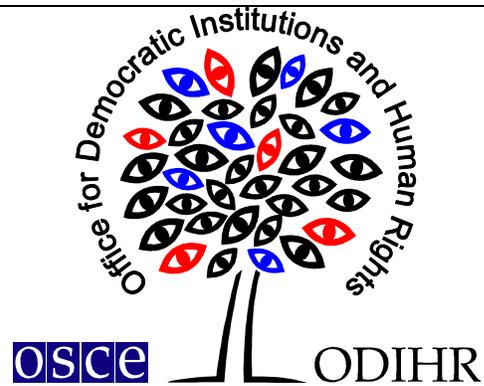


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NOTE

ON THE CONCEPT PAPER ON THE REFORM OF CRIMINAL PROCEDURE LEGISLATION IN ARMENIA

**Based on an unofficial English translation of the Concept Paper and related
documents provided by the OSCE Office in Yerevan**

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Annex 1: Concept Paper on the Reform of the Criminal Procedure Legislation in Armenia

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1. INTRODUCTION

1. *From April 2008 to June 2009, the OSCE/ODIHR conducted a Trial Monitoring Project in Armenia. The Final Report completing this Project (hereinafter “the Final Report”) was issued in March 2010 and included numerous recommendations on various issues related to criminal proceedings and the implementation of related human rights standards.¹ On the basis of the findings contained in the Final Report, as well as, inter alia, case law of the European Court of Human Rights, decisions of the Constitutional Court of Armenia and other input from a special presidential task force and relevant stakeholders, a special Commission² has developed a Concept Paper on the Reform of the Criminal Procedure Legislation in Armenia (hereinafter “the Concept Paper”).*
2. *On 21 July 2010, the Minister of Justice of the Republic of Armenia addressed the Head of the OSCE Office in Yerevan with a request for expertise on the Concept Paper. As per established procedure, the OSCE Office in Yerevan forwarded English translations of both the request and the Concept Paper to the OSCE ODIHR. The current Note is provided in response to the above request.*

2. SCOPE OF REVIEW

3. The scope of this Note covers the Concept Paper and the three Conceptual Questions appended to it. Thus limited, the Note does not constitute a full and comprehensive review of the current and draft criminal procedure legislation in Armenia.
4. In the interests of brevity and for purposes of concision, the Note focuses on areas that are a source of immediate concern rather than on the positive features of the Concept Note. The ensuing recommendations and comments are based on international human rights standards, as found in international agreements and commitments ratified by the Republic of Armenia.³
5. This Note does not address structural issues related to the chosen procedural model and its internal consistency, insofar as this choice does not constitute a breach of international human rights standards. However, additional expert consultations with regard to the Concept Paper may contribute to finding solutions that facilitate better implementation of these standards in practice.
6. The Note is based on an unofficial translation of the Concept Paper and the three Conceptual Questions, which are attached to this document as Annexes 1 and 2 respectively. Errors from translation may result.

¹ The Final Report is available on the OSCE /ODIHR website under http://www.osce.org/documents/odihr/2010/03/42944_en.pdf

² This Commission was established under Instruction NK-58-A of the President of the Republic of Armenia (26 April 2010).

³ Of particular relevance for the purposes of this Note is the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (signed on 4 November 1950, entered into force on 3 September 1953, ratified by the Republic of Armenia on 26 April 2002) and the United Nations International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966, acceded to by the Republic of Armenia on 23 June 1993).

7. In view of the above, the OSCE/ODIHR would like to make mention that this Note is without prejudice to any written or oral recommendations and comments to the criminal procedure legislation of the Republic of Armenia that the OSCE/ODIHR may make in the future.

3. EXECUTIVE SUMMARY

8. The Concept Paper is a progressive and well-drafted policy document which for the most part meets international standards on the protection of human rights in criminal proceedings. To ensure the Concept Paper's full compliance with relevant international law, it is recommended as follows:

- A. During discussions on a new Criminal Procedure Code, policy-makers should also take into consideration: [par 16]
1. the role and regulation of "operative intelligence activities";
 2. the use of information obtained through administrative/prosecutorial inspections;
 3. the introduction of habeas corpus proceedings; and
 4. the role of the police in criminal procedures.
- B. To engage in additional discussions on the advisability and advantages of: [par 17]
1. the division of prosecutorial functions between prosecutor and investigators;
 2. retaining two forms of pre-trial proceedings (inquest and preliminary proceedings);
 3. the formal instigation of a criminal case.
- C. When drafting provisions on alternatives to the normal course of proceedings, such as "discretionary criminal prosecution" or "simplified preliminary investigation", to provide detailed and effective safeguards for the rights of all participants in proceedings; [par. 19]
- D. To reconsider the rule making recourse to simplified proceedings dependant upon on the victim's approval; [par. 20]
- E. To consider introducing, instead of the institution of procedural witnesses, a procedure requiring the attendance by defence counsel in investigative actions, as way to protect the rights of the accused and to prevent abuses by criminal investigation bodies; [par. 21]
- F. In regulating the use of detention on remand, to ensure full respect for the right to liberty and security of person, while at the same time taking into account the exigencies of criminal proceedings; [pars. 22-26]
- G. To reconsider the proposal to weaken the procedural status of the victim's successor; [par. 27] and
- H. To allow detention of a suspect for *up to* 10 days, instead of automatically imposing a 10-day detention term. [par 28]

4. ANALYSIS AND RECOMMENDATIONS

4.1. Preliminary Remarks

9. From the outset, the Commission set up to draft the new Criminal Procedure Code should be praised for having commenced its work by developing a Concept Paper on the Reform of the Criminal Procedure Legislation. The drafting of such policy-setting documents at the preliminary stages of the legislative process helps ensure a comprehensive and integrated approach to drafting legislation, and is especially important in the preparation of complex legislative texts such as the Criminal Procedure Code.
10. It is also commendable that the Commission has decided to procure international expertise and assistance already at the policy-making stage. Consultation at the stage of policy formation – i.e., prior to a draft legislative text being prepared for parliamentary consideration – is particularly effective for meaningful consideration of international expertise. At such preliminary stage, it is institutionally easier to take account of available international expertise and relevant best practices, as such discussions take place before there is a firm internal consensus on policy and legislative text.
11. At the same time, it is worth recalling that the full implications of a legislative concept or initiative, as a rule, do not become apparent until policy is translated into a specific legislative text. Only then could a comprehensive assessment be made of such matters as, for instance, the separation of powers between the investigative, prosecutorial and judicial authorities, or the scope of prerogatives of inquest and investigation bodies. It is therefore crucial that adequate consultation with the engaged stakeholders continues throughout the stages of the legislative drafting process.

4.2. Analysis of the Concept Paper

12. The OSCE/ODIHR notes that on the whole, the Concept Paper seeks to promote many internationally recognized principles concerning the observance of human rights in the course of criminal proceedings. The document explains that, following years of incremental amendments to the 1998 Criminal Procedure Code, the Armenian authorities have now decided to develop a conceptually new Criminal Procedure Code. The new Code is to reflect relevant international law (particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the ECHR”) and the case law of the European Court of Human Rights (hereinafter “the ECtHR”)), as well as established best practice. It aims to eliminate legislative inconsistencies and lacunae as well as some residual Soviet-era practices and institutions that were found to violate human rights.
13. The Concept Paper prescribes that the new Code, as compared to the existing one, shall generally provide greater clarity and precision in its legal provisions, and that the procedural status and the rights and prerogatives of various participants in criminal proceedings shall be prescribed through specific and detailed regulations. This is undoubtedly a positive undertaking, as the clarity

and precision of criminal legislation (substantive and procedural) are qualitative requirements enshrined in international law.⁴

14. The Concept Paper notes that in the course of past judicial reforms in Armenia, some fundamental principles of criminal procedure were prescribed also in the Judicial Code of the Republic of Armenia. The OSCE/ODIHR recalls that in the recent past, it has commented on specific procedures prescribed by both the Criminal Code and the Judicial Code of Armenia,⁵ recommending greater clarity and precision concerning those procedures with dual legal basis. The OSCE/ODIHR reiterates that in the interests of legality and foreseeability, all criminal procedure matters should be prescribed in clear and precise terms, and ideally, be contained exhaustively in the Criminal Procedure Code.
15. The Concept Paper proposes a series of commendable amendments to the currently existing criminal procedure legislation. The stated aims of the proposed changes concern the following: strengthening elements of adversarial proceedings; ensuring equality of arms; expanding the rights of the defense; ensuring a better separation of procedural functions between the police, prosecutors, and the judiciary; strengthening the role of the court in all stages of criminal proceedings; enhancing court oversight over pre-trial proceedings; and streamlining the legislation regulating appeal and cassation proceedings. All these policy goals are commendable, and if properly transposed into law they should ensure an effective protection of human rights in the course of criminal proceedings.
16. At the same time, the Concept Paper is silent on a number of conceptual issues which may merit additional consideration by the policy-makers. Among these issues, *inter alia*, are the regulation of so called “operative intelligence activities” and their place in relation to criminal proceedings; the use of information obtained through administrative and prosecutorial inspections in criminal proceedings; introduction of a *habeas corpus* procedure; and the role of the police in criminal proceedings.
17. Other proposals contained in the Concept Paper suggest that its authors are keen to preserve some features of post-Soviet criminal procedure which may not provide sufficient protection of human rights guarantees. These include the division of prosecutorial functions between prosecutors and investigators; retention of two forms of pre-trial proceedings (inquest and preliminary investigation); and the formal instigation of a criminal case. These proposals merit additional expert discussions to determine the advisability of these approaches and the comparative advantages of alternative models.
18. Additionally, some provisions of the Concept Paper would benefit from re-consideration in order to fully meet international standards, as explained below.

⁴ See *Korbely v. Hungary*, ECtHR [GC] judgment of 19 September 2008 (application no. 9174/02), paragraph 70; and *Kafkaris v. Cyprus*, ECtHR judgment of 12 February 2008 (application no. 21906/04), paragraph 140. See also the UN General Comment to Art. 29 ICCPR, paragraph 7.

⁵ See the OSCE/ODIHR Note on Modifications to Armenian Criminal Legislation Related to Acts of Contempt of Court (Opinion-Nr.: CRIM – ARM/162/2010, of 23 September 2010), available online in English at <http://www.legislationline.org/>.

19. In Section 1 on “Pre-Trial Proceedings”, the “discretionary criminal prosecution” and the “simplified preliminary investigation”, appear as time-saving and cost-effective alternatives to regular investigations. One potential concern with such procedures is that they may open the door for undue prosecutorial discretion or abuse (especially considering that “discretionary criminal prosecution” may be applied also to medium-gravity offences). To prevent such potential abuse, these special procedures need to be circumscribed by adequate procedural safeguards, which may include providing the victim with a right to challenge in court the prosecutor’s decision to refrain from instituting criminal proceedings (for instance, following the German model of *Klageerzwingungsverfahren*), or providing for the possibility of subsidiary prosecution. Such procedural safeguards should be worked out in detail when drafting the text of the Code.
20. Section 1 on “Pre-Trial Proceedings” also proposes to make recourse to simplified proceedings dependant upon the victim’s approval. Notwithstanding all due respect for the victim and his or her procedural status, affording the victim a veto over the use of simplified proceedings may very often frustrate the primary objective of the simplified procedure, which is to honour defendant’s cooperation by the promise of a more lenient sentence. That provision could therefore be re-thought. Instead, the drafters may consider the introduction, in addition to the simplified proceedings, of some victim-friendly restorative justice schemes.
21. Section 1 on “Pre-Trial Proceedings” further proposes to abolish the institution of procedural witnesses. This reform is commendable, as procedural witnesses have proven rather ineffective in many jurisdictions. Instead, attendance by defence counsel in investigative actions can be a more effective way to protect the rights of the accused and to prevent abuses by the criminal investigation bodies. What is more, for certain procedures such as searches in lawyers’ offices or medical institutions, even additional safeguards might be necessary.⁶
22. Section 2 on “Measures of Restraint” proposes the introduction of new restraint measures such as home arrest and placement under police supervision. The introduction of new alternatives to detention is laudable, but the rule stated in paragraph 3 of the same section – that the same grounds should not be applicable for both detention and other measures of restraint – raises some concerns. The ground of preventing the repetition of offence, or the tampering with evidence, for instance, may justify detention in one case, but could also serve as a ground for home arrest in another case. If other restraint measures are made applicable only on grounds different from those justifying detention, then there is a real risk that they will not serve as alternatives to detention, which could result in further restriction of liberty.
23. Section 2 on “Measures of Restraint” further contains several provisions which apparently aim at eradicating the Soviet-era legacy of detention being requested by the prosecution, and ordered by the court, through motions and orders which contain only stereotypical and scant reasoning. Ensuring that detention is ordered only in cases where relevant and sufficient reasons are adduced to establish its necessity, is a commendable goal and also a

⁶ See, for instance, *Niemietz v. Germany*, ECtHR judgment of 16 December 1992 (Application no. 13710/88).

requirement under international law.⁷ At the same, some of the means by which the Concept Paper proposes to pursue this goal may be overly exigent and result in unintended deleterious effects.

24. Thus, it is noted that the measure described in par 4 of Section 2 on measures of restraint seeks to address repeated motions for detention, in those cases where such motions are based on identical grounds to prior motions that have been rejected. While the attempt to eradicate repetitive or even frivolous motions is well recognised, the matter certainly warrants further consideration. That is, other means of curtailing repetitive and frivolous motions should also be considered and the court should be given the requisite flexibility to review and decide on a case by case basis.
25. Further, Paragraph 5 of Section 2 provides that “[t]he detention term may not be prolonged on the basis of the same arguments that were used in imposing the previous detention term”. Such a rule would seem to pursue a legitimate aim of preventing superficially-argued and poorly-substantiated motions on detention.⁸ However, a blanket prohibition on the prolongation of detention based on the arguments used to order the previous detention may be overly broad. The proposed rule would make sense in cases where, for example, detention is ordered based on the risk of tampering with evidence; there, the risk of influencing witnesses or co-defendants – though originally genuine – may gradually diminish or disappear altogether as criminal proceedings develop, testimonies are taken and investigations are brought to completion.⁹ At the same time, though, especially in complex cases requiring multifaceted and prolonged investigations, it may be sometimes inevitable to have to extend a defendant’s detention based on the same grounds and arguments as those used in the previous detention order – if they continue to be genuinely valid. For instance, in cases involving organized crime, the risk of the defendant fleeing or re-offending can remain genuine for more than just the period of one detention order, and if indeed persistent – and sufficiently established by the prosecution – the same ground(s) should be admissible when considering the extension of a detention order. Rather, the rule should say that detention cannot be extended *solely* based on the same arguments that were used to order the previous detention term.¹⁰ Such a phrasing would more accurately reflect the exigencies of international law.¹¹ The Code could also expressly prescribe that, in the absence of relevant and sufficient reasons adduced by the prosecution, the preventive measure of detention cannot be ordered.

⁷ See Art. 5(3) ECHR and Art. 9(3) ICCPR.

⁸ See Chapter 1 of the Final Report from the Trial Monitoring Project available on the OSCE /ODIHR website under http://www.osce.org/documents/odihr/2010/03/42944_en.pdf.

⁹ See *Tomasi v. France*, ECtHR judgment, 27 August 1992 (application no. 12850/87), paragraphs 92-95; *Kemmache v. France*, ECtHR judgment of 27 November 1991 (application nos. 12325/86; 14992/89), paragraph 54; *Muller v. France*, ECtHR judgment of 17 March 1997 (application no. 21802/93), paragraph 40.

¹⁰ See also recommendation 15e at p. 90 of the Final Report from the Trial Monitoring Project available on the OSCE /ODIHR website under http://www.osce.org/documents/odihr/2010/03/42944_en.pdf.

¹¹ The ECtHR has held that “[t]he persistence of a reasonable suspicion that the person arrested has committed an offence is a *conditio sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices”, and thus a continued detention should be justified with other “relevant and sufficient” grounds. See *Musuc v. Moldova*, ECtHR judgment of 6 November 2007 (application no. 42440/06), paragraph 39.

26. Paragraph 12 of Section 2 on “Measures of Restraint” proposes to make bail applicable in all cases, irrespective of the severity of the offence incriminated. Such reform is essential and indispensable for bringing the Armenian criminal procedure legislation in line with the requirements of international law.¹² The restriction against allowing bail in cases involving grave crimes should therefore be removed from the Armenian criminal procedure legislation, just as it was repealed from the legislation of other former-Soviet states which have acceded to the ECHR.
27. Section 4 on “Legal Status of Participants in Proceedings” proposes to strengthen the procedural status of the victim by, among others, providing for the assistance of a legal representative not only during the victim’s interview but in all procedural actions performed with the victim’s participation. This is a commendable reform, albeit one which may entail substantial costs. Drafters may wish to reconsider, however, their position with respect to the so-called indirect victim (victim’s successor) in the cases where the direct victim has died. If the procedural status of the victim is strengthened and the victim becomes a more active participant in proceedings, it would seem unreasonable to deprive the relative of the deceased of an opportunity to shape the process.

4.3. Consideration of Conceptual Questions

28. The first Conceptual Question proposes a 10-day term for holding a suspect detained, which period may then be extended by the court for up to one month, provided that the investigator so requests through a reasoned decision. This proposal would appear to not directly violate international law, provided that the initial 10-day detention is also ordered by a court of law, and provided as well that there is the requisite reasonable suspicion that the suspect has committed an offence, and that his or her detention is indeed indispensable. At the same time, the automatic imposition of a 10-day detention term may deprive the judiciary of the necessary flexibility to make decisions based on the individual circumstances of each case. Thus, allowing detention of *up to* 10 days would appear to be a better solution from a human rights - based perspective.
29. The second Conceptual Question stipulates that in addition to the participation of the defense counsel in the “confrontation,” the right of the defense counsel to ask questions may be prescribed if the right of the accused to demand confrontation with a person testifying against him and to pose questions to such person has been stipulated. This proposal is welcome in so far as it aims to ensure genuine equality of arms in the course of criminal proceedings.
30. The third Conceptual Question asks whether the victim or his proxy or representative should have the right to participate in a hearing on imposing detention as a restraint measure or reviewing a motion to prolong the detention term, given that the draft provides that the hearing shall be public and that they shall have the right to be present at the hearing. Generally, it should be borne in mind that detention hearings “should in principle meet, to the largest extent

¹² A general rule prohibiting bail in cases involving serious charges and which excludes *a priori* the possibility of any consideration by the court of releasing the defendant on bail, violates that person’s right to liberty as it effectively removes the judicial control over detention in that particular category of cases, in violation of Article 5(3) of the ECHR. See *S.B.C. v. UK*, ECtHR judgment of 19 June 2001 (application no. 39360/98), paragraphs 22-23.

possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial”,¹³ which include such principles as adversarial proceedings and equality of arms. Some countries provide in their criminal procedure legislation that the hearings on detention are held in public session, as a general rule.¹⁴ Allowing victim’s participation on the basis of a substantiated prosecutor’s motion may be considered as a solution which strikes the necessary balance in this regard.

[END OF TEXT]

¹³ See *Shishkov v. Bulgaria*, ECtHR judgment of 9 January 2003 (application no. 38822/97), paragraph 77.

¹⁴ See, for instance, Art. 145 of the Criminal Procedure Code of France (in force from 2 March 1959, consolidated version as of 1 October 2010), which provides that the hearing on detention shall take place in open court, unless the public prosecutor, the person under judicial examination or his defense counsel request that the hearing be closed if publicity may hinder the specific inquiries needed by the investigation, or threaten personal dignity or a third party's interest.

Annex 1:

DRAFT

***Concept Paper
On the Reform of the Criminal Procedure Legislation***

*Necessity and Prerequisites of Reforming the Criminal Procedure
Legislation*

The Criminal Procedure Code of the Republic of Armenia was adopted on 1 July 1998 on the basis of the so-called “Model Criminal Procedure Code.” The underlying principles and the specific legal provisions of the 1998 Code were driven by the perceptions that prevailed at the time, including factors such as the strong influence of aforementioned Model Code, the reluctance to alter institutions typical of the former Soviet legal system, and the like.

Although the Constitution adopted earlier (5 July 1995) stipulated the principle of primacy of the common principles of international law over the domestic legislation, a variety of practical factors significantly diminished the possibility to apply the said principle in practice. For instance, drafts of domestic legislation were virtually never submitted to the relevant international organizations for expert review. There was a lack of awareness of the international legal texts, including the case law of the European Court of Human Rights and other international best practices. Attempts aimed at fundamental reforms were to some extent hindered by stereotypes existing in practice.

Later, as the impact of some of the aforementioned factors changed due to the accession of the Republic of Armenia to the Council of Europe, around 200 amendments and additions had to be made to the Code in a relatively short time period. The justifications of the majority of these amendments and additions stated the need to “bring the Code into line with the international legal standards.”

However, in the absence of a comprehensive Concept Paper, it was impossible to secure the internal solidity and to safeguard consistency of such

a large volume of amendments and additions. Some of the initiated amendments contradicted legal provisions adopted in the remote or recent past. Moreover, there were cases of adopting laws amending the Code on the same day, which contradicted one another.

As many of the initiatives did not undergo sufficiently elaborate development and discussion procedures, some of them were shortly after adoption declared unconstitutional by decisions of the Constitutional Court.

Unfortunately, specific problems were at times caused by the practical application of the legal provisions, rather than their text per se. In some of its decisions, the Constitutional Court construed legal provisions in a way that would not render a provision unconstitutional, had its practical application not been unlawful. This situation was due to not only prevailing stereotypes in the practical application of laws, but also the lack of clarity and certainty of the legislative provisions.

An overview of the international experience supports the conclusion that many countries with more advanced democracy and civilizational and legal systems do not focus as much on the clarity of legal provisions, because they have traditions related to specific legal issues. Whereas, given the short time since the adoption of the aforementioned Code, it would be hard to expect established traditions.

In view of the circumstances, including the amendments to the Constitution adopted in a referendum on 27 November 2005, the national legislation needed to be amended on the basis of specific conceptual frameworks underlying legislation on criminal proceedings. Similar methodologies were followed in the adoption of the Republic of Armenia Judicial Code, the Law on the Prosecution Office, and other laws.

Parallel to the aforementioned legal acts, the idea to adopt a new Criminal Procedure Code was conceived. On 6 December 2006, the President of the Republic of Armenia issued a decree on creating a task force that would develop a new Criminal Procedure Code and, if necessary, prepare a legislative package. Though the decree did not contemplate the elaboration of a concept paper, the task force carried out its work on the basis of the key elements of the Concept Paper on a New Criminal Procedure Code, which was developed by the Law Department of Yerevan State University.

The discussion of the draft of the new Criminal Procedure Code, which was developed mostly in line with the key elements of the aforementioned Concept Paper, revealed a lack of consistent and integrated solutions to certain legal issues and institutions; given the polarization of views, it was not considered appropriate to hold official discussion of the draft Code.

Developing a completely new Concept Paper was viewed as a more effective option, which would not only provide structured solutions to the problems arising in the application of the national legislation, but also reflect the international standards. To ensure the sustainability of the reform effort, it was considered necessary to incorporate in the new Concept Paper the parts of the previous Concept Paper that were in line with the international legal standards and the logic of domestic legislative developments. The Concept Paper for the Criminal Procedure Code of the Republic of Armenia was developed in accordance with Instruction NK-58-A (dated 26 April 2010) of the President of the Republic of Armenia with a view to both resolving the issues arising in the application of the extant legislation and harmonizing the national legislation with the international legal standards.

The Concept Paper was developed on the basis of the following legal documents:

- The recommendations in the “Trial Monitoring” Report of the OSCE ODIHR concerning the Criminal Procedure Code of the Republic of Armenia, as well as the opinions of the international experts on the draft Criminal Procedure Code that had already been circulated;

- The case law of the European Court of Human Rights;

- Proposals of the members of the Task Force created by Instruction NK-34-A (dated 27 February 2008) of the President of the Republic of Armenia;

- Recommendations presented during different phases of the process by the stakeholder agencies; and

- Decisions adopted by the Constitutional Court in recent years regarding certain provisions of the Criminal Procedure Code, as well as decisions of the Cassation Court in criminal cases.

The analysis of the aforementioned documents supported the conclusion that the innovation made in the previous phase of the judicial

reform was not sufficient for making the sector legislation complete and comprehensive. This Concept Paper essentially proposes to ensure the sustainability of the judicial reform and to revise and adjust the institutions that have proven to be ineffective.

The numerous amendments to the extant Code focused on specific issues, as well as issues of principle that had to be addressed to align the Code with the international legal standards, including the case law of the European Court of Human Rights.

The amendments to the Constitution (27 November 2005) marked the beginning of a new phase of judicial reform, including the reform of one of its key components, the criminal procedure legislation. During this phase, the fundamental principles of procedure, particularly criminal procedure were prescribed in the Judicial Code of the Republic of Armenia. This approach, which was harshly criticized by the international experts, was aimed at defining one set of rules for all types of proceedings; however, a number of caveat prescribed in the new Judicial Code showed that the different types of proceedings were often so different that no justification could be provided for stipulating them all by one legislative act. Moreover, the Judicial Code of the Republic of Armenia was designed to regulate a completely different set of matters (such as the status of judges, the safeguards of their independence, their appointment, promotion, and accountability, and the institutions supporting the sound functioning of the judiciary), which were in no way related to proceedings.

Having legislation in conformity with the spirit of the Constitution is a key priority that must be addressed on the basis of an in-depth and impartial analysis of the decisions of the Constitutional Court and the relevant international treaties, rather than arbitrary interpretation of a crucial legal text such as the Constitution. The last three years' experience shows that the Constitutional Court frequently addresses the unconstitutional provisions of the legislation.

Another prerequisite for the reform of the extant legislation is that many of its provisions are considered highly controversial, including provisions on the status of the prosecutor and investigator, the nature and boundaries of prosecutorial control, the grounds for instigating pre-trial proceedings, the

focus of pre-trial proceedings in general, judicial control of pre-trial proceedings, and various other issues.

The next prerequisite for the reform of the criminal procedure legislation is the need to preclude the inconsistencies that currently exist.

Overview of the Reform of the Criminal Procedure Legislation

For the draft Criminal Procedure Code of the Republic of Armenia to resolve the aforementioned issues effectively, it is necessary to introduce a number of new concepts based on the Constitution and international commitments of the Republic of Armenia, mostly with a view to ensuring the balanced protection of public and private interests in the sphere of criminal proceedings.

Some key concepts are proposed on the basis of this idea and the review of the international best practices and their adaptation for Armenia. The key concepts can be structured as follows:

- It is necessary to strengthen the elements of adversarial proceedings at the pre-trial stage, because adversarial proceedings are an effective safeguard of respect for the rights of suspects and the accused, as well as for the fair trial of cases.

At the current stage of development of the criminal procedure legislation, the system of practical application of laws does not safeguard effective adversarial proceedings at the pre-trial phase, although the key elements of the principle of adversarial proceedings are enshrined in the Constitution and specific laws of the Republic of Armenia. In their reports, international experts and the competent international organizations have repeatedly emphasized the need to better safeguard this principle.

Equality of arms is an integral attribute of adversarial proceedings, which, too, should be clearly prescribed in the criminal procedure legislation. Equality of arms in proceedings means that the sides should have equal procedural means and possibilities to present their arguments and to challenge those of the other side.

The existing inequality could be largely mitigated by expanding some procedural rights of the accused and the defense counsel (for instance, the accused should have the right to participate in the investigative actions

performed with the involvement of his defense counsel, as well as the right to a free-of-charge medical checkup and the right to receive a medical opinion in case of being arrested or detained, the defense counsel should participate in all the investigative actions performed upon his motion or with the involvement of his client, and so on).

- The various functions in proceedings should be clearly separated to ensure speedy investigation and to preclude the redundant performance of certain actions by different bodies and their officials, i.e. each function should be performed by a specific body or person. The rights of the defense during the preliminary investigation should be expanded.

The clear separation of the procedural functions is also a key element of adversarial proceedings. The prosecutor, being the key actor in pre-trial proceedings, is responsible for the instigation of criminal prosecution in criminal cases. The prosecutor also supervises the lawfulness of inquest and investigation. It is due to the exclusive nature of the prosecutor's constitutional powers in the sphere of criminal proceedings and the need to clarify them and to limit some powers of the prosecutor in the current system.

The investigator has the exclusive authority to conduct the pre-trial investigation. Expanding the powers of the investigator should safeguard the investigator's procedural autonomy (for instance, an opportunity to appeal against instructions of the superior prosecutor and the decisions of the supervising prosecutor). The baseline here is that the prosecutor may perform or participate in the performance of certain investigative actions in the procedure and cases provided by law, which should not be viewed as a departure from the fundamental principle that the investigator performs the preliminary investigation.

- It will be necessary to separate the instigation of criminal prosecution from the instigation of criminal case proceedings. The power to instigate criminal case proceedings should be vested in the inquest body and the investigator. Exhaustive grounds and procedures for instigating criminal case proceedings will be defined.

- The instigation of criminal prosecution should be possible only in the presence of a person charged with a criminal offence, reasonable suspicion that the person has committed the alleged offence, and sanctions as legal

consequences for committing the proscribed offence. The main “clock” of criminal proceedings should start as soon as criminal proceedings are instigated in relation to a person.

- The role and significance of courts as actors in criminal proceedings should be strengthened in all the stages of criminal procedure.

The center of gravity of criminal case investigation should be moved from the pre-trial proceedings to the court phase gradually, because abrupt changes in the correlation of pre-trial and trial stages of proceedings under the current system of criminal proceedings could negatively affect the legal practice and imply large costs. Besides, a complete transition to investigation in court would be seen as a radical reform for which there are currently neither prerequisites nor necessity.

Court control of pre-trial proceedings will need to be improved significantly in order to protect the constitutional rights and freedoms of the individual from any encroachment and to prevent groundless limitations.

The introduction of different types of proceedings is one solution of the aforementioned problem. It is contemplated that the preliminary investigation body will investigate cases of non-grave and medium-gravity offences short procedural timeframes (“simplified preliminary investigation”), and there will be no pre-trial proceedings for cases brought forward on the basis of private charges.

- The effectiveness of the system of judicial appeals should be improved considerably by means of streamlining the legislation regulating appeal and cassation proceedings. It is necessary to contemplate a limited scope of review on appeal, giving the appellate court the power to examine evidence directly, and not precluding the possibility of presenting and weighing new evidence. As to the cassation court, its only focus should not be on ensuring the uniform application of the law.

The following issues arising at different stages of proceedings will need to be addressed:

1) Pre-Trial Proceedings

- In criminal cases, pre-trial proceedings should be conducted only in the form of inquest and investigation.

Pre-trial proceedings should be deemed to have commenced as soon as a natural person, legal entity, or mass medium reports a crime, or as soon as bodies conducting proceedings discover signs of a crime during the performance of their functions. If the crime report does not contain sufficient information, and revealing such information would be possible only by performing the actions contemplated for criminal proceedings, then pre-trial proceedings should be commenced. If other checking actions, different from the procedural actions, need to be performed in relation to the crime report, then they should be referred to the competent authorities or performed by the prosecution, inquest, or investigation bodies without commencing pre-trial proceedings. The power to carry out some checking actions could be reserved for the inquest and investigation bodies, as well; however, they should not in any way be related to their professional functions and should be limited to making inquiries or reviewing documents.

In any case, the protocol compiled by the inquest body should be sent to the prosecutor immediately, but no later than within 12 hours, in order to make sure that every crime report is recorded, filed, processed, and subjected to prosecutorial control.

A decision to begin criminal proceedings should be made in order to commence pre-trial proceedings. Within 24 hours of making such a decision, it should be sent to the prosecutor supervising the lawfulness of inquest and investigation. The court may commence criminal proceedings only in cases brought forward on the basis of private charges. In other cases, if the court detects signs of a criminal offence, it should file a crime report with the prosecution office, but not make any decision or motion thereon.

The inquest may last no more than 14 days. However, if the prosecutor so decides in exceptional cases based on the reasoned motion by the inquest body, this deadline may be prolonged by another 7 days. When receiving a crime report directly, the prosecutor shall, in case of necessity to determine the signs of the criminal offence, instruct the inquest body to carry out an inquest, or, if the signs of the criminal offence are obvious, instruct the investigator to make a decision on commencing a preliminary investigation and conducting the proceedings in line with the legally-prescribed rules on the jurisdiction to investigate. Such instructions of the prosecutor shall be binding

for the investigator, and the investigator should have no right to appeal against such instructions.

During the inquest, the performance of investigative and other procedural actions defined by law, which are necessary for attaining the objectives of this stage of proceedings, should be permitted in accordance with the procedure stipulated by law. At the inquest phase, arrest and apprehension should be the only coercive measures permitted.

The inquest should be terminated, if:

a) The inquest body decides to discontinue the commenced proceedings, having failed to discover signs of a crime during the maximum time period of the inquest prescribed by law;

b) Having discovered, during the inquest period provided by law, information containing signs of a crime, the inquest body decides to commence a preliminary investigation and transfers such decision and the case materials to the prosecutor for determining the future course of the proceedings;

c) Prior to the inquest deadline stipulated by law, the prosecutor, acting in a procedure of control, takes the materials from the inquest body and gives them to the investigator together with a binding instruction to make a decision on commencing the preliminary investigation and conducting proceedings. It can be based on the inquest body's undue delay in making the decision to commence the preliminary investigation when all the inquest objectives have been effectively attained. The prosecutor may instruct to assign the conduct of proceedings to the investigator, if he considers appropriate, on the basis of certain grounds, to have simplified preliminary investigation conducted.

The preliminary investigation should start with the making of the decision to start the preliminary investigation. The investigator should have the exclusive power to conduct the preliminary investigation. The inquest body and the prosecutor should have the right to make a decision on commencing the preliminary investigation, provided that they discover grounds for doing so during the performance of their functions. The investigator, too, should have the right to make a decision on commencing the preliminary investigation, if obvious signs of a new criminal offence committed

by a different person are discovered in the frameworks of a case over which the investigator is conducting proceedings. In such cases, the investigator shall immediately, but no later than within 24 hours send the decision to commence the preliminary investigation, together with the materials that served as a basis for such decisions or copies thereof, to the prosecutor for the latter to check the lawfulness and justification of the decision made and to process the relevant proceedings in accordance with the legally-prescribed rules on the jurisdiction to investigate.

The prosecutor may make a decision to commence the preliminary investigation only in the course of performing his control function, i.e. when the prosecutor terminates an unlawful and groundless decision of the inquest body on discontinuing proceedings. However, if the prosecutor does not consider the grounds sufficient for preliminary investigation, he may decide to terminate the unlawful and groundless decision of the inquest body or investigator on commencing the preliminary investigation; similarly, a superior prosecutor may terminate a decision of an inferior prosecutor and discontinue the proceedings, and other parties with a stake in the proceedings may appeal such decisions in court in accordance with the procedure stipulated by law. The preliminary investigation may end with a decision to send the case to court upon endorsement of the indictment (or the accusatory act in case of simplified preliminary investigation), to send the case to court for imposing measures of medical coercion, or to discontinue the proceedings.

Commencing pre-trial proceedings is not the same as *the instigation of criminal prosecution*. The latter is the prosecutor's exclusive authority that is expressed in the form of approving the investigator's decision on getting a person involved as the accused. The instigation of criminal prosecution is identical with the approval of the decision on getting a person involved as the accused, given the huge importance of such approval for both pre-trial proceedings and the criminal proceedings as a whole. As soon as criminal prosecution is instigated, an accused must emerge in the case. This factor also determines the flow and calculation of most procedural deadlines (deadlines for criminal prosecution, suspension of criminal proceedings, and detention). It is also a basis for imposing measures of restraint on the person.

- During the preliminary investigation, *discretionary criminal prosecution* may be applied, as well, when the nature of the act, the complexity of the case, and a number of other circumstances (the offence being non-grave or of medium-gravity, the offender having no former conviction, and the like), the prosecutor may, with the consent of the superior prosecutor, refrain from instigating criminal prosecution or, subject to the presence of certain conditions, terminate the instigated criminal prosecution and discontinue the proceedings.

- It is necessary to define *simplified preliminary investigation* in the form of expedited and agreed-upon proceedings. Simplified proceedings are aimed at ensuring the swift and effective investigation of certain cases. They are cost-efficient systems of criminal case investigation, which ensure savings of procedural resources. In general, simplified proceedings should, unlike the general forms of proceedings, pursue important legitimate aims such as the effective recovery of the rights of the victims, and the justified and legitimate alleviation of the workload of courts and law-enforcement agencies, because their workload is currently excessive in the Republic of Armenia. Similar provisions can be found in the criminal procedure codes of Italy, France, Germany, Spain, Latvia, and Estonia.

Effective safeguards of the rights of participants of simplified proceedings serve as a key precondition of the successful application of such proceedings. Certain steps should be taken in this direction, first of all attempting to safeguard the rights and lawful interests of the defendant (the accused). They should follow certain patterns and engage different criteria depending on the nature of the cases or certain circumstances discovered during the case investigation: for instance, an investigator may conduct *expedited* preliminary investigation, if all of the following conditions are concurrently met:

- 1) The offender was discovered at the time of or immediately after committing the criminal offence;
 - 2) The offender has committed a non-grave or medium-gravity crime;
- and
- 3) The expedited preliminary investigation can end during 7 working days.

Within two working days of receiving the investigator's decision on conducting expedited preliminary investigation and the case materials, the prosecutor shall either issue his consent to continuing the preliminary investigation in an expedited manner or return the case materials to the investigator for continuing the preliminary investigation in a regular manner.

If all the circumstances relevant for proving the case have been discovered and the accused has agreed to the qualification of the alleged act, the amount of damage inflicted, the full scope of the charges, and the application of the agreed-upon procedure, then the prosecutor may, at his initiative or upon motion by the investigator or the accused or the defense counsel for the latter, enter into *an agreement* with the accused, whereby the accused shall plead guilty and accept the punishment, unless:

1) There are several accused persons in one set of criminal proceedings, and such consent may not be applied to all the accused persons;

2) The accused person or his defense counsel or proxy do not agree to the application of this procedure; or

3) The victim or civil plaintiff or civil respondent do not agree to the application of the agreed-upon procedure.

In both cases, the preliminary investigation must end with the compilation of the indictment. However, in case of expedited preliminary investigation, the court may try the case in accordance with the general procedure provided by the Code. In agreed-upon preliminary investigation proceedings, speedy trial procedure may be applied by the court. At the stage of discussing the draft Code, it is possible to contemplate a trial agreement procedure similar to that employed in Estonia. In case of expedited preliminary investigation, the court trial of the case may be performed in the form of a speedy trial procedure. Both options may be discussed during the elaboration of the draft.

- A separate chapter of the Code should define the various investigative actions and the general conditions of their performance. The required mandatory participation of a procedure witness to the performance of investigative actions should be reconsidered, allowing the investigator to decide whether or not to engage them in the performance of certain

investigative actions depending on necessity or possibility. Definitions of the specific investigative actions should be provided, as they are currently lacking in the legislation.

The current legal grounds for the practice of using “procedure witnesses” do not correspond to the international legal standards applicable to this sphere, thereby unnecessarily casting doubt on the impartiality of investigative actions. Whilst ensuring the impartiality of investigative actions is crucial, it should be addressed by stipulating effective safeguards for the defense to participate in investigative actions, rather than by using legal solutions typical of the Soviet legal system.

- The constitutional provision on prosecutorial control of the lawfulness of both inquest and investigation should be supported with solutions that would meet the requirement of safeguarding the lawfulness of the investigation under prosecutorial control, without undermining the autonomy of bodies and officials conducting pre-trial proceedings. Virtually all procedural acts predetermining the course of proceedings should either enter into legal force only after approval by the prosecutor or be subject to binding control. The investigator, vested with relative autonomy, may appeal against the prosecutor’s decisions and instructions to a superior prosecutor; such appeals would not suspend the execution of the aforementioned decisions and instructions, save for cases provided by law. In parallel, prosecutorial control over the performance of certain investigative actions and the enforcement of procedural coercive measures would be retained.

- The procedural status of the heads of investigative units should be exhaustively and clearly defined. The Criminal Procedure Code will regulate the procedural powers of the heads of investigative units, while powers exercised in their administrative capacity would be regulated by the legal acts stipulating the status and operational procedures of the relevant state bodies.

As to their procedural powers, the starting point is that they will not have the power to intervene in the investigation of specific cases, to give binding instructions, or directly to perform certain investigative actions. If it is, however, considered necessary to prescribe the power of the heads of investigative units to give instructions, it must be stipulated that such instructions may not contradict the instructions issued by the controlling

prosecutor and his superior prosecutor, or that the prosecutor's instruction will be binding for execution in case of inconsistencies.

2) Measures of Restraint

Overall, measures of restraint have undergone significant institutional reform. However, to consolidate the process, certain other issues, as described below, will have to be addressed.

- The scope of restraint measures should be expanded by prescribing new measures such as home arrest and placement under police supervision. The procedures of imposition and application of detention should be reviewed and brought into line with the provisions of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular:

1) The gravity of the criminal offence per se should not be a sufficient basis for imposing detention; rather, the Code should define the arguments that must be stated in a decision to file motion for detention to be imposed as a restraint measure.

2) The motion for detention as a restraint measure to be terminated should be reviewed immediately, and its review may not be postponed until after the examination of the evidence in the case. Moreover, the proposal is to incorporate a provision that will require the court immediately to examine and immediately to make a decision on such motions in order to avoid the practice of courts illegitimately postponing hearings and creating a complicated and uncertain situation.

3) The same grounds should not be applicable for both detention and other measures of restraint. More stringent conditions have to be met for detention to be imposed as a restraint measure.

4) The decision to impose detention as a restraint measure should be reviewed immediately at any stage of proceedings. To prevent unnecessary abuse of this right, a procedure should be prescribed on non-admissibility of a motion citing the same grounds as those cited in a motion that was previously rejected.

5) The continuing existence of reasonable suspicion in relation to the accused should be reviewed every time a decision on prolonging the

detention is made. The detention term may not be prolonged on the basis of the same arguments that were used in imposing the previous detention term.

6) The court must be obliged in each case to set a specific term of detention regardless of the time period proposed in the motion.

7) The scope of the principle of public trial should be expanded: court sessions to review motions for detention to be imposed as a restraint measure should be public, as well.

8) Minutes of court sessions related to detention motions should be taken in the same way as minutes are taken for regular court sessions.

9) Detention as a restraint measure may be applied in relation to suspects, as well. This crucial provision will help to overcome the current bias to file charges rapidly without having sufficient grounds. It will be sufficient to present arguments on the existence of reasonable suspicion, alongside some other arguments. The maximum period during which a suspect may remain detained should be 10 days.

10) If detention is not imposed as a restraint measure within 72 hours of the initial arrest, then the person shall be released from detention on the basis of not only a decision of the criminal prosecution body, but also a specific provision enshrined in the law, which will be a more reliable safeguard.

11) The term of detention may not be suspended on the basis of any ground, including the fact that the indictment has been sent to court. To this end, it is necessary to stipulate a procedure whereby the detention term will not be suspended, and the person will be immediately released, unless a decision on prolonging the detention term is presented. This approach is consistent with the case law of the European Court of Human Rights, including some judgments rendered against the Republic of Armenia. The European Court of Human Rights, too, considers that holding a person detained without a decision is unlawful and amounts to a breach of Article 5 of the ECHR.

12) It is necessary to regulate various aspects of the imposition of detention on persons that are fugitive. Detention as a restraint measure may be imposed also in respect of fugitives; however, immediately after a fugitive is discovered, within 72 hours of his transfer to the place where criminal case

proceedings will be conducted, the detained fugitive shall be taken before court for checking the lawfulness of the detention.

- Bail procedures should be defined in a way that will preclude the groundless rejection of motions to replace detention with bail. To this end, it is necessary first of all to stipulate a procedure whereby the court shall, when deciding to impose detention as a restraint measure, also determine the applicability of bail regardless of whether or not a bail motion has been received. As soon as the pledgor presents to the body conducting proceedings a document confirming full payment of the bail, detention as a restraint measure will be automatically replaced with bail, and the person will be released from detention immediately.

Besides, the extant legislation permits bail only in case of non-grave and medium-gravity crimes, which means that bail may be legitimately applied depending only on the gravity of the criminal offence, i.e. the application of bail in grave or particularly grave criminal offence is simply prohibited in all cases.

The proposal is that the gravity of the criminal offence should not be viewed as an obstacle to the application of bail. Rather, the application of bail should be based on circumstances that take into account the offender's character and are consistent with the case law of the European Court of Human Rights.

3) Special Proceedings

The extant legislation contains some provisions on special proceedings. However, considering that certain proceedings are only generally addressed, it will be necessary to prescribe detailed regulation of all the proceedings that are conducted in specific ways:

- It is possible to prescribe significant differences between proceedings of cases based on charges brought forward publicly versus privately. Distinguishing the proceedings of privately-prosecuted cases also aims at moving the center of gravity of the case to the court. Pre-trial proceedings as such should not exist in such cases. The victim's complaint is directly addressed to court, which tries and adjudicates the case at full scope based on the evidence adduced by the parties and materials acquired on its own.

In privately-prosecuted cases, a person is recognized as a victim by decision of the court to start criminal proceedings. From the time of the decision to start criminal proceedings, the person against whom charges were filed is considered the accused.

In such cases, the victim acts as the prosecutor in the trial, defending the charges in court and exercising the rights of both a victim and a prosecutor, with the exception of the right to give binding instructions to the inquest body for ensuring the submission of evidence to court. If the parties settle, the criminal proceedings in such cases shall be discontinued.

If criminal proceedings were instigated publicly, then they shall be discontinued if it is established that the act is considered subject to a case to be charged privately. In case of a combination of cases to be charged publicly and privately, the criminal prosecution shall be carried out publicly.

As to the provision of state-financed legal aid to persons wishing to initiate privately-prosecuted cases, such aid shall be provided only to indigent persons: to this end, an amendment should be made to the Republic of Armenia Law on Advocacy to provide that the rights of such persons in privately-prosecuted cases shall be protected by the public defender.

In privately-prosecuted cases, the party filing private charges shall be responsible for obtaining evidence. Whenever procedural actions are needed for obtaining evidence, they shall be performed by court based on a relevant motion. Furthermore, it will be necessary to expand the legal possibilities for obtaining evidence autonomously in such cases, including by means of procedural actions;

- It is possible to prescribe proceedings regarding proceeds of crime, similar to the Criminal Procedure Code of Latvia. During the pre-trial criminal proceedings, in the interests of completing the proceedings in a short period, the body conducting proceedings may, subject to the agreement of the supervising prosecutor, separate the materials related to the crime proceeds and start separate proceedings, if:

1) The evidence as a whole supports the conclusion that the proceeds that were confiscated or seized were acquired criminally (or were related to a crime); or

2) Due to objective reasons, it is impossible to send the case to court in the near future (in a reasonable period), and it may create significant unjustified costs.

Specific matters related to the legal bases and procedures for this institution can be elaborated when the final text of the draft is being prepared.

4) Legal Status of Participants of Proceedings

The main innovation regarding the legal status of participants of proceedings consists of the following:

- The aim of clarifying the legal status of the suspect should be pursued, in particular, by introducing the provision on the decision to recognize a person as a suspect and requiring that the decision is delivered to such person immediately and free of charge. The defender's participation should be considered mandatory from the time of not only being arrested, but also being recognized as a suspect.

To clarify the status of the person who has suspect status and to preclude any uncertainty in this regard, it is necessary to set a maximum 10-day period for either terminating the suspects status or filing charges;

- The victim's legal status should be clarified, because the current definition of the "victim" implies that recognizing a person as a victim equals to finding of the fact that damage has been inflicted upon him by an act proscribed by the criminal law. Whereas, for the damage inflicted upon a person to be deemed found, a final judgment is necessary. Besides, it is possible that further investigation of the case shows that the damage inflicted upon the person is not a consequence of an act proscribed by the criminal law.

Under the current regulation, it is not clear what criteria should be applied to recognize a person as a victim. Hence, it should be clarified that *sufficient grounds* for finding that the damage was inflicted upon the person, rather than for finding that damage has been inflicted in general, must be present to recognize a person as a victim.

In the context of expanding the procedural tools available to the victim, it is not sufficient just to prescribe the defense counsel's participation during the interrogation, because other investigative and procedural actions, too, are

performed with the victim's participation, in which the participation of the victim's defense counsel would be logical and desirable;

- Stipulating the victim's successor as an autonomous entity in proceedings is not feasible, because when a person has died as a consequence of the crime, the body conducting proceedings would have to grant legal status to the deceased, who no longer exists and cannot be an entity in law. On the other hand, if the deceased were recognized as a victim, then no person could be recognized as the victim's successor, because it would create a situation in which there is no victim, but there is a successor of the victim.

Hence, this notion should be included in the definition of the victim with the caveat that the person may not exercise rights associated with the victim's person.

5) Court Proceedings

Court proceedings are characterized by clear delineation of authority between the different judicial instances, strengthening of their autonomy, differentiation of judge panels, enhancement and strengthening of the principle of adversarial proceedings, and effective administration of justice. Hence, in this context, the criminal procedure legislation reform could focus on the following areas:

- In the first instance court, the case trial begins when a judge admits the criminal case into proceedings. The aim of this stage should be to check the process and materials of the pre-trial proceedings to make sure that there are no circumstances inhibiting the court trial of the case or, if they do exist, that they are removed. The stage of admission of the criminal case into proceedings may be handled by a sole judge or in the form of *preliminary court hearings* if the grounds prescribed by law are present;

- It is necessary to introduce the preliminary court hearings as a distinct set of proceedings lying between the pre-trial proceedings and the actual court trial. Preliminary court hearings may be conducted when the matters to be resolved by court are of certain significance to the parties and are or may become the subject of dispute. Preliminary court hearings must be conducted with the participation of the judge, the prosecutor, the accused, and his

defense counsel by virtue of a certain motion or special circumstances prescribed by law. As a result of the preliminary court hearings, it will be determined whether or not to try the merits of the criminal case in court.

The existence of this institution will make court trial more effective and increase the responsibility of the sides in the exercise of their procedural powers.

The peculiarities of case trial in the first instance court will depend on the differentiated types of proceedings, such as privately-prosecuted cases, agreed-upon proceedings, speedy trial, and the like.

- A differentiated form of proceedings, i.e. *speedy trial* in case of the agreement of the defendant or the accused with the filed charges, were recently introduced in the extant Criminal Procedure Code of the Republic of Armenia, when all the sub-stages of ordinary trial are maintained, with the exception of the evidence examination or court trial stage.

Clearly, it secured more speedy and effective resolution of criminal cases. However, it is beyond doubt that this institution, whilst being new, has created a number of problems in legal practice due to the absence of certain proper safeguards in the current legislation.

As was mentioned above, a key precondition of the application of this institution is the contemplation of clear safeguards of the rights of participants of proceedings; for instance, while guaranteeing the rights and lawful interests of the defendant and the accused, the legislature has neglected the interests of another participant of proceedings, i.e. the victim, despite the fact that the compensation of damage inflicted upon the victim by the crime may seriously influence the determination of the type and severity of the sentence to be imposed on the defendant later on. These and similar issues should be addressed in the draft new Criminal Procedure Code of the Republic of Armenia.

First of all, it should be noted that the introduction of “Speedy Trial” (Chapter 9) into the Code in February 2007 was driven by the aim to increase the effectiveness of justice. Under Paragraph 2 of Article 375.1 of the Code, the court shall apply speedy trial, if the defendant realizes the nature and consequences of the motion filed by him, and the motion has been filed voluntarily and after consulting the defense counsel, if the defendant has one.

Though speedy trial has certain upsides, it is quite problematic and is heavily criticized in the global practice in terms of its capacity to resolve problems in the early stage of investigation of criminal cases.¹⁵ Given the importance of speedy trial and the shortcomings of the current system, this institution should obviously be reformed. Introducing the element of plea bargaining considerably reduces the duration of proceedings; however, the position of the *victim* as a fully-fledged participant of proceedings on the application of speedy trial should be taken into account.

Unlike common-law states, countries with a continental legal system prescribe the special status of the victim in criminal cases, which implies also the victim's special role and rights. Under such circumstances, speedy trial may undermine the victim's legitimate expectations.

The victim is a fully-fledged participant in criminal proceedings and has a number of procedural rights, including the right to testify and give explanations, to provide materials, to file motions, to file challenges, to appeal the actions of the body conducting proceedings, to challenge the decisions of the court, and the like. In this situation, it is necessary to take into account the need to protect the victim's rights in the context of speedy trial. Therefore, in addition to the aforementioned grounds, the draft Code should prescribe, as an additional condition for the application of speedy trial, the *victim's "no objection."*

- The activities of the second instance of the judiciary in the Republic of Armenia should be based on a model of *"limited review on appeal,"* which essentially means that the review will be limited to the scope of the appeal. Under such conditions, the appellate court will perform a function typical only of the appellate court, i.e. remedying the factual errors of the first instance court and the violations of the substantive or procedural rights of the parties based on a party's appeal. With limited review on appeal, the appellate court is bound by the grounds of the appeal and the demands and justifications cited in the appeal. In other words, the scope of the trial is narrower in the appellate court than in the first instance court.

¹⁵ American Bar Association/ Rule of Law Initiative, Central European and Eurasian Law Initiative, Criminal Law Program of the Republic of Armenia, Memorandum on Speedy Trial Statute, August 2007

The limited review concept does not, however, mean that new evidence may not be adduced in the appellate court. Otherwise, the appellate court would not be able to effectively rectify the errors made or not rectified by the first instance court. If a party reasonably explains its failure to present certain evidence in the past, then the court should accept the evidence, and examine and assess it in combination with all the evidence available to it. The direct scrutiny of the evidence is not beyond the appeal function; rather, it is a key feature distinguishing appellate proceedings from cassation proceedings.

Prescribing a narrower scope of appellate review also implies that the appellate review shall concern the defendant who lodged an appeal himself or through his defense counsel or proxy, or the defendant against whom the prosecutor or victim lodged an appeal.

The judgment of the first instance court remains final in relation to the other defendants. The finality of the judgment in relation to the non-appealing defendants should not be suspended, because their failure to lodge an appeal means that they agree with the judgment.

The model of “limited review on appeal” should be reflected in the draft in such a way as not to undermine the role of the first instance court, to avoid redundancy of functions, and not to deprive the parties of effective access to the remedy of changing the substantive error committed in the judicial act of the first instance court.

- The purpose of the Cassation Court is to ensure the uniform application of the law. However, justice and ensuring the uniform application of the law as functions of the cassation court are not identical.

Hence, it is necessary to elaborate a clear and acceptable model defining their interplay, on the one hand outlining the powers of the Cassation Court of the Republic of Armenia, and, on the other, upholding the role and place of the Cassation Court as the highest court in the criminal law sphere.

6) International Cooperation in the Sphere of Criminal Proceedings

In practice, certain issues arise in connection with the extradition of prisoners. Therefore, a separate chapter of the draft should stipulate provisions on extradition in line with the European Convention on Extradition.

The draft should be supplemented with two new chapters regulating the transfer of persons convicted in foreign states to the Republic of Armenia for serving the sentence, as well as the transfer of persons convicted in the Republic of Armenia to foreign states for serving the sentence.

Conclusion. The anticipated legislative innovation will take into account the fact that a number of the proposed legislative provisions can have full effect if a number of other legislative acts are amended, as well. It may become necessary to address preventable inconsistencies with legislation such as the Republic of Armenia Judicial Code, the Law on the Prosecution Office, and the like.

Some of the aforementioned innovation, having core significance, has never been reviewed by international experts. It is, therefore, possible that the package of the draft legislation should be presented to them for review.

The OSCE ODIHR experts have expressed their willingness to support the legislative drafting effort, given that they made some recommendations concerning reforms of the criminal procedure legislation in the OSCE ODIHR Trial Monitoring Report on the Republic of Armenia.

The new draft Code and the related drafting efforts should meet the following general requirements:

- Unnecessary shocks should be avoided and the smooth and predictable flow of the reforms secured;
- The continuity of the judicial reform should be ensured as a safeguard of following the general line of the reforms and avoiding sharp deviations;
- Radical approaches and abrupt change should be avoided or allowed only in case of extreme necessity and the existence of sufficient grounds;
- The core principles and concepts enshrined in the extant legislation should be maintained insofar as they have been effective and viable over time in the application practice and have not contradicted the standards of international law;
- The views of all the state bodies and advocates concerned with the application of the criminal procedure legislation should be adequately taken into account, and, in case of significant discrepancies, consensus-based

solution should be developed and accepted in agreement with the national experts and the international expert organizations;

- The key issues should be regularly discussed with specialized experts and international specialists;

- The drafting of the Code should be assigned to specialists that have the necessary academic expertise in this sphere, subject to the guidance of the task force and regular reporting back;

- Preference should be given to solutions that provide greater protection of the person's rights and freedoms stipulated by the international legal documents, are consistent with the fair trial principles, and spare the judiciary unnecessary costs and unjustifiable investments;

- The Code should be as clear as possible, avoiding ambiguous provisions and internal inconsistencies;

- Every institution, including the proposed new ones, should be well elaborated and backed by the necessary legal safeguards;

- The legal solutions introduced should be in full compliance with the core provisions of the Constitution, and preference should be given to solutions that can also be applied in practice in line with the spirit and principles of the Constitution.

The aforementioned conceptual considerations are not exhaustive. Further work and discussions of the draft Code by the task force and committee may generate new issues and conceptual solutions.

Annex 2:

Conceptual Questions

1. The draft proposes a 10-day term for holding a suspect detained. It is possible to stipulate that, based on the reasoned decision of the investigator, the court may decide to prolong the detention term by a period of up to one month, similar to Article 67 of the Criminal Procedure Code of Estonia.

2. In addition to the participation of defense counsel in the “confrontation,” the right of the defense counsel to ask questions may be prescribed if the right of the accused to demand confrontation with a person testifying against him and to pose questions to such person has been stipulated.

3. Should the victim or his proxy or representative have the right to participate in a hearing on imposing detention as a restraint measure or reviewing a motion to prolong the detention term, if the draft provides that the hearing shall be public and that they shall have the right to be present at the hearing?