



ON BEHALF OF THE REPUBLIC OF ARMENIA

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

**THE CASE ON CONFORMITY OF ARTICLE 17, PART 2
OF THE CIVIL CODE OF THE REPUBLIC OF ARMENIA
WITH THE CONSTITUTION OF THE REPUBLIC
OF ARMENIA ON THE BASIS OF THE APPLICATION
OF THE CITIZEN ARTUR KHACHATRYAN**

Yerevan

5 November 2013

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

with the participation of the representatives of the Applicant: A. Zeynalyan and A. Ghazaryan,

official representatives of the Respondent: S. Hambardzumyan, the Chief Specialist and H. Sardaryan, the Leading Specialist of the Legal Expertise Division of the Legal Department of the National Assembly Staff 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 on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Article 17, Part 2 of the Civil Code of the Republic of Armenia with the Constitution of the Republic of Armenia based on the application of the citizen Arthur Khachatryan.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the citizen Arthur Khachatryan on 03.04.2013.

Having examined the report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondents, having studied the Civil 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 Civil Code was adopted by the RA National Assembly on 5 May 1998, signed by the RA President on 28 July 1998 and came into force on 1 January 1999 in accordance with the RA Law on Putting the RA Civil Code into effect adopted by the RA National Assembly on 17.06.1998.

The challenged Part 2 of Article 17 of the RA Civil Code states: “Losses means the expenses that the person whose right was violated made or must make to reinstate the right that was violated, the loss of or injury to his property (actual damage), and also income not received that this person would have received under the usual conditions of civil commerce if his right had not been violated (forgone benefit).”

Since adoption, Part 2 of Article 17 of the RA Civil Code was not amended.

2. The brief procedural background of the Case is the following: on 28.06.2010 Vardan Khachatryan lodged a claim on compensation of damages to the RA First Instance Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan versus the Republic of Armenia, in behalf of the Ministry of Finance, and demand to compensate pecuniary damage, i.e. the sum paid to his representatives for representing him in the courts and RA Constitutional Court, all kinds of taxes accumulated on that sum, as well as compensation of his non-pecuniary damage (moral) damage on the grounds that «besides the real damage, Vardan Khachatryan was also under stress while waiting for the solution of his case by the court. That uncertainty, which lasted from the moment of applying to the General Jurisdiction Court till adoption of the decision

of the Constitutional Court, application of legislative provisions contradicting the RA Constitution against him, violation of his right to fair trial, caused him mental trouble and anxiety. Vardan Khachatryan would not have passed through psychological trouble and anxiety (effect), if his right had not been violated (cause). There is a cause and effect linkage».

On 15.07.2012 the First Instance Court of General Jurisdiction made a decision on “Initiating the proceeding of the claim and preparing the case for consideration” and accepted the case.

After the death of Vardan Khachatryan the General Jurisdiction Court by its Decision “On Reopening the Proceeding of the Civil Case and Calling a Court Session” dated 28.09.2011 recognized Arthur Khachatryan as a legal successor of the plaintiff Vardan Khachatryan of the Case ԵԿԴ/1320/02/10 and by its decision dated 02.05.2012 satisfied the claim partially by obliging the Republic of Armenia, in behalf of the RA Ministry of Finance, to pay 1.000.000 (one million) AMD to Arthur Khachatryan, Vardan Khachatryan’s legal successor, as amount of compensation of the pecuniary damage caused to Vardan Khachatryan. The claim in part of the demand of levying 564.225 AMD for pecuniary damage and its calculated taxes was denied. The proceeding of the civil case concerning the compensation of non-pecuniary (moral) damage was suspended by the reasoning according to which “unlike the pecuniary damage, the moral damage is not regulated by the RA legislation”, the court may not apply the institution of the moral damage, as its definition and regulation is not available in the legislation regulating civil legal relations of the Republic of Armenia”, “the legislation of the Republic of Armenia regulating civil legal relations does not stipulate the compensation of the moral damage as a type of responsibility, based on which the dispute is not subject to consideration by the court”.

An appeal was submitted against the mentioned judgment demanding to oblige the Republic of Armenia, in behalf of the RA Ministry of Finance, to pay Arthur Khachatryan, the legal successor of Vardan Khachatryan, compensation of pecuniary and non pecuniary damage in the amount of 1.564.225 (one million five hundred sixty four thousand two hundred twenty-five) AMD for pecuniary damage and all kind of taxes calculated on the mentioned amount, and 2.000.00 (two thousand) Euros equivalent in AMD for non-pecuniary, moral damage. The Court of Appeal by its decision of 26.07.2012 satisfied the appeal partially, vacated the decision from 02.05.2012 of the RA General Jurisdiction Court of the

Kentron and Nork-Marash administrative districts Yerevan regarding the denied part of levying the damage of 564.225 AMD from the amount 1.564.225 AMD, modified it and satisfied the claim in regard to levying the damage in amount of 564.225 AMD. The Court of Appeal considered the rest of the decision of the General Jurisdiction Court as well-grounded based on the same reasoning that “the legislation of the Republic of Armenia regulating civil legal relations does not stipulate compensation of the moral damage as a type of responsibility based on which the dispute is not subject to consideration by the court”.

On 19.09.2012 the Cassation Court made a decision to return the cassation complaint.

3. The Applicant challenges the constitutionality of Article 17, Part 2 of the RA Civil Code in so far as it does not include the institution of compensation of moral damage stating that Article 17, Part 2 of the Code in so far as does not consider the damage caused to a person as a non-pecuniary damage, contradicts Articles 3, 18, 19 and 83.5 of the RA Constitution. Simultaneously, the Applicant mentions, “that this application challenges the constitutionality of the legal gap.” Moreover, the Applicant quotes Decision DCC-914 of the RA Constitutional Court in order to substantiate the possibility of the legislative gap to be the object of the constitutional justice.

For substantiating his position, the Applicant mentions that “the right to fair trial and effective legal remedy guaranteed by the European Convention of Human Rights, assumes, inter alia, the consideration of the case on the merits “by the competent state body” and the payment of fair compensation”.

For grounding his position, the Applicant refers also the judgments of European Court of Human Rights on the cases of “Poghosyan and Bagdasaryan versus Armenia”, “Khachatryan and others versus Armenia”, and “Comingersoll S.A versus Portugal”, mentioning that in the judgment of the third case the European Court of Human Rights stated that “Among the matters which the Court takes into account when assessing compensation are pecuniary damage, that is the loss actually suffered as a direct result of the alleged violation, and non-pecuniary damage, that is reparation for the anxiety, inconvenience and uncertainty caused by the violation, and other non-pecuniary loss.”.

4. The Respondent finds that Article 17, Part 2 of the RA Civil Code is in conformity with the requirements of Articles 3,18, 19 and 83.5 of the RA Constitution in the context of current legal regulations.

For substantiation of his position, the Respondent, referring the means of protection of civil law rights prescribed by Article 14 of the RA Civil Code, including compensation of losses, as well as the provision of Article 162 of the same Code concerning notion of non-material values, according to which, nonmaterial values shall be protected in accordance with the present Code and other statutes in cases and by the procedure provided by them and also in those cases and within those limits in which the use of means of protection of civil law rights (Article 14) follows from the nature of the violated nonmaterial right and the nature of the consequences of this violation, stated that although there is no direct note about the moral damage in the RA Civil Code, but it is implemented in the cases of protection of honour, dignity and business reputation from the defamation by other persons. The Respondent also stated that, however, the mentioned circumstance does not illustrate the complete introduction of the pecuniary compensation of moral damage, as the RA Civil Code does not consider the moral damage as a type of damage.

Signifying the necessity of introduction of the institution of compensation of the moral damage from the perspective of full protection of the rights of a person and effective restoration of violated rights, the Respondent stated that the problem may not be solved by mere inclusion of the notion of “moral damage” in Article 17 of RA Civil Code, as it demands introduction of the certain institution of pecuniary compensation of the moral damage, which will include detailed regulations on the notion of “moral damage”, the frames and grounds of implementation of this institution, clear mechanisms for calculation of the moral damage and, in general, other issues ensuring undistorted application of this institution.

5. In its decisions DCC-864 dated 05.02.2010 and DCC-914 dated 14.09.2010 the RA Constitutional Court expressed the legal positions concerning the legal possibility of consideration of constitutionality of the legislative gap by the Constitutional Court. Decision DCC-864 of the Constitutional Court defined that “In the frames of consideration of the case, the Constitutional Court touches upon the constitutionality of any legislative gap, if the legal uncertainty in the law enforcement practice, conditioned with the content of challenged norm brings to such interpre-

tation and application of that norm which violates or may violate certain constitutional right”.

Decision DCC-914 of the Constitutional Court states that “Legislative gap may become the matter of consideration by the Constitutional Court only in the case of absence of other legal guarantees in the legislation for filling that gap, or contradictory law enforcement practice is established in the case of availability of relevant legal guarantees, or when the existing legislative gap does not ensure possibility of realization of any right. Otherwise, the constitutionality of the gap of legal regulation is not a matter of the consideration by the Constitutional Court.

Considering the position of the Applicant and based on the above-mentioned legal positions expressed in the decisions DCC-864 and DCC-914 of the Constitutional Court, the Constitutional Court states that the assessment of the constitutionality of the challenged provision of the Code shall be touched upon from the following perspectives:

- a. Whether the institution of moral damage and legal basis for possibility of pecuniary compensation of such damage exists in the RA legal system,
- b. Whether the Republic of Armenia has obliged to prescribe possibility of pecuniary compensation of non-pecuniary (moral) damage in the domestic legal system by the virtue of the international obligations undertaken by the Republic of Armenia.

6. Concerning the above-mentioned statements the Constitutional Court considers necessary to state that constitutional legal content of a number of provisions of the RA Constitution verify that moral damage and possibility of pecuniary compensation of the moral damage derive from the constitutional legal approaches established in the spheres of protection of human rights. Thus, Article 3, Part 1 of the RA Constitution stipulates: “The human being, his dignity and the fundamental human rights and freedoms are an ultimate value.” In this concern, the Constitutional Court finds that one of the pivotal elements of the human dignity, inter alia, is to be free from the moral distress conditional on individual features. In its turn, Article 16 of the Constitution guarantees personal liberty and security of a person. Part 4 of the mentioned Article prescribes, “ Every person shall have the right to recover damages in case when he has illegally been deprived of liberty or subjected to a search, on the grounds and by a procedure defined by the law. “ In this concern, the Constitutional Court

finds that in the case of being illegally deprived of liberty or illegal search, the damage caused to a person may not be automatically concluded to the compensation of physical or pecuniary damages as in this case the compensation provided to the victim will not be adequate to the moral distress of the latter. In this context, referring to regulations of Article 17 of the RA Constitution which stipulates: “No one shall be subjected to torture, as well as to inhuman or degrading treatment or punishment”, the Constitutional Court finds that tortures, inhuman or degrading treatment or punishment are always accompanied by the caused mental and moral distress, which may be even more than the possible physical or pecuniary damage caused by them, and it is not possible to fully compensate the damage caused to a person and his/her dignity without reasonable and fair compensation. Otherwise, it will not be possible to guarantee protection of a person, his dignity and fundamental rights and freedoms which are proclaimed as ultimate value by the Constitution.

7. In the frames of consideration of this case, the Constitutional Court considered necessary to state that the pecuniary compensation of the moral damage is regulated by corresponding provisions of a number of normative legal acts of the Republic of Armenia. Thus, the term “moral damage” is available in different normative legal acts of the Republic of Armenia. In particular, Article 268 of the RA Code on Administrative Offences prescribes, “Victim is the person, who was injured physically, morally or materially as a result of an administrative offence.” The term “moral damage” is also stipulated in a number of provisions of the RA Criminal Procedure Code, in particular, in Point 45 of Article 6 where the term “damage” is considered as ““damage” meaning moral, physical, or property damage which lends itself to pecuniary assessment”. Article 58, Part 1 of the same Code prescribing the notion of the term “injured,” envisages, “The person is recognized as the injured, in respect to whom bases are available to suppose, that a moral, physical or proprietary damage has been caused to him/her directly by a deed forbidden by Criminal Code. A person also is recognized as aggrieved, to whom moral or physical damage might be directly caused, if the deed, forbidden by the Criminal Code would have been finished.” Article 104, Part 1 of the RA Law on Fundamentals of Administration and Administrative Proceeding prescribes: “In cases of causing non-property damage to physical person by illegitimate administration through restriction of freedom, violation of security

of home, private or family life, harming the person’s honor, good name or reputation, the person shall have the right to claim monetary compensation or elimination of entailed consequences by the amount equivalent to the non-property damage caused.”

Simultaneously, the Constitutional Court states that, although, the challenged Article 17, Part 2 does not consider moral damage among the losses, Article 1087.1, Points 1 and 8 of the RA Civil Code prescribes possibility of monetary compensation of the damage caused to person’s honor, dignity and business reputation, that is accordingly in the case of insult in the amount of 1000-fold and in case of defamation in the amount of 2000-fold of the minimal salary. Meanwhile, Point 11 of the same Article stipulates that while determining the amount of compensation in case of insult and defamation, the court shall not take into account the property damage, caused a consequence of insult and defamation. The circumstance that the court while deciding the amount of the compensation of the damage caused to honour, dignity and business reputation does not take into account the caused property damage, directly confirms that compensation of property damage is not the goal of the considered regulation. On the contrary, it is called to regulate the possibilities of pecuniary compensation of caused moral damage.

The study of the international practice shows that the regulations of monetary compensation of the damage caused to the dignity, honour and business reputation of a person namely concern the institution of pecuniary compensation of the moral damage (in particular, such an institution is envisaged by the legislation of the Russian Federation, Croatia, Latvia, Lithuania, Estonia, Slovenia, Spain and other countries).

Deriving from the above-mentioned, the Constitutional Court states that various cases of pecuniary compensation of moral damage are prescribed by the legislation of the Republic of Armenia, but the mentioned institution is not fully regulated which does not allow to ensure legislative harmony in the matters of cases, grounds and procedure of pecuniary compensation of such damages, which, in their turn, hinder the effective protection of the rights and freedoms guaranteed by the RA Constitution. Moreover, the mentioned situation may not be in concordance with the provision prescribed in Part 3 of Article 3 of the RA Constitution, according to which “The state shall be limited by fundamental human and civil rights as possessing direct effect”.

8. Part 2 of Article 3 of the RA Constitution prescribes the obligation of the Republic of Armenia to ensure the protection of fundamental human and civil rights in conformity with the principles and norms of international law. Article 43 of the RA Constitution prescribes that 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.

Touching upon the matter in dispute from the perspective of Article 3 and Article 43, Part 2 of the RA Constitution, the Constitutional Court states that in the Republic of Armenia inharmonious regulations of pecuniary compensation of the moral damage caused to a person hinder diligent implementation of the international obligations assumed by the Republic of Armenia. The Constitutional Court finds that the right to pecuniary compensation of the moral damage derives both from the content of provisions of the RA Constitution and a number of legislative acts of the Republic of Armenia and the international obligations assumed by the RA, in particular, from the provisions of the European Convention of Human Rights and Fundamental Freedoms (and protocols thereto) and law enforcement practice of the European Court of Human Rights.

Thus, the European Court of Human Rights in the judgments adopted against the Republic of Armenia non-provision of compensation for the moral damage suffered considers as a violation of the relevant provisions of the European Convention of Human Rights and Fundamental Freedoms (and protocols thereto). In particular, in the judgments of the cases *Khachatryan and others v. Republic of Armenia* (Application N 23978/06. 27.11.2012) and *Poghosyan and Baghdasaryan v. Republic of Armenia* (Application N 22999/06. 12.06.2012), non provision of the compensation of the moral damage based on internal legislation, recognized as a violation of European Convention of Human Rights and Fundamental Freedoms. In the judgment of the case *Poghosyan and Baghdasaryan v. Republic of Armenia*, the Court states, “The Court has previously found that, in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies”. The same judgment also states that the applicant should have been able to apply for compensation for the non-pecuniary damage suffered by him as a result of ill-treatment. Article 3 of the Protocol No. 7 to Convention has been touched upon, concerning which it was high-

lighted that “The Court reiterates that the aim of Article 3 of Protocol No. 7 is to confer the right to compensation on persons convicted as a result of a miscarriage of justice where such conviction has been reversed by the domestic courts on the ground of a new or newly discovered fact.” In the same Judgment the Court has stated that “As regards compliance with the guarantees of Article 3 of Protocol No. 7, the Court considers that, while this provision guarantees payment of compensation according to the law or the practice of the State concerned, it does not mean that no compensation is payable if the domestic law or practice makes no provision for such compensation”. Furthermore, the Court, considering that the purpose of Article 3 of Protocol No. 7 is not merely to recover any pecuniary loss caused by a wrongful conviction but also to provide a person convicted as a result of a miscarriage of justice with compensation for any non-pecuniary damage such as distress, anxiety, inconvenience and loss of enjoyment of life, at the same time states that no such compensation, however, was available to the applicant in the present case. Simultaneously, in the Judgment of the case *Khachatryan and others v. Republic of Armenia*, the European Court of Human Rights holds that there has been a violation of Article 5 § 5 of the Convention and notes that Article 5 § 5 should not be construed as affording a right to compensation of purely pecuniary nature, but should also afford such right for any distress, anxiety and frustration that a person may suffer as a result of a violation of other provisions of Article 5.

Based on the above mentioned, the Constitutional Court finds that incomplete regulation of the compensation of non-pecuniary damage is not in compliance with international obligations assumed by the Republic of Armenia.

9. Simultaneously, based on the necessity to provide completeness of the legal regulations concerning the protection of human rights and freedoms and consequently the institution of non-pecuniary damage, the Constitutional Court notes that general criteria and procedure of compensation of non-pecuniary damages shall be precisely stipulated by legislation for ensuring the reasonable and fair compensation of non-pecuniary damage in certain cases and by certain procedure, ensuring effective implementation of the rights and freedoms guaranteed by the RA Constitution and not hindering the diligent implementation of the international obligations assumed by the Republic of Armenia.

The Constitutional Court takes into account that considering the mentioned circumstances the legislative initiative of the RA government is being conducted by the RA Ministry of Justice to make relevant amendments in the RA Civil Code and , in particular, to ensure the implementation of the abovementioned judgments of the European Court of Human Rights concerning Armenia.

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

1. To declare Article 17, Part 2 of the RA Civil Code in so far as it does not consider non-pecuniary damage as a type of damage and does not ensure possibility of compensation of moral damage, blocking the effective implementation of rights to access to the court and fair trial, simultaneously, hindering diligent fulfillment of the international obligations of the Republic of Armenia, contradicting Article 3, Part 2, Article 16, Part 4, Article 18, Part 1, Article 19, Part 1 and Article 43, Part 2 of the Constitution of the Republic of Armenia and void.

2. To determine 1 October, 2014 as the deadline for the invalidation of Article 17 Part 2 of the RA Civil Code, considering the fact, that the declaration of the norm mentioned in Part 1 of the operative part of this Decision, to be inconformity with the Constitution and invalid from the date of announcement of the decision, shall inevitably lead to the consequences which will distort the legal security to be established on the moment of the invalidation of the given norm, as well as taking into consideration the requirement to have systemized legislative regulation of the institution of compensation of the moral damage, which, in particular will include the notion of “non-pecuniary damage”, provisions for the frames and grounds of implementation of that institution, precise procedure for calculation of the non-pecuniary damage and other issues, based on Article 102, Part 3 of the RA Constitution and Article 68, Part 15 of the RA Law on the Constitutional Court.

3. 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
3 November 2013
DCC-1121