For the Republic of Armenia

The Decision of the Constitutional Court of the Republic of Armenia

Based on the applications filed by Tigran Karapetyan and Levon Ter-Petrosyan on the case concerning the "Challenging the decision # 24-A of the Central Electoral Commission of RA dated on 24 February 2008 on "Election of the President of the Republic of Armenia"

Yerevan 8 March, 2008

The Constitutional Court of the Republic of Armenia by the following composition:

G. Harutyunyan (President), K. Balayan, H.Danielyan (reporter), F. Tokhyan (reporter), V.Hovhannisyan, Z.Ghukasyan, H.Nazaryan (reporter), R.Papayan,

with the participation of:

Applicant party: Presidential Candidate Tigran Karapetyan, his representatives A. Ghazaryan, R.Stepanyan,

Applicant party: Presidential Candidate Levon Ter-Petrosyan, his representatives A. Zeynalyan, V. Grigoryan, P.Ohanyan

respondent party in the case: the representatives Central Electoral Commission (hereinafter – CEC) of the Republic of Armenia chairman G.Azaryan, CEC Secretary A.Baghchagulyan, attorney D. Mantashyan,

as co-respondents: representatives of the Prosecutor's Office Deputy General Prosecutor A.Tamazya, Senior Prosecutor of the Prosecutor's Office K.Piloyan, Prosecutor of the State Interests Protection Department D.Davtyan, Representatives of the Police adjunct to the Cabinet of RA first deputy of the Police A.Mahtesyan, Deputy head of the Police head of the general investigatory department G. Hambardzumyan, representative of National Commission on TV and Radio G.Amalyan, head of the license division of the license and method department of the same Commission A.Arzumanyan, as well as senior specialist of program monitoring and supervision department L.Shahbazyan,

third party, enrolled in the case under article 74 (5) of the Law on the Constitutional Court of RA, representatives of S.Sargsyan, Chairman of the permanent commission of the National Assembly D.Harutyunyan and lawyer K.Petrosyan,

in accordance with the articles 51 (5), 100(3.1), 101(9) of the Constitution and articles 25 and 74 of the Law on the Constitutional Court of RA

in an open hearing adjudicated the case concerning on the applications filed by Tigran Karapetyan and Levon Ter-Petrosyan on the case concerning the "Challenging the decision # 24-A of the Central Electoral Commission of RA dated on 24 February 2008 on "Election of the President of the Republic of Armenia".

The occasion of the case were the applications filed at Constitutional Court by Tigran Karapetyan on 27.02.08 and by Levon Ter-Petrosyan on 29.02.08.

The Constitutional Court accepted the application of Tigran Karapetyan by its procedural decision.

At the same time by the same procedural decision, under article 74 (4) of the Law on Constitutional Court of the Republic of Armenia as respondent party the CEC, as co-respondent – RA Prosecutor's Office, Police, National Commission on Television and Radio were enrolled. By the procedural decision of the Constitutional Court dated on 1 March 2008 the application of Levon Ter-Petrosyan was accepted for adjudication. The cases initiated on base of the applications filed by Levon Ter-Petrosyan and Tigran Karapetyan were joined under article 39 of the Law on Constitutional Court by the procedural decision of the Court dated on 1 March 2008, for being adjudicated in one case before the Court. Presidential Candidate in Presidential Elections 2008 S.Sargsyan was enrolled in the case as third party by the procedural decision of the Constitutional Court dated on 1 March 2008, in accordance with the article 74(5).

Having heard the joint report of the judges, the explanations of the representatives of parties to the case, having examined and compared the arguments and counterarguments presented by them, as well as examining the applications and other documents of the case, the Constitutional Court of the Republic of Armenia found out:

1. The election of the President of Republic of Armenia was held on 19 February 2008 in accordance with the time frames prescribed in article 51 of the Constitution. Under article 15 of Electoral Code of RA for the purpose of organizing and carrying out the voting 1923 PECs were formed. In accordance with the article 17.1 of the Electoral Code of the Republic of Armenia 41 TECs were created in the territory of the Republic of Armenia. According to article 31 of the same code three-grade system of electoral commissions was composed: central electoral commission, territorial electoral commissions and precinct electoral commissions. The whole process of elections was organized and supervised by the central electoral commission.

2. The Central Electoral Commission summarized the results of the Presidential elections of 19 February 2008 by its decision # 24-A dated on 24 February 2008. According to the summarizing protocol filed by the CEC at Constitutional Court, the number of all ballot papers which were voted for all 9 candidates is 1.632.666, which was distributed among the candidates as follows: A. Baghdasaryan – 272.427 votes, A.Geghamyan – 7.524 votes, T.Karapetyan – 9.792 votes, A.Harutyunyan – 2.892 votes, V.Hovhannisyan – 100.966 votes, V.Manukyan – 21.075 votes, A.Melikyan – 4.399 votes, S.Sargsyan – 862.369 votes, Levon Ter-Petrosyan – 351.222 votes.

   Based on the abovementioned results and being governed by the articles 83 and 84(1) of the Electoral Code of RA, the CEC adopted its decision # 24-A on 24 February 2008, according to which Serge Azati Sargsyan was elected as President of the Republic of Armenia.
3. The applicants think that it is necessary to consider invalid the CEC decision # 24-A dated on 24 February 2008 and to invalidate the results of the Presidential Elections of 19 February 2008.

   According to applicant, Presidential Candidate Tigran Karapetyan asserts that number of crucial violations indicated in international observation mission report, which enable him to dispute the CEC decision of 24 February 2008 # 24-A and elections results. As violations particularly were mentioned the fact indicated by the observation mission that unequal conditions were created for the candidates, the composition of the majority of the troika of electoral commissions (chairman, deputy and secretary) created opportunity for one political force to control the organization of elections, some attacks on pre-electoral campaign offices were registered, the National Commission on Television and Radio did not perform its competence regarding the supervision over mass media means adequately, passport data were collected for the purpose of doing possible electoral-falsifications etc. The applicant did not present any additional argument to the Constitutional Court but attached only the preliminary findings of the international observation mission for 19 February 2008 Presidential Elections.
4. The representative of the Presidential Candidate Levon Ter-Petrosyan assert that the violations which took place during the preparation and carrying out the Presidential

Elections of 19 February 2008 were of such a nature, that violated the basic principles enshrined in article 4 of the Constitution.

According to the applicant the violation of the principle of universality of electoral law can be evidenced in the following, by the article 1(5) of the Electoral Code the out of country voting was banned, which in its turn violates the articles 30 and 43 of the Constitution. The applicant finds that the universal right to election was also violated by the fact that in voters register in the column foreseen for the birth dates of the voters, titled as «date, month and year of birth» the date and month were indicated as «00.00» for about 80.000 citizens.

The applicant thinks that thousands of citizens were included in simultaneously both in the main and additional lists and voted double time, on Election Day double voting was performed by stamping the cover page next to the last page.

For proving that the equal right to election was violated the applicant presented the following arguments:

-Because of the absence in the Electoral Code provisions to regulate the period preceding the pre-electoral campaign and after the appointment of the elections the candidate declared as elected had the opportunity for early-start in the pre-electoral campaign, which violated the equity between the applicant and elected declared candidate.

- Violating the Electoral Code the President of the Republic of Armenia both during the campaign and before the campaign period was carrying out campaign for the elected declared candidate, as well as anti-campaign against the applicant,

- In such conditions that Presidential Candidate Serge Sargsyan was continuing to perform his official duties as Prime-Minister of RA, the real opportunity for violating the equality among the candidates in favor of that candidate, i.e. S.Sargsyan. Presidential candidate S.Sargsyan continued to perform his competence as head of executive power in the capacity of Prime Minister, without any supervision upon the discretionary use of those competences, using the privileges of his official duty in favor of himself and to the prejudice of Presidential Candidate Levon Ter-Petrosyan.

Regarding the violation of the right to free elections the applicant, particularly mentioned following allegedly violations, which took place during the pre-electoral campaign

- 31.01.2008 and 17.02.2008 a religious organization was involved in S.Sargsyan's pre-electoral campaign, particularly head of the Ararat Branch of Saint Apostolic Armenian Church, in result of which, according to applicant, article 18(4)(3) of Electoral Code and article 8.1(1) of the Constitution were violated,

- Two officers holding commanding positions in RA armed forces, violating Electoral Code, performed public and official announcements in favor of presidential candidate Serge Sargsyan,

- Public TV through «Haylur» aired reportage covering the official visit of Serge Sargsyan to his working group, which was violation of the prescribed order for the campaign. The said working group was established by the decision # 855-A of Prime-Minister dated on 4 December 2007 «On establishing a working group». According to the applicant the position of the Prime-Minister was used during the establishment of this group and the group in the name of S.Sargsyan and at the expense of state budget was providing different and massive services to the citizens,

- within the period starting from 21.01.2008 to 30.01.2008 the references made to S.Sargsyan by 8 TV channels were mostly positive in nature, while the all the references about Levon Ter-Petrosyan were negative, several TV channels while covering the candidates did not manifest equality, the air time was distributed unequally. The applicant for supporting his assertion relating to the fact that the electronic mass media means violated the principles of legality, equality and freedom, cites the OSCE/ODIHR EOM report and Yerevan Media Club interim report published on 14 February 2008,

- according to applicant prohibited campaign was carried out, which was manifested in the fact that on 18-19 February 2008 the campaign posters of Serge Sargsyan were still attached on all billboards in Yerevan, as well as latent campaign was conducted through characters of movies (serials).

The applicant finds also that the states that the state and local self-governing bodies were taking steps in order to ban the meetings with presidential candidate Levon Ter-Petrosyan and his supporters, including by beating the supporters, artificially decreasing the number of participants of the meetings, and vice versa: involving secondary school pupils in meetings with presidential candidate Serge Sargsyan, without the information of their parents or disturbing employees from work.

After having assessed the facts of violations of citizens' right to election the applicant party finds that the article 2 of the Constitution of the Republic of Armenia was violated, under which people exercise his power through free elections, the obligation to guarantee free elections prescribed for state parties by article 3 of Additional Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms and the requirements of article 1 and 18 were also violated.

The applicant finds that there are violations of principle of financial discipline. Particularly, in violation of the article 25 of Electoral Code organizations with state share made payments to pre-electoral fund of Serge Sargsyan, or such organizations in which the 30 % of the share is foreign (e.g. «HayRusgazard» Closed Sock Association), as well as Serge Sargsyan exceeded the permissible maximum ammount of pre-electoral fund, prescribed by the law.

According to the assertion of the candidate both the consideration of the complaint-applications at CEC, and the adjudication of the applications at Administrative Court were formal in nature, in result of which the said means of protection were uneffective. Particularly, seperate complaint-applications were not considered at all or were considered not in a proper way. During the consideration of complaint-applications the right of the applicant to be heard in an administrative proceeding, the publicity of the considerations were not guaranteed, some commission members had not been notified about the day and time of the consideration of the application, close discussions were being organized not giving the mass media means to be present at the considerations. With this regard the applicants cite the OSCE/IDIHR EOM report, according to which, the process of consideration of application-complaints at CEC creates doubts about the effectiveness of the said legal mean of protection for the applicant.

The applicant finds that the disputed decision of the CEC dated on 24.02.08, # 24 –A was adopted by violation of articles 63.2(3), 83(1) and 86(2) of Electoral Code, which is particularly manifested by the following:

- The CEC did not consider during its session of 24.02.08 the information about the violations included Electoral Code in more than 60 application-complaints filed at CEC and in cases being considered at Administrative Court,
- the violations which took place during the preparation and carrying out of elections and which could have an impact on the results of elections, were not considered,
- when the CEC was adopting the decision in question it disregarded number of violations and pending cases at the court,
- befoe adopting the disputed decision within 7 days the applicant was not provided with the opportunity to exercise the protection of his rights,
- the decision in question was adopted, when the application on electoral matter filed at Administrative Court was not taken under consideration,

The applicant finds that, during the voting and during the summation of results various violations took place, pointing out both the application-complaints of his proxies and the proxies of the other candidates, the applications on recounting addressed to TECs and the CEC. Particularly they related to the violation of their rights, according to the applicant's assessment, to obstacles created for them, cases of stuffing, incorrect vote counting, not ensuring the secrecy of ballot, to voting in certain PECs, particularly, in cases of military voting, vote buying cases. The applicant also finds that the final data of PEC result protocols were changed by the CEC, in certain PECs the meetings were interrupted in violation of the article 61 (5) of Electoral Code.

The applicant also asserts that they requested to invalidate the results in 167 PECs, which were not considered by relevant TECs at all or adopted unreasoned rejecting decision, without ensuring the right of the applicant to participate. 35 applications on performing recounting in PECs were filed, which either were not responded at all or were rejected, according to them, with baseless reasoning.

According to applicant the electoral violations indicated by him had organized, massive, repetitive and periodical character and in such conditions, the principles of electoral right, prescribed in article 4 of the Constitution were violated.

For the purpose of basing his arguments the applicant party submitted to the Constitutional Court different application-complaints, protocols on voting results, judicial acts adopted in the result of cases initiated for the protection of electoral rights, monitoring reviews, observation mission reports, video recordings.

Presidential candidate Levon Ter-Petrosyan particularly asserted before the Constitutional Court also that under article 53.1 of the Constitution during martial law or state of emergency no elections of the President of the Republic shall be held and the President of the Republic shall continue the discharge of his/her responsibilities. The party is concluding from that "Presidential Election" includes the whole process starting from nomination up to the end of the date prescribed for appeal, i.e. the decision of the Constitutional Court. Accordingly, as it is state of emergency currently, hence the elections cannot be considered as valid or lawful.

5. The respondent party with regard to the applicant's arguments concerning violations of the principle of general right to voting, as by the Law adopted by RA National Assembly Law, which prohibits the establishment of precincts outside the RA violates the principle of "general right to voting", and absence of the "certain legal basis" for the term preceding the campaign determined by the Law of the NA violates the principle of "general right to voting", as well as to the issue that the President of the Republic carried out obvious campaign for the elected candidate which entailed violation of article 18(4)(1) of the Electoral Code, finds that:

- the Electoral Code does not provide organizing and carrying out of voting outside the geographical territory of the Republic of Armenia, therefore, non-creation of the precincts and non-carrying out the voting outside of the RA are not violations of Electoral Code and cannot be considered as basis for invalidating the election results,

- lawful campaign is carried out exclusively in the terms and by the procedure defined by the legislation. The Electoral legislation regulates only the electoral relations and does not deal with relations of other kind, even if they are similar to some electoral relations. The activities of the citizens and parties with regard to departing information before the start of campaign period,

even if they have some signs of the campaign, cannot be considered as campaign. Political campaign or political advertising, despite the interpretation, anyway, are not considered as campaign in the framework of meaning prescribed by Electoral Code,

- while commenting article 18(4)(1) of Electoral Code, it should be considered that the issue relates to prohibition of carrying out campaign in the framework of fulfillment of the competences by the state body. And, the public speech of the President of the Republic of Armenia is not an exercising of the competence as state body, but it is a political activity.

The respondent party, with regard to the assertions of the applicant concerning the violations of the prescribed order of the campaign, i.e. campaign carried out by the religious organization, finds that:

- participation of the persons carrying campaign slogan of any candidate during the measure organized by the Ararat's branch of the Armenian Apostolic Church cannot in any way be taken similar as the campaign fulfilled by the religious organization; as well as the RA Constitution and acting legislation warrantee the freedom of the religion, and, in the meantime, it is not forbidden for the candidates for the President of the Armenia to reveal this freedom.
- The respondent party, in regard to the applicant's argument concerning violation of the voting right of the citizens having right to free elections during campaign period, i.e. the CEC did not supervise the determined order of the campaign properly, finds, that the CEC, pursuing its collegial nature, uses 4 methods to supervise the determined order of the campaign: by initiative of the Commission members, via staff of the CEC, through the examination of the applications, complaints, and information provided by the TECs.

The respondent party asserts, that according the Commission members no violation of the prescribed order for the campaign took place.

The relevant employee of the CEC did not raise at CEC an issue concerning violations of the prescribed order of the campaign. A part of the complaints related to prescribed order of the campaign, and all the Commission members had been informed on all the complaints.

Part of the facts mentioned in the complaints were not considered by the Commission as violation of the prescribed ordered of the campaign, the other part was redirected, or was referred to other competent bodies for discussion, in accordance with the Law "On basics of administration and administrative procedure". The TECs did not submit any fact CEC, relating to violation of prescribed order of campaign.

The respondent party, in regard to those demands of the applicant concerning forbidden campaign, that all the billboards in Yerevan stayed posted with the campaign posters carrying the portrait of the candidate and his number in the ballot paper and the voting mark, and the campaign was carried out in hidden manner via TV serials(movies) in favor of Serge Sargsyan, finds the following:

- in compliance with article 18(5) of Electoral Code, the exclusion is made from the prohibition of carrying out the campaign on election day and on the day before that day for printed materials, i.e. posted campaign materials. Campaign materials, which are not in the precinct centers, are being left on their places on the voting day.

- concerning the latent campaign for Serge Sargsyan via TV serials (movies), no sufficient information was provided in the application in order to consider the issue.

The respondent party, with regard to assertions concerning the violations of the electoral order, i.e. the local self-governing bodies and the state bodies used their administrative resources to reduce the number of participants in the meetings with Levon Ter-Petrosyan, and, vice versa, in cases of meetings with Serge Sargsyan, to enlarge the number of participants, by enrolling the Tax Service, finds that the indicated facts (if they will be proved) can contain characters of crime. Taking into account the circumstance that the CEC does not possess the necessary rights and means to find out the fact of existence of the indicated, all the applications concerning such cases were referred to the Prosecutor's Office.

The respondent party, with regard to assertions of the applicant concerning the use of the official position of the Prime-Minister during campaign, that the working group created by the Prime-Minister's Decision 855-A "On creation of the working group", dated 4 December, 2007, acted on behalf of Serge Sargsyan, candidate for the President of the Republic, and provided different services on budgetary means, that the applications were drafted using special forms and

as addressee was indicated "Candidate for the President of the Republic, RA Prime-Minister, Serge Sargsyan", finds that:

- Indication of other status than the post of the Prime-Minister of the Republic of Armenia in the applications addressed to the Prime-Minister of the Republic of Armenia should be considered as formal error, within the meaning of the Law "On basics of administration and administrative procedure", which cannot be a reason for rejecting the application.

Such kind of rejection would contradict with the principle of the "prohibition of misuse of formal requirements". According to the response of the Head of the Cabinet Staff addressed to the CEC, the said Decision of the Prime-Minister was for the following purposes: comprehensive examination of the issues raised during the reception of citizens, comprehensive and full consideration of filed applications/complaints, increasing the effectiveness of the work in this regard.

- exercise of the obligations stipulated by the legislation, without any doubt, cannot be considered as providing of services. This approach is also stipulated by the Decision of the Administrative Court, AC /1014/05/08 dated 16.02.2008. The applicant attached no evidence to prove that services had been provided.

The respondent party, with regard to the assertion of the applicant concerning the violation of the common right of voting, that there are 80.000 voters in the voter register, whose birth dates are indicated as 00.00, i.e. including also voters, who are outside the Republic or have died, the data of the mentioned citizens with 00.00 birth dates "disappeared" from the CEC website, as well as regarding the issue that the CEC adopted an administrative act, by which it wrongly commented the concept "last page" enshrined in EC, finds that:

- Department of the Passports and Visas of Police reported that in the course of official filing of the citizens' passports of former USSR sample, in accordance with the procedure in force, in case of absence of the day/month of birth, only year of birth is written. In this regard with the requirements for the printing system of the RA citizen's passport, and based on the automatically program requirements, for printing the passports of the RA citizens having only year of birth, in front of the birth's day and month the "01.07" mark was filled in. Later, with

the aim to avoid the repetition of the citizens' data, as well as considering complaints of the citizens, relevant change was made in the automatic program complex of the passports, i.e. "01.07" mark was replaced by "00.00".

In accordance with the database of the automatic program complex of the passports, RA citizens at number of 73.730 have "00.00" mark for the day/month of birth in their passports. The applicant did not present any proof, that marking the day/month of birth as "00.00" in the passports affected in any manner the election results, or that it is a violation of the voting right.

The responder also finds, that the assertion of the applicant about the "disappearance" of data on citizens with "00.00" marks for the day of birth from the CEC website is not reliable. Data concerning the citizens marked with "00.00" for days of birth were available at the CEC website both before the election day, and at this moment, without any amendments.

Regarding the administrative act adopted by the CEC, there is a Decision of the Administrative Court available on this, which by the applicant's application was rejected.

The respondent party, in this regard asserts of that the applicant for the violation of the principle of the financial discipline, finds, that it is evident that the payments to the fund of Serge Sargsyan, candidate for the President of the Republic, were also done by the organizations, which don't have the right to do so. But, the Code enshrines for such cases that the payments should be transferred to state budget, and, the requirement of the Law for transferring these amounts to the state budget was observed. The applicant did not bring any example, to prove that such amount was not transferred to state budget, or was used for the campaign. No attachment was submitted by the applicant to prove the assertion that the said candidate used resources other than pre-electoral fund for the campaign, and the invocation should be dismissed.

The respondent party, with regard to non-performance of the supervision by the CEC by its own initiative, concerning the alleged violation of the procedure of the applications/complaints consideration, finds that the applications (complaints) and suggestions were accepted, discussed and responded at the CEC with in accordance with the EC.

The Commission made decisions concerning 57 applications, observing the procedure determined by the EC.

With regard to recounts, the respondent party asserted that recount was performed at the in 135 precincts voting results, 62 of which were performed by the applications received from L. Ter-Petrosyan's, and 11 from T. Karapetyan's representatives. In result, essential falsification of the results was found only in 1 precinct, and a criminal case was initiated. Because of the lack of time, voting results of 24 precincts of different constituencies were not recounted within the term determined by the Law, 19 of which were requested by the representatives of Ter-Petrosyan.

Regarding additional files submitted by the applicant concerning the TECs 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 16, 27, 28, 29, 31, 34, 40, the respondent party finds, that amongst presented documents those only have legal value, which are drafted in written by proxies in accordance with the determined order.

The respondent party, based on the circumstance, that the applicant had 5051 registered proxies, finds, that only 6.3 % of them participated in submission of the said above files. Thoughts expressed in the files mentioned above, up to respondent party, relate only to 291 of 1923 precincts formed in the Republic, or to 15.1 %. The respondent party also underlined that of 1923 precincts in the Republic in 1506 (78.3 %) the protocols on voting results were signed by all 8 Commission members, in 340 protocols were signed by 7 members, in 69 - by 6 members and only in eight precincts they were signed by 5 members. From 1923 precincts of the Republic, with 15.384 total number of members, only 39 (0.25 %) members presented special opinion (there notes in the protocols): 32 in the precincts (1.66 %), and such kind of opinion were factually submitted at three precincts only (0.16 %), only by 4 PEC members (0.03 %). On these evidences, the applicant did not raise any issues and did not present any refusals.

The respondent party finds that, despite separate non-essential failures, the results of 19 February, 2008 elections of the President of the Republic are fully in compliance with the reality; the elections were carried out in line with the requirements of the EC, and the CEC Decision N 24-A "On the President of the Republic elected" dated 24 February. 2008 was made in correspondence with the requirements of the Electoral Code.

6. Co-respondent –the representative from the Prosecutor's Office, with regard to the applicant's alleged violations and measures taken by the Prosecutor's Office therein, argued that the working group was created for the purpose of prevention of the possible violations during 19

February, 2008 elections of the President of the Republic, to react at them in operative manner and to give a relevant legal assessment. During the campaign, in akin to election process, deeds for 52 notifications, applications, announcements were processed, in 29 of which the initiation of criminal casein was rejected : for 19 the reason was absence of characters of crime, for 13 written clarification had been sent, for 12 – criminal cases were filed. Received notifications and complaints were discussed within the terms determined by the legislation; there was no violation of time frames or baseless delay. As by the representative from the Prosecutor's Office, the statistical data presented, as well as the nature of the criminal cases filed, certify that, actually, violations, which took place during campaign, did not have massive character. The party finds that within the frame of whole election process, representatives of the applicant party, instead of effective use of the legal opportunities to protect their rights tried to create an illusion of the massive (widespread) violations, by filing many baseless applications, complaints, announcements.

Regarding the violations which took place on election day, the co-respondent stated: 11 criminal cases were initiated for obstructing the work of the electoral commissions and the authorities and the persons participating in the voting process, another 11 criminal cases were initiated for falsification of the voting results, protocols, 2 criminal cases for voting instead of other person, 1 criminal case was initiated for giving false report about crime (article 333 of Criminal Code of RA). In the meantime, comparative analysis of the results of the discussions on the notifications received by the working group established at the Prosecutor's Office certifies that, actually, various violations of the voting right occurred, but they were not massive and organized.

7. Co-respondent, the representative of the Police adjunct to Government, in regard with the alleged violations committed by the RA Police territorial bodies raised in the application of presidential candidate Levon Ter-Petrosyan, stated that they are based on assumptions and the applicant's facts are not argument by the evidence as required by article 41 of the RA Law "On Constitutional Court". Co-respondent, disagreed with the arguments brought by the applicant and submitted his own counter arguments and their foundations.

Concerning simultaneous involvement of the citizens both in the main and additional lists, double voting, non-providing by the Police of the reference on number of the individuals

involved in the additional lists, the Department of Passports and Visas of the Police received 2 applications from Levon Ter-Petrosyan campaign office, in one of which they requested the number of those voters involved in the additional lists, and by other they were requesting to have the electronic version of the lists. The applications were satisfied on 18.02.08, i.e. the applying party had absolute opportunity, basing on the documents provided by the Police, to verify the data relating to the exclusion the individuals from the main lists at the registration place and including them into the additional lists. In aim to support the voting right of the citizens, for the period from 19 January, 2008 to 19 February, 2008, 1330 individuals were issued by the RA Police territorial bodies form #9 on the reason of the passport loss, and 264 citizens received the references defined for participation in the voting. Policemen serving at the precincts intervened for discipline support only by motion of the PECs. In result of such intervention, 6 criminal cases were prevented.

8. Co-respondent, G. Amalyan, representative of the National Commission of the TV and Radio, reported that during campaign of the 19 February, 2008 RA Presidential elections the programs mentioned in the application of the applicant L. Ter-Petrosyan, were monitored by the Supervising and Monitoring Department of the programs by the said Commission staff and no violation of the determined order of the campaign was found. And, the media activity outside the term determined for the campaign by the RA legislation cannot be a subject for consideration. Concerning the positive or negative coverage of the candidates for the campaign period, insisting about the negative coverage was done by failure of understanding and with no arguments.

9. Representative of the third party of the case Presidential Candidate S.Sargsyan D.Harutyunyan in response to the applicant's assertion that presidential candidate Prime-Minister S.Sargsyan should have resigned under article 78 of Electoral Code for the period of elections, submitted the following explanation. By comparing the first two sentences of article 78 (1) one can conclude that the Prime Minister is an authority in "state service". But, taking into consideration the definition of concept of "public service" given in article 1(1) of Civic Service Law adopted on 9 January 2002, as well as the types of state service, prescribed in parts 2 and 3 of the same article, it is obvious that political and discretionary positions are not included in state service position

list. Because of that the position of Prime Minister is considered as political position, and accordingly the Prime Minister is not in state service.

Accordingly the Prime Minister of RA is a political position and hence the Prime Minister is not in state service. D.Harutyunyan argued that there is a contradiction between article 78 of Electoral Code and article 1 of Civic Service Law, which, under the Law on Legal Acts should be solved in favor of the provision of Civic service Law, according to which the position of the Prime Minister is political one.

Regarding the issue of sources of financial fund and legality of expenditures D.Harutyunyan told, that there were cases when payments were made to candidate's pre-electoral fund by subject, who does not have the right to do so, but in all those cases the paid amounts, in accordance with the law, were transferred to state budget. There was no case when the expenses were exceeding the amount of lawful payments made for that moment.

In response to arguments of the applicant with regard party working group established by the decision of Prime Minister dated on 4 December 2007, D.Harutyunyan stated that the establishment of the said group has only one purpose, i.e. to ensure the effective consideration and dealing with the rising number of applications (in 2005 – 3584 applications, 2007- 18.424 applications). Those applications, which were addressed to the Presidential Candidate Serge Sargsyan, were transferred from Cabinet to S.Sargsyan's campaign office. At the same time there were applications, in which the position of the addressee was indicated with some mistakes, i.e. those, by their substance were addressed to Prime Minister, but as addressee was indicated Presidential Candidate, Prime Minister S.Sargsyan. Here we are dealing with formal mistake under the Law on Administrative Procedure and Basics of Administration, and the same Law prohibits the abuse of formal mistakes, in such circumstance the administrative body is authorized to act on its self initiative to eliminate the mistake, without bearing the applicants with additional administration, which is not only the right but also the obligation of the cabinet.

Regarding the continuation of the adjudication of the matter at the constitutional court in the situation of state of emergency the representative of the third party notified that under article 53.1 of RA Constitution during state of emergency no elections of the President of the Republic shall be held, and the elections end at the moment when the competent body adopts the decision on results. The challenging the results of elections are not considered as separate election stage.

Moreover, the suspension of the hearing at this moment will contradict to articles 51(5) and 19 of the Constitution of RA.

What regards to the boundaries of competence of the Constitutional Court while adjudicating an electoral matter, then according to the representative, after 2005 Constitutional amendments and amendments of the Law on Constitutional Court, the Court is hearing case concerning not election results but the dispute regarding the decision adopted on election results. In the framework of the mentioned case the Constitutional Court is competent to consider whether the decision is valid, i.e. whether the decision making body, in case when the existence of certain facts will be proved, adopted a lawful decision or not.

The CEC receiving the voting results from TECs cannot disregard them while adopting the decision, until they were not, under the procedure prescribed by law, appealed to Administrative Court and were not altered by judicial act. The Constitutional Court is neither competent nor eligible by virtue of its organization and the terms prescribed for the adjudication of the case to substitute the Administrative Court and the whole system of electoral commissions.

10. During the preparation of the case the Constitutional Court requested and received from the CEC the protocols of consideration of application-complaints filed by presidential candidates regarding the 19.02.08 presidential elections, the decisions adopted therein, copies of responses given, by certain PECs, document on results of recounting conducted by the presidential candidates' application-complaints and on reasons for not doing the recounting in case when relevant application-complaint had been filed. The court received the accounts, prescribed by the law, of pre-electoral funds of candidates, as well as the results of recounting, those decisions of TECs, by which the applications on recounting were rejected. The following was requested and received from National Commission of Television and Radio: the copies of application-complaints filed at the Commission, protocols of the discussions held on those applications, responses given to them.

Summarizing document on criminal cases was requested and received from the Prosecutor's office. Copies of judicial acts adopted by Administrative Court on matters regarding the protection of electoral rights during Presidential Elections of February 19, 2008 were

requested and received from Administrative Court. All the above mentioned materials were provided to the parties of the case.

During the trial, the representative of the applicant party A.Zeynalyan testified also in the capacity of a witness, in accordance with articles 51(5) and 52 of the Law on Constitutional Court.

11. As a result of Constitutional Amendments of 27 November 2005, under article 100 (3.1) of RA Constitution the Constitutional Court resolves disputes concerning the decision adopted in election results. The legal base of the CEC decision in the results can be challenged in constitutional court from two perspectives: regarding the fulfillment of prescribed order, the formal requirement of adoption (procedure), as well as with regard the potential violation of material legal provisions, by which the CEC made a wrong conclusion on the fact whether the candidate was elected or not (material bases). In addition in the second case, those violations can be considered as having impact on election results, which falsify the general image of realization by citizens of their right to vote, deprive the opportunity to come to a precise conclusion on final election results. At the same time, the active electoral right of already voted voters cannot be violated, in the result of assessment of the impact, which various violations can have on election results in the framework of protection of passive electoral right.

The Constitutional Court also states, the Court is not competent to adjudicate matter of constitutionality of laws in the framework of a dispute concerning the decision adopted on election results, which is not prescribed in the Law on Constitutional Court. According to article 94 of RA Constitution the order of activities of the Constitutional Court shall be prescribed by the Constitution and the Law on Constitutional Law. At the same time article 100 of the Constitution also enshrines that Constitutional Court exercises its competence in accordance with the order prescribed by the law.

12. The obligation of the Constitutional Court to discover the facts of the case independently the positions of parties to the case has its special boundaries, the existence of which is conditioned with the real opportunities prescribed by the Constitution and the Laws and with the functional and other adjunct competences. Ex officio discovery of the facts of the case is limited to those boundaries, and this principle does not enable the constitutional court to act as

lawenforcing body (like prosecutor's office, or inquiry body) or to substitute judicial or other administrative bodies.

In cases concerning the decision adopted on election results the constitutional court shall adopt a decision of merits of the case within 10 days, starting from the date of filing the application, by the virtue of article 51 (5) of the Constitution. In this case, the exhaustion of all legal remedies and applying to constitutional court with evidentary arguments is becoming crucial.

13. Taking into consideration articles 100 (3.1) and 101 (9) of Constitution, as well as the nature of the procedure prescribed by electoral code for the protection of electoral rights, constitutional court in its decision dated on 10 June 2007 # SDO-703 (adopted after Constitutional amendments), expressed legal position, according to which all the issues, which relate to disputes arising during elections on registration of candidates, and the adjudication of which is under the jurisdiction of other courts, shall not be subject to consideration by the constitutional court seperately, and only final judicial acts shall be accepted as evidence. The adjudication of the present matter witnessed that the applicant party, citing different legal positions of constitutional court, during the whole electoral process and while filing the application did not pay sufficient attention to abovementioned matter.

Constitutional court specially emphasizes the ncessity to comply with normative requirements, which relate to relationships on appealing in election processes in all stages of the said process, which is sound legal base for protecting the violated electoral rights through constitutional justice.

14. Constitutional court gives importance to the activities and the role of international observation mission, from now on finds that selective presentation of observations about separate violations indicated in observation mission preliminary report is not sufficient evidentiary base to be used in judicial procedure for the purpose of invalidating the CEC decision. Particularly, the first applicant did not add any evidentary argument to those observaions. In such case that report should be considered in its integrity, taking into consideration, that in that report in a conclusive way it is indicated that: «The 19 February presidential election in the Republic of Armenia was administered mostly in line with OSCE and Council of Europe commitments and standards».

15. The representatives of LTP submitted to constitutional court more than 500 various primary (initial) documents relating to voting process, from which only 94 are properly drafted and can have legal effect, including: applitions on recounting – 23, announcments on violations – 7, applications – 12, application-complaints – 7, protocols on violations (or excerpts) – 13, exceprts from voting result protocols – 28, TEC meeting protocols or excerpts from them – 2, receipts of applications – 2. Video materials on electoral violations were also submitted.

All presidential candidates, who took part in elections, submitted to TECs applications on performing recounts in 258 PECs (13.4 % of total number of PECs), from which:

a) 53 % or 135 applications (62 of which were filed by LTP, and 15 by T. Karapetyan representatives) were satisfied and recounting was performed based on them, the results of those recounts has been submitted by the respondent party,

b) applications on recounting in 24 PECs had been filed, but the recount did not take place, as they run out of the time prescribed by the law,

c) applications on 99 PECs were rejected by various reasonings,particularly:

- Applicatins on 35 PECs were rejected as the applications were not filed by proper subject – article 40.2 (1) and (13) of EC

- Applications on 16 PECs were not properly drafted, in result of which were rejected- article 40.2(2) and/or (3) and (13) of EC

- Applicaions on 25 PECs were rejected under article 40.2 (13), (1), (2), (3) of EC, as the applicant had not appeared personally, violating article 40.2 of EC,

- Applications on performing recount in 23 PECs were rejected because of being baseless. But those decisions were not appealed neither through administrative, nor judicial ways.

At the same time the applicant submitted excerpts from voting result protocols properly ratified and received from 25 PECs (1/28, 8/27, 17/02, 18/30, 20/04, 20/17, 20/18, 21/10, 23/41,

24/18, 24/19, 25/07, 26/26, 27/15, 27/35, 27/36, 28/15, 33/04, 33/21, 33/22, 35/13, 37/03, 37/11, 37/44, 37/74 PECs), where the included data differs from data published on web-page of the CEC. But, in 3 PECs from the mentioned ones (27/15, 27/35, 27/36) according to documents submitted by the CEC at constitutional court, recounting was performed. Regarding the 3 PECs (20/04, 24/18, 24/19) according to information provided by Prosecutor's office, criminal cases have already been initiated, under article 150 of Criminal Code. The data included in excerpts of protocols of 7 PECs (18/30, 20/17, 21/10, 25/07, 26/26, 35/13, 37/74) and the data published on CEC web-page differ insignificantly (1-4 points). The data included in excerpts of protocols of 12 PECs (01/28, 08/27, 17/02, 20/18, 23/41, 28/15, 33/04, 33/21, 33/22, 37/03, 37/11, 37/44) and the data published on CEC web-page differ significantly. The appicant refused to perform inspections in certain PECs by Constitutional Court, reasoning that it is sensless to organize that days after the election day.

According to the document submitted by the prosecutor's office to constitutional court, during 19.02.08 presidential elections because of the inconsistencies between the data indicated in excerpts of protocols in PECs 9/18, 17/5, 20/4, 22/21, 22/22, 22/30, 24/18, 24/19 and 38/62 provided to proxies and the data included in protocols submitted for official summation of election results, criminal cases have been initiated already and investigation is being carried out.

The Constitutional court beofore constitutional ammendments in its decision # SDO- 412 dated on 16.04.2003, expressed legal position, according to which during the adjudication of electoral disputes, the election results in PECs are unreliable if:

a) in the same PEC there are summarizing protocols, which are official and differ one from another,

b) it is legally argued that there were cases of ballot stuffing, erroneous vote counting, votig for others and other crucial violations, but which were rejected by TEC unreasonably, and the courts did not protect in duly form prescribed by law the rights of commission members and proxies, regarding the organizing checking of voting results in PECs in accordance with the order and time frames enshrined in the law. **At the same time for the purpose of assesing the possible impact of unreliable voting results on overall results, constitutional court reduced**

the overall difference of votes for all the candidates in the amount of the votes of the candidate, who had received the majority of the votes in certain PEC.:

Notwithstanding the fact that the applicant party during the adjudication of the case was emphasizing not the quantitive, but the qualitive characters of the violations assessment, citing, by his opinion, the "massive and organized character" of violations, anyway even in the case of present legal regulation and application of abovementioned legal position of constitutional court, there is no quantities change of real votes' proportion takes place.

16. The analysis with regard to content and law enforcement perspectives of articles 14, 14^1, 17^1, 18, 20, 25, 26, 40, 63^2, 75, 79 and 139 of Electoral Code, as well as articles 143-150 of Administrative Procedural Code makes it evident that Administrative Court was granted with significant competence in the field of electoral rights protection. What relates to constitutional court, as it was already mentioned already, is competent under article 100 (3.1) to adjudicate cases concerning the final decision on elections results. In addition, the mentioned articles of Electoral and Administrative Procedural Codes mean that the violations taken place during electoral processes shall have evidentiary character, when they had been adjudicated at competent courts, within the precise time frames prescribed by law, where the factual circumstances of certain violations were discovered. The real image of 19 February 2008 elections is that the possibilities conferred by administrative justice were not used effectively, even in cases, when separate TECs by their decisions rejected applications on recounting, those decisions were not appealed through judicial way. The assertion of the applicant that it was conditioned by low credibility towards Administrative Court does not give any justification; such kind of argument does not ensure guarantees for further legal process.

At the same time, the fact of violation in certain PEC or TEC cannot be base for making assumptions about similar violations in other precincts or for casting doubt on legality of electoral process as a whole. As grounds for invalidating the decision adopted in election results can be only those augmented, in accordance with the law, violations, which had essential impact or could have such impact on election results.

17. The applicant party emphasizes the fact of creating unequal conditions for candidates during campaign and particularly violation by «Haylur» program of H1 of impartiality principle,

enshrined in electoral code. With this regard constitutional court finds, that during 2008 presidential elections the campaign field was out of effective control of CEC

National Commission on TV and Radio adopted a formal approach towards performance of requirements of law. In the result of this there were not only partial approaches in mass media, but moreover, in separate broadcasts violations of legal and moral norms took place.

Even in such conditions the issue of equality of campaign for candidates is very strictly related to formation of voters' will and constitutional court finds that the candidates anyway were able to make the voters affiliated with their position through various media means. At the same time, steaming out from international legal standards, the principle according to which the pre-electoral campaign should be honest and fare, cannot be interpreted so broad to exclude the exercise the freedom of speech and right to receive information or to exclude the possibility of presenting a response opinion to the condemnations addressed to official person.

18. The consideration of number of electoral violations indicated by the applicants, the criminal cases initiated by Prosecutor's Office and facts submitted by the Police show that the main shortcomings of the electoral process and the lack of public confidence towards electoral process have far reaching reasons. Constitutional court in its decision dated on 10.06.2003 # SDO 703, empresses the following legal position: «protection of electoral right, particularly in the framework of constitutional justice, does not assume formal approach, i.e. to what extent the passive and active electoral rights of people were violated. The issue has more broad content and relates to public function of elections, i.e. how and with what confidence the representative system of government is formed, how the freedom to participate in government and obligation of forming representative body are harmonized, what is the public conduct of individuals in this process. Hence, it is state, and not separate individuals, who is obliged to ensure the possibility of holding democratic elections. The article 1(4) of Electoral Code is reasoned with the mentioned and international obligations of the republic of Armenia, under which «The state, the government and local self-governing bodies, as well as bodies and officials forming the Central Electoral Commission, shall bear responsibility, within the framework of the powers given to them by the legislations, for the legality of preparation, organization and conduct of elections». Hence the state is obliged to ensure such guarantees, for:

a) The electoral legislation will not contain such shortcomings, obstructing the effective enjoyment of electoral right,

b) A distinction should be drawn between everyday political activity and pre-electoral campaign,

c) Exclude the combination of political and charitable activities,

d) To prevent the possibility of interweaving of political and business interests.

In accordance with fundamental principles prescribed in articles 2 and 4 of Constitution, the for a legal state it is essential to ensure such legislative and organizational guarantees for rule of societies' political interest in electoral processes, which will exclude any possibility of interweavement of political and business interests».

Sufficient attention was not paid during amendments of electoral code and reform of whole electoral system, particularly, for the purpose of ensuring the application of article 65 of Constitution, which can essentially promote the strengthening of public confidence towards electoral system and towards certain electoral process.

It can be inferred from the fundamental principles of RA Constitutional order that the elections in the Republic of Armenia should turn into a factor for strengthening the bases of the state order and for overcoming the political confrontation. In reality, the post electoral processes sharpen both political and public confrontation, endangering such democratic values, as tolerance, pluralism, cooperation, public confidence, civilized dialogue. Such situation is a problem, which requires constitutional-legal solution, which was numerous times referred to by constitutional court in its decisions, as well as in annual reports.

Constitutional court finds that there are some problems, which require primary solution. This first of all relates to electoral system in force. In such circumstance the consequences can be the same. The electoral system should be based on principle of prevention of potential violations. This can be reached only through cardinal reform of the system of organizing and conducting the elections. For increasing public confidence and organizing the elections in compliance with fundamental constitutional principles qualitatively new approach should be adopted towards the whole system of appealing the electoral processes.

With regard to assessment of the situation subject to judicial consideration, then, comparing the arguments and counter-arguments of parties, analyzing the documents of the case, existing legal provisions and the practice of their application, the court finds that in the framework of existing legal regulation the constitutional court finds those factual results of elections, which were reached in accordance with the requirements of Electoral Code and after summarizing within the competence prescribed by Electoral Code, the CEC could not pass another decision on results of presidential elections of 19 February 2008.

Proceeding from the results of hearing of the case and being governed by articles 100(3.1), 102 of the Constitution, articles 63,64 and 74 of the Law on Constitutional Court, the Constitutional Court of the Republic of Armenia DECIDES:

1.To leave in force the decision of the CEC on «Election of the President of the Republic of Armenia» dated on 24 February 2008 # 24-A.

2. For the purpose of legal assessment and for discovering the lawfulness of the changes made in summarizing protocols of PECs 01/28, 08/27, 17/02, 20/18, 23/41, 28/15, 33/04, 33/21, 33/22, 37/03, 37/11, 37/44, the decisions of TECs 30, 31 and 38 on rejection of recounting application, as well as the ballot papers and envelopes and facts included in video materials, to refer the all above mentioned to Prosecutor's Office.

3. Under part 2 of article 102 of RA Constitution this decision is final and enters into force from the moment of announcement.

Preceding Judge **G. Harutyunyan**

8 March 2008

CCD - 736