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ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF ARMENIA

THE CASE ON CHALLENGING THE DECISION N-62-Ա, OF THE CENTRAL ELECTORAL COMMISSION OF 25 FEBRUARY 2013 ON ELECTING THE PRESIDENT OF THE REPUBLIC OF ARMENIA BASED ON THE APPLICATIONS OF THE CANDIDATES OF THE RA PRESIDENT RAFFI K. RICHARD HOVHANNISYAN AND ANDRIAS GHUKASYAN

Yerevan ***14 March 2013***

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan (Rapporteur), F. Tokhyan (Rapporteur), M. Topuzyan, A. Khachatryan (Rapporteur), V. Hovhannisyan, H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of K. Mezhlumyan and Z. Postanjyan, the representatives of the Applicant, the RA candidate of President Raffi K. Richard Hovhannisyan,

the Applicant, the RA candidate of President A. Ghukasyan,

the representatives of the Respondent the RA Central Electoral Commission T. Mukuchyan, the Chairman, A. Smbatyan, Secretary and N.

Hovhannisyan, Head of the Legal Department of Staff of the Central Electoral Commission of the RA,

the representatives of co-respondents the RA Prosecutor's Office, A. Tamazyan, Deputy Prosecutor General of the RA, K. Piloyan, Head of the RA Prosecutor General Office's Corruption and Organized Crime Department, H. Harutyunyan, Senior Prosecutor of the Prosecutor General's Office,

the representative of the RA Police adjunct to the RA Government T. Petrosyan, Head of the Legal Department of the RA Police,

D. Harutyunyan and H. Tovmasyan, the representatives of the third party, the candidate S. Sargsyan, involved in the proceeding based on Article 74, Part 5 of the RA Law on the Constitutional Court,

pursuant to Article 51, Part 5, Article 100, Point 3.1, Article 101, Point 9 of the Constitution of the Republic of Armenia, Articles 25 and 74 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by an oral procedure the Case on challenging the Decision N-62-Ա of the Central Electoral Commission of 25 February 2013 on electing the President of the Republic of Armenia based on the applications of Raffi K. Richard Hovhannisyan and Andrias Ghukasyan, the candidates of the RA President.

The Case was initiated on the basis of the applications submitted to the Constitutional Court of the Republic of Armenia on 04.03.2013 by Raffi K. Richard Hovhannisyan and A. Ghukasyan, the candidates of the RA President at the Elections of 18 February 2013.

By the Procedural Decision PDCC -13 of 5 March 2013 the Constitutional Court accepted for consideration the case on challenging the Decision N-62-Ա of the Central Electoral Commission dated 25 February 2013 on electing the President of the Republic of Armenia based on the application of Raffi K. Richard Hovhannisyan, the candidate. Simultaneusly, according to Article 74, Part 4 of the Law of the Republic of Armenia on the Constitutional Court the RA Central Electoral Commission was involved as a respondent, the RA Prosecutor's Office and the RA Police adjunct to the RA Government as co-respondents in the proceeding by the same Procedural Decision. By the Procedural Decision PDCC-14 of 5 March 2013 the Constitutional Court accepted for consideration the case on challenging the Decision N-62-Ա of the Central Electoral Commission dated 25 February 2013 on electing the President of the

Republic of Armenia based on the application of the candidate Andrias Ghukasyan.

The cases, accepted for consideration on the basis of the applications of Raffi K. Richard Hovhannisyan and Andrias Ghukasyan, the candidates of the RA President, were united to be examined in the same session of the Court by the Procedural Decision PDCC-14 dated 5 March 2013 pursuant to Article 39 of the RA Law on the Constitutional Court. Simultaneously, by the Procedural Decision PDCC-13 of 5 March 2013 based on the necessity of preparation of the case to the examination the following documents were required:

a) from the RA Administrative Court - the judgments adopted on the submitted claims concerning the issues of the 2013 RA Presidential Election;

b) from the RA CEC

- the protocol on the results of voting compiled in accordance with the procedure prescribed by law,
- the decisions adopted on the basis of consideration of the applications (complaints) received by the electoral commissions,
- the decisions of the Territorial Electoral Commissions on the violations registered in the record books of the Precinct Electoral Commissions on Eelection Day,
- a reference concerning the results of the recounts made on the basis of the applications of the candidates on elections of RA President on 18.02.2013 held in certain electoral precincts,
- the decisions adopted on the results of voting,
- reference on the number of members to Precinct Electoral Commissions, chairs and secretaries of commissions nominated by different political forces, as well as on the number of proxies of the candidates of President;

c) from the RA Prosecutor's Office – brief information on measures undertaken for prevention of electoral violations and other cases, which occurred during the RA Presidential Elections held on 18.02.2013;

d) from the RA Police adjunct to the RA Government brief information on measures undertaken for prevention of electoral violations and other cases by the police authorities, which occurred during the RA Presidential Elections held on 18.02.2013.

In accordance with the procedure prescribed by law, Litigants were also provided with all materials.

By the Procedural Decision PDCC-18 of the Constitutional Court dated 11 March 2013, in accordance with Article 74, Part 5 of the RA Law on the Constitutional Court, S. Sargsyan, the candidate in the Presidential Elections of the Republic held on 18 February 2013, based on his application was involved in the proceeding as a third party.

Having heard the report of the Rapporteur on the Case, the explanations of the parties to the case, co-respondents and the third party, having examined and compared their arguments, as well as having examined the applications and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The presidential election was held in the Republic of Armenia on 18 February 2013, in accordance with the time-term prescribed by Article 51 of the Constitution on the Republic of Armenia. Pursuant to Article 14 of the Electoral Code of the Republic of Armenia, in the territory of the Republic of Armenia for conducting the relevant voting and summarizing the results 1,988 Precinct Election Commissions were formed. In accordance with the procedure prescribed by Article 17 of the Electoral Code of the Republic of Armenia, in the territory of the Republic for organizing and conducting the elections 41 Territorial Election Commissions were formed. In accordance with Article 34 of the Code, for organizing and conducting elections, a three-level system of electoral commissions, consisting of the Central Electoral Commission, territorial electoral commissions, and precinct electoral commissions was formed. In the framework of the powers prescribed by the law, the RA Central Electoral Commission organized and supervised the entire process of elections.

Twelve international organizations (632 observers), as well as 26 local NGOs (6251 observers) conducted election observation of the RA Presidential Elections held on 18 February 2013.

In line with the requirements of the RA Electoral Code, Hrant A. Bagratyan, Paruyr A. Hayrikyan, Raffi K. Richard Hovannisyan, Andrias M. Ghukasyan, Arman V. Melikyan, Serzh A. Sargsyan and Vardan Zh. Sedrakyan were registered and included in the ballots as candidates to the 2013 Presidential Elections of the RA.

2. On 25 February 2013, the RA Central Electoral Commission sum-

marized the results of the RA Presidential Elections held on 18 February 2013. In accordance with the protocol on the results of voting of the President Elections of the Republic submitted to the Constitutional Court by the RA Central Electoral Commission the total number of the ballots cast for the 7 candidates, included in the ballots is 1.468.864, which distributed among the RA candidates of President as follows: Hrant Bagratyan with 31.643, Paruyr Hayrikyan with 18.096, Raffi Hovannisyan with 539.693, Andrias Ghukasyan with 8.329, Arman Melikyan with 3.520, Serzh Sargsyan with 861.373 and Vardan Sedrakyan with 6.210 votes.

Based on the above mentioned results and being ruled by Article 91, Part 1, Point 1 and Article 92, Part 1 of the RA Electoral Code, the RA Central Electoral Commission adopted the Decision N-62-Ա of 25 February 2013, according to which, Serzh A. Sargsyan was elected as the President of the Republic of Armenia.

3. By applying to the RA Constitutional Court, the Applicants claim that it is necessary to declare the Decision N-62-Ա of the RA Central Electoral Commission dated 25.02.2013 invalid. The Applicant, the candidate Raffi K. Richard Hovhannisyan also finds necessary to declare him to be elected or to declare the results of the elections of the President of Republic held on 18 February 2013 invalid.

Referring to the RA President's letter of response addressed to Diaspora Armenian musician Serzh Tangyan, OSCE/ODIHR preliminary statement of 19.02.2013, as well as interim reports, interviews of a number of territorial governors and mayors and information on resigning of some of them, the Applicant, the candidate Raffi K. Richard Hovhannisyan finds that the system of checks and balances prescribed by Article 5 of the Constitution, either does not practically exist or is identified with the institution of the RA President. According to the Applicant, in numerous cases 1600 campaign offices of the candidate, the incumbent functioned in the state or local self-government bodies and during the RA President elections the state and local self-government systems transformed into electoral mechanisms.

Considering certain analysis and the Post-Election Interim Report of OSCE/ODIHR dated 02.03.2013 on the Presidential Election held on 18 February 2013, to Applicant's opinion, in the context of the impact of a number of violations and other various circumstances, i.e. the ink for

stamping the voters' passports disappeared quickly and could be removed with the help of a plain paper, cases of proxy voting, as well as voting instead of absent voters and ballot box stuffing, big number of invalid ballots, absence of invalid ballots in one precinct, and availability of 337 invalid ballots in the other, the Applicant Raffi K. Richard Hovhannisyan expressed his concerns on participation of huge number of voters in some precincts and stated that in all precincts where the number of the cast voters exceeded average index registered in the Republic on the basis of the official results, the incumbent won with great advantage, which, according to the Applicant, is because of the provision prescribed in Article 11, Part 1 of the RA Electoral Code that prohibits to publish the signed voters' lists as well as undue intermediacy.

To substantiate his application, the Applicant, in particular, presented the following arguments:

- The incumbent's expenses subject to declaration for the campaign were made not from the means of pre election fund,
- The incumbent's amount of the expenses subject to declaration for the campaign purposes have exceeded the permissible maximum limit,
- The total number of the campaign posters of the candidate, the incumbent has exceeded 1600, as they were posted not only outside but also inside the campaign offices,
- The payment for the rent of the campaign offices of the candidate, the incumbent, used as campaign offices, should be included in the campaign expenses but by the Decision of the RA CEC they were excluded from the list of the expenses, meanwhile there are OSCE/ODHIR 19.02.2013 interim, as well as 02.03.2013 post interim reports on the 18 February 2013 presidential election about them,
- According to the Applicant, the RA Central Electoral Commission performed inaction, did not study the above mentioned facts and did not apply to the court for declaring the registration of the candidate invalid, instead on 25.02.2013 adopted the Decision N-60-Ա, by which, according to the Applicant, tried to justify its inaction,
- The electoral commissions performed inaction and rejected recounts in any precinct by their own initiative; about 125 applications on declaring the results of the elections in the precincts invalid were rejected.

The application of the candidate the RA President Raffi K. Richard Hovhannisyan submitted to the RA Constitutional Court is composed of 16 pages. The first 5 pages, which contain "Brief assessment of the elections" with 11 references of the attached materials, present analytical views on the alleged electoral violations. The second part titled "The arguments and legal grounds of the Application" (3.5 pages) contain quotations from relevant legal acts. The following 6 pages contain the arguments which were submitted to the RA Administrative Court, and which were considered in the framework of the jurisdiction of the latter and on 04.03.2013 a final decision ՎԴ/1423/05/13 was adopted, according to which the claim was recognized as groundless and subject to rejection. In the last page of the above mentioned application the Applicant's request and the list of attached materials is presented (receipt of payment of state duty, power of attorney, the copies of passports of the Applicant and his representative, the copy of license, publications of mass media, videotaping, photographs and other materials on digital data carriers – in total 24).

Approximately 40 percent of the materials attached to the application are decisions of different election commissions, 18 percent - applications addressed to electoral commissions, approximately 24 percent information – taken from different websites of internet, approximately 7 percent – the reports of the organizations, which exercised observation missions over the election process; and 11 percent – various other materials. In the stage of the court trial of the dispute, concerning the decision adopted on the results of the RA President election, the Applicant did not submit any other additional material to the Constitutional Court, except for the two copies of photographs.

4. Referring to two announcements made by the candidate, the incumbent S. Sargsyan concerning the letter of response addressed to the Diaspora Armenian musician Serzh Tangyan and the answer to the question to the journalist in Gyumri, the Applicant, the candidate A. Ghukasyan finds that, in his opinion, during the elections of the RA President, the three-level system of the RA electoral commissions was ruled by the incumbent, and as incumbent the latter possessed the levers for ensuring any result of voting

The Applicant expressed his concerns on high turnout in 576 precincts

and found that the mentioned fact had essential impact on the general results of elections.

To substantiate his application, the Applicant, in particular, presented the following arguments:

- In 414 precincts, the number of voters exceeded the number of the ballot envelopes of defined specimen in the ballot box by 1729,
- In 469 precincts, in total 1883 ballots were missing from ballot boxes,
- The above-mentioned discrepancies were not included in the final protocols of the results of voting of the precincts,
- The RA Central Electoral Commission performed inaction as it neglected the above-mentioned facts,
- The application of the candidate A. Ghukasyan consists of 7 pages, where by presenting his approaches and concerns regarding the independent and objective activity of the electoral system, the Applicant mainly presents his own analysis and the conclusions concerning the results of voting by precincts.

During the case trial, the candidate A. Ghukasyan also mentioned that his arguments were mainly based not on the issue of protection of his subjective suffrage, but the issue of constitutional-legal systemic reforms, which might be an important guarantee for growing the public confidence towards the election processes.

In their explanations, the Applicants raised the issues concerning the lawfulness of participation of the state officials in the electoral processes, the procedure of compiling the voters lists and publicity of the signed voters' lists, presenting the data on the citizens temporary absent from the Republic to the Applicants, declaration of the registration of the candidate to the RA President S. Sargsyan as invalid by court. The Applicants also referred to the independence of the RA Central Electoral Commission and legal contents of structural interrelations between this Commission and the RA President, as well as the issues of assessment of activity of the law enforcement bodies for ensuring legality during the entire electoral process.

5. The Respondent did not accept the arguments of the Applicants presented in the applications and found that the Decision N 62-Ն of the Central Electoral Commission dated 25 February 2013 was lawful, it was adopted in accordance with the requirements of the Electoral Code of the

Republic of Armenia, and three-level electoral commissions were formed and functioned in line with the manner and powers prescribed by the RA Electoral Code.

As for the issue of participation of the state officials in the electoral process raised by the candidate to the RA President Raffi K. Richard Hovhannisyan, based on Article 18, Part 6 and Article 22 of the RA Electoral Code, the Respondent mentioned that the officials are free to exercise pre-election campaign, taking into consideration the restrictions prescribed by the RA Electoral Code.

The Respondent also mentioned that in the time-period from January 21, 2013 to February 18 the Tele-Radio Broadcasting National Commission did not receive any complaint concerning the election campaign from the candidates to the President of the Republic, as well as from the state bodies, non-governmental or international organizations, mass media and citizens. During the campaign of Elections of the President of the Republic of Armenia held on February 18, 2013 (21.01.2013-16.02.2013), as well as on "silence" day and the Eelection Day up to 20.00 p.m. no violations of the requirements of the Electoral Code of the Republic of Armenia and the Law on Television and Radio were registered.

Regarding the enquiry concerning the location of the campaign offices of the candidate , incumbent President, referring to Article 18, Part 5 of the RA Electoral Code, and Statement of the Preliminary Findings and Conclusions of 19.02.2013 of OSCE/ODIHR mentioned by the Applicant, the Respondent stated that even in that case the mentioned judgment was not in concordance with the source mentioned by the Applicant, as the presented conclusion mentioned **only a few cases** of location of the campaign offices **occupied in the buildings** of the state and local self-government bodies. The Respondent claimed that there was no complaint concerning the above- mentioned cases, although by Decision N 42 – Ա. RA CEC on its own initiative initiated an administrative proceeding, conducted hearings by inviting also the proxy of the Applicant and as a result on 11.02.2013, adopted the Decision N-49-Ա..

Regarding the issue of compiling the voters' lists, the Respondent, referring to Article 2, Article 7, Part 1 and Article 8, Part 1 of the RA Electoral Code, states that the principles, entire procedure of compiling and keeping of the voters' lists is regulated in details by the RA Electoral

Code, and as for the conceptual suggestions of the Applicant connected with other principle of compiling voters' lists, the Respondent finds that the discussion of the suggestions concerning legislative amendments is not in the framework of consideration of this case.

As for the issue of the absolute impossibility and ineffectiveness of actions against the violations because of accessibility restraint of the voters' lists, referring to Article 11, Part 1, Articles 31, 33 and 48 of the RA Electoral Code, the standards defined by the European Commission Democracy Through Law of the Council of Europe (Venice Commission) and OSCE Office of Democratic Institutions and Human Rights, Point 4 (Right of Secret Suffrage) Sub point C of the Code on Good Practice in Electoral Matters of Venice Commission of the Council of Europe of 30.10.2002 (CDL – AD (2002) 23), Report on Joint Recommendations CDL-AD (2010) 043 of OSCE Office of Democratic Institutions and Human Rights and Venice Commission, Document CDL-EL (2009) 015 of OSCE/ODIHR on Monitoring the Process of Registration of the Voters, legal positions of the RA Constitutional Court, the Respondent finds that the Applicant faced no obstacles to be familiarized with the signed voters' lists and make extracts.

Referring to the issue of the application submitted to the CEC on 25.02.2013, raised by the Applicant, where the latter demanded from the Central Election Commission to apply to the court with the demand to declare the registration of the candidate S. Sargsyan invalid, the Respondent also stated that as a result of the examination of the mentioned application, on 25.02.2013 the CEC adopted Decision N 60- Ա, which was appealed to the Administrative Court and the final judgment of the Court was available, according to which the Decision N 60- Ա, of the CEC was declared lawful.

Regarding the suffrage protection institutions, such as the recounting of the results of voting of a precinct, declaring the results of the voting of a precinct invalid, the Respondent states that that all submitted applications were considered in accordance with the requirements of Articles 45, 46 and 47 of the Electoral Code of the Republic of Armenia and due decisions were made and responses in written were provided. The Applicants were duly notified about the day and time of the consideration of the applications and the decisions made on the basis of examination were sent to the Applicants in the manner prescribed by Law and were pub-

lished at the official web site of the Central Election Commission of the Republic of Armenia.

According to the Respondent:

- During the organization of elections, till the Eelection Day no complaint or application was submitted to the Territorial Election Commissions,
- On Eelection Day only one application on discrepancy in the voters' list was submitted to 41 Territorial Election Commissions, i.e. in Territorial Election Commission N 28 and the Chair of the Commission provided a note in written, and one warning signal was submitted in TEC N 29 upon which a relevant decision was made,
- After the EEelection Day of the Presidential Elections, besides the applications submitted for declaring the results of voting invalid and recounting, only Territorial Election Commission N 17 received 7 applications for recounting, which were discussed by the Territorial Election Commission in accordance with the manner prescribed by law. Central Election Commission readdressed one application submitted by non-governmental organization exercising domestic election observation to the Territorial Election Commission N 17, which was received and examined by the latter,
- The situation analysis center studied the information published at electronic websites especially on the Eelection Day (panorama.am, news.am, hra.am, lurer.am, asparez.am, ilur.am, haynews.am, aravot.am, 1in.am, tert.am, slaq.am, galatv.am, etc.) and in mass media, the reliability of information was ascertained, clarifications or information was provided on 65 publications, and in the case of confirmation of the facts of violations the appropriate actions were immediately undertaken to prevent the violations and eliminate the consequences,
- From 1988 Precinct Election Commissions only in the record books of 40 Precinct Election Commissions notes were made in accordance with the procedure prescribed by Article 66, Part 6 of the Electoral Code of the Republic of Armenia,
- During the organization and conduct of the Presidential Elections held on 18 February 2013 until the summarization of the results of the election, three claims appealing the decisions and actions (inaction) of the electoral commissions were submitted to the Adminis-

trative Court of the Republic of Armenia, and the Administrative Court rendered the Judgments No. ՎԴ/0094/05/13, ՎԴ/0359/05/13 and ՎԴ/0377/05/13 on refusing the claims,

- After the summary of the results of the elections for the President of the Republic, two more claims were submitted to the RA Administrative Court, and the Administrative Court rendered the Judgments No. ՎԴ/1423/05/13 and ՎԴ/1606/05/13 on refusing the claims.

Referring to the materials submitted to the Constitutional Court, the Respondent states that they are mere correspondence, materials taken from different websites, which do not have any evidential significance and may not be subject to discussion at the Constitutional Court.

Referring to the issue raised by the candidate Andrias Ghukasyan on high percentage of turnout and high number of votes received by the candidate Serzh Sargsyan in a number of precincts, the Respondent finds that allotting these precincts from others only because one of the candidates had received more than 64 percent, is illogical. According to the Respondent, it is inacceptable to allot the precinct only on the basis of digital indicative and propose a theory, according to which the Central Election Commission should be especially confident about the results at those precincts is incomprehensible. According to the Respondent, the Applicant made the digital argumentations with a purpose, which does not reflect the overall pattern, as well as, in the application no fact is presented, based on which the results of the voting of the presented precincts shall cause concern.

Regarding the precincts where all voters cast votes, the Respondent states that in all 6 precincts where the turnout was 100 percent are situated in penitentiary institutions where, as a rule, all voters vote and the total number of the voters in those precincts is 248, in average, 40 voters. One of the 5 precincts where the turnout was more than 95 percent, where the highest turnout 98.44 percent was registered, also was a precinct formed in penitentiary institution and the rest were small rural communities.

According to the Respondent, in the application the precincts with participation of 63 percent and more were allotted, and if all such precincts are allotted in accordance with this logics, by the results of voting of those precincts, in 61 precincts the candidate, who was on the sec-

ond position, and according to the Applicant's logic, the results of voting of those precincts should cast doubts, despite the fact which candidate had got more votes which, according to the Respondent, is an inexplicable approach.

The Respondent also states that candidate of the RA President A. Ghukasyan did not attempt to challenge the results of voting in precincts, and, there is no fact or proof on non-trustworthiness of the results is present in the application, but some ideas were pointed out in the application, according to which in a considerable number of the precincts the results of the voting contradict the reality and that the three-level system of the electoral commissions has entirely performed inaction, which, according to the Respondent, is groundless.

6. The representatives of the Co-respondent the RA Prosecutor's Office state that during the pre-election campaign there were no cases of crime related to the electoral process, except for the case of attempted murder committed against the candidate P. Hayrikyan. During the campaign, the prosecutor's office received 88 reports, notifications, and publications concerning electoral violations, which, however, did not contain any element of crime. During the campaign the copies of the decisions made by the investigation bodies regarding the reports, announcements and publications received on electoral violations were sent to their addressees and none of these decisions was appealed.

Regarding the next stage of the electoral process, i.e. voting, 159 reports, notifications and publications were preceded by the Prosecutor's Office, 12 criminal cases were initiated, 4 criminal cases with indictment were sent to the court.

Assessing the overall pattern of the violations during electoral process, the representatives of the RA Prosecutor's Office stated that, actually, the violations registered during the entire electoral process were not universal and widely practiced; and the facts of crimes were isolated and did not relate to each other.

7. The conclusion presented by the Co-respondent, the RA Police adjunct to the RA Government regarding the materials attached to the application, mentioned that the information presented in the applications "... by their content are mostly of general nature, different circumstances

relating elections are presented as dubious without any distinct substantiation, the analyses are subjective and certain circumstances of the process of elections are interpreted as infringement from the perspective of their own perception without any distinct substantiation." It is also stated that the warning signals concerning electoral violations and their examination state that they were not of general and systemic nature, and, at the same time, most of them were groundless and unreasoned.

As for the information presented in the applications of the candidates of the RA President, as well as presented by videotapes, the Representative of the RA Police claims that by their content some of them are mostly of general nature, they are presented without any precise reasoning; the analysis are of subjective nature and are interpreted from the perspective of own perception. Regarding the other part of the information from 19 infringements in 13 cases the police investigations have already been filed and are still pending. From the mentioned 13 cases, in 8 cases decisions were made to refuse initiating the case, in 2 cases the filed criminal cases with indictment were sent to the courts, in 2 cases the prepared materials were sent to the RA Special Investigation Department; and 1 case is still pending. The RA Police departments received no warning signal concerning the other 6 cases. Nevertheless, regarding the mentioned 6 cases the relevant departments of Police received instructions to check and resolve the further process in accordance with the procedure prescribed by law.

8. The representatives of the candidate Serzh Sargsyan, involved as a third party, touching upon the arguments of the Applicants stated that from 1988 precinct election commissions in 1884 (95 percent) the political party Heritage nominated members, 38 of which did not appear on Eelection Day, in 108 precincts the chairs of precinct election commissions and in 104 precincts the secretaries of the precinct election commissions were nominated by Heritage. Only in 79 precincts (3.9 percent), concurrently there was no member of the commission nominated by the political party Heritage and no proxy of the candidate Raffi Hovhannisyan.

120 applications on declaring the results of voting in electoral precincts invalid were submitted, which, according to the assessment of the representative of the third party were not due applications. Nevertheless, it is stated that even if hypothetically iall 120 applications on de-

claring the results of voting in electoral precincts invalid are substantiated, in the case of declaring the results of voting in those precincts invalid, the votes for the candidate Raffi Hovhannisyan would become 37.85 percent; and the votes cast for the RA candidate of President Serzh Sargsyan – 57.46 percent, i.e. in fact, the outcome would not change.

Simultaneously, opposing to the tabulation based on the diverse criteria of the results in each precinct and conclusions deriving from them, representatives of Serz Sargsyan, involved as a third party, presented analysis by similar and different criteria. In particular, allotting all the precincts where the chairs or secretaries of the precinct election commissions were nominated by the political parties Heritage and ARD and comparing the results of the voting in those precincts, considered as obvious that they do not essentially deviate from the entire and final official results of the elections.

9. In the framework of examination of this case, the RA Constitutional Court, in particular, necessitates:

- The requirement of Article 5 of the RA Constitution, according to which, "State and local self-government bodies and public officials are competent to perform only such acts for which they are authorized by Constitution or the laws."
- The legal scopes of the powers prescribed by Article 100, Point 3.1 of the Constitution, according to which, **the Constitutional Court shall, in conformity with the procedure defined by law, resolve all disputes concerning the decisions adopted with regard to the elections of the President of the Republic and Deputies.**
- The peculiarities of the procedure for consideration and resolving of such disputes prescribed by Article 74 of the RA Law on the Constitutional Court.

In Points 12 and 13 of the Decision DCC-736 from 8 March 2008, as well as in Points 6 and 7 of the Decision DCC-1028 from 31 May 2012, the RA Constitutional Court expressed its precise legal positions concerning the constitutional legal content and the frames of the power prescribed in Article 100, Point 3.1 of the Constitution.

In particular, in the Decision DCC-736 of 8 March 2008, the RA Constitutional Court stated: "As a result of constitutional amendments based on the results of the referendum of 27 November 2005, in accor-

dance with Article 100, Point 3.1, the Constitutional Court shall resolve disputes concerning the decisions adopted with regard to the results of elections. The legal substantiation of the decision of the RA CEC on the results of the elections of the President of the Republic may be challenged from two perspectives regarding both the maintenance of the legislatively required form (i.e. the stipulated manner of its adoption (formal grounds) and the grounds of alleged errors of implementation of the norms of substantive law, based on which, the Central Election Commission, summarized the results of elections and made a wrong conclusion on the fact whether the candidates were elected or not (substantive grounds)."

In the Decision DCC-1028 of 31 May 2012, the RA Constitutional Court stated that, "The amendments of legal regulation of the electoral processes made during last years had an important impact on the domain of judicial protection of suffrage in Armenia, which nevertheless, has not been accepted relevantly by the legal subjects participating in the election process yet." It was also highlighted that: "for efficient judicial protection of electoral right, it is necessary:

a/ to take into account the requirement of Article 5 of the RA Constitution, according to which each body is competent to perform only such acts for which it is authorized by Constitution or the laws,

b/ to understand precisely the scopes of competence of each judicial instance,

c/ to implement remedies of protection for electoral right before the Court with relevant jurisdiction in the time limits and manner prescribed by law,

d/ to take into consideration that the RA Constitutional Court is not a superior court to other courts, regarding the issues of judicial protection of electoral right, but it is entitled to implement specific power, set forth by the Constitution,

e/ the disputes on the Decisions adopted on the results of elections may not be deemed as disputes on constitutionality of a legal norm, since other constitutional legal requirements and procedures are prescribed to resolve them.

The Constitutional Court stated that "according to the RA legislation, the Constitutional Court is not authorized to consider all those issues, which should be considered beforehand and be legally resolved at the RA

Administrative Court, and the decisions of which on those issues ... are final and not subject to review."

The amendment of the power of the Constitutional Court linked with the electoral legal relations was also conditioned with the circumstance that if till 2005 time term restrictions for such issues were not prescribed by the RA Constitution, after the constitutional amendments, under Article 51, Part 5 of the Constitution, based on Article 100, Point 3.1, the time limit prescribed for consideration of the disputes was strictly restricted and deriving from the essence of the abovementioned competence 10 day time limit was stipulated. That is, the restriction of the time limit is conditioned with the amendments of the Constitutional Court's power concerning the electoral disputes, in line with which more concise framework of the issues of legal significance subject to clarification was prescribed.

During the entire electoral process and also while applying to the Constitutional Court, the Applicants in the instant case not only should have considered the legal positions on this issue expressed in the abovementioned decisions, as well as in Decision DCC-1027 from May 5, 2012 of the Constitutional Court, but also in the systemic entity should have considered and taken as grounds:

1. the requirements of Article 5 (Part 2), Article 51 (Part 5), Article 94 (Part 3), Article 100 (Point 3.1) and Article 101 (Part 1, Point 9) of the RA Constitution.

2. the requirements of Article 74 of the RA Law on the Constitutional Court in their systemic integrity and colligation with other legislative provisions.

3. the requirements of the RA Electoral Code, in particular, Article 37, Part 12, Article 46, Parts 1,3,5,7,8 and 9, Article 48, Part 1, Article 66, Part 6, Article 91, as well as the requirements of the entire Chapter 25 of the RA Administrative Procedure Code.

The consideration of the case states that those requirements were mainly neglected by the Applicants or were not implemented legitimately or in concordance with the manner and time limits prescribed by law. It has also become obvious that the Applicants did not duly conceive the new procedure of judicial protection of suffrage established as a result of the 2005 constitutional amendments and the power of the Constitutional Court prescribed by Article 100, Point 3.1 of the Constitution,

without differentiating the manner and peculiarities of exercising the powers in concordance with the legal provisions **"challenging the decision made on the results of elections" and "challenging the results of elections".**

Moreover, Article 91 of the RA Electoral Code also precisely prescribes the procedure for summarizing the results of the elections and **the decision adopted, which may be challenged in the RA Constitutional Court.** Taking into consideration the provisions prescribed by Article 91 and Article 75, Part 6 of the RA Electoral Code, as well as the requirements of Article 100, Point 3.1 of the RA Constitution, Article 74 of the RA Law on the Constitutional Court, regarding the disputes connected with the decision of the RA Central Electoral Commission the Constitutional Court clarifies whether during the adoption of the decision in accordance with the procedure prescribed by law the Following was available and taken into consideration:

a/ the protocol on the results of voting compiled in accordance with the law,

b/ the judgments concerning the electoral processes within the scopes of competence of the Administrative Court,

c/ the decisions adopted on the basis of the results of examination of the applications (complaints) received by the electoral commissions,

d/ the decisions of Territorial Election Commissions on the violations registered in the record books of the Precinct Election Commissions on the Eelection Day,

e/ the Decisions adopted on the results of the voting.

Besides, in line with the requirements of Article 74, Part 13 of the RA Law on the Constitutional Court, the Constitutional Court clarifies the circumstances of unsubstantiated refusal by the competent electoral commission to examine (consider) the complaints regarding elections submitted in line with the manner prescribed by law, non-examination (non-consideration) of such complaints in the time limit prescribed by law and refusal or deviation from the examination (consideration).

Thus, the legislatively defined task of the Constitutional Court, as a court of right (and not of fact), is to assess whether the final decision of the Central Election Commission is legitimate, as a result of considering the abovementioned circumstances of legal significance.

The RA Constitutional Court is not competent and may not commit

once again the powers and obligations of the political forces and dozen thousands of legal entities representing them or nominated by them, as well as powers and obligations of other courts within 10 day term in accordance with the manner prescribed by law and by appropriate manners which were obliged to commit relatively ex officio by the manner and precise time term envisaged by the RA Electoral Code. The representatives of the Applicant tried to fill up non implementation of the actions in time or inadequate implementation of these actions with unlawful or practically unfeasible motions, creating the impression in the society that the Constitutional Court could but did not want to implement what they should have implemented in due time and the frames of the powers prescribed by law and should submit an application substantiated with legal arguments of evidential significance.

The correlated assessment of summation of the legal facts of evidential significance, which are exclusively formed on the basis of legitimate actions of the mentioned subjects, may serve as legal grounds for the decision of the Constitutional Court. This is the requirement of the RA Constitution and the RA Law on the Constitutional Court.

10. The Constitutional Court also states that from the constitutional legal perspective the pre-election and postelection situation created in the country may not become a subject of discussion only in the framework of the direct comparison of the legal facts of evidential significance. There are realities which need relevant legal positions concerning the constitutional fundamental principles, the guarantee of supremacy of the constitution and its direct action.

The Constitutional Court, first, states the fact that, though especially the previous decisions of the Court made on the results of the national elections were substantiated and reasoned legally and contained legal positions, they were not accepted equivocally by the certain segments of society. This is resulted not only from the current level of legal consciousness and legal and political culture, but also from the objective situation, where this perception is first the reflection of distrust towards the political system and authorities of the country, which has not been overcome yet. This problem requires such legal political solutions, which will essentially consolidate the guarantees of sustainable development and public trust by effective implementation of the constitutional fundamental principles.

The reality is that regardless the outcome of these elections, more than half of the parliamentary political forces, enjoying the right and obligation also to participate in the organization and conduct of electoral process, have formed the atmosphere of distrust towards them. The fact is that 2/3 of the candidates have not jointly collected more than 5 per cent of the votes cast by the voters. The number of the ballots recognized as invalid because of being marked differently, essentially exceeds the number of votes received by half of the candidates. These are facts that are also the expression of the social relevant expectations and sow relevant attitude towards the legal processes.

Thus, the Constitutional Court finds that the issue is not only the assessment of factual circumstances in the framework of the subject in dispute, but also from the perspective of the constitutional axiology possible reveal of the current situation and its constitutional legal reasons and expression of the relevant legal positions, which were referred to in the process of the examination of this case likewise.

The reasons of the expression of such discontent conditioned with electoral processes are much deeper from the perspective of the constitutional legal assessment. They are substantially conditioned with the tendencies of integration of the political, economical, and administrative forces during the decades, when the danger of distortion of the constitutional fundamental values and principles, in particular, the principle of the balance and checking of the authorities rises. In decisions DCC-703 dated 10.06.2007 and DCC − 736 dated 08.03.2008, the Constitutional Court already expressed the legal position that in line with the principles prescribed in Articles 2 and 4 of the RA Constitution, in the electoral processes it is initial for the legal state to ensure legislative and procedural guarantees for supremacy of political interests of the society, **which will exclude any possibility of direct combination of political and business interests in the formation of the authoritative representative bodies endowed with the initial mandate**. This legal position, which was expressed also by the international observers during the previous elections, has not received sufficient attention yet in the process of amendment of the RA Electoral Code and entire legal system, **in particular, also regarding the assurance of entire implementation of the requirements of Articles 65 and 67 of the RA Constitution.** This could essentially assist the normal development of the political structures in the country, ef-

fective implementation of the constitutional functions of the state institutions, as well as strengthening the public trust towards the electoral system and certain electoral process.

The Constitutional Court finds that it will be difficult to anticipate radical changes in the terms of amendment of electoral technologies only and even their impeccable implementation. The Constitutional Court stated this circumstance in the Decision DCC − 736 from 8 March 2008, according to which "It can be inferred from the fundamental principles of the RA constitutional order that the elections in the Republic of Armenia should turn into a factor for strengthening the basis of the state order and for overcoming the political confrontation. In reality, the post electoral processes strain both political and public confrontation, endangering such democratic values as tolerance, pluralism, cooperation, public confidence and civilized dialogue. Such situation is a problem, which requires constitutional-legal solution, which was numerous times referred to by the Constitutional Court in its decisions, as well as in annual reports of 2006 and 2007".

The RA Constitutional Court finds that only the proper estimation of this reality and practical consequences may contribute the formation of the legal political agenda relevant to the objective situation, the normal development of the country, manifestation of the social behavior of people and society, and guaranteeing rule of the law is the axiological axis of the latter.

This issue come up to the state political level in Armenia recently. Although the electoral and post electoral processes confirmed that what has been already done is not relevant to the challenges and constitutional legal new approaches, and, relevant active solutions are required.

11. In the framework examination of factual materials of the case and on the basis of the case consideration, the RA Constitutional Court stated that during the entire process of the election of the RA President held on 18 February 2013, the complaints mainly concerned the stages of summarization of the results of voting and elections except for the disputes related to the registration of some candidates.

As it was mentioned, 1988 electoral precincts were formed in the Republic of Armenia for the conduct of the election of the RA President held on 18 February 2013.

During the elections of the RA President, the political party "Heritage" supported the candidacy of Raffi K. Richard Hovhannisyan. Two parliamentary parties, ARD and PPA, as well as alliance ANC announced officially that they would not support any candidate of the RA President during the electoral process. All mentioned political forces participated in the formation of the precinct electoral commissions in the manner prescribed by law and on Eelection Day their nominated members who passed trainings in advance (1950 from PPA, 1884 from "Heritage", 1909 from ARD, 1482 from ANC), factually participated in the work of commissions. The total number of the members of the precinct electoral commissions were 15652, from which 7224 or 46, 03 per cent of the members of the commissions was nominated by the above mentioned political forces. PPA nominated 1225 chairs and secretaries of the precincts, APD – 211, "Heritage" 212 and ANC – 265 - in total 1913. Meanwhile, 48, 8 per cent of the persons nominated by these political forces were chairs of the precinct electoral commissions, and 47, 4 per cent were secretaries. **From them 1912 persons verified the protocols of the results of the voting with their signatures without any reservation.**

On Eelection Day 5038 proxies (among which 299 for the candidates of President H. Bagratyan, 141 for P.Hayrikyan, 1009 for Raffi K. Richard Hovhannisyan, 3589 for Serzh Sargsyan) were present in the precincts. The Applicant, candidate of the RA President A. Ghukasyan did not nominate any proxy in the precincts.

On Eelection Day, according to the CEC data, the international observers visited 1208 polling stations. 4469 local observers were present in 1426 polling stations. 1993 representatives of mass media, who in accordance with the manner prescribed by law also enjoyed wide range of power of review, followed the process of elections in 1321 polling stations.

The Constitutional Court considers important to state that the RA Electoral Code, in particular, as a result of the new procedural solutions of formation of the electoral commissions, has stipulated a system of functions and their implementation, which may guarantee the necessary and sufficient control of the electoral process and effective implementation of suffrage, if the political forces presented in the RA National Assembly properly implement the rights and obligations prescribed by law. Consequently, in the framework of the electoral dispute in this case, as well as

from the perspective of trust towards the electoral system, it is an important criterion to assess legally the fact how fully the political forces involved in the electoral processes implemented the functions reserved for them by the RA Electoral Code for the abovementioned goal.

The legal process of post electoral processes also shall be anchored on the results of the legitimate activity of that system. This is pivotal for the legal regulation of the electoral system and a necessary and objective demand for the legal and political culture of the democratic state.

12. On February 18, 2013 **20690 persons who participated in the electoral legal relations and enjoyed the competence prescribed by law (from which 8233 were nominated by the above mentioned four political forces presented in the National Assembly) together with other legal subjects involved in the electoral processes by their rights and responsibilities only in the polling stations were called to guarantee the proper process of the voting, ensure full implementation of review functions and assist effective exercising of suffrage of the RA citizens. This could be implemented, in particular, as a result of legitimate, consistent and timely exercising of the following competences prescribed by law.**

First, in accordance with Article 37, Part 12 of the RA Electoral Code:

"At the first sitting of commissions, each member of the electoral commission shall publicly read and sign a commitment "On performing duties of the electoral commission member in accordance with the requirements of the Constitution of the Republic of Armenia and legislation of the Republic of Armenia", which is attached to the record book of the electoral commission…"

The member of the commission assumes this obligation as a person nominated as a result of political trust and as a person also endowed with functional independence. In the international practice the formation of the precinct electoral commissions on the basis of multiparty principles is one of the effective means for ensuring of balances in review. For many years, the RA political forces have been trying to

achieve this. The RA Electoral Code ensured with this possibility as a guarantee of trust towards the electoral process. During these elections 15652 citizens of the Republic of Armenia, who were nominated by the political forces representing the RA National Assembly as the members of the precinct electoral commissions and were mainly highly qualified ones, undertook the relevant obligations towards the entire electoral process.

Simultaneously, Article 66, Part 6 of the RA Electoral Code prescribes: "If the commission member or the proxy finds that cases of violations of voting procedures have taken place during the voting process as stipulated by this Code, he or she has the right to require for his or her opinion to be recorded in the register."

Despite the contents and legal substantiation of factually recorded material, from 20690 legal subjects prescribed by law (as a member of the commission or proxy) records were made only in the record books of 40 precinct electoral commissions from 1988, which comprises only 2 percent of the total number of the polling stations.

Second, Article 46, Part 3 of the RA Electoral Code stipulates that, amongst the others, also the proxy if s/he was present in that electoral precinct may submit an application for declaring the voting results in an electoral precinct, as well as the member of the relevant electoral precinct if s/he has made a record in the protocol on having a special opinion.

None of 20690 legal subjects, nominated as members of the commission or proxies by the political forces represented in the RA National Assembly and by the candidates of the RA president, has submitted any such application. That is, in the framework of the obligations assumed by the mentioned persons, the signed protocols were considered as reliable and non-appealable.

On the basis of the abovementioned Article, the applications of the candidate Raffi K. Richard Hovhannisyan were proceeded by the manner prescribed by law. According to the materials of the case, the decisions of the Territorial Electoral Commissions regarding them were not appealed by supremacy or judicially, and concerning about

85 percent of the precincts mentioned in the applications there was no warning signal or record in the record books of the mentioned Territorial Electoral Commissions.

The case consideration also proved that in line with Article 74, Part 13 of the RA Law on the Constitutional Court there were recorded cases of unjustified rejection of examination (review) of the electoral appeals submitted in the procedure prescribed by Law, as well as the cases of breaking of timeframes of examination (review) of such appeals and of refusal or avoidance of examination (review) of those appeals by the relevant electoral commissions.

Third, Article 48, Part1 of the RA Electoral Code stipulates:

"The candidate, the proxy, where they have been present at the process of summarizing the voting results in the electoral precinct, as well as the member of the precinct electoral commission in case of making a record — in the protocol on the voting results in the electoral precinct — on having a special opinion concerning the procedure of summarizing the voting results, shall have the right to appeal, in the manner and within the time limits specified by this Code, against the results of voting in the electoral precinct concerned, by submitting an application for recount of the results of voting in the electoral precinct (hereinafter referred to as "recount") to the constituency electoral commission.

An application for recount of the voting results in the electoral precinct may be submitted only to the relevant constituency electoral commission from 12.00 to 18.00 on the day following the voting."

According to the materials of the case, only 12 applications (concerning 0,6 per cent of the electoral precincts) were submitted, from which 10 applications were submitted by 2 persons.

Actually 20690 legal subjects, including 1009 proxies, who assumed the legal obligation to protect the rights of R. Hovhannisyan, may have submitted applications for the recounts.

The latter submitted only one application based on the requirements of the law.

On Voting Day of the Elections of the RA President, only one person from 15652 members of the precinct electoral commissions submitted a special opinion (Precinct 3/33 where the recount was held).

This means that 15651 legal subjects, who were nominated by all political forces representing the National Assembly and who assumed special obligations, considered the results of voting as reliable and by their signatures verified it. These served as grounds for the summarization of the results of the elections.

The legislatively stipulated possibility to appeal the results of voting by the means of recount and checking the reliability of the voters' lists signed by the voters, who participated in the elections, is the main means prescribed by law to dispel any suspicions which Applicants almost did not use.

Fourth, materials on the various violations concerning the electoral process submitted to the Constitutional Court by the Applicant were provided to the RA Prosecutor's Office and the RA Police adjunct to the RA Government as correspondents, to examine them, in the frames of their competence, as well as for providing the precise explanation concerning the means undertaken for preventing the electoral violations and registered cases related to the 18.02.2013 RA elections of the RA President. According to the explanations submitted by the RA Prosecutor's Office, the examination of the video materials attached to the application of the candidate Raffi K. Richard Hovhannisyan revealed that one of the video materials contained the recording of the session of the RA Administrative Court of the administrative case AC/423/05/13 which may not be the subject to examination at the Constitutional Court and in other video materials and photographs made in different electoral precincts, their contiguous territories and other places, part of which were examined in time, and the others are currently examined by relevant competent bodies.

Simultaneously, in the framework of the entire electoral process the RA Prosecutor's Office received 247 warning signals, including 187 - from the publications posted in mass media, 5 - by the Hot Line of the RA Prosecutor General Office. **From 247 warning signals, 13 cases (or 5.3%) were clarified, in 13 cases (or 5.3%) decisions were adopted to initiate a criminal case, in 218 cases (or 88.3%) filing of the criminal case on the grounds of absence of the criminal event and corpus delicti were declined,** and three cases are pending. Moreover, not a single appeal was submitted concerning the refused cases in the manner prescribed by law. It is also stated that the violations, as well as the warning

signals concerning them were limited in number and were not of large scale.

The RA Police informed that during the campaign, voting, and post election stages 276 warning signals on apparent violations were considered or are pending. **From these, 250 cases or 90,6 percent were refused or left without consideration on the basis of absence of the criminal feature or corpus delicti.**

The entire picture is the following: all 27152 legal subjects, who participated in the entire electoral process, legislatively stipulated powers of review, and could not only prevent, but at least signal about the possible electoral violations. In fact, 1.9 percent of the persons entitled with such competence made warning signals. Moreover, the considerable portion of the warning signals was made by the citizens with no concrete competence in the electoral processes.

Fifth, Chapter 25 of the RA Administrative Procedure Code (which entered into force from January 1, 2008) is entirely dedicated to the procedures for judicial protection of suffrage. Article 144 of this Code defines: "The persons defined by Article 3 of this Code, as well as, the relevant electoral commission may apply on the electoral cases to the Administrative Court in the cases prescribed by the Electoral Code of the Republic of Armenia."

Article 3 of this Code, in particular, stipulates that:

"Each legal and physical person in accordance with the manner defined by this Code is authorized to apply to the Administrative Court if s/he considers that administrative acts, actions, and inaction of the state or local self-government or their officials violated or could directly violate his/her rights and freedoms stipulated by the Constitution of the Republic of Armenia, international agreements, laws and other legal acts".

In addition, Article 46, Part 7 of the RA Electoral Code prescribes: "Decisions and actions (inaction) of the Central Electoral Commission (except for the decisions taken with regard to the results of national elections) may be appealed against before **the Administrative Court."**

Before the summarization of the results of the elections, 3 claims were submitted to the RA Administrative Court concerning registration of the candidates. At the moment of summarization of the results of

the elections no claim with regard to the voting and challenging its results based on Article 91 of the RA Electoral Code was submitted to the RA Administrative Court.

After publication of the final results of the elections and adoption of the Decision 62- Ն by the CEC, on 28.02.2013 and 07.03.2013 the RA Administrative Court proceeded two claims with regard to the electoral process which were exclusively in the competence of the Administrative Court and were refused based on the results of case examination. Moreover, as it has been already mentioned, the decision of the Administrative Court with regard to the registration of the candidates is final and cannot be subject to discussion at the Constitutional Court, which the representatives of the Applicant have not paid relevant attention to.

Sixth, the Applicants have not submitted any evidential legal argument with regard to the possible victory of Raffi K. Richard Hovhannisyan in the elections. In this concern, the only argument was challenging the registration of the candidate Serzh Sargsyan, which by the judicial procedure was examined in accordance with jurisdiction and refused by the final decision of the RA Administrative Court. Meanwhile, based on the Article 101, Point 6 of the RA Constitution, on 07.03.2013, R. Hovhannisyan submitted an individual application to the RA Constitutional Court, challenging the constitutionality of the provisions of the law applied in this case by the RA Administrative Court, which is in the stage of the examination in accordance with the procedure prescribed by law.

During the instant case trial, inquires of the Applicants mainly concerned the declaration of the results of elections as invalid, in the framework of the materials attached to the applications. Regarding these materials, the parties were able to express the precise position at the Constitutional Court. Resulted from their combined assessment, the Constitutional Court stated that they could have been served as grounds or cause for appealing the results of voting in the electoral precincts in accordance with the procedure and time limit prescribed by law, which was not done. The arguments concerning the results of the voting in PEC 17/5, are perhaps the exception based on the examination of which, the RA Constitutional Court finds that those results could not be considered as trustworthy. Thus, based on Article 46, Part 10 of the RA Electoral Code the results of the voting in this precinct shall be considered as invalid,

based on Article 72, Part 3 of the RA Electoral Code the number of the cast voters shall be stated as the account of inaccuracies in the precinct. In accordance with Article 46, Part 10 of the RA Electoral Code, the Territorial Electoral Commission shall send all materials concerning this precinct to the RA Prosecutor's Office.

Seventh, besides the abovementioned, Article 46, Part 9 of the RA Electoral Codes stipulates, "An application for declaring the election results invalid may be submitted to the relevant electoral commission before 18.00 not later than two days prior to the expiry of the relevant time limit prescribed by this Code for summarizing the election results."

The mentioned norm is a precise and exclusively significant procedure for challenging the results prescribed by law before adopting a final decision on the results of election.

As it derives from the materials of the case, the RA Central Electoral Commission did not receive such an application from the candidates of the RA President within the time limits, the results of the elections were not challenged within the time limits and procedure prescribed by law, thus omitting one more legislatively prescribed possibility to dispel the possible suspicions.

During the examination of the case, arguments were also presented concerning shortcomings, which occurred in a number of precincts, theoretically impossible results of voting in those precincts, different announcements made by certain candidates, which were not challenged by the grounds and time limits prescribed by Article 46, Part 9 of the Electoral Code and were not the subject to discussion before the adoption of the Decision N 62 – Ն of the Central Electoral Commission dated February 25, 2013.

Based on the materials and results of the examination, these are the general picture and factual results exclusively in the framework of the dispute concerning the legal procedure of the protection of passive suffrage during the Elections of the RA President held on18 February 2013. **These, in their turn, have conditioned the legal contents and logics of the final decision on the results of elections made by the CEC by the manner and time limits prescribed by the RA Electoral Code.**

The combined assessment of the above-mentioned facts states that by the procedure and in the time limits prescribed by Article 91, Part

1 of the RA Electoral Code the RA Central Electoral Commission could not have made other decision.

Simultaneously, the RA Constitutional Court states that the considerations of the parties in regard to the possible imperfections of the electoral system are out of the framework of the subject of the considered case and may be the issue of the legislative reforms, taking into consideration also the legal positions of the RA Constitutional Court. **Besides, as it has been already mentioned in Point Ten of this decision, in the condition of the current post election situation the implementation of the necessary reforms of constitutional legal essence resulting from political wide consent, tolerance and civilized dialogue may become the means to ensure the normal development of the state and legitimate and effective remedy for the strengthening of constitutionality, the need of which was also highlighted during this case consideration.**

Proceeding from the review of the Case and being ruled by Article 100, Point 3.1, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 74 of the RA Law on the Constitutional Court, taking into consideration the legal positions expressed in this decision, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To leave in force the Decision N-62-Ա of the Central Electoral Commission on electing the President of the Republic of Armenia dated 25 February 2013.

2. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

14 March 2013
DCC - 1077

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 44, PART 4 OF THE LAW OF THE REPUBLIC OF ARMENIA ON THE RULES OF PROCEDURE OF THE NATIONAL ASSEMBLY WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE DEPUTIES OF THE RA NATIONAL ASSEMBLY

Yerevan ***16 April 2013***

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan, F. Tokhyan, A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan (Rapporteur), V. Poghosyan,

with the participation of the representative of the Applicant– G. Jhangiryan, Deputy of the RA National Assembly,

official representative of the Respondent – the RA National Assembly: D. Harutyunyan, the Chair of the Standing Committee on State and Legal Affairs of the RA National Assembly,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 3 of the Constitution of the Republic of Armenia, Articles 25, 38 and 68 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by an oral procedure the Case on conformity of Article 44, Part 4 of the Law of the Republic of Armenia on the Rules of Procedure of the National Assembly with the Constitution of the Republic of Armenia on the basis of the application of the Deputies of the RA National Assembly.

The Case was initiated on the basis of the application submitted to the RA Constitutional Court by 34 Deputies of the RA National Assembly on 6 December 2012.

Having examined the report of the Rapporteur on the Case, the explanations of the Applicant and the Respondent, as well as having studied the RA Law on the Rules of Procedure of the National Assembly and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Law on the Rules of Procedure of the National Assembly was adopted by the RA National Assembly on 20 February 2002, signed by the RA President on 21 March 2002 and came into force on 12 April 2002.

The challenged Part 4 of Article 44 of the RA Law on the Rules of Procedure of the National Assembly, titled "Registration of the Deputies for the Sitting of the National Assembly," states: "The sitting is competent provided that more than half of the total number of Deputies are duly registered (which means that there is quorum)."

2. Challenging the constitutionality of the provision of Part 4 of Article 44 of the RA Law on the Rules of Procedure of the National Assembly, the Applicant finds that it contradicts Articles 70 and 71 of the RA Constitution in regard to the part of holding extraordinary session or sitting.

The Applicant's position is particularly based on the following arguments:

The constitutional power to initiate an extraordinary session or sitting of the National Assembly at the initiative of at least one third of the total number of Deputies is intended to provide the opposition (the minority) of the National Assembly a possibility to convene an extraordinary session or sitting of the National Assembly by the preferred agenda and timeframe, and the Constitution does not associate or condition the above mentioned with any manifestation of the will or wish of the majority of the National Assembly.

According to the Applicant the RA Constitution does not stipulate any threshold for quorum, i.e. for eligibility of sessions or sittings (including extraordinary) of the National Assembly. The requirements of the Constitution concern the number of the voters and adopted decisions.

Based on own analysis of constitutional norms, the Applicant concludes that for convening an extraordinary session or sitting of the National Assembly on the initiative of at least one third of the total number of Deputies, the sittings must be considered as eligible, when the mentioned threshold of one third of the total number of Deputies is ensured.

According to the Applicant, the challenged provision prescribes requirement for eligibility of an extraordinary session or sitting initiated by the minority of the National Assembly, which is not prescribed by the Constitution; and it requires that the number of Deputies registered for the sitting should not be less than half of the total number of Deputies.

3. Opposing the arguments of the Applicant, the Respondent finds that Article 44, Part 4 of the RA Law on the Rules of Procedure of the National Assembly is in conformity with the RA Constitution.

To reason his position, the Respondent, in particular, presents the following arguments:

The Applicant's allegation, regarding the part that the constitutional power to initiate an extraordinary session or sitting of the National Assembly on the initiative of at least one third of the total number of Deputies is intended to provide the opposition of the National Assembly (the minority) a possibility **to convene** an extraordinary session or sitting of the National Assembly on the proffered agenda and timeframe, is already a wrong emphasize, and, particularly, regarding the part of application of the term "to convene" a sitting or an extraordinary session; it is not a constitutional term, and causes confusion. According to the Respondent, Article 70 of the RA Constitution precisely applies the terms **to initiate and convene;** attributes the rights of one third of the total number of Deputies not only to the opposition, but also to the authorities and, in general, this constitutional norm is aimed to exercising the powers of the National Assembly.

According to the Respondent, stipulating the framework of eligibility (i.e. quorum, making a decision) of the RA National Assembly, Article 71 of the RA Constitution, in essence, predetermines the scopes in the

availability of which the National Assembly is entitled to exercise its constitutional powers as a legislative authority.

Opposing to the argument of the Applicant, according to which, the Constitution defined at least the discussion of the issue included in the agenda of an extraordinary session or a sitting at the plenary session of the National Assembly, the Respondent finds that the National Assembly not only aims to ensure political deliberations, but also to adopt decisions. According to the Respondent, the given issue could be a matter of consideration if within the scopes of its activity, the National Assembly does not have and does not ensure certain institutions of realization for discussions, in particular, parliamentary hearings etc.

4. The RA Constitutional Court states that international practice of constitutional justice also has referred to the problem of protection of the rights of parliamentary (deputy) minority, especially, taking into account the provisions of Resolution No. 1601 of the Parliamentary Assembly of the Council of Europe dated 23 January 2008, which concern Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament. In particular, the Decision of the Constitutional Court of Czech Republic dated 1 March 2011 makes a special emphasis on consideration of the constitutional principles within the scopes of legal regulations and legislative process, such as separation of powers, pluralism, free competition of political forces and representative democracy. The requirement of protection of the rights of parliamentary minority, publicity and transparency of deliberation of draft laws and hearing of all parties also derive from the above mentioned.

From the aspect of guaranteeing efficiency of representative democracy and political tolerance the aforementioned Resolution defines such procedures of regulation of the activity of the legislator, which, in particular, will ensure the active role of the opposition in parliamentary deliberations and in the process of fulfillment of functional powers of parliaments.

The Report "On the role of the opposition in a democratic parliament" made by the European Commission for Democracy through Law /Venice Commission/ dated 15 November 2010 (Council of Europe) also pursues the same aim. The latter makes a special emphasis on **ensuring functional balance between parliamentary majority and minority** in favor of guaranteeing the efficiency of the activity of the legislator. It also

emphasizes that the rate of democratic maturity can be assessed depending to what extent the certain parliamentary opposition in a given parliamentary system is allowed to fulfill these functions /Point 26/. For resolving such an issue, it lays down the initial approach, according to which parliamentary Rules of Procedure should preferably be regulated "... so as to make it difficult for a simple majority to set aside the legitimate interests of the political minority groups" /Point 96/.

Taking into account the positions of the Parties, as well as international constitutional practice and judicial practice, the RA Constitutional Court finds that based on systemic approach within the framework of this case it is necessary to establish:

- to what extent has the RA Constitution precisely define the scopes of powers of the legislator?
- what guarantees are constitutionally stipulated for realization of the rights of parliamentary opposition and for ensuring functional balance between parliamentary majority and minority?
- to what extent the challenged norms of the RA Law on the Rules of Procedure of the National Assembly and other norms systemically interrelated with them are in concordance with constitutional solutions?

5. In international practice of constitutional law, as well as in our country the competence of the state body is conditioned with its capacity to fulfill its functional powers. In its turn, it is based on the existence of quorum. For example, Part 2 of Article 49 of the RA Law on the Constitutional Court stipulates that "At a fixed time period, after having been assured of the validity of the Session, the Chairman shall declare so and announce the case to be reviewed." In this case the validity of the Session is directly conditioned with the quorum for considering the issue in dispute and making a decision.

The term "quorum" has Latin origin /quorum praesentia sufficit/, and it literally means "the presence is sufficient." In the case of representative body the **presence,** which enables the given body to be competent to fulfill activities corresponding to its constitutional legal status **is sufficient. The availability of quorum is the evidence of eligibility of the given body and the guarantee of legitimacy of fulfillment of functions**. Quorum is the criterion that provides the specified number of

Deputies with qualitative feature of functional nature, acknowledging it as the National Assembly.

To what extent does the RA Constitution define the scopes of powers of the legislator concerning the activity of the RA National Assembly? The RA Constitutional Court finds that the given issue received a precise and complete response. It is defined in Article 71 of the RA Constitution, according to which "The laws and decisions of the National Assembly, except for the cases set forth in the Constitution, shall be adopted by the majority of votes of the Deputies having participated in the voting provided that more than half of the total number of Deputies has voted."

It implies from this and several systemically interrelated articles that:

a/ Regarding the RA National Assembly, the RA Constitution **stipulates a general rule** for quorum and exceptions from it in cases set forth in the Constitution /in particular, Article 72, Part 1, Article 74, Article 79, Part 1, Article 83.1, Part 1, Article 84, Part 1, etc/;

b/ The interrelated institutions of validity of a sitting and making a decision (adoption of a law) are differentiated. The National Assembly may adopt a law or a decision by the majority of votes of the Deputies having participated in the voting, provided that the sitting is eligible to be acknowledged as a sitting of the body of legislative authority. The latter is available if more than half of the total number of Deputies has voted. **The presence of more than half of the total number of Deputies is the threshold for eligibility of the RA National Assembly, except for certain cases set forth in the RA Constitution.** According to the RA Constitution, if the number of Deputies is less, the National Assembly may not be eligible to act as a legislative authority;

c/ Article 71 of the RA Constitution systemically linked also to Article 74.1 of the Constitution, which touches upon the manifestations of inaction of the legislator that may be grounds for its dissolution. Such inaction, in particular, may be manifested as a result of non-ensuring required quorum for fulfillment of functions or making decisions. In this case, quorum is a feature for carrying out the powers of the National Assembly.

Within the framework of the matter in dispute, a number of other provisions of the RA Constitution are also observable. In particular, Article 62 /Part 4/ defines that the procedure of the activities of the National Assembly are defined not only by the Constitution, **but also by**

the Rules of Procedure of the National Assembly, and the latter is a Law. That means that within the framework of constitutional regulation **the legislator is also endowed with certain discretion to set forth the procedure of its activities.** As for stipulation of the rule on at least one third of the total number of Deputies by Article 70 of the Constitution, in this context not the procedure of the activities of the National Assembly is clarified, but the matter of legal personality is resolved due to endowment at least one third of the total number of Deputies with the power of initiating an extraordinary session or sitting of the National Assembly. The President of the Republic and the Government also have such competence.

Within the framework of such constitutional solutions, the following provisions act as constitutional guarantees for protection of the rights of Deputies, including the rights of parliamentary minority are, particularly:

a/ Guaranteeing the activities of the National Assembly based on the fundamental principles of the separation and balance of the powers, ensuring the rule of law and sovereignty of the people, and establishment of a democratic and rule of law state;

b/ Guaranteeing of discharge of the powers by Deputies on a continual basis, based on free and independent mandate;

c/ Based on Article 66 of the Constitution, stipulation of the immunity arising from the status of a Deputy,

d/ Acknowledgement of at least one third of the total number of Deputies as holder of constitutional rights, and endowing the latter with the power to convene an extraordinary session or sitting of the National Assembly;

e/ Recognition of the right to legislative initiative of Deputies on constitutional level;

f/ Endowing Deputies with the constitutional competence to address written and oral questions to the Government, or submit interpellations via deputy groups and factions.

In such a case, the main issue is how these guarantees are legislatively ensured and carried out.

6. According to the Applicant, the challenged Part 4 of Article 44 of the RA Law on the Rules of Procedure of the National Assembly, as it was mentioned, impedes the fulfillment of the constitutionally ensured

rights of parliamentary minority, as it is conditional on any manifestation of the will or wish of the majority of the National Assembly.

The Constitutional Court finds that such a conclusion derives not from the main essence of the legal regulation of the given legislative provision, but only reflects the established practice of parliamentary activities.

As for of the constitutional legal content of the challenged provision in dispute:

First, the given provision **stipulates a general rule** and concerns all sittings of the National Assembly. Taking into consideration the latter, the Applicants could raise a question on the additional legal regulation or overcoming the gap in legal regulation in regard to parliamentary minority, which is in the scopes of the legislator's competence;

Second, as it was mentioned, quorum is one of the characteristics of eligibility of the given institution, and according to the RA Constitution, particularly, Articles 62, 67 and 71, the functional powers of certain Deputies and the legislator are carried out by casting a vote and participating in the voting;

Third, the RA Constitution and the RA Law on the Rules of Procedure of the National Assembly, including Article 5 of the latter, **no Deputy is allowed to be absent from sittings of the National Assembly without valid reason, and evade from the constitutional requirement to execute of his/her powers on a continual basis.** Moreover, Article 6 of the Law on the Rules of Procedure of the National Assembly **obligates** the Deputy to participate in the sittings of the National Assembly without any reservation;

Fourth, implying absence from sittings of the National Assembly as a "political boycott" is legally groundless. The RA Law on the Rules of Procedure of the National Assembly stipulated only two possible institutions for non-participation in the voting, when, in one case, according to Point d/ of Part 3 of Article 99 of the given Law and in a manner prescribed by law, at the sitting of the National Assembly the Deputy makes a statement on refusing to participate in a particular voting, and in other case, based on Point e/ of Part 3 of the given Article, before the voting the faction or deputy group make such a statement.

The RA Constitutional Court states that the RA legislation does not stipulate any legal ground **for refusing to participate in the sittings of the National Assembly** for political reasons. Except for the exhaustive

list of valid absences from the sittings of the National Assembly for valid reason in a manner prescribed by the law (including the absence of Deputies from the sittings based on the mentioned grounds stipulated by Points d/ and e/ of Part 3 of Article 99 of the RA Law on the Rules of Procedure of the National Assembly), all other absences shall be considered as without valid reason, and must lead to adequate legal consequences in the manner prescribed by Article 67 of the RA Constitution.

At the same time the RA Constitutional Court states that the problem of protection of the rights of parliamentary minority does not exist, and it is not conditional on the provision in dispute, but on the legal regulations of Parts 4-8 of Article 99 of the RA Law on the Rules of Procedure of the National Assembly, and proceeding from the requirements of Article 68, Part 9 of the RA Law on the Constitutional Court. the Constitutional Court considers necessary to touch upon the latter.

First, the Constitutional Court states that regardless the initiators stipulated by Article 70 of the RA Constitution for convening an extraordinary session or sitting of the National Assembly, all Deputies **shall be obliged** to participate in the sittings of the National Assembly, proceeding from the requirements of Point a/ of Part 1 of Article 6 of the RA Law on the Rules of Procedure of the National Assembly. The absence may be considered as valid reason only in case of existence of certain grounds prescribed by law. All other cases of non-compliance with the given principle may lead to inaction of the Deputy and the legislator and adequate legal consequences.

The entire problem is what kind of consequences are and to what extent they also guarantee exercising the rights of parliamentary minority. The study of current legislative regulations states that there are solutions that make the direct action of Article 67 of the RA Constitution unfeasible, namely, **termination** of the powers of a Deputy upon absence without valid reason from more than half of floor voting in the course of one session. In practice, regardless the grounds of absence without valid reason stipulated by law, finally, the Article 99 of the RA Law on the Rules of Procedure of the National Assembly provides the National Assembly with the competence to decide whether the absences are with or without reason, and the latter, by merits, is the expression of the will of parliamentary majority. In such conditions, protectiveness of the rights of parliamentary minority or the direct action of the above mentioned pro-

vision of Article 67 of the Constitution shall be touched upon with great reservation.

The Constitutional Court also states that the given legal regulation is a result of apparent non-compliance of Articles 62 and 67 of the RA Constitution, and the Court considers necessary to touch upon it from the viewpoint of finding the effective solution of the current constitutional legal issue.

7. Article 62 of the RA Constitution not only defines the place and role of the RA National Assembly in the system of state power, but also stipulates the procedural scopes of activity of the legislative body. The clarification of the scope of issues, in regard to which the National Assembly adopts decisions, belongs to the latter.

Based on their legal nature, the above mentioned Article includes two types of legal norms; first, substantive legal norms, which regulate legal relations and clarify the competence of the legislator, and second, procedural legal norms, which resolve the issue of exercising of functions.

If in Article 62 of the RA Constitution the provision "the legislative power in the Republic of Armenia shall be vested in the National Assembly" defines the constitutional legal status of the legislator, then the clarification of the scopes for fulfillment of the decision making power, first of all, pursues the aim of regulating the activity of the National Assembly. In addition, all Articles listed by Article 62 Part 1 of the Constitution, except for Article 67 (Article 74.1 may be a certain subject for discussion), provide concrete powers for the National Assembly, and which may be fulfilled via adopting decisions. The mentioned is proved by comparison of constitutional legal content of Article 62, Part 1 of the Constitution with legal regulations of Article 55, Points 13 and 14; Articles 57 and 59; Article 62, Part 2; Articles 66, 69, 73, 74, 75, 77 and 79; Article 80, Part 2; Articles 81, 83, 83.1, 83.2, 83.3, 83.4, 84 and 94.1; Article 101, Part 1, Point 2; Articles 103, 111 and 112. The latter precisely define the powers of the National Assembly within the given legal regulation.

Article 67 of the Constitution entirely regulates substantive-legal relations of public nature and stipulates all exhaustive cases for **termination** of the powers of a Deputy. Meanwhile, the given cases are listed without any specific features and exceptions. Anyway, amongst the listed cases, the reference to Article 65 of the Constitution needs a special approach,

which assumes the legislative fulfillment of the given provision must precisely be linked to legislative assurance of the exercise of the requirements of Article 65 of the Constitution.

In the given context, the **term "termination"** stipulated by Article 76 of the RA Constitution has the constitutional legal nature, according to which, consequences occur *ex jure,* **provided that the fact is present**. In particular, the expiration of the powers of the National Assembly or dissolution of the National Assembly *ex jure* leads to termination of the powers of a Deputy. It is impossible to block the action of the given constitutional norm by any decision or even a law as it will directly contradict the requirements of Article 6 /Parts 1 and 2/ of the Constitution.

It follows from the constitutional legal content of Article 67 of the Constitution that such an approach equally applies also to the absence without valid reason from more than half of floor voting during a successive session, and no certain competence *to dissolve* the powers is defined.

Based on the results of comparative analysis of different constitutional articles, the RA Constitutional Court finds that two fundamental principles of constitutional law must be considered as a basis for overcoming this situation.

First, the Constitution is self-sufficient, and apparent textual noncompliance may be overcome based on the system of values and fundamental principles of the Constitution. In this regard, it is essential to **ensure direct action** of Article 67 and for establishment democracy in the country creation of necessary legal background, effective exercise of representative democracy is one of the most significant guarantees for ensuring the functionality of legislative body.

Second, the procedural norm of the law shall not be considered as an obstacle for entire and precise implementation of the substantive norm. In this regard, within the framework of fulfillment of the requirements of Article 76 of the Constitution, the RA National Assembly, only regarding the challenged issue, may only "take into account" the presence of the legal fact and the consequence deriving from it and it may not be entitled to suspend the action of the constitutional norm by casting a vote, and, **in practice, to convert the term "termination" into the term "dissolution,"** as the latter supposes availability of precise and adequate powers. The comparative analysis of constitutional legal content of the terms **"termination" and "dissolution,"** stipulated by Article 67, Article 55, Point

10, Paragraph 2, and Article 83, Point 3 of the RA Constitution, also proves the above mentioned. Incidentally, Article 62 of the RA Constitution states that "The powers of the National Assembly shall be defined by the Constitution." In case of absence without valid reason from more than half of floor voting during a successive session, the Constitution does not endow the RA National Assembly with the power of **dissolution** of the powers of a Deputy, that is, by adoption of a decision.

It is concluded that the provisions of the RA Law on the Rules of Procedure of the National Assembly, in particular, the provisions of Article 99, Parts 4-8, change the legal content of the constitutional norm regarding the discussion of the issue of absence of a Deputy of the National Assembly and adopting a decision on considering the latter with or without valid reason **by casting a vote, and termination of the powers by virtue of law alters into the process of dissolution of the latter.** If in case of the institution of termination of the rights of parliamentary minority are also guaranteed, and the dissolution is conditioned with the expression of the will of parliamentary majority, and it loses its preventive significance. Based on the requirements of Article 67 of the RA Constitution, Parts 4-8 of Article 99 of the RA Law on the Rules of Procedure of the National Assembly shall be envisaged such a possibility of legal regulation, where, in the terms prescribed by law, **the fact of legal significance is taken a note** and a protocol on **termination of powers of the deputy ex jure is drawn**.

It is also necessary the agreed consideration of the circumstance prescribed in Articles 6 and 99 of the RA Law on the Rules of Procedure of the National Assembly, according to which, absence of the Deputy may be considered as for valid reason only provided **that certain basis prescribed by the law is available** and in the manner **prescribed by the law**; and the latter shall not be a result of discretional assessment. Article 12 of the RA Law on the Rules of Procedure of the National Assembly also requires appropriate amendments within the framework of legal positions expressed in the given Decision.

Proceeding from the consideration of the Case and being ruled by Article 100, Point 1, Article 101, Part 1, Point 3, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. Article 44, Part 4 of the RA Law on the Rules of Procedure of the National Assembly is in conformity with the Constitution of the Republic of Armenia.

2. To declare the provisions of Article 99, Parts 4-8 of the RA Law on the Rules of Procedure of the National Assembly systemically interrelated with the challenged provision of the given case, insofar as the current procedures alter the constitutional institution "termination of powers" of a Deputy into the institution "dissolution of the powers" of the latter by the Decision of the RA National Assembly, contradicting Article 67 of the RA Constitution and void.

3. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

16 April 2013
DCC - 1081

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 51, PART 4 AND ARTICLE 54, PART 5 OF THE CRIMINAL CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE HUMAN RIGHTS DEFENDER OF THE REPUBLIC OF ARMENIA

Yerevan ***23 April 2013***

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan, F. Tokhyan, M. Topuzyan, A. Khachatryan, V. Hovhanissyan, H. Nazaryan (Rapporteur), A. Petrosyan, V. Poghosyan,

with the participation of the representatives of the Applicant: A. Vardevanyan and S. Yuzbashyan, the employees of the staff of the Human Rights Defender of the Republic of Armenia,

official representatives of the Respondent: S. Hambardzumyan, the Chief Specialist and H. Sardaryan, the Leading Specialist of the Legal Expertise Division of the Legal Department of the National Assembly Staff of the Republic of Armenia,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 8 of the

Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Article 51, Part 4 and Article 54, Part 5 of the Criminal Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the Human Rights Defender of the Republic of Armenia.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the Human Rights Defender of the Republic of Armenia on 11.10.2012.

On 26.02.2013 the Constitutional Court made Procedural Decision PDCC-12 to involve A. Gabuzyan, PhD in Law, Head of Chair of Criminal Law of the Law Department of Yerevan State University as an expert in the examination of this Case and offered him to provide the Constitutional Court with expert opinion on the provisions of Article 51, Part 4 and Article 54, Part 5 of the Criminal Code of the Republic of Armenia. Simultaneously, the Constitutional Court demanded from the Ministry of Justice of the Republic of Armenia to submit written substantiations on the legal regulations challenged in this Case.

Having examined the report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondents, the substantiations submitted by the Ministry of Justice of the RA, the expert opinion, as well as having studied the Criminal Code of the Republic of Armenia and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Criminal Code was adopted by the RA National Assembly on 18 April 2003, signed by the RA President on 29 April 2003 and came into force on 1 August 2003.

Part 4 of Article 51 of the RA Criminal Code, titled "Fine," states:

"4. In case of impossibility to pay the fine, the court may substitute the fine or unpaid part thereof with community service counting 5 hours of community service as minimal salary. If the result of the calculation of the fine or unpaid part thereof with community service is less than two hundred seventy hours, two hundred seventy hours shall be assigned; and if it exceeds two thousand two hundred hours, two thousand two hundred hours shall be assigned."

The current content of the above-mentioned Article was set forth in accordance with Article 3 of the Law ՀՕ-119-Ն dated 26.06.2006.

Part 5 of Article 54 of the Code, titled "Community service," states:

"5. In case the offender maliciously evades from performing community service the court may substitute the unperformed part of it with arrest or imprisonment for a certain term, on the basis one day of arrest or imprisonment per three hours of community service."

The mentioned Article of the RA Criminal Code was amended by Article 6 of the Law ՀՕ-97-Ն dated 01.07.2004, according to Article 4 of the Law ՀՕ-119-Ն dated 26.06.2006 Parts 1-3 of it was edited and Part 5 was amended.

2. The Applicant states that the above-mentioned provisions of the Code are not in conformity with the RA Constitution on the following reasoning.

Based on Article 49 of the RA Criminal Code, the Applicant states that the norm defines the types of punishment taking into account the criteria of their comparative gravity, i.e. from more lenient punishment to graver, according to which the fine is the most lenient punishment, which is followed by prohibition to hold certain posts or practice certain professions, community service, etc. In the system of punishments, community service by its position and impact is a harsher punishment than the fine as it restricts the convict's freedom.

The Applicant, referring also to Part 1 of Article 61 of the Code, states that fair punishment shall be assigned in relation to the person found guilty in the commitment of a crime which is determined within the limits of relevant article of the Special Part of the RA Criminal Code, taking into account the provisions of the General Part of the Code. According to the Applicant, the mentioned norm obligates not to go beyond the scopes of the punishment of the Article of the Special Part of the Code. Meanwhile, according to Articles 66 and 67, "only in the case of accumulation of crimes and judgments the court may be entitled to go beyond the scopes of the punishment stipulated in the Special Part for certain corpus delicti and impose harsher punishment than maximal punishment prescribed by the relevant article."

Based on Article 22, Part 3 of the RA Constitution, the Applicant also finds that imposing harsher type of punishment than the fine defined

for corpus delicti stipulated by the Special Part of the RA Criminal Code, may cause non-conformity with the RA Constitution and the relevant articles of ECHR "due to absence of precise guarantees of trial."

Besides, based on the analysis of Part 4 of Article 51 of the RA Criminal Code, the Applicant concludes that there is no precise distinction between impossibility to pay the fine and malicious evasion from payment. The Applicant finds that the legal regulation of substantiation of the fine with community service and the latter with arrest shall distinguish between the cases of impossibility to pay the fine and malicious evasion from payment, and only in this case imposing punishment will not bring to violation of human rights.

In the additional explanations submitted to the Constitutional Court the Applicant insists on his viewpoint concerning the challenged legal provisions expressed in the Application.

3. The Respondent states that the challenged provisions of the RA Criminal Code do not contradict the Constitution, in particular, according to the international legal practice, as well as the analysis of the current legislation, the Respondent concludes that, in the framework of the issue in dispute, the principle "... no punishment shall be imposed, unless provided by the law" is applicable. According to the Respondent, the issue may arise in the case when the crime was committed during the action of the current criminal law but during the adoption of the judgment other criminal law was in force.

The Respondent also substantiates the conformity of the challenged norms with the Constitution by the argument according to which "during the commitment of the crime... before the adoption of the decisions by the court and in the adoption process thereof, the current criminal law (the RA Criminal Code) prescribed similar procedure of imposing punishment and similar type of punishment. Meanwhile, by saying criminal law the entire Criminal Code is considered, and not only the Special Part thereof."

Touching upon the issue of inadmissibility of substitution of the fine with community service, as the implementation of the harsher punishment, the Respondent states that two punitive measures constitute the group of punishment not related to the imprisonment and certain procedure of calculation for their substitution is prescribed by law, the aim of

which is to ensure the proportionality; besides, while determining the amount of the fine, the court takes into account the property status of the convict, and in case of impossibility to pay the fine, it can be substituted with other type of punishment, " ... with community service though it is graver by its nature." Otherwise, as the Respondent concludes, "... corruption risks may occur: the convicts may be punished with a fine, payment of fine may be postponed or deferred, and thereby they may avoid liability and punishment."

In the additional explanation submitted to the Constitutional Court the Respondent simultaneously finds that "...the mechanism of calculation of substituting the fine or unpaid part thereof with community service does not ensure proportionality between those two types of punishment in cases when, as a result of calculation, it is less than 270 hours as defined by the law... meanwhile, the law, in fact, blocks the possibility to assign less term of community service than defined by the law, thus it exacerbates the status of the individual, who does not have capacity to pay the fine."

The Respondent assesses legitimate to substitute community service with arrest or imprisonment for a certain term, when the convict maliciously evades from performing the community service and concludes that "...in case of substitution of community service with arrest or imprisonment for a certain term, the applicable means of reaction by its harshness may also exceed the previously assigned punishment."

4. The RA Constitutional Court necessitates assessing the constitutionality of the challenged norms:

- from the perspective of ensuring lawful implementation of the principles of inevitability and individuality of criminal liability,
- from the perspective of the correspondence with the constitutional legal content of the institution of substituting the type of punishment and guaranteeing the rule of law,
- from the perspective of comprehensive study and assessment of international practice concerning the legal regulation in dispute.

The assessment of the constitutionality of the challenged norms is based on the requirements of Part 7 of Article 68 of the RA Law on the Constitutional Court, in particular, inter alia, to reveal the necessity of ensuring, protection and free exercise of the constitutionally defined

human and civil rights and freedoms, permissibility of their restrictions, and to ensure direct effect of the Constitution.

Based on the questions and conclusions of the Applicant, the Constitutional Court finds necessary to reveal the constitutional legal content of legal regulations stipulated by the challenged norms also based on the comparative analysis of other norms of the RA Criminal Code systemically interrelated with those norms.

5. The challenged norms of Articles 51 and 54 of the RA Criminal Code directly stipulate the elements of the procedure and terms of implementation of punishment not related to imprisonment, i. e. fine and community service, in particular, connected with the substitution of those types of punishment with other certain enforcement measures by the court against the persons found guilty in a crime, i.e. with the procedure and terms of implementation of the institution of substitution of the punishment.

The procedure and terms of implementation of the fine and community service as the punishments not related to imprisonment are prescribed in Articles 24-26 and Articles 32-35 of the RA Criminal Enforcement Code, links of which with the challenged legal regulations in the constitutional legal sense, are beyond the scopes of the subject matter of this case.

As it derives from the common legal content of the challenged norm and other relevant norms of the RA Criminal Code, fine is a punishment which limits the property rights of the convict, is implemented against the persons guilty in the criminal action committed due to carelessness or with mercenary motives or by intention. This is a monetary fine, which is imposed for the crimes of not gross or medium gravity in the cases and limits prescribed by the Special Part of the RA Criminal Code in the amount of thirty to one thousand of the minimal salaries as established by the Law of the RA at the moment of fining.

The study of the relevant articles of the common and special parts of the RA Criminal Code states that the amount of the fine is differentiated. It is determined by the court taking into consideration the gravity of the committed crime and the property status of the convict (amount of earning, well-being of the family, etc). The fine may be imposed as the only basic punishment as well as in the cases prescribed in Articles 64 and 77 of the RA Criminal Code.

The community service is the execution of free socially useful work imposed by the court, implemented by the convict in the place assigned by the competent body. It may be assigned as the basic punishment against the persons who committed not gross or medium gravity crimes and sentenced not more than two years of imprisonment, as the alternative punishment of imprisonment after receiving the order of implementation of the judgment entered into force within twenty day period on the basis of the written application of the convict as well as a type of punishment substituting the fine in accordance with the procedure prescribed in Part 4 of Article 51 of the Code.

Thus, the Constitutional Court states that, in accordance with Article 48 of the RA Criminal Code, both the fine and the community service are **state coercive (legal liability) measures,** which are imposed in the name of the state against the person found guilty for a criminal act and are expressed in deprivation or limitation of the rights and freedoms of the person in accordance with the legislatively prescribed procedure, consequently, they derive from the necessity of legal regulation prescribed by Article 83.5, Point 2 of the RA Constitution. These measures, amongst the other legislatively prescribed compulsory measures, are implemented by the decision of the competent court and follow the aims of maintenance of public order, prevention of the crimes, morality of the society, protection of the constitutional rights and freedoms, honour and good reputation of others, thus, they are lawful and are aimed at the maintenance of the principles of the constitutional order and legality.

Touching upon the constitutional legal content of the institution of substitution of fine and community service with other types of punishment, the Constitutional Court states that it is quantity of constitutional and other (criminal, criminal procedural, criminal execution) norms which is assumed to ensure the replacement of the punishment, imposed by the judgment against the person found guilty in the commitment of a crime with another relevant type of punishment prescribed by law. According to the content of the challenged legal regulation, necessity of replacement of the punishment is conditioned with the presence of such circumstances which hinder exercise of the formerly appointed punishment.

In particular, pursuant to the mentioned legal regulation, in case of certain legal conditions prescribed in Parts 3 and 4 of Article 51 of the Code, the fine (or unpaid portion of the fine) is replaced by the community service, **first,** when **the convict is not able to pay immediately the assigned fine in lump.** That is, the legislator meant, in particular, the personal property or unfavorable status of the convicted person. In this case the court appoints a payment deadline, maximum up to 1 year, or allows paying the fine on installment within the same period, or defines a payment schedule determining the amount of each payment (i.e. in accordance with the prescription of Article 51, Part 3 of the Code, a privilege is envisaged for serving the sentence). The court substitutes the fine or unpaid part thereof with community service in case if the convicted person fails to execute the obligations defined by payment schedule (to use privilege opportunity). Meanwhile, the legislator **signifies the fact of motives for violation of the mentioned obligations (legal requirement) and not for their non-implementation.** In fact, in this case relevantly unfavorable legal consequences followed the violation of the "favorable" (privileged) legal regime of legislatively prescribed legal regulation by the convict.

Secondly, legal requirement (Article 51, Part 4 of the Code) according to which the fine is substituted with the community service **is the impossibility to pay fine.** And although the legislator has not clarified the manifestation of "impossibility" (it is not precise also in Article 25, Part 1 of the RA Criminal Execution Code), however those may be considered as the circumstances which are not prescribed in the Part 3 of the challenged Article of the Code. Simultaneously, it is evident that the term "impossibility" can not include in it the terms "intent" or "malignant evasion". As it derives from the content of the legal regulation of Article 51, Part 4 of the RA Criminal Code, it is the matter of the judicial interpretation by the competent court to decide whether any factual circumstance appears to be an obstacle for payment or nonpayment of the fine by the convict. Those may be both objectively and subjectively grounded circumstances.

The Constitutional Court considers significant to state that availability of two groups of legal requirement prescribed in the mentioned Article 51 (Parts 3 and 4) of the Code conclude to **the same legal consequence,** i. e. the substitution of the fine with the community service (substitution

of the type of punishment). Thus, the legislator pursues the aim to ensure implementation of the punishment assigned by the court, to implement the goals of the punishment, i.e. rehabilitation of the social justice, reformation of perpetrator and prevention of crimes.

Simultaneously the Constitutional Court states that in the frames of legal regulation of the abovementioned Article 51, Part 4 of the Code the absence of the legal contents of the "impossibility" to pay the fine may bring to different interpretation in the law enforcement practice. The Constitutional Court states that the latter was neither revealed in the previous of amended edition of the challenged legal regulation. In particular, the possible consequences of impossibility of paying the fine and not paying the fine (evasion of paying the fine) are not differentiated. The Constitutional Court finds that implementation of the institution of substitution of the punishment (fine with community service) pursues lawful goal but it also demands differentiated approach based on the motives of substitution. Consequently, non-stipulation of possible consequences of evasion of payment of the fine in the scope of legal regulation of Article 51, Part 4 may cause the issue of constitutionality in practice.

Besides, the issue of proportionality of substitution of the punishment (in this case fine) with other punishment (in this case with community service) arises, which is linked with implementation of the prescribed calculation prescribed in the challenged legal regulation for substitution of the fine or unpaid part thereof with the community service. Pursuant to the provision in dispute "If calculation of replacement of the fine or the unpaid portion of the fine with community service results less than two hundred seventy hours, then two hundred seventy hours is assigned, but if it exceeds two thousand two hundred hours, two thousand two hundred hours is assigned". Besides, in the scope of the above mentioned legal regulation, the legislator in principle has not touched upon the issue of necessity of implementation of the institution of substitution with harsher punishment in the case of malignant evasion (or other manifestations of intent), which is available in the challenged part of Article 54 of the RA Criminal Code. The Constitutional Court states that evasion from the community service as well as from the fine, as the punishment not related to imprisonment, requires relevant legal assessment by the legislative body, from the perspective of the same degree of public danger, consequently, also relevant legal regulation based on the principle according to which

felonious manifestations of both non-implementation (impossibility of implementation) of the obligation to pay fine and evasion from it by convict should be considered.

According to Articles 4 and 10 of the RA Criminal Code fairness is one of the fundamental principles of the regulation (measures of influence) of criminal legal relations, which means that punishment and other criminal legal measures of influence should be appropriate to the gravity of the crime, to the circumstances in which it was committed, to the personality of the criminal, it should be necessary and sufficient to correct criminal and to prevent new crimes. The challenged legal regulation may be assessed only in this context, when the principle of proportionality between the aim pursued and legal measures taken to achieve that aim has been maintained.

Touching upon the issue of lawfulness (proportionality) of normative regulation of Article 51, Part 4 of the RA Criminal Code, the Constitutional Court states that in case there is no undisputable circumstance of the convict's evasion from the punishment substantiated in accordance with the manner prescribed by law, **the intensification of the assigned punishment trough its substitution is not lawful,** which practically may take place as a result of the mentioned legal regulation. The problem is that instead of community service with less time period resulted from the stipulated calculation for replacement of the punishment, such service with longer time terms is prescribed (when as a result of calculation made for replacing fine or unpaid part thereof with community service is less than two hundred seventy hours), i.e. as a result the proportionality between the previous and replaced punishments is distorted, the condition of a person, who had no possibility to pay the fine, is worsened groundlessly, and when the legal general (prescribed by the criminal legislation) grounds (intention or other circumstances) for such intensification are not available. As a result, the person (the convict) in practice is deprived of the possibility to exercise his/her right to effective means of legal protection guaranteed by Article 18 of the RA Constitution. Thus, the Constitutional Court states that **the norms of Article 51, Part 4 of the RA Criminal Code contain disproportional legal regulating means, i.e. intensification of the punishment (groundless worsening of the position of the convict) in the case when the legitimate ground of its implementation is not available, and the absence of such intensifica-**

tion in cases of possible availability of the relevant legal grounds (intention).

6. The Constitutional Court states that a precise legal requirement is prescribed in case of replacement of community service, as a punishment, with other means of coercion. In particular, pursuant to Article 54, Part 5 of the Code, the court substitutes the unperformed part of the community service with the arrest or imprisonment with a certain period, when **the convict evades maliciously from performing of community service.** That is, malice as a criminally objectionable subjective factor and as more dangerous social phenomenon objectively brings to intensification of the replaced punishment (replacement and exercising the punishment linked with imprisonment), consequently also executing the effective means of legal regulation. It pursues the aim to rehabilitate the social justice, correct a punished person, and prevent crimes, i.e. guarantee the maintenance of the foundations of the constitutional order.

Consequently, the Constitutional Court states that in the sense of the legal consequence, in the above-mentioned case the legislator has followed the principle of relevancy of pursued goal and legal means for achieving it.

Assessing the above-mentioned legal regulation from the perspective of the lawful implementation of the principles of inevitability, liability and personification of punishment, as well as from the perspective of guaranteeing the effectiveness of the institution of the substitution of punishment and protection of human rights and ensuring the rule of law, the Constitutional Court states that the challenged norms of Article 54, Part 5 of the Code contain sufficient norms for effective implementation of punishment in accordance with the principles prescribed in Article 14, Article 14.1, Part1 of the RA Constitution, as well as for ensuring the judicial protection of the rights of an individual in accordance with Articles 18 and 19 and Article 20, Part 3 of the RA Constitution, which is not fully ensured in the scopes of legal regulation prescribed in Article 51, Part 4 of the Code.

The international practice states that the legislative solutions, provided for the challenged legal regulations, have both generalities and certain peculiarities. Mainly they conclude the following:

a. in majority of countries there is a differentiation in the issues of

implementation of replacement of the punishment in case of impossibility to pay the fine and in case of malicious evasion from paying fine,

b. imprisonment is considered as extreme means when the person maliciously evades from paying the fine or exercising community (corrective, socially useful) service.

c. imprisonment is in certain ratio with the amount of unpaid fine or non-exercised community service.

The peculiarities conclude the following:

a. in the significant number of countries imprisonment is envisaged proportionally to the unpaid fine (despite the circumstances of non-payment),

b. the issue of substitution of the fine with the community service or imprisonment is decided simultaneously linked to the circumstance of not paying the fine.

Based on the above-mentioned generalizations of the international practice, the Constitutional Court states that the issue of the challenged legal regulations of Article 51 of the RA Criminal Code has been provided with stepwise solution, first replacing fine with community service in the case of impossibility to pay the fine and in case of malicious evasion from the community service it is replaced with the imprisonment. Consequently, the Constitutional Court considers necessary in the level of legislative regulations of the institution of substituting the punishment more precise and effective implementation of that institution which will promote not only improvement of the criminal legal influence but also improvement of means of legal protection of persons' rights and freedoms.

Proceeding from the results of consideration of the case and being ruled by Article 100, Point 1, Article 101, Part 1, Point 8, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Article 51, Part 4 of the Criminal Code of the Republic of Armenia insofar as in the result of the calculation made for substitution of fine or unpaid part thereof with community service does not guarantee legal possibility of implementation of community service less than two hundred and seventy hours against the persons who do not have possibility to pay the fine, therefore blocking the implementation of their right to

effective means of legal protection, as well as does not provide differentiated approach towards impossibility of the circumstances of paying the fine and evading from it, contradicting Article 18 of the Constitution of the Republic of Armenia and void.

2. Article 54, Part 5 of the Criminal Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia taking into consideration the legal positions expressed in the Decision.

3. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

23 April 2013
DCC-1082

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 26, PART 1 OF THE LAW OF THE REPUBLIC OF ARMENIA ON COMPULSORY ENFORCEMENT OF JUDGMENTS WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF "HSBC BANK ARMENIA" CJSC, "ACBA-CREDIT AGRICOLE BANK" CJSC, "VTB-ARMENIA BANK" CJSC AND "ARTSAKHBANK" CJSC

Yerevan ***23 April 2013***

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices F. Tokhyan, M. Topuzyan, A. Khachatryan, H. Nazaryan (Rapporteur), A. Petrosyan, V. Poghosyan,

with the participation of the representatives of the Applicant: H.Harutyunyan, S. Gishyan, K. Petrosyan and M.Mkoyan

official representatives of the Respondent: S. Hambardzumyan, the Chief Specialist and H. Sardaryan, the Leading Specialist of the Legal Expertise Division of the Legal Department of the National Assembly Staff of the Republic of Armenia,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 6 of the

Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Article 26, Part 1 of the Law of the Republic of Armenia on Compulsory Enforcement of Judgments with the Constitution of the Republic Of Armenia on the basis of the application of "HSBC Bank Armenia" CJSC, "ACBA-Credit Agricole Bank" CJSC, "VTB-Armenia Bank" CJSC and "Artsakhbank" CJSC.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by "HSBC Bank Armenia" CJSC, "ACBA-Credit Agricole Bank" CJSC, "VTB-Armenia Bank" CJSC and "Artsakhbank" CJSC on 29.03.2013.

Having examined the report of the Rapporteur on the Case, the explanations of the Applicant and the Respondents, having studied the Law of the Republic of Armenia on Compulsory Enforcement of Judgments of the Republic of Armenia and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The Law of the Republic of Armenia on Compulsory Enforcement of Judgments was adopted by the RA National Assembly on 5 May 1998, signed by the RA President on June 3 and came into force on 1 January 1999.

The challenged Part 1 of Article 26 of the mentioned Law titled "Judgment enforcement remand" prescribes, "Where an enforced judgment has been reversed and a new judgment on fully or partially rejecting the action has been rendered, or the proceedings of the case have been struck out, or the action has been dismissed, the court shall render a judgment on full or partial return of the property to the debtor in accordance with the new judgment".

2. The procedural background of the case is the following: on 12 October, 2009 the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan rendered the Judgment ԵԿԴ-0094/01/09 on the criminal case, according to which found Cornel Konstantin Romica Stengachu, citizen of Rumania guilty of crimes prescribed by a number of articles of the RA Criminal Code and sentenced him to imprisonment for the term of 12 years, along with the confiscation

of the entire property equivalent to the amount not exceeding 64.142.000 AMD, and with the confiscation of the proceeds of crime prescribed by Article 55, Part 4 of the RA Criminal Code. The Court satisfied the Civil claims of the Applicants and decided to confiscate from the convict 25,457,000 AMD in total, as compensation for the damage caused by the crime. After the judgment entered into force, the Applicants received writs of execution regarding the satisfaction of their civil claims and submitted them to the Judgments Compulsory Enforcement Service of the RA Ministry of Justice, which informed them that the RA Prosecutor's Office was the first to submit a writ of execution regarding this Case to ensure confiscation of the entire property of the convict equivalent to the amount not exceeding 64.142.000 AMD. The Applicants applied to the Court which rendered the judgment, demanding to interpret the ambiguity of the judgment on the abovementioned criminal case, which concerns the provisions on property obligations of the accused in part of the implementation of the judgment and confiscation of the proceeds from crime. On 3 June 2010, the Court made a Decision interpreting the ambiguity of the rendered judgment and stated that the property, recognized as physical evidence, being proceeds of crime are confiscable regardless the ownership or the possession by the convict or any third party; and that property (amounts, items) may not be confiscated in favor of Civil Claimants and may not be aimed to compensate the damages caused to the Civil Claimants and the Aggrieved, but for implementation of the judgment regarding satisfied civil claims, the confiscation shall be extended to the funds and other property owned by the accused. The Applicants' complaints were declined by the Appeal Court, and returned by the Cassation Court.

Based on the Applicants' application, the Constitutional Court considered the conformity of the provision stipulated in Article 55, Part 4 of the RA Criminal Code with the RA Constitution (DCC-983) and held that in regard to the interpretation in law-enforcement practice it does not guarantee necessary protection of property interests and right to ownership of the aggrieved (legal possessor), to be incompatible with the requirements of Article 20, Part 5 and Article 31, Part 2 of the Constitution of the Republic of Armenia with the requirements of Part 5 of Article 20 and Part 2 of Article 31 of the RA Constitution.

Due to new circumstance, on October 12, 2011 based on the above-

mentioned decision of the Constitutional Court, the Applicants submitted an appeal to the RA Appeal Criminal Court with the demand to reverse the judgment of ԵԿԴ 0094/01/09 (with the interpretation provided by the decision of the same Court dated June 3, 2010 on interpretation of ambiguity of the judgment) of the General Jurisdiction Court of Kentron and Nork-Marash Administrative Districts dated October 12, 2009 (in regard to the part of not prescribing guarantees for returning the proceeds from crime and recognized as physical evident primarily to the Aggrieved parties) and, in particular, with the demand to change the judgment which was refused on 14 November 2011. As a result of the consideration of the cassation complaint admitted on 30 March 2012, the RA Cassation Court reversed the mentioned decision of the RA Appeal Criminal Court and the case was sent to the same court with the demand of new consideration. On 14 June 2012 the RA Appeal Criminal Court made a decision to satisfy the appeal complaints, according to which financial means recognized as physical evident were proportionally divided among the aggrieved parties. Simultaneously, the demand of the Applicants concerning the remand of the judgment of the General Jurisdiction Court of Kentron and Nork-Marash Administrative Districts (concerning the physical evidences confiscated in favour of the state budget) was not satisfied. On July 13, 2012, the Applicants submitted an application to the RA Appeal Criminal Court which was left without consideration on the reasoning that the remand of the judgment is not in the scopes of competence of that Court. The cassation complaint was returned based on the Decision of the RA Cassation Court of September 24, 2012.

3. Challenging Part 1 of Article 26 of the Law of the Republic of Armenia on Compulsory Enforcement of Judgments with the interpretation provided by the RA Appeal Criminal Court concerning the Case ԵԿԴ-0094/01/09 of 27 July 2012 and quoting international legal instruments and case law of the European Court of Human Rights, as well as Decision DCC-983 of the Constitutional Court dated 12 July 2011, the Applicants state that they were deprived of the effective means of protection of their rights consonant with the obligations assumed by the Republic of Armenia, which according to the Applicants, contradicts Article 3, Part 2 and Article 18, Part 1 of the RA Constitution. They also state that they are deprived of the possibility of consideration of their case for protection of

their violated rights, which is incompliance with Article 19 of the RA Constitution. In its turn, it also leads to the fact that the right to property of the Applicants is not protected and they, as aggrieved parties of the criminal case, do not receive compensation for their damages, which contradicts Article 8, Part 1 and Article 20, Part 5 of the Constitution. As a result, the Party thinks that interpretation provided by the RA Appeal Criminal Court to the provision stipulated in Article 26 of the RA Law on Compulsory Enforcement of Judgments brings to its unconstitutionality.

4. The respondent states that the challenged norms of the RA Law on Compulsory Enforcement of Judgments, in essence, are civil procedural norms and they regulate "...only the issue of the remand of the judgment in favour of the debtor, as means of protection of the right of the debtor."

According to the Respondent "In criminal procedure the remand of the judgment is stipulated only for the cases when the acquittal judgment, or the decision to terminate the criminal case or discontinue legal prosecution, upon which the damage was compensated, is abolished and indictment judgment was made. In this case, the amount paid as compensation of damage, may be seized in accordance with the court's decision according to the procedure of the remand. "

The Respondent states that there is no "possibility of remand of the enforced judgment in the RA Law on Compulsory Enforcement of Judgments "...from a person in favour of the aggrieved one". According to the Respondent, such a legal regulation is not conditioned with the absence of term "judgment" in the challenged norm; it is directed towards protection of the interests of the debtor. Although, as the Respondent finds, "...there is a legislative gap, which does not regulate the remand of enforced judgment in favour of the aggrieved and in the terms of which the possibility of the effective restoration of the violated rights is not ensured".

5. In the frames of this Case, while evaluating the constitutionality of the challenged legal regulation, the Constitutional Court considers necessary to touch upon the legal positions expressed in Decision DCC-983 of the Constitutional Court of 12 July 2011 insofar as the matter in dispute concerns the positive duty of the state to protect private individual's property from illegal actions of others as well as to ensure effective protection of the rights and lawful interests of persons who suffer property

damage in the frames of enforcement of this duty. In this concern, the challenged norm directly prescribes the manner and terms of the remand of the enforced judgment based on certain grounds in the sphere of regulation of civil-legal relations, which generally, is a guarantee for protection of the property rights of persons, who suffered damages from an offence, as well as the right to fair examination and access to justice guaranteed by the Constitution.

As it derives from the content of the challenged legal regulation of the RA Law on Compulsory Enforcement of Judgments, **from procedural perspective** the issue of remand of the enforced judgment may be resolved if:

- the enforced judgment of the court is available, and
- if the enforced judgment of the court is reversed by the competent court and a new judgment is adopted on rejecting partially or entirely the action, or the proceedings of the case have been struck out or the action is left without consideration.

In the case of availability of the above-mentioned legal requirements, the competent court renders a ruling, i.e. a decision or a judgment, to return **the property** (movable or immovable) to the party concerned, i.e. debtor (i.e. in accordance with the previous judgment, the person who is liable for the other party) in accordance with new judgment. That is, it is unequivocal that the institute of remand of judgment **aimed at regulating the civil-legal relations** rehabilitation (compensation) of the damage caused to a person (persons) because of enforcement of the judgment based on judicial error (new or newly revealed or other circumstances).

Article 26, Part 2 of the above-mentioned Law stipulates the terms of enforcement of remand of the judgment, which have not been implemented.

From substantive perspective, the issue of remand of the enforced judgment of the court may be solved in such particular cases, when there are legislatively prescribed grounds for (partial or entire) reverse of the judgment of the court, termination of the case proceedings and leaving the action without consideration; and consequently there is a legal necessity to abolish the legal consequences (restoration of legal condition prior to enforcement of that act, the previous rights and obligations of the concerned party (aggrieved) based on circumstances of the case) resulted from the enforcement of that act. That is, the aim of the remand of enforced judgment of the court is to ensure the administration of fair and

effective justice (enforcement of the goals of justice), and the object is **right to property** and rights and obligations of the parties, conditioned with the lawfulness of their implementation in the frames of the given civil dispute. That is, by implementation of institute of remand of judgment, the state, in the name of the competent court, pursue the aim to fulfill its positive duty to protect property of the persons (including from illegal actions of others), which is also one of the main tasks of administration of justice.

Thus, the Constitutional Court states that the institute of remand of the enforced judgment of the court is an important guarantee concerning protection of rights and freedoms of individuals prescribed in Articles 8, 18, 19 and other articles of the RA Constitution, and in the frames of the legal regulation, it may not cause issue of constitutionality itself, if the legislation prescribes effective procedure for its enforcement, in particular, possibility of **swift, complete and effective** restoration of the rights and freedoms of persons violated as a result of the enforcement of an unlawful judgment. The examination of the documents and, in particular, judgments attached to the application states that the statements of the Applicants contain factual demand of necessity to ensure such procedures for **restoration of the damage caused by crime,** which, as follows from the procedural background of the Case, although has not been directly related to the issue of necessity of implementation of the institute of remand of the judgment of the civil case, but is also aimed at solving of this issue based on general goals of legal regulation. Consequently, ruled by requirements of Article 19 of the RA Law on Constitutional Court, in the frames of this case, the Constitutional Court considers necessary to touch upon the issue of necessity of relevant legislative regulations on ensuring constitutional-legal principles of restoration of pecuniary (property) damage caused to persons by the crime and especially in accordance with its legal positions concerning that issue expressed in previous decisions.

6. In the frames of the statements in dispute, the complex study of the legislative acts regulating procedural relations states, that there are still no effective procedures for compensation of pecuniary damage caused to a person as a result of an offence at the level of legislative regulation. In particular, the Constitutional Court signifies the necessity of successive implementation of such conceptual approach at the level of legislative reg-

ulation, which will guarantee swift, complete and effective (fair) restoration (compensation) in **the frames of one case by single judicial procedure, based on the possible simpl**ified procedure. The necessity to guarantee legislatively such legal requirements is a constitutional legal demand and derives from Articles 1, 3, 14, 14.1, 18, 19 and other numerous articles of the RA Constitution. The necessity to administer justice based on assurance of these guarantees is also signified by the decisions of the Constitutional Court (DCC-929, DCC-983).

Stating their primary significance, considering peculiarities of the consideration of the constitutionality of legal regulation (Article 55, Part 4 of the RA Criminal Code) related to the challenged issue in structural perspective in Decision DCC-983 of July 12, 2011, the Constitutional Court drew attention especially to the following legal positions expressed in that decision:

- "...the principle of immunity of property not only means that the owner, as the holder of subjective rights, is entitled to demand from others not to violate his/her right to property but also assumes the duty of the State to protect the persons' property from illegal infringement. In the situation in question, this duty of the State requires **to ensure effective mechanism for protection of property rights of the crime victims and for recovery of damages".**
- "... If, in the case of confiscation as a supplementary type of the punishment prescribed by Article 55, Part 1, the object is exclusively the **legitimate** property of the convict, then the object of confiscation prescribed by the challenged Part 4 of this Article is not the legitimate property of the convict, but the property gained from the commitment of the crime, and, as a rule, it is the property of the aggrieved".
- " that confiscation of property as a supplementary type of the punishment and confiscation of property gained from crime are different institutions by their constitutional legal content, which have different tasks and objectives. The institution of confiscation, as a supplementary type of the punishment straightly directed against the property of the convict, follows from Article 31, Part 2 of the RA Constitution, as **in this case confiscation of the property of the convict is a measure of compulsion following from liability that lawfully restricted his right of ownership.** Meanwhile, in the case

of confiscation of the property gained from crime, the aim of confiscation is to withdraw the property gained from crime from the convict, and in this case, the right of ownership of the convict is not restricted. Hence, taking into account that, as a rule, the property gained from crime is the property of the aggrieved, while confiscating that property, understanding of the concept of confiscation by implication of Article 55, Part 1 of the RA Criminal Code, that is, gratuitous transfer of the confiscated property to the state's ownership without restoring the right of ownership of the aggrieved, is inadmissible, as in the case of such understanding the measure of confiscation is straightly directed against the right of ownership of the aggrieved unlawfully restricting his/her right of ownership. **The Constitutional Court finds that gratuitous transfer of that property to the state's ownership blocks the possibility to satisfy the property interests of the aggrieved at the expense of the property gained from crime and the possibility to restore violated right of ownership."**

- " during the application of the challenged norms on confiscation of the property gained from crime it is pivotal to guarantee the compensation of damages caused by the crime to the aggrieved, which is also a constitutional legal duty of the state particularly stipulated by Articles 3, 20 (Part 5) and 43 (Part 2) of the RA Constitution."
- "money, valuables and other objects and documents, which may serve as means to discover a crime, determine factual circumstances, expose the guilty person, prove a person's innocence or mitigate responsibility are acknowledged to be physical evidence. Article 119 of the same Code states the rules according to which the issue of physical evidence shall be solved in the sentence of the court as well as in the decision on dismissing the case. According to Part 1, Point 3 of the said Article, money and other valuables, which may not be legally possessed due to committing a crime, **shall be returned to the owners, possessors or their successors.** According to Part 1, Point 4 of the said Article, money, items and other valuables obtained in an illegal way shall be used **to cover** the court expenses and **damages of the crime**, and if the person who suffered the damages is unknown, the money shall be forwarded to the state budget. Simultaneously, according to these provisions, Article 59,

Part 1, Point 17 and Article 61, Part 2, Point 3 of the RA Criminal Procedure Code state the right of the aggrieved and the civil plaintiff, respectively, to get back the property, seized by the body conducting criminal proceedings as physical evidence".

- " The Constitutional Court states that Article 55, Part 4 of the RA Criminal Code, according to which, property gained from crime shall be confiscated regardless the ownership or the possession of the convict or any other third party, and, in accordance with Article 119, Part 1, Point 3 of the RA Criminal Procedure Code, it does not stipulate the condition of necessary protection of the right to property of the aggrieved. In such situation not only intersystem contradictions emerged, but also the institutions of confiscation of the property of the convict, as a type of punishment and confiscation of the property gained from crime became identical. In the law-enforcement practice, the challenged legal regulation is interpreted in a way that in the case of confiscation of property gained from crime the entire property is gratuitously transfer to the State without protection of the property interests and right of ownership of the aggrieved (legal possessor)."

So, by its abovementioned decision, the Constitutional Court, signifying the assurance of lawful implementation of the institution of compensation of the damage caused by crime in law enforcement practice, pointed out the constitutional legal principles for ensuring legislative regulation of the latter which will be also guarantees for complex and effective legal regulation of the challenged issue in this case, as well as for formation of further unified judicial practice.

Taking into consideration the current law enforcement practice, the abovementioned legal positions, shall be considered also by the RA Prosecutor's Office in regard to guaranteeing restoration of the violated rights of the victims in the frames of its competence.

Simultaneously, the task and constitutional obligation of the RA National Assembly is, on the basis of the requirements of Article 83.5, Points 1 and 2 of the RA Constitution, to overcome the gap of legal regulation and to prescribe precise provisions for ensuring the possibility of full restoration of the rights of persons in the frames of the challenged issue.

7. The study of international practice states that there are diverse solutions of the legislative regulation on compensation of the damage caused by crime. Although the general analysis points out the following main approaches:

- The issue of compensation of the damage caused by an offence is solved in the scopes of one proceeding, in some cases authorizing the concerned parties to choose the type of litigation (civil or criminal),
- Prescription of the precise procedure for satisfying the demand to return the property obtained as a result of an offence to its lawful owner,
- The action of compensation of the damage may be submitted to the same court considering the case, during which the person is deprived of the possibility to apply simultaneously to other court of general jurisdiction,
- The actions of the court within the criminal case for compensation of damages are regulated by the civil procedure without any reservation,
- The civil action deriving from the civil case is considered in accordance with the rules of civil procedure,
- The civil claim on compensation of the damage may be subject to consideration despite the results of consideration of the criminal case,
- Parallel to main damages based on civil action, the demand of compensation of moral damage may raise,
- In some cases the demand of compensation of damage may be submitted even orally in the court which may be considered immediately,
- If the proceeding is realized in the frames of criminal procedure, demand to compensate the damage may be subject to obligatory consideration only in the given court,
- The action on compensation of damage based on civil procedure rules may be subject to consideration, if in the frames of criminal proceeding the newly acquired facts are not enough,
- Till the end of the consideration of the criminal case, urgent measures may be undertaken for ensuring civil action regarding compensation of damage,
- The action on compensation of damage may include the demand on return of property,
- The decision of the court on compensation of damage in the frames

of criminal case may be appealed in regard with that part in accordance with rules of civil procedure.

8. The study of the case law of the European Court of Human Rights regarding compensation of damage by crime states that the Court, in respect to prescribing means of submitting a complaint on ensuring compensation of the damage caused by crime, considers in the wide discretion of the state. Meanwhile, it is stated that prolonged compensation, which obliges the Applicant disproportionately, as a result the balance is violated, which is available between the protection of the right to property and common interest (Case of Karoly Hegedus v. Hungary. (Application no.11849/07), Judgment, November 2011, Final.03/02.2012):

- concluded that civil plea on compensation principally is effective means of judicial protection (see: Lukenda v. Slovenia, no. 23032/02, §59, ECHR 2005-X; Jazbec v. Slovenia no.31489/02, §75, 14 December 2006, Varacha v, Slovenia, no. 9303/02, §32, 9 November 2006, and Lakota v. Slovenia, no. 33488/02, §35, 7 December 2006; a contrario. Ommer v. Germany (no.1), no. 10597/03, §75, 13 November 2008).
- stated that Article 6, Paragraph 1 of the Convention is "right to trial," which is related to accessibility of the court, i.e. right to file a proceeding in the court on the basis of civil plea is one of its elements (see: The Holy Monasteries v. Greece judgment of 9 December 1994, Series A no. 301-A, pp. 36-37, para. 80). Hereinafter it added that doubtlessly Paragraph 1 of Article 6 is applicable for the applications on compensation for damages as result of bad approach of the state officials (see: The Tomasi judgment cited at paragraph 61 above, p. 43, paras 121-22) (Case of Aksoy v. Turkey, (Application no. 21987/93), Judgment, 18 December 1996).

In the frames of Council of Europe regarding the issue of compensation of damage by crime the introduced legal principles conclude the following:

- The victim party shall be informed during the criminal proceeding about the possibility of compensation of damage and legal aid and consultation,
- The Court on criminal cases shall have possibility to adopt a decision

on providing compensation to the victim by the offender. For this, the restrictions, limits and technical obstacles, which prevent practical implementation of such a possibility, shall be repelled,

- entire information on damages and losses of victim shall be accessible to the court so that the latter, while decision of the form and measure of the punishment, could take into consideration:
- a. necessity of receiving compensation by the victim,
- b. compensation of the damage made by the offender or efforts made for this purpose,
- in the stage enforcement of the judgment, if the compensation is a criminal sanction, it shall be implemented by the prescribed order of collecting fines and there shall be priority regarding any type of other financial sanction imposed on the offender. In all cases, the victim shall be assisted regarding collecting the sum (Recommendation No. R(85)11 on the position of the victim in the framework of criminal law and procedure (Adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies).

Simultaneously, it is also signified that:

- regarding the issue of receiving compensation, in the case of payment of the sums by the insure companies or other organizations and, if possible, in the case of compensation provided by state, assistance shall be imposed (Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims (Adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies).
- States should therefore take the necessary steps to ensure that victims have effective access to all civil remedies, and within a reasonable time,
- States should institute procedures for victims to claim compensation from the offender in the context of criminal proceedings. Advice and support should also be provided to victims in making these claims and in enforcing any payments awarded.
- Compensation should be provided for treatment and rehabilitation for physical and psychological injuries.(annex to Recommendation Rec(2006)8).

9. The RA Constitutional Court finds that at the level of legislative regulation of the challenged issue the abovementioned conceptual approaches fixed in the international practice shall also be taken into consideration as requirements directly deriving from provisions of Article 3 of the RA Constitution.

Meanwhile, till legislative clarifications, the necessity of which is accepted also by the Respondent, the enforcement of the decision adopted by the RA Appeal Court on 14.06.2012 in the name of the Republic of Armenia regarding the judgment of General Jurisdiction Court of Kentron and Nork-Marash Administrative Districts dated 12 October 2008 regarding termination of the part of the civil action and proportionally distributing the sum of AMD equivalent to 25.000 Euros and 4,040,000 AMD, shall be ensured. The materials of the case state that the current situation proves the manifestation of formal approach of enforcement of the principle of rule of law.

The RA Constitutional Court states that from the perspective of protection of subjective rights of the Applicants, thus, the role of the RA Prosecutor's Office should be efficient as on the basis of its writ of execution the means of compensation provided to the Applicants was transferred to the RA state budget.

Proceeding from the results of consideration of the case and ruled by Article 100, Point 1, Article102 of the RA Constitutional Court, Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. Article 26, Part 1 of the Law of the Republic of Armenia on Compulsory Enforcement of Judgments is in conformity with the Constitution of the Republic of Armenia, taking into consideration the legal positions expressed in this Decision.

2. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

28 June 2013
DCC-1102

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 204.38, PART 2 OF THE RA CIVIL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF "HELSINKI CITIZENS' ASSEMBLY" VANADZOR OFFICE

Yerevan *18 September 2013*

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan (Rapporteur), F. Tokhyan, M. Topuzyan, A. Khachatryan, V. Hovhanissyan, H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of the representatives of the Applicant: A. Zeynalyan and A. Ghazaryan,

official representatives of the Respondent: S. Hambardzumyan, the Chief Specialist and H. Sardaryan, the Leading Specialist of the Legal Expertise Division of the Legal Department of the National Assembly Staff of the Republic of Armenia,

Representatives of the RA Cassation Court: L. Drmeyan and R. Makhmudyan,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 6 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by an oral procedure the Case on conformity of Article 204.38, Part 2 of the RA Civil Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of "Helsinki Citizens' Assembly" Vanadzor Office.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by "Helsinki Citizens' Assembly" Vanadzor Office on01.03.2013.

In the application submitted to the Constitutional Court, the Representatives of the Applicant considered appropriate to unite this case with the case on conformity of Article 426.9, Part 2 of the RA Criminal Procedure Code with the Constitution of the Republic of Armenia considering the identical nature of the subject matter. The RA Constitutional Court considered the constitutionality of Article 426.9, Part 2 of the RA Criminal Procedure Code severally, taking into consideration that regardless the identical nature of the mentioned legal relations, different law enforcement practice is formed in the Chambers of the RA Cassation Court, as well as there is a necessity to examine more comprehensively the case law formed in concern with this issue by the Chamber of Civil and Administrative Cases of the RA Cassation Court. Based on these considerations, on July 4, 2013 the RA Constitutional Court postponed the examination of the case, in particular, holding to conduct the examination of the case by an oral procedure, as well as, "Taking into consideration that the matter in dispute has different interpretations in the judicial practice and, that during the examination of that issue there is a necessity to hear the RA Cassation representatives' explanations on the given issue by the of Court, to invite the authorized representative of the RA Cassation Court to the oral examination of the case and propose the RA Cassation Court to ensure the participation of the latter to the case examination." By the same decision, the Constitutional Court demanded from the RA Judicial Department "...within one month period to submit to the Constitutional Court the copies of the decisions of all cases examined by the Civil and Administrative Chamber of the RA Cassation Court since 2006, without any exception".

In the prescribed period, the RA Judicial Department submitted to

the Constitutional Court 150 decisions adopted by the Civil and Administrative Chamber of the RA Cassation Court based on the new circumstances.

Having examined the report of the Rapporteur on the case, the explanations of the representatives of the Applicant and Respondent, the explanations of the representatives of the RA Cassation Court, having studied the RA Civil Procedure Code and other documents of the case, as well as decisions adopted by the Civil and Administrative Chamber of the RA Cassation Court based on new circumstances, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Civil Procedure Code (hereinafter Code) was adopted by the RA National Assembly on 17 June 1998, signed by the RA President on 7 August 1998 and came into force on 1 January 1999.

Article 204.38 of the Code titled "The rules of judgment review on the basis of the newly revealed or new circumstances" prescribes:

"1. The general rules of this Code cover the procedure for judgment review on the basis of the newly revealed or new circumstances, if this Chapter does not prescribe special rules.

2. The court may leave in force the operative part of the reviewed judgment by its judgment adopted as a result of this proceeding, if on the basis of the grave arguments it substantiates that the circumstances prescribed by Article 204.32 and 204.33 of the Code could not have impact on the outcome of the case on merits.

3. The judgment of the Appeal Court may be appealed in the Cassation Court in accordance with the general procedure prescribed by law.

Article 204.38 of the Code was edited based the RA Law ՀՕ-269-Ն dated 26.10.11.

2. Referring to the legal positions of the Constitutional Court expressed in the Decisions DCC-943 from 25.02.2011 and DCC-984 from 15.07.2011, the Applicant states that if the procedure prescribed in the mentioned decisions is not provided, i.e. the Constitutional Court, declaring the legal provision contradicting the Constitution or in conformity with it, holds that it was applied with the interpretation other than the one revealed in the operative part of the Decision, and this decision will not be an effective signal for case renewal in the general jurisdiction courts and a ground for the vacation of the judgment where an unconstitutional

norm was applied, then the person's "right to apply to the Constitutional Court" guaranteed by Article 101, Point 6 of the RA Constitution is not realistic, and initiation of the constitutional legal dispute in the Constitutional court will become senseless.

Analyzing the legislative amendments made in Article 204.38 of the Code on the basis of the Decision DCC − 984 of the Constitutional Court, the Applicant concludes that they contradict the legal position of the Constitutional Court expressed in the abovementioned Decision, according to which the judgment review shall ipso facto lead to the vacation of the judgment where an unconstitutional norm was applied, which supposes that the fact of application of the unconstitutional norm in the judgment shall be the only ground for review, and any other circumstance, term, fact or argument may not be put forward or prescribed in addition to the mentioned fact.

3. The Respondent finds that the challenged legal norm is in conformity with the RA Constitution, as without excluding the possibility of no impact of the new or newly revealed circumstance on the outcome of the case, the legislator, as an exclusive case and simultaneously as a guarantee for protection of the rights and legitimate interests of the persons submitting appeal to judgment review due to new or newly revealed circumstances, stipulates that the court may leave in force the operative part of the judgment based on grave arguments. Although, in accordance with the assessment of the latter, the possibility stipulated in the challenged provision to adopt a judgment and to leave in force the operative part of the reviewed judgment derived from the proceeding based on the new and newly revealed circumstances prescribed by the challenged provision in accordance with the general procedure prescribed by Code, **in essence, concerns only the new judgment adopted as an outcome of the new consideration of the case after vacation of the judgment.** That is, if in the frames of review proceeding from the fact of availability of the new or newly revealed circumstance is confirmed, as a result of review proceeding the reviewed judgments shall be annulled. As a result of the review proceeding either the case may be sent for new consideration to the trial court, or the court reversing the judgment may change it, if the confirmed factual circumstances permit to adopt a new judgment without new consideration, taking onto account the essence of the stated violation and its impact on the outcome of the case. Thus, according to the Re-

spondent, the availability of newly revealed circumstances, relevant acts of the RA Constitutional Court or European Court of Human Rights, by itself, may not predict the outcome of the case and bring to justification or guiltiness of a person. The nature of the stated violation shall be considered and its restoration via relevant legal remedies shall be based on the principle of "restitution to the previous (original) condition".

Based on the above mentioned the Respondent finds that assessment of the nature of violation and its impact on the outcome of the case, a new judgment shall be adopted as a result of review proceeding, based on the general procedure prescribed by law. Thus, according to the Respondent, **the challenged provision of the Code** is in conformity with the requirements of Article 3, 6, 18,19, 93 and Article 101, Point 6 of the RA Constitution **so far as it excludes the possibility to leave in force the judgment which violates the constitutional or conventional rights.**

4. The procedural background of the this case is the following: the Applicant applied to the RA Administrative Court demanding to recognize the fact of violation of the right to freedom of information, abolish the order of RA Minister of Defense on information of expanded department list of information subject to ciphering and oblige to provide information requested by inquiry number Ъ/2010-051 dated 10.02.2010. On 23.11.2010 the RA Administrative Court adopts a judgment on declining of the application. This judgment was appealed to the Appeal Court. The RA Administrative Appeal Court declined the appeal of the organization by the decision dated 16.03.2011, and the decision from 23.11.2010 was not changed. On 18.05.2011 the RA Cassation Court made a decision to return the cassation complaint of the Applicant.

On 06.03.2012 the Constitutional Court adopted Decision DCC-1010 based on the application of the "Helsinki Citizens' Assembly" Vanadzor Office Non Governmental Organization on declaring Article 8, Part 4, Sub point "f" and Article 12, Parts 6 and 7 of the RA Law on State and Official Secret contradicting to the Constitution and void.

On 27.06.2012 the RA Cassation Court made a decision to accept the applicant's cassation complaint on review of the decision of the RA Cassation Court from 18.05.2011 on returning the Cassation complaint due to new circumstance based on the Decision DCC-1010 of the Constitutional Court, as a result of which the above mentioned cassation complaint of the Applicant was denied by the decision dated 25.12.2012.

5. The examination of the application shows that in the frames of judgment review proceeding due to new circumstances, the Applicant puts forward the issue of legal possibility of validity of judgment where the norm declared unconstitutional was applied. That is, the Applicant challenges Article 204.38, Part 2 of the Code only from the perspective of judgment review due to new circumstances and not due to newly revealed circumstances, thus in the scope of the consideration of the this case, the Constitutional Court examines the constitutionality of Article 204.38, Part 2 from the perspective of judgment review proceeding due to new circumstances.

6. In its Decision DCC – 1099 dated May 31 2013, the Constitutional Court again touched upon the constitutional legal content of the institution of new circumstances and stated that "In a number of its decisions (in particular DCC-701, DCC-751, DCC-758, DCC-767, DCC-833, DCC-866, DCC-871, DCC-935, DCC-943, DCC-984) as well as in the annual reports concerning the state of implementation of the Constitutional Court decisions, the Constitutional Court touched upon the issues concerning the legal regulations of the institution of judgment review due to new circumstances and put forward conceptual position, according to which the effective implementation of the person's right to apply to the Constitutional Court demands comprehensive legislative regulation of judgment review based on the decision of the Constitutional Court, which will provide a person with the possibility to restore his/her right violated as a result of the application of the normative act declared unconstitutional by the Constitutional Court.

In Point 7 of Decision DCC-984 dated15.07.2011 the Constitutional Court expressed the following legal positions "...the judgment review following the Constitutional Court decision shall ipso facto lead to vacation of the judgment, where the unconstitutional norm was applied. Concerning the powers of the competent body resulting from the judgment vacation the Constitutional Court finds that peculiarities of each specific case conditioned **the referring of the given case to be revised in the court previously considered that case, or change of the vacated act by the court vacating the judgment, if the confirmed factual circumstances makes possible to render a new judgment without revision taking into account the declaration of the applied legal norm as contradicting the RA Constitution."**

Drawing the attention of the RA National Assembly and the RA Cassation Court to the legal positions expressed in Decision DCC-984 of 15.07.2011 of the Constitutional Court and international legal approaches, in Decision DCC-1099 the RA Constitutional Court stated once again that "...the constitutional legal content of the institution of judgment review due to new circumstances shows that this institution ensures the **restoration of the violated constitutional and/or conventional rights.** The latter, based on the basic principles of the state ruled by law requires the elimination of the negative consequences for the victim, which occurred as a result of violation, which, in its turn, demands **restoration to the condition before the violation *(restitution in integrum)*** as much as possible."

In the same decision, the Constitutional Court expressed a precise legal position according to which "...the Constitutional Court states that the term "judgment review" due to new circumstance by its content is equivalent to the contents of the terms "renewal of the case", "re-opening of the case proceeding", **and the mentioned understanding of the concept of judgment review shall predetermine the content of the review proceedings, its problems and the issues subject to solution in its frames.** So, in the frames of proceeding of judgment review, i.e. in the frames of the proceeding of the case renewal the judicial actions shall be undertaken to ensure new consideration of the case, which is possible only **in case of vacation of the judgments applied an unconstitutional norm** which has entered into force. The institution of review may pursue its aim only in the case when new consideration of the case is ensured in the conditions of availability of the fact of unconstitutionality of the applied norm and fact of violation of the conventional right, **taking also into consideration the legal positions expressed in the judgment of the Constitutional Court and European Court of Human Rights, which is a new circumstance.**

The judgment review due to new circumstance shall inevitably ipso facto bring to the vacation of the judgment where an unconstitutional norm was applied and the conventional right was violated."

Amongst the mentioned and other legal positions of great significance for this case expressed in this and in a number of other decisions the RA Constitutional Court stated that, **"In case when the courts evade from the formal numeration of legislative norms and the application of the legislative norm will have real content, the review of the content of the operative part will be inevitable as a result of entire case review."**

The Constitutional Court also stated "...the additional requirement prescribed by the provision in dispute pursues a lawful aim. It shall be observed not as a right or subjective discretion to leave the judgment unchangeable, but in such possible cases as a normative obligation **on submitting substantiation based on grave arguments.** Simply such legal regulation also assumes proper level of legal culture and legal definition of the discretional limits of the term "substantiation by pointing out grave arguments," which is the task of legislator and initiation of relevant judicial precedent. Taking into consideration that this term is prescribed also in other articles (in particular, Article 8, Part 4 of the RA Criminal Procedure Code, Article 204.38, Part 2 of the RA Civil Procedure Code), the RA National Assembly and the RA Cassation Court in the scope of their competence should ensure the uniform understanding and implementation of the provision based on the requirements of the principle of legal certainty. It is also necessary to consider that in the case of absence of such arguments leaving the operative part of reviewed judgment uphold shall contradict the principle of rule of law and basic values of state ruled by law." The Constitutional Court also considers such an important circumstance that **argument may be "grave" if it is of initial and decisive significance for relevant conclusion.**

7. Considering the fact that the RA Constitutional Court, as it was mentioned, has repeatedly referred to the constitutional legal content of the institution of consideration of the case due to new circumstances and considers also significant that the reference to the introduction of the legal practice of the individual complaints in our country after the 2005 constitutional reforms for providing a precise and full answer to the issues put forward. Deriving from the requirements of Article 63, Part 1 of the RA Law on the Constitutional Court, comprehensive study of about 150 decisions recently adopted by the Civil and Administrative Chamber of the RA Cassation Court shows that in regard to 92.3 percent of the examined cases the case consideration due to new circumstances was denied and the complaints were returned. Only in 7,7 percent cases of initiating complaints based on new circumstances were satisfied in the sense of starting a proceeding of review of the previously adopted judgments on denying their consideration. Nevertheless, in all cases the final judgment was not reviewed. And this happens in the case, when Article (Part 2) in dispute clearly defines that in the scope of proceeding of judgment review due to

new circumstances the Court may leave in force the operative part of the **reviewed judgment** only pointing out grave arguments.

The Constitutional Court stated that in the sense of guaranteeing the superiority of the Constitution, more than half of the examined decisions is problematic and has formed law enforcement practice incompliance with the basic principle of rule of law, and they should be necessarily addressed from the perspective of assessment of the law enforcement practice. The matter is that the institution of the constitutional review of specific cases is systemically interrelated to the institution of judgment review due to new circumstances, the essence of which is that based on the relevant decision of the Constitutional Court, as a result of a certain judgment review the new judgment differing from judgment adopted before the decision of the Constitutional Court is adopted, by the case of physical and legal entity, if there are relevant grounds. In this context, the Constitutional Court states that it is necessary to differentiate the terms "filing a review proceeding due to new circumstances" and "judgment review due to new circumstances." Thus, filing a proceeding of judgment review due to new circumstances occurs during solution of the issue of admissibility of the complaint on judgment review due to new circumstances, in the process of which, based on Articles 204.33, 204.36 and 204.37 of the RA Civil Procedure Code, the impact of the unconstitutional norm applied against the Applicant on the conclusion of the court may not be assessed. In this certain case, by the virtue of the legal positions expressed in Decision DCC-984 of the Constitutional Court, if there are no grounds for returning the application, the court, which reviews the judgment, **not only** must **file a review proceeding but also as a result of it must vacate the reviewed judgment,** otherwise the judgment will continue to be based on the applied legal norm declared as unconstitutional and invalid or interpreted differently from the interpretation of the Constitutional Court. As for the judgment review due to new circumstances, **it is a process following the vacation of the reviewed judgment and only during it the impact of the new circumstance on the outcome of the case may be assessed**, upon which the necessity to amend or not amend the operative part of the reviewed judgment is substantiated. Otherwise, the essence of institution of constitutional review substantiated on certain cases and systematically interrelated institution of judgment review due to new circumstances shall be distorted. Moreover, as it is stated in Decision DCC-984, according to the RA Civil Procedure Code, the Appeal and Cassation Courts, while reviewing the judgment, are entitled either to

vacate the judgment and send back the case for new consideration or to vacate the reviewed judgment and amend it.

8. In the context of the above-mentioned legal positions of the Constitutional Court touching upon the situation existing in the RA judicial practice concerning the legal institution of new circumstances in civil and administrative cases, the RA Constitutional Court states that not only contradictory law enforcement practice exists, but it is also evident that in a number of cases renewal of the case due to new circumstances is denied based on the arguments inadequate to the constitutional legal content of that institution. The typical examples are the cases of 2007 due to new circumstances based on the Decision DCC-690 of the Constitutional Court dated 09.04.2007. By Point 3 of this Decision the RA Constitutional Court stated that "Article 231.1, Point 2 of the Civil Procedure Code of the Republic of Armenia (in edition of 7 July 2006):

a. is in conformity with the Constitution of the Republic of Armenia in regard to the stipulation of a time period for adoption of decision on returning the cassation complaint,

b. to declare as incompliance with requirements of Articles 3, 6 (Parts 1 and 2), Articles 18 (Part 1) and Article 19 (Part 1) of the Constitution of the Republic of Armenia and void in so far as it does not stipulate a mandatory term of argumentation of decision on returning the cassation complaint and consequently does not ensure legal guarantees for sufficient access to justice and its effectiveness".

In this case, the RA Cassation Court denied to file proceeding of review of the decision due to new circumstances stating that the Decision of the Constitutional Court does not cover "...the legal relations that started before that decision got into force". It is obvious that in the scopes of interpretation of the requirements of Article 68 of the RA Law, in particular Parts 10, 12 and 13 of it, the requirements of Parts 12 and 13 of Article 69 of the same Law may not be ignored. The institution of retroactivity of the decision of the Constitutional Court first concerns the conceptual constitutional review and certain legal procedural rules and peculiarities of constitutional review based on the individual applications are prescribed by Article 69 of the RA Law of the Constitutional Court. Part 11 of the latter also refers to Parts 6-17 of Article 68 of the Law, emphasizing that the rules of the mentioned parts of Article 68 are applicable to the consideration of **all other circumstances related** to the cases

determined by the given Article, as well as, adoption of the decisions of those cases. However, the rules on imputability of the decision of the Constitutional Court based on individual applications are prescribed in Parts 12 and 13 of Article 69 of the RA Law on the Constitutional Court according to the principle of legal certainty. As a result of incorrect interpretation of the legal essence of two legal institutions (retroactivity of the decision of the Constitutional Court and protection of constitutional rights via individual complaint) the possibility to protect the rights of the right holders at the courts prescribed by Parts 12 and 13 of Article 69 of the RA Law on Constitutional Court is restricted.

It causes concern that later the Civil and Administrative Chamber of the RA Cassation Court again denied the renewal of the case due to new circumstance based on different arguments. It concerns not only the cases of postponement of the decision through definition of a deadline for nullity of the legal norms declared as contradicting the Constitution, but also the appearance of the new circumstance from the moment of publication of the decision by the virtue of declaring the unconstitutional norm as invalid.

There are even such decisions, which obviously violate the limits of the judicial discretion. For instance, Article 69, Part 12 of the RA Law on Constitutional Court prescribes, "In the cases defined by this Article on declaring the provisions of the law applied against the Applicant as null and contradicting the Constitution, or when the Constitutional Court, in the operative part of the decision revealing the constitutional legal contents of the provision of the law, declared it in conformity with the Constitution and found simultaneously that the provision was applied to him in a different interpretation, the final judgment made against the applicant on the grounds of new circumstances is subject to review in accordance with the procedure prescribed by law". Article 204.33 of the RA Civil Procedure Code prescribes, "**New circumstances** are grounds for judgment review, if:

1. The Constitutional Court of the Republic of Armenia declared the provision of the law applied by the court in the given civil case as contradicting the Constitution and null or declared it in conformity with the Constitution but found that the provision was applied in other than its constitutional legal content revealed in the operative part of the decision".

The content of the first paragraph of this provision was not amended also during the legislative amendments of 26.10.2011. It is obvious that in this certain case the RA legislation **does not require other precondition of exercising of right.** Moreover, in a number of countries in the

case of application of unconstitutional norm against a person it is the duty of the state to initiate restoration of his/her right and overcome consequences. In the judicial practice of the RA Civil and Administrative Chamber of the RA Cassation Court often returns the complaint with mere statement that "...the availability of the new circumstances is not substantiated in the cassation complaint". Meanwhile, availability of the new circumstance based on the person's application or concerning the subjects prescribed by Article 69, Part 13 of the RA Law on the Constitutional Court is proved by the decision of the Constitutional Court based on which the norm applied to him/her is declared as contradicting the Constitution or implemented with different interpretation which, according to the Constitutional Court, is in inconformity with the constitutional legal content of this norm. If the Constitutional Court already initiated the consideration of the case and adopted a similar decision, the Chamber of the Cassation Court is not competent to cast doubt and evade from its implementation because of diverse approaches.

In certain cases, the formal approach leads to the situation that the error or mistake made by the Applicant is automatically reproduced in the judgment. For instance in the frames of the civil case ԵՄԴ/0644/02/10 of January 11, 2012, the decision on returning of the cassation complaint states the absence of grounds for review of the previous decision due to new circumstances on the basis of the Decision DCC-897 of the RA Constitutional Court dated 15.11.2011, and the initiation of the consideration of the complaint is denied on the grounds that "...the Complainants have not substantiated the availability of new circumstance in the cassation complaint". However, the mentioned Decision of the Constitutional Court was adopted on June 22, 2010 and concerned the constitutionality of the obligations stipulated by an international agreement.

9. The Constitutional Court finds that an essential differentiation shall be introduced between the legal requirements prescribed by Articles 204.32 and 204.33 of the RA Civil Procedure Code in judicial practice. Article 204.32 of the RA Civil Procedure Code considers as a ground for judgment review due to newly appeared circumstances the obligatory legal requirement according to which the Applicant shall prove that "...those circumstances were not known and could not be known to the parties of the Case, or those circumstances were familiar to the parties to the case but they did not appear at the hearing owing to circumstances beyond

them, and those circumstances are of essential significance for the decision of the case". Although, Article 204.33 does not prescribe any legal requirement for substantiation of existence of a new circumstance, except for the availability of relevant acts of the RA Constitutional Court and European Court of Human Rights. This is a necessary and sufficient condition for renewal of the case. It is another issue that after renewal in the scopes of consideration of the renewed case on merits **the competent court shall decide whether the application of the norm contradicting the Constitution, impacts the outcome of the considered case and how the person's violated rights shall be restored**. Instead of it the right of the person to access to the court is simply blocked.

It is inacceptable that instead of implementing the requirement of the law, the Civil and Administrative Chamber of the RA Cassation Court in certain cases tried "to interpret" the decisions of the Constitutional Court and in this way evade the fulfillment of their requirements, thus such a practice does not derive from the requirements of Article 92, Part 2 and Article 93 of the Constitution. This practice is based in particular on the peculiar interpretation of the provisions of the RA Constitution and the RA Law on the Constitutional Court. By evading the doctrinal approaches of the Constitutional Court expressed also in the Decision DCC-1010 of the RA Constitutional Court, the Civil and Administrative Chamber of the RA Cassation Court in the decision of the administrative case ՎԴ/1314/05/10 dated 25.12.2012 stated, that "...the trial courts (general jurisdiction and/or specialized) are authorized to terminate the proceeding of the case in the case of appearance of certain circumstances. One of such circumstances is the contradiction of the applicable law or other legal act to the RA Constitution based on the court opinion." This legitimate statement is followed by the conclusion, according to which, "The circumstance of the contradiction of the certain provision to the RA Constitution is subject to assessment by the court (by the judge or composition of judges considering the case).

Article 71(in particular Part 5) of the RA Law on the Constitutional Court prescribes that the Court shall provide two justifications while applying to the Constitutional Court. First, the position on unconstitutionality of the challenging provision of the normative act shall be substantiated. Secondly, it shall be substantiated that the solution of the given case may be possible only by the application of the challenged provision. In the first case, the legal position may be formed as a result of independent and adequate legal analysis on constitutionality of the norm

done by the judge. Nevertheless, it may not become a matter of consideration and a result of "assessment" and the conformity or non-contradiction of the norm with the Constitution may not be stated in the judgment adopted in the name of the Republic of Armenia. It will simply contradict the requirements of Article 93 of the RA Constitution and the content of material and procedural norms of the judicial constitutional review. The interpretation of the possible concern on constitutionality of the applicable norm and possibility of its dispersion via the Constitutional Court as a **competence to assess the contradiction of that norm to the Constitution** will bring to arbitrariness, indirectly assuming the function of constitutional justice and also creating further legal confusion. The point is that in the decision adopted in the name of the Republic of Armenia**, "as a result of assessment",** the Cassation Court may express a legal position on the conformity of the given norm with the Constitution, in the case when the Constitutional Court, again in the name of the Republic of Armenia and in the frames of its constitutional competence and relevant procedural rules, legitimately declares the same provision as contradictory to the Constitution and void. Naturally, such a judicial practice may not be formed. Nevertheless, the fact is that during the last years the provisions applied by the RA courts are declared as contradictory to the Constitution and void based on the applications of nearly 60 citizens. When applying those norms, no court had a concern on their constitutionality even in the cases when there were motions to apply to the Constitutional Court. This causes concern.

The Constitutional Court finds that in the case of being ruled by the principle of rule of law, the possibility of the courts to apply to the Constitutional Court shall be understood as not only a right, but also an obligation. Without it, on one hand, the concern on constitutionality of norm may not be dispersed by discretional approach, as it demands relevant procedural rules for «assessment» and constitutional authority to implement it, and on the other hand, the application of possible unconstitutional norm will violate human rights instead of their protection. The judicial practice also shows that their further restoration becomes more and more difficult and often impossible, bringing to loss of trust towards justice. Thus, the problem is not only further increase of functionality and effectiveness of the institution of the new circumstances, but, also the reasonable implementation of the possibilities given to the RA courts according to Article 101, Point 7 of the RA Constitution, being ruled by the demand of steady

implementation of the fundamental principle of the rule of law. This may be guaranteed only in the case of correct interpretation and implementation of the constitutional legal content of Article 71 of the RA Law on the Constitutional Court. The wording «find» shall be understood as a discretional position, based on grave suspicion resulted from the legal analysis of a judge. However, the «assessment» presumes relevant procedural rules and adequate authority for its implementation.

10. The Constitutional Court considers also significant circumstance that in the stage of initiation of the consideration of the case, the Cassation Court often implements the function of resolving of the case on the merits. The Constitutional Court finds that the legislation shall more precisely differentiate the procedural rules on accepting the case for consideration and adoption of the decisions on the merits and the requirements presented to the decisions adopted by the Cassation Court. The notion "final judgment" also needs necessary clarification. It is often confused with the act adopted by the superior court. If the citizen applies to the Cassation Court and the latter denies to accept his/her application for consideration, this decision is not meant to be a final judgment, as it was interpreted in a number of decisions of the Civil and Administrative Chamber of the RA Cassation Court, and was confirmed also in the clarifications of the representative of the RA Cassation Court.

The complete realization of the institution of appeal is necessary for exhausting all remedies of judicial protection. If all these remedies are exhausted, the possibility to apply to the Constitutional Court or European Court of Human Rights appears. Article 101, Part 1, Point 6 of the RA Constitution prescribes three legal requirements for every person to file an application to the Constitutional Court:

- the final act of the court is available,
- all possibilities of judicial protection are exhausted,
- constitutionality of the legislative provision applied against him/her by that act is challenged.

The constitutional norm refers to the final judgment and not any act adopted by the final instance court in the process of appeal. Simultaneously, Article 91 of the RA Constitution prescribes, **"The final acts of the court shall be adopted in the name of the Republic of Armenia".** By the constitutional legal content the final act of the court means the act, which has resolved the case on the merits has entered into force law-

fully and has caused relevant legal consequence for a person. Such an approach also derives from the legal content of Article 241.11, Part 2 of the RA Civil Procedure Code, according to which "In accordance with the given Code, **the final** judgment considered to be the act, which has been adopted by the First Instance Court and has entered into force in accordance with the procedure prescribed by this Code, and which is not appealable , as well as, the judgment on the merits adopted by the Appeal Court of the Republic of Armenia, which has entered into force and excludes the initiation and continuation of the case consideration".

The RA Constitutional Court also states that for overcoming the current confusion existing in the judicial practice, the requirements presented to the similar acts shall be defined more precisely in the legislation and shall be in conformity with the principle of certainty of law.

11. As it was mentioned above, in the scopes of the Decision DCC-1099 of 31May 2013, the RA Constitutional Court expressed its entire position concerning the subject of legal regulation of the challenged article. Deriving from the current situation of the law enforcement practice, the Constitutional Court does not find that statements of the Applicant are conditioned with the constitutional legal contents of Article 204,38, Part 2 of the RA Civil Procedure Code. On the contrary, this Article prescribes necessary guarantee for protection of rights, i.e. to leave without changes the operative part of the **reviewed judgment** only in the case when it is substantiated by grave arguments. It assumes that it should be an exception conditioned with incontrovertible and grave arguments. This circumstance was also confirmed by the Respondent. However, the notion "grave argument" needs normative clarification for the judicial practice. The latter is also stipulated in other legal acts (for instance, in Articles 8 and 426.9 of the RA Criminal Procedure Code, Article 15 of the RA Procedure Code, Article 15 of the RA Judicial Code, etc.). If the judicial practice did not appropriately address the legal content of this term, the legislative body shall also make relevant conclusion and make the legal content of the notion of "grave argument"legislatively more precise, as in the given legal relations the latter has decisive importance for the protection of rights of persons and implementation of the constitutional requirement of their direct action. As it was mentioned, it is essential that **the given argument shall objectively have decisive significance for adequate conclusion.**

The point is that the established law enforcement practice **mainly evades the requirement of the challenged Article**. As a result, in a large number of cases, the judicial practice of implementation of the legal institution of new circumstances is not harmonious to the constitutional requirements of ensuring and protecting human rights. In such a situation, the RA Constitutional Court finds that for ensuring rule of law, being faithful to the constitutional principle of the state ruled by law and for following steadily the requirements of Article 3 of the RA Constitution the serious change of legal mentality dictated by consistent implementation of the rule of law principle in the RA judicial practice and the overcoming the mentioned situation stated by the RA Constitutional Court is of pivotal significance. Assurance of the supremacy and direct action of the RA Constitution is possible only through that way.

Proceeding from the results of consideration of the case and being ruled by Article 100, Point 1, Article102 of the RA Constitution, Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. Article 204.38, Part 2 of the RA Civil Procedure Code in regard to proceeding of review of the judgment due to new circumstances is in conformity with the Constitution of the republic of Armenia, by the constitutional legal content, according to which,

a. judgment review due to new circumstances shall inevitably *ipso facto* bring to the vacation of the judgment where an unconstitutional norm was applied and/or the conventional right was violated, excluding the possibility to leave it in force.

b. the possibility not to modify the operative part of the reviewed judgment **concerns only the new judgment adopted as a result of new consideration after vacation of judgment. The obligatory normative requirement to substantiate non-modification of the operative part based on grave arguments** is a necessary guarantee for the protection of human rights.

2. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

18 September 2013
DCC-1114

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 73, PART 1, POINT 3 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE HUMAN RIGHTS DEFENDER OF THE REPUBLIC OF ARMENIA

Yerevan ***8 October 2013***

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan (Rapporteur), F. Tokhyan, M. Topuzyan, A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of the Applicant: A. Vardevanyan, the Head and S. Yuzbashyan, Specialist of the Legal Expertise Department of the Human Rights Defender,

official representatives of the Respondent: S. Yuzbashyan, the Head of the Expertise Division of the National Assembly Staff of the Republic of Armenia, S. Hambardzumyan, Chief Specialist of the Legal Expertise Division and H. Sardaryan, Expert of the Centre for Exploration and Analysis,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 8 of the Constitution of the Republic of Armenia, Articles 25, 38 and 68 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Article 73, Part 1, Point 3 of the Criminal Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the Human Rights Defender of the Republic of Armenia.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the Human Rights Defender of the Republic of Armenia on 31.05.2013.

Having examined the report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, having studied the Criminal Procedure Code of the Republic of Armenia and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Criminal Procedure Code was adopted by the RA National Assembly on 1 July 1998, signed by the RA President on 1 September 1998 and came into force on 12 January 1999.

Point 3 of Part 1 of Article 73 of the Code, titled "The Rights and Obligations of Defense Attorney", states:

"1. For the purpose of revealing the circumstances, refuting the indictment, excluding the liability of the suspect or the accused, or mitigating the gravity of the punishment and the measures of procedure compulsion, for the protection of his/her legitimate interests, and for offering to the suspect and the accused legal aid, the defense attorney, in the manner prescribed by this Code, has the right ...

3) to participate in the investigatory or other procedural actions conducted by the body of criminal prosecution upon the suggestion of the latter; with the permission of the body of criminal prosecution, to take part in all investigatory and other procedural actions of the body of criminal prosecution conducted upon his/her motion; to participate in any investigatory or other procedural action, conducted with the participation of his/her defendant, if that is demanded by the suspect or the accused, or if this is requested by the defense attorney himself/herself at the beginning of these actions."

Point 3 of Part 1 of Article 73 of the Code has not been amended since adoption.

2. The Applicant finds that the challenged norms of the Code contradict the provision set forth in the first sentence of Part 1 of Article 20 of the RA Constitution.

According to the Applicant, regulation concerning the rights of the defense attorney, according to which, **with the permission** of the body of criminal prosecution, the defense attorney has the right to participate in all investigatory and other procedural actions of the body of criminal prosecution conducted upon his/her motion, shall lead to restriction of mechanisms for fulfillment of those rights in the case if the suspect or the accused has a defense attorney and does not demand the latter's participation, and it is requested by the defense attorney. The Applicant finds that providing the criminal prosecution body with such power, in practice, may bring to irrelevant and unlawful restrictions concerning the participation of the defense attorney in the process of the investigatory and other procedural actions. According to the Applicant, the aim pursued by the legislator is also not clear, as the latter stipulated an obstacle and/or restriction for fulfillment of the obligations one of the pivotal parties in the criminal proceeding, namely, defense attorney, "... this is requested by the defense attorney at the beginning of investigatory action."

To substantiate his point of view, the Applicant finds necessary to note that there are no precise conditions and/or grounds in the Code due to which the body conducting the criminal proceeding may "disallow" the participation of the defense attorney in the investigatory and other procedural actions conducted upon his/her motion.

Based on his own interpretation of the term **"at the beginning"** stipulated in the challenged provisions of the Code, the Applicant finds that according to the requirements of Part 1 of Article 86 of the RA Law on Legal Acts, with the literal interpretation of the given term means that in all those cases when the defense attorney makes a motion to take part in the already initiated investigatory action, then such motion shall be rejected according to the challenged provisions of the Code, as it does not observe the temporal requirement "at the beginning" stipulated by the Code.

Referring to the Judgments of the European Court of Human Rights the Sunday Times v. the United Kingdom, and Marchx vs. Belgium, as well as the Decision DCC-753 of the RA Constitutional Court, the Applicant finds that the terms "with the permission" and "at the beginning" stipulated in the challenged provisions of the Code do not comply with

the principle of legal certainty, and contain real risk of discrepancies, which may result in violation of the person's right to get legal aid and seriously endanger the legal aid provided to the defendant by the defense attorney in the course of criminal action.

3. The Respondent generally does not object the arguments of the Applicant.

Touching upon the Applicant's argument, according to which, there are no precise conditions and/or grounds in the Code due to which the body conducting the criminal proceeding may "deny" the participation of the defense attorney in the investigatory and other procedural actions conducted upon his/her motion, the Respondent also states that the law does not stipulate the grounds only due to which the right of the defense attorney to take part in the investigatory and other procedural actions may be restricted. Thereby, the Respondent assumes that unimpeded participation of the defense attorney must be ensured if there are no legislatively stipulated circumstances excluding the participation of the latter; and the Respondent expresses an opinion that the restrictions may concern the investigatory actions such as examination (Article 220), personal search (Article 229) and expert examination (Article 248).

Touching upon the next argument of the Applicant regarding uncertainty of law, the Respondent, not excluding the necessity of participation of the defense attorney in investigatory actions not only from their very beginning but also in the process, also finds that the challenged norm of the Code may be misinterpreted and serve as a ground for restriction of participation of the defense attorney in the investigatory and other procedural actions.

Based on the study of criminal procedure codes of the CIS countries, the Respondent finds that they also indicate that the defense attorney shall freely participate in the investigatory and other procedural actions conducted with the participation of his/her defendant, or, when the defense attorney himself/herself or his/her defendant launch the initiative to conduct the investigatory and other procedural actions. Simultaneously, referring to certain articles of criminal procedure codes of a number of CIS countries, the Respondent states that in the mentioned countries the defense attorney shall participate in other investigatory and procedural actions with the permission of the body of criminal prosecution.

Summarizing the Respondent finds that due to the terms of the legal regulation stipulated by the challenged norm of the Code according to which, the participation of the defense attorney in the process of the investigatory and other procedural actions shall be restricted by the permission of the body of criminal prosecution, and such circumstance may serve as a ground for limitation of the defendant's right to receive legal aid, which does not guarantee full protection of his/her rights and lawful interests.

Simultaneously, the Respondent states that the updated version of the RA Draft Criminal Procedure Code (document code: Կ-084-14.09.2012, 10.06.2013-ՊԻ-010/0) has been put into circulation by the RA National Assembly which stipulates the legal regulation to eliminate the restrictions in the Code concerning the defense attorney, and guarantees the unimpeded participation of the latter in the process of the investigatory and other procedural actions both conducted with the participation of the defendant and upon his/her motion or upon the motion of his/her defendant. According to the Respondent, Point 3 of Part 1 of Article 49 of the draft, titled "The Rights and Obligations of Defense Attorney", is in a new wording, according to which:

"1. For revealing the circumstances, refuting the indictment, precluding the liability of the accused, mitigating the sentence or the procedural compulsory measures, as well as, for the protection of his/her rights and lawful interests, the defense attorney, in accordance with the procedure prescribed by this Code, shall enjoy the right ...

3) to take part in any evidentiary or other procedural action, conducted with the participation of his/her defendant, to take part in proving and other procedural action conducted upon his/her motion or upon the motion of his/her defendant, and in other cases to take part in proving or other procedural action upon the proposal of the investigator."

4. The first paragraph of Part 1 of Article 73 of the Code defines the strategic and tactical goals of participation of the defense attorney in criminal cases, that is, to reveal the circumstances, refuting the indictment, excluding the liability of the suspect or the accused, or mitigating the gravity of the punishment and the procedural compulsory measures, as well as to protect the lawful interests of the suspect or the accused, and to provide them legal assistance.

Taking into account the goal of the participation of the defense attorney in the pre-trial proceedings of a criminal case, and the role of the defense attorney conditioned by that purpose, the Constitutional Court finds necessary to consider the challenged norm of the Code in the context of the right to legal assistance, stipulated in the first sentence of Part 1 of Article 20 of the Constitution, and in the context of the right to effective legal remedies before other public bodies, stipulated by Part 1 of Article 18 of the Constitution.

5. According to Article 18, Part 1 of the RA Constitution, "Everyone shall be entitled to effective legal remedies to protect his rights and freedoms before judicial as well as other public bodies".

According to the provision stipulated by the first sentence of Part 1 of Article 20 of the RA Constitution, "Everyone shall be entitled to legal assistance".

Article 43, Part 1 of the RA Constitution does not consider the right to effective legal remedies before judicial as well as other public bodies as the right subject to restrictions, and the right to legal assistance, inter alia, stipulated by the first sentence of Part 1 of Article 20 of the RA Constitution is subject to restrictions only by law, "... if it is necessary in a democratic society in the interests of national security, public order, crime prevention, protection of public health and morality, constitutional rights and freedoms, as well as the honor and reputation of others."

Article 18 of the Constitution provides everybody with the right to effective legal remedies, particularly, before other public bodies, and the state correspondingly has a direct obligation both to stipulate legislatively the availability to effective legal remedies and ensure it in law enforcement practice. Namely, no legal mechanisms must be legislatively defined, which, at first sight, serve as guarantees for realization of the given legal mechanism, though, in fact, in the details of the regulation those legal mechanisms are senseless or restricted.

Touching upon the right to legal assistance, inter alia, provided by the defense attorney stipulated in the first sentence of Part 1 of Article 20 of the RA Constitution, as well as taking into account the circumstance that, finally, the given right is aimed to legal protection of lawful interests of the right holder before other public bodies, the Constitutional Court finds that the considered right supposes **completeness** of legal aid, and

the latter is conditional on efficiency of fulfillment of the obligation of the defense attorney to provide legal aid, **taking into account the possibility of limitation of the given right on the grounds stipulated by Article 43, Part 1 of the Constitution.** Accordingly, the duty of the state is in conformity with the disputed right stipulated in the first sentence of Article 20, Part 1 of the Constitution both legislatively and in law enforcement practice to guarantee effective exercise of the obligation to be provided with legal aid by defense attorney and in the case of obstacles to undertake steps to abolish them.

Simultaneously, within the framework of the review of this Case, the Constitutional Court finds that certain requirements may be legislatively stipulated for realization of the right to legal remedies before public bodies and the right to legal assistance, or the procedures of realization of the given rights may include certain formal conditions, and through the latter shall not be to the extent which makes the realization of those rights inefficient and distorts their essence, or turns into such a limitation of the right which does not pursue any legitimate aim.

6. The challenged Point 3 of Part 1 of Article 73 of the RA Criminal Procedure Code defines three situations of participation of the defense attorney in the investigatory or other procedural actions:

a/ the defense attorney shall take part in the investigatory or other procedural actions performed by **the body of criminal prosecution upon the permissal of** the latter. Taking into account the circumstance that other cases of participation of the defense attorney are also stipulated by Point 3 of Part 1 of Article 73 of the RA Criminal Procedure Code, the Constitutional Court states that the considered case concerns the situations when the investigatory or other procedural action is not conducted upon the motion of the defense attorney, or the defendant does not participate in that process;

b/ the defense attorney takes part in all investigatory and other procedural actions of the body of criminal prosecution conducted **upon his/her motion with the permission of the criminal prosecution body;**

c/ the defense attorney shall take part in any investigatory or other procedural action, conducted with the participation of his/her defendant, **if that is demanded by the suspect or the accused, or if this is motioned by the defense attorney at the beginning of the actions.**

As concerns the legal regulation stipulated by the above mentioned subparagraph "a," the Constitutional Court considers legitimate to condition the participation of the defense attorney in the investigatory or other procedural actions conducted without the motion of the defense attorney or without the participation of his/her defendant (as prescribed by the challenged norm of the Code) by **the permission of the body of criminal prosecution.**

As for the case presented in the above mentioned subparagraph "b," the Constitutional Court states that the legislator stipulated a certain requirement for realization of the right to legal remedies before public bodies and the right to legal assistance, that is, the permission of the body of criminal prosecution.

The Constitutional Court takes into account the circumstance that **there are no grounds stipulated by the RA Criminal Procedure Code,** upon which the body conducting the criminal proceeding shall be entitled to deny the defense attorney's participation in the investigatory and other procedural actions conducted upon his/her motion, and the Respondent of this Case also states this circumstance, and, in the aspect of limitation of the constitutional right to legal assistance, such circumstance could be considered legitimate in the context of the grounds stipulated by Article 43, Part 1 of the Constitution. It is also important to state that in this case, the matter concerns the investigatory and other procedural actions conducted upon the motion of the defense attorney and not by the initiation of the body of criminal prosecution. The Constitutional Court finds that, in violation of the provisions of Article 43, Part 1 of the Constitution, the provision stipulated in the challenged norm of the Code, which conditions the participation of the defense attorney in the investigatory and other procedural actions, conducted upon his/her motion, with the permission of the body of criminal prosecution, restricts the constitutional right to legal remedies before public bodies and the right to legal assistance, and, as a result, the constitutional right to effective legal remedies before public bodies. Moreover, such restriction does not pursue any legitimate aim.

As for the case presented in the above mentioned subparagraph "c," the Constitutional Court states that the legislator put forward a certain requirement for realization of the right to legal remedies before public bodies, that is, **availability of demand of the suspect or the accused, or the motion of the defense attorney** concerning his/her participation.

Based on the legal positions expressed in this Point, in this regard, the Constitutional Court finds that, in violation of the provisions of Article 43, Part 1 of the Constitution, the provision stipulated in the challenged norm of the Code, which conditions the participation of the defense attorney in the investigatory and other procedural actions, conducted with the participation of the defendant, with availability of demand of the suspect or the accused concerning such participation, restricts the constitutional right to legal remedies before public bodies and the right to legal assistance, and, as a result, the constitutional right to effective legal remedies before public bodies. Moreover, such restriction pursues any legitimate aim neither.

As concerns the challenged provision of the Code, which conditions the participation of the defense attorney in the investigatory or other procedural actions, conducted with the participation of the defendant, with **making a motion thereon at the beginning of the actions,** and which is challenged by the Applicant from the perspective of legal certainty, then based on the legal positions expressed in this Point, the Constitutional Court considers necessary to evaluate the phrase "at the beginning of the actions" prescribed by the challenged provisions of the Code from the viewpoint of time limitation of the participation of the defense attorney in the investigatory or other procedural actions, and from the viewpoint of obligatory nature of the motion being made for the participation of the defense attorney, and not from the viewpoint of its compliance with the requirements of legal certainty. In this regard, based on the legal positions expressed in this Point, the Constitutional Court finds that, in violation of the provisions of Article 43, Part 1 of the Constitution, the provisions on time limitation of the participation of the defense attorney in the investigatory or other procedural actions, conducted **with the participation of the defendant,** and the obligatory nature of the motion being made for the participation of the defense attorney, also restricts the constitutional right to legal remedies before public bodies and the right to legal assistance, and, as a result, the constitutional right to effective legal remedies before public bodies, and do not pursue any legitimate aim.

Besides, taking into account the circumstance that, according to other provisions of the challenged norm of the Code, the suspect or the accused are entitled anytime to demand the participation of the defense attorney in the investigatory or other procedural actions, conducted with their par-

ticipation, that is, if the motion of the defense attorney is declined regardless of making it before the beginning of the investigatory or other procedural action, or after that, the defense attorney may again take part in the investigatory or other procedural action, if the suspect or the accused demand it; so, the Constitutional Court also considers the time limitation of the participation of the defense attorney in the investigatory or other procedural actions, conducted with the participation of the defendant, prescribed by the challenged norm of the Code, as groundless and, therefore, not pursuing any legitimate aim.

As for the challenged norm of the Code, the Constitutional Court finds that **in all cases the defense attorney shall have the right to take part in the investigatory and other procedural actions, conducted with the participation of the defendant, without making any motion and regardless the fact whether the suspect or the accused demand his/her participation or not.**

In this regard the Constitutional Court takes into consideration the updated version of the RA Draft Criminal Procedure Code (document code: Կ-084-14.09.2012, 10.06.2013-ՊԻ-010/0) put into circulation by the RA National Assembly, and finds that the legal regulation stipulated by Point 3 of Part 1 of Article 49 of the draft, titled "The Rights and Obligations of Defense Attorney", deserves attention.

7. Based on the results of study of relevant legislations of certain countries concerning the matter in dispute, the Constitutional Court states that the law does not condition the participation of the defense attorney in the investigatory or other procedural actions with a will of the body of criminal prosecution, and does not stipulate any time limitation for the participation of the defense attorney in the criminal proceeding, thereby providing the defense attorney with the opportunity to enjoy the vested rights.

The Constitutional Court finds necessary to state that the European Court of Human Rights also expressed certain legal positions concerning the right to a fair trial, guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Particularly, in the John Murray v. the United Kingdom Judgment of 8 February 1996, the European Court of Human Rights expressed the following legal positions:

"62.... the manner in which Article 6 para. 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case.

63.... Article 6 (art. 6) will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing."

Considering the challenged norm in the light of the aforementioned legal positions of the European Court of Human Rights, and comparing it with the norms regulating similar legal relations in other countries, the Constitutional Court finds that the legal regulations stipulated by them include actual danger of unproportional restriction of the rights.

Proceeding from the results of the consideration of the Case and being ruled by Article 100, Point 1, Article 101, Part 1, Point 8, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Article 73, Part 1, Point 3 of the RA Criminal Procedure Code, in regard to the wordings **"with the permission of the body of criminal prosecution"** and **"if the suspect or the accused demand, or if this is requested by the defense attorney at the beginning of the action"** contradicting Article 18, Part 1, the provision stipulated by the first sentence of Part 1 of Article 20, and the provisions of Article 43, Part 1 of the Constitution of the Republic of Armenia and void.

2. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

8 October 2013
DCC - 1119

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 17, PART 2 OF THE CIVIL CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE CITIZEN ARTUR KHACHATRYAN

Yerevan ***5 November 2013***

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan, F. Tokhyan, M. Topuzyan(Rapporteur), A. Khachatryan, V. Hovhanissyan, H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of the representatives of the Applicant: A. Zeynalyan and A.Ghazaryan,

official representatives of the Respondent: S. Hambardzumyan, the Chief Specialist and H. Sardaryan, the Leading Specialist of the Legal Expertise Division of the Legal Department of the National Assembly Staff of the Republic of Armenia,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 6 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Article 17, Part 2 of the Civil Code of the Republic of Armenia with the Constitution of the Republic of Armenia based on the application of the citizen Arthur Khachatryan.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the citizen Arthur Khachatryan on 03.04.2013.

Having examined the report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondents, having studied the Civil Procedure Code of the Republic of Armenia and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Civil Code was adopted by the RA National Assembly on 5 May 1998, signed by the RA President on 28 July 1998 and came into force on 1 January 1999 in accordance with the RA Law on Putting the RA Civil Code into effect adopted by the RA National Assembly on 17.06.1998.

The challenged Part 2 of Article 17 of the RA Civil Code states: ".Losses means the expenses that the person whose right was violated made or must make to reinstate the right that was violated, the loss of or injury to his property (actual damage), and also income not received that this person would have received under the usual conditions of civil commerce if his right had not been violated (forgone benefit)."

Since adoption, Part 2 of Article 17 of the RA Civil Code was not amended.

2. The brief procedural background of the Case is the following: on 28.06.2010 Vardan Khachatryan lodged a claim on compensation of damages to the RA First Instance Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan versus the Republic of Armenia, in behalf of the Ministry of Finance, and demand to compensate pecuniary damage, i.e. the sum paid to his representatives for representing him in the courts and RA Constitutional Court , all kinds of taxes accumulated on that sum, as well as compensation of his non-pecuniary damage (moral) damage on the grounds that «besides the real damage, Vardan Khachatryan was also under stress while waiting for the solution of his case by the court. That uncertainty, which lasted from the moment of applying to the General Jurisdiction Court till adoption of the decision

of the Constitutional Court, application of legislative provisions contradicting the RA Constitution against him, violation of his right to fair trial, caused him mental trouble and anxiety. Vardan Khachatryan would not have passed through psychological trouble and anxiety (effect), if his right had not been violated (cause). There is a cause and effect linkage».

On 15.07.2012 the First Instance Court of General Jurisdiction made a decision on "Initiating the proceeding of the claim and preparing the case for consideration" and accepted the case.

After the death of Vardan Khachatryan the General Jurisdiction Court by its Decision "On Reopening the Proceeding of the Civil Case and Calling a Court Session" dated 28.09.2011 recognized Arthur Khachatryan as a legal successor of the plaintiff Vardan Khachatryan of the Case ԵԿԴ/1320/02/10 and by its decision dated 02.05.2012 satisfied the claim partially by obliging the Republic of Armenia, in behalf of the RA Ministry of Finance, to pay 1.000.000 (one million) AMD to Arthur Khachatryan, Vardan Khachatryan's legal successor, as amount of compensation of the pecuniary damage caused to Vardan Khachatryan. The claim in part of the demand of levying 564.225 AMD for pecuniary damage and its calculated taxes was denied. The proceeding of the civil case concerning the compensation of non-pecuniary (moral) damage was suspended by the reasoning according to which "unlike the pecuniary damage, the moral damage is not regulated by the RA legislation", the court may not apply the institution of the moral damage, as its definition and regulation is not available in the legislation regulating civil legal relations of the Republic of Armenia", "the legislation of the Republic of Armenia regulating civil legal relations does not stipulate the compensation of the moral damage as a type of responsibility, based on which the dispute is not subject to consideration by the court".

An appeal was submitted against the mentioned judgment demanding to oblige the Republic of Armenia, in behalf of the RA Ministry of Finance, to pay Arthur Khachatryan, the legal successor of Vardan Khachatryan, compensation of pecuniary and non pecuniary damage in the amount of 1.564.225 (one million five hundred sixty four thousand two hundred twenty-five) AMD for pecuniary damage and all kind of taxes calculated on the mentioned amount, and 2.000.00 (two thousand) Euros equivalent in AMD for non-pecuniary, moral damage. The Court of Appeal by its decision of 26.07.2012 satisfied the appeal partially, vacated the decision from 02.05.2012 of the RA General Jurisdiction Court of the

Kentron and Nork-Marash administrative districts Yerevan regarding the denied part of levying the damage of 564.225 AMD from the amount 1.564.225 AMD, modified it and satisfied the claim in regard to levying the damage in amount of 564.225 AMD. The Court of Appeal considered the rest of the decision of the General Jurisdiction Court as well-grounded based on the same reasoning that "the legislation of the Republic of Armenia regulating civil legal relations does not stipulate compensation of the moral damage as a type of responsibility based on which the dispute is not subject to consideration by the court".

On 19.09.2012 the Cassation Court made a decision to return the cassation complaint.

3. The Applicant challenges the constitutionality of Article 17, Part 2 of the RA Civil Code in so far as it does not include the institution of compensation of moral damage stating that Article 17, Part 2 of the Code in so far as does not consider the damage caused to a person as a non-pecuniary damage, contradicts Articles 3, 18, 19 and 83.5 of the RA Constitution. Simultaneously, the Applicant mentions, "that this application challenges the constitutionality of the legal gap." Moreover, the Applicant quotes Decision DCC-914 of the RA Constitutional Court in order to substantiate the possibility of the legislative gap to be the object of the constitutional justice.

For substantiating his position, the Applicant mentions that "the right to fair trial and effective legal remedy guaranteed by the European Convention of Human Rights, assumes, inter alia, the consideration of the case on the merits "by the competent state body" and the payment of fair compensation".

For grounding his position, the Applicant refers also the judgments of European Court of Human Rights on the cases of "Poghosyan and Baghdasaryan versus Armenia", "Khachatryan and others versus Armenia", and "Comingersoll S.A versus Portugal", mentioning that in the judgment of the third case the European Court of Human Rights stated that "Among the matters which the Court takes into account when assessing compensation are pecuniary damage, that is the loss actually suffered as a direct result of the alleged violation, and non-pecuniary damage, that is reparation for the anxiety, inconvenience and uncertainty caused by the violation, and other non-pecuniary loss.".

4. The Respondent finds that Article 17, Part 2 of the RA Civil Code is in conformity with the requirements of Articles 3,18, 19 and 83.5 of the RA Constitution in the context of current legal regulations.

For substantiation of his position, the Respondent, referring the means of protection of civil law rights prescribed by Article 14 of the RA Civil Code, including compensation of losses, as well as the provision of Article 162 of the same Code concerning notion of non-material values, according to which, nonmaterial values shall be protected in accordance with the present Code and other statutes in cases and by the procedure provided by them and also in those cases and within those limits in which the use of means of protection of civil law rights (Article 14) follows from the nature of the violated nonmaterial right and the nature of the consequences of this violation, stated that although there is no direct note about the moral damage in the RA Civil Code, but it is implemented in the cases of protection of honour, dignity and business reputation from the defamation by other persons. The Respondent also stated that, however, the mentioned circumstance does not illustrate the complete introduction of the pecuniary compensation of moral damage, as the RA Civil Code does not consider the moral damage as a type of damage.

Signifying the necessity of introduction of the institution of compensation of the moral damage from the perspective of full protection of the rights of a person and effective restoration of violated rights, the Respondent stated that the problem may not be solved by mere inclusion of the notion of "moral damage" in Article 17 of RA Civil Code, as it demands introduction of the certain institution of pecuniary compensation of the moral damage, which will include detailed regulations on the notion of "moral damage", the frames and grounds of implementation of this institution, clear mechanisms for calculation of the moral damage and, in general, other issues ensuring undistorted application of this institution.

5. In its decisions DCC-864 dated 05.02.2010 and DCC-914 dated 14.09.2010 the RA Constitutional Court expressed the legal positions concerning the legal possibility of consideration of constitutionality of the legislative gap by the Constitutional Court. Decision DCC-864 of the Constitutional Court defined that "In the frames of consideration of the case, the Constitutional Court touches upon the constitutionality of any legislative gap, if the legal uncertainty in the law enforcement practice, conditioned with the content of challenged norm brings to such interpre-

tation and application of that norm which violates or may violate certain constitutional right".

Decision DCC-914 of the Constitutional Court states that "Legislative gap may become the matter of consideration by the Constitutional Court only in the case of absence of other legal guarantees in the legislation for filling that gap, or contradictory law enforcement practice is established in the case of availability of relevant legal guarantees, or when the existing legislative gap does not ensure possibility of realization of any right. Otherwise, the constitutionality of the gap of legal regulation is not a matter of the consideration by the Constitutional Court.

Considering the position of the Applicant and based on the above-mentioned legal positions expressed in the decisions DCC-864 and DCC-914 of the Constitutional Court, the Constitutional Court states that the assessment of the constitutionality of the challenged provision of the Code shall be touched upon from the following perspectives:

a. Whether the institution of moral damage and legal basis for possibility of pecuniary compensation of such damage exists in the RA legal system,

b. Whether the Republic of Armenia has obliged to prescribe possibility of pecuniary compensation of non-pecuniary (moral) damage in the domestic legal system by the virtue of the international obligations undertaken by the Republic of Armenia.

6. Concerning the above-mentioned statements the Constitutional Court considers necessary to state that constitutional legal content of a number of provisions of the RA Constitution verify that moral damage and possibility of pecuniary compensation of the moral damage derive from the constitutional legal approaches established in the spheres of protection of human rights. Thus, Article 3, Part 1 of the RA Constitution stipulates: "The human being, his dignity and the fundamental human rights and freedoms are an ultimate value." In this concern, the Constitutional Court finds that one of the pivotal elements of the human dignity, inter alia, is to be free from the moral distress conditional on individual features. In its turn, Article 16 of the Constitution guarantees personal liberty and security of a person. Part 4 of the mentioned Article prescribes, " Every person shall have the right to recover damages in case when he has illegally been deprived of liberty or subjected to a search, on the grounds and by a procedure defined by the law. " In this concern, the Constitutional Court

finds that in the case of being illegally deprived of liberty or illegal search, the damage caused to a person may not be automatically concluded to the compensation of physical or pecuniary damages as in this case the compensation provided to the victim will not be adequate to the moral distress of the latter. In this context, referring to regulations of Article 17 of the RA Constitution which stipulates: "No one shall be subjected to torture, as well as to inhuman or degrading treatment or punishment", the Constitutional Court finds that tortures, inhuman or degrading treatment or punishment are always accompanied by the caused mental and moral distress, which may be even more than the possible physical or pecuniary damage caused by them, and it is not possible to fully compensate the damage caused to a person and his/her dignity without reasonable and fair compensation. Otherwise, it will not be possible to guarantee protection of a person, his dignity and fundamental rights and freedoms which are proclaimed as ultimate value by the Constitution.

7. In the frames of consideration of this case, the Constitutional Court considered necessary to state that the pecuniary compensation of the moral damage is regulated by corresponding provisions of a number of normative legal acts of the Republic of Armenia. Thus, the term "moral damage" is available in different normative legal acts of the Republic of Armenia. In particular, Article 268 of the RA Code on Administrative Offences prescribes, "Victim is the person, who was injured physically, morally or materially as a result of an administrative offence." The term "moral damage" is also stipulated in a number of provisions of the RA Criminal Procedure Code, in particular, in Point 45 of Article 6 where the term "damage" is considered as ""damage" meaning moral, physical, or property damage which lends itself to pecuniary assessment".". Article 58, Part 1 of the same Code prescribing the notion of the term "injured," envisages, "The person is recognized as the injured, in respect to whom bases are available to suppose, that a moral, physical or proprietary damage has been caused to him/her directly by a deed forbidden by Criminal Code. A person also is recognized as aggrieved, to whom moral or physical damage might be directly caused, if the deed, forbidden by the Criminal Code would have been finished."Article 104, Part 1 of the RA Law on Fundamentals of Administration and Administrative Proceeding prescribes: "In cases of causing non-property damage to physical person by illegitimate administration through restriction of freedom, violation of security

of home, private or family life, harming the person's honor, good name or reputation, the person shall have the right to claim monetary compensation or elimination of entailed consequences by the amount equivalent to the non-property damage caused."

Simultaneously, the Constitutional Court states that, although, the challenged Article 17, Part 2 does not consider moral damage among the losses, Article 1087.1, Points 1 and 8 of the RA Civil Code prescribes possibility of monetary compensation of the damage caused to person's honor, dignity and business reputation, that is accordingly in the case of insult in the amount of 1000-fold and in case of defamation in the amount of 2000-fold of the minimal salary. Meanwhile, Point 11 of the same Article stipulates that while determining the amount of compensation in case of insult and defamation, the court shall not take into account the property damage, caused a consequence of insult and defamation. The circumstance that the court while deciding the amount of the compensation of the damage caused to honour, dignity and business reputation does not take into account the caused property damage, directly confirms that compensation of property damage is not the goal of the considered regulation. On the contrary, it is called to regulate the possibilities of pecuniary compensation of caused moral damage.

The study of the international practice shows that the regulations of monetary compensation of the damage caused to the dignity, honour and business reputation of a person namely concern the institution of pecuniary compensation of the moral damage (in particular, such an institution is envisaged by the legislation of the Russian Federation, Croatia, Latvia, Lithuania, Estonia, Slovenia, Spain and other countries).

Deriving from the above-mentioned, the Constitutional Court states that various cases of pecuniary compensation of moral damage are prescribed by the legislation of the Republic of Armenia, but the mentioned institution is not fully regulated which does not allow to ensure legislative harmony in the matters of cases, grounds and procedure of pecuniary compensation of such damages, which, in their turn, hinder the effective protection of the rights and freedoms guaranteed by the RA Constitution. Moreover, the mentioned situation may not be in concordance with the provision prescribed in Part 3 of Article 3 of the RA Constitution, according to which "The state shall be limited by fundamental human and civil rights as possessing direct effect".

8. Part 2 of Article 3 of the RA Constitution prescribes the obligation of the Republic of Armenia to ensure the protection of fundamental human and civil rights in conformity with the principles and norms of international law. Article 43 of the RA Constitution prescribes that limitations on fundamental human and civil rights and freedoms may not exceed the scope defined by the international commitments assumed by the Republic of Armenia.

Touching upon the matter in dispute from the perspective of Article 3 and Article 43, Part 2 of the RA Constitution, the Constitutional Court states that in the Republic of Armenia inharmonious regulations of pecuniary compensation of the moral damage caused to a person hinder diligent implementation of the international obligations assumed by the Republic of Armenia. The Constitutional Court finds that the right to pecuniary compensation of the moral damage derives both from the content of provisions of the RA Constitution and a number of legislative acts of the Republic of Armenia and the international obligations assumed by the RA, in particular, from the provisions of the European Convention of Human Rights and Fundamental Freedoms (and protocols thereto) and law enforcement practice of the European Court of Human Rights.

Thus, the European Court of Human Rights in the judgments adopted against the Republic of Armenia non-provision of compensation for the moral damage suffered considers as a violation of the relevant provisions of the European Convention of Human Rights and Fundamental Freedoms (and protocols thereto). In particular, in the judgments of the cases Khachatryan and others v. Republic of Armenia (Application N 23978/06. 27.11.2012) and Poghosyan and Baghdasaryan v. Republic of Armenia (Application N 22999/06. 12.06.2012), non provision of the compensation of the moral damage based on internal legislation, recognized as a violation of European Convention of Human Rights and Fundamental Freedoms. In the judgment of the case Poghosyan and Baghdasaryan v. Republic of Armenia, the Court states, "The Court has previously found that, in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies". The same judgment also states that the applicant should have been able to apply for compensation for the non-pecuniary damage suffered by him as a result of ill-treatment. Article 3 of the Protocol No. 7 to Convention has been touched upon, concerning which it was high-

lighted that "The Court reiterates that the aim of Article 3 of Protocol No. 7 is to confer the right to compensation on persons convicted as a result of a miscarriage of justice where such conviction has been reversed by the domestic courts on the ground of a new or newly discovered fact." In the same Judgment the Court has stated that "As regards compliance with the guarantees of Article 3 of Protocol No. 7, the Court considers that, while this provision guarantees payment of compensation according to the law or the practice of the State concerned, it does not mean that no compensation is payable if the domestic law or practice makes no provision for such compensation". Furthermore, the Court, considering that the purpose of Article 3 of Protocol No. 7 is not merely to recover any pecuniary loss caused by a wrongful conviction but also to provide a person convicted as a result of a miscarriage of justice with compensation for any non-pecuniary damage such as distress, anxiety, inconvenience and loss of enjoyment of life, at the same time states that no such compensation, however, was available to the applicant in the present case. Simultaneously, in the Judgment of the case Khachatryan and others v. Republic of Armenia, the European Court of Human Rights holds that there has been a violation of Article 5 § 5 of the Convention and notes that Article 5 § 5 should not be construed as affording a right to compensation of purely pecuniary nature, but should also afford such right for any distress, anxiety and frustration that a person may suffer as a result of a violation of other provisions of Article 5.

Based on the above mentioned, the Constitutional Court finds that incomplete regulation of the compensation of non-pecuniary damage is not in compliance with international obligations assumed by the Republic of Armenia.

9. Simultaneously, based on the necessity to provide completeness of the legal regulations concerning the protection of human rights and freedoms and consequently the institution of non-pecuniary damage, the Constitutional Court notes that general criteria and procedure of compensation of non-pecuniary damages shall be precisely stipulated by legislation for ensuring the reasonable and fair compensation of non-pecuniary damage in certain cases and by certain procedure, ensuring effective implementation of the rights and freedoms guaranteed by the RA Constitution and not hindering the diligent implementation of the international obligations assumed by the Republic of Armenia.

The Constitutional Court takes into account that considering the mentioned circumstances the legislative initiative of the RA government is being conducted by the RA Ministry of Justice to make relevant amendments in the RA Civil Code and , in particular, to ensure the implementation of the abovementioned judgments of the European Court of Human Rights concerning Armenia.

Proceeding from the results of consideration of the case and being ruled by Article 100, Point 1, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 69 of the Law of the Republic of Armenia Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Article 17, Part 2 of the RA Civil Code in so far as it does not consider non-pecuniary damage as a type of damage and does not ensure possibility of compensation of moral damage, blocking the effective implementation of rights to access to the court and fair trial, simultaneously, hindering diligent fulfillment of the international obligations of the Republic of Armenia, contradicting Article 3, Part 2, Article 16, Part 4, Article 18, Part 1, Article 19, Part 1 and Article 43, Part 2 of the Constitution of the Republic of Armenia and void.

2. To determine 1 October, 2014 as the deadline for the invalidation of Article 17 Part 2 of the RA Civil Code, considering the fact, that the declaration of the norm mentioned in Part 1 of the operative part of this Decision, to be inconformity with the Constitution and invalid from the date of announcement of the decision, shall inevitably lead to the consequences which will distort the legal security to be established on the moment of the invalidation of the given norm, as well as taking into consideration the requirement to have systemized legislative regulation of the institution of compensation of the moral damage, which, in particular will include the notion of "non-pecuniary damage", provisions for the frames and grounds of implementation of that institution, precise procedure for calculation of the non-pecuniary damage and other issues, based on Article 102, Part 3 of the RA Constitution and Article 68, Part 15 of the RA Law on the Constitutional Court.

3. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

3 November 2013
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