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 ARTICLE 35 AND PART 2 OF ARTICLE 135 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF ROBERT KOCHARYAN

Yerevan September 4, 2019

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

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

the representative of the applicant: A. Vardevanyan, advocate,

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

pursuant to clause 1 of article 168, clause 8 of part 1 of article 169 of the Constitution, and articles 22 and 69 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of article 35 and part 2 of article 135 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Robert Kocharyan.

The Criminal Procedure Code of the Republic of Armenia (hereinafter also referred to as the Code) was adopted by the National Assembly on 01.07.1998, signed by the President of the Republic on 01.09.1998, and entered into force on 12.01.1999.

The challenged article 35 of the Code, titled: “Circumstances Excluding Criminal Prosecution”, prescribes:

“1. Criminal case cannot be instituted and criminal prosecution may not be carried out, and the proceedings in the initiated case shall be terminated:

1) in the absence of criminal act;

2) if the alleged act contains no corpus delicti;

3) if the act, which caused damages, is considered legitimate by the criminal law;

4) if the complainant’s appeal is missing in the cases prescribed by this Code;

5) if the injured party and the suspect or the accused have come to terms in cases prescribed by this Code;

6) the limitation period has expired;

7) if there is a final verdict against the person that entered into legal force, or other court decision on the same charge which establishes the impossibility of criminal prosecution;

8) if there is an unrevoked decision of the body conducting the initial inquiry, investigator and prosecutor against the person on refusal to carry out criminal prosecution on the same charge;

9) if at the moment of commitment of the crime the person had not reached the age of criminal responsibility as prescribed by law;

10) if the person deceased except for the cases when the proceedings are necessary to rehabilitate the rights of the deceased or to resume the case due to new circumstances with regard to other persons;

11) if the person voluntarily renounced to complete the commission of the crime, unless actually committed action does not contains other corpus delicti;

12) if the person is liable to exemption from criminal liability as prescribed in the General Part of the Criminal Code of the Republic of Armenia;

13) if a law on amnesty is adopted.

1^1. Clause 10 of the first part of this article does not apply to the cases of the pronouncement of the person’s death in the manner prescribed by the Civil Procedure Code. The pronouncement of the person’s death in the manner prescribed by the Civil Procedure Code is considered as grounds for terminating the criminal prosecution of a person and suspension of criminal proceedings only in accordance with the decision of the Prosecutor General of the Republic of Armenia.

2. Criminal prosecution is subject to termination and the proceedings of the case are subject to suspension in case of failure to substantiate the commitment of crime by the suspect or the accused, if further possibilities of obtaining new evidences have been exhausted.

3. At any stage of pre-trial proceedings, the prosecutor and the investigator, having ruled out the circumstances of the proceedings in the case, shall make a decision on suspension of the case proceedings or termination of the criminal prosecution. The prosecutor is entitled to render a decision on suspension of case proceedings or termination of the criminal prosecution also after sending the case to the court, but prior to hearing of the case.

4. If the prosecutor, having revealed at the court the circumstances ruling out the proceedings in the criminal case, shall be obligated to pronounce his/her refusal from exercising criminal prosecution against the defendant. The pronouncement of the prosecutor on refusal from exercising criminal prosecution against the defendant shall serve as grounds for the court to suspend the proceedings of the criminal case and terminate the criminal prosecution.

5. The court, having revealed the circumstances ruling out the proceedings in the criminal case, resolves the issue of termination of the criminal prosecution against the defendant.

6. Based on clauses 6 and 13 of this article, suspension of the case and termination of criminal prosecution is not permitted if the defendant objects. In these cases the proceedings continue in the ordinary manner.

Refusal to initiate proceedings, suspension of proceedings and termination of criminal prosecution on the grounds specified in clause 13 of part 1 of this article is not allowed if the damage caused is not compensated or this issue is not settled otherwise or there is a dispute in connection with the damage to be compensated. In this case, the proceedings also continue in the ordinary way. The regulation prescribed in this paragraph is valid unless otherwise prescribed by the law on amnesty".

Part 2 of the challenged article 135 of the Code, titled: "Basis for Application of Preventive Measures", prescribes:

"2. Detention may be applied to the accused if there is a reasonable suspicion that s/he/ committed such a crime for which the prescribed judicial time-limits of imprisonment exceeds one year, and there are sufficient reasons to believe that the accused may perform any action prescribed in part 1 of this article".

The case was initiated on the basis of the application of Robert Kocharyan submitted to the Constitutional Court on 29 May 2019.

Having examined the application and the attached documents, the written explanations of the parties, other documents of the case, as well as the relevant regulations of the Code, the Constitutional Court **FOUND:**

1. Applicant's arguments

The applicant considers that the interpretation used in the law-enforcement practice of part 2 of article 135 of the Code, as well as article 35 of the same Code contradict articles 27 and 63 of the Constitution.

According to the applicant, the reasonable suspicion prescribed in part 2 of article 135 of the Code cannot be considered as a mechanism for assessing the functional immunity of the President of the Republic, taking into account the essence of immunity in general and the pursued goals, since the latter is also aimed at protecting persons enjoying this guarantee, as well as from the perspective of assessment of reasonable suspicion.

Meanwhile, the applicant considers that, in the framework of the criminal case subject to consideration, by the decision of the Cassation Court of 15 November 2018 the reasonable suspicion prescribed in article 135 of the Code was specifically interpreted, according to which the reasonable suspicion prescribed in article 135 of the Code is an indispensable element of functional immunity.

The applicant also presents substantiation on violating the procedure prescribed by law for restricting the right to personal freedom guaranteed by the Constitution. In particular, in this regard, the applicant states that only the circumstance that article 135 of the Code and its judicial interpretation do not refer to the procedure of application of the preventive measure and the regulations prescribed thereof, thus interpreting the rules regarding the terms of reasonable suspicion solely in practice, and this circumstance indicates a violation of the initial term for compliance with the procedure prescribed by law as a guarantee of the protection of personal freedom guaranteed by article 27 of the Constitution.

In addition, the applicant notes that the circumstance that the full assessment of the conditions prescribed by article 35 of the Code should be followed by consideration of the application on a preventive measure in the form of detention is a violation of the procedure prescribed by law for

restricting the right to personal freedom guaranteed by the Constitution, since the court may not even address the issue of detention conditioned by the circumstance excluding criminal prosecution. Having analyzed in this context the legal positions expressed by the Cassation Court in various criminal cases, the applicant considers that the preventive measure in the form of detention should not be applied until the immunity has been overcome or the issue of its existence has been clarified, i.e. this should be discussed before addressing the issue of reasonable suspicion.

Referring to the functional immunity of the retired President of the Republic guaranteed by the Constitution, the applicant notes that the interpretation of the immunity of the President of the Republic - insofar as the institution of immunity is considered exclusively in the context of the legitimate actions of the retired President of the Republic during his/her tenure - does not correspond to the Constitution, nor to the international practice. The applicant considers that the establishment of the fact of the presence or absence of official status is the starting point of disclosing the functional immunity, and with respect to the applicant the courts clearly confirmed that during the act incriminated to the applicant he was the President of the Republic, i.e. he had official status.

In this regard, the applicant also states that it is no coincidence that the Constitution does not provide a mechanism to overcome the functional immunity of the retired President of the Republic, since the will of the Founder of the Constitution *prima facie* was expressed in not addressing this issue at all if the alleged act was committed on the basis of the status of the President of the Republic; this circumstance excludes criminal prosecution.

The applicant notes that article 35 of the Code contains a legislative gap, since in a number of circumstances that exclude criminal prosecution or the proceedings of the criminal case, there is no question of non-compliance with the process related to the immunity of a person, and in the rest of the articles of the Code the institution of immunity is discussed exclusively within the framework of diplomatic immunity. Moreover, according to the applicant, the mentioned legislative gap cannot be overcome if the issue under discussion is considered from the perspective of the grounds of part 2 of article 135 of the Code.

In addition, the applicant considers that article 135 of the Code, as interpreted in law enforcement practice, contradicts article 66 of the Constitution.

In support of the above position, the applicant informs that by the decision of the Cassation Court dated 15 November 2018, as a result of interpretation and application of part 2 of article 135

of the Code, a completely new criteria has been put forward for assessing reasonable suspicion, which concerns the issue of confirming the presence or absence of functional immunity.

The applicant also submitted an objection to the argument of the respondent, noting that the respondent did not provide any contextual reference to the issue of constitutionality of the challenged provisions, as well as the issue of constitutionality of the interpretation of the challenged provisions in the framework of law enforcement practice.

2. Respondent's arguments

Referring to a number of legal regulations, in particular, the challenged provisions of the Code, constitutional provisions regarding the rule of law (article 1 of the Constitution), personal liberty (article 27 of the Constitution), fair trial (article 63 of the Constitution) and the presumption of innocence (article 66 of the Constitution), as well as the applicant's arguments, the legal positions expressed by the Constitutional Court, the practice of bodies acting in accordance with international human rights treaties ratified by the Republic of Armenia, and a number of criminal-procedural regulations, the respondent considers that personal freedom is not absolute, and the norms of constitutional and criminal law prescribe deprivation of liberty, clearly establishing such regulations, on the basis of which it can be conducted.

Referring to the alleged breach of the right to a fair trial, the respondent reiterates to a number of decisions of the Constitutional Court, which, in his opinion, relate to this issue. And with respect to the alleged violation of the presumption of innocence, the respondent states that as an objective status of the accused it does not mean that the Constitution excludes the guilt of the accused. Further, the respondent cites the legal assessments regarding the presumption of innocence expressed in the Decision DCC-871 of the Constitutional Court.

Based on the foregoing, the respondent concludes that the legal provisions prescribed in article 35 and part 2 of article 135 of the Code are consistent with constitutional requirements for personal liberty, fair trial and the presumption of innocence.

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

For the determination of the constitutionality of the provisions challenged in the present case, the Constitutional Court considers it necessary, in particular, to address the following issue:

- Does the Code contain legislative mechanisms and procedures necessary for the effective protection of officials endowed with immunity by the Constitution, from prosecution and liability for actions related with their status or activities during or after their term?

Considering the legal positions expressed in the Decision DCC-1453 of 16 April 2019 mainly applicable also in the present case, the Constitutional Court, in the framework of the issues raised in the application, states that the provisions challenged by the applicant regarding the evidence of the applicant's guilt in the criminal case are not still applied, and the applicant challenges their constitutionality in framework of the interpretation of these provisions in law enforcement practice, by virtue of which it has become possible to bring charges and select detention as a preventive measure.

At the same time, the Constitutional Court states that the resolution of lawfulness of the charges in the present case and, therefore, the detention is conditional on the constitutional guarantees of the immunity of the retired President of the Republic. Taking into account that the applicant raises the issue of the legislative gap in article 35 of the Code from this perspective as well, the Constitutional Court considers that the alleged absence of legislative application of constitutional guarantees of immunity of the retired President of the Republic in a number of circumstances excluding criminal prosecution or the proceedings of the criminal case, may directly lead to unjustified (from the perspective of the Constitution) restriction of his/her rights to personal freedom, as well as judicial protection and fair trial. Consequently, in order to assess the legitimacy of the charge and, as a consequence the detention, it is essential that not only the criminal law underlying the charge but also **the provisions of the criminal-procedural law regulating the criminal prosecution must comply with the Constitution, which also includes that the criminal-procedural law must contain no legislative gaps contradicting the Constitution**.

Based on the foregoing, the Constitutional Court considers and resolves the present case within the framework of the issues raised in the application not from the perspective of the alleged substantial breach of the constitutional guarantees of immunity of the retired President of the Republic (which is impossible within the framework of the application and taking into account the prerequisites for admissibility of the individual application), but from the perspective of ensuring the legality of the charge due to the functional immunity of the officials (including the retired President of the Republic) endowed by the Constitution, taking into account the direct impact of constitutional guarantees of functional immunity of an official to his/her fundamental rights and

freedoms guaranteed by the Constitution, as well as the facts of the existence of a final judicial act and exhaustion of remedies.

Thus, the Constitutional Court considers the provisions challenged in the present case from the perspective of their compliance with clause 4 of part 1 of article 27, part 1 of article 61, part 1 of article 63 and article 75 of the Constitution.

4. Legal assessments of the Constitutional Court

4.1. The Constitution endowed a number of officials who exercise important constitutional functions with immunity, the purpose of which is, first and foremost, to guarantee the normal and efficient activities of these persons, as well as to protect them from unlawful interference with their powers and unreasonable prosecution.

At the same time, the content of constitutional immunity is not uniform or the same for officials endowed with immunity, and depending on the status of a particular official, immunity has a different scope and procedures for overcoming.

Thus, according to part 1 of article 96 of the Constitution, during and after the term of office, a deputy of the National Assembly may not be prosecuted and held liable for the voting or opinions expressed in the framework of parliamentarian activities. This immunity right shall also apply to the Human Rights Defender (first sentence of part 1 of article 193 of the Constitution).

According to part 2 of article 140 of the Constitution, during and after the term of office, the President of the Republic may not be prosecuted and held liable for actions related with his/her status.

According to part 2 of article 164 of the Constitution, a judge may not be held liable for opinions expressed or judicial acts rendered in the course of administering justice, unless features of a crime or disciplinary offence are present.

The provision of additional constitutional protection to the above officials is determined by their special constitutional status and by the content of their functions arising from it (hereinafter referred to as functional immunity). At the same time, the Constitution provides another guarantee of immunity, which also protects some officials from harassment not related with their status or activity (hereinafter - personal immunity). However, in this matter the regulations are not identical either.

From the above constitutional norms, it follows that the deputy of the National Assembly, the President of the Republic and the Human Rights Defender enjoy *both functional and personal immunity* during their term of office, and after that term they enjoy *only functional immunity*. Meanwhile, judges are endowed only with functional immunity and do not enjoy personal immunity. By virtue of the regulation envisaged in the Constitutional Law Judicial Code of the Republic of Armenia (part 5 of article 83), a similar protection is also provided for those members of the Supreme Judicial Council that are elected by the National Assembly.

With respect to the constitutional guarantees of the immunity of the President of the Republic, the Constitutional Court states that the President of the Republic enjoys the unlimited duration of functional immunity (parts 1 and 2 of article 140 of the Constitution. Identical regulations also existed in parts 1 and 2 of article 56.1 of the Constitution with amendments of 2005). As for the personal immunity of the President of the Republic, it is valid only for the term of his/her office and is suspended after the end of this term (part 3 of article 140 of the Constitution. Identical regulations also existed in part 3 of article 56.1 of the Constitution with amendments of 2005).

The comprehensive analysis of the constitutional norms guaranteeing the immunity of the President of the Republic shows that the Constitution does not provide for a public authority competent to overcome the personal immunity of the President of the Republic during his/her term of office, and such a procedure is not predetermined. Of course, this does not mean the exclusion of the legal possibility of holding the President of the Republic accountable, as the impeaching from office of the President of the Republic prescribed in article 141 of the Constitution, which is an indirect mechanism for the early termination of the guarantee of his/her personal immunity, leads to the suspension of his/her powers earlier than the term established by the Constitution, which in turn, allows initiating proceedings against him/her.

At the same time, the Constitutional Court states that the Constitution does not prescribe a special procedure, in the framework of which the actions, which serve as grounds for holding the retired President of the Republic accountable, can be assessed by any state body as related or not with the status of the President of the Republic.

4.2. The Constitutional Court states that article 35 of the Code exhaustively lists a number of factual and legal grounds, and the confirmed presence of those circumstances excludes the criminal prosecution or continuation of criminal proceedings against a specific person.

Reiterating the legal position expressed in its Decision DCC-871 of 30 March 2010 that the grounds for suspension of the proceedings of the case and termination of criminal prosecution or grounds for the joint application of these two institutions are not clearly delineated in parts 1 and 2 of article 35 of the Code, the Constitutional Court at the same time states that by virtue of the regulations prescribed in parts 3-5 of the aforementioned article, they are a mandatory prerequisite for issuing the relevant procedural solutions by the body conducting criminal proceedings. The cases prescribed in part 6 of article 35 of the Code are the only exceptions, which establish additional guarantees for the protection of the rights and legitimate interests of the accused and the victim and due to certain conditions, they prohibit the body conducting criminal proceedings from terminating the criminal prosecution and completing the proceedings of the case.

The Constitutional Court considers that the goal of the institutions of suspension of criminal proceedings and termination of criminal prosecution is primarily to secure the procedural guarantees for the exercise of the fundamental rights of a person suspected or accused of committing a crime, including the right to a fair trial, the presumption of innocence and the right not to be tried or punished twice, as well as the establishment of an effective organizational mechanism and procedure for the implementation of criminal proceedings. *Thus, their incomplete or improper legal regulations directly jeopardize the implementation of this goal*.

Turning to the application by the courts of article 35 of the Code in the criminal case indicated in the application in the present case, the Constitutional Court states that the courts, without directly interpreting article 35 of the Code, essentially applied it: they interpreted article 140 of the Constitution, specifying within their perception the purpose and scope of the functional immunity of the President of the Republic, including the retired President. In addition, it should be noted that the application of detention as a preventive measure is impossible without establishing the existence of circumstances excluding criminal proceedings or criminal prosecution, regardless of whether this article is formally mentioned in a judicial act or not. It is also a fact that the courts turned to the interpretation of the immunity of the retired President of the Republic as prescribed in the Constitution as excluding criminal liability.

In the Decision DCC-747 of 4 April 2008, referring to the term on applying the provision of the law, the Constitutional Court expressed the legal position that this term does not mean any reference to the provision of the law in judicial acts. The application of the law **must lead to legal consequences for the person**. This means that a formal reference to the provision of the law in the

final judicial act does not imply that it was not applied to the applicant if it has led to legal consequences for the latter. In this case, a charge was brought and detention was applied as a preventive measure. **Moreover, in the case of a legislative gap, no specific reference to the provision in the judicial act is required for the Constitutional Court to address the constitutionality of that gap, as otherwise the legislative omissions made by the legislator, which may violate or violate the fundamental rights and freedoms of the person, cannot be examined or overcome by the Constitutional Court, whereas the Constitutional Court has developed a long-standing and coherent practice in this respect by expressing precise legal positions**.

In the present case, the Constitutional Court states that by interpreting the Constitution, the courts have tried to fill the gap in the criminal-procedural law, namely, in the framework of judicial control over pre-trial criminal proceedings, which indicates that they have acknowledged and designated the predetermining importance of immunity for the charge, therefore also for the legitimacy of detention[1].

The Constitutional Court states that the courts did not have any grounds prescribed in the ordinary law for the application of the criminal procedural consequences of constitutional immunity, since the Code did not empower them with such authority.

Thus, **by virtue of the Constitution** the functional immunity **is a circumstance that excludes criminal liability** and a criminal procedure; so it should be specified first of all in the relevant article 35 of the Code so that the competent authorities *have procedural grounds for its application in framework of criminal proceeding*.

4.3. As for the other relevant provisions of the Code, according to clause 3 of part 1 of article 31 of the Code, criminal proceedings may be completely or partly suspended upon a decision of the prosecutor, the investigator or the court, if the accused or the person with regard to whom sufficient evidence is available to charge with an offense, is immune from criminal prosecution. According to part 5 of article 31 of the Code, the proceedings of the criminal case are suspended until the elimination of the circumstances which served as grounds for its suspension. After their elimination, the proceedings are resumed by the decision of the prosecutor, the investigator or the court.

[1] In the relevant part, see, in particular, clauses 19-21 of the Decision No YD/0743/06/18 of 7 December 2018 of the Criminal Court of Appeal of the Republic of Armenia.

The Constitutional Court states that the aforementioned article of the Code, by virtue of enjoying immunity from criminal prosecution by a person, the body conducting proceedings is endowed by the discretionary power to suspend temporarily the criminal process, but it does not specify either the constitutional status of the person or the type of immunity (functional or personal). Consequently, this regulation applies equally to all individuals endowed with constitutional immunity.

At the same time, the Constitutional Court states that the Code also includes other general regulations regarding persons who are immune from criminal prosecution, in particular clause 11 of part 2 of article 53, second paragraph of part 2 of article 136, and second paragraph of part 1 of article 295 of the Code.

The Constitutional Court notes that the Code does not contain any *special and necessary regulations following from the Constitution* that during the initiation and prosecution of officials endowed with functional immunity would allow assessing whether or not the action or inaction attributed to them relates or has related with their current or former status or activity.

Consequently, the issue of the availability of functional immunity of these persons should be resolved within the framework of general criminal-procedural regulations by the investigator or prosecutor in pre-trial proceedings, and by the court - in judicial proceedings.

The Code, however, does not prescribe the legal consequences that would arise if the competent authority comes to the conclusion that an action or inaction attributed to a person endowed with functional immunity relates with his/her status or activity. **Moreover, in all cases where it turns out that the act attributed to the person is connected with an action or inaction related with his/her status or activity, or it is confirmed that the criminal prosecution already initiated against him/her is incompatible with his/her functional immunity, the competent authority will objectively be deprived of the legal possibility of non-initiation of criminal prosecution or termination of the already initiated criminal prosecution against the person on the basis of functional immunity, as well as the adoption of a legitimate decision on not applying detention, as there is no procedural basis for rendering such a decision**.

The Constitutional Court states that, in accordance with the *general criminal-procedural regulations*, the *sufficient combination of evidence* proving that the person has committed a crime is the basis for attracting him/her as an accused, and only in the case of presence of this basis the investigator and the prosecutor shall issue a reasoned decision to attract a person as an accused

(parts 1 and 2 of article 202 of the Code). In this aspect, the Constitutional Court considers that **the charge against persons endowed with immunity by virtue of the Constitution and in this connection under special protection (including the retired President of the Republic), including from the perspective of reasonable doubt, should meet the additional and preliminary mandatory requirement of legitimacy, i.e. the act incriminated to these persons, including the facts underlying it, should not relate to such action or inaction that relates or has related with their status or activities**. Otherwise, criminal prosecution with respect to the persons endowed with functional immunity cannot be instituted, and the initiated criminal prosecution and all further actions must be acknowledged as unlawful and terminated immediately.

Therefore, **the legislator is obliged to establish clear regulations that, from the perspective of functional immunity, will allow conducting effective prosecutorial supervision and judicial control over pre-trial criminal proceedings, as well as, in addition to general requirements, assess the legitimacy of criminal prosecution to be initiated or already initiated against persons endowed with functional immunity, and consequently, the application of detention**.

4.4. In a number of decisions, the Constitutional Court addressed the issues of the legislative gap (in particular, DCC-864, DCC-914, DCC-922, DCC-1020, DCC-1056, and DCC-1143).

Reiterating and developing the legal positions regarding the legislative gap, the Constitutional Court considers:

1) the legislative gap may become the subject of consideration by the Constitutional Court in the event that it is a *deficiency of legal regulation*, and not the will of a law-making body; in this case, the legislator's will to refrain from legal regulation perceived as a legislative gap;

2) not every imperfect legislative regulation may become the subject of consideration of the Constitutional Court, but only *such a legislative gap that cannot be overcome by the interpretation and application of other relevant legal regulations*;

3) the legislative gap should have led to a contradictory law enforcement practice that cannot be overcome or that has not actually been overcome by ordinary courts;

4) the legislative gap exists in the case when due to the absence of an element ensuring the integrity of the legal regulation or imperfect regulation of this element, **the fully-fledged and normal implementation of the legislatively regulated legal relations** is violated;

5) in cases where a gap in law is due to the absence of a normative requirement regarding specific

circumstances within the sphere of legal regulation, overcoming such a gap is within the competence of the legislative body. Within the framework of the consideration of the case, the Constitutional Court refers to the constitutionality of any of the gaps in the law if, due to the content of the challenged norm, the legal uncertainty led to such an interpretation and application of this norm in law enforcement practice **that violates or may violate a specific constitutional right**.

Based on the foregoing, the Constitutional Court states that the regulations conditioned by the functional immunity of the officials, who are under special protection by virtue of the Constitution, are not properly defined in the Code, as a result of which the competent authorities have no obligation to establish whether or not from the perspective of the act, the charges brought against these persons concern the action or inaction related with their status or activity. Moreover, **as a result of this, the court conducting judicial control, from the perspective of the functional immunity of these persons, is not obliged to verify the legitimacy of the charges even when arrest is applied, although detention is a more intense interference with their personal freedom**.

The peculiarities of the constitutional provisions concerning the functional immunity of the retired President of the Republic are not realized in the Code, thus entailing diverse interpretations of the latter made by different courts, which, inter alia, also indicates the absence of other legal possibilities to fill in that legislative gap in the Code.

Such a situation can lead to the situation that in respect of individuals endowed with functional immunity (including the retired President of the Republic) criminal prosecution may be instituted and carried out, as well as they may be subjected to criminal liability for such actions, which derived from their status or activities. That is, unlawful and unreasonable charges may be brought against these individuals, and they will not be endowed with the possibility to effective judicial protection against this charge due to their functional immunity likewise.

As for functional immunity, within the framework of selecting detention as a preventive measure, the competent authority must also bear the additional responsibility for justifying the legitimacy of the charge. Meanwhile, the absence of its legislative consolidation affects the fundamental right to personal liberty, as well as the right to a fair trial of persons endowed with functional immunity (including the retired President of the Republic), thus making in practice the criminal prosecution (which is unlawful from the perspective of the Constitution) for the action or inaction related with the status or activity of the latter, which, in terms of the absence of the grounds

for non-initiation or termination of criminal prosecution on the basis of immunity in the criminal-procedural law, may also lead to a breach of the fundamental right to effective judicial protection.

Having regard to the relevant case-law of the European Court of Human Rights, the Constitutional Court considers it necessary to note that the European Court considers that in respect with "lawfulness" of deprivation of liberty, the Convention for the Protection of Human Rights and Fundamental Freedoms refers to the domestic legislation and establishes that it must comply with substantive and **procedural rules** of national law. First of all it requires that **in domestic legislation, any detention or arrest shall have a legal basis, but it also concerns the quality of the law**, **requiring it** to comply with the rule of law - a concept that is reflected in all articles of the Convention (see, in particular, the Judgment Kafkaris v. Cyprus (GC), § 116, in the case No. 21906/04 of 12.02.2008, and the Judgment Del Rio Prada v. Spain (GC), § 125, in the case No. 42750/09 of 21.10. 2013; highlighted by the Constitutional Court).

Thus, the Constitutional Court considers that **there is a legislative gap in article 35 of the Code, namely, there is no legal basis according to which criminal prosecution will not be carried out for the officials who, by virtue of the Constitution, are under special protection and the proceedings of the criminal case is terminated in all the cases when due to legal procedure the competent authority determines the presence of their functional immunity. The presence of functional immunity in any case must be confirmed or denied by the combination of facts revealed by the body conducting criminal proceedings and served as a basis for the charge brought against the individual.**

4.5. The applicant also raised the issue of the contradiction of part 2 of article 135 of the Code with the Constitution, in accordance with the interpretation used in the law enforcement practice, especially of article 66 of the Constitution.

The Constitutional Court considers that part 2 of article 135 of the Code is not controversial from the perspective of constitutionality, since it concerns the general prerequisites for detention and could not contain special regulations regarding individuals endowed with immunity; therefore no legislative gap could exist.

As regards the alleged contradiction of this challenged provision with article 66 of the Constitution, first of all, it cannot contradict the presumption of innocence only with respect of the applicant or other persons endowed with functional immunity. In addition, given the general nature of part 2 of article 135 of the Code and the presence of a legislative gap in article 35 of the Code,

the judicial practice could not ensure the application of this provision with respect to the persons who, by the force of the Constitution, are endowed with special protection, taking into consideration the peculiarities of the status of each of them and, resulting from this, the difference in the contents of immunity, which could not be disclosed in the absence of clearly established and differentiated positive-legal formulations.

The assessment of the alleged incorrect application of the challenged provision within the framework of the interpretation of solely the ordinary law by the courts is beyond the competence of the Constitutional Court.

Based on the review of the case and governed by clause 1 of article 168, clause 8 of part 1 of article 169, and article 170 of the Constitution, Articles 63, 64 and 69 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. To declare article 35 of the Criminal Procedure Code of the Republic of Armenia in part of not prescribing the functional immunity of officials who, by virtue of the Constitution, are endowed with special protection, among the grounds excluding the proceedings of criminal case or criminal prosecution contradicting clause 4 of part 1 of article 27, part 1 of article 61, part 1 of article 63 and article 75 of the Constitution and invalid.

2. Part 2 of article 135 of the Criminal Procedure Code of the Republic of Armenia is in conformity with the Constitution.

3. 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**

September 4, 2019
DCC -1476

DISSENTING OPINION

ON THE CASE OF CONFORMITY OF ARTICLE 35 AND PART 2 OF ARTICLE 135 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF ROBERT KOCHARYAN

This dissenting opinion is presented in regard to both the motivation part and part 1 of the operative part of the Decision DCC-1476 of September 4, 2019 (hereinafter referred to as the Decision) of the Constitutional Court.

I do believe that the proceedings on the case of conformity of article 35 and part 2 of article 135 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Robert Kocharyan should be terminated on the basis of clauses 1 and 2 of part 1 of article 29, clause 1 of part 1 of article 60 of the constitutional law on the Constitutional Court with the following reasoning.

1. According to clause 8 of part 1 of article 169 of the Constitution, "1. The following may apply to the Constitutional Court: … 8) everyone — under a specific case where the final act of court is available, all judicial remedies have been exhausted, and he or she challenges the constitutionality of the relevant provision of the normative legal act applied against him or her upon this act, which has led to the violation of his or her basic rights and freedoms enshrined in Chapter 2 of the Constitution, taking into account also the interpretation of the respective provision in law enforcement practice". Actually, in a similar form, this constitutional regulation is also reproduced in part 1 of article 69 of the constitutional law on the Constitutional Court.

According to clause 2 of part 1 of article 29 of the same constitutional law, the Constitutional Court shall render a procedural decision on the full or partial refusal to consider a case if the applicant is not entitled to apply to the Constitutional Court on this matter. A person is not competent to apply to the Constitutional Court if the individual application does not contain any of the conditions specified in part 1 of article 69 of the constitutional law on the Constitutional Court (PDCC-21 dated 17.03.2009). One of such terms, inter alia, is the application of a challenged normative legal act or provision with respect to the person and the

occurrence of legal consequences for the person. In cases where the absence of the specified condition, that is, the non-application of the challenged normative legal act or position and the non-occurrence of legal consequences for the person, is disclosed after the adoption of the case on the basis of an individual application, the proceedings of this case shall be terminated by force of clause 1 of part 1 of article 60 of the constitutional law on the Constitutional Court (for more details, see the third and fourth paragraphs of clause 5 of the Decision DCC-1238 of the Constitutional Court adopted on 01.01.2015).

In its Decision DCC-747 of April 4, 2008 the Constitutional Court, revealed the constitutional and legal content of the concept of "application of the normative-legal provision" and, in particular, noted: "The Constitutional Court finds that the concept of "application" used in the phrase …" provisions of the law applied with respect to him\her ..." prescribed in part 6 of article 101 of the Constitution of the Republic of Armenia, as well as the phrase "... and did not apply" prescribed in part 2 of article 60 of the RA Law on the Constitutional Court does not refer to any a particular provision of the law expressed in judicial acts. It may be considered as "application" of a provision of the law only if it causes legal consequences for a person. In all cases where the reference is informative or by the means of which it the attention of the party to the proceedings is drawn to the legality of its action and from the point of view of increasing the constitutionality of the issue, this cannot be regarded as an "application" of the provisions of the law.(point 5, para.2).

Based on the study of interim judicial acts issued in a court case that formed the preconditions for submitting an individual application to the Constitutional Court in the present case, it must first be noted that they lack judgments regarding the term "gap" in the law or a legislative "gap". None of the judicial acts in the case YD/0743/06/18 mentioned such a "gap" in the aspect of any of the rights guaranteed by the Constitution, as well as in the aspect of the threat of violation of "functional" independence and the need to overcome it. Moreover, in the framework of the same case, the RA Court of Appeal by a decision of August 13, 2018 considering as confirmed the fact of immunity, did not touch upon the presence or absence of the terms and grounds for detention, and, in fact, it was for this reason that it dismissed and changed the decision of the Court of First Instance and rejected the application for detention. In fact, the court did not find any procedural obstacle, including a "legislative gap" for rejecting detention on the basis of immunity, otherwise it would be the Court of Appeal that would be obliged to

suspend the proceedings and apply to the Constitutional Court on the relevant issue. It is also worth emphasizing that none of the acts mentioned in article 35 the "gap" as an obstacle to resolve the issues related to criminal prosecution or detention of a person for the actions based on the status. I am sure that this is not an "accidental" omission or, moreover, not the desire to use this "gap" to the detriment of any subject.

The Cassation Court, presenting its position on the matter at issue, was, inter alia, guided by the requirements of articles 27 and 140 of the Constitution and as such not any "gap" is reiterated in the procedural code. The Constitution included corresponding norms, and there were no obstacles for their direct application. In other words, the Cassation Court did not follow the path of formalism in the interpretation and application of rights and directly applied the relevant norms of the Constitution, which were vested both in the Constitution and in the procedural code.

In view of the foregoing, I believe that article 35 of the RA Criminal Procedure Code has not been applied and has not caused any consequences for the applicant, therefore, in the above-mentioned judicial acts there could not be any objective judgments regarding the "gap in law". The courts, as the basis excluding criminal prosecution, brought article 140 of the Constitution to discussion, interpreted and applied this article, therefore, for the applicant, the corresponding consequences were not caused by article 35 of the Criminal Procedure Code, but by article 140 of the Constitution. The legal act challenged specifically in the present case, or its provision, or a gap therein, would cause legal consequences for the applicant only if, as a result of this gap, the law enforcement body did not take into account the functional immunity motivating that it is not prescribed in article 35 of the Code, that is, if the court argued that the criminal prosecution of a person cannot be terminated due to non-provision of functional immunity.

Meanwhile, the provision or non-provision of functional immunity in the challenged provision did not matter in terms of causing legal consequences for the applicant, and causing legal consequences is an indispensable condition for the Constitutional Court to accept the case on the basis of an individual application. I would like to repeat that the Court turned to functional immunity by directly applying the provisions of articles 27 and 140 of the Constitution. In addition, it was precisely expressed in the Decision that "by interpreting the Constitution, the courts tried to fill the gap in the criminal procedure law, moreover, in the framework of judicial control over pre-trial criminal proceedings, which indicates that they admitted and indicated the

pre-emptive importance of immunity for the prosecution, therefore also for the lawfulness of the detention" (sixth paragraph of clause 4.2).

2. In addition to the above-mentioned grounds, it is also necessary to discuss the issue whether or not the "legislative gap" in the challenged provision could have raised the issue of constitutionality of protecting fundamental human rights, or whether it was impossible to overcome this gap through the direct application by law enforcement bodies (in this case - the courts) of norms from other sources of law, including the relevant provisions of the Constitution, so as to guarantee the protection of fundamental human rights. In other words, has this individual application on the "gap of law" with the necessary and mandatory conditions for accepting a case for consideration by the Constitutional Court on this basis, regarding the content of which the Constitutional Court expressed its legal assessments?

Thus, with regard to such a legal phenomenon as "a gap in the law" or "a legislative gap", the Constitutional Court has consistently formed and developed sufficiently defined, stable and comprehensive positions. Below are some of them:

- "6. … In addressing the gap in the law, considering the competence of the legislative body and the Constitutional Court in the context of the principle of separation of powers, the Constitutional Court considers it necessary to state that in all cases where the gap in the law is due to the absence of a normative requirement with respect to specific circumstances in the field of legal regulation, overcoming such a gap is within the competence of the legislature.

- "7. When considering the constitutionality of the legislative gap, the task of the Constitutional Court is to find out whether this legislative gap is due to a deficiency of legal regulation or the law-making body, when establishing such legal regulation, took into account the existence of relevant legal guarantees in the legislation and anticipated the formation of the appropriate law enforcement practice on the basis of these legal guarantees ...

Developing its aforementioned legal assessments (expressed in the Decision DCC-864 of February 5, 2010, /quotation in the parenthesis is made by the author/), the Constitutional Court considers that the legislative gap can be considered by the Constitutional Court only if there are other legal guarantees to fill this gap in legislation or even if there are relevant legal guarantees in the legislation, a contradictory law enforcement practice has been formed, or when the existing legislative gap does not provide the possibility of implementation of any other right.

Otherwise, the issue of constitutionality of the gap in legal regulation is not subject to consideration by the Constitutional Court" (DCC-914 of September 14, 2010):

- "In a number of decisions, in particular in DCC-864 and DCC-914, regarding the competence of considering the issue of constitutionality of a gap in the law, the Constitutional Court expressed its legal assessments that the normative legal solution of a gap of legal regulation is the competence of the legislative branch. In particular, according to the above-mentioned Decisions, "in overcoming the gap in the law, considering the competence of the legislative body and the Constitutional Court in the context of the principle of separation of powers, the Constitutional Court considers it necessary to state that in all cases where a gap in the law is due to the absence of a normative requirement with respect to specific circumstances in the scopes of the legal regulation, overcoming such a gap is within the competence of the legislative body "(DCC-933 of January 25, 2011);

- "6. ... In such circumstances, the Constitutional Court considers it necessary to discuss the relationship between the legislative gap and the lack of legislative stipulation of definitions of legal terms. In connection with the aforementioned, the RA Constitutional Court considers it appropriate to state that the legislative gap cannot be mechanically identified only with the absence of a legislatively defined stipulation of a particular term. A legislative gap exists when, due to the absence of an element ensuring the integrity of legal regulation or its insufficient regulation, the coherent and natural implementation of legislatively regulated legal relations is violated.

"

The Constitutional Court of the Republic of Armenia, in a number of decisions, in particular DCC-864, DCC-914 and DCC-933, regarding the authority to consider the issue of constitutionality of a gap in the law, expressed the legal assessment that the normative legal solution of a gap in the legal regulation is the competence of the legislative body. In particular, in accordance with the legal assessments expressed in the aforementioned decisions, considering the competencies of the legislative body and the Constitutional Court in overcoming gaps in the law in the context of the principle of separation of powers, the Constitutional Court considered it necessary to state that in all cases where a gap in the law is due to the absence of a normative requirement with respect to specific circumstances of the legal regulation, overcoming such a gap is within the competence of the legislator.

The Constitutional Court considers that the current problem is caused not by the various interpretations of the challenged norm, but simply due to the fact that the legislator has not clarified the concepts used in the law. The current situation is a gap in the legal regulation that must be overcome within the competence of the National Assembly of the Republic of Armenia" (DCC-1143 of April 8, 2014);

"The Constitutional Court of the Republic of Armenia, in the Decision DCC-1143 of April 8, 2014, clearly distinguished between those cases of inferiority of legislative regulations that can be considered by the Constitutional Court, and the cases, when the legislative body is exclusively empowered to resolve such cases

In clause 6 of the given Decision, the Constitutional Court expressed the following fundamental legal assessments:

a) "... A legislative gap exists when, due to the lack of an element ensuring the fullness of legal regulation, or its insufficient regulation, the coherent and natural implementation of legally regulated legal relations is violated";

b) "considering the competences of the legislative body and the Constitutional Court in overcoming the gap in the law in the context of the principle of separation of powers, ... in all cases where the gap in the law is due to the absence of a normative requirement due to specific circumstances in the legal regulation, overcoming of such a gap is within the competence of the legislator" (DCC-1154 of June 10, 2014);

- "4.3. … The Constitutional Court addressed the issue of constitutionality of the legislative gap in a number of decisions, in particular in the Decisions DCC-864, DCC-914, DCC-917, DCC-922, DCC-933, DCC-1020, DCC-1056, DCC-1143, DCC-1154 and DCC-1255. Reiterating and developing in the framework of the present case the positions expressed in the abovementioned Decisions, the Constitutional Court considers that **there is no legislative gap in all cases where issues related to the alleged legislative gap are directly regulated by the Constitution** " (DCC-1434 of November 6, 2018.

The above-mentioned legal assessments in the complex define clear and predictable boundaries of the permissible framework for constitutional review of "a gap in law" or "a legislative gap", and establish certain criteria for admissibility of applications regarding the constitutionality of these gaps.

Thus, according to the legal assessments of the Constitutional Court, a gap in the law is the absence of a specific normative requirement regarding the actual circumstances in the legal regulation, as well as the uncertainty of legal regulation. **There can be no issue of a legislative gap when matters relating to an alleged legislative gap are directly regulated by the Constitution.** In other words, one can speak of "a gap" only when the corresponding normative requirement is absent both in the ordinary law and in the Constitution. Moreover, this circumstance is a necessary, but not sufficient condition for the Constitutional Court to consider the constitutionality of the "gap", and even more so to declare any provision of the law as contradicting the Constitution. In addition to the foregoing, the issue the constitutionality of any "gap" in the law may be the subject of consideration at the Constitutional Court if:

- the legal uncertainty caused by the content of the challenged norm in the law enforcement practice leads to such an interpretation and application of this norm that violates or may violate a specific constitutional law;
- the existing legislative gap does not provide an possibility to exercise any right;
- due to the lack of an element ensuring the integrity of the legal regulation, or its insufficient regulation, the coherent and natural implementation of legally regulated legal relations is distorted;
- there are no other legal guarantees in the legislation to fill in this gap, or even if there are relevant legal guarantees in the legislation, a contradictory law enforcement practice has been formed;
- overcoming the gap is not within the competence of the legislator.

In addition to the foregoing, in each case "when considering the issue of constitutionality of the legislative gap, the task of the Constitutional Court is to establish whether the legislative gap is a deficiency of legal regulation or the law-making body, when establishing such a legal regulation, has taken into account the existence of relevant legal guarantees in the legislation and anticipated the formation of relevant law enforcement practice on the basis of these legal guarantees...".

.The above-mentioned assessments also follow from the logic that the recognition of a gap as unconstitutional should be considered as an exceptional measure (since in any case the recognition of a norm as unconstitutional will inevitably lead to certain difficulties in law enforcement) in the system of procedures for protecting human rights and should be applied only

when, in particular, the courts cannot overcome this gap within the framework of the aforementioned and other assessments of the Constitutional Court by directly applying constitutional norms, appealing to constitutional axiology, as well as constitutional principles, including by revealing their content in the regulatory relationship of the constitutional axiology and principles with generally recognized principles and norms of international law (for more details, see N. Bondar, “Legal gaps as a category of constitutional legal defectology: research methodology and judicial practice to overcome ” // “Almanac”, Publishing House “Nzhar”, Yerevan 2016, p. 99).

The Cassation Court, in its decision of November 15, 2018, as a part of the cassation review of the decision of the Court of Appeal of August 13, 2018, having analyzed the relevant articles of the Constitution and other laws, expressed a number of assessments that were important not only from the point of view of ensuring the consistent application of the law, but they should have had a significant indirect effect on the resolution of issues related to the submission of the application in the present case and its consideration on the merits, taking into account the above-mentioned and the following assessments of the Constitution Court.

In this part of the opinion, almost literally I have quoted some excerpts from the decision of November 15, 2018 of the Cassation Court. The decision is not completely quoted purely for practical reasons, without the aim to detract the significance of the non-quoted parts compared to those quoted. I simply think that the quoted parts are enough to justify the assessments presented in this opinion. First of all, the justifications of the Cassation Court on the adoption of the cassation appeal to the proceedings deserve attention: “11. The Cassation Court considers that there is a question of ensuring a consistent application of the law regarding the correlation of the interpretation of the inviolability of the President of the Republic and the other conditions for detention as one of the conditions for selecting detention as a preventive measure and the reasonable suspicion the other condition for detention. Therefore, the Court considers necessary to express legal assessments in the present case, which may be of directive importance for the due formation of judicial practice in such cases” (p. 23).

The titles of the parts of the decision also say a lot: “I. The Institution of Immunity of the President of the Republic and the Possibility of Overcoming” (p. 23) and “II. Correlation of Reasonable Suspicion as one of the Conditions of Detention and a Feature of Immunity of the President” (p. 36).

The Cassation Court, sequentially analyzing the constitutional provisions regarding the status, functions and powers of the President of the Republic, his role in the system of state authorities (and comparing the Constitution of 2005 and the Constitution of 2015), noted that: "15. The institution of immunity guaranteed by the Constitution is the fundamental legal means for realizing the powers of the President freely, ensuring his/her unhindered activities and protection against unjustified criminal or administrative prosecution, therefore it is not coincidental that the President has immunity not only during his/her term of office, but also after the termination for the actions prescribed by his/her status" (clause 15.1, p. 28). "15.2. It follows from the constitutional norms establishing guarantees of the immunity of the retired President, that the President during and after his/her term of office cannot be prosecuted and held liable for the actions derived from his/her status. The position held by a person in a certain period does not serve as the basis for this type of immunity (functional immunity), but the nature of the actions that s/he performed during his tenure (that is, actions based on his/her status).

The Cassation Court reiterates that when speaking about the status of the President, it is necessary to understand his/her functional role, the entire range of his/her powers, rights and obligations" (p. 30).

Further the same idea is developed and concretized in the decision: "15.2. ... At the same time, it should be noted that when the President exercises his/her powers in accordance with the Constitution and the laws granted to him/her by the Constitution, s/he cannot be prosecuted and subjected to liability in any way, which is guaranteed by the institution of immunity of the President.

16. Thus, the Constitution of the Republic of Armenia endowed the President with a range of powers, the implementation of which in some cases is also discretionary; therefore, the President is not responsible for his/her policies, acts adopted and actions taken within his/her powers. The President of the Republic should be insured against further prosecution of him/her both for the policy pursued by him/her and for any decision taken within his/her powers, including within the framework of discretionary powers. The above-mentioned is the main content of the institution of immunity of the President and an important guarantee for the President to exercise the constitutionally granted powers freely and without any exertion of pressure and not holding him/her accountable both during and after his/her term of office.

The Constitution of the Republic of Armenia does not establish a procedure for overcoming the functional immunity of the retired President, which is also conditioned with the above-mentioned logic. In other words, the President is endowed with immunity and cannot be prosecuted and held accountable for actions based on his/her status" (p. 30-31).

After the assessments related to the scope and content of the functional immunity, the Decision states: "16.1. As for actions that are not related to the status of the President, after the termination of powers, the President does not enjoy the guarantees of immunity associated with them and is held liable on a common basis" (p. 31).

Summing up the analysis carried out in clauses 15-16.1 of the same Decision regarding the functional immunity of the President of the Republic, the Cassation Court stated: "17. ... the application of immunity cannot be regarded as a mechanical process. To establish whether the actions actually performed are conditioned with the status of the President or not, one should not be guided by the formal approach and take as the basis only that the person was the President at the time of the alleged act " (p. 32).

In other parts of the Decision, the Cassation Court addresses the second legal issue put forward: "20. Without making the subject of consideration the reasonable suspicion of the alleged commission of a crime by the retired President of the Republic of Armenia R. Kocharyan envisaged by part 1 of article 300.1 of the RA Criminal Code, could the Court of Appeal actually come to a reasoned conclusion on the issue of its inviolability?" (p. 36).

Further, referring to the issue of selection in respect of the retired President the detention as a measure of prevention on the basis of the legal norms and legal assessments cited in the same Decision and developing the legal assessments expressed in previous decisions, the Cassation Court in the light of constitutional norms, regulating the institution of immunity of the President of the Republic, and the analysis carried out in clauses 15-17 of the same Decision regarding them, stated that "21.1. ... the extension of the guarantee of immunity to the retired President is determined by the nature of the actions committed by him, namely, whether they are determined by his status or not. That is, the application of functional immunity to the retired President is not a mechanical process: the establishment of the issue of the application or non-application of immunity of this type is closely related with a reasonable suspicion of a person who committed a suspected criminal act, in particular with an assessment of the existence of an objective connection between the person and the alleged act. In other words, resolving the issue of the

functional immunity directly involves assessing the actions imputed to the person from the point of view of reasonable suspicion. Consequently, without assessing the reasonable suspicion (whether the person is connected with the commission of the alleged criminal offense attributable to him and whether the case the person is charged with, coincides with the elements of the offense prescribed by criminal law), the court effectively deprives him of the immunity of the retired President, in particular, the possibility of reaching a reasonable conclusion related to the issue of conditioning or non-conditioning of actions committed by the President by his status " (p. 40).

Almost the entire motivational part of the Decision of the Cassation Court, with all conclusions and assessments, in practical application constitutes the proof of the existence of a general procedure for criminal proceedings against a person endowed with functional immunity.

In contrast to personal immunity, which must be overcome, for instance, by means of the special procedures and only after the resolution of the issue of criminal prosecution, even if a person has committed a crime, due to personal immunity is not subject to criminal liability until personal immunity is not overcome, the functional immunity implies assessment of the action in essence for the establishment whether it is conditional or not conditional to his status, and, according to the results of the assessment, only after the resolution of the issue of termination or non-termination of criminal prosecution. Otherwise, the institution of personal immunity and the institution of functional immunity are identified.

3. The Criminal Procedure Code does not directly prescribe the norm prohibiting criminal prosecution for the actions conditioned with the status of an official, or, otherwise, due to functional immunity, however, the relevant regulations existed in other sources of law that form the part of the legal system, and the courts, including the Cassation Court, were competent to interpret and apply them, in particular the relevant provisions of the Constitution.

Thus, according to part 1 article 6 of the Constitution, "State and local self-government bodies and officials shall be entitled to perform only such actions for which they are empowered by the Constitution or laws".

According to part 1 article 162 of the Constitution, "In the Republic of Armenia, justice shall be administered only by courts in compliance with the Constitution and laws".

According to part 1 article 164 of the Constitution, "When administering justice, a judge shall be independent, impartial and act only in accordance with the Constitution and laws".

The Constitutional Court in the Procedural Decision PDCC-7 of 25.01.2019 stated:

“4.2. The circumstance that the scope of constitutional justice in accordance with part 1 of article 171 of the Constitution is beyond the scope of the functions of the Cassation Court, it does not mean that the Cassation Court is not authorized to interpret and apply the Constitution.

4.3. According to part 1 article 164 of the Constitution, when administering justice, a judge shall be independent, impartial and act only in accordance with the Constitution and laws. This key rule establishing the independence of a judge, and therefore the court, inter alia, also establishes the judge’s mandatory power to act in accordance with the Constitution, which means that by the Constitution, the power to interpret and apply the Constitution is granted to each court, including the Cassation Court. It is the correct and consistent perception, interpretation and application of constitutional norms by the courts that also stipulate the constitutionality.

…

4.7. By virtue of part 1 of article 61 of the Constitution, human rights and freedoms, especially fundamental ones, are directly subject to judicial protection, therefore, not only the Cassation Court, but also all other courts are obliged to protect, in the first place, fundamental human rights and freedoms, and this is impossible without interpretation and application of the provisions of the Constitution enshrining these rights and freedoms”.

From what has been said it may seem that, in particular, the courts are empowered to interpret and apply the Constitution exclusively in the cases when it comes to provisions enshrining fundamental human rights. Consequently, they cannot directly interpret and apply article 140 of the Constitution, since it does not enshrine a fundamental right. Let us acknowledge for a moment that the Cassation Court could not directly interpret and apply article 140 of the Constitution. Along with this, even agreeing with this point of view, we acknowledge that the Cassation Court was competent to interpret and apply article 27 of the Constitution as establishing fundamental human rights, and it was authorized to do so precisely in the context of article 140. We must not forget an important circumstance that the Constitutional Court accepted the individual application for proceeding, precisely to protect fundamental human rights. This issue is crucial for resolving the issue of considering not only the challenged case, but also any other individual application (clause 8 of part 1 of article 169 of the Constitution).

So, in the fifth paragraph of clause 3 of the Decision of Constitutional Court, it is specifically noted that “... the Constitutional Court considers and resolves the present case within

the framework of the issues raised in the application not from the perspective of the alleged substantial violation of constitutional guarantees of the immunity of the retired President of the Republic, which, taking into account the preconditions of admissibility of an individual application, at the current stage is impossible, and from the point of view of ensuring the lawfulness of the accusation of officials vested immunity by the virtue of the Constitution, including charges resulting from the functional immunity of the retired President, taking into consideration the direct impact of the constitutional guarantees of functional immunity of any official on his above-mentioned and constitutionally guaranteed fundamental rights and freedoms as an individual ...".

Therefore, guided by this approach, it must be noted that, according to the logic of the part cited in the Decision, the Cassation Court was empowered to resolve the issue related to the functional immunity of the retired President of the Republic, by applying the same fundamental rights and, in particular, by directly applying the rest of the criminal procedural tools prescribed in article 27 of the Constitution,.

Within the framework of this opinion, I will refrain from a meaningful interpretation of article 27 of the Constitution, taking into account the vast reserve of the legal assessments of the Constitutional Court regarding it, as well as the case-law of the ECHR regarding the relations regulated by the same article. I simply note that the mere presence of this better and vast reserve was quite enough to ensure the rights of a person enjoying the guarantees prescribed in article 140 of the Constitution.

Referring to the position enshrined in the seventh paragraph of part 4.2. of the, according to which “the Constitutional Court states that the courts did not have any grounds prescribed in the ordinary law for applying the criminal procedural consequences of constitutional immunity, since the Code did not vest them with such authority”, I think that this position also significantly differs from the sustainable assessments submitted by the Constitutional Court and partially presented in the given Opinion.

Thus, in the already mentioned case on conformity with the Constitution of part 1 of article 17 of the constitutional law on the Constitutional Court, parts 1, 3 and 8 of article 141 of the constitutional law Regulations of the National Assembly, as well as the constitutional law on the Constitutional Court, in part of the absence of regulation regarding the consequences of the non-election of a judge of the Constitutional Court on the basis of an application from the President

of the Republic (DCC-1434 of November 6, 2018), which, by the way, was not discussed from the point of view of protecting fundamental rights, the Constitutional Court noted that **”**. **4.3.** … The Constitutional Court addressed the issue of constitutionality of the legislative gap in a number of its decisions, in particular, in Decision DCC-864, DCC-914, DCC-917, DCC-922, DCC-933, DCC-1020, DCC-1056, DCC-1143, DCC-1154, and DCC-1255... In the framework of the present case, reiterating and developing the legal assessments expressed in the aforementioned decisions, the Constitutional Court considers that **there is no legislative gap in all cases where the issues regarding the alleged legislative gap are directly regulated by the Constitution”.** It is natural that, the instructions clearly set out in this assessment are addressed to all law enforcement bodies, including the courts, and the point is that the relevant state bodies and officials, when resolving any dispute or issue, do not refer to the “legislative gap” in all those cases when there is no legal requirement in sectoral legislation regarding any factual circumstance, although it is available in the Constitution. And given that the above-mentioned case did not concern fundamental human rights, it must be noted that this applies to all the provisions of the Constitution to the extent that they are applicable for the resolution of a particular dispute or an issue. Therefore, these bodies not only have the right, but are also obliged to apply the norm enshrined in the Constitution, if the corresponding regulation is “missing” in other normative legal acts.

The foregoing does not in any way detract the role of the Constitutional Court in the application and interpretation of the Constitution: the final and mandatory interpretation of the Constitution is within the competence of the Constitutional Court as a remedy for ensuring the supremacy of the Constitution. Nevertheless, “4.10. ... the verification of constitutionality is the responsibility of all courts.

…

6. The authority of the courts, including the Cassation Court, or other bodies of public power, does not detract the exceptional role of the Constitutional Court in the application and interpretation of the Constitution, as the body ensuring the supremacy of the Constitution and providing final solution to the issues of interpretation of the Constitution, which is binding for all bodies of public power, natural persons or legal entities (PDCC-7).

In addition, in the specific case under discussion, the corresponding basis is directly prescribed in part 1 of article 1 of the Criminal Procedure Code, according to which “1. The

procedure for criminal proceedings in the Republic of Armenia is established by the Constitution of the Republic of Armenia, international treaties of the Republic of Armenia, this Code, the constitutional law of the Republic of Armenia on Judicial Code and other laws adopted in accordance with them".

I also cannot agree with the position expressed in the fourth paragraph of clause 4.4 of the Decision (p. 20), according to which "the peculiarities of the constitutional provisions regarding the functional immunity of the retired President of the Republic are not implemented in the Code, which led to a different interpretation of this by different courts, which, inter alia, also indicates the absence of other legal possibilities to fill in this legislative gap in the Code", since in this case we are dealing with judicial acts issued in the framework of the same case (part 3 of article 29 of the constitutional law on Judicial Code of the Republic of Armenia), and the interpretation of the Court of Appeal, different from the interpretation of the Court of First Instance of General Jurisdiction within the same case, may not be qualified as "diverse" by virtue of the existence of a decision of the Cassation Court within this case and its significance for the consistent application of normative legal acts.

4. Thus, on the basis of the foregoing, I do believe that the proceedings of the case on conformity of article 35 and part 2 of article 135 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Robert Kocharyan should have been terminated on the basis of clauses 1 and 2 of part 1 of article 29, clause 1 of part 1 of article 60 of the constitutional law on the Constitutional Court, since the challenged article 35 of the Criminal Procedure Code was not applied to the applicant and did not cause legal consequences.

In addition, there are grounds for terminating of the proceedings of the case on the basis of clause 1 of part 1 of article 29 and clause 1 of part 1 of article 60 of the constitutional law on the Constitutional Court, since an individual application regarding a "gap in the law" did not meet the following preconditions necessary for its adoption in the Constitutional Court:

- the legislation envisaged other legal guarantees to fill in this "gap" and a contradictory law-enforcement practice is not formed (diverse interpretations);

- the existing legislative "gap" did not violate the possibility of realizing a particular right of a person;

- the coherent and normal implementation of legislatively regulated legal relations is not violated due to the absence of an element ensuring the coherence of legal regulation or imperfect regulation of this element,

JUDGE OF THE CONSTITUTIONAL COURT A. DILANYAN

September 13, 2019

DISSENTING OPINION

ON THE DECISION DCC-1476 OF 04.09.2019 ON THE CASE OF CONFORMITY OF ARTICLE 35 AND PART 2 OF ARTICLE 135 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF ROBERT KOCHARYAN

Based on clause 10 of article 62 of the constitutional law on the Constitutional Court, I submit a dissenting opinion.

In the above-mentioned case, the Constitutional Court has held in the Decision DCC-1476:

"1. To declare article 35 of the Criminal Procedure Code of the Republic of Armenia in part of not envisaging the functional immunity of the officials who, by virtue of the Constitution, enjoy special protection among the grounds excluding the proceedings of the criminal case or criminal prosecution, as contradicting to clause 4 of part 1 of article 27, part 1 of article 61, part 1 of article 63 and article 75 of the Constitution and void.

2. Part 2 of article 135 o the Criminal Procedure Code of the Republic of Armenia is in conformity with the Constitution.

A. Regarding the constitutionality of part 2 of article 135 of the Criminal Procedure Code (hereinafter referred to as the Code), I have no objection since it concerns the general prerequisites for detention and could not contain special regulations for persons endowed with immunity, therefore there could be no legislative gap.

B. As for the unconstitutionality due to the presence of a legislative gap in article 35 of the Code, I do believe that **all legal grounds for terminating the proceedings of the case in this part** are present with the following reasoning.

First of all, we note that when determining the constitutionality of the provisions challenged in the present case, the Constitutional Court considered it necessary, in particular, to address the following question: are there legislative mechanisms and procedures in the Code that are necessary for the effective protection of the officials endowed with immunity by the Constitution from being prosecuted and charged **for actions related with their status or activity** committed during or after their term of office?

It should be noted here that such a guiding formulation of the issue is not very correct from the perspective of the text of the Constitution, since the provisions of article 140 of the

Constitution (which establishes the immunity of the President of the Republic) specify the constitutional terms “actions related with his/her status” and “actions not related with his/her status”, and the actions “**related with their activities**” are not mentioned.

At the same time, the Constitutional Court stated that the resolution of the issue of the legality of the prosecution in the present case, and thereby the detention is due to the constitutional guarantees of immunity of the retired President of the Republic. Taking into account the fact that the applicant raises the **issue of the legislative gap** in article 35 of the Code also from this point of view, the Constitutional Court considers that the alleged absence of legislative provision of constitutional guarantees of immunity of the retired President of the Republic in a number of circumstances excluding criminal proceedings or criminal prosecution can directly lead to the restriction of his/her right to personal liberty, as well as the right to judicial protection and fair trial, which are unjustified from the perspective of the Constitution. Consequently, for assessment of the legality of the prosecution and, as a result, the detention, **the compliance of not only the provisions of the criminal law with the Constitution, but also the provisions of the criminal procedure law (which also includes the absence of legislative gaps contradicting the Constitution) is essential.**

First of all, it should be noted that the regulations of the RA Constitution of 2015 do not openly (explicitly) stipulate the independent authority of the Constitutional Court to study and assess legislative gaps in the laws and other legal acts. The Constitutional Court, with its considerable practice and legal position expressed in the national report presented on June 14, 2008 at the Assembly of the International Organization “Conference of European Constitutional Courts” stated that a number of provisions of the RA Constitution suggest that the Constitutional Court has an implicit right to study and assess the constitutionality of legislative gaps.

Based on the above-mentioned, the Constitutional Court concluded that a similar perception of the role and place of the Constitutional Court in ensuring constitutional legality in the state, as well as the supremacy and direct action of the Constitution in the legal system of the Republic of Armenia, implicitly confirms its authority to study and assess the constitutionality of legislative gaps.

We can add that the special legal nature and legal force inherent in the decisions of the Constitutional Court (generally binding and definitive nature, direct effect, etc.), inter alia, make it possible to talk about the implicit authority of the Constitutional Court to study and assess legislative gaps.

Here, it is necessary to touch upon the legal role of the Constitutional Court regarding the complicated theoretical and practical issues of overcoming the gap in the law and a number of legal positions expressed by the latter.

In a number of decisions, the Constitutional Court has addressed the issues of the legislative gap (in particular, DCC-864, DCC-914, DCC-922, DCC-1020, DCC-1056, and DCC-1143).

Reiterating and developing its legal positions regarding the legislative gap, in the Decision DCC-1476 the Constitutional Court has concluded:

"1) the legislative gap may become the subject of consideration by the Constitutional Court in the case of a *deficiency of legal regulation*, and not of the law-making body; in this case, the legislator's discretion to refrain from legal regulation perceived as a legislative gap;

2) not every imperfect legislative regulation may become the subject of consideration of the Constitutional Court, but only *such a legislative gap that cannot be overcome by the interpretation and application of other relevant legal regulations*;

3) the legislative gap should have led to a contradictory law enforcement practice that cannot be overcome or that has not actually been overcome by ordinary courts;

4) the legislative gap exists in the case when due to the absence of an element ensuring the integrity of the legal regulation or imperfect regulation of this element, **the fully-fledged and normal implementation of the legislatively regulated legal relations** is violated;

5) in cases where a gap in law is due to the absence of a normative requirement regarding specific circumstances within the sphere of legal regulation, overcoming such a gap is within the competence of the legislative body. Within the framework of the consideration of the case, the Constitutional Court refers to the constitutionality of any of the gaps in the law if, due to the content of the challenged norm, the legal uncertainty leads to such an interpretation and application of this norm in law enforcement practice **that violates or may violate a specific constitutional right".**

It is surprising that among these important criteria the Constitutional Court did not indicate the legal positions stated in the Decision DCC-914 of September 14, 2010, namely: "... a legislative gap might be a subject to consideration by the Constitutional Court **only** in the case when there are no other legal guarantees in the legislation to fill in this gap, or if a contradictory law-enforcement practice has been formed in the legislation when corresponding legal guarantees are present, or when the existing legislative gap does not ensure the possibility of realization of any right". That is, in the Decision DCC-914 the

Constitutional Court has established the criteria, in the presence of any the legislative gap is the subject of constitutional control.

Back in October 2016, in a report presented by us at the Yerevan International Conference organized by the Constitutional Court with the assistance of the European Union, as well as at the Venice Commission of the Council of Europe (dedicated to legal uncertainty and the role of the Constitutional Court in overcoming legal gaps) which analyzed the rich experience of the Constitutional Court of the Republic of Armenia in overcoming legal gaps, we noted that the presence of a legal gap does not indicate that any application should be accepted to examination by the Constitutional Court. The position of the Constitutional Court is of pivotal significance, according to which **filling in** the gaps in legal regulation is not within the competence of the Constitutional Court; this is the exclusive power of the legislature, and the Constitutional Court is called upon to **overcome** legal gaps with its special means of constitutional control. The concepts of "filling in" and "overcoming" are pretty close in meaning and interrelated, but not identical.

The Decision DCC-1476 of the Constitutional Court states that "the Code does not establish specific constitutional provisions regarding the functional immunity of the retired President of the Republic, which leads to **different interpretations made by different courts**, which, inter alia, also indicates the absence of other legal possibilities to fill in this legal gap in the Code.

Such a situation may lead to the initiation and exercise of the criminal prosecution with respect to the individuals endowed with functional immunity (including the retired President of the Republic), as well as they may be subjected to criminal liability for such actions, which were related with their status or activities. That is, these persons may be unlawfully and groundlessly charged, and they will not have the possibility of effective judicial protection against this charge also due to their functional immunity.

In our opinion, in the course of the consideration of the present case, the Constitutional Court was obliged to take into account a number of fundamental legal positions expressed in two adopted important procedural decisions[1]. In particular, we are talking about the procedural decision PDCC-7 of 25.01.2019 "**On the refusal** to consider the case on

[1] It should be noted that in a similar case, the Constitutional Court of the Russian Federation in its Decision N 17-P of July 20, 2016 addressed the issue of the absence of provisions in the criminal procedure legislation of the Russian Federation regarding persons with special status, and noted that the absence of a norm is not per se a sufficient basis for declaring this legal regulation of the criminal procedure as contradicting to the Constitution of the Russian Federation, especially if it is possible through constitutional interpretation to establish appropriate guarantees for both the given person and other entities of certain legal regulations.

conformity of clause 1 of part 1 of article 414^2 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Robert Kocharyan" and, especially, the procedural decision PDCC-17 of 22.02.2019 "**On the refusal** to consider the case on conformity of parts 1 and 2 of article 135 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Robert Kocharyan".

As a result of studying the justifications set out in the application in question, we can state that the applicant, in fact, rose:

a) the issue of legality of the decision rendered by the Cassation Court and the legitimacy of the provisions of the normative legal act applied by this decision;

b) the issues of disclosing the legal content of certain provisions of the Criminal Procedure Code of the Republic of Armenia, their consistent and complete perception and interpretation.

The Constitutional Court also notes that the issues of the alleged gap in the law are raised in the application, which are mainly based on general abstract groundings that may be considered not within the framework of constitutional control carried out on the basis of individual applications, but within the framework of abstract constitutional control (article 68 of the constitutional law on the Constitutional Court). In other words, the legal groundings provided in the application raise the issue of legality of interpretation, and application of the provisions of the normative legal act applied to the applicant which leads, in fact, to the issue of constitutionality of the decision rendered by the Cassation Court in the given case and the resolution of this issue is beyond the powers of the Constitutional Court.

The Constitutional Court considers it necessary to state that, within the framework of the issues and their justifications raised in the application, the primary task is to ensure the consistent application of the challenged provisions, which, according to the Constitution, is the function of the Cassation Court. The Constitutional Court is not competent to assess the **legality of application** by the courts of the provisions of normative legal acts.

We consider it necessary to note that although the control carried out on the basis of individual applications is aimed at guaranteeing the direct application of the provisions of the Constitution and thus protecting the fundamental rights of a person, nevertheless, the exercise of this function is possible solely on the basis of articles 168 and 169 of the Constitution and, on the basis of the latter, within the framework of legal regulations prescribed by the constitutional law on the Constitutional Court, and provided that the applicant has sufficiently

substantiated the need to protect his/her subjective rights in a certain case but not any issue of the objective law in general, which in this present case, the applicant has bypassed.

Referring to the issue of the "legal gap" raised by the applicant, we consider it necessary to state that the legal gap (a gap in the legal regulation), when it is caused not by the normative provisions challenged in a particular case, but by the **fully-fledged legal regulation of the certain legal mechanism and by overcoming the legal gap** as the applicant has tried to justify, and it is necessary to consider the above-mentioned in the context of the constitutional principle of separation and balance of the powers (article 4 of the Constitution), and in all cases when it is caused by the alleged absence in the sphere of legal regulation of normative requirements regarding specific circumstances overcoming of such a gap is the competence of the legislature. However, within the framework of consideration of cases on the basis of the individual applications, the Constitutional Court addresses the issue of constitutionality of any gap in the law if the legal uncertainty arising from the content of the challenged norm (norms) leads to such an interpretation and application of this norm in law enforcement practice due to which a specific fundamental right is violated or may be violated. While the application subject to consideration does not **contain such legal justifications directly relating to** a specific fundamental right that would become the basis for their consideration in the context of a violation of one of the rights prescribed in chapter 2 of the Constitution; therefore they cannot be a subject to assessment by the Constitutional Court within the framework of an individual application. **This is one of the core criteria for acceptability of the individual applications.**

The content of substantiation of the applicant, in fact, is not related to the issue of challenging the constitutionality of normative provisions in accordance with the requirements of the individual application, but only to the issue of legitimacy of interpretation and application of these provisions. By submitting the challenged provisions to the Constitutional Court in the due form, i.e. a request to declare the challenged provisions contradicting the Constitution in the interpretation provided in the law enforcement practice, the applicant raises the issue of lawfulness of their application, which is not an issue to be considered by the Constitutional Court according to the legal position expressed in the procedural decision PDCC-21 of the Constitutional Court dated March 17, 2009, which has been reiterated multiply, as well as pursuant to clause 6 of part 1 of article 29 and part 5 of article 69 of the constitutional law on the Constitutional Court.

The aforementioned provision, in essence, **reproduces** the provision prescribed in clause 1 of part 2 of article 171 of the Constitution, according to which by reviewing judicial

acts within the scope of its powers prescribed by law, the Cassation Court shall ensure the consistent application of laws and other normative legal acts.

The mentioned constitutional provision establishes the function of the Cassation Court, i.e. to ensure the consistent application of normative legal acts. The consistent application of normative legal acts, i.e. ensuring their rightful interpretation as means to promote the development of right, are structurally interrelated functions. The expression of legal positions on uniform perception of normative legal acts applied by the courts directly derives from the constitutional function of the Cassation Court to ensure the consistent application of normative legal acts.

The circumstance, that according to part 1 of article 171 of the Constitution, the sphere of constitutional justice is beyond the scopes of functions of the Cassation Court, does not mean that the Cassation Court does not have the power to interpret and apply the Constitution.

According to article 164 of the Constitution, when administering justice, a judge shall be independent, impartial and act **only** in accordance with the **Constitution** and the laws. This provision, which enshrines the core rule of the independence of judges and the courts, also establishes, inter alia, the judge's mandatory obligation **to act in accordance with the Constitution**, which means that the power of interpretation and application of the Constitution is vested to each court, including the Cassation Court. The rightful and consistent perception, interpretation and application of constitutional norms by the courts also determine the establishment of constitutionality.

By establishing the functions of the Cassation Court, the founder of the Constitution aimed to emphasize that the Cassation Court differs from the Courts of First Instance and the Court of Appeal particularly by the circumstance that the Cassation Court does not accept for proceedings and does not consider any case. In addition, the constitutional provisions regarding the Cassation Court reveal that the founder of the Constitution, by the wording of part 2 of article 172 of the Constitution, did not intend to leave the task of ensuring a consistent interpretation and application of the Constitution by the Courts of First Instance and the Court of Appeal beyond the competence of the Cassation Court.

As a remedy to ensure the supremacy of the Constitution, **the final and compulsory interpretation and application of the Constitution** is the exclusive competence of the Constitutional Court, and all public authorities, within the framework of their powers prescribed in the Constitution and laws shall interpret and apply the Constitution.

It should be emphasized that although the implementation of constitutional justice, especially the determination of compliance with the Constitution of the law and other normative legal acts specified in the Constitution is the exclusive competence of the Constitutional Court, nevertheless, verification of constitutionality is the responsibility of all courts.

So, according to part 4 of article 169 of the Constitution, if during the proceedings the courts are faced with the constitutionality of a normative legal act to be applied in a specific case, i.e. reasonable suspicions arise accordingly, and if the resolution of the case is possible only by the means of the application of the given normative legal act, the courts **are obliged** to apply to the Constitutional Court to determine the conformity of the given act with the Constitution, which means that **all courts, not just the Cassation Court , must review the constitutionality of the applicable normative legal act in incident order** and are obliged to apply to the Constitutional Court in the event of such prerequisites.

We consider it necessary to assert that not only the courts, but also other constitutional bodies, the functions and powers of which are established exclusively by the Constitution, for instance, the National Assembly, are obliged to interpret and apply the Constitution in their activities regardless of the fact of the existence of constitutional or other laws regulating their activities.

“The power of the courts (including the Cassation Court or other public authorities to interpret the Constitution and ensure its application) does not violate the exclusive nature of the powers of the Constitutional Court to provide final solutions to the issues of interpretation of the Constitution as a body ensuring the supremacy of the Constitutions, which is generally binding for all public authorities, natural persons and legal entities.

The Constitutional Court ultimately ensures the consistent application of the Constitution, within the scopes of the powers resolving all disputes relating to the interpretation of the Constitution. The essence of constitutional justice could be distorted or the effectiveness of this justice could be reduced if the **final** resolution of disputes related to the interpretation and application of the Constitution was provided to another public authority (PDCC-7 of 25.01.2019)”.

Summarizing, we note that:

1. There was no alleged legislative gap in the present case, since in the substantive aspect of clause 3 of article 140 of the Constitution has been interpreted in judicial practice, in particular by the decision of the Cassation Court dated November 15, 2018. In the present

case, the Constitutional Court had nothing else to do. The solution to the issue lies entirely in the sphere of the legislative body.

2. We reiterate the position expressed in the dissenting opinion of the Decision DCC-754 of the Constitutional Court of the Republic of Armenia of 26.06.2008 on the case of conformity of part 4 of article 231.1 of the RA Civil Procedure Code (part 4 of article 233 in the new wording) with the Constitution of the Republic of Armenia on the basis of the application of the citizen Emilia Melikyan, according to which, "when exercising constitutional control over the laws, the Constitutional Court must first of all interpret not only the challenged provisions of the law, but also the relevant provisions of the Constitution, which the challenged provisions of the law allegedly contradict to. The approach that only by interpreting the provisions of the law, the latter are declared contradicting the Constitution" and void, is unsubstantial especially if conditioned by the gap in the law.

3. I am convinced that in the present case the High Court would have concluded otherwise, if the Decision was not adopted in certain haste due to the complexity and great social significance of this issue.

JUDGE OF THE CONSTITUTIONAL COURT F. TOKHYAN

September 13, 2019