

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

**ON THE CASE OF CONFORMITY OF PART 5 OF ARTICLE 69, POINT 2 OF PART 1
OF ARTICLE 70, AND THIRD SENTENCE OF PART 2 OF ARTICLE 72 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

13 February 2018

The Constitutional Court of the Republic of Armenia composed of V. Hovhannisyan (Chairman), A. Gyulumyan (Rapporteur), F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan, A. Petrosyan,

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

the Applicant - A. Tatoyan, Human Right Defender of the Republic of Armenia,

representative of the Respondent: V. Danielyan, official representative of the RA National Assembly Chief Specialist at the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 8 of Part 1 of Article 101 of the RA Constitution (with Amendments of 2005), Articles 25, 38 and 68 of the RA Law on the Constitutional Court, examined in a public hearing by a **written** procedure the Case of conformity of Part 5 of Article 69, Point 2 of Part 1 of Article 70, and third sentence of Part 2 of Article 72 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 RA Constitutional Court by the Human Rights Defender on 9 October 2017.

Having examined the Application, the written report of the Rapporteur on the Case, and the written explanations of the Respondent, as well as having studied the RA Criminal Procedure Code 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 entered into force on 12 January 1999.

Part 5 of Article 69 of the RA Criminal Procedure Code, titled "**Mandatory participation of the defense counsel**", which was introduced into the Code by the Law HO-45-N of 5 February 2009, , prescribes:

"In the case provided in Paragraph 11 (1) of this article, the court does not accept the defendant's denial of the defense counsel and, in the order prescribed by this Code, appoints a defense counsel or retains the powers of the appointed defense counsel." The case prescribed in paragraph 11 (1) of this article relates to the application of the sanction prescribed in Paragraph 2 of Part 1 of Article 314.1 of the same Code, i.e. removal from the courtroom of persons involved in criminal proceedings.

Paragraph 2 of Part 1 of Article 70 of the RA Criminal Procedure Code, titled "**The invitation, appointment, replacement of defense counsel and other grounds for his/her participation in the criminal proceedings,**" which, after the adoption of the Code, was amended by the Law ՀՕ-270-N on November 28, 2007, prescribes:

"1. Lawyers participate in the criminal proceedings as defenders:

...

2) by appointment of the Chamber of Advocates of the Republic of Armenia on the basis of the requirement of the body conducting criminal proceedings."

The third sentence of Part 2 of Article 72 of the RA Criminal Procedure Code, titled "**Refusal from Defender**", states:

"In cases stipulated in paragraphs 2-5 and 8 of the first part of Article 69 of this Code, the body conducting criminal proceedings has the right not to accept the refusal of the suspect or the accused from the defender and appoint a defender or retain the powers of the appointed defender."

2. The Applicant considers that the challenged provisions regulated by the criminal procedural legislation contradict Part 2 of Article 67 and Article 79 of the Constitution of the Republic of Armenia insofar as in the application of the institution of compulsory participation of a defender the full exercise of the defendant's right to be defended the person personally or through his chosen counsel is not ensured.

In the Applicant's opinion, existing legal regulations create a situation in which, on the one hand, the fundamental right of a suspect or accused for the defense, in person or through a lawyer chosen by him, is opposed, and on the other hand, the obligation of the body conducting the

criminal proceedings (as part of the right to a fair judicial trial) to ensure effective legal representation, within which the body conducting the proceedings has the right not to accept (and in the case of applying the sanctions as the removal of the defendant from the courtroom, the court does not accept) the refusal of the suspect, accused or defendant from the defender.

The Applicant notes that, as a general condition, the defense counsel assumes his/her authority with the consent of the person accused of a criminal offense (Part 2 of Article 68 of the RA Criminal Procedure Code), whereas in the case of applying sanctions against the defendant without his/her consent, applying the institution of mandatory legal representation, a public defender is involved, which indicates a contradiction between these legal regulations and legal uncertainty.

The Applicant asserts that the RA Criminal Procedure Code does not specifically and clearly regulate in which case the duty of the state represented by the implementing body to ensure compulsory legal representation prevails over the fundamental right of the accused to defend him/herself or through his/her chosen counsel.

Referring to some precedents of the European Court of Human Rights, the Applicant argues that the right of an accused person to have a defender of his choice is not absolute. This right of a court can be ignored or considered secondary if there are relevant and sufficient grounds for this due to the priority interest of the judiciary. According to the Applicant, the RA Criminal Procedure Code should clearly indicate the boundaries, as well as the criteria and standards by which the body conducting proceedings can determine whether there are actually "relevant" and "sufficient" grounds to consider the existence of a priority interest in justice.

According to the Applicant, "until the Code establishes the substantive and procedural grounds for the deviation, the defendant's derogation from the fundamental right to defend him/herself through his/her chosen lawyer, the legal uncertainty will continue to exist ..." in the application of the challenged norms. At the same time, the Applicant believes that "in cases of compulsory participation of a lawyer, the law does not provide for clear and specific criteria for the decision of the body conducting criminal proceedings", which are important enough as "the balance should form the basis for assessing each case for the individual's right to defend him/herself or through his chosen counsel and shall serve as the priority interest or interest of justice."

3. The Respondent, objecting to the Applicant's arguments, believes that the challenged legal provisions are in accordance with the Constitution of the Republic of Armenia.

According to the Respondent, the RA Criminal Procedure Code establishes the opportunity to defend him/herself personally, and through his/her chosen counsel. However, in all cases where a person wishes to defend him/herself personally without using the services of a lawyer,

however, if sanctions are applied against him/her as removal from the courtroom, the state establishes the mandatory participation of the defender in order to ensure a fair trial for the person. Moreover, in case of applying this sanction, pursuant to Part 5 of Article 69 of the RA Criminal Procedure Code, the body conducting the proceedings retains the powers of the appointed defense counsel if the person has a defender.

According to the Respondent, the provision on the appointment of a lawyer by the body conducting criminal proceeding through the RA Chamber of Advocates operates exclusively in such conditions when a person is sanctioned in the form of removal from the courtroom, the person does not have a lawyer, and s/he also does not express the desire to defend him/herself through the chosen lawyer. Otherwise, Paragraph 1 of Part 1 of Article 69 of the RA Criminal Procedure Code will apply, which means that if a person expresses a desire to have a lawyer even after the sanction has been applied in the form of removal from the courtroom, s/he can be defended through his chosen counsel.

The Respondent concludes that in such a case there can be no question of collision between two different institutions or of the secondary nature of the defendant's right to defend him/herself through his/her chosen counsel in relation to the obligation of the court to ensure compulsory legal representation, since the accused him/herself voluntarily renounces the right to have a counsel of his/her choice.

4. In accordance with Part 7 of Article 68 of the RA Law on the Constitutional Court, taking into account the need to ensure and protect the free exercise of the rights and freedoms of a person and citizen enshrined in the Constitution, the permissibility and certainty of their limitations and on the basis of the arguments of the parties, the Constitutional Court considers it necessary to assess the challenged legal norm not only from the point of view of guaranteeing the constitutional human right to defend him/herself against the charge personally or through his/her chosen counsel, but also in general from the point of view of ensuring the right of persons to receive legal aid, a fair trial and the principle of adversarial criminal proceedings.

5. The first sentence of Part 1 of Article 64 of the RA Constitution guarantees everyone the right to receive legal aid, which implies the discretion of each person to benefit from legal aid or not. The Constitution requires the public authorities to consolidate at the legislative level such procedures and mechanisms that will effectively guarantee the possibility of effective implementation by a person of the right to receive legal aid, and also in practice ensure that the person voluntarily and consciously decides whether to benefit from legal aid or not.

This general rule also applies to Paragraph 2 of Part 2 of Article 67 of the Constitution, which provides that "Everyone accused of a crime shall have ... 2) the right to defend himself or herself personally or be defended through an advocate chosen thereby."

Given the significance and importance of this right in the issue of effective protection of fundamental rights, especially in the implementation and protection of the right to effective judicial protection and the right to a fair trial, the second sentence of Article 64 (1) of the Constitution establishes the right of a person to receive legal aid financed by public funds in cases prescribed by law. That is, the Constitution guarantees the right of a person to receive legal aid also when the person in the case of his/her insolvency or in other cases established by law cannot enjoy this right.

Although Article 67 of the Constitution guarantees the right to defend for the person accused of a crime personally or through a lawyer chosen by him/her, however, in comparison with the second sentence of Article 64 (1), s/he is guaranteed the right to defend him/herself not only personally or through his/her chosen counsel, but also by the state defender in cases provided by law.

According to Part 4 of Article 6 of the RA Law on the Profession of Advocate the state guarantees free legal aid prescribed in Article 41 of the same Law. Article 41 of the Law reveals the content of the notion of "public defense", according to which free legal aid provided in the cases prescribed in the same article is considered public protection, and establishes both a list of those persons who are granted public defense and lists those cases and persons who will not be provided with free legal aid.

6. Ensuring the constitutional right of a person to receive legal aid is one of the core principles of criminal justice. The adversarial nature of criminal proceedings (Article 23 of the RA Criminal Procedure Code) necessarily involves the mandatory participation of the defense counsel from the moment of appearance of the accused in criminal proceedings.

Article 10 of the RA Criminal Procedure Code prescribes that in the case of expressing a wish by the suspect or accused or, when the interests of justice demand, as well as in compulsory cases according to the legislation, the body conducting the criminal proceedings must ensure their right to receive legal aid.

That is, the participation of counsel in criminal proceedings is compulsory:

- a) when the suspect or accused expressed such a wish;
- b) when the interests of justice require;
- c) in cases that are considered mandatory according to the legislation.

In the presence of the last two groundings, the refusal of the defense counsel may not be accepted and legal regulations apply regarding the compulsory participation of the defender in criminal proceedings.

According to Article 19 of the Code, the suspect and the accused are entitled to protection, and the body conducting criminal proceedings is required to explain to them their rights and to ensure de facto opportunity to defend themselves against the charge by all means not prohibited by law. Part 4 of the same article prescribes the right of the suspect and accused to defend themselves against the charges both in person and through the defender and legal representative, while simultaneously establishing that the participation of the latter in criminal proceedings does not limit the rights of the suspect and the accused.

In accordance with Point 3 of Part 2 of Article 65 of the Code, the accused has the right, from the moment of charge, to have a defender, to refuse a defender and to defend her/himself.

Article 68 of the RA Criminal Procedure Code establishes the status and legal status of the defender and regulates the remaining issues related to it. By virtue of this article, the defense attorney is a lawyer who represents the legitimate interests of the suspect or accused in the proceedings in the criminal case and provides them with legal aid by all means not prohibited by law. The person acquires the status of a defender with the consent of the suspect or the accused from the moment of taking over his/her defense. Part 3 of the same article lists those cases when the defender ceases to participate in the criminal proceedings such as:

- 1) the suspect or accused shall terminate the agreement with him/her;
- 2) s/he is not authorized to participate in further proceedings in the relevant case;
- 3) the body that conducts criminal proceedings releases the defense counsel from participating in the proceedings in the criminal case due to the discovery of circumstances precluding his/her participation in criminal proceedings;
- 4) the body conducting criminal proceedings in the cases prescribed by the Code has accepted the refusal of the suspect or the accused from the defense counsel.

From the analysis of the submitted legal norms it follows that according to the RA legislation, the person accused of a crime is allowed to be defended personally (*pro se*), defended through a lawyer by concluding a contract with him/her and paying for it, and also to use free legal aid in the framework of public protection.

7. According to Article 79 of the RA Constitution, in case of restriction of fundamental rights and freedoms, the preconditions and the scope of restrictions shall be stipulated by law; the latter shall be sufficiently certain for the holders of fundamental rights and the addressees to be able to engage in appropriate conduct.

The RA Constitutional Court states that, as a rule, with the will of the person, his/her right to have a defender shall be realized, and the person can refuse the chosen counsel any time and exercise his defense independently. It should be noted that the latter is not an absolute right, since the legislator clearly provided for a range of cases where the right of a person to defend himself can be limited. Under certain circumstances, which are prescribed by Article 69 of the RA Criminal Procedure Code, it is strictly required that the suspect or accused shall be represented, since without the legal aid provided by the defense counsel, the suspect or accused cannot defend her/himself or fully exercise her/his right to defense. The legislator's consideration is not limited to establishing such cases. The legislator also prescribes cases when the receipt of legal aid is mandatory and the will of a person to enjoy the right to legal aid or not ceases to be decisive. Such a regulation should be aimed at protecting any constitutional value. The RA Constitutional Court considers that the right of a person to exercise independently her/his defense in this situation is not limited, as the stipulated regulations serve to the implementation of the positive obligation of the state to guarantee the right to legal aid.

With regard to the refusal of a person to defend her/himself, firstly, Part 2 of Article 72 of the RA Criminal Procedure Code makes it clear in which cases it is impossible to refuse a defense counsel, and it is obvious that in other cases a person can refuse a counsel. Secondly, Part 4 of Article 72 of the same Code stipulates that a suspect or an accused who has refused a defense counsel has the right to change her/his position any time during the criminal proceedings, but the participation of a new defense counsel does not serve as grounds for resuming proceedings.

The RA Constitutional Court considers it necessary to note that, in the context of the application of the institutions of the right to protection and the refusal to exercise the right, it is necessary to ensure proportionality, and the application of the institution of refusal without reservations may lead to violation of rights. The institution of the refusal to exercise the right cannot lead to the demand of the state to refuse from the positive obligation, aimed at protecting the interests of justice and human rights. In such a situation, the state is guided by the human right not only as an opportunity of the person to choose her/his behavior, but also as the highest value.

8. Referring to the issue of the constitutionality of the provision of Part 5 of Article 69 of the RA Criminal Procedure Code, the RA Constitutional Court considers that, within the framework of the institution of mandatory participation of an advocate, the goal of the advocate's participation is to ensure the protection of the rights of his/her principal, hence the continuation of the case with the participation of a advocate and in the absence of the defendant proceeds from human rights and assumes a more effective process than continuing the consideration of the case with the simultaneous absence of the defendant and advocate. In the case when the

defendant is sanctioned a removal from the courtroom, the legal regulation of the appointment of a public defender serves as a guarantee of the right to legal aid. And the issue that the defendant is deprived of the right to defend her/himself personally and to be heard is connected with the application of such a sanction and the continuation of the court session.

9. Regarding the impossibility of attracting an advocate by the choice of the accused in the case of mandatory participation of the defense counsel, the RA Constitutional Court considers it necessary to note that in such situations the defendant's ability to have an advocate of her/his choice is not ruled; in such a situation the legislation prescribed the mandatory participation of the counsel whom a person may choose as her/his own advocate, but in her/his absence the state will attract a defender at the expense of public funds. **Article 69 of the Code concerns the mandatory participation of a defense counsel but not the mandatory participation of a public defender. The Constitutional Court considers that the mandatory participation of an advocate does not limit the right of a person to defend her/himself through a advocate provided by the state, and even if appointed by the public prosecutor's office, the person still retains the right to defend her/himself through her/his advocate.** The situation develops differently when a person does not have an advocate or does not want to be represented by an advocate. In this case, the state attracts a lawyer, and in some cases even excludes the refusal.

10. It follows from the study of law enforcement practice that according to the information provided by the head of the Office of the Public Defender of the RA Chamber of Advocates, in 2017, 485 cases of refusal of the services of the public defender were registered, which is approximately 8% of the total number of cases of involvement of the public defender by the bodies performing the proceedings. Moreover, the indicated cases of the refusal of the suspect or accused from the services of the public defender both during the preliminary investigation stage and at the trial stage were due to the desire of the suspect or accused to have a defender of his/her choice or to defend him/herself personally. With regard to the cases of involvement of a public defender as a result of the application of the sanction in the form of removal of the defendant from the courtroom, the defendants did not give their consent in 12 cases from 12 registered cases, but the court involved public defenders, and in one case the public defender appeared in court, but was not attracted because of the involvement of a private defender.

The RA Court of Cassation, referring to the "admissible by the RA Criminal Procedure Code cases of refusal of legal aid, namely, the refusal to have a defender or the refusal of a designated counsel", in Decision ԵՔԴ/0436/01/08 dated 29.06.2009, considered that a person's voluntarily expressed desire to benefit from the legal aid, namely, to have a defender mandatory for the body

that conducts the proceedings, noting in particular that "... **the refusal of the person must be accepted by the body conducting the proceedings only when taking into account the age of the person and investigating the motives of her/his refusal of the right to defense, the body conducting the proceedings comes to the conclusion, that:**

a) such a desire is expressed by a person voluntarily (at her/his own will), on her/his own initiative, and the refusal is not compulsory based on the circumstances of the case;

b) the person is able to fully realize the consequences of her/his behavior;

c) a person is able to conduct her/his own defense independently. "

In the same Decision the Court of Cassation stated also the fact that " **there is an issue of ensuring uniform application of the law** in connection with the legal issue of adoption by the body conducting the proceedings of the person's refusal from the person invited by her/him or other persons or appointed by counsel in the manner prescribed by law."

11. The rights of a person to receive legal aid and protection from prosecution are also enshrined in international human rights treaties ratified by the Republic of Armenia, in particular in Part of Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.

In paragraph 1 of the UN General Assembly Resolution of December 20, 2012, "Principles and Guidelines for Access to Legal Aid in Criminal Justice Systems" A/RES/67/187 states that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.

The same Resolution states that States should consider the provision of legal aid their duty and responsibility (Principle 2, para. 15).

From the first guideline of this Resolution it follows that, a court may direct that that person be provided with legal aid, with or without his or her contribution, when the interests of justice so require (paragraph 41).

The European Court of Human Rights expressed the position that "the right of legal representation is not conditioned by the presence of the accused", considering that "the right of every accused in a criminal offense to defense, which is effectively carried out by counsel, is one of the main signs of a fair trial. The accused does not lose this right only because he did not participate in the court session (hearings). The legislator should avoid groundless refusals and cannot punish, excluding the right to legal aid. The legal requirement of participation of

defendants in court hearings can be provided by other means, besides deprivation of the right to be protected." ("Van Geyselhem v. Belgium", app. no. 26103/95, 21/01/1999)."

It follows from the case law of the European Court that the Court does not consider the defendant's right to exercise protection in person or through his chosen counsel as an absolute right. The Court noted that "it is true that Article 6 of the Convention may allow an accused person to be duly represented by a lawyer during criminal proceedings. Nevertheless, despite the importance of trust in the relationship between the lawyer and the client, this right cannot be considered as absolute" and "the domestic courts are competent to decide whether the interests of justice require the appointment of a lawyer as mandatory or not" ("Croissant v. Germany", app. No. 13611/88, 25/09/1992, § 29 "Lagerblom v. Sweden", app. no. 26891/95, 14/04/2003). The question is whether to allow a person to exercise his/her defense in person or appoint a lawyer for him/her is within the discretion of the state, since the state, within its legal system, can most effectively make a choice to guarantee effective protection ("Correia de Matos v. Portugal" app No. 48188/99, 15/11/2001).

At the same time the European Court found that if a lawyer appointed to provide legal aid clearly demonstrates negligence in the performance of his/her duties, the positive obligation of the authorities is to replace him/her (Artico v. Italy, app. No. 6694/74, 13/05/1980, §31-38).

12. Regarding to the issue that when applying the sanction in the form of removal from the courtroom, the defender can arbitrarily leave the courtroom or leave the courtroom at the request of the defendant, the Constitutional Court states that in this case the defendant is in fact deprived of his/her defense, therefore, according to the assessment of the Constitutional Court, the interests of justice require that a public defender shall be appointed in the manner prescribed by law.

According to the case-law of the European Court, for avoiding interruption and adjournment of the trial the appointment of a defender also follows from the interests of justice ("Croissant v. Germany", app. No. 13611/88, 25/09/1992, §28). According to Article 304 of the Criminal Procedure Code, the new member attending the case is provided time sufficient for the examination of the case materials and s/he has the right to petition for the recurrence of any proceeding before joining the case, which results in the discovery of significant circumstances, which can lead to a prolonged trial.

In view of the foregoing, the Constitutional Court considers that:

firstly, without the consent of the defendant, a public defender can be appointed from the interests of justice, such as ensuring the rights to effective judicial protection, hearing the case within a reasonable time and the principle of adversarial proceedings.

Secondly, the defendant in the case of her/his removal from the courtroom should be informed in advance of the consequences of removal of the defense counsel. Since legal aid can have a significant impact on the process of guaranteeing the effective exercise of fundamental rights and freedoms, the Constitutional Court also considers **that the refusal of the defense counsel should be voluntary and conscious, and the person must be informed in advance of the consequences of the refusal.**

Thirdly, if a public defender is appointed, but in the future the defendant wishes to have a defender on his/her choice, the powers of the public defender, based on the interests of justice, can be preserved by the court, which cannot be a ban on the participation of the defender chosen by the defendant.

Based on the review of the Case and governed by Point 1 of Article 100, Point 8 of Part 1 of Article 101, and Article 102 of the Constitution of the Republic of Armenia (with Amendments of 2005), 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.** Part 5 of Article 69, Point 2 of Part 1 of Article 70 and the third sentence of Part 2 of Article 72 of the RA Criminal Procedure Code are in conformity with the Constitution of the Republic of Armenia within the framework of the legal positions expressed in this Decision.
- 2.** Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia (with Amendments of 2005) this Decision shall be final and effective upon publication.

Chairman

V. Hovhannisyan

13 February 2018

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