Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF ARTICLE 41 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA AND NORMS INCORPORATED IN CHAPTER 49 OF THE RA CRIMINAL PROCEDURE CODE TITLED "ENFORCEMENT OF JUDICIAL DECISIONS" WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE CRIMINAL COURT OF APPEAL OF THE REPUBLIC OF ARMENIA

Yerevan 22 January 2019

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

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

the applicant: Criminal Court of Appeal of the Republic of Armenia.

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

pursuant to Clause 1 of Article 168, Part 4 of Article 169 of the Constitution, as well as Articles 22, 40 and 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of article 41 of the Criminal Procedure Code of the Republic of Armenia and norms incorporated in Chapter 49 of the RA Criminal Procedure Code titled "Enforcement of Judicial Decisions" with the Constitution of the Republic of Armenia on the basis of the application of the Criminal Court of Appeal of the Republic of Armenia.

The Criminal Procedure Code of the Republic of Armenia (hereinafter referred to as the Code) was adopted by the National Assembly on July 1, 1998, signed by the President of the Republic Armenia on 1 September 1998 and entered into force on January 12, 1999.

Article 41 of the Code titled “Powers of the Court” prescribes:

“1. The court is authorized to consider in its sessions and to resolve the cases and materials brought before it. No refusal from administration of justice may be admissible.

2. The following are related, in particular, to the powers of the court:

1) the passing of judicial decisions connected with arrest, extension of the term of arrest, in cases provided for in this Code, imposition of restrictions on refusal of a petition for search, confiscation, placement of persons in a medical institution, and withdrawal, obtaining information that is notaries secret, as well as on the confidentiality of communications, telephone conversations, postal, telegraph and other communications; in cases established by law, the review and resolution of complaints against decisions and actions (inaction) of the person in charge of investigation, the investigator, the prosecutor and operative and investigatory bodies

2) the passing of decisions connected with the preparation of the case for trial;

3) the consideration of criminal cases in the order of appeal, cassation, or in the first instance;

4) addressing a motion to the prosecutor on institution of criminal prosecution in cases prescribed by this Code;

5) sending the verdict to be executed;

6) resolution of the issues arising in connection with the execution of the verdict;

7) resolution of the issues connected with the expungement of criminal records;

8) in cases prescribed by law, resolution of other issues.

3. According to the decision of the judge considering the case, a court session may be held outside the courtroom if it derives from the interests of the effectiveness of justice.

After the adoption of the Code, the article was amended, supplemented and edited by the Law HO-91-N of 25.05.06, the Law HO-93-N of 21.02.07 and the Law HO-270-N of 28.11.07.

CHAPTER 49 of the Code titled “Implementation of court decisions” includes the following articles:

Article 427. The court decision coming into force and its implementation,

Article 428. The instruction to hand the court decision for implementation,

Article 429. Providing the rights of the convict while implementing the court decision,

Article 430. Resolution of doubts and uncertainties concerning the court decision,

Article 431. Postponement of the implementation of the court decision,

Article 431.1. Replacing fine with community service,

Article 432. Exemption from punishment due to illness,

Article 433. Exemption of the convict whose court decision implementation is delayed, as well as the elimination of the delay in the implementation of the court decision,

Article 434. Release on parole and replacement of the sentence with a less strict one,

Article 434^{1}. Search for a convict,

Article 436. Inclusion of the time spent in a medical institution in the calculation of the term,

Article 437. The courts which resolve the issues concerning the execution of court sentences,

Article 438. Procedure of resolving the issues concerning the execution of court decisions.

The case was initiated on the basis of the application of the RA Criminal Court of Appeal submitted to the Constitutional Court on October 25, 2018, which presented the Decision of the RA Criminal Court of Appeal "On applying to the RA Constitutional Court and terminating the proceedings of the case" on the case ARD/0011/15/18 of October 22, 2018.

Having examined the application, the written explanation of the respondent as well as analyzing the relevant provisions of the Code and other legal acts, the Constitutional Court

ESTABLISHES:

1. Position of the applicant

The applicant considers that the right of a person to judicial remedies, enshrined in the Constitution, shall also extend to issues arising at the stage of execution of court judgments that have entered into legal force, which means that at the stage of execution of court judgments the person shall also have the right to apply to court to eliminate or prevent alleged violations of his/her rights, and the legislator, in accordance with the principle of legal certainty, must clearly establish the court competent to hear these complaints (administrative or general jurisdiction), and the necessary judicial procedures and mechanisms so that the right of a person is real, not illusory.

According to the applicant, from the analysis of various legal acts it does not become clear which court should consider the appeal against the decisions and actions of the head of the Penal

Enforcement institution – the administrative court or the court of general jurisdiction. In addition, if such cases are to be considered by courts of general jurisdiction, then, according to the applicant, it is not clear in what time frame, in what order and what powers the court has or should have when deciding on appeals against the decisions and actions under consideration.

The applicant considers that by the norms included in Chapter 49 of the Code regulating the stage of execution of judicial acts, the criminal procedure legislation regulates exclusively the activities of the judiciary to the extent (in terms of those powers) that relate exclusively to issues resolved in the sentence in accordance with Article 360 Code.

The applicant notes that the current criminal procedure legislation in the criminal procedure can be raised and resolved the issue solely regarding those issues related to the execution of the punishment and the criminal law serves as the substantive legal basis. On this basis, the applicant concludes that the current criminal procedure legislation does not regulate such legal relations, which, although they arise in connection with the execution of a conviction, nevertheless they do not concern the issues resolved by this sentence, for instance, determination of the legality of applying punishment to the convicted by the head of CDS since not criminal law, but Penal Enforcement legislation serves as substantive and legal basis.

Referring to the provisions of the Decision DCC-1215 of the Constitutional Court, the applicant considers that the rulings of Chapter 49 of the Code and the legal regulations for the implementation of the necessary procedural actions are not consistent with the principle of legal certainty, jeopardizing the rights and legitimate interests of the convicted person.

Summarizing, the applicant considers that article 41 and chapter 49 of the Code insofar as they do not provide for terms, procedural order, grounds, conditions for the submission of an appeal by a convicted against the decisions and actions of the head of the Penal Enforcement institution, the procedural order for the consideration of these complaints, the composition of the subjects entitled to participate in the proceedings, the scopes of powers of the court and other related issues contradict Articles 61, 63, 75 and 79 of the Constitution.

2. Position of respondent

The applicant, as a result of a comprehensive review of the procedural as well as the penal-enforcement legislation, considers that the legislator in Articles 7, 59, 60, 94 and 97 of the RA Penal Enforcement Code prescribes that officials of the penalty enforcement bodies are

authorized to carry out actions prescribed by the law, where the legislator has clearly stipulated that the execution of the actions of officials may be appealed in court or in another body prescribed by law.

On the other hand, the respondent notes that in relation to a person sentenced to imprisonment for violating the established order of serving the sentence, the following punishments such as a comment, a strict comment, placement in a punishment cell for up to fifteen days can be applied, and for a juvenile convict - for up to ten days, when the established penalties are applied in cases and in the manner provided exclusively by the internal regime.

The respondent also notes that Article 10 of the Administrative Procedure Code of the Republic of Armenia clearly establishes that the RA Administrative Court does not have jurisdiction over cases of execution of punishment, meanwhile, according to Part 2 of Article 21 of the Judicial Code of the Republic of Armenia in criminal cases of general jurisdiction, the cases related to judicial control over pre-trial criminal proceedings, as well as related to the execution of punishment prescribed by law, are considered only by a specialized criminal court, except for certain types.

Following the analysis of the Criminal Procedure Code of the Republic of Armenia, the respondent believes that the latter, being in systemic relationship with the above-mentioned legal norms, established the scope of authority of the court and secured along with a number of court powers, the authority to decide other issues in the cases provided by law (Article 41 of the Code), thereby ensuring the legal guarantee of the realization of the right to accessibility of the court in cases prescribed by law related to the execution of a sentence.

In addition, the respondent notes that the legislator has taken into account a number of international standards and recommendations in the relevant field.

Summarizing the above-mentioned, the respondent notes that, in general, conceptual issues of ensuring the right to accessibility of the court and the exercise of the right to a fair trial based on appealing cases related to the execution of punishment are established, and considers that the norms included in article 41 and chapter 49 of the RA Criminal Procedure Code titled “Enforcement of Judicial Decisions” comply with the requirements of the Constitution.

3. **Circumstances to be clarified within the framework of the case**

Considering that the applicant, in the context of the challenged provisions, raises, in fact, two issues - in connection with the determination of the proper court, resolving the disputes arising during the execution of the punishment, and due to the absence of procedural order for resolving the relevant disputes, the Constitutional Court considers it necessary to refer to the following issue:

- Do the provisions of article 41 of the Code, which establish the powers of the court, comply with the principle of certainty enshrined in the Constitution, while ensuring that convicts serving their sentences have the right to judicial protection and a fair trial provided by the Constitution?

At the same time the Constitutional Court considers it necessary to note that the norms challenged by the applicant, included in Chapter 49 of the Code, are not related to the case in its proceedings. So, the complainant in the case ԱՐԴ / 0011/15/18 asked the RA Criminal Court of Appeal to cancel, change and terminate the decision of the Armavir marz first instance court dated 10.07.2018, which refused to demand the cancellation of the decisions of "Nubarashen" Penal Enforcement Institution of the RA Ministry of Justice.

The provisions of Chapter 49 of the Code, prescribes the procedure for the execution of court decisions, do not directly concern issues related to the appeal by a convicted person of the actions (inaction) of officials of the Penal Enforcement institutions. Consequently, the Constitutional Court considers that the appeal does not partially satisfy the requirements of Part 1 of Article 71 of the Constitutional Law "On the Constitutional Court", and the proceedings in this case are partially subject to termination on the grounds of clause 1 of Article 60 of the Constitutional Law "On the Constitutional Court" in the part of the norms included in the Code of Criminal Procedure of the RA Criminal Procedure Code, titled "Execution of court decisions".

4. Legal positions of the Constitutional Court

4.1. In accordance with Articles 61 and 63 of the Constitution, everyone, including every convicted person, shall have the right to effective judicial protection of his/her rights and freedoms, as well as the right to a fair, public hearing by an independent and impartial court of his/her case within a reasonable time. These rights are also correlated with the judicial protection by the convict of their rights and freedoms while serving the sentence. Moreover, given that the convicts are at a disadvantage, the protection of their rights and freedoms, provision of necessary measures to ensure them should be at the particular concern of the legislator. In this aspect, it

should also be noted that a number of international acts provide minimum guarantees for the judicial protection of persons deprived of their liberty.

In particular, according to sub-clause 3 of clause 36 of the "Standard Minimum Rules for the Treatment of Prisoners" adopted by the first UN Congress on August 30, 1955, every prisoner shall be allowed to make a request or complaint, to the prison administration, the judicial authority or other proper authorities.

Article 12 of the Penal Enforcement Code prescribes a system of fundamental rights of the convict, the main element of which is "to submit, both personally and through a lawyer or a legal representative, applications and appeals regarding violations of his/her rights and freedoms to the administration of the body or institution that executes the punishments, their higher authorities, **to the court**, to the prosecutor's office, to the Human Rights Defender, to the state and local self-government bodies, public associations and parties, the media, as well as international bodies or organization for the protection of human rights and freedoms". In addition, according to the principle of legality prescribed in Article 7 of the Penal Enforcement Code, officials of the bodies and institutions of the penal enforcement institutions are entitled to perform the actions assigned to them under the law, and "the actions of officials may be appealed to a court or other body prescribed by law. "

Specifying the possibility for a convicted person to exercise this fundamental right to judicial protection, Article 18 of the Penal Enforcement Code states that "In cases and in accordance with the procedure established by law, the court considers complaints of the convicted person on the actions of the administration of the authority or institution that executes the punishment." Thus, the Constitutional Court states that the legislation of the Republic of Armenia, consonant with the requirements of international law, enshrines the right of a convicted person to appeal to the court while serving his/her sentence.

4.2. In the framework of the issues raised by the applicant, the Constitutional Court considers it necessary to address issues of jurisdiction and criminality of cases in connection with appealing against actions and inaction of officials of Penal Enforcement institutions, given also the fact that determining the proper court is one of the most important guarantees for ensuring the effective exercise of the right to judicial protection.

Although the penal enforcement legislation establishes the right of the convicted person to submit a complaint to the court on the part of the violation of his/her rights, however, does not

specify which court s/he can apply to the Administrative court or court of general jurisdiction. In this regard, the Constitutional Court considers it necessary to examine also the regulation of other legal acts.

According to article 20 of the Constitutional Law "Judicial Code", "Courts of first instance of general jurisdiction shall examine all the matters subject to examination under judicial procedure except for cases falling under the competence of an administrative court.", and in accordance with Paragraph 2 of Article 21 of the same Law "In the Court of First Instance of General Jurisdiction criminal cases, cases **stipulated by law** in connection with judicial control over pre-trial criminal proceedings, as well as the execution of punishment are considered only by a judge of criminal specialization, with the exception of the cases prescribed in part 3 of this Article. Exceptions also include the cases where the Supreme Judicial Council selects judges from civil and criminal specializations who, in addition to cases of relevant specialization, consider a separate type of case (juveniles, return of illegally transported and illegally withheld children in the Republic of Armenia, operational searches conducted on the basis of motions, etc.).

4.3. According to Article 44 of the Code, titled "Criminal Cases Subject to the Jurisdiction of the Court of First Instance", the court of first instance considers cases on all crimes, other cases prescribed by the criminal procedure legislation (materials), and also controls the pre-trial proceedings of the criminal case.

Comparing the above provision with the powers of the court, not exhaustively prescribed in Article 41 of the Code, the Constitutional Court states that the administration of a sentence for execution, as well as the resolution of issues arising during the execution of a sentence, the court of first instance of general jurisdiction exercises in the frame of consideration of other cases (materials) prescribed by the criminal-procedural legislation. And the criminal procedure legislation establishes the procedure for exercising these powers of the court in Chapter 49 of the Code titled "Execution of court decisions", according to which the issues to be decided by the court relate, in particular, to the order to transfer the court's decision to execution, to ensuring at the stage of execution of the court decision the rights of the convicted person in connection with the execution of the court decision, resolution of doubts and inaccuracies regarding the court decision, the extension of the execution of the court decision, the replacement of the fine by public work, release from punishment due to illness, release from punishment of the convicted

person, execution of the court decision in relation to him was postponed, as well as cancellation of postponement of execution of the judicial decision, early conditional release from the punishment and replacement of the punishment with a milder punishment, search for the convicted, calculation of the time of stay in a medical institution in terms of punishment.

As for clause 8 of part 2 of article 41 of the Code, according to which the court's powers also include "resolution of other issues in cases specified by law", the Constitutional Court considers that criminal procedure legislation, including other law, to consider a matter or the material will be considered a court of jurisdiction, if by this law it is directly provided for as a power of the court of general jurisdiction considering criminal cases.

The Constitutional Court states that, according to the aforementioned regulations, the court of first instance of general jurisdiction only has jurisdiction over cases prescribed by law in connection with the execution of a sentence. For this reason, the Constitutional Law, in order to specify the jurisdiction of cases in connection with the execution of the punishment, the judge with criminal specialization chose the foreseeable criterion of special provision by the law.

In the conditions of today's legislative regulations, these are the issues or cases envisaged by Chapter 49 of the Code.

4.4.. Part 2 of Article 10 of the Administrative Justice Code of the Republic of Armenia, titled "Jurisdiction of Cases", envisages that the administrative court does not have jurisdiction over the cases under the jurisdiction of the Constitutional Court of the Republic of Armenia, criminal cases under the jurisdiction of the court of general jurisdiction, as well as **cases related to the execution of a sentence**. From the content of this provision it follows that no case in connection with the execution of a sentence can be considered by the Administrative Court. At the same time, the Constitutional Court states that the aforementioned provision does not establish any criterion that would clarify which court is in charge of these cases, which may lead to systemic uncertainty.

Considering the fact that in the Constitutional Law "Judicial Code", as well as in the Administrative Procedure Code, the legislator applied the notion "related to the execution of punishment" in determining the issues of jurisdiction, while the Code deals with the consideration of issues related to the execution of court decisions (including the verdicts), the Constitutional Court considers it necessary to refer to the content of these concepts.

According to article 429 of the Code, the stage of enforcement of the court decision includes the application of the court decision to execution and the execution of the court decision. That is, relations in connection with the execution of a judicial act are criminal-executive relations, which are exhaustively provided by the Code. At the same time, the execution of judicial acts, as a rule, involves the execution of the penalties prescribed by these acts.

On the other hand, while serving a sentence, numerous legal relations may arise which, by merit, are penal enforcement relations, in particular, bringing the convicted person to disciplinary responsibility, appealing actions and inaction of officials of the penal enforcement institution by the convicted prescribed by the Penal Enforcement Code, etc.

In addition, relations in connection with the execution of punishment are regulated not only by the Code and the Penal Enforcement Code, but also other legal acts. In particular, Article 45 of the Law "On Probation" for the benefit of probation provides, inter alia, the right to appeal to the court against the actions and inaction of the Probation Service (which, in the manner prescribed by law, executes punishments not related to deprivation of liberty). In addition, according to the Law "On Compulsory Enforcement of Judicial Acts", the Compulsory Enforcement Service also executes sentences in criminal cases regarding confiscation of property, which is also the execution of punishment. Article 8 of the same Law prescribes that in the course of the enforcement proceedings, the parties have the right to appeal against the actions of the enforcement agent.

In this aspect, applying the concept of "cases involving the execution of punishment", the legislator in some cases did not mean all cases arising in the course of the execution of punishment. This is evidenced by the fact that, in accordance with clause 6 of part 2 of article 22 of the Penal Enforcement Code, judges of the Republic of Armenia, who, in accordance with the procedure established by law, consider **issues related to the execution of punishment** and freedoms of the convicted person**,** as well as **on the actions of the administration of the body or institution that executes the punishment,** are allowed unfettered access to places of execution**,.** That is, appeals on certain issues are clearly distinguished from issues related to the execution of punishment, and are beyond the content of this concept.

The Constitutional Court considers it necessary to note that the Cassation Court of the Republic of Armenia in one of the case-law decisions which addresses the issue under consideration and expresses the position that "actions and decisions, related to the competence of

the administration of a body or institution that executes punishment, serve as necessary elements for the application of criminal-legal institution for conditional release from serving a sentence or replacing the unserved portion of the penalty with a more litigent type of punishment, therefore, they also originate from the criminal legal relations, and filed complaints to them shall be considered with the use of penal enforcement norms. Moreover, despite the fact that in this case the private person (convicted) disputes the legality and validity of the decision concerning the interests of the administration or the actions of the administrative body, however, this dispute cannot be considered such a dispute arising from public relations, the resolution of which is under the jurisdiction of the Administrative Court" (Decision number ՇԴ2/0007/15/12 of September 13, 2013).

However, the Constitutional Court considers that the aforementioned Law on "Judicial Code", Part 2 of Article 10 of the Code of Administrative Court Procedure should be comprehended **that the Administrative Court does not have jurisdiction over matters proceeding from public relations whose authority to consider it is given to another court.**

. In this context, it should also be noted that based on such an approach the Administrative Court considers the cases related to the alleged violations of a number of rights prescribed in article 13 of the Law "On the maintenance of detainees and persons in custody" which are almost the same as rights of the convicted.

4.5. The Constitutional Court, referring to the principle of legal certainty in its Decision DCC-1270 of May 3, 2016, notes: " the rule of law is one of the most important features of the rule-of-law State and the main requirements of ensuring are the principle of legal certainty, regulation of legal relations exclusively by such laws that comply with the certain qualitative features: clarity, foreseeability, accessibility."

In the context of other Decisions (DCC-630, DCC-1142) referring to the principle of legal certainty, the Constitutional Court considers that in relevant legal relations it is necessary for the participants to have the opportunity to foresee the consequences of their behavior reasonably and be confident both in the officially recognized status and the acquired rights and obligations.

In this aspect, the challenged provisions comply with the principle of certainty stipulated by the Constitution, and the powers of the court of general jurisdiction provided for in Article 41 of the Code are explicit and foreseeable.

4.6. The rights to judicial protection and to a fair trial are those fundamental rights, the realization of which guarantees respect and protection of a number of other constitutional rights; therefore "from the constitutional right of a person to judicial protection derives the positive duty of the state to ensure it in law-making and law-enforcement activities. (ՊԻԿՀ-1249). This implies, on the one hand, the obligation of the legislator to enshrine the possibility and mechanisms of full judicial protection in the law, and on the other hand, the obligation of the law enforcer, without exception, to admit the applications of persons for consideration sent to them legally, who asks for legal protection against alleged violations of their rights" (DCC-1249).

It should be noted that, based on considerations of the proper exercise of both the right to judicial protection and other fundamental rights, the Constitution also provides a provision to establish the requirement for institutional mechanisms for the exercise of fundamental rights and freedoms, according to which, by the regulation of fundamental rights and freedoms, institutional arrangements and procedures necessary for the effective exercise of these rights and freedoms are established. The implementation of a basic right becomes more realistic and effective in all cases where legislation provides for appropriate mechanisms and procedures for the implementation of this right, they are distinct and definite.

Turning to the position of the applicant, that in case of specification of the Court, the issue arises which procedural order should be used when considering appeals regarding the decisions of the head of the penal enforcement body submitted by the convict, the Constitutional Court argues that the regulation of the aforementioned issues falls within the competence of the legislator, and the solutions proposed by the latter may have no connection with the provisions challenged in this case. In particular, legal regulations regarding judicial protection of the rights of a convicted person during serving a sentence may be envisaged within the framework of both administrative proceedings and criminal proceedings or other legislation.

The Constitutional Court also notes that **before the National Assembly overcomes the present systemic legal uncertainty of the case examined in this Decision regarding appealing the actions (inaction) of officials of the Penal Enforcement institution, they must be considered by the Administrative Court of the Republic of Armenia,** according to part 2 of Article 21 of the Constitutional Law "Judicial Code", until the power of consideration of a particular case, material or issue concerning the execution of a punishment is not explicitly provided to the court of general jurisdiction considering the case.

At the same time, the absence in Article 41 of the Code, the court's authority to consider complaints from a convicted person cannot be compensated for by applying the general procedures provided for in Chapter 49 of the Code, since they do not resolve a number of core issues, in particular, issues related to territorial jurisdiction, time limits, and features of the complaint procedure, distribution of the burden of proof, as well as the content of the judicial act and its appeal.

Based on the review of the case and governed by Clause 1 of Article 168, part 4 of article 169 and part 4 of Article 170 of the Constitution, as well as Articles 60, 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. To terminate the proceedings of the case "On determining the issue of compliance of Article 41 of the RA Criminal Procedure Code and the norms included in Chapter 49 of the RA Criminal Procedure Code with the Constitution of the Republic of Armenia on the basis of the appeal of the Criminal Court of Appeal of the Republic of Armenia" partially, in the part of the norms, included in the heading "Execution of court decisions" of chapter 49 of the RA Criminal Procedure Code.

2. Article 41 of the RA Criminal Procedure Code is in concordance with the Constitution in such an interpretation that the "resolution of other issues in cases stipulated by law" noted in clause 8 of the article are the powers of the court that are directly provided by the criminal procedure legislation as powers of the court of general jurisdiction.

3. Pursuant to Part 2 of Article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman **H. Tovmasyan**

22 January 2019

DCC-1439