



**HUMAN RIGHTS DEFENDER OF
THE REPUBLIC OF ARMENIA**



Newsletter

**Summary of Special Positions of the RA Human Rights Defender
Submitted to the Constitutional Court of the Republic of Armenia in
2017-2018**

-Yerevan 2018-

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POSITIONS PROVIDED IN 2017

1. On the matter of determining the compliance of Para 6 of Part 1 of Article 142 of RA Criminal Procedure Code with the RA Constitution

An application to the Court has raised the issue of release of a person by the administration of the penitentiary institutions based on a court decision. The issue was that irrespective of the fact that the evidence is provided (court decision in the given case), according to current regulations administration of the penitentiary institutions additionally may enquire a decision of investigative body for a release. As a result of in-depth legal study an amicus brief to the Court has been submitted where a position was made that due to the lack of sufficient and due legislative mechanisms, as well as to the practical implementation issues right to personal integrity is being violated, stating that the court decision itself must be a ground for a release by the administration.

2. On the matter of determining the compliance of Articles 451, 453, 455, 457, 458, 459 of RA Criminal Procedure Code with the RA Constitution

An application stated that within proceedings on the decision of insanity after recipient of a bill of indictment the court or the prosecutor are not entitled to initiate compulsory medical treatment proceeding, which inter alia infringes such rights as to have a legal representative, not to undergo criminal prosecution under criminal charge as well to get medical treatment relevant to their mental health and other right. With regards to these legal norms a position in the brief has been made that irrespective of the fact that the state recognized a number of rights that persons with disabilities have, however proper mechanisms to realise these rights are not guaranteed.

3. On the matter of determining the compliance of Part 1 of Article 213 of RA Administrative Code with the RA Constitution

The issue of incompliance was raised as current regulations restrict person's right to appeal the Administrative Court decision regarding electoral rights. A brief has been submitted to the Court considering right to fair trial and right to appeal, concluding that such right should be in place for such decisions.

4. On the matter of determining the compliance of Parts 4 and 7 of Article 68 of the RA Land Code with the RA Constitution

An issue was raised by the applicant regarding auctions of community-owned land. The applicant argues that the law limits access of community members of civil society and media representatives. As a result, publicity of local authority's actions is not guaranteed, which leads to a number of human rights infringements. A position in the brief has presented study on these issues from the point of the right to information and the right to freedom of expression considering the fact that community representative who in fact own all such properties must be represented during auction procedure which are organized to sale community properties.

5. On the matter of determining the compliance of Para 10 of Part 1 of Article 35 of RA Criminal Procedure Code with the RA Constitution

Paragraph 10 of the Part 1 of Article 35 of the Code, under the title "Excluding circumstances of Criminal proceedings or criminal prosecution" defines: "1. Criminal case can not be instituted and criminal prosecution may not be started and the instituted criminal case is subject to suspension, if: (...)

10) The person died, except the cases when the proceedings are necessary to rehabilitate the rights of the deceased or to resume the case on occasion of new circumstances with regard to other persons...". The RA Criminal Procedure Code does not stipulate such direct regulation, in which circumstances the objection to the cessation of criminal prosecution against the deceased by the close relatives of the deceased or other interested persons will be an obstacle to make such a decision. Meanwhile, in case of death of the alleged perpetrator, his nearest line descendants should have the right to demand continued proceedings for the purpose of protection of the rights of the deceased. This is a way of protect the good reputation of the deceased and his family. In addition, in case of acquittal of a person, his heirs acquire a number of civil rights derived from it.

Accordingly, the issue was considered from the point of view of the rights of the legal successors of the deceased.

POSITIONS PROVIDED IN 2018

1. On the matter of determining the compliance of RA Criminal Code Article 57 Part 2 with the Constitution of the RA.

Results of studies regarding RA Penitentiary Code about detention and other forms of deprivation of liberty (imprisonment) as a criminal sanction shows that procedure and conditions for detention are stricter. Private conversations with people deprived of their liberty and visits to the RA penitentiary institutions by representatives of the RA Human Rights Defender's (also the Defender) office, also of the representatives of the Torture and Ill-Treatment Prevention Department of the Defender's Office monitoring visits to penitentiary institutions indicate that practically detainees or convicts prefer detention as a mean of sanction instead of a other types of deprivation of liberty (imprisonment) as a punishment. Information provided by private conversations shows that such preference is conditioned by the fact that a shorter period s provided for a detention, unlike imprisonment. That is, despite the restrictions of existing rights, people deprived of their liberty prefer to bear the punishment without these rights but for a shorter period than with a wider range of rights, but for a longer period of time.

At the same time, international experience and international standards have been studied which proves the need for assurance of all the rights (including the right of receiving visits of family members) of people deprived of their liberty.

2. On the matter of determining the compliance of the Articles 75 and 221.1 of RA Civil Procedure Code with the Constitution of the RA.

Procedural terms and the matter of their uniform application in the Civil Code have been examined. Circumstances surrounding the case are related to the fact that the one-month period for filing appeal to the Court of Appeal differs in practice because of different month having different quantities of days (for example February). The RA Human Rights Defender has considered that setting one-month term for judicial appeal provides a period during which the party will impartially have the opportunity to take appropriate measures to appeal against the verdict. In this case it is worth mentioning that in cases prescribed by

the RA Civil Procedure Code upon entering into force of the case from the moment of the publication of the substantive judicial act, the participants of the trial shall be entitled to a one-month period for the right of appeal of a judicial act in higher order. But in the case of February, as February is composed of 28 days (29 days in leap years) and within the three days in which the judicial act will be available to the person, for the appeal the person will have 25 and respectively 26 days in leap year.

3. On the matter of determining the compliance of the Article 204.33 Point 1 phrase “in the conclusive part” of RA Civil Procedure Code with the RA Constitution

A question to what extent accepting the content of the conclusive part of the Constitutional Court’s decision as a newly emerged circumstance serves to its purpose and whether the content can fully reflect a complete position of the Constitutional Court expressed in its decision’s. As a result of the studies a position has been made that analyses and legal assessments prescribed in each section of the decisions of Constitutional Court decisions should be equally applicable as a new circumstance and should be laid down in the basis for the review of the judicial acts.

4. On the matter of determining the compliance of the RA Criminal Procedure Code Article 381 Part 2 with the RA Constitution

Part 1 of Article 381 of the RA Criminal Procedure Code defines that “The appeal must contain: ... 8) the signature of the applicant”, and part 2 of the same article provides that “In the case when the appeal does not conform with the above requirements, by the decision of the Court of Appeal decision, it is left without examination”. In other words, the part 1 of article 381 of the RA Criminal Procedure Code provides formal conditions for the appeal to the Court of Appeal, one of which is also the requirement of the applicant’s signature. The latter pursues the purpose of identifying the applicant and is aimed at proper administration of justice. At the same time the RA Criminal Procedure Code provides regulations regarding leaving the appeal without examination as a consequence of not conforming with the above mentioned requirements. As a result, the person actually is deprived of the opportunity to

re-submit the appeal. This situation was discussed from the point of realization of the right of fair trial.

Comparative analysis on the appeals has been made between the regulations of the RA Civil Procedure Code and RA Administrative Procedure Code. The administrative procedure entitles applicants to re-submit the appeal after correcting the shortcomings as a result of which the court had rejected to submit the appeal. Lack of such opportunity to re-submit applications in criminal procedures are not justified particularly when similar regulations exist in administrative procedures.

5. On the matter of determining the compliance of the RA Law on Status of Military Service and Servicemen Article 61 Part 16 with the RA Constitution

The Defender's office studied regulations of the RA Law on Status of Military Service and Servicemen as they have not ensured servicemen right to receive monetary compensation for all unused vacations in case of dismissal from the work or military service. The problem is that, according to the RA Law on Status of Military Service and Servicemen in case of dismissal from the military service servicemen who have an unused vacation during military service shall be provided with compensation no more than for the days of dismissal from the military service and the previous two years unused vacations, in the amount determined by the Government of the RA. According to the Law the days of servicemen not included in the general term of the military service are not included in the calculation of the days of unused vacation. As a result, with the adoption of the Law the servicemen, who have not used their serial vacation more than two years, have been deprived of the right to receive monetary compensation for unused vacation, so their right to property has also been violated. The issue was considered in terms of exclusion of discrimination since similar legal relations regulating other legal acts have not provided such restrictions.

6. On the matter of determining the compliance of the RA Criminal Procedure Code Article 300 with the RA Constitution

In the chapter on the preparation of the case for trial, the RA Criminal Procedure Code (hereinafter, the Code) obliges also to refer the issue of possible precautionary measures along with the decisions made during the preparation of the case for trial. In particular, pursuant to article 300 of the Code “At the same time with adopting decrees, except the decree to forward the case by jurisdiction, the court must consider the issue of using or not using means to secure appearance of the accused, and whether these means are justified or unjustified, if this means had been selected”. The Code does not require the participation of any party to the proceedings for the consideration of the issue of the preparation of the case for trial. It turns out that the Code allows to discuss the issue of choosing or not choosing precautionary measures related to the deprivation of liberty in the absence of the person concerned.

The Criminal Procedure Code does not entail provisions on court session procedure for the consideration of the issue of choosing a detention as a preventive measure or when the detention is chosen discussion for determining justification of the decision with the participation of the accused or his lawyer.

The RA Human Rights defender has also done analyses on the reasonableness of judicial acts. The lack of mentioned provisions infringes the right to fair trial, deprives the person of the opportunity to discuss the substations and reasoning for choosing or imposing detention as a preventive measure. Considering the practice of the courts imposing detention and extending the period of it this is especially problematic from the point of these decisions’ reasoning.

7. On the matter of determining the compliance of the RA Administrative Procedure Code Article 60 and the practice established by complaints against the decisions of the appropriate authorities/bodies regarding to administrative offenses prescribed by the RA Law on State Duty Article 22 part 1 paragraph 9 sub-paragraph 6 with the RA Constitution

The regulations regarding the state duty charged during the administrative trial and exemption from the state duty were researched. Meanwhile, the practice shows that instead of applying Article 22 Part 1 of the RA Law on State Charges prescribed by the Article 57 of the RA Administrative Procedure Code courts apply Article 60 of the RA Administrative Procedure Code and force the applicants to pay state duty in cases when the complaint against decision about administrative responsibility is denied.

The regulations prescribed by the RA Law on State Charges do not provide an opportunity for charging state duty. That is to say, in this kind of circumstances for applying to court state levy is not prescribed by Law, and in such circumstances the state charges levied on the basis of the RA Administrative Procedure Code Article 60 contradicts the requirement of predictability derived from the idea of legal certainty.

8. On the matter of determining the compliance of the RA Law on the Fundamentals of Administrative Action and Administrative Proceedings Article 63 Part 1 with the RA Constitution

The issue is about the subordination and jurisdiction between the administrative and civil courts. During the examination of the case, it was found out that the solution to the case can be given solely to the rest of the problem, in this case referring to the main claim of its nature. It turns out that if the person submitted a complaint with two claims, the case would be referred to the civil procedure rule, but since it was submitted only with the derivative claim, the case was examined by the rules of the administrative procedure and at the same time referring to the main requirement. As a result, the opportunity for professional and special procedural solution of the main issue in the case is not provided posing infringement of the right to fair trial.

9. On the matter of determining the compliance of the RA Land Code Article 102 Part 5 with the RA Constitution

According to the RA Land Code Article 102 the rights on land are compulsively terminated through judicial procedures in the case of non-payment of the land tax within three years and non-payment of the debt during the fourth year. The issue has been considered in terms of right to property and proportionality of its deprivation prescribed by the Constitution of the RA. At the same time, it was discussed that it is not regulated by Code whether the person is exempted from the unpaid land tax or not. Therefore, this issue is also left to the court decision.

10. On the matter of determining the compliance of the RA Criminal Procedure Code Article 379 part 1 para 2 with the RA Constitution

A research has been conducted on the grounds for presenting cassation and appeal cases established by the RA Criminal Procedure Code were studied. The results have shown that appeal application on the matter of the ground of a fundamental breach is limited to 6 months in contrary cassation applications do not have such time limitations. The latter has been examined in the light of the right to fair trial and the right to effective judicial protection of his or her rights and freedoms.

11. On the matter of determining the compliance of the Administrative Procedure Code Article 96 part 1 paragraph 6 with the RA Constitution

A comparative analysis on the RA Administrative Procedure Code has shown that in any case there is no diversion for cases of the administrative case dismissal on the ground of plaintiffs for example, a state body) rejection of the claim. Upon dismissal of the aforementioned administrative procedures, the further prosecution of the respondent within the same administrative case is also terminated. The issue of concern has been considered from the point of the dignity, honour and good reputation of the respondent.

12. On the matter of determining the compliance of the part 3 of article 9 of the RA Law “On service and social guarantees, ensuring the activities of the officials” with the RA Constitution

As a result of this study, it turns out that the RA Law “On service and social guarantees, ensuring the activities of the officials” reserves the right to a long term service pension to investigators of National Security, Special Investigative Committee and investigative service. The underlying question is that a long term service pension is not reserved to investigators of tax and customs bodies. The issue was examined from the point of view of discrimination.

13. On the matter of determining the compliance of the Paragraph 3 (b) of part 8 of Annex 1 of Decision No 275-N of the RA Government “On Approving the establishment and the procedure of appointment and payment of one-time childbirth allowance” with the RA Constitution

The issue related to the conformity of the Paragraph 3 (b) of part 8 of Annex 1 of Decision No 275-N of the RA Government of March 6, 2014 “On Approving the establishment and the procedure of appointment and payment of one-time childbirth allowance” with the article 29 of the RA Constitution was discussed. Particularly, the principle of prohibition of discrimination was examined from the point of view of the father parent's right to receive one-time childbirth allowance. Within the scope of this case, the legislator has established a provision in which the father parent is manifested in a differentiated approach compared with the mother parent in the same situation as the result of which the latter is in a more favourable situation.

14. On the matter of determining the compliance of the part 3 of article 198 of RA Civil Code with the RA Constitution

In the framework of the study, the question is that the constitutional legal interpretation of the disputed norm of the decision of the Constitutional Court is used by the courts in another interpretation.

Examining the application of compliance of the part 3, article 198 of the RA Civil Code with the Constitution of the Republic of Armenia, by the Decision SDO-1009 of 24 February 2012 the Constitutional Court recognized the disputed norm as not contradictory to the Constitution. In particular, each of the participants of joint ownership shall have the right to enter into transactions for disposition of common property, unless otherwise provided for by their agreement, bearing in mind that in the following cases, for entering into the transaction for disposition of common property by a separate participant, there is a need a positive consensus of all co-owners which will explicitly indicate the presence of the necessary authorization to the participant entering into transaction.

Along with the above-mentioned, the Constitutional Court extensively analysed the disputed norm and explicitly revealed the scope of its application in the reasoning part of the decision.

Thus, the Constitutional Court has clearly defined the command of the integrity of the decisions made by the Court, underlining that the legal consequence of the legal position disclosing the constitutional and legal content of the Constitutional Court is not conditioned by the fact that the legal position is fixed in this or that part of the decision of the Constitutional Court.

At the same time, it should be highlighted that although SDO-1359 decision was made in 2017, however, it should be guided by previous decisions and all decisions of the Constitutional Court shall be exercised by the courts, state and local self-governing bodies in its entirety and not only the final part of the decision.