



Helsinki Citizens' Assembly Vanadzor Office
Recommendations
on Draft Criminal Procedure Code

1. Access to the Court of Cassation

Article 359(2) of the Draft Code stipulates that non-lawyer private participants can file an appeal before the court of cassation only via advocates.

Under Article 386(1) of the Draft Code, the Court of Cassation shall accept the appeal in case it concludes that the court of appeals has committed a *prima facie* judicial error or in case of a legal or factual *prima facie* circumstance rendering the judicial act in question illegitimate or if the ruling by the Court of Cassation on the issue raised in the appeal can be of essential importance in terms of uniform application of the law, or in case of any serious factual or legal *prima facie* circumstances or a grave *prima facie* legal error that have affected the outcome of the proceedings.

According to Article 18 of the RA Constitution, everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial or other public bodies. Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by the law.

Article 7(3) of the RA Judicial Code reads as follows: “Everyone has the right to exercise his/her right to judicial protection either through a representative or advocate, or **personally**.”

Back in 2008, the RA Constitutional Court examined the constitutionality of the accredited advocate institution at the RA Court of Cassation. Despite the fact that this case also entailed an extra obstacle in the form of lawyer accreditation institute for appealing to the Court of Cassation, the position and legal analysis of this issue in the ruling of the Constitutional Court can, nevertheless, play a significant role in the issue at hand as well. In particular, the Constitutional Court held that given the practical features of the Court of Cassation, the procedure of applying to the Court of Cassation exclusively by way of legal representation might be deemed legitimate **if it served the interests of natural and legal persons by providing legal representation by an experienced and professional and specialist**. At the same time, the Constitutional Court highlighted that the alternative of applying to the Court of Cassation exclusively via an advocate could be deemed as lawful only if the law provided everybody with equal access to

advocate services, regardless of their financial status.¹

Position of the European Court of Human Rights

The ECtHR ruling on *Andreyev v. Estonia* reiterates its view that the Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of the Convention must be complied with.² The Court has also stated that the right to a court, of which the right of access is one aspect, is not absolute... However, the limitations must not restrict or reduce a person's access in such a way or to such an extent as to impair the very essence of the right. Furthermore, such limitations will only be compatible with the Convention if they pursue a legitimate aim, and there is a reasonable relationship of proportionality between the means employed and the aim pursued.³

In the case *Sialkowska v. Poland*, the European Court of Human Rights was of the view that in the light of the circumstances of the case seen as a whole, the applicant was put in a position in which her efforts to have access to a court secured in a "concrete and effective manner" by way of legal representation appointed under the legal aid system failed.⁴

It must be noted that this was a civil appeal. The plaintiff was unable to appeal to the domestic Supreme Court with compulsory legal representation since the lawyer appointed under the free legal aid system refused to lodge her appeal to the Supreme Court as he considered it not to offer any reasonable prospect of success. When a legal aid lawyer refused to draw up a cassation appeal, the plaintiff did not have enough time to lodge with the court a new motion for the appointment of another lawyer. The Court has also emphasized that it is the responsibility of the State to ensure a requisite balance between the effective enjoyment of access to justice on the one hand, and the independence of the legal profession, on the other.

Financial aspect of access to advocate services

According to Article 6(4) of the RA Law on Advocacy, the State shall ensure free legal aid to the persons and in the cases as prescribed by Article 41 of the Law. Article 7(2)(6) stipulates that the objective of the Chamber of Advocates of the Republic of Armenia is to ensure that everybody can exercise his/her right to equally accessible and effective free legal aid as prescribed by the Law on Advocacy. The right to free legal aid is ensured by the public defender. Free legal aid in criminal cases is provided as prescribed by the Criminal Procedure Code of the Republic of Armenia to the suspects and accused (according to the draft, accused as well as witnesses involved as accused in other criminal proceedings). Other private participants of criminal proceedings, namely the aggrieved party, property offence defendants,

¹ See Para. 18(3), Decree № 765 of the RA Constitutional Court dated October 8, 2008 on the case of determining the compliance with the RA Constitution of Article 223(1)(1), Article 231(2), Article 233(1)(3-6), Article 233(2 and 4) of the RA Civil Procedure Code; Article 29.1 of the RA Law on Advocacy; Article 404(1)(1 and 3) of the RA Criminal Procedure Code (Article 404(1)(1) as edited on 28.11.2007) and Article 13(6) of the RA Judicial Code based on the applications of the citizens below: Hovhannes Rushanyan, Gevorg Gyozyan, Khachatur Shahinyan, Ruben Manukyan, Hrach Vardanyan, Makayel, Marietta and Madlena Babalyans, Hakob Rafyan, Hayk Mikayelyan and Samvel Mikayelyan.

² Case of *Andreyev v. Estonia*, Application no. 48132/07, Strasbourg, 22 November 2011, § 68.

³ *Ibid.*, § 67.

⁴ Case of *Sialkowska v. Poland*, Application no. 8932/05, Strasbourg, 22 March 2007, § 116.

their legal and authorized representatives shall enjoy the right to free legal aid in cases under Article 41(5) of the RA Law on Advocacy.

The RA Law on Advocacy also imposes some limitations. Particularly, the Law stipulates that the persons above (as prescribed under Article 41(5) of the RA Law on Advocacy) cannot be provided with legal aid if involved in entrepreneurial activities (including corporate disputes), cases on property (funds) claims exceeding one thousand-fold of the minimum salary, with factual and reliable data denying his/her insolvency, except in the event when the applicant is involved as the defendant or a third party defendant.

The legislative authority provided for quite a broad category of persons eligible for free legal aid. If we discard the listings of individual groups and consider the right to free legal aid based on insolvency, the law prescribes free legal aid for insolvent natural persons who support their insolvency with reliable data. For the purposes of this Paragraph, the natural person shall be considered insolvent if he/she lacks sufficient income, an employed family member sharing his/her house as well as any other real estate, except for his/her apartment or a vehicle worth a sum exceeding one thousand-fold of the minimum salary. In theory, this provision can give rise to various interpretations. In particular, the question arises as to how to understand the phrase "sufficient income". Also, how can the "employed" status of the family member sharing a house with the applicant and the resulting income /salary/ positively affect his/her financial situation? Can "any other real estate" or "a vehicle worth a sum exceeding one thousand-fold of the minimum salary", if they are the subject of the dispute, be considered as a factor denying the insolvency of the person in question?

Furthermore, the Law provides another imperative provision on ineligibility of a person to free legal aid in cases of property (funds) claims exceeding one thousand-fold of the minimum salary. However, the matter is that such claim can by no means attest to either solvency or insolvency of the applicant since in some cases, the claimed property might be his/her only property exceeding the minimum value specified by the legislative authority.

In terms of the financial aspect of access to advocate services, the proportionality of the average cost of advocate services and the average income of solvent citizens is to be taken into account. If we consider the average cost of advocate services in compliance with the values found in the Average Pricelist of Attorney Fees Related to Reimbursement of Court Costs by Courts⁵ approved by the RA Council of Bars and the income level of citizens in compliance with the Average Monthly Nominal Wages as published by the RA National Statistical Service (155940 AMD⁶, including the income tax), it can be stated that using advocate's services for applying to the RA Court of Cassation can appear to place an insurmountable financial burden on most citizens even in possession of a certain income.

It follows from the aforesaid that the person's solvency threshold set by the legislative authority is too high, and the person unable to access paid legal aid can also fall short of the applied standards. In such cases, as the person is unable to file an appeal to the court personally, he/she will be actually deprived of access to the court.

⁵ <http://pastaban.am/resources/advocates//img/decision/0834910847086a079c931f3258e7443a.pdf>

⁶ <http://www.armstat.am/am/?nid=126&id=08001&submit=%D5%93%D5%B6%D5%BF%D6%80%D5%A5%D5%AC>

Non-financial aspect of access to advocate services

Under Article 20(4) of the RA Law on Advocacy, an advocate can renounce his/her obligations only in cases prescribed by this law or by the contract signed with the client.

As prescribed in Article 27(1) of the RA Law on Advocacy, the Code of Advocate's Conduct determines uniform rules for advocates' conduct and principles for advocate's ethics compulsory for all advocates and their employees.

The Code of Advocate's Conduct prescribes advocates' duty to reject assignments of their clients. In particular, Para. 3.1.7 of the Code provides that the advocate shall not take up a case beyond his/her competence, without collaborating with a competent lawyer. Para. 3.1.8 states that the advocate shall not provide legal aid if he/she is unable to complete his/her task timely and in good faith due to his/her workload or for any other reason whatsoever.

Thus, the law prescribes certain cases when advocates must reject the requests of legal aid. Meanwhile, the law provides no guarantees to the effect that the person who seeks public defender's services to draw up a cassation appeal in terms of free legal aid will not be rejected based on the alleged uselessness of filing the appeal, absence of sufficient grounds or for any other reason.

The question may arise as to whether the right of the person who seeks to apply to the RA Court of Cassation will not be restricted only to the effect that he/she is obliged to file his/her appeal indirectly and the exercise of his/her right also depends on a third party.

Hence, the clause on filing the cassation appeal via an advocate should necessarily offer guarantees below:

1. This measure must pursue a legitimate aim;
2. The limitations must not restrict or reduce the access to court to the extent and to the effect that it impairs the very essence of right;
3. There must be a reasonable relationship of proportionality between the applied measures and the aim pursued;
4. Everybody must be provided with access to attorney's services, irrespective of their financial status;
5. In the light of the independence of the legal profession, no person should be deprived of the right to access to court by being unable to access to the Court of Cassation.

Based on the above, we can conclude as follows:

1. The right of non-lawyer private participants to file an appeal before the court of cassation exclusively via an advocate can theoretically pursue the legitimate aim serving the interests of natural and legal persons by providing legal representation by experienced and professional specialists. However, this aim should be achieved by measures that



entail no risks for the person's right to access to court as a part of the right to a fair trial.

2. In the RA, the legal mechanisms of free legal aid still fail to guarantee that in any case the person's right to appeal to the Court of Cassation will not be restricted to any extent in view of both the financial factors and the guarantees of the independence of the legal profession.
3. Introducing such regulations into the Criminal Procedure Code is in conflict with Article 7(3) of the RA Judicial Code stipulating that everybody can exercise his/her right to judicial remedy either through a representative or advocate, or personally.
4. Considering the aforementioned, a question arises as to whether the right of the non-lawyer private participants of criminal proceedings to file an appeal before the court of cassation only through an advocate as a means to achieve the aim of legal representation by experienced and professional specialists complies with the reasonable proportionality between the aim and the means.
5. Neither the Constitutional Court, nor the European Court of Human Rights have ever required filing appeals exclusively via advocates, though both the courts are courts of law. The restricted access to the Court of Cassation may result in restricted right to apply to the Constitutional Court and the European court of Human rights.

We hereby recommend amending Article 359(2) of the draft Criminal Procedure Code by omitting the first sentence.