

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

**ON THE CASE OF CONFORMITY OF PART 2 OF ARTICLE 169 AND PART 4 OF
ARTICLE 140 OF THE RA CIVIL PROCEDURE CODE WITH THE CONSTITUTION
OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE
FIRST INSTANCE COURT OF GENERAL JURISDICTION OF YEREVAN**

Yerevan

June 18, 2019

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

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

the applicant: First Instance Court of General Jurisdiction of Yerevan,

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 part 2 of article 169 and part 4 of article 140 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the application of the First Instance Court of General Jurisdiction of Yerevan.

The Civil Procedure Code of the Republic of Armenia (hereinafter - the Code) was adopted by the National Assembly on 09.02.2018, signed by the President of the Republic on 27.02.2018, and entered into force on 09.04.2018.

The challenged part 4 of article 140 of the Code, titled: “Filing a counterclaim”, prescribes:

“4. Failure to file a counterclaim on the grounds prescribed in clause 2 of part 3 of this article, shall deprive the respondent of the possibility to file such a claim in future which could fully or partially

exclude granting the initial claim, except for cases when filing a counterclaim as prescribed in this article is proved impossible due to the reasons beyond the respondent's control".

The challenged part 2 of article 169 of the Code, titled: "Decision on distribution of burden of proof", prescribes:

"2. If a complaint is filed against the ruling on the return of the counterclaim or on the refusal to accept the counterclaim, the decision on the distribution of the burden of proof is made after the final judicial act issued on this complaint comes into force."

The above-mentioned articles of the Code have not been supplemented or added.

The case was initiated on the basis of the application of First Instance Court of General Jurisdiction of Yerevan submitted/registered in to the Constitutional Court on 6 March 2019, which included the decision of the same Court on "Applying to the Constitutional Court" on the case YD/6306/02/18 of 27 February 2019.

Having examined the application, the written explanation of the respondent, as well as having analyzed the relevant provision of the Code and other documents of the case, the Constitutional Court **ESTABLISHES:**

1. Positions of the applicants

Referring to the norms of the Constitution, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the legal positions of the Constitutional Court, the applicant finds that when applying to the court, a person must be confident that he/she can effectively exercise his/her right to defense without any obstacle prescribed by law, and in the process of implementation of the violated rights of a person, these obstacles can for a long time create an impasse that contradicts the essence of a person's rights to effective judicial protection and the consideration of his/her case within a reasonable time, and this situation does not depend on the outcome of the implementation of the procedural rights of the court and the person".

According to the applicant, "the public and fair proceeding, as well as its effectiveness and speed will have no value, if these processes are not resolved or the essence of this right is not legislatively ensured". Domestic law may prescribe certain legal restrictions on the above rights, as these rights are not absolute; though their restriction must be exercised so that the right to an effective remedy is not

violated or the person is not deprived of that right and the right to hearing of his/her case within a reasonable time to the extent that would violate the essence of these rights.

The applicant considers that the activities of the courts and the norms regulating the genuine proceeding that may create such situations in practice where the proceeding can be paralyzed for a long time and leave no other choice may lead to its inaction.

Therefore, the applicant considers that *inappropriate delays* due to regulations, that contradict the essence of the right to an effective judicial protection and right to hearing of his/her case within a reasonable time, challenge vulnerability of these rights.

The applicant concludes that part 2 of article 169 and the related part 4 of article 140 of the Code contradict the Constitution, as they do not provide legislative regulation equivalent to the essence of the person's fundamental rights to effective judicial protection and the consideration of the case within a reasonable time.

2. Positions of the respondent

The respondent considers that within the framework of the subject matter of the constitutional legal dispute, enabling the person to file a counterclaim prescribed by procedural norms and granted to the person by guaranteed rights, as well as the pursued aims are exceptionally called upon "ensuring a reasonable and fair balance due to the establishment of the right to a fair trial".

According to the respondent, in order to restore the violated rights, "in case the claim arising from the derivative relationship, i.e. aimed at eliminating the legal consequences of the primary relationship, is presented to the court, the court is practically deprived of the opportunity to render a fair decision on the case, and the right of a person to a fair trial is violated, since the court must comprehensively, completely and objectively examine the circumstances of the case in order to render a fair decision". Consequently, according to the respondent, the establishment and regulation of the legal procedures of the institution of counterclaim, enshrined in the challenged norms of the Code, are designed to exclude ineffective remedies. Therefore, according to the respondent, part 2 of article 169 and part 4 of article 140 of the Code are in conformity with the requirements of the Constitution.

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

To determine the constitutionality of the norms challenged in the present case, the Constitutional Court considers it necessary, in particular, to address the following issues:

1. Are the rights of a person to effective judicial protection of rights and freedoms and the consideration of the case within a reasonable time guaranteed by the challenged provisions of the legal regulations?
2. Is the inviolability of the essence of the right to judicial protection within a reasonable time guaranteed, taking into account both the legal positions of the Constitutional Court and international experience?
3. Are the constitutional legal criteria for the suitability of the means chosen by legal regulation to achieve the stated goal met?
4. Is the guaranteeing of effective procedures aimed at a predetermined goal ensured?

4. Legal positions of the Constitutional Court

4.1. The legal content of the provisions challenged in this case entails the establishment of general conditions for the implementation of the procedural right of filing a counterclaim conditioned by certain peculiarities of the stage of the consideration of the case, as well as by the tasks to be solved. By the Decisions DCC-1289 and DCC-1315 the Constitutional Court refers to the content and issues of the exercise of this right conditioned by the peculiarities of judicial review of cases arising from public legal relations (administrative) and in an overall assessment noted that:

- the legal regulation of the institution of counterclaim is aimed at the provision of the necessary and sufficient procedural guarantees to ensure the legitimate exercise of a person's right to a hearing within a reasonable time;
- the institution of counterclaim makes it possible to resolve the mutual claims of the parties during one hearing by one judicial act and, with the application of minimal procedural efforts and means, conduct the hearing with greater efficiency;
- as a procedural means of protecting the interests of the respondent, the counterclaim is aimed at facilitating the exercise of the right to effective judicial protection and to ensure the exercise of the right to a fair trial of a person's right to examination of cases concerning him/her within a reasonable period.

As the comparative analysis of the norms challenged in this case and other norms interrelated with the latter shows that the “counterclaim”, as the same legal remedy and mechanism for protecting the respondent from the claim in the civil procedure, is aimed at - in the cases arising from civil relations - providing the respondent as well as the court with the possibility to:

- conduct verification (a set-off of mutual claims and obligations) in the initial claim;
- reject the initial claim in full or in part, carry out a joint consideration of the dispute, taking into account the mutual relationship between the original and counterclaims;
- provide the swiftest and most effective resolution of the case.

The application of the institution of “counterclaim” for the solution of the above-mentioned tasks aims to protect rights, and the legislator has underlined the effectiveness of its implementation especially during the preliminary court session, and in this regard has provided a limited opportunity for the respondent to apply such a procedural remedy against the claim. As a general institutional principle and a means of legal regulation, the latter is aimed at guaranteeing a fair balance between the possibility of exercising the procedural rights and obligations of the parties, on the one hand, and the obligation of the court to examine jointly the original claim and the counterclaims, and render a decision on the case within a reasonable time, on the other hand. In particular, the legal regulations prescribed in article 140 of the Code are aimed at achieving this goal, according to which, prior to the court decision on the distribution of the burden of proof, the respondent has the right to file a counterclaim to the plaintiff for joint consideration with the initial claim. The issues related to the presentation of a counterclaim, its acceptance to proceeding, dismissing it or the return of it to the person who presented the counterclaim, shall be resolved in accordance with the legal regulations relating to the statement of claim (parts 1 and 2).

The Constitutional Court also considers it necessary to state that guarantees of the effectiveness of consideration of a counterclaim are also prescribed in other legal regulations of the Code in connection with the prohibitions on absentee litigation (part 4 of article 292), consideration of cases through a simplified procedure (part 3 of article 297), as well as accelerated hearings (part 1 of article 306) in the case of filing such a claim.

Thus, the legislator provided equivalent guarantees for accepting for consideration a claim and a counterclaim in a civil case, presenting evidence, examining it, evaluating and adjudicating a case based on the results of a hearing under equal legal conditions.

The same objectives are pursued by the legal regulations of the part 4 of article 140 of the Code challenged in the present case. The legislator, in fact, guided by the need to guarantee the effectiveness of justice, in certain cases of non-presentation of a counterclaim, limited the further possibility of a respondent filing a claim to protect his/her rights, except when the latter justifies the impossibility of filing a counterclaim in the prescribed manner for reasons beyond his/her control.

The Constitutional Court considers that in this context due to the regulatory significance and from the perspective of fair and effective exercise of a person's right to judicial protection, the institution of "counterclaim" pursues such general legal goals that are in concord with the legal terms prescribed in part 1 of article 61 and part 1 of article 63 of the Constitution. Consequently, within the framework of the challenged subject matter, the Constitutional Court reiterates the legal positions expressed in the Decisions DCC-1289 and DCC-1315.

4.2. Referring to international experience in assessing the reasonableness of the time limit for the consideration of the case, the Constitutional Court notes that the European Court of Human Rights has repeatedly noted that the access to the court may have certain procedural and time limitations, which, however, should not violate the very essence of this right, and that the establishment of procedural time limits is aimed at regulating the proceedings of the case and its implementation as soon as possible.

The Constitutional Court attaches importance to the following criteria approved by the European Court of Human Rights:

- States parties to the Convention should organize their judicial systems in such a way as to guarantee the right to a court decision within a reasonable time, excessive workload cannot be taken into account (Vocaturò v. Italy, § 17, Cappello v. Italy § 17);
- the introduction of a reform designed to expedite the consideration of cases cannot justify delays since States are under a duty to organise the entry into force and implementation of such measures in a way that avoids prolonging the examination of pending cases (Fisanotti v. Italy, § 22);
- chronic overload cannot justify the excessive length of the proceedings (Probstmeier v. Germany, § 64);
- the Contracting States that are obligated to organize their judicial systems in such a manner that their courts can guarantee everyone's right to a final decision on disputes related to civil rights and obligations within a reasonable time (Scordino v. Italy (No. 1) [MP], § 183);

- even in legal systems applying the principle that the procedural initiative lies with the parties, the latter's attitude does not absolve the courts from the obligation to ensure the expeditious trial required Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention) (Pafitis and Others v. Greece, § 93, Tierce v. San Marino, §31, Sürmeli v. Germany [MP], §129);
- only delays attributable to the State may justify a finding of failure to comply with the "reasonable time" requirement (Buchholz v. Germany, §49, Papageorgiou v. Greece, §40, Humen v. Poland [MP], §66);
- the applicant's conduct is considered as an objective fact that cannot be attributed to the respondent State and which must be taken into account in order to determine whether the reasonable time period referred to in Article 6 § 1 of the Convention has been exceeded (Poiss v. Austria, § 57, Wiesinger v. Austria, § 57, Humen v. Poland [MP], §66). The applicant's conduct cannot be used as a means of justifying the period of inaction;
- Article 6 § 1 does not require the applicants to actively cooperate with the judicial authorities, nor can they be accused of fully enjoying the remedies provided to them in accordance with domestic law (Erkner and Hofauer v. Austria, § 68). An interested person is only required to show diligence in carrying out the procedural actions associated with him, to refrain from using delay tactics and to use the procedures provided by national legislation for the termination of proceedings (Unión Alimentaria Sanders SA v. Spain, § 35). Nevertheless, if the problems are the result of the complexity of organizing domestic procedures and, therefore, are objectively attributed to the state, then they may not be interpreted in favor of the respondent state. This is the case when domestic law considers it necessary to appeal to different courts alternately¹.

4.3. Referring to the issue of constitutionality of the legal regulation of the challenged part 2 of article 169 of the Code and considering in the context of the constitutional legal content of part 1 of article 61, part 1 of article 63, articles 75, 78 and 80 of the Constitution, the Constitutional Court states that the postponement of the distribution of the burden of proof at a preliminary hearing is the essence of the

¹ The following sources were used: ECHR, Guidelines on Article 6 of the Convention: right to a fair trial (civil law aspect). https://www.echr.coe.int/Documents/Guide_Art_6_HYE.pdf, Human Rights Files No. 16, The length of civil and criminal proceedings in the case-law of the European Court of Human Rights, Council of Europe Publishing, [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-16\(2007\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-16(2007).pdf), European Commission for Efficiency of Justice (CEPEJ), Length of Court Proceedings in the Member States of the Council of Europe Based on the Case-Law of the European Court of Human Rights, <https://rm.coe.int/1680747c36>.

above legal regulation in the case when the court decision on the return of the counterclaim or dismissal of the counterclaim has been appealed to a higher court.

Through the above-mentioned, the legislator tried to achieve the following goals:

- 1) before the distribution of the burden of proof between the persons participating in the case, the person who presented the counterclaim - by appealing the court decision on the return of the counterclaim or dismissing the counterclaim - gets the opportunity to protect his/her rights in the substantive sense;
- 2) for the persons participating in the case, the limits of evidence indicated in part 3 of article 169 of the Code become certain and predictable in a particular case;
- 3) the most effective consideration of the case is ensured.

Thus, by virtue of part 2 of article 169 of the Code, the hearing of the case on the basis of the original claim cannot be appointed until the final judicial act on the appeal regarding the decision on returning the counterclaim or dismissing the counterclaim has entered into legal force. Although upon the filing of an appeal by the person who filed a counterclaim, the possibility of a swift and effective resolution of the plaintiff's case on the basis of the initial claim is postponed for a certain period of time, the Constitutional Court considers that the legal means prescribed in part 2 of article 169 of the Code are suitable and necessary to achieve the goal pursued, since in the framework of the consideration of the certain civil case they are aimed at guaranteeing balanced protection of both the rights of the plaintiff (respondent in a counterclaim) and the rights of the respondent (person who filed a counterclaim).

At the same time, the Constitutional Court states that by filing a counterclaim, as well as appealing against a court decision on returning the counterclaim or dismissing the counterclaim (in connection with this also postponing the resolution of issues related to the distribution of the burden of proof and continuing further consideration of the case), the respondent receives the legal opportunity to defend against claims submitted against him/her and to consider a counterclaim together with the initial claim. Such a legal regulation per se does not raise an issue of constitutionality. However, the mechanisms for realizing this possibility within the framework of a specific legal relationship must comply with the principles of proportionality and effectiveness, and be in consonance with the constitutional legal content of the right to judicial protection and the ways of its implementation.

The Constitutional Court considers it necessary to note that in the context of the constitutional legal content of part 1 of article 61, part 1 of article 63, articles 75 and 78 of the Constitution, effective procedures ensuring the fair trial of the case in the framework of the original claim must also be

established. Taking into account the circumstance that the reasonable time limits of a fair trial cannot be circumvented by exercising the right to appeal, therefore also the constitutionally guaranteed rights of the person who has applied for judicial protection cannot be violated, hence, the relevant legal regulations must contain the necessary and sufficient guarantees preventing the violation of the very essence of constitutional right for judicial protection.

In this regard, the Constitutional Court considers it necessary to refer to the regulations of the Code which, in the context of part 2 of article 16, are called upon to ensure prompt and effective consideration of the relevant complaint of the person who submitted a counterclaim. The comprehensive study of articles 362, 367, 369 - 372, 377, 391, 392, 394 - 398 and 400 of the Code shows that they do not provide any peculiarity in terms of time limits and procedures for the consideration of complaints against a court decision on returning the counterclaim or dismissing the counterclaim. Considering the current general procedures for appealing court decisions in connection with the acceptance of a counterclaim and especially the regulations regarding the time limits, the Constitutional Court calls upon the Government and the National Assembly to establish effective mechanisms to ensure the consideration of the case within a reasonable time, in the scopes of the legal regulation of part 2 of article 169 of the Code.

Cumulatively, the above regulations of the Code create a problematic situation in connection with the protection of human rights: on the one hand, they, in fact, guarantee the respondent's right to appeal the court decision on the admissibility of the counterclaim, and on the other hand, they disproportionately restrict and make senseless the right of the plaintiff to judicial protection on the basis of the initial claim (Articles 78 and 80 of the Constitution). The Constitutional Court considers that the institution of “counterclaim”, being aimed at guaranteeing a fair and effective trial within a reasonable time, cannot envisage controversial procedures for the implementation of trial at different stages (preparatory stage and appeal stage).

The significance of the implementation of a person’s right to appeal a court decision regarding the adoption of a counterclaim is beyond any doubt. However, the implementation of this right should not lead to the ignoring of the constitutional legal requirements of effective judicial protection and consideration of the case within a reasonable time.

Therefore, the Constitutional Court considers that the task of the legislator is to provide, within the framework of the interrelated legal regulations challenged in this case, such effective procedures that

guarantee in the framework of the counterclaim the protection of the constitutional rights of the plaintiff on the basis of the initial claim.

Based on the review of the case and governed by clause 1 of article 168, part 4 of article 169, and parts 1 and 4 of article 170 of the Constitution, as well as Articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court

HOLDS:

1. Part 4 of article 140 of the Civil Procedure Code of the Republic of Armenia is in conformity with the Constitution.
2. Part 2 of article 169 of the Civil Procedure Code of the Republic of Armenia is in conformity with the Constitution.
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

June 18, 2019

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