

**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 3 OF ARTICLE 93 OF THE CRIMINAL
PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE
CONSTITUTION ON THE BASIS OF THE APPLICATION OF THE FIRST INSTANCE
COURT OF GENERAL JURISDICTION OF ARMAVIR MARZ OF THE REPUBLIC
OF ARMENIA**

Yerevan

1 December 2020

The Constitutional Court composed of A. Dilanyan (Chairman), V. Grigoryan, A. Tunyan, A. Khachatryan, Y. Khundkaryan, E. Shatiryan, A. Vagharshyan, with the participation of (in the framework of the written procedure):

the applicant: First Instance Court of General Jurisdiction of Armevir Marz of the Republic of Armenia,

the respondent: K. Movsisyan, official representative of the National Assembly, Head of the Legal Support and Service Division of the National Assembly Staff,

pursuant to clause 1 of article 168 and part 4 of article 169 of the Constitution, articles 22 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 3 of article 93 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of the First Instance Court of General Jurisdiction of Armevir Marz of the Republic of Armenia.

The Criminal Procedure Code of the Republic of Armenia (hereinafter – 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. Part 3 of article 93 of the Code, titled: “Procedure for and conditions of compensation for non-pecuniary damage caused as a res

Part 3 of Article 93 of the Code, titled “Removal of the Defense Counsel and Representative from the Proceedings”, stipulates: "The removal of the defense counsel on the grounds envisaged in part 2 of this Article is permitted only with the consent of the defendant"

Having examined the application, the written explanation of the respondent, other documents of the case, as well as other relevant legislative norms, the Constitutional Court FOUND:

1. Applicant's approach and arguments

The applicant states that the legislature, amongst inter alia, considered the presence of a conflict of interests of the defendants as a circumstance excluding the participation of the defense counsel in the criminal case. The issue of removing the defense counsel from the proceedings is regulated by article 93 (2) and article 70 (7) of the Code. However, unlike article 70 (7) of the Code, article 93 (3) envisages a term for the removal of the defense counsel from the proceedings on the appropriate grounds, i.e. it requires the consent of the defendant. The applicant finds that the above-mentioned provision contradicts both article 70 (7) of the Code and clause 1, paragraph 2, article 20 and paragraph 4 of the Law on Advocacy of the Republic of Armenia. According to the applicant, the disputed provision, contrary to the above-mentioned legal norms, not only created legal uncertainty, thus causing inconsistency with article 79 of the Constitution, but also endangered such a legal norm as a component of the right to a fair trial guaranteed by article 63 of the Constitution - the requirement of fair examination of the case and the principle of competition and equality between the parties, as well as the right to receive proper legal aid guaranteed by article 64 of the Constitution. Summarizing the arguments, the applicant requests to determine the compliance of part 3 of article 93 of the Code with articles 63, 64, 79 of the Constitution.

2. Respondent's argument

The respondent states that the right to judicial protection is such a set of rights of the suspect or accused and serves as the means of their implementation, which provides a real possibility to protect the legitimate interests of the latter. In addition to serving as a guarantee for the protection of the legitimate interests of persons, it is also a key guarantee of the administration of justice. According to the respondent, the right to have a lawyer stands out among the rights included in the right to persons's protection. The right to have a lawyer is the most fundamental right assigned to a person; it acts as a guarantee for the realization of all the other rights of the suspect or the accused. Therefore, the right of everyone, charged with a criminal offence to be effectively defended by a lawyer, is one of the basic features of a fair trial. According to the respondent, it is clear from the content of clause 28 of article 6 of the Code that the goals of the defense counsel's judicial activity are - clarification of the circumstances excluding or mitigating the responsibility and denying the accusation of the suspect or accused and providing legal aid to the suspect or accused and achieving the adoption of the most favorable court decisions in a specific criminal case. The respondent considers necessary to emphasize that the same goals are enshrined in article 73 (1) of the Code. Moreover, in order to

achieve these goals, the defense counsel's tasks are to work out the defense strategy with his / her client, to determine the methods and means of carrying out the necessary legal actions and obtaining evidence. The respondent considers that the right to have a lawyer is one of the most important rights reserved for a person. This right, as the most important right of a person, is based on the free will of the person to invite or choose a lawyer, an issue which arises from the moment of initiating the criminal prosecution against him/her. The right to have a lawyer is the minimum right of any charged with committing an offence. According to the respondent, the expression of a person's will to have a lawyer of his own choosing is an unconditional term for the exercise of the right to defense, which is not an end in itself. It is based on the formation of the necessary atmosphere of trust between the defender and the defendant. According to the respondent, article 70 of the Code regulates the general principles of involving the defender in criminal proceedings, and article 93 - the grounds for removing the latter from the proceedings. Therefore, the above-mentioned provisions do not contradict but complement each other. The RA Law on Advocacy states that a lawyer can provide legal aid in cases where he has to represent the client's interests and the person's interests conflict with the interests of the trustee, the latter issues a written consent. In this case, the respondent notes that there are no contradictions between the regulations raised by the applicant. Summarizing the above, the respondent states that the disputed provision is in conformity with Articles 63, 64 and 79 of the Constitution.

3. Circumstances to be clarified in the frames of the case

The Constitutional Court notes that the disputed provision within the framework of this constitutional issue should be considered from the point of view of legal guarantee of the circumstances excluding the participation of the defense counsel in the criminal case, taking into account the fact that the criminal procedure regulates this issue by two separate provisions, one of which envisages the possibility to remove the defense counsel from the proceeding by the consent of the defendant, as the other does not envisage such a possibility. Taking into account the mentioned circumstance in assessing the constitutionality of the disputed norm of the Code in the framework of this case, the Constitutional Court considers it necessary to find out:

1) Compared with other related legal regulations is the legal regulation enshrined in the disputed provision compatible with the constitutional principle of legal certainty?

2) In the conditions of the current legal regulations on the circumstances excluding the participation of the defense counsel in the criminal case, is the person's right to be protected through the lawyer of his own choosing preserved?

4. Legal positions of the Constitutional Court

4.1. Taking into account the importance and significance of constitutional and international legal regulations of effective protection of fundamental rights, especially the right to effective judicial protection and realization of the right to a fair trial, the criminal procedure

legislation of the Republic of Armenia envisages other grounds for inviting, appointing and replacing the defense counsel, as well as the terms for removal of excluding of the defense counsel in the criminal proceeding. Thus, Article 70 (7) of the Code, titled "Inviting, Appointing, Replacement and Other Grounds for Participation of a Defense Counsel in the Proceeding," stipulates that if more than one suspect or an accused are involved in the same criminal case, they may have one lawyer, except for, amongst others, the cases of conflict of interests between the defendants. Article 93 (2) of the Code, titled "Removal of the Defense Counsel and the Representative from the Proceedings", stipulates that the defense counsel shall not participate in the criminal proceedings on behalf of the defendant or the trustee if he / she provides legal aid or has provided it to the person, whose interests conflict with the interests of the defendant. Based on the results of the combined study of Articles 70 and 93 of the Code, the Constitutional Court notes that Article 70 (7) and Article 93 (2) of the Code refer to different legal relations, and they should not be equated.

Article 93 of the Code deals with the **grounds for removing** a lawyer from the proceedings. They are as follows: a) the defense counsel is in a kinship or personal relation, or is in professional dependency with the official who participated or has participated in the examination of the criminal case; b) the defense counsel participated in the case as a judge, a prosecutor, an investigator, a specialist, an expert or a witness (c) the defense counsel is not entitled by the law or a court judgment to be an advocate; **(d) the defense counsel provides or has provided legal aid to a person whose interests conflict with the interests of the defendant, as well as s/he is in a kinship or in other personal relationship with that person.** Moreover, for removal of the defense counsel, the consent of the defendant is required only in case of application of the last provision of the above-mentioned four substantiations.

According to the Constitutional Court, the applicant was confused by Article 70 (7) of the Code, which defines a special case of defense counsel's participation in the proceedings (possibility of more than one suspect or accused to have one defense counsel) and **except for that certain case** (conflict of defendants' interests). Part 3 of article 93 of the Code establishes the procedural rule for removing the defense counsel from the proceedings on the basis of Part 2 of the same article (consent of the defendant).

Examination of the application, as well as analysis of the submitted arguments, show that one of the issues raised in the application, namely the existence of legal uncertainty arising from the alleged discrepancy between the cited legal norms, is not subject to the Constitutional Court, as the applicant raises not the issue of constitutionality of a legal norm (including due to uncertainty), but the issues of legality of application of the current norm, which are not subject to examination by the Constitutional Court.

Based on the above-mentioned, the Constitutional Court states that the content of article 70 (7) and article 93 (3) 3 the Code reveals that even in the case of a conflict of interests of the defendants (envisaged in Article 93 (2)), if there is more than one suspect or

defendant in the same criminal case, they are allowed to have one lawyer, if the defendant agrees.

4.2. The other question raised by the applicant concerns the issue, according to which: “Part 3 of article 93 of the Code jeopardizes the requirement of fair judicial proceeding guaranteed by article 63 of the Constitution of the Republic of Armenia, which is a component of the right to a fair trial and the principle of equality between the parties and the right to receive adequate legal aid guaranteed by Article 64 of the Constitution of the Republic of Armenia.” At the same time, according to the applicant, regardless of the consent of the defendant, existence of a conflict of interests between the defendants objectively hinders performance of the defense counsel's duties. In this regard, the Constitutional Court notes that the right to legal aid and the right to be defended in person or through a legal aid of his own choosing, has been enshrined constitutionally and internationally. Thus, article 64 (1) of the Constitution, titled "The Right to Legal Aid", stipulates that everyone shall have the right to receive legal aid. And according to article 67 (2) of the Constitution, titled "Right to Be Defended Against a Charge”, everyone charged with a crime shall have the right to defend himself or herself personally or be defended through an advocate chosen thereby. personally or be defended through an advocate chosen thereby”. According to article 6 (3) (c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to defend himself in person or through legal aid of his own choosing or, if he has not sufficient means to pay for legal aid, to be given it free when the interests of justice so require. To be tried in his presence, and to defend himself in person or through legal aid of his own choosing is also enshrined in article 14 (3) (d) of the International Covenant on Civil and Political Rights.

At the same time, UN General Assembly Resolution A / RES / 67/187 of December 20, 2012, "Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems" emphasizes that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process. States must guarantee this right at the domestic level, at the highest possible level and, if necessary, by the Constitution (paragraph 1, Principle 1, paragraph 14).

The Constitutional Court referred to the right to receive legal aid and to be defended through his/her chosen lawyer, which conclude as follows:

- The Constitution requires the public authorities to consolidate such procedures and mechanisms at the legislative level that will effectively guarantee the possibility of effective implementation of a person's right to receive legal aid, and also in practice ensure that the person on the voluntary and conscious basis decides whether to benefit from legal aid or not. This general rule also applies to paragraph 2 of part 2 of article 67 of the Constitution, which provides that "Everyone charged with a criminal offence shall have ... 2) the right to defend himself or herself personally or be defended through an advocate chosen thereby.” (13.02.2018, DCC-1403),

- "The right of a person to be defended in person or through legal aid of his own choosing is guaranteed on the basis of point 2 of Article 67 of the RA Constitution, therefore, it is obligatory for securing the law enforcement practice " (02.09.2016, DDC -1295).

The European Court of Human Rights (hereinafter as the ECtHR) addressed the issue in its judgments. In particular, the ECtHR notes that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, and therefore the applicant's complaints under paragraphs 1 and 3 of Article 6 should be examined together (Sakhnovskiy v. Russia, judgment of 2 November 2010, § 94, Gafgen v. Germany, judgment of 1 June 2010, § 169). In addition, the ECtHR further recalls that the right of an accused to participate effectively in a criminal trial includes, in general, not only the right to be present, but also the right to receive legal aid, if necessary. (Lagerblom v. Sweden, 14.04.2003, app. no. 26891/95 §49; Galstyan v. Armenia, 15.02.2008, app. no. 26986/03 §89). The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial. (Meftah and Others v. France, judgment of 26 July 2002, § 45, Pakelli v. Germany, judgment of 25 April 1983, § 31, Salduz v. Turkey, judgment of 27 Nov. 2008, § 51). Although, as a general rule, the right of an accused to be defended by counsel of his own choosing should be respected (Lagerblom v. Sweden, judgment of 14 April 2003, § 54), consequently the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (Meftah and Others v. France, judgment of 26 July 2002, § 45, Croissant v. Germany, judgment of 25 September 1992, § 29). Moreover, within the same legal positions, the question of whether to allow a person to defend himself in person or to appoint a lawyer is within the discretion of the state, as it can more effectively choose within its legal system to guarantee effective defense. (Correia de Matos v. Portugal, judgment of 15 November 2001).

4.3. In the light of the above legal positions, the Constitutional Court notes that the right of a person to be defended through a legal aid of his own choosing serves as a guarantee for the full and effective exercise of the right to a fair trial, and for ensuring it, adequate legislative regulation is needed.

Thus, the criminal procedure legislation defines the circumstances of choosing a lawyer, appointing him, replacing him, as well as circumstances of removal of the latter from the proceedings. The criminal procedure law also guarantees the right of everyone to be defended in person or through a legal aid of his own choosing, but, in the interests of both the defendants and administration of justice, it envisages certain restrictions which do not violate the person's right to be protected by the defense counsel of his own choosing, but aids to the effective exercise of that right.

The right of a person enshrined in the Constitution to be represented by a lawyer of his own choosing presupposes not only the right to choose a lawyer but also the right to receive

effective defense through that lawyer, which cannot always be guaranteed when the same person defends the rights of more than one person whose interests conflict.

In addition, it is necessary to ensure the effective and proper administration of justice in each case, and the provision of a fair trial under criminal procedure law is conditional on a comprehensive, complete and objective examination of the circumstances of the case, thus if the communication of the defense counsel with more than one defendant may hinder the effective examination of the case by jeopardizing the administration of justice, the restriction of the protection of the interests of more than one person in the same case should be considered lawful.

This approach is also substantiated by the mentioned legal positions of the ECtHR, within the framework of which, **the interest of justice** is mentioned as a basis for restricting the right of a person to be defended through the lawyer of his own choosing.

In this case, it is noticeable that in one case, the criminal procedure legislation mentions the conflict of interests of the defendants as an obstruction in participation in the trial, as well as the risk of obstructing the administration of justice, and, in the other case, the legislator is restricted only by the prescription of the conflict of interests by expanding the scope of the subjects and it becomes clear that the legislator was guided by the logic that in all cases where there can be only a conflict of interest, the removal of the defense attorney is possible only with the consent of the defendant; while in the case of obstruction of justice, the defendant's consent can not be taken into account as in such circumstances the principle of a fair trial, which is an important component of the right to a fair trial, would be violated.

Based on the above, the Constitutional Court notes that the considered institution, within the scopes of the constitutional right to be defended by the lawyer of his own choosing and permissible restrictions, takes into account the balance of the state and public interests on the one hand and the legitimate interests of a person and a citizen on the other.

Moreover, in this case, the public interest is conditioned by the positive responsibility of the state to ensure the right to a fair trial, which, in turn, derives from the rights and legitimate interests of a person and a citizen. And in this case the protection of the rights and legitimate interests of a person and a citizen is manifested by the institution of the defendant's consent: defendants are responsible for their own interests, taking into account all the risks of having one defense counsel.

In view of the above, the Constitutional Court considers it possible to state that the wording of Articles 70 (7) and 93 (2) and (3) derives from the positive obligation of the state to warn in duly manner to the persons with more than one suspect or defendants in the same criminal case about the possible negative consequences of having one lawyer due to a conflict of interest between the defendants, including the lawyer's being in a kinship or other relationship with one of the defendants.

Based on the above and governed by clause 1 of article 168, part 4 of article 169, 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 3 of article 93 of the Criminal Procedure Code is in conformity with the Constitution.

2. Pursuant to part 2 of article 170 of the Constitution this Decision is final and shall enter into force upon its promulgation.

Chairman

A. Dilanyan

1 December 2020

DCC -1564