

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

**ON THE CASE OF CONFORMITY OF PART 4 OF ARTICLE 6 THE LAW ON
EDUCATION OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF
THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE
HUMAN RIGHTS DEFENDER OF THE REPUBLIC OF ARMENIA**

Yerevan

12 June 2018

The Constitutional Court of the Republic of Armenia composed of H. Tovmasyan (Chairman),
V. Hovhanissyan, A. Gyulumyan, A. Tunyan, A. Khachatryan, H. Nazaryan,

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

of the Applicant: A. Tatoyan, RA Human Rights Defender,

Respondent: V. Danielyan, official representative of the RA National Assembly, Head of the
Legal Expertise Division of the Legal Expertise Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 168, Point 10 of Part 1 of Article 169 of the Constitution of the
Republic of Armenia, Part 1 of Article 23, Article 3, Article 35, Parts 1 and 2 of Article 40 and
Article 68 of the RA Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Part 4 of Article
6 the Law on Education of the Republic of Armenia with the Constitution of the Republic of
Armenia on the basis of the application of the Human Rights Defender of the Republic of
Armenia.

The Law on Education of the Republic of Armenia was adopted by the National Assembly of the Republic of Armenia on 14 April 1999, signed by the President of the Republic of Armenia on 8 May 1999 and entered into force on 14 May 1999.

Having examined the application, written explanations of the parties, the RA Law on Education as well as other documents of the Case, the Constitutional Court of the Republic of Armenia

ESTABLISHES:

1. Applicant's positions

1.1. On November 6, 2017, the Applicant, the Human Rights Defender, applied to the Constitutional Court with a request to determine the conformity of Part 4 of Article 6 of the RA Law on Education with Article 38 of the Constitution, in so far as it envisages that "The state shall provide free of charge the textbooks for the initial general education programs for schoolchildren of the first and fourth grades of secondary education, funded from the State budget" does not ensure full implementation of the right to receive free secondary education in public educational institutions.

1.2. The Applicant believes that although the Constitution envisages the right of everyone to free and compulsory secondary education, the state, in accordance with the challenged provision of the Law, provides free of charge the textbooks for the initial general education programs for schoolchildren of the first and fourth grades of secondary education, funded from the State budget, and for the use of textbooks by the schoolchildren of other classes their parents (legal representatives) pay the investment the size of which, according to the results of research, is growing every year, and the RA Law on Education does not provide any exceptions for the textbooks of the schoolchildren of vulnerable groups.

1.3. The Applicant also considers that the right to free secondary education also includes the right to receive free school textbooks. In the Applicant's opinion, the provision of free school textbooks is also established in a number of international treaties ratified by the Republic of Armenia.

1.4. Referring to the information of the Ministry of Education and Science, according to which: a) the compensation of the investment amount for textbooks of students from socially unsecured families is carried out within the framework of the program of the state budget of the

Republic of Armenia "Compensation of payment for textbooks of children from socially unsecured families"; b) the list of students from socially unsecured families is discussed and formed at a joint meeting of the teacher's and parents' councils of the institution, which is approved by the principle, so the Applicant notes that it is not clear on what criteria and principle the schoolchildren or their families are included in the list.

2. The Respondent's positions

2.1. The Respondent, objecting to the Applicant's arguments, believes that, in the light of international criteria, in the context of providing free education the State undertakes:

- a) to ensure the accessibility of education, that is, everyone, irrespective of his/her social status or place of residence, should have an equal opportunity to enjoy educational programs;
- b) to ensure the availability of information and materials for all children;
- c) do not to deny the possibility to get an education and the right to education.

2.2. In the light of the above criteria, the Respondent states that the state, as a part of its function to provide free education, is obliged to provide each student with free textbooks. Thus, within the framework of the function to ensure the above-mentioned economic accessibility, the state only in general undertakes either to establish a geographically located convenient school in the neighborhood or to provide distance education, but not to provide every student with free transportation. By the same logic, the state undertakes to ensure the availability of the syllabus, which does not imply the provision of free textbooks or accessories to every student. This means that the teaching material can be provided by enabling to use the relevant material in the school library or in the electronic version, or by providing financial assistance to the vulnerable groups so that no student, due to lack of financial resources, is deprived of the opportunity to obtain an education. In the specific case, by the Order No. 1137-U/Ք of the Minister of Education and Science of the Republic of Armenia "On the Amounts Reimbursable for Textbooks Provided Free of Charge to the Children from Socially Vulnerable Families from the State Educational Institutions of the Republic of Armenia" dated October 12, 2011, the necessary legal preconditions for the provision of financial assistance to socially vulnerable groups for free acquisition of textbooks, and the alleged injustice indicated by the Applicant goes beyond the assessment of the constitutionality of the provisions, which are the subject of a constitutional and legal dispute.

2.3. Consequently, according to international criteria, free education concerns the provision by the state with the material and technical base of educational institutions, the payment of administrative and pedagogical staff of state educational institutions, the state funding of retraining, in other words, the "free attendance" of students. The European Committee of Social Rights in the European Social Charter digest book (hereinafter referred to as the Charter), referring to the interpretations of different articles of the Charter, in connection with Part 2 of Article 17 of the Charter, namely that primary and secondary education must be free of charge, notes that: This covers the basic education system. **In addition, hidden costs such as books or uniforms must be reasonable and assistance must be available to limit their impact on the most vulnerable groups.**"¹

2.4. This means that, in essence, the payment for textbooks does not contradict the state's obligation to provide free education, but charging for textbooks should be reasonable, and vulnerable groups should receive financial assistance in this matter, so that no one, because of lack of financial resources, is deprived of the right to compulsory secondary education. The investment fee for textbooks is established by the order of the Minister of Education and Science of the Republic of Armenia, and the assessment of the reasonableness of this fee is beyond our competence, but we consider it necessary to note that setting of an unreasonable price, even by an order in itself, cannot lead to unconstitutionality of the norm of the law establishing a provision on the payment for the purchase of textbooks.

2.5. Taking into account the abovementioned, the Respondent believes that the provision set forth in Part 4 of Article 6 of the RA Law on Education meets the requirements of the RA Constitution.

3. Circumstances essential for the outcome of the Case

The Constitutional Court considers that for the outcome of the Case it is necessary to clarify the following circumstances:

a) does the provision stipulated in Part 1 of Article 38 of the Constitution "...Secondary education within state educational institutions shall be **free of charge**," in the aspect of content include the free of charge school textbooks?

¹See. DIGEST OF THE CASE LAW OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS, 1 September 2008 <https://rm.coe.int/168049159f>, p.-122.

b) what are the features of the constitutional guarantee of basic social rights?

c) are there disproportionate financial obligations that may impede the exercise of the right to free secondary education for students of 5-12 grades of public secondary schools, especially students from socially vulnerable families?

d) did the legislator, in securing the constitutional right to free education, take into account the criteria established by the international human rights treaties ratified by the Republic of Armenia (Article 81 of the Constitution).

4. Legal positions of the Constitutional Court

A. Does the provision stipulated in Part 1 of Article 38 of the Constitution "...Secondary education within state educational institutions shall be free of charge," in the aspect of content include the free of charge school textbooks?

To disclose the constitutional and legal content of the right to **free of charge** secondary education, the Constitutional Court considers it necessary to consider the following.

4.1. Constitutional guarantee of the right to education in a comparative historical context

The study of the history of the constitutional law of Armenia shows that the right to free secondary education and the right to receive free school textbooks are not identical. When enshrining the right to free education, neither Article 96 of the Constitution of the Armenian Soviet Socialist Republic of March 23, 1937 nor Article 6 (d) of the Constitution of the Socialist Soviet Republic of Armenia dated February 4, 1922 contained provisions on school textbooks. Only Article 43 of the Constitution of the Armenian Soviet Socialist Republic of April 14, 1978, specifically enshrined the free provision of textbooks, distinguishing it from free education. Article 43 of the Constitution considered "free of charge of all types of education" and "free provision of school textbooks" as a means of ensuring the right to education. It follows directly from the indicated constitutional formulations that the free education did not include the free provision of school textbooks and was considered as an independent constitutional duty of the state in the field of guaranteeing the right to education. The special provision prescribed in Article 43 of the 1978 Constitution regarding the free provision of textbooks clearly shows that before that, at the constitutional level, it was not considered as an element of the right to free education. The Constitution of the Republic of Armenia of July 5, 1995 (Article 35), as well as

its further amendments in 2005 (Article 39) and in 2015 (Article 38) enshrined only the right to free secondary education. That is, unlike the Constitution of 1978, which directly enshrined the free provision of textbooks as a positive constitutional duty of the state, in the Constitution of 1995 and its further editions, the founder of the Constitution – the legislator refused such fixation, which shows that the free provision of textbooks was not considered an element of the law for free secondary education. The right to free education was considered only as "free education" also in the special literature.

4.2. Implementation of the constitutional norm in the RA Law on Education since 1995

4.2.1. After the adoption of the Constitution of 1995 in the RA Law on Education of 1999 (adopted by the National Assembly on April 14, 1999, HO-297), under free education the legislator implies exceptionally non-payment of tuition fees. This is evidenced, in particular, by Part 3 of Article 6, Part 9 of Article 28 of the current Law, by which free education is defined as education "with full compensation for tuition fees in the form of student benefits from the state." And in the initial version of the Law (HO-297), in Parts 3 and 4 of Article 6 the free secondary education is delineated from the free provision of textbooks. If the founder of the Constitution has stated that the constitutional and legal content of free education is further restricted in the Law, the founder had the opportunity, in the constitutional amendments of 2005 and 2015, to specify its content, directly including the provision of textbooks, as was done in the 1978 Constitution.

4.2.2. In the abovementioned context of the, the Constitutional Court concludes that free secondary education, within the meaning of Part 1 of Article 38 of the Constitution, is the *absence of fee* for admission to state educational institutions (state general education school) and education.

B) What are the features of the constitutional guarantee of basic social rights?

4.3. Differentiation of the basic rights and goals of the state: the discretion of the state in the implementation of the duties of the state

4.3.1. Fundamental rights as protective rights first of all require the state to abstain from violating this right of influence. Advantage of protective rights basically is that in case of violation of the right protected by the basic law, obviously the existence of a violation and its legal consequence, as well as protective rights, are easily realized, since the state basically

requires inaction in the form of non-interference in these rights. Of course, protective rights can also require specific positive actions in the form of eliminating the consequences of violations and compensation for damage. In this case, some costs are also created for the state. That is, even in the case of protective rights, which do not necessarily require positive state action, the state has some financial responsibilities.

4.3.2. In comparison with protective rights, the right to demand the performance of actions is of a different nature (thus constituted also by the right to education), which necessarily imply the provision of some benefit through the positive actions of the state. Moreover, in this case, expenditures inevitably arise².

4.3.3. From the right to demand actions, especially the "basic social rights" (including the right to education) may set too high obligations for the government, which can only be realized within the framework of the existing state capabilities. This could jeopardize the normative values of the fundamental rights, which, according to Part 3 of Article 3 of the Constitution, are directly operating rights.

4.3.4. Meanwhile, the Constitution in the version of 2015 adheres to the approach of a clear delineation of basic human rights as directly acting rights (Chapter 2 of the Constitution) and legislative guarantees in the economic, social and cultural spheres and the main goals of state policy (Chapter 3 of the Constitution). The latter are provided by the Constitution with a different regime and the obligation to consolidate and protect - the states provide legislative guarantees and social goals of the state only within their capabilities. Thus, the Constitution of the Republic of Armenia, in addition to Article 38 which establishes the subjective right, by, Article 86, in particular Points 6 and 13, as the goal of state policy provides for the creation of favorable conditions for the full and comprehensive development of the individuality of children, as well as the development of free higher and other vocational education. However, these provisions are only objective legal obligations of the state (Part 1 of Article 87 of the Constitution) and do not create subjective rights. This circumstance is due to the delineation of Chapters 2 and 3 of the Constitution.

4.3.5. Since the free provision of school textbooks is not included in the subject of protection of the subjective right to free education, it is up to the discretion of the legislator to settle the issue of free provision of textbooks based on the goals and priorities of state policy in

²T. Kingreen, R. Poscher, Grundrechte. Staatsrecht II, 33., neu bearbeitete Auflage 2017, pp 53-54.

this area, the availability of financial resources and their effective use. At the same time, the assessment of the discretion granted to the legislator and the Government in the exercise of these functions goes beyond the competence of the Constitutional Court.

4.3.6. It is no coincidence that a comparative analysis of the constitutions of the member states of the European Union shows that, unlike the guarantee of the right to education, including free of charge, no country at the constitutional level has secured the free provision of textbooks³. However, it must also be noted that at least several countries, such as Finland, Great Britain, Latvia, Estonia, Cyprus, Japan, provided free textbooks at the level of law and in the absence of constitutional regulations; in fact, this was interpreted as an element of free education.

4.4. The need for a reasonable balance between the needs of society in the field of education and the capacity of the state

4.4.1. In case of inclusion in free education, in addition to the circumstances of non-payment of tuition fees, there are also other elements that raise the issue why only textbooks should be provided free of charge, and no other materials that are not less important for the educational process (such as office supplies, food, school uniforms). With such a perception, no differentiation is possible not only between grades 1-4, but also between grades 5-12. At the same time, Part 2 of Article 38 of the Constitution provides for the possibility of receiving free education in state higher and other special educational institutions.

4.4.2. Such a broad interpretation of the concept of "free education" violates a reasonable balance between the needs of society in the field of education and the capacity of the state. The ECtHR also noted in its jurisprudence that "from the viewpoint of organizing, education is a complex and, in terms of implementation, expensive activities, since the means that the authorities can provide for this are limited. It is also true that with the regulation of the accessibility of education and, in particular, in settling the issue of charging or not charging for it

³For example, Paragraph 3 of Article 24 of the Constitution of Belgium, Part 3 of Article 53 of the Constitution of Bulgaria, Paragraph 76 of the Constitutional Act of Denmark, Paragraph 1 of Article 16 of the Constitution of Finland, Part 4 of Article 42 of the Constitution of Ireland, Article 21 of the Constitution of Sweden, Paragraph 2 of Article 66 of the Constitution of Croatia, Paragraph 2 of Article 34 of the Constitution of Italy, Part 1 of Article 23 of the Constitution of Luxembourg, Clause "a" of Part 2 of Article 74 of the Constitution of Portugal, Part 4 of Article 27 of the Constitution of Spain, Article 112 of the Constitution of Latvia, Paragraph 2 of Article 41 of the Constitution of Lithuania, Paragraph 1 of Article 37 of the Constitution of Estonia, Part 2 of Article 42 of the Constitution of Slovakia, Article 16 of the Constitution of Hungary, Part 2 of Article 70 of the Constitution of Poland, Paragraph 2 of Article 57 of the Constitution of Slovenia, Article 10 of the Constitution of Malta, Part 2 of Article 20 of the Constitution of Cyprus, Paragraph 13 of the Preamble of the Constitution of France, Part 4 of Article 16 of the Constitution of Greece, Part 2 of Article 33 of the Charter of Fundamental Rights and Freedoms of the Czech Republic, Part 4 of Article 32 of the Constitution of Romania.

or levying a person, the state must balance on the one hand between educational needs under its jurisdiction and on the other, its limited capacity to provide them”⁴.

C. Are there disproportionate financial obligations that can impede the realization of the right to compulsory free secondary education for the students of grades 5-12 of state general schools, especially students from socially unsecured families?

4.5. The Constitutional Court considers that when establishing the requirement of compulsory secondary education, thereby schoolchildren and their parents (legal representatives) should not be charged with disproportionate financial obligations. Expenses arising from compulsory education - fees for unified school uniforms, office supplies, sports uniforms of students, including prices for school textbooks, should not be at such a rate that will question the principle of free compulsory secondary education.⁵

4.6. According to Part 1 of Article 42 of the Constitutional Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court demanded from the Ministry of Education and Science of the Republic of Armenia, among other things, information on the amount allocated annually for printing textbooks and whether there is a specific procedure for providing students of 5-12 classes, students of socially unsecured group with the textbooks for free or at a discount. The Ministry of Education and Science in the response of May 8, 2018, number 01/10/ 5028-18 reported that "the amount allocated annually for the printing of textbooks is unstable, it is determined on the basis of applications submitted to the Ministry, which are drafted up on the basis of actual number of students of the given academic year and required textbooks". In connection with the second question, the Ministry reported that "the compensation of the investment amount for the textbooks provided to students of an institution from socially unsecured families is carried out from the state budget of the Republic of Armenia under the program "Compensation for Payment for Textbooks of Children from Socially Unsecured Families." The list of students of an institution from socially unsecured families is compiled at a joint meeting of the pedagogical and the parents' board of the institution and approved by the principal." At the same time, in the mentioned letter, the Ministry stated that there are no students who do not attend school due to the lack of textbooks, since the issue of providing

⁴Case of Ponomaryovi v. Bulgaria, 5335/05, 21/06/2011, point 55.

⁵ Kingreen, Art. 14 Rn. 2 // in C. Calliess, M. Ruffert, EUV/AEUV Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta Kommentar, 5. Auflage 2016: Report submitted by the Special Rapporteur, Katarina Tomasevski, E/CN.4/2004/45, 15 January 2004, point 26:

textbooks is regulated by sub points 5 and 6 of point 10, point 11 of the Procedure for Providing Textbooks for Secondary Education Institutions of RA and Publication of Textbooks on General Subjects" approved by the order of the Minister of Education and Science of the Republic of Armenia of August 21, 2009 N 752-N. It was also noted that "at the beginning of each academic year, the institution specifies the number of necessary textbooks based on the actual number of students, and if there is a shortage of textbooks obtained in the given and the previous academic year, an additional application can be submitted."

4.7. Examination of the Appendix to the Order N834-A/2 of the Minister of Education and Science of the Republic of Armenia of 28.07.2017 "On Approval of the Amount of Investment Amounts for the Textbooks of the 2017-2018 School Year of Institutions Implementing General Education Programs" shows that the minimum investment amount is 300 AMD and the maximum - 550 AMD for 5- 12 grades. According to the assessment of the Constitutional Court, even paying the specified maximum amount of 550 AMD by a socially unsecured family for one textbook cannot be considered as an essential interference with the right to free secondary education in state educational institutions.

4.8. At the same time, the Constitutional Court considers that the state is obliged to guarantee sufficiently certain transparent and equality-based procedures that ensure the availability of textbooks to students from socially unsecured families. In this aspect, the compensation procedure under the program "Compensation for Payment for Textbooks of Children from Socially Unsecured Families" is controversial in terms of guaranteeing the availability of textbooks for at least two reasons. Firstly, this procedure does not determine the specific procedures for obtaining a status of a "socially unsecured" family and, in connection with this, ensuring the availability of textbooks free of charge or at a substantially low price. And, secondly, the procedures and mechanisms necessary for the effective implementation of basic human rights, in this case the procedure for ensuring the availability of textbooks to students from socially unsecured families, should be enshrined in the law and in the subordinate regulatory legal acts adopted to implement this law.

D. When securing the constitutional right to free education, did the legislator take into account the obligations undertaken by the Republic of Armenia in connection with the provision of this right in ratified international human rights treaties and the corresponding legal practice (Part 1 of Article 81 of the Constitution).

4.9. The Constitutional Court states that neither the international treaties ratified by the Republic of Armenia nor the practice of the bodies acting on the basis of these treaties stipulate that free secondary education also includes the free provision of school textbooks. It follows from the above-mentioned case-law of the European Court of Human Rights that "the right to education in its nature presupposes regulation by the State, this regulation in time and space can differ according to the needs and capacities of the community"⁶.

It should also be taken into account that the Republic of Armenia, in the matter of guaranteeing the right to free education, has adopted more binding obligations than stipulated by international documents⁷. The latter basically guarantee the right to free education for "primary" ("fundamental", "basic") education ("primary education" or "elementary school")⁸, which is compulsory.

Thus, Article 13 of the International Covenant on Economic, Social and Cultural Rights of 1966 states that for all, primary education is compulsory and free, and for secondary education requires that it in its various forms, including secondary technical and vocational education, should be open and accessible to all, by all appropriate means, in particular through the introduction of free education with high academic achievement.

Meanwhile, pursuant to the second sentence of Part 1 of Article 38 of the Constitution, Part 7 of Article 18 of the RA Law on Education provided that 12 years of secondary or primary professional (vocational) or secondary vocational education is compulsory in the Republic of Armenia until the student turns 19-year-old age, if this right was not realized earlier. Secondary education is carried out in a three-stage secondary school with a total duration of 12 years in the following consecutive steps:

⁶Case of Ponomaryovi v. Bulgaria, 5335/05, 21/06/2011, Point 53, Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (merits), 23 July 1968, B. Interpretation adopted by the Court, Point 5; Campbell and Cosans v. the United Kingdom, 25 February 1982, Point 41, Series A no. 48; Çiftçi v. Turkey (dec.), no. 71860/01, ECHR 2004 VI; Konrad v. Germany (dec.), no. 35504/03, ECHR 2006 XIII.

⁷Part 1 of Article 26 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948, Part 2 of Article 13 of the International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on December 16, 1966, Part 1 of Article 28 of the Convention on the Rights of the Child adopted by the UN General Assembly on November 20, 1989.

⁸According to international documents, "primary" education usually begins between the ages of 5-7 years and lasts for 7 years, although it can last from 4 to 7 years, usually up to 10-12 years of age. UNESCO International Standard Classification of Education (ISCED) (2011), Points 120-123, CESCR General Comment No. 13: The Right to Education (Art. 13), adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999, Point 9, The World Declaration on Education for All, adopted by the World Conference on Education for All, held at Jomtien, Thailand from 5-9 March 1990, Part 1 of Article 5.

1) primary school (grades 1-4);

2) middle school (grades 5-9);

3) high school (grades 10-12)

Based on the review of the Case and governed by Point 1 of Article 168, Point 10 of Part 1 of Article 169, Article 170 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the RA Constitutional Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. Part 4 of Article 6 of the Law on Education of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia.

2. Pursuant to Part 2 of Article 170 of the Constitution of the Republic of Armenia this Decision shall be final and shall enter into force upon its promulgation.

Chairman

H. Tovmasyan

12 June 2018
DCC-1419