

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

**ON THE CASE OF CONFORMITY OF PARTS 7 AND 8 OF ARTICLE 1087.2 OF THE
CIVIL CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION ON
THE BASIS OF THE APPLICATION OF THE FIRST INSTANCE COURT OF
GENERAL JURISDICTION OF YEREVAN**

Yerevan

March 3, 2020

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

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

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

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

pursuant to clause 1 of article 168, part 4 of article 169 of the Constitution, as well as article 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of parts 7 and 8 of article 1087.2 of the Civil Code of the Republic of Armenia with the Constitution on the basis of the application of the First Instance Court of General Jurisdiction of Yerevan.

The Civil Code of the Republic of Armenia (hereinafter – the Code) was adopted by the National Assembly on 5 May 1998, signed by the President of the Republic on 28 July 1998 and entered into force on 1 January 1999.

Parts 7 and 8 of article 1087.2 of the Code, titled: **“Procedure for and conditions of compensation for non-pecuniary damage caused as a result of violation of fundamental rights and wrongful conviction”**, stipulate:

“7. The amount of compensation may not exceed:

1) 3000-fold of the minimum salary, in the cases of violating the rights envisaged by clauses 1 and 2 of part 2 of article 162.1, as well as part 3 of the same article;

2) 2000-fold of the minimum salary, in the cases of violating the rights envisaged by clauses 3-9 of part 2 of article 162.1.

8. The amount of compensation for non-pecuniary damage may, in exceptional cases, exceed the maximum threshold envisaged by part 7 of this article, where grave consequences have been emerged as a result of the damage caused.

The above-mentioned article of the Code was supplemented in accordance with the Law HO-21-N of 19.05.14, amended, supplemented and edited in accordance with the Law HO-184-N of 21.12.15, and edited in accordance with the Law HO-21-N of 16.12.16.

The case was initiated on the basis of the application of the First Instance Court of General Jurisdiction of Yerevan submitted to the Constitutional Court on 25 September 2019, which included the decision of the same Court on “Applying to the Constitutional Court” on the case YD/0217/02/19 of 19 September 2019.

Having examined the application and the attached documents, the written explanations of the respondent, other documents of the case, as well as having analyzed a number of provisions of the Code, the Constitutional Court **FOUND:**

1. Applicants’ arguments

The applicant finds that “Such indicators as publicity, fair trial, and effectiveness of the court will be devaluated if, in the course of the administration of justice, a judge encounters disproportionate and unreasonable restrictions on substantive norms in the event of an alleged violation of protected value, in particular if the process equivalent to the essence of this right is not ensured, which disproportionately restricts the powers of the court and disproportionately imposing on the applicant a disproportionate requirement in relation to the value protected or a disproportionate burden for restoring the right violated by the State’s interference in this value”.

Referring to article 61 of the Constitution, the applicant notes that a person’s right to freedom will be imaginary if the legal system does not allow the court to establish effective means for proportional compensation in cases of violation of this right, when the court is really deprived of the possibility of “establishing compensation of more than 2000-fold, if the grave consequence is not

justified, but there is a consequence”, namely, a person, for instance, was imprisoned for 5, 10, 15, 20 years, which in itself should be considered a well-known fact, and not a fact to be proved, and the current Law provides such an imperative requirement.

According to the applicant, being guided by the legislatively established regulation, the court is forced to state that the holder of the violated right, for example, did not prove the grave consequences that occurred “as a result of unlawful deprivation of liberty, regardless of the length of the person’s unlawful punishment, or the court is forced to establish such amount of compensation which, in its opinion, it is not justified from the perspective of emergence of consequences (we are not talking about grave consequences) being limited only by the maximum threshold of 2000-fold of the minimum salary”.

In the applicant's opinion, the challenged provisions “should not nullify the rights that protect the persons participating in the case and demanding compensation for a possible violation of fundamental rights and fair liability, allowing the Court to independently decide on the amount of compensation and (or) allowing the Court to establish a larger amount of compensation, raising the maximum threshold of compensation and (or), depending on the duration of deprivation of liberty, to consider that grave consequences have occurred, without justifying it through an additional set of facts”.

Referring to part 1 of article 62 of the Constitution, the applicant considers that it establishes a specific reason-purpose for the protection of this right due to unlawful deprivation of liberty, the order of application of which must be established by law. In this case, the constitutional principle of proportionality dictates to the legislator that in this case, when choosing legislative means guaranteeing the right of a person to compensation due to restriction of personal liberty, the latter were necessary and sufficient for achieving the objective established by the Constitution. The means chosen by the legislator must be equivalent to the importance of the restricted fundamental right or freedom.

Based on the foregoing, the applicant asks to resolve the issue of compliance with articles 3, 23, 27, 61, 62, 75, 78, 79, 80 and 81 of the Constitution of the challenged provisions “in full or insofar as they provide for extremely low maximum amounts of compensation or even establish such amounts, do not establish specific amounts of compensation on the basis of the duration of the violation of the law, regardless of the requirement to prove the existence of any consequence, as

well as an additional set of facts is required for cases of establishing compensation above the maximum threshold, i.e. proof of grave consequences”.

2. Respondent’s arguments

Referring to the relevant articles of the Constitution, the positions of the Constitutional Court, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), the positions established in the case-law of the European Court of Human Rights, as well as the positions of the Cassation Court expressed in respect of compensation for non-pecuniary damage, the respondent considers that within the framework of the challenged provisions, the possibility for the person to exercise the right to compensation for damage and to a fair trial is not limited.

According to the respondent, the legislator has established the procedure and criteria for compensation for non-pecuniary damage, through which a person receives reasonable and fair compensation. “At the same time, the right of a person to compensation is guaranteed quite definitely, which follows from considerations of guaranteeing human rights, and prevention of arbitrariness by law enforcement authorities”.

The respondent notes that the Code provides a provision whereby an unjustly convicted person can receive compensation exceeding the maximum amount of compensation for damage established by law, provided that the latter provides sufficient evidence that grave consequences have arisen for him as a result of an unfair conviction. According to the respondent, such an exception is not an end in itself and should not be based on assumptions and probabilities, therefore, the court, as a body administering justice and based on the principles of reasonableness, fairness and proportionality, should conduct a comprehensive, complete and objective examination of the case taking into account the evidence proving the validity of the circumstances submitted by the parties.

Based on the foregoing, the respondent considers that in connection with rendering a lawful and substantiated decision by the court, the person’s obligation to submit evidence is indicated, since uncertainty and doubt should remain beyond the justification of the decision. Consequently, in determining the amount of non-pecuniary damage suffered by a person, the court cannot but take into account the degree of validity of the claim submitted by the person, since only in this case the court will be able to establish a proportionate and fair compensation for the damage.

As regards bringing the amounts of non-pecuniary damage established by domestic law in accordance with the requirements of the case law of the European Court, the respondent notes that such a difference cannot lead to unconstitutionality of the challenged provisions, since the legislative experience of European countries and the requirements of the case law of the European Court imply not the establishment of similar amounts of compensation in domestic legislation, but pursue the aim to ensure the full and effective exercise of the right each person to compensation for damage, therefore, domestic legislation should establish such amounts of compensation for damage, due to which a person will be able to receive proportional and fair compensation for non-pecuniary damage.

Based on the foregoing, the respondent concludes that parts 7 and 8 of article 1087.2 of the Code are in conformity with the Constitution.

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

Taking into account that the applicant raises the issue of constitutionality of imposing the maximum limit of compensation for non-pecuniary damage by the challenged provisions, given that the possibility of providing compensation above these amounts is provided only in exceptional cases when grave consequences have occurred, the Constitutional Court considers it necessary to address the following questions:

- Does the establishment of the maximum amount of compensation for non-pecuniary damage ensure the full realization of the person's right to compensation for damage prescribed in article 62 of the Constitution, and also does it hinder the possibility of effective exercise of the person's right to judicial protection?

- Are the legal regulations established by the challenged provisions regarding the amount of compensation for non-pecuniary damage in consonance with the principles of certainty and proportionality prescribed in the Constitution, and are the restrictions prescribed therein exceed the restrictions established by international treaties of the Republic of Armenia?

4. Legal assessments of the Constitutional Court

4.1. According to part 1 of article 62 of the Constitution, everyone shall have the right to compensation for damage inflicted by unlawful actions or inaction of state and local self-

government bodies and officials, and in cases prescribed by law, also by lawful administration. The law shall define the conditions and procedure of compensation for damage.

Article 17 of the Code also counts non-pecuniary damage – which is subject to compensation in cases prescribed by law – among the relevant damages. Referring to the issues of compensation for non-pecuniary damage, in the Decision DCC-1121 of 5 November 2013 the Constitutional Court stated: “The constitutional legal content of a number of provisions of the RA Constitution indicates that moral damage and possibility of pecuniary compensation for the moral damage derive from the constitutional legal approaches established in the sphere of protection of human rights. Thus, part 1 of article 3 of the RA Constitution stipulates: “The human being, his dignity and the fundamental human rights and freedoms are an ultimate value”. In this concern, the Constitutional Court finds that one of the pivotal elements of the human dignity, inter alia, is to be free from the moral distress conditional on individual features”.

Based on the foregoing, the Constitutional Court states that the right to compensation for damage caused by unlawful actions or inaction, and in cases established by law, also by the legitimate administration of state bodies, also includes the possibility of compensation for non-pecuniary damage in cases provided by law.

Considering the importance of compensation for non-pecuniary damage, as well as taking as a basis the above-mentioned Decision of the Constitutional Court, the legislator supplemented the Code with articles 162.1 and 1087.2, which establish provisions regarding the procedure and conditions, as well as the amount of compensation for non-pecuniary damage.

Referring to the legal regulations regarding the compensation for non-pecuniary damage caused as a result of a violation of fundamental rights and unfair conviction, the Constitutional Court considers it necessary to emphasize the following:

Firstly, unlike material damage, the amount of non-pecuniary damage cannot be determined accurately. Since non-pecuniary damage is the physical or mental suffering of a person, first of all, a person should be able to assess the amount of monetary compensation for such suffering;

Secondly, non-pecuniary damage is compensated from the state budget or the corresponding community budget, which suggests that when determining the amount of compensation, the financial capabilities of the state or community are also taken into account;

Thirdly, the final amount of non-pecuniary damage, i.e. monetary compensation is determined by the court, based on the principles of reasonableness, justice and proportionality, as

well as taking into account the nature, degree and duration of physical or mental suffering, the consequences of the damage caused, the presence of guilt when causing damage, personal characteristics of the person who suffered non-pecuniary damage, and other relevant circumstances;

Fourthly, for monetary compensation for non-pecuniary damage, the maximum limit is set by which a person requiring compensation and a court are burdened (with a certain reservation or exception).

It follows from the foregoing that, in addition to establishing the conditions and procedure for compensation for non-pecuniary damage caused as a result of a violation of fundamental rights and unfair conviction, the maximum amount of monetary compensation for this damage was also subjected to legal regulation by the legislator.

So, in case of violation of the right to life or the right not to be subjected to torture, inhuman or degrading treatment or punishment, as well as when the convicted person is acquitted under the conditions prescribed in Article 3 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), 3000-fold of the minimum salary was chosen as the maximum amount of compensation for non-pecuniary damage, and 2000-fold of the minimum salary - in case of violation of the right to personal liberty and integrity, the right to a fair trial, the right to respect for personal and family life, the inviolability of the home, the right to freedom of thought, conscience and religion, free expression of one's own opinion, the right to freedom of assembly and association, the right to an effective remedy, and the right to property.

Nevertheless, the Constitutional Court states that the establishment of a maximum amount of monetary compensation for non-pecuniary damage together with the legal regulations on specific conditions and the procedure for compensation for such damage does not prevent or limit the full exercise of the right of a person to effective judicial protection. In this aspect, the regulations in the Code are aimed at balanced protection of private and public interests, and the general criteria prescribed in the law make it possible to assess and determine the monetary value of the compensation for non-pecuniary damage, taking into account the combination of factual circumstances for each specific case.

In the Decision DCC-1383 of 07.11.2017, the Constitutional Court expressed the following position: "... the legislator has authorized the court to define the equivalent amount of compensation for non-pecuniary damage in each particular case, at the same time stipulating the highest standards

(the maximum amount of compensation) to which the court should be guided by the case review. Consequently, the Constitutional Court finds that the specific content of the “adequate amount” of compensation for non-pecuniary damage, based on the legal regulation of article 62 of the Constitution, should be disclosed as a result of lawful activity”.

4.2. The Constitutional Court also states that, by the challenged provisions, the legal regulations concerning the amount of compensation for non-pecuniary damage, in general, envisage for a person two main restrictions on the right to receive monetary compensation, namely, the type of violated fundamental right and the monetary value of the maximum amount of compensation (with a certain reservation or exception).

By nature and content, grounds and volume, degree of specificity and causing consequences, those restrictions do not violate the essence of the right to receive compensation for the damage caused, do not infringe its value or significance, as well as allow the holder or addressee of this right to engage in appropriate conduct.

In this regard, it should be noted that Article 3 of Protocol No. 7 to the Convention prescribes: “When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated **according to the law or the practice of the State concerned**, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him”. That is, each State itself determines the procedure and amount of compensation, therefore, the provision of the maximum amount of compensation for damage is within the competence and discretion of the State.

4.3. The Constitutional Court also considers it necessary to refer to the circumstance that, together with the limitation of the maximum amount of non-pecuniary damage to be compensated 2000-fold of the minimum salary, the Code in exceptional cases envisaged the possibility of providing compensation in a larger amount if grave consequences occurred as a result of the damage.

The Constitutional Court considers that by virtue of this special regulation, part 8 of article 1087.2 of the Code, in case of claiming a compensation amount exceeding the maximum threshold, has also provided an additional obligation of proof for a person, among the general requirements for justifying the damage suffered (justification of the fact of violation of a law, the time limit for filing

a claim, amount compensation), namely, to substantiate in essence the exclusivity of the given case and the presence of grave consequences. Moreover, it is noteworthy that the legislation does not disclose which cases are exceptional and what consequences can be considered as grave.

For the purpose of consideration of the provisions challenged in the present case from the perspective of the constitutional legal principle of **legal certainty**, the Constitutional Court considers it necessary to refer to the following assessments. In particular, in the Decision DCC-1270 of 3 May 2016, the Constitutional Court noted: “Even in the case of the most clearly formulated legal norm, judicial interpretation is not excluded. There is always a need to clarify legal provisions and bring them into line with changing circumstances i.e. evolving social relations. Consequently, the certainty and clarity of legislative regulation cannot be absolutized; even insufficient clarity can be supplemented by court interpretations”.

In addition, the Constitutional Court stated in the Decision DCC-780 of 25.11.2008, that the certain concepts used in the laws cannot be self-sufficient. Their content and the frame of characteristic indicators are specified not only as a result of legislative activity, but also in judicial practice.

The analysis of the terms “**in exceptional cases**” and “**grave consequences**” prescribed in part 8 of article 1087.2 of the Code and their comparison with the legal regulation of part 7 of the same article shows that certain cases must have an “unusual” or “extraordinary” nature, so that the amount of compensation for the non-pecuniary damage could exceed the maximum limit prescribed in part 7 of article 1087.2 of the Code.

In the conditions of such legal regulations, the court, in the light of the person’s request, must first assess the exclusivity of the given case, then the occurrence of grave consequences as a result of the damage caused, and only after a positive conclusion on the latter the court must determine how much the amount of non-pecuniary compensation for damage can exceed the maximum limit prescribed in part 7 of article 1087.2 Code.

The Constitutional Court considers that in a democratic and legal state, any alleged case of violation of fundamental rights and unfair conviction should be assessed as exceptional, and for each person requiring compensation for the non-pecuniary damage caused as a result of such violation, it is exceptional in its own way. No case of compensation of non-pecuniary damage on this basis can be considered exceptional in relation to another. Therefore, it should not provide for an additional obligation for a person to justify the “unusualness” of his physical or mental suffering.

For the same reason, the court should not assess the circumstances of a particular case on its own or from the perspective of exclusivity compared with the circumstances of another relevant case, and should not substantiate own decision on this vague criterion.

The Constitutional Court also notes that the establishment of an uncertain obligation to justify the exclusivity of a case of violation of fundamental rights and unfair conviction imposes a disproportionate burden on the person who tries to restore his violated rights, which deprives him of the right to effective judicial protection of his rights.

4.4. At the same time, the Constitutional Court considers it necessary to state that the need to overcome additional legal barriers by the person is proportional to the value protected by the state, in the event the latter submits a claim for monetary compensation for non-pecuniary damage exceeding the maximum threshold prescribed by law.

In the event of a violation of a similar right, with the likelihood of receiving greater monetary compensation compared with another person, the person must prove the circumstances (which may be considered or assessed as grave consequences), that certainly differ or identifiably vary from other cases. Such circumstances may reasonably become the basis for exceeding the maximum threshold of non-pecuniary compensation for damage provided by law: for instance, unlike other cases, as a result of an unfair conviction, a person may get disability or other harm to health, and in case of violation of the right to inviolability of the home, information regarding personal life may be published.

Therefore, the Constitutional Court states that the concept of “grave consequences” is subject to assessment by the court in each particular case, based on a comparative analysis of all the factual circumstances of the certain case. The court considering the case is competent to decide on the fact whether the consequences arisen as a result of the damage caused to a given person is grave or not.

The amount of non-pecuniary compensation for damage that exceeds the maximum threshold prescribed by law must be determined by the court, based on the criteria prescribed in parts 5 and 6 of article 1087.2 of the Code.

Regarding the above-mentioned, the Constitutional Court considers it necessary to refer to the judgment of the European Court of Human Rights in the case of Poghosyan and Baghdasaryan v. Armenia (application no. 22999/06, 12.06.2012), in which the Court stipulated that “... the purpose of Article 3 of Protocol No. 7 was not merely to recover any pecuniary loss caused by wrongful conviction but also to provide a person convicted as a result of a miscarriage of justice with

compensation for any non-pecuniary damage such as **distress, anxiety, inconvenience and loss of enjoyment of life**. No such compensation had been available to the first applicant”.

In addition, the Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which is an interpretation of the provisions of Protocol No. 7, states that in all cases in which the preconditions of Article 3 of Protocol No. 7 are satisfied, compensation is payable according to the law or practice. This does not mean that no compensation is payable if the law or practice makes no provision for such compensation. It means that the law or practice of the State should provide for the payment of compensation in all cases to which the article applies. Paragraph 25 of the Report also states that: “The intention is that States would be obliged to compensate persons only in clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent. The article is not intended to give a right of compensation where all the preconditions are not satisfied, for example, where an appellate court had quashed a conviction because it had discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge”¹.

Obviously, the guarantee envisaged in Article 3 of Protocol No. 7 to the Convention in practice can be ensured not only in cases where domestic legislation will establish certain compensation criteria, but also as a result of practice that has arisen as a result of determining the amount of compensation at the court’s discretion. Paragraph 25 of the Report also states that there should be no legislative obstacle to the provision of compensation, which directly concerns the determination of the amount of compensation.

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

1. Part 7 of article 1087.2 of the Civil Code of the Republic of Armenia is in conformity with the Constitution.

¹ Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22.XI.1984, Commentary on Article 3, p. 5-6.

2. To declare the expression “in exceptional cases” prescribed in part 8 of article 1087.2 of the Civil Code of the Republic of Armenia contradicting part 1 of article 61, articles 78 and 79 of the Constitution and void.

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

Chairman

H. Tovmasyan

March 3, 2020

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