ԵՐԵՎԱՆԻ ՊԵՏԱԿԱՆ ՀԱՄԱԼՍԱՐԱՆ
ЕРЕВАНСКИЙ ГОСУДАРСТВЕННЫЙ УНИВЕРСИТЕТ
YEREVAN STATE UNIVERSITY

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ
ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ

ВЕСТНИК ЕРЕВАНСКОГО УНИВЕРСИТЕТА
ПРАВОВЕДЕНИЕ

JOURNAL OF YEREVAN UNIVERSITY
JURISPRUDENCE

ՀԱՍԱՐԱԿԱԿԱՆ ԳԻՏՈՒԹՅՈՒՆՆԵՐ
ОБЩЕСТВЕННЫЕ НАУКИ
SOCIAL SCIENCES

№ 2 (39)

ԵՐԵՎԱՆԻ ՊԵՏԱԿԱՆ ՀԱՄԱԼՍԱՐԱՆԻ ՀՐԱՏԱՐԱԿՉՈՒԹՅՈՒՆ
ИЗДАТЕЛЬСТВО ЕРЕВАНСКОГО ГОСУДАРСТВЕННОГО УНИВЕРСИТЕТА
YEREVAN STATE UNIVERSITY PRESS

ԵՐԵՎԱՆ - 2023

«Բանբեր Երևանի համալսարանի. Իրավագիտություն» հանդեսը լույս է տեսնում տարեկան երեք անգամ: Հրատարակվում է 2010 թվականից: Իրավահաջորդն է 1967-2009 թթ. հրատարակված «Բանբեր Երևանի համալսարանի» հանդեսի:

Журнал "Вестник Ереванского университета. Правоведение" выходит три раза в год. Издается с 2010 года. Правопреемник издававшегося в 1967-2009 гг. журнала «Вестник Ереванского университета».

Three issues of "Journal of Yerevan University. Jurisprudence" are published annually. The journal has been published since 2010. It is the successor of "Journal of Yerevan University" published in 1967-2009.

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 3-10 *Պետության և իրավունքի տեսություն ու պատմություն*
https://doi.org/10.46991/BYSU:C/2023.14.2.003

THE EVOLUTION OF LEGAL ASSISTANCE

GEVORG DANIELYAN

The article reveals the evolution of the legal foundations of legal support in the countries that gained independence in the post-Soviet era, as well as its socio-political and ideological antecedents based on the example of Armenia. Particularly, it is shown, that in the Soviet state legal system, the attitude regarding the advocacy, at least as a part of the state structure, have not been completely revised, but is accompanied by new justifications.

On the other hand, we discussed the problem that formation of an advocacy called to guarantee the right to a fair trial receives obstacles from the so-called "state mentality".

In particular, an advocate is perceived as a litigant who defends criminals by all means, therefore a state is not obliged to "excessively" cover the needs of free legal support.

The article thoroughly discusses the prerequisites for the evolution of legal assistance/legal support, especially the factor of legal culture, clear positions are expressed relating the issues arising from the scientific and practical dimension, and for overcoming the existing problems, and a number of legislative recommendations are offered, reference was made in a form of predictions.

Key words: *Legal assistance, advocate, fair trial, public defender, advocacy, advocacy secret, principle of competition, evolution*

In the context of outlining the directions of the formation of legal culture, what is of key importance is the structural and procedural basis on which the subjective human rights are brought into existence, in particular, what kind of role in their system is assigned to the advocacy called to provide legal assistance. In all post-Soviet countries, a cautious attitude towards the institutions of legal support to people has been openly observed in the activity of the state government, which is explained by the fact that in authoritarian systems that do not have stable traditions of democracy, they still do not have a clear and adequate idea of the practical role of non-state structures for the protection of human rights, the latter is considered as a sector operating outside of state control and providing unrestricted assistance to criminals, and accordingly, an atmosphere of mistrust prevails towards the latter.

The authorities of the newly established independent states see a strong threat to their power, a counterweight, in structures of that nature, therefore, formally remaining within the framework of democracy propaganda, in practice they either do not apply at all to enshrining the legal foundations of such structures or clearly obstructing their formation, significantly slowing down the whole process. It is not by chance, that the formation of the mentioned legal foundations in Armenia is also related to the late period, which we will discuss below.

The problem also acquires additional complications in connection with the question that in the environment of officials with a completely Soviet legal and political culture, it is extremely difficult to adequately understand the place and role of legal support institutions in the political system as well. Basically, the

various trends and interpretations regarding this issue, in our opinion, can be conditionally divided into two groups:

a) Advocacy is called to support the judiciary and

b) the fundamental task of advocacy is the protection of the client's rights. Let's note in advance that both of these approaches are not sufficiently scientific and are highly vulnerable in terms of emphasis, content, and imperativeness of questioning.

In this research, we did not limit ourselves to revealing the role of advocacy in the context of post-Soviet legal and political preconditions, but equally, take into account the need for a complex analysis desired to ensure the actual role of democracy in systems with stable traditions of democracy.

At the same time, we consider it necessary to emphasize that the starting point of scientific research concerning advocacy is perhaps limited to providing legal assistance to a person, while the most significant aspect is ignored without radically reviewing the foundations of the latter's relationship with justice and law enforcement agencies, the mission of legal assistance to a person will remain unfinished. Advocacy, also as an independent structure, must be endowed with the components of independence and immunity characteristic of the aforesaid bodies, be able to guarantee the true independence and unfettered professional activity of the representative of his community, the lawyer.

In general, giving great importance to the complex research of the components of the human rights system, we cannot ignore recording that the judgments and evaluations expressed in the sources of domestic jurisprudence regarding the mentioned components are not always distinguished by the necessary systematicity, with adequate disclosure of the actual place and role of a specific component, including setting standards for competition between rights. Ultimately, the same fundamental rights cannot have the same legal value and degree of protection. The fact that the mentioned rights are enshrined in the same source of law, the Constitution, does not mean at all that they are of equal value, in particular, the freedom of assembly cannot have the same legal and political value and level of protection as the right to life, etc.

Concerning the mentioned approaches, first of all, we consider it appropriate to present some initial judgments and conclusions, the justifications of which will be discussed below, slightly deviating from the traditional research methodology:

– Supporting the judicial power, which is mainly manifested by supporting the interest of justice, is not essentially in conflict with the protection of person’s rights by providing him legal support. Separating the above-mentioned tendencies from each other or opposing to each other has no reasonable justification. This question is precisely addressed in Opinion No. 16(2013) of the Advisory Council of European Judges and the Advisory Council of European Prosecutors “On the Relationship between Judges and Lawyers” “... the quality and effectiveness of judicial proceedings depend, first of all, on proper procedural legislation, as well as rules on essential aspects of civil, criminal and administrative proceedings. States must establish such provisions following Article 6 of the Convention. Judges and advocates should be involved in the process of developing such provisions, not for the benefit of both professions, but for

the benefit of fair administration of justice". Thus, professional, corporate interests are not an end in themselves, they must be unconditionally subordinated to the interest of justice. The professional characteristic of an advocate is that he supports the interest of justice by providing legal assistance.

– In the context of guaranteeing the right to a fair trial, it is considered adequate not to give preference to any of the mentioned approaches, but to prioritize providing legal assistance consistent with the realization of the right to a fair trial as a result of their harmonization. Underlying this conclusion is the rationale that legal support is more closely related to the right to a fair trial than to furthering the interests of justice.

– Advocacy as a structure should not be identified with any of the structures already defined by legislation, it is a structure with an independent status endowed with special public powers and may be granted the status of a legal entity under public law. It is not about recognizing a constitutional body endowed with public power, but about the status of a legal entity under public law, in which case being endowed with public power is not a mandatory condition. Accordingly, the Chamber of Advocates should be considered not just an autonomous non-state structure, but a system that fully guarantees the interests of advocates in public relations. In practice, the latter is mostly perceived as a tool for controlling the activities of advocates, including disciplinary prosecutions, while the latter has almost no real authority when criminal prosecution is carried out against the advocate. We believe that, along with the above-mentioned arguments, as well as to guarantee the unfettered activity of advocates at least to a minimum extent in countries that do not have stable democratic traditions, it is appropriate to grant the Chamber of Advocates the authority to consider petitions for consent to initiate criminal prosecution based on actions arising from the powers of advocates. In this case, it should be noted that the advocate has a greater need for protection from directed prosecution than the prosecutors. Moreover, the basis for this conclusion is also the moral and psychological atmosphere in which the advocate is not only considered a criminal defender of criminals but is also simply identified with the client he defends. Unfortunately, cases of beating the advocate directly in the police administrative building are also recorded[1].

– Legal assistance is consistent with the right to freedom of action, which means that it can be provided not only in prescribed ways but also in ways that do not conflict with the Constitution and laws and do not conflict with the rights of others. Of course, the advocate has a dual status, in particular, the latter acts not only as a private person, but also exercises obvious public-legal powers, but this cannot at all oblige the advocate to exercise only the powers established by the Constitution and laws. Accordingly, part 1 of article 5 of the Law "On Advocacy" stipulates that advocacy activities are carried out "by all means and methods not prohibited by law".

Let's make only one significant reservation in this regard: the constitutional norm of free action defines at least three components: a) a person is free to do everything that does not violate the rights of others, b) it does not contra-

[1] In particular, the fact that on February 9, 2023, in the administrative building of the Erebuni Police Department in Yerevan, the police officers beat two advocates in the office of the police operatives who were carrying out their professional activities, especially for providing legal assistance to minors (link: https.//www.facebook.com/watch/?ref=tab).

dict the Constitution and laws and c) no one can bear duties that are not defined by law. Among the mentioned components, the legal precondition that a person is free to do anything that does not violate the rights of others needs further analysis. In particular, it is not legitimate to be guided by the primitive mentality that the use of rights should be unconditionally stopped in all cases if the rights of others are violated. In the case of such a simple and precise approach, the need to predetermine the priority of possible rules of conduct from the point of view of competition of rights is merely ignored[2].

– Guaranteeing the advocate's ordinary activity cannot be limited only to the rules of procedure and courtesy, because the institution of immunity from liability, intended only for judges, and partially also for prosecutors, practically makes the advocate vulnerable. Moreover, such guarantees are especially necessary in the case of government bodies and officials who still do not have stable traditions of democracy, and who do not adequately perceive the real role of advocacy yet. Only the fact that a high-ranking official, perceiving the advocate as an entity protecting criminals, calls on them to refrain from supporting the latter, is enough to at least enshrine the advocate's right to immunity from criminal liability by legislation. Moreover, this proposal can be considered realistic only if the right to revoke immunity is reserved for the Council of the Chamber of Advocates[3].

Several other jurists have researches on the need to review the bases of judicial or investigative actions applied to advocates, but I think it is necessary to put forward a more radical and realistic legal solution[4], which we referred to above. In many international legal documents, there is also fixed physical immunity of advocates[5], which is also important, but it is not enough to guarantee the normal activity of the advocate in the necessary dimension.

The theoretical and legal prerequisites for forming advocacy are perhaps determined by legal and political culture, in other words, purely political perceptions and expectations, as well as professional ones, especially constitutional-legal positions play a specific role. Finally, the character of regional interstate, often also universal international relations is of crucial importance, because the real possibilities of legal cooperation, including advocacy in inte-

[2] For a comprehensive survey of rights competition issues, see Michael Sachs, Basis of the General Doctrine of Fundamental Rights in Germany. Subjective public rights in administrative law, Yerevan, Tigran Mets, 2012, p. 15-28.

[3] This point of view is thoroughly researched by T.I. by Shakirov. International standards of independence and accountability of advocates, Shakirov T. R., Text of a scientific article on the specialty “Law”, link to the article: https://cyberleninka.ru/article/n/mezhdunarodnye-standardty-nezavisimosti-i-podotchetnosti-advokatov.

[4] See, for example ` **Nowak M**., Commentary on the U.N. Covenant on Civil and Political Rights. Kehl: N.P.Engel Verlag, 2005. P. - 383, 384. **Голованов С.С.**, Гарантии независимости и неприкосновенности адвокатов, Вопросы современной юриспруденции, 5(66), 2017 г., link to the article` https://cyberleninka.ru/article/n/garantii-nezavisimosti-i-neprikosnovennosti-advokatov, **Вайпан В.А**., Настольная книга адвоката: постатейный комментарий к Федеральному закону об адвокатской деятельности и адвокатуре. / В.А. Вайпан // - М.: Юстицинформ, 2017 г. - С. 98. **Демидова Л.А**., Адвокатура в России: учебник // Л.А. Демидова, В.И. Сергеев. - М.: Юстицинформ, 2016. - 569 с. **Суровова К.Ю**., Организационная деятельность адвоката: понятие и содержание / К.Ю. Суровова // «Адвокатская практика», 2016, № 5. - С. 26 and etc.

[5] This point of view is thoroughly researched by T.I. by Shakirov: “International Standards of Independence and Accountability of Lawyers”, Shakirov T. R., Text of a scientific article on the specialty “Law” Report to the aricle: https://cyberleninka.ru/article/n/mezhdunarodnye-standarty-nezavisimosti-i-podotchetnosti-advokatov.

gration activities, are outlined by those factors. In particular, it became evident that with the direct support and participation of Turkey, in the context of the criminal prosecutions and trials initiated by the Azerbaijani law enforcement bodies against hundreds of prisoners of war as a result of the 44-day war unleashed by Azerbaijan, as well as in the courts, is to talk about human rights protection activities in the case of the injured Armenians who appeared in the criminal defendant's chair, is already from the absurd genre.

And this is not a purely domestic phenomenon, it has already acquired a broad geography and has become a challenge for all humanity. Now, as briefly as possible, let me address the legal and political prerequisites of the establishment and evolution of domestic advocacy, which are directly related to the theses proposed by us above. I was lucky enough to be one of the committee members for the first bill in this area. The latter consisted of two other members: the President of the Bar Association Mr Misha Piliposyan and jurist Koryun Nahapetyan. Already on June 18, 1998, as a result of our developments, the Law "On Advocacy" was adopted, which was radically different from the Soviet legal bases in force until then. Our task was to make perceptible positions that were unusual for the mentioned period, the legality of some of which is contested even today, not only for politicians, but also for wide circles of jurists as well. Perhaps, I will single out the most important ones:

– firstly, back in 1979, the law of the USSR "On Advocacy" and the statutes of the Union republics of the same name, the advocacy as an independent structure was called to support: a) protection of human rights and legal interests, b) the implementation of justice, c) preservation and strengthening of socialist legitimacy and d) educating people in the spirit of respecting laws and caring for people's welfare, maintaining labor discipline, respecting the rights, honor and dignity of others, as well as the rules of socialist coexistence. As you can see, advocacy has been perceived in terms of public ideology, as an attachment of the party and state apparatus, especially the investigative and judicial system. Overcoming such intentions is not an easy task.

First of all, we tried to formulate the long-term mission mentioned above as adequately as possible, that is: "Advocacy is a type of human rights activity recognized by the Constitution and laws, which is aimed at realizing the interests pursued by the recipient of legal support by means and methods not prohibited by law" (Part 1 of Article 4 of the Law "On Advocacy"). I would like to mention that this wording was also fixed by the current law "On Advocacy" with a partial editorial intervention: "Advocacy is a type of human rights activity carried out by an advocate and is aimed at the implementation and protection of the rights, freedoms and interests of the person receiving legal assistance by all means and methods not prohibited by law" (Part 1 of Article 5).

Although this wording was maximally consistent with international legal standards and international best practices, in the case of formed stereotypes, it caused a great resonance both in the political and professional spheres. Many, especially the representatives of the judiciary and the prosecutor's office, expressed concern that advocates thus ceases to support the interest of justice, which is their primary mission.

Our explanation at the stage of public debates was basically as follows:

human rights activities by their nature cannot contradict the interest of justice if we understand this term adequately and do not unnecessarily equate it with the process of detecting a crime. The interest of justice is not a universal value, but is only one of the essential components of the fundamental right of a person to a fair trial, therefore, in turn, it is called to contribute to the guarantee of that right, not to prevail over the latter.

The mentioned approach, with a slightly different aspect, was again confirmed by the current law "On Advocacy": "The body conducting proceedings in criminal cases provides free legal assistance through the public defender's office in cases provided for by the legislation of the Republic of Armenia or international treaties, or if the interest of justice requires it" (Part 4 of Article 41). In other words, the existing law also prioritized to the unhindered exercise of a human right to a fair trial rather than the discovery process.

Let us add that not only the right to a fair trial but also the interest of justice does not in itself prevent the detection of crimes, otherwise, they obstruct their disclosure by illegal means, in violation of the principle of proportionality, which should be acceptable from the point of view of public interests as well. In all cases, the reinterpretation of the role of the advocate contributed and contributes to the professional growth not only of advocates but also of law enforcement agencies and courts, on the whole new incentive to be knowledgeable has emerged.

Another problem is the structural, institutional status of advocacy. By the way, in the text of the 2015 amendments to the Constitution, the norms on advocacy were included for the first time through the efforts of the Chamber of Advocates. Of course, the latter's expectations, moreover, with completely legal justifications, were much higher, while the political forces and the professional community were not ready to fully accept them yet, so it was possible to establish at least the following in the context of the constitutional right to legal assistance: "To provide legal assistance, advocacy activities based on independence, self-government and equality of rights of advocates are guaranteed. The status, rights and duties of advocates are defined by law" (Part 2 of Article 64 of the Constitution).

As we can see, this norm does not directly address the institutional status of advocacy but outlines its essence and status boundaries. In general, the question is often raised as to what the Chamber of Advocates is: is it a public organization with a special status, and if so, on what basis were the functions typical of public authority assigned to it? In the depth of these judgments, other questions of the exact nature are often raised: to which branch of government does the prosecutor's office belong: judicial or executive, are the control bodies not an independent branch of government, etc.?

I think we have to overcome some stereotypes in this matter. First of all, advocacy is now an independent, self-governing structure provided for by the Constitution, so in this case, we are dealing with a structure that has acquired status under the Constitution: thus it should be regulated not by a law, to reserve a status from an institutional point of view, but the status must be should be derived based on the Constitution. "... the status, rights and duties of advocates" (Part 2 of Article 64). It follows from what has been said that the structures provided for by the Constitution should not be subject to the so-called general rules of the register, but act under the power of the Constitution. In such cases,

it is necessary to register not the structure with constitutional status, but the latter's staff, which is necessary from the point of view of making the regular activity of the main structure uninterrupted and effective.

As for the prosecutor's office in the context of similar questions, the latter should not be imagined as part of this or that branch of government, but as an independent constitutional body serving the principle of separation and balance of power. Many Latin American countries have preferred not three, but four or even six branches of government with their primary laws, trying to consider controversial bodies as independent branches of government. Without referring to the legality of these approaches, let's just note that not all constitutional bodies must necessarily be involved in this or that branch of government, some of them are called to guarantee the balancing mission of the government, therefore, their way of working should not be openly related to the executive power, but try to remain within the limits of their autonomy set by the Constitution.

I find it expedient to briefly address the key issues of advocacy in Armenia, first of all, overcoming and filling gaps in the legislative foundations. First, it is welcome that advocates not only take the initiative to improve the legislation themselves but also have a vested interest in vetting the drafted bills. But even more valuable is the mission of bringing to life the truly complex and challenging culture of applying the law and the analogy of law from the point of view of overcoming the loopholes of the law. Unfortunately, there is still an unwarranted wariness of these very important institutions in state systems: as a rule, they only try to fill the gaps in the law by adopting new, large-scale laws, which leads to the unnecessary burden and loss of professionalism of the parliament and law-enforcement bodies[6].

Summarizing the judgments regarding the issues related to the selected topic, I present the following general conclusion:

The constitutional mission of advocacy cannot be limited either to legal assistance or merely to guaranteeing the supremacy of the interest of justice, because such extreme perceptions make the latter unnecessarily vulnerable, as a result of which neither goal is fully realized. Both the interest of justice and the right to legal assistance do not contradict each other, but complement each other and ensure the necessary harmony of these ideas, since both are to a greater or lesser extent meant to guarantee the right to a fair trial. The interest of justice does not imply an unconditional limitation of the right to a fair trial, on the other hand, the realization of the right to a fair trial is not possible without adequate protection of the interest of justice.

Thus, the right to a fair trial cannot be entirely consistent with the interest of justice, therefore, in the conditions of this relative competition, it is appropriate to reserve the preference for such criteria for fixing and realizing the right to a fair trial, which are more consistent with the fundamental values and components of both legal assistance and the interest of justice.

[6] I addressed this question in detail in the article entitled “Current Issues of Overcoming Legal Conflicts and Legislative Gaps”. “Collection of materials of the conference of the Faculty of Law of YSU”, 1(3) 2019, Ch. Editor: G.S. Ghazinyan. - S.: YSU Publishing House, Yerevan - 2020., pp. 5-26.

ԳԵՎՈՐԳ ԴԱՆԻԵԼՅԱՆ – *Իրավաբանական օգնության էվոլյուցիան* – Հոդվածում Հայաստանի օրինակով, բացահայտված է հետխորհրդային դարաշրջանում անկախություն ձեռք բերած երկրներում իրավաբանական օգնության իրավական հիմքերի, դրանց սոցիալ-քաղաքական և գաղափարախոսական նախադրյալների էվոլյուցիան: Մասնավորապես, ցույց է տրվել, որ խորհրդային պետաիրավական համակարգում փաստաբանությունն առնվազն պետական կառույցի մաս դիտարկելու դիրքորոշումները ոչ միայն ամբողջությամբ չեն հաղթահարվել, այլև ուղեկցվում են նորանոր դրսևորումներով:

Մյուս կողմից, անդրադարձ է արվել այն խնդրին, որ արդար դատաքննության իրավունքի լիարժեք երաշխավորմանը կոչված փաստաբանություն ձևավորելը խոչընդոտում են այսպես կոչված «պետական մտածելակերպի» դրսևորումները: Մասնավորապես, փաստաբանն ընկալվում է իբրև ամեն գնով հանցագործներին պաշտպանող դատավարական կողմ, ուստի պետությունը պարտավոր չէ «չափից դուրս» հոգալ անվճար իրավաբանական օգնության կարիքները:

Հոդվածում հանգամանորեն քննարկվել են իրավաբանական օգնության էվոլյուցիայի նախադրյալները, հատկապես իրավական մշակույթի գործոնը, ձևակերպվել են հստակ դիրքորոշումներ գիտագործնական հարթությամբ ծագած հարցերի, առկա հիմնախնդիրների հաղթահարման առնչությամբ և առաջադրվել են օրենսդրական մի շարք առաջարկություններ, ինչպես նաև կանխատեսումներ:

Բանալի բառեր – *իրավաբանական օգնություն, փաստաբան, արդար դատաքննություն, հանրային պաշտպան, փաստաբանական գործունեություն, փաստաբանական գաղտնիք, մրցակցության սկզբունք, էվոլյուցիա*

ГЕВОРГ ДАНИЕЛЯН – *Эволюция юридической помощи* – В статье на примере Армении, раскрываются правовые основы эволюции юридической помощи в странах, получивших независимость в постсоветский период, а также их социально-политические и идеологические предпосылки. В частности, показано, что в советской государственной правовой системе отношение к адвокатуре, по крайней мере, как к части государственного устройства, полностью не пересмотрено, и сопровождается новыми обоснованиями.

С другой стороны, была затронута проблема того, что формированию адвокатуры, призванной полностью гарантировать право на справедливое судебное разбирательство, препятствуют так называемые проявления «государственного менталитета». В частности, адвокат воспринимается как истец, защищающий преступников любой ценой, поэтому государство не обязано «чрезмерно» покрывать потребности в бесплатной юридической помощи.

В статье подробно рассмотрены предпосылки эволюции юридической помощи, особенно фактор правовой культуры, высказаны четкие позиции по отношению к вопросам, возникающим на научно-практическом уровне, преодолению существующих проблем, сформулирован ряд законодательных рекомендаций, а также выдвинуты некоторые прогнозы.

Ключевые слова: *юридическая помощь, адвокат, право на справедливое судебное разбирательство, общественный защитник, адвокатская деятельность, адвокатская тайна, принцип конкурентности, эволюция*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 11-20 *Պետության և իրավունքի տեսություն ու պատմություն*
https://doi.org/10.46991/BYSU:C/2023.14.2.011

THE STRATEGIC PERSPECTIVE FOR THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

ARTYOM SEDRAKYAN

Strategic aspects of execution of the European Court of Human Rights judgments are analyzed in this article.

In the author's view, a strategic perspective matters also for the execution of judgments; State agencies should be armed with the ability to anticipate, prepare, and get positioned for further challenges. He suggests that there is an objective need to ensure the responsible involvement of relevant state bodies in the process of execution of judgments, clarifying the toolkit of interaction between them. With this view, several strategic steps are highlighted.

The author concludes that the adoption of a national strategy for interaction will increase the understanding of "shared responsibility" among state institutions within the process of the execution of judgments of the Strasbourg Court.

Key words: *European Convention on Human Rights, European Court of Human Rights, strategic perspective, execution of judgments, interaction, national strategy, shared responsibility, rule of law, human rights, human rights standards*

A "perspective" is a particular way of thinking and viewing things that depend on one's experience.[1] Perspective matters as it helps form a holistic vision of what you do. The *strategic* perspective is especially important as it "develops the competitive mindset"[2] of those responsible for a particular thing to be done. It combines the processes of observation and orientation, and it opens room to identify all the circumstances that hinder the achievement of the final result and contribute to it. Without a strategic perspective, it becomes hard to face challenges, and it becomes easy to miss the big picture ahead of you.

Such an understanding is essential today, especially when things and their processes have become rapid, and leaders face incredible pressures to deliver immediate results. The leaders and their teams must be able to look beyond short-term goals and outcomes. With this view, therefore, they must adopt a strategic perspective and act on that perspective. This is also true with regard to the process of execution of the European Court of Human Rights (ECtHR) judgments[3], where the state agencies should be armed with the ability to antici-

[1] See, e.g., *Oxford Advanced Learner's Dictionary*, 7th ed., Oxford University Press, 2006, p. 1085 and *Cambridge Dictionary* (https://dictionary.cambridge.org/dictionary/english/perspective).

[2] ***What Is Strategic Perspective?*** **By Zach Lazzari, 3 June 2019,** https://smallbusiness.chron.com/strategic-perspective-14365.html**.**

[3] For more details on the execution of judgments of the ECtHR, see "The Execution of the Court's Judgments" in *Law of the European Convention on Human Rights*, D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, 3rd ed., Oxford University Press, 2014, pp. 180-199, "The Execution of Judgments" in *The European Convention on Human* Rights, Clare Ovey & Robin C.A. White, 4th ed., Oxford University Press, 2006, pp. 496-502, and "Enforcement of Judgments" in *Taking a Case to the European Court of Human Rights*, Philip Leach, 3rd ed., Oxford University Press, 2012, pp. 83-106.

pate, prepare, and get positioned for further challenges. Put differently, strategic thinking capabilities should continuously be developed within the state institutions in implementing international human rights standards, including the guarantees enshrined in the European Convention on Human Rights (ECHR).

Previously, I was personally involved in the process of execution of the ECtHR judgments, and I can testify from within that this process is a complex one; it is a multi-layered and multi-angled process in which various actors are involved. Although these actors are both national and supranational, I will focus on national actors and their interaction in this article, given the fact that, from a strategic perspective, the issues to be faced (or that have been faced) are mostly *domestic*.

Within the framework of the following questions, I will introduce my understanding of the [possible] future strategic perspective regarding the execution of judgments.[4]

A. From a strategic perspective, what is the execution of judgments, and why is it a domestic process?

Armenia is a Council of Europe member state.[5] The execution of judgments for Armenia, thereby, is essential.

From a strategic point of view, its effectiveness is important in two ways: on the one hand, it contributes to the protection and promotion of human rights in Armenia; on the other, it makes it possible to introduce international legal standards into domestic law and practice while ensuring the fulfillment of the state's international obligations.

In general, the execution of judicial acts is an integral part of justice. In this sense, it is not possible to ensure the full implementation of justice if there are no clear mechanisms for executing (implementing) the judicial acts that are adopted as a result of justice. The same logic applies to the implementation of judgments of the bodies operating under international human rights treaties (in this case, the ECtHR). The more developed the structure of the execution of judgments, the greater the possibility of ensuring human rights in a specific member state of the Council of Europe.

Alternatively, in the strategic perspective context, the execution of judgments of the ECtHR is essential as it includes the guarantees for the rule of law in Armenia. Further, under such an umbrella, domestic law and legal practice are being developed through implementation of European and international human rights standards. Several results in Armenia are obvious examples to prove this: e.g., strengthening the legal framework to combat torture or other forms of ill-treatment, or establishment of new mechanisms for alternative service and non-pecuniary-damage compensation.[6]

The authorities should manifest and promote among the state institutions that these human rights standards are not someone else's; they are our own ones as they are adopted and issued by the supranational body that operates *with our*

[4] In this article, the phrase "execution of judgments" is used to refer to the execution of both the judgments and decisions of the European Court of Human Rights.

[5] Armenia joined the Council of Europe on January 25, 2001 (the country profile is available at https://www.coe.int/en/web/portal/armenia).

[6] For brief information on the reforms undertaken within the execution of judgments of the ECtHR is presented at the website of Armenia's Government Representation before the European Court of Human Rights, https://echr.am/en/legislative/legislativeammendments.html.

participation. Moreover — and most importantly — they are consistent with our national Constitution as they are in line with the requirements of our constitutional grand norms.

So, this was my answer to the above question in terms of strategic view. But I also need to find the answer to the question in the text of the Constitution. In this regard, two groups of constitutional provisions will be considered.

(1)The correlation between Article 3 and Article 6 of Armenia's Constitution: Article 3 of the Constitution declares that "[t]he human being shall be the highest value in the Republic of Armenia." It also states that the respect for, and protection of, the basic rights and freedoms of the human being and the citizen "shall be the duty of the public power." Moreover, the public power "shall be restricted by the basic rights and freedoms of the human being and the citizen as a directly applicable law." In turn, Article 6 provides that state bodies and officials "shall be entitled to perform only such actions for which they are authorized under the Constitution or laws."

Given the mentioned provisions, some conclusions are necessary to be made: (a) In practice, state agencies often bypass Article 3, especially when dealing with the process of the execution of judgments; (b) They prefer "hiding" behind Article 6 although they should be reminded that Article 3 is a "non-amendable" provision, which means it shall never be subject to amendment.[7] And if the matter is about the execution of judgments and, hence, the implementation of human rights standards, then they should not try to avoid their *own share* of responsibility.

(2)The correlation between Article 5 and Article 81 of Armenia's Constitution: According to Article 5, the Constitution shall have "supreme legal force," and statutory laws "must comply with constitutional laws, whereas secondary regulatory legal acts must comply with constitutional laws and [statutory] laws." It also declares that in case of conflict between international legal norms and those of statutory laws, "the norms of international treaties shall apply." As regards Article 81 of the Constitution, it states that "[t]he practice of bodies operating on the basis of international treaties on human rights, ratified by the Republic of Armenia, shall be taken into account when interpreting the provisions concerning basic rights and freedoms enshrined in the Constitution." This means that state authorities are limited in their actions or inactions with international legal practice.

Some conclusions are necessary to be made here: (a) Public authorities have broad and enduring discretion under Article 5, as the number one law in Armenia is obviously the national Constitution that has provided for specific functions and authorities; (b) But this discretion is not unlimited, so the state bodies, when dealing with human rights, must both implement international legal standards and create and implement their own standards, as [in principle] required by the Constitution; (d) This is essential from the point of view of the execution of judgments, which many today often simply fail to follow.

B. From a strategic perspective, to what extent are domestic actors held accountable?

[7] The Constitution provides, as follows: "Articles 1, 2, 3, and 203 of the Constitution shall not be subject to amendment" (Article 203).

The open question remains: If the execution of judgments is a domestic matter, how do state bodies interact during the process of execution?

Armenia ratified the ECHR in April 2002. In December 2003, the position of Government Agent before the ECtHR was created, with its office [the Justice Ministry's Department of Relations with the EctHR] to assist the Government Agent in conducting their functions. Today, this role is run by the Representative of Armenia on international legal matters with the Office of the Representative.[8] And upon consensus, and in the conceptions of competent state bodies at the domestic level, this body, or simply the Government Agent Office (GAO), is responsible for co-ordination of the execution of judgments since 2004.

In Armenia, the GAO has a solid legal status and sufficient authority, with many years of background and intensive experience in executing judgments. However, it is not enough to clearly define the GAO's role as co-ordinator. As concluded at the Tirana Round Table in 2011, it should be ensured that "the role of the co-ordinator is clearly defined, if appropriate, in legislative or regulatory acts, or through established working methods."[9] With this message in mind and given that the current legal framework does not sufficiently address this issue, the importance of indicating the Government Agent's role as co-ordinator is deemed necessary. Such an explicit regulation may increase the "clarity", "visibility", and "legal certainty" of the law and, thus, will strengthen the co-ordinating role in practice.

At least in the last ten years, the execution of judgments in Armenia has been quite successful, sometimes even exemplary. This means that the Armenian model of the execution of judgments, with its positive track record, has been relatively effective and has somewhat evolved along with the challenges of the times.[10]

Along with the aforementioned, however, the Council of Europe system of execution is being improved. Within the development of the ECtHR jurisprudence, the same is true with international experience. Besides, new ideas are coming to life, updated tools are being used, and new opportunities are being viewed. Therefore, the national model of the execution of judgments, and the current legislation and practice need to be continuously improved in line with the modern standards and the challenges of the time. Moreover, there is an objective need to ensure the responsible involvement of other state bodies in this process, clarifying the toolkit of interaction between them.

(1) But what steps must be taken to enhance the synergies between state bodies? In order to identify the need for changes concerning the

[8] The Law on Representative on International Legal Matters, HO-141-N, adopted 10 July 2019.

[9] Guide to good practice on the implementation of Recommendation CM/Rec(2008)2 of the Committee of Ministers on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, (CDDH(2017)R87 Addendum I, as adopted by the Steering Committee for Human Rights (CDDH) at its 87th meeting, 6-9 June 2017 in Strasbourg, para. 17).

[10] The effectiveness of the Armenian model of execution was also facilitated by the use of new working methods developed by the Committee of Ministers of the Council of Europe in 2011 (*Human Rights Files, No. 19*, p. 35, https://echr.am/resources/echr//pdf/1468c3fde0d097cf21 fcbac9c153e028.pdf). Under such methods, the new opportunities created favorable conditions for developing domestic practice in Armenia. This was also supported by the adoption of the 2019 Law on the Republic of Armenia Representative before the European Court of Human Rights (currently: The Law on Representative on International Legal Matters).

improvement of the very interaction, the following steps were involved in the provision of this analysis:

(a) The Armenian current legislative framework was analyzed as regards the interaction between the GAO and other state bodies[11];

(b) The relevant Council of Europe documents were studied12;

(c) The background of the GAO's positive achievements in executing judgments, as well as the assessment of needs for further improvement was analyzed. It was indicated that the Government Agent, with his team, has the necessary status and authority to establish more effective and smooth interaction with other state institutions in Armenia.

In order to enhance the effectiveness of interaction between the GAO and other bodies involved in the process of execution of judgments, there is a need to, firstly, evaluate the domestic law and practice as regards the very interaction and, secondly, to look at those dimensions that raise legal and practical difficulties. In this regard, the following issues were identified to be addressed.

First, Armenia needs to review and re-evaluate its own toolkit in this domain, taking into account, *inter alia*, the suggestions by the Steering Committee for Human Rights (CDDH), adopted in 2017.[13] It is to be concluded

[11] Including: *(a)* The Law on the Representative of Armenia before the European Court of Human Rights, currently: The Law on Representative on International Legal Matters [«Միջազգային իրավական հարցերով ներկայացուցչի մասին» ՀՀ օրենքն ընդունվել է 10.07. 2019 թ., ՀՕ-141-Ն]; *(b)* The Government Decree on the Order of Implementation of Functions of the Representative of Armenia before the European Court of Human Rights [ՀՀ կառավարության «Մարդու իրավունքների եվրոպական դատարանում Հայաստանի Հանրապետության ներկայացուցչի լիազորությունների իրականացման կարգը հաստատել մասին» 04.08.2020 թ. թիվ 1289-Լ որոշում]; *(c)* The Statute of the Office of the Representative of Armenia before the European Court of Human Rights [ՀՀ վարչապետի «Մարդու իրավունքների եվրոպական դատարանում Հայաստանի Հանրապետության ներկայացուցչի գրասենյակի կանոնադրությունը հաստատելու մասին» 23.08.2019 թ. թիվ 1181-Լ, որոշում]; *(d)* Decree on Interagency Commission [ՀՀ վարչապետի «Միջգերատեսչական հանձնաժողով ստեղծելու, դրա կազմը և աշխատակարգը հաստատելու մասին» 17.12.2021 թ. թիվ 1443-Ա որոշում]; *(e)* and other legal acts, applicable for the process of interaction and those agencies involved in the process.

[12] In particular: *(a)* Interlaken (2010), Izmir (2011), Brighton (2012), Brussels (2015), and Copenhagen (2018) Declarations [political declarations, available at https://www.coe.int/en/web/execution/political-declarations]; *(b)* Recommendation CM/Rec(2002)13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights (adopted by the Committee of Ministers on 18 December 2002 at its 822nd Session), Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights (adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies), Recommendation CM/Rec(2019)5 of the Committee of Ministers to member States on the system of the European Convention on Human Rights in university education and professional training (adopted by the Committee of Ministers on 16 October 2019 at the 1357th meeting of the Ministers' Deputies); *(c)* Guide to good practice on the implementation of Recommendation (2008)2 of the Committee of Ministers on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights (as adopted by the Steering Committee for Human Rights (CDDH) at its 87th meeting, 6–9 June 2017); *(d)* Report on measures taken by the member States to implement relevant parts of the Brussels Declaration (as adopted by the CDDH at its 91st meeting, 18–21 June 2019); *(e)* Implementation of judgments of the European Court of Human Rights, PACE (adopted by the Assembly on 29 June 2017, 26th Sitting).

[13] Guide to good practice on the implementation of Recommendation (2008)2 of the Committee of Ministers on efficient domestic capacity for rapid execution of judgments of the Euro-

from the current regulations that, even if there is assistance from various domestic actors when requested, the GAO is practically alone in the functions related to the execution of judgments. In such a situation, in fact, discussing "shared responsibility," which are very important for the rapid and effective execution of judgments, becomes challenging. With regard to this need, the setting up of an effective inter-institutional body devoted to the execution of judgments can be a solution to this issue. Such a platform for interaction between the GAO and other state agencies may, in principle, have a significant potential to achieve their effective involvement and coordination.

Secondly, establishing a contact-persons mechanism will be another step to enhance the synergies between the GAO and other state bodies involved. As noted in its report on the implementation of some provisions of the Interlaken and Izmir Declarations, the CDDH stressed that "the formal appointment of contact persons in other ministries and public authorities with whom the co-ordinator will liaise may also facilitate the process [of execution of the ECtHR judgments]." Furthermore, the Brussels Declaration has explicitly called for the establishment of "contact persons" for human rights matters within not only the Executive but also the Legislative and the Judiciary. This mechanism may serve as an alternative to the platform for interaction or may complement it. The latter seems *a better* solution.

Thirdly, the Brussels Declaration has also emphasized the importance of the role of national parliaments in the process of execution. Given the parliamentary system of governance in Armenia, an active role of the Parliament and pro-active involvement of the national parliamentarians must necessarily be ensured within the execution process. This, too, will have a positive impact on legislative development as the general measures reflected in the ECtHR judgments usually imply amendments to the statutory laws.

And last, but not least, a national strategy for interaction is needed to enhance the necessary synergies. In general, the role of concept papers or strategic documents is important for the coordination and monitoring of any process more effectively. In this sense, significant progress can be made to increase the efficiency of the execution process by developing a strategy (roadmap) for interaction between the competent authorities, as well as an action plan, if necessary, for its implementation. These matters will be further detailed below.

(2)What factors should be considered when developing an effective platform for interaction? In order to properly and strategically view the interaction between the GAO and other state bodies in the process of execution, it is necessary to see what are (or what can be) the circumstances that contribute to the primary objectives. It is worth noting that the problem of increasing the effectiveness of the execution of judgments has been regularly discussed in many relevant documents of the Council of Europe. The political declarations adopted in Interlaken (2010), Izmir (2011), Brighton (2012), Brussels (2015), Copenhagen (2018), and Reykjavík (2023) are some examples among others.

---

pean Court of Human Rights (as adopted by the CDDH at its 87th meeting, 6–9 June 2017). *See also:* Report on measures taken by the member States to implement relevant parts of the Brussels Declaration (as adopted by the CDDH at its 91st meeting, 18–21 June 2019).

For example, in *Interlaken*, the urgent need was stressed for the Committee of Ministers to develop the means which will render its supervision of the execution of judgments "more effective and transparent", and *Izmir* reiterated the call for such a necessity and invited the Committee of Ministers to apply fully the principle of subsidiarity, "by which the States Parties have in particular the choice of means to deploy in order to conform to their obligations under the Convention." These two political documents paved the way for the further development of interaction mechanisms. *Brighton* took an additional step forward. It encouraged the state parties "to develop domestic capacities and mechanisms to ensure the rapid execution of judgments." In *Brussels*, it was called "to develop and deploy sufficient resources at national level with a view to the full and effective execution of all judgments, and afford appropriate means and authority to the Government Agents or other officials responsible for coordinating the execution of judgments." The *Copenhagen* called on the states parties to take "further measures" in order to strengthen the "capacity for effective and rapid execution" at the national level, including through the use of inter-State co-operation. As to *Reykjavík*, it was pledged to "redouble our efforts for the full, effective and rapid execution of judgments, including through developing a more co-operative, inclusive and political approach based on dialogue."[14]

All this indicates the need to improve the mechanisms of the execution of judgments, including the need for a new quality of interaction. In this regard, several factors need to be taken into account when developing an effective platform for interaction:

(a) To reinforce the support and authority of the GAO, as co-ordinator, and of their actions;

(b) To overcome the challenges and possible practical obstacles in interpreting certain judgments (with the aim of identifying the measures required);

(c) To develop a strategy (roadmap) and, when appropriate, an action plan concerning interaction, to enhance the synergies between the GAO and other state bodies;

(d) To further increase the involvement of parliament, as well as the interest of parliamentarians, the courts, and civil society representatives;

(e) To increase the visibility of the work of the Committee of Ministers.[15]

The bottom line is that the GAO is not the only player to be responsible for the process of the execution. The execution of judgments (and, hence, the implementation of international legal standards) is a part of domestic and foreign policy. And given that the Executive [the Cabinet] is responsible for both policies[16], the competent members of the Cabinet must "share" this

[14] These political declarations are available at https://www.coe.int/en/web/execution/political-declarations.

[15] It is noteworthy that the Committee of Ministers is the key actor to supervise the execution of judgments of the European Court of Human Rights [Article 46(2) of the ECHR: "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution"].

[16] Article 146 of the Constitution provides that the "government shall, based on its programme, develop and implement the domestic and foreign policies of the State."

responsibility. Besides, law enforcement agencies, and the Office of the Prosecutor General, in particular, play a key role in ensuring the rule of law and accountability of public authorities in the country. And the work of the courts of law is important; the role of judges is hardly to be overestimated. Parliament should play a principal role here, too.[17]

C. If something should be done, how should it be done from a strategic perspective?

As highlighted above, a *strategic* perspective combines the processes of observation and orientation. In order to have a systemic approach and to form a holistic vision as regards the process of execution, as well as with the aim to establish a more effective interaction between the GAO and other state bodies, some main steps[18] might be considered:

(1)Inter-institutional platform: Developing an efficient inter-institutional expert body will contribute to the effectiveness of the domestic execution process. This can work in full, extended, or narrowed composition for a smooth interaction between the GAO and other state institutions. Such a platform will involve all the bodies concerned, with significant potential to achieve their fuller participation, as well as with a view to the swift execution of judgments and implementation of the Convention law, in general.

For many years, Armenia lacked an institutional platform for interaction. Interaction, thereby, was largely developed within existing practice. In December 2021, an interagency commission was formally established to coordinate the implementation of international obligations, including the execution of judgments. Such a first step is important. However, it should be considered only a formal step to increase the effectiveness in practice. Big results are yet to be visible.

(2)Contact-persons mechanism: For an effective interaction, strong support can, alternatively, be establishing a mechanism of contact persons appointed by relevant state bodies. They will interact with the GAO on a daily basis and help identify targeted measures to implement a particular judgment or decision.

This mechanism can also be considered with the view to increasing the Parliament's involvement. In the process of execution of judgments, the parliament and parliamentarians should have a pro-active (but not re-active) role. The maximum involvement of the national Parliament and parliamentarians may have a strong and positive impact on the execution process, especially in terms of the implementation of general measures.[19]

(3)Developing a national interaction strategy: The strategy should have the purpose of enhancing the synergies between the GAO and other state bodies.[20]

[17] The parliamentarians are not proactive in practice; they are hardly even active. No statutory law has been initiated by the parliament within the framework of the execution of judgments of the European Court of Human Rights. This in itself speaks volumes.

[18] Several steps mentioned here were discussed within the Council of Europe project on the execution of judgments in Armenia.

[19] The Parliament might be another tool for increasing the visibility of the execution process (via organising thematic debates or annual execution readings, involving possible educational and/or training components, among the others).

[20] Within a Council of Europe project, a draft model strategy has been developed by national and international consultants for the implementation of the judgments of the ECtHR. As earlier as possible the national strategic documents should be adopted, the implementation of which will further contribute to the improvement of the necessary process of execution of the ECtHR judgments.

It should focus on the process and practice rather than on the theory and formal messages. It should identify the practical obstacles and the required measures.

Such a strategic document should also highlight the role of the GAO as a co-ordinating unit, the practical essence of the inter-institutional body, the key actors to be involved, contact persons, and their activities to enhance the effectiveness of interaction.

Besides, the strategy could be used to function the co-ordination mechanism because the domestic authorities rarely observe human rights issues from the same perspectives as the GAO or the Committee of Ministers. The view of the authorities is narrow and limited to their own role and the competencies they have in the system of government.[21]

Along with this, the adoption of a comprehensive strategy will assist in shaping the strategic vision and will positively affect the process of execution in three ways. *First*, special importance will be given to the procedures and working methods of the Council of Europe Committee of Ministers. *Secondly*, the national authorities' views will become visible: i.e., how the government views the case or the priority and logic of execution of that strategic action in a specific situation. *Thirdly*, this will increase the understanding of "shared responsibility" among relevant state institutions within the process of the execution of judgments of the Strasbourg Court.

ԱՐՏՅՈՒՄ ՍԵԴՐԱԿՅԱՆ – *Մարդու իրավունքների եվրոպական դատարանի վճիռների կատարման ռազմավարական հեռանկարը* – Հեղինակը վճիռների կատարման համար կարևորում է ռազմավարական հեռանկարը. պետական մարմինները պետք է զինված լինեն հետագա մարտահրավերները կանխատեսելու, դրանց պատրաստվելու և համապատասխանաբար դիրքավորվելու կարողությամբ: Ընդգծվում է, որ գոյություն ունի վճիռների կատարման գործընթացում պետական իրավասու մարմինների պատասխանատու ներգրավվածությունն ապահովելու օբյեկտիվ անհրաժեշտություն, և պետք է հստակեցվի նրանց միջև փոխգործակցության գործիքակազմը: Այս տեսանկյունից առաջարկվում են մի քանի ռազմավարական քայլեր:

Հեղինակը եզրահանգում է, որ փոխգործակցության ազգային ռազմավարության ընդունումը կբարձրացնի պետական հաստատությունների «բաշխված պատասխանատվություն» գաղափարի ըմբռնումը Ստրասբուրգի դատարանի վճիռների կատարման համատեքստում:

Բանալի բառեր – *Մարդու իրավունքների եվրոպական կոնվենցիա, Մարդու իրավունքների եվրոպական դատարան, ռազմավարական հեռանկար, վճիռների կատարում, փոխգործակցություն, ազգային ռազմավարություն, բաշխված պատասխանատվություն, իրավունքի գերակայություն, մարդու իրավունքներ, մարդու իրավունքների չափանիշներ*

[21] For example, the Judiciary normally would be concerned with the issues on fair trial and remedies; the prosecution services would be normally interested in the questions of investigations and criminal matters, etc. Yet both might not see the connection and the common root causes of the violations, such as for example deficient administrative practices in both institutions or lack of accountability.

АРТЁМ СЕДРАКЯН — ***Стратегическая перспектива исполнения решений Европейского суда по правам человека.*** — В статье анализируются стратегические аспекты исполнения решений Европейского суда по правам человека.

По мнению автора, стратегическая перспектива актуальна и для исполнения судебных решений. Государственные органы должны быть вооружены способностью предвидеть, готовиться и позиционироваться к дальнейшим вызовам. Он подчеркивает, что существует объективная необходимость обеспечить ответственное участие соответствующих государственных институтов в процессе исполнения судебных решений, уточнив инструментарий взаимодействия между ними. С этой точки зрения выделяется несколько стратегических шагов.

Автор приходит к выводу, что принятие национальной стратегии взаимодействия повысит понимание «общей ответственности» среди государственных институтов в процессе исполнения решений Страсбургского суда.

Ключевые слова: *Европейская конвенция по правам человека, Европейский суд по правам человека, стратегическая перспектива, исполнение судебных решений, взаимодействие, национальная стратегия, общая ответственность, верховенство права, права человека, стандарты прав человека*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 21-35 *Պետության և իրավունքի տեսություն ու պատմություն*
https://doi.org/10.46991/BYSU:C/2023.14.2.021

THE FOURTH INDUSTRIAL REVOLUTION AND THE NEW PATH OF LAW

TARON SIMONYAN

The contemporary accelerating changes in technology lead to drastic transformations in economy, social and political structures, as well as legal practice and the very essence of law. The present research is a try to bring to the light the evolution of industrial revolutions and realize the transformations and developments of law and legal practice throughout the First, Second, Third and Fourth Industrial Revolutions.

Taking into account the consequences of the previous industrial revolutions and the ongoing nature of the Fourth Industrial Revolution, the research defines some general developments / paths in the law, especially the transformations in legal practice (Practical Perspective); transformations in teaching law (Educational Perspective) and transformation in the essence and perception of law itself (Theoretical Perspective).

Based on the research two possible social structures, with economic, political and legal order, have been proposed: negative and positive.

Key words: *industrial revolutions; accelerating changes; artificial intelligence; LegalTech; transformation in legal practice; transformation in teaching law; transformation in perception of law*

The world we are living in has new features that make unprecedented differences with the past social, political and legal environments. The main features include the temp, periodicity, amplitude and phases of changes a person faces during his/her lifetime. This makes a real life of persons, societies, states and, in general, humankind full of new challenges and deep gaps of solutions for them.

The fast-social transformations are an inherent part of these types of realities. Sometimes, they create the sense of chaos, and the socio-political, state-legal, financial-economic challenges are met on the edge of chaos, where organization of social life becomes a complex issue requiring new methods and new paradigms. The paradigm changes are required also for legal perspective on social realities.

These kind of phases in change sometimes are called “revolutions”, which start in the deep levels of a social environment with interconnected complex structures, evolve during some transitional time and with accumulating fluctuations[1] explode in a very short period of time, creating a wide range of bifurcations[2] of future developments.

If we look around, it will not be hard to see that the socio-political, technological, state-legal and other environments around us are behaving in the man-

[1] One of several changes in size, amount, quality, etc. that happen frequently, especially from one extreme to another. - https://www.oxfordlearnersdictionaries.com/definition/english/fluctuation

[2] There are certain locations in parameter space, however, where changes are explosive. The system crosses over an invisible boundary and the landscape of attractors alters dramatically. Such changes are called bifurcations. - **Russ Marion**, *The Edge of Organization, Chaos and Complexity Theories of Formal Social Systems,* Sage Publications, 1999, p. 20.

ner of accelerating changes, which create the feeling of chaos or at least the edge of chaos with different bifurcations.

This is very similar to the notion of "revolutions", a new step or wave of developments that, for example, Alvin Toffler was speaking about a few decades ago. He separated three stages of developments of civilizations and societies: (1) agricultural, (2) industrial and (3) informational[3]. Another author – Klaus Schwab, the director of the World Economic Forum, has introduced his views in his famous book – The Fourth Industrial Revolution[4]. Unlike Alvin Toffler's approach, Klaus Schwab defined this phase of accelerating changes as the continuation of the industrial revolution, naming it as the Fourth Industrial Revolution or otherwise – Revolution 4.0 or 4IR . According to his definition, the main goal of the research was to emphasize the way in which technology and society co-exist, meanwhile sub-goals create a framework for thinking about the technological revolution that outlines the core issues and highlights possible responses[5].

Before digging deep into the possible resonances of the new – the 4th industrial revolution on society, we need to realize the dynamics of the industrial changes till now.

The Fourth Industrial Revolution is not a specific time period or epoch in the history of mankind, but rather refers to a wave of technological development over a period of time that has (had) a significant and widespread impact on all aspects of people's lives[6].

What we, as lawyers, are interested in, is the challenge to the legal practice and legal theory, because we (as practitioners and theorists) have a feeling of being runners left behind social transformations, we want to regulate human relations, but find themselves in the past with no idea of the real horizon of changes in present and future. This brings us to the idea of Heisenberg's "*the principle of uncertainty*", which states that "*one cannot assign exact simultaneous values to the position and momentum of a physical system*", and that "*the more precisely the position (momentum) of a particle is given, the less precisely can one say what its momentum (position) is*"[7]. This principle has been developed in quantum mechanics, but social scientists believe that we are at the borders of the quantum societies and world, so sometimes these principles are the tools for unlocking the fog of incomprehensive realities[8]. For lawyers, dealing with the pure legal principle of legal certainty, pursuing justice based on the rule of law, it is hardly bearable to face the principle of uncertainty, which is becoming the common rule of social reality, especially in the phase of the industrial revolutions.

In any case, we will have a short look at the history of industrial revolu-

[3] **Alvin Toffler**, *The Third Wave,* Bantam Books, 1989.

[4] **Klaus Schwab**, *The Fourth Industrial Revolution*, World Economic Forum, Geneva, 2016, https://law.unimelb.edu.au/__data/assets/pdf_file/0005/3385454/Schwab-The_Fourth_Industrial_Revolution_Klaus_S.pdf

[5] Ibid. p. 9.

[6] **Andra Le Roux-Kemp**, "*The Fourth Industrial Revolution and a New Policy Agenda for Undergraduate Legal Education and Training in England and Wales*", Journal of Law, Technology, and Trust, 2(1). 2021, pp. 1-35, p. 4.

[7] Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/qt-uncertainty/

[8] **Chris Jay Hoofnagle, Simson L. Garfinkel**, *Law and Policy for Quantum Age*, Cambridge University Press, 2022.

tions from the legal perspective trying to stipulate reasons and tendencies of the development / changes, targeting the essential changes in the legal practice and the perception of law itself.

HISTORICAL PERSPECTIVE

With the help of domesticated animals, the agrarian revolution started its way in the Armenian Highlands and Middle East (around 10,000 years ago), spreading all over the world, when there was a shift from foraging to farming.

It combined the efforts of animals with those of humans for the purpose of production, transportation and communication. The agrarian age lasted till the 18th century and gave to humankind the birth of law - in general, then the slavery law, Roman law, the Middle Ages law, customary law, canonical law, etc.

According to Klaus Schwab, the "agrarian revolution was followed by a series of industrial revolutions that began in the second half of the 18th century. These marked the transition from muscle power to mechanical power, evolving to where today, with the fourth industrial revolution, enhanced cognitive power is augmenting human production"[9].

The first two industrial revolutions started in Europe, the third one was initiated in the USA and the fourth one is underway in the global world.

The First Industrial Revolution started in the mid-18th century. The discovery of steam engines started to drive industrialization. A set of manufactories started to emerge creating the new realities of the industrial world with the wave of colonial policy and the new perception of law, based on the ideas of Enlightenment, Reformation, Natural Law, Social Contract theory, and in general - the birth of the modern (classical) law, or the law as we know it today.

Literally "the law was used to tame the industrial beast. In 1802, the Parliament of the United Kingdom passed the first of a series of Factory Acts, to protect workers in the mechanised cotton factories.[10] In France, Napoleon regulated the coal mines in 1810 and installed a mining inspection in 1813.[11] In 1831, Prussia dealt with its steam engines and in 1838 with the upcoming railroads, introducing a regime of strict liability.[12] Law also facilitated the industrial revolution. The British patent system, for instance, was continually evolving and responding to the needs of the industrialising economy, without any legislative reform.[13] Inventors could easily obtain and enforce patent rights, which encouraged them to develop new technology. In the 1830s, several German states, such as Baden and Saxony, changed their expropriation legislation to facilitate the construction of railroads.[14] In other words, law played a pivotal role in regulating and facilitating the industrial revolution.[15] The other way around, the First Industrial Revolution

[9] **Klaus Schwab**, ibid, p. 11.

[10] **E.P. Hennock**, *The origins of the welfare state in England and Germany*, 1850–1914, Cambridge University Press, 2007, 73–85.

[11] Loi concernant les mines, les minières et les carriers 1810; Décret contenant les dispositions de police relatives à l'exploitation des mines 1813.

[12] **Miquel Martin-Casals** (ed.), *The Development of Liability in relation to Technological Change,* Cambridge University Press, 2010.

[13] **Sean Bottomley**, *The British patent system during the industrial revolution*, 1700–1852, Cambridge University Press 2014.

[14] **Jonatan Bromander**, *Expropriation i Sverige – en rättshistorisk analys,* examensarbete Juridiska institutionen Uppsala 2020.

[15] **Marc Steinberg**, *England's great transformation: law, labor, and the Industrial Revolution,* The University of Chicago Press, 2016.

seems not to have had any direct impact on the legal sector (legal education, legal professions, legal methodology)"[16].

In other words, in parallel with the first industrial revolution, as its result or as its facilitation, new branches of law and even new legal consciousness have emerged, such as Constitutional Law in the USA, French Republic, Poland, German states, etc., Human Rights (Social Rights, Labor Law, Economic Rights) in Europe and USA, Construction Law in the United Kingdom of Great Britain, French Republic, German states, etc., Civil Law (Ownership, Contracts, Delicts (Torts), etc.), Commercial Law in the Netherlands, Belgium, France, Austria, UK, USA, etc.

Moreover, Napoleon's Civil Code (1804) was the pure manifestation of the tectonic changes, which took place at that time of the First Industrial Revolution along with the political and legal revolutions.

Another important feature of this period of time was that the main legal-political teachings, governing Europe and the whole world in the 20th century and fighting or cooperating with each other, emerged during the rule of the First Industrial Revolution. Those teachings were Communism / Socialism, Nationalism, Liberalism, Nihilism, etc.

It is hard to agree with some ideas that those changes did not have any direct impact on legal education. We can emphasize the great changes in the legal education we have had since the 18th century based on the needs and requirements of the economy, social and political transformations. Whether those changes were shaped directly or indirectly by the First industrial revolution, is not so important, as they were real and transformed the legal education dramatically, giving birth to a set of new law schools with new syllabuses in Europe, USA and Russia.

The Second industrial revolution, which started in the late 19th century and into the early 20th century, made mass production possible, fostered by the advent of electricity and the assembly line[17]. Meanwhile, we should not forget that along with the emerging new wave of revolution the fuel of the First Industrial Revolution had not been run out. It continued to grow and to develop with a growing network of railroads and new factories from the USA to Europe, Russia, British India, and Japan.

The Second Industrial revolution changed the energy of steam engines with the energy of electricity. Since then, the successor of animals' and humans' muscles was not the steam (as it was in the First Industrial Revolution), but electricity.

Fortunately, or unfortunately, "[l]aw increasingly had to deal with interesting legal questions raised by the ongoing industrialization. One example was electricity, which was mostly invisible, powerful and had an incredible arrangement of new, fascinating possible applications. Lawyers had to figure out how they could legally frame this elusive matter. All kinds of difficult legal issues emerged. What was electricity? An object? Which legal qualification should it receive? Electricity could be produced, measured, traded, stolen, etc. Other difficulties arose. The In-

[16] **Bruno Debaenst**, "*The Digital Revolution from a Legal Historical Perspective*", Law, AI and Digitalization, (ed) Katja de Vries and Mattias Dahlberg, Juridiska Fakulteten, I Uppsala, 2021, pp. 23-36, p. 24.

[17] **Klaus Schwab**, ibid, p. 11.

dustrial Revolution developed organically; over the years, each country or even each company had developed its own standards. Lawyers and engineers gathered at international conferences to develop universal standards, for instance, regarding electricity.[18] The Second Industrial Revolution increasingly fuelled the legal development. New branches of law popped up and old ones blossomed. "Industrial law" became the hot topic of the day. Industrial law included inter alia patent law that had to deal with the numerous conflicts arising out of scientific discoveries and technical advances. Industrial workplace accidents also received increasing attention from lawyers because of the many liability issues that arose"[19].

Practical issues in the legal regulations forced the academics of law to multiply their efforts to develop legal theories and practical solutions for new challenges in social, economic and political life. These challenges influenced the law itself. They stimulated the development of insurance law and contemporary social law.

Taking into account the Bolshevik Revolution in Russia and emergence of a new communist state in the map of the world, the social and socialist law started to develop in the USSR faster than in the other part of the world.

In any case, it will be justified if we agree with an idea that "[i]n comparison with the First Industrial Revolution, the Second Industrial Revolution seems to have had some influence on law, through the development of new areas of law; otherwise, the influence was rather limited"[20].

Maybe the reason was that during this very specific period of time the world faced two World Wars and an unprecedented destruction. Because of those factors the attention of law was directed to the development of international law with its mechanism of prohibition of use of force (1928 - the Kellogg-Briand Pact, 1945 - UN Charter), settlement of disputes, elimination of consequences of wars (International Humanitarian Law) and creation of international organizations (League of Nations, United Nations, etc.) that would deal with them.

The Third Industrial Revolution is connected with the digital age, which is very native to almost all people living in the modern world, because their view of the world, perception of reality, thinking and even legal consciousness have been developed in this very period of time. "It is usually called the computer or digital revolution because it was catalyzed by the development of semiconductors, mainframe computing (1960s), personal computing (1970s and 80s) and the internet (1990s)"[21]. "The start of the Third Industrial Revolution is generally situated in the 1940s, with the development of the first modern computers (Alan Turing).[22] In the 1970s and 1980s, the personal computer (PC) conquered the world. In the 1990s, the Internet developed with the speed of light, linking together computers from all over the world."[23] Among the inven-

[18] **Miloš Vec**, Recht und Normierung in der Industriellen Revolution. Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung, Klostermann Vittorio 2006.

[19] **Bruno Debaenst**, ibid, p. 26.

[20] **Bruno Debaenst**, ibid, p. 26.

[21] **Klaus Schwab**, ibid, p. 11.

[22] **Michael Haenlein & Andreas Kaplan**, '*A Brief History of Artificial Intelligence: on the Past, Present and Future of Artificial Intelligence'* [2019] California Management Review 61(4) 5 (6).

[23] **Bruno Debaenst**, ibid, p. 27.

tions one should also mention: newer sources of energy - nuclear power, and massive progress in electronics.

This new wave has been trying to help humans not only with the help of the "surrogates of muscles" (as it was in agriculture, the 1st and the 2nd industrial revolutions), but also with the help of calculations, sharing information, verbal and written communication, etc., something that helps human brain. "The move from analog electronic and mechanical devices to pervasive digital technology dramatically disrupted industries, especially global communications and energy. Electronics and information technology began to automate production and take supply chains global. … Intellectual property became more valuable than the products and properties during this era. Industrialization, globalization, and the free market economy flourished during the 3rd industrial revolution. The world became into a fingertip of citizens"[24].

Maybe, a little bit belated, but the strong regulations on supply-chain have been developed in the USA and in the European Union[25], as well as the EU member states. The regulations require industrial companies to carefully manage Human Rights, social and environmental impacts throughout their supply chain, including their own business operations, and going far beyond the existing legislation at national level. This was possible only because of the fast-growing information technologies, without which there could not be any opportunity for due management of Human Rights, social and environmental impact throughout the supply chains.

This period of time is special also for the promotion of liberal values and liberalism as a whole. Communism, nationalism, as a way of social life, could not compete with liberal economy and yielded the hegemony of social consciousness to liberal values, which promoted democracy, human rights, rule of law, etc. Some scientists announced that this was the demonstration of the victorious potential of liberalism and thus it was the final destination of societies - the end of history[26]. Was the Third Industrial Revolution the result of liberalism, as a way of socio-political and state-legal organization of humans' life, or did the prerequisite of the Third Industrial Revolution (development of semiconductors, mainframe computing, personal computing, internet - digitalization as an approach) create the basis for liberalism to win the competition? That could be a subject for eternal debates. The fact is that the Third Industrial Revolution started in the USA and gradually took over the world, creating a new social reality of interconnected persons, organizations, groups, parties, which interacted with each other, sharing information, feelings, ideas, goods, money, etc. at an incredible speed (especially through online social networks). The sense of

[24] **Engr. A. K. M. Fazlul Hoque**, *The 4th Industrial Revolution: Impact and Challenges,* Conference paper, Conference: National Conference on Electronics and Informatics jointly organized by Bangladesh Electronics Informatics Society and Bangladesh Atomic Energy Commission held at Atomic Energy Centre, Dhaka, 4-5 December 2019: https://www.researchgate.net/publication/337830441_4th_Industrial_Revolution-_Impact_and_Challenges

[25] On February 23, 2022, the European Commission presented its proposal for a law on corporate sustainability obligations – the Corporate Sustainability Due Diligence Directive (CSDD). The Bundestag has passed the Act on Corporate Due Diligence Obligations in Supply Chains (July 16, 2021), which can be considered as an implementation of the EU requirements. Meanwhile, Germany has provided more detailed regulations rather than the EU act. The Law enters into force on January 1, 2023.

[26] **Francis Fukuyama**, *The End of History and the Last Man,* Free Press, 1992, 2006.

new social reality has even changed the perception of statehood and law. The governments have had to enter the digital age and reorganize their administrative and regulatory functions, as well as state services through digital tools (e-gov, e-state services, e-documents, etc.).

Maybe one of the reasons for the victory of liberalism against communism was the opportunities of technological progress that gave a competitive advantage to liberalism. In any case, after the collapse of the USSR, a new wave of legal reforms started from Eastern Europe to Caucasus, Middle Asia and China. The legal reforms, once again, have been initiated to match the norms of social behavior to the social changes arising from digitalization of the information and growing interconnection among people. In the meantime, those legal reforms, as well as promotion of democracy, human rights, rule of law and constitutionalism, have been trying to fill the gap of legal consciousness and legal culture of the specific societies striving for the benefits of digital age but have been lacking the realization of the legal requirements and legal culture that were meant to serve them. There is an opinion that "however, despite the many fundamental changes brought by the computer, we can meanwhile also observe that the general impact of the Third Industrial Revolution on law has not been that drastic. The way in which legal professionals process and share information may have changed because of the computer, e-mail and the Internet, but these technologies have not fundamentally transformed the way lawyers work.[27] Lawyers are rather conservative, and they do not like to change their usual modus operandi.[28] It is this force of tradition that explains why it took (takes) so long for many of the predictions from the nineties to become real. … Another observation is that – just as with the previous two industrial revolutions – lawyers quickly conquered the unchartered territory created by the new Industrial Revolution".[29]

In any case, we must accept that, even now, on the edge of the next industrial revolution, we still lack of matching or approximation of legal regulations with the accelerating changes of socio-economic developments, and, what is more important - the legal education, which is the main hope for the states to educate professionals who will deal with the complexity of legal systems, have not fulfilled their minimum assignments yet, but have to face the new challenges of the Fourth Industrial Revolution.

The Fourth Industrial Revolution marks its start while most of the progressive world is still in the complexity of reality filled by the previous (third) industrial revolution. Moreover, some states and societies are still in the First or Second Industrial Revolution, not speaking about the backward societies that are still in the agricultural age, but all of them feel the breath of the new wave of revolution. The Fourth Industrial Revolution **"**is characterized by a much more ubiquitous and mobile internet, by smaller and more powerful sensors that have become cheaper, and by artificial intelligence and machine learning. Digital technologies that have computer hardware, software and networks at their core are not new, but in a break with

[27] **Willem H. Gravett**, *Is the Dawn of the Robot Lawyer upon Us? The Fourth Industrial Revolution and the Future of Lawyers*, 2020, 23 Potchefstroom Electronic Law Journal 1.

[28] **Charles Sainctelette**, *De la responsabilité et de la garantie (accidents de transport et de travail)*, Bruylant, 1884, 49.

[29] **Bruno Debaenst**, ibid, p. 29-30.

the third industrial revolution, they are becoming more sophisticated and integrated and are, as a result, transforming societies and the global economy".[30]

The new technologies that transform the whole society include but are not limited to: "artificial intelligence and cognitive computing, robotics, Internet of Things (IoT), autonomous vehicles, 3-D printing, digital currencies, block-chain and distributed ledger technology, nanotechnology, biotechnology, materials science, energy storage, and quantum computing[31].

The driving forces behind these evolutions are the advancements in computing, where the speed, power and capacity have been doubling every two years.[32] The new revolution, however, "is not only about smart and connected machines and systems. Its scope is much wider. Occurring simultaneously are waves of further breakthroughs in areas ranging from gene sequencing to nanotechnology, from renewables to quantum computing. It is the fusion of these technologies and their interaction across the physical, digital and biological domains that make the fourth industrial revolution fundamentally different from the previous revolutions".[33] "These features of 4IR animate disruptions in all aspects of society. The disruptions go beyond connecting smart, advanced machines and systems and the growing harmonization and integration of multiple disciplines and inventions: these developments are spurring conceptual breakaways and breakthroughs, forcing functions that are altering our ways of being, doing, perceiving, and thinking".[34]

LEGAL PERSPECTIVE

Trying to understand the impact of the Fourth Industrial Revolution on law, or finding out some interaction paths with the last one, we can see some familiarities with the previous industrial revolutions. And that is normal, as the influences of the previous patterns have still been in force and will be. Maybe, they will be unlimited in time, but are paralleled with the influences of the new patterns.

As a result of these influences and especially having in mind the great push by the Fourth Industrial Revolution, some general developments in the law can be identified:

(a) transformations in legal practice (Practical Perspective);

(b) transformation in teaching the law (Educational Perspective),

(c) transformation in the essence and perception of law itself (Theoretical Perspective).

The technology of legal practice is changing rapidly. Predictive coding is transforming discovery in litigation. Start-ups like Ravel,[35] Lex Machina,[36] and

[30] **Klaus Schwab**, ibid, p. 12.

[31] **Engr. A. K. M. Fazlul Hoque**, *ibid*.

[32] **Benjamin Alarie, Anthony Niblett & Albert H Yoon**, '*Law in the future*', 2016, 66 (4), University of Toronto Law 423 (424); Jerry Kaplan, Artificial Intelligence, What Everyone Needs to Know, Oxford University Press 2016.

[33] **Klaus Schwab**, ibid, p. 12.

[34] **Virginia Bacay Watson**, *The Fourth Industrial Revolution and its Discontents: Governance, Big Tech, and the Digitization of Geopolitics,* Hindsight, Insight, Foresight: Thinking about Security in the Indo-Pacific, September, 2020, pp. 37-48, p. 38.

[35] Ravel Law. 2015a. Ravel: *Data Driven Research* www.ravellaw.com (accessed December 30, 2015).

[36] **Surdeanu, Mihai, Nallapati, Ramesh, Gregory, Walker, Joshua, and Manning, Christopher D.**, Risk analysis for intellectual property litigation, *Proceedings of the 13th International Conference on Artificial Intelligence and Law.* New York, NY: ACM, 2011, pages 116-20.

the Watson-based Ross[37] are garnering attention and enlisting law firm subscribers, These and other developments in text analytics offer new process models and tools for delivering legal services, promising greater efficiency and, possibly, greater public accessibility[38].

All these new tools in the legal services create a new age of LegalTech, leading to a new reality in legal practice, where "*the result of legal commoditization is a software service or product that anyone can purchase, download, and use to solve legal problems without hiring an attorney, or in current parlance, a kind of computerized legal application, a "legal app"*."[39]

Legal applications or other service based applications with AI create more complex problems for lawyers, as "*[t]he AI universe needs regulation, and the many applications of AI raise numerous ethical and legal issues.[40] In many cases, law does its trick by applying old rules to new problems.[41] Liability questions arising from self-driving cars can be studied in tort law, and smart contracts are part of contract law.[42] ... Change is on the way. The only question is how fast or fundamental this change will be. Compared to the previous industrial revolutions, this one is going much faster. It is evolving at an exponential, rather than linear pace.[43] Therefore, some predict a complete "disruption", where "law as we know it" will disappear and transform into something new. Authors such as Richard Susskind – who already made quite accurate predictions in the 1990s – predict that the legal profession will change more in the coming twenty years than in the previous two hundred.[44]* [45],

It is required from lawyers to get more and more broad view on the new realities brought by the Fourth Industrial Revolution, in order to stay in the wave of legal services or in general, legal practice. A very different and complex set of issues are arising almost in all spheres of practice from Intellectual Property and Copyright[46] to Legal Education[47].

---

[37] Ross Intelligence. 2015. Ross: Your Brand New Super Intelligent Attorney www.rossintelligence.com/ (accessed December 0, 2015).

[38] **Kevin D. Ashley**, *Artificial Intelligence and Legal Analytics, New Tools for Law Practice in the Digital Age,* Cambridge University Press, 6th printing, 2019, p. 6.

[39] **Kevin D. Ashley**, ibid, p. 8.

[40] **Michiel Fierens, Stephanie Rossello and Ellen Wauters**, '*Setting the Scene: On AI Ethics and Regulation*', in Jan De Bruyne and Cedric Vanleenhove (eds), *Artificial Intelligence and the Law* (Intersentia 2021), p. 49.

[41] **Jan De Bruyne and Cedric Vanleenhove** (eds), Artificial Intelligence and the Law, Intersentia, 2021; Woodrow Barfield & Ugo Pagallo (ed.), Research Handbook on the Law of Artificial Intelligence, Edward Elgar Publishing 2018.

[42] **Jan De Bruyne, Elias Van Gool and Thomas Gils**, '*Tort Law Damage Caused by AI Systems*', in Jan De Bruyne and Cedric Vanleenhove (eds), Artificial Intelligence and the Law (Intersentia 2021), p. 359.

[43] **Klaus Schwab**, ibid, p. 8.

[44] **Richard Susskind**, Tomorrow's lawyers. An Introduction to Your Future (second edition), Oxford University Press, 2017, p. xvii.

[45] **Bruno Debaenst**, ibid, p. 32-33.

[46] **Ruth L. Okediji**, *Creative Markets and Copyright in the Fourth Industrial Era: Reconfiguring the Public Benefit for a Digital Trade Economy*, International Center for Trade and Sustainable Development (ICTSD), Issue Paper No. 43, 2018.

[47] **Andra Le Roux-Kemp**, "*The Fourth Industrial Revolution and a New Policy Agenda for Undergraduate Legal Education and Training in England and Wales*", Journal of Law, Technology, and Trust, 2(1). 2021, pp. 1-35; Taron Simonyan, "Practical Challenges of a Lawyer in XXI century: Artificial Intelligence", Articles of the annual conference of the Faculty of Law YSU, 2018, Yerevan, pp. 35-45.

Taking into account the above-mentioned and trying to sum up all the features of the industrial revolution in a scheme, we will use Petre Pisecaru's table[48], and will add a new column for Law.

Wave	Period	Transition period	Energy resource	Main technical achievement	Main development industries	Transport means	Law[49]
I	1760-1900	1860-1900	Coal	Steam engine	Textile, Steel	Train	**Creation of the basis for Human Rights, Ownership Rights and in general civil law**
II	1900-1960	1940-1960	Oil, Electricity	Internal combustion engine	Metallurgy, Auto, Machine Building	Train, Car	**Industrial Law, Social Law, Insurance Law, Electric Law, Patent Law, Intellectual Property law,**
III	1960-2000	1980-2000	Nuclear Energy, Natural Gas	Computers, Robots	Auto, Chemistry	Car, Plane	**Air Law, Space Law, IT Law, Information Law, General Data protection Regulations (GDPR)**
IV	2000-….	2000-2010	Green Energies	Internet, 3D Printer, Genetic Engineering	High Tech Industries	Electric Car, Ultra-Fast Train	**Law of Metaverse, Law of artificial intelligence, Genetics and Law, etc.**

The drastic changes bring new challenges and new opportunities not only for technology engineers but also for the engineers of societies, politics and law. These challenges and opportunities are capable of transforming the structure of power (political and other) in societies and in the world, as the capacity of economic and political power is now measured not only or not even by the amount of real estate (Middle ages) or moveable capitals and stocks (Industrial period), but rather by the big data one owns or possesses.

Moreover, if the 1st and 2nd industrial revolutions are about exchanging the human muscles with the steam and internal combustion engines (coal, oil, electricity), the 3rd and 4th are about exchanging the human brain with new non-human thinking systems and intelligence (robotics and artificial intelligence). If during the 1st and 2nd industrial revolutions the political influence upon the creation and interpretation of legislation was in the hands of those group of people, who owned "energy flow" of coal, oil and electricity, the 3rd Industrial Revolution has brought the power to big data owners (Google, Facebook, Tweeter, etc.), who control the flow of information in a society. As it concerns the Fourth Industrial Revolution, the power is generated in and by the artificial intelligence, and those who create, control and direct the analytic and decision making algorithms of different artificial intelligences in economy, finances, politics, etc.

[48] **Petre Prisecaru**, "*Challenges of the Fourth Industrial Revolution*," Knowledge Horizons - Economics 8, no. 1 (2016), pp. 57-62, p. 57.

[49] The Law's column was added by the Author.

Thus, they will be the ones who will influence the legislative processes much more than other agents in the society.

As Klaus Schwab emphasizes, the growth of inequality within local and global societies, it is connected with different factors of consequences from the Fourth Industrial Revolution: "*The discussion on economic and business impacts highlighted a number of different structural shifts which have contributed to rising inequality to date, and which may be further exacerbated as the fourth industrial revolution unfolds. Robots and algorithms increasingly substitute capital for labour, while investing (or more precisely, building a business in the digital economy) becomes less capital intensive. … As all these trends happen, the winners will be those who are able to participate fully in innovation-driven ecosystems by providing new ideas, business models, products and services, rather than those who can offer only low-skilled labour or ordinary capital*"[50]. Moreover, "*ontological inequality will separate those who adapt from those who resist – the material winners and losers in all senses of the word. The winners may even benefit from some form of radical human improvement generated by certain segments of the fourth industrial revolution (such as genetic engineering) from which the losers will be deprived. These risks create class conflicts and other clashes unlike anything we have seen before*."[51]

But, it is not the last transformation we will face when speaking about law. I believe it is apparent what the new structure of power can do with such social phenomena, as law. It can transform not only the legal practice, or legal education, but even the essence and nature of law as we know it since the 18th century, as it hits the very basics of the values, which create the notion and perception of law.

In this part of the world we define the law as "*mandatory regulatory rules of conduct, accepted and implemented by the state authority, and conditioned by the nature of a society / human, as well as expressing the freedom of a human*". The static thing in this definition is that it is still the state authority that accepts and implements mandatory regulatory rules of conduct. The changing phenomenon is that the nature, essence of a society / human and the freedom of a human have been transforming in an accelerating regime for the last decades. This means that the main fundamentals of law are in the process of active change, such as: values of ethics, freedom, equality, perception of justice and law, as well as the appearance of a new subject, which pretends to the same rights that are possessed by humans.

I have already mentioned about different changes we undergo now in the society level, including socio-economic and socio-political developments. The important features of these developments are also the problem of the rising inequality between peoples and members of societies, based on the unequal distribution of technological tools and information, which having a very big opportunity to deepen the gap between those possessing big data, information flow and algorithms of artificial intelligence and the ones, not possessing them.

On the individual level, we are facing the challenge of one of the fundamental issues we could not even imagine before. The issue of who is an indi-

[50] **Klaus Schwab**, ibid, p. 86.
[51] **Klaus Schwab**, ibid, p. 92.

vidual, is becoming a new subject of discussion in parallel with the rise of technologies and artificial intelligence. This issue is becoming a real subject more and more, as the accelerating changes in technology, which lead to socio-political and legal transformations, bring to the fact of changing not only what humans do, but also who they are. The big data analyzing functions, new tools of artificial intelligence and the whole development patterns suggested by the Fourth Industrial Revolution affect the very identity of human beings and other related factors, such as - consumption, sense of privacy, ownership in circular economy, intellectual property and copyright, nature of relationship between persons (interpersonal, family and other relations), social hierarchies, metaverse relations of virtual reality, virtual personality, rights to such personality, rights to be forgotten and to be deleted as a virtual personality, genetic technologies (genetic prediction and personalized medicine) and ethics, classical education - hierarchical system, new financial tools (block-chains, bitcoins, etc.), and last but not least - the legal personhood of artificial intelligence.

The last issue is becoming a subject of discussion not only in the scientific level[52], but also in practical and in judicial litigations. For example, a robot named Sophia received a citizenship,[53] a chatbot programmed to be a seven-year-old boy became the first AI bot to be granted official residence in Japan[54], the European Parliament accepted a report on a special legal status for robots (electronic person) for possible liabilities,[55] a number of domestic judicial cases on artificial intelligence have already their decisions,[56] etc.

All these developments and factors, challenges and opportunities make us believe that it is time for lawyers to try to expand the horizons of legal practice, legal education and perception of law, taking into account the new reality of the quantum age of technologies, artificial intelligence and metaverse, otherwise they will be behind developments, losing the main regulatory function of social relations, the amplitude, fluctuations and speed of which are far ahead from the law itself.

These challenges may create different types of inhumane and/or inefficient social structures with economic, political and legal order (negative version):

---

[52] **Lawrence Solum B.**, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. Rev. 1231, 1992, p 1231, https://scholarship.law.unc.edu/nclr/vol70/iss4/4/ , Hatziavramidis K. S., Esq., Artificial Intelligence & The Law: Pros And Cons, 2018, p. 383, https://lintar.untar.ac.id/repository/penelitian/buktipenelitian_10288001_3A220716.pdf

[53] **Cuthbert O.**, *Saudi Arabia Becomes First Country To Grant Citizenship To A Robot*, *Arab News,* 26 October 2017, https://www.arabnews.com/node/1183166/saudi-arabia

[54] **Cuthbertson A.**, *Artificial Intelligence "Boy" Shibuya Mirai Becomes World's First AI Bot To Be Granted Residency*, *Newsweek*, 6 November 2017, https://www.newsweek.com/tokyo-residency-artificial-intelligence-boy-shibuya-mirai-702382

[55] European Parliament, Committee on Legal Affairs. Report With Recommendations To The Commission On Civil Law Rules On Robotics (2015/2103(INL)), pp. 17–18, https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.html

[56] Gill v. Whitford, US Supreme Court, (138 S. Ct. 1916 (2017)), Rucho v. Common Cause, US Supreme Court, (139 S. Ct. 2484 (2019)), Spokeo, Inc. v. Robins, US Supreme Court, (136 S. Ct. 1540 (2016)); Kraus v. Cegavske, No. 82018, 2020 Nev. Unpub. LEXIS 1043 (Nov. 3, 2020); Williams-Sonoma Inc. v. Amazon.com, Inc. (N.D. Cal. 3:18-cv-07548); Asif Kumandan et al. v. Google LLC (N.D. Cal. 5:19-cv-04286); Vance et al v. Amazon.com, Inc. (W.D. Wa. 2:20-cv-01084); Vance et al v. Facefirst, Inc. (C.D. Cal. 2:20-cv-06244); Vance et al v. Google LLC (N.D. Cal. 5:20-cv-04696); Vance et al v. Microsoft Corporation (W.D. Wa. 2:20-cv-01082); Janecyk v. IBM Corp. (Cook County Cir. Ct. Ill. 2020CH00833); Jordan Stein v. Clarifai, Inc. (Cook County Cir. Ct. Ill. 2020CH01810); K. et al v. Google, LLC (N.D. Cal. 5:20-cv-02257); Williams et al. v. PersonalizationMall.com LLC (N.D. Ill. 1:20-cv-00025).

(1)an unorganized society with a nihilistic atmosphere regarding law and legal culture, because law has nothing to do with the dynamic relations it tries to regulate. As a result, it leaves the real life behind and stands as archaic institution, creating large gaps, which will be filled with other social norms, such as canonical rules, religion, customary norms, traditions, moral norms of particular groups, taking all societies to a atomization age or even extremist solutions for human behavior;

(2)a dictatorial society, where legislators and governments will try to impose outdated law upon the social environment far ahead of it, because the classical law and political order is understandable for them, and they are not able or unwilling to develop new legal mechanisms and tools, which will meet the challenges of the new realm. By doing so, such societies will be forced to cease the developments not only in technologies but also in legal culture;

(3)a society with a new layered system, where the winners (those who possess the big data, algorithms of artificial intelligence, technology of influences, as well as the quantum technologies) take all power and transform it into mandatory will expressed in law. As it was correctly mentioned before: "*[t]he pendulum could swing back to a world where elite - the small number of people who operate and understand quantum technologies - have more command over ideas and the matters of what is correct and incorrect*"[57]. This will lead to societies with classes full of discriminations in the old (racial, financial, etc.) or new versions, where the ones who have the algorithms (the power) will govern the ones who are feared to lose the access to the system of informational network (metaverse).

In the meantime, the same challenges may create anthropocentric and/or very efficient social structures with economic, political and legal order (positive version) - a very organized society with an effective legal and political mechanism for social coexistence and common development. This ought to be positive and effective not only for all human beings (without any discrimination), but also - an example of social coexistence with the technologies created by humans and even non-human, artificial intelligence, which adapts to the fast-changing transformations of the quantum age realities much more effectively than any human being does. By doing so, technologies, their creators or the ones who possess the algorithms of the information flow/analysis and decision makers will not compete for superiority with other parts of society, but rather will become a unique bridge between humans' time perception and the time of accelerating changes.

The positive version of developments requires much more energy and input than the negative ones, as the last ones will come to life automatically, if nothing is done for the positive option. But the positive version of the future requires hard work on morality, ethics and law, as the leading social norms free from any discrimination. It also requires transformation of what we believe is morality, ethics and law, in order to prepare them for the unpredictable changes they are called to predict and regulate. Moreover, morality, ethics and law must work together in harmonized state, in order not to limit the sphere of influencing of each other.

[57] **Chris Jay Hoofnagle, Simson L. Garfinkel**, *ibid,* p. 355.

The classical paradigm of jurisprudence with its education and practice is not capable of meeting the challenges of the Fourth Industrial Revolution with its artificial intelligence and quantum technologies. It needs to be developed itself, like we had it in the 18th century (after the 1st Industrial Revolution), when the old, archaic, feudal and canonical law had to give its way to the new - classical law, we know it today as the organizer and the tool for predicted behavior in our private, social, state and international life.

The Fourth Industrial Revolution is some kind of transitional period for law, because it gives a set of opportunities to jurisprudence to develop and/or define new features and nature of law that will be an effective tool for regulating human and non-human (but intelligence) behavior in the new realm of metaverse, quantum age of acceleration and coexistence with new members of our common "human life".

What will be the next step after the Fourth Industrial Revolution, is hard to predict. But we can assume that if it goes well, and the coexistence of technologies and humans takes place without any apocalyptic results, it will be a shift to a new type of society and humanity, with its socio-economic, political and legal philosophies and paradigms.

ՏԱՐՈՆ ՍԻՄՈՆՅԱՆ – ***Չորրորդ արդյունաբերական հեղափոխությունը և իրավունքի նոր ուղին*** **–** Տեխնոլոգիաներում արագացող արդի փոփոխությունները հանգեցնում են արմատական կերպափոխումների տնտեսությունում, սոցիալական և քաղաքական կառուցվածքներում, ինչպես նաև իրավական պրակտիկայում ու իրավունքի էության մեջ: Սույն հետազոտությունն արդյունաբերական հեղափոխությունների էվոլյուցիան վեր հանելու և Առաջին, Երկրորդ, Երրորդ ու Չորրորդ արդյունաբերական հեղափոխությունների ընթացքում իրավունքի ու իրավական պրակտիկայի կերպափոխումներն ու զարգացումները գիտակցելու փորձ է:

Հաշվի առնելով նախորդ արդյունաբերական հեղափոխությունների հետևանքները և Չորրորդ արդյունաբերական հեղափոխության ընթացիկ բնույթը՝ հետազոտությունը սահմանում է իրավունքում որոշ ընդհանուր զարգացումներ / օրինաչափություններ, մասնավորապես՝ կերպափոխումներ իրավական պրակտիկայում (գործնական տեսանկյուն), կերպափոխումներ իրավունքի դասավանդման մեջ (կրթական տեսանկյուն) և կերպափոխումներն իրավունքի ընկալման մեջ (տեսական տեսանկյուն):

Հիմնվելով հետազոտության վրա՝ առաջարկվել են երկու հնարավոր՝ դրական և բացասական սոցիալական կառուցվածքներ՝ տնտեսական, քաղաքական և իրավական կարգերով:

Բանալի բառեր – *արդյունաբերական հեղափոխություններ, արհեստական բանականություն, արագացող փոփոխություններ, իրավական տեխնոլոգիաներ, կերպափոխումներ իրավական պրակտիկայում, կերպափոխումներ իրավունքի դասավանդման մեջ, կերպափոխումներ իրավունքի ընկալման մեջ*

ТАРОН СИМОНЯН – ***Четвертая промышленная революция и новый путь права.*** **–** Современные ускоряющиеся изменения в технологиях приводят к радикальным преобразованиям в экономике, социальных и политических струк-

турах, а также юридической практике и самой сути права. Настоящее исследование представляет собой попытку пролить свет на эволюцию промышленных революций и осознать трансформации и развитие права и юридической практики на протяжении Первой, Второй, Третьей и Четвертой промышленных революций.

Принимая во внимание последствия предыдущих промышленных революций и продолжающийся характер Четвертой промышленной революции, исследование определяет некоторые общие тенденции/пути в праве, особенно трансформации в юридической практике (Практическая перспектива), трансформации в преподавании права (Образовательная перспектива) и трансформация в сущности и восприятии самого права (Теоретическая перспектива).

На основе исследования были предложены две возможные социальные структуры с экономическим, политическим и правовым порядком: негативная и позитивная.

Ключевые слова: *промышленные революции, ускорение изменений, искусственный интеллект, юридические технологии, трансформация в юридической практике, трансформация в преподавании права, трансформация в восприятии права*

2023. № 2. 36-43 *Պետության և իրավունքի տեսություն ու պատմություն*
https://doi.org/10.46991/BYSU:C/2023.14.2.036

CONTEMPORARY MATTERS OF CONSTITUTIONALIZATION OF LEGAL NORMS IN THE REPUBLIC OF ARMENIA

NARINE DAVTYAN

The article examines the issues of constitutionalization of law in RA. The constitutionalization of the right is one of the contemporary problems of modern constitutionalism, which is currently of interest not only to specialists in the field of constitutional law but also to scholars dealing with problematic issues in other branches of law, the article studied the Constitutionalization process, which is of great importance in terms of guaranteeing the supremacy of the Constitution and is meant to ensure the compliance of normative legal acts with the requirements of the Constitution.

The process of constitutionalization was studied from an institutional point of view, conventionally classifying it into two main groups.

First, it is the units, operating in the field of public service which is entitled to subject the drafts of normative legal acts to legal examination. One of the important goals of such examination is to provide law-making bodies and officials with conclusions on the conformity of the legal acts reflected in the drafts of the aforementioned normative legal act with the requirements of the Constitution.

Second, as a result of the constitutional reforms of 2015, the role and importance assigned to the Constitutional Court in order to ensure the constitutionalization of the legal field was studied. The Constitutional Court, as a constitutional supervisory body, is called to ensure the supremacy of the Constitution, which is carried out within the framework of concrete and discrete control.

Keywords: *constitutionalization of law, supremacy of the Constitution, process of constitutionalization, legal examination*

The theory of the state and law considers the important issues of the emergence and development of the legal system, providing the main elements of its improvement with signs of constitutionality. Among the main trends covering all the aspects of the process of development and improvement of the legal system, first of all, it is necessary to distinguish the elements of the process of constitutionalization, especially in the field of legislative regulation.

The constitutionality of social relations means the concurrence of the real and the proper (defined by the Constitution). Constitutionality implies the constitutionalization of sectoral legislation and legal practice, that is, compliance of legal principles and norms with the spirit and letter of the Constitution.

The constitutionalization of the right is one of the contemporary problems of modern constitutionalism, which is currently of interest not only to specialists in the field of constitutional law but also to scholars dealing with problematic issues in other branches of law. The study of the problems of constitutionalization of law implies the definition of the role of the Constitution as the basis for the development of the legal system of the state, as well as the definition of the mechanism of regulation of public relations by constitutional principles

within the framework of judicial constitutional normative control, which, according to a number of modern approaches, has law-making features.

Despite the existence of a significant number of scientific studies on this topic, some issues related to constitutionalization need a multi-faceted study. It should be noted that research in this field was carried out by A. S. A. Vagyan, G. G. Harutyunyan, I.V. Kravets, V. I. Kruse, A. A. Liverovsky, and others.

The term "Constitutionalization" is used in the narrow and broad sense of the word. In a narrow sense, constitutionalization implies the reflection of certain provisions in the norms of the Constitution. This is the most common approach in constitutional jurisprudence, which is reflected in various legal dictionaries. For instance, the Big Legal Dictionary describes the term "Constitutionalization" as "fixing any provision in the text of the Constitution, giving it constitutional force."[1]

In a broad sense, the term "Constitutionalization" means the implementation of the principles and norms of the Constitution in the field of legislation based on the decisions of the Constitutional Court.[2]

Based on the judicial interpretation of constitutional provisions in modern doctrines, considers constitutionalization and legislative support for their implementation within the framework of constitutional teleology as a science of the goals and problems of constitutional regulation.[3]

According to V. I. Kruse, constitutionalization should be considered as the constitutionalization of a legal system, which is continuously being formed, gradually acquiring constitutional quality and national consciousness.[4]

A group of theorists considers constitutionalization from other perspectives, in particular, from the perspective of "ideological" constitutionalization, which implies the construction and interpretation of sectoral norms by the legislator in the spirit of constitutional values, principles, and goals. "Normative" constitutionalization ensures compliance of sectoral legislation with the provisions of the Constitution, which are elaborated and concretized in practical concepts. "Practical" constitutionalization includes the constitutionalization of the practice of law and politics.[5]

Thus, Constitutionalization is the subordination of the entire legal system to the Constitution, which forms its core and predetermines the development of this system, which implies the formation of such a legal system in which the supremacy of the Constitution and the law is ensured. The degree of implementation of constitutional norms shows the quality of the constitutional order in the country. Constitutionalization leads to the strengthening of the constitutional

[1] Большой юридический словарь / [В. А. Белов и др.]; Под ред. А.Я. Сухарева, В.Е. Крутских. - 2. изд.

[2] **Авакьян С. А.** Конституция России: природа, эволюция, современность М. 2000.528.

[3] **Кравец И. А.** Конституционная телеология и основы конституционного строя: научно-практическое издание: Издательские решения, 2016. С. 8-9.

[4] **Крусс В. И**. Конституционализация права: основы теории: монография.М.:Норма: инфа-М2017.240с.

[5] **Лексин И. В**. Конституционное право и конституционный судебный процесс в свете представлений о конституционализации отраслей российского права //3-й Московский юридический форум. X Международная научно-практическая конференция /Кутафинские чтения/: материалы конференции ч. 1. М. 2016. С. 228-229.

order; predetermines and connects the effectiveness of the application of constitutional legislation and the activity of state bodies.

It should be noted that the need to concretize the Constitutional norms is due to the fact that many of the norms related to the rights of citizens operate through branch legislation. In addition, the Constitution is perceived as a long-term legal document. By adopting normative acts specifying the provisions of the Basic Law, the legislator gets the opportunity to more fully use its regulatory and also political, social, and moral potential in the interest of social progress.

The process of constitutionalization in the Republic of Armenia is of great importance in terms of guaranteeing the supremacy of the Constitution. It is designed to ensure compliance of normative legal acts with the requirements of the Constitution. Constitutionalization as a legal process has its own form and content.

The first refers to the institutional mechanisms of the legal system, through which compliance of legal acts with the Constitution is ensured, the second is related to substantive issues, that is, the compliance of the rules of conduct fixed or to be fixed in normative legal acts with constitutional norms and principles.

According to lawyer G. B. Danielyan, in principle, the legal system should exclude such a phenomenon of legal regulation as the adoption of incomplete and controversial legal acts.[6] In this sense, in the course of legislative activity, the competent entities must identify the legal needs of the society, make a proper assessment of them, and adopt normative legal acts corresponding to their content. The proper assessment of social needs should be based on the individual demands of citizens that have arisen at the current stage of constitutional development. The content of the constitutional activity of the legislative bodies of the state authorities should lead to the fixation of citizens' demands in legal norms.[7]

Considering the above-mentioned, it should be noted that the process of constitutionalization can be conventionally classified into two main groups from the institutional point of view.

First, it is the units, operating in the field of public service which is entitled to subject the drafts of normative legal acts to legal examination. One of the important goals of such examination is to provide law-making bodies and officials with conclusions on the conformity of the legal acts reflected in the drafts of the aforementioned normative legal act with the requirements of the Constitution.

The general regulations of legal expertise are provided in the RA Law "On Normative Legal Acts" (hereinafter "the Law"). In particular, according to Article 6 of the Law "On Examination and Terms of Draft Normative Legal Acts", the drafts of legislative and sub-legislative normative legal acts are necessarily

---

[6] Տե՛ս **Գ. Բ. Դանիելյան** «Իրավական որոշակիության, իրավունքի անալոգիայի (համանմանության) եվ իրավական ակտի մեկնաբանության փոխհարաբերության արդի հիմնախնդիրները» , «Բամբեր Երևանի համալսարանի. Իրավագիտություն» Երևան 2016 №2(20), էջ 3-17:

[7] **Гаджиев Г. А**. Конституционная идентичность и права человека в России// Ученны е записки юридического факультета. СПб: Фонд «Университет». 2017. Вып. 42-43.

subject to state-legal examination. Exceptions are some cases provided by the Law. The examination is carried out within 15 days by the Agency for Expert Examination of Legal Acts of the Ministry which, develops and implements the government's policy in the field of justice. The specified period may be extended for another ten days. With regard to the normative legal act subjected to examination, a conclusion on its compliance with the Constitution and the Law is prepared.

It should also be noted that according to Part 7 of the aforementioned Law, if the Legal Acts Examination Agency of the Ministry does not issue an expert opinion on the draft of the sub-legislative normative legal act or does not extend the period for providing the opinion, then the body adopting the act may accept it and send it for publication without an expert opinion. Although this provision provides an effective regulation in terms of meeting deadlines, it is quite problematic from the point of view of ensuring constitutionalization.

In addition to the regulations provided by the above-mentioned Law, ensuring the constitutionalization of draft Laws is also carried out in accordance with the constitutional law "Rules of Procedure of the National Assembly", as well as the Work Regulations of the National Assembly (hereinafter the "Work Regulations"). In particular, according to Article 35 of the Work Regulations, "the conclusion of the Staff on the draft law is submitted to the President of the National Assembly and the head committee within three weeks after the draft is put into circulation. The conclusion includes:

1) the results of the examination on compliance of the project with the requirements of the Constitution and other laws".

It should also be noted that the legal subdivisions operating in the public bodies also play an important role in the law-making process from the point of view of constitutionalization, which give conclusions on the drafts of normative legal acts to be adopted in terms of compliance with the Constitution.

Second, the Constitutional Court has a special role in ensuring the constitutionalization of the legal field. The Constitutional Court, as a constitutional supervisory body, is called to ensure the supremacy of the Constitution, which is carried out within the framework of concrete and discrete control.

As a result of the constitutional reforms of 2015, the role and importance of the Constitutional Court were emphasized in terms of ensuring the constitutionalization of the legal field. In particular, it should be noted that:

1. The list of disputable legal acts in the Constitutional Court has been expanded. According to Article 168 of the Constitution, sub-legislative normative legal acts, among others, were considered objects of constitutional control.

2. The institution of individual applications has been improved. Unlike the previous edition of the Constitution, according to the current provisions of the Constitution, an individual application can be submitted by any individual or legal entity if the latter disputes not only the provision of the normative legal act applied to him/her but also the interpretation of that provision by legal practice. In addition, under the previous edition, only the provisions of the law applied to the applicant could be disputed with an individual application.

3. The role of the President of the Republic has been changed in terms of ensuring constitutionalization. According to Article 123 of the Constitution, the

President of the Republic monitors the preservation of the Constitution, and one of the important ways of exercising this authority is ensuring constitutionality through constitutional monitoring.

4. The range of entities entitled to appeal to the Constitutional Court has been expanded, etc.

It should be noted that the constitutional monitoring institute provides the opportunity to implement the constitutionalization process more efficiently and systematically.

Constitutional monitoring includes the daily analysis of legal norms and law enforcement practices in order to bring them into line with the latest requirements of the Constitution. Moreover, the effective implementation of the power of the President to carry out constitutional monitoring will contribute to the constitutionalization of the legal field to a certain extent.

It should also be noted that according to the Constitution, the President of the Republic, refusing to sign the adopted law, has the right to apply to the Constitutional Court within 21 days to decide the issue of compliance of that law or its provisions with the Constitution. In addition, the President of the Republic has the right to apply to the Constitutional Court to verify the constitutionality of normative legal acts.

The Constitutional Court, in its turn, participates in the process of constitutionalization of legislation, that is, establishes a connection between constitutional principles and norms and legislative regulations of various branches of law. It not only exercises control over the adopted normative legal acts but also predetermines the constitutional development of the state.

Regardless, it is about concrete or discrete constitutional control, the Constitutional Court makes one of the following decisions in accordance with Part 9 of Article 68 of the Constitutional Law "On the Constitutional Court":

1) On recognizing the disputable act or its disputable provision as consistent with the Constitution;

2) On recognizing the disputable act or its disputable provision as consistent with the Constitution according to the interpretation of the Constitutional Court;

3) On recognizing the disputable normative legal act in whole or in part as contrary to the Constitution and later setting a date.

4) On recognizing the disputable normative legal act in whole or in part as contrary to the Constitution and later setting a date in connection with its invalidation.

The Constitutional Court also carries out functions of ensuring constitutionalization related to international treaties, in particular, through preliminary constitutional control. Although the competent department issues a preliminary opinion on international treaties in terms of compliance with the Constitution before submitting them to the Constitutional Court, the final decision on the matter is reserved to the Constitutional Court. This being the case, the Constitutional Court is authorized to adopt only one of the following decisions:

1. On recognizing the obligations stipulated in the international agreement as conforming to the Constitution.

2. On recognizing the obligations stipulated in the international agreement in whole or in part contrary to the Constitution.

In terms of content, when talking about constitutionalization, it should be noted that the Constitutional Court, by revealing the constitutional content of this or that legal norm, or recognizing the norm as contradictory, ensures the supremacy of the Constitution.

In terms of content, from the point of view of ensuring constitutionalization, the provisions related to the fundamentals of the constitutional order established by the Constitution and the basic rights and freedoms of humans and citizens are of great importance because the majority of normative legal acts are related to those provisions.

In addition, in terms of ensuring constitutionalization, the principles of certainty and proportionality stipulated by the Constitution are of particular importance, by application of which the highest quality of constitutionalization is guaranteed.

Thus, the Constitutional Court referred to the constitutional principle of certainty in a number of its decisions. In this regard, a number of positions expressed by the Constitutional Court in its decision SDO-1488 of November 15, 2019, are interesting, namely:

a) "The principle of the legal state, among others, also requires the existence of legal law. The latter should be sufficiently accessible, the legal persons should have the opportunity to determine which legal norms are applied in the given case in appropriate circumstances. The norm cannot be considered a "law" if it is not formulated with sufficient accuracy to allow legal and natural persons to conform their behavior to it; they should have the opportunity to foresee the consequences that this action may cause" (SDO-753 of 13.05.2008),

b) "(...) within the framework of the adoption of the principle of the rule of law, the legal regulations laid down in the law should make the person's legitimate expectations predictable." (SDO-1213 of 09.06.2015),

c) "(...) one of the most important features of the legal state is the supremacy of the law, one of the main requirements for ensuring which is the principle of legal certainty, the regulation of legal relations exclusively with such laws that correspond to certain qualitative features: clarity, predictability, accessibility" (SDO-1270 of 03.05.2016),

The Constitutional Court has also referred to the principle of proportionality in many of its decisions. Summarizing the essence of a number of its legal positions, the Constitutional Court notes that:

"... the principle of proportionality derives from Article 1 of the Constitution (principle of the legal state)", (SDO-917),

According to the decision SDO-1546 of the Constitutional Court of June 18, 2020:

"...any limitation of the fundamental right is possible only by law, and due to the principle of proportionality, the requirements related to the limitations of the fundamental right by law are as follows:

1) the **legitimacy of the purpose** of the restriction, that is, its definition by the Constitution;

2) means selected for limitation:

a) **suitability** to achieve the goal defined by the Constitution;

b) **the necessity** to achieve the goal set by the Constitution;

c) **equivalence** to the meaning of the limited fundamental right and freedom".

Summarizing the above, it should be noted that constitutionalization is an important task from the point of view of ensuring the supremacy of the Constitution. That is why a multi-faceted study is needed, as well as the development of legal regulations.

ՆԱՐԻՆԵ ԴԱՎԹՅԱՆ – *Իրավական նորմերի սահմանադրականացման արդի հիմնախնդիրները Հայաստանի Հանրապետությունում* – Հոդվածում ուսումնասիրվել են իրավունքի սահմանադրականացման հիմնախնդիրները ՀՀ-ում: Քանի որ իրավունքի սահմանադրականացումը ժամանակակից սահմանադրականության արդի խնդիրներից է, որը հետաքրքրում է ոչ միայն սահմանադրական իրավունքի ոլորտի մասնագետներին, այլև իրավունքի այլ ճյուղերի՝ խնդրահարույց հարցերով զբաղվող գիտնականներին, հոդվածում ուսումնասիրվել է սահմանադրականացման գործընթացը, ինչը կարևոր նշանակություն ունի Սահմանադրության գերակայությունն երաշխավորելու առումով և կոչված է ապահովելու նորմատիվ-իրավական ակտերի համապատասխանեցումը Սահմանադրության պահանջներին:

Սահմանադրականացման գործընթացն ուսումնասիրվել է ինստիտուցիոնալ տեսանկյունից՝ պայմանականորեն այն դասակարգելով երկու հիմնական խմբի:

Առաջինը հանրային ծառայության ոլորտում գործող այն ստորաբաժանումներն են, որոնք օժտված են նորմատիվ-իրավական ակտերի նախագծերն իրավական փորձաքննության ենթարկելու իրավասությամբ: Այսպիսի փորձաքննության կարևոր նպատակներից է իրավաստեղծ մարմիններին և պաշտոնատար անձանց տրամադրել եզրակացություններ հիշյալ նորմատիվ իրավական ակտերի նախագծերում արտացոլված իրավանորմերի՝ Սահմանադրության պահանջներին համապատասխանության վերաբերյալ:

Երկրորդ, ուսումնասիրվել են 2015 թվականի սահմանադրական բարեփոխումների արդյունքում իրավական դաշտի սահմանադրականացումն ապահովելու նպատակով սահմանադրական մարմիններին և Սահմանադրական դատարանին վերապահված առանձնահատուկ դերն ու նշանակությունը: Սահմանադրական դատարանը՝ որպես սահմանադրական վերահսկողության մարմին, կոչված է ապահովելու Սահմանադրության գերակայությունը, որն իրականացնում է վերացական և կոնկրետ վերահսկողությամբ:

Բանալի բառեր – *իրավունքի սահմանադրականացում, Սահմանադրության գերակայություն, սահմանադրականացման գործընթաց, իրավական փորձաքննություն, սահմանադրական վերահսկողություն*

НАРИНЕ ДАВТЯН – ***Актуальные вопросы конституционализации правовых норм в Республике Армения***. – В статье рассматриваются вопросы конституционализации права в РА. Учитывая, что конституционализация права является одной из актуальных проблем современного конституционализма, что в настоящее время интересует не только специалистов в области конституционного права, но и ученых, занимающихся проблемными вопросами других отраслей права, в

статье рассматривается процесс конституционализации, который имеет важное значение с точки зрения обеспечения верховенства Конституции и призван обеспечить соответствие нормативных правовых актов требованиям Конституции.

Процесс конституционализации был рассмотрен с институциональной точки зрения, который условно был разделен на две основные группы.

Во-первых, подразделения, действующие в сфере публичной власти, обладают полномочиями подвергать проекты нормативных правовых актов юридической экспертизе. Одной из важных целей такой экспертизы является предоставление правотворческим органам и должностным лицам заключений о соответствии нормативно-правовых актов требованиям Конституции.

Во-вторых, изучена роль и значение Конституционного Суда в сфере обеспечения конституционализации правового поля в связи с конституционными изменениями 2015 года. КС как орган конституционного контроля призван обеспечить верховенство Конституции, что осуществляется в рамках абстрактного и конкретного нормоконтроля.

Ключевые слова: *конституционализация права, верховенство Конституции, процесс конституционализации, правовая экспертиза*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 44-53 *Սահմանադրական իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.044

THE GENESIS OF SYSTEMIC CONFLICTS IN THE PERIOD OF THE USSR COLLAPSE AND STATE FORMATION IN THE POST-SOVIET PERIOD

VARDAN AYVAZYAN

The object of the study is the genesis of systemic conflicts in the paradigm of the phenomenology of statehood, with its inherent methodological and methodical approaches to the mechanisms of formation and building of the state task, which presupposes the systems of interacting institutions that determine the structure of public administration.

The subject of the study is the main trends of statehood formation in modern history, a systemic crisis of administration in the decline period, and the actual trajectory and mechanics of statehood formation in the post-Soviet space and in the world after the collapse of the USSR. Special attention is paid to the analysis of key causes of the emergence of systemic conflicts as a result of differences in content, understanding, and installation of the structure of state building on an operational level without a qualitative legal metric of legitimacy of state-formation. The genesis of systemic conflicts of constitutional and legal regulation in the conditions of the growing scale of global integration, as well as the critical need for an effective supranational level of legal regulation within the framework of a systemically full-fledged international law.

The study concludes that due to systemic conflicts, ensuring common understanding, interpretation and application of the guiding principle of the Rule of Law becomes ambiguous and makes the formation of a common unified global legal space impossible. As a result, as an objective consequence, integration processes, in the absence of a systematically organized legal discipline, go into the mode of "self-determination" where the principle Rule of Law based on a system of legal norms on the long term basis, is replaced with a conventional system of situational agreements oriented on the rules of the short-term basis of the current conjecture.

Key-words: *Genesis, legal genesis, systemic conflicts, sin, Constitution, constitutional regulation, the Rule of Law, the USSR, world order, civilization*

The moral, cognitive, and methodological aspects of the problem.

In his book "The Morality of Law", the famous American jurist Lon Fuller starts with the selection of the following construct:

Sin, vol. 1. Voluntarily deviate from the path of duty prescribed to man by God. Webster's New International Dictionary Sin is sinking into nothingness*(Fuller Long A, 2007, p. 13).

Adopting this concept for highlighting legal issues through “systemic conflicts”, we denote a “sin” in the context of the genesis of conflicts in the system of state formation. “To commit a sin” in science is the assumption of unreason, leading to a logical ambiguity of the studied subject area because the latter immerses a scientist into the void of ignorance. In this setting, the qualitative

property of any science to have the right to be a science and realize its purpose functionally as an essential uniqueness is postulated. Otherwise, it is something else, and then a sin is committed as an act when that "something else" replaces the existing.

This is a primary basic cognitive conflict in the system of scientific knowledge, which triggers the deformation of the essential manifestation of the object by its subjective perception of the observer, forming a curved spatiality in (pseudo, sublimation) the reality, i.e., the deformation of the reasonable touch of the observed object, and this is certainly the basis of the entire genesis of systemic conflicts in the processes of law formation and state formation.

Ignoring this primary basic component will make the insurance of the logical adequacy of jurisprudence, political science, administration, and all related subject areas as a science and rationality, the creation and establishment of states, as well as the legal formation of the world order impossible, and this is a sin that can lead to the disappearance of the sin-bearer itself - the human world.

As an independent entity the legal essence of sin, can be represented in the ontological construct of the bearer of sin, as the subject responsible for the assumptions of the act of deviation from duty and the object of duty itself, which determines the objectivity of sin. Therefore, the subject, the bearer of sin, commits a sin before the established order of obligation.

In particular, jurisprudence is sinful to humanity to the extent that it cannot (although it should) explain the nature and essence of law, provide a fundamental system of knowledge that allows to design the architecture of state building in the conditions of the world legal order, establish a legal space in which the state building will be formed, as well as to start its operation with its subsequent operational administration. In this regard, in his book "Critique of Pure Reason", the well-known German philosopher E. Kant rightly notes that lawyers are still looking for a definition for their concept of law (Kant I., 1998, pp. 730-731).

We can say that the President of the Russian Federation V.V. Putin had in mind the same circumstance in one of his interviews, in which he notes, "Whoever does not regret the collapse of the Soviet Union has no heart; whoever wants to recreate it in its previous form has no head - (https://ru.citaty.net/tsitaty/633404-vladimir-vladimirovich-putin-kto-ne-zhaleet-o-raspade-sovetskogo-soiuza-u-togo-n/»).). In the format of our toolkit, this thought can be interpreted as "The one who rejoices at the collapse of the USSR has no conscience, no heart (and this is sinful and immoral), and the one who believes that it can be recreated in its previous form has no mind, and this creates cognitive conflict, which is also sinful."

One of the most famous works of the philosopher and futurist Francis Fukuyama "The End of History and the Last Man" (Francis Fukuyama, 2015), is directly related to the topic under discussion. The manifestation of sin lies in the fact that the natural essence of a person is eliminated, along with all the accumulated civilizational cognition and rationality, with the abolition of philosophy, art, and instead, launching an "event history" (already cognitive dissonance) in which a postmodern subject is formed without a construct of obligation in the format "Liberal Democracy". This is, in fact, a declaration of "freedom from sin, freedom from the freedom of a natural person, freedom from

everything" and the abolition of obligation in general, in fact- canceling the civilized legal order.

At the same time, it establishes a new cognition in which Aristotelian logic and scientific character are suspended. Therefore, constructive "liberal democracy" should not prove anything, even if it is in the minority. There is an abolition of traditional rationality, the creation of a new culture of political ethics, the establishment of significance and dominance of the minority over the majority, and the establishment of a new era.

At the same time, the statements of former US Secretary of State John Kerry in Berlin can be qualified as a sin: "We Americans highly value freedom in general, and freedom of speech in particular. With us, anyone has the right to be stupid if he wants to be." (https://vk.com/@wpristav-rss-209740668-1293694745).

Another illustrative example of a sin is the professor Noah Yuval Harari's attempt in his newfound scientific research (Yuval Noah Harari, 2015 by Vintage; Yuval Noah Harari, (Harvill Secker, 2016), Yuval Noah Harari, (Jonathan Cape, 2018).) to conceptualize the "objective " nature of the end of the humanistic era and the beginning of a new civilization (with the change of the natural person as the substantive basis of civilization to the "supernatural person", with the transition to the incomprehensible hypostasis of "already a different non-human and non-civilization", something incomprehensible, unknown, beyond responsibility in general, in which all traditional institutions will not have a place to be, with the replacement of the traditional understanding of administration as an entity in a different format, as a dialectic of controlled chaos with a "constitutional" setting of the assumption of "uncertainty" in everything, the end of reason and the abolition of cognition and scientificity in general. This is a new era of the "subject of the supernatural", and it is very likely that the term "man" itself can be abolished as the substantial basis of the planet's population.

In such an incredible paradigm, similar to a dystopia, the concept of the state and law will disappear "naturally", just like jurisprudence, political science, and administration, they will simply be repudiated as was the case with the history of the CPSU.

As a result, the world order will be fundamentally different, in which there will be no state based on human rights because there will be no man himself.

The bearer of this sin, unfortunately, objectively is humanity itself in its immanent legal personality.

A sin in the administration system manifests a deviation from fulfilling of one's functional purpose.

Law is a system of preventing a sin and ensuring the integrity of the administration system.

The above examples are the primary signs of reality and the program of replacing the Law with the Rules.

In this formulation, cognition may be outside the logical necessity of constructing a cause-and-effect chain of evidence for something.

Consideration of the nature of this sin requires special methodological tools based on the phenomenological synthesis of political, sociocultural, economic, and other institutional components of state formation to provide the required capacity of scientific tools and to cope with understanding the complex

task of state building, its installation of administration, functioning, and progressive development.

Scientific research, especially the decision-making system without which it is impossible to manage at all, should be based on a system of objective fundamental knowledge with its own theoretical base, methodology, methodological apparatus, and application tools within those subject areas in which the operational administration of goal-setting objects and systems as well as the release of the final product are determined.

Subject area - state - state building

In our consideration, the basic object is the state as a phenomenon and all related subject areas, essentially including all areas of scientific and practical activity, philosophy (including theosophy and theology), jurisprudence (including necessarily the philosophy of law, jurisprudence), political philosophy, political science, conflictology, sociology, economic theory, cybernetics, and other related disciplines. Based on this, an unambiguous construct is established for such key objects as the state, legal genesis and state formation, etc., reflecting their essence.

Without a fundamental understanding of the legal nature of the state, knowledge of the "intrinsic nature of political power, constant under changing circumstances, determining the path along which forms of government develop, and not determined by these forms" (Anthony de Yasai, 2016, p. 11), the state simply will not be visible, tangible, distinguished and formalized as a basic entity and functional. Therefore, it will not be designated as a control object in the process of analytical operation and generation of conclusions for decision-making.

In particular, in the case of an uncontested need for operational legal consolidation, the duality of state administration as a result of a systemic conflict "constitutional ambivalence" of statehood has led to:

• loss of controllability in the last period of the USSR. The fact is that Soviet Law, based on the socialist concept of the theory of state and law, with the corresponding methodology for building a legal space, with its system of law formation, is fundamentally different from the methodology of law formation based on the ideological and theoretical platform of capitalist statehood.

One of the main trends in legal analysis was aimed at establishing the thesis asserting that the collapse of the socialist regimes in Russia and its satellites was objective and inevitable. Unfortunately, the topic of the collapse of the USSR was not a priority object of scientific research (mainly for reasons of political inexpediency and the policy of forgetting everything that is associated with communism). The transfer of the main emphasis on the transition of capitalist law formation, as well as the focus and conjecture of research activities, has reduced the request for fundamental research on the causes and nature of the collapse of the USSR to a minimum.

Meanwhile, China has not only continued but also developed the whole theory of socialist and communist state-building with the applied result of launching the phenomena known as "Chinese Miracle, two systems - one country; peaceful supremacy, economic expansion of China as No.1 Economy, Chinese socialism, etc." despite the fact that the USSR was the source of the theo-

retical and practical plan. It should also be noted the strategy of internal self-isolation of the scientific base and the policy of non-advertising and information protection of intellectual activity in the field of state and law. With this respect, it comes as a surprise that fundamental works on Chinese socialism, state building and law formation, and the experience of successfully overcoming methodological and methodological challenges are not a priority request in the countries of the former USSR.

Regarding the ascertaining of the collapse of the socialist camp, the consistency of the ideology and theory of communism, socialism, Anthony de Yasai's statement is indicative: “It is difficult to say what exactly is refuted by this collapse. Should such an attempt always end in such a failure? I see no compelling reason for this in one form or another” (Anthony de Yasai, 2016, p. 12)

The systemic conflict of "Developed socialism" arises as a result of the lack of a conceptual model of the stage of the subsequent transition on the path to Communism. The research capacity of this conflict is of a fundamental nature and cannot be fully disclosed within the framework of one article; in connection with this, we designate systemic conflicts only in the context of its manifestation with targeted application on the following points:

- The controlled process of the predictable dialectical development of society and statehood, due to the systemic conflict, switched to the mode of evolutionary self-formation with the launch of a situational administration system and the principle of empirical auto-correction.

The conceptual model for a new qualitative level of economic development was confined to the formula “The economy must be economical”, and had no backed up fundamental concept for a new stage within the framework of the ideological and theoretical base of socialist statehood, with the identification of all implementation parameters, taking into account qualitative transformations in all areas (as was done in China with a clear description of the stages and program for the implementation of reforms). As a result of this, the genesis of the systemic conflict "Jump to Nowhere" occurred - the sin of immersing the socialist state into uncertainty, emptiness, and nothing with the inevitable outcome of its collapse.

- Initiation of structural changes in the functioning of the state, which were ambiguous in their political, economic content and goal-setting; in fact, institutional transformations under the “Perestroika” brand, without scientific and practical justification and applied convergence, based on the mere declaration “glasnost and perestroika, new thinking”, the syndrome of political sublimate slogans, violated legal bases, transformed the institutions of the state building into the format of a “self-forming web”, with the inevitable paralysis of the functional viability of the state administration system.
- Quite a natural outcome, as a result of the already existing systemic conflicts was the inability to correct the dysfunctions of basic institutions, which led to a loss of controllability in all areas.
- Ensuring the constitutional legal order of the state became untenable.
- A dual constitutional and legal regulatory body was formed, actually composed of the traces of the resettled administration system where “the infrastructures of state institutions and functionality of public administration

had already been resettled." On the one hand, each element of the administration system had to correspond to the normative legal acts while, on the other hand, Perestroika, as an initiative form of a reform independent of organic interconnections and compliances with the constitutional regulatory norms, had powers to establish and change the status of functions of the state bodies; that is to say, while the constitutional status of the functional as a unit of the administration system corresponded to the constitutional legal regulations, Perestroika entitled the functional to feel free to change its administration format for implementation including the so-called "household account 1, 2, 3". In fact, the "double legitimacy" had increased, launching parallel regulations without reconciling the entire hierarchy of the administration system from top to bottom, and in the opposite direction, thus paralyzing all the processes of the state administration system.

- At the same time, the genesis of the "Ambivalence" systemic conflict was launched, in which any element of the administration system was to be by the ideological theoretical base of the old (prohibiting private ownership of the means of production) and the current administration system as a web of "self-organizing functionalities using political and public administrational resources of the old system creating ambiguity not only in the decision-making system, but also in the interpretation of all processes in the paradigm of a new (market) not yet systematically established, but already present as an ideological and theoretical concept (with elements of a market economy assuming private ownership of means of production - the so-called cooperatives) - yet being unaware of its conflict potential in relation to the official constitutional arrangement. This had been seen at all hierarchical levels of the state administration of the USSR - from the Republics, ministries, departments, enterprises and organizations to the individual citizens.
- The systemic conflict of "Ambivalence" gave rise to the systemic conflict of "Duality of the public administration system"; as a result, a two-factor instability was formed at all levels - from production, logistics, and financing to the functioning of the planned economy as a whole. Because of chronic instability at all levels, the principle of state-planned administration, as the main mechanism for ensuring the welfare of society, had become unfeasible. The main aspect of the increase in ambivalence was the formula for choosing the current economic reality - on what ideological and theoretical basis to identify the state of statehood - the economic dilemma - the socialist market or market socialism, with the associated political dilemma - state or private ownership of the means of production. The presence of this dilemma itself meant that the former statehood no longer existed, while the new one was wandering between the above dilemmas. At the same time, the scientific level of understanding the phenomenon of the market economy was untenable for solving the above dilemmas, especially in the face of growing uncontrollability at that time. In fact, this meant paralysis of the constitutional legal administration. In reality, the paralysis of the constitutional legal regulation launched the genesis of law.
- Creeping decentralization and self-governance as an operational reality, demanded "its independence from the old" and was not yet aware of the

meaning of "constitutional independence as a separate subject" of legal genesis, lacking un understanding of the significance and purpose of the legal system in general. In the manifestation of this systemic conflict, the subject declaring independence does not understand the legal meaning, content, and purpose of independence" (the genesis of pseudo-sovereignty).

- The project of a renewed form of government of the USSR and its operational process led to the deformation of the constitutional order of the USSR.
- The next step was Belovezhskaya Pushcha and the denunciation of the USSR, after which a parade of declarations of independence followed in the Union Republics.

Back in 2016, I began my scientific article "Conflictogenic Nature of the Rule of Law Principle and the Genesis of Systemic Conflicts of Constitutional Regulation" with the following thoughts:

"The modern world in its current state can be characterized as a process of conflicts with unprecedented dynamics of generation and, accordingly, global system challenges across all sections of the aggregate social process - from the national level, defining key problems of development, formation, structural reforms (especially for countries with transitional and developing economies) to open questions of system formation of global interaction of the entire world community. Undoubtedly, the functional effectiveness of all approaches and solutions to these challenges, as well as the implementation mechanisms already in practice, are directly linked and dependent on the system of legal consolidation within the framework of national and supranational law formation within the framework of system uniformity, which allows to synchronize the actions of law within the common legal space (global action) taking into account the diversity and specifics of systems of sovereign law." (Ayvazyan V.N., 120-127)

The scientific research, especially the decision-making system without which public administration is impossible in general, should be based on a system of objective fundamental knowledge with its theoretical base, methodology, methodological apparatus and application tools within those subject areas in which the operational administration of goal-setting objects and production systems are determined.

As a result, the process of state formation was inevitably doomed to obstruction. The state bodies of the current statehood (the Supreme Council, not yet the Parliament) launched in the legal space of the administrative law of socialist statehood with constitutional powers, an anti-constitutional act - the Declaration of Independence, abolishing the current statehood, with the transition to an undefined statehood, with essential uncertainty, in fact forming a mutational formation with public administration system of the previous statehood, launching not just the ambivalence of the state building, but in fact laying the foundation for the annihilation of statehood.

Unfortunately, there is no a term in the word stock of jurisprudence, political sciences and other related scientific disciplines. It has not been designated, has not yet been defined, as a result of which a conceptual and legal entropy is formed, which inevitably triggers a cognitive dissonance that abolishes any metric of rationality, while all institutions, by inertia, worked as a mechanism of

the old public administration system. The most difficult (somewhat ridiculous) in connotation of a systemic conflict is that the operating control system works by inertia and, in fact, is already illegitimate. That is, it functions in the space of non-legal regulation with the worst constitutional consolidation through ovulation tools outside the legal semantic review, but with the status of the main law, which prohibits the objectivity of the state as an object of constitutional legal consolidation with a clear ideology.

At the same time, the principle of the inadmissibility of any level of crystallization of the essential identification of the state is established, without which not only sovereignty as a feature of independent will is unacceptable, but also any ideological issue is also prohibited. As a result, the systemic conflict of state formation is accompanied simultaneously by the emergence of systemic conflicts of constitutional regulation. The source itself in the chain of the falseness of the genesis of statehood, in this case, is the document "Declaration of Independence", which is not classified by its legal status, in which there is no constitutional content to justify the object of dependence and independence (from what? - the answer is "from the dictates of the center! We ourselves want to control our fate - How ? Not like now!).

This complex and invisible aspect (the phenomenon of the annihilation of law) of the recursion is the genesis of state formation and the genesis of the system of constitutional regulation, which, within the framework of epistemology and cognitive sciences, are classified as a special phenomenological class of self-referential concepts. Undoubtedly, the scientifically analytical apparatus of jurisprudence, unfortunately, abolished the philosophy of law as a mandatory, basic, initial institutional component of deductive thinking in the field of state and law, with the transition to the trend of positive law, which historically transformed legal thinking at the inductive level of practical priority in a narrow range of legal thinking and essentially abolished the essence of law. This is the reason for methodological blindness and has launched a systemic relapse of the replacement of legal analytics purely within the framework of methodological aggregation at the level of law enforcement as a rule. Such annihilation is a clear example of a systemic conflict, when an object operationally exists and functions in the absence of a reasonable observer who is aware and singles out the object of observation in the analytical form, on the basis of which, with a proper level of understanding of the phenomenon of the object of observation, with subsequent transfer of the interaction process to the plane of the subject of administration - the object of administration.

The erasure of historical memory, the de-installation of the analytical integrity of the scientific heritage, and the formation of current positive scientificity serve the opportunistic interests of the situational layout with the priority of short-term planning.

The methodology of long-term, medium-term and short-term planning as a single entity is replaced by purely short-term planning, at the same time, the strategy is based on the iterative pursuit of situational solutions to achieve established goals on a long-term time scale.

As a result of cognitive conflictogenicity, the systemic conflict "War for Peace" is functioning today, based on constructive uncertainty and the principle

of mandatory uncertainty as a sign of the democratic arrangement of a modern state building. This is an unconscious systemic conflict triggering Chaos.

The author declares no conflict of interest.

List of Reference

1. Айвазян Вардан, Конфликтогенная природа верховенства права и генезис системных конфликтов конституционно-правового регулирования, Бизнес в законе, экономико-юридический журнал, N 2, г. Москва, 2016 г., стр. 120-127.

2. Кант И., Критика чистого разума, пер. с нем. Н. Лоского,-Мн.: Литература, 1998, 960 стр.

3. Конец истории и последний человек / Фрэнсис Фукуяма ; [пер. с англ. М. Б. Левина].: АСТ; Москва; 2015, 259 стр.

4. Источник: https://ru.citaty.net/tsitaty/633404-vladimir-vladimirovich-putin-kto-ne-zhaleet-o-raspade-sovetskogo-soiuza-u-togo-n/»

5. Источник https://vk.com/@wpristav-rss-209740668-1293694745

6. Фуллер Лон А., Мораль права, М., ИРИСЭН, 2007, 308 стр.

ՎԱՐԴԱՆ ԱՅՎԱԶՅԱՆ – ***Համակարգային հակամարտությունների ծագումնաբանությունը ԽՍՀՄ փլուզման և հետխորհրդային փուլի պետականագոյացման գործընթացում*** – Հետազոտության օբյեկտը համակարգային հակամարտությունների ծագումնաբանությունն է պետականության հարացույցում՝ իրեն բնորոշ մեթոդաբանական և մեթոդական մոտեցումներով, պետական կառույցի ձևավորման կառուցակարգերով՝ որպես փոխգործակցող ինստիտուտների համակարգային համալիր, որոնցով որոշվում է պետական կառավարման կառուցվածքը:

Ուսումնասիրության առարկան նորագույն պատմության մեջ պետականություն ձևավորելու հիմնական միտումներն են, կառավարման համակարգային ճգնաժամը փլուզման ժամանակաշրջանում, պետականության ձևավորման փաստացի հետագիծն ու կառուցակարգը հետխորհրդային տարածքում՝ ԽՍՀՄ փլուզումից հետո, և աշխարհում: Առանձնահատուկ ուշադրություն է դարձվում համակարգային հակամարտությունների հիմնական պատճառների վերլուծությանը, որոնք պայմանավորված են պետականաշինության կառուցվածքի գործառական մակարդակում բովանդակության և ներդրման ըմբռնման տարբերությամբ՝ առանց պետականագոյացման լեգիտիմության որակականության իրավական մետրիկայի:

Առանձին-առանձին դիտարկվում է սահմանադրական և իրավական կարգավորման համակարգային հակասությունների ծագումը գլոբալ ինտեգրման աճող ծավալի և լիարժեք համակարգային միջազգային իրավունքի շրջանակներում իրավական կարգավորման արդյունավետ վերազգային մակարդակի ծայրահեղ անհրաժեշտության համատեքստում:

Աշխատանքի հիմնական եզրակացությունն այն է, որ համակարգային հակամարտությունների պատճառով իրավունքի գերակայության առաջատար սկզբունքի ընդհանուր ըմբռնման, մեկնաբանման և կիրառման ապահովումը դառնում է ոչ միանշանակ, և անհնար է դառնում միասնական համաշխարհային իրավական հարթության ձևավորումը:

Արդյունքում, որպես օբյեկտիվ հետևանք, ինտեգրացիոն գործընթացները համակարգված իրավական գիտակարգ բացակայության պայմաններում

անցնում են «ինքնորոշման» ռեժիմի՝ փոխարինելով երկարաժամկետ իրավական նորմերի համակարգի վրա հիմնված իրավունքի գերակայության սկզբունքին։

Բանալի բառեր – *ծագումնաբանություն, իրավական ծագումնաբանություն, համակարգային հակամարտություններ, մեղք, Սահմանադրություն, սահմանադրահիրավական կարգավորում, իրավունքի գերակայություն, ԽՍՀՄ, աշխարհակարգ, քաղաքակրթություն*

ВАРДАН АЙВАЗЯН – ***Генезис системных конфликтов в процессе распада СССР и государствообразования в постсоветский период***. – Объектом исследования является генезис системных конфликтов в парадигме феноменологии государственности, с присущими ему методологическими и методическими подходами, механизмами формирования и построения государственности, как совокупности системы взаимодействующих институтов, определяющих структуру государственного управления.

Предметом исследования являются основные тенденции государствообразования новейшей истории, системный кризис управления в период распада, фактическая траектория и механика становления государственности на постсоветском пространстве и в мире после распада СССР. Отдельное внимание в работе уделено анализу ключевых причин возникновения системных конфликтов, как посследствие различий в содержании, понимании и инсталляции конструкции государственности на операционном уровне без качественной правовой метрики легитимности государствообразования. Отдельно рассматривается генезис системных конфликтов конституционно-правового регулирования в условиях нарастающего масштаба глобальной интеграции и критической необходимости наличия действенного наднационального уровня правового регулирования в рамках системного и полноценного Международного Права.

Основным выводом работы является то, что вследствие Системных Конфликтов обеспечение единого понимания, толкования и применения ведущего принципа Верховенства Права становится неоднозначным, а формирование общего единого мирового правового пространства - невозможным. В результате как объективное посследствие, интеграционные процессы в условиях отсутствия системно-организованной правовой дисциплины переходят в режим «самоопределения» с заменой принципа верховенства права, основанного на системе правовых норм на долгосрочной основе, на конвенциональную систему ситуационных договорённостей, ориентированных на правилах краткосрочной основы текущей конъюнктуры.

Ключевые слова: *генезис, правогенез, системные конфликты, грех, Конституция, конституционно-правовое регулирование, верховенство права, СССР, Миропорядок, цивилизация*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 54-60 *Սահմանադրական իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.054

THE ISSUES OF IMPROVEMENT FOR THE INSTITUTE OF CLAIM SECURITY IN ADMINISTRATIVE PROCEDURE

SAYAD BADALYAN

The Code of Administrative Procedure (CAP) in the Republic of Armenia needs to improve its regulations for the institute of securing a claim. Chapter 15 of the CAP (Claim Security) has imperfect regulations that are not in line with current procedural legislation. Adjustments in Article 83 and Chapter 15 of the CAP could contribute to the improvement of the institute of securing a claim in administrative procedures. Article 83 of the CAP is one of the most discussed articles since it entered into force. It introduced the suspension of an administrative deed by force of law and not by the court, which poses inevitable risks, such as an opportunity for plaintiffs to abuse their rights. Overall, the issues with Article 83 and Chapter 15 of the CAP highlight the need for consistent adjustments and a systemic solution to the problem in order to improve the institute of securing a claim in administrative procedure. In this context, it is proposed that the general rule should not be the suspension of the administrative deed, and then the definition of exceptions to that rule, but Article 83 of the CAP should define only those cases when accepting a challenging claim suspends the performance of the administrative deed. However, it's important to note that this does not imply that the execution of an administrative deed should never be suspended in cases not listed in Article 83 of the CAP. In such instances, the court may still order suspension as a means of securing the claim if there are pertinent grounds.

Keywords: *institute of securing a claim, administrative procedure, Code of Administrative Procedure, suspension of an administrative deed, temporary protection, administrative deed, challenging claim*

The institute of securing a claim is currently one of those needing improvement in administrative procedure. Chapter 15 of the Code of Administrative Procedure of the Republic of Armenia (hereinafter referred to as “the CAP”) (Claim Security) is notable for its incomplete and imperfect regulations, which are not in line with the current trends in the development of procedural legislation. Meanwhile, it is impossible to consider the issues of the institute of securing a claim in the administrative proceedings and to find effective solutions without also referring to the provisions of the suspension of the administrative deed, as defined by Article 83 of the CAP. Under such conditions, only consistent adjustments in Article 83 and Chapter 15 of the CAP could contribute to the improvement of the institute of securing a claim in administrative procedure.

In general, Article 83 of the CAP is one of the most discussed articles of the Code since it has entered into force. The matter is that the mentioned article introduced into the legislation an essentially new institute for procedural legislation: suspension of an administrative deed by force of law and not by the

court. Still, the further practice of applying this article revealed the inevitable risks associated with it, which remain relevant to a certain extent, despite a number of amendments made to the CAP since its adoption.

It should be noted that the legal consequence of the suspension of an administrative deed in case of a challenging claim is not unique, it works in one form or another in several European states as well (e.g. Germany[1], Georgia[2]). Also, many are states which legislation does not provide for the suspension of an administrative deed by virtue of accepting the claim into proceedings. (eg. Czech[ia3], Estonia[4]). In this case, the issue is solved using the general procedural institute of securing the claim[5]. Thus, this matter has no uniform international (European) standards.

The most significant risk associated with Article 83 of the CAP was, of course, the creation of a great opportunity for the plaintiffs to abuse their rights in the form of applying to the court with apparently groundless claims and avoiding the performance of the administrative deed until the trial is completed. That was the reason that, after the adoption of the CAP, supplementations were made to Article 83 aimed at expanding the list of exceptions to the rule of suspension of the performance of an administrative deed. Currently, the number of these exceptions is 8 instead of the initial 2. We are sure that the number of these exceptions will rise over time unless the logic of this article changes, that is, the general rule should not be the suspension of the administrative deed, and then the exceptions defined to this rule, but Article 83 should define only those cases when accepting a challenging claim suspends its performance. Of course, the foregoing does not mean that the performance of an administrative deed should not be suspended in cases not listed in Article 83 of the CAP, it's simply in that case the suspension can already be done by the court as a means of securing the claim, if there are relevant grounds.

Keeping up with the policy of defining exceptions in Article 83 of the CAP will deviate from the path of giving a systemic solution to the problem and will lead to only ad hoc solutions. For example, why the administrative deed on termination of the subsoil use right is on the list of exceptions, while the administrative deed on termination of any conditional water use permit that causes irreversible damage to water resources is not on that list. Or why the administrative deeds adopted by the Compulsory Enforcement Service are on that list, and, for example, the administrative deeds of the Urban Development, Technical, and Fire Safety Inspection Authority are not among the exceptions.

The next problematic issue related to Article 83 of the CAP is the

[1] The Code of Administrative Procedure of Germany, Article 80, https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.pdf

[2] The Code of Administrative Procedure of Georgia, Article 29, https://matsne.gov.ge/en/ document/download/16492/48/en/pdf

[3] The Code of Administrative Procedure of Czechia, § 73, https://unece.org/fileadmin/DAM/env/pp/compliance/C2016-143_Czech/ Annex5_CodeAdministrativeJustice.pdf

[4] The Code of Procedure of the Administrative Court of Estonia, § 249, https://www.riigiteataja.ee/en/eli/527012014001/consolide

[5] The European experience in this field is more thoroughly analyzed in the justifications for the adoption of the Law HO-384-N "On Supplementations and Amendments to the Code of Administrative Procedure of the Republic of Armenia".

following: what is suspended when the court accepts the challenging claim into proceedings? It is noteworthy that according to Article 83, not the administrative deed is suspended, but its performance. This allows us to conclude that the goal of the legislator was originally to provide for the suspension of only those administrative deeds that imply performance, for example, administrative deeds on imposing administrative liability in the form of a fine, administrative deeds on public legal monetary claims, etc.. Meanwhile, there are administrative deeds that do not even imply performance, for example, the state registration of ownership rights to real estate. Does accepting a claim to invalidate the state registration of ownership rights to real estate suspends the performance of the state registration or, in general, what does "suspension of the state registration" mean, what legal consequences does it cause for the owner, etc.? Of course, the development of judicial practice has ignored this issue, and all administrative deeds, regardless of whether they imply performance or not, have been considered within the scope of Article 83 of the CAP. The foregoing is clearly proved by points 4 and 4.1 of Part 1 of Article 83 of the CAP, which set exceptions to the suspension of administrative deeds on imposing an administrative penalty in the form of suspending or depriving the right to drive vehicles and of administrative deeds on termination or suspension of the right to subsoil use. If the administrative deed has terminated any permit, then such legal relationship has already ceased, and even if we consider such administrative deed to be enforceable, then it has already been performed and the fact of the termination of the permit exists. Does later submission of a challenging claim by the addressee of the permit restore the operation of the permit? We think it does not. In such conditions, the means of temporary protection of the rights of the addressee of the permit should not be considering the performance of the administrative deed as suspended by accepting the challenging claim into proceedings but applying the means of securing the claim at the request of the addressee of the permit, for example, "temporary satisfaction of the plaintiff's claim", if there are sufficient grounds for measures to secure the claim.

Taking the above into account, in our opinion, Article 83 of the CAP should be put down in the context of its original purpose, which, we believe, the legislator wanted to put in the norm, that is, to provide the consequence of suspension by force of law only for those administrative deeds that imply performance in the form of confiscation of funds from the addressee of the administrative deed in favor of the state or municipal budget (first of all, these are the administrative deeds regarding administrative liability in the form of a fine and public legal monetary claims). This solution, we believe, will also ensure a reasonable balance between public and private interests. For example, even if a person goes to court only to delay the payment of a public legal monetary claim, then this itself will not be very problematic in terms of public interest, because if the claim is really groundless, the money will sooner or later be confiscated (moreover, the administrative court has also the opportunity, upon the petition of the administrative body, to place a lien on the plaintiff's property in the amount of the public monetary claim until the end of the case examination). The situation is different when the performance of the

administrative deed does not imply confiscation of money, but elimination of violations of legislation by the addressee in any field. For example, if the Urban Development, Technical, and Fire Safety Inspection Authority, by its administrative deed, obliged an entity to eliminate the violations of fire safety requirements, then the mechanical suspension of the performance of such an administrative deed, which can be done by filing an apparently groundless claim, violates the balance of public and private interests to the detriment of public interest. Surely, in this case, the plaintiff should not be deprived of the legal opportunity to achieve the suspension of the performance of the administrative deed, but this should happen by the court taking a measure to secure the claim, if there are relevant grounds. Of course, the mentioned opportunity can work only upon the improvement of the institute of securing a claim in administrative proceedings which will be referred to below.

As already mentioned, Chapter 15 of the CAP dedicated to the institute of securing a claim with its three articles is not in line with the current trends in the development of procedural legislation and needs a thorough revision. In particular, part 1 of Article 91 of the CAP defines only the possibility of the performance of a judicial act becoming impossible or difficult as a basis for applying a means of securing a claim. Meanwhile, there are practically many cases where failure to take measures to secure a claim will not make it impossible or difficult to perform a future judicial act, but if such measures are not taken, significant damage will be caused to the plaintiff or the protection of the latter's rights will be nullified.

For example, in the case of obliging claims, currently the remedy of "temporary satisfaction of the plaintiff's claim" can never be applied, even if the claim is apparently justified because even if the examination of the case lasts for several years, the plaintiff will eventually get the administrative deed they seek for, that is, there is no evidence of impossibility or difficulty in performing the judicial act. It is another matter that the absence of the administrative deed sought by the plaintiff during the examination of the case may cause irreparable damage to the plaintiff, and make the judicial protection of rights pointless. For this reason, we consider it important to include, in Article 91 of the CAP, the instances where failure to implement security measures may result in significant harm to the plaintiff or make it impossible to protect their rights, as a basis for the application of such measures.

The next issue is the limited measures of securing a claim defined by Article 91 of the CAP. In order to increase the efficiency of the institute of securing a claim, we consider it necessary to supplement that list with such measures of securing a claim, as prohibiting not only the participant in the trial, but also other administrative bodies or other persons from performing certain actions related to the subject of the dispute and obliging the participant in the trial, other administrative bodies or other persons to perform certain actions related to the subject of the dispute. Moreover, taking into account this recommendation, it is also necessary to make amendments to Article 19 of the CAP, so that the persons and bodies against whom the specified means of securing a claim have been applied, have the opportunity to acquire the status of a participant in the trial, which will enable the latter to use the procedural

opportunities related to the securing of the claim (for example, submission of petitions for counter-security, replacement, modification and cancellation of the security of claim)[6].

In the context of the amendments we proposed for Article 83 of the CAP, it is also essential to consider the inclusion of a provision in Chapter 15 of the CAP that envisages the suspension of the disputed administrative deed, either wholly or partially, as a means of securing the claim.

The next important issue is to determine the criteria for applying means of securing a claim under the CAP, which is completely absent in Chapter 15 of the CAP. We recommend to define the following as such criteria:

- the means of securing the claim shall be proportional to the submitted claim and the goal pursued by securing the claim;
- the means of securing the claim shall ensure a reasonable balance between the plaintiff, the other participants in the trial, and the public interests;
- when taking measures to secure the claim, the court shall also take into account the "prima facie" justification of the claim;
- the means of securing the claim shall not create obstacles or lead to the impossibility of any person's activity or of the exercise of the powers of the administrative body or lead to the latter's violation of the requirements established by the legislation.

Among the criteria mentioned above, the criterion of "prima facie" justification of the claim deserves special consideration. There prevails an erroneous stereotype in the RA legal practice, that if the court expresses an attitude regarding the justification of the claim in the context of this or that interim decision before the publication of the final judicial act, then this is an evidence of the court's bias and should have legal consequences of at least challenge or recusal petition presented to the judge. Meanwhile, when taking measures to secure a claim, the legislative confirmation of the criterion of "prima facie" justification of the claim is very important to have an effective institute of securing the claim and to prevent cases of abuse of procedural rights. In order not to give rise to speculations in any case, we propose to specially emphasize that taking measures to secure the claim by the court, taking into account the "prima facie" justification of the claim, cannot itself be considered as evidence of the bias of the administrative court, a basis for challenge or recusal, an appeal or review of a judicial act, as well as a basis for disciplinary action against a judge.

Therefore, the suggested solutions concerning the institute of securing a claim and suspension of administrative deeds in the event of a challenging claim align with the current trends in the evolution of procedural legislation. Implementing these solutions can significantly aid the reform of the institute of securing a claim in the administrative procedure by ensuring a reasonable balance between public and private interests in this domain and preventing instances of procedural rights abuse by parties involved in the proceedings.

[6] This issue is currently also present in civil procedure. Article 129 of the Code of Civil Procedure also provides for the possibility of applying the discussed means of securing the claim, but the persons, against whom these measures are applied, do not have the opportunity to become a person participating in the case in any status and to make use of the procedural tools related to securing the claim.

ՍԱՅԱԴ ԲԱԴԱԼՅԱՆ – *Հայցի ապահովման ինստիտուտի կատարելագործման հիմնախնդիրները վարչական դատավարությունում* – Այս ինստիտուտը ներկայումս վարչական դատավարության կատարելագործման կարիք ունեցողներից է: ՀՀ վարչական դատավարության օրենսգրքի (այսուհետ՝ ՎԴՕ) 15-րդ գլուխը (Հայցի ապահովումը) աչքի է ընկնում ոչ ամբողջական կարգավորումներով, որոնք չեն համապատասխանում դատավարական օրենսդրության զարգացման արդի միտումներին: ՎԴՕ 83-րդ հոդվածի և 15-րդ գլխի համահունչ կարգավորումները կարող են նպաստել վարչական դատավարությունում հայցի ապահովման ինստիտուտի բարեփոխմանը: Առհասարակ, ՎԴՕ 83-րդ հոդվածն այդ օրենսգրքի ուժի մեջ մտնելուց ի վեր դրա ամենաքննարկված հոդվածներից է: Խնդիրն այն է, որ այդ հոդվածով ներմուծվել է դատավարական օրենսդրության համար ըստ էության նոր ինստիտուտ՝ վարչական ակտի կասեցում օրենքի ուժով և ոչ թե դատարանի կողմից, ինչը հայցվորների համար իրավունքի չարաշահման մեծ ռիսկ է ստեղծում: Այսպիսով, ՎԴՕ 83-րդ հոդվածի և 15-րդ գլխի հետ կապված հիմնահարցերը պահանջում են համահունչ և համակարգային կարգավորումներ վարչական դատավարությունում հայցի ապահովմանն առնչվող հիմնախնդիրներին լուծումներ գտնելու համար: Այս համատեքստում առաջարկվում է, որ ընդհանուր կանոնը լինի ոչ թե վարչական ակտի կատարման կասեցումը, իսկ այնուհետև այդ կանոնից բացառությունների սահմանումը, այլ ՎԴՕ 83-րդ հոդվածը պետք է սահմանի միայն այն դեպքերը, երբ վիճարկման հայցը վարույթ ընդունելը կասեցնում է դրա կատարումը: Իհարկե, ասվածը չի նշանակում, որ ՎԴՕ 83-րդ հոդվածում չթվարկված դեպքերում վարչական ակտի կատարումը չպետք է կասեցվի, պարզապես այդ դեպքում կասեցումն արդեն կարող է կատարվել դատարանի կողմից՝ որպես հայցի ապահովման միջոց՝ համապատասխան հիմքերի առկայության դեպքում:

Բանալի բառեր – *հայցի ապահովման ինստիտուտ, վարչական դատավարություն, ՀՀ վարչական դատավարության օրենսգիրք, վարչական ակտի կասեցում, հայցի ապահովում, վարչական ակտ, վիճարկման հայց*

САЯД БАДАЛЯН – *Проблемы совершенствования института обеспечения иска в административном судопроизводстве.* - В настоящее время институт обеспечения иска является одним из институтов административно-процессуального права, нуждающихся в усовершенствовании. Глава 15-ая (Обеспечение иска) Административно-процессуального кодекса РА (далее АПК), выделяется неполноценностью регуляций, которые не соответствуют современным тенденциям развития процессуального законодательства. Гармоничные регуляции статьи 83 и главы 15 АПК могут способствовать реформированию института обеспечения иска в административно-процессуальном праве. В целом, Статья 83 АПК является одной из самых обсуждаемых статей Кодекса с момента его вступления в силу. Вопрос в том, что с помощью данной статьи был внедрен новый, по сути, институт процессуального законодательства – приостановление действия административного акта в силу закона, а не судом, что приводит к возрастанию риска злоупотребления правом со стороны истцов. Итак, вопросы, связанные со статьей 83 и главой 15 АПК, требуют гармоничных и систематизированных регулирований для решений проблем, связанных с обеспечением иска в администра-

тивном судопроизводстве. В этом контексте предлагается отказаться от общего правила о приостановления исполнения административного акта, предполагающего установление отдельных исключений из этого правила. Вместо этого, в статье 83 АПК необходимо определить те случаи, когда принятие иска об оспаривании административного акта приостанавливает его исполнение. При этом, данный подход, конечно, не будет исключать приостановление исполнения оспариваемого акта и в других случаях, однако для этого уже потребуется определение суда об обеспечении иска, при наличии соответствующих оснований.

Ключевые слова: *институт обеспечения иска, административное судопроизводство, административно-процессуальный кодекс, приостановление действия административного акта, обеспечение иска, административный акт, иск об оспаривании*

2023. № 2. 61-68 *Սահմանադրական իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.061

MANIFESTATION OF DIRECT APPLICATION OF CONSTITUTIONAL NORMS IN THE FIELD OF LAW ENFORCEMENT

SOSE BARSEGHYAN

The article discusses the competence of courts to apply constitutional norms and interpret the law enforcement practice of the Constitutional Court. The article reflects the absence of such guarantees, under which the application of constitutional norms is not effectively implemented. In particular, the subject of discussion was the right of a person to seek judicial proceedings to protect his/her constitutional rights, the competence of courts to apply the Constitution, the relationship between the principle of the supremacy of the Constitution and the concept of the implementation of the Constitution as an exception by the Constitutional Court, the obligation of ordinary courts to appeal to the Constitutional Court and at the same time justify the unconstitutionality of a legislative norm. We have come to the conclusion that there are insufficient guarantees for the interpretation and application of the Constitution in practice, as well as to oblige courts to appeal to the Constitutional Court in order to make the unconstitutionality of the norm the subject of constitutional justice, since the existing legal institutions contradict each other and create difficulties in practice. The effective application of constitutional norms, the introduction of flexible and applicable mechanisms of constitutional justice are proposed.

Key words: *constitutional norm, direct application, interpretation of Constitution, supremacy of Constitution, application of Constitution, applying to the Constitutional court, constitutional justice*

During the exercise of rights and duties by legal subjects, it is the task and purpose of law enforcement to provide proper state-legal support and guarantee by a competent or responsible official through exercising its corresponding authority. For example, in the form of issuance of relevant permission or a certificate, implementation of state registration, satisfaction of a claim, etc[1].

The above-mentioned also applies to the implementation of constitutional rights and responsibilities by law enforcement agencies in the framework of the application of constitutional legal norms. It should be noted that the direct application of the constitutional norm is often presented more as an opportunity for judicial protection of individual rights. In particular, the most characteristic feature of the direct application of constitutional norms is that a person can use judicial protection for the rights reserved to him directly, based on the constitutional regulation, and the court cannot reject that demand, justifying that there is no legislative or sub-legislative legal act specifying the given norm[2]. However, it should be noted that such an approach is a rather narrow definition of the

[1] See **Нерсесянц В. С.** Общая теория права и государства. Учебник для юридических вузов и факультетов. – М.: Издательская группа НОРМА—ИНФРА-М, 1999. – 485с., available at http://kursach.com/biblio/0010019/507.htm (02.02.2020)

[2] See **Венгеров А. Б.** Теория государства и права. Учебник, 3-е изд. – М.: Юриспруденция, 2000. – 528 с.: available at http://www.bibliotekar.ru/teoria-gosudarstva-i-prava-4/22.htm (24.04.2020)

direct application of the constitutional norm since the application refers to all bodies of public power and not only to the court. At the same time, such wording ensures only the protection of violated rights and does not provide the preservation of constitutional rights and the prevention of their violation. Simultaneously, the text of the Constitution, including Article 3 of the Constitution, itself testifies that the addressee of the observance of the constitutional provision is, first of all, the public authority. However, taking into account the objective and volume limitations of the scientific article, in this work, we will try to address some features of the direct application of constitutional norms by the courts in the light of the Constitution (2015 edition).

When directly applying the constitutional norm, different situations may arise: *a) when the constitutional norm does not require any specification and is sufficient by itself for the regulation of the legal relationship; b) when the constitutional norm regulating the relationship is not specified by any legislative norm, despite the fact that it is necessary; c) when there is a specific legal norm regulating the given relationship.*

In the first case, it should be observed whether a constitutional norm is a directly regulating norm of the relationship, when it does not require specifications. For example, the same person may be elected as President of the Republic of Armenia only once. Since the Constitution (2015 edition) enshrines only the basic rights and freedoms of a person and a citizen as directly applicable rights, it has become controversial whether this deprives a constitutional norm that does not need additional privatization of its ability to be directly applied. However, we believe that for such cases, the constitutional norm should have been capable of not relying on other legislative regulations.

The issues may arise in the second case when additional regulations are required for the implementation of the constitutional norm. However, such regulations are not stipulated in the legislative acts.

Finally, in the third case, a problematic situation might be when we are dealing with such a legal norm, the application of which raises the question of unconstitutionality.

In cases where the constitutional regulation needs legislative specification but there are no corresponding legal regulations, then proper legal mechanisms should come to the rescue to ensure the application of the constitutional norm. Such a legal mechanism should be, for example, a legal analogy. We believe that this approach should be demonstrated when applying the Constitution (2015 edition). Chapter 3 of the Constitution has a certain peculiarity, considering that the latter were stipulated as the goals of the state's policy and are characterized by gradual implementation. Despite the mentioned, we are certain that Chapter 3, together with other legal norms, should be able to regulate and predetermine the meaning and essence of these legal norms.

Let's now discuss the direct application of constitutional norms by the courts as a law enforcement body. When directly applying the constitutional norm, it seems, at first glance, that the court should have the authority in case of conflict of norms, based on the principle of the hierarchy of norms (the highest legal force of the Constitution), to apply the constitutional norm itself. Particularly, according to Article 40(1)(1) of the Law "On Normative Legal Acts" adopted on March 21,

2018, in case of conflicts between the norms of normative legal acts, the norm of the normative legal act with higher legal force is applied.

After the constitutional amendments of 2015, the Constitutional Court, in its CCD-1683 decision of April 11, 2023, states: The constitutional provisions concerning the basic rights and freedoms of man and citizen achieve their regulatory goals through legislation and its application, but in the given process of legal regulation it is necessary to prevent threats to basic rights in the face of exceptions to constitutional provisions, deviations from them, legislative conflicts with them and violations of the constitutional provisions. ***One of the important guarantees to prevent those dangers is the supreme legal force of the Constitution; due to this also, the fundamental legal significance of the provisions of the Constitution, as well as norms stipulated in Article 3 (3) of the Constitution, as a basis of the constitutional order defining that "Public power is limited to the basic rights and freedoms of a person and a citizen as a directly applicable right"***. Simultaneously, there is another legal institution: the implementation of constitutional justice exclusively by a special constitutional body. Therefore, when discussing the issue of the application of constitutional norms by the courts, the question of the relationship between the direct application of constitutional norms, as norms with the highest legal force, and the requirements to implement constitutional justice exclusively by a special constitutional body inevitably arises. In particular, the correlation between these two different institutions leads to the fact that addressing the hierarchy of constitutional and legislative norms to resolve the issue of the inconsistency of the legislative norm is outside the scope of the courts' powers as exclusively the jurisdiction of the Constitutional Court. But, at the same time, the court is obliged not to apply the legislative norm with lower legal force but is obliged to apply the higher legal rule, in this particular case, the constitutional norm. By virtue of the Constitution (Article 169 (4)), courts refer to the Constitutional Court regarding the constitutionality of a normative legal act to be applied in a specific case before them, if they have reasonable doubts about its constitutionality and find that the solution of the given case is possible only through the application of that normative legal act. This is not exempt from being problematic: in practice, it is not possible, even through the application of another normative legal act, not to apply the normative legal act regulating the relationship without justifying why it should not be applied. In other words, the law-enforcement body does not have the opportunity, according to Article 40(1)(1) of the Law "On Normative Legal Acts", to apply the norm of a normative legal act with a higher legal force, because it cannot justify it without the Constitutional Court, and at the same time, the requirement to refer to Constitutional Court for the court, in turn, causes confusion with its wording. In order not to apply a normative legal norm, the law-enforcement body must first address the question of whether the given legal norm is really not subject to application, and whether it has the authority not to apply it. At the same time, when applying the constitutional norm, the court (including any law-enforcing body) must justify why it does not apply the legal norm, what legal problem has arisen, that it solves the case, based only on the regulation of the Constitution or any other legal norm. The analysis and discussion of these issues in the reasoning part of the court's decision will also

lead to the conclusion of the issue that this legal norm does not correspond to the constitutional norm. And as it was already mentioned, the answer to that question can be given only in the scope of jurisdiction of the Constitutional Court, discussing the possible unconstitutionality of the legislative norm. Moreover, the wording "reasonable doubt" means that not every doubt should be the subject of the Constitutional Court's examination, but those that will be considered such by the Constitutional Court. For example, the Constitutional Court stated in the procedural decision No. CCPD-10 of January 14, 2022, by rejecting the examination of the case: It directly follows from the content of the provision of the Constitution that the jurisdiction of the courts to apply to the Constitutional Court exists only if the following two conditions are present at the same time when the courts: 1. have reasonable doubts about the constitutionality of the normative legal act to be applied in the specific case before them; and 2. find that the solution of the given case is possible only through the application of that normative legal act. ***Under the conditions of such regulations, there is a situation where the courts have to justify the existence of their duty***. Which is not an effective legal framework for the principle of the rule of law, the requirement that the law-enforcement body should be limited by human rights, and the realization of a person's right to a fair trial.

Constitutional Court, in its SDAO-212 decision of October 26, 2021, stated: “According to Article 169 (4) of the Constitution, the "reasonable suspicion" can be substantiated by the court if, among other conditions submitted to the application, the court has submitted sufficient justifications that the uncertainty of the norms submitted to the Constitutional Court for verification is impossible to overcome by the court exercising its powers and by providing an exhaustive judicial interpretation ensuring sufficient clarity of the legal norm. In other words, the court applying to the Constitutional Court is obliged to justify how it tried to interpret the disputed legal norms in order to dispel doubts about the clarity of the contested legal norms, and what their final legal content is, using the entire methodological toolkit for the contested norms' interpretation, justifying the inconsistency of that content with the Constitution”. In such practice, although the Constitution (2015 edition) defines the duty of the court to apply to the Constitutional Court, the former legal structure of applying to the Constitutional Court was preserved, as far as the new regulation does not create prerequisites for the effective fulfillment of the mentioned duty. The issue also has links with the principle of legal certainty and the requirement to define clearly powers for law enforcement agencies.

It seems that in the conditions of our current legal regulation (Article 169 (4) of the Constitution), the court has no choice but to appeal to the Constitutional Court[3]. In the meantime, it remains unclear the wording for the court to

[3] In a similar way, the decision of the Plenum of the Supreme Court of the Russian Federation "On some issues of the application of the Constitution of the Russian Federation in the administration of justice by the courts" states: “According to the Article 15 (1) of the Constitution of the Russian Federation, the Constitution has the highest legal force, direct effect and is applied throughout the territory of the Russian Federation. (…) In cases where a provision of the Constitution contains a reference, the courts must apply the law governing that relationship when considering the case. In case of uncertainty regarding the compliance of the law to be applied in a specific case with the Constitution, the court applies to the Constitutional Court with an applica-

justify that the solution of the given case is possible only through the application of that certain normative legal act. In fact, acting on the presumption of compliance of legal norms with the Constitution for law-enforcement bodies, there is no actual legal duty imposed on the latter, based on the supremacy of the Constitution, and from the need to protect human rights, to effectively initiate the resolution of the issue of the constitutionality of the norm, even though the Constitutional Court. Moreover, in the case of such legal regulation, it becomes easier for the court to be guided by the regulation of the legislative norm, without delving into the disclosure of the essence of the constitutional norm. Although in the light of the Constitution (as amended in 2015), it is not the discretionary authority of the court, but the duty to apply to the Constitutional Court for the clarification of the constitutionality of the act, which, we believe, is completely justified and is a guarantee of ensuring the application of constitutional norms. ***However, when the direct application of the constitutional norm is realized by the court through the Constitutional Court, in our opinion, there is a lack of effective mechanisms. Thus, there is no practical legal mechanism to oblige the court, during the discussion of legal relations subject to the regulation of constitutional norms, to address, first, the question of constitutionality and the need to apply to the Constitutional court.***

Moreover, the Constitutional Court clearly stated in its decision[4] CCD-1459 of May 7, 2019: "General jurisdiction and specialized (non-constitutional) courts are constrained not only by the Constitution but also by law, otherwise they can act either as legislators or as bodies of constitutional justice. (…) In addition, unlike the Constitutional Court, which is constrained only to the Constitution when administering justice (Article 167 (2) of the Constitution), all other courts are bound by both the Constitution and laws (Article 164 (1) of the Constitution). Therefore, the law cannot be abolished, invalidated, revised by those courts, but can only be applied. (…) Changing the statutory powers of any court in legal practice in order to expand them, regardless of the reason, is inadmissible, and to reduce them means their non-implementation or improper implementation, which, depending on the circumstances, can be tantamount to denying justice".

With the same decision, the Constitutional Court, referring to its other CCPD-7 decision[5], on rejecting the examination of the case on determining the question of compliance with the Constitution, on January 25, 2019, stated: "As a means of ensuring the supremacy of the Constitution, **the final and binding interpretation and application of the Constitution is the exclusive competence of the Constitutional Court**, and all bodies of public power can interpret and apply the Constitution **within the framework of their powers established by the Constitution and laws**, especially if, in accordance with Article 3 of the Constitution, it is about directly applying law, that is, the basic rights and free-

tion regarding the question of the compliance of the law with the Constitution". - see Пленум верховного суда Российской Федерации: Постановление от 31 октября 1995 г. N 8 ″О некоторых вопросах применения судами Конституции Российской Федерации при осуществлении правосудия″

[4] See Constitutional Court CCD-1459 decision of May 7, 2019.

[5] However, in our opinion, this decision again does not clearly reveal the essence of the possibility of applying the constitutional norm by the courts.

doms of human and citizen, to which all public power is limited".

At the same time, ***the Constitutional Court stated that verification of constitutionality is the responsibility of all courts***. The Constitutional Court especially emphasized that: "(…) all courts, and not only the Court of Cassation, must incidentally verify the constitutionality of the normative legal act to be applied and are obliged to apply to the Constitutional Court in the presence of the mentioned prerequisites. (…) In the case of the interpreting the requirements of the law, documenting their uncertainty is nothing more than recording the problem of constitutionality. Making the existence of that problem a basis for "liberation" from the fulfilling the requirement established by law and expanding or limiting one's powers means a unique solution to the problem of constitutionality by a non-Constitutional Court, which is impermissible".

In conclusion, whether the court can interpret the law in line with the meaning and essence of the constitutional provision in case of an ambiguous regulation of the law. If not, how or in what cases does the court generally interpret and apply the Constitution? If we take into account the above interpretation of the Constitutional Court in its decision, in case of an ambiguous regulation of the law, it is not the Constitution that is interpreted and applied by the court, but the court is obliged to document the existence of a constitutional problem and apply to the Constitutional Court[6].

Thus, we can state the following problems.

a. At first, it reaffirmed the duty to apply to the Constitutional Court. However, the constitutional regulation (Article 169(4) of the Constitution) has remained such that applying to the Constitutional Court is possible only through the court justifying its suspicion and excluding the application of another legal act for issuing its judicial act. In other words, applying to the Constitutional Court becomes the last necessary measure. However, if the court is deprived of the actual (but not theoretical) opportunity to personally interpret and apply the Constitution, then applying to the Constitutional Court should be considered very necessary and not considered a "last resort".

b. Although the legal practice has established both the necessity and the competence (with certain limitations) of interpreting the Constitution by courts, but if there are no effective mechanisms for its implementation, then the theoretical position is not actually realized. ***What should it mean, on the one hand, to interpret and apply the Constitution by courts, and on the other hand, to be bound by the laws, and in the case of proving their uncertainty during the interpretation of the requirements of the law, to apply to the Constitutional Court in a mandatory manner, and on the other hand, to apply to the Constitutional Court only in case of reasonable doubt and if it is not possible to apply another law (legal norm), excluding the application of one law (legal***

[6] Ukraine has adopted a different approach in this matter, ensuring the right of a person to have his case examined within a reasonable time. In particular, if the court finds that the current law does not comply with the Constitution, it applies the constitutional norm as a directly applicable norm, and after making its decision, it refers to the Supreme Court to resolve the question of the constitutionality of the contested legal norm in the Constitutional Court-see **Judge Tetiana Brezina** The principle of direct effect of the norms of the constitution and the specifics of its application by the court, National law journal: Theory and practice- 2008, p. 28: available at` http://www.jurnaluljuridic.in.ua/archive/2018/1/part_2/8.pdf

norm). These requirements exclude one another, even more so if we also take into account the fact that the court must justify and give reasons for its actions in each case.

Thus, the regulations and their practical interpretation of the right to apply to the Constitutional court, as well as the duty of applying constitutional norms in general, need to be reviewed, clarified, and coordinated, which should be aimed at ensuring the maximum provision of the direct application of constitutional rights. We believe that the existence of the Constitutional Court as a body implementing constitutional justice should not undermine the demand for constitutional norms to have the highest legal force and be directly applied, but there should be effective legal mechanisms to not make the existence of such a demand meaningless. *One of such guarantees is that the courts do not just act based on the presumption of compliance of the law with the Constitution but take measures as much as possible to reveal the meaning of the constitutional norm. In particular, the obligation to interpret the legal norm in accordance with the essence of the constitutional provision as much as possible should be an expressly defined requirement. Secondly, such a guarantee can be the duty to apply the legal norm in accordance with the general constitutional principles and the fundamentals of the constitutional order, and also not to consider applying to the Constitutional Court as a last resort, that is, the court has the opportunity to apply to and take the position of the Constitutional Court regarding the constitutional norm in any case. Finally, the reassessment of the role and jurisdiction of the Constitutional Court can also be such a guarantee. The primary task of the Constitutional Court should be not so much the compliance of the wording and application of the law with the Constitution, but rather the interpretation and development of the Constitution and the reveal and interpretation of the essence of the constitutional norm.*

ՍՈՍԵ ԲԱՐՍԵՂՅԱՆ – ***Սահմանադրական նորմերի անմիջական կիրառման դրսևորումը իրավակիրառ ոլորտում*** – Հոդվածն անդրադառնում է դատարանների կողմից սահմանադրական նորմերի կիրառման և Սահմանադրական դատարանի իրավակիրառ պրակտիկայում տրված մեկնաբանություններին: Աշխատանքը դիտարկում է սահմանադրական նորմերի կիրառման արդյունավետ իրականացման անհրաժեշտ երաշխիքների բացակայությունը: Մասնավորապես քննարկման առարկա են դարձել անձի՝ իր սահմանադրական իրավունքների համար դատական պաշտպանությունից օգտվելու իրավունքը, դատարանների կողմից Սահմանադրության կիրառման իրավասությունը, Սահմանադրության՝ որպես բարձրագույն ուժ ունեցող իրավական ակտ լինելու և սահմանադրական արդարադատության ինստիտուտների հարաբերակցությունը, Սահմանադրական դատարան դիմելու և օրենսդրական նորմի հակասահմանադրականությունը հիմնավորելու պարտականությունը: Եզրահանգել է, որ բացակայում են բավարար երաշխիքները Սահմանադրությունը մեկնաբանելու և կիրառելու, ինչպես նաև դատարանների կողմից նորմի հակասահմանադրականությունը սահմանադրական արդարադատության առարկա դարձնելու համար պայմանավորված այն իրողությամբ, որ միաժամանակ գոյություն ունեն մի քանի ինստիտուտներ, որոնք թեև միգուցե

ոչ տեսականորեն, սակայն գործնականում հակասում են միմյանց, և դժվարություններ են առաջանում այդ իրավանորմերի փաստացի իրացման համար: Հոդվածում առաջադրված եզրահանգումներն ուղղված են սահմանադրական նորմերն արդյունավետ և անմիջականորեն կիրառելու, օրենսդրական նորմերի հակասահմանադրականության քննարկմանն ուղղված սահմանադրական արդարադատության ճկուն և կիրառելի մեխանիզմների ներդրման քննարկումներին:

Բանալի բառեր – *սահմանադրական նորմեր, անմիջական կիրառում, Սահմանադրության մեկնաբանում, Սահմանադրության գերակայություն, սահմանադրական արդարադատություն*

СОСЭ БАРСЕГЯН – *Проявление непосредственного применения конституционных норм в сфере правоохранительной деятельности.* – В статье обсуждается компетенция судов по применению конституционных норм и толкования правоприменительной практики Конституционного суда. В статье отражено отсутствие таких гарантий, в условиях которых применение конституционных норм эффективно не реализуется. В частности, предметом обсуждения стали право лица добиваться судебного разбирательства для защиты его/ее конституционных прав, компетенция судов применять Конституцию, взаимосвязь между принципом верховенства Конституции и концепцией осуществления Конституции в порядке исключения Конституционным судом, обязанность обычных судов обращаться в Конституционный суд и одновременно обосновывать неконституционность той или иной законодательной нормы. Мы пришли к выводу, что отсутствуют достаточные гарантии для толкования и применения Конституции на практике, а также для того, чтобы обязать суды обращаться в Конституционный суд, с тем чтобы сделать неконституционность нормы предметом конституционного правосудия, поскольку существующие правовые институты противоречат друг другу и создают трудности на практике. Предложено эффективное применение конституционных норм, внедрение гибких и применимых механизмов конституционного правосудия.

Ключевые слова: *конституционная норма, прямое применение, толкование Конституции, верховенство Конституции, конституционное правосудие*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 69-75 *Սահմանադրական իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.069

THE FACTORS DETERMINING THE FEATURES OF THE ADMINISTRATIVE PROCEEDINGS

TATEVIK NAHAPETYAN

In the article, the author focuses on the factors determining the features of the administrative proceedings. The author concluded that without the development and definition of state management procedures, without the formation of a modern legal institution of administrative proceedings, it is not possible to have effective management, including limiting the number of illegal acts adopted by entities holding public authority in the field of management, as well as guarantee the effective implementation and protection of human and citizen rights. The author emphasizes that the separation of certain features for the purpose of classification of administrative proceedings and their coordination is primarily intended to facilitate the analysis of a separate type of administrative proceedings and the extraction of its substantive characteristics, thus also evaluating the justification of the initiative of the Legislator to define administrative proceedings as a separate type in some areas of relationship regulation.

Keywords: *Administrative proceedings, human rights, state authority, public relations, right to be heard, administrative act, administrative bodies*

Depending on the extent to how human and citizen rights and freedoms are preserved, whether these rights are protected, and most importantly, how they are realized by the state authority, predetermine the course and development of society and the state.

Thus, Article 3 of the Constitution of the Republic of Armenia stipulates that the human being shall be the highest value in the Republic of Armenia, the inalienable dignity of the human being shall constitute the integral basis of their rights and freedoms, so the respect for and protection of the basic rights and freedoms of the human being and the citizen shall be the duty of the public power.

Thereby, human beings is are of the highest value, and the respect and protection of the basic rights and freedoms of a human and a citizen are the responsibilities of the public authorities.

These cornerstone provisions established by the Constitution are the most important basis of the legal system of Armenia in general and are particularly fundamental for the administrative proceedings itself. The mere recognition of the rights and freedoms by the State is not enough. It is also necessary to create conditions for the realization of these constitutional values, to define the content and order of realization of the powers of the executive power and officials, understandable for all participants of public relations.

It is also no coincidence that the right to proper administration has been enshrined in the Constitution, which includes everyone's right to an impartial, fair, and reasonable examination of the cases related to him by the administrative authorities, to get acquainted with all the documents related to him during the administrative proceedings, until the adoption of the individual administra-

tive act which can intervene the right and the right to be heard.

Article 40 of the Constitution of the Republic of Armenia stipulates, that everyone shall have the right to impartial and fair examination by administrative bodies of a case concerning him or her, within a reasonable time period: in the course of administrative proceedings, everyone shall have the right to get familiar with all documents concerning him or her, except for the secrets guarded by law, State and local self-government bodies and officials shall be obliged to hear the person prior to the adoption of an interfering individual act thereon, except for the cases prescribed by law.

Administrative proceedings, as a type of administrative procedural activity, are inseparably connected with state administration and public power-bearing bodies. It is a part of managerial activities.

Social management and one of its types, state management, are one of the most important conditions of society's life activity and derive from the social nature of society itself. The joint activity of people presupposes its organization, which in turn represents, first of all, bringing people together for a common activity and secondly, a certain defined procedure of their activity. Thus, we can state that the essence of state administration is its organizational activity, the nature of which comes down to the following: form one or another body of public authority, develop an action plan, provide the necessary resources for its implementation, distribute common problems among the participants of the relationship and unite their actions and efforts, regulate daily activities (establishing rules of conduct), monitor compliance with set goals and activities (monitoring and control), to apply means of persuasion and coercion to the participants of managerial relations. [1]

The proper provision and effective protection of human and citizen rights and freedoms is one of the most important tasks of the legal state. In those areas where the legal status of a person or the organization created by him is "vulnerable", a more detailed legislative regulation is required. Such a sphere, of course, can also be considered the sphere of activity of public authority, where the body holding public authority, in the form of an official, has dominant powers. In dealing with authorities, a person may be in a "vulnerable" legal situation, so it is the establishment of appropriate structures by law for the realization and proper protection of his rights and legitimate interests that can protect him from any kind of arbitrariness. Thus, the development of effective structures regulating administrative, legal relations and, in particular, administrative proceedings is an important tool for the development of democracy and the formation of civil society and one of the fundamental problems faced by any legal state.

Moreover, the presence or absence of an administrative procedure in this or that area cannot be evaluated as a mere technical issue because the presence of an effective procedure in a specific area has a decisive effect on achieving the expected result.[2]

[1] Administrative procedures: monograph / ed. L.L. Popov, S.M. Zubarev. – M.: Norma: INFRA-M, 2018, page 14.

[2] **Deirdre Curtin, Herwig C. H. Hofmann, Joana Mendes**, "Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda", European Law Journal, Vol. 19, Issue 1, 2013, page 3

In administrative law, perhaps, the term "administrative proceedings" is given a broad definition: the latter is mainly used as a procedure for any function performed by the executive branch. In this case, it is not taken into account whether the given activity is aimed only at the solution of internal organizational problems or also causes certain legal consequences in external.

In the administrative law of foreign countries, the term "administrative proceedings" is mostly used in its narrow sense. In particular, the activity of administrative bodies is aimed at the adoption of an administrative act with external influence. Exactly this meaning is fixed in the Law "On Fundamentals of Administrative Action and Administrative Proceedings[3]" (hereinafter - the Law). In this case, we are talking about the adoption of such an act that leads to the emergence, modification or termination of rights and duties for entities outside the intra-organizational influence of the administrative body.

Thus, the term "administrative proceedings" is interpreted as an activity directed at the adoption of an administrative act by an administrative body and, on that basis, includes all the processes that are necessary to ensure the adoption and application of such an act.

In light of the above, we can come to the conclusion that without the development and definition of state management procedures, without the formation of a modern legal institution of administrative proceedings, it is not possible to have effective management, including limiting the number of illegal acts adopted by entities holding public authority in the field of management, as well as guarantee the effective implementation and protection of human and citizen rights.

The law does not exclude the existence of separate types of administrative proceedings.[4] Quite a few legislative acts define separate types of administrative proceedings. In particular, independent types of administrative proceedings are defined by the RA Code on Administrative Offenses, the RA Tax Code, the RA Law "On Licensing", the RA Law "On Enforcement of Judicial Acts", the RA Law "On the Organization and Conduct of Inspections in the Republic of Armenia", etc.

Regarding the types of individual administrative proceedings, the following questions are particularly important:

a) Are the general provisions of the Law related to administrative proceedings applicable in case of certain types of proceedings?

b) How relevant is the institution of defining separate types of proceedings. Doesn't this undermine the principle of the prohibition of arbitrariness?[5]

At the same time, different administrative bodies use special procedures to solve individual issues assigned to them, so it is also dangerous to overgeneralize the procedures.[6]

Basically, the current legislative acts do not exclude the possibility of ap-

[3] Article 19. Administrative proceedings is the activity of administrative body directed at the adoption of an administrative act.

[4] Article 2, part 3: Peculiarities of certain types of administrative proceedings are laid down by laws and international treaties of the Republic of Armenia.

[5] Administrative proceedings and litigation. Educational manual / G. Danielyan. - Yer.: "YSU" ed., 2022, page 30.

[6] Fox, William F. Understanding Administrative Law/William F. Fox, Jr.—4th ed. p. cm.—(Legal text series), page 18.

plying the basic provisions of the Law within the framework of a separate type of proceeding. The extent to which the principles of the Law are applicable depends on the state of the legal regulation in each case In particular, in the case of a "contradiction" between the law regulating a separate type of administrative proceedings and the Law " On Fundamentals of Administrative Action and Administrative Proceedings" on the basis of a special norm, preference is given to the first one, which is also consistent with the requirements of the same Law. In this case, it is simply necessary to clearly assess the nature of the norms and find out whether it is a contradiction in the classical sense or a contradiction manifested in the form of a feature.[7]

It is worth addressing the question of which norms of the Law, in particular, are applicable in the case of certain types of administrative proceedings. Thus, the approach according to which the fundamental principles of administration laid down in the Law are applicable to all types of administrative proceedings is considered to be the most justified. As for the specifics, they can refer only to such procedural provisions that will not be in conflict with the fundamental principles. And if the special law defines only specifics regarding the type of administrative proceedings, then the provisions of the Law are taken as the basis for the regulation of other relations, if they do not contradict the general logic of the given special law. This last situation is more widespread, because the special laws mostly regulate only certain procedural issues, in which case the necessity of applying the general law does not decrease at all.[8]

Defining separate types of proceedings is not a negative phenomenon in itself and does not contradict the principle of prohibition of arbitrariness, but it should not be a goal in itself. Establishing separate types of administrative proceedings should be dictated by the need to establish more guaranteed procedures for the implementation and protection of people's rights in the field of administration, and not be determined only by fixing the easiest and "special" conditions for the activity of administrative bodies in this or that field of administration, which is often not consistent with the legal interests of other subjects of law related to these administrative bodies.

Therefore, at the theoretical level, separating the factors determining the features of administrative proceedings, we believe, in practice, at the stage of lawmaking activity, it will be possible to ensure the unity of the principles of administrative proceedings even in the conditions of defining separate types of proceedings.

The systematic analysis of the Law and other laws regulating separate types of administrative proceedings shows that the Legislator has a tendency to differentiate between separate types of administrative proceedings in comparison to the administrative proceedings generally regulated by the Law in the fact that not all of its stages are mandatory, also differ in the order of notifying the participants of the proceedings about the initiation of the proceedings, the actions carried out within the proceedings and the conclusion of the proceedings, the legal consequences of the appeal of the administrative act concluding the proceedings.

[7] Administrative proceedings and litigation. Educational manual / G. Danielyan. - Yer.: "YSU" ed., 2022, page 30.

[8] Administrative proceedings and litigation. Educational manual / G. Danielyan. - Yer.: "YSU" ed., 2022, page 33.

As a result of the study of the domestic legislation, we can draw out the features on the basis of which the administrative proceedings can be subjected to a certain classification.

Thus, one of the characteristics is the basis for initiation of administrative proceedings.[9]

According to the basis for initiation of administrative proceedings, administrative proceedings can be classified as:

1) Administrative proceedings initiated by a person (on the basis of an application or complaint).

Administrative proceedings initiated by a person can be separated by conditioning them on the existence of a dispute between the subjects, like this:

a) administrative proceedings initiated on the basis of an application.

b) administrative proceedings initiated on the basis of a complaint.

2) administrative proceedings initiated by the administrative body.

The separation of administrative proceedings with the mentioned feature allows highlighting certain procedural features of the proceedings, which are present in one case and not in the other.

For example, as a rule, administrative proceedings initiated by a person's initiative are considered to have been initiated from the date of receipt of the relevant application or complaint in the administrative body[10]. Therefore, in administrative proceedings initiated by a person, the presumption that the person is informed about the initiation of the proceedings legally applies. However, in this case, the question arises as to what is the burden of the regulation of the Law, which obliges to notify the participants of the proceedings or their representatives about the initiation of the administrative proceedings within three days after the initiation of the administrative proceedings based on the application to the administrative authorities. In our opinion, such a regulation does not have an objective justification; therefore, burdening the administrative body with additional actions within the framework of the proceedings does not follow the principle of efficiency[11] of the proceedings stipulated by the Law.

At the same time, the approach to notify a person about the initiation of administrative proceedings is different within the framework of administrative proceedings initiated by the administrative body. According to the Law, when the administrative body initiates administrative proceedings on its own initiative, it notifies the participants of the proceedings or their representatives in accordance with the procedure established by law if the period between the initiation of administrative proceedings and the adoption of the administrative act is more than three days.

In this case, as well, the Law connects the duty of the administrative body

[9] Article 30, part 1: Grounds for initiating administrative proceedings are: (a) the application or complaint of a person; (b) initiative of the administrative body

[10] Article 30, part 2: In cases provided for in point (a) of part 1 of this Article, administrative proceedings shall be considered initiated from the date when administrative body received the application or complaint, except for the cases when application or complaint was readdressed to the competent administrative body or was returned to the applicant (complainant) pursuant to Article 33 of this Law..

[11] Article 11: In excercising its powers the administrative body shall act in such a manner as to, without undermining the performance of its powers, ensure the most effective utilisation of means submitted to its disposal, in shortest possible term and for assuring the most favourable results.

to notify the addressee about the administrative proceedings initiated by the administrative body with the fact that the period between the initiation of the proceedings and the adoption of the administrative act should not exceed three days, which, in our opinion, is not an effective solution from the point of view of protecting the rights of individuals, taking into account the fact , that the maximum duration of the administrative proceedings is defined by the Law or by the laws defining the features of separate types of administrative proceedings. According to the law, the maximum period of administrative proceedings is 30 days; however, in order to avoid notifying the addressee of the administrative proceedings, the administrative body can bring the proceedings initiated on its own initiative to the final stage within three days after the initiation, essentially bypassing the right to be heard, which is a component of proper administration established by the Constitution. In this regard, in our opinion, it is appropriate to formulate the norm in such a way that, according to the administrative body, when initiating administrative proceedings on its own initiative, the participants of the proceedings or their representatives are notified of the initiation of administrative proceedings in accordance with the law, except if the administrative proceedings are limited only to the final stage in cases provided for by law.

As a characteristic of the classification of administrative proceedings, it also could be the legal norm underlying the proceedings and implemented within its framework.

Thus, according to the nature of the norm implemented during the administrative proceedings, we can distinguish:

1) administrative procedure of authorizing nature, which in turn can be divided into subtypes;

a) administrative procedure aimed at granting the right;

b) administrative procedure aimed at registration of the right;

c) administrative procedure aimed at encouraging a person;

2) administrative proceedings of a coercive nature.

3) protective-restrictive administrative procedure, which in turn can be divided into the following subtypes:

a) administrative procedure aimed at licensing-permitting.

b) administrative proceedings aimed at supervision.

Such a classification, in our opinion, is important for ensuring an optimal balance between private and public interests, taking into account the priorities of preserving private interests in one case and public interests in others.

Another distinguishing feature may be the form of the administrative act concluding the administrative proceedings.

According to the forms of the administrative act concluding the administrative proceedings.

1) proceedings aimed at the adoption of a written administrative act.

2) proceedings aimed at the adoption of an oral administrative act.

3) proceedings aimed at adopting a different form of administrative act.

In summary, we can state that the separation of certain features for the purpose of classification of administrative proceedings and their coordination is primarily intended to facilitate the analysis of a separate type of administrative pro-

ceedings and the extraction of its substantive characteristics, thus also evaluating the justification of the initiative of the Legislator to define administrative proceedings as a separate type in some areas of relationship regulation.

ՏԱԹԵՎԻԿ ՆԱՀԱՊԵՏՅԱՆ – ***Վարչական վարույթի առանձնահատկությունները պայմանավորող գործոնները*** **–** Հոդվածում հեղինակը եզրահանգել է, որ առանց պետական կառավարման ընթացակարգերի մշակման և սահմանման, առանց վարչական վարույթի արդիական իրավական ինստիտուտի ձևավորման հնարավոր չէ ունենալ արդյունավետ կառավարում, այդ թվում՝ սահմանափակել հանրային իշխանություն կրող սուբյեկտների կողմից կառավարման ոլորտում ընդունվող ոչ իրավաչափ ակտերի քանակը, ինչպես նաև երաշխավորել մարդու և քաղաքացու իրավունքների արդյունավետ իրացումն ու պաշտպանությունը: Հեղինակն ընդգծում է, որ վարչական վարույթների դասակարգման նպատակով որոշակի հատկանիշների առանձնացումը և ըստ դրա համակարգումը առաջին հերթին նպատակ ունեն դյուրին դարձնել առանձին տեսակի վարչական վարույթի վերլուծությունը և դրա բովանդակային բնութագրի վերհանումը, ինչն իր հերթին թույլ կտա գնահատել հարաբերությունների կարգավորման որոշ բնագավառներում վարչական վարույթը որպես առանձին տեսակ սահմանելու օրենսդրի նախաձեռնության արդարացվածությունը:

Բանալի բառեր – *վարչական վարույթ, մարդու իրավունքներ, պետական կառավարում, հանրային հարաբերություններ, լսված լինելու իրավունք, վարչական ակտ, վարչական մարմին*

ТАТЕВИК НАГАПЕТЯН – ***Факторы, определяющие особенности административного процесса.*** **–** В статье автор акцентирует внимание на факторах, определяющих особенности административного производства. Автор пришел к выводу, что без разработки и определения процедур государственного управления, без формирования современного правового института административного производства невозможно эффективное управление, в том числе ограничение количества неправомерных актов, принимаемых субъектами публичной власти в сфере управления, а также гарантировать эффективную реализацию и защиту прав человека и гражданина. Автор подчеркивает, что выделение отдельных признаков с целью классификации административных производств и их координации призвано, прежде всего, облегчить анализ отдельного вида административного производства и выделение его содержательных характеристик с целью оценки обоснованности инициативы законодателя выделить административное производство в отдельный вид в некоторых сферах регулирования отношений.

Ключевые слова: *административное производство, права человека, государственная власть, общественные отношения, право быть выслушанным, административный акт, административные органы*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 76-85 *Քրեական իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.076

CERTAIN ISSUES RELATED TO THE CORPUS DELICTI OF ISSUING A MANIFESTLY UNJUST JUDGMENT, VERDICT, OR OTHER JUDICIAL ACT

ARMAN HOVHANNISYAN

In the scopes of the present article, certain issues related to the offense of issuing a manifestly unjust verdict, judgment, or other judicial act has been discussed. Analyzing the crime of issuing a manifestly unjust verdict, judgment, or other judicial act, it has been noted that in many countries there is no such crime in the section of crimes against the interests of justice. In the countries that have it, the formulation of the crime is diverse. Though some authors think that the judicial acts mentioned in the Article 482 of the Criminal Code have to resolve the case on the merits, in our opinion, certain other acts like the decision to choose a preventive measure should also be included in the scope of acts. The requirement of having the judicial act reviewed and annulled by higher instances is not mandatory in RA, however, the analysis of the article in detail makes this requirement necessary to prevent abuses. Though certain countries do not require motives as a mandatory element of this crime, we think that motives should be required for the proper qualification of the crimes.

Key words: *making of a manifestly unjust judicial act, verdict, judgment, other judicial act, acts resolving the case on the merits, to be annulled, mercenary, other personal interestedness, group interests*

This scientific article aims at starting the discussion of issues related to the corpus delicti of "Issuing a manifestly unjust judgment, verdict, or other judicial act", which causes serious problems in practice. The relevance of the topic is expressed by the fact that almost no judicial acts have been issued in RA under this article, and corpus delicti has not undergone serious analysis.

As the first part of the article has been included in the new RA Criminal Code in almost the same wordings, assertions (judgments) made in regard to the former wordings of corpus delicti made in this article are equally applicable now too.

Pursuant to Article 91 of RA Constitution[1] of 1995 *"In the Republic of Armenia justice shall be administered solely by the courts in accordance with the Constitution and the laws."*

And pursuant to Article 97 *"When administering justice, judges and members of the Constitutional Court shall be independent and shall only be subject to the Constitution and the law."*

The complex analysis of the mentioned articles proves that in the newly independent Republic of Armenia, a request was made before the state at the constitutional level to ensure the existence of a strong and independent judicial system. It is not a coincidence that the mentioned articles were equally included

[1] See https://pdf.arlis.am/1

in the constitutional amendments of 2002[2].

In the Constitution adopted in 2015, the status of judges and administration of justice were given greater importance, but the above-stated requirements with slightly different wordings were preserved in articles 162 *(In the Republic of Armenia, justice shall be administered only by courts in compliance with the Constitution and the laws)* and Article 164 *(When administering justice, a judge shall be independent, impartial and act only in accordance with the Constitution and the laws.*

A judge may not be held liable for the opinion expressed or judicial act rendered during the administration of justice, except where there are elements of a crime or disciplinary violation.) of the Constitution.

To ensure these constitutional requirements, a whole chapter is devoted to the crimes against justice interests in both the previous and current criminal codes. The corpus delicti, which is the subject of this research, has also been included in that chapter.

The article 352 of the Criminal Code of former edition[3] defined responsibility *for issuing a manifestly unjust judgment, verdict, or other judicial act by a judge with mercenary or other personal motives.* The article also stipulated the qualified types of the corpus delicti. In particular, the second part stipulated responsibility *for the same deed, which had negligently caused serious consequences, whereas the third part – for the same deed, which had willfully caused serious consequences.*

The article is included in the new criminal code almost identically. The only difference relates to the motive – *the circumstance of acting based on group interests*[4] was added. Thus, article 482 of the new criminal code determines responsibility *for issuing a manifestly unjust judgment, verdict, or other judicial act by a judge starting from mercenary, other personal, or group interests.* Unlike the former code, the new code does not contain aggravating and more aggravating circumstances. Under the conditions of the new code, in case of intentionally causing other consequences, the act must be qualified by a combination of relevant articles.

The corpus delicti in question is also included in the criminal codes of a number of other countries with similar wordings. In particular, article 305 of the RF criminal code determines responsibility *for issuing a manifestly unjust judgment, verdict, or other judicial act by a judge or judges*, and by the second part responsibility is determined *for the same act which has caused imprisonment or other serious consequences*[5].

By section 339, the criminal code of Germany determines responsibility for the perversion of the course of justice. According to this article, *"A judge, other public official or arbitrator who perverts the course of justice while conducting a trial or making a decision on a legal issue to the benefit or detriment*

[2] See https://pdf.arlis.am/75780

[3] See https://www.irtek.am/views/act.aspx?aid=150015

[4] See https://rm.coe.int/new-criminal-code-guideline-arm/1680a72c57

[5] Seehttps://www.consultant.ru/document/cons_doc_LAW_10699/b9ab9819ab2d12f2938889cc08a5baa909989122/#:~:text=1.%20Вынесение%20судьей%20(судьями)%20заведомо,на%20срок%20до%20четырех%20лет

of a party shall be liable to imprisonment from one to five years"[6].

The Ukraine criminal code, article 375, part one, determines responsibility for *issuing a manifestly unjust judgment, verdict, or other judicial act by a judge*[7]. Unlike the example of Germany, Ukraine does not require any motive to qualify an action by this article. In case of acting out of mercenary or other personal interests or causing serious consequences, the deed is qualified by quality corpus delicti.

The Presence of motives and incentives is not a mandatory element in Kazakhstan either[8].

There are also developed countries, which do not determine criminal responsibility for issuing a manifestly unjust judicial act by a judge. For example, there is a chapter in the criminal legislation of Canada relating to crimes against justice, but this chapter defines only such corpora delicti as *involving officials in corruption, bribing a municipal official, defrauding the government, and other similar crimes*[9].

Similarly, the USA federal criminal legislation has no corpus delicti devoted to the issuing of a manifestly unjust judicial act by a judge[10]. Only *bribing the judge, giving false testimony, disrespecting the court, not appearing as a witness, disrupting the course of the trial, etc.*[11] are considered crimes against justice in the USA.

French legislation also stipulates a separate chapter for crimes against administering justice, in which, nevertheless, the corpus delicti in question is absent[12].

In RA, despite the responsibility stipulated for issuing a manifestly illegal judicial act, it is worrying that no judicial acts relating to the mentioned corpus delicti were found by results of the search in "The Datalex" judicial information system which speaks of the fact that in practice this corpus delicti is not applicable.

First, issuing a manifestly unjust judicial act is a crime of corruption with the high degree of latency. Taking into consideration the possibility of a judicial error, in practice no sufficient mechanisms are developed to understand when issuing a wrong judicial act is a crime and when it is simply a result of a judicial error.

Let's present the relevant issues connected with corpus delicti by analyzing the elements of corpus delicti separately.

The objective aspect of the crime stipulated under the article in question is displayed by issuing an unjust judgment, verdict, or other judicial act[13]. Taking into consideration the circumstance that a judgment and a verdict are acts which are issued by a first instance court when resolving the case on the merits, the

[6] See https://defensewiki.ibj.org/images/d/d7/Criminal_Code_Germany.pdf
[7] See https://yurist-online.org/laws/codes/crime/Criminal_Code_of_Ukraine.pdf
[8] See https://www.vertic.org/media/National%20Legislation/Kazakhstan/KZ_Criminal_Code.pdf
[9] See https://laws-lois.justice.gc.ca/eng/acts/c-46/page-19.html#h-117787
[10] See https://www.law.cornell.edu/uscode/text/18/part-I
[11] See https://criminallaw.uslegal.com/crimes-against-justice/
[12] See https://yurist-online.org/laws/foreign/criminalcode_fr/_doc-5-.pdf
[13] See **Arakelyan Sergey, Gabuzyan Ara, Khachikyan Harutyun, Ghazinyan Gagik, Maghakyan Norik, Margaryan Anna, Simonyan Tigran, Kocharyan Vigen**, Criminal Law of the Republic of Armenia (special part) 2012, Yer., Yerevan Univ. Public..

acts issued by the court which significantly affect the resolution of the case or deal with important rights and freedoms of a person can be considered as other judicial acts mentioned in the article. Such can be the decisions regarding the selection of a restraining measure or its elimination, the postponement of execution of the judgment or elimination of the decision on conditional non-application of a sentence, and decisions on other issues. Simultaneously, those judicial acts which do not affect the outcome of the case and resolve only organizational issues (decisions on the postponement of a court session, the order of holding the session, etc.) are not judicial acts in the sense of Article 482.

There is also a viewpoint according to which issuing a manifestly unjust judicial act supposes issuing of only such judicial acts, which in essence decide the outcome of the case[14]. Acts on arrest or selection of another measure of restraint are not included in the list of such decisions. In the case of the second approach, an illegal decision on arrest can be qualified as an offense under article 478 of the current code, which stipulates responsibility for illegal detention, arrest by a competent person, or for not releasing illegally a detained or arrested person subject to release. In the case of the first approach, the qualification of the deed depends on the motives of the act and the chosen measure of restraint. In our opinion, nevertheless, in this sense the approach adopted in RA is more grounded, as there are numerous judicial acts that do not resolve the case on the merits (are not final acts), but significantly restrict the rights and freedoms of persons (sequestration of property – the right of free disposition of property by a person, the decision on allowing the execution of an evidentiary action – a person's right to inviolability of private life, etc.), therefore, issuing of such acts unjustly should not be left without criminal consequences. Even the supporters of the viewpoint, according to which the corpus delicti of issuing a manifestly unjust judicial act is applicable only in case of acts resolving the case on the merits, take note of the decision N УКПИ10-11 of the Supreme Court of the Russian Federation, dated 18 February 2011, stating that a *decision on arrest can also bring to the qualification of the deed with the above corpus delicti*[15].

A judicial act is considered unjust when it is made by gross violation of requirements of the norms of substantive or procedural law. Moreover, they can be in any part of a judicial act.

In other words, as a consequence of injustice, inconsistency arises between the court decision and the factual circumstances of the case, stable legal regulations, approaches, and theoretical analyses.

Nevertheless, it should be noted that not all, even gross violations of substantive or procedural norms should be qualified as issuing a manifestly unjust judgment, verdict, or other act. If these violations did not result in the acquittal of a guilty person, the conviction of an innocent person or other similar consequences, there is no corpus delicti. Acts issued by courts of appeal or cassation are considered unjust if by them the first instance court acts are groundlessly

[14] See, for example, Kudryavtsev V.L. Legal and procedural problems of determining the subject of a crime stipulated by art. 305 of CC RF "Issuing of a manifestly unjust judgment, decision or other judicial act"

[15] See, for example, Kudryavtsev V.L. Legal and procedural problems of determining the subject of a crime stipulated by art. 305 of CC RF "Issuing of a manifestly unjust judgment, decision or other judicial act"

left unchanged or vice versa, they are unreasonably changed, as a consequence making the judicial act unjust[16].

In accordance with decision N 23-П of RF Constitutional Court, dated 18 October 2011, in the terms of the corpus delicti in question, only a judicial act, *the illegality or groundlessness of which has been recognized under order determined by criminal procedure*, can be considered an unjust act[17].

This means that if a judicial act has entered into legal force, is not appealed, or is left unchanged after appealing, it cannot be considered a manifestly unjust judicial act. In our opinion, such an approach is justified. Otherwise, this corpus delicti will become an instrument in the hands of the law-enforcement bodies to apply pressure on all those judges whose acts do not satisfy.

Although in RA the interpretation of this article does not mention that an act, that is considered manifestly unjust, should be annulled by a higher instance, by some cases RA domestic courts have also come to the conclusion given by RF Constitutional Court. In particular, by case N YC/0067/11/21, by thedecision taken on 1 July 2001, RA Yerevan City First Instance Court of General Jurisdiction recorded the following: *"Thus, the Court, taking into consideration the above, comes to the conclusion that in each case when the court issues a judicial act which by evaluation of this or that procedural party is illegal, groundless, impermissible and even absurd, but* ***there is no specific assessment of a relevant authority, in this case – of a higher instance, yet and/or reasonable motives, reasons regarding the possible illegality of the act, it cannot be treated as an apparent crime. The opposite approach is very dangerous and may have its negative impact in the sense of restriction of independence of the court (the judges), as each judicial act, which is by estimation of a party illegal, can serve as a basis for starting a criminal procedure towards a body having guarantees of inviolability".***

In another decision N YC/0253/11/21 taken on 18 June 2021, the same court recorded the following: "And, for the part of the demand stated in the conclusive part of the appeal, by which it was requested to acknowledge the conformity of the decision made by judge K.P. by the civil case N YC/24011/02/20 on 18 August 2020 with the requirements of RA Civil Procedure and RA Law "On Bankruptcy", the Court does not relate to, because, as it has already been mentioned above, ***the competency of checking the legality of the judicial act issued by a court belongs to superior court instances***".

In the indicated situation, a logical question can arise in regard to those acts, which are not subject to appeal and, therefore, cannot be annulled. Such are, for instance, decisions of the Court of Cassation and the Constitutional Court. Some authors simply consider that in the case of the mentioned acts, the deed cannot be qualified as issuing of a manifestly unjust judicial act[18]. Al-

[16] See Arakelyan Sergey, Gabuzyan Ara, Khachikyan Harutyun, Ghazinyan Gagik, Maghakyan Norik, Margaryan Anna, Simonyan Tigran, Kocharyan Vigen, Criminal Law of the Republic of Armenia (special part) 2012, Yer., Yerevan Univ. Public..

[17] See http://www.consultant.ru/document/cons_doc_LAW_120709/

[18] See, for example, Kudryavtsev V.L. Legal and procedural problems of determining the subject of a crime stipulated by art. 305 of CC RF "Issuing of a manifestly unjust judgment, decision or other judicial act"

though the stated approach is unfair at first glance, it is more acceptable than waiving the condition of annulment of the judicial act. Only courts administer justice in the RA. This requirement is constitutional and absolute. No exceptions can be made to it by law. Public participants of criminal proceedings or the Supreme Judicial Council, when initiating criminal proceedings or depriving a judge of inviolability, are not entitled to make or express positions in regard to the legality or justice of the judicial act issued by the judge.

Both the international and regional criteria of a judge's independency determine that a judge cannot be of his/her decision, judicial error, or different interpretation. This is determined by the Common Charter of Judges, article 7-1, by African Principles and Guidelines for Fair Trial and Legal Aid (article 4-2), paragraph 66 of the Recommendation on Independency of a Judge of the Council of Europe, paragraph 21 of Magna Karta of Judges, paragraph 25 of Kiev Recommendations[19].

RA Judicial Code constitutional law also, following the international regulations, determines by article 142 that *when administering justice or other law-provided authorities as a court, interpretation of the law, assessment of facts and proofs cannot automatically lead to disciplinary responsibility.* Hence, if the interpretation of the law, the assessment of facts and proofs by itself cannot lead to disciplinary responsibility, then they cannot lead to the application of criminal-legal intervention measures either.

At the same time, though we find that for the presence of the corpus delicti in question, as a rule, it is necessary that the fact of issuing the judicial act unjustly, with gross violation is confirmed by a superior instance (i.e. the fact of annulment of the judicial act), the possible situations when as a result of mutual arrangement a judicial act with obvious violation is issued in several instances of judicial system is also left open (for example, a first instance court, starting from group interests, acquits a person by evidently wrong application of law, whereas the superior instances leave it unchanged with the same interest).

In other words, in the given example, it is complicated to imagine the issues of revealing the discussed crime, starting a legal process and/or subjecting it to responsibility.

Besides, there can be situations when the judge, having certain material or other interest, from a legal point of view issues a sound and legally reasoned judicial act, in favour of a participant of the proceedings or one of the parties, which is left unchanged as a result of appealing to superior instances. In such conditions, there will be no features of the interpreted corpus delicti in the judge's behavior, as though there is a motive (the fact that the act was issued starting from money or group interests), the absence of indication of a violation of the norms of substantive or procedural law by the superior instances, and as a consequence, the non-annulment (non-alteration) of the judicial act excludes the legal possibility of considering the specific judicial act as manifestly unjust. We find that in such situations when an issued judicial act is formally lawful, the judge's deed must be considered in the scopes of another corpus delicti (other corpora delicti).

[19] See https://undocs.org/A/75/172

The discussed corpus delicti is formal: the crime is considered completed from the moment of publication of the judicial act[20]. Thereupon there are no serious contradictions between the approaches. The corpus delicti is formal as in the criminal codes of all the states which stipulate this corpus delicti only the deed in is mentioned without determining consequences[21]. Therefore, the approaches to the moment of the end of the crime are not contradictory either. A crime is considered completed from the moment of publication of the manifestly unjust act by the judge[22].

The subjective side of the corpus delicti is characterized by direct intent: the criminal is conscious that he/she issues an unjust judicial act and wants to do it. The fact, that the subjective side of this offense is characterized only by direct intent, is proved by several circumstances. In the opinion of many authors, this is evidenced by the use of the term "manifestly" in the disposition of the article, which shows the awareness of the injustice of the issued judgment or other judicial act by the person issuing it[23].

Article 25 of the new criminal code determines the types of direct and indirect intention. According to the article "The crime is considered committed with direct intention if the person is conscious of those factual circumstances of his/her deed, which are features of corpus delicti, and the performance of this deed is his/her purpose/goal or the means to achieve his/her goal. The crime is considered committed with indirect intention if the person is conscious of those factual circumstances of his/her deed which are features of corpus delicti, and although the commitment of this deed and commitment of the given crime is not his/her goal, he/she commits it". From this expression/wording, it follows indirectly that the differential line between the direct and indirect intentions is the attitude of the offender to the consequences of the deed. In his dissertation, Kartashov notes that in the case of formal corpora delicti, when the occurrence of the consequence is not obligatory, the subjective aspect of the crime can only be characterized by direct intent[24]. The basis for this conclusion is the judgment that it is not possible to foresee the possibility of dangerous consequences for the public, not to want these consequences, but knowingly cause them, if the occurrence of such consequences is not necessary to consider the act completed and qualify it as a crime[25].

If an unjust judgment of another judicial act is a result of an error, then in

[20] See Arakelyan Sergey, Gabuzyan Ara, Khachikyan Harutyun, Ghazinyan Gagik, Maghakyan Norik, Margaryan Anna, Simonyan Tigran, Kocharyan Vigen, Criminal Law of the Republic of Armenia (special part) 2012, Yer., Yerevan Univ. Public..

[21] See Kartashov Alexandr Yuryevich Criminal Responsibility for Issuing Manifestly Unfair Judgment, Decision or Other Judicial Act – criminal law and criminology, criminal-executional law, Dissertation, Stavropol – 2004, Course on Criminal Law, Special part. V. 5 / edited by G.N. Borzenkov, V.S. Komissarov. – M. 2002. – P. 196; Criminal Law, Special part. V. 2 /edited by L.D.Gaukhman, S.V.Maksimov – M 1999.

[22] See in the same place.

[23] See Kartashov Alexandr Yuryevich Criminal Responsibility for Issuing Manifestly Unfair Judgment, Decision or Other Judicial Act – criminal law and criminology, criminal-executional law, Dissertation, Stavropol – 2004

[24] See Kartashov Alexandr Yuryevich Criminal Responsibility for Issuing Manifestly Unfair Judgment, Decision or Other Judicial Act – criminal law and criminology, criminal-executional law, Dissertation, Stavropol – 2004

[25] See in the same place.

case of the presence of respective features the deed/act can be qualified as official negligence[26]. A judicial error is the wrongful application of substantive or procedural norms as a result of bona fide delusion/ignorance. In many cases, such errors are made as the judge cannot estimate correctly the level of satisfaction of evidence/proofs compiled on this or that threshold of proving. Besides, in many cases, the inferior instances hope that even if they make a mistake in estimation/evaluation of this or that circumstance that will not lead to annulation of the judicial act. The judicial error differs from acts characterized in Article 482 of the Criminal Code, as the latter are made consciously. The judge understands clearly /is clearly aware that he/she administers illegal/unlawful and unjust act, and wants it.

In terms of evaluating the subjective aspect of the act, the use of the term "manifestly" in the definition of the crime is also important. The word "manifest", according to Eduard Agayan's Modern Armenian Explanatory Dictionary[27], is interpreted as *evident,* and according to the Explanatory Dictionary of Modern Armenian Language published by the Language University after Hrachya Acharyan[28] – as *apparent, ostensive, evident, explicit, known, unhidden.*

A logical question can arise – for whom should the unjustness of the judicial act be obvious? All authors studied by us consider in their works obviousness as an element substantiating the intent of the act made by the judge, and so interpreted the term "manifestly" as obviousness for the judge who has made the act. This approach is acceptable, nevertheless, the inclusion of such wording in the corpus delicti generally becomes redundant. The presence of motives and the wording of corpus delicti by itself witness the fact that the act is manifested with direct intent from a subjective aspect, therefore, the offender is clearly aware that he/she issues an unjust judicial act.

As it has been already noted, the motive of the crime is a mandatory feature of the subjective aspect of the corpus delicti: the crime has a place only when it is committed with mercenary or other personal incentives. According to the new code, one more motive has been added to this group – a commitment to crime starting from group interests. Mercenary motives can be manifested in various ways. In particular, the offender convicting an innocent person wants to take possession of his/her property in the absence of the latter or makes an unjust judicial act in exchange for a bribe. If the deed is combined with receiving a bribe, then the deed should be qualified by a combination of crimes. Other personal motivations also can have various manifestations – jealousy, revenge, etc.[29] Group interests also can be manifested in various forms. Group interestedness can be manifested in the form of willingness to defend the interests of a

[26] See **Arakelyan Sergey, Gabuzyan Ara, Khachikyan Harutyun, Ghazinyan Gagik, Maghakyan Norik, Margaryan Anna, Simonyan Tigran, Kocharyan Vigen**, Criminal Law of the Republic of Armenia (special part) 2012, Yer., Yerevan Univ. Public..

[27] See http://www.nayiri.com/imagedDictionaryBrowser.jsp?dictionaryId=24&query=ulկhuujun

[28] See http://www.nayiri.com/imagedDictionaryBrowser.jsp?dictionaryId=29&dt=HY_HY&query=ulկhuujun

[29] See **Arakelyan Sergey, Gabuzyan Ara, Khachikyan Harutyun, Ghazinyan Gagik, Maghakyan Norik, Margaryan Anna, Simonyan Tigran, Kocharyan Vigen**, Criminal Law of the Republic of Armenia (special part) 2012, Yer., Yerevan Univ. Public..

party, a clan or other groups[30].

In some situations, the judges may consciously commit wrong application or partial neglect of substantive and especially procedural norms to make the process of the trial faster in conditions of imperfect legislation providing the reasonable terms of criminal case examination or to achieve procedural solutions that do not transgress the rights of the parties. In this case, the deed will not be qualified by Article 482 either, however, not because of a procedural error but on the grounds that the motives for committing the crime will be absent.

This is exactly the main reason that we, as many domestic and foreign authors, find that, unlike the approach adopted by the legislators of Russia, the Ukraine, Kazakhstan, and other post-Soviet countries, the presence of motives in the corpus delicti under discussion is mandatory. Otherwise, the borderline between a judicial error and the making of a manifestly unjust judicial act would be very ambiguous, and the qualification of an act by this article – is unjustified in many cases.

The subject of the crime is special, these are only the judges[31]. This means that intermediaries, arbitrators, and other decision-making authorities cannot be considered the subject of this corpus delicti, even if the acts issued by them have mandatory legal force for the parties[32]. In terms of corpus delicti, subject can be considered a person who appears as a judge or carries out actions arising from the position of a judge[33].

Finally, it is also necessary to record that the corpus delicti stipulated by Article 482 of the Criminal Code is a special norm for the corpus delicti of abuse of official powers. Therefore, each time, when a judge issues a manifestly unjust act, the deed should be qualified by Article 482 of the current criminal code.

In conclusion, it can be noted that establishing the issuing of a manifestly illegal judicial act as a crime was an important decision on the part of the legislator, nevertheless, the qualification of a deed with this corpus delicti will continue to be rare, very complicated from the aspect of differentiation and proving of a judicial error, until the mechanisms of subjecting to responsibility for a commitment of this act are clarified, precise features of differentiation from judicial errors are developed.

ԱՐՄԱՆ ՀՈՎՀԱՆՆԻՍՅԱՆ – *Ակնհայտ անարդար դատավճիռ, վճիռ կամ դատական այլ ակտ կայացնելու հանցակազմի հետ կապված որոշ հիմնախնդիրներ* – Հոդվածի շրջանակներում վերլուծելով ակնհայտ անարդար դատավճիռ, վճիռ կամ այլ դատական ակտ կայացնելու հանցակազմը՝ արձանագրվել է, որ շատ երկրներում «Արդարադատության շահերի դեմ ուղղված հանցագործությունները» վերտառությամբ գլխում այդպիսի հանցակազմ նա-

[30] See http://www.ysu.am/files/pashtoneakan.pdf

[31] See **Arakelyan Sergey, Gabuzyan Ara, Khachikyan Harutyun, Ghazinyan Gagik, Maghakyan Norik, Margaryan Anna, Simonyan Tigran, Kocharyan Vigen**, Criminal Law of the Republic of Armenia (special part) 2012, Yer., Yerevan Univ. Public..

[32] See **Kartashov Alexander Yuryevich** Criminal Responsibility for Issuing Manifestly Unfair Judgment, Decision or Other Judicial Act – criminal law and criminology, criminal-executional law, Dissertation, Stavropol – 2004

[33] See in the same place

խատեսված չէ, իսկ որտեղ նման հանցակազմ առկա է, ապա տրված ձևակերպումներն էապես տարբերվում են: Թեև որոշ հեղինակներ կարծում են, որ ՀՀ քրեական օրենսգրքի 482-րդ հոդվածը վերաբերում է բացառապես գործն ըստ էության լուծող դատական ակտերին, սակայն, հեղինակի գնահատմամբ, քննարկվող դատական ակտերի շրջանակում պետք է ներառվեն նաև մի շարք այլ՝ գործն ըստ էության չլուծող դատական ակտեր, օրինակ՝ խափանման միջոց ընտրելու մասին որոշումը: Հիշարժան է, որ հանցակազմի առարկա հանդիսացող դատական ակտի բեկանված (վերացված) լինելու իմպերատիվ պահանջը չի նախատեսվում, սակայն հոդվածի վերլուծությունն անհրաժեշտ է դարձնում այն՝ խուսափելու հնարավոր չարաշահումներից: Թեև որոշ երկրներում այս հանցագործությունը չի առանձնանում պարտադիր շարժառիթների նախատեսմամբ, այնուամենայնիվ, հեղինակը կարծում է, որ արարքի պատշաճ որակման համար դրանց ամրագրումն անհրաժեշտ է:

Բանալի բառեր – *ակնհայտ անարդար դատական ակտի կայացում, վճիռ, դատավճիռ, դատական այլ ակտ, գործն ըստ էության լուծող ակտեր, բեկանում, շահադիտական, անձնական այլ շահագրգռվածություն, խմբային շահեր*

АРМАН ОГАНЕСЯН – *Некоторые вопросы, связанные с правонарушением в виде вынесения заведомо неправосудного приговора, решения или иного судебного акта.* – В рамках настоящей статьи рассмотрены отдельные вопросы состава правонарушения в виде вынесения заведомо неправосудного приговора, постановления или иного судебного акта. При анализе преступления и вынесения заведомо неправосудного приговора, приговора или иного судебного акта отмечено, что во многих странах в разделе преступлений против интересов правосудия такого преступления нет. В странах, где он есть, формулировка преступления разнообразна. Хотя некоторые авторы считают, что судебные акты, указанные в статье 482 УК Республики Армения, должны разрешать дело по существу, на наш взгляд, в состав актов следует включить и некоторые другие акты, например постановление об избрании меры пресечения. Требование о пересмотре и отмене судебного акта вышестоящими инстанциями не является обязательным в РА, однако подробный анализ статьи делает это требование необходимым для предотвращения злоупотреблений. Хотя в некоторых странах мотивы не являются обязательным элементом данного преступления, мы считаем, что мотивы должны быть обязательными для правильной квалификации преступлений.

Ключевые слова: *вынесение заведомо несправедливого судебного акта; приговор; иной судебный акт; акты, разрешающие дело по существу; отмененные акты; корыстные, иные личные интересы; групповые интересы*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 86-97 *Քրեական դատավարություն և կրիմինալիստիկա*
https://doi.org/10.46991/BYSU:C/2023.14.2.086

INDICTMENT OF THE ACCUSED IN ABSENTIA

GAGIK GHAZINYAN, PETIK MKRTCHYAN

The article concerns the essence and features of the presentation of charges in proceedings carried out in the absence of the accused (correspondence proceedings).

The authors turn to the grounds and conditions for bringing charges in the course of proceedings carried out in the absence of the accused, to the opinions expressed in theory regarding the institution in question.

The regulations of the institution in question are presented in the national criminal procedure legislation and comparisons of regulations provided for by the legislation of foreign countries are carried out.

The article also presents the positions of the European Court of Human Rights on this issue, and in their light discusses the theoretical problems of bringing charges in absentia.

The subject of discussion is also the question of when the preliminary investigation body knows the exact location of the accused, whether the latter should take measures to notify the accused of the day and time of the indictment, and only in case of his failure to present the charge in absentia.

In connection with the formulation of the question, the authors come to the conclusion that when there are grounds and conditions for absentee proceedings, and the investigator decides to carry out absentee proceedings, then charging the accused by video does not follow from the general ideology of absentee proceedings.

Keywords: *absentee proceedings, indictment, change of charges, video communication, international mutual assistance, public notification, removal of the defender from the proceedings*

Bringing charges is followed by the decision of the competent prosecutor to prosecute the accused.

The indictment of the accused is the procedural measure that provides the accused with the right to be informed of the legal and factual bases of the charge.

The right of a person to be informed of the attributed accusation has both constitutional and conventional foundations. This right of an individual is provided for in Article 27, Part 2 of RA Constitution, in Article 6 Paragraph 3 of the European Convention "On Protection of Human Rights and Fundamental Freedoms, " as well as in Article 14 Paragraph 3 of International Covenant on Civil and Political Rights. The right to be informed of the attributed accusation is also provided for by the RA Code of Criminal Procedure (hereinafter referred to as RA CCP). It is stipulated by Article 18 of CCP that every person be duly explained the reasons for deprivation of liberty and the charge-in case of being accused in a crime. In accordance with Article 43 of the same code, the accused has the right to be informed immediately and duly of the factual and legal bases of the accusation in a language he understands and of the grounds and reasons for deprivation of liberty in case of being taken into custody.

The European Court of Human Rights has repeatedly stressed that the question of whether the accused has been provided with sufficient information on the legal and factual bases of the accusation in a specific case should always be considered in the context of the right to a fair trial provided for by Article 6, Paragraph 1 of European Convention on "Human Rights and Fundamental Freedoms".[1]

In order to efficiently exercise the right of the defense during a competitive trial, the defense must at least have the opportunity to get acquainted with the legal and factual bases of the accusation, to present their own statement regarding them, and to participate in the process of proof. It is impossible to implement the right of defense, as well as to provide a competitive trial, if the accused is not aware of the unlawful act he is accused of and the bases of the accusation evidence.[2]

Article 190 of CCP RA stipulates that the investigator, having ascertained himself in the identity of the accused, hands him a copy of the decision to institute criminal prosecution, clarifies the factual bases and legal assessment of the charges, clarifies the rights and responsibilities of the accused, and hands him over their complete list.

The same article also defines: "1. The investigator files a charge within 18 hours after receiving the decision to institute criminal prosecution (...)".

The requirement to institute criminal prosecution within 18 hours is a common one, which is applied when the accused is available to the prosecuting authority. In the event that the location of the accused is unknown, or it is impossible to ensure his availability for some other reason, the 18-hour time limit for bringing charges is lifted, and the charges are submitted to the criminal court after the accused has been put at the disposal of the body conducting proceedings within 24 hours upon appearing (Article 190, Part 3 of CCP RA).

RA Court of Cassation, referring to the fact that the defendant has received a proper procedural status for case No. YEAKD/0218/06/12 has stated that detention can be applied only to the accused, i.e., the person who has successively passed the following stages of acquiring the status of an accused:

a) making a decision on involving a person as an accused,

b) notification of the decision to involve a person as an accused,

c) explanation of the core of the charges,

d) handing over a copy of the decision involving the person as an accused and the list of rights and obligations of the accused.

As a result of the actions performed in the above stated sequence, a person is indicted in accordance with the procedure established by law, and he acquires the procedural status of the accused. Moreover, the performance of all the mentioned actions must be certified by relevant documents and confirmed by the signature of the accused and the investigator or with the appropriate note of the investigator in case of refusal of the accused to sign.

In addition to the above-mentioned, the Cassation Court emphasizes that if the person hides from the investigation, the decision to involve him as an ac-

[1] See: Deweer v. Belgium, judgment of 27 February 1980, paragraph 56, Artico v. Italy, judgment of 13 May 1980, paragraph 32, Goddi v. Italy, judgment of 9 April 1984, paragraph 28, Colozza v. Italy, judgment of 12 February 1985, paragraph 26.

[2] See: The decision of the RA Court of Cassation of August 24, 2012, case No. YSHD/0002/01/11

cused is sufficient in order to choose his detention as a restraint measure: (...)[3]

It is easy to observe that the process of bringing direct charges can be implemented when the accused is available to the authority conducting the proceedings, while this process becomes objectively impossible when the accused avoids (hides from) the investigation. Accordingly, in the situation described, there comes a need to apply such a structural procedure that will guarantee not only further proceedings but also the principle of competitive trial and the right of efficient defense of the accused.

The issue of remote indictment has not been studied thoroughly at the doctrinal level. However, some issues have gained the attention of scientists.[4]

There is an opinion in criminal procedural science that an indictment in the absence of the accused cannot be considered an independent form of indictment. A different approach leads to completely neutralizing of the procedural significance of the mentioned institute of criminal procedure. There is no remote indictment, and this procedural action cannot be replaced by handing over the indictment decision to the defense. As a result, the overall importance of indictment decreases, so only bringing direct charges acquires a real procedural value.[5]

This means that in case the accused fails to appear, the investigator should do his best to find out the real and not the alleged reasons, as well as provide the accused with an opportunity to participate in the criminal proceedings and exercise his procedural rights, regardless of the reasons for not appearing.

At the same time, according to another, a more common approach, the remote indictment is perceived as a criminal procedure activity performed by the person conducting the preliminary investigation, which is concluded by subsequent actions: a) to invite the defense of the defendant who is avoiding the investigation and b) to notify the latter about the decision to initiate criminal prosecution against the accused (involving the person as an accused).

When considering the issue from a legal standpoint, it should be noted that there are countries like the Republic of Moldova, the Russian Federation, etc., whose judicial systems have no special procedure of remote indictment of the accused evading investigation, although the possibility of conducting proceedings in absentia is still provided for.

In accordance with Article 321 of CCP of the Republic of Moldova, a case shall be heard in the first instance and in the court of appeals with the participation of the defendant, except in cases specified in this article. A case may be

[3] See: The decision of the RA Court of Cassation of April 18, 2013, case No. YAKD/0218/06/12.

[4] See: **Арабули Д. Т.** Сравнительный анализ заочного судебного разбирательства в Российской Федерации и Республике Казахстан // Мировой судья. 2008. № 6. С. 17–18 ; **Мазюк Р.В**. Международное сотрудничество по уголовным делам и заочное уголовное преследование // Вестник ОГУ. 2009. № 3. С. 78–81 ; **Тукиев А.С.** Особенности заочного возбуждения уголовных дел // Актуальные проблемы права: материалы науч. конференции. Караганда: КарЮИ МВД РК им. **Б. Бейсенова**, 2002. С. 68–69 ; **Тукиев А.С., Ахпанов А.Н., Кусаинов Ш.К.** Особенности привлечения в качестве обвиняемого по заочной форме уголовного судопроизводства в Республике Казахстан // Закон и время. 2004. № 10. С. 42–44 ; **Хасенов О.З.** Институт заочного обвинения в уголовном судопроизводстве Республики Казахстан // URL: www.rusnauka.com/1_NIO_2014/Pravo/5_154476.doc.htm ; и др.

[5] See: **Купрейченко С. В.** Заочное судопроизводство в Российской Федерации по уголовным делам о тяжких и особо тяжких преступлениях: Монография.- М.: Юрлитинформ, с. 133,135.

heard in the absence of the defendant:

1) if the defendant evades appearing in court;

2) if the defendant, being detained, refuses to be brought before the court to the case hearing and if his/her refusal is also confirmed by his/her defense counsel or the administration of the place of detention; (…)

The court shall decide on a case hearing in the absence of the defendant if the prosecutor submits sound evidence that the person accused and in whose regard the case was sent to court expressly waived his/her right to appear before the court and to defend himself/herself personally as well as has evaded criminal investigation and trial.

Article 247 Paragraph 5 of RF CCP provides that in exceptional cases, a court hearing on criminal cases of grave and especially-grave crimes may be conducted without the attendance of an accused person who is outside the territory of the Russian Federation and/or declines to appear in court, unless that person has been held accountable on the territory of a foreign state in this criminal case.[6]

Although the CCP of the RF does not provide a special procedure for a remote indictment to the accused evading investigation, the investigative practice envisages that in the situations described above the pre-investigative body sends the notification about the date of filing the charge to the address of the residence or location of the accused in the Russian Federation. This is followed by handing in a copy of the decision to the defense of the accused, which implies bringing charges in indirect order.[7]

At the same time, the CCP of some countries provides for the features of indictment in absentia to a person who avoids investigation.

Thus, for example, in accordance with Article 406 of the CCP of Latvia, if the whereabouts of an accused are known, but he or she is evading appearance on the basis of a summons of a public prosecutor, a copy of the prosecution shall be issued to the accused after the conveyance by force of him or her, or sent by post to the address for the receipt of consignments notified by such accused.

If a search for an accused has been announced, a copy of the prosecution, and written information regarding the rights of an accused, shall immediately be issued after the receipt of a written report regarding the arrest or detention of the accused.

If an accused is hiding in another state and a search for him or her has been announced, a copy of the prosecution shall be issued simultaneously with the report of the official extradition request.

In accordance with Article 297 Paragraph 5 of the CCP of Ukraine, in case of conducting a special pre-trial investigation, the summons shall be sent to the last known address of residence or staying of the suspect. It shall be published in national mass media and official websites of the agencies conducting a pre-trial investigation. The suspect shall be deemed to have been properly in-

[6] In this regard, the judicial board of Sverdlovsk region has recorded for a specific criminal case that the current Russian Criminal Procedure Code does not provide for the possibility of filing charges remotely. The execution of the mentioned action in a remote order has no procedural significance. See: Decision No. 22-8535/2008 of the Sverdlovsk District Court of August 27, 2008.

[7] See: **Клевцов К.К** Досудебное производство в отношении лиц, уклоняющихся от уголовной ответственности за пределами территории Российской Федерации./ под ред. канд. юрид. наук, доц. **А.М. Багмета.** — М.: Юрлитинформ, 2018. С. 197-198.

formed about the summons content from the moment of its publishing in national mass media. The copies of procedural documents to be delivered to the suspect shall be sent to a defense counsel. [8]

Article 206 paragraph 8 of the CCP of the Republic of Kazakhstan provides that in the case of finding the suspected outside the Republic of Kazakhstan and his (her) evasion to appear in the criminal prosecution bodies the person, conducting the pre-trial investigation, and in the case of the appearance of the defense counsel -the defense counsel certifies on the decision of the qualification of an act of the suspected that the suspicion may not be declared in connection with his (her) location outside the Republic of Kazakhstan and evasion to appear in the pre-trial investigation bodies.

Furthermore, the mentioned article stipulates that if the location of the suspected is known, a copy of the decision shall be sent to him (her) by means of communication, including by mail.

If necessary, the person conducting the pre-trial investigation (investigator), with the consent of the procurator shall have the right to organize the publication of reports on the qualification of an act of the suspected in the Republican mass media, the mass media on the location of the suspected, as well as in public telecommunication networks.

Nonetheless, it is difficult to consider this method of remote indictment as fully successful firstly because, direct sending of procedural documents, including the decision to initiate criminal prosecution, by post, can be considered as a disregard towards the sovereignty of the state, and secondly, announcements about the decision on criminal prosecution in mass media or on the official website of the state body cannot be considered justified, because the accused may not have noticed them. At the same time, in accordance with the CCP of Kazakhstan, reporting about involving the person as an accused through mass media is not considered to be the responsibility of the official conducting the preliminary investigation. Therefore, the officials may not take the necessary measures to report through public telecommunication methods. In its turn, the European Court of Human Rights considers receiving information on criminal proceedings through mass media as a non-reliable notification.[9]

Article 169 of the CCP of Georgia stipulates that, if the accused avoids appearing before an investigative authority, he/she or his/her relative shall be given a reasonable period for hiring a defense lawyer. If he/she fails to hire a defense lawyer within that period the accused shall be assigned a mandatory defense. To bring charges, the prosecutor, or upon his/her instructions, an investigator, shall summon the defense lawyer of the accused and familiarize him/her with the indictment, which shall be considered the same as bringing charges. The defense lawyer of the accused shall confirm in writing that he/she has become familiar with the charges.

[8] The CCP of Ukraine provides a separate chapter, 24-1, which regulates the features of the preliminary investigation in the absence of the accused (proceedings in absentia). This procedure is called "Special pre-trial procedure".

[9] See: Информация о постановлении ЕСПЧ от 18 мая 2004 г. по делу «Шомодьи (Somogyi) против Италии (жалоба № 67972/01) // СПС «КонсультантПлюс».

It is easy to note that the features of the remote indictment provided by RA CCP, with some differences, were receptions from the procedural system of Georgia (more on this see later).

Presenting a charge to the accused in absentia is necessary in order to ensure the further course of the proceedings. Thus, during the pre-trial proceedings carried out in the absence of the accused, the following situations can be distinguished:

First, the accused hasn't been formally charged. This situation may be feasible when the accused evaded the investigation before the charge was presented to him.

Second, even though the formal charge was brought before the accused evaded the investigation, the charge was changed after the accused evaded the investigation.

Third, when the defense attorney involved in the remote indictments was replaced by a new one, even though the formal charge was presented to the replaced defense attorney.

Fourth, in each case of amendment of the charge by the competent prosecutor of the proceedings in absentia.

Another subject to discussion is the question of the circumstances under which the system of filing charges remotely can be conducted.

According to A. Tukiev, at the time of filing a charge in absentia, among the facts that are the standard of proof in the case, additional circumstances specific to the given proceedings must be established, such as- the fact of the accused's evasion of the investigation, the fact that the latter was notified of the place and time of the proceedings, as well as the requirement to attend the proceedings in person[10]**:**

It is noteworthy that the basis for filing charges in absentia is the impossibility of ensuring the presence of the accused evading investigation. In this case the investigator is deprived of the opportunity to file charges against the accused in general terms. And the terms for filing charges remotely are perhaps the circumstances that are the basis for the investigator to make a decision to initiate remote indictments (CCP of RA, Article 476). In addition, the participation of the defense in its process is also an independent condition.

Accordingly, the structural framework of presenting charges remotely in RA criminal proceedings can be implemented only when the investigator has made a decision to conduct remote indictments against the accused. In other words, the presentation of the accusation in a remote order as a judicial action should chronologically follow the decision to transform the proceedings from the general order to the remote order. This implies that the structure of presenting the accusation remotely cannot be applied earlier than the decision of the investigator to conduct remote indictments against the accused.

According to Article 479 of the CCP of RA: "3. in remote proceedings, the charges shall be brought by handing over the copy of the decision to initiate criminal prosecution to the defense counsel of the accused who avoids investigation, as well as clarifying to him the factual bases and legal assessment of the accusation. The execution of the specified actions is confirmed by the corre-

[10] See**.: Тукиев А. С.** Проблемы процессуальной формы заочного уголовного судопроизводства: автореф. дис. … канд. юрид. наук. Караганда, 2005. С. 20.

sponding protocol, which is signed by the investigator and the defense attorney.

In order to present an accusation to the accused in remote proceedings, the participation of the defense is mandatory. And if the accused does not have a lawyer involved in the proceedings, the investigator takes measures to provide the accused with a lawyer (CCP of RA, Article 478, Part 2). In addition, the CCP of the Republic of Armenia stipulates that if the accused has not been charged before the decision to conduct remote proceedings is made, then the time limit (18 hours) for the filing of the charge, defined in part 1 of Article 190 of the CCP of the Republic of Armenia, begins to run, from the moment of involving a defense attorney in the proceedings in accordance with Article 478, Part 2 (CCP of the Republic of Armenia, Article 479, Part 2).[11]

It is quite evident that the mentioned norm provides for calculating the total term for filing charges only for those cases when the accused does not have a lawyer involved in the proceedings. Therefore, the question arises as to how the time limits for bringing charges should be calculated when a defense attorney was involved in the proceedings or the defense attorney did not appear within the specified period to participate in the process of bringing charges.

In view of the above, if a defense attorney was involved in the proceedings before the decision to conduct remote proceedings was made, then the period defined by Article 190, Part 1 of the CCP (18 hours) should begin to run from the moment of making the decision to conduct remote proceedings. In case of impossibility to ensure the presence of the defense counsel of the accused within those terms, then the procedure set forth in part 3 of Article 190 of the CCP of the Republic of Armenia shall analogically apply to the defense counsel. Thus, in accordance with the above mentioned procedure, accusation shall be presented to the defense counsel at the disposal of the body conducting the proceedings within 24 hours after appearing.

The procedure defined by Article 190, Part 3 of the CCP of the Republic of Armenia shall also be applied in the event that, although being involved in the proceedings in accordance with the procedure provided for by Article 478, Part 2 of the CCP, the defense counsel fails to be available within the due time (18 hours). Meanwhile, when the defense attorney notified to participate in the process of filing charges in absentia does not appear twice without a valid reason to participate in the mandatory procedural action, he may be excluded from the proceedings by the decision of the investigator (CCP of the Republic of Armenia, Article 147).

Thus, we consider that once the investigator has made a decision to remove the defense counsel of the accused from the proceedings, the defense counsel should be involved in the remote proceedings in accordance with the procedure provided for in Article 478, Part 2 of the CCP of the Republic of Armenia, start-

[11] According to part 2 of Article 478 of the CCP of RA, if the accused does not have a defense attorney involved in the proceedings, after the start of remote proceedings, within a three-day period, the investigator sends the evading accused, and in case of its objective impossibility, any of his close relatives to the given accused remotely. a copy of the decision to conduct proceedings and providing a ten-day period for inviting a defense attorney, as well as a written explanation of the consequences of conducting remote proceedings and not inviting a defense attorney within that period. If a defense attorney is not invited within that period, the investigator requests the Chamber of Advocates of the Republic of Armenia to appoint a defense attorney.

ing the calculation of the three-day period from the day following the day. The decision on removing the defense attorney from the proceedings was approved by the supervising prosecutor. In case of the involvement of a new defense attorney in remote proceedings , the procedure provided for in Article 479, Part 2 of the CCP of the Republic of Armenia shall be applied again.

The above-mentioned situation can occur in the event that the accused has not been charged in the given proceedings. Therefore, if the accusation was presented to the accused in the given proceedings through a general procedure, then the above-mentioned structure of presenting the charges remotely, through the defense counsel, will not be valid.

Nonetheless, if the competent prosecutor changed the accusation after the accused evaded the examination, even though the accusation was presented to the accused in general order, we strongly believe that to ensure the further course of the proceedings in absentia and the right of defense of the accused, the amended accusation should be presented to the defense counsel of the accused avoiding the examination, keeping in mind the procedure provided by Article 190 (relevant part (mutatis mutandis)) and Article 479, Part 3 of the CCP of RA. The same procedure should be applied in remote proceedings in each case of changing the charge by the supervising prosecutor.

We assume that the structure of presenting charges to the defense counsel in remote proceedings should also be applied in the case when the defense counsel involved in the proceedings was replaced by a new one, and the charges were presented to the previous defense counsel. In this case, the investigator, observing the procedure provided for by Article 479, Part 3 of the CCP of RA, must present the accusation to the new defense attorney involved in the proceedings. The mentioned regulation aims to ensure the effective functioning of the defendant's right to defense in competitive proceedings.

At the same time, we consider that if several defenders were involved in the remote proceedings, but at least one of them was charged, then there is no need to charge the other defender(s).

Presenting the accusation to the defense counsel in the remote proceedings does not exclude the application of the general procedure for presenting the accusation to the accused in the pre-trial proceedings (Article 190 of the CCP of the Republic of Armenia), when the investigator makes a decision to conduct the proceedings in a general procedure based on ensuring the physical availability of the accused. In such cases, the obstacle to filing a charge in a general procedure disappears. The legal possibility to continue the proceedings based on a charge filed in a remote procedure ceases because a charge filed in remote proceedings can only ensure the further course of the remote proceedings, and the procedure carried out in a general procedure requires a general procedure, performance of procedural actions.

Thus, when the accused appears in the investigation or his participation in the investigation of the case is ensured in some other way, then the direct presentation of the charges becomes mandatory. Therefore, if the charges were not presented to the accused before the decision to conduct proceedings in absentia was made, or even if it was, but the charges were later changed, then the body conducting the proceedings cannot refer to the fact that the charges were clari-

fied to the defense counsel and refuse to present an accusation to the accused who appeared for the examination.

This is also due to the fact that, in comparison with the remote procedure, presenting an accusation to the accused in a general procedure is a more objective process arising from the latter's rights, which provides an opportunity to ensure both the factual basis and legal assessment of the accusation, as well as the accused's awareness of his rights and responsibilities, and in case the accused refuses to sign the protocol, the investigator has the opportunity to find out the reasons for the refusal.

The above structure of charging the accused in remote proceedings seems fully justified when the location of the accused who evades investigation is unknown. However, the question arises whether the application of this same procedure can be considered justified when the location of the accused who evades investigation is known. Still it is not possible to ensure his availability to the proceedings (for example, the accused is outside the borders of the Republic of Armenia and it is not possible to arrange his extradition).

In the situations described in the jurisprudence, the following approaches worthy of attention are put forward regarding the features of presenting charges in remote proceedings .

Thus, P.A. Litvishko believes that in order to perform procedural actions within the framework of mutual legal assistance, including indicting and interrogating the accused, the investigator can send a request to the relevant consular representation of the country where the accused is located, if this is provided for by international treaties or allowed by the legislation of the state of location[12]**:**

According to K. K. Klevtsov, in cases where the preliminary investigation body knows the exact location of the accused, the latter should take measures to notify the accused about the day and time of bringing charges, and only in case of his failure to appear, file charges remotely.[13] Mandatory notification of the accused is fully justified when there is a suspicion that the person is not aware of the criminal prosecution initiated against him.

In case the location of the accused who is in another country and is evading investigation is known, it is also suggested to organize the trial process of bringing charges through international mutual assistance.[14]

Undoubtedly, the presentation of charges to the accused in the framework of mutual legal assistance can ensure the condition of the accused being properly notified of the criminal prosecution initiated against him in the case of remote proceedings, and subsequently create an opportunity to make a decision to apply remote proceedings to the given accused.[15] Therefore, we believe that

[12] See **Литвишко П. А.** Осуществление уголовно-процессуальной юрисдикции в зарубежных представительствах государств: дис. … канд. юрид. наук. М., 2014. С. 79.

[13] See **Клевцов К. К.** Досудебное производство в отношении лиц, уклоняющихся от уголовной ответственности за пределами территории Российской Федерации./ под ред. канд. юрид. наук, доц. **А.М. Багмета.** — М.: Юрлитинформ, 2018. С. 201-202.

[14] See ibid, C. 206-211.

[15] Recently, the issues of providing legal assistance with the use of typefaces have attracted great interest at the scientific level as well, which indicates the need to use this possibility in practice.

The CCP of the Republic of Armenia does not contain norms that regulate the issues of performing non-evidential (but procedural) actions through the use of evidence. However, a number of international treaties simply provide for provisions that allow the use of specifics within the

the presentation of charges to the accused in the framework of mutual legal assistance can be considered justified when the accused does not avoid participating in the proceedings or is not aware of the criminal prosecution initiated against him, in other words, there are no grounds or (and) conditions for conducting proceedings in absentia.

Nevertheless, in the event that the basis and conditions of remote proceedings are present, and the investigator has made a decision to conduct remote proceedings, then we believe that presenting an accusation to the accused by means of a bond does not follow the general ideology of remote proceedings. If it is considered acceptable to present the accusation to the accused who avoids the investigation by means of a bond, the performance of evidentiary and other procedural actions through this means should also be accepted, which will contradict the nature of remote indictments and will neutralize the purpose of these proceedings, and the proceedings will not be considered in absentia.

The idea behind remote proceedings, that is, the accused's waiver of his right to participate in the proceedings, cannot lead to the duty of the prosecuting authority to provide the accused with a direct presentation of the charges. In case of waiving the right to participate in the proceedings, the accused also indirectly refuses to participate in such actions that imply his direct participation. Therefore, in case of avoiding the examination of the accused, the preliminary investigation body cannot be burdened with such obligations in the remote proceedings initiated, which would assume to ensure the direct presentation of the accusation to the accused at any cost.

Accordingly, it is worth noting that the documentation of the accused's refusal to participate in the proceedings and the refusal of separate procedural rights are the same. Therefore, if the defendant waives his right to participate in the criminal proceedings, he also indirectly waives a number of other procedural rights (for example, the right to cross-examination or the right to testify, the right to directly participate in the process of presenting an accusation).[16] In addition, it is not easy in practice to organize procedural actions carried out within the framework of international mutual assistance, which may create unjustified obstacles to the implementation of the said procedural actions, thus limiting the further movement of the proceedings.[17]

Thus, based on the above, it can be noted that bringing an accusation through a defense attorney is considered a legal fiction enshrined in the CCP, which provides an opportunity to ensure the further progress of the proceedings,

framework of legal aid. Among them are the Convention against Corruption (Articles 32, 46), the Convention against Transnational Organized Crime (Articles 18, 24), the Second Additional Protocol to the European Convention on Legal Aid of 1959. Article 9, Chisinau Convention 2002 (Articles 6, 105).

The national legislation of some foreign countries also provides for the possibility of specific use within the framework of legal aid (for example, Canada). The legislation of many countries provides for the use of tapes in court proceedings, rarely in the pre-trial phase:

[16] Due to the above, we agree with the authors who claim that the accused's refusal to participate in the proceedings should be evaluated as a waiver of the right to testify. See **Хан А.Л., Акимбеков А.К**. Вопросы оптимизации предварительного расследования// Перспективы государственно-правового и социального развития РК. - Костанай, 2001. - С. 223.

[17] The CCP of the Republic of Armenia lacks provisions regulating the performance of non-evidential procedural actions through the use of evidence.

in particular, in the absence of the accused, to complete the preliminary investigation and send the proceedings to the court on the one hand, and make it possible to guarantee effective implementation of the principle of competition and the defendant's right to defense in criminal proceedings on the other. In the CCP of the Republic of Armenia, the regulations for presenting charges to the accused in remote proceedings cannot be considered complete. However, if the criminal procedure law is applied by analogy, it will be possible to overcome the legislative gaps described above.

ԳԱԳԻԿ ՂԱԶԻՆՅԱՆ, ՊԵՏԻԿ ՄԿՐՏՉՅԱՆ – *Մեղադրանք ներկայացնելը մեղադրյալի բացակայությամբ իրականացվող վարույթում* – Հոդվածը վերաբերում է մեղադրյալի բացակայությամբ իրականացվող վարույթում (հեռակա վարույթ) մեղադրանք ներկայացնելու էությանը և առանձնահատկություններին։

Հեղինակներն անդրադառնում են մեղադրյալի բացակայությամբ իրականացվող վարույթի ընթացքում մեղադրանք ներկայացնելու հիմքին և պայմաններին, քննարկվող ինստիտուտի վերաբերյալ տեսության մեջ արտահայտված կարծիքներին։

Ներկայացվում են ազգային քրեադատավարական օրենսդրության մեջ խնդրո առարկա ինստիտուտի կանոնակարգումները, և իրավահամեմատականներ են անցկացվում արտասահմանյան երկրների օրենսդրությամբ նախատեսված կարգավորումների միջև։

Հոդվածում ներկայացվում են նաև խնդրո առարկայի վերաբերյալ Մարդու իրավունքների եվրոպական դատարանի դիրքորոշումները, և դրանց լույսի ներքո քննարկվում են հեռակա վարույթում մեղադրանք ներկայացնելու տեսագործնական հիմնախնդիրները։

Քննարկման առարկա է դառնում նաև այն հարցը, որ երբ նախաքննության մարմնին հայտնի է մեղադրյալի գտնվելու ճշգրիտ վայրը, ապա վերջինս արդյոք պետք է միջոցներ ձեռնարկի մեղադրանք ներկայացնելու օրվա և ժամի մասին մեղադրյալին ծանուցելու ուղղությամբ, և միայն նրա չներկայանալու դեպքում մեղադրանք ներկայացնի հեռակա կարգով։

Հարցադրման կապակցությամբ հեղինակները հանգում են այն հետևության, որ երբ առկա են լինում հեռակա վարույթի հիմքն ու պայմանները, և քննիչը որոշում է կայացնում հեռակա վարույթ իրականացնելու մասին, ապա մեղադրյալին տեսակապի միջոցով մեղադրանք ներկայացնելը չի բխում հեռակա վարույթի ընդհանուր գաղափարաբանությունից։

Բանալի բառեր – *հեռակա վարույթ, մեղադրանք ներկայացնել, մեղադրանքի փոփոխում, տեսակապ, միջազգային փոխօգնություն, հրապարակային ծանուցում, պաշտպանին վարույթից հեռացնել*

ГАГИК КАЗИНЯН, ПЕТИК МКРТЧЯН – *Предъявление обвинения в производстве, осуществляемом в отсутствие обвиняемого* – Статья касается сути и особенностей предъявления обвинения в производстве, осуществляемом в отсутствие обвиняемого (заочное производство).

Авторы обращаются к основаниям и условиям предъявления обвинения в

ходе производства, осуществляемого в отсутствие обвиняемого, к мнениям, высказанным в теории относительно рассматриваемого института.

Представляются регламенты рассматриваемого института в национальном уголовно-процессуальном законодательстве и проводятся сопоставления регулирований, предусмотренных законодательством зарубежных стран.

В статье представлены также позиции Европейского суда по правам человека по данному вопросу, и в их свете обсуждаются теоретические проблемы предъявления обвинений в заочном производстве.

Предметом обсуждения становится также вопрос о том, когда органу предварительного следствия известно точное место нахождения обвиняемого, должен ли последний принять меры для уведомления обвиняемого о дне и времени предъявления обвинения, и только в случае его неявки предъявить обвинение в заочном порядке.

В связи с постановкой вопроса авторы приходят к выводу, что когда имеются основания и условия заочного производства, и следователь принимает решение об осуществлении заочного производства, то предъявление обвиняемому обвинения по видеосвязи не вытекает из общей идеологии заочного производства.

Ключевые слова: *заочное производство, предъявление обвинения, изменение обвинения, видеосвязь, международная взаимопомощь, публичное уведомление, отстранение защитника от производства*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 98-105 *Քրեական դատավարություն և կրիմինալիստիկա*
https://doi.org/10.46991/BYSU:C/2023.14.2.098

CRIMINAL PROSECUTION IN THE CRIMINAL PROCEDURE OF THE REPUBLIC OF ARMENIA

SAMVEL DILBANDYAN

This article is dedicated to the issues of criminal prosecution in criminal procedure. In the current Code of Criminal Procedure, a new ideology was introduced for the implementation of criminal procedure problems in pre-trial proceedings. In the criminal proceedings, the criminal prosecution has a significant role, it determines the further course of the criminal proceedings and the boundaries of the investigation. Criminal prosecution is apparently the driving force behind criminal proceedings, which means that the further course of criminal proceedings is determined by it. Undoubtedly, it is also important for ensuring the protection of human rights within the framework of criminal proceedings.

So far, the issues of initiation and implementation of criminal prosecution have remained unresolved in the theory and practice of criminal procedure. Although the criminal procedure legislation regulates in detail the legal bases of criminal prosecution, some important issues remain unsettled. Today, the replacement of the terms of the criminal proceedings with the terms of the criminal prosecution has caused problems in the implementation of the right to defend for the persons who were actually prosecuted, in particular, the said person is deprived of the opportunity to exercise the fundamental rights of the accused. The essence of the problem lies in the fact that the body conducting the proceedings, in order to fit within the terms of criminal prosecution set by the law, strives to give a later status to the person actually prosecuted, in order to fit within the stated terms. Meanwhile, the body conducting the proceedings performs such procedural actions throughout the criminal proceedings that affect the legitimate interests of the person who is actually under criminal prosecution.

Key words: *criminal prosecution, institute of criminal prosecution, criminal proceedings, initiate criminal proceedings, actual criminal prosecution, terms of criminal prosecution*

The concepts of 'Criminal Prosecution' and the 'Institution of Criminal Prosecution' were initially legislated in the RA Constitution (1995) and later in the Code of Criminal Procedure. Criminal prosecution was sufficiently studied in domestic theory of criminal procedure law and the most recognized approach was that criminal prosecution is related to the appearance of a person in criminal proceedings. This concept has been applied in the current Code of Criminal Procedure. However, unlike the previous version, the current Code of Criminal Procedure provides only a definition for the concept of the 'Initiation of Criminal Prosecution' among its main definitions. The demarcation of the concepts of 'Criminal Prosecution,' 'Initiation of Criminal Prosecution,' and 'Accused' is crucial because the initiation of criminal prosecution is often perceived as the involvement of a person as an accused, while it is a broader concept in terms of content.

To address this issue, it is essential to consider the approaches found in legal literature, which are instrumental for the legislative definition and practical application of this concept. In judicial literature, there is no unified approach to the concept of criminal prosecution, highlighting its complexity. Similarly, in procedural literature, there are differing opinions regarding the characteristic features and practical significance of the concept. It's worth noting that these concepts were scarcely explored in Soviet criminal procedure law, as criminal prosecution was not used as a procedural category in Soviet legislation. It was only after being enshrined in the RA Constitution (1995) and the former Code of Criminal Procedure that it received attention in domestic procedural literature. Both domestic and foreign legal scholars have generally recognized that criminal prosecution relates to a person's involvement in criminal proceedings.

Soviet legal scholar M.S. Storgovich has studied the function of criminal prosecution quite deeply, we think that we should agree with his approach, emphasizing that "the concept of criminal prosecution indicates the accusatory nature of that activity, criminal prosecution is the accusation, as a procedural function, accusatory activity" [1] . Of course, there are scholars who have a different approach, particularly in the procedural literature there is no unified approach to the concept of criminal prosecution. There are scholars, in particular L. Larin and V. Savitsky, who consider the criminal prosecution to be an evidentiary action at the stage of the preliminary investigation[2]. The abovementioned scholars expressed positions regarding the concept of "criminal prosecution" which we can say complemented each other and today the mentioned concept is presented as a combination of these approaches.

Criminal prosecution indeed serves as the driving force behind criminal proceedings, significantly influencing their course and outcomes. It plays a pivotal role in determining the trajectory of criminal cases and, unquestionably, holds paramount importance in safeguarding human rights within the framework of criminal proceedings.

In this context, it is imperative to align with the perspective articulated in the guide on the RA Code of Criminal Procedure, which asserts that 'a completely new concept forms the foundation of legal relations related to criminal prosecution.' Consequently, almost all regulations pertaining to this domain have undergone fundamental revisions in the Code. The category of 'Criminal Prosecution' has assumed a more comprehensive character. It now encompasses not only the initiation of criminal prosecution, decisions of non-prosecution, and its termination but also delves into the various phases of criminal prosecution, including its suspension and subsequent renewal[3]. Due to this logic, in the new Code of Criminal Procedure, a new concept of pre-trial proceedings was applied, in the center of which is the person - the accused. According to Article 6, Clause 17 of the former Code of Criminal Procedure: "Criminal prosecution" means all procedural activities conducted by the prosecuting bodies, and in

[1] See **Строгович М. С**. Уголовное преследование в советском уголовном процессе, М., 1951, page 58.

[2] See Уголовный процесс, словарь справочник, /под ред. В.М. Савицкого, М., 1999, page 186.

[3] See A practical guide to conceptual solutions, innovative approaches and key institutions of the new RA Criminal Procedure Code, Yerevan, 2022. page 287.

cases envisaged in this Code, by the injured party, with the purpose of revealing the action prohibited by criminal law, identifying the personality of its actor, determining whether he is guilty of a crime, and ensuring that the criminal is punished or subjected to other compulsory measures". The concept of criminal prosecution is not given in the current Code of Criminal Procedure of the Republic of Armenia, which, in our opinion, causes certain problems related to the protection of the rights and legitimate interests of the persons actually subjected to criminal prosecution.

According to Article 6, Clause 42 of the current Code of Criminal Procedure of the Republic of Armenia: "Charges: a hypothesis about commission of an alleged crime by a specific person, which has factual and legal substantiation".

The concept of charge was also defined in the Article 6, Clause 20 of the former Code of Criminal Procedure: "A statement made in the manner prescribed by this Code and claiming that a named person has committed a definite action prohibited by criminal law".

In contrast to the previous Code of Criminal Procedure, the criminal prosecution under the new legislation begins with the decision to involve a person as an accused. This legislative regulation gives grounds for concluding that initiating a criminal prosecution is equivalent to involving a person as an accused. With the mentioned decision, the person acquires the status of the accused and fulfils his/her rights provided by the procedural law and bears the corresponding responsibilities. In relation to the mentioned issue, the European Court of Human Rights and the RA Court of Cassation interpret the concept of criminal prosecution quite widely in their case law. In the case regarding Levik Poghosyan, the RA Court of Cassation expressed the position that it considers the initiation of a criminal case against a person as the initiation of a criminal prosecution and considers the appeal of the decision to initiate a criminal case legitimate[4].

Within the framework of the case-law of the European Court and the RA Court of Cassation, it is important to clarify the issue of whether there is criminal prosecution or not in the cases of arrest and initiation of criminal proceedings. In other words, whether the person who found himself/herself in the mentioned status can consider himself/herself to be actually criminally prosecuted and exercise the rights provided by the European Convention on the Protection of Human Rights and Fundamental Freedoms and the Code of Criminal Procedure of the Republic of Armenia. This issue, within the framework of the legal regulations of the current Code of Criminal Procedure, poses problems related to arrest and the initiation of criminal proceedings. According to the Code, criminal prosecution begins at the moment a decision to initiate criminal proceedings is made.

Arrest: restriction of the right to personal liberty without a court decision based on an immediately arisen reasonable suspicion of a commission of a crime or for bringing the accused before the Court[5].

[4] See The Decision No. EKD/0136/11/11 of the RA Court of Cassation, 22 December 2011 regarding Levik Poghosyan.

[5] See Article 6, Part 1, Clause 44 of the RA Code of Criminal Procedure.

According to the previous Code of Criminal Procedure, arrest was also considered a criminal prosecution. According to the current Code of Criminal Procedure, although the arrest is not an initiation of criminal prosecution, the arrested person exercises the rights provided by the law for the accused.

According to Article 109, Clause 5 of the Code of Criminal Procedure: "Promptly, but no later than within six hours upon de-facto deprivation of liberty in a manner prescribed by this Article, a decision on arresting or releasing him, as well as the list of rights and obligations of the accused prescribed by this Code shall be served upon the Arrested Person." According to the regulation in criminal law, in case of arrest, actual criminal prosecution is carried out against a person, because before acquiring the relevant rights of the accused, the arrested person has the following rights: to know the reason for depriving him/her of freedom, to keep silence, to inform the person of his/her choice about his/her location, to communicate and meet with a lawyer, to undergo a medical examination at his/her request (Article 110, Clause 2 of the Code of Criminal Procedure).

It is evident that an arrest signifies the initiation of criminal prosecution against the person, irrespective of the fact that, according to criminal procedure legislation, formal criminal prosecution and its associated timeframes commence upon the decision to initiate such prosecution. In the case of an arrest, it is clear that actual criminal prosecution has commenced, and the individual in question, as a subject of criminal prosecution, possesses the right to protect their rights.

The question of actual criminal prosecution upon initiating criminal proceedings can be problematic. Initiating criminal proceedings marks the commencement of criminal proceedings and serves as the legal foundation for carrying out procedural and evidentiary actions. The absence of this initiation can result in the termination of criminal proceedings.

According to part 2 of Article 178 of the Code of Criminal Procedure, the protocol for initiating criminal proceedings must include the investigator's name, surname, position, the reason for initiating criminal proceedings, a factual description of the apparent crime as stated in the report, and the relevant article, part, or clause of the criminal code under which the proceedings commence. The protocol may also list any attached materials. Notably, there is no requirement to identify the person allegedly responsible for the crime in the protocol for initiating criminal proceedings.

The relationship between the initiation of criminal proceedings and criminal prosecution is of practical significance. Can initiating criminal proceedings with characteristics of an apparent crime constitute actual criminal prosecution?

This issue remained relevant even under the previous Code of Criminal Procedure, where a criminal case was initiated not only based on the occurrence of a crime but also against the person allegedly responsible for it. Although Article 6 of the former Code of Criminal Procedure defined the initiation of criminal prosecution as involving the arrest of a person, making a decision to implead a person as an accused, and applying compulsory measures, the RA Court of Cassation, in its precedent decisions, interprets criminal prosecution more broadly. Specifically, the Court of Cassation emphasizes that when a deci-

sion to initiate a criminal case suggests that a specific person has committed a criminal act, it carries legal consequences equivalent to charging that person[6].

According to the case law established by the European Court of Human Rights concerning the concept of a "Criminal charge" the term should be understood not merely in a formal (documentary) but in a substantive (practical) sense. In this context, an 'accusation' can be defined as an official notification by a competent authority to an individual, indicating a presumption that they have committed a criminal offense *(see Deweer v. Belgium, Judgement of 27 February 1980, Application No. 6903/75, paragraphs 44, 46, 75)*. In simpler terms, the presence of "an accusation" against an individual can also be established through actions that imply suspicion of a crime and significantly affect the situation of the person in question *(as highlighted in the Eckle v. Germany, Judgment of 15 July 1982, Application No. 8130/78, paragraph 73, Šubinski v. Slovenia, Judgment of 18 January 2007, Application No. 19611/04, paragraph 62, and G.K. v. Poland, Judgment of 20 January 2004, Application No. 38816/97, paragraph 98).*

Since the protocol for initiating criminal proceedings is considered equivalent to the decision to institute a criminal case, it's essential to refer to the position of the Court of Cassation in cases such as V. Grigoryan and V. Manukyan. According to this position, "The decision to initiate a criminal case does not confer procedural status upon an individual allegedly involved in a crime". The Court of Cassation asserts that the decision to initiate a criminal case doesn't require the identification of the person allegedly committing the crime. This is because the purpose of initiating a criminal case differs from granting a status or filing charges. Additionally, the law doesn't mandate a specific level of evidence for making this decision. Furthermore, during the initiation of a criminal case, the burden of proof is solely to establish the grounds for initiating a criminal case, not to assign a status to the alleged offender or press charges. In the case of initiating criminal proceedings, a specific level of proof is also not required. However, if the crime report documents an event, action, or inaction that can reasonably receive a preliminary legal assessment for compliance with any act outlined in the Criminal Code of the Republic of Armenia, it may proceed.

Criminal proceedings are initiated on the fact, but not the person, so these assessments can only refer to the facts and cannot refer to the person or his/her actions.

If the actions of the person who allegedly committed the crime are described in the record of initiation of criminal proceedings and an appropriate legal assessment is given to them, then we can say that the criminal prosecution against the person has already started with the execution of the mentioned procedural act.

The purpose of the broad interpretation of criminal prosecution is to preserve to the person who is actually prosecuted with the rights within the criminal proceedings, in particular with the right to dispute the legality of the criminal proceedings initiated against him/her. It is not excluded that criminal proceedings are initiated against a person before the decision to

[6] See The Decision No. EKD/0136/11/11 of the RA Court of Cassation, 22 December 2011 regarding Levik Poghosyan.

institute criminal prosecution is made, in particular, procedural and evidentiary actions may be carried out.

In fact, a person who is actually being prosecuted, but does not have the status of a private participant in the proceedings, is deprived of the opportunity to actively participate in the proceedings. Of course, one should agree with the approach found in the procedural literature that criminal prosecution should consider all those actions that contain suspicions that a person has apparently committed a crime [7].

Today, the replacement of the terms of the criminal proceedings with the terms of the criminal prosecution has caused problems in the implementation of the right to defense for the persons who were actually prosecuted, in particular, the said person is deprived of the opportunity to exercise the fundamental rights of the accused. The essence of the problem lies in the fact that the body conducting the proceedings, in order to fit within the criminal prosecution terms, set by the law, seeks to give a status to the actual criminal prosecution person later, in order to fit within the stated terms. Meanwhile, the body conducting the proceedings performs such procedural actions throughout the criminal proceedings that affect the legitimate interests of the person who is actually under criminal prosecution. Thus, there are evidentiary actions defined by the Code, in connection with the execution of which the accused exercises certain rights. The private participant in the proceedings, to the legitimate interest of whom the expert examination concerns prima facie, shall have the following rights in relation to the performance of an expert examination: 1) Prior to the performance of the expert examination, to become familiarized with the decision of the Investigator on ordering an expert examination and to obtain clarification of his rights under this Article; 2) To seek a recusal to the Expert in three days after receiving the Investigator's decision on performance expert examination, to submit a motion to have a person specified by him invited as an Expert, substantiating that such person is professionally competent as well as to submit a motion to have posed additional questions to the Expert; 3) Upon the permission of the Investigator and the consent of the Expert, to be present during the performance of the expert examination; 4) To provide explanations to the Expert; 5) To obtain a copy of the Expert's conclusion within 3 days of transferring such conclusion to the Investigator; 6) To submit a motion on questioning the Expert or ordering an additional expert examination or a repeat expert examination; 7) To take part in the questioning of the Expert performed on his motion[8]. In fact, this is a very crucial evidentiary action, and sufficient rights have been fairly reserved to the interested person by the legislation, therefore, the realization of the above-mentioned rights is of essential importance for the person who has actually been prosecuted.

According to the Part 41 of the Article 6 of the Code of Criminal Procedure: "Institution of criminal prosecution: rendering of a decision by the Prosecutor which contains description and legal assessment of the alleged criminal offence of a person, or submission of a criminal claim to the Court by an alleged

[7] See **Кальницкий В. В**. Право свидетеля на зашиту // Законодательство и практика, 2000, № 2(5) - pages 11-13:

[8] See Part 1 of Article 255 of the RA Criminal Procedure Code.

Victim". In the current Code of Criminal Procedure, the concept of "initiation of criminal prosecution" is given, and not the "criminal prosecution". The content of initiating a criminal prosecution is the description of the apparent crime committed by a person and the legal assessment given to it.

The concept of criminal prosecution is not a theoretical category, but a concept of practical importance, which is related to the implementation of the right to protection of a person during the execution of procedural actions. For a person, the possibility of exercising the rights provided by the law should be very clear and certain in practice. For this, the person must have a clear and practical opportunity to perform actions. It is more important in case of actual criminal prosecution, when actual criminal prosecution is carried out against a person, and the latter is not a formally prosecuted person, because no criminal prosecution has been initiated yet. The practical significance of the concept of criminal prosecution lies in the fact that a person should take advantage of a clear and specific opportunity to challenge an action that is an interference with his rights.

The actual criminal prosecution is all the procedural and evidentiary actions carried out by the investigator, which are of an accusatory nature, suspecting the person of the alleged crime.

ՍԱՄՎԵԼ ԴԻԼԲԱՆԴՅԱՆ – *Քրեական հետապնդումը Հայաստանի Հանրապետության քրեական դատավարությունում* – Հոդվածը նվիրված է քրեական դատավարությունում քրեական հետապնդման հիմնահարցերին: Քրեական դատավարության գործող օրենսգրքում դրվեց նոր գաղափարախոսություն մինչդատական վարույթում քրեական վարույթի խնդիրների իրականացման համար: Քրեական վարույթում քրեական հետապնդումը նշանակալի տեղ է զբաղեցնում. դրանով պայմանավորվում են քրեական վարույթի հետագա ընթացքը և քննության սահմանները: Քրեական հետպնդումը առերևույթ հանցագործության վերաբերյալ իրականացվող քրեական վարույթի շարժիչ ուժն է, իսկ դա նշանակում է, որ դրանով է պայմանավորված քրեական վարույթի հետագա ընթացքը: Անկասկած, այն կարևոր է նաև քրեական վարույթի շրջանակներում անձի իրավունքների պաշտպանության ապահովման համար:

Մինչ այսօր քրեական հետապնդման հարուցման և իրականացման հարցերը քրեական դատավարության իրավունքի տեսության մեջ և պրակտիկայում մնացել են չլուծված: Թեև քրեական դատավարության օրենսդրությունը մանրամասն կարգավորում է քրեական հետապնդման իրավական հիմքերը, բայց որոշ կարևոր հարցեր մնացել են չկարգավորված: Այսօր քրեական վարույթի ժամկետների փոխարինումը քրեական հետապնդման ժամկետների փաստացի քրեական հետապնդման ենթարկված անձանց համար առաջացրել է պաշտպանության իրավունքի իրականացման խնդիրներ. մասնավորապես՝ նշված անձը զրկված է մեղադրյալի հիմնարար իրավունքներն իրականացնելու հնարավորությունից: Խնդրի էությունն այն է, որ վարույթն իրականացնող մարմինը օրենքով սահմանված քրեական հետապնդման ժամկետների մեջ տեղավորվելու համար ձգտում է փաստացի քրեական հետապնդման

ենթարկված անձին ավելի ուշ կարգավիճակ տալ: Մինչդեռ վարույթն իրականացնող մարմինը քրեական վարույթի ողջ ընթացքում կատարում է վարույթային այնպիսի գործողություններ, որոնք շոշափում են փաստացի քրեական հետապնդման ենթարկված անձի իրավաչափ շահերը:

Բանալի բառեր – *քրեական հետապնդում, քրեական հետապնդում հարուցել, քրեական վարույթ, քրեական վարույթ նախաձեռնել, փաստացի քրեական հետապնդում, քրեական հետապնդման ժամկետներ*

САМВЕЛ ДИЛБАНДЯН – *Уголовное преследование в уголовном судопроизводстве Республики Армения.* – Данная статья посвящена вопросам уголовного преследования в уголовном судопроизводстве. В действующем УПК введена новая идеология реализации уголовно-процессуальных задач в досудебном производстве. В уголовном судопроизводстве уголовное преследование занимает значительное место, оно определяет дальнейший ход уголовного процесса и границы расследования. Уголовное преследование, очевидно, является движущей силой уголовного судопроизводства, а значит, дальнейший ход уголовного судопроизводства определяется им. Несомненно, это важно и для обеспечения защиты прав человека в рамках уголовного судопроизводства.

До сегодняшнего дня вопросы возбуждения и осуществления уголовного преследования остаются нерешенными в теории и практике уголовно-процессуального права. Хотя уголовно-процессуальное законодательство детально регламентирует правовые основы уголовного преследования, некоторые важные вопросы остаются неурегулированными. На сегодняшний день замена условий уголовного судопроизводства условиями уголовного преследования вызвала проблемы в реализации права на защиту для лиц, фактически привлеченных к уголовной ответственности, в частности, указанное лицо лишается возможности осуществлять основные права обвиняемого. Суть проблемы заключается в том, что орган, ведущий производство, чтобы уложиться в установленные законом сроки уголовного преследования, стремится придать более поздний статус фактическому лицу, осуществляющему уголовное преследование, чтобы уложиться в установленные законом сроки. При этом орган, ведущий производство, в ходе уголовного судопроизводства совершает такие процессуальные действия, которые затрагивают законные интересы лица, фактически подвергающегося уголовному преследованию.

Ключевые слова - *уголовное преследование, возбуждение уголовного преследования, уголовно производство, инициирование возбуждение уголовного делопроизводства, фактическое уголовное преследование, сроки уголовного преследования*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 106-121 *Եվրոպական և միջազգային իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.106

THE RE-OPENING OF JUDICIAL PROCEEDINGS IN THE ARMENIAN LAW AND PRACTICE FOLLOWING THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

ARTAK ASATRYAN

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) guarantees a number of rights and freedoms that the states that have ratified the Convention are obliged to respect in the territories under their jurisdiction. Regarding violations recorded by the European Court of Human Rights (hereinafter referred to as the ECtHR) created on the basis of the Convention, there is often a need to reopen judicial cases at the domestic level. The importance of this process lies in its central place in the execution system of the ECtHR's judgments and in some cases is considered as the only way to restore the violated rights.

Within the framework of this article, the legislation and practice of the Republic of Armenia regarding the reopening of judicial cases following the judgments of the ECtHR were studied. In particular, the relevant legal regulations of RA criminal procedure, RA civil procedure, RA administrative procedure codes and other legal acts were analyzed. As a result of the comprehensive studies carried out in the article, the gaps, shortcomings and uncertainties of the RA legislation and practice in the discussed field were highlighted, and relevant recommendations were made to fill, eliminate or clarify them.

Key words: *Execution of ECtHR judgments, reopening of judicial cases, revision of judicial cases, legislation of reopening of judicial cases, practice of reopening of judicial cases, flaws in reopening legislation, practical issues of reopening of judicial cases*

As explained in the Explanatory Memorandum to the Recommendation Rec (2000) 2 of the Committee of Ministers of the Council of Europe to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights[1], the Contracting Parties to the Convention enjoy a discretion, subject to the supervision of the Committee of Ministers, as to how they comply with the obligation in Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2] (hereinafter referred to as "the Convention") "to abide by the final judgment of the Court in any case to which they are parties."

The Court has held: "A judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach[3]". The Court was here expressing the well-known international law principle of restitutio in integrum, which has also

[1] Recommendation was adopted by the Committee of Ministers on 19 and 21 January 2000 at its 694th Session.

[2] Adopted in Rome on 4 Nov. 1950; entered into force on 3 Sept. 1953.

[3] See, inter alia, the Court's judgment in the *Papamichalopoulos* case against Greece of 31 October 1995, paragraph 34, Series A 330-B.

frequently been applied by the Committee of Ministers in its resolutions. In this context, the need to improve the possibilities under national legal systems to ensure restitutio in integrum for the injured party has become increasingly apparent.

Although the Convention contains no provision imposing an obligation on Contracting Parties to provide in their national law for the re-examination or reopening of proceedings, the existence of such possibilities has proven to be important in special circumstances, and indeed in some cases the only means to achieve *restitutio in integrum*. An increasing number of States have adopted special legislation providing for the possibility of such re-examination or reopening. In other States, this possibility has been developed by the courts and national authorities under existing law.

In this article, we have set the task to review Armenian legislative norms governing the issue of re-opening of cases in the light of the rulings and judgments of the European Court of Human Rights (hereinafter referred to as "the ECtHR"), identify the gaps and inadequate provisions, which in practice can cause problems, or as a result of which some practical problems have already been identified, and make appropriate recommendations for their elimination and further streamlining. To this end, we will refer to the relevant provisions of the RA Criminal Procedure Code[4], the RA Civil Procedure Code[5], the RA Administrative Procedure Code[6], decisions of the RA Constitutional and Cassation Courts and other relevant legal acts.

Before referring to the regulations of the Procedural Codes, it should be noted that the issue at stake was also referred to by the RA Constitutional Court in a number of its rulings. In particular, in the decision No. CCD-1099[7], the High Court states: "…the legal constitutional content of the judicial acts' revision mechanism is that it ensures restoration of violated rights under Constitution and/or Convention. The latter, based on the basic principles of the rule of law, requires elimination of the negative consequences for the victim as a result of the violation, which in turn requires the restoration of the situation that existed before the violation (restitutio in integrum). In case the Constitutional and/or Convention right of a person has been violated by a judicial act that has entered into force, the restoration of that right before the violation of the law presupposes the creation of a situation for the person that existed in the absence of the Court act.

Below we will separately discuss provisions of the Procedural Codes pertaining to the revision of judicial acts following ECtHR judgments.

CRIMINAL PROCEDURE CODE

The proceeding for revision of a case upon new circumstance is included in Chapter 49 of the RA Criminal Procedure Code, which is entitled "Exclusive Review". The list of judicial acts that are subject to exclusive review has been significantly expanded in the wording of the new Code (Article 401).

[4] Adopted by the RA National Assembly on July 30, 2021.
[5] Adopted by the RA National Assembly on February 9, 2018.
[6] Adopted by the RA National Assembly on December 5, 2013.
[7] Adopted by the RA Constitutional Court on 31 May, 2013.

According to Article 402.1 (3-4) of the Code, the following persons have the right to lodge an exclusive review appeal: ….

1) the person who was a private participant in the given proceedings, whose legitimate interests are related to the alleged new circumstance or the alleged fundamental violation or the alleged new emerging circumstance;

2) …

3) a private participant in the given proceedings, who at the time of making the relevant judicial act by the international court, to which the Republic of Armenia is a participant, had the right to apply to an international court in accordance with the requirements of the international treaty;

4) Prosecutor General of the Republic of Armenia and the deputies thereof.

Moreover, instead of the persons mentioned in Article 402 (1-3), an exceptional review appeal may be submitted by his/her authorized person (proxy), who must also submit to the court the document attesting his/her powers.

The analysis of the aforementioned provisions of the Code shows that the scope of persons to lodge a re-opening appeal on the basis of the ECtHR judgment is limited. Thus, the Code stipulates that person must have been a private party to the judicial proceedings. According to Article 6 (13) of the Code, private participants in the proceedings are the defendant, legal representative to the defendant, lawyer, victim, property respondent, legal representative of the victim and property respondent and the authorized representative.

As we can see, these regulations sufficiently limit the chances of the person involved in the examination of the application to lodge an appeal for reopening the case in the event of the death of the applicant who was the initiator of the application to the ECtHR. In particular, consider the situation where, for example, following murder the legal successor of the victim, having exhausted the effective domestic remedies, applied to the ECtHR, claiming that there had been numerous procedural violations during the investigation of the criminal case, which later served as a basis for identification by the ECtHR of a violation of the procedural aspect on the protection of the right to life. In the example given, if we assume for a moment that the applicant had died before the ECtHR rendered a judgment and that another person with victim status under ECtHR case law had been involved in the examination of the complaint, it remains unclear whether the latter would have an opportunity to file an application for the exceptional revision of the case. Evidently, the Code does not provide for regulation in such circumstances. The situation in the context of the circumstances described above is unclear also in the event of the applicant's death following a decision of the ECtHR. We would recommend adding to the list of those eligible to lodge an appeal for reviewing a judicial act on the basis of a new circumstance the persons involved in the examination of the case in the ECtHR, who have a legitimate interest in the review of that act.

According to Article 403 (1) (5) of the Criminal Procedure Code, an appeal under new circumstances may be brought, if the fact of violation of the right provided for by the international treaty of the Republic of Armenia has been confirmed by the valid judgment or decision of the international court with the participation of the Republic of Armenia, or the international court approved the reconciliation agreement (friendly settlement) reached between the parties

or the unilateral declaration made by the Republic of Armenia. As a matter of fact, in contrast to Civil and Administrative Procedure Codes, the Criminal Procedure Code mentions explicitly among the grounds of an exceptional review of the judicial act under the new circumstance, the fact of violation of the right of a person under the international treaty of the Republic of Armenia as envisaged by the friendly settlement or unilateral declaration. In this regard, it should be noted that while the Civil Procedure Code and Administrative Procedure Code do not specifically focus on the above grounds, the wording "the fact of violation of a right of a person provided for in the international treaty of the Republic of Armenia was confirmed by the valid judgment or decision of international court" includes recognition of the fact of violation of the rights established by the friendly settlement or unilateral declaration as the friendly settlement or a unilateral declaration are confirmed by a decision of the European Court.

In this regard, it would be appropriate to refer to *Grigoryan and others v. Armenia*, Application No. 40864/06. The Government of the Republic of Armenia made a unilateral declaration regarding this complaint, which was adopted by the ECtHR and on the basis of which the Court, by its decision of 08.11.2018, struck out the application from the list of cases to be examined. Subsequently, the applicants in the case lodged an appeal with the Court of Cassation to review the judicial act, stating that the judgment of the European Court of Human Rights was a new circumstance within the meaning of Article 419 (1) (2) of the RA Civil Procedure Code as "the fact of violation of the right of a person envisaged by the international treaty ratified by the Republic of Armenia (...)was substantiated by the judgment of the court acting on the basis of the international treaty ratified by the Republic of Armenia ...". In relation to this appeal, the Court of Cassation stated that «(...) As a result of the literal interpretation of the words and expressions of the above-mentioned norm, in other words, due to the expression "substantiated" used in the Article 419 (1) (2) of the RA Civil Procedure Code not to consider the European Court's decision on a unilateral declaration or friendly settlement as a ground for reopening a case under a new circumstance may be an overly formal interpretation. In this regard, the Court of Cassation considers it necessary to emphasize that both the friendly settlement and the unilateral declaration are approved by the European Court, and the fulfilment of the conditions stipulated in them is under the control of the Committee of Ministers[8]."

With regard to deadlines, under Article 404 of the Criminal Procedure Code, an appeal for an exceptional review on the basis of an ECtHR judgment can be lodged within four months. Calculation of the four-month period shall start from the day of the delivery of the valid judgment or decision of the international court, to which the Republic of Armenia is a participant, to the person who applied to that court in the manner prescribed by the regulations of that court.

In accordance with paragraph 3 of Rule 77 of the ECtHR Rules of Court, the judgment shall be transmitted to the Committee of Ministers. The Registrar

[8] For more details on the decision of the ECtHR on a unilateral declaration or friendly settlement as a basis for reopening the case, see the decision of the Court of Cassation of October 19, 2021 on revising the ruling of the Chamber of Civil and Economic Affairs of the Court of Cassation of 07.04.2006.

shall send copies to the parties, to the Secretary General of the Council of Europe, to any third party, including the Council of Europe Commissioner for Human Rights, and to any other person directly concerned.

It is appropriate to note that the ECtHR Registry sends to the parties both the final judgment that has entered into force and those that have not yet entered into force. This depends on which body made the judgment - the Committee, the Chamber or the Grand Chamber. Judgments of the Committee and the Grand Chamber are final and shall enter into force upon their adoption. With regard to judgments made by the Chamber, under Article 44 of the Convention there are three scenarios for their entry into force. According to paragraph 2 of the mentioned article, the judgment of the Chamber should be considered final:

(a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or

(b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

(c) when the panel of the Grand Chamber rejects the request to refer under Article 43

It follows from the above that the ECtHR Registry delivers to the parties in one case a final decision which has already entered into force (Committee, Grand Chamber), which confirms the new circumstance, while in the second case, it delivers a decision which can take effect in up to three months period or at a later date, depending on what further steps the parties take in relation to that judgment (declare that they will not request a referral to the Grand Chamber; they will not appeal the judgment within three months after it has been made; or in the event of an appeal, the Grand Chamber will review or reject the review of the Chamber judgment).

Taking into account the above mentioned, we recommend to make an amendment to the Criminal Procedure Code, stipulating ***that an appeal to review a judicial act under a new circumstance may be brought within a period of 4 or 6 months (provisionally) following a judgment or decision of an international court to which the Republic of Armenia is participant enters into force.*** As a result, there will be no need to differentiate between a judgment of the Committee, the Chamber or the Grand Chamber, in order to understand whether it has already entered into force at the time of delivering the appeal or not, etc. The proposed period will be sufficient even for the delivery of the judgment that has already entered into force to the parties and lodging of an appeal for the review of the judicial act on that basis.

As we mentioned above, the Code also reserved the right to file a complaint for the review of the judicial case based on the ECtHR judgment to the RA Prosecutor General and the deputy thereof. However, the Code does not specify in what terms the latter can submit this complaint. In practice, the RA Prosecutor's Office is informed about the decision from the letter of the RA Representative before the ECtHR. But even in these cases, problems with the calculation of the time period do not disappear, as the Representative of Armenia before the ECtHR himself/herself is usually not aware of the date of service of the ECtHR judgment (decision) to the applicant, and, therefore, cannot indicate the date of expiration of the four-month period. Hence, if the RA Prosecutor General or the deputy thereof wishes to lodge a

reopening appeal the only thing that can be done is to arrange the process "within a safe period". This, obviously, cannot be an adequate solution to the problem. Our recommendation seems to solve this problem as well. Thus, if we set a four-month or six-month period for the review of a judicial act after the entry into force of the ECtHR judgment, there will be no problems for either the applicant or the Prosecutor General or his/her Deputy in terms of starting and counting that period.

In the context of the reopening of cases based on ECtHR judgments, the language of the documents presented to the court acquires special importance. The official languages of the ECtHR are English and French. In order to reopen cases, it is necessary to attach, among other documents, also the ECtHR judgment or decision to the complaint. In this regard, it is worth mentioning that all procedural codes contain provisions on the conduct of court proceedings in Armenian. In addition, for example, the Code of Criminal Procedure states that the document presented to the court in another language is attached to the proceeding materials with the Armenian translation certified by the translator (Article 27). The Civil and Administrative Procedure Codes stipulate that the persons participating in proceedings submit all the procedural documents in Armenian or in another language with a proper Armenian translation (Articles 16 and 9, respectively). As we can see, the regulations of procedural laws regarding Armenian translation are not uniform. In particular, the term “proper translation” remains vague, to put it mildly.

In Armenia, ECtHR judgments are translated through the “Translation Center” SNCO of the Ministry of Justice of the Republic of Armenia, but they are not official translations, which is usually the case for official translations of normative legal acts under the requirements of the RA Law on Normative Legal Acts and other legal acts. Also, there is a question of what criteria should be used to assess the "adequacy" of that translation if the applicant decides to translate the ECtHR judgment on his own or even in person. For example, in one case the appellant submitted a judgment to the Court of Cassation translated personally, which, however, was not considered a proper translation by the Court of Cassation and the appeal was dismissed. In other words, under the established practice, translations done by the "Translation Center" SNCO of the RA Ministry of Justice are deemed proper translation of the ECtHR judgments.

Summing up this issue, it should be noted that in the event only translations of the Translation Center of the Ministry of Justice are deemed “proper”, the applicant or the Prosecutor General or his/her Deputy have a very limited time to file a complaint, as they will have to wait for the Armenian translation of the judgment. To this end, we would recommend, first to streamline in the procedural codes the requirement to attach the Armenian translation of the ECtHR judgment. This would bring clarity to the issue at stake and exclude ambiguities. Moreover, having regard that the Court of Cassation considers exclusively translations of the ECtHR judgments by the Ministry of Justice Translation Center as "proper", we recommend to introduce here a legislative clarification, which will prevent translation of the ECtHR judgments by the appellants on their own.

Our recommendation concerning the deadline for the reopening of judicial cases will in fact solve the time problem related to translations. In particular,

within three months after the translation of the ECtHR judgment by the Ministry of Justice Translation Center and its publication on the relevant websites, the applicants and the Prosecutor General or his/her Deputy will still have time to lodge an appeal for the revision of the case. Moreover, in order to make the deadlines for revision of the judicial act more predictable, it is proposed to translate judgments of the Committee and the Grand Chamber not in 3 but in 2 months, enhancing the preparation of the appeal for the appellant in terms of time.

RA Criminal Procedure Code states, that review of acquittals or decisions to discontinue prosecution is permitted during the statute of limitations for criminal liability. The exclusive review of the judicial act with the request to prove the innocence of the convict or their committing a lesser crime is not limited in time. The death of a convict is not an obstacle to conducting an exclusive review to restore the rights of the convict or other persons. (Article 404 (3-5) of the new Criminal Procedure Code).

The appeal of the exclusive review must be submitted to the Court of Cassation, or to the Court of Appeal, if the appealed judicial act was made by the court of first instance. In case of a review appeal by the Prosecutor General of the Republic of Armenia or the deputy thereof, copies of the review appeal and attached materials shall be duly sent to the persons who were private participants in the proceedings. In case of an exceptional review appeal by a private participant in the proceedings or a person authorized by him based on the decision of the ECtHR, copies of the appeal and the attached materials shall also be sent to the Prosecutor General of the Republic of Armenia or the deputy thereof. The documents confirming that copies of the appeal and the attached materials were sent to the mentioned addressees shall be attached to the appeal for exclusive review (Article 406).

An exclusive review proceeding based on an exceptional review appeal shall be initiated by a decision of a competent court. Exclusive review shall be carried out within a reasonable time.

In case of conducting the proceedings through the oral procedure, the person who filed the appeal, the authorized person thereof, the Prosecutor General of the Republic of Armenia and private participants of the given proceedings shall be notified about the place and time of the court session.

Initiation of an exceptional review shall be rejected by a decision if there are any of the following grounds:

1) the appeal was not brought in line with the requirements set forth in Article 355 (1) or (2), or Article 406 of the Code within the period established by the competent court;

2) the appeal is overdue, and in case of initiation, the motion to restore the missed deadline of the appeal was rejected;

3) the appeal was filed or signed by an ineligible person;

4) the appeal was brought against a judicial act that is not subject to exclusive review.

The decision to initiate or reject the initiation of review shall be made by the competent court within one month after receiving the appeal, and shall be sent to the appellant and the persons referred to in Article 406 (2) of the Code.

The decision of the Court of Appeal on rejecting the initiation of an exceptional review may be appealed by the interested person to the Court of Cassation in accordance with the special review procedure established by this Code (Article 407).

Based on the results of the exceptional review, the competent court shall completely or partially overturn the appealed judicial act, transfer the proceedings to the relevant lower court or terminate the criminal prosecution, and terminate the proceedings as well, as needed.

The court conducting the exclusive review has the right not to overturn the appealed judicial act only if it substantiates with a strong argument that the violation registered by the decision of the ECtHR could not substantially affect the outcome of the proceedings.

A court decision rendered as a result of an exceptional review shall enter into force from the date of its publication. The judicial act of the Court of Appeal may be appealed by the interested person through cassation.

A court decision rendered as a result of an exclusive review shall be sent within a reasonable time to the person who lodged the appeal and to the private participants in the given proceedings.

In case the appealed judicial act is overturned by an exceptional review and the proceedings are transferred to a lower court, the proceedings shall be conducted on a general basis, within the limits set by the court conducting the exceptional review.

CIVIL PROCEDURE CODE

Chapter 58 of the Civil Procedure Code deals with the review of judicial acts upon new circumstances. According to Article 415 of the Code, judicial acts of a Court of First Instance and of the Court of Appeal having entered into legal force, which are subject to appeal, orders on payment, as well as the decisions rendered by the Court of Cassation on returning the cassation appeal, leaving it without consideration, dismissing the cassation appeal and the decisions rendered based on examination of the cassation appeal may be reviewed based on newly emerged or new circumstances[9].

The judicial act delivered by a Court of First Instance having entered into legal force shall be reviewed by the Court of Appeal upon newly emerged or new circumstances. The judicial acts delivered by the Court of Appeal or by the Court of Cassation having entered into legal force shall be reviewed by the Court of Cassation upon newly emerged or new circumstances (Article 416).

According to Article 417 of the Code, persons having the right to lodge an appeal for reviewing a judicial act upon newly emerged or new circumstances shall be:

(i) persons participating in the case and the legal successors thereof, where the disputed legal relationship or that established by a judicial act allows legal succession;

[9] Pursuant to the decision of the RA Constitutional Court CCD-1573 of 27.01.21, paragraph 1 of Article 415 of Civil Procedure Code was recognized as contradicting Articles 61 and 75 of the RA Constitution and void to the extent that it precludes the review of judicial acts of the Court of Appeal which have entered into force, but are not subject to appeal upon new circumstances.

(ii) Prosecutor General and the deputy thereof, in cases provided for by law.

In this context, questions arise, such as whether the Prosecutor General or the deputy thereof have the right to appeal for the review of a judicial act following an ECtHR judgment in a civil case, or whether the above wording refers to newly emerged circumstances. If so, in what cases can such an appeal be lodged by the latter? This is important because the Code article uses the term "in cases provided for by law", which creates ambiguity. First, what law and what cases are we talking about? While it can be assumed that it is a matter of bringing an appeal in the field of protection of state interests, in this case, its connection with the ECtHR judgment remains unclear. Based on the above, we would suggest referring to "newly emerged" and "subjects having the right to review a judicial act on the basis of new circumstances" in two separate articles, in order to avoid any ambiguity.

According to Article 419 of the Code, "new circumstances shall be a basis for reviewing a judicial act, where: …

2) in a judgment or a decision, having entered into legal force, of an international court operating based on international agreements ratified by the Republic of Armenia, the fact has been substantiated that a person's right, as defined in the international agreement ratified by the Republic of Armenia, has been violated, or where the person, at the moment of entry into force of the given judgment or decision, has had the opportunity to exercise that right in compliance with the requirements (time limits) provided for by international agreements.

Appeal on reviewing a judicial act upon emerged or new circumstances may be lodged within a three-month period. Calculation of the three-month period shall begin on the date on which the judgment is served on the person who has applied to that court in the manner prescribed by the judgment of the international court in which the Republic of Armenia is a participant. In this regard, we will probably not make a separate analysis, as we have already presented the problems related to a similar article of the Code above, and it would be desirable for them to be resolved in the Code as well.

Furthermore, Article 420 (2) of the Code defines that an appeal on reviewing a judicial act may not be lodged where twenty years have passed since the entry of the judicial act into legal force. The mentioned time limit shall not be restored.

According to Article 421 of the Code, an appeal on reviewing a judicial act upon newly emerged or new circumstances shall be compiled in writing, in compliance with the requirements of Article 16 (2) of the Code. The appeal must be legible.

In the appeal on reviewing judicial acts upon newly emerged or new circumstances the following shall be included:

(1)name of the court whereto the appeal is addressed;

(2)names of the person having lodged the complaint and persons participating in the case, the addresses of their residence (location);

(3)name of the court having delivered the judicial act against which the appeal is lodged, the number of the case and the year, month, day of delivering the judicial act;

(4)the expounding of the newly emerged or new circumstance serving as a basis for reviewing the judicial act and substantiation of the reason it must be a basis for reviewing the judicial act;

(5)the claim of the person having lodged the appeal;

(6) list of documents attached to the appeal.

The following shall be attached to the appeal:

(1)document attesting the powers of the representative, if not available in the case and where the application has been signed by the representative;

(2)evidence confirming newly emerged or new circumstance;

(3)document attesting to the fact of legal succession where the appeal has been lodged by the legal successor of the person participating in the case;

(4)a motion on restoring the term for lodging an appeal where the appeal has been lodged in violation of the time limit as provided for by part 1 of Article 420 of this Code;

(5)evidence of having sent the appeal to the court having delivered the judicial act, except for the case where the appeal is lodged against a judicial act delivered by the Court of Cassation;

(6)evidence of having sent or handed the appeal and the attached documents to other persons participating in the case.

Motions on restoring the term for lodging an appeal, as well as other motions of the person having lodged the appeal, may also be submitted by being included in the appeal.

The appeal on reviewing a judicial act upon newly emerged or new circumstances shall be signed by the person having lodged it or the representative thereof.

According to Article 422 of the Code, the court shall render a decision on returning the appeal lodged for reviewing a judicial act under newly emerged or new circumstances within a one-month period after receiving it, where:

(1)requirements provided for by Article 421 of this Code have not been observed;

(2)an appeal has been lodged against the judicial act of a lower court where there is a judicial act of a higher court that has entered into legal force with regard to the given case or the given issue;

(3)existence of a newly emerged or new circumstance has not been obviously substantiated within the scope of the appeal.

The appeal of the review of the judicial act shall also be waived by the Court of Appeal and the Court of Cassation on the grounds established by Articles 371 and 395 of the Code, respectively.

In the decision of the court on returning the appeal lodged for reviewing a judicial act shall be indicated all prima facie contraventions made in the appeal. In case of rendering such a decision, only the decision on returning the appeal for reviewing a judicial act shall be sent to the person having lodged the appeal.

In case of eliminating the committed contraventions and lodging an appeal again within a two-week period following receipt of the decision on returning the appeal on the grounds of contravention of the requirements of Article 420 of the Code, lodging an appeal upon expiry of the defined time limit and not containing a motion on restoring the defined time limit or having lodged an

appeal against more than one judicial act, the court shall, within a month time, render a decision on initiating proceedings for reviewing the judicial act upon newly emerged or new circumstances. In case of lodging the appeal over again, new time limits shall not be provided for the elimination of contraventions.

The decision of the Court of Appeal on returning the appeal lodged for reviewing a judicial act may be appealed against in cassation procedure within two weeks after receiving it. Where the Court of Cassation cancels the decision, the court shall render a decision on initiating proceedings for reviewing a judicial act upon newly emerged or new circumstances within a three-day period after receiving the case.

The Court of Appeal shall reject the appeal for review of the judicial act on the grounds and in accordance with the procedure established by Article 372 of the Code. The Court of Cassation shall leave the appeal for reviewing a judicial act without consideration and shall reject to accept for proceedings in compliance with the grounds and the procedure as prescribed by Articles 396 and 397 of the Code.

Where there are no grounds for returning an appeal lodged for reviewing a judicial act, leaving it without consideration or dismissing it, the Court of Appeal shall render a decision on accepting the appeal lodged for reviewing the judicial act upon newly emerged or new circumstances for proceedings within one month period after receiving the appeal, and the Court of Cassation - within a three-month period.

The court shall send the decision on accepting for proceedings the appeal lodged for reviewing the judicial act to the person having lodged it and to other persons participating in the case after rendering the decision.

By the decision on accepting for proceedings the appeal lodged for reviewing the judicial act, or during the examination of the case, the court may, on its own initiative or upon motion of a person participating in the case, suspend execution of the judicial act or a part thereof.

Suspension of execution of the judicial act appealed against or a part thereof shall be retained until the judicial act rendered in the result of the appeal enters into legal force, and in case the proceedings for reviewing the judicial act are terminated - before the announcement of the judicial act on that.

The person participating in the case shall have the right to send a response or submit it to the court and other persons participating in the case within a two-week period after receiving the decision of the court on accepting for proceedings the appeal lodged for reviewing a judicial act upon newly emerged or new circumstances.

The response to the appeal lodged for reviewing a judicial act must comply with the requirements prescribed by Articles 369 or 398 of this Code respectively.

The person submitting the response may attach evidence to the response to the appeal lodged for reviewing a judicial act.

The response shall be attached to the response submitted, and, in case evidence has been submitted, also confirmation on having sent the copies of that evidence to other persons participating in the case.

The response shall be signed by the person having submitted it or by a rep-

resentative thereof. A document attesting powers of the representative shall be attached to the response signed by the representative.

While reviewing judicial acts upon newly emerged or new circumstances, the Court of Appeal and the Court of Cassation shall examine the case in the procedure of review in compliance with the rules defined for examination of cases in a relevant court prescribed by the Code, unless otherwise provided by the Chapter on the review of a judicial act upon newly emerged or new circumstances.

During the examination of the appeal on reviewing a judicial act, the court shall study the evidence existing in the case.

For the purpose of determining the availability or absence of grounds of the appeal lodged for reviewing a judicial act, the court shall evaluate the evidence examined and may consider new evidence as confirmed, where it is possible to arrive at such a conclusion based on the evidence examined.

When determining the availability of grounds for the review of a judicial act upon a new circumstance, the court shall reverse the judicial act being reviewed and remand it to the respective court for new examination, if it is not possible to amend it.

When reviewing the judicial act on the basis of the judgment of the ECtHR, the court may not reverse the judicial act, only if it substantiates that it could not in fact affect the outcome of the case.

When reversing the judicial act being reviewed, the court shall amend it where the facts confirmed in the case make it possible to deliver a new judicial act without a new examination of the case.

In the result of the examination of the appeal lodged for reviewing a judicial act upon newly emerged or new circumstances, the court shall render a decision which must comply with the requirements of Articles 381 and 406 of the Code, respectively.

The judicial act of the Court of Appeal may be appealed against in the Court of Cassation pursuant to the general procedure prescribed by law.

ADMINISTRATIVE PROCEDURE CODE

Chapter 25 of the RA Administrative Procedure Code deals with the reopening of court cases under a new circumstance.

Pursuant to Article 182.1 (3) of the Code of Administrative Procedure, new circumstances are grounds for review of a judicial act if, by a judgment or decision of an international court acting on the basis of an international treaty ratified by the Republic of Armenia confirmed the fact of violation of a person's right provided by an international treaty ratified by the Republic of Armenia.

A judicial act of an Administrative Court that has entered into legal force shall be reviewed by the Court of Appeal under a new circumstance unless that judicial act has been reviewed by the Court of Appeal or the Court of Cassation before it enters into legal force. Decisions of the Courts of Appeal and Cassation that have entered into legal force shall be reviewed under new circumstances by the Court of Cassation.

An application for the review of a judicial act under emerged or new circumstances may be launched by:

1) participants of the trial, as well as their legal successors, if the disputed legal relationship allows legal succession;

...

3) persons who, at the time of the issuance of the judicial act by the international court where the Republic of Armenia is a participant, may apply to an international court in accordance with the international treaty (Article 184 of the Code).

Article 185 of the Administrative Procedure Code deals with the terms of reviewing a judicial act under emerged or new circumstances. According to that article, an application for review of a judicial act under emerged or new circumstances may be submitted within 3 months after the relevant ground appears.

In contrast to the current new Criminal Procedure and Civil Procedure Codes, which considered the start of the appeal period for reviewing a judicial act, the date of service of a judgment or decision on a person applying to that court in accordance with ECtHR regulations, the Administrative Procedure Code stipulates that an application for review of a judicial act may be submitted within 3 months after the relevant grounds appear. In such case, the basis is **the valid** judgment or decision on violation of a right or freedom guaranteed by the Convention. In the case of regulations of the Administrative Procedure Code, most of the problems can arise in the case of the judgments of the Committee and the Grand Chamber, because, as already mentioned above, they are final and come into force from the moment of issuing. In this context, it should not be forgotten that they have yet to be properly delivered to the applicant and must be translated by the Translation Center of the RA Ministry of Justice. In such circumstances, the possibility of bringing a complaint to review the judicial act within three months on the basis of a new circumstance seems very unrealistic. Therefore, in order to avoid problems in practice, we would suggest expanding the recommendation made in paragraph 12 above to the provisions of the Administrative Procedure Code.

The legal successor of an individual participating in the proceedings may submit an application for review of a judicial act under the emerged or new circumstances within 3 months after being recognized as such if the legal successor did not exercise his/her right to submit an application because of death (Article 185.2). As a matter of fact, the deadline for the legal successor to file a complaint for review of a judicial act is not regulated in the Administrative Procedure Code and the Code needs to be streamlined in this regard.

An application for review of a judicial act may not be lodged if twenty years have elapsed since the entry into force of the judicial act. An application for review of a judicial act under the emerged or new circumstances shall be made in writing, stating:

1) name of the court to which the application is addressed;

2) names of the person submitting the application and participants in the proceedings;

3) year, month, date and case number of the judicial act subject to review;

4) grounds for reviewing the case under the emerged or new circumstances, as well as substantiations concerning their impact on the outcome of the case;

5) the subject matter of the claim in the application;

6) list of documents attached to the application.

Attached to the application shall be the fact of a new circumstance or evidence confirming the new circumstance, as well as other additional evidence that has not been previously presented. In cases provided by law, the application shall be accompanied by a document confirming the payment of the state fee related to its examination or the code certifying the transfer of the state fee to the relevant treasury account issued by the settlement company, and where the law provides for the possibility of postponing or deferring the payment of the state fee or reducing its amount, the application must include a relevant motion.

The application must be signed by the person submitting it or by his/her representative.

The application and the attached documents and materials shall be filed with the relevant Court.

In the absence of grounds for dismissing the application, the Court shall make a decision on accepting the application for proceedings within fifteen days following the day of receiving it.

Within three days after the decision to accept the application is made, it must be sent to the participants of the proceedings, at the same time informing them of their right to respond to the application.

Parallel to sending the decision to accept the application for proceedings, the participants of the trial shall be notified about the time and place of the court session.

Articles 188-190 of the Code of Administrative Procedure establish norms on the grounds for dismissing the application, the procedure for submitting the response to the application and the procedure for reviewing judicial acts under the emerged or new circumstances.

CONCLUSION

Summarizing the conducted analysis and highlighting the gaps, shortcomings and uncertainties in the national regulations concerning the review of judicial acts following the ECtHR judgments, we have arrived at the following conclusions and recommendations:

- all procedural codes consider judgments of the European Court of Human Rights which identify violations of the rights and freedoms of a person guaranteed by the Convention or the protocols thereto, as an unconditional basis for review of a judicial act. The problem is that in such cases it is not always possible to eliminate the violation by reviewing the judicial act or to reach *restitutio in integrum*. In light of this, we propose to add in the procedural codes a clause for review of a judicial act, noting that ***it can be reviewed if the violation had an impact on the outcome of the case and it cannot be eliminated or the resulting damage cannot be compensated other than by a revision of the judicial act***. As a matter of fact, such conditions exist in the procedural codes of a number of European countries[10]. In this regard, it should be noted that the Court of Cassation rejected the reopening of the case on a number of appeals, finding that the judgment or decision of the European Court indicating a violation is not a ground for reversing or quashing the judicial act.[11]

[10] See, for example, Article 366 (1) (7) of the Estonian Criminal Procedure Code.

[11] See, for example the decision of the Court of Cassation of November 7, 2019 on criminal

- We would recommend to amend provisions on the deadlines for the revision of a judicial act following a judgment or decision of the ECtHR, and stipulate that ***an appeal to review a judicial act under a new circumstance may be brought within a period of 4 or 6 months***.
- Given the problems arising in practice with regard to the requirement to submit an Armenian translation of the ECtHR judgments, we would recommend ***to revisit in the procedural codes the requirement to attach an Armenian translation of the ECtHR judgment*** regardless of the existence of a general provision on the language of the trial and the documents submitted during it.
- Furthermore, given that *there is uncertainty with the "proper translation" of ECtHR judgments into Armenian**, we would recommend*** ***to clarify in the legislation that translations of SNCO "Translation Center" of the RA Ministry of Justice shall be considered as such*** and acceptable to the Court of Cassation. This will exclude translation of judicial decisions by the applicants, requesting revision of the judicial acts at their own expense and save them from extra costs.
- In order to streamline the deadlines for revision of the judicial acts, we would recommend ***to translate the decisions of the ECHR or at least those made by the Committee and the Grand Chamber not in 3 but in 2 months***, which will enhance filling in the application by the applicant in terms of time.
- We would recommend in addition to the private participants in the proceedings***, to add to the list of persons in the Civil Procedure Code eligible to apply for revision of the judicial act in light of new circumstances, the persons involved in the examination of the case in the ECtHR that have a legitimate interest in revision of that act***.
- Considering that the time limit for filing a complaint by the legal successor of a participant in the trial is not regulated in the Civil Procedure Code, we would recommend ***to regulate the issue in the Civil Procedure Code in a similar way to the Administrative Procedure Code.***

ԱՐՏԱԿ ԱՍԱՏՐՅԱՆ – ***Մարդու իրավունքների եվրոպական դատարանի վճիռների արդյունքում դատական գործերի վերաբացման ընթացակարգը ՀՀ օրենսդրությունում և պրակտիկայում*** – Մարդու իրավունքների և հիմնարար ազատությունների պաշտպանության մասին կոնվենցիան (այսուհետ՝ Կոնվենցիա) երաշխավորում է մի շարք իրավունքներ և ազատություններ, որոնք Կոնվենցիան վավերացրած պետությունները պարտավորվել են հարգել իրենց իրավազորության ներքո գտնվող տարածքներում: Կոնվենցիայի հիման վրա ստեղծված Մարդու իրավունքների եվրոպական դատարանի (այսուհետ՝ ՄԻԵԴ) արձանագրած խախտումների առնչությամբ հաճախ անհրաժեշտություն է լինում ներպետական մակարդակում վերաբացելու դատական գործերը: Այս գործընթացի կարևորությունն այն է, որ դա առանցքային տեղ է զբաղեցնում ՄԻԵԴ վճիռների կատարման համակարգում և որոշ դեպքերում դիտարկվում է որպես խախտված իրավունքների վերականգնման միակ ճանապարհ:

case No. ECD/ 0190/06/08, the decision of the Court of Cassation of October 19, 2021, the decision of the Chamber of Civil and Economic Affairs of the Court of Cassation of 07.04.2006 on grounds for review under new circumstances, etc.

Սույն հոդվածի շրջանակներում ուսումնասիրվել են ՄԻԵԴ վճիռների հիման վրա դատական գործերի վերաբացման վերաբերյալ Հայաստանի Հանրապետության օրենսդրությունը և պրակտիկան: Մասնավորապես, վերլուծության են ենթարկվել ՀՀ քրեական դատավարության, ՀՀ քաղաքացիական դատավարության, ՀՀ վարչական դատավարության օրենսգրքերի և այլ իրավական ակտերի վերաբերելի իրավակարգավորումները: Հոդվածում կատարված համակողմանի ուսումնասիրությունների արդյունքում վեր են հանվել քննարկվող ոլորտում ՀՀ օրենդրության և պրակտիկայի բացերը, թերությունները և անորոշությունները, որոնց լրացման, վերացման կամ հստակեցման ուղղությամբ կատարվել են համապատասխան առաջարկություններ:

Բանալի բառեր - *ՄԻԵԴ վճիռների կատարում, դատական գործերի վերաբացում, դատական գործերի վերանայում, դատական գործերի վերաբացման օրենսդրություն, դատական գործերի վերաբացման պրակտիկա, վերաբացման օրենսդրության թերություններ, դատական գործերի վերաբացման գործնական խնդիրներ*

АРТАК АСАТРЯН – *Порядок возобновления судебных дел в законодательстве и практике РА в результате решений Европейского суда по правам человека.* – Конвенция о защите прав человека и основных свобод (далее – Конвенция) гарантирует ряд прав и свобод, которые государства, ратифицировавшие Конвенцию, обязаны соблюдать на территориях, находящихся под их юрисдикцией. Что касается нарушений, зафиксированных Европейским судом по правам человека (далее ЕСПЧ), созданным на основании Конвенции, часто возникает необходимость возобновления судебных дел на внутригосударственном уровне. Важность этого процесса заключается в том, что это занимает ключевое место в системе исполнения решений ЕСПЧ и в ряде случаев рассматривается как единственный способ восстановления нарушенных прав.

В рамках данной статьи изучены законодательство и практика Республики Армения относительно возобновления судебных дел на основании постановлений ЕСПЧ. В частности, были проанализированы соответствующие правовые нормы Уголовно-процессуального, Гражданского процессуального, Административно-процессуального кодексов РА и других правовых актов. В результате комплексных исследований, проведенных в статье, были освещены пробелы, недостатки и неопределенности законодательства и практики РА в обсуждаемой сфере и даны соответствующие рекомендации по их восполнению, устранению или уточнению.

Ключевые слова*: исполнение решений ЕСПЧ, возобновление судебных дел, рассмотрение судебных дел, законодательство о возобновлении судебных дел, практика возобновления судебных дел, недостатки законодательства о возобновлении судебных дел, практические проблемы возобновления судебных дел*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 122-130 *Եվրոպական և միջազգային իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.122

THE LINKAGE BETWEEN HUMAN TRAFFICKING AND MIGRATION: IDENTIFICATION OF VICTIMS

SERGEY GHAZINYAN

Trafficking in human beings, as a modern form of slavery, severely violates people's fundamental rights and dignity. The victims of human trafficking are being subjected to exploitation as a result of violence or the threat of it, fraud, or lack of awareness of their rights. Migrants are especially vulnerable to trafficking, and among them are especially those with certain socioeconomic issues or in need of international protection.

Considering the socio-economic, humanitarian, and documentation problems of the aforementioned group and the probability of illegal movements and presence in the territory of certain countries, they are more vulnerable to trafficking.

The current article seeks to analyze the correlation between migration and the phenomenon of human trafficking, as well as analyze the minimum necessary steps that the state authorities, particularly, those operating in the field of migration need to implement. Those activities should be aimed at ensuring effective combat against the trafficking in human beings by detecting and referring the relevant cases in the frame of migration to the competent authorities.

Key words: *human trafficking and exploitation, victim of human trafficking, identification of victims of human trafficking, asylum seeker, refugee, international protection, migrant, migration and human trafficking, asylum and human trafficking, GRETA*

I. Applicable legal framework with regard to refugees and migrants

Refugees and asylum seekers

It is particularly important that the majority of persons representing the mentioned group of migrants suffer life-threatening situations in their countries of origin and rarely have access to personal documents, thus facing challenges in obtaining legal status in the country of presence. As a result, they become more "targetable" in the context of recruitment and exploitation by criminals and human traffickers.

The main international treaty regulating the international protection and rights of refugees is the 1951 Refugee Convention. According to Article 1(A)(2) of the Convention, the term "refugee" shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[1]

[1] UN Refugee Convention relating to the Status of Refugees (1951), Article 1(A)(2), available at: https://www.unhcr.org/1951-refugee-convention.html.

Hence, refugees are in need of international protection. Meanwhile, an asylum seeker is a person who has left their country and is seeking protection from persecution and serious human rights violations in another country, but who hasn't yet been legally recognized as a refugee and is waiting to receive a decision on their asylum claim. Seeking asylum is a human right. This means everyone should be allowed to enter another country to seek asylum.[2]

It should be highlighted that the states should treat asylum seekers as those in need of international protection until it is proven otherwise following the complete and objective procedure. However, the asylum system differs between states, and in some cases, it does not exist.[3]

Migrants

According to the IOM, "Migrant" is an umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes several well-defined legal categories of people, such as migrant workers, persons whose particular types of movements are legally defined, such as smuggled migrants, as well as those whose status or means of movement are not specifically defined under international law, such as international students.

It should also be noted that at the international level, no universally accepted definition of "migrant" exists. The present definition was developed by IOM for its purposes, and it is not meant to imply or create any new legal category.[4]

However, Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines "migrant worker" as referring to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. It also gives the definition of the "members of the family" and prescribes the rights of all those benefiting from the Convention[5].

II. The link between human trafficking and migration

While the previous section seeks to provide the overall legal definition of migrants and refugees, the current one is intended to show the causal link between migration and the phenomenon of human trafficking and discuss the possible scenarios in practice. For that purpose, the legal definition of human trafficking should be analyzed.

According to the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter referred to as the "Convention"), "Trafficking in human beings" shall mean the recruitment, transportation, transfer,

[2] Amnesty International, "Refugees, Asylum Seekers and Migrants" available at: https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/#:~:text=An%20asylum%20seeker%20is%20a,decision%20on%20their%20asylum%20claim.

[3] Annick Pijnenburg and Conny Rijken (2021), "Moving Beyond Refugees and Migrants", available at: https://www.tandfonline.com/doi/epdf/10.1080/1369801X.2020.1854107?needAccess=true&role=button.

[4] IOM, "Definition of "Migrant" available at: https://www.iom.int/about-migration.

[5] UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers.

harbouring, or receipt of persons using the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.[6]

As it is foreseen from the above-cited description, trafficking in human beings might be conditionally divided into three main stages: (i) recruitment, (ii) transportation, and (iii) exploitation.

Various methods are used for recruitment purposes, including the coercion or deception of a victim of human trafficking into work that involves exploitation. In particular, people are offered jobs or opportunities on favourable and enticing terms that do not actually exist, or through which exploitative working conditions are imposed on them. Some victims are also kidnapped or abused during recruitment.

Trafficking also involves overt or covert transportation from one place to another for the purpose of exploitation. Moreover, it can be done both in a group and individually, using public or private means of transport. It is essential to consider that in cases where people are moved from one country to another for the purpose of exploitation, crossing a state border can be not only illegal but also legal. Transporting people within the country for the purposes of trafficking or exploitation does not imply crossing a state border. The purpose of the transfer is to isolate and easily control the victim.

The exploitation of another person for prostitution or other forms of sexual exploitation, forced or compulsory labour or coercion to provide a service or perform illegal acts, enslavement or slavery-like conditions, purchase or sale, cell, organ, taking tissue or biological materials or fluids is the last conditional stage. This definition is envisaged by the Article 188 (4) of the RA Criminal Code.[7]

According to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[8]

It is noteworthy that the use of coercion and its degree in all the mentioned stages of human trafficking or exploitation is not unambiguous. For example, in some cases, physical force is used, and in some, the victims are even practically unaware that they are being exploited or transferred for the purpose of exploita-

[6] Council of Europe Convention on Action against Trafficking in Human Beings (2005), Article 4 (a), available at: https://rm.coe.int/168008371d.

[7] RA Criminal Code (2021), Article 188 (4), available at: https://www.arlis.am/DocumentView.aspx?DocID=172528.

[8] UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000), Article 3 (a), available at: https://www.ohchr.org/sites/default/files/ProtocolonTrafficking.pdf.

tion. Therefore, it is necessary not to consider the possibility of human trafficking only in the case of self-identification of the alleged victim, but also to pay attention to the situations when the person may not be aware of his or her own exploitation.

Although human trafficking does not necessarily involve crossing a state border, its practical manifestations make it clear that it is closely related to migration. People affected by migration crises caused by war or other general problems or involved in mass flows are considered more vulnerable to trafficking and have a higher probability of being targeted by criminals for this purpose. The same applies to people who need international protection on an individual basis.

The link between migration and human trafficking is also manifested in the context of other migration flows, particularly labour migration. In order to solve social-economic problems, migrants often leave their country of residence to work abroad. This is also a common phenomenon in Armenia. Migrant workers are, in practice, subjected to exploitation, becoming victims of deception and violence. Coercion is often associated with the victim not having a legal basis for residence in the country of destination, handing over the identity document to the criminal, and other issues.

Therefore, one of the stages of human trafficking, transportation, often involves the transfer of the victim from one country to another. Furthermore, as the acts of transportation and relocation imply, the perpetrator may force the victim to leave his or her residence using seclusion, manipulation, and disorientation as a means of control.

However, human trafficking is also very likely to affect voluntary migration. Criminals take advantage of the vulnerability of potential migrants in their country of origin and exploit their desire or need to migrate. Therefore, the link between migration and human trafficking is deeply rooted in the causes of migration: the economic, social, and political conditions of the country of origin, including poverty, war, violence, and persecution.

Risks and vulnerabilities can also exist in the destination country, especially for migrants who lack legal status. All these factors reveal the vulnerability of migrants to human trafficking and highlight the need for necessary state mechanisms to identify and provide assistance to victims by preventing human trafficking.

In the conditions of existing migration flows, the transportation of people for the purpose of trafficking is mainly carried out by the same channels and means used by persons seeking international protection, economic and other migrants, as well as persons traveling directly. Therefore, in the case of such mixed flows, it is difficult to clearly identify the alleged victim of human trafficking or exploitation if the competent authority does not have sufficient capacity.

The identification, assistance, and protection of an alleged victim of human trafficking or exploitation, as well as the identification of the alleged crime and the accountability of the perpetrators, depend on an effective response by the competent state authority.

In this context, the difference between the transportation of victims of hu-

man trafficking and migrant smuggling (organization of illegal migration) should be discussed. It can be difficult to distinguish between these phenomena because people might illegally cross the state border in both cases.

In contrast to human trafficking, which can take place both domestically and internationally, migrant smuggling is a crime that takes place only across borders. It consists in assisting migrants to enter or stay in a country illegally for financial or material gain. Smugglers make a profitable business out of migrants' need and desire to enter a country and the lack of legal documents to do so. International law requires governments to criminalize migrant smuggling, but not those who are smuggled.

Since migrants consent to the smuggling venture, mostly due to the lack of regular ways to migrate, they are not considered victims in absolute terms. However, smuggled migrants are often put in dangerous situations by smugglers (such as a hazardous sea crossing) and might, therefore become victims of other crimes during the smuggling process, including severe human rights violations.[9]

Furthermore, as described by the EUROPOL, although patterns of human trafficking are similar to those seen in people smuggling, they are different legally and a broad distinction can be made between the two. In general, the individuals who pay a smuggler in order to gain illegal entry to a country do so voluntarily, whereas the victims of human trafficking are often duped or forced into entering another country. In addition, people smuggling does not necessarily involve exploitation for economic purposes.[10]

There is also academic research on certain case studies where the trafficking of migrants and those in need of international protection are thoroughly analysed. In the context of migrant smuggling the phenomenon of human trafficking for ransom is also analysed.[11] Certain academic analysis is also made on human trafficking for ransom in the digital age and how people can become trapped in a human trafficking cycle by the use of Information and communication technologies (ICTs).[12]

In cases where the victims of human trafficking are foreigners or persons with documentation issues, authorities may conclude that they are migrants trying to cross the border illegally rather than victims of human trafficking. In that case, the criminal involved is an organizer of illegal migration, not a human trafficker. Such assessments might result in violation of the non-punishment principle of the victim of human trafficking, non-provision of assistance and protection, as well as prevent the cases to be investigated as human trafficking, and/or alleged perpetrators from being prosecuted with the appropriate crime.

[9] UNODC, "Human trafficking and migrant smuggling", available at: https://www.unodc.org/e4j/en/secondary/human-trafficking-and-migrant-smuggling.html.

[10] EUROPOL, "Trafficking in Human Beings", available at: https://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/trafficking-in-human-beings.

[11] Klara Smits & Mirjam Van Reisen (2023), "Deceived and Exploited: Classifying the Practice as Human Trafficking", available at: https://www.researchgate.net/publication/367254709_Deceived_and_Exploited_Classifying_the_Practice_as_Human_Trafficking/link/63cea4b26fe15d6a57425555/download.

[12] Mirjam Van Reisen, Klara Smits, Morgane Wirtz & Anouk Smeets (2023), "Living in a Black Hole: Explaining Human Trafficking for Ransom in Migration", available at: https://research.tilburguniversity.edu/en/publications/living-in-a-black-hole-explaining-human-trafficking-for-ransom-in.

Furthermore, arrested traffickers often attempt to frame their human trafficking case as smuggling, crossing a border illegally, or being in the country illegally to avoid a comprehensive investigation and more severe punishment. Victims may believe they are being smuggled, even if they are actually being trafficked or transported for the purpose of exploitation in the country of destination.

Taking into account the above, it is necessary to distinguish between the illegal crossing of the state border by the victim of human trafficking by force or deception and the migrant smuggling or organization of illegal migration by establishing the relevant domestic mechanisms and ensuring the capacity of competent state officials.

Another group of vulnerable people to human trafficking in the context of migration are those in need of international protection. According to the UNHCR Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, refugees are vulnerable to human trafficking, inter alia, for the grounds set out in the 1951 Refugee Convention, as well as for social-economic reasons.[13]

Furthermore, in those cases, the non- refoulement principle should be duly respected. The Convention establishes the grounds upon which a victim or potential victim of trafficking may not be removed from the State's territory. In particular, Article 10(2) states that: "[E]ach Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of … (trafficking in human beings) has been completed by the competent authorities …".[14]

As stated in the Guidance Note of the Council of Europe Group of Experts on Action Against Trafficking in Human Beings (hereafter referred to as the "GRETA") on the entitlement of victims of trafficking and persons at risk of being trafficked to international protection, "[T]he Convention recognizes that trafficked people may have international protection needs, and it requires Parties to duly assess such protection needs. The essence of international protection is to provide relief from potential future danger. Accordingly, the duty of international protection applies not only to victims of trafficking but also to those at risk of being trafficked, should they return to their country of origin. Any removal of a person to a territory where they are at risk of being trafficked will constitute a violation of the principle of non- refoulement".[15]

Therefore, the state authorities should ensure proper identification and

[13] UNHCR Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, pp. 29-40, available at: https://www.unhcr.org/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html.

[14] Council of Europe Convention on Action against Trafficking in Human Beings (2005), Article 10 (2), available at: https://rm.coe.int/168008371d.

[15] Council of Europe Group of Experts on Action Against Trafficking in Human Beings Guidance Note On the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection, paragraph 15 (2020), available at: https://rm.coe.int/ guidance-note-on-the-entitlement-of-victims-of-trafficking-and-persons/16809ebf44.

risk-assessment mechanisms in order to detect the cases of trafficking in human beings among those in need of international protection and guarantee the implementation of the principle of non- refoulement. For this purpose, the following guiding principles should be considered:

Non-punishment;

Access to Asylum for Victims of Trafficking;

Assistance to Victims of Trafficking;

Proper Return and Repatriation procedure of Victims of Trafficking;

Specificities of work with the child Victims of Trafficking and Asylum.[16]

Furthermore, it is important not only to raise awareness about human trafficking and migrant smuggling but also to address the root causes of social vulnerabilities, such as poverty, conflict, and to uphold human rights.[17]

III. State response to trafficking in human beings in the context of migration

Over time, the changing forms and methods of human trafficking force state authorities to take systemic steps: adopt strategic documents, create specialized structures against human trafficking, form inter-agency bodies, etc.

The peculiarity of human trafficking lies in the fact that the various forms of exploitation and stages can be related to different state bodies and organizations. Although the primary function of certain entities might not be to combat human trafficking, state officials may have the opportunity to detect and prevent human trafficking in their day-to-day work.

That is the reason why in the course of action against human trafficking, states should engage not only law enforcement authorities but also other state entities and organizations. In this context, the migration authorities are the most relevant entities to combat the trafficking in human beings in the context of migration.

Furthermore, this may be related, for example, to the vulnerability of the group of persons who are considered the main beneficiaries of a particular body. In the case of migration authorities, indeed, they are migrants and refugees.

For this purpose, the state response should include not only legislative regulations on combat human trafficking but strict guidelines for the state authorities. As mentioned in the Uniform Guidelines for the Identification and Referral of Victims of Human Trafficking within the Migrant and Refugee Reception Framework in the OSCE Region [M]any victims do not recognize themselves as such, since they may be in transportation, post-recruitment or pre-exploitation phase, and thus it is possible that no exploitation has occurred yet. Others, particularly undocumented migrants, may avoid identifying themselves to authorities due to fear of deportation, retaliation by their traffickers, or because their behaviour has been pre-conditioned by religious rituals or beliefs that have been imposed upon them. In some cases, the victim may have a relationship with the trafficker or may fear stigmatization, especially if the abuse they have suffered was sexual in nature. To reflect these scenarios, a unified set of identification indicators should be developed and appropriately adjusted to

[16] Ibid. paragraphs 34-48.

[17] UNODC, "Human trafficking and migrant smuggling", available at: https://www.unodc.org/e4j/en/secondary/human-trafficking-and-migrant-smuggling.html.

the specific context of the reception procedures.[18]

In the case of Armenia, based on the decree of the Head of the Migration Service, the indicators for the identification of presumed victims of human trafficking or exploitation were defined. Following the adoption of the decree, the respective handbook on the relevant topics was prepared, and the competent staff of the Migration Service was trained.

Conclusion

Considering the above, the role of state institutions and officials against human trafficking or exploitation is essential. For that purpose, state authorities should establish effective detection, assistance, and referral mechanisms with regard to the alleged cases of human trafficking. The system should contain criteria/indicators and specific questions aimed at identifying the possible cases, making the activities of competent authority more predictable, effective and clear in relevant situations. Latter should be a subject of further research and adaptation to the national context prior to its implementation.

Nevertheless, despite the establishment of the legislative framework and guidelines, it is important to develop the theoretical and practical capacities of competent state officials, aimed at ensuring the effective implementation of legal regulations.

ՍԵՐԳԵՅ ՂԱԶԻՆՅԱՆ – ***Մարդկանց թրաֆիքինգի և միգրացիայի փոխկապակցվածությունը. զոհերի նույնականացում*** – Մարդկանց թրաֆիքինգը՝ որպես ստրկության ժամանակակից դրսևորում, կոպտորեն խախտում է մարդկանց հիմնարար իրավունքները և արժանապատվությունը: Մարդկանց թրաֆիքինգի զոհերը ենթարկվում են շահագործման՝ բռնության կամ դրա սպառնալիքի, խարդախության կամ իրենց իրավունքների մասին տեղեկացված չլինելու հետևանքով: Միգրանտները հատկապես խոցելի են թրաֆիքինգի նկատմամբ, և նրանց թվում են հատկապես որոշակի սոցիալ-տնտեսական խնդիրներ կամ միջազգային պաշտպանության կարիք ունեցողները:

Հաշվի առնելով վերոհիշյալ խմբի սոցիալ-տնտեսական, հումանիտար և փաստաթղթային խնդիրները և որոշ երկրների տարածքում անօրինական տեղաշարժերի ու ներկայության հավանականությունը՝ նրանք առավել խոցելի են թրաֆիքինգի նկատմամբ:

Սույն հոդվածը նպատակ ունի վերլուծել միգրացիայի և մարդկանց թրաֆիքինգի երևույթի հարաբերակցությունը, ինչպես նաև այն նվազագույն անհրաժեշտ քայլերը, որոնք պետք է իրականացնեն պետական, մասնավորապես միգրացիայի ոլորտում ներգրավված մարմինները: Այդ գործողությունները պետք է ուղղված լինեն մարդկանց թրաֆիքինգի դեմ արդյունավետ պայքարի ապահովմանը՝ միգրացիայի շրջանակներում համապատասխան դեպքերը բացահայտելու և իրավասու մարմիններին փոխանցելու միջոցով:

Բանալի բառեր — *մարդկանց թրաֆիքինգ և շահագործում, մարդկանց թրաֆիքինգի զոհ, մարդկանց թրաֆիքինգի զոհերի նույնականացում, ապաստան հայցող,*

[18] OSCE Uniform Guidelines for the Identification and Referral of Victims of Human Trafficking within the Migrant and Refugee Reception Framework in the OSCE Region (2019), available at: https://www.osce.org/files/f/documents/2/4/413123_0.pdf

փախստական, միջազգային պաշտպանություն, միգրանտ, միգրացիա և մարդկանց թրաֆիքինգ, ապաստան և մարդկանց թրաֆիքինգ, ԳՐԵՏԱ

СЕРГЕЙ КАЗИНЯН – ***Связь между торговлей людьми и миграцией: идентификация жертв.*** – Торговля людьми как современная форма рабства нарушает фундаментальные права и достоинство людей. Жертвы торговли людьми подвергаются эксплуатации в результате насилия или угрозы его применения, обмана, введения в заблуждение или незнания своих прав. Мигранты особенно уязвимы в плане торговли людьми, и среди них особенно те, у кого есть определенные социально-экономические проблемы или кто нуждается в международной защите.

Учитывая социально-экономические, гуманитарные и документальные проблемы вышеупомянутой группы, а также вероятность нелегального перемещения и присутствия на территории отдельных стран, они более уязвимы в плане торговли людьми.

В настоящей статье ставится задача проанализировать взаимосвязь между миграцией и явлением торговли людьми, а также проанализировать те первоначальные шаги, которые необходимо осуществить государственным органам, в частности тем, которые работают в сфере миграции. Эта деятельность должна быть направлена на обеспечение эффективной борьбы с торговлей людьми путем выявления и передачи соответствующих случаев в сфере миграции компетентным органам.

Ключевые слова: *торговля людьми и эксплуатация людей, жертва торговли людьми, идентификация жертв торговли людьми, лицо, ищущее убежища, беженец, международная защита, мигрант, миграция и торговля людьми, убежище и торговля людьми, ГРЕТА*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 131-141 *Եվրոպական և միջազգային իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.131

INTERNATIONAL PATENT LAW CONFLICTS WITH THE RIGHT OF ACCESS TO MEDICINES AND HEALTHCARE: KEY ASPECTS

ANI SIMONYAN

This article is dedicated to the legal conflicts between international patent law and the right of access to medicines and healthcare. This article discusses the problem above under the light of the framework of the international agreements, mainly WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Doha Declaration on the TRIPS agreement and public health. As we know, patents give exclusive rights to the inventors to use their innovations for a long period of time. This limits the ability of public to get easy access to medications, consequently to indispensable healthcare. It is undoubtable that the quality of life and the healthcare of the public is an absolute priority. On the contrary, the expropriation of patent rights, inadequate compensation of damages for issuing the compulsory licensing may have irreversible consequences for the states. Foreign investor may file claims against the governmental authorities to ad hoc or permanent arbitral institutions.

Key words: *access to medicines, public health, TRIPS agreement, Doha Declaration, pharmaceutical patent disputes, compulsory licensing, foreign investment, patent law*

Patents are one of the leading legal tools of intellectual property rights protection. As Bruce Lehman described *"patents are exclusive property right in intangible creations of the human mind."*[1] To put it differently, after the innovation is registered by governmental authorities, the inventor may protect his invention from using it without his permission. In other words, the inventor can use his innovative product like any other property.

Recent years there is an endless political, social and legal debate on the conflict between patent law and the right to access to medications. Some scholars and politicians state that the pharmaceutical manufacturers who are holding the patent rights monopolies on the drugs and leads the pricing policy for life-essential medications.[2] In contrast, the business world representatives and key players of financial markets insist that compulsory licensing of drugs is nothing but expropriation of intellectual property rights of pharmaceutical sector.

This article discusses the problem as mentioned above under the light of the framework of the international agreements, mainly WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Doha Declaration on the TRIPS agreement and public health. We will present both sides opinion and will argue the statement that protection of intellectual

[1] Bruce Lehman, The Pharmaceutical Industry and the Patent System, International Intellectual Property Institute, {2003} 2 < https://users.wfu.edu/mcfallta/DIR0/pharma_patents.pdf> accessed 18 December 2019

[2] Dean Baker, End Patent Monopolies on Drugs, The New York Times, (New York, 10 January 2016) <https://www.nytimes.com/roomfordebate/2015/09/23/should-the-government-impose-drug-price-controls/end-patent-monopolies-on-drugs> accessed 21 December, 2019

rights of investors downstream the rights of the public to the highest attainable standard of health.

As it was mentioned patents are essential for every innovative activity, no matter the region or the country. Patent protection of pharmaceutical products is especially important, as the drug producing process may be easily replicated and disarrange the investments in clinical testing and scientific research.[3]

The main international treaty that regulates relations between WTO member states regarding the protection of the intellectual property rights is TRIPS Agreement. Before 1994 TRIPS Agreement none of developing counties has an adequate system to protect international intellectual property rights. When the TRIPS Agreement entered into force the developing countries were able to regulate the public health problems slightly interference from the intellectual property rights.[4]

TRIPS Agreement aims to *"reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade"*[5]

As can be seen from TRIPS Agreement, the patents are temporary, and they are valid for twenty years from the date the inventor files his patent application.[6] It is obvious, that after TRIPS Agreement entered into force in 1995, majority of emerging countries faced the difficulties to reconcile the policy and technology of the intellectual property rights.[7] New regulation and policy undoubtedly benefited the financial markets and entire economy of developing countries. But still, there are arguable aspects of this question, especially regulations concerning the public health protection. As it was mentioned above, patents give exclusive rights of the inventors to use their innovations for twenty years. After the period of twenty years, the exclusive patent rights become generic and open for public use. But in particular cases, TRIPS Agreement grant the governmental authorities with the right to use the patent rights without permission of patent holder. In other words, according to the Article 27 (2) *"members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law"*[8]

Moreover, as it is mentioned within TRIPS Agreement principles, the

[3] William N. Monte (2016) Compulsory licensing of patents, Information & Communications Technology Law, 25:3, 247-271, DOI: 10.1080/13600834.2016.1230928 <https://0-www-tandfonline-com.wam.city.ac.uk/doi/pdf/10.1080/13600834.2016.1230928?needAccess=true> accessed 27 December 2019

[4] Frederick M. Abbott and Jerome H Reichman, The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines under the Amended TRIPS Provisions, Journal of International Economic Law 10(04), 927 < http://ssrn.com/abstract=1025593> accessed 29 December 2019

[5] Agreement on Trade-Related Aspects of Intellectual Property, {1994}, Annex 1C

[6] Ibid. Article 33

[7] Margaret Chon, Intellectual Property and the Development Divide, 27 CARDOZO L. REV. 2821 (2006). <https://digitalcommons.law.seattleu.edu/faculty/558> accessed 21 December, 2019

[8] TRIPS Agreement Article 27 (2)

member states may create their legislation in the framework of public health, nutrition and other public interest's protection.[9]

In this contrast, many politicians and civil society representatives raised the problem of patented medications, which are highly priced and sometimes unaffordable for the public, especially in the developing countries.[10]

At the same time, there is a problem of so-called Parallel trade of medications. Oliver Morgan, a journalist of The Guardian, reports, that pharmaceutical manufacturer practicing in buying cheap pills and re-exporting them more expansively.[11] This practice raises the prices of medications artificially and may cause a shortage of medications. In the long run, people in less developed EU countries struggle with different diseases as a result of the Parallel pharmaceutical trade organized by the UK, Holland and Germany pharmaceutical private sector. Pharmaceutical companies buy the same drugs at a lower price in Spain or Greece and re-sell them at a higher price in the UK.[12]

Under those circumstances, a new wave of objections raised in the UK. As Sarah Boseley, journalist of The Guardian mentioned in her article; the UK government should urgently interfere and regulate the price policy of the pharmaceutical companies, as it can extend the lives of thousands.[13] Boseley states that people simply die all over the world, facing unreasonably high prices of medications, henceforth the government should react as the NHS system is unable to resolve the situation.[14] Correspondingly, the solution of the problem with NHS system, which is unable to provide the public with life-essential medications are supposed to rely on pharmaceutical companies. In fact, there is a precedential case of compulsory licensing on AIDS drugs in Brazil. Brazilian authorities issued a compulsory license on a drug that is a life essential for 75,000 people, and according to the state health authorities will decrease the price of it until twenty-four million USD.[15] It is notable that, before the compulsory licensing issued, Brazilian authorities negotiated with drug producing company and decreased the costs of the medication. But still the problem of provision it to the public was not solved.

According to the TRIPS Agreement, there are some exceptions to exclusive rights of inventors which "*do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner"*[16]. Consequently, the TRIPS The agreement provides the member states with the authorization to create in their national legislation a

[9] Ibid. Article 8

[10] Kenan Malik, Big Pharma Can Only See the Benefit of R&D for Wealthy Markets, The Guardian, (London 5th of May 2019) < https://www.theguardian.com/commentisfree/2019/may/05/big-pharma-can-only-see-the-benefit-of-r-and-d-for-rich-markets > accessed 22 December 2019

[11] Oliver Morgan, Parallel Trade in Drugs Puts EU Patients at Risk, The Guardian (London 29th June 2008) <https://www.theguardian.com/business/2008/jun/29/pharmaceuticals> accessed 23 December 2019

[12] Ibid

[13] Sarah Boseley, Calls for actions on patients denied 100,000 GBP cystic fibrosis drug, The Guardian (London 3rd of February, 2019) <https://www.theguardian.com/society/2005/sep/12/socialcare.politics> accessed 22 December, 2019

[14] Ibid.

[15] BRAZIL ISSUES COMPULSORY LICENCE FOR AIDS DRUG < http://www.ictsd.org/brazil-issues-compulsory-licence-for-aids-drug> accessed 21 December 2019

[16] TRIPS Agreement Article 30

system of compulsory licensing. Still, it should also be based on the respect of the inventor's best interests. Accordingly, the member states are not allowed just to expropriate the exclusive patent rights of the financial corporations, reasoning that process as a benefit for the public. What are the criteria of limitation of exclusive patent rights on TRIPS Agreement and are they interpreted in good faith? TRIPS Agreement member states also may exclude from patentability "*in diagnostic, therapeutic and surgical methods for the treatment of humans or animals"* also *"plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes"*[17]

The theory of excluding the patentability in favour of the public was the cornerstone of the political campaign of Labour Party in the UK for the 2019 general elections. Jeremy Corbyn, the leader of the Labour Party and the candidate for the Prime Minister in UK general elections 2019, outlined a radical new national health system policy, based on public ownership.[18] With this intention, Corbyn suggested creating a system, which would allow the UK to produce cheap drugs identical to the high-priced medications. In particular, the UK can make a similar version of Orkambi, which is still unaffordable for NHS, as the American producing manufacturer aimed unreasoned high profits.[19] At the same time, Christina Walker, a publisher of The Guardian, argued that intellectual property rights are not absolute and they need to be balanced with the health rights of the public sector.[20] Also in this political brief analytical review, the World Trade Organization is presented as a safeguard institution for the private pharmaceutical companies and their exclusive patent rights. The main idea is that the governmental authorities can issue government use license, so preventing the patent monopoly and make the life essential drugs affordable for the public.[21]

The official results of the UK general elections 2019 showed that this policy did not meet the expectations of the public. The Labour Party made the worst results since 1935 general elections, won 203 seats at the Parliament or 32,2 percent of the votes.[22] Consequently, the results of the elections states, that civil society realized the irreversible consequences of patent rights expropriation.

It is also vital to analyze the political and even legal nature of compulsory licensing, especially on pharmaceutical products. The first remarks regarding compulsory licensing can be found in US Copyright Act of 1909. Also, Article 13th of Berne Convention for the Protection of Literary and Artistic Works states "*the possible limitations of the right of recording of musical words and*

[17] TRIPS Agreement Article 27 (3) (a) and (b)

[18] Sarah Boseley, Labour pledges to break patents and offer latest drugs on NHS, The Guardian (London 24th September, 2019) < https://www.theguardian.com/politics/2019/sep/24/labour-pledges-to-break-patents-and-offer-latest-drugs-on-nhs> accessed 26 December 2019

[19] Ibid.

[20] Christina Walker, My son's life depends on this cystic fibrosis drug. And ministers stand in the way, The Guardian, (London 5th February 2019) https://www.theguardian.com/commentisfree/2019/feb/04/save-lives-cystic-fibrosis-orkambi-nhs accessed 26 December 2019

[21] Ibid.

[22] https://www.bbc.co.uk/news/election/2019/results accessed 26 December 2019

any words pertaining."[23]

The World Trade Organization defines compulsory license as: "for patents: when the authorities license companies or individuals other than the patent owner to use the rights of the patent – to make, use, sell or import a product under patent (i.e. a patented product or a product made by a patented process) – without the permission of the patent owner".[24]

The first significant dispute between pharmaceutical companies and the state took place in South Africa in February 1998. South African Pharmaceutical Manufacturers Association and 39 leading drug-producing companies blamed the government in violations against the constitution and the TRIPS Agreement.[25] South African authorities tried to provide essential medication breaking constitutional principles and even international treaties. The legal procedure of this case was intertwisted with various political actions, even with diplomatic pressure from US governmental bodies and European Union different bodies. The main consequence of this particular case was the flexibility of the TRIPS Agreement. Though TRIPS Agreement reflects the question of public priorities towards patented rights, but still there were unclear sides of their limits. It was obvious that TRIPS Agreement needed to be clarified.

From above mention point of view, the crucial legal document on compulsory licensing of medications is WTO ministerial declaration on public health (Doha declaration) adopted in Doha, Qatar, in 2001 November. The Doha declaration affirmed the sovereign right of all member states to issue compulsory licensing for protection of health rights of the public.[26] The main idea of the Doha declaration is the gravity of the public health problems in emerging countries[27]. Even so, the Doha declaration also recognizes the importance of intellectual rights protection as the guarantee of new medicine development.[28] We also need to state that the Doha declaration is not a legally binding international document (soft law).

On this condition, we can state, that the Doha declaration is granting the WTO member states with the right to create a national legal framework and to issue compulsory licensing to protect the health of the public. Henceforth, the according to the Doha declaration every member state may "remove" the exclu-

[23] "*Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."* Berne Convention for the Protection of Literary and Artistic Works, World [1886], Article 13 (1)

[24] Compulsory licensing of pharmaceuticals and TRIPS, World Trade Organization <https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm> accessed 23 December 2019

[25] 1998: Big Pharma versus Nelson Mandela, Médecins Sans Frontières (20 February1998) <https://www.msfaccess.org/1998-big-pharma-versus-nelson-mandela> accessed 27 December 2019

[26] Ellen F.M. 't Hoen, Hans V. Hogerzeil, Jonathan D. Quick and Hiiti B. Sillo, A quiet revolution in global public health: The World Health Organization's Prequalification of Medicines Programme, Journal of Public Health Policy, (Macmillan Publishers Ltd, 16 January 2016) <https://www.msh.org/sites/msh.org/files/whopqp_jphp_15jan14.pdf> accessed 29 December 2019

[27] Declaration on the TRIPS agreement and the public health, WTO MINISTERIAL [2001], Article 1

[28] Ibid. Article 3

sive rights of the inventors imposing the governmental decision. Also, the compulsory licensing may be forced by the national courts. The patent rights may even be revoked and used directly by the governmental authorities themselves. As it was mentioned above, Brazil issued compulsory licensing in 2006 referring to the increasing problem of unaffordable pricing on AIDS drug efavirenz, produced by Merck.[29] Consequently, the Brazilian government provided the public with much-needed medicine through the revocation of private company patent rights. Given these points, we can state that the Brazilian government did not give the investor a prompt and adequate compensation for all investments, human and financial resources. Overall, other cases of issuing the compulsory licensing will be discussed.

Compulsory licensing on pharmaceutical products also was implemented in Thailand. Up to the present time, the health insurance system is smouldering and the national population of the country struggling against the healthcare costs. Though Thailand domestic legislation regulated the obligation of the state to provide essential life drugs to the patients, still there was a substantial lack of medications affordable for the public. Generally speaking, the authorities of Thailand issued compulsory licensing on HIV/AID drugs in November 2006. Consequently, the policy of producing cheap generic versions of patented drugs was encouraged.[30] The main argument put in was the Doha declaration and also the TRIPS that allow issuing compulsory licensing in "emergency cases and public uses."[31] The production and also import of generic copies of the drugs, surly faced active critical reviews from the patent holders, especially from the Merck, US pharmaceutical key player. Mainly, the patent holders stated that the Thai government did not arrange a proper negotiation process and did nothing to decrease the prices of the medications. Given these points, it was more acceptable to expropriate the exclusive rights of the pharmaceutical sector instead to negotiate for the lower rates.[32] The compulsory licensing of several drugs in Thailand did not solve the problems with pricing policy and essential medications access. Thousands of people still suffer from the lack of much-needed medicine and healthcare in Thailand. Thereupon, it is the result of wrong management of the field and classified approach on the drug providing policy.[33] In the political analytical articles, published in The Wall Journal, Thai governmental authorities were described as *"patent hooligans*" and blamed in attacking the property of inventors.[34]

[29] BRAZIL ISSUES COMPULSORY LICENCE FOR AIDS DRUG

[30] Thailand Issues Compulsory Licence for Patented AIDS Drug, International Center for Trade and Sustainable Development, (Bridges, 13 December 2006) <https://www.ictsd.org/bridges-news/bridges/news/thailand-issues-compulsory-licence-for-patented-aids-drug> accessed 26 December 2019

[31] TRIPS Agreement, Article 31 (b)

[32] Thailand Authorises Generic Production of Two More Patented Drugs International Center for Trade and Sustainable Development, (Bridges, 31 December 2007) <http://www.ictsd.org/bridges-news/bridges/news/thailand-authorises-generic-production-of-two-more-patented-drugs> accessed 26 December 2019

[33] Jared S. Hopkins, Generic-Drug Approvals Soar, But Patients Still Go Without, The Wall Street Journal, (19 November 2019) < https://www.wsj.com/articles/many-generic-drugs-havent-hit-market-hindering-cost-control-efforts-11574198448?mod=searchresults&page=1&pos=2> accessed 27 December 2019

[34] Bangkok's Drug War Goes Global, The Wall Street Journal, (7 March 2007) 3

The Doha declaration had a significant impact also on the public health system of Malaysia. The authorities of Malaysia granted a compulsory license on the groundbreaking hepatitis C drugs to produce a generic alternative to patented ones.[35] Starting from 2001 Malaysian government negotiated with deferent pharmaceutical companies to engage them in the price reducing policy. As a result of unsuccessful negotiations, the compulsory licenses issued.

The other developing country experienced the parallel trade of drugs and compulsory licensing of pharmaceutical products is Kenya. According to Kenya Property Act 2001 the government issued compulsory licensing to produce life essential drugs more cheaply than patented medication imported from developed countries.[36] Surly, the pharmaceuticals protested to protect their patented rights. The case was resolved six years after, in favour of the Government of Kenya. After all, Kenya started to produce generic drugs for HIV/AID patents with affordable prices. Given this points, the governmental authorities provided cheap drugs approximately to 270,000 to 300,000 patients.[37] The pharmaceutical companies announced about "wild" expropriation of their property rights and started the procedure of financial compensation of the damaged.

Another cornerstone case in pharmaceutical patent disputes is the Canada v Eli Lilly ICSID case. The federal court of Canada revoked the patents of two medications. The patent holder Eli Lilly company announced about violations against their exclusive patent rights. The company signified the investment that was made in Canada and the approximate amount of their financial damages. Eli Lilly filed a claim against the Canadian authorities to the International Centre for Settlement of Investment Disputes referring to the North American Free Trade Agreement (NAFTA).[38] It is important to mention that Canada v Eli Lilly case is precedential as the pharmaceutical patent issues were discussed in the light of international investment. The Canadian authorities presented counter-arguments referring to their national jurisdiction. In general Eli Lilly company, did not succeed in this investment dispute, had to bear the costs of this arbitral trial. Given those points the Canada v Eli Lilly case did not leave any positive impact on patent right protection and the company was refused to get any adequate compensation for their financial damages.

Another crucial question on pharmaceutical patent protection is the duration of patent validity. Many scholars argue that twenty years of patent duration is a very long period. In other words, some critics offer to reduce validity duration up to three years. First of all, it is important to analyse how the international approach to the patent validity formulated and how it was supported. As it was discussed above, granting the patents is the only way to protect the exclusivity of the inventor. Only if the invention is registered by the governmental

[35] Catherine Saez, Malaysia Grants Compulsory License for Generic Sofobuvir despite Gilead License, Intellectual Property Watch, (15 September 2019) <https://www.ip-watch.org/2017/09/15/malaysia-grants-compulsory-licence-generic-sofosbuvir-despite-gilead-licence/> accessed 27 December 2019

[36] Paul Garwood, Kenya Rejects Bid to Remove Government's Compulsory Licensing Flexibilities, Intellectual Property Watch, (14 September 2007) <https://www.ip-watch.org/2007/09/14/kenyan-parliament-rejects-bid-to-remove-governments-compulsory-licensing-option/> accessed 15 December 2019

[37] Ibid.

[38] Canada v Eli Lilly ICSID [2017] Case No. UNCT/14/2

authorities, the patent holder may protect his financial and all other related rights.

Most importantly, the innovation process, especially in the field of chemicals and pharmaceutical production, is in the particular need of financial investments. The pharmaceutical inventions are intertwisted with severe scientific research, high technology, various laboratory testing and tremendous human resources. It is obvious, that the powerful pharmaceutical companies are expecting to get financial benefits from their investments in this specific field of public interest. Given these points, we can state that, if the beneficial period of 20 years may be reduced to seven or three, the investors will choose the alternative field to invest their financial capital. So to sum up, the long term of patent duration is the vital guarantee of pharmaceutical industry development and flow of investments in this life essential field.

On balance, it is urgent to analyze the potential dangers on compulsory licensing of patented pharmaceutical products. As a result, the revocation of the proprietary rights of the inventors parentally may dramatically increase the production of fake medications. While the patent holders are interested in making investigations on the drug market and controlling the imitative medical products manufacturing. Whereas, after changing the exclusive patented drugs into generics, big pharmaceutical companies will defiantly lose their interest in the specific market supervision by using their financial and human resources.

Although the developing countries should have the right to development[39] and correspondingly should have the opportunity to realize it, but still these countries may face difficulties in organizing the manufacturer of pharmaceutical products. The developing countries may not have appropriately equipped high tech laboratories, which are vital for drug production. Lack of well-developed health and medical infrastructure may be dangerous for public health. Under those circumstances, the emerging states may not manage to organize multidimensional scientific research, which is crucial for drug-producing and healthcare.

In addition, we can fact, that every new invention in pharmaceutical industry is immediately made available for scientific research community.[40]

The last but not the least, the revocation of the patent rights may stop or decrease capital investments in the pharmaceutical sphere. As long as the pharmaceutical industry will be attractive and profitable for investors, they will continue to invest substantial financial capital for the development of research in this essential field. Equally necessary to mention, that expropriation of patent rights, inadequate compensation of damages for issuing the compulsory licensing may have irreversible consequences for the states. Foreign investor may file claims against the governmental authorities to ad hoc or permanent arbitral institutions. In fact, the majority of such cases are solved in favor of the investors. Accordingly, the arbitration awards usually combined with tremendous financial obligations towards investors, which defiantly affect the economic growth of the country.

[39] UN GA Declaration on the Right to Development 41/128 {1986}

[40] Servier, Mediator information < https://servier.com/en/news/why-patents-are-necessary-for-the-pharmaceutical-industry/> accessed 28 December 2019

As it has been noted, drugs produced by patent holders improved the health conditions and even the quality of life for a million people all over the world. If the drugs are not adequately patented, the development of pharmaceutical companies could not be realized. Given these points, we can state that pharmaceutical companies in developed countries, like the USA, Canada, France, Germany and around the world should benefit from reliable protection of intellectual property rights. For this reason, protection of intellectual property rights will ensure their contribution towards science and technological research, which will surely benefit the people both in developing and developed countries.

All things considered, we can state that the quality of life and the healthcare of the public is an absolute priority. Every human being should have the right to get immediate health protection and essential life medication. Instant access to drugs is an undivided part of the right of health. This principle was first noted in the Constitution of the World Health Organization in 1946.[41]

But at the same time, it is essential to mention, that the protection of the right to health is the absolute obligation of the State and its governmental authorities. As it can be seen from the Constitution of the World Health Organization *"governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures."*[42]

Even so, the states cannot transfer their obligation of health protection of the public to the private pharmaceutical companies. The compulsory licensing without adequate compensation of all financial damages is nothing but expropriation of the patented property. As it was mentioned above the reliable protection of intellectual property rights of pharmaceutical companies is the only effective way to decrease the development of drug production. As it was discussed in this coursework, the invention of new pharmaceutical products is directly connected with the level of intellectual property protection. To summarize, the private company should be secure in the protection of the capital investments made for the production of the pharmaceutical goods.

For this reason, the reduction of patent validity up to three or even seven years, will not resolve the conflict between intellectual property rights and access to medicine. The governmental authorities should find an alternative solution against violations of the intellectual property rights. In the long run, especially developing countries may provide the public with life essential drugs and healthcare through implementation of flexible health insurance system. Developed health insurance system will guarantee the access to the adequate healthcare and life essential medication. Another vital instrument of the realization of the right to the health is the creation of strong antimonopoly native legislation. In fact, it may help to ensure that drug producing companies will keep their exclusive intellectual property rights, but still in accordance with respect to

[41] *"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."* World Health Organization Constitution {1946} < https://www.who.int/about/who-we-are/constitution > accessed 29 December, 2019

[42] Ibid.

other role players of the pharmaceutical market. The strict antimonopoly legislation and policy will protect the society from unreasonable or artificial prices of the pharmaceutical products. In December 2019, the parliament of the Russian Federation accepted new law regarding the regulation of prices in the pharmaceutical market. According to the new policy, if the pharmaceutical companies must be involved in the administrative procedure if the locally produced drugs are higher in price as the alternatives in the international markets.[43] The aim of this new law is to reduce the prices of life essential drugs.

In the final analysis, we can state that balancing the free access to drugs with the effective protection of the Intellectual property rights is the only way to provide sufficient healthcare to the public.

ԱՆԻ ՍԻՄՈՆՅԱՆ – ***Միջազգային արտոնագրային իրավունքը հակասության մեջ է մտնում դեղերի և առողջապահության հասանելիության իրավունքի հետ. հիմնական ասպեկտներ*** – Հոդվածում վեր են հանվում միջազգային արտոնագրային իրավունքի և առողջապահության ու դեղամիջոցների հասանելիության իրավունքի հակասությունները՝ մի շարք միջազգային իրավական փաստաթղթերի լույսի ներքո: Այդ փաստաթղթերի շարքին առաջին հերթին դասվում է Առևտրի միջազգային կազմակերպության կողմից 1994 թվականին ընդունված Մտավոր սեփականության իրավունքների առևտրային ասպեկտների վերաբերյալ համաձայնագիրը կամ ԹՐԻՓՍ համաձայնագիրը, Դոհայի հանրային առողջության մասին 2001 թվականի համաձայնագիրը և միջազգային իրավական այլ համաձայնագրեր: Ինչպես հայտնի է, մտավոր սեփականության արտոնագրերը գյուտերի հեղինակներին տալիս են իրենց հայտնագործությունների երկարաժամկետ բացառիկ օգտագործման հնարավորություն՝ դրանով իսկ սահմանափակելով այդ հայտնագործության արդյունքներին հանրության ազատ հասանելիությունը: Հաշվի առնելով այն հանգամանքը, որ մտավոր սեփականության ներպետական և միջազգային իրավունքով պաշտպանվող հայտնագործությունները հաճախ առնչվում են հանրության կյանքի, առողջապահության ու դեղամիջոցների հասանելիության իրավունքների (որոնք անվերապահորեն յուրաքանչյուր պետության համար բացարձակ առաջնահերթություն են) սահմանափակմանը, հարց է առաջանում՝ արդյո՞ք պետությունները կարող են զրկել կամ նվազեցնել հայտնագործողների արտոնագրային իրավունքները: Հեղինակը վերլուծել է նշված հարցերի վերաբերյալ մի շարք երկրների փորձը, ինչպես նաև ներկայացրել է միջազգային արտոնագրային իրավունքների սահմանափակման հնարավոր վտանգավոր հետևանքները:

Բանալի բառեր – *արտոնագրային իրավունք, դեղամիջոցների հասանելիության իրավունք, ԹՐԻՓՍ համաձայնագիր, Դոհայի համաձայնագիր, օտարերկրյա ներդրողներ, դեղագործական արտոնագրային վեճեր, պարտադիր արտոնագրում*

[43] https://www.1tv.ru/news/2019-12-16/377500-dmitriy_medvedev_podpisal_postanovlenie_o_snizhenii_tsen_na_zhiznenno_vazhnye_lekarstva

АНИ СИМОНЯН – ***Международное патентное право вступает в противоречие с правом доступа к лекарствам и здравоохранению: ключевые аспекты.*** – Научная статья посвящена анализу юридического конфликта между международным патентным правом и правом на свободный доступ к медикаментам и здравоохранению в свете ряда международных правовых документов. В числе этих документов в первую очередь проанализировано соглашение по торговым аспектам прав интеллектуальной собственности, или соглашения ТРИПС, принятого в ходе Уругвайского раунда генерального соглашения по тарифам и торговле в 1994-ом году Всемирной торговой организацией. В работе проанализирована также Дохинская конвенция о здравоохранении 2001-го года.

Как известно, патентные права дают их владельцу возможность долговременного исключительного использования их изобретений, тем самым ограничивая доступ общественности к использованию этих изобретений.

Принимая во внимание тот факт, что изобретения, которые защищены международным правом интеллектуальной собственности, часто касаются права на здравоохранение и права на свободный доступ к медикаментам (эти права являются абсолютным приоритетом для любого государства), возникает вопрос, может ли государство лишить или ограничить изобретателя патентных прав.

Автором представлен международный правовой опыт разных государств по ограничению международных патентных прав, а также показаны возможные негативные последствия ограничения международных патентных прав.

Ключевые слова: *соглашение ТРИПС, Дохинская конвенция, принудительное лицензирование, патентные права, право на доступ к медикаментам, право на здравоохранение, фармацевтические патентные споры, международные инвесторы*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 142-150 *Քաղաքացիական իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.142

SOME ISSUES OF IDENTIFYING AND ENSURING THE "BEST INTEREST OF THE CHILD" IN RA

RUBINA PETROSYAN

The principle of ensuring the protection of the best interests of the child, embedded in international and domestic legal documents, underlies the legal system for child protection. It runs like a red thread in all legal acts regulating relations with the participation of a child; it also guides the competent authorities in almost all actions involving the child and, in the documents, drawn up as a result. The European Court of Human Rights, at the same time regarding the "best interests of the child" both as a substantive right, and as a principle, and as a norm of judicial procedure, thereby shows the comprehensive and fundamental significance of the latter. Therefore, in terms of identifying and reinforcing the evaluative concept of "the best interests of the child," it is important to develop effective training in which the "best interests of the child" will be considered as the fundamental criterion in all matters affecting the child. As a result, in the event of competition between the interests of the child and the rights of others, in all cases, the supremacy of the interests of the child will be affirmed, and even an action determined by a judicial act cannot be carried out in a way that violates the best interests of the child.

Keywords: *best interests of the child, legally protected interest, subjective right, guardianship and guardianship authority, the child's right to express an opinion, child's right to be heard, protection of rights*

The principle of ensuring the best interest of the child is provided by both international and domestic legal acts. The basis of the formation of "The best interest of the child" is the Convention on the Rights of the Child[1] (hereinafter referred to as the Convention) adopted in 1989, where the basic standards for ensuring the well-being of a child are fixed. The principle of ensuring the best interest of the child is the basis of the legal structure of child protection, which exists and operates in the context of direct connection and interaction between the subject, object of protection, and the measures applied by competent authorities in this regard. The object subject to protection is the subjective rights reserved to the child (disputed or violated) and interests protected by law, the boundaries of which are outlined in the 2nd part of the 6th Article of the Family Code[2], with the requirement of non-violation of the rights, freedoms and legal interests of others. There is no clear dividing line between the concepts of "subjective right" and "interest protected by law" in the Family Code. The dominant approach in the professional literature is the distinction between these two concepts. The characteristic distinguishing features of subjective law are clarity, certainty and legal guarantee of the highest degree[3], in another case, the absence of direct duties towards the relevant

[1] Adopted on 20.11.1989, entered into force on 22.07.1993. МРНИРТ 2008/Special edition.
[2] Adopted on 09.11.2004, entered into force on 19.04.2005. НИРТ 2005.01.19/4(376) Art. 60.
[3] See **Малеина Н. М.** Защита личных неимущественных прав советских граждан, М., 1991, Знание, p. 9-10.

persons, not opposed to the interest protected by law.[4] S. S. Alekseev defines a subjective right as a means of permissible behavior belonging to a legal person for the purpose of satisfying his interests, which is secured by the legal obligations of other persons.[5] The mediating nature of the "interest protected by law" also follows from the latter approach. Not identifying these two concepts, we believe that they do not exist completely isolated from each other. On the contrary, by outlining the scope of children's rights, becoming the guarantor of their realization, and creating a bridge through harmonious interaction, the basis of the child's rights protection system is formed.

The Arbitration Council operating in the American legal system also adopts the approach of separating the concepts of "right" and "interest". Admitting that the concepts of disputes about rights and interests are not fixed in any provision of the law, he noted: "The dispute of the part of the law refers to the rights stipulated in the law, the agreement or the collective agreement and based on the law council can resolve it... The dispute about the interest has no basis arising from the law, agreement or the collective agreement and the Council resolves it based on the principles of justice".[6]

"Interest" as a legal term, concept, and phenomenon has a special manifestation in the context of relationships involving a child. Various definitions have been voiced in scientific circles. Thus, A. M. Nechaeva, referring to the term "child's interest" several times, considers it not certain and subject to various interpretations, considers the conscious need under interest, and according to the author, the minor is not always able to realize what he needs and why.[7] O. Yu. Ilina considers the child's interest as his need to achieve a certain good, both directly defined by the law and not prohibited by it, recognized by legal norms.[8] M. B. Antokolskaya considers the "interest of the child" from the standpoint of "public interest" and considers that the protection of "child's interests" is at the same time the protection of the public interest.[9] Thus, the author elevates the "interest of the child" to the level of a publicly valued and appreciated phenomenon.

The European Court of Human Rights (hereinafter referred to as the ECtHR) has repeatedly referred to the disclosure and provision of the "best interest of the child" in its precedent decisions, assessing it simultaneously as a material right, a principle, and a rule of procedure.[10] The ECHR has laid down a procedural rule that in all cases where the proceedings are directly related to the rights defined by Article 8 of the European Convention for the Protection of

[4] See Теория государства и права, /Под ред. Н. И. Матузова, А. В. Малько/ - 2. изд., перераб. и доп. - М. : Юристъ, 2004, p. 209-211.

[5] See **Алексеев С. С.** Общая теория права, М.: Проспект, 2009, p. 305.

[6] Available at https://www.arbitrationcouncil.org/right-vs-interests-disputes-whats-the-difference/ as of 24.04.2023.

[7] See **Нечаева Л. М.** Семейно-правовой статус несовершеннолетних, //Проблемы реализации правовых норм в период проведения судебно-правовой реформы, Тюмень, 1994, p. 140.

[8] See **Ильина О. Ю.** Проблемы интереса в семейном праве Российской Федерации, М, Городец, 2007 p. 78.

[9] See **Антокольская М. В.** Семейное право, Учебник, Изд. 2-е, перераб. и доп., Ibid, p. 228.

[10] See European Court of Human Rights, Case of **Olsson v. Sweden (No. 2),** 27.11.1992, app No (s). 13441/87. European Court of Human Rights, Case of **P., C. and S. v. The United Kingdom,** 16/07/2002, App. No(s). 56547/00. European Court of Human Rights, Case of **W. v. The United Kingdom,** 08/07/1987, Application No. 9749/82.

Human Rights and Fundamental Freedoms[11], must be fair and give the beneficiary the opportunity to fully present his arguments in court, emphasizing the child's right to be heard in court.

UN Committee on the Rights of the Child[12] (hereinafter the Committee) interprets the "interest of the child" as a dynamic, complex, comprehensive concept that cannot be defined abstractly and objectively. It must be determined on a case-by-case basis, taking into account the situation, the personal context and the needs of the child.[13] In terms of ideology, the Constitutional Court also expressed the same position, noting that the concept of "child's interest" is subject to evaluation in each specific case based on a combined analysis of all the factual circumstances of the given case.[14]

In the American legal literature, the "best interest of the child" is defined as a vague standard (criterion), which can be problematic, first of all, in connection with the court's determination of the "best interest of the child" in competitive proceedings.[15] In particular, it is mentioned: "In determining the best interest of the child, the court needs the support of the legislature, which is unlikely to be provided by any other entity"[16], and the incomplete disclosure of the meaning and content of "best interest" in legislative acts and the unlimited opportunity given to the court or other competent entities to determine the "best interest of the child" without semantic restrictions, carries the risk of increasing arbitrariness.[17]

In the presented approaches, the enumeration of the exhaustive list of circumstances in the legal acts that will become the revealer of the "best interest of the child" is especially important. According to Andrea Scharlow, some countries have gone as far as enumerating in their legislation a list of circumstances that the competent entity must consider when determining the best interests of the child, while other countries have left the determination of these circumstances to the discretion of the courts. However, no state is clear on what is "the best interests of the child" criterion (standard). It should be applied to create a happy childhood or a well-adjusted adult.[18]

Despite the lack of clear definitions of the concepts of "child's interest", "child's legal interest" and "child's best interest" laid down in the Family Code[19],

[11] Adopted on 04.11.1950. Entered into force on 26.04.2002.

[12] The UN Committee on the Rights of the Child supervises the implementation by the member states of the UN Convention on the Rights of the Child, ratified by RA in 1993, and of the two protocols attached to the Convention.

[13] **Otto Luchterhandt, Nora Sargsyan,** Regulation of children's rights according to RA 2015 under the editorship of the Constitution, "Bulletin of Yerevan University. Jurisprudence", Yerevan, 2019 N 2 (29), page 31.

[14] See the decision of the RA Constitutional Court SDO-919 of October 5, 2010.

[15] See **Katherine Hunt Federle & Danielle Gadomski,** The Curious Case of the Guardian Ad Litem, available at https://udayton.edu/law/_resources/documents/law_review/curious_case_of_the_guardian.pdf as of 25.04.2023.

[16] See **Katherine Hunt Federle** "Children's Rights and the Need for Protection", Family Law, Quarterly 34(3), 2000, p. 426-427.

[17] See **Katherine Hunt Federle & Danielle Gadomski,** The Curious Case of the Guardian Ad Litem, Ibid.

[18] See this author's review ibid.

[19] "The best interest of the child" is equivalent to the concept of "the best interest of the child" provided for in Article 3, Part 1 of the Convention on the Rights of the Child, which is one of the 4 general principles of interpretation and implementation of the Convention on the rights of children. About this, see **Otto Luchterhandt, Nora Sargsyan**, Ibid, page 31.

they have a standard role. In the relationship with the child, everyone, the competent body, in their actions, should proceed from ensuring the integrity and protection of that "interest". The peculiarity of "child's interest" is caused by the child's inability to fully realize his demands and interests. Part 8 of Article 1 of the Family Code is aimed at confirming this, according to which if any norm can be applied differently, the best interests of the child shall be taken into account when applying it.

The definition of a non-exhaustive range of characteristics of the concept of "child's interest" or "child's best interest" for individual situations in the Family Code and the obligation of the entities responsible for ensuring this speak of its evaluative nature. However, there are circumstances that are universally considered in determining the "best interests of the child". For example, in the case of parents living separately from each other, when determining the place of residence of the child, for the court as "best interest" revealing circumstances are indicated: the attachment of the child to each of the parents, siblings, the age of the child, other moral and personal characteristics of the parents, existence between each of the parents and the child relationships, the possibility of creating conditions for the upbringing and development of the child (the nature of the parents' activity (work), their property and family situation, etc.). For example, statutes in 22 US states and the District of Columbia include the parent's ability to provide a safe home and adequate food, clothing, and medical care, the child's physical and mental needs, the parent's physical and mental health, the presence of domestic violence in the family.[20]

Guardianship and trusteeship bodies (hereinafter also referred to as Guardianship Bodies) have a key role among the entities obliged to ensure the "best interest of the child".[21] Court disputes regarding child care, upbringing, determining the place of residence and in a number of cases provided for by law shall be carried out exclusively with the mandatory participation of Guardianship Bodies. According to part 2 of Article 67 of the RA Family Code, the Guardianship Authority is obliged to conduct an investigation of the living conditions of the child and the person(s) who claim(s) to organize the care and education of the child and submit the investigation act and it's based on the conclusion about the nature of the dispute. Thus, the Guardianship Body submits to the court the research act and the conclusion about the essence of the dispute.

In the civil case No. SD3/0139/02/15 of December 02, 2016, the RA Court of Cassation (hereinafter referred to as the Court of Cassation) recorded that although the presence of the conclusion of the Guardianship Body is mandatory in cases related to the upbringing of a child and it is of a professional nature, however, the court should not limit itself to repeating the provisions mentioned in the conclusion of the Guardianship body, should ensure their validity and compare it with other evidence obtained in the case. Only after that, taking into account their combination and interrelation, the law should be applied, consider-

[20] Available at https://www.childwelfare.gov/pubPDFs/best_interest.pdf as of 23.04.2023.

[21] The activities of guardianship and trusteeship bodies shall be regulated by "Decision No. 164 of February 24, 2011 of the Government of the Republic of Armenia on Approving the Charter of Guardianship and Trusteeship Bodies" by Decision No. 631-N of June 2 (hereinafter also Decision).

ing the court's internal conviction to decide the issue of rejection or satisfaction of the submitted claims.[22]

Within the framework of another case, the Court of Cassation raised the following legal question: whether the act of research submitted by the Guardianship Body, which was conducted without researching the life of the child and one of the parents claiming to raise him, can be evaluated by the court as proper evidence for the resolution of the dispute. In response, he recorded that the guardianship and trusteeship body is obliged to conduct an investigation of the life of the child and of the person(s) who claim to raise him/her, according to the law.[23] Thus, the Court of Cassation made an attempt to expand the scope of the investigation of the Guardianship Body to include all the persons who claim to raise the child. However, the monitoring of the activities of Guardianship Bodies proves that they are very often limited to researching the life of only one party (often only the plaintiff party). In their conclusions, as a rule, they refer to the right of "the best interest of the child", formally referring to domestic and international norms, without applying the General Comment No. 14 of 2013 of the UN Committee on the Rights of the Child[24] (hereinafter also General Comment No. 14) defined elements by which the scope, presence or absence of the best interest of the child in a given situation should be determined under Article 3 of the Convention. As a result, the conclusions are often declarative in nature, offering traditional solutions, for example, taking into account the interest of the parent of the child rather than the child. The reason for this is the existing legal regulations, to the extent that the implementation of the functions of Guardianship bodies is delegated to the heads of communities, and there is no legal requirement for these officials to have appropriate specialization. As for the guardianship and trusteeship commissions (hereinafter also referred to as the Commission) created under the guardianship bodies, they may include from three to nine persons and these persons may be structural divisions of the staff of regional governorships (Yerevan City Hall in Yerevan), regional social assistance agencies (departments) workers, community employees of the municipal administration staff, medical workers, community educators, psychologists, social work specialists and lawyers, as well as representatives of non-governmental organizations (with consent) (Decision, clauses 11-14)). Under the conditions of such a discretionary requirement, it is possible to form, for example, a Commission that will be composed only of lawyers. Meanwhile, it is obvious that in order to identify the best interests of the child, it is necessary to include not only lawyers, but also psychologists and pedagogues in the Commission, and this should be a mandatory, not a discretionary requirement.

Studies show that Guardianship bodies and Commission members do not have appropriate specialization and experience, do not know referral mechanisms, and do not have methodical literature. Although on January 31, 2017, the Minister of Labor and Social Affairs approved the "Methodological guidance on

[22] See the decision of the RA Court of Cassation dated December 02, 2016 in civil case No. SD3/0139/02/15.

[23] See the decision of the RA Court of Cassation of March 23, 2012 in civil case No. YAKD/0474/02/11.

[24] See UN Committee on the Rights of the Children, General Comment № 14 (2013).

the activities of guardianship and trusteeship commissions attached to the guardianship and trusteeship authorities," which states that when examining or making a decision on any question regarding a child, it is necessary to take into account the best interests of the child it does not provide methodological instructions on how to determine it. Despite the fact that, both at the legislative level and by precedent decisions of the Court of Cassation, it was recorded that the conclusion of the Guardianship body is evidence of a professional advisory nature, the courts generally resolve the dispute based on the said conclusion.

After the systemic changes made in 2018, part 2 of Article 203 of the RA Civil Procedure Code[25] (hereinafter referred to as the Civil Procedure Code) established the possibility for the courts to find out the factual circumstances of the case ex officio when examining family dispute cases. The legislator established that the court is obliged to take the necessary steps based on the need to ensure the best interests of the child, which means that in order to identify the "best interests of the child", the courts are obliged to involve educators, psychologists, appoint various experts and not limit themselves only to the guardianship body on their own initiative often with a one-sided and subjective conclusion. According to the 3rd part of the same article, based on the need to ensure the best interests of the child, the court, on its own initiative or through the mediation of the party, may prohibit or oblige other persons participating in the case or other persons to perform certain actions, even if the applied means of securing the claim apparently leads to the actual fulfillment of the presented claim. It is noteworthy that a separate procedure for disputing the research report and conclusion provided to the court by the Guardianship Body is not provided, the participants of the trial can dispute it exclusively during the trial.

According to Article 6 of the RA Law "On Enforcement of Judicial Acts"[26] representatives of the guardianship and trusteeship authority participate in the implementation of enforcement actions when carrying out enforcement actions related to handing over the child to one of the parties, when carrying out enforcement actions related to the visitation of the child if the need arises. It follows from this that the participation of the representative of the guardianship authority is mandatory when carrying out enforcement actions related to handing over the child to one of the parties, while it is not necessary when carrying out enforcement actions related to visitation.

In all cases, when the decision made by the court is in the best interests of the child but contradicts the child's opinion and wishes, then the enforced execution of the court act must be carried out exclusively with the participation of a psychologist or pedagogue, who must carry out appropriate work with the child, otherwise, the child will be subjected to violence. Placing him in the care of a court-ordered parent against his will or visitation would also be against the child's best interests. We encounter such a situation in one of the precedent decisions of the RA Court of Cassation, where in one case, the Court of Cassation emphasized the importance and necessity of the child's rights to be heard, to express an opinion, and in another case, the parent's right to prefer to educate

[25] Adopted on 09.02.2018. Entered into force on 09.04.2018. HHPT 2018.03.05/16(1374) Art.208.

[26] Adopted on 05.05. 1998. Entered into force on 01.01.1999. HHPT 1998.06.15/12(45).

the child over other people, and as a result, evaluating and combining the said rights from the point of view of the best interests of the child, the rights and interests of the parent are given priority.[27] In order to avoid such problems, in addition to involving a psychologist and/or pedagogue, Article 36 of the RA Law "On Enforced Execution of Judicial Acts" also provides for the possibility of postponing or rescheduling the execution of a judicial act, changing the manner and order of its execution. We can confidently assert that even the action determined by the legal act of the court cannot be carried out in violation of the best interest of the child.

In the current version, the Code of Civil Procedure provides for a number of tools aimed not only at identifying the "best interests of the child", but also at achieving them during the trial. In particular, according to part 3 of Article 203 of the Civil Procedure Code of the Republic of Armenia, based on the need to ensure the best interests of the child, the court, on its own initiative or through the mediation of a party, may prohibit or oblige other persons participating in the case or other persons to perform certain actions, even if the claimed security is applied the remedy shall appear to result in the actual fulfillment of the claim made. For example, during child visitation disputes, it is necessary to ensure periodic contact between the parent and the child, etc., until the final court decision is made. The mentioned legal regulation provides an opportunity to present such motions as necessary to determine the "best interest of the child" such as involving a psychologist or pedagogue in the trial, delaying the execution of the judicial act, providing the conclusion of the guardianship body, etc.

Thus, we can define the "interest of the child" as a concept valued by the law (jurisdiction). In terms of the regulation of relations related to the protection of the child's interests, the definition of "child's interest" is of landmark importance because when regulating these relations, the state follows the path of satisfying the child's needs, serving the child's interests. Through legal norms, the state defines the interests of the child protected by law, the necessary legal measures to prevent their possible violations or to restore the violated right, and the corresponding legal consequences in case of violations. The first step in ensuring the child's interests should be expressed by the persons responsible for their realization or by the state bodies creating certain conditions for his life and upbringing, which first of all implies the determination of the subjective rights of the child and the obligations of other persons and competent authorities in order to ensure their realization, and the rights of the child and establishing the methods and forms of protection of interests is necessary in order to prevent and eliminate possible violations.

Analyzing the approaches expressed in the professional literature regarding the concepts of "best interest of the child" and "subjective right of the child," the interpretations given in the legal practice, and the current trends in the development of legislation, we can state that they are closely related and mutually dependent on each other. We agree with the point of view that "... interest is not included in the content of the subjective right, but is necessary for

[27] See the decision of the RA Court of Cassation of December 27, 2011 in civil case No. ARAD/0264/02/11.

the existence of that right"[28], and we do not consider the definition of the concept of "best interest of the child" and the exhaustive fixation of the circumstances that reveal it in the law to be realistic. When making a decision in each situation, next to the general circumstances revealing the "best interest of the child", the typical circumstances arising from the situation and caused by the person of the given child, the legal representative must be identified and evaluated in a general combination. Therefore, the expansion of the set of circumstances considered revealing the content of the concept is not the fundamental guarantor of the protection of the child's rights and interests. Therefore, we emphasize the formation of such a legal culture in which "the best interest of the child" will be perceived as a fundamental criterion in all matters related to the child (determination of the child's status, organization of care and upbringing, realization of this or that right, limitation, protection), "right" and "interest" " will be considered not in isolation, but in the context of interdependence. In case of competition between the interests of the child and the rights of others, the primacy of the interest of the child will be confirmed. Even the action decided by a judicial act cannot be carried out in violation of the best interest of the child.

ՌՈՒԲԻՆԱ ՊԵՏՐՈՍՅԱՆ – *«Երեխայի լավագույն շահի» բացահայտման և ապահովման որոշ հիմնախնդիրներ ՀՀ-ում* – Միջազգային և ներպետական իրավական փաստաթղթերում ամրագրված՝ «երեխայի լավագույն շահի» ապահովման սկզբունքն ընկած է երեխայի պաշտպանության իրավական կառուցակարգի հիմքում: Այն կարմիր թելի նման անցնում է երեխայի մասնակցությամբ հարաբերությունները կարգավորող բոլոր իրավական ակտերում, իրավասու մարմինների կողմից վկայակոչվում է երեխայի մասնակցությամբ գրեթե բոլոր գործողություններում և դրանց արդյունքում կազմված փաստաթղթերում: Մարդու իրավունքների եվրոպական դատարանը, «երեխայի լավագույն շահը» գնահատելով միաժամանակ թե՛ նյութական իրավունք, թե՛ սկզբունք և թե՛ դատավարության կանոն, այդպիսով ցույց է տալիս դրա ընդգրկուն և հիմնարար նշանակությունը: Հետևաբար, «երեխայի լավագույն շահ» գնահատողական հասկացության բացահայտման և ապահովման առումով կարևոր է այնպիսի իրավական մշակույթի ձևավորումը, որում «երեխայի լավագույն շահը» կընկալվի որպես հիմնարար չափանիշ երեխային առնչվող բոլոր հարցերում: Արդյունքում երեխայի շահերի և այլոց իրավունքների միջև մրցակցության դեպքում կհաստատվի երեխայի շահի գերակայությունը, և անգամ դատական ակտով որոշված գործողությունը չի կարող իրականացվել «երեխայի լավագույն շահի» ոտնահարմամբ:

Բանալի բառեր – *«երեխայի լավագույն շահ», օրենքով պաշտպանվող շահ, սուբյեկտիվ իրավունք, խնամակալության և հոգաբարձության մարմին, երեխայի կարծիք արտահայտելու իրավունք, երեխայի լսված լինելու իրավունք, իրավունքների պաշտպանություն*

[28] See **Алексеев С. С.** Общая теория права, М., Ibid., p. 358.

РУБИНА ПЕТРОСЯН – ***Некоторые проблемы выявления и обеспечения «наилучших интересов ребенка» в РА.*** – Принцип обеспечения защиты наилучших интересов ребенка, заложенный в международных и внутригосударственных правовых документах, лежит в основе правовой системы защиты ребенка. Он красной нитью проходит во всех правовых актах, регулирующих отношения с участием ребенка, им же руководствуются компетентные органы практически во всех действиях с участием ребенка и в оформляемых в результате документах. Европейский суд по правам человека, одновременно расценивая «наилучшие интересы ребенка» и как материальное право, и как принцип, и как норму судопроизводственной процедуры, тем самым показывает всеобъемлющую и фундаментальную значимость последнего. Следовательно, в плане выявления и закрепления оценочного концепта «наилучшие интересы ребенка», важна разработка такого эффективного обучения, при котором «наилучшие интересы ребенка» будут рассматриваться как основополагающий критерий во всех вопросах, касающихся ребенка. В результате, в случае возникновения конкуренции между интересами ребенка и правами других, во всех случаях, будет утверждено верховенство интересов ребенка, и даже действие, определенное судебным актом, не может быть осуществлено путем нарушения наилучших интересов ребенка.

Ключевые слова: *наилучшие интересы ребенка, охраняемый законом интерес, субъективное право, орган опеки и попечительства, право ребенка на выражение мнения, право ребенка быть услышанным, защита прав*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 151-158 *Քաղաքացիական իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.151

ANTIMONOPOLY COMPLIANCE[1] IN THE REPUBLIC OF ARMENIA

ARSEN HOVHANNISYAN, MARTIN KHACHIKYAN

The article discusses the legal regulations related to antimonopoly compliance programs in the Republic of Armenia and the necessary actions to ensure their effective implementation.

The circumstances and factors that business entities should take into account when drafting antimonopoly programs were also discussed.

Through the implementation of warning and prevention procedures, it is possible to practically improve the compliance of business entities with the antimonopoly legislation, because the application of milder measures of administrative responsibility by the authorized body provides a unique opportunity to correct and prevent possible violations.

Acceptance of the antimonopoly compliance program does not imply its implementation, because a number of business entities can stipulate the acceptance of the act as a tool for reducing the fine imposed in the event of a possible violation of the antimonopoly legislation in the future, as a result of which it is necessary that the Commission for the Protection of Competition is not limited only to the presence of a compliance program at the business entity, but also through other appropriate mechanisms, find out whether the relevant business entity is guided and was previously guided by the compliance act adopted by it, or whether its existence is formal.

The article also singles out the conditions, the simultaneous presence of which will make it possible to ensure the effective implementation of the antimonopoly compliance program.

Key words: *compliance, compliance program, antitrust law, fair competition, freedom of economic activity, competitive development*

In order to improve economic market relations, in addition to the legal norms regulating the given sector, it is also necessary to take actions aimed at preventing possible illegal behavior by business entities.

For years now, a number of states have developed various tools to prevent antitrust behavior. Antimonopoly compliance is among the mentioned tools.

In the legal literature, the concept of compliance: its goals, functions, areas of application, consequences of implementation, etc. is interpreted in different ways.

According to D. Malikhin and O. Franskevich, compliance means acting in accordance with public requirements for a person carrying out business activities. They characterize it as a form of self-regulation based on legal norms regulating public relations by state bodies. According to E. Markovkina, compliance is the self-monitoring of a person carrying out business activities, which is

[1] The term "anti-monopoly" is used as an internationally recognized term and does not characterize the nature of the legislation of the Republic of Armenia on the protection of competition.

based on his own interests and does not contradict the legislation[2].

In the field of protection of economic competition, the introduction of compliance and its effective enforcement is of significant importance due to the importance of natural and fair competition in economic relations.

In the most general definition, competition can be characterized as a "conflict" between market economy participants for the best conditions for the production and sale of goods[3].

Competition is the economic law of a market economy. There are also other definitions of competition in the theoretical literature. A. Marshall believes that competition consists of one competing with another especially in the case of buying and selling something[4].

D. Reimer and F. Bayer state that competition is present in all cases when several businesses face each other in the market, pursuing the same goal in the economic sphere[5].

Shershenevich notes that "the public idea of competition is that the striving of each economy to maintain its own existence ultimately leads to the best satisfaction of society's needs."[6].

Competition is characterized as the efforts of two or more persons acting independently of each other, aimed at attracting the customers of a third party by offering the most favorable conditions for the purchase of goods[7]. Competition in a broad sense is the competition between different people to achieve a certain goal, competition in entrepreneurial activity is the competition between business people for the best conditions for the production and sale of goods[8].

The principles of freedom of economic activity and free economic competition, together with the right to property, are a prerequisite for the stable existence of civil society, the economic basis of human freedom. Freedom of economic activity is the fundamental principle of the market economy and acts as an objective prerequisite for the formation and development of free economic relations.

Through the introduction of an antitrust compliance program and its effective enforcement,

- business entities get the opportunity to avoid problems and comply with the law,
- business entities save their money and reputation,
- the necessary environment for normal competition is provided through the consistent implementation and control of the project.

---

[2] **Попондопуло, Владимир Ф., Дмитрий А.Петров.** 2020. «Комплаенс как правовой инструмент минимизации рисков и профилактики правонарушений». Вестник СанктПетербургского государственного университета. Право 1: стр. 105. (available at 26.03.2023 https://doi.org/10.21638/spbu14.2020.107).

[3] **Кабисов А.Р.** Соотношение конкуренции и монополии в период перехода к рыночной экономике, М., 2001, Дисс., с. 98.

[4] **Маршалл А**. Принципы экономической науки. М.: Издат. группа Прогресс, 1993, Т. I, с. 60.

[5] **Ерёменко В.** Законодательство о пресечении недобросовестной конкуренции капиталистических стран. М., 1994, с. 4**.**

[6] **Шершеневич Г.Ф**. Курс торгового права,Ч.II. Спб, 1908., стр. 109:

[7] **Chevalier F.** Unfair Competition// Industrial property in Asia and the Pasific, 1988, N 22, p. 41.

[8] Հայաստանի Հանրապետության Սահմանադրության մեկնաբանություններ, **Գ. Հարությունյանի** և **Ա. Վաղարշյանի** խմբ., Եր.: «Իրավունք», 2010, էջ 411:

The key to any successful compliance programme, whether it relates to antitrust or another topic, is to reach the stage where the behaviour required under the programme is an indistinguishable part of the company culture.[9]

In the sense of the legislation on the protection of economic competition, compliance can be defined as a set of actions aimed at complying with the legislation and legal acts regulating the sector, as well as preventing possible violations.

According to D.N. Rodinova, the main objective of the co-compliance program is to reduce the likelihood of antitrust violations by assessing risks and implementing countermeasures[10].

According to N. V. Medvedeva, the antimonopoly compliance standard is a minimum set of requirements, the implementation of which will help reduce the number of violations of antitrust laws in the conduct of activities by authorities. This document establishes a set of measures aimed at the introduction of preventive measures and the creation of a system for prompt response to situations of risks of violations of the antimonopoly law[11].

Competition compliance programmes have the greatest potential with concerning to preventing and uncovering hard core cartels. Competition compliance programmes are more likely to prevent some types of misconduct than others. Programmes are not especially well-suited to conduct that is known to require complex legal and economic analysis as well as in-depth inquiries into facts and market effects, such as abuse of dominance and monopolisation. On the other hand, programmes can be very helpful in preventing and exposing hard-core cartel conduct, which is illegal per se and which lay people can more easily understand. Hard core cartels, however, also represent a monitoring challenge because they are deliberate and conspiratorial violations in which deception and secrecy are used to hide the illegal activity[12].

Compliance with the law has become particularly important in the field of antitrust law, where the proliferation of laws across the globe has been unprecedented. Existing antitrust laws are constantly evolving and new laws are being adopted. Sanctions for antitrust violations are often substantial and reputational damage to companies as a result of an adverse antitrust finding is massive[13].

Having an effective culture of compliance with competition law will help a business to avoid the many adverse potential consequences of competition law infringement including the following:

- financial penalties of up to 10 percent of group turnover
- adverse reputational impact (business and personal) associated with

[9] The ICC Antitrust Compliance Toolkit. p. 4 (available at 30.03.23 https://compliance. concurrences.com/en/compliance/2020/corporations-initiatives/the-icc-antitrust-compliance-toolkit)

[10] **Родионова Д. Н.** Антимонопольный комплаенс как важная часть системы предупреждения антимонопольных нарушений // Вестник БГУ. – 2017. – Вып. 3. – с. 92.

[11] **Medvedeva N. V.** Antimonopoly complains in the system of development of competition // Power and Administration in the East of Russia. 2019. No. 1 (86).p\p. 4 (available at 30.03.2023 http://vlastdviu.ru/downLoad/rio/j2019-1/7%20%D0%9C%D0%B5%D0%B4%D0%B2%D0%B5%D0%B4%D0%B5%D0%B2%D0%B0%20%D0%9D.%20%D0%92..pdf).

[12] OECD Policy document DAF/COMP (2011)20 Promoting Compliance with Competition Law 2011. p. 14 (available at 26.03.2023 http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf):

[13] International Chambers of Commerce. "The ICC Antitrust Compliance Toolkit", 2013. p. 4 (available at 24.03.2023 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf).

having committed a competition law infringement

- director disqualification orders for the directors of infringing companies
- criminal convictions for those individuals involved in a cartel
- considerable diversion of management time and the incurring of legal costs in order to deal with investigations by competition authorities
- the unenforceability of restrictions in agreements that infringe the law, and
- lawsuits from those who have suffered harm as a result of the infringement.

Effective competition law compliance has greater benefits than just avoiding the adverse consequences mentioned above. Other potential advantages of an effective competition law compliance culture include the following:

- the early detection and termination of any infringements that have been committed by the business allowing, in appropriate cases, immunity or leniency applications to be made, potentially helping to reduce or eliminate financial penalties
- taking appropriate steps to comply with competition law might result in an up to 10 per cent reduction in the amount of the financial penalty imposed by the Office of Fair Trading for a competition law infringement, depending upon the circumstances
- employees being able to recognise the potential signs that another business might be infringing competition law, particularly in situations where their own business might be the victim of such an infringement and might decide to take appropriate action
- employees being confident of 'the rules of the game' and able to compete vigorously for business without fear of infringing competition law, as well as recognising when they should seek legal advice on potential competition law issues, and
- an effective culture of competition law compliance is an essential part of an ethical business culture, which can provide reputational advantages.[14]

Recently in the Republic of Armenia, the term compliance is often discussed, it became more relevant after it was introduced as a new institution in the competition protection legislation.

Among the powers of the Commission for the Protection of Competition in the Republic of Armenia is also the implementation of measures to prevent violations of the legislation on the protection of economic competition, which also includes the approval of guidelines and other documents of an advisory nature related to economic competition.

According to some theoreticians, it is not possible to achieve widespread acceptance of the compliance program through legislative reforms, because it is more appropriate to provide incentive norms to inspire business entities[15].

By issuing various guidelines and/or organizing meetings with business entities, the Competition Protection Commission tries to make the provisions of the competition protection legislation available to the widest range of people and the importance of maintaining them.

Until 2023, there was no legal regulation that would promote the imple-

[14] United Kingdom Office of Fair Trading Guidance document 1341. How your business can achieve compliance with competition law 2011. pp.5-6 (available at 26.03.2023 http://oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1341.pdf.).

[15] **Глубокая Ю.** Антимонопольный комплаенс в США и Европе. По какому пути пойдет Россия? // Конкуренция и право. – 2015. – № 4. – с. 34.

mentation of antimonopoly compliance in their activities by economic entities, but on May 23, 2022, the Commission for the Protection of Competition published the "Guideline on the Implementation of Antimonopoly Compliance" (hereinafter: the Guideline), where antimonopoly compliance is defined as a set of measures aimed at an economic entity to carry out activities in accordance with the legislation on competition protection.

The implementation of the antimonopoly compliance program by economic entities implies the adoption of an internal legal act from a legal point of view.

The requirements for the antimonopoly compliance program should be clearly defined by the regulatory and supervisory bodies of the sector because only if such guidelines and the requirements in it are clearly formulated, it is possible to create an objective and real opportunity for business entities to adopt and maintain the compliance program.

According to I. V. Knyazeva, the key to the success of a compliance program is also that the program becomes an integral part of the company's corporate culture over time[16].

Therefore, the existence of the Antimonopoly Compliance Guide of the Republic of Armenia is very important, because the guideline defines both the circumstances that business entities must take into account, and the conditions imposed on the content of the internal legal act adopted by business entities.

Especially, when developing the compliance program, the business entity's field of activity and its features, the competitive risks recorded during the activity, the characteristics of the product market structure where the business entity operates, the fact that the business entity has a monopoly or a dominant position must be taken into account[17].

According to the Guideline, the compliance program/act must contain the competitive risks recorded during the activity of the economic entity, a list of measures aimed at reducing the risk of violation of the economic competition legislation (risk determination, risk assessment, reducing the risk occurrence probability, periodic risk assessment), information on the system for ensuring the implementation of the antimonopoly compliance program and etc.

At the same time, the Guideline states that in case of changes in the legislation on the protection of competition, the compliance program is subject to alignment with the existing legislation[18].

Thus, we can record that the antimonopoly compliance enforcement policies and procedures of the Republic of Armenia, through their real and effective implementation, can contribute to the improvement of the competitive environment, which in the end will also contribute to the revitalization of investment activities.

A number of states, in order to bring the behavior of business entities into compliance with competition legislation and to ensure the practical applicability

[16] **Knyazeva, I.V., Dozmarov, K.V.** (2020). Antitrust Compliance Programme – Prevention of Risks of Violation of Competition Law by the Company. ECO. No. 4. p.127 (In Russ.). (available at 28.03.2023 https://competitionsupport.com/wp-content/uploads/2020/03/Knyazeva-Dozmarov.pdf).

[17] Compliance-guideline. 2022 p. 19, (available at 27.03.23 http://competition.am/wp-content/uploads/2022/05/Complience-guideline.pdf).

[18] Compliance-guideline. 2022 p. 19-20, (available at 27.03.23 http://competition.am/wp-content/uploads/2022/05/Complience-guideline.pdf).

of the legislative regulations, provide incentive norms for those business entities that have implemented antitrust compliance.

The percentage reduction of the amount of the fine when imposing a fine on an economic entity can be included among the incentive norms if the economic entity has accepted the anti-monopoly compliance.

A number of European Union countries are considering reducing the amount of sanctions at the national level in cases where the company has adopted an antitrust compliance program and maintains it. In the UK and France, in the presence of a compliance program, a 10% reduction is applied when imposing a fine on the relevant companies, and in Italy, it is 15%[19].

As a result of the legislative reforms implemented in the Republic of Armenia on February 1, 2023, changes were made in the methodology of choosing the measure of responsibility and calculating the fine, and among the circumstances mitigating the measure of responsibility, in particular, in the presence of a compliance program, a percentage reduction should be applied to the applicable fine;

- When calculating the fine, 10% is reduced if the compliance was accepted and submitted to the Competition Protection Commission by the business entity prior to initiating proceedings on the offense, and if the business entity committed an offense for the first time after the compliance was introduced.
- When calculating the fine, 5% is reduced, if the compliance was accepted by the business entity after the initiation of proceedings regarding the offense in the field of economic competition and before the decision to apply a measure of responsibility was submitted to the Commission for Protection of Competition.

Envisioning the implementation of antimonopoly compliance as a basis for reducing the fine, at the same time, the lack of proper control over the actual implementation of this compliance can lead to situations when business entities implement the compliance solely to avoid large fines.

In order to exclude such situations, it is necessary for the Competition Protection Commission not to limit itself to the existence of a compliance program at the economic entity, but to find out through appropriate mechanisms whether the relevant economic entity is guided and previously guided by the compliance act adopted by it, or whether its existence is formal.

Along with antimonopoly compliance providing a condition for the reduction of fines assigned by the Competition Protection Commission, effective mechanisms are needed to find out the actual application of that compliance.

The requirements reflected in the Guidelines submitted to antimonopoly compliance are only indicative in nature and cannot be binding for the business entity, as the Guidelines are not a normative legal act.

At the same time, the Guide stipulates that the business entity can submit the antimonopoly compliance plan project to the Competition Protection Commission to receive a conclusion.

It is noteworthy that applying to the Commission for the Protection of Competition in order to obtain a conclusion is a right for business entities, not a

[19] **Румянцева Ю. Н.** Антимонопольный комплаенс как часть комплаенс-программы соблюдения законодательства Российской Федерации // Пролог: журнал о праве / Prologue: Law Journal. – 2019. – № 2. с. 56.

duty, and the risk of negative consequences of not applying must be borne by the business entity.

The guidelines for the application of liability measures by the Competition Protection Commission only state that the existence of a compliance program or its acceptance during the initiated proceedings may be sufficient to reduce the amount of fines.

That is, to discuss the issue of reducing the amount of the fine, the Competition Protection Commission must be satisfied with the existence of the compliance document without having an opportunity to take actions aimed at revealing the compliance of the program with the competition protection legislation, because the submission of the compliance plan is sufficient to reduce the amount of the fine.

Summarizing the study, we find that to ensure the effective enforcement of antimonopoly compliance, the simultaneous presence of the following conditions is necessary;

- In the case of submitting an antimonopoly compliance plan for the purpose of reducing the amount of the fine, the Competition Protection Commission should have the authority to assess the compliance of the plan with the requirements of the law and the Guidelines and reduce the amount of the fine only in the case of a plan that meets the requirements.
- The Competition Protection Commission must have the objective ability to monitor compliance with the compliance program approved and submitted by business entities after the reduction of the fine, as well as after receiving the positive conclusion of the Competition Protection.
- If the existence of a compliance program is the basis for the reduction of the fine, the decision to apply a measure of liability must contain an order to the economic entity to comply with the compliance program. the economic entity will be held liable, in case of non-compliance,.
- In case of violation of the terms of the compliance program based on the reduction of the fine (the order issued by the decision to apply a measure of responsibility), the amount of the fine imposed should be an amount reduced (5-10 percent) from the previously applied fine.

ԱՐՄԵՆ ՀՈՎՀԱՆՆԻՍՅԱՆ, ՄԱՐՏԻՆ ԽԱՉԻԿՅԱՆ – *Հակամենաշնորհային կոմպլաենսը Հայաստանի Հանրապետությունում* – Հոդվածում քննարկման առարկա են դարձել Հայաստանի Հանրապետությունում հակամենաշնորհային կոմպլաենս ծրագրերին առնչվող իրավական կարգավորումները և դրանց արդյունավետ կիրարկումն ապահովելու համար անհրաժեշտ գործողությունները։

Քննարկվել են նաև այն հանգամանքները և գործոնները, որոնք տնտեսավարող սուբյեկտները պետք է հաշվի առնեն հակամենաշնորհային ծրագրերը կազմելիս։ Նախազգուշացման և կանխարգելման ընթացակարգերի ներդրման միջոցով հնարավոր է գործնականում բարելավել տնտեսավարող սուբյեկտների՝ հակամենաշնորհային օրենսդրությանը համապատասխան գործելը, քանի որ լիազոր մարմնի կողմից վարչական պատասխանատվության ավելի մեղմ միջոցների կիրառումը բացառիկ հնարավորություն է ընձեռում շտկելու և կանխելու հնարավոր խախտումները։

Հակամենաշնորհային կոմպլաենս ծրագրի ընդունումը չի ենթադրում դրա գործարկումը, քանի որ մի շարք տնտեսավարող սուբյեկտներ ակտի ընդունումը կարող են պայմանավորել որպես ապագայում հավանական հակամենաշնորհային օրենսդրության խախտման դեպքում նշանակվող տուգանքի նվազման գործիք, ինչի արդյունքում անհրաժեշտ է, որ Մրցակցության պաշտպանության հանձնաժողովը չսահմանափակվի միայն տնտեսավարող սուբյեկտի մոտ կոմպլաենս ծրագրի առկայությամբ, այլ համապատասխան մեխանիզմների միջոցով պարզի՝ արդյո՞ք համապատասխան տնտեսավարող սուբյեկտը առաջնորդվում է և նախկինում առաջնորդվել է իր ընդունած կոմպլաենս ակտով, թե՞ դրա առկայությունը ձևական է:

Հոդվածում առանձնացվել են նաև այն վավերապայմանները, որոնց միաժամանակյա գոյությունը հնարավորություն կտա ապահովելու հակամենաշնորհային կոմպլաենս ծրագրի արդյունավետ կիրարկումը:

Բանալի բառեր – *կոմպլաենս, կոմպլաենս ծրագիր, հակամենաշնորհային օրենսդրություն, բարեխիղճ մրցակցություն, տնտեսական գործունեության ազատություն, մրցակցության զարգացում*

АРСЕН ОГАННИСЯН, МАРТИН ХАЧИКЯН – ***Антимонопольный комплаенс в Республике Армения.*** **–** В статье рассматриваются правовые нормы, связанные с программами антимонопольного комплаенса в Республике Армения, и необходимые действия для обеспечения их эффективной реализации. Также были обсуждены обстоятельства и факторы, которые субъекты предпринимательства должны учитывать при составлении антимонопольных программ.

За счет реализации процедур предупреждения и профилактики можно на практике улучшить соблюдение хозяйствующими субъектами антимонопольного законодательства, поскольку применение уполномоченным органом более мягких мер административной ответственности дает уникальную возможность исправить и предотвратить возможные нарушения.

Принятие программы антимонопольного комплаенса не предполагает ее реализацию, поскольку ряд хозяйствующих субъектов могут оговорить принятие акта как инструмента снижения размера штрафа, налагаемого в случае возможного нарушения антимонопольного законодательства в будущем, в результате чего необходимо, чтобы Комиссия по защите конкуренции не ограничивалась только наличием у экономического субъекта комплаенс-программы, через другие соответствующие механизмы выяснить, руководствуется и ранее руководствовался ли соответствующий хозяйствующий субъект принятым им актом о соблюдении, или же его существование носит формальный характер.

В статье также выделены условия, одновременное наличие которых позволит обеспечить эффективную реализацию программы антимонопольного комплаенса.

Ключевые слова: *комплаенс, комплаенс-программы, антимонопольное законодательство, добросовестная конкуренция, свобода экономической деятельности, развитие конкуренции*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 159-169 *Քաղաքացիական դատավարություն*
https://doi.org/10.46991/BYSU:C/2023.14.2.159

THE KEY ISSUES OF THE EXECUTION OF THE ARBITRAL AWARDS IN THE REPUBLIC OF ARMENIA

VAHE HOVHANNISYAN

In this scientific article, the author investigated and observed the arbitral awards enforcement regimes on the territory of the Republic of Armenia. Observation of the legislation of the Republic of Armenia in the relevant field revealed features of state compulsory enforcement of arbitral awards of ad hoc institutions on the territory of the Republic of Armenia, permanent arbitration awards and finally arbitration tribunal decisions not exceeding the minimum wage by five thousand time. Some valuable recommendations have been made to improve voluntary enforcement of arbitral awards.

The contemporary issues of co-called domestic arbitral awards state compulsory enforcement have been discussed in comparison with western developed countries legal practice. In the article, the author made some suggestions regarding improvement of the legislation on commercial arbitration, mainly concerning the protection of subjective rights.

Moreover, the author presented the practical guideline how to exclude by law the private entity eligibility of state compulsory enforcement.

Key words: *Arbitral award, voluntary enforcement, compulsory enforcement, writs of execution, deferred judicial review, commercial arbitration, ad hoc arbitration*

Mechanism for the effective protection of violated or contested subjective rights are of key importance for every legal state. The positive duty to ensure such protection is determined by the international conventional obligations undertaken by the state, as well as the need to fulfill constitutional legal issues[1]. Furthermore, the domestic legislation of the Republic of Armenia provides an equal legal environment for the protection of rights for all participants in civil circulation, regardless of their legal status, nature of activity, or other circumstances. It should be noted, however, that the legal status and nature of the activities of the participants in civil circulation may sometimes determine the choice of a particular form or mechanism of protection of subjective rights stipulated in the legal system of the Republic of Armenia.

This is because such means of protection may have specific characteristics that can be best addressed by the legal mechanisms provided in the legal system of the Republic of Armenia, resulting in the most effective outcome for the subjects of the law[2]. It is noteworthy that to successfully implement the discussed issue, ongoing changes have recently been undertaken in the domestic legal system. These changes are mainly aimed at reducing the overload of the judicial

[1] See European Convention on Human Rights, Article 6: Right to a fair trial, United Nations International Covenant on Civil and Political Rights, Article 14, Constitution of the Republic of Armenia, Chapter 2.

[2] See **V. Hovhannisyan, S. Meghryan, V. Esayan, P. Tadevosyan, A. Gharslyan, T. Markosyan, Y. Khundkaryan,** Civil Procedure textbook (1), chapter - The means of protection of subjective rights, Yerevan, 2022.

system and promoting alternative forms and methods of rights protection. Although these two directions are mutually intertwined, an increase in successful implementation of rights protection or alternative dispute resolution means can lead to a decrease in the statistics of recourse to judicial dispute resolution. However, it should be kept in mind that this process must proceed naturally and be conditioned by the effectiveness of the enforcement of alternative forms of rights protection.

According to Article 86 of the "Partnership and Cooperation" Agreement signed between the Republic of Armenia and the European Community back in April 22 1996 and entered into force on July 1, 1999, the parties shall encourage the settlement of disputes arising from commercial and cooperative transactions by arbitration, as well as encourage recourse to the arbitration rules elaborated by the United Nations Commission on International Trade Law (UNCITRAL) and to arbitration by any center of a State signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958.

Providing favorable conditions for settling disputes through arbitration is necessary to achieve the constitutional and legal objectives of the state. Specifically, Article 86(1) of the Constitution of the Republic of Armenia defines the main goal of the state's policy as improving the business environment, the primary prerequisite of which is providing effective domestic structures for the protection of rights.

The protection of subjective rights implies the existence of effective mechanisms to realize the right to protection. It is pointless to undertake the protection of any violated or contested right or legal interest if there is no possibility to enforce them effectively in the future, meaning the full possibility of the enforcement of the act aimed at protecting the right. The state has a duty to ensure the execution of the act, which is also supported by the precedent practice of the European Court. The Court has held that the enforced execution of the judicial act is an effective means of the right to judicial protection. Without the effective enforcement of judicial acts, the entire judicial activity could be rendered meaningless[3].

The duty of the state to ensure the execution of arbitral awards derives from the international and domestic legal framework, including the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards"[4] the law of Republic of Armenia on "Commercial Arbitration" (2006)[5] and the RA Civil Procedure Code[6].

A complex analysis of the legal norms regulating the enforcement of arbitration awards in the Republic of Armenia reveals two primary regimes for ensuring their enforcement in the territory of the Republic of Armenia. The first regime operates **under state control**, in which the grounds for refusing the enforcement of an arbitration award are applicable. The second regime operates **without state control**,

[3] See Commentaries to the Armenian Constitution, Yerevan, "Iravunq", 2010, p. 210.

[4] See United Nations Commission on International Trade Law. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

[5] See RA Law on "Commercial Arbitration", 2007.01.31/8(532).

[6] See Civil Procedure Code of the RA, 2018.03.05/16(1374).

whereby an arbitration award is subject to compulsory execution without being sanctioned by the state. In this regime, the existence of grounds for rejecting the compulsory execution of the arbitration award is not reviewed.

The state-controlled regime, in turn, is further divided into two categories, namely, "domestic" and foreign arbitration proceedings for the enforcement of writs of execution. When the place of arbitration is located within the territory of the Republic of Armenia, the rules of procedure for cases with applications for the enforcement of an arbitration award (Chapter 46 of the Civil Procedure Code) are applicable. On the other hand, in cases where the arbitrations are held in foreign countries or involve international commercial arbitration awards, the rules of procedure for cases with applications for recognition and enforcement (Chapter 47 of the Civil Procedure Code) apply.

In other words, in the case of arbitration awards made on the territory of the Republic of Armenia, an application for issuing a writ of execution is submitted to the court (Articles 321-322 of the Civil Procedure Code of the Republic of Armenia). Meanwhile, in the case of foreign (international) arbitration awards, an application is submitted for recognition and enforcement (Articles 326-327 of the Civil Procedure Code of the Republic of Armenia).

Legal regulation, which seems logical at first glance, cannot fully reflect the principles that ensure the enforcement of arbitration awards, which are scientifically justified and based on advanced international practice. In particular, both in legal theory[7] and in Armenian legislative practice and legislation, there is a distinction between acts that require performance and those that do not require performance as separate types of acts aimed at protecting subjective rights.

Furthermore, in cases provided for by law, acts that do not require enforcement are presented only for recognition, while acts that require execution are presented for recognition and enforcement. It is noteworthy that legal doctrine also recognizes the approach that acts not requiring enforcement operate with full effect from the moment of adoption, granting the person the appropriate status or rank. Therefore, there is no need for separate recognition of their legal action in the territory of another state (for example, a judgment of divorce nullifying the marriage or a judgment declaring a person incapacitated due to mental disorder operates in all countries)[8]. However, this approach has been criticized because there are many judicial acts that do not require execution but recognition of their legal action in the territory of the Republic of Armenia is necessary to ensure the principle of legal certainty and other priorities established by law.

The recognition of foreign judicial acts not requiring execution is possible in the Republic of Armenia, as provided for in Articles 52 and 55 of the Minsk and Chisinau Conventions, and Parts 1 and 6 of Article 346 of the Civil Procedure Code of the Republic of Armenia. This recognition can apply to both the

[7] See **R. C. Crampton, D. P. Currie, H. H. Kay, L.** Kramer Conflict of Laws. Cases, Comments. Questions/ Fifth edition. ST paul, 1993, pp. 404-406, **Lits, M. O.** Recognition and enforcement of foreign court and arbitration decisions in the Russian Federation: correlation between international legal and domestic regulation. Dissertation for the degree of Candidate of Juridical Sciences, Ekaterinburg, 2002, pp. 55-56, etc.

[8] See **Yablochkov, T. M.** Works on Private International Law (Classics of Russian Civil Law. Private International Law). Moscow, Statut, 2009, pp. 162-164.

acts fully satisfying the claimant's claim and the acts rejecting the claims, whether in whole or in part. Such recognition may be necessary in cases where there is a procedural prohibition or obstacle to investigating the same case between the same parties on the same subject matter and factual basis (res judicata). It is apparent that in the case of a judgment rejecting the claims, no enforcement of the claimant's material rights is involved, and the acts are therefore subject to mere recognition.

Based on the legal analysis presented, it appears that the RA legislator did not differentiate between the regimes of sanctioning the legal action of arbitral awards requiring enforcement and those not requiring enforcement. This lack of differentiation may create issues regarding the execution of writs only with acts subject to recognition or with the necessity of recognition.

Furthermore, the distinction between the procedures for sanctioning the legal validity of domestic and foreign arbitration awards in the Civil Procedure Code of the RA is perplexing.

Only domestic arbitral awards that require enforcement within the Republic of Armenia are sanctioned, while foreign arbitral awards are merely recognized, and a writ of execution is provided for enforcement.

Additionally, the regulations stated in the Civil Procedure Code of the RA for sanctioning the legal effect of arbitration awards unify the actions of issuing a writ of execution for recognition and enforcement, which can’t be performed or considered separately.

The Civil Procedure Code of the RA does not provide recognition of arbitration awards that do not require execution as a distinct legal action, which deprives parties of certain legal tools derived from the principle of legal certainty.

The concept of having distinct procedures for legal recognition of awards resulting from RA and foreign arbitrations raises concerns. This is because in both situations, the acts are made by private parties who are not acting on behalf of the state or implementing justice. As a result, the state's primary responsibility is to conduct deferred judicial oversight of the arbitration process and verify the grounds for refusing recognition and enforcement of arbitration awards, as per the provisions of Article 36 of the RA Law "On Commercial Arbitration" and the New York Convention.

Additionally, it is remarkable that the arbitration law considers recognition and enforcement of arbitration awards as autonomous legal actions.

The Article 35 (Parts 1 and 2) of the RA Law "On Commercial Arbitration" specify that the arbitration tribunal's award made within the Republic of Armenia or any other state that is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall be recognized as mandatory and enforced by filing a motion to the court in accordance with Articles 35 and 36 of the Law.

The party relying on the award or filing a motion on its enforcement must provide the original or a duly authenticated copy of the award, as well as the original or a duly authenticated copy of the arbitration agreement referred to in Article 7 of the Law.

Furthermore, Article 36 of the Law on Arbitration under the heading "Grounds for refusal of recognition or enforcement" states that "Recognition or

enforcement of an arbitral tribunal's award, which was made within the Republic of Armenia or any member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in the territory of another state, can be refused only...".

T**he Arbitration Law makes a clear distinction between recognizing arbitration awards and motioning the enforcement as separate legal actions, without distinguishing between awards made in Armenia or other states that are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.**

Moreover, the law also emphasizes the importance of relying on arbitral award and motioning its execution, in what conditions, the possibility of presenting only recognition of arbitration awards that do not require execution, including the rejection of claims within the scope of res judicata, becomes actual.

From our perspective, when a state recognizes an arbitral award, it acknowledges the legal consequences that come with it, including the mandatory nature, exclusivity, irrefutability, and, if necessary, enforceability.

This recognition endows the arbitral award with these features, as the Civil Procedure Code of the RA prohibits revisiting the same dispute between the same parties on the same factual grounds and issue that the award has already resolved (Articles 126 and 182), once the period for annulment of an arbitration award by the court has expired, or if the award has been corrected or an additional award has been made, or if the parties no longer have the opportunity to do so, it is not subject to change or addition in any way[9], is mandatory for execution for those to whom they are addressed and shall be subject to execution throughout the whole territory of the Republic of Armenia (Art. 5, sections 5 and 8).

Some legal experts argue that the state recognizes the arbitration awards “ex lege” and does not require any motion to the court, as long as enforcement is not necessary[10].

This view is supported by the fact that, according to procedural codes, the existence of an arbitration award on the same dispute between the same parties, if a writ of execution was not refused, serves as a basis for dismissing the statement of claim or terminating the proceedings by the court, which demonstrates the unique nature of arbitration awards recognized by the state. However, it should be noted that recognition of foreign arbitral awards can confer upon them legal effects that extend beyond their exclusivity, particularly in the case of declaratory awards.

Lebedev suggests that the recognition of arbitration awards also includes the feature of prejudicial circumstance[11]. However, this feature cannot be ap-

[9] According to Article 34, sections 3 and 4 of the "On Commercial Arbitration" law of the RA, an application for annulment of an arbitral award cannot be submitted after three months from the date of receiving the tribunal's decision. If an application is made under Article 33 of the law to correct errors in the award, such as arithmetic, typographical, or other similar errors, or to request an additional award, the application must be submitted within three months from the date of the tribunal's decision on that matter. If an application for annulment is submitted, the court may suspend the proceedings for a certain period of time, at the request of either party or at its own discretion, to allow the arbitral tribunal to resume the arbitration process or take other proper measures that may remedy the grounds for annulment of the award.

[10] Karabelnikov B.R. International Commercial Arbitration, M, Infotropic Media, 212, 276-282.

[11] Lebedev SN International comm arb M., 1965, page 21.

plied in RA due to the interpretation of the civil procedure regulations by the RA Court of Cassation. The Court of Cassation considers the rules of adversarial system proceedings as the determining factor for establishing pre-judgment of any circumstance. Therefore, if a circumstance is established without following formal procedural rules, with a serious violation of procedural rules of evidence collection, research, and evaluation, or with limitations on the procedural possibilities of one party, then the court shall not recognize it as prejudicial for the case under examination[12].

It is widely recognized that the strict adherence to procedural formalities in arbitration cannot have the same applied meaning as it does in civil proceedings. As per Article 19 of the RA Law "On Commercial Arbitration", the parties are free to agree on the procedure to be followed by the arbitration tribunal. In the absence of such an agreement, the tribunal is empowered to conduct the proceedings on its own discretion, provided that it is in compliance with the regulations of the law (proper, appropriate). One of the powers conferred to the arbitral tribunal is the power to determine the admissibility, relevance, materiality and significance of evidence.

We believe that there is a gap in domestic legal regulations determining the extent to which arbitration awards are mandatory and have legal force. In particular, on the one hand, the Arbitration Law distinguishes between the legal actions of recognition of an arbitration award and enforcing it in court, on the other hand, the RA Civil Procedure Code stipulates different procedures for sanctioning arbitration awards in the territory of the Republic of Armenia and foreign arbitration awards, without specifying recognition as a legal action for arbitration awards made in the territory of the Republic of Armenia, while for foreign arbitral awards, recognition and motion on enforcement are considered a joint legal action. From a legal perspective, such regulation does not establish a significant distinction between the mandatory nature of "domestic" and foreign arbitral awards or other legal action features because, under Articles 126 and 182 of the RA Civil Procedure Code, the court dismisses a statement of claim or terminates the case proceedings if there is an arbitral award concerning the case between the same persons, over the same subject and on the same factual grounds, except for the case where the court refuses to issue a writ of execution for enforcement of the arbitral award. Furthermore, according to Article 180 of the Civil Procedure Code, the court shall leave the claim without consideration in any stage of proceedings, if there is a case concerning a dispute between the same persons, on the same subject matter and on the same factual grounds in the proceedings of the same or another court or in the arbitration tribunal. Thus, domestic procedural law does not differentiate between the civil procedural consequences of arbitration conducted in the territory of the Republic of Armenia or foreign countries, nor the legal effect of rendered awards.

In addition, the determination of the limits of the mandatory nature of the legal effect of the arbitration award is also problematic in the sense that the systematic analysis of the norms of the RA Law "On Commercial Arbitration", the RA Civil Procedure Code, and the RA Law "On Enforcement of Judicial

[12] See the decision of the RA Court of Cassation No. 3-93 (VD) of 29.02.2008 on the civil case.

Acts" does not allow a clear draw a conclusion about the beginning and limits of the mandatory nature of the arbitration award. Thus, by concluding an arbitration agreement, the parties accept the mandatory nature of the arbitration award, because an arbitration agreement is an agreement concluded between the parties in relation to a certain contractual or non-contractual legal relationship to submit all or certain existing or possible cases to **arbitration** (emphasis mine) ("On Commercial Arbitration" **Article 7** of RA Law). **Meanwhile**, the RA Law "On Commercial Arbitration" **does not define the procedure and possibility of voluntary execution of arbitration awards, thereby creating certain risks for the party, voluntarily executing the award. The state may not accept the voluntary execution of the arbitration award, considering such execution groundless.** In order to avoid such a risk, the party should at least have a legislative opportunity to submit the arbitration award for recognition, while according to Article 321 of the RA Civil Procedure Code, the court examines the application on issuing a writ of execution for enforcement of the arbitration award in the event that the venue of arbitration has been the territory of the Republic of Armenia, and issuing a writ of execution for the enforcement of the arbitration award is also examined based on the application of the person in favor of whom the arbitration award was made. Such legal regulation not only de facto deprives the losing party of the opportunity to apply to the court for voluntary execution or recognition of the award, but also establishes an absolute requirement for deferred judicial control over the arbitration, which cannot be justified. It should be noted that the enforcement of the act is a facultative way of exercising the right, and it works only in cases when the party does not voluntarily fulfill the requirements of the arbitration award or judicial act. It turns out that the domestic legislation excludes the possibility of legal enforcement of the arbitration award without judicial control.

In our view, the fact of concluding the arbitration agreement makes the arbitration award mandatory for the parties, and it is not appropriate to draw direct comparisons between the limits of the mandatory nature of the arbitration award and that of a court's award. The mandatory nature of a judicial act is aimed at an indefinite range of persons, as it is mandatory for all, including the citizens of the RA and legal entities, state and local self-govern bodies in the Republic of Armenia. On the other hand, the mandatory nature of an arbitration award can only be extended to a certain extent after it has been recognized by the state, especially if it concerns acts that do not require enforcement. *Therefore, it is crucial to stipulate a procedure and an opportunity to apply to the court for the voluntary execution and recognition of the arbitration award in the RA Law "On Commercial Arbitration" and the Civil Procedure Code, in order to safeguard the rights and interests of Actors in civil transactions and mitigate potential risks.*

Besides, the Civil Procedure Code of RA defines different subjectness for submitting an arbitral award enforcement application to the court, referring to whether the award was granted within the territory of RA or not.

According to the Article 321 (2) a writ of execution for enforcement of the arbitral award shall be examined by the court based on the application of the person in favour of whom the arbitral award has been made, meanwhile, issues of recognition and enforcement of foreign arbitral awards shall be examined

upon an application filed by a party to foreign arbitration Article 326 (2).

The current arguments are based on the fact that the arbitral awards granted on the RA territory do not need enforcement. But the legislative discarded the fact that the arbitration might be international even if proceeded on the territory of the RA.

Nevertheless, both in international legal acts and legal academic collocation an arbitration is international if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States, or one of the following places is situated outside the State in which the parties have their places of business, the place of arbitration if determined in, or pursuant to, the arbitration agreement, any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.[13]

Although the exterritoriality of arbitration agreement parties is emphasizing the international origin of arbitration, it is important to underline that arbitral disputes derive from international trade and other international economic relations.[14]

The following inaccurate legal regulation is a consequence of the wrong perception of international arbitration conduct and character and, undoubtedly, it must be reviewed.

A complete review of the RA legislation on arbitration law also reveals omissions in the recognition and enforcement of arbitral awards. Hence, according to the RA Law on Commercial Arbitration, arbitral awards not exceeding the minimum wage by five thousand times are sent for compulsory enforcement directly by arbitration institutions. Therefore, the private institutions are endowed with eligibility for state compulsory enforcement, which must be absolute state priority.

According to the latest corrections on the Law on Commercial Arbitration of RA, the parties may appeal the arbitral award only. If the right of appeal is not provided in arbitral agreement, the state compulsory enforcement is inevitable.[15]

The Article 35 (4) of Law on Commercial Arbitration states that the permanent arbitration institution sends the decision of the arbitral tribunal for enforcement to the Enforcement Proceedings Service by electronic message if:

1. the arbitration was conducted by a permanent arbitral institution or
2. the place of arbitration was the territory of the Republic of Armenia, or
3. the party to the arbitration is a citizen of the Republic of Armenia or a Legal entity registered in the Republic of Armenia, or
4. the amount recoverable by the award does not exceed the minimum wage by five thousand times.

In these cases, the arbitral awards may be compulsorily enforced based on the application of the person in favour of whom the arbitral award has been made. An application on issuing a writ of execution for enforcement of arbitral

[13] UNCITRAL Model Law article 1(3), Tibor Varadi, The international commercial arbitration in different legal systems, 1998 p. 52

[14] Rene David, Arbitration in International Trade, 1985, p. 84

[15] Accepted 23 December, 2022 584-N

award may be submitted within a one-year period but not earlier than three months from the date when it is received (Article 35.1).

The following changes have designs on compulsory enforcement for the arbitral awards granted on the territory of the RA. Mainly, to improve the enforcement proceedings for so-called" domestic" arbitration awards. Nevertheless the Article 4(3) refers to both international and domestic arbitration proceedings. On the whole, the legal discrepancy between the Law on Commercial Arbitration and Civil Procedure Code (unit 47) is inevitable.

The Law on Commercial Arbitration state one of the arbitral parties must be either national of the RA or a legal entity registered in the RA. The following regulation does not make foreigners in the arbitration process impossible. We may consider the determination of international arbitration within the framework of the RA legislation has an institutional concept.

Nevertheless, the eligibility of compulsory state enforcement for private institutions is unconstitutional and unprecedented not only for the RA but also for many other developed countries. This limits the grounds for rejecting the applications for enforcement of arbitral awards. However there are few countries in which the arbitral award may be sent for enforcement directly by the arbitration institutions. But in that case the state has a capacity to observe the grounds for enforcement rejection, which is absolute state priority. The following legal practice provides state supervision functions on arbitration.

According to the Swedish Arbitration Act (Section 57) an application for enforcement shall not be granted unless the opposing party has been afforded an opportunity to express its opinion upon the application. A decision of the Enforcement Service applies immediately. However, a default fine may not be enforced before the decision, in respect of which the Enforcement Service has confirmed the default fine, has entered into final legal force.[16] The Enforcement Code of Sweden (Section 18) states if there is no impediment against enforcement of the arbitration award, it is enforced as a judgment that has entered into final legal force, unless otherwise ordered by the Court where the action against the arbitration award is pending.[17]

Arbitration awards are recognized and may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect also in United Kingdom (Arbitration Act 1996, Section 101).[18] The same legal policy is practiced in Germany[19], USA[20] and other developed States.

[16] The Swedish Arbitration Act (The Swedish Code of Statutes (SFS) 1999:116, updated as per SFS 2018:1954) https://sccarbitrationinstitute.se/sites/default/files/2022-11/the-swedish-arbitration act_1march2019_eng-2.pdf

[17] The Enforcement Code (1981:774) (including amendments up to SFS 2001:377)` https://www.regeringen.se/contentassets/1500e590992c4340a9600211fbc609b0/the-enforcement-code-1981774/

[18] Arbitration Act 1996, https://www.legislation.gov.uk/ukpga/1996/23/contents

[19] German Arbitration Act The following provisions of the Arbitral Proceedings Reform Act entered into force on 1 January 1998. Subsequent amendments, i.a. by the Civil Procedure Reform Act of 27 Jul.

2001 and the Law of Contracts Reform Act of 26 Nov. 2001 have been incorporated. Article 1, No. 7 of the Arbitral Proceedings Reform Act: Tenth Book of the Code of Civil Procedure Arbitration Procedure Sections 1025 – 1066 https://sccarbitrationinstitute.se/sites/ default/files/2022-11/german-arbitration-act.pdf, https://www.disarb.org/fileadmin/user_upload/Wissen/Deutsches_ Schiedsverfahrensrecht_98_-_Englisch.pdf

The overview of the RA legislation on arbitral awards compulsory enforcement has three regimes.

First, the judicial sanctioning of permanent arbitration awards (exceeding the minimum wage by five thousand time) and ad hoc arbitration awards provides capacity to supervise the grounds of rejections of enforcement through deferred judicial review of arbitration.

Secondly, the recognition of foreign arbitral awards and issuance of a writ of execution for enforcement of arbitral award by the court. This also provides capacity to supervise the grounds of rejections of enforcement.

And the last, permanent arbitration awards (not exceeding the minimum wage by five thousand time) compulsory enforcement without state capacity to supervise the grounds of rejections of enforcement. As a result, the arbitral institution becomes an authorization applying state coercion.

We must state, within following legal framework protection of subjective rights through arbitration is ineffective. Ineffective legal mechanisms of arbitration awards enforcement may negatively impact the protection of rights through arbitration. Subsequently, the realization of rights concluded in the final act, arbitral award, is also unproductive.

According to Article 361 1(9) of Civil Procedure Code of RA decision delivered in the result of examination of application on recognition and enforcement of a foreign arbitral award shall be subject to appeal by appellate procedure. This differentiates the protection from unlawful exequatur of judgments for "domestic" and "foreign" arbitration.

Practical approaches and features of arbitral awards enforcement on the territory of RA must be reviewed urgently. Voluntary enforcement of arbitral awards must be legally recognized as primary.

In the event of non-compliance with arbitral award voluntarily, the parties must be provided with compulsory enforcement abilities. And finally, the eligibility of state compulsory enforcement capacity of private entities must be excluded by law.

ՎԱՀԵ ՀՈՎՀԱՆՆԻՍՅԱՆ – *Հայաստանի Հանրապետության տարածքում արբիտրաժի վճիռների կատարման առանձնահատկությունները* – Հոդվածում հեղինակի կողմից ուսումնասիրվել և համակարգային վերլուծության են ենթարկվել Հայաստանի Հանրապետության տարածքում արբիտրաժի վճիռների կատարման իրավական ռեժիմները: Առանձնացվել են երկրում իրականացված արբիտրաժի վճիռների, օտարերկրյա արբիտրաժի վճիռների, ինչպես նաև Հայաստանի Հանրապետության տարածքում մշտապես գործող արբիտրաժային հաստատությունների տրիբունալների՝ նվազագույն աշխատավարձի հինգհազարապատիկը չգերազանցող վճռների կատարման առանձնահատկությունները: Կատարված գիտահետազոտական աշխատանքի արդյունքում բացահայտվել են նշված իրավակարգավորումների մի շարք թերություններ և հակասություններ այլ նորմատիվ իրավական ակտերի հետ: Հոդվածում արվել են առաջարկություններ, մասնավորապես՝ համակարգային առումով վերանայել և վերաիմաստավորել Հայաստանի Հանրապետութ-

[20] The Federal Arbitration Act (USA) https://sccarbitrationinstitute.se/sites/default/files/2022-11/the-federal-arbitration-act-usa.pdf

յան տարածքում արբիտրաժային վճիռների կատարման ինստիտուտի գործառական առանձնահատկությունները՝ կամավոր կատարումն օրենսդրորեն ամրագրելով որպես արբիտրաժի վճիռների կատարման առաջնային եղանակ: Հոդվածում հիմնավորվել է, որ արբիտրաժի վճիռը կամավոր չկատարվելու պարագայում իրավունքի սուբյեկտների համար պետք է ապահովել հարկադիր կատարում պահանջելու լիարժեք հնարավորություն՝ անկախ արբիտրաժի տեսակից, որպիսի պայմաններում դատական կարգով հնարավոր կլինի ստուգել վճռի հարկադիր կատարումը մերժելու հիմքերի առկայությունը, ինչպես նաև օրենսդրորեն բացառել իրավունքի մասնավոր սուբյեկտների կողմից պետական հարկադրանքի կիրառման ոչ իրավաչափ հնարավորությունը: Հեղինակը համադրումներ է կատարել նաև արևմտյան առաջատար երկրների իրավակակարգավորումների հետ:

Բանալի բառեր – *արբիտրաժի վճիռ, կամավոր կատարում, հարկադիր կատարում, ճանաչում, կատարողական թերթի տրամադրում, կատարման մերժում, դատական վերահսկողություն, օտարերկրյա արբիտրաժ*

ВАГЕ ОГАНИСЯН – ***Некоторые ключевые аспекты принудительного исполнения арбитражных решений на территории Республики Армения.*** – В рамках данной статьи автором исследованы и проанализированы правовые режимы исполнения арбитражных решений на территории Республики Армения. В работе выделены и исследованы особенности арбитражных решений, принятых на территории Республики Армения, решений, принятых международным арбитражем, а также решений арбитражных институтов-трибуналов на территории Республики Армения, не превышающих минимальную заработную плату в пять тысяч раз. В результате проведенного исследования был выявлен ряд неточностей и противоречий в правовом регулировании вышеуказанных вопросов. Автором предлагается пересмотреть, а также и переосмыслить, и системно представить практические особенности института исполнения арбитражных решений на территории Республики Армения, при этом провозгласить на законодательном уровне добровольное исполнение в качестве первичного пути.

В данной статье автор обосновывает необходимость обеспечения полноценных условий для требования принудительного исполнения в случае добровольного неисполнения арбитражного решения для субъектов правоотношений судебным путем. Независимо от вида арбитража участники должны иметь возможность проверить наличие правовых положений об отказе принудительного исполнения. Еще одна важная проблема выявлена в сфере субъектов уполномоченных принимать принудительные меры для осуществления арбитражных решений. Как известно, в Республике Армения государственная принудительная система является абсолютной прерогативой государства, а не частных субъектов.

Ключевые слова: *арбитражные решения, принудительное исполнение, коммерческий арбитраж, исполнительный лист, перманентный арбитраж, международный арбитраж, институт исполнения арбитражных решений*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 170-176 *Քաղաքացիական դատավարություն*
https://doi.org/10.46991/BYSU:C/2023.14.2.170

THE POSSIBILITY OF APPLYING ARTIFICIAL INTELLIGENCE IN CIVIL PROCEEDINGS

ASHKHEN GHARSLYAN

In the article, the author referred to the possibility of using artificial intelligence in judicial procedures. For this purpose, first of all, the author revealed the essence of artificial intelligence algorithms, the advantages and disadvantages of their application, and identified the possible legal areas in which these algorithms can be applied. The ability of artificial intelligence algorithms in predicting justice has been discussed in more detail. At the same time, the article presented the five principles provided by the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment adopted by the European Commission for the Efficiency of Justice in 2018, which should have guiding significance in the design and implementation of artificial intelligence algorithms in judicial procedures.

Keywords: *artificial intelligence, algorithm, judicial procedure, principle, charter, predictable justice*

Currently, artificial intelligence has become widely used in the world, not only in the technological field. According to experts, it is capable of creating a new development of humanity's perspectives or fundamentally changing existing structures.

To find out the possibility of using artificial intelligence in judicial procedures, first of all, it is necessary to reveal its essence.

Artificial intelligence is a system of algorithms capable of solving such problems, which usually requires human intelligence and abilities. Artificial intelligence is formed as a result of the study and analysis of such abilities of the human brain as teaching, reasoning, and self-improvement. As an outcome of such research, so-called "intelligent programs and systems" are being developed. Artificial intelligence can be defined as a system of algorithms that analyze patterns and features in specific data to draw conclusions.

Experts also widely discuss its advantages and disadvantages. Speed, availability, reduction of human error, and ability to easily solve repetitive problems are indicated as advantages. Costliness and the inability to completely repeat the human creative mind are considered a disadvantage. The fact that the wide spread of artificial intelligence can lead to unemployment and human indifference is also mentioned as a disadvantage.

The rapid spread of artificial intelligence could not get around the legal sphere, particularly the judiciary.

The initiative for the possibility of using artificial intelligence tools in the judicial process essentially originated from the private sector, for whose beneficiaries it is a means of reducing legal uncertainty and the unpredictability of judicial decisions.

Studying the experience of European countries allows us to identify the possible legal areas within which artificial intelligence algorithms can be applied. These include the creation of intelligent search engines for case law, online dispute resolution, assistance in the development of legal documents, predictive analytics, classification of contracts, and chatbots, which are designed to inform or assist interested parties in initiating legal processes.

Among the listed, within the framework of this article, reference will be made to those algorithms of artificial intelligence that are capable of predicting justice. The purpose of such algorithms is to determine the probability of success of a legal dispute in court. The algorithm works based on the analysis of statistical indicators of previous decisions of courts with similar legal disputes, comparing them with the actual circumstances of the expected legal dispute[1]. The more data the algorithm contains, the more accurate its predictions will be. The task of the mentioned algorithms is to repeat the conclusions made by the courts when examining cases with similar facts. This toolkit can not only be used, for example, by advocates, but it can also be of assistance to judges in drafting judicial decisions. With these algorithms, it is also possible to calculate the amount of damages or the amount of alimony to be paid.

Objectively, a question may arise whether artificial intelligence algorithms can ensure the reasoning behind the court's decision. It is indisputable that the algorithm is not capable of providing it. This is explained by the fact that the reasoning of the judicial act itself is a complex process and largely depends on the discretion of the judge. In particular, it is not possible to make conclusions in advance without finding out what the circumstances that are important for solving the legal dispute, which of those facts are proven and which are not, what legislation should be applied, and how the legal norms to be applied should be interpreted. With all this in mind, designers of artificial intelligence algorithms are still content with creating programs that can only predict the outcome of a case. Referring to the accuracy of such predictions, it should be noted that a similar study was conducted by the students of the University College London (UCL) based on the case law of the European Court of Human Rights, and the accuracy of the conducted prediction was estimated at 79 percent.

It is worthwhile to discuss the issue of whether artificial intelligence *post factum* can interpret the impartiality of the judge delivering a given decision. Currently, an attempt is being made to design algorithms that analyze the outcome of certain legal disputes solved by the judge to evaluate his or her behavior. Such an approach, however, has been criticized because this criterion alone cannot prove that the judge was not impartial when making a judicial act in a specific case.

No matter how obvious the effectiveness of artificial intelligence algorithms is, their design and operation require certain legal regulations.

It is for this reason that the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe has adopted the European Ethical

[1] Raffaele Giarda, International: Artificial Intelligence in the administration of justice, February 19, 2022, https://www.globalcompliancenews.com/2022/02/19/international-artificial-intelligence-in-the-administration-of-justice310122/

Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment (hereinafter the Charter)[2].

The Charter is addressed to stakeholders in the public and private sectors who are responsible for the design and implementation of artificial intelligence algorithms designed to ensure the processing of judicial decisions and other data.

The use of artificial intelligence tools in the judicial system has a purpose to increase the efficiency and quality of justice. Therefore, such use should be encouraged. However, fundamental human rights should be taken into account when implementing artificial intelligence tools.

Processing of judicial decisions and data by artificial intelligence aims to ensure the predictability of applying of the legal norms and the stability of judicial practice.

Regardless of the circumstances of how artificial intelligence algorithms will be used in legal proceedings, such use must be carried out transparently, impartially, and fairly, subject to external and independent expert evaluation.

The Charter has established **five principles**, according to which the interested entities of the public and private spheres should implement the design and operation of artificial intelligence algorithms, as well as the monitoring of this process.

1. **Principle of respect for fundamental rights: ensure that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights:**

The first principle requires that the design and operation of artificial intelligence algorithms should be carried out in accordance with fundamental rights provided by the European Convention on Human Rights and the Convention on the Protection of Personal Data.

Where artificial intelligence tools are used as a means of resolving legal disputes or assisting of drafting judicial decisions, it is important that such tools do not undermine the rights to access to court and fair trial. The use of such a toolkit should also be carried out, taking into account the principles of the rule of law and the independence of the judge.

2. Principle of non-discrimination: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals:

Given the ability of these processing methods to reveal existing discrimination through grouping or classifying data relating to individuals or groups of individuals, public and private stakeholders must ensure that the methods do not reproduce or aggravate such discrimination and that they do not lead to deterministic analyses or uses.

3. Principle of quality and security: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models conceived in a multi-disciplinary manner in a secure technological environment:

First of all, this principle implies that representatives of the judiciary, as

[2] https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c

well as scientists conducting research in the fields of law and other social sciences, should be involved in the process of developing artificial intelligence programs. It must be ensured that the database of court decisions to be entered into the system will not be subject to any changes. Artificial intelligence algorithms must be developed in such a way as to ensure their safe operation, which implies ensuring the integrity of the system and excluding interference.

4. Principle of transparency, impartiality, and fairness: make data processing methods accessible and understandable, authorize external audits:

This principle is to ensure transparency, impartiality, and fairness. This principle requires access to and expertise in the methods of designing and conducting artificial intelligence algorithms. Although artificial intelligence is an object of intellectual property, a reasonable balance must be ensured between the intellectual property right to specific algorithms and the transparency of their processing methods (access to their design), impartiality (absence of bias), fairness (priority must be given to the interests of the judiciary), especially when such algorithms have legal consequences or directly affect the rights of individuals.

5. The principle "under user control": precludes a prescriptive approach and ensures that users are informed actors and in control of their choices:

First of all, it requires the awareness of artificial intelligence users. Users must be informed in a clear and accessible manner about the artificial intelligence systems, their performance, the possibility of error, the nature of the proposed decisions, their binding or non-binding consequences, other methods of dispute resolution, or the right to access to the court.

The representatives of the judicial authority should have the opportunity at any time to check the database as a result of the processing of which a certain solution is proposed by the artificial intelligence, and also, depending on the circumstances of the specific case, they should have the opportunity to ignore the proposed solutions.

Discussing the possibility of applying artificial intelligence algorithms in domestic civil proceedings, it should be noted that despite the large penetration of digital technologies into the RA judicial system, artificial intelligence algorithms are still not applicable in civil proceedings. Perhaps the only manifestation of their use can be considered the special computer program for the distribution of cases among judges, which makes a specific conclusion about the distribution of court cases based on the analysis of certain data patterns and features.

Taking into account the advantages of using artificial intelligence algorithms, it is necessary to discuss the issue of which civil procedure structures are possible to launch and in what manner.

As already mentioned, the algorithm works in the way of carrying out certain comparisons. Therefore, it is possible to solve such civil procedure questions that require comparisons between the contents of the procedural documents and/or attached documents on the one hand and the conditions mentioned in the disposition of the legal provision on the other hand. It is important to

mention that such conditions should not give rise to different interpretations.

The above mentioned application of artificial intelligence algorithms is possible when solving the issue of admissibility of electronically submitted claims, applications, appeals, and cassation appeals.

In particular, according to Article 100 of the RA Civil Procedure Code:

1. The documents provided in the same code (claim, application, complaint, response to the claim, petition, etc.) can be submitted according to the law and in the order established by the Supreme Judicial Council.

2. The documents attached to the documents submitted electronically are submitted electronically in a scanned version, and in case of the need to pay the state duty, it is paid through the electronic system of state payments (www.e-payments.am).

3. The simple power of attorney signed with an electronic signature is attached to the documents submitted electronically, and the power of attorney with notarization is attached in the form of a copy, with the reflection of the password that enables the court to check its authenticity online or an electronic original.

In case of the possibility of submission of claims, applications, and complaints electronically, the program can be designed and operated in such a way that in case of non-compliance with the content of the mentioned documents and/or the attached documents, the requirements presented by law are not observed, the program automatically returns it to the addressee. Objectively, a question may arise as to whether the program can make such a conclusion regarding all content elements. Thus, for example, such content elements that refer to the name of the court, the persons participating in the case, passport data or state registration number, registration or notification address, and the list of attached documents do not need any additional comments, these conditions are either present in the mentioned procedural documents, or not, or they are presented incompletely. Therefore, taking into account the current capabilities of artificial intelligence algorithms, it can be confidently asserted that the discussed content defects can not only be raised by the program, but also the application of the corresponding procedural consequence is possible. Regarding the documents attached to claims, applications, and complaints, without any exception, the algorithm must be able to check not only their existence but also, in individual cases, compliance with the requirements presented to them.

Artificial intelligence algorithms are also capable of analyzing patterns and characteristics of certain data to draw conclusions. Therefore, through artificial intelligence, it is possible to provide a solution to civil procedural issues that require comparisons between the facts of the case and the previous decisions of the courts. The more data the algorithm contains, the more accurate its predictions will be. According to that, the use of artificial intelligence algorithms can possibly be considered when solving the issue of admissibility of appeals on a point of law as well.

One of the requirements for the content of appeals on a point of law is the existence of a ground for accepting the appeal and its justification. In all cases when the appeal on the point of law is brought on the ground of the uniform application of the law and other normative legal acts, the Court of Cassation

must find out the existence of a conflicting interpretation when deciding the admissibility of such appeal. Meanwhile, with the availability of a suitable database and the introduction of intelligent search systems, this contradiction can be raised by artificial intelligence. Moreover, the algorithm can be designed in such a way that, for example, in relation to the norm indicated in the appealed judicial act, it not only brings up the judicial act indicated by the appealed person and the possible conflict with it but also all the possible judicial practice in connection with it, thus also providing the Court of Cassation to reveal the existence of contradictory judicial practice, why not also in the cassation proceedings, and to fulfill its constitutional function.

The algorithm can also be designed to make predictive inferences about the resolution of the dispute. Although such conclusions may have a purely advisory nature, they can greatly contribute to reducing the workload of the courts. Therefore, artificial intelligence algorithms can be used to determine the possible outcome of a court case. Thus, for example, part 1 of Article 297 of the Civil Procedure Code of the Republic of Armenia stipulates that claims for confiscation of an amount not exceeding AMD 5,000,000 are examined by the court of first instance in a simplified procedure. The study of judicial practice shows that the above-mentioned claims arise from similar legal disputes, have repeated facts, and do not contain any serious legal disputes. Moreover, as a rule, the final judicial act held in the framework of the discussed proceedings does not have a reasoning part by force of law, taking into account the exceptions provided by the RA Civil Procedure Code.

The above-mentioned proves that in the case of the examination of claims provided for in Article 297, Part 1 of the RA Civil Procedure Code, artificial intelligence algorithms can not only predict the possible outcome of the dispute, which will be carried out based on the factual circumstances of the claim to be examined, following the practice of courts in disputes with similar factual circumstances in the past but also in case of satisfying the claim (if no objection was submitted and/or the claim is satisfied in full) they can develop the draft of the final judicial act automatically. It should be kept in mind that the mentioned prediction will have only an advisory nature, and the court should have full discretion to disagree with the predicted solution.

ԱՇԽԵՆ ՂԱՐՍԼՅԱՆ – ***Արհեստական բանականության կիրառման հնարավորությունը քաղաքացիական դատավարությունում*** – Հոդվածում հեղինակն անդրադարձել է դատավարական ընթացակարգերում արհեստական բանականության կիրառման հնարավորությանը: Այդ նպատակով նախ և առաջ բացատրել է արհեստական բանականության ալգորիթմների էությունը, դրանց կիրառման առավելությունները և թերությունները, առանձնացրել է այն հնարավոր իրավական ոլորտները, որոնց շրջանակներում կարող են կիրառվել այդ ալգորիթմները: Առավել մանրամասն քննարկման առկա է դարձել արհեստական բանականության ալգորիթմների ունակությունն արդարադատության կանխատեսման հարցում: Միաժամանակ հոդվածում ներկայացվել են Արդարադատության արդյունավետության եվրոպական հանձնաժողովի կողմից 2018 թվականին ընդունված Դատական համակարգերում և հարա-

կից միջավայրում արհեստական բանականության օգտագործման վերաբերյալ եվրոպական էթիկական խարտիայով նախատեսված այն հինգ սկզբունքները, որոնք ուղղորդող նշանակություն պետք է ունենան դատավարական ընթացակարգերում արհեստական բանականության ալգորիթմների նախագծման և գործարկման հարցերում:

Բանալի բառեր – *արհեստական բանականություն, ալգորիթմ, դատավարական ընթացակարգ, սկզբունք, խարտիա, կանխատեսելի արդարադատություն*

АШХЕН КАРСЛЯН – ***Возможность применения искусственного интеллекта в гражданском процессе.*** **–** В статье автор ссылается на возможность, использование искусственного интеллекта в судебных процессах. Для этого, прежде всего, автор раскрыл сущность алгоритмов искусственного интеллекта, преимущества и недостатки их применения, а также обозначил возможные правовые сферы, в рамках которых эти алгоритмы могут применяться. Искусственный интеллект стал предметом более детального обсуждения в вопросе о способности алгоритмов в деле прогнозирования правосудия.

Параллельно в статье представлены пять принципов, предусмотренных Европейской этической хартией по использованию искусственного интеллекта в судебных системах и связанных с ними средах, принятых Европейской комиссией по эффективности правосудия в 2018 г., которые должны иметь руководящее значение в разработках и внедрении алгоритмов искусственного интеллекта в судебных процессах.

Ключевые слова: *искусственный интеллект, алгоритм, судебный процесс, принцип, устав, предсказуемое правосудие*

ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 177-184 *Քաղաքացիական դատավարություն*
https://doi.org/10.46991/BYSU:C/2023.14.2.177

THE INSTITUTIONAL FEATURES OF THE JUDICIAL OVERSIGHT ON THE LEGITIMACY OF THE "PRE-JUDICIAL" PHASE OF THE PROCEEDINGS FOR CONFISCATION OF PROPERTY OF ILLICIT ORIGIN

VAHE HOVHANNISYAN, TIGRAN MARKOSYAN

The legal proceedings for confiscating property of illicit origin represent a novelty in Armenian legal system, and the study of both its comprehensive and individual issues hold significant theoretical and practical importance.

Based on international documents, domestic legislation, and jurisprudence, the authors present an analysis of the general characteristic of the confiscation of property of illicit origin, as well as discuss several practical issues in the existing tools for management of the legitimacy of its "pre-trial" stage. Namely, the necessity for proper judicial oversight of acts, including actions and omissions that fall outside the scope of current oversight mechanisms, its implementation peculiarities, including consequences of recorded infringements are highlighted and as a result, the need for legislative regulations of such issues is raised.

In the article, the authors present several scientific and practical conclusions, such as the need to establish on a legislative level the scope and conditions for oversight of the legitimacy of the decisions, actions, and omissions of the competent authority in the "pre-judicial" stage of the confiscation of property of illicit origin. As a result, it can be stated that the conclusions presented in the article can serve as an indication for the further development of legal practice and existing regulations.

Keywords: *civil confiscation, proceedings for confiscation of property of illicit origin, in rem, right to property, "pre-trial" stage, legitimacy, judicial oversight, direct appeal, "deferred" appeal*

The establishment of effective measures for the confiscation of property of illicit origin is a necessity for every state. For this reason, states make significant efforts to continuously develop such tools.

It is noteworthy that in addition to the institution of confiscation of property of illicit origin in criminal proceedings, there is a growing trend of confiscating property of illicit origin outside of criminal proceedings. In these cases, the confiscation is initiated in the framework of a criminal proceeding but does not depend on the outcome, or the confiscation is imposed on the property regardless of any criminal proceedings.[1] Accordingly, this type of confiscation is commonly known as "civil confiscation", "in rem confiscation", or by other similar names.[2]

While civil confiscation shares some similarities with the institution of confiscation in criminal proceedings, it differs fundamentally in that it does not

[1] See Совет Европы, Использование ареста и конфискации без вынесения обвинительного приговора, 2021, page 10.

[2] See **Теодор Гринберг, Линда Сэмюэль, Вингейт Грант, Ларисса Грей,** Возврат похищенных активов: Руководство по конфискации активов вне уголовного производства; Пер. с англ. — М.: Альпина Паблишерз, 2010, page 35.

necessitate the existence of a guilty verdict.[3] On the other hand, it is directed against a broader range of illicit property. The use of a civil confiscation mechanism is an acceptable tool not only for criminal assets but also for assets obtained through other illegal ways.[4]

Considering the aforementioned, it is evident that this institution is a direct interference with an individual's rights to property, which requires more carefully developed legislation. In this regard, Resolution 2218 of CoE Parliamentary Assembly should be highlighted, according to which such measures have successfully withstood scrutiny by the highest courts of the countries concerned and also by the European Court of Human Rights and were found to be compatible with human rights if legislation establishes appropriate safeguards, such as full judicial review by an independent and impartial tribunal, within a reasonable time, granting compensation to persons whose assets have been frozen or confiscated erroneously, providing for legal aid for judicial review, compensation proceedings for persons who cannot afford a legal representative, etc.[5]

In contrast to many other countries, the civil confiscation procedure is a recent addition to the legal system of Armenia. It was introduced by the law "On confiscation of property of illicit origin[6]," according to which proceedings for confiscation of property of illicit origin is a procedure initiated by a competent authority[7] for the purpose of confiscation of property of illicit origin, which shall start by rendering a decision on initiating an investigation of grounds for initiating a claim for in rem proceedings and shall be completed by a final judicial act, that has entered into legal force, on the claim submitted for confiscation of property of illicit origin, or based on other grounds prescribed by this Law. Meanwhile, the law introduced the notion of "investigation on the grounds for initiating a claim (hereinafter referred to as investigation)" as a procedure aimed at obtaining data on the existence of illicit property, the volume thereof, and the scope of persons concerned.

Thus, it can be inferred that the study and the confiscation proceedings of the property of illicit origin are related as a part and a whole. In other words, the study is the independent stage of the mentioned proceedings, which precedes the judicial proceedings and has a "pre-trial" nature. Moreover, it determines the possibility of filing a lawsuit, identifies the subject of the lawsuit to be filed, and determines the court examination procedure.

However, it is crucial to examine whether the Law provides sufficient substantive and procedural safeguards to achieve a fair balance between the public interests involved and the legitimate interests of persons targeted by confisca-

[3] See **Жан-Пьер Брюн, Ларисса Грей, Кевин Стивенсон, Клайв Скотт,** Руководство по возврату активов для специалистов-практиков; Пер. с англ. — М.: Альпина Паблишер, 2012, pages 28-29, 161-163.

[4] See **Venice Commission**, CDL-AD(2022)048, Amicus curiae Brief for the Constitutional Court of Armenia on certain questions relating to the Law on the Forfeiture of Assets of Illicit Origin, adopted by the Venice Commission at its 133rd Plenary Session (Venice, 16-17 December 2022), para. 25.

[5] See Parliamentary Assembly Resolution 2218, Fighting organised crime by facilitating the confiscation of illegal assets, 26 April 2018 (17th Sitting), para. 5 and 9.

[6] Adopted 16.04.2020. entered into force 23.05.2020: See HHPT 2020.05.13/50(1605) Art.580: Hereinafter referred to as "the Law".

[7] According to the Law - the responsible subdivision of the Prosecutor General's Office.

tion measures.[8]

In this context, first of all, the justification for the adoption of the Law is noteworthy, according to which:

"73. Furthermore, to ensure procedural guarantees for an effective defense, the draft law has provided a certain time limit on the confiscation of the property. This allows the defendant to effectively participate in the proceedings and submit materials related to the case.

106. In addition to the introduction of a mechanism for the confiscation of property of convicted persons, several guarantees have been established to protect fundamental rights, including:

- time limits for the implementation of a study,
- confidentiality about the study and collected materials therein,
- implementing mandatory public notices to provide an opportunity for all interested parties to participate in the case regarding the property,
- providing the opportunity to review the materials, submit statements, and present positions prior to the submission of the claim,
- granting the possibility to appeal judicial acts in accordance with the general procedure outlined in the RA Civil Procedure Code,
- the defendant's opportunity to use free legal assistance,
- allowing for the possibility of releasing a part of the confiscated property from seizure by court decision to cover legal fees, living expenses of the involved party, or to avoid interference with business activities,
- the right to claim compensation for damage caused by the use of the security measure".[9]

Correspondingly, the legislator devoted Chapter 2 of the Law titled "Investigation on the Grounds for Initiating a Claim" to the regulations related to the "pre-trial" stage of the confiscation of property of illicit origin, in the framework of which the following issues were regulated: grounds for initiating an investigation, initiation of investigation and lawfulness of investigation, scope of investigation and time limits for conducting investigation, powers of the competent authority when conducting an investigation, preliminary and final summary of investigation results and other relations. Moreover, for comparison, it should be noted that the Law "On Prosecution"[10], which included the initiation of a claim for confiscation of property of illicit origin in the functions of the prosecutor's office for initiation of a claim for the protection of the state interests, did not provide such detailed regulations regarding the preparation of the initiation of a claim for the protection of state interests on other issues.

Moreover, the Law allowed the implementation of specific actions during the study only with the decision of the court. According to Articles 12,14 and 15, notarial, bank, insurance or trade secrecy, service information prescribed by

[8] See **Venice Commission**, CDL-AD(2022)048, Amicus curiae Brief for the Constitutional Court of Armenia on certain questions relating to the Law on the Forfeiture of Assets of Illicit Origin, adopted by the Venice Commission at its 133rd Plenary Session (Venice, 16-17 December 2022), para. 27.

[9] See https://www.e-draft.am/projects/1931/about

[10] Adopted 17.11.2017. Entered into force 09.04.2018. See HHPT 2017.12.13/74(1349) Art.1213.

the Law on Securities Market, except for the information prescribed by Clause 6 of Part 2 of Article 98 of the Law on Securities Market, credit information or credit history and evidence preliminary securing is possible only by the decision of the court made on the basis of the application of the competent authority.

Meanwhile, the legislator stated in Part 4 of Article 6 that violations of the procedural requirements regulating the initiation of investigation and implementation thereof, as prescribed by this Law, shall only entail consequences that are directly prescribed by this Law, the Civil Procedure Code of the Republic of Armenia, or other laws. The Law, as a matter of fact, provided only one such consequence, namely, according to Part 1 of Article 8, an investigation may last three-year maximum, and according to Part 2 of Article 8, a claim submitted in violation of the time periods prescribed by this Article shall be deemed to be submitted in violation of the statute of limitation.

In light of the above, the question is whether the legitimacy of decisions, actions, and omissions by the competent authority, which are not related to the infringement of the pre-trial investigation period, is susceptible to judicial review. If so, how is such oversight executed. As an example, if the competent authority conducted the study without sufficient legal grounds or in violation of the procedural rules governing relevant decisions, exercised illegal discretion regarding the duration of the study or the amount of property to be transferred pursuant to a settlement agreement, or failed to notify interested parties.

Although the European Court of Human Rights has considered property confiscation proceedings without a conviction to be civil in nature, some legal scholars argue that defendants in these proceedings should be given more rigorous protection measures typically afforded to a criminal litigant since measures of civil proceeding are assumed to be "unfair" when there is a risk of confiscation of the defendant's property. [11] Yet, the Venice Commission stresses that the procedural safeguards in civil confiscation procedures are as essential as those in a criminal procedure, depending on the specific features of the confiscation regime and private circumstances.[12]

In this context, it is noteworthy to mention some of the positions expressed by the Constitutional Court regarding the rights to property and judicial protection, such as the following:

- The right to property not only plays a crucial role in safeguarding the rights and freedoms of individuals in a democratic, social, and legal state but also holds significant constitutional and legal importance in serving as a framework for regulating private and public legal relationships.[13]

- Any legislative regulation related to the right to property, its interpretation and application must comply with the regulations established by the Constitution and the legal positions presented by the Constitutional Court in relation to the fundamental right, in particular, by establishing preconditions for the owner to freely dispose, use and possess the property legally owned by him, as well as

[11] See Совет Европы, Использование ареста и конфискации без вынесения обвинительного приговора, 2021, page 25.

[12] See **Venice Commission**, CDL-AD(2022)014, Kosovo - Opinion on the Draft Law N°08/L-121 on The State Bureau for verification and confiscation of unjustified assets, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022), para. 19.

[13] See Constitutional Court Decision DCC–1432 of 30.10.2018.

for the free development and equal legal protection of all forms of property, must ensure compliance with constitutional requirements regarding deprivation of property by judicial order in the cases defined by law, as well as guarantee the protection of property rights based on legitimate expectations of acquiring property.[14]

- The rights to judicial protection and fair trial are among the fundamental constitutional rights, and their realization guarantees the respect and protection of several other constitutional rights, therefore; "… the constitutional right to judicial protection gives rise to the positive duty of the state to ensure it in both law-making and law-enforcement activities. This duty entails, on the one hand, the obligation of the legislator to establish the possibility and mechanisms of full judicial protection in the laws and, on the other hand, the duty of law enforcers to accept, without exception, applications made to them in a legal manner, through which individuals seek legal protection against alleged violations of their rights".15

- the institution of judicial appeal of decisions and actions of bodies and officials, carrying out investigation and pre-trial investigation and of prosecutors in pre-trial proceedings (as outlined in Part 2 of Article 278 and Article 290 of the Criminal Code of the Republic of Armenia) serves as a crucial means of protecting the rights and freedoms of individuals involved in criminal proceedings. Its purpose is to ensure the implementation of constitutional norms, such as those laid down in Articles 18 and 19, as well as Articles 3, 14, 14.1, 16 and17 of the RA Constitution, as well as other key articles that reflect the principle of protecting human rights and freedoms. It is designed to safeguard the constitutional and other rights and freedoms of individuals, protecting them from illegal or unlawful decisions and actions by state bodies and officials through judicial oversight of pre-trial proceedings. As such, this is also highlighted in the review of motions from investigative bodies, investigators, or prosecutors regarding the execution of investigative or operational-detective activities and the application of judicial coercive measures that may limit a person's constitutional rights and freedoms (as outlined in Part 1 of Article 278 and Article 282 of the Criminal Code of the Republic of Armenia).[16]

Hence, it can be inferred that the legitimacy of the decisions, actions, and omissions of the competent authority during the "pre-trial" stage of the proceedings in question should also be subject to judicial oversight based on reasons not related to the violation of the study period. This conclusion also follows from the concept of the rule of law, according to which no legal act, including normative (except for the Constitution), can be excluded from judicial review, the purpose of which is the protection of the violated rights of a person, including effective judicial protection, which is provided by an independent and impartial court within a reasonable time, a fair and public hearing. [17]

As for the regime of implementation of the aforementioned oversight, the logic behind the appeal of interim judicial acts can serve as a helpful guideline.

[14] See Constitutional Court Decision DCC–1611 of 28.09.2021.
[15] See Constitutional Court Decision DCC–1249 of 22.12.2015.
[16] See Constitutional Court Decision DCC-844 of 07.12.2009.
[17] See Constitutional Court Decision DCC-1584 of 09.03.2021.

Thus, the legislator differentiates between two fundamental types of appeals for interim judicial acts, that is, an appeal within the framework of the appeal of a judicial act resolving the case on its merits - "deferred appeal" and a direct appeal of an interim judicial act. If the only possible means of legal protection against an interim judicial act suspending the further course of the proceedings is its direct appeal, and accordingly, the law is required to provide a procedure for direct appeal of the given act, then the choice between the two mentioned procedures for appealing an interim judicial act adopted during the pending and ongoing proceedings is left to the discretion of the law. [18] At the same time, according to international jurisprudential practice, there is a general tendency to minimize the possibility of direct appeal of interim judicial acts and to give preference to their "deferred appeal" procedure. [19]

Considering the aforementioned positions and referring to the issue of oversight of the decisions' legitimacy, actions and omissions of the competent authority on grounds not related to the violation of the investigation period in the "pre-judicial" stage of the confiscation of property of illicit origin, it should be noted that, apart from cases of direct oversight explicitly stated in the Law, the remaining issues fall under the purview of the court review. In other words, the "deferred" regime is the most acceptable option for judicial oversight on legitimacy, as there is no need for an urgent appeal. The opposite approach would create opportunities for artificial obstructions in the normal course of investigation, which would significantly reduce the effectiveness of the institution of illicit property confiscation.

Moreover, this position, even in connection with a narrower range of issues, was also stated in the Constitutional Court Decision DPJCC - 64 of November 21, 2022, according to which: "The legitimacy of the facts underlying both the decision to start the study and the conclusion regarding the results of the study can be referred to during the judicial examination of the relevant case. Moreover, the mentioned facts can become the subject of judicial review and assessment also within the framework of the appeal of the judicial act that resolves the case on its merits.".

Nevertheless, it is important to emphasize that the limits and conditions of such oversight require legislative regulation because, as mentioned, the Law lacks certain legal regulations in this regard, and perhaps the only relevant rule of the Civil Procedure Code of the Republic of Armenia[20] pertains to the admissibility of evidence, which prohibits the use of evidence obtained by violation of rights or violating the right to a fair trial. Therefore, it is evident that it sets an extremely high threshold for effectively countering potential violations of legality.

Thus, based on this study, we can draw the following conclusions:

1. The proceedings for the confiscation of property of illicit origin is an effective mechanism for confiscating property obtained through criminal or other illicit means and comprise two stages: the pre-trial and judicial stages.

[18] See Constitutional Court Decision DCC–922 of 02.11.2010.

[19] See Constitutional Court Decision DCC–1191 of 24.02.2015.

[20] Adopted 09.02.2018. Entered into force 09.04.2018. See HHPT 2018.03.05/16(1374) Art.208.

2. The "pre-trial" stage of the proceedings for confiscation of property of illicit origin holds significant importance for the entire proceedings because it firstly determines the possibility of filing a lawsuit and, subsequently, establishes the subject of the lawsuit and the scope of the judicial examination.

3. In the "pre-judicial" stage of the confiscation of property of illicit origin, the legitimacy of individual actions of the competent body (request of confidential information provided by law, application of measures for preliminary securing of the claim, and preliminary securing of evidence) is subject to direct judicial review and is carried out by examining the relevant applications submitted by the competent authority.

4. During the "pre-trial" stage of the proceedings for confiscation of property of illicit origin, the legitimacy of the decisions, actions, and omission of the competent authority, apart from the ones subject to the immediate judicial control, are subject to a "deferred" judicial review within the framework of the court proceedings.

5. It is necessary to establish on a legislative level the scope and conditions for oversight of the legitimacy of the decisions, actions, and omissions of the competent authority in the "pre-judicial" stage of the confiscation of property of illicit origin.

ՎԱՀԵ ՀՈՎՀԱՆՆԻՍՅԱՆ, ՏԻԳՐԱՆ ՄԱՐԿՈՍՅԱՆ – ***Ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթի «մինչդատական» փուլի օրինականության նկատմամբ դատական վերահսկողության ինստիտուցիոնալ առանձնահատկությունները*** – Ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթը նորույթ է հայրենական իրավական համակարգում, և դրա ինչպես համապարփակ, այնպես էլ առանձին հարցերի ուսումնասիրությունն ունի տեսագործնական մեծ կարևորություն։

Միջազգային փաստաթղթերի, հայրենական օրենսդրության և դատավարագիտության մեջ ձևավորված մոտեցումների հիման վրա հեղինակները ներկայացնում են ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթի ընդհանուր բնութագիրը, ինչպես նաև քննարկում դրա «մինչդատական» փուլի օրինականության նկատմամբ վերահսկողության առկա գործիքակազմին առնչվող մի շարք գործնական խնդիրներ։ Մասնավորապես փաստվում են ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթի գործիքակազմի ծածկույթից դուրս գտնվող մի շարք ակտերի, այդ թվում՝ առանձին գործողությունների և անգործության պատշաճ դատական վերահսկողության անհրաժեշտությունը, դրա իրականացման ռեժիմի առանձնահատկությունները, ներառյալ արձանագրված խախտումների հետևանքները, և հիմնավորվում է այս հարցերի լուծման ուղղությամբ օրենսդրական կարգավորումներ նախատեսելու հրատապությունը։

Հոդվածում հեղինակները ներկայացնում են գիտագործնական մի շարք եզրահանգումներ, որոնցից է օրենսդրական մակարդակով ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթի ընթացքում իրավասու մարմնի որոշումների, գործողությունների և անգործության իրավաչափության վերահսկողության սահմանները և պայմանների հստակեցման անհրաժեշտությունը։ Հոդվածում ներկայացված եզրահանգումները կարող են ուղենիշային լինել ի-

բավակիրառ պրակտիկայի, ինչպես նաև առկա կարգավորումների հետագա զարգացման համար։

Բանալի բառեր – *քաղաքացիական բռնագանձում, ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթ, in rem, սեփականության իրավունք, «մինչդատական» փուլ, դատական վերահսկողություն, անմիջական բողոքարկում, «հետաձգված» բողոքարկում*

ВАГЕ ОГАНИСЯН, ТИГРАН МАРКОСЯН – *Институциональные особенности судебного надзора в отношении законности «досудебной» стадии конфискации имущества незаконного происхождения* – Производство о конфискации имущества незаконного происхождения является новшеством в отечественной правовой системе, и ее как комплексное изучение, так и изучение отдельных вопросов имеют большое теоретико-практическое значение.

На основе подходов, выработанных в международных документах, отечественном законодательстве и процессуальном правоведении, в работе авторы представляют общие характеристики производства о конфискации имущества незаконного происхождения, а также обсуждают ряд практических проблем существующий инструментарий контроля за законностью его «досудебной» стадии. А именно аргументируется факт необходимости надлежащего судебного контроля над рядом актов, которые находятся за рамками данного инструментария, включая отдельные действия и бездействие, особенности их реализации, включая последствия обнаруженных нарушений и, как следствие, отмечена необходимость законодательного регулирования подобных вопросов..

В статье авторы представляют ряд научно-практических выводов, таких как необходимость установления на законодательном уровне объема и условий контроля за законностью решений, действий и бездействия компетентного органа на «досудебной» стадии конфискации имущества незаконного происхождения. В результате можно констатировать, что выводы, изложенные в статье, могут стать ориентиром для дальнейшего развития правоприменительной практики, а также действующих регулирований.

Ключевые слова: *гражданская конфискация, производство о конфискации имущества незаконного происхождения, право собственности, «досудебная» стадия, судебный контроль, непосредственная обжалование, «отложенная» обжалование*

ՏԵՂԵԿՈՒԹՅՈՒՆՆԵՐ ՀԵՂԻՆԱԿՆԵՐԻ ՄԱՍԻՆ
СВЕДЕНИЯ ОБ АВТОРАХ
INFORMATION ABOUT THE AUTHORS

1. **Գևորգ Դանիելյան –** իրավաբանական գիտությունների դոկտոր, պրոֆեսոր, ԵՊՀ պետության և իրավունքի տեսության ու պատմության ամբիոնի վարիչ
   Геворг Даниелян – доктор юридических наук, профессор, заведующий кафедрой теории и истории государства и права ЕГУ
   Gevorg Danielyan – Doctor of Law, Professor, Head of YSU Chair of Theory and History of State and Law
   Էլ. փոստ՝ gdanielyan@ysu.am
2. **Արտյոմ Սեդրակյան –** իրավաբանական գիտությունների թեկնածու, ԵՊՀ պետության և իրավունքի տեսության ու պատմության ամբիոնի դոցենտ
   Артём Седракян – кандидат юридических наук, доцент кафедры истории и теории государства и права ЕГУ
   Artyom Sedrakyan – Candidate of Law, Associate Professor at YSU Chair of History and Theory of State and Law
   Էլ. փոստ՝ artyom.sedrakyan@gmail.com
3. **Տարոն Սիմոնյան** – իրավաբանական գիտությունների թեկնածու, ԵՊՀ պետության և իրավունքի տեսության ու պատմության ամբիոնի դոցենտ
   Тарон Симонян – кандидат юридических наук, доцент кафедры теории и истории государства и права ЕГУ
   Taron Simonyan – Candidate of Law, Associate Professor at YSU Chair of Theory and History of State and Law
   Էլ. փոստ՝ taron.simonyan@ysu.am
4. **Նարինե Դավթյան –** իրավաբանական գիտությունների թեկնածու, դոցենտ, ԵՊՀ պետության և իրավունքի տեսության ու պատմության ամբիոնի ասիստենտ
   Нарине Давтян – кандидат юридических наук, доцент, ассистент кафедры теории и истории государства и права ЕГУ
   Narine Davtyan – Candidate of Law, Associate Professor, Assistant at YSU Chair of Theory and History of State and Law
   Էլ. փոստ՝ ndavtyan2@mail.ru
5. **Վարդան Այվազյան –** իրավաբանական գիտությունների թեկնածու, դոցենտ, ԵՊՀ սահմանադրական իրավունքի ամբիոնի վարիչ
   Вардан Айвазян – кандидат юридических наук, доцент, заведующий кафедрой конституционного права ЕГУ
   Vardan Ayvazyan – Candidate of Law, Associate Professor, Head of YSU Chair of Constitutional Law
   Էլ. փոստ՝ vardanayvazyan@ysu.am, iravaget@mail.ru
6. **Սայադ Բադալյան** – իրավաբանական գիտությունների թեկնածու, ԵՊՀ սահմանադրական իրավունքի ամբիոնի դոցենտ
   Саяд Бадалян – кандидат юридических наук, доцент кафедры конституционного права ЕГУ
   Sayad Badalyan - Candidate of Law, Associate Professor at YSU Chair of Constitutional Law
   Էլ. փոստ՝ sayad.badalyan@ysu.am

7. **Սոսե Բարսեղյան –** ԵՊՀ սահմանադրական իրավունքի ամբիոնի դասախոս
   Сосэ Барсегян – Преподаватель кафедры конституционного права ЕГУ
   Sose Barseghyan – Lecturer at YSU Chair of Constitutional Law
   Էլ. փոստ՝ sose_barseghyan@ysu.am, barseghyansose@gmail.com
8. **Տաթևիկ Նահապետյան –** ԵՊՀ սահմանադրական իրավունքի ամբիոնի դասախոս
   Татевик Нагапетян – Преподаватель кафедры конституционного права ЕГУ
   Tatevik Nahapetyan – Lecturer at YSU Chair of Constitutional Law
   Էլ. փոստ՝ t.nahapetyan@ysu.am
9. **Արման Հովհաննիսյան** – իրավաբանական գիտությունների թեկնածու, ԵՊՀ քրեական իրավունքի ամբիոնի ասիստենտ, Երևանի առաջին ատյանի ընդհանուր իրավասության դատարանի դատավոր
   Арман Оганесян – кандидат юридических наук, ассистент кафедры уголовного права ЕГУ, судья суда первой инстанции общей юрисдикции Еревана
   Arman Hovhannisyan – Candidate of Law, Assistant at YSU Chair of Criminal Law, Judge of the First Instance Court of General Jurisdiction of Yerevan
   Էլ. փոստ՝ arman.hovhannisyan@ysu.am, armanhovhannisyan86@gmail.com
10. **Գագիկ Ղազինյան –** իրավաբանական գիտությունների դոկտոր, պրոֆեսոր, ՀՀ ԳԱԱ ակադեմիկոս, ՀՀ վաստակավոր իրավաբան, ԵՊՀ իրավագիտության ֆակուլտետի դեկան
    Гагик Казинян – доктор юридических наук, профессор, академик НАН РА, заслуженный юрист РА, декан юридического факультета ЕГУ
    Gagik Ghazinyan – Doctor of Law, Professor, Academician at the NAS of the RA, Honoured Lawyer of the RA, Dean of YSU Faculty of Law
    Էլ. փոստ՝ gghazinyan@ysu.am
11. **Պետիկ Մկրտչյան –** ՀՀ ՊԵԿ իրավաբանական վարչության պետի տեղակալ, ԵՊՀ քրեական դատավարության և կրիմինալիստիկայի ամբիոնի դասախոս, Արդարադատության ակադեմիայի դասընթացավար
    Петик Мкртчян – заместитель начальника юридического управления КГД РА, преподаватель Академии юстиции и кафедры уголовного процесса и криминалистики ЕГУ
    Petik Mkrtchyan – Deputy Head of the Legal Department of the RA State Revenue Committee, Lecturer at YSU Chair of Criminal Procedure and Criminalistics and the Academy of Justice
    Էլ. փոստ՝ petikmkrtchyan@ysu.am
12. **Սամվել Դիլբանդյան –** իրավաբանական գիտությունների դոկտոր, պրոֆեսոր, ԵՊՀ քրեական դատավարության և կրիմինալիստիկայի ամբիոնի վարիչ
    Самвел Дилбандян – доктор юридических наук, профессор, заведующий кафедрой уголовного процесса и криминалистики ЕГУ
    Samvel Dilbandyan – Doctor of Law, Professor, Head of YSU Chair of Criminal Procedure and Criminalistics
    Էլ. փոստ՝ s.dilbandyan@ysu.am
13. **Արտակ Ասատրյան –** իրավաբանական գիտությունների թեկնածու, դոցենտ, ԵՊՀ եվրոպական և միջազգային իրավունքի ամբիոնի վարիչ
    Артак Асатрян – кандидат юридических наук, доцент, заведующий кафедрой европейского и международного права ЕГУ

Artak Asatryan – Candidate of Law, Associate Professor, Head of YSU Chair of European and International Law
Էլ. փոստ՝ artakasatryan@ysu.am

14. **Սերգեյ Ղազինյան –** ԵՊՀ եվրոպական ուսումնասիրությունների կենտրոնի փորձագետ, ԵՊՀ եվրոպական և միջազգային իրավունքի ամբիոնի դոցենտ
Сергей Казинян – эксперт центра европейских исследований ЕГУ, доцент кафедры европейского и международного права ЕГУ
Sergey Ghazinyan – Expert, YSU Centre for European Studies, Associate Professor at YSU Chair of European and International Law
Էլ. փոստ՝ sergey.ghazinyan@ysu.am
15. **Անի Սիմոնյան** – ԵՊՀ եվրոպական և միջազգային իրավունքի ամբիոնի դասախոս
Ани Симонян – преподаватель кафедры европейского и международного права ЕГУ
Ani Simonyan – Lecturer at YSU Chair of European and International Law
Էլ. փոստ՝ ani.simonyan@ysu.am
16. **Ռուբինա Պետրոսյան** – իրավաբանական գիտությունների թեկնածու, ԵՊՀ քաղաքացիական իրավունքի ամբիոնի ասիստենտ, ՀՀ փաստաբանների պալատի անդամ
Рубина Петросян – кандидат юридических наук, ассистент кафедры гражданского права ЕГУ, член Палаты адвокатов РА
Rubina Petrosyan – Candidate of Law, Assistant Professor at YSU Chair of Civil Law, Advocate of the Chamber of Advocates of the RA
Էլ. փոստ՝ rubina.petrosyan@ysu.am
17. **Արսեն Հովհաննիսյան –** իրավաբանական գիտությունների թեկնածու, ԵՊՀ քաղաքացիական իրավունքի ամբիոնի դասախոս, «ԲԼԻՍ ԳՐՈՒՊ» ՍՊԸ կառավարիչ գործընկեր
Арсен Оганнисян – кандидат юридических наук, преподаватель кафедры гражданского права ЕГУ, управляющий партнер ООО «БЛИС ГРУП»
Arsen Hovhannisyan – Candidate of Law, Lecturer at YSU Chair of Civil Law, Managing partner of "BLIS GROUP" LLC
Էլ. փոստ՝ ahovhannisyan@ysu.am
18. **Մարտին Խաչիկյան** – ԵՊՀ քաղաքացիական իրավունքի ամբիոնի ասպիրանտ, «ԲԼԻՍ ԳՐՈՒՊ» ՍՊԸ ավագ իրավաբան
Мартин Хачикян – аспирант кафедры гражданского права ЕГУ, старший юрист ООО «БЛИС ГРУП»
Martin Khachikyan – PhD student at YSU Chair of Civil Law, Senior lawyer of "BLIS GROUP" LLC
Էլ. փոստ՝ khachikyanmartin@gmail.com
19. **Վահե Հովհաննիսյան –** իրավաբանական գիտությունների դոկտոր, պրոֆեսոր, ԵՊՀ քաղաքացիական դատավարության ամբիոնի վարիչ
Ваге Оганисян – доктор юридических наук, профессор, заведующий кафедрой гражданского процесса ЕГУ
Vahe Hovhannisyan – Doctor of Law, Professor, Head of YSU Chair of Civil Procedure
Էլ. փոստ՝ vahehovhannisyan@ysu.am

20. **Աշխեն Ղարսլյան** – իրավաբանական գիտությունների թեկնածու, ԵՊՀ քաղաքացիական դատավարության ամբիոնի դոցենտ
Ашхен Карслян – кандидат юридических наук, доцент кафедры гражданского процесса ЕГУ
Ashkhen Gharslyan – Candidate of Law, Associate Professor at YSU Chair of Civil Procedure
Էլ. փոստ՝ ashkhengharslyan@ysu.am

21 **Տիգրան Մարկոսյան** – իրավաբանական գիտությունների թեկնածու, ԵՊՀ քաղաքացիական դատավարության ամբիոնի դոցենտ, ԵՊՀ իրավագիտության ֆակուլտետի իրավաբանական կլինիկայի դասախոս-կոորդինատոր, Սնանկության գործով կառավարիչների որակավորման հանձնաժողովի անդամ, Մրցակցության պաշտպանության հանձնաժողովի անդամ
Тигран Маркосян – кандидат юридических наук, доцент кафедры гражданского процесса юридического факультета ЕГУ, Преподаватель-координатор юридической клиники юридического факультета ЕГУ, Член Квалификационной комиссии управляющих по делам о банкротстве, Член Комиссии по защите конкуренции РА
Tigran Markosyan – Candidate of Law, Associate Professor at the Chair of Civil Procedure YSU, YSU, Faculty of Law, Lecturer-Coordinator at the Legal Clinic, Member of the Commission for the Qualification of the Bankruptcy Managers, Member of the Competition Protection Commission RA
Էլ. փոստ՝ tigranmarkosyan@ysu.am

ԲՈՎԱՆԴԱԿՈՒԹՅՈՒՆ ❋ СОДЕРЖАНИЕ ❋ CONTENTS

ՊԵՏՈՒԹՅԱՆ ԵՎ ԻՐԱՎՈՒՆՔԻ ՏԵՍՈՒԹՅՈՒՆ ՈՒ ՊԱՏՄՈՒԹՅՈՒՆ
ТЕОРИЯ И ИСТОРИЯ ГОСУДАРСТВА И ПРАВА
THEORY AND HISTORY OF STATE AND LAW

ՍԱՀՄԱՆԱԴՐԱԿԱՆ ԻՐԱՎՈՒՆՔ
КОНСТИТУЦИОННОЕ ПРАВО
CONSTITUTIONAL LAW

ՔՐԵԱԿԱՆ ԻՐԱՎՈՒՆՔ
УГОЛОВНОЕ ПРАВО
CRIMINAL LAW

ՔՐԵԱԿԱՆ ԴԱՏԱՎԱՐՈՒԹՅՈՒՆ ԵՎ ԿՐԻՄԻՆԱԼԻՍՏԻԿԱ
УГОЛОВНОЕ СУДОПРОИЗВОДСТВО И КРИМИНАЛИСТИКА
CRIMINAL PROCEEDINGS AND CRIMINOLOGY

ԵՎՐՈՊԱԿԱՆ ԵՎ ՄԻՋԱԶԳԱՅԻՆ ԻՐԱՎՈՒՆՔ
ЕВРОПЕЙСКОЕ И МЕЖДУНАРОДНОЕ ПРАВО
EUROPEAN AND INTERNATIONAL LAW

ՔԱՂԱՔԱՑԻԱԿԱՆ ԻՐԱՎՈՒՆՔ
ГРАЖДАНСКОЕ ПРАВО
CIVIL LAW

ՔԱՂԱՔԱՑԻԱԿԱՆ ԴԱՏԱՎԱՐՈՒԹՅՈՒՆ
ГРАЖДАНСКОЕ СУДОПРОИЗВОДСТВО
CIVIL PROCEDURE

Խմբագրության հասցեն. Երևան, Ալեք Մանուկյան փող., 1
Адрес редакции: Ереван, ул. Алека Манукяна 1
Address: 1, Alex Manoogian str., Yerevan

Կայք՝ journals.ysu.am
Էլ. փոստ՝ ephbanber@ysu.am

Հեռ. 060 710 218, 060 710 219

Հրատարակչական խմբագիր՝ **Արմեն Հովակիմյան**
Издательский редактор **Армен Овакимян**
Publishing Editor **Armen Hovakimyan**

Վերստուգող սրբագրիչ՝ **Գայանե Գրիգորյան**
Контрольный корректор **Гаяне Григорян**
Proofreader **Gayane Grigoryan**

Թողարկման պատասխանատու՝ **Հասմիկ Եսայան**
Ответственный выпуска **Асмик Есаян**
Issued by **Hasmik Yesayan**

Ստորագրված է տպագրության՝ 12. 12. 2023: