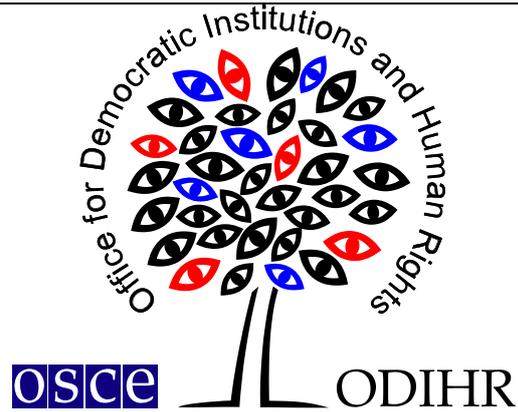


Warsaw, 23 April 2013

Opinion-Nr.: CRIM -ARM/228/2013 [LH]

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OPINION

ON THE DRAFT CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA

Based on an unofficial English translation of the Draft Law

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Annex 1: Draft Criminal Procedure Code of the Republic of Armenia
(unofficial translation; Annex 1 constitutes a separate document)

I. INTRODUCTION

1. *On 1 February 2013, the Minister of Justice of the Republic of Armenia sent a letter to the Head of the OSCE Office in Yerevan requesting an OSCE/ODIHR expert assessment of the Draft Criminal Procedure Code of the Republic of Armenia (hereinafter, “Draft Code”). The OSCE Office in Yerevan forwarded the request to the OSCE/ODIHR and thereafter, on 1 March, also provided an unofficial English translation of the Draft Code.*
2. *This Opinion is provided in response to the Minister’s above-mentioned request, by virtue of OSCE/ODIHR’s mandate to, upon request, provide assistance to legislative reforms in OSCE participating States.*

II. SCOPE OF REVIEW

3. The scope of the Opinion covers key aspects of the above-mentioned Draft Code, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of all framework legislation regulating criminal procedure in the Republic of Armenia. The OSCE/ODIHR reiterates that the recommendations which it made in previous reviews on certain aspects of the criminal procedure law of the Republic of Armenia remain valid.¹
4. The Opinion raises key issues and indicates areas of concern. In the interests of concision, the Opinion focuses on problematic areas rather than on the positive aspects of the Draft Code. The ensuing recommendations are based on relevant international rule of law standards and OSCE commitments, as well as good practices from the OSCE region.
5. This Opinion is based on an unofficial translation of the Draft Code. 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 Code or related legislation that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

7. The OSCE/ODIHR believes that the Draft Code is generally compliant with international standards and relevant good practice, and contains many novel and progressive institutions and procedures. At the same time, in order to further improve its compliance with international standards, it is recommended as follows:

¹ See, in particular, the *OSCE/ODIHR Opinion on Draft Amendments to the Criminal Procedure Code of the Republic of Armenia* (12 November 2010); *Note on the Concept Paper on the Reform of Criminal Procedure Legislation in Armenia* (4 November 2010); and the *Opinion on the Draft Law Amending the Section on Pre-Trial Proceedings in Criminal Cases of the Criminal Procedure of the Republic of Armenia* (15 July 2009). All reviews are available online at <http://www.legislationline.org/search/runSearch/1/country/45/rows/10/type/2>

1. Key Recommendations

- A. to clarify what could be the outcome of the regular proceedings re-instituted upon the accused person's objection to the termination of proceedings under Article 12 par 4 [par 13]
- B. to clarify that the principle of publicity of proceedings applies only to court proceedings [par 14]
- C. to expressly include, in the wording of the prohibition from Article 18 par 6, also "inhuman and degrading treatment and punishment" [par 15]
- D. to reconsider the "deviation" from the equality of arms principle in the cassation proceedings, and to allow the defendant's participation therein [par 16]
- E. to ensure that in cases of revised accusations, the defendant is properly notified and afforded adequate time and facilities to prepare the defense [par 18]
- F. in Article 28, to reflect more precisely the grounds for the exclusion of the public – which should be the ones outlined in Article 6 ECHR – and to bring into harmony Articles 28 and 274 of the Draft Code [pars 20 and 47]
- G. to expressly prescribe, in the section on the principles of the criminal proceedings, the principle of judicial independence (and impartiality) [par 21]
- H. in Article 46, to ensure that the mandatory participation of the defense council is also be allowed in court proceedings [par 24]
- I. to ensure that the difference in the status and position of experts appointed by the authorities, and experts retained by the defense, does not result in a violation of the equality of arms principle [par 27]
- J. to revise Article 65 by providing that the disqualification of a judge shall be decided by another judge or panel of the court, or eventually the president of the respective court, rather than by the respective judge himself or herself [par 28]
- K. in Article 97 par 10, to provide that evidence recognized as impermissible shall be removed from the case-file [pars 30-31]
- L. to reconsider the rule from Article 116 par 3 subpar 2, according to which no reasons have to be given for an initial detention in case of a grave or particularly grave crime [par 33]
- M. to expressly prescribe that any person who had been the victim of arrest or detention in violation of the provisions of the Code shall have an enforceable right to compensation [par 34]
- N. to amend Article 122 by authorizing exclusively the court to grant bail [par 35]

- O. to revise Article 172 by prescribing stricter chronology for the calculation of the time-periods of restraint measures such as deprivation of liberty [par 39]
- P. to amend Article 252 by prescribing a procedure through which any person affected by an undercover action is notified after the event [par 45]
- Q. to permit the conducting of the additional court hearing only in the presence of the convicted person and counsel in the case of Article 351 par 1 subpar 2, unless the defense has unequivocally waived their right to participate [pars 53-54]
- R. to reconsider certain provisions related to the returning of cases to the first instance court for re-examination [pars 56-57]
- S. to clarify certain provisions related to the cassation proceedings [pars 58-60]
- T. in cases involving persons who, subsequent to the perpetration of the crime, developed a mental disorder that renders the imposition or the execution of the sentence impossible, to provide that proceedings shall be suspended until the recovery of the person [par 64]

2. Additional Recommendations

- U. to consider prescribing among the jurisdictional rules that the law of the requesting state shall not be applied if it violates the constitutional principles of the Republic of Armenia [par 10]
- V. to define the term “minor” in Article 6 of the Draft Code [par 11]
- W. to clarify certain provisions in Article 129; Articles 292 and 294; Article 107, Article 140, Article 202; Article 228; Article 258; Article 332; Article 409 [paragraphs 11; 23; 32; 36; 42; 43; 46; 51; 62]
- X. to harmonize Article 12 par 2 and Article 6 par 40 [par 12]
- Y. to ensure that the defense is given the opportunity to draw the attention of the Prosecutor General to the need to initiate a cassation procedure [par 17]
- Z. in Articles 50 and Article 58, to limit the exemption from the duty to testify to cases when the victim/witness by testifying or providing materials would *incriminate* himself or herself or his/her relatives [par 25]
- AA. to consider authorizing the court, rather than the body conducting criminal proceedings, to rule on an attorney’s dismissal [par 29]
- BB. in order to safeguard the right to effective defense, to prescribe that when the accused is removed from the courtroom (because of repeated disobedience or contempt), the participation of the defense counsel shall be mandatory, and that the accused would then hear a summary of the evidence that was examined by the court in his or her absence [par 38]

- CC. to extend the prohibition of using language that may infringe the presumption of innocence to *all* cases where the person has no opportunity to enforce the continuation of the proceedings with a view to having his or her innocence declared by a court judgment [par 40]
- DD. to consider introducing additional safeguards for searches conducted in a lawyer's office as well as in a notary's office or in a medical institution or medical reception rooms [par 44]
- EE. to reconsider and redraft the Article 284 paragraphs 6 and 7 [par 48]
- FF. in Article 336, to provide that if a witness, who had testified at the pre-trial phase, later at trial makes use of their privilege not to testify, the disclosure of pre-trial testimony shall not be permitted [par 52]
- GG. to consider automatically granting an appeal for extraordinary review in cases where a law is passed decriminalizing a certain act [par 61]
- HH. to ensure that a sufficiently long *vacatio legis* is provided for [par 65].

IV. ANALYSIS AND RECOMMENDATIONS

1. Preliminary Remarks

8. Overall, the Draft Code takes into account the standards laid down in global and regional human rights instruments and international documents on procedural arrangements. With some exceptions, the provisions of the Draft Code are in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, "ECHR")² and the jurisprudence of the European Court of Human Rights (hereinafter, "ECtHR"), as well as with relevant Recommendations of the Council of Europe's Committee of Ministers, such as Rec(97) 13 Concerning Intimidation of Witnesses and the Rights of the Defense,³ Rec(87) 18 Concerning the Simplification of Criminal Justice,⁴ or Rec(2006) 8 on Assistance to Crime Victims.⁵ The draft provisions aim at expediting criminal proceedings;

² Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms* (signed on 4 November 1950 entered into force on 3 September 1953; ratified by the Republic of Armenia on 26 April 2002).

³ Rec(97) 13 *Concerning Intimidation of Witnesses and the Rights of the Defense*, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=566782&SecMode=1&DocId=574856&Usage=2>

⁴ Rec(87) 18 *Concerning the Simplification of Criminal Justice*, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=608011&SecMode=1&DocId=694270&Usage=2>

⁵ Rec(2006) 8 *On Assistance to Crime Victims*, available at <https://wcd.coe.int/ViewDoc.jsp?id=1011109&Site=CM>

guarantee defendants' due process rights; protect victims and witnesses; and provide for victims' participatory rights. Commendably, the Draft Code expressly provides for the primacy of international treaties over the provisions of the Code, in case of conflict.⁶ It is also positively noted that some of the novel provisions of the Draft Code take due account of the recommendations which the OSCE/ODIHR had put forward in its *Final Report on the Trial Monitoring Project in Armenia (April 2008 – July 2009)*.⁷

9. It may be noted that the Draft Code deviates from Western European-type criminal procedure laws in that, unlike the latter, it contains detailed provisions which address the internal relations within the law enforcement agencies and the relations between the investigatory bodies and the prosecution service. Examples of such provisions can be found, for instance, in Articles 37 and 38 of the Draft Code on the powers of higher-ranking and supervising prosecutors during pre-trial proceedings. Conversely, "Western"-type criminal procedure laws usually contain only provisions regulating the relationship between so-called public and private participants. However, the option chosen by the drafters of the Draft Code does not raise human rights concerns.

2. Detailed Analysis of the Draft Law

A. General Provisions

10. The General Provisions of the Draft Code, amongst others, set out the jurisdictional rules. Under Article 3 par 1, criminal proceedings in Armenia shall follow the provisions of the Draft Code, irrespective of the place of perpetration. Paragraph 2 of the same Article provides that the Draft Code shall similarly apply to proceedings on alleged crimes committed outside the borders of the Republic of Armenia on board any air, sea or river vessel registered in an airport or seaport of the Republic of Armenia, lawfully under the flag of the Republic or bearing its insignia. The latter provision mirrors Article 14 par 4 of the Criminal Code of Armenia on territorial jurisdiction, albeit imperfectly (minor discrepancies might be the result of translation into English). The provisions on the applicability of the Draft Code in proceedings conducted outside Armenia and on the applicability of foreign law when assistance is requested by an international or a foreign court (Article 3 par 4) are in line with new trends in mutual legal assistance in criminal proceedings. In this context, it may be noted that many codes of criminal procedure also provide that even if an international treaty permits the application of the law of the requesting state, such law shall not be applied if it violates the

⁶ Article 3 par 1 of the Draft Code. See also Article 16 par 4 of the Draft Code, which reiterates that ECtHR judgments are binding on the body conducting criminal proceedings. See also Art. 6 par 4 of the Constitution of the Republic of Armenia (of 5 July 1995, with subsequent amendments).

⁷ See the OSCE/ODIHR *Final Report on the Trial Monitoring Project in Armenia (April 2008 – July 2009)*. The report is available online at <http://www.osce.org/odihr/41695>

constitutional principles of the requested state. The drafters might wish to incorporate such a rule among the jurisdictional provisions of the Draft Code, unless it is already set out in the respective treaties themselves.

11. Article 6 provides for a relatively long list of definitions and key terms used in the Draft Code. It is recommended to similarly define the term “minor”, therein. While the definition of “minor” can be inferred from Article 416 – which provides that the rules on proceedings concerning a crime attributed to a minor “shall apply in proceedings concerning persons that have not reached the age of 18 at the time of arrest or at the time of presenting the Accusation” – the drafters may still wish to define the term in Article 6, both in the interests of legal certainty and also because the term appears (undefined) in a number of provisions prior to Article 416 (for example, in Articles 44, 53, 69, 129 and others). In addition, it is not completely clear whether, for instance, the educational supervision by parents (and others), which is prescribed by Article 129 but is not mentioned in Chapter 51 on proceedings concerning crimes attributed to a minor, could still be exercised if the accused reaches the age of 18 while the proceedings are still in progress. It is recommended to clarify this.
12. Article 12 prescribes the circumstances precluding criminal prosecution. Under Article 12 par 2, the accused is entitled to rehabilitation – defined as restitution under Article 6 par 40 – in the cases set out in sub-paragraphs 1 through 4 of paragraph 1 of the same Article. The respective provisions go beyond the requirements of Article 7 of Protocol 3 to the ECHR,⁸ which obliges state parties to compensate only if the conviction is reversed and it can be shown that there has been a miscarriage of justice, and only if the person suffered punishment as a result of the conviction (unless it is proved that the non-disclosure of the unknown fact in time was wholly or partly attributable to him). With respect to rehabilitation, it may also be noted that there appears to be a certain disharmony between the wording of Article 12 par 2 and Article 6 par 40. According to the latter, rehabilitation means “restitution performed in accordance with the legislation of the Republic of Armenia on behalf of the Republic of Armenia for the benefit of the *Acquitted*” (emphasis added), whereas the former provides for rehabilitation/restitution in the case of *termination* of criminal prosecution, which may also occur without a court decision acquitting the defendant. It is recommended to harmonize these provisions.
13. Under par 4 of Article 12, the termination of criminal prosecution based on the lapse of the statute of limitations, by a general amnesty or by the decriminalization of the respective conduct, “shall not be permitted if the

⁸ See Article 3 of Protocol No. 7 (of 22 November 1984) to the ECHR; ratified by the Republic of Armenia on 26 April 2002.

person objects to it”. In such cases, criminal proceedings may not be terminated and will have to continue under the regular procedure. The solution adopted by the Draft Code is rather unusual (though not entirely exceptional, as similar rules may be found in other countries) – but is nonetheless in line with the rules on the presumption of innocence.⁹ The termination on the above-mentioned grounds may namely make the impression that the accused had actually committed the criminal offense in question. It is however not clear if the regular procedure conducted following the accused person’s objection to the termination of proceedings, may end with a verdict of guilty, or if, in case the accused is not acquitted, proceedings will have to be terminated with reference to the expiration of the statute of limitation, amnesty or decriminalization. One could argue that by objecting to the termination of proceedings, the accused accepts the risk of being ultimately convicted. However, it would run counter to the principles of the rule of law to convict and sentence someone for conduct that could not have been prosecuted due to the statute of limitation, or for conduct that, at the time of adjudication, does not constitute a criminal offense. At the same time, it may appear unreasonable to permit the accused to insist on regular criminal proceedings if such proceedings may then only conclude with either an acquittal or a decision that he or she refused to accept. In the case of a general amnesty, the objection to the termination of proceedings can more easily be justified since no one can be forced to accept the “generosity” of the Parliament, and in that case there are no rule-of-law concerns if the regular proceedings end in a guilty verdict. It is therefore recommended to more clearly prescribe what could be the outcome of the regular proceedings re-instituted upon the accused person’s objection to the termination of proceedings on the above-mentioned grounds.

14. Chapter 3 of the Draft Code prescribes the principles underlying criminal proceedings. In general, the respective list seems comprehensive, and the principles well-selected. Article 15, which prescribes the “publicity of proceedings” and provides that “the conduct of proceedings is a public activity [...]”, raises the question whether pre-trial proceedings, namely criminal investigations, are also meant to be [open to the] public. It is usually the rule that criminal investigations are confidential, and that only court proceedings are public. Unless owing to imprecision in translation (it is noted that the Draft Code uses the terms “criminal proceedings” and “proceedings” distinctly, although no explanation is given for the distinction), it is recommended to clarify that the principle of publicity of proceedings applies only to court proceedings (as is explicitly mentioned in Article 28).

⁹ See *Adolf v. Austria*, ECtHR Judgment of 26 March 1982 (application no. 8269/78), paragraphs 35-41.

15. Article 18 par 6 sets out the prohibition against “torture or unlawful physical or mental violence [...], or other cruel treatment”. In order to more accurately reflect the wording of the ECHR – whose provisions, along with the case-law of the ECtHR, are binding on the bodies conducting criminal proceedings¹⁰ – it is recommended to expressly include, in the wording of the prohibition, also “inhuman and degrading treatment and punishment”, which is expressly prohibited by international law, and which is distinct from “torture” as such.¹¹
16. Article 21 par 1 appears somewhat problematic in so far as it permits “deviation” from the equality of arms principle in the cassation proceedings and in the extraordinary review proceedings. It bears recalling in this context that the ECtHR, in a series of cases brought against Belgium, France and the Netherlands, found a breach of Article 6 ECHR on the grounds of violation of the equality of arms principle exactly in cassation proceedings.¹² In the provisions of the Draft Code, the deviation from the equality of arms principle is reflected in the provisions authorizing the prosecutor to participate in hearings before cassation courts (Article 39 par 10), while denying the defendant the right to be present at such hearings (Article 43 par 26) – although this is to some extent counterbalanced by the fact that defense council may attend such hearings (Article 49 par 15). Since in cassation proceedings, both factual and legal issues are reviewed (see Chapter 48 of the Draft Code), it is recommended to reconsider the above-mentioned provisions and to permit the defendant’s participation in the cassation procedure, as otherwise he/she would be deprived of the opportunity to instruct his or her defense council in such proceedings. Although defense council, under the civil law approach, is an autonomous participant in proceedings, and not “simply” the defendant’s representative as in the common law system, it is essential that the defendant is given the opportunity to consult with his/her council both prior to and *during* the hearing.
17. Related to the above, it is also noted that only the Prosecutor General and his or her deputies may appeal to the court of cassation against a decision rendered by the appellate court (see Articles 358 par 3 and 359 par 2). Since one of the rationales of the cassation procedure is to ensure the uniform application of the law, the respective provisions are acceptable provided that the defense is given the opportunity to draw the attention of the Prosecutor General to the need to initiate a cassation procedure. It is recommended to ensure the latter condition.

¹⁰ See Article 3 par 1 and Article 16 par 4 of the Draft Code.

¹¹ See Article 3 ECHR and, in particular, Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

¹² See *Borgers v. Belgium*, ECtHR Judgment of 30 October 1991 (Application No. 12005/86); *J.J. v. The Netherlands*, ECtHR Judgment of 27 March 1998 (Application No. 9/1997/793/994); *Vacher v. France*, ECtHR Judgment of 17 December 1996 (Application No. 20368/92); *Berger v. France*, ECtHR Judgment of 3 December 2002 (Application No. 48221/99).

18. In line with the civil law tradition, Article 21 par 5 provides that “the court is not bound by the legal assessment of the act attributed to the accused.” It should be noted, however, that in such cases, to comply with Article 6 of the ECHR, the defendant has to be notified if the court is of the view that the legal qualification of the act may be altered. Otherwise, the defendant’s right to be informed in detail of the nature and cause of the accusation against him, and his right to have adequate time and facilities for the preparation of the defense, would be infringed.¹³ It is therefore recommended to include such a rule, for instance in Article 284 par 4 on revised accusations/indictments.
19. Article 22 par 7, prescribing that a conviction may not be based “solely or predominantly” on the testimony of a person whom the accused or his or her defense council had no possibility of cross-questioning, is a commendable incorporation of relevant ECtHR case-law,¹⁴ and represents an important fair trial safeguard.
20. According to Article 28, court hearings are generally public, but the court may, *ex officio* or upon the request of a party, decide that the hearing or part of it should be conducted *in camera*, “provided that this will not result in an unjustified limitation of the publicity principle”. It is recommended to add to this provision the grounds listed in Article 6 par 1 ECHR which may justify the exclusion of the public (i.e., morals, public order or national security in a democratic society, interests of juveniles or the protection of parties’ private lives, or in other special circumstances where publicity might prejudice the interests of justice). It is noted that Article 169 mentions respect for family life and private life among the grounds that may justify an *in camera* hearing; since this provision is placed among the “Other General Provisions”, in Section 5 of the Draft Code, it appears to apply to criminal proceedings in their entirety. As concerns the trial stage, Article 274 enumerates the cases when the public may be excluded from court hearings, but the wording is not identical with that of Article 6 ECHR (see par 47 *infra*). It is recommended to reflect more precisely the grounds for the exclusion of the public, which should be the ones outlined in Article 6 ECHR, and to bring into harmony Articles 28 and 274 of the Draft Code.
21. It is also recommended to prescribe, in the section on the principles of the criminal proceedings, the principle of judicial independence (and impartiality). While Article 15 mentions that “when administering justice or securing other judicial safeguards, a judge must be and appear impartial”, there seems to be no mention of the requirement of judicial independence anywhere in the Draft

¹³ See *Pelissier and Sassi v. France*, ECtHR Grand Chamber Judgment of 25 March 1999 (Application No. 25444/94); and *Dallos v. Hungary*, ECtHR Judgment of 1 March 2001 (Application No. 29082/95).

¹⁴ See *Unterpertinger v. Austria*, ECtHR Judgment of 24 November 1986 (Application no. 9120/80), paragraph 33.

Code. In light of the fundamental importance of this guarantee, it is recommended that it be expressly prescribed among the principles of criminal proceedings.

22. Under Article 43 par 11, the accused has the right to participate in evidentiary actions and other procedural actions that are undertaken upon his or her, or defense council's, request. The accused also has the right to inspect the protocols prepared of these actions (Article 43 par 1 sub-paragraphs 11 and 18.). The same applies to defense council, who however may also be granted the right to participate in other actions and have access to the protocols prepared on these actions (Article 49 par. 1 sub-paragraphs 3 and 12). It is noted that the text mentions that this presupposes "the proposal" of the investigator, though it is left unclear which body shall actually decide on defense council's participation. Limited access to the files may become problematic when it comes to the judicial review of the lawfulness of pre-trial detention, as envisaged by Article 5 par 4 ECHR. According to the ECtHR jurisprudence, it might be legitimate to keep part of the information secret during an investigation, in order to prevent that the course of justice is undermined. However, also during the *habeas corpus* procedure the equality of arms principle must be observed, which means that information essential to assess the lawfulness of detention has to be made available to the suspect's lawyer.¹⁵ If properly applied, the provisions on judicial safeguards of the application of restraint measures in Chapter 38 of the Draft Code, may guarantee compliance with ECtHR case-law.
23. Article 294 stipulates that the court hearing on ordering or prolonging restraint measures shall be conducted on the basis of the equality of the parties, and with the mandatory participation of the investigator and the accused. According to Article 292 par 2 subpar 8, the investigator's motion for applying or prolonging the restraint measure shall indicate the justification for the motion. Materials necessary to confirm the substantiation of the motion shall be annexed (Article 292 par 3) and made available to the "defense party" (Article 292 par 7). From these provisions it may be inferred that in the *habeas corpus* proceedings the detained accused will have the right to inspect also documents that he or she is not permitted to inspect under the general rules on accessibility of materials (Article 49 par 1 subparas 3 and 12). Nonetheless, in the interests of legal certainty, it is recommended to clarify and confirm this in the respective provisions of the Draft Code.
24. Article 46 lists the cases of mandatory defense. It is not clear why mandatory participation of defense council is limited to the period "from the moment of

¹⁵ See *Garcia Alva v Germany*, ECtHR Judgment of 13 February 2001 (Application No. 23541/94), paragraphs 42-43; and, very recently, *X.Y. v. Hungary*, ECtHR Judgment of 19 March 2013 (Application No. 43888/08), paragraphs 51-52.

the person's arrest until the moment the accusation is presented". If due to mental or physical handicap, or mental underdevelopment, the accused is not in a position to defend himself or herself effectively (Article 46 par 1 subpar 1), but also in other cases listed in Article 46 par 2m, it is crucial that defense council participates also in *court proceedings*, i.e. *after* the accusation is presented. Unless owing to imprecise translation (perhaps the text should read "from the moment of arrest OR the presentation of the accusation", assuming that suspects are not necessarily arrested), it is recommended to revise this provision.

25. Under Article 50 par 2 subpar 3 and Article 58 par 1 subpar 3, the victim testifying as a witness, and witnesses in general, may refuse to give testimony and provide materials "if they may later be used or construed to their detriment or to the detriment of their spouses or close relatives". Such exemption from the duty to testify appears too broad and may unnecessarily jeopardize an effective defense. It is recommended to limit the exemption to cases when the victim/witness by testifying or providing materials would *incriminate* himself or herself or his/her relatives (unless the provisions already provide so but the translation into English is imprecise).
26. Article 55 lists the rights and obligations of the "property respondent".¹⁶ It appears that the rights enumerated satisfy the requirements of the ECHR, according to which the respondent in criminal proceedings has the right to a fair trial under the civil "limb" of Article 6 ECHR.
27. Article 59 distinguishes between experts appointed by the authorities and those engaged by the private participants in proceedings. The former issue a written "conclusion" while the latter prepare a written "opinion" (see Article 59 paragraphs 1 and 2). The difference between an expert conclusion and an expert opinion remains unclear, though the experts appointed by the authorities seem to enjoy greater prerogatives. Thus, experts who prepare a "conclusion" (i.e., at the request of the body conducting criminal proceedings) have the power to "demand" objects, samples etc., while the experts working on an "opinion" (i.e., at the request of a private participant), need "the permission" of the criminal proceedings body in order to obtain materials relevant to proceedings (see Article 60 par 1 subparas 1 and 2). Furthermore, it seems that certain evidence, such as "the inability of a witness or victim to correctly perceive, memorize and reproduce circumstances that are significant to the proceedings", may only be adduced through a "conclusion" (see Article 107 par 3), which would imply that only the body conducting criminal proceedings can obtain such evidence. It is recommended to reconsider and revise these provisions, given that, under ECtHR standards, the difference in the status and position of experts appointed by the authorities, and experts

¹⁶ Defined in Article 6 par 1 subpar 27 as "a natural or a legal entity that may bear property liability in the cases and procedure provided by law for damage inflicted by an alleged crime".

retained by the defense, should not result in a violation of the equality of arms principle.¹⁷

28. As regards the provisions on disqualification and recusal, the rule from Article 65 par 4 – according to which in case of a “recusal expressed in relation of a judge” it is the judge in question who will “solve the “recusal” – is problematic since in case the judge whose disqualification was requested by one of the participants decides not to withdraw, this may jeopardize the appearance of impartiality. It is therefore recommended that a panel of the court, or eventually the president of the respective court, be authorized to decide on the disqualification. This would align the procedure to the practice of other European countries, which provide that requests for a judge’s recusal shall be settled by another judge or by a separate panel of judges or by a higher court, but not by the respective judge himself or herself.¹⁸
29. Furthermore, according to Article 65 par 7, the body conducting criminal proceedings may dismiss defense council and other private participants. It would run counter to the principle of equality of arms if, for instance, the investigator would have the power to dismiss defense counsel. It is true that most of the grounds precluding the participation of an attorney (Article 68) are formulated in a manner that excludes arbitrary decisions. However, the decision-maker (i.e., the investigator) has some discretion when assessing whether the attorney provided legal assistance to a person *whose interests are in conflict* with the interests of the person assisted by her or him, or whether the attorney has a *relation of personal dependency* with such a person (Article 68 par 1 subpar 3). It is therefore advised to consider authorizing the court to rule on an attorney’s dismissal instead.
30. The provisions on the use and exclusion of evidence are overall in line with international standards in so far as they provide for the exclusion of evidence which is unreliable or was obtained in material violation of the law. However, it is not clear why “evidence recognized as impermissible shall be kept in the materials of the proceedings” (Article 97 par 10). Keeping such “evidence” in the file may lead to situations in which judges are influenced also by illegally obtained evidence, even if they do not refer to such evidence when reasoning their decisions on the merit. It is recommended that the evidence recognized as impermissible be removed from the case-file. It also bears reiterating, in this context, the recommendation made in the OSCE/ODIHR *Final Report on the Trial Monitoring Project in Armenia (April 2008 – July 2009)*, that “Rules

¹⁷ See *Bönisch v. Austria*, ECtHR Judgment of 6 May 1985 (Application no. 8658/79), paragraphs 33-35.

¹⁸ See, for instance, Articles 670 and 674 of the Criminal Procedure Code of France; Article 40 of the Criminal Procedure Code of Italy; Section 27 of the Criminal Procedure Code of Germany; Article 42 par 2 of the Criminal Procedure Code of Poland; Article 35 par 1 of the Criminal Procedure Code of R. Moldova; Article 67 of the Criminal Procedure Code of Romania; Chapter 4 Article 15 section 3 of the Code of Judicial Procedure of Sweden.

on the inadmissibility of evidence in the Code of Criminal Procedure should clearly state the standard of proof needed to exclude tainted evidence”.¹⁹

31. The above recommendation is particularly relevant given that, under Article 66 par 2, the judge conducting the preliminary hearing – as is common in many jurisdictions – may also serve as the trial judge on the case. Given that at the preliminary hearing, the judge rules on evidence admissibility and decides what evidence shall be examined at trial (see Article 326), this means that the [trial] judge inevitably gets acquainted also with the evidence declared impermissible, and is possibly influenced by it. Article 326 par 4, which stipulates that “impermissible evidence shall be removed from the list of evidence subject to examination, but shall be retained in the criminal case file”, may serve to preclude that *reference* is made to unlawfully obtained evidence in the judgment, but does not ensure that the judge will not be *influenced* by such evidence when assessing the weight of other pieces of evidence examined at the trial. For these reasons, it might be appropriate to consider assigning the preliminary hearing and the decision on evidence admissibility to a judge other than the trial judge, if the exclusion of evidence is requested by the parties. Alternatively, the impermissible evidence could simply be removed from the case-file, as recommended above.
32. Chapter 12 prescribes the rules of the evidentiary procedure (“The Proving”) starting with the list of facts that have to be proven in the course of proceedings (Article 102). It is noted that the list does not contain some circumstances that may be relevant for the application of procedural norms. It is left unclear if that means, for instance, that facts that may lead to the disqualification of the judge, or others, need not be proven. Furthermore, Article 107 lists the facts that have to be proven by a certain type of evidence. That raises the question of whether the list is exhaustive, which if so would mean that the spousal relationship, for instance, which may exempt certain persons from testifying (Article 58 par 1 subpar 3), does not have to be proven by an official document. It is recommended to clarify such matters.
33. Most of the provisions of Section 4 on “Coercive Measures” applied during criminal proceedings are in line with international standards. It is commendable that authorities are obliged to inform the arrested person both orally and in writing about his or her rights (Article 110 par 2 subpar 1, and Article 110 par 5 subparagraphs 1 and 2), and it is similarly welcome that the Draft Code provides for a rather high number of alternatives to detention. On this point, the recommendation made in the OSCE/ODIHR *Final Report on the Trial Monitoring Project in Armenia (April 2008 – July 2009)* should be recalled, namely that courts make appropriate use of such alternatives to

¹⁹ See the OSCE/ODIHR *Final Report on the Trial Monitoring Project in Armenia (April 2008 – July 2009)*, section on “Concluding Recommendations”, p. 9 (page 88).

detention.²⁰ It is further noted that, under Article 116 par 3 subpar 2, no reasons have to be given for an initial detention (it is assumed that this means detention for the first month – see Article 119 par 2) in case of a grave or particularly grave crime, which is somewhat problematic. This would appear to imply that, for instance, the risk of absconding is presumed on the basis of the severity of the punishment that can be meted out for the given criminal offense. This, of course, makes it rather difficult for the defense to challenge the decision to detain. It bears recalling that the ECtHR has held that the danger of absconding cannot be gauged solely on the basis of the severity of the sentence risked and that it must be assessed with reference to other relevant factors too.²¹ It must be noted, however, that the respective ECtHR case concerned the applicant's *continued* detention, which had been ordered with reference to, among others, the seriousness of the alleged offences. In any case, it is recommended to further consider the respective provision.

34. Article 114 regulates the release of an arrested person, among other situations when “the person was deprived of liberty with a material violation of the arrest procedure”. It is recommended to add a provision, whether here or in another relevant Article of the Draft Code (such as Article 18 on liberty and security of persons), to expressly prescribe that any person who had been the victim of arrest or detention in violation of the provisions of the Code shall have an enforceable right to compensation, in line with Article 5 par 5 of the ECHR.
35. It is appreciated that from among the alternative restraint measures, house arrest and administrative supervision can only be ordered by the court (Article 122 par 3). In contrast, bail may be granted in the pre-trial phase of the proceedings also by the investigator and the prosecutor (Article 122 par 4 subpars 1 and 2). Since bail is traditionally understood as an alternative to detention, and since detention may be ordered only by a court, it is recommended to authorize exclusively the court to grant bail.
36. Article 140 regulates the procedure of medical supervision in a psychiatric institution. It is assumed that only the defendant, and not any “person”, may be subject to such supervision. This interpretation seems to be supported by Article 140 par 2 and also by the wording of Article 428. If this interpretation is correct, it is recommended to reformulate the text in Article 140 par 1 so that it clearly refers to “the defendant”.
37. Article 141 lists, among other procedural sanctions, also the removal from the courtroom. According to Article 144 par 1, any “participant” may be subjected to procedural sanctions, which means that both public and private participants can be removed from the courtroom. There is no rule in the

²⁰ See the OSCE/ODIHR *Final Report on the Trial Monitoring Project in Armenia (April 2008 – July 2009)*, section on “Concluding Recommendations”, p. 16 (page 90).

²¹ See *Tomasi v France*, ECtHR Judgment of 27 August 1992 (Application no. 12850/87), paragraph 98.

respective Article on what procedure to follow when the prosecutor is removed; however, Article 280 par 2 provides that the removed prosecutor has to be replaced “if the continued participation of the prosecutor is impossible due to the removal of the public accuser from the proceedings or another reason, he shall be replaced with another prosecutor”. It is unclear what is meant by the term “continued participation”, in this context. If it means “further / future / subsequent participation”, then it raises no concern. What is important is that the trial should not be conducted in the absence of the prosecutor, not even for a relatively short period of time, since in that case the court would have to assume the role of the accuser, which is impermissible.

38. In case of repeated disobedience and contempt by the accused, the court may remove him or her for the rest of the trial and proceed in his or her absence (Article 144 par 4). To safeguard the right to effective defense, it is recommended to prescribe the mandatory participation of defense counsel in such cases. Article 144 par 4 further provides that even where the accused was removed for trial, he or she has to be present during “the publication of the conclusive judicial act”. The right to defense would be better served if the accused were permitted to return to the courtroom after all evidence has been examined, and hear a summary of the evidence that was examined by the court in his or her absence. It is recommended to consider prescribing such a procedure.
39. Article 172 prescribes the procedure for calculating time periods defined by the Draft Code. Thus, par 3 provides that “when counting a time period in days, the time period begins from the zero hour of the night of the first day [...]” and also that “if the day on which a time period ends is not a working day, then the first working day following it shall be considered the last day of the time period”. It is recommended that such relatively lax counting rules do not apply in the case of restraint measures such as deprivation of liberty, to which precise chronology – at least, by the hour – should apply.

B. The Preliminary Proceedings

40. Article 195 regulates the procedure for discretionary criminal prosecution. The provisions on the victim’s right to enforce review of the prosecutor’s decision not to prosecute or to terminate prosecution, by a higher prosecutor and by the court (Article 195 pars 2 and 5, and Article 199 par 6), is in line with the recent trend of recognizing victims’ needs, and represents an important safeguard against possible prosecutorial abuse. In line with the case-law of the ECtHR,²² Article 199 par 5 prescribes that the decision not to prosecute or to terminate proceedings based on certain grounds may not contain “language that casts doubt on the person’s innocence”. However, it

²² See *Minelli v. Switzerland*, ECtHR Judgment of 25 March 1983 (application no. 8660/79).

will rarely occur that in a decision based on proven innocence, or on the fact that the conduct does not constitute a criminal offense, language violating the presumption of innocence would be used. That is more likely to happen in the case of decisions based on other grounds listed in Article 12, such as the suspect's death or the expiry of the statutory period of limitation. It is therefore recommended to extend the prohibition of using language that may infringe the presumption of innocence to *all* cases where the person has no opportunity to enforce the continuation of the proceedings with a view to having his or her innocence declared by a court judgment.

41. According to Article 200, the decision to not initiate or terminate prosecution can be annulled by a supervising prosecutor and, in higher instance, by the Prosecutor General, even in the absence of an appeal, within three months of its entry into force. The Prosecutor General may annul such a decision even after the expiry of three months, but only in case new circumstances come to light (Article 200 par 3). This appears to imply that within three months, the prosecutor's decision not to proceed or to terminate prosecution can be overruled even in the absence of new circumstances. Since the three-month period is relatively short, this provision does not violate the requirement of legal certainty. At the same time, fairness may require that the person is informed of the fact that the decision may be overruled.
42. Article 202 sets out the rules on the inspection of the criminal case-file before the "preparation of the accusatory conclusion". Paragraph 6 of the Article provides that the investigator may set a "reasonable period" within which the files may be studied. It bears recalling that Article 6 par 3 letter "b" of the ECHR provides that everyone charged with a criminal offense has the right "to have adequate time for the preparation of his defense". This should be borne in mind when the respective time period for the case-file inspection is set.
43. Article 228 specifies the modalities of questioning an accused. Paragraph 4 of this provision contains a commendable list of all the information that has to be given to the accused before he or she is questioned by the investigator. At the same time, this provision states that if the accused is prepared to testify, he or she must be informed of "the obligation to tell the truth and the liability prescribed for giving false testimony". It is not quite clear if this shall apply only to situations where the accused testifies as a witness and is therefore generally criminally liable of perjury, or whether such liability arises only in the case of falsely accusing another person, as is the case in countries following the civil law model of criminal procedure. Under the civil law approach, the testimony of the accused is an independent source of evidence and the accused is not under an obligation to tell the truth. If, however, the accused testifies as a witness and is thus under an obligation to tell the truth and faces prosecution for perjury, then Article 336 par 3 may be problematic. It also provides that the testimony given by the accused before the investigator

may not be disclosed if it was obtained in the absence of a defender and the accused claims at trial that “it was erroneous”. While this provision, in and of itself, is an important safeguard against forced confessions and pressured testimonies, it might also lead to a situation in which the accused could be prosecuted for perjury for having given an untruthful testimony, provided that “erroneous” (in Article 336 par 3) is the equivalent of un-“truthful”, or “false” (in Article 228 par 4). It is recommended to clarify these provisions.

44. Under Article 241 par 2, the search of a “house” can only be authorized by a court. In this context, it is somewhat unclear – possibly as a result of translation – whether medical reception rooms and premises in medical institutions are also covered by the term “office”, contained in the definition of “house” in Article 6 par 53, and therefore qualify as a “house” that can be searched only by court order. Furthermore, it must be noted that according to the case-law of the ECtHR,²³ additional guarantees may be needed if the search is conducted in a lawyer’s office (for instance, the presence of a representative of the Bar) but also in a notary’s office or in a medical institution or medical reception rooms. It is recommended to consider introducing such additional safeguards.
45. According to Article 252 par 5, the protocol of undercover investigative actions shall be transferred to the investigator, and “may not be transferred to other bodies or persons”. However, there should be a procedure to ensure that the person affected by the undercover action is notified after the event. In the absence of legal provisions on notification and on the system of remedies for the ordering and execution of undercover measures, anyone can claim to be a victim of a violation of the right to respect for private and family life under Article 8 of the ECHR.²⁴ It is therefore recommended to prescribe a respective notification procedure.
46. Article 258 prescribes the procedure for the simulation of taking or giving a bribe. It is commendable that the simulation is only permissible on the basis of a written statement made by the person who claims to have received an offer to accept or give a bribe (Article 258 par 1). However, it should be ascertained that the statement made by the respective person is likely to be true, since otherwise the simulation may qualify as instigation (or entrapment) and result in a breach of Articles 6 and/or 8 of the ECHR.²⁵

C. The Court Proceedings

47. Article 274 sets forth the rules on the publicity of court proceedings, with the exception outlined in par 2 of the Article. Contrary to Article 6 par 1 of the

²³ See *Niemietz v. Germany*, ECtHR Judgment of 16 December 1992 (Application No. 13710/88).

²⁴ See *Klass v. Germany*, ECtHR Judgment of 6 September 1978 (application No. 5029/71).

²⁵ See *Teixeira de Castro v. Portugal*, ECtHR Judgment of 9 June 1998 (application No. 44/1997/828/1034).

ECHR, the protection of morals, public order and national security are not mentioned among the grounds justifying the exclusion of the public (although “the protection of state secrets” from Article 274 par 2 subpar 4 can be said to be covered by the notion of “national security” from Article 6 par 1 ECHR). Of course, narrowing the grounds for the exclusion of the public raises no concerns, unlike the adding of grounds which are not recognized as legitimate under the ECHR. Such a ground is the protection of banking, insurance, service and commercial secrets as well other secrets “designated by law” (Article 274 par 2 subpar 4). The exclusion of the public with reference to the need to protect such various secrets might be problematic. It is certainly true that the list of the grounds in Article 6 of the ECHR is not exhaustive, given that the public may also be excluded if the court finds that “in special circumstances [...] publicity would prejudice the interests of justice”. However, it can be argued that the interests of justice may not be invoked to justify the exclusion of the public in order to protect, for instance, business secrets. At the same time, both Article 274 par 2 of the Draft Code and Article 6 par 1 of the ECHR make mention of the right to privacy as a ground justifying the holding of an *in camera* hearing, and the ECtHR has given a rather broad interpretation of the right to private life, including therein also activities of a professional or business nature.²⁶ Even so, it is recommended that courts employ great caution when using the power to exclude the public with reference to the protection of banking secrets, business secrets or insurance secrets.

48. Under Article 284 par 6, if the prosecutor, after the examination of all evidence at trial, concludes that the case may not be proven, then he or she shall file a petition in the closing speech proposing the defendant’s acquittal. Although not common in “Western”-type criminal procedure laws, where the prosecutor in such cases would simply drop the charge, the option chosen by the Draft Code raises no concerns. However, the fact that the court is not bound by the prosecutor’s respective petition (Article 284 par 7), appears problematic given that it may run counter to the principle of separation of prosecutorial and judicial functions and also since it may raise doubts as to the court’s impartiality. If the prosecuting party is of the opinion that the defendant may not be held criminally liable, but the court in spite of that convicts the defendant, then not only the defendant, but also objective observers may reasonably question the court’s impartiality. It is understood that the respective provisions are well-intended, aiming to prevent the abuse of prosecutorial powers, and to protect the interests of victims. However, the same goals could be accomplished by placing the prosecutor under an obligation to adduce reasons for his or her belief that the accusation may not be proven, complemented by the already mentioned options for victims to

²⁶ See *Niemietz v. Germany*, ECtHR Judgment of 16 December 1992 (Application No. 13710/88), paragraph 29.

challenge such decision. It is therefore recommended to reconsider and redraft the respective provisions.

49. Chapter 38 on judicial safeguards for the application of restraint measures contains a number of progressive provisions. It appears that the accused and counsel are provided with the necessary materials to enable them to challenge the investigator's position and guarantee the observance of Article 5 par 4 of the ECHR (Article 292 paras 3 and 7). The hearing on ordering or prolonging a restraint measure (detention, house arrest and administrative supervision) is adversarial and conducted on the basis of the parties' equality (Article 294). It may be noted that in most civil law countries, court hearings prior to the trial (for instance, hearings on releasing the detainee and granting bail) are normally closed to the public. The Draft Code follows the common-law tradition in so far as it provides that, as a general rule, the hearings on restraint measures are open to the public, though the court may still decide to hold the hearing in camera (Article 294 par 3). It is laudable that also the detained accused and his or her defender and legal representative may file a petition to the court for release or for the application of an alternative measure of detention (Article 296). The court may either reject the petition or grant it "partially or fully" (Article 296 par. 4). It is noted that the petition must be filed not later than seven days before the end of the detention term and that if the deadline is not observed the court will automatically reject the initiation of proceedings (Article 296 par 2). This seemingly rigid rule raises no problems here, as in order to prolong the detention, a new hearing must be held upon the initiative of the investigator who must submit a petition not later than five days before the end of the detention term (Article 292 par 1 and 6).
50. Chapter 42 (Articles 312-315) prescribes the judicial deposition of testimony. This novel procedure for Armenia – the enactment of which was suggested by the OSCE/ODIHR *Final Report on the Trial Monitoring Project in Armenia (April 2008 – July 2009)*²⁷ – should serve as an important tool for preserving witness testimony for use at trial in case a witness dies, becomes ill, or due to fear or other reasons is unable to testify at trial and be subject to cross-examination by the defense. Taken in conjunction with the rules from Article 22 par 7 and from Article 336, the deposition procedure aims to prevent the liberal reading, at trial, of pre-trial statements taken by law enforcement officials – a rather common malpractice (from the viewpoint of adversariality) in the criminal proceedings of many post-soviet countries, including Armenia.²⁸ The new deposition procedure prescribed by the Draft Code compares favorably with similar provisions from European criminal procedure

²⁷ See the OSCE/ODIHR *Final Report on the Trial Monitoring Project in Armenia (April 2008 – July 2009)*, section on "Concluding Recommendations", p. 4 (page 88). The report is available online at <http://www.osce.org/odihr/41695>

²⁸ *Ibidem*, pages 51-52.

codes,²⁹ and represents a commendable step forward for Armenia's criminal procedure.

51. The questioning of persons at trial follows the common-law adversarial model in which an individual is first questioned by the party that petitioned the invitation of the person (Article 332 par 3). Assuming that the accused testifies as a witness – see par 43 above, recommending a clarification on this point – it is assumed that he or she will be first examined by his or her counsel. If however the accused is not represented by counsel, then it is not clear who will first examine the accused. It would also be helpful to clarify this.
52. Article 336 regulates the disclosure of testimony during court examination. Under certain conditions, the testimony given at the pre-trial stage may be disclosed at trial. According to Article 336 par 2, a person's past testimony may be disclosed after the person has been questioned in the trial or if it turns out that his or her "questioning is impossible". This raises the question whether the provision, in addition to the cases explicitly mentioned in Article 336, also extends to testimonies of witness who had testified at the pre-trial phase but who later, at trial, make use of their privilege not to testify (because by their truthful testimony they would incriminate themselves or a relative). With a view to safeguarding family life and private life, as well as with a view to safeguarding the adversarial nature of the trial, it is recommended not to permit the disclosure of pre-trial testimony in this case.
53. From Article 351 on issues subject to discussion during additional court hearings, it appears that the Draft Code follows the bifurcated system of trials which is typical of the common-law model: the trial ends with the rendering of the verdict (guilty or not guilty) and then the sentence is imposed in a separate, additional hearing. At the additional hearing, a number of other issues may be discussed and decided. Although the additional hearing is to be conducted with the participation of the public accuser and the private participants to the proceedings, "the absence of the public accuser and the private participants shall not be an obstacle to conducting the additional court hearing, unless the court decides otherwise" (Article 352 pars 1 and 2). On this point, it bears recalling that according to the case-law of the ECtHR, the right to a fair trial, including the requirement of adversarialness, applies also at the sentencing stage of the trial.³⁰ It is therefore recommended not to permit the conducting of the additional court hearings in the absence of the convicted person and counsel in the case of Article 351 par 1 subpar 2.
54. Holding such hearings in the absence of private participants also appears problematic when matters such as the compensation for the damage caused by

²⁹ See, for instance, the Criminal Procedure Code of Italy, Articles 392, 401 and 403.

³⁰ See *Findlay v. UK*, ECtHR Judgment of 25 February 1997 (Application no. 22107/93) and *T. v. UK*, ECtHR Grand Chamber Judgment of 16 December 1999 (Application No. 24724/94).

the crime, or the issue of restraint measures, form the subject of the additional hearing. In the case of damages, this involves the determination of a civil right, and thus Article 6 par 1 of the ECHR must automatically be respected. When compensation for damages is at issue (and also “solving the property claim”), it is recommended to limit the holding of an additional hearing in the absence of private participants to cases where they have clearly and unequivocally waived their right to be present. The unequivocal waiver of the right to be present by the convicted person and counsel should similarly be a precondition for conducting the hearing in their absence when such hearing concerns or involves the application of coercive measures.

55. As regards the appeals procedure, it is commendable that in order to guarantee the equality of the parties, a copy of the appeal lodged by one of the participants is sent for comments to all participants whose interests are concerned (Article 368). Generally speaking, the powers of the appellate courts are relatively broad; in addition to examining legal issues, they may, within certain limits, also examine new evidence (Art. 372), and therefore the participation of the parties is essential. The appellate court, as a general rule, is bound by “the ground stated in the petition for appeal and the facts confirming it”. It is commendable that additionally, the appellate court is able to surpass the scope of the petition to the benefit of the accused in certain cases (Article 372 par. 1).
56. The Draft Code also prescribes the prohibition of *reformatio in peius* (Article 376 par 2), though it is not clear to what extent this prohibition applies when the case is returned to the first instance court for re-examination (for instance, in the case envisaged in Article 380 paragraphs 3 and 4, or when the case is returned to the first instance court because of the violation of procedural rules). The power of the appellate court to convict an accused who was acquitted by the first instance court (or in cases where the criminal prosecution was terminated), instead of returning the case to the first instance court in cases where the case had previously already been “transferred” back to that court on the same grounds (Article 380 par. 4), appears problematic. First, this provision might appear troublesome from the viewpoint of respect for judicial independence. Presumably, the rationale of the drafters of the Code was that in case the first instance court is not willing to accept the legal position of the appellate court, the procedure may never end. This point is well taken. However, some more informal means such as judicial conferences might perhaps be used to ensure that the position of the appellate court is followed by the lower court, or that the appellate court accepts the position of the first instance court.
57. The provision in question is also problematic because it actually undermines the right to appeal. It is true that, according to Article 2 of Protocol No. 7 to

the ECHR,³¹ the right to appeal may be subject to exceptions if the person concerned was convicted following an appeal against an acquittal. However, it is also noted that the Constitution of the Republic of Armenia provides that “[e]very convicted person shall have the right to review of the judgment passed on him or her by a higher instance court”,³² without making mention of any exception in that regard. It is therefore recommended to reconsider the respective provisions.

58. As regards cassation proceedings, it bears recalling that typically, cassation courts rule on legal issues. The power of the Armenian Cassation Court is broader, since in addition to legal questions it may also deal with factual issues. Cassation courts normally annul judgments of lower courts and send the case back for re-trial, whereas the Armenian Cassation Court may also amend (change) lower courts’ decisions under certain conditions. The prohibition of *reformatio in peius* applies also to cassation proceedings; accordingly, the acquitting judgment may not be quashed and a convicting judgment may not be quashed or changed in a way that “deteriorates the condition of the accused”, save for cases where the prosecutor or the victims or their representative have lodged an appeal demanding it (Article 393 par 3). It is assumed that this provision refers to “ordinary” appeals, since under Article 359 par 2, an appeal for review to the Cassation Court can be lodged by the Prosecutor General and his or her deputies only.
59. At the same time, Article 393 par 2 provides that the Cassation Court may not change the sentencing part of the lower court’s judicial act. This provision seems to prohibit changes to the convicting judgment to the detriment of the accused and appears to contradict what is stated in Article 393 par 3. As in the case of “ordinary” appeals, it is not clear to what extent the prohibition of *reformatio in peius* applies if the decision is quashed and the case is sent back to the lower court. According to Article 386 par 4 subpar 3, cassation review is permissible if the type or the severity of the sentence imposed on the accused for the crime attributed to him/her is not prescribed by law for that crime or if the sentence imposed was wrongly calculated. According to Article 394 par 3, the Cassation Court may quash the first-instance decision and transfer the case back to the lower court. In this context, it is not clear whether the lower court is prevented from imposing a harsher sentence if the court that imposed the original judgment erred to the benefit of the accused. It is recommended to clarify these aspects.
60. Article 395 par 2 provides that the decision of the cassation court shall be sent to the person who lodged the appeal and to other participants in proceedings “within a reasonable time period after the date of rendering the decision”. To

³¹ Protocol No. 7 (of 22 November 1984) to the ECHR, ratified by the Republic of Armenia on 26 April 2002.

³² Article 20 par. 3 of the Constitution of the Republic of Armenia (adopted on 5 July 1995, with subsequent amendments).

prevent undue delays in notifying participants, the drafters might wish to consider setting a precise timeframe for sending out the cassation court decision, perhaps similar to the rules applying to decisions on appeal (see Article 384 par 2, which provides that decisions on appeal shall be sent to participants “not later than within five days of publication”).

61. As concerns extraordinary review proceedings, Article 409 par 1 subpar 7 provides that an appeal for extraordinary review may be lodged if “a law decriminalizing the act has entered into force, *provided that such law provides the possibility of review due to new circumstances*” (emphasis added). On this point, it bears recalling that the ECtHR has in recent years affirmed, in light of a consensus that had emerged over the past few decades in Europe and internationally, that “Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence, and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant”.³³ While this *dictum* is distinguishable from the case of the extraordinary review proceedings – which are an instrument by which a *final* judgment can be set aside – it is nonetheless recommended that whenever a law is passed decriminalizing a certain act, an appeal for extraordinary review is *automatically* granted. The rationale for this recommendation is that no person should be held in jail for an act which is not considered to be a crime at the time of the implementation of the criminal sentence.
62. Article 409 par 1 subpar 7 provides that an appeal may be lodged if newly discovered circumstances not known to the court rendering the original judgment seem to prove the “innocence of the acquitted person [...]”. This appears to be an error – possibly due to translation – as, logically, the appeal should be allowed where new evidence suggests the *guilt* (and not the “innocence”) of the “acquitted person”.
63. Chapter 51 regulates the proceedings concerning crimes attributed to minors. The provisions are generally in line with international standards on juvenile justice. Contrary to what is set forth in Article 6 par 1 of the ECHR, in juvenile cases the rule is to hold hearings *in camera* (Article 424 par 1). However, in light of the ECtHR judgment in the case of *T. v. UK*,³⁴ and the possibility to request a public hearing, the respective provision does not raise concerns.

³³ See *Scoppola v. Italy*, ECtHR Grand Chamber Judgment of 17 September 2009 (Application No. 10249/03), paragraph 109.

³⁴ *T. v. UK*, ECtHR Grand Chamber Judgment of 16 December 1999 (Application No. 24724/94).

64. As regards proceedings to apply compulsory medical measures (Chapter 52), it is noted that such proceedings may also be conducted in respect of a person who, subsequent to the perpetration of the crime, developed a mental disorder that renders the imposition or the execution of the sentence impossible (Article 428 par 1 subpar 2). Such a person, who is probably unable due to his or her mental state to defend himself or herself, can then be convicted (Article 436 par 2 subpar 5 and Article 436 par 6). This raises concerns, and it is recommended that instead, in such cases, proceedings be suspended until the recovery of the person.

D. Final and Transitional Proceedings

65. Finally, in light of the complexity of the Draft Code and the significant number of novel procedures which it aims to introduce, it is recommended that a sufficiently long *vacatio legis* be provided for, so as to allow for adequate and efficient training of law enforcement and judicial personnel, as well as defense counsel, on the new legal provisions. From this perspective, depending on when the Draft Code is adopted in final reading, the date of entry into force of the Draft Code, currently set for 1 January 2014 (see Article 471), might have to be extended.

[END OF TEXT]