Non-Official Translation

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

ON THE CASE CONCERNING THE CONSTITUTIONALITY OF PARAGRAPHS 9.1 AND 9.2 OF THE ANNEX TO THE DECISION NO. 1586-N OF THE GOVERNMENT DATED 27 SEPTEMBER 2020 ON DECLARING MARTIAL LAW IN THE REPUBLIC OF ARMENIA, AS WELL AS ARTICLE 182.5 §§ 5-7 AND CORRELATED §§ 13 AND 14 OF THE RA ADMINISTRATIVE OFFENCES CODE RAISED BY THE APPLICATION OF THE HUMAN RIGHTS DEFENDER

Yerevan 4 May 2021

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

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

the applicant: the Human Rights Defender A. Tatoyan,

the respondent: representatives of the National Assembly G. Atanesyan, Head of Expertise and Analytical Department of the Staff of the National Assembly, and M. Mosinyan, Chief Specialist of Legal Support and Service Division of the Staff of the National Assembly, and

the Government,

pursuant to Article 168(1) and Article 169 § 1(10) of the Constitution, as well as Article 23 § 1, and Article 68 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case concerning the constitutionality of paragraphs 9.1 and 9.2 of the Annex to the Decision No. 1586-N of the Government dated 27 September 2020 on Declaring Martial Law in the Republic of Armenia, as well as Article 182.5 §§ 5-7 and correlated §§ 13 and 14 of the RA Administrative Offences Code raised by the Application of the Human Rights Defender.

The Decision No. 1586-N of the Government **on Declaring Martial Law in the Republic of Armenia** (hereinafter also referred to as the "Decision") was adopted, signed, and entered into force on 27 September 2020.

The Annex to the Decision was supplemented with paragraphs 9.1 and 9.2 by the Decision No. 1655-N of the Government dated 8 October 2020 **on Making Supplements to the Decision No. 1586-N of the Government of the Republic of Armenia dated 27 September 2020.** Paragraphs 9.1 and 9.2 of the Decision prescribed as follows:

"9.1. The publication of reports criticizing, refuting, and questioning their effectiveness, or otherwise depreciating the actions (including speeches and publications) of state and local self-government authorities and officials related to ensuring the legal regime of martial law and ensuring the state security, shall be prohibited.

9.2. Propaganda directed against the defense capability and security of the Republic of Armenia and the Republic of Artsakh, including the publication of reports questioning the defense capability of the Republic of Armenia and the Republic of Artsakh, shall be prohibited".

According to the Procedural Decision PDCC-209 of the Constitutional Court dated 20 November 2020, the effect of paragraphs 9.1 and 9.2 of the Annex to the Decision No. 1586-N of the Government dated 27 September 2020 on Declaring Martial Law in the Republic of Armenia was suspended, pending the completion of the case trial.

Chapter 4 of the Annex to the Decision was repealed by the Decision No. 1917-N of the Government dated 2 December 2020 on making Amendments to the Decision No. 1586-N of the Government of the Republic of Armenia dated 27 September 2020. Accordingly, by force of the above Decision, paragraphs 9.1 and 9.2 of the Annex to the Decision were repealed.

According to the Decision DNA-001-N of the National Assembly dated 24 March 2021 **on the Abolition of Martial Law in the Republic of Armenia**, the martial law declared by the Decision No. 1586-N of the Government of the Republic of Armenia dated 27 September 2020 was abolished.

The Administrative Offences Code of the Republic of Armenia (hereinafter referred to as the "Code") was adopted by the Supreme Council of the Armenian SSR on 6 December 1985, and entered into force on 1 June 1986.

The Law HO-456-N **on Making Supplements to the Administrative Offenses Code of the Republic of Armenia** was adopted on 9 October 2020, and entered into force the next day, according to which the Code was supplemented with Article 182.5. Article 182.5 §§ 5-7, 13, and 14 of the Code, titled "**Violation of the rules in force during the legal regime of martial law**" read as follows:

"5. Violation of the rules of publishing or imparting information during the martial law by the entity carrying out media activities, failure of a journalist to comply with the special procedure for accreditation, and the violation of the special rules for using means of communication, shall:

entail a fine in the amount of 700 to 1000-fold of the minimum salary.

6. Violation of the rules of publishing or imparting information during the martial law by the entities not carrying out media activities, or violation of the rules of restriction on freedom of expression of opinion, shall:

entail a fine in the amount of 300 to 700-fold of the minimum salary.

7. After being subject to the penalties prescribed by §§ 5 and 6 of this Article, the failure to immediately remove the publication imparted during the martial law in violation of the rules of publishing or imparting information, shall:

entail a fine for the entity carrying out media activities in the amount of 1000 to 1500-fold of the minimum salary, and for the entities not carrying out media activities – in the amount of 700 to 1000-fold.

(…)

13. A repeat of the acts prescribed by this Article (except for the acts envisaged in § 14 of this Article) after the date of imposing an administrative penalty, shall:

entail a fine in the amount of two-fold of the fine previously imposed for the same act.

14. A repeat of the acts prescribed by §§ 2, 3, 5, 8, and 11 of this Article by an organization after the date of imposing an administrative penalty, shall:

entail the suspension of economic activity for a period of one month to three months, but no longer than until the end of the legal regime of martial law".

This case was initiated by the application of the Human Rights Defender which was submitted to the Constitutional Court on 4 November 2020.

Having examined the application, the written explanations of the applicants, as well as having analyzed the relevant legal acts and other documents in this case, the Constitutional Court **FOUND:**

1. Applicant's submission

The applicant challenges the conformity of paragraphs 9.1 and 9.2 of the Annex to the Decision No. 1586-N of the Government dated 27 September 2020 on Declaring Martial Law in the Republic of Armenia, as well as Article 182.5 §§ 5-7, 13, and 14 of the Administrative Offences Code of the Republic of Armenia with Articles 42, 76, 78, 79, and 81 of the Constitution in the sense that the wording of the existing legal regulations devoid of general and legal certainty lead to a disproportionate restriction on freedom of expression of opinion.

The applicant argues that the law providing for restrictions of rights or freedoms should be as precise as possible, excluding provisions that give rise to arbitrary interpretation or vague understanding when applying the law. A state of emergency or martial law are such situations that especially require clarity and precise regulations of legal rules, which is first of all necessary for public authorities when ensuring the clarity of regulations and uninterrupted practice in a tense situation of emergency or martial law. It is important for a person and a citizen to clearly understand his rights and actions of the state, as well as the scope of his responsibility and duties.

The applicant considers that certain wordings of the contested provisions of the Decision of the Government ("criticizing", "refuting", "questioning their effectiveness", "depreciating", and "questioning the defense capability") are evaluative and problematic as a basis for restricting reports and publications from the perspective of ensuring legal certainty. There are no criteria allowing the law enforcer to qualify a report as "criticizing", "refuting", or otherwise. It gives law enforcers wide discretion to subject individuals to administrative liability, which can lead to unreasonable restrictions on freedom of expression of opinion.

According to the applicant, the failure of the provisions of the above-mentioned Decision of the Government to meet the constitutional requirements of legal certainty, proportionality, strict compliance with international practice and the international obligations of the Republic of Armenia, as well as the interference with the freedom of expression of opinion, as an inevitable consequence, also raises the issue of constitutionality of the provisions of the Administrative Offenses Code of the Republic of Armenia defining the legal consequences of the implementation of the said problematic regulations. The applicant considers that the administrative and legal norms prescribed at the level of the mentioned Code do not stipulate certain conditions for considering the act as an administrative offense, and certifying the presence of criminal features, while, the latter are entirely dependent on the contested provisions of the Decision of the Government.

The applicant believes that the inconsistency of the contested provisions with the constitutional requirements is also the result of gross procedural violations of their development and adoption. In this regard, the applicant expresses his concern regarding the practice that, according to his definition, sensitive or rights-restricting drafts are not submitted to the Human Rights Defender for an opinion, or the submission thereof is formal based on

the drafts of respective acts in certain cases. The applicant also notes that the drafts prescribing the contested provisions have not become a matter of public discussion.

The applicant also raises the issue of the severity of the fines stipulated by the disputed provisions of the Administrative Offenses Code of the Republic of Armenia in terms of disproportionate interference with the freedom of expression of opinion, stating that the sanctions of the contested provisions of the said Code (large amounts of fines, up to doubling of these amounts in case of continuation or re-commitment of the violation, or the suspension of economic activity) already indicate their unlawful restraining effect on media activities.

In advancing his arguments, the applicant refers to a number of legal positions of the Constitutional Court of the Republic of Armenia, the European Court of Human Rights, and the provisions of domestic and international related acts and documents.

2. Respondent's submission

2.1. Submission of the National Assembly

According to the respondent, the standards by which any legal regulation is assessed should be revealed prior to determining whether the respective legal regulation meets the standard of certainty. Referring to the legal positions expressed in the acts of the European Court of Human Rights (hereinafter referred to as the "ECHR") in a number of cases, the respondent notes that the ECHR has stated as follows:

- the use of evaluative and relatively vague formulations in the case of several legal regulations where it is impossible to define a specific list (rigid and unambiguous formulations) due to the imperative to ensure the flexibility of the legislative regulation,

- the absence of an issue in terms of legal certainty, even if a legal norm can be interpreted otherwise,

- the predictability of a legal norm even in the cases where possible consequences can be predicted not only by obtaining legal advice but also by common sense,

- the professional status of the person to whom the norm affects, contributes to ensuring the predictability of a legal norm.

As for the above-mentioned, the respondent draws attention to the fact that the above conclusions were made by the ECHR in relation to criminal laws where higher requirements of certainty are defined for the norms stipulating criminal liability, compared to the norms of other branches of law.

The use of evaluative and relatively vague concepts in legal norms stems from the fact that those legal norms inherently "serve" social relations. As rules of conduct regulating social relations, the legal norms cannot be absolutely certain and clearly formulated where the social relations regulated by these norms are often very complex and multi-layered.

The respondent considers that the regulations laid down in paragraphs 9.1 and 9.2 of the Annex to the Decision meet the standard of legal certainty since it was impossible to initially predetermine and exhaustively define the options for criticizing, refuting, questioning their effectiveness, or otherwise depreciating the actions (including speeches and publications) of state and local self-government bodies and officials that relate to the legal regime of martial law and the state security. It was also impossible to initially predict and define all the options by which the propaganda against the defense capability and security of the Republic of Armenia and the Republic of Artsakh could be manifested or the defense capability of the two republics could be questioned.

In relation to the issue of the necessity of adopting the contested provisions in a democratic society, the respondent states that they were adopted under martial law in order to prevent imparting information, disinformation, and panic-inducing information that endangers the combat effectiveness of the army and state security. According to the respondent, in this case, the adoption of the contested provisions and restricting freedom of expression of opinion are aimed at the protection of the state security.

The respondent believes that the fight against any harmful phenomenon is almost always aimed at a significant reduction of the volume of that phenomenon but not at the complete elimination thereof. Even in the case of the most severe restrictions, in terms of the current information flows, it is impossible to completely exclude the publication of any information. However, it should be noted alongside that the information flows provided by the mass media operating in the territory of the Republic of Armenia with a large audience are a volume of information (in many cases unrecognizable) compared to the information disclosed by a person residing outside the Republic of Armenia, who does not have a large audience. According to the respondent, it is unequivocal that there is a high probability that the Armenian audiences do not trust the information received from the second option of information disseminator as mentioned above. Therefore, the restrictive measure that can significantly (even if not completely) prevent the dissemination of inadmissible information in terms of the practical impossibility of completely excluding such a possibility, should be considered as a suitable measure.

The respondent does not exclude the fact that there were issues in the legal practice related to the application of the contested norms and, at the same time, he disagrees that those issues were caused by the contested provisions.

2.2. Government's submission

According to the respondent, the clearly expressed legal objective of the regulation prescribed by the contested norms is the maintenance of state and information security in terms of martial law, which is of a constitutionally predetermined public-legal significance since it is called upon to guarantee the fulfillment of the constitutionally prescribed commands. According to the legal content of the contested norms, the legally permitted means of achieving that goal is the restriction on the freedom of expression of opinion of a person which is manifested by the temporary establishment of the restriction on imparting information laid down in paragraphs 9.1 and 9.2 of the Annex to the Decision, and in case of imparting the said information, it is manifested by the application of tough sanctions as prescribed by Article 182.5 §§ 5, 6, 7, 13 and 14 of the Code that arises from martial law. In this sense, the latter are primarily called upon to guarantee the effective maintenance of the legal regime of martial law. Although the concepts used in paragraphs 9.1 and 9.2 of the Annex to the Decision (correlated with Article 182.5 of the Code) are evaluative, yet they are well noted and cannot be otherwise interpreted by the court (law enforcement administrative authority). Within the scopes of the regulation of the Decision, the latter are mainly reflected in the systemic organic link, and in terms of martial law, they provide a legitimate balance between the right to expression of opinion and the overriding public interest, i.e. the state security.

According to the respondent's assessment, the standards laid down in paragraphs 9.1 and 9.2 of the Annex to the Decision (correlated with Article 182.5 of the Code) are aimed to prevent imparting information against the state security of the Republic of Armenia under martial law, and the law enforcement (judicial) practice is entrusted with the task of ensuring the adequate perception and the legal application thereof, as well as the systemic disclosure of the legal truth in each specific case.

As for the fact that a fairly short period of time was provided to the Office of the Human Rights Defender to submit an opinion on the respective legislative package and that it did not undergo the respective procedures defined by the legislation, the respondent states that according to paragraph 7 of the Annex to the Decision, the activity of state and territorial administration authorities and local self-government bodies was shifted to the working regime of martial law starting from 16.00 on September 27, 2020. Therefore, each state authority was obliged to organize and adapt its activities to the legal regime of martial law, ensuring efficient and fast operation under such conditions. Moreover, it was urgently necessary to ensure the implementation of the restrictions set by the legal regime of martial law. As for the issue of failure to comply with the procedural norms by putting the legislative package into circulation in a short period and carrying out the respective process on an expedited basis, the respondent also states that in the report of the Council of Europe dated 7 April 2020 on the restrictions

applied during the state of emergency, it was emphasized that in such situations, first of all, the state executive power must be able to act quickly and efficiently. It implies simpler decision-making procedures and, to the extent permitted by the Constitution, bypassing some of the powers vested in the competent state authorities.

The respondent states that when setting the amount of the sanction for the misdemeanors prescribed by Article 182.5 §§ 5-7, 13, and 14 of the Code, the legislator aimed to define the severity of the sanction that would be sufficient, necessary and suitable for the pursued legitimate goal, that is, for achieving the adequate state security, which would exclude as much as possible the dangers and threats from the information flows under martial law. The envisaged actions can lead to disruption of state security, endanger the life of a soldier defending the motherland, and provide information to the enemy. The amounts of sanctions were defined considering this danger, and according to the respondent, those amounts are not problematic from the perspective of proportionality.

Noting that the adverse consequences presented by the applicant are the result of the relevant administrative acts rendered by the administrative authority, the respondent finds that by disputing the constitutionality of the provisions in question, the applicant raises the issue of the legitimacy of application thereof, trying to hide it by contesting the constitutionality of the provisions in question.

The respondent considers that Article 182.5 §§ 5-7, 13, and 14 of the Code, and paragraphs 9.1 and 9.2 of the Annex to the Decision comply with the Constitution, and requests to consider the issue of terminating the proceedings of this case.

3. Considerations to be clarified in the case

For determining the constitutionality of the contested provisions in the case, the Constitutional Court considers it necessary to address, in particular, the following questions:

(1) Are the contested regulations of the Annex to the Decision stipulating restrictions on imparting reports and publications consistent with the constitutional principle of legal certainty, due to the evaluative nature of the wording prescribed therein?

(2) Do the contested provisions of the Code stipulating administrative liability comply with the constitutional principles of proportionality and certainty necessary for the restriction on freedom of expression of opinion?

Based on the above, the Constitutional Court considers it necessary to assess the constitutionality of the contested provisions on the basis of Articles 42, 76, 78, and 79 of the Constitution.

At the same time, the Constitutional Court notes that the applicant did not provide any justification regarding the constitutionality of the provision "(...) failure to observe the special procedure for accreditation by a journalist, violating the special rules for using means of communication", stipulated in Article 182.5 § 5 of the Code, the provision "Any of the acts defined by this Article", stipulated in Article 182.5 § 13 of the Code (that is, each act defined by the above-mentioned Article of the Code), and the provision "(...) any of the acts defined by §§ 2, 3, (...), 8, and 11 of this Article (...)", stipulated in Article 182.5 § 14 of the Code, and the applicant raised the issue in a different context.

4. Assessments of the Constitutional Court

4.1. For assessing the constitutionality of the contested legal regulations in the case, the Constitutional Court considers it necessary to conduct a comprehensive analysis not only of the contested provisions, i.e. the normative legal acts listed above, but also of the respective provisions of the Law on the Legal Regime of Martial Law (hereinafter referred to as the "Law") which, in particular, leads to the following:

(1) martial law (…) allows the imposition of certain restrictions on the rights and freedoms of legal persons, citizens of the Republic of Armenia, foreign citizens and stateless persons, as well as the imposition of additional obligations with respect to the latter (Article 1 of the Law HO-258-N **on the Legal Regime of Martial Law**, adopted on 05.12.2006, entered into force on 27.01.2007);

(2) the list of temporary restrictions on the rights and freedoms of the citizens of the Republic of Armenia, foreign citizens, stateless persons, and organizations, as well as the measures to be applied and the additional obligations with respect to the latter should be established by the Decision of the Government on declaring martial law (Article 6 § 1(e) of the Law);

(3) in case of declaration of martial law, during the entire period of martial law, restriction on freedom of expression of opinion can be carried out in accordance with the procedure prescribed by the Law, as well as temporary confiscation or seizure of printing devices, radio broadcasting and sound-amplifying technical means, and multiplying equipment, as well as the establishment of special procedure for accreditation of journalists, and special rules for using means of communication (Article 8 § 1(l) of the Law);

(4) according to the Law, the Government shall define the measures and temporary restrictions ensuring the legal regime of martial law, the authorities and forces ensuring the legal regime of martial law, and shall control the process of implementing the measures and temporary restrictions aimed at ensuring the legal regime of martial law (Article 11 § 1(2));

(5) under the conditions of martial law (…), the restrictions on the constitutional rights and freedoms of the individuals (…), and the additional obligations imposed on legal entities must be implemented within the scopes that ensure the requirements of Article 76 of the Constitution, and are equivalent to the circumstances that served as the basis for declaring martial law, as well as the latter must comply with the international obligations of the Republic of Armenia in the field of human rights protection, and must derive from the international obligations regarding the deviation from obligations under martial law (emergency situations) (Article 14 of the Law);

(6) paragraph 9 stipulated in Chapter 4 titled **"Restrictions on the implementation of publications and reports"** of the Annex to the Decision read as follows: "The public dissemination of publications, informational materials, interviews, reports and information about combat operations taking place in the territory of the Republic of Armenia and the Republic of Artsakh, and directions thereof, as well as the movement of combat equipment, armed forces and other troops, and civilians (groups), the losses and damages caused by combat operations, as well as the transmission of other information (hereinafter referred to as a "report") directly related to the latter, including in the form of the publication of such information on websites and social networks (hereinafter referred to as "publication") shall be carried out exclusively with reference to official information provided by state authorities (hereinafter referred to as "official information") which shall fully reflect official information (without editing)". It follows from the quote that the content of the terms "report" and "publication" was disclosed in paragraph 9 of the Annex to the Decision;

(7) paragraph 9.3 of the Annex to the Decision stipulated as follows: "The Police of the Republic of Armenia shall supervise the observance of the rules prescribed by paragraphs 9, 9.1, and 9.2 of this Annex. The Police of the Republic of Armenia shall be entitled to take necessary measures to ensure the elimination of published reports and information, to temporarily confiscate or seize printing devices, radio broadcasting and sound-amplifying technical means, and multiplying equipment";

(8) paragraph 10 of the Annex to the Decision stipulated as follows: "The restrictions prescribed by this Chapter shall not apply to reports made by public officials or references made to such reports".

4.2. As an important precondition for the existence and development of a democratic society, freedom of expression of opinion and guaranteeing the basic means for the realization thereof are crucial both in constitutional legal and international legal levels.

According to Article 42 of the Constitution, "1. Everyone shall have the right to freely express his opinion. This right shall include freedom to hold own opinions, as well as to seek,

receive, and impart information and ideas by any means of information without interference by state or local self-government bodies and regardless of state frontiers.

2. The freedom of the press, radio, television and other means of information shall be guaranteed. The state shall guarantee the activities of an independent public television and radio offering a diversity of informational, educational, cultural, and entertainment programs.

3. Freedom of expression of opinion may be restricted only by law with the aim of protecting state security, the public order, health and morals, or honor and reputation of others, and other fundamental rights and freedoms".

Freedom of expression (including freedom of opinion, freedom to seek information and ideas without interference from state authorities, as well as freedom to receive and impart such information through any media) is guaranteed by the Universal Declaration of Human Rights (Article 19), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10), and the International Covenant on Civil and Political Rights and its Optional Protocol (Article 19).

In addition to the above-mentioned international contractual obligations, the relevant international and regional standards for guaranteeing freedom of expression are prescribed by the commitments undertaken within the framework of the OSCE (e.g., the documents of the Moscow and Copenhagen Meetings of the Conference on the Human Rights Dimension of the OSCE, adopted on 03.10.1991 and 29.06.1999, respectively), the recommendations adopted by the political bodies of the Council of Europe, and the consultations and comments of expert bodies providing authorial interpretations of acceptable standards in the field of freedom of speech.

The constitutional content of freedom of expression is revealed in a number of decisions of the Constitutional Court. The Constitutional Court Decision DCC-1396 of December 26, 2017, states as follows: "(...) Freedom of expression of opinion is not only a component of human rights and freedoms, but it is also of fundamental importance in the system of public interests, and the importance of guaranteeing this right is a constitutional legal and international legal requirement".

In a number of legal positions expressed in the decisions of the Constitutional Court, the Court has emphasized the importance of guaranteeing this freedom not only in the scope of realization of the subjective rights of a person but also within the framework of regulation of public legal relations. In particular, the Constitutional Court Decision DCC-1010 of March 6, 2012, states as follows: "(...) Accessibility to public information before democracy and the public is one of the essential prerequisites for transparency of state governance. Democratic control exercised due to public opinion stimulates transparency of actions of the state power and facilitates accountability of public authorities and officials".

The Constitutional Court Decision DCC-278 of January 11, 2001, states as follows: "(…) By ensuring the freedom of everyone's right to freely express opinions, including to hold own opinions, as well as to receive and impart information and ideas, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 Covenant on Civil and Political Rights, and other relevant international instruments, consider the exclusion of the interference of state bodies as an important guarantee of the implementation of the above right. observes the. However, this does not hinder the legislative provision of some restrictions in this field (...) due to the legitimate interests of the society and the state".

Freedom of expression is not an absolute right, and may be restricted on the grounds prescribed by relevant international legal instruments, as well as by the Constitution and in accordance with the law, with the aim of protecting state security, public order, health and morals (public interests) or honor and reputation of others, and other fundamental rights and freedoms. In this regard, in the Decision DCC-997 dated November 15, 2011, the Constitutional Court expressed the following legal position: "(...) any restriction of the right to freedom of expression of opinion must be defined by the law, serve the aim of protecting legitimate interests, and be necessary for ensuring certain interests".

The ECHR has repeatedly referred to the content of the freedom of expression and the restrictions thereof, in particular, stating that "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment" (CASE OF HANDYSIDE V. THE UNITED KINGDOM, application no. 5493/72, judgment of 07.12.1976, para 49, CASE OF STOLL V. SWITZERLAND, application no. 69698/01, judgment of 10.12.2007, para 101, CASE OF MORICE V. FRANCE, application no. 29369/10, judgment of 23.04.2015, para 124).

According to the ECHR, freedom of expression, as one of the essential foundations of a democratic society, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established (CASE OF OBSERVER AND GUARDIAN V. THE UNITED KINGDOM, application no. 13585 /88, judgment of 26.11.1991, para 59, CASE OF HERTEL V. SWITZERLAND, 59/1997/843/1049, judgment of 25.08.1998, para 46).

4.3. According to Article 79 of the Constitution, in case of restriction of fundamental rights and freedoms, the laws shall define the grounds and scope of restrictions and be sufficiently certain for the holders of such rights and freedoms and the addressees to be able to engage in appropriate conduct.

In a number of decisions, the Constitutional Court has referred to the content of the constitutional requirements of legal certainty, stating particularly as follows:

(a) "(...) one of the most important features of a legal State is the **rule** of law, and one of the main requirements for ensuring the latter is the **principle of legal certainty**, and the regulation of legal relations exclusively by the **laws that correspond to certain qualitative features,** i.e. they shall be clear, predictable, and accessible" (DCC-1270);

(b) "(...) the law shall also comply with the legal position expressed in a number of judgments 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 (…), that is, it is not formulated with a sufficient degree of clarity, which allows the citizen to be able to engage in appropriate conduct" (DCC-630);

(c) "the principle of the rule of law, inter alia, also requires the existence of the legal law. The latter should be sufficiently accessible, i.e. the addressees of the law should have the opportunity to determine which legal norms are applied in a certain case and under the respective circumstances. A norm cannot be considered a 'law' unless it is formulated sufficiently precise to allow legal and natural persons to be able to engage in appropriate conduct, i.e. they must be able to predict the consequences that a certain action may cause" (DCC-753);

(d) "from the perspective of ensuring legal certainty, the concepts used in the legislation should be clear and certain, and should not lead to different interpretations or confusion" (DCC-1176);

(e) "(...) *legal certainty is also an important component of legal security,* which, inter alia, ensures trust in public power and its institutions,

(...) in a rule of law State, the protection of trust in the future existence of the current legal system should be guaranteed exclusively through specific, *i.e. predictable and clear legal regulations which are accessible for everyone*" (DCC-1488);

(f) "(...) within the framework of adhering to the principle of the rule of law, the legal regulations laid down in the law should make the person's legal expectations predictable. In addition, as one of the fundamental principles of the rule of law State, the principle of legal certainty also implies that the actions of all addressees of legal relations, including the public power, should be predictable and legitimate" (DCC-1213);

(g) the constitutional principle of legal certainty shall apply to all laws, regardless of the fact that the latter are of the nature of restricting the fundamental right, or regulating the exercise of the fundamental right (DCC-1357);

(h) "Even if the legal norm is worded as clearly as possible, judicial interpretation is not excluded. There is always a need to clarify legal positions and adapt them to changing circumstances and developing public relations. Therefore, the certainty and accuracy of the

legislative regulation cannot be absolutized, i.e. even the insufficient clarity can be supplemented by the interpretations of the court" (DCC-1270 and DCC-1488).

The ECHR has repeatedly referred to the principle of legal certainty in its judgments. In particular, the ECHR has stated that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the person to regulate his or her conduct: he or she must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. 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 (CASE OF THE SUNDAY TIMES V. THE UNITED KINGDOM, application no. 6538/74, judgment of 26.04.1979, para 49, CASE OF BUSUIOC V. MOLDOVA, application no. 61513/00, judgment of 21.03.2005, para 52).

In one of the cases, the ECHR has stated that the concept of "breach of public order" used in Article 283 § 1 of the Criminal Code is to a certain extent vague. However, as ordinary life can be disrupted in a potentially endless number of ways, it would be unrealistic to expect the national legislator to enumerate an exhaustive list of illegitimate means for achieving a particular aim. The Court therefore considers that the terms in which Article 283 § 1 is formulated to satisfy the qualitative requirements emanating from its case law (CASE OF KUDREVIČIUS AND OTHERS V. LITHUANIA, application no. 37553/05, judgment of 15.10.2015, para 113).

Based on the above, it is worth mentioning that the general logic in terms of ensuring the principle of legal certainty suggests that although legal certainty is necessary, nonetheless, this principle does not exclude the existence of such formulations or terms in legal acts, which are of an evaluative nature, and in each specific case the latter are more clarified within the framework of legal practice.

As for the issue of compliance with the constitutional principle of certainty of the wording of the contested regulations ("criticizing", "refuting", "questioning their effectiveness", "questioning the defense capability", and "otherwise depreciating"), it should be noted that the presence of such wordings in the legal acts is inevitable due to the fact that in a number of cases, for the comprehensive presentation of the circumstances and for the adequate assessment of the act, it is impossible to refrain from using such wordings, the content of which should primarily be revealed within the framework of legal practice. In that regard, it is objectively impossible to exhaustively and completely present the definitions of a number of wordings of contested regulations defined by the Annex to this Decision since

the latter are of an evaluative nature, and their content should also be revealed within the framework of legal practice. The maximum clarity of those norms should be guaranteed also within the framework of the acts adopted as a result of their application, so that it is clear and distinct for the addressee to determine, for instance, whether his action is criticizing, refuting, questioning their effectiveness/ defense capability, or otherwise depreciating.

The above-mentioned also refers to the legal regulations prescribed by Article 182.5 §§ 5-7 of the Code, in the context of the issue of compliance of those regulations with the constitutional requirements of certainty.

At the same time, in line with assessing the content of a number of wordings of the disputed provisions in legal practice, the Constitutional Court emphasizes, in this case, the imperative that the provisions/wordings of the legal acts envisaging restrictions on the freedom of expression must be as certain, clear, predictable and accessible as possible, to exclude their misunderstandings/arbitrary interpretations. The mentioned circumstance is important, first of all, for those addressees with respect to whom the respective regulations (provisions/wordings) are applied, so that the latter are able to realize their essence/requirements as clearly as possible, to adjust their behavior to these requirements, and to predict the possible consequences of their conduct in this regard; and this circumstance is also important for the entities applying/interpreting those regulations.

With respect to the above, the Constitutional Court Decision DCC-1488 of November 15, 2019, states as follows: "(...) the clarity, predictability and accessibility of laws restricting fundamental rights or freedoms are directly proportional to the degree of the restriction of the fundamental right: **the more intense this restriction is, the more clear, predictable and accessible the wording of the** said **laws should be**, in order to avoid ambiguity regarding the existence and content of prohibitions, other restrictions or obligations imposed on individuals;

(…) considering the diversity of vital issues, and the impossibility of responding to all situations through the rule-making activity, the requirement of certainty in legislative and sub-legislative regulations does not exclude the establishment of vague legal concepts in laws and sub-legislative normative legal acts, although such establishment must necessarily be implemented through equivalent interpretation, and in identical cases, uniform interpretation of such concepts, and the failure to do so would make it impossible to attest to the foreseeability of those provisions".

The Constitutional Court considers that the above-mentioned legal positions expressed in the Decision DCC-1488 of November 15, 2019, are also applicable in this case.

Based on the results of the study of the materials attached to the response letter of the Police submitted to the Constitutional Court on March 24, 2021, i.e. the protocols on the administrative offenses prescribed by Article 182.5 §§ 5-7 of the Code, and the decisions on

administrative offenses, the Constitutional Court states that the said protocols and decisions mostly refer to paragraph 9.1 of the Annex to the Decision, the constitutionality of which is also contested in this case. At the same time, the regulations of Article 182.5 § 5 and 6 of the Code are mainly applied.

In that regard, although when indicating and assessing the relevant misdemeanors (administrative offenses), the reference is made to the wordings "criticizing", "questioning the effectiveness", and "otherwise depreciating", as stipulated in paragraph 9.1 of the Annex to the Decision; nevertheless, in the context of qualifying the relevant act as an administrative offense, the content of each of those wordings is not in-depth and duly revealed. In other words, a mechanical approach was demonstrated in essence by referring to the respective norm(s) and wording(s). Moreover, where the wording "criticizing" is clear enough, the same cannot be said about the wordings "questioning the effectiveness", and "otherwise depreciating", which have a high degree of abstraction. Therefore, the margin of appreciation of the authority referencing/applying those wordings is unlimited, in essence. In addition, "questioning the effectiveness", and "otherwise depreciating", together or separately, can be manifested both in the light of criticism (in that context) and have an autonomous content.

Based on the above and stating that the wordings "questioning the effectiveness", and "otherwise depreciating" stipulated in paragraph 9.1 of the Annex to the Decision may lead to ambiguity regarding the existence and content of prohibitions/restrictions for private persons or the duties imposed thereon, the Constitutional Court considers that the wording "questioning the effectiveness or otherwise depreciating" stipulated in paragraph 9.1 of the Annex to the Decision is not consonant with the constitutional principle of certainty.

The study of Article 182.5 §§ 5-7 of the Code indicates that the latter are content-wise related to the provisions reflected in paragraphs 9-9.2 of the Annex to the Decision. In particular, the contents of the terms "report" and "publication" were revealed in paragraph 9 of the Annex to the Decision ("The public dissemination of publications, informational materials, interviews, reports and information about (…) as well as the transmission of other information (hereinafter referred to as a 'report') directly related to the latter, including in the form of the publication of such information on websites and social networks (hereinafter referred to as 'publication')"), and the wording "publication of reports" was used in paragraphs 9.1 and 9.2 of the Annex to the Decision.

The wording "ensuring the legal regime of martial law" was used in paragraph 9.1 of the Annex to the Decision, and Article 182.5 of the Code is titled "Violation of the rules in force during the legal regime of martial law". The wording "violation of the rules of publishing or imparting information" is used in Article 182.5 §§ 5 and 6 of the Code, and the wording "violation of the rules of restriction on freedom of expression of opinion" is also used in Article 182.5 § 6 of the Code. The wording "publication imparted (…) in violation of the rules

of publishing or imparting information" is used in Article 182.5 § 7 of the Code. In Article 182.5 §§ 13 and 14 of the Code, the emphasis is made on the repeat of the acts prescribed by the said Article or the respective part thereof after the date of imposing an administrative penalty.

In that regard, the Constitutional Court considers that the dispositions of the contested norms of Article 182.5 §§ 5-7 of the Code (in terms of wordings) are, in fact, dependent (blanket), which fits within the logic of the rules of legislative technique.

4.4. According to Article 76 of the Constitution, "In a state of emergency or during martial law, fundamental rights and freedoms of the human being and the citizen, with the exception of those prescribed by Articles 23–26, 28–30, 35–37, Article 38 § 1, Article 41 § 1, Article 47 § 1, the first sentence of Article 47 § 5, Article 47 § 8, Article 52, Article 55 § 2, Articles 56, 61, and 63–72 of the Constitution, may be temporarily suspended or subjected to additional restrictions in the procedure prescribed by law to the extent required by the situation, subject to the international commitments undertaken with respect to derogations from commitments in emergency situations".

According to Article 81 of the Constitution, "1. The practice of bodies operating on the basis of international human rights treaties, which have been ratified by the Republic of Armenia, shall be taken into account when interpreting the provisions of the Constitution on fundamental rights and freedoms.

2. Restrictions of fundamental rights and freedoms may not exceed the restrictions prescribed by the international treaties of the Republic of Armenia".

Thus, in accordance with Article 76 of the Constitution, in a state of emergency or during martial law, the freedom of expression may be temporarily suspended or subjected to additional restrictions, but only to the extent required by the situation, subject to the international commitments undertaken with respect to derogations from commitments in emergency situations.

In accordance with Article 15 § 1 of the **European Convention for the Protection of Human Rights and Fundamental Freedoms** (hereinafter referred to as the "Convention"), titled "Derogation in time of emergency", in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. In other words, any member state of the Council of Europe can derogate from its obligations under the Convention to the extent strictly required by the exigencies of the situation.

The ECHR has emphasized that the States do not enjoy an unlimited power in this respect, and the Court is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis (CASE OF IRELAND V. THE UNITED KINGDOM, application no. 5310/71, judgment of 18.01.1978, para 207). The Court examines, inter alia, whether the ordinary laws were sufficient to overcome the emergency situation (CASE OF IRELAND V. THE UNITED KINGDOM, application no. 5310/71, judgment of 18.01.1978, para 212); whether the derogation has a limited scope, and whether the reasons are advanced in support of it; whether the safeguards were introduced along with the measures imposed; whether it was in practice possible to exercise judicial review in these cases (CASE OF BRANNIGAN AND MCBRIDE V. THE UNITED KINGDOM, application no. 14553/89; 14554/89, judgment of 26.05.1993, paras 59, 61-66); whether the measures taken were proportionate to the purpose pursued; and whether unjustifiable discrimination existed (CASE OF A. AND OTHERS V. THE UNITED KINGDOM, application no. 3455/05, judgment of 19.02.2009, para 190).

Derogation from the assumed obligations requires domestic authorities to observe the principle of strict necessity, according to which the severity, duration and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent. The application of any derogation measure from the provisions of the **International Covenant on Civil and Political Rights** should be avoided in all situations where ordinary measures permissible under the specific limitation clauses of the Covenant would be adequate to deal with the threat to the life of the nation. Each measure shall be directed to an "actual, clear, present or imminent danger" and may not be imposed merely because of an apprehension of potential danger (the Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights, 28.09.1984, E/CN.4/1985/4, paras 51, 53, and 54).

"No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the Government.

(…) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology (…)" (the Johannesburg Principles on National Security, Freedom of Expression and Access to Information", Article 19, London ISBN 1 870798 89 9.11.1996, principles 1 (d), and 2 (b)).

4.5. Although the restriction of rights and derogation from the provisions of the Convention implies autonomous legal procedures, it is necessary that the latter are also based on the principle of proportionality.

According to Article 78 of the Constitution, 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 commensurate to the significance of the fundamental right and freedom that is restricted.

The Constitutional Court states that any restriction of fundamental rights is possible only by law, and in this case, the requirements related to the restriction of fundamental rights by law are as follows:

(1) the legitimacy of the aim of the restriction, that is, the constitutional prescription;

(2) (a) the suitability of the means chosen for the restriction, that is, for the achievement of the aim prescribed by the Constitution;

(b) the necessity of the means chosen for the restriction, that is, for the achievement of the aim prescribed by the Constitution;

(c) the commensurability of the means chosen for the restriction to the significance of the fundamental right and freedom that is restricted.

In a number of decisions, the Constitutional Court has touched upon the principle of proportionality. In particular:

(a) " (…) The essence of the principle of proportionality is the **limitation of restrictions** on the fundamental rights of a human being and a citizen by ensuring a reasonable balance between private and public interests, as well as *it is of particular importance* among the constitutional requirements to the restriction of fundamental rights and freedoms" (DCC-1546);

(b) " (...) when exercising the authority to define the duties, the types and extent of liability, as well as the coercion measures of natural persons and legal entities (...), the legislator independently decides, in particular, the content of the provisions of the legislation on administrative offenses, the scope of the actions, the performance of which leads to administrative liability, the scope of entities subject to administrative liability, and defines the measures and extent of administrative liability. The legislator's discretion in the mentioned issues, however, has its own constitutional frameworks, and the legislator is constrained by certain constitutional principles in exercising the above-mentioned authority. (...) The implementation of public power is limited first of all by the general principle of proportionality that derives from the idea of a state governed by the rule of law. This principle

is one of the most important principles underlying legal liability, in general, and administrative liability, in particular (…)" (DCC-920);

(c) " (...) The principle of proportionality first of all requires to ensure a fair balance between the measure and extent of liability, and the legitimate aim pursued by imposing liability;

(…) The constitutional principle of proportionality underlying legal liability also requires that the extent of liability must be differentiated according to the gravity of the act committed, the degree of public danger, the damage caused, the degree of guilt, and other essential circumstances. Accordingly, the legislator is required to establish such a legal regulation of liability that would enable the responsible authority to determine the specific extent of liability to be imposed according to the nature and severity of the misdemeanor (...)" (DCC-924);

(d) " (...)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 prescribed 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 (...)" (DCC-1293);

(e) " (...) the interference with a person's right to property must follow from the need to ensure the execution of a fine and (...) payment by the given person, must be sufficient and necessary to achieve the aim pursued, the power of the competent authority and the procedure for implementation of such power must be certainly defined at the legislative level in view of (…) the need to establish guarantees for the protection of the right to property (…)" (DCC-1153);

(f) " (...) the means chosen by the legislator must also be necessary. The means is necessary in the absence of any other milder interfering means that would allow achieving the aim pursued with the same efficiency" (DCC-1448).

The ECHR has also referred to the principle of proportionality by interpreting this principle for determining the scope of admissibility of restricting human rights and freedoms. "The principle of proportionality is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" (CASE OF SOERING V. THE UNITED KINGDOM, application no. 14038/88, judgment of 07.07.1989, para 89). " (...) the Court must determine whether the proportionality between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights is preserved" (CASE OF THE FORMER KING OF GREECE & OTHERS V. GREECE, application no. 25701/94, judgment of 23.11.2000, para 89).

The ECHR has also emphasized the issue of preserving a reasonable relationship of proportionality between the means employed and the aim sought to be realised (CASE OF PRESSOS COMPANIA NAVIERA S.A. AND OTHERS V. BELGIUM, application no. 17849/91, judgment of 20.11.1995, para 38). At the same time, the ECHR has expressed the position that the restrictions on fundamental rights and freedoms must be proportionate to the circumstances so as not to violate the constitutional values (CASE OF GRIGORIADES V. GREECE, application no. 121/1996/740/939, judgment of 25.11.1997).

The Court must consider the interference in light of all the circumstances of the case as a whole. In particular, it must determine whether the interference at issue was proportionate to the legitimate aim pursued (CASE OF BARFOD V. DENMARK, application no. 11508/85, judgment of 22.02.1989, § 28). The Court has to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 of the Convention and, moreover, that they based themselves on an acceptable assessment of the relevant facts (CASE OF JERSILD V. DENMARK, application no. 15890/89, judgment of 23.09.1994, SERIES A no. 298, p. 24, § 31).

In the Decision DCC-1546 of June 18, 2020, the Constitutional Court addressed in detail each of the elements of the principle of proportionality in terms of content. Accordingly, "The first element of the principle of proportionality is the *legitimacy of the aim of restricting* the fundamental right, that is, to be envisaged by the Constitution. This means that when exercising the power to restrict a fundamental right, the legislator must take as basis the aim prescribed by the Constitution. In all cases, where those aims are directly prescribed by the constitutional provisions relating to a restricted fundamental right or liberty (…), the legislator has the power to specify them only in the laws; in other cases, the legislator itself discloses the constitutional content of the aim of the restriction defined by the law, based on the interpretation of the relevant norms of the Constitution.

Convinced of its constitutional aim disclosed, the legislator shall then choose the means to achieve it. Therefore, *the constitutionality of the chosen means is predetermined primarily by the aim pursued thereby*.

As for the choice of means by the legislator to achieve the constitutionally justified aim, first of all, they must be suitable for achieving the mentioned constitutional aim. That is to say, suitable legislative means, by which *the legislator is able to achieve the pursued aim*; in other words, when the probability is ensured that the result, that the legislator aspires to, will appear.

The *necessity* of the means chosen by the legislator is the next element of the principle of proportionality, that is, this means together with the others, must presuppose the most moderate interference with any fundamental right or freedom. From all the means suitable for

achieving the aim defined by the Constitution, the legislative means should be chosen, which, with the same probability of achieving the aim, that is, with the same effectiveness yet more moderately restricts any fundamental right or freedom.

The fourth and last element of the principle of proportionality requires the legislator to compare the chosen *suitable and necessary* means with the *constitutional significance* of the restricted fundamental right or freedom to determine whether, by virtue of that means, the State actually achieves the aim pursued; and the restricted fundamental right or freedom, by its significance, *does not maintain its supremacy over the public interests*, and for the purpose of the protection of the latter, the legislator applies the restriction of the fundamental right or freedom. Ultimately, this means that **it is a rule not to interfere with or guarantee a fundamental right or freedom, depending on its nature, and the restriction thereof is an exception**, which must be justified in each case of restriction. Thereby, **the more intense is the restriction, the greater is the burden of justifying the restriction"**.

Considering the contested regulations of the Code in the light of the above, the Constitutional Court states that those regulations fit within the logic of Article 76 of the Constitution, and are consonant with the constitutional principle of proportionality in terms of restricting the freedom of expression. At the same time, based on the results of the study of the materials attached to the response letter of the Police submitted to the Constitutional Court on March 24, 2021, i.e. the protocols on the administrative offenses prescribed by Article 182.5 §§ 5-7 of the Code, and the decisions on administrative offenses, it should be noted that the administrative authority generally imposed a fine in the minimum amount for the offenses prescribed by the respective parts of Article 182.5 of the Code.

As for Article 182.5 §§ 13 and 14 correlated with Article 182.5 §§ 5-7 of the Code, the Constitutional Court states that envisaging stricter liability for the same act after being subject to the penalties is fairly widespread in terms of the legislative regulations on administrative liability. In this regard, the imposition of the most severe types of administrative penalties, and in the case of fines - the larger amounts thereof (in case of re-commitment of the same violation) is within the jurisdiction of the legislator. Therefore, the mentioned provisions are not problematic in terms of ensuring the constitutional principle of proportionality.

At the same time, the Constitutional Court considers that **when applying the above-mentioned liability to a person/media in law enforcement practice, the law enforcer must take into account the property status of a person/media, and impose the mildest fine possible within the limits allowed by law in all cases where a real danger exists that the imposition of a more severe amount of fine would impose a disproportionately heavy material burden on a person/media, which would have a negative decisive financial impact on the latter's activity, and in the case of a media, it will inevitably lead to the**

cessation of the latter's activity (including actual), which is unacceptable due to the significance of the media in a democratic society.

Based on the examination of the case and subject to Article 168(1), Article 169 § 1(10), and Article 170 of the Constitution, as well as guided by Articles 63, 64, and 68 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. To declare the wording "questioning their effectiveness, or otherwise depreciating" prescribed by paragraph 9.1 of the Annex to the Decision No. 1586-N of the Government dated 27 September 2020 on Declaring Martial Law in the Republic of Armenia, contradicting Articles 42 and 79 of the Constitution and void.

2. Paragraph 9.2 of the Annex to the Decision No. 1586-N of the Government dated 27 September 2020 on Declaring Martial Law in the Republic of Armenia complies with the Constitution.

3. Article 182.5 §§ 5-7 and correlated §§ 13 and 14 of the Administrative Offences Code of the Republic of Armenia comply with the Constitution.

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

PRESIDENT

A. DILANYAN

May 4, 2021

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