*Non-Official Translation*

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

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# ON THE CASE OF CONFORMITY OF PART 2 OF ARTICLE 419 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF ROBERT KOCHARYAN

Yerevan May 7, 2019

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

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

the representative of the applicant: A. Vardevanyan, advocate,

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, clause 8 of part 1 of article 169 of the Constitution, and articles 22 and 69 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of part 2 of article 419 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Robert Kocharyan.

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

After adoption of the Code, article 419 titled “Powers of the Cassation Court” was amended three times by the Law HO-152-N adopted by the National Assembly on 7 July 2006, signed by the President of the Republic on 12 July 2006 and entered into force on 5 August 2006; by the Law HO-

270-N adopted by the National Assembly on 28 November 2007, signed by the President of the Republic on 18 December 2007 and entered into force on 27 December 2007; and by the Law HO-38-N adopted by the National Assembly on 8 February 2011, signed by the President of the Republic on 26 February 2011 and entered into force on 19 March 2011.

After the adoption of the Code, Article 419, titled "Powers of the Court of Cassation," was amended three times by Law HO-152-N, which was adopted by the National Assembly on July 7, 2006, signed by the President of the Republic on July 12, 2006, and entered into force on August 5, 2006 , Law HO-270-N, which was adopted by the National Assembly on November 28, 2007, was signed by the President of the Republic on December 18, 2007 and entered into force on December 27, 2007, and Law HO-38-N, which was adopted by the National Assembly on February 8, 2011, signed by the President of the Republic on February 26, 2011 and in entered into force on March 19, 2011.

The challenged part 2 of the Law prescribes:

"As a result of the review of judicial acts not resolving the merits of the case, the Cassation Court shall dismiss the cassation appeal, leaving the judicial act in force, or shall render a new judicial act, which enters into legal force upon its promulgation".

The case was initiated on the basis of the application of Robert Kocharyan submitted to the Constitutional Court on 17 January 2019.

Having examined the application, the written explanations in the case, as well as having analyzed the relevant provisions of the Code and other documents of the case, the Constitutional Court **ESTABLISHES:**

**1. Positions of the applicant**

The applicant reiterates that as a result of the legislative wording of part 2 of article 419 of the Code, its interpretation in law enforcement practice and the absence of procedural and institutional guarantees of consideration of the legitimacy of detention in cassation proceedings in the same Code, his rights prescribed in Articles 27, 61, 63, 75 and 79 of the Constitution are violated.

The applicant argues that the other provisions prescribed in chapter 48 of the Code, which are systematically interrelated with the challenged legal provision, do not provide **procedural and**

**institutional guarantees** for considering the legitimacy and validity of choosing or not choosing detention as a measure of restraint in cassation proceedings, which leads to the violation of the rights prescribed in articles 27, 63 and 75 of the Constitution.

According to the applicant, the legislator granted the Court of Appeal the special authority to verify the legality and validity of the election or non-election of detention as a measure of restraint by the special regulation of Article 288 of the Code.

In contrast to this article, which prescribes special regulations and exact dates for verifying the legality and validity of choosing or not choosing detention as a measure of restraint, chapter 48 of the Code does not contain any regulations regarding the Cassation Court to take over the proceedings, as well as on the tight deadlines for consideration, and other procedural features, which results in violation of the constitutional rights of a person to personal liberty, effective judicial protection, a fair trial, as well as the constitutional requirement of ensuring the institutional mechanisms and procedures necessary for the effective implementation of these rights.

The applicant claims that other provisions enshrined in Chapter 48 of the Code, which are systematically interconnected with the contested legal provision, do not provide procedural and institutional guarantees for considering the lawfulness and justification of the election or non-election of a custody as a measure of restraint, which leads to a violation of rights, enshrined in Articles 27, 63 and 75 of the Constitution.

According to the applicant, the Code does not provide for other legal guarantees to fill this gap, and they are **left to the absolute discretion of the Court of Cassation**.

Referring to the law-enforcement practice of the Cassation Court, the applicant concludes that due to a **gap in the law**, namely the lack of exact timelines for the consideration of the cassation appeals, procedural and institutional guarantees filed against substantive cases, the Court of Cassation, in the status in its constitutional status a means of effective judicial protection of the rights of a person, notes violations of human rights,  that do not resolve the case on the merits, a situation arises when the Cassation Court, as a constitutionally prescribed means of effective judicial protection of the rights of a person, notes the violation of human rights, but **does not take any measures** to eliminate them, “since the decisions are made in such an unreasonable time frame and in the absence of the necessary legislative guarantees that the rights to a fair trial and effective judicial protection senseless”. The applicant indicates cases where the Cassation Court, as a result of verification of the legality and validity of choosing or not choosing detention as a measure of restraint, found that its application was

unreasonable and unmotivated, however, not only was the detention period had expired, but also the person was sentenced.

The applicant, referring to the law-enforcement practice of the Court of Cassation, concludes that due to a gap in the law, namely the lack of exact timelines for the consideration of cassation appeals, procedural and institutional guarantees filed against substantive cases, the Court of Cassation being in its constitutional status a means of effective judicial protection of the rights of a person, it notes violations of human rights, but does not take any measures to eliminate them, "how decisions are made in such unreasonable terms and in the absence of the necessary legislative guarantees that the right to a fair trial and effective judicial protection loses its meaning. "

The applicant argues that the Cassation Court, referring to the regulations of article 394 of the Code, expressed the position that, in the case of judicial acts that do not resolve the case on the merits, the legislative wording regarding the rendering of new judicial acts is uncertain; the law does not specify the concept of "new judicial act" and does not specify which decisions of the Court of Appeal are considered "new judicial acts", and in order to avoid this uncertainty, the Cassation Court found that when rendering a new judicial act as a result of the review of judicial acts that do not resolve the case on the merits, the courts must be guided by the powers prescribed in clause 1 of article 394 of the Code regarding the judicial acts that resolve the case on the merits. According to the applicant, the Cassation Court **did not take any action** to overcome the alleged uncertainty of the norm, and ensure the rules of its uniform application; according to the interpretation to the challenged norm, the Cassation Court actually exceeded the powers granted to it by the Constitution and the Code. The applicant considers that in this case the Cassation Court ceases to act as a "court established by law".

According to the applicant, the legislator took a differentiated approach to resolving a case on the merits and not resolving a case on the merits of judicial acts, and the term "new judicial act" used in paragraph 2 of Article 419 of the Code is a clear prima facie and aims to provide a final solution to the issue raised by judicial acts not resolving the case on the merits, at the earliest possible date.

Meanwhile, the implementation by the Court of Cassation of the powers provided for resolving a case on the merits of judicial acts in terms of not resolving a case on the merits of judicial acts violates the legal legitimate aim of objective of division and leads, inter alia, to the violation of the right to a fair trial, including with the terms of the consideration of cases within a reasonable time.

The Applicant believes that in this situation, the solution to the problem could be the Constitutional Court's disclosure of the constitutional-legal content of the term "new judicial act", since it was the

interpretation of the Court of Cassation that created the problem of legal certainty, which was implemented not to ensure uniform application of the law, but, confronting the legislator's differentiated approach to judicial acts, the Court of Cassation established a new authority.

**2. Positions of the respondent**

According to the respondent, the legislator, in consonance with the calling of the Court of Cassation as the highest court of justice and ensuring the uniform application of the law, in the framework of its legislative activities, has consistently strengthened and developed the restrictions on the person's right to freedom in the course of criminal proceedings aimed at eliminating the unjustified or conditional on arbitrary factors that do not resolve the case on the merits, when applying detention as a measure of restraint, and these guarantees also follow from the legal positions expressed in the case law of the European Court of Human Rights (hereafter the ECHR).

According to the respondent, within a reasonable time, arising from the features of each court case, which does not resolve the merits of the case, in particular, in each case of application in the case under review in relation to detention as a measure of restraint and the appeal, which is consonantly recognized by the legislator of the concept, the indisputable necessity of restricting the right to freedom from the point of view of protecting higher benefits, assessed by the civilized humanity as a public interest, should be assessed, ensuring a reasonable balance of public and private interests, the validity of restrictions on freedom, the existence of effective mechanisms for control and supervision

Based on the results of an analysis of the judicial practice of the Constitutional Court and the ECtHR, the respondent concluded that the applicant's allegation that the failure to establish clear mechanisms and procedures for the consideration of cases on detention created issues related to legal gaps, was groundless, since the subject matter of the constitutional legal dispute in question does not contain similar legal issue.

As for the issue raised by the applicant on the non-determination by the legislator of certain deadlines, the respondent notes that "according to the criminal procedural concepts of both the appellate and cassation proceedings, in accordance with the criminal procedure rules on the judicial acts that do not resolve the case on the merits, in particular when applying detention as a measure of restraint, a reasonable time limit is required for the consideration of the case (articles 388 and 417 of the Code)".

According to the applicant, by establishing the definition "reasonable time limit", the legislator showed a unified approach both to the Court of Appeal and the Cassation Court.

The respondent believes that part 2 of article 419 of the Code is in conformity with the requirements of the Constitution.

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

Within the scope of constitutional legal issues raised in the present case, the Constitutional Court considers it necessary, in particular, to address the following issues:

1) does the effective judicial protection of the fundamental right of a person to challenge the legitimacy of deprivation of liberty, prescribed in part 5 of article 27 of the Constitution, include *the mandatory requirement to consider the legitimacy of deprivation of liberty in a cassation instance?*

2) *does* the requirement of part 5 of article 27 of the Constitution, regarding the adoption by a higher court of a decision on the legitimacy of the detention in a short time, also *concern the Cassation Court?*

3) from the perspective of considering the legitimacy of detention in cassation proceedings, is there *a legislative gap* and does it lead to a violation of the requirements prescribed in articles 27, 63 and 75 of the Constitution?

4) from the perspective of ensuring the right to effective judicial protection, prescribed in part 1 of article 61 of the Constitution, *is it permissible in the cassation instance, when considering the issue of the legitimacy of detention, to be limited only to a statement of the violation of the fundamental right* without eliminating the violation?

5) does it follow from part 2 of article 171 and article 172 of the Constitution that the scope/range of review of interim judicial acts in the appellate and cassation instances should be identical?

6) should the powers exercised as a result of the review of judicial acts that do not resolve the case on the merits differ from the powers exercised as a result of the review of judicial acts resolving the case on the merits from the perspective of ensuring the right to effective judicial protection, prescribed in part 1 of article 61 of the Constitution, and within the functions of appeallete courts and cassation instances, prescribed in part 2 of article 171 and article 172 of the Constitution?

7) from the perspective of part 1 of article 6, part 1 of article 164 and article 171 of the Constitution, *did the Cassation Court interpret its authority to render a new judicial act* as a result of the review of judicial acts that do not resolve the case on the merits, as legal possibility of changing the content of its powers established by law.

**4. Legal positions of the Constitutional Court**

**4.1.** Part 1 of article 419 of the Code establishes the authorities of the Cassation Court as a result of the review of judicial acts resolving the case on the merits, while the challenged part 2 establishes the authorities of the Cassation Court as a result of the review of judicial acts that do not resolve the case on the merits (hereinafter also an interim judicial acts). According to part 1 of the mentioned article, the Cassation Court is empowered to exercise **6 powers**, including completely or partially cancel the judicial act and send the case in the canceled part to a lower court for new consideration, establishing the scope of the new consideration.

The challenged part 2 of article 419 of the Code endows the Cassation Court with **two powers**: to dismiss the cassation appeal, leaving in force the judicial act that does not resolve the case on the merits, or to render **a new judicial act**, which enters into force from the moment of adoption.

The comparison of the mentioned provisions of the Code shows that the legislator purposefully distinguished the content and scope of powers of the Cassation Court as a result of the review of judicial acts resolving and not resolving the case on the merits. In one case, the legislator granted the Cassation Court more extensive powers, and in another case limited its powers to two alternatives. Moreover, **for the Constitutional Court it is obvious** that in the second case the legislator filed a request to the Cassation Court **to make one of the following decisions regarding interim judicial acts** - to dismiss the cassation appeal leaving the challenged judicial act in legal force or in the cassation proceedings to render a new judicial act.

The Constitutional Court considers that by limiting the powers of the Cassation Court in cases of judicial acts resolving and not resolving the case on the merits, as well as limiting the powers of the Cassation Court **by the requirement of rendering new judicial acts** in the case of judicial acts not resolving the case on the merits, the legislator pursued the aim of **preventing the procedural cycle** of judicial acts not resolving the case on the merits, as well as the aim of **forming final legal position on these matters in the Cassation Court,** and, by securing the latter, the effective implementation of the right to judicial protection and ensuring the consideration of the case within a reasonable time.

According to the Constitutional Court's assessment, this regulation is preventive and is aimed at ensuring the core function of making a final decision on the merits from the perspective of the

**principle of limiting revision in a higher order**, which is impossible to implement in the case of endless review of judicial acts not resolving the case on the merits.

The legal possibility of an endless review of judicial acts not resolving the case on the merits, which could be possible in the case if the more extensive powers of the Cassation Court were legislatively enshrined, could significantly affect the consideration of a certain case on the merits in both lower courts and the cassation instance. Moreover, the Constitutional Court considers that not preventing legislatively the possibility of unrestricted review of judicial acts not resolving the case on the merits could jeopardize the very function of justice, since it would be impossible to predict the actual or possible impact of decisions resulting from the review of interim judicial acts on the resolution of the case on the merits, therefore, as a result, either the trial would last unreasonably or the courts would have to turn to the consideration of interim judicial acts after rendering the decision on the merits, which would be unacceptable.

**4.2.** The Constitutional Court states that the content of the legal regulations of the judicial control over the application of detention is mainly the following:

1) considering the nature of detention as one of the most intensive forms of interfering with personal liberty, the Criminal Procedure Code established **preliminary judicial control in the court of first instance** over the legitimacy of detention (article 44 of the Criminal Procedure Code in conjunction with articles 278 and 136), which includes:

a) the application of detention as a measure of restraint **only by a court decision** (article 280 of the Criminal Procedure Code);

b) **full** consideration of the investigator's or prosecutor's motion on the choice of detention as a measure of restraint, that is, in conjunction with all factual and legal circumstances, **in the court of first instance** (part 1 of article 278 of the Criminal Procedure Code), particularly, in order to verify the validity of the detention, through the exercise of the power to seek the necessary documents and material evidence to verify the validity of the motion for the detention, as well as through the exercise of the power to seek additional materials and explanations verify the validity of the motion for the detention (part 4 of article 285 of the Criminal Procedure Code in conjunction with part 3 of article 283);

c) when making a decision on detention, **the obligation** of the court of first instance **to decide on the issue of the release of the accused from detention on bail** (part 4 of article 137 of the Criminal Procedure Code);

d) **the immediate consideration** of the motion on the choice of detention as a measure of restraint in the court of first instance (part 2 of article 285 of the Criminal Procedure Code);

2) the decision of the court of first instance on the choice of detention as a measure of restraint may be appealed to the Court of Appeal (part 1 of article 287 of the Criminal Procedure Code), which:

a) **in the order of a limited review**, that is, **in a general manner**, checks the legitimacy and validity of the decision of the court of first instance (part 1 of article 288 of the Criminal Procedure Code);

b) upon receipt of the complaint, the Court of Appeal is obliged **to immediately request the materials justifying the need for detention and the decision of the court of first instance** (part 3 of article 287 of the Criminal Procedure Code);

c) within **a short period** clearly prescribed in the Code, i.e. within three days from the date of receipt of the above-mentioned materials, the Court of Appeal must make a decision regarding the decision of the court of first instance (part 2 of article 288 of the Criminal Procedure Code);

d) as a result of checking the legitimacy and validity of detention, the Court of Appeal **is empowered to resolve directly the issue of detention**, in particular to cancel detention and release a person from detention (part 5 of article 288 of the Criminal Procedure Code), that is, in terms of assessing the legitimacy of detention, the Criminal Procedure Code specifies the scope of the powers of the Court of Appeal prescribed in part 2 of article 394 of this Code as a result of the consideration of appeals against the judicial acts that do not resolve the case on the merits, **maximally specifying them through the special provisions**, including **the content and range of authority of rendering a new judicial act** on this issue by the Court of Appeal;

3) the decisions of the appeals instance concerning detention can only be appealed to the Cassation Court (article 403 and part 1 of article 404 of the Criminal Procedure Code), and, unlike the first and appeal instances, **no peculiarities are prescribed** for considering the legitimacy and validity of detention in the Cassation Court, which means that:

a) when instituting proceedings of the cassation appeal on the issue of the legitimacy and validity of detention, the Cassation Court considers it within a **total period of three months** (part 5 of article $414^2$ of the Criminal Procedure Code);

b) a cassation complaint on the issue of legitimacy and validity of detention is submitted **on the general grounds** prescribed for filing a cassation appeal and is accepted for consideration if the decision of the Cassation Court regarding the issue raised in the complaint **may be essential for the uniform application of the law and other legal acts,** or **seemingly there is a fundamental violation**

**of human rights and freedoms** (article 407 of the Criminal Procedure Code in conjunction with Article $414^2$);

c) the consideration in the cassation instance of the issue of legitimacy and validity of detention is carried out **in a general manner, i.e. within a reasonable time**.

Based on the aforementioned legislative regulations, the Constitutional Court considers that the legislator has delimited the mechanisms of judicial control in different judicial instances over the legitimacy of pre-trial proceedings regarding the deprivation of personal liberty in the form of detention. If the court of first instance must **in advance control** the legitimacy of detention **in full extent**, making a preliminary decision on this matter, then the appellate and cassation courts **in the future must resolve the issue of legitimacy of a judicial act** if there is a relevant complaint and within the scope of the subject matter of this complaint.

Accordingly, for the court of first instance the legislator established the full authority and a special time frame to verify the legitimacy of detention, and for the Court of Appeal retained the general rule of limited review, also prescribing a special time frame; meanwhile, with the exception of general authorities prescribed for the review of interim judicial acts (part 2 of article 394 of the Criminal Procedure Code), the legislator established special authorities for the review of the legitimacy of detention (part 5 of article 288 of the Criminal Procedure Code), and in connection with the issue of the legitimacy of detention at the Cassation Court, the legislator did not establish any particularities.

It should be noted that in a number of decisions against Ukraine, the ECHR found that the right to personal liberty and inviolability of a person has been violated since the Criminal Procedure Code did not distinguish between the motions for release of a person deprived of liberty and other petitions during the trial, and found that this problem periodically arises due to the lack of clear and predictable provisions regulating the procedures that meet the requirements of clause 4 of article 5 of the European Convention on Human Rights and freedoms (hereinafter the Convention), (see Nechiporuk and Yonkalo v. Ukraine, app. no. 42310/04, 21/04/2011, §248; Molodorych v. Ukraine, app. no. 2161/02, 28/10/2010, §108; Kharchenko v. Ukraine, app. no. 40107/02, 10/02/2011, §86, etc).

**4.3.** According to part 5 of article 27 of the Constitution, everyone deprived of personal liberty shall have the right to challenge the lawfulness of depriving him of liberty, about which the court shall render a decision in a short time and shall order his release if the deprivation of liberty is unlawful.

According to the Constitutional Court's assessment, if the requirement of part 4 of the same article of the Constitution - that the court must immediately make a decision to permit continued deprivation of

liberty or to release the person - only concerns cases prescribed in clause 4 of part 1 of the same article in order to ensure that the person appears to the competent authority, and presumes such motion by the competent authority, then the right of the person to challenge the lawfulness of depriving him of liberty applies to all cases of deprivation of personal liberty and presumes that person will appeal against the decision on application of detention.

The means of exercising the right to Appealing to the appropriate higher court against the decisions on the application f detention as a measure of restraint rendered by the courts of first instance and appellate courts is a means of exercising the right to challenging the legitimacy of deprivation of liberty in cases prescribed in clause 4 of part 1 of article 27 of the Constitution.

The Constitutional Court states that if there are **special grounds** conditioned by the functions of the **Cassation Court** prescribed in part 2 of article 171 of the Constitution, this right may also include the requirement to establish the **possibility of reviewing the judicial act of the lower court in the cassation instance**.

At the same time, the Constitutional Court notes that this right is interrelated with the right to effective judicial protection of rights and freedoms prescribed in part 1 of Article 61 of the Constitution. Effective judicial protection cannot assume a procedural cycle of other judicial acts that do not resolve the case on the merits, along with making decisions on the merits. This would also be incompatible with the requirement of ensuring legal security, as an element of the rule of law.

The Constitutional Court considers that in case of challenging judicial acts that do not resolve the case on the merits, the Constitution does not require their mandatory review in the appellate procedure, with the exception of the decision of the court of first instance on the issue of the legitimacy of detention, as well as the Constitution does not require the possibility of considering the legitimacy of imprisonment in cassation proceedings, except for the cases when the decision on the use of imprisonment was issued by the Court of Appeal, since consideration of interim issues may also create an undue burden for the courts and impede the exercise of justice within a reasonable time, which may contradict the fundamental right prescribed in part 1 of article 61 of the Constitution.

On the other hand, the Constitutional Court states that the establishment of a procedure for challenging judicial acts is left to the discretion of the legislator; however, the solutions chosen by the legislator must ensure **the effective administration of justice in all judicial instances**. Therefore, if the legislator has decided to establish the possibility of challenging part of interim judicial acts within the framework of the three-stage judicial system institutionalized in the Republic of Armenia, then in all

judicial instances, taking into account the limits of their constitutional functions, **the effectiveness of judicial protection and the guarantees for fair trial** must be first of all provided by law. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful

The ECHR has repeatedly noted that part 4 of article 5 of the Convention, which prescribes the right of a person to challenge the legitimacy of detention, **does not oblige Contracting Parties to have more than one court instance to review the legitimacy of detention and to consider applications for the release of a person**. However, if a state provides for a second level of competence, then, as a rule, prisoners should be provided with procedural guarantees such as in the first instance, including the speed of review by a higher court of a lower court's decision on the application of detention (Ilnseher v Germany, 4 December 2018, GC app. no. 10211/12, 27505/14, §254; Navarra v. France, 23 November 1993, §28, Series A no. 273-B; Khudobin v. Russia, 26 October 2006, app. no. 59696/00, §124 ECHR 2006-XII; Piotr Baranowski v. Poland, app. No. 39742/05, §63, 2 October 2007; S.T.S. v. the Netherlands, 7 June 2011, app. no. 277/05 §48). The same applies even to those constitutional courts that resolve the issue of legitimacy of detention of a person and decide on his/her release if the detention is illegal (Smatana v. the Czech Republic, app. no. 18642/04, §123, 27 September 2007; and Mercan v. Turkey (dec.), app. no. 56511/16, §24, 8 November 2016). Assuming it permissible to consider in the higher instances the issue of the legitimacy of detention in a slightly longer period compared to the court of first instance, however, the ECHR found that this does not exempt the higher instance from the obligations prescribed in article 5 of the Convention to decide speedily on the lawfulness of the applicant's detention in order to guarantee that the right to a speedy decision remains practical and effective (Ilnseher v. Germany, 4 December 2018, GC app. no. 10211/12, 27505/14, §273).

The Constitutional Court considers that, if the law permits, **challenging in cassation instance the judicial acts that do not resolve the case on the merits should be an exception, not a rule**, just as all the interim judicial acts of the first instance courts cannot be considered in the appeals instance. At the same time, when challenging in cassation instance the judicial acts that do not resolve the case on the merits**,** the necessary preconditions must also be provided in the cassation proceedings to ensure effective judicial protection and a fair trial. In this aspect, the Constitutional Court draws the attention of the Government and the National Assembly to Part 5 of Article $414^2$ of the Code, which is systemically interlinked with the challenged provision in part of accepting for consideration the

cassation complaint on the issue of legitimacy of detention within three months. Given the maximum duration of the initial detention and its each extension, as prescribed in articles 138-139 of the Code, it is obvious that the legislator has stipulated that the detention may be exhausted before the Cassation Court accepts for consideration the issue of legitimacy of detention.

**4.4.** According to part 2 of article 171 of the Constitution, by reviewing judicial acts within the scope of its powers prescribed by law, the Cassation Court shall ensure the consistent application of laws and other normative legal acts; as well as eliminate fundamental violations of human rights and freedoms.

The Constitutional Court considers that the functions of the Cassation Court are fully prescribed in the Constitution, and the promotion of the development of law is not a separate function and should be carried out only within the framework of the functions prescribed in the Constitution, as a result of their implementation through the powers prescribed by law. In addition, finding a court violation of a right without its elimination means non-administration of justice, while the court is called upon to review the judicial acts of lower courts (and for the Cassation Court this requirement is directly prescribed in part 2 of article 171 of the Constitution), and the court has to administer justice and eliminate the violation of fundamental or other rights and freedoms, especially when such violations are established/indicated. It is obvious that any such legislative mechanism or judicial practice will contradict part 1 of article 61 of the Constitution, and in such cases the guarantees for a fair trial will not be provided either.

Based on the above, the Constitutional Court considers that the **solutions** proposed by the legislator **regarding the consideration by the Cassation Court of the issue of legitimacy of deprivation of liberty on general grounds**, including the procedure for considering a cassation complaint within a reasonable time, **are not problematic from the perspective of the Constitution**.

As regards the provision fixing the three-month deadline for accepting a cassation complaint on the legitimacy of detention, longer than the maximum duration of the initial detention and each extension, prescribed in part 5 of article $414^2$ of the Code, although it is systematically interrelated with the challenged provision, however, the Constitutional Court cannot touch upon the issue of its constitutionality, taking into account the requirements of part 10 of article 68 of the Constitutional Law on the Constitutional Court in conjunction with part 13 of article 69 of the same Law, that the Constitutional Court shall also touch upon the constitutionality of other provisions systemically interrelated with the challenged provision only if the challenged provision is declared contradicting the Constitution.

Therefore, the Constitutional Court considers that, in addition to the cases predetermined by the Constitution, **judicial acts that do not resolve the case on the merits** may be appealed **in the cassation instance** in particular cases if the legislator considers it permissible, based on the constitutional functions of the Cassation Court.

On the other hand, the legislator **is obliged to establish the necessary prerequisites for an effective judicial protection and a fair trial at the cassation instance** so that the **Cassation Court**, having concluded on any violation of right or freedom, **mandatorily and in an effective procedure, by administering justice, eliminates this violation**. The Constitutional Court considers it necessary to emphasize that **this applies particularly to such a method of intensive interference with personal liberty, such as detention**, the issue of instituting proceedings of the cassation appeal on the issue of its legitimacy, as the system logic of the Code requires, must be resolved in such a short time frame, which will allow **to resolve this issue**, as a rule, **at least not exceeding the maximum term of detention, selected as a measure of restraint on the basis of a reviewed judicial act**. Despite this, given the fact that detention is one of the most effective ways of interfering with personal liberty, although detention issues can be considered at the Cassation Court within a reasonable time frame and on general grounds, however, the Cassation Court should take into account that the requirement of a reasonable time frame in this case means a significantly shorter time frame than in the case of challenging judicial acts resolving the case on the merits.

The Constitutional Court emphasizes that it follows from the constitutional requirement of issuing a decision on the legitimacy of deprivation of liberty prescribed in part 5 of article 27 of the Constitution, that when interpreting a reasonable time frame for consideration of a case, the Cassation Court must take into account the constitutional requirement of considering all the circumstances of the case and making a decision **in a possible short time frame**.

**Thus, the Constitutional Court considers that the more intensive the interference with the basic and other human rights and freedoms, the shorter the time frame, the courts, including the Cassation Court, within the framework of effective mechanisms and procedures prescribed by law, with respect for all guarantees of a fair trial, must consider the claims (complaints) submitted with the purpose of effective protection against interference.**

**4.5.** The applicant raises the issue of constitutionality of the challenged provision of the Code and the systemically interconnected chapter 48 of the same Code also from the perspective of the legislative gap, considering that the said provisions contradict articles 27, 63, 75 of the Constitution “insofar as

they do not provide procedural and institutional guarantees for the consideration of detention in the production of the Cassation Court".

The Constitutional Court has repeatedly addressed the issue of legal gaps, in particular, the legislative gap. According to the general logic of the legal positions expressed earlier by the Constitutional Court:

1) "When examining the issue of the constitutionality of the legislative gap, the task of the Constitutional Court is to clarify whether the legislative gap **is a lack of legal regulation or a law-making body considered the existence of appropriate legal guarantees in the legislation when establishing such legal regulation and hoped that the relevant law enforcement practice would be formed based on these legal guarantees.** ... the legislative gap may be subject to consideration by the Constitutional Court only if **there are no other legal guarantees in the legislation to fill this gap or if contradictory law-enforcement practice has been formed in terms of appropriate legal guarantees in the legislation, or when the existing legislative gap does not provide the possibility of exercising any right**. Otherwise, the issue of constitutionality of gaps in legal regulation is not subject to consideration by the Constitutional Court" (DCC-914),

2) "There is a legislative gap in the case when, due to **the absence of an element ensuring the full legal regulation or an incomplete regulation of this element**, the full and natural implementation of legally regulated legal relations is violated" (DCC-1143),

3) "Considering the competence of the legislature and the Constitutional Court in overcoming legal gaps in the context of the principle of separation of powers, the Constitutional Court considers it necessary to state that in all cases where the legal gap is conditioned by **the absence of a normative prescription for specific circumstances in the sphere of legal regulation of regulation**, the issue of overcoming such a gap falls within the competence of the legislature. Within the framework of consideration of the case, the Constitutional Court refers to the constitutionality of any gap in the law if the legal uncertainty caused by the content of the challenged norm leads to such interpretation and application of this norm in law enforcement practice that violates or may violate a specific constitutional right" (DCC-864).

Analyzing from the perspective of the alleged legislative gap the challenged provisions of the Code and chapter 48 of the same Code systemically interrelated with the latter, the Constitutional Court considers that the legislator has fully regulated the proceedings before the Cassation Court and established rules on the right to appeal, its grounds and content, the grounds (specific) for taking over the proceedings, the limits of the consideration of cases in the Cassation Court, the preparation of the

session of the Cassation Court, the scope of competence of the Cassation Court, the peculiarities of abolition of the judgment of acquittal, the content of the decisions of the Cassation Court, and the procedural consequences of the abolition of a judgment or a decision of the Cassation Court. The legislator has also established the time frames for taking over the proceedings of the cassation appeal and its consideration, therefore it cannot be considered as a legislative gap, and in this Decision the Constitutional Court has already addressed the issue of constitutionality of the time frames.

Consequently, the Constitutional Court considers that in the challenged provision and in chapter 48 of the Code, the legislator has fully regulated the proceedings in cassation instance, establishing all the important features that distinguish this proceeding from the proceedings in the first and appellate instances.

Thus, the Constitutional Court states that, in the aspect of cassation proceedings, **equivalent law enforcement practice could have been formed on the basis of the legal guarantees prescribed in the legal regulations of the Code**.

Based on the above, the Constitutional Court considers that within the framework of the subject matter of the present case, chapter 48 of the Code **does not contain any legislative gap**, **therefore, from the perspective of articles 27, 63, 75 of the Constitution, the challenged provision and other provisions of the Code systematically interrelated with the latter are not problematic**.

**4.6.** Comparing the constitutional regulation on the functions of the Cassation Court with article 172 of the Constitution (which establishes the function of the Appellate Courts), according to which the Appellate Courts are the judicial instance that review the judicial acts of first instance courts within the framework of powers prescribed by law, the Constitutional Court, in the framework of the considered case, states that:

1) the principle of limiting revision in a higher order follows from the mentioned requirements of the Constitution in conjunction with part 1 of article 61 of the Constitution, and implies a limitation of the scope of review from the first instance courts to the Cassation Court, in accordance with the rule “the higher the court instance, the more limited the scope of review”;

2) the review of judicial acts is essentially the main function of higher courts, i.e. the essence of justice, and other powers of higher courts may be further limited by the legislator (except for cases prescribed in the Constitution), based on the need to ensure the organizational mechanisms and procedures necessary for the realization of the basic right to effective judicial protection;

3) in contrast to the review of judicial acts resolving the case on the merits, the review of judicial acts that do not resolve the case on the merits can be implemented in accordance with significantly different rules that ensure the effective and fair consideration of judicial acts that do not resolve the case on the merits in all court instances, and consequently preventing the procedural cycle on these issues and its influence on the effectiveness of justice.

Referring to the issue of the scope/range of review of interim judicial acts in the appellate and cassation instances from the perspective of the above-mentioned, the Constitutional Court considers that the solutions prescribed in the Code - the limitation of the scope of interim judicial acts challenged in the appellate instance, and in the cassation instance, supplementing the mentioned limited scope with the requirement of overcoming more complicated **common prerequisites** for the admissibility of a cassation appeal - are consonant with the logic of the mentioned articles of the Constitution. At the same time, as already noted, the legislator has rightly established special powers of the Court of Appeal to consider the legitimacy of detention as a measure of restraint, in contrast to the cases of reviewing other interim judicial acts by the Court of Appeal, and for the Cassation Court the legislator has not established any special powers to consider the legitimacy of detention. In this aspect, such an approach is unacceptable for the Constitutional Court when, by its decisions the Cassation Court on the one hand has fully identified the scope of its powers and the powers of the Court of Appeal, and on the other hand caused misunderstanding/incorrect perception on the essence of the new judicial act.

So, the study of the practice of the Cassation Court shows that in the decision KD/0003/11/10 of 11 May 2011 in the case of “Artsakhbank” CJSC, the Cassation Court expressed a legal position that “... **legislative wording** regarding new judicial acts adopted by the Court of Appeal as a result of the consideration of the complaint against the judicial acts that do not resolve the case on the merits, **is uncertain**, ... ”. In this regard, the Cassation Court found that, in order to overcome this uncertainty, the Court of Appeal should be guided by the **general authorities of reviewing the judicial acts resolving the case on the merits**.

Ignoring the special powers of the Court of Appeal prescribed in part 5 of article 288 of the Code (on the issue of the legitimacy of detention), the Cassation Court has formed a judicial practice, in which it turned to own authority to review interim judicial acts, stating that they **are identified** with the scope of powers of the Cassation Court; moreover, **the Cassation Court is empowered to exercise those of**

**its powers, which are established to consider in the cassation instance the judicial acts resolving the case on the merits**.[1]

The Constitutional Court considers that the Constitution essentially delineates the functions and status of Appellate Courts and the Cassation Court, which also affects the scope of review of judicial acts, especially interim judicial acts, and that, in any case, due to the principle of limiting revision in a higher order provided by the Constitution, the letter must differ from each other; therefore in connection with the legitimacy of **interim judicial acts** and especially the judicial acts on the **legitimacy of detention**, **the scope of competence of the Court of Appeal is greater than that of the Cassation Court**. This difference is predetermined by the legal prerequisites arising from the functions and status of the Cassation Court prescribed by the Constitution, which establish a substantially higher threshold for the admissibility of the cassation complaint, which in turn determines the extent to which the Cassation Court reviews judicial acts.

**4.7.** Referring to the applicant's arguments about the alleged abuse of power by the Cassation Court prescribed in the challenged provision, the Constitutional Court notes that the analysis of the decisions of the Cassation Court on this issue made in the previous point of this Decision shows that the practice of the Cassation Court is problematic from the perspective of the compliance with articles 171 and 172 of the Constitution.

Based on the legal positions prescribed in point 4.1 of this Decision on the objectives of the implementation of the challenged powers of the Cassation Court regarding the review of interim judicial acts, the Constitutional Court considers that for that purpose the wording “new judicial act” is prescribed in the challenged provision.

The Constitutional Court states again that the term “new judicial act” is not identified with any of the judicial acts prescribed in part 1 of article 419 of the Code, and the legislator by using the term “new judicial act” did not mean the powers listed in part 1 of the said article, which are vested to the Cassation Court when reviewing the judicial acts resolving the case on the merits. This also concerns the purpose of securing the identical wording, prescribed in part 2 of article 394 of the Code on the review of interim judicial acts, which is systemically interrelated with the challenged provision. According to the Constitutional Court's assessment, the legislator used the term “new judicial act” within the meaning of clause 10 of article 6 of the Code.

[1] See the Decision of the Court of Cassation in case YD/0743/06/18 of 15 November 2018, pp. 45-46.

The Constitutional Court considers it necessary to reiterate that, unlike the court of first instance, which considers all the factual and legal circumstances of the case as the basis for rendering a judicial act on the merits and an interim judicial act, the legislator applied the limited review model in the appellate instance; and in the Cassation Court it is about a more limited review with special preconditions. Moreover, it should concern the consideration of the issues in line with the administration of justice and, in this sense, the interim issues; and the review of judicial acts that do not resolve the case on the merits, inter alia, is also intended to ensure the effectiveness of justice, therefore, within the framework of the system logic of the limited review model, it is clearly aimed at rendering **final decisions** in part of interim judicial acts, which prevents both the procedural cycle on these issues, as well as the possible or, in certain cases, even the inevitable negative impact on the effective implementation of the very function of justice.

It is obvious to the Constitutional Court that the legislator for this purpose delineated the powers of the Court of Appeal and the Cassation Court, which are implemented for the review of judicial acts resolving the case on the merits and the judicial acts that do not resolve the case on the merits, that is, **a final solution to the issue of legitimacy of the certain act** within the framework of the facts studied in previous instances. In the case of a cassation complaint challenging the legitimacy of detention, **the mandatory authority of the Cassation Court to render a new judicial act as the only alternative** (prescribed by the challenged provision) to reject the cassation complaint means **to satisfy the cassation complaint by canceling the decision of the Court of Appeal on the application or non-application of detention as a measure of restraint**.

The above-mentioned decision of the Cassation Court must finally resolve the issue of legitimacy of detention and thereby prevent further procedural cycle on this issue, thus ensuring legal certainty and predictability in the application of detention.

**As for the interpretation by the Cassation Court of the challenged provision of the Code, it contradicts article 6 of the Constitution in conjunction with part 1 of article 164 and article 171 of the Constitution.**

The Constitutional Court considers that the courts of general jurisdiction and specialized courts (not constitutional) are burdened **not only with the Constitution but also the law**, otherwise they can act either as a legislative body or as a body of constitutional justice.

The Constitutional Court states that by virtue of part 1 of article 6 of the Constitution, within the framework of the subject matter of this constitutional dispute, the Cassation Court could exercise only

the powers prescribed in the challenged provision of the Code. In addition, unlike the **Constitutional Court**, which **shall abide only by the Constitution** when administering justice (part 2 of article 167 of the Constitution), all other courts are limited by both the Constitution and laws (part 1 of article 164 of the Constitution), therefore these courts cannot abolish, invalidate, or review the **law**, but **only apply** it. Moreover, the mandatory requirements of the law, including the mandatory powers prescribed by the law, cannot but be applied, except for the only case when the court suspends the proceedings (which, by the way, is its duty if there are grounded suspicions on constitutionality /Part 4 of Article 169 of the Constitution/) and applies to the Constitutional Court.

Changing/amending the powers of any court in law enforcement practice in the direction of their expansion, is unacceptable regardless of motivation, and in the direction of reduction means their non-implementation or proper implementation, which, depending on the circumstances, may be similar to a denial of justice.

The contradiction to the Constitution of expanding the powers prescribed by law with own interpretation becomes most obvious from the perspective of the requirement for the Cassation Court prescribed in part 2 of article 171 of the Constitution that the Cassation Court shall exercises its constitutional powers by reviewing judicial acts **within the scope of its powers prescribed by law**.

According to the position of the ECtHR, in the sense of application of clause 1 of article 6 of the Convention the court that ruled in relation to the appealed proceedings, going beyond the limits of legally established powers, cannot be considered as “a court created by law” (Sokurenko and Strygun v. Ukraine, app. no. 29458/04 and 29465/04, 11/12/2006).

Based on the other application submitted by the applicant in the present case, by the Procedural Decision PDCC-7 of 25 January 2019, declining to consider the case on conformity of clause 1 of part 1 of article $414^2$ of the Criminal Procedure Code of the Republic of Armenia with the Constitution, referring to the issue of interpretation and application of the Constitution by the courts, including the Cassation Court, the Constitutional Court expressed the legal positions, in particular that “The circumstance that the scope of constitutional justice, in accordance with part 1 of article 171 of the Constitution, goes beyond the scope of the Cassation Court, does not mean that the Cassation Court does not have the power to interpret and apply the Constitution”, and that “As a means of ensuring the supremacy of the Constitution, **the final and obligatory interpretation and application of the Constitution** is the exclusive competence of the Constitutional Court, and all public authorities within the framework of the powers provided by the Constitution and by the laws, interpret and apply the

Constitution, especially if in consonance with article 3 of the Constitution, this is a matter of directly applicable law, namely the fundamental rights and freedoms of the human being and citizen, by which **all public authority** is limited". In addition, in this Decision the Constitutional Court has stated that it is the exclusive competence of the Constitutional Court to exercise constitutional justice, especially the determination of conformity with the Constitution of the laws and other regulatory legal acts prescribed in the Constitution, however stating that the **verification of constitutionality is the responsibility of all courts**. The Constitutional Court then emphasized that according to part 4 of article 169 of the Constitution, if the courts in a specific case in their proceedings conclude that there is an issue of constitutionality of an applicable regulatory legal act, that is, there are reasonable doubts in this regard, and if the solution of the case is possible through the application of this regulatory legal act, then they **are obliged to apply** to the Constitutional Court on the issue of determining the conformity of this act to the Constitution, which means that all courts, and not only to the Cassation Court, **must by incidence verify the constitutionality of the applicable normative legal act and apply to the Constitutional Court in the presence of these prerequisites**.

Confirming the mentioned legal positions, the Constitutional Court considers that identifying by the courts of the problem of certainty of the law or any other lack of the law significant from the perspective of constitutionality, that cannot be overcome by interpretation, is **the mandatory authority** of the courts, which is ensured especially by the requirements of part 4 of article 169 of the Constitution.

The Constitutional Court considers that **identifying such problems in the law** makes it inevitable to apply to the Constitutional Court, since they **cannot be overcome by other (non-constitutional) courts**. Arguing their vagueness in interpreting the requirements of the law is nothing more than stating an issue of constitutionality. Considering the existence of this issue as a basis for "being exempt" from fulfilling the requirement established by law and expanding or limiting own powers means a peculiar solution to the issue of constitutionality by a non-constitutional court, which is inadmissible. And the analysis of the law-enforcement practice of the challenged provision in framework of the case under consideration indicates that, in order to justify the uncertainty of the challenged provision of the Code, the Cassation Court referred to one of its previous decisions ignoring the mandatory authority to apply to the Constitutional Court prescribed in the Constitution.

However, the Constitutional Court argues that the provisions of the Code regulating the procedure for applying to the Constitutional Court, yet prescribe the discretion of the court to apply to the Constitutional Court, but not the obligation (part 2 of article 31 of the Code). Considering the

circumstance that these provisions are not systemically interrelated with the challenged provision of the Code, the Constitutional Court is not entitled to refer to their constitutionality. On the other hand, the Constitutional Court draws the attention of the Government and the National Assembly to this fundamental issue, and calls for a process of revising the said provisions in the light of the Constitution.

Noting the mandatory nature of the authority of all courts, including the Cassation Court, to apply to the Constitutional Court, the Constitutional Court concludes on the basis of the foregoing that the Cassation Court took a discretionary approach in the issue of applying to the Constitutional Court, based on the formulation of the law, though it could be reasonably expected that in this case it should at least not have assessed the challenged provision of the law, indirectly qualifying it as indefinite, i.e. unconstitutional.

Based on the review of the case and governed by clause 1 of article 168, clause 8 of part 1 of article 169, and article 170 of the Constitution, Articles 63, 64 and 69 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

**1.** Part 2 of article 419 of the Criminal Procedure Code of the Republic of Armenia is in conformity with the Constitution in the interpretation that the authority of the Cassation Court to render a new judicial act as a result of the review of judicial acts that do not resolve the case on the merits, is deemed rendering final decision on the specific issue.

**2.** Considering the circumstance that the challenged provision has been applied to the applicant in the interpretation other than the Constitutional Court's interpretation, according to part 10 of article 69 of the Constitutional Law on the Constitutional Court, the final judicial act rendered against the applicant due to new circumstances is subject to review in accordance with the procedure prescribed by law.

**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**

February 7, 2019

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