AMERICAN UNIVERSITY OF ARMENIA

MASTER'S PAPER

Bail as an alternative preventive measure in Armenia

Instructor: Armen Mazmanyan

Student: Irina Kharatyan

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Terms and abbreviations used in Paper

1. Republic of Armenia – RA
2. Council of Europe - CoE
3. European Convention for the Protection of Human Rights and Fundamental Freedoms – ECHR
4. European Court of Human Rights – ECtHR
5. Code of Criminal Procedure – CCP
6. Code of Criminal Procedure of the Republic of Armenia – CCP RA
7. Code of Criminal Procedure of Russian Federation – CCP RF
8. Cassation Court of Armenia – CC RA

Introduction

The right to liberty and security, as well as presumption of innocense are inalienable rights included in most of the International Conventions, as well as in Constitutions and Legal Codes of many Countries. The European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights stand at the heart of the protection mechanism guaranteeing these rights.

On 25 January 2001 the RA became a member of the Council of Europe. On April 26, 2002 the National Assembly of RA ratified the "European Convention for the Protection of Human Rights and Fundamental Freedoms". Individual's freedom is one of the fundamental values protected by the ECHR, warranting close scrutiny on the part of the ECtHR concerning any measure that infringe on this right.[1]

Every State after ratifying the European Convention starts working on making its national legal provisions in compliance with the standards and principles of the Convention. Armenia has made amendments in different laws and legal provisions in order to protect rights and fundamental freedoms and comply with requirements of ECHR and ECtHR case law. However, there are certain fields that still have drawbacks and need to be changed. In this research I will discuss the issue of incompliance of Armenian law and practice concerning alternative preventive measures, especially bail, with requirements of European Convention on Human Rights and the Case Law of the European Court of Human Rights. According to Article 5 of ECHR, "Everyone has the right to liberty and security of person". According to Article 6 of ECHR, "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". This means that there should be no right to imprison persons simply because they have been accused of a crime, no matter how serious. Bail must be available as of right for most offences, and those accused of

[1] Eur.Ct.H.R. – De Wilde, Ooms and Versijp v. Holland, 18.06.1971

serious crimes *must* be released on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention.

Although the Cassation Court made first attempt in harmonization of relevant provisions of CCP RA with ECHR Article 5, the practice shows that the law in this field is weak and does not work properly. The statistics shows that notwithstanding the existence of numerous ECtHR judgements against other CoE member states, in Armenia most of the people suspected of committing crimes are under detention and only in very few cases bail as an alternative preventive measure was applied. The system of ECHR highly requires that Member States bring their domestic legislation into compliance with the provisions of the ECHR before any complaint is brought against it. Also, the CoE highly recommends that if there exist a judgment against one of the Member States, the others make legislative amendments in order to create a uniform legal system covered by the ECHR. This is the reason why I decided to make proposals to change relevant provisions of CCP RA and make our practice in this field in compliance with ECHR standards.

The objective of the Paper is to protect the right to liberty of any person accused of committing crime until the court will prove his guilt and avoid possible ECHR judgments concerning this issue against Armenia and paying monetary damages from the state budget for violations of human rights. In order to meet the objective, I will propose legislative amendments in Criminal Procedure Code, based on the practice of other post-soviet countries, which have also faced this problem and amended their laws.

Law and Practice of Armenia concerning bail as an alternative preventive measure.

CCP Article 135 stipulates: "…Arrest and the alternative preventive measure shall be executed in respect to the accused 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 can commit actions mentioned in the first part of the present Article".

CCP Article 137 para. 4: " … upon delivering an order for arrest the court decides on the admissibility of the release of the accused on bail; if the court determines pre-trial release is permissible, it shall determine the amount of the bail.

CCP Article 139 para. 2 stipulates: "Upon the settlement of the issue of the extension of the detainment period the court shall have the ***right*** to allow the release of the accused on bail and determine the amount of the bail".

CCP Article 143. Bail

1. Bail may consist of money, securities and other valuables posted by one or several persons to the deposit of the court for the release from detention of someone accused of committing a crime classified as minor and medium gravity.

…

4. The amount of the bail designated by the court shall not be less than:

1) the minimum amount of 200 salaries - when the accusation is one of committing a crime classified as minor.

2) the minimum amount of 500 salaries when a crime is classified as medium.

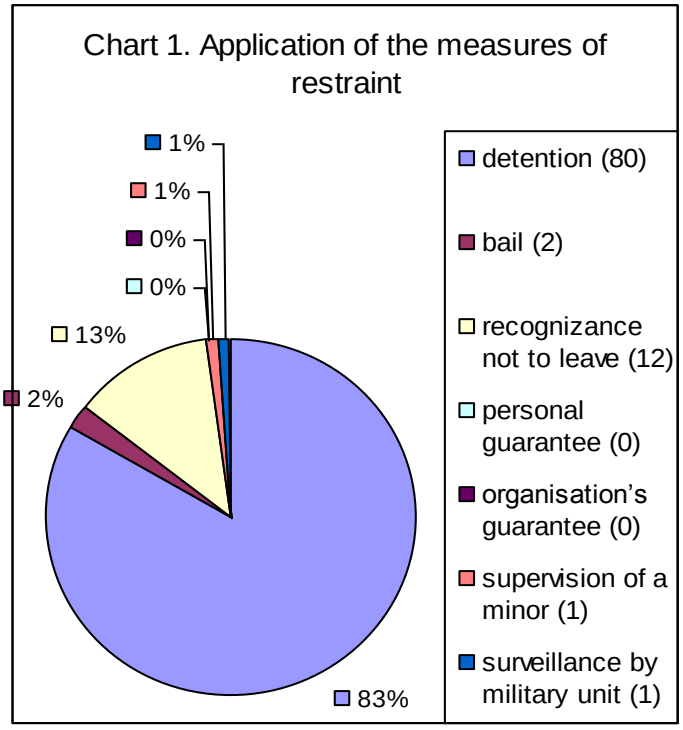
Decision of Cassation Court of Armenia, Taron Hakobyan, 13 July 2007, which gives the power to the court to consider bail in all cases.

Research shows that bail is rarely applied as a preventive measure in Armenian legal practice. In 2001 there were 6 cases registered when the preventive measure of arrest was changed to bail. In the first six months of 2003, bail was chosen only once. Of the researched proceedings there were only 2 cases registered for bail, however, one of those cases was cancelled in the Court of Cassation. One investigator explained the following example, "Over the past nine months we presented about 60-70 petitions for arrest and only in four cases the preventive measure of bail was applied."[2]

[2] Monitoring of Preliminary Detention Cases in the Republic of Armenia, Civil Society Institute, NGO, Yerevan 2005, Chapter 3, page 17.

On February 15, 2008, during the press conference in Cassation Court of Armenia, statistical data was presented by Chairman of Chamber of Criminal Cases Davit Avetisyan, which confirms the results shown in Civil Society Institute's research. He mentioned that in 2007 detention as a preventive measure was applied to 2780 persons, when bail was applied to 62 persons[3].

OSCE Final Report on Trial Monitoring Project in Armenia (April 2008 – July 2009) also shows that the most frequently applied preventive measure was detention, which was applied in 83% of observed cases (see the Chart 1)[4]. Bail was applied only in 2% of the observed cases.



[3] Statistics provided by the Cassation Court of Armenia
[4] OSCE Final Report on Trial Monitoring Project in Armenia (April 2008 – July 2009), page 20

Official statistical data of the Cassation Court of Armenia for 2009 shows that bail was applied in 186 cases, when detention was applied in 3362 cases. Official statistical data of the Cassation Court of Armenia for first six months of 2010 shows that bail was applied in 101 cases, when detention was applied in 1710 cases.

Relevant Legal Provisions of other CoE Member States, Especially of Post- Soviet and Communist Bloc States

1. Poland

Chapter 24 of the Law of 19 April 1969 – Code of Criminal Procedure (*Kodeks postępowania karnego*) – entitled "Preventive measures" (*Środki zapobiegawcze*). The Code is no longer in force. After receiving numerous ECHR judgments against Poland, it was repealed and replaced by the Law of 6 June 1997 (commonly referred to as the "New Code of Criminal Procedure"), which entered into force on 1 September 1998.

The Code listed as preventive measures, *inter alia*, detention on remand, bail and police supervision.

The Code set out the margin of discretion in maintaining a specific preventive measure. Articles 213 § 1, 218 and 225 of the Code were based on the precept that *detention on remand was the most extreme preventive measure and that it should not be imposed if more lenient measures were adequate.*

Article 213 § 1 provided:

"A preventive measure [including detention on remand] shall be immediately lifted or varied, if the basis for it has ceased to exist or new circumstances have arisen which justify lifting a given measure or replacing it with a more or less severe one."

Article 225 stated that detention on remand *shall not be imposed* if bail or police supervision, or both of those measures, are considered adequate.

Finally, Article 218 stipulated:

"If there are no special reasons to the contrary, detention on remand should be quashed, in particular when:

(1) it may seriously jeopardise the life or health of the accused, or

(2) it would entail excessively burdensome effects for the accused or his family."

The fact that Polish Courts in the past have not been very open to alternatives to pre-trial detention has led to several critical remarks and decisions by the ECHR because the ultima ratio-character of this measure was not even considered. One of those cases is Litwa v Poland, which is discussed below.

BULGARIA

Article 152 §§ 1 and 2 of former CCP, provided as follows:

"1. Pre-trial detention shall be ordered [in cases where the charges concern] a serious intentional offence.

2. In the cases falling under paragraph 1 [pre-trial detention] may be dispensed with if there is no risk of the accused obstructing the course of justice, absconding or committing further offences."

Article 93 § 7 of the CC defined a "serious" offence as one punishable by more than five years' imprisonment.

The Supreme Court's practice at the relevant time (it has now become at least partly obsolete as a result of amendments to the CCP in force since 1 January 2000) was that Article 152 § 1 required that a person charged with a serious intentional offence be detained. An exception was only

possible, in accordance with Article 152 § 2, where it was clear beyond doubt that any risk of absconding or re-offending was objectively excluded as, for example, in the case of a detainee who was seriously ill, elderly, or already in custody on other grounds, such as serving a sentence (опред. № 1 от 4 май 1992 г. по н.д. № 1/92 г. на ВС I н.о.; опред. № 48 от 2 октомври 1995 г. по н.д. № 583/95 г. на ВС I н.о.; опред. № 78 от 6 ноември 1995 г. по н.д. 768/95 г.).

Paragraph 3 of Article 152, as in force until 11 August 1997, provided that remand in custody was mandatory without exception where other criminal proceedings for a publicly prosecutable offence were pending against the accused, or where he or she was a repeat offender.

On 21 March 1997 the Supreme Court of Cassation examined a request by the Chief Prosecutor for an interpretative decision on Article 152 of the CCP. The court considered that Article 152 § 3 of the CCP was incompatible with the Constitution, the Convention and the International Covenant on Civil and Political Rights. It therefore decided to submit the matter to the Constitutional Court which is competent to rule on the compatibility of legislation with the Constitution and international treaties. Ultimately, the Constitutional Court did not decide the point, as the impugned provision was repealed with effect from 11 August 1997.

The issue was made clear after adopting a new CCP of Bulgaria, which is in force since 2006. Article 63 of the new Code states:

(1) The restraining measure detention in custody shall be taken when a grounded assumption that the accused has commuted a crime, which is punishable with imprisonment or other stricter punishment, and the evidence on the case indicates a real danger that the accused may abscond or commit a crime exists.
(2) Should the opposite not be found from the evidence under the case, the danger under Para 1 shall be there upon the initial disposition of detention in custody, when:
1. 1. The charge is for an offence committed repeatedly or under the conditions of a dangerous recidivism;
2. The charge is for a grave malicious crime and the accused has been convicted for another grave malicious crime of general nature to imprisonment of no less than one year or to another more severe punishment, the execution of which has not been delayed on the grounds of Art. 66 of the Penal Code;
3. the person has been involved as accused in a crime for which a punishment of at lest 10 years

imprisonment or other more severe punishment is provided.
(3) Where the danger that the accused may abscond or commit another crime is over, the detention in custody shall be replaced by a lighter restraining measure or shall be cancelled.
Article 64 of the same Code states:

(4) The court shall take restraining measure detainment in custody, where the grounds of Art. 63, Para 1 appear, and if these grounds do not appear, *the court shall not take restraining measure or shall take a lighter one.*

MOLDOVA

CCP Section 191 provided: The provisional release under judicial control of a remanded person

(1) A provisional release under judicial control of a remanded person, or of a person in respect of whom a request for detention on remand has been made, may be granted by the investigating judge or by a court only in case of offences committed through negligence or intentional offences punishable with less than 10 years of imprisonment.

(2) A provisional release under judicial control may not be granted to an accused who has outstanding criminal convictions for serious, very serious or exceptionally serious offences or if there exists information that he or she will commit another offence, will try to influence the witnesses, will try to destroy evidence or will abscond.

The Commentary of the Code of Criminal Procedure, edited in 2005, the authors of which are amongst others the President and several judges from the Supreme Court of Justice and several senior law professors, states the following in respect of section 191:

"The first paragraph of section 191 provides for the first condition of admissibility of release under judicial control which is determined by the gravity of the offence with which the accused is charged. This condition [the gravity of the offence] is determined in the documents issued by the investigation body or by the prosecutor, who establish the qualification of the offence...

The investigating judge is not empowered with assessing whether the legal qualification of the offence is correct since he does not examine the evidence on which the qualification is made ...

At the trial stage, the trial court can give a new qualification to the offence with which the accused is charged..."

This provision was the reason why the ECtHR made judgements against Moldova, one of which, case of Boicenco v. Moldova, is discussed below.

UKRAINE

Article 148 of the CCP, which governs the use of preventive measures, provides:

"Only absent any reasons for application of a preventive measure will a defendant be released solely on a "signed promise to return." The presumption is that a preventive measure will be applied.

Despite the enactment of the law on bail in 1996, to date the statute has been little used by the prosecutors and the courts.[5] For example, in 1997, the first full year for which statistics are available, bail was used in only 110 cases of the approximately 230,000 criminal cases heard in Ukraine.[6]

However, as Professor of George Mason University, Louise Shelley noted, "the fact that no category of cases is automatically excluded from those eligible for bail, and the accompanying promotion of a case-by-case approach, directly contradicts long-standing Soviet-era directives that pretrial detention is the only appropriate option for defendants charged with the most serious crimes".[7]

[5] *See* U.S. Dep't of State, *supra* note, at 1365 ("The 1996 Amendment to the Criminal Procedures Code provides for bail, but to date it rarely has been used.").
[6] *On the Scales of Justice*, *supra* note (Hon. Petro Pilipchuk, Judge, Supreme Court of Ukraine, citing figures collected and maintained by the Ministry of Justice). According to Judge Pilipchuk, "[b]ail was used in 16 cases in Kiev in 1997, in nine cases in Ternopil and Chernivtsi, in eight cases in Dnipropetrovsk . . . and in Lviv . . . four." ***Id.*** As of 1998, the courts of the Autonomous Republic of Crimea, with a population of 2.5 million, had used bail in only six cases. Shapovalova Remarks.
[7] *See* Louise I. Shelley, Policing Soviet Society: The Evolution of State Control 70 (1996).

RUSSIA

Since 1 July 2002 criminal-law matters have been governed by the Code of Criminal Procedure of the Russian Federation (Law no. 174-FZ of 18 December 2001). "Preventive measures" or "measures of restraint" (*меры пресечения*) include an undertaking not to leave a town or region, personal surety, bail and detention (Article 98). If necessary, the suspect or accused may be asked to give an undertaking to appear (*обязательство о явке*) (Article 112).

When deciding on a preventive measure, the competent authority is required to consider whether there are "sufficient grounds to believe" that the accused would abscond during the investigation or trial, reoffend or obstruct the establishment of the truth (Article 97) Detention may be ordered by a court if the charge carries a sentence of at least two years' imprisonment, *provided that a less restrictive preventive measure cannot be applied* (Article 108 § 1).

Requirements of ECHR and Case Law of European Court of Human Rights

Article 5 § 3 of the Convention, the relevant part of which provides:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The European Court of Human Rights provideas interpretation of this article in its Case Law. In case Litwa v Poland the Court states: "The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained" (Litwa against Poland, judgment of 4 April 2000, §78).

In case *Kaszczyniec v. Poland* the European Court of Human Rights states: "…under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are *obliged* to consider alternative measures of ensuring his appearance at trial".

Further interpreting application of Article 5 § 3 in cases, where the national court decides on continuing detention, the Court stated: "That provision does not give the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release – even subject to guarantees. Until conviction he must be presumed innocent, and the purpose of Article 5 § 3 is essentially to require his provisional release once his continuing detention ceases to be reasonable".[8]

In *Jablonski v. Poland*, when the domestic courts extended the applicant's detention beyond the statutory time-limit (three years) because he had previously inflicted injuries on himself and had thus obstructed the progress of the trial, the Court found a violation of Article 5 (3), arguing that the national courts – when they decided that the applicant should be kept in detention in order to ensure the proper conduct of the trial – failed to consider any alternative "preventive measure" such as bail or police supervision.[9]

In case Polonskiy v. Russia, the Court noted: "The presumption is in favour of release. The second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. … 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, among other authorities, *Castravet v. Moldova*, no. 23393/05, §§ 30 and 32, 13 March 2007; *McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006-...; *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000; and *Neumeister v. Austria*, 27 June 1968, § 4, Series A no. 8).[10]

The national judicial authorities 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 the

[8] Neumeister v. Austria judgment of 27 June 1968, Series A no. 8, § 4
[9] Monica Macovei, A guide to the implementation of Article 5 of the Eur.Ct.H.R., Human Rights handbooks, No. 5; *Jablonski v. Poland*, para. 111

[10] Polonskiy v. Russia**,** 19 March 2009, para. 139

presumption of innocence, a departure from the rule of respect for individual liberty, and must set them out in their decisions dismissing the applications for release.[11]

In case Lind v. Russia, the Court noted: "The Court has frequently found a violation of Article 5 § 3 of the Convention in Russian cases where the domestic courts prolonged an applicant's detention relying essentially on the gravity of the charges and using stereotyped formula without addressing concrete facts or considering alternative preventive measures (see *Belevitskiy v. Russia*, no. 72967/01, §§ 99 et seq., 1 March 2007; *Khudobin v. Russia*, no. 59696/00, §§ 103 et seq., ECHR 2006-... (extracts); *Mamedova v. Russia*, cited above, §§ 72 et seq.; *Dolgova v. Russia*, cited above, §§ 38 et seq.; *Khudoyorov v. Russia*, cited above, §§ 172 et seq.; *Rokhlina v. Russia*, cited above, §§ 63 et seq.; *Panchenko v. Russia*, cited above, §§ 91 et seq.; and *Smirnova v. Russia*, nos. 46133/99 and 48183/99, §§ 56 et seq., ECHR 2003-IX (extracts)). The Court is aware of the fact that a majority of the above-mentioned cases concerned longer periods of deprivation of liberty and that against that background one year may be regarded as a relatively short period spent in detention. Article 5 § 3 of the Convention, however, cannot be seen as authorising detention unconditionally provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I (extracts)). The fact that the maximum time-limit permitted by the domestic law was not exceeded is not a decisive element for the Court's assessment, either. The calculation of the domestic time-limits depended solely on the gravity of the charges which was decided upon by the prosecution and was not subject to an effective judicial review (see *Shcheglyuk*, cited above, § 43). Having regard to the above, the Court considers that by failing to address concrete facts or consider alternative "preventive measures" and by relying essentially on the gravity of the charges, the authorities prolonged the applicant's detention on grounds which, although "relevant", cannot be regarded as "sufficient". In these circumstances is not necessary to examine whether the proceedings were conducted with "special diligence". There has therefore been a violation of Article 5 § 3 of the Convention.[12]

[11] Polonskiy v. Russia**,** 19 March 2009

[12] Lind v. Russia, 02/06/2008, para. 83-86

Concerning compliance of National legislation with the requirements of the ECHR, in case of Boicenco v. Moldova, the ECt.HR held: "The Court notes that in *S.B.C. v. the United Kingdom* (no. 39360/98, 19 June 2001) it found a violation of Article 5 § 3 because the English law did not allow the right of bail to a particular category of accused. The Court found in that case that the possibility of any consideration of pre-trial release on bail had been excluded in advance by the legislature. The present case is similar to *S.B.C.* in that under section 191 of the Moldovan Criminal Procedure Code no release pending trial is possible for persons charged with intentional offences punishable with more than 10 years' imprisonment. It appears that in the present case the applicant was charged with such an offence. The Government's argument that the charge against the accused could theoretically be changed to a milder charge and thus make it possible for him to obtain release pending trial cannot be accepted by the Court. In the first place, the Court notes that such a change cannot be effected by the investigating judge who issues and prolongs the detention warrant, but only by a trial judge after the criminal case-file is transmitted to the court for the examination of the merits. Secondly, and most importantly, follows from *S.B.C.* that the right to release pending trial cannot in principle be excluded in advance by the legislature. As to the Government's argument that the applicant could have requested release on bail or release under a personal guarantee or under the guarantee of an organisation, the Court considers it to be irrelevant for the present case since the domestic proceedings at issue referred to release pending trial only. Accordingly, the Court concludes that there has been a violation Article 5 § 3 of the Convention in that under section 191 of the Code of Criminal Procedure it was not possible for the applicant to obtain release pending trial.[13]

The Moldovan Government's argument was based on a fact, that after finding a gap in law, Supreme Court of Moldova made a precedential decision, stating that a judge can change the charge against the accused to a milder charge and thus make it possible for him to obtain release pending trial. However, the Court found this solution theoretical and insufficient.

In case of E.M.K. v. Bulgaria, the Court noted: "Moreover, after the applicant was charged with robbing Ms M.V.'s car, the investigator applied another provision of the CCP, paragraph 3 of

[13] Boicenco v. Moldova, 11/10/2006, para. 134-138

Article 152, which excluded any possibility of the release of a person against whom more than one investigation was pending (see paragraph 74 above). The Sofia City Prosecutor's Office also relied on that provision in its decisions to refuse bail of 24 June and 26 September 1996 (see paragraphs 75 and 78 above). So did the reporting judge at the Sofia City Court and the Supreme Court of Cassation (see paragraphs 82, 85 and 87 above). That approach was clearly incompatible with Article 5 § 3 of the Convention (see *Yankov v. Bulgaria*, no. 39084/97, § 173, 11 December 2003, *Belchev v. Bulgaria*, no. 39270/98, § 80, 8 April 2004, *Kuibishev v. Bulgaria*, no. 39271/98, § 64, 30 September 2004, and, *mutatis mutandis*, *Nankov v. Bulgaria*, no. 28882/95, §§ 83 and 84, Commission report of 25 May 1998, unpublished)".[14]

Committee of Ministers of the Council of Europe, in its Recommendation Rec(99)22 provides: "deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only, where the seriousness of the offence would make any other sanction or measure clearly inadequate"[15]

Comparing Armenian Legislation and Practice with those of Other CoE Member States, Especially with Post-Soviet Republics and Communist bloc Countries

Armenian Criminal Procedure Code provides that upon delivering an order for arrest the court ***decides*** on the admissibility of the release of the accused on bail. However, research and statistics show, that Armenian courts in most of cases disregard question of possible release on bail and do not refer in judicial decisions to the issue of alternative preventive measure[16]. Bail is rarely applied as a preventive measure in Armenian legal practice. This practice contradicts the principles of ECHR and standards prescribed by the case law of ECtHR. The CCP provision gives judges of

[14] In case of E.M.K. v. Bulgaria, 18 January 2005, para. 122

[15] Rec(99)22E 30 September 1999
[16] OSCE Final Report on Trial Monitoring Project in Armenia (April 2008 – July 2009), page 20

national courts a wide discretion in deciding the issue of applying bail as an alternative preventive measure instead of detention.

International legal provisions oblige Armenian judges to discuss possible alternative preventive measures instead of detention in all cases, where the possible application of detention is considered. In Case of *Kaszczyniec v. Poland* the European Court of Human Rights emphasised that under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are *obliged* to consider alternative measures of ensuring his appearance at trial. Indeed, that provision proclaims not only the right to "trial within a reasonable time or to release pending trial" but also lays down that "release may be conditioned by guarantees to appear for trial" (see *Neumeister*, cited above, p. 36, § 3; *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000; *Kaszczyniec v. Poland*, no. 59526/00, 22 May 2007).

In case of Aslan Avetisyan, the Cassation Court of Armenia held that the reasoning for the detention may be also taken as a basis for rejecting the bail, by condition that the reasoning will be based on the materials of the case. However, the OSCE report states, that in some cases the seriousness of the charge by itself was considered as sufficient ground for applying detention, which contradicts the ECHR Case Law.[17] The example below is from the reasoning of the decision of the first instance court decision on applying detention provided by OSCE Trial Monitoring Project.

> The Court of Kentron and Norq-marash Communities in the reasoning of its decision from 10 March 2008 stated: "taking into account the facts that for the committing of offence, for which the person is accused, the Criminal Code provides the maximum time for imprisonment for more than one year, the Court holds, that the prosecutor's motion is reasoned and should be satisfied. "[18]

The Working Group on Arbitrary Detention of the United Nations Human Rights Council conducted a country mission to the Republic of Armenia from the 6h of September 2010 until 10th of September 2010 following an invitation from the Government. In its final report the Working Group mentioned: "Although the law provides for a bail system, the Working Group understands that this is not sufficiently applied in practice. Prisoners are thus required to serve the totality of their sentences, even when the law provides for the possibility of conditional release."[19]

[17] *Nikolov v. Bulgaria*, ECHR judgment 30 January 2003, para. 70
[18] R.N.58-16.06.2008
[19] http://www.lragir.am/engsrc/society19091.html, published: 15.09.2010

The Working Group came to the conclusion that: "- Law and practice on remand, in sentencing and by not granting release have extended detention beyond the proportionate level. Law reform and change in court and administrative practice are required. The criteria for granting bail or remanding suspects in detention require tightening up with concomitant changes in practice."[20]

In its Recommendation of February 2007 concerning possible changes to CCP of Russian Federation, the Committee of Ministers noted: "However, it appears that judges and prosecutors' practice does not fully comply with either the CCP or the Convention. Violations are most often due to the lack of sufficient grounds to impose the detention and failure to consider alternative measures (e.g. Mamedova against the Russian Federation, judgment of 1 June 2006; Dolgova against the Russian Federation, judgment of 2 March 2006, all concerning situations after 2002). In any event, the obligation to thoroughly review all grounds, to consider personal circumstances and possibilities of alternative measures at all stages of the proceedings is worth being explicitly stated in the CCP…. Accordingly, the specific requirement of Article 108§1 that detention on remand may be ordered only if it is impossible to apply another preventive measure implies an obligation on the national authorities to consider possible alternatives to detention (see Wemhoff against Germany (2122/64), judgment of 27 June 1968; Jablonski against Poland (33492/96), judgment of 21 December 2000)".[21]

The relevant Article of CCP of Russian Federation provides: "Detention may be ordered by a court if the charge carries a sentence of at least two years' imprisonment, *provided that a less restrictive preventive measure cannot be applied*".[22]

The similar articles of CCP RA provide: "Arrest and the alternative preventive measure shall be executed in respect to the accused 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 can commit actions mentioned in the first part of the present Article. " … upon delivering

[20] http://www.lragir.am/engsrc/society19091.html, published: 15.09.2010

[21] Detention on remand in the Russian Federation: Measures required to comply with the European Court's judgments. Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights, **CM/Inf/DH(2007)4,** 12 February 2007

[22] Article 108 § 1, CCP Russian Federation

an order for arrest the court decides on the admissibility of the release of the accused on bail; if the court determines pre-trial release is permissible, it shall determine the amount of the bail".[23]

In comparing these to legal prescriptions, it is easy to understand that CCP RF obliges judges to first of all consider all the possible alternative preventive measures, and then only, if there is no single reason to apply alternatives, consider the application of detention. CCP RA does not oblige judges to consider first alternative preventive measure, i.e. bail, it only states that toghether with decising on detention, the judges also decides whether to apply the bail or not.

In my opinion, the reason why the law in this field does not work promptly in practice, is that the law is weak and it does not meet the requirements of the European Convention of Human Rights. Even though Cassation Court made a decision, where it held that Article 143 contradicts the ECHR, we still need to amend the Criminal Procedure Code for the following reasons:

a) The decision gives the *authority* to judges to consider bail as an alternative measure in any kind of crimes, when in Case of *Kaszczyniec v. Poland* the European Court of Human Rights emphasised that under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are *obliged* to consider alternative measures of ensuring his appearance at trial.

b) Article 137 of Criminal Procedure Code of Armenia states that upon delivering an order for arrest the court decides on the admissibility of the release of the accused on bail; if the court determines pre-trial release is permissible, it shall determine the amount of the bail. Later, upon a petition being presented by the defense, the court may reconsider its decision concerning the inadmissibility and the amount of bail.

The practice shows that judges understand this provision as their right to decide on the issue of bail but not a duty and in a number of cases they do not refer to this question, when the Convention is consistently held to require that the detention on remand be used as an exceptional measure of last resort.[24] As the Court recalled, "the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found

[23] Articles 135 and 137 para. 4, CCP Republic of Armenia

[24] See the Recommendation Rec(99)22 concerning overcrowding and prison population inflation provides that "deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only, where the seriousness of the offence would make any other sanction or measure clearly inadequate"

to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained" (Litwa against Poland, judgment of 4 April 2000, §78).

Another reason proving the necessity for amending CCP RA is that courts rarely consider other preventive measures because they fear being perceived as corrupt. Interviewees reported that judges and prosecutors now greatly fear being accused of corruption and thus are less likely to take actions that could be perceived as favoring defendants. Other interviewees believed that the low incidence of bail or preventive measures is a legacy of the Soviet era, when bail did not exist and many current judges served as prosecutors.[25] If we amend the law so that it will impose a duty on judges to consider bail in each case and provide reasoned decision in case of rejecting bail, they will no more fear of being perceived as corrupt. There exist also opinion that the problem may be solved by separating bail from detention (Article 137 CCP) and making bail a separate preventive measure.[26] In my opinion, even if we separate bail from detention, the most important thing in this case is to directly impose obligation on judges. And as the result would be same or similar, I think that it is technically more convenient to amend already existing articles, than to create new ones.

c) The law provides only minimum amount of bail that may be designated by the court which may give the discretion to the court to decide to impose a very high amount amount of money that will be difficult to pay. In this regard, I will propose also to amend this article and provide the concrete maximum amount of bail in order to minimize the judicial discretion. The next problem is that although CC decision gives right to apply bail also in cases of committing grave offences, there is no provision in law providing the amount of bail for grave offences. I will also propose to make amendments concerning this issue.

Proposals for RA Legal System

All the examples of other States presented above are relevant and similar.

1. similar legal formulations,

[25] ABA Rule of Law Initiative, Detention Procedure Assessment Tool for Armenia, April 2010, p. 36-37
[26] Interview with judge of the Cassation Court of Armenia, Hamlet Asatryan

2. similar practice of applying detention without an independent, reasoned judicial decision,
3. reluctance to discuss the option of applying bail , often in violation of the letter of domestic law.

This combination of poorly designed laws and practices held over from the soviet era violate the letter and spirit of the European Convention, Art. 5, in all three elements:

1. domestic law is not drafted in conformity with the European Convention,
2. the law as written and applied violates the "principle of legal certainty,"
3. the law as written and applied violates the "protection against arbitrariness."

The best solution for legislation improvement will be choosing the most relevant parts of each example for Armenia and trying to create a better option, which can not only be in accordance with the spirit of law, but also easily be implemented to RA legal system. To achieve conformity with the ECHR, countries amend their national legislations in order to achieve the goals of the ECHR.

Armenian legislation does not oblige judges to consider bail as an alternative preventive measure. This gap in our legislation will finally lead to the judgment of the ECHR against Armenia. Thus it would be better to prevent such a judgment by amending our existing laws in order for them to be in compliance with ECHR requirements. Based on the summary of practice and legal reform of similar post-soviet legal frameworks, I will now apply these to the Armenia context in the form of proposals for legal reform to achieve compliance with ECHR standards on detention.

Below I will propose the necessary amendments to the CCP RA:

1. **Article 137. Arrest**

   In paragraph 4, after the sentence: "Upon delivering an order for arrest the court decides on the admissibility of the release of the accused on bail", add the following sentence: *Arrest may be applied only if a less restrictive preventive measure cannot be applied,* after which the text will be as follows: "Upon delivering an order for arrest the court decides on the admissibility of the release of the accused on bail; arrest may be applied only if a less restrictive preventive measure cannot be applied; if the court determines pre-trial release is permissible, it shall determine the amount of the bail.

2. **Article 139. Extension of the Detention Term**

   In paragraph 2, in the sentence: "Upon the settlement of the issue of the extension of the detainment period the court shall have the right to allow the release of the accused on bail

and determine the amount of the bail", change the words *shall have the right to allow the release* to *must allow the release of the accused unless there are relevant and sufficient reasons to justify the continued detention*, after which the text will be as follows: "Upon the settlement of the issue of the extension of the detainment period the court shall must allow the release of the accused unless there are relevant and sufficient reasons to justify the continued detention".

3. Article 143. Bail

In paragraph 4, after the point 2, add the following text:

"*3) the minimum amount of 600 salaries - when the accusation is one of committing a crime classified as grave.*

4) the minimum amount of 700 salaries when a crime is classified as particular grave.

The amount of the bail designated by the court shall not be more than:

1) the minimum amount of 300 salaries - when the accusation is one of committing a crime classified as minor.

2) the minimum amount of 600 salaries when a crime is classified as medium.

3) the minimum amount of 700 salaries - when the accusation is one of committing a crime classified as grave.

4) the minimum amount of 900 salaries when a crime is classified as particular grave", after which the text will be as follows:

4. The amount of the bail designated by the court shall not be less than:

1) the minimum amount of 200 salaries - when the accusation is one of committing a crime classified as minor.

2) the minimum amount of 500 salaries when a crime is classified as medium.

3) the minimum amount of 600 salaries - when the accusation is one of committing a crime classified as grave.

4) the minimum amount of 700 salaries when a crime is classified as particular grave.

The amount of the bail designated by the court shall not be more than:

1) the minimum amount of 300 salaries - when the accusation is one of committing a crime classified as minor.

2) the minimum amount of 600 salaries when a crime is classified as medium.

3) the minimum amount of 700 salaries - when the accusation is one of committing a crime classified as grave.

4) the minimum amount of 900 salaries when a crime is classified as particular grave.

Conclusion

With the enactment of the proposed amendments to the CCP RA, the right to alternative prevention measure in Armenia would be better protected and the RA legal framework and would be in compliance with the ECHR, which is an obligation Armenia undertook when it joined the Council of Europe. Of course, even without enactment of the amendments, it is possible, desirable and indeed necessary for Armenian courts and executive/investigatory bodies to bring their practice into compliance with the ECHR, since the ECHR is applicable in Armenia and under the RA Constitution, prevails over contradictory domestic law. However, enactment of these amendments to domestic law would be an additional measure to assure that Armenian authorities act in compliance with the ECHR. In any event, the adoption of conventions or enactment of laws is not enough. The authorities must exercise good judgment, restraint and self-discipline to assure that these principles and rights are routinely respected by officials and state bodies. As shown from examples in other post-soviet and European jurisdictions, the laws must be applied to assure that the ECHR policies and rights are duly protected.

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