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IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA
ON THE CASE OF CONFORMITY OF ARTICLE 244 OF THE CRIMINAL CODE 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 **January 26, 2016**

The Constitutional Court of the Republic of Armenia composed of V. Hovhannisyan (Chairman), K. Balayan, F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan, A. Petrosyan (Rapporteur),

with the participation of (in the framework of the written procedure) the Applicant: RA Human Rights Defender,

representative of the Respondent: H. Sardaryan, official representative of the RA National Assembly, Chief Specialist of the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100, Point 8 of Part 1 of Article 101 of the Constitution of the Republic of Armenia, Articles 25, 38 and 68 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Article 244 of the Criminal Code 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 Case was initiated on the basis of the Application submitted to the RA Constitutional Court by the RA Human Rights Defender on September 17, 2015.

Taking into account the fact that by the abovementioned Application the RA Human Rights Defender presented his positions on the constitutionality of Article 244 of the RA Criminal Code challenged in this Case within the framework of the provisions of Chapter 2 of the RA Constitution with amendments through 27 November 2005, the RA Human Rights Defender submitted a complemented application to the RA Constitutional Court on 14 January 2016, clarifying his positions on the constitutionality of Article 244 of the RA Criminal Code challenged in this Case, in accordance with the provisions of the current Chapter 2 of the RA Constitution with amendments through 6 December 2015 (which entered into force on 22 December 2015).

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the RA Criminal Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Criminal Code was adopted by the RA National Assembly on 18 April 2003, signed by the RA President on 29 April 2003 and entered into force on 1 August 2003.

Article 244 of the RA Criminal Code challenged in this Case is titled: "Abandonment of the site of road accident," which states:

"Abandonment of the site of road accident by the driver of a vehicle who violated the traffic rules or rules of operation of vehicles, in the case of consequences envisaged in Article 242 of this Code,

shall be punished with a fine in the amount of 100-fold to 250-fold minimal salaries, or with arrest for the term of up to 3 months, or with imprisonment for the term of up to 2 years, with or without deprivation of the right to hold certain posts or practice certain activities for up to 3 years."

The challenged Article was amended by the RA Law HO-119-N of 1 January 2009.

2. The Applicant considers that Article 244 of the RA Criminal Code creates an issue of constitutionality and asks to resolve the issue of conformity of the said Article with Articles 65 and 66 of the RA Constitution with amendments through 6 December 2015.

In the Applicant's opinion, "it follows from the formulation and literal interpretation of the challenged norm that its real purpose is not to protect and/or provide assistance to those affected by the accident, but to assist law enforcement authorities in investigating a road accident."

According to the Applicant, the challenged Article obliges the person guilty of a road accident to recognize and admit his guilt first and foremost at the site of the accident, i.e. not to abandon the site of the accident. That is, the challenged norm obliges the participants of a road accident to act on the basis of the presumption of their own guilt, since at the time of the accident and immediately after it (especially in disputable cases) no one can be sure who can eventually be found guilty of the accident.

To ground his positions, the Applicant refers to the legal positions expressed in a number of judgments of the European Court of Human Rights concerning the right to silence and not to testify about himself/herself, the presumption of innocence, as well as the legal positions expressed by the constitutional justice authorities of a number of foreign states regarding the issue in dispute. The Applicant also refers to the legal positions of the RA Court of Cassation expressed in the Decision of 13 September 2013 (ԵԱՆԴ/0122/01/12) regarding the issue in dispute.

3. Objecting the arguments of the Applicant, the Respondent finds that providing criminal liability for the abandonment of the site of road accident is due to the need to protect the rights of affected persons and, in particular, under the threat of punishment it pursues the aim to oblige the participants of a road accident not to abandon and provide the necessary assistance to persons affected by the accident.

According to the Respondent, in order to fully understand the legal content of Article 244 of the RA Criminal Code, it is necessary to apply to the RA Law on Ensuring Road Traffic Safety (in particular Article 24), which defines the duties of owners of vehicles and drivers.

Referring to the duty of persons, who violated the rules of road safety, to testify and the danger of being under threat of criminal prosecution, the Respondent notes that the Law does not oblige the person who violated the traffic rules to testify. Moreover, both the RA Con-

stitution and the RA Criminal Procedure Code entitle not only the suspect but also the witness to refuse to testify about himself/herself, if a person may be under threat of criminal prosecution as a result of this. The right to refuse to testify is valid even if such testimony may not only directly but also indirectly turn a person from witness into suspect.

According to the Respondent, the provisions of Article 244 of the RA Criminal Code are in conformity with the RA Constitution.

4. Within the framework of the constitutional legal dispute raised in this Case, taking into account the requirements of Part 7 of Article 68 of the RA Law on the Constitutional Court, and based on the arguments and conclusions of the Applicant in this Case, the Constitutional Court considers it necessary to establish:

a) the legal objectives and grounds for the challenged legal regulation;

b) the duties of the driver of the vehicle in the event of participation in a road accident;

c) in case of the challenged legal regulation, the legal guarantees and ensuring the exercise of the constitutional rights to be exempted from the duty to testify and the presumption of innocence.

5. Within the framework of the systemic analysis of the provisions of the RA Criminal Code, the RA Constitutional Court states that the tasks of the RA Criminal Code are the protection of the rights and freedoms of the human being and the citizen, the rights of legal entities, the property, the environment, the public order and security, the constitutional order, the peace and security of mankind from criminal encroachments, as well as crime prevention. To implement these objectives, the RA Criminal Code establishes the basis for criminal liability and the principles of criminal legislation, determines which socially dangerous acts are considered crimes, and establishes the types of punishment for the committal of these acts and other penal and legal measures (Article 2 of the RA Criminal Code). The General Part of the RA Criminal Code also defines the purpose of punishment, i.e. restoration of social justice, correction of the person punished, as well as crime prevention (Part 2 of Article 48 of the RA Criminal Code).

Within the framework of the powers to assess the public danger of the act and its criminalization, the legislator, based on the above-mentioned tasks and objectives of the RA Criminal Code, fixed the Article challenged in this Case in Chapter 23 of the RA Criminal Code, titled: "Crimes against public security." According to the mentioned regulation, the legislator considers the abandonment of the site of road accident by the driver of a vehicle who violated the traffic rules or rules of operation of vehicles as crime, and determines the qualification of this act as such with the circumstance of the mandatory occurrence of consequences stipulated in Article 242 of the RA Criminal Code, titled: "Violation of the traffic rules and rules of operation of vehicles." These consequences are: causing grave or medium gravity damage to human health by negligence, causing death by negligence, causing death of two or more persons by negligence.

The Respondent in this Case argues that by the challenged legal regulation, determination of the legal requirement not to abandon the site of road accident is aimed at protecting the rights of affected persons and it is conditioned by the necessity of exercising the duties of the vehicle driver stipulated by the RA Law on Ensuring Road Traffic Safety.

Based on the above-mentioned, the RA Constitutional Court considers that the argument of the Applicant that "... providing criminal liability for the abandonment of the site of road accident, under the threat of punishment the legislator pursued the aim to oblige the driver of a vehicle who violated the traffic rules or rules of operation of vehicles to stay at the site of road accident solely for the purpose of assisting law enforcement authorities" is not grounded.

The RA Constitutional Court states that according to Point "d" of Part 2 of Article 24 of the RA Law on Ensuring Road Traffic Safety, titled: "Main Duties of Owners of Vehicles and Drivers," the vehicle driver shall be obliged:

"d) in case of involvement in a road accident:

1) to immediately stop the vehicle, turn on emergency lights in the manner prescribed by the traffic rules, and not move both the vehicle and the objects related to the accident (in order to ensure emergency safety at the site of the road accident, emergency lights of vehicles, stopped for assistance in the immediate vicinity of the site of the accident, must also be turned on);

2) to take the necessary measures to provide first aid to the affected persons, call the "First Aid Service" or other specialized service, and in case of emergency take the affected persons in a passing car or in his own vehicle to the nearest medical institution, inform her/his name, registration number plate of the vehicle (with the presentation of an identity document or driver's license and vehicle registration certificate), then return to the site of accident;

3) to free the carriageway in the manner prescribed by Part 4 of this Article, if there are obstacles which hinder the movement of other vehicles;

4) to report the accident to the Police and await the arrival of the police officers."

According to Part 4 of the same Article, "In case there are no affected persons as a result of the road accident victims, by mutual agreement on assessing the situation with the accident the drivers may draw up and sign the scheme of the accident in advance, appear at the nearest post of road patrol service or the territorial police agency for registration of the accident in the established order."

It follows from the above-mentioned legal regulation that in the event of participation the driver of a vehicle in a road accident the legislator, inter alia, included not only the duties conditioned by the relations with law enforcement authorities, but also the obligation to take the necessary measures to provide first aid to the affected persons.

The RA Constitutional Court also states that according to Article 33 of the RA Law on Ensuring Road Traffic Safety, "persons who violate the legislation on ensuring road traffic safety shall be liable in accordance with the procedure provided for by the law."

It should be noted that Article 124^6 of the RA Administrative Offences Code establishes administrative liability for violation of the legislation in the field of ensuring road traffic safety (which caused an emergency or a road accident) for the failure to perform her/his duties by the driver-participant of the accident. In particular, Part 3 of the said Article establishes administrative liability for failure to fulfill road traffic safety obligations by the driver-participant of the road accident, if it does not contain signs of a crime.

The study of the RA legislation on road traffic shows that prior to the adoption of the RA Law on Ensuring Road Traffic Safety, the RA

Government Decision No. 924-N "On Approval of the Rules of the Road Traffic of the Republic of Armenia" dated 23 May 2002 was in force, which included similar legal regulations prescribed by the said Law.

The RA Constitutional Court considers it necessary to state that a legal position on the legal regulation challenged in this Case was also expressed in the Decision of the RA Court of Cassation (ԵԱՆԴ/0122/01/12) dated 13 September 2013. In particular, in Point 18 of the Decision, the RA Court of Cassation noted that "Article 244 of the RA Criminal Code aims to punish those who violated the rules of road traffic, abandoned the site, evaded assistance to the persons affected by the road accident, did not want to report the road accident to the law enforcement authorities and assist to disclose the committed act and circumstances connected with its consequences." The RA Constitutional Court states that **in case of participation in a road accident, the law does not envisage the duty of the vehicle driver to assist to disclose the committed act, the circumstances connected with its consequences and the liability for its non-performance. Meanwhile, according to Point 9 of Part 1 of Article 62 of the RA Criminal Code, the assistance to the disclosure of the crime is considered a circumstance mitigating liability and punishment.** Therefore, the law enforcement practice should be guided by the approach to exclude imposing duty to the person beyond legislative regulation and, as a consequence, criminal liability for its non-performance.

Based on the aforementioned analysis, the RA Constitutional Court states that the provision of criminal liability for the act, provided for by the Article challenged in this Case, is conditioned by the need to ensure the protection of the interests of participants of road traffic, in particular the persons affected, as well as the performance of the duties of drivers of vehicles in the case of her/his participation in the road accident. The Constitutional Court finds that by establishing criminal liability for the act provided for by the Article challenged in this Case, the State shall in particular exercise its constitutional obligation to protect the rights and freedoms of the human being and the citizen.

At the same time, the RA Constitutional Court finds that in case, in the course of further legislative developments the legislator complies with the policy of criminalization of the act provided for by the Article

challenged in this Case, in order to avoid different interpretations it will be necessary to further increase the level of legal certainty and legal predictability of legal regulation, taking into account the legal positions expressed by the Constitutional Court in this Decision.

6. The RA Constitutional Court states that the rights to be exempted from the duty to testify and the presumption of innocence are established by Articles 65 and 66 of the RA Constitution (with amendments through 6 December 2015).

Article 65 of the RA Constitution, titled: "Right to be Exempted from the Duty to Testify," states that "No one shall be obliged to testify about herself/himself, her/his spouse, or close relatives, if it is reasonably assumed that it may be used against him or her or against them in the future. The law may prescribe other cases of exemption from the duty to testify."

Article 66 of the RA Constitution, titled: "The presumption of innocence," states that "A person accused of a crime shall be presumed innocent until her/his guilt is proven in accordance with the law, upon criminal judgment of the court entered into legal force."

The constitutional rights to be exempted from the duty to testify and the presumption of innocence, in similar regulation, were also stipulated by Articles 21 and 22 of the RA Constitution with amendments through 27 November 2005.

The rights to be exempted from the duty to testify and the presumption of innocence are directly or indirectly enshrined in a number of international legal instruments. In particular, Article 11 of the Universal Declaration of Human Rights, Part 2 of Article 14 of the International Covenant on Civil and Political Rights, Part 2 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms establish the right to the presumption of innocence. It should be noted that in the 17 December 1996 Judgment of the European Court of Human Rights in the case of Saunders v. the United Kingdom (Application no. 19187/91) Court expressed the position that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure. In the same Judgment, the European Court of Human

Rights also concluded that the right to silence is closely intertwined with the presumption of innocence.

In its decisions, the RA Constitutional Court also addressed the issues of guaranteeing and ensuring the full realization of the constitutional rights to be exempted from the duty to testify and the presumption of innocence. Within the framework of This Case, the Constitutional Court considers it necessary to refer, inter alia, to the following legal position expressed in the Decision DCC-871 of 30 March 2010:

"... the principle of the presumption of innocence is aimed at protecting a person from an unfair charge, while at the same time it cannot exclude the fact that the competent authority has a suspicion of a criminal offense until such suspicions were not justified as a result of the lawful actions of that authority."

The RA Constitutional Court states that the legislator provided legal guarantees for the realization of the constitutional rights to be exempted from the duty to testify and the presumption of innocence in the RA Criminal Procedure Code, in particular in Article 18 titled: "The Presumption of Innocence," and Article 20 titled: "Exempted from the duty to testify."

The RA Criminal Procedure Code also defines other guarantees ensuring the implementation of the above-mentioned rights. In particular, according to the RA Criminal Procedure Code, testifying or refusal to testify, giving explanations or refusal to give explanations, are defined as the rights of the suspect (Points 7 and 8 of Part 2 of Article 63) and the accused (Points 6 and 7 of Part 2 of Article 65). In addition, the RA Criminal Procedure Code prescribes the legal requirement for the investigator to explain the suspect (Part 3 of Article 211) and the accused (Part 8 of Article 212) of her/his rights before conducting interrogation, including the right to refuse to testify, the legal requirement for the investigator to warn a witness (at the beginning of the confrontation) about the right not to testify about herself/himself, her/his spouse, or close relatives (Part 2 of Article 216), and the legal requirement for the presiding judge to clarify to a witness (before questioning) her/his right to refuse to testify about herself/himself, her/his spouse, or close relatives (Point 1 of Part 1 of Article 339).

It should also be noted that Part 2 of Article 339 of the RA Criminal Code, titled: "Refusal to testify," states: "A person who refused to testify about herself/himself, her/his spouse, or close relatives shall be exempted from criminal liability."

Comparing the above with the Applicant's conclusion in this Case, according to which Article 244 of the RA Criminal Code challenged in this Case "raises an issue of constitutionality insofar as it contradicts the right of a person not to testify about herself/himself, as well as the principle of the presumption of innocence," the RA Constitutional Court finds, that this conclusion is not justified, since direct regulation of legal guarantees and ensuring the implementation of the constitutional rights to be exempted from the duty to testify and the presumption of innocence, goes beyond the scope of legal regulation of the RA criminal legislation and naturally also the scope of the legal regulation challenged in this Case. Legal guarantees for the realization of the constitutional rights to be exempted from the duty to testify and the presumption of innocence in the systemic integrity are provided by the RA criminal procedure legislation.

Based on the review of the Case and being governed by Point 1 of Article 100, Point 8 of Part 1 of Article 101, and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. Article 244 of the Criminal Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia within the framework of legal positions expressed by the Constitutional Court in this Decision.

2. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman **V. Hovhannisyan**

January 26, 2016

DCC-1252

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA
ON THE CASE OF CONFORMITY OF POINTS 1 AND 3 OF PART 1 OF ARTICLE 53, POINTS 1 AND 2 OF PART 2 OF ARTICLE 53 AND POINT 4 OF PART 2 OF ARTICLE 57 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF THE PROSECUTOR GENERAL OF THE REPUBLIC OF ARMENIA

Yerevan **February 2, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan (Rapporteur), A. Gyulumyan, F. Tokhyan, A. Tunyan, A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan,

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

the Applicant: G. Kostanyan, RA Prosecutor General,

representative of the Respondent: H. Sardaryan, official representative of the RA National Assembly, Chief Specialist of the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100, Point 7 of Part 1 of Article 101 of the Constitution of the Republic of Armenia, Articles 25 and 71 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Points 1 and 3 of Part 1 of Article 53, Points 1 and 2 of Part 2 of Article 53 and Point 4 of Part 2 of Article 57 of the Criminal

Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the Applications of the Prosecutor General of the Republic of Armenia.

The Case was initiated on the basis of the Applications submitted to the Constitutional Court of the Republic of Armenia by the RA Prosecutor General on September 28, 2015.

By the Procedural Decision PDCC-61 of 20.10.2015 the Constitutional Court decided to combine and examine during the same session of the Court the Cases submitted on the basis of the above-mentioned Applications.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the RA Criminal Procedure Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Criminal Procedure Code (hereinafter the Code) was adopted by the RA National Assembly on 1 July 1998, signed by the RA President on 1 September 1998 and entered into force on 12 January 1999.

Point 1 of Part 1 of Article 53 of the Code, titled: "Powers of the prosecutor at the pre-trial proceedings" states: "During the pre-trial proceedings the prosecutor is authorized … to institute and carry out criminal prosecution, cancel the decision of the investigator on suspension of a criminal case, institute a criminal case based on court motion, cancel the decision of the body of inquiry and the investigator on rejecting the institution of a criminal case and institute a criminal case, as well as institute a criminal case on her/his own initiative."

Point 3 of the same Part of this Article stipulates: "During the pre-trial proceedings the prosecutor is authorized … in case of a crime, to instruct the body of inquiry and the investigator to prepare the materials for the institution of a criminal case."

Point 1 of Part 2 of this Article prescribes: "During the implementation of the procedure of prosecutorial management of the preliminary investigation and the inquest, the prosecutor is exclusively entitled … to check the implementation by the body of inquiry the requirements of law on receiving, registration of and follow up on the reports on committed or prepared crimes, on other accidents."

Point 2 of the same Part stipulates: "During the implementation of the procedure of prosecutorial management of the inquest and the preliminary investigation, the prosecutor is exclusively entitled … to request materials, documents, criminal cases and information on the progress of the investigation from the investigator, the body of inquiry, as well as to familiarize with them or check them at the place of their location."

Point 4 of Part 2 of Article 57 of the Code, titled: "Powers of the body of inquiry" states: "The body of inquiry … immediately informs the prosecutor and the investigator about the revealed crime and the inquest initiated under the case."

One of the challenged provisions – Point 1 of Part 1 of Article 53 – was supplemented by the RA Law HO-91-N on "On making amendments and supplements to the Criminal Procedure Code of the Republic of Armenia," which was adopted by the RA National Assembly on 25 May 2006, signed by the RA President on 20 June 2006 and entered into force on 8 July 2006. According to this Law, the RA National Assembly supplemented Point 1 of Part 1 of Article 53 of the Code with the words "as well as institute a criminal case on her/his own initiative."

The other challenged provisions were not amended or supplemented since the adoption of the RA Criminal Procedure Code.

2. In regard to the criminal case No. 61202415, the procedural background of this Case is the following: as a ground to initiate a criminal case envisaged by Point 3 of Article 176 of the RA Criminal Procedure Code, the report addressed to the RA Prosecutor General No. 36/15-15 of 9 April 2015 by N. Misakyan, Head of the Department for Combating Corruption and Economic Crimes of the Prosecutor General's Office of the RA was sent to the RA Special Investigation Service on 13 April 2015.

According to the mentioned report, the Head of the Department for Combating Corruption and Economic Crimes of the Prosecutor General's Office of the RA in essence reported that the officials of the RA Ministry of Finance, authorized with the powers of the body of inquiry, did not carry out the duties prescribed by Point 4 of Part 2 of Article 57 of the RA Criminal Procedure Code, i.e. they did not immediately

inform the prosecutor about the revealed crime, and as a result the prosecutor was deprived of the opportunity to carry out the exclusive power to check the implementation by the body of inquiry the requirements of law on receiving, registration of and follow up on the reports on committed or prepared crimes, on other accidents, as prescribed by Point 1 of Part 2 of Article 53 of the RA Criminal Procedure Code.

In particular, according to the report, a copy of the decision of 25 February 2015 from the Department for Detection of Offenses and Implementation of Administrative Proceedings of the Ministry of Finance of the Republic of Armenia on the refusal to institute criminal proceedings based on the materials concerning "Hov-Grig Shin" LLC was submitted to the Prosecutor General's Office of the RA for the verification of legality.

Based on the materials prepared on the basis of the report by the Head of the Department for Combating Corruption and Economic Crimes of the Prosecutor General's Office of the RA, on 18 April 2015 the Deputy Head of the Department of the RA Special Investigation Service made a decision on dismissal to institute criminal proceedings due to absence of corpus delicti.

By the decision of the RA Prosecutor General dated 27 April 2015, the decision of 18 April 2015 made by the Deputy Head of the Department of the RA Special Investigation Service was canceled and on the grounds of the crime provided for by Part 1 of Article 315 of the RA Criminal Code, a criminal case No. 61202415 was instituted on the fact of official negligence.

The criminal case and the decision of 24 July 2015 of the Deputy Head of the Department of the RA Special Investigation Service on not carrying out criminal prosecution and suspension of a criminal case based on the criminal case No. 61202415 were submitted to the Prosecutor General's Office of the RA on 24 July 2015.

The prosecutor implementing the procedure of prosecutorial management of the preliminary investigation made a decision on 31 July 2015, according to which the decision of 24 July 2015 of the Deputy Head of the Department of the RA Special Investigation Service was canceled with the motivation to be illegal.

The criminal case and the decision of 19 August 2015 of the Deputy Head of the Department of the RA Special Investigation Service on not

carrying out criminal prosecution and suspension of a criminal case based on the criminal case No. 61202415 were submitted to the Prosecutor General's Office of the RA on 20 August 2015.

The prosecutor implementing the procedure of prosecutorial management of the preliminary investigation made a decision on 27 August 2015, according to which the decision of 19 August 2015 of the Deputy Head of the Department of the RA Special Investigation Service was canceled with the motivation to be illegal.

In regard to the criminal case No. 61202715, the procedural background of this Case is the following: as a ground to initiate a criminal case envisaged by Point 3 of Article 176 of the RA Criminal Procedure Code, the report addressed to the RA Prosecutor General No. 36/15-14 of 21 October 2014 by B. Petrosyan, Deputy Head of the Department for Combating Corruption and Economic Crimes of the Prosecutor General's Office of the RA was sent to the RA Special Investigation Service on 22 October 2014.

According to the mentioned report, the Deputy Head of the Department for Combating Corruption and Economic Crimes of the Prosecutor General's Office of the RA in essence reported that the officials of the RA Ministry of Finance, authorized with the powers of the body of inquiry, did not carry out the duties prescribed by Point 4 of Part 2 of Article 57 of the RA Criminal Procedure Code, i.e. they did not immediately inform the prosecutor about the revealed crime, and as a result the prosecutor was deprived of the opportunity to carry out the exclusive power to check the implementation by the body of inquiry the requirements of law on receiving, registration of and follow up on the reports on committed or prepared crimes, on other accidents, as prescribed by Point 1 of Part 2 of Article 53 of the RA Criminal Procedure Code.

In particular, according to the report, by the writ No. 10903/13-14 dated 9 October 2014 of the Head of the Department for Detection of Offenses and Implementation of Administrative Proceedings of the Ministry of Finance of the Republic of Armenia, a copy of the decision of 9 October 2014 on the refusal to institute criminal proceedings against the customs broker Martin Hakob Avetisyan was sent to the Department for Combating Corruption and Economic Crimes of the Prosecutor General's Office of the RA for the verification of legality.

Based on the materials prepared on the basis of the report by the Deputy Head of the Department for Combating Corruption and Economic Crimes of the Prosecutor General's Office of the RA, on 10 November 2014 the Deputy Head of the Department of the RA Special Investigation Service made a decision on dismissal to institute criminal proceedings due to absence of corpus delicti.

By the decision of the RA Prosecutor General dated 11 May 2015, the decision of 10 November 2014 made by the Deputy Head of the Department of the RA Special Investigation Service was canceled and on the grounds of the crime provided for by Part 1 of Article 315 of the RA Criminal Code, a criminal case No. 61202715 was instituted on the fact of official negligence.

The criminal case and the decision of 24 July 2015 of the Deputy Head of the Department of the RA Special Investigation Service on not carrying out criminal prosecution and suspension of a criminal case based on the criminal case No. 61202715 were submitted to the Prosecutor General's Office of the RA on 24 July 2015.

The prosecutor implementing the procedure of prosecutorial management of the preliminary investigation made a decision on 31 July 2015, according to which the decision of 24 July 2015 of the Deputy Head of the Department of the RA Special Investigation Service was canceled with the motivation to be illegal.

The criminal case and the decision of 19 August 2015 of the Deputy Head of the Department of the RA Special Investigation Service on not carrying out criminal prosecution and suspension of a criminal case based on the criminal case No. 61202715 were submitted to the Prosecutor General's Office of the RA on 20 August 2015.

The prosecutor implementing the procedure of prosecutorial management of the preliminary investigation made a decision on 27 August 2015, according to which the decision of 19 August 2015 of the Deputy Head of the Department of the RA Special Investigation Service was canceled with the motivation to be illegal.

3. The Applicant finds that the challenged provisions of the RA Criminal Procedure Code contradict Part 1 of Article 18, Part 5 of Article 20, and Article 103 of the RA Constitution with amendments through the Referendum of 27 November 2005.

According to the Applicant the provisions "revealed crime" and "inquest initiated under the case" stipulated by Point 4 of Part 2 of Article 57 of the Code are not norms stipulating conditions, and Paragraph 2 of Part 10 of Article 45 of the RA Law on Legal Acts refers the norms stipulating conditions. Therefore, the body of inquiry is obliged to inform the prosecutor not only about the inquest initiated under the case, but also the crime revealed by the body of inquiry. Meanwhile, in the law enforcement practice the provisions "revealed crime" and "inquest initiated under the case" stipulated by Point 4 of Part 2 Of Article 57 of the Code are perceived as norms stipulating simultaneous conditions separated by the conjunction "and," they are interpreted by the rules prescribed by Paragraph 2 of Part 10 of Article 45 of the RA Law on Legal Acts, as a result of which the provisions prescribed by Point 4 of Part 2 of Article 57 of the Code receive a different meaning. As a result, according to law enforcement practice, the body of inquiry is obliged to immediately inform the prosecutor about the revealed crime **only in case of initiating inquest under the case**.

The Applicant states that the provision of Point 4 of Part 2 of Article 57 of the Code establishing the duty to inform the prosecutor about the revealed crime - in the interpretation given to it in the law enforcement practice - does not provide the prosecutor with the opportunity to implement the power to initiate a criminal case independently, based on the materials about the crime revealed by the body of inquiry (as prescribed by Point 1 of Part 1 of Article 53 of the RA Criminal Procedure Code) prior to initiation of a criminal case by the body of inquiry /initiating inquest/, the power to instruct the investigator to prepare the materials in case of a crime revealed by the body of inquiry (as prescribed by Point 3 of Part 1 of Article 53 of the RA Criminal Procedure Code), the power to check the implementation by the body of inquiry the requirements of law on receiving, registration of and follow up on the reports on committed or prepared crimes, on other accidents (as prescribed by Point 1 of Part 2 of Article 53 of the RA Criminal Procedure Code), as well as the power to request materials in case of a crime revealed by the body of inquiry from the body of inquiry, as well as to familiarize with them or check them at the place of their location (as prescribed by Point 2 of Part 2 of Article 53 of the RA Criminal Procedure Code).

To ground his positions on the contradiction of the challenged legal provisions to Part 1 of Article 18, Part 5 of Article 20 and Article 103 of the RA Constitution, the Applicant cites the legal position expressed by the RA Court of Cassation in the decision No. ԵՇԴ/0097/01/09 of 26 March 2010 in the case of T. Kamalyan, the analysis of the practice of the European Court regarding the application of Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of the International Covenant on Civil and Political Rights, Articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the legal positions expressed by the European Court of Human Rights in the case of Jankovic v. Croatia, and in the case of Bekos and Koutropoulos v. Greece, approaches for the adoption at national level of measures to protect the rights of victims, proposed in A/RES/40/34 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of the UN General Assembly dated 29 November 1985 and Recommendation No. R(85)11 of the Committee of Ministers of the Council of Europe dated 28 June 1985 on the Position of the Victim in the Framework of Criminal Law and Procedure.

4. The Respondent maintains that the legislative determination and regulation of the powers of the prosecutor's office was primarily carried out in such a way as to guarantee the implementation of the objectives stipulated by the RA Criminal Procedure Code. Due to this, the legislator provided the prosecutor's office with the powers, which, if necessary, provide solutions to socio-legal problems arising from the constitutional legal status of the prosecutor's office, although those powers go beyond the preliminary investigation stage established by the RA Criminal Procedure Code. The study of the RA Criminal Procedure Code shows that the prosecutor's supervision begins with the stage of initiating a criminal case, and the implementation of the tasks of criminal proceedings depends on the legitimacy of this stage, i.e. protection of the rights and legitimate interests of a person, society and the State.

Checking the implementation by the body of inquiry the requirements of law on receiving, registration of and follow up on the reports on committed or prepared crimes, on other accidents is one of the su-

pervisory powers of the prosecutor's office regarding the legitimacy of the institution of a criminal case.

Referring to the Recommendation of the Committee of Ministers of the Council of Europe Rec(2000)19 dated 6 December 2000 on the Role of Public Prosecution in the Criminal Justice System, the Guidelines on the Role of Prosecutors adopted by the UN in 1990, the Standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors on 23 April 1993, the Respondent finds that they have a starting point in the formation of domestic legislation and law enforcement practice.

The Respondent also notes that the issue put forward by the Applicant was legally resolved in the legal regulations of the draft of the new RA Criminal Procedure Code, which is in circulation in the RA National Assembly. The draft of the new Code envisages canceling the stage of initiation of a criminal case and including it in the stage of preliminary investigation. Criminal proceedings start from the moment of receiving a report of a crime and end with the sending of criminal proceedings to court or its termination.

Summarizing, the Respondent concludes that the provisions of Points 1 and 3 of Part 1 of Article 53, Points 1 and 2 of Part 2 of Article 53, Point 4 of Part 2 of Article 57 of the RA Criminal Procedure Code are in conformity with the requirements of the RA Constitution, as they are called to ensure the exercise of supervisory powers of the prosecutor's office regarding the legitimacy of the inquiry and preliminary investigation, protection of the rights and freedoms of individuals from criminal encroachments.

5. The Constitutional Court notes that at the time of accepting the Cases for examination on the basis of the two Applications submitted by the Applicant, the RA Constitution with amendments through the Referendum of 27 November 2005 was in effect, and the Applicant considers the challenged provisions of the RA Criminal Procedure Code to be controversial from the viewpoint of Part 1 of the Article 18, Part 5 of Article 20 and Article 103 of the Constitution in this edition.

At the same time, the Constitutional Court states that:

a) the legal regulation of Part 1 of Article 18 of the RA Constitution

with amendments through the Referendum of 27 November 2005 is stipulated in Part 1 of Article 61 of the RA Constitution with amendments through the Referendum of 6 December 2015;

b) according to Part 6 of Article 209 of the RA Constitution with amendments through the Referendum of 6 December 2015, Article 103 of the RA Constitution with amendments through the Referendum of 27 November 2005 continues to operate.

6. Within the framework of examination of this Case, the Constitutional Court considers it necessary first of all to refer to the constitutional legal content of a number of provisions of the RA Law on Legal Acts, given that the references to those provisions served as the basis for a diverse interpretation of the norms in dispute in the law enforcement practice.

Part 1 of Article 86 of the RA Law on Legal Acts, titled "Interpretation of legal acts" states: "A legal act shall be interpreted according to the literal meaning of the words and expressions contained therein, taking into account the requirements of the law.

An interpretation of a legal act shall not change its meaning."

According to Paragraphs 1-3 of Point 10 of Article 45 of the same Law, titled "Other rules of legislative technique," "The conjunction 'or' may not be used when listing conditions where the existence of all of the listed conditions is mandatory. In this case, the conjunction 'and' must be used.

The conjunction 'and' may not be used when listing conditions where the existence of only one of all the listed conditions is sufficient, neither may they be separated by a comma or other punctuation mark. In this case, the conjunction 'or' must be used.

If the application of a norm stated in a legal act depends on conditions separated by the conjunction 'and,' the existence of all the listed conditions shall be mandatory for the application of that norm."

It follows from the analysis of the provisions of Paragraphs 1-3 of Point 10 of Article 45 of the RA Law on Legal Acts that they concern exclusively the norms defining conditions. That is, they concern the cases when the application of a norm stated in a legal act depends on conditions separated by the conjunction "and" that have a simultaneous role and guarantee the realization of the objective of legal regulation.

The RA Constitutional Court considers it necessary to state that the legislation of the Republic of Armenia, including the RA Criminal Procedure Code, contain different legal norms separated by the conjunction "and," and not all of which define the simultaneously necessary conditions for the application of that norm. Those conditions, inter alia, may be norm-principles, norm-objectives, norm-tasks, as well as specific regulatory norms that do not define any condition or, what the same is, do not condition the application of the given norm by a set of conditions. One of these specific regulatory norms is, for example, the norm stipulated by Part 1 of Article 52 of the RA Criminal Procedure Code, which, inter alia, contains the following provisions: "supervises the legitimacy of the preliminary investigation and inquest," "appeals against the court verdicts and other decisions."

In connection with the above-mentioned first provision, the Constitutional Court states that according to the RA criminal procedure legislation, simultaneous implementation of inquiry and preliminary investigation in case of a certain crime is impossible, since, as a rule, preliminary investigation follows the inquiry, according to the RA criminal procedure legislation.

In connection with the above-mentioned second provision, the Constitutional Court states that the RA criminal procedure legislation does not consider it mandatory that in a particular criminal case the court of first instance simultaneously issue both a verdict and other final decision. The general rule is that in a particular criminal case the court of first instance issues a verdict, and the higher courts issue a decision /the case of simultaneously issuing both a verdict and other final decision is envisaged in Article 360.1 of the Code and refers an additional court decision that is issued simultaneously with the verdict or decision/.

In connection with the above-mentioned first and second provisions, the Constitutional Court also states that they stipulate respectively the domains of prosecutor's supervision and other functions of the prosecutor, as well as condition the exercise of the powers of the prosecutor by the presence of an appropriate case, fact or event. In each of these provisions, two equivalent but independent notions are defined before and after the conjunction "and," and they assume two separate prerequisites for the exercise of the powers of the prosecutor, when

only one of the cases defined before and after the conjunction "and" is sufficient for the application of the provisions at issue. That is, in the example above, the prosecutor supervises the inquiry in case an inquiry is conducted under a particular case, the prosecutor supervises the preliminary investigation in case preliminary investigation is conducted, and the prosecutor is competent to challenge the verdict in case only a verdict and not other final judicial act is available under a particular case, regardless of whether there is or not other final judicial act subject to appeal under a particular case.

Interpretation of the legal norm must be conjunct with the existence of an independent function and the conditions for its implementation, rather than manifesting a mechanical approach. Point 1 of Part 2 of Article 53 of the RA Criminal Procedure Code clearly stipulates that "... the prosecutor is exclusively entitled … to check the implementation by the body of inquiry the requirements of law on receiving, registration of and follow up on the reports on committed or prepared crimes, on other accidents." The exercise of independent power may not be conditioned by the simultaneous presence of an object of legal regulation conditioned by other power.

The Constitutional Court finds that the rules stipulated by Paragraph 2 of Part 10 of Article 45 of the RA Law on Legal Acts are not used when listing objects of independent legal regulation, as well as the provision in dispute does not stipulate the requirement of simultaneous presence of necessary conditions relating specific legal regulation. The same relates to the provision stipulated by Paragraph 1 of Part 1 of Article 53 of the Code /cancel the decision of the body of inquiry and the investigator rejecting the institution of a criminal case/. The provision of Part 2 of Article 55 of the Code /the investigator is authorized to prepare materials in case of a crime and initiate a criminal case/ may also serve as an example. In this case, according to the interpretation given in the law-enforcement practice, the investigator may not prepare materials in case of a crime, unless a criminal case is initiated for this crime, or the investigator is obliged to initiate a criminal case on the basis of materials prepared in case of a crime, regardless of the fact that there are grounds for rejecting the institution of a criminal case.

In addition, in order to reveal the constitutional legal content of the provision of Point 4 of Part 2 of Article 57 of the Code, it is necessary

to present the given provision in the integrity of its legal content and consider in the context of the organic interconnectedness with other provisions of the Code. This is about Points 1 and 3 of Part 1 of Article 53 and Points 1 and 2 of Part 2 of Article 53 of the Code. The powers established by the latter presume the performance of the duty of the body of inquiry to immediately inform the prosecutor about committed or prepared crimes and other accidents, regardless of the circumstance of initiating or not initiating inquest under the given case. Failure to perform the duty in question or conditioning this duty by the circumstance of initiating inquest under the case will distort the essence of the prosecutor's supervision regarding the legitimacy of the inquiry and preliminary investigation provided for by the Constitution and the law, as well as it will become an obstacle to the exercise of the powers of the prosecutor stipulated by Points 1 and 3 of Part 1 of Article 53 and Points 1 and 2 of Part 2 of Article 53 of the RA Criminal Procedure Code.

The Constitutional Court finds that in case of interpretation and application of the disputed provisions in law enforcement practice on the basis of the legal positions expressed by the Constitutional Court in this Decision, the normal and effective exercise of the powers of the prosecutor in regard to exercising supervision regarding the legitimacy of the inquiry and preliminary investigation, as well as checking the implementation by the body of inquiry the requirements of law on receiving, registration of and follow up on the reports on committed or prepared crimes, on other accidents may be guaranteed in consonance with Article 103 of the RA Constitution, and in such a case those provisions do not raise an issue of constitutionality.

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 71 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. Points 1 and 3 of Part 1 of Article 53, Points 1 and 2 of Part 2 of Article 53 and Point 4 of Part 2 of Article 57 of the RA Criminal Procedure Code are in conformity with the Constitution of the Republic of Armenia within the framework of legal positions expressed by the RA Constitutional Court in this Decision.

Based on the constitutional legal content of the provision of Point 4 (titled: "Powers of the body of inquiry") of Part 2 of Article 57 of the RA Criminal Procedure Code, which states: "The body of inquiry … immediately informs the prosecutor and the investigator about the revealed crime and the inquest initiated under the case," the given provision may not be interpreted in the law enforcement practice as stipulation of simultaneously necessary conditions for the terms "revealed crime" and "inquest initiated under the case," which are separated by the conjunction "and," applying the legal regulation of Paragraph 2 of Part 10 of Article 45 of the RA Law on Legal Acts.

2. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

February 2, 2016
DCC-1253

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 1 AND 5 OF ARTICLE 156, POINT 1 OF PART 1 OF ARTICLE 160 OF THE RA ADMINISTRATIVE PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF KAREN HARUTYUNYAN, ARTAK GEVORGYAN, DAVIT HARUTYUNYAN AND VARTGEZ GASPARI

Yerevan **February 9, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan, A. Gyulumyan, F. Tokhyan, A. Tunyan, A. Khachatryan (Rapporteur), V. Hovhanissyan, H. Nazaryan, A. Petrosyan,

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

the Applicants K. Harutyunyan, A. Gevorgyan, D. Harutyunyan, V. Gaspari and their representatives A, Zeynalyan, T. Safaryan and T. Yegoryan,

representative of the Respondent: H. Sardaryan, official representative of the RA National Assembly, Senior Specialist of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100, Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with Amendments throgh 2005), Articles 25, 38 and 69 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Parts 1 and 5 of Article 156, Point 1 of Part 1 of Article 160 of the RA Administrative Procedure Code with the Constitution

of the Republic of Armenia on the basis of the Applications of Karen Harutyunyan, Artak Gevorgyan, Davit Harutyunyan and Vartgez Gaspari.

The Case was initiated on the basis of the Applications submitted to the Constitutional Court of the Republic of Armenia by the citizens Karen Harutyunyan, Artak Gevorgyan, Davit Harutyunyan and Vartgez Gaspari on 19 August, 9 November and 23 December accordingly.

By the Procedural Decisions PDCC-55 of 8 September 2015, PDCC-74 of 4 December 2015 and PDCC-3 of 29 January 2016 of the Constitutional Court, the Applications were taken into consideration and the Constitutional Court, guided by Article 39 of the RA Law on Constitutional Court, decided to join the mentioned cases and examine them in one hearing.

Having examined the written report of the Rapporteur on the joint Case, the written explanations of the Applicant and the Respondent, having studied the RA Administrative Procedure Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Administrative Procedure Code (hereinafter referred to as the Code) was adopted by the RA National Assembly on December 5, 2013, signed by the President of the Republic of Armenia on December 28, 2013 and entered into force on January 7, 2014.

Parts 1 and 5 of Article 156 of the Code prescribe:

"1. Cassation appeal may be submitted against the judgment resolving the case by merits till the deadline prescribed for entering into legal force except for the cases of appealing the judgment based on the grounds envisaged by Part 3 of this Article,

…

5. After expiry of the deadlines prescribed by Parts 1- 3 of this Article the Cassation Appeal may be submitted to the Cassation Court which may initiate the proceeding if a motion is submitted on considering the omission of the respective deadline valid and the court satisfied it".

Point 1 of Part 1 of Article 160 of the Code prescribes:

1. The cassation appeal is not considered, if:

1) The cassation appeal is submitted after the expiry of the deadline and motion on restoring the missed deadline misses or it is refused…"

2. The procedural background of the joint Case is the following:

2.1. With regard to Karen Harutyunyan's application:

The RA Police submitted a claim to the RA Administrative Court against Karen Harutyunyan demanding to bring him to the administrative responsibility. The Administrative Court satisfied the claim by the decision dated on 25.07.2014. The representative of Karen Harutyunyan appealed the decision at the RA Administrative Appeal Court but the latter by the decision of 18.12.2014 refused the appeal and left the decision of the Administrative Court of 25.07.2014 in force. The representative of Karen Harutyunyan submitted a cassation claim against this decision demanding to cancel the mentioned decision of the RA Administrative Appeal Court and review or terminate the case. On 11.02.2015 the RA Civil and Administrative Chamber of the Court of Cassation adopted a decision on Leaving the cassation claim without consideration, stating, "In this case the decision of 18.12.2014 of the Appeal Court was sent to the applicant on 19.12.2014; it was received on 20.12.2014, the cassation claim against the decision of the Court of Appeal of 18.12.2014 was forwarded by post on 20.01.2014, i.e. one day after the deadline prescribed for submission of the cassation claim by law and motion ommission of the deadline for submission of cassation claim as valid and restoring the deadline was not submitted.

2.2. With regard to Artak Gevorgyan's application:

The RA Police submitted a claim to the RA Administrative Court against Artak Gevorgyan demanding to bring him to the administrative responsibility. The Administrative Court by the decision of 10.02.2015 satisfied the claim. The representative of Artak Gevorgyan appealed the decision at the RA Administrative Appeal Court but the latter by the decision of 10.06.2015 refused the appeal and left the decision of the Administrative Court of 10.02.2015 in force. The representative of Artak Gevorgyan submitted a cassation claim against this decision. On 26.08.2015 the RA Court of Cassation adopted a decision on leaving the cassation claim without consideration, stating, "…the cassation claim was submitted to the Court of Cassation on 22.07.2015 (the post envelope served as grounds), i.e. after expiry of the deadline of one month to submit the cassation claim and motion on missing the deadline for submission of cassation claim as valid and restoring the deadline was not submitted".

2.3. With regard to David Harutyunyan's application:

The RA Police submitted a claim to the RA Administrative Court against David Harutyunyan demanding to bring him to the administrative responsibility. The Administrative Court by the decision of 05.11.2014 satisfied the claim. By the decision of 24.06.2015 of the RA Administrative Appeal Court, David Harutyunyan's appeal was refused and the decision of the Administrative Court of 05.11.2014 was left in force. The representative of David Harutyunyan submitted a cassation claim against this decision. On 26.08.2015 the RA Court of Cassation adopted a decision on leaving the cassation claim without consideration, stating, "…the cassation claim was submitted to the Court of Cassation on 22.07.2015, i.e. after expiry of the deadline of one month to submit the cassation claim and motion on ommission of the deadline for submission of cassation claim as valid and restoring the deadline was not submitted".

2.4. With regard to Vartgez Gaspari's application:

The RA Police submitted a claim to the RA Administrative Court against Vartgez Gaspari demanding to bring him to the administrative responsibility. The Administrative Court by the decision of 02.10.2014 satisfied the claim. By the decision of 07.04.2015 of the RA Administrative Appeal Court the appeal of Vartgez Gaspari's representative was refused and the decision of the Administrative Court of 02.10.2014 was left in force. The representative of Vartgez Gaspari submitted a cassation claim against this decision. On 03.06.2015 the RA Court of Cassation adopted a decision on leaving the cassation claim without consideration, stating, "…the cassation claim was submitted to the Court of Cassation on 11.05.2015, i.e. after expiry of the deadline. Simultaneously, the person who submitted the motion on recognizing the reason for omission of the deadline for submission of the cassation claim and restoring the missed deadline…" The Court of Cassation states that … in accordance with the enclosed to post warranty note, the latter received the decision of the Court of Cassation on 10.04.2014, meanwhile the cassation claim was submitted on 11.05.2015, i.e. after the deadline for submission of the cassation claim prescribed by law. … That is, the motion of the complainant is not grounded and is subject to refusal as the arguments of the representative of Vartgez Gaspari on considering the missed deadline as void is

not grounded, in particular, there is no argumentation for the time period from 10.04.2014 to 11.05.2015".

3. The Applicants analyzed the challenged provisions of the RA Administrative Procedure Code and stated that the contents of the latter conclude that even in case of "omission" of the deadline beyond control of the Applicant (such as, due to delayed receipt of the post delivery), for considering it valid and exercising the right to submit the cassation claim within one month time period after receiving the judgment, the complainant needs to submit a motion to allow the Court of Cassation to permit exercise of his/her right, and the merits and frameworks of discretion of the latter are not prescribed by law. The Applicants also state that the period prescribed by law for appealing the judge means that the complainant may submit his/her complaint any day within that time period, as well as the last day of the time period. In this case the complainant, besides getting familiarized with the challenged judgment, discussing the main theses with the client, developing, agreeing the actions depending on his/her professional workload, as well as on other circumstances, based on these circumstances s/he decides the possible day for submitting the appeal within one month time period, which in certain cases may be the last day of the defined time period. Meanwhile due to the reason, which does not depend on the control of the complainant, such as receiving the judgment late by mail, the time period prescribed for submitting the complaint is reduced, if the time for appeal is calculated from the day of publication of the judgment and not from the day of receiving the latter. And in this case it does not matter how late the complainant receives a judicial act.

Based on the legal positions enshrined in a number of decisions of the Constitutional Court of the Republic of Armenia and judgments of the European Court of Human Rights, the applicants believe that establishing an obligation to appeal a judicial act of the Court of Appeal that resolves the case on the merits in a shorter period instead of the one-month period prescribed by legislator for the commission of this action and imposition of this on the person who filed the complaint is a disproportionate restriction of the right of access to the court.

As a result of a comparative analysis of the challenged provisions, the Applicants concluded that so far as Parts 1 and 5 of Article 156,

Paragraph 1 of Part 1 of Article 160 of the Administrative Procedure Code of the Republic of Armenia do not prescribe the duty of courts, by virtue of the right, to recognize as a valid deadline missed for reasons beyond the complainant's control which contradicts Articles 18 and 19 of the RA Constitution (with Amendments throgh 2005) and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4. Objecting to the Applicants' arguments, the Respondent states that the provisions of Parts 1 and 5 of Article 156, Paragraph 1 of Part 1 of Article 160 of the RA Administrative Procedure Code are in conformity with Articles 18 and 19 of the Constitution of the Republic of Armenia (with Amendments throgh 2005).

In the Respondent's opinion, although the monthly period for appealing the judicial decisions that resolve the case on the merits is calculated from the moment of their publication, at the same time, the legislator, by securing legal guarantees, ensured the possibility of effective exercising of the right of individuals to appeal. The legislator also established a legal procedure to restore the missed procedural deadline. It is a specific legal procedure in the framework of which the court assesses the validity of the reasons for the omission of the procedural period.

Regarding the legal positions expressed in the Decision No. 36 of the Council of Courts Chairmen of 22 December 2000 and the Decision DCC-1052 of the Constitutional Court of the Republic of Armenia of 16 October 2012, the Respondent considers that the restoration of the missed time term is one of those issues where the court is competent to exercise discretion, but judicial discretion must be exercised not arbitrarily and within the framework of the law. The validity of the reasons is decisive in the issue of restoring the missed time period, which is considered the starting point for the court's decision.

According to the Respondent, in international practice in the issue of restoring the missed time period, the legal regulations differ significantly. However, the Respondent also argues that, as a rule, cases where a person for objective reasons beyond his control was unable to file a complaint within the time period prescribed by law.

Regarding the issue of the lawful exercise of the discretionary powers of the courts, the Respondent thinks that the prevention of formation

of a non-uniform or controversial law enforcement practice would be facilitated by the legislative establishment of those criteria or an approximate non-exhaustive range of grounds for the validity of the reasons for the omission of the procedural time period, which in each case would be initial for the courts in assessing the validity of the missed time period.

In conclusion, the Respondent states that the Applicants received the judicial acts in a timely manner, they did not comply with the procedure established by law for restoring the missed time, therefore, the court did not discuss the validity of the reasons for the omission of the term. In the Respondent's opinion, the alleged violation of the Applicants' rights is not due to the constitutionality of the norm of law, but is due to the fact that they did not comply with the requirements of the law. Consequently, there is a reason to terminate the proceedings of this case.

5. In this case, the Constitutional Court considers it necessary during the assessment of the constitutionality of the challenged norms to proceed from:

- the need to ensure effective protection by public authorities on the basis of international treaties ratified by the Republic of Armenia on fundamental human rights and freedoms (arts. 3 and 81 of the RA Constitution (with Amendments through 2015);
- from the need to guarantee the right to effective judicial protection and the right to a fair trial, as stipulated in Articles 61 and 62 of the RA Constitution (with amendments through 2015), taking into account the legal positions expressed in the decisions of the Constitutional Court of the Republic of Armenia.

At the same time, within the framework of the present case, the Constitutional Court considers it necessary to state the following:

a) the study of appeals and justifications shows that they, in fact, concern not only Part 1 of Article 156 of the Administrative Procedure Code of the Republic of Armenia as a whole, but only the provisions of this Part stating that "a cassation complaint on a judicial act resolving the case on merits, can be filed before the deadline established for this act till the entry of it into legal force";

b) at the time of registering the appeals, the Constitution of the Republic of Armenia with amendments through 2005 was in force, and

the Applicants considered the challenged legal provisions controversial in terms of their compliance with Articles 18 and 19 of the Constitution in this edition. Taking into account the fact that Chapters 1-3 of the Constitution of the Republic of Armenia (with amendments through 2015) entered into force on December 22, 2015, the issue of constitutionality of the provisions challenged in the present case is subject to consideration in the context of Parts 1 of Articles 61 and 63 of the Constitution (with amendments through 2015).

6. The Constitutional Court of the Republic of Armenia, taking into account the legal positions expressed in connection with the same issue in its Decisions DCC-1052, DCC-1062 and DCC-1249, and according to the results of analysis of the legal practice of the European Court of Human Rights and certain countries on the issue of the institution of appeal of judicial acts, within the framework of consideration of the present case, reaffirms previously expressed legal position that **legislatively it is necessary to establish the necessary and sufficient guarantees to receive the complete judicial act filed by the complainant in a reasonable time term and effective implementation of the right to access to the court and a fair trial**.

The Constitutional Court, within the scope of the subject matter of the present case, noted the importance of the Recommendation of the Committee of Ministers of the Council of Europe on December 15, 2004, N (2004) 20 "Regarding judicial review of administrative acts", which establishes separate legal standards for effective judicial control of administrative acts. In particular, the point is: a) providing a reasonable time term for appealing the administrative act (paragraph 46); b) the establishment of a reasonable period for challenging the lawfulness of the administrative act (paragraph 47); c) the moment when the person is notified of the administrative act as the beginning of the reference period for the appeal (para. 48).

Thus, paragraph 46 of the above-mentioned Recommendation invites the member states of the Committee of Ministers of the Council of Europe "... to guarantee that the parties have a reasonable time to initiate their case in court", with due regard to the fact that "if the deadline for filing a statement of claim is too short, the parties control will be deprived of the opportunity to appeal the administrative act." Para-

graph 47 of the same Recommendation requires state parties to set a reasonable time limit for challenging the legality of an administrative act in court with a view to ensuring effective access to judicial review, as well as by the national legislation, clarifying the term "reasonable time term".

At the same time, in accordance with the requirements of paragraph 48 of the same Recommendation, the Committee of Ministers of the Council of Europe invites the participating States to take into account the fact that the beginning of the period for the appeal of an administrative act should not be directly related to the moment when an individual or legal entity learned or should have learned about the relevant act. It is obvious that this period starts from the moment of notification of the person about this act, and in connection with this circumstance, invites the participating States also establish the time of notification of the relevant act as the beginning of the reference period for the appeal.

Based on the above, the Constitutional Court of the Republic of Armenia considers that, despite the fact that the period for appealing court decisions is generally counted from the moment of publication, nevertheless, sufficient legislative guarantees are needed which control will ensure the effective exercise of the person's rights for judicial protection and fair trial.

7. As a part of the consideration in the present case, the Constitutional Court of the Republic of Armenia states that:

a) the logic of the legal regulation of Part 1 of Article 156 of the Administrative Procedure Code of the Republic of Armenia is commensurable with the logic of legal regulations of Paragraph 3 of Part 1 of Article 379 of the RA Criminal Procedure Code, which is the subject of consideration in case DCC-1052 and Part 1 of Article 412 of the RA Criminal Procedure Code, which is the subject of consideration in the case of DCC-1062;

b) the logic of legal regulation of Part 5 of Article 156 of the Administrative Procedure Code of the Republic of Armenia is commensurable with the logic of legal regulations of Parts 1 and 2 of Article 380 of the RA Criminal Procedure Code, which are the subject of consideration in case of DCC-1052;

c) the logic of legal regulation of Paragraph 1 of Part 1 of Article 160 of the Administrative Procedure Code of the Republic of Armenia is commensurable with the logic of legal regulation of Poit 1 of Part 2 of Article 414.1 of the RA Criminal Procedure Code, which is the subject of consideration in the case of DCC-1249.

On the basis of the above-mentioned conclusions and taking into account the equivalence of the contents of the provisions subject to consideration in DCC-1052, DCC-1062 and DCC-1249 and the provisions challenged in the present case, arguing that the legal positions enshrined in these Decisions are also applicable to the subject matter under consideration, the Constitutional Court takes as a basis the legal positions expressed by the Constitutional Court concerning the issue of constitutionality of the provisions that have been the subject of consideration in the above mentioned decisions.

In particular, the Constitutional Court in its Decision DCC-1249 noted: "... when the reason for the omission of the deadline for filing a cassation appeal prescribed by law to the Court of Cassation is due to late receipt of the relevant appealed judicial act by the complainant for reasons beyond his/her control, the complainant must submit a petition for the restoration of the missed time, attaching to it evidence corroborating the relevant circumstance, and the Court of Cassation, taking into account this circumstance must satisfy this motion. In this case, the missed time is restored by the Court of Cassation by virtue of the law (ex jure), arguing this in the relevant judicial act."

8. The Constitutional Court finds necessary to state that the Applicant Vartgez Gaspari attached to the cassation appeal an application on the restoration of the missed deadline and a proof certifying that the late receipt of the judicial act was not dependent on the complainant (enclosed with the cover letter) which verified that Vartgez Gaspari received a judgment of the Administrative Court of Appeal of the Republic of Armenia on April 10, 2015. This is also argued by the RA Court of Cassation.

On June 3, 2015, the Court of Cassation adopted a judgment "On leaving the cassation complaint without consideration," on administrative case number ՎԴ/0277/05/14 noting that "... the complainant's motion is not justified and is subject to rejection, since Vartgez Gas-

pari's representative's argument on recognition of the reason for the omission of a valid time period is not justified, in particular, because it does not contain any motivation for the period from 10.04.2014 to 11.05.2015." Such a conclusion is not clear, given that the appealed decision of the Administrative Court of Appeal of the Republic of Armenia was adopted on 07.04.2015.

In connection with the above mentioned decision, the Constitutional Court considers it necessary to note that despite the fact that in this decision, in the six cases "2014" is indicated instead of "2015", at the same time **the RA Court of Cassation also certifies that the evidence was provided indicating the late receipt of a judicial act by the complainant for reasons beyond his control such as a postal certificate attached to the letter.** At the same time, it was ascertained that according to this certificate, the Applicant "received the judgment of the Court of Appeal on April 10, 2014, while the cassation appeal was filed on May 11, 2015, that is, after the deadline for filing a cassation appeal prescribed by law." However, it was not taken into account that May 10, 2015 was a non-working day, and according to Part 5 of Article 52 of the Administrative Procedure Code of the Republic of Armenia, "when the last day of the procedural period falls on a statutory non-working day, the next working day following the expiration of the deadline shall be considered as deadline."

The materials of the case show that in the application of this norm in judicial practice there are different approaches and the constitutional requirement of uniform application of the law is not guaranteed.

At the same time the Constitutional Court states that, in the context of the consideration of this case, the legal positions regarding the issue, envisaged in the above-mentioned Decisions DCC-1052 and DCC-1062 of the Constitutional Court, were not consistently taken into account.

9. The Constitutional Court considers it necessary to state that after the adoption of Decisions DCC-1052, DCC-1062 and DCC-1249, the institution of appeal of judicial acts was not subjected to the relevant comprehensive legislative regulations, thus, the clear and consistent legal positions enshrined in the above-mentioned Decisions of the RA Constitutional Court were not fulfilled.

The Constitutional Court also notes that legislative regulations on the subject of the examination are necessary, in particular, with the aim to find equivalent decisions regarding the preconditions for filing a complaint regarding judicial acts, within the framework of a single criminal procedural, civil procedural and administrative procedural policy.

This circumstance is also due to the fact that According to Part 2 of Article 9 of the Law of the Republic of Armenia on Legal Acts, "Laws shall comply with the Constitution and shall not contradict the decisions of the Constitutional Court of the Republic of Armenia", which suggests that the decisions of the Constitutional Court receive the meaning and content, become the source of law in their integrity based on the legal positions expressed in the same decisions.

In this context, the Constitutional Court considers positive that the above mentioned circumstance within the framework of the explanation presented in this case by the National Assembly on November 30, 2015, also substantiates the statement of the official representative of the Respondent that "... in general, the prevention of formation of a non-uniform or controversial law enforcement practice would be facilitated by the legislative establishment of those criteria or an approximate non-exhaustive range of grounds for the validity of the reasons for the omission of the procedural time period, which in each case will be initial for the courts in assessing the validity of the missed time period."

Based on the review of the Case and being governed by the requirements of Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. The provision of Part 1 of Article 156 of the Administrative Procedure Code of the Republic of Armenia "a cassation complaint on a judicial act resolving the case on merits, can be filed before the deadline established for this act till the entry into legal force" is in conformity with the Constitution of the Republic of Armenia insofar as it is con-

sonant with the legal positions expressed in relation to the same issue in the Decisions DCC-1052 and DCC-1062 of the Constitutional Court of the Republic of Armenia, guarantees the provision of a judicial act in the manner and time prescribed by law to the person who has the right to file a complaint and, for reasons beyond his/her control, omission of this deadline in the presence of a relevant motion and evidence by virtue of law (ex jure) is recognized as valid.

2. To declare Part 5 of Article 156 of the Administrative Procedure Code of the Republic of Armenia contradicting the requirements of Parts 1 of Articles 61 and 63 of the Constitution of the Republic of Armenia (with Amendments through 2015) and void insofar as the restoration of the missed deadline for filing a complaint due to reasons beyond the control of the person enjoying the right to file a complaint is left to the discretion of the court and, if there is an appropriate motion and evidence, is not considered valid by virtue of law (ex jure).

3. Point 1 of Part 1 of Article 160 of the Administrative Procedure Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia insofar as it is consonant with the legal positions expressed in the Decision DCC-1249 of the Constitutional Court of the Republic of Armenia, guarantees by the virtue of law (ex jure) omission of the deadline for filing a complaint due to reasons beyond the control of the person enjoying the right to file a complaint as valid, if there is an appropriate motion and evidence.

4. Based on the requirements of Point 9.1 of Article 64 and Part 12 of Article 69 of the RA Law on the Constitutional Court, as well as Point 1 of Part 1 of Article 182 of the Administrative Procedure Code of the Republic of Armenia, the final judicial act adopted on the case of Vartgez Gaspari is subject to review in the manner prescribed by law on the basis of new circumstances.

5. In accordance with Part 2 of Article 102 of the RA Constitution (with Amendments through 2005) this decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

February 9, 2016
DCC-1254

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF ARTICLE 71 OF THE RA LAW ON STATE REGISTRATION OF RIGHTS TO THE PROPERTY WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE NON-GOVERNMENTAL ORGANIZATION "FREEDOM OF INFORMATION CENTER"

Yerevan **February 23, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan, A. Gyulumyan, F. Tokhyan, A. Tunyan (Rapporteur), A. Khachatryan, V. Hovhanissyan, H. Nazaryan, A. Petrosyan,

with the participation of (in the framework of the written procedure) representatives of the Applicant non-governmental organization "Freedom of Information Center": A. Zeynalyan, G. Hayrapetyan,

representative of the Respondent: H. Sardaryan, official representative of the RA National Assembly, Chief Specialist of the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100, Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 25, 38 and 69 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Article 71 of the RA Law on State Registration of Rights to the Property with the Constitution of the Republic of Armenia on

the basis of the Application of the non-governmental organization "Freedom of Information Center."

The Case was initiated on the basis of the Application submitted to the Constitutional Court of the Republic of Armenia by the non-governmental organization "Freedom of Information Center" on 19.10.2015.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, having studied the RA Law on State Registration of Rights to the Property, the RA Law on Freedom of Information and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Law on State Registration of Rights to the Property (hereinafter referred to as the Law) was adopted by the RA National Assembly on 14 April 1999, signed by the RA President on 30 April 1999 and entered into force on 6 May 1999.

The challenged Article 71 of the Law, titled: "Fee for state registration and provision of information" states:

"1. In accordance with the procedure established by this Law, for state registration of property rights and restrictions, their origin, termination, assignation or modification, as well as for services provided for the provision of information from the unified cadastre of real estate, a fee shall be charged to the state budget (to the corresponding account opened at the treasury) in the amount provided for by this Law.

2. Applicants shall make payments prescribed by this Law."

The above-mentioned Article was stipulated by the Law HO-247-N of 23 June 2011, after which it was not amended or supplemented.

2. The procedural background of the Case is the following:

On 7 May 2013, the Applicant submitted a written request to the Center for Information Technologies of the Staff of the State Committee (hereinafter referred to as the Committee) of the Real Estate Cadastre adjunct to the RA Government to obtain information about the Covered Market of the city of Yerevan.

By the letter No. ՔԻՍ-1/1813 of 18.05.2013, the Committee rejected the application and did not provide the Applicant with the requested information. The rejection was due to the fact that the fee for the pro-

vision of information prescribed by the Law was not paid, as well as due to the fact that the provision of certain information included in the range of the requested information was limited by law.

On 23.08.2013, the Applicant submitted a claim "On the requirement to provide information" to the RA Administrative Court against the Committee. On 06.06.2014, the Administrative Court rendered a Judgment on rejecting the claim on the administrative case No. ՎԴ/7503/05/13, and motivated that the Applicant did not pay the fee for the requested information prescribed by the RA Law on State Registration of Rights to the Property.

On 30.06.2014, the Applicant submitted an appeal to the RA Administrative Court of Appeal, and by the Decision of 18.12.2014 the Court rejected the appeal of the Applicant and left the appealed judicial act unchanged.

On 18 January 2015, the Applicant appealed the Decision of the RA Administrative Court of Appeal to the RA Court of Cassation, and on 01.04.2015 the Court of Cassation issued a Decision "On rejecting to accept the cassation appeal for examination."

3. The Applicant considers that the challenged provisions of the Law contradict Articles 8, 18, 23, 27 and 27.1 of the RA Constitution (in the edition of 2005), insofar as they envisage restriction of the right of a person to access to information about herself/himself or information important for the protection of the rights of a person, or information of public importance (important for the protection of public interest).

According to the Applicant, the Constitutional legislator has directly linked the right to obtain information or documents from state authorities with the protection of public interests. The importance of the right prescribed in Articles 27 and 27.1 of the Constitution (in the edition of 2005) is reflected in Part 2 of Article 7 and in Part 2 of Article 10 of the RA Law on Freedom of Information, according to which the owner of information shall immediately disclose or in any other accessible way inform the public about the information she/he owns, the disclosure of which can prevent the danger threatening state and public security, public order, public health and morals, rights and freedoms of others, environment, property of persons, and besides, the fee is not

charged when providing such information, if up to 10 printed or copied pages are provided.

To substantiate his position the Applicant refers to the fact that his request for information on the grounds for property rights or lease of the Covered Market of the city of Yerevan located on Mashtots Avenue is of social significance, and he finds that any information of public importance shall be undoubtedly available to a person free of charge or without any condition or precondition, regardless of the fact whether this information has a degree of secrecy or not, and if so, the secrecy of which information should not serve as grounds for rejecting to provide the information of public importance to the person.

In addition, the Applicant finds that the RA Constitution guarantees an unrestricted right of a person to obtain information about herself/himself, without any interference. The information on a person available in state and local self-government bodies or any other state institution shall be available to her/him without any encumbrance, including the duty to make payments. This right derives from the requirements of well-known international documents on the protection of human rights, in particular the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, etc.

In conclusion, the Applicant emphasizes that he does not challenge the constitutionality of payment for obtaining any information and he does not challenge the constitutionality of payment for the provision of services, but he challenges the legal regulation where the state sets out a condition for making payment for providing information of public importance.

The Applicant also stated that Article 8 of the RA Constitution (in the edition of 2005) is comparable to Article 10 of the RA Constitution (in the edition of 2015), Article 18 is comparable to Articles 50 and 61, Article 23 is comparable to Article 34, Article 27 is comparable to Articles 42 and 51, Article 27.1 is comparable to Article 53. At the same time, the Applicant stated that the numbering of articles of the RA Constitution was changed, however the content of the rights indicated therein remained the same, therefore, according to the Applicant, there was no need to amend the interpretations, positions and arguments indicated in the Application.

4. The Respondent considers that in the modern conditions of information society, the right to information is one of the fundamental human rights. This right is closely connected with the spheres of public life, and the exercise of this right creates prerequisites for the realization of other basic human rights.

The right to freedom of information creates positive obligations for the state to ensure the necessary legislative conditions for the exercise of this right.

The Respondent notes that the right to obtain information is implemented in two ways - active and passive. The active right to obtain information requires the person to apply to the authorities possessing the relevant information in order to obtain the necessary information, and the passive right to obtain information corresponds to the duty of the authorities possessing the information to disclose on their own initiative the information considered to be generally available. The RA Law on Freedom of Information has already predetermined the information of public importance, the duty of disclosure or gratuitous provision of which is assigned to the authorities possessing the relevant information. Such provisions are the guarantee for the civil society to exercise public control over the activities of state and local self-government bodies, socio-political organizations, and various spheres of public life.

According to the Respondent, unlike the RA Law on Freedom of Information (which establishes general rules for the provision of information), certain laws, including the RA Law on State Registration of Rights to the Property, regulate relations concerning the provision of information in certain areas. Given the importance of the right to obtain information, the fee charged for providing information should not be so high as to hinder the exercise of this right. Fee for obtaining information is compensatory and deterrent.

The Respondent notes that the provision of information based on the free-of-charge principle is acceptable only in the case of information with certain content that is of public importance, is of interest to a wide section of society, or the immediate notification of the public about this information is due to extreme necessity. The provision of information based on the free-of-charge principle is not conditioned by the status of the entities requesting information, but the nature of the information.

The Respondent also refers to the international experience, and recalls the legislations of a number of countries, which also provide a fee for obtaining information. The Respondent notes that even in the countries the legislations of which basically stipulate the right to obtain information on a free basis, laws on registration of rights to the property stipulate the amount of fees charged for the provision of related services.

Summarizing, the Respondent concludes that the provisions of Article 71 of the RA Law on State Registration of Rights to the Property are in conformity with the RA Constitution, they were established in accordance with the requirements of the RA Law on Freedom of Information, and the fees charged for providing the requested information are not aimed at restricting the right to access to information, but they are the conditions that are elements of the procedure for exercising this right.

5. The RA Constitutional Court states that within the framework of the present constitutional legal dispute, the Applicant points out two issues, namely:

1. Fee for obtaining information by the person about herself/himself,

2. Fee for obtaining information important for the protection of the rights of a person, or information of public importance (important for the protection of public interest).

Therefore, the Constitutional Court considers it necessary to refer to the following questions:

- Does not the fee for obtaining information related to public interest violate the right of a person to obtain information prescribed by Article 51 of the RA Constitution, as well as Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms?
- Is the fee for the exercise of the right of a person to obtain information about herself/himself in conformity with the requirements of Article 34 of the RA Constitution?
- Do not the procedure and the amount of the fee for providing information (as prescribed by the RA Law on State Registration of Rights to the Property) lead to possible blocking of guarantees of freedom of information prescribed by law?

6. The right of a person to obtain information from the state and local self-government bodies is prescribed by Article 51 of the RA Constitution /with Amendments through 2015/, and Part 1 of the latter states: "1. Everyone shall have the right to access to information on the activities of state and local self-government bodies and officials, including the right to become acquainted with documents." This constitutional right may be restricted by law in two cases:

1. for the purpose of protecting public interests,

2. for the purpose of protecting the fundamental rights and freedoms of others.

In addition, a number of other articles of the RA Constitution, in particular, Article 34 (Protection of Personal Data), Article 42 (Freedom of Assembly) and Article 53 (Right to Submit Petitions) relate to the right to obtain information.

The main legislative guarantees for the realization of the right to obtain information are stipulated by the RA Law on Freedom of Information. The Law has general nature and establishes the main principles in the field of information, the restrictions on the right to obtain information, the procedure for sending requests for information, etc. According to this Law, the provision of information in cases provided for by the law shall be carried out based on the free-of-charge principle. In particular, according to Article 10 of the RA Law on Freedom of Information, for the provision of information by state and local self-government bodies, the fee is not charged in the following cases:

"1) when answering oral requests;

2) when providing up to 10 printed or copied pages of information;

3) when providing information by E-mail (Internet);

4) when responding to written requests for information provided for by Part 2 of Article 7 of this Law;

5) when providing information on the change in the period of the provision of information in the cases provided for by Point 3 of Part 7 of Article 9, and Part 10 of Article 9 of this Law;

6) in case of rejecting to provide information."

Based on the provisions of the above-mentioned Law, by the Decision No. 1204-N of 15 October 2015 the RA Government established the procedure for providing information or its duplicate (copy) by state and local self-government bodies, state institutions and organizations

(hereinafter referred to as the procedure for providing information). According to this procedure, the process of providing information became definite, including the provisions related to the determination of fees charged for providing information for the cases when, according to the Law, the provision of information is carried out in accordance with the principle of payment.

At the same time, the RA Law on State Registration of Rights to the Property regulates the process of providing information on the rights to the property, according to which the provision of information provided for by this Law shall be chargeable. In particular, according to Part 2 of Article 32 of the Law "the receipt for payment of information shall be attached to the request" for information. In addition, Article 71 of the Law imperatively stipulates the obligation to make payment for the provision of information from the unified cadastre of real estate, without exception. The same logic is adhered to in Article 73 of the Law, which envisages the amounts of fees for the provision of information.

Article 75 of the Law provides privileges in respect of the fee for the provision of information. Considering the system of privileges for obtaining information, it becomes evident that in one case the provision of information on real estate located in border and high-mountainous settlements on preferential terms is not conditioned by the status of the requesting entity, i.e. each person who requests to obtain such information shall have the right to a 50 percent discount on payment for information. In another case, a number of state authorities are exempted from the duty to pay for obtaining information, i.e. application of the privilege is directly related to the status of the requesting entity. The Law does not prescribe other cases of exemption from payment for information.

Comparing Article 10 of the RA Law on Freedom of Information with Articles 32 and 71 of the RA Law on State Registration of Rights to the Property, the RA Constitutional Court states that the implementation of the guarantees of freedom of information provided for by the law is ignored by the legal act relating to a specific sphere. Such a situation does not follow from the principle of certainty stipulated by Article 79 of the RA Constitution, according to which: in case of restriction of fundamental rights and freedoms, the preconditions and

the scope of restrictions shall be stipulated by law; the latter shall be sufficiently certain for the holders of fundamental rights and the addressees to be able to engage in appropriate conduct.

7. Within the framework of constitutional legal dispute in this Case, it is also necessary to apply to the requirements of the Recommendation NR(81)19 of the Committee of Ministers of the Council of Europe on the Access to Information held by Public Authorities, according to which:

"I. Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities.

II. Effective and appropriate means shall be provided to ensure access to information.

III. Access to information shall not be refused on the ground that the requesting person has not a specific interest in the matter.

IV. Access to information shall be provided on the basis of equality.

V. The foregoing principles shall be applicable only to such limitations and restrictions which are necessary in a democratic society for the protection of legitimate public interests (such as national security, public safety, public order, the economic well-being of the country, the prevention of crime, or for preventing the disclosure of information received in confidence), and for the protection of privacy and other legitimate private interests, having, however, due regard to the specific interest of an individual in information held by the public authorities which concerns him personally.

VI. Any request for information shall be decided upon within a reasonable time.

VII. A public authority refusing access to information shall give the reasons on which the refusal is based, according to law or practice.

VIII. Any refusal of information shall be subject to review on request."

In addition, it should be noted that in a number of judgments the European Court of Human Rights has referred to the issues of freedom of information, in particular in the case of Tarsasag a Szabadsagjogokert v. Hungary of 14 April 2009 (application no. 37374/05) the Court concluded that obstacles to the provision of information of public interest

may adversely affect persons engaged in media activities and related fields. By the 28 November 2013 Judgment of Osterreichische Vereinigung zur Erhaltung, Starkung und Schaffung eines wirtschaftlich gesunden land und forstwirtschaftichen Grundbesitzes v. Austria (application no. 39534/07) the Court reiterated the previous positions, i.e. the Court advocated a broader interpretation of the notion "freedom to obtain information," which includes the principle of access to information.

Summarizing the aforementioned requirements and comparing them with the legal regulations of the law in dispute, the RA Constitutional Court states that the right to obtain information from state and local self-governments bodies and officials imposes positive obligations on the state to ensure the proper and effective implementation of the relevant law. Regulating the legal relations related to payment of the fee for the provision of information from the unified cadastre of real estate, the legislator is bound by the obligation to guarantee the principle of access to information.

The RA Constitutional Court states that the right to obtain information, provided for by the RA Constitution, can be exercised in various ways.

In particular, depending on the content and importance of the information, it may be available either as information subject to mandatory disclosure, or information provided in accordance with the procedure provided for by the law.

Part 3 of Article 7 of the RA Law on Freedom of Information establishes the information related to the activities of the owner of information, as well as the information and changes therein published at least once a year, regarding which the RA Constitution and (or) the Law do not provide otherwise. According to the legislator, the latter is the minimum information that should be available to everyone, as information of public interest. However, the range of information of public interest is not limited to this. Each person, including organizations, should have opportunities, in conditions of equality, to reclaim or get acquainted with information possessed by state and local self-government bodies, if the provision of such information does not violate the protection of public interests or the rights and freedoms of others.

Moreover, Part 3 of Article 8 of the RA Law on Freedom of Information has already predetermined the range of information that cannot, under any conditions, serve as grounds for restricting the provision of information on the basis of a violation of public interest.

As for the availability of becoming acquainted with the information about herself/himself, this right is envisaged in a number of articles of the RA Constitution, in particular Article 34 titled: "Protection of Personal Data," and Part 3 of this Article stipulates the following: "Everyone shall have the right to become acquainted with the data about her/him collected in state and local self-government bodies ..." This right may be restricted by law with the aim of protecting state security, the economic wellbeing of the country, preventing or solving crimes, the public order, health and morals, or the fundamental rights and freedoms of others.

Fee for information regarding the access to information may become an obstacle to the effective exercise of the right to obtain information, if it is not a matter of the actual and reasonable costs incurred or information provided by state and local self-government bodies for the services rendered by state and local self-government bodies.

The Constitutional Court considers it necessary to emphasize that although defining the amount of the fee for the provision of information is within the powers of the legislator, it must nevertheless be consonant with the principle of proportionality provided for by Article 78 of the RA Constitution, i.e. the means chosen for restricting fundamental rights and freedoms have to be suitable and necessary for the achievement of the aim prescribed by the Constitution.

In addition, the task of the legislator is to ensure privileges for insolvent persons from the principle of fee for obtaining information about themselves, ensuring the inviolability of the essence of fundamental rights and freedoms provided for by Article 80 of the RA Constitution, in this case, the right to obtain information.

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64, 68 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. To declare Article 71 of the Law of the Republic of Armenia on State Registration of Rights to the Property, as well as Part 2 of Article 32, systemically related to the latter, contradicting Articles 34, 51, 78, 79 and 80 of the Constitution of the Republic of Armenia, insofar as they do not prescribe differentiated approach when the requested information concerns the information about the person, as well as the implementation of guarantees on freedom of information provided for by the law.

2. Taking into consideration the necessity not to damage the legal security of the system, pursuant to Part 3 of Article 102 of the Constitution of the Republic of Armenia and Part 15 of Article 68 of the Law of the Republic of Armenia on the Constitutional Court, to determine 1 November 2016 as deadline for invalidating the legal norms declared contradicting the Constitution of the Republic of Armenia by this Decision, thus allowing the National Assembly of the Republic of Armenia and Government of the Republic of Armenia, in the scopes of their powers, to align the legal regulations of the Law of the Republic of Armenia on State Registration of Rights to the Property, and other laws and normative legal acts systemically related to the latter, with the requirements of this Decision, taking into consideration the new clarifications, prescribed by the Constitutional Amendments through 2015, regarding the restriction of rights.

3. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

February 23, 2016
DCC-1256

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 1 AND 4 OF ARTICLE 132, POINT 3 OF PART 1 OF ARTICLE 136 OF THE RA ADMINISTRATIVE PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF LALA ASLIKYAN

Yerevan **April 26, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan, A. Gyulumyan, F. Tokhyan, A. Tunyan, A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan (Rapporteur),

with the participation of (in the framework of the written procedure) L. Aslikyan, the Applicant, and T. Safaryan, representative of the Applicant;

representative of the Respondent: V. Danielyan, official representative of the RA National Assembly, Chief Specialist at the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Parts 1 and 4 of Article 132, Point 3 of Part 1 of Article 136 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Lala Aslikyan.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by Lala aslikyan on 15 December 2015.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the RA Administrative Procedure Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Administrative Procedure Code was adopted by the RA National Assembly on 5 December 2013, signed by the RA President on 28 December 2013 and entered into force on 7 January 2014.

The challenged Parts 1 and 4 of Article 132 of the RA Administrative Procedure Code, titled "Time limit for lodging an appeal" stipulate:

"1. An appeal against a judicial act deciding on the merits of the case may be lodged prior to the time limit prescribed for the entry into legal force of that act, except for the cases of appealing against a judicial act on the ground provided for in Part 3 of this Article.

...

4. An appeal lodged after the time limits provided for in Parts 1-3 of this Article may be accepted for examination by the Court of Cassation, where a motion for the recognition of the relevant missed time limit as valid has been filed and it has been granted by the Court".

The challenged Point 3 of Part 1 of Article 136 of the RA Administrative Procedure Code, titled "Returning the appeal" stipulates:

"1. The appeal shall be returned if:

…

3) the appeal has been lodged after the expiry of the defined time limit and does not contain a motion for recovering the missed time limit".

The Articles challenged by this Case were not amended and (or) supplemented.

2. The procedural background of this Case is the following:

the Central Division of Yerevan City Department of the Police submitted a statement of claim to the RA Administrative Court demanding that Lala Aslikyan be subjected to administrative liability. Lala Aslikyan filed a counterclaim to the Court and demanded that the actions of the

Police on 05.03.2014 be recognized as unlawful. By the decision of the Court dated 27.04.2015, the proceeding of the administrative case upon the claim of the Central Division of Yerevan City Department of the Police against the demand of Lala Aslikyan on subjecting to administrative liability was stroked out on the basis of refusal of the claim, and the counterclaim was rejected by the Administrative Court Decision of 16.07.2015.

The representative of Lala Aslikyan lodged an appeal to the RA Administrative Court of Appeal against the said Decision of the RA Administrative Court, and the RA Administrative Court of Appeal returned the appeal by the Decision of 04.09.2015, with the justification that "... the one-month appeal time limit has been missed and no motion for recovering the missed time limit has been lodged. ... In such conditions, considering that the Decision was made on 16 July 2015, and the appeal was submitted to the postal service on 18 August 2015 ... and no motion for recovering the missed time limit has been lodged, the Administrative Court finds that ... the appeal shall be returned".

The representative of Lala Aslikyan filed a cassation appeal against the above-mentioned Decision. On 28.10.2015, the Court of Cassation issued a Decision "On rejecting to accept the cassation appeal for examination".

3. The Applicant finds that Parts 1 and 4 of Article 132, Point 3 of Part 1 of Article 136 of the RA Administrative Procedure Code contradict Articles 18 and 19 of the RA Constitution (with Amendments through 2005) insofar as the latter do not provide for the duty of courts to recognize the missed time limit due to reasons independent of the will of the appellant as valid by the force of law.

The Applicant analyzes the challenged provisions of the RA Administrative Procedure Code and notes that, in the cases when the content of the act becomes available to the appellant after a certain time of its announcement, the appellant does not have a real opportunity to appeal against it starting from the moment of announcement of the act until the receipt of the full judicial act, since she/he does not have access to important data necessary for the effectiveness of the appeal. The Applicant also notes that the content of the challenged provisions indicates that even for recognizing the missed one-month time limit for lodging

an appeal due to reasons independent of the will of the appellant (for example, due to the late receipt of the judicial act by mail), as well as for exercise of the right to lodge the appeal within one-month appeal time limit after the receipt of the judicial act the appellant must file a certain motion requesting the Court of Appeal to let her/him exercise her/his right, and the scope and margin of discretion of the latter are not provided by law. The Applicant also considers that a one-month time limit provided for by the law for appealing the judicial act means that the appellant may lodge the appeal on any day of this time limit, including the last day. In this case, in addition to becoming familiar with the appealed judicial act, discussing, developing and agreeing the main theses of the appeal with the principal, the appellant shall determine the possible day of lodging the appeal, depending on her/his workload and other circumstances, as well as based on those circumstances, and in some cases the mentioned day may also be the last day of the set time limit. Meanwhile, the time limit set for lodging the appeal by the appellant is shortened due to reasons independent of the will of the appellant (for example, due to the late receipt of the judicial act by mail), if the time limit for appeal is calculated from the moment of the announcement of the act and not from the moment of its receipt. Moreover, in this case it does not matter how late the appellant receives the judicial act.

Based on the logic of legal positions prescribed by a number of decisions and judgments of the RA Constitutional Court and the European Court of Human Rights respectively, the Applicant considers that establishing a duty to appeal a judicial act deciding on the merits of the case issued by the Administrative Court within a shorter time limit than the one-month time limit provided for by the legislation for the implementation of this process, and imposing such duty on the appellant indicate a disproportionate restriction on the right of access to the court.

4. Objecting to the arguments of the Applicant, the Respondent finds that the provisions of Parts 1 and 4 of Article 132, Point 3 of Part 1 of Article 136 of the RA Administrative Procedure Code are in conformity with the RA Constitution.

According to the Respondent, the one-month time limit of appealing established by the challenged legal regulation is reasonable, and it

is quite sufficient, in the ordinary circumstances, for the effective exercise of the right to judicial protection of the person lodging the relevant appeal.

The Respondent notes that in order to assess the circumstances of the missed one-month time limit of appealing due to reasons independent of the will of the person based on this grounds, it is necessary to have certain evidence that will confirm that objectively the person did not have the opportunity to exercise her/his right to appeal independent of her/his will. Moreover, those evidences shall be legally assessed by the court.

For the purpose of ensuring legal certainty, the Respondent attaches importance to the requirement of availability of a motion and stresses that "... without a motion and the underlying evidence, the court may not assess for what reasons the person missed the time limit provided for by the law, and moreover it is impossible by the force of law and without a legal assessment of the court".

According to the Respondent, taking into account the great variety of social relations and the peculiarities of factual circumstances in each particular case, the legislator cannot exhaustively determine in which cases the court is obliged to recognize the missed time limit as valid. In this matter the legislator provided the court with a certain scope of discretion. The Respondent also notes that in any case the motion must be granted if the person proves that the time limit is missed for valid reasons. As a general rule, the court has the discretion to consider the circumstances to be for valid reasons or not; however, the circumstances that are undoubtedly considered for valid reasons - such as the receipt of a written text of a judicial act after a certain period of time limit independent of the will of the person - means there is no alternative for the court, and in any case the court shall be obliged to grant such motions.

The Respondent also considers that the restriction of recognizing the missed time limit as valid through filing a motion pursues a legitimate aim, there is a reasonable relationship between the measure applied and the aim pursued, and "the access to the court is effective in case of availability of the mechanism for filing a motion, since the person has a clear and practical opportunity to appeal against a judicial act affecting her/his rights".

5. Assessing the constitutionality of the legal regulations challenged by this Case, the RA Constitutional Court considers it necessary to be based on:

- the need for effective protection of the fundamental rights and freedoms of individuals and citizens by the public authorities based on international treaties ratified by the Republic of Armenia (Articles 3 and 81 of the RA Constitution with Amendments through 2015);
- the need for guaranteeing the right to effective judicial protection and the right to a fair trial, enshrined in Part 1 of Article 61 and Part 1 of Article 63 of the RA Constitution with Amendments through 2015, taking into account the legal positions expressed in the decisions of the RA Constitutional Court.

At the same time, the RA Constitutional Court considers it necessary to state that:

a) in the present Case, the administrative procedural legal regulations on the time limit for lodging an appeal against a judicial act deciding on the merits of the case, acceptance of the appeal lodged after the mentioned time limit, as well as returning the appeal are challenged. From contextual perspective these legal regulations are equivalent to the administrative procedural legal regulations on the time limit for lodging a cassation appeal against a judicial act deciding on the merits of the case, acceptance of the cassation appeal lodged after the mentioned time limit, as well as dismissal of the cassation appeal, and the issue of their constitutionality was the matter at issue in the Decision DCC-1254 of the RA Constitutional Court;

b) the study of the grounds mentioned in the Application at issue in the present Case states that they, in fact, do not entirely concern Part 1 of Article 132 of the RA Administrative Procedure Code, but only the provision "An appeal against a judicial act deciding on the merits of the case may be lodged prior to the time limit prescribed for the entry into legal force of that act ..." stipulated by the given Part;

c) according to the legal regulations of the RA Administrative Procedure Code, a judicial act deciding on the merits of the case shall be announced within 15 days after the consideration of the case, unless no other time limit is provided for by the RA Administrative Procedure Code (Part 2 of Article 114), immediately after announcement, the ju-

dicial act deciding on the merits of the case **shall be forwarded** to the participants of the proceeding. Where any of the participants of the proceeding has failed to appear, a copy of the judicial act deciding on the merits of the case **shall be sent** to her/him on the day of announcement or the day following it (Part 7 of Article 114), judicial acts of the Administrative Court deciding on the merits of the case shall enter into legal force one month following the announcement, unless otherwise provided for by this Code (Part 1 of Article 127);

d) at the time of registration of the Application at issue in the present Case, the RA Constitution with Amendments through 2005 was in effect, and the Applicant considered disputable the challenged legal regulations from the point of view of their conformity with Articles 18 and 19 of the RA Constitution with Amendments through 2005. Taking into account the fact that Chapters 1-3 of the RA Constitution with Amendments through 2015 came into force on 22 December 2015, the issue of constitutionality of the provisions challenged in the present Case shall be considered in the context of Part 1 of Article 61 and Part 1 of Article 63 of the RA Constitution with Amendments through 2015.

6. Within the framework of this Case, the Constitutional Court considers it necessary to state that:

a) the logic of legal regulation of Part 1 of Article 132 of the RA Administrative Procedure Code is comparable with the logic of legal regulations of Point 3 of Part 1 of Article 379 of the RA Criminal Procedure Code at issue in the Decision DCC-1052 of the RA Constitutional Court, Part 1 of Article 412 of the RA Criminal Procedure Code at issue in the Decision DCC-1062 of the RA Constitutional Court, as well as Part 1 of Article 156 of the RA Administrative Procedure Code at issue in the Decision DCC-1254 of the RA Constitutional Court;

b) the logic of legal regulation of Part 4 of Article 132 of the RA Administrative Procedure Code is comparable with the logic of legal regulations of Parts 1 and 2 of Article 380 of the RA Criminal Procedure Code at issue in the Decision DCC-1052 of the RA Constitutional Court, and Part 5 of Article 156 of the RA Administrative Procedure Code at issue in the Decision DCC-1254 of the RA Constitutional Court;

c) the logic of legal regulation of Point 3 of Part 1 of Article 136 of the RA Administrative Procedure Code is comparable with the logic of legal regulations of Point 1 of Part 2 of Article 414[1] of the RA Criminal Procedure Code at issue in the Decision DCC-1249 of the RA Constitutional Court, and Point 1 of Part 1 of Article 160 of the RA Administrative Procedure Code at issue in the Decision DCC-1254 of the RA Constitutional Court.

Considering the contextual equivalence of legal regulations at issue in the Decisions DCC-1052, DCC-1062, DCC-1249 and DCC-1254, and the legal regulations challenged in this Case, the Constitutional Court finds that the legal positions stipulated by these Decisions are applicable also in the aspect of legal regulations at issue in this Case.

7. Taking into account the contextual equivalence of legal regulations of the RA Criminal Procedure Code and the RA Administrative Procedure Code regarding the time limits of appealing judicial acts, acceptance of appeals lodged after the mentioned time limit, returning appeals or dismissal of appeals, as well as the unity of legal positions of the Constitutional Court regarding the constitutionality of these legal regulations, the Constitutional Court considers it necessary to refer to the study of the current situation in judicial practice also in the framework of this Case. As a result of this study, in particular, it is stated:

1) on the criminal case ԵՇԴ/0133/01/14 of 31 March 2016, the RA Court of Cassation issued the decision "On dismissal of the cassation appeal", noting in particular that the decision of the RA Criminal Court of Appeal was announced on 14 January 2016, the mentioned decision of the RA Criminal Court of Appeal was received on 4 February 2016, and the cassation appeal was lodged on 4 March 2016, i.e. after the expiry of the one-month time limit for lodging cassation appeal stipulated by Part 1 of Article 412 of the RA Criminal Procedure Code. The Court of Cassation also stated that the cassation appeal was lodged with a violation of the 27-day time limit from the moment of receipt of the challenged judicial act, therefore, the grounds presented by the person who lodged the appeal on the receipt of the challenged act on 4 February 2016, may not be considered sufficient for recognizing the missed time limit for lodging cassation appeal as valid, and granting the motion of the person who lodged the appeal for its restoration.

In the mentioned decision, the RA Court of Cassation only stated the fact of receipt of the challenged judicial act by the appellant, and did not state any other fact of forwarding the full text of this act to the appellant and officially making it available to the appellant. It should be noted that the comparison of the date of the announcement of the challenged judicial act (14.01.2016) with the day of receipt of this act by the appellant (04.02.2016) shows that the challenged judicial act was not forwarded (was not available) to the appellant within three- day time limit provided for by Part 2 of Article 402 of the RA Criminal Procedure Code.

By the Decision DCC-1062 the Constitutional Court declared that Part 1 of Article 412 of the RA Criminal Procedure Code is in conformity with the RA Constitution insofar as - in consonance with the legal positions stipulated by the Decision DCC-1052 of the RA Constitutional Court - forwarding the judicial act to the person entitled to lodge an appeal is guaranteed under the procedure and within the terms prescribed by law, and the missed time limit due to reasons independent of the will of the appellant is recognized as valid by the force of law (ex jure). By the Decision DCC-1052 the Constitutional Court recognized Article 402 of the RA Criminal Procedure Code as a guarantee insofar as the term "shall be forwarded" - stipulated by Part 2 of this Article - guarantees the forwarding of the full text of the judicial act (its availability) within the three-day time limit to the person entitled to lodge an appeal.

Due to the legal positions of the Constitutional Court, law enforcement practice should be guided by the perception that the one-month time limit provided for appealing a judicial act is to be calculated from the moment of the announcement of the act in the case when the appellant has received the challenged judicial act or has the full text of the act at her/his disposal (it was available to her/him) within the three-day time limit provided for by the law.

At the same time, the RA Constitutional Court stipulated in the Decision DCC-1062 and reaffirmed in the Decision DCC-1249 the legal position according to which "... the calculation of the appeal time limit of a judicial act deciding on the merits of the case from the moment of **announcement** of the judicial act does not itself contradict the RA Constitution, if there are guarantees ensuring sufficient **time** for becoming familiar with the judicial act and for effective implementation of the right to appeal. As already noted, the Constitutional Court recognized Article 402 of the

Code as such a guarantee, **and only in the case when a judicial act is forwarded (was available) to the person within the three-day time limit stipulated by Part 2 of this Article. That is, according to the current legislation, a person must have at least 27 days to lodge a reasonable appeal".**

The said **"at least 27 days"** mentioned in the legal position **should not be regarded as an independent and maximum time limit calculated for lodging an appeal. Only in the case when the appellant had received the challenged judicial act or had the full text of the act at her/his disposal (it was available to her/him) within the three-day time limit provided for by the law, the appellant must have at least 27 days - as a minimum time limit - to lodge a reasonable appeal;**

2) on the criminal case ԵՇԴ/0129/01/14 of 25 March 2016, the RA Court of Cassation issued the decision "On dismissal of the cassation appeal", noting in particular that the motion for recognizing the missed appeal time limit as valid must be rejected, since it is not justified.

The Constitutional Court stipulated in the Decision DCC-1249 and in particular, reaffirmed in the Decision DCC-1254 the legal positions according to which "... in case the cassation appeal is lodged after the expiry of the time limit provided for by the law, **the motion** for recovering the missed time limit **is an objective legal necessity**, it pursues a legitimate aim, i.e. to enable the competent authority to consider the request included in the motion. ... in case the late receipt of the relevant challenged judicial act due to reasons independent of the will of the appellant is the reason for the missed time limit for lodging a cassation appeal to the Court of Cassation, the appellant must file a motion for recovering the missed time limit, attaching evidence confirming and signifying the relevant circumstance, and the Court of Cassation must grant the presented motion taking into account this circumstance. In this case, the missed time limit is recovered by the Court of Cassation by the force of law (ex jure), stating this in the relevant judicial act".

That is, **by the legal positions the Constitutional Court did not provide any other condition for justifying the motion for recovering the missed appeal time limit. The condition arising from the constitutional legal content of this legal regulation is that in the case when the appellant had received the challenged judicial act or had the full text of the act at her/his disposal (it was available to her/him) within the three-day time limit provided for by the law, the appellant must file a motion**

for recovering the missed time limit, attaching evidence confirming and signifying the relevant circumstance.

The results of the above-mentioned study show that the legal positions stipulated by the Decisions DCC-1052, DCC-1062, DCC-1249 and DCC-1254 of the RA Constitutional Court are not yet sufficiently taken into account in judicial practice, thus creating a threat of hindering the implementation of the constitutional right to effective judicial protection.

8. The RA Constitutional Court also considers it necessary to emphasize that after the adoption of the Decisions DCC-1052, DCC-1062, DCC-1249 and DCC-1254, the institute of appeals against judicial acts has not yet undergone the relevant comprehensive and uniform legislative regulation, and this circumstance is not reflected in the explanation submitted by the Respondent.

Within the framework of this Case, the Constitutional Court considers it necessary to once again emphasize the legal regulations stipulated by its own decisions, in particular:

a) "... on the one hand, at the legislative level it is objectively impossible to list all cases of valid reasons for circumstances in connection with the missed appeal time limit, and on the other hand, based on the need for a legitimate restriction of judicial discretion, it would be advisable to provide a certain group of valid reasons at the legislative level" (DCC-1249),

b) "... the legal fixing of certain valid grounds for the missed appeal time limit would help to improve the efficiency of these legal relations, as well as the level of predictability of public and legal conduct of courts" (DCC-1249),

c) "... legislative regulations of the matter at issue are necessary, in particular, with the aim of finding equivalent solutions in connection with preconditions for lodging an appeal against judicial acts within the framework of single criminal procedural, civil procedural and administrative procedural policy" (DCC-1254).

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. The provision "An appeal against a judicial act deciding on the merits of the case may be lodged prior to the time limit prescribed for the entry into legal force of that act …" stipulated by Part 1 of Article 132 of the RA Administrative Procedure Code is in conformity with the Constitution of the Republic of Armenia insofar as - in consonance with the legal positions on the same issue stipulated by the Decisions DCC-1052, DCC-1062 and DCC-1254 of the RA Constitutional Court - forwarding the judicial act to the person entitled to lodge an appeal is guaranteed under the procedure and within the terms prescribed by law, and the missed time limit due to reasons independent of the will of the latter is recognized as valid by the force of law (ex jure) in case of availability of relevant motion and evidence.

2. To declare Part 4 of Article 132 of the RA Administrative Procedure Code contradicting the requirements of Part 1 of Article 61 and Part 1 of Article 63 of the Constitution of the Republic of Armenia (with Amendments through 2015) and void in regard to the part that recovering the missed appeal time limit due to reasons independent of the will of the person entitled to lodge an appeal is at the discretion of the court, and it is not recognized as valid by the force of law (ex jure) in case of availability of relevant motion and evidence.

3. Point 3 of Part 1 of Article 136 of the RA Administrative Procedure Code is in conformity with the Constitution of the Republic of Armenia insofar as - in consonance with the legal positions on the same issue stipulated by the Decisions DCC-1249 and DCC-1254 of the RA Constitutional Court - recognizing the missed appeal time limit due to reasons independent of the will of the person entitled to lodge an appeal as valid by the force of law (ex jure) is guaranteed in case of availability of relevant motion and evidence.

4. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

April 26, 2016
DCC-1268

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF PARAGRAPH 2 OF PART 1 OF ARTICLE 27 OF THE LAW OF THE REPUBLIC OF ARMENIA ON THE NOTARIAT AND SUB-POINT "A" OF POINT 1 OF PART 1 OF ARTICLE 3 OF THE LAW OF THE REPUBLIC OF ARMENIA ON FUNDAMENTALS OF ADMINISTRATIVE ACTION AND ADMINISTRATIVE PROCEEDINGS WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF LUSINE ALEKSANYAN, NARINE SAKEYAN, HASMIK VARDANYAN AND GAGIK AVETISYAN

Yerevan **May 10, 2016**

The Constitutional Court of the Republic of Armenia composed of V. Hovhannisyan (Chairman), K. Balayan, A. Gyulumyan (Rapporteur), F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan, A. Petrosyan,

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

representatives of the Applicants: A. Zeinalyan and A. Ayvazyan,

representative of the Respondent: V. Danielyan, official representative of the RA National Assembly, Chief Specialist at the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Paragraph 2 of Part 1 of Article 27 of the Law of the Re-

public of Armenia on the Notariat and Sub-point "a" of Point 1 of Part 1 of Article 3 of the Law of the Republic of Armenia on Fundamentals of Administrative Action and Administrative Proceedings with the Constitution of the Republic of Armenia on the basis of the Application of Lusine Aleksanyan, Narine Sakeyan, Hasmik Vardanyan and Gagik Avetisyan.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by L. Aleksanyan, N. Sakeyan, H. Vardanyan and G. Avetisyan on 11 January 2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicants and the Respondent, as well as having studied the RA Law on the Notariat, the RA Law on Fundamentals of Administrative Action and Administrative Proceedings, and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Law on the Notariat was adopted by the RA National Assembly on 4 December 2001, signed by the RA President on 27 December 2001 and entered into force on 1 March 2002.

Paragraph 2 of Part 1 of Article 27 of the Law of the Republic of Armenia on the Notariat, titled "Property Liability of the Notary" stipulates:

"The Republic of Armenia shall not be liable for damage caused by a notary due to the violation of her/his official duties".

The RA Law on Fundamentals of Administrative Action and Administrative Proceedings was adopted by the RA National Assembly on 18 February 2004, signed by the RA President on 16 March 2004 and entered into force on 31 December 2004.

Sub-point "a" of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings, titled "Main concepts" (supplemented by the Law HO-257-N of 17.12.14) stipulates:

"The main concepts used in this Law have the following meanings:

1) administrative bodies - republican and territorial administrative bodies of the executive power of the Republic of Armenia, as well as local self-government bodies;

a) republican bodies of the executive power of the Republic of Ar-

menia - ministries of the Republic of Armenia, Commission on Appeal stipulated by the RA Law on Inspection Bodies, and other state bodies carrying out administrative action within the whole territory of the Republic…"

2. The procedural background of the Case is the following:

Using a passport belonging to another person, on 04.07.2007 F. Mkrtchyan purchased an apartment located at Sheram str., building 113, apt. 81, and received a property registration certificate.

On 04.08.2007 F. Mkrtchyan presented a false passport under another name and sold the above-mentioned apartment - under the contract of purchase and sale certified by the notary of "Kentron" notary office - to the Applicant Lusine Aleksanyan and received 34.500 USD from her, which is equivalent to 11.390.000 AMD. On the same day, F. Mkrtchyan once again presented the mentioned passport and sold the above-mentioned apartment - under the contract of purchase and sale certified by the notary of "Shengavit" notary office - to the Applicant Narine Sakeyan and received from her 10.938.916 AMD in various currencies.

In the above way, on 06.08.2007 F. Mkrtchyan sold the same apartment - under the contract of purchase and sale certified by the notary of "Malatia" notary office - also to the Applicant Hasmik Vardanyan and received 34.000 USD from her, which is equivalent to 11.459.360 AMD. On the same day, F. Mkrtchyan, once again presented the above-mentioned false passport and sold the same apartment - under the contract of purchase and sale certified by the notary of "Nor Nork" notary office - to the Applicant Gagik Avetisyan and received from him 29.800 USD, which is equivalent to 10.054.282 AMD.

By the Judgment ԵԿԴ/0047/01/11 of the Court of First Instance of Kentron and Nork-Marash Administrative Districts of Yerevan dated 06.09.2011, F. Mkrtchyan, along with other crimes, was found guilty of swindling of sums of money of the Applicants in this Case in particularly large amount, and was sentenced to imprisonment. The court also decided to recover from F. Mkrtchyan the sums paid by the Applicants under the contract of purchase and sale in favor of the Applicants in this Case as compensation for property damage caused by the crime.

Due to the absence of property belonging to the convict, the Judgment of the Court on compensation of property damage caused to the Applicants by the crime was not executed.

On 05.05.2014 the representatives of the Applicants applied to the RA Minister of Justice with a demand for compensation of property damage caused by the actions of notaries. By the Letter No. 10/3396-14 of 23.05.2014 the RA Ministry of Justice returned the application stating that "... the demand put forward in the application does not fall under the competence of the RA Ministry of Justice or any other administrative body ..."

The Applicants filed a lawsuit to the RA Administrative Court against the RA Ministry of Justice claiming to oblige adopting favorable administrative act expected in the above-mentioned application. By the Decision of 25 December 2014 (administrative case number ՎԴ/3369/05/14), the Administrative Court dismissed the claim.

By the Decision of the RA Administrative Court of Appeal dated 8 July 2015, the appeal lodged against the above-mentioned Decision of the RA Administrative Court was also dismissed. Simultaneously, during the consideration of the case by the RA Administrative Court of Appeal, a petition "… for the suspension of the proceedings, and applying to the RA Constitutional Court on the Case of conformity of Paragraph 2 of Part 1 of Article 27 of the RA Law on the Notariat and Sub-point "a" of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings with the RA Constitution" was submitted on behalf of the Applicants, which was dismissed by the Protocol Decision of the Court of Appeal dated 18.06.2015.

By the Decision of 4 November 2015, the RA Court of Cassation determined that there are no necessary reasons for acceptance of the cassation appeal on the administrative case for examination and dismissed to accept the appeal submitted on behalf of the Applicants.

3. The Applicants find that Paragraph 2 of Part 1 of Article 27 of the RA Law on the Notariat (excluding the liability of the Republic of Armenia for damage caused by a notary due to the violation of her/his official duties), and Sub-point "a" of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative

Proceedings (not considering the notary as a body performing administration) contradict Articles 1, 3, 23, 28, 61, 63, 66, 10, 59, 76 and 75 of the RA Constitution (with Amendments through 6 December 2015).

The Applicants find that the conclusion of the contract of purchase and sale of real estate in the presence of a notary and its notarial certification are not left to the discretion of the Parties, since it is not a voluntary act but the duty of the Parties, and the failure to conclude the contract shall lead to the nullity of the transaction by the force of law.

The Applicants consider that the RA Law on the Notariat does not provide for an effective mechanism for protecting the property rights of individuals and restoring the damage caused, since "in any case of termination of the legal capacity and/or active capacity of a notary, no one shall be liable for damage caused by a notary due to the violation of her/his official duties, or after the termination of the office of a notary, from a substantive perspective, the notary does not have a legal successor. ... There may be also cases when there is no guilt of a certain notary, however due to imperfect mechanisms, people may become victims of breach of law".

According to the Applicants, due to the legal regulation in question, persons - including those who have the status of "victim" due to the violation of official duties of a notary - are deprived of the right to legal protection.

Grounding their position, the Applicants refer to the Decision DCC-983 of the Constitutional Court dated 12.07.2011 on guaranteeing, securing and protecting property rights, and as referred to in the said Decision, Point 134 of the Judgment of the Grand Chamber of the European Court of Human Rights (hereinafter referred to as the ECHR) in the case of Oneryildiz v. Turkey (Oneryildiz v. Turkey 48939/99) dated 30 November 2004.

The Applicants are convinced that there is a legal gap in Sub-point "a" of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings, since it does not include notaries as bodies that perform public services and functions. The Applicants find that the whole domain of legal relations concerning notaries is thus left out of the extrajudicial legal protection and control by the legislator.

4. Objecting to the arguments of the Applicants, the Respondent finds that the challenged legal provisions are in conformity with the RA Constitution.

According to the Respondent, notaries cannot be included in the concept "administrative bodies" stipulated by Sub-point "a" of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings, since according to Part 5 of Article 15 of the RA Law on the Notariat, the business activity regime stipulated by the Civil Code of the Republic of Armenia shall be applied to notarial acts or paid services provided by a notary, therefore, as individual entrepreneurs, notaries shall carry out their activities at their own risk, for which, like in the case of other individual entrepreneurs, the state shall not bear responsibility.

The Respondent finds that the public nature of the notary's activity is due to the notary's mission to promote justice, and this is not considered either administration or executive administrative activity typical for administrative bodies.

According to the Respondent, the current notarial system is an effective mechanism for the citizens for the exercise of their rights. The fact that in particular case persons had suffered damage due to swindling may not create legitimate expectations among the victims that the damage caused by the crime should be compensated by the state. The state cannot introduce a mechanism that will exclude crimes and the damage caused to persons by the crime, or compensate the material damage caused to the victims by all crimes. As a mechanism for compensating such damage, the state has established the obligation of persons to compensate for damage caused.

5. At the request of the Constitutional Court, the RA Notary Chamber submitted explanations on the issues raised in the Application, which in particular state that:

- the current notarial system of the Republic of Armenia is borrowed from the Latin model and widely used in the countries of the Romano-Germanic legal system, where notaries are called upon to provide a combination of public and private interests in the law enforcement process. Although the notary performs public functions, she/he is empowered by the state and implements them on behalf

of the state, yet the notary is not a state body and is not endowed with state power, which would ensure the obligatoriness of the will of the notary for the other participants of legal relations, while the notary acts independently and under own responsibility;

- according to international practice and the RA legislation, a mandatory requirement for insurance of both the risk of property liability of a notary and own liability of a notary is stipulated at the legislative level in order to ensure compensation for damage caused to persons by the actions of notaries;
- summarizing similar legal regulations on the legal status and liability of the notary in other countries, the Notary Chamber concluded that, as a rule, states do not bear responsibility for the actions of notaries.

The Notary Chamber finds that taking into account the public significance of the notary's activity, the state ensured the protection of property rights having stipulated at the legislative level the property liability for damage caused to persons by a notary due to intentional violation, and the mandatory requirement for insurance of such risk.

6. In order to determine the conformity of the legal provisions challenged within the framework of this Case with the RA Constitution, the Constitutional Court considers it necessary to be based on the need to provide effective protection of the fundamental human and civil rights and freedoms by public authorities and, in this context to establish and assess:

- the peculiarities of the legal status of notaries, legal grounds of their activities, as well as compensation for damage caused to the person due to such activities;
- whether the legal provisions, related to the property liability for damage caused due to the activities of the notary, provide for the necessary organizational and legal mechanisms and procedures to ensure the restoration of the violated rights of the person.

7. According to Part 2 of Article 3 of the RA Constitution, the respect for and protection of the fundamental human and civil rights and freedoms shall be the duty of public authorities. The said constitutional provision entrusts two clear duties to the public authorities, i.e. **to re-**

spect, in particular, to refrain from any unnecessary interference, as well as **to protect**, that is, to ensure through a combination of certain actions, that the fundamental human and civil rights and freedoms are not violated or be restored if violated.

The Constitutional Court finds that in order to assess whether the public authorities actually fulfilled these duties, it is necessary to turn to constitutional provisions concerning the relevant fundamental right or freedom. The constitutional legal dispute within the framework of this Case concerns the exercise of property rights.

According to Part 1 of Article 60 of the RA Constitution, everyone shall have the right to possess, use and dispose of legally acquired property at her/his discretion. This provision guarantees that everyone shall have not only the right to possess, use and dispose of at her/his discretion, but also the right to legally acquire property, which requires the state to regulate the legal basis in such a way that no losses are incurred to the person, and the right to acquire property is guaranteed.

In case of failure to provide effective organizational and legal mechanisms and relevant procedures for the exercise of the said rights, a person may suffer damage.

According to the case law of the ECHR, the ECHR member states are obliged not only to refrain from violating the person's right of ownership guaranteed by Article 1 of Protocol No. 1 of the ECHR, but also to adopt legislation that protects the person's right of ownership from infringement of other persons (Case of Sovtransavto Holding v. UKRAINE, 25/07/2002, Application no. 48553/99, paragraph 96).

In this regard the RA Constitutional Court considers it necessary to re-confirm the legal position expressed in the Decision DCC-983, according to which: "Considering the issue of protection of the property rights of the crime victims in the context of the positive obligation of the State in the sphere of protection of right to property, the Constitutional Court states that the principle of immunity of property not only means that the owner, as the holder of subjective rights, is entitled to demand from others not to violate her/his right to property but also assumes the duty of the State to protect the person's property from illegal infringement. In the situation in question, this duty of the State requires to ensure effective mechanism for protection of property rights of the crime victims and for recovery of damages".

The Constitutional Court considers it necessary to emphasize that a new provision was stipulated by the RA Constitution with Amendments through 6 December 2015, namely Article 75 of the RA Constitution, which directly obliges the legislator to provide for organizational and legal mechanisms and procedures for guaranteeing the effective exercise of fundamental rights and freedoms when regulating those rights and freedoms.

8. According to Paragraph 1 of Part 1 of Article 3 of the RA Law on the Notariat, a notary is a public officer promoting justice, who shall carry out notarial activities and services provided for by this Law **on behalf of the Republic of Armenia** and in accordance with the Constitution and laws of the Republic of Armenia, including by certifying documents or providing certified documents.

Certifying the document, the notary confirms its validity and certifies the full probative force of the document **"on behalf of the Republic of Armenia".** A document confirmed or certified by the signature and seal of a notary shall have public significance and full probative force provided for by the Law.

Several functions characteristic of public authorities were delegated to the notary by the legislator. Moreover, the Ministry of Justice of the Republic of Armenia provides the notary with a seal with the image of the state emblem of the Republic of Armenia, on which the words "Republic of Armenia" are marked, and which certifies the relevant documents. Acting on behalf of the Republic of Armenia emphasizes the importance of this function from the perspective of organizing public life. Therefore, a notary may not simply be considered an individual entrepreneur acting at her/his own risk, as the Respondent mentions.

At the same time, according to Part 5 of Article 15 of the RA Law on the Notariat, the regime of entrepreneurial activity provided for by the Civil Code of the Republic of Armenia shall be applied to notarial acts or paid services provided by a notary.

The RA Constitutional Court states that, according to the legal position expressed in the decision of the RA Court of Cassation on the administrative case number ՎԴ/5014/05/09, in the Republic of Armenia the legal status of the notary is twofold, i.e. public-legal and private-legal.

Analyzing the constitutional legal nature of the legal status of the notary, the Constitutional Court affirms that the legislator regulated the activity of notaries by a separate Law on the Notariat; therefore, not including notaries in the list of administrative bodies may not be regarded as a legal gap. The RA Law on Fundamentals of Administrative Action and Administrative Proceedings is not applicable to notaries, but it concerns only the state bodies and local self-government bodies carrying out administrative action, and the legal grounds of their activities differ.

The RA Constitutional Court also takes note of the fact that the legislative initiative "On Amendments to the Law of the Republic of Armenia on Fundamentals of Administrative Action and Administrative Proceedings" is put into circulation in the National Assembly of the Republic of Armenia (Կ-902-24.11.2015-ՊԻ-010/0).

According to the amendments proposed by the RA Government, Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings should stipulate Part 2, according to which "... the body or person, directly empowered to carry out administrative action, shall also be considered administrative body". The substantiation of the draft amendments states that the notion "administrative body" may not include only state bodies and local self-government bodies specified in the said Article, since there are also other bodies and persons, which are not state bodies and local self-government bodies, and they are empowered to carry out administrative action in the cases and in the manner provided for by the Law.

The Constitutional Court emphasizes the importance of the need for legal regulations, within the framework of which the state may not disclaim responsibility for the inefficient exercise of administrative powers when transferring certain administrative powers to private individuals.

9. Turning to the question of how the procedures created by the state guarantee full compensation for damage caused by the activities of a notary acting on behalf of the Republic of Armenia, the Constitutional Court considers that this must be assessed in comparison with other systematically interrelated provisions of the same Law, and the Constitutional Court states the following:

Firstly, according to Part 3 of Article 17 of the RA Law on the Notariat, the invalidation of a document confirmed or certified by a notary or its change through a judicial procedure do not entail the liability of a notary who confirmed or certified the document in case it was not changed or invalidated by the notary due to the violation of the requirements of the law or other legal act when performing notarial actions. In all cases, it can only concern liability if there is guilt. The court must approve the fault of the notary in violation or performance of notarial actions contrary to the law.

Secondly, according to Paragraph 1 of Part 1 of Article 27 of the RA Law on the Notariat, a notary shall bear property liability only for damage caused to persons - who applied for notarial actions - due to violations committed **intentionally**. In this regard, the Constitutional Court states that intent is only one form of guilt. Other forms of guilt are disclosed in the RA Criminal Code and the RA Code of Administrative Offenses. Not excluding the real possibility of damage caused by the notary through negligence (particularly by carelessness) when performing her/his functions, the Constitutional Court finds that in this case such a differentiated approach does not pursue any legitimate aim, i.e. where the notary's liability is foreseen only for damage caused to persons - who applied for notarial actions - due to violations committed intentionally. The study of international experience (Russia, Ukraine, Lithuania, Estonia, Bulgaria and Slovenia) shows that in most countries the wordings "by a guilty action" or "due to her/his fault", which means that in order to incur property liability, the form of guilt, that caused the damage, is not significant.

Thirdly, according to Part 2 of Article 27 of the RA Law on the Notariat, a notary must insure the risk of her/his liability in the manner prescribed by law, the amount of which must be no less than 3000-fold of the minimum salary. The circumstance that a notary is obliged to insure the risk of her/his liability, shows that the legislator tried to prescribe a procedure that guarantees compensation for damage caused due to the activities carried out on behalf of the Republic of Armenia. However, it should be noted that the indicated minimum amount of the insured risk of liability may not always be considered sufficient for the legitimate compensation for damage caused due to the fault of the notary.

The Constitutional Court finds that the said provisions of the Law, regulating issues of the notary's liability, do not take into account the whole range of possible situations and do not establish sufficient mechanisms and procedures for the protection of the person's right of ownership that was violated, and the state shall bear such liability according to Articles 3 and 75 of the RA Constitution.

Referring to the positive obligation of the state under Article 1 of Protocol No. 1 of the ECHR, in the case of **Blumberga v. Latvia** (Judgment of 14/10/2008, application no. 70930/01, paragraph 67) the ECHR expressed the position that a positive duty of the state is to protect the rights of a person through effective mechanisms established by the national legislation, including, if necessary, securing the right to compensation for damages.

Based on the above-mentioned, the RA Constitutional Court finds that the legislative procedures matter at issue **do not guarantee the legitimate compensation** for damage caused due to the actions of a notary, acting on behalf of the Republic of Armenia, **and guaranteed protection of the constitutional rights of a person**.

As to the liability of the state for the damage caused, the Constitutional Court finds that this does not mean that the compensation for damage should be carried out exclusively at the expense of public funds. In this case, the property liability of the state may be excluded in case **the mechanisms and procedures created by the state guarantee full compensation for damage caused due to the activities carried out on behalf of the Republic of Armenia.**

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64, 68 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. To declare Paragraph 2 of Part 1 of Article 27 of the RA Law on the Notariat and Paragraph 1 of Part 1 of the same Article systemically interrelated with the latter contradicting the Constitution of the Republic of Armenia.

2. Taking into consideration the necessity not to damage the security of the legal system of the Republic of Armenia, pursuant to Part 3 of Article 102 of the Constitution of the Republic of Armenia and Part 15 of Article 68 of the Law of the Republic of Armenia on the Constitutional Court, to determine 31 October 2016 as deadline for invalidating the legal norms declared contradicting the Constitution of the Republic of Armenia by this Decision, thus allowing the National Assembly of the Republic of Armenia and Government of Republic of Armenia, in the scopes of their powers, to align the legal regulations of the Law on the Notariat of the Republic of Armenia with the requirements of this Decision.

3. Sub-point "a" of Point 1 of Part 1 of Article 3 of the RA Law on Fundamentals of Administrative Action and Administrative Proceedings is in conformity with the Constitution of the Republic of Armenia.

4. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman **V. Hovhannisyan**

May 10, 2016
DCC-1271

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 1 OF ARTICLE 87 OF THE RA ADMINISTRATIVE PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF GEVORG SAFARYAN

Yerevan **June 23, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan, A. Gyulumyan (Rapporteur), A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan,

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

T. Yegoryan and G. Petrosyan, representatives of the Applicant Gevorg Safaryan,

representative of the Respondent: official representative of the RA National Assembly V. Danielyan, Chief Specialist at the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the RA Law on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Part 1 of Article 87 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Gevorg Safaryan.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by Gevorg Safaryan on 19 January 2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the RA Administrative Procedure Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Administrative Procedure Code was adopted by the RA National Assembly on 5 December 2013, signed by the RA President on 28 December 2013 and entered into force on 7 January 2014.

Part 1 of Article 87 of the RA Administrative Procedure Code, titled: "Submission of a counterclaim," stipulates:

"1. Prior to the assignment of the trial of the case, the respondent may file a counterclaim against the applicant for consideration of the counterclaim together with the initial claim."

2. The procedural background of the Case is the following.

The RA Police filed a case to the Administrative Court of the Republic of Armenia demanding that G. Safaryan (hereinafter referred to as the Applicant) be subjected to administrative liability for non-compliance with the legitimate requirement of a police officer (on the grounds of Article 182 of the Administrative Offences Code of the Republic of Armenia).

The Applicant filed a counterclaim to the Court and demanded to recognize unlawful the actions of police officers, that interfered with the exercise of his rights.

By the Decision of 15.01.2015, the RA Administrative Court rejected to accept the counterclaim, arguing that it was filed after the assignment of the trial of the case.

The appeal submitted by the Applicant against the given Decision of the RA Administrative Court was rejected by the Decision of 03.04.2015 of the RA Administrative Court of Appeal.

By the Decision of 24.06.2015, the RA Court of Cassation rejected to accept the cassation appeal for examination submitted by the Applicant against the given Decision of the Court of Appeal.

3. The Applicant finds that Part 1 of Article 87 of the RA Administrative Procedure Code – which was applied against him by the above-

mentioned judicial acts – contradicts Articles 1, 3, 28 and 29, Part 1 of Article 61, Part 1 of Article 63, Articles 78, 79, 80 and 81 of the RA Constitution.

Referring to the positions of the Constitutional Court (DCC-630, DCC-753, DCC-902) and the case law of the European Court of Human Rights, the Applicant states that the challenged legal position – which restricts the right of the respondent to file a counterclaim – does not meet the requirements of legal certainty and predictability, disproportionately restricts a person's right to effective judicial protection and a fair trial, as well as it violates the principle of equality of parties to proceedings.

Based on the analysis of a number of articles of the RA Administrative Procedure Code, the Applicant concluded that the deadline prescribed for the implementation of the respondent's right to file a counterclaim – i.e. the moment for the assignment of the trial – is not predictable for the respondent. The Applicant finds that, under the current legal regulations, it is impossible to predict the minimum time period for assignment of the trial after the Court renders a decision on accepting the claim for examination, since this depends both on the submission of the response to the claim and the discretionary power of the Court regarding the assignment of a preliminary hearing.

According to the Applicant, from the moment of receipt of the decision on the assignment of the trial, the respondent is deprived of the right to file a counterclaim, since this right ceases from the moment of the assignment of the trial, and not from the moment of beginning of the trial. At the moment of receipt of the decision on the assignment of the trial, the respondent is actually notified about the expiry of the time period and the possibility of exercising the right to file a counterclaim, whereas the applicant retains the possibility of changing the grounds and the subject matter of the claim. The Applicant considers that this legal regulation disproportionately restricts the respondent's right of access to a court and also violates the principle of equality of the parties.

The Applicant considers that the challenged provision is systemically connected with Articles 54 and 80 of the RA Administrative Procedure Code, and even in the case of filing a motion for recognizing the missed time period for filing a counterclaim as valid, the court cannot grant the motion with the motivation that the case is at the trial stage.

4 Objecting the arguments of the Applicant, the Respondent asserts that the challenged legal position meets the requirements of the RA Constitution.

Referring to **the principle of equality of parties, the Respondent** finds that the challenged legal regulation has even more balanced the possibilities of the parties, since according to the previous legislation, the grounds and the subject matter of the claim could be changed before the assignment of the trial of the case, and a counterclaim could be filed within the deadline prescribed for the submission of the response to the claim. According to the current legislation, the grounds and the subject matter of the claim can be changed before the assignment of the trial of the case or within seven days after the receipt of the court decision on the assignment of the trial, and a counterclaim can be filed before the case is assigned for trial.

According to the Respondent, the violation of the principle of **access to a court** is possible in case the right of a person to enjoy judicial protection is limited in practice. Meanwhile, the current legal regulations allow the person to file a counterclaim for consideration of the counterclaim together with the initial claim, as well as in the event of failure to file such a claim, to protect her/his rights within the framework of another proceeding by filing a separate claim.

Regarding the principle of legal certainty, the Respondent notes that procedural time terms can be established both by indicating the specific time period and establishing the certain time period, and the calculation of the beginning or the end of the time period would be conditioned by the occurrence of any procedural event, which does not depend on the will of the parties to the proceedings or cannot be foreseen by the latter. The Respondent finds that this does not mean that the legal regulations in question can lead to unpredictability of legitimate expectations of the person.

5. For determination of conformity of the legal provision - challenged in this Case - with the RA Constitution, the Constitutional Court considers it necessary to find out and assess:

- the constitutional legal content and objective of the institution of counterclaim in administrative proceedings;

- the guarantees for the implementation of the constitutional principle of general equality before the law in the conditions of the challenged legal regulation (Article 28 of the RA Constitution);
- the sufficient certainty of time period for filing a counterclaim, so that the respondent would be able to show appropriate behavior and exercise her/his constitutional rights to effective judicial protection and fair trial, especially the right to access to a court (Articles 61 and 63 of the RA Constitution).

6. It follows from the content of Article 87 of the RA Administrative Procedure Code, that **the filing of a counterclaim for consideration of the counterclaim together with the initial claim** within the framework of certain trial **is an independent requirement presented by the Respondent, which is aimed at deduction of the initial demand, or the satisfaction of which completely or partially excludes the satisfaction of the initial claim, or which is interrelated with the initial claim, and their joint consideration can ensure more prompt and correct resolution of the dispute.** Obviously, in the aspect of protection of constitutional rights, the institution of counterclaim becomes meaningless unless necessary and sufficient procedures are provided for its consideration together with the initial claim.

The institution of counterclaim allows to resolve mutual claims of the parties within one trial and rendering one judicial act, as well as carry out the trial more effectively using minimum procedural powers and means. The relationship between the counterclaim and the initial claim is a binding term, and a separate examination of two interrelated claims may delay the resolution of the dispute on the merits and not fully guarantee the realization of the right to effective judicial protection.

As a procedural means for protection of the interests of the respondent, the counterclaim aims to promote the exercise of her/his right to effective judicial protection and ensure the exercise of the person's right to hearing of his case within a reasonable period, as an element of the right to a fair trial. Therefore, according to the legislation, the main task of the legal regulation of the institution of counterclaim is to provide necessary and sufficient procedural guarantees to ensure its legitimate implementation.

7. The provision – **stipulated by Article 28 of the RA Constitution, according to which everyone shall be equal before the law – is expressed as a requirement of equality of parties to the proceedings** within the framework of **the right to a fair trial** guaranteed by **Article 63 of the RA Constitution and** Article 6 of the European Convention on Human Rights.

In regard to the arguments of the Applicant on the principle of equality of all before the law, the RA Constitutional Court reaffirms the legal position stated in Point 5 of the Decision DCC-881 of 04.05.2010, according to which "... the constitutional principle of equality of all before the law implies ensuring equal responsibility before the law, the inevitability of liability and the equal conditions of legal protection, and this principle is not related to the establishment of preconditions – due to any legitimate aim – for entities having different legal status."

Referring to the principle of equality of parties during the trial, the European Court of Human Rights reaffirmed its case law in the Nikoghosyan and Melkonyan v. Armenia Judgment, according to which "... one of the features of the wider concept of a fair trial, implies that each party must be afforded a reasonable opportunity to present their case – including evidence – under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent" (Nikoghosyan and Melkonyan v. Armenia, app., No. 11724/04 and 13350/04, 06.12.2007, §37; Dombo Beheer B.V. v. The Netherlands, app. No. 14448/88, 23.09.1993, §33; Steck-Risch v. Liechtenstein, app. No. 63151/00, 19.05.2005).

In the Wynen v. Belgium Judgment (Wynen and Centre Hospitalier Interregional Edith-Cavell v. Belgium, app. no. 32576/96, 05.11.2002), the availability of different terms for submitting additional motions to the Court of Cassation by the parties was considered by the European Court of Human Rights as a violation of the requirement of equality of parties.

Article 6 of the RA Administrative Procedure Code provides for the implementation of administrative proceedings based on the equality of parties, i.e. the court is obliged to provide the parties with equal opportunities throughout the course of the proceedings, which includes also enabling each party full opportunity to submit its position on the case.

Comparing the challenged legal position challenged in this Case with Part 1 of Article 88 of the RA Administrative Procedure Code, the Constitutional Court finds that, according to the legislation, the challenged provision **does not provide the parties with equal opportunities in regard to the time period for submitting her/his position regarding the case.** Thus, Part 1 of Article 88 of the RA Administrative Procedure Code prescribes that the applicant **may change the grounds and (or) the subject matter of the claim during the preliminary hearing or within seven days after the receipt of the decision of the Administrative Court on the assignment of the trial, whereas the respondent may file a counterclaim only before the assignment of the trial.**

8. According to Part 1 of Article 61 of the RA Constitution: everyone shall have the right to effective judicial protection of her/his rights, and according to Part 1 of Article 63: everyone shall have the right to a fair and public hearing of her/his case within a reasonable period by an independent and impartial court.

According to the legal position challenged in this Case, filing a counterclaim in administrative proceedings is possible only before the assignment of the trial. Completely different legal regulation is stipulated by **Article 96 of the RA Civil Procedure Code**, which provides that a counterclaim can be filed before the adoption of a judgment on the case.

Both civil and administrative proceedings are based on the principles of publicity and equality of parties, and in both cases the constitutional legal requirement to consider the case within a reasonable period exists.

By the Decision DCC-1257 of 10 March 2016, the RA Constitutional Court reaffirmed the legal positions - expressed in a number of previous Decisions, in particular in the Decisions DCC-1127, DCC-1190 and DCC-1222 - on the right to a fair trial and the right of access to a court, and within the framework of the judicial protection of the rights and freedoms of a person - deriving from Articles 61 and 63 of the RA Constitution with Amendments through 6 December 2015 – the Court considers that: "... no peculiarity or procedure may hinder or prevent the effective exercise of the right to a court, make senseless the right to the judicial protection guaranteed by the RA Constitution or become an obstacle for its implementation." It was also stressed

that "no procedural peculiarity may be interpreted as justification for limiting the right of access to a court guaranteed by the RA Constitution ..."

The Constitutional Court considers that the constitutionality of the provision in dispute must also be assessed taking into account the given legal position.

9. Both the Constitutional Court and the European Court of Human Rights have repeatedly emphasized that the access to a court may have certain procedural and temporal restrictions, which, however, should not distort the very essence of this right.

The purpose of establishing the procedural time periods is to regulate the proceedings of the case and to implement it in the shortest time periods.

The institutions of procedural time periods and counterclaim are interrelated, and the filing of a counterclaim must also be envisaged at a stage where the parties to the proceedings were given a reasonable time period to develop their legal position.

The Constitutional Court considers it necessary to note that in the administrative proceedings, the legislator does not establish a certain time period for the assignment of the trial of the case. The Administrative Court issues a decision on the assignment of the trial of the case, when considers that the case is prepared for trial (Article 90 of the Administrative Procedure Code).

According to Part 1 of Article 86 of the RA Administrative Procedure Code, the respondent shall be obliged to submit the response to the claim to the Administrative Court within **two weeks** after the receipt of the decision on accepting the claim for examination. The same Article also provides for the right of the court to establish a **longer time period** for sending the response, or, upon the respondent's motion, to **extend** the time period for submission of the response, **based on the circumstances of the case**. In addition, **according to Part 8 of the same Article, the non-submission of the response may be regarded by the Administrative Court as acceptance of the facts - stated by the applicant - by the respondent, and according to Part 9, the filing of a counterclaim does not release the person from the obligation to submit a response to the claim.**

According to Article 89 of the RA Administrative Procedure Code, when preparing the case for trial, the Administrative Court - after the receipt of the respondent's response to the claim, and in case of non-receipt of it, after the expiration of the time period provided for sending the response – **may** convene more than one preliminary hearings for the effective conduct of the trial, and in the course of those hearings the Court, inter alia, determines the grounds and the subject matter of the claim, sets the time periods for the submission of evidence, decides on the issues providing evidence or counterclaim, as well as other motions of the parties.

Only after the completion of the given procedural actions, the court **may** consider the case as prepared and assign the hearing. Such a legislative regulation makes the implementation of **the right of access to a court and the right to a fair trial directly depend on the discretion of the judge regarding the convening of a preliminary hearing and the assignment of a hearing. Moreover, law enforcement practice shows that the current legal regulation also emerges legal uncertainty for the applicant in the aspect of manifestation of legitimate behavior.**

In a number of decisions (DCC-630 and DCC-1142), the RA Constitutional Court addressed the principle of legal certainty, and finds that the latter is necessary in order that the participants of the relevant relations might be reasonably able to foresee the consequences of their behavior and be convinced of the immutability of their officially recognized status, as well as the acquired rights and obligations.

The Constitutional Court also considers it necessary to note that Part 3 of Article 87 of the RA Administrative Procedure Code prescribes that the counterclaim shall be filed in accordance with the general rules for filing a claim. The acceptance or return of the counterclaim for examination, or the rejection to accept the counterclaim for examination shall be carried out in the manner prescribed by Articles 78-80 of the same Code. The acceptance of the counterclaim shall be also rejected, in case it does not meet the requirements of Parts 1 and 2 of the same Article, i.e. **in case it is filed after the assignment of the trial of the case, or in case it is not interrelated with the initial claim.**

Such legal regulation can be a reason for different interpretation in judicial practice, since in one case the legislator considered the missing of the time period as grounds for directly rejecting the claim, however

in the same Article the legislator referred to Article 79 of the Code, according to Point 6 of Part 1 of which: in case the time period for filing the claim is missed and no motion for its restoration is submitted, the acceptance of the claim shall not be rejected, and the claim shall be returned.

In addition, despite the fact that Article 54 of the RA Administrative Procedure Code provided **for the possibility of restoring the procedural time periods - missed** by the participants in the proceedings for due reasons - **by filing a motion to the Administrative Court, nevertheless, in terms of the above mentioned legal regulation, it is unclear how applicable the latter is in the case of a counterclaim.**

The argument of the Respondent - that in case of rejection of a counterclaim, the respondent has the opportunity to file a claim on general grounds - cannot be considered justified, since the effective implementation of the institution of the counterclaim is not guaranteed, and the initiation of a separate claim cannot ensure the effectiveness of judicial protection and guarantee the hearing of the case within a reasonable period.

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64, 68 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Part 1 of Article 87 of the RA Administrative Procedure Code contradicting Part 1 of Article 61 and Part 1 of Article 63 of the RA Constitution and void in regard to the part of the provision "prior to the assignment of the trial of the case."

2. Pursuant to Part 3 of Article 102 of the Constitution of the Republic of Armenia and Part 15 of Article 68 of the Law of the Republic of Armenia on the Constitutional Court, to determine 1 December 2016 as deadline for invalidating the legal norm declared contradicting the Constitution of the Republic of Armenia by this Decision, thus allowing the National Assembly of the Republic of Armenia and the Government of the Republic of Armenia, in the scopes of their powers, to align the legal regulation of Part 1 of Ar-

ticle 87 of the RA Administrative Procedure Code with the requirements of this Decision.

3. Pursuant to Point 9.1 of Part 1 of Article 64 and Part 12 of Article 69 of the RA Law on the Constitutional Court, the final judicial act rendered against the Applicant is subject to review due to new circumstances, in accordance with the procedure provided for by law.

4. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

June 23, 2016
DCC-1289

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 1 OF ARTICLE 207, PART 1 OF ARTICLE 140, PART 3 OF ARTICLE 213 OF THE RA CIVIL PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF VARTGEZ GASPARI

Yerevan **June 28, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan, A. Gyulumyan, F. Tokhyan, A. Khachatryan (Rapporteur), V. Hovhannisyan, H. Nazaryan, A. Petrosyan,

with the participation of (in the framework of the written procedure) representatives of V. Gaspari: T. Yegoryan, G. Petrosyan and L. Hakobyan,

representative of the Respondent: V. Danielyan, official representative of the RA National Assembly, Chief Specialist at the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 25, 38 and 69 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Part 1 of Article 207, Part 1 of Article 140, Part 3 of Article 213 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Vartgez Gaspari.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by Vartgez Gaspari on 11 February 2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the RA Civil Procedure Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Civil Procedure Code (hereinafter referred to as the Code) was adopted by the RA National Assembly on 17 June 1998, signed by the President of the Republic of Armenia on 7 August 1998 and entered into force on 1 January 1999.

Part 1 of Article 140 of the Code challenged by this Case stipulates:

"1. Judicial acts of the court of general jurisdiction deciding the case on the merits shall enter into force one month following the promulgation, except for the cases provided for by Points 2 and 3 of this Article".

Part 1 of Article 207 of the Code challenged by this Case stipulates:

"1. An appeal against a judicial act deciding the case on the merits may be lodged prior to the time limit prescribed for the entry into legal force of that act".

Part 3 of Article 213 of the Code challenged by this Case stipulates:

"3. In case of elimination of errors in the appeal after the return of the appeal on the ground stipulated by Sub-point 1 of Point 1 of this Article and resubmission of the appeal within a period of two weeks after receiving the decision, the appeal shall be considered as accepted in the court. In case of resubmission of the appeal, no new time limit shall be provided for the elimination of errors".

2. The procedural background of this Case is the following:

A. Demirkhanyan submitted a lawsuit to the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts against Vartgez Gaspari with a demand for a public apology for insulting honor and dignity and compensation for damage. By the 19.12.2014 Decision of the Court, the claim was partially satisfied.

By this civil case, on 26.01.2015 an appeal was lodged with the calculation of the one-month time limit provided for by the law from the

moment the Judgment became available to the appellants, i.e. on 24.12.2014.

On 12.02.2015, the RA Civil Court of Appeal made a Decision on returning the appeal, and the appellants received the said decision on 19.02.2015. The appeal was returned on the following grounds: "... the appeal was lodged on 26.01.2015, i.e. after the expiry of the time limit provided for by the law, and the appeal does not contain a motion for recovering the missed time limit, thus violating Part 1 of Article 207 of the RA Civil Procedure Code, therefore the appeal shall be returned".

By this civil case, on 05.03.2015 once again an appeal was lodged in compliance with the two-week time limit, and a motion was also filed for recognizing the one-month time limit – calculated from the moment of the announcement of the judicial act – missed due to reasons independent of the will of the appellants as valid by the force of law (ex jure) and recovered, and for recognizing the appeal lodged in due time, considering that the one-month time limit - from the moment the Judgment became available to the appellants - expires on 26.01.2015.

On 18.05.2015, the RA Civil Court of Appeal made a Decision on rejecting the motion for recognizing the missed time limit for appealing the Judgment as valid and for recovering the said time limit, and on returning the appeal lodged on behalf of V. Gaspari against the Judgment of the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts dated 19.12.2014.

On 10.06.2015 the appellants filed a cassation appeal against the above-mentioned Decision. By the Decision of 08.07.2015 the RA Court of Cassation rejected to accept the cassation appeal for examination.

3. Analyzing the challenged provisions of the RA Civil Procedure Code, the Applicant notes that in the event that the appeal is lodged with violation of the procedural time limit and does not contain a motion for recovering the time limit, the appeal shall be returned without providing a time limit for elimination of the error, which in this case leads to rejection to accept the appeal. Such restriction does not pursue any legitimate and reasonable aim, in which case depriving the person - who committed such error - of the opportunity of lodging an appeal may be considered fair.

According to the Applicant, "in this case the RA Administrative Procedure Code provides for diametrically opposite regulation, assessing the failure to file a motion for recognizing as valid the missed time limit as formal error". In such circumstances, the person who lodges the appeal is given the opportunity to re-submit the appeal within a specified time limit after correcting this formal error.

The Applicant finds that in the present Case the challenged provisions were applied by the courts in the interpretation that an appeal against a judicial act of the court of general jurisdiction deciding the case on the merits may be filed one month following the promulgation of the relevant judicial act, but not following the moment the judicial act became available to the party, and it is possible to appeal the judicial act starting from the moment of receipt of that act within a month only in case a motion for recovering the missed time limit is filed.

The Applicant also finds that the challenged provisions – by the above-mentioned interpretation given to them in the court practice – directly contradict Part 1 of Article 61, Part 1 of Article 63, Articles 28 and 29 of the RA Constitution, as well as the legal positions expressed in the Decision DCC-1052 of the RA Constitutional Court which state that the time limits of appeal should be calculated from the moment of the appearance of a real opportunity the judicial act becomes available, that is, from the moment of receipt of the judicial act.

Based on the comparative analysis of the challenged provisions, the Applicant requests to determine the conformity of Part 1 of Article 140, Part 1 of Article 207 and Part 3 of Article 213 of the Code with Articles 1, 3, 28, 29, 78-81, Part 1 of Article 61 and Part 1 of Article 63 of the RA Constitution (with Amendments through 2015).

4. The Respondent's position on the constitutionality of the challenged norms is as follows:

a) the right to access to a court may be subject to legitimate restrictions according to the law, which occurs when the restriction pursues a legitimate aim, a reasonable ratio exists between the measures applied and the aim pursued, and the access to a court is effective in terms of this restriction.

In the case of the legal regulation under discussion, the person is actually deprived of the opportunity of correcting a technical error,

according to Point 2 of Part 1 of Article 213 of the Code, and it leads to negative consequence that the person's right to apply to the court is actually restricted. According to the Respondent, such restriction may not pursue a legitimate aim, since the differentiation of this condition from other conditions stipulated by Point 1 of Part 1 of Article 213 of the Code is not reasonable and objectively justified. "In terms of such legal regulation, the person is deprived of a concrete and practical opportunity to appeal a judicial act affecting her/his rights", which restricts the right of a person to apply to a court:

b) with regard to the beginning of the calculation of the time limit for appealing the judicial act provided for by the law, and filing the relevant motion, "the legal positions of the RA Constitutional Court are as follows: 1) the beginning of the time limit for appealing the judicial act provided for by the law shall not be calculated from the moment of the announcement of the judicial act, but from the moment of actual receipt of the judicial act by the person, 2) the motion for recognizing the missed time limit as valid after the expiry of the one-month appeal time limit provided for by the law is an objective legal necessity".

According to the Respondent, the discussed mechanism for filing the relevant motion is fully in line with the requirements of the RA Constitution, i.e. in case of the mechanism for filing a motion, the access to a court is effective as the person has a concrete and practical opportunity to appeal a specific judicial act.

In a particular case, the negative legal consequences for a person are caused by the failure to file the relevant motion to the court, the return of the appeal on the said basis, and the legal interpretations of the court on this matter, and not the legal interpretations of the court regarding the calculation of the appeal time limit:

c) in the sense of the principle of legal certainty, the wordings in the challenged provisions of the Code are clear enough and fully comply with the requirements of the law (which is in accordance with the principles of the rule of law). As to the challenged Part 1 of Article 140 and Part 1 of Article 207 of the Code, the latter – in the Respondent's opinion – provide legitimate regulations, and correspond to the RA Constitution.

The Respondent also finds that "the differentiated legal regulations of the relevant norms of the Code and the RA Administrative Procedure Code are discriminatory, since such differentiation is not grounded in any legitimate aim, and the restriction in question stipulated by the Code is not reasonable and objectively justified".

The Respondent concludes that: "1) The provisions of Part 1 of Article 207 and Part 1 of Article 140 of the RA Civil Procedure Code are in conformity with the requirements of the RA Constitution. 2) Part 3 of Article 213 of the RA Civil Procedure Code is not in conformity with the requirements of the RA Constitution, insofar as it does not sufficiently guarantee the person's access to a court not providing an opportunity to correct the said error in the event of failure to file the relevant motion".

5. Assessing the constitutionality of the norms challenged by this Case, the Constitutional Court considers it necessary to be based on:

- the need for effective protection of fundamental human rights and freedoms by the public authorities based on international treaties ratified by the Republic of Armenia (Articles 3 and 81 of the RA Constitution with Amendments through 2015);
- the need for guaranteeing the right to effective judicial protection and the right to a fair trial, enshrined in Part 1 of Article 61 and Part 1 of Article 63 of the RA Constitution (with Amendments through 2015), taking into account the legal positions expressed in the decisions of the RA Constitutional Court.

Within the framework of review of this Case, the RA Constitutional Court reaffirms the legal positions on similar legal regulation expressed in the Decisions DCC- 1052, DCC-1062, DCC-1249, DCC-1254 and DCC-1268.

6. Within the framework of review of this Case, the RA Constitutional Court considers it necessary to state that the logic of legal regulation of Part 1 of Article 207 of the RA Civil Procedure Code is comparable with the logic of legal regulations of Point 3 of Part 1 of Article 379 of the RA Criminal Procedure Code at issue in the Decision DCC-1052 of the RA Constitutional Court, Part 1 of Article 412 of the RA Criminal Procedure Code at issue in the Decision DCC-1062 of the

RA Constitutional Court, Part 1 of Article 156 of the RA Administrative Procedure Code at issue in the Decision DCC-1254 of the RA Constitutional Court, as well as Part 1 of Article 132 of the RA Administrative Procedure Code at issue in the Decision DCC-1268 of the RA Constitutional Court.

Considering the contextual equivalence of legal regulations at issue in the Decisions DCC-1052, DCC-1062, DCC-1254 and DCC-1268, and the provision of Part 1 of Article 207 of the RA Civil Procedure Code challenged in this Case, as well as arguing that the legal positions stipulated by these Decisions are applicable also in the aspect of the said provision at issue in this Case, the Constitutional Court is based on the legal positions expressed by the Constitutional Court on the issue of constitutionality of the provisions which were at issue in the said Decisions.

Within the framework of the above-mentioned Decisions, as a condition of the constitutionality of the challenged provisions, the Constitutional Court noted that, firstly, providing the judicial act to the person entitled to lodge an appeal in accordance with the procedure and time limits provided for by the law must be guaranteed, as well as the fact that the missed time limit due to reasons independent of the will of the person entitled to lodge an appeal must be recognized as valid by the force of law (ex jure). Moreover, according to the assessment of the Constitutional Court, only in these circumstances the constitutional rights to lodge a justified appeal within a reasonable time, access to a court and fair trial will be guaranteed for a person entitled to lodge an appeal.

7. Based on the study of the materials of the Case as well as the Applicant's positions regarding Part 1 of Article 140 of the RA Civil Procedure Code, the Constitutional Court states that the alleged violation of constitutional rights to a fair trial and judicial protection, as the Applicant mentioned, as well as the adverse consequences that have arisen for him are not due to the constitutionality of the challenged Part of the said Article of the Code, as well as within the framework of this constitutional legal dispute there is no causal relationship between the application of the said provision by the courts to the Applicant and the alleged violation of the aforementioned constitutional rights of the Applicant.

In this regard, the Constitutional Court argues that the mentioned provision of Article 140 of the Code stipulates the procedure for the entry into legal force of judicial acts of the courts of general jurisdiction deciding the case on the merits. Its application does not directly deprive the Applicant of the opportunity of lodging an appeal after the expiry of the time limit provided for by the law. Consequently, the adverse consequences that arose for the Applicant – i.e. the deprivation of the opportunity of filing an appeal (as provided for by the law) in the case of missed time limit due to reasons independent of the will of the Applicant – are not due to the application of the said provision by the courts to the Applicant.

Consequently, based on the requirements of Article 32, Part 1 of Article 60, Part 7 of Article 69 of the RA Law on the Constitutional Court, the Case on conformity of Part 1 of Article 207, Part 1 of Article 140, Part 3 of Article 213 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Vartgez Gaspari is subject to termination in regard to the part of Part 1 of Article 140 of the RA Civil Procedure Code.

8. Referring to the issue of constitutionality of Part 3 of Article 213 of the RA Civil Procedure Code and taking into account the positions of the Applicant and the Respondent concerning the constitutionality of the said provision, the Constitutional Court states that within the framework of the present Case, the constitutionality of the said provision is assessed only regarding the part that the challenged provision does not provide for the opportunity to correct the said error on the basis of failure to file the relevant motion for recovering the missed time limit after the return of the appeal and resubmit the appeal within a period of two weeks.

According to the legal regulation of Point 1 of Part 1 of Article 213 of the Code, the appeal shall be returned in case the requirements of Article 210 of the same Code are not met, however, the case of absence of an appeal for recognizing the missed time limit as valid is not provided by those requirements. That is, the challenged provision of Article 213 of the Code does not provide for the opportunity to correct the error after the return of the appeal on the basis of failure to file the motion for recovering the missed time limit.

Taking into account the above-mentioned, the Constitutional Court states that the appeal is returned without providing time term for elimination of the error, which involuntarily leads to an actual refusal to accept the appeal.

In the Decisions DCC-864 and DCC-914, the RA Constitutional Court expressed legal positions, according to which the issue of the constitutionality of the legislative gap shall be subject to consideration by the Constitutional Court when the criteria established by the Constitutional Court are simultaneously available in a particular case, i.e. violation of a specific constitutional law or the potential possibility of this violation and the absence of other legal guarantees of filing this legislative gap, or conflicting law enforcement practice formed in the presence of appropriate legal guarantees in the legislation.

In this regard, the RA Constitutional Court also states that, among other things, the effective implementation of the rights to effective judicial protection and a fair trial provided for by Articles 61 and 63 of the RA Constitution (with Amendments through 2015) can be ensured **in case of legislative guarantees for mandatory consideration by a higher court of the motion for recovering the missed time limit**.

Article 78 of the RA Constitution (with Amendments through 2015) states: "The means chosen for restricting fundamental rights and freedoms have to be suitable and necessary for the achievement of the aim prescribed by the Constitution. The means chosen for restriction have to be proportionate to the significance of the fundamental right that is restricted".

Assessing the constitutionality of the challenged norm in the context of the mentioned provisions of the Constitution, it is necessary to take into account the circumstance that the opportunity to correct the error after the return of the appeal on the basis of failure to file the motion for recovering the missed time limit is not provided.

In this sense, the Constitutional Court finds that the approaches of the Applicant and the Respondent are grounded in regard to the issue that the legal regulation stipulated by Part 3 of Article 213 of the Code creates obstacles for individuals in the protection of the right to access to a court, and does not pursue any legitimate and reasonable aim.

Disproportionality of such restriction becomes more evident when compared with other grounds provided for in Article 210 of the Code (for example, failure to file a motion by the appellant for deferment or

installment of payment of state duty or their reduction, failure to provide substantiation of violation of substantive or procedural law in the appeal, as well as on their impact on the outcome of the case, failure to submit a claim by the appellant, as well as non-signing of the appeal), and in those cases the person is given the opportunity to correct the error and re-submit the appeal.

9. The Constitutional Court considers it necessary to state that the aforementioned disproportionate restrictions of a person's right to access to a court were stipulated by the legislator not only in the framework of the civil procedure, but also the criminal procedure and partly the administrative procedure, and those restrictions concern the institution of appeal of judicial acts in both appellate and cassation procedures.

The Constitutional Court takes note of the information provided in the Applicant's explanation that "... the legal issue under discussion has already been resolved in the RA draft Law on Amending the Civil Procedure Code of the Republic of Armenia, designed and discussed by the Ministry of Justice, which proposes a new edition of the Code. Pursuing the aim to give a conceptual solution to a number of civil and judicial-legal institutes, considering the legal positions expressed by the RA Constitutional Court and the RA Court of Cassation, the said draft proposes to provide also the basis for the return, i.e. the appeal was lodged after the defined time limit and does not contain a motion for recovering the missed time limit, and the opportunity to resubmit the appeal within 15 days in case of elimination of the error".

Attaching particular importance to the institute of appeal of judicial acts in civil cases, the corresponding complex legislative regulation, and the necessity of stipulating properly regulated procedures for the motions for recovering the missed time limit, the Constitutional Court states that due to the gap in the legal regulation of Part 3 of Article 213 of the RA Civil Procedure Code, excluding the opportunity to correct the error after the return of the appeal on the basis of failure to file the motion for recovering the missed time limit may lead to violation of the person's rights to a fair trial and judicial protection in the law enforcement practice.

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005), Point 6 of Article 32, Point

1 of Article 60, Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. To partially terminate the proceedings of the Case on conformity of Part 1 of Article 207, Part 1 of Article 140, Part 3 of Article 213 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Vartgez Gaspari with regard to Part 1 of Article 140 of the RA Civil Procedure Code.

2. Part 1 of Article 207 of the RA Civil Procedure Code is in conformity with the RA Constitution insofar as – in line with the legal positions expressed in the Decisions DCC-1052, DCC-1062, DCC-1254 and DCC-1268 of the RA Constitutional Court – providing the judicial act to the person entitled to lodge an appeal in accordance with the procedure and time limits provided for by the law is guaranteed, and the missed time limit due to reasons independent of the will of the latter – in case of relevant motion and evidence – is recognized as valid by the force of law (ex jure).

3. To declare Part 3 of Article 213 of the RA Civil Procedure Code contradicting the requirements of Articles 61, 63 and 78 of the Constitution of the Republic of Armenia (with Amendments through 2015) and void in regard to the part that it does not provide for the opportunity to correct the error on the basis of failure to file a motion for recovering the missed time limit after the return of the appeal and resubmit the appeal within the time limit provided for by the law.

4. According to Point 9.1 of Article 64 and Part 12 of Article 69 of the RA Law on the Constitutional Court, the judicial act adopted against the Applicant with the application of the disputed Part 3 of Article 213 of the RA Civil Procedure Code is subject to review due to new circumstances and in accordance with the procedure provided for by the law.

5. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

June 28, 2016
DCC-1290

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF POINT 3 OF PART 2 OF ARTICLE 231 OF THE CIVIL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF OJSC "YERFREZ"

Yerevan **July 12, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), A. Gyulumyan, F. Tokhyan, A. Tunyan, A. Khachatryan, V. Hovhannisyan (Rapporteur), H. Nazaryan, A. Petrosyan,

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

representative of the Applicant: Kh. Ohanyan,

representative of the Respondent: S. Tevanyan, official representative of the RA National Assembly, Adviser to the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the RA Law on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Point 3 of Part 2 of Article 231 of the Civil Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the Application of OJSC "Yerfrez".

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by OJSC "Yerfrez" on 16 February 2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the RA Civil Procedure Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Civil Procedure Code was adopted by the RA National Assembly on 17 June 1998, signed by the President of the Republic of Armenia on 7 August 1998 and entered into force on 1 January 1999.

Point 3 of Part 2 of Article 231 of the Code, titled "Content of the cassation appeal", stipulates:

"2. In case of submitting the cassation appeal on the ground provided for in Point 1 of Part 1 of Article 234 of this Code, the person having lodged the appeal must justify that the decision of the Court of Cassation on the appeal should promote ensuring the uniform application of the law, and particularly justify in the cassation appeal that:

…

3) the interpretation of any norm in the disputed judicial act contradicts the interpretation given to the said norm in the decision of the European Court of Human Rights, attaching those judicial acts and citing the contradicting parts thereof, as well as making comparative analysis regarding the contradiction of the disputed judicial act and the judicial act of the European Court of Human Rights on the case which includes certain actual circumstances".

The RA National Assembly has made a number of amendments and supplements to the above-mentioned Article, and the challenged provision was enshrined in the RA Civil Procedure Code by the RA Law HO-49-N on Making amendments and supplements to the Civil Procedure Code of the Republic of Armenia dated 10.06.14.

2. The procedural background of the Case is the following:

The Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan examined the case number ԵՄՔԴ/1104/02/11 under the claim of OJSC "Yerfrez" v. the RA Ministry of Finance, with a demand for early termination (on 01.07.2010) of the contract of the Renewable Energy and Energy Saving Foundation of Armenia signed on 01.06.2005, and, as a consequence, to oblige

the return of equipment provided to the Respondent in the form of a loan, and on the counterclaim of the RA Ministry of Finance and the Renewable Energy and Energy Saving Foundation of Armenia as a third party against OJSC "Yerfrez" for recovery of the amount. By the 20.05.2013 Decision of the Court, the claim of OJSC "Yerfrez" was satisfied, and the counterclaim of the RA Ministry of Finance was rejected.

The RA Ministry of Finance lodged an appeal against the 20.05.2013 Decision of the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan. By the Decision of 25.12.2013, the RA Civil Court of Appeal partially satisfied the appeal: the 20.05.2013 Judgment of the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan was partially abolished in regard to the part of the rejection of the counterclaim of the RA Ministry of Finance, and the abolished part of the case was sent for a new consideration to the same Court. The Decision remained in force in regard to the rest part.

The RA Ministry of Finance filed a cassation appeal against the 25.12.2013 Decision of the RA Civil Court of Appeal, and the cassation appeal was returned by the 05.03.2014 Decision of the RA Court of Cassation.

By the 05.12.2014 Judgment of the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan the counterclaim was rejected.

By the 22.04.2015 Decision of the RA Civil Court of Appeal the appeal of the RA Ministry of Finance was partially satisfied: the 05.12.2014 Judgment of the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan was partially abolished and amended in regard to the part of rejection of the counterclaim of the RA Ministry of Finance, i.e. the counterclaim was satisfied.

By the 03.06.2015 Decision of the RA Court of Cassation returned the cassation appeal filed on behalf of OJSC "Yerfrez", setting a fifteen-day period from the moment the decision was received to correct the errors indicated in the decision and resubmit the cassation appeal. The cassation appeal was resubmitted to the RA Court of Cassation, on the basis of which the RA Court of Cassation on 22.07.2015 adopted the

Decision "On dismissal of the cassation appeal", arguing that "... the cassation appeal filed earlier on behalf of the Company was also returned by the 03.06.2015 Decision of the Civil and Administrative Chamber of the RA Court of Cassation with the justification that in the cassation appeal the person, who lodged the appeal, referred to the 09.10.1979 Judgment of the European Court of Human Rights in the case of Airey v. Ireland (application no. 6289/73), the 28.10.1999 Judgment of the European Court of Human Rights in the case of Brumarescu v. Romania (application no. 28342/95), the 06.12.2007 Judgment of the European Court of Human Rights in the case of Beian v. Romania (No. 1), (application no. 30658/05), as well as the 24.07.2009 Decision of the RA Court of Cassation in the civil case number ԵԱՆԴ/2534/02/08 and the 04.07.2013 Decision of RA Court of Cassation in the administrative case number ՎԴ3/0011/05/10, however the person, who lodged the appeal, did not attach these judicial acts to the appeal. At the same time, a deadline was fixed for the correction of the given formal error in the cassation appeal and resubmission of the cassation appeal. Now the representative of the Company resubmitted the cassation appeal on the same grounds, not having corrected the abovementioned error stated by the 03.06.2015 Decision of the Civil and Administrative Chamber of the RA Court of Cassation. In these circumstances, the Court of Cassation finds that the cassation appeal must be dismissed".

3. The Applicant notes that the Republic of Armenia is governed by the rule of law, and the decisions of the Constitutional Court of the Republic of Armenia and the decisions of the European Court of Human Rights are constituent parts of the legal system of the rule of law state. According to the logic of the 03.06.2015 Decision of the RA Court of Cassation and the 22.07.2015 Decision of the RA Court of Cassation "On dismissal of the cassation appeal", when filing a cassation appeal, it is also necessary to attach copies of the relevant norms of the RA Civil, Administrative, Criminal Codes and other legal acts to which reference is made in the appeal. The exercise of justice by the court and the constitutional guarantee for the implementation of fair trial must operate uninterruptedly. These values may not be diminished for technical reasons, i.e. due to the reasoning that the decisions of the Consti-

tutional Court of the Republic of Armenia and the decisions of the European Court of Human Rights were not attached to the cassation appeal. Moreover, no such norm is prescribed for applying to the Constitutional Court, according to which the applicant, when referring to any position of the Constitutional Court and indicating the number of the decision, must also attach the said decision.

The Applicant also argues that the European Court of Human Rights has repeatedly stated that the right to judicial protection, part of which constitutes the right of access to the court, is not absolute and may be limited especially in connection with the terms for acceptance of the appeal. In any case, states in this regard enjoy the freedom of discretion. Nevertheless, along with what has been said, the restrictions applied must not anyhow or to any extent restrict the person's right of access to a court thus causing damage to the very essence of this right and diminishing justice. Therefore, the Applicant finds that the challenged legal regulation contradicts the separate recommendations of the Committee of Ministers of the Council of Europe and the case law of the European Court of Human Rights, it does not follow from international legal approaches, and it is aimed at excluding the exercise of the right of access to justice.

The Applicant's arguments in connection with the challenged provision are that the right of access to a court and the right to effective remedies are violated, as the legislatively stipulated legal norm does not allow restoring the violated rights, imposes a disproportionate obligation and blocks the realization of substantive law.

Analyzing the challenged norm in a comparative manner, the Applicant concludes that Point 3 of Part 2 of Article 231 of the RA Civil Procedure Code contradicts Part 1 of Article 61, Part 1 of Article 63 and Article 78 of the RA Constitution (with Amendments through 2015), and Articles 1 and 6 of the European Convention for the Protection of Human rights and Fundamental Freedoms.

4. The Respondent finds that Point 3 of Part 2 of Article 231 of the RA Civil Procedure Code is in conformity with the requirements of the RA Constitution.

Referring to the legal positions regarding the right of access to a court, expressed in the 22 March 2007 Judgment of the European Court

of Human Rights in the case of Sialkowska v. Poland, and stating that the right of access to a court is not absolute and may be subject to lawful limitations, the Respondent finds that a violation of the principle of the right of access to a court may occur when the said right is limited to an extent that in practice it restricts the person's right to benefit from the legal protection of the court. Meanwhile, according to the Respondent, in terms of current legal regulation, a person has a practical opportunity to enjoy the right to judicial protection, since the decisions of the European Court are public and available to everyone. And even the non-attachment to the appeal for the first time of the relevant acts of the European Court does not deprive the person of the opportunity to enjoy the right to judicial protection, since the court sets a time limit for the elimination of the violation and resubmission of the appeal.

Referring to the legal positions expressed in the judgments of the European Court of Human Rights regarding the terms of acceptance of cassation appeal, and similar legal regulations in some countries, particularly in France, as well as Article 92 of the RA Constitution, Part 1 of Article 234, Part 2 of Article 231 of the RA Civil Procedure Code, and also emphasizing the role of the RA Court of Cassation in the RA justice system, the Respondent considers that the requirement of attaching the judicial act of the European Court to the cassation appeal is legitimate on the grounds that the requirement in dispute is a legal guarantee that the person is fully acquainted with the content of the legal acts she/he referred to, since the person is obliged to substantiate the contradiction of the legal acts she/he referred to via citing the contradicting parts.

Touching upon the arguments of the Applicant regarding the non-conformity of the challenged provision with the requirements of legal certainty, the Respondent refers to the legal positions regarding legal certainty, expressed in the 6 December 2012 Judgment of the European Court of Human Rights in the case of Michaud v. France, the legal positions on the same issue expressed in 18 April 2006 Decision DCC-630 and 2 April 2014 Decision DCC-1142 of the RA Constitutional Court, and finds that the challenged provision meets the requirements of the law (which is in accordance with the principles of the rule of law).

5. In order to determine the conformity of the legal provision challenged in this Case with the RA Constitution, the Constitutional Court considers it necessary to assess the constitutionality of the challenged norm in the context of the right to judicial protection and the right of access to justice, which is an element of the latter, and attaching special importance to:

- guaranteeing the free implementation of the right of access to justice (the right to a court) as an important precondition for the exercise of the right to judicial protection as provided for by the Constitution. To assess it within the framework of current procedural rules for the exercise of this right and the possible legal consequences arising during their application, taking into account also the legal positions expressed by the Constitutional Court in connection with this right, as well as international legal criteria for the realization of this right,
- the comparability of the legal restriction with the essence of the principle of proportionality stipulated by Article 78 of the RA Constitution (with Amendments through 2015) due to the regulation in dispute.

6. The right to judicial protection of the rights and freedoms of the person is envisaged in Articles 61 and 63 of the RA Constitution (with Amendments through 2015), according to which: everyone shall have the right to effective judicial protection of her/his rights and freedoms, the right to a fair and public hearing of her/his case within a reasonable period by an independent and impartial court.

From the perspective of guaranteeing the realization of the right to judicial protection of the rights and freedoms of the person, it is of pivotal importance to answer these questions: how accessible is justice and how effective are the terms and tools for exercising the right to a court for the protection of the violated rights of the person?

The full-fledged guarantee of the realization of a person's right to a court is one of the initial legal preconditions for the protection of constitutional rights and freedoms of the person in a judicial procedure. Among other things, the assessment of the constitutionality of the legal regulation in dispute especially in the context of the right of access to a court is due to that circumstance.

7. In a number of decisions (DCC-652, DCC-690, DCC-719, DCC-765, DCC-844, DCC-873, DCC-890, DCC-932, DCC-942, DCC-1037, DCC-1052, DCC-1115, DCC-1127, DCC-1190, DCC-1192, DCC-1196, DCC-1197, DCC-1220, DCC-1222, DCC-1257 and DCC-1289) the Constitutional Court referred in detail to the issues of constitutionality of guaranteeing the right of access to justice, as well as the right to fair and effective trial, having considered them as necessary components of the right to judicial protection, and equally emphasizing their importance in the judicial process.

The Constitutional Court states that the constitutional legal principles guaranteeing the right to judicial protection of the rights and freedoms of the person are underlying the legal regulation of Articles 61 and 63 of the RA Constitution with Amendments through 2015, in the context of which the Constitutional Court expressed legal positions in the above-mentioned decisions.

In the aforementioned decisions, the Constitutional Court underlined a number of principles of legal regulation, which are of fundamental importance from the perspective of assessing the constitutionality of the norm challenged in this Case, and in particular:

- no judicial peculiarity or procedure may impede or prevent the effective implementation of the right to a court, make the right to judicial protection guaranteed by the RA Constitution senseless, or prohibit its implementation;
- no procedural peculiarity may be interpreted as a justification for limitations on the right of access to a court guaranteed by the RA Constitution;
- the right of access to a court may have limitations that do not distort the very essence of this right;
- when applying to a court, the person should not be burdened with unnecessary formal requirements;
- based on the requirement of ensuring legal certainty, the presence of a certain imperative precondition necessary for the exercise of the right of access to a court may not be considered as contradicting the RA Constitution. Another question is that such precondition must be feasible, reasonable and not lead to a violation of the essence of law;

- stipulating requirements to the acceptance of cassation appeal, that may be even more rigorous, is not problematic itself;
- the terms of acceptance of cassation appeal filed against a judicial act, including the time limits of appeal, may not exceed or impede the guarantees for ensuring the right of access to a court.

At the same time, the Constitutional Court considers it necessary to refer to the legal positions of the ECHR regarding the limitations on the right of access to a court, according to which:

- this right is not absolute, and States may condition the possibility of its implementation by certain requirements and criteria (Luordo v. Italy, Judgment of 17 October 2003, Staroszczyk v. Poland, Judgment of 9 July 2007, Stanev v. Bulgaria, Judgment of 17 January 2012, etc.),
- the State may establish certain terms for enjoying the right to a court, "... the limitations applied by the State must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. In addition, the limitation will not be compatible with Part 1 of Article 6, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (Case of Khalfaoui v. France, application no. 34791/97, 14/03 /2000),
- such limitations will not be compatible with the requirements of Part 1 of Article 6 of the European Convention on Human Rights, if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (Case of Marini v. Albania (application no. 3738/02), Judgment of 18 December 2007, para.113).

These positions are important especially for providing legislative guarantees for the rights of the person to fair justice, as stipulated by Part 1 of Article 61 and Part 1 of Article 63 of the RA Constitution (with Amendments through 2015).

8. It follows from the legal regulations stipulated by Part 2 of Article 231 of the RA Civil Procedure Code that in case the person having lodged the appeal finds that the decision of the Court of Cassation regarding the issue raised in the appeal may be of significant importance

for the uniform application of the law, the person having lodged the appeal must, in particular, justify that:

- at least in two judicial acts of lower courts the same norm in different cases has been applied in contradictory interpretation,
- the interpretation of any norm in the disputed judicial act contradicts the constitutional legal content of the said norm, revealed in the conclusive part of the decision of the Constitutional Court of the Republic of Armenia,
- the interpretation of any norm in the disputed judicial act contradicts the interpretation given to the said norm in the decision of the European Court of Human Rights,
- the interpretation of any norm in the disputed judicial act contradicts the interpretation given to the said norm in the decision of the Court of Cassation of the Republic of Armenia on the case which includes similar actual circumstances.

The Constitutional Court finds that the requirement of the legislator to submit a proper legal justification in case of submitting a cassation appeal is legitimate, since it includes such elements as citing the parts of the disputed judicial act that contradict the judicial act referred to, as well as making comparative analysis of the contradiction between the disputed judicial act and the judicial act referred to.

In the mentioned context, the legal requirement of submitting a justification does not itself block the opportunity of exercising the person's right of access to a court, considering that such a requirement does not impose an unenforceable duty on a person, taking into account the possibilities of objective reality. The Constitutional Court considers that this also does not cause damage to the essence of the law. Moreover, establishing requirements for submitting a justification is not aimed at burdening the person, who lodged the appeal with unnecessary duties, and it is aimed at reasoning the legitimacy of the circumstances presented in the given disputed case.

The Constitutional Court also states that the legal requirement of submitting a proper legal justification pursues a legitimate aim, i.e. to ensure implementation of judgments and decisions of the European Court of Human Rights, decisions of the RA Constitutional Court and RA Court of Cassation, and to promote uniform law enforcement practice, since the legal positions expressed by the European Court of

Human Rights, the RA Constitutional Court and the RA Court of Cassation are the main guidelines for stable dynamic development of the law enforcement practice and the legal system in general.

Thus, the requirement of making comparative analysis of the legal positions referred to by the person, who filed cassation appeal and the legal positions expressed in the relevant judicial acts is legitimate. Moreover, this may be ensured only in the case when not only the relevant legal position is indicated, but also the identification, characteristic and typical data of the judicial act are indicated, in which the referred legal positions are fixed (in particular, the name of the authority that adopted the referred judicial act, title of the judicial act, date of adoption, and case number).

9. It is obvious that any restriction on a right must be applied only in exceptional cases, as a means of ensuring a balance between the interests of democratic institutions and a particular person. In order the notion "exceptional cases" was not interpreted too broadly or arbitrarily, the European Convention on Human Rights establishes that the rights of a person may be restricted only if necessary in a democratic society and if it derives from the interests of state security, public order, economic well-being of the country, prevention of crimes or other interests that are of greater public significance than providing the person with the mentioned rights.

The Constitutional Court finds that the requirement of attaching the judicial acts - referred to within the framework of the legal norm in dispute - to the appeal unjustly burdens the appellant. Moreover, such requirement not only unequally restricts the exercise of the right of access to a court and the right to effective remedies, but also becomes an obstacle in the aspect of effective and full implementation of the constitutional legal function of ensuring a uniform application of the law by the Court of Cassation, thus not allowing the Court of Cassation to accept the cassation appeal for examination and administer justice in case of satisfying other grounds provided for by the law.

Envisaging the requirement of attaching the referred judicial acts is not justified, when they are available to the parties to the proceedings and to the RA Court of Cassation (including through relevant official websites on the Internet). The positive duty of the State is to

ensure the accessibility of the judgments of the European Court of Human Rights, decisions of the Constitutional Court and the RA Court of Cassation, as well as judicial acts of lower courts. Meanwhile, this must be ensured through faithful and legally equally translated texts approved by a specific state authority. The requirement of the law creates a real danger of blocking the implementation of the person's right to a fair trial (in particular, see the 27 April 2016 Decision of the RA Court of Cassation in the civil case number ԵԱՔԴ/ 0229/02/16) in particular regarding the requirement of attaching to the appeal all acts referring the case law of the European Court of Human Rights when, on the one hand, they consist of dozens of pages and, according to law enforcement practice, must be submitted in a translated form (taking into account that in the Republic of Armenia, the proceedings are conducted in Armenian), and on the other hand, the time limit for filing an appeal is limited or the delay of the time limit may have irreversible negative consequences for the applicant.

In the context of what has been said above, the Constitutional Court considers it necessary also to emphasize that, unlike the disputed legal provision, Parts 3 and 4 of Article 15 of the RA Judicial Code do not envisage any duty for the appellant in the aspect of attaching the relevant judicial acts. The above-mentioned Parts stipulate that:

- at the time of examination of her/his case, everyone **shall have the right to invoke**, as legal argument, the reasoning of a final judicial act in legal force (including the interpretations of the law) of a court of the Republic of Armenia in another case with similar factual circumstances,
- reasoning of a judicial act of the Court of Cassation or the European Court of Human Rights (including the interpretations of the law) in a case with certain factual circumstances shall be mandatory for the court during the examination of the case with similar factual circumstances.

As a rule, formal procedural requirements are a necessity for the effective administration of justice. However, the Constitutional Court considers that the dismissal of the cassation appeal - in this case, with the justification for non-compliance with the requirement in dispute - is a disproportionate restriction on the right of access to a court. In this

regard, the Constitutional Court states that, when exercising the power of defining restrictions on rights and freedoms, the legislator should exercise this power in a proportion that the chosen restriction was consonant with the principle of proportionality provided for by Article 78 of the RA Constitution (with Amendments through 2015), i.e. the means chosen for restricting fundamental rights and freedoms have to be suitable and necessary for the achievement of the aim prescribed by the Constitution. Consequently, the Constitutional Court finds that the achievement of this legitimate aim is also possible without envisaging the requirement of attaching to the cassation appeal the judicial acts referred to in the provision in dispute, and without violating a reasonable balance between the measures applied and the aim sought to be achieved.

The Constitutional Court also states that Point 3 of Part 2 of Article 158 of the RA Administrative Procedure Code, and Point 3 of Part 2.2 of Article 407 of the RA Criminal Procedural Code also include legal regulations similar to the legal provision at issue in this Case. The RA National Assembly should also pay special attention to the latter, taking into account the legal positions of the Constitutional Court expressed in this Decision.

The Constitutional Court also requests the RA National Assembly to pay attention to the circumstance that the mentioned legal acts at issue include unequal application of the notions "judgment" and "decision" of the European Court of Human Rights.

Based on the review of the Case and being governed by Point 1 of Article 100, Point 6 of Part 1 of Article 101, and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. To declare Point 3 of Part 2 of Article 231 of the RA Civil Procedure Code contradicting the requirements of Part 1 of Article 61, Part 1 of Article 63 and Article 78 of the Constitution of the Republic of Armenia (with Amendments through 2015) and void in regard to the part of the requirement of attaching to the cassation appeal the referred judicial acts of the European Court of Human Rights.

2. Based on the requirements of Point 9.1 of Article 64 and Part 12 of Article 69 of the RA Law on the Constitutional Court, the final judicial act adopted against the Applicant is subject to review due to new circumstances and in accordance with the procedure provided for by the law.

3. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

July 12, 2016
DCC-1293

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF ARTICLE 249 OF THE CIVIL CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF MARETA ARAKELYAN

Yerevan **July 19, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), F. Tokhyan, A. Tunyan (Rapporteur), A. Khachatryan, V. Hovhanissyan, H. Nazaryan, A. Petrosyan,

with the participation of (in the framework of the written procedure) the Applicant Mareta Arakelyan,

representative of the Respondent: official representative of the RA National Assembly V. Danielyan, Chief Specialist at the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the RA Law on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Article 249 of the Civil Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the Application of Mareta Arakelyan.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by Mareta Arakelyan on 29.02.2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, having studied the Civil Code of the Republic of Armenia and other documents

of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Civil Code was adopted by the RA National Assembly on 5 May 1998, signed by the RA President on 28 July 1998 and entered into force on 1 January 1999 according to the RA Law on Enactment of the Civil Code of the Republic of Armenia adopted by the National Assembly of the Republic of Armenia on 17.06.1998.

Article 249 of the Civil Code, titled: **"Procedure for levying execution on the pledged property without applying to court,"** prescribes:

"1. For the purpose of satisfying her/his claim, a pledgee shall have the right to levy execution on the collateral and realize it without applying to court, including transferring the pledged property to the ownership of the pledgee or a third person mentioned by the pledgee for the corresponding amount of the principal obligation, if:

1) It is provided for by the contract of pledge, or

2) There is a written agreement concluded between the pledgee and the pledgor, and, when a consent or permission of a third person has been required for conclusion of the contract of pledge – also the written consent of the latter, without the court judgment on realization of the pledged property.

2. In case of non-fulfillment or improper fulfillment of an obligation secured by a pledge, the pledgee shall notify the pledgor in writing and in a proper manner on the execution levied on the collateral without applying to court (notification of execution). The pledgor shall have the right to challenge, through judicial procedure, the lawfulness of the execution levied on the collateral, in accordance with this Article; in this case the court may suspend the process of levy of execution on the collateral. The court may suspend the process of levy of execution on the collateral provided the pledgor provides security equal to the value of the collateral for the compensation of possible damages caused to the pledgee.

After the notification of execution has been properly served to the debtor, the pledgee shall have the right to take the collateral into her/his possession (if it is a movable property), as well as to take reasonable measures for preserving, maintenance of the collateral and ensuring its safety.

The pledgee shall, by virtue of this Code, have the right – subject to Article 195 of this Code – to realize the collateral through direct sales or public biddings on behalf of the pledgor, two months after serving the notification of execution to the debtor, unless the pledgor and the pledgee have agreed on another procedure for realizing the collateral. The pledgee shall be obliged to realize the collateral at a reasonable price existing at the market at the given moment.

Current version of the challenged Article 249 of the Code was fixed by the RA Law HO-188-N dated 04.10.2005.

2. The procedural background of the Case is the following: according to the loan agreement No. 068-23, concluded between Gegham Arakelyan, the husband of the Applicant, and Unibank CJSC (hereinafter referred to as the Bank) on 20.07.2007, the Bank granted him a loan of 36.000.000 AMD at a rate of 15 percent per annum with the maturity date until 20.07.2019. The purchased house with a land plot located at Davtashen, 3rd quarter, 59/1, Yerevan was mortgaged in favor of the Bank.

According to the agreement on the subsequent mortgage of real estate No. 270-23/Ա.Հ, concluded on 12.10.2009, the Bank granted Gegham Arakelyan a loan of $ 50.000 at a rate of 24 percent per annum with the maturity date until 12.10.2011. Under an agreement certified on 12.10.2009 by Nune Sargsyan, notary of "Kentron" notary office, the Applicant agreed that Gegham Arakelyan (her husband) mortgaged the house – acquired at the time of their marriage – located at Davtashen, 3rd quarter, 59/1, Yerevan, and in case of non-fulfillment of loan obligations, the Applicant agreed that the claims of the pledgee were satisfied at the expense of the pledged property, without applying to court.

According to the notification of enforcement of the recovery No. 269, sent by the Bank to Gegham Arakelyan on 15.03.2011 (and Gegham Arakelyan received this notification), the Bank informed that in case of improper performance of obligations by Gegham Arakelyan within 10 days, the Bank has the right – through direct sale or public bidding – to realize in its own favor the mortgaged house located at Davtashen, 3rd quarter, 59/1, Yerevan, two months after the notification is sent.

As a result of extrajudicial execution, the mortgaged house – according to agreement No. 858/ԱՀ of 17.10.2012 – was transferred to the ownership of Ovsanna Arakelyan, Deputy Chairman of the Board of the Bank.

On 15.05.2013, the Applicant and her husband submitted a claim to the Court of First Instance of Ajapnyak and Davtashen Administrative Districts against Unibank CJSC, Ovsanna Arakelyan, Yerevan division of the State Committee of Real Estate Cadastre adjunct to the RA Government, third party: Nune Sargsyan, notary of "Kentron" notary office, demanding to restore the right to the property, invalidate the contract of sale of real estate and apply the consequences of invalidity of the contract.

Based on the provisions of Article 249 of the RA Civil Code, on 21.10.2014 the Court rendered a Judgment on the civil case ԵԱԴԴ/0529/02/13, according to which the claim was rejected.

The Judgment was appealed to the RA Civil Court of Appeal. The Court of Appeal found justified the circumstance that the Bank violated the mandatory requirement of the RA Civil Code to notify the pledgor on the extrajudicial procedure for levying execution on the collateral, on 29.01.2015 the Court rendered a Decision on partial satisfaction of the appeal and sending the case to the same Court for new and full consideration.

By the Decision of 27.11.2015, the RA Court of Cassation rejected the Decision of the RA Civil Court of Appeal dated 29.01.2015, and gave legal force to the Judgment of the Court of First Instance dated 21.10.2014.

3. The Applicant finds that Article 249 of the RA Civil Code – in regard to the part of the content provided by the law enforcement practice – contradicts Articles 10, 60 and 61 of the RA Constitution, insofar as it does not correspond to the constitutional approaches of acknowledgement, guaranteeing and protecting the right to property.

Comparing the guarantees stipulated by Articles 10 and 60 of the RA Constitution with the provision "for the purpose of satisfying her/his claim, a pledgee shall have the right to levy execution on the collateral and realize it without applying to court" – stipulated by the challenged Part 1 of Article 249 of the Code – the Applicant grounds

her above conclusion as follows: a) it is obvious that in the case of realization of the pledged property by extra-judicial procedure, the seizure of property – against the will of the owner – by the pledgee without a court decision is provided, which implies deprivation of the right to property against the will of the owner; b) it is obvious that in the disputed legal norm there are no objective grounds for the deprivation of the right to property provided for by law."

Referring to the basic mandatory conditions for the deprivation of property – prescribed in the Decision DCC-903 of the Constitutional Court, the Applicant finds that the deprivation of the right to property must be realized through court, on free of charge basis, as a compulsory action arising from liability. Meanwhile, the issue of the claim of a bank-pledgee to the property of a person – in the currently established judicial and law enforcement practice – is resolved in the context of the execution process carried out by banks-pledgees and credit companies at their discretion, which leads to arbitrariness and lawlessness in the process of deprivation of property.

To ground the alleged violation of the right to judicial protection, the Applicant states that based on the challenged Article of the Code, the Bank extra judicially executed her property, did not notify her about the execution and failed to send her notifications of execution, and the Applicant finds that as a result, she – as a co-owner of the house – has lost the chance to challenge the legitimacy of levying execution on the property, and accordingly, the right to judicial protection of the right to property. In addition, according to the Applicant, in the challenged norm the mechanisms for comparing the voluntary and compulsory grounds for termination of the right to property with respect to the pledged property are not revealed precisely enough. According to the Applicant, the extrajudicial realization of property – provided for in the first part of the challenged norm – is the forfeiture of property against the will of the owner, and the second part provides for a mandatory term for the existence of an agreement on the transfer of the property of the owner in return for debts, and establishes that an extrajudicial execution of the property cannot be carried out in case there is no written agreement concluded at the will of the owner with the pledgee on the transfer of property. According to the Applicant, the agreement on the transfer of the house to the Bank in return for debts should be

drafted in writing and certified by a notary. Referring to the Decisions rendered by the RA Court of Cassation on civil cases No. ԵԿԴ/2013/02/12 and ԵԱԴԴ/0529/02/13, the Applicant considers that due to various, mutually exclusive and contradictory interpretations to the challenged norm in the judicial practice, the Court of Cassation restricted her right to judicial protection and the right to property, which led to the violation of her rights and legitimate interests.

To substantiate her position, the Applicant refers to a number of decisions of the RA Constitutional Court, as well as to Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4. The Respondent finds that the provisions challenged by the Applicant do not contradict the RA Constitution. Referring to Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Respondent notes that Article 1 of the Protocol does not concern the relations that are purely contractual between private individuals.

According to the Respondent, in Part 4 of Article 60 of the RA Constitution it is a question of dispossession, which implies the transfer of the right to property against the will of the person, whereas in the framework of the challenged Article, a person loses property in terms of prior consent regarding the collateral. The Respondent states that in case of realization of the collateral in extrajudicial order it is necessary that the person expresses her/his consent either directly by the pledge agreement or by a written consent separately from the pledge agreement. By such legal regulation, the legislator established a guarantee of a clear expression of the will of the person: the expression of will must be carried out exclusively in writing, i.e. on an objective material carrier. Consequently, according to the Respondent, the person agrees in advance with the possible legal consequences in case of improper performance of her/his obligations, and in regard to this part, the consequences are predictable for the person. This logic is inherent in the essence of obligations in civil-legal relations.

On the Respondent's opinion, the Applicant unreasonably refers to the possible contradiction of the challenged provision with the constitutional right of a person to judicial protection, since Article 249 of the

Code enables the pledgee to challenge – in accordance with the same Article – the legitimacy of levying execution on the collateral, and in this case the court can suspend the process of levying execution the collateral.

According to the Respondent, within the framework of this constitutional dispute the Applicant obviously challenges the lawfulness of application of the provisions at issue against her.

As for the assessment of contradictory acts passed by the RA Court of Cassation, the Respondent considers that the competence of the RA Constitutional Court does not include consideration of lawfulness of judicial acts and their legal assessment.

Considering the above-mentioned, the Respondent finds that the provisions stipulated by Article 249 of the RA Civil Code are in conformity with the requirements of the RA Constitution. At the same time, taking into account the circumstance that the Applicant challenges the lawfulness of application of the norm, the Respondent makes a motion for the termination of the proceedings of the Case.

5. The RA Constitutional Court states that within the framework of concrete constitutional control, the Applicant points the following two issues:

1. Violation of her right to property as a person having the right of common ownership of the collateral,

2. Failure to ensure the right to judicial protection in the process of levying execution on the collateral by extrajudicial procedure.

Therefore, in order to resolve the constitutional legal dispute raised in the present case, the RA Constitutional Court considers it necessary to address the following issues:

1) Is the procedure for levying execution on the collateral in extrajudicial procedure – according to the interpretation to the latter in law enforcement practice – in consonance with the content of the right to property, protected by the RA Constitution?

2) Do not the legal regulations of Article 249 of the Code restrict the right of access to a court – provided for by the RA Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms – to the extent that a person can be deprived of the right to judicial protection?

6. Comparing Article 60 of the RA Constitution with the provisions stipulated by Article 249 of the RA Civil Code, the RA Constitutional Court considers it necessary to address the constitutional legal content of the institution of "deprivation of property." In particular, by the Decision DCC-903 of 13.07.2010, the RA Constitutional Court reaffirmed the following main components of deprivation of property, namely:

"- in the case of deprivation of property, a gratuitous termination of the right to property of the owner takes place **against the will and consent of the latter**;

- deprivation of property is applied as a measure of responsibility;

- in the case of deprivation of property, a simultaneous termination of the powers of the owner to own, use and dispose of the property takes place, without guarantee of continuity."

In legal relations concerning the levying execution on the collateral in extrajudicial procedure, in connection with the expression of the will and consent of the owner of property, it is necessary to state the following:

Firstly, by concluding a pledge agreement, the pledgee gives her/his consent to a possible termination of the right to property in respect of the collateral belonging to her/him in case of failure to perform or improper performance of the obligation secured by the pledge,

Secondly, the pledgee gives her/his consent to the possibility of levying execution on the collateral and realizing it in extrajudicial procedure, in case of failure to perform or improper performance of the obligation secured by the pledge. Moreover, according to Article 249 of the RA Civil Code, such consent can be given both under the pledge agreement and in the form of a separate agreement concluded between the pledgee and the pledgor,

Thirdly, prior to the levying execution on the collateral in extrajudicial procedure by the pledgee, the pledgor has the opportunity either to take measures to fulfill the obligation secured by the pledge – and thereby prevent the loss of the ownership right of the pledged property – or to challenge the legitimacy of extrajudicial execution in court.

In the first two of the above-mentioned three situations (which may coincide in the case of provision in the pledge agreement of the conditions for execution in extrajudicial procedure), the will of the owner of the pledged property is manifested through active actions, i.e.

through the conclusion of a relevant contract or agreement, and the commission of such active activities is an obligatory term. In the third situation, the will of the owner can be expressed by passive actions when, having learned about the execution on the collateral in extrajudicial procedure, she/he does not take any actions prescribed by law to terminate the execution in extrajudicial procedure.

In the latter case, from the viewpoint of protection of the right to property guaranteed by the RA Constitution, the legal regulations of ensuring and effective protection of the rights of the owner are of particular importance.

The RA Constitutional Court states that in the context of the challenged Article, the protection of right to property is closely interrelated with the right to judicial protection. Analyzing the provisions of the challenged Article, it is necessary to single out the following legal guarantees for securing the rights of the owner with respect to the collateral:

1) The proper notification of the pledgor about levying execution on the collateral in extrajudicial procedure (notification of execution),

2) The possibility of challenging in court the legitimacy of execution in extrajudicial procedure,

3) Levying execution on the collateral in extrajudicial procedure within two months after serving the notification of execution to the debtor,

4) The realization of the collateral by the pledgee at a reasonable market price applied at the moment.

On the other hand, Article 249 of the Code establishes a number of obligations of the pledgor, in particular: the court may suspend the process of levying execution on the collateral, "in case the pledgor provides the collateral value to recover the possible losses of the pledgee." Considering this provision in the light of Articles 10 (Guaranteeing Ownership), 60 (Right of Ownership), and 61 (Right to Judicial Protection and the Right to Apply to International Bodies of Human Rights Protection) and 78 (Principle of Proportionality) of the RA Constitution, the Constitutional Court finds that it disproportionately complicates the possibility of the pledgor to suspend the execution in extrajudicial order, since for the suspension it obliges the pledgor to provide guarantee not in the amount of possible losses of the pledgee,

but in the amount of the collateral. In some cases, the amount of the collateral may several times exceed not only the amount of the basic obligation secured by the pledge, but also the amount of possible losses of the pledgee. In terms of such legal regulation, the realization of the right – provided for by law – to suspend the process of levying execution on the collateral mainly becomes unrealizable.

7. The RA Constitutional Court states that the legislative requirement of proper notification of the pledgor by the pledgee (notification of execution) is not an end in itself and has the objective of ensuring the realization of other rights of the pledgor. In particular, the requirement of notification is intended to provide another right of the pledgor, stipulated by Article 252 of the RA Civil Code, according to which: "Debtor or pledgor, who is a third person, shall have the right to terminate the levy of execution on and realization of the collateral at any time before the sales thereof, by fulfilling the obligation secured by pledge or the part thereof the fulfillment of which has been made in default. The agreement limiting that right shall be null and void."

In addition, stipulating by the legislator of the obligation on proper notification of the pledgor by the pledgee pursues the aim of guaranteeing the right of the pledgor to judicial protection.

In this aspect, the RA Constitutional Court finds that Part 2 of Article 249 of the RA Civil Code should be applied in the context of ensuring the rights of the pledgor, stipulated by the aforementioned norms, otherwise the exercise of the rights – provided to the pledgor according to the legislation – of challenging the legitimacy of the execution or terminating the execution will not be effective and will not follow the requirements of the RA Constitution.

On the other hand, in the second and third paragraphs of Part 2 of the challenged Article, the legislator considers the debtor and not the pledgor as the addressee of the appropriate notification. In particular, "After the notification of execution has been properly served to the **debtor**, the pledgee shall have the right to take the collateral into her/his possession (if it is a movable property), as well as to take reasonable measures for preserving, maintenance of the collateral and ensuring its safety. The pledgee shall, by virtue of this Code, have the right – subject to Article 195 of this Code – to realize the collateral

through direct sales or public biddings on behalf of the pledgor, two months after serving the notification of execution to the **debtor**, unless the pledgor and the pledgee have agreed on another procedure for realizing the collateral."

According to the abovementioned regulation, the pledgee shall properly notify both the pledgor and the debtor about levying execution on the collateral, however the pledge shall have the right – by the force of law – to realize the collateral only two months after serving to the debtor.

Stipulation in the challenged Article – at the legislative level – of different addressees, i.e. the pledgor or the debtor might even not cause any problem, in case the pledgor and the debtor were always the same persons. However, the situation changes when the debtor and the pledgor do not coincide. According to Part 2 of Article 228 of the Code, "2. Both a debtor and a third person may be a pledgor."

It follows from the literal interpretation of the challenged Article, that unlike the case of notification of the debtor about the obligation secured by the pledge, in case of notifying a third person – as a pledgor – the day after serving the notification of execution to the latter, the pledgee obtains the right to realize the collateral through direct sales or public biddings.

It should also be noted that although, according to Article 345 of the RA Civil Code, the parties to the pledge agreement, i.e. the pledgor and the pledgee as the parties to the civil legal obligation, are called the debtor and the creditor, nevertheless, it follows from the logic of the challenged Article that the debtor is the party to the main obligation secured by the pledge.

In this regard, the legislator did not clearly and unequivocally regulate the issues whether in what terms after notifying the pledgor, the pledgee may have the right to realize the collateral. The challenged Article does not say anything about the pledgor or pledgors who are not debtors. Such regulations can raise a number of issues from the viewpoint of guaranteeing the fundamental right of a person to property. In particular, due to this uncertainty, the pledgors who are not debtors, in comparison with the pledgors who are debtors, do not enjoy equal terms of protecting their property. An unscrupulous debtor-pledgor who does not perform or improperly performs the obligation secured

by the pledge, shall be obligatorily notified of the execution, and only after two months the collateral may be realized, but the pledgor who is not a debtor might even not enjoy this opportunity, since the two-month period fixed by the challenged position concerns the debtor and not the pledgors. In addition, such regulation may deprive the pledgor, as a third party, of the opportunity to challenge in court the legitimacy of levying execution on the collateral, and in practice it may hinder the implementation of the right stipulated by Article 252 of the Code. This is also evidenced by the study of legal positions expressed in the Decisions of the RA Court of Cassation, rendered in the cases ԵԿԴ/2013/02/12 dated 28.11.2014 and ԵԱԴԴ/0529/02/13 dated 27.11.2015, where in both cases it is a question of proper notification of the pledgors in case of levying execution on the collateral under common joint ownership in extrajudicial procedure.

8. According to Part 1 of Article 10 of the RA Constitution, all forms of ownership shall be recognized and equally protected in the Republic of Armenia.

This constitutional provision includes two most important guarantees of the exercise of the right to property:

- The Republic of Armenia recognizes all forms of ownership, and
- The Republic of Armenia equally protects all forms of ownership.

According to Article 28 of the RA Constitution, everyone shall be equal before the law, and it follows from this, that all entities – who are in a similar situation – shall enjoy the guarantees and procedures provided for by law.

The principle of equality requires the Republic of Armenia that no distinction was made when protecting property owned by different entities within the same form of ownership.

According to Article 75 the RA Constitution, "When regulating fundamental rights and freedoms, laws shall define the organizational structures and procedures necessary for their effective exercise."

The challenged Article 249 of the Code concerns the procedure for levying execution on the pledged property without applying to court, which is a necessary procedure – through the loan agreement – for exercising the right of the owner to dispose of the legally acquired property at own discretion. However, such procedure must be

legitimate, and not violate the principle of equality of all before the law. Analysis of both the challenged provision and the law enforcement practice shows that **the uncertainty of legislative regulation does not provide an opportunity to clearly understand what procedural guarantees the pledgor, who is not a debtor, shall enjoy in connection with the notification of execution,** which makes ineffective the challenged regulation in connection with the pledgor, as a third party.

The RA Constitutional Court finds that from the constitutional legal content of the term "pledgor" prescribed in the first paragraph of Part 2 of Article 249 of the RA Civil Code, it follows that in the given legal relations the term "pledgor" refers not only to the pledgor-debtor, but also the pledgor acting in these relations as a third party. At the same time, from the constitutional legal content of the term "debtor" prescribed in the second and third paragraphs of Part 2 of Article 249 of the RA Civil Code, it follows that the term "debtor" refers not only to the pledgor-debtor, but also the pledgor acting in these legal relations as a third party.

The question is that, not including other pledgors in the wording "two months after serving the notification of execution to the debtor," the legislator does not clearly and unambiguously guarantee this two-month term for the pledgor, which violates the principle of equality of all before the law. As a result, the pledgor, as a third party, can not only be deprived of the right to terminate the levy of execution on and realization of the collateral through the fulfillment of an obligation secured by a pledge or through the fulfillment of the overdue part thereof, but also the right to challenge the legitimacy of levying execution.

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. Part 1 of Article 249 of the Civil Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia.

2. The first paragraph of Part 2 of Article 249 of the Civil Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia in the constitutional legal content of the term "pledgor" in this paragraph, according to which: the term "pledgor" refers not only to the pledgor-debtor, but also the pledgor acting in these legal relations as a third party.

3. The second and third paragraphs of Part 2 of Article 249 of the Civil Code of the Republic of Armenia are in conformity with the Constitution of the Republic of Armenia in the constitutional legal content of the term "debtor" in these paragraphs, according to which: the term "debtor" refers not only to the pledgor-debtor, but also the pledgor acting in these legal relations as a third party.

4. To declare the phrase "provided the pledgor provides security equal to the value of the collateral" in the first paragraph of Part 2 of Article 249 of the Civil Code of the Republic of Armenia contradicting Part 1 of Article 61 and Article 78 of the RA Constitution and void in regard to the part that the debtor can be obliged to provide security greater than the amount of possible damage to the pledgee.

5. Pursuant to Point 9.1 of Part 1 of Article 64 and Part 12 of Article 69 of the RA Law on the Constitutional Court, the final judicial act rendered against the Applicant is subject to review due to new circumstances, in accordance with the procedure provided for by law.

6. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

July 19, 2016
DCC-1294

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 2 OF ARTICLE 176 OF THE RA ADMINISTRATIVE PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF HAYK MASHURYAN

Yerevan **October 18, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan, A. Gyulumyan, F. Tokhyan, A. Tunyan (Rapporteur), A. Khachatryan, V. Hovhanissyan, H. Nazaryan,

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

A. Zeynalyan and R. Revazyan, representatives of the Applicant Hayk Mashuryan,

representatives of the Respondent: official representatives of the RA National Assembly H. Sargsyan, Head of the Legal Department of the RA National Assembly Staff, and V. Danielyan, Chief Specialist at the Legal Consultation Division of the same Department,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 25, 38 and 69 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Part 2 of Article 176 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Hayk Mashuryan.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by Hayk Mashuryan on 20.06.2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondents, as well as having studied the RA Administrative Procedure Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Administrative Procedure Code (HO-139-N) (hereinafter referred to as the Code) was adopted by the RA National Assembly on 5 December 2013, signed by the RA President on 28 December 2013 and entered into force on 7 January 2014.

Part 2 of Article 176 of the RA Administrative Procedure Code challenged in this Case stipulates:

"Article 176: Order of the new consideration of the case

…

2. During the new consideration of the case, the grounds, the subject matter of the claim or the size of the claims shall not be changed, no counterclaim shall be submitted."

The above-mentioned Article of the Code was not amended and supplemented.

2. The procedural background of the Case is the following:

the Central Division of Yerevan City Department of the Police submitted a claim to the RA Administrative Court on 12.09.2013 demanding that the Applicant be subjected to administrative liability for non-compliance with the legitimate requirements of a police officer. By the Decision of 07.10.2013, the Administrative Court accepted the claim for examination.

By the Decision of 08.10.2014, the Administrative Court granted the claim of the RA Police against the Applicant on subjecting the latter to administrative liability, and the Applicant was subjected to administrative liability in the amount of 50.000 (fifty thousand) AMD on the basis of Ar-

ticle 182 of the Administrative Offences Code of the Republic of Armenia. The Applicant appealed the given Decision to the RA Administrative Court of Appeal, and the latter granted the appeal by the Decision of 25.02.2015, cancelled the Decision of the RA Administrative Court dated 08.10.2014, and sent the Administrative Case No. ՎԴ/8125/05/13 to the RA Administrative Court for new and full consideration.

The acceptance of the counterclaim submitted by the Applicant on 12.06.2015 was rejected by the Decision of 16.06.2015 of the RA Administrative Court, with the justification that "Prescribing the order of the new consideration of the case, Article 176 of the RA Administrative Procedure Code excludes the opportunity to submit a counterclaim during the new examination of the case." At the same time, the Court noted that within the framework of grounds and justifications presented in the counterclaim, the interested person may protect her/his rights and legitimate interests by submitting a separate claim.

The Applicant submitted an appeal to the RA Administrative Court of Appeal, and by the Decision of 07.08.2015 of the RA Administrative Court of Appeal, the appeal was rejected and the Decision of the RA Administrative Court "On rejecting to accept the counterclaim" was unchanged.

On 11.09.2015, the Applicant submitted a cassation appeal to the RA Court of Cassation against the Decision "On rejecting the appeal" on the Case No. ՎԴ/8125/05/13, and on 02.12.2015, the RA Court of Cassation issued a Decision "On rejecting to accept the cassation appeal for examination".

3. The Applicant finds that the RA Constitution guarantees persons under the jurisdiction of Armenia, inter alia, the right to judicial protection, equality and non-discrimination. Referring to a number of decisions of the RA Constitutional Court, the Applicant notes that guaranteeing the right of access to justice, as well as the right to a fair and effective trial have been considered by the Constitutional Court as necessary components of the right to judicial protection.

Article 63 of the RA Constitution, as well as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) establish the guarantees and standards for ensuring the effectiveness of the right of a person to judicial protection. The latter in their integrity are called upon to ensure the full-fledged restoration of the violated rights of a person.

The Applicant notes that in its decisions, the European Court has repeatedly noted that Part 1 of Article 6 of the Convention guarantees the right to apply to a court in the event of a dispute over the civil rights and duties of a person. This provision embodies the right to a court, i.e. "to initiate a civil action in court."

The Applicant refers to Part 1 of Article 3 of the RA Administrative Procedure Code, according to which any natural person or legal entity shall be entitled to apply to the Administrative Court in the manner prescribed by this Code, if she/he considers that by the administrative acts, actions or inaction of state or local self-government bodies or their officials her/his rights and freedoms – enshrined in the RA Constitution, international treaties, laws and other legal acts – are violated or may be violated, and if she/he considers that some responsibility is unlawfully imposed on her/him or she/he is unlawfully subjected administratively to administrative liability.

Based on the foregoing, the Applicant concludes that by applying Part 2 of Article 176 of the RA Administrative Procedure Code, the RA Administrative Court limited the Applicant's right to submit a counterclaim to the Court. Part 2 of Article 176 of the RA Administrative Procedure Code does not provide for any differentiation, however, according to the Applicant, one should accept that situations can be substantially different. Particularly, within the framework of this Case, the Applicant did not have the opportunity to submit a counterclaim against the claim filed against him. He was notified about the case brought against him only after receiving the final judicial act of the Administrative Court. The matter would be different if the Appli-

cant had been notified that a claim had been filed against him, and if he had objectively had the opportunity to make a counterclaim. However, for substantially different situations, the legislator has established the same procedure.

According to the Applicant, not establishing any differentiation, Part 2 of Article 176 of the RA Administrative Procedure Code contains a legal gap that contradicts Articles 3, 61 and 63 of the RA Constitution.

In addition, according to the Applicant, the challenged procedural norms of the RA Administrative Procedure Code impede the realization of the "right of access to a court" of the person in general and the Applicant in particular, which violates the fundamental principle of constitutional law, according to which "the procedural norm of law cannot impede the full-fledged implementation of the substantive norm."

4. Referring to the provisions envisaged in Part 1 of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the positions expressed by the European Court regarding the access to a court, that is part of a fair trial (Sialkowska v. Poland, Judgment of 22 March 2007), the Respondent concludes that the above-mentioned legal principle may be violated when the right of access to a court is limited to the extent that in practice limits the enjoyment by a person of the right to judicial protection.

Referring to the legal positions expressed by the RA Constitutional Court in the Decision DCC-1289 of 23 June 2016, the Respondent notes that the counterclaim – as a procedural means of protecting the interests of the respondent – aims to promote the realization of the right of the respondent to effective judicial protection and ensure the exercise of the person's right to consideration of the case within a reasonable period, which is an integral part of the right to a fair trial. This means that the RA Constitutional Court considers the establishment

of an effective mechanism for joint consideration of the counterclaim with the initial claim as an integral part of the constitutional legal content of the institution of counterclaim in administrative proceedings, which will fully guarantee the exercise of the right to effective judicial protection.

Regarding legal certainty, the Respondent refers to the legal positions expressed by the European Court, as well as the RA Constitutional Court, and notes that "(...) no legal norm may be regarded as 'law' unless it complies with the principle of legal certainty (res judicata), i.e. it is not formulated accurately enough to allow citizens to reconcile own behavior with the latter".

In the Respondent's opinion, Part 2 of Article 176 of the Code contains a clear time restriction (prohibition) for submitting a counterclaim at a certain stage of administrative proceedings, which is a legitimate solution.

Based on the foregoing, the Respondent finds that in regard to this part, the disputed provision fully complies with the RA Constitution, particularly, the legal requirements for legal certainty, clarity of the wordings used in the law, sufficient accessibility, practical real possibility of bringing the behavior of respective participants in line with the requirements of the prescriptions of the law and the requirements of foreseeability of the occurrence of possible negative legal consequences in case of non-compliance with the requirements of the law. The question is that public relations are extremely manifold, and it is objectively impossible to provide solutions for all cases due to any legal formulation.

However, in the Respondent's opinion, under a certain combination of circumstances in a specific case, the person was objectively deprived of the right to submit a counterclaim, which neither follows from the objective of legal regulation stipulated by Part 2 of Article 176 of the Code, nor the logic of legal positions expressed by the RA Constitutional Court in the Decision DCC-1289 of 23 June 2016.

Taking into account the foregoing, the Respondent finds that the

provision stipulated by Part 2 of Article 176 of the RA Administrative Procedure Code is not in conformity with the requirements of the RA Constitution, insofar as it does not provide the possibility of submitting a counterclaim by a person who failed to submit a counterclaim during the new consideration of the case due to reasons independent of the will of the person.

5. Assessing the constitutionality of the legal provision challenged in this Case, the RA Constitutional Court considers it necessary to touch upon the following key issues:

- whether the prohibition on submitting a counterclaim in the event of sending the case for new and full consideration as a result of satisfaction of the appeal by a higher court, does not restrict the right of a person – guaranteed by the RA Constitution and international legal acts – to effective judicial protection, as well as the possibility of the consideration of the case within a reasonable period, which is an integral part of the right to a fair trial;
- whether the challenged provision does not contradict the principle of equality of the initial conditions of the parties, which is one of the principles of a fair trial stipulated by the RA Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- whether there is a legal gap in the challenged provision in terms of the possibility of independently submitting a claim, taking into account also the legal positions regarding the latter expressed in the decisions of the RA Constitutional Court.

6. The RA Administrative Procedure Code has established a number of conditions, in the presence of which the adoption of a counterclaim for consideration becomes possible. Those conditions are stipulated by Part 2 of Article 87 of the RA Administrative Procedure Code, namely:

1) demand of the counterclaim is aimed at offsetting the initial demand, or

2) satisfaction of a counterclaim excludes the satisfaction of the initial claim in whole or in part, or

3) there is an interlink between the counterclaim and the initial claim, and their joint consideration can ensure the prompt and proper resolution of the dispute.

In addition, according to the RA Administrative Procedure Code, a counterclaim may not be submitted against challenging and binding claims, as well as the cases provided for by Chapters 26 and 28 of the Code.

Considering the institution of counterclaim – provided for by the RA Administrative Procedure Code – from the perspective of effective implementation of the person's right to judicial protection, the RA Constitutional Court reaffirms the legal positions expressed in the Decision DCC-1289. In particular, the Constitutional Court emphasized that:

- "in the aspect of protection of constitutional rights, the institution of counterclaim is meaningless unless necessary and sufficient procedures are provided for its consideration together with the initial claim,"
- "as a procedural means of protecting the interests of the respondent, the counterclaim aims to exercise the respondent's right to effective judicial protection and ensure the exercise of the individual's right to consideration of the case within a reasonable period, which is an integral part of the right to a fair trial."

Based on the foregoing, the RA Constitutional Court states that, although restrictions on the possibility of submitting a counterclaim generally do not hinder the possibility of judicial protection of a person, since in any case she/he has the right to independently submit a claim to a court in the manner prescribed by the Administrative Procedure Code, nevertheless, in case of inconsistency with the principle of proportionality within the framework of a specific legal relationship, such restrictions may be inconsonant with the constitutional

legal content of the right to judicial protection provided for by Article 61 of the RA Constitution, as well as the requirements of Part 1 of Article 63 of the RA Constitution, according to which everyone shall have the right to a fair and public consideration of the case concerning her/him **within a reasonable period** by an independent and impartial court.

7. The RA Constitutional Court states that the legislative prohibition on submitting a counterclaim after cancellation of the judicial act deciding on the merits of the case by the higher court and sending the case for new consideration should be considered in the whole context of the institution of the new consideration of the case.

According to the legal regulations of Chapter 24 of the RA Administrative Procedure Code, the new consideration of the case in the Administrative Court or the Court of Appeal shall be conducted according to the rules prescribed by the RA Administrative Procedure Code for the consideration of cases in the Administrative Court or the Court of Appeal respectively. At the same time, based on the peculiarities of the new consideration of the case, the legislator provided for a number of exceptions:

Firstly, a judge who has tried the case in a lower court may not participate in the new consideration of the given case /Article 175/;

Secondly, during the new consideration of the case, the grounds, the subject matter of the claim or the size of the claims shall not be changed /Article 176/;

Thirdly, during the new consideration of the case, no counterclaim shall be submitted /Article 176/;

Fourthly, the new consideration of the case in a lower court shall be carried out on the basis of the decision of a higher court and in the extent established by a higher court /Article 177/;

Fifthly, during the new consideration of the case, the parties may not submit new evidence, except when the court points to a new fact to be proved, and demands to submit new evidence in this regard, as

well as hears the objections of the other party on the facts that led to the cancellation /Article 177/.

The presence of the above-mentioned peculiarities is due to the circumstance that, as a result of satisfying the appeal by a higher court, the stage of the new consideration of the case is aimed at a review of the judicial act deciding on the merits of the case based on a judicial error (violation or misapplication of the norms of substantive law, or violation or misapplication of the norms of procedural law). That is, due to the satisfaction of the appeal, the new consideration of the case is aimed at correcting substantive legal and/or procedural shortcomings in connection with the judicial act already issued.

In addition, the prohibition on changing the grounds, the subject matter of the claim, the size of the claim, as well as the prohibition on submitting a counterclaim, and submitting new evidence with certain exceptions, are aimed at ensuring the constitutional right of a person to consideration of the case concerning her/him within a reasonable period. The above-mentioned restrictions become necessary and effective in cases when a higher court, exercising its authority, cancels the judicial act completely or in part, sends the case in regard to the canceled part to the appropriate court for a new consideration, establishes the extent of the new consideration, and leaves the act unchanged in regard to the uncancelled part.

It should be noted that the prohibition on submitting a counterclaim within the framework of the new consideration of the case is related to the lack of possibility for the applicant to change the grounds, the subject matter of the claim, and the size of the claims. The provision of such restrictions by the legislator in the general sense pursues a legitimate aim, i.e. to ensure a reasonable balance between the possibilities of the parties in the course of judicial proceedings.

8. Thereby, the RA Constitutional Court states that another issue is that when the judicial act is canceled due to the non-participation of the respondent in the proceedings due to improper notification of

the time and place of the session, therefore the respondent is actually deprived of the possibilities to exercise her/his right to effective judicial protection, including the submission of a counterclaim.

According to the materials of the Case, the RA Administrative Court of Appeal cancelled the Decision of the RA Administrative Court, sent the Case for new and full consideration, and applied Part 2 of Article 152 of the RA Administrative Procedure Code, which served as the unconditional basis for the cancellation of the judicial act.

The RA Constitutional Court does not address the legitimacy of the application of the grounds for the cancellation of the judicial act within the framework of specific control, and finds that in this case one of the most important objectives of the new consideration of the case is to enable the respondent to participate in the proceedings, using legal remedies if necessary, including the submission of a counterclaim. This also ensures the principle of equality of the parties, stipulated by Article 6 of the RA Administrative Procedure Code, according to which each party should be given a **full** opportunity to present its position on the case under consideration.

Referring to the principle of equality of parties in proceedings, the European Court of Human Rights reaffirmed the legal position in the Judgment of Nikoghosyan and Melkonyan v. Armenia, according to which: "... the requirement of equality of parties in proceedings, one of the features of the concept of a fair trial, implies that each party must be afforded a reasonable opportunity to present their arguments – including evidence – under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent" (Nikoghosyan and Melkonyan v. Armenia, app. no. 11724/04).

In this aspect, the legal position expressed in the Decision DCC-1289 of the RA Constitutional Court, – which states that: "... according to the legislation, the main task of the legal regulation of the institution of counterclaim is to provide necessary and sufficient procedural guarantees to ensure its legitimate implementation," –

is also applicable in the event of sending the case for new and full consideration after the cancellation of the judicial act due to the respondent's improper notification of the time and place of the session.

9. The Constitutional Court also considers it important that the institution of counterclaim provides an opportunity to resolve mutual demands of the parties by one judicial act and in one proceeding, as well as to conduct the trial with the greatest effectiveness applying minimal procedural efforts and means.

The argument that in case of rejection of a counterclaim, the respondent shall have the right to independently submit a claim thus exercising the right to judicial protection, cannot be considered fully justified from the perspective of effective judicial protection of the respondent's rights with the following argumentation:

Firstly, Article 21.2 of the RA Judicial Code, titled: "Procedure for the distribution of cases in the court of first instance," regulates the process of distribution of cases in courts, including the Administrative Court. In contrast to submitting a counterclaim, the above-mentioned regulation does not guarantee the consideration of the given claim in the same residence of the Administrative Court, in case the respondent independently submits a claim;

Secondly, in the case of independently submitting a claim, the court expenses stipulated by Articles 58 and 59 of the RA Administrative Procedure Code obviously increase;

Thirdly, as a result of the consideration of the counterclaim together with the initial claim, one judicial act is issued, which is most accessible and effective from the perspectives of appealing, as well as executing the given act.

10. Referring to the issue in the challenged provision regarding the absence of any possibility of submitting a counterclaim in case of the new consideration of the case, the RA Constitutional Court considers

it necessary to examine the challenged provision, on the one hand, in the context of the institution of submitting a counterclaim, and on the other hand, in the context of the statements of the Applicant concerning the legislative gap.

By the Decision DCC-1257 of 10 March 2016, the RA Constitutional Court reaffirmed the legal positions regarding the right to a fair trial and the right of access to a court, expressed in a number of its previous decisions /in particular, DCC-1127, DCC-1190 and DCC-1222/, and found that: "... no peculiarity or procedure may hinder or prevent the effective exercise of the right to a court, make the Constitutionally guaranteed right to judicial protection meaningless or become an obstacle to its implementation." It was also noted that: "... no procedural peculiarity may be interpreted as a justification for restricting the right of access to a court guaranteed by the RA Constitution ..."

As for the legislative gap, the RA Constitutional Court expressed a number of legal positions of fundamental importance (DCC-864, DCC-914, DCC-933 and DCC-1143), which, in particular, are as follows:

- "Within the framework of consideration of the case, the Constitutional Court refers to the constitutionality of one or another gap in the law if the legal uncertainty – conditioned by the content of the challenged norm – leads to the interpretation and application of the given norm in law enforcement practice, which violates or may violate a specific constitutional right" (DCC-864);
- "... the legislative gap may be subject to consideration by the Constitutional Court only in the case when there are no other legal guarantees in the legislation to fill this gap, or in the case when conflicting law enforcement practice is formed in the presence of relevant legal guarantees in the legislation, or in the case when the existing legislative gap does not allow exercising one or another right" (DCC-914);
- "… the legislative gap may not be mechanically identified merely with the absence of legislatively stipulated definition of one or another term. The legislative gap exists in the case, when due to

absence of the element ensuring the completeness of legal regulation or incomplete regulation of that element, the complete and normal implementation of legislatively regulated legal regulations is distorted" (DCC-1143).

Summarizing the foregoing, the RA Constitutional Court states that the restriction provided for by the challenged provision – regarding the exclusion of submitting a counterclaim in any case during the new consideration of the case – due to incomplete legal regulation, improperly restricts the right to effective judicial protection and the right to consideration of the case within a reasonable period, which is an integral part of the right to a fair trial, in the cases when the possibility of submitting a counterclaim by a person who failed to submit a counterclaim during the new consideration of the case due to reasons independent of the will of the person, as well as the possibility of full consideration of the counterclaim, are not provided.

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 63, 64, 68 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. To declare Part 2 of Article 176 of the Administrative Procedure Code of the Republic of Armenia contradicting the requirements of Articles 61 and 63 of the Constitution of the Republic of Armenia and void in regard to the part that the possibility of submitting a counterclaim during the new consideration of the case by a person who failed to submit a counterclaim due to reasons independent of the will of the person, is not provided.

2. The final judicial act rendered against the Applicant on the basis of Part 12 of Article 69 of the RA Law on the Constitutional Court, as well as Article 182 of the RA Administrative Procedure Code, is sub-

ject to review due to new circumstances, in accordance with the procedure provided for by law.

3. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

October 18, 2016
DCC-1315

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA
ON THE CASE OF CONFORMITY OF POINT 12 OF PART 1 OF ARTICLE 41 OF THE LAW OF THE REPUBLIC OF ARMENIA ON STATE PENSIONS WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF MARIAM LALAYAN

Yerevan **November 29, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan, A. Gyulumyan, F. Tokhyan (Rapporteur), A. Tunyan, A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan,

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

Applicant M. Lalayan,

representatives of the Respondent: official representatives of the RA National Assembly H. Sargsyan, Head of the Legal Department of the RA National Assembly Staff, and V. Danielyan, Chief Specialist at the Legal Consultation Division of the same Department,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 25, 38 and 69 of the RA Law on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Point 12 of Part 1 of Article 41 of the Law of the Republic of Armenia on State Pensions with the Constitution of the Republic of Armenia on the basis of the Application of Mariam Lalayan.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by Mariam Lalayan on 14 June 2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the RA Law on State Pensions and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Law on State Pensions was adopted by the National Assembly on 22.12.2010, signed by the RA President on 30.12.2010 and entered into force on 01.01.2011. The challenged provision was enshrined in the Law HO-100-N on Making Amendments and Supplements to the RA Law on State Pensions, which was adopted by the RA National Assembly on 19.03.2012, signed by the RA President on 12.04.2012 and entered into force on 05.05.2012.

The challenged provision of the Law stipulates that the right to receive a pension shall be terminated… "12) in case of failure to pay a pension for five consecutive years to a pensioner entitled to a labor or military pension or to a person entitled to receive a pension in lieu of the latter".

2. The procedural background of the Case is the following:

In 2003, an old age labor pension was granted to the Applicant. The Applicant was paid pension till March 2004; afterwards she submitted an application for transferring the pension to her bank account in the RA Central Bank.

According to the Applicant, she had not checked her account for several years, being convinced that her pension was being accumulated. In 2013 the Applicant became aware that from June 1, 2012 her right to receive a pension was terminated on the grounds of Point 12 of Part 1 of Article 41 of the RA Law on State Pensions.

On December 19, 2013, the Applicant filed a statement of claim to the RA Administrative Court with a request to oblige the Vanadzor territorial department of the Staff of the Social Security Service of the Ministry of Labor and Social Affairs of the Republic of Armenia to restore her right to receive a pension and pay the pension that was not paid over the last few years.

On December 8, 2014, the RA Administrative Court decided to dismiss the claim (administrative case No. ՎԴ6/0666/05/13).

An appeal was filed against the Judgment of the RA Administrative Court, which was rejected by the Decision of the RA Administrative Court of Appeal dated September 8, 2015.

A cassation appeal was filed against the Decision of the RA Administrative Court of Appeal dated September 8, 2015, and according to the Decision of the RA Court of Cassation dated December 9, 2015, the RA Court of Cassation dismissed the cassation appeal in regard to one part, and rejected to accept the cassation appeal for examination in regard to the other part.

3. The Applicant finds that the challenged provision of the Law contradicts Part 1 of Article 10, Parts 1 and 4 of Article 60, as well as Article 83 of the RA Constitution, as it deprives her of her property.

Referring to the Decision No. 3-1260 (ՎԴ) of the RA Court of Cassation dated 30.06.2006, the Judgments Burdov v. Russia, Beyeler v. Italy of the European Court of Human Rights, the Applicant justifies her position by the fact that from the moment she was granted a pen-

sion, the amount to be paid to her was her property, she had the right to own, use and dispose of this amount at her own discretion, and that by the application for transferring her monetary means to her bank account she only determined the way the property would be used, and she did not commit any actions aimed at abandoning her monetary means.

The Applicant also notes that stipulating by the challenged provision of the Law of the time term for the termination of the right to receive a pension is not justified, and as a result, the right to social security and the right to property - which are vital for the existence of the most vulnerable part of society - are violated.

4. Objecting to the arguments of the Applicant, the Respondent finds that Point 12 of Part 1 of Article 41 of the RA Law on State Pensions is in conformity with the RA Constitution.

Referring to a number of legal positions of the European Court of Human Rights and the RA Constitutional Court, the Respondent substantiates his position by the fact that, within the meaning of the European Convention for the Protection of Human Rights and Fundamental Freedoms, at the time the Applicant submitted the alleged application for transferring the pension to her bank account, the Applicant did not have property rights in respect of the monetary means to be paid to her, since for acquiring the right to receive a pension and ensuring the continuity of receipt of a pension, the legislator has established a group of certain legitimate duties, such as the presentation of the required documents, and in case of non-cash receipt of a pension, appearing in the bank at least once a year.

According to the Respondent, the termination of the right to receive a pension does not lead to the loss of the right to a pension.

5. Taking into account the Applicant's arguments, the Constitutional Court, within the framework of this Case, first of all considers it necessary to turn to the constitutional legal content of the terms "the right to a pension" and "the right to receive a pension" used in the Law.

Pursuant to Part 2 of Article 7 of the Law - titled "The right to a pension and the right to receive a pension" – "A person entitled to a pension under this Law shall be entitled to receive a pension in case, according to the procedure provided for by the law, she/he applied to the appropriate division of the entity empowered to appoint a pension (hereinafter referred to as the division that appoints a pension), and she/he is entitled to a pension (hereinafter referred to as the pensioner)".

Pursuant to Part 1 of Article 9 of the Law, "An old age labor pension shall be granted to the person upon reaching the age of 63 years, provided she/he has at least 25 years of service".

It follows from the above-mentioned legal norms that:

a) As a form of manifestation of the constitutional right to social security, the right to a pension is initial, and it serves as a precondition for acquiring the right to receive a pension;
b) The right to a pension has its own prerequisites and legal grounds for the emergence;
c) The right to receive a pension is the guarantee of the realization of the right to a pension in the presence of legal conditions provided for by the law.

The prerequisites for the right to a pension and the right to receive a pension are different: if in a specific case, reaching a certain age and the existence of a certain length of service are the preconditions for the emergence of the right to an old age labor pension, the submission of an application and the necessary documents to the appropriate di-

vision of the entity empowered to appoint a pension are the prerequisites for the emergence of the right to receive a pension.

The legislator enshrined in the Law the conditions that are prerequisites for the person for the realization of the constitutional right to social security. Firstly, Article 35 of the Law prescribes a certain duty, in particular, Part 6 of the Law stipulates: "In case of non-cash receipt of a pension, a pensioner (in the case of a minor or a pensioner in charge, her/his legal representative i.e. parent, adoptive parent or guardian) **shall be obliged** to appear in the bank **at least once a year** to continue the receipt of a pension and sign an announcement about being in the Republic of Armenia, and not later than the last working day of the twelfth month following the month of appearing in the bank (to apply for non-cash receipt of a pension) during the previous year". According to Point 3 of Part 2 of Article 41 of the Law, the payment of a pension shall be terminated "in case of non-submission of an announcement (failure to appear in the bank) in the procedure prescribed by Part 6 of Article 35 of this Law".

Moreover, it follows from Articles 36 and 41 of the Law that **the legislator provided only for the possibility of terminating the right to receive a pension, and not terminating the right to a pension**. Envisaging in the Law at issue of the provisions on the restoration of the right to receive a pension and the renewal of the payment of a pension also follows from the above-mentioned (respectively, Parts 3 and 4 of Article 41 of the Law). Moreover, it follows from the provisions of Part 4 of Article 41 of the Law that, firstly, the right to receive a pension must be restored, and only then the payment of a pension must be renewed.

6. The Constitutional Court considers it necessary to state that there is a need for more specific clarification of the internal logical

connection between Parts 1, 2, 3, 4 and 5 of Article 41 of the RA Law on State Pensions. Obviously, the "right to receive a pension" derives from the "right to a pension". Part 1 of Article 41 of the Law establishes the grounds for the termination of the right to receive a pension. Part 2 of the same Article, in particular, provides that **the payment of a pension shall be terminated in the event the right to receive a pension is discontinued**. According to Point 12 of Part 1 of Article 41 of the Law, non-payment of a pension becomes the basis for the **termination** of the right to receive a pension. In Article 41 of the Law, no consistent and differentiated approach is present in regard to the terms **"discontinuation"** and **"termination"**. **"Discontinuation"** assumes a legal consequence by force of law, and **"termination" is a consequence of a certain legal action, i.e. a consequence of the will of the authority endowed with state powers**. In this case, the issue of judicial protection of the rights of a person may even arise. In addition, it follows from the legal conditions of Part 1 of the same Article that in all cases, except for Point 12, the grounds for **termination** of the right to receive a pension result from the circumstances of **discontinuation** of the right to a pension.

At the same time, it follows from Part 5 of Article 41 of the Law that **the payment of a pension shall be renewed in case of restoration of the right to receive a pension**. However, there is no system link between the legal regulations for the **termination of the right** to receive a pension on the basis of Part 4 /renewal of payment of a pension/ and Point 12 of Part 1 of the same Article. In case the legislator had in mind - in connection with this provision - that the right to a pension shall discontinue, and as a result, the right to receive a pension shall be terminated when a person had not received a pension for five consecutive years, hence this provision should be stated exactly this way. Otherwise, questions arise, in particular, why the pension was not

paid, what opportunities the person had to protect her/his rights, who should **terminate** paying the pension and in what procedure, etc.

7. The Constitutional Court considers it necessary to state that Article 75 of the Constitution of the Republic of Armenia, titled: "Organizational Mechanisms and Procedures for the Exercise of Fundamental Rights and Freedoms" states that: "When regulating fundamental rights and freedoms, laws shall define the organizational mechanisms and procedures necessary for their effective exercise". Although this constitutional requirement of legislative regulation directly concerns fundamental rights and freedoms, the guarantees set forth in Chapter 3 of the Constitution of the Republic of Armenia must also meet the constitutional requirement of effectiveness.

The Constitutional Court finds that this requirement was not consistently implemented by the legal regulation at issue. Failure to pay a pension for five consecutive years to a pensioner entitled to a labor or military pension or to a person entitled to receive a pension in lieu of the latter may have various reasons and may not assume that the circumstance of **discontinuation** of the right to a pension exists. In addition, the cause-and-effect relationship is also violated. According to Point 12 of Part 1 of Article 41 of the Law, "The right to receive a pension shall be terminated ... in case of failure to pay a pension", and according to Point 1 of Part 2 of Article 41 of the Law, "Payment of a pension **shall be terminated** ... in the case the right to receive a pension **is discontinued**". Such legal regulation leads to the fact that a person receives only one opportunity to restore the **right to a pension** (which she/he did not actually lose) and to re-acquire the right to receive a pension.

The Constitutional Court finds that the legal regulation, when the failure to pay a pension to a person without taking into account the

concrete circumstances of the **termination of her/his right to receive a pension**, is not legitimate and does not meet the requirements of the constitutional principle of legal certainty. Due to this legal regulation, a person is also deprived of the opportunity of challenging the **issue of termination** of her/his right to receive a pension, as well as effective judicial protection of the right to property.

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. To declare Point 12 of Part 1 of Article 41 of the RA Law on State Pensions, within the framework of the legal content provided by the law enforcement practice, contradicting the requirements of Articles 3, 60, 61, 78, 79 and 83 of the Constitution of the Republic of Armenia and void.

2. Considering that the provision declared as contradicting the RA Constitution is systemically interrelated with the provisions of Articles 35, 36, 41 and a number of other articles of the RA Law on State Pensions, as well as taking into account the possible consequences conditioned by the legal security to be achieved via the elimination of this provision at the moment of the announcement of this Decision, pursuant to Article 102 of the RA Constitution /with Amendments through 2005/ and Part 15 of Article 68 of the RA Law on the Constitutional Court, to determine 1 October 2017 as deadline for entry into force of this Decision in regard to the provision declared as contradicting the Constitution, thus allowing the RA National Assembly and the RA Government, in the scopes of their powers, to take steps to

guarantee in system integrity the constitutionality of the legal regulation at issue.

3. Based on Part 12 of Article 69 of the RA Law on the Constitutional Court, the final judicial act adopted against the Applicant is subject to review due to new circumstances and in accordance with the procedure provided for by the law.

4. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005) this Decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

November 29, 2016
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