Non-official translation

HUMAN RIGHTS DEFENDER'S SUGGESTIONS

On Republic of Armenia Draft Criminal Procedure Code

1. ***The period of presenting the individual the decision of his imprisonment and release and the legal status of the latter before presenting the decision.***

The Part 4 of the Article 85 of the Criminal Procedure Code (hereinafter the Draft) instead of the previous 3 hours now envisages 6 hours for presenting the individual the decision on imprisonment or release; nevertheless during that period the legal status of the individual is not defined in any way. Court of Cassation in one of its case decision defined, that the individual brought to custody gets the status of the "brought" and enjoys at least the following rights: a) to know the reason of his arrest; b) to inform on being brought to custody; c) to invite his lawyer, d) remain silent (Court of Cassation decision number ԵԱԴԴ/0085/06/09). The mentioned legal position was not considered in the Draft, hence for 6 hours the individual does not have the status defined by law. Studying a number of countries experience it was revealed that their Criminal Procedure Codes do not define such a long period for the implementation of the above-mentioned activity (France, Georgia, the Russian Federation): Moreover, the visits and results gained by the Torture Prevention Expert Council and Rapid Response Group adjunct to the RA Human Rights Defender testify that even during 3 hours when the individual does not have status defined by law and he/she is still not provided with the decision of arrest, there is a high risk that that person might be subjected to torture or to cruel, inhuman or degrading treatment, therefore prolongation of this period might even worsen the current situation («2011 Report on RA Human Rights Defender activities and on the violations of human rights and fundamental principles in the country», «RA Human Rights Defender as a National Preventive Mechanism 2011» Report):

Based on the above- written we suggest leaving the corresponding provision of the current law that defines the period of presenting the individual the decision of his imprisonment and release unchanged and provide individual a clear status by law during that period.

2. ***Not justifying the presented mediation for assigning the preventive measure***

The point 2 of the part 3 of the Article 91 of the Draft without justifying the circumstances presented in the points 1-3 of the part 2 of the same article defines the implementation of the primary arrest or other preventive means for the individuals accused of grave and very grave crimes. Thus, the investigator can mediate for the implementation of arrest or alternative preventive means against that individual without presenting the court any justification or argument. Consideration of such a provision is against the Article 5 part 1 and the Article 6 of the European Convention of Human Rights (hereinafter ECHR). Related legislations of a number of countries were analyzed revealing that such a provision is absent there. From the decisions of the European Court of Human Rights in regards to such issue it can be concluded, that failure of presenting the individual sufficient justification for arrest does not correspond to the requirements of the European Convention on Human Rights. ("Pirusyan vs.. Republic of Armenia" and "Malkhasyan vs. Republic of Armenia" 2012, Kahit Dimerel vs, Turkey, complaint number 18623/03, 7 July 2009, parag. 24; Boienko vs. Moldova,

complaint number 41088/05, 11 July2006, parag. 143, 144). Moreover, the above-mentioned article of the draft indirectly limits the right and/or the opportunity of the individual for the appeal because of the lack of justification from the accusing side. The part 3 of the Article 93 of the Draft envisions implementation of arrest only in case when the legality conditions anticipated by the relevant Article are justified by the investigator or prosecutor in sufficient wholeness of factual circumstances and were vindicated and approved by the court. As the result of the comparative analysis it can be concluded that point 2 of the part 3 of the Article 91 contradicts the above-mentioned article.

In regards to this case we suggest to define concerning each case for the accusing side the obligation to present justified mediations for implementation of preventive means.

3. The procedure of the interrogation of a teenager

The Part 2 of the Article 235 of the Draft envisaging the interrogation of the teenager victim or witness defines that the interrogation of an individual under 16, or at investigator's discretion interrogation of an individual under 18, is implemented with the participation of a teacher. The legal representative of a teenage victim or witness has the right to be present during the interrogation. The participation of a teacher based on the differentiation of the age at discretion of the investigator is not corresponding to the international demands (UN Convention on the Rights of the Child). The Draft does not envisage during the interrogation of a teenager victim or witness in case of necessity participation of a psychologist next to the teacher. The judicial or investigatory activities towards a teenager should be conducted in accordance to certain procedures. Given the mental development and excitement of a teenage witness or victim the participation of the psychologist during the interrogation comes from the teenager's interest.

Based on the abovementioned we suggest not to define age differentiation, in all cases of the teenager interrogation consider the involvement of a teacher, and in certain cases of a psychologist. Based on the interests of the teenager consider also the latter's legal representative's participation during the interrogation.

4. The Right of the Arrested individual to have free of charge medical examination and medical conclusion.

The Point 4 of the part 1 of the Article 37 of the Draft envisages the right of the accused, in case of arrest at any stage of criminal proceedings, to pass free of charge medical examination and receive conclusion. The Draft, providing the opportunity for the implementation of that right during "each stage" of the clear proceedings, at the same time does not define clear limits both in terms of timing and procedure. In accordance to the 2002 and 2011 criteria defined by the European Committee for the Prevention of Torture, as well as in accordance with the position of European Court of Human Rights on the latter (Salmooghlu and Polattas vs Turkey(17.03.2009)) at each moment the demand for the medical support are aimed at control and/or prevention of torture or other inhuman or degrading treatment. The implementation of the free of charge medical examination on "each stage" instead of "each time" will result in improper implementation of the current right.

For the solution of this issue we offer to change the "each stage" term with "each time" term.

5. Judicial deponation of the Accused confession testimony

In accordance to Part 1 of the Article 328 the judicial deponation of the testimony is carried out - based on investigator's motion- for the provision of trustworthiness of the confession testimony of the accused, and the part 2 of the above-mentioned article defines that the legal deposition of the testimony is carried out in case of reasonable assumption of not being able to be present at the trial for obtaining credible testimony from any individual based on motion of the investigator or any other participant of the case. We consider that the 1st part regulations might be used against the accused, as during the pre-investigation stage the interrogated individuals are under the pre-investigation body control and despite the fact that they are going to be questioned in the court, it is impossible to deny that the individual's court testimony is credible, as the testimony might be obtained under physical and psychological pressure. Moreover, through the above –mentioned provision the investigators will be interested and/or constrained to deponate in all cases confession testimonies for provision of trustworthiness of the confession testimony. Whilst the accused at any point of the trial can announce his/he wish to provide testimony (Part 1 of the Article 355 of the Draft) and the latter will not be at all constrained by his previously presented and deponited testimonies. A number of countries' legislations were studied in regards to this issue and only in the USA legislation defined the deponation of the accused testimony and only with consent of the accused. The rest of the 4 countries define the deponation of the witness when 1) there is a fear that the witness will further participate in the trial, and 2) when two parties of the trial (accusing and defending) have equal rights for the deponation of the witness's testimony (Italy, Bulgaria, Georgia, Estonia, Kazakhstan):

Based on the above-mentioned we suggest to remove the Part 1 of the Article 328 from the New Code.

6. The procedure of confrontation with the participation of juveniles

According to the 1st part of the Article 244 of the Draft, confrontation is a simultaneous interrogation of the two formerly examined persons, in whose testimonies there are significant discrepancies. This Article does not define the possibility that one of the persons might be a juvenile, and moreover it does not specify the case when the juvenile is the victim. Confrontation with the participation of a juvenile is such an investigative operation which would better be completely excluded or performed only with a juvenile's or its legal representative's consent, with involvement of a psychologist, and in case the accused is the juvenile's legal representative the investigator should invite a competent authority. Generally the confrontation of a juvenile may lead to serious psychological problems for the latter, for instance, double victimization. Special procedures of confrontation and/or interrogation of juveniles are clearly defined in certain international legal acts (UN, 2005 "Crimes' basic principles on administration of justice with participation of juvenile-victims and witnesses"; UN, 2005 "Protection of witnesses in the justice system", Proposal N24). According to the Council of Europe's Committee of Ministers R (2006) 8 Recommendation, the State is obliged to ensure the victims' *physical and psychological* immunity in each trial stage. The study of the European countries practice showed that a specific confrontation procedure is defined in case the victim is a juvenile, for instance, confrontation of a juvenile victim with the accused should be conducted only when the juvenile claims it (Switzerland, Latvia). Such a special and privileged order is considered *imperative and legitimate* by ECHR (Sweden (application N34209/96)).

Based on the abovementioned, we recommend to amend this provision and to define a particular procedure for juveniles.