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