

SECRETARIAT GENERAL

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRETARIAT DU COMITE DES MINISTRES



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Date: 11/09/2013

DH-DD(2013)947

Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1179 meeting (24-26 September 2013) (DH)

Item reference: Communication from a NGO (Chamber of advocates of Armenia) (26/08/13) and reply from the authorities (05/09/13) in the case of Gabrielyan against Armenia (Application No. 8088/05)

Information made available under Rules 9.2 and 9.3 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1179 réunion (24-26 septembre 2013) (DH)

Référence du point : Communication d'une ONG (Chamber of advocates of Armenia) (26/08/13) et réponse des autorités (05/09/13) dans l'affaire Gabrielyan contre Arménie (Requête n° 8088/05) (**anglais uniquement**)

Informations mises à disposition en vertu des Règles 9.2 et 9.3 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

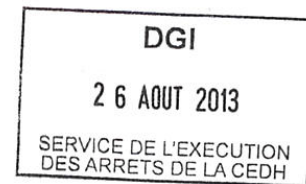
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CHAMBER OF ADVOCATES OF THE REPUBLIC OF ARMENIA
ПАЛАТА АДВОКАТОВ РЕСПУБЛИКИ АРМЕНИЯ

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N 1 / 1477
16 August 2013



Department for the Execution of the Judgments of the ECHR
Directorate General of Human Rights and legal Affairs
Council of Europe
F-67075 Strasbourg CEDEX
France

Re: Communication on the execution of the judgments of ECHR by Armenia

Gabrielyan v. Armenia

Application No. 8088/05

(Judgment made on 10/04/2012 and became final on 10/07/2012)

Dear Sir/Madam,

This communication is brought under Rule 9.2 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments.

On April 24, 2013 the Government of Armenia submitted an Action Plan with regards to the above referenced case. In its submissions, the Government extensively covered the upcoming changes in the draft Criminal Procedure Law concerning the new procedures of admissibility and examination of testimonies of absent witnesses. In doing so, the Government relied mainly on the provisions stipulating a new procedure covered under Chapter 42 of the Draft Code and named as "Judicial Deposition of Testimony". The new procedure presumes securing, by way of deposition, of pre-trial testimonies of persons who would presumably not appear to trial proceedings. The paragraph 1 of the article 312 of the Draft Code refers in this regards to the "confession Testimony of the defendant" under motion of the investigator. While the Chamber is of positive view of the deposition procedure as a whole, it has strongly opposed to the paragraph 1 of the article 312 of the Draft Code. In many plenary and group discussions of the Draft among legal professionals and practitioners (such discussions were held often by the

initiative of the Ministry of Justice and other legal groups), the representatives of the Chamber of Advocates strongly criticized the procedure of deposition of defendant's confession as a procedure that strongly jeopardizes the fairness of the proceedings as a whole.

Firstly, the deposition of confession lays strong basis for admitting and recognizing the pre-trial testimony of the defendant as a decisive evidence vis-à-vis the testimonies given at trial. The pre-trial investigative bodies will be tended to obtain confession of the defendant by all means and have it deposited by court under all circumstances in order to guarantee the outcome of the case to their benefit. In fact, once the confession is obtained and deposited by court at pre-trial level, the investigative bodies will no longer be interested in carrying out a comprehensive and thorough investigation. Besides, in view of the fact that only the confession given in the absence of defense lawyer would be subject to deposition under the Draft, the pre-trial bodies would be tended to take measures for excluding under various pretexts the presence or participation of a lawyer in the initial stages of the pre-trial investigation in order to insure deposition of confession of the defendant in the absence of a lawyer.

It is a wide practice in Armenia where testimonies under pre-trial level, at very initial stages of the pre-trial investigation, are obtained under pressure and duress. The sole fact that the deposition is given at the presence of a judge shall not be considered as excluding the possibility that the defendant had been under pressure of giving self-incriminatory and confessing testimonies.

If with respect to testimonies of other parties to the proceedings the part 2 of article 312 provides the "reasonable presumption of not giving testimony at court proceedings" as basis for having their testimonies deposited, no such basis is defined with respect to the defendant under part 1 of the article 312. This is a differential approach which will certainly be implemented to the detriment of the rights of the defendant. No reasonable explanation was given so far for incorporating such differential approach in the Draft law.

No explanation was given also as to why the part 1 of the article 312 covered only the "confessing" testimonies of the defendant. The defendant is entitled also of giving testimonies of non-confessing nature which, especially in cases where there are co-defendants in the case, may be of crucial importance to the defendant in proving in the court his/her innocence.

The part 3 of the article 314 of the Draft provides: *"In case of deposition of the testimony envisaged by Paragraph 2 of Article 312 of this Code, the Court shall determine the date of the deposition while taking into consideration the time period that the Participants in the proceedings would need to prepare for the cross-examination"*. This is another provision which provides differential approach between the rights of the defendant and the rights of other parties to the proceeding. It is unclear why the drafters of the Draft Code did not want to stipulate a similar opportunity of cross-examination also for the defendant.

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The Draft is also silent about the situation where a person was charged and obtained the status of defendant after the deposition was carried out. Under such circumstances the defendant would be deprived of the opportunity of cross-examining the person who testified against him since at the time when the cross-examination was carried the person in question did not have the status of defendant and was consequently unable to participate in the deposition while after obtaining the status of defendant (after bringing charges) he/she would no longer be able to question the person who had testified against him. This gap in the law will result in a situation where the investigators will be tended in bringing charges at later stages of the pre-trial proceedings.

The part 2 of the article 313 provides the following: *"Materials, which will enable the participants in the deposition to properly exercise their right of cross-questioning, shall be annexed to the Petition"*. This provision, under such formulation, in fact means that it is the investigator who decides which materials the parties may have at their disposal for exercising their right to cross-examination. This is unacceptable from the standpoint of the rights of the Defense. The Defense must be given all the materials of the criminal case in order to carry out effective cross-examination during the deposition procedure. Moreover, the scope of the papers necessary for the cross-examination should not be decided by the investigator. In this respect, the Draft Code is silent also as to whether the Defense may rely during the cross-examination on the papers or the documents that it acquired by its own initiative and which are not included in the criminal case file. The Draft does not explain whether such papers can be used or not during the deposition, and, if yes, what are the procedures of referring to such documents, etc.

In general, the Chamber is of the opinion that the procedure of deposition of the confessions of the defendant, covered under paragraph 1 of the article 312, is not necessary and should be removed from the Draft Code. What sense it makes to have the confessions of the defendant deposited at pre-trial level of the proceedings, if the trial proceedings shall be held at his/her presence anyway.

We hope that the above information will be useful. We would be pleased to provide you with any further information and documents that may be required.

Sincerely,

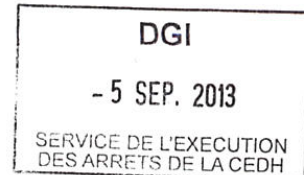
Mr Ruben SAHAKYAN

Chairman of the Chamber of Advocates of the Republic of Armenia



Department for the Execution of Judgments of
the European Court of Human Rights

Your ref.: DG1/GM/IKM/VD/Ima



5 September 2013

Dear Ms Mayer,

With reference to the communication from the Chamber of Advocates of the Republic of Armenia (16 August 2013), I would like to refer to Rule 9.2 of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* and advise that this communication should not be considered by the Committee of Ministers as it is not "with regard to the execution of [the *Gabrielyan* judgment] under Article 46, paragraph 2, of the Convention." We believe, that the process of execution of judgments should not be used as a platform for irrelevant discussions and biased criticism.

In the *Gabrielyan* judgment (Application no. 8088/05, 10 April 2012), the European Court of Human Rights concluded that "the applicant was unreasonably restricted in his right to examine witnesses whose testimony played a decisive role in securing his conviction," and held that there had been "a violation of Article 6 § 3(d) taken together with Article 6 § 1 of the Convention" (*see* §§ 86, 87). In other words, the *Gabrielyan* judgment **is not about "deposition of defendant's confession"**. It is about his Convention "right to [effectively] examine witnesses" against him. In the *Gabrielyan* Action Plan, the Government submitted that new approach had been developed within the Draft Code of Criminal Procedure "which provide more guarantees while taking testimonies and evidence" and was designed "to guarantee during pre-trial stage the right to confrontation (cross-examination) under Article 6 § 3(d) of the Convention". In this regard the Government noted the "judicial deposition of testimony" (*see* Action Plan, *Legislative measures*) mechanism - a twofold mechanism, relating to *Gabrielyan* judgment only in part of Article 312(b) of the Draft Code. This provision states as follows:

The judicial deposition of Testimony shall be performed:

(...)

b. For the purpose of obtaining proper Testimony from a person who is unable to attend the Court examination or if there is a reasonable presumption that he will lawfully not give Testimony during the Court examination, by Petition of an Investigator or a Private Participant in the Proceedings.

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Hence, annexing the full texts of Article 312, and Chapter 42 in general, the Government aimed to have the new draft mechanism introduced fully, while in main body of the Action Plan referring only to one component of that mechanism (set forth in Article 312(b)).

Yours Sincerely,

Ruben Melikyan

A handwritten signature in black ink, appearing to read 'R. Melikyan', with a stylized flourish at the end.

Deputy Minister of Justice
Deputy Government Agent