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Arrivée

ՀԱՅԱՍՏԱՆԻ ՀԱՆՐԱՊԵՏՈՒԹՅԱՆ ՍԱՀՄԱՆԱԴՐԱԿԱՆ ԴԱՏԱՐԱՆԻ ՆԱԽԱԳԱՆ  
PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

**TO MR. LINOS-ALEXANDRE SICILIANOS  
PRESIDENT OF THE EUROPEAN COURT OF HUMAN RIGHTS**

2 August 2019

*Dear Mr. President,*

Within this note, I would like to inform you that there are two cases pending before the Constitutional Court of the Republic of Armenia (hereinafter referred to as the Constitutional Court) on the case of conformity of Article 300.1 of the Criminal Code of the Republic of Armenia with the Constitution on the basis of the application of the Court of First Instance of General Jurisdiction of Yerevan and former President of the Republic of Armenia Mr. Robert Kocharyan.

On 18. July 2019 by two procedural decisions (PDCC-81 and PDCC-82) the Constitutional Court decided to apply to the European Court of Human Rights and by this fact the Constitutional Court suspended the proceedings of both cases.

While facing the issue of the constitutionality of the relevant provision of the Criminal Code of the Republic of Armenia, the Constitutional Court confronts with the some questions of principle relating to interpretation and application of rights and freedoms envisaged in the Convention in respect to Article 300.1 of the Criminal Code.

Having regard to the above-mentioned considerations, and being guided by the Article 1 of the Protocol 16 to the European Convention, we ask for an advisory opinion on the mentioned issues in enclosed request.

We would like to inform that, the Constitutional Court is limited with the procedural terms, so we will appreciate, if the European Court of Human Rights, in case of a possibility, provides the requested opinion on the shortest possible time frames.

For the purpose of the proceedings and further correspondence our contact person shall be Ms. Ruzanna Abrahamyan (Assistant to the President of the Constitutional Court of the Republic of Armenia; Tel.: (+37498) 199 930; E-mail: abrahamian.ruzanna@gmail.com).

Please find enclosed to this note the request to the European Court for the advisory opinion (19 pages).

We would like also to inform that the Constitutional Court has also applied to the Venice Commission for an amicus curie brief on comparative constitutional and international law issues.

I avail this opportunity and express my sincere thankfulness in advance for your consideration and response.

Yours sincerely,



**HRAYR TOVMASYAN**

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**REQUEST TO  
THE EUROPEAN COURT OF HUMAN RIGHTS  
FOR ADVISORY OPINION UNDER ARTICLE 1 OF THE PROTOCOL 16  
TO THE EUROPEAN CONVENTION**

APPLICANT: CONSTITUTIONAL COURT OF THE REPUBLIC OF  
ARMENIA

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2 August 2019

THE RELEVANT FACTUAL AND LEGAL BACKGROUND OF THE  
DOMESTIC CASE IN THE DOMESTIC COURT

**I. THE ESSENCE OF THE DOMESTIC CASE**

1. On May 20, 2019, the First Instance Court of General Jurisdiction of Yerevan applied to the Constitutional Court of the Republic of Armenia (hereinafter referred to as the Constitutional Court) in the criminal case YD/0253/01/19.
2. Having regard to Article 169, Part 1 Point 8 and Part 4 of the Constitution of the Republic of Armenia, the Court, in particular, has requested to clarify the conformity of the applicable Article 300.1, Part 1 of the Criminal Code of the Republic of Armenia (hereinafter - the Criminal Code) and of interrelated Article 300, Part 1 of the Criminal Code (in force till March 24, 2009) with Articles 72, 73 and 79 of the Constitution of the Republic of Armenia (hereinafter referred to as the Constitution).
3. The Court, inter alia, noted that the criminal prosecution authorities brought a charge against Robert Kocharyan and his alleged accomplices



for the events of February and March 2008 under Article 300.1 of the Criminal Code, adopted on March 18, 2009, and entered into force on March 24, 2009. The Court reasonably doubted that the applicable Article 300.1, Part 1 of the Criminal Code does not meet the requirement of legal certainty. Moreover, in comparison with Article 300, Part 1 of the Criminal Code (which was in force till March 24, 2009), it deteriorates the person's legal status: it does not mitigate the punishment, does not improve the status of a person committing a crime. Thus, its retroactivity is prohibited.

4. Robert Kocharyan, in his two applications from May 30, 2019 and June 4, 2019, particularly asked the Constitutional Court to determine the conformity of Article 300.1 of the Criminal Code with Articles 72, 73, 78 and 79 of the Constitution.
5. According to the applicant, he is accused of acts that were supposedly committed in February-March, 2008, while the applicable law (Article 300.1, Part 1 of the Criminal Code) did not exist at the material time and was envisaged only in March 2009. The applicant also claimed that Article 300 (in force in February-March 2008) and Article 300.1 of the Criminal Code (in force from 24 March 2009) essentially differ from each other, consequently, the application of Article 300.1 of the Criminal Code in respect with the alleged crime committed in 2008 violates the right guaranteed by Article 72 of the Constitution and Article 7, Part 1 of the European Convention (hereinafter – the Convention).
6. The applicant also believes that Article 300.1 of the Criminal Code does not comply with the principle of legal certainty envisaged in Article 79 of the Constitution, in particular, the wording “termination of the validity of a constitutional norm in the legal system” is neither specific nor foreseeable. The applicant also mentioned that since 2009, no sustainable court practice or case law relating to the interpretation of the Article at stake had been established which would clarify its meaning.



7. On June 21, 2019, the Constitutional Court adopted two procedural decisions (PDCC-60 and PDCC-61) regarding the aforementioned request, examined them, and scheduled a joint hearing on August 29, 2019. The National Assembly of the Republic of Armenia has been involved as respondent.
8. On July 8, 2019, the Constitutional Court by its procedural decision (PDCC-72) also ruled on the admissibility of the request from the Court of First Instance of General Jurisdiction of Yerevan to determine the conformity of Article 300.1, Part 1 of the Criminal Code with the Constitution. The hearing is scheduled on August 20, 2019.
9. On July 18, 2019, by two procedural decisions (PDCC-81 and PDCC-82) the Constitutional Court decided to apply to the European Court of Human Rights (hereinafter referred to as the European Court) and the European Commission for Democracy through Law (hereinafter referred to as the Venice Commission) and by this very fact the Constitutional Court suspended the proceedings of both cases.
10. While facing the issue of the constitutionality of the relevant provision of the Criminal Code the Constitutional Court confronts with the questions of principle relating interpretation and application of rights and freedoms envisaged in the Convention, with regard to Article 300.1 of the Criminal Code. Thus, there is a need for advisory opinions on the mentioned issues.

## **II. RELEVANT FACTUAL CIRCUMSTANCES**

11. On July 3, 2018 a case was initiated regarding on preliminary agreement made by the Minister of Defense of the Republic of Armenia with other persons was initiated on the overthrow of the constitutional order of the Republic of Armenia based on part 1 of Article 300.1 of Criminal Code for the period of February 23 – March 2, 2008, which were unified in one case, which have been investigated by the Special Investigation Service of the Republic of Armenia since 2008, regarding the incitement and



organization of mass disorders accompanied with the use of firearms, explosives, and murders in the city of Yerevan for the period of 1 March and 2 March 2008, as well as cases of the deaths of 10 people during the mass disorders in Yerevan for the period of March 1 and 2, the cases of violation of the rules of use of firearms by the officers of the Armed Forces of the RA Police, which caused deaths of three persons due to negligence and the case of sustaining various injuries to three persons for the period of March 1 and 2.

12. On July 26, 2018, the second President of RA Robert Kocharyan was charged with Article 300.1 of the Criminal Code.
13. By the decision of July 27, 2018, the Court of First Instance of General Jurisdiction of Yerevan applied a restraint measure as detention for 2 months against the accused R. Kocharyan. During the investigation, this restraint measure was revoked twice (by the decisions of the RA Criminal Court of Appeals, August 13, 2018 and Yerevan City Court of First Instance, May 18, 2019), but the higher courts have abrogated these decisions and implemented detention against R. Kocharyan.
14. In July and December 2018, three former high-ranking officials, Yuri Khachaturov, former Deputy Defense Minister, former Yerevan Garrison Chief, Seyran Ohanyan, former Chief of the General Staff of the Armed Forces of the Republic of Armenia and Armen Gevorgyan, the Former Secretary the RA President Staff and former Secretary of the National Security Council were charged on the basis of Article 300.1 (1) of the Criminal Code.
15. On April 29, 2019, the criminal case with an indictment against the aforementioned persons was sent to the First Instance Court of General Jurisdiction of Yerevan.
16. R. Kocharyan was charged under part 1 of Article 300.1 of the Criminal Code according to which:
  - From April 9, 1998 to April 9, 2008 he was holding the position of the President of the Republic of Armenia and on the basis of the Constitution



of the Republic of Armenia he acted as the head of the state and bearing the responsibilities of ensuring the RA Constitution, the regular functioning of the legislative, executive and judicial authorities, as well as authorized with permanent organizational-distributive and administrative-economic functions, in accomplice with other persons overthrew the constitutional order of the Republic of Armenia.

- R. Kocharyan, on accomplice with RA Minister of Defense Mikael Harutyunyan, Yuri Khachaturov, former Deputy Defense Minister, former Yerevan Garrison Chief and Seyran Ohanyan, former Chief of the General Staff of the Armed Forces of the Republic of Armenia and other persons with the assistance of Armen Gevorgyan, the Former Secretary the RA President Staff and former Secretary of the National Security Council, committed actions aimed at overthrowing the constitutional order, involving illicitly the Armed Forces and illegally armed civilians in post-election political situation, as well as by the intentional other deeds, by illegal violation and restriction of the fundamental rights of citizens, had, de facto, eliminated the relevant main provisions of the constitutional order by usurping power.

- R. Kocharyan used armed forces in political matters against civilians participating in peaceful rallies. President of the Republic of Armenia R. Kocharyan exploit the circumstance that according to Article 12 of the RA Constitution, he was the Commander-in-Chief of the Armed Forces and coordinated the activities of the state bodies in the field of defense, on February 23, 2008 he held a consultation with high-ranking officials of the Ministry of Defense of Republic of Armenia and, apparently exceeding his powers, instructed in oral form to stage troops readiness at 00:00 the next day, declaring a state of emergency.

- According to Robert Kocharyan's instruction and the order No. 0038 issued on February 23, 2008 by Mikael Harutyunyan, the Defense Minister of the Republic of Armenia, the anti-constitutional use of the armed forces led to anti-constitutional implementation of the army units, by forming a



new illegal structure of military management and on the night of February 24 instructed the redeployment of the army units, i.e. a number of units of the armed forces, armed and with military equipment were withdrawn from the locations of their deployment, including the military units carrying the frontier shifts, and moved to the military bases located in Yerevan or nearby.

- With the full knowledge of R. Kocharyan, on March 1, 2008, at around 06:30, around 1,200 police officers forced citizens to exit the square, illegally using physical force and special means to disperse hundreds of peaceful demonstrators from the Freedom Square. After the evictions of the sit-in protesters from the Freedom Square, the police continued using force against the citizens in the central parts of the city to prevent possible demonstrations and assaults.

- On March 1, 2008, R. Kocharyan, the President of RA, in accordance with Article 56 of the Constitution of the Republic of Armenia, having been obliged to publish decrees not contradicting the RA Constitution and laws, in the absence of a direct threat to the constitutional order, in violation of Article 55 (14) of the RA Constitution, adopted NH-35-N decree "On declaring the state of emergency". By the decree of the President of the Republic of Armenia, the state of emergency was declared in Yerevan on March 1 for the period of 20 days, and the RA Ministry of Defense together with the Police of the RA were empowered to secure with the legal regime of the state of emergency. At the same time, apparently exceeding his authority, violating the provision prescribed in Article 44 of the Constitution of the Republic of Armenia, that individual and civil rights and freedoms may be temporarily limited only in manner prescribed by law, within the framework of international commitments in case of martial law or state of emergency, in the absence of the law regulating the legal regime of the state of emergency, R. Kocharyan, in his above-mentioned decree, unlawfully declared a state of emergency, enabling such measures and temporary restrictions as envisaged in the RA



Law on the Legal Regime of Military Status adopted on 5 December 2006. Particularly, paragraph 4 of the decree stipulated the following temporary restrictions in the territory of state of emergency: 1) prohibition of the conduct of meetings, rallies, demonstrations, marches and other mass events; (2) prohibition of other measures that cease or stop the activities of strikes and other activities of organizations; 3) restriction of mobility of persons and means of transportation and their examination by the law enforcement bodies, if necessary; 4) publications of the mass media on state and internal affairs shall be carried out exclusively within the official information of public authorities. 5) banning leaflets and other forms of political propaganda without the permission of relevant state bodies; 6) suspension of the activities of political parties and other non-governmental organizations, hindering the elimination of the circumstances underlying the establishment of a state of emergency; 7) expulsion of persons who have violated the legal regime of the state of emergency and does not live in the territory. That is, a military-type mode was created in Yerevan.

17. According to the indictment, the actions aimed at overthrowing the constitutional order prescribed by Article 1 of the Constitution of the Republic of Armenia, according which the Republic of Armenia is a democratic and rule of law state; Article 2 stipulates that the power in the Republic of Armenia belongs to the people; Article 3 stipulates protection of fundamental human and citizen's rights and freedoms, in conformity with the principles and norms of international law, Article 5 prescribes State power shall be exercised in conformity with the Constitution and the laws, based on the separation and balance of the legislative, executive and judicial powers. State and local self-government bodies and officials shall be competent to perform only such actions for which they are authorised under the Constitution or laws; part 1 of Article 6 envisages that the Constitution has supreme legal force, and its norms apply directly and by abolishing these norms, in this time period which was followed by the Presidential Elections (February 23-March 20, 2008) by violating the



limits of authorities provided by the above-mentioned officials of the principles and norms of international rights which are means of exercising the power which belongs to the people in democratic and rule of law state, that is freedom of opinion, freedom of expression, freedom of the media and other information, conduct peaceful and unarmed rallies and the rights to effective remedies of legal and judicial protection.

18. According to the indictment, R. Kocharyan has overthrown the constitutional order of the Republic of Armenia with the other persons, that is, he has committed a criminal act under Article 300.1 of the RA Criminal Code.

### **III. RELEVANT DOMESTIC LEGAL REGULATIONS**

#### **19. Constitution with the amendments of 2005 (in force in material time)**

Article 1. The Republic of Armenia is a sovereign, democratic, social State governed by the rule of law.

Article 2. In the Republic of Armenia the power belongs to the people. The people shall exercise their power through free elections, referenda, as well as through state and local self-government bodies and officials provided for by the Constitution.

Usurpation of power by any organization or individual shall be a crime.

Article 3. The human being, his or her dignity, fundamental rights and freedoms are the highest values.

The State shall ensure the protection of fundamental human and citizen's rights and freedoms, in conformity with the principles and norms of international law.

The State shall be bound by fundamental human and citizen's rights and freedoms as directly applicable law.



Article 4. Elections of the President of the Republic, to the National Assembly and local self-government bodies, as well as referenda shall be held on the basis of universal, equal and direct suffrage, by secret ballot.

Article 5. State power shall be exercised in conformity with the Constitution and the laws, based on the separation and balance of the legislative, executive and judicial powers.

State and local self-government bodies and officials shall be competent to perform only such actions for which they are authorized under the Constitution or laws.

Article 6. The Constitution has supreme legal force, and its norms apply directly.

Laws must be in compliance with the Constitution. Other legal acts must be in compliance with the Constitution and laws.

Laws shall enter into force following their publication in the "Official Journal of the Republic of Armenia". Other regulatory legal acts shall enter into force following their publication as prescribed by law.

International treaties shall enter into force only after being ratified or approved. International treaties are an integral part of the legal system of the Republic of Armenia. If ratified international treaties define norms other than those provided for by laws, such norms shall apply. International treaties contradicting the Constitution may not be ratified.

Regulatory legal acts shall be adopted on the basis of the Constitution and laws and for the purpose of ensuring their implementation.

## **20. Constitution with the amendments of 2015 (currently in force)**

Article 1. The Republic of Armenia is a sovereign, democratic, social state governed by the rule of law.



Article 2. In the Republic of Armenia, the power belongs to the people.

The people shall exercise their power through free elections, referenda, as well as through state and local self-government bodies and officials provided for by the Constitution.

Usurpation of power by any organization or individual shall be a crime.

#### Article 3. The Human Being, His or Her Dignity, Basic Rights and Freedoms

1. 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 his or her rights and freedoms.

2. 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.

3. The public power shall be restricted by the basic rights and freedoms of the human being and the citizen as a directly applicable law.

#### Article 4. The Principle of Separation and Balance of Powers

State power shall be exercised in conformity with the Constitution and the laws, based on the separation and balance of the legislative, executive and judicial powers.

#### Article 5. The Hierarchy of Legal Norms

1. The Constitution shall have supreme legal force.

2. Laws must comply with constitutional laws, whereas secondary regulatory legal acts must comply with constitutional laws and laws.

3. In case of conflict between the norms of international treaties ratified by the Republic of Armenia and those of laws, the norms of international treaties shall apply.

#### Article 6. The Principle of Lawfulness



1. State and local self-government bodies and officials shall be entitled to perform only such actions for which they are authorized under the Constitution or laws.
2. Bodies provided for by the Constitution may, based on the Constitution and laws and with the purpose of ensuring the implementation thereof, be authorized by law to adopt secondary regulatory legal acts. Authorizing norms must comply with the principle of legal certainty.
3. Laws and secondary regulatory legal acts shall enter into force after being promulgated as prescribed by law.

#### Article 72. Principle of Lawfulness in Defining Crimes and Imposing Punishments

No one shall be sentenced for an action or inaction not deemed to be a crime at the time of committal. A punishment more severe than that applicable at the time of committing the criminal offence may not be imposed. A law decriminalizing an act or mitigating the punishment therefore shall have retroactive effect.

#### Article 73. Retroactive Effect of Laws and Other Legal Acts

1. Laws and other legal acts deteriorating the legal condition of a person shall not have retroactive effect.
2. Laws and other legal acts improving the legal condition of a person shall have retroactive effect where these acts so provide for.

#### Article 78. Principle of Proportionality

The means chosen for restricting basic rights and freedoms must be suitable and necessary for achievement of the objective prescribed by the Constitution. The means chosen for restriction must be commensurate to the significance of the basic right or freedom being restricted.

#### Article 79. Principle of Certainty



When restricting basic rights and freedoms, laws must define the grounds and extent of restrictions, be sufficiently certain to enable the holders and addressees of these rights and freedoms to display appropriate conduct.

#### Article 81. Basic Rights and Freedoms and International Legal Practice

1. The 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.

2. Restrictions on basic rights and freedoms may not exceed the restrictions prescribed by international treaties of the Republic of Armenia.

#### Article 169. Applying to the Constitutional Court

1. The following may apply to the Constitutional Court:

(...) (8) everyone – under a specific case where the final act of court is available, all judicial remedies have been exhausted, and he or she challenges the constitutionality of the relevant provision of a regulatory legal act applied against him or her upon this act, which has led to the violation of his or her basic rights and freedoms enshrined in Chapter 2 of the Constitution, taking into account also the interpretation of the respective provision in law enforcement practice (...).

4. Courts shall apply to the Constitutional Court in respect of the constitutionality of the regulatory legal act applicable in a specific case they are seized of, if they have reasonable doubts on the constitutionality thereof and find that the adjudication of the case is possible only through the application of the regulatory legal act.

## 21. Criminal Code

#### Article 12. Operation of the criminal law in time



1. The criminality and punishability of the act is determined by the acting criminal law at the time of committal of the offence.
2. The time of committal of crime is the time when socially dangerous action (inaction) was committed, regardless when the consequences started to take effect.

#### Article 13. Retroactive effect of criminal law

1. The law eliminating the criminality of the act, mitigating the punishment or improving the status of the criminal in any way, has retroactive effect, i.e., this law is extended to the persons who committed this act before this law had taken effect, including those persons who are serving the punishment or served the punishment, but have a record of conviction.
2. The law stipulating the criminality of the act, making the punishment more severe or worsening the status of the criminal in any other way, has no retroactive effect.
3. The law partially mitigating the punishment and, in the meantime, partially making the punishment more severe has retroactive effect only in respect to the part which mitigates the punishment.

#### Article 18. The notion of crime

1. The wilful committal of a socially dangerous act envisaged in this Code is considered a crime.

#### Article 300. Usurpation of power (this edition of the Article became effective on 24 March 2009)

1. Seizure of power – appropriation of the powers of the President of the Republic, National Assembly, Government or Constitutional Court through violence or threat of violence, as well as in any other way not envisaged by the Constitution – shall be punishable by ten to fifteen years of imprisonment.







2. Holding power – continuing to exercise the powers of President of the Republic, member of parliament, prime minister, minister after the powers have been terminated shall be punishable by ten to fifteen years of imprisonment.

3. The person, who voluntarily informed the law enforcement bodies on the crime under part 1 of this article at its preparation stage, shall be released from criminal liability under part 1 of this article.

Article 300.1. Overthrow of the Constitutional Order (this Article became effective on 24 March 2009)

1. The overthrow of the constitutional order – the factual elimination of any norm stipulated in Articles 1 to 5 of the Constitution or part 1 of Article 6 which is expressed in termination of the validity of norm in the legal system - shall be punishable by ten to fifteen years of imprisonment.

2. The person who voluntarily informed the law enforcement bodies on the crime under this article at its preparation stage shall be released from criminal liability under this article.

Article 300. Usurping state power (this edition of the Article was in force till 24 March 2009)

1. Usurping state power - seizure of state power, in violation of the Constitution of the Republic of Armenia, or keeping it with violence, as well as, actions aimed at the overthrowing of constitutional order of the Republic of Armenia, or the violent breach of territorial integrity of the Republic of Armenia, is punished with imprisonment for the term of 10 to 15 years.

2. The person who voluntarily informed the authorities about the crime envisaged in this Article, is exempted from criminal liability, if, as a result of taken measures and provided information, the committal of these actions was prevented.



#### IV. THE RELEVANT CONVENTION ISSUES

22. This request is aimed at obtaining advisory opinion on the questions of principle relating to the interpretation and application of the rights to be prosecuted, convicted and punished based on certain, accessible, foreseeable and stable criminal law, as well as avoiding the retrospective effect of a criminal law, as prescribed by Article 7, Part 1 of the Convention.

#### OBSERVATIONS OF THE CONSTITUTIONAL COURT ON THE RAISED ISSUES

23. The guarantee prescribed in Article 7 of the Convention is an essential element of the principle of the rule of law and occupies significant place in the Convention system of protection. No derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency.
24. It should be construed and applied as follows from its object and purpose in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.
25. Article 7 of the Convention is not confined to prohibiting the retrospective application of criminal law to an accused disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). It is also prohibits to extend the content of the current offenses at the expense of the actions which have not been previously criminally punishable.
26. A person can recognize and enjoy his freedom only in the case if he knows what is criminally punishable. The principles prescribed in this Article also guarantee the legal security as one of the fundamental sub-principle the rule of law state.



27. The norm prescribed in paragraph 1 of Article 7 of the Convention generally contains *corpus delicti* and the principle of description of the punishment according to the law. It also follows from its content that the description of *corpus delicti* at the time of committing an offense must be legally enforced, and the type of punishment and penalty are clearly outlined.

28. The requirement «prescribed by law» is defined also, in particular, in Articles 8 - 11 of the Convention. In its case law, the European Court clarified that the concept of «law», used both in Article 7 and Articles 8-11 of the Convention, must comprise certain qualitative requirements, in particular those of accessibility and foreseeability of the law. In the case of Article 8-11 of the Convention, the European Court does not establish strict requirements for foreseeability of the law. Article 7 of the Convention prohibits to extensively construe criminal law to an accused's detriment, for instance, by analogy. Therefore, it can be assumed that in the sense of Article 7 of the Convention, the qualitative requirements to the notion of «law», including certainty, accessibility and stability are more stringent.

29. The Constitutional Court finds that a number of peculiarities of Article 300.1 of the Criminal Code, in conjunction with other relevant circumstances results in a situation where the European Court's case law seems not to serve as a sufficient basis for well-founded conclusions with respect to the Convention right.

Thus,

30. Article 300.1 of the Criminal Code is the only Article that refers to specific Articles of the Constitution, linking them with the notion of offense.

31. Article 300.1 of the Criminal Code also refers to the fundamental constitutional principles, *inter alia*, sovereignty, rule of law, democracy and the social state (Article 1 of the Constitution), which, in turn, provide a prospect of a broader interpretation and concretization in law



enforcement practice. Moreover, this interpretation can be changed, and the corpus delicti is dependent on it. It is particularly noteworthy that the reference is made to the principle of the social state, which must be applied in the absence of relevant specific constitutional norms and, as it is known, the Constitutional and other courts are constantly interpreting it, without violating its essence, but taking into account the financial and economic capacities of a particular state.

32. Article 300.1 of the Criminal Code also contains a reference to the principle of legality (Article 5, Part 2 of the Constitution in the version of 2005), which in turn refers to other laws. Thus, it makes successive references, which means that the description of the offense is dependent on the ordinary laws, which might be changed at any time by the ruling majority.
33. The corpus delicti of the attributable crime allegedly committed in February-March 2008 (Article 300 of the Criminal Code) and corpus delicti of Article 300.1 defined one year after the assumed committal of crime, exhibit obvious and significant differences. The corpus delicti of a crime in force in 2008 was broader and included any action aimed at overthrowing the constitutional order, whereas the current corpus delicti of Article 300.1 of the Criminal Code relates only to a part of foundations of the constitutional order envisaged in chapter 1 of the Constitution, namely, the norms prescribed in Articles 1-5 or part 1 of Article 6 of the Constitution. At the same time, in some sense Article 300 of the Criminal Code was narrower as it contained an element of violence, which is missing from the corpus delicti of Article 300.1 of the Criminal Code.
34. In addition, the manner of committing the act has essentially changed; if Article 300 of the Criminal Code did not require a specific form of action, Article 300.1 of the Criminal Code requires factual elimination of any of the norms prescribed in Articles 1-5 or Article 6, Part 1 of the Constitution, which is manifested by the termination of the validity of that norm in the legal system.



35. The action to factually eliminate the constitutional norm as specified in the challenged Article should be expressed in the form of the termination of the validity of that norm in the legal system. In other words, a simultaneous presence of both terms is required. Meanwhile, either the norm is eliminated factually or it loses its force in the legal system.
36. The penalty for both aforementioned articles are the same, although, as it was referred, in Article 300 of the Criminal Code the corpus delicti had a qualitative attribute of violence, while it is missing in Article 300.1 of the Criminal Code.
37. Currently, in the legal community, Article 300.1 of the Criminal Code is differently interpreted, which results in the ambiguity. Particularly, the criminal prosecution authorities (some investigators and prosecutors) tend to insist that Article 300 of the Criminal Code, which was in force at the time of the alleged committal of the act in 2008, is construed broadly, thus includes any actions aimed at overthrowing the constitutional order, particularly those prescribed by Article 300.1 of the Criminal Code, entered into force in March 2009. However, there is no court or prosecutorial decision to support this approach.
38. At the same time, there are few cases in the court practice when a few years ago, several prosecutors dropped the charges under Article 300.1 of the Criminal Code for the events of 2008, on grounds that they did not constitute crime at the time of the alleged committal. Hence, the relevant provision cannot have retroactive effect.

#### QUESTIONS ON THE PRINCIPLE OF INTERPRETATION AND APPLICATION OF ARTICLE 7 OF THE CONVENTION

39. Article 81 of the Constitution requires that the practice of bodies operating on the basis of international human rights treaties, which have been ratified by the Republic of Armenia, shall be taken into account when interpreting the provisions of the Constitution on fundamental rights and freedoms. The fair



resolution of the issues raised before the Constitutional Court is not possible in the framework of the judicial approaches and case law developed under Article 7 of the Convention, given the factual circumstances of this case, cited legal regulations as well as made observations. Therefore the Constitutional Court considers it necessary. Based on the foregoing and the Statute of the Venice Commission, the Constitutional Court considers it necessary, in view of Article 300.1 of the Criminal Code, to apply to the European Court of Human Rights for an advisory opinion on the following questions:

40. Does the concept of "law" under Article 7 of the Convention and referred to in other Articles of the Convention, for instance, in Articles 8 – 11, have the same degree of qualitative requirements (certainty, accessibility, foreseeability and stability)?
41. If not, what are the standards of delineation?
42. Does the criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meet the requirements of certainty, accessibility, foreseeability and stability?
43. In the light of the principle of non-retroactivity of criminal law (Article 7, Part 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?