Decision no. 20, dated 11.07.2006
(D – 20/06)

The Constitutional Court of the Republic of Albania, made up of: Gjergj Sauli, Chair, Alfred Karamuço, Fehmi Abdiu, Kujtim Puto, Vjollca Meçaj, Xhezair Zaganjori, Petrit Plloçi, Sokol Sadushi, Kristofor Peçi, members, and Arbenka Lalica, secretary, on 21.03.2006, reviewed during an open-door judicial session the case no. 22, Act, which relates to:

R E Q U E S T E R:

1. ALBANIAN HELSINKI COMMITTEE, represented by Mr. Njazi Jaho, authorized.

2. PEOPLE'S ADVOCATE, represented by Mr. Ermir Dobjani.

3. ALBANIAN HUMAN RIGHTS GROUP, represented by Ms. Elsa Ballauri.

INTERESTED SUBJECT: **COUNCIL OF MINISTERS OF THE REPUBLIC OF ALBANIA,** represented by Mr. Enkelejd Alibej, authorized.

S U B J E C T: **1. Abrogation as incompatible with the Constitution of decisions of the Council of Ministers no.43, dated 27.01.2006 "On avoiding nepotism and influence of power on the hiring and career of personnel of the public administration"; no.44, dated 27.01.2006 "On avoiding nepotism in the public administration", and no.48, dated 27.01.2006 "On some additions to the Council of Ministers' decision no.205, dated 13.04.1999 "On the approval of implementation provisions of the Customs Code in the Republic of Albania", amended";**

2. Annulment of the above decisions of the Council of Ministers.

LEGAL FOUNDATION: Articles 17, 18, 49, 107, 116, 118, 131/c, 134/dh of the Constitution of the Republic of Albania; articles 27-31 and 45 of the law no. 8577, dated 10.02.2000, “On the organization and functioning of the Constitutional Court of the Republic of Albania", as well as article 24 of the law no. 8454, dated 04.02.1999 “On the People's Advocate”.

The ***Requesters*** submitted the following reasons for the invalidation of the above decisions:

1. All three decisions of the Council of Ministers violate through no law human rights envisioned in the Constitution, infringing upon the principle of equality before the law, the principle of non-discrimination, and the right of employees to benefit living means through legal work that they chose or accept themselves (articles 17, 18, and 49 of the Constitution);

- Based on the contents of constitutional provisions, it results that only the Parliament may reckon whether due to public interest or for the protection of the rights of others, these rights may be limited, in keeping with the criteria of article 17 of the Constitution.

2. Based on the concrete provisions of the laws on which the decisions rely, it does not result that the Council of Ministers is charged with issuing sub-legal acts to limit citizens’ rights, due to their family, gender, or in-laws relations;

- Article 9 of the Labor Code, on which decision no. 43 is based, prohibits any discrimination, including that of family relations.

3. The contents of Council of Ministers decisions is in contravention of the requirements of article 107 of the Constitution, in appointing employees in the public administration and guarantees for them to remain in their jobs;

- The Council of Ministers has given retroactive powers to these decisions. They establish rules on relations that emerged before they and the laws they rely upon entered into force.

4. The decisions of the Council of Ministers represent another clear case of discrimination due to family relations. The measure of dismissal from work is not proportionate to the sought goal, which is the fight against corruption. The law on ethics and that on conflict of interest are sufficient for curbing abusive and corruptive methods.

The representative of the interested subject submitted the following reasons why Council of Ministers decisions are in keeping with the Constitution:

1. The purpose of issuing the decisions is dictated by the prevailing conditions of corruption in customs and tax administration. They are in keeping with the spirit and goal of the legislation in force, mainly with the law on ethics and the conflict of interest, imposing and making applicable limitations established in these laws.

2. The decisions were issued by respecting the conditions of delegation in article 118 of the Constitution, by the authorized body and on issues established by law.

3. No discriminating situations are created because different categories exist both for the categories of areas that the Council of Ministers decisions cover and for particular persons. In both cases, there are no equal circumstances, hence no violation of equality before the law.

4. The expression “only by law” of article 17 of the Constitution does not mean only a law by the Parliament, but also according to the law. That is the spirit and the letter of the provision, because the law does not exhaust a given case and may allow a degree of discretion to implementing bodies.

5. The decisions have adopted limiting standards for family relations, based on a reasonable and objective justification, proportionate to the situation giving rise to them, for the public interest, and without surpassing limitations of the European Convention of Human Rights.

THE CONSTITUTIONAL COURT,

After listening to the relator of the case Kristofor Peçi, the representatives of the requesters, and of the interested subject, and discussed the case in its entirety;

N O T E S:

The reasons submitted by the requesters highlight problems of constitutional control in terms of the compatibility of the normative acts with the Constitution and international agreements. During its review of the case, the Constitutional Court considered the request to suspend the implementation of the Council of Ministers decisions until a final ruling of the Constitutional Court founded, and by decision of 21.03.2006, decided to suspend them. Furthermore, it deems that the analysis of issues emerging as a function of these normative acts' constitutional control is related to the fact whether the opposed decisions limit human rights and whether they are in agreement with the Constitution and the European Convention on Human Rights.

Therefore, it is necessary to analyze a series of Constitutional provisions that directly address the problems raised or directly related to them and particularly the articles 4, 17, 18, and 49 of the Constitution.

Article 49 of the Constitution reads:

“1. Everyone has the right to earn the means of living by lawful work that he has chosen or accepted himself. He is free to choose his profession, place of work, as well as his own system of professional qualification.

2. Employees have the right to social protection of work”.

The right to work, which article 49/1 of the Constitution guarantees, includes choosing a profession, the workplace, and the professional qualification system, with a view to ensuring lawful means of living. Choosing a profession, as envisioned by this provision, is a right of the individual in the sense that he/she commits himself/herself to an activity in order to ensure means of living.

This right of the individual to benefit through lawful work assumes significance also from a social standpoint because work, as a profession, is a value also in terms of the contribution it makes to the society as a whole.

The right to work and the freedom of (choosing) a profession indicates any lawful activity that generates incomes and has no established time span, with the

exception of special legal regulations. In this sense, the act of state bodies causing direct consequences that obstruct professional activity represents a violation of this right to act. The guarantees that the Constitution provides to the individual regarding the right to work and the freedom of a profession intend their protection from unsubstantiated state limitations.

Freedom of profession is not just a right to have a job. It should be understood as a social work, as well as a negative freedom that does not permit intervention or impediment by the state, during its exercise.

The definition that article 49 of the Constitution provides for the right to work should be understood as having a double meaning. It represents a positive obligation that requires state engagement to create appropriate conditions for the realization of such a right, as well as a negative obligation, which requires that the state does not intervene to violate this right. That is precisely how the Constitutional doctrine handles the right to work, by emphasizing that freedom of work is protected by constitutional regulations.[1]

2. According to article 17 of the Constitution, the individual's rights and freedoms may be only limited by a law. The Constitutional Court considers that first, it should be clarified what is indicated by the term law; because, in contradiction of the requesters' claims, the interested subject argues that the word law indicates all normative acts and, therefore, the phrase should be understood as meaning "by and on the basis of a law".

Referring to the contents of article 17 of the Constitution, the Constitutional Court considers that this provision, in the way it is formulated, does not render any possibility for delegation to any other body except for the Parliament, as a representative body. The purpose of this article is that, in the case of limitations, not only should other criteria established in it be respected, but, in order for guarantees to be as complete as possible, only one body should be competent (for this) and precisely the highest law-making body. The phrase "only by law" means that, in case limitation of a right provided for in the Constitution is necessary, then this assessment is only at the discretion of the lawmaker and not of other bodies, including the Council of Ministers. The Constitution has expressed the case of delegation of competences to the Government on acts that have the power of a law

in article 101, also establishing the relevant criteria for such a regulation, which it does not provide for in article 17.

There are cases when the term "law" used in the Constitution and in general in legislation means a wide interpretation, to include sub-legal acts. This has to do with cases related to general regulations, which mean the use of the word law in the sense of legislation or justice, not of the lawmaking body. In order to determine whether we are faced with one variant or the other, it is important to clarify the context, which makes clear the purpose of the norm. Considering the context, the word law, in article 17 of the Constitution, does not have the same meaning as that used in article 18, "equality before the law". The latter phrase is identified with justice in general, whereas the former refers to the competence of a single body. The context in which the phrase "only by law" is used does not allow for an expanded interpretation; this, also due to the fact that such an interpretation of constitutional norms may only be made in the positive sense, when this interpretation goes in favor of the protection of rights and not the opposite, as is the case in question. This is the position assumed by the European Court for Human Rights in its practice.[2]

The expanded concept of the term law, used in the doctrine, is not valid for article 17 of the Constitution. The excluding phrase "only by law" used in articles 11/3 and 17 of the Constitution, is related to limitations of rights and has the same meaning in both, that of the narrow interpretation, as opposed to other provisions, whereby the word law may be understood as something broader.

Besides what was mentioned, the same conclusion is reached also referring to the word "only", mentioned in articles 11/3 and 17 of the Constitution. The use of this word is not accidental, but to show that such limitations may not be imposed through any other acts except the law.

The Constitutional Court considers that the regulation provided for in article 17 on the limitation of rights and freedoms only by law also has to do with establishing the competence of a concrete body, which, in this case, is only the Parliament. Such an expression refers one to the competence of the lawmaking body and the issuance of other acts to regulate such relations violates the competence of this body.

Concluding the analysis of the phrase "only by law", provided for in article 17 of the Constitution, the Constitutional Court deems that any opposing interpretation is undoubtedly an invalidation of the guarantees that the Constitution provides for the protection of human rights and freedoms and would effectively infringe upon these freedoms and rights.

3. Aside from the above, decisions of the Council of Ministers, which are the target of the request, extend their effects also on those relations established before. According to them, persons employed in the relevant sectors specified by these decisions are forced to leave their jobs, if the cause of incompatibility related to nepotistic connections or nepotistic connections to power is proven.

Based on the contents of decisions no. 43 and 48 of the Council of Ministers, it emerges that "nepotistic relations with power exist or emerge when applicants or personnel … have or create nepotistic relations". Whereas decision no. 44 establishes that "the existence of … relations represents a cause for interrupting work relations".

From these phrases it is understood that the decisions are given retroactive powers, thus affecting even those employees who were in work relations before the decisions were issued. The unconstitutionality of the decisions lies not only in the fact that the Council of Ministers' decisions are applicable on previously created relations, but also because of the failure to respect the principle of proportionality, as employees affected by these decisions are not provided other jobs. According to this principle, of all the different tools that may be employed to achieve a lawful goal, the administrative authority should use the most appropriate legal tools, which would cause the most minimal injustice for the individual and the least harmful measures upon him/her. This indicates the second element of the principle. This principle requires necessarily the fulfillment of the third condition, according to which, intervention into an individual's rights should not be beyond the rapport of aspired goals. Thus, the inclusion of three essential elements necessitates that a measure or a tool should be appropriate and necessary to achieve a given goal and the tool and the purpose should be in reasonable proportion to each other.

The principle of the rule of law, on which the democratic state relies, means that the law rules and arbitrariness is avoided, for the purpose of achieving respect and guaranteeing human dignity, justice, and juridical security. Some of the

elements of the rule of law related to the subject of this constitutional review are the principle of the division of powers, approval of laws in keeping with the Constitution, reliance of executive bodies' activity on the law only, control of the administration, guaranteeing fundamental rights and freedoms, and the principle of juridical security.

According to the doctrine, the practice of a profession may be limited by reasonable regulations that may be attributed to considerations of the greater good. The situation is different when the state is directed to control objective criteria for admitting a person to a job. In these cases, limitations are only permissible in very narrow and established terms. In general, the legislator may impose such conditions only when they are necessary to show extremely probably risks to essentially significant interests of a community.[3]

On that, the Constitutional Court says in one of its decisions, "The doctrine of constitutional law has recognized that juridical security is one of the essential elements of the rule of law. This security presupposes, among other things, the citizens' confidence in the state and the unchangeability of the law on regulated relations. Confidence has to do with the fact that the citizens should not worry continuously about the changeability and negative consequences of normative acts that harm and aggravate a situation established through previous acts. If security regarding a given juridical situation could not be justified and defended materially, then we would not be dealing with a case of guaranteeing confidence in the system of juridical norms".[4]

Referring to the case in question, with regard to regulations established by the three decisions of the Council of Ministers on retroactive effects, it should be emphasized that even if these limitations would have been made by a law, according to the criteria of article 17/1 of the Constitution, the above-mentioned principles would have been applicable.

Ultimately, the Constitutional Court considers that the submitted request is founded, should be accepted, and that the decisions of the Council of Ministers should be invalidated as incompatible with the Constitution.

FOR THESE REASONS;

The Constitutional Court of the Republic of Albania, on the basis of articles 131 letter “c”, 134 letters “dh, f” of the Constitution, and of articles 49 and 72 of the law no. 8577, dated 10.02.2000 “On the organization and functioning of the Constitutional Court of the Republic of Albania", by majority vote,

D E C I D E D:

The invalidation as incompatible with the Constitution of decisions of the Council of Ministers no.43, dated 27.01.2006 “On avoiding nepotism and the influence of power in the recruitment and career of tax administration personnel"; no. 44, dated 27.01.2006 “On avoiding nepotism in the public administration", and no. 48, dated 27.01.2006 “On some additions to decision no.205, dated 13.04.1999 of the Council of Ministers "On the approval of enforcement provisions of the Customs Code in the Republic of Albania", amended".

- This decision is final and enters into force upon publication in the Official Gazette.

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[1] Livio Paladini, “Diritto Constituzionale”, CEDAM, Padova, 1991

[2] Decision Delcourt versus Belgium, dated 23.07.1968.

[3] Donald P.Kommers “The Constitucional Jurisprudence of The Federal Republic of Germany”, 2 edit, Duke University Press, Durham and London, 1997

[4] Decision no.26, dated 02.11.2005, of the Constitutional Court.

MINORITY VIEW

Pursuant to article 131/2 of the Constitution and article 72/8 of the law no. 8577, dated 10.02.2000 “On the organization and functioning of the Constitutional Court of the Republic of Albania", and for the purpose of a continued cultivation of theoretical thought on constitutional control, I will address the arguments and causes that highlight an opposing view to that of the majority, on all aspects of the case review.

The causes submitted by the requesters as well as opinions presented by the interested subject touch upon issues of compatibility of normative acts with the Constitution. In this case, a series of problems need to be clarified, related with and interdependent on each other, but which converge in two main aspects where the constitutional review and control should focus, in order to determine whether the decisions targeted in the request limit the individual's rights and freedoms, and whether they are in contravention of the Constitution and the European Convention on Human Rights.

The clarification of these aspects requires a careful analysis of the claims and arguments raised, related to the provisions of the Constitution that directly address these problems, and particularly articles 17, 18, 49, 107, and 118 of the Constitution.

Based on such analysis, considering the goal sought to be achieved, based on the contents of the decisions, their assessment against the Constitution and the laws, as well as on accepted standards of constitutional jurisprudence, it does not result to me that the decisions of the Council of Ministers, which are the subject of the request, are incompatible with any concrete provisions or the spirit of the Constitution and the Convention, for these reasons:

1. The requesters stated that the three decisions of the Council of Ministers are a violation of the criteria of article 118 of the Constitution because the laws referred to give no right to this body to issue normative acts. This claim is not founded and is speculative. Should one refer to the legal basis of the decisions, it is complete; it respects delegation conditions of article 118 of the Constitution because the acts were issued by the authorized body and on issues established by law. Thus, these decisions rely upon article 100 of the Constitution; on article 4 of the law no. 8549, dated 11.11.1999 “Status of the civil employee"; on article 3 of the law no. 9131, dated 08.09.2003 “On ethics rules in the public administration", as well as on article 9 of the Labor Code. Whereas decision no. 48, because of its specifics, following additions to a previous decision of the Council of Ministers, also relies upon relevant provisions of the Customs Code.

This legal basis is not just formal. Referring to the specific articles of the laws that the decisions refer to, it results that they authorize the Council of Ministers to

issue normative acts in keeping with the principles established in the law. Article 4/2 of the law on the status of the civil employee authorizes the Council of Ministers to issue sub-legal acts for the implementation of this law, in keeping with the general principles mentioned therein. Article 3, item 1, on the rules of ethics, letter “dh”, establishes that the public administration employee should not allow his/her private interests to run counter to his/her public office and should avoid conflict of interest. Whereas item 2 of this article authorizes the Council of Ministers to issue regulations pursuant to the principles established in item 1. Article 4 envisions the conflict of interest and describes what it is and what it entails: family relations, business relations, or political connections. Item 3 of this article mandates the employee to avoid conflict of interest. Item 4 establishes that the candidate, in order to be employed in the public administration, should dissolve the conflict of interest before his/her appointment; whereas article 5 establishes the criteria for avoiding conflict of interest. Article 9 of the Labor Code, to which the requesters refer to partially in order to argue that this article does not allow discrimination due to family relations, also includes this definition: "Differentiations, exclusions, or preferences sought for a given job are not considered discrimination". Based on the above-cited provisions, the Council of Ministers has decided that in certain sectors, employees with "nepotistic" relations should be "excluded" and others, without such relations, should be "preferred". Such differentiation cannot be considered discrimination.

Article 3 of the law on ethics, addressing avoiding conflict of interest, refers one to law no. 9367, dated 07.04.2005 “On the prevention of conflict of interest in carrying out public functions". This is natural: the ethics law, which was issued before, mentions avoiding conflict of interest in general, whereas the one on its prevention provides for a more extensive and detailed handling of these problems in several provisions. Article 37 of this law addresses cases of prevention and dissolution of conflict of interest through resignation from a public function, transfer, and the taking of measures necessary to avoid the appointment or selection of an official to jobs that involve or may involve conflict of interest. This legal regulation has retroactive effects for persons who are in the job and should leave because a conflict of interest has emerged. It also is applicable for the future in terms of avoiding such appointments. The Council of Ministers decisions have applied precisely these legal principles in special sectors and, in that respect, they are in keeping with the Constitution and the laws they were based upon. The already known principle that any law or sub-legal act is presumed to be in keeping with the

Constitution forces those who claim otherwise to produce convincing and clear arguments why the act is un-constitutional, which, in the concrete case, was not done.

2. In order to provide for a just resolution of the case, first, it should be defined whether we are in the circumstances of article 17 of the Constitution, as the requesters claim, with a limitation of a right provided for by the Constitution, but done without a law. Sticking to the view that such limitations may only be done through a law by the Parliament and in respect of the criteria of article 17 (on this point, I am in agreement with the decision of the majority), regarding the case in question, I am confident that we are not dealing with such rights as to apply article 17 of the Constitution. As a result, the limitations (which, in this concrete case, exist) as well as other components do not have the same importance, consequence, and repercussion they would if they were a part of article 17. The question arises: limitation of what? Article 17 says: "...of rights and freedoms provided for in this Constitution". If the rights provided for by article 49 of the Constitution are the ones that article 17 is talking about, then the imposed limitations are unconstitutional, at least, because they should have been done by a law (without analyzing the other components). However, this needs to be looked at and analyzed carefully. Article 49 really belongs to Part II of the Constitution, "Fundamental human rights and freedoms", but this is divided into separate chapters and, with regard to personal rights, it begins with Chapter II (Right to Life), Chapter III (Political Freedoms and Rights), and then Chapter IV (Economic, Social, and Cultural Rights), which include the right to work. This ranking of the rights should be taken into consideration with regard to their protection, as well as dependant upon their importance, but it does not solve the problem, because article 17 deals with rights provided for in the Constitution.

Before I give my opinion on whether, in this case, a constitutional right has been violated or limited, I will briefly mention how the right provided for in article 49 should be understood. This article, placed in the chapter I mentioned above, does not sanction essentially personal rights and freedoms, but offers the freedom of choosing means of living for the individual through work. In this case, the selection is not an obligation of the state. The state and the society are interested in and have obligations for taking measures and to eliminate shortcomings. The rights provided for in article 49, in principle, have no direct effect, in the sense that their immediate

implementation should be sought in any case and without any conditions. They do not give the individual the right in an absolute manner (and, at the same time, do not task the state) to fill a given job. This conclusion emerges from the fact that article 49 provides for positive obligations and does not provide for negative obligations for the state, as could be the case for other rights (articles 24-39 of the Constitution).

Unlike some other rights included in this Chapter, such as those provided for by articles (Marriage and Family), 54 (Children, Pregnant Women), 55 (Health Care), which specify that they enjoy special protection or care from the state, the right provided for by article 49 does not bear such a condition. So, for that reason too, it should not be understood as a negative freedom.

In continuation of this reasoning, article 38/2 of the Constitution is of assistance: “Nobody may be obstructed to freely travel out of the country”. This phrasing is the same as that of article 2/2 of Protocol 4, according to which: “Any person is free to leave any country, including his own”. The difference here is only in the phrasing: according to the Protocol, there is a clearly positive phrasing; according to the Constitution, the phrasing is seemingly negative, but, in fact, should be and is positive. This is so because it may not be said or accepted that currently (or at any period of time) going out of the country is entirely free and for everybody. In order to make the argument clearer, I will refer to the contents of article 26 of the Constitution, to compare it to article 49. The phrase in article 26 that “Nobody may be asked to carry out forced labor…”, represents a negative phrasing and is the opposite of article 49, not only in terms of the phrasing, but also in terms of contents. Failure to respect this article would be a violation of a constitutional right, which cannot be said of the right provided for by article 49.

The European Convention on Human Rights, in Title I, “Rights and Freedoms” (articles 2-14), although it addresses the freedom of assembly and organization (article 11), it does not mention at all the right to work, indicating that there is another regulation for this right, a relative one, compared to the mentioned rights and freedoms. This juridical status of economic, social, and cultural rights makes some say that those are not at all real rights [1], or are to be considered programmatic rights.[2]

This conclusion derives also from the theoretical and practical standards of many countries, according to which, we are dealing not only with the state's positive obligations, but the formulation of such rights too is done in a relative fashion and they may be subjected to excluding criteria, for public interests, etc. The Constitutional Court of Russia, in its decision of December 27, 1999, addresses the case regarding economic, social, and cultural rights, and, referring to Convention 111, 1958, of the International Labor Organization (ILO), says that differentiations, exclusions, or preferences in the area of employment, based on special job requirements, are not considered discrimination. According to the Constitutional Court of Romania, the regulation of conditions for the exercise of a profession and the establishment of some incompatibilities do not represent a limitation of the right to work. Limitations envisioned by law are just conditions applied to persons who seek to assume the status of public accountant, similar to the conditions having to do with education or tenure of service and, as such, are not a limitation of certain constitutional rights (decision of 06.06.2002).

Nevertheless, the establishment of some criteria for exercising a profession is not discrimination, but, on the contrary, is a fundamental condition for the enforcement of constitutional principles in the rule of law. In a democratic society, there are and there cannot be unlimited freedoms that run counter to constitutional rights. In this sense, the reference of the requesters to article 49 of the Constitution is wrong and unfounded. This article does not necessarily guarantee the individual a given job. He/she may lose the job (as it often happens, for a wide variety of reasons), but he/she has the right and real possibilities to choose another job in the conditions of the market economy. No equal sign may be placed between the right provided for by article 49 and what is called a right to a given job as the requester claims. Therefore, there is no violation of any constitutional right, or a limitation according to the criteria of article 17 of the Constitution.

3. I am of the opinion that the case is of interest also in another aspect. While having no violation of the right provided for by article 49, nor a limitation according to article 17, the claim for unconstitutionality of the decisions as related to these articles is invalid; however, there is still an analysis to be made regarding article 107 of the Constitution, according to the claims of the requester. On the basis of this article, employees in the public administration are selected through competition, with the exception of cases provided for by the law, and that guarantees for remaining in

a job and their legal treatment are regulated by law. Issues arising from a comparison of the contents of the three Council of Ministers' decisions and these constitutional guarantees are numerous and interdependent upon each other. Nevertheless, the constitutional definition does not reduce the regulation of these problems only by law, in the sense that there should be no further regulation through sub-legal acts. On the contrary, regulation through such acts may and should be done, on condition that requirements of article 118 of the Constitution are respected: authorization of the law, competent body, issues to be regulated, etc. These conditions are met, as I mentioned above (item 1), therefore, the case should be treated more broadly regarding the contents and limitations borne in the decisions of the Council of Ministers, and whether they violate constitutional principles.

Based on the contents of the three decisions of the Council of Ministers, it results that they establish excluding criteria, which represent limitations for certain individuals, but not limitations in the sense of article 17 of the Constitution. The question rightfully arises: do these definitions or limitations create discriminating situations or place individuals in unequal conditions? In order to respond to this question, we should start from the accepted standard, also adopted by the Albanian Constitutional Court, which now represents a maxim: that equality in the law and before the law should be highlighted only when we deal with the same conditions, not in different situations. "Equality in the law and before the law does not mean that there should be the same solutions for individuals or categories of persons who are objectively in different conditions. Equality in the law and before the law presumes the equality of individuals who are in equal conditions".[3] In another decision,[4] this Court confirms this fact, underscoring that this represents a stance already consolidated in the practice of the Constitutional Court. Whereas in decision no.171, dated 30.07.2002, the conclusion is reached that the relevant article of the law on the status of deputies is not in contravention of the Constitution "due to the fact that deputies and other competitors have different positions from each other and, therefore, exclusion of deputies from competition, done precisely because of their position, does not infringe upon the constitutional principle of equality before the law, nor does it represent any special form of discrimination". The Constitutional Court of Slovenia too, addressing the principle of equality before the law, says in one of its decisions: "An extreme understanding of equality, without considering the specific nature of a certain actual or legal situation, in fact, leads to inequality".[5]

Should we refer to the Council of Ministers decisions, I am of the opinion that they ensure equal treatment in the same situations and, of course, different treatment in different situations. These different situations have been highlighted for both categories of subjects, and for specific individuals. With regard to the categories, it is a fact that the decisions do not affect all sectors, but only three (customs, tax administration, and the public administration). Regarding the latter, it should be clarified that incompatibility is an obstacle only inside the same institution and does not extend between institutions of the public administration. This is important to highlight in order to understand the relatively limited character and consequences deriving from the enforcement of the decision.

Looking at the case in this way, it cannot be said that the principle of equality is violated or that discriminating situations are created vis-à-vis other categories, which belong to other sectors because the conditions are not the same. According to a decision of the France Constitutional Council: “The principle of equality of treatment in the employees’ career development is only applicable to employees belonging to the same category”.[6]

From a comparative look at the position of individuals within the categories affected by the Council of Ministers’ decisions, it results that the conditions here are not the same either. Employees inside the respective categories (customs, tax administration, or inside a public institution), compared to other employees within the same categories, are in different objective positions from each other, so, they are not in the same conditions. Precisely the different position of the former, created by the fact of nepotistic relations, is the cause for taking relevant measures pursuant to the decisions. In this case, the constitutional principle of equality before the law is not violated; on the contrary, equality infringed, in fact, by the privileged position of those employees who enjoyed nepotistic relations, is reinstated.

The European Court of Human Rights states with regard to discrimination that, although the definition in article 14 of the Convention is not exhaustive, space for action should be allowed for the State Parties, emphasizing that it (discrimination) is founded if three tests or criteria are met: 1. There is reasonable and objective justification; 2. A legitimate goal is pursued; and, 3. There is a reasonable proportion between measures taken and the goal to be achieved.[7]

The European Court of Human Rights has adopted in its practice the margin of appreciation doctrine, as a general achievement in the delicate task of balancing the sovereignty of Contracting Parties with their obligations according to the Convention. The dilemma that worried this Court, becoming evident in cases displaying the possibility for applying the criteria of evaluation, was how to remain loyal in its responsibility to develop a series of principles deriving from the Convention and, at the same time, recognize the diversity of political, economic, social, and cultural situations in the Contracting State Parties. The doctrine of the margin of appreciation applies an element of relativity in the uniform interpretation of the Convention, depending on the concrete case's circumstances. It derives from the fact that a country's domestic bodies are closer to the situation, problems, and concerns of the society and the state and know them better than international institutions.

Based on the application of the criteria of this doctrine, one reaches the conclusion that not any discrimination in special circumstances may represent a violation of the Convention, because there may be justified reasons for it. In the case Abdulaziz and others.,[8] the European Court of Human Rights expands the margin of appreciation for the state, not only in the sense of enforcing a positive right, but even in the sense of whether the right exists, arguing that in such cases, the State Parties enjoy a wide margin of appreciation, a double appreciation of community and individual's needs and demands to adjust to the Convention. In this case, the Court states that the margin of appreciation is used not only to balance individual and community rights, but also to assess whether there are circumstances that justify the treatment of a group in a more favorable fashion than another. This Court also admits that, through a special detailed analysis of the facts of the case in question, the subject, and the circumstances in general, the objectivity and reasonableness of the allowed violations is defined.[9] On that, Prof.Gustavo Zagrebelsky, honorary chair of the Constitutional Court of Italy, states, "Communication between doctrines presupposes the existence of a certain degree of elasticity in constitutional interpretation, in other words, of discretionary authority. In those cases when this is lacking, the entire argument mentioned above would be useless".[10]

When I forward these arguments, it does not mean that I think these rights should not be protected and subjected to constitutional control, but the latter should take into consideration the fact that, their being such rights (not absolute), limitations and differentiations relying on relevant articles of the Constitution should

be such as to be justified on the basis of the three tests established by the European Court of Human Rights. On the other hand, it is worth emphasizing that as if the word “unjustly” in article 18/2 of the Constitution (which means that “justly”, in a justified manner, this discrimination is permissible), in item 3 of this article, through the phrase “unless there is reasonable and objective justification”, the Constitution has clearly admitted that, in certain circumstances, discrimination, or more simply put, justified differentiation, is permissible.

In this sense, the opposed decisions have objective and reasonable justification, stemming from the good purpose of fighting nepotism, corruption, etc. From the standpoint of article 18/2 of the Constitution, they do not represent unjust discrimination and do not infringe upon the principle of equality before the law. It is worth emphasizing that these decisions do not consider family relations or parental background a potential and a priori obstacle; what creates incompatibility is not the existence of family relations in general, but the fact of such relations of an individual holding a specific office with another who carries out just as defined duties, which come in contravention of the law on ethics and the law on avoiding conflict of interest.

It is important that, although at first sight it seems that the Council of Ministers' decisions have established new rules of conduct, in reality, they have done nothing else but have developed further and have detailed more clearly excluding criteria established previously through special laws. In article 4/4 of the law on the rules of ethics in the public administration, it is established that potential conflict of interest of a candidate to be employed in the public administration should be resolved before his/her appointment. Whereas article 37 of the law on avoiding conflict of interest envisions that the resolution of conflict of interest situations is done through the transfer of the employee or by taking measures to avoid appointment or selection.

Based on the contents of these legal provisions, (as well as others), it emerges that the limitation of some rights has been legitimized for the purpose of avoiding conflict of interest through non-appointment or transfer to another job. Both of these laws, the one on ethics and the one on conflict of interest, are in full harmony. The second elaborates to a higher level the concept of conflict of interest as well as establishes its limits and the way it should be handled. In this case, the

issuance of acts by the Council of Ministers is a right of this body to establish binding rules in order to avoid continued conflict of interest that not only emerges from these laws, but also represents a contribution to their further enforcement.

With regard to the requesters' claim that sub-legal acts may not be given retroactive powers, it does not have a legal basis. According to article 112 of the Code of Administrative Procedures, administrative procedures have retroactive powers, among other cases, also when the law allows this. In fact, the laws on which the Council of Ministers' decisions are based allow and demand such a regulation.

Aside from the analysis in the context of constitutional control, it should be mentioned that the Council of Ministers' decisions were issued at a time (and for a major purpose) when international bodies and organisms have placed an emphasis on the essentialness of the fight against corruption and nepotism as a condition for strengthening the rule of law. The December 2004 OECD (Organization for Economic Cooperation and Development) report says that corruption represents one of the most serious impediments to faster economic development and, furthermore, nepotism, political patronage, and bribery are customary. The 2004 SIGMA report on Albania highlights that the level of corruption, including nepotism and clientelism, obstructs the civil service system from developing its human capacities and administrative functioning. It is clear that this situation has necessitated the undertaking of an anti-nepotistic initiative, which became concrete with the issuance of the three Council of Ministers' decisions.

Nepotism and the fight against it is not an Albanian phenomenon only. There are examples of such cases all over the world as well as efforts to minimize through very varied methods and forms, which are different from one country to the other and at different times. However, the common thing is in noncompliance with the phenomenon, which may have been temporarily tolerated until disturbing dimensions force the state to interfere through the force of the law. The Brazilian judiciary has experienced absurd examples of nepotism, such as the appointment by the Amazon federal court chief justice of his son in the position of the director in the same court; based on a control from 1999 in Paraiba state, it resulted that 160 of 565 court employees were close cousins of state judges and the Supreme Court Chief Justice alone had hired seven of his own children; whereas a federal labor court judge in the state of Paraná hired no less than 63 of his relatives, including his wife and four

children. This situation forced the Congress to issue a law forbidding federal judges to hire their own relatives.[11]

In view of consolidated constitutional doctrinarian and jurisprudence thought in our country and abroad (part of which illustrate this minority view), I have the impression that the opposite arguments used by the requesters and accepted by a decision of the majority, to consider the Council of Ministers' decisions incompatible with the Constitution, cannot stand theoretical debate, which is based on widely accepted objective criteria and not on formal criticism.

In the aspect of improving the contents of the norms, it would be appropriate for the Council of Ministers' decisions to expressly mention the transfer to another job in such cases, but this shortcoming does not make them unconstitutional, because transfer is provided for in the law on the prevention of conflicts of interest, which, based on the criterion of the hierarchy of normative acts, is directly enforced without causing any consequences.

I ultimately express the conviction that the Council of Ministers' decisions to avoid nepotism are compatible with the Constitution not only in terms of the good goal they seek to achieve, but also for other substantial reasons, because they were issued on the basis of and pursuant to laws, according to criteria established in article 118 of the Constitution; they are in keeping with their spirit and goal (law on ethics and prevention of conflict of interest); they do not establish new limitations, but detail and make applicable excluding criteria provided for in the mentioned laws.

Member: K. Peçi

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[1] C. Krause and A. Rosas, “Economic, Social and Cultural Rights”, Martin Nijhoff Publishers, Netherlands, 1995, f.17.

[2] H. Steiner and Ph.Alston, “International Human Rights in Context”: Law, Politics and Morals. Oxford, 2002/2003, f.245.

[3] Decision no.11, dated 27.08.1993, Constitutional Court of Albania.

[4] Decision no.16, dated 17.04.2000, Constitutional Court of Albania.

[5] Decision no.57, 1992, Constitutional Court of Slovenia.

[6] Decision of 15.07.1976, France Constitutional Council.

[7] Cited according to “The European System for the Protection of Human Rights”, R. Macdonald, F. Matscher and H. Petzold, publication of the European Court of Human Rights, English edition, p. 118.

[8] Decision of May 28, 1985, Series A, No.87, European Court of Human Rights.

[9] Rasmussen Case, Series A, No. 87.

[10] Remarks at the official 50th anniversary ceremony for the foundation of the Constitutional Court, Rome, May 2006.

[11] Augusto Zimmermann, “Has the Brazilian Judiciary Become a Mafia?”, Brazil Magazine, 4.01.2005.