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Dear Reader*,

The first issue of the English version of the Supplement to the Bulletin of the Constitutional Court of the Republic of Armenia (published also in Russian) is presented. It aims to make the decisions of Armenia accessible for the English speaking readers and to emphasize the nature and peculiarities of establishment and development of the constitutional justice in Armenia.

The constitutional justice is more actively becoming a part of the state-legal system of nearly one hundred countries. Simultaneously, the bodies of the constitutional review of a number of countries face relatively common problems, but at the same time each country has many specific problems, which, of course, are reflected in the decisions of the constitutional courts of those countries.

The research of the practice of the constitutional review bodies of other countries plays a significant role in the establishment of rule of law state and civil society, as well as in strengthening the constitutionality, protection of constitutional legality and legal order in each country and has even become an imperative requirement. The publication of this Supplement by the Constitutional Court of the Republic of Armenia aims to address this problem.

The English translation of the decisions of the Constitutional Court of the Republic of Armenia firstly addresses to the English speaking readers, in particular, the representatives of the constitutional review bodies, judges, researchers and specialists. We are sure that the new issue shall play a special role and will raise interest among the specialists. We are also looking forward to their active cooperation with the Bulletin.

We would be glad to receive opinions and feedbacks concerning the published materials, which will be considered in the process of our further activity.

The English translation of the texts, published in this Supplement, is not official version, but, at the same time, the editors confirm their identity.

G. G. Harutyunyan
President of the Constitutional Court
of the Republic of Armenia,
Doctor of Law Sciences

* English translation of the decisions of the Constitutional Court of the Republic of Armenia for 2011, according to which the challanged legal norms were recognised as non constitutional, are included in this supplement.

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 426.1, PART 1 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE PROSECUTOR GENERAL OF THE REPUBLIC OF ARMENIA

Yerevan **4 February 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. Hovhannisyan (Rapporteur), H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of the representative of the Applicant, V. Shahinyan, the Head of the Department for Crimes Against the Person of the General Prosecutor's Office of the Republic of Armenia

the Respondent: the National Assembly of the Republic of Armenia, officially represented by 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 7 of the Constitution of the Republic of Armenia, Articles 25 and 71 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a written procedure in a public hearing the Case on conformity of Article 426.1, Part 1 of the Criminal Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the Prosecutor General of the Republic of Armenia.

The Case was initiated on the basis of the applications submitted to the Constitutional Court of the Republic of Armenia by the Prosecutor General of the Republic of Armenia on 27.09.2010.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent and having studied the Criminal 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 National Assembly of the Republic of Armenia on 1 July 1998, signed by the President of the Republic of Armenia on 1 September 1998 and came into force on 12 January 1999.

Article 426.1, Part 1 of the Code, which is titled "The court entitled to review the judgment due to newly revealed or new circumstances", states: "Only the judgment in force is reviewable due to newly revealed or new circumstances".

2. The procedural background of the Case is the following: within the criminal case on swindling initiated by Malatia Investigation Department of the RA Police, it was established that Arsen Y. Simonyan convicted of theft for four times and sentenced to imprisonment for the fifth time for the term of 13 years, got acquainted with Anush M. Nersisyan in the prison. A. Simonyan, abusing the confidence of the latter, with the help of his friend Arusyak N. Shelelenkyan, defrauded a particularly large amount of jewelry and money in sum of 3.050.030 AMD. During the proceeding of the criminal case a decision dated 26.01.2010 was made to separate the part from the criminal case concerning Arusyak N. Shelelenkyan, dismiss the proceeding regarding the mentioned part on the basis of Article 35, Part 2 of the RA Criminal Procedure Code and refusal from criminal prosecution against her.

The criminal case on charges against Arsen Y. Simonyan on 10 February 2010 was forwarded to the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts based on Article 178, Part 3, Points 1 and 3 of the RA Criminal Code. A. Simonyan was sentenced to 10 years' imprisonment without confiscation of property by the judgment from 15 June 2010 delivered by the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts. On 22 June 2010 the Trial Judge sent a letter stating that in the trial of the mentioned criminal case new circumstances were revealed substantiating the fact of A. Shelelenkyan's assistance to the commitment of the given swindling, which necessitated abrogating the decision dated 26.01.2010

on refusal from the criminal prosecution against her, dismissing the part of the Case and consider the issue of imposing criminal liability on her.

On 24.08.2010 the Prosecutor's Office of Yerevan Malatia-Sebastia Administrative District made a decision on initiation of proceeding due to newly revealed circumstances and the Malatia Investigation Department of the RA Police was assigned to carry out investigation.

3. Challenging the constitutionality of Article 426.1, Part 1 of the Code, the Applicant finds that it contradicts Articles 3, 18, 19 and 103 of the RA Constitution.

From the viewpoint of the Applicant, in the conditions of such a wording of the challenged legal norm, in essence, the review of the decisions of criminal prosecution body to dismiss the proceeding and terminate the criminal prosecution due to newly revealed or new circumstances is excluded. According to the Applicant, in this situation the constitutional rights of the persons injured by the crime, the legislative systematic regulation of that problem and the scope and logic of execution of constitutional powers of the Prosecutor's Office are violated.

The Applicant finds that the constitutional wording "... to restore his/her violated rights" stipulated in Article 19, Part 1 of the RA Constitution, concerns also the injured person in the criminal case. Hence, mechanisms shall be defined on review and abrogation of the decisions adopted in violation of law by the state bodies of criminal prosecution and judiciary. According to the Applicant, in the aspect of newly revealed circumstances, the current Criminal Procedure determines such mechanisms which concern only the review of judgments in legal force, thus excluding the necessity of those also for the acts adopted in pre-trial proceeding.

Based on the comparative analysis of previous and current legal regulations concerning the review of the acts adopted in pre-trial and trial proceedings, due to newly revealed or new circumstances, the Applicant finds that the legal norms of the Code of primary edition regulating the challenged legal relation, particularly Articles 21 and 408-410 of the Code, have been in a systematic connection, while Article 21 and provisions of Section 12.1 of the Code of current edition do not ensure the systematic and unified regulation of the problem. The Applicant's position is based on the argument that the analysis of the norms of Article 21 and Section 12.1 of the Code of current edition states that both the judgments and the decisions on dismissal of the proceeding and termination of the

criminal prosecution made in pre-trial proceeding, are reviewable due to newly revealed circumstances.

Considering the challenged norm in the context of the scopes and the logic of implementation of constitutional powers of the Prosecutor's Office, analyzing Article 103, Part 5, Point 2 of the RA Constitution, as well as Article 53, Part 2, Point 13 of the Code, the Applicant concludes that the review of the decision to dismiss the proceeding, including the review of the decision due to newly revealed circumstances is the Prosecutor's exclusive authority, and this argument is substantiated by positions expressed in the decision DCC-884 of the RA Constitutional Court dated 07.12.2009 regarding the interrelation between the prosecutor's supervision and judicial control over the pre-trial proceeding.

4. Opposing to the arguments of the Applicant, the Respondent finds that Article 426.1, Part 1 of the RA Criminal Procedure Code is in conformity with the RA Constitution. For substantiating this position, the Applicant notes that the norms of Section 12.1 of the RA Criminal Procedure Code titled "Judgments review due to newly revealed or new circumstances" concern only the judgments review. Meanwhile, "The RA current Criminal Procedure Code does not determine the procedure for abrogating the decisions on dismissal of the proceeding or termination of the criminal prosecution by the Prosecutor, due to newly revealed and new circumstances".

The Respondent insists that "While the current Criminal Procedure Code provides no precise procedural rules for abrogating the decisions on dismissal the proceeding or termination of the criminal prosecution by the Prosecutor due to newly revealed circumstances, … the declaration of Article 426.1, Part 1 of the Code contradicting the RA Constitution and void, may lead to legal uncertainty, violation of the constitutional and conventional right not to be under double jeopardy".

The Respondent also states that in "the concept of the RA new Criminal Procedure Code" the mechanism of the proceeding due to new and newly revealed circumstances is suggested to be also applied to the final acts made in pre-trial proceeding.

5. Within this Case, the RA Constitutional Court necessitates examining the challenged legal norm in the context of the entire legal regulation concerning the review of procedural acts, taking into account the necessity of balancing the interests of the injured on the one hand and the

principle of inadmissibility of double jeopardy, as a public interest on the other.

According to Article 21, Part 3 of the Code: "The decision of criminal prosecution body on dismissal of the proceeding, termination of the criminal prosecution or refusal from the criminal prosecution, excludes the reopening of the criminal case, if it may lead to exacerbation of the status of a person, except for the cases prescribed by part four of this Article."

According to the analysis of Article 6, Points 2, 4 and 5 of the Code which respectively defines the content of the concepts "criminal case", "proceeding", "pre-trial criminal proceeding", the Constitutional Court states that the phrase "reopening of the criminal case" in Article 21, Part 3 of the Code **may equally concern** criminal cases both in trial and in pre-trial proceedings or the criminal cases **finished** during one of the mentioned proceedings.

Based on the fact that the nature of new or newly revealed circumstances does not allow the body of preliminary inquiry or investigation to be aware of them, while conducting the proceeding of the given Case, the Constitutional Court also states that during the supervision over the legitimacy of the preliminary inquiry and investigation, the Prosecutor objectively may not regard the fact that the body of preliminary inquiry or investigation did not consider the new or newly revealed circumstance as a procedural mistake made in the process of conducting the proceeding of this Case.

As for the possibility of performance by the Prosecutor's Office the supervisory functions over the pre-trial proceeding caused by newly revealed or new circumstances after the expiry of the time limit mentioned in Article 21, Part 4 of the Code, then it is regulated by Article 21, Part 5 of the Code, which, in its turn, refers to the provisions of Section 12.1 of the Code. That is, it follows from the analysis of the provisions of Article 21, Parts 3, 4 and 5 of the Code that the legislator has envisaged the performance by the Prosecutor's Office of the supervisory functions over the pre-trial proceeding caused by newly revealed or new circumstances after the expiry of the time limit mentioned in Article 21, Part 4 of the Code and it has predetermined the necessity of providing the appropriate legal guarantees for realization of such possibility through the norms of Section 12.1 of the Code. Moreover, the review of the decisions on dismissal of the proceeding, termination of the criminal prosecution or refusal from the criminal prosecution made by the Prosecutor in pre-trial

proceeding, is considered to be a separate type of control over the legitimacy of the preliminary inquiry and investigation; it concerns the fulfillment of the Prosecutor's obligation to institute a criminal prosecution and to disclose the crime determined by Article 103, Part 1, Point 1 of the RA Constitution and Article 27 of the Code; it is an independent proceeding and, therefore, has certain peculiarities.

6. Based on the analysis of Section 12.1 of the Code, the Constitutional Court states that the mentioned Section concerns the relations regarding **exclusively the judgments** review due to new or newly revealed circumstances. This conclusion is based not only on the norms of Section 12.1 of the Code, but also on the titles of the mentioned Section and the titles of certain Articles. Moreover, there was no consistency in the process of the legislative amendments concerning the clarification of the subject matter of the legal regulation. For example, the challenged Article is titled "The court entitled to review the judgment due to newly revealed or new circumstances", while the subject matter of legal regulation of Part 1 of that Article is the system of legal acts, from which **only** the judgment **"in legal force"** is specified. This wording is also a manifestation of inertia of legal thinking, whereas there may not be concepts of "a judgment in legal force" and "a judgment in illegal force" so that the choice between them will be made through the restrictive concerning part of speech **"only"**.

As it follows from the grammatical analysis of the current wording, the expression "... **only** the judgment in legal force" of Article 426.1 of the Code is not limited with the stress on the circumstance of the judgment in "legal" force. The expression **"only"** in this phrase, as a restrictive concerning part of the speech, presumes that, in criminal proceedings no other final legal act may be reviewed due to newly revealed or new circumstances. Similar exception and stress like that demand to express fundamental constitutional legal position, concerning the issue, whether the blockage of the review of the final legal act due to newly revealed or new circumstances in pre-trial proceeding causes problems for assurance of effective protection of human rights. The issue of procedure types set forth by the legislator for the lawful implementation of this institution is another matter.

Purely from the viewpoint of necessity and overcoming the mentioned problems, the Respondent gives an exhaustive answer to the question, stating that "... taking into consideration the importance and conceptual

significance of the problem, as well as realizing that it may be effectively solved only in the case of systematic regulation ..., **in the concept of the RA new Criminal Procedure Code the mechanism of the proceeding due to new and newly revealed circumstances is offered to be also applied to the final acts adopted in pre-trial proceeding".**

The Constitutional Court finds that in practice, first of all, the absence of the legislative mechanism for review of final decisions on dismissal of the proceeding, termination of the criminal prosecution or refusal from the criminal prosecution, made in pre-trial proceeding of criminal case due to new or newly revealed circumstances should be practically considered as a violation of the rights and dignity of the person injured by the crime.

Realizing that the non-enjoyment of the right to access to the justice by the injured violates the principle of equality before the court, thereby making meaningless the idea of justice itself, a number of international legal instruments determined the scopes of the obligations of States, which shall support the effective protection of the procedural rights of the injured. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power A/RES/40/34, adopted by the UN General Assembly on 29 November, 1985 and Recommendation No. R(85)11 of the Committee of Ministers of the Council of Europe on "The position of the victim in the framework of criminal law and procedure" recommended to take internal measures to protect the rights of the injured, in particular to improve the judicial and administrative mechanisms of compensation of damages caused to the injured, to determine the status of the injured during the proceeding of the criminal case, the nature of the rights and duties of the court concerning the issue of guaranteeing his/her rights. According to the mentioned documents, one of the most important functions of criminal justice is to satisfy the demands of the injured and protect his/her interests and to increase confidence of the injured towards criminal justice.

7. The RA Constitutional Court states that the absence of the systematic legal regulation of the possibility to review the final decision of the body of criminal prosecution on dismissal of the proceeding, termination of the criminal prosecution or refusal from the criminal prosecution due to new or newly revealed circumstances, first of all, is caused by the current wording of Article 426.1, Part 1 of the RA Criminal Procedure Code, as a result of which the right of the person to effective remedies to protect his/her rights and remedies before judiciary, as well as other public bodies, is jeopardized.

Proceeding from the consideration of the Case and ruled by Article 101, Part 1, Point 7, Article 102 of the Constitution, Articles 63, 64, 68 and 71 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare the expression **"only"** in Article 426.1, Part 1 of the Criminal Procedure Code of the Republic of Armenia, insofar as it excludes the review of other final legal acts prescribed by law due to newly revealed or new circumstances thereby jeopardizing, particularly, the person's right to effective legal remedies before the competent public bodies during pre-trial proceeding, as contradicting to the requirements of Article 18, Part 1 of the RA Constitution and void.

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

Chairman **G. Harutyunyan**

4 February 2011
DCC-935

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 141, PART 1 OF THE ADMINISTRATIVE PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF THE CITIZENS SHAVARSH AND RAYA MKRTCHYAN AND OTHERS

Yerevan **8 February 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. Hovhannisyan, H. Nazaryan (Rapporteur), A. Petrosyan, V. Poghosyan,

with the participation of the representative of the Applicant: K. Mejlumyan, Advocate

the 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 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 141, Part 1 of the Administrative Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the applications of the citizens Shavarsh and Raya Mkrtchyan and others.

The Case was initiated on the basis of the applications submitted to the Constitutional Court of the Republic of Armenia by the citizens Shavarsh and Raya Mkrtchyan and others on 17.08.2010.

By its DCCCC/1-25 decision dated 06.09.2010 the Court Chamber of

3 Members of the Constitutional Court of the Republic of Armenia took the application for consideration in part of Article 141, Part 1 of the Administrative Procedure Code of the Republic of Armenia.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicants and the Respondent, having studied the Administrative Procedure Code of the Republic of Armenia, the challenged norm, other laws regulating procedural relations and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Administrative Procedure Code was adopted by the RA National Assembly on 28 November 2007, signed by the RA President on 10 December 2007 and came into force on 1 January 2008.

Article 141 of the RA Administrative Procedure Code is titled: "The ground for appealing the Administrative Court judgments in cases of challenging the validity of the normative legal acts." Prior to the adoption of the RA Law (ՀՕ-135-Ն) on making amendments to the Administrative Procedure Code dated 28.10.2010, the Part 1 of the Article challenged in this Case provided as follows:

"1. Administrative Court judgments in cases challenging the validity of the normative legal acts may be appealed to the Court of Cassation based only on the violation of substantive law".

According to the Case materials, adopting the final judgment, namely the decision in administrative case No. ՎԴ/4394/05/09 dated 05.05.2010, the Administrative Court applied Article 141, Part 1 of the RA Administrative Procedural Code in previous edition to the Applicants, which was amended by the Law ՀՕ-135-Ն after the Applicants applied to the Constitutional Court, and it states as follows:

"1. Administrative Court judgments in cases of challenging the validity of the normative legal acts may be appealed to the Court of Appeal, and Court of Appeal judgments may be appealed to the Court of Cassation based only on the violation of substantive law".

According to the Case materials, on 02.10.2009 the Applicants brought the case for invalidation of the Decision No. 944- Ն of the RA Government dated 26.06.2009 before the RA Administrative Court. On 30.10.2009 the Administrative Court made a decision on admission of the submitted complaint. On 25.02.2009 the RA Administrative Court officially notified of the administrative case examination in a written procedure according to Article 138 of the RA Administrative Procedure Code

and the date of announcement of the judgment on the merits. The Applicants filed a motion to the Administrative Court for a public examination of the Case. The court found the motion to be ill-founded, denied it and announced the decision No. ՎԴ /4396/05/09 on dismissal of the demand for invalidation of the decision 944- Ն of the RA Government dated 26.06.2009.

The Applicants filed an appeal in cassation against the decision of the Administrative Court. By its decision ՎԴ /4396/05/09 dated 05.05.2010 the RA Court of Cassation returned the appeal, and, referring to the Applicant's reasoning on the violation of Article 138 of the RA Administrative Procedure Code, mentioned that Article 138 of the Code is a procedural norm in accordance with Article 141, Part 1 of the RA Administrative Procedure Code, and the Administrative Court judgments in the cases challenging the validity of the normative legal act may be appealed only on the basis of violation of substantive law.

2. Challenging the provisions of Article 141, Part 1 of the RA Administrative Procedure Code in edition of 28 November 2007, the Applicants finds that "with the interpretation in law-enforcement practice" they contradict Articles 3, 18 and 19 of the RA Constitution, as they give a factual opportunity to the Administrative Court to deliver the judgments on the merits in the cases of challenging the normative legal acts without public trial or application of other constitutional principles of justice. The Applicants substantiate their arguments, referring also to the requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

According to the Applicant, the practice of administrative justice states that the current procedure of case consideration in a written procedure entirely ignores the principle of publicity and the right to public hearing is violated, and the RA Court of Cassation, while referring to the provisions of Article 141, Part 1 of the RA Administrative Procedure Code, has considered this fact neither.

3. Objecting to the arguments of the Applicants, the Respondent finds that the legislator included the challenged provisions in Chapter 24 titled "Special Proceedings" of the RA Administrative Procedure Code, which indicates their peculiarity, in particular, the methodology of consideration of the cases challenging the validity of normative legal acts compared with the consideration of administrative cases via the general proceedings and, as a result,

special appellate procedure against the delivered judgments. According to the Respondent: "in this case, as opposed to other proceeding rules, from the perspective of protection of the litigants' rights, the importance and significance of the procedural norms become of secondary importance, as in these cases the justice is administered based only on the norms of substantive law ... through the checking of the conformity of the normative legal acts with the superior normative acts, except for the RA Constitution."

The Respondent also finds the proceeding of the Case to be terminated, as the Applicants, formally challenging the constitutionality of the legislative provision, in essence, raise the issue of legitimacy of application of that provision, and in addition, the issue of the constitutionality of the challenged provisions of the Code is ill-founded in the application.

4. In this case the Constitutional Court finds no grounds upon which to terminate the proceeding, and while assessing the constitutionality of the challenged norm, necessitates deriving from:

- the need to ensure the judicial protection of fundamental human and civil rights in conformity with the principles and norms of international law (Article 3 of the RA Constitution),
- the need to guarantee the right to judicial protection and its important component the right to appeal the judgments, stipulated in Article 18 of the RA Constitution, as well as the right to fair trial stipulated in Article 19 of the Constitution, deriving from the common concept of complex legislative developments in that sphere, which follows from the decisions of the RA Constitutional Court on the constitutionality of the institution of judicial appeal,
- the necessity to implement the legal positions expressed in the previous decisions of the Constitutional Court concerning the increasing of the effectiveness and further improvement of the institution of administrative justice in the Republic of Armenia.

While evaluating the constitutionality of the challenged norm stipulated in Article 141, Part 1 of the RA Administrative Procedure Code, the Constitutional Court considers that, the abovementioned norm was amended by the Law ՀՕ-135-Ն dated 28.10.2010, which resulted in no substantial amendments to the legal regulation concerning the issue raised by the Applicants.

5. The RA Constitutional Court states that the RA Constitution guarantees:

- the right to protect the rights and freedoms of physical and legal persons before the court;
- the right to effective judicial remedies;
- the right to equal judicial protection in accordance with all requirements of fairness;
- the right to restore the violated rights by an independent and impartial court within reasonable time and in a public hearing.

Simultaneously, the person's right to judicial review by a higher court, i.e. the judicial appeal is a constitutionally prescribed special institution guaranteeing the judicial (effective) protection of violated rights and freedoms (Article 20, Part 3 of the RA Constitution). During the execution of the right to judicial protection and the administration of fair trial, the judicial appeal is the state's primary duty, that is, the fulfillment of justice objectives through the certain procedure, including the correction of possible judicial errors. The RA current legislation prescribes such procedures in the spheres of criminal, civil and administrative justice. In particular, the norms prescribed in Chapters 46 and 48 of the RA Criminal Procedure Code, as well as in Sections 4 and 5 of the RA Civil Procedure Code, regulate the relations connected with the judicial appeal in criminal and civil cases. For administrative cases, these relations are mainly regulated by the norms stipulated in Chapters 19.1 and 20 of the RA Administrative Procedure Code, as well as in Sections 4 and 5, and partially in the challenged Article 141 of Chapter 24.

Having examined the norms regulating the relations connected with the judicial appeals to the Appellate and Cassation Courts in the RA legal system and their features, the Constitutional Court states:

- the judgments, whether in force or without effect, such as the judgments on the merits and interim acts listed by the law, are appealable by the procedure prescribed by law;
- the courts entitled to review the judgments based on the appeal or cassation, the review procedures and the resulted decisions are set forth;
- the appeal grounds against the judgments, including a judicial error, are set forth by law;
- According to the RA Criminal Procedure Code, the RA Civil Procedure Code, as well as the RA Administrative Procedure Code, except for the cases of challenging the validity of normative legal acts, the violation or misuse of the norm of both substantive and procedural law serve as grounds for appeal, which is the fundamental

violation under Article 207, Part 7 of the RA Civil Procedure Code. Moreover, according to the abovementioned Codes (Articles 380.1, 406 and others of the RA Criminal Procedure Code, Articles 226, 227, 228 and others of the RA Civil Procedure Code, as well as Article 117.4 of the RA Administrative Procedure Code) the judgment on the merits may be reviewed and abrogated only on the grounds of the violation of substantive and procedural norms, which affected the outcome of the Case or resulted in wrong adjudication. If the legislator meant the misinterpretation of the given norm, the implementation of the norm that should not have been implemented or non-implementation of the norm that should have been implemented, as grounds for the violation of substantive norms, then as grounds for violation of the procedural norm, it presumed the ones which hindered the comprehensive, complete and objective examination of the Case, violated the procedural rights of the litigants and resulted in the violation of the principles of justice.

Thus, the legislator stipulated procedures for appealing the judgments and considers as a precondition for their review (except for review due to new and newly revealed circumstances) only those violations of substantive and procedural law, which affected **the outcome of the Case or resulted in wrong adjudication**. In some cases, such as the cases of cassation appeal in a civil case, the legislator forbids to abrogate on formal grounds the court's decision which is correct on the merits. That is, in the abovementioned cases, the legal regulation is based on the principle, according to which, the judgment which is **a result of a judicial error**, may be abrogated on the basis of violation of substantive and procedural law.

6. The Constitutional Court necessitates referring to the constitutional-legal content of the term "**judicial error**", as well as to the scope of its manifestations as a crucial legal fact for the effective implementation of the right to judicial appeal, and finds that it may not be subject to expanded interpretation and may not be understood as any error or atrocity by the court. Judicial error may be made only as a result of adoption of the judgment on the merits, that is, the act, which will be called upon to adjudicate on criminal, civil or administrative Case, to eliminate its argumentativeness, i.e. to determine the indisputable legal status of the litigants or participants of disputable legal relations, to make possible for the persons to implement their rights and protect their legitimate interests,

therefore, it is called to implement objectives of judicial protection and justice stipulated in Articles 18 and 19 of the RA Constitution. In that process, the **court applies the norms of both substantive and procedural law**, which resulted in the judgment. Therefore, judicial challenge of the validity of that act may be necessarily based on the violation of the norms of both **substantive** and **procedural** law. And the judicial error or the fact of violation of the substantive or procedural norms, **which led to the wrong adjudication of the given case**, thereby, violating objectives of justice and jeopardizing the reputation of justice and court, shall be assessable and be confirmed by the competent court as a result of the consideration of the appeal or cassation.

The stipulation of the abovementioned procedural conditions regulating the appeal against the judgment shall be based on the principles ensuring the regulatory requirements of Articles 3, 5 (Part 1), 18 and 19 of the RA Constitution. The Constitutional Court finds that the regulation and implementation of the institution of judicial appeal shall be based on the realization of the following prior legal terms, particularly:

- the fundamental rights and freedoms of a person, as the ultimate value, are protectable in an unreserved manner by the courts in the scopes of both the consideration of the case on the merits and its possible further review;
- the judicial appeal, as a remedy of judicial protection, shall be an effective remedy for restoration of the violated rights and freedoms of the person, following the constitutional principles of justice administration, particularly, the ones under Articles 18 and 19 of the RA Constitution;
- the institution of judicial appeal, without exception, shall be a remedy for revealing the judicial errors in equal, objective, comprehensive, fair and public trial, within the reasonable time, and for rectifying all those judicial errors which, resulting from the violation of both substantive and procedural norms, consequently led to the wrong adjudication of the judicial case;
- the review of judgments based on the appeal or cassation, as a function of justice administration, may support the implementation of the abovementioned constitutional legal tasks, if carried out by an independent and impartial court.

7. Touching upon the issue of assessment of the constitutionality of the challenged legal norm of the current case, namely Article 141, Part 1

of the RA Administrative Procedure Code, the Constitutional Court states that, according to the matter of legal regulation, it is called to regulate the relations connected with appealing of the judgments rendered by the Administrative Court in the cases challenging the validity of the normative legal acts in administrative special proceeding, insofar as connected with the grounds for the judicial appeal, according to which judgments rendered in such cases may be appealed only on the grounds of violation of substantive law. Thus, for the abovementioned cases the legislator has excluded the possibility of appealing the judgments of the Administrative Court and challenging their validity based on violation of the norms of procedural law according to the procedure prescribed by law, and did not allow persons to enjoy full and effective implementation of their constitutional right to judicial protection while challenging the normative acts of state and local self government bodies and their public officials.

In a number of decisions, such as DCC-652, DCC-665, DCC-673, DCC-719, DCC-758, DCC-780 etc., the Constitutional Court emphasized the legislative assurance of effective implementation of the institution of judicial appeal, including in the sphere of administrative justice, considering the issue in terms of assessment and assurance of its conformity with the principles of constitutional order, objectives of justice administration, as well as international legal obligations assumed by the RA. In particular, in decision DCC-780 it has been stressed that it is necessary to implement the right to judicial appeal, which is a significant element of the right to judicial protection, in a way which will ensure "... the effective implementation of that right and the minimization of the probability of judicial errors". The Constitutional Court also highlighted the necessity of implementation of judicial effective review over the obligations assumed by the Republic of Armenia under international treaties, in particular ensuring the protection of human rights and freedoms by domestic, including judicial remedies, as well as the necessity to administer effective judicial review over administrative acts on the basis of the Recommendation (2004)20 of the Committee of Ministers of the Council of Europe, emphasizing that "... the domestic legislation shall define the terms of appeal ... which shall be in conformity with the requirements of Article 6 of the European Convention on Human Rights".

Reconfirming its legal positions expressed in the abovementioned decisions, the conclusions resulting from the generalization of the international legal practice, the Constitutional Court finds that the provision of Article 141, Part 1 of the RA Administrative Procedure Code, which

entirely excludes the possibility of appealing the judgments of the Administrative Court on the basis of violation of the norm of procedural law, is not in conformity with the constitutional and international legal criteria for the effectiveness of justice, the judicial protection of violated rights and freedoms of a person, as well as the implementation the right to judicial appeal. It is not also in conformity with the general conceptual approaches of judicial appeal, which was legislatively brought in the RA legal system.

The Constitutional Court states that, despite the fact that for the implementation of the legal positions expressed in the decision DCC-780, the RA administrative justice system was replenished and a new system of judicial appeal was brought in, nevertheless, the current procedure of appeal, in particular, regarding the cases challenging the validity of the normative legal acts through a special proceeding, was not amended correspondingly, which resulted in the restriction of the constitutional right of persons to fair, accessible and effective judicial protection. The Respondent's position stating that, from the viewpoint of the protection of litigants' rights, the significance and gravity of the procedural norms concerning the cases challenging the validity of normative legal acts is of secondary importance, does not derive from the constitutional legal content of justice, from the decisions of the Constitutional Court, as well as from the general concept of the regulation on the institution of judicial appeal legislatively brought in the RA legal system. The court's decision, adopted in violation of the procedural rules, may not be considered legitimate and in conformity with the requirements of justice.

The Constitutional Court finds that any procedural peculiarity or proceeding type, namely special proceeding, may not be legislatively interpreted or implemented in a way that makes human fundamental rights guaranteed by Articles 18 and 19 of the Constitution completely meaningless or impedes their implementation. Consequently, the principles of legal regulation of the RA procedural relations in the sphere of judicial appeal, which are underlined in Point 6 of this decision, must be included in all procedural norms regulating this institution, including the ones on challenging the validity of the normative legal acts.

Proceeding from the results of consideration of the case and ruled by the provisions of Article 100, Point 1, Article 101, Part 1, Point 6 of the Constitution of the Republic of Armenia, 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 Article 141, Part 1 of the RA Administrative Procedure Code in regard to blocking the person's right to appeal the Administrative Court judgments in cases challenging the validity of the normative legal acts based on the violation of the norm of procedural law, to be incompatible with Articles 3, 18 and 19 of the RA Constitution and invalid.

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

Chairman **G. Harutyunyan**

8 February 2011
DCC-936

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 68, PART 3 OF THE ADMINISTRATIVE PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE POLITICAL PARTY "REPUBLIC"

Yerevan **22 February 2011**

The Constitutional Court of the Republic of Armenia composed of the Chairman G. Harutyunyan, Justices K. Balayan, F. Tokhyan, M. Topuzyan (Rapporteur), A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan, V. Poghosyan,

With the participation of the representative of Applicant: A. Zeynalyan,

the Respondent: the National Assembly of the Republic of Armenia, officially represented by 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 on the Constitutional Court of the Republic of Armenia,

examined by a written procedure in a public hearing the Case on conformity of Article 68, Part 3 of the Administrative Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of application of the of the political party "Republic".

The case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the political party "Republic" on 07.09.2010.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, having studied the Administrative Procedure Code of the Republic of Armenia and the

other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The Administrative Procedure Code of the Republic of Armenia was adopted by the National Assembly of the Republic of Armenia on 28 November 2007, signed by the President of the Republic of Armenia on 10 December 2007 and came into force on 1 January 2008.

Part 3, Article 68 of the RA Administrative Procedure Code, titled "Lawsuit for Recognition", challenged in this Case, states:

"Bringing a lawsuit for recognition, the Plaintiff may demand to declare the intervening administrative act without legal force or the action as unlawful, if the Plaintiff is truly interested in declaration of the act or action as unlawful, that is:

1) there is a risk to adopt similar administrative act of intervention or to perform same action again in similar situation;

2) the plaintiff intends to claim compensation for property damage, or

3) it pursues the aim to restore honor, dignity and business reputation of the Plaintiff".

2. The procedural background of the considered Case is the following: on 16.11.2009 the Applicant brought a lawsuit before the RA Administrative Court against the RA Government demanding to declare the Government's inaction as unlawful (void) and to oblige the latter to recognize the facts of violation of the right to assembly, freedom of expression, right to be free from discrimination and right to effective legal remedies before public bodies. The Administrative Court dismissed the lawsuit submitted by the Decision on Refusal to Accept a Lawsuit dated 23.11.2009 (Administrative Case ՎԴ/4816/05/09).

The abovementioned decision of the RA Administrative Court was appealed on 01.12.2009, and the Administrative Court rejected the submitted appeal by the decision on Rejection of the Appeal adopted collegially on 04.12.2009. The Decision of the Administrative Court adopted collegially on 04.12.2009 was appealed before the RA Court of Cassation on 21.12.2009. The submitted cassation appeal was returned by the Decision of the Court of Cassation on Returning the Cassation Appeal dated 10.02.2010.

3. The Applicant finds that Article 68, Part 3 of the RA Administrative Procedure Code challenged by him contradicts Articles 18 and 19 of the RA

Constitution. In this regard, in the challenged legal norm the Applicant highlighted the significance of the criteria for guaranteeing certainty, accessibility and effective remedies ensuring the right to judicial protection and its effective implementation prescribed in the mentioned Articles of the Constitution, which is particularly stressed within the case law of the European Court of Human Rights.

Referring to Article 59, Part 3, Point 1 of the Administrative Procedure Code, the definition of the term "administration" prescribed in Article 3, Point 2 of the RA Law on Foundations of Administration and Administrative Proceeding, as well as Articles 69 and 96 of the same Law, the Applicant concludes that the Procedure Code shall provide an appropriate legal regulation to ensure the right to bring a lawsuit before the Administrative Court for declaring the **inaction** of the administrative body as unlawful. Meanwhile, according to the Applicant, in the given Case the Administrative Court interpreted the provisions in constitutional legal dispute in a way like the Court is not authorized to initiate the proceeding on lawsuit for nullification of the inaction of the administrative body.

In addition to the abovementioned, the Applicant, referring to Article 69 of the RA Law on Foundations of Administration and Administrative Proceeding, as well as the definition of the term "administrative act" prescribed in the Recommendation R2004(20) of the Committee of Ministers, expressed the point of view that if the term "administrative act" used in Article 68, Part 3 of the RA Code of Administrative Procedure, includes also the act "action", then it is meaningless along with the referring to the three acts in one term, to mention also one of them separately. In his opinion, that causes uncertainty, as well as provides with possibility for ambiguous and discretionary interpretations, which contradicts the principle of legal certainty.

4. In objection to the arguments of the Applicant, the Respondent finds that the state may regulate the procedure, the mechanisms and time limits of implementation of the right to judicial protection by legislatively stipulating distinct terms for the holder of that right. Based on the results of the comparative analysis of Articles 3, 65-68 the RA Administrative Procedure Code, the Respondent concludes that the Code precisely prescribes all those legal mechanisms that ensure the implementation of the right to judicial protection guaranteed by Articles 18 and 19 of the RA Constitution.

At the same time, analyzing the factual circumstances of the Case, the Respondent finds that the Applicant did not use all legal remedies prescribed

in the RA Administrative Procedure Code, which are aimed to implement the right to judicial protection.

The Respondent also makes a motion on dismissal of the proceeding with the motivation that the challenged provision was not applied to the Applicant, and, the questioning of the constitutionality of the challenged norm, does not actually pursue the aim to protect the subjective rights.

5. The RA Constitutional Court finds no grounds to dismiss the proceedings, and considering that the Applicant, based on the terminology prescribed in the RA Law on Foundations of Administration and Administrative Proceeding, challenges the constitutionality of Article 68, Part 3 of the RA Administrative Procedure Code in the aspect of constitutional-legal content of the concepts stipulated therein, firstly, necessitates touching upon the issue of separation of the concepts of administrative act, action and inaction prescribed in the mentioned Law.

The comparative analysis of the subject matter of general legal regulation, as well as the particular provisions (Article 2, Part 2, Articles 3, 69, Article 71, Part 1, Articles 76, 96, 101, 102 and 108) of the RA Law on Foundations of Administration and Administrative Proceeding indicates that a clear differentiation was made between the terms **administrative act, action and inaction**, in accordance with the content inherent to each of them. While using the term **"act"** in Article 69 of the Law, the legislator has not identified these three terms presenting them as **"an administrative act".** The analysis of this Article indicates that in the sense of the subject matter of legal regulation of the latter, the term **"act"** is just used as a collective concept, which may not be a basis for the identification of these terms within the frames of legal regulation of Articles 3, 65-68, 70-72, 114, 145, 154-156, 158 of the RA Administrative Procedure Code.

At the same time, the Constitutional Court highlights the revelation of the logic of legal regulation of the RA Administrative Procedural Code from the perspective of assurance of effective remedies for judicial protection and access to the court.

In this respect, the RA Constitutional Court, in its Decisions DCC-719, DCC-721, DCC-780, DCC-844 and DCC-882, highlighted the necessity of judicial protection against the **inaction** of the administrative bodies, without which the system of protection of rights and freedoms will be incomplete.

Addressing the revelation of the logic of legal regulation of the RA legislation, in particular the Administrative Procedure Code, based on the sys-

tematic analysis of the Articles of the Code, the Constitutional Court states that the legislature intended to establish such a legal regulation in the system of administrative justice which shall ensure full and effective implementation of the right of the **person** to judicial protection not only against **the administrative and normative acts adopted by the state or self government bodies or their officials and their actions**, but also against their **inaction**. Continuing the consistent implementation of the mentioned logic, the legislator included Section Two titled "Proceeding and Settlement of the Case before the Administrative Court", and in the context of the latter, Chapter 11 titled "Grounds for Filing a Case and Types of Lawsuits" in the Code as the legal guarantee, which ensures the effective implementation of Articles 1 and 3 of the Code. It prescribes the following types of lawsuits brought before the Administrative Court: nullity lawsuit (Article 65 of the Code), lawsuit **requiring the issue of administrative act** (Article 66 of the Code), lawsuit for the performance of **a certain action** (Article 67 of the Code), lawsuit for **recognition** (for the establishment of the existence or absence of a legal relation, Article 68 of the Code), through which the persons immediately start the judicial protection of their violated rights and freedoms.

The examination of the mentioned lawsuit types prescribed in Articles 65-67 of the Code indicates that both the lawsuit requiring the issue of administrative act and lawsuit for the performance of a certain action are called to guarantee the judicial protection of person's violated rights and freedoms caused by inaction of state or local self-government bodies or their officials. Besides in the case of a lawsuit requiring the issue of administrative act, the judicial protection is implemented against the inaction **related to the adoption of an administrative act**, and in case of lawsuit for the performance of a certain action it concerns an inaction **not related to the adoption of the administrative act**.

Moreover, the general logic of the Administrative Procedure Code, according to which within the administrative justice, the judicial protection shall be equally ensured also against inaction of the administrative bodies and public officials, consistently reflected in Article 70 of the Administrative Procedure Code, where the legislator, along with the terms "administrative act" and "action" also uses the term "inaction", and extends it also to **the lawsuit for recognition**.

The Constitutional Court states that, as opposed to Articles 1, 3 and 70 of the Code an inconsistent approach is taken in Article 68, Part 3 of the Code, and along with the terms "administrative act" and "action", the

term "inaction" is not emphasized. However, as it follows from the logic of the legal regulation of the Code, in the law-enforcement practice it shall not be interpreted to the detriment of human rights protection.

The RA Constitutional Court finds that **Article 68, Part 3 of the RA Administrative Procedure Code also assumes the cases of judicial protection against the inaction of the administrative body according to the logic of the systematic analysis of other norms of the Code**, and the law-enforcer shall proceed from the interpretation of the legal norm prescribed in Article 68, Part 3 of the Code, considering that:

a) As it follows from the aim of the legislator and the trend of the legal regulation, prescribed in Articles 1 and 3 of the Code, the mentioned Articles stipulate the possibility of the judicial protection also in the case of inaction of the administrative body;

b) in Article 70 of the Code, the legislator, along with the terms "administrative act" and "action", **equally attributed** the term **"inaction" to the lawsuit for recognition as well.**

6. Simultaneously, the RA Constitutional Court necessitates stating that the subject matter of the lawsuit for recognition prescribed by Article 68, Part 3 of the RA Administrative Procedure Code, is characterized by the following feature: within the subject matter of the lawsuit for recognition, the legislator provides with the possibility to challenge the legitimacy of those administrative acts of intervention or actions (inaction) **which no longer have the legal force and meaning for their addressees**. Moreover, while bringing such a lawsuit, the Applicant shall pursue the aim to solve the issues prescribed in Article 68, Part 3, Points 1- 3 of the Code.

The abovementioned feature indicates that Article 68, Part 3 of the Code is a separate institution for protection of the rights, which differs from the institution of judicial protection prescribed by Articles 65-67 of the Administrative Procedure Code by the subject matter of its legal regulation and pursued objectives, in the essence of its content, and if in the frames of the latter, the judicial protection is exercised against the acts with legal force and significance for the person, in the case of Article 68, Part 3 of the Code the judicial protection is exercised against **the acts with no legal force and significance for the person, i.e. against the acts which do not have immediate legal effects for the addressee by their adoption, implementation and manifestation.**

7. In accordance with Article 68, Part 9 of the RA Law on the Constitutional Court, the RA Constitutional Court necessitates referring also to the constitutionality of Article 114, Part 1, Point 5 of the RA Administrative Procedure Code, systemically interconnected with the challenged norm.

Article 114, Part 1 of the RA Administrative Procedure Code, titled "Types of the Judgments on the Merits", exhaustively lists the types of judgments on the merits delivered in administrative cases. Moreover, the provisions, listed the types of mentioned judgments, simultaneously, relate to the powers of the Administrative Court. In that regard, the Constitutional Court, taking into account Article 5, Part 2 of the Constitution, states that the existence of the relevant legislatively prescribed powers for the courts and their execution makes possible to guarantee the person's rights to court access, to effective judicial protection and fair trial.

The examination of Article 114 of the RA Administrative Procedure Code states that it is called, in particular, to ensure the implementation of Articles 65-68 of the Code guaranteeing the justice administration regarding the lawsuits brought in the frames of the mentioned articles. In particular, Article 114, Part 1, Point 5 of the Code is systematically interconnected with Article 68, Part 3 of the Code and is called to ensure the implementation of the Plaintiff's right to declare as unlawful the interfering legal act or the action, which have no legal force anymore. Meanwhile, as opposed to Article 68, Part 3 of the Code, which stipulates the possibility to challenge, along with the administrative act, the actions (also inaction within the abovementioned legal positions) of the administrative body, in violation of the logic of the Code, in particular, the legal regulation of Articles 1, 3, and 70, thus Article 114 of the Code grants the Administrative Court with the corresponding power **regarding the administrative act only**. As a result, considering that Article 114, Part 1 of the Code concerns the powers of the Administrative Court, and, that according to the requirements of Article 5, Part 2 of the RA Constitution the Administrative Court may act only within the powers, clearly stipulated by the Constitution and the Law, the Constitutional Court finds that the mentioned provision blocks the possibility of implementation of Article 68, Part 3 of the Code, in regard to challenging the action and inaction of the administrative body, thus causing violation of the constitutional principle of court access, constitutional rights to effective judicial protection and fair trial, as well as a blockage of the function of the state to administer justice.

Proceeding from the results of consideration of the case and ruled by Article 100, Point 1, Article 102 of the 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 68, Part 3 of the Administrative Procedure Code is in conformity with the Constitution of the Republic of Armenia within the frames of the legal positions expressed in this Decision, considering also the possibility of the judicial protection against the inaction of administrative body.

2. To declare Article 114, Part 1, Point 5 of the Administrative Procedure Code of the Republic of Armenia, systematically interconnected with Article 68, Part 3 of the Administrative Procedure Code, insofar as it does not include the action and inaction of the adminstrative body along with administrative act, contradicting to the requirements of Articles 18 and 19 of the Constitution of the Republic of Armenia and invalid.

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

Chairman **G. Harutyunyan**

22 February 2011
DCC – 942

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 426.3, PART 1, POINT 4 AND ARTICLE 426.4, PART 1, POINT 1 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA, ARTICLE 69, PART 12 OF LAW OF THE REPUBLIC OF ARMENIA ON THE CONSTITUTIONAL COURT WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF THE CITIZENS S. ASATRYAN AND A. MANUKYAN

Yerevan **25 February 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. Hovhannisyan, H. Nazaryan (Rapporteur), A. Petrosyan, V. Poghosyan,

with the participation of the representatives of the Applicants: A. Zeinalyan, K. Mezhlumyan,

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 and 69 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Joint Case on conformity of Article 426.3, Part 1, Point 4 and Article 426.4, Part 1, Point 1 of the Criminal Procedure Code of the Republic of Armenia, Article 69, Part 12 of the Law of the Republic of Armenia on the Constitutional Court with the Constitution of the Republic of Armenia on the basis of the applications of the citizens S. Asatryan and A. Manukyan.

The Case was initiated on the basis of the applications submitted to the

Constitutional Court of the Republic of Armenia by the citizens S. Asatryan and A. Manukyan on 02.07.2010 and 15.12.2010 respectively.

Taking into account that the Cases, submitted for consideration based on the applications of the citizens S. Asatryan and A. Manukyan, refer to the same issue, the Court, according to Article 39 of the RA Law on the Constitutional Court, by the Procedural Decision PDCC-1 of the Constitutional Court dated 11.01.2011 the Constitutional Court joined them to consider in the same court session.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicants and the Respondent, having studied the Criminal Procedure Code of the Republic of Armenia, the Law of the Republic of Armenia on the Constitutional Court, the challenged norms 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.

Article 426.3 of the Code is titled "The grounds and time limits for judgments review due to newly revealed circumstances." The Part 1, Point 4 of Article challenged in this case provides the grounds for judgments review due to newly revealed circumstances, if:

"... other circumstances unknown to the court in rendering the judgment, are revealed, which, by themselves or together with previously determined circumstances, prove that a convicted person is not guilty or has committed a lesser or more serious criminal offence than the one for which he or she has been convicted, as well as testify regarding the guilt of the acquitted person or a person in relation to whom the criminal prosecution has been terminated or the proceedings have been dismissed."

Article 426.4 of the RA Criminal Procedure Code is titled "The grounds and time limits for review of the cases due to new circumstances." According to Part 1, Point 1 of Article challenged in this case, the judgments, inter alia, are reviewed due to new circumstances, if:

"... the Constitutional Court of the Republic of Armenia declared the law applied by the court in the given criminal case to be fully or partially unconstitutional."

The RA Law on the Constitutional Court was adopted by the RA National Assembly on 1 June 2006, signed by the RA President on 14 June 2006 and came into force on 1 July 2006.

Article 69 of the RA Law on the Constitutional Court is titled "Consideration of cases brought by natural and legal persons on the constitutionality of the laws applied to those persons by final judgments regarding particular cases (consideration of individual complaints)." The challenged Part 12 of that Article states:

"12. In the cases defined by this Article, when the decision declaring the legislative provision challenged by the Applicant as null and contradicting the Constitution, the final judgment made against the applicant is subject to review in accordance with the procedure prescribed by law."

2. The procedural background of the case under consideration is the following. The Court of First Instance of Avan and Nor Nork Communities, having considered the criminal case No. 1-15/2007, found U. G. Wolfson and S.V. Asatryan guilty of crimes under a number of Articles of the RA Criminal Code and sentenced them to imprisonment for 11 and 9 years respectively. The judgment was appealed. The RA Criminal Court of Appeal considered the Case fully and rendered a judgment dated 18.06.2008 on sentencing U. G. Wolfson to imprisonment for the term of 6 years and affirmed the judgment relating to S. V. Asatryan. On 21.11.2008 the cassation appeal was filed against the abovementioned judgment of the RA Criminal Court of Appeal based on the reasoning stipulated in Article 414.2, Part 1 of the RA Criminal Procedure Code. By the Decision No. ՎԲ-82/08 of the RA Court of Cassation the cassation appeal was returned.

Based on the Decision DCC-818 of the RA Constitutional Court dated 28.07.2009 on declaring Article 414.1, Part 2.1 of the RA Criminal Procedure Code as contradicting the RA Constitution and void, S. V. Asatryan lodged a cassation appeal to the Court of Cassation due to a new circumstance, and the latter returned the cassation appeal by its decision No. ՎԲ-28/09 dated 25.09.2009, basing it on the requirements of Article 407 and Article 414.2, Part 1of the RA Criminal Procedure Code.

On the basis of the legal positions of the RA Constitutional Court expressed in the Decisions DCC-751 dated 15.04.2008, DCC-849 dated 22.12.2009 and DCC-866 dated 23.02.2010, S. Asatryan applied to the RA Court of Cassation demanding to review the decision No ՎԲ-28/09 of the RA Court of Cassation dated 25.09.2009 due to a new circumstance. The RA Court of Cassation returned the cassation appeal by the Decision No ՎԲ-08/10 dated 30.04.2010 basing it on Article 426.4, Part 1, Point 1 of the RA Criminal Procedure Code, according to which the judgments are reviewed due to new circumstances, if "... the Constitutional Court of the

Republic of Armenia declared the law applied by the court in the given criminal case to be unconstitutional," and found no ground stipulated in Article 414.2, Part 1, Point 4 of the RA Criminal Procedure Code.

Based on the decision DCC-872 of the RA Constitutional Court dated 02.04.2010 regarding the constitutionality of Article 309.1, Parts 1 and 2 of the RA Criminal Procedure Code, applied to him in the criminal case ԵԿԴ/0106/01/08, which declared the abovementioned norms in conformity with the Constitution within the framework of the legal positions expressed by the Court, the Applicant A. Manukyan applied to the RA Court of Cassation on 28.04.2010 demanding to review the Decision on "Returning the Cassation Appeal" concerning the Case ԵԿԴ/0106/01/08 dated 19.05.2009 due to a newly revealed or new circumstance. By the decision of 07.06.2010 the Court of Cassation rejected to institute the proceeding for reviewing the abovementioned case, finding the decision DCC-872 of the RA Constitutional Court dated 02.04.2010 not to be a "new circumstance" or a "newly revealed circumstance" and stating that according to Article 69, Part 12 of the RA Law on the Constitutional Court and Article 426.3, Part 1, Point 4, Article 426.4, Part 1, Point 1 of the RA Criminal Procedure Code "... the judgments shall be reviewed due to new circumstances if the Constitutional Court declares the law applied by the Court in the given criminal case as unconstitutional".

3. The Applicants find that the provisions of Article 426.3, Part 1, Point 4 of the RA Criminal Procedure Code, "insofar as they do not stipulate the RA Constitutional Court Decision on the constitutionality of the applied norm, which states the inconformity of the norm-interpretation with the legal positions expressed in its reasoning part, as a ground for judgment review" contradict the requirements of Articles 18, 19 and 101 of the Constitution. The Applicants also challenge the constitutionality of Article 69, Part 12 of the RA Law on the Constitutional Court based on the same reasoning.

The Applicants challenge the constitutionality of Article 426.4, Part 1, Point 1of the RA Criminal Procedure Code insofar as the norms of that Article, "do not regard the previous application of the challenged law or its provision in the interpretation contradictory to the legal positions expressed in the reasoning part of the decision of the Constitutional Court, as a ground for judgment review due to a new circumstance," and therefore, it contradicts Articles 3, 18 and 19 of the RA Constitution. According to the Applicants, that contradiction appears in the fact that even though in its

numerous decisions the Constitutional Court has confirmed the constitutionality of judicially applied legislative provision within the scopes of its legal positions, it also affirms, whether directly or not, the application of those norms by the court in a diametrically opposite interpretation, which has not derived from the corresponding constitutional provisions. That is, the directly applicable constitutional right of a person was obviously violated, however, such a Decision of the Constitutional Court does not become an effective remedy for judicial protection of the person's right, as it does not serve as a ground for judgment review due to a new circumstance and elimination of the violation of the right, which does not result in the restitution of the violated right. Meanwhile, the reasoning part of the Constitutional Court Decision causes legal consequences and shall be regarded as a new circumstance. Otherwise, as the Applicants find, the RA legal and political security can be jeopardized, inasmuch as there may be cases where the courts interpret and apply the legislative provisions in conformity with the Constitution in the meaning contradictory to the one deriving from the Constitution. The Applicants state that current legal regulation lacking the provision on judgment review does not provide the full execution of the legal positions expressed in the Constitutional Court decisions and makes the implementation of the person's right to constitutional justice "an end in itself and ineffective". At the same time, the Applicants insist that the legal norms in question are formulated so vaguely that has led to their interpretation and application in the law enforcement practice in a way that violates the rights guaranteed by Articles 18, 19 and 101 of the Constitution.

4. Objecting to the arguments of the Applicants, the Respondent finds that Article 426.4, Part 1 of the RA Criminal Procedure Code is in conformity with the RA Constitution, because the Constitutional Court, as a result of evaluation of the constitutionality of the challenged norm, shall only make one of the decisions stipulated in Article 68, Part 8 of the RA Law on the Constitutional Court, from which only the decision on declaring the challenged act as fully or partially contradicting to the Constitution and void may be deemed a new circumstance.

As the Respondent states similar legal regulation is typical for the legislations of number of countries, such as Estonia, Bosnia and Herzegovina, Serbia, Latvia, etc.

The Respondent also argues the conformity of Article 69, Part 12 of the RA Law on the Constitutional Court with the Constitution based on the same abovementioned reasoning.

Regarding the constitutionality of Article 426.3, Part 1, Point 4 of the RA Criminal Procedure Code, the Respondent expresses the viewpoint that the Applicant "has not provided any arguments on unconstitutionality of the challenged legal provisions and makes only general propositions".

Simultaneously, the Respondent files a motion to dismiss the case regarding Article 426.3, Part 1, Point 4 of the RA Criminal Procedure Code.

5. Having studied the positions and arguments of the Applicants and the Respondent on the constitutionality of the challenged norms, the Constitutional Court finds no ground to dismiss the Case regarding Article 426.3, Part 1, Point 4 of the RA Criminal Procedure Code, and hence, it is subject to full consideration.

The Constitutional Court also states that by the decision DCC-751 dated 15.04.2008 the RA Constitutional Court declared the provisions of Article 69, Part 12 of the RA Law on the Constitutional Court as contradicting to the requirements of Article 19 of the RA Constitution and void "in regard to the part which limits the possibility to restore the rights due to new circumstances for the persons, in case, when the time period between the delivery of final judgment in relation to them and the starting date of case consideration by the Constitutional Court on the constitutionality of the legislative provision applied to those persons based on the application(s) of another person (other persons) or the date of making a decision by the Constitutional Court on that issue, does not exceed 6 months".

Stating that the RA National Assembly has not yet made necessary amendments deriving from the Decision DCC-751 concerning the abovementioned Article of the RA Law on the Constitutional Court, simultaneously, the RA Constitutional Court finds that the proceeding regarding Article 69, Part 12 of the Law is to be dismissed on the grounds stipulated in Article 68, Part 14 and Article 60, Point 1 of the RA Law on the Constitutional Court.

6. Within this case, while challenging the constitutionality of the legal norms, the Applicants, in essence, propounded the following issues:

a / What is the essence and the content of the legal positions expressed in the decisions of the Constitutional Court?

b / What is the legal effect of the legal positions and the legal consequences caused by those positions in the context of judgment review due to a new circumstance?

In the framework of the abovementioned issues the Constitutional Court necessitates evaluating the constitutionality of the challenged norms deriving from:

- the constitutional legal content of the powers of the RA Constitutional Court, as the body of the constitutional justice which provides supremacy and direct application of the Constitution in the RA legal system,
- the legal content of the legal effect of the Constitutional Court decisions, as the normative acts aimed to the protection of objective and subjective rights in public-legal disputes, and their place and role in the RA legal system,
- the necessity of unified legal understanding of the decisions of the Constitutional Court including the legal positions expressed therein as the key source for development of the law, including branch-law,
- the necessity of clarification of the conditions for mandatory enforcement of the Constitutional Court decisions by the subjects of law, including courts of general jurisdiction and specialized courts, regarding them as a new circumstance for judicial appeal,
- the approaches formed in the RA legal practice regarding the legal positions of the RA Constitutional Court,
- the necessity of further legislative assurance of the legal conditions for mandatory enforcement of the legal positions of the Constitutional Court.

Based on the subject matter of applications in this Case, the Constitutional Court necessitates evaluating the constitutionality of implementation of the legal positions expressed in its decisions, regarding as a ground the peculiarities of the **decisions made on the cases determining the constitutionality of the legal norms**, whether within abstract norm-control or based on the individual applications.

7. The Constitutional Court touched upon the content of the Court's constitutional legal status and its peculiarities in number of its decisions, such as DCC-652, DCC-665 etc. Reaffirming its legal positions expressed in relation with that issue and proceeding from the functional and institutional principles of establishment and operation of the bodies of constitutional justice articulated in the international practice, as well as from the scopes of specific powers, the Constitutional Court, necessitates highlighting the peculiarities through the comprehensive analysis of the appropriate norms of the RA Constitution and the RA Law on the Constitutional Court, the evaluation of which makes possible to clarify the constitutionality of the challenged norms in this case.

8. The RA Constitutional Court is endowed with a special constitutional legal status, which is conditioned by its place and role in the system of state bodies and by its powers accordingly (Articles 92 and 100 of the RA Constitution). According to Article 93 of the RA Constitution, the Constitutional Court, as a judicial body, is authorized with exclusive power to administer constitutional justice. The Constitutional Court shall ensure the supremacy and direct application of the Constitution, which results in the adoption of decisions and conclusions. These acts have a special place and role in the RA legal system due to their content, legal-regulatory meaning and the caused legal consequences. The relations regulated by them concern all the spheres of public life and all the subjects of legal relations. The decisions of the Constitutional Court are subject to implementation immediately or within the time limits stipulated by the Court, throughout the entire territory of the Republic of Armenia and they are not discussable, challengeable or examinable by any state or local government body or an official, an organization or an individual.

The decision of the Constitutional Court is an official written document, adopted in the framework of its powers in cases and according to the procedure provided by the RA Constitution and law, which defines imperatively recognizable, protectable and applicable rights, duties, responsibility and limitations subject to maintenance and observance, legally undisputable and unreviewable normative rules, i.e**. rules of conduct** subject to observance unconditionally, implicitly and immediately, unless another time limit is stipulated. It conditions the normative nature of the Constitutional Court decisions and special legal consequences immediately following them, that are connected with the loss of legal effect of the legal norm declared unconstitutional, declaring the legal norm in conformity with the RA Constitution within the scopes of interpretation of the constitutional norms, i.e. legal positions, as well as resolving vital constitutional legal issues and assessing the facts (Article 100, Points 3-9 of the RA Constitution).

The legal nature of the decisions of the Constitutional Court, from the viewpoint of comprehension of the role and place of these acts in the **RA legal system**, is as follows:

- in the hierarchy of the RA legal acts the decisions of the RA Constitutional Court follow the Constitution and the RA Law on the Constitutional Court, thus it also determines the legal effect of these acts. According to Articles 9, 12, 13, 13.1, 14, 15, 16, 17, 18, 19 and 20 of the RA Law on Legal Acts, the laws, as well as other acts of the RA legislation shall not contradict the decisions of the

Constitutional Court, therefore, the decisions of the Constitutional Court have a higher legal force than any other legal act;

- being final judgments of the court these decisions are adopted on behalf of the Republic of Armenia, and their enforcement, as for a legal act, is guaranteed by law and backed by state coercion (Article 66 of the RA Law on the Constitutional Court);
- the Constitutional Court decisions on the merits are mandatory for all state and local self-government bodies, their officials as well as for natural and legal persons in the whole territory of the Republic of Armenia (Article 61 of the RA Law on the Constitutional Court).

The Constitutional Court decisions have also a special legal nature **in the system of the acts of the courts of general jurisdiction and specialized courts of the Republic of Armenia.** The comparative analysis of the nature, content and legal effect of the Constitutional Court decisions and other judgments indicates that:

- as it was mentioned, the RA Constitutional Court has the exclusive power to administer constitutional justice and in the framework of that function adopts decisions on the merits (Article 92, Part 2 and Article 93 of the RA Constitution);
- considering constitutional cases of public-legal nature, the Constitutional Court adopts decisions subject to mandatory enforcement by other judicial bodies, i.e. by all the courts of general jurisdiction and specialized courts of the Republic of Armenia;
- determining the constitutionality of the legal acts and proceeding from the requirements of Articles 19 and 63 of the RA Law on the Constitutional Court, the Constitutional Court shall also assess the general jurisdictional and specialized justice practice, as well as disclose the constitutional legal content of the laws and their certain provisions implemented, inter alia, in the judicial practice, developing both constitutional law and branch law;
- the Constitutional Court decision on unconstitutionality of the legal acts leads to legal consequences, that is, new circumstances, which compulsorily result in judgment review according to the procedure prescribed by law;
- the Constitutional Court, in essence, interprets the RA Constitution in its decisions;
- the decisions of the Constitutional Court are not disputable before any domestic or international court.

The abovementioned peculiarities are also resulted from the constitu-

tional legal content of the relations regulated by the acts of the Constitutional Court. Article 102 of the RA Constitution stipulates the entry into force of these acts from the moment of announcement, as well as the guaranteed immutability, i.e. finality, usually unreviewability of the norms set forth by them, which is highlighted on the following basis:

- the decisions of the Constitutional Court resolve the cases of public-legal importance, which are directly connected with the interpretation and application of the norms of the RA Constitution, the legal and political security, continuity (succession) of the public authority, implicit fulfillment of the constitutional functions by those authorities and public officials, as well as with determination of constitutionality of the powers endowed them, therefore, the norms set forth in these acts are applicable indisputably and immediately;
- being governed by the fundamental principles of the RA Constitution through its decisions and in the framework if its powers the Constitutional Court ensures both remedies for restoration of violated rights and freedoms of the natural and legal persons, the direct application of the constitutional rights of the persons, the limitation of the state by these rights (Article 3 of the RA Constitution) and the stability of the foundations of constitutional order, namely the constitutional lawfulness, thereby it obligates all public authorities and officials to take effective measures to fulfill the requirements of the Constitutional Court decisions, it also obligates the RA courts of general jurisdiction and specialized courts to interpret and apply the laws in accordance with their constitutional legal content, as well as to review the judgments rendered against the persons due to new circumstances.

9. Proceeding from the constitutional legal status of the RA Constitutional Court, the legal nature of the Court decisions and their abovementioned legal consequences, the Constitutional Court states that its acts, their nature and legal effect, as for any other state body with the authority to adopt normative legal acts, must be understood and evaluated in comparison and unity of the **"functional and institutional status"**, and in the given case within the framework of the norms stipulated by Articles 92 (Part 2), 93, 94 (Part 3), 100 and 102 of the RA Constitution and their interpretations stated in Point 8 of this decision.

Simultaneously, the Constitutional Court decision, as well as any legal act, complies with common rules of legal technique considering the peculi-

arities stipulated by the RA Law on the Constitutional Court, which is aimed to provide their uniform and complete understanding by the individuals and law enforcement entities (the Constitutional Court touched upon that issue in a number of its decisions, such as DCC-630, DCC-720, DCC-723, DCC-780 etc.)

The Constitutional Court decisions must be also understood in their structural integrity, (introduction, descriptive-reasoning and operative parts) for ensuring the clarity of the implementation of the content, principles and peculiarities of the legal regulations stipulated in these decisions, as well as the rules of subjective and objective conduct derived from them. This issue is addressed especially through the **legal positions** expressed in the descriptive-reasoning part of the Constitutional Court decisions, which usually contain conclusions of the court which are the basis of the operative part of the decision and result from the legal analysis of the subject matters (the raised issues and constitutional legal disputes) of the applications addressed to the Constitutional Court, and disregard of their essence and content may not ensure the implementation of the court decision.

The RA Constitutional Court states that the RA Law on the Constitutional Court does not clearly disclose the content of the term "legal position". The law has not fully regulated the issues concerning the Constitutional Court legal position, its legal force, the role and the rule-making significance in the legal system yet. In the annual reports on the state of implementation of its decisions the Constitutional Court has emphasized that the law enforcement entities shall imperatively consider the legal positions of the Constitutional Court, which is also an established rule in the international practice of constitutional justice. However, the institution of legal position, as means of regulation of public-legal relations, is brought in the RA legal system, particularly in the field of administrative justice, (Article 114, Part 3 of the RA Administrative Procedure Code), and applied in the practice of the RA Constitutional Court especially after the institution of individual complaints was brought in since 1 July, 2006. Currently, the legal nature of the legal positions of the RA Constitutional Court has also got some certainty in the decisions of the RA National Assembly, when the international treaties are ratified based on the legal positions expressed in each specific decision of the RA Constitutional Court.

In a number of decisions, namely DCC-652, DCC-701 and DCC-833, the Constitutional Court touched upon the legal nature of the positions expressed in its decisions, particularly noting that, "according to the Constitution and the RA Law on the Constitutional Court, the

Constitutional Court is entitled to establish final legal position on the constitutional provisions, while assessing the constitutionality of the normative acts. The content of these legal positions is the official interpretation of the constitutional norm ...", "... the approach to the further application of the norms declared as 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." It was also emphasized that "... the international practice of constitutional justice definitely indicates that the legal positions, expressed in the decisions of the bodies of constitutional justice through the disclosure of the legal content or the interpretation of the constitutional or legislative norm, are binding both the for law-enforcers and the law-making bodies".

The practice of the RA Constitutional Court indicates that the Court expresses legal positions in the decisions on the merits of the case, as well as in the decisions rejecting the consideration of the case or dismissing the proceeding, under Articles 32 and 60 of the RA Law on the Constitutional Court. The legal positions expressed in the decisions of the Court generally contain legal criteria, which are basis for adjudication of the given case and regard to:

- the assessment of the constitutionality of the challenged norm or the legal act, which results in the disclosure of the constitutional legal content of the norms of the RA Constitution, commitments stipulated by the international treaties, laws and other acts of the legislation (Article 100, Points 1 and 2 of the RA Constitution), understanding and application deriving from their constitutional axiology, assurance of the direct application of the constitutional rights of the person;
- the evaluation of the law enforcement practice, including the justice administration practice, and the necessity to practically apply the norms of the RA Constitution, laws and other legal acts in accordance with their constitutional legal content;
- the solution of the issues of constitutional legal importance and evaluation of the facts.

The Constitutional Court states that the legal positions expressed in the Court decisions shall ensure more complete and uniform understanding of the RA Constitution and constitutional lawfulness in the law enforcement practice, and purposefully directing the law enforcement practice to the understanding and application of the normative acts in accordance with

their constitutional legal content. Being an important source of constitutional law, they are essential for the law-making or rule-making activity following from the decisions of the Constitutional Court. In its decisions revealing the constitutional legal content of the law (its particular provisions) or other legal acts, the Constitutional Court determines their legal effect based on the expressed legal positions and declares them void, if contradictory to the Constitution. The necessity for further regulation of the legal relation previously regulated by that act or those norms, hence, the necessity of rule-making (law-making) activity by the competent public authority emerges from this fact.

Proceeding from the peculiarities of the constitutional legal status of the RA Constitutional Court and the legal effect and nature of its decisions, the Constitutional Court finds that the legal positions expressed in those decisions:

a/ directly follow from the powers of the Constitutional Court, therefore, they are officialized;

b/ have specific legal consequence, they are addressed to the subjects of a specific case and to all subjects of public legal relationships, i.e. they are universal;

c/ have unlimited legal force and they can be amended only by the decisions of the Constitutional Court;

d/ are called to promote the elimination of the legal uncertainty in the RA legal system and law enforcement practice, they are a basis for constitutionalization of legal relations and have precedential nature;

e/ prior to the normative regulation of the relation in dispute, in some cases they are also temporary means of legal regulation;

f/ are the official interpretation of the norms of the RA Constitution.

10. International practice also explicitly states that the main prerequisite for ensuring the rule of law, hence, the supremacy of the Constitution is to guarantee the enforcement of obligatory, final and *erga omnes* judgments, namely, judgments that are deprived of legal content if not considering the legal positions expressed therein.

In particular, the research of the existing case law of the European Court of Human Rights (Philis v. Greece, para. 59, Golder v. the United Kingdom, paras. 34-36, Hornsby v. Greece, p. 40, Di Pede v. Italy, paras. 20-24, Zappia v. Italy, paras. 16-20, Imobiliare Saffi v. Italy, p. 66) within the scopes of Article 6, Part 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, indicates that the

European Court approaches to the enforcement of the decisions of domestic courts, namely: "The right to the court would be illusory, if a Contracting State's domestic legal system allowed a final and binding judicial decision to remain inoperative to the detriment of one party", "the execution of a judgment given by any court must be regarded as an integral part of the "trial", for the purposes of Article 6".

The positions of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, with respect to the structural role of the bodies of constitutional justice and legal nature of their decisions, lead to the conclusion that the national system of individual complaint must be full and complete and includes all legal acts; the decisions on these applications must effectively stimulate the courts of general jurisdiction for resumption or termination of the proceeding against persons, as well as effective legal remedies shall be provided to require fair compensation from the respondent (Cocchiarella judgment (ECtHR, GC, Cocchiarella v. Italy, March 29, 2006, paragraphs 76-80 and 93-97, on individual access to Constitutional justice, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), paragraphs 79, 94).

11. The arguments of the Applicants on the constitutionality of the challenged norms within this Case are similar in content, according to which, the corresponding judgments must be reviewed due to new circumstances if the Constitutional Court adopts a decision declaring the challenged legal norm as in conformity with the RA Constitution within the framework of certain legal positions expressed therein, and if it has been judicially interpreted otherwise.

As mentioned, in a number of decisions and annual reports the Constitutional Court emphasized the importance of mandatory implementation of the legal positions expressed in the Constitutional Court decisions, stating the cases of their implementation or evasion both in law enforcement and rule-making practices. According to the Constitutional Court, the incomplete implementation of the legal positions expressed in its decisions, as also for this Case, is conditional on the current shortcomings of the law enforcement practice, as well as on the lack of the necessary legislative regulations.

The Constitutional Court, within the framework of this case, while assessing the constitutionality of the challenged norms necessitates emphasizing the applicability of legal remedies for the solution of those problems that concerns with:

a) the mandatory implementation of the legal positions of the Constitutional Court by the law-enforcers, based on the principles of the rule of law, protection of fundamental human rights and freedoms in accordance with the principles and norms of International Law and on other constitutional legal principles, as well as on legal regulations stipulated by the current legislation;

b) the necessity of further legislative assurance of additional legal conditions aimed at mandatory implementation of the legal positions of the Constitutional Court.

The Constitutional Court, on the cases concerning the determination of constitutionality of the legal norms, whether within abstract norm-control or based on individual applications, adopts one of the following decisions:

1)on declaring the challenged act as in conformity with the Constitution;

2) on declaring the challenged act as fully or partially contradicting to the Constitution and void.

Based on the circumstances of admissibility of the application submitted to the Constitutional Court, *ratione materie* jurisdiction and other circumstances stipulated by the RA Law on the Constitutional Court, with regard to the abovementioned cases the Constitutional Court also adopts decisions on the dismissal of the case consideration or termination of the proceeding.

Declaring the challenged act as in conformity with the Constitution, as, for example, with regard to DCC-872, DCC-890, DCC-903, DCC-906, DCC-918, DCC-920, DCC-923 and other cases, the Constitutional Court often reveals the constitutional legal content of disputed legal norms through their interpretation and in the operative part of the Decision, declares those norms as in conformity with the Constitution or as in conformity with the Constitution within the framework of certain legal positions or partially within the framework of certain legal regulation, thus indicating:

- the legal limits of understanding and application of the given norm;
- the legal limits beyond which the application or interpretation of the given norm shall lead to unconstitutional consequences;
- the constitutional legal criteria, based on which the competent authorities are obliged to provide additional legal regulations for the full application of the norm in question.

The Constitutional Court proceeds from the fundamental provision according to which the essence of constitutional justice is to ensure the supremacy and direct application of the Constitution, and no procedural

norm or its inaccurate wording can hinder the implementation of the constitutional function.

Consequently, the Constitutional Court finds well-grounded the assertions of the Applicants, according to which, the norm, declared as in conformity with the Constitution within the framework of legal positions, **may not be applied in the content divergent from the interpretation provided by the Constitutional Court**. Otherwise, the actions and the acts of the competent public authorities, including the court, will obviously contradict the fundamental principles of the constitutional order, guaranteed by Articles 1, 3, 5, 6 and by a number of other articles of the RA Constitution. During the application of normative legal acts within the consideration of a case on the merits and in the framework of judicial appeal, the RA Courts of General Jurisdiction and specialized courts are obliged to consider the legal positions regarding those acts expressed in the Constitutional Court Decisions; in particular, they are bound to do so while **assessing the existence of judicial error** in accordance with the current procedural legislation, if there is a Constitutional Court legal position on the constitutional legal understanding of any substantive or procedural norm applied to the persons within the particular case. The competent courts must consider the similarly reasoned applications of the concerned persons for reviewing a judgment, and the rejection to consider that kind of application without reasonable motivation will provide a person with the opportunity for international judicial protection of his/her rights and freedoms. Such an ongoing practice will contradict not only the fundamental principles of the RA constitutional order, but also a number of international commitments assumed by the RA.

The RA Constitutional Court also necessitates referring to the Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19.01.2000 at the 694th meeting of the Ministers' Deputies. The latter, particularly, states: "The Committee of Ministers of the Council of Europe … bearing in mind that the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*". At the same time, it invites the Contracting States to ensure that adequate possibilities exist to achieve *restitutio in integrum* at national level.

The Constitutional Court finds that the judgments review, in accordance with necessary legislative procedures based on the legal positions expressed in the cases on constitutionality of the legal acts, is an effective remedy to ensure the supremacy and direct application of the Constitution, therefore, it is also a constitutional legal requirement.

However, whereas from the standpoint of protecting an objective right, it is unconditional that **no legal norm can be interpreted and applied avoiding the legal positions of the Constitutional Court**, from the subjective right perspective the problem shall be solved otherwise.

First, the fact is that the judicial practice, proceeding from the current legislative formulations, does not recognize as a new circumstance the Constitutional Court Decisions on declaring the norm as in conformity with the Constitution within the framework of the expressed legal positions, and does not provide an opportunity for restoration and protection of violated rights and freedoms of the person. **Secondly,** the implementation of the principle of guaranteeing the rule of law, and thus, the supremacy of the Constitution is deadlocked. **Thirdly,** this situation is conditional not only on imperfection of separate provisions of the procedural codes, but also the RA Law on the Constitutional Court.

The current legal regulation and law enforcement practice are obviously in contradiction with the requirements of Articles 1, 3, 6, 18, 19, 92, 93 and a number of other Articles of the RA Constitution.

The Constitutional Court finds 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.

Proceeding from the results of consideration of the case and ruled by the provisions of Articles100(1), Article 101 Part 1, Point 6 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 426.3 Part 1, Point 4 of the RA Criminal Procedure Code is in conformity with the Constitution of the Republic of Armenia within the framework of legal positions expressed in this decision.

2. To declare Article 426.4, Part 1, Point 1 of the RA Criminal Procedure Code 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 application 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 within the scopes of judicial appeal, to be incompatible with the requirements of Articles 3, 6, 18, 19 and 93 of the Constitution of the Republic of Armenia and invalid.

3. To dismiss the case in regard to Article 69, Part 12 of the RA Law on the Constitutional Court.

4. To determine November 1, 2011 as the deadline for the invalidation of the provision that is declared incompatible with the RA Constitution and invalid, considering the fact, that the declaration of the norm mentioned in Part 2 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 complex solution of the issue of human rights protection and guaranteeing the necessary legal security, based on Article 102, Part 3 of the RA Constitution and Article 68, Part 15 of the RA Law on the Constitutional Court.

5. 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**

25 February 2011
DCC-943

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLES 1 AND 4 OF THE LAW OF THE REPUBLIC OF ARMENIA ON VETERANS OF THE GREAT PATRIOTIC WAR AND THE DECISION N207-Ն OF THE GOVERNMENT OF THE REPUBLIC OF ARMENIA DATED 5 FEBRUARY 2004 WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE DEFENDER OF HUMAN RIGHTS OF THE REPUBLIC OF ARMENIA

Yerevan **3 June 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. Hovhannisyan, H. Nazaryan (Rapporteur), A. Petrosyan, V. Poghosyan,

With the participation of the Representative of the Applicant: A. Mashinyan,

the Respondent: the National Assembly of the Republic of Armenia, officially represented by D. Melkonyan, the Adviser to the Chairman of the National Assembly of the Republic of Armenia

pursuant to Article 100, Article 101, Part 1, Point 8 of the RA Constitution, Articles 25, 38 and 68 of the RA Law on the Constitutional Court,

examined in a written procedure in a public hearing the Case on conformity of Articles 1 and 4 of the RA Law on Veterans of the Great Patriotic War, Decision N207 − Ն of the Government of the Republic of Armenia dated 5 February 2004 with the Constitution of the Republic of Armenia on the basis of the application of the RA Defender of Human Rights.

The Case was initiated on the basis of the application submitted to the

Constitutional Court by the RA Defender of the Human Rights on 13.01.2011.

Having examined the written report of the Case Rapporteur, the written explanations of the Applicant and Respondent, having studied the RA Law on Veterans of the Great Patriotic War, Decision N207 – Ն of the Government of the Republic of Armenia dated 5 February 2004, other RA legislative acts, as well as other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Law on Veterans of the Great Patriotic War was adopted by the National Assembly of the Republic of Armenia on 2 December 1998, signed by the President of the Republic of Armenia on 30 December 1998 and came into force on 1 January 1999.

Currently challenged Articles 1 and 4 of the RA Law on Veterans of the Great Patriotic War state accordingly:

"Article 1. The concept of Veterans of the Great Patriotic War

According to this Law, Veterans of the Great Patriotic War (hereinafter – Veterans) are citizens of the Republic of Armenia and persons permanently residing in the Republic of Armenia who participated in the Great Patriotic War, as well as participants of the siege of Leningrad during the war and former underage prisoners of Nazi concentration camps. The status of foreign citizens and stateless persons temporary residing or staying in the Republic of Armenia, who took part in the Great Patriotic War, shall be established by international treaties of the Republic of Armenia.

Article 4. The right of Veterans to social protection

Social protection of Veterans is exercised in accordance with the procedure prescribed by this Law and other legal acts.

Veterans are entitled to free health care and services under government support, as well as to get vouchers with privileged conditions for sanatorium-resort therapy in accordance with the procedure legislatively prescribed for military personnel.

Monthly financial allowance is provided to Veterans for covering the electricity and transportation costs, and to war veterans with disabilities - for covering also the charges for gas supply, water supply, sewerage and heating services in accordance with the procedure and amount established by the Government of the Republic of Armenia.

Veterans with disabilities also have the right to:

a) (Point "a" was annulled by the Law ŽÐ-224- Ն dated 11.29.06);

b) pay the charges for flat maintenance, recycling services, telephone and radio with 50 percent discount;

c) receive free prosthetic appliances and restorative supplies in accordance with the procedure prescribed by the Government of the Republic of Armenia.

The Veteran is granted monthly reward in accordance with the procedure prescribed by the Government of the Republic of Armenia.

The amount of the reward is non-taxable and shall not be calculated while determining the index of social means testing of the veterans or their families.

The expenses for implementation of the privileges prescribed in this Article shall be covered from the state budget of the Republic of Armenia, as well as from other means not prohibited by the legislation of the Republic of Armenia."

The Decision No. 207- Ն of the Government of the Republic of Armenia was adopted on 5 February 2004 and confirmed by the President of the Republic of Armenia on 2 March 2004. This decision prescribes the procedure for granting and payment of financial allowance to the war veterans and persons equated with them and families of the fallen militaries.

The Decision No. 207- Ն of 5 May 2011 was annulled by the Decision No. 672- Ն of the Government of the Republic of Armenia. Simultaneously, the RA Government adopted the Decision No. 668-Ն on Determining the Amount of Monthly Financial Allowance Provided to Military Personnel and the Members of their Families by the Categories of Persons Entitled to Receive Financial Allowance, the Procedure for Granting and Payment of Monthly Financial Allowance dated 5 May 2011, and re-regulated the relations concerning the procedure of granting and payment of financial allowance to the veterans of the Great Patriotic War, the persons equated with them and the families of the Fallen Militaries, including also the persons of other categories stipulated in the Agreement on Mutual Recognition of the Privileges and Guarantees of the Participants and the Disabled of the Great Patriotic War, Participants of Military Operations in the Territory of Other States and the Families of the Fallen Militaries, signed in the frames of CIS, in the list of persons entitled to receive such allowance.

2. The Applicant, arguing with regard to the constitutionality of the challenged provisions, finds that in accordance with Article 43, Part 2 of the Constitution limitations of the fundamental human and civil rights and freedoms may not exceed the scope defined by the international commit-

ments of the Republic of Armenia. The CIS Agreement of 1994 on Mutual Recognition of the Privileges and Guarantees of the Participants and the Disabled of the Great Patriotic War, Participants of Military Operations in the Territory of Other States and the Families of the Fallen Militaries ratified by the Republic of Armenia, applies to the disabled and the participants of the Civil and the Great Patriotic Wars, participants of the Military Operations in the Territory of other States, Families of the Fallen Militaries and the categories of the persons, who, in accordance with Annex 1 to the Agreement, were granted the privileges under the legislation of the former USSR. Thus, as the Applicant concludes, the privileges prescribed by the RA Law on Veterans of the Great Patriotic War and other legal acts shall not be less than the privileges and guarantees prescribed by Annex 2 to the mentioned Agreement.

At the same time, according to the Applicant, as it follows from the system analysis of the aforementioned Agreement, for the assurance of the enforcement of the majority of the prescribed privileges it is necessary to adopt an appropriate national legal act prescribing the procedure of the application of the privilege. In addition, Annex 2 to the Agreement prescribes a number of privileges that were not found in the RA legislation at all or were partially prescribed for the certain groups of citizens, thus violating the principle of equality and contradicting the requirements of the Agreement. According to the Applicant, the normative provisions which establish appropriate privileges, contradict the international obligations assumed by the Republic of Armenia also from the perspective of conformity of the contents of privileges.

The Applicant also finds that there are also lots of legislative gaps and contradictions in the sphere of implementation of the Agreement, in particular, persons of numerous categories, listed in Annex 1 to the CIS Agreement of 1994, including Point 2.3 of Annex 1 to the CIS Agreement of 1994, were not included in Article 1 of the RA Law on Veterans of the Great Patriotic War, as well as in the list of persons equated with the Veterans of the Great Patriotic War by the Decision N 207- Ն of the RA Government dated 5 February, 2004. At the same time, in the law enforcement practice these persons are considered as persons equated with the veterans or disabled veterans of war, and enjoy the same privileges prescribed by the RA legislation as the latter persons do (except for the monthly award, which is granted only to the persons who participated in the Great Patriotic War in accordance with law).

3. According to the position of the Respondent, the RA National Assembly, the legal regulation, stipulated in Article 4 of the RA Law on Veterans of the Great Patriotic War, may not contradict the principle of everyone's equality before the law prescribed in Article 14.1 of the RA Constitution, as "it is necessary to consider the constitutional principle of equality of all persons before the law as not only a formal equality but also a constitutional criteria for the assessment of the legislative regulation of the rights and freedoms, and, in this concern, the possibility of implementing this principle in various manifestations shall not be excluded, when the endorsement of the formal equality may lead to the material inequality. In particular, in case of the formal equality of the economic and social rights and freedoms certain categories of people may be found in unequal conditions. It would be considered a breach of the principle of equality before the law, when the person enjoying the same status, deprives from the privileges and benefits based on any ground prescribed in Article 14.1, Part 2 of the RA Constitution. Meanwhile, the law defines privileges and benefits for the persons of same categories, without any exception.

According to the Respondent, i.e. the RA National Assembly, the challenged provision of the abovementioned Law does not contradict the right to social security for old age, disability, loss of breadwinner, unemployment and other cases prescribed by Article 37 of the RA Constitution neither, as "in this case the law prescribes the benefits and privileges for the persons of certain category. Moreover, the ways and mechanisms of implementation of social security are prescribed by other laws...." According to the position of the RA National Assembly, the challenged provisions of the RA Law on Veterans of the Great Patriotic War may not contradict Article 42, Part 2 of the RA Constitution, as in the terms of the challenged provisions of the Law the permissible and impermissible limitations of the rights may not be spoken about, whereas in this case not the guaranteed right and its limitation, which shall be in conformity with the internationally defined scope of limitation, but the privilege prescribed by the law for persons of certain category, is a point.

According to the position of the Respondent, the RA Government, the challenged provisions of the RA Law on Veterans of the Great Patriotic War and the Decision N 207- Ն of the RA Government dated 5 February 2004, do not contradict Articles 14.1, 37, 40 and Article 43, Part 2 of the RA Constitution, as "the relevant decision of the RA Government defines certain privileges equally to all those who have the status of the disabled veterans and persons equated with them," and that Article 37 of the RA

Constitution is fully reflected in the abovementioned legal acts. In regard to the inconformity of the challenged provisions with Article 43, Part 2 of the RA Constitution, the RA Government finds that these legal acts do not set limitations, but grant privileges to the persons of certain categories, and they may not be considered as restrictions of the fundamental rights and freedoms.

4. Within the consideration of this Case, while assessing the constitutionality of the provisions of the challenged normative acts, the Constitutional Court necessitates being based on:

- the content of the constitutional legal regulation of the RA international treaties' legal force and the implementation of the norms stipulated therein;
- the constitutional principle of the necessity to guarantee other human and civil rights and freedoms stipulated in the international treaties and laws;
- the requirement of Article 83.5 of the Constitution regarding the determination of the terms and procedure of implementation and protection of human rights (including privileges) exclusively by law;
- the requirement of Article 60 of the RA Law on the Constitutional Court regarding the legal consequences of cancellation or invalidation of the challenged legal act or its provisions before or during the case consideration at the Constitutional Court.

Within the subject matter of this Case, the relations concerning the social protection of the Veterans is internationally regulated by the Agreement on Mutual Recognition of the Privileges and Guarantees of the Participants and the Disabled of the Great Patriotic War, Participants of Military Operations in the Territory of Other States and the Families of the Fallen Militaries signed in the frames of the CIS on 15 April 1994, which entered into force for the Republic of Armenia on 26 February 1996. The comparative analysis of this Agreement, the RA Law on Veterans of the Great Patriotic War and the challenged Decision N 207- Ն dated 5 February 2004 adopted by the RA Government for guaranteeing their implementation, as well as other acts of the RA legislation in the sphere of social security certifies, in particular, that, the persons stipulated in Annex 2.3 to the abovementioned Agreement, for whom, in accordance with abovementioned international Agreement (Article 2), privileges would be prescribed, remained out of the scopes of such a legal regulation. The RA legislation also partially addressed the entire scope of privileges prescribed in the abovementioned Agreement.

5. In accordance with Article 6, Part 4 of the RA Constitution, international treaties are the constituent part of the legal system of the Republic of Armenia. If a ratified international treaty stipulates norms other than those stipulated in the laws, the norms of the treaty shall prevail.

As it appears from the constitutional legal content of the norm, the international treaties of the RA are normative legal acts, which are constituent part of the legal system of the RA, i.e. contain mandatory rules of behavior for the subjects of relevant sphere of the legal regulation, have a higher legal force over the laws and other legal acts of the RA, shall be binding for all state and local self-government bodies and the public officials of the RA throughout the entire territory of the RA.

The constitutional principle of the priority of international treaties of the RA over the laws is enshrined in a number acts of the current legislation of the RA, as well as in Article 3 of the Law on Veterans of the Great Patriotic War, which directly states that **"if the RA international treaties stipulate the norms other than the ones prescribed in this Law, then the norms of international treaties are applicable".**

According to Article 83.5, Point 1 of the RA Constitution, the terms and procedure for the implementation and protection of human rights shall be determined exclusively by the laws of the Republic of Armenia. The Constitutional Court finds that the content of that normative provision is based on the constitutional legal requirement to regulate the relations concerning the implementation and protection of human rights not only by the very law, but also comprehensively, and firstly, **in accordance with the principles of law**.

According to Article 42 of the RA Constitution, the fundamental human and civil rights and freedoms, stipulated by the Constitution, do not exclude other rights and freedoms prescribed by the laws and international treaties. According to Article 44 of the Constitution, the mentioned legal regulation is not subject to limitation. The Constitutional Court finds that the enjoyment of such rights and freedoms (including privilege) is also a human right which is subject to assurance and protection by domestic law. **Simultaneously, the rights and freedoms (including privileges) prescribed by any international Treaty, may not be excluded or restricted by the law and other legal acts**.

In parallel with disclosure of the constitutional-legal content of the aforementioned norms of the RA Constitution and the necessity to ensure their homogeneous understanding in the law-enforcement practice, the Constitutional Court also highlights the fundamental requirement of Article

6, Part 1 of the Constitution regarding the direct effect of the constitutional provisions and the necessity to implement them unconditionally.

6. Addressing the issue of the constitutionality of the challenged provisions of the Law on Veterans of the Great Patriotic War, the Constitutional Court states that the legislator's duty is to prescribe the necessary legal regulations in the framework of the international obligations assumed by the Republic of Armenia, for assurance of the implementation of these obligations in accordance with the principles and norms of the international law, consequently with the principle prescribed in Article 9 of the Constitution as well, which should be aimed not only to the establishment of good-neighborly and mutually beneficial relations with the states, but also for the guaranteed protection of human rights. The Constitutional Court considers that the incomplete implementation of the provisions of the Agreement on Mutual Recognition of the Privileges and Guarantees of the Participants and the Disabled of the Great Patriotic War, Participants of Military Operations in the Territory of Other States and the Families of the Fallen Militaries signed in the frames of CIS on 15 April 1994 **is conditioned not with the issue of the constitutionality of the challenged provisions of the above-mentioned Law, but ignorance of the normative requirement of Article 3 of this Law in law-enforcement practice.**

In its Decision DCC – 668 (Point 5), the RA Constitutional Court stated that the RA Law on Veterans of the Great Patriotic War, while prescribing the concept "Veterans of the Great Patriotic War" did not cover the persons prescribed in Point 2.3 of Annex 1 to the Agreement, and in the law enforcement practice the interpretation of the concept "War Veterans" shall be unconditionally based on the provisions of Point 3 of Annex 1 to the Agreement. The Constitutional Court states that, according to the law enforcement practice, the mentioned requirement of the Decision DCC-668 is not fulfilled. At the same time, the Constitutional Court finds that in the law-enforcement practice the normative requirement of Article 3 of the mentioned Law shall be considered not only in the aspect of the concept "war veterans", but also in relation to the application of the privileges within the entire scope prescribed for the persons by the Agreement. Touching upon the position of the Respondent (the RA Government), according to which "it is not necessary to reconsider the legal positions of the Constitutional Court prescribed in Point 5 of the Decision DCC-668 dated 28.11.2006", the Constitutional Court states that re-establishing the legal positions expressed in Decision DCC-943, the law enforcement prac-

tice shall consider the legal positions expressed by the Constitutional Court regarding the constitutional-legal content of the legal acts (their particular provisions). The Constitutional Court finds that the establishment of a different practice would contradict the fundamental principles of the constitutional order prescribed by the RA Constitution.

7. Pursuant to Article 85, Part 2 of the RA Constitution, the Government adopts decisions also for ensuring the implementation of the international treaties and laws in the entire territory of the Republic of Armenia.

The Government has a constitutional obligation to determine the procedure and terms for the implementation of the provisions stipulated in Agreement on Mutual Recognition of Privileges and Guarantees for the Participants and Disabled of the Great Patriotic War, the Participants of Military Operations in the Territories of other States, Families of Fallen Militaries of 15 April 1994 signed in the framework of the CIS , as well as the RA Law on Veterans of the Great Patriotic War to the extent and content directly deriving from these acts and the powers granted to it by the Constitution and laws, taking also into account the position of the Constitutional Court expressed in Point 5 of Decision DCC-668.

The comparative analysis of the provisions of the abovementioned Agreement and the Law, as well as other legislative acts regulating the relations concerning the social security of veterans, shows that in its Decision N 207-Ն of 5 February 2004 the RA Government has not envisaged exhaustive terms for ensuring the full implementation of privileges and guarantees for the Veterans of the Great Patriotic War, Persons Equated with Them, Families of the Fallen Militaries prescribed by international treaty and the Law on Veterans of the Great Patriotic War. The RA Government has ensured the enforcement of the Decision DCC-668 of the Constitutional Court neither. In particular, a number of people, who are considered as disabled veterans of the war by the international Treaty of the RA (Point 2 of Annex 1 to the mentioned Agreement) and used to enjoy the privileges, prescribed for the disabled veterans of the war, have been left out of the scope of the mentioned legal regulation of the Decision of the Government. The blockage of the right prescribed by the RA international obligations has been occurred because of the annulment of previous decisions and not defining financial compensation for the abovementioned persons by the Decision N 207-Ն of the RA Government dated 05.02.2004. Moreover, the RA judicial practice also confirmed that the demand of the citizens concerning the

recognition of the disabled war veterans has been precisely solved in the framework of the Agreement on Mutual Recognition of the Privileges and Guarantees of the Participants and the Disabled of the Great Patriotic War, Participants of Military Operations in the Territory of Other States and the Families of the Fallen Militaries" on 15 April 1994 signed in the frames of CIS, but the lawsuit of the citizens to preserve their privileges or payment of monetary compensation was not satisfied based on the Decision of the Government in dispute.

The RA Constitutional Court finds the position of the Applicant concerning the constitutionality of the Decision N207- Ն of the Government of Armenia dated 5 February 2004 to be well-grounded, considering that governed by Articles 6 (Parts 1 and 4), 42 (Part 1), 44, 85 (Part 2) of the Constitution, as well as the requirements of Article 4 of the RA Law on Veterans of the Great Patriotic War, the RA Government was obliged to adopt a decision ensuring the implementation of social-economic privileges of the veterans and persons equated with them or pay them monetary compensation also for the persons of the categories, prescribed in Point 2.3 of the Annex 1 to the mentioned Agreement.

At the same time, the Constitutional Court considered that by its Decision N 672- Ն of 5 May 2011 the RA Government annulled challenged Decision N 207- Ն. By its Decision N 668- Ն of 5 May 2011 on Determining the Amount of Monthly Financial Support Provided to Military Personnel and the Members of their Families by the Categories of Persons Entitled to Receive Financial Support, the Procedure for Granting Monthly Financial Support and its Payment dated 5 May 2011, the RA Government re-regulated the relations, arisen since 1 January 2011, connected with the procedure of granting financial support and its payment to the veterans, persons equated with them, and the families of the fallen militaries. The persons, prescribed by Agreement on Mutual Recognition of the Privileges and Guarantees of the Participants and the Disabled of the Great Patriotic War, Participants of Military Operations in the Territory of Other States and the Families of the Fallen Militaries signed in the frames of CIS are also included in the list of the persons entitled to receive such support.

Proceeding from the results of consideration of the case and being ruled by Article 100(1), Article 102 of the Constitution of the Republic of Armenia, Article 60(2), Articles 63, 64 and 68 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. Articles 1 and 4 of the RA Law on Veterans of the Great Patriotic War are in conformity with the Constitution of the Republic of Armenia.

2. To declare Decision N 207- Ն of the Government of the Republic of Armenia dated 5 February 2004 as contradicting Article 3, Part 2, Article 85, Part 2, Article 43, Part 2 of the Constitution of the Republic of Armenia in regard to non-stipulation of the rights' implementation procedure and blocking of the rights of the persons mentioned in Point 2.3. of the Annex to the Agreement on Mutual Recognition of the Privileges and Guarantees of the Participants and the Disabled of the Great Patriotic War, Participants of Military Operations in the Territory of Other States and the Families of the Fallen Militaries of 15 April 1994, signed within CIS, and entered into force for the Republic of Armenia on 26 February 1996, considering the legal positions expressed in Points 6 and 7 of the Reasoning Part of this Decision and the Decision N668-Ն of the RA Government dated 5 May 2011.

3. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman **G.Harutyunyan**

3 June 2011
DCC-966

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

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, Points1 and 2, Article 190, Part 3, Point 1,by its Decision of 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, as 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, as 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 the 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 proper-

ty 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 Цneryildiz 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 by 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

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

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 Oganesova, 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 Oganesova, 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. Oganesova, 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 Oganesova 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 (ՏԴ) and No. 3-11 (ՏԴ) 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(ՏԴ)2009 and ԵԿԴ 3-11(ՏԴ)2009 according to which the decisions dated 19.02.2009 in Civil Cases No. 3-10 (ՏԴ) and No. 3-11 (ՏԴ) 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(ՏԴ) and No. 3-397(ՏԴ) 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(ՏԴ) and No. 3-397(ՏԴ) 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 chal-

lenged provisions is in the fact that it prondes with 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 Oganesova, 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 serves as 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. Oganesova, 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 provide the court, reviewing the judgment due to new circumstance, with 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 a 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, from 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 31cases, 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 implemen-

tation 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 the 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, only aims 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 the human and the 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 conse-

quences, 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 above-mentioned 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 its aim only in the case of assurance of the 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 evi-

dence 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 emphasis of 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' vio-

lated 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

ON BEHALF OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 78, PART 2 AND PART 3, PARAGRAPH 3 OF THE LAW OF THE REPUBLIC OF ARMENIA ON LEGAL ACTS WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE ADMINISTRATIVE COURT OF APPEAL OF THE REPUBLIC OF ARMENIA

Yerevan **29 November 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. Hovhannisyan, H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of the representative of the Respondent: A. Mkhitaryan, the Senior Expert of the Legal Expertise Division of the Legal Department of the National Assembly Staff,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 7 of the Constitution of the Republic of Armenia, Articles 19, 25 and 71 of the RA Law on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Article 78, Part 2 and Part 3, Paragraph 3 of the Law of the Republic of Armenia on Legal Acts with the Constitution of the Republic of Armenia on the basis of the application of the Administrative Court of Appeal of the Republic of Armenia.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the Administrative Court of Appeal of the Republic of Armenia on 08.09.2011.

Having examined the written report of the Rapporteur on the Case, the

written explanations of the Applicant and the Respondent, having studied the Law of the Republic of Armenia on Legal Acts and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Law on Legal Acts was adopted by the National Assembly of the Republic of Armenia on 3 April 2002, signed by the President of the Republic of Armenia on 29 April 2002 and came into force on 31 May 2002.

The challenged Part 2 of Article 78 of the RA Law on Legal Acts states:

"The legal act, eliminating or mitigating the liability for offence or otherwise improving the conditions of the legal and physical entities violated the law, applies to the relations emerged before the legal act came into force, that is, it has retroactive effect, unless otherwise prescribed by the law or that legal act".

The challenged Paragraph 3 of Part 3 of Article 78 of the RA Law on Legal Acts states:

"The effect of the invalidated legal act extends to the relations emerged before the day of its invalidation, unless otherwise prescribed by the current law or by the invalidating legal act".

2. The procedural background of the Case under consideration is the following: on the basis of the Order No. 1001171 of the Chairman of the RA State Revenue Committee adjunct to the Government dated 28.06.2010 an accuracy inspection on the budget interrelations and the fulfillment of the particular legislative requirements supervised by tax authorities was conducted at "H.A.T.A.K" LLC. As an outcome of the inspection, the act of inspection No. 1001171 was drawn up on 04.10.2010, upon which the violation of requirement of Article 4, Point 2 of the RA Law on Simplified Tax was established, as such. The RA Law ՀՕ-61 of 5 June 2000 on Simplified Tax was annulled by Article 1 of the RA Law (21.08.2008, ՀՕ-149-Ն) on the invalidation of the Law of the Republic of Armenia on Simplified Tax, which entered into force on 1 January 2009.

"H.A.T.A.K" LLC lodged a claim to the RA Administrative Court against the State Revenue Committee adjunct to the RA Government, Ashtarak Territorial Tax Department of the State Revenue Committee adjunct to the RA Government, with a demand to declare the act of inspection No. 1001171 of the Tax Department dated 04.10.2010 as partially

null and void. Ashtarak Territorial Tax Department of State Revenue Committee adjunct to the RA Government submitted a counter-claim with the demand of the exaction of 12.045.100 AMD from "H.A.T.A.K" LLC in favor of the state budget. By the judgment of 01.04.2011, the RA Administrative Court fully satisfied the claim and the counter-claim partially. Ashtarak Territorial Tax Department of State Revenue Committee adjunct to the RA Government appealed the judgment of the court. The RA Administrative Court of Appeal took over the case under the Decision of 04.05.2011. On 06.09.2011 the RA Administrative Court of Appeal made a decision to terminate the proceeding of the Case and apply to the RA Constitutional Court.

3. According to the Applicant, the provisions stipulated in Article 78, Part 2, and Part 3, Paragraph 3 of the RA Law on Legal Acts, applicable within the case under its consideration, contradict the requirements of Article 42, Part 4 of the RA Constitution. According to the Applicant, the contradiction of Article 78, Part 2 of the RA Law on Legal Acts with the requirements of Article 42, Part 4 of the RA Constitution is in stipulation the procedure differing from the one prescribed by Article 42, Part 4 of the RA Constitution in the challenged norm, which concerns the retroactivity of the legal acts, eliminating, mitigating the liability for the breach of law, otherwise improving the legal status of an individual. Particularly, according to the challenged norm, the legal acts improving the legal status of an individual shall be retroactive in all cases, unless otherwise is prescribed by law or by the legal act in question; meanwhile Article 42, Part 4 of the RA Constitution stipulates that the abovementioned acts shall be retroactive if so prescribed by those acts.

In regard to the norms prescribed in Article 78, Part 3, Paragraph 3 of the RA Law on Legal acts, the Applicant finds that its contradiction with the Constitution is conditional on the certain connection with the challenged Part 2 of this Article, as it makes applicable the rule under Article 78, Part 2 of the RA Law on Legal Acts via the stipulation of the notion “to this Law”.

4. The Respondent, in essence, does not object to the arguments of the Applicant and accepts the discrepancy between Article 78, Part 2 of the RA Law on Legal Acts and Article 42, Part 4 of the RA Constitution. The Respondent explains this discrepancy by the fact that this norm of the RA

Law on Legal Acts was adopted prior to the constitutional amendments adopted by the referendum of 27 November 2005, before which the RA Constitution did not stipulate a legal regulation with regard to the retroactivity of the legal acts improving the legal status of an individual. At the same time, the Respondent argues the incompliance of the challenged norm with Article 42, Part 4 of the RA Constitution by the fact that the supreme legal effect of the Constitution allows to ensure the direct effect of the mentioned constitutional norm.

Regarding Article 78, Part 3, Paragraph 3 of the RA Law on Legal Acts, the Respondent finds that the contradiction of the norm with the Constitution directly derives from the legal regulation of Part 2 of the same Article. Consequently, in case of ensuring the compliance of the latter with the Constitution, this problem will be eliminated.

5. The RA Constitutional Court firstly states the absence of the dispute on the constitutionality of the legal provisions under consideration between the Applicant and the Respondent as such, who state the incompliance of the mentioned legislative provisions with the Constitution using almost the same arguments. Simultaneously, the Constitutional Court finds that consideration of this Case will not only have essential significance in the perspective of detection of the constitutional-legal content of the operation of the legal act in time and the assurance of the legal certainty, but also make the essence of the institute of direct application of the constitutional norms more understandable for the judicial practice.

The comparative analysis of Article 22, Parts 3-6, as well as Article 42, Parts 3 and 4 of the RA Constitution indicates that the constitutional regulation on the operation of legal act in time is based on the logics, according to which the denial of the retroactive effect of the legal acts is **a general rule**, and the possibility of retroactive effect of those acts is **an exception to the general rule**. This approach derives from the considerations concerning the assurance of the legal certainty, legitimate expectations of the legislation, human rights and prevention of arbitrariness by the law enforcement bodies. In accordance with the mentioned general rule, Article 22, Parts 3 and 4 of the RA Constitution prohibit the retroactive effect of the Law making the offence punishable and aggravating the punishment. Part 6 of concerned Article prohibits the retroactive effect of the law instituting or aggravating the liability. According to Article 42, Part 3 of the Constitution, the laws and other

legal acts exacerbating the legal status of an individual shall not be retroactive as well.

The norms stipulated in Article 22, Part 5 and Article 42, Part 4 of the Constitution are exception to this general rule. Article 22, Part 5 of the Constitution, according to which the law, eliminating or mitigating the punishment for an offence, shall be retroactive in the scopes of the logic and the subject of legal regulation of the given Article concerns only the laws prescribing liability for an offence, and it is a deviation from the general rule.

The constitutional norms, regulating the relations in regard to elimination or mitigation of the punishment for an offence and the approaches set forth by them, are in concordance with the provisions stipulated in the international legal instruments. Thus, Article 11, Part 2 of the Universal Declaration of Human Rights states that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." Simultaneously, the International Covenant on Civil and Political Rights (Article 15), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 7, Part 1) and other international legal instruments also touched upon the regulation of concerned issues, stipulating that the **Criminal Law**, eliminating or mitigating the punishment for an offence, shall be retroactive.

The Constitutional Court states that retroactive effect of the law eliminating or mitigating the punishment for an offence is conditioned by the virtue of constitutional law, as well as by international obligations of the Republic of Armenia, and it does not assume any legislative discretion.

As for the exception, stipulated in Article 42, Point 4 of the RA Constitution, the Constitutional Court finds that it is rather a general rule; it is not appropriate with the legal regulation of Article 22, Part 5 of the Constitution and depends on the discretion of the legislator. The latter, in its turn, may be manifested in the framework of the legal relations, regulated exceptionally by the Act concerned.

Resulting from of the examination of the international experience of the constitutional justice, the Constitutional Court also necessitates emphasis of the coherency of the abovementioned approach with the international practice. According to the latter, as a rule, the practice of providing retroactive

effect to the legal act which improves the legal status of an individual by the competent body, except for the cases regarding the subject matter of legal regulation of Article 22, Part 5 of the Constitution, is permissible in the exceptional cases, and the decision on retroactivity of the Act of the body which adopted the Act concerned, shall be based on the comprehensive analysis and evaluation of the possible legal consequences of such a decision for the society and the state.

6. The Constitutional Court finds that Article 78, Part 2 of the RA Law on Legal Acts correlates not with Article 22, Part 5 of the RA Constitution but with Article 42, Part 4, for the following reasons:

a/ Article 42, Part 4 of the Constitution and Article 78, Part 2 of the RA Law on Legal Acts assume the discretion of the law-maker, which is excluded in Article 22, Part 5 of the Constitution,

b/ Article 22, Part 5 of the Constitution refers only the **Law**, though Article 78, Part 2 of the RA Law on Legal Acts and Article 42, Part 4 of the Constitution refer **all legal acts**,

c/ if Article 22, Part 5 of the Constitution concerns elimination of "punishability" or mitigation of **"punishment"**, then Article 42, Part 4 and Article 78, Part 2 of the RA Law on Legal Acts concern the **legal status (position) and liability** of the person.

Consequently, Article 78, Part 2 of the RA Law on Legal Acts shall be in concordance and harmony with the legal logic of Article 42, Part 4 of the RA Constitution.

Simultaneously, the norm stipulated in Article 42, Part 4 of the RA Constitution which improves the legal status of an individual, regulates the effect of the legal acts eliminating and mitigating his/her liability in time, has a direct effect and, thus, if the branch legislation does not prescribe a corresponding norm defining the rules on the effect of this legislation in time or contains the norms contradicting the concerned constitutional norm, then in accordance with Article 6, Parts 1 and 2 of the RA Constitution **the mentioned constitutional norm is applied by the virtue of its direct legal effect**.

The norm stipulated in Article 42, Part 4 of the RA Constitution constitutionally regulates the effect of the legal acts, improving the legal status of an individual, the laws eliminating or mitigating his/her liability, as well as other legal acts in time, and, thus, this provision is addressed to the legislator and **other law making bodies** likewise. The legal content of the

norm leads to the following: giving retroactive effect to the legal act improving the legal status of an individual or eliminating and mitigating the liability, is left to the **discretion of the body adopting the legal act** (for sure, taking into consideration the requirements of Article 83.5 of the Constitution). Simultaneously, this norm defines the procedure for the implementation of that discretion, i.e. in each particular case the body, which adopted the act, stipulates the provision on its retroactiveness, if appropriate, exercising its discretionary power provided for by the Constitution. This procedure for the implementation of the mentioned discretion is not end in itself and logically proceeds from the general logic of regulation on the effect of the legal acts in time, under the Constitution.

Resulting from of the comparative analysis of the constitutional norm and the challenged legislative norm, regulating the same legal relation, the Constitutional Court finds that the norm, stipulated in Article 78, Part 2 of the RA Law on Legal Acts diverging from the **presumtion of absence of the retroactive effect** of the challenged legal acts, stipulated in Article 42, Part 4 of the RA Constitution, has stipulated **the presumtion of existence of retroactive force** of these legal acts, **transforming the exception into a general rule**.

Simultaneously, the Constitutional Court finds that, before the contradiction is overcome legislatively, the law enforcement practice shall be governed by the requirement prescribed in Article 42, Part 4 of the Constitution, as a norm with direct effect under Article 6, Part 1 of the Constitution.

7. The challenged legal regulation on the effect of the legal acts, improving the legal status of an individual, eliminating or mitigating his/her liability, in time, prescribed by Article 78, Part 2 in the RA Law on Legal Acts was adopted before the constitutional amendments of 2005, when as opposed to the current Constitution no constitutional provision was envisaged for regulating the action of the legal acts in time. In the conditions of the absence of the concerned legal regulations by the Constitution, the legislator was free to regulate that legal relation independently, and the choice between the presumptions of existence or absence of the retroactive effect of the mentioned acts was left to the discretion of the legislator.

The operation of the legal acts eliminating or mitigating the legal status of an individual in time was regulated constitutionally only as a result of the 2005 constitutional amendments. Article 42 of the RA Constitution,

unlike the challenged norm, has stipulated the rule of exclusion of the retroactive effect of the legal acts improving the legal status of an individual, eliminating and mitigating his/her liability. In the conditions of similar constitutional regulation under Article 117, Point 1 of the RA Constitution the necessary amendment should have been made to the challenged Part 2 of Article 78 of the RA Law on Legal Acts within a two-year period, which has not been implemented yet.

8. The content of the provision stipulated in Article 78, Part 3, Paragraph 3 of the RA Law on Legal Acts means, that according to the general rule, this invalidated Act applied to the relations arisen prior to its invalidation, unless otherwise prescribed by the RA Law on Legal Acts or the legal act making the act invalid.

The Constitutional Court finds that this Provision may not be automatically compared with Article 78, Part 2 of the same law, as the subject matter of their legal regulation differs. While evaluating the constitutionality of Article 78, Part 3, Paragraph 3 of the RA Law on Legal Acts, first it is necessary to consider the general constitutional principle that after the invalidation the effect of the legal act is terminated completely. However, there is also another circumstance. As providing the legal act with retroactivity is under the discretionary legal regulation in the scopes of Article 42, Part 4 of the Constitution, then such situations may remain uncovered, when this legal act has not envisaged retroactivity, the previous legal act has been invalidated and, at the same time, a particular problem regarding legal responsibility has arisen for previously committed act. In this case, the legislator envisages a provision, according to which "The invalidated legal act applies to the relations prior to the day of its invalidation, unless otherwise prescribed by the current law or the legal act invalidating the act". It also derives from the said wording that the retroactive norm will apply, if the retroactivity of the norm of the legal act is concerned under Article 42, Part 4 of the RA Constitution. Such legal regulation is lawful, without which a serious legislative gap may arise.

Proceeding from the results of the case consideration and ruled by Article 100, Point 1, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64, 68 and 71 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. To declare Article 78, Part 2 of the RA Law on Legal Acts as contradicting to the requirements of Article 42, Part 4 of the Constitution of the Republic of Armenia and void.

2. Based on this decision, Article 78, Part 3, Paragraph 3 of the RA Law on Legal Acts is in conformity with the Constitution of the Republic of Armenia in terms of invalidation of Article 78, Part 2 of the RA Law on Legal Acts.

3. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

29 November 2011
DCC-1000

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