Non-Official Translation

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 300.1 OF THE CRIMINAL CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATIONS OF ROBERT KOCHARYAN AND THE FIRST INSTANCE COURT OF GENERAL JURISDICTION OF YEREVAN

Yerevan 26 March 2021

The Constitutional Court composed of A. Dilanyan (Chairman), H. Tovmasyan, A. Tunyan, A. Khachatryan, Y. Khundkaryan, E. Shatiryan, A. Petrosyan, A. Vagharshyan,

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

the applicant: A. Vardevanyan, representative of Robert Kocharyan,

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

the respondent:K. Movsisyan, official representative of the National Assembly of the Republic of Armenia, Chief of the Legal Expertise Division of the Legal Expertise Department at the Staff of the National Assembly of the Republic of Armenia,

pursuant to Paragraph 1 of Article 168, Paragraph 8 of Part 1 and Part 4 of Article 169 of the Constitution, as well as Articles 22, 69 and 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case of conformity of Article 300.1 of the Criminal Code of the Republic of Armenia with the Constitution on the basis of the applications of Robert Kocharyan and the First Instance Court of General Jurisdiction of Yerevan.

The Criminal Code of the Republic of Armenia (hereinafter referred to as the Code) was adopted by the National Assembly on April 18, 2003, signed by the President of the Republic on April 29, 2003, and entered into force on August 1, 2003.

The challenged Article 300.1 of the Code titled “Overthrowing state order” prescribes:

“1. Overthrow of the constitutional order, that is, the actual elimination of any norm prescribed in Articles 1-5 and Article 6(1) of the Constitution which is expressed by termination of this norm in the legal system, is punished with imprisonment for the term of 10 to 15 years.

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2. A person who participates in the preparation of a crime under this article, at the stage of its preparation, voluntarily reported to law enforcement bodies about the preparation of a crime, shall be exempted from criminal liability prescribed in this article”.

Article 300.1 of the Code was supplemented by the Law HO-53, adopted by the National Assembly on March 18, 2009, signed by the President of the Republic on March 20, 2009, and entered into force on March 24, 2009.

The case is based on the decision of the Court of General Jurisdiction of the Court of First Instance of the city of Yerevan, No. ED / 0253/01/19, of 20 May 2019, "On applying to the Constitutional Court to suspend the proceedings" of 20 May 2019, as well as the applications submitted by Robert Kocharyan to the Constitutional Court on May 29, 2019 and June 4, 2019.

By the Procedural Decision of the PDCC-61 of 21 June 2019, the Constitutional Court accepted for consideration the case “On Determining Compliance of Article 300.1 of the Criminal Code of the Republic of Armenia with Articles 72 and 73 of the Constitution on the Basis of Robert Kocharyan's Appeal” was combined with the Procedural Decision of the PDCC-60 of June 21, 2019 in the case "On Determining Compliance of Article 300.1 of the Criminal Code of the Republic of Armenia with Articles 78 and 79 of the Constitution on the Basis of Robert Kocharyan's Appeal" and decided to consider the above cases at the same session of the Court.

The Constitutional Court, by Procedural Decision PDCC-72 of 8 July 2019, accepted for consideration the case “On Determining the Compliance of Part 1 of Article 300.1 of the Criminal Code of the Republic of Armenia with the Constitution on the Basis of the Appeal of the First Instance Court of General Jurisdiction of the City of Yerevan”, and consideration of the case on the basis of the same appeal, 1) in terms of determining the issue of compliance of Part 1 of Article 300 of the Criminal Code of the Republic of Armenia (in the wording of Law HO-53-N valid till 20 March 2009) with the Constitution, 2) in terms of the interpretation of Articles 56.1 and 57 of the Constitution (Articles 140 and 141 of the Constitution as amended in 2015) in the context of Articles 78 and 79 of the Constitution.

In accordance with Article 16 of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms of July 18, 2019, based on the Decisions PDCC-81 and PDCC-82, the Constitutional Court applied to the European Court of Human Rights for an advisory opinion.

At the same time, by the same decisions, the Constitutional Court, on the basis of the Charter of the European Commission for Democracy through Law (hereinafter referred to as the Venice Commission), also applied to the Commission for an advisory opinion.

By the above-mentioned decisions, the Constitutional Court decided to suspend accordingly the proceedings on the case "On determining the issue of conformity of Article 300.1 of the Criminal Code of the Republic of Armenia with the Constitution on the basis of Robert Kocharyan's appeal" and the proceedings on the case "On determining the conformation of Part 1 of Article 300.1 of the Criminal Code of the Republic of Armenia with the Constitution on the basis of the First Instance Court of the General Jurisdiction of the city of Yerevan "before receiving the advisory opinions of the European Court of Human Rights and the Venice Commission.

Considering the fact that the Advisory Opinion of the European Court of Human Rights was published on 29 May 2020, and the Advisory Opinion of the Venice Commission - on 18 June 2020, the Constitutional Court, by its Procedural Decisions PDCC-136 and PDCC-137 of 22 June 2020, stated that the grounds for the termination of proceedings in the above cases disappeared, and decided to resume the examination.

By Constitutional Court Decision PDCC-138 of 22 June 2020, the Constitutional Court "Based on Robert Kocharyan's applications to determine the conformity with Article 300.1 of the Criminal Code of the Republic of Armenia" and "Based on the application of the Court of First Instance of "On determining the conformity Part 1 of Article 300.1 of the Criminal Code of the Republic of Armenia with the Constitution", the case was decided to be examined jointly at the same court session.

Having examined the applications and other documentation, as well as the written explanation of the respondent, as well as having analyzed the relevant provisions of the Code and other legislative norms correlated to the case, the Constitutional Court **FOUND:**

1. Applicants' arguments

1.1. The applicant Robert Kocharyan raised the issue of conformity of Article 300.1 of the Criminal Code of the Republic of Armenia, titled "Overthrowing the Constitutional Order", with Articles 72, 73, 78 and 79 of the Constitution.

Referring to the mentioned articles of the Constitution, legal positions expressed in a number of decisions of the Constitutional Court, referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), as well as the practice of the European Court of Human Rights (hereinafter referred to as the ECHR), analyzing the legal regulation defined by the disputed article of the Code, comparing it with other legislative

provisions, the applicant finds that Article 300.1 of the Code is not formulated with sufficient clarity and certainty and does not meet the requirements of predictability of the norm.

According to the applicant, first of all, the term "termination of the validity of a constitutional norm in the legal system" is vague and unpredictable, and there is a need to disclose its constitutional and legal content. In law enforcement practice, the alleged violation of a constitutional norm is identified with the termination of this norm. In this case, a situation is possible when any violation of the relevant norm will be considered as the overthrow of the constitutional order. Considering the term "legal system", the applicant notes that in a narrow sense it is perceived as a set of legal acts, in which the termination of a norm is manifested as a change in an act or its loss of force, which is controversial, given the circumstances that not in all cases a change in legal an act or its recognition as invalid may constitute the overthrow of the constitutional order. In law enforcement practice, the alleged violation of a constitutional norm is identified with the termination of that norm. In this case, a situation is possible when any violation of the relevant norm is considered as overthrowing of the constitutional order. With a broad interpretation, the article does not define the criteria by which it is necessary to assess the termination of a legal norm in the legal system, in particular: it presupposes the process of recognizing a specific article as invalid or actions that will give reason to assume that these norms do not actually work. According to the applicant, the issue of duration is also unclear. In addition, at the time of the adoption of Article 300.1 of the Code, the relevant constitutional norms envisaged in the 2015 edition of the Constitution underwent significant changes in the Constitution and a question arises whether the practical implementation of Article 300.1 should be guided by the relevant norms of the Constitution in the previous or current edition, as their objects and the scope of regulation are significantly different. It is also not clear whether the term "constitutional order" should be considered as a more complex and comprehensive phenomenon or interpreted only within the framework of individual articles of the Constitution. In addition, according to the applicant, the legislator has also established a completely new approach in terms of the ensuing legal consequences. In 2008, there was no wording "shall actually terminate in the legal system", which also does not comply with the principle of legal certainty.

Addressing the problem of certainty through legal practice, the applicant noted that since 2009 there has been no stable legal practice regarding its interpretation, which would ensure legal certainty and predictability.

Addressing of overcoming the problem of certainty through legal practice, the applicant noted that since 2009 there has been no stable legal practice regarding its interpretation, which would ensure legal certainty and predictability.

According to the applicant, the elements of the corpus delicti under Article 300.1 of the Code are problematic from the point of view of the constitutional requirement of certainty, inter alia, taking into account the differences between the elements of Article 300.1 of the Code (Article 300.1 of the Code as amended) (including substantial).

In addition, the applicant refers to the transcripts of the sittings of the National Assembly in support of the fact that the legislature has also established that the said provision did not comply with the requirements of legal certainty.

Turning to the issue of the conformity of the challenged legal provisions with the principle of proportionality, the applicant notes that in these legal provisions, in order to protect the foundations of the constitutional order, the legislator has also established criminal liability for such acts that may not endanger the foundations of the constitutional order, as a result of which objective grounds for criminal liability for Article 300.1 of the Code are not suitable and not necessary to achieve the goal established by the Constitution (the said applicant also justifies the presented comparative legal analysis). Regarding the equivalence of the chosen measure in the context of the meaning of the restricted right and freedom, the applicant noted that it is controversial to criminalize such actions, which, although they can lead to the overthrow of the constitutional order, although are not aimed at denying and destroying the foundations of the constitutional order (they are not accompanied by agitation of violence, intolerance, hatred).

The applicant, comparing the elements of the offenses of Articles 300.1 and 300 of the Code, came to the conclusion that the framework of the constitutional order established in them not only does not correspond to the framework enshrined in the Constitution and, in fact, the requirements imposed on the crime in the light of Article 72 of the Constitution, but such a significant change in the elements of the corpus delicti, that when it was applied in relation to the allegedly criminal acts that took place in February-March 2008, the applicant's right guaranteed by Article 72 of the Constitution and the requirement of the founder of the Constitution were violated, since in February-March 2008 the challenged provisions "at the time of the commission of a crime they were not."

At the same time, the applicant referred to the law-enforcement practice of Article 300 in the previous edition of the Code, as well as to the comparisons of the crimes mentioned by the Legislature and the Venice Commission, stating that Article 300.1 is considered a qualitatively new, separate crime.

As a result, among other things, the applicant concludes that the act provided for in in such a form and in such content Article 300.1 of the Code at the time of the alleged commission of a crime was not a crime, as a result of which the filing of the said accusation, the use of detention and the

failure to provide a proper assessment of the problem in as a result of the exhaustion of judicial remedies, they violated the requirements of Articles 72 and 73 of the Constitution.

1.2. The applicant - First Instance Court of Yerevan (hereinafter referred to as the Court) raised the issue of compliance of Article 300.1 of the Code with Articles 72, 73 and 79 of the Constitution, noting that there are reasonable doubts that the new law to be applied not only does not provide the requirement of legal certainty, but also, in comparison with the previous law, is a law that aggravate the legal status of individuals.

In particular, when deciding on the proper application of the previous or current law, it is necessary to compare not only sanctions, but also dispositions. In this case, according to the applicant, although the previous and new laws provide for the same type and length of punishment, however, the dispositions of these articles differ significantly - the scope of the disposition of the previous law is already previous legal norm established responsibility for actions aimed at overthrowing the constitutional order with the use of violence, meanwhile, the current regulation also has corpus delicti without this feature (violence may not be an obligatory element of the corpus delicti provided for in this article).

The Court also notes that the content of Article 300.1 of the Code should be based on the relevant articles of the Constitution referred to in the given Article, but there is uncertainty as to which year of Constitution (2005 or 2015) the reference should be made.

In addition, the Court considers it problematic whether in the context of a possible extentional and broad application of Article 300.1 of the Code, it is possible to exhibit appropriate conduct, in particular, whether it is reasonably certain that the "de facto abolition of a legal norm" implies actions, how it can be implemented, the term "legal system" is used in a broad or narrow sense, how the same legal norm can be terminated, in particular, the termination can be episodic or not, systemic, final or temporary.

2. Respondent's arguments

The respondent, referring to Articles 1, 72, 73, 78 and 79 of the Constitution, having analyzed Article 300.1 of the Code, notes that the actus reus of the crime may manifest itself in a change in the structure of state power provided for by the Constitution, the liquidation of certain institutions of power and the establishment of new institutions, abolition of democratic principles of the government, violation of the constitutional procedure for the formation of individual institutions of power, violation of the principle of separation and balance of powers, violation, restriction of human and civil rights and freedoms, abolition of the supreme legal force of the Constitution and the direct

operation of its norms. As for the subjective side of the crime, the respondent notes that it is characterized by direct intent, where the subject of the crime may be a physical person with a sound mind who has reached the age of 16.

The respondent added that the legislator has established an incentive norm in Part 2 of Article 300.1 of the Code, which is the subject of this constitutional dispute, according to which a person, who was involved in the commission of the crime but reported on it, to the law enforcement bodies is released from the criminal liability provided for in Part 1 of the Article.

Referring to Article 3 of the Code, the respondent stated that the commission of a crime is the only basis for criminal liability, after which the person whose act is publicly dangerous is directly subject to the provisions of a special part of the Code and to ensure the mentioned provision, it is necessary to carry out the proper qualification of the crime committed by the person, referring also to the order of qualification of the crime.

Referring to the constitutional and legal requirements of legal certainty, proportionality, predictability and retrospective application concerning the framework of a constitutional-legal dispute, the respondent referred, in particular, to the legal positions expressed by the Constitutional Court in the Decisions of DCC-630, DCC-753, DCC-1000, DCC-1148, DCC-1270. The respondent, based on the fact that it follows from his conclusions and positions that the challenged legal regulation enshrined by the legislator with the appropriate legal tools within the framework of this constitutional legal dispute ensures the full implementation of the constitutional requirements, finds that Part 1 of Article 300.1 of the Code complies with the Constitution.

3. Advisory Opinion of the European Court of Human Rights[1]

By the Procedural Decisions PDCC-81 and PDCC-82 of 18 July 2019, the Constitutional Court applied to the European Court of Human Rights for an advisory opinion based on Article 1 of Protocol No 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also the Convention), posing the following questions:

"1) Does the concept of 'law' under Article 7 of the Convention and referred to in other Articles of the Convention, for instance, in Articles 8-11, have the same degree of qualitative requirements (certainty, accessibility, foreseeability and stability)?, 2) If not, what are the standards of delineation?, 3) Does the criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meet the requirements of certainty, accessibility,

[1] https://www.echr.am/resources/echr/judgments/19963d5f567f262c689eab822767f39c.pdf

foreseeability and stability? 4) In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?

In the Advisory Opinion on 29 May 2020 concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law (Request no. P16-2019-001), the ECHR, in particular, has stated the following:

"(…) 77. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see S.W. v. the United Kingdom, 22 November 1995, § 34, Series A no. 335-B; C.R. v. the United Kingdom, 22 November 1995, § 32, Series A no. 335-C; and Kafkaris [v. Cyprus [GC], no. 21906/04], ... § 137[, ECHR 2008]).

78. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage (concerning the retrospective application of a penalty, see Welch v. the United Kingdom, 9 February 1995, § 36, Series A no. 307-A; Jamil v. France, 8 June 1995, § 35, Series A no. 317-B; Ecer and Zeyrek v. Turkey, nos. 29295/95 and 29363/95, § 36, ECHR 2001-II; and Mihai Toma v. Romania, no. 1051/06, §§ 26-31, 24 January 2012). It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege – see Kokkinakis v. Greece, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; for an example of the application of a penalty by analogy, see Başkaya and Okçuoğlu v. Turkey [GC], nos. 23536/94 and 24408/94, §§ 42-43, ECHR 1999-IV).

79. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see Cantoni v.

France, 15 November 1996, § 29, Reports of Judgments and Decisions 1996-V, and Kafkaris, cited above, § 140).

80. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see Coëme and Others, cited above, § 145, and Achour v. France [GC], no. 67335/01, § 43, ECHR 2006-IV).

(…)

91. When speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see Kokkinakis, cited above, §§ 40-41; Cantoni, cited above, § 29; Coëme and Others, cited above, § 145; and E.K. v. Turkey, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

92. (…) One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see Kokkinakis, cited above, § 40, and Cantoni, cited above, § 31). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see Kafkaris, cited above, § 141).

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (ibid.). The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States (see Kruslin v. France, 24 April 1990, § 29, Series A no. 176-A). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see S.W. v. the United Kingdom, cited above, § 36; C.R. v. the United Kingdom, cited above, § 34; Streletz, Kessler and Krenz [v. Germany [GC], nos. 34044/96 and 2 others, § 50[, ECHR 2001-II]; K.-H.W. v. Germany [GC], no. 37201/97, § 85, 22 March 2001; Korbely v. Hungary [GC], no. 9174/02, § 71, ECHR 2008; and Kononov v. Latvia [GC], no. 36376/04, § 185, ECHR 2010). The lack of an

accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights (see, concerning the constituent elements of the offence, Pessino v. France, no. 40403/02, §§ 35-36, 10 October 2006, and Dragotoniu and Militaru-Pidhorni v. Romania, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; as regards the penalty, see Alimuçaj v. Albania, no. 20134/05, §§ 154-62, 7 February 2012).

(…)

80. The Court reiterates that Article 7 of the Convention unconditionally prohibits the retrospective application of the criminal law where this is to an accused's disadvantage (see for the general principles concerning that principle, Del Río Prada, cited in paragraph 60 above). The principle of non-retroactivity of criminal law applies both to the provisions defining the offence (see Vasiliauskas, cited above, §§ 165-66) and to those establishing the penalties incurred (see M. v. Germany, no. 19359/04, §§ 123 and 135-37, ECHR 2009).

(…)

83. In the present proceedings the Constitutional Court's question requires the Court to give an opinion on the application of the principle on non-retroactivity. … The Court considers that its case-law relating to the reclassification of charges under an amended version of the Criminal Code which has entered into force after the commission of the act in question is of particular interest. In such situations, the Court primarily seeks to determine whether there is continuity of the offence, taking into account the moment of the commission of the offence and the moment of the conviction.

(…)

85. In such cases, the Court has examined in essence whether the acts in question were already punishable under the provisions in force at the time of their commission.

86. The Court's case-law does not offer a comprehensive set of criteria for comparing the criminal law in force at the time of commission of the offence and the amended criminal law. Nonetheless, it is possible to draw the conclusion that the Court has regard to the specific circumstances of the case, that is, the concrete facts of the case as established by the national courts, when assessing whether the acts committed were punishable under the provision in force at the time of their commission. Moreover, in line with the general principles of its case-law regarding the foreseeability of the law in force at the time of the commission of the relevant offences, the Court has regard to the domestic court's case-law, if any exists, elucidating the notions used in the law in force at that time (see G. v France, cited above, §§ 25-26, and Berardi and Mularoni, cited above, §§ 46-56).

87. In contrast, the Court is not concerned with the formal classifications or names given to criminal offences under domestic law (…)

As a result, the European Court of Human Rights has, inter alia, concluded that:

1. "(…) Using the "blanket reference" or "legislation by reference" technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7 of the Convention. The referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable. This requirement applies equally to situations where the referenced provision has a higher hierarchical rank in the legal order concerned or a higher level of abstraction than the referencing provision.

2. The most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. Moreover, the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision. In any event, it is up to the court applying both the referencing provision and the referenced provision to assess whether criminal liability was foreseeable in the circumstances of the case.

3. In order to establish whether, for the purpose of Article 7 of the Convention, a law passed after an offence has allegedly been committed is more or less favourable to the accused than the law that was in force at the time of the alleged commission of the offence, regard must be had to the specific circumstances of the case (the principle of concretisation). If the subsequent law is more severe than the law that was in force at the time of the alleged commission of the offence, it may not be applied".

4. Amicus Curiae Brief adopted by the Venice Commission [2]

Based on PDCC-81 and PDCC-82 procedural decisions of 18 July 2019 and the regulations of the Venice Commission, the Constitutional Court applied to the Venice Commission for an advisory opinion, submitting the following questions:

1) Do the offences against the constitutional order prescribed in the criminal laws of the member States of the Venice Commission contain references to constitutions or their specific articles? 2) How are the concepts of constitutional order, overthrow of the constitutional order, usurpation of power described in the relevant legal acts of the member States of the Venice Commission and, in particular, in criminal laws, and are there judicial interpretations of these concepts? 3) Which are the European standards for the

[2] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)005-e

requirement of certainty of a criminal law? 4) Do the legislations of the member States of the Venice Commission stipulate a similar offence to the one prescribed in Article 300.1 of the Criminal Code of the Republic of Armenia? 5) If so, which is the best practice from the perspective of legal certainty?

Based on the above, in its opinion on Article 300.1 of the Code adopted at the 123rd Plenary Session (Venice, June 18, 2020, CDL-AD (2020) 005), the Venice Commission, in particular, stated:

"9. Among the Venice Commission's member States, the concept of constitutional order almost always refers to the institutional aspect of their constitutions. While some countries will use the term constitutional order, others will prefer to use the terms constitutional system or democracy. It frequently alludes to the principle of the separation of powers – more specifically – to acts against the normal functioning of constitutional institutions.

(...)

19. These specifications suggest that the constitutional order in the respective member States relates to different constitutional principles (such as sovereignty, territorial integrity, democratic order, state of law, rule of law, legal formalism, balance of powers) and also comprises the institutions as established by the respective constitutions and their proper functioning.

20. (...)

These criminal acts include the overthrowing of the highest institutions31 (including, but not limited to, the government32), altering the political foundations33 as well as different forms of violation of territorial integrity

(...)

33. (...) "Legal certainty has several functions: it helps in ensuring peace and order in a society and contributes to legal efficiency by allowing individuals to have sufficient knowledge of the law so as to be able to comply with it. It also provides the individual with a means whereby he or she can measure whether there has been arbitrariness in the exercise of state power. It helps individuals in organising their lives by enabling them to make long-term plans and formulate legitimate expectations."

34. (...) The effects of the law must also be foreseeable, which means that the law must be proclaimed before its implementation and its effects foreseeable i.e. the law must be worded with sufficient precision and clarity to enable legal subjects to align their conduct accordingly. The degree of foreseeability required will depend on the nature of the law (especially important for criminal law), followed by the question of whether laws are stable and consistent.

35. The prohibition of retroactivity of criminal laws and the requirement of providing sufficiently clear and precise definitions of criminal acts in laws are crucial for their application. With respect to the requirement of clarity and precision in the context of this amicus curiae brief, it might be argued that the

unspecified concept of constitutional order could present a problem in this respect. Yet, perhaps in most member States, there seems to be a widespread consensus that might cover possible criticisms of the imprecision of the constitutions and the laws, with respect to what this concept is *(constitutional order, the overthrowing of the constitutional order)*. The common practice, disclosed by the material received by the Venice Commission, on leaving the constitutional order undefined, does not allow us to conclude that the principle of legal certainty is breached where there is no further definition of this concept. If it is not possible to provide a general definition for constitutional order in all cases in which criminal law is applied, reference should be made to specific constitutional provisions or to clear constitutional principles that were allegedly violated.

36. Article 300.1 of the Armenian Criminal Code leaves room for interpretation as to what is meant by the "actual elimination of any norm provided for in Articles 1 to 5 or in Part 1 of Article 6 of the Constitution", making it difficult to identify similar provisions in the legislation of other member States. In addition, the legal definition provided by the provisions ("which is expressed in termination of the action in the legal system") does not clarify the situation, which may however be due to the translation. For the sake of clarity, the aspect of the "actual elimination" is therefore omitted from the following comments.

(...)

44. The rather broadly worded offences of high treason, insurrection or rebellion usually require an element of violence, force or threat combined with the intent (or an actual attempt) to direct said violent or forceful act against the constitutional order or a related protected interest. Provisions that do not require violence and/or such intent directed against the constitutional order generally stipulate more specific acts (e.g. distribution of writings or use of symbols of an unconstitutional party or association) that are deemed inherently anti-constitutional.

(...)

49. In reply to the five questions regarding Article 300.1 of the Armenian Criminal Code – which penalises overthrowing the constitutional order – addressed to the Venice Commission by the Constitutional Court of Armenia for this amicus curiae brief – the Venice Commission noted that the material received from most of its member States shows significant differences in the issues addressed and the detail provided. For this reason, the conclusions drawn in this amicus curiae brief are only tentative.

50. National constitutions and legislation tend to vary from one member State to the next in the way crimes against the constitutional order are dealt with. In member States where such offences exist and are referred to in the constitution, they often stipulate the forceful and unlawful amendment of the constitution as an element of this crime – and refer to the constitution in its entirety. Others explicitly refer to the duty of respecting the constitutional order, however, without defining it. Nevertheless, there seem to be no

statutory provisions that contain an explicit reference to specific articles of constitutions. However, most (if not all because terms used may CDL-AD(2020)005 - 13 - CDL-AD(2020)005 differ) provisions in criminal codes/legislation will implicitly refer to the constitution by citing constitutional principles such as sovereignty, territorial integrity, democracy and elections or refer to certain constitutional institutions such as parliament. Hence, there seem to be no explicit references to constitutions with respect to crimes "against the constitutional order", however the conclusion may be drawn that there are indirect or implicit references to them.

51. The concepts of constitutional order, overthrow of the constitutional order, usurpation of power as such seem not to be defined in the statutory provisions of most member States. Many – but not all – member States will refer to the offence of overthrowing the constitutional order as high treason i.e. the intent or actual attempt to deceitfully, forcefully and unlawfully amend the constitution, which does not always require an actual overthrowing of the constitutional order.

52. There is a lack of case-law on the concepts of constitutional order, overthrow of the constitutional order, usurpation of power, showing that, for the most part, statutory provisions governing these concepts have not been applied to this day. This, in turn, shows that there is no best practice as to the factual circumstances under which charges of the most similar crime, notably high treason, would be dealt with in member States. With respect to the prohibition of retroactivity of criminal laws and the requirement of providing sufficiently clear and precise definitions of criminal acts in laws, criticisms of imprecisions regarding the concepts of constitutional order and the overthrowing of the constitutional order might be appeased in the knowledge that there seems to be a convergence among the member States of the Venice Commission to leave these concepts undefined or imprecise. Hence, no conclusion can be drawn with respect to what constitutes a best practice from the perspective of legal certainty. Nevertheless, in view of this principle and the principle of proportionality, it seems only reasonable to expect that the more broadly the statutory provision is worded, the more consideration should be given to the individual freedoms and basic rights of the accused. Such a provision should be interpreted narrowly, taking into account the principle in dubio pro reo.

5. The circumstances to be clarified within the framework of the case

In order to determine the compatibility of Article 300.1 of the Code with the Constitution, the Constitutional Court considers it necessary to find out, in particular, whether the disputed article complies with the constitutional principles of certainty, proportionality, guaranteed accordingly, are the fundamental rights enshrined in Articles 72 and 73 of the Constitution.

6. Legal Positions of the Constitutional Court

6.1. According of Article 72 of Constitution, "No one shall be sentenced for an action or inaction not deemed to be a crime at the time of committal. A punishment more severe than that applicable at the time of committing the criminal offence may not be imposed. A law decriminalizing an act or mitigating the punishment therefore shall have retroactive effect."

According of Article 73 of Constitution, "Retroactive Effect of Laws and Other Legal Acts 1. Laws and other legal acts deteriorating the legal condition of a person shall not have retroactive effect. 2. Laws and other legal acts improving the legal condition of a person shall have retroactive effect where these acts so provide for.

In accordance with Article 7 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), " No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed." Moreover, the validity of the safeguard provided for in Article 7 of the Convention is underscored by the fact that even in the event of war or any other emergency threatening the life of a nation, No derogation from this rule shall be made (Article 15 (2)) of the Convention.

This rule is also reflected in the Code, in particular in Article 12, according to which:

"1. The criminality and punishability of the act is determined by the acting criminal law at the time of committal of the offence.

2. The time of committal of crime is the time when socially dangerous action (inaction) was committed, regardless when the consequences started to take effect."

The rule "No crime, no punishment if it is not defined by law" (nullum crimen, nulla poena sine lege)" is a universally recognized principle of both international and domestic law;

According to Article 13 of the Code, "2. The law stipulating the criminality of the act, making the punishment more severe or worsening the status of the criminal in any other way has no retroactive effect."

The general rule of validity of legal acts in time, which denies the possibility of retroactive legal acts, pursues legitimate goals, thus it makes possible to guarantee human rights, ensure the principles of legal certainty, legal security, stability of public relations, etc.

The Constitutional Court expressed a similar legal position by the Decision DCC-1000 of 29 November 2011, in particular, stating that "The combined analysis of Parts 3-6 of Article 22, as well as Parts 3 and 4 of Article 42 states that according to the RA Constitution, the regulation of legal acts

in time is based on the logic that the refusal of retroactive legal acts **is a general rule**, and the possibility of retroactive action of those acts is **an exception to the general rule**."

The Constitutional Court also expressed a similar legal position in its Decision of DCC-1000 of November 29, 2011, in particular, stating that "a comparative analysis of Parts 3-6 of Article 22, as well as Parts 3 and 4 of Article 42 of the RA Constitution testifies that the regulation of the RA Constitution of the effect of legal acts in time is based on the logic that deviation from the retroactive effect of the law is a general rule, and the possibility of retroactive effect of the law is an exception to the general rule. This approach follows from considerations of legal certainty, legitimate expectations from legislation, guaranteeing human rights, preventing arbitrariness on the part of law enforcement bodies".

Moreover, the exceptions, in turn, are different: "(1) When the founder of the Constitution excludes the possibility of the legislator showing any discretion, establishing a direct requirement of retroactive force (a law abolishing the punishability of an act or mitigating punishment has retroactive effect (Article 72 of the Constitution), and (2) when the power to provide a retroactive effect to a legal act that improves the legal status of a person is left to the discretion of the competent (adopting this act) body (laws and other legal acts that improve the legal status of a person are retroactive if it is provided for by these acts (Part 2 of Article 73 of the Constitution)". In these cases, the Constitutional Court also reaffirms the legal position expressed in the Decision DCC-1000 that the retroactive effect of a legal act is permissible in exceptional cases, and the decision of the body adopting this act to provide retroactive effect to this act should be based on a comprehensive analysis and assessment of possible the legal consequences of such a decision for society and the state.

The constitutional legal requirement according to which a law abolishing the punishability of an act or mitigating punishment has retroactive effect is also reflected in Article 13 of the Code: "1. A law that eliminates the criminality of an act, mitigates punishment or otherwise improves the position of a person who has committed a crime, has retroactive effect, that is, it applies to persons who committed the relevant act before the entry into force of such a law, including persons who are serving a sentence or who have served a sentence, but having a criminal record." Part 3 of the same article regulates those cases when by the same law liability is partially mitigated and partially strengthened. For such cases, proceeding from the essence of Article 72 of the Constitution, the legislator has established that "the law, partially mitigating responsibility and at the same time partially increasing responsibility, is retroactive only in the part that mitigates responsibility".

The Constitutional Court, in its Decision DCC-1348 of February 14, 2017, referring to the content of the provision "a law abolishing the punishability of an act or mitigating punishment has

retroactive effect" of the second sentence of Article 72 of the Constitution, titled "The principle of legality in establishing crimes and imposing punishments", state:

"(…) firstly, for laws abolishing the punishment or mitigating the punishment, the Constitution provides for a **special procedure** for the latter, that is, such laws apply to the relevant relations that arose before the entry into force of those laws;

secondly, unlike **other laws** that improve the position of a person, the founder of the Constitution **does not stipulate** the retroactive effect of a law abolishing the punishability of an act by the fact that it is **provided for by these laws**;

thirdly, within the framework of the legal regulation enshrined in the above-mentioned constitutional-legal provision, the Constitution extends the requirement of retroactive application of the law abolishing the punishment to all persons involved in all criminal proceedings; the action is not conditioned by this or that stage of the criminal proceedings or penitentiary, as reflected in Part 1 of Article 13of the RA Criminal Code, according to which the law eliminating the crime, mitigating the punishment or otherwise improving the condition of the perpetrator has retroactive effect, **i.e. applies to persons who have committed an act prior to the entry into force of this law, including those who are serving or have served a sentence but have a conviction;**

fourthly, proceeding from the constitutional and legal requirements that the inalienable and inviolable dignity of a person is the inalienable basis of his rights and freedoms, and the principle of the direct action of fundamental rights, the application of a retroactive law canceling the punishability of an act against a person presupposes that all that have arisen for persons as a result of the application of the law establishing the punishability of the act, adverse legal consequences, that is, the application of the retroactive law abolishing the punishability of the act against the person restores the position that existed before the application of the law establishing the punishability of the act;

(...)

seventhly, the retroactive application of the overturning law directly concerns such fundamental rights of a person as the right to judicial protection and a fair trial, and both the processes of establishing crimes and sentencing, and the processes of cancellation of the punishability of an act should be based not only on the principle of legality when establishing crimes and imposing punishments, enshrined in Article 72 of the RA Constitution, but also on ensuring the direct effect of the constitutional requirements for the effective judicial protection of fundamental rights and freedoms, certainty and proportionality of restricting fundamental rights and freedoms, since according to Part 3 of Article 3 of the RA Constitution "public power is limited by the fundamental

rights and freedoms of a man and citizen, which are directly applicable law "(paragraph 6 of the Decision of the DCC-1348).

The Constitutional Court notes that if Article 7 of the Convention does not explicitly stipulate the rule of retrospective application of a softer criminal law, however, the HRSI in the case of Skopolla v. Italy (no.2) [GC] (no.), based on an analysis of Article 7 of the Convention, concluded that "... Article 7 (1) of the Convention guarantees not only the principle of reversal of stricter criminal law**, but also the presumably the principle of retroactive power in the more lenient criminal law**. This principle is embodied in the rule according to which in the case of differences between the final judgment of the criminal law in force at the time of the offense and the criminal law adopted thereafter, the courts should apply the law the provisions of which are more favorable to the accused. (ibid, Paragraphs 108-09).

Moreover, in paragraph 82 of the advisory opinion on this case, the ECHR also noted that: "Although the requirement of retrospective application of the more lenient criminal law was worded in general terms in *Scoppola (no. 2)*, it is to be noted that this requirement has been developed and subsequently applied in the context of changes in the applicable penalties or sentencing regime (see, for instance, *Gouarré Patte v. Andorra*, no. 33427/10, §§ 28-36, 12 January 2016, and *Koprivnikar v. Slovenia*, no. 67503/13, § 59, 24 January 2017). In the case of *Parmak and Bakir v. Turkey* (nos. 22429/07 and 25195/07, § 64, 3 December 2019), the Court found for the first time that the principle of retrospective application of the more lenient criminal law also applied in the context of an amendment relating to the definition of the offence."

At the same time, the Constitutional Court states that the effect of the *"new" criminal law (without the possibility of any discretion) applies retroactively to such legal relations (cases) that arose before the adoption, when:*

1) the new criminal law completely or partially abolishes the criminality of the act (complete decriminalization, partial decriminalization);

2) the new criminal law mitigates the punishment;

3) the new criminal law otherwise improves the position of the person who committed the crime.

The Constitutional Court considers it necessary to note that not any change in the criminal law leads to the criminalization / decriminalization of the act, mitigation / toughening of punishment or otherwise improves / worsens the situation of the person who committed the crime.

In the context of the foregoing, the Constitutional Court finds that the establishment of a new corpus delicti for one or another manifestation of an already criminal act and its application in

relation to a person **may be consonant with Articles 72 and 73 of the Constitution only in the case when this new corpus delicti did not expand the range of criminal offenses.**

In the context of the above, the Constitutional Court finds that the definition and application of this or that manifestation of a criminal act with a new corpus delicti to a person ***may be consistent with Articles 72 and 73 of the Constitution only if the new corpus delicti has not expanded the scope of the criminal act.***

6.2. In each specific case, the choice of the applicable law is made by comparing the time of the commission of the act and the duration of the applicable law. The Constitutional Court finds that it is unambiguous that the exclusive competence of conducting such a comparison has been granted to the body carrying out the criminal proceedings in compliance with the principles indicated above by the Constitutional Court, taking into account the fact that only the body carrying out the proceedings has access to the circumstances of the case, information on the circumstances confirming or refuting the facts of the commission of a criminal act, its duration and time of the onset of the consequences, about the circle of persons who allegedly committed a criminal act and otherwise, which in its integrity will solve the issue of applying a specific provision of the criminal law in time.

The ECHR also expressed such a position in its advisory opinion on this case, in particular, stating that:

88. Thus, the comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law has to be carried out by the competent court, not by comparing the definitions of the offence *in abstracto*, but having regard to the specific circumstances of the case.

(…)

90. Even though the principle of concretisation was developed in cases relating to an amendment of the relevant penalties, the Court, having regard to the considerations set out above (see paragraphs 87-88**),** considers that the same principle also applies to cases involving a comparison between the definition of the offence at the time of its commission and a subsequent amendment.

91. … It will be for the competent domestic courts to compare, in light of the alleged actions or omissions by the accused and other specific circumstances of the case, the legal effects of possible application of Article 300.1 of the 2009 CC and of Article 300 of the Criminal Code in the version in force at the time of the impugned events…

92. The Court is therefore of the opinion that in order to establish whether, for the purposes of Article 7 of the Convention, a law passed after an offence has allegedly been committed is more or less favourable to the accused than the law that was in force at the time of the alleged commission of the offence, regard must be had to the specific circumstances of the case (the principle of concretisation). If

the subsequent law is more severe than the law that was in force at the time of the alleged commission of the offence, it may not be applied.

6.3. Acccording to Article 79 of the Constitution, "when restricting basic rights and freedoms, laws must define the grounds and extent of restrictions, be sufficiently certain to enable the holders and addressees of these rights and freedoms to display appropriate conduct."

In a number of the decisions, the Constitutional Court has referred to the constitutional principle of certainty. In this case, the Constitutional Court reaffirms its, in particular, the following legal positions expressed by the decision DCC-1488 of November 15, 2019.

1) "... the law shall also comply with the legal position expressed in a number of decisions of the European Court of Human Rights, according to which any legal norm cannot be considered "law" if it does not comply with the principle of legal certainty (res judicata), that is, is not formulated clearly enough to allow a person to regulate his behavior "(DCC-630);

2) "Principle of rule of law, among others, requires the existence of a legal law. The latter should be sufficiently accessible, subjects of law should be able to decide in the relevant circumstances what legal norms are applied in the given case. A norm cannot be considered a "law" if it is not formulated with sufficient precision to allow legal entities and individuals to adjust their behavior to it, they should be able to predict the consequences that the action may cause.

Another important factor in assessing the predictability of the law is the presence or absence of inconsistencies between the various regulations governing these relationships" (DCC-753);

3) ... The Constitutional Court holds that in the absence of significant differences between the offenses specified in Article 63 of the RA Judicial Code and Article 314.1 of the RA Criminal Procedure Code, and the corpus delicti specified in the chalenged norm, a person is deprived of the opportunity to foresee the legal consequences of his behavior, which does not proceed from the principles of predictability and certainty of the law" (DCC-851);

4) "The Constitutional Court finds that in a state governed by the rule of law, within the framework of the recognition of the principle of the rule of law, the legal regulations enshrined in the law should make the person's legitimate expectations predictable..." (DCC-1148);

5) "One of the most important features of the rule of law enshrined in Article 1 of the Constitution of the Republic of Armenia is the rule of law, the main requirements of which is the provision is the principle of legal certainty, regulation of legal relations exclusively by such laws, which correspond to certain qualitative features the principle of legal certainty as clearity, predictability, accessiblity," (DCC-1270);

6) “In the context of a number of other resolutions (DCC-630, DCC-1142), referring to the principle of legal certainty, the Constitutional Court considered that this principle is necessary so that the participants in the relevant relations could reasonably foresee the consequences of their behavior and officially recognized status, and in the matter of acquired rights and obligations (DCC-1439);

7) (...) Positions regarding the principle of legal certainty are enshrined in a number of decisions of the Constitutional Court, in particular, in the Decisions DCC-630, DCC -753, DCC -1270, from which it follows that the Constitutional Court considers the principle of legal certainty as one of the main requirements of the rule of law, which is the most important feature of the rule of law established by Article 1 of the Constitution, and the mentioned constitutional and legal principle applies to all laws, regardless of whether they restrict the fundamental right or regulate the implementation of the fundamental right (DCC -1357);

Referring to the principle of legal certainty, the Constitutional Court in its decisions expressed legal positions regarding the fact that, in particular, any legal norm cannot be considered a “law” if it is not formulated clearly enough, which will allow a citizen to combine his behavior with it (DCC - 630), the law must be sufficiently accessible so that the subjects of law have the opportunity, in the appropriate circumstances, to determine which legal norms apply in this case (DCC - 753), the concepts used in the legislation must be precise, definite and not lead to different interpretations or confusion (DCC-1176, DCC-1449);

8) “… The Constitutional Court considers that the principle of legal certainty presupposes both the presence of the most precise legal regulation and ensuring its predictability. In particular, the wording of legal regulation should give a person not only the opportunity to shape his behavior in accordance with it, but also the ability to foresee what the actions of public authorities may be and what consequences the application of this legal regulation will entail. ... The Constitutional Court considers that, along with the provision of the requirement of certainty of the law, it is impossible to provide for the regulation of all issues exclusively by law, for this reason, a clear interpretation of the law by the courts is especially important in this matter.” The Constitutional Court finds that, despite the requirement of certainty in the law, it is not possible to envisage the settlement of all issues exclusively by law, therefore, a clear interpretation of the law by the courts is needed in this regard.

The Constitutional Court confirms the legal position expressed by it in the Decision DCC-1270 of 03.05.2016 that “even with the most clear formulation of a legal norm, judicial interpretation is not excluded. The need to clarify legal norms and bring them in line with changing circumstances - developing social relations always exists. Consequently, the certainty and clarity of legislative regulations cannot be absolutized - even the lack of clarity can be compensated for by the

interpretations of the court". Therefore, *the certainty and accuracy of the legislative regulation cannot be absolute, even insufficient clarity can be supplemented by court interpretations."* The foregoing is also confirmed by the legal positions of the European Court of Human Rights, in particular in the Case of Busuioc v. Moldova, application no. 61513/00, 21/12/2004, that "... although certainty formulation is highly desirable, it is necessary to avoid excessive rigidity, since the law must have the ability to follow changing circumstances. Therefore, many laws use terms that are more or less vague. Their interpretation and application is the task of judicial practice"(DCC-1452);

9) "The Constitutional Court in its Decision DCC - 1213 of June 9, 2015 established that" ... the legal regulations enshrined in the law in the framework of the recognition of the rule of law must make his legitimate expectations predictable for a person. In addition, the principle of legal certainty, being one of the fundamental principles of the rule of law, also presupposes that the actions of all subjects of legal relations, including those in power, must be predictable and lawful" (DCC-1475).

Confirming and developing its legal positions, the Constitutional Court finds that: 1) legal certainty is also an important element of legal security, which, among other things, ensures confidence in public authority and its institutions;

2) in a state governed by the rule of law, the protection of trust in the continued existence of the existing legal order must be guaranteed exclusively through certain, that is, *predictable, clear and accessible to all legislative regulations;*

(...)

4) violation of the principle of certainty directly by the public authorities affects the principle of the rule of law and significantly reduces the degree of accomplishment of the rule of law;

5) clarity, predictability and availability of laws restricting fundamental rights or freedoms are directly proportional to the degree of restriction of the fundamental right: **the more intense this restriction, the more clear, predictable and accessible the wording of the said laws should be,** so as not to create ambiguity for individuals in the issue of the content and availability of prohibitions, other restrictions or responsibilities assigned to them**;**

6) Taking into account the diversity of vital issues and impossibility of responding to all situations in a normative way, the requirement of certainty of legislative or by-laws does not preclude the fixation of vague legal concepts in laws and by-laws, but it must be accompanied with a uniform interpretation, without which it will be impossible to prove the predictability of those provisions (…).

6.4. At the same time, referring to the requirement of certainty imposed by the blanket norm established by the Code, the Constitutional Court states that the peculiarity of norms containing blanket disposition is manifested in the fact that they cannot be implemented independently, that is,

they are not independent regulators of social relations and their socially regulating function can carried out only in conjunction with other standards.

The Constitutional Court notes that many provisions of the Code refer to the definitive norms laid down in other legislative acts, but blanket dispositions with reference to specific articles or parts of a specific law, in addition to the disputed article, are also provided for in a number of other articles of the Code (particularly Article 190.2, Articles 314.3, 353.1 and other articles).

The Constitutional Court states that in many provisions of the Code, references are made to the definitive norms established by other legislative acts, however, blanket dispositions containing a reference to specific articles of a particular law or parts thereof, in addition to the challenged article, are also provided for in a number of other articles of the Code (in particular, in Articles 190.2, 314.3, 353.1, etc).

It should be noted that the Constitutional Court addressed the problem of blanket dispositions of the Code in its Decision DCC -1453 of April 16, 2019, expressing the following legal positions:

- "In law enforcement practice, problems arise when the legislator makes changes not directly to the criminal law, but to the intersectoral legislation, which in one way or another determines the content of criminal law prohibitions or the limits of criminal punishment. These difficulties are due to the fact that in the formal aspect they are not considered a change in the criminal law. However, it should be considered that Article 72 of the Constitution does not use the term "criminal law", but the term "law". From both the literal and the systemic interpretation of the above provision, it follows that the rule of exclusion of retroactive effect of the law also applies to those laws to which the blanket provision of the Code refers";

This interpretation of the Constitutional Court concerns not only the disputed parts of Article 310.1 and Article 314.3 of the Code in this case, but also any other act provided for by the Code". **6.5.** Articles 1 and 2 of the Constitution are immutable. The remaining constitutional norms to which Article 300.1, challenged in the present case, refers to although they leave the impression that the texts of the Constitution as amended in 2005 and 2015 clearly have the same subject of regulation, at the same time they **have undergone significant content changes**.

Constitutional norms in their essence differ from other legal norms as they are more sustainable, more internally autonomious and they reflect the socio-political, legal realities of the historical period when they are adopted. From the moment of its adoption until the amendments of 2015, the Constitution was characterized as a tough Constitution, any change in the norms of which was carried out by the most complex procedure.

. In the Concept of Constitutional Reforms, published in 2014 by the Specialized Commission on Constitutional Reforms under the President of the Republic of Armenia, regarding the implementation of reforms in the relevant constitutional norms in order to best implement the principles of democracy, the

rule of law, and separation of powers that are the foundations of the constitutional system, its authors provide a number of weighty conceptual justifications. A systematic analysis of the texts of the contested norms of the Constitution in the versions of 2005 and 2015 in the Concept shows that the authors, and later the founder of the Constitution, represented by RA citizens who have the right to vote, provided a substantially new content to the mentioned constitutional norms.

6.6. The ECHR has expressed its position in the advisory opinion on this case, according to which: "74 … The Court is therefore of the opinion that using the "blanket reference" or "legislation by reference" technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7 of the Convention. The referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable. This requirement applies equally to situations where the referenced provision has a higher hierarchical rank in the legal order concerned or a higher level of abstraction than the referencing provision." The Constitutional Court, comparing the positions expressed above and the above-mentioned positions of the ECHR, states that the existence of a blanket norm in criminal law is not problematic in itself. The only essential fundamental circumstance is that both the provisions of the criminal law and the provisions of the law to which the reference is made, taken together, should provide the person concerned with the opportunity to perceive the elements of the offense and clearly foresee what actions (inaction) will lead to responsibility.

In this case, the Constitutional Court states that the fact that the legislator did not make relevant amendments to the contested article of the Code **for a long term** after the constitutional amendments of 2015 for both the law enforcement officer and the person concerned creates problems in connection with legal certainty.

On the basis of the foregoing, the Constitutional Court finds that **insofar as Article 300.1 of the Code refers to the blanket norms of the Constitution in force at the time of its adoption, but have changed at the time of application of the Constitution**, it is problematic from the point of view of the principle of legal certainty established by Article 79 of the Constitution, since it does not allow a person to make a clear idea of the constituent elements of the corresponding corpus delicti provided for by the Code and clearly foresee what his actions (inaction) will cause criminal liability.

6.7. The Constitutional Court considers especially important the fact that the question of the uncertainty of the concepts used in the challenged article is also raised by the court considering the case on the merits. In particular, the term "in fact to abolish a norm" used in the challenged article, which should manifest itself as "the termination of this norm in the legal system" is unclear to the Court. It is not clear to the court whether the term "*legal system" is used in a general or narrow*

sense, the termination of a legal norm should be episodic, or systemic, final, or temporary. In this aspect, the Constitutional Court considers it necessary to note that the normative content of the term “legal system” is not enshrined in the legislation of the Republic of Armenia. It arose and was used in the theory of law and is characterized as the integrity of the normative system of law (a set of legal norms) that ensure the implementation of the law of structures (institutions) and ideological and legal elements (legal culture, legal doctrine, legal consciousness

The Constitutional Court finds that the challenged article in this sense cannot have a sufficient degree of legal certainty, given the fact that even with the existence of a judicial interpretation of the term in practice it is difficult to imagine that it will ever be possible to implement the challenged article by any person, charge with the actual abolition of the constituent elements of the legal system, for example, one of the foundations of the constitutional system in public or individual legal consciousness.

As for the meaning of the term "legal system", which is a regulator of social relations, the integrity of legal measures and mechanisms stabilizing them, that is, a phased institutional system that ensures the implementation of the law (its use, execution, observance, law enforcement in a broad sense), then even in this case, doubts about the satisfaction of the challenged legal provisions of the requirement of the principle of certainty do not disappear.

A norm cannot have a sufficient degree of certainty and be perceived by a law enforcement officer, even if the “legal system” was perceived as a “system of law”. The legal form of expression of the system of law as a set of legal norms, an abstracted concept is legislation. This would mean that there has been a termination of the norm in the legislation. Termination of a norm in legislation can take place only as a result of certain formal legal official procedures established by the Constitution and laws. The termination of a norm takes place, for example, when it is canceled, is declared invalid in court, its validity period expires, public relations regulated by this norm are terminated, etc. Meanwhile, before that, Article 300.1 of the Code emphasizes the “de facto cancellation” of the norm.

The Constitutional Court finds that the formulations used by the legislator in the described disposition “de facto abolition of a norm” (“de facto” provision) and “termination of this norm in the legal system” (“de jure” provision), in any formulation, cannot be logical - legal relationship with each other. The provisions implied by these formulations are in semantic contradiction, since the “de facto” clause of the abolition of the norm cannot by itself lead to the “de jure” clause of the cessation of the norm. In other words, the formulation of the disposition of the corpus delicti of overthrowing the constitutional order was given by the legislator, among other things, in an incompatible set of different terms.

Thus, the challenged provision, which envisages a more intensive interference with the fundamental right of a person to personal liberty, is formulated so vaguely that it does not make it possible to understand its meaning and may lead to unpredictable, and therefore also arbitrary, application, and allows expanding the boundaries of the crime, which is due to the circumstance references to constitutional norms that are too abstract. A high degree of abstractness in itself would not be problematic if the disposition of the corpus delicti were formulated clearly and would allow reasonable identification of the way of expressing the described act.

6.8. In its numerous decisions, the Constitutional Court also referred to the constitutional principle of proportionality. It is enshrined in Article 78 of the Constitution, which states that "the means chosen to restrict fundamental rights and freedoms must be appropriate and necessary to achieve the objective set by the Constitution." The means chosen for the restriction must be commensurate with the meaning of the restricted fundamental right lı freedom. ”

The Constitutional Court in its Decision DCC-1546 of June 18, 2020, summarizing its previous related positions, commented in detail on the content of this fundamental constitutional principle, ensuring the proper preconditions for its equal perception and implementation. Once again confirming these fundamental legal positions, the Constitutional Court considers it necessary to single out the following from them: **the more intensive the restriction of the fundamental right or freedom of a person, the greater the burden of justifying this restriction**.

In the framework of the present case, the systemic links of the principle of proportionality with the principle of certainty is essential. The Constitutional Court also addressed this issue in its aforementioned ruling. Referring to the Decisions DCC-917 and DCC-1488, the Constitutional Court noted that the suitability of the measure selected by the law restricting the fundamental right, first of all, depends on the circumstances of compliance with other requirements of the Constitution regarding restrictions on fundamental rights and freedoms, especially the constitutional principle of certainty.

Thus, in one case, the ambiguity of the legislative formulation (DCC-1488), in another case, insufficient substantiation by subject criteria (DCC-917), the Constitutional Court assesses as *the absence of appropriate prerequisites* to guarantee the proportionality of the restriction of a specific fundamental right.

From the point of view of establishing the actus reus, the content of the norms containing the link, conceptual confusion, and vague forms of definition of the crime, the legislator did not choose a measure suitable for achieving the legitimate goal of protecting the constitutional order. That is, the legislator did not substantiate the choice of the norms of the Constitution with substantive criteria, and some of the norms he chose may have a constantly changing content, depending on the possibility

of their general interpretation. In addition, as a result of the interpretation of these legislative regulations, an insurmountable confusion arose in terms of the legal force of the norm, its existence and actual influence in the legal system, considering the actual abolition of the norm as a form of expression of the termination of its legal action.

Thus, the Constitutional Court finds that the challenged article is inconsistent with Articles 78 and 79 of the Constitution.

Based on the review of the case and governed by Paragraph 1 of Article 168, Paragraph 8 of Part 1 and Part 4 of Article 169, and Article 170 of the Constitution, as well as Articles 63, 64 and 71of the Constitutional Law on the Constitutional Court, the Constitutional Court HOLDS:

1. To declare Article 300.1 of the Criminal Code of the Republic of Armenia contradicting Articles 78 and 79 of the Constitution and void.

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

Chairman **A. Dilanyan**

26 March 2021
DCC - 1586