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The Constitutional Court of the Republic of Macedonia on basis of Article 110 of the Constitution of the Republic of Macedonia and Article 70 clause 1 of the Rules of the Constitutional Court of the Republic of Macedonia ("Official gazette of the Republic of Macedonia", nr. 70/92) on its session held on 12 September 2002 made

DECISION

1. Article 10 paragraph 1 of the Law on Defense of the Republic of Macedonia is quashed ("Official gazette of the Republic of Macedonia", nr. 42/2001).

2. This decision produces legal effect from the day of its publication in the "Official gazette of the Republic of Macedonia".

3. The Constitutional Court of the Republic of Macedonia, with its decision nr. 37/2002 dated 26 June 2002, following the initiative of Stamen Filipov from Skopje, Shpend Devaja, lawyer from Skopje and the Civil Society Recourse Center from Skopje, started proceeding for evaluation of constitutionality of the provision mentioned in the point 1 of this decision, because there was well-founded reason to check whether it is compatible to the Constitution.

After making the decision, initiative for evaluation of constitutionality of the same legal provision was submitted by Cene Jakimovski from Skopje.

4. The Court on its session established that according to Article 10 paragraph 1 a recruit who wants to perform military service according to Article 8 of this Law (military service in Army without carrying weapons or military conscription in a civilian service) submits request in writing to the Ministry of Defense within 15 days from the day of receipt of the call to report for recruitment, stating the reasons and the manner in which he wants to perform military service.

5. In relation to Article 10 of the Law on Defense, the Court had in mind the constitutional provisions that refer to the equality of citizens, the freedom of religion and the freedom of belief, conscience and thought and public expression of thought, the protective guarantees relating to the freedom of belief, conscience, thought and public expression of thought, as well as the international documents that are integral part of the national legal order of the Republic of Macedonia and refer to the question at issue.

According to Article 8 clause 1 of the Constitution of the Republic of Macedonia, the fundamental human and citizen freedoms and rights, which are recognized by the international law and are established by the Constitution, are one of the cornerstones of the constitutional order of the state.

According to Article 16 paragraph 1 of the Constitution of the Republic of Macedonia, the freedom of belief, conscience, thought and public expression of thought is guaranteed.

Article 19 paragraph 1 of the Constitution guarantees the freedom of religion. Paragraph 2 of this Article guarantees expression of religion, freely and in public, either alone or in community with others.

According to Article 54 paragraph 1 of the Constitution, the human and citizen freedoms and rights can be limited only in cases prescribed by the Constitution.

¹ Unofficial translation of the decision published in "Official gazette of the Republic of Macedonia" nr. 73, 20 September 2002.

According to paragraph 3 of this Article, limitation of the freedoms and rights cannot be discriminatory on basis of sex, race, colour, language, religion, national or social origin, proprietary or social position.

Paragraph 4 contains particular kind of protective guarantee for certain freedoms and rights - such category of freedoms and rights cannot be limited by the Constitution. The limitation of the freedoms and the rights cannot refer to the right to life, the prohibition of torture, inhuman or degrading treatment and punishment, legal determination of crimes and penalties, as well as the freedom of belief, conscience, thought and public expression of thought.

Article 9 of the European Convention for Protection of Human Rights and Fundamental Freedoms refers to the freedom of thought, conscience and religion.

According to paragraph 1, every person has a right to freedom of thought, conscience and religion. This rights includes freedom to change his religion or belief and freedom either alone or in community with others and in public or in private to manifest his religion or belief, in worship, teaching, practice and observance.

According to paragraph 2, the freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a normal democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

According to Article 14 of the Convention, enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

According to Article 18 of the Universal Declaration on Human Rights of the United Nations, everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

According to Article 18 of the International Covenant on Civil and Political Rights of the United Nations, everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

On the basis of the above, the Court evaluates that the Constitution of the Republic of Macedonia, as well as the respective provisions of the international legal documents, treat the freedom of belief, conscience and thought as a right which is natural and integrally linked to the human essence. Namely, thought, conscience and belief (including the religious one) fall into the sphere of personal, intellectual and philosophical comprehension of the world surrounding human being. They are based on the person's own comprehension and beliefs and as such cannot be subject to coercion or any kind of pressure which could result in their disturbance or limitation. Thus, the law provides adequate and appropriate legal mechanisms to enable guarantees and protection to this freedom.

Conscience objection is derivative right, which comes out from the freedom of belief, conscience and thought. It is a means (instrument) which allows its holder to avoid certain legal obligations, because their fulfilment is contrary to his/her moral, religious, philosophical and humanitarian beliefs. Basically, this right exists in the sphere of defense of the country, where certain persons and under strictly determined conditions could seek (and the state might permit) exemption from military service. However, it does not mean that these persons are completely excluded/exempted from this obligation. The conflict of personal beliefs with the citizen duties is manifested in respect of carrying and usage of weapons. Therefore, the state provides conditions to these people to fulfil their right and obligation relating to defense of the state in a manner which would not be contrary to their intimate beliefs.

So, according to Article 8 of the Law, recruit who because of religious or moral beliefs (conscience objection) does not want to perform military service in army carrying weapons, may perform military service without weapons or to perform conscription in a civil service.

The disputed Article 10 of the Law determines the manner (procedure) for implementation of this right, in order to enable its holder to enjoy it.

Namely, a recruit who wants to perform military service in one of the alternative manners should submit request in writing to the Ministry of Defense within 15 days from receipt of the call to report for recruitment. The request should contain reasons and manner in which he wants to perform military service.

The Court ascertained that the issue in question is the procedure in which potential holders of this right are bound to prove that performance of military service with weapons is not compatible to their moral or religious beliefs and that because of such incompatibility their conscience and personal beliefs do not allow them to perform their citizen duty by carrying weapons. For these reasons, they are bound in appropriate procedure to prove that it is not acceptable for them to perform military service by carrying weapons and to declare in which manner (among the determined manners) they will perform military service. In addition to the obligation to perform military service in one of the alternative manners, the conscientious objector must obtain recognition of respective status in appropriate administrative proceeding. Only these two elements (taken cumulatively) - the obligation to perform alternative service and the proceeding for recognition of status of conscientious objector, may be considered as an acceptable basis which can confirm with high level of certainty that only persons, who refuse to perform military service carrying weapons because of conscience objection, can be exempted from this obligation.

Chapter V of the Law defines the military conscription. According to Article 50 of the Law, person subject to military conscription is conscript. During the military conscription, a conscript is:

- a) Recruit - during the recruit conscription,
- b) Soldier - during performance of military service,
- c) Reserve conscript - after regularization of performance of military service.

All these categories of persons participate in accomplishment of their constitutional right and obligation prescribed by Article 28 of the Constitution - defense of the state. All these persons, regardless whether they are recruits, soldiers or reserve conscripts are treated as conscripts and are subject to rights and obligations prescribed by this Law.

Having in mind the diction of Article 10 of the Law, it can be concluded that only recruits can enjoy the right to conscience objection, but other categories of conscripts cannot. The Law prescribed possibility of recognition of this right (to lodge conscience objection) only to one category of conscripts - recruits, without taking into account other conscripts who have status of soldiers or reserve conscripts. The conscience objection cannot depend on the status of the conscript and cannot be linked to it. The conscience objection is integrally linked to the thinking human sphere, which is

why the Court established that it is not acceptable to recognize the right to one category of conscripts and to fail to provide legal basis for accomplishment of this right by other category of conscripts. Therefore, by recognizing right to conscience objection only to recruits, the legislature failed to determine a proceeding that would allow accomplishment of this right to all those who are bound to participate in performance of military conscription. On such a way, the legislature discriminated those categories of conscripts (soldiers and reserve conscripts) who are performing their military conscription and disabled them to accomplish this right as long as they are bound by their legal obligation to participate in defense of the state.

The conscience objection actually is external manifestation of the freedom of thought, conscience and religion. This right includes the freedom to change religion and belief. Therefore, it is indisputable that such freedom means creation, change and cancellation of certain individual comprehension, moral or religious beliefs. If in one moment something is acceptable for human conscience and beliefs, it does not mean that it is durable and that it cannot be subject to certain modifications and changes during the time. Especially since the military conscription is continuous and is accomplished during long period of life.

The Law prescribes this right only for recruits, who can accomplish this right by submitting request in writing, addressed to appropriate Commission, within 15 days from the day of receipt of call to report for recruitment. The Court evaluates that this period of time is preclusive and that its expiration results in cease of the right of realization of conscience objection. It means that if the recruit does not submit request in writing for recognition of his right to conscience objection within 15 days from the day of receipt of call to report for recruitment, he would lose that right and later he cannot use it at all. The Court also established that such legal provision defines the freedom of conscience and belief (manifested through the right to conscience objection) as something unchangeable, having in mind the fact that the Law is linking accomplishment of that right to a period of time, after which expiration the right cannot be accomplished. According to the Court, it is limitation of the right because of the fact that the conscience objection could be lodged only once in a lifetime. Considering that the freedom of conscience also means change of belief, time limits cannot be prescribed for accomplishment of this right and freedom, i.e. the right cannot be limited in a manner of linking it to a time limit after which expiration the right could not be accomplished. Linkage of these freedoms with time limits directly attacks the essence and meaning of these freedoms, as strictly personal and integrally linked to their holder - the individual. The Court' reason for suspicion come out from the time unlimited character of the freedom of belief, conscience, thought and public expression of thought, which include the freedom to change these beliefs.

On the basis of the above, the Court established that the disputed provision of Article 10 paragraph 1 of the Law on Defense is not compatible to Article 9, Article 16 paragraph 1, Article 19 paragraph 1 and Article 54 paragraph 4 of the Constitution of the Republic of Macedonia, as well as to Article 9 of the European Convention for Protection of Human Rights and Fundamental Freedoms, Article 18 of the Universal Declaration on Human Rights and Article 18 of the International Covenant on Civil and Political Rights.

6. On the basis of that, the Court decided as in point 1 of this decision.

7. This decision was made by the Court composed of the President of the Court d-r Todor Džunov and the judges Bahri Isljami, d-r Nikola Krleski, d-r Stojmen Mihajlovski, d-r Milan Nedkov, d-r Jovan Proevski and d-r Josif Talevski.

U br. 37/2002
12 September 2002
Skopje

President of
the Constitutional Court of the Republic of Macedonia
d-r **Todor Džunov**, signed personally