

**ON BEHALF OF THE REPUBLIC OF ARMENIA  
DECISION OF THE CONSTITUTIONAL COURT OF  
THE REPUBLIC OF ARMENIA**

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**THE CASE ON CONFORMITY OF ARTICLE 55, PART 4 OF THE CRIMINAL  
CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE  
REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF “ACBA-  
CREDIT AGRICOLE BANK” CJSC, “ARTSAKHBANK” CJSC, “HSBC BANK  
ARMENIA” CJSC AND “VTB-ARMENIA BANK” CJSC**

**Yerevan**

**12 July 2011**

The Constitutional Court of the Republic of Armenia composed of the Chairman G. Harutyunyan, Justices K. Balayan, F. Tokhyan, M. Topuzyan, A. Khachatryan, V. Hovhanissyan (Rapporteur), H. Nazaryan, A. Petrosyan, V. Poghosyan, with the participation of the representatives of the Applicants: R. Sargsyan, A. Galstyan, H. Harutyunyan, K. Petrosyan

representative of the Respondent: D. Melkonyan, the Adviser to the Chairman of the National Assembly of the Republic of Armenia,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 6 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Article 55, Part 4 of the Criminal Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of “ACBA-Credit Agricole Bank” CJSC, “Artsakhbank” CJSC, “HSBC Bank Armenia” CJSC AND “VTB-Armenia Bank” CJSC.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by “ACBA-Credit Agricole Bank” CJSC, “Artsakhbank” CJSC, “HSBC Bank Armenia” CJSC and “VTB-Armenia Bank” CJSC on 2 March 2011.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicants and the Respondent, having studied the Criminal Code of the Republic of Armenia, other legislative acts and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Criminal Code was adopted by the RA National Assembly on 18 April 2003, signed by the RA President on 29 April 2003 and came into force on 1 August 2003.

The RA National Assembly amended Article 55 of the RA Criminal Code by the RA Law ՀՕ -206-N on Amending the Criminal Code of the Republic of Armenia adopted on 28.11.2006, which entered into force on 04.01.2007. Due to these amendments, Article 55 of the Code was set forth in the current wording.

The challenged Part 4 of Article 55 of the RA Criminal Code, titled “Confiscation of Property”, states: “The confiscation of the property extracted in criminal way, as well as the property originated or gained directly or indirectly as a result of legalization of the proceeds

extracted in criminal way and of the commitment of the deeds stipulated by Article 190 of this Code, including the proceeds or any other benefits gained from the utilization of that property, instrumentalities that were served or were determined to be used for the commitment of those deeds, and in the case of non-detection of the property extracted in criminal way, the confiscation of any other property equivalent to that property is obligatory. That property is confiscable regardless the ownership or the possession by the convict or any other third party.”

The Applicants originally challenged the constitutionality of Article 55, Parts 2 and 7 of the RA Criminal Code. By the Decision of the DCMCC/1-9 dated 18 March 2011 the First Court Chamber of 3 Members of the RA Constitutional Court took the Case for consideration in part of Article 55, Part 4 of the RA Criminal Code, dismissing the Case consideration in part of Part 7 of the same Article.

2. The procedural background of the Case is the following: the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan, considering the criminal case ԵԿԴ-0094/01/09 based on the accusation against Cornel Konstantin Romica Stengachu under Article 203, Part 3, Point 1, Article 177, Part 3, Points 1 and 2, Article 190, Part 3, Point 1, by its Decision dated 12.10.2009 found Cornel Konstantin Romica Stengachu guilty of crimes prescribed by the abovementioned Articles, and sentenced the latter to imprisonment for the term of 12 years, along with the confiscation of the entire property equivalent to the amount not exceeding 64.142.000 AMD, and with the confiscation of the proceeds of crime prescribed by Article 55, Part 4 of the RA Criminal Code.

The Court satisfied the Civil claims of the Applicants and decided to confiscate from the convict 25,457,000 AMD in total, as compensation for the damage caused by the crime.

Besides, the Court decided to leave the sequestration of the money and property of Cornel Konstantin Romica Stengachu made by the Decision dated 11.10.2008 unchangeable, until the execution of the judgment with regarding to his pecuniary obligations.

Considering the issue of physical evidence, the Court decided to confiscate the amounts of 25.200 Euros and 4.040.000 AMD, which, being proceeds of crime prescribed by Article 55, Part 4 of the RA Criminal Code, were recognized as physical evidence by the Decisions dated 24.12.2008 and 30.03.2009.

After the judgment entered into force, the Applicants received writs of execution regarding the satisfaction of their civil claims and submitted them to the Judgments Compulsory Enforcement Service (hereinafter JCE Service) of the RA Ministry of Justice.

The JCE Service informed the Applicants that the RA Prosecutor's Office was the first to submit a writ of execution regarding this Case to ensure confiscation of the entire property of the convict equivalent to the amount not exceeding 64.142.000 AMD.

The Applicants applied to the Court which rendered the judgment, demanding to interpret the ambiguity of the judgment. On 03.06.2010, as a result of consideration of the

submitted applications the Court made a decision interpreting the ambiguity of the rendered judgment as follows: "After the judgment entered into force, the amounts of 25.200 Euros and 4.040.000 AMD, cell phones and the eye glasses recognized as physical evidence, being proceeds of crime prescribed by Article 55, Part 4 of the RA Criminal Code, are confiscable regardless the ownership or the possession by the convict Cornel Konstantin Romica Stengachu or any third party. This amounts and items may not be confiscated in favor of Civil Claimants and may not be aimed to compensate the damages caused to the Civil Claimants and the Aggrieved. Implementing the judgment regarding satisfied civil claims, the confiscation shall be extended not to the amounts of 25.200 Euros and 4.040.000 AMD, cell phones and the eye glasses recognized as physical evidence, but to the funds and other property owned by Cornel Konstantin Romica Stengachu."

The mentioned Decision was appealed at the RA Criminal Court of Appeal. The latter by the Decision dated 15.07.2010 concluded that the Decision of the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan is substantiated and reasoned, and found no grounds to abolish, amend or vacate it. Hence, the Court decided to dismiss the appeals lodged by the representatives of the Applicants against the Decision of the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan dated 3 June 2010 on interpreting the ambiguity of the judgment dated 12.10.2009 of the same Court.

The representatives of the Applicants lodged Cassation Appeals against the Decision of the RA Criminal Court of Appeal dated 15.07.2010, which were returned by the Decision of the RA Court of Cassation dated 02.09.2010.

3. Challenging the constitutionality of Article 55, Parts 4 and 7 of the RA Criminal Code, the Applicants stated that they contradict Articles 3, 6, 8, 18, 19, 20, 31 of the RA Constitution, insofar as these norms narrowly and exhaustively define the term of "bona fide third party" and stipulate confiscation of the proceeds of crime irrespective of the will of bona fide third parties (aggrieved persons) without primary recovery of that property to the bona fide third parties or providing guarantees for relevant compensation by the State.

Referring to the provisions proscribed by Article 3, Part 2, Article 6, Parts 1, 2 and 4 of the RA Constitution and a number of the international treaties ratified by the RA, the Applicants point out that the Republic of Armenia has obliged to provide necessary legislative remedies to confiscate the proceeds from money laundering or previously committed crimes, instrumentalities used or were determined to be used for commitment of those crimes or any other relevant property, at the same time without harming the rights of bona fide third parties.

In this context the Applicants point out that while Article 55, Part 6 of the RA Criminal Code prescribes that the property of the bona fide third party is not confiscable, Part 7 of this Article narrowly and exhaustively defines the term "bona fide third party." The Applicants conclude that, according to the logics of the law, only the person who voluntarily passed the property to another person may be considered as bona fide. As a result, according to the Applicants, from this definition derives that, if the property passed to the person

committed the crime regardless the will of the legitimate possessor, then according to Article 55 of the RA Criminal Code that person may not be considered as bona fide third party, and consequently, in the process of confiscation the protection of the rights of the aggrieved is not assured.

4. The Respondent did not present any substantiation on the merits regarding the constitutionality of the challenged provision. The Respondent filed a motion to terminate the proceeding of the Case, reasoning that the Applicants have not exhausted the judicial remedies at the Courts of General Jurisdiction.

5. Pursuant to Article 69, Part 1 of the RA Law on the Constitutional Court the individual complaints may be brought by those natural and legal persons who were litigants at the courts of general jurisdiction and in specialized courts, in relation to whom the legislative provision was applied **by the final judgment**, who exhausted all judicial remedies and who believe that the provision of the Law applied for the particular case contradicts the Constitution.

In the case under consideration, the Judgment of the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan dated 12.10.2009 is the final judgment on the merits.

Article 430 of the RA Criminal Procedure Code prescribes the solution of suspicions and ambiguity regarding the court decision as an additional remedy. The judgment adopted in accordance with this Article, the decision on interpreting the ambiguity of the judgment in this case is in a systematic totality with the act on the merits, i.e. the judgment. Consequently, using the possibilities prescribed by law for appealing the decision on interpretation of ambiguity of the judgment, the Applicants exhausted the remedies against the judgment on the merits.

Based on the abovementioned, the Constitutional Court finds no ground to grant the motion of the Respondent on termination of the proceeding of the Case.

Simultaneously, the Constitutional Court states that no time limitation is stipulated for implementation of additional remedy prescribed by Article 430 of the RA Criminal Procedure Code, which, in practice may lead to the abuse of the right to enjoyment of that remedy.

6. The Constitutional Court necessitates considering the constitutional legal dispute arisen in this Case from the viewpoint of the State's positive obligation to protect private property of persons from illegal actions of others, as well as from the viewpoint of guaranteeing effective protection of the rights and legal interests of the aggrieved. The Constitutional Court also finds it necessary to consider the challenged legal regulation and the mentioned issues in the context of international obligations of the Republic of Armenia. Therefore, the Constitutional Court finds it necessary to clear up:

- whether the supposed violation of the constitutional rights of the Applicants is conditioned by the regulation of Article 55, Part 4 of the RA Criminal Code, according to

which the proceeds of crime is confiscable regardless the ownership or possession of any third party,

- whether the RA legislation prescribes a relevant effective mechanism guaranteeing the possibility to recover the damage caused by crime to the aggrieved.

7. According to Article 3 of the RA Constitution, the state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of international law.

The European Court of Human Rights defining the scopes of State obligations in the sphere of protection of the right to property guaranteed by Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, developed the idea of positive obligations of the State. The latter, in particular, means that the real and effective exercise of the right to property does not depend merely on the State's duty not to interfere, but may require also certain positive measures of protection in particular, when there is a direct link between the measures which an applicant may legitimately expect from the authorities and his enjoyment of his possessions (§ 134 of the Grand Chamber Judgment on the Case *Öneryildiz v. Turkey* dated 30 November 2004). According to the European Court, in the sphere of protection of the right to property the positive obligation of the State may include, *inter alia*, the duty to provide compensation.

Considering the issue of protection of the property rights of the crime victims in the context of the positive obligation of the State in the sphere of protection of right to property, the Constitutional Court states that the principle of immunity of property not only means that the owner, as the holder of subjective rights, is entitled to demand from others not to violate his/her right to property but also assumes the duty of the State to protect the persons' property from illegal infringement. In the situation in question, this duty of the State requires to ensure effective mechanism for protection of property rights of the crime victims and for recovery of damages.

8. A number of International legal instruments, particularly, the United Nations Convention against Transnational Organized Crime, which entered into force for the Republic of Armenia on 29 September 2003, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention), which entered into force for the Republic of Armenia on 1 March 2004 and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention), which entered into force for the Republic of Armenia on 1 October 2008 stipulate provisions, according to which, property gained from crime is subject to mandatory confiscation. By these international legal documents the State Parties, including the Republic of Armenia shall adopt legislative or other measures as maybe necessary to ensure confiscation of the property gained from the crimes covered by these Conventions.

Simultaneously, the mentioned international legal instruments stipulate certain legal guarantees for the protection of legitimate interests of the victims of respective crimes. Particularly, according to Article 14 of the United Nations Convention against Transnational Organized Crime, as well as Article 25 of the Council of Europe Convention on Laundering,

Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention) the States Parties shall give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party **so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.** Article 25 of the United Nations Convention against Transnational Organized Crime titled “Assistance to and protection of victims” obligates the States Parties to establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

9. In the framework of this Case, the Constitutional Court particularly emphasizes the revelation of the constitutional legal content of confiscation of property as a type of punishment, an institution, by implication of Article 55, Part 1 of the RA Criminal Code, on the one hand and the institution of confiscation of the property gained from crime on the other.

Section 3 of the RA Criminal Code titled “Punishment”, Chapter 9 titled “Notion of punishment, purposes and types”, Article 49 titled “Types of punishment” defines the types of punishment, listing confiscation of property among them (Point 5). Articles 51-61 of the RA Criminal Code reveal the content of each type of punishment mentioned in Article 49: Article 55 of the Code reveals the content of confiscation as a supplementary punishment.

According to Article 50 of the RA Criminal Code, the confiscation of property is a supplementary punishment, which maybe imposed only for serious and especially serious crimes in cases prescribed in the Special Part of the Code. Confiscation is envisaged either as obligatory supplementary or non-obligatory supplementary punishment in the sanctions of the Articles of the Special Part. Article 55, Part 1 of the RA Criminal Code defines the confiscation of property as a supplementary punishment. According to that definition, confiscation of property is the enforced and uncompensated seizure of the property **considered to be convict’s property or part thereof in favor of the state.**

The comparative analysis of Articles 50 and 55 of the RA Criminal Code states that by its essence, tasks and goals the confiscation of property gained from crime stipulated in the challenged Part 4 of Article 55 of the Code is not equivalent to the confiscation prescribed in Part 1 of the said Article. Article 55 of the RA Criminal Code differentiates the objects of confiscation of property as a supplementary type of punishment and confiscation of property gained from crime prescribed by Article 55, Part 4. If, in the case of confiscation as a supplementary type of the punishment prescribed by Article 5, Part 1, the object is exclusively the **legitimate** property of the convict, then the object of confiscation prescribed by the challenged Part 4 of this Article is not the legitimate property of the convict, but the property gained from the commitment of the crime, and, as a rule, it is the property of the aggrieved. The next essential difference between the institutions of confiscation prescribed by Article 55, Parts 1 and 4 of the RA Criminal Code is in the fact that if confiscation of the property of the convict, as a supplementary type of the punishment may be applied exclusively for serious and especially serious crimes, its application may be left at the discretion of the court and it may be facultative, then, in the case of confiscation of property gained from crime, confiscation is mandatory and it is applied regardless of seriousness of crime.

The Constitutional Court necessitates stating that, the RA Criminal Executive Code, regulating the relations on confiscation of property and, concerning the procedure of confiscation, referring to the procedure stipulated by the RA Law on Compulsory Enforcement of Judgments (Article 39 of the RA Criminal Executive Code), means exclusively the confiscation of property as a supplementary type of punishment. Particularly, clarifying the scopes of the confiscable property, Article 40 of that Code states that the confiscable property includes **the property under ownership by the convict**.

Taking into account the fact that the institution of confiscation of property as a supplementary type of punishment prescribed by Article 55, Part 1 of the RA Criminal Code and the institution of confiscation of property gained from crime prescribed by Part 4 of the same Code essentially differ from each other and the confiscable property confiscated in that framework is clearly differentiated, the Constitutional Court states that in case of parallel application of these two institutions, objectively no legal collision or any issue of priority of law enforcement may emerge concerning the satisfaction of demands of confiscation of the property of the convict and confiscation of property gained from crime, as the object of confiscation is the property of the convict on one side, and the property gained from crime on the other.

Based on the abovementioned, the Constitutional Court finds that confiscation of property as a supplementary type of the punishment and confiscation of property gained from crime are different institutions by their constitutional legal content, which have different tasks and objectives. The institution of confiscation, as a supplementary type of the punishment straightly directed against the property of the convict, follows from Article 31, Part 2 of the RA Constitution, as **in this case confiscation of the property of the convict is a measure of compulsion following from liability that lawfully restricted his right of ownership**. Meanwhile, in the case of confiscation of the property gained from crime, the aim of confiscation is to withdraw the property gained from crime from the convict, and in this case, the right of ownership of the convict is not restricted. Hence, taking into account that, as a rule, the property gained from crime is the property of the aggrieved, while confiscating that property, understanding of the concept of confiscation by implication of Article 55, Part 1 of the RA Criminal Code, that is, gratuitous transfer of the confiscated property to the state's ownership without restoring the right of ownership of the aggrieved, is inadmissible, as in the case of such understanding the measure of confiscation is straightly directed against the right of ownership of the aggrieved unlawfully restricting his/her right of ownership. **The Constitutional Court finds that gratuitous transfer of that property to the state's ownership blocks the possibility to satisfy the property interests of the aggrieved at the expense of the property gained from crime and the possibility to restore violated right of ownership.**

**10.** In the framework of this Case, during the application of the challenged norms on confiscation of the property gained from crime it is pivotal to guarantee the compensation of damages caused by the crime to the aggrieved, which is also a constitutional legal duty of the state particularly stipulated by Articles 3, 20 (Part 5) and 43 (Part 2) of the RA Constitution.

According to Article 115 of the RA Criminal Procedure Code money, valuables and other objects and documents, which may serve as means to discover a crime, determine factual circumstances, expose the guilty person, prove a person's innocence or mitigate responsibility are acknowledged to be physical evidence. Article 119 of the same Code states the rules according to which the issue of physical evidence shall be solved in the sentence of

the court as well as in the decision on dismissing the case. According to Part 1, Point 3 of the said Article, money and other valuables, which may not be legally possessed due to committing a crime, **shall be returned to the owners, possessors or their successors**. According to Part 1, Point 4 of the said Article, money, items and other valuables obtained in an illegal way shall be used **to cover** the court expenses and **damages of the crime**, and if the person who suffered the damages is unknown, the money shall be forwarded to the state budget. Simultaneously, according to these provisions, Article 59, Part 1, Point 17 and Article 61, Part 2, Point 3 of the RA Criminal Procedure Code state the right of the aggrieved and the civil plaintiff, respectively, to get back the property, seized by the body conducting criminal proceedings as physical evidence.

The abovementioned analysis states that in the process of confiscation of the property gained from crime, the RA criminal-procedural legislation guarantees the possibility to restore damages of the crime, and according to the abovementioned legal regulation, it assures the priority of the aggrieved persons to recover damages at the expense of the confiscated property, namely the property gained from crime, including judicial recovery of damages, which directly follows from the norms stipulated by Articles 3, 18 and 19 of the RA Constitution. Accordingly, the Constitutional Court states that application of Article 55, Part 4 of the RA Criminal Code may be considered lawful only when the property gained from crime is returned to the owner, possessor or their successors, according to Article 119, Part 1, Point 3 of the RA Criminal Procedure Code.

Moreover, even if the property gained from crime is not enough to recover the property which may not be legally possessed due to committing crime, the RA legislation provides the possibility to satisfy the interests of the aggrieved at the expense of the property confiscated from the convict, as a supplementary type of punishment. Particularly, according to Article 69 of the RA Law on Compulsory Enforcement of Judgments, the damages of the crime are the forth to be satisfied from the value of the confiscable property of the convict.

The Constitutional Court states that Article 55, Part 4 of the RA Criminal Code, according to which, property gained from crime shall be confiscated regardless the ownership or the possession of the convict or any other third party, and, in accordance with Article 119, Part 1, Point 3 of the RA Criminal Procedure Code, it does not stipulate the condition of necessary protection of the right to property of the aggrieved. In such situation not only intersystem contradictions emerged, but also the institutions of confiscation of the property of the convict, as a type of punishment and confiscation of the property gained from crime became identical. In the law-enforcement practice, the challenged legal regulation is interpreted in a way that in the case of confiscation of property gained from crime the entire property is gratuitously transfer to the State without protection of the property interests and right of ownership of the aggrieved (legal possessor).

Proceeding from the results of consideration of the case and being ruled by the provisions of Article 100, Part 1 and Article 102 of the RA Constitution, Articles 63, 64 and 69 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare the provision “That property is confiscable regardless the ownership or possession by the convict or any other third party” of Article 55, Part 4 of the RA Criminal Code in regard to the interpretation in law-enforcement practice, that does not guarantee necessary protection of property interests and right to ownership of the aggrieved (legal



possessor), to be incompatible with the requirements of Article 20, Part 5 and Article 31, Part 2 of the Constitution of the Republic of Armenia and invalid.

2. Pursuant to Article 102, Part 2 of the RA Constitution this decision is final and enters into force from the date of announcement.

Chairman

G. Harutyunyan

12 July 2011

DCC-983