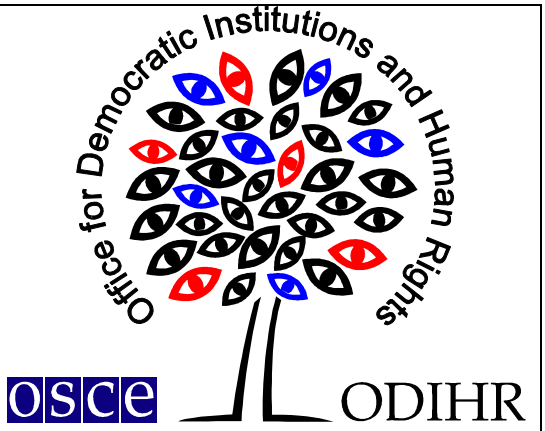
Warsaw, 15 July, 2009 Opinion-Nr.: CRIM ARM/136/2009(MA) www.legislationline.org	

Opinion
On the Draft Law Amending the Section on Pre-Trial Proceedings in Criminal Cases of the Criminal Procedure of the Republic of Armenia

based on an English translation of draft law provided by the OSCE Office in Yerevan.

This Preliminary Opinion has been prepared for the OSCE ODIHR by Stephen C. Thaman, Professor of Law, Saint Louis University.

TABLE OF CONTENTS

I. INTRODUCTION

II. SCOPE OF REVIEW

III. EXECUTIVE SUMMARY

IV. ANALYSIS AND RECOMMENDATIONS

(i) General Remarks and Observations
(ii) Preliminary Investigations
(iii) Adversarial Procedure and the Role of the Judge
(iv) Arrest and Pretrial Detention
(v) Expedited and Consensual Procedures
(vi) Interrogations
(vii) Privacy

I. INTRODUCTION

1. *On 16 March, 2009, by letter addressed to the Head of the OSCE Office in Yerevan, the Deputy Minister of Justice of the Republic of Armenia requested the assessment of the draft law amending the section of the Criminal Code of the Republic of Armenia which pertains to pre-trial proceedings in criminal cases (hereinafter, referred to as the "Draft").*

2. *Thereafter, the OSCE Office in Yerevan referred the request to the OSCE ODIHR. The Opinion has been developed as a result thereof.*

II. SCOPE OF REVIEW

3. The scope of the Opinion includes the abovementioned Draft, which was submitted for review. Therefore, the Opinion does not constitute a full and comprehensive review of pre-trial rights in light of all available framework legislation governing the issue in the Republic of Armenia. Instead, it focuses on the pre-trial rights established in the Draft and makes some general remarks regarding provisions dealing with wiretapping, search and seizure and other investigative measures.

4. The Opinion provides a discussion and analysis of (a) preliminary investigations (b) adversarial procedure and the role of the judge (c) arrest and pretrial detention (d) expedited and consensual procedures (e) interrogations and; (f) privacy.

5. The Opinion is based on an unofficial translation of the text of the Draft. Errors from translation may result.

6. In view of the above, the OSCE ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the Draft that the OSCE ODIHR may wish to make in the future.

III. EXECUTIVE SUMMARY

7. In order to ensure the compliance of the Draft with international standards and obligations to which the Republic of Armenia is signatory and has committed, it is recommended as follows;

   A. the Draft should be amended to ensure that the defendant (and defense counsel) are invited to participate in all pretrial investigative acts after he/she has been arrested or charged;
   B. the Draft Law should ensure that the defendant is always represented by counsel, with exceptions permissible in strictly defined and justified circumstances.

C. All evidence should be introduced at trial by calling the witnesses who conducted investigative acts or witnessed events, and not by introducing reports or documents compiled primarily by the prosecution and its subordinate organs, in a closed procedure.
D. The Draft should introduce a procedure to preserve evidence when it is feared that a witness will die or be unavailable at trial and this procedure must include inviting the defendant and his or her counsel to a deposition and giving them the opportunity to cross-examine the endangered witness.
E. In general, the preliminary investigation should be aimed at making sure there is probable cause to charge a case. Otherwise, all witnesses should be called to testify at trial.
F. The Draft should eliminate any inquisitorial functions of the trial judge or the judge of the investigation. The duty to ascertain the truth should belong to the prosecutor and his/her subordinate organs, and not the judge, who should assume the rule of adjudicator and guarantor of constitutional rights during the trial.
G. The Draft Law should consider limiting plea bargaining or guilty pleas to less serious offenses
H. The Draft should introduce an exclusionary rule for confessions obtained in the absence of counsel
I. The Draft Law is also recommended to tighten provisions on wiretapping to limit interception of private communications to 30 days, and, furthermore, to limit its use to the most serious crimes in situations where other normal investigative methods have proved to be unsuccessful.

IV. ANALYSIS AND RECOMMENDATIONS

(i) General Remarks and Observations

8. The Draft Law appears to maintain the traditional inquisitorial, written preliminary investigation in serious criminal cases. This adherence to somewhat outdated traditions does not complement well with the fact that Armenia has an adversarial system of criminal justice and, as a result, a clear delineation between the functions of prosecution, defense and adjudication, and has clearly recognized the presumption of innocence, and even a constitutional mandate to introduce trial by jury.

9. Furthermore, Armenia's membership in the Council of Europe and its ratification of the European Convention on Human Rights (ECHR) requires written evidence prepared by investigative officials to be compiled with due regard for the right of the defense to confront the witnesses, experts and police officers whose observations are incorporated into reports and documents of the preliminary investigation. The lack of due regard for the rights of the defendant may lead to a violation of Art. 6(3)(d) of the European Convention on Human Rights (hereinafter, "ECHR") which limits admissibility of evidence in violation of the right to confrontation. The European Court of Human Rights (hereinafter, "Eu.Ct.HR") has expressed its interpretation of the rights of the defendant, in this regard in a number of cases which shall be referred to below.

10. Furthermore, despite Armenia's progress in introducing judicial control of invasions of the rights of criminal suspects in the areas of dwelling searches, interception of private communications, and pretrial detention, the Draft still appears to depend too heavily on using criminal suspects and the accused as sources of incriminating evidence and has authorized periods of pretrial detention which are considered too long.

11. Expedited proceedings for flagrant cases and plea and sentence agreements between prosecution and defense which seek to accelerate criminal proceedings and avoid violations of Art. 6(1) of the ECHR for denial of trial within a "reasonable time," if introduced, are recommended to be clarified to ensure that they do not provide for an opportunity for abuse.

(ii) Preliminary Investigation

12. The Draft provides for a closed, written, labour-intensive preliminary investigation for serious cases, and a more streamlined expedited procedure for minor crimes or cases where the suspect is arrested *in flagrante* or shortly after the commission of the crime (§ 221 Draft). The expedited proceedings allow for the case to be investigated rapidly and submitted to the prosecutor and court within three days, accompanied solely by a police report and without the comprehensive investigative dossier (§ 221(1)(2) Draft). Similar provisions may be found in the Codes of Criminal Procedure of Italy, Germany, France and Spain[1] and other modern codes and they often provide for the commencement of the trial within 15 days or so. American criminal cases are also investigated rapidly, with the majority of police reports being turned over to the public prosecutor within anywhere from a few days to two weeks.

13. It is recommended for the Armenian legislator to consider expanding this informal, expeditious method of investigation to apply to the overwhelming majority of cases and to limit the cumbersome written preliminary investigation to cases in which a suspect has not yet been determined, or in complicated economic crime cases, in which there is a necessity to review a large amount of written documents in order to assess whether or not to charge a person. Whenever a person has been arrested and detained pretrial, the cumbersome written preliminary investigation will often, if not invariably, violate the right to a speedy trial, the presumption of innocence, and the right to confront and cross-examine the witnesses.

14. The Draft has made no significant changes to the procedures for performing a preliminary collection of evidence at the pretrial stage, reducing it to written form, and merging it into one official investigative dossier which constitutes the repository of all evidence (§ 188 of the Draft). This procedure only makes sense if the preliminary investigation is the centerpiece of criminal procedure,

[1] *See* STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 43 (2nd ed. 2008)

as it was in inquisitorial times, and if, as it was in the past, all written documents compiled in accordance with the procedural rules, would be admissible in the trial court without having to subpoena those who prepared the reports and subject them to cross-examination by the defense. This procedure has a major shortcoming, which is that it results in repetitions of all of the evidence meticulously gathered during the preliminary investigation at the trial, during which time the defendant is often incarcerated in pretrial detention.

15. If the Armenian system is to be shaped to be adversarial [2] then the taking of the evidence should be done with respect for the principles of orality, immediacy and the right of the defendant to confront and cross-examine the witnesses. One party to the dispute, in this case the prosecution, should not be in the position to prepare all of the evidence. Currently, the preliminary investigation is not adversarial, as participation of the defendant is only allowed upon permission of the investigator, unless the defendant is the object of the investigation or the investigative measure has been requested by the defense. The required level of "confrontation" which falls within the meaning of Art. 6(3)(d) ECHR, cannot be replaced by a "confrontation," in which the investigator essentially interrogates the suspect in the presence of a witness who has testified in a manner different from that of the suspect (§§ 258-259 of the Draft). A written report can also not be made admissible simply by requiring the suspect-accused to sign the record, which is a rule of an inquisitorial nature and is known to have been used in various jurisdictions to lend validity to secretly constituted evidence (§§205(6), 246(6) of the Draft).

16. One result of the secret preliminary investigation with limited participation of the defendant, is that the defendant only has a chance to make evidentiary motions at the end of the pretrial phase, after familiarization with the file (§ 309(1) of the Draft). If the defendant were invited to be present during the preliminary taking of evidence, any motions could be made as a response to each piece of evidence, thus saving considerable time. It is therefore, recommended to consider amending this provision.

17. Furthermore, the Eur. Ct. HR has been consistent in ruling that a person may not be convicted based on hearsay evidence in the form of documents or written evidence, if he or she has not had a chance to confront and cross-examine the sources of this evidence.[3] This applies not only to transcripts of witness statements, but also the opinions of experts and the reports of police officers who carry out investigative measures such as securing the scene of the crime, making arrests, searches, seizures, wiretaps, etc. Chapters 33-38 of the Draft outlines the procedures for carrying out these investigative measures, by and large following the codification style of the previous system, while including important advances such as judicial authorization for many of the

[2] § 23(1) Code of Criminal Procedure of the Republic of Armenia, all cites from http://www.parliament.am/legislation.php?sel=show&ID=1450&lang=eng

[3] See Delta v. France, 16 E.H.R.R.574 (1993), and discussion in THAMAN, *supra* note 1, at 129-30. *See also* STEFAN TRECHSEL, HUMAN RIGHTS AND CRIMINAL PROCEDURE 314-15 (2005).

acts. It is contended that even if the rights of the defendant are not violated in the gathering of evidence through such investigative techniques, the use of the reports of these is likely to violate the right of the defendant under Art. 6(3)(d) ECHR to be confronted with the witnesses against him.

(iii) Adversarial Procedure and the Role of the Judge

18. The Code of Criminal Procedure of the Republic of Armenia (hereinafter, "CCP-RA) states that it follows an adversary procedure (§ 23(1) CCP-RA) and that the roles of prosecution, and defense and adjudication should be clearly delineated (§ 23(2) CCP-RA), but at the same time it proclaims that the judge need not accept the positions of prosecution and defense and may, *sua sponte*, take any necessary measures to ascertain the truth during the trial (§ 23(4) CCP-RA). With true separation of powers between prosecution and judge, the prosecutor (and other law enforcement officials) should alone have the duty to prove the truth of the charges beyond a reasonable doubt and the judge, as adjudicator, should have the duty to determine whether the prosecutor has satisfied this burden or whether the presumption of innocence (§ 18(1) CCP-RA) still adheres and the defendant should be acquitted. Armenia, while proclaiming the right to trial by jury (Art. 91, Constitution of Armenia (hereinafter, "Const. Ar"]), still has no lay participation in its criminal courts (§ 39 CCP-RA). In which case, it is recommended as even more important for a judge, who simultaneously tries the facts, to maintain his/her adjudicatory neutrality and not assume investigative tasks as this would have implications for his/her ability to respect the presumption of innocence.[4]

19. In addition, the *prima facie* admissibility of all written evidence in the investigative dossier which has been compiled in accordance with the rules laid out in §§ 104(2)(8-9), 121-22 CCP-RA, means that the trial judge, whose role is to try the facts, must receive as evidence, documents prepared unilaterally by the investigator, who is directly under the tutelage of the prosecutor, who in turn, according to the Const. Armenia, is also part of the judiciary (Art. 103 Const. Armenia).[5] The traditional "embrace" of the judge and the prosecutor, characteristic of most criminal justice systems, and the implicit automatic acceptance of a trial judge of evidence prepared by other government officials during the pretrial, clearly impedes the judge from being an impartial adjudicator of the facts.[6]

20. Moreover, when the investigative dossier and the indictment reach the trial court, it is the trial judge himself who reads the file before the trial commences

[4] For a discussion of the problems of the inquisitorial trial judge and its impact on the presumption of innocence, and the Russian Constitutional Court's early response to this problem, *see* THAMAN, *supra* note 1, at 180-90.

[5] All cites from Armenian Constitution from http://www.armeniaforeignministry.com/htms/conttitution.html#CHAPTER6

[6] On the problem of collusion between judge and prosecutor in "truth-seeking" in the Soviet-era and modern Russian trials, *see* Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L. JOURNAL 355, 370-75 (2007).

and decides that the evidence is sufficient to sustain a guilty verdict (§ 292 CCP-RA). This is the same procedure presumably followed by the investigator, when he/she decides there is sufficient evidence to charge (§ 231 Draft) and by the prosecutor when reviewing the charges proffered by the investigator (§§ 235, 315, 316 of the Draft). There appears to be no reason to have two law enforcement officials separately review the evidence. The trend on the European continent nowadays is to have the prosecutor be responsible for the investigation and many countries are gradually eliminating the independent investigating magistrate and combining investigative and evaluative functions in the hands of the public prosecutor.[7] Otherwise, there is an unnecessary duplication of the evaluation function, which again serves to prolong the pretrial stage of the proceedings. It is therefore recommended to consider amending the provisions to avoid such duplication.

21. Another inquisitorial trait of the Draft is the fact that the prosecutor may change the list of witnesses to be called at trial, (§ 318(1) of the Draft) and it is noted that there exists no procedural provision which would allow the defense do the same. It is recommended that this imbalance be rectified.

22. The CCP-RA also allows the judge to cure any constitutional or procedural errors committed by the law enforcement officials which might affect the admissibility of evidence by sending the case back to the investigative stage to correct these errors (§ 297 CCP-RA). Since the code provides that illegally gathered evidence should be excluded (§ 105(1) CCP-RA), cases which lack sufficient evidence to convict should be dismissed when they reach the trial court. It is the duty of the prosecutor, in his/her review of the sufficiency of the evidence after filing of the charge by the investigator, who should find the errors and correct them (§ 235 of the Draft). The prosecutor and investigator are given ample time to investigate and verify the quality of the investigation, thus it is suggested that the trial judge should not have to be in a position to rectify their failure to gather sufficient admissible evidence to convict.[8] In this respect, § 178(3-3.1) of the Draft clearly gives the judge powers to investigate for the purpose of charging new cases. This constitutes an encroachment on the powers of the public prosecutor, who, as ultimate supervisor of the preliminary investigation, is responsible for ascertaining and proving the truth of the charges in a court of law. It is therefore recommended that the

[7] Germany eliminated the investigating magistrate in 1974, Italy in 1988, THAMAN, *supra* note 1, at 18, and legislation is pending in the homeland of this investigative figure, France, to do the same. Robert Badinter, *La mort programmé du juge d'instruction*, LE MONDE, March 21, 2009 http://www.lemonde.fr/opinions/article/2009/03/21/la-mort-programmee-du-juge-d-instruction-par-robert-badinter_1170904_3232.html#ens_id=1165341 Similar moves have been made in several Latin American countries., for instance in Chile, Costa Rica, and the Argentine Province of Córdoba, to name a few. Cristián Riego, *Informe Comparativo Proyecto "Seguimiento de los Procesos de Reforma Judicial en América Latina"*, Centro de Estudiosde Justicia de las Américas (CEJA) at 9,26 http://www.cejamericas.org/doc/proyectos/inf_comp.pdf

[8] For critiques of the Soviet-Russian tradition of allowing the trial judge to save a weak prosecution case by sending it back to the investigative stage, *see* THAMAN, *supra* note 1, at 187-90; and Stephen C. Thaman, *The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT. ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMASKA 106-08 (John Jackson et al eds. 2008).

provision be revised to remove investigative powers from the remit of the powers of the trial judge.

23. Furthermore, it appears to be the pretrial judge, again, who assumes prosecutorial powers when he/she orders the prosecutor to continue to prosecute a case which the prosecutor believes should be dismissed. The Draft provides the aggrieved party with the right to ask the court to overturn the public prosecutor's decision to dismiss the case and the court may compel the public prosecutor to prosecute if the aggrieved party's motion is granted (§ 186 of the Draft). These provisions place the judge in a precarious position of making decisions which should only be those of the executive branch (the prosecutor's office) which is responsible for charging and proving criminal cases. A similar procedure is applicable in cases where the public prosecutor refuses to issue an accusatory pleading after the investigator has completed the investigation and sent the case to the prosecutor with a charge (§§ 238, 239 Draft).[9] These provisions are recommended to be revised to remove from within the scope of the powers of the trial judge, those which belong to the prosecution.

(iv) Arrest and Pretrial Detention

24. It is to be welcomed that Armenia has abandoned the practice of allowing the public prosecutor to approve pretrial detention and now requires judicial authorization for both pretrial detention and house arrests (§§ 321, 326(1) of the Draft). The previous practice was consistently condemned by the Eur. Ct. HR in cases brought against Poland, Bulgaria and Lithuania, which had similar provisions.[10]

25. Nevertheless, the Draft Law falls short of international standards in a number of places. Namely, according to the provisions of the CCP-RA, the police or prosecutor may hold a person for up to 96 hours before bringing him or her before a judge (§§ 11(3), 62(2), 129(2) CCP-RA). In the U.S. the maximum limit is 48 hours,[11] and the Eur.Ct.HR has found violations in cases where persons have been detained for more than 48 hours, even when the detention was for terrorist offenses.[12] Chapter 27 of the Draft dealing with the inquest procedures (*NB: "search inquiry" is a misleading translation*), makes no mention of bringing a detained person before a judge, but only of referring the suspect to the prosecutor within 21 days (§ 210 of the Draft). This is recommended to be revised.

---

[9] Germany, and other countries have procedures allowing an aggrieved party to ask a judge to compel the prosecutor to charge. THAMAN, *supra* note, at 26.b

[10] Assenov v. Bulgaria 28 EHRR 652 (1998); Nikolova v. Bulgaria [2001] 31 EHRR 64 (1999).; Niedbala v. Poland, 33 EHRR 1137 (2000); Grauslys v. Lithuania, 34 E.H.R.R.1084 (2000). *See also*, Nikolov v. Bulgaria [Jan. 30, 2003]; Salapa v. Poland [Dec. 19, 2002]; Kawka v. Poland [June 27, 2002]; Migon v. Poland [June 25, 2002]; Dacewicz v. Poland [July 2, 2002]; Stasaitis v. Lithuania [March 21, 2002]; Butkevicius v. Lithuania [March 26, 2002], www.echr.coe.int; *see also* TRECHSEL, *supra* note 3, at 510.

[11] County of Riverside vs. McLaughlin, 500 U.S. 44 (1991).

[12] TRECHSEL, *supra* note 3, at 512-13.

26. Furthermore, the permissible periods for investigating criminal cases are too long. That is, § 138(4) CCP-RA currently limits pretrial detention to one year for all cases, which is a reasonable maximum period, though only to be rarely used for very complex cases involving dangerous prisoners.[13] However, § 197 of the Draft extends the maximum period of the preliminary investigation to 18 months for especially grave crimes, with lesser periods of twelve, nine and six months for crimes of a lesser gravity, in which the defendant is subject to legal constraints, presumably including pretrial detention, and indicates that "the proceeding must be terminated or else all means of procedural coercion and restrictions on the rights to property must be lifted." This seems to indicate that pretrial detention can be up to 18 months, with a further extension of six months, constituting a maximum of two years(§ 197(2) Draft). [14]

27. It has been argued that pretrial detention constitutes a form of "punishment" for those suspected of crime,[15] although courts contend that it is not to be equaled with "punishment" but rather that it is a coercive measure used for the purpose of enforcing other important interests of the state, for instance ensuring that the defendant will not interfere with the investigation or with the trial by not appearing in court.[16]

28. When setting the limits for pre-trial detention, what is recommended to be borne in mind is that ideally a person should neither be arrested nor detained pretrial unless the state has already gathered evidence that would amount to a strong suspicion being formulated, and if accepted by the judge, would be sufficient to convict. If the state arrests a person but needs to depend on long-term imprisonment in order to gather enough evidence to send him or her to trial, then an arrest should not be made in the first place.

29. The Draft Law in § 217, limits the preliminary investigation to two months, but provides for what appear to be unlimited extensions. This conclusion is made when § 217 of the Draft Law is read together with § 197 of the Draft. The provisions are therefore recommended to be clarified and revised.

30. The labour intensive procedure required for every step of the preliminary investigation, the requirement of civilian witnesses (§ 81 CCP-RA, witnesses to a search), the requirement that all participants or witnesses sign a large volume and selection of documents, and that they be assembled into one official investigative file (§§ 188, 205 of the Draft) and finally the time-

---

[13] Some post-Soviet countries also allow no more than one year pretrial detention: Art. 18(6) Const. Georgia limits pretrial detention to nine months; limits of one year are found in §§ 158-59 CCP Azerbaijan ; § 130(3) CCP Estonia; § 153 CCP Kazakhstan; § 111 CCP Kyrgyzstan; Art. 25(4) Const. Moldova; pretrial detention of up to 18 months is possible according to: §121(2) CCP-Lithuania; § 156 CCP-Ukraine; § 118 CCP-Belarus and § 109 CCP-Russia; Latvia allows up to 30 months: §277 CCP-Latvia. Spain allows pretrial detention for up to four years, § 504 Ley de Enjuiciamiento Criminal (CCP of Spain).

[14] A two year period is longer than the 18 months allowed in the following post-Soviet republics: § 121(2) CCP-Lithuania; § 156 CCP-Ukraine; § 118 CCP-Belarus and § 109 CCP-Russia, though less than the 30 months allowed in § 277 CCP-Latvia and the four years allowed in § 504 CCP-Sapin.

[15] LUIJI FERRAJOLI, DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE 336 (5th ed. 1998).

[16] This is the approach of the U.S. Supreme Court. United States v. Salerno, 481 U.S. 739 (1987).

consuming procedure of the defendant and other participants familiarizing themselves with the file (§ 308 of the Draft) is considered unnecessary in the age of computers and the era of public adversarial trials. It is recommended for the procedure to be simplified in order to ensure that the preliminary investigation can be completed at a much faster pace. This also has implications in practice, as the sooner witnesses testify in front of the judge and are subject to confrontation by the defendant, the better their recollection of the facts is likely to be.

31. In view of the above, it is recommended for the Draft Law to reflect adversarial participation of the defendant in the preliminary investigation, i.e., being present and being able to question and make comments while witnesses and experts are being questioned and inspections, searches and seizures are taking place, evidence will be preserved in the event of the death or unavailability of a witness or police officer, and there will be less necessity for a long "familiarization" with the contents of the one file. [17]

32. It should also be noted, that the Draft Law provides prosecution parties with the opportunity to read and copy material from the file before the defendant does (§§ 307-08 of the Draft). If a written pretrial procedure is to be maintained, the documents should be computerized and a copy of the file can be immediately made available to the defendant, even after each investigative act is performed, thus shortening the time of "familiarization." According to the Draft Law, each participant must at separate times copy material from the one official file (§ 308(4) of the Draft).

33. There is no provision for releasing the defendant, or dismissing the case, when the prosecutor decides to send the case back to the investigator due to insufficiency of legally gathered evidence (§ 235(3)(1) of the Draft) or when the judge does the same thing after receiving the file from the prosecutor (§ 297 CCP-RA). This is recommended to be rectified in the Draft Law to ensure that the defendant is not detained as a consequence of inefficiency of law enforcement.

(v) Expedited and Consensual Procedures

34. The principles of legality, which requires mandatory prosecution of all crimes which come to the attention of law enforcement authorities is expressed in the Draft Law (§§ 184(1), 195(2), 209(1), 214(1) of the Draft). In practice, no state is able to conduct full prosecutions and trials in relation to every crime reported to the police, therefore, the Draft proposes the introduction of a guilty plea procedure, which allows negotiations which appear to be mainly directed at arriving at an agreed-upon punishment. A prerequisite is that the accused agrees with the qualification of the crime arrived at by the public prosecutor and the amount of restitution for negotiations to begin as to punishment (§§ 225(1), 226(3) of the Draft). This has been defined in the Draft Law as an

[17] On the general lack of adversariality in the preliminary investigation in the post-Soviet republics, *see* Thaman, *Two Faces*, *supra* note 8, at 100-01.

"agreement on guilt and punishment" the procedure is applicable to all crimes, if the "circumstances of the case are clear." It appears, also, that the prosecutor will "make a recommendation" as to punishment in court, but nothing appears to bind the judge to accept this recommendation (§ 229(1)(9), 230(1) of the Draft).

35. The procedure recommended by the Draft (described above) is in some respects similar to the procedures for plea bargains in the United States Federal Rules of Criminal Procedure in which the prosecutor offers a recommendation as to sentence (favorable to the defendant), which, however, is not binding on the judge.[18] It also seems to apply to all crimes, even especially grave crimes, as plea bargaining does in the U.S. In contrast, most European consensual procedures are limited to minor crimes. Many European countries have introduced penal orders for fine-only offenses. This is a procedure where the prosecutor will recommend a resolution of the case with a particular fine (and perhaps other conditions) and the defendant will get a certain number of days (typically 7-15) to object to it. If no objection is forthcoming, the fine is imposed and the conviction becomes final. This seems to be the model suggested in § 243 of the Draft. The Draft Law requires an admission of guilt and the provision of restitution, which is not required, in other countries such as Germany, France and Italy where penal orders are in effect.[19] Another "consensual" form of resolving minor criminal cases is victim-offender conciliation, proposed in § 242 Draft, which actually results in dismissal of the case if restitution has been made and the victim consents.[20] Both of these procedures do not seriously undermine the legality principle, for most cases of victim-offender mediation or conciliation arise out of cases of private prosecution, so there is no state duty to prosecute in the first place. In the cases of penal orders, the main concern is that it is the head of the investigation, the prosecutor, who essentially determines punishment, thus resurrecting the old inquisitorial practice, the state official who is both investigator, judge and jury all incorporated into one person. But because no prison is threatened, there can be minimal pressure caused by pretrial detention, and thus it is difficult to see a serious violation of due process.

36. Additionally, § 241 of the Draft introduces a kind of discretionary dismissal of a case, applicable to minor offenses where the defendant has made restitution and has no serious criminal record. This introduction of a limited "opportunity principle" relating to minor offenses has become very popular in Europe as an exception to a strict legality principle of mandatory charging.[21] In the U.S. and other common law jurisdictions, however, an unlimited discretion in

[18] Rule 11(e)(4) Fed. R. Crim. P.

[19] On penal orders in comparative law, *see* Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, in GENERAL REPORTS OF THE XVIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 969-71 (Katharina Boele-Woelki & Sjef van Erp eds. 2007)

[20] *Id*. At 966-68. Penal orders have also been introduced in Estonia and Lithuania, and victim-offender mediation or conciliation, which existed in the Soviet-era codes, has been maintained in Belarus, Latvia, Lithuania, Russia, Tajikistan and Uzbekistan. Thaman, *Two Faces*, *supra* note 8, at 109.

[21] On procedures of conditional dismissals (called "diversion" in the U.S.), in Germany and other European countries, some post-Soviet republics (Moldova and Estonia), *see* Thaman, *Plea-Bargaining, supra* note 20, at 964-66; Thaman, *Two Faces*, *supra* note 8, at 109.

charging is recognized. The penal orders, victim-offender mediation and discretion not to charge minor offenses are to be welcomed, in order to conserve time and resources to more rapidly process the more serious cases coming before the courts.

37. Very few European or Latin American countries have allowed bargaining in relation to serious offenses. Some countries have introduced a kind of "*nolo contendere*" plea (i.e. without a required admission of guilt) with a guaranteed one-third reduction in the punishment for mid-level crimes (in Italy, those punishable by no more than five years, and in Russia, for no more than ten years). In some Latin American countries, however, and in the new French system, an admission of guilt is required for the case to be resolved short of trial. In Spain, a similar procedure of "agreement" or "*conformidad*" is limited to cases in which the prosecutor is requesting no more than six years deprivation of liberty.[22]

38. In light of the above analysis and provided examples, it is recommended that the procedure should set up a system of statutory discounts, that is, substantial reductions in punishment. Otherwise, it will be difficult to assess whether in practices it will be a genuinely "consensual" system which benefits defendants, or a coercive system which may even induce the innocent to admit to crimes they did not commit, as may sometimes be the case in the U.S., where heavy punishments and the offer of great discounts make it extremely dangerous for defendants to demand their constitutional right to a jury trial.[23]

(vi) Interrogations

39. The Draft should be commended for recognizing that a person should be advised of the right to remain silent and should have a chance to talk with a lawyer before being interrogated (§ 253(2-4) of the Draft). This recognition of what is known in the U.S as *Miranda* rights, based on the famous U.S. Supreme Court decision of *Miranda v. Arizona*,[24] has been adopted in most new criminal procedure codes around the world, even though there are still some old inquisitorial systems that have been slow to turn away from their old systems of mandatory police interrogation in the absence of counsel, the prime example being France.[25]

40. Further to the above, it is recommended that the provisions of the Draft Law can be strengthened, in order to avoid over reliance on confessions as the main items of evidence in support of convictions. Thus, it is important to establish strong procedural protections that make over-reliance on confessions and

[22] For a discussion of the various forms of consensual procedures applied to less-serious crimes in Europe and Latin America, *see* Thaman, *Plea-Bargaining*, *supra* note 20, at 975-80.
[23] On the inherent coerciveness of American plea bargaining, *see* Thaman, *Plea-bargaining*, *supra* note 20, at 972.
[24] 384 U.S. 436 (1966).
[25] *See* in general, Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L. J. 581 (2001); cf. THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 1, at 85-90.

abuse thereof, impossible.[26] One recommendation that may be made in this regard is to make the defendant's "interrogation" solely a weapon of the defense, only to be conducted upon request of the defendant. This has been done in the 1988 Italian Codes of Criminal of Procedure,[27] and in several of the new Code of Criminal Procedure introduced in Latin America in the 1990's. The Draft still sees the "interrogation" as the key procedure to prove the elements of the crime, which may amount ot over-reliance on the defendant to prove his or her own guilt (§ 247(1) of the Draft).

41. Finally, the Draft allows the defendant to waive the right to have a lawyer present during the interrogation (§ 253(4) of the Draft)). This provision opens the door for abusive interrogators to use the pressures of pretrial custody to induce suspects and the accused to waive the right to counsel. It is recommended, in the alternative, that the Draft Law should either should require counsel to be present at all interrogations, an option chosen in Italy in 1988 and some Latin American countries in their new codes of the 1990's, or the Draft Law should introduce an exclusionary rule similar to that contained in § 75 of the Code of Criminal Procedure of the Russian Federation, which indicates that any time a person is interrogated in the absence of counsel, even if the person has waived counsel, the statement may not be used unless the person interrogated affirms the veracity of the statement at trial. In such case, anytime a defendant retracts the statement, it would fall under an ironclad exclusionary rule.

(vii) **Privacy**

42. The Draft Law is commended for requiring judicial authorization for the most serious invasions of citizens' privacy, whether conducted to search or inspect private spaces, seize items in private places, or intercept private communications (§§ 320, 322(1) of the Draft). In the absence of the consent of the owner, § 263(2) of the Draft requires, judicial authorization for entries into homes (see also § 273(2) of the Draft) and private buildings, and searches of computers and even automobiles. It is also commendable that police would need judicial authorization to compel a suspect to submit to a physical inspection (§ 267(2) of the Draft) or to allow blood, sperm, fingernail, saliva or other samples to be taken from him or her (§ 302 of the Draft). The Draft offers additional protection from an invasion into privacy by requiring judicial authorization to search for and seize bank records (§ 273(2) of the Draft).
The warrant requirement also requires a specification of the place to be searched and the items or persons to be seized, if present on the premises (§ 273(4) of the Draft).

43. It is also welcomed that the exception for searches conducted in extraordinary circumstances, i.e., searches without judicial warrant when there is danger of loss or destruction of the item sought, or escape of the person sought, is coupled with an exclusionary rule if the later judicial review of the search determines the search to have been in violation of the law (§ 273(5) of the

[26] Thaman, *Two Faces*, *supra* note 8, at 102-03.
[27] THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 1, at 103.

Draft). The same is true for emergency wiretaps or seizures of conversations that are done without judicial authorization due to exigent circumstances (§ 325(8) of the Draft). However, the Armenian legislator must make sure that evidence is truly excluded when officials violate the procedural laws, and especially the constitutional rights of citizens. The CCP-RA is unclear with respect to the strength of the rules of exclusion. Whereas § 104(3) CCP-RA states that only evidence gathered in adherence to the rules of the CCP-RA may be used in court, and explicitly excludes evidence gathered by force, threat fraud, violating the dignity of the defendant or other illegal means, violating rights of suspect to a defense or "essential violations," (§ 105(1) CCP-RA), it then goes on to limit "essential violations" to those which impair the credibility of the illegally obtained evidence (§ 105(2) CCP-RA). This appears to be a rather weak exclusionary rule, as it would never lead to exclusion of physical evidence gained as a result of an illegal search or seizure or an illegal wiretap.[28] It is thus recommended to strengthen the exclusionary clause, to make certain that evidence gained as a result of an illegal search or seizure or an illegal wiretap may be excluded from the trial.

44. Furthermore, although the requirement of having civilian witnesses present during searches (§ 274(1) of the Draft) is more cumbersome, it is recommended to nonetheless be maintained. If performed honestly, this lay participation at the investigative stage will prevent possible police fabrication or planting of evidence during a search. This is especially important in countries where a there is a low level of confidence in the police and law enforcement in general. The requirement of the presence of the suspect/accused, if possible, or a family member, is also important in this respect. If the defendant has already been arrested and has counsel, it is important that counsel also be invited to be present during the search (§ 274(5) of the Draft). Furthermore, as recommended above, the defense should be invited to take part in all but the most sensitive investigative measures, in order to ensure the credibility of the procedure, and, to facilitate the right to confrontation, which will have as an end effect the preservation of the written record for use at trial if the witnesses who performed the act becomes unavailable.

45. The Draft makes an exception to the warrant requirement for the search of a person at the time of arrest or shortly thereafter (§ 276(2) of the Draft). It would, of course, be impracticable to require a warrant in such situations, and such searches are required to preserve evidence and protect the arresting officers. The Draft generally requires "sufficient grounds" as the evidentiary standard for searches and seizures which constitute invasions of constitutionally protected areas (§§ 272(1), 276(1),282(1) of the Draft). What is pivotal is for the courts to interpret the standard to mean something more than a mere possibility. It is therefore recommended for the Draft to the précised so as to avoid the possibility of invasions of citizen's privacy being

[28] Among the former Soviet republics, strong exclusionary rules applying to evidence illegally seized regardless of its "credibility," exist in § 105(4) CCP-Belarus, § 116(4) CCP-Kazakhstan, § 6(3) CCP-Kyrgyzstan, § 75 CCP-Russia ; weak exclusionary rules, such as is found in Armenia, exist also in § 125(2)(1) CCP-Azerbaijan, § 130(2-3) CCP-Latvia, § 94(1) CCP-Moldova.

conducted upon a lesser suspicion, which could lead to the violation of the rights of many innocent persons.

46. The Draft is correct in requiring judicial authorization for seizing private writings and communications (§§ 279(4), 325(1) of the Draft). Court authorization is, of course, explicitly required by the Eur. Ct. HR for the interception of private communications through wiretapping, bugging of private spaces, or interception of electronic communications. While the Draft requires judicial authorization (§ 282(3) of the Draft), some of the other aspects of the wiretap provisions are deficient and are recommended to be improved. For instance, it is impermissible to allow a wiretap, or other operative-detective measure which violates personal constitutional rights, to last for six months without further judicial intervention (§§ 282(4), 325(7) Draft). While certain countries, like France, also allow for six months, other such as Italy allow for only 30 days, and the U.S. allows for 60 days if the probable cause still exists. It is therefore recommended to consider reducing this period.

47. Furthermore, wiretapping is not explicitly restricted to the investigation of the most serious crimes, such as organized criminality, terrorism, narcotics trafficking, etc., and appears to apply to all crimes. It is recommended for the Draft Law to enumerate a list of crimes where these serious intrusions into constitutionally protected rights are permitted during the preliminary investigation or as a measure of operative-detective activity (such a list should also be contained in the provisions regarding operative-detective activities under § 323(2) of the Draft).

48. It is also recommended to introduce provisions for the defense to inspect the seized conversations, something akin to the inventory which is required when police search a house and which includes all things seized by the authorities (§ 277 of the Draft).

49. Finally, it is recommended that the agent conducting the operative measure which violates privacy should have to indicate the proportionality of this measure, and provide justification as to why the information cannot be found using other less-intrusive modes of investigation. This "necessity" aspect is missing both from the provisions relating to wiretapping and the more general provisions relating to operative-detective activity[29] and thus it is recommended to revised these provisions.

[END OF TEXT]

[29] For a discussion of the Eur. Ct. HR decisions on wiretapping, and the requirements of a catalogue of crimes, necessity, etc., *see* THAMAN, COMPARATIVE CRIMINAL PROCEDURE , *supra* note 1, at 61-68.