

## Summary of the special report

### On the results of comparative analysis of certain provisions of the NKR Criminal, Civil and Administrative Procedure Codes related to human rights from the point of view of the NKR Constitution and the correspondence of other laws

Certain discrepancies have been found through the comparative analysis carried out by the NKR Criminal, Civil and Administrative procedure codes from the point of view of the NKR Constitution and by the correspondence of other laws.

#### A. NKR Criminal Procedure Code

1. According to Article 5 of NKR Law on “Mass Media” adopted in October 20, 2004, in the case a journalist or a person conducting information activity being forced by the court to elicit the source of information, the administration of the trial upon the motion of the journalist shall be closed-door. However, the NKR Criminal Procedure Code does not contain a provision on this.

Consequently, in order to eliminate the mentioned discrepancy, it is necessary to add a fourth paragraph in part 2 of the Article 16 of the NKR Criminal Procedure Code with the following content: “The administration of trial upon the motion of a journalist shall be closed-door in the case the court compels a journalist or a person conducting information activity to elicit the source of information.”

2. According to part 2 of the Article 455 of the Code, the right to present the appeal of supervising the judicial act with new circumstances shall have only the persons interested and having participated in the activity concerned that circumstance, except the cases prescribed by laws of the Republic of Nagorno Karabakh and international agreements.

Only the interested persons having participated in the activity concerning that circumstance shall be entitled to effective the right to present complaint to supervise judicial acts with new circumstances.

Thus, Article 455 of the Code does not give the opportunity to exercise the constitutional protection of their rights to those who did not take part in the investigation of criminal acts for different reasons, while they had this right.

By restricting the rights of the mentioned persons, this provision contradicts to Article 44 of the NKR Constitution, part 1 of which states that “Everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms.”

Consequently, it is necessary to make changes in the Article 455 of the Constitution, which would give people the opportunity to restore the violated rights as a result of practicing an adopted norm contradicting to the Constitution on the basis of the decision of the constitutional chamber of the Supreme Court.

3. According to part 1 of the Article 301 of the Code, complaints on the decisions and actions not being on the legal grounds against the employee of investigating body, the investigator, bodies implementing operative-searching activities of the prosecutor can be filed to court by the suspect, the accused, the defender, the victim, the criminal trial participants and by other people whose rights and legitimate interests have been violated by these decisions and actions and in the case if their complaints have not been satisfied by the Prosecutor.

Thus, as proves the legal content of the mentioned norm, a person exercising his rights and freedoms prescribed by the NKR Constitution must initially demand satisfaction to his complaint before the Prosecutor, that is to exercise his right to availability of justice provided to implement another means of legal protection.

The presence of such obligatory condition, when the rights and legitimate interests of the participants of the court proceedings and other interested persons were violated by the body implementing criminal proceedings, by the actions or the inactivity of an official, and he is not able to exercise his right to court protection without preliminary conditions, does not correspond to the Article 44 of the NKR Constitution, where part 1 states "Everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms."

4. According to part 1 of the Article 295 of the code, operative-searching activities which restrict individuals' right to the secrecy of correspondence, telephone conversations, mail, telegram and other communications, except the cases when the one of the interlocutors gave his/her consent to supervision, are carried out only by court decision.

The following provision contradicts to part 4 of the Article 23 of the NKR Constitution, according to which "Everyone shall have the right to secrecy of correspondence, telephone conversations, mail, telegraph and other communications, which may be restricted only by court decision in the cases and by procedure prescribed by law." Consequently, the restriction of this right, without the court decision, based on the decree of the operative-searching activities body only carrying out the given activity and the decision of one of the interlocutors on preliminary listening to or supervising them, directly contradicts to the NKR Constitution, as it states that "Everyone's right to secrecy of correspondence, telephone conversations, mail, telegraph and other communications shall be restricted only by court decision in cases and conformity with the procedure prescribed by the law."

Furthermore, part 1 of the Article 295 states that by the agreement of the one of the interlocutors correspondence, telephone conversations, mail, telegraph and other communications without court decision listening or supervising on supervision of legitimate opportunities is in internal contrast to the provisions of the Articles 14, 250 and 252 of the same code, as in the provisions mentioned above court agreement is pointed as a compulsory condition as well.

Based on the above written it is necessary to remove the following part of the sentence from part 1 of the Article 295 of the code:

"Except the cases when the one of the interlocutors gave his/her consent to supervision."

According to part 5 of the Article 320 of the Criminal Procedure Code, if during criminal trial it is found that the legal qualification of the criminal act of the defendant is not right, and the prosecutor does not make a decision on re-qualification, the court on its initiative postpones the court sitting for 10 days offering the Procurator General or his deputy to reaffirm the indictment. After the reaffirmation of the indictment the court, according to the indictment, pronounces the judicial act.

Unlike the two possible cases of the prosecutor's petition, which concern the changes of the accusation on mitigation and aggravation in the sense of the mentioned provision the court's initiative may concern the changes of the accusation, that is, the court "prompts" the prosecutor to carry out necessary actions for making changes in the sense of aggravation.

It is unequivocal that changes like these, cannot be in the sense of aggravation, as the court will change from the body administering justice into the one executing criminal prosecution, as well as will be violated the suspect's right to defense, as he will be deprived of the opportunities to defend himself from new accusations.

I think that in this case the preservation of the important fact has not been fully taken into account, according to which the court is not a body supporting either the prosecution, or defense party,

while maintaining and expressing only the interests of the law and justice (NKR Criminal Procedure Code, Article 23), the principle which is aimed at preserving independence and impartiality, as well as the principles of securing adversary court proceedings and equality of the parties, prescribed by Article 45 of the NKR Constitution.

Thus, part 5 of the Article 320 of the Code should become null and void.

#### B. NKR Civil Procedure Code

Paragraph 2 of part 3 of the Article 66 of the Code states that “Individual entrepreneurs and commercial organisations can not be exempted from the state imposition.”

In my opinion this provision does not correspond to part 1 of the Article 44 of the NKR Constitution, which states that “Everyone shall be entitled to effective legal remedies to protect his/her freedoms,” and according to Article 5 of the same Code that “Justice in civil cases is exercised based on the principle of equality of citizens and legal entities before the law and the court.”

From the statement above, I find it necessary to consider invalid Paragraph 2 of Part 3 of the Article 66.

#### C. NKR Administrative Procedure Code

According to part 1 of the Article 141 of the Code, the judicial acts of the administrative court on the actions concerning the appeal of the regularity of normative legal acts may be appealed to Supreme court only based on the violation of material right. That is, the mentioned provision does not give an opportunity to appeal the administrative court judicial acts to Supreme court in the case of violation of the norm. Such restrictions of the right of a person to apply to court does not correspond to the Articles 5, 44 and 45 of the NKR Constitution as well as to the requirements of the Article 6 of the European Convention on Defense of Human rights and fundamental freedoms.

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