

**IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA**

**ON THE CASE OF CONFORMITY THE PROVISION “TO PARTICIPATE”
PRESCRIBED IN PART 6 AND THE PROVISION “THE ENTRANCE TO THE
AUCTION ROOM SHALL BE PROHIBITED FROM THE MOMENT OF START THE
AUCTION” PRESCRIBED IN PART 7 OF ARTICLE 68 OF THE LAND CODE OF THE
REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF
ARMENIA ON THE BASIS OF THE APPLICATION OF “INVESTIGATIVE
JOURNALISTS” NON-GOVERNMENTAL ORGANIZATION**

Yerevan

January 30, 2018

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

with the participation of:

A. Zeinalyan and A. Ghazaryan, the representatives of the Applicant,

representative of the Respondent: official representative of the RA National Assembly
V. Danielyan, 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 RA Constitution (with Amendments of 2005), Articles 25, 38 and 69 of the RA Law on the Constitutional Court,

examined in a public hearing by an oral procedure the Case on conformity the provision “to participate” prescribed in Part 6 and the provision “The entrance to the auction room shall be prohibited from the moment of start the auction” prescribed in Part 7 of Article 68 of the Land

Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of “Investigative Journalists” Non-Governmental Organization.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by “Investigative Journalists” Non-Governmental Organization on 4 September 2017.

Having heard the joint report of the Rapporteurs on the Case, the explanations of the Applicant and the Respondent, as well as having studied the RA Land Code, the RA Law on Public Biddings and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Land Code (hereinafter referred to as the Code) was adopted by the RA National Assembly on 2 May 2001, signed by the RA President on 4 June 2001 and entered into force on 15 June 2001.

Parts 6 and 7 of Article 68 of the Code, titled: “Preparation and Conduct of Auctions,” stipulate accordingly:

“6. The receipt of applications and registration of auction bidders shall be terminated three days before the auction. The auction shall be held behind closed doors, with the participation of only the bidders, the auctioneer and the registering clerk

The type of auction performance shall be mentioned in the announcement.

7. The entrance to the auction room shall be prohibited when the auction starts.

The auction shall start if the number of bidders is more than one.

If the auction is not held for the first time, the second auction shall be organized and conducted in the manner and terms established by this Article, with the exception of the auction of agricultural land plots, which is held within 7 working days with the publication of the required information.

A separate protocol shall be developed according to the results of the bidding, which shall include data on place, time period, participants and auctioneer of the auction, course of bidding and results.

Based on the results of each auction, a separate protocol is drawn up, which includes data on the place, terms, bidders and auctioneers, the process and results of the bidding. ”

The challenged provisions of the Code were not amended since adoption.

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

the Applicant submitted applications to the heads of four different communities with a request to allow the attendance of the upcoming auction-sales of community-owned lands **for observation and coverage**.

Referring to Parts 6 and 7 of Article 68 of the RA Land Code, the heads of communities dismissed the Applicant's claim in the replies, stating that the auction is conducted behind closed doors, where only the bidders, the auctioneer and the registering clerk participate, and that the entrance to the auction room shall be prohibited after the start of auction.

The Applicant challenged the above-mentioned letters in the RA Administrative Court, claiming to recognize of the administrative acts as unlawful, and this claim was dismissed by the Judgment of the RA Administrative Court dated 23.05.2016 (Administrative case No. ՎԴ/5371/05/15). The RA Administrative Court mainly motivated its Judgment by the virtue of Part 6 of Article 68 of the RA Land Code, the auction shall be held behind closed doors, with the participation of only the bidders, the auctioneer and the registering clerk.

An appeal was filed against the aforementioned Judgment of the RA Administrative Court, which was dismissed by the Judgment of the RA Administrative Court of Appeal dated 14.03.2017. The Administrative Court of Appeal of the Republic of Armenia in its judgment found it lawful the administrative body's prohibition regarding attendance of other persons, including the representatives of the Applicant at the auction held behind closed doors.

A cassation appeal was filed against this Decision, and by the Decision of 17.05.2017, the RA Court of Cassation rejected to accept the cassation appeal for examination.

3. The Applicant considers that the expression "participate" prescribed in Part 6 of Article 68 of the Code and the provision "the entrance to the auction room shall be prohibited from the moment of start of the auction" prescribed in Part 7 of Article 68 of the Code are accordingly an expression and a provision restricting the rights, and, at the same time, contradict Articles 1, 2, 7, 42, 48, 49, 51, 78, 79, 80, 81 and 183 of the RA Constitution (with Amendments of 2015).

The Applicant claims that the right to be informed is an element of freedom of speech, therefore, the right to be informed of the alienation of the property owned by the community is necessary for the realization of the right to administer the property owned by the community. Meanwhile, according to the Applicant, the term “participate” prescribed in Part 6 of Article 68 of the Code concerns only the bidders, that is, those interested in being recognized as winners in the auction, the auctioneer and the registering clerk, and Part 7 of the same Article establishes the ban for other persons, that is, “The entrance to the auction room shall be prohibited moment of start of the auction.”

According to the Applicant, the presence at auction, scheduled at communities, aims at obtaining, as well as dissemination of information, and the latter is attributable to the public activities of the Applicant (non-governmental organization), i.e. journalistic investigation of events of public significance.

The Applicant also substantiates his position by the fact that having ratified the UN Convention against Corruption, the Republic of Armenia has undertaken an obligation to facilitate the active participation of civil society in the prevention of and fight against corruption. According to the Applicant, this participation should be enshrined by such measures as enhancing the transparency, ensuring the public effective access to information, undertaking public information activities, freedom to search, receive, publish and disseminate information concerning corruption.

4. The Respondent considers that Part 6 of Article 68 of the Code, insofar as it hinders the coverage of the auction in the mass media, according to the interpretation to the latter in law enforcement practice , **is not in conformity with the requirements of the RA Constitution**, meanwhile the provision prescribed by Part 7 is in conformity with the RA Constitution.

At the same time, the Respondent finds that the National Assembly has created sufficient legislative prerequisites to guarantee freedom of information.

In regard to Part 6 of Article 68 of the Code, the Respondent refers in particular to Articles 1, 42, 51, 78 and 81 of the RA Constitution, a number of decisions of the Constitutional Court on freedom of expression, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the case law of the European Court of Human Rights, the RA Law on Protection of Personal Data and the RA Law on Freedom of Information,

and considers that in a particular case, the sale at auction of land owned by the state and the community is an activity of public interest and affects the interests of the residents of the community, therefore, must be covered in the means of mass media. Nevertheless, the Respondent finds that in this process simultaneously it is also necessary to protect the personal data of the bidders of the auction, including personal data transmission to third parties through the mass media, since the auction process implies processing and use of personal data pursuant to the RA Law on Protection of Personal Data, therefore, compliance with legal regimes in accordance with the aforementioned Law.

At the same time, the Respondent considers that the need to protect the personal data of persons directly participating in the auction cannot prevail over the legitimate public interest regarding the legitimacy of the auction process. Consequently, the impediment to the participation of the media cannot be considered “necessary in a democratic society” in the terminology of the European Court.

Referring to the legal regulation “the entrance to the auction room shall be prohibited from the moment of start of the auction,” prescribed in Part 7 of Article 68 of the Code, the Respondent considers it necessary to note that this provision does not concern the range of possible bidders of the auction and therefore the participation restriction of certain groups of persons, and it is the organizational rule for conducting an auction, which, in the Respondent’s opinion, pursues a legitimate aim. According to the Respondent, if Part 6 of Article 68 of the Code was not perceived as excluding the participation of mass media in the auction, the above-mentioned ban (stipulated by Part 7 of Article 68 of the Code), having a procedural nature, would be perceived exclusively as a disciplinary rule ensuring the proper course of the auction.

5. It follows from the study of the Application that the issue raised by the Applicant and the justification provided by the latter relate exclusively to the provision “the auction shall be held behind closed doors, with the participation of only the registered bidders, the auctioneer and the registering clerk”, prescribed in the second sentence of the first paragraph of Part 6 of Article 68 of the Code, and the provision “the entry to the auction room shall be prohibited from the moment of start of the auction,” prescribed in the first paragraph of Part 7 of Article 68 of the Code.

In view of the above-mentioned, the Constitutional Court considers it necessary to address the following issues:

- Is conducting auctions behind closed doors for the sale of land owned by the state and the community consonant with the principles of legal and democratic state and does not hinder the person from exercising the rights to freedom of expression and freedom of information provided for by the RA Constitution?

- Are the challenged provisions of the Code consonant with the principles of proportionality and certainty provided for by the RA Constitution?

6. It follows from Part 4 of Article 67 of the Code that the procedure for preparing and conduct of auctions for the sale of land owned by the state and the community is prescribed by the RA Civil Code, the RA Land Code and the RA Law on Public Biddings.

According to Article 464 of the RA Civil Code, auctions may be open and closed. Unlike an open auction, where any person who meets the established criteria may participate, “persons invited specially for that purpose may participate in closed auctions and closed tenders.”

The analysis of Article 68 of the RA Land Code shows that land plots owned by the state and the community shall be sold through biddings at **open** auctions. In accordance with Part 2 of Article 68 of the Code: “The auctioneer, one month before the auction, shall announce in the press or other mass media the place, day and time of biddings, the location, code, starting price, goals and size of the land, information on availability of road network, water and sewage lines, electrical power lines, gas pipe lines (in case of agricultural land the qualitative characteristics and limitations (including the servitudes) in respect of the given land.” According to Parts 3 and 4 of the same Article, **each person** who, in accordance with the Code, is a holder of the right of ownership of the land may participate in the auction in the prescribed manner, if once wished.

On the other hand, Part 6 of Article 68 of the Code stipulates that **the auction shall be held behind closed doors**, with the participation of only the registered bidders, the auctioneer and the registering clerk. Considering that the provisions of the RA Law on Public Biddings shall apply to auctions of land owned by the state and the community except for the first paragraph of Part 2 of Article 3, the RA Constitutional Court states that the expression “the auction shall be held behind closed doors” applied in Part 6 of the challenged Article does not imply that invited

persons may **participate** in these auctions. The Constitutional Court considers it necessary to distinguish between the concepts “**closed biddings**” and “**auctions held behind closed doors.**” The RA Constitutional Court considers it necessary also to emphasize that **in any case public auctions are open auctions**, and based on this the second paragraph of Part 1 of Article 1 of the RA Law on Public Biddings stipulates that “the relations connected with the organization of closed biddings shall not be regulated by this Law.”

7. According to the logic of Article 10 of the RA Law on Public Biddings, public auctions shall be attended both by the participants of the auction, i.e. persons who in due course paid a deposit and received the certificate of the bidder from the auctioneer, as well as **persons not considered to be bidders in** the auction. Moreover, according to the above-mentioned Article, an entrance fee may be established for persons not considered to be bidders in the auction in accordance with the rules of procedure of the auction, and the amount of the fee cannot exceed five-fold of the minimum salary defined. In addition, as noted, the bidders and persons not considered to be bidders shall take separate seats in the auction room.

In this aspect, public auctions, in addition to the auctioneer, the registering clerk and the bidders may be **attended** also by the persons who have received a relevant status.

That is, the freedom of expression, search and receiving information was envisaged in the RA Law on Public Biddings, thus enabling each person **to attend** a public auction and observe the process.

On the other hand, according to Part 6 of Article 68 of the Code, receiving of applications and registration of participants shall be terminated three days before the auction. The same Part stipulates that the auction shall be held behind closed doors, with the participation of only the registered bidders, the auctioneer and the registering clerk.

Taking into account the circumstance that in this Article the persons related to the very process of the auction i.e. persons “**participating**” in the process are concerned, **therefore this must not be identified with the concept “attending”**, and the relevant provisions must not serve as an obstacle for the persons who expressed desire to observe the process of the auction, and having the status of **attending** the biddings.

In connection with the foregoing, the Constitutional Court considers it necessary to note that in response to the 22.12.2017 UŦU-18 letter of the Rapporteurs on this Case, in reply

№01/16.1/157-18 dated 16.01.2018 from the RA Minister of Territorial Administration and Development in response to the question whether there are rules of procedure for conducting auctions in the communities of the Republic of Armenia, provided for by Article 2 of the RA Law on Public Biddings, and whether regulations concerning the presence at the auction of persons not considered to be bidders in the auction are provided, it was noted that in accordance with Parts 6 and 7 of Article 68 of the RA Land Code, the auction shall be held behind closed doors, with the participation of only the bidders, the auctioneer and the registering clerk, and the entry to the auction room shall be forbidden after the start of auction. In addition, it was noted that there is no need to adopt additional rules of procedure for conducting auctions of land, since the issues associated with the auction-sale of lands owned by the state and the community shall be regulated by the provisions of Article 67 of the RA Land Code, and the procedure for preparing and conducting an auction is regulated by the provisions of Articles 68 of the same Code.

The Constitutional Court considers it necessary also to take into account that in jurisprudence, the provision stipulated by Part 6 of the challenged Article 68 of the Code was interpreted as a provision excluding the attendance of persons, who are not participants in auctions of land owned by the state and the community. In particular, the RA Administrative Court of Appeal concluded in its judgment that “closed auctions of land owned by the community may be attended exceptionally by the bidder, the auctioneer and registering clerk.”

8. The Constitutional Court states that according to Part 1 of Article 42 of the RA Constitution, the right to freely express her/his opinion also includes freedom to search, receive, and disseminate information.

The Constitutional Court considers it necessary to reaffirm the legal position expressed in the Decision DCC-1010 dated 6 March 2012, according to which “... the availability of public information is one of the essential prerequisites for democracy and transparency of public administration, responsible to the society. The democratic control exercised through public opinion stimulates transparency of the actions of state power and promotes accountable activity of state authorities and officials.”

It should also be noted that the right to expression is not an exclusive right and may be restricted on the grounds and in the order prescribed by Part 3 of Article 42 of the RA

Constitution. In particular, it may be restricted only by law for state security, protection of the public order, health and morals, honor and reputation of others, as well as other fundamental rights and freedoms.

Given this circumstance, the legislator must provide for such a legal regulation of auctions for the sale of land owned by the state and the community, which, on the one hand, will be considered necessary for ensuring the normal course of the auction, on the other hand – relating to property owned by the state and the community, and in this regard, the need for public control over the activities of the bodies of local self-government will be available to the society and raise public confidence in public authority and, in particular, in local self- governance.

Guided by considerations of ensuring public control over state and local self-government bodies, transparency of the actions of public authorities, accountable activities, and public legal responsibility, the Constitutional Court finds that **the realization** of the right to search, receive, and disseminate information on the auction of land owned by the state and the community **through the attendance at the auction is a necessity**, taking into account the limitations provided for by the RA Constitution, and the auction of land owned by the state and the community should be transparent.

Turning to the right of a person to search information, the Constitutional Court states that, although according to Part 7 of Article 68 of the Code, the protocol on the results of the auction shall include data on place, time period, bidders and auctioneer of the auction, **course of bidding** and results, all the information stated in the protocol cannot be equivalent to the information obtained as a result of attendance. In addition, it should be added that according to the letter of the RA Minister of Territorial Administration and Development, video recording of the auctions of the land owned by the state and the communities shall not be performed.

The Constitutional Court considers that the prohibition of the presence at the auctions of land owned by the state and the communities of persons including representatives of public organizations endowed with the appropriate statutory authority is not a proportionate restriction and does not pursue a legitimate goal. The attendance of the latter is aimed at ensuring the effectiveness of public control over the activities of the bodies of local self-government, increasing public confidence in the institutions of public authority, the role of civil society and, in particular, of non-governmental organizations.

9. By the Decision DCC-1396 dated 26 December 2017, the Constitutional Court reaffirmed its position, expressed in the Decision DCC-278 dated 11.01.2001, and found that the legislator, providing for the restriction of fundamental rights and freedoms, must be guided exclusively by constitutional legal standards which are stipulated by Articles 75, 76, 78, 79, 80, and Part 2 of Article 81 of the RA Constitution.

According to Article 78 of the Constitution, the means chosen for restricting fundamental rights and freedoms shall be suitable and necessary for the achievement of the goal prescribed by the Constitution, and the means chosen for restriction shall be proportionate to the significance of the restricted fundamental right and freedom. Simultaneously, according to Article 79 of the Constitution, when restricting basic rights and freedoms, laws must define the grounds and extent of restrictions, be sufficiently certain to enable the holders and addressees of these rights and freedoms to display appropriate conduct.

The Constitutional Court considers that **conducting auctions behind closed doors of land plots owned by the state and the community cannot be assessed from the perspective of constitutionality as equivalent to the meaning of restricted fundamental rights, such as the right to search, receive, and impart information. It cannot be assessed as suitable and necessary for the achievement of any aim prescribed by the Constitution.**

In a number of Judgments, the European Court of Human Rights has addressed to the issues of freedom of information, in particular, in the case of *Társaság a Szabadságjogokért v. Hungary* (application no. 37374/05) dated 14 April 2009, and considers that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters.

By the Judgment in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land und forstwirtschaftlichen Grundbesitzes v. Austria* (application no. 39534/07) dated 28 November 2013, the Court reaffirmed its previous positions, namely, the Court advanced towards a broader interpretation of the notion of the “freedom to receive information,” which includes the right of access to information.

As for the compliance of the challenged provision of Part 6 of Article 68 of the Code with the principle of certainty, the Constitutional Court considers it necessary to note the mutually exclusive legal regulations of the auction-sale of land owned by the state and the community. In particular, on the one hand, the Code limits the possibilities of the persons who

wish **to attend** the auction, and on the other hand, the RA Law on Public Biddings provides for special regulation regarding the attendance at the auction of the persons who are not bidders.

10. Article 14 of the RA Law on Public Biddings regulates the order of public auctions, according to which, prior to the start of the auction, the auctioneer shall register the bidders by checking the documents proving their identity, their authority, as well as other documents specified in the public notice of the auction. At the same time, according to the above-mentioned Law, other procedural terms for the auction may be provided for by the rules of regulation of the auction, and the auctioneer must familiarize the bidders with the provisions of the rules of regulation before the auction starts.

Article 8 of the RA Law on Public Biddings, which deals with public notification of the auction, states that public notification of the auction shall include the date, month year,, and **hour** of conducting the auction. Even in cases where a public notification initially prescribes the possibility of making amendments, the amended notification shall be published no later than three days before the auction. Such legal regulations are a guarantee of **the attendance** at biddings of interested persons at the stated time.

The Constitutional Court considers it necessary also to emphasize that the moment of start of the auction is prescribed in Part 2 of Article 14 of the RA Law on Public Biddings, according to which: “The auction shall open with an announcement. The announcement specifies the name, description, starting price, and restrictions on the lot to be sold at auction, as well as the form of the auction including the procedure for submission of price bids.” That is, the moment of making the announcement, as prescribed by Part 2 of Article 14 of the RA Law on Public Biddings, is the moment of start of the auction. Therefore, this provision is designed to ensure the normal course of the auction, to raise the discipline of persons entitled to attend the auction.

In the context of such legal perception, the ban on entering the hall when the auction starts, complies with the principles of proportionality and certainty, and does not restrict the freedom of expression and the right of a person to receive information.

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 (with Amendments through 2005),

Articles 19, 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. To declare the provision “The auction shall be held behind closed doors, with the participation of only the bidders, the auctioneer and the registering clerk” prescribed in the first paragraph of Part 6 of Article 68 of the RA Land Code, in regard to the part that according to the interpretation to the latter in law enforcement practice it prohibits the attendance in the prescribed manner at the auctions of land owned by the state and the communities, and observe the process of the auction for the persons who wished, including representatives of non-governmental organizations and mass media endowed with the appropriate statutory authority, contradicting Articles 42, 78 and 79 of the RA Constitution and void.

2. The provision ““The entrance to the auction room shall be prohibited from the moment of start the auction”” prescribed in the first paragraph of Part 7 of Article 68 of the RA Land Code is in conformity with the RA Constitution within the framework of legal positions expressed in this Decision.

3. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005) this Decision shall be final and effective upon the publication.

Chairman

G. Harutyunyan

January 30, 2018

DCC-1399