

U. no: 261/2008-0-0

Date: 09/16/2009

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 September 16, 2009, adopted the following

RESOLUTION

Text

1. A PROCEDURE IS NOT INSTIGATED for appraisal of the constitutionality of Article 2 lines 4, 6 and 7-a and Article 3 paragraph 2 and on the Anti-Smoking Law in its entirety ("Official Gazette of the Republic of Macedonia" no. 36/1995, 70/2003, 29/2004, 37/2005, 103/2008 and 140/2008).

2. Miroslav Grchev and 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 2 lines 4, 6 and 7-a and Article 3 paragraph 2 and on the entirety of the Law mentioned underpoint 1 of this Resolution.

According to the allegations of the submitter of the initiative Miroslav Grchev, the contested Article 2 lines 4, 6 and 7-a and Article 2 paragraph 2 were not in accordance with Article 9, Article 16, Article 25 and Article 55 of the Constitution of the Republic of Macedonia. Namely, [according to the submitter] the contested Law, with its title and definition of purpose of the stipulated matter implied that it stipulates measures for protection from smoking which refer to all citizens equally, i.e. that the prohibitive measures refer to tobacco, smoking and the harmful effects of smoking, not only that it not forbids smoking tobacco, but does not prohibit the manufacturing, processing, trade and intermediation of tobacco and tobacco products as it is usually done with harmful, toxic and dangerous to health substances and products. Therefore, it could have been concluded that this Law treats smoking as legal and legitimate activity practiced by citizens with full awareness and responsibility, as a result of personal beliefs and decision.

Although Article 1 of the Law declares that the Law stipulates the protection from the harmful effects of smoking to citizens, preservation of health and environment, ban of smoking in certain public premises, and ban on advertising cigarettes, the Law does not state any protective measure from the harmful effects of smoking or for preservation of the environment, but it only stipulates the ban on smoking in public premises (Articles 2 and 3 of the Law); ban on advertising cigarettes as well as ban on sales of cigarettes to persons under the age of 16. Thus, the Law does not fulfil the legitimate goals – protection of both health and the environment.

The Anti-Smoking Law does not stipulate the protection of health of all citizens equally, rather only of selective group of citizens-non smokers, and only partially, from the harmful effects of the activity of a particular group of citizens-smokers in premises which are listed in Article 2.

With the contested Articles 2 and 3 of the Law, citizens-smokers were limited the right to free movement, gathering, socialization and relaxation, not only in public institutions for education,

culture, health, state administration and sports, but also in the catering industry, which is not a public activity in its nature.

The only goal which was partially achieved by the Anti-Smoking Law was the protection of the citizens-nonsmokers from the effects of the cigarette [second-hand] smoke which was exhaled from the citizens-smokers in their presence. But, the legislator could have and should have achieved this objective in a manner which would provide equal rights and freedoms to all citizens, which means that the Law had to provide opportunity, wherever spatially and architecturally possible, to enable separate areas in the facilities to be used by both smokers and nonsmokers. Also, the Law had to have stipulated the possibility of the existence of assigned premises, especially outside the public sector, which were for use by citizens-smokers, since it was the only way for the objective to be achieved, that is the protection of the health of nonsmokers, without violating constitutionally guaranteed rights and freedoms of smokers and without exposing them to humiliation and public discrimination.

Article 2, lines 6 and 7-a of the Law, states all types of commercial catering industry facilities, as public premises in which smoking is banned, that legally and factually do not belong to the public sector for which a public interest is asserted. Thus, these economic subjects were denied their constitutionally guaranteed equal legal position, as well as the freedom of the market; their ownership was jeopardised, as well as the ventured capital and the subsistence on the market.

These violations of the constitutional rights of the economic subjects were unnecessary and unprincipled, because their only legitimate goal was protection of nonsmokers, which was achievable through complete spatial separation of the smokers from nonsmokers, which was architecturally possible. The same goal was achievable without public discrimination of either of the groups, and the economic subjects were provided the opportunity to freely express and customize their facilities to smoking and nonsmoking, and would thus be given their constitutional right to free market decision-making.

In Article 3 paragraph 2 of the Law, unlike the other contested provisions, the legislator perceived the necessity for existence of separate smoking rooms for accommodating guests in commercial facilities, but completely arbitrarily limited the number of these rooms to not more than 30% of the total capacity of the facility. This lump-sum and arbitrary limitation unnecessarily violated the freedom of market decision-making in certain situations, as well as the freedom of movement, without actually achieving any legitimate goal in the protection of citizens, since the number of smoking rooms in no way affected the number of protected citizens-nonsmokers.

According to the allegations of the submitter of the initiative Stamen Filipov, the contested law violated Article 8 paragraph 1 lines 1, 3 and 7, Article 9, Article 11 paragraph 1, Article 12 paragraph 1, Article 51, Article 54 paragraphs 1 and 3, and Article 55 of the Constitution of the Republic of Macedonia. This is because, since its adoption in 1995, the law was amended and supplemented five times, which makes it imprecise and inconsistent, and was not in accordance with the Constitution, as there was no constitutional basis for its adoption; it was discriminatory towards people who smoke cigarettes, severely violated their personal choice, and they were forced by penal provisions to respect its provisions.

The limitation and the penal provisions stated in the contested law could not pass the test of proportionality with the legitimate goal, and thus a fair equilibrium between the individual and the public interest was not achieved.

The right to freedom also meant a person's right to free movement, freedom of action and freely expressed behaviour, which was not the case with the contested law. This right represents one of the fundamental rights since it served as a condition for the complete activity of a person and supposition for fulfillment of his/her other rights and freedoms. At first, this right had the same importance as the right to life and the right to inviolability of the person.

3. At its session, the Court determined that the Anti-Smoking Law stipulates the protection from the harmful effects of smoking tobacco and other tobacco products on people, preservation of a healthy environment, ban on smoking in public premises and the ban on cigarette advertising (Article 1).

According to Article 2 of the law, the following are implied as public premises:

1. Facilities for performing educational activities and facilities for residence and accommodation of children, pupils and students;
2. Health and social facilities;
3. Closed and open spaces for sports events, cultural and entertainment events, gatherings and other public events;
4. Means for public transport of passengers;
5. Rope railways and ski-lifts;
6. Facilities for manufacturing, preparation, serving, sales and consumption of food and internet cafes;
7. Premises in the state's bodies, facilities and institutions in the local self-government in which meetings and gatherings are held;
- 7-a. Restaurants, coffee places, night bars, cafe bars, cabarets, disco clubs and pubs;
8. Common areas in residential buildings as well as common parts of the residential building (skylights, elevators, common boilers, etc.) determined by law and,
9. Other public premises (halls, offices, working areas, waiting rooms, corridors, etc.).

According to Article 3 paragraph 1 of the Law, smoking is forbidden in the public premises in Article 2 of this Law. According to paragraph 2 of this Article, in facilities that accommodate guests, smoking rooms can be designated for no more than 30% of the total capacity of the facility. According to paragraph 3 of the same Article, in the public premises stated in Article 2 of this law as well as in the rooms for accommodating nonsmokers in the facilities stated in paragraph 2 of this Article, the responsible person from the legal person will put out a sign indicating that smoking is prohibited and will provide a control mechanism for the smoking ban.

Article 4 of the Law stipulates the issue of ban on advertisement of tobacco products and tobacco industry in any given form, directly or indirectly, internally or externally and specifically: in public places and public premises, in the press, on radio and television, through film slides and movies, panels, boards, stickers, awnings, parasols and umbrellas, advertising materials, promotional materials, sponsorship and donations for sports, cultural, music and other performances and events.

The tobacco products can be displayed at sales points (newsstands, shops, restaurants, etc.) only in the original package along with the standard price information.

Further, the Law details the issue of indirect advertising of tobacco and tobacco products, that carry the name of a tobacco product on non-tobacco products, and thus it indicates the following as indirect advertising: using logos, letter, signs, symbols, slogans, places of production of the product used in relation to the tobacco products in the past or the present.

Article 4 paragraph 4 of the contested Law determined that besides the public premises in Article 2 of this Law, as public places in which advertising of tobacco products is forbidden are considered places accessible to anyone with or without tickets, such as: streets, squares, ports, beaches, administrative business/residential buildings, facilities for sports, recreation, culture and entertainment, hotels, restaurants and other catering facilities, shopping malls, shops, newsstands, etc.

Article 5 of the Law states the issue on ban on sales of cigarettes and tobacco to persons under the age of 18 in retail stores.

According to Article 5-a paragraph 1 of the Law, the sales of cigarettes inside and outside facilities located in sports and recreational areas is forbidden, and paragraph 2 of this Article forbids the sales of tobacco products by individual unit (per cigarette), sales through cigarette machines, in self-service areas, as well as preordered sales.

According to Article 6 of this Law, the manufacturer of cigarettes is obliged to print a warning message on the cigarette packs that smoking is harmful to health.

The warning messages from paragraph 1 of this Article are to be determined by the Minister of Health within 60 days of entry into force of this Law.

Article 7 of the Law stipulates the issue of inspection supervision regarding the implementation of the Law, which is done by the State Market Inspectorate, the State Sanitary and Health Inspectorate, the State Educational Inspectorate and the State Labor Inspectorate.

Articles 9, 10, 10-a through 10-d stipulate the amount of the penalty for breaching the provisions of the Law; the authorization of persons responsible for the inspection supervision to submit a request for instigating a misdemeanor procedure before the competent court; the possibility for the authorised person to propose a settlement procedure for some of the misdemeanors of the perpetrator before submitting a request for misdemeanor procedure, in order to overcome the consequences of the misdemeanor by performing community service or providing the means for performing a community service.

The Law on amending and supplementing the Anti-Smoking Law ("Official Gazette of the Republic of Macedonia", no. 103/2008), which entered into force on August 27, 2008, declares that Article 2 line 7-a of the Law will be implemented from January 1, 2010.

4. According to Article 8 of the Constitution of the Republic of Macedonia, along with the other fundamental values of the constitutional order of the Republic of Macedonia, the landscaping and the protection and promotion of the environment and nature is determined. This fundamental value is normatively expressed in several articles of the Constitution. Thus, according to Article 43 of the Constitution, every person has the right to a healthy environment.

Everyone is obliged to promote and protect the environment and nature.

The Republic provides the conditions for exercising the rights of citizens to a healthy environment.

According to Article 39 of the Constitution, every citizen is guaranteed their right to health care, the citizens have the right and duty to protect and promote their own health and the health of others.

Considering the problems caused by the uncontrolled technological and economic development of the country, as well as the world in general, which leads to jeopardizing of the environment, i.e. disruption of the equilibrium between man and nature, the creator of the Constitution raised protection and promotion of the environment and the nature to a level of fundamental values of the constitutional order of the Republic of Macedonia.

Further, the creator of the Constitution in the part for exercising certain civic and political freedoms and rights determined by the Constitution (right to inviolability of the home, right to free movement and choice of residence (Articles 26 and 27 of the Constitution) and freedom of market and entrepreneurship (Article 55 of the Constitution), allows limitation of these freedoms and rights if it is in the best interest for protection of the environment or health of people, environment and nature.

In order to protect the environment and the health of people, with reference to Article 12 of the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on December 16, 1966, which determines everyone's right to achieving the highest attainable standard of physical and mental health, as well as to the preamble to the Constitution of the World Health Organization stating that exercising the highest attainable standard of health is one of the fundamental rights of every human regardless of race, religion, sex, persuasion, economic and social status, in May, 2003 the World Health Organization adopted the Framework Convention on Tobacco Control.

Article 8, "Protection from Exposure to Tobacco Smoke" of the named Convention, stipulates that the parties accept that the scientific evidence unequivocally shows that exposure to tobacco smoke causes death, disease and disability.

Each party will adopt and implement measures in the existing areas of the national legislation, in a way which is determined in that legislation and will actively promote on other legislative levels adoption and implementation of effective, legislative, executive, legislative and/or other measures to ensure protection from tobacco smoke exposure in working areas, public transport, public premises and other public places respectfully.

The Framework Convention became a part of the internal legal order of the Republic of Macedonia with its ratification by the Assembly of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 68/2006).

From the analysis of the Anti-Smoking Law in its entirety, as well as the contested provisions which are stipulated in the Law after the ratification of the named Framework Convention and which, in their essence imply implementation of Article 8, it becomes evident that the legislator opted for a strict concept of prohibition, i.e. limitation of smoking in public premises which is clearly determined, without exceptions.

However, considering that the strict concept of prohibition of smoking in facilities listed in Article 7-a of the Law (catering facilities) will cause negative economic effects for the entities in the market performing such activity, and which, when making a decision to perform this activity did not have the opportunity to know that smoking will not be allowed in those facilities, the legislator allowed a period of adjustment of these entities until December 31, 2009, in order to gradually eliminate those economic effects.

Starting from above stated, and also considering the allegations from the initiatives that the Law in its entirety, along with the contested provisions violated Articles 9, 16, 25 and 55 of the Constitution, the Court held that these are unfounded. The reason is that the behavior of the

individual to smoke as a personal determination cannot be brought into correlation with the principle of equality, freedom of belief, as well as respect and protection of privacy of the personal and family life, dignity and reputation.

There are no stipulations in the Law with which the legislator prohibits the individual to smoke or not, i.e. the Law does not consider their personal determination whether to smoke or not, but only obliges smokers to restrain from smoking in environments, places and facilities where there is contact with nonsmokers thus providing protection not only to their health, but also to the health of the other citizens, which is also a constitutional duty.

All places stipulated by the legislator as public premises where smoking is prohibited are accessible to the individual-smoker, however they should adjust their behavior to the behavior of the other citizen-nonsmokers, in a manner and under conditions stipulated by law and which refer to all the citizens under same conditions.

According to the opinion of the Court, the contested provisions and the Law in its entirety neither have the goal nor represent limitations to the determination of the individual to smoke, but are oriented to protection of life and health of other people as much greater values which can be jeopardized through the smokers' irresponsible behavior, and thus it cannot be said that these are used to discriminate smokers in respect of nonsmokers.

The Court also marked that the allegations from the initiatives, that the contested provisions restricted the freedom of the market and entrepreneurship determined in Article 55 of the Constitution, are unfounded. According to the Court, this is because the legislator has the legitimate right to stipulate the relations in the separate areas of the social life, and it is in this sense that it stipulates the issue of the prohibition of smoking in catering facilities without any exceptions, and towards protection of the health of people.

At the same time, the Court marked as unfounded the allegation in the initiative that the legislator gave lump-sum and arbitrary stipulation of the number, i.e. the percentage of smoking rooms in commercial facilities for accommodation of guests in a manner which unnecessarily violated the freedom of market decision-making and the freedom of movement without achieving a legitimate goal – protection of citizens. This is because, as it was stated above, the legislator has the right to assess and determine the maximum when there is a possibility for separate smoking rooms in commercial facilities for accommodation of guests, which are isolated and in which smokers do not jeopardize and do not bring into question the health of nonsmokers.

The allegation in the initiative that the contested law did not comply with the Constitution because it was amended and supplemented several times is unfounded. According to the Court, this is because the legislator has the right to assess and decide on the need for adoption, amendment and supplementing laws and the Constitutional Court appraises only their compliance with the Constitution, and not the purposefulness of the necessity for adoption, i.e. amendment of the laws, which means that the allegations in the initiative are beyond the scope of jurisdiction of the Constitutional Court as determined by the Constitution of the Republic of Macedonia.

5. By virtue of the above said, the Court has decided as in point 1 of this Resolution.

6. This Resolution was delivered by the Court in the following composition: President of the Court, Trendafil Ivanovski PhD and the judges Natasha Gaber-Damjanovska PhD, Ismail

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Darlishta, Liljana Ingilizova-Risotva, Vera Markova, Branko Naumoski, Igor Spirovski, Gzime Starova PhD, and Zoran Sulejmanov PhD, and in relation to Article 2 line 7-a, the Resolution was delivered by majority of votes.

U.no.261/2008
U.no.70/2009
September 16, 2009
Skopje
I.k.

PRESIDENT
of the Constitutional Court of the Republic of Macedonia
Trendafil Ivanovski PhD