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TITLE

IMPLEMENTATION OF CRITERIA OF EUROPEAN COURT OF HUMAN RIGHTS ON PRETRIAL DETENTION AND EXTENSION OF DETAINMENT TERM IN LEGISLATION AND PRACTICE OF REPUBLIC OF ARMENIA

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ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ICCPR – International Covenant on Civil and Political Rights

CPC – Criminal Procedure Code of the Republic of Armenia

INTRODUCTION

In many countries, overreliance on detention is a major problem both at pretrial and dispositional stages of criminal proceedings.[1] International standard of "detention as a last resort" strongly fosters the application of noncustodial measures during the pretrial investigation, and holds that deprivation of liberty should be imposed only as a last resort, when non-custodial measures would not be sufficient to meet the requirements of criminal proceedings and administration of justice. The overuse of detention is often a symptom of a dysfunctional criminal justice system that may lack protection for the rights of criminal defendants and the institutional capacity to impose, implement, and monitor non-custodial measures and sanctions. It is also often a cause of human rights violations and societal problems associated with an overtaxed detention system, such as overcrowding; mistreatment of detainees; inhumane detention conditions; failure to rehabilitate offenders leading to increased recidivism; and the imposition of the social stigma associated with having been imprisoned on an ever-increasing part of the population. Overuse of pretrial detention and incarceration at sentencing are equally problematic and both must be addressed in order to create effective and lasting criminal justice system reform.[2]

The pretrial detention is the harshest form of the restraint measures and the dangerous part of it is that it interferes with the right to liberty of a person who is still not convicted and is considered innocent under the internationally acknowledged principle of presumption of innocence. That is why the use of pre-trial detention should be limited to exceptional cases and

[1] Handbook of International Standards on Pretrial Detention Procedure, American Bar Association, *available at* https://www.ilsa.org/jessup/jessup16/Batch%201/handbook_of_international_standards_on_pretrial_detention_procedure_2010_eng.authcheckdam.pdf (last visited on March 19, 2017)
[2] Ibid.

needs to be justified on a case-by-case basis. International human rights law prohibits arbitrary and unnecessary use of pretrial detention.[3]

As the pretrial detention has multiple negative effects both on the detainee and on society as a whole, The European Convention on Human Rights (hereinafter referred to as ECHR) establishes limits for the use of pretrial detention and rules applying to the treatment of pretrial detainees.[4] According to the Article 5 of the ECHR, the term "reasonable suspicion" is essential for deprivation of liberty of a person in form of pretrial detention. The analysis of European Court of Human Rights (hereinafter referred to as "ECtHR") case-law does not imply that for the justification of the initial detention more is required than to establish the reasonable suspicion of committing a crime. However, the same cannot be claimed about the extension of the detainment term.[5] It can be considered legitimate only when there are "relevant and sufficient" reasons to justify the continued detention[6].

The global problem of overuse of detention has been detected in the Republic of Armenia as well. Penal Reform International, an independent non-governmental organization, has indicated in its report of 2012 on pretrial detention and its alternative in Armenia that throughout the period of 2005-2010 pretrial detention in Armenia has been used in excessive and unnecessary ways.[7]

According to the publication of the Judicial Department of the Republic of Armenia in 2014 the courts received 2331 motions for pretrial detention and the 94.5% of them was applied. From the received 572 petitions of replacing detention with bail, only 99 (that is 17.3% of the total amount) were satisfied by courts. The judicial system in terms of these indicators is in the target of criticism of international organizations.[8] It is evident from this numbers that the current

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[3] Pre-Trial Detention and its alternative in Armenia, Penal Reform International (2012), *available at* https://www.penalreform.org/wp-content/uploads/2013/05/Armenia-Report-PTD-alternatives-ENG.pdf (last visited on March 19, 2017)

[4] Abuse of Pretrial Detention in States Parties to the European Convention on Human Rights, Council of Europe Parliamentary Assembly (Doc. 13863, 2015), *available at* http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21992&lang=en (last visited on March 19, 2017)

[5] ՄԻԵԴ Նախադեպային իրավունքի հիմնահարցերը էթեական գործերով, Դ. Մելիոնյան, Ս. Հարությունյան, Երևան, 2015, page 30

[6] See *Khodorkovskiy v. Russia*, 31 May 2011, §182

[7] See footnote 3.

[8] Publication of Judicial Department of RA on 16th of March, 2015, *available at* http://www.court.am/?l=lo&id=11&item_id=3380 (last visited March 19, 2017)

alternatives for the pretrial detention in Armenia are not effective. According to Davit Avetisyan, the former Chairman of the Criminal Chamber of Court of Cassation of RA, the vast majority of the detainees are kept for not grave and medium gravity crimes and they are not bringing applications to higher instances, particularly because of that they do not have lawyers for defending their rights.[9]

But what are the causes of these indicators of excessive use of pretrial detention as a preventive measure? The reasons lie behind the current criminal procedure legislation of Armenia and also the emerged practice of the relevant authorities. These two reasons are interlinked and shape the problem of abuse of pretrial detention regarding both international standards and domestic legislation. The Criminal Procedure Code of Republic of Armenia (hereinafter referred to as CPC) has several drawbacks and gaps in regards of the application of pretrial detention as a preventive measure. Another problem that the legislation encounters is extending of the detainment term, which, as mentioned above, is also covered by the international law and case-law. In this regards, it is essential to change and modify the current legislation, bringing more restraint measures which could serve as real and effective alternatives for pretrial detention. Also, safeguards and strict criteria should be implemented in the law in order to avoid the abusive use of pretrial detention. These provisions should definitely provide the circumstances where the detention may be applied and where it can be prolonged.

The purpose of this paper is to show the international standards and criteria of the ECHR on the pretrial detention and extending the detainment term, then to compare the mentioned standards with the current legal framework of the Republic of Armenia, to spot the drawbacks and the gaps in the legislation and practice and finally to draw a perspective of changes and implementation of the international criteria in the Armenian legal system. Particularly, in Chapter I the Article 5 of the ECHR is analyzed, the relevant case-law of ECtHR is represented and the main criteria that are not implemented in the legislation and practice of Armenia, are distinguished. The interpretation of the Article 5 of the ECHR and the relevant case-law is very broad and in this paper only the standards that are not in compliance with the Armenian situation, are represented. Afterwards, Chapter II discusses the present legal regulations and

[9] Ibid.

practice on detention and expending the detainment term in Armenia, the provisions of the Criminal Procedure Code, the case-law of the Cassation Court of Republic of Armenia and the issues of the compliance with the international standards. Here, the shortcomings of the legal framework are described. Eventually, Chapter III is designed to discuss the prospects of modifications in the field and represent the legal settings suggested by the draft of the Criminal Procedure Code (hereinafter referred to as Draft) concerning the pretrial detention. Chapter III also considers the compliance of the provisions of the Draft with the standards of ECHR and ECtHR.

The paper literature is based on comprehensive discussion of the interpretation of Article 5 of the ECHR and on the relevant case-law study of the ECtHR, the study of Armenian legal framework (Constitution, Criminal Procedure Code, relevant case-law) and the Draft of the Criminal Procedure Code.

CHAPTER I

International Standards on Pretrial Detention

The right to liberty of a person has its deep roots in history of mankind before being mentioned in international legal documents and treaties. A right to personal liberty was enshrined in English law by the Magna Carta in 1215. The Magna Carta dictates that no free man shall be taken, imprisoned, outlawed, or exiled except by lawful judgment.[10] Freedom from executive detention has been described as 'probably the oldest of recognized human rights in reliance on chapter 39 of Magna Carta 1215'.[11]

While the international human rights law was developing, the right to liberty was mentioned in various international documents. The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 provides that "Everyone has the right to life, liberty and security of person".[12] According to the Article 9 (1) of the International

[10] Textbook on International Human Rights (Third Edition), Rhona K.M. Smith, Oxford University Press, 2007, page 226

[11] Human Rights in the Investigation and Prosecution of Crime, Colvin Cooper, Oxford University Press, 2009, page 157

[12] Universal Declaration of Human Rights, Article 3, *available at* http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (last visited on March 19, 2017)

Covenant on Civil and Political Rights adopted in 1966 by the United Nations General Assembly, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[13] African Charter of Human and Peoples' Rights, The American Convention on Human Rights and ECHR safeguard the right to liberty and security of a person as well.

All human beings have the right to enjoy respect for their liberty and security. It is axiomatic that, without an efficient guarantee of the liberty and security of the human person, the protection of other individual rights becomes increasingly vulnerable and often illusory.[14]

According to the Article 5 (1) of the ECHR, "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

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[13] International Covenant on Civil and Political Rights, Article 9, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (last visited on March 20, 2017)

[14] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, Office of the High Commissioner for Human Rights, International Bar Association, UN Publications, 2003, page 161

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."[15]

Further, the Article 5 (3) provides that "[e]veryone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".[16]

Article 5 of European Convention embodies a key element in protection of an individual's human rights. Personal liberty is a fundamental condition, which everyone should generally enjoy. Its deprivation is something that is also likely to have a direct and adverse effect on the enjoyment of many of the other rights, ranging from the right to family and private life, through the right to freedom of assembly, association and expression, to the right to freedom of movement. Furthermore, any deprivation of liberty will invariably put the person affected into an extremely vulnerable position, exposing him or her to the risk of being subjected to torture and inhuman and degrading treatment.[17] The aim of the Convention is to secure real rights for individuals, which means that the rights should be ones with a substantive content and not simply affording a mere formal guarantee. Consequently, the limitations on the right to liberty should be seen as exceptional and only permitted where a cogent justification for them is provided; their implementation cannot begin with any assumption that anything which public authorities propose is necessarily appropriate.[18]

So, Article 5 (1) of ECHR starts with a declaration of the right to liberty and security of a person and then continues with the assertion that "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law". This paragraph

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[15] European Convention on Human Rights, *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited on March 20, 2017)
[16] Ibid.
[17] The right to liberty and security of the person, A guide to the implementation of Article 5 of the European Convention on Human Rights, Monica Macovei, 2002, pp 5-6, *available at* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4b (last visited on March 20, 2017)
[18] Ibid. pages 6-7

points out the concept of presumption of liberty stating that liberty should be enjoyed by everyone and its deprivation is possible only in limited and particular circumstances. Furthermore, the presumption of liberty is underlined by the imperative requirement under Article 5 to ensure that liberty should both be lost for no longer than is *absolutely necessary* and be capable of being readily recovered where such loss is not justified. The former is evident in the stipulation that suspected offenders "shall be entitled to trial within a reasonable time" and the latter is found in the prescription that everyone deprived of liberty "be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". There is thus a clear burden of proof on those who have taken away someone's liberty to establish not only that the power under which it occurred falls within one of the grounds specified in Article 5 but also that its exercise was applicable to the particular situation in which it was used.[19]

For a more comprehensive approach and for better understanding the risen topic, a need to discuss the pretrial detention is relevant at this point, after which the discussion will return to the ECHR and its interpretation.

The criminal procedure law itself is a complicated field of study which includes various concepts that interfere with the human rights, though these interventions have the purpose of promoting the administration of justice. The implementation of the objectives of the criminal procedure is sometimes interlinked with the necessity to restrict the rights of the subjects of the procedure. This restriction is implemented by state procedural measures of compulsion that are prescribed by law. The state measures of compulsion are also applied in other fields of public life. However, in criminal procedure, where the issues of resolution of crimes and criminal responsibility are resolved and where the counteraction against justice may attain extreme nature and forms, procedural measures of compulsion are implemented more often and essentially affect the fundamental rights and freedoms of a person.[20] In the criminal justice system, the time between arrest and case disposition is known as the pretrial period. Each time a person is arrested and accused of a crime, a decision must be made as to whether the accused person will be

[19] Ibid. page 8

[20] Հայաստանի Հանրապետության քրեական դատավարություն, Ընդհանուր մաս, (4-րդ հրատարակություն, լրացումներով և փոփոխություններով) Ս. Դիլբանդյան, Ա. Հարությունյան, Երևան, 2006, p 340

detained in jail awaiting trial or will be released back into the community. But pretrial detention is not simply an either-or proposition.[21] Though pretrial detention is the strictest form of the procedural measures of compulsion and preventive mechanisms which interferes with the right to liberty of a person who is still not convicted for a crime and therefore is considered innocent, it may be justifiable taking into account various circumstances of counteraction against administration of justice. Coming back to the interpretation of the European Convention, it is important to note that Article 5 (1) recognizes in the list of situations where deprivation of liberty may be justified in criminal process, the lawful apprehension of a person suspected in involvement of committing a crime (para. c).

In the case-law of the ECtHR the presence of *'reasonable suspicion'* is mandatory for any case of deprivation of liberty of a person under the Article 5 (1) (c). In other words any type of deprivation of liberty (apprehension, arrest, detention) on the ground of suspicion of committing a crime can be considered legitimate if at least 'reasonable suspicion' of committing a crime is existent.[22] In the case of *Fox, Campbell and Hartley v. the United Kingdom* the Court accentuated that "[t]he "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c)" and that "(…) having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence".[23] Therefore, a failure by the authorities to make a genuine inquiry into the basic facts of a case in order to verify whether a complaint was well-founded disclosed a violation of Article 5 § 1 (c).[24] A relevant case is of *Stepuleac v. Moldova,* where, according to the facts, the prosecutor brought a request to a court for pretrial detention of the applicant and on the same day the court accepted the motion and ordered the applicant's detention on ten days reasoning its decision with the statement that the "the crime of which [the applicant] is accused is

[21] The Hidden Costs of Pretrial Detention, Ch. T. Lowenkamp, M. VanNostrand, A. Holsinger, 2013, *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf (last visited on March 21, 2017)
[22] See footnote 4, page 29
[23] See *Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990,* para. 32
[24] Guide on Article 5 of the Convention, Right to Liberty and Security, Council of Europe/European Court of Human Rights, 2014, page 15, *available at* http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf (last visited on March 21, 2017)

a serious one for which the law provides a penalty of more than two years; during the initial stage of proceedings the accused could obstruct the investigation, could put pressure on witnesses and the victim and could destroy evidence".[25] The applicant appealed but with no success. Eventually, The Court found violation of Article 5 (c) where arrest and detention of the applicant did not verified whether the complaints against him were *prima facie* well-founded.[26]

The analyses of the case-law of the European Court does not imply that for the justification of the initial pretrial detention more is needed than the establishment of the 'reasonable suspicion' of committing a crime. However, the same cannot be claimed about the extension of the detainment term.[27] In the case of *Khodorkovskiy v. Russia* "[t]he Court reiterates that a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify the continued detention".[28] In the case of *Piruzyan v. Armenia* "(…) the applicant requested to be released on bail on several occasions. On at least two occasions the Lori Regional Court dismissed the applicant's requests on the grounds provided for by Article 143 § 1 of the [Criminal Procedure Code] with an explicit reference to that provision, which precluded release on bail of a detainee accused of a serious or a particularly serious offence (…). The Government's assertion that the Court of Appeal, in reviewing one of those decisions, refused bail on a different ground appears to contradict the materials of the case. In particular, even though the Court of Appeal did not make an explicit reference to Article 143 § 1 of the [Criminal Procedure Code], the content and essence of that decision show that it confirmed the findings reached by the Regional Court, including those concerning the refusal to grant bail. Thus, the Court agrees with the applicant that his application for bail was refused on the grounds provided by Article 143 § 1 of the [Criminal Procedure Code] and that he can claim to be a victim of an alleged violation of Article 5 § 3 on that ground. The Government's objection as to incompatibility ratione personae must therefore be dismissed." [29] It is also important to note that according to the case facts the investigator brought a motion to the Lori Regional Court for detaining the applicant for a period of two months "on the grounds

[25] *Stepuleac v. Moldova, 6 Nov. 2007,* para. 16
[26] Ibid. para 76, 81
[27] See footnote 5, page 30
[28] *Khodorkovskiy v. Russia, 31 May 2011,* para. 182
[29] See *Piruzyan v. Armenia, 26 June 2012, para. 87*

that [applicant] had previous convictions, the offence belonged to the category of serious crimes and that, if at large, he would abscond".[30] Before the end of the detainment term, the investigator applied to the court for expending the applicant's detainment term for more two months on the basis that additional biological examination had to be carried out and on the same ground that the applicant would abscond since there was a presumption that he had committed a serious crime and also had been convicted for other crimes prior. A statement was made that the applicant "had not admitted his guilt and would therefore obstruct the investigation".[31] Further, one more motion was brought to the court by the investigator. The court examined "the investigator's application and the materials confirming that it was well-founded, decided to grant the application in part and to extend the applicant's detention by one month (…)"[32] on the ground that the ordered biological examination had not yet been completed. Referring to Article 143 § 1 of the Code of Criminal Procedure (CCP), the court further decided to refuse the applicant's request for bail, on the ground that he was accused of a serious crime.[33] Eventually, The European Court reiterated that "[a] person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify the continued detention (see *Smirnova v. Russia, nos. 46133/99 and 48183/99, § 58, ECHR 2003-IX (extracts); Becciev v. Moldova, no. 9190/03, § 53, 4 October 2005; and Khodorkovskiy v. Russia, no. 5829/04, § 182, 31 May 2011*)".[34] The Court held that there has been a violation of Article 5 (1) (c) of the Convention on account of the failure to provide relevant and sufficient reasons for the applicant's continued detention and on account of the automatic rejection of the applicant's applications for bail.

So ECtHR differentiates the initial pretrial detention from the subsequent ones highlighting the problem of the "certain lapse of time". In the recent case of *Buzandji v. The Republic of Moldova* the Court states that "the persistence of reasonable suspicion is a condition *sine qua non* for the validity of the continued detention, but does not suffice to justify the

[30] Ibid. para. 10
[31] Ibid. para. 12
[32] Ibid. para. 16
[33] Ibid.
[34] Ibid. para. 91

prolongation of the detention after a certain lapse of time".[35] This dictum is one of the "Letellier principles" that have been reestablished in various Grand Chamber judgments and affirms that while for the initial stage of pretrial detention the existence of the reasonable suspicion is enough, after "certain lapse of time" it no longer suffices and other "relevant and sufficient" grounds for the prolongation of the detainment are required.

The reasons for prolongation of detention will only be admissible if they are actually applicable to the circumstances of the person concerned. There can, therefore, never be a rule which excludes persons who have a particular criminal record or who are accused of certain specified offences from being considered for release pending their trial. In *Caballero v. the United Kingdom*, where the applicant was arrested for attempted rape, the government conceded that there had been a violation of Article 5 (3) when a court refused the applicant bail pursuant to a law that precluded – without exception – all persons charged with, or convicted of, murder, manslaughter and rape from being granted bail. Such a law was objectionable because it prevented the courts from considering the particular circumstances of someone who had been deprived of his or her liberty. It should be noted that the Court has found prolonged deprivation of liberty to be unjustified even in murder cases. Furthermore, it may be found that reasons which at first appear to justify a continued deprivation of liberty will become less compelling the longer this lasts and it is essential that applications for release be examined with an open mind. Where such reasons do not exist – whether initially or at a later stage – but there is still reasonable suspicion regarding the commission of an offence, the person concerned should be released on bail but this may be subject to guarantees designed to ensure that he or she appears for trial. However, even if the reasons justifying continued deprivation of liberty can still be demonstrated to be applicable to a particular individual, there is also a need to ensure that he or she is *brought to trial within a reasonable time* and this necessarily sets limits to the overall period for which such a deprivation can be allowed to endure.[36]

In its broad case-law the ECtHR has set strict grounds as relevant to prolong the term of the pretrial detention of a person when the reasonable suspicion of committing a crime is still existent. Those acceptable grounds are as follows:

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[35] *Buzadji v. The Republic of Moldova, App. No. 23755/07, Judgment of July 7, 2016,* para 92

[36] See footnote 17, page 28

- the risk of fleeing;
- the risk of interference with the course of justice;
- the risk of committing further offences;
- the need to preserve the public order.

In the case of *Mansur v. Turkey* the ECtHR stated that: "It falls in the first place to the national judicial authorities to ensure that, in a given case, the detention of an accused person pending trial does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release".[37] The continuance of the reasonable suspicion of committing an offence is essential for the continued detention, however, after some time it no longer suffices and other grounds that justify the prolongation of the deprivation of liberty, should be confirmed. These grounds may be "relevant" and "sufficient", but still the domestic authorities should show "special diligence" in the proceedings. Eventually, in this case "[t]he Court points out that the danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risk. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of the danger of absconding or make it appear so slight that it cannot justify detention pending trial".[38] In the case of *Aleksanyan v. Russia* the ECtHR reiterated that "[t]he national judicial authorities must examine all the facts arguing for or against the existence of genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty (…)" and "[a]rguments for and against release must not be "general and abstract" (…) but contain references to the specific facts and the applicant's personal circumstances justifying his detention(…)".[39]

The ECtHR notices as well that the relevant considerations can vary over time and thus, a new evaluation becomes required at regular intervals. Also, it is important to note that over time the requirements of the investigation no longer suffice for justification of the pretrial detention,

[37] *Mansur v. Turkey, June 06,1995,* para. 52
[38] Ibid. para. 56
[39] *Aleksanyan v. Russia, December 22, 2008,* para 179

because the risks of the interference with the investigation significantly decrease when the testimonies are done and the inquiries are made.

To summarize the Chapter I, it is worth revising the main segregated standards of the European Convention and the ECtHR case-law. So, those are:

1) the mandatory presence of the “reasonable suspicion” and that the "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence;
2) “relevant and sufficient” reasons to justify the continued detention and that the reasonable suspicion is no longer sufficient for the extension of the detainment term.

These main standards should be implemented in the Armenian legislation in order to fight the abusive use of pretrial detention. These will be the first steps of fighting the phenomenon in the legislative level.

CHAPTER II

Pretrial detention in the legislation and practice of Armenia

For understanding the legislative and practical issues of the deprivation of liberty in form of pretrial detention in Armenia, the relevant rules as the right to liberty, presumption of

innocence, criminal procedure legislation and case-law of the Cassation Court of RA, afterward, the issues with the compliance with the abovementioned requirements of the European Convention and ECtHR, are provided in this chapter.

As prescribed in the international legal documents, the right to liberty was provided by the Constitution of the Republic of Armenia as well. Particularly, the Article 27 states that: "Everyone shall have the right to personal liberty. No one may be deprived of personal liberty otherwise than in the following cases and as prescribed by law:

(1) the person has been sentenced by a competent court for committing a criminal offence;

(2) the person has failed to obey a legitimate court order;

(3) for the purpose of ensuring the fulfilment of a certain obligation prescribed by law;

(4) for the purpose of bringing a person before a competent authority where there exists a reasonable suspicion that the person has committed a criminal offence, or a justified necessity of preventing the committal of a criminal offence by the person or his or her fleeing after having done so;

(5) for the purpose of placing a minor under educational supervision or bringing him or her before a competent authority;

(6) for the purpose of preventing the spread of contagious diseases dangerous for the public, as well as the danger posed by persons with mental disorder, drug addicts and alcoholics;

(7) for the purpose of preventing the unauthorized entry of a person into the Republic of Armenia, or for deporting or extraditing a person to another state".[40]

The principal of the presumption of innocence is established by the Constitution as well. According to the Article 66 of the Constitution anyone charged with a crime shall be presumed innocent until proven guilty as prescribed by law, upon criminal judgment of the court entered into force.[41] While the constitutional provision of presumption of innocence remained the same comparing with the Amendments to Constitution introduced in 2005, the right to liberty has developed and became more in compliance with the Article 5 of ECHR. A progressive step is that according to the Article 27 (4) of the Amendments to Constitution introduced in 2015, the

[40] Amendments to the Constitution of RA, December 6, 2015, Article 27
[41] Ibid. Article 66

"[i]f within a reasonable time period upon depriving of liberty but no later than within 72 hours the court fails to render a decision on authorising further confinement of a person deprived of liberty on the ground referred to in point 4 of part 1 of this Article, he or she shall be immediately released". The provision stresses that the decision should be made *in a reasonable time period*, but not later than 72 hours. In this manner the Constitution requires for the body conducting the criminal proceedings to act in reasonable time, trying wherever possible to bring a decision even before the 72 hours passes, as the fundamental right to liberty of a person engaged is limited.

Further, the Article 18 of the CPC reiterates the principal of the presumption of innocence and continues with the statement that no conclusion that a person is guilty of a crime can be based on suppositions, and such conclusion has to be supported sufficient combination of reliable and compatible evidence, which is relevant to case.

Moving to the pretrial detention part, it is relevant to note that as it was stated above the pretrial detention is one of the restraint measures used for promoting the administration of justice. The restraint measures are described in the Chapter 18 of the CPC and the Article 134 starts with the definition of those measures. In particular, restraint measures are measures of coercion taken towards the suspect or the accused to prevent their inappropriate behavior during the criminal proceedings and to ensure the execution of the sentence.[42] Currently there are 7 types of restraint measures prescribed by the Code. Those are detention, bail, a written obligation not to leave a place, a personal guarantee, an organization guarantee, taking under supervision and taking under supervision of a commander.[43] It is important to note that the bail is an alternative measure to the pretrial detention and can be granted only after the decision of the court about the detention of the accused person.[44]

The CPC gives the grounds for execution of the restraint measures in the Article 135, where it is stated that those measures shall be executed only when the material obtained for the criminal case provides sufficient reason to assume that the suspect or the accused person may:

1) hide from the body which carries out the criminal proceeding;

[42] Criminal Procedure Code of the RA, Article 134 (1)
[43] Ibid. Article 134(2)
[44] Ibid. Article 134 (4)

2) inhibit the pre-trial process of investigation or court proceeding in any way, particularly by means of illegal influence of the persons involved in the proceeding, concealment and falsification of the materials relevant to the case, negligence of the subpoena without any reasonable explanation;
3) commit an action forbidden by Criminal law;
4) avoid the responsibility and the imposed punishment;
5) oppose the execution of the verdict.[45]

But for the detention and its alternative measure bail the Code gives a particular provision in the same Article, stating that these two can be executed in respect to the accused person only for his commitment of a crime for which he may be imprisoned for more than a year *or* there are sufficient grounds to suppose that the suspect or the accused person may commit one of the abovementioned actions. Such a written form of the law provides two options for detaining a person, first one is that the maximum sanction for the crime of which the person is suspected in committing, is more than one year of imprisonment, and the second one is that there are sufficient grounds to assume that the person may commit the actions that are listed by Article 135 (1) of the Criminal Procedure Code. Thus, the law prescribes the possibility to detain a person who has committed not a grave crime either, which is pretty much abused by bodies conducting the proceedings, as states the former Chairman of the Criminal Chamber of Cassation Court. This is one of the shortcomings of the law.

What concerns the term of the pretrial detention, the Article 138 (3) states that detention carried out at the time of pretrial criminal proceedings shall not last longer than 2 months except for the cases prescribed by the Code. Further, it is prescribed by the Article 138 (4) that in pretrial criminal proceedings the detainment term of the accused person may be extended by the court up to 6 months due to the complexity of the case and in exceptional cases, when a person is accused of committing such grave or particularly grave crime the detainment term can be extended up to 12 months. Regarding the situation in court proceedings, it is essential to highlight that according to Article 138 (6) there is no maximum limit for the detainment term in that stage of the judicial proceedings.

[45] Ibid. Article 135 (1)

Article 139 of the Criminal Procedure Code regulates the issues of the extension of the detainment term, and asserts that while delivering a decision about the extension of the detainment term of the accused person, the court shall determine the terms of the further detention in the time limits prescribed by the Code and the duration of each extension period shall not last longer than 2 months. From these provision it is evident that there are no special requirements for prolonging the detainment term and these is the next substantial problem.

The abovementioned provisions are the general regulatory norms that are provided by the Criminal Procedure Code. First of all, the provisions do not always comply with the constitutional right to liberty and the purposes of the criminal procedure. The legal regulations have a lot of gaps and give a capacity for excessive use of pretrial detention. The latter is conditioned not only by the provisions of the detention but also with the lack of other alternative restraint measures that can be applied in reality. An internationally accepted standard of applying the pretrial detention as a last resort due to its strictness does not operate because of these and other reasons as well.

In regards of the ECtHR case-law discussed in Chapter I of the present paper, the Armenian legal regulations of pretrial detention and extension of the detainment term are uncertain. As it is stated above, the pretrial detention is the strictest measure of restraint because it interferes with the fundamental human right of liberty for the person who, under the presumption of innocence has not yet been convicted as guilty for a crime and is an innocent person. The risks of the detention such persons are very high as the deprivation of liberty not only limits the right to liberty, but also creates prerequisites for the limitations of many other fundamental human rights. Thus, every single time when the domestic courts are delivering a decision to detain a person in the pretrial criminal proceedings, they should be guided with real and not illusionary grounds and with the concept of "reasonable suspicion" provided by ECHR and relevant case-law.

It can be drawn from the abovementioned provisions of the CPC, standards of the European Convention and the relevant case-law that fundamentally essential requirements of the Convention and ECtHR case-law are not implemented in the domestic legislation, thus, giving grounds for unnecessary and ill-founded applications of the pretrial detention.

First of all, the requirement that the relevant authorities should show that there are grounds for "reasonable suspicion" that the person may flee, interfere with the course of justice or commit other offences is not prescribed by the law.

Another issue is connected with the prolongation of the detainment term, regarding to which according to the ECtHR case-law a genuinely "reasonable suspicion" must be established for the continued detention, however, there comes a moment when the existence of the "reasonable suspicion" is no longer enough and other genuine reasons must be represented to justify the ongoing deprivation of liberty. Meanwhile, the Criminal Procedure Code does not reflect these standards and that is why it should be reviewed.

The Court of Cassation of the Republic of Armenia has its case-law on the issue, and in some of its cases the interpretation of the Article 5 (c) of the ECHR is reflected. The Courts decisions have the nature of precedent, so its role in the application and interpretation of law is essential. In the case of Vahram Gevorgyan of 24 February 2011, the Court affirmed that the first instance court had not justified the pretrial detention in its decision and the issue of the reasonable suspicion was not even considered. In fact, the reasoning of the detention in the decision was the simple wording of the provision of the Criminal Procedure Code. The Court of Cassation claiming the Article 16 (4) of the Constitution (the amendments introduced in 2005) and Article 5 of the ECHR came to the conclusion that the detainment of a person would be legitimate only in case when the reasonable suspicion and the grounds prescribed by the Article 135 (1) will be established.[46]

Although the role of the Cassation Court is highly important and in its decisions the Court is willing to be guided by the ECHR and ECtHR case-law rules and interpretations, the problem should be dealt from higher legislative level and changes should be brought to the CPC, in order to safeguard the right to liberty in its all capacity and exempt unnecessary and arbitrary cases of detention. As it is mentioned above, the problem is that only few cases are brought to higher instances due to poor financial conditions and unawareness of persons involved, who are not able to afford lawyers and protect their rights.

[46] Vahram Rudik Gevorgyan case, February 24, 2011, decision N ԵԿԴ/0678/06/10

To summarize the situation with the current legislation and practice of pretrial detention in Armenia, it is important to note that the legal framework is insufficient and has a lot of shortcomings, that give possibilities for the authorities to abusively apply pretrial detention as a restraint measure, to prolong it when even it is not absolutely necessary, even in the cases where person is suspected in committing not a grave crime. Moreover, there is problem with the real and effective alternatives of the pretrial detention.

CHAPTER III

The Perspectives of Changes in Applying Pre-Trial Detention and Extending the Detainment Term in Legislation and Practice of Republic of Armenia

The problem of excessive use of pretrial detention is a serious problem that needs a comprehensive approach both in legislative level and in practical. For the solution of the issue the causes of the phenomenon should be considered and a relevant conclusion should be drawn in order to fight the problem. In both legislative and practical levels the ECHR and ECtHR standards on application of the pretrial detention have their essential role in fighting against the over-incarceration and excessive use of the pretrial detention. Therefore, the standards in the first limb should be implemented in the national legislation, giving exact grounds and details of applying the detention in pretrial criminal proceedings and prolonging the detainment term. There is a huge need of effective alternative measures as well, which are noncustodial.

In this regards, it is worth mentioning that the Concept of the New Criminal Procedure Code of Republic of Armenia (hereinafter referred to as "Draft") was introduced to the Government of the Republic of Armenia and affirmed by the appendix of the Government Protocol decision of the N 9 session on March 10, 2011. According to the Concept, the Criminal Procedure Code was adopted in 1998 and it was a progressive step for administration of justice in democratic principles and guaranteed the rights and legitimate interests of a person. However, the CPC, with all of its positive attributes, has also shortcomings some of which were existent at the time of the adoption and others emerged during its practical application.[47] In the list of

[47] The concept of the new criminal procedure code, para. 1.2 and 1.3

proposed reforms, the concept plans to clarify the purpose of arrest and detention, its grounds, conditions, as well as procedures of the means of coercion, to enhance and optimize the range of restraint measures. One of the main characteristics of the Draft is the expansion of the scope of the restraint measures. The detention of the accused person may be selected only where the other restraint measures cannot ensure or guarantee the proper behavior and the proportionate protection of public interests.[48] The concept also states that for the initial detention the reasonable doubt of commitment of an offence may be sufficient. In that case the detention can be applied for a one month period. It is unacceptable to extend the detainment term only on the ground of reasonable suspicion.[49] As it can be implied the Concept intends to implement the criteria of the ECtHR by bringing other alternative measures and also the reasonable suspicion at the initial detention period. However, the paragraph 2.31 of the Concept clearly states that the ground of reasonable suspicion is not enough for prolonging the detainment term.

The Draft was introduced to the National Assembly of the Republic of Armenia by the Government, however, since 2012 it has continuously been amended and modified. As was prescribed by its Concept, the Draft suggests vast modifications in the criminal proceedings, particularly in the part of the restraint measures. The Chapter 14th of the Draft is dedicated to the restraint measures and according to the Article 116 (1) "A restraint measure may not be applied unless there is reasonable suspicion that the Accused has committed the act attributed to him".[50] Further Article 116 (2) states that:

"A restraint measure may be applied if it is necessary:

1) To prevent the escape of an Accused;

2) To prevent the commission of a crime by the Accused; or

To ensure the fulfillment by the Accused of obligations placed on him by law or by Court decision".[51]

Meanwhile, the Draft then proposes that justifying the circumstances mentioned in sub-paragraphs 1 to 3 of Paragraph 2 of the Article 116 is not required in two cases:

1) in case of applying certain alternative restraint measures stipulated by this Code;

[48] Ibid. para. 2.29
[49] Ibid. para. 2.31
[50] The Draft of the Criminal Procedure Code of The Republic of Armenia (01.06.2015), Article 116 (1)
[51] Ibid. Article 116 (2)

2) in case of the initial application of detention or an alternative restraint measure upon a person accused of a grave or particularly grave crime.[52] The Draft also suggest that when choosing the type of the restraint measure, all the possible circumstances ensuring or hindering proper conduct by the Accused shall be taken into consideration.[53]

Concerning the second point of no requirement for justifying circumstances of the Article 116 (2) a contradiction is existent with the ECtHR caselaw (*Cabarello v. United Kingom)* and such a rule of law may be considered objectionable because it prevents the courts from considering the particular circumstances of someone who had been deprived of his or her liberty. Therefore, to keep the compliance with the ECtHR case-law and relevant standards, it will be more productive to remove this certain provision from the Draft.

In regards of the pretrial detention and its lawfulness, the Draft provides with rather definite provisions. According to it, the detention is the deprivation of liberty of the accused person by court decision in the cases and procedure stipulated by law for a term defined by law and by such court decision.[54] After defining the detention the Draft suggests the following provision:

> "Detention may be applied only in case the application of alternative restraint measures is impossible or insufficient for preventing the illegal conduct of the Accused".[55]

The implementation of the standard of applying the pretrial detention as a last resort is clear in this provision. The latter provides with additional safeguard that pretrial detention will be applied only when the other alternative restraint measures will be not sufficient to prevent the conducts prescribed by the Article 116 (2) of the Draft.

Another implementation was made in the Article 118 (3) of the Draft, according to which:

> "Detention may be applied only in case when, based on the sufficient totality of factual circumstances, the Investigator or Prosecutor has justified and the Court has confirmed with reasoning the relevant conditions of lawfulness envisaged by Article 116 of this

[52] Ibid. Article 116 (3)
[53] Ibid. Article 116 (4)
[54] Ibid. Article 118 (1)
[55] Ibid. Article 118 (2)

Code. In Court Proceedings, the reasoned confirmation of such conditions by Court is sufficient for applying detention".[56]

Concerning the extension of the detainment term the Draft recommend the following rule:

"When prolonging the detention term, the due diligence exerted by the Body Conducting the Criminal Proceedings for the purpose of discovering circumstances of significance to the proceedings in question, as well as the necessity of continuing the criminal prosecution of the Accused in question must be justified in front of Court, as well."[57]

Here, as it is evident the Draft is implementing the requirement of the ECtHR concerning the prolongation of the detainment term, in regards of that for the continued detention, after a certain lapse of time, the reasonable suspicion cannot suffice the justification of the detention and other genuinely "relevant and sufficient" reasons are indispensable.

Concerning Article 118 (4) it is worth mentioning that the provision divides two necessary prerequisites for the prolongation the detainment term:

1) the due diligence exerted by the body conducting the criminal proceedings for the purpose of discovering circumstances of significance to the proceedings in question;

2) the necessity of continuing the criminal prosecution of the Accused in question.

Although, the provision is a huge step forward in regards of the present legislative regulation upon the issue, but it is has its shortcoming and not really complies with the ECtHR standard. The due diligence of the body that conducts the criminal proceedings has its vital role for the proper administration of justice, however, it is not the only requirement of the ECtHR case-law on the issue. Particularly, the relevant authority can act in due diligence, organizing all necessary examinations and significant conducts, but the core of the justification for the prolongation of detainment term is the promotion of the new "relevant and sufficient" reasons that confirms the reasonable suspicion that the person in question may genuinely act illegally (risk of fleeing, risk of interference with the course of justice, risk of committing further offence).

[56] Ibid. Article 118 (3)
[57] Ibid. Article 118 (4)

The problem of the second perquisite of the discussed provision is that though the appropriate and sufficient grounds for prolonging the detainment term may not be found or justified, but the necessity of continuing the criminal prosecution of the accused person may still be relevant. It can be implied from the provision that in case when the court does not prolong the detention, the person in question should be free of the criminal prosecution. However, the criminal prosecution is a wide term and the Draft does not directly define it. Article 6 (1) (41) of the Draft states that the initiation of criminal prosecution is the act of a prosecutor rendering a decision on engaging a person as the accused, or the act of an alleged victim filing a criminal claim with a court. In respect of the present legislation it should be noted that the CPC defines the criminal prosecution and it means all procedural activities conducted by the prosecuting bodies, and in cases envisaged in the CPC, the injured party, with the purpose of revealing the action prohibited by criminal law, identifying the personality of its actor, determining whether he is guilty of a crime, and ensuring that the criminal is punished or subjected to other compulsory measures, though according to the scholars this definition is incomplete either.[58] Nevertheless, the scope of the criminal prosecution is wide one, and the necessity to continue the criminal prosecution of the person may still be relevant after the detainment term ends.

Thus, the implementation of the ECtHR standard on the issue will be better achieved if the wording of the provision will clearly defines that the establishment of the "reasonable suspicion" no longer suffices for prolonging the pretrial detention and new "relevant and sufficient" grounds for the justification of the detention should be represented by the body conducting the criminal proceedings and affirmed by the court.

Concerning the alternative restraint measures, a progressive step is offered by the Draft and the Article 122 (1) introduces:

1) House arrest;
2) Administrative supervision;
3) Bail;
4) Prohibition of absence;
5) Suspension of office;

[58] See footnote 20, page 35

6) Guarantee;

7) Educational supervision;

8) Military supervision.

Although, the Draft proposes progressive and positive steps, it has some points that should be reviewed in order to implement the ECHR and ECtHR standards on the issue, to safeguard the right to liberty and also the administration of justice. Nevertheless, all of the abovementioned reforms are still in the process of adoption and it will take time to reach the main goals envisaged in those amendments.

CONCLUSION

The right to liberty as a fundamental right prescribed by international legal documents and Constitution should be always properly respected and in every case of depriving a person from liberty should be in compliance with the mentioned legal rules. As already mentioned pretrial detention in criminal proceedings is one of the dangerous parts, which interferes with the right to liberty of a person still innocent. It always should be executed as an exception and as a last resort, when other alternative restraint measures will not suffice for promoting the administration of justice. Pretrial detention cannot be excluded from the criminal proceedings, as it is an essential part of dealing with difficult situations where other social interests are in danger, as well. It has two sides of a coin, both negative and positive. But controlling the use of pretrial detention is not illusionary and it is possible, thus, considerable steps should be taken for developing the legislation and bringing it to a new level. In this respect, the ECHR and ECtHR case-law have their special role for enhancing the quality of the rule of law. The requirements for the “reasonable suspicion” and the ones regarding the prolongation of the detainment term

should be implemented in the national legislation. Also, the alternative restraint measures should be implemented in the law to give the possibility for not detaining a person if it is not *absolutely necessary.* The provisions setting the bail should be flexible and practical, taking into account the financial condition of a person involved. The house arrest should be effectively supervised by Probation Service to insure the effectiveness of the restraint measure. Finally, the courts and other bodies conducting the proceedings should change their approach for detaining a person and should thoroughly examine every single case of deprivation of liberty guided by international standard of applying the pretrial detention as a last resort. Thus, the legislation should provide the details and conditions of every restraint measure, and the authorities should be guided by them, examining the possibilities and conditions from the last restraint measure in the list and only in cases where the all the others are not applicable, the detention "as a last resort" with all of its safeguards should be applied. These will be the first step of fighting against the excessive use of pretrial detention and overincarceration. Moreover, in regards of practical approach, the Cassation Court of the Republic of Armenia should be very thoroughly examining the cases of applying pretrial detention and in this way continue its mission of developing and ensuring the uniform application of the rule of law.

Though the problem is of a global nature and fighting it can be challenging, but steps should be taken anyway, in order to safeguard the fundamental human rights and promote the administration of justice.

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