Implementation of Criminal Procedure Legislation of the Republic of Tajikistan and Recommendations for its Improvement

Edited by ABA ROLI Staff Attorneys in Tajikistan: Majitov A.M. and Kamolova E.D.
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Letter from the Supreme Court of the Republic of Tajikistan
Letter from the General Prosecutor’s Office, Republic of Tajikistan
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February 29 & March 1, 2012

Dear Colleagues,

On behalf of the American Bar Association Rule of Law Initiative (ABA ROLI) office in Tajikistan, I am pleased to welcome you to our conference “Harmonization and Development of the Criminal Procedure Legislation.” As we approach the second anniversary of the enactment of the Republic of Tajikistan’s new Criminal Procedure Code (CPC) it seems an appropriate time to examine the implementation of this law on the criminal justice system.

Two years ago, ABA ROLI embarked on an ambitious program to develop a practical training program on the new CPC with particular focus on the changing balance of power, rights and responsibilities among the parties to criminal cases. Working with the Prosecutor General’s Office and the Prosecutor’s Training Center, the Ministry of Internal Affairs and the Police Academy, and members of the defense advocate community, a diverse group of experienced criminal justice professionals was assembled and ABA ROLI worked with them to develop practical training materials and to hone their training skills. In various combinations, the trainers conducted two-day CPC training for over 1200 members of the criminal justice system.

During the trainings ABA ROLI and the trainers noticed that a number of practical issues, questions and obstacles related to their efforts to implement the new CPC were raised by program participants. To address these issues, ABA ROLI in cooperation with our trainers and other representatives of the above mentioned entities as well as members of the Supreme Court, conducted a series of nine (9) round-table discussions to further study the issues and to jointly develop recommendations to resolve implementation problems faced by the those responsible for taking the legislation from the paper into practice.

The result of those roundtable discussions are presented today for further discussion and debate by the broader criminal justice community both national and international. We hope that these recommendations will spur action and that the Government of Tajikistan will continue its efforts to improve its criminal justice system for the benefit of all citizens of Tajikistan.

We are grateful to all of the participants of the roundtables for sharing their time and expertise, we look forward to the dialogue and input of all participants of this conference and we would like to thank the U.S. Department of State’s International Narcotics and Law Enforcement Affairs Bureau (INL) for their generous financial support of this initiative.

Warm regards,

Marit Rasmussen, Juris Doctor
Country Director for Tajikistan ABA ROLI
Директору АБА РОЛИ
в Таджикистане
господе Марит Расмуссен

Верховный Суд Республики Таджикистан выражает благодарность и поддерживает инициативу по проведению Конференции по проблемам практического применения уголовно-процессуального законодательства Республики Таджикистан.
Обсуждение проблемных вопросов применения норм УПК Республики Таджикистан способствует выработке объективных предложений по совершенствованию положений УПК РТ.

Заместитель Председателя Верховного
Суда Республики Таджикистан

Холова Б. М.
Supreme Court of the Republic of Tajikistan
N 35/1-23

January 13, 2012
To Ms. Marit Rasmussen
Director of the Tajikistan Branch of ABA ROLI

The Supreme Court of the Republic of Tajikistan expresses to you its gratitude and supports the initiative to hold the Conference devoted to the problems of practical application of the criminal procedure legislation of the Republic of Tajikistan. Discussion of the problematic issues of the implementation of the Republic of Tajikistan’s Criminal Procedure Code promotes development of the objective proposals for improving its provisions.

Deputy Chair of the Supreme Court of the RT
(Signature)
Kholova B.M.
Директору Американской Ассоциации Юристов Программы Верховенства Права (АБА РОЛИ)
госпоже Мариэт Расмуссен

Уважаемая госпожа Расмуссен,

Генеральная Прокуратура Республики Таджикистан подтверждает, что в серии круглых столов посвященных обсуждению норм УПК РТ наши представители принимали активное участие. В связи с чем, Генеральная Прокуратура Республики Таджикистан, поддерживает Вашу инициативу по проведению Конференции посвященной проблемам практического применения уголовно-процессуального законодательства Республики Таджикистан. Мы уверены, что обсуждение положений УПК РТ в широком кругу юридического сообщества будет способствовать выработке объективных и важных предложений по совершенствованию УПК РТ с учетом международных стандартов, менталитета таджикского народа и сегодняшних реалий правоприменительной практики.

В свою очередь, благодарим Вас за вклад в развитие верховенства права на территории нашей страны и сотрудничество в построении правового государства Республики Таджикистан.

Генеральный Прокурор Республики
Таджикистан, Государственный советник юстиции 3-го класса

Салимзода Ш.О.
General Prosecutor’s Office of the Republic of Tajikistan
N 6/28-12
January 9, 2012

To Ms. Marit Rasmussen
Director of the Tajikistan Branch of ABA ROLI

Dear Ms. Rasmussen,

The General Prosecutor’s Office of the Republic of Tajikistan affirms that representatives of our institution have taken active part in the round-table discussions on the provisions of the new Criminal Procedure Code. In connection with this, the General Prosecutor’s Office supports your initiative to hold a conference devoted to the problems of practical application of the criminal procedural legislation of the Republic of Tajikistan. We are convinced that the discussions of the provisions of the Criminal Procedure Code in the broad circle of the legal community will contribute to the development of objective and important proposals for the improvement of the Criminal Procedure Code in consideration of international standards, the mentality of the Tajik people, and today’s realities of implementing the law in practice.

In turn, we thank you for the contribution to the development of rule of law in the territory of our country and your cooperation in building a constitutional state.

General Prosecutor of the Republic of Tajikistan
(Signature)
Salimzoda Sh.O.
Г-же Марит Расмуссен

Директору представительства
Американской ассоциации юристов в
Республике Таджикистан (ABA ROLI)

Уважаемая г-жа Расмуссен!

Министерство внутренних дел свидетельствует своё уважение
Американской ассоциации юристов и выражает удовлетворение обойдным
сотрудничеством в вопросах организации обучения следователей и
dознавателей Министерства внутренних дел по вопросам применения нового
уголовно-процессуального кодекса Республики Таджикистан. С июня по
ноябрь 2011 были проведены 25 тренингов, где приняли участие 482
следователя и дознавателей всех регионов республики. Тренинги позволили
позволят 12 тренеров, выработать единое понимание и применение норм
уголовно-процессуального кодекса, рекомендовать пути и способы
разрешения возникающих в правоприменении проблем. Участники
тренингов были обеспечены кодексами, электронными версиями
действующих нормативно-правовых актов и другими материалами.

Министерство внутренних дел Республики Таджикистан как
правоприменительный орган заинтересован в выработке единого понимания
и применения законов и поддерживает идею проведения международной
Конференции по вопросам применения норм УПК.

МВД РТ заверяет Вас в заинтересованности в сотрудничестве с АБА
РОЛИ.

С уважением –

Министр внутренних дел

Р. Х. Рахимов
Ministry of Internal Affairs
N 7/1-90
January 12, 2012
To Ms. Marit Rasmussen
Director of the Tajikistan Branch of ABA ROLI

Dear Ms. Rasmussen,

The Ministry of Internal Affairs expresses its respect to the American Bar Association and its satisfaction with our mutual cooperation in organizing the trainings for the investigators of the Ministry of Internal Affairs related to the application of the new Criminal Procedure Code of the Republic of Tajikistan. For the period from June to November 2011, 25 trainings were conducted, in which 482 investigators of all regions of the country participated. The trainings included preparing 12 trainers, developing common understanding and application of the provisions of the Criminal Procedure Code, and recommending ways of solving problems related to the law’s implementation. The participants of the trainings were provided the codes, electronic versions of current normative legal acts, and other materials.

The Ministry of Internal Affairs of the Republic of Tajikistan as a law enforcement institution is interested in the development of uniform comprehension and application of the laws, and it supports the idea to organize an international conference on the issues of applying the provisions of the Criminal Procedure Code.

The Ministry of Interior Affairs assures you its interest in cooperating with ABA ROLI.

With regards,
Minister of Internal Affairs,
(signature)
R.Kh. Rakhimov
Executive Summary – CPC Recommendations

Introduction

In April 2010, the Government of the Republic of Tajikistan enacted a new Criminal Procedure Code (“CPC”) that introduced a number of significant changes to the criminal justice system. The CPC is a step in the right direction toward building a more robust rule of law in Tajikistan. On paper, for example, defense attorneys are accorded more rights to meet with their clients, judges are in a better position of neutral decision-making, and adversarial principles are promoted.

Despite these improvements, the CPC falls short of solving the pressing problems and inequities in Tajikistan’s criminal justice system. The American Bar Association Rule of Law Initiative (“ABA ROLI”) has spent more than a year working closely with prosecutors, judges, defense advocates, and law enforcement officials to elicit discussion and recommendations for further improving the CPC. The government has indicated a willingness to consider additional reforms through the operation of a State Judicial and Legal Reform program, so the working group’s efforts have been a valuable and timely contribution to improving and strengthening the criminal justice system.

This publication summarizes the diligent efforts of this diverse group of local stakeholders who participated in a series of roundtable discussions wherein they critically analyzed each aspect of the CPC to determine where further revisions are necessary to create a more accessible and fair criminal justice system in Tajikistan.

Background and Process for Creating Recommendations

ABA ROLI began working closely within the Tajikistani legal community to address the challenges and opportunities introduced by the new CPC. In this effort, ABA ROLI sought to increase the ability of the legal community to implement the CPC, improve the capacity of the independent defense advocate community, and raise public awareness of secular law in Tajikistan.

ABA ROLI established a core group of legal professionals to provide trainings on the new provisions of the CPC. After conducting intensive train-the-trainer workshops, ABA ROLI, in partnership with the Prosecutor General’s Office, the Prosecutorial Training Center, and the Ministry of Internal Affairs, trained more than 1,200 practicing lawyers, members of the prosecutor’s office, and law enforcement officials on practical implementation of the CPC.

ABA ROLI then established a working group consisting of Supreme Court judges, defense advocates, representatives of the Ministry of Internal Affairs, and prosecutors from the Prosecutor General’s Office to discuss the CPC’s provisions and focus on its introduction, implementation, and revision.

These roundtable discussions brought together diverse constituents of the legal and law enforcement communities in Tajikistan, often for the first time. These stakeholders worked together collaboratively to produce these recommendations for revising the CPC. Adding clarity, addressing gaps, resolving discrepancies, and indicating problems between the law and what occurs in reality, these recommendations demonstrate a joint willingness to work for reform and positive change.

Many of the following recommendations reflect the efforts and priorities of ABA ROLI in Tajikistan in promoting the rule of law, including moving towards a more adversarial system, upholding the equality of the parties, and
other aspects of legal practice that protect the rights of the accused and maintain human rights throughout the criminal justice system.

However, not all of these recommendations are fully aligned with ABA ROLI’s views and priorities. Some do not go far enough in advancing the criminal justice system towards a truly effective culture of rule of law. In those cases, this Executive Summary attempts to note the discrepancies. In any event, it must be noted these recommendations are the product of the work of a group of local stakeholders and are not an official reflection of the policies or principles of ABA ROLI or its donors.

Summary of Recommendations

The recommendations for revising the CPC are wide-ranging, from defining specific terms to including new chapters dealing with judicial procedures for approving search warrants.

Overall, recommendations can be grouped into the following categories:\(^1\)
- to uphold the principles of an adversarial system and equality of the parties;
- to ensure the impartiality and neutrality of the court;
- to clarify ambiguity in the language of the text;
- to resolve discrepancies between various parts of the CPC or between the CPC and other laws, including the Constitution of the Republic of Tajikistan;
- to ensure the same rights are granted equally to the suspect, the accused, and the defendant;
- to ensure participants’ procedural rights/lawful interests and presumption of innocence are upheld; and
- to recommend additions to the CPC which fill gaps in the law or address practical constraints.

This Executive Summary groups each recommendation under one of the broad categories above and has condensed and rephrased each recommendation to be accessible for a lay audience. It is recommended that particular recommendations of interest in this publication be cross-referenced to both the official recommendations along with a copy of the CPC itself.

Next Steps

The recommendations put forth by the working group represent a significant improvement to the current provisions of the CPC. Further additions to these recommendations will follow a conference facilitated by ABA ROLI in Dushanbe on February 29 and March 1, 2012 where more stakeholders and legal professionals will have the opportunity to weigh in on revisions to the CPC and suggest revisions for its amendment.

The final collection of recommendations will be presented to the Parliament and to the Presidential Apparatus for consideration in future amendments. With the backing of such a diverse group of professionals including judges, prosecutors, defense attorneys, nongovernmental organizations, and international diplomatic missions, the recommendations will carry significant influence in future legislative decisions regarding Tajikistan’s Criminal Procedure Code.

Implementing the principles of the adversarial process, the presumption of innocence, and equality of arms in criminal justice are necessary first steps, but there is still much work to be done to realize a system that respects the rights of the individual, protects against the state mistakenly infringing on the liberty of an innocent person,

\(^1\) Each summarized recommendation in this Executive Summary is cross-referenced to the recommendations produced by the working group by a designated number (i.e., 1.1, 11.12).
and maintains the rule of law in society. Further efforts to support the right against searches and seizures, the right to a speedy trial, prohibitions against forced guilty pleas, and the prevention of police abuse of authority during detention are required to ensure a functioning, effective criminal justice system in Tajikistan.

Recommendation Notes

To maintain the adversarial system and equality of the parties:
A major change the CPC made explicit was encouraging an adversarial system. This means that both parties in a case present their strongest arguments to an impartial decision-maker (in this case, a judge or panel of judges) who then determines the truth of the case. In order for the adversarial system to function properly, both sides must have access to evidence, be able to conduct their own investigations, and present their arguments equally. The lynchpin of the adversarial system is the division of responsibility between the decision-maker and the parties seeking to represent their cases as favorably as possible. The adversarial system is arguably most effective at reaching a fair result in a criminal trial because the self-interest of each party will result in the seeking and presentation of all relevant evidence and vigorous questioning and cross-examining the opposition before a neutral decision-maker.

Justice Black, who served as a U.S. Supreme Court Justice from 1937 to 1971, stated in a famous criminal case, “From the very beginning, our … laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”

The adversarial process is meant to ensure fairness in justice and a respect for the rights of the accused, which means starting with a presumption of innocence and the neutrality of the decision-maker. In order to achieve this goal, parties must be equally able to access information and resources in order to prove their case. The new CPC allows for more rights and access for defense attorneys to vigorously advocate for their clients by indicating that they may have meetings of unlimited duration with their clients, they may have access to evidence produced by the prosecutor’s investigation, and they may begin representing their clients from the moment of arrest.

The working group reviewing the new CPC also made recommendations further separating the duties of the prosecutor and the judge with respect to certain investigative functions and procedural authorizations in order to strengthen the ability of the court to remain neutral and for the adversarial system to operate.

Though not explicitly described or mentioned in the new CPC, the implication for the adversarial system is also equality of the parties. The idea behind the equality of arms is not ensuring that both sides possess equal skill and resources but that there is a level playing field: both sides have procedural rights which allow each party to form and present an opinion. Therefore, procedural rights work together to make the adversarial process a functional reality. For equality of arms, procedures must exist that allow each party to subpoena witnesses

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3 Gideon v. Wainwright, 372 U.S. 335, 344 (1963). Gideon is a landmark U.S. court case establishing the right of a defendant in a state criminal trial to an attorney even if he or she cannot afford one.
4 Justice Black also noted that, “A criminal trial is in part a search for truth. But it is also a system designed to protect ‘freedom’ by insuring that no one is criminally punished unless the State has first succeed in the admittedly difficult task of convincing a jury that the defendant is guilty.” Williams v. Florida, 399 U.S. 78, 113 (1970).
and records, introduce evidence, cross-examine adverse witnesses, make objections, and give opening and closing statements.\(^5\)

The recommendations that the working group made with regard to the new CPC include the following:

1.1. The court’s power to initiate cases must be eliminated; it cannot be unbiased if it must determine the elements of a crime and must necessarily assume the subjective qualities of the prosecution. Giving the court the power to initiate cases contradicts principles of adversarial proceedings and equality of the parties. Further, Article 35, item 1 contradicts other aspects of the CPC, which call for the court to be objective and unbiased and to provide parties with conditions such that they may exercise their procedural rights and perform their procedural duties.

1.13. There must be an obligation on the part of the prosecutor, judge, or investigator to terminate proceedings if the parties have no claim against each other or if the offender shows repentance and has reimbursed the harm caused by the crime. There can be no implementation of the adversarial principle if there is no dispute to pursue. Further, this recommendation notes that if the judge, prosecutor, or investigator chooses not to terminate proceedings in such an instance, there will be mistrust of the judicial system and would be inconsistent with the principle of a humane and fair criminal justice system.\(^6\)

2.2. A suspect must be given the chance to consult with his/her defense attorney before being questioned by the prosecutor/investigator. The right to counsel is a key component of the adversarial principle, and the timing of the provision of that counsel is important for procedural fairness.\(^7\)

2.3. The defense attorney should be able to participate in court sessions rendering decisions to authorize procedural actions during the preliminary investigation phase. In order for a true adversarial process to function, both the defense and prosecution need to be able to offer opinions in judicial decision matters.

2.5. Sections of the CPC should be amended such that the suspect always gets a copy of the ruling initiating criminal proceedings against him/her so that he/she can prepare a complaint against it and prepare an adequate defense.

2.8. It should be mandatory for defense attorneys to participate even if the suspect does not request an attorney in order to uphold constitutional guarantees of the right to effective defense. A suspect should not have to file a petition for a defense attorney, so one should only be withheld if the suspect specifically waives that right.

3.10. The defense attorney should have the right to make copies of case file documents during the trial, not just at the completion of the investigation.

3.12. The defense should have the right to present opening remarks at the trial.

3.13. A party should have the right to put questions directly to a witness of the other party as opposed to simply allowing that witness’s statement to be read in court.

5.8. Article 111 should be amended so the court can impose a different measure of restraint other than

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6 ABA ROLI expresses concern about this recommendation is that there are instances where a victim’s forgiveness of the accused/defendant should not preclude prosecution, such as in cases of domestic violence (where victims may end up further abused or killed upon taking the abuser back) or in situations where a criminal may convince a victim that he or she may only be repaid if the criminal stays out of prison (and therefore convinces the victim not to pursue prosecution).

7 ABA ROLI would like to see this and other related recommendations be expanded to indicate that any time a person is questioned by authorities, he or she should have the right to counsel and must be informed of his or her right to refuse to answer questions incriminating him or herself or close family members.
detention, and the court should have the right to extend the arrest period in order for both parties to present arguments for/against imposing detention as a pretrial restraint measure.8

5.9. The CPC should specify what standard of proof a court ruling should meet, and the law should oblige the judge to provide a copy of the ruling to the suspect's defense attorney such that the principle of equality of the adversarial parties may be maintained.

5.14. Parties should have the ability to appeal/challenge the imposition, change, or revocation of a restraint measure for detention rulings.

11.9. Parties need to be able to file objections to adverse actions done by an opposing party not just the presiding judge in order to maintain the principle of an adversarial trial.

11.11. Court rulings, granting or rejecting motions with comment on the record, should be allowed to be appealed or challenged.

To uphold the impartiality and neutrality of the court:

For an adversarial system to function properly and for people to have trust in and rely on the justice system, courts must be impartial and neutral in rendering decisions affecting the liberty or property of the parties.

Conflicts of interest in terms of the court’s role vis-a-vis the prosecutorial function have historically been an issue in Tajikistan. In moving more towards an adversarial system where the court is a neutral decision-maker, the working group focused on ensuring that the CPC did not put the court in a position that might compromise its neutrality and impartiality.

As described above, the key to an adversarial system is the separation of responsibility between the parties and the decision-maker. A government’s promotion of the adversarial system signals its recognition of the value of the individual and a commitment to reigning in state power even at the expense of occasionally freeing the guilty.9 The system theoretically intends to treat the prosecution (the state) as an equal party to the defendant10 and therefore would seek to ensure, procedurally at least, that neither side gains an unfair advantage nor that the court is forced into a position that requires it to favor one party over the other.

The working group’s recommendations to the CPC reflect a concern that the current procedures put the court into a necessarily biased position or that there are no procedures that enable parties to challenge the court’s decision should it appear to be biased.

The recommendations that the working group made with regard to the new CPC include the following:

1.2. A challenge to a court’s decision must be decided by a chairperson or other court’s chairperson instead of the court itself in order to ensure impartiality and neutrality. Though adequate procedures for reviewing the challenge of a court are contained in certain other laws, two Articles of the CPC should be amended to be consistent in maintaining the impartiality and neutrality of the court.

1.15. The judge should be able to decide to impose a different non-detention restraint measure when examining the prosecutor’s motion to impose detention in custody. This amendment would enable the court to make decisions on pre-trial measures above and beyond a prosecutor’s motion.

8 ABA ROLI recommends that there be an expansion of this provision to say that defense counsel may also submit evidence and/or testimony to argue whether pretrial detention is required. Further, the standard of proof should be “clear and convincing,” not simply “may” as is outlined in the CPC.


10 § 1.5(c) Adversary adjudication, 1 Crim. Proc. § 1.5(c) (3d ed.).
5.2. Bail should not be set at the high amount as currently specified in the CPC and there should be limits imposed based on the category of the crime. Further, bail matters should be transferred to the court’s jurisdiction and not the investigator/inquiry officer because the court is an independent body.

5.5. When pre-trial detention is deemed necessary, the investigator/prosecutor should file a motion with the court and state the arguments/grounds for such a motion. This should be submitted to the court six hours before the arrest period expires, and copies should be sent to the suspect and his/her defense attorneys against their signatures at least six hours before motion is examined by the court. Otherwise the court will see it and then ask to see all evidence in direction of accused person’s guilt, which leads to questions of its impartiality.

5.10. Article 111 should be amended to stipulate that a court ruling to extend the arrest period to 72 hours shall be subject to appeal/challenge.

6.11. Article 35 must not contradict Article 11, which allows a person to be committed to a medical institution on the grounds of a court ruling. There must be judicial control over the validity of the decision to commit a person to a medical institution.

6.12. Article 216 must be amended such that it obligates the investigator/inquiry officer to apply to the court for authorization to commit a person to a medical in-patient institution, which would then be consistent with Article 35. Further, the CPC needs to define the procedure that obliges the court to examine the investigator’s application in this issue.\(^\text{11}\)

7.1. The court should not rule for the remand of a criminal case for additional investigation or dismissal since that requires the judge to side with either the prosecutor or defense. Instead, the judge should rule purely on administrative or organizational issues if the judge must personally proceed with preparing for a trial and the judge should hold preliminary hearings to ensure compliance with the adversarial principle and to uphold the court’s neutrality in resolving the issues. A new Chapter should also be included which addresses the matter of preliminary hearings.

To clarify ambiguity in language:

The many individuals working to draft the recommendations for the new CPC paid careful attention to the language and translations of the legislation to ensure that there were as few ambiguities as possible. The recommendations are such that the terms used throughout the CPC are consistent with one another and would make sense to the various parties expected to abide by and uphold the procedures.

The recommendations that the working group made with regard to the new CPC include the following:

1.3. The CPC must define the “other prosecutors” who are able to set and extend detention time period limits. The language of the current Article does not fully designate the appropriate prosecutors responsible for extending detention time period limits.

1.5. The title of Chapter 14 should be amended to be consistent with its contents that complaints can be lodged not only against court actions and decisions, but against actions/omissions/decisions of inquiry officers, investigators, and prosecutors.

1.8. The legality principle should be better defined so that it is easier to understand what procedural decisions/acts should be considered legal/illegal and also to better use the words “illegal” and “liability” in this Article. Various Articles of the CPC must be amended to indicate the consequences for violations of the requirements of the law, including inadmissibility of evidence obtained in violation\(^\text{11}\)

ABA ROLI recognizes and urges that, in cases where allegations of psychiatric or mental issues are involved, even stricter procedural protections are warranted.
of the rules of the CPC and invalidity of the acts adopted if they were performed in violation of the requirements of the law.\textsuperscript{12}

1.14. Preliminary investigation time limits should describe the rights and obligations of prosecutors and deputy prosecutors. The Article does not extend certain privileges to parties who would logically have them and therefore should be amended.

2.12. "Close relatives" for purposes of whom one is not required to testify against should be clarified to include in-laws as well as close friends if one’s parents are deceased and if one has no living relatives.

3.6. The word “complaint” must be defined so that it is clear which government body has jurisdiction over criminal proceedings and is therefore authorized to examine complaints.

3.7. Article 148 must specify what happens if a complaint is lodged after the 14-day deadline and if it is possible to extend the deadline if it was missed for valid reasons.

4.1. The Tajik version should use one word like the Russian version to indicate “arrest.”

4.2. The term “arrestee” must be defined.

4.3. The term “actual arrest” must be defined.

4.4. The term “delivery” must be defined.

5.3. The Russian version of the CPC needs to use one definition/term of the word “detention.”

6.7. The CPC needs to introduce a comprehensive term to help investigators identify the type of communication and relevant rule in order to obtain authorization to check the contents of communications.

11.1. The CPC should be amended to better define relevance, admissibility, and sufficiency of evidence.

11.8. The definition of “leading questions” must be made clear and explained as to its importance in the CPC.

11.12. Judges should use a technical means to execute a court judgment and sign each page of it, and so should the panel of judges. Court judgments otherwise may be easily amended without the parties’ knowledge.

11.19. The CPC needs to specify the authority entitled to approve decrees as issued by an inquiry officer.

11.20. The CPC needs to more specifically define an inquiry officer’s powers.

11.21. The law needs to specify the investigative jurisdiction with respect to offenses set out in Article 111 in instances when the suspect pleads innocent.

11.22. Article 137 needs to be amended such that it provides for the renewal of the period of pre-trial investigation when the statutory deadline is missed for valid reasons.

To resolve logical contradictions between different parts of the CPC or between the CPC and other laws:

The CPC covers a wide variety of procedural elements. The working group has been able to determine where certain Articles necessarily contradict or negate other Articles, even though the Articles may be referring to different elements of criminal procedure. Further, the reviewers were methodical in ensuring that the Articles of the new CPC did not somehow conflict with Tajikistan’s Constitution or any other laws already in place.

The recommendations that the working group made with regard to the new CPC include the following:

1.4. The court is the appropriate party to rule on revoking a decree rejecting a request to initiate criminal proceedings, and the provision stipulating that the ruling be executed by the prosecutor is not logical.

\textsuperscript{12} ABA ROLI further recommends that there should be no possibility of \textit{nunc pro tunc} ratification of improper actions by the court (i.e., that those improper/illegal actions may be retroactively made proper/legal by the court at a later date).
in light of other Articles that say a court’s ruling to revoke a decree shall not be subject to appeal or challenge. If a prosecutor were to be responsible for deciding this instead of the judge, the Article waiving that decision to appeal or challenge is made invalid.

1.9. Restrictions of the scope of the prosecutor’s authority to transfer corruption cases in the CPC should be eliminated to bring it into line with the Constitution and other Articles of the CPC which provide for a wider scope of prosecutorial supervision.

1.10. Articles related to terminating proceedings in public/private prosecution cases when parties reconcile must be brought in line so they make sense together and also for both minor/medium gravity crimes.

1.11. Article 28 should be amended to be consistent with Article 27 of the CPC and Article 82 of the Criminal Code so that an act of amnesty can be consistently considered a ground for exemption from criminal liability if a decision is made to reject a request to institute or terminate criminal proceedings.

1.12. Article 29 should be amended to be consistent with Article 72 of the Criminal Code in terms of saying that proceedings against someone who is a first time offender of a minor/medium-gravity crime do not have to be instituted if he/she actively repents (currently, the Tajik version says minor crime, Russian Code says medium gravity and Criminal Code says minor OR medium gravity crime).

1.16. The requirement that the investigator must obtain the prosecutor’s consent to cancel or change a restraint measure previously imposed conflicts with the Constitution’s interest in a citizen’s rights and liberties and should be amended. This is because there could be unreasonable delays in restoring a person’s rights and liberties if the investigator must first obtain prosecutorial permission.

2.13. Article 200 says that the interrogated person may document his/her testimony by writing in his/her own hand but Articles 42, 44, 46, 47, 54, 56, 57, and 58 do not mention that right. These should therefore be amended accordingly.

2.17. Article 210, item 2 should be amended so that a victim or a witness’s lack of written consent to an expert examination does not entirely preclude the investigation from being conducted in instances when it is required as listed in Article 209, item 1.

3.1. Articles 47 and 46 must be brought into line by providing the right of a suspect to participate in a court hearing intended to decide to place him/her into custody.

3.3. Article 22 and Article 176 need to be aligned to ensure that there are detailed mechanisms specified for protecting the property of a person placed into custody and to make attachment of that property to be possible.

3.5. The right to lodge complaints should be consistent among the Articles in order to ensure overall consistency with the Constitution, which guarantees the right to judicial protection to everyone.

3.9. The Tajik text of Article 112 should be amended to be consistent with the Russian version in indicating the time limits for providing case material for review.

3.11. The CPC must be amended such that the investigator ensures that a defense attorney must participate in the examination of the accused if the accused does not refuse counsel.

4.15. The right for a civilian to apprehend an individual and thus confer on that person procedural rights of a suspect should go with a chapter that establishes the principle setting forth the arrest procedure and not make the start of the arrest period dependent on who arrests the person.

5.4: Language regarding reasons for placing persons into custody as a pre-trial restraint measure should be removed in order to make Articles consistent.

5.12. Article 232 conflicts with Article 111 in stipulating that a motion to impose detention as a pre-trial restraint measure should be heard in the presence of the suspect/accused person because they will otherwise not be able to appeal against such a ruling. Therefore, if a person is ordered into pre-trial detention as a restraint measure in absentia, they are to be brought immediately to a court to determine the appropriateness of that action.
8.2. Article 453 must be brought in line with other CPC Articles and include Article 195 so that fast track proceedings apply to illegal purchase/transfer/sale/carrying of weapons as well as illegal manufacturing of those weapons (which are both classified as minor offenses).

8.6. Article 46 contradicts Article 2, item 3 in terms of indicating that a person who is having actions performed against him/her by a criminal prosecution agency should be called a suspect because then that person has a right to defense as well as other rights that would be infringed. There would be unlawful restriction of human and civil rights and liberties unless Article 46 is brought into line with Article 2, item 3.

11.13. Tajik and Russian counterparts to the CPC should be aligned in saying that a copy of a court judgment should be served on the prosecutor.

11.14. The CPC should be made consistent such that complaints and protests against a court judgment may be filed by either party within ten days.

11.18. Article 111 should be aligned with Article 35 and the Constitution in saying that an investigator should be able to apply to a court for an arrest warrant.

To ensure the same rights are granted to the suspect, the accused, and the defendant:

Similar to the principles of the adversarial system, it is important to ensure that the same rights are generally granted to a person of interest in criminal proceedings, regardless of their nominal classification. A loophole that has been typically exploited is not granting certain privileges to a person because he or she is not technically considered a defendant or has not yet had criminal proceedings initiated against him or her and therefore does not have the same rights as a defendant, such as the right to defense counsel.

The working group recommended that certain Articles of the CPC be amended such that treatment for a suspect, the accused, or the defendant is the same and rights are therefore granted to each type of category. This will be an effective measure to ensure that the rights of the individual are respected for access to defense counsel, among other rights.

The recommendations that the working group made with regard to the new CPC include the following:

2.1. The right to a defense attorney should be acquired from the moment of being suspected of committing a crime and not only after an official decree is issued to initiate criminal proceedings. There is otherwise a violation of the constitutional principle of the presumption of innocence. Further, informal suspects who can be called in for questioning or subject to other investigation do not get the same defense protection as a formal suspect against whom criminal proceedings have been initiated.

2.4. Sections of the CPC should be amended to be consistent in allowing both a suspect and the accused to have unlimited meetings with his/her defense attorney.

2.14. Article 46 should be amended to grant the same amount of time to prepare the defense to a suspect as is given to the accused under Article 47.

2.15. The suspect should have the same right to review relevant expert opinions as the accused does.

2.16. Both the accused and a suspect should have the same right as the defendant to be provided with copies of decisions against which complaints have been lodged.

3.2. The CPC must stipulate that both the suspect/accused also have the right to review the records of court proceedings, not just one who is a defendant.

4.14. Article 11 should cover both an arrestee and a detainee for purposes of lodging complaints.
To ensure participants’ procedural rights/lawful interests and presumption of innocence are upheld:

The new CPC provides for the presumption of innocence, which is an important theoretical step in reshaping Tajikistan’s criminal justice system. If procedural elements, covering investigation, initiating criminal actions, and pre-trial and trial processes begin with the belief that the suspect is presumed innocent until proven guilty, many other democratic and equitable principles necessarily follow (including the adversarial system and equality of parties). It is not to say that there was not a presumption of innocence prior to the revision of the CPC, but it is now embodied in the text of the Code itself. This presumption carries meaning both before and during the trial, technically ensuring that suspects are treated with respect and dignity throughout the criminal investigation and defendants are given the opportunity to present their best defense and evidence.

The recommendations that the working group made with regard to the new CPC include the following:

1.6. Article 124, item 5 of the CPC should be changed to allow that a judge’s ruling under that Article may, in fact, be challenged. This is to ensure that the judge may not use his/her powers to violate the parties’ rights by ruling illegally to revoke a decree not to institute criminal proceedings and to institute or resume criminal proceedings.

1.17. A person in custody as well as a person not in custody should only be committed to a hospital pursuant to a court order. Persons in custody have no guarantees of judicial review of the decision to commit them to a medical facility, and this amendment would ensure that all decisions to commit a suspect or the accused to a medical or psychiatric institution would be made by a judge.

2.6. Article 18 should be clarified to ensure that a defendant receives prosecution documents in a language he/she can read and understand.

2.7. A directive must be established to create a mechanism for paying interpreter’s fees. This is allowed for in the CPC but there are no funds to administer it to meet the requirement. This will ensure that the rights of the accused or the suspect are upheld so that they are informed of the charges against them in the language they understand.

2.9. The rule should guarantee that the person under investigation/defendant should get mandatory participation of a defense attorney if he/she cannot read/write or know grammar of the language used in the criminal proceedings.

2.10. The Article of the CPC dealing with witness immunity should specify the consequences of giving such testimony or officials obligated to give explanations about the right to the suspect and/or the accused and to witnesses. This amendment ensures that a suspect, the accused, or the witness is protected from testifying against oneself or against one’s close relatives.

2.11. Article 56 and Article 12 conflict, so Article 56 should be amended to ensure that a witness is informed that he/she does not have to testify against close relatives or himself/herself prior to questioning.

3.4. Article 23 should stipulate the right to lodge complaints against the actions/decisions of the chief of the investigative agency/inquiry agency because these parties may cause violations of the procedural rights and lawful interests of participants.

3.8. The investigator must warn parties of criminal liability for disclosing information about a person’s private life (not just that it may not be disclosed without permission).

3.14. There should be an obligation to warn a specialist that there is criminal liability for giving a false opinion (as this is done for experts).

5.1. No measure of restraint including bail should be made conditional on the reimbursement of damage costs because the person has not yet been found guilty and therefore this infringes on the presumption of innocence.
6.1. Article 13 should be amended to make it clear what the criminal prosecution agency must do to be able to inspect a dwelling without the consent of the people living there.

6.2. To maintain the principle of inviolability of a dwelling, the CPC needs to be amended so that inspection of a dwelling is in strict compliance with Article 13 because it does not mention the need to obtain court authorization for inspecting a dwelling without the residents’ consent.

6.13. The CPC needs to be amended to provide a mechanism obligating the investigator/prosecutor/judge to ensure the safety of property belonging to a defendant placed in custody. Further, the CPC must also allow for the attachment of the defendant’s property to ensure its safekeeping in response to his/her motion. In addition, the CPC must also explain the judicial procedure for examining an investigator’s motion for property attachment and the possibility of/procedure for appealing the relevant court ruling.

8.3. The suspect/person of interest must agree to a fast-track proceeding because his/her rights are limited inevitably in that approach and therefore consent is important.

Practical recommendations:

There are often gaps between what occurs in practice and what is specified in the law, and the working group was careful to note where procedural requirements conflicted with practical constraints.

The recommendations that the working group made with regard to the new CPC include the following:

1.7. The procedural time limit for reviewing statements/reports of crimes committed should be extended from three days to ten days by the chief of the inquiry agency or the preliminary investigation agency and up to one month by the prosecutor. This is because checking industrial/work safety violations inevitably takes longer than ten days.

5.11. The law should specify who shall provide information on the court’s ruling to the short-term detention facility where an arrestee is kept and when this should be done.

8.7. Seven days of a fast track proceeding is too short in some areas to perform all listed procedural actions in Article 453, item 3 and therefore should be extended.

Broad recommendations to address gaps:

In addition to observing inconsistencies and ensuring that new principles of adversarial systems, equality of the parties, and presumption of innocence, the working group kept in mind areas where there were gaps in procedural coverage and where the drafters failed to include key provisions that would help bolster the criminal justice system.

The recommendations that the working group made with regard to the new CPC include the following:

4.5. A procedure should be drafted that governs arrest procedures since the CPC nor any other law describe the sequence of actions for performing arrests.

4.6. An arrestee delivery log should be added to Article 91 so that there may be some documentation to help combat violations that often occur immediately after the arrest and the hours thereafter.

4.7. Bull-pens should be abolished or used only for short-term detention of arrestees because they are not safe or healthy.

4.8. Relatives should be notified immediately after an arrest (not 12 hours after).

4.9. A medical check should be conducted as soon as the arrestee is brought to the law enforcement agency to protect against unlawful coercions, torture, etc.
4.10. The arrest record should be executed immediately after an arrestee is delivered to the criminal prosecution agency, not three hours later.

4.11. A new item should be added to the CPC that indicates that there will be liability on the chief of the detention facility if there is a failure in providing safe and healthy detention conditions.

4.12. A new item should be added to the CPC indicating that someone is responsible for ensuring that an arrestee is kept in appropriate conditions after an arrest.

4.13. A new Article should be added that addresses the chance that a witness/victim/arrestee may be questioned before criminal proceedings are instituted.

5.6. A procedure for general due notification should be included in the CPC, both as an amendment to Article 111 and as an additional chapter to be added (Chapter 16).

5.7. Amendments to Article 111 should be made such that it is clear that a record of court proceedings should be kept and that the principle of adversarial proceedings is observed at the hearing.

5.13. Article 168 should be amended so an investigator does not have to seek prosecutorial approval to revoke detention previously imposed by the court. The rule currently limits the investigator’s discretion and authority.

6.3. A new Article must be added to regulate the judicial procedure for obtaining authorization to perform procedural actions. There also needs to be a procedure for the court to use to issue search warrants.

6.4. A new Article must be added that specifies the court’s actions following receipt of information that a search has been conducted without the court’s authorization.

6.5. A new Article and an amendment must be added that describe the procedure for issuing authorization by the court to preserve personal/family secrets and privacy of savings/deposits/communications. Further, the CPC needs to specify judicial procedures to authorize the search/detention of correspondence including, specifically, email messages.

6.6. A new Article must be added describing the judicial procedure for authorizing monitoring/recording telephone conversations and listing persons entitled to participate in judicial proceedings and provisions for keeping records of court hearings.

6.8. The CPC needs to indicate to people that there is criminal liability for failing to ensure the confidentiality of information containing personal secrets that may be part of a seizure/inspection of correspondence.

6.9. The CPC must specify a procedural rule whereby an investigator/inquiry officer may apply to the court for authorization to perform an inspection, search, or seizure.

6.10. CPC needs to provide a guarantee that the investigator will conduct an inspection in good faith and record findings without attesting witnesses present and that the investigator should not have to put his/her health/life at risk in performing such inspections.

8.1. The CPC needs to define a fast-track proceeding as a type of preliminary investigation or an inquiry or a special type of preliminary investigation that comprises attributes of both an investigation and an inquiry. The CPC should also specify what criteria have been used to identify under which Criminal Code Articles fast-track proceedings can be used, and the scope of such Articles should be expanded accordingly.

8.4. The CPC should have a provision that stipulates that measures of restraint imposed upon a suspect who agrees to a fast-track proceeding should not include detention in custody. This will be an incentive for a suspect who has made a confession and has agreed to a fast-track proceeding.

8.5. A new Article should be added that includes a commitment to appear when summoned by an inquiry agency or court and a responsibility to inform these parties of a change of address as procedural compulsion measures, including procedural consequences for violating this commitment.
9.1. A CPC Article should be amended to take into consideration issues raised in summary trial proceedings, including setting forth grounds for applying summary trial procedures. The Article should specify at what stage of the trial the defendant may file a motion for a summary trial procedure. Defense attorneys should be present at any summary trial. Further, the defendant must plead guilty and give consent to the summary trial procedure as well as ensure that his/her attitude to the charges is understood.

10.1. Article 354 must be amended to say that private prosecution victims can file complaints through criminal prosecution agencies, not just directly to the court. Further, the Article must specify that the court must give time to the victim to remedy defects in the complaint in order to meet Article 354, items 3 and 4.

11.2. The title of Article 140 is not accurate because it only mentions the basis for initiating a criminal case but yet only lists ways for initiating criminal prosecution.

11.3. There should be a provision in the CPC to make verification of the voluntary nature of the defendant’s refusal to attend court hearings mandatory and also that grave/extremely grave crimes may not be tried without the defendant’s presence.

11.4. Rule 88 should elaborate the consequences arising from the invalidation of evidence that has been obtained without resort to lawful means. The term “invalid evidence” should be replaced by the term “inadmissible evidence.”

11.5. Court may not admit into evidence testimony of a suspect/defendant which is given in the course of pre-trial proceedings violating their right to have defense counsel present as well as testimony of victim/witness that may be based on guesses/assumptions/hearsay.

11.6. There needs to be a mechanism specified in the CPC by which evidence may be ruled inadmissible at the trial preparation stage.

11.7. Court records must be made accurately with technical equipment, and parties should be able to review the record after each day/court session and not have to wait until a trial is fully completed.

11.10. The CPC needs a provision for filing comments on the record after completing one day’s court session. There also needs to be some differentiation between the term “trial” and “court session.”

11.15. The CPC must include a section that addresses the judicial procedure for securing evidence in order to further adversarial principle/equality of the parties in accessing and using evidence.

11.16. If there are no rules that regulate in any given situation in the CPC, officials should rely on using statutes by analogy.

New Draft of Chapter 11 for CPC Proposed

The working group reviewing the new CPC concluded that even with amendments, there were still gaps to be filled and issues to be addressed that the CPC overlooked. To that end, the group drafted a fully revised chapter, Chapter 11, which addresses Arrest of a Person. The new Chapter importantly addresses at what moment in time a person is under actual arrest, an important distinction because the moment of arrest triggers a variety of procedural rights that help ensure the safety and rights of the person under arrest.

Article 91: Defines “actual arrest” to ensure a single and uniform understanding of the term and to ensure that procedural rights commence after that moment. This Article also provides for informing the suspect of his/her procedural rights immediately with a written statement to be completed attesting to that fact.

ABA ROLI encourages the development of a specific and separate Code of Evidence in Tajikistan. This Code would encourage the definition and clarity of what constitutes relevant, admissible evidence and determine how to ensure the integrity and maintenance of that evidence throughout the chain of custody.
The Article also establishes the requirement of completing an arrestee delivery log, relative notification, medical check, and formalization of arrest record procedures. Lastly, the Article specifies that non-law enforcement officers may apprehend a person caught committing a crime and establishes the maximum arrest period and consequences of not staying within that period.

**Article 92:** Details an exhaustive list of grounds for arrest. The CPC formerly contained vague and very broad grounds for arrest, which meant that there could legally be arbitrary arrests based on the grounds enumerated in the CPC.

**Article 93:** Deletes one reason for an arrest when a person has no permanent residence and identity has not been established. Critics had argued that this particular reason for arrest violated Article 9(1) of the ICCPR, which stated that no one can be subject to arbitrary arrest or detention.

**Article 94:** Decision to institute criminal proceedings should be made within 12 hours from the time of the actual arrest (but initial questioning may still be conducted). The arrestee shall be released if a decision is made within 12 hours not to institute proceedings.

**Article 95:** Similar to current CPC except there is no provision for the investigator to render an arrest decree if the accused person is in a different region and also does not mention a maximum arrest period of 72 hours and has a clearer wording of the provision in item 4.

**Article 96:** Mostly contains the same provisions as the existing Article but adds legal consequences and also stipulates that the agency conducting criminal proceedings has the discretion to impose different procedural compulsion measures.

**Article 97:** Item 3 is amended, clarifying language.

**Article 98:** This Article proposes major changes, mostly regarding arrestees only being kept in short-term detention facilities and procedures including keeping a detailed facility log that includes contacting relatives and the results of a medical check. The proposed Article further details requirements for the authorization of meetings with one’s defense attorney and puts liability on the chief of the detention facility for unsafe/unhealthy detention conditions.

**Article 99:** This amended Article excludes the provision that the “grounds for keeping the person in detention do not exist any more” as a ground for releasing an arrestee. This amendment demonstrates a shift to ensure strict enforcement of the maximum arrest period (72 hours).

**Article 100:** This amended Article contains a reference to Article 91, which is about notifying an arrestee’s relatives of his/her arrest. Further, if a member of the armed forces is a suspect, notification of military unit should also occur. A new item was included stipulating that if an arrestee is moved to a different facility, relatives and defense attorneys must be notified within three hours.

**New Chapter 16 for CPC Proposed**

The reviewers of the new CPC realized that the CPC does not provide for a general due notification procedure and proposed a chapter dedicated to addressing a general procedure for summoning proceedings participants to participate in investigative actions or court hearings. Since a similar chapter exists in Tajikistan’s Code of Civil Procedure, the reviewers recommended modeling the CPC version on this.

**Article 139:** The full Article covers 6 aspects of summoning participants to different criminal proceedings. These items cover subpoenas, subpoena contents, subpoena delivery, service of a subpoena, consequences of refusing to receive a subpoena, and what happens if a participant changes his/her address during the proceedings.
New Draft of Chapter 31 for CPC Proposed

The panel of reviewers recommended a new Chapter be added to the CPC to address issues of preliminary hearings. The chapter is proposed to ensure that the principle of adversarial proceedings is upheld in the course of addressing issues that may require the adoption of procedural rulings that impact the administration of criminal cases.

**Article 261** keeps the same title but provides for three possible court decisions which are to transfer a criminal case to another court to cure defects in jurisdiction, to hold a preliminary hearing or to set a date for trial.
- Paragraph 2 remains unchanged.
- Paragraph 3 provides that court rulings must be issued within seven days for regular criminal cases but may be extended to 12 by decree of the presiding judge.

**Article 262** is shorter and does not cover a number of issues specified in the current Article 262.

**Article 263** defines the grounds for conducting a preliminary hearing in order to resolve the following: remand of a criminal case to the prosecutor; suspend/dismiss a criminal case; examine a party’s motion to suppress evidence; and calls for a short time period to file a motion for preliminary hearing.
- Paragraph 1 is identical to Article 266 and enlarged to include Paragraph 2 which provides that a criminal case may be transferred to another jurisdiction if the prosecutor changes the formal charges against the defendant in the course of preliminary hearing.

**Article 265** is the same as current CPC Article 267.

**Article 266** provides appointment of a “trial” instead of a “court session” (in current Article 263).
- Item 1 replicates Paragraph 1 of current Article 263.
- Item 2 additionally specifies whether a criminal case would be tried by a single judge or by a panel of judges; who would be summoned to a trial of the parties; and measures of restraint to be imposed on the defendant.
- Item 3 replicates Article 263, Item 3.
- Item 4 provides that parties should be notified of the venue, date, and time of trial.

**Article 269** specifies the duties of the court reporter.

**Article 267** is included to ensure equality of adversarial parties by allowing the defense attorney the right to copy case records after the pre-trial investigation.

**Article 268**, Item 1 does not require that a preliminary hearing commence in exceptional cases in 30 days because that limitation period does not explain the exclusive nature of the delay.

**Article 268**, Item 2 prohibits the commencement of a trial earlier than seven days after a copy of the indictment has been served on the defendant. This guarantees the defendant has a minimal time period to prepare for the trial and retain an experienced defense attorney.

**Article 269** is title “preliminary hearing procedure.”
- Paragraph 1 provides that a preliminary hearing shall be conducted by a judge with the mandatory participation of the parties in accordance with the rules laid out in Chapters 32 and 33 of the CPC.
- Item 2: A preliminary hearing shall be held within ten days of the date of the criminal case’s admission to the court. The general time limit to prepare for a trial is seven days.
- Item 3: If necessary, a preliminary hearing may be held within a period of three days.
- Item 4: This allows for a preliminary hearing to be held without the defendant’s participation.
- Item 5: This provides that a preliminary hearing may still be held if a party fails to appear in court without a valid excuse.
- Item 6: Describes procedures for examining motions to suppress evidence.
- Items 7 and 8: These specify grounds for satisfying defense motions to discover additional evidence/objects.
• Item 9: Preliminary hearings must be duly recorded, and parties can read the record and also submit comments thereon.

**Article 270** describes the procedure for filing motions to suppress evidence.\(^{14}\)
- Item 1: This stipulates that a copy of motions must be served on the adverse party on the day of the motion’s submission to the court. The Item also lists requirements set forth by the criminal law regarding contents of such motions as well as the order of presenting arguments.
- Item 3: Describes the mechanism whereby a judge may establish the occurrence of events which served as grounds for suppressing evidence by way of examining witnesses.
- Item 4: Fairly distributes the burden of proof between parties to preliminary hearings.
- Item 5: Discloses the legal consequences of the suppression of evidence, including loss of its probative value.
- Item 6: This makes it possible for the court to re-address the issue of the admissibility of suppressed evidence.

**Article 271** deals with the changing the practice of additional investigation by the court.
- Item 1: Provides four instances when a court may remand a criminal case to the prosecutor to remove obstacles to a trial. In remanding, a court may act upon a party’s motion and at its own discretion.
- Item 2: Sets a ten-day deadline for the prosecutor to correct technical violations.
- Item 3: Obligates the court to rule on a measure of restraint to be imposed on the defendant.
- Item 4: Forbids the prosecution to conduct any investigative/procedural actions unless otherwise provided by Article 271.
- Item 5: Specifies the legal consequences for violations by the prosecutor of a ban on conducting procedural actions and of statutory limitation periods set forth in Article 271.

**Article 271 (2)** regulates the procedure for suspending criminal proceedings.
- Item 1: Provides four instances when a court may rule to suspend criminal proceedings.
- Item 2: Obligates the court to dismiss a criminal case in the event of a defendant’s active repentance or reconciliation with victim.\(^{15}\)
- Item 3: Specifies what data must be stated in a court ruling to dismiss a criminal case and what must be resolved in the process.
- Item 4: Specifies participants in proceedings upon whom a copy of the court judgment to dismiss the case must be served as well as deadline for service.

**Conclusion**

The recommendations provided herein represent a concerted effort to reach all interested stakeholders and work together to discuss the critical issues in Tajikistan’s criminal justice system as embodied in the Criminal Procedure Code. In an unprecedented collaboration, defense advocates, prosecutors, judges, and law enforcement officers all contributed to the discussion of reforming the CPC. Throughout the course of these

14 ABA ROLI further recommends that there be more time granted for the defense to file a motion in opposition. Without enough time to review motions and file motions in opposition, there can be no equality of the parties and the adversarial principle cannot be upheld.

15 As stated above in n.6, ABA ROLI expresses concern about this recommendation is that there are instances where a victim’s forgiveness of the accused/defendant should not preclude prosecution, such as in cases of domestic violence (where victims may end up further abused or killed upon taking the abuser back) or in situations where a criminal may convince a victim that he or she may only be repaid if the criminal stays out of prison (and therefore convinces the victim not to pursue prosecution).
discussions, important changes to the criminal and judicial processes related to criminal law in Tajikistan were raised. The move towards a presumption of innocence, towards a truly adversarial system, and towards a more fair process for investigating and processing criminal matters is not easy and straightforward, but conversations such as these are a key component of positive and lasting change.

Criminal procedure is important in any context because it ensures that the constitutional and civil rights of the accused are protected. Due process and the right to a fair trial are the foundations of a robust rule of law – one where citizens may trust the system of justice, where rules are predictable and consistent, and where they can rely on neutral decision-makers to help uphold the law.16

16 This Executive Summary was prepared for ABA ROLI by Legal Intern, Sari Long
1. Competence of the Subjects of Criminal Process

1.1. Subject: The court’s authority to institute criminal proceedings.

Existing rules: Article 35, item 1, sub-item 15 of the Criminal Procedure Code (CPC): - in instances provided by law, institute criminal proceedings and assign cases to appropriate competent authorities for preliminary investigation.

Existing rules: Article 20, item 1 of the CPC: Judicial proceedings in criminal cases shall be conducted in accordance with equality and adversarial principles. 2. The court is not an agency of criminal prosecution and shall not take the side of the prosecution or the defense in a case. The court shall create the conditions necessary for the parties to perform their procedural duties and to exercise their procedural rights.

Existing rules: Article 21, item 5 of the CPC: The court and/or the judge, acting in an objective and impartial manner, shall create the necessary conditions for the parties to exercise their rights to a complete examination of the circumstances of the case.

The issue: This power of the court, as stipulated by Article 35 of the CPC, contradicts the principles of adversarial proceedings and the equality of the parties in criminal judicial proceedings. For example, Article 20, item 1 of the CPC stipulates that the court is not an agency of criminal prosecution and shall not take the side of either the prosecution or the defense. Correspondingly, the court is not included among the list of agencies with the obligation to conduct criminal prosecution, as per Article 26 of the CPC. Also, Article 20, item 2 of the CPC obligates the court to provide the parties with conditions for exercising their procedural rights and for performing their procedural duties. In detailing how the court shall provide the parties with conditions for adversarial proceedings, Article 21, item 5 of the CPC stipulates that the court shall act in an objective and unbiased manner in providing the parties with the conditions required for exercising their rights to a complete evaluation of the circumstances of the case. The question arises, however, how the court can remain objective and unbiased if the law empowers the court to examine case material and to institute criminal proceedings. For criminal proceedings to be instituted, elements of a crime must be identified, which means that the court will inevitably assume the subjective functions of the prosecution. Besides, the court’s right to institute criminal proceedings only applies to certain instances specified in the CPC, but the CPC mentions no instances in which criminal proceedings may be instituted by the court. Also, Article 145, item 4 expressly stipulates that statements and reports of crimes filed to court shall be forwarded to the prosecutor’s office to decide whether to initiate criminal proceedings, while proceedings in a private prosecution case shall be initiated by the victim filing a complaint to court (Article 354, item 1 of the CPC).

In compliance with the principles of adversarial proceedings and the equality of the parties in criminal proceedings, as well as the independence and impartiality of the court and other principles of criminal proceedings, and in furtherance of the correct conceptual understanding of the powers of the court, the court’s power to institute criminal proceedings must be eliminated.

Recommendation: Bullet point 15 in Article 35, item 1 of the CPC should be deleted, with bullet point 16 to become bullet point 15.

1.2. Subject: Who should examine the challenge of a judge or the entire court?

Existing rules: Article 64, item 3 of the CPC: A decision on a challenge of several judges or the entire court shall be made by a majority vote of the entire court.

Existing rules: Article 64, item 4 of the CPC: A decision on a challenge of a judge examining a case in a single-judge court or resolving petitions to apply a pre-trial restraint measure or other procedural compulsion measures shall be made by the judge in accordance with the single-judge procedure, with a ruling rendered.
**Existing rules:** Article 122, item 1 of the CPC: The review of a complaint may not be assigned to the prosecutor or judge whose actions are being complained of, or to the official who has approved the decision under complaint.

**Existing rules:** Article 24, item 4 of the Republic of Tajikistan’s Code of Economic Court Proceedings: A decision on a challenge of several judges or the entire court examining a case shall be made by the chairperson or a deputy chairperson of that economic court.

**Existing rules:** Article 43, item 3 of the Republic of Tajikistan’s Code of Administrative Procedure: A challenge motion, challenge or recusal decisions shall be examined and resolved by the supervisor of the official being challenged or, in the absence of such supervisor, by the chief executive of the superior administrative agency.

**The issue:** Trial prosecutors and defense attorneys note the defective nature of the court challenge procedure. For example, Article 64, item 3 of the CPC stipulates that a decision on a challenge of several judges or the entire court shall be made by a majority vote of the entire court. So, according to the CPC, if an entire court is challenged due to circumstances that raise doubts about the court’s impartiality, it is the court being challenged that shall examine and evaluate the circumstances set forth in the challenge motion. The issue is that the law does not provide solid guarantees of an impartial examination of a challenge motion by the court being challenged since the reasons for challenging the court are precisely circumstances that cause doubts about the court’s impartiality. In this case, Article 64, item 3 of the CPC contradicts Article 122, item 1 of the CPC, which sets forth the procedure for examining complaints. Article 122 of the CPC stipulates that review of a complaint may not be assigned to the prosecutor or judge whose actions are being complained of. The ban is intended to guarantee unbiased and impartial review of a complaint by a neutral party. Such statutory provision is quite justified. As a rule, a challenge is always based on doubts about a court’s impartiality and neutrality, since impartiality and neutrality (in the sense of Article 20 of the CPC) are necessary conditions that are integral to the rendering of a lawful and just judicial act on the merits of a case.

It should be pointed out that adequate procedures for reviewing a challenge of a court are contained in certain existing laws of the Republic of Tajikistan. For example, Article 24, item 4 of the Republic of Tajikistan’s Code of Economic Court Proceedings stipulates that the chairperson or a deputy chairperson of that court shall make a decision on a challenge of several judges or the entire court examining a case. Besides, as per Article 43, item 3 of the Republic of Tajikistan’s Code of Administrative Procedure, a challenge motion, challenge or recusal decisions shall be examined and resolved by the supervisor of the official being challenged or, in the absence of such supervisor, by the chief executive of the superior administrative agency.

**Recommendation:** Article 64, item 3 of the CPC should be amended to read as follows: “A decision on a challenge of several judges or the entire court shall be made by the chairperson of that court or, if such chairperson is absent or is the one being challenged, by the chairperson of a different court of the same tier.”

**Recommendation:** Article 64, item 4 of the CPC should be amended to read as follows: “A decision on a challenge of a judge examining a case on its merits in a single-judge court or examining procedural matters as part of pre-trial proceedings shall be made by the chairperson of that court or, if such chairperson is absent or is the one being challenged, by the chairperson of a different court of the same tier.”

1.3. Subject: Detention period time limits and extension procedure.

**Existing rules:** Article 112, item 3 of the CPC: The detention period may be extended by up to six months by a judge of a district or city court or a military garrison court in accordance with the procedures established by Article 111, items 2 and 3 hereof only if it is impossible to complete a preliminary investigation within
the two-month time period and no grounds exist for imposing a different pre-trial restraint measure on the accused. Further extension of the time period in excess of six months may only be ordered with regard to persons charged with grave or very grave crimes and/or to persons who have committed a crime in the territory of the Republic of Tajikistan but are not permanent residents in the Republic of Tajikistan if there are sufficient grounds to believe that they will escape investigation or court by hiding outside the territory of the Republic of Tajikistan. In such cases, the decision to extend the detention period shall be rendered by a judge of the same court on a motion of the investigator with the consent of the prosecutor of the Gorno-Badakhshan Autonomous Oblast, Oblast prosecutors, Tajikistan transportation system’s prosecutors, Dushanbe city and other equal-status prosecutors. For Republic-jurisdiction areas – with the consent of the Deputy Prosecutor General of the Republic of Tajikistan and/or the Chief Military Prosecutor of the Republic of Tajikistan - such time period shall be extended to no more than 12 months.

**The issue:** Article 112, item 3 of the CPC stipulates that the pre-trial detention period may be extended by the judge of a district or city court or a military garrison court. This means that the decision to extend a detention period is rendered by a judge of the same court on a motion of the investigator with the consent of the prosecutor of the Gorno-Badakhshan Autonomous Oblast, Oblast prosecutors, Tajikistan transportation system’s prosecutors, Dushanbe city and other equal-status prosecutors. And for Republic-jurisdiction areas – with the consent of the Deputy Prosecutor General of the Republic of Tajikistan and/or the Chief Military Prosecutor of the Republic of Tajikistan - such time period shall be extended to no more than 12 months. Article 112 of the CPC lists all the competent prosecutors, namely: the prosecutor of the Gorno-Badakhshan Autonomous Oblast, Oblast prosecutors, Tajikistan transportation system’s prosecutors, Dushanbe city “and other equal-status prosecutors.” The question is who are those “other prosecutors”? And why is it that deputy prosecutors in charge of the investigation are not listed in that Article?

**Recommendation:** Article 112, item 3 of the CPC should be amended, with the words “and other equal-status prosecutors” to be replaced with “the deputies of the above-listed prosecutors.”

1.4. **Subject:** Is it correct to have a provision stipulating that the prosecutor shall accept a court’s ruling to revoke a decree rejecting a request to institute criminal proceedings?

**The issue:** Article 124, item 4 of the CPC stipulates that, after finding that a complaint against a decree to reject a request to institute criminal proceedings or to terminate criminal proceedings is justified, a judge shall render a ruling to revoke such a decree and forward the ruling to the prosecutor for execution. This rule is incorrect because a court’s ruling to revoke a decree shall not be subject to appeal or challenge, as per Article 124, item 5 of the CPC, and therefore shall become effective as soon as rendered. Therefore, the provision requiring that the prosecutor execute such a ruling is not logical. A provision in the Criminal Procedure Code of the Russian Federation contains a correct description of the prosecutor’s authority with regard to a court ruling to revoke a decree to institute or terminate criminal proceedings: “The judge shall declare the act unlawful and send it to the prosecutor for rendering a lawful decision.”

**Recommendation:** Article 124, item 4 of the CPC should be amended to read as follows: “The judge who finds such complaint justified shall render a reason-supported ruling to grant the complaint and to declare such a decree unlawful. The judge’s ruling to declare the decree unlawful shall be sent to the prosecutor for rendering a lawful decision.”

1.5. **Subject:** Chapter 14 of the CPC is entitled, “Lodging Complaints Against Court Actions and Decisions.” Is the chapter’s title consistent with its contents?

**The issue:** Chapter 14 contains provisions about lodging complaints not only against actions and decisions of courts, but also against actions, omissions and decisions of inquiry officers, investigators and
prosecutors. The chapter’s title in Tajik is similar to the Russian version. The title of Chapter 14 should be amended to be consistent with its contents.

Recommendation: the title of Chapter 14 of the CPC should be amended to read as follows: “Lodging Complaints Against Actions, Omissions and Decisions of Officials Who Conduct Criminal Judicial Proceedings”.

1.6. Subject: Is it justified to have a provision stipulating that the judge’s ruling rendered under Article 124 of the CPC shall not be subject to appeal?

The issue: A judge’s ruling rendered under Article 124, item 5 of the CPC shall not be subject to appeal or challenge. This gives rise to a practical question: if a ruling rendered by a judge under Article 124 of the CPC is ill-founded or illegal, what can be done to prevent execution of this illegal court decision? Such powers may be used by a judge to violate the parties’ rights by ruling illegally to revoke a decree not to institute criminal proceedings and to institute or resume criminal proceedings. While is possible to lodge complaints against decisions rendered by prosecutors or investigators, a judge’s decision SHALL NOT be subject to appeal. But does this mean that if a court institutes criminal proceedings, the case must go to court? However, as per Article 20, item 2 of the CPC, the court is not an agency of criminal prosecution and shall not take the side of the prosecution or the defense.

Recommendation: Article 124, item 5 of the CPC should be amended to read as follows: “A judge’s ruling may be challenged or appealed as required by Article 363, item 3 hereof.”

1.7. Subject: The procedural time limit for reviewing statements and reports of crimes committed.

Existing rules: Article 145, item 5 of the CPC: A decision regarding statements or reports of crimes received shall be made within three days after such statements or reports are filed. Where necessary for obtaining additional explanations from the person filing such statement, requesting documents and/or inspecting the scene of the incident, the prosecutor may extend the period to ten days.

The issue: A decision regarding statements or reports of crimes received shall be made within three days after such statements or reports are filed. Where necessary for obtaining additional explanations from the person filing such statement, requesting documents, and/or inspecting the scene of the incident, the prosecutor may extend the period to ten days. Therefore, a decision may be rendered within three days, if no additional information is required, i.e., if all the signs of a crime are clearly in evidence. If more information/material is required, the period is extended to ten days. However, ten days is generally not enough to audit or check industrial or work safety violations. Only if it is not possible to render an informed decision on a statement or report of a crime committed within ten days shall the prosecutor extend the time period.

Recommendation: Article 145, item 5 of the CPC should be amended to read as follows: “A decision regarding statements or reports of crimes received shall be made within three days after such statements or reports are filed, or, in exceptional circumstances, within one month. For a complete and thorough check of the information contained in such statements or reports, the inquiry period may be extended to ten days by the chief of the inquiry agency or the preliminary investigation agency and to one month by the prosecutor.”

1.8. Subject: The legality principle.

The issue: The definition of the legality principle in Article 9 of the CPC does not contain any general rules regarding legality of procedural acts rendered by officials conducting criminal judicial proceedings.
Correspondingly, the CPC does not set forth any criteria for checking compliance with the legality principle. It is therefore quite difficult for law enforcement officials to establish what procedural decisions and acts should or should not be regarded as legal. Additionally, Article 9, item 3 of the CPC stipulates that, “Violation of the requirements of the law in the course of criminal proceedings, whatever the motives for such violation, is inadmissible and shall cause liability, as established by the law, invalidity of the illegal acts and cancellation thereof.” This wording is incorrect, because an illegal act adopted is invalid on its face, so the qualifying adjective “illegal” in this phrase is superfluous. Also, there is no need to mention liability, because relevant laws provide for liability in such instances, and mentioning liability only complicates understanding of Article 9, item 3 of the CPC. Moreover, the legality principle does not set forth the legal consequences of committing illegal acts but only addresses the rendering of illegal decisions.

The totality of the comments about the legality principle indicate that it is not clearly and fully stipulated and defined, so the wording of the principle should be modified.

**Recommendation:** Article 9, item 3 of the CPC should be amended to read as follows: “Court rulings and decrees rendered by a judge, prosecutor, investigator and/or inquiry officer must be legal, well-founded and supported by reason.”

**Recommendation:** Article 9, item 3 of the CPC should be amended and added as Article 9, item 4 of the CPC to read as follows: “Violation of the requirements of the law in the course of criminal proceedings, whatever the motives for such violation, is inadmissible and shall cause invalidity of the acts adopted and cancellation thereof.”

**Recommendation:** Add a new item 5 to Article 9 of the CPC to read as follows: “Violation of the rules of this Code by a court, prosecutor, investigator, inquiry agency or inquiry officer in the course of criminal judicial proceedings shall cause evidence obtained in that manner to be rejected as inadmissible.”

### 1.9. Subject: May a prosecutor accept and conduct proceedings in a corruption case?

**The issue:** As per Article 168, item 1, sub-items 18 and 19 of the CPC, a prosecutor shall have the right to transfer a case from one investigator to another and to suspend an inquiry officer or an investigator from investigating a case, which is consistent with the provisions of the Constitutional Law On the Prosecutor’s Offices. However, Article 159, item 2 of the CPC empowers the prosecutor to accept and conduct proceedings in any case, except for corruption cases. Such restriction in the CPC is inconsistent with the scope of prosecutorial supervision established by the Constitutional Law On the Prosecutor’s Offices. All the more so since the prosecutor may transfer major criminal cases, such as terrorism, murder and other cases investigated by national security agencies, to another agency or investigator. As per the Republic of Tajikistan’s Law On Normative Legal Acts, a Constitutional Law shall prevail over the Republic of Tajikistan’s Codes or Laws, therefore the restrictions of prosecutors’ scope of authority established in the CPC must be eliminated to bring it into accordance with the hierarchy of the sources of law established by the Republic of Tajikistan’s Law On Normative Legal Acts.

**Recommendation:** Article 159, item 2 of the CPC should be worded as follows: “The prosecutor may accept and conduct proceedings in any criminal case, but the charge sheet shall be approved by a prosecutor of the same level or a higher level of authority.”

**Recommendation:** Article 161, item 3 of the CPC should be amended to read as follows: “In proceedings concerning crimes committed by judges, prosecutors, investigators or officers of internal affairs, customs, anti-corruption or drug enforcement agencies, and crimes committed against the above-listed officers in connection with their official work, preliminary investigation shall be conducted by prosecutor’s office investigators.”
**Recommendation:** Article 161, item 12 of the CPC should be amended to read as follows: “To ensure the most complete, comprehensive and objective nature of inquiry and preliminary investigation, regardless of investigative jurisdiction as provided by Article 168 hereof, the prosecutor may demand and obtain any criminal case from the inquiry and investigative agency or refer it to the charge of the prosecutor’s office”.

**Recommendation:** Article 168, item 1, sub-item 18 should be amended to read as follows: “- transfer a case from one investigator to another and/or from one investigative agency to another, in compliance with the investigative jurisdiction rules.”

1.10. Subject: Termination of proceedings in private-public prosecution cases.

**The issue:** Article 24, item 3 of the CPC stipulates that proceedings in private-public prosecution cases shall not be terminated in connection with the victim’s conciliation with the defendant, except for the instances set forth in Article 30 of the CPC. But Article 30 of the CPC sets forth the procedure for exemption of a defendant from criminal liability by reason of the victim's conciliation with the defendant, which indicates a contradiction in meaning between Article 24 and Article 30 of the CPC. Also, conciliation between the parties is applicable to minor and/or medium-gravity crimes, i.e., to crimes addressed by 13 of the 14 Articles of the Republic of Tajikistan’s Criminal Code covered by Article 24, item 3 of the CPC. The only rule that addresses a grave crime is Article 138, item 1 of the Criminal Code. Therefore the existing wording of Article 24, item 3 of the CPC may render the institution of conciliation between the parties inapplicable in practice with regard to the above-mentioned Articles that address minor or medium-gravity crimes, as covered by Article 24, item 3 of the CPC.

**Recommendation:** Article 24, item 3 of the CPC should be amended to read as follows: “Cases in crimes addressed by Articles 113-115, 118(1), 119, 120, 123(1) and (2), 124(1), 125(1), 126(1), 127(1), 128(1), 129(1), 138(1) of the Criminal Code of the Republic of Tajikistan shall be considered private-public prosecution cases, shall be initiated pursuant to a complaint filed by the victim or his/her legal representative and shall be dismissed by reason of the victim’s conciliation with the accused, except for the crime addressed in Article 138 (1) of the Criminal Code of the Republic of Tajikistan.”

1.11. Subject: What are the grounds for applying the Law on Amnesty?

**Existing rules:** Article 28, item 1 of the CPC: As per Articles 72, 73, 74, and 75 of the Criminal Code of the Republic of Tajikistan, a court, judge, prosecutor, as well as an investigator and inquiry officer, subject to the above Articles and to a prosecutor’s consent, may reject a request to institute criminal proceedings or terminate criminal proceedings and exempt the person in question from criminal liability by reason of: - repentance; - conciliation with the victim and reimbursement of the harm caused; - a change of circumstances; - expiration of the period of limitation for criminal prosecution.

**The issue:** As per Article 28 of the CPC, a court, judge, prosecutor, as well as an investigator and inquiry officer, subject to a prosecutor’s consent, may reject a request to institute criminal proceedings or terminate criminal proceedings and exempt the person in question from criminal liability. However, Article 28 of the CPC does not name an act of amnesty as a ground for exemption from criminal liability if a decision is made to reject a request to institute criminal proceedings or to terminate criminal proceedings. Such inconsistency in Article 28 of the CPC contradicts Article 27 of the CPC and Article 82 of the Criminal Code of the Republic of Tajikistan.

**Recommendation:** Article 28 of the CPC should be amended to read as follows: “As per Articles 72, 73, 74, 75, and 82 of the Criminal Code of the Republic of Tajikistan, a court, judge, prosecutor, as well as an investigator and inquiry officer shall be obligated to reject a request to institute criminal proceedings or
terminate criminal proceedings and exempt the person in question from criminal liability by reason of:
- active repentance;
- conciliation with the victim and reimbursement of the harm caused;
- a change of circumstances;
- expiration of the period of limitation for criminal prosecution;
- application of an act of amnesty."

1.12. Subject: Termination of criminal proceedings by reason of active repentance.

Existing rules (in Tajik): Банди 1 к.1 м.29 УПК таджикского текста ~ бо сабаби пушаймонї аз кирдори худ дар ҳакқи шахсе, ки бори аввал чинояти начандон вазнин содир кардааст, оғози парвандан чиноятиро рад кунанд.

Existing rules: Article 29, item 1, sub-item 1 of the Russian text of the CPC: [...] reject a request to institute criminal proceedings against a person who has committed a medium-gravity crime for the first time.

The issue: Article 29, item 1, sub-item 1 of the Tajik text of the CPC provides for the right to reject a request to institute criminal proceedings against a person who has committed a minor crime for the first time by reason of the person’s active repentance, while Article 29, item 1, sub-item 1 of the Russian text of the CPC provides for the right to reject a request to institute criminal proceedings against a person who has committed a medium-gravity crime for the first time by reason of the person’s active repentance. Article 72 of the Criminal Code of the Republic of Tajikistan (the Tajik version) stipulates that a person who has committed a minor or medium-gravity crime may be exempted from criminal liability by reason of the person’s active repentance. Therefore, Article 29, item 1, sub-item 1 of the CPC must be amended.

Article 29, item 1, sub-item 1 of the CPC stipulates that a prosecutor may reject a request to institute criminal proceedings against a person who has committed a medium-gravity crime by reason of the person’s active repentance. However, Article 72 of the Criminal Code stipulates that criminal proceedings may also be terminated against a person who has committed a minor crime by reason of the person’s active repentance.

Thus, Article 29 of the CPC wrongly disregards the possibility of terminating criminal proceedings by reason of active repentance of a person who has committed a minor crime, even though such crime is less dangerous for society than a medium-gravity crime. The Tajik version of the CPC stipulates the right to reject a request to institute criminal proceedings against a person who commits a minor or medium-gravity crime in connection with medium-grave crimes.

Recommendation: Article 29, item 1, sub-item 1 of the CPC should be amended to read as follows: “In view of active repentance, criminal proceedings shall not be instituted against a person who has committed a minor or medium-gravity crime for the first time.”

1.13. Subject: Criminal proceedings termination procedure.

The issue: Article 28, item 1 of the CPC stipulates that a court, judge, prosecutor, as well as an investigator (and/or inquiry officer) may terminate criminal proceedings and exempt the person in question from criminal liability by reason of: repentance; conciliation with the victim; a change of circumstances; or expiration of the period of limitation for criminal prosecution. Article 32 of the CPC stipulates that it shall be mandatory to reject a request to institute criminal proceedings or to terminate criminal proceedings if the period of limitation has expired. However, in the sense of Article 30 of the CPC, in the event of the
defendant's conciliation with the victim and reimbursement by the defendant of the harm inflicted upon the victim, the judge, prosecutor or investigator may terminate the criminal proceedings. That means that, even after a conciliation and reimbursement of the harm, the judge, prosecutor or investigator is under no obligation to terminate the criminal proceedings and will make a decision depending upon positive changes in the legal relationships between the offender and the victim. The question is why the law does not obligate the judge, prosecutor or investigator to terminate criminal proceedings in instances when the incident is settled, there is no controversy, and the parties have no claims against each other? Law enforcement practitioners do not understand how it is possible to implement the adversarial proceedings principle when the incident has been settled and the parties do not intend to pursue any disputes. This is precisely a situation where the objectives of justice have been achieved, since a legal restitution has taken place, i.e., the legal relationships have been restored to their original state, through conciliation of the parties and reimbursement of the harm, which, logically, is a mandatory ground in itself for terminating criminal proceedings since the parties no longer have claims against each other.

Moreover, in the sense of Article 29 of the CPC, if the offender shows active repentance and has reimbursed the harm caused by the crime, the judge, prosecutor or investigator may terminate the proceedings. This means that even if all the elements listed in Article 72 of the Criminal Code of the Republic of Tajikistan are present, the judge, prosecutor or investigator have no obligation to terminate the criminal proceedings and will make a decision depending on whether the objectives of the punishment have been achieved (Article 46, item 2 of the Criminal Code of the Republic of Tajikistan) without imposing a criminal sanction at the phase of the pre-trial investigation or the trial. Such wording of Article 29, item 1 is inconsistent with the principle of humane and fair criminal justice; it demonstrates the cruelty of justice, with criminal prosecution of a person who, having committed an offense, immediately becomes aware that the act committed is illegal, repents and actively assists in restoring the full damage caused by the crime. This leads to mistrust of the judicial system.

**Recommendation:** Article 30 of the CPC should be amended to read as follows:

"The court, judge and/or prosecutor, as well as the investigator and/or inquiry officer acting with the consent of the prosecutor, pursuant to Article 72 of the Criminal Code of the Republic of Tajikistan, shall:
- reject the request to institute criminal proceedings;
- terminate the criminal proceedings, with the exemption of the person in question from criminal liability."

**Recommendation:** Article 29, item 1 of the CPC should be amended to read as follows:

"The court, judge and/or prosecutor, as well as the investigator and/or inquiry officer acting with the consent of the prosecutor, pursuant to Article 72 of the Criminal Code of the Republic of Tajikistan, shall:
- reject the request to institute criminal proceedings;
- terminate the criminal proceedings, with the exemption of the person in question from criminal liability."

1.14. **Subject:** Article 164, item 5 of the CPC (Preliminary Investigation Time Limits) does not describe the rights and obligations of certain prosecutors and deputy prosecutors.

**The issue:** Article 164, item 1 of the CPC stipulates that preliminary investigation in criminal cases shall be completed within two months from the date of the institution of criminal proceedings in such cases. Article 164, item 5 of the CPC, for criminal cases specified in Article 164, item 1, the preliminary investigation period may be extended to six months by a district, city and/or military garrison prosecutor and to one year by the Prosecutor of the Gorno-Badakhshan Autonomous Oblast, Oblast Prosecutors and/or the Dushanbe City Prosecutor. But the special prosecutor, the Chief Military Prosecutor and Deputy Chief Military Prosecutors, the Prosecutor and Deputy Prosecutors of the Transportation System of Tajikistan, Deputy Prosecutors of the Gorno-Badakhshan Autonomous Oblast, Oblasts and Dushanbe City have no such powers.
Recommendation: Article 164, item 5 of the CPC to be amended to read as follows: “For criminal cases specified in item 1 of this Article, the preliminary investigation period may be extended to six months by a district, city, penitentiary facility and/or military garrison prosecutor and to one year by the Prosecutor and Deputy Prosecutors of the Gorno-Badakhshan Autonomous Oblast, Oblast Prosecutors and Deputy Oblast Prosecutors, the Dushanbe City Prosecutor and Deputy Prosecutors, and the Prosecutor and Deputy Prosecutors of the Transportation System of Tajikistan. For criminal cases investigated in Republic-jurisdiction cities and areas, preliminary investigation periods shall be extended by the Deputy General Prosecutor of the Republic of Tajikistan. Further extensions of preliminary investigation periods shall be authorized by the General Prosecutor of the Republic of Tajikistan.”

1.15. Subject: The judge’s authority to impose a non-detention restraint measure in examining a motion to impose detention in custody.

The issue: As it now stands, Article 111, item 5 of the CPC, stipulates that the judge, acting on a motion for imposing a restraint measure on the suspect or accused filed by the prosecutor, shall have the power to render one of the following rulings:
- that detention in custody shall be imposed as a pre-trial restraint measure;
- that the motion shall be denied; or
- that the period for ruling on the motion shall be extended by no longer than 72 hours. It is possible that, after reviewing the documents provided, the judge will find no reason for granting the prosecutor’s motion and will decide to impose a different pre-trial restraint measure within the judge’s scope of authority. These measures could include bail or house arrest. Subject to the requirements of Article 102 of the CPC, a judge may render a ruling to impose a different pre-trial restraint measure.

Recommendation: When denying a motion to place an accused or suspect into custody as a pre-trial restraint measure, the judge may, acting on his/her own initiative and if there are grounds set forth in Article 102 hereof, to impose bail or house arrest on the suspect or accused as a pre-trial restraint measure.

Recommendation: Article 35, item 1, sub-item 4 of the CPC should be amended to read as follows: “permit to impose a pre-trial restraint measure other than detention in custody or house arrest, depending on the circumstances, and to extend the pre-trial restraint measure previously imposed.”

1.16. Subject: Is the prosecutor’s consent required when changing or cancelling a pre-trial restraint measure?

The issue: Article 168, item 1, sub-item 3 of the CPC stipulates that the prosecutor shall provide his/her consent to the inquiry officer or investigator for filing a motion with the court to impose a measure of restraint in the form of incarceration or house arrest and to change or cancel such measures. But Article 104 of the CPC and Article 111 of the CPC set forth no requirement that the investigator seek the prosecutor’s or the court’s consent to cancel or change a restraint measure previously imposed. Prosecutorial supervision and judicial review are necessary when a person’s constitutional rights and liberties are restricted, but by changing or cancelling a restraint measure, the investigator eliminates restrictions of a person’s rights and liberties previously imposed. So the requirement that the investigator should have the prosecutor’s consent to cancel or change a restraint measure previously imposed may lead to unreasonable delays in restoring a person’s rights and liberties, which is inadmissible from the standpoint of the Constitution of the Republic of Tajikistan.

Recommendation: Article 168, item 1, sub-item 3 of the CPC should be amended to read as follows: “give his/her consent to the inquiry officer or investigator for filing a motion to court to impose a measure of restraint in the form of incarceration or house arrest.”
1.17. **Subject: Committing a person to a hospital pursuant a court order.**

**Existing rules:** Article 35, item 1, sub-item of the CPC: - grant a permission to commit a suspect or accused who is not in custody to a medical or psychiatric in-patient institution for forensic medical examination or forensic psychiatric examination.

**The issue:** Article 35, item 1, sub-item 6 of the CPC stipulates that the court shall have the sole power to grant permission to commit a suspect or accused who is not in custody to a medical or psychiatric in-patient institution for forensic medical examination or forensic psychiatric examination. Unlike a person who is not in custody, a person kept in custody can be committed to a hospital or mental clinic without a court decision. Therefore, persons kept in custody have no guarantees of judicial review of the decision to commit them to a medical facility, where, apart from a medical examination, they may be exposed to various drugs. This is also at variance with Article 11, item 3 of the CPC, which stipulates that a person may only be committed to a medical facility by decision of a judge.

**Recommendation:** Article 35, item 1, sub-item 6 of the CPC should be amended to read as follows: “- grant a permission to commit a suspect or accused to a medical or psychiatric in-patient institution for forensic medical examination or forensic psychiatric examination.”
2. Mechanisms for Ensuring the Rights of Participants in Criminal Judicial Proceedings (1)

Statutory provisions shall be interpreted in a manner that guarantees the existence of effective rights in practice, rather than illusory rights in theory.

The differentiation between the status of a suspect or the status of the accused described in the law hinders the suspect’s right to defense. This means that the Republic of Tajikistan fails to comply with its international commitments regarding provision of the minimum standards of fair justice. Moreover, such differentiation provisions are inconsistent with the precept set forth in Article 92 of the Constitution of the Republic of Tajikistan that legal assistance shall be guaranteed at all the phases of investigation and judicial proceedings, which presupposes equal opportunities in terms of the right to defense for the suspect as well as for the accused.

2.1. Subject: When the right to defense is acquired.

Existing rules: Article 22, item 1 of the CPC: Any person may use the services of a defense attorney from the moment of being arrested.

2. The arrestee, suspect, accused, defendant on trial and/or convicted defendant may exercise the rights granted to them in accordance with the procedure established hereby to defend themselves from charges personally or with the assistance of a defense attorney or a legal representative.

Existing rules: Article 12, item 1 of the CPC: The judge, prosecutor, investigator and/or inquiry officer shall be obligated to protect the human rights and liberties of the person participating in criminal proceedings and to create conditions for exercising them and to take timely measures to satisfy lawful requests of the participants in judicial proceedings.

Existing rules: Article 49, item 2 of the CPC: The defense attorney shall be permitted to participate in criminal proceedings from the moment when a decree is issued to initiate criminal proceedings against a person and/or from the moment of the suspect’s actual arrest.

The issue: As per the meaning of Article 22, item 2 of the CPC, a person may exercise the rights granted to such a person in accordance with the procedures established by the CPC. Article 12, item 1 of the CPC stipulates that anyone may use the services of a defense attorney from the moment of arrest. However, Article 49, item 2 of the CPC stipulates that the defense attorney shall be permitted to participate in criminal proceedings from the moment when a decree is issued to initiate criminal proceedings against a person and/or from the moment of the suspect’s actual arrest. If criminal proceedings are instituted because elements of a crime have been detected and not against a specific person, and if later a person who is a “potential suspect of committing the crime” is summoned to be questioned as a “witness,” such a person is not guaranteed the assistance of a defense attorney who could be present during the questioning. So, unlike a formal suspect (against whom criminal proceedings have been instituted and/or who has been arrested), a “potential suspect” in the sense of Article 49 of the CPC is in a less favorable position in terms of the right to defense because there are no legal grounds for permitting a defense attorney to participate in the questioning of a “potential suspect.”

Furthermore, Article 49, item 2 of the CPC does not allow for a defense attorney to be permitted to participate in the proceedings during the pre-investigation inquiry. But this is the phase when law enforcement officers work with a “potential suspect” and obtain his/her written testimony/explanations. In conformity with the existing CPC, law enforcement officers do not explain to “potential suspects” that they have a right not to testify against themselves or their next of kin, a right to consult with a defense attorney, a right to lodge
complaints against actions (or omissions) of officials that affect or restrict people’s constitutional rights (such as the right to privacy). Such procedural “blindness” does not provide for the “potential suspect’s effective right to defense from suspicion of committing a crime. Thus, law enforcement agencies’ work at that early stage results in a violation of the constitutional principle of the presumption of innocence which places the proof of burden of guilt on the prosecution and guarantees the offender’s right to defense in all cases and at all stages of the process.

**Recommendation:**

Article 22, item 1 of the CPC should be amended to read as follows: “Any person may use the services of a defense attorney from the moment of becoming suspected of committing a crime.”

**Recommendation:**

Article 49, item 2 of the CPC should be amended to read as follows: “A defense attorney shall join the proceedings when a person becomes suspected of committing a crime, even if no criminal proceedings have been instituted against such person.”

**Recommendation:**

Article 46, item 1 of the CPC should be amended to read as follows: “A person shall be recognized as a suspect as soon as the person becomes suspected of committing a crime, even if no criminal proceedings have been instituted and if such person is arrested or subjected to other restraint measures before any charges are brought.”

**2.2. Subject: The right to consult with a defense attorney before being questioned or giving explanations.**

**Existing rules:** Article 46, item 2 of the CPC: The suspect must be questioned immediately, and in any case within 24 hours of his/her actual arrest.

**The issue:** Article 46, item 2 of the CPC stipulates that a suspect must be questioned within 24 hours of his/her actual arrest. However, this rule does not obligate the prosecution agency to guarantee the effective right to defense by providing the suspect with an opportunity to consult with his/her defense attorney prior to questioning. Such improvidence of the law does not provide the suspect with an opportunity to have a prior consultation with his/her defense attorney, which leads to a lack of adequate understanding by the suspect of his/her procedural rights (since it is the defense attorney who is obligated to provide the suspect with a full and comprehensive explanation of his/her procedural rights and limitations thereof and to inform the suspect of the investigator’s and/or inquiry officer’s procedural obligations). Thus, such a seemingly insignificant omission in the law leads in practice to a failure to provide for the equality of the adversarial parties (in terms of the procedural powers exercised by the suspect and the investigator) – the suspect (who lacks adequate knowledge of procedural rules) and the investigator (a professional who possesses in-depth knowledge of existing laws and is competent to conduct criminal prosecution on a systematic basis).

**Recommendation:**

Article 46, item 2 of the CPC should be amended to read as follows:

“The suspect must be questioned immediately after consulting his/her defense attorney, and in any event within 24 hours of his/her actual arrest.”

**2.3. Subject: The defense attorney’s right to participate in court sessions authorizing pre-trial procedural actions.**

**Existing rules:** Article 53, item 2, sub-item 9 of the CPC: - participate in the trial court proceedings;
Existing rules: Article 53, item 2, sub-item 11 of the CPC: - participate in any cassation or supervisory court hearings of the case and in court hearings of a case re-opened due to newly-discovered facts and provide explanations about complaints filed.

The issue: Article 53, item 2, sub-item 9 of the CPC stipulates that the defense attorney may participate in the trial court proceedings. Also, Article 53, item 2, sub-item 11 of the CPC stipulates that the defense attorney may participate in any cassation or supervisory court hearings of the case and in court hearings of a case re-opened due to newly-discovered facts and provide explanations about complaints filed. But Article 53 of the CPC does not provide for the defense attorney’s right to participate in court sessions rendering decisions to authorize procedural actions during the preliminary investigation phase. Such legal provision makes it possible to examine judicial authorization matters without the defense attorney’s participation, even in instances when it is appropriate for the court to hear the opinions of both the prosecution and the defense to render a decision.

Recommendation:

Article 53, item 2, sub-item 9 of the CPC should be amended to read as follows:

“- participate in the court session that examines matters requiring judicial authorization of procedural actions in the preliminary investigation phase.”

Recommendation:

Article 53, item 2, sub-item 11 of the CPC should be amended to read as follows:

“- participate in any trial, cassation or supervisory court hearings of the case and in court hearings of a case re-opened due to newly-discovered facts and provide explanations about complaints filed.”

2.4. Subject: The suspect's right to one-on-one meetings with his/her defense attorney

Existing rules: Article 47, item 4, sub-item 9 of the CPC: - freely have a one-on-one meeting with his/her defense attorney from the time of being arrested.

Existing rules: Article 53, item 2, sub-item 2 of the CPC: - freely have one-on-one conversations with his/her client, without limitation of the number and duration of such meetings.

The issue: Article 47, item 4, sub-item 9 of the CPC stipulates that the accused shall have the right to freely have one-on-one meetings with his/her defense attorney from the time of being arrested. But Article 46 of the CPC mentions no such right, despite the fact that Article 53 of the CPC provides for the defense attorney’s right freely to have one-on-one meetings with his/her client (the suspect or the accused), without limitation on the number or duration of such meetings. Due to the above-mentioned differentiation of the status and rights of the person under investigation (as either the suspect or the accused), the defense attorney finds it difficult in practice to obtain an opportunity to meet with the suspect prior to the first questioning and to exercise his/her right to freely have one-on-one conversations with his/her client, without limitation of the number and duration of such meetings. This restricts the rights of the person under investigation to effective defense and timely development of a line of defense jointly with his/her defense attorney. As mentioned above, Article 53 of the CPC provides for the defense attorney’s right to freely have one-on-one conversations with his/her client, without limitation on the number and duration of such meetings but Article 47 of the CPC provides for the right to freely have one-on-one meetings with the defense attorney for the accused only. Also, Article 47 of the CPC does not stipulate that the number and duration of meetings with the defense attorney shall be unlimited.

Furthermore, Article 47, item 4, sub-item 9 of the CPC refers to a meeting with the defense attorney, whereas Article 53, item 2, sub-item 2 of the CPC refers to one-on-one conversations between the defense attorney and his/her client. But ensuring the right to defense requires legal consultations for the purposes
of building an effective defense in the proceedings, not just social meetings or “small talk” between the
person under investigation and his/her defense attorney. “Meetings and conversations” would be more
applicable to meetings with relatives, but a defense attorney is a procedural agent in his/her own right
in criminal proceedings. Therefore, the term “consultations” will be more appropriate in the law than
“meeting” or “conversation.”

**Recommendation:**
A new sub-item (bullet point) should be added to Article 46, item 4 of the CPC, to read as follows:
“ – freely have one-on-one consultations with his/her defense attorney at any time, without limitation of
the number or duration of such consultations, specifically, from the moment of being arrested.”

**Recommendation:**
Article 47, item 4, sub-item 9 of the CPC should be amended to read as follows:
“ – freely have one-on-one consultations with his/her defense attorney at any time, without limitation of
the number or duration of such consultations, including the period from the moment of arrest.”

**Recommendation:**
Article 53, item 2, sub-item 2 of the CPC should be amended to read as follows:
“ – freely provide one-on-one consultations to his/her client at any time, without limitation of the number
or duration of such consultations.”

**2.5. Subject: Due notification about the nature of the suspicion**

**Existing rules:** Article 47, item 4, sub-item 2 of the CPC: ~ know what he/she is being charged with and
be provided with a copy of the ruling to prosecute him/her as an accused.

**Existing rules:** Article 46, item 4, sub-item 2 of the CPC: ~ know what he/she is being suspected of.

**Existing rules:** Article 146, item 2 of the CPC: ~ A copy of the ruling to institute criminal proceedings shall
be promptly delivered to the prosecutor. The complainant shall be advised of the decision rendered.

**Existing rules:** Article 262, item 1 of the CPC: ~ In connection with a criminal case submitted to court,
the judge shall check… whether copies of the charge sheet or the ruling to institute fast-track criminal
proceedings have been served.

**The issue:** Article 47, item 4, sub-item 2 of the CPC stipulates the accused person’s right to know
what he/she is being charged with and to be provided with a copy of the ruling to prosecute him/her in
criminal proceedings. However, Article 46, item 4, sub-item 2 of the CPC provides only for the right of
the suspect to know what he/she is being suspected of. Article 146 of the CPC obligates the criminal
prosecution agency to serve a copy of the ruling to institute criminal proceedings to the person suspected
of committing the crime for which the criminal proceedings have been instituted and to that person’s
defense attorney. The absence of that right makes it impossible for the suspect to fully understand what
he/she is being suspected of and does not fully guarantee the suspect’s and the defense attorney’s right
to lodge a complaint against the ruling to institute criminal proceedings against the person under investigation. In
order to prepare a reason-supported complaint against a document, one must have and use the physical
document, not just recitations of its contents. Moreover, in certain instances a ruling to institute criminal
proceedings must be served (this refers to Article 262 of the CPC). The question is, how is it possible
to lodge a complaint against a ruling that has not been served to a person who has the right to lodge a
complaint against it?

**Recommendation:**
Article 46, item 4, sub-item 2 of the CPC should be amended to read as follows:
“- know what he/she is being suspected of and be provided with a copy of the ruling to institute the criminal proceedings.”

**Recommendation:**

Article 53, item 2, sub-item 1 of the CPC should be amended to read as follows:

“- know what the person he/she is defending is being suspected of or charged with and be provided with a copy of the ruling to institute proceedings and of the ruling to bring charges against such person.”

**Recommendation:**

A new item 6 should be added to Article 22 of the CPC, to read as follows:

“Procedural documents or copies thereof that are required by this Code to be served to the suspect and/or the defendant on trial and/or the convict shall be served after having been duly certified by the agencies executing such documents.”

2.6. Subject: A person’s right to be provided with procedural documentation in a language the person understands.

**Existing rules:** Article 18, item 3 of the CPC: Procedural documents that are required by this Code to be served to the accused and/or the defendant on trial and/or the convicted defendant or other participants in criminal proceedings shall be served to them by the agencies executing such documents translated into the native language of the person in question or into a language that he/she understands.

**The issue:** Article 18, item 3 of the CPC obligates officials to serve procedural documents to participants in criminal judicial proceedings in the Republic’s official language or translated into the native language of the person in question or into a language that he/she understands. As per the sense of this rule, criminal prosecution agencies and the court may serve procedural documents only in the Republic’s official language to a person who cannot understand or read the language. So this rule does not guarantee equal access to justice to persons who cannot speak or read the official language of Tajikistan, as opposed to persons who can speak or read the language. For example, Iranians or Afghans understand Tajik speech, but cannot read the Tajik language.

**Recommendation:**

Article 18, item 3 of the CPC should be amended to read as follows:

“Procedural documents that are required by this Code to be served to the accused and/or the defendant on trial or other participants in criminal proceedings shall be translated in writing into the native language of the participant in question or into the language that he/she can understand and read.”

2.7. Subject: Payment of interpreter and defense attorney fees by the State.

**Existing rules:** Article 139, item 3 of the CPC: Court costs associated with the participation of an interpreter in the proceedings shall be paid by the State. If the interpreter performs his/her functions as part of his/her official duties, payment for such work shall be made by the State to the interpreter’s employer.

**Existing rules:** Article 50, item 9 of the CPC: Payment of remuneration to the defense attorney shall be made in accordance with the applicable laws.

**The issue:** The law enforcement agencies are puzzled by the need to pay the interpreter because they have no budget for that or for paying fees to government-provided defense attorneys. Moreover, existing laws establish no mechanism for paying fees to interpreters and defense attorneys, which generally affects the quality of interpreter and defense attorney services provided by the State.

**Recommendation:** A directive is to be developed for the payment of fees to interpreters. It is advisable to combine it with provisions for fee payments to government-provided defense attorneys.
2.8. Subject: Mandatory participation of a defense attorney.

**The issue:** Article 51, item 1, sub-item 1 of the CPC requires that the defense attorney must participate in proceedings if so requested by the suspect and/or the accused and/or the defendant on trial. This wording assumes that it is the suspect that should take the initiative and file a petition for a defense attorney to be provided. But law enforcement officials unanimously note Tajik people’s low level of legal literacy. Therefore many people are not aware they have a right to have a defense attorney to help protect their interests. As per Article 17 of its Constitution, Tajikistan guarantees the rights and liberties of any person, regardless of ethnic origin, race, gender, language, religion, political convictions, education or social or property status. Also, in accordance with existing constitutional guarantees and international commitments, Tajikistan has the obligation to provide any person in its territory with the right to effective defense from charges of committing offenses. The effectiveness of such defense is assessed in terms of the adequacy of a professional defense attorney who is capable of contending adequately against the investigator, a professional prosecution attorney.

**Recommendation:**
Article 51, item 1, sub-item 1 of the CPC should be amended to read as follows:
“[if] the suspect or the accused or the defendant on trial has not declined the services of a defense attorney in his/her presence.”

2.9. Subject: The right to mandatory participation of a defense attorney.

**The issue:** Article 51, item 1, sub-item 4 of the CPC requires that a defense attorney must participate in the proceedings if the suspect or the accused or the defendant on trial does not speak the language of the judicial proceedings. But this rule does not guarantee that a defense attorney must participate in the proceedings if the person under investigation or the defendant on trial speaks the language of the judicial proceedings but cannot read/write or does not know the grammar of that language. For example, Afghan or Iranian nationals understand Tajik speech, but do not understand the written Tajik language (Cyrillic-based). All procedural documents are executed in the literary language of Tajikistan (Cyrillic-based) and contain legal terms that, regrettably, are not understood even by most Tajik citizens.

**Recommendation:** Article 51, item 1, sub-item 4 of the CPC should be amended to read as follows: “[if] the suspect or the accused or the defendant on trial does not understand the literary language or the written language of the judicial proceedings.”

2.10. Subject: Provision of explanations about the right to witness immunity.

**Existing rules:** Article 12, item 5 of the CPC: No one is obligated to testify against himself/herself and against his/her close relatives as hereby defined.

**The issue:** Article 12, item 5 of the CPC stipulates the right not to testify against oneself and against one’s close relatives. But this rule does not specify the consequences of giving such testimony or the officials obligated to provide explanations about the right granted by Article 12, item 5 of the CPC to the suspect and/or the accused and to witnesses. Further, Article 6 of the CPC does not contain the term “witness immunity.”

**Recommendation:**
Article 12, item 5 of the CPC should be amended to read as follows:
“If persons who enjoy witness immunity agree to testify, the inquiry officer, the investigator, the prosecutor and/or the court shall be obligated to warn such persons that their testimony can be used as evidence in further proceedings in the criminal case.”
Recommendation:
The following definition should be added to Article 6 of the CPC:
“Witness immunity” means an individual’s right not to testify against himself/herself or against his/her close relatives.

2.11. Subject: A witness’s right not to testify against himself/herself or against his/her close relatives.

The issue: Article 56, item 3 of the CPC, which defines the rights of a witness, does not include a witness’s right not to testify against himself/herself or against his/her close relatives. So the law does not exclude the possibility that a witness may automatically testify against himself/herself or against his/her close relatives before the start of the questioning when the witness is advised about his/her rights (as per Article 56 of the CPC). As required by Article 56, item 6 of the CPC, a witness shall be advised about criminal liability for refusing to testify. It should be pointed out that Article 202, item 2 of the CPC obligates the investigator to advise witnesses and the victim about their right not to give testimony that may expose them or their close relatives as perpetrators of crimes. But the investigator is not obligated to inform the witness about the requirements of Article 202 of the CPC before a questioning, and if the investigator forgets to comply with Article 202, item 2 of the CPC, the witness will not know about his/her right not to testify against himself/herself and his/her close relatives, because Article 56 of the CPC does not stipulate such a right. Thus, the requirement of Article 12, item 5 of the CPC is not adequately guaranteed for the witness, as it is for the suspect/the accused. This equally applies to the rights of the victim, the civil-law plaintiff and the civil-law respondent, the specialist and the expert.

Recommendation:
A new sub-item should be added to Article 56, item 3 of the CPC, to read as follows:
“ - testify or not testify against himself/herself or his/her close relatives and be informed about that right prior to questioning.”

Recommendation:
A note should be added to Article 352 of the CPC, to read as follows:
Note: A witness who refuses to testify against himself/herself or his/her close relatives, as hereby defined, shall not be subject to criminal liability.

2.12. Subject: A person’s right not to testify against his/her close relatives

Existing rules: Article 6, item 25 of the CPC: - “Close relatives” means the person’s parents, children, adoptive parents, adopted children, brothers and sisters, grandparents, grandchildren and spouse.

The issue: Article 12, item 5 of the CPC stipulates that no one is obligated to testify against oneself or against one’s close relatives, as defined in the CPC. But Article 6, item 25 defines close relatives to include the person’s parents, children, adoptive parents, adopted children, brothers and sisters, grandparents, grandchildren, and spouse. So the law does not grant immunity for refusing to testify against one’s parents-in-law, which may spoil relations in the family or even ruin the family. Moreover, a person who grew up in an orphanage does not have any close relatives, only friends, who are not covered by the definition in Article 6 of the CPC, so the person must testify against such close friends (who, in human terms, are close relatives for such a person). Overall, this definition discriminates against persons with no relatives.

Recommendation:
Article 6, item 25 should be amended to read as follows:
- “close relatives” means the person’s parents, children, adoptive parents, adopted children, brothers and sisters, grandparents, grandchildren, spouse and the spouse’s parents; for persons with no relatives – a close friend.

**Recommendation:**
Add a new item 29 to Article 6 of the CPC to read as follows:
- “a person without relatives” means a single person who has no parents, children or other relatives.

2.13. Subject: The right of the person being questioned to document his/her testimony in writing in his/her own hand.

**Existing rules:** Article 200, item 4 of the CPC: After giving a free-form oral account, the person being interrogated may document his/her testimony in writing in his/her own hand.

**Issue:** Article 46, item 4 and Article 47, item 4 of the CPC, which set forth the rights of the suspect and the accused, only stipulate that they have the right to give or not to give explanations/testimony. Importantly, Article 200, item 4 of the CPC stipulates the right of the person being questioned to put down his/her testimony in writing in his/her own hand. However, the law does not obligate the investigator to advise the person specifically about the person’s rights under Article 200 of the CPC, when advising the person of his/her rights under the CPC before a questioning; and if the investigator forgets to comply with Article 200, item 4 of the CPC, the person under investigation will not know of his/her right to give a written account of the testimony in his/her own hand, because Articles 46 and 47 of the CPC do not mention that right. This fully applies to the rights of the victim, the civil-law plaintiff and the civil-law respondent, the specialist and the expert.

**Recommendation:**
Add a new bullet point to Articles 42, 44, 46, 47, 54, 56, 57, and 58 of the CPC to read as follows:
“ - provide a written account of the explanations/testimony in his/her own hand.”

2.14. Subject: Adequate time for preparing one’s defense.

**Existing rules:** Article 46, item 3 of the CPC: As per Article 49 hereof, the suspect shall have the right to defense from the time of being arrested.

**Existing rules:** Article 47, item 3 of the CPC: The accused shall have the right to defend his/her rights and lawful interests using all the facilities and methods that are consistent with the law and this Code and be provided with adequate time and opportunity to prepare his/her defense.

**The issue:** Article 46 of the CPC sets forth the rights of the suspect, and Article 47 of the CPC, the rights of the accused. As per Article 47, item 3 of the CPC, the accused shall have the right to be provided with adequate time and opportunity to prepare his/her defense. But Article 46 grants no such right to the suspect, even though the defense must be developed from the very start of the preliminary investigation.

**Recommendation:**
Article 46, item 3 of the CPC should be amended to read as follows:
“The suspect shall have the right to defend his/her rights and lawful interests using all the facilities and methods that are consistent with the law from the moment stated in item 1 of this Article and be provided with adequate time and opportunity to prepare his/her defense.”

2.15 Subject: The suspect’s right to view relevant expert opinions.

**Existing rules:** Article 47, item 4, sub-item 12 of the CPC: - view a decree to conduct an expert examination and the expert opinion.
The issue: As per Article 46 of the CPC, the suspect has no right to view the decree to conduct an expert examination and obtain an expert opinion, while such right is granted to the accused. But practice shows that expert examinations may be ordered before charges are brought.

Recommendation:
Article 46, item 4, sub-item 8 of the CPC should be amended to read as follows:
“– view records of investigative actions conducted with his/her participation, as well as the decree to conduct an expert examination and obtain an expert opinion.”

Recommendation:
A new sub-item should be added to Article 46, item 4 of the CPC, to read as follows:
“– be provided with copies of documents and records submitted to court as evidence that he/she has been placed into custody as a pre-trial restraint measure.”

2.16. Subject: The right to be provided with procedural acts.

The issue: Article 47, item 6, sub-item 5 of the CPC stipulates the right of the defendant on trial to be provided with copies of decisions against which complaints have been lodged. But that right is not included in the list of the rights of the suspect or the accused. The lack of such a right prevents the person under investigation from fully understanding the reasons and grounds for procedural acts executed and does not adequately guarantee the right of the person under investigation to lodge complaints against the procedural acts. In order to prepare a reason-supported complaint against a document, one must have and use the physical document, not any recollections of its contents.

Recommendation: A new sub-item should be added to Article 46, item 4 of the CPC, to read as follows:
“– be provided with a copy of any decision for lodging a complaint.”

Recommendation: A new sub-item should be added to Article 47, item 4 of the CPC, to read as follows:
“– be provided with a copy of any decision for lodging a complaint.”

2.17. Subject: An expert examination to be conducted with the victim’s and/or a witness’s consent.

The issue: Article 210, item 2 of the CPC stipulates that expert examinations shall be conducted subject to the victim’s and/or a witness’s consent given in writing, but Article 209, item 1 of the CPC lists instances when an expert examination must be conducted. This recommendation is submitted because sometimes such persons’ denial of consent to an expert examination hinders the efforts to obtain evidence for the prosecution and development of an opinion regarding the case’s prospects.

Recommendation:
Article 210, item 2 of the CPC should be amended to read as follows:
“Except for the instances listed in Article 209 hereof, an expert examination of victims and witnesses shall only be conducted with their voluntary consent, which shall be given in writing. If such persons are under sixteen years of age or have been found by the court to be incapable, written consent to an expert examination shall be given by their legal representatives.”
3. Mechanisms for Participants in Criminal Judicial Proceedings to Exercise Their Rights (2)

Statutory provisions shall be interpreted in a manner that guarantees the existence of effective laws and rights in practice, rather than illusory ones, in theory.

3.1. Subject: The right of the suspect to participate in the court hearing to decide on placing him/her into custody.

The issue: Article 47, item 4, sub-item 15 of the CPC stipulates the right of the accused to participate in the court hearing to decide on imposing a pre-trial restraint measure on him/her. But Article 46 of the CPC provides no such right for the suspect, although the court may also impose a pre-trial restraint measure on the suspect, and the suspect has the right to lodge a complaint against such a decision.

Recommendation: A new sub-item should be added to Article 46, item 4 of the CPC, to read as follows:

“– participate in the court hearing to decide on imposing a pre-trial restraint measure on the suspect.”

3.2. Subject: The right to review records of court proceedings.

The issue: As per Article 47, item 5, sub-item 3 of the CPC, the defendant on trial shall have the right to review records of court proceedings and to submit comments on them. Both the suspect and the accused may participate in the court hearing to render decisions on imposing a pre-trial restraint measure and on committing the suspect or the accused to a medical institution, but the right of the suspect or the accused to review records of court proceedings is not stipulated.

Recommendation: A new sub-item should be added to Article 46, item 4 of the CPC, to read as follows:

“- review records of court proceedings and submit comments on them.”

Recommendation: A new sub-item should be added to Article 47, item 4 of the CPC, to read as follows:

“- review records of court proceedings.”

3.3. Subject: Arrestee’s property protection mechanisms.

Existing rules: Article 176, items 1-3 of the CPC: 1. If a suspect or an accused person arrested or placed into custody as a pre-trial restraint measure has underage children, aged parents or other dependants left without care or assistance, the investigator shall place them in the care of relatives or other persons or place them into institutions for children left without parental care (educational institutions, medical institutions, social-care institutions or other similar institutions).

2. The investigator shall take measures in compliance with the law to protect the property and the home of a suspect or an accused arrested or placed into custody. 3. The suspect or the accused shall be advised of the measures taken to protect his/her property.

The issue: Article 22, item 3 of the CPC obligates the judge, the prosecutor, the investigator and/or the inquiry officer to ensure protection of the personal and property rights of the suspect, the accused, the defendant on trial and/or the convict. Article 176 of the CPC (Taking Care of Children and Dependents and Protecting the Property of the Suspect and/or the Accused) does not detail any mechanisms for protecting the property of a person placed into custody. In practice, it happens that an arrestee must make
a request to ensure his/her property is protected and to prevent the dishonest spouse from squandering it. The investigator may attach such property, for, in the sense of Article 116, item 2 of the CPC, property may be attached as security for civil claims or in view of potential seizure.

**Recommendation:**

Article 116, item 2 should be amended to read as follows:

“Attachment of property shall be used to secure execution of civil claims and potential seizure of property, as well as at the request from the person under investigation to ensure protection of his/her property. The agency with jurisdiction over the criminal proceedings, with the prosecutor’s consent, shall file a motion with the court for attachment of the property of the suspect, the accused or persons with financial liability for such property. A ruling to attach the property shall be rendered by the judge.”

3.4. Subject: The principle stipulating the right to lodge complaints.

**Existing rules:** Article 23, items 1-2 of the CPC: Criminal proceedings participants, individuals and representatives of enterprises, organizations and/or institutions interested in the proceedings in the criminal case may lodge complaints against actions or decisions of the judge (the court), the prosecutor, the investigator and/or the inquiry officer in accordance with procedures and subject to the time limits established by this Code. 2. Any person who has been convicted or acquitted shall have the right to have the judgment in his/her case reviewed by a higher court in accordance with the procedures hereby established.

**The issue:** The rule in Article 23, item 1 of the CPC is included in Chapter 2 of the CPC; along with other Articles of that Chapter, it is one of the principles of the CPC. Therefore, Article 23 of the CPC is fundamental to the institution of lodging complaints as a mechanism for guaranteeing the procedural rights and lawful interests of the participants of the proceedings. First, the existing language of Article 23, item 1 of the CPC stipulates the right to lodge complaints against actions and decisions of the officials listed in the Article only. Also, this rule does not mention the right to lodge complaints against the lack of action on the part of those officials, even though the law does set time limits for the officials to render decisions on certain matters. So an official’s failure to render a decision within the time period set by the law may serve as grounds for lodging a complaint – a complaint against the official’s failure to act. Second, the rule stipulates the right to lodge complaints against actions or decisions of the judge, the prosecutor, the investigator, and/or the inquiry officer. However, Article 23, item 1 of the CPC does not stipulate the right to lodge complaints against actions and decisions of the chief of the investigative agency and/or of the inquiry agency, even though in certain instances actions, omissions and decisions of those entities may cause violations of the procedural rights and lawful interests of the proceedings’ participants.

**Recommendation:**

Article 23, item 1 of the CPC should be amended to read as follows:

“Complaints against actions, omissions and/or decisions of the court, the prosecutor, the chief of the investigative agency, the investigator, the inquiry agency, the inquiry officers and (other) officials involved in criminal judicial proceedings may be lodged in accordance with the procedure set by this Code.”

3.5. Subject: The right to lodge complaints against officials’ actions and decisions.

**Existing rules:** Article 119, items 1-3 of the CPC: 1. Participants in criminal judicial proceedings and other persons whose interests are prejudiced may lodge complaints against the actions, omissions or decisions of the inquiry officer, the investigator, the prosecutor or the court and/or the judge with the government agency or official with jurisdiction over the proceedings in the criminal case. 2. Complaints
may be lodged in written or oral form. Oral complaints shall be entered into official records which shall be signed by the complainant and by the official accepting the complaint. 3. An oral complaint stated by a person during a visit with competent officials shall be resolved in accordance with the same procedure as complaints submitted in written form. Additional materials may be attached to complaints.

**Existing rules:** Article 124, item 1 of the CPC: Any natural person or legal entity may lodge a complaint with the court against a decision not to accept a statement about a crime or a violation of the law in instituting or terminating criminal proceedings, if such a complaint has been dismissed by the prosecutor and/or the higher-level prosecutor or has not been resolved within the time period set by this Code.

**Existing rules:** Article 14, item 1 of the Constitution: Human and civil rights and liberties shall be exercised directly. They shall determine the objectives, the contents and the application of laws and the work of the legislative, executive and local government bodies, including local self-ruling bodies, and shall be supported by the judiciary.

**The issue:** As per Article 23 of the CPC, participants in criminal proceedings may lodge complaints against actions or decisions of the court, the prosecutor and/or the investigator. Also, as per the sense of Article 119 of the CPC, proceedings participants and other persons whose interests are prejudiced, may lodge complaints against actions, omissions and decisions of the court, the prosecutor and/or the investigator. This may appear impressive, but, as per Article 124 of the CPC (which sets forth the judicial procedure for examining complaints), complaints may be lodged with the court only against certain decisions and/or actions or omissions of the inquiry officer, the investigator and/or the prosecutor, namely: a) against the decision to refuse to accept a statement of a crime; and b) against a violation of the law in instituting or terminating criminal proceedings. This leads to a practical question: how can one lodge a complaint with the court against other decisions or actions or omissions of the inquiry officer, the investigator and/or the prosecutor which may prejudice the constitutional rights and liberties of participants in criminal judicial proceedings or hinder citizens’ access to justice (such as unlawful arrests, searches, attachment of property and other violations of the CPC)? The narrow restriction of grounds for lodging complaints with the court in Article 124, item 1 of the CPC obviously contradicts the constitutional provision that guarantees the right to judicial protection to all, so such protection cannot be provided by the judiciary as stipulated by Article 14 of the Constitution. Moreover, defense attorneys are unable to provide adequate defense services in pre-trial proceedings in the absence of an independent arbitrator authorized to examine complaints against procedural violations committed by the prosecution. Opponents may object that the prosecutor is authorized to supervise lawful conduct of the investigation. It should be emphasized, however, that, as per Article 6 of the CPC, the prosecutor represents the prosecution, so, by definition, the prosecutor cannot be objectively disinterested in proving the defendant’s guilt. Besides, the prosecutor is not a representative of the judiciary, so the prosecutor’s powers do not guarantee the constitutional right to judicial protection. The right to lodge complaints against actions and decisions of the pre-trial investigation agencies with the court is also restricted by Article 124, item 5 of the CPC, which forbids parties to challenge or lodge complaints against the judge’s rulings, including rulings to dismiss complaints for reasons not listed in Article 124 of the CPC. Such contradiction between CPC rules compromises the law’s intent to provide a platform for adversarial proceedings at the stage of the pre-trial investigation and is inconsistent not only with the Constitution, but also with international fair trial standards. A violation of citizens’ constitutional rights and liberties, which are of paramount importance, capable of prejudicing constitutional rights and liberties or hindering access to justice, should be, according to the Constitution, sufficient grounds for seeking judicial protection during the pre-trial investigation.

**Recommendation:** Article 124 of the CPC should be amended to read as follows:

“1. Complaints against decisions, actions and omissions of the inquiry officer, the investigator and/or the prosecutor that may prejudice constitutional rights and liberties of participants in criminal judicial
proceedings or hinder citizens’ access to justice can be lodged with the court in the area where the pre-trial investigation is conducted.

2. A complaint may be lodged with the court directly or through the inquiry officer, the investigator, the chief of the investigative agency or the prosecutor. The prosecutor shall be obligated to provide the court with information and/or documents pertaining to the complaint.

3. The judge shall check the lawfulness and validity of the actions, omissions and decisions of the inquiry officer, the investigator, the chief of the investigative agency and/or the prosecutor within five days after receiving the complaint, in a court session with the participation of the complainant and the complainant’s defense attorney, legal representative or representative, if they participate in the criminal proceedings, and of other persons whose interests are directly affected by the action, omission or decision being complained against, and with the participation of the prosecutor. If persons duly notified about the time of the examination of such complaint fail to appear in court and do not insist that the complaint shall be examined in their presence, this shall not prevent the court from examining the complaint. Complaints that are to be examined by the court shall be examined in a public court hearing, except for the instances specified in Article 273, item 2 of this Code.

4. At the start of the court session, the judge shall announce what complaint is to be examined, introduce himself/herself to the persons who appear in court, and advise them of their rights and obligations. After that, the complainant, if present, shall describe the grounds for the complaint, whereupon other participants in the court session shall be heard. The complainant shall be invited to make a reply. The participants in the court session shall have the right to review the record of the session immediately after the ruling is pronounced and submit comments on the record within 24 hours. The persons who have reviewed the record shall put their signatures in the record to confirm they have reviewed it.

5. Having examined the complaint, the judge shall render a ruling:
   1) to find the official’s action, omission or decision in question unlawful or ill-founded and to obligate the official to remedy the violation; or
   2) to dismiss the complaint.

6. Copies of the judge’s ruling shall be served to the complainant, the prosecutor and the chief of the investigative agency.

7. Lodging a complaint shall not suspend the performance of the action being complained against or the execution of the decision being complained against, unless the inquiry agency, the inquiry officer, the investigator, the chief of the investigative agency, the prosecutor or the court finds it necessary to do so.

8. The judge’s ruling may be challenged/complained against in accordance with Article 363, item 3 of this Code.

3.6. Subject: The definition of “complaint.”

Existing rules: Article 119, item 1 of the CPC: Participants in criminal judicial proceedings and other persons whose interests are prejudiced shall lodge complaints against actions, omissions and/or decisions of the inquiry officer, the investigator, the prosecutor or the court and/or the judge with the government body or official with jurisdiction over proceedings in the criminal case.

The issue: Article 119, item 1 of the CPC makes it possible to lodge complaints against officials’ actions, omissions and/or decisions with the government body or official with jurisdiction over proceedings in the criminal case. The current wording is incorrect for the following reasons. First, the rule leaves unclear what government body has jurisdiction over proceedings in the criminal case and is authorized to examine complaints against actions/decisions of the judge examining procedural matters (such as imposing a pre-trial restraint measure, attachment of property, etc.). Second, if a complaint is lodged against actions,
omissions or decisions of the prosecutor, the court is not the body with jurisdiction over proceedings in the criminal case.

**Recommendation:**

Article 119, item 1 of the CPC should be amended to read as follows:

“Complaints against actions, omissions and/or decisions of the inquiry agency, the inquiry officer, the investigator, the chief of the investigative agency, the prosecutor and/or the court may be lodged in accordance with the procedure established by this Code by participants in criminal judicial proceedings and other persons whose rights and/or interests are prejudiced by the procedural actions, omissions and/or the procedural decisions made.”

3.7. Subject: The consequences of the expiration of the complaint deadline.

**Existing rules:** Article 149, item 4 of the CPC: A complaint against a decree not to institute criminal proceedings may be lodged with the prosecutor within 14 days after a copy of the decree is served. A complaint against the prosecutor’s decision to dismiss the complaint may be lodged with the superior prosecutor or with the court in accordance with the procedure established by this Code.

**Existing rules:** Article 137, item 3 of the CPC: A deadline missed for a valid reason must be extended by a decree of the agency that conducts the criminal proceedings at a motion or request of the interested person who has missed the deadline.

**The issue:** Article 148, item 4 of the CPC does not specify what happens if a complaint is lodged after the 14-day deadline. This raises a practical question: what should be done if the complaint deadline is missed for a valid reason, and is it possible to extend the complaint deadline if it is missed for a valid reason?

**Recommendation:**

Article 149, item 4 of the CPC should be amended to read as follows:

“A complaint against a decree not to institute criminal proceedings may be lodged with the prosecutor within 14 days after a copy of the decree is served. A complaint against the prosecutor’s decision to dismiss the complaint may be lodged with the superior prosecutor or with the court in accordance with the procedure established by this Code. If the deadline is missed, it can be extended in accordance with Article 137, item 3 of this Code.”

3.8. Subject: Confidentiality of information about citizens’ private life.

**The issue:** As per Articles 240 and 241 of the CPC, after the completion of the pre-trial investigation, the investigator shall be obligated to provide the case file to be reviewed by the victim, the civil plaintiff, the civil defendant and representatives thereof, as well as the accused and his/her defense attorney. Article 177 of the CPC stipulates that, where necessary, the investigator shall warn witnesses, the victim, the civil plaintiff, the civil defendant, the expert, the specialist, the interpreter, attesting witnesses and other persons who witness investigatory actions that preliminary investigation information may not be disclosed without the investigator’s permission. Such persons shall give a written commitment not to disclose such information and be warned about their liability under Article 361 of the Criminal Code of the Republic of Tajikistan. However, the law does not obligate the investigator to warn such persons about criminal liability for disclosing information about a person’s private life that becomes known to them from reviewing the criminal case file.

**Recommendation:**

A new item 5 should be added to Article 239 of the CPC, to read as follows:

“In order to ensure that information about one’s private life, state and other secrets are kept confidential, the investigator and/or the inquiry officer shall warn the persons who review the criminal case file about criminal liability under Article 361 of the Criminal Code of the Republic of Tajikistan.”
3.9. Subject: Time limits for providing case material for review.

The issue: There is a discrepancy between the Tajik and Russian texts of Article 112, item 6 of the existing CPC. The Russian text says that materials of a completed criminal investigation shall be provided to the accused and to his/her defense attorney within the 30 days prior to the expiration of the maximum detention period. In Russian, the rule contains the words “the maximum period,” whereas the Tajik text uses the word “muaianshuda” («муайаншуза»), which means “established or set.” Therefore, the Tajik text of the law distorts the meaning of the Article, which results in a misunderstanding of its provisions.

Recommendation:
Article 112, item 5 of the CPC in Tajik should be amended to read as follows:
«Маводи тафтиши анљомёфтаи парвандаи љиноятї барои шиносшавї ба айбдоршаванда ва њимоятгари ў боий дар муҳлати на дертар аз 30 шабонарўз то анљоми муњлати муайяншудаи нињоии дар ҳабс нигоҳ доштан, ки қисмҳои 3 ва 4 ҳамин модда муайян кардаанд, пешниҳод гардад».

3.10. Subject: The right of the defense to be provided with copies of all the case materials at the trial.

Existing rules: Article 241, item 2 of the CPC: The accused and his/her defense attorney, as they review a multiple-volume case file, may go back to any of such volumes and copy out any amount of any information and make copies of documents and use technical devices for such purposes, and such copies shall be attested to by the investigator. Excerpts and copies of documents from the criminal case file containing information that constitutes state secrets, business secrets or other secrets protected by the law shall be kept with the criminal case file and shall be provided to the accused and his/her defense attorney during the trial only.

Existing rules: Article 47, item 4 of the CPC: - review ... all the criminal case materials upon completion of the preliminary investigation and copy out any necessary information.

Existing rules: Article 270 of the CPC: After setting the date of the trial, the judge shall provide the parties at their request with an opportunity to review the entire criminal case file and to copy out any necessary information.

The issue: Article 47 of the CPC stipulates that the accused shall have the right to review all the case materials upon completion of the investigation and copy out any necessary information. Article 241, item 2 of the CPC, in furtherance of the above right of the accused and his/her defense attorney, stipulates that they can make copies of case file materials, even using copying equipment, and such copies shall be certified by the investigator. But such right does not apply during the trial. Article 270 of the CPC stipulates that, once the date of the trial is set, the judge shall provide the parties, at their request, with an opportunity to review the entire criminal case file and to copy out any necessary information. Thus, the law does not stipulate the parties’ right to make copies of case file documents during the trial. But the prosecuting attorney always has the case supervision file in court, with all the necessary documents to support the prosecution. Unlike the prosecuting attorney, the defense attorney has no such material available. Therefore, a defense attorney who has not been involved in the pre-trial investigation and joins the proceedings at the trial phase has no opportunity to copy case file materials that are required for a competent and adequate defense. So a defense attorney who joins the proceedings at the trial phase, unlike one involved in the pre-trial investigation, has a very limited opportunity to review and then use case file materials in order to provide effective counsel to his/her client. Article 281, item 3 of the CPC only stipulates that a defense attorney joining the proceedings at the trial phase shall be provided with adequate time for preparing for the trial, but does not obligate the court to provide such defense attorney with an opportunity to obtain copies of all the case file documents that he/she deems necessary (at his/
her cost and expense). Therefore, the existing wording of the law does not provide for implementing the principle of the equality of the adversarial parties.

**Recommendation:** Article 270 of the CPC should be amended to read as follows: “After setting the date of the trial, the judge shall provide the parties at their request with an opportunity to review all the criminal case file materials, to copy out any necessary information in any amount, make copies of documents, including use of copying equipment, and such copies shall be certified by the judge. Excerpts and copies of documents from the case file with information that constitutes state secrets, business secrets or other secrets protected by the law shall be kept with the case file and shall be provided to the accused and his/her defense attorney during the trial only.”

### 3.11. Subject: The right to having a defense attorney during the trial.

**Existing rules:** Article 227, item 3 of the CPC: A defense attorney must participate in the questioning of an accused who is a minor or an accused who, due to physical or mental defects, is incapable of exercising his/her right to defense or who does not speak the language of the proceedings, or if the accused is charged with a crime punishable by life imprisonment or capital punishment.

**Existing rules:** Article 51, item 1 of the CPC: A defense attorney must participate in proceedings in a criminal case if: this has been requested by the suspect, the accused, or the defendant on trial; the suspect, the accused or the defendant on trial is a minor; the suspect, the accused or the defendant on trial, due to physical or mental defects, is incapable of exercising his/her right to defense or does not speak the language of the proceedings, or is charged with a crime punishable by capital punishment or life imprisonment.

**The issue:** Article 227, item 3 of the CPC stipulates that a defense attorney must participate in the questioning of an accused who is a minor or an accused who, due to physical or mental defects, is incapable of exercising his/her right to defense or who does not speak the language of the proceedings, or if the accused is charged with a crime punishable by life imprisonment or capital punishment. But this rule does not require that a defense attorney participate in the questioning of an accused if so requested by the accused. The existing wording of Article 227, item 3 of the CPC contradicts Article 51, item 1, sub-item 1 of the CPC, which stipulates that a defense attorney must participate in proceedings in a criminal case if this has been requested by the suspect, the accused or the defendant on trial.

**Recommendation:**

Article 227, item 3 of the CPC should be amended to read as follows: “In the circumstances listed in Article 51 of this Code, a defense attorney must participate in the questioning of the accused.”

### 3.12. Subject: The right of the defense to an opening address at the trial.

**The issue:** As per Article 20, item of the CPC, the prosecution and the defense shall have equal rights in criminal judicial proceedings and shall be provided with equal opportunities to defend their positions. Also, Article 53, item 1 of the CPC obligates the defense attorney to use all means and methods of defense not forbidden by law to obtain and present evidence to protect the interests of his/her client. Article 281, item 1 of the CPC stipulates the defense attorney’s right to present his/her opinion on the merits of the charges and the proof thereof. Specifically, Article 12, item 1 of the CPC obligates the judge to provide conditions for the trial participants to exercise their rights and to take timely measures to satisfy their lawful requirements. Also, Article 276 of the CPC obligates the presiding judge to take steps to secure equal rights of the adversarial parties and to provide adequate conditions for a full and comprehensive examination of the circumstances of the case. Article 308 of the CPC stipulates that the prosecution shall make an opening statement at the trial, describing the charges brought. Article 308,
item 2 of the CPC, however, only stipulates that the judge shall ask the defendant on trial whether he/she understands the essence of the charges and whether he/she wishes to express his/her attitude to the charges brought. In our opinion, this rule is not fully consistent with the principles of the equality of the parties and adversarial proceedings. First, this rule grants the right to make an opening statement to the prosecution, not to the victim (so the prosecuting attorney speaks for the victim). But the defense attorney does not have a right to make an opening statement for the defense after the prosecution’s statement (to speak for the defendant on trial, like the prosecuting attorney speaks for the victim), to set forth the defense’s attitude to the charges brought and the defense’s version of what occurred. Such an opening statement by the defense attorney would help the court understand why the defense focuses on specific aspects in examining evidence and witnesses for the defense and for the prosecution. Moreover, this will save time required to support motions of the defense for taking certain judicial actions, conducting expert examinations and summoning witnesses.

**Recommendation:**

Article 308, item 2 of the CPC should be amended to read as follows: “After the charges brought are described by the prosecuting attorney, the presiding judge shall ask the defendant on trial whether he/she understands the essence of the charges and explain that the defense has the right to present its attitude to the charges brought. If the defendant on trial does not understand the essence of the charges, the prosecuting attorney shall explain it to the defendant on trial.”

### 3.13. Subject: Reading testimony in court.

**The issue:** Article 317 of the CPC permits reading testimony of the victim and/or a witness at the trial if the victim and/or a witness are not present for reasons that make it impossible for them to appear in court. This wording of the law may lead in practice to sustaining a motion of a party for presenting such testimony even if the other party objects and insists that the witness or the victim shall be questioned in person. Article 317 of the CPC does not require obtaining evidence that the victim or the witness are unable to appear in court (such as sending the court’s inquiry to the competent authorities and obtaining a reply to such inquiry or sending a warrant to appear in court and obtaining a written refusal of the persons summoned to court for questioning). Therefore, the existing rule, vague as it is, allows for a violation of the right of a party to put questions directly to a witness of the other party. This is also at variance with Article 273 of the CPC, which requires direct examination of all evidence (including face-to-face questioning of witnesses and/or the victim). Overall, this entails a violation of the principle of adversarial proceedings and unreasonably releases the court from the obligation to provide the parties with conditions for exercising their procedural rights.

**Recommendation:**

Article 317 of the CPC should be amended to read as follows:

1. Reading out loud of the victim’s or a witness’s testimony given earlier during the pre-trial investigation or the trial and demonstration of photographic negatives, photographs and/or slides taken during questioning, playing of audio and/or video recordings or films of questioning shall be permitted subject to the parties’ consent if the victim or a witness do not appear in court, except for the instances set forth in item 2 of this Article.
2. If the victim or a witness fails to appear at a court session, the court, acting on a motion of a party or on its own initiative, may decide to have testimony given by them earlier read out loud in court if: 1) the victim or the witness is dead; 2) the victim or the witness are gravely ill and are physically unable to appear at the trial; 3) the victim or the witness is a foreign citizen and refuses to appear in court; or 4) they cannot appear at the trial due to a natural disaster or other emergency.
3. The court, acting at a motion from a party, may rule to allow recitation of the victim’s or a witness’s testimony given earlier during the pre-trial investigation or the trial, if there are material differences between the earlier testimony and the testimony given during the current trial session.

4. A victim’s or a witness’s refusal to testify at the trial shall not prevent presentation of his/her testimony given during the pre-trial investigation if such testimony has been obtained in compliance with Article 12, item 5 of this Code.

5. Demonstration of photographic negatives, photographs, and/or slides taken during questioning, playing of audio and/or video recordings or films of questioning shall not be permitted without a prior oral presentation of the testimony contained in the record of the questioning or the record of the court session in question.”


Existing rules: Article 58, item 7 of the CPC: An expert who knowingly gives a false expert opinion, fails to appear or refuses to perform his/her responsibilities shall be liable under Articles 351 and 352 of the Criminal Code of the Republic of Tajikistan.

Existing rules: Article 57, item 5 of the CPC: A specialist who fails to appear when subpoenaed by the preliminary inquiry or investigation agencies or by the court or who fails to perform his/her responsibilities, shall be held liable under the laws of the Republic of Tajikistan.

Existing rules: Article 179, item 2 of the CPC: Before the start of an investigative action, the investigator shall check the identity and the competence of the specialist and the specialist’s attitude to the suspect or the accused and the victim. The investigator shall advise such specialist of his/her rights and duties under Article 57 hereof and warn him/her of his/her liability under this Article for refusing to perform or evading his/her duties, with an entry to that effect made in the record of the investigative action and attested to by such specialist's signature.

Existing rules: Article 284 of the CPC: A specialist subpoenaed to appear in court shall take part in the trial in accordance with the procedure established by Articles 57 and 179 hereof.

The issue: As per Article 72 of the CPC, the specialist’s opinion and testimony are a type of evidence in their own right. However, there is no obligation to warn the specialist, unlike the expert, about criminal liability for giving a false opinion, although the specialist’s opinions and testimony can be used as evidence in proceedings in the case. Article 179, item 2 of the CPC stipulates that the investigator shall warn the specialist about liability under Article 57 of the CPC. But Article 57 of the CPC does not stipulate any liability. Moreover, in accordance with the existing laws of Tajikistan, liability is established by the Criminal Code or the Code of Administrative Offenses, but not by the Code of Criminal Procedure.

Recommendation:

Article 57, item 5 of the CPC should be amended to read as follows: “A specialist who knowingly gives a false expert opinion, fails to appear or refuses to perform his/her responsibilities shall be liable under Articles 351 and 352 of the Criminal Code of the Republic of Tajikistan.”

Recommendation:

The language of the offense description in Article 351, item 1 of the Criminal Code of the Republic of Tajikistan should be amended to read as follows: “An intentionally false witness or victim testimony or expert or specialist opinion and an intentionally wrong interpretation during an inquiry, pre-trial investigation, or trial...”
4. Arrest Procedures

4.1. Subject: Consistent use of a term to indicate “arrest.”

Existing rules: Article 92, item 1 of the CPC (in Tajik): ~ Шахсро дар содир намудани чиноят ба шарте гумонбаршуда хисобидан mumkin ast, ки аз тараф макомоти пешбурди таъъкиби чинояти дар доираи салоҳияти худ ҳангоми мавчуд будани яке аз асосҳои зерин дасттир карда шавад, агар: - дар вақти содир кардани чиноят ё бевосита баъди содир кардани он боздошт шуда бошад; - шоњидони ходиса, аз он чумла, шахси аз чиноят чабрдида бевосита шахси содирнамудаи чиноятро нишон диҳанд ё бо тартиби пешбининамудаи моддаи 94 Кодекси мазкур боздошт намоянд.

The issue: The Tajik version of the CPC uses two different terms for “arrest” in various Articles - “dastgir” (“дастгир”) and “bozdosht” (“боздошт”). It follows from Article 40, item 1 of the Law of the Republic of Tajikistan On Normative Legal Acts that “a normative legal act shall not use different terms with the same meaning.” In compliance with that Law and for the purpose of a consistent understanding and use of terms, the term “dastgir” should be adopted as the single definition and term for “arrest”, as the term “bozdosht” is also used in Article 265 of the CPC and governs suspension of proceedings in a criminal case.

Recommendation: The terms “bozdosht” and “bozdoshta”, used as synonyms of “dastgir”, should be replaced with “dastgir” in Article 92, item 1, sub-items 1 and 2 and in Article 92, item 3 of the CPC.

4.2. Subject: The term “arrestee” is used, but not defined, in the CPC.

The issue: The absence of the term for “arrestee” makes it difficult to determine the moment when a person under arrest acquires the status of an “arrestee.” The term is not defined in the Terms and Definitions in Article 6 of the CPC, but it is important to define for the commencement of the procedural right to defense and other related rights. An arrest, which restricts the person’s freedom of actions and movement for a certain period of time, is used in the CPC alongside the terms “suspect,” “accused” and “defendant on trial.”

Recommendation: A new item, including term and definition, should be added to Article 6 of the CPC to read as follows: “A person who is actually restricted in his/her choice of actions and/or movement shall be recognized as an arrestee.”

4.3. Subject: The term “actual arrest” is used, but not defined, in the CPC.

Existing rules: Article 94, item 1 of the CPC: ~ Within three hours after an arrestee is delivered to the criminal prosecution agency, an arrest record shall be executed by a competent official, stating the grounds for the arrest, the location and the time of the actual arrest (the date and the exact time in hours and minutes), the results of the body search and the time at which the record is executed.

The issue: The CPC does not define “actual arrest,” so in practice various interpretations of the term are used. The prosecution interprets it as the time when the person is delivered to the criminal prosecution agency, while some officials hold that the time of the actual arrest is the time when the arrest record is executed. The defense interprets “arrest” as the actual restriction of the person’s freedom of actions and/or movement or when the person is ordered to move in a certain direction designated by the arresting
persons. Analysis of the practical application of the law makes it advisable to add a detailed definition of the term “actual arrest.”

**Recommendation:** Article 81, item 1 of the CPC should be amended to read as follows: “The time of the actual arrest is the time when the arresting person restricts the arrestee’s choice of actions and/or movement.”

### 4.4. Subject: The delivery of the arrestee to a criminal prosecution agency.

**Existing rules:** Article 91, item 1 of the CPC: An arrest is the delivery of a person to a criminal prosecution agency and a short-term detention of such person in custody at a special facility and in conditions as defined by law and this Code.

**The issue:** Article 91 of the CPC interprets “arrest” as the delivery of an arrestee to a criminal prosecution agency. But the law does not explain the term “delivery.” In practice, even before an arrestee is brought to a criminal prosecution agency, there emerges a legal relationship in which one party (the criminal prosecution agency) has the right to compel, and the other party must obey (the arrestee). Also, the term “delivery” must be specific and convey the actions performed by officers of the criminal prosecution agency. The term “an arrestee’s delivery” should not contradict the term “actual arrest.”

**Recommendation:** Article 91, item 2 of the CPC should be amended to read as follows: “The delivery of an arrestee is the time during which the arrestee is escorted from the actual arrest location to the time of the recording of the arrestee’s registration in the appropriate log of the criminal prosecution agency.”

### 4.5. Subject: The arrest procedure and the sequence of arrest actions are not governed by the CPC.

**The issue:** The CPC or other laws do not govern arrest procedures, so there is no established lawful sequence of actions by competent persons in performing arrests. If such procedures were established, this would establish limits for the validity and lawfulness of arrest actions by competent persons and potentially exclude violations of the arrestee’s rights and enable the officers to read the arrestees’ rights to them in a timely manner. Further, from the time of the actual arrest, a person arrested on suspicion of committing a crime would be able to lodge complaints against failure to meet lawful arrest requirements and against violations of the arrest procedure and also learn about procedural rights under the CPC (including the right freely to have meetings of unlimited duration with his/her defense attorney, to make a telephone call and the right to remain silent).

**Recommendation:** A rule to govern the arrest procedure and the sequence of arrest actions should be drafted and added to Article 91 of the CPC.

### 4.6. Subject: Should the CPC contain a rule that arrestee delivery logs must be kept in order to ensure compliance with the requirements of Article 10 of the CPC?

**Existing rules:**

Article 10 of the CPC: Respect for the honor and dignity of the individual is a responsibility of the officials and agencies that conduct proceedings in a criminal case. No participant in criminal proceedings may be subjected to violence, torture or any other cruel or degrading treatment.

Article 94, item 1 of the CPC: Within three hours after an arrestee is delivered to the criminal prosecution agency, an arrest record shall be executed by a competent official, stating the grounds for the arrest, the location and the time of the actual arrest (the date and the exact time in hours and minutes), the results of the body search and the time at which the record is executed.
The issue: The time of an arrestee’s delivery to a law enforcement agency is an important moment for executing procedural documents and for monitoring potential abuses by law enforcement agencies regarding violations of the arrestee’s procedural rights. Practice shows that many violations occur immediately after the actual arrest and in the early hours thereafter. All the time periods of the arrest procedure must be logged precisely when a person is arrested and brought to the law enforcement agency.

Recommendation: A definition of the “arrestee delivery log” should be added to Article 91 of the CPC, to read as follows: “The arrestee delivery log shall be used for logging the date and the exact time when an arrestee is delivered to the criminal prosecution agency and to record that a defense attorney has been summoned.”

4.7. Subject: Arrestee short-term detention facilities.

Existing rules:
Article 11, item 3 of the CPC: A person put under arrest as a pre-trial restraint measure and a person arrested as a suspect of committing a crime must be held at facilities that are not detrimental to their life and health.

Article 91, item 1 of the CPC: An arrest is the delivery of a person to a criminal prosecution agency and a short-term detention of such person in custody at a special facility and in conditions as defined by law and this Code.

Article 104 of the Republic of Tajikistan’s Criminal Punishment Execution Code stipulates the procedure for and conditions of keeping persons in custody and serving jail sentences. Persons serving jail sentences in prison facilities shall be provided with necessary accommodation and utilities that meet sanitary and hygiene requirements. Per inmate accommodation space rates are as follows: correctional facilities must have at least 2 square meters; prisons, at least 3.5 square meters; correctional facilities for women, at least 3 square meters; correctional facilities for juvenile inmates, at least 3.5 square meters; medical centers of correctional facilities, at least 3.5 square meters; and medical and preventive treatment centers of correctional facilities, at least 5 square meters.

Article 23 of the Republic of Tajikistan’s Law On Detention and Imprisonment Procedures: 1. Suspects, accused persons and defendants on trial shall be provided with accommodation conditions that meet hygiene, sanitation and fire safety requirements. 2. Suspects, accused persons and/or defendants on trial shall be provided with a dedicated sleeping accommodation, bedding and tableware free of charge. With due regard for their age, gender and climate conditions, inmates shall be provided with opportunities to procure seasonally appropriate clothing, underwear and footwear. 3. All of the cells shall be equipped with a PA/radio system and, where possible, have television, refrigerators and ventilation. Inmates in the cells shall be allowed to have books and periodicals brought from the facility’s library or purchased through the facility’s management, as well as table games. 4. The accommodation space rate for cells shall be 4 square meters per person.

The issue: Suspects under arrest are kept in offices of law enforcement officers or in short-term detention rooms of police stations, known as “bull-pens.” Arrestees who have not been convicted are often kept in makeshift facilities where conditions are often worse than those prescribed for convicts. Such facilities do not provide adequate conditions, have no minimum living space requirements in place and have no officers responsible for ensuring compliance with sanitation and hygiene standards. Therefore, such detention facilities lead to situations where arrestees are kept unlawfully, and their rights are violated. There are no laws that determine the status of such detention facilities or custody rules and procedures for them, so arrestees are placed in such facilities arbitrarily and no arrest records are executed. Such
facilities do not meet the requirements of Article 11, item 3 of the CPC. They are not safe for arrestees’ life and health, for they are not designed for detention purposes, and they do not provide for a person’s basic needs (no toilet, no table or chair, no water, etc.). Besides, there are no laws that establish a minimum accommodation space rate per arrestee/detainee for such facilities.

**Recommendation:** “Bull-pens” must be abolished and must not be used for short-term detention of arrestees. Further, criminal prosecution officers should be held liable for bringing arrestees to their offices. Arrestees must only be kept at short-term detention facilities or pre-trial detention centers that meet international detention conditions standards.

4.8. Subject: Relative notification procedure.

**Existing rules:**

Article 100, item 1 of the CPC: “Within 12 hours after a person’s actual arrest, the agency that conducts criminal proceedings and has arrested the person shall notify any of the adult members of his/her family or his/her close relatives about such arrest, or shall provide the arrestee with an opportunity to notify them.

**The issue:** This rule requires that relatives of an arrestee shall be notified within 12 hours. The period is unjustifiably long. People who have no information about their relative for such a long time will suffer, and this may cause high blood pressure or other grave medical problems in aged or sick persons. Relatives and friends will be trying to locate the arrestee, calling morgues, hospitals and police stations. However, law enforcement agencies tend to withhold such information during the early hours after the arrest, trying to get the arrestee to confess to committing a crime and claim that the arrest information has to be withheld until investigative actions have been performed. Therefore, in order to provide the arrestee with the right to defense and to prevent his/her relatives from worrying (and uphold the state’s humane attitude towards its citizens), it must be required that an arrestee’s relatives shall be notified as soon as the arrestee is delivered to the criminal prosecution agency, along with the reading of the arrestee’s rights under Article 46 of the CPC by a competent official at the time of his/her actual arrest.

**Recommendation:** A new item should be added to Article 91 of the CPC to read as follows: “The official responsible for entering the arrestee in the arrestee delivery log shall notify the arrestee’s family member or relative about the arrest or shall provide the arrestee with an opportunity to do so, and a note to that effect shall be put in the arrestee delivery log.”

4.9. Subject: An arrestee delivered to a criminal prosecution agency must undergo a medical check, and the results shall be recorded in a medical check report when the arrestee’s delivery is registered by the criminal prosecution agency.

**The issue:** The absence of the requirement to conduct a medical check of an arrestee at the time of the arrestee’s delivery to the law enforcement agency makes it possible to apply unlawful methods of coercion to obtain a confession of committing a crime, which contradicts the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the provisions of Articles 10 and 11 of the CPC. Also, the absence of a medical check report makes it difficult or impossible to lodge complaints against unlawful actions of the criminal prosecution agency during the arrest and in the course of the investigation because there is no evidence. Therefore, the criminal prosecution agencies must be obligated to perform a medical check of every arrestee during the arrestee delivery registration before the arrest record is executed.

**Recommendation:** A new item should be added to Article 91 of the CPC to read as follows: “Following the registration in the arrestee delivery log, a mandatory medical check of the arrestee shall be performed.
4.10 Subject: The existing arrest record execution period of three hours is too long.

The issue: The existing requirement, under Article 94, item 1 of the CPC, is that the arrest record shall be executed within three hours after the arrestee is delivered to the criminal prosecution agency. The period does not include the time between the actual arrest and the delivery of the arrestee to the criminal prosecution agency. The period is too long, which may lead to inaccurate recording of the time when the person is actually arrested, when the person is delivered to the criminal prosecution agency and when the arrestee’s rights are read to him/her. Therefore, the law enforcement agency must be obligated to execute an arrest record as soon as the arrestee is delivered to the criminal prosecution agency, to ensure that the date and the time of the actual arrest are recorded without delay and the arrestee’s rights are duly read to him/her and the arrestee’s medical condition at the time of the delivery is recorded. This immediacy requirement is a measure to prevent use of violence, torture and other cruel or degrading treatment.

Recommendation: A new item should be added to Article 91 of the CPC to read as follows: “Following a medical check of the arrestee, the official who has performed the arrest shall execute an arrest record immediately. Such record shall be executed in accordance with the rules set forth in Article 172 hereof, stating the location and the time of the actual arrest (the date and the exact time in hours and minutes), the grounds for the arrest, the results of a medical check and a body search, the time at which the record is executed and a note indicating that an arrestee rights information statement is attached to the arrest record.”

4.11. Subject: Is it necessary to designate officials responsible for keeping arrestees in custody from the time of the delivery to the law enforcement agency throughout the detention in custody until the pre-trial restraint measure decision is rendered?

The issue: This is not covered by any existing laws, so no agency or official is directly responsible for ensuring that an arrestee be kept in appropriate conditions after the arrest. This gap in legislation leads to a situation where no one takes responsibility for protecting the rights of an arrestee from the time of the actual arrest until a pre-trial restraint measure is imposed and charges are brought. The absence of assigned responsibility leaves room for criminal prosecution officers to commit abuses, such as improper and unsupervised neglect or inhuman treatment of arrestees, including torture. Thus, Chapter 11 of the CPC should include a rule to designate the agency or official responsible for keeping the arrestee in custody until a pre-trial restraint measure is imposed and the arrestee is committed to a pre-trial detention center.

Recommendation: A new item should be added to Article 98 of the CPC to read as follows: “Improper treatment of arrestees and failure to provide safe and healthy detention conditions for arrestees shall entail liability of the chief of the detention facility in which arrestees are kept.”

4.12. Subject: The CPC does not set a single and strict maximum arrest period, such as 72 hours from the time of the actual arrest.

Existing rules:

Article 92, item 3 of the CPC: A person arrested on the grounds listed in item 1 of this Article may not be kept under arrest for more that 72 hours from the moment of arrest. Upon expiration of the above period,
the arrestee shall be released, or a different pre-trial restraint measure provided hereby must be imposed, except for the measures specified in Article 111, item 5 hereof.

Article 95, item 3 of the CPC: ~ A person arrested on the grounds listed in item 1 of this Article may not be kept under arrest for more than 72 hours from the moment of the actual arrest.

Article 96, item 2 of the CPC: ~ A suspect arrested under item 1 of this Article may not be kept under arrest for more than 72 hours from the moment of the actual arrest.

The issue: The rules above stipulate that a person may not be kept under arrest for more than 72 hours. But Article 111, item 5 of the CPC contradicts those rules: it stipulates that the arrest period may be extended by another 72 hours by a court ruling. Furthermore, the law does not limit the court’s powers to a single extension. So after a second 72 hour period expires, the court may extend the period by another 72 hours and so on, ad infinitum. In order to prevent unreasonably long custody periods for arrestees, the short-term arrest period must be limited by 72 hours, and the requirement may be stated in one of the Articles of the CPC (for example, in Article 91).

Recommendation: A new item should be added to Article 91 of the CPC to read as follows: “In all cases without exception, a person may not be arrested for longer than 72 hours from the time of the actual arrest. Upon expiration of the above period, the arrestee shall be released or placed into custody as a pre-trial restraint measure.”

4.13. Subject: Is it permitted to conduct an initial questioning of a suspect, a witness or a victim before criminal proceedings are instituted, with the testimony given to be accepted as evidence in the criminal proceedings?

The issue: As per Article 92 of the CPC, the criminal prosecution agency must make a decision on instituting criminal proceedings within 12 hours. However, as per Article 163, item 1 of the CPC, pre-trial investigation and investigative actions shall only be performed after criminal proceedings are instituted. As per Article 46 of CPC, an arrestee shall not be declared a suspect and may not be questioned before criminal proceedings are instituted. It is possible to obtain explanations from an arrestee, just like from a witness or the victim, before criminal proceedings are instituted, but, as per Article 72 of the CPC, such explanations may not be admitted as evidence in the criminal proceedings. This means that, during the 12 hours before charges are brought, the investigator should try to detect elements of a crime from sources that are not admissible sources of evidence. A supplement should be added to Article 199 of the CPC to address the exceptional possibility that a witness, a victim and/or an arrestee may be questioned before criminal proceedings are instituted, i.e., before they acquire their respective statuses.

Recommendation: A new rule should be added to Chapter 11 of the CPC to read as follows: “Before a decision is made to institute criminal proceedings, the inquiry officer and/or the investigator may perform an initial questioning of the victim and a witness and the arrestee/suspect regarding the reasons and grounds for the arrest. Such persons shall be questioned according to the rules set forth in Articles 197 through 201 hereof. An initial questioning of an arrestee shall only be permitted after a consultation with his/her defense attorney.”

4.14. Subject: It is necessary to have a rule to stipulate the right of an arrestee to lodge complaints against actions, omissions and decisions of law enforcement officials.

Existing rules: Article 11 of the CPC: ~ 1. No one may be arrested or taken into custody unless legal grounds are present. 2. Detention and/or commitment of a person to a medical or correctional facility shall only be permitted by decision of the court and/or the judge. 3. A person subjected to pre-trial detention
and/or a person arrested on suspicion of committing a crime shall be held in conditions that are not deleterious to his/her life and health. 4. An arrestee shall have the right to lodge complaints.

The issue: The law grants the right to lodge complaints to the arrestee only, whereas, as per item 3 of the same Article, a detainee and a person arrested on suspicion of committing a crime shall have the same right to be kept in conditions that are safe for their life and health.

Recommendation: Article 11, item 4 of the CPC should be amended to read as follows: “An arrestee and a detainee shall have the right to lodge complaints against officials’ actions, omissions and decisions.”

4.15. Subject: Is the right of individual civilians to apprehend a suspect a well-balanced one?

The issue: Article 93 of the CPC stipulates that an individual civilian may perform an apprehension, but Article 91 of the CPC does not list individuals as a criminal prosecution agency. Also, as per Article 92, item 1 of the CPC, an arrestee may be deemed a suspect if arrested by a criminal prosecution agency acting within its scope of authority. Therefore, analysis of the above rules of the CPC indicates that, if apprehended by an individual, an arrestee may not be deemed to be a suspect, and the procedural rights of a suspect shall not apply to such arrestee.

Recommendation: Such a right should be moved to the chapter that sets forth the principles of the CPC or to the Article that sets forth the arrest procedure, with language that will not make the commencement of the arrest period dependent on whom the person is arrested by – a law enforcement officer or a civilian.

In view of multiple inconsistencies in the CPC and gaps in Chapter 11 of the CPC, a new draft of Chapter 11 of the CPC is proposed for review (Attachment 1). The proposed draft uses the same Article numbers as the existing version and consists of ten Articles, from Article 91 to Article 100.

Explanatory memo to the draft of Chapter 11 of the CPC

Article 91 of this draft uses the same title, but it contains a definition of “actual arrest” to ensure a single understanding of the term by prosecution authorities, defense attorneys and the court. This is important because, as per the CPC, the time of the actual arrest is when the procedural rights of a suspect commence, i.e., from that moment on, the suspect may exercise his/her right to defense counsel. Therefore, the new draft of Article 91 contains a mechanism for advising the arrestee of his/her procedural rights immediately (at the location and time of apprehension), with a statement to be completed in duplicate (as per the form in Attachment 2). The original version of the arrestee rights information statement must be attached to the arrest record as an integral part thereof. The duplicate of the statement shall be served to the arrestee/suspect against his/her signature. This will provide the arrestee with a practical opportunity to check that the location, the date and the time of the actual arrest are stated correctly, to learn immediately what crime he/she is suspected of and to learn the full name and position of the arresting officer. Furthermore, with a copy of such a statement in his/her possession, the arrestee may re-read it at any time and understand more fully his/her procedural rights under the law.

Also, as the actual arrest procedure is further defined, it is proposed that the term of delivery and its scope as an element of the arrest are defined: the taking of the arrestee from the location of the actual arrest to the time of registration in the arrestee delivery log. The log should record the date and the exact time of the arrestee’s delivery to the criminal prosecution agency and the summoning of a defense attorney to provide an initial consultation to the suspect about his/her procedural rights and the scope thereof and to establish in practice the need for legal assistance in the course of the investigation, or the arrestee’s voluntary rejection.
and waiver of the defense attorney’s services in the presence of such defense attorney (as required by Article 52 of the CPC) and the arrestee’s choice to conduct his/her own defense. Furthermore, the official registering the delivery of an arrestee should be obligated to notify the arrestee’s relatives or to allow the arrestee to do so, as per Article 100 of the existing version of the CPC. It is proposed that relatives should be notified during the registration because it is not always possible to use the telephone and notify relatives about the arrest during the actual arrest, while the telephone line at the criminal prosecution agency office is likely more reliable.

In further characterization of the institution of arrest, the new draft of Article 91 requires a mandatory medical check of the arrestee to be performed to establish his/her condition at the time of the delivery to the criminal prosecution agency. A medical check is needed to confirm the absence or existence of injuries on the arrestee’s body, so that the arrestee cannot make false accusations later about being subjected to violence during the arrest and the delivery to the agency; if the arrestee chooses to lodge complaints against inadmissible actions of the arresting officers, the results of the medical check will be used as evidence. Additionally, a medical check is necessary to establish immediately after the arrest whether the arrestee has any grave diseases that prevent him/her from being kept at a short-term detention facility or a pre-trial detention center (such as coronary disease, diabetes, etc.). To preclude arbitrary interpretation of diseases that prevent commitment of a person to a short-term detention facility or a pre-trial detention center, an official list of such diseases should be approved by the Ministry of Health. In view of the above, a medical check report should be attached to the arrest record and be made an integral part thereof.

It is proposed in the new draft of Article 91 that the final phase of the institution of arrest shall be formalized in an arrest record, which shall be executed without delay. It is important that the arresting officer execute the arrest record. It is the officer who has performed the actual arrest (an operative, as a rule) and is in a position to provide a full and comprehensive account of the reasons and grounds for the arrest, as well as the location, the date and the time and the circumstances of the actual arrest. Practice shows that the arresting officers do often not execute arrest records. The investigator to whom an arrestee is brought is unable to provide a detailed account of the actual arrest because he/she was not present. Thus, an arrest record executed by an investigator cannot be complete or comprehensive. An arrest record must state the location, the date and the time (hours and minutes) of the actual arrest, the grounds for and the circumstances of the arrest, the results of the body search performed, the time when the arrest record is executed and a note that an arrestee rights information statement and a medical check report have been attached to the arrest record.

After defining the arrest procedure in the new draft of Article 91, provisions are proposed to empower any persons, including Tajik nationals, foreign nationals and stateless persons, and not only law enforcement officers, to apprehend a person caught in the course of committing a crime or trying to escape immediately thereafter and to take such person to a criminal prosecution agency.

Since Article 91 of the new draft is essentially devoted to the concept and scope of the institution of arrest, it is proposed that Article 91 should include a provision that a person may be arrested before criminal proceedings are instituted and should set the maximum arrest period and consequences of the expiration of that period. The suspect’s procedural right to lodge complaints is inseparable from the institution of arrest, so it advisable to stipulate that right in Article 91 of the new draft.

The new draft of Chapter 11 of the CPC contains a differentiation of grounds and reasons for an arrest. The differentiation is intended to support a clear understanding of the arrest permissibility and lawfulness criteria when law enforcement officers perform an arrest. Article 92 contains an exhaustive list of three grounds for an arrest. One of the grounds is suspicion of committing a crime punishable under the Criminal Code by imprisonment or commitment to a disciplinary military unit (as stipulated in Article 91, item 2 of the existing CPC). But, in contrast to Article 91, item 3, sub-item 2 of the existing CPC, the new draft of Article 92 specifies
the list of officials authorized to render arrest decrees, precluding broad interpretations to authorize the chief
of police station or other criminal prosecution agency to render such decrees.

Article 93 of the draft sets forth an exhaustive list of three reasons for an arrest, largely reproducing
the reasons in Article 92, item 1 of the existing CPC. However, Article 93 of the new draft proposes deleting
one reason for an arrest, namely, when there are other sufficient grounds for suspecting the person of
having committed a crime, provided that the person has no permanent residence and his/her identity has not
been established. This reason is proposed to be eliminated, first, because suspecting the person of having
committed a crime is set forth in a separate bullet point of the new draft. And, second, if we delete the text
about suspicion, we will only have unknown identity and the lack of a permanent residence, which cannot be a
reason for an arrest under a criminal procedure as both are administrative offenses. The proposed wording of
Article 93 has practical importance since it contains an express directive to state such information in the arrest
record and the arrest decree.

The new draft of Article 94 also addresses “the actions of a criminal prosecution agency during an arrest.”
The new draft of Article 94 and Article 92 of the existing CPC stipulate that a decision to institute criminal
proceedings shall be made within 12 hours from the time of the actual arrest. During these 12 hours, the
investigator and/or the inquiry officer may conduct an initial questioning of a witness, the potential victim and
the suspect regarding the reasons, grounds and circumstances of the suspect’s arrest. These new provisions
are proposed because in obtaining such statements, the investigator and/or the inquiry officer will make a
decision to institute criminal proceedings using non-procedural documents, since such statements used by
the investigator are not classified as sources of personal evidence under Article 72 of the CPC. Moreover, the
new draft of Article 94 stipulates that an arrestee shall be released if a decision is made within the statutory
12-hour period not to institute criminal proceedings.

The new draft of Article 95 generally reproduces the provisions of the existing Article 95. The title remains
unchanged. Article 95, item 1, as proposed, does not include a provision that the investigator may render
an arrest decree if the accused person is in a different region. If the accused is in a different region and the
investigator is aware of that, such a provision is a ground for arrest, if retained in the law, will serve as a formal
ground for arresting such a person to enable the investigator to exert inadmissible pressure on him/her; if
the accused leaves for a different region without the investigator’s knowledge and it is not until later than the
investigator learns of the accused person’s whereabouts, the provision that the accused person’s location is
not known applies, because the accused person has not advised the investigator about his/her intention to go
to a specific destination. Furthermore, Article 95, item 3 of the new draft does not mention that the maximum
arrest period shall be 72 hours. The single maximum arrest period of 72 hours is stipulated in Article 91 of
the new draft and applies to any arrest instances. Also, Article 95, item 3 of the new draft contains a clearer
wording of the provision that follows from Article 95, item 4 of the existing version.

The new draft of Article 96 keeps 90 percent of the provisions of existing Article 96, including the title.
Amendments have to do with the legal consequences set forth in the existing Article 96. Instead of imposing
“detention in custody” as a mandatory restraint measure, the new draft of Article 96 stipulates that the agency
conducting criminal judicial proceedings in the case shall have the discretion to make a decision on imposing
different procedural compulsion measures that are available under the CPC. The reason for that is the CPC
does not permit imposing “detention in custody” on persons being suspected of or charged with crimes that
are not punishable by imprisonment.

The new draft of Article 97 only amends item 3 of the existing version. Clarifying changes have been
made to the language to help understand the sense of Article 97, item 3.

Major changes are proposed to Article 98. The title is changed to read, “Arrestee Detention Facilities and
Conditions.” The new draft of Article 98, item 1 stipulates that arrestees shall only be kept at a short-term
detention facility and violations of that rule will entail liability under Article 358 of the Criminal Code of the
Republic of Tajikistan. This provides a legislative solution to the problem of keeping arrestees in offices or “bull pens.” Article 98, item 2 contains a brief description of the procedure for placing an arrestee into a short-term detention facility. The procedure includes recording in the facility’s log the exact time when the arrestee is placed into the facility and the results of the arrestee’s medical check. These minimum requirements are included in the draft of Article 98 because Article 16 of the Republic of Tajikistan’s Law on Detention of Suspects, Accused Persons and Defendants on Trial does not detail the procedure for registering persons placed into short-term detention facilities and/or pre-trial detention centers but contains a reference to internal regulations to be approved by law enforcement agencies with the concurrence of the Prosecutor General of the Republic of Tajikistan. Furthermore, Article 98, item 2 of the draft stipulates that the officer responsible for registering an arrestee in the facility’s log shall inform his/her relative or friend and his/her defense attorney about the arrestee’s location and put a note to that effect in the facility’s log. Such a provision will guarantee that the arrestee’s relatives will know where the person is kept and will be able to provide the person with critical medicine and other necessary items and the defense attorney will be able to meet with his/her client and provide him/her with urgent legal assistance. This will ensure compliance with the international standard that arrestees may not be left without any contact with the external world and will enable the defense attorney to provide effective legal assistance. The draft of Article 98, item 3 of CPC, unlike Article 5, item 1 of the Republic of Tajikistan’s Law on Detention of Suspects, Accused Persons and Defendants on Trial, details the content of the document authorizing the keeping of arrestees in custody: not the arrest record, but a copy thereof, because the arrest record is a procedural document, with a full description of the grounds for and circumstances of the arrest, and as such it should be kept in the criminal case file. Additionally, the draft of Article 98, item 4 of CPC, unlike Article 18, item 2 of the Republic of Tajikistan’s Law on Detention of Suspects, Accused Persons and Defendants on Trial, details requirements for authorizing the arrestee’s meetings with his/her defense attorney: the attorney is required to present not only a warrant, but also a lawyer’s certificate to confirm his/her status as a lawyer. The obligation to permit such meetings is imposed on the detention facility’s management, which has no right to require that the defense attorney produce the investigator’s written confirmation that this particular defense attorney is involved in proceedings in this particular case or other documents.

The draft of Article 98, item 5, in furtherance of the requirements of Articles 10 and 11 of the CPC, makes the chief of the detention facility personally liable for mistreatment of arrestees and for failure to provide safe and healthy detention conditions. The closing item of Article 98, item 6, stipulates that other matters not addressed in Article 98 of the CPC shall be governed by Republic of Tajikistan’s Law on Detention of Suspects, Accused Persons and Defendants on Trial.

The draft of Article 99, item 1 does not include the provision that “grounds for keeping the person in detention do not exist any more” as a ground for releasing an arrestee. It is proposed to eliminate that provision because it refers to “detention” and not to “arrest.” Moreover, the language “do not exist any more” will indicate that the suspicion against the arrestee has not been confirmed or that the arrest has been performed in violation of the CPC. Those grounds are set forth in Article 99, item 1 of the draft. Article 99, item 2 of the draft is phrased differently, with a shift of emphasis in meaning: “Upon expiration of the arrest period, the chief of the short-term detention facility shall release the arrestee and inform the official in charge of the criminal proceedings in case that the arrestee has been released.” Such language is required to ensure strict enforcement of the maximum arrest period (72 hours). The existing version of Article 99, item 2 of the CPC forbids an arrestee to be released upon expiration of the 72 hours unless the official in charge of the criminal proceedings in the case is duly notified. So in practice the arrests last more than 72 hours, in gross violation not only of the Criminal Procedure Code, but also of the Constitution of Tajikistan and the Republic’s international commitments to comply with international standards of fair trial. The provision in existing Article 99, item 3 is kept in the new draft, with certain amendments. Since an arrestee is to be released by the chief
of the detention facility, it shall be that official who shall issue a certificate stating the arresting agency, the
grounds for and the location, the date and the time of the arrest and the grounds for and the date and the time
of the release.

As per the model of the new draft of Chapter 11, Article 91 of the new draft shall govern notification of an
arrestee’s relatives. So Article 100, item 1 of the draft contains a reference to Article 91; also, Article 100, item
1 has some additional language to address the arrest of a member of the armed forces as a suspect, in which
case both the arrestee’s relatives and the commanding officer of the arrestee’s military unit shall be notified.
This addition is required because a member of the armed forces is a special subject of criminal law, subject
to liability for offenses like absence from his/her unit due to absence without official leave or abandonment
of the military unit (determined by the duration of the absence). Article 100, item 2 of the existing version
is unchanged. However, a new item 3 is added to Article 100 to stipulate that if an arrestee is moved to a
different detention facility, the arrestee’s relative or close associate and the arrestee’s defense attorney must
be notified within three hours. This will keep interested persons informed about the arrestee’s location and
movements at all times, ensure compliance with the international standard that a person may not be kept out
of touch with the world and provide the defense attorney with a practical opportunity to render effective legal
assistance to the arrestee.
ATTACHMENT 1

Chapter 11 of the CPC to be amended to read as follows:

Article 91. Arrest

1. Actual arrest shall be the time from which the arresting person restricts an arrestee’s freedom of actions and/or movement.

2. A person arrested shall immediately have his/her rights read to him/her, and this shall be confirmed by an arrestee rights information statement to be executed in duplicate. The top part of such statement shall be attached to the arrest record and made an integral part thereof. The bottom part (copy) shall be served to the arrestee against his/her signature and for his/her possession.

3. Delivery of an arrestee is the taking of the arrestee from the location of the actual arrest until registration in the arrestee delivery log. The log should record the date and the exact time of the arrestee’s delivery to the criminal prosecution agency and a note that a defense attorney has been informed of the arrestee’s location and arrest. At the same time, the official in charge of registering the delivery of the arrestee in the arrestee delivery log shall notify the arrestee’s relatives or allow the arrestee to do so, and a note to that effect shall be made in the arrestee delivery registration log.

4. After registration in the arrestee delivery log, the arrestee must undergo a medical check. The results shall be recorded in a report to be executed in compliance with Article 187 of the CPC. The medical check report shall be attached to the arrest record and made an integral part thereof. An arrestee may be kept at a detention facility if he/she does not have any of the diseases stated in the list approved by the Ministry of Health.

5. After a medical check of the arrestee, the arresting official shall execute an arrest record. The arrest record shall be executed according to the rules set forth in Article 172 hereof and attached to the case file. The record shall state the location, the date and the time (hours and minutes) of the actual arrest, the grounds for and the circumstances of the arrest, the results of the body search performed, the time when the arrest record is executed and a note that an arrestee rights information statement and a medical check report have been attached to the arrest record.

6. Any civilian individual, just like a criminal prosecution agency representative, may apprehend a person caught in the course of committing a crime or trying to escape immediately thereafter and take that person forcibly to a criminal prosecution agency.

7. A person may be arrested before criminal proceedings are instituted. In all cases without exception, a person may not be arrested for more than 72 hours from the time of the actual arrest. Upon expiration of the above period the arrestee shall be released or placed into custody as a pre-trial restraint measure.

8. The arresting official shall notify the prosecutor about the arrest within 24 hours of the actual arrest. The arrestee shall have the right to lodge complaints against officials’ actions, omissions and decisions.

Article 92. Grounds for an Arrest

A person may be arrested on the following grounds only:

• if suspected of committing a crime punishable by imprisonment or commitment to a disciplinary military unit;

• if a decree has been rendered by a prosecutor, an investigator or an inquiry officer;

• if a ruling has been issued by a court to arrest a convict pending a decision to cancel a decision to suspend or defer a sentence or to release a convict on parole.
Article 93. Reasons for an Arrest

A person may be arrested for the following reasons only:

• if the person has committed a crime or tries to escape from the scene of the crime immediately thereafter;
• if the person is expressly identified by eyewitnesses and the victim as the person who committed the crime;
• if the person’s body, clothes or objects he/she is carrying or uses, the person’s home, work place or vehicle reveals clear traces indicating his/her involvement in committing a crime;
• if there are other sufficient reasons to suspect the person of committing a crime, provided that the person has no permanent residence or his/her identity has not been established.

Article 94. Arrest Actions by the Criminal Prosecution Agency

1. A criminal prosecution agency official, in performing the actual arrest, shall immediately inform the arrestee about his/her procedural rights at the time of restricting his/her freedom of action and/or travel and provide conditions for exercising those rights and take timely measures to satisfy the arrestee’s lawful requirements.

2. A decision to institute criminal proceedings must be made by the criminal prosecution agency within 12 hours from the time of the actual arrest.

3. In order to make a decision to institute or not to institute criminal proceedings, the inquiry officer and/or the investigator may perform an initial questioning of the victim and a witness and the arrestee/suspect about the reasons and grounds for and circumstances of the arrest. Such persons shall be questioned according to the rules set forth in Articles 197 through 201 hereof. An initial questioning of an arrestee shall only be permitted after a consultation with his/her defense attorney.

4. If the decision is made not to institute criminal proceedings or no decision is made regarding institution of criminal proceedings within the period set forth in item 2 of this Article, the arrestee shall be released.

Article 95. Arrest for Bringing Charges

1. If a suspect/accused person’s whereabouts are unknown, the agency conducting the criminal judicial proceedings may render a decree to have such person arrested.

2. Such degree shall be executed by the inquiry agency. When such arrest decree is executed, the agency conducting criminal judicial proceedings shall be notified immediately.

3. Charges shall be brought against the suspect/accused within 72 hours after the actual arrest, if detention is not imposed on him/her as a pre-trial measure of restraint.

Article 96. Arrest of a Person Who Has Violated the Terms of a Measure of Restraint

If the suspect/accused violates the terms of a non-detention measure of restraint or a written commitment to appear when summoned by the agency conducting the criminal proceedings and to inform the agency about any change of residence, the agency conducting the criminal judicial proceedings may render a ruling to have such person arrested and make a decision to impose other measures of procedural compulsion on such person as set forth in this Code.

Article 97. Arrest of a Convict

1. The court and/or the judge shall render a ruling to have a convict arrested until a decision is made to cancel a decision suspend the sentence or release the convict on parole or to defer the sentence, if a
representation is submitted by a competent agency with supporting information documents indicating that the convict is not performing his/her obligations imposed by the court or other terms set forth by Articles 71, 76 and 78 of the Criminal Code of the Republic of Tajikistan.

2. Such representation by a competent agency shall be examined by the court and/or the judge within seven days after the actual arrest of the convict.

3. A ruling to have the convict arrested shall be served by the court and/or the judge to the inquiry agency for execution. Having executed the ruling to have the convict arrested, the inquiry agency shall immediately inform the court.

**Article 98. Arrestee Detention Facilities and Conditions**

1. Arrestees shall only be kept at short-term detention facilities that are equipped for such purposes and meet the requirements of Articles 10 and 11 of this Code. Detention of arrestees in facilities other than short-term detention facilities shall entail liability under Article 358 of the Criminal Code of the Republic of Tajikistan.

2. Before being placed in a short-term detention facility, an arrestee shall be registered in the facility’s log and the date and the exact time of such placement shall be recorded, as well as the results of the medical check. The officer responsible for registering the arrestee in the facility’s log shall inform his/her relative or friend and his/her defense attorney about the arrestee’s location and put a note to that effect in the facility’s log.

3. An arrestee shall be placed into a short-term detention facility pursuant to a copy of the arrest record.

4. Meetings between an arrestee and his/her defense attorney shall be granted by the detention facility’s management pursuant to a warrant and the lawyer’s certificate, such meetings shall be held one-on-one, and their number and duration shall be unlimited. It shall be forbidden to request any other documents from the defense attorney.

5. Improper treatment of arrestees and failure to provide safe and healthy detention conditions for arrestees shall entail disciplinary and criminal liability of the chief of the detention facility.

6. Arrestee detention shall be governed by the Republic of Tajikistan’s Law on Detention of Suspects, Accused Persons and Defendants on Trial.”

**Article 99. Release of an Arrestee**

1. An arrestee shall be released by virtue of a decree by the court, the prosecutor, the investigator or the inquiry officer, or a court ruling, if:
   • the suspicion that the person has committed a crime has not been confirmed;
   • it is established that the arrest was made in violation of requirements set by this Code; or
   • the arrest period has expired.

2. Upon expiration of the arrest period, the chief of the short-term detention facility shall release the arrestee and inform the official in charge of the criminal proceedings in the case that the arrestee has been released.

3. Any arrestee released shall have a certificate issued by the management of the detention facility which shall state the arresting agency, the grounds for and the location, the date and the time of the arrest and the grounds for and the date and the time of the release.
Article 100. Notice of an Arrest

1. A relative or a close associate of the arrestee shall be notified about his/her arrest and location in accordance with the procedure set by Article 91, item 3 of this Code. If a member of the armed forces is arrested as a suspect, both his/her relatives and the command of his/her military unit shall be notified.

2. If a foreign national is arrested, the arresting agency of criminal prosecution shall inform the Ministry of Foreign Affairs of the Republic of Tajikistan about such arrest within 12 hours from the time of the actual arrest so that the embassy or the consulate of the state in question can be notified.

3. If a suspect/accused person is moved to a different detention facility, the person’s relative or close associate and his/her defense attorney shall be notified within three hours.

A new item should be added to Article 6 of the CPC to read as follows: “A person who is actually restricted in his/her choice of actions and/or movement shall be recognized as an arrestee.”
ATTACHMENT 2

Arrestee Rights Information Statement
This statement is executed to certify that at _______ (time: hours and minutes) on _________________ 201__ I, (the arrestee’s full name and date of birth) was arrested at (address, location) due to a suspicion of committing a crime punishable under Articles ______ of the Criminal Code of the Republic of Tajikistan.

At the time of the arrest, I was informed that I have the right:
- to inform my relatives that I have been arrested;
- to invite a defense attorney and give any explanations or testimony in the presence of such attorney;
- to know what I am suspected of;
- not to testify against myself or against my close relatives;
- to give or not to give explanations or testimony;
- to give explanations or testimony in my native language or in a different language that I speak;
- to use interpretation/translation services free of charge;
- to be provided with a copy of the arrest record and of the restraint measure ruling;
- to file motions;
- to review investigative action records and submit comments on them;
- to present evidence;
- to lodge complaints against officials’ actions, omissions and/or decisions.

The title of the arresting officer _________________________________.
The full name of the arresting officer _________________________________.
Duplicate statement received: (the arrestee’s signature and date).
Duplicate statement served: (the officer’s signature and date).

This statement shall be attached to the arrest record and included in the criminal case file.

A Duplicate of the Arrestee Rights Information Statement
This statement is executed to certify that at _______ (time: hours and minutes) on _________________ 201__ I, (the arrestee’s full name and date of birth) was arrested at (address, location) due to a suspicion of committing a crime punishable under Articles ______ of the Criminal Code of the Republic of Tajikistan.

At the time of the arrest, I was informed that I have the right:
- to inform my relatives that I have been arrested;
- to invite a defense attorney and give any explanations or testimony in the presence of such attorney;
- to know what I am suspected of;
- not to testify against myself or against my close relatives;
- to give or not to give explanations or testimony;
- to give explanations or testimony in my native language or in a different language that I speak;
- to use interpretation/translation services free of charge;
- to be provided with a copy of the arrest record and of the restraint measure ruling;
- to file motions;
- to review investigative action records and submit comments on them;
- to present evidence;
- to lodge complaints against officials’ actions and decisions.

The title of the arresting officer _________________________________.
The full name of the arresting officer _________________________________.
Duplicate statement served: (the officer’s signature and date).

The original of this statement shall be attached to the arrest record and included in the criminal case file.
5. Authorization of Restraint Measures by the Court

5.1. Subject: Applicability of bail as a measure of restraint.

Existing rules: Article 109, item 1 of the CPC: ~ Bail is the transfer by the suspect, the accused and/or the defendant on trial or by a different natural person or legal entity of a cash amount to the deposit account of the investigative or judicial agency for the purpose of ensuring that the suspect, the accused and/or the defendant on trial appears when summoned by the criminal prosecution agency or the court. The bail amount shall be determined by the criminal proceedings agency or the court imposing this pre-trial restraint measure, with due regard for the gravity of the crime committed and the character of the suspect, the accused and/or the defendant on trial and the financial situation of the person posting bail, but the amount shall be at least three hundred times the minimum monthly wage. Bail shall be granted subject to complete reimbursement of the property damage caused by the crime. Bail shall not be granted to persons suspected of or charged with commission of grave or very grave crimes.

The issue: Article 109, item 1 of the CPC stipulates that bail as a pre-trial restraint measure shall be imposed subject to complete reimbursement of the property damage caused by the crime. But this means that a person who has not been convicted but is only suspected of or charged with a crime must have reimbursed the damage caused by the crime in order for this measure of restraint to be imposed. In our opinion, during the phase of preliminary investigation no measure of restraint, including bail, may be made conditional on reimbursement of the damage. At a time when the guilt of the suspect in committing the crime has not yet been proved, the principle of the presumption of innocence fully applies to the suspect. As per Article 109, item 1 of the CPC, bail shall be used to ensure that the suspect, the accused and/or the defendant on trial appears when summoned by the agency conducting the criminal proceedings in the case. Moreover, as per Article 102 of the CPC, pre-trial restraint measures are imposed not for the purpose of remedying the consequences of the crime committed but in order to ensure that the suspect/accused cannot escape from the criminal prosecution agency or the court, obstruct the pre-trial investigation or the trial, hide or falsify evidence, influence witnesses or victims or commit a new crime.

Recommendation:

The sentence, “Bail shall be granted subject to complete reimbursement of the property damage caused by the crime” should be deleted from Article 109, item 1 of the CPC. Article 109, item 1 of the CPC shall therefore read as follows:

“Bail is the transfer by the suspect, the accused and/or the defendant on trial or by a different natural person or legal entity of a cash amount to the deposit account of the investigative or judicial agency for the purpose of ensuring that the suspect, the accused and/or the defendant on trial appears when summoned by the criminal prosecution agency or the court. The burden of the proof of the value of the bail shall rest with the bailor.”

5.2. Subject: Setting the bail amount and authorities’ jurisdiction with regard to imposing bail.

The issue: Article 109, item 1 of the CPC stipulates that the bail amount shall be determined with due regard for the gravity of the crime committed and the character of the suspect, but the amount shall be at least three hundred times the minimum monthly wage. The law sets the minimum bail amount at an unreasonably high level – 300 times the minimum monthly wage (the equivalent of 10,500 somoni in total). If the suspect is a farmer or an office worker, considering the current high levels of unemployment and the low income level, the suspect is unlikely to be able to raise 300 times the minimum monthly wage. Moreover, the law does not set any limits on the bail amounts to vary with the category of the crime.
Existing rules: Article 109, item 2 of the CPC: ~ The inquiry officer and/or the investigator may impose bail with the consent of the prosecutor.

The issue: Article 109, item 2 of the CPC stipulates that the investigator and/or the inquiry officer may set the bail amount and, subject to the prosecutor’s consent, impose bail. It should be pointed out that attachment of cash assets of individuals and legal entities may only be permitted by the court. But bail also has to do with cash and other assets. Moreover, as per Article 109, item 4 of the CPC, bail amounts may be forfeited and transferred to the state budget by a court decision. Therefore, in order to preclude bail abuses by the individual conducting the investigation, bail matters should be transferred to the jurisdiction of the court – an independent agency.

Recommendation:
Article 109, item 2 of the CPC should be amended to read as follows:
“Bail shall be imposed subject to the prosecutor’s authorization or by a court decision. Bail amount shall be determined with due regard for the gravity of the crime committed and the character of the suspect, the accused, and/or the defendant on trial and the financial situation of the bailor, but the amount shall be: at least fifty times the calculation amount for minor crimes, at least one hundred times the calculation amount for medium-gravity crimes and at least two hundred times the calculation amount for grave crimes. Bail shall not be granted to persons suspected of or charged with the commission of very grave crimes.”

5.3. Subject: Two terms with the same meaning.

Existing rules: Article 26, item 6 of the CPC: Detention is a pre-trial restraint measure imposed by decision of the judge or by a court ruling on suspects, accused persons or convicts only.

The issue: The Russian version of the CPC uses two terms to mean “detention.” Article 6 does not include “detention in custody” as a defined term, but defines “detention” as a measure of restraint imposed by decision of the judge or by a court ruling on suspects, accused persons or convicts only, Article 11 of the CPC uses “arrest.” Other Articles of the CPC use “detention in custody.” For example, Article 101 of the CPC, which addresses measures of restraint, uses “detention in custody.” Articles 111 and 112 of the CPC also contain references to that term. So which single term should be used in the CPC to describe that measure of restraint?

Recommendation: Use “detention in custody” instead of “detention (arrest)” to describe the pre-trial measure of restraint in Articles 6, 11, 35, 50 and 234 of the CPC.

5.4. Subject: Applicability of “detention in custody” as a pre-trial measure of restraint.

Existing rules: Article 111, item 1 of the CPC: ~ Detention as a pre-trial restraint measure shall be imposed by a judge order or a court ruling on a person suspected of or an accused charged with a crime punishable by imprisonment for a term exceeding two years. Suspects, accused persons or defendants on trial suspected of or charged with the commission of a grave or very grave crime may be subject to the pre-trial restraint measure in the form of detention on the grounds of the gravity of the crime only. In exceptional circumstances, this pre-trial restraint measure may be imposed on a suspect, an accused person or a defendant on trial suspected of or charged with committing a crime punishable by imprisonment for a term shorter than two years if the person has no permanent residence in the territory of the Republic of Tajikistan or the person’s identity has not been established, or the person has fled from criminal prosecution agencies or from the court or has violated a previously imposed pre-trial restraint measure.

Existing rules: Article 102 of the CPC: ~ 1. Pre-trial restraint measures may only be imposed by the criminal judicial proceedings agency if:
- available evidence provides sufficient grounds to believe that the suspect, the accused and/or the defendant on trial may flee from the criminal prosecution agency and the court;
- the suspect, the accused, and/or the defendant on trial may obstruct the pre-trial investigation of the criminal case or the trial, by withholding or forging documents relevant to the case, among other things, or exert unlawful influence on persons participating in the criminal proceedings, fail to appear without a valid reason when summoned by the agency that conducts the criminal judicial proceedings, commit a new crime, or obstruct execution of the judgment.

2. A decision whether to impose a restraint measure on a suspect, an accused or a defendant on trial shall be made with due regard for the nature of the suspicion or the charges, the person’s personality, age, health, family and financial status, whether the person has a permanent residence and other circumstances.

The issue: Article 111, item 1 of the CPC contains three mutually exclusive contradictions. First, this rule sets an applicability criterion, namely, that detention in custody as a pre-trial restraint measure shall only be imposed in proceedings of crimes with at least the medium level of gravity. It also stipulates that suspects, accused persons or defendants on trial suspected of or charged with the commission of a grave or very grave crime may be subjected to the pre-trial restraint measure in the form of detention on the grounds of the gravity of the crime only. Third, the rule also says that in exceptional circumstances this restraint measure may be imposed on a suspect, an accused person or a defendant on trial suspected of or charged with committing a minor crime if the person has no permanent residence in the territory of the Republic of Tajikistan or the person’s identity has not been established, or the person has fled from criminal prosecution agencies or from the court or has violated a previously imposed pre-trial restraint measure. The provision that suspects, accused persons or defendants on trial suspected of or charged with the commission of a grave or very grave crime may be subjected to the pre-trial restraint measure in the form of detention on the grounds of the gravity of the crime contradicts Article 102 of the CPC and the practices of the United Nations Commission on Human Rights, which develops its recommendations using precedents arising from international commitments of the states that are parties to the International Covenant on Civil and Political Rights. Practice shows that investigators do not comply with Article 102 of the CPC and do not provide meaningful reasons for placing persons into custody as a pre-trial restraint measure, but simply use formalistic language – suspicion of or charges with committing a grave or very grave crime. Courts, in turn, accept that language as valid grounds for authorizing detention. As a result, most persons under investigation in Tajikistan get placed into custody, despite the strict requirements of Article 102 of the CPC.

Recommendation: The sentence reading, “Suspects, accused persons or defendants on trial suspected of or charged with commission of a grave or very grave crime may be subject to the pre-trial restraint measure in the form of detention on the grounds of the gravity of the crime only,” should be deleted from Article 111, item 1 of the CPC.

5.5. Subject: Having documents to be submitted to the court with a motion for a detention ruling reviewed by the person under investigation and his/her defense attorney.

Existing rules: Article 111, item 2 of the CPC: ~ When detention is deemed necessary as a pre-trial restraint measure, the prosecutor, or the investigator or the inquiry officer acting with the consent of the prosecutor, shall file a motion to that effect in the form of a decree with the court. A decree to submit such a motion shall state the arguments and grounds as to why the suspect or the accused person must be detained and no other pre-trial restraint measures may be imposed. Supporting documents shall be attached to the motion. If such a motion is filed for the detention of a suspect or arrestee who has been
arrested pursuant to Articles 92 and 94 hereof, the decree and such materials shall be submitted to the judge no later than eight hours before the expiration of the arrest period.

**The issue:** Article 111, item 2 of the CPC stipulates that documents supporting the motion must be submitted to the judge at least eight hours before the arrest period expires. Further, Article 111, item 3 of the CPC stipulates that the judge shall examine a detention motion decree within eight hours after the court receives the decree package. Evidently, the eight hours is intended by the law to enable the court to plan its work and order of business. But practice shows that judges use the period to review the documents supporting such decrees and to request that the investigator and/or the inquiry officer provide documents that prove the guilt of the person under investigation. In other words, they request evidence supporting the underlying suspicion and/or charges (including accident scene inspection records, victim and witness questioning records, confrontation records and other documents), despite the fact that the guilt of the suspect and/or accused person must not be pre-judged during the pre-trial investigation in connection with a detention decision because this contradicts the presumption of innocence. Such practice violates the principle of the court’s impartiality, as it promotes the development of a one-sided view on the part of the court. Besides, the defense has not yet reviewed the documents submitted and therefore cannot present its arguments and its counter-arguments disproving the arguments of the prosecution to the court. Moreover, the law does not stipulate who has the obligation to provide such documents to the person under investigation and his/her defense attorney and when such documents should be provided, so that the defense can review them and prepare its counter-arguments and documents to disprove the investigator’s arguments in support of detention of the person under investigation. All this indicates that the existing language does not provide for implementation of the principles of adversarial proceedings and equality of the parties, which must be maintained in any procedure involving the court and the parties. Also, Article 111 of the CPC does not obligate the court to check the detention motion decree for grounds required by Article 102 of the CPC, which is fundamental to any decision regarding the appropriateness of any pre-trial restraint measure.

**Recommendation:**

Article 111, item 2 should be amended to read as follows:

“When detention is deemed necessary as a pre-trial restraint measure, the investigator or the inquiry officer acting with the consent of the prosecutor shall file a motion to that effect in the form of a decree with the court. The prosecution agency’s motion shall state the arguments and grounds required by Article 102 of this Code as to why the suspect or the accused person must be detained and no other pre-trial restraint measures may be imposed. The prosecution agency’s motion shall be submitted to the court with a list of persons to be summoned. Documents supporting the motion shall be presented to the court at the hearing. A motion for detention of an arrestee shall be filed by the prosecution agency at least six hours before the arrest period expires. Copies of the prosecution agency’s motion and supporting documents should be provided to the suspect and/or the accused person and his/her defense attorney against their signatures in advance, at least six hours before the motion is to be examined by the court. The court shall notify all the persons to be summoned to the court hearing at least four hours before the court examines the prosecution agency’s motion.”

5.6. Subject: Participation in the detention hearing.

**Existing rules:** Article 111, item 3 of the CPC: A decree with a motion to impose detention as a pre-trial restraint measure shall be examined by a judge of a city court or district court or same-level military garrison court in a single judge procedure, with the participation of the suspect and/or the accused person, the prosecutor and the suspect/accused person’s defense attorney, if such a defense attorney is involved in the criminal proceedings in the location of the pre-trial investigation or the suspect’s arrest, within
eight hours after the motion package is received by the court. The suspect or the person arrested under Articles 92 and 94 hereof shall be brought to the court session. A legal representative of the suspect or accused person if the person is a minor, the investigator and/or the inquiry officer shall also have the right to participate in the court hearing. If parties notified about the time of the hearing in a timely manner fail to appear without a valid reason, this will not prevent the court from examining the motion, except if it is the suspect or the accused person who fails to appear.

**The issue:** Article 111, item 3 of the CPC stipulates that if parties notified about the time of the hearing in a timely manner fail to appear without a valid reason, this will not prevent the court from examining the motion, except if it is the suspect or the accused person who fails to appear. But the CPC does not provide for a general due notification procedure. Article 198 of the CPC addresses the procedure for summoning a person for questioning; Articles 223 and 224 cover the procedure for summoning a person for bringing charges; Article 263, item 4 of the CPC stipulates that the parties must be notified about the time of the trial at least five days before the start thereof, but that provision is not applicable to detention authorization hearings.

**Recommendation:**

Article 111, item 3 of the CPC should be amended to read as follows:

“A decree with a motion to impose detention as a pre-trial restraint measure shall be examined by a judge of a city court or district court or same-level military garrison court in a single judge procedure, with the participation of the suspect and/or the accused person, the prosecutor and the suspect/accused person’s defense attorney, if such defense attorney is involved in the criminal proceedings at the location of the pre-trial investigation or the suspect’s arrest, within eight hours after the motion package is received by the court. The suspect or the person arrested shall be brought to the court session. A legal representative of the suspect or accused person if the person is a minor, the investigator and/or the inquiry officer shall also have the right to participate in the court hearing. If parties notified about the time of the hearing in a timely manner fail to appear without a valid reason, this will not prevent the court from examining the motion, except if it is the suspect or the accused person who fails to appear.”

**Recommendation:** A dedicated Chapter 161 should be added to the CPC to address a general procedure for summoning proceedings participants for participating in investigative actions or court hearings. Such a chapter could be modeled on Chapter 10 of the Code of Civil Procedure of the Republic of Tajikistan. (See Attachment 3).

5.7. Subject: The procedure for examination by the court of a detention motion.

**Existing rules:** Article 111, item 4 of the CPC: ~ At the start of the court hearing, the judge shall announce what motion is to be heard and inform those attending the hearing of their rights and duties. After that, the prosecutor or the official filing the motion, authorized by the prosecutor, shall present the grounds for the motion after which other persons attending the court session shall be heard.

**The issue:** Article 111, item 4 of the CPC stipulates that at the start of the court hearing, the judge shall announce what motion is to be heard and inform those attending the hearing of their rights and duties. After that, the prosecutor or the official filing the motion, authorized by the prosecutor, shall present the grounds for the motion after which other persons attending the court session shall be heard. This rule does not say whether a record of court proceedings is kept and when it can be reviewed and whether the principle of adversarial proceedings is observed at the hearing. For example, it is not clear whether the parties may put questions to each other about the motion and the arguments in its support, whether the defense may present evidence to disprove the arguments in the criminal prosecution agency’s motion with regard to circumstances arising from Article 102 of the CPC or file a motion of its own.
Recommendation:

Article 111, item 4 of the CPC should be amended to read as follows:

“The court hearing shall be held in accordance with the procedure set forth in Article 276 of this Code, with due regard for the requirements of Articles 273, 277, 278, 279, 281, 290, 293, 299, 301 and 306 of this Code. The official filing the motion or the prosecutor shall state the grounds for the motion, whereupon the position of the defense with regard to the merits of the motion shall be established. In hearing the criminal prosecution agency’s motion, the court shall only examine documents pertaining to the lawfulness of the arrest and appropriateness or inappropriateness of imposing a pre-trial restraint measure, following the provisions of Article 102 of this Code. The parties to the trial may review the record of the proceedings immediately after the court pronounces its ruling and submit comments on the record within 24 hours. Persons who review the record shall put their signatures in it to confirm they have reviewed it.”

5.8. Subject: The court’s powers in examining a motion to impose a pre-trial restraint measure and extension of the arrest period by the court.

Existing rules: Article 111, item 5 of the CPC: ~ After hearing the motion, the judge shall render a ruling:
- to impose a pre-trial restraint measure on the suspect or the accused in the form of detention;
- to deny the motion; or
- to extend the motion decision period by a maximum of 72 hours, in order to have reason-supported arguments provided to support the arrest. In that case, the judge’s ruling shall specify by how long the arrest period is extended.

The issue: Article 111, item 5 of the CPC does not empower the court to impose a different measure of restraint if the court does not find sufficient grounds for imposing detention. Furthermore, Article 111, item 5 of the CPC stipulates that in hearing a detention motion, the court may extend the decision period by a maximum of 72 hours, in order to have reason-supported arguments provided to support the arrest. This rule actually means that the court may extend the arrest period to 72 hours in order to have reason-supported arguments provided to support the arrest. But the hearing is about detention, not arrest, so the court should have the right to extend the arrest period for the parties to present arguments in favor or against imposing detention as a pre-trial restraint measure.

Recommendation:

Article 111, item 5 of the CPC should be amended to read as follows:

“After hearing the motions of the parties, the judge shall render a ruling:
- to place the person under investigation into custody, if the arrest is legal;
- to find the arrest illegal and to release the arrestee in the courtroom;
- to impose a different pre-trial restraint measure on the person under investigation, if there are grounds and circumstances stated in Article 102 of this Code;
- to extend the arrest period. The arrest period may be extended, if the court finds the arrest lawful and reasonable, by a maximum of 72 hours from the moment when the court rules on the motion of one of the parties, in order for additional evidence to be provided in favor or against detention as a pre-trial restraint measure. The ruling to extend the arrest period shall state the date and the time to which the arrest period is extended.”

5.9. Subject: Court ruling service procedure.

Existing rules: Article 333 of the CPC: ~ 1. A judgment must be lawful, well founded and fair. 2. A judgment shall be deemed to be lawful if it is based on the law and complies with all the requirements of the law. 3. A judgment shall be deemed to be well founded if it is rendered on the basis of the evidence presented to the court that has been examined in a comprehensive, complete and objective manner in the
course of the trial. 4. A judgment shall be deemed to be fair if the punishment imposed on the defendant found guilty has been determined in compliance with the Article of the Criminal Code of the Republic of Tajikistan that addresses liability for the crime committed, with due regard for the guilty defendant’s personality and aggravating and mitigating circumstances that may influence the punishment. 5. Any person who is not guilty shall be acquitted.

Article 343, item 1 of the CPC: ~ The description and reasons section of a judgment of conviction should contain a description of the criminal act found proven by the court, the location, the time and the mode of the crime, the form of guilt, the reasons, objectives and consequences of the crime. The judgment shall describe the evidence providing the basis for the court’s findings regarding the defendant on trial and the reasons why the court has rejected other evidence. It shall also describe any circumstances mitigating or aggravating the liability, and, if some of the charges have been dismissed as unfounded or the crime’s classification has been found to be wrong, the grounds and reasons for the modification of the charges.

Article 111, item 6 of the CPC: ~ A ruling rendered by the court and/or the judge shall be served to the person who has filed the motion, the prosecutor and the suspect or the accused and shall be executed immediately.

The issue: Article 111 of the CPC does not specify what requirements a court ruling shall meet. For example, Article 333 of the CPC stipulates that a judgment must be lawful, well founded and fair. Article 343 of the CPC stipulates that a judgment shall describe the evidence providing the basis for the court’s findings regarding the defendant on trial and the reasons why the court has rejected other evidence. This means the law’s requires that a judgment shall be reason-supported. But no such requirements for a court ruling are set by the CPC. Moreover, many judges write rulings and orders by hand, quite illegibly, which makes it possible to make arbitrary changes to judicial acts when cassation appeals or challenges are submitted.

Furthermore, Article 111, item 6 of the CPC stipulates that a judge’s ruling shall be served to the person who has filed the motion, the prosecutor and the suspect or the accused and shall be executed immediately. But the law does not obligate the judge to provide a copy of the ruling to the suspect’s or the accused person’s defense attorney, who has the right to lodge a complaint against such a ruling. This language violates the principle of the equality of the adversarial parties because such a ruling is to be served to the prosecutor and the investigator, but not to the defense attorney.

Recommendation:

Article 111, item 6 of the CPC should be amended to read as follows:

“A court ruling must be lawful and well-founded, and it shall describe the evidence providing the basis for the court’s findings and the reasons why other evidence has been rejected by the court. A court ruling shall be printed (made using special equipment), with every page signed by the ruling judge and served to the criminal prosecution agency, the suspect or the accused and to his/her defense attorney against their signatures.”

5.10. Subject: Court ruling appeal and/or challenge procedure.

Existing rules: Article 111, item 9 of the CPC: ~ An appeal or challenge against a judge’s ruling to impose detention as a pre-trial restraint measure or to deny a detention motion may be submitted to the higher court by way of cassation within three days after such ruling is rendered. The cassation court shall rule on the appeal or challenge within three days after the submission of the appeal/challenge package.

The issue: Article 111, item 9 of the CPC stipulates that a judge’s ruling to impose detention as a pre-trial restraint measure or to deny a detention motion shall be subject to appeal or challenge with the higher
court. But the law does not stipulate that a court ruling to extend the arrest period to 72 hours shall be subject to appeal or challenge.

**Recommendation:**

Article 111, item 9 of the CPC should be amended to read as follows:

“A ruling rendered by a judge in accordance with the procedure set forth in item 5 of this Article shall be subject to appeal or challenge with the higher court by way of cassation within three days after such ruling is rendered. The cassation court shall rule on the appeal or challenge within three days after the submission of the appeal/challenge package and may impose any measure of pre-trial restraint or cancel a previously imposed measure of pre-trial restraint, including the one imposed at the time of extending the arrest period. The judge who heard the criminal prosecution agency’s motion shall be obligated to provide the motion package to the cassation court within 48 hours after the challenge or appeal is filed.”

5.11. **Subject: Court ruling notification obligation.**

**Existing rules:** Article 111, item 10 of the CPC: ~ The official in charge of the criminal case shall be obligated to provide information that detention has been imposed as a pre-trial restraint measure to those listed in Article 100 of this Code, and if detention has been imposed on members of the armed forces, to the command of the military unit in question.

**The issue:** Article 111, item 10 of the CPC stipulates that the official in charge of the criminal case shall be obligated to provide information that detention has been imposed as a pre-trial restraint measure to those listed in Article 100 of this Code, and if detention has been imposed on members of the armed forces, to the command of the military unit in question. The law does not specify, however, who shall provide the information about the court’s ruling to the short-term detention facility in which the arrestee has been kept and when this should be done.

**Recommendation:**

Article 111, item 10 of the CPC should be amended to read as follows:

“The investigator and/or the inquiry officer in charge of the criminal case shall be obligated immediately to provide information about the court’s ruling to the short-term detention facility, to the command of the military unit if members of the armed forces are placed into custody, and to those listed in Article 100 of this Code.”

5.12. **Subject: Imposing detention in absentia.**

**Existing rules:** Article 232, item 3 of the CPC: ~ 1. When the accused person’s whereabouts are unknown, the investigator may direct inquiry agencies to conduct a search for the accused. Such a directive shall be noted in the decree to suspend the preliminary investigation or in a separate decree. 2. A search for the accused may be called in the course of the preliminary investigation or at the time when the preliminary investigation is suspended. 3. If there are grounds listed in Article 101 hereof, a pre-trial restraint measure may be imposed on the fugitive accused. In the instances listed in Article 111 hereof, detention may be imposed as a pre-trial restraint measure.

**The issue:** Article 232, item 3 of the CPC stipulates that if there are grounds listed in Article 101 hereof, a pre-trial restraint measure may be imposed on the fugitive accused. In the instances listed in Article 111 of the CPC, detention may be imposed as a pre-trial restraint measure. In compliance with that rule, the inquiry agency shall require that the investigative agency have the detention ruling suspended in order to conduct a search for and arrest the person. In our opinion, this practice conflicts with Article 111 of the CPC, which stipulates that, a motion to impose detention as a pre-trial restraint measure shall be heard in the presence of the suspect and/or the accused person. The requirement that the suspect and/
or the accused be present at the detention hearing is intended to enable the person under investigation to challenge the investigator’s and/or the inquiry officer’s arguments in favor of the person’s detention. Moreover, a person under investigation who will be arrested pursuant to the court’s detention ruling rendered in absentia will not be able to appeal against such a ruling because the appeal period, as per Article 111 of the CPC, is too short – only three days, while the person may be arrested a month later and kept in custody for several months and will only be able to appeal against rulings to extend the detention period. So the law does not provide for the right to appeal against a detention ruling rendered by the court in absentia. As per Article 95, item 1 of the CPC, a search for and arrest of a person shall be performed pursuant to a decree rendered by the investigator and/or the inquiry officer or a court ruling for having a specific person arrested.

**Recommendation:**

Article 232 of the CPC should be amended to read as follows:

1. When the accused person’s whereabouts are unknown, the investigator shall render a decree to organize a search for the suspect or the accused and direct inquiry agencies to conduct the search.
2. A search for the accused may be called in the course of the preliminary investigation or at the time when the preliminary investigation is suspended.
3. If there are grounds listed in Article 101 hereof, a pre-trial restraint measure may be imposed on the accused fugitive. A person arrested under a court ruling rendered in absentia shall be taken to court immediately in order for the court to check the appropriateness of detention imposed as a pre-trial restraint measure.

**5.13. Subject: The investigator to revoke a pre-trial restraint measure acting on his/her own authority.**

**Existing rules:** Article 168, item 1, sub-item 3: ~ In supervising the implementation of laws in performance of inquiry and investigation of criminal cases, the prosecutor, acting within the scope of his/her authority, shall provide his/her consent to the inquiry officer and/or the investigator to file a motion for imposing a pre-trial restraint measure in the form of detention and/or house arrest, or a motion to have such measures changed or revoked.

**The issue:** This norm does not enable the investigator to revoke detention previously imposed by the court without the prosecutor’s consent. However, Article 35 of the CPC, which defines the court’s scope of authority, does not mention the court’s consent to a revocation of a pre-trial restraint measure previously imposed by the court. Practicing investigators are of the opinion that the law unreasonably limits the investigator’s discretion and authority.

**Recommendation:**

Article 168, item 1, sub-item 3 should be amended to read as follows:

“~ provide his/her consent to the inquiry officer and/or the investigator to file a motion with the court for imposing a pre-trial restraint measure in the form of detention or house arrest.”

**5.14. Subject: The detention ruling appeal procedure.**

**Existing rules:** Article 363, item 2 of the CPC: ~ Court rulings (decrees) rendered at the trial on examination of evidence, motions by the parties, imposition, change, or revocation of a restraint measure, order in the courtroom, except for rulings (decrees) to impose cash fines, shall not be subject to appeal or challenge under this Article. Objections to such decisions may be included in a cassation appeal or a challenge of the judgment.
The issue: This rule forbids appealing against a restraint measure imposed by the court. The question is why do parties have the right to appeal against the court’s ruling on restraint measures during the pre-trial investigation but not during the trial? Generally speaking, the need to impose or not to impose a restraint measure, including the need to revoke or change one, should be examined on the initiative of a party, not the court. But if the initiative belongs to a party, then the parties should have the right to appeal against the court’s decision on the matter, in terms of grounds and lawfulness.

Recommendation:
Article 363, item 2 of the CPC should be amended to read as follows:
“Court rulings (decrees) rendered at the trial on examination of evidence, motions by the parties, order in the courtroom, except for rulings (decrees) to impose cash fines, shall not be subject to appeal or challenge under this Article. Objections to such decisions may be included in a cassation appeal or a challenge of the judgment.”
ATTACHMENT 3

CHAPTER 161. SUBPOENAS

Article 139¹. Subpoena

1. Persons participating in proceedings, as well as witnesses, forensic experts, specialists and interpreters shall be summoned to the criminal proceedings agency by a registered-mail letter, with advice of delivery of the subpoena, by telephone message or cable, facsimile or other registered-call communications systems.

2. Subpoenas to persons participating in proceedings and to representatives thereof shall be served to allow them enough time to appear when summoned, but in any event no later than three days before the start of the procedural actions or the trial scheduled.

3. A subpoena shall be delivered to the address of the person participating in proceedings. If the person is not residing at the address designated, the subpoena may be delivered to his/her employment location. A subpoena addressed to a legal entity shall be delivered to its address.

Article 139². Subpoena Contents

1. A subpoena shall contain:
   - the title and the exact address of the agency conducting the criminal proceedings;
   - the information on where and when the subpoenaed person is to appear;
   - the title of the case to which the subpoena is related;
   - the full name of the person being subpoenaed and the capacity in which he/she is to appear;
   - an invitation to the persons participating in the proceedings to present all the evidence they have in the case;
   - a note about the duty of the person who receives the subpoena in the absence of the addressee to serve the subpoena to the addressee as soon as possible;
   - a warning about the consequences of a failure to appear and the duty to explain the reasons for such failure.

Article 139³. Subpoena Delivery

1. A subpoena shall be sent by mail or by personal service through a person instructed to deliver it. The time when a subpoena is served to the person subpoenaed shall be marked on the return section of the subpoena.

2. The agency conducting the criminal proceedings may give a subpoena to a person participating in the proceedings, subject to that person’s consent, for serving it to another person summoned to participate in the proceedings. The person instructed to deliver a subpoena shall be obligated to bring back the “return” section of the subpoena with the subpoenaed person’s signature to the agency conducting the criminal proceedings.

Article 139⁴. Service of a Subpoena

1. A subpoena shall be served on a person by hand, against the person’s signature on the return section of the subpoena. A subpoena addressed to an entity shall be served to a competent official thereof, who shall put his/her signature on the return section of the subpoena.
2. If the person delivering a subpoena does not find the individual being summoned at his/her residence or employment location, the subpoena shall be served on adult members of the person’s family residing with the person, subject to their consent, or, if no such family members are present, the subpoena shall be delivered to the local housing and utilities maintenance office, the local self-rule authority or the management of the person’s employer. In such cases, the person accepting the subpoena shall write his/her full name and relation to the person being subpoenaed (spouse, father, mother, son, daughter, etc.) or his/her job title and shall be obligated to serve the subpoena to the person being summoned as soon as possible and without delay.

3. In the event of the addressee’s temporary absence from his/her residence or employment location, the person delivering the subpoena shall write it on the subpoena’s return section where the addressee has left and when he/she is expected to return. The information shall be confirmed by the housing and utility maintenance office, the local self-rule authority or the management of the person’s employer.

Article 139. The Consequences of a Refusal to Receive a Subpoena

1. If a person being subpoenaed refuses to accept a subpoena, the delivering person shall write a note on the subpoena that the addressee has refused to accept it, and the subpoena shall be returned to the agency conducting the criminal proceedings. The note that the addressee has refused to accept the subpoena shall be attested to by the local housing and utilities maintenance office, the local self-rule authority or the management of the addressee’s employer, if the subpoena has been delivered to them for service.

2. A person who refuses to accept a subpoena shall be deemed duly informed about the time and the location of the procedural actions or the trial. A person’s refusal to accept a subpoena shall not suspend the proceedings in the case.

Article 139. A Change of Address during Proceedings

The persons participating in proceedings shall inform the agency conducting the proceedings about a change of address during the proceedings. If such notice is not given, a subpoena shall be sent to the person’s last known address and be deemed delivered, even if the person being subpoenaed no longer resides at such address.
6. Judicial authorization to perform investigative actions


Effective rules: Article 13 of the CPC: 1. The dwelling of a person is inviolable. 2. Entry into a dwelling without the residents' consent shall be forbidden. 3. Inspection and search of a dwelling may be performed in accordance with the procedure established hereby.

Article 35, item 1, sub-items 7-8 of the CPC: The court shall have the exclusive power to: 7) authorize the inspection of a dwelling without the residents' consent; 8) authorize the search of a dwelling.

The issue: Article 13 forbids entry into a dwelling without the residents' consent. Inspection and search of a dwelling may be performed in accordance with the procedure established by the CPC. In addition, pursuant to Article 35, item 1, the court has the exclusive power to authorize the inspection of a dwelling without the residents' consent. Also, Article 35, item 1, sub-item 8 stipulates that only the court has the right to authorize the search of a dwelling. However, the principle formalized in Article 13 of the CPC does not explain what the criminal prosecution agency should do to be able to inspect a dwelling without the consent of the people residing therein.

Recommendation: Article 13 of the CPC should be amended to read as follows:

“1. The dwelling of a person is inviolable.
2. Inspection of a dwelling, as well as search and seizure within a dwelling may only be performed with the consent of the adult residents or subject to a court ruling, except as otherwise provided by Article 171⁴, item 5 hereof.”

6.2. Subject: Procedure for obtaining judicial authorization to inspect a dwelling.

Effective rules: Article 22 of the Constitution: Entry into a person’s dwelling and deprivation of a person of his/her dwelling shall not be allowed except as otherwise provided by law.

Article 183 of the CPC: 1. Inspections shall be conducted in the presence of attesting witnesses. In exceptional cases (such as in remote areas, in the absence of proper means of communication, as well as in cases when inspections may entail risk to the health and lives of individuals), inspections may be conducted without the participation of attesting witnesses. 2. The investigator and the inquiry officer may commit the accused, the suspect, the victim, the witness and the specialist to participate in the inspection. 3. Inspections, where necessary, may require the performance of measurements, the use of photography, sound and video recording, the creation of plans and charts, casts and impressions of traces; the impression of traces, together with the relevant item or part thereof, shall be seized, where possible, with the use of such technical means and methods as may be allowed by law. 4. Traces and other tangible items as may be discovered shall be inspected on the site of the investigative action. If the inspection procedure may take a long time or prove difficult to perform on site, the relevant items must be seized, packed, sealed and delivered undamaged to a location deemed convenient for the inspection thereof. 5. All of the items discovered and seized during the inspection must be demonstrated to the attesting witnesses and the other participants. 6. Subject for seizure shall only be such items as may be relevant to the case. The seized items shall be packed, sealed and attested by the signatures of the investigator and the attesting witnesses. 7. Persons participating in the inspection may draw the investigator's attention to anything that, in their opinion, may be conducive to the establishment of the circumstances of the case. 8. During the inspection of a dwelling, measures shall be taken to ensure the presence of an adult resident thereof. Where the presence of such a person cannot be secured, representatives of the housing and utilities management organization or of the local self-government authorities shall be invited, and the dwelling shall be inspected in compliance with the requirements set...
forth in Article 13 hereof. 9. The premises of enterprises, organizations and institutions shall be inspected in the presence of representatives thereof or representatives of the local self-government authorities. 10. The premises occupied by diplomatic missions and those occupied by members of diplomatic missions and their family members shall only be inspected at the request or with the consent of the diplomatic envoy and in his/her presence. The diplomatic envoy's consent shall be solicited through the Ministry of Foreign Affairs of Tajikistan. The presence of a prosecutor and a representative of the Ministry of Foreign Affairs of Tajikistan during the inspection of such premises shall be mandatory.

The issue: Article 13, item 2 of the CPC prohibits entry into a dwelling without the residents’ consent. Thus, the principle of inviolability of dwelling, as stipulated by Article 13, directly ensures the constitutional right of an individual formalized in Article 22 of the Constitution of the Republic of Tajikistan. In its turn, Article 35, item 1, sub-item 7 of the CPC, specifying the powers of the court, empowers the court to authorize the inspection of a dwelling in the absence of consent granted by the residents. However, Article 183 of the CPC, while describing the inspection procedure, fails to mention the necessity to obtain, prior to the inspection, the court’s authorization for the inspection of a dwelling in the absence of the residents’ consent. Consequently, Article 183 comes into conflict with the principle of inviolability of dwelling. In addition, Article 182 of the CPC, which specifies the grounds for conducting inspections (including the inspection of a dwelling), contains no prescription to comply with the requirements vested in the principle of inviolability of dwelling. At the same time, Chapter 21 of the CPC, which regulates the inspection procedures, does not contain a procedural rule to be used by the court for authorizing the inspection of dwellings.

Recommendation:
Article 182 of the CPC should be amended to include item 3 reading as follows: “The inspection of a dwelling shall be conducted in strict compliance with the provisions of Article 13 hereof.”

To add to the CPC Article 171 which would regulate the judicial procedures for obtaining authorization to perform procedural actions.

6.3. Subject: Procedure for obtaining judicial authorization to search a dwelling.

Effective rules: Article 192 of the CPC: 1. Search and seizure shall be performed by the inquiry officer, the investigator or by the prosecutor on the grounds of a motivated decree and authorization of the court/judge. 2. The search and seizure of documents containing a state secret or another secret protected by law must be authorized by the court/judge. 3. In exceptional cases, where the risk is high that the item searched for and subject for seizure may, as a result of delay, be lost, damaged or criminally used, or that the wanted person may abscond, the search may be conducted without the judicial authorization, followed within twenty-four hours by notification of the court about the search. 4. Before commencing the search, the inquiry officer, the investigator or the prosecutor shall make the parties concerned familiar with the search warrant. 5. Search and seizure shall be conducted with the participation of attesting witnesses and, where necessary, a specialist and an interpreter. 6. Prior to conducting search or seizure, the inquiry officer or the investigator must submit a relevant decree to the prosecutor with a view to applying for judicial authorization to conduct the search or seizure. 7. Commencing the search, the inquiry officer or the investigator shall request that such items and documents as may be relevant to the case be surrendered voluntarily. If such items and documents are surrendered voluntarily and there are no grounds to believe that items and documents subject for seizure may have been concealed, the search shall be terminated. 8. Locked premises and storage facilities may be forced open during the search if the owner refuses to open them voluntarily. In the process, no unnecessary damage shall be caused to the door locks or to other items. 9. Upon discovery of the items and documents being searched for, the inquiry officer or the investigator shall perform a compulsory seizure thereof. 10. In a dwelling or in the premises
of enterprises, organizations and institutions, search and seizure shall be conducted in the presence of persons indicated in Article 183, item 8 and Article 183, item 9 hereof. 11. In the premises occupied by diplomatic missions and those occupied by members of diplomatic missions and their family members, search and seizure shall be conducted in compliance with the requirements set forth in Article 183, item 10 hereof. 12. The inquiry officer or the investigator must take measures to ensure non-disclosure of any private circumstances of the person occupying the premises or those of other persons as may be revealed during the search and seizure. 13. The inquiry officer or the investigator shall have the right to forbid the persons who are present in the premises or in the place where the search and seizure is being conducted, as well as the persons who may come to such premises or place, to leave these premises or place, or to talk to one another and to other persons until the search and seizure have been completed. 14. While conducting search and seizure, the inquiry officer and the investigator shall only seize such items and documents that are relevant for the case. Prohibited items and documents shall be subject for seizure irrespective of their relevance to the case. 15. All of the items and documents seized shall be demonstrated to the attesting witnesses and the other attending persons, and, if necessary, packed and sealed at the place of search or seizure and attested by the signatures of the investigator and the attesting witnesses.

**The issue:** Article 192 of the CPC establishes the search and seizure procedure and stipulates in item 1 that search and seizure are to be conducted on the basis of a motivated decree and subject to the court’s authorization. In its turn, Article 192, item 4 of the CPC obligates the inquiry officer/investigator to make the parties concerned familiar with the search warrant issued by the court. At the same time, neither Article 192 nor Chapter 22 of the CPC, which regulates the search procedures, contain a procedure to be used by the court for issuing search warrants. In addition, Article 190 of the CPC, which specifies the grounds for search (including the search of a dwelling), contains no prescription to comply with the requirements vested in the principle of inviolability of dwelling. Thus, Chapter 22 of the CPC contradicts the principle of inviolability of dwelling.

**Recommendation:**
Article 190 of the CPC should be amended to include item 3 reading as follows: “The search of a dwelling shall be conducted in strict compliance with the provisions of Article 13 hereof.”

To add to the CPC Article 1711 which would regulate the judicial procedure for obtaining authorization to perform procedural actions.

**6.4. Subject: Notification of the court about a search conducted without the court’s authorization.**

**The issue:** Pursuant to Article 192, item 3 of the CPC, the search of a dwelling may be conducted without judicial authorization, provided the court is promptly notified of the search of a dwelling performed without the court’s authorization. However, the law does not specify the court’s actions following the receipt of such notification. That is why the courts have not been responding to notifications of searches performed without the court’s authorization.

**Recommendation:** The new article of the CPC that would regulate the judicial procedure for obtaining authorization to perform procedural actions (Article 1711) should include a rule defining the court’s actions following the receipt of the investigator’s notification of a procedural action performed without the court’s authorization, as well as the legal consequences arising from the court’s review of said notification.

**6.5. Subject: Procedure for obtaining judicial authorization to detain postal communications.**

Effective rules: Article 14 of the CPC: Personal and family secrets are protected by law. Any person shall be entitled to the privacy of savings and deposits, correspondence, telephone conversations, postal,
telegraph and other communications. Limitation of these rights in the course of criminal proceedings may only be allowed in some cases and according to the procedure expressly provided by law.

Article 195, item 4 of the CPC: The investigator’s application for the detention, inspection and seizure of postal and telegraph communications shall be examined by the judge/court in accordance with the rules set forth in Article 192 hereof. Should the judge/court authorize the detention of postal and telegraph communications, the investigator shall forward the court ruling to an appropriate communication facility, which is requested to detain the relevant postal and telegraph communications and promptly notify the investigator to that effect.

The issue: Article 14 of the CPC guarantees the preservation of personal and family secrets, as well as the privacy of savings, deposits, correspondence, telephone conversations, postal, telegraph and other communications. Limitation of these rights in the course of criminal proceedings may only be allowed in cases and according to the procedure expressly provided by law. As per Article 195, item 4, the investigator’s application for the detention, inspection and seizure of postal and telegraph communications shall be examined by the judge/court in accordance with the rules set forth in Article 192. However, Article 192 contains no rule describing the procedure for the issue of authorization by the court. In addition, neither Article 195, nor Chapter 22 of the CPC, which includes Articles 192 and 195, provides for a judicial procedure to be used to authorize the search or detention of correspondence. Furthermore, the law does not specify the procedure for the detention of e-mail messages.

Recommendation:

Article 195, item 4 of the CPC should be amended to read as follows: “The investigator’s application for the detention, inspection and seizure of postal and telegraph communications shall be examined by the judge/court in accordance with the rules set forth in Article 171 hereof. Should the judge/court authorize the detention of postal and telegraph communications, the investigator shall forward the court ruling to an appropriate communication facility, which shall be obliged to detain such postal and telegraph communications and promptly notify the investigator to that effect.”

To add to the CPC Article 171 which would regulate the judicial procedure for obtaining authorization to perform procedural actions.

6.6. Subject: Procedure for obtaining judicial authorization to monitor and record telephone conversations.

Effective rules: Article 195, item 4 of the CPC: the investigator refers the decree to the court/judge, and upon receipt of the court’s/judge’s authorization, the decree is further referred to an appropriate institution for execution.

The issue: Article 196 of the CPC establishes the procedure for authorizing the monitoring and recording of telephone conversations. Article 196, item 4 stipulates that the investigator must refer the decree to the judge, and once the authorization is granted, the decree is subsequently referred to the appropriate institution for execution. However, Article 196 does not specify in detail the judicial procedure for authorizing the monitoring and recording of telephone conversations. It does not list the persons who are entitled to participate in the judicial proceedings, and it contains no provisions for the keeping of records of the court hearings.

Recommendation:

Article 196, item 4 of the CPC should be amended to read as follows: “The investigator’s decree shall be referred to the judge for examination in accordance with the rules set forth in Article 171 hereof. Should the court authorize the monitoring and recording of telephone conversations, the decree shall be forwarded to the appropriate institution for execution.”
To add to the CPC Article 171 which would regulate the judicial procedure for obtaining authorization to perform procedural actions.

6.7. Subject: The definition of postal and telegraph communications.

The issue: Article 195 of the CPC regulates the procedure for the detention of postal and telegraph communications and provides for a possibility to detain only such messages and communications as may be sent by mail or by telegraph. However, due to rapidly developing technologies, we now have access to new communication means (teletype, fax machines, e-mail and SMS messages, for example). Consequently, the term used in Article 195 does not cover the latest technological developments. It seems appropriate to introduce into the CPC a comprehensive term which would help investigators identify the type of communication and the relevant rule, subject to which they could obtain authorization to check the contents of communications and messages.

Recommendation: Article 195 of the CPC should be amended as follows: the phrase “postal and telegraph communications” to be replaced with the phrase “messages and communications dispatched through communication facilities.”

6.8. Subject: Ensuring confidentiality of information.

The issue: Article 14 of the CPC guarantees the preservation of personal and family secrets, as well as the privacy of savings, deposits, correspondence, telephone conversations, postal, telegraph and other communications. Limitation of these rights in the course of criminal proceedings may only be allowed in cases and according to the procedure expressly provided by law. However, Article 195 provides for no obligation of the investigator/inquiry officer to advise persons who may witness the inspection or seizure of correspondence of criminal liability in order to ensure confidentiality of information that may contain personal secrets. The same rule applies to the procedure for inspecting and listening to recorded telephone conversations as provided in Article 196, item 7 of the CPC.

Recommendation: Article 195, item 5 of the CPC should be amended to read as follows: “Inspection, seizure and the copying of detained messages and communications dispatched through communication facilities shall be performed by the investigator at the relevant communication facility and in the presence of attesting witnesses who are employees of that institution. The investigator, where necessary, shall have the right to summon an appropriate specialist and an interpreter to participate in the inspection and seizure of messages and communications dispatched through communication facilities. The attending persons shall be advised of criminal liability as stipulated by Article 177 hereof, which shall be duly entered in the record of inspection of messages and communications dispatched through communication facilities; the record shall also indicate the person(s) who inspected, copied and forwarded to the recipients, or detained messages and communications dispatched through communication facilities, as well as the messages and communications that were subjected to inspection, copying, forwarding or detention.

Recommendation:

Article 196, item 7 of the CPC should be amended to read as follows: “Before commencing the inspection of and listening to a phonogram, the investigator shall advise the attesting witnesses and, where appropriate, the attending specialist of their liability as stipulated by Article 177 hereof. The inspection and listening procedure shall be duly recorded, and the record shall contain a verbatim transcript of the recorded conversation in the part pertaining to the case. The phonogram shall be attached to the case file. The part of the phonogram that has no relevance to the case shall be destroyed either after the judgment of conviction becomes effective or after the dismissal of the case.”
6.9. Subject: Procedure for judicial authorization of investigative actions.

Effective rules: Article 88, item 3 of the CPC: Evidence that has been obtained in the course of inquiry and preliminary investigation through the use of force, coercion, cruelty, inhuman treatment or by other unlawful means shall be deemed invalid and may not constitute the grounds for formal charges and may not be used to prove the circumstances specified in Article 85 hereof.

The issue: Neither Article 183 that establishes the inspection procedures, nor Article 192 that regulates the search procedures, nor other CPC provisions specifying the procedural actions that may require judicial authorization, contain a procedural rule whereby the investigator/inquiry officer may apply to the court for authorization to perform an inspection, search or seizure.

Recommendation:
To add to the CPC Article 171\(^{1}\) entitled, “The judicial procedure for obtaining authorization to perform procedural actions,” reading as follows:

1. In cases stipulated in Article 35, item 1, bullet points 6 - 14, the investigator/inquiry officer, subject to the prosecutor’s approval, shall seek judicial authorization to perform a procedural action by issuing an appropriate decree.

2. The motion to perform a procedural action shall be examined by a single judge of a district/city court or a military garrison court of the appropriate tier located at the place where the preliminary investigation or the procedural action is to be conducted within 24 hours of the motion’s submission.

3. The prosecutor, the investigator and the inquiry officer shall have the right to participate in the court hearings.

4. Having examined the motion, the judge shall rule to authorize or to deny the procedural action, complete with the reasons for such denial. The court ruling shall be served to the relevant criminal prosecution agency.

5. In exceptional cases, when the procedural action involving inspection of a dwelling, search and seizure in a dwelling, a personal search, seizure of an item that has been pawned or placed for safe-keeping at the pawnbroker’s, as well as attachment of property, cannot be delayed, the aforementioned procedural actions may be conducted on the grounds of a motivated decree issued by the investigator/inquiry officer without the court’s authorization. In this case, within 24 hours of initiation of a procedural action, the investigator/inquiry officer shall notify the prosecutor and the court of the procedural action performed. Attached to the notice shall be a copy of the decree to perform the procedural action, which shall be verified as to its legality and relevance. Upon receipt of such notice, the judge shall examine the legal validity of the decision to perform the procedural action within the time limit specified in item 2 hereof. Basing on his/her examination, the judge shall pass a motivated ruling on the legal validity or invalidity of the decree issued by the criminal prosecution agency.

6. The investigator/inquiry officer shall serve a copy of the decree to perform a procedural action on the person subject to that procedural action, which may involve inspection of the dwelling, search and seizure in the dwelling, personal search, seizure of an item that has been pawned or placed for safe-keeping at the pawnbroker’s, as well as attachment of property.

7. The court rulings that authorize or deny the performance of procedural actions as well as rulings that confirm or deny the legal validity thereof may be contested/appealed in a higher court in accordance with the cassational procedure. The same procedure may be used to contest/appeal the record of a procedural action. The judge that has examined the motion for a procedural action or the notice of procedural action performed that has been filed by the criminal prosecution agency, shall refer the relevant documents to the court of cassation within two days of the receipt of a notice of appeal or complaint.
8. The court of cassation shall pass a judgment on the notice of appeal or complaint within three days of receipt of the relevant documents. Should the court of cassation find the decree on the performance of a procedural action or the record of such procedural action unlawful, all the evidence as may have been discovered in the course of said procedural action shall be deemed invalid under Article 88 hereof.”

6.10. Subject: Inspection conducted without participation of attesting witnesses.

The issue: Article 183, item 1 of the CPC stipulates that inspections shall be conducted in the presence of attesting witnesses. In exceptional cases (in remote areas, in the absence of proper communication means, as well as in cases when inspections may entail risk to the health and lives of individuals), inspections may be conducted without participation of attesting witnesses. First, it would be impractical for an investigator to needlessly put his/her life and health at risk. Second, the value of the results of an inspection conducted without the participation of an attesting witness is low, and the very possibility of such evidence being admitted by the court may be questioned since virtually all procedural actions must be conducted in the presence of impartial persons who are not interested in the outcome of the criminal case and who are engaged to attest the fact, nature, progress and results of a procedural action. At the same time, Article 60 of the CPC provides that an attesting witness must be able to correctly perceive all of the actions performed in his/her presence. Thus, the law prescribes that attesting witnesses are to confirm the actual performance of a procedural action, the lawful manner of obtaining the evidence, as well as the completeness and correctness of facts stated in the record of the relevant procedural action. Only when a dwelling has been inspected in the presence of attesting witnesses can the adversary parties to a trial check the fact of inspection, the completeness and impartiality of the inspection record and discard the assumption that the physical evidence may have been planted or falsified. The analysis of Article 759 and Article 761 of the Code of Administrative Offenses of the Republic of Tajikistan shows that, although these offenses pose a far lower social threat than those listed in the Criminal Code, attesting witnesses must be present during the inspection of a transport vehicle or [personal] property. The question is why the CPC, by contrast to the CAO, fails to provide a guarantee that the investigator will conduct an inspection in good faith and objectively record the findings without attesting witnesses being present? Furthermore, why should the health and life of an investigator, unlike the health and lives of other persons, be placed at risk, if the former CPC did not allow that?

Recommendation:

Article 183, item 1 of the CPC should be amended to read as follows:
“Inspections shall be conducted in the presence of attesting witnesses with due account of the requirements set forth in Article 60 hereof.”

6.11. Subject: Judicial authorization to commit persons to in-patient medical institutions for forensic examination.

Effective rules: Article 35, item 1, bullet point 6 of the CPC: The court has the exclusive power to authorize commitment of suspects and defendants who are not held in custody to a medical or psychiatric in-patient institution for forensic medical or forensic psychiatric examination.

Article 11, item 2 of the CPC: Detention or commitment of a person to a medical or educational facility shall require the authorization of the court/judge.

The issue: Article 35, item 1, bullet point 6 of the CPC provides that the court has the exclusive power to authorize commitment of the suspect and of the defendant, who are not held in custody, to a medical or psychiatric in-patient institution for forensic medical or psychiatric examination. Consequently, any
defendant who is held in custody, unlike those who are not, may be committed to a medical or psychiatric in-patient institution without a court ruling. Thus, such individuals do not enjoy the guarantee of judicial control over the validity of the decision to commit them to a medical institution, where, in addition to medical examination, they may be subjected to medicinal intervention. In addition, this rule contradicts the provision of Article 11, item 2 that allows for a person to be committed to a medical institution only on the grounds of a court ruling.

**Recommendation:**

Article 35, item 1, bullet point 6 of the CPC should be amended to read as follows:

“To permit the commitment of suspects and defendants to a medical or psychiatric in-patient institution for forensic medical or forensic psychiatric examination.”

6.12. Subject: Applying for the court’s authorization to commit a person to a medical in-patient institution for expert examination.

Effective rules: Article 216 of the CPC: 1. If in the course of prescribed forensic medical or psychiatric examination the suspect or the defendant may require hospitalization, he/she may be committed to a public medical in-patient institution, which shall be duly noted in the decree (ruling) prescribing the performance of forensic medical examination.

2. If the need to conduct a forensic medical examination and to commit the defendant to a medical in-patient institution arises in the courtroom, the decision shall be taken by the court/judge, at the request of the parties or at the court’s discretion, followed by a relevant ruling.

3. When the suspect is committed to a psychiatric in-patient institution for forensic psychiatric examination, the statutory period for filing formal charges shall be suspended until the time when the psychiatric examination board submits a report on the suspect’s mental state.

**The issue:** Article 216 of the CPC, which regulates the procedure for committing a person to an in-patient medical institution, does not obligate the investigator/inquiry officer to apply to the court for authorization to commit a person to a medical in-patient institution, which is a violation of the provisions set forth in Article 35, item 1, bullet point 6 of the CPC. In addition, the CPC does not define the procedure that obliges the court to examine the investigator’s application on the matter.

**Recommendation:**

Article 216, item 1 of the CPC to be amended to read as follows: “1. If in the course of prescribed forensic medical or psychiatric examination the suspect or the defendant may require hospitalization, he/she may be committed to a public medical in-patient institution as provided by Article 171 hereof” (the new version of Article 171 of the CPC as recommended herein).

6.13. Subject: Ensuring the safety of property belonging to suspects and defendants and the procedure for property attachment.

Effective rules: Article 22, item 3 of the CPC: The court/judge, the prosecutor, the investigator or the inquiry officer shall advise the suspect, defendant and the convicted defendant of their rights, enable them to defend themselves by any statutory ways and means and ensure the protection of their personal and property rights.

Effective rules: Article 116, item 2 of the CPC: 1. Attachment of property is a coercive procedural measure consisting of an inventory of assets and prohibition for the owner or possessor to dispose of and, where necessary, use such assets.
2. Attachment of property is used as an interim measure to secure a civil claim and, possibly, the forfeiture of property. The criminal prosecution agency, with the prosecutor’s approval, shall apply to the court for the attachment of property belonging to the suspect, defendant or materially accountable persons. The court shall render a judgment on the attachment of property.

3. Attachment of property represents a prohibition imposed on the property owner or possessor to dispose of and, where necessary, use that property, or the seizure and placement into custody of that property.

4. Attachment of property and formalization of the relevant record shall be performed in accordance with the provisions of Articles 172 and 173 hereof.

5. Property constituting articles of daily necessity cannot be attached under the Annex to the Code of Execution of Criminal Punishments.

6. Attachment of property shall be performed in the presence of attesting witnesses and, where necessary, an expert appraiser.

7. Attached property may be seized or, at the discretion of the attaching official, placed in the custody of the official representing the local self-government or the housing and utilities management company, the possessor of such property or another person, who must be advised of their liability for the safe-keeping of that property and sign personal recognizance to that effect.

8. Upon attachment of money deposits, bank accounts or securities, any transactions with these assets shall terminate.

9. When attachment of property is no longer required, the attachment shall be withdrawn by a relevant decree issued by the inquiry officer, investigator, prosecutor, or by the ruling of the judge/court that handles the proceedings in the criminal case.

The issue: As per Article 116 of the CPC, attachment of property is used as an interim measure to secure a civil claim and, possibly, the forfeiture of property. The law does not provide for a mechanism that would obligate the investigator, prosecutor or judge to ensure the safety of property belonging to a defendant that has been placed into custody. In practice, the defendant may file a motion to the investigator or the court seeking to ensure the safety of his/her property, if the defendant distrusts the ability of his/her spouse to act in good faith to preserve their jointly owned property or the property owned by the defendant. The law obligates the investigator, prosecutor and the court to ensure the protection of the defendant’s property rights, but makes no provisions for a mechanism to protect these rights. Furthermore, Article 116 does not allow the attachment of the defendant’s property to ensure its safety in response to the motion filed by the defendant. Besides, Article 116 does not explain the judicial procedure for examining the investigator’s motion for property attachment, nor does it mention the possibility of and procedure for appealing the relevant court ruling. This gap in the law impedes implementation of the principle laid down in Article 23 of the CPC.

Recommendation:

Article 116, item 2 of the CPC to be amended to read as follows: “2. Property shall be attached to ensure the safety of assets belonging to the suspect or defendant, as requested thereby, as well as to secure a civil claim and, possibly, the forfeiture of property. The investigator/inquiry officer, with the prosecutor’s approval, shall apply to the court for the attachment of property belonging to the suspect, defendant or materially-accountable persons as provided by Article 171 hereof” (the new version of Article 171 of the CPC as recommended herein).
7. Preparation for Trial and Preliminary Hearing (Chapter 31 of the CPC)

7.1. Subject: Participation of the parties in the trial scheduling proceedings.

The issue: As provided by Article 261 of the CPC, on a criminal case admitted to the court, the judge shall render one of the following decisions: set the date for trial; remand the criminal case for additional investigation; suspend the criminal proceedings; transfer the criminal case to another court to cure defects in jurisdiction; or to dismiss the criminal case. Under Article 262 of the CPC, with respect to a criminal case admitted to the court, the judge shall clarify the following issues: whether there are grounds to dismiss the criminal case or suspend the criminal proceedings; whether there were violations of the rules of criminal procedure at the time of inquest or pre-trial investigation, which would preclude the appointment of trial; whether copies of the indictment or the ruling to initiate summary criminal proceedings were duly served; whether the pre-trial measure of restraint imposed on the defendant should be changed; whether measures to secure recovery of damage caused by the offense (and potential forfeiture of property) have been taken; and whether there are motions and statements pending satisfaction.

Acting in accordance with judicial competencies and duties when preparing for trial, the judge must personally, without participation of the parties, examine all of the criminal case records and rule on the aforementioned issues. Consequently, when ruling for the remand of a criminal case for additional investigation or for the dismissal of a criminal case, the judge is obliged to side either with the prosecution or with the defense. This obligation, however, runs counter to the adversarial nature of a court trial, which, in itself, is a serious violation of the adversarial principle provided for by the Constitution, under which the court is not a criminal prosecution institution, and cannot side either with the prosecution or with the defense.

Recommendation: With due account of opinions expressed by most participants in round-table discussions, it was deemed reasonable to have the judge personally proceed with preparations for trial by resolving relevant organizational and administrative issues. Where such issues may require procedural rulings that would impact the criminal case administration, the judge must be obligated to hold preliminary hearings to ensure compliance with the adversarial principle in the course of resolving the issues. For that reason, it is advisable to introduce in the CPC a new chapter (Chapter 31) entitled “Preparation for and Appointment of Trial.” To resolve issues that require procedural rulings that may affect the criminal case administration and to ensure compliance with the adversarial principle in the course of resolving such issues, it is recommended to introduce in the CPC a new chapter (Chapter 311) entitled “Preliminary Hearing.”

In view of the multiple contradictory rules set forth in Chapter 31 of the effective CPC, the newly drafted Chapter 31 of the CPC of the Republic of Tajikistan (Annex №4) is hereby submitted for consideration. The proposed Chapter has the same numbering as the current Chapter 31, which consists of 8 articles, opening with Article 261 and ending with Article 268.

Explanatory note to the draft of Chapter 31 of the CPC of the Republic of Tajikistan

In the proposed draft, Article 261 retains its original title but only provides for three possible court decisions in contrast to the effective statute. These are the following court rulings: to transfer the criminal case to another court to cure defects in jurisdiction, to hold a preliminary hearing, or to set the date for trial.

Paragraph 2 of Article 261 remains unchanged.

Paragraph 3 of Article 261 provides that with respect to regular criminal cases, court rulings must be issued within seven days, while in event of extremely complex or large volume criminal cases, the time period may be
extended to 12 days by the decree of the presiding judge. The proposed shortening of the statutory limitation periods is explained by the fact that the judge would be personally resolving the following issues: whether the criminal case is within the court’s jurisdiction; whether copies of the indictment have been duly served; whether the pre-trial measure of restraint imposed on the defendant is subject to change or cancellation; whether measures to secure recovery of damage caused by the offense (and potential forfeiture of property) have been taken; and whether there are grounds to conduct a preliminary hearing. This would significantly reduce the number of records to be verified by the judge.

The newly proposed Article 262 is significantly shorter than the current Article and does not cover the following issues:

- whether there are grounds necessitating dismissal of a criminal case or suspension of criminal proceedings;
- whether there were violations of the rules of criminal procedure during the inquiry or pre-trial investigation, which would preclude a trial;
- whether there are motions and statements to be granted. These issues must be resolved in the course of preliminary hearings in the presence of the adversarial parties.

Article 263 of the draft focuses on a totally new purpose and defines the grounds for conducting a preliminary hearing, where it is necessary to resolve the following issues: remand a criminal case to the prosecutor; suspend or dismiss a criminal case; examine a party’s motion to suppress evidence, as well as other motions, statements or complaints filed by the parties, which require procedural rulings capable of affecting further administration of a criminal case. The proposed rule provides for a short time period (seven days) for filing a motion to hold a preliminary hearing.

Paragraph 1 of Article 264 is identical to the current Article 266. However, Article 264 has been enlarged to include paragraph 2, which provides that a criminal case, where necessary, may be transferred to another jurisdiction if the prosecutor changes the formal charges against the defendant in the course of the preliminary hearing.

Article 265 replicates in full the effective provisions of Article 267.

Article 266 provides for the appointment of a “trial” instead of a “court session” as provided by the current Article 263. The reason for that amendment is that the term “court session” may also be applicable to interim decisions rendered by the court at the stage of pre-trial investigation, for instance, to impose measures of restraint, attach property, etc. The term “trial,” conversely, envisages judicial examination of a criminal case on the merits of the formal charges filed against the defendant. Article 266, item 1 essentially replicates the provisions of paragraph 1 of the current Article 263. Article 266, item 2, apart from the provisions set forth in the current Article 263, item 2, would additionally specify whether the criminal case would be tried by a single judge or by a panel of judges; the persons listed by the parties to be summoned to the trial (thus giving sufficient time for the defense to submit to the court a list of their witnesses); the measure of restraint to be imposed on the defendant, excluding such measures as house arrest or detention in custody.

Article 266, item 3 replicates the tenor of the current Article 263, item 3.

Article 266, item 4 provides that the parties should be notified of the date, venue and time of trial.

Article 269 also specifies the duties of a court reporter, who shall, among other things forward to the defendant and the victim copies of a court ruling on the measure of restraint imposed on the defendant, if the judge has changed the previously imposed one; summon to the court session all the persons indicated in the court ruling on the appointment of trial; and take other measures in preparation for trial.

Article 267 is included to ensure the equality of the adversarial parties. Article 47 of the CPC stipulates the defendant’s right to get familiarized, upon completion of the pre-trial investigation, with all of the criminal case
records, as well as make abstracts of the relevant case records. In addition, Article 241, item 2 of the CPC, in furtherance of the defendant’s and defense attorney’s right, enables them to make copies of the criminal case records, with or without the use of technical means, providing that such copies are certified by the investigator. The same right, however, is not granted thereto during the trial. For instance, Article 270 of the CPC stipulates that the judge, upon appointment of trial, shall, if so requested by the parties, make sure that they get familiarized with the criminal case records and make all the relevant abstracts thereof. Consequently, the law does not provide for the parties’ right to make copies of the criminal case records during the court proceedings. At the same time, the public prosecutor always has access to the supervisory procedure file, which contains all of the records used for filing formal charges against the defendant. Unlike the prosecutor, the defense attorney has no immediate access to such records. Consequently, if the defense attorney did not participate in the proceedings at the stage of pre-trial investigation, he/she, having joined the proceedings at the stage of trial, would have no right to copy such case records as may be required to ensure a knowledgeable and comprehensive defense. Thus, the capacity of a defense attorney, who joined the proceedings at the stage of trial, to get access to the criminal case records whenever necessary is significantly lower than that of an attorney who joined the proceedings at the stage of pre-trial investigation because Article 281, item 3 of the CPC only provides for the right of a newly entered defense attorney to be given ample time to prepare for trial, without obligating the court to enable the defense attorney to obtain (for his/her own account) as many copies of the criminal case records as may be deemed necessary. Thus, the proposed provisions of Article 267 should fully ensure the parties’ right to prepare for the performance of their functions.

Article 268, item 1 of the draft, in contrast to the effective provisions of Article 271, does not require that a preliminary hearing commence, in exceptional cases, in 30 days, because the effective 30-days limitation period does not explain the exclusive nature of the delay. Furthermore, if defendants are detained in custody, any delay of this kind may unjustifiably prolong the trial of the criminal case on its merits. Article 268, item 2 prohibits commencement of a trial earlier than seven days after a copy of the indictment has been served on the defendant. This provision guarantees the defendant a minimal time period to prepare for the trial and, where necessary, retain an experienced defense attorney.
ATTACHMENT 4

Chapter 31. General procedure for trial preparation

Article 261. Powers of the judge over a criminal case admitted to the court

1. On a criminal case admitted to the court, the judge shall render one of the following decisions:
   1) transfer the criminal case to another court to cure defects in jurisdiction;
   2) hold a preliminary hearing; or
   3) set the date for trial.

2. The decision of the judge shall be executed in the form of a court ruling specifying:
   1) the date and venue of the court ruling;
   2) the court name, the name and initials of the judge to issue the court ruling; and
   3) the grounds for the decision.

3. The court ruling shall be issued within seven days of the date of a criminal case’s admission to the court. In event of extremely complex or large volume criminal cases, the time period may be extended to twelve days by the decree of the presiding judge.

4. A copy of the court ruling shall be forwarded to the defendant, victim and prosecutor.

Article 262. Issues to be clarified regarding a criminal case admitted to the court

In respect of a criminal case admitted to the court, the judge shall clarify the following issues with regard to each defendant:

1) whether the criminal case is within the court’s jurisdiction;
2) whether a copy of the indictment or the decree to file formal charges against the defendant have been duly served;
3) whether the pre-trial measure of restraint imposed on the defendant is subject to change or cancellation;
4) whether measures to secure recovery of damage caused by the offense, and potential forfeiture of property, have been taken; and
5) whether there are grounds to conduct a preliminary hearing as provided by Article 263, item 2 of this Code.

Article 263. Grounds to conduct a preliminary hearing

1. The court shall hold a preliminary hearing in accordance with the procedure established by Chapters 33 and 34 of this Code, upon the parties’ motions or at its own discretion, and given the grounds specified in paragraph 2 hereof.

2. A preliminary hearing shall be held, if and where:
   1) there are grounds to remand the criminal case to the prosecutor as provided by Article 2712 of this Code; or
   2) there are grounds to suspend or dismiss the criminal case; or
   3) there is a party’s motion to suppress evidence, filed in accordance with paragraph 3 hereof; or
   4) there are other motions, statements or complaints filed by either party.

3. A motion to hold a preliminary hearing may be filed by a party after familiarization with the criminal case records or after the criminal case, including the indictment, has been referred to the court, within seven days of the date when a copy of the indictment was served on the defendant.
Article 264. Transfer of a criminal case to cure defects in jurisdiction

1. Finding, in the course of the preparatory procedure, that the court has no jurisdiction over a criminal case that has been referred thereto, the judge shall rule to transfer the case to the relevant jurisdiction in accordance with the provisions set forth in Chapter 30 of this Code.

2. Should the prosecutor, in the course of a preliminary hearing, change the formal charges filed against the defendant, the judge shall issue a ruling to that effect and, where provided by this Code, transfer the criminal case to the relevant jurisdiction.

Article 265. Interim measures to secure a civil action and potential forfeiture of property

Should the inquiry officer, investigator or prosecutor fail to take measures to secure recovery of damage caused by the offense, or potential forfeiture of the property, the judge shall order the investigative authority to adopt appropriate interim measures.

Article 266. Appointment of trial

1. The judge shall rule to hold trial, unless there are grounds to issue decisions in accordance with items 1 or 2 of Article 261, item 1 of this Code.

2. Apart from the issues referred to in Article 261, item 2 of this Code, the court ruling shall specify:

   1) the venue, date and time of the trial;
   2) whether the criminal case shall be tried by a single judge or by a panel of judges;
   3) the defense counsel appointed as stipulated by Article 51, item 1 of this Code;
   4) the persons listed by the parties to be summoned to the trial;
   5) whether the criminal case shall be examined in camera as provided by Article 273 of this Code; and
   6) the measure of restraint to be imposed on the defendant, excluding such measures as house arrest or detention in custody.

3. The court ruling shall also contain the decision to put the criminal case on trial, specifying the full name of each and every defendant, the legal qualification of offenses incriminated to them and the measures of restraint.

4. The parties shall be notified of the date, venue and time of trial at least five days prior to the commencement thereof.

5. After the judge has issued a court ruling to hold a trial, the court recorder, as instructed by the judge, shall:

   1) forward to the defendant and the victim copies of a court ruling on the measure of restraint imposed on the defendant, if the judge has changed the previously imposed one;
   2) summon to the court session all the persons indicated in the court ruling on the appointment of trial; and
   3) take other measures in preparation for trial.

Article 267. Provisions for the parties to get familiarized with criminal case records

Following the appointment of a trial and subject to a motion filed by a party thereto, the judge shall provide conditions for that party to become familiarized with all of the criminal case records, make abstracts of such records and to such extent as may be required, as well as make copies of the documents, with or without the use of technical equipment, which shall be certified by the judge. Abstracts and copies of the
criminal case records that may contain information constituting state, commercial or other secrets that are protected by law, shall be kept together with the criminal case records and be made available to the defendant and his/her defense counsel during the trial.

**Article 268.** The time limit for commencing a trial

1. A criminal trial must commence within 14 days of the court ruling to appoint a trial.
2. A criminal trial cannot commence earlier than seven days after a copy of the indictment has been served on the defendant.

As stated above, presented below for consideration is the draft of a new chapter of the CPC of the Republic of Tajikistan (Chapter 31') entitled “Preliminary Hearing” (Annex №5). The newly proposed chapter is designed to ensure the principle of adversarial proceedings in the course of addressing issues that may require the adoption of procedural rulings that may impact the administration of criminal cases. The new chapter starts with Article 269 and ends with Article 2713.

**Explanatory note to the draft of Chapter 31' of the CPC of the Republic of Tajikistan**

Article 269 of the draft is entitled “The preliminary hearing procedure.” Paragraph 1 of this Article provides that a preliminary hearing shall be conducted by the judge with mandatory participation of the parties in accordance with the rules set forth in Chapters 32 and 33 of the CPC. As per Article 269, item 2, a preliminary hearing shall be held within ten days of the date of a criminal case’s admission to the court. Thus, the general time limit to prepare for trial is seven days. Where necessary, a preliminary hearing may be held within a period of three days (Article 269, item 3 of the draft), which is set for the purpose of timely notification of the parties about the impending hearings. Article 269, item 4 allows for a preliminary hearing to be held without the defendant’s participation. Article 269, item 5 provides that a preliminary hearing may still be held if a party fails to appear in court without valid excuse. In that case, the absent party would bear the negative consequences of a court ruling issued on the basis of such arguments and documents as have been earlier submitted by the parties. Article 269, item 6 describes the procedure for examining motions to suppress evidence. Items 7 and 8 of Article 269 specify the grounds for satisfying the defense’s motion to discover additional evidence or objects. These rules are being introduced into the CPC by analogy with the civil law procedure for securing evidence (Articles 67-69 of the Code of Civil Procedure of the Republic of Tajikistan) in event of circumstances of insuperable force (for instance, where it is necessary to examine a witness who is leaving the country for a long period of time or plans to permanently reside abroad or where there is a risk of loss of documents before the criminal case is put on trial). As provided by Article 269, item 9, preliminary hearings must be duly recorded, and not only the parties may read the record against signature, but, within one day, they may submit their comments thereon (this provision fully ensures the fair and adversary nature of the court procedure at this stage of the criminal proceedings).

Article 270 describes the procedure for filing motions to suppress evidence. Article 270, item 1 stipulates that a copy of such motions must be served on the adverse party on the day of the motion’s submission to the court. These motions may be filed with respect to any piece of evidence that the moving party believes to have been obtained in violation of the CPC provisions. It is important that motions to suppress evidence be examined during preliminary hearings so that criminal case records are purged of invalid evidence, thus enabling the court to focus, during the trial, on the examination and evaluation of such evidence as may strengthen the positions of both parties (a fully fledged implementation of the principle of adversarial trial). It will also facilitate deliberations of the court, seeking to impartially evaluate each and every piece of evidence, as well as the entire body of evidence and remove the description of inadmissible and invalid evidence from
the declarative section of the judgment. Article 270, item 1 lists the requirements set forth by the criminal law to the contents of such motions as well as the order of presenting arguments. These criteria serve to clarify for the judge and the adverse party which piece of evidence must be suppressed and why. Failure to comply with these criteria will provide the grounds for dismissing the motion. Article 270, item 3 describes a mechanism whereby the judge may establish the occurrence of events which served as the grounds for suppressing evidence by way of examining witnesses and ushering records of a criminal case records and documents that have been submitted by the parties in support of their motions. Further, this paragraph provides that the party objecting to the suppression of evidence must present arguments in support of the objections. Unjustified objections will entail satisfaction of the motion. This rule truly facilitates the implementation of the adversarial functions of the parties to court proceedings. In addition, based on the principles of adversarial trial and presumption of innocence, Article 270, item 4 fairly distributes the burden of proof between the parties to preliminary hearings. If the defense alleges that evidence was obtained in violation of the provisions of the Criminal Procedure Code, the prosecutor will bear the burden of proving the legitimacy of means used to obtain such evidence. In all other instances, the burden of proof will be with the moving party. Article 270, item 5 discloses the legal consequences of suppression of evidence, including the loss of its probative value, inadmissibility of such evidence for examination and reference during the trial and prohibition to use it to motivate a court judgment or another judicial act. However, even when the court rules to suppress some evidence, provisions of Article 270, item 6 make it possible for the court to re-address in the trial the issue of admissibility of suppressed evidence. This kind of restitution (restoration of the initial status) is justified, where in the course of examination of other evidence pertaining to the merits of the case, the court finds additional evidence, which could have been used to support objections against the suppression of evidence during the preliminary hearing.

Article 271, item 1 describes five types of court rulings that may be issued on the basis of facts discovered during a preliminary hearing. Article 271, item 2 clarifies the structure of and grounds for a court ruling. Article 271, item 3 provides that a court ruling must specify the evidence to be suppressed as well as the criminal case records justifying the suppression thereof which cannot be examined or referred to at trial. Article 271, item 4 explains actions of the court when a defendant held in custody files a motion for giving him/her time to get familiarized with the criminal case records whereas his/her term of pre-trial custody detention has expired. Article 271, item 5 provides only for two instances when a court ruling may be appealed which applies to a ruling to dismiss a criminal case and a ruling to hold a court session to address the issue of a pre-trial measure of restraint. Article 271, item 6 specifies the participants in the proceedings upon whom a copy of a court ruling must be served.

Article 271\(^1\) deals with transformation of the institute of additional investigation. Under the current Article 264 of the CPC, when a criminal case is being scheduled for trial, the court may remand the case for additional investigation when discovering grave violations of the CPC rules committed during the pre-trial investigation. In remanding a criminal case, the judge must specifically state what sort of investigative actions must be performed in the course of additional investigation. First, acting in accordance with judicial competencies and duties when preparing for trial, the judge must personally, without participation of the parties, examine all of the criminal case records and rule on the remand of the case for additional investigation. Practice shows that a criminal case file contains the indictment and evidence supporting the position of the prosecution. At the same time, when a criminal case file is referred to court, it generally does not contain evidence discovered by the defense. Thus, while examining criminal case records during the pre-trial procedure, the judge learns about the theory of the case as presented by the prosecutor and nothing about the position of the defense. In addition, examination of criminal case records by the court outside of an adversarial trial is a violation of the principle of equality of the parties and the adversarial character of judicial procedure. Secondly, as the judge examines a criminal case on its merits as presented by the prosecutor, he is obliged to side with the
prosecution, which is inconsistent with the independent and impartial status of the court. Consequently, such activities are inconsistent with the function of the court, which is to provide for the parties such conditions as may be required for the exercise of their right to have a comprehensive examination of all the circumstances relevant to a criminal case. In view of the above, it would be appropriate to abolish the institution of additional investigation altogether and provide for a possibility to remand a criminal case to the prosecutor for correction of technical errors.

Article 271, item 1 provides for four instances when the court may remand a criminal case to the prosecutor to remove obstacles to a trial. In remanding a criminal case, the court may act upon a party's motion and at its own discretion. These are the grounds as stated by the proposed rule: 1) indictment has been executed in violation of the provisions of the CPC, making it impossible for the court to issue a judicial act on the charges filed; 2) a copy of the indictment has not been duly served on the defendant; 3) a copy of the ruling to apply a compulsory medical measure has not been duly served on the defense counsel or the legal representative of the defendant; and 4) there are grounds for the joinder of criminal cases, as provided by Article 166 of the CPC. Article 271, item 2 sets a ten-day deadline for the prosecutor to correct all of the technical violations. Article 271, item 3 obligates the court to rule on the measure of restraint to be imposed on the defendant. Article 271, item 4 forbids the prosecution to conduct any investigatory or procedural actions, unless otherwise provided by Article 271. This ban serves, on the one hand, to preserve the entire body of evidence as it has been referred to the court, and, on the other hand, to ensure that the prosecution would only correct technical omissions or violations. Article 271, item 5 specifies the legal consequences for violation by the prosecutor of the ban to conduct procedural actions and of the statutory limitation periods set forth in Article 271.

Article 271 regulates the procedure for suspending criminal proceedings. Article 271, item 1 provides for the following four instances, when the court may rule to suspend criminal proceedings: 1) when the defendant has absconded and his/her location is unknown; 2) when the defendant suffers from a serious disease, providing that the fact is confirmed by a medical examination report; 3) when an inquiry has been filed to and accepted for consideration by the Constitutional Court of the Republic of Tajikistan consistent with the Constitution of the Republic of Tajikistan of the statute applied to or subject to application in the criminal case; and; 4) when the defendant’s location is known but it is not feasible to bring him/her to stand trial. Article 271, item 2 obligates the court to remand the criminal case to the prosecutor with instructions to search and retrieve the defendant who has escaped from custody detention and his/her location is unknown. Article 271, item 3 prohibits suspension of criminal proceedings if a party moves for trial to be held in the absence of the defendant who has absconded and his/her location is unknown, or even if his/her location is known, it is not feasible to bring him/her to stand trial.

Article 271 regulates the procedure for dismissing criminal cases. Article 271, item 1 refers to the grounds whereupon the court can rule to dismiss a criminal case. Article 271, item 2 allows the court to dismiss a criminal case in event of the defendant’s active repentance or reconciliation with the victim. This rule is being introduced first as a mechanism for implementing such institutes of the criminal law that provide relief from criminal liability without trial, and, second, in order to reduce the caseload for the courts and preclude inexpedient trials. Article 271, item 3 expressly specifies what data must be stated in a court ruling to dismiss a criminal case and what issues must be resolved in the process. Article 271, item 4 specifies the participants in the proceedings upon whom a copy of the court judgment to dismiss the case must be served, as well as the deadline for serving that judicial act thereupon.
Chapter 31. Preliminary hearing

Article 269. The preliminary hearing procedure

1. A preliminary hearing shall be conducted by the judge in the presence of the parties in accordance with the rules set forth in Chapters 32 and 33 of this Code and with exemptions provided by this Chapter.

2. A preliminary hearing shall be held within ten days of the date of a criminal case’s admission to the court, and in the event of extremely complex or large volume cases, - within fifteen days of admission thereof.

3. A notice of summons shall be forwarded to the parties not later than three days prior to the preliminary hearing. If so requested by a party, the court shall allow for additional time to get familiarized with the criminal case records.

4. A preliminary hearing may be held absente reo, if so requested by the defendant, or in the presence of grounds specified in Article 280, item 4 of this Code.

5. Failure of other duly notified participants to appear in court without valid excuse shall not impede a preliminary hearing.

6. Where a party moves to suppress evidence, the judge shall determine if the adverse party objects to the motion. In the absence of valid and motivated objections, the judge shall grant the motion and rule to hold trial.

7. A defense motion to discover additional evidence or objects shall be granted if the requested evidence and objects are relevant to the criminal case.

8. If so requested by the parties, the court may additionally examine witnesses who may have knowledge of the circumstances pertaining to the criminal case, the performance of investigative actions, or the seizure and attachment to the criminal case file of documents, except for such witnesses as may enjoy testimonial privilege.

9. The preliminary hearing procedure shall be duly recorded. The parties may get familiarized with the preliminary hearing record following the reading of the court ruling, and, within one day, submit their comments. The persons to familiarize themselves with the preliminary hearing record shall confirm this fact by affixing their signatures to the record.

Article 270. Motion to suppress evidence

1. The parties shall have the right to move for exclusion of any evidence from the list of evidence attached to the criminal case file. Where such a motion is filed, a copy of it shall be served on the adverse party on the day of the motion’s submission to the court.

2. A motion to suppress evidence shall include reference to:

1) the evidence that the party is moving to suppress; and

2) the grounds for suppressing such evidence as provided by this Code, as well as arguments in support of the motion.

3. The judge shall be empowered to examine witnesses, usher the criminal case records and documents submitted by the parties, and attach such documents to the criminal case file. The party objecting to the suppression of evidence shall provide arguments to support the objections. Unjustified objections shall entail satisfaction of the motion.

4. During examination of a motion to suppress evidence that is filed by the defense attorney on the ground that such evidence was allegedly obtained in violation of the provisions of this Code, the prosecutor shall
bear the burden of refuting allegations made by the defense. In all other instances, the burden of proof shall be with the moving party.

5. Should the court rule to suppress a piece of evidence, such evidence shall become invalid and cannot form the basis for a court judgment or another judicial act, nor can it be examined or used in any way in the course of trial.

6. Where a criminal case is tried on its merits, the court, on a party’s motion, shall be empowered to readdress the issue of admissibility of the suppressed evidence.

**Article 271. Types of court rulings issued at preliminary hearings**

1. Based on the findings of a preliminary hearing, the judge shall rule to:
   1) transfer the criminal case to the relevant jurisdiction; or
   2) remand the criminal case to the prosecutor; or
   3) suspend the criminal proceedings; or
   4) dismiss the criminal case; or
   5) send the criminal case to trial.

2. The court ruling shall specify:
   1) the date and venue of the court ruling;
   2) the court name, the name and initials of the judge to issue the court ruling;
   3) the rulings on the motions, objections and complaints filed by the parties; and
   4) the grounds for the decision.

3. Where the judge grants a motion to suppress evidence and sends a criminal case to trial, the court ruling shall specify the evidence to be suppressed, as well as the criminal case records justifying the suppression thereof which cannot be examined or referred to at trial, or used as a means of proof.

4. Where, while examining the defendant’s motion for giving him/her time to get familiarized with the criminal case records, the court finds that the provisions set forth in Article 112, item 6 of this Code have been violated and the statutory limitation of pre-trial custody detention has expired, the court shall change the measure of restraint in the form of custody detention, grant the defendant’s motion and set a time period for the defendant to get familiarized with the criminal case records.

5. Court rulings issued at preliminary hearings shall not be subject to appeal, except for rulings to dismiss a criminal case and/or to hold a court session to decide on a measure of restraint.

6. Copies of court rulings shall be forwarded to the defendant, victim, prosecutor, civil claimant and civil defendant.

**Article 271. Remand of a criminal case to the prosecutor**

1. Upon a party’s motion or at its own discretion, the court shall remand a criminal case to the procurator to remove obstacles to the trial, where and if:
   1) the indictment has been executed in violation of the provisions of this Code, making it impossible for the court to issue a judicial act on the charges filed;
   2) a copy of the indictment has not been duly served on the defendant;
   3) a copy of the ruling to apply a compulsory medical measure has not been duly served on the defense counsel or the legal representative of the defendant; and
   4) there are grounds for the joinder of criminal cases, as provided by Article 166 of this Code.
2. In instances specified in paragraph 1 hereof, the prosecutor shall make sure that within ten days these violations are rectified.

3. On remanding the criminal case to the prosecutor, the judge shall rule on the measure of restraint to be imposed on the defendant.

4. No investigative or procedural actions, other than those stipulated herein, may be conducted in respect of the criminal case that has been remanded to the prosecutor.

5. Evidence obtained in the course of procedural actions that are not provided hereunder or upon the expiry of the statutory limitation periods set forth in paragraph 2 hereof, shall be deemed inadmissible.

Article 271\(^2\). Suspension of criminal proceedings

1. The judge shall rule to suspend criminal proceedings, where and if:
   1) the defendant has absconded and his/her location is unknown;
   2) the defendant suffers from a serious disease, providing that the fact is confirmed by a medical examination report;
   3) an inquiry has been filed to and accepted for consideration by the Constitutional Court of the Republic of Tajikistan consistent with the Constitution of the Republic of Tajikistan of the statute applied to or subject to application in the criminal case; and
   4) the defendant’s location is known but it is not feasible to bring him/her to stand trial.

2. In instances referred to in paragraph 1, item 1 hereof, the judge shall suspend criminal proceedings and remand the criminal case to the prosecutor with instructions to retrieve the defendant who has escaped from custody detention; or, if the fugitive defendant has not been detained in custody, the judge shall impose thereupon a measure of restraint in the form of custody detention and instruct the prosecutor to secure the fugitive’s retrieval.

3. Paragraph 1, items 1 and 4 hereof shall not apply if a party moves for trial in accordance with the procedure set forth in Article 280, item 4 of this Code.

Article 271\(^3\). Dismissal of a criminal case

1. The court/judge shall rule to dismiss a criminal case in instances set forth in Article 27, item 1 of this Code, and if the prosecutor should discontinue criminal prosecution in accordance with the procedure stipulated in Article 279, item 10 of this Code.

2. The court/judge may also dismiss a criminal case on the grounds set forth in Articles 29 and 30 of this Code, subject to a motion filed by either party.

3. The court ruling to dismiss a criminal case or criminal prosecution shall state:
   1) the grounds for dismissing the criminal case and/or criminal prosecution;
   2) the decision to cancel the pre-trial measure of restraint, discontinue the attachment of property, interception of correspondence, temporary suspension from office, the monitoring and recording of telephone conversations; and
   3) the decision to dispose of physical evidence.

4. Within five days of the date of the court ruling to dismiss a criminal case, copies thereof shall be forwarded to the prosecutor, the person against whom the criminal prosecution has been discontinued, his/her defense attorney and the victim.
8. Fast-Track Investigation Proceedings and Procedures

8.1. Subject: Is a fast-track proceeding a type of an inquiry or of a preliminary investigation?

**The issue:** This question arises because the legal status of every issue raised in the Criminal Procedure Code must be clearly defined, both in theory and in practice. However, Articles in the Code that allow for fast-track proceedings cover the inquiry phase and/or the investigation phase, and although preliminary investigation includes both inquiry and investigation, fast-track proceedings should be part of either an inquiry or an investigation. For example, Articles 111, 247, 253, 334, 338 and 339 of the Republic of Tajikistan’s Criminal Code, under which fast-track proceedings are warranted by Article 453 of the CPC, belong to the jurisdiction of the investigation authorities. However, Articles 453-455 of the CPC stipulate that fast-track proceedings shall be conducted by the inquiry agencies. This, however, disregards the requirement of Article 168 of the CPC that investigations may only be conducted by inquiry authorities subject to the prosecutor’s consent.

**Recommendation:** The CPC should clearly define the status of a fast-track proceeding as a type of a preliminary investigation or an inquiry or a special type of preliminary investigation that comprises attributes of both an investigation and an inquiry. The CPC should also specify what criteria have been used to identify Criminal Code Articles under which fast-track proceedings can be used and the scope of such Articles should be expanded as required. Such Articles mainly address minor offences, but some of them deal with medium-gravity crimes, such as those punishable under Article 339, item 3 of the Republic of Tajikistan’s Criminal Code.

8.2. Subject: An inquiry under Article 195, item 4 of the Republic of Tajikistan’s Criminal Code.

**The issue:** As per Article 453 of the CPC, fast-track proceedings can be applied under Article 196, item 4 of the Criminal Code, which addresses illegal manufacturing of gas spray guns, daggers, switchblades or other side arms. But, as per the sense of Article 453 of the CPC, it is not allowed to conduct fast-track proceedings under Article 195, part 4 of the Criminal Code, which addresses illegal purchase, transfer, sale or carrying of gas spray guns, daggers, switchblades or other side arms. However, according to the punishment under those Articles, both offenses are classified as minor offenses.

**Recommendation:** Article 453 of the CPC should be amended to include Article 195, item 4 of the Criminal Code.

8.3. Subject: Is the perpetrator’s consent required for fast-track proceedings to be applied?

**The issue:** The question arises because in a fast-track proceeding, the suspect’s rights as regards complete and thorough investigation are inevitably limited. In other words, a fast-track proceeding does not require performance of all investigative actions and allows certain basic actions to be performed so as to complete an inquiry in the case. Moreover, the fast-track proceeding procedure requires that the suspect (although the person is not a suspect in the sense of Article 46 of the CPC during the first seven days) obey the inquiry officer even before criminal proceedings are instituted, during the brief period of the fast-track proceeding.

**Recommendation:** Article 453, item 1 of the CPC should be amended to read as follows:

1. If there are elements of the offenses punishable under Article 111, part 1; Article 125, item 1; Article 126, item 1; Article 131, item 1; Article 195, item 4; Article 196, item 4; Article 230, item 1; Article 232, item 1; Article 234, item 1; Article 237, item 1; Article 247, item 1; Article 253, item 1; Article 254, item 1; Article 255, item 1; Article 294, item 1; Article 334, Article 338, or Article 339 of the Republic of Tajikistan’s Criminal Code.
Criminal Code and if it is obvious that the crime has been committed, the person suspected of the crime is known and the person does not deny involvement in the commission of the crime and agrees to a fast-track proceeding, the inquiry officer shall institute criminal proceedings and commence the fast-track proceeding.

8.4. Subject: Improving the situation of a perpetrator who agrees to a fast-track proceeding.

The issue: A fast-track proceeding mainly benefits the inquiry officer, as it saves him/her time and avoids bureaucratic delays. The person suspected of a crime who “does not deny involvement in the commission of the crime” and gives a confession, (i.e., cooperates with the inquiry agency) assists the investigation. Nevertheless, such a person may not expect any leniency. The suspect stands to gain nothing from a fast-track proceeding versus a full-scale inquiry or investigation (as opposed to a summary judicial investigation). In view of the above, the law should include a provision stipulating that measures of restraint imposed upon a suspect who agrees to a fast-track proceeding should not include detention in custody. This will be an incentive of sorts for the suspect who has made a confession and has agreed to a fast-track proceeding.

Recommendation: Article 455, item 1 of the CPC should be amended to read as follows: “Having established that material gathered is sufficient for instituting criminal proceedings and taking the case to court, the inquiry agency shall render a decree to institute criminal proceedings, commence proceedings in the case, hold the perpetrator liable as an accused person under Articles 221 through 228 of this Code, render a decision to impose a measure of restraint other than detention on the accused person and render a decision to recognize relevant persons as a victim, a civil plaintiff or a civil defendant.”

8.5. Subject: What is a person’s commitment to appear when summoned by the inquiry agency or the court and to inform them about a change of address?

The issue: As per Article 453 of the CPC, a person who has committed a crime shall be required to make a commitment to appear when summoned by the inquiry agency or the court and to inform them about a change of address. If he/she fails to appear at the inquiry agency or the court hearing, such a person may be subjected to compulsory process measures. Section 4 (Chapters 11, 12 and 13) of the CPC provides for procedural compulsion measures, such as arrest, restraint measures, and other procedural compulsion measures. But those chapters do not mention a commitment to appear when summoned by the inquiry agency or the court and to inform them about a change of address as a procedural compulsion measure or any procedural consequences of violating such a commitment.

Recommendation: A new Article 114,1 “A Commitment to Appear When Summoned,” should be added to the CPC to read as follows: “If there are no grounds for imposing a restraint measure, the suspect, the accused person or the defendant on trial may be required to provide a written commitment to appear when summoned by the criminal prosecution agency or the court and to inform them about a change of address. A person who violates such a commitment may be subject to other procedural compulsion or restraint measures.”

8.6. Subject: What is the procedural status of the person against whom a fast-track proceeding has been launched?

The issue: The key issue is that Article 46 of the CPC lists the grounds for declaring a person a suspect. As per that Article, a person shall be recognized as a suspect if criminal proceedings have been instituted against such a person in accordance with the procedure set forth in the CPC in connection with being
suspected of having committed a crime and the person has been informed of this by the investigator and/or the inquiry officer, or the person has been arrested, or a restraint measure has been imposed on such a person pending presentation of charges. During the first seven days when a fast-track proceeding has been launched against a person who has committed a crime, criminal proceedings have not been instituted yet. The person has not been arrested, and charges have not been brought against the person, so no formal grounds exist for granting the legal status of a “suspect” to the person. As a result, the person has no right to defense. However, the inquiry officer has already been treating the person as a suspect, the person has been required to make a commitment to appear when summoned by the inquiry agency and the court and to inform them about any change of address, and the person has been warned that if he/she fails to appear at the inquiry agency or the court, he/she may be subjected to the compulsory appearance procedure. All these actions of the inquiry officer are procedural actions, but they are performed with a person who is not a participant in criminal proceedings. Such provisions of the law are inconsistent with the requirements of Article 2, item 3 of the CPC, which stipulates that “the criminal proceeding procedures hereby established ensure protection from … unlawful restriction of human and civil rights and liberties...”

**Recommendation:** Article 46, item 1 of the CPC should be amended to read as follows: “A person shall be recognized as a suspect if actions are performed by a criminal prosecution agency against such a person to establish his/her involvement in committing a crime, even if no criminal proceedings have been instituted against such person.”

8.7. Subject: The fast-track proceeding period.

**The issue:** As per Article 453, item 3 of the CPC, “The inquiry agency, in conducting fast-track proceedings before criminal proceedings are instituted, within seven days shall obtain explanations from the perpetrator, witnesses and other persons about the circumstances of the crime, request information on whether the perpetrator has prior convictions, gather information about the perpetrator’s personality and obtain other materials relevant to a hearing of the case in court.” During a workshop on the CPC held in the Rasht district for local investigators, inquiry officers and other police operatives, the participants pointed out that, working in a highland region, it often was impossible to find witnesses to obtain explanations within seven days in a fast-track proceeding. Thus, seven days is an unreasonably short period for performing all the above-listed procedural actions.

**Recommendation:** Article 453, item 3 of the CPC should be amended to read as follows: “3. The inquiry agency, in conducting fast-track proceedings after criminal proceedings are instituted, within ten days shall obtain explanations from witnesses and other persons and the perpetrator about the circumstances of the crime, request information on whether the perpetrator has prior convictions, gather information about the perpetrator’s personality and obtain other materials relevant to a hearing of the case in court.”

**Recommendation:** Article 455 of the CPC should be amended to read as follows:

“1. Having established that material gathered is sufficient for taking the case to court, the inquiry agency shall render a decree to bring charges against the person in accordance with the procedure set in Articles 221 through 228 of this Code, render a decision to impose a measure of restraint other than detention on the accused person and render a decision to recognize relevant persons as a victim, a civil plaintiff or a civil defendant.

2. After performing the actions listed in item 1 of this Article, the inquiry agency, acting on the grounds and in accordance with the procedure set in Articles 239 through 243 of this Code, shall complete the fast-track proceeding and take the case to the prosecutor, without executing a charge sheet.”
Recommendation: Article 262, item 1, sub-item 4 should be amended to read as follows:
“- whether copies of the charge sheet or the decree to hold the person liable as an accused person and to bring charges against the person in a fast-track proceeding have been served.”

Recommendation: A new Article 2501 should be added to the CPC, to read as follows:
“1. The prosecutor who receives a fast-track proceeding criminal case shall perform the actions and render decisions on the matters covered by Articles 247 through 249 of this Code, except for matters pertaining to a charge sheet.
2. After performing the actions referred to in item 1 of this Article, the prosecutor shall serve a charges decree instead of a charge sheet on the accused, whereupon the criminal case shall be taken to court.”
9. Summary Trial Proceedings

9.1. Subject: Summary Trial Proceedings

Existing rule: Article 310 of the CPC: 1. If the defendant on trial pleads guilty, and such a pleading is not challenged by either party or raises doubts in the court and/or the judge, the court and/or the judge may, with the parties' consent and after asking the defendant whether such pleading of guilty is forced, examine only the evidence designated by the parties or declare the judicial investigation completed and proceed to the pleadings. 2. The presiding judge shall also advise the parties that the decision not to examine evidence shall make it impossible to appeal or challenge the judgment on that ground. 3. The rules set forth in item 1 of this Article shall not apply to crimes committed by minors, grave or very grave crimes or to situations where at least one of the defendants does not plead guilty and that the defendant's case cannot be severed into a separate proceeding. 4. A request for a summary trial may only be made by the defendant on trial, subject to the consent of the public prosecutor or the private prosecutor and the victim. 5. If the defendant on trial's request is denied or if the public prosecutor or the private prosecutor do not agree to have a summary trial, the trial shall be conducted according to the regular procedure. 6. If it is established by the court and/or the judge that the guilt of the defendant on trial is well founded and supported by available evidence, a judgment of conviction shall be rendered and a punishment shall be imposed on the defendant. Punishment imposed by the court may not exceed two-thirds of the maximum term or amount that is normally imposed for such crimes as per the relevant Criminal Code Articles. 7. Following the pronouncement of the sentence, the court or the judge shall advise the parties of their right to appeal and the procedure for appealing against the sentence in accordance with Chapter 38 of this Code. 8. A sentence rendered in accordance with this Article on the grounds set forth in bullet points one and two of Article 372 shall not be subject to appeal or challenge.

The issue: Article 310, item 1 of the CPC stipulates that the court's decision to conduct summary trial proceedings shall be conditional on the defendant's pleading guilty, subject to the party's consent. However, Article 308, item 2 of the CPC obligates the presiding judge to ask the defendant on trial whether he/she understands the charges brought and whether he/she wishes to state his/her attitude to the charges, but Article 308, item 2 of the CPC does not mention any pleading of guilty or not guilty. Therefore, Article 310, item 1 of the CPC contradicts the requirements of Article 308, item 2 of the CPC. Also, Article 310, item 1 of the CPC does not set forth any grounds for applying the summary trial procedure; it would be logical to see such grounds at the beginning of the provision setting forth such procedure. Moreover, Article 301 of the CPC does not specify at what stage of the trial the defendant may file a motion for a summary trial procedure. In our opinion, one important pre-requisite for applying the summary trial procedure should be the judge's knowledge that the accused person and/or the defendant on trial has been duly informed about his/her rights in criminal proceedings and has received professional advice from his/her defense attorney about the consequences of filing a motion for a summary trial and that the accused person and/or the defendant on trial has filed the motion voluntarily. The absence of a defense attorney at a summary trial directly violates the principles of equality of the parties and adversarial proceedings because the accused person and/or the defendant on trial, unaware of the consequences of filing the motion, deprives himself/herself of the right to appeal against the sentence of the court based on the facts of the case. The consequences of failure to satisfy the above conditions should be spelled out in this Article. The CPC does not set forth the summary trial motion filing procedure or specify the stage in the proceedings when such a motion shall be filed. The Russian text of the CPC calls the motion a "request," and this too should be addressed. Therefore, there is no guidance for the defendant on trial regarding what to do and when or for the court as to the motion acceptance procedure. The right moment may come immediately after the charges are set forth by the public prosecutor and the defense's attitude to the charges is expressed,
which will be consistent with the objectives of the summary trial procedure. The court must be certain that filing a summary trial motion is an informed decision, so the defense attorney must be present in court when the motion is filed. If the defense attorney has not been involved in the investigation and the trial, the court shall be obligated to have the defense attorney present during the filing of such motion.

The legislator’s position regarding circumstances that must be examined in a summary trial is not quite clear. Article 310, item 1 of the CPC stipulates that the court may limit itself to examining the evidence designated by the parties or declare the judicial investigation completed and proceed to the pleadings. However, Article 310, item 6 of the CPC obligates the court to establish that the defendant’s pleading of guilty is justified and supported by the evidence available, so the court may render a judgment of conviction. The question is how the judge can establish that defendant’s pleading of guilty is justified and supported by the evidence gathered in the proceedings without examining all the evidence available? A complete and comprehensive examination of all the available evidence is likely the only way. But then, what makes a summary trial special?

Moreover, Article 310, item 6 of the CPC sets a limitation for the court that the punishment it may impose shall not exceed two-thirds of the term or amount set by the relevant Criminal Code Article for the charges brought. As per the sense of Article 310, item 6 of the CPC, the court is bound by the punishment set forth in the relevant Criminal Code Article for the crime the defendant is charged with. However, the summary trial is grounds for imposing punishment in accordance with Article 63 of the Criminal Code of the Republic of Tajikistan.

Recommendation: Article 310 of the CPC shall be amended to be titled, “Grounds for Summary Trial Proceedings” and to read as follows:

1. At the opening of a trial, the defendant on trial shall have the right to plead guilty to the charges brought and file a motion for a summary trial, if the crimes committed are classified as minor or medium-gravity, except for crimes committed by minors.
2. A summary trial motion shall be filed by the defendant on trial in the presence of his/her defense attorney. If no defense attorney has been retained by the defendant on trial or his/her legal representative or by other persons acting on their instructions, the participation of a defense attorney in the procedure shall be provided for by the court.
3. In the instance set forth in item 1 of this Article, the court shall have the right to conduct a summary trial of the case if it establishes that:
   1) the defendant on trial understands the nature and the consequences of the motion filed;
   2) the motion has been filed voluntarily, after a consultation with the defense attorney;
   3) the prosecution and the defense agree with the summary trial motion.
4. If the judge finds, after examining the defendant’s motion, that the conditions set forth in items 1 and 3 of this Article are not met, the judge shall rule to conduct a regular-procedure trial.

Recommendation: Add a new Article 310' to the CPC, to be entitled “Summary Trial Proceedings”, to read as follows:

1. A summary trial shall be conducted with the participation of the defendant on trial and his/her defense attorney, both of who must be present.
2. A summary trial shall only examine evidence characterizing the defendant’s personality and circumstances aggravating or mitigating punishment.
3. If the defendant on trial, the public prosecutor or the private prosecutor and/or the victim object to pursuing the summary trial, the judge shall rule to terminate the summary trial and continue the trial according to the regular procedure.
4. After examination of the circumstances referred to in item 2 of this Article, pleadings and the defendant’s pre-imposition statement, the judge shall render a judgment of conviction and impose a punishment on the defendant on trial with due regard for Article 63 of the Criminal Code of the Republic of Tajikistan.

5. The description and reasons section of a judgment of conviction should contain a description of the criminal act to which the defendant on trial has pleaded guilty and the court’s findings regarding satisfaction of a summary trial conditions. The judgment shall not include an examination of evidence and the judge’s evaluation thereof.

6. Following the pronouncement of the sentence, the judge shall advise the parties of their right to appeal and the procedure for appealing against the sentence in accordance with Chapter 38 of this Code. A sentence rendered in a summary trial shall not be subject to cassational appeal or challenge on the ground set forth in bullet points one and two of Article 372 of this Code.

7. Legal costs under Article 138 of this Code may not be recovered from the defendant on trial.
10. Proceedings in Private Prosecution Cases

10.1. Subject: What should be done if a victim in a private prosecution case files a complaint with a criminal prosecution agency?

The issue: As per Article 354 of the CPC, proceedings in a private prosecution case shall be instituted by the victim and a legal representative thereof who shall file a complaint with the court requesting criminal prosecution of the perpetrator. Practice shows that many citizens who become victims of crimes punishable under Article 112 of the Criminal Code (Intentional Causing of Light Harm to Health) or under Article 116 of the Criminal Code (Battery) complain to criminal prosecution authorities – the police or the prosecutor’s office. This stems from persistent stereotypes of the past when the prosecutor’s office and police investigated such crimes. For example, victims maintain that they have been exposed to disorderly conduct or suffered bodily injuries that are graver than light ones but later it is established that the offenders did not commit disorderly conduct and the victim suffered light bodily injuries or injuries that do not cause any damage to health. Then, as per Article 145 of the CPC, “Having received a statement or report about a crime committed or being committed, the inquiry agency, the inquiry officer, the chief of the inquiry agency, the investigator, the chief of the investigations unit or the prosecutor shall render a decree: - to institute criminal proceedings, not to institute criminal proceedings or to refer the statement and/or the report to the agency with an appropriate judicial or investigative jurisdiction.”

However, since the new CPC was enacted, statements and material in private prosecution cases that the criminal prosecution agency refers to courts have not been accepted by the judicial authorities; they hold that the statements/complaints are not addressed to the court, that they do not contain the necessary information as required by Article 354 of the CPC and that the complaint must be filed with the court directly, not though a criminal prosecution agency. However, the courts disregard Article 355, item 1 of the CPC, which stipulates that a judge may summon the complainant and ask him/her to remedy the defects within a certain period if the victim’s complaint does not meet the requirements of Article 354, items 3 and 4 of the CPC.

Recommendation: Article 354, item 1 of the CPC should be amended to read as follows: “1. A private prosecution case shall be heard by the court on the basis of a complaint filed by the victim or the victim’s legal representative with a request to initiate criminal prosecution of the offender without conducting an inquiry or a pre-trial investigation.”

Legal provisions must be interpreted so as to ensure practical and effective, rather than theoretical and illusory, application of legal rules and observance of rights.

Effective rules: Article 87 of the CPC: Evidence obtained in a criminal case shall be subject to comprehensive and impartial verification. The verification procedure involves analysis of obtained evidence, comparison thereof against other and newly obtained evidence and review of the sources of such evidence.

Effective rules: Article 88, item 1 of the CPC: Each and every piece of evidence shall be evaluated as to its relevance, admissibility and reliability, and the entire body of obtained evidence shall be evaluated as to its sufficiency for the disposition of the criminal case.

The issue: Referring to relevance, admissibility and sufficiency of evidence, the Criminal Procedure Code, by contrast to the RT Code of Civil Procedure, does not explain how these terms need to be understood. The lack of clear definitions of these terms in the law leads, in practice, to different interpretations of the legal requirements set to law enforcement agencies, and as a result, such requirements may be ignored or interpreted unilaterally.

Recommendation: Article 87 of the CPC should be amended to include paragraph 2 reading as follows: Only such evidence as may have significance for a criminal case shall be deemed relevant. Only such evidence as has been obtained in strict compliance with the requirements set forth in this Code shall be deemed admissible. Evidence shall be deemed reliable, if, in the course of its analysis and comparison against other evidence, it is found that data contained therein represent true facts. When evaluating documents and other types of written evidence, with due account of all other evidence, it shall be necessary to ascertain that the document or piece of written evidence has been issued by the agency authorized to provide this type of evidence, is signed by the person authorized to sign such documents and contains all of the requisite elements of this type of evidence.

11.2. Subject: Grounds for initiating a criminal case.

Effective rules: Article 140 of the CPC: Causes for initiating a criminal case shall be as follows:
- a statement of a crime;
- voluntary surrender and confession of the offender;
- a formal report filed by an official of an enterprise, institution or organization;
- a publication in mass media;
- information, indicating elements of a crime, directly discovered by the inquiry officer, investigator or prosecutor.

The issue: Effective Article 140 of the CPC is entitled, “Grounds for initiating a criminal case,” but only lists causes for initiating criminal prosecution.

Recommendation: Article 140 of the CPC should be amended to read as follows:
1. Sufficient data containing all of the elements of a crime as provided by the Criminal Code of the Republic of Tajikistan, shall constitute the grounds for initiating a criminal case.
2. Causes for initiating a criminal case shall be as follows:
- a statement of a crime;
- voluntary surrender and confession of the offender;
- a formal report filed by an official of an enterprise, institution or organization;
- a publication in mass media;
- information, indicating elements of a crime, directly discovered by the inquiry officer, investigator or prosecutor.

11.3. Subject: The defendant’s right to refuse to participate in a court session.

**Effective rules:** Article 280, item 3 of the CPC: Should a defendant, who is held in custody detention, refuse to appear before court, the court shall have the right to hear his/her case in absentia, with the mandatory participation of the defense counsel.

**The issue:** Under Article 280, item 3 of the CPC, the court may examine a criminal case in the absence of the defendant. The law, however, makes no provisions for mandatory verification of the voluntary nature of the defendant’s refusal to attend court hearings. Furthermore, grave and extremely grave crimes should not be tried in the absence of the defendant.

**Recommendation:** Article 280, item 3 of the CPC should be amended to read as follows: “A criminal case may be tried in the absence of a defendant but with mandatory participation of the defense counsel, if the defendant files a motion for the criminal case to be tried without his/her participation.”

11.4. Subject: Inadmissible evidence.

**Effective rules:** Article 88, item 3 of the CPC: Evidence that has been obtained in the course of pre-trial inquiry and investigation by using force, pressure, cruelty, inhuman treatment or by other unlawful methods shall be deemed invalid and may not be used as a basis for formal charges or for proving any of the circumstances specified in Article 85 hereof.

**The issue:** Article 88, item 3 of the CPC invalidates evidence that has been obtained by the aforementioned unlawful means. This rule, however, does not elaborate the consequences arising from invalidation of evidence that has been obtained without resort to unlawful means, but in violation of effective rules of procedure.

Furthermore, the law uses the term “invalid evidence,” although from a linguistic point of view, such evidence does not exist in reality and has no effect. Therefore, this meaning is foreign in the sense that should be associated with the term. In view of the aforementioned, the term “inadmissible evidence” seems more appropriate. (The Russian word “недействительный” may be translated as “invalid, unreal, ineffective, void or null” depending on the context – translator’s comment).

**Recommendation:** Article 88, item 3 of the CPC should be amended to read as follows:

3. Evidence obtained in violation of requirements set forth in this Code shall be inadmissible. Inadmissible evidence shall have no legal force and may not be used as a basis for formal charges or for proving any of the circumstances specified in Article 85 hereof.

11.5. Subject: Types of inadmissible evidence.

**The issue:** References to inadmissible evidence in Article 88, item 3 of the CPC do not explain precisely what sort of procedural violations may be considered inadmissible. Moreover, Article 375, item 1 of the CPC recognizes substantial violations of the rules of criminal procedure that may constitute grounds for reversing a court judgment. These are violations of the principles and other general procedures pertaining to criminal prosecution under this Code, which, through deprivation of the trial participants...
of their lawful rights or restriction thereof, through failure to comply with the judicial proceedings or in any other manner, obstruct a comprehensive and impartial examination of circumstances of a criminal case, as well as influence or could influence the passing of a fair judgment. This provision implicitly applies to the court proceedings, rather than to the pre-trial investigation. It means that testimony given by a suspect or defendant during pre-trial investigation in default of appropriate legal protection (i.e., without consultations with defense attorneys or in their absence from interviews) would still be admitted by the court for the simple reason that the examination records have been duly executed in compliance with the requirements set forth in the CPC, albeit in the absence of the participant’s defense attorneys. Another question concerns the legislator’s permission to treat as admissible evidence testimony of victims and witnesses, which may be based on their guesses, assumptions or even hearsay. Despite the fact that the law specifies “inability to name the source of one’s information” as a criterion for inadmissibility of evidence, the abovementioned provision does not forbid witnesses to base their testimony on their personal perceptions, including guesses and assumptions, which, according to psychologists, may change with the course of time or under the influence of a person’s fantasies. In the absence of such a ban in the criminal law, the court may admit as evidence testimony of a suspect or defendant which may be given in the course of pre-trial proceedings in violation of their right to have legal defense, as well as testimony of a victim or witness which is based on their guesses, assumptions or hearsay.

**Recommendation:** To add to Article 88 of the CPC paragraph 4, reading as follows:

4. The following evidence shall be inadmissible:

1) testimony of a suspect or defendant given in the course of pre-trial proceedings in a criminal case in the absence of a defense counsel and not confirmed by the suspect or defendant in court;
2) testimony of a victim or witness if it is based on a guess, assumption or hearsay; or
3) other evidence obtained in violation of this Code.


**The issue:** Under Article 9, item 3 of the CPC, failure to comply with statutory requirements in the course of criminal proceedings, whatever the motives, shall be inadmissible and entail invalidation and cancellation of any unlawfully executed acts. The law, however, does not provide mechanisms to be used to invalidate evidence that may be obtained during pre-trial investigation. Consequently, in the course of judicial examination of evidence, the parties may question the validity thereof and move to exclude it as inadmissible. In the absence of the abovementioned mechanism, the court has to examine evidence, which could be found inadmissible during preparation for trial and excluded from consideration of a criminal case on its merits. That is why today, courts are obliged to explain reasons for excluding evidence as inadmissible not in relevant rulings, but in the final judgments, which not only makes the text of a judgment more complicated and overloaded with details, but also complicates the judge’s work in the deliberations room and automatically lengthens the pronouncement of judgments.

**Recommendation:** To include a mechanism for ruling evidence inadmissible at the stage of preparation for trial.

11.7. Subject: Right to study the court record.

**The issue:** Under Article 293, item 5 of the CPC, a court record must be executed and signed by the presiding judge and court recorder within five days of the trial’s completion. Under Article 293, item 6, the presiding judge has to ensure that the parties have full and free access to the court record while it is being executed. Practice shows, however, that quite frequently such records incompletely and in a biased
manner describe circumstances examined in the course of trial. Sometimes, trials may last for weeks or even months. Once such long trials are over, it may be very difficult to check whether all of the procedural actions pertaining to the examination of evidence have been recorded duly and in full, since Article 293, item 5 implies that the parties may only get to study the court record after it has been formalized upon completion of the trial. Consequently, the parties have no right to check the completeness of the record at the end of each court session so as to confirm its objectivity. The necessity of timely familiarization with interim court records follows from the fact that such records constitute the grounds for cassational protests and appeals.

**Recommendation:** Article 293 of the CPC should be amended to read as follows:

1. All of the court proceedings shall be duly recorded in a verbatim report and audio recording of each court session. A court record must be executed with the aid of technical means. The verbatim report and phonogram of court proceedings shall be attached to the criminal case file.

3. The verbatim report and phonogram of a court session shall include:

1) the venue and date of a court session, complete with the opening and closing hours;
2) the criminal case examined;
3) the names and composition of the court, the names of the court recorder, interpreter, prosecutor, defense counsel, defendant, victim, civil claimant, civil respondent, representatives thereof and other persons summoned to the court;
4) information about the defendant’s personality and measure of restraint imposed on him/her;
5) actions of the court in the order they were taken during a court session;
6) statements, objections and motions of participants in the criminal case;
7) determinations or rulings issued by the court without retiring to the deliberations room;
8) determinations or rulings issued by the court in the deliberations room;
9) an entry on explanation of the rights, duties and liability of participants in the criminal proceedings;
10) detailed testimonial accounts;
11) questions put to persons examined, including their answers;
12) results of procedural actions performed in a court session with a view to examining evidence;
13) facts to be entered in the court record as requested by participants in the criminal proceedings;
14) summaries of the parties’ arguments and the defendant’s last plea;
15) an entry on the pronouncement of judgment and explanation of the procedure for getting access to the court session record and filing comments thereon;
16) an entry on explanation to the acquitted and convicted persons of the procedure and deadlines for contesting the judgment, as well as explanation of their right to move for participation in the review of the criminal case by a cassational court.

4. The verbatim report and phonogram shall also describe sanctions imposed on any person to have disrupted order in the course of a court session.

5. If photography, video and cinematographic recordings of examination procedures were made in the course of a court session, a relevant entry shall be made in the court record. In this case, all photographs, video and cinematographic recordings shall be attached to the criminal case file.

6. A court record shall be executed and signed by the presiding judge and court recorder within three days of the trial’s completion. A court record may be executed piece by piece, and the presiding judge and court recorder shall also sign each piece of the record. If so requested by the parties, they may have access to pieces of record as they are executed.
7. To be able to study the court record, the parties shall file a written motion within three days of the trial completion. Should a party fail to file a motion for valid reasons, the deadline may be renewed. The motion shall not be granted if the criminal case has already been referred to a cassational court or if, upon the expiry of the statutory deadline for filing a cassational complaint, the judgment has become effective. The presiding judge shall provide access to the court record within three days after the receipt of a motion. The presiding judge may grant access to the court record to other participants in the trial, if so requested thereby and in the part pertaining to their testimony. If, by force of objective circumstances, the court record is executed upon the expiry of three days after the trial completion, the participants who have filed relevant motions must be notified of the date of record signing and of the time when they could get familiarized therewith. The presiding judge shall set the time limit for studying the court record depending on the size thereof, but the time limit may not be less than five days starting with the date of first access to the record. In exceptional cases, the presiding judge, if so requested by a person studying the court record, may extend the statutory deadline. Should a trial participant quite obviously temporize with the study of the court record, the presiding judge may, by his ruling, set a deadline for the study thereof.

8. Copies of the court record and phonogram shall be made upon written request and for the account of trial participants.

9. Should there be contradictions between the contents of the court record and phonogram, the audio record shall prevail.

11.8. Subject: The notion of “leading questions” and admissibility thereof.

Effective rules: Article 53, item 3 of the CPC: Defense counsel that participates in investigative actions may, with the investigator’s permission, put questions to persons being examined. The investigator or inquiry officer may overrule leading questions and shall enter the overruled questions into the examination record.

Effective rules: Article 199, item 4 of the CPC: Upon completion of a free narrative, the examined person may be asked questions to clarify and amplify his/her testimony. Leading questions shall be forbidden.

Effective rules: Article 314, item 1 and Article 311, item 1 of the CPC: ... The presiding judge shall order all the leading questions and answers be removed from the court record as irrelevant to the criminal case.

The issue: As stated above, the phrase “leading questions” is mentioned in a number of rules of the effective CPC. The law, however, does not explain what questions may be qualified as leading, nor why they may not be asked. In the absence of a clear legal definition of the term, officials in charge of criminal proceedings may arbitrarily interpret the aforementioned provisions of the criminal law and overrule, at will, questions that may be raised in trial. The worst thing about this situation is that the trial participant who is asked a question that is overruled cannot contest the legitimacy of that decision, as the law does not define the term “leading questions.” The ambiguity of the criminal law on this issue restricts the right of the parties to enjoy in full their equality in an adversarial trial.

Recommendation: To include in Article 6 of the CPC the following item that would clarify the term: “Leading questions are such questions which, in letter or in spirit, suggest obvious answers.”

11.9. Subject: Right to object to actions of a party.

The issue: Article 276 of the CPC provides that trial participants may file objections against actions of the presiding judge. At the same time, the effective CPC does not explain how a party may react to inadmissible actions of the adverse party. Article 314, item 4 of the CPC states, for instance, that the
presiding judge must disallow leading questions and questions that are irrelevant to the criminal case. Thus, should the judge miss a leading question put by one party to the person being examined, the other party, seeking to protect his/her interests, should be able to draw the attention of the court to the adverse party’s inappropriate conduct. The same requirement should apply to closing arguments. Under Article 328, item 2 of the CPC, trial participants may not refer in their closing arguments to evidence that was not examined during the trial. Should the presiding judge overlook a party’s reference to such evidence in their closing arguments, the other party should be able to point to the court that the other party is acting in bad faith. Furthermore, if the presiding judge fails to respond to objections raised by one party against actions of the other party, the objecting party should have the right to object to omissions of the presiding judge. Article 276, however, only provides for the right to protest against actions of the presiding judge. These statutes do not effectively ensure the implementation of the principle of an adversarial trial concerning violations of the CPC requirements by a party to judicial proceedings.

Recommendation: Article 276 of the CPC should be amended to read as follows:
1. The presiding judge shall direct the trial and explain to all of the trial participants their rights, duties and procedures for the exercise thereof. The presiding judge, while remaining objective and impartial, shall use any statutory means to ensure an adversarial trial and equality of the parties, and to provide for them conditions as may be required for the use of their procedural rights, a comprehensive and full examination of circumstances of a criminal case and presentation of closing arguments.
2. Objections raised by any trial participant to actions/omissions of the presiding judge shall be entered in the court record.
3. Should one party object to actions of the other party, the presiding judge shall promptly sustain or overrule the objection to ensure order and compliance with the requirements set forth in this Code.

11.10. Subject: Comments on the court record.

The issue: Pursuant to Article 294 of the CPC, the parties may submit their comments on the court record within five days of its signing date. The law, however, has no provisions for filing comments on the court records after the completion of one day’s court session. Besides, the term “court session” is not semantically equal to the term “trial,” since a court session lasts until the end of the business hours, whereas a trial may include a large number of court sessions.

Recommendation: Article 294, item 1 of the CPC: The parties shall have the right to file their written comments on a portion of the court record within one day of getting familiarized therewith.

Recommendation: Article 294 of the CPC should be amended to include paragraph 2, reading as follows: “The parties shall have the right to file written comments on the court record within three days of getting familiarized therewith. If so requested by the parties, the presiding judge may extend the statutory time limit to ten days.”

Recommendation: Article 294 of the CPC should be amended to include paragraph 3, reading as follows: “If, upon getting familiarized with an interim part of the court record, a party files no comments thereon, that party, when filing comments on the entire court record, may not move for examination of comments pertaining to the interim record that the party’s has already studied.”

11.11. Subject: Filing appeals/protests against court rulings.

The issue: Pursuant to Article 23 of the CPC, trial participants may contest actions and decisions of officials in charge of criminal proceedings. The right to file comments on a court record is also focused on the effective implementation of the principle of court’s objectivity and impartiality as well as the adversarial nature of a trial where the parties may defend their respective positions based on the criminal case facts
examine in trial. Pursuant to Article 295, item 2 of the CPC, however, court rulings, granting or rejecting motions with comments on the court records, cannot be appealed or challenged.

**Recommendation:** Article 295 of the CPC should be amended to include paragraph 3, reading as follows: “A ruling issued by the presiding judge upon review of comments on court records may be appealed or challenged in accordance with the procedure set forth in Article 363 of this Code.”

11.12. **Subject: Execution of court judgments in hard copy.**

**The issue:** Pursuant to Article 341, item 2 of the CPC, a court judgment must be executed by hand or by technical means by one of the judges participating in the passing thereof, and be signed by the entire panel of judges. In actual practice, however, some handwritten judgments are virtually illegible, making it hard for the parties to study them and make sure that the judgments are well founded and lawful. Some judges, unfortunately, have been known to amend judgments upon receipt of cassational complaints and protests.

**Recommendation:** Article 341, item 2 of the CPC should be amended to read as follows: “A court judgment shall be executed by technical means by one of the judges participating in the passing thereof, and be signed by the entire panel of judges. The judge to execute the judgment shall sign each and every page of it.”

11.13. **Subject: Service of copies of a court judgment.**

**The issue:** Article 350 of the Tajik counterpart of the CPC does not provide for a copy of a court judgment to be served on the prosecutor. The Russian counterpart of Article 350 of the CPC, however, does contain a provision to this effect. Such limitation of the prosecutor’s rights is not conducive to implementation of the principle of equality of parties to adversarial judicial proceedings.

**Recommendation:** Article 350 of the Tajik version of CPC should be amended to read as follows: “На дертар аз панљ шабонарўз баъд аз эълони њукми суд, нусхаи он бояд ба мањкумшуда ё сафедшуда супурда шавад. Дар хамин мўхлат нусхаи ўқум баба химоятгар, айбдоркунанда, чабрдида, дайвогари граждани, чавобгари граждани ва намояндагони онҳо бо дархости шахсони зикргардида супурда мешавад.”

11.14. **Subject: Statutory period for filing cassational complaints.**

**The issue:** Pursuant to Article 359 of the CPC, the parties may file complaints and present protests against a court judgment within ten days of its publication. At the same time, Article 350 of the CPC prescribes that copies of a judgment must be served on the parties within five days of the judgment’s publication. Consequently, there are just five days during which the parties may draw up and file cassational complaints/protests. The only exception is made for the convicted defendant who has the right to file a cassational complaint within ten days of being served a copy of the judgment of conviction. It should also be noted that under Article 327 of the Code of Civil Procedure of the Republic of Tajikistan, litigants may file cassational complaints and protests within one month of being served copies of a court judgment.

**Recommendation:** Article 359, item 1 of the CPC should be amended to read as follows: “Complaints and protests against a court judgment may be filed by the parties within ten days of being served copies thereof.”

11.15. **Subject: Legalization of evidence by the defense counsel during pre-trial investigation.**

**The issue:** Pursuant to bullet-point 3 of Article 53, item 2 of the CPC, the defense counsel has the right to obtain and present such evidence and information as may be required for providing legal assistance.
Bullet-point 1 of Article 86, item 3 of the CPC similarly empowers the defense counsel to present evidence. The law, however, does not empower defense attorneys to perform investigative actions on their own in order to collect evidence. Thus, to secure such evidence as may be obtained during a pre-trial investigation, the defense counsel must file motions with investigation authorities for performing certain types of investigative actions. At the same time, the law does not oblige the inquiry officer/investigator to perform the requested investigative actions in the presence of the requesting defense attorney. What happens in practice is that the statements made by witnesses while being interviewed by investigation officials at the request of defense attorneys, but in their absence, are later pronounced null and void because investigators carelessly or inappropriately recorded those facts and circumstances that were known to such witnesses. The reason why investigators often inappropriately record witness statements in procedural documents lies in the investigator’s procedural status, which is opposite to the defense, as investigators represent the prosecution. The powers of the inquiry officer/investigator are not balanced off by some alternative adversarial mechanisms, which would empower the defense counsel to initiate procedural actions with a view to securing obtained evidence independently of the procedural opponent (investigator). It is difficult to maintain, no matter how badly we may want to, that prosecutors remain impartial during pre-trial investigation. In practice, it is hard to avoid subjectivity when focusing on the examination of leads suggested by the prosecution. And it is even more difficult for an investigator to step back from his/her subjective conviction of a suspect’s guilt because the same investigator has decreed to initiate criminal proceedings against the suspect. It also happens in practice that a case investigator may leave his/her area of investigative jurisdiction (e.g., travel to another region) for a certain time, and during that very time a witness, who has information that is very valuable for the defense, goes abroad for an extended period of time or for good. It means that without a case investigator, a defense attorney cannot procedurally secure such evidence as may be relevant to a criminal case.

Pursuant to Article 20, item 2 of the CPC, a court is not a criminal prosecution authority and cannot take the side of the prosecution or the defense. The court provides for the parties conditions for the exercise of their procedural rights and duties. This is the rule that may be used to ensure that evidence obtained by and in the interest of the defense be properly secured. At the same time, the court, acting as an impartial arbitrator that is procedurally unrelated to the adverse parties, would be empowered to perpetuate witness statements as requested by the defense attorney, as well as advise witnesses of their liability for giving false testimony, for violation of the requirements set forth in the CPC, and etc. The court would also be able to validate the statements made by witnesses and ascertain that witnesses testified of their free will. This approach would in no way diminish the authority of the procedural opponent (the prosecution), as, upon validation by the court, such evidence would be submitted to the investigator, who, in accordance with the procedure set forth in Article 88 of the CPC, would evaluate it together with the other evidence obtained in the course of pre-trial investigation. Moreover, if the CPC allows for the prosecution to apply to a court (without participation of the defense counsel) for authorization of procedural actions aimed at obtaining evidence, then, in line with the principle of equality of parties to judicial proceedings, the defense, where necessary, should also be able to apply to a court (without participation of the prosecution) to secure evidence.

The mechanism of judicial perpetuation of evidence is not a new addition to the law of procedure of the Republic of Tajikistan. For instance, Articles 67, 68 and 69 of the Code of Civil Procedure contain rules for securing evidence: thus, under Article 67, if litigants are concerned that some time in the future it may be impossible or extremely difficult for them to obtain evidence that they need, they may request the court to secure such evidence.

**Recommendation:** The CPC should be amended to include new Article 86 entitled “Judicial procedure for securing evidence” and reading as follows:
1. If, in the course of pre-trial investigation, the defense counsel may doubt the ability of the prosecution to secure evidence in an objective, comprehensive and complete manner, or if the recording of evidence that is necessary for the defense may later be impeded or impossible, the defense counsel may file a motion to secure evidence judicially.

2. A motion to secure evidence shall specify facts to be confirmed by such evidence and the criminal case that they refer to, as well as reasons for the defense council’s application to the court.

3. Evidence shall be secured by a procedural action performed by a judge of a district/city court or of a military garrison court of the relevant tier, within 24 hours of the receipt of such motion. Evidence shall be secured in the presence of the defense counsel and, where necessary, in the presence of the witness and/or expert recorder in accordance with the procedure set forth in this Code.

4. All records and documents obtained in the process shall be kept safe at the court, whereas copies thereof, duly certified by the judge, shall be promptly forwarded to the investigation authority and served on the defense counsel to file the motion.

11.16. Subject: Admissibility of applying rules of procedure by analogy.

The issue: The Criminal Procedure Code does not explain what rules an official should be guided by in a specific situation that is unregulated by the CPC. For instance, the contents of e-mail messages on a private account are the private domain of an individual and are protected by relevant laws. At the same time, pursuant to Article 14 of the CPC, a person’s right to privacy may be restricted in the course of criminal proceedings in instances and in accordance with the procedure expressly defined by the CPC. The effective Criminal Procedure Code, however, does not specify a procedure to be used if it is necessary to inspect or seize such information. In addition, sub-item 14 of Article 53, item 2 of the CPC empowers a defense attorney to use any other ways and means of defense that do not contradict the law. This rule suggests using statutes by analogy, unless expressly forbidden by law. Such a ban is set forth in Article 71 of the Law of the Republic of Tajikistan on laws and regulations, which forbids analogy of statutes and analogy of law in event of limitation of rights and identification of liable persons. Analogy of procedure is not a new institution in the Tajik procedural legislation. For instance, pursuant to Article 2 of the Code of Civil Procedure, in default of rules of procedure that regulate resolution of disputes arising in the course of judicial proceedings, the court shall apply rules that regulate similar legal relations (analogy of statute), or, lacking such rules, the court shall be guided by the fundamental principles of judicial procedure in the Republic of Tajikistan (analogy of law).

Recommendation: Article 4 of the CPC should be amended to include paragraphs 2 and 3, reading as follows:

2. If this Code does not contain rules regulating specific issues that may arise in the course of criminal proceedings, trial participants and the court shall apply rules of procedure regulating similar legal relations (analogy of statute), or, in the absence of such rules, they shall be guided by the principles of law of procedure (analogy of law).

3. It shall be forbidden to resort to analogy of statute or analogy of law for the purpose of identifying grounds for criminal liability or restricting procedural rights.

11.17. Subject: Notice of initiation of criminal prosecution.

The issue: The existing procedure for issuing decrees on the opening of criminal cases requires amendment because, under Article 146 of the CPC, only the prosecutor and the applicant must be notified about initiation of criminal prosecution, but the law does not oblige investigating authorities to similarly notify the person against whom a criminal case has been initiated.
Recommendation: Article 146, item 2 of the CPC should be amended to read as follows:
“The decree shall specify the time and venue of its execution, the name of the issuing authority, the cause and grounds for initiating a criminal case, the criminal law statute that defines the elements of a crime being prosecuted, as well as the procedure for administering the case. Copies of the decree to initiate criminal prosecution shall be promptly forwarded to the prosecutor and duly served on the person against whom the criminal prosecution has been initiated. The applicant shall be duly notified of the decision.”

11.18. Subject: Filing a motion to a court.

The issue: Article 111 of the CPC should be made consistent with the provisions of Article 35 of the CPC, and it is further in conflict with the Constitution of the Republic of Tajikistan. If, under Article 35, the court has the exclusive right to authorize arrest of a person, denial of arrest should also be placed within the exclusive jurisdiction of the court. However, according to the effective rules, an investigator may not, without the prosecutor’s approval, apply to a court for an arrest warrant. Furthermore, the statutory limitation period for obtaining incriminating evidence that would justify the arrest of a suspect is 72 hours. And practice shows that preparation of documents to be submitted to the prosecutor for review and approval takes, in general, half a working day, and the other half of the days is spent in preparation of relevant documents for filing to the court. In addition, these documents must be filed within 64 hours of the arrest of a suspect. For all practical purposes, there is very little time left for obtaining incriminating evidence. This lack of time is perceived even more acutely, if there are two or more detainees. Furthermore, due to the lack of funding, an investigator has to make photocopies of all the records for his/her account. In view of the aforementioned, there are two recommendations proposed below.

Recommendation: Upon notifying the prosecutor, the investigative authority shall directly apply to the court for authorization to impose a measure of restraint.

Recommendation: Should the prosecutor refuse to apply to the court for authorization of a measure of restraint in the form of arrest, the investigator shall have the right to directly apply to a court for such authorization.

11.19. Subject: Approval of decrees issued by an inquiry officer.

The issue: The Criminal Procedure Code does not specify the authority entitled to approve decrees as may be issued by an inquiry officer.

Recommendation: Article 41 of the CPC should be amended so as to include the right of the head of the inquiry authority to approve decrees issued by inquiry officers.


The issue: Article 41 of the CPC specifies the powers of the head of inquiry authority and those of inquiry officers. Analysis of this rule, however, suggests that the inquiry officer’s powers are rather vaguely defined and based on a reference rule.

Recommendation: To add to the effective CPC Article 411 entitled, “Powers of an inquiry officer.”

11.21. Subject: Investigative jurisdiction; Article 111, item 1 of the RT CP

The issue: Article 151 of the CPC, while referring certain statutes of the Criminal Code to specific investigative jurisdictions, does not refer the offense specified in Article 111, item 1 of the CP to the investigative jurisdiction of an inquiry authority, whereas Article 453 of the CPC, which establishes a fast-
track inquiry procedure, stipulates that offenses described in Article 111, item 1 of the CP may be subject to a summary inquiry procedure if the suspect pleads guilty. But the law does not specify the investigative jurisdiction in respect of offenses set forth in Article 111, item 1 of the CP in instances when the suspect pleads innocent.

**Recommendation:** Article 151 of the CPC should be amended to include the right to perform inquiry under Article 111, item 1 of the CP.

11.22. **Subject: Renewal of expired pre-trial investigation deadlines.**

**The issue:** Article 164 of the CPC establishes statutory deadlines for the performance of pre-trial investigation. This rule, however, does not provide for the renewal of the period of pre-trial investigation when the statutory deadline is missed for valid reasons.

**Recommendation:** Article 137, item 3 of the CPC should be amended to read as follows: “A statutory deadline missed for valid reasons shall be renewed by the decree of the person in charge of pre-trial inquiry, investigator or prosecutor, or by the ruling of the court handling the relevant criminal case.”