not the discussions of candidates. So, even if for a moment we take for granted the opinion or interpretation of the JAC Chairperson for non-publication of the discussions of candidates in the summarized meetings of JAC meetings, in the case of meetings deliberating on the drafting of regulations, the discussions would not only have no legal impediment to becoming public, but would rather increase transparency and public confidence in this new public body which was adopting the basic documents of its functioning, as these discussions were principled, legal and not pertaining to individual candidates.

Regarding this issue, we would like to add that the official requests that the People's Advocate addressed to the JAC Chairperson to make the meeting minutes available, included also the request to have the audio recording of those meetings and their full transcript²⁶ (according to the JAC

²⁵ The legislation governing the JAC activity does not provide for a different provision for the JAC Chairperson as compared to the members as regards the publication of discussions in the JAC meeting minutes.

²⁶ The JAC Internal Regulation stipulates in Article 17, paragraph 8 that: *"The summarising minutes, together with the audio recording of the meeting and its full transcript, are deposited for safekeeping under the legislation in force to the archives at the office of the secretariat, protocol and archive created specifically for the Council at the High Court."*

Chairperson, the transcript required physical time, so the audio version did not need time to be processed, but just to be copied and made available). But even for this part of the request to receive audio recordings of the JAC meetings and their full transcript fell short of a reply by the JAC Chairperson.

Given the discussions made in JAC meetings in 2019 on this issue (on the meeting minutes), we wish to reiterate that **there must not be a confusion between the notion a) meeting minutes and b) summarizing meeting minutes.**

The procedure for their preparation is as follows:

- *The complete minutes of each meeting* are taken by the secretaries, transcribed by them, sent first to the JAC members and guests, and adopted by the JAC members at the start of the next meeting.
- *The summarizing meeting minutes* are drafted by the JAC Chairperson (based on the complete meeting minutes) and is sent for comments to JAC members before their publication. We note that these summarizing minutes must contain the main discussions by the JAC members in the meetings, and not only the discussions of the JAC members as was wrongly the case during 2019.

Referring to the legal rules and principles governing the functioning of collegial public bodies, the JAC members must adopt the complete minutes of each meeting, whereas the preparation of the summarizing minutes is an obligation that the lawmaker vested on the JAC Chairperson and which are not required to be signed by the JAC members (but, as mentioned above, the summarising minutes must be read beforehand by each member to check whether their discussions were summarized correctly).

As a conclusion, the only legal provision that explicitly requires the signature of the minutes by the JAC members is Article 232, paragraph 2 of Law 115/2016, which explicitly states that “*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*”, but it should be noted that this is not the minutes of each meeting, but rather a certain moment in the JAC activity.

Finally, we recall that the 2018 JAC took a different stance on the publication of meeting minutes. Specifically, the minutes of the only meeting this body held were published complete.²⁷

In conclusion of the above, we note that:

- failure to provide the JAC members with the complete minutes of meetings;

²⁷ http://www.gjykataelarte.gov.al/web/Procesverbali_i_mbledhjeve_184_1.php

- failure to provide the complete minutes of meetings to the observer (People's Advocate) or other invited guests entitled to participate in JAC meetings;²⁸
- failure to publish the summarized minutes with actions occurred during the JAC meetings;

significantly reduces the transparency of the public body - specifically JAC - below the limits defined in the law. This transparency is very restricted to even the institutions prescribed by law to participate in the meetings in order to ensure the transparency, because transparency for third parties is even more restricted in our view.

5. Drafting of the JAC's activity regulations

As for the JAC activity during 2019, it should be noted at the outset that the elected members of this public body during this year had the extraordinary burden of drafting the normative (sublegal) acts on the functioning of the body itself, and then verifying and evaluating the lists of candidates for many vacancies simultaneously. We recall that the JAC in 2017 and 2018 had failed to adopt any normative sublegal acts to this effect, for the reasons discussed above. Elected members of this public body that would exercise their activity during 2019 also had tremendous public pressure as the country was without a functioning Constitutional Court and without a High Justice Inspector, therefore the JAC started work immediately and with high responsibility.²⁹

It should also be noted that the organizational problems were not minor, not only in terms of drafting the legal acts by which the Council would operate, but also in relation to the significant workload that members would have to perform in the JAC (in and out of meetings, that is, the procedures of each rapporteur regarding the verification of each candidate). The law does not provide for the relieved workload of JAC members in their primary function, i.e. their duties as judges or prosecutors in relevant courts or prosecution offices during their tenure as JAC members. In addition, the decreasing number of magistrates in the system has further aggravated the possibility of reducing the burden on JAC members.

We wish to underline that the Euralius project provided a big assistance in drafting the JAC regulations.³⁰

²⁸ We note that there were requests even by the Albanian Helsinki Committee and the Independent Commission for the Coordination, Monitoring and Follow-up of Enforcement of the Law no. 115/2016 "On governance bodies of the justice system" to follow the JAC meetings, but these requests were rejected by the JAC Chairperson (without presenting them for decision-making to the Council, in our knowledge).

²⁹ The concern for the JAC to start its activity as soon as possible was made aware to the JAC by our official letter no. 12 dated 10.01.2019.

³⁰ An issue disclosed in the media but not examined by the JAC is also the case of a local expert engaged by the Euralius Mission (K.R.) in drafting part of the JAC regulations, who ran for member to the Constitutional Court after his engagement as expert in the same year (2019).

During the drafting of internal regulations for the functioning of this public body, an attempt was detected to limit the legal powers of the People's Advocate. Thanks to the arguments put forward by us³¹, this tendency was initially limited,³² but again some of these Regulations - in their final versions published on the JAC's official website - limited our institution's powers to attend the meetings and activities as provided by the Constitution and Law 115/2016, thereby sanctioning a further restriction of the transparency of the Council's activity (full official letter with subject: Opinion on the draft regulation: "On the organization and functioning of the Justice Appointments Council", in Annex 1 enclosed to this Report).

More specifically, the JAC adopted a regulation introducing the concept of a "*deliberation chamber*" at meetings of this administrative body, which not only is not provided for in law, but it is also - if one would refer to the theory of law - a concept used in court proceedings rather than administrative ones. Thus, according to paragraph 41 of the JAC Decision no. 4, dated 11.03.2019 "On procedure for the verification of candidates for the vacant positions in the Constitutional Court and the High Justice Inspector", it was decided that "*The discussions on the issue as well as the voting of the decision shall be made only in the presence of the members of the Council.*" This normative stipulation, besides directly limiting the powers of the People's Advocate, affects also the spirit transmitted by the lawmaker in ensuring and preserving the transparency in the entire activities of the JAC. Moreover, the final version of this regulation restricts the People's Advocate's opportunity to give opinions in Council only to any procedural violations in the verification procedure for candidates, and not concerning the merits/essence of matters or issues set forth for discussion by the rapporteurs. Obviously, the role of each stakeholder in this procedure must be to contribute in the best constructive way to reaching the common goal, i.e. the selection of the best and better qualified candidates to deliver the very important duty of member to the Constitutional Court or the High Justice Inspector. In practice, despite this limitation introduced in this regulation, the People's Advocate stated its full opinion any time it was present in the meetings pertaining to the phase of verification of formal eligibility criteria for each candidate, until the matter passed in deliberation which pertains to the verification after the reporting made by the rapporteur. Finding this provision in violation of the powers that the Constitution and the Law confer to the People's Advocate, we prepared a court complaint to challenge this sub-legal act. But, in order not to hamper the process of creation of the Constitutional Court, we waited for its lodging until completion of all processes initiated by the JAC, so that we could reflect entirely all the issues/problems that could be included in the court complaint, but also not to jeopardize the image of the justice reform. In December 2019, our institution lodged the court complaint to the Administrative Court of Appeal in Tirana, seeking the repeal of some articles in the three regulations adopted by the Justice Appointments Council³³, and this process is underway at the Court.

³¹ See the full letter with object: Opinion on the draft regulation: "On the organization and functioning of the Council of Appointments in Justice", in annex 1 attached to this Report

³² See JAC Decision no. 1 "On the approval of the internal regulation of the Justice Appointments Council".

³³ full text of the lawsuit is in Annex enclosed to this Report

6. Procedure followed by JAC to verify fulfilment of formal eligibility requirements and evaluate the candidates

6.a. Verification of the formal eligibility requirements of candidates

Following the adoption of the Regulations on the functioning of the JAC and the relevant announcements, the candidates submitted the relevant documentation. As in the process of drafting regulations, the stage of announcement and submission of documents was a procedure carried out for the first time by JAC, consequently, there were issues that provoked debate. It turned out that some candidates did not have the proper knowledge of the process and/or did not comprehend the criteria the same way as the JAC did, in particular regarding the deadline for verifying the fulfilment of the asset requirement.

Based on our findings it was noted that the strict deadlines provided by the law for this stage (particularly Article 235, paragraph 2, of Law 115/2016) as a result some of the candidates withdrew from the race, as a consequence they failed to obtain/complete the relevant documentation in time. So, the deadlines provided by law are very stringent, both for the candidates to the Constitutional Court and the High Justice Inspector, and for the institutions. More specifically, according to Article 235, paragraph 2 of Law 115/2016, the deadlines are as follows:

- a. candidates shall submit the completed forms of an asset declaration and financial interests to the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest no later than 15 days from the moment they received these forms from the JAC;
- b. the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest shall verify the accuracy and authenticity of the declarations no later than 30 days from their submission by the candidates.

From our review to the documentation submitted by 17 candidates, it reveals that these deadlines were implemented as following :

Calculation of the deadlines of the verification procedures followed by HIDAACI for the candidacies submitted to JAC

No.	Name Surname	Submission's date of the declaration to HIDAA	Completion date of the control	Duration (day)	Day out of time	Additional notes	
						Date when the 30-day deadline expires	Day of the week
1	Altin Hazizaj	23-Apr-2019	29-May-2019	36	6	23-May-2019	thursday
2	Elsa Toska	23-Apr-2019	27-May-2019	34	4	23-May-2019	thursday
3	Eris Hysi	16-Apr-2019	30-May-2019	44	14	16-May-2019	thursday
4	Dede Kasneci	24-Apr-2019	29-May-2019	35	5	24-May-2019	friday
5	Gëzim Allaraj	24-Apr-2019	29-May-2019	35	5	24-May-2019	friday

6	Mimoza Qinami	16-Apr-2019	27-May-2019	41	11	16-May-2019	thursday
7	Petrit Kaja	25-Apr-2019	29-May-2019	34	4	25-May-2019	saturday
8	Sinan Tafaj	30-Apr-2019	30-May-2019	30	0	30-May-2019	thursday
9	Valbona Bala	24-Apr-2019	27-May-2019	33	3	24-May-2019	friday
10	Vladimir Gërmenji	24-Apr-2019	29-May-2019	35	5	24-May-2019	friday
11	Zhaklina Peto	30-Apr-2019	30-May-2019	30	0	30-May-2019	thursday
12	Arta Vorpsi	24-Apr-2019	27-May-2019	33	3	24-May-2019	friday
13	Artur Metani	23-Apr-2019	28-May-2019	35	5	23-May-2019	thursday
14	Fiona Papajorgji	23-Apr-2019	27-May-2019	34	4	23-May-2019	thursday
15	Genci Gjoncaj	24-Apr-2019	30-May-2019	36	6	24-May-2019	friday
16	Klodian Rado	6-May-2019	30-May-2019	24	-6	5-Jun-2019	wednesday
17	Marsida Xhaferllari	25-Apr-2019	27-May-2019	32	2	25-May-2019	saturday
Average daily duration:				34.2 days	4.2 days		

In this view, particularly important is the provision in Article 229, paragraph 2 of the Law no. 115/2016 which explicitly states that " *The Justice Appointments Council in order to ensure the development of a transparent, public and merit-based procedure, by decision, adopt more detailed rules for the selection and scoring of candidates, including rules for the procedure of verification of assets, integrity and their professional and personal background.*"

Concerning the stage of verification of documents by the JAC, a claim raised by some candidates in court proceedings - challenging the JAC decisions that disqualify their candidacies - was the failure to comply within the 5-day deadline set out in paragraphs 26³⁴ and 48³⁵ of the Regulation

³⁴ "26. Based on the findings of the verification procedure, when the rapporteur preliminarily considers that he/she can proceed with the order on the permission or the prohibition of the candidacy, the rapporteur shall notify the verified candidate regarding the preliminary findings as well as the right to: a) submit in writing, within a 5-day time limit from the day of the notification, directly to the special office of the Council attached to the High Court or electronically, the respective opinions and explanations related to the findings of the verification procedure, as well as the necessary supporting documentation, according to the candidate's judgement; b) withdraw, accordingly, a copy of the documentation and of the acts of this administrative proceeding or the part of these acts related to the verification of the respective conditions and legal criteria, for which the rapporteur deemed preliminarily that they would cause the prohibition of the candidacy."

³⁵ "48. When, after examining the report and the acts in the file of the verified candidate, the Council concludes that it is the case to evaluate the opportunity to reject the candidacy, but the procedures stipulated in paragraphs 22 up to 27 of this Decision have not been followed in that case, the Council shall notify the organization of another meeting to review the case. The verified Candidate shall be notified on the material with the findings and the motives, which may cause the rejection of the candidacy. The candidate is entitled to submit his/her explanations in writing as well as the supporting documents, **not later than 5 days** from the day when he/she is notified on the material sent by the Council."

"On procedure for the verification of candidates for the vacant positions in the Constitutional Court and for High Justice Inspector" approved by Decision no. 4, dated 11.03.2019 of the JAC.

More precisely, the claim of some of them was that the deadline was less than 24 hours, which according to them it created difficulty in giving full explanations. As mentioned above, the materials [documentation] of the candidates made available to the People's Advocate prior to the meetings (and in any case not 5 days before the discussion in the meeting) were incomplete and one of the missing documents was the JAC communication with the candidate. In these conditions, the People's Advocate's staff after the completion of the candidates' evaluation procedure – were asked to view the full files of the candidates at the JAC's protocol office. From the inspection it revealed that only some files were archived. In the files that had been partially archived, initially we did not find the document proving the communication of the rapporteur with candidates, because according to the explanations given by the employee of this office, "the communication was done by e-mail and since the e-mails were administered by JAC advisors, they were responsible for these documents." The JAC secretariat employess (who also cover archiving) it was requested time to find these documents, as they explained that they would have to ask the JAC advisors to print out these communications from their e-mails. Given that our intention was not to ascertain a specific moment, but to ensure a long-term regulation of these issues, the People's Advocate's staff went for a second time visit to the JAC secretariat which resulted that from 5 files (for 5 candidates) for which the filing was completed, that this communication was made but the 5-day deadline was not respected; so, the right prescribed in the regulation to give the candidate the opportunity of 5 days to express their stance on the final verification outcome. Moreover, this right does not appear to have been made known to the candidates either in the official communications verified above.

The People's Advocate's staff taking into consideration the above mentioned situation started to verify this new problem (communication of advisors with candidates) and it resulted that: During 2019 in the institution of the JAC, an electronic address was opened to each member of the JAC. Meanwhile, communication with candidates to the Constitutional Court and HID is realised through other addresses, specifically: ked1@ked.gov.al; ked2@ked.gov.al, ked3@ked.gov.al. These 3 addresses are used by advisors attached to the JAC. Furthermore, from the verifications at the JAC protocol office came out that even the communications between rapporteurs and advisors attached at the JAC did not take place through the protocol office.

Pursuant to the paragraph 34³⁶ of the JAC Decision no. 4 dated 11.03.2019 *"On the procedure for verification of candidates for the vacant positions at the Constitutional Court and the High Justice Inspector"*, the day and the time when the meeting is held along with the report prepared by the

³⁶ "34. The day and the time when the meeting is held, along with the report prepared by the rapporteur, shall be notified to the verified candidate and to the subjects that are invited to participate in the meetings of the Council according to the law. The People's Advocate shall also receive the documentation prepared by the rapporteur on the actions carried out by him during the procedure followed for the verification of the candidate. This notification shall also be made public on the official webpage of the High Court in the part dedicated to the Justice Appointments Council."

rappporteur are sent to the candidate. Regardless of this procedural determination, we consider that the submission of the report prepared by the rapporteur - with the subject 'Findings in the verification procedure of candidates for the vacant positions for judge at the Constitutional Court to the relevant candidate – must not be formal.

Another legal problem identified is that there was no possibility of a direct communication of the candidate with the Council. More specifically, the communication between the candidate and the JAC is realised mainly through the rapporteur and the latter compiles the relevant report for the Council. Given that, as mentioned above, the complete documentation of the communication between the rapporteur and the candidate was not made available to us, it cannot be determined whether this document was summarized in the report.

An issue that needs to be addressed is that of the ability of candidates to act administratively. The Constitutional Court in an already consolidated practice (Decisions no. 76, dated 25.04.2002 and no. 21, dated 01.10.2008) held that: “... *Article 42/1 of the Constitution does not restrict the right of the individual to a fair legal process only in the judicial process , but also to that of an administrative disciplinary character*”. Also the same Court, by decision no. 75, dated 19.04.2002, has consolidated its interpretation regarding the meaning of fair legal process by reasoning that: “... *preliminary access of the person sought to be dismissed to the documents that make him liable, the respect of the right to be heard and to defend himself, both in giving preliminary explanations and during the examination of the case, constitute some of the basic elements that guarantee everybody the constitutional right to a fair process, as a fundamental right whose violation is considered by the Constitutional Court's case-law as a breach of Constitution*”. Although the procedure to run for member of the Constitutional Court or High Justice Inspector is not the same to disciplinary proceedings, if we consider the negative consequences on the candidate (i.e. the prohibition to candidate), the candidate should be provided with all the necessary remedies and safeguards to address potential irregularities since the administrative stage of the process. Furthermore, the provisions of the Law 218 of Law 115/2016 guarantees to candidates that their candidacies shall be examined by upholding the standards of a fair legal process. From this point of view, the candidate's opportunity to know the rapporteur's final position and to express his opinion on it, is a right that must be guaranteed in this procedure. It turns out that all the candidates were notified the relevant acts considered in the audit conducted by the HIDAACI as the institution that makes the first assessment of this criterion, and they were given the opportunity to express their opinion on this criterion, but, on the other hand, the candidates were not informed about the rapporteur's final stance after the provided explanations and were deprived of the opportunity to refute these findings by further evidence.³⁷

³⁷ For further information, see the findings related to the content of reports.

6.b. Evaluation of candidates

On 10 September 2019, our institution was informed through the media that the Justice Appointments Council had evaluated the candidates eligible to run for the vacancies at the Constitutional Court.

In the absence of an official notification to the People's Advocate for such a meeting,³⁸ we verified this information at the official website of the Justice Appointments Council, which concluded that the section "Media and Public Announcements" did not contain a notification for a JAC meeting with the subject *Evaluation of candidates eligible to run for the vacancies at the Constitutional Court* (from the publication on the JAC website, it resulted that the last meeting of JAC had been that of 09.09.2019, which had another object).

The only information related to this topic (i.e. the evaluation of the candidates eligible to run for the vacancies at the Constitutional Court) was a Press Release published by the High Court's Press Office with the date 10.09.2019. Through this announcement published on the JAC's online website, we became aware of the fact, expressly quoting that: *"The Justice Appointments Council (JAC), following the evaluation procedures for candidates eligible for the vacancies at the Constitutional Court, pursuant to Article shall make public the preliminary scoring for each candidate as follows: ... "*

From this press release, but also from the lack of notice about a meeting with this topic, it was unclear to our institution whether the JAC convened to score the candidates for vacancies at the Constitutional Courtband, if yes, when?

In view of the above, our institution in accordance with Article 179/11 of the Constitution of the Republic of Albania, as well as paragraph 1, Article 233 of Law no. 115/2016 "On governance institutions of the justice system", asked information from the JAC³⁹ about the following:

1. How did the JAC proceed in scoring the candidates for the vacancies at the Constitution Court – through the meeting or by another procedure?
2. If it was based on the meeting:
 - a. points were awarded in a single meeting or several meetings?
 - b. were the JAC members notified of the meeting as provided for in the provisions of Article 11 of the Internal Regulation "On the functioning of the Justice Appointments Council" (approved by the JAC Decision no. 1, dated 08.02.2019)?

Also, based on the above-cited legislation (Article 179/11 of the Constitution of the Republic of Albania and Article 233 of Law no. 15/2016 "On governance institutions of the justice system"),

³⁸ We inform that a day earlier, on 09.09.2019, our institution participated in the next meeting of the JAC, but neither in line with Article 10/2 of the Internal Regulation "On the functioning of the Justice Appointments Council" (approved by JAC Decision no. 1 dated 08.02.2019) by which *"The preceding meeting of the Council shall, before its conclusion, discuss and decide, if it deems necessary, on the agenda, day and time of the subsequent meeting"*, it was decided for the subsequent meeting.

³⁹ See in the annex attached to this Report our letter no. 398 prot., Dated 13.09.2019

but also on specific legislation defining the mandate and the activity of our institution (Article 63, paragraph 4 of the Constitution and Law no. 8454 dated 04.02.1999 “On the People's Advocate”, as amended), the People's Advocate requested a copy of all the available documentation exhausting the above questions (including the minutes of the meeting with the subject: Evaluation of candidates eligible for the vacancies at the Constitutional Court).

Although our request was clear and did not require the preparation of any particular materials or any voluminous efforts, **we received no response from the JAC Chairperson.**

In these circumstances, as well as appreciating the importance of the issue, our institution informed the Speaker of the Assembly and the President of the Republic of Albania about this situation.⁴⁰

On 21 September 2019 (Saturday), based on a notification issued only a day before,⁴¹ the Council held the next meeting with the following agenda:

- 1. Discuss and approve the Final Ranking Lists of Candidates for 4 vacancies at the Constitutional Court and the relevant reports in this ranking;*
- 2. Announcement of the beginning of the procedure for the verification of candidates running for the vacancy to the Constitutional Court, temporary vacancy announced by the Assembly on 21.08.2019, and conduct the lot procedure to assign the rapporteur of this vacancy;*
- 3. Discuss on the progress of the verification procedure for candidates and the number of remaining candidates for the temporary vacancy at the Constitutional Court announced by the Decree no. 10723 dated 07.02.2018 of the President of the Republic”.*

As mentioned above, prior to 20.09.2019, the People's Advocate and nor the candidates or the general public were notified of any meetings in which the evaluation and scoring of candidates to the Constitutional Court took place.

Likewise, the JAC's official website did not indicate that any such meeting was held (i.e. with the agenda being the evaluation and scoring of candidates), nor was there any notice of this institution for any scheduled meeting.

The only notice on the JAC website on this matter is the one mentioned above (dated 10.09.2019), which publicly disclosed the preliminary result of the scoring. **So, from the documentation published by JAC, it turns out that there was no special meeting for the evaluation and scoring of the candidates.** The foregoing is incomprehensible as to how the preliminary result of the scoring for candidates can be made public (notice dated 10.09.2019), as long as there were no meetings held on this matter. We would like to add that from 10.09.2019 until 21.09.2019 there was no notice to the public, or even to our institution as an actively legitimated participant in the JAC meetings and activity, that would ensure the principle of transparency set out in the Constitution and in the Law 115/2016.

⁴⁰ See in the annex attached to this Report, our letter no. 403 prot., Dated 16.09.2019.

⁴¹ Enclosed to the notice were also the materials consisting of many documents.

Going back to the meeting of 21.09.2019, we presented all the problems we identified about the nature of decision-making and the legal arguments about the fact that the sent lists with insufficient number of candidates were provoking significant anomalies. Besides, from our point of view the sent documentation (reports) were not properly drafted. Specifically, the candidates were divided artificially, with a line was drawn below the third name, which we find incorrect. There were also relevant decisions, certainly after the People's Advocate and other guests were tell to leave the meeting. The acts prepared to that date - as clearly evident - lack of any reasoning for such ranking, which is an obligation explicitly stated in the law. JAC decisions on these matters are public and must include the relevant scoring and the lists of ranked candidates sent by the JAC, so, not only the list of the winning candidates. This meeting – after the People's Advocate and other guests left due to the transition in the 'deliberation chamber', proceeded with the adoption of the relevant acts, in accordance with the notice of this meeting. There was no summary list with the final score of candidates – either in the meeting materials or during the meeting, but it was stated that these would be fully published in the following days.

After that meeting, there was no further public announcement about the completion of the procedure, i.e. the sending of lists to the appointment bodies. On the other hand, there was no explanation for their drafting and submission in the manner provided by law, namely enabling the appointment bodies to the highest extent possible to choose among several candidates in order to discard any suspicions that the Justice Appointments Council was pre-determining the members to the Constitutional Court beyond its powers. So, to quash suspicions that it was limiting the choice between at least 3 first-listed candidates - and the inability to make two lists as required by law where there is more than one vacancy (specifically a list with magistrate candidates and a list with non-magistrate candidates).

Notwithstanding the foregoing, there was no public notification or explanations on the reasons of sending them at different times - as part of an administrative procedure carried out by the Chairperson of the Council without a required decision-making of the Council for this matter. Despite our institution's request to tell us the reason for this action,⁴² which diminished the ability of the appointment bodies to have greater choice among candidates, we have received no response so far.

Another issue is related to the reasoned assessment act that were not published before the meetings where the review of the candidates.

It is worth noting that publicly disclosing the evaluation made to each candidate by each member of the Council is a decision that must be appreciated and contributes to the accountable decision-making and ensures the transparency of this part of the process to a satisfactory degree. We emphasize that the evaluation methodology - as a guiding act adopted by the Council - constitutes an important basis to apply the same criteria to all candidates. However, an analysis could be useful in cases where scoring by some JAC members for certain candidates were essentially

⁴² Enclosed our official letters addressed to the JAC Chairperson and the Assembly's Speaker.

disproportionate in values. Albeit a sporadic case, we think it is worth making a broader analysis of these elements, as this is the only way by which the Council will essentially guarantee the purpose for which it is established as an *ad hoc* constitutional body, namely to ensure the highest professional and moral criteria of candidates. For sure, Council members should have discretion in their evaluation of different candidates, but they must use the same standards of evaluation across all candidates - to ensure public confidence in these bodies, and furthermore, must provide exhaustive reasoning on their essentially disproportionate evaluations. If the decisions have had a level of reasoning regarding the disproportionate evaluations by some JAC members of some candidates, we find that the same standard was not applied in at least two cases in the evaluation of 2 candidates on same grounds. Obviously, our finding is based on the reading of acts and materials made available to the People's Advocate and/or made public in the official website of the JAC.

Despite the hard work and dedication of all the JAC members, other participants in the meeting, but also of the legal advisers and the JAC secretariat, it could not carry out a flawless process for the selection of the members to the Constitutional Court. For all participants in this process, there is no explanation of any kind (neither public nor in meetings without the presence of third parties), what caused the submission of the final lists to the appointment bodies by the JAC Chairperson many days after 21.09.2019 (after 15 days later to the President of the Republic and 21 days later to the Assembly of the Republic of Albania). Moreover, both vacancies of the Assembly had fewer candidates on the list than those of the President of the Republic and each candidate on the Assembly's lists was also on those of the President. So, the undisputed fact is that there were the same listed documents and the same reasoned decisions, therefore, there is no objective reason to explain why the lists were sent to the Assembly 6 days late compared to those sent to the President of the Republic.

In any case, there is no public explanation or an answer to this question, neither to the direct question that the People's Advocate addressed to the JAC Chairperson at the meeting of 06.11.2019.⁴³ This was the first meeting of the JAC, convened for a letter from the President of the Republic (there were no meetings on all positions or other requests of the President of the Republic) and the Council's position as a collegial body can be verified in the public statement issued afterwards, as even these final discussions took place without the participation of the People's Advocate or other guests – although it was neither a verification procedure nor a scoring procedure requiring participants to leave the meeting so that a decision could be made. The audio-recorded minutes may indicate the entire positions of the Council or the issues raised for discussion. There is no matter for discussion related to decision-making on procedures, or to accepting or rejecting the eventual decisions of the President or other bodies, or a position on the weight of the Council's decision-making or publication of these decisions by another body, except that sanctioned in the law. If such decisions or matters were made or discussed, our institution has not been disclosed.

⁴³ Convened by the JAC Chairperson the day before, with the agenda: "Discussion on the positions of the President of the Republic concerning the filling of vacancies at the High Court".

Another issue identified by us was a candidate to the Constitutional Court running for several vacancies simultaneously. Given the problem that arose in practice, we think that such a situation needs to be better legally regulated.

7. Various issues identified in the 2019 JAC activity

7.1. JAC transparency

7.1.a. Issues related to documents compiled by JAC

(7.1.a.1. Report and 7.1.a.2. Decision)

- 7.1.a.1. Report

In our view, the structure of Reports is not entirely in line with all the requirements laid down by law - despite the very good work done by the Council in this regard. Specifically, the Report, despite being structured in 3 parts (A. verification procedure, B. Findings in the verification procedure, C. Matters for consideration at the JAC meeting), but the Findings section (analysis) leaves a lot to desired.

So, the rapporteur merely presents to the Council a summary of the procedural steps performed and a summary of the documentation collected, but lacks the analysis, reasoning or necessary evaluation by the rapporteur, and does not reach conclusions if the candidate meets the relevant criteria provided by the law based on the submitted documentation.

In our judgement, Article 228 of Law 115/2016 mentions several times the concept of evaluation as follows: “*1. In order to conduct preliminary **verification of fulfilment of the legal requirements and evaluation of professional and moral criteria** of candidates, as well as their ranking, the Justice Appointments Council shall assign by lot a rapporteur for the vacancies in each institution... 5. The rapporteur, in order to conduct the procedure of verification, assessment and ranking, shall perform the following tasks: a) review and **verify** documentation filed by candidates...*”.

As long as the law requires **evaluation** and **verification**, in our opinion, the Rapporteur should make an analysis whether the eligibility criteria are met or not, but also an analysis of the findings, and come up with a conclusion in terms of the logic of the law. Reports cannot simply be a total of information received and a formal transmission of gathered information or actions performed by a rapporteur. In cases where the verification process identifies issues, the candidate should be made aware and given the opportunity to clarify the noted issues, not only by HIDAA or CISD, but also for the rapporteur's final stance on these findings and other potential findings of the rapporteur so that the candidate is given the opportunity to present additional documents but also to defend his position with regard to the final position of the rapporteur and/or the Council. The spirit envisaged by the regulation to enable the candidate to express his/her opinion on the final findings of the

rappporteur and/or the Council when the latter had other or different findings - has not been respected in practice and this practice should be improved in the future, particularly so given that the law restricts the candidate's right to appeal against JAC decisions related to the verification stage only to serious procedural grounds.

The People's Advocate acknowledges the voluminous work done by the entire JAC in 2019 for the issuance of normative sub-legal acts governing the exercise of its functional powers and the conduct of a number of procedures, as well as the issuance of nominal acts in examining each candidacy for members to the Constitutional Court or High Justice Inspector. But it is also worth noting that this activity must at all instances and at all times respect the standards of fair legal process, and uphold the highest standards of observing and protecting the legitimate rights and individual freedoms in administrative proceedings conducted by this public body. This takes more importance because of the closed nature of the process and the limited opportunity that candidates have to exercise their right to appeal. Compliance with all these elements would increase confidence in a flawless process and would prove beyond any doubt the purpose of the creation of the JAC as expressed in the law: ensure the highest professional and moral quality in the composition of the Constitutional Court and in the appointment of the High Justice Inspector.

The missing analysis in the Report also violates the rights of the candidates, as they have the right to know the specific reasons why they are denied from the candidacy (i.e. the candidate will not oppose the act or omission of the rapporteur, but rather its content/conclusion).

This shortcoming does not guarantee the application of the principles on which the JAC body should operate and the process of verifying the fulfilment of legal requirements and the evaluation of professional and moral criteria of candidates for members to the Constitutional Court and for the High Justice Inspector.

The lack of analysis by the rapporteur in the Report coupled with the fact that our institution was excluded from further part in the process (i.e. in deliberations on fulfilment of requirements by candidates) following the Decision no. 4, dated 11.03.2019 of the Justice Appointments Council "On the procedure for verification of candidates for the vacant positions at the Constitutional Court and the High Justice Inspector", not only reduces the level of transparency, but makes it very difficult for the People's Advocate to deliver the duties conferred to it by the Constitution and Law no. 115/2016.

- **7.1.a.2. Decision**

The reports of the rapporteur on the verification of the eligibility criteria and/or the evaluation report of the rapporteurs elaborate in detail the procedural steps taken by the rapporteur, but do not contain an analysis on the relevant findings. In any case, we think that reasoning of decisions and/or reports would increase the transparency of the decision-making of the JAC whose main form of communication with the public is the decisions.

7.1.b. Incomplete information presented in JAC Decisions

From our analysis of the JAC decisions on the eligibility of candidates, we note that not everything that happened during the process is reflected therein. Specifically, **the fact that the People's Advocate is excluded from the activity of the JAC - under provisions introduced in the internal regulations of this public body - is not reflected in the JAC decisions.** The introductory part of all the JAC decisions states that the People's Advocate has been present; the reasoning part states the opinions given by the People's Advocate on the matter in question, but there is no mention in these Decisions of the fact that **the People's Advocate was not present in the deliberation on issues about candidates, or in the moment of voting.**⁴⁴ Normally, given that the main stages of this process are held in 'deliberation chamber' and without the presence of candidates, the Decision must present the facts fully and correctly.

7.1.c. Omission of discussions of JAC members from the summary minutes of JAC meetings.

Recognising the importance of presenting the work of a public body and the transparency to the general public, the People's Advocate maintains that the summary minutes of JAC meetings must not contain only the opinions/discussions of the JAC Chairperson, but also those of the JAC members, the permanent observer so, that of the People's Advocate) and other guests (generally representatives of the institution of the President of the Republic of Albania), as has been the case so far.

Omission of the opinions/discussions of the JAC members from the summary minutes of the JAC meetings and their non-publication, not only does not serve the purpose envisaged by the lawmaker for the widest possible transparency of the activity of this public collegial body, but means that the summary minutes do not accurately reflect what really happens in this activity.

In the end, the State interest in this case is the transparency of the process, which is a constitutional notion emphasized in all appointment procedures for high constitutional officials, as well as in the transitional re-evaluation procedures for judges and prosecutors as part of the Justice Reform process.

7.2 Other issues found in the JAC activity during 2019:

7.2.a. Missing check list (inventory) of documents and incomplete documentation sent to the People's Advocate

⁴⁴ Due to the provision in the JAC Regulation no. 4 on verification procedure of candidates, explained in this report.

The specific role and active participation of the People's Advocate in the entire activity of JAC is affirmed by the Constitution in the provisions of Law no. 115/2016 "On governance institutions of the justice system", and the normative sub-legal acts issued by JAC in the course of its activity. Specifically, paragraph 34 of JAC Decision no. 4 dated 11.03.2019 states explicitly that "*The People's Advocate shall also receive the documentation prepared by the rapporteur on the actions carried out by him during the procedure followed for the verification of the candidate.*" This JAC obligation subsequently recognized as the right of the People's Advocate stems from all rights vested on the People's Advocate by the Constitution and law in observing the activity of this public body. On such basis, paragraph 35 of JAC Decision no. 4 dated 11.03.2019 states that "*The members shall participate in the meeting of the Council. Also, the People's Advocate and the representatives of the subjects, who are invited according to the law...*".

Despite such JAC obligation towards the People's Advocate, we noted during processes conducted by this public body in 2019 for the examination of the candidacies for members to the Constitutional Court and High Justice Inspector that:

- None of the nominal files of candidates for the vacancies at the Constitutional Court and High Justice Inspector sent to the People's Advocate had an inventory (check list) of submitted documents. The absence of this list is important during the verification process of files sent from the JAC to the People's Advocate, because it does not give certainty or assurances about the number of acts administered by the Rapporteur during his/her preliminary procedure, and does not confirm the number of documents that form part of the candidate's file.
- The documentation sent was incomplete, which made it significantly difficult to create an objective and accurate opinion on the procedures followed by the JAC and also made it impossible for the People's Advocate to provide an exhaustive opinion on the fulfilment of the criteria - set by the legislation in force - by each candidate. This concern has been constantly raised by the People's Advocate at the JAC meetings.⁴⁵

In addition, from our monitoring it resulted that the files sent by Rapporteurs to the Council never included a check-list of all the materials contained in the file.

However, our assessment of the procedural steps followed by the JAC in examining each candidate for member to the Constitutional Court and High Justice Inspector, taken into consideration by the part of the JAC is based as far as possible on the documents provided to us by this public body.⁴⁶

⁴⁵ The accompanying documents enclosed to this Report with official letters addressed to the JAC with the subject of giving an opinion on some meetings (on 26.07.2019, 29.07.2019, 30.07.2019, 11.12.2019), provide a complete overview of the documents that were not provided to us.

⁴⁶ In order to facilitate the JAC activity, given the experience that our institution has gained in the course of the Justice Reform (i.e. during examination of documentation of candidates for members to the IQC and SAC), we recommended to JAC to use a points/score table for ease of work, based on provisions of the law, but this recommendation was ignored. Nevertheless, we identified the documents received for each candidate, based on which we gave our opinion in each case.

These deficiencies displayed in the JAC work and activity in relation to the stipulated legal relations it must have with the People's Advocate, were detrimental to our exercise of powers during the JAC activity and fall short of complying with the constitutional principle of loyalty in the relations between these two public bodies.

7.2.b. Unification of procedure by JAC when HIDAACI renders a decision for candidates

During the examination of the documentation of candidates for the Constitutional Court or High Justice Inspector that the People's Advocate received from the JAC, it resulted that HIDAACI rendered a negative decision for 11 of them, in terms of their declaration of assets and conflict of interest.

Given that the Reports prepared by Rapporteurs gave no information on what actions they took – in exercising their legal duties – upon receiving this information from HIDAACI, the People's Advocate addressed the following questions to the JAC:

1. Should the Rapporteur make the assessment in these cases, or it simply presents this information in the Report prepared for the JAC members?
2. If the Rapporteur does not make an assessment abovementioned but forwards the case to the JAC, what actions does the JAC take after receiving the objections / submissions of the scrutinized candidate.⁴⁷
 - a. JAC resends the case for opinion to HIDAACI ?
 - b. JAC assigns an expert to examine the candidate's objections?

Referring to the practice of the Independent Qualification Commission (another important public body established in accordance with the adopted Justice Reform legislation) which frequently modified the HIDAACI decisions in its final rulings, we raised another question at JAC meetings: if HIDAACI renders a positive decision, will the JAC inquire further or shall it take for granted the positive decisions, and will inquire only into the negative evaluations of this public body?

7.2.c. People's Advocate's position on the progress of examination of candidates for members to the High Court and High Justice Inspector who had not successfully passed the transitional re-evaluation process for judges and prosecutors in the Republic of Albania

The JAC meeting dated 24.07.2019 was intended to examine candidates who had not completed the transitional re-evaluation process for judges and prosecutors in the Republic of Albania.

Specifically, the examination process would include:

- candidates with positive ruling by the Independent Qualification Commission but appealed by the Public Commissioner at the Special Appeal Chamber with the latter having not yet rendered a decision;

⁴⁷ We remind that JAC provided the HIDAACI documents to each candidate and they gave written explanations.

- a candidate with positive ruling by the Independent Qualification Commission but the time-limit for appeal by the Public Commissioner not yet expired because the meeting took place within this appeal time-limit that could be exercised by the Public Commissioner to appeal the IQC decision.

The People's Advocate's position – considering the issue ascertained in this case – was to suspend the examination process for these candidates and revise the paragraph 112 of the JAC Decision no. 4 dated 11.03.2019. This attitude is based on as follows:

1. Article 7/a of Law no. 8577/2000 "On the organization and functioning of the Constitutional Court in the Republic of Albania", as amended, stipulates that: "*1. Member of the Constitutional Court can be elected the Albanian citizen meeting the following conditions: ... dh) Having **successfully passed the process of auditing and verification of his/her personal assets and those of the family members, in accordance with the law** ". Since this law uses the term *process of auditing* to refer to criteria that a candidate must meet to become a member of the Constitutional Court, then, in our view, this terminology means the successful passing of the transitional re-evaluation process at both instances, i.e. the Independent Qualification Commission and the Special Appeal Chamber.*

2. The Public Commissioner's appeal is a procedural act that from our point of view must be reflected in the JAC's examination of candidates - and must trigger the suspension of this examination. We draw the attention on the fact that during the discussions at the JAC meetings (on the adoption of draft regulations of JAC), it was emphasized that JAC verification of the integrity and moral background of candidates would take into account public complaints by citizens against these candidates. Moreover, appeals filed by the Public Commissioner represent a procedural act performed by an important public body in the course of verification of the background of judges and prosecutors in the Republic of Albania, therefore, this fact cannot be circumvented and even less be downgraded.

Our assessment is also based on the fact that the Special Appeal Chamber has overturned almost every decision appealed by the Public Commissioner, hence the positive decisions of the Independent Qualification Commission based entirely on the initiation of the process of re-evaluation of this decision through the appeal filed by the Public Commissioner. For this reason, we maintain that the JAC must not propose candidates for vacancies in appointment bodies as long as these candidates have not yet completed the vetting process, as provided by law. If it acts otherwise, then it might provoke consequences even to the processes conducted by the JAC and not only. Such approach was followed also by other important bodies in the Justice Reform, such as the High Prosecutorial Council, during the examination of candidates in similar procedures.⁴⁸ Our position seeks to ensure compliance with effective legal provisions for a fair legal process in the administrative sphere, as well as ensure the public confidence in the JAC and correct selection procedures for candidates who fully meet the legal criteria to become members of the Constitutional Court and High Justice Inspector.

For all these reasons, the People's Advocate proposed to JAC to suspend the examination of candidacies found in these conditions at the JAC meeting dated 27.07.2019, and also recommended the revision of paragraph 112 of the JAC Decision no. 4 dated 11.03.2019 "On procedure for the verification of candidates for the vacant positions in the Constitutional Court and for High Justice Inspector". The People's Advocate also demanded that in the framework of the institutional cooperation the candidates for the Constitutional Court be confirmed with priority by the Independent Qualification Commission and Special Appeal Chamber.

Specifically, paragraph 112 of the JAC Decision no. 4 dated 11.03.2019 explicitly stipulates that: *"The verification procedures on the candidacies for the vacancies cannot finish before the Independent Qualification Commission has issued a decision regarding the candidate magistrates and the assesseses, pursuant to law no. 84/2016"*.

This assessment was disregarded by the JAC, despite our insistence. However, the following months showed that the JAC's failure to suspend the examination process in the case of candidate B.M. (who was qualified by the JAC, subsequently appointed by the President of the Republic of Albania and ultimately dismissed from office by the Special Appeal Chamber) proved that not only

⁴⁸ <http://klp.al/2019/07/16/keshilli-i-larte-i-prokurorise-shpall-listen-me-15-prokurore-per-spak-lista/>

it was not time-saving in filling the vacancy, but the process had to start from the beginning after the vacancy created by the dismissal of the candidate Mr. B.M.

7.2.d. People's Advocate's position on mechanisms used by JAC to verify some criteria

- **7.2.d.1.** For the verification of the fulfilment of the legal eligibility criteria by candidates at the moment of candidacy, provided in paragraph 5, Article 125 of the Constitution and Article 7a, paragraph 1c of Law no. 8577/2000 “On the organization and functioning of the Constitutional Court in the Republic of Albania”, as amended, according to which, “*having assumed no political functions in the public administration and having assumed no leadership positions in political parties during the past 10 years from the date of application*”, it turns out that the JAC addressed a request for information to the Central Election Commission and later to some political parties. Regarding this procedure followed by the JAC, we find that the formulation of this request is incomplete, because:
 - a. The JAC request extended over a limited period (earliest reference time were the last parliamentary elections; this is a very short time-span compared to the 10-year tenure provided by law).
 - b. The JAC request was limited to parliamentary elections leaving the local elections out of the verification while the law does not make such an exception.
 - c. The CEC is not the only body where this information can be found and obtained, as more complete and exhaustive information is needed. The CEC has registered only those political parties that registered for elections and not all existing political parties, regardless whether they enter the elections or not.
- **7.2.d.2.** For the verification of the fulfilment of the legal criteria of candidates related to verification and check of integrity pursuant to letter 'ç' of Article 7a, Law no. 8577/2000, Article 236 of Law no. 115/2016 and paragraph 82 of the JAC Decision no. 4 dated 11.03.2019 “On procedure for the verification of candidates for the vacant positions in the Constitutional Court and for High Justice Inspector”, the JAC requested the General Prosecution Office to conduct this preliminary verification. Reply from the General Prosecution Office - in cases where it responded by a decision, it resulted that the verification focused only on the criminal records of the candidate(s) within the territory of the Republic of Albania. Noting that some candidates had been living for long periods abroad (e.g. 5 years or 8 years), we recommended to the JAC to conduct more in-depth inquiries, by checking their criminal records also from the countries where they lived in the relevant periods (self-declared by them).

- **7.2.d.3.** For the verification of the legal condition to be fulfilled by the candidates for the High Justice Inspector, for not being a collaborator, informant or agent of the intelligence services, provided for in Article 199, paragraph 1, letter 'e' of Law no. 115/2016, it resulted that the JAC requested information from the State Intelligence Service. However, the reports prepared by the rapporteurs on a case-by-case basis failed to prove information as to whether the State Intelligence Service had replied to the JAC for this purpose. In view of the above, we recommended that JAC should wait for the SIS reply before proceeding with review procedures. This recommendation was not taken into consideration.

During our discussions on this matter, the JAC Chairperson claimed that he could not impart this information obtained from SIS, and that this information was obtained through CISD. Regarding this claim, we stated that it remained unclear who had unified this procedure, as this issue was never set forth for discussion in any JAC meeting and, moreover, this matter is not regulated in any of the Regulations governing the JAC activity.

It remains unclear whether this was a decision-making taken by the Rapporteur or the JAC Chairperson; whichever the case, this fact should have been reflected in the Reports prepared by the Rapporteurs, but this does not seem the case.

In our view, the JAC did not receive any reply from the State institutions addressed to verify this legal criterion. In these circumstances, such a fact should have been stated in both the Rapporteur's Reports and the JAC final decision on each candidacy examined. Not only this is missing in the Reports and Decisions drafted by the JAC in 2019, but this issue was not even raised as a concern in the JAC 2019 Activity Report.

7.2.e. Court proceedings

During 2019, following the issuance of JAC decisions in conclusion of the examination process for candidates running for members to the Constitutional Court and the High Justice Inspector, some candidates (9 of them) appealed the JAC decision to disqualify them at the Administrative Court of Appeal in Tirana. We appreciate the fact that the JAC remained for the outcome of the administrative litigation to proceed with other procedures and we also appreciate that the candidates were given an effective opportunity to pursue the proceedings *prima facie*.

The initiated Court proceedings based on these complaints were monitored by the People's Advocate. It should be emphasized that in some of the lawsuits filed in the court, the People's Advocate was summoned in litigation in the capacity of 'interested party'.

In the end, only one of the lawsuits filed (separated in two lawsuits) was admitted, whereas the other lawsuits were rejected. This fact is reflected on page 14 of the JAC 2019 Annual Report, but it does not infer whether legal measures were taken against the civil servants responsible for this

situation and, above all, whether measures were taken to avoid recurrence of similar situations in the future.

It is worth noting that the court appeal by candidates for members to the Constitutional Court or High Justice Inspector, is *atypical* compared to other court proceedings.⁴⁹ This is because of the reasons: (i) the short deadline for filing an appeal (appeal must be filed within 5 days, while adjudication must end within 7 days); (ii) the subject of lawsuit (candidates may complain only for serious procedural violations, whereas, given that JAC is an administrative/public body, there should be more safeguards for the candidates); and (iii) non-triggering of the suspension mechanism (paragraph 3 of the above cited Article 238). The appeal process formulated under the above conditions, may be an inhibitor to candidates who would be interested to apply. It appears that the appointment bodies did not have sufficient candidates for the vacancies and these restrictions further reduced the number of candidates. Judicial review of these decisions is also expected to be incomplete.

7.2.ë. Assignment of external experts

We have found a double standard in the procedures followed by the JAC in assigning external experts. If we compare the procedures of assigning experts to examine the fulfilment of legal criteria by a candidate for the Constitutional Court and the assignment of experts to review the fulfilment of legal criteria by candidates for the High Justice Inspector, it turns out that:

- In the assignment of experts for the asset assessment, two rapporteurs took a decision on 19.07.2019 on the need to assign an accounting expert and a statutory auditor, and on 24.07.2019 addressed a proposal to the Council for the assignment.
- Meanwhile, in the case of assigning the expert who would test the candidates for the High Justice Inspector for the foreign language, there was no documentation available on how he was selected. However, the verbal explanations of the JAC Chairperson at one JAC meeting indicated that he himself had contacted an expert for this purpose.

Based on Article 70 of the JAC Decision no. 4 dated 11.03.2019 "On the procedure for the verification of candidates for the vacant positions at the Constitutional Court and the High Justice Inspector" which stipulates that "*Experts shall be selected from the updated lists of the subjects licensed in the respective field by the competent body according to the law, or among those who*

⁴⁹ Article 238 of Law 115/2016: "Complaints against disqualification decisions".

1. Appeals against decisions on the disqualification of candidates only for serious procedural infringements shall be addressed to the Administrative Court of Appeal not later than 5 days from the day of the announcement of the contested decision.

2. The Administrative Court of Appeal shall decide within 7 days from the day of submission of the complaint. Its decision is final and irrevocable.

3. The appeal does not suspend the preliminary evaluation and preliminary verification conducted by the Justice Appointments Council under Article 240 of this law.

exercise the activity in specialized institutions...”, we believe that the same rules must be applied even by other State institutions to obtain such service.⁵⁰

Furthermore, for the unification of this administrative practice, this matter should be decided beforehand by the Council and not the Rapporteurs.

Based on paragraph 71 of the JAC Decision no. 4 dated 11.03.2019 which states that *"The experts shall be assigned by the Council, upon the proposals submitted by the member, rapporteur of the vacancy. ..."*, we maintain that it must be Council and not the Rapporteurs to select the expert.

According to paragraph 71 cited above, the rapporteur presents the request for the need to assign an expert and the tasks he must perform, while the selection and appointment of the expert must be made by the Council. This is also due to the fact that the Council is the public body that will assess the candidate and in this evaluation procedure the Council is not bound by the conclusions/facts reported by the rapporteur. To have an objective examination and decision-making, the JAC has the legal opportunity and should administratively investigate *ex officio* into any candidacy for members to the Constitutional Court or High Justice Inspector.

7.3. JAC Chairperson liability for failure to exercise legal powers

Despite the fact that the People's Advocate identified some issues which fall under the purview of the JAC Chairperson to address, in accordance with Article 226 of Law 115/2016, it did not take the required legal actions in many cases. In addition to actions and omissions mentioned above in this report, we would add some issues as follows:

7.3.a. Agenda

According to Article 16 of the JAC Decision no. 1 dated 8.02.2019 "On the approval of the Internal Regulation on the functioning of the Justice Appointments Council", it is stipulated that *"The Council Chairperson, prior to the conclusion of the meeting, proposes a discussion on the day and time of the next meeting, as well as **possible agenda items...**"*. In many cases during the JAC activity in 2019, this has not happened and the agenda was notified to the JAC members only together with the meeting notice.

In the activity of the JAC during 2019, the People's Advocate found that in many cases it did not receive any response from the JAC for written requests addressed to this public body. The absence of cooperation entitles the People's Advocate to demand that administrative sanctions are imposed

⁵⁰ Referring to the domestic legislation, failure to apply the public procurement legislation is regulated by the relevant normative act (mainly DCM), so, the relevant initiatives could be taken by the JAC if it deems necessary.

on the certain public officials who caused this situation - in accordance with Article 22/1 of Law no. 8454 dated 04.02.1999 “On the People's Advocate”, as amended.⁵¹

In this context, the People's Advocate found additional legal violations committed by the JAC Chairperson, such as failure to transcript and publish for 11 (eleven) months the complete and summary minutes of the JAC meetings, or failure to bring the requests addressed by the People's Advocate to the JAC - to the attention of the JAC members for discussion.

In the view of the People's Advocate, the failure to address the issues raised in this report, or the failure to address other requests by the JAC Chairperson, **have significantly limited the ability of the People's Advocate to exercise the duties vested on it by the Constitution and the law, and potentially restricted the candidates' opportunity to receive equal treatment.**

Whereas: a. these acts and omissions of the JAC Chairperson are inconsistent with both Articles 226 and 233 of Law 115/2016, as well as general legislation governing the good administration of State institutions; b. and referring to the findings identified in this report and the continuation of the exercise of the function by the JAC Chairperson Mr.Dvorani also in 2020, we recommend correcting all of the above in the JAC's activity.

7.3.b. Failure by public institutions and civil society organizations to give opinions

According to Articles 7/b paragraph 2, 7c paragraph 5 and 7ç paragraph 1 of Law no. 8577/ 2000 "On the organization and functioning of the Constitutional Court in the Republic of Albania" as amended: "*Public institutions related to the justice system, civil society organisations being active in the protection of human rights or established for the protection of the interests of the users of the justice system may submit their opinions regarding the candidacies to the Justice Appointments Council.*"

During 2019 it does not appear that the above two categories (a. Public institutions, b. Civil society organizations) have provided opinions on the candidacies. In our view, this lack of opinion may also be the result of the JAC's insufficient efforts to enforce this legal obligation. Specifically, there has been no customized announcement addressed to these two categories, or even any notice through other communication forms such as press releases, media communications, etc.

Throughout the announcement posted on the JAC's website for the meeting (through which the above categories of candidates can be informed) is insufficient for the JAC to fulfil the above-cited legal obligation.

7.3.c. High Court failure to announce vacancies

⁵¹ Article 22/1 – Sanctions for failure to cooperate with the People’s Advocate: "*Refusal to cooperate with the People’s Advocate by the civil servant, official or public authority shall construe grounds for the People’s Advocate to demand that the competent authority to initiate the administrative procedure and take disciplinary sanctions for the removal from office or from civil service*".

Article 7/ç of Law no. 8577/ 2000 “On the organization and functioning of the Constitutional Court in the Republic of Albania” as amended, defines the selection procedure at the High Court. It stipulates that *"The Chairperson of the Constitutional Court shall, under this law, notify the Chairperson of High Court on the vacancy, who shall announce on the public information media and on the official internet website the opening of the application procedures."*

Until 26 July 2019 when the Special Appeal Chamber dismissed from office the High Court Chairperson Mr. Xhezair Zaganjori, he made some announcements at the High Court's official website, but, after his dismissal, the acting Chairperson of this court Mr. Ardian Dvorani – who simultaneously was also the JAC Chairperson for the year 2019 – not only interrupted this process (no announcements were made), but did not even give any explanations on this omission (either at the JAC meetings or in the JAC annual report for 2019).

7.4. JAC compliance with deadlines

The Justice Appointments Council exceeded the deadlines set out in the Law no.8577/2000 "On the organization and functioning of the Constitutional Court in the Republic of Albania" and the Law no. 115/2016 “On governance institutions of the justice system”, for the procedures of verification and evaluation of candidates.

From the examination of procedures followed by the JAC during 2019, it turns out that the deadlines were exceeded considerably from the moment it received the list of candidates from the appointment bodies for each vacancy at the Constitutional Court.

8. Final Conclusions and Recommendations

Conclusions:

The JAC had to cope with a large workload during 2019, consisting primarily in drafting the sub-legal framework and then in examining and evaluating candidates. The situation of the justice system (especially the nonfunctional of the Constitutional Court) made that the number of vacancies and consequently the number of candidates running for those seats quite high, resulting in an unforeseen extra workload for the JAC.

Given that the justice reform legislation is new and is being applied for the first time, enforcement led to a number of issues that were met by different positions.

Recommendations:

In view of the analytical screening of the created situation and the issues elaborated in this report, the People's Advocate issues the following recommendations for the 2020 JAC:

A. For the correct implementation of the normative acts in force:

- Re-examining the People's Advocate's request about its restricted competences by the 2019 JAC through its Regulations, namely repeal the "deliberation chambers" as a

mechanism unprescribed in any normative act (Constitution or law) that governs the activity of JAC.

- Drafting the regulation on the internal communication in JAC (including communication between rapporteurs and the Chairperson, rapporteurs and legal advisors, etc.).
- Taking measures to adjust the JAC archive (registrar office) in conformity with the provisions of the legislation on archives.
- Requests addressed to the JAC in line with Article 229 of Law 115/2016 ought to be set forth for discussion in the JAC meetings by the JAC Chairperson.
- Announcements of JAC on meetings ought to comply with deadlines set out in Article 11 of the Internal Regulation on the functioning of the Justice Appointments Council. If this deadline is impossible to comply with, provide the reasons thereof, in compliance with the provision in paragraph 11 of this Regulation.
- Documentation for JAC meetings ought to be distributed within an adequate time (at least within the deadlines set out in paragraph 11 of the Internal Regulation on the functioning of the Justice Appointments Council) and the distributed documentation ought to be numbered/inventoried in advance.
- Taking measures to fully respect the standards of fair legal process in the verification procedure for candidates, concerning the content of the final report for each candidate, as well as informing the candidate and granting them effective opportunity to challenge the relevant findings.
- Ensure access to audio-recorded minutes and written minutes for participants and/or guests in the meetings.
- Ensure minute-taking in line with legal provisions, essentially preserving the transparency as a key element that enhances public confidence.

B. Legislative recommendations (proposed amendments to the JAC Regulations):

- Amend Article 13/2 of the JAC Regulation no. 1 according to which: "*2. If the People's Advocate considers to be present, s/he shall attend all meetings of the Council. In the absence, the People's Advocate may be represented by one of the commissioners.*" Referring to provisions governing the institution of representation, the People's Advocate has the discretion to designate its own representative and this must not be imposed by the JAC. This stipulation by the JAC is not in line with Article 118 of the Constitution, because the law has not mandated the JAC to determine such a matter.
- For the meeting minutes: Specify in the Internal Regulation on the Functioning of JAC the obligation to compile two types of minutes: 1. *Full meeting minutes* and 2. *Summary minutes*.
- To guarantee the traceability of the procedures performed by JAC in the administrative investigation carried out for the candidates.

C. Other recommendations:

- If the JAC deems inadequate the human and financial resources to deliver its duties - set out in the law - properly and in line with legal deadlines, it must calculate and demand promptly the coverage of these needs.
- Explore the possibility for proportionate reduction of the workload at the Courts or Prosecution Offices where JAC members deliver their functional duties, but indispensably so for rapporteur members.
- For issues identified during 2019 that are addressed by legal amendments, the JAC presented an annual report with relevant findings which we support in their entirety.
- To address in the law the issue of candidacies in several vacancies simultaneously.
- To prescribe more appropriate deadlines for candidates but also for the Council to conduct the evaluation of candidates.
- To guarantee the legal obligation of other law enforcement bodies to directly communicate with the Council, or amend the relevant legal provisions so that these safeguards/requirements do not remain on paper.
- Revise the criteria for members to the Constitutional Court to ensure the possibility for individuals with similar careers to run, and define different evaluation criteria for magistrates and non-magistrates.
- To define a reasonable deadline for the period when candidates under the asset audit.
- Standardize the procedure for sending the final list to the appointment body.⁵²
- Define the date when the unblocking mechanism deadline commences for each appointment body (see Article 201 2 f) of Law 115/2016 "On governance institutions of the justice system" and Articles 7b 4 and 7c 6 of Law no. 8577, dated 10.02.2000 "On the organization and functioning of the Constitutional Court in the Republic of Albania").

In conclusion of above, the People's Advocate, in light of specific duties entrusted to it in this process by the legislation, but also as an independent constitutional body whose key activity pillars are the protection, prevention of violations and promotion of the legitimate rights and freedoms of individuals, which it finds to be closely connected to the well functioning and administration of the justice system, assures that the Justice Reform shall continue to be one of the main objectives of the activity of our institution.

PEOPLE'S ADVOCATE

Erinda BALLANCA

⁵² The list of candidates for members to the Constitutional Court is prescribed to be sent immediately, whereas the list of candidates for the High Justice Inspector must be sent within a 3-day deadline (see Article 201/2 of Law "On governance bodies of the justice system" and Articles 7b 4 and 7c 4 of Law no. 8577, dated 10.02.2000 "On the organization and functioning of the Constitutional Court in the Republic of Albania").

9. Annex

9.1 Letters of the People's Advocate, addressed to the JAC body:

- a. no. 12 prot., dated 10.01.2019, with object: "*On the progress of the activity of the Council of Appointments in Justice*";
- b. January 2019, via e-mail, with object: "*To give an opinion on the draft regulation: "On the organization and functioning of the Judicial Appointments Council"*";
- c. no.143 prot., dated 15.03.2019, with object: "*Request for making available full audio recordings, as well as minutes of meetings*";
- d. no. 398 prot., dated 13.09.2019, with object: "*Request for information regarding the manner of proceeding of the KED, for determining the points, of the candidates for the Constitutional Court*";
- e. no. 534 prot., dated 11.12.2019, where the request for making available the complete minutes of the meetings is repeated, as well as their audio version;
- f. no. 348 prot., dated 29.07.2019; no. 535 prot., dated 11.12.2019, as well as two documents without protocol no., (sent via e-mail), for meetings date: 26.07.2019, 30.07.2019; all with object: Giving an opinion on the meeting ;

9.2 Letter no. 403 prot., dated 16.09.2019, of the People's Advocate, addressed to the Speaker of the Assembly, with the object: "*Information on a procedure of the Justice Appointments Council*".

9.3 Lawsuit with parties: Plaintiff: *The People's Advocate Institution* and Defendant: *Judicial Appointments Council*. Subject: Repeal of some points of the two decisions of JAC (point 41 of Decision no.4 dated 11.03.2019; points 46 and 62 of Decision no.5 dated 2.04.2019).

ⁱ This report has been finalized in March 2020, but due to the consequences caused by the pandemic of COVID-19, it is being sent in May 2020.