

U. no: 16/2006-0-0

Date: 06/21/2006

Preface

The Constitutional Court of the Republic of Macedonia, by virtue of Article 110 of the Constitution of the Republic of Macedonia, and Article 71 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 70/1992), on its session held on June 21, 2006, adopted the following

RESOLUTION

Text

1. A PROCEDURE IS NOT INSTIGATED for appraisal of the constitutionality of Article 178 item 5 of the Law on Execution of Sanctions ("Official Gazette of the Republic of Macedonia" no. 2/2006).
2. Stamen Filipov from Skopje submitted an initiative to the Constitutional Court of the Republic of Macedonia for instigating a procedure for appraisal of the constitutionality of Article 178 item 5 of the Law stated in item 1 of this resolution.

The submitter of the initiative after quoting the contested provision alleges that with it Article 11 paragraph 1 and 2 and Article 12 paragraph 2 of the Constitution of the Republic of Macedonia are being violated, because the convicted person was placed in complete sensory isolation without a court decision which amounted to inhuman, uncivilized and degrading treatment and punishment. This was because the point of the punishment was not to dehumanize the person breaking the law, but the opposite. The person deprived of freedom, was also a citizen and subject of the law.

Furthermore, the submitter of the initiative states that solitary confinement as a disciplinary measure was applied in the old and anti-national regimes and according to him it was incomprehensible for it to exist in this day and age.

Due to these statements, the submitter of the initiative believes that with the contested legal provisions: Article 8 paragraph 1 lines 1, 3, 4; Article 11 paragraph 1 and 2; Article 12 paragraph 2; Article 51; Article 54 paragraph 1 and 4; and Article 98 paragraph 1 and 2; of the Constitution of the Republic of Macedonia are being violated.

3. The Court at the session determined that according to the content of Article 178 of the Law on Execution of Sanctions, for disturbing the peace and discipline the following disciplinary measures may be inflicted upon the convicted persons: warning (item 1); public warning (item 2); confiscating part of the compensation for work up to 20% (item 3); limitation of awarding privileges for up to three months if the convicted person abused the given privileges (item 4); and direction to solitary confinement for 3 to 15 days with or without a right to work (the contested item 5).
4. According to Article 8 paragraph 1 lines 1, 3, and 4 of the Constitution of the Republic of Macedonia, the fundamental freedoms and rights of the individual and the citizen, recognized by the international law and determined by the Constitution, the rule of law and the separation of

the legislative, executive and judicial authority, are fundamental values of the constitutional order of the Republic of Macedonia.

According to Article 11 paragraph 1 of the Constitution, the physical and moral integrity of man are inviolable, and according to paragraph 2 of the same Article of the Constitution, every form of torture, inhuman or degrading treatment and punishment are prohibited.

According to Article 12 paragraph 2 of the Constitution, no one can be restricted from freedom, except with a decision by the court and in cases and in a procedure determined by law.

According to Article 51, paragraph 1 of the Constitution, in the Republic of Macedonia laws shall accord with the Constitution and all other regulations shall be in accordance with the Constitution and the laws. It is everyone's duty to respect the Constitution and the laws.

According to Article 54, paragraph 1 of the Constitution, the freedoms and rights of the individual and the citizen can be restricted only in cases determined by the Constitution. According to paragraph 4 of the same Article, the restriction of freedoms and rights cannot involve the right to life; the bans on torture, inhumane and degrading treatment and punishment; the legal determination of criminal offences and punishments; as well as the freedom of belief, conscience, thought, and public expression of thought and creed.

With item 1 of Amendment XXV Article 98 of the Constitution of the Republic of Macedonia is being replaced. According to the stated Amendment, the judicial authority is exercised by the courts. The courts are autonomous and independent. The courts reach their decisions based on the Constitution and the laws and international agreements ratified in accordance with the Constitution. Extraordinary courts are prohibited. The type, the jurisdiction, the establishment, the disbanding, the organization and the structure of the courts, as well as the court procedure, are regulated by law which needs to be adopted by a two-thirds majority of the total number of representatives.

Law on Execution of Sanctions in Chapter XI regulates the matter regarding the preservation of the order and discipline in the penitentiary and educational-corrective institution.

According to Article 176 of the Law, order and discipline are maintained in the interest of the safety of the institution, in order to provide a common life for the convicted persons and to achieve the goals of the treatment (paragraph 1). The convicted persons are obliged to respect the provisions of this law and the house rules, to perform the obligations of the treatment program and to follow the orders of the official persons (paragraph 2).

According to Article 177 paragraph 1 item 1 of the Law, violations of discipline can be major and minor.

According to Article 177 paragraph 1 item 2 of the Law, major violations of discipline are:

- Not following an order by an official person which would cause bigger disturbance in the working of the institution,
- Physical assault of an official person or other convicted person,

- Bringing in or making objects that could be used for assault, escape or for performing a criminal offence,
- Escape from prison sentence,
- Abuse of the awarded privileges,
- Bringing in or making alcoholic beverages and narcotics, for the purpose of consuming or distributing,
- Intentional violation of the regulations regarding safety at work, protection from fire, explosion or other natural disasters,
- Causing significant material damage, if it was caused on purpose or by extreme negligence,
- Reselling,
- Money lending and mutual debt for usurer interest,
- Using force, exercising psychological pressure and physical form of pressure against other convicted persons and incentive of the above, and
- Repeating minor violations.

According to paragraph 2 from the same Article of the Law, the minor disciplinary violations are determined by the house rules of the institution.

Article 178 of the Law contains the types of disciplinary punishments, among them directing to solitary confinement for 3 to 15 days with or without a right to work (the contested item 5 from Article 178 of the Law).

According to Article 179 of the Law, the disciplinary punishments are pronounced by the director of the institution or a person who is his substitute (paragraph 1). During the disciplinary procedure the convicted person has to be heard and his statement should be verified (paragraph 2). The behavior of the convicted person and whether he has received disciplinary punishment in the past will be taken into consideration during the disciplinary sentencing (paragraph 3). Before sending the convicted person to serve in solitary confinement as disciplinary punishment, an opinion regarding the health of the convicted person will be obtained from the doctor (paragraph 4).

According to Article 180 of the Law, the disciplinary measures limitation of awarding privileges for up to three months if the convicted person abused the given privileges, and directing the convicted person to solitary confinement for 3 to 15 days with or without a right to work, can be used in major breaches of discipline (paragraph 1). The execution of the disciplinary punishments, limitation of awarding privileges and directing to solitary confinement can be conditionally delayed for up to six months, if there is basis to the expectation that even without the execution of the pronounced punishment the goal of the disciplinary punishment will be achieved (paragraph 2).

The conditional delaying of the execution of the disciplinary punishment will be revoked if the conditionally punished convicted person is again disciplinarily punished within the time limit for which the execution was delayed. If the pronounced punishment is revoked one punishment will be pronounced for both the old and the new disciplinary violation, whereupon a sending to solitary confinement for up to 30 days can be pronounced (paragraph 3).

According to Article 181 of the Law, during the execution of disciplinary punishment directing to solitary confinement, the convicted person is provided with hygienic and health services as needed and the option to read books and newspapers (paragraph 1). The room where the disciplinary punishment directing to solitary confinement is served has to be at least 9m³ big, lit with daylight, have sanitary equipment, drinking water, bed with sheets, table and chair and it has to be heated (paragraph 2). The disciplinarily punished who is directed to solitary confinement must be provided one hour per day of fresh air outside of the closed rooms (paragraph 3). The punished person is visited by a doctor every day and by the director of the institution once a week (paragraph 4).

According to Article 182 of the Law, disciplinary punishment directing to solitary confinement will not be executed or the execution will be stopped if the health of the convicted person is jeopardized with the execution. During this, the pronounced disciplinary punishment can be substituted by another milder punishment.

According to Article 183 of the Law, the Director of the institution can stop the execution of the punishment if he determines that the goal of the disciplinary punishment is achieved with a partial execution of the punishment.

According to Article 185 of the Law, the convicted person has a right to appeal to the Director of the institution within 3 days against the resolution for the pronounced disciplinary punishment, as well as against the resolution in Article 184 of this Law regarding the compensation of damages (paragraph 1). The appeal of the convicted person does not delay the execution of the punishment (paragraph 2). The procedure for deciding upon the appeal is an urgent one (paragraph 3).

5. Starting from the content of Article 11 paragraph 1 and 2 of the Constitution, one concludes that the right to the protection of the physical and moral integrity is a generally accepted personal freedom and right guaranteed with the Constitution of the Republic of Macedonia, and the mechanism for providing the anticipated guarantee is contained in the ban on all kinds of torture, inhumane or degrading treatment and punishment.

From this, the physical and moral integrity of man and all citizens have to be respected in every occasion, both by the state bodies in charge of repression as well as by each citizen individually. The Constitution protects the citizen from every form of abuse, humiliation and rough treatment that is intended to degrade his personality or expose him to intentional physical or mental suffering, regardless of whether he is free or in jail. Namely, the citizen, whether he is free or in jail, has the same constitutionally guaranteed rights. To achieve this goal, he has a right to object to the procedures of the state bodies and to request respect of his integrity.

In evaluating directions to solitary confinement as a disciplinary punishment with the greatest dosage of repression, according to its placement in the Law, it turns out that it is applied as a final solution to discipline a convicted person who has broken an order and a discipline, for actions precisely defined by law (Article 177, paragraph 1, item 2). This punishment is applied after a previously instigated legally legislated procedure by the prison management, a procedure which, among other things, required the mandatory hearing of the convicted person as well as the verification of his statement (Article 179 paragraph 2 of the Law).

Considering the fact that during the application of this punishment, it is to be expected that certain negative effects on the physical and mental health of the convicted person could occur, Article 179 paragraph 4 of the Law requires a mandatory opinion by a doctor regarding the health of the convicted, before being sent to solitary confinement, and according to Article 191 paragraph 4 of the Law, the punished person must be visited by a doctor every day.

Consequently, the directing to solitary confinement as the hardest type of disciplinary punishment is applied in cases of major violations of discipline, precisely determined in Article 177 paragraph 1, item 2 of the Law, the measure is pronounced in a precisely determined procedure in which the right to appeal is anticipated (Article 185, paragraph 1 of the Law) and it can be executed if the health of the convicted person allows for it, taking into consideration the principle of individualization and the supposed effect of its execution.

Furthermore, the Court aiming to determine if and for what reasons there is a need for this type of disciplinary punishment considered the circumstances that can lead to its application.

Namely, the convicted persons in prison conditions should adjust their behavior to the special societal norms and to the norms of the prison facilities, contained in the house rules of the penitentiary institutions where they are serving the imprisonment sentence. The two systems of norms for the convicted persons represent systems of various deprivations and limitations of the previously enjoyed rights and freedoms, which in certain cases could lead to a depersonalization of the personality, and furthermore these persons could resort toward breaking the order and the discipline in the penitentiary institution.

To preserve the order and discipline in cases when re-educational norms will not have an effect, the disciplinary punishments setup as a special method of re-educational treatment are applied. They of course should be applied carefully, especially taking into consideration the principle of individualization and the supposed influence on the convicted person.

Such disciplining of the convicted persons cannot contain degradation and humiliation and should be an expression of the necessity to keep order and discipline in accordance with the need to re-educate the convicted person.

Consequently, according to the concept of the Law in general and the orderliness of the procedure for pronouncing this type of disciplinary punishment, it cannot be accepted that the contested legal provision recedes from the constitutional guarantee for protection of the physical and the moral integrity of man, as well as that it leads to inhumane and degrading behavior and punishment. This is so especially taking into consideration that the room where the pronounced

disciplinary punishment of solitary confinement is taking place should: fulfill the legally required hygienic-technical conditions; 1 hour stay in fresh air every day; daily visits by a doctor; and the possibility for reading books and newspapers (Article 181 of the Law), which ultimately does not represent a drastic recede from the conditions enjoyed by the rest of the confined persons.

According to the Court the allegation in the initiative that the convicted person is placed in a position of sensory isolation during the execution of the pronounced disciplinary punishment direction of solitary confinement, is unfounded. This also due to that the expression's terminology implies they stay in a room with total sound and light isolation, which is not the case with the room where the stated disciplinary measure is executed.

Finally, starting from the reasons which could lead to directing to solitary confinement, the regulation of the procedure for pronouncing this type of disciplinary punishment, its duration (from 3 to 15 days), as well as the goal which should be achieved with the pronounced punishment (Article 176 paragraph 1 of the Law) according to the Court, the constitutionality of the contested provision regarding its accordance with Article 11 of the Constitution of the Republic of Macedonia cannot be questioned. Also, a circumstance that should be taken into consideration is that according to the whole concept of directing to solitary confinement as a disciplinary punishment, its realization toward a specific person does not represent a radical change in the established everyday prison regime.

6. According to the Court the contested provision cannot be evaluated as to its accordance with Article 12 of the Constitution, for the simple reason that this constitutional provision does not sublimate the cases in which, according to a legally conducted procedure and delivered court decision, the freedom of man is already previously limited.

Furthermore, paragraph 4 in Article 54 of the Constitution contains a special type of a protection clause for certain freedoms and rights and the inability to limit this category of freedoms and rights even with the Constitution. The restriction of the freedoms and rights cannot apply to the right to life, the prohibition of torture, inhumane and degrading treatment and punishment, the legal determination of the criminal offences and the punishments, as well as on the freedom of persuasion, conscience, thought, public expression of thought and religious expression.

Following this, the Court assesses that the constitutionality of the contested provision regarding its accordance with Article 54 of the Constitution cannot be questioned, because the Constitution expresses, in this part, the principle of the existence of the freedoms and rights, specifically enumerated in paragraph 4, which are inviolable and untouchable even during a war or an emergency situation, which is not the case with the contested legal provision. The disciplinary punishment directing solitary confinement has the goal to sanction the convicted persons for major disciplinary violations and disobeying the legally determined regime of behavior in prison conditions. From this, the existence of one sanction in the penal law, in principle, does not exclude the existence of the same or similar sanction in the discipline sphere.

The Court, also to confirm the expressed view affirmed that the revised text of the European Prison Rules foresees an option for punishment with disciplinary confinement meaning that this

type of disciplining is not unknown to the wider European legislation. Namely, according to the rule 38.1 from the European Prison Rules, the punishment of disciplinary confinement, as any other punishment that could have an opposite effect on the physical and mental health of the prisoner, can only be applied if a doctor gives a written confirmation, after the examination, that the prisoner is capable to undergo this type of punishment.

Thus, according to the Court the constitutionality of the contested provision regarding its accordance with Article 8, paragraph 1, lines 1 and 3 of the Constitution and Amendment XXV cannot be questioned.

7. On the basis of the above, the Court has decided as stated in item 1 of this resolution.

8. This resolution was delivered by the following composition of the Court: president of the Court Mahmut Jasufi and the judges Trenda fillvanovski PhD, Liljana Ingilizova-Ristova, Mirjana Lazarova Trajkovska, Vera Markova, Branko Naumoski, Bajram Polozani PhD, Igor Spirovski and Zoran Sulejmanov PhD.

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June 21, 2006
Skopje

PRESIDENT
of the Constitutional court of the Republic of Macedonia
Mahmut Jasufi