

**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 426.9, PART 1 OF THE RA CRIMINAL PROCEDURE CODE AND ARTICLE 204.33, PART 1, ARTICLE 204.38 OF THE RA CIVIL PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF THE CITIZENS ARAM SARGSYAN, KARAPET RUBINYAN, SERINE FLJYAN, IRINA OGANESOVA, ANNA AND AGNESSA BAGHDASARYAN, SVETA HARUTYUNYAN, SERGEY HAKOBYAN, GAYANE KIRAKOSYAN AND “MELTEX” LLC**

**Yerevan**

**15 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 (Rapporteur), V. Hovhanissyan, H. Nazaryan, A. Petrosyan (Rapporteur), V. Poghosyan, with the participation of the representatives of the Applicants: A. Zeinalyan, A. Ghazaryan, K. Mezhlumyan, G. Torosyan,

representative of the Respondent: D. Melkonyan, the Adviser of 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 on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Article 426.9, Part 1 of the RA Criminal Procedure Code and Article 204.33, Part 1, Article 204.38 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the applications of the citizens Aram Sargsyan, Karapet Rubinyan, Serine Fljyan, Irina Oganeseva, Anna and Agnessa Baghdasaryan, Sveta Harutyunyan, Sergey Hakobyan, Gayane Kirakosyan and “Meltex” LLC.

The Case was initiated on the basis of the applications submitted to the Constitutional Court of the Republic of Armenia by the citizens Aram Sargsyan and Karapet Rubinyan on 14.01.2011, Irina Oganeseva, Anna and Agnessa Baghdasaryan on 14.02.2011, Serine Fljyan on 14.02.2011, “Meltex” LLC on 15.02.2011, Sveta Harutyunyan on 06.05.2011, Sergey Hakobyan, Gayane Kirakosyan on 16.06.2011 respectively.

On the basis of Article 39 of the RA Law on the Constitutional Court, the Constitutional Court joined the cases on the abovementioned applications to consider in the same court session by the Procedural Decision PDCC-56 of the Constitutional Court dated 06.07.2011.

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

1. The RA Criminal Procedure Code was adopted by the RA National Assembly on 1 July 1998, signed by the RA President on 1 September 1998 and came into force on 12 January 1999.

The challenged Part 1 of Article 426.9 of the RA Criminal Procedure Code titled "Judgments Review" stipulates:

"1. While considering the case in review proceedings due to new or newly revealed circumstances the court renders a judgment according to the general procedure prescribed by this Code."

The RA Civil Procedure Code was adopted by the RA National Assembly on 17 June 1998, signed by the RA President on 7 August 1998 and came into force on 1 January 1999.

The challenged Part 1 of Article 204.33 of the RA Civil Procedure Code stipulates:

"New circumstances are grounds for judgments review, if:

- 1) The Constitutional Court of the Republic of Armenia found fully or partially unconstitutional the judicially applied law or legal act by its decision in force."

The challenged Article 204.38 of the RA Civil Procedure Code stipulates:

"Article 204.38. The rules for judgment review due to new or newly revealed circumstances

If the given Section does not prescribe special rules, then the general rules of this Code shall cover the proceeding of judgment review due to new or newly revealed circumstances."

By ՀՕ-270-Ն Law dated 28.11.2007 the RA Criminal Procedure Code was supplemented by Section 12.1 titled "Judgment Review due to newly revealed circumstances." Article 426.9 is set forth in Chapter 49.1 of this Section, Part 1 of which has not been amended afterwards.

The challenged Article 204.38 of the RA Civil Procedure Code was set forth in the RA Civil Procedure Code by the RA Law ՀՕ-94.9-Ն dated 20.05.2010 on making amendments and supplement to the Civil Procedure Code of the Republic of Armenia. In accordance with Article 1 of the latter, Sections 3.1 and 3.2 of the RA Civil Procedure Code were invalidated. In accordance with Article 2 of this Law, the Code was supplemented with Section 3.3, which includes the challenged norm.

2. The procedural background of the joint case under consideration is the following. Based on the Decisions DCC-844 dated 07.12.2009 and DCC-871 dated 30.03.2010 of the RA Constitutional Court, on 01.05.2010 the Applicants K. Rubinyan and A. Sargsyan lodged a complaint to the RA Court of Cassation demanding to review due to new circumstance the decisions on returning the cassation appeal adopted by the Court respectively on 03.07.2009 and 27.05.2009 concerning the criminal cases ԵԿԴ/0007/11/09 and ԵԿԴ/0008/11/09. On the basis of the lodged complaints, on 04.06.2010 the RA Court of Cassation adopted decisions to initiate a proceeding for judgment review due to new circumstances.

On 08.04.2010 the Applicants I. Oganosova, Anna and Agnesa Baghdasaryan lodged complaints to the RA Court of Cassation demanding to review the decision of the RA Court of Cassation on returning the cassation complaint due to new circumstance on the basis of DCC-866 of the RA Constitutional Court dated 23.02.2010. By the decision of the RA Court of Cassation dated 19.05.2010 a proceeding was initiated on the basis of the submitted complaints.

By the decision No. 3-7(ՎԴ) of the RA Court of Cassation dated 13.08.2010 the submitted complaint was partially satisfied and the decision of the Civil and Administrative Chamber of the RA Court of Cassation dated 13.03.2009 was reviewed. By the same decision of the Civil Chamber of the RA Court of Cassation the decision dated 05.02.2007 on returning the cassation complaint was left unchanged, and the complaint of Irina Oganosova and Anna and Agnesa Baghdasaryan was dismissed.

Based on the decision DCC-866 of the RA Constitutional Court dated 23.02.2010, the Applicant Serine Fljyan lodged a complaint to the RA Court of Cassation on 16.03.2010 demanding to review the decisions of the RA Court of Cassation on returning the cassation complaint due to new circumstance. On 14.04.2010 the RA Court of Cassation made a decision to initiate a proceeding based on the submitted complaints.

By the decision No. 3-123 (ՎԴ) of the RA Court of Cassation dated 13.08.2010 the submitted complaint was partially satisfied and the decision of the Civil and Administrative Chamber of the RA Court of Cassation dated 24.07.2009 was reviewed. By the same decision of the Civil Chamber of the RA Court of Cassation the decision dated 30.11.2007 on returning the cassation complaint was left unchanged, and the complaint of S. Fljyan was dismissed.

Based on the decision DCC-917 of the RA Constitutional Court dated 18.09.2010, the Applicant Sveta Harutyunyan lodged a complaint to the RA Court of Cassation on 28.10.2010 requesting to review the decision ՎԴ4426/05/08 in administrative case of the RA Court of Cassation on returning the cassation complaint dated 08.07.2009 due to new circumstance and to overturn and change the decision ՎԴ4426/05/08 in the administrative case rendered by the RA Administrative Court on 23.04.2009.

By the decision on returning the cassation complaint, dated 10.11.2010 the RA Court of Cassation returned the complaint for the reason of it's incompliance with the requirements of Article 234, Point 1, Sub point 4 of the RA Civil Procedure Code.

Based on the decision DCC-866 of the RA Constitutional Court dated 23.02.2010, the Applicant "Meltex" LLC lodged a complaint to the RA Court of Cassation on 09.03.2010 demanding to review the decisions dated 19.02.2009 and 19.02.2009 in civil cases No. 3-10 (SԴ) and No. 3-11 (SԴ) rendered by the Civil and Administrative Chamber of the RA Court of Cassation due to new or newly revealed circumstances. On the basis of the complaints submitted by "Meltex" LLC on 09.03.2010, the RA Court of Cassation adopted decisions on initiating proceeding of the cassation complaint on 24.03.2010.

On 13.08.2010 the RA Court of Cassation adopted decisions on partial satisfaction of the lodged complaints in Cases ԵԿԴ 3-10(SԴ)2009 and ԵԿԴ 3-11(SԴ)2009 according to which the decisions dated 19.02.2009 in Civil Cases No. 3-10 (SԴ) and No. 3-11 (SԴ) rendered by the Civil and Administrative Chamber of the RA Court of Cassation, and the decisions dated 23.04.2004 and 27.02.2004 in Civil Cases No 3-748(SԴ) and No. 3-397(SԴ) respectively, were left unchanged, and the complaints of "Meltex" LLC were not satisfied.

The RA Court of Cassation did not regard the judgment of the European Court of Human Rights dated 18.06.2008 concerning the case "Meltex" LLC and Mesrop Movsesyan vs. Armenia (Complaint No. 32283/04) as a ground to review it's decisions dated 23.04.2004 and 27.02.2004 in civil cases No. 3-748(SԴ) and No. 3-397(SԴ) respectively.

Based on the decision DCC-873 of the RA Constitutional Court dated 13 April 2010, according to which Article 118.6, Part 1, Point 3 of the RA Administrative Procedure Code was declared contradicting to the RA Constitution and invalid, the Applicants S. Hakobyan and G. Kirakosyan applied to the RA Court of Cassation demanding to review the decision of the RA Court of Cassation dated 07.04.2010 due to mentioned decision. On 29 December 2010, the Court of Cassation made a decision to dismiss the demand to initiate a review proceeding, reasoning that the mentioned decision of the Constitutional Court may not be regarded as a ground to review the judgment in question, as by its decision the Constitutional Court postponed the invalidation of the norm declared as unconstitutional.

3. According to the Applicants A. Sargsyan, K. Rubinyan and "Meltex" LLC, the challenged legal regulations of the RA Criminal and Civil Procedure Codes first violate the right to constitutional justice, which is component of the right to judicial protection guaranteed by Article 18 of the RA Constitution, thus not providing with the opportunity to restore their violated constitutional rights due to the decisions of the Constitutional Court acknowledged as new circumstance. According to them, that violation is particularly in the fact that in the challenged provision the wording "general procedure" or "general rule" means that as a result of

the Case consideration initiated due to new circumstances, the Court exercises the same powers, as for checking the legitimacy of the judgment of the inferior court, which in its turn means, that the court reviewing the judgment is authorized to dismiss the complaint leaving the reviewed judgment unchanged. That is, according to the Applicants, the unconstitutionality of the challenged provisions is in the fact that it gives the possibility to leave unchanged the reviewable judgment, that has been rendered in application of the legislative provision declared as contradicting the RA Constitution by the Constitutional Court or in violation of the requirements of the European Convention on Protection of Human Rights and Fundamental Freedoms.

Based on the abovementioned argumentation the Applicants requested to declare Article 426.9, Part 1 of the RA Criminal Procedure Code and Article 204.38 of the RA Civil Procedure Code as contradicting Articles 18, 19 and 101 of the RA Constitution and invalid so far as they authorize the courts to adopt a judgment according to the general procedure prescribed by the procedural code, as well as dismiss the complaint and leave the judgment unchanged while considering the Case in proceeding initiated due to new circumstance.

According to the Applicants Irina Oganeseva, Anna and Agnesa Bagdasaryan and Serine Fljyan, if according to the former RA Civil Procedure Code the provisions regulating the proceedings to review the judgments due to new circumstance precisely defined the scope of the decisions adopted as a result of judgment review due to new circumstance, then the current legal regulation does not specify the scope of the decisions. According to them, the expression “general rules of this Code cover the proceeding of judgments review due to new circumstances” in the challenged provision of the RA Civil Procedure Code contradicts Articles 1 and 6 of the RA Constitution from the perspective of legal certainty. Such ambiguity is a ground for the RA Court of Cassation to apply Article 204.38 of the RA Civil Procedure Code and adopt a decision prescribed by Article 240, Part 1, Point 1 of the RA Civil Procedure Code leaving the reviewed judgment unchanged, while reviewing the judgment due to new circumstance.

According to the Applicants, owing to such ambiguity, the RA Court of Cassation gains opportunity or is forced to exercise its powers defined for the cases concerning the review of the judgments on the merits. Meanwhile, in the case of judgment review due to new circumstance, the RA Court of Cassation may not have full authorities prescribed by Article 240 of the RA Civil Procedure Code, but is bound by the decision of the RA Constitutional Court which is considered as a new circumstance and may not leave unchanged the judgment containing an unconstitutional norm.

The arguments of the Applicant S. Harutyunyan, concerning the unconstitutionality of Article 204.38 of the RA Civil Procedure Code by, in essence, are similar to the argumentation presented by the Applicants I. Oganeseva, Anna and Agnesa Bagdasaryan and S. Fljyan.

Concerning Article 204.33, Part 1 of the RA Civil Procedure Code the Applicant stated that it does not regard the application of legislative provision against the person with the

interpretation contradictory to the one provided by the Constitutional Court decision, as the ground for judgment review due to new circumstance. According to the Applicant, the challenged provision contradicts the requirements of Articles 3, 18 and 19 of the RA Constitution. According to the assessment of the Applicant, in the case of apparent violation of the constitutional right of a person the RA Constitutional Court decision declaring the challenged provision in conformity with the Constitution in the framework of the legal positions of the Constitutional Court, does not become a judicial remedy for the right of a person, because of not being a grounds for the judgment review due to new circumstance, and as a result the restoration of the violated right does not occur.

According to the Applicants S.Hakobyan and G.Kirakosyan, Article 204.33, Part 1 of the RA Civil Procedure Code, with the interpretation provided in the law enforcement practice, does not make possible to ensure the restoration of the violated constitutional right of the person via the case review due to new circumstances, when the challenged provisions was applied to a person with the interpretation differing from the legal position of the RA Constitutional Court. Besides, in the law enforcement practice the phrase “declared as unconstitutional” of the challenged norm is understood as such only for the cases when the provision declared as unconstitutional loses its force from the moment of entering into force of the decision of the Constitutional Court.

4. In his explanation concerning the constitutionality of Article 426.9, Part 1 of the RA Criminal Procedure Code and Article 204.38 of the RA Civil Procedure Code the Respondent, objecting the argumentation of the Applicants, states that Criminal Procedure and Civil Procedure Codes provide comprehensive legislative regulation for the judgments review based on the decisions of the Constitutional Court, and give the court reviewing the judgment due to new circumstance, the possibility to adopt decisions prescribed by Criminal Procedure and Civil Procedure Codes, as well as to dismiss the cassation complaint leaving the judgment unchanged. That is, the judgment review does not always assume its amendment or invalidation. According to the Respondent similar regulation is fully in the framework of complete mechanism for judgment review due to new circumstances.

Concerning the issue of the constitutionality of Article 204.33, Part 1 of the RA Civil Procedure Code, the Respondent refers to the Decision DCC-943 of the RA Constitutional Court dated 25 February 2011, stating that the Constitutional Court expressed its legal position concerning the challenged legal regulation in this decision.

Presenting the mentioned explanation, the Respondent, simultaneously, files a motion to terminate the proceeding of the case concerning Article 426.9, Part 1 of the RA Criminal Procedure Code and Article 204.38 of the RA Civil Procedure Code, reasoning that the challenged provisions may not be regarded as “application” of the legislative provision to the Applicants in the perspective of its constitutionality.

5. Concerning the motion of the Respondent to terminate the proceeding of the case, the Constitutional Court finds the argumentations of the Applicants to be sufficient grounds for consideration of the case on merits, revelation of the constitutional-legal contents of the challenged norms and adoption of a decision on the merits according to the requirements of Article 19 of the RA Law on the Constitutional Court.

In the framework of this case, the Constitutional Court, in particular, necessitates finding out:

- Whether the challenged legal regulations make possible to ensure effective judicial protection of the violated rights of a person and to restore the violated constitutional rights guaranteeing implementation of the decisions of the Constitutional Court;
- Whether in the process of judgment review due to new circumstance the powers of the competent court are subject to a specific legal regulation;
- Whether it is lawful to leave the reviewed act unchanged while reviewing the judgment due to new circumstance?
- Whether the challenged legal regulations and the established law enforcement practice correspond to the legal positions on the constitutionality of the institution of the judgments review due to new circumstances expressed in the previous decisions of the RA Constitutional Court.

In a number of decisions (DCC-701, DCC-751, DCC-758, DCC-767, DCC-833, DCC-935 and DCC-943) the RA Constitutional Court expressed fundamental legal positions concerning the institution of the judgments review due to new circumstances, the criteria of its effectiveness and viability, legal guarantees necessary for the implementation of the person's rights to the constitutional justice of through this institution. Thus, the RA Constitutional Court necessitates considering the constitutional legal dispute raised within this Case in the context of its legal positions and from the perspective of prerequisites of implementation of effective protection of the subjective human rights.

For assessment of the influence of the challenged legal regulations on the effectiveness and viability of the institution of review of the judgments due to new circumstances, as well as on the possibility of effective implementation of the right to constitutional justice, the Constitutional Court necessitates also revealing the constitutional legal content of the concepts "proceeding in judgment review" and "judgment review," as well as the tasks of each procedural stage of «initiating the proceeding for judgment review» and of «judgment review», to specify the issues raised within their framework and subject to solution, underlining the significance of the necessity of uniform understanding of not only the concept of «new circumstances» in the judicial practice, but also the procedural rules for judgment review due to new circumstances, i.e. the restoration of the violated rights of the person.

6. Pursuant to requirements of Article 63, Part 1 of the RA Law on the Constitutional Court during the determination of the constitutionality of the challenged legal regulation it is crucial to reveal the constitutional legal content of the challenged provisions together with the interpretation provided in the law enforcement practice, as **the constitutionality of the legal norm is not only conditioned with the way of its stipulation in the legal act, but also its understanding and application in law enforcement practice.**

According to the information provided concerning this case provided by the RA Judicial Department to the Constitutional Court, 48 persons lodged 68 complaints to the RA courts concerning the judgments review due to new circumstances prescribed by Article 426.4, Part 1 of the RA Criminal Procedure Code and Article 204.33, Point 1 of the RA Civil Procedure Code, since 4 October 2004 to 10 May 2011. One complaint amongst them was submitted to the RA Criminal Court of Appeal, which was not considered, and 67 complaints were submitted to the RA Court of Cassation. 46 complaints were submitted to the Civil and Administrative Chamber of the Court of Cassation due to the mentioned grounds, 37 of which were returned and 9 of them were satisfied regarding the demand of review. 21 complaints were submitted to the Criminal Chamber of the Court of Cassation, 10 of which were returned, the initiation of proceeding for 7 complaints were dismissed and 4 complaints were satisfied with regard to review and the cases were sent to the corresponding courts for new examination.

Taking into consideration that during the abovementioned period the RA Constitutional Court has declared the law provisions as contradicting the RA Constitution and invalid on the basis of 96 individual applications in 31 cases, the Constitutional Court states that only 48 from 96 competent subjects have applied to demand the judgment review due to new circumstances.

The researches made by the Constitutional Court state that in the cases when according to Article 102, Part 3 of the RA Constitution and Article 68, Part 15 of the RA Law on the Constitutional Court the Constitutional Court postponed the invalidation of the norm contradicting the Constitution, in the judicial practice the citizens' applications based on new circumstances, usually were not considered (26 similar complaints were registered, which in particular concern the Decisions DCC-753, DCC-758, DCC-780, DCC-782, DCC-873, DCC-930 and DCC-943 of the RA Constitutional Court).

The examination of the established law enforcement practice concerning the procedure of initiation of review proceeding and judgments review due to new circumstances states that the following basic procedural elements are typical for that proceeding:

- The competent court initiates a review proceeding based on the complaint if it finds a new circumstance to be existed. If the court finds the corresponding decision of the Constitutional Court in regard to that person, not to be a new circumstance then the demand to initiate a review proceeding is dismissed;



- While reviewing the corresponding judgment in the framework of the initiated proceeding in review, the influence of implementation of the norm declared as unconstitutional on the judgment by which that norm has been applied and/or on the outcome of the given case is assessed;
- If assessing the abovementioned circumstance in the framework of the proceeding in review, the competent court finds the fact of implementation of the norm declared as unconstitutional to have no effect on the outcome of the case and/or the given judgment, **it left the judgment, by which an unconstitutional norm has been applied, unchanged.** The legal basis for it are the challenged provisions of Article 426.9, Part 1 and Article 204.38 of the RA Criminal Procedure and Civil Procedure Code, respectively, and according to the interpretation provided in the law enforcement practice, the formulation “general procedure” prescribed therein makes possible during the judgment review to be guided by Article 419 of the RA Criminal Procedure Code and Article 240 of the RA Civil Procedure Code respectively, and to leave the corresponding judgment unchanged;
- As a rule, the initiation of the proceeding in review is rejected for all those cases when the Constitutional Court decided to postpone the invalidation of the legal norm declared as unconstitutional;
- As a result of the performance of the function of the review of the judgments in force due to new circumstances the Court of Cassation exercises the same powers as defined for the performance of the function of the review of the judgments in force by Court of Appeal.

Based on the results of the research of law enforcement practice, the Constitutional Court states that, no judgment, by which the norm declared as contradicting the RA Constitution has been applied, was left unchanged in the practice of judgments review due to the decisions of the Constitutional Court, by the Criminal Chamber of the RA Court of Cassation. Meanwhile, as a result of the proceeding in review initiated by the Civil and Administrative Chambers of the RA Court of Cassation, 5 judgments containing a norm declared as contradicting the RA Constitution, were left unchanged.

Assessing the abovementioned law enforcement practice, the Constitutional Court states that for the last case the legal position expressed in Point 13 of the Decision DCC-758 of the RA Constitutional Court dated 9 September 2008 and reconfirmed in DCC-866 dated 23 February 2010, was not considered, according to which, if the decision of the Constitutional Court on declaring the corresponding legislative provision as contradicting the Constitution and invalid, is a new circumstance and a ground for judgment review, **then practically the ongoing effect of the reviewed act is impossible, because the justice administration was based on the unconstitutional norm which will continue to be in force.**

The Constitutional Court states that because of this law enforcement practice even for the abovementioned few cases satisfying the demands for judgments review, in separate cases, the

judgments by which the norms declared as contradicting the RA Constitution has been applied, continue to be in force and their review does not cause any legal consequences for the applicants from the viewpoint of protection of their subjective rights. Meanwhile, in a number of cases the demands for review of the judgment by which the unconstitutional norm has been applied and for initiation a proceeding in review are even rejected, and a decision on returning the complaint in review is adopted. Moreover, in vast majority of the cases, as it was mentioned, this demand is dismissed by reasoning that the Constitutional Court, while declaring the provision applied by the courts as contradicting the Constitution, postponed the invalidation of the unconstitutional norm and the complainant has not proved and substantiated the existence of a new circumstance in this matter. Moreover, if the complaint is submitted after the expiry of the postponement term, the complaint is returned by reasoning that three months deadline for submitting a complaint prescribed by law was missed.

In this concern, the Constitutional Court necessitates stating that the judicial practice has developed as opposed to the legal positions expressed in the Decision DCC-701 of the Constitutional Court dated 11 May 2007. In this decision the Constitutional Court mentioned in particular: “concerning the possibility of citizens rights protection due to new circumstances then it springs up from the date of invalidation of the legal act or its any provision by the Decision of the Constitutional Court, that is from the date of expiry of its postponement term according to the procedure prescribed by law.

However, according to the requirements of Article 68, Part 16 and 17 of the RA Law on the Constitutional Court the further effect of the norm declared unconstitutional, has only the aim to prevent the threats of legal security, inevitable and harmful consequences for the public and for the state and to avoid more essential harm to the basic rights and freedoms of human and citizen. Meanwhile, if the provisions prescribed in Article 102, Part 3 of the Constitution, as well as Article 68, Part 15, Paragraph 1 of the RA Law on the Constitutional Court are grounds for the Constitutional Court to postpone the invalidation of the legal act and its particular unconstitutional provision, then the state and local self government (especially law-making) bodies are obliged to take possible and necessary measures within this time period in order to prevent the consequences, mentioned in Article 68, Part 15, Paragraph 1 of the RA Law on the Constitutional Court. Hence, the approach to the further application of the norms declared unconstitutional and postponed must not be mechanical, but considering the legal position of the Constitutional Court following from the fundamental constitutional principles and the abovementioned priorities underlying postponement and stipulated by law, also ruling out the possibility of reproduction of the unconstitutional provisions in any legal act.”

Based on the analysis of the mentioned law enforcement practice, the Constitutional Court, meanwhile, finds that practice to be the result of incorrect understanding and interpretation of the concepts “proceeding in review” and “judgment review.”

7. The Constitutional Court necessitates revealing the constitutional legal content of the concepts “proceeding in review” and “judgment review” in result of the systematic analysis of

the norms of Chapter 49.1 of the RA Criminal Procedure Code and Section 3 of the RA Civil Procedure Code **based on the legal content of the institution of restoration of violated rights.**

The whole content of the institution of judgments review due to of the Constitutional Court decision is in the assurance of restoration of the violated constitutional rights through this institution. The restoration of violated rights demands elimination of negative effects occurred to the person by violation, which in its turn demands to restore as much as possible the situation existing prior to the violation (*restitutio in integrum*). If the constitutional right of the person is violated by the judgment in force, restoration of the situation prevailing prior to the violation, assumes the creation of a situation existed in the absence of this judgment. That is, in concerned case the invalidation of corresponding judgment makes possible to provide the restoration of violated rights. Consequently, the proceeding in judgment review, as the means of restoration of violated constitutional right of a person shall lead to the invalidation of the judgment that violated the right.

The European Court of Human Rights revealed the content of the universally recognized principle *restitutio in integrum* in Case of Papa michalopoulos and others v. Greece dated 31 October 1995, in Point 34 of which the Court, in particular, states that “a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.” The principle of *restitutio in integrum* expressed in the European Court judgment, afterwards is reflected in the Recommendation R (2000)2 on re-examination or re-opening of certain cases at domestic level following from the judgments of the European Court of Human Rights adopted by the Committee of Ministers of the Council of Europe. The Constitutional Court necessitates emphasizing that in the mentioned recommendation the **re-examination of the case and new consideration of the case** are indicated as the means of effective guaranteeing of the principle of *restitutio in integrum* **and the renewal of the case is considered as a special remedy for reopening of the case, i.e. the reopening of the proceeding of the Case.** The examination of the Resolutions of the Committee of Ministers on execution of the judgments of the European Court states that in criminal cases the new consideration of the criminal case following the judgment of the European Court, as a rule, is the only means for ensuring the principle of *restitutio in integrum*.

Referring to the legal positions expressed in a number of previously adopted decisions concerning the constitutionality of judgments review due to new circumstances, as the institution of restoration of the violated rights of the person, and reconfirming them, the Constitutional Court states:

- In the case of existence of new circumstances, when there is an objective necessity for implementation of the right, because of the legally confirmed fact of application of the normative act declared as unconstitutional, the initiation of “the proceeding in judgment review” and the process of judgment review by the competent court is a legal necessity, the court’s constitutional obligation, which has the aim to restore the violated constitutional rights of the person;
- **The scope and framework of corresponding enforced judgment review due to new circumstances is conditioned with the subject of regulation, the nature and peculiarities of relations, scopes of application of the normative provision**

**declared as unconstitutional, and the fact of violation of the certain rights of the person based on them.**

The Constitutional Court necessitates stating that it is nonrandom that, although Chapter 49.1 of the RA Criminal Procedure Code is titled “Judgments review due to newly revealed or new circumstances” and the definition “**judgment review**” is mainly used in the provisions of this Chapter, Article 426.4 of the mentioned Chapter is titled “Grounds and time-limits **of the review of cases** due to new circumstances.”

Based the abovementioned content of the institution of violated rights’ restoration, as well as the content of restitutio in integrum principle and analysis of the mentioned Recommendation of the Committee of Ministers addressed to assurance of that principle, the Constitutional Court finds that by its contents the term “judgment review” due to new circumstance in essence is equivalent to the contents of the terms “reopening of the case” and “resumption of the case proceeding” and the mentioned understanding of the concept of judgment review shall predetermine the content, scope, framework and tasks of proceeding in review and the issues subject to solution within it. Meanwhile, in the framework of the proceeding in judgment review, that is the proceeding in case resumption, such measures shall be undertaken, which, if necessary, shall ensure the case review in a scope, which is possible only for cases of vacation of the judgments in force, by which an unconstitutional norm has been applied and for judgment review in full or as to part thereof conditioned with the violated right of a person. The institution of review may reach it’s aim only in the case of assurance of case resumption in the conditions and framework of declaration of a particular fact of unconstitutionality of the applied certain norm. Considering the international legal approaches, the Constitutional Court also finds that even though the institution of case resumption has its peculiarities in the criminal and civil proceedings, their constitutional legal contents follow the same aim: to ensure protection of the subjective right of a person.

Based on the abovementioned, the Constitutional Court finds that the judgment review following the Constitutional Court decision shall ipso facto lead to vacation of the judgment, which applied the unconstitutional norm. Concerning the powers of the competent body resulting from the judgment vacation the Constitutional Court finds that peculiarities of each specific case conditioned **the referring of the given case to be revised in the court previously considered that case, or change of the vacated act by the court vacating the judgment, if the confirmed factual circumstances makes possible to render a new judgment without revision taking into account the declaration of the applied legal norm as contradicting the RA Constitution.**

Judgments review due to new circumstances is an exceptional case, when the assurance of the protection of human rights and effective implementation of the decisions of the Constitutional Court and the judgments of the European Court of Human Rights prevail over the principles upon which the doctrine res judicata is based, in particular over the principle of legal certainty. This circumstance is highlighted in a number of decisions of the European Court of Human Rights. In particular, concerning this issue, the European Court of Human Rights indicates that “...the requirements of legal certainty are not absolute. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character or if serious legitimate considerations outweigh the principle of legal certainty. The mere possibility of reopening a criminal case is prima facie compatible with the Convention, including the guarantees of Article 6. It must be assessed in the light of, for

example, Article 4 § 2 of Protocol No. 7, which expressly permits a State to reopen a case due to the emergence of new facts, or where a fundamental defect is detected in the previous proceedings, which could affect the outcome of the case” (Judgment of Case of Xheraj v. Albania dated 29 July 2008, Points 52-53).

Proceeding from the mentioned above, the Constitutional Court states that rejection of the demand for judgment review due to new circumstance may not be substantiated by the reasons and necessity of preserving of the doctrine of *res judicata*, in particular, the principle of legal certainty, upon which it is based.

8. The Constitutional Court necessitates considering the concerned constitutional legal dispute also from the perspective of ensuring the constitutional harmony of function-institution-competence trinity.

Thus, in the scope of proceeding in judgments review due to new circumstances, the function with its own tasks and goals is exercised to restore the right violated in the conditions of existence of valid final judgment. The effective implementation of this function may be ensured by considering the peculiarities conditioned with its content, tasks and goals, and excluding the possibility of leaving unchanged the reviewed judgment containing an unconstitutional norm.

The RA Constitutional Court finds that leaving unchanged the reviewed judgment, by which a norm declared as contradicting the RA Constitution and invalid has been applied, does not guarantee the possibility for effective implementation of the function of judgments review, thus also not permitting to realize the goals and tasks of judgments review and, simultaneously, blocking the possibility of effective realization of the person’s right to constitutional justice. In this situation the assurance of the principle of rule of law and the supremacy of the Constitution deriving from it are not guaranteed.

Simultaneously, the Constitutional Court states that in the challenged norm the provision “as a result of consideration of the case, the court renders a judgment according to general procedure stipulated by this Code” first concerns **the case consideration** resulting from reopening of the case due to new circumstance. The general procedure of case consideration may be only implemented with regard to revision of the case following from the vacation of the corresponding judgment by which the norm declared as unconstitutional has been applied.

According to Article 426.7 of the RA Criminal Procedure Code and Article 204.36 of the RA Civil Procedure Code, amongst the other terms, the complaints for judgments review must contain the statement on new circumstance, which is a ground for the judgment review, and the materials confirming new circumstance must be attached to the complaint. According to Article 426.8, Part 2, Point 4 of the RA Criminal Procedure Code and Article 204.37, Part 4, Point 1 of the RA Civil Procedure Code, the Court rejects to initiate the proceeding in review, if **no evidence confirming** the new circumstance being a ground for judgment review **has been presented and if the Court is not aware of such a new circumstance**. The comparative analysis of the requirements for the complaint in review stipulated in the relevant Articles of the RA Criminal Procedure and Civil Procedure Codes, and the ground in question for rejecting the initiation of proceeding allows to conclude that if the complainant must state the new circumstance which appears to be the ground for review and present evidence confirming the new circumstance, then **at the stage of initiation of the proceeding or, which is the same, at the stage of admission of the complaint** the competent court must check the existence of appropriate evidence and not to assess its possible legal effects and to decide the issue of

admissibility of the complaint based on it. It is unequivocal that **availability of the new circumstance is a necessary and sufficient ground to initiate the proceeding in review and to invalidate the judgment containing unconstitutional norm, thus overcoming the legal effects of application of the unconstitutional norm.**

9. The Constitutional Court states that the proceeding in judgments review due to new circumstance may ensure the realization of its constitutional legal objective and tasks in the case of the following constitutional legal content of that proceeding:

a/ the existence of the statement of the new circumstance and the evidence confirming the new circumstance in the complaint for review, in addition to other terms set forth for the complaint, are sufficient basis for initiation of the proceeding in review;

b/ the demand to review may be rejected, if during the consideration of complaint within the proceeding in review, the circumstance mentioned in the complaint appears not to be a ground for judgment review, i.e. that circumstance is not a new one in that case, in the same time, if the Constitutional Court while declaring that norm as unconstitutional, postponed its invalidation, pursuant to the decision DCC-701 of the Constitutional Court dated 11 May 2007, the postponement may not be a ground for disregarding the Decision of the Constitutional Court as a new circumstance. If the Constitutional Court declares the provision as unconstitutional “as to this or that part thereof”, “so far as”, then that Decision is a new circumstance for judgment review, if that norm was applied to the person as to that part with the interpretation contradicting the RA Constitution;

c/ if within the proceeding in review the existence of the new circumstance is confirmed, then the judgments by which an unconstitutional norm has been applied, shall be invalidated as a result of this proceeding.

10. What concerns the constitutionality of Article 204.33, Part 1 of the RA Civil Procedure Code, then, in this regard, the Constitutional Court necessitates referring to its Decision DCC-943, dated 23 February 2011, Part 2 of the operative part of which declared Article 426.4, Part 1, Point 1 of the RA Criminal Procedure Code contradicting Articles 3, 6, 18, 19 and 93 of the RA Constitution and invalid; “in regard to the content used in law-enforcement practice, that does not provide an opportunity to restore the violated human rights that were resulted from the applying of a law (other legal norm) with an interpretation other than the legal positions of the Constitutional Court, through the review of the case due to new circumstances.” In Point 11 of the reasoning part of this Decision the Constitutional Court states “that the recognition of the legal positions expressed in the Constitutional Court decisions on the constitutionality of the legal acts as a new circumstance by the RA courts of general jurisdiction and specialized courts needs to be **comprehensively** and **urgently** regulated both in criminal, civil and administrative proceedings, considering the legal positions expressed in this Decision.”

Considering the equivalence of the content of the provision prescribed in the challenged Article 204.33, Part 1 of the RA Civil Procedure Code with the content of the provision prescribed in Article 426.4, Part 1, Point 1 of the RA Criminal Procedure Code, and that in the legal enforcement practice it gets the identical content with the one given to Article 426.4, Part 1, Point 1 of the RA Criminal Procedure Code, within this Case the Constitutional Court is based on the legal positions expressed in the Decision DCC-943 dated 25 February 2011, and finds these legal positions to be equally concerned also Article 204.33, Part 1 of the RA Civil Procedure Code.

11. Even if in a number of its decisions the RA Constitutional Court stated unproductiveness of legal regulation of the institution of judgments review due to new circumstances in the Republic of Armenia, nevertheless that institution continues to be imperfect. Considering the mentioned circumstance, within the consideration of this Case the Constitutional Court necessitates emphasizing the necessity of well-grounded reappraisal of the entire methodology of judgments review due to new circumstances, finding that the methodology of legal regulation of that institution shall be based on the obligations of the State prescribed in Article 3 of the RA Constitution to protect the fundamental rights and freedoms of the person and the citizen in conformity with the principles and norms of International Law.

The individual constitutional complaint is based on the idea and goal of protection of the subjective right of a person. The effective fulfillment of this goal requires restoring the violated constitutional rights of a person, on the basis of the Constitutional Court Decision. The examination of international practice shows that the mechanisms of restoration of violated constitutional rights due to decisions of Constitutional Justice Bodies are different depending on the choice and peculiarities of this or that model of individual constitutional complaint. In the countries, which have the institution of individual complaint, the restoration of violated constitutional right is carried out by the Constitutional Court, which, declaring the challenged norm or its application as unconstitutional, simultaneously overrules also the judgment by which the unconstitutional norm has been applied or the constitutional right of the person has been violated. In the case of this mechanism, the State itself guarantees the restoration of the violated constitutional right within the constitutional justice via fulfillment of its duty to protect the constitutional rights and freedoms of the citizens. In the countries, where only the judicially applied legal provisions are the object of constitutional review, the restoration of the violated constitutional rights is ensured on the basis of the constitutional courts decisions through the institution of judgments review.

The Constitutional Court finds that the existence of effective institution of judgments review shall also be based on the logics, according to which the State shall ensure the restoration of the violated rights because the duty to protect the rights and freedoms of citizens assumes that the State itself is responsible for restoration of rights violated by the judgments. Judgments review by the virtue of law is a quite effective remedy for ensuring the implementation of this duty of the State. In the Russian Federation, for example, the legal regulation of the institution of judgments review is based on this methodology.

The Constitutional Court finds that for further reinforcement of the guarantees for protection of human rights in the republic, the legislative developments shall proceed in accordance with the mentioned methodology.

Proceeding from the results of consideration of the case and being ruled by the provisions of Article 100, Part 1, 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. Article 426.9, Part 1 of the Criminal Procedure Code of the Republic of Armenia in regard to the constitutional legal content, which excludes the possibility of leaving unchanged the judgment, by which a norm declared as contradicting the RA Constitution has been applied, is in conformity with the Constitution of the Republic of Armenia.

2. Article 204.38 of the Civil Procedure Code of the Republic of Armenia in regard to the constitutional legal content, which excludes the possibility of leaving unchanged the judgment, by which a norm declared as contradicting the RA Constitution has been applied, is in conformity with the Constitution of the Republic of Armenia.

3. In the law-enforcement practice Article 426.9, Part 1 of the RA Criminal Procedure Code and 204.38 of the Civil Procedure Code may not be interpreted and implemented in another way contradictory to their constitutional legal content expressed in this Decision.

4. To declare Article 204.33, Part 1 of the Civil Procedure Code of the Republic of Armenia in regard to the content used in the law enforcement practice according to which while reviewing the case due to new circumstances within judicial appeal the opportunity to restore the persons' violated rights, that were resulted from the application of a legislative norm with the interpretation other than the constitutional legal content revealed by the RA Constitutional Court, is not provided, to be contradictory to the requirements of Articles 3, 6, 18, 19 and 93 of the Constitution of the Republic of Armenia and invalid.

5. Based on Article 102, Part 3 of the RA Constitution and Article 68, Part 15 of the RA Law on the Constitutional Court to determine 1 November, 2011 as the deadline for the invalidation of Article 204.33, Part 1 of the RA Civil Procedure Code, considering the fact, that the declaration of the norm mentioned in Part 4 of the operative part of this Decision, to be inconformity with the Constitution and invalid from the date of announcement of the decision, shall inevitably give rise to unfavorable effects in the sense of solution of the issue of human rights protection and guaranteeing the necessary legal security.

6. 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

15 July 2011

DCC-984