IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE APPLIED BY CITIZEN VARDAN MALKHASSYAN CONCERNING THE DETERMINATION OF THE ISSUE REGARDING THE CONFORMITY OF ARTICLE 301 WITH THE RA CONSTITUTION

Yerevan city 14 October 2008

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (presiding judge), K. Balayan, H. Danielyan (rapporteur), F. Tokhyan, V. Hovhanissyan, Z. Ghukhassyan (rapporteur), H. Nazaryan R. Papayan, V. Poghosyan,
with the participation of
the representatives of the Applicant: attorney M.Shushanyan,
the respondent: the representative of the National Assembly of the Republic of Armenia, the head of the department of Analysis of the Staff Regulation of the RA National Assembly A.Khachatryan,
pursuant to Article 100, point 1, Article 101, point 6 of the RA Constitution, Articles 25, 38 and 69 of the Law on "The Constitutional Court"
examined in a public hearing the case applied by citizen Vardan Malkhassyan concerning the determination of the issue regarding the conformity of article 301 with the RA Constitution
The case was initiated through the application of 26.05.2008 submitted to the Constitutional Court by the citizen Vardan Malkhassyan.
Having heard the report put forward by the rapporteur judges on this case, the explanations of the representatives of the Applicant, having studied the documents submitted by them, the Constitutional Court of the Republic of Armenia

FOUND

1. The RA Criminal Code was adopted by the National Assembly on April 23 2003, it was signed by on April 29, 2003 by the President of RA and pursuant to Article 1 of the RA Law on "Entering into force the RA Criminal Code" was entered into force on August 1, 2003. Article 301 of the RA Criminal Code is entitled "Public calls for changing the constitutional order of the Republic of Armenia by force." The Article envisages "Public calls for seizing state power by force, changing the constitutional order of the Republic of Armenia by force

are punished with a fine in the amount of 300 to 500 minimal salaries or with arrest for the term of 2-3 months, or with imprisonment for the term of up to 3 years."

2. According to the judicial acts presented in the case, V.Malkhassyan in 2006, December 2, participated at the first meeting of "Unit of the Armenian volunteers" organized by the public initiative coordinator "Protection of the freed territories", the chair of the board of guardians of "Araks-Kur" re-settlement and development foundation J. Sefilyan which took place at the hall of the state college of art of dance and in the presence of 150 people made public calls of the seizure of power by force.

By the verdict rendered by Yerevan Centre and Nork-Marash First Instance Court on August 6 2007 the applicant was recognized guilty pursuant to Article 301 of the RA Criminal Code and was sentenced to two years of imprisonment. The Appeal Court on the Criminal Cases by its decision of 25.09.2007 left the decision of Yerevan Centre and Nork-Marash First Instance Court on August 6 2007 unchangeable and did not satisfy the appeal.

The RA Cassation Court by its 04.05.2008 decision returned the cassation appeal.

3. The applicant finds that the expressions of disposition as "Public calls directed towards the seizure of the state power by force" and "Public calls directed towards the seizure of the constitutional order of the Republic of Armenia by force" stipulated in Article 301 of the RA Criminal Code cause legal vagueness and by this contradict to Articles 1, 2, 3, 5, 14.1, 16, 27 and 43 of the RA Constitution.

Particularly, according to the applicant the expressions "Public calls directed towards the seizure of the state power by force" and "Public calls directed towards the seizure of the constitutional order of the Republic of Armenia by force" envisaged in the disputed Article because of judicial vagueness cannot be interpreted correctly by the judicial implementary bodies and on the basis of this, the applicant's opinion expressed in public was considered as a deed prescribed by Article 301 of the RA Criminal Code and as a result the among the others the right of expression of the opinion by the applicant was limited.

The applicant party stated power is not a material phenomenon and consequently it cannot be subjected to the influence of material phenomena among which is the seizure by force. According to the applicant, the comprehension of power as a material phenomenon as well as "state power" and "state power implementing official" and its identification was accepted in the totalitarian soviet society and the disputed article of the RA Criminal Code by its contents is a soviet prototype, which cannot be accepted, in the democratic society.

Besides the issue of legal vagueness of the disputed provisions, the applicant arises the issue of discrepancy between the legal regulation and objective reality grounding on their own versions of interpretation of the contents of the expressions of "Public calls directed towards

the seizure of the state power by force" and "Public calls directed towards the seizure of the constitutional order of the Republic of Armenia by force". Particularly, by stating that the concepts of "state power" and "power of people" are identical and the people realize their power as state power and local self government as well as taking into consideration that in accordance with Article 104 of the RA Constitution the local self government is the right and capacity of the community, the applicant party summarizes that the concept of "state power" means "ability and right of the Armenian people to solve their problems of state importance on their own responsibility". On the basis of this definition and the arguments on the essence and type of the power the applicant party states that in the objective reality it is not possible to seize the rights and capacity of the people and in the case of direct, common and literal interpretation of the disputed provisions as a result nonsense can be achieved." The applicant finds that the "public calls" directed to "to seize the power by force" or "to change the constitutional power by force" are "impossible in reality" and they are not and cannot be considered as dangerous "deeds"; their banning is "a Protection" from non-existing, imaginary danger; it provides not legal definition, accessibility and predictability, but, on contrary, it "ensures" legal vagueness, vulnerability and discrimination, so it contradicts to the Constitution and Convention".

Analyzing the disputed provisions of Article 300 and 301 of the RA Criminal Code as well as correlations of Articles 2, 3 and 5 of the RA Constitution, the applicant party comes to a general conclusion that the disputed provisions and contents of the Part 11 of the Code keeps the RA Criminal Code on the level of the civilization crisis of the soviet past by its contents, essence, inner logics, and value system.

4. The respondent objected to the arguments of the applicant stating that Article 301 of the RA Criminal Code does not cause any issue of constitutionality in the frame of the inquiries of the applicant and does not see sufficient grounds for considering it contradicting and invalid to Articles 1, 2, 3, 5, 27, and 43 of the RA Constitution.

The respondent stated that Article 2 of the RA Constitution envisages that seizure of the power by any organization or a person is considered as a crime. The "seizure" implemented in different ways: by force or without a force. The expression "seizure" used in Article 301 of the RA Criminal Code unequivocally assumes violence or threat of violence.

The respondent finds that the direct object of the crime envisaged by Article 301 of the RA Criminal Code comprises the constitutionally formed principles of the RA constitutional order where the principles of the formation and activity of the state power are stipulated. This article criminally pursues the public calls directed towards changing the constitutional order

by force by Article 47 Part 2 of the RA Constitution, by the provisions of Article 43 Part 1 of the RA Constitution and Part 2 of the same article, as well as by international law.

The respondent finds that the call to change by force the constitutional order according to the contents of Article 301 of the RA Criminal Code means "such oral or written or imaginary influence on the consciousness, will or behaviour of people which aims to form among them inclination to change the constitutional order with the help of anti-constitutional means". Therefore, according to Article 301 of the RA Criminal Code the call of violence means anti-constitutional armed means of the political fight, destructive mass actions, destruction, or change of the institutions of power. In addition, the essence of the violence expressed in the calls must sound definitely up to direct mentioning of the way of violence.

The respondent also points out that the expression of seizure of the power by violence "public call directed towards changing the constitutional order by force" is used in the criminal codes of Switzerland, Latvia, Lithuania, Bulgaria and other states. The respondent quotes the conclusion 542/2007 of 17 December 2007 of the European Commission for "Democracy through Law" (Venice Commission) of Council of Europe on the basis of the application of the RA Ombudsman on the issue of conformity of Article 301 of the RA Criminal Code with the European norms, particularly its conformity with Article 10 of European Convention of Human Rights.

According to the respondent, from the point of legal definition the public call directed towards the seizure of any branch of the state power prescribed in Article 301 of the RA Criminal Code is against state power. In this specific case the legal simplicity, certainty, and predictability are insured.

5. Taking into consideration the circumstance that applicant mainly connects the violation of his rights with the legal vagueness of the disputed provisions of the RA Criminal Code and as a result with the wrong interpretation of the latter in the judicial practice, taking as a ground, the requirements of Article 63 Part 1 and Article 67 Part 7 of the RA Law on "The Constitutional Court", the Constitutional Court highlights the importance of the reveal of the constitutional legal significance of the provisions of Article 301 of the RA Criminal Code and the evaluation of the approaches expressed in the practice of implementation.

Simultaneously, in the frames of this case the Constitutional Court considers necessary to find out if the disposition of Article 301 of the RA Criminal Code achieves the legitimate goal from the perspective of constitutional norms and principles and there is a sensitive difference between the concepts of "public calls for seizing state power by force "and "free expression of opinion."

6. In Article 301 of the RA Criminal Code expressions "Public calls for seizing state power by force" and "Public calls for changing the constitutional order of the Republic of Armenia by force" are of subject of correlated evaluation. The constitutional order of the country presents itself as the system of regulation of the fundamental relations of a society, organization of the state power and constitutionally stipulated interrelations between an individual and state. This is based on the completeness of the values and principles, which are separated as the principles of the constitutional order of a state. The order of regulation of fundamental relations of a society, organization of state power and interrelation between an individual and state cannot be defined or changed by this or other ways and methods than is prescribed by the Constitution. Consequently, the interrelation of these disputed provisions can be considered from this point. From the perspective of the constitutional law, the power is the right and capacity to bind the will. The Constitutional Court states that the state power, as the binding means of one of the most important practical element of people's will, which is expressed by the state as the capacity to implement the state's mission publicly and absolutely with the help of definition of the rules of totally obligatory behaviour and ensuring its implementation.

On the constitutional level, the conceptions of "people's power" and "state power" differ. In the countries of democracy, the power belongs to people, which is the only carrier and source of this power. Moreover, Article 2 of the RA Constitution defines that "The people exercise their power through free elections, referenda, as well as through state and local self-governing bodies and public officials as provided by the Constitution." From the analysis of the Articles 1, 2, 3, and 5 of the RA Constitution precedes that **the state power appears as a form of state organized public power of people, which is implemented in accordance with the Constitution and laws, based on check and balance of the legislative, executive, and judicial powers.** This division is implemented based on its functional essence according to which the necessary structures are formed, i.e. the bodies of power, which by the constitution is empowered by **adequate competence and is competent,** to realize only such actions which are authorized by the Constitution and laws.

Based on triple union of the constitutional harmony, the state power implements a function-institute-competence, in the frames of restriction constitutionally prescribed human rights and freedoms. In this triple union the institute and competence are means for the implementation of the function, which based on the principles of representative democracy proceeds in the frames of structures, concrete competences, forms and methods, envisaged by the Constitution and laws and as a result the regulation of the social relations in the entire territory of the country is insured (definition of the rules of obligatory behaviour) and

guarantee of their implementation. All the actions, deprived from this, are considered illegal. Among the number of such illegal actions are considered also the actions stipulated by the Constitution and law to the constitutional institute as a state power function and seized by violence or by another means. Article 47 of the RA Constitution requires that everyone shall be obliged to honor the Constitutions and laws, to respect the rights, freedoms, and dignity of others. The same Article bans the exercise of the rights and freedoms with the purpose of overthrow of the constitutional order, incitement to national, racial, and religious hatred, propaganda of violence or warfare. In this context prohibition of the exercise of the rights and freedoms with the purpose of the overthrow of the constitutional order has the constitutional legal meaning that prohibition of abuse of laws is stipulated for such actions which are directed towards constitutionally prescribed legal regulations making impossible the actions of failing (ruining, destructing, etc) by force.

The prohibition of abuse of rights is also proscribed by Article 17 of the European Convention on the Protection of the fundamental human rights and freedoms.

The state shall create legal guarrantees for the implementation of this constitutional requirement and for the ensuring the stability of the constitutional order of the country.

Taking into consideration the abovementioned approaches, the concepts "Public calls for seizing state power by force" and "Public calls for changing the constitutional order of the Republic of Armenia by force" stipulated in Article 301 of the RA Criminal Code shall be understood as "**an appeal or invitation for enrolling other people in the actions for planning, organization, preparation or implementation of seizure of the functions of legislative, executive or judicial bodies by direct and real threat by violation of the order envisaged by the Constitution of the Republic of Armenia.** The evaluation of factual circumstances of legal implementing practice must deprive from the constitutional legal content: **first, taking into consideration the mentioned circumstance of the infringements on state power functions with the help of illegal (by force) actions**. The aim of the call by force is one: to unite people and direct their violent actions. The calls of criticizing the authorities, substantiating the necessity of resign of the authorities, calls and organization of rallies, marches, and mass rallies, expressions made figuratively cannot be considered as calls of violence.

The bodies of public power and officials must endure even tougher criticism than the one made towards private people. From the other side, this criticism cannot transform into call of violence, which is incompatible with the right of freedom of speech. For corpus delicite the calls of violence must take public turn, i.e. must be obvious and comprehensive, directed to a big scope of people thus instigating to implementation of violence.

From the above mentioned interpretation proceeds that on the essence of Article 301 of the RA Criminal Code the concept of "state power" cannot be identified with the concept of "official" and that cannot be done in the legal implementation practice.

In the context of the disputable provisions all abuses should be evaluated only in the abovementioned contents from the perspective of necessity of the real threat and its prevention directed towards forcible overthrow of the constitutional order. From the perspective of the constitutional norms and principles, only the disposition of Article 301 of the Criminal Code can obtain legitimate character.

7. Pursuant to Article 27 of the RA Constitution, "Everyone shall have the right to freely express his/her opinion. No one shall be forced to recede or change his/her opinion.

Everyone shall have the right to freedom of expression including freedom to search for, receive, and impart information and ideas by any means of information regardless of the state frontiers.

Freedom of mass media and other means of mass information shall be guaranteed.

The state shall guarantee the existence and activities of an independent and public radio and television service offering a variety of informational, cultural, and entertaining programs.

From the analysis of Article 27 of the Constitution follows that the rights defined in parts 1 and 2 of the article concern directly to a person. The provisions defined by parts 3 and 4 of the Article concern the means of mass media, guarantee presence of the corresponding institutional and organizational means and ensure the productive realization of the rights envisaged by parts 1 and 2 of Article 27 of the Constitution. In this sense, Article 301 of the RA Criminal Code should be evaluated from the perspective of the defined rights and their restrictions stipulated in parts 1 and 2 of Article 27 of the Constitution.

The right to express freely his/her opinion stipulated in parts 1 and 2 of Article 27 of the Constitution can be restricted on the basis stipulated in Article 43 of the Constitution.

Pursuant to Article 43 of the Constitution. "The fundamental human and civil rights and freedoms set forth in Articles 23-25, 27, 28-30, 30.1, Part 3 of Article 32 may be temporarily restricted only by the law if it is necessary in a democratic society in the interests of national security, public order, crime prevention, protection of public health and morality, constitutional rights and freedoms, as well as honor and reputation of others.

Limitations on fundamental human and civil rights and freedoms may not exceed the scope defined by the international commitments assumed by the Republic of Armenia."

In connection to Article 301 of the RA Criminal Code the Constitutional Court states that the provisions of this Article from the scope of its legal regulation, by Article 27 of the RA

Constitution, Article 10 of the European Convention on the Protection of Human rights and fundamental freedoms, the right of restriction of the rights of free expression and speech are consonant with Article 43 of the RA Constitution and norms defined by Article 10 Part 2 of the European Convention of the Protection on Human rights and fundamental freedoms, as well as the requirements set forth in Article 47 of the RA Constitution and Article 17 of the Convention on the prohibition of the abuse of violations of these rights.

In its decisions, the European Court on Human Rights has referred to this issue and stated that as Article 10 of the European Convention defines this freedom is subject to exceptions, which must be strictly interpreted, and any interference must be defined convincingly.

Simultaneously, from the precedential law of the European Court of Human Right proceeds that the calls to seize the power or change the constitutional order by force can be prohibited by in accordance with those exceptions, which are envisaged in Article 10 Part 2 of the Convention. The analysis of this Article concludes that the expression of “public call” in the sense of legal provisions made by the Constitutional Court is not vague and that it is directed to the members of the society. Also the expressions “Public calls for seizing state power by force” and “Public calls for changing the constitutional order of the Republic of Armenia by force”, which do not include legally implemented actions, are not vague.

The Constitutional Court also mentions that interrelations of the provisions of Article 301 of the RA Criminal Code, Article 27 of the RA Constitution and Article 10 of the Convention must be considered from the view of Article 29 of the RA Constitution and Article 47 of the Convention, as well as Article 29 of the RA Constitution and Article 11 of the Convention.

The point is that the rights stipulated in the last two articles are recognized by constitutional legal aspect as peaceful and without armament. Article 10 Part 2 o of the Convention, considers that implementation of the right of expression is connected with duties and responsibilities proscribed by the restrictions but also with the possibility of implementation of means of punishment, for the achievement of the legitimate aims in a democratic society listed in Article 10 and for exclusion of abuse of right.

The analysis of the mentioned articles proceed that in the concept of “Public calls for seizing state power by force” and “Public calls for changing the constitutional order of the Republic of Armenia by force” a rational dissociation exists.

8. The Constitutional Court states that in the frames of the case subject of examination the primary issue is the guarantee of decent legal interpretation and implementation of the disputable norm. According to the RA Constitution, the RA Cassation Court bears the legitimate responsibility of its insurance. Unlike other countries, pursuant to the RA Constitution and the RA Law on “The Constitutional Court,” the Constitutional Court, from

the point of constitutionality, is not competent to make a subject of discussion the judicial acts. The Constitutional Court is not competent to evaluate proportionality of the implementation of the measures of punishment as it cannot evaluate the factual circumstances of the concrete criminal cases, which have become the grounds for the appointment of this or that punishment. Thus, the RA Constitutional Court, based on the provisions prescribed by Article 19 of the RA Law on "The Constitutional Court", as well as in legitimate provisions expressed in CCD-690 of 09.04.2007, state that the RA Cassation Court by its decision of 04.05.2008 had returned the cassation appeal by simply mentioning that "The analysis of the materials of the case shows that there are no grounds to assume that the decision of the Cassation Court cannot have essential significance on the similar implementation of the law".
Meanwhile, the legal provisions of the Constitutional Court state, that pursuant to the requirements of Article 92 of the RA Constitution and Article 50 Part 1 of the RA CPC, the official interpretation of Article 301 of the RA Criminal Code by the RA Cassation Court could have essential significance for the similar implementation of the law. Moreover, the Cassation Court in its decision of 2007 September 25 had not provided any interpretation of the legal contents of Article 301 of the RA Criminal Code and the analysis of judicial practice witness that after the independence of the Republic of Armenia the practice of the implementation of that norm has not formed.
Proceeding from the results of hearing of the case and being governed by Articles 100 (1), 102 of the Constitution, Articles 63,64 and 69 of the Law on "The Constitutional Court", the Constitutional Court of the Republic of Armenia DECIDES:
1. The provisions of Article 301 of the RA Criminal Code correspond to the RA Constitution in the frames of the legal provisions expressed in this decision of the Constitutional Court.
2. Under Part 2 of Article 102 of RA Constitution this decision is final and enters into force from the moment of announcement.

Preceding Judge **G. Harutyunyan**

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