ԵՎՐՈՊԱԿԱՆ ՄԻՈՒԹՅՈՒՆԸ ՀԱՅԱՍՏԱՆԻ ՀԱՄԱՐ
EUROPEAN UNION FOR ARMENIA

«ՍՈՑԻԱԼԱԿԱՆ ՏԵԽՆՈԼՈԳԻԱՆԵՐԻ
ԿԵՆՏՐՈՆ» ՀԱՍԱՐԱԿԱԿԱՆ ԿԱԶՄԱԿԵՐՊՈՒԹՅՈՒՆ

"SOCIAL TECHNOLOGIES CENTER" NGO

ՁԵԿՈՒՅՑ
REPORT

«ԿՈՌՈՒՊՑԻՈՆ ՌԻՍԿԵՐԸ ԱՆՁԱՆՑ ԿԱԼԱՆԱՎՈՐՄԱՆ ԻՐԱՎԱԿԻՐԱՌ ՊՐԱԿՏԻԿԱՅՈՒՄ ԵՎ ՕՐԵՆՍԴՐԱԿԱՆ ԽՈՉԸՆԴՈՏՆԵՐԻ ԲԱՐԵԼԱՎՄԱՆ ՀԻՄՆԱՀԱՐՑԵՐ»-Ի «ՀԱՆՐԱՅԻՆ ՔԱՂԱՔԱԿԱՆՈՒԹՅԱՆ ՄՈՆԻԹՈՐԻՆԳԱՅԻՆ ԵՎ ԲԱՐԵԼԱՎՄԱՆ» ԾՐԱԳԻՐ

"PUBLIC POLICY MONITORING AND DEVELOPMENT PROJECT OF "CORRUPTION RISKS IN LAW ENFORCEMENT PRACTICE OF DETENTION OF PERSONS AND ISSUES TO IMPROVE LEGISLATIVE BARRIERS"

ԿԱՌՈՒՑՈՂԱԿԱՆ
ԵՐԿԽՈՍՈՒԹՅԱՆ
ՀԱՆՁՆԱԺՈՂՈՒԹՅՈՒՆ
COMMITMENT TO CONSTRUCTIVE DIALOGUE

SOCIAL
ARMENIA

This report was prepared with the financial support of the European Union within the framework of “public policy monitoring and development project of “Corruption risks in law enforcement practice of detention of persons and issues to improve legislative barriers” being implemented by the “Centre for Social Technologies” NGO within the framework of the sub-grant provided by “Commitment to Constructive Dialogue” project being implemented by the consortium under the leadership of "Armenian Lawyers’ Association" NGO.

The project cast was 4.800.000 AMD.

The project duration was January 1-30, 2019.

Project head: Gegham Grigoryan
“Centre for Social Technologies” NGO President

Assistant to the head: Azniv Karapetyan

Project experts:

Vrezh Gasparyan
Marine Petrosyan
Arnold Vardanyan

CONTENT

PROJECT AIM

Emphasizing the importance of the anti-corruption reforms being made under conditions of the new socio-political situation in Armenia, the “Centre for Social Technologies” NGO has elaborated this monitoring project (hereinafter referred to as the “Project”) of the evidenced public policy and development on elimination of possible corruption risks and legislative barriers contributing thereto in the low enforcement practice of selecting detention as a measure of restraint for persons committed a crime, development of that sector.

The “willful application of legislative possibilities to limit human freedom” is indicated as “the most important issue of the field of Human rights” according to point 5.1. of the annex of the program of the Government approved by Decision N 581-A of June 1, 2018 of the RA Government.

In the same paragraph, as a solution, it is also defined that "the Government should encourage the application of measures of restraint not related to deprivation of liberty. In addition, it is necessary to exclude the situation when a detainee does not have a place for sleep in a criminal-executive institution provided for by law. The number of detainees and imprisoned persons should correspond to the possibilities of full provision of the conditions provided for by the RA legislation”.

Issue

Up to now the massive approach of law enforcement bodies and courts to select detention of persons suspected of committing a crime as a measure of restraint still remains an urgent issue in the field of the public criminal policy.

In its turn, abuse of deprivation of liberty is often a sign of systemic defects of the criminal justice. This can lead to the ineffectiveness of the protection of the rights of accused persons in criminal matters, as well as the decrease in effectiveness in the institutional aspect of application, execution and supervision of measures and sanctions that are not related to imprisonment. It is also often the cause of social problems related to violations of human rights and detention system overload, such as the state of prisons being crowded, ill-treatment with respect to detainees, inhuman conditions in detention places, internal vicious procedures and morals present in prisons by custom, absence of special professional standards presented to employees in prisons, incompetence of employees, discriminatory treatment expressed by them to persons being in custody. In other words, detention as a massive approach to apply a measure of restraint, besides the fact that it leads to numerous problems of violations of “fundamental rights and freedoms of the human being and the citizen”, also contains serious corruption risks, the identification thereof is possible only in the case of a systematic solution to the issue, combined with legislative solutions, participatory public policy, by the formation of an institutional system providing legitimate and decent behavior of officials.

Aim

By means of selecting detention as a measure of restraint in low enforcement practice and of the tool kit of monitoring the process of satisfying them by courts, to find out

1 / Bases for the possible existence of corruption risks (unfair and illegal behavior of officials, social status, pyramidal structured working style, etc.);

2/ Coefficient of self-will and being guided by stereotypes: working style of the bodies implementing the proceedings,

3/ Legislative barriers that hinder state authorities to apply other measures of restraint not related to deprivation of freedom,

4/ Public opinion study, as there is a widespread concern that decisions on application of detention are predetermined. (Surveys among advocates, formerly detained persons, within the population of regions of different territories),

5/ To consider court decisions on selecting detention as a measure of restraint for cases which have lost the power of keeping confidentiality in pre-trial investigation, taking into consideration the fact that there is a widespread opinion that courts refer to the European Convention only to justify the application of pre-trial detention, ignoring the verdicts that protect the application of alternative means.

Expected result

1/ To develop a package of legislative proposals based on the obtained data and to submit to relevant bodies, international and non-governmental organizations, to publicize and reach the reduction and exclusion of corruption in the field through the ongoing processes, improvement of the legislation, ensuring of legal and conscientious behavior of state employees, reduction and absolute exclusion of human rights and freedoms,

2/ To develop a new methodology in line with the INTES methodology of an effective anti-corruption fight in the field of education or to amend the same methodology in the field of the criminal policy in general and to introduce especially an effective tool kit in this problematic field and to achieve visible and measurable results as a result of its application by the participation of law enforcement bodies and the civil society.

At the same time, of course, it is also obvious that any research cannot give grounds for a 100% true political decision ...

But the researches and assessments being carried out will help identify the projects and policies that give the desired result, by using a clearly developed methodological base that is the very essence and demand of the EVIDENCED PUBLIC POLICY.

GENERAL DESCRIPTION OF THE PROJECT IMPLEMENTATION

We have concluded contracts with experts Marine Petrosyan, Vrezh Gasparyan, Arnold Vardanyan, “G DESIGN” and “Ditaket” companies for the implementation of the project.

Expert Marine Petrosyan has thoroughly studied almost all the decisions of the RA Court of Cassation on the issues of detention, the decisions of the RA Constitutional Court and the respective decisions of the collegium of the RA Prosecutor's office. Several dozens of press releases have been studied. The expert developed questionnaires including over 2 dozens questions from the Project related issues addressed to state and other interested bodies, that were ordered and shipped via e-mail to

The RA Special Investigation Service,

The RA Investigative Committee,
The RA Ministry of Justice,
The RA Judicial Department,
The RA Human Rights Defender,
The RA Chamber of Advocates,
The RA General Prosecutor's Office.

The expert has examined the answers to the received queries and summarized in the final report of the Project.

A service provision contract has been concluded with "G DESIGN" LLC to create a separated platform on http://socialarmenia.org official site of the Organization, about aims and issues of the Project, as well as a professional platform, "Targeted Sectors", has been created on http://socialarmenia.org official site of the Organization, on technical maintenance during and after the Project. The site includes "Justice and Human Rights" section.

A service provision contract has been concluded with “Ditaket” company to carry out 10 expert researches. Within the framework of the expert research, 10 interviews with acting advocates and legal scholars have been held, the results of which are included in the analytical section of this report.

Expert Vrezh Gasparyan has conducted a complex study of the summary based on expert researches and answers of state bodies.

Ordered and additional requests have been sent via e-mail

To the RA Minister of Justice requesting to provide the legislative draft on introducing alternative measures of restraint to the competent state authorities for obtaining the information necessary to carry out the research.

To the President of the RA National Assembly to find out whether the RA National Assembly is currently discussing the draft of the new RA Criminal Procedure Code, which is included in the agenda of the seventh session of the fifth convening of the RA National Assembly and if not, whether the RA National Assembly initiates legislative drafts of introducing new alternative measures of restraint, of the revision of the system of measures of restraint provided for by the acting RA Criminal Procedure Code.

To the RA General Prosecutor to find out whether the RA General Prosecutor's Office has carried out relevant studies, developed relevant legislative projects to

introduce options for replacing pre-trial detention with other adequate measures of restraint (except for bail).

By the results of the study of the data provided by additional inquiries addressed to the RA National Assembly, the RA Ministry of Justice and the RA General Prosecutor's office by expert Vrezh Gasparyan and Arnold Vardanyan, the package of proposals for the project of improvement of the public policy has been elaborated and completed.

The elaborated package of proposals for improvement and the draft on the legislative initiatives arising therefrom, in particular on amendments and supplements to the RA Criminal Procedure Code, were sent to the RA National Assembly and the RA Ministry of Justice.

We, within the framework of the partnership with our partner and other interested organizations, shall pursue the implementation and entering into force of the provisions of the presented project.

WORK ANALYSIS

THE PICTURE RECENTLY FORMED ON THE APPLICATION OF DETENTION AS A MEASURE OF RESTRAINT IN RA

The study of the recent statistical data on application of detention as a measure of restraint in the RA makes it clear that,

- 2363 motions on application of detention as a measure of restraint were received in courts of the general jurisdiction of the RA first instance during 2017, 2220 motions of which (93,9%) were satisfied, 12 motions (0,5%) were partially satisfied, 127 motions (5,3%) were rejected, 3 ones were left without consideration, and one motion was incomplete as of December 29, 2017. During the same time period 788 motions on application of bail as an alternative measure of detention were received in courts of the general jurisdiction of the RA first instance, 125 motions of which (15,9%) were satisfied, 4 motions (0,5%) were partially satisfied, 641 motions (81,3%) were rejected, 8 ones were left without consideration, and 10 motions were incomplete as of December 29[1]:

-2044 motions on application of detention as a measure of restraint were received in courts of the general jurisdiction of the RA first instance during 2018, 1935 motions of which (94,7%) were satisfied, 9 motions (0,5%) were partially satisfied, 90 motions (4,4%) were rejected, 7

[1] See the comparative statistical analysis on the activities of 2017-2018, of the RA Judicial Department, available on court.am website.

(0,3%)ones were left without consideration, and three motions (0,1%) was incomplete as of December 28, 2018. During the same time period 906 motions on application of bail as an alternative measure of detention were received in courts of the general jurisdiction of the RA first instance, 173 motions of which (19,1%) were satisfied, 713 motions (78,7%) were rejected, 9 ones were left without consideration, 5 ones are united in one proceedings, and 6 motions were incomplete as of December 28, 2018[2]:

Based on the foregoing, it should be noted that the substantial part of the motions of detention being received in courts of general jurisdiction of the first instance is practically satisfied, and the indices of the use of the bail, as the only alternative measure of restraint, are substantially low and prove the ineffectiveness of that measure of restraint.

BRIEF DESCRIPTION OF THE STUDY DONE WITHIN THE FRAMEWORK OF THE PROJECT

Within the framework of "Commitment to Constructive Dialogue" project, for implementation of monitoring of the public policy, development of the sector, solution of the project issues, measures have been taken to get necessary information from persons directly related to the process of the use of detention as a measure of restraint, to analyze it and to identify the main issues existing in the sector, within the framework of "Corruption risks in law enforcement practice of detention of persons and issues to improve legislative barriers" project being implemented by "Centre for Social Technologies" NGO.

The following conclusions have been made regarding the issues arising during the legal process of the use of detention as a measure of restraint as a result of the study:

- Effective restraint measures not related to deprivation of freedom are absent by the RA Criminal Procedure Code,

- currently the only alternative measure of detention, the bail is not an effective restraint measure.

- in the event of impossibility to choose bail with non all grounds of the use of a measure of restraint, detention does not have an alternative, in this case the risk of unconscientious behavior by the criminal prosecution authorities indicating additional grounds in the detention motion comes forward to exclude the use of the bail in the court in general,

- the bail, without being an independent measure of restraint, makes it impossible to choose it at once by the preliminary investigation body, which leads to the fact that in some cases the latter involuntarily submits the motion of the use of detention as a measure of restraint with respect to a person to the court,

[2] Ibid.

- maximum sizes of bail amount determination are not provided for by the acting legislation, which in some cases is of concern to the law enforcement agencies,

- from the point of view of guaranteeing principles of exclusion of corruption risks, transparency and publicity, the publicly consideration of motions of the use of detention as a measure of restraint may be made the subject of the discussion,

- "Nubarashen" Criminal-Executive Institution from the criminal-executive institutions acting in the territory of the Republic of Armenia does not correspond to the defined standards for keeping detainees,

- in order to minimize the possible practice of the use of detention as a punishment by criminal prosecution authorities, the introduction of the cooperation proceedings in the criminal trial can be considered as a solution.

At the same time within the framework of "Commitment to Constructive Dialogue" project, for implementation of monitoring of the public policy, development of the sector, solution of the project issues, measures have been taken to get necessary information from state competent authorities on the studies of the process of the use of detention as a measure of restraint, within the framework of "Corruption risks in law enforcement practice of detention of persons and issues to improve legislative barriers" project being implemented by "Centre for Social Technologies" NGO.

Thus, by examining the protocol of the session of August 4, 2017 of the collegium of the RA Prosecutor's Office, received as a result of the made inquiry it was found out that the Prosecutor's Office has established minimum requirements for the use of detention as a measure of restraint with respect to the accused and for the preparation and submission of grounded motions to the court, regarding prolongation of the detention period, for legitimacy of initial and continuous detention of an accused during the pretrial proceedings, which are aimed at enhancing the justification of the use of detention as a measure of restraint.

By examining the protocol of the session of June 12, 2018 of the collegium of the RA Prosecutor's Office, it was found out that among others, it was instructed to

- to submit a motion on using detention as a measure of restraint with respect to persons accused for crimes of minor or medium-gravity (providing for up to 5 year imprisonment) to the court only in the case when it will be justified by the definite wholeness of the factual data acquired for the case that the accused has already preformed any action provided for by part 2 of Article 135 of the RA Criminal Procedure Code,

- to submit a motion on the use of detention as a measure of restraint, with respect to persons accused for such crimes to the court in the case when the accused does not have a permanent residence place in the RA territory or the materials acquired for the criminal case are a satisfactory base to suppose that the accused, staying in freedom, will hinder consideration of the case in the pretrial

proceedings or court by imposing an illegal influence on the persons participating in the criminal trial, hiding or faking the materials being important for the case, not appearing without good reasons by the call of the body conducting the criminal proceedings
or through other way,

- to submit a motion on extending the detention period to the court only in the case when as a result of the detailed analysis of the evidence acquired for the case a real continuous existence of grounds for detention is approved, and due studiousness aimed at solving the issues of the preliminary investigation has been shown by bodies conducting the proceedings,

-to compulsory consider the question of the possibility of the use of measures of alternative restraint in each case of the discussion of the question of selecting a measure of restraint or extending its period and to submit a motion on the use of detention as a measure of restraint with respect to the accused to the court exclusively in the cases when the use of other measure of restraint, not related to deprivation of freedom cannot objectively guarantee the due behavior of the accused during the proceedings for the criminal case,

- if detention as a measure of restraint has been used with respect to the accused, conditioned only by the risk of hiding from the body conducting the criminal proceedings, in case of submission of a motion on replacement of detention with the bail by the defense party, the prosecutor will participate in the discussion of the indicated motion in the court and, if the presented reasons are taken as a base to suppose that the use of an alternative measure of detention can objectively ensure the due behavior of the accused, do not object against it, considering the use of the bail as a more effective measure ensuring the guarantee of the due behavior of the accused, including in the form of real estate.

Together with the foregoing, the study of legal regulations of the use of detention as a measure of restraint developed and put into the circulation by the RA General Prosecutor's Office, including of the project to make additions and amendments to the RA Criminal Procedure Code related to the introduction of alternative measures of detention, shows that it is suggested to introduce alternative detention measures like home arrest, administrative supervision. At the same time it is suggested to differentiate the degree of justification of detention grounds, conditioned by the degree of the crime charged with.

Thus, summarizing the foregoing it should be noted that competent authorities are also concerned about the issue of the widespread use of detention as a measure of restraint and take measures to increase justification of its use, introduction of alternative measures of detention.

SUGGESTIONS BEING PRESENTED AS A RESULT OF THE STUDY DONE WITHIN THE FRAMEWORK OF THE PROJECT

In the context of Article 5 of the European Convention "On protection of rights and fundamental freedoms of the human being" the European Court of Human Rights expressed the following legal positions:

- interstate authorities, while making a decision on freeing or detaining a person, should also pursue alternative measures that will allow the provision of the existence of the given person during the trial[3],

- detention should be used as the last or extreme measure of restriction of the right of freedom of a person when it is impossible to wholly guarantee the due process of the proceedings with other measures[4],

- the use of detention as a strict measure may be justified when the use of other, less effective measures has been discussed and it has been decided that they are not satisfactory to ensure protection of private or public interests, which can demand detention of a person[5],

- Point 3 of Article 5 fixes not only the right to trial within a reasonable time period or the right of freeing before the trial", but also plans that "freeing may be conditioned by guarantees of appearing for a trial"[6],

- the bail may be required as long as there are reasons to justify detention[7].

In compliance with point 9 of the recommendation concerning custody pending trial, of the Committee of the Ministers of the Council of Europe, in case of the use of pretrial detention the court should consider whether the use of detention may be avoided by alternative measures[8]:

In compliance with point 4 of the recommendation regarding guarantees of the use of detention, conditions necessary therefor and of protection from abuses, addressed to the States Parties to the Committee of the Ministers of the Council of Europe, in order to avoid non grounded use of de-

[3] See Judgment of May 22, 2012 of the Grand Chamber of the European Court of Human Rights for the case of Idalov v. Russia, application N 5826/03, point 140.

[4] See Judgment of March 20, 2018 of the European Court of Human Rights for the case of mutatis mutandis, Sahin Alpay v. Turkey, application N 16538/17, point 181.

[5] See Judgment of April 15, 2014 of the European Court of Human Rights for the case of mutatis mutandis, Djundiks v. Latvia, application N 14920/05, point 89.

[6] See Judgment of November 8, 2005 of the European Court of Human Rights for the case of Khudoyorov v. Russia, application N 6847/02, point 183.

[7] See Judgment of November 6, 2007 of the European Court of Human Rights for the case of Musuc v. Moldova, application N 42440/06, point 42, Judgment of March 14, 2009 of the European Court of Human Rights for the case of Aleksandr Makarov v. Russia, application N 15217/07, point 139.

[8] See Recommendation N R(80)11 of June 27, 1980, concerning custody pending trial, of the Committee of the Ministres of the Council of Europe.

tention a possibly wide range of alternative measures should be provided for with the use of less restrictions, taking into consideration the behavior of the suspect in committing the crime[9].

In compliance with subpoint "c" of point 7 of the same recommendation, a person may be kept under detention, if suppositions regarding escape, committing a grave crime, interfering in the implementation of justice or representing a serious threat to public order cannot be dispelled by the use of alternative measures[10]:

In compliance with point 1 of Resolution on "Abuse of pretrial detention in States Parties to the European Convention on Human Rights" of the Parliamentary Assembly of the Council of Europe, pretrial detention should be applied in exclusive cases as a last resort, when alternative measures are not satisfactory to guarantee the due process of the proceedings[11].

In compliance with point 6.1 of United Nations Standard Minimum Rules for "Non-custodial Measures" ("The Tokyo Rules"), pretrial detention should be applied as a last resort, taking into consideration issues of the preliminary investigation, protection of the society and the injured[12]:

In compliance with point 6.2 of the same rules, alternative measures of pretrial detention should be applied as early as possible[13].

Taking into consideration requirements indicated in the above-mentioned legal documents, legal positions expressed by the European Court of Human Rights, it should be noted that the system of alternative detention measures provided for by the acting criminal procedure code is incomplete. Particularly, in case of the acting regulations only the bail has been provided for as an alternative detention measure by the legislative body.

While it has long been imperative to supplement the acting code with such alternative measures such as home arrest or administrative supervision.

So, home arrest is such a restriction of the right to freedom of a person, by the application thereof the accused undertakes an obligation not to leave the residence place indicated in the court decision. In compliance with legal positions of the European Court of Human Rights, the guarantees defined by Article 5 of the European Convention "On protection of rights and fundamental freedoms of the human being" apply to home arrest, hence, while solving the issue of the procedure

---

[9] See Recommendation N (2006)13 of Spetember 27, 2006, regarding guarantees of the use of detention, conditions necessary therefor and of protection from abuses, addressed to the States Parties to the Committe of the Ministers of the Council of Europe.

[10] Ibid.

[11] Resolution N 2077 (2015) on "Abuse of pretrial detention in States Parties to the European Convention on Human Rights" of the Parliamentary Assembly of the Council of Europe, 1 October 2015

[12] See United Nations Standard Minimum Rules for "Non-custodial Measures", 14 December 1990 ("The Tokyo Rules").

[13] Ibid.

of deprivation of freedom of a person, including of the existence of corresponding grounds and conditions mutatis mutandis grounds and conditions to apply detention as a measure of detention are applied with respect to the person[14].

As for administrative supervision, it restricts the freedom of movement of a person under the conditions thereof the person is obliged to appear and be registered in the competent authority indicated in the court decision within a certain period of time. Otherwise, in the case of the application of the given restraint measure, a person shall be subject to supervision through the appropriate administrative authority.

At the same time during the whole period of the use of the indicated restraint measures supervision of the behavior of the person should be carried out by the use of special electronic means. The accused is obliged to always wear the mentioned electronic supervision means, not to damage them, as well as to respond to the supervision signals of the competent body. In this regard, it should be noted that in the framework of the RA legislative regulations "On Probation", on November 9, 2017 the RA Government Decree No. 1440-N established the procedure for the use and financing of electronic supervision means. According to the annex to this decision, two types of electronic supervision means are used for electronic supervision: GPS and radio wave equipment.

In compliance with the same annex, in case of supervision of detention measures related to not leaving the residence place, radio wave equipment is used: personal identification device and fixed supervision hardware. And in other cases of electronic supervision defined by law GPS equipment is used: personal identification and GPS satellite supervision devices.

This means that the study of the acting regulations shows that legal grounds for the application of corresponding electronic supervision means are provided for by the RA legislation. Moreover, the study of the official website of the State Probation Service of the RA MJ shows that the mentioned electronic supervision means have also been used in the RA within the framework of the corresponding pilot project[15]:

Together with the foregoing it should be emphasized that during home arrest, as well as the application of measures of restraint of administrative supervision additional restrictions and barriers may be provided for with respect to the person. Particularly, contact with definite persons or visit of some places may be prohibited or other barriers or restrictions may be defined.

The study of the international experience shows that foreign countries made reforms to their legislation already many years ago and provided for several alternative measures of detention, by this also enabling the body conducting the proceedings to select a measure of restraint in a personal-

[14] See Judgement of July 5, 2016 of the European Court of Human Rights for the case of Buzadji v. The Republic of Moldova, application N 23755/07, points 103, 105, 113.

[15] See http://probation.am/en/node/236

ized way, taking into consideration factual circumstances of each case and the behavior of the person accused of committing a crime. Particularly, the study of the criminal procedure code of the countries of the CIS: the Russian Federation, Ukraine, Moldova, as well as of the European countries: France, Poland, Italy and a number of other countries, shows that alternative restriction measures of detention are provided for in these countries, such as home arrest or restraint measures containing a ban on not leaving the definite place. The full list of alternative restraint measures is provided for by point 2 of Recommendation N (2006)13 of September 27, 2006, regarding guarantees of the use of detention, conditions necessary therefor and of protection from abuses, addressed to the States Parties to the Committee of the Ministers of the Council of Europe, in which among other things, taking a passport[16], registration in the police or other body for a definite period or provision of monetary or other means are provided for for ensuring appearance for a trial.

Meanwhile, the Criminal Procedure Code acting in the RA, connected to the fact of depriving a person of freedom, provides for only one alternative, bail, for the restraint measure of detention, which due to some regulations indicated in the code, is not an effective measure to fully neutralize the manifestation of unlawful behavior of a person.

Thus, the RA Court of Cassation recorded by the decision of October 31, 2014 that the bail could be used to ensure the presence of the accused in the disposition of the body conducting the proceedings and could not be an effective guarantee for neutralizing the risk of impeding the proper course of the proceedings through illegal influence by the accused on the participants of the trial[17].

The above-mentioned commentary is based on the analysis of Article 143 of the RA Criminal Procedure Code, dedicated to the regulations related to the bail, in which the legislative body conditions the use of the bail by hiding from the body conducting the proceedings. Particularly, in compliance with part 1 of Article 143 of the RA Criminal Procedure Code, the bail is used to ensure the presence of the accused in the disposition of the body conducting the criminal proceedings. Moreover, in compliance with part 6 of the same Article the amount of the bail may become state property only in the cases when the accused has hidden from the body conducting the criminal proceedings or has left for other place without permission. Under such conditions it turns out that the

[16] Taking a passport should be provided for as an independent restraint measure. Unfortunately, at present taking a passport from a person is combined with the use of the signature put for not leaving, being a measure of restraint, the legal grounds therefor are not provided for by the RA Criminal Procedure Code. Moreover, it should be noticed that the put signature loses its value, when it is additionally "ensured" by a passport being taken from a person. As for the regulations provided for by the RA Law "About a passport", they are indefinite and abstract, as a result of which a passport may be taken from a person even in the case of having a suspect status. Meanwhile, the international experience certifies that a passport may be taken from a person not as a measure of restraint in exclusive cases, when the latter is deprived of his/her freedom.

[17] See Decision N ԵԱՔԴ/0056/06/14 of October 31, 2014 of the Cassation court for the case of Davit Vardanyan, point 16.

bail is an effective measure of restraint only to prevent the risk of hiding of the person from the body conducting the proceedings. Meanwhile, in case of the existence of other grounds of the application of the measure of restraint, provided for by part 1 of Article 135 of the RA Criminal Procedure Code, if the accused violates their conditions, the bail cannot become state property. So, for example, in case of hindering the consideration of the case in the pretrial proceedings or court by the accused the subject of the bail cannot become state property, as in this case the possibility of the amount of the bail to become state is not provided for by part 6 of Article 143 of the RA Criminal Procedure Code. As a result it turns out that in the mentioned case the bail may not be an effective measure to restrain the illegal behavior of the person, under conditions thereof the restriction of the right to freedom of the person does not have any alternative, which is not compatible with the requirements of Article 5 of the European Convention "On protection of rights and fundamental freedoms of the human being".

The raised problem also contains a number of risks. In particular, for example, the ground for hindering the consideration of the case in the pretrial proceedings or court, of the person, may be often indicated in the motion of detention presented by the body conducting the proceedings, in the case of which at least initially the possibility of the use of the bail with respect to the person decreases (taking into account the circumstance that the court may not consider its existence approved).

Therefore, as a solution of the problem it is necessary to review part 1 of Article 143 of the RA Criminal Procedure Code, by conditioning the application of the bail by preventing the illegal behavior of the person in general, not ensuring the existence of the person in the disposition of the body conducting the proceedings. Besides it is also necessary to review part 6 of the same Article, by providing for the possibility of the subject of the bail to become state not only in the case of hiding from the body conducting the proceedings, but also in the case of the illegal behavior of the person in general.

Together with the foregoing, it should be noted that it turns out from the study of the website of the RA Constitutional Court that the RA Court of Cassation, with the demand for checking constitutionalism of the above-mentioned legal regulations, has applied to the RA Constitutional Court where though the trial of the case was scheduled for June 25 of this year, it was postponed on October 8[18].

The next issue related to the use of the bail relates to the circumstance that the bail itself is viewed as an alternative of detention. This means that the court should use detention for the use of the bail in order to be able to make the issue of the possibility to select the bail as a measure of restraint the subject of the discussion. Practically there are such situations in which the body conduct-

[18] See http://concourt.am/armenian/decisions/working/2019/pdf/sdav-53.pdf

ing the proceedings is not against the use of the bail, moreover, finds that it can be the most effective in the system of the acting measures of restraint, but for the reason that the bail itself is not a measure of restraint, has to present to the court and insist on the justification of the motion of detention regarding the deprivation of freedom of the person. As a result, it turns out that as a consequence of legislative regulations the use of detention with respect to the person in such situations becomes artificial, as it is just a transitional measure to pass to the discussion of the bail. Under such conditions the nature of the bail as a measure of restraint should be reviewed, by viewing it not as an alternative of detention, but an independent measure of restraint, with the jurisdiction to select it the body conducting the proceedings will also be endowed.

At the same time referring to the concerns of the legal authorities on the maximum size of the amount of the bail it should be noted that such a suggestion does not seems grounded. In particular, the amount of the bail, in each case, is subject to determination, based on the property condition of the person who has committed a crime, on the nature of the committed crime and other circumstances, which have an individual nature. Otherwise, in each case the court, while determining the size of the bail, takes into account the specific facts of the case and comes to an appropriate conclusion. By the way it should be emphasized that determination of the amount of the bail itself does not suppose that the person should be released. It is only in the case of the payment of the amount of the bail that the person is subject to release. In all remaining cases when the person cannot pay the determined amount, can dispute against the size of the amount of the appointed bail, insisting on the fact that it does not correspond to the principle of proportion. The mentioned approach is also acceptable in foreign countries. The study of the international experience done by us certifies that maximum sizes of the bail are not defined by the legislation. It should be mentioned that in the Anglo-Saxon legal system, where the use of the bail has more use, barrier of "Excessive bail" has been developed[19], in compliance to which the determination of the amount of the bail should not be abused, it should not be turned into punishment, by the presumption of innocence of a person and the 8th amendment to the USA Constitution. The mentioned approach has also been considered acceptable by the Supreme Court of the USA in its several decisions.

Based on the foregoing it should be noted that the suggestion of the determination of the maximum size of the amount of the bail does not seem grounded. Moreover, though minimum thresholds of the use of the bail are provided for by the acting criminal procedure code, they are also subject to elimination. In particular, still in 1998, at the time of the adoption of the criminal procedure code, the legislative body has planned that in case of crimes of minor gravity the amount of the bail cannot be less than two hundred times of the minimum salary and in case of crimes of medium gravity the amount of the bail cannot be less than five hundred times of the minimum salary.

[19] See https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-9.pdf

It is obvious that the sizes of the mentioned amount are no longer relevant more than 20 years after the adoption of the code, as a consequence of the change in the value of the monetary unit. Moreover it should be noted that the absence of the determination of the minimum size of the bail for grave or especially grave crimes during years[20] has never created a problem. Under such conditions, taking into account the above-mentioned too, in each case the need for an individual approach, it becomes clear that there is no need to determine the maximum sizes of the amount of the bail, and the maximum sizes of the subject of the bail are also subject to elimination.

At the same time the issue of provision of publicity of the trial of the cases regarding the use of detention as a measure of restraint is of interest. In particular, a group of law enforcement bodies finds that the trial of the cases regarding the use of pretrial detention and the prolongation of its period should not be held behind closed door, as it is required by Article 283 of the acting criminal procedure code. In other words, in the given case it is suggested to eliminate the legislative regulation on holding a closed door trial by law.

It should also be noted that the other part of law enforcement bodies finds that the public hearing of the cases on the use of pretrial detention and prolongation of its period is not lawful as in way the protection of the trial secret is endangered. This means that the protection of the trial secret justifies restriction of public hearings by law. At the same time, as additional evidence, it is pointed out that during the consideration of pretrial detention, within the period of the initial investigation of the case, the level of public excitement is high, which can be aggravated by public hearings.

In fact, according to the study of the right to a fair trial guaranteed by Article 63 of the RA Constitution and Article 6 of the European Convention "On protection of rights and fundamental freedoms of the human being" it requires public hearing of the case, unless the need for a closed-door trial is justified. That is, until the existence of grounds for a closed-door trial has not been found out.

Moreover, it should be emphasized that, in compliance with the legal positions of the European Court of Human Rights, the mere existence of confidential information in the materials of the case does not automatically suggest that the trial should be closed to the public, thereby ignoring the balance between the considerations of open trial and national security. According to the European Court of Human Rights, before prohibiting public presence during a criminal trial, the courts should

[20] Though in compliance with legislative regulations the use of the bail has been allowed only in case of crimes of minor and medium gravity up to now, the Cassation court, taking into account legal positions of the European Court of Human Rights, found by Decision N ՎԲ-115/07 of July 13, 2007, for the case of Taron Hakobyan, that the use of the bail was permissible regardless of the gravity of a crime.

disclose specific facts that closing the trial is necessary to protect the supreme interest of the state and to restrict the confidentiality to the extent necessary to protect that interest[21].

Based on the foregoing it should be noted that a trial of motions on pretrial detention and prolongation of its period should be held, as a rule, open-door, before the court, by the motion of the party or at its own initiative, makes a decision to hold the trial of the motion on detention behind closed doors, based on protection of the interest of justice. Consequently, the regulation contained in Article 283 of the RA Criminal Procedure Code is subject to review.

Together with the foregoing, we shall briefly address the issue of the conditions of the criminal executive institutions of the Republic of Armenia, particularly "Nubarashen" criminal executive institution. Though it has been raised many times over the past years, this criminal executive institution continues to be exploited in the Republic of Armenia. "Nubarashen" criminal executive institution was built in 1981 and was put into operation as an investigative isolator. However, as a result of the study, it was found out that the mentioned criminal executive institution, which is also intended for detainees, does not correspond to international requirements. The requirements for ensuring minimum 4 square meters of an area per person are not satisfied. Moreover, a number of advocates interviewed within the framework of this project mentioned that this criminal executive institution does not have the minimum conditions which are necessary to meet detainees and to discuss separate circumstances of advocacy assistance. Consequently, within the framework of the research which was carried out, the attention of the competent authorities is drawn to a final solution to the continuously raised issue on poor conditions of "Nubarashen" criminal executive institution again.

Thus, by summarizing the above-mentioned, it should be noted that the system of measures of restraint provided for by the acting Criminal Procedure Code is subject to review, moreover, by the adoption of a new Criminal Procedure Code, which will enable systematic implementation of radical reforms[22], that will also significantly improve the currently formed law-enforcement practice on the use of detention as a measure of restraint. Nevertheless, prior to the transition to such systemic reforms, most of the issues raised within the framework of this study can also be solved by including the suggestions, through appropriate amendments and additions, into the acting Criminal Procedure Code, which are presented attached in Annex 1.

---

[21] See Judgment of December 4, 2008 of the European Court of Human Rights, for the case of Belashev v. Russia, application N 28617/03, point 83, Judgment of March 1, 2011 2008 of the European Court of Human Rights for the case of Welke and Białek v. Poland, application N 15924/05, point 77.

[22] For example, in order to minimize possible practice of the use of detention by criminal prosecution bodies as a punishment, the introduction of cooperation proceedings in a criminal trial can be considered as a solution, which will enable to cooperate legally with the accused, by offering appropriate favorable conditions against it.

ANNEX 1
PROJECT

LAW OF
THE REPUBLIC OF ARMENIA
ON MAKING AMENDMENTS AND ADDITIONS
TO THE CRIMINAL PROCEDURE CODE
OF THE REPUBLIC OF ARMENIA

Article1. To replace “Arrest, keeping in custody” words with “Arrest, home arrest, administrative supervision, prolongation of their time period” words in part 3 of Article 11 of the Criminal Procedure Code (hereinafter referred to as the “Code”) of July 1, 1998 of the Republic of Armenia.

Article 2. To fill in “the use of home arrest, administrative supervision, prolongation of their time period” words after “prolongation of the period of detention in point 1 of part 2 of Article 41 of the Code.

Article 3. In Article 53 of the Code

1) to fill in “home arrest or administrative supervision” words after “detention with respect to the accused” words in point 5 of part 3 and to replace “and detaining her/him” words with “or detaining her/him, imposing home arrest or administrative supervision on her/him” words.

2) to fill in “home arrest, administrative supervision” words after “detention” word in point 7 of part 3.

Article 4.

1) to fill in “home arrest, administrative supervision” words after “detention” word in point 8 of,

2) to fill in “of home arrest or administrative supervision” words after “with the exception of arrest” and to fill in “home arrest or administrative supervision” words after “release by his/her decision” words, as well as to fill in “home arrest or administrative supervision” words after “detention thereof” in point 22 of,

3) to fill in “home arrest or administrative supervision” words after “detention with respect to the accused” words, to fill in “of home arrest or administrative supervision” words after “detention with respect to the accused” words in point 24 of part 4 of Article 55 of the Code.

Article 5. In Article 134 of the Code

1) to fill in with points 1.1 and 1.2 with the following content in part 2:

“1.1) home arrest.

1.2) administrative supervision.”.

2) to recognize part 3 invalid.

Article 6. To replace “detention and its alternative measure of restraint” words with “detention, home arrest, administrative supervision and bail” words in Article 2 of Article 135 of the Code.

Article 7. To fill in the Code with Articles 142.1 and 142.2 with the following content:

“Article 142.1. Home arrest

1. Home arrest is such a restriction of freedom of the accused during which he/she is obliged not to leave the residence place indicated in the court decision.

2. The accused can also be forbidden by the court decision

1) to have a telephone conversation, to send or receive letters, mail, telegraph and other communications, to use other means of communication:

2) to contact with some persons or to accept other persons as guests in his/her residence place.

3. The court decision on use of home arrest indicates specific restrictions, which apply to the accused, as well as the competent body that is assigned to supervise keeping of these restrictions.

4. The supervision over the behavior of the accused is carried out with special electronic means defined by the legislation by the court decision.

The accused is obliged to always wear the mentioned electronic supervision means, not to damage them, as well as to respond to supervision signals of the competent body.

5. The provisions defined by this code for detention apply to the order of the use of, the terms of home arrest and to appeal.

6. One day of home arrest is equal to one day of detention.

Article 142.2. Administrative supervision

1. Administrative supervision is a restriction of freedom of movement and actions of the accused, under conditions thereof he/she is obliged to register in the competent body of the place indicated in the court decision not often, but 3 times per week.

2. By the court decision the accused may also be forbidden to

1) to change permanent or temporary residence place, community, and in Yerevan city, administrative district, without the permission of the body conducting the proceedings,

2) to visit some places indicated in the decision,

3) to communicate with some persons,

4) to leave his/her residence place at some hours of the day, but no more than 12 hours.

3. In establishing the prohibitions provided for by part 2 of this Article, the health condition of the accused, as well as the conditions of work and study are taken into account.

4. A copy of the decision on administrative supervision of the accused is sent to the competent authority defined by the court for execution.

5. The competent authority immediately records the accused and informs the body conducting the proceedings about accepting her/him for supervision.

6. Supervision over the behavior of the accused is carried out by the court decision by special electronic means defined by the legislation. The accused is obliged to always wear the mentioned electronic supervision means, not to damage them, as well as to respond to the supervision signals of the competent body.

7. The provisions defined by this code for detention apply to the order of the use of administrative supervision and to appeal".

Article 8. In Article 143 of the Code

1) To replace "ensure the presence of the accused in the disposition of the body conducting the proceedings" words with "preventing the fulfillment of actions provided for by part 1 of Article 135 of this code" words.

2) To replace "If the accused has hidden from the body conducting the criminal proceedings or left for other place without permission" words with "If the accused fulfills actions provided for by part 1 of Article 135 of this code" words in part 6.

3) to recognize part 4 invalid.

Article 9. To fill in "home arrest or administrative supervision" words after "detention of the person" words in part 2 of Article 271 of the Code.

Article 10. To fill in "home arrest or administrative supervision" words after "apply to the court, detention" in Article 275 of the Code.

Article 11. To fill in "home arrest, administrative supervision" words after "detention" word in Article 280 of the Code.

Article 12. To state part 1 of Article 283 of the Code with the following edition:

"1. Motions on the use of judicial compulsory measures are reviewed solely by the judge, at an open door court session in the presence of the official applied by the motion or his/her representative.

Motions on performing investigatory actions are reviewed solely by the judge, at a closed door session in the presence of the official applied by the motion or his/her representative".

Article 13. Entering into force

1. This law enters into force on the fifteenth day following the day of its official promulgation.