



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

---

**ON THE CASE CONCERNING THE DETERMINATION OF THE ISSUE  
REGARDING THE CONFORMITY OF ARTICLE 55, PART 4 OF THE CRIMINAL  
CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE  
REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF “ACBA-  
CREDIT AGRICOLE BANK” CJSC, “ARTCAKHBANK” CJSC, “HSBC BANK  
ARMENIA” CJSC AND “VTB-ARMENIA BANK” CJSC**

Yerevan

12 July 2011

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

with the participation of the representatives of the Applicants: R. Sargsyan, A. Galstyan, H. Harutyunyan, K. Petrosyan

representative of the Respondent: D. Melkonyan, the Adviser of the Chairman of the National Assembly of the Republic of Armenia,

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

examined in a public hearing by a written procedure the Case concerning the determination of the issue regarding the conformity of Article 55, Part 4 of the Criminal Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of “ACBA-Credit Agricore Bank” CJSC, “Artcakhbank” CJSC, “HSBC Bank Armenia” CJSC AND “VTB-Armenia Bank” CJSC.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by “ACBA-Credit Agricole Bank” CJSC, “Artcakhbank” CJSC, “HSBC Bank Armenia” CJSC and “VTB-Armenia Bank” CJSC on 2 March 2011.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicants and the Respondent, having studied the Criminal Procedure Code of the Republic of Armenia, the Law of the Republic of Armenia on the Constitutional Court, the challenged norms and other documents of the Case, the Constitutional Court of the Republic of Armenia **FOUND:**

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

The RA National Assembly amended Article 55 of the RA Criminal Code by the RA Law HO-206-N on Amending the Criminal Code of the Republic of Armenia adopted on 28.11.2006, which entered into force on 04.01.2007. Due to these amendments, Article 55 of the Code was formulated in the following wording.

The challenged Part 4 of Article 55 of the RA Criminal Code, titled Confiscation of property, states: “It is obligatory to confiscate the proceeds derived from crime, as well as the property, originated or acquired directly or indirectly as a result of legalization of the incomes derived from crime and commitment of the deeds stipulated by Article 190 of this Code including the income or any other benefit received from the utilization of that property, tools used or prescribed to be used for the commitment of these deeds, and in the case of non-detection of the property perceived from crime, confiscation of any other property relevant to this property. That property shall be confiscated despite the circumstance if it is the property of the accused or any other third party if the latter are its owner.”

The Applicants first challenged the constitutionality of Article 55, Parts 2 and 7 of the RA Criminal Code. By the Decision of the DJCCC/1-9 dated 18 March 2011 the judicial composition No. 1 of the RA Constitutional Court examined the Case regarding the part concerning the Decision on the constitutionality of Article 55, Part 4 of the RA Criminal Code, rejecting the examination of the Case due to Part 7 of the same Article.

2. The judicial prehistory of the Case is the following: the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan examined the criminal case ԵԿԴ-0094/01/09 based on the accusation (indictment) against Cornel Konstantin Romica Stengachu by Article 203, Part 3, Point 1, Article 177, Part 3, Points 1 and 2, Article 190, Part 3, Point 1 and by its Decision dated 12.10.2009 found Cornel Konstantin Romica Stengachu guilty for committing the deeds prescribed by the above mentioned Articles, and sentenced the latter to imprisonment for the term of 12 years, confiscating the

entire property, but not more than 64.142.000 AMD, confiscating the proceeds of crime prescribed by Article 55, Part 4 of the RA Criminal Code.

The Court satisfied the Civil claims of the Applicants and decided to confiscate in total 25,457,000 AMD from the accused as compensation for the damage caused by the crime.

Besides, the Court decided to leave the sequester arrest on the money and property of Cornel Konstantin Romica Stengachu made by the Decision dated 11.10.2008 unchangeable, till the implementation of the judgment regarding the part concerning the property obligations against him.

Discussing the issue of physical evidence, the Court decided to confiscate the amount of 25.200 Euros and 4.040.000 AMD recognized as physical evidence by the Decisions dated 24.12.2008 and 30.03.2009 as proceeds of crime prescribed by Article 55, Part 4 of the RA Criminal Code.

After the judgment entered into legal force, the Applicants received writs of execution regarding satisfaction of the Civil Claim for compulsory enforcement of the judgment and lodged them to the RA Compulsory Enforcement of Court Decrees of the Ministry of Justice.

The CECD service informed the Applicants that the RA Prosecutor's Office was the first to lodge a writ of execution regarding this Case to ensure confiscation of the entire property of the accused but not more than 64.142.000 AMD.

The Applicants applied to the Court which rendered the judgment demanding to interpret the ambiguity of the judgment. On 03.06.2010, as a result of discussion of the lodged Applications the Court made a Decision according to which it interpreted the ambiguity of the rendered judgment in the following way: "After the judgment entered into legal force, the amounts of 25.200 Euros and 4.040.000 AMD, cell phones and the eye glasses recognized as physical evidence as proceeds of crime prescribed by Article 55, Part 4 of the RA Criminal Code, are subject to confiscation despite the circumstance of being the property of the accused Cornel Konstantin Romica Stengachu or any third party, or the circumstance of being owned by them. This sums and items cannot be confiscated in favor to Civil Claimants and cannot be directed to compensate the damages caused to the Civil Claimants and the aggrieved. Fulfilling the judgment in regard to satisfied civil claims, the confiscation shall be extended not over (on) the amounts of 25.200 Euros and 4.040.000 AMD, cell phones and the eye glasses recognized as physical evidence, but over the funds and other property owned by Cornel Konstantin Romica Stengachu."

The mentioned Decision was appealed at the RA Criminal Court of Appeal. The latter by the Decision dated 15.07.2010 concluded that the Decision of the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan is substantiated and reasoned; there are no grounds to abolish, amend or dismiss it. Hence, the Court decided to decline the appeals lodged by the representatives of the Applicants against the Decision dated 3 June 2010 of the same Court on interpreting the ambiguity of the judgment dated

12.10.2009 of the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan.

The representatives of the Applicants lodged Cassation Appeals against the Decision of the RA Criminal Court of Appeal dated 15.07.2010, which were returned by the Decision of the RA Court of Cassation dated 02.09.2010.

**3.** Challenging the constitutionality of Article 55, Part 4 and Part 7 of the RA Criminal Code, the Applicants stated that they contradict Articles 3, 6, 8, 18, 19, 20, 31 of the RA Constitution, as far as these norms precisely prescribe the term of “conscientious third party” and stipulate confiscation of the proceeds of crime irrespective of the will of the conscientious third party (aggrieved) without primary recovery of the property of the conscientious third party or providing guarantees for relevant compensation by the State.

Referring to the provisions proscribed by Article 3, Part 2, Article 6, Parts 1, 2 and 4 of the RA Constitution and a number of the international treaties ratified by the RA, the Applicants point out that the Republic of Armenia has obliged to create necessary legislative remedies to confiscate the profits received from the money laundry or the previously committed crimes, tools used or planned to be used for commitment of those crimes or any other relevant property, at the same time not jeopardizing the rights of the conscientious third party.

In this context the Applicants point out that in the case when Article 55, Part 6 of the RA Criminal Code prescribes that the property of the conscientious third party shall not be confiscated, Part 7 of this Article precisely determines the term “conscientious third party.” The Applicants conclude that, according to the logics of the law, only the person who voluntarily passed the property to another person can be considered as conscientious. As a result, according to the Applicants, from this definition derives that, if the property passed to the person who committed the crime despite the will of the legitimate possessor, then according to Article 55 of the RA Criminal Code that person cannot be considered as conscientious third party, and consequently, in the process of confiscation the protection of the rights of the aggrieved is not assured.

**4.** Regarding the constitutionality of the challenged provision, the Respondent did not present any substantiation *inter alia*. The Respondent made a motion to terminate the proceeding of the Case, reasoning that the Applicants had not expired the remedies of judicial defense at the Courts of General Jurisdiction.

**5.** Pursuant to Article 69, Part 1 of the RA Law on the Constitutional Court: the appeals on the cases described in this Article (hereinafter individual appeals) can be brought

by those natural and legal persons who were participants at the courts of general jurisdiction and in specialized courts, in relation of who the law was implemented **by the final judicial act**, who exhausted all the remedies of judicial protection and who believe that the provision of the Law applied for the particular case contradicts the Constitution.

In the case of considered subject matter, the judgment dated 12.10.2009 of the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan shall be the final judicial act resolving this Case.

As an additional remedy of defense, Article 430 of the RA Criminal Procedure Code prescribes the solution of suspicions and ambiguity regarding the court decision.

The judgment adopted in accordance with this Article, in this case the decision on interpreting the ambiguity of the judgment, together with the act inter alia resolving the case, that is the judgment, composes a systemic entity. Consequently, using the possibilities prescribed by law for appealing the decision on interpretation of ambiguity of the judgment, the Applicants expired the remedies of defense versus the judgment resolving the Case inter alia.

Based on the above mentioned, the Constitutional Court states that the motion of the Respondent on termination of the proceeding of the Case is not grounded.

Simultaneously, the Constitutional Court states that no time limitation is stipulated for implementation of additional remedy of defense prescribed by Article 430 of the RA Criminal Procedure Code, which, in practice can lead to the abuse of the right to enjoy that remedy of defense.

**6.** The Constitutional Court finds necessary to consider the constitutional legal dispute expressed in the framework of this Case from the viewpoint of the State's positive duty to defend the private property of persons from illegal actions of others, as well as from the viewpoint of guaranteeing effective defense of the rights and legal interests of the aggrieved. The Constitutional Court finds necessary to consider also the challenged legal regulation and the mentioned issues in the context of International obligations assumed by the Republic of Armenia. Therefore, the Constitutional Court finds necessary to clarify:

- whether the supposed violation of the constitutional rights of the Applicants is conditioned with the regulation of Article 55, Part 4 of the RA Criminal Code, according to which the proceeds of crime is subject to confiscation despite the circumstance of being the property of any third party or being possessed by him/her,

- whether the RA legislation prescribes a relevant effective institution guaranteeing the possibility to recover the damage caused by crime to the aggrieved.

7. According to Article 3 of the RA Constitution, the state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of international law.

The European Court of Human Rights defining the scopes of State duties in the sphere of protection of the right of property guaranteed by Protocol No. 1, Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, developed the idea of positive duties of the State. The latter, in particular, is expressed in the fact that the real and effective implementation of the right to property does not depend only on the State's duty not to interfere, but demands also certain positive actions of defense in particular, when there is a direct link between the effective implementation of the property rights of the person and the activities the person can lawfully anticipate from the authorities (§ 134 of the Grand Chamber judgment, dated 30 November 2004 on the CASE OF ÖNER YILDIZ v. TURKEY). According to the European Court, in the sphere of protection of the right to property the positive duty of the State, among the others, can include the duty to provide compensation.

Considering the issue of protection of the property rights of the crime victims in the context of the positive duty of the State in the sphere of protection of property right, the Constitutional Court states that the principle of immunity of property not only means that the owner as the carrier of subjective rights is authorized to demand that others shall not violate his/her right to property but also assumes the duty of the State to protect the persons' property from illegal infringement. In this situation in question, this duty of the State demands to ensure effective mechanism for protection of property rights of the crime victims and for recovery of damages.

8. A number of International legal documents, particularly, the United Nations Convention against Transnational Organized Crime, which entered into force for the Republic of Armenia on 29 September 2003, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention), which entered into force for the Republic of Armenia on 1 March 2004 and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention), which entered into force for the Republic of Armenia on 1 October 2008 stipulate provisions, according to which, property perceived from crime is subject to obligatory confiscation. By these international legal documents the State Parties and Member States, as well as the Republic of Armenia undertake obligations to initiate such legislative or other activity, which shall allow ensuring confiscation of the property perceived from the mentioned crimes proscribed by these Conventions.

Simultaneously, the mentioned international legal documents prescribe certain legal guarantees for the protection of legitimate interests of the victims of respective crimes. Particularly, according to Article 14 of the United Nations Convention against Transnational Organized Crime, as well as Article 25 of the Council of Europe Convention on Laundering,

Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention) the States Parties shall give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party **so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.** Article 25 of the United Nations Convention against Transnational Organized Crime titled Assistance to and protection of victims obligates the States Parties to establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

9. In the framework of this Case, the Constitutional Court particularly emphasizes the revelation of the constitutional legal content of confiscation of property as an institution, type of punishment, by implication of Article 55, Part 1 of the RA Criminal Code, on the one hand and the institution of confiscation of the property perceived from crime on the other.

Section 3 of the RA Criminal Code titled “Punishment,” Chapter 9 titled “Notion of punishment, purposes and types,” Article 49 titled “Types of punishment” defines the types of punishment amongst them mentioning also confiscation of property (Point 5). Articles 51-61 of the RA Criminal Code reveal the content of each type of punishment mentioned in Article 49: Article 55 of this Code reveals the content of confiscation as supplementary punishment.

According to Article 50 of the RA Criminal Code, confiscation of property as supplementary punishment can be assigned only in cases for grave and particularly grave crimes envisaged in the Special Part of this Code. In the sanctions of the Articles of the Special Part, confiscation is envisaged either as obligatory supplementary or non-obligatory supplementary punishment. Article 55, Part 1 of the RA Criminal Code determines the definition of confiscation of property as supplementary punishment. According to that definition, confiscation of property is the enforced and uncompensated seizure of the property **considered as the convict’s property or part thereof in favor of the state.**

The comparative analysis of Articles 50 and 55 of the RA Code state that confiscation of property perceived from crime by its essence, tasks and goals stipulated in the challenged Part 4 of Article 55 of the RA Code is not equivalent to the confiscation prescribed in Part 1 of this Article. Article 55 of the RA Criminal Code differentiates confiscation of property as a supplementary type of punishment and objects of confiscation of property perceived from crime prescribed by Article 55, Part 4. If, in the case prescribed by Article 5, Part 1, exclusively the **legitimate** property of the accused is the object of confiscation as a supplementary type of the punishment, then the object of confiscation prescribed by the challenged Part 4 of this Article is other than the legitimate property of the accused, i.e. the property which is purchased as result of the crime, and, as a rule, it is the property of the aggrieved. The next essential difference between the institutions of confiscation prescribed by Article 55, Parts 1 and 4 of the RA Criminal Code is in the fact that if confiscation of the property of the accused, as a supplementary type of the punishment can be applied exclusively in the cases for grave and particularly grave crimes, its application can be left at the discretion

of the court and it can be non-mandatory, then, in the case of confiscation of property perceived from crime, confiscation is mandatory and it is applied regardless of gravity of crime.

The Constitutional Court finds necessary to state that, regulating the relations on confiscation of property and, concerning the procedure of confiscation, referring to the procedure stipulated by the RA Law on Compulsory Enforcement of Court Decrees (Article 39 of the RA Criminal Executive Code), the RA Criminal Executive Code purports exclusively the confiscation of property as a supplementary type of punishment. Particularly, clarifying the scopes of the property subject to confiscation, Article 40 of that Code states that the property subject to confiscation includes **the property under ownership of the accused**.

Taking into account the fact that the institution of confiscation of property as a supplementary type of punishment prescribed by Article 55, Part 1 of the RA Criminal Code and the institution of confiscation of property perceived from crime prescribed by Part 4 of the same Code essentially differ from each other and the property subject to confiscation in that framework is clearly differentiated, the Constitutional Court states that in the case, when these two institutions are applied parallel, objectively no legal collision or any issue of priority of law enforcement can emerge on the satisfaction of demands of confiscation of the property of the accused and confiscation of property perceived from crime, as, on the one hand, the property of the accused is the object of confiscation and on the other hand the property perceived from crime is.

Based on the above mentioned the Constitutional Court finds that confiscation of property as a supplementary type of the punishment and confiscation of property perceived from crime are different institutions by their constitutional legal content with different tasks and objectives. As a supplementary type of the punishment straight directed against the property of the accused, the institution of confiscation follows from Article 31, Part 2 of the RA Constitution, as **in this case confiscation of the property of the accused is a measure of compulsion following from liability that lawfully abuses the right of ownership of the accused**. Meanwhile, in the case of confiscation of the property perceived from crime, the aim of confiscation is to withdraw the property perceived from crime from the accused, and in this case, the right of ownership of the accused is not abused. Hence, taking into account that, as a rule, the property perceived from crime is the property of the aggrieved, in the case of confiscating that property, perception of the concept of confiscation is inadmissible by implication of Article 55, Part 1 of the RA Criminal Code that is, voluntarily handling the confiscated property into the state's ownership without restoring the right of ownership of the aggrieved, as in the case of such perception the measure of confiscation is straight directed against the right of ownership of the aggrieved unlawfully abusing his/her right of ownership. **The Constitutional Court finds that voluntarily handling that property into the state's ownership blocks the possibility to satisfy the property interests of the aggrieved at the expense of the property perceived from crime and the possibility to restore violated right of ownership.**



10. In the framework of this Case, the issue of guaranteeing compensation to the aggrieved for recovery of damages due to crime when applying the challenged norms on confiscating the property perceived from crime, and it is also constitutional legal duty of the state particularly stipulated by Articles 3, 20 /Part 5/ and 43 /Part 2/ of the RA Constitution.

According to Article 115 of the RA Criminal Procedure Code, money, valuables and other objects and documents which can serve as means to discover a crime, determine factual circumstances, expose the guilty person, prove a person's innocence or mitigate responsibility are acknowledged to be material evidence. Article 119 of the same Code states the rules according to which the issue of material evidence shall be solved in the sentence of the court as well as in the decision on dismissing the case. According to Part 1, Point 3 of this Article, money and other valuables **which cannot be legally possessed due to committing a crime or any other action prohibited by law shall be returned to the owners, possessors or their successors**. According to Part 1, Point 4 of the same Article, money, items and other valuables obtained in an illegal way shall be used **to cover** the court expenses and **damages of the crime**, and if the person who suffered the damages is unknown, the money shall be forwarded to the state budget. Simultaneously, according to these provisions, Article 59, Part 1, Point 17 and Article 61, Part 2, Point 3 of the RA Criminal Procedure Code state the right of the injured and the civil plaintiff, respectively, to get back the property, seized by the body conducting criminal proceedings as a material evidence.

The above-mentioned analysis states that in the process of confiscating the property perceived from crime, the RA criminal-procedural legislation guarantees the possibility to restore damages of the crime, and according to the above-mentioned legal regulation, it assures recovery of damages for the injured as a matter of high priority at the expense of the confiscated property, that is the property perceived from crime, including recovery of damages by judicial means, which directly follows from the norms stipulated by Articles 3, 18 and 19 of the RA Constitution. Accordingly, the Constitutional Court states that application of Article 55, Part 4 of the RA Criminal Code can be considered lawful only when the property perceived from crime is returned to the owner, possessor or their successors, according to Article 119, Part 1, Point 3 of the RA Criminal Procedure Code.

Moreover, even if the property perceived from crime is not enough to recover the property which cannot be legally possessed due to committing crime, the RA legislation, as a supplementary type of punishment, provides the possibility to satisfy the interests of the aggrieved at the expense of the property confiscated from the accused. Particularly, according to Article 69 of the RA law on Compulsory Enforcement of Court Decrees, from the value of the property of the accused subject to confiscation, the damages of the crime are satisfied.

The Constitutional Court states that Article 55, Part 4 of the RA Criminal Code, according to which, property perceived from crime shall be confiscated despite the circumstance if it is the property of the accused or any other third party if the latter are its owner, and, according to Article 119, Part 1, Point 3 of the RA Criminal Procedure Code, it does not suppose necessary protection of the right to property of the aggrieved. In such situation not only intersystem contradictions emerged, but also the institutions confiscation of

the property of the accused, as a type of punishment and confiscation of the property perceived from crime were identified. In the law-enforcement practice, the challenged legal regulation is interpreted the way according to which, in the case when the entire property perceived from crime is confiscated in favor of the State without protection of the property interests and right of ownership of the aggrieved , that is the legitimate owner.

Proceeding from the results of consideration of the case and ruled by the provisions of Article 100, Part 1 and Article 102 of the RA Constitution, Articles 63, 64 and 69 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare the provision “That property shall be confiscated despite the circumstance if it is the property of the accused or any other third party if the latter are its owner” of Article 55, Part 4 of the RA Criminal Code in regard to the content used in law-enforcement practice, that does not guarantee necessary protection of property rights and right to ownership of the aggrieved /legal owner/, to be incompatible with the requirements of Article 20, Part 5 and Article 31, Part 2 of the Constitution of the Republic of Armenia and invalid.

2. Pursuant to Article 102, Part 2 of the RA Constitution this decision is final and enters into force from the date of announcement.

**Chairman**

**G. Harutyunyan**

12 July 2011  
DCC-983