Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE CONCERNING THE CONSTITUTIONALITY OF PART 3 OF ARTICLE 309.1 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA ADOPTED IN 1998, RAISED BY THE APPLICATION OF THE CASSATION COURT OF THE REPUBLIC OF ARMENIA

City of Yerevan 22 July 2024

The Constitutional Court, composed of A. Dilanyan (Presiding Judge), V. Grigoryan, D. Khachaturyan, Y. Khundkaryan, H. Hovakimyan, E. Shatiryan, and A. Vagharshyan,

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

the applicant: RA Cassation Court (hereinafter also referred to as "the applicant"), and

the respondent: the representative of the National Assembly, M. Stepanyan, Head of Legal Support and Service Division of the Staff of the National Assembly (hereinafter also referred to as "the respondent"),

according to point 1 of Article 168 and 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 an open session through the written procedure the case concerning the constitutionality of part 3 of Article 309.1 of the Criminal Procedure Code of the Republic of Armenia adopted in 1998, raised by the application of the Cassation Court of the Republic of Armenia.

The Criminal Procedure Code of the Republic of Armenia adopted on 1 July 1998 (hereinafter also referred to as "the Code") was invalidated on 1 July 2022, except for the cases prescribed by Article 483 of the Code HO-306-N of 30 June 2021. The provisions of chapters 54, 54.1, 54.2, 54.3, and 54.4 of the Code were not invalidated.

Part 3 of Article 309.1 of the Code, entitled **"Limits on supplementing or amending the proposed charge",** stipulates:

"3. The accuser may – before the court leaves for the deliberation room – amend the charge, including in terms of severity if the evidence examined during the trial irrefutably proves that the defendant has committed a crime other than he is imputed".

The Code was supplemented with Article 309.1 by the Law HO-270-N of 28 November 2007.

This Case was initiated by the application of the RA Cassation Court which was submitted to the Constitutional Court on 22 January 2024, based on the Decision "On submitting an application to the Constitutional Court" in Case No. ED/0253/01/19.

By the Procedural Decision PDCC-110 of the Constitutional Court dated 22 July 2024, the proceedings in the case "On determining the issue of compliance with the Constitution of part 3 of Article 309.1 of the RA Criminal Procedure Code adopted in 1998, and parts 1, 4, and 5 of Article 35 systemically interrelated with the latter, as well as the interpretation given in legal practice of part 2 of Article 366 of the same Code, raised by the application of the RA Cassation Court" were partially terminated in part of parts 1, 4, and 5 of Article 35 of the Code, as well as in part of the interpretation given in legal practice of part 2 of Article 366 of the same Code.

Having examined the application, the written explanations of the applicant and the respondent, and other documents in the case, as well as having analyzed the contested and the respective legal provisions, the Constitutional Court **ESTABLISHED:**

1. Brief procedural background of the Case

1.1. Having examined the criminal case according to the charges against Robert Sedrak Kocharyan (charged under part 1 of Article 300.1 and part 2 of Article 311 of the RA Criminal Code, a bail was applied as a restraint measure), Seyran Mushegh Ohanyan (charged under part 1 of Article 300.1 of the RA Criminal Code, subscription on recognizance was chosen as a restraint measure), Yuri Grigoriy Khachaturov (charged under part 1 of Article 300.1 of the RA Criminal Code, bail was applied as a restraint measure), Armen Andranik Gevorgyan (charged under part 1 of Article 38-300.1, point 2 of part 4 of Article 311, and point 1 of part 3 of Article 190 of the RA Criminal Code, subscription on recognizance was chosen as a restraint measure), on 6 April 2021, the First Instance Court of General Jurisdiction of Yerevan decided:

"1. To terminate the criminal prosecution against Robert Sedrak Kocharyan under part 1 of Article 300.1 of the RA Criminal Code due to the absence of the event of a crime.

To reject the defense's motion to cancel or reduce the bail imposed on Robert Sedrak Kocharyan as a restraint measure.

2. To terminate the criminal prosecution against Seyran Mushegh Ohanyan under part 1 of Article 300.1 of the RA Criminal Code due to the absence of the event of a crime.

To lift the subscription on recognizance chosen against Seyran Mushegh Ohanyan as a restraint measure.

To lift the seizure imposed on Seyran Mushegh Ohanyan's movable and immovable property, financial (monetary) means, shares, securities, and assets.

3. To terminate the criminal prosecution against Yuri Grigoriy Khachaturov under part 1 of Article 300.1 of the RA Criminal Code due to the absence of the event of a crime.

To lift the bail chosen against Yuri Grigoriy Khachaturov as a restraint measure.

To return Armen Kamo Badalyan the bail amount of 5.000.000 (five million) AMD paid by Armen Kamo Badalyan to the deposit account No. 900013298014 of the General Jurisdiction Court of Yerevan on 28 July 2018.

To lift the seizure imposed on Yuri Grigoriy Khachaturov's movable and immovable property, financial (monetary) means, shares, securities, and assets.

4. To terminate the criminal prosecution against Armen Andranik Gevorgyan under part 1 of Article 38-300.1 of the RA Criminal Code due to the absence of the event of a crime.

To terminate the criminal case proceedings in part of the charges against Robert Sedrak Kocharyan, Seyran Mushegh Ohanyan, and Yuri Grigoriy Khachaturov under part 1 of Article 300.1 of the RA Criminal Code, and against Armen Andranik Gevorgyan – under part 1 of Article 38-300.1 of the RA Criminal Code.

To reject the defense's motions to oblige the criminal prosecution authorities to request a written apology from Robert Sedrak Kocharyan, Seyran Mushegh Ohanyan, Yuri Grigoriy Khachaturov, and Armen Andranik Gevorgyan.

To leave without examination the civil lawsuit the victim Artur Sargis Avagyan filed.

(…)".

1.2. Having examined the appeals of the Deputy Prosecutor General of the Republic of Armenia G. Baghdasaryan, victim A. Ketikyan, victim A. Avagyan's representative S. Safaryan, and R. Kocharyan's defense attorneys H. Khudoyan and H. Alumyan against the Decision No. ED/0253/01/19 of the First Instance Court of General Jurisdiction of Yerevan dated 6 April 2021, regarding the defendants Robert Sedrak Kocharyan, Seyran Mushegh

Ohanyan, Yuri Grigoriy Khachaturov, and Armen Andranik Gevorgyan, charged under part 1 of Article 300.1 of the RA Criminal Code, on 26 November 2021, the RA Criminal Court of Appeal decided:

"To reject the appeals of the Deputy Prosecutor General of the Republic of Armenia G. Baghdasaryan, victims A. Ketikyan and M. Tadevosyan, victim A. Avagyan's representative S. Safaryan, and R. Kocharyan's defense attorneys H. Khudoyan and H. Alumyan, without amending the Decision No. ED/0253/01/19 of the First Instance Court of General Jurisdiction of Yerevan dated 06.04.2021.

The decision may be appealed to the RA Cassation Court within 1 month from the date of receipt".

1.3. On 19 January 2024, the RA Cassation Court examined in a written procedure the cassation appeal of the RA Prosecutor General A. Davtyan against the decision of the RA Criminal Court of Appeal dated 26 November 2021 and decided to apply to the Constitutional Court to determine the issue of compliance with the Constitution of part 3 of Article 309.1 of the RA Criminal Procedure Code adopted in 1998, and parts 1, 4, and 5 of Article 35 systemically interrelated with the latter, as well as the interpretation given in legal practice of part 2 of Article 366 of the same Code.

2. Positions of the applicant

Presenting the procedural background of the criminal case No. ED/0253/01/19, the grounds, justifications, and claim of the cassation appeal, as well as the respective legal positions of the Cassation Court on the issue in question, the applicant, in particular, notes that "The absence of the possibility for the accuser to amend the legal qualification of the act imputed to a person by the accuser, and the absolute requirement for the court to terminate the criminal case proceedings and to make a decision to terminate the criminal prosecution – if the criminal legal norm defining a special category of corpus delicti, by which the person's act is qualified, is declared as contradicting the RA Constitution and void, but that act apparently corresponds to the characteristics of another category of corpus delicti prescribed by the RA Criminal Code – *prima facie* leads to a violation of the victim's constitutional rights to judicial protection and a fair trial, guaranteed by Articles 61 and 63 of the RA Constitution. The above, in turn, leads to a violation of the requirement prescribed by Article 75 of the RA Constitution, according to which, when regulating fundamental rights and freedoms, laws shall define the organizational structures and procedures necessary for their effective exercise. In such conditions, the issue of the impossibility of implementing the constitutional requirement to take into account the practice of the authorities operating under international human rights treaties ratified by the Republic of Armenia regarding the right to fair trial arises".

The applicant considers that under the legal regulations of parts 1, 4, and 5 of Article 35, part 3 of Article 309.1, and part 2 of Article 366 of the RA Criminal Procedure Code, the accuser is deprived of the opportunity to amend the legal qualification of the act in circumstances where, even though the criminal legal norm defining the corpus delicti, by which the person's act is qualified, is declared as contradicting the Constitution and void, nevertheless, the committed act corresponds to the characteristics of another corpus delicti prescribed by the RA Criminal Code. The applicant notes that the combined analysis of the above norms shows that the latter do not provide an opportunity to amend the charge by applying the respective and necessary procedural mechanisms, in particular in the case when the norm of the RA Criminal Code, which provides for and qualifies the act imputed to a person, is no longer in force, though that act apparently corresponds to the characteristics of the general corpus delicti defined by another norm of the RA Criminal Code.

Based on the above, the applicant draws the attention of the Constitutional Court to the need to consider the absence of the possibility of amending the legal qualification of the act in the context of the disputed legal regulations (in its assessment) as a legislative gap within the scope of the subject of legal regulation of part 3 of Article 309.1 of the RA Criminal Procedure Code, in the event of indicating the existence of which, according to the applicant, the provisions of parts 1, 4, and 5 of Article 35, and part 2 of Article 366 of the RA Criminal Procedure Code, systemically interrelated with the mentioned norm, would be subject to direct application within the scope of the given case, since the resolution of the case is possible only through the application of the disputed norms.

The applicant states that "(…) The legal issue raised before the Constitutional Court in this case is the following: in the event that the criminal law norm defining a special category of corpus delicti, which qualifies the act imputed to a person, is declared contradicting the RA Constitution and void, and in the absence of the possibility for the accuser to amend the legal qualification of the act and requalify it as another corpus delicti under the RA Criminal Code, and in the presence of a requirement for the court to terminate the criminal case proceedings and terminate the criminal prosecution, whether the existing legislative gap in relation to Article 309.1 of the RA Criminal Procedure Code and the interpretation given in law enforcement practice to the provisions of parts 1, 4, and 5 of Article 35, and part 2 of Article 366 of the RA Criminal Procedure Code, systematically interrelated with the latter, do not create a limitation of the function of the defense of the accusation, a violation of the victim's rights to judicial protection and a fair trial, including an insurmountable obstacle to the realization of the right to restoration of social justice and compensation, as well as the violation of the constitutional requirements to provide for organizational structures and procedures necessary for their implementation by law when regulating fundamental rights, and to take into account the practice of the authorities operating under international human rights treaties ratified by the Republic of Armenia when interpreting the provisions prescribed by the Constitution".

The applicant also notes that the legal regulations governing the criminal procedural institution of amending and/or supplementing the charge by the accuser do not provide for the possibility of amending or supplementing the charge in cases where it is necessary to amend only the legal qualification of the act, providing for such a possibility only in the event of amending the circumstances constituting the factual aspect of the charge.

According to the applicant, "(…) the legal regulations prescribed by the RA Criminal Procedure Code adopted on 30 June 1998 – insofar as they do not provide for the possibility of amending the legal aspect of the accusation during the judicial examination of the case if the criminal legal norm by which the act imputed to the person is qualified, is declared as contradicting the RA Constitution and void, which, as a result of the application of Articles 35 and 366 of the RA Criminal Procedure Code with the interpretation given in law enforcement practice, unconditionally leads to the termination of the criminal case proceedings and the termination of the criminal prosecution – are incompatible with the rights of a victim to judicial protection and a fair trial, as prescribed by part 1 of Article 61 and part 1 of Article 63 of the RA Constitution".

The applicant concludes that "(...) the legislative gap defined by Article 309.1 of the RA Criminal Procedure Code creates an insurmountable obstacle to the limitation of the function of the defense of the accusation, and the exercise of the rights (…) of a victim to judicial protection and a fair trial (...)".

3. Positions of the respondent

In particular, referring to Articles 61, 63, and 176 of the Constitution, the respective provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, citing the legal regulations stipulated by the contested provisions of the Code, and other relevant legal regulations, as well as the certain legal positions reflected in several acts of the Cassation Court and the European Court of Human Rights, the respondent finds that "Amending the factual circumstances of the charge serves as a basis for deciding to amend the charge under the procedure set forth by part 3 of Article 309^1 of the RA Criminal Procedure Code if amending these circumstances leads to amendments to the characteristics of the corpus delicti.

(…)

It should also be stated that amending the criminal legal qualification of an act imputed to a person by the court, while maintaining the guarantees established by the legislation, stems from the essence of the principle of fair examination of the case as prescribed by the Code. Amending the legal qualification of an act imputed to a person, while maintaining the legal guarantees established by the Code, cannot be

completely unpredictable, in particular, based on the factual circumstances of the act imputed to a person".

Referring to the issue of the existence of an alleged legislative gap raised by the applicant, the respondent cites the relevant legal positions of the Constitutional Court on the legislative gap and considers that "(…) when establishing the given legal regulation, the legislator took into account the existence of respective legal guarantees in the legislation and expected the formation of the relevant legal practice based on those legal guarantees, and the establishment of such a procedure was the legislator's purpose". The respondent states that "(…) in this case, there is no impossibility of overcoming the gap in the law, in particular, in the conditions when the legislator has established the possibility of the criminal legal qualification of the crime, and within a broad interpretation, it becomes possible to apply the given norm in the context of the regulations prescribed by Article 35 of the RA Criminal Procedure Code in its previous edition. In all cases, the institution of termination defined in the mentioned norm does not exclude the amendment of the criminal legal qualification of the crime (amending the charge) if the factual circumstances are sufficient".

The respondent requests: **"(…) to adopt a decision in the case on declaring the contested provision to conform the Constitution".**

4. Considerations to be clarified in the Case

Considering that the constitutional legal dispute in the present Case is confined to the issue of the alleged absence of a legislative possibility to amend the legal aspect of the charge purely during the trial of the case if the criminal legal norm – defining a special category of corpus delicti by which the act imputed to the person is qualified – is declared as contradicting the RA Constitution and void, for clarifying the constitutionality of the laws contested in this application in the context of effective judicial protection of the rights of a victim and guaranteeing the right to a fair trial, the Constitutional Court considers it necessary to address, in particular, the following question:

– Does part 3 of Article 309.1 of the Code – taking into account its interpretation in legal practice, according to which, the criminal law norm qualifying the act imputed to a person where it is declared as contradicting the Constitution and void during the trial of the case and leads to the impossibility of amending the charge by the accuser if the criminality of the act remains unchanged – comply with part 1 of Article 61 and part 1 of Article 63 of the Constitution in terms of the protection of the fundamental rights of a person with the procedural status of a victim, also taking into account the requirement prescribed by Article 75 of the Constitution according to which, when regulating fundamental rights and freedoms, laws shall define the organizational structures and procedures necessary for their effective exercise?

5. Legal positions of the Constitutional Court

5.1. In the context of the consideration of this constitutional legal dispute, when assessing the constitutionality of the contested provisions in terms of guaranteeing the protection of the rights and legitimate interests of the victim, the Constitutional Court states as follows:

According to part 1 of Article 61 of the Constitution, entitled ***"Right to Judicial Protection and Right to Apply to International Bodies of Human Rights Protection"***, everyone shall have the right to effective judicial protection of his rights and freedoms.

According to part 1 of Article 63 of the Constitution, entitled ***"Right to Fair Trial"***, everyone shall have the right to a fair and public hearing of his case within a reasonable period by an independent and impartial court.

The Constitutional Court has repeatedly addressed the disclosure of the constitutional legal content of the right to effective judicial protection in this regard, in particular expressing the following legal positions:

– "A person's constitutional right to judicial protection entails the positive obligation of the state to ensure that right both in the implementation of norm-setting and law enforcement activities. This implies, on the one hand, the obligation of the legislator to enshrine in the laws the possibility and mechanisms of full judicial protection, and, on the other hand, the obligation of the law enforcer to accept, without exception, the applications of persons addressed to them in a lawful manner, by which the persons seek legal protection from alleged violations of their rights" (Decision DCC-719 of 28 November 2007, point 6);

– "(...) Guaranteeing the realization of a person's right to apply to the court is a primary legal prerequisite for the judicial protection of a person's constitutional rights and freedoms" (Decision DCC-1257 of 10 March 2016, point 6).

By the Decision DCC-1477 of 24 September 2019, the Constitutional Court stated that "The Constitutional Court has repeatedly considered Articles 61 and 63 of the Constitution as a single legal phenomenon. This applies in particular to the right to access to justice as an element of the right to a fair trial.

Nevertheless, the legal regulation of Article 63 of the Constitution underlies the right to a fair trial, since in addition to establishing the framework for applying this right, it also establishes more general guarantees.

(…) The legal regulation of Articles 61 and 63 of the Constitution is based on those constitutional legal principles of guaranteeing the right to judicial protection of the rights and freedoms of a person in the context of which the Constitutional Court expressed its legal

assessments in its decisions. These positions also reflect the results of a comprehensive study of the international legal experience" (point 4.1).

The Constitutional Court has previously addressed the normative boundaries and guarantees of the constitutional right to effective judicial protection, or in other words, access to justice, in the decisions DCC-652, DCC-690, DCC-765, DCC-844, DCC-873, DCC-890, DCC-932, DCC-942, DCC-1037, DCC-1052, DCC-1115, DCC-1127, DCC-1190, DCC-1192, DCC-1196, DCC-1197, DCC-1220, and DCC-1222, establishing a list of legal guarantees for ensuring effective judicial protection, the full observance of which forms the necessary legal and structural prerequisites for the realization of the constitutional right to effective judicial protection. The guarantees relevant to the given constitutional legal dispute are as follows:

– No procedural feature or procedure may hinder or prevent the effective exercise of the right to apply to the court, render meaningless the right to judicial protection guaranteed by the Constitution, or become an obstacle to its exercise;

– No procedural feature may be interpreted as a justification for restricting the right of access to court guaranteed by the Constitution;

– Access to court (justice) may have certain limitations, which should not undermine the very essence of that right.

According to Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

According to the legal positions expressed by the European Court of Human Rights:

– "(…) the right to a fair trial, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights" (see Case of Běleš and Others v. the Czech Republic, application no. 47273/99, 12.11.2002, § 49);

– "(...) when applying procedural rules, domestic courts must avoid both excessive formalism that would infringe the fairness of the proceedings, and excessive flexibility that would result in the elimination of procedural requirements laid down by law" (see Case of Walchli v. France, application no. 35787/03, 26.10.2007, § 29, Peca v. Greece (no. 2), application no. 33067/08, 10.06.2010, § 30);

– "(...) the right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court" (see Case of Efstathiou and others v. Greece, application no. 36998/02, 27.07.2006, § 24, Case of Vamvakas v. Greece, application no. 36970/06, 16.10.2008, § 26, and Case of Louli-Georgopoulou v. Greece, application no. 22756/09, 16.03.2017, § 39);

– The State may apply limitations on the right of access to justice; however, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right of access to a court is impaired (see Case of Khalfaoui v. France, application no. 34791/97, final 14/03/2000, § 36).

Considering the case law established by the European Court of Human Rights, in the Decision DCC-1559 of 17 November 2020, the Constitutional Court stated that "(...) to ensure the effective implementation of the constitutional rights to judicial protection and a fair trial, it is necessary to legislatively guarantee both the access to a court, the possibility of applying to the court, and the legal possibility of examining the case by an independent and impartial court following the requirements of fairness, i.e. the principles of competition and equality".

The Constitutional Court states that as a full-fledged subject of criminal proceedings and acting on the side of the prosecution, the victim has a unique range of interests to pursue, which are aimed at restoring the subjective rights of the victim violated by the crime and compensating for the damage caused or forming the necessary legal grounds for compensation. In other words, if in court proceedings the accuser pursues the public-legal goals of protecting law and order, revealing crimes, and bringing the guilty to criminal liability in court, the victim, along with or through the goals mentioned above, pursues the legitimate interests of protecting his violated rights or freedoms and compensating for the damage caused to him. Therefore, including under Article 3 of the Constitution, which guarantees the fundamental right to life (Article 24), Article 75 which requires the provision of effective mechanisms for the implementation of the right to life as a directly applicable right, as well as Article 203 which stipulates that Article 3 of the Constitution is unamendable, the state is obliged to take effective legal and structural measures to guarantee the effectiveness of the procedural status of a victim and to define and practically implement the procedural rights arising thereof. Herewith, the full implementation of the procedural status of a victim largely depends on the existence of mechanisms for the effective implementation of the procedural rights reserved to the accuser and the guarantee of the conditions for their implementation.

As for the implementation of the functions of the prosecutor's office in criminal proceedings to initiate and conduct criminal prosecution and defend the charge in court, the Constitutional Court states that the above functions ensure not only the protection of **public**

interest in revealing crimes and bringing the perpetrator to criminal liability but also the protection of the **private** interests of a person with the procedural status of a victim, as a private participant in the proceedings.

According to part 1 of Article 58 of the Code, a person is considered a *victim* if he/she has suffered moral or physical injury, or property damage directly through an act forbidden by the Criminal Code. A person is also considered a victim if he/she might suffer moral or physical injury directly through a deed prohibited by the Criminal Code that might have been conducted.

Within the meaning of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly in its resolution 40/34 of 29 November 1985, the term "victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power (Annex, section "A", part 1). Victims are entitled to ***access to the mechanisms of justice*** and to prompt redress, as provided for by national legislation, for the harm that they have suffered (Annex, section "A", part 4).

The preamble to Recommendation No. R(85)11 of the Committee of Ministers of the Council of Europe of 28 June 1985 on the Position of the Victim in the Framework of Criminal Law and Proceedings specifically emphasizes that it was adopted considering that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender, consequently, the operation of this system has sometimes tended to add to rather than to diminish the problems of the victim. Meanwhile, it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim.

Within the scope of the Decision in criminal case No. EShD/0097/01/09 of 26 March 2010, the Cassation Court, inter alia, referred to the legal status of the victim and noted that "(...) **the legitimate interests of the victim include the recovery of the damage caused to him, the full disclosure of the circumstances of the act that caused harm to him and its correct criminal-legal qualification, as well as the conviction of the person who committed the crime against him and the imposition of fair punishment. One of the guarantees for ensuring these interests is the right of the victim to have his case examined "in compliance with all the requirements of justice"** (point 18).

In the context of the above, the Constitutional Court states that respect for the dignity of the victim and the effective protection of his rights and legitimate interests in criminal justice are the most important issues of criminal justice, the neglect of which may lead to a

degradation of the rights and freedoms of the victim, incompatible with the requirements of part 2 of Article 3 of the Constitution.

In this regard, it is necessary to guarantee the full-fledged realization of the victim's rights within the framework of criminal proceedings and the existence of appropriate legal mechanisms for their protection. Therefore, in light of the above-mentioned analysis of the constitutional legal content of the right to effective judicial protection, the Constitutional Court states that the protection of the legitimate interests of the victim is also conditioned by the provision of an effective opportunity for the public participant in criminal proceedings, i.e. the prosecutor, to initiate criminal prosecution against the person, who has allegedly committed a criminal act, *through effective mechanisms* and to carry out the functions of defending the charge.

During a court trial, the key function of the prosecutor as the prosecution party is to defend the charge. The effective implementation of this very function of the prosecutor depends on the instrumentality of ensuring the legitimate interests of the victim in all cases where the case also concerns an act prohibited by criminal law committed against the rights or freedoms of the victim. By implementing the respective function, the prosecutor acts not only for the sake of public interest but also for the sake of protecting the interests of the persons affected by the crime (mutatis mutandis, Constitutional Court Decision DCC-906 of 7 September 2010, point 6). As for the relevance of other constitutional powers of the prosecutor's office in other criminal procedural relations, the Constitutional Court has stated that "(...) under such legislative regulation, the prosecutor is the only defender of the interests of the victim within the framework of the above-mentioned constitutional powers (...)" (Decision DCC-1373 of 13 June 2017, point 6).

Thus, the full-fledged realization of the victim's rights is also conditioned by the proper implementation of the prosecutor's function, in particular, the function of defending the charge in court, as prescribed by point 3 of part 2 of Article 176 of the Constitution, which, in turn, is also conditioned by the existence of respective legal regulations at the legislative level and the existence of effective mechanisms within the framework of the latter.

Based on the aforementioned statements, the Constitutional Court considers it necessary to **address the issue of the proper and effective implementation of the prosecutor's function of defending the charge (as prescribed by the Code)** in light of the legislative limits of the exercise of the accuser's (prosecutor's) authority to supplement or amend the charges proposed against the defendant in a case under trial in the first instance court.

Part 1 of Article 309 of the Code, entitled *"Limits of Trial",* stipulates that the trial of the case in court shall be conducted only in respect of the defendant and **only within the**

scope of the charges proposed against the defendant. In other words, the scope of the trial is limited to the circle of the accused and the charges proposed against the latter.

In this context, criminal proceedings are a cognitive activity, due to which, at different stages (sub-stages) of criminal proceedings, it is objectively possible for new circumstances to emerge (be revealed) which – without being the result of shortcomings of criminal prosecution bodies, including the accuser (prosecutor) – would necessarily condition an objective need to amend the charges brought at the initial (sub)stages of criminal proceedings at the trial stage.

Bearing this in mind, the legislator has reserved the prosecutor with the authority to amend the charge in the first instance court. Thus, Article 309.1 of the Code, entitled ***"Limits on supplementing or amending the proposed charge"***, defines two regimes for amending the charge proposed against the defendant in a case under trial in the first instance court. One of them is prescribed by part 3 of the aforementioned article of the Code, and provides for the possibility of amending the charge without performing additional investigative and other procedural actions, in particular, the accuser may amend the charge before the court leaves for the deliberation room, including in terms of aggravation, if the **evidence examined** during the trial irrefutably proves that the defendant committed a crime other than he is imputed.

As a result of the substantive analysis of the above-mentioned provision of the law, the Constitutional Court states that, *without performing additional investigative and other procedural actions, the charge may be amended by the accuser exclusively in the event of the simultaneous existence of the following imperative conditions:*

(a) during the trial in the first instance court (the charge may be amended in both mitigating and aggravating aspects);

(b) before the court leaves for the deliberation room; and

(c) the evidence examined during the trial must irrefutably prove that the defendant committed a crime other than the one he is imputed.

In the Decision in criminal case No. EAKD/0002/01/13 of 13 September 2013, the Cassation Court stated that "The procedure defined by the aforementioned criminal procedural norm shall be applicable only in the case of examination of evidence during the trial (...)" (point 23).

In the Decision in criminal case No. ED/0147/01/19 of 10 May 2024, the Cassation Court stated that "(...) It follows from such legal regulations that the examination of evidence during the trial is considered a condition for amending the charge, and the amendment of the charge, that is not the result of the examination of evidence in court, is excluded. (…) As a result of the examination of evidence, only the factual circumstances

underlying the charge can be amended. The legal qualification of the act – expressing the relationship between the fact-law components of the charge – is beyond the scope of the evidence-fact relationship, therefore its amendment cannot be a direct result of the examination of evidence, which means that the legal element of the charge, i.e. the legal qualification, cannot be independently amended in court, without an amendment in the factual circumstances.

(…)

Based on the above, the Cassation Court states that to ensure the consistent implementation of the principle of justice, as well as the fundamental human rights guaranteed by the most important international legal instruments, it is necessary to review and develop the legal position previously expressed by the Cassation Court on the mechanism for amending charges without conducting investigative actions, indicating that the charge may be amended or supplemented without conducting investigative actions in part of the factual circumstances only in the case when, as a result of the examination of the evidence, circumstances have emerged and been confirmed that indicate the inevitability of proposing a new charge against a person. Therefore, in the case of the mechanism for amending charges without conducting investigative actions, the circumstances amending the charge must be essentially new, i.e., until that moment, they must be objectively beyond the awareness of the competent authority conducting the pre-trial proceedings" (point 11.1).

Thus, under the semantic boundaries of the text of part 3 of Article 309.1 of the Code, the Cassation Court by its judicial interpretations gave the mentioned norm such content, according to which the amendment of the charge without conducting investigative actions was conditioned exclusively by the amendment in the factual circumstances underlying the charge as a result of the examination of evidence, **considering it impossible to amend the charge in court without examining the evidence during the trial**.

The second regime for the accuser to amend the charge in court allows for amending the charge by performing investigative and other procedural actions (parts 1 and 2 of Article 309.1 of the Code). In particular, if during the trial in the first instance court, the accuser finds that the charge proposed is subject to supplement or amendment in terms of aggravation or mitigation since circumstances have emerged that were unknown and could not have been known during the pre-trial proceedings and that the factual circumstances of the case do not allow for supplementing or amending the charge without postponing the trial, the accuser submits to the court a motion to supplement or amend the charge proposed and to postpone the trial for proposing a new charge.

A prerequisite for the operation of the above-mentioned regime of amending the charge in court is the emergence of circumstances that were unknown and could not have been known during the pre-trial proceedings: therefore, in each specific case, when

considering a motion to amend the charge and postpone the trial for proposing a new charge, the court assesses whether or not the factual circumstances that served as the basis for amending the scope (limits) of the charge were known during the pre-trial proceedings, or whether they could have been known.

In this regard, in the Decision DCC-872 of 2 April 2010 on the review of the constitutionality of parts 1 and 2 of Article 309.1 of the RA Criminal Procedure Code, the Constitutional Court stated that "(…) the legislator has established several mandatory preconditions for the exercise of the right of the accuser to supplement or amend the charge and to file a motion to postpone the trial for proposing a new charge, which are designed to guarantee the protection of the rights and freedoms of the participants in criminal proceedings, and which must be unconditionally taken into account in judicial practice. Those preconditions are as follows:

(a) if circumstances have emerged that were unknown and could not have been known during the pre-trial proceedings;

(b) if the factual circumstances of the case do not allow supplementing or amending the charge without postponing the trial;

(c) the court must assess the existence of the grounds mentioned above;

(d) the hearing may be postponed solely to carry out necessary investigative and other procedural actions, and propose a new charge;

(e) the hearing may be postponed for no more than one month, except in cases where a longer period is reasonably required to carry out the necessary investigative and other procedural actions;

(f) the postponement cannot be aimed at supplementing an incomplete preliminary investigation carried out previously.

The Constitutional Court states that, according to the interpretation submitted by the Cassation Court, the regulations prescribed by Article 309.1 of the Code allow the accuser to amend the charge during the trial only in limited cases, and in the case of two legal regimes for amending the charge in court (through the performance of investigative and other procedural actions and without performing additional investigative and other procedural actions), **amending the charge is possible exclusively by amending the factual aspect of the charge (not excluding the possibility of amending the legal aspect due to the amendment in the factual aspect).**

As a result, the legislative regulations of part 3 of Article 309.1 of the Code, as interpreted in legal practice, exclude an independent amendment in the legal aspect of the charge, regardless of the amendment in the factual aspect of the charge.

The Constitutional Court, however, considers it necessary to state that the amendment in the legal aspect of the charge, i.e. the legal assessment of the act, may not always be associated with the amendment in the factual aspect of the charge. A situation is possible when there is a need to amend the legal aspect of the charge, i.e. the legal assessment of the act, without the amendment in the factual aspect of the charge.

A similar situation may also arise if the criminal law norm characterizing the act imputed to the defendant is declared by the Constitutional Court as contradicting the Constitution and void.

Such a situation is not related to the amendment in the factual aspect of the charge, therefore, it cannot be revealed as a result of the examination of evidence, and the performance of investigative or other procedural actions.

At the same time, the aforementioned interpretation in legal practice – in terms of excluding the amendments in the legal assessment, regardless of the factual aspect of the charge – paralyzes the implementation of the constitutional function of the prosecutor's office to defend the charge, inter alia, leading to the violation of the private interests of the victim(s) protected thereby.

Based on the above, the Constitutional Court states that the interpretation that – according to the legislator's approach, an independent amendment of the legal aspect of the charge, regardless of the amendment in the factual aspect of the charge, is impossible and cannot serve as a basis for amending the charge without conducting investigative actions – is in itself problematic in terms of constitutionality.

The Constitutional Court states that the interpretation in the legal practice of the contested provision of the Code – according to which the amendment in the legal assessment of the act by the accuser without amending the factual aspect of the charge is excluded if the criminal law norm providing for a special category of crimes qualifying the act imputed to the defendant is declared by the Constitutional Court as contradicting the Constitution and void – leads to the impairment of the guarantee of protection of the rights of the victim, violation of the principle of the rule of law, and serious threats to legal security.

5.2. According to Article 75 of the Constitution, when regulating fundamental rights and freedoms, laws shall define the organizational structures and procedures necessary for their effective exercise. The stated requirement is aimed at the effective and actual implementation of the fundamental rights and freedoms prescribed by the Constitution since the mere enshrining of a right or freedom is not sufficient for the full-fledged realization of the given legal opportunity: therefore, **the enshrining of the respective structures and**

procedures at the legislative level is a necessary guarantee to ensure the effective implementation of fundamental rights and freedoms.

Within the framework of Decision DCC-1546 of 18 June 2020, the Constitutional Court referred to the content of Article 75 of the Constitution stating that "(…) any legislative regulation, and not just any restriction of a fundamental right or liberty, should aim to and provide for (3) *organizational* (4) *structures* and (5) *procedures* (2) *necessary for the* (1) *effective exercise* of all fundamental rights. Only the simultaneous existence of all these conditions in any legislative regulation, especially in a legislative regulation restricting the fundamental right or freedom, can ensure its compliance with the Constitution" (point 4.5).

Within the framework of Decision DCC-1571 of 8 December 2020, the Constitutional Court stated that "The state must create the necessary guarantees for the effective realization of human rights and freedoms. The state is obliged not only to recognize, respect and protect rights and freedoms, but also to create state legal structures that can effectively prevent and eliminate any violations, and restore the violated rights and freedoms" (point 4.1).

According to the study of the materials of this Case, **the legal norm providing for a special crime, i.e. Article 300.1 of the RA Criminal Code, served as the basis for the criminal legal qualification of the alleged acts imputed to the defendants** within the framework of the criminal case No. ED/0253/01/19, **being declared as contradicting Articles 78 and 79 of the Constitution and void by the Constitutional Court Decision DCC-1586 of 26 March 2021, and according to the accuser in this Case, it became necessary to assess the alleged act committed by the latter under a new legal norm providing for a different crime,** however, under the conditions of the respective (contested) legal regulations, the possibility of requalifying the act and continuing the criminal case proceedings with a new charge by only amending the legal qualification of the act, is excluded.

In light of the above, the Constitutional Court states that such an interpretation of the respective legislative regulations – when the norm providing for a special category of corpus delicti under the RA Criminal Code (a special category of corpus delicti separated from the general category of corpus delicti under the RA Criminal Code, as a particular manifestation thereof) is declared as contradicting the Constitution and void due to the termination of its force, the implementation of the function of defense of the charge in criminal proceedings becomes impossible due to the fact that the legal assessment of the charge cannot be amended, and the termination of criminal prosecution and/or the termination of the criminal case proceedings occurs – does not ensure the effective implementation of the requirements prescribed by Article 75 of the Constitution, hinders/disrupts the implementation of the constitutional legal function of defense of the charge, as a result also leading to a violation of the rights of the victim(s) to judicial protection and a fair trial.

The Constitutional Court considers that law enforcement agencies should interpret the existing organizational structures and procedures in such a way that, in case the Constitutional Court declares the legal norm of the RA Criminal Code providing for a special category of corpus delicti as contradicting the Constitution and void, the latter should ensure the possibility of the accuser to amend exclusively the legal aspect of the charge in court, independently of the factual aspect of the charge, thereby, the realization of the function of the accuser to defend the charge, which would allow ensuring the protection of the interests of the victim in criminal proceedings and the realization of the latter's rights to effective judicial protection and fair trial, thus preventing possible threats to legal security. Otherwise, the exclusion of the possibility by the accuser to amend the legal qualification of the act under the conditions of the termination of the operation of the norm defining the special corpus delicti of the RA Criminal Code, that is, the impossibility of requalifying the act with the norm defining the general corpus delicti, leads to a violation of the rights (guaranteed by part 1 of Article 61 and part 1 of Article 63 of the Constitution) of persons having the status of victims in criminal proceedings.

5.3. The Constitutional Court considers it necessary to assess the constitutionality of part 3 of Article 309.1 of the Code in the systemic interrelation with part 1 of Article 309.1 of the Code.

According to part 1 of Article 309.1 of the Code, if during the trial in the first instance court, the accuser finds that the charges proposed are subject to supplement or amendment in terms of aggravation or mitigation since circumstances have emerged that were unknown and could not have been known during the pre-trial proceedings and that the factual circumstances of the case do not allow for supplementing or amending the charge without postponing the trial, then the accuser submits to the court a motion to supplement or amend the charge proposed and to postpone the trial to propose a new charge. The accuser may submit such a motion before the court leaves for the deliberation room.

Part 1 of Article 309.1 of the Code defines the possibility of supplementing or amending the charge by the decision of the accuser during the court proceedings in the event of objectively unknown circumstances during the pre-trial proceedings. Moreover, the legislator has provided for two regimes for amending the charge, namely, immediately after the need to amend the charge arises – in the same court session, or, in case of impossibility – by supplementing or amending the charge and proposing a new charge to the accused after the court postpones the court session.

In the context of this application, the Constitutional Court considers it necessary to address the objective scope of circumstances that are objectively unknown in pre-trial proceedings. The Constitutional Court finds that to clarify the aforementioned issue, it is necessary to reveal the purpose of the legislator, based on the general issues of criminal

proceedings. Thus, according to part 1 of Article 2 of the Code, criminal proceedings are conducted to ensure the protection of the individual, society, and the state from crime, as well as for the protection of the individual and society from arbitrary actions and abuses of state power in connection with actual or alleged criminal offenses. According to part 2 of Article 2 of the Code, the bodies conducting criminal proceedings are obliged to take all measures so that as a result of their activities, everyone who has committed an act prohibited by the criminal codes is identified and held accountable in the cases provided for by the criminal law and in the manner prescribed by the Code, no innocent person is suspected, accused or convicted of committing a crime, as well as no one is subjected to unlawful or unnecessary procedural coercion, punishment, or other restrictions on rights and freedoms.

It follows from the cited legal provisions that:

– the primary objective of criminal proceedings is the existence of a society and state free from crime or at least with low crime, where the rights of the person would be protected from criminal encroachments; and

– the state, represented by competent state authorities, shall bear a positive obligation to identify and prosecute those who have committed crimes.

The Constitutional Court notes that by defining the general issues of criminal proceedings, the legislator has attached importance to ensuring legal order by identifying and prosecuting those who have committed crimes. Moreover, by crime, the legislator has meant any crime defined by the RA Criminal Code, which is imputable to a person following the procedure prescribed by the RA Criminal Procedure Code. In other words, the legislator has considered the criminal proceedings legitimate and effective, by which the bodies conducting the criminal proceedings would provide all the means to reveal publicly dangerous acts and bring the perpetrators to criminal liability. One of these measures is the qualification and requalification of the act imputed to the person by the body conducting the proceedings, through which, in the presence of respective grounds and evidence, the person's conduct is subject to criminal assessment, based on the relevant corpus delicti of the RA Criminal Code, which most accurately and specifically models the person's unlawful conduct.

Such an interpretation of the legal norm under discussion also expresses the need to guarantee the rights of the victim in criminal proceedings, when a certain conduct of a certain person has caused criminal legal consequences, including causing harm to the victim, which is subject to restoration by the administration of justice through the implementation of the respective effective mechanisms, which is a mandatory requirement of the constituent power (Article 75 of the Constitution).

In this case, the Constitutional Court notes that guided by the principle of determining the criminality and punishability of an act by the law in force at the time of the commission

of the crime, as prescribed by part 1 of Article 12 of the RA Criminal Code (2003), the accuser cannot objectively foresee the adoption of a decision by the Constitutional Court on declaring the article qualifying the act imputed to the accused (defendant) as contradicting the Constitution and void: consequently, if during the court proceedings it is proven that the relevant legal norm of the RA Criminal Code has been declared as contradicting the Constitution and void by the decision of the Constitutional Court, and the accuser considers that the committed act can be qualified by another current article of the RA Criminal Code, then he is entitled, based on Article 309.1 of the Code, to take steps aimed at supplementing or amending the charge, assessing the circumstance that:

(a) an event of a crime is present;

(b) persons have been injured as a result of a crime; and

(c) the involvement and objective link of the accused to that act have been preserved, and the charges against the latter have not been refuted through due legal procedure.

At the same time, taking into account that Article 35 of the Code does not contain a specific basis for terminating criminal prosecution based on the fact that the Constitutional Court has declared unconstitutional the norm of the RA Criminal Code defining the corpus delicti of a crime, the amendment of the charge by the accuser – if the acts remain criminal – cannot be considered in the light of the violation of the principle of legality and the right to a fair trial, taking into account that they equally ensure the protection of the interests of the parties in resolving the issues of criminal proceedings.

Summarizing the above, the Constitutional Court considers that part 3 of Article 309.1 of the RA Criminal Procedure Code adopted in 1998, is in conformity with the Constitution by the interpretation according to which, if the Constitutional Court declares the norm of the RA Criminal Code – by which the act imputed to the defendant was qualified – as contradicting the Constitution and void, the accuser may change the charge proposed against the defendant (the legal qualification of the act imputed to him) before the court leaves for the deliberation room, if the defendant's act contains the characteristics of another act prescribed by criminal law, regardless of the examination of evidence during the trial.

Based on the results of the examination of the Case and guided by part 1 of Article 167, point 1 of Article 168, part 4 of Article 169, and parts 1 and 2 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 **DECIDED:**

1. Part 3 of Article 309.1 of the RA Criminal Procedure Code adopted in 1998, is in conformity with the Constitution by the interpretation according to which, if the

Constitutional Court declares the norm of the RA Criminal Code – by which the act imputed to the defendant was qualified – as contradicting the Constitution and void, the accuser may change the charge proposed against the defendant (the legal qualification of the act imputed to him) before the court leaves for the deliberation room, if the defendant's act contains the characteristics of another act prescribed by criminal law, regardless of the examination of evidence during the trial.

2. According to part 2 of Article 170 of the Constitution, this Decision shall be final and enter into force upon its promulgation.

PRESIDING JUDGE A. DILANYAN

22 July 2024

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