

**U. no:** 70/2009-0-0

**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 16 September 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 to instigate 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 stated on item 1 of this Resolution.

The submitter of the initiative Miroslav Grchev alleges that the contested Article 2 lines 4, 6 and 7-a and Article 3 paragraph 2 do not accord with Article 9, Article 16, Article 25 and Article 55 of the Constitution of the Republic of Macedonia. Namely, the contested Law in its title and definition of purpose of the regulated matter implied that what is being regulated are measures for protection from smoking that apply to all citizens equally, in other words the prohibiting measures apply to tobacco, smoking and damaging actions caused by smoking, but not only was the act of smoking not prohibited, but also the manufacturing, processing, the trade or the intermediation of tobacco and tobacco products, as prohibition usually exists in relation to harmful, toxic, narcotic and health hazard materials and products which are not prohibited. Because of this it could have been concluded that this Law treats smoking as a legal and legitimate activity which the citizens would have practiced with complete conscience and responsibility as a fruit of their personal persuasion and decision.

Although Article 1 of the Law declares that it regulates protection from harmful actions to citizens caused by smoking, the preservation of health, the environment, prohibition of smoking in certain public premises, and prohibition of advertising cigarettes, there has not been even one measure in the Law about the protection from harmful consequences caused by smoking or the preservation of the environment, but the regulation only concerns to prohibition of smoking in public premises (article 2 and 3 from the Law); the prohibition on advertising of cigarettes, as well as the prohibition of selling to persons younger than 16 years of age. Because of this, the Law's legitimate goals of protection of health and the protection of the environment were not being realised in practise.

The Anti-Smoking Law does not regulate the protection of health of all citizens equally, but selectively only of a group of citizens non-smokers, and only partially, from the harmful influence of the activity of group of citizens smokers in the premises that are specifically enumerated in Article 2.

In the contested Articles 2 and 3 of the Law, the citizen smokers were being limited in their right to free movement, gathering, socialization and relaxation not only in public institutions of education, culture, health, state administration and sports, but also in the catering industry which isn't a public activity by nature.

The only goal from the Anti-Smoking Law which is partially achieved was the protection of citizen non-smokers from the effect of smoke from cigarettes used by the citizen smokers in their presence. But, this objective of the legislator could have and should have been achieved in a manner that would give equal rights and freedoms to all citizens, which means the law must have provided an opportunity, wherever the space and architecture allows for providing separate premises for usage of the assigned facilities by citizen smokers and non-smokers. Also, the Law must have regulated the possibility of the existence of assigned premises, especially outside the public sector, which could be used by citizen smokers because that was the only way to achieve the same objective, which is the protection of health of non-smokers without violating the constitutionally guaranteed freedoms and rights of citizen smokers and without exposing them to humiliation and public discrimination.

In Article 2 lines 6 and 7-a of the Law, public premises where smoking is prohibited by law are stated as all commercial catering industry facilities which legally and de facto didn't belong to the public sector for which a public interest asserted. With this, these economic subjects were denied a constitutionally guaranteed equal position before the law, as well as the freedom of the market, thereby jeopardising the property, invested resources and their survival in the market.

These disruptions to constitutional rights of economic subjects were unnecessary and non-principled because the only legitimate goal was protection of non-smokers which could have been achieved with a complete separation of the premises for the smokers and non-smokers, which was architecturally possible. The same goal could have been achieved without discrimination of any group of citizens with the possibility for free declaration from economic subjects and specialisation of their facilities, facilities catering to smokers and facilities catering to non-smokers, thus also securing the constitutional right to free market decision making.

In Article 3 paragraph 2 of the Law, differing from the other contested provisions, the legislator perceived a necessity of rooms for smokers in commercial facilities to accommodate guests, but completely arbitrarily limited the number of these rooms to no more than 30% of the facility's whole capacity. With the lump-sum and arbitrary limitation, the freedom of making market decisions in certain situations and freedom of movement are unnecessarily disrupted, without achieving any legitimate goals in protecting the citizens, because the numbers of rooms for smokers haven't had any effect at all on the number of protected citizen non-smokers.

The submitter of the initiative Stamen Filipov alleges that the contested law infringes 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 was because after its adoption in 1995, it was amended and supplemented 5 times, which demonstrates its imprecision, inconsistency and divergence with the Constitution, because there has been no constitutional basis for its adoption, it was discriminatory toward people who smoke cigarettes and severely infringed their personal choice whilst using penal provisions to force them to respect its provisions.

The limitations and penal provisions stated in the contested Law could not have passed a proportionality test in line with a legitimate goal, as well as failing to achieve a fair balance between the individual and the public interest.

The right to freedom includes man's right to free movement, freedom of action and freely expressed behaviour, this has not been the case in the contested law. This right represents a basic right because it was a condition for all activity of people and a preposition for exercising his other rights and liberties. This right had the same importance as the right to life and the right to inviolability of personality.

3. During the session the Court determined that the Anti-Smoking Law regulates protection from harmful actions caused by smoking tobacco or other tobacco products, on citizens, the preservation of a healthy environment, prohibition of smoking in public premises and prohibition of advertising cigarettes (Article 1).

According to Article 2 of the stated Law, public premises as meant by this law are;

1. Facilities performing an educational activity and facilities for stay and accommodation of children, pupils and students;
2. Facilities belonging to health and social institutions;
3. Closed and open spaces for sports matches, cultural and entertainment events, gatherings and other public events;
4. Means for public transportation of passengers;
5. Rope railway and ski-lifts;
6. Facilities for producing, preparing, serving, selling and consuming food and internet cafes,
7. Premises in the state's establishments, institutions and the establishment of local self-government where meetings take place;
- 7-a. Restaurants, coffee places, night clubs, cafe bars, cabarets, disco clubs and breweries,
8. Common areas in an apartment building and common parts of an apartment building (lighthouses, lifts, common boiling rooms and similar parts) determined by law; and
9. Other public premises (halls, offices, work spaces, waiting rooms, hallways and similar spaces).

According to Article 3 paragraph 1 of the Law, in public premises stated in Article 2 of this law smoking is prohibited. According to paragraph 2 of this article, in facilities for accommodating guests, rooms for accommodating smokers can be designated, but only up to 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

non-smokers in the facilities stated in paragraph 2 of this Article, the responsible person of the company will put out a sign indicating that smoking is prohibited and will provide a control mechanism for smoking prohibition.

Article 4 of the Law regulates matters regarding the prohibition on advertising tobacco products and the tobacco industry in any form, directly or indirectly, inside and outside in the following venues: in public places and in public premises, in the press, on radio and television, by using film and movies, on panes, tables, stickers, tents, on umbrellas used for protection from sun or rain, on advertising materials, in promotional activities, by sponsoring and donating to sport, culture, music... and during other occasions and events.

Tobacco products can only be exposed in places of sale (kiosk, shop, restaurant and others) and only in original packaging along with the standard information about the price.

Furthermore, the Law regulates the issue of indirect advertising of tobacco and tobacco products, which carries the name of a tobacco product, but are not a tobacco product, and indirect advertising can be considered the use of a logo, a letter, signs, symbols, slogans, places of manufacturing of the product which were used in connection with tobacco products in the past or the present.

Article 4 paragraph 4 of the contested Law determines that along with the public premises in Article 2 of this law, as a public place where the advertising of tobacco products is prohibited is included any place available to everyone with or without tickets, like: streets, squares, ports, beaches, parks, administrative-business apartment buildings, facilities used for sport, recreation, culture and entertainment, hotels, restaurants and other catering industry facilities, shopping malls, shops, kiosks and similar spaces.

Article 5 of the Law regulates the matter regarding the prohibition of sales of cigarettes and tobacco to persons under the age of 18 years in the retail market.

According to Article 5-a paragraph 1 of the Law, the sale of cigarettes inside and outside facilities located in sport-recreational spaces is forbidden, and according to paragraph 2 of the article the sale of tobacco products one piece at a time (one cigarette) is forbidden, also forbidden are the sales in automated vending machines, self-serve places, as well as sale using remote ordering.

According to Article 6 of the Law, the cigarettes manufacturer is obligated to print a warning message on the cigarette pack stating that smoking is harmful for the health.

The warning messages in paragraph 1 of this article are determined by the Minister of Health within a 60 day deadline from the law's entering into force.

Article 7 of the Law regulates the matter regarding supervising the implementation of the law, and this supervision is currently done by State Market Inspectorate, State Sanitary and Health Inspectorate, State Education Inspectorate and State Labour Inspectorate.

Articles 9, 10, 10-a through to 10-e regulate the matter of a fine for violating the provisions in the Law, the authority given to persons responsible for conducting the inspection supervision to submit a request for initiating a misdemeanour procedure before a competent court, the possibility that the official person has, for certain misdemeanours of the offender, to suggest a plea-bargain before submitting a request for a misdemeanour procedure, the goal of which is to overcome the consequences of the misdemeanour through doing community service or by providing a means to conduct a community service.

In the Law 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, it is detailed that Article 2 line 7-a of the Law will be enforced starting from January 1, 2010.

4. In 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 value of the arrangement and humanisation of premises and protection and improvement of the environment and nature is established. This foundational value is normatively expressed in multiple articles of the Constitution. So, according to Article 43 of the Constitution for example, every man has a right to a healthy environment.

Everyone is obligated to improve and protect the environment and nature.

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

According to Article 39 of the Constitution of the Republic of Macedonia, the right to health care is guaranteed to each citizen, the citizen has the right and the duty to preserve and improve his own health as well as the health of others.

Considering the problems caused by the uncontrolled technological and economic development within the country and throughout the world generally leads to the endangerment of the environment and disturbing the balance between man and nature, the creator of the Constitution has raised the protection and improvement of the environment and nature to the level of a fundamental value of the constitutional order of the Republic of Macedonia.

Furthermore, the creator of the Constitution in the part devoted to realising certain civil and political freedoms and rights established within the Constitution such as the right to inviolability of the home, the right to free movement and free choice of a dwelling (Articles 26 and 27 of the Constitution) and the freedom of the market and entrepreneurship (Article 55 of the Constitution), affords the limitation of these freedoms and rights, if this limitation is in the interest of protecting the environment or the health of people, the environment and nature.

The World Health Organisation in May 2003 adopted a Framework Convention on Tobacco Control with the goal of protecting the environment and the health of people, invoking 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, in which everyone's right to

enjoying the highest attainable standard of physical and mental health is established, as well as the preamble of the Constitution of the World Health Organisation which states that enjoying the highest attainable standard of health is one of the basic rights of every man regardless of his race, religion, sex, persuasion, economic and social status.

Article 8 titled "Protection from exposure to smoke from tobacco" of the before mentioned Convention, anticipates that the parties accept that the scientific evidence conclusively has shown that exposure to smoke from tobacco 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 by the legislation and will actively promote in the other legislative levels the adoption and implementation of effective, legislative, executive, legislative and/or other measures for providing protection from exposure to smoke from tobacco in work spaces, public transport, public premises and appropriately in other public places.

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

From analysing the Anti-Smoking Law in its entirety, as well as the contested provisions detailed in the Law after the ratification of the stated Framework Convention, which in their essence imply the implementation of Article 8, it turns out that the legislator chose a strong concept of prohibition, or limiting of smoking on public premises without exceptions which are specifically stated.

However, taking into consideration that the strong concept of prohibition of smoking in the facilities of Article 7-a of the Law (catering industry) will cause negative economic effects for the legal persons performing such activity within the market, and who, while making the choice to perform this activity couldn't have known that smoking would not be allowed in their facilities, the legislator allowed an adjustment deadline for these legal persons by December 31, 2009, with the goal of gradual elimination of these economic effects.

Following from this, while considering the allegations in the initiatives that the Law in its entirety and the contested provisions Articles 9, 16, 25 and 55 of the Constitution are being violated, the Court decided that these allegations are unfounded. This because the behaviour of the individual to smoke as a subjective choice is not consistent with the principle of equality, freedom of persuasion as well as with respecting and protecting the privacy of the personal and family life, to dignity and the reputation.

In no provision in the Law is the legislator prohibiting the individual to smoke or not, in other words the legislator doesn't consider personal persuasion whether to smoke or not, but determines that the individual smoker should withhold from smoking in areas, places and facilities where he comes into contact with non-smokers, thereby providing not only the protection of his health, but the protection of the health of the other citizens which is a constitutional obligation.

All places which the legislator determined as public premises where smoking is prohibited are available to the individual-smoker, but they have to adjust their behaviour towards the behaviour of the other citizen non-smokers in ways and under conditions determined by law which apply to all citizens under the same conditions.

According to the opinion of the Court, the contested provisions and the law in its entirety do not have the goal nor do they represent a limitation of the choice of an individual to smoke, but are directed towards the protection of the life and the health of the other persons as greater values which may be jeopardised by the irresponsible behaviour of the smokers, and because of this it cannot be said that discrimination of smokers compared to the non-smokers is taking place.

The Court also decided that the allegations in the initiatives claiming that the freedom of the market and entrepreneurship established in Article 55 of the Constitution is being limited with the contested provisions are unfounded. This because, according to the Court, the legislator has a legitimate right to regulate matters in certain areas of society and with this the right to also regulate the matter of prohibition of smoking in the catering industry facilities with no exceptions, and with the goal of protecting the health of the people.

At the same time, the Court decided that the claim in the initiatives stating that the legislator lump-sum and arbitrarily determined the number, and the percentage of smoking rooms in the commercial facilities for accommodating guests in a way that completely unnecessarily disrupting the freedom of making market decisions and the freedom of movement without achieving a legitimate goal – the protection of the citizens, is also unfounded. This because, as already stated, it is the right of the legislator to evaluate and determine the maximum potential for having separate rooms for smokers in commercial facilities for accommodating guests which are isolated and do not jeopardise or bring into question the health of the non-smokers.

The allegation in the initiative that the contested law was not compliant with the Constitution only because it was changed and amended several times is unfounded. This is due to the reason that according to the Court, it is the right of the legislator to evaluate and decide the need for adopting, amending and supplementing laws, while the Constitutional Court can only judge their compliance with the Constitution, and not the purposefulness of the need for adoption or amendments to laws, which means that the claims of the initiative are outside of the jurisdiction domain of the Constitutional Court determined by the Constitution of the Republic of Macedonia.

5. On the basis of the above stated, the Court decided as stated in item 1 of this Resolution.

6. This Resolution was delivered by the following composition of the Court: President of the Court Trendafil Ivanovski PhD and the judges Natasha Gaber-Damjanovska PhD, Ismail Darlishta, Liljana Ingilizova-Ristova, Vera Markova, Branko Naumoski, Igor Spirovski, Gzime Starova PhD and Zoran Sulejmanov PhD, and regarding Article 2 line 7-a, the Resolution is delivered with a majority vote.

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September 16, 2009  
Skopje

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