



ON BEHALF OF THE REPUBLIC OF ARMENIA

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

**THE CASE ON CONFORMITY OF ARTICLE 73, PART 1,
POINT 3 OF THE CRIMINAL PROCEDURE CODE
OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION
OF THE REPUBLIC OF ARMENIA ON THE BASIS
OF THE APPLICATION OF THE HUMAN RIGHTS DEFENDER
OF THE REPUBLIC OF ARMENIA**

Yerevan

8 October 2013

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

with the participation of the Applicant: A. Vardevanyan, the Head and S. Yuzbashyan, Specialist of the Legal Expertise Department of the Human Rights Defender,

official representatives of the Respondent: S. Yuzbashyan, the Head of the Expertise Division of the National Assembly Staff of the Republic of Armenia, S. Hambardzumyan, Chief Specialist of the Legal Expertise Division and H. Sardaryan, Expert of the Centre for Exploration and Analysis,

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

examined in a public hearing by a written procedure the Case on conformity of Article 73, Part 1, Point 3 of the Criminal Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the Human Rights Defender of the Republic of Armenia.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the Human Rights Defender of the Republic of Armenia on 31.05.2013.

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

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

Point 3 of Part 1 of Article 73 of the Code, titled “The Rights and Obligations of Defense Attorney”, states:

“1. For the purpose of revealing the circumstances, refuting the indictment, excluding the liability of the suspect or the accused, or mitigating the gravity of the punishment and the measures of procedure compulsion, for the protection of his/her legitimate interests, and for offering to the suspect and the accused legal aid, the defense attorney, in the manner prescribed by this Code, has the right ...

3) to participate in the investigatory or other procedural actions conducted by the body of criminal prosecution upon the suggestion of the latter; with the permission of the body of criminal prosecution, to take part in all investigatory and other procedural actions of the body of criminal prosecution conducted upon his/her motion; to participate in any investigatory or other procedural action, conducted with the participation of his/her defendant, if that is demanded by the suspect or the accused, or if this is requested by the defense attorney himself/herself at the beginning of these actions.”

Point 3 of Part 1 of Article 73 of the Code has not been amended since adoption.

2. The Applicant finds that the challenged norms of the Code contradict the provision set forth in the first sentence of Part 1 of Article 20 of the RA Constitution.

According to the Applicant, regulation concerning the rights of the defense attorney, according to which, **with the permission** of the body of criminal prosecution, the defense attorney has the right to participate in all investigatory and other procedural actions of the body of criminal prosecution conducted upon his/her motion, shall lead to restriction of mechanisms for fulfillment of those rights in the case if the suspect or the accused has a defense attorney and does not demand the latter’s participation, and it is requested by the defense attorney. The Applicant finds that providing the criminal prosecution body with such power, in practice, may bring to irrelevant and unlawful restrictions concerning the participation of the defense attorney in the process of the investigatory and other procedural actions. According to the Applicant, the aim pursued by the legislator is also not clear, as the latter stipulated an obstacle and/or restriction for fulfillment of the obligations one of the pivotal parties in the criminal proceeding, namely, defense attorney, “... this is requested by the defense attorney at the beginning of investigatory action.”

To substantiate his point of view, the Applicant finds necessary to note that there are no precise conditions and/or grounds in the Code due to which the body conducting the criminal proceeding may “disallow” the participation of the defense attorney in the investigatory and other procedural actions conducted upon his/her motion.

Based on his own interpretation of the term “**at the beginning**” stipulated in the challenged provisions of the Code, the Applicant finds that according to the requirements of Part 1 of Article 86 of the RA Law on Legal Acts, with the literal interpretation of the given term means that in all those cases when the defense attorney makes a motion to take part in the already initiated investigatory action, then such motion shall be rejected according to the challenged provisions of the Code, as it does not observe the temporal requirement “at the beginning” stipulated by the Code.

Referring to the Judgments of the European Court of Human Rights the *Sunday Times v. the United Kingdom*, and *Marchx vs. Belgium*, as well as the Decision DCC-753 of the RA Constitutional Court, the Applicant finds that the terms “with the permission” and “at the beginning” stipulated in the challenged provisions of the Code do not comply with

the principle of legal certainty, and contain real risk of discrepancies, which may result in violation of the person's right to get legal aid and seriously endanger the legal aid provided to the defendant by the defense attorney in the course of criminal action.

3. The Respondent generally does not object the arguments of the Applicant.

Touching upon the Applicant's argument, according to which, there are no precise conditions and/or grounds in the Code due to which the body conducting the criminal proceeding may "deny" the participation of the defense attorney in the investigatory and other procedural actions conducted upon his/her motion, the Respondent also states that the law does not stipulate the grounds only due to which the right of the defense attorney to take part in the investigatory and other procedural actions may be restricted. Thereby, the Respondent assumes that unimpeded participation of the defense attorney must be ensured if there are no legislatively stipulated circumstances excluding the participation of the latter; and the Respondent expresses an opinion that the restrictions may concern the investigatory actions such as examination (Article 220), personal search (Article 229) and expert examination (Article 248).

Touching upon the next argument of the Applicant regarding uncertainty of law, the Respondent, not excluding the necessity of participation of the defense attorney in investigatory actions not only from their very beginning but also in the process, also finds that the challenged norm of the Code may be misinterpreted and serve as a ground for restriction of participation of the defense attorney in the investigatory and other procedural actions.

Based on the study of criminal procedure codes of the CIS countries, the Respondent finds that they also indicate that the defense attorney shall freely participate in the investigatory and other procedural actions conducted with the participation of his/her defendant, or, when the defense attorney himself/herself or his/her defendant launch the initiative to conduct the investigatory and other procedural actions. Simultaneously, referring to certain articles of criminal procedure codes of a number of CIS countries, the Respondent states that in the mentioned countries the defense attorney shall participate in other investigatory and procedural actions with the permission of the body of criminal prosecution.

Summarizing the Respondent finds that due to the terms of the legal regulation stipulated by the challenged norm of the Code according to which, the participation of the defense attorney in the process of the investigatory and other procedural actions shall be restricted by the permission of the body of criminal prosecution, and such circumstance may serve as a ground for limitation of the defendant’s right to receive legal aid, which does not guarantee full protection of his/her rights and lawful interests.

Simultaneously, the Respondent states that the updated version of the RA Draft Criminal Procedure Code (document code: 4-084-14.09.2012, 10.06.2013-ՊԻ-010/0) has been put into circulation by the RA National Assembly which stipulates the legal regulation to eliminate the restrictions in the Code concerning the defense attorney, and guarantees the unimpeded participation of the latter in the process of the investigatory and other procedural actions both conducted with the participation of the defendant and upon his/her motion or upon the motion of his/her defendant. According to the Respondent, Point 3 of Part 1 of Article 49 of the draft, titled “The Rights and Obligations of Defense Attorney”, is in a new wording, according to which:

“1. For revealing the circumstances, refuting the indictment, precluding the liability of the accused, mitigating the sentence or the procedural compulsory measures, as well as, for the protection of his/her rights and lawful interests, the defense attorney, in accordance with the procedure prescribed by this Code, shall enjoy the right ...

3) to take part in any evidentiary or other procedural action, conducted with the participation of his/her defendant, to take part in proving and other procedural action conducted upon his/her motion or upon the motion of his/her defendant, and in other cases to take part in proving or other procedural action upon the proposal of the investigator.”

4. The first paragraph of Part 1 of Article 73 of the Code defines the strategic and tactical goals of participation of the defense attorney in criminal cases, that is, to reveal the circumstances, refuting the indictment, excluding the liability of the suspect or the accused, or mitigating the gravity of the punishment and the procedural compulsory measures, as well as to protect the lawful interests of the suspect or the accused, and to provide them legal assistance.

Taking into account the goal of the participation of the defense attorney in the pre-trial proceedings of a criminal case, and the role of the defense attorney conditioned by that purpose, the Constitutional Court finds necessary to consider the challenged norm of the Code in the context of the right to legal assistance, stipulated in the first sentence of Part I of Article 20 of the Constitution, and in the context of the right to effective legal remedies before other public bodies, stipulated by Part I of Article 18 of the Constitution.

5. According to Article 18, Part I of the RA Constitution, “Everyone shall be entitled to effective legal remedies to protect his rights and freedoms before judicial as well as other public bodies”.

According to the provision stipulated by the first sentence of Part I of Article 20 of the RA Constitution, “Everyone shall be entitled to legal assistance”.

Article 43, Part I of the RA Constitution does not consider the right to effective legal remedies before judicial as well as other public bodies as the right subject to restrictions, and the right to legal assistance, *inter alia*, stipulated by the first sentence of Part I of Article 20 of the RA Constitution is subject to restrictions only by 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 the honor and reputation of others.”

Article 18 of the Constitution provides everybody with the right to effective legal remedies, particularly, before other public bodies, and the state correspondingly has a direct obligation both to stipulate legislatively the availability to effective legal remedies and ensure it in law enforcement practice. Namely, no legal mechanisms must be legislatively defined, which, at first sight, serve as guarantees for realization of the given legal mechanism, though, in fact, in the details of the regulation those legal mechanisms are senseless or restricted.

Touching upon the right to legal assistance, *inter alia*, provided by the defense attorney stipulated in the first sentence of Part I of Article 20 of the RA Constitution, as well as taking into account the circumstance that, finally, the given right is aimed to legal protection of lawful interests of the right holder before other public bodies, the Constitutional Court finds that the considered right supposes **completeness** of legal aid, and

the latter is conditional on efficiency of fulfillment of the obligation of the defense attorney to provide legal aid, **taking into account the possibility of limitation of the given right on the grounds stipulated by Article 43, Part 1 of the Constitution.** Accordingly, the duty of the state is in conformity with the disputed right stipulated in the first sentence of Article 20, Part 1 of the Constitution both legislatively and in law enforcement practice to guarantee effective exercise of the obligation to be provided with legal aid by defense attorney and in the case of obstacles to undertake steps to abolish them.

Simultaneously, within the framework of the review of this Case, the Constitutional Court finds that certain requirements may be legislatively stipulated for realization of the right to legal remedies before public bodies and the right to legal assistance, or the procedures of realization of the given rights may include certain formal conditions, and through the latter shall not be to the extent which makes the realization of those rights inefficient and distorts their essence, or turns into such a limitation of the right which does not pursue any legitimate aim.

6. The challenged Point 3 of Part 1 of Article 73 of the RA Criminal Procedure Code defines three situations of participation of the defense attorney in the investigatory or other procedural actions:

a/ the defense attorney shall take part in the investigatory or other procedural actions performed by **the body of criminal prosecution upon the permissal of the latter.** Taking into account the circumstance that other cases of participation of the defense attorney are also stipulated by Point 3 of Part 1 of Article 73 of the RA Criminal Procedure Code, the Constitutional Court states that the considered case concerns the situations when the investigatory or other procedural action is not conducted upon the motion of the defense attorney, or the defendant does not participate in that process;

b/ the defense attorney takes part in all investigatory and other procedural actions of the body of criminal prosecution conducted **upon his/her motion with the permission of the criminal prosecution body;**

c/ the defense attorney shall take part in any investigatory or other procedural action, conducted with the participation of his/her defendant, **if that is demanded by the suspect or the accused, or if this is motioned by the defense attorney at the beginning of the actions.**

As concerns the legal regulation stipulated by the above mentioned subparagraph "a," the Constitutional Court considers legitimate to condition the participation of the defense attorney in the investigatory or other procedural actions conducted without the motion of the defense attorney or without the participation of his/her defendant (as prescribed by the challenged norm of the Code) by **the permission of the body of criminal prosecution.**

As for the case presented in the above mentioned subparagraph "b," the Constitutional Court states that the legislator stipulated a certain requirement for realization of the right to legal remedies before public bodies and the right to legal assistance, that is, the permission of the body of criminal prosecution.

The Constitutional Court takes into account the circumstance that **there are no grounds stipulated by the RA Criminal Procedure Code,** upon which the body conducting the criminal proceeding shall be entitled to deny the defense attorney's participation in the investigatory and other procedural actions conducted upon his/her motion, and the Respondent of this Case also states this circumstance, and, in the aspect of limitation of the constitutional right to legal assistance, such circumstance could be considered legitimate in the context of the grounds stipulated by Article 43, Part 1 of the Constitution. It is also important to state that in this case, the matter concerns the investigatory and other procedural actions conducted upon the motion of the defense attorney and not by the initiation of the body of criminal prosecution. The Constitutional Court finds that, in violation of the provisions of Article 43, Part 1 of the Constitution, the provision stipulated in the challenged norm of the Code, which conditions the participation of the defense attorney in the investigatory and other procedural actions, conducted upon his/her motion, with the permission of the body of criminal prosecution, restricts the constitutional right to legal remedies before public bodies and the right to legal assistance, and, as a result, the constitutional right to effective legal remedies before public bodies. Moreover, such restriction does not pursue any legitimate aim.

As for the case presented in the above mentioned subparagraph "c," the Constitutional Court states that the legislator put forward a certain requirement for realization of the right to legal remedies before public bodies, that is, **availability of demand of the suspect or the accused, or the motion of the defense attorney** concerning his/her participation.

Based on the legal positions expressed in this Point, in this regard, the Constitutional Court finds that, in violation of the provisions of Article 43, Part 1 of the Constitution, the provision stipulated in the challenged norm of the Code, which conditions the participation of the defense attorney in the investigatory and other procedural actions, conducted with the participation of the defendant, with availability of demand of the suspect or the accused concerning such participation, restricts the constitutional right to legal remedies before public bodies and the right to legal assistance, and, as a result, the constitutional right to effective legal remedies before public bodies. Moreover, such restriction pursues any legitimate aim neither.

As concerns the challenged provision of the Code, which conditions the participation of the defense attorney in the investigatory or other procedural actions, conducted with the participation of the defendant, with **making a motion thereon at the beginning of the actions**, and which is challenged by the Applicant from the perspective of legal certainty, then based on the legal positions expressed in this Point, the Constitutional Court considers necessary to evaluate the phrase "at the beginning of the actions" prescribed by the challenged provisions of the Code from the viewpoint of time limitation of the participation of the defense attorney in the investigatory or other procedural actions, and from the viewpoint of obligatory nature of the motion being made for the participation of the defense attorney, and not from the viewpoint of its compliance with the requirements of legal certainty. In this regard, based on the legal positions expressed in this Point, the Constitutional Court finds that, in violation of the provisions of Article 43, Part 1 of the Constitution, the provisions on time limitation of the participation of the defense attorney in the investigatory or other procedural actions, conducted **with the participation of the defendant**, and the obligatory nature of the motion being made for the participation of the defense attorney, also restricts the constitutional right to legal remedies before public bodies and the right to legal assistance, and, as a result, the constitutional right to effective legal remedies before public bodies, and do not pursue any legitimate aim.

Besides, taking into account the circumstance that, according to other provisions of the challenged norm of the Code, the suspect or the accused are entitled anytime to demand the participation of the defense attorney in the investigatory or other procedural actions, conducted with their par-

ticipation, that is, if the motion of the defense attorney is declined regardless of making it before the beginning of the investigatory or other procedural action, or after that, the defense attorney may again take part in the investigatory or other procedural action, if the suspect or the accused demand it; so, the Constitutional Court also considers the time limitation of the participation of the defense attorney in the investigatory or other procedural actions, conducted with the participation of the defendant, prescribed by the challenged norm of the Code, as groundless and, therefore, not pursuing any legitimate aim.

As for the challenged norm of the Code, the Constitutional Court finds that **in all cases the defense attorney shall have the right to take part in the investigatory and other procedural actions, conducted with the participation of the defendant, without making any motion and regardless the fact whether the suspect or the accused demand his/her participation or not.**

In this regard the Constitutional Court takes into consideration the updated version of the RA Draft Criminal Procedure Code (document code: 4-084-14.09.2012, 10.06.2013-ՊԻ-010/0) put into circulation by the RA National Assembly, and finds that the legal regulation stipulated by Point 3 of Part 1 of Article 49 of the draft, titled “The Rights and Obligations of Defense Attorney”, deserves attention.

7. Based on the results of study of relevant legislations of certain countries concerning the matter in dispute, the Constitutional Court states that the law does not condition the participation of the defense attorney in the investigatory or other procedural actions with a will of the body of criminal prosecution, and does not stipulate any time limitation for the participation of the defense attorney in the criminal proceeding, thereby providing the defense attorney with the opportunity to enjoy the vested rights.

The Constitutional Court finds necessary to state that the European Court of Human Rights also expressed certain legal positions concerning the right to a fair trial, guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Particularly, in the *John Murray v. the United Kingdom* Judgment of 8 February 1996, the European Court of Human Rights expressed the following legal positions:

"62.... the manner in which Article 6 para. 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case.

63.... Article 6 (art. 6) will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing."

Considering the challenged norm in the light of the aforementioned legal positions of the European Court of Human Rights, and comparing it with the norms regulating similar legal relations in other countries, the Constitutional Court finds that the legal regulations stipulated by them include actual danger of unproportional restriction of the rights.

Proceeding from the results of the consideration of the Case and being ruled by Article 100, Point 1, Article 101, Part 1, Point 8, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Article 73, Part 1, Point 3 of the RA Criminal Procedure Code, in regard to the wordings "**with the permission of the body of criminal prosecution**" and "**if the suspect or the accused demand, or if this is requested by the defense attorney at the beginning of the action**" contradicting Article 18, Part 1, the provision stipulated by the first sentence of Part 1 of Article 20, and the provisions of Article 43, Part 1 of the Constitution of the Republic of Armenia and void.

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

Chairman

G. Harutyunyan

8 October 2013

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