Non-Official Translation

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

ON THE CASE OF CONFORMITY OF PART 2 OF ARTICLE 57 OF THE CRIMINAL CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE FIRST INSTANCE COURT OF GENERAL JURISDICTION OF SYUNIK MARZ

Yerevan **February 6, 2018**

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

with the participation of (in the framework of the written procedure)

the Applicant: First Instance Court of General Jurisdiction of Syunik Marz,

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, Point 7 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 25, 38 and 71 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 Part 2 of Article 57 of the Criminal Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the First Instance Court of General Jurisdiction of Syunik Marz.

The Case was initiated on the basis of the application submitted to the RA Constitutional Court by the First Instance Court of General Jurisdiction of Syunik Marz on October 11, 2017.

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

1. The Criminal Code of the Republic of Armenia (hereinafter referred to as the Code) was adopted by the RA National Assembly on 18 April 2003, signed by the RA President on 29 April 2003 and entered into force on 1 August 2003.

Part 2 of Article 57 of the Code titled: "**Arrest**," prescribes:

"Arrest shall not be imposed in respect of the persons who have not attained 16 years of age by the time of adjudication, nor upon pregnant women or persons who have children of less than eight years of age, who are dependent on the latter."

The challenged norm of the Code was not amended and supplemented by the RA National Assembly.

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

On 29 June 2017, Pasha Ararat Avanesyan was charged on the grounds of Part 1 of Article 361 of the Code. On the same day, restricted residence was applied against him as a measure of restraint.

On 30 June 2017, the criminal case no. 90959117, with the indictment, against Pasha Ararat Avanesyan was sent to the First Instance Court of General Jurisdiction of Syunik Marz (case no. ՍԴ1/0079/01/17).

On 27 September 2017, the First Instance Court of General Jurisdiction of Syunik Marz, having completed the consideration of case no. ՍԴ1/0079/01/17, retired to the deliberation room. On the same day, the Court resumed the proceeding of the Case and, having heard the parties, decided to suspend the proceeding of the Case and apply to the RA Constitutional Court on the issue of conformity of Part 2 of Article 57 of the Code with the RA Constitution.

3. The Applicant considers that Part 2 of Article 57 of the Code contradicts Articles 16, 27, 28, 29, 71 and 78 of the RA Constitution.

To ground his positions, the Applicant, based on the analysis of Articles 57, 58, 59, 84 and 361 of the Code, first of all stated that:

a) the duration of arrest is from 15 days to 3 months, and the term of detention in a disciplinary battalion or the term of imprisonment is from 3 months to 2 years,

b) in Article 49 of the Code, the sentence are imposed from the most lenient punishment to the most severe punishment, and the arrest is prescribed before detention in a disciplinary battalion and imprisonment,

c) detention is envisaged only for crimes of minor and medium gravity, and imprisonment is also envisaged for grave crimes,

d) in case of arrest, **the terms criminal records** shall be **expunged after** one year after serving the sentence, and in case of imprisonment, after at least three years after serving the sentence.

Afterwards, on the basis of the above-mentioned analysis, the Applicant considers that arrest is a more lenient punishment than detention in a disciplinary battalion or imprisonment.

Simultaneously, referring to the mitigating circumstance in a specific case, namely the defendant has a dependent child under eight years of age, and, consequently, the necessity of imposing a milder punishment in respect of the defendant, the Applicant considers that in this case the mitigating circumstance creates an adverse consequence for the defendant, since by the force of the challenged norm of the Code, having a dependent child under eight years of age excludes the possibility of choice to impose arrest as a more lenient punishment in respect of the defendant from the punishments prescribed by the sanction of Part 1 of Article 361 of the Code (arrest up to 3 months, service in a disciplinary battalion up to 2 years, imprisonment up to 3 years).

4. Objecting to the arguments of the Applicant, the Respondent finds that the Court correctly stated that in the sanction of the challenged Article, the arrest is the most lenient punishment. However, it must also be taken into account that arrest as a type of punishment is much graver by its nature than imprisonment and service in a disciplinary battalion: in the Article and the Code in question, it is milder compared with such punishments as imprisonment and service in a disciplinary battalion, except for possible severity for the legislatively prescribed sentence types. Thus, according to the Code, the arrest can be applied between 15 days to 3 months, the service in a disciplinary battalion from 3 months to 2 years, and the imprisonment from 3 months to 20 years.

At the same time, the Respondent finds that “Although in the context of difference of the above-mentioned severity, as well as the criminal legal consequences after serving the sentence, arrest is a more lenient type of punishment, however, if we observe and compare one day of these types of punishments, it becomes obvious that arrest is a graver type of punishment. Pursuant to Part 1

of Article 57 of the RA Criminal Code, arrest is keeping the convict in a correctional institution in custody in strict isolation from the society. Based on this requirement, the RA Criminal Executive Code prescribes stricter procedures and terms of captivity than in the case of service in a disciplinary battalion or imprisonment."

Due to this circumstance, the Respondent finds that "... in the case of arrest, the convict shall not be allowed a visit, short-term leave and are not entitled to correspond, receive parcels, transfers and packages, and primary and secondary vocational education is not organized."

Taking into account the above-mentioned justifications, the Respondent also finds that "... the legislator lawfully prescribed in Part 2 of Article 57 of the RA Criminal Code that arrest shall not be imposed on persons under the age of 16 at the time of sentencing, nor pregnant women or persons with dependent children under eight years of age."

At the same time, such a legal regulation – according to the Respondent – intends to protect the best interests of the family and derives precisely from the requirement of Article 16 of the RA Constitution, namely, the family, being the natural and fundamental unit of society and the basis for the preservation and reproduction of population, as well as motherhood and childhood shall be under special protection and care of the state, and this legal regulation may not in any case be interpreted as contradicting the requirement of Article 16 of the Constitution and create the possibility of strict confinement of the convict from society in such family conditions, including the confinement of the persons with dependent children under eight years of age.

In connection with this justification – according to the Respondent – could be no question of possible discriminatory legal regulation, referred to by the Court, and the Respondent refers to one case-law judgment of the European Court, according to which "For the purposes of Article 14 a difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized." (Sahin v. Germany Judgment of 8 July 2003).

The Respondent also considers that the Code contains the necessary legal tools for imposing a fair punishment for the person. According to Article 61 of the Code, "1. A fair punishment is imposed to the person found guilty of an offence determined within the appropriate article in the Special Section of this Code, taking into account the provisions of the General Part of this Code." For imposing a more lenient punishment, the court may apply a number of provisions of the General Part of the Code, such as Article 64, titled: "Imposition of a more lenient

punishment than prescribed by the law," Article 70, titled: "Conditional non-application of punishment."

Based on the foregoing, the Respondent believes that the provision stipulated by Part 2 of Article 57 of the RA Criminal Code is in conformity with the requirements of the RA Constitution.

5. Taking into account the arguments of the Applicant and the Respondent, the Constitutional Court states that the raised constitutional legal dispute concerns the legitimacy of the choice and imposition of arrest, as a type of punishment, from the perspective that the sanctions of certain corpus delicti prescribed by criminal legislation do not provide for a more lenient type of punishment than arrest.

In this regard, in the framework of consideration of this Case, the Constitutional Court considers it necessary to establish the nature of the arrest, within the system of punishment of criminal legal nature, from the standpoint to ensure the legal mechanisms necessary for guaranteeing and protecting the constitutionally enshrined fundamental rights of a person.

6. Within the framework of the systemic analysis of the provisions of the Code, the RA Constitutional Court states that the legislator, within the framework of its competence to assess the public danger of the action and its criminalization, envisaged punishments of varied gravity based on the objectives and objectives of the Code. The variety of punishments entitles the court to take into account the gravity of the offence and the offender, and to impose a just punishment that will maximally contribute to the correction of the convict, restoration of social justice and combating new crimes.

For example, the sentence prescribed in Article 49 of the Code and applied in the Republic of Armenia are listed in the following sequence: fine, disqualification from certain positions and activities, community work, deprivation of special or military rank, grade, rank or qualification category, restriction to military service, confiscation of property, arrest, service in a disciplinary battalion, deprivation of liberty for a specific period, life imprisonment.

Moreover, in this system of punishments stipulated by the Code, the sentence types follow a certain hierarchy, i.e. firstly, more lenient sentence are presented, which are not related to the deprivation of liberty, and the next more severe sentence are presented, which are related to the deprivation of liberty. Such a sequence of sentence clearly shows how the legislator assesses the

relative severity of each sentence and focuses the court to choose a more effective type of punishment, in particular, when imposing more lenient punishment than those provided by the law.

At the same time, it follows from the logic of the criminal legislation that arrest is the main type of punishment, is related to short-term deprivation of liberty, and can be imposed by the court of the sanction prescribed in the Special Section of the Code, as well as imposes by a more lenient punishment than prescribed by the law (Article 64 of the Code), when replacing the unserved part of the punishment with a more lenient sentence (Article 77 of the Code), and refusing to perform socially useful work. (Article 54 of the Code).

7. It follows from the content of Part 1 of Article 57 of the Code that arrest is incommunicado detention in a correctional institution, and it can be imposed for minor and medium gravity office, for a period of between fifteen days to three months.

According to Part 1 of Article 59 of the same Code, "Deprivation of liberty is isolation from the society for a certain period in the form of confinement in a correctional institution."

At the same time, according to Article 14 of the RA Criminal Executive Code, "The rights and obligations of the convict prescribed by this Code are differentiated, based on the punishment imposed by the court verdict, in certain cases also the type of correctional institution and the established internal regime."

However, by virtue of Parts 1 and 2 of Article 56 of the RA Criminal Executive Code, sentenced convicts are subject to incommunicado detention and are subject to the conditions for serving sentence prescribed by the same code and other legal acts for persons deprived of liberty and serving sentence in secure correctional institution. In particular, the sentenced convicts shall not be allowed visits, except for meeting with the defender and under exceptional personal circumstances, and they are not entitled to correspond, receive parcels, transfers and packages, except for articles of basic necessity and seasonal clothes.

Within the framework of the results of the analysis of the mentioned legal regulations, the Constitutional Court states that **although the conditions for the enforcement of arrest as a punishment, including the conditions for isolation of the person are severe, nevertheless, in the aspect of the term of serving the sentence, arrest is a more lenient sentence compared to service in a disciplinary battalion (Article 58 of the Code) or deprivation of liberty for a specified term (Article 59 of the Code).**

In regard to this justification, the Constitutional Court states that the challenged norm provides for **prohibition of the arrest** as a punishment, to the minors under the age of 16 at the time of sentencing, or pregnant women or persons with dependent children under the age of eight, **pursuing the objective to ensure the interests of these individuals, which follows not only from the content of the principle of proportionality of the act, but also from the relevance of the principle of humanism provided for in Article 11 of the Code.**

At the same time, taking into account the requirement of legal regulation of Article 16 of the Constitution of the Republic of Armenia, according to which: "Family, being the natural and fundamental cell of society and the basis for the preservation and growth of population, as well as motherhood and childhood shall be under special protection and care of the state," the Constitutional Court also states that in the challenged Article the prohibition of the arrest as a punishment, from the perspective of the imposition of a more lenient sentence than sanctions of certain corpus delicti prescribed by criminal legislation may be one of the important manifestations of special protection and care of the state towards family, maternity and childhood.

Based on the foregoing, the Constitutional Court finds that the prohibition of the imposition of arrest of the minors under the age of 16 at the time of sentencing, nor upon pregnant women or persons with dependent children under age of eight, is legitimate and follows from the nature of arrest as a type of punishment.

8. According to Part 2 of Article 71 of the RA Constitution, the punishment prescribed by law, as well as the imposed sentences and severity of punishment shall be proportionate to the gravity of crime. This constitutional norm first of all requires the legislator to prescribe a punishment for each criminal act proportionate to the committed act. And if certain sentence types and severity of punishment are prescribed, which, based on the circumstances of a particular case, legitimately leave the court the discretion to choose the specific sentence type and severity, the court may impose this discretion based on the constitutional requirement of proportionality of the sentence type and severity of punishment shall be to the committed act.

At the same time, it is necessary to take into account that the issue of determining the specific sentence type and severity of punishment for socially dangerous acts goes beyond the scope of the review of the constitutionality of the norm. However, the Constitutional Court may assess the proportionality of an already imposed punishment. And in this regard, the Constitutional Court finds that the limitations of fundamental human rights must correspond, among other

requirements, to the principle of proportionality of limitation of rights, and the punishment prescribed by law, as well as the imposed sentence type and severity of punishment shall be proportionate to the committed act.

Taking into account the circumstance that the imposition of the sentence type and/or severity of punishment prescribed by the legislator may not be justified within a specific case and violates the principle of proportionality, the legislator has established the **possibility of imposing a more lenient punishment than what prescribed by law**

In particular, according to Parts 1 and 2 of Article 64 of the Code, in exceptional circumstances related to the motives and purpose of the crime, the role of the perpetrator, her/his conduct in committing the crime and in other circumstances significantly reducing the level of danger of the crime for the society, as well as, with the active assistance in detection of the crime of a gang activity, a lenient punishment may be imposed below the minimum penalty envisaged in the relevant article of the Special Section of this Code than envisaged in that article, or no additional mandatory punishment may be imposed. Specific mitigating circumstances as well as a combination of these circumstances may be considered exceptional.

The comprehensive analysis of the mentioned norms shows that for ensuring the justification of the sentence type and/or severity of punishment, and the proportionality of the penalty and severity of punishment within the framework of a particular case, the legislator granted the court to impose more lenient punishment than prescribed by law.

At the same time, the issue raised by the Applicant, that in some cases the challenged humane norm leads to imposition of a more severe and disproportionate punishment for the involved persons, is on the agenda of the RA law enforcement practice. The mentioned issue arises when the sanction of the relevant article does not provide for another punishment, apart from arrest and imprisonment, resulting only depriving from liberty becomes applicable, which is a more severe penalty than arrest. It follows from the study of the Code that this problem exists in 24 corpus delicti (Part 1 of Article 113, Part 2 of Article 114, Part 1 of Article 235, Part 1 of Article 268, Article 283, Part 3 of Article 296, Parts 1 and 2 of Article 306, Parts 1 and 2 of Article 327, Part 1 of Article 327.1, Part 1 of Article 327.3, Part 1 of Article 327.4, Part 2 of Article 327.6, Article 328, Part 1 of Article 348, Part 4 of Article 356, Parts 1 and 2 of Article 361, Parts 1 and 3 of Article 363, Part 1 of Article 364, Part 2 of Article 368, and Part 1 of Article 368.1 of the Code). If the imposition of punishment as a deprivation of liberty is disproportionately assessed in a

particular case, nothing is left to the court but to impose more lenient punishment than by the force of Article 64 of the Code, in order to prevent violation of the rights of the person, even if there are no relevant grounds.

In connection with the above-mentioned, the Constitutional Court finds that such a legal regulation of the prescription of sanctions of the above-mentioned corpus delicti by the legislator leads to their practical problems insofar as they do not prescribe more lenient punishment than arrest.

Based on the review of the Case and governed by Point 1 of Article 100, Point 7 of Part 1 of Article 101, and Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 63, 64 and 71 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. Part 2 of Article 57 of the Criminal Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia within the framework of legal positions expressed in this Decision.

2. 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 publication.

Chairman **G. Harutyunyan**

February 6, 2018
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