

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

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**ON THE CASE CONCERNING THE CONSTITUTIONALITY OF PART 1  
OF ARTICLE 117 OF THE FAMILY CODE OF THE REPUBLIC OF ARMENIA,  
RAISED BY THE APPLICATION OF THE FIRST INSTANCE COURT OF  
GENERAL JURISDICTION OF SHIRAK MARZ OF THE REPUBLIC OF  
ARMENIA**

City of Yerevan

14 January 2025

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

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

the applicant: the First Instance Court of General Jurisdiction of Shirak Marz, 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,

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 1 of Article 117 of the Family Code of the Republic of Armenia, raised by the application of the First Instance Court of General Jurisdiction of Shirak Marz of the Republic of Armenia.

The RA Family Code (hereinafter also referred to as “the Code”) was adopted by the National Assembly on 9 November 2004, was signed by the President of the Republic on 8 December 2004, and entered into force on 19 April 2005.

Part 1 of Article 117 of the Code, entitled “*Age difference between the adopter and the adopted child*”, stipulates:

“1. The age difference between the adopter and the adoptee must be no less than 18 years and no more than 50 years, except in cases where the child is adopted by persons having preferential rights to adopt”.

In the cited version, the contested provision was formulated in Law HO-10-N of 21.12.2017.

This Case was initiated by the application of the RA First Instance Court of General Jurisdiction of Shirak Marz, which was submitted to the Constitutional Court on 26 July 2024 based on the decision of 24 July 2024 of the same court in civil case No. ShD/6930/02/22 “On applying to the Constitutional Court and suspending the proceedings in the civil case”.

Having examined the application, the written explanation of the respondent, and other documents in the Case, as well as having analyzed the contested and relevant legal provisions, the Constitutional Court **ESTABLISHED:**

### **1. Positions of the Applicant**

The First Instance Court of General Jurisdiction of Shirak Marz (hereinafter also referred to as “the Court” or the “Applicant”), in particular, states as follows: “(...) in the case under its consideration, the age difference between the second Applicant and the adopted Child is (...) [exceeds 50 years], the presence of which fact, according to point 1 of Article 117 of the RA Family Code, precludes the possibility of adoption, furthermore, **under such conditions the Court can no longer consider the best interests of the adopted child**, taking into account that the disclosure of that fact cannot entail any other consequences”.

The Applicant finds that “Part 1 of Article 117 of the RA Family Code is problematic from the perspective of the constitutional principle of prioritizing the best interests of the child in matters concerning the child (...), **insofar as it precludes the court (competent authority) from identifying and assessing the best interests of the child in a specific case and, in the presence of exceptional grounds, from waiving the application of the maximum age difference threshold limit of ‘no more than 50 years’ between the adopter and the adoptee**”.

Referring to the relevant provisions of the Code, the RA Civil Procedure Code, and the Law “On Normative Legal Acts”, the Applicant concludes that “(...) Article 117 of the RA Family Code cannot be interpreted in any manner other than the literal meaning of the words and expressions contained therein, namely, where the facts of the case establish that the age difference between the adopter (in the case of spouses, at least one of them) and the adoptee exceeds 50 years and the exceptions specified in the same article are missing, the need to disclose the best interests of the child no longer exists and

the application for the request for approval of adoption is subject to rejection or in other words: ***the courts are precluded from waiving the application of the maximum age difference threshold due to the best interests of the child***’.

In this regard, the Applicant raises the issue of compliance of the contested provision of the Code with part 2 of Article 37 of the Constitution.

Referring to the relevant provisions of the United Nations (hereinafter also referred to as “the UN”) Convention on the Rights of the Child of 1989 (entered into force for the Republic of Armenia on 22 July 1993), and the respective legal positions of the Constitutional Court, the Cassation Court and the European Court of Human Rights relating to the best interests of the child, the Applicant states: “(...) the child shall have the right to have his best interests identified and given primary consideration, and the possible impact of a certain decision on the child’s rights and interests must be disclosed when making decisions concerning the child”.

The Applicant believes that **“the age difference (this refers to the maximum age difference threshold) may serve as a basis for rejecting the request for approval of adoption; at the same time, the impact of that difference should be considered in the context of the comparison and assessment of other circumstances worthy of attention relating to the interests of the child, the possibility of implementation of which was precluded by the contested norm”**.

The Applicant adds that international documents establish criteria regarding the minimum age of the adopter, still, no such criterion is established regarding the maximum age: for instance, the Revised European Convention on the Adoption of Children stipulates that there shall be an appropriate age difference between the adopter and the child, having regard to the best interests of the child, preferably a difference of at least 16 years. The said Convention does not set a maximum age difference and, even in the cases where a minimum age difference is specified, it allows for deviations from this requirement due to exceptional circumstances.

The Applicant concludes that part 1 of Article 117 of the Code is problematic in terms of the constitutional principle of giving priority to the interests of the child in matters concerning the child, insofar as it precludes identifying and assessing the best interests of the child in a specific case and, in the presence of exceptional grounds, from waiving the application of the maximum age difference limit of “no more than 50 years” between the adopter and the adoptee.

## **2. Positions of the Respondent**

Referring to Articles 36 and 37 of the Constitution, the relevant provisions of the Convention on the Rights of the Child, citing the contested provision of the Code and other relevant legal regulations, the respective legal positions of the Cassation Court and the

European Court of Human Rights, the National Assembly (hereinafter also referred to as “the Respondent”), in particular, notes: “In a number of cases, the legislator has granted the courts the discretion to deviate from statutory rule due to the best interests of the child, noting this in the relevant norm, while **the clarification of the procedure for selecting a foster parent should allow for reasonable confidence that a foster parent has been selected who has sufficient abilities and resources to provide for the child’s upbringing, health, and full and harmonious development.** Elderly parents encounter challenges emerging over time that might not be problematic at the time of adoption but could later hinder the child’s care and development. Therefore, the court, in practice, may be unable to accurately assess the child’s best interests for the mentioned period of time, i.e., to objectively foresee long-term challenges”.

The Respondent also states: “The norms establishing the maximum age limit for adoptive parents aim to ensure that adoption is in the best interests of the child. Adoption is a lifelong commitment. Age limits ensure that adoptive parents have the maturity and relevant experience necessary to provide a stable environment for the child’s development. Younger or older parents may face different challenges that may affect their ability to meet the child’s needs. Age limits help balance these factors, enabling adoptive parents to physically meet the child’s developmental needs in the long term, namely, to be able to plan for the child’s future, provide education, and provide emotional support. Age limits also address a number of social issues, namely, elderly parents approaching retirement age, which can complicate income planning and the adequate provision of children’s needs”.

**According to the Respondent: “The establishment of a [maximum] age limit helps to create a consistent standard for the assessment of all prospective adoptive parents. It ensures that decisions are based on objective criteria, rather than the court’s individualized judgments about the individual abilities of the adoptive parent in a particular situation, guided solely by the best interests of the child. Since courts cannot practically predict in the long term the physiological changes of the adoptive parent due to age and make them the subject of assessment, and therefore also to properly assess the best interests of the child.** In addition, it is necessary to pay attention to the circumstance that the issues subject to assessment are not so much legal as social in nature and that they may emerge over a certain period of time. Therefore, it is not realistic to carry out a rational assessment of these circumstances within a certain precise period of time”.

The Respondent states that the establishment of the age limit is based on objective and reasonable criteria, aiming to achieve the legitimate goal of balancing the best interests of the child, and the physical and mental abilities of the adopter, the effective exercise of parental rights to ensure the needs of the child at different stages of their development, which should exclude individualized judgments of the court, taking into account the high

risk of possible obstacles appearing in the long term (decisions on age limits are often based on scientific evidence and medical examinations).

Based on the foregoing, the Respondent claims that “the age limit is justified, it pursues the goal exclusively of ensuring the best interests of the child and stems from the principles of ensuring certain social guarantees”.

### **3. Considerations to be clarified in the Case**

In order to determine the constitutionality of the contested provision of the Code, the Constitutional Court considers it necessary to address, in particular, the following questions:

– Whether the requirement prescribed by part 1 of Article 117 of the Code refers to the constitutionally guaranteed right of the child to have his interests given priority consideration in matters concerning him, and if so, whether the mentioned right is subject to any interference (restriction), and whether the contested legislative regulation is constitutional from the perspective of ensuring the best interests of the child.

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

**4.1.** Article 37 of the Constitution, entitled “*Rights of a Child*”, reads as follows:

“1. A child shall have the right to express his views freely, which shall be taken into consideration in matters concerning the child in accordance with his age and maturity.

2. In matters concerning the child, the interests of the child shall be a primary consideration.

3. Every child shall have the right to maintain a regular personal relationship and direct contact with his parents, unless, according to a court decision, it is contrary to the child’s interests. Details shall be prescribed by law.

4. Children left without parental care shall be under the care and protection of the state”.

Article 3 of the Constitution, entitled “*The human being, his dignity, fundamental rights and freedoms*”, reads as follows:

“1. The human being shall be the supreme value in the Republic of Armenia. The inalienable dignity of the human being shall be the integral basis of his rights and freedoms.

2. The respect for and protection of the fundamental rights and freedoms of the human being and the citizen shall be the duties of the public power.

3. The public power shall be bound by fundamental rights and freedoms of the human being and the citizen as the directly applicable law”.

Thus, by placing the rights of the child under high constitutional protection, the constituent power has also enshrined constitutional guarantees for ensuring these rights, which are of fundamental importance both in terms of the development of legislation regulating the rights and legitimate interests of the child, and law enforcement practice in line with the Constitution, in particular:

(1) *The right of the child to express his views freely in matters concerning him, in accordance with his age and level of maturity, which must be unconditionally taken into account.* This regulation gives key importance to the appreciation of the child's expression of will in matters of family law, contributing to the enhancement of his role in the family and society, ultimately creating a favorable environment for the child's physical, mental, and social development;

(2) *The right of the child to maintain regular personal relations and direct contact with his parents, except for cases where, according to a court decision, this is contrary to the interests of the child;*

(3) *The circumstance that the child left without parental care is under the care and protection of the state, which implies an unquestionable obligation of the public power to consider every child left without parental care under its high care and protection;*

(4) *The prerequisite for the child's interests to be given primary consideration in matters concerning the child, which acquires fundamental importance in terms of guaranteeing the rights of the child, taking into account its key role in the formation of a culture of respecting and promoting the rights of the child. The recognition and strict implementation of the constitutional principle of guaranteeing the interests of the child ensure that, in relevant decision-making processes, the interests of the child are given primary consideration in matters concerning him.*

The Constitutional Court's Decision DCC-1333 of 20 December 2016 states: "(...) part 2 of Article 37 of the RA Constitution places a clear obligation on the public power to give primary consideration to the interests of the child in matters concerning him. Therefore, the purpose of the constituent power is to protect the interests of the child first in matters concerning him, where there are different interests, and then the other existing interests, and in cases where these interests conflict, the public power is obliged to protect the interests of the child.

(...)

**Following part 3 of Article 3 of the RA Constitution, the provisions of Article 37, in particular of parts 1 and 2, shall be directly applicable, and judicial practice is obliged to be guided by this requirement" (point 7).**

Based on the above provisions of the Constitution and the cited legal positions of the Constitutional Court, the Constitutional Court states that **the right of the child to have his interests given primary consideration in matters concerning him** - as prescribed by part 2 of Article 37 of the Constitution - **shall prevail over all other possible interests**, and there cannot be any rights, the exercise of which would restrict the mentioned right of the child. The Constitutional Court also considers it necessary to state that other subjects participating in the relevant legal relations, in this case, persons who have expressed a wish to adopt, shall not have any subjective right in the adoption process that does not stem from the said interest of the child, or any obligation that does not correspond to it.

Similarly, the public power - being obliged to respect and protect the rights of the child, in particular the right envisaged in part 2 of Article 37 of the Constitution - is obliged not only, as a negative obligation, to refrain from actions that endanger the realization of fundamental rights as a directly applicable right, but also as a positive obligation to ensure their effective realization by providing for appropriate regulations, and before that, i.e., in the absence of regulations, to ensure the **direct realization** of these rights by revealing their content in a specific case and, as a result, by adopting **acts subject to mandatory implementation**.

Based on all of the above, the Constitutional Court states that due to the contested regulation, the legislator pursued the goal **not of limiting the right of the child to have his interests given primary consideration in matters concerning him, but of regulating the exercise of that right based on the best interests of the child**.

**4.2.** Having examined the application and other materials of the case, the Constitutional Court states that to ensure the right of the child to have his interests given primary consideration in matters concerning him, the legislator - within the framework of the regulation of legal relations on adoption - has established a prohibition on adoption based on the maximum age difference for adoption by persons who do not have preferential rights to adopt, which **prevents the adoption of a child by a person wishing to adopt, regardless of any other circumstances in the case**.

The Constitutional Court states that the above regulation is defined by the Code, which meets the qualitative characteristics of the law. In particular, the contested provision is intelligible and certain; moreover, it is formulated as a prohibiting absolute (not providing for reservations) norm, thus precluding the possibility of assessing the relevance of any other fact after establishing the fact of the maximum age difference established by law and any judicial interpretation of the content of the contested provision. In this light, the Constitutional Court expresses its consent with the Applicant's assertion that in this Case, "by judicial interpretation, it is impossible for the Applicant to overcome the reasonable doubt about the contradiction with the Constitution of the norm subject to application".

The Constitutional Court considers it necessary to note that it agrees with the positions presented by the Respondent, which substantiate the legitimacy of the objectives of the contested provision, as outlined in point 2 of this Decision. Refraining from reiterating those positions, the Constitutional Court, nevertheless, considers it essential to highlight two circumstances:

1. Although the concerns or risks underlying the goals stated by the Respondent are objectively justified, however, they are of predictive, presumptive and approximate nature, and are based on concerns about the dangers that **may, as a rule, arise** in the event of an age difference between the adoptive parents and the adopted child exceeding the maximum threshold; moreover, these dangers are assumed (presumed) by the legislator exclusively in the case of persons who do not have a preference for adoption.

2. The court is deprived of the **authority to assess the likelihood (reality) of these dangers materializing in each specific case, and as a result, the ability to examine and state the fact that the possibility mentioned above is also realistic in a given case.**

In other words, the Constitutional Court states that while pursuing legitimate goals when adopting the contested provision, the legislator substantiated it with the **presumption based on reasonable probabilities, but not subject to review by judicial cognition. On the other hand, the Constitutional Court finds that by the prohibition under discussion, the legislator attempted to provide for a more effective regulation that ensures the realization of the best interests of the child.**

**4.3.** The Constitutional Court deems it necessary to consider whether the disputed method of dispelling the legitimate concerns underlying the contested regulation of the right of the child under consideration - in the form of establishing a prohibition on adoption without reservations - **complies with part 2 of Article 37 of the Constitution from the perspective that the child is deprived of the opportunity to have all the circumstances of the specific case concerning him assessed by the court. In other words, whether the regulation - based on assessing the probability of negative consequences for the child foreseen by the legislator with such an adoption as already a reality or fact in each specific case - is in line with the best interests of the child, thereby depriving the courts of the possibility of assessing the inevitability of the materialization of such a possibility in a specific case concerning a given child.**

The Constitutional Court's Decision DCC-919 of 5 October 2010 states: "In this case, the issue concerns the concept of 'interests of children' used in part 3 of Article 53 of the RA Family Code and the disclosure of its characteristic features. Moreover, the mentioned concept is subject to **assessment in each specific case**, based on a comprehensive analysis of all the factual circumstances of a given case.

(...)



In part 3 of Article 53 of the RA Family Code, the conditions listed after the phrase ‘whereas’ oblige the courts to take these conditions as a basis when assessing the interests of the child, as well as, guided by their discretionary authority, **also to consider other conditions as a basis if the court believes there are any” (point 6).**

Thus, the constitutional recognition and enshrining of the rights of the child is an effective guarantee of the realization of his right to legal protection, ensuring his well-being, his right to be heard, and maintaining regular personal relationships and direct contact with his parents, and the effective provision and protection of the above depends on the respective commitment of the state, on which the overcoming of the gap between constitutional values and the realities experienced by the child directly depends.

The principle of guaranteeing the “(best) interests of the child” has also been enshrined in a number of international legal documents. In particular, according to the first paragraph of Article 3 of the *Convention on the Rights of the Child*, “**In all actions concerning children**, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**”, and according to the second paragraph, “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, **and, to this end, shall take all appropriate legislative and administrative measures**”. The first paragraph of Article 18 of this Convention prescribes: “(...) Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern”.

The United Nations Committee on the Rights of the Child, in its General Comment No. 14 (2013) of 29 May 2013 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), specifically addressing the best interests of the child, underlined that the concept of the “child’s best interests” consists of the following elements:

(a) A substantive right: The child has the right to have his or her best interests assessed and taken into account in all actions or decisions that concern him or her. Moreover, this right has priority over other rights. Article 3, paragraph 1 of the 1989 UN Convention on the Rights of the Child creates an intrinsic obligation for the States parties, is directly applicable and can be invoked before a court.

(b) *A fundamental, interpretative legal principle*: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen.

(c) *A rule of procedure*: **Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.** Evaluating and determining the child’s best interests require procedural guarantees. Furthermore, **the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations** (Introduction, A. The best interests of the child: a right, a principle and a rule of procedure, paragraph 6)<sup>1</sup>.

In the same document (paragraph 10), the United Nations Committee on the Rights of the Child also stated that all states must ensure that the best interests of the child are taken as a primary consideration in decisions that concern him or her, both by courts of law, administrative authorities, and legislative processes, in particular at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines, as well as during all measures aimed at their implementation.

The Preamble to the 1996 European Convention on the Exercise of Children’s Rights states that the member States recognise the importance of the parental role in protecting and promoting the rights and best interests of children and considering that, where necessary, States should also engage in such protection and promotion. According to Article 6 of the same Convention, in proceedings affecting a child, the judicial authority, before taking a decision, shall consider **whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information**, in particular from the holders of parental responsibilities (paragraph ‘a’), and according to Article 8, **in proceedings affecting a child the judicial authority shall have the power to act on its own motion in cases determined by internal law where the welfare of a child is in serious danger.**

Referring to the concept of the “best interests of the child”, the European Court of Human Rights has expressed the legal position that the best interests of the child cannot be determined by a general legal assumption and **depends on the particular circumstances of the case**, taking as a basis the primacy of the interests of the child (Schneider v. Germany, Application no. 17080/07, 15.09.2011, FINAL 15.12.2011, §100).

As for the relationship between a child and his parents, the European Court of Human Rights has held that Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms requires that the domestic authorities should strike a fair balance

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<sup>1</sup> General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), adopted by the Committee at its sixty-second session (14 January – 1 February 2013), <https://www.refworld.org/legal/general/crc/2013/en/95780>

between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents (Rytchenko v. Russia, Application no. 22266/04, 20.01.2011, FINAL 20.04.2011, §39).

Thus, the principle of ensuring the (best) interests of the child serves at the international and constitutional levels as a guiding standard for decision-making concerning children, transcending cultural, legal and political boundaries, ensuring that the rights of children, their welfare, and ensuring their full and harmonious development must always be taken into account as a primary consideration.

**4.4.** In line with the above-mentioned principles and regulations, the legislator has established respective regulations based on the internationally accepted constitutional idea of protecting the rights of the child and the primacy of his best interests.

The second sentence of Article 1 of the Law “On the Rights of the Child” stipulates that the child shall be under the tutelage and protection of society and the state. According to part 1 of Article 8 of the same law, every child shall have the right to living conditions necessary for the full physical, mental, and spiritual development.

According to part 7 of Article 1 of the Code, entitled “*Fundamental Principles of Family Legislation*”, “Any action taken against the child must be in his best interests. Ensuring the best interests of the child is aimed at the effective and full implementation of the rights of the child prescribed by the Constitution and laws of the Republic of Armenia, as well as the development of the child, taking into account the child’s mental and physical needs, the possibility of appropriate care and upbringing to meet those needs, the importance of returning to the family or living with the family, the importance of communicating with the parent and other family members for the child’s development, the issue of nationality, the child’s cultural, linguistic, spiritual or religious ties or upbringing and significance in the family environment, and other needs, requirements and interests (hereinafter referred to as ‘the best interests of the Child’).” According to part 8 of the aforementioned article of the Code, “If any norm can be applied differently, the best interests of the Child shall be a primary consideration when applying it”.

In accordance with the first sentence of part 1 of Article 43 of the Code, the child shall have the right to protection of his rights and legitimate interests.

In the context of the above, the Constitutional Court emphasizes that **the state, having undertaken by the Constitution to guarantee the rights of the child, must create appropriate prerequisites for the stable development of the child, ensuring the application of the principle of guaranteeing “the best interests of the child” in all actions and decisions concerning him, including in the processes of exercising the right to adoption, emphasizing the right of the child left without parental care to live and be**

**raised in a family, since the presence of a healthy family environment is of key importance in the life of the child in terms of his comprehensive physical, emotional, social and mental development.**

Expressing unconditional commitment to the primacy of the rights of the child, the legislator has also stipulated in the Code several legal regulations on the adoption of children, *considering adoption a preferable form of organizing the care and upbringing of children left without parental care.*

Chapter 18 of the Code, entitled “*Adoption of Children*”, refers to the general legal regulation of adoption-related relations, i.e., children subject to adoption, the procedure and conditions for their adoption, the registration of children subject to adoption and persons wishing to adopt children, persons entitled to adopt, and other issues.

According to the first paragraph of part 1 of Article 112 of the Code, adoption is a judicial act by which the adoptee shall acquire family ties equivalent to biological ties, due to which the adopters and the adoptees shall acquire the rights and obligations prescribed by law for parents and children. Adoption shall be carried out in the best interests of the child, based on the assessment of the criteria for comparability of the adopter and the adoptee established by the Government.

In that regard, the Constitutional Court states that **the principle of ensuring the best interests of the child is of key importance in the adoption process**, therefore, the procedures related to adoption, the legal provisions establishing clear criteria and procedures for the selection of adoptive parents must aim to ensure that **the adoption process serves the best interests of the child and provides a permanent, full, stable family environment and ties** that would allow the child to grow up in a healthy and safe environment with parents who have parenting skills and abilities. **In any decision-making related to adoption, both in the legislative and law enforcement spheres, priority shall be given to implementing opportunities to ensure the full physical, psychological, spiritual, and moral development of the child, taking into account the possible impact of adoption on the child’s future.**

4.5. Addressing the contested legal regulation in the context of the above, the Constitutional Court states:

According to part 1 of Article 117 of the Code, the age difference between the adopter and the adoptee must be no less than 18 years and **no more than 50 years**, except in cases where the child is adopted by persons having preferential rights to adopt.

The contested provision essentially establishes **minimum and maximum age differences between the adopter and the adopted child. An exception to age differences is provided only for persons who have the right of preference to adopt a child.**

The provision by the legislator of the maximum age difference between the adopter and the adoptee, which is the subject of discussion in this Case, aims to *establish and strengthen the link between the child and the person who expressed a wish to adopt*, taking into account the fact that the **apparent maximum age difference can indeed disrupt the formation of a parent-child psycho-emotional bond**. In such conditions, taking into account ethical considerations and social values, the standard of living of the population, health, mortality rates, as well as the consequences of late parenthood and its possible impact on the physical, emotional and psychological development of children, the legislator has established the minimum age thresholds for persons wishing to adopt, as well as the maximum thresholds, which are the subject of discussion in this Case.

Considering the above, the Constitutional Court deems it necessary to note that **in addition to the application of instrumentalities to overcome the maximum age difference threshold, the state has established at the legislative level such effective adoption procedures, under which some of the concerns underlying the prohibition under discussion can be dispelled**. Among the aforementioned instrumentalities, **the scope of persons entitled to adopt** is of key importance. According to part 1 of Article 116 of the Code, the right to adopt shall be granted to an adult registered as a person wishing to adopt a child under the procedure established by the Government, who has participated in the preparatory courses prescribed by part 4 of the aforementioned article. The mentioned provision of the Code also defines the scope of persons who are not entitled to adopt:

- (a) persons declared by the court as having no or limited active legal capacity;
- (b) spouses, one of whom has been declared by the court as having no or limited active legal capacity;
- (c) persons who have been deprived of parental rights or whose parental rights have been restricted through judicial procedure;
- (d) persons removed from the duties of a legal guardian (curator) for improper performance of the duties imposed on them by law;
- (e) former adopters, if the adoption was terminated by the court through their fault;
- (f) persons who, due to health conditions, cannot exercise parental rights;
- (g) persons who, at the time of adoption, do not have an income sufficient for ensuring the minimum living conditions of the adopted child;
- (h) persons who do not have a permanent place of residence, as well as a living space that meets the established sanitary and technical requirements;
- (i) persons having a conviction for a grave or particularly grave criminal offense against a human being or public order and morality at the time of adoption.

According to part 4 of the same article of the Code, “In order to provide psychological, pedagogical and legal support to a person wishing to adopt a child, the authorized state administrative body of the Government of the Republic of Armenia shall conduct free preparatory courses”.

In addition, according to the first paragraph of part 2 of Article 113 of the Code, *for the adoption of a child by a citizen of the Republic of Armenia, a conclusion of the Marzpetarans /regional administrations/ (Yerevan Municipality) of the Republic of Armenia on the justification of the adoption and compliance of the adoption with the interests of the adopted child is required*, indicating information on the fact of personal contacts between the adopted child and the adopter (adoptors), and *in the case of the adoption of a child of the Republic of Armenia by foreign citizens and stateless persons, as well as citizens of the Republic of Armenia residing outside the Republic of Armenia, a conclusion of the central body on the justification of the adoption and compliance of the adoption with the interests of the adopted child*. Moreover, **the court shall have exclusive jurisdiction to approve the adoption, which is of fundamental importance in terms of guaranteeing the legitimacy of this process.**

The above gives grounds to conclude that the implementation of the institution of adoption, in light of the primary guarantee of the best interests of the child, is and should **consistently** be under the watchful eye of the state.

**4.6.** Based on the above, the Constitutional Court considers it necessary to state that **the prohibition on adoption due to the maximum age difference threshold (without allowing any exceptions)** as prescribed by the contested provision, **deprives law enforcement of any opportunity to take into account all the circumstances of each specific case, in other words, to assess them as facts of legal significance and to derive legal consequences therefrom.** Considering that the mentioned circumstances may contain **facts relevant** to the child’s right to have his interests given primary consideration in matters concerning him, the legislator’s initial exclusion of their relevance to make a judicial act is although based on concerns expressing the best interests of the child, however, it precludes the possibility of taking into account other circumstances, including those expressing the best interests of the child.

**In addition, the aforementioned prohibition is independent concerning other legislatively established mechanisms aimed at dispelling the aforementioned concerns, i.e., it applies to those persons who have the right to adopt in the absence of such a prohibition. The Constitutional Court is convinced that the aforementioned is worrying from the perspective of the justification of the means for achieving a legitimate aim in the sense that at least some of the concerns underlying the prohibition on adoption due to the maximum age difference should be dispelled within the framework of the regulations of Article 116 of the Code, according to which, persons**

**who, inter alia, due to their health condition, cannot exercise parental rights, may not have the right to adopt.**

Moreover, contrary to the above-cited position of the *United Nations Committee on the Rights of the Child* that “**Whenever a decision is to be made that will affect a specific child (...), the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child (...)**”, the regulation of the contested provision also deprives the Court of the opportunity to assess the prospects of a positive impact of a decision allowing an adoption, in each case forcing the Court to reflect in its judicial act refusing an adoption exclusively the concern of the legislator to avoid the possible exclusively negative consequences underlying the prohibition of adoption.

**4.7. Thus, the Constitutional Court states that the prohibition imposed due to the maximum age difference threshold set by the contested provision is of concern from the perspective of the best interests of the child, as it deprives the courts of the opportunity to assess also the positive impact of such an adoption in the best interests of the child, as well as to dispel concerns about the negative impact through a comprehensive analysis of the circumstances of the case, thus depriving the State of the opportunity to effectively implement its negative and positive obligations under the right established by part 2 of Article 37 of the Constitution.**

**In this context, the Constitutional Court considers it important to address the issue of what criteria and evidentiary standards should be applied by the courts to make an exception to the prohibition (legislatively prescribed by the contested provision) stemming from legitimate objectives, by directly applying part 2 of Article 37 of the Constitution.**

The Constitutional Court states that the above-mentioned positions of the Constitutional Court and relevant international specialized institutions stipulate the standards and criteria, the sustainable and predictable application of which in judicial practice would reasonably ensure that the discretion to make an exception to the prohibition prescribed by the contested provision - conditioned by the interests of the child - does not lead to arbitrariness of the law enforcement. In particular, the requirements subject to mandatory implementation in each case are as follows:

(a) The prohibition imposed by the contested provision is a presumption arising from scientifically substantiated conclusions that, as a rule, the best interests of the child require that the maximum age difference between the adopter and the adoptee does not exceed 50 years. It follows from this fact that this presumption can be rebutted: 1) **in exceptional cases**, by a **decision substantiating** a 2) **full, comprehensive and objective examination** of all the circumstances of a certain case, and 3) by a **decision specifically substantiating** the exceptionality of the circumstances of a certain case, that is, a decision that dispels all

reasonable concerns of the legislator underlying the prohibition given the circumstances of a certain case. In other words, if a rule (prohibition) simply requires the existence of a factual basis for the application of that rule (a difference of 50 years), then in order to make an exception to the rule, it is necessary that the exception made therefrom be specifically justified;

(b) The obligation to dispel all concerns in the judicial act - arising from the guarantees indicated in the previous paragraph - implies that the court must consider it as proven that **the risk of occurrence of all the negative consequences** - that the legislator considered to be the basis for establishing the said prohibition **and** as a result of making an exception, from the perspective of the best interests of the child - is missing; **at the same time, there is a reasonable prospect of positive effects and/or consequences;**

(c) The Court's conclusions regarding the absence or presence of the above-mentioned negative or positive impact and/or consequences of the reasonable prospect, respectively, must be supported by a combination of facts that complement each other and exclude the contrary **beyond a reasonable doubt.**

Based on the results of an 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. To declare part 1 of Article 117 of the Family Code of the Republic of Armenia contradicting part 2 of Article 37 of the Constitution and void insofar as, by establishing a prohibition on adoption due to the maximum age difference between a person who does not have preferential rights to adopt and the adoptee, it does not provide for any exceptions to that prohibition, thus depriving law enforcement of the opportunity to take into account all the circumstances of each specific case, namely, the best interests of the child.

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**

14 January 2025

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