



ON BEHALF OF THE REPUBLIC OF ARMENIA

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

**THE CASE ON CONFORMITY OF ARTICLE 51, PART 4
AND ARTICLE 54, PART 5 OF THE CRIMINAL CODE
OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION
OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE
APPLICATION OF THE HUMAN RIGHTS DEFENDER
OF THE REPUBLIC OF ARMENIA**

Yerevan

23 April 2013

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

with the participation of the representatives of the Applicant: A. Vardevanyan and S. Yuzbashyan, the employees of the staff of the Human Rights Defender of the Republic of Armenia,

official representatives of the Respondent: S. Hambardzumyan, the Chief Specialist and H. Sardaryan, the Leading Specialist of the Legal Expertise Division of the Legal Department of the National Assembly Staff of the Republic of Armenia,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 8 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 51, Part 4 and Article 54, Part 5 of the Criminal Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the Human Rights Defender 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 Human Rights Defender of the Republic of Armenia on 11.10.2012.

On 26.02.2013 the Constitutional Court made Procedural Decision PDCC-12 to involve A. Gabuzyan, PhD in Law, Head of Chair of Criminal Law of the Law Department of Yerevan State University as an expert in the examination of this Case and offered him to provide the Constitutional Court with expert opinion on the provisions of Article 51, Part 4 and Article 54, Part 5 of the Criminal Code of the Republic of Armenia. Simultaneously, the Constitutional Court demanded from the Ministry of Justice of the Republic of Armenia to submit written substantiations on the legal regulations challenged in this Case.

Having examined the report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondents, the substantiations submitted by the Ministry of Justice of the RA, the expert opinion, as well as having studied the Criminal 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 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.

Part 4 of Article 51 of the RA Criminal Code, titled “Fine,” states:

“4. In case of impossibility to pay the fine, the court may substitute the fine or unpaid part thereof with community service counting 5 hours of community service as minimal salary. If the result of the calculation of the fine or unpaid part thereof with community service is less than two hundred seventy hours, two hundred seventy hours shall be assigned; and if it exceeds two thousand two hundred hours, two thousand two hundred hours shall be assigned.”

The current content of the above-mentioned Article was set forth in accordance with Article 3 of the Law 20-119-Ն dated 26.06.2006.

Part 5 of Article 54 of the Code, titled “Community service,” states:

“5. In case the offender maliciously evades from performing community service the court may substitute the unperformed part of it with arrest or imprisonment for a certain term, on the basis one day of arrest or imprisonment per three hours of community service.”

The mentioned Article of the RA Criminal Code was amended by Article 6 of the Law 20-97-Ն dated 01.07.2004, according to Article 4 of the Law 20-119-Ն dated 26.06.2006 Parts 1-3 of it was edited and Part 5 was amended.

2. The Applicant states that the above-mentioned provisions of the Code are not in conformity with the RA Constitution on the following reasoning.

Based on Article 49 of the RA Criminal Code, the Applicant states that the norm defines the types of punishment taking into account the criteria of their comparative gravity, i.e. from more lenient punishment to graver, according to which the fine is the most lenient punishment, which is followed by prohibition to hold certain posts or practice certain professions, community service, etc. In the system of punishments, community service by its position and impact is a harsher punishment than the fine as it restricts the convict’s freedom.

The Applicant, referring also to Part 1 of Article 61 of the Code, states that fair punishment shall be assigned in relation to the person found guilty in the commitment of a crime which is determined within the limits of relevant article of the Special Part of the RA Criminal Code, taking into account the provisions of the General Part of the Code. According to the Applicant, the mentioned norm obligates not to go beyond the scopes of the punishment of the Article of the Special Part of the Code. Meanwhile, according to Articles 66 and 67, “only in the case of accumulation of crimes and judgments the court may be entitled to go beyond the scopes of the punishment stipulated in the Special Part for certain corpus delicti and impose harsher punishment than maximal punishment prescribed by the relevant article.”

Based on Article 22, Part 3 of the RA Constitution, the Applicant also finds that imposing harsher type of punishment than the fine defined

for *corpus delicti* stipulated by the Special Part of the RA Criminal Code, may cause non-conformity with the RA Constitution and the relevant articles of ECHR “due to absence of precise guarantees of trial.”

Besides, based on the analysis of Part 4 of Article 51 of the RA Criminal Code, the Applicant concludes that there is no precise distinction between impossibility to pay the fine and malicious evasion from payment. The Applicant finds that the legal regulation of substantiation of the fine with community service and the latter with arrest shall distinguish between the cases of impossibility to pay the fine and malicious evasion from payment, and only in this case imposing punishment will not bring to violation of human rights.

In the additional explanations submitted to the Constitutional Court the Applicant insists on his viewpoint concerning the challenged legal provisions expressed in the Application.

3. The Respondent states that the challenged provisions of the RA Criminal Code do not contradict the Constitution, in particular, according to the international legal practice, as well as the analysis of the current legislation, the Respondent concludes that, in the framework of the issue in dispute, the principle “... no punishment shall be imposed, unless provided by the law” is applicable. According to the Respondent, the issue may arise in the case when the crime was committed during the action of the current criminal law but during the adoption of the judgment other criminal law was in force.

The Respondent also substantiates the conformity of the challenged norms with the Constitution by the argument according to which “during the commitment of the crime... before the adoption of the decisions by the court and in the adoption process thereof, the current criminal law (the RA Criminal Code) prescribed similar procedure of imposing punishment and similar type of punishment. Meanwhile, by saying criminal law the entire Criminal Code is considered, and not only the Special Part thereof.”

Touching upon the issue of inadmissibility of substitution of the fine with community service, as the implementation of the harsher punishment, the Respondent states that two punitive measures constitute the group of punishment not related to the imprisonment and certain procedure of calculation for their substitution is prescribed by law, the aim of

which is to ensure the proportionality; besides, while determining the amount of the fine, the court takes into account the property status of the convict, and in case of impossibility to pay the fine, it can be substituted with other type of punishment, “... with community service though it is graver by its nature.” Otherwise, as the Respondent concludes, “... corruption risks may occur: the convicts may be punished with a fine, payment of fine may be postponed or deferred, and thereby they may avoid liability and punishment.”

In the additional explanation submitted to the Constitutional Court the Respondent simultaneously finds that “...the mechanism of calculation of substituting the fine or unpaid part thereof with community service does not ensure proportionality between those two types of punishment in cases when, as a result of calculation, it is less than 270 hours as defined by the law... meanwhile, the law, in fact, blocks the possibility to assign less term of community service than defined by the law, thus it exacerbates the status of the individual, who does not have capacity to pay the fine.”

The Respondent assesses legitimate to substitute community service with arrest or imprisonment for a certain term, when the convict maliciously evades from performing the community service and concludes that “...in case of substitution of community service with arrest or imprisonment for a certain term, the applicable means of reaction by its harshness may also exceed the previously assigned punishment.”

4. The RA Constitutional Court necessitates assessing the constitutionality of the challenged norms:

- from the perspective of ensuring lawful implementation of the principles of inevitability and individuality of criminal liability,
- from the perspective of the correspondence with the constitutional legal content of the institution of substituting the type of punishment and guaranteeing the rule of law,
- from the perspective of comprehensive study and assessment of international practice concerning the legal regulation in dispute.

The assessment of the constitutionality of the challenged norms is based on the requirements of Part 7 of Article 68 of the RA Law on the Constitutional Court, in particular, inter alia, to reveal the necessity of ensuring, protection and free exercise of the constitutionally defined

human and civil rights and freedoms, permissibility of their restrictions, and to ensure direct effect of the Constitution.

Based on the questions and conclusions of the Applicant, the Constitutional Court finds necessary to reveal the constitutional legal content of legal regulations stipulated by the challenged norms also based on the comparative analysis of other norms of the RA Criminal Code systemically interrelated with those norms.

5. The challenged norms of Articles 51 and 54 of the RA Criminal Code directly stipulate the elements of the procedure and terms of implementation of punishment not related to imprisonment, i. e. fine and community service, in particular, connected with the substitution of those types of punishment with other certain enforcement measures by the court against the persons found guilty in a crime, i.e. with the procedure and terms of implementation of the institution of substitution of the punishment.

The procedure and terms of implementation of the fine and community service as the punishments not related to imprisonment are prescribed in Articles 24-26 and Articles 32-35 of the RA Criminal Enforcement Code, links of which with the challenged legal regulations in the constitutional legal sense, are beyond the scopes of the subject matter of this case.

As it derives from the common legal content of the challenged norm and other relevant norms of the RA Criminal Code, fine is a punishment which limits the property rights of the convict, is implemented against the persons guilty in the criminal action committed due to carelessness or with mercenary motives or by intention. This is a monetary fine, which is imposed for the crimes of not gross or medium gravity in the cases and limits prescribed by the Special Part of the RA Criminal Code in the amount of thirty to one thousand of the minimal salaries as established by the Law of the RA at the moment of fining.

The study of the relevant articles of the common and special parts of the RA Criminal Code states that the amount of the fine is differentiated. It is determined by the court taking into consideration the gravity of the committed crime and the property status of the convict (amount of earning, well-being of the family, etc). The fine may be imposed as the only basic punishment as well as in the cases prescribed in Articles 64 and 77 of the RA Criminal Code.

The community service is the execution of free socially useful work imposed by the court, implemented by the convict in the place assigned by the competent body. It may be assigned as the basic punishment against the persons who committed not gross or medium gravity crimes and sentenced not more than two years of imprisonment, as the alternative punishment of imprisonment after receiving the order of implementation of the judgment entered into force within twenty day period on the basis of the written application of the convict as well as a type of punishment substituting the fine in accordance with the procedure prescribed in Part 4 of Article 51 of the Code.

Thus, the Constitutional Court states that, in accordance with Article 48 of the RA Criminal Code, both the fine and the community service are **state coercive (legal liability) measures**, which are imposed in the name of the state against the person found guilty for a criminal act and are expressed in deprivation or limitation of the rights and freedoms of the person in accordance with the legislatively prescribed procedure, consequently, they derive from the necessity of legal regulation prescribed by Article 83.5, Point 2 of the RA Constitution. These measures, amongst the other legislatively prescribed compulsory measures, are implemented by the decision of the competent court and follow the aims of maintenance of public order, prevention of the crimes, morality of the society, protection of the constitutional rights and freedoms, honour and good reputation of others, thus, they are lawful and are aimed at the maintenance of the principles of the constitutional order and legality.

Touching upon the constitutional legal content of the institution of substitution of fine and community service with other types of punishment, the Constitutional Court states that it is quantity of constitutional and other (criminal, criminal procedural, criminal execution) norms which is assumed to ensure the replacement of the punishment, imposed by the judgment against the person found guilty in the commitment of a crime with another relevant type of punishment prescribed by law. According to the content of the challenged legal regulation, necessity of replacement of the punishment is conditioned with the presence of such circumstances which hinder exercise of the formerly appointed punishment.

In particular, pursuant to the mentioned legal regulation, in case of certain legal conditions prescribed in Parts 3 and 4 of Article 51 of the Code, the fine (or unpaid portion of the fine) is replaced by the community service, **first, when the convict is not able to pay immediately the assigned fine in lump.** That is, the legislator meant, in particular, the personal property or unfavorable status of the convicted person. In this case the court appoints a payment deadline, maximum up to 1 year, or allows paying the fine on installment within the same period, or defines a payment schedule determining the amount of each payment (i.e. in accordance with the prescription of Article 51, Part 3 of the Code, a privilege is envisaged for serving the sentence). The court substitutes the fine or unpaid part thereof with community service in case if the convicted person fails to execute the obligations defined by payment schedule (to use privilege opportunity). Meanwhile, the legislator **signifies the fact of motives for violation of the mentioned obligations (legal requirement) and not for their non-implementation.** In fact, in this case relevantly unfavorable legal consequences followed the violation of the “favorable” (privileged) legal regime of legislatively prescribed legal regulation by the convict.

Secondly, legal requirement (Article 51, Part 4 of the Code) according to which the fine is substituted with the community service **is the impossibility to pay fine.** And although the legislator has not clarified the manifestation of “impossibility” (it is not precise also in Article 25, Part 1 of the RA Criminal Execution Code), however those may be considered as the circumstances which are not prescribed in the Part 3 of the challenged Article of the Code. Simultaneously, it is evident that the term “impossibility” can not include in it the terms “intent” or “malignant evasion”. As it derives from the content of the legal regulation of Article 51, Part 4 of the RA Criminal Code, it is the matter of the judicial interpretation by the competent court to decide whether any factual circumstance appears to be an obstacle for payment or nonpayment of the fine by the convict. Those may be both objectively and subjectively grounded circumstances.

The Constitutional Court considers significant to state that availability of two groups of legal requirement prescribed in the mentioned Article 51 (Parts 3 and 4) of the Code conclude to **the same legal consequence,** i. e. the substitution of the fine with the community service (substitution

of the type of punishment). Thus, the legislator pursues the aim to ensure implementation of the punishment assigned by the court, to implement the goals of the punishment, i.e. rehabilitation of the social justice, reformation of perpetrator and prevention of crimes.

Simultaneously the Constitutional Court states that in the frames of legal regulation of the abovementioned Article 51, Part 4 of the Code the absence of the legal contents of the “impossibility” to pay the fine may bring to different interpretation in the law enforcement practice. The Constitutional Court states that the latter was neither revealed in the previous of amended edition of the challenged legal regulation. In particular, the possible consequences of impossibility of paying the fine and not paying the fine (evasion of paying the fine) are not differentiated. The Constitutional Court finds that implementation of the institution of substitution of the punishment (fine with community service) pursues lawful goal but it also demands differentiated approach based on the motives of substitution. Consequently, non-stipulation of possible consequences of evasion of payment of the fine in the scope of legal regulation of Article 51, Part 4 may cause the issue of constitutionality in practice.

Besides, the issue of proportionality of substitution of the punishment (in this case fine) with other punishment (in this case with community service) arises, which is linked with implementation of the prescribed calculation prescribed in the challenged legal regulation for substitution of the fine or unpaid part thereof with the community service. Pursuant to the provision in dispute “If calculation of replacement of the fine or the unpaid portion of the fine with community service results less than two hundred seventy hours, then two hundred seventy hours is assigned, but if it exceeds two thousand two hundred hours, two thousand two hundred hours is assigned”. Besides, in the scope of the above mentioned legal regulation, the legislator in principle has not touched upon the issue of necessity of implementation of the institution of substitution with harsher punishment in the case of malignant evasion (or other manifestations of intent), which is available in the challenged part of Article 54 of the RA Criminal Code. The Constitutional Court states that evasion from the community service as well as from the fine, as the punishment not related to imprisonment, requires relevant legal assessment by the legislative body, from the perspective of the same degree of public danger, consequently, also relevant legal regulation based on the principle according to which

felonious manifestations of both non-implementation (impossibility of implementation) of the obligation to pay fine and evasion from it by convict should be considered.

According to Articles 4 and 10 of the RA Criminal Code fairness is one of the fundamental principles of the regulation (measures of influence) of criminal legal relations, which means that punishment and other criminal legal measures of influence should be appropriate to the gravity of the crime, to the circumstances in which it was committed, to the personality of the criminal, it should be necessary and sufficient to correct criminal and to prevent new crimes. The challenged legal regulation may be assessed only in this context, when the principle of proportionality between the aim pursued and legal measures taken to achieve that aim has been maintained.

Touching upon the issue of lawfulness (proportionality) of normative regulation of Article 51, Part 4 of the RA Criminal Code, the Constitutional Court states that in case there is no undisputable circumstance of the convict's evasion from the punishment substantiated in accordance with the manner prescribed by law, **the intensification of the assigned punishment through its substitution is not lawful**, which practically may take place as a result of the mentioned legal regulation. The problem is that instead of community service with less time period resulted from the stipulated calculation for replacement of the punishment, such service with longer time terms is prescribed (when as a result of calculation made for replacing fine or unpaid part thereof with community service is less than two hundred seventy hours), i.e. as a result the proportionality between the previous and replaced punishments is distorted, the condition of a person, who had no possibility to pay the fine, is worsened groundlessly, and when the legal general (prescribed by the criminal legislation) grounds (intention or other circumstances) for such intensification are not available. As a result, the person (the convict) in practice is deprived of the possibility to exercise his/her right to effective means of legal protection guaranteed by Article 18 of the RA Constitution. Thus, the Constitutional Court states that **the norms of Article 51, Part 4 of the RA Criminal Code contain disproportional legal regulating means, i.e. intensification of the punishment (groundless worsening of the position of the convict) in the case when the legitimate ground of its implementation is not available, and the absence of such intensifica-**

tion in cases of possible availability of the relevant legal grounds (intention).

6. The Constitutional Court states that a precise legal requirement is prescribed in case of replacement of community service, as a punishment, with other means of coercion. In particular, pursuant to Article 54, Part 5 of the Code, the court substitutes the unperformed part of the community service with the arrest or imprisonment with a certain period, when **the convict evades maliciously from performing of community service.** That is, malice as a criminally objectionable subjective factor and as more dangerous social phenomenon objectively brings to intensification of the replaced punishment (replacement and exercising the punishment linked with imprisonment), consequently also executing the effective means of legal regulation. It pursues the aim to rehabilitate the social justice, correct a punished person, and prevent crimes, i.e. guarantee the maintenance of the foundations of the constitutional order.

Consequently, the Constitutional Court states that in the sense of the legal consequence, in the above-mentioned case the legislator has followed the principle of relevancy of pursued goal and legal means for achieving it.

Assessing the above-mentioned legal regulation from the perspective of the lawful implementation of the principles of inevitability, liability and personification of punishment, as well as from the perspective of guaranteeing the effectiveness of the institution of the substitution of punishment and protection of human rights and ensuring the rule of law, the Constitutional Court states that the challenged norms of Article 54, Part 5 of the Code contain sufficient norms for effective implementation of punishment in accordance with the principles prescribed in Article 14, Article 14.1, Part 1 of the RA Constitution, as well as for ensuring the judicial protection of the rights of an individual in accordance with Articles 18 and 19 and Article 20, Part 3 of the RA Constitution, which is not fully ensured in the scopes of legal regulation prescribed in Article 51, Part 4 of the Code.

The international practice states that the legislative solutions, provided for the challenged legal regulations, have both generalities and certain peculiarities. Mainly they conclude the following:

- a. in majority of countries there is a differentiation in the issues of

implementation of replacement of the punishment in case of impossibility to pay the fine and in case of malicious evasion from paying fine,

b. imprisonment is considered as extreme means when the person maliciously evades from paying the fine or exercising community (corrective, socially useful) service.

c. imprisonment is in certain ratio with the amount of unpaid fine or non-exercised community service.

The peculiarities conclude the following:

a. in the significant number of countries imprisonment is envisaged proportionally to the unpaid fine (despite the circumstances of non-payment),

b. the issue of substitution of the fine with the community service or imprisonment is decided simultaneously linked to the circumstance of not paying the fine.

Based on the above-mentioned generalizations of the international practice, the Constitutional Court states that the issue of the challenged legal regulations of Article 51 of the RA Criminal Code has been provided with stepwise solution, first replacing fine with community service in the case of impossibility to pay the fine and in case of malicious evasion from the community service it is replaced with the imprisonment. Consequently, the Constitutional Court considers necessary in the level of legislative regulations of the institution of substituting the punishment more precise and effective implementation of that institution which will promote not only improvement of the criminal legal influence but also improvement of means of legal protection of persons' rights and freedoms.

Proceeding from the results of consideration of the case and being ruled by Article 100, Point 1, Article 101, Part 1, Point 8, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Article 51, Part 4 of the Criminal Code of the Republic of Armenia insofar as in the result of the calculation made for substitution of fine or unpaid part thereof with community service does not guarantee legal possibility of implementation of community service less than two hundred and seventy hours against the persons who do not have possibility to pay the fine, therefore blocking the implementation of their right to

effective means of legal protection, as well as does not provide differentiated approach towards impossibility of the circumstances of paying the fine and evading from it, contradicting Article 18 of the Constitution of the Republic of Armenia and void.

2. Article 54, Part 5 of the Criminal Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia taking into consideration the legal positions expressed in the Decision.

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

23 April 2013

DCC-1082