

**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 4 AND RELATED PART
10 OF ARTICLE 2 OF THE LAW “ON PROCLAIMING AMNESTY ON CRIMINAL
MATTERS ON OCCASION OF THE 2800 ANNIVERSARY OF EREBUNI YEREVAN
AND 100TH ANNIVERSARY OF INDEPENDENCE OF THE FIRST REPUBLIC”
WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF
THE APPLICATION OF THE CRIMINAL COURT OF APPEAL OF THE REPUBLIC
OF ARMENIA**

Yerevan

February 26, 2019

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, A. Dilanyan, F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan, A. Petrosyan (Rapporteur),

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

the applicant: the Criminal Court of Appeal of the Republic of Armenia,

the respondent: A. Kocharyan, official representative of the National Assembly, Chief of the Legal Expertise Division of the Legal Expertise Department of the National Assembly Staff,

pursuant to clause 1 of article 168, part 4 of article 169 of the Constitution, as well as articles 22 and 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of part 2 of article 4 and related part 10 of article 2 of the Law “On Proclaiming Amnesty on Criminal Matters on Occasion of the 2800 Anniversary of Erebuni Yerevan and 100th Anniversary of Independence of the First Republic” with the Constitution of the Republic of Armenia on the basis of the application of the Criminal Court of Appeal of the Republic of Armenia.

The Law of the Republic of Armenia “On Proclaiming Amnesty on Criminal Matters on Occasion of the 2800 Anniversary of Erebuni Yerevan and 100th Anniversary of Independence of the First Republic” (hereinafter referred to as the Law) was adopted by the National Assembly on 1 November 2018, signed by the President of the Republic on 3 November 2018, and entered into force on 6 November 2018.

Part 2 of article 4 of the Law challenged in this case prescribes:

“2. In case of applying an amnesty, the issue of compensation for the harm caused to the injured party, as prescribed by an enforceable judgment, can be resolved in accordance with the procedure prescribed by the Civil Procedure Code of the Republic of Armenia”.

Part 2 of article 10 of the Law prescribes the cases of non-application of an amnesty.

The case was initiated on the basis of the application of the Criminal Court of Appeal of the Republic of Armenia submitted to the Constitutional Court on 6 December 2018, which presented the Decision of the Criminal Court of Appeal of the Republic of Armenia “On applying to the RA Constitutional Court and terminating the proceedings of the case” on the criminal case YAKD/0188/01/17 of 3 December 2018.

Having examined the written explanations of the applicant and the respondent in this case, as well as having analyzed the relevant provisions of the Law and other documents of the case, the Constitutional Court **ESTABLISHES:**

1. Positions of the applicant

According to the applicant’s assessment, insofar as “in case of release from punishment under an amnesty, no mandatory term is prescribed regarding the fact that the injured party has been compensated for the caused harm”, moreover, part 2 of article 4 of the Law stipulates that the issue of compensation for the harm caused to the injured party, as prescribed by a judgment, can be resolved in accordance with the procedure prescribed by the Civil Procedure Code, in as much the provision of part 2 of article 4 of the Law seemingly contradicts articles 1, 3, 61, 63, 79 and 81 of the Constitution.

According to the applicant, by the regulation of part 2 of article 4 of the Law, the legislator did not properly assess the State-person relations, the ratio of mutual rights and duties. The State should not exercise the right to release from punishment under an amnesty to the detriment of constitutional duties towards the injured parties. According to the applicant, it turns out that the State not only failed to prevent the commission of a crime, but, being obliged to resolve the crime and allow the injured party to realize the protection of his/her violated rights, amnesties the person who committed a crime and orients the injured party to defend his/her rights through other mechanisms. According to the applicant, clause 2 of article 4 of the Law indicates that the issue of compensation for the harm caused to the injured party cannot be resolved in criminal proceedings; to this end, the injured party must refer to civil procedural mechanisms. However, they have no positive effect from the perspective of compensation for the harm caused to the injured party in terms of cost of the compensation. In the Civil Procedure Code, in addition to the initiation of a claim, there are no other legal mechanisms in connection with the resolution of the issue of compensation for the harm caused to the injured party.

The applicant believes that if the Law prescribed that “compensation for the harm caused to the injured party is a prerequisite for the release from punishment, then this would not only be an additional guarantee of compensation for the harm caused to the injured party, but also force the perpetrator to take effective measures to compensate for the harm caused to the injured party”.

2. Positions of the respondent

The respondent emphasizes that the act on amnesty must be consonant with the nature of the amnesty, as an act of mercy, and the constitutional responsibility of state authorities, which obliges the legislator to take into account the issues of resocialization of those benefiting from amnesty and the need to ensure that these issues are resolved without jeopardizing the interest of guaranteeing a stable legal order and the rights of citizens in a democratic society.

The respondent notes that the legislative grounds for the application of an amnesty are not provided. That is, the regulation of the issue is entirely left to the discretion of the highest competent state authority. In each case, both as a matter of the expediency of declaring an amnesty and determining the range of persons who committed a crime, as well as establishing the terms, mechanisms of and exceptions to the application of an amnesty are left to the discretion of the legislator. Consequently, the establishment of specific crimes and the range of perpetrators, the terms and legal mechanisms for applying an amnesty cannot be considered as a violation of the rules guaranteed by articles 61, 63 and 79 of the Constitution.

According to the respondent, it is obvious that the discretionary powers of the legislator, who adopted the act on amnesty, can be exercised only within the framework of legitimate decisions and fundamental principles of the Constitution, excluding any manifestation of violation of the right to compensation for the harm caused to the injured party, particularly, in part of the right of property of the injured party, when the legislator in consonance with the principle of certainty enshrined the norms that follow from the constitutional legal duties of the State to protect the right of property of each person, which indicate that the issue of compensation for the harm caused to the injured party shall be resolved according to the procedure prescribed by the Civil Procedure Code, which is, undoubtedly, aimed at guaranteeing the restoration of the violated property rights.

Based on the above, the respondent believes that part 2 of article 4 and related part 10 of article 2 of the Law are in conformity with the Constitution.

Considering that, according to article 117 of the Constitution, by proposition of the Government, the National Assembly may adopt a law on amnesty, the Constitutional Court also applied to the Government and received an explanation, which, inter alia, states that the Law was adopted in consonance with article 82 of the Criminal Code, and based on the approach that the act on amnesty concerns the issues of release of a person from the criminal liability or punishment, but not the issues of release from the fulfillment of the duties towards the injured party. According to the Government, by the challenged legal regulations the State does not release the perpetrator, from the duties towards the injured party and guarantees the effectiveness of means of protection of the rights of the injured party.

The Government also notes that by implementing a coherent policy on the issue of release from punishment and based on the circumstance that an enforceable judgment is preemptive and puts the injured party in an advantageous position in the matter of receiving further compensation for the harm in civil proceedings, and the compensation or remediation otherwise for the harm caused to the injured party in connection with the issue of release of a person from punishment on the basis of an amnesty and based on the enforceable judgment, is not considered by the State as an exceptional precondition for the application of an amnesty.

The Government considers that the legal regulations challenged in the present case do not contradict articles 1, 3, 61, 63, 79 and 81 of the Constitution.

3. Circumstances to be ascertained within the framework of the case

Within the scope of constitutional legal issues raised in the present case, the Constitutional Court considers it necessary, in particular, to address the following issues:

- a) Is the legislator's discretion, in granting amnesty for the person who failed to fulfill his/her duty to compensate for the harm caused to the injured party, limited?
- b) Do the legal regulations of the challenged and interrelated provisions provide legal prerequisites for the establishment of unfavorable terms for an injured party by failing to fulfill the person's duty to compensate for the harm caused to the injured party?
- c) Is the realization of the right of the injured party to compensation in court for the caused harm guaranteed?

4. Legal positions of the Constitutional Court

4. 1. Relations related to the amnesty are prescribed in article 117 of the Constitution, titled "Amnesty", according to which: "By proposal of the Government, the National Assembly may adopt a law on amnesty by majority vote of the total number of parliamentarians". From the above constitutional regulation it follows that:

- the founder of the Constitution granted the National Assembly the authority to declare an amnesty, which is implemented by adopting a law;
- The National Assembly may adopt a law on amnesty only by proposal of the Government;
- the constitutional provision "may adopt" emphasizes that the National Assembly has a wide discretion in the matter of adopting a law on amnesty;
- A law on amnesty is adopted by a majority vote of the total number of parliamentarians.

In addition to the above, other relations related to the amnesty, including **those related to the application of amnesty or the limits of its application are not prescribed by the Constitution**. The Constitution also does not establish the right of a person to demand an amnesty or the right to request an amnesty from the State. That is, also in this aspect, the legislator's discretion is not directly limited by constitutional regulations. It is explicit that **the legislator's discretionary power can be exercised only within the framework of fundamental constitutional principles and other legitimate solutions**.

The founder of the Constitution has not prescribed the details of amnesty in the general regulatory law and currently there is no such a specific law.

General legal regulations related to amnesty are prescribed in a number of laws, including the Criminal Code. Article 82 of the Code, titled "Amnesty", states: "The person who committed a crime can be released from criminal liability by an act on amnesty adopted by the legislature, and the convict can be completely or partially released from the basic, as well as from the supplementary punishment, and the convict's unserved part of the punishment can be replaced with a milder form of punishment, or the criminal record can be expunged".

Acts on amnesty are normative legal acts. According to the Constitution amended in 2015, a law on amnesty may be adopted, and before the mentioned amendments a decision of the National Assembly might have been adopted. It follows from the merits of the institute of amnesty and the practice of

legislative activity, that as a normative legal act, the act on amnesty nevertheless has its own specifics. In particular, the act on amnesty:

- in a certain period of time, shall extend to persons of certain categories accused of crime, or sentenced for committing a certain crime, as well as certain criminal acts assigned to the latter;
- shall concern the issues of release from criminal liability, total or partial release from penalties or mitigation of punishment, as well as expunging a criminal record;
- shall set the specific time-limits for the application of an amnesty, in other words, this act must have a specific period of validity.

It follows from the above that acts on amnesty may be adopted, and depending on the discretion of the legislator, the scope of application of amnesty or the scope of its restriction by each of these acts may differ.

At the same time, the Constitutional Court considers that, by expressing the humane attitude of the State to a certain category of perpetrators by the exercise of discretionary powers of the legislator, an amnesty **cannot be applied in detriment to the rights of others**. In this context also, **the establishment of organizational structures and procedures for the effective exercise of fundamental rights and freedoms is the constitutional duty of the State** (article 75 of the Constitution).

4.2. The institute for compensation for the harm is an institute of private law, and the general legal regulations are stipulated by the Civil Code (in particular, article 17 and the provisions of chapter 60).

Referring to the constitutional legal basis of the institute of compensation for the harm caused to the injured party, the Constitutional Court notes that this institute first of all directly concerns the right of the injured party to compensation in court for the caused harm, which is an element of the right to effective judicial protection prescribed by part 1 of article 61 of the Constitution.

As a result of an analysis of the provisions of the Law related to compensation for the harm caused to the injured party, the Constitutional Court states that the legislator has distinguished and established a separate framework for the application of an amnesty.

Thus, firstly, **it follows from the legal regulations of parts 5 and 6 of article 2 of the Law, that in cases of absence of an enforceable judgment, for the application of an amnesty it is mandatory that the harm caused is compensated for or remediated otherwise, or there is no dispute over the caused harm, and in the case of presence of the latter, an amnesty is not applied.**

Part 5 of article 2 of the Law prescribes regulations on refusal to initiate proceedings, suspension, as well as termination of criminal prosecution or not carrying out criminal prosecution in the absence of criminal cases before October 21, 2018 inclusive. At the same time, part 6 of the same article prescribes that the mentioned part 5 shall be applied with observance of the provisions of part 6 of article 35 of the Criminal Procedure Code. Part 6 of article 35 of the Criminal Procedure Code prescribes that the refusal to initiate the proceedings, suspension and termination of criminal prosecution on the basis of the adoption of a law on amnesty shall be prohibited if the caused harm has not been compensated or remediated otherwise, or there is a dispute over the compensation for the caused harm (second paragraph). Moreover, it should be noted that the said provision shall be valid unless otherwise prescribed in the law on amnesty. The Constitutional Court states that the Law does

not stipulate anything other than the legal regulation prescribed in the second paragraph of part 6 of article 35 of the Criminal Procedure Code.

The study of the materials of the present case shows that the legal regulations of parts 5 and 6 of article 2 of the Law are first of all based on the approach that the decisions on the refusal to initiate proceedings, suspension, and termination of criminal prosecution, as well as regarding the issue of further restoration of violated rights under civil judicial procedures do not have the force of pre-established evidence. In other words, these decisions in civil proceedings cannot be preventive; they can be used as documentary evidence and discussed in conjunction with other evidence presented. In judicial practice, the aforementioned approach has also developed (a similar legal position was expressed by the Court of Cassation, in particular, in its decision of 22 April 2010, rendered in the civil case ARAD/0093/02/09).

The Constitutional Court considers that within the framework of the issues under consideration in the present case, **the legal regulations of parts 5 and 6 of article 2 of the Law, from which it follows that in cases, where there is no enforceable judgment, for the application of an amnesty it is imperative that the caused harm is compensated for or remediated otherwise, or there is no dispute over the harm, and permitting the latter, an amnesty must not be applied, are legitimate, since the injured party has no duty to prove the facts with respect to certain actions related to causing harm and the persons, which is a favorable condition from the perspective of realizing the right of the injured party to compensation in court for the caused harm.**

Secondly, **in cases of presence of an enforceable judgment, the Law does not envisage restriction on the application of an amnesty for the persons who did not compensate the harm caused to the injured party.** Part 10 of article 2 of the Law does not prescribe such a restriction for the cases of non-application of an amnesty. **The law prescribes that in case of applying an amnesty, the issue of compensation for the harm caused to the injured party, prescribed by the enforceable judgment, can be resolved in accordance with the procedure prescribed by the Civil Procedure Code (part 2 of article 4).**

The study shows that by the acts on amnesty of 19 June 2009, 26 May 2011, and 3 October 2013, the legislator, at own discretion, did not provide the application of an amnesty for the persons who did not compensate for the material harm prescribed in the enforceable judicial act. At the same time, it should also be noted that in the previously adopted acts on amnesty, there are no provisions regarding the judgments on compensation for the material harm caused to the injured party by an enforceable judgment in accordance with the procedure prescribed in the Civil Procedure Code.

The study of the materials of the present case shows that the legal regulations of part 2 of article 4 and related part 10 of article 2 of the Law are primarily based on the approach that during the consideration of the case in civil proceedings the enforceable judgment, which confirms the facts regarding certain acts related to causing harm to the injured party, and the persons who committed them, is of probative value. According to part 3 of article 61 of the Civil Procedure Code, titled **“Grounds for exonerations”**, prescribes: “Facts with regard to certain acts which have acquired legal force by an enforced judicial act and their perpetrators are not a subject for discussion in another case”. In this case, the aforementioned approach was also formed in judicial practice (a similar legal position was expressed by the Court of Cassation in its decision of 5 September 2007, rendered in a civil case 3-1091(VD)).

The Constitutional Court considers that in the framework of the issues under consideration in the present case, **the legal regulations of the challenged and interrelated provisions of the Law - according to which, in cases of an enforceable judgment, no restriction shall be envisaged on the application of an amnesty for the persons who did not compensate for the harm caused to the injured party, as well as in case of applying an amnesty, the issue of compensation for the harm caused to the injured party, as prescribed by an enforceable judgment, can be resolved in accordance with the procedure prescribed by the Civil Procedure Code - are legitimate, since the burden of proving the facts about certain actions related to causing harm, and the persons who committed them shall not be shifted on the injured party, which is a favorable condition from the perspective of realizing the right of the injured party to compensation in court for the caused harm.**

4.3. The Constitutional Court also considers it necessary to note that within the framework of the general legislative policy of release from punishment, the compensation or remediation otherwise for the harm caused to the injured party is not considered as **an exceptional precondition**, without which it is impossible to release a person from punishment. In this context, it should also be noted that the conditional early release from serving a sentence also shall not be based on the circumstance of compensation or remediation otherwise for the harm caused to the injured party, as an exceptional precondition. In the case of the conditional early release from serving a sentence, the compensation or remediation otherwise for the harm caused to the injured party, or the written commitment on compensation or remediation otherwise for the caused harm is one of the circumstances considered by the court when assessing the probability of committing a new crime by the convict (part 1.2 of article 76 of the Criminal Code).

The harm caused to the injured party is the basis for a civil legal liability, the compensation for the harm is not the purpose of punishment, and non imposition of punishment is not only a guarantee for compensation for the harm caused to the injured party, as prescribed by an enforceable judgment, but it can be an even more unfavorable condition for compensation for the harm due to the circumstance that the person, who should compensate for the harm, is kept in captivity.

In addition, in practice there may be cases when the claim of the injured party for compensation for the caused harm is satisfied in court, but the convict is not able to fulfill it. This, of course, does not mean that after the expiration of the sentence imposed by the verdict the convict will be kept in captivity for as long as he/she has not fulfilled the duty to compensate for the caused harm.

The above-mentioned approach does not mean at all that by the release from punishment under an amnesty the legislator exercises the discretion through the realization of the right of the injured party to compensation for the caused harm. **By the act on amnesty the person may not be released from the fulfillment of civil duties towards other persons.**

In the context of the aforementioned, the Constitutional Court also finds that the legal regulation of part 10 of article 2 of the Law, according to which, in cases where there is an enforceable judgment, no restriction shall be envisaged on the application of an amnesty for the persons who did not compensate for the harm caused to the injured party, is legitimate and not controversial from the perspective of constitutionality.

4.4. The procedures for the realization of the right of the injured party to compensation in court for the caused harm, are prescribed both in the criminal procedure legislation and the civil procedure legislation.

In the Decision DCC-947 of 5 April 2011, the Constitutional Court expressed a legal position, according to which: “It is not an end in itself that, in contrast to part 1 of article 3 of the RA Civil Code, which uses the phrase “restoration of violated rights”, part 1 of article 2 of the RA Criminal Code uses the phrase “protect the rights”, which means that the criminal legislation has a preventive value, and it is objectively impossible to restore the already violated rights by means of criminal legislation. This is also the reason that in the RA Criminal Procedure Code the legislator prescribed the institute of a civil suit in a criminal proceeding, through which, in practice, the restoration of violated rights is ensured”.

The Constitutional Court considers that the resolution of the issue of compensation for the harm caused to the injured party through judicial procedures does not raise an issue of constitutionality, and it is under the discretion of the legislator. The constitutional requirement is that these procedures be effective, and the assessment of the effectiveness of existing procedures is beyond the scope of the present case.

It should be noted that in a number of judgments, the European Court of Human Rights also affirms that the issues related to the mechanisms aimed at protecting the right to compensation for the harm caused to the injured party are under the wide discretion of the State, and the Court stresses that the State should guarantee the effectiveness of these mechanisms. In particular, it is noted that the effectiveness of the remedies of the injured party presupposes the existence of such a measure that can eliminate the violation of the right or prevent its further impact, or provide sufficient compensation for the committed violation. For the consideration of a claim for compensation as an effective measure, it must both have a reasonable prospect of success and provide sufficient compensation. The civil suit for compensation was considered as an effective remedy (in particular, judgment in the case of Kudła v. Poland of 10.26.2000, application no. 30210/96; judgment in the case of Sejdivic v. Italy of 01.03.2006, application no. 56581/00; judgment in the case of Lukenda v. Slovenia of 10.06.2005, application no. 23032/02; judgment in the case of Jazbec v. Slovenia of 14.12.2006, application no. 31489/02, judgment in the case of Varacha v. Slovenia of 09.11.2006, application no. 9303/02; judgment in the case of Budayeva and Others v. Russia of 20.03.2008, applications no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment in the case of Károly Hegedűs v. Hungary of 03.11.2011, application no. 11849/07).

It should also be noted that **the injured party shall also have a wide discretion in the realization of the right to compensation for the caused harm.** In particular, the injured party may either take advantage of the opportunity to protect his/her rights through criminal proceedings, or may not take advantage of this opportunity and apply to civil proceedings for the compensation of the caused harm. The injured party may also not at all realize the right to compensation for the caused harm. With this in mind, in part 2 of article 4 of the Law the legislator has prescribed the provision “can be”, and left this question to the discretion of the injured party.

The Constitutional Court states that, regardless of the circumstances whether the injured party realizes his/her right to compensation for the harm caused within the framework of criminal proceedings or civil proceedings, the norms of civil-procedural legislation shall apply (in the Criminal Procedure Code, the relevant regulations are prescribed by the norms of chapter 20 titled “Civil suit in criminal proceedings”). Compensation for the harm caused to the injured party is provided on the basis of the norms of civil-procedural legislation, as well as through the enforcement of judicial acts within the framework of the proceedings initiated on the basis of the enforcement order.

The Constitutional Court considers that since the issues of establishing essential (principal) details in connection with the judicial procedures are beyond the scope of regulation of the Law, therefore the legal regulation of the Law, according to which, if amnesty is applied, the issue of compensation for

the harm caused to the injured party, as prescribed by an enforceable judgment, can be resolved in accordance with the procedure prescribed by the Civil Procedure Code (part 2 of article 4), follows from the above-mentioned general legal regulations, and there are sufficient legislative guarantees for the realization of the right of the injured party to compensation in court for the caused harm.

At the same time, the Constitutional Court notes that, based on considerations of implementing the constitutional requirements of establishing the institutional mechanisms and procedures necessary for the implementation of the right to effective judicial protection prescribed by the Constitution, as well as fundamental rights and freedoms, ensuring the full and effective legislative development of the right of the injured party to compensation for the caused harm, is the competence of the National Assembly.

Based on the review of the case and governed by clause 1 of article 168, part 4 of article 169, parts 1 and 4 of article 170 of the Constitution, articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. Part 2 of article 4 and related part 10 of article 2 of the Law “On Proclaiming Amnesty on Criminal Matters on Occasion of the 2800 Anniversary of Erebuni Yerevan and 100th Anniversary of Independence of the First Republic” are in conformity with the Constitution.
2. Pursuant to part 2 of article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman

H. Tovmasyan

February 26, 2019

DCC -1447