



IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION

OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

**ON THE CASE OF CONFORMITY OF PARAGRAPH 2 OF PART 1
OF ARTICLE 27 OF THE LAW OF THE REPUBLIC OF ARMENIA
ON THE NOTARIAT AND SUB-POINT “A” OF POINT 1 OF PART 1
OF ARTICLE 3 OF THE LAW OF THE REPUBLIC OF ARMENIA
ON FUNDAMENTALS OF ADMINISTRATIVE ACTION
AND ADMINISTRATIVE PROCEEDINGS WITH THE CONSTITUTION
OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE
APPLICATION OF LUSINE ALEKSANYAN, NARINE SAKEYAN,
HASMİK VARDANYAN AND GAGİK AVETISYAN**

Yerevan

May 10, 2016

The Constitutional Court of the Republic of Armenia composed of V. Hovhannisyan (Chairman), K. Balayan, A. Gyulumyan (Rapporteur), F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan, A. Petrosyan, with the participation of (in the framework of the written procedure)

representatives of the Applicants: A. Zeinalyan and A. Ayvazyan, representative of the Respondent: V. Danielyan, official representative of the RA National Assembly, Chief Specialist at the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the Law of the Republic of Armenia on the Constitutional Court, examined in a public hearing by a written procedure the Case on conformity of Paragraph 2 of Part 1 of Article 27 of the Law of the Re-

public of Armenia on the Notariat and Sub-point “a” of Point 1 of Part 1 of Article 3 of the Law of the Republic of Armenia on Fundamentals of Administrative Action and Administrative Proceedings with the Constitution of the Republic of Armenia on the basis of the Application of Lusine Aleksanyan, Narine Sakeyan, Hasmik Vardanyan and Gagik Avetisyan.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by L. Aleksanyan, N. Sakeyan, H. Vardanyan and G. Avetisyan on 11 January 2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicants and the Respondent, as well as having studied the RA Law on the Notariat, the RA Law on Fundamentals of Administrative Action and Administrative Proceedings, and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Law on the Notariat was adopted by the RA National Assembly on 4 December 2001, signed by the RA President on 27 December 2001 and entered into force on 1 March 2002.

Paragraph 2 of Part 1 of Article 27 of the Law of the Republic of Armenia on the Notariat, titled “Property Liability of the Notary” stipulates:

“The Republic of Armenia shall not be liable for damage caused by a notary due to the violation of her/his official duties”.

The RA Law on Fundamentals of Administrative Action and Administrative Proceedings was adopted by the RA National Assembly on 18 February 2004, signed by the RA President on 16 March 2004 and entered into force on 31 December 2004.

Sub-point “a” of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings, titled “Main concepts” (supplemented by the Law HO-257-N of 17.12.14) stipulates:

“The main concepts used in this Law have the following meanings:

1) administrative bodies - republican and territorial administrative bodies of the executive power of the Republic of Armenia, as well as local self-government bodies;

a) republican bodies of the executive power of the Republic of Ar-

menia - ministries of the Republic of Armenia, Commission on Appeal stipulated by the RA Law on Inspection Bodies, and other state bodies carrying out administrative action within the whole territory of the Republic...”

2. The procedural background of the Case is the following:

Using a passport belonging to another person, on 04.07.2007 F. Mkrtchyan purchased an apartment located at Sheram str., building 113, apt. 81, and received a property registration certificate.

On 04.08.2007 F. Mkrtchyan presented a false passport under another name and sold the above-mentioned apartment - under the contract of purchase and sale certified by the notary of “Kentron” notary office - to the Applicant Lusine Aleksanyan and received 34.500 USD from her, which is equivalent to 11.390.000 AMD. On the same day, F. Mkrtchyan once again presented the mentioned passport and sold the above-mentioned apartment - under the contract of purchase and sale certified by the notary of “Shengavit” notary office - to the Applicant Narine Sakeyan and received from her 10.938.916 AMD in various currencies.

In the above way, on 06.08.2007 F. Mkrtchyan sold the same apartment - under the contract of purchase and sale certified by the notary of “Malatia” notary office - also to the Applicant Hasmik Vardanyan and received 34.000 USD from her, which is equivalent to 11.459.360 AMD. On the same day, F. Mkrtchyan, once again presented the above-mentioned false passport and sold the same apartment - under the contract of purchase and sale certified by the notary of “Nor Nork” notary office - to the Applicant Gagik Avetisyan and received from him 29.800 USD, which is equivalent to 10.054.282 AMD.

By the Judgment ԵԿԴ/0047/01/11 of the Court of First Instance of Kentron and Nork-Marash Administrative Districts of Yerevan dated 06.09.2011, F. Mkrtchyan, along with other crimes, was found guilty of swindling of sums of money of the Applicants in this Case in particularly large amount, and was sentenced to imprisonment. The court also decided to recover from F. Mkrtchyan the sums paid by the Applicants under the contract of purchase and sale in favor of the Applicants in this Case as compensation for property damage caused by the crime.

Due to the absence of property belonging to the convict, the Judgment of the Court on compensation of property damage caused to the Applicants by the crime was not executed.

On 05.05.2014 the representatives of the Applicants applied to the RA Minister of Justice with a demand for compensation of property damage caused by the actions of notaries. By the Letter No. 10/3396-14 of 23.05.2014 the RA Ministry of Justice returned the application stating that "... the demand put forward in the application does not fall under the competence of the RA Ministry of Justice or any other administrative body ..."

The Applicants filed a lawsuit to the RA Administrative Court against the RA Ministry of Justice claiming to oblige adopting favorable administrative act expected in the above-mentioned application. By the Decision of 25 December 2014 (administrative case number ՎՂ/3369/05/14), the Administrative Court dismissed the claim.

By the Decision of the RA Administrative Court of Appeal dated 8 July 2015, the appeal lodged against the above-mentioned Decision of the RA Administrative Court was also dismissed. Simultaneously, during the consideration of the case by the RA Administrative Court of Appeal, a petition "... for the suspension of the proceedings, and applying to the RA Constitutional Court on the Case of conformity of Paragraph 2 of Part 1 of Article 27 of the RA Law on the Notariat and Sub-point "a" of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings with the RA Constitution" was submitted on behalf of the Applicants, which was dismissed by the Protocol Decision of the Court of Appeal dated 18.06.2015.

By the Decision of 4 November 2015, the RA Court of Cassation determined that there are no necessary reasons for acceptance of the cassation appeal on the administrative case for examination and dismissed to accept the appeal submitted on behalf of the Applicants.

3. The Applicants find that Paragraph 2 of Part 1 of Article 27 of the RA Law on the Notariat (excluding the liability of the Republic of Armenia for damage caused by a notary due to the violation of her/his official duties), and Sub-point "a" of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative

Proceedings (not considering the notary as a body performing administration) contradict Articles 1, 3, 23, 28, 61, 63, 66, 10, 59, 76 and 75 of the RA Constitution (with Amendments through 6 December 2015).

The Applicants find that the conclusion of the contract of purchase and sale of real estate in the presence of a notary and its notarial certification are not left to the discretion of the Parties, since it is not a voluntary act but the duty of the Parties, and the failure to conclude the contract shall lead to the nullity of the transaction by the force of law.

The Applicants consider that the RA Law on the Notariat does not provide for an effective mechanism for protecting the property rights of individuals and restoring the damage caused, since “in any case of termination of the legal capacity and/or active capacity of a notary, no one shall be liable for damage caused by a notary due to the violation of her/his official duties, or after the termination of the office of a notary, from a substantive perspective, the notary does not have a legal successor. ... There may be also cases when there is no guilt of a certain notary, however due to imperfect mechanisms, people may become victims of breach of law”.

According to the Applicants, due to the legal regulation in question, persons - including those who have the status of “victim” due to the violation of official duties of a notary - are deprived of the right to legal protection.

Grounding their position, the Applicants refer to the Decision DCC-983 of the Constitutional Court dated 12.07.2011 on guaranteeing, securing and protecting property rights, and as referred to in the said Decision, Point 134 of the Judgment of the Grand Chamber of the European Court of Human Rights (hereinafter referred to as the ECHR) in the case of *Oneryildiz v. Turkey* (*Oneryildiz v. Turkey* 48939/99) dated 30 November 2004.

The Applicants are convinced that there is a legal gap in Sub-point “a” of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings, since it does not include notaries as bodies that perform public services and functions. The Applicants find that the whole domain of legal relations concerning notaries is thus left out of the extrajudicial legal protection and control by the legislator.

4. Objecting to the arguments of the Applicants, the Respondent finds that the challenged legal provisions are in conformity with the RA Constitution.

According to the Respondent, notaries cannot be included in the concept “administrative bodies” stipulated by Sub-point “a” of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings, since according to Part 5 of Article 15 of the RA Law on the Notariat, the business activity regime stipulated by the Civil Code of the Republic of Armenia shall be applied to notarial acts or paid services provided by a notary, therefore, as individual entrepreneurs, notaries shall carry out their activities at their own risk, for which, like in the case of other individual entrepreneurs, the state shall not bear responsibility.

The Respondent finds that the public nature of the notary’s activity is due to the notary’s mission to promote justice, and this is not considered either administration or executive administrative activity typical for administrative bodies.

According to the Respondent, the current notarial system is an effective mechanism for the citizens for the exercise of their rights. The fact that in particular case persons had suffered damage due to swindling may not create legitimate expectations among the victims that the damage caused by the crime should be compensated by the state. The state cannot introduce a mechanism that will exclude crimes and the damage caused to persons by the crime, or compensate the material damage caused to the victims by all crimes. As a mechanism for compensating such damage, the state has established the obligation of persons to compensate for damage caused.

5. At the request of the Constitutional Court, the RA Notary Chamber submitted explanations on the issues raised in the Application, which in particular state that:

- the current notarial system of the Republic of Armenia is borrowed from the Latin model and widely used in the countries of the Romano-Germanic legal system, where notaries are called upon to provide a combination of public and private interests in the law enforcement process. Although the notary performs public functions, she/he is empowered by the state and implements them on behalf

of the state, yet the notary is not a state body and is not endowed with state power, which would ensure the obligatoriness of the will of the notary for the other participants of legal relations, while the notary acts independently and under own responsibility;

- according to international practice and the RA legislation, a mandatory requirement for insurance of both the risk of property liability of a notary and own liability of a notary is stipulated at the legislative level in order to ensure compensation for damage caused to persons by the actions of notaries;
- summarizing similar legal regulations on the legal status and liability of the notary in other countries, the Notary Chamber concluded that, as a rule, states do not bear responsibility for the actions of notaries.

The Notary Chamber finds that taking into account the public significance of the notary's activity, the state ensured the protection of property rights having stipulated at the legislative level the property liability for damage caused to persons by a notary due to intentional violation, and the mandatory requirement for insurance of such risk.

6. In order to determine the conformity of the legal provisions challenged within the framework of this Case with the RA Constitution, the Constitutional Court considers it necessary to be based on the need to provide effective protection of the fundamental human and civil rights and freedoms by public authorities and, in this context to establish and assess:

- the peculiarities of the legal status of notaries, legal grounds of their activities, as well as compensation for damage caused to the person due to such activities;
- whether the legal provisions, related to the property liability for damage caused due to the activities of the notary, provide for the necessary organizational and legal mechanisms and procedures to ensure the restoration of the violated rights of the person.

7. According to Part 2 of Article 3 of the RA Constitution, the respect for and protection of the fundamental human and civil rights and freedoms shall be the duty of public authorities. The said constitutional provision entrusts two clear duties to the public authorities, i.e. **to re-**

spect, in particular, to refrain from any unnecessary interference, as well as **to protect**, that is, to ensure through a combination of certain actions, that the fundamental human and civil rights and freedoms are not violated or be restored if violated.

The Constitutional Court finds that in order to assess whether the public authorities actually fulfilled these duties, it is necessary to turn to constitutional provisions concerning the relevant fundamental right or freedom. The constitutional legal dispute within the framework of this Case concerns the exercise of property rights.

According to Part 1 of Article 60 of the RA Constitution, everyone shall have the right to possess, use and dispose of legally acquired property at her/his discretion. This provision guarantees that everyone shall have not only the right to possess, use and dispose of at her/his discretion, but also the right to legally acquire property, which requires the state to regulate the legal basis in such a way that no losses are incurred to the person, and the right to acquire property is guaranteed.

In case of failure to provide effective organizational and legal mechanisms and relevant procedures for the exercise of the said rights, a person may suffer damage.

According to the case law of the ECHR, the ECHR member states are obliged not only to refrain from violating the person's right of ownership guaranteed by Article 1 of Protocol No. 1 of the ECHR, but also to adopt legislation that protects the person's right of ownership from infringement of other persons (Case of *Sovtransavto Holding v. UKRAINE*, 25/07/2002, Application no. 48553/99, paragraph 96).

In this regard the RA Constitutional Court considers it necessary to re-confirm the legal position expressed in the Decision DCC-983, according to which: "Considering the issue of protection of the property rights of the crime victims in the context of the positive obligation of the State in the sphere of protection of right to property, the Constitutional Court states that 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 her/his right to property but also assumes the duty of the State to protect the person's 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".

The Constitutional Court considers it necessary to emphasize that a new provision was stipulated by the RA Constitution with Amendments through 6 December 2015, namely Article 75 of the RA Constitution, which directly obliges the legislator to provide for organizational and legal mechanisms and procedures for guaranteeing the effective exercise of fundamental rights and freedoms when regulating those rights and freedoms.

8. According to Paragraph 1 of Part 1 of Article 3 of the RA Law on the Notariat, a notary is a public officer promoting justice, who shall carry out notarial activities and services provided for by this Law **on behalf of the Republic of Armenia** and in accordance with the Constitution and laws of the Republic of Armenia, including by certifying documents or providing certified documents.

Certifying the document, the notary confirms its validity and certifies the full probative force of the document “**on behalf of the Republic of Armenia**”. A document confirmed or certified by the signature and seal of a notary shall have public significance and full probative force provided for by the Law.

Several functions characteristic of public authorities were delegated to the notary by the legislator. Moreover, the Ministry of Justice of the Republic of Armenia provides the notary with a seal with the image of the state emblem of the Republic of Armenia, on which the words “Republic of Armenia” are marked, and which certifies the relevant documents. Acting on behalf of the Republic of Armenia emphasizes the importance of this function from the perspective of organizing public life. Therefore, a notary may not simply be considered an individual entrepreneur acting at her/his own risk, as the Respondent mentions.

At the same time, according to Part 5 of Article 15 of the RA Law on the Notariat, the regime of entrepreneurial activity provided for by the Civil Code of the Republic of Armenia shall be applied to notarial acts or paid services provided by a notary.

The RA Constitutional Court states that, according to the legal position expressed in the decision of the RA Court of Cassation on the administrative case number ՎԴ/5014/05/09, in the Republic of Armenia the legal status of the notary is twofold, i.e. public-legal and private-legal.

Analyzing the constitutional legal nature of the legal status of the notary, the Constitutional Court affirms that the legislator regulated the activity of notaries by a separate Law on the Notariat; therefore, not including notaries in the list of administrative bodies may not be regarded as a legal gap. The RA Law on Fundamentals of Administrative Action and Administrative Proceedings is not applicable to notaries, but it concerns only the state bodies and local self-government bodies carrying out administrative action, and the legal grounds of their activities differ.

The RA Constitutional Court also takes note of the fact that the legislative initiative “On Amendments to the Law of the Republic of Armenia on Fundamentals of Administrative Action and Administrative Proceedings” is put into circulation in the National Assembly of the Republic of Armenia (Կ-902-24.11.2015-ՊԻ-010/0).

According to the amendments proposed by the RA Government, Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings should stipulate Part 2, according to which “... the body or person, directly empowered to carry out administrative action, shall also be considered administrative body”. The substantiation of the draft amendments states that the notion “administrative body” may not include only state bodies and local self-government bodies specified in the said Article, since there are also other bodies and persons, which are not state bodies and local self-government bodies, and they are empowered to carry out administrative action in the cases and in the manner provided for by the Law.

The Constitutional Court emphasizes the importance of the need for legal regulations, within the framework of which the state may not disclaim responsibility for the inefficient exercise of administrative powers when transferring certain administrative powers to private individuals.

9. Turning to the question of how the procedures created by the state guarantee full compensation for damage caused by the activities of a notary acting on behalf of the Republic of Armenia, the Constitutional Court considers that this must be assessed in comparison with other systematically interrelated provisions of the same Law, and the Constitutional Court states the following:

Firstly, according to Part 3 of Article 17 of the RA Law on the Notariat, the invalidation of a document confirmed or certified by a notary or its change through a judicial procedure do not entail the liability of a notary who confirmed or certified the document in case it was not changed or invalidated by the notary due to the violation of the requirements of the law or other legal act when performing notarial actions. In all cases, it can only concern liability if there is guilt. The court must approve the fault of the notary in violation or performance of notarial actions contrary to the law.

Secondly, according to Paragraph 1 of Part 1 of Article 27 of the RA Law on the Notariat, a notary shall bear property liability only for damage caused to persons - who applied for notarial actions - due to violations committed **intentionally**. In this regard, the Constitutional Court states that intent is only one form of guilt. Other forms of guilt are disclosed in the RA Criminal Code and the RA Code of Administrative Offenses. Not excluding the real possibility of damage caused by the notary through negligence (particularly by carelessness) when performing her/his functions, the Constitutional Court finds that in this case such a differentiated approach does not pursue any legitimate aim, i.e. where the notary's liability is foreseen only for damage caused to persons - who applied for notarial actions - due to violations committed intentionally. The study of international experience (Russia, Ukraine, Lithuania, Estonia, Bulgaria and Slovenia) shows that in most countries the wordings "by a guilty action" or "due to her/his fault", which means that in order to incur property liability, the form of guilt, that caused the damage, is not significant.

Thirdly, according to Part 2 of Article 27 of the RA Law on the Notariat, a notary must insure the risk of her/his liability in the manner prescribed by law, the amount of which must be no less than 3000-fold of the minimum salary. The circumstance that a notary is obliged to insure the risk of her/his liability, shows that the legislator tried to prescribe a procedure that guarantees compensation for damage caused due to the activities carried out on behalf of the Republic of Armenia. However, it should be noted that the indicated minimum amount of the insured risk of liability may not always be considered sufficient for the legitimate compensation for damage caused due to the fault of the notary.

The Constitutional Court finds that the said provisions of the Law, regulating issues of the notary's liability, do not take into account the whole range of possible situations and do not establish sufficient mechanisms and procedures for the protection of the person's right of ownership that was violated, and the state shall bear such liability according to Articles 3 and 75 of the RA Constitution.

Referring to the positive obligation of the state under Article 1 of Protocol No. 1 of the ECHR, in the case of **Blumberga v. Latvia** (Judgment of 14/10/2008, application no. 70930/01, paragraph 67) the ECHR expressed the position that a positive duty of the state is to protect the rights of a person through effective mechanisms established by the national legislation, including, if necessary, securing the right to compensation for damages.

Based on the above-mentioned, the RA Constitutional Court finds that the legislative procedures matter at issue **do not guarantee the legitimate compensation** for damage caused due to the actions of a notary, acting on behalf of the Republic of Armenia, **and guaranteed protection of the constitutional rights of a person.**

As to the liability of the state for the damage caused, the Constitutional Court finds that this does not mean that the compensation for damage should be carried out exclusively at the expense of public funds. In this case, the property liability of the state may be excluded in case **the mechanisms and procedures created by the state guarantee full compensation for damage caused due to the activities carried out on behalf of the Republic of Armenia.**

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64, 68 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Paragraph 2 of Part 1 of Article 27 of the RA Law on the Notariat and Paragraph 1 of Part 1 of the same Article systemically interrelated with the latter contradicting the Constitution of the Republic of Armenia.

2. Taking into consideration the necessity not to damage the security of the legal system of the Republic of Armenia, pursuant to Part 3 of Article 102 of the Constitution of the Republic of Armenia and Part 15 of Article 68 of the Law of the Republic of Armenia on the Constitutional Court, to determine 31 October 2016 as deadline for invalidating the legal norms declared contradicting the Constitution of the Republic of Armenia by this Decision, thus allowing the National Assembly of the Republic of Armenia and Government of Republic of Armenia, in the scopes of their powers, to align the legal regulations of the Law on the Notariat of the Republic of Armenia with the requirements of this Decision.

3. Sub-point “a” of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings is in conformity with the Constitution of the Republic of Armenia.

4. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman

V. Hovhannisyan

**May 10, 2016
DCC-1271**