



AVOKATI I POPULLIT



REPUBLIC OF ALBANIA
PEOPLE'S ADVOCATE

Bulevardi "Zhan D'Ark" Nt. 2
Tirana, Albania

MONITORING REPORT
ON
THE LOT-DRAWING PROCEDURE FOR THE SELECTION OF MEMBERS
TO THE JUSTICE APPOINTMENTS COUNCIL

HELD BY
THE ASSEMBLY OF THE REPUBLIC OF ALBANIA
ON 7 DECEMBER 2018

Tirana, December 2018

The People's Advocate is an independent institution set out in the Constitution to protect and promote the legitimate human rights and freedoms. It considers the Justice Reform as the most significant reform in advancing and developing the democratic system in Albania.

The People's Advocate attaches special focus to the Justice Reform, not just because of legal obligations sanctioned in legislation, but also because of its paramount significance and direct correlation with the respect of human rights in Albania.

Under such responsibility, the People's Advocate has been and continues to be fully supportive of the implementation of the Justice Reform as a vital reform to all Albanian citizens, given that many issues addressed by them involve the domestic justice system that is marred by a number of aggravating problems. Moreover, the People's Advocate considers the restoration of public trust in the justice system as crucial to Albanian society and, therefore, has contributed to monitoring many processes conducted under the Justice Reform.

We are presenting below the monitoring report on the lot-drawing procedure for the election of members to the Justice Appointments Council (JAC) held at the headquarters of the Assembly of the Republic of Albania on 7 December 2018.

1. People's Advocate's power to monitor the lot-drawing procedure for the election of members to the Justice Appointments Council

This report was drafted in view of the power to specifically monitor the lot-drawing procedure for the selection of the JAC members which in this case was conducted by the Speaker of the Assembly.

The Constitution of the Republic of Albania stipulates in Article 149/d, paragraph 3 and in Article 179, paragraph 11 (transitional and final provisions) *inter alia* that:

*“Between December 1 and December 5 of each year, the President of the Republic shall elect by lot the members of the Justice Appointments Council (JAC)¹ ... If the President of the Republic fails to select the members by December 5, the Speaker of the Assembly shall make the selection by lot before December 10 of that calendar year. **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.**”*

“Within 5 days of the entry into force of this law, the President of the Republic shall elect by lot the members of the Justice Appointments Council in accordance with Article 149/d paragraph 3 of the Constitution. If the President of the Republic fails to select the members within 5 days of the entry into force of this law, the Speaker of the Assembly shall select them by lot within 10 days of the entry into force of this law...”

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

The People's Advocate shall participate as an observer in the selection by lot, as well as in the meetings and operations of the Justice Appointments Council."

Also, Article 284, paragraph 6 of Law no. 115/2016, "On governance institutions of the justice system" provides that:

"The President of the Republic shall organize the lot for the election of members of the Provisional Council for Appointments in the Justice System without delay. The procedures of the lot shall be documented by the President of the Republic. The procedures of the lot shall be held in the presence of the Ombudsman [People's Advocate] who drafts and publishes a monitoring report on the lot procedures."

Pursuant to Article 149/d of the Constitution of the Republic of Albania, the Justice Appointments Council is responsible for verifying the fulfilment of legal requirements and assessing the professional and moral criteria for the candidates for High Justice Inspector and members to the Constitutional Court.

This very important body consists of nine members selected by lot among judges and prosecutors who meet the legal criteria set out in Article 221/1 of Law no.115/2016 "On governance institutions of the justice system". They hold office for a one-year term commencing from 1 January of each calendar year.

Meanwhile, according to Article 220 of Law no. 115/2016 "On governance institutions of the justice system" the composition of nine members of the JAC is as follows:

- two judges of the Constitutional Court,
- one judge of the High Court,
- one prosecutor of the General Prosecution Office,
- two judges of the Courts of Appeal,
- two prosecutors of the Prosecution Offices of Appeal,
- one judge of the Administrative Courts.

According to Article 220, paragraph 3, and Article 221, paragraph 7 of the same Law, in addition to the JAC members, their substitute members are selected to replace the former in the event of impossibility or conflict of interest.

In the official announcement that the Assembly sent to some institutions and published on its official website, it is stated that the procedure takes place on 7 December 2018 and would be for the selection of the members to the Justice Appointments Council.

As previously explained in the section clarifying the powers of the People's Advocate in the process, the President of the Republic has the primary constitutional and legal power to conduct the lot-drawing process for the selection of the members to the Justice Appointments

Council between 1 December and 5 December of each calendar year. For this procedure, the President of the Republic must adopt a lot-drawing regulation that must entail the principles of transparency, traceability and monitoring of the process (Article 221, paragraph 9 of Law no. 115/2016 "On governance institutions of the justice system").

If the President of the Republic fails to select the members within December 5, the Speaker of the Assembly must select them by lot within December 10 of that calendar year.

During the lot-drawing procedure, the Assembly informed us that this was exactly the case, i.e. due to the impossibility of the President of the Republic to select the members, the Law delegates this right to the Speaker of Assembly to make the selection of JAC members.

In the President of the Republic's official letter under prot. no. 3479, dated 21.11.2018, "On the organization of the lot for the election of the Justice Appointments Council for the period 1 January to 31 December 2019" addressed to the Speaker of the Assembly, the following position is stated: "During the lot-drawing procedure held on 7 December 2017, the Assembly, through interpretation, seems to have applied the transitional provisions of Article 284 of the Law no. 115/2016, but by selecting the Justice Appointments Council. Given that the President of the Republic found himself in an extra-legal situation, it is impossible for the President to exercise his constitutional powers and deems that the Assembly has the right to conduct the lot-drawing procedure for the selection of the members to the Justice Appointments Council within the spirit of the Constitution, being that *inter alia*, the Assembly is precisely the body entitled with the authentic interpretation of the Constitution.

Further, the Constitution and the Law no.115/2016 "On governance institutions of the justice system", give discretion to the President of the Republic, or otherwise, to the Speaker of the Assembly to adopt the rules governing the lot-drawing procedures for the selection of members to the Justice Appointments Council. From the documentation made available by the Assembly, it seems that the Speaker of the Assembly has issued a discretionary act, precisely Order no. 2 dated 03.12.2018 "On defining the procedure and rules governing the drawing of lot for the selection of members to the Justice Appointments Council".² Paragraph 22 of this Order repealed the Assembly's Order no. 1 dated 22.11.2017 "On defining the procedure and rules governing the drawing of lot for the selection of members to the Justice Appointments Council". Though the law does not explicitly stipulate the obligation of the Speaker of the Assembly (as in the case of the President of the Republic) to adopt a regulation on the lot-drawing procedure, the People's Advocate holds that the adoption of such a regulation is necessary. In any event, this regulation must uphold the principles of transparency, traceability and monitoring of the process which are substantial and essential elements in conducting these lots.

As stated by the People's Advocate in its report dated 7.12.2017 concerning the lot-drawing on 7 December 2017, again in the lot organized in December 2018, the People's Advocate was

² This Order is published on the Official Gazette no. 171 dated 04.12.2018.

not provided with any documentation prior to the lot-drawing procedure. Moreover, it does not appear that the above report has been considered and examined, and neither the issues presented therein seem to have been taken into account. The People's Advocate holds that the participation and monitoring of this process - and particularly the assessment of monitoring reports - should be considered part of the "check and balance" system and issues, if any, must be addressed and reflected in the activity of the other bodies on a regular basis. In no event can the constitutional and legal provisions be interpreted in such a way as to leave these provisions devoid of action, meaning or purpose, when in fact it is the contrary. In our view, the Constitution of the Republic of Albania makes no difference concerning the name of the Justice Appointments Council.

Both constitutional provisions regulating this matter, Article 149/d and Article 179, paragraph 11 of the Constitution of the Republic of Albania, use the same name, i.e. the Justice Appointments Council. The difference is made in Law 115/2016, which explicitly provides in Article 284 for the term "Provisional Justice Appointments Council" by designating it as the first Council to be elected upon entry into force of the Constitution (and/or the package of laws governing the reform issues).

The difference between the two involves part of the selection procedure for members (institutions/bodies that must identify - among each group of judges represented in the body - those who meet the criteria of the applicable legislation) and their tenure which could be less than 12 calendar months in the case of the Provisional Justice Appointments Council.

So, Article 179, paragraph 11 of the Constitution and Article 284, paragraph 6 of the Law no. 115/2016 "On governance institutions of the justice system" sanction and define detailed procedures for the organization of lots for the selection of the first members of the Justice Appointments Council - as an exemption procedure, but not for the selection of the JAC members. Meanwhile, we find it appropriate to emphasize that the criteria that candidates subject to lots must fulfil are the same for both cases, but the former does not stipulate a complaint/appeal procedure for applicants left out of the list.

The questions that arise are: Which body took over in this process the prerogatives of the High Judicial Council and the High Prosecutorial Council still not established, and on what legal grounds? How many criteria were deemed to be fulfilled by the candidacies presented by the Constitutional Court and by the magistrate candidates who had to be screened by the High Judicial Council and the High Prosecutorial Council? Were the applicants excluded from the lists sent to the Assembly notified and what was their stance for being excluded?

In conclusion of this topic, our view is that there is no legal provision for such a situation, and this creates the prospects to render the process disputable.

It seems that the President of the Republic, in order to avoid this fact, stated for a second time that it was impossible for him to conduct the lot procedure, subsequently giving the right of

way to the Assembly to do so. Apparently, the Speaker of the Assembly did not share the same need for authentic interpretation of the Constitution in such event and proceeded with the organization of the lot procedure under Order no. 1 dated 22.11.2018 “On defining the procedure and rules governing the drawing of lot for the selection of members to the Justice Appointments Council”.

In addition, an issue discussed by the parties present in the lot procedure was also the name of the body to be elected (Justice Appointments Council or Provisional Justice Appointments Council)³. Or in other words, can the constitutional and legal provisions for the selection of the Provisional Justice Appointments Council be also applied as exemption rules for the selection of the Justice Appointments Council? In our view, when it comes to the selection of members to the Justice Appointments Council, the reference should be found in Article 221, paragraph 3 of the Law no. 155/2016 “On governance institutions of the justice system” which 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.”*.

Another issue worth addressing is the fulfilment of eligibility criteria by candidates in the lot. Article 221, paragraph 1 of the Law no.115 /2016 “On governance institutions of the justice system”, sets out the eight criteria that candidates must fulfil.

- The Secretary General of the High Council of Justice enclosed two lists (in the official letter prot. no. 3427/1 dated 04.12.2018 entitled “Reply”) addressed to the Assembly of the Republic of Albania. One list comprising the names of judges eligible according to Article 221 of Law no. 115/2016 “On governance institutions of the justice system”, and the other list with the names of judges the eligible according to Article 149/d, paragraph 3, so, only the disciplinary measure requirement.
- The Prosecutor General sent (enclosed in official letter prot. no 3054 dated 14.11.201) the list of prosecutors eligible for JAC members according to Article 284, paragraphs 1, 2, and 3 of the Law no.115/2016 “On governance institutions of the justice system” and the list of prosecutors who meet all the eligibility criteria except for graduation from the School of Magistrates, and the motivation given is that the General Prosecution Office seeks to be coherent with the practice of other institutions.
- The Chairperson of the High Court submitted (in the official letter prot. no. 3982 dated 13.11.2018) the list of the High Court members who partially meet the criteria stipulated in Article 221 (fail to meet the requirement in Article 221/1 d), having excluded one member who failed to fulfil two requirements of Article 221, namely

³ Let us recall that the Constitution uses only the term Justice Appointments Council and not Provisional Justice Appointments. The name of the Provisional Justice Appointments Council is found only in Law no. 115/2016 “On governance institutions of the justice system” whereby Article 284 provides for the procedures of nomination and selection to this body.

paragraphs 1-a and 1-d. Rigorous compliance with of the requirements in Article 221 of the aforesaid law would leave the High Court without representation to the JAC.

Regardless of our view that the eligibility requirements for JAC candidates set out in Law no. 115/2016, "On governance institutions of the justice system" preclude a big number of judges from their right to election in the JAC, they must be applied strictly by the competent bodies as long as they are sanctioned in the law, but the example above demonstrates that this was not the case.

As already discussed, the eligibility list in paragraph 1 of this Article enumerates eight cumulative criteria – and not one - that must be met by the JAC candidates at the moment of lot drawing. Such an unequivocal provision is set out in Article 221, paragraph 2, of Law no.115/2016 which explicitly provides that: "*Candidates who do not meet one of these requirements are excluded from the lot*".

These criteria must be fulfilled equally by all candidates, regardless of the category they represent in the judicial system; in other words, the same criteria should apply to candidates coming from the High Court or the General Prosecution Office, Courts of Appeal, Prosecution Offices of Appeal and Administrative Courts. The law stipulates different criteria for the representation of Constitutional Court members in the JAC. Noting that these issues/problems have been raised before, we believe that the lot-drawing regulation should introduce the elements that address these issues. The People's Advocate considers that if the same criteria were applied on the list from the General Prosecution Office and /or the Prosecution Offices of Appeal, then the High Court would be left without representation as none of its members fulfilled all the criteria stipulated in the law. Concurrently, if the same criteria under which the list coming from the High Court would apply across the entire spectrum, then the number of candidates from the General Prosecution Office and Prosecution Offices of Appeal participating in the lot(s) would be higher, and there would be much more substitute members for these categories, which was not the case.

In our view, it is appropriate to introduce an instrument for the preliminary screening of the lists submitted from the competent bodies to the Assembly. It is particularly important when one institution submits more than one list of candidates to be lotted, or when a clear conflict of interest is ascertained just before the lot, such as the fact presented in the official letter sent by the Chairperson of the High Court in relation to the High Court members who have personally applied for the vacancies at the Constitutional Court.

In our view, these issues should have been addressed in one of the following ways:

- take the initiative to improve legal provisions through introduction of relevant amendments;
- bring the matter before the Legislation Council to be discussed and to find solutions; and/or

- address these issues in the Procedural Order on the lot regulation issued by the Speaker of the Assembly.

On one hand, the lot-drawing process addressed neither the fact that the High Council of Justice and the Prosecutor General had submitted two potential lists to be lotted, nor the reason why one of the lists submitted by them, specifically the list that provided for the strict fulfilment of all the criteria set by Article 221 of Law no. 115/2016 "on governance institutions of the justice system" had been selected. Similarly, another finding is that the law provides for measures to be taken when the institutions fail to submit the candidate list, but not when the submitted list is incompliant with the law.

The People's Advocate has certain powers in this process explicitly stipulated in the Constitution of the Republic of Albania and also in the Law no. 115/2016, "On governance institution of the justice system", as regards to:

- Monitoring (observing) the lot-drawing procedure for the selection of the JAC members conducted by the President of the Republic and drafting and publishing of its monitoring report.
- Participation as an observer in the meetings and operations of the Justice Appointments Council (after its establishment).

In this view, based on the legal provisions on the exercising of powers of the People's Advocate, this monitoring report contains deals with the both with the monitored lot drawing, and the issues identified at the onset of the entire lot procedure, as well as relevant recommendations for further improvement of the process.

Therefore, we reiterate our recommendation made also in the 2017 report to introduce amendments to the legislation to enable effective application of the spirit of the law, on the selection methodology of these bodies. Unfortunately, various interpretative stances in this respect lead to debates which - according to the People's Advocate - potentially jeopardize public confidence in the selection procedure in particular, and in the implementation of the justice reform in general. Building public confidence in the justice system and delivery of justice in Albania are major goals that must be considered as the light-motif of any constitutional body exercising their powers.

On the other hand, due to the importance and transparency of the process, the People's Advocate being entrusted by the Constitution and Law no. 115/2016 "On governance institutions of the justice system" recommends that the documents which are an integral part of the procedure are provided in advance of the lot procedure to the People's Advocate and the other invitees in the presence of whom the lot shall be drawn - as set forth in the Order of the Speaker of the Assembly. This is a significant proof and acknowledgment of the importance that the People's Advocate embodies – as a chain link in the justice reform – in

monitoring the strict compliance with the law and accountability, as well as in issuing recommendations, as entrusted by the law. If the Assembly of the Republic of Albania considers that mere publication of the documentation on the official website meets the standards of transparency in this process, then we consider that the announcement should at least refer the documents (indicating the link) based on which the lot is drawn, as well as all the appropriate details and documents forwarded by the institutions pursuant to the Law no. 115/2016 "On the governance institutions of the justice system" supporting their lists. Such detailed publication is missing, albeit it is an essential component of the process, therefore the People's Advocate recommends that this must be addressed in order to ensure legality, transparency, accountability and confidence in the process.

The principles of transparency, traceability and monitoring of the process set out in Article 221, paragraph 9 of the Law no. 115/2016 "On the governance institutions of the justice system" must be effective, in order to clearly define not only the candidates who will be included in the lot, but also the shortlisting procedure of candidates. In other words, a lot cannot be simply the procedure for extracting winning names from the boxes, but also the procedure of putting into the box those names that correctly fulfil the criteria established by law.

Monitoring of the lot-drawing procedure

In the respective announcement from the Speaker of the Assembly of Albania addressed to the People's Advocate through official letter, prot. no. 3817/3 dated 04.12.2018, the People's Advocate was requested to participate in the lot-drawing procedure for the selection of JAC members taking place at the Assembly headquarters on 7 December 2018 at 10:00 am. The announcement from the Speaker is based on Article 149/d, paragraph 3, of the Constitution of the Republic of Albania and Article 284 of Law no 115/2016 "On the governance institutions of the justice reform".

The procedure was presided by the Speaker of the Assembly of Albania, Mr. Gramoz Ruçi who officially opened the process and delivered some remarks. The verification carried out by the Technical Secretariat - established by the Speaker for the process - showed that representatives of the Constitutional Court, General Prosecution Office, People's Advocate and High Council of Justice attended the lot-drawing procedure at the Assembly headquarters.

Also, representatives of the parliamentary groups (Democratic Party – Mr. Oerd Bylykbashi, Socialist Party – Mr. Ulsi Manja), international diplomatic institutions and organizations in their capacity as observers, and the media were present at the procedure. It is noted that among invited institutions, only the People's Advocate was represented by its Head, while the other institutions were represented at lower levels.

Then, Mr. Bylykbashi, representative of the Democratic Party (DP), asked for the floor to tell the DP stance on the lot-drawing procedure. Putting forward several arguments in opposition to the lot-drawing conducted in such circumstances, he pointed out the stance of the DP Parliamentary Group against the procedure as being non-constitutional based on grounds and fact that the President of the Republic considered the Assembly was once again the only competent and entitled body to resolve the situation under the legal vacuum which should have led the Assembly to ponder for a legal resolution.

Further, Mr. Ruçi went on with the organization of the lot with the argument that the purpose of that meeting was exactly its conduct in compliance with the Constitution and the applicable law.

After following debates, the lot-drawing process for the selection of the JAC members was underway.

A Technical Secretariat was established for the lot-drawing, being appointed by the Secretary General of the Assembly and composed of civil servants of this institution. Two transparent boxes were placed for the procedure: one out of which contained the balls and the other one of a roller-mechanism (which was initially empty) contained the balls inside which the paper strips were inserted with the candidates' names nominated by each institution according to the respective lists submitted to the Assembly. Initially, the paper strips with the candidates' names were placed in a separate transparent box. After being read to the public and at the presence of the media, the paper strips with the candidates' names were inserted in the balls and the lot-drawing order was decided as below:

- Constitutional Court candidates
- High Court candidates
- General Prosecution Office candidates
- Courts of Appeal candidates
- Prosecution Offices of Appeal candidates
- Administrative Courts candidates.

1. The lot-drawing procedure for the selection of the Constitutional Court candidates did not take place, because only two names had been provided by the Constitutional Court who were automatically considered members of this Council. Namely, Mr. Bashkim Dedja and Ms. Vitore Tusha are the selected judges from the Constitutional Court.

The procedure for the selection of the substitute members did not take place because no candidates were nominated for the pertinent positions.

2. Regarding the procedure for the selection of the High Court candidates (3 candidates according to the respective list), the High Court representative, after having mixed the balls, randomly drew the name of one candidate which he/she further read aloud and showed to the Technical Secretariat and all participating representatives. Namely, Mr.

Ardian Dvorani is the selected judge from the High Court. The paper strip inside the selected ball was then handed to the Technical Secretariat. The candidate shall be a member of the Justice Appointments Council.

Pursuant to provisions of Article 221, paragraph 7 of Law no. 115/2016 “On governance institutions of the justice system”, a substitute candidate, namely Mr. Mehdi Bici from the High Court was selected during the same lot and procedure.

3. The lot-drawing procedure for the selection of the General Prosecution Office candidates did not take place, because the General Prosecution had submitted only one name who was considered by *ipso-jure* a member of the Council without the need for the lot to be drawn. Namely, the Prosecutor Arta Marku was appointed.

The procedure for the selection of the substitute members did not take place as none of the prosecutors fulfilled the criteria.

4. The lot-drawing procedure for the selection of the Prosecution Offices of Appeal candidates did not take place as the institution had provided only one name that is equal to the number of seats designated for the Council. The candidate was considered by ‘*ipso-jure*’ a member of the Council without the need for the respective lot to be drawn. Namely, Prosecutor Fatjona Memçaj was appointed.

The procedure for the selection of the substitute members did not take place because no candidates were nominated for the pertinent positions.

5. Regarding the procedure for the selection of the Courts of Appeal candidates, the list consisted of 14 nominated judges. After the mixing of the balls, two candidates’ names were randomly drawn and read aloud while being shown to the Technical Secretariat and all participating representatives. Namely, Judges Fatri Islamaj and Margarita Buhali are selected from the Court of the Appeal. The candidates will be members of the Justice Appointments Council.

For the selection procedure of the substitute candidates, the Technical Secretariat extracted the ball of the paper strip with the name of judge Gurali Brahimllari.

6. Regarding the procedure for the selection of the Administrative Courts candidates, there were 16 nominated judges. After the mixing of the balls, two candidates’ names were randomly drawn and read aloud while being shown to the Technical Secretariat and all participating representatives. Namely, Judge Erjol Roshi is selected from the Administrative Courts. The paper strip inside the selected ball was handed to the Technical Secretariat. The candidate shall be member of the Justice Appointments Council.

Pursuant to provisions in Article 221, paragraph 7 of Law no. 115/2016 “On the Governance Institutions of the Justice Reform, a substitute candidate, namely judge Klodiana Veizi (Mema), from the Court of Appeal and the Administrative Court was selected during the same lot and procedure.

In conclusion of the process, eight (8) members of the Provisional Justice Appointments Council and three (3) substitute members were selected in total. The lots results and procedure were audio and video recorded.

At the closure of the lot drawing, the Speaker of the Assembly Mr. Gramoz Ruçi announced the names of the members and substitute members for the (Provisional) Justice Appointments Council selected by lots which are:

Members of the Justice Appointments Council:

- | | |
|---------------------|---------------------------------------|
| 1. Vitore Tusha | Constitutional Court Judge |
| 2. Bashkim Dedja | Constitutional Court Judge |
| 3. Ardian Dvorani | High Court Judge |
| 4. Arta Marku | General Prosecution Office Prosecutor |
| 5. Fatri Islamaj | Court of Appeal Judge |
| 6. Margarita Buhali | Court of Appeal Judge |
| 7. Fatjona Memçaj | Court of Appeal Prosecutor |
| 8. Eriol Roshi | Administrative Court Judge |

Substitute Members of the Justice Appointments Council:

- | | |
|--------------------------|----------------------------|
| 1. Medi Bici | High Court Judge |
| 2. Gurali Brahimllari | Court of Appeal Judge |
| 3. Klodiana Veizi (Mema) | Administrative Court Judge |

PEOPLE’S ADVOCATE

ERINDA BALLANCA

[signature]