

Bail Reform in Ukraine: Transplanting Western Legal Concepts to Post-Soviet Legal Systems

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August 1991 saw the break-up of the Soviet Union and the reemergence of Ukraine as an independent European state.¹ It was a time of great euphoria and great expectations, not only in Ukraine, but throughout the New Independent States (NIS) and the world. However, the euphoria was short-lived. The citizens of Ukraine and of all the NIS quickly realized how daunting the task of rebuilding and redesigning their society would be.²

In 1991, Ukraine inherited the government and institutions of the Ukrainian Soviet Socialist Republic. While Ukraine quickly revised the names and titles, this effected little substantive change.³ Eight years after independence, many of these institutions remain intact, and many of the former leaders remain in power and positions of influence.⁴ The pace of reform in all sectors of society remains excruciatingly slow.⁵

Among the institutions inherited from the Soviet Union was its legal system, complete with all its flaws and idiosyncrasies. The system has proved remarkably resistant to change. As a result, the criminal justice system that

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1. Ukrainian independence from the Soviet Union was declared by the Ukrainian Supreme Soviet on Aug. 24, 1991, following the aborted coup attempt in Moscow against Mikhail Gorbachev by communist hard-liners. Independence was subsequently confirmed in a national referendum held on December 1, 1991, in which 84% of the Ukrainian electorate went to the polls, and 90.3% of that group voted for an independent Ukraine. See DAVID REMNICK, RESURRECTION: THE STRUGGLE FOR A NEW RUSSIA 23-24 (1997); ECONOMIST INTELLIGENCE UNIT: UKRAINE COUNTRY PROFILE 4-5 (1997).

2. See generally TARAS KUZIO, UKRAINE UNDER KUCHMA: POLITICAL REFORM, ECONOMIC TRANSFORMATION, AND SECURITY POLICY IN INDEPENDENT UKRAINE (1997).

3. *Id.*

4. See, e.g., SHERMAN W. GARNETT, KEYSTONE IN THE ARCH: UKRAINE IN THE EMERGING SECURITY ENVIRONMENT OF CENTRAL AND EASTERN EUROPE 30 (1997).

5. See, e.g., New York University School of Law, *Constitution Watch, Ukraine*, E. EUR. CONST. REV., Spring 1998, at 33-34; *Constitution Watch, Ukraine*, E. EUR. CONST. REV., Winter-Spring 1999, at 41-42 [hereinafter 1999 *Constitution Watch*].

operates in Ukraine today is effectively the same one that was developed and used under Soviet rule.⁶ A courtroom observer from the early 1980s would notice few differences in the day to day procedures or application of the law today.⁷

Like most of its former communist neighbors, Ukraine is committed, at least rhetorically, to recasting itself along democratic lines and to reconstituting its laws to meet international, and more particularly, European standards. Membership in the Council of Europe and other pan-European bodies requires nothing less. As a consequence, major overhauls of the Ukrainian legal system have been advocated almost since the day Ukraine declared independence. To date, however, there has been no final consensus on what form these changes should take.⁸ Proposals to completely revise the country's Criminal Code and Criminal Procedure Code continue to circulate among legislators, Ministry of Justice officials, the courts and the academic community, but no single version has received the support of a consensus.⁹ Thus, enactment of such major reforms remain years away.¹⁰ Actual implementa-

6. The operative criminal procedure code in Ukraine continues to be the *Kriminalno Protsesual'nyi Kodeks Ukrainskoyi Radianskoyi Socialistichnoyi Respubliki* (Code of Criminal Procedure of the Ukrainian Soviet Socialist Republic), originally enacted by the communist government on Dec. 28, 1960. The code was renamed as the *Kriminalno Protsesual'nyi Kodeks Ukraini* (Code of Criminal Procedure of Ukraine) (on file with author) [hereinafter Code of Criminal Procedure of Ukraine] following independence in 1991, but the text of the Code provisions (and their numbering) remained unchanged. Likewise, the Soviet era criminal code, *Kriminalniy Kodeks Ukrainskoyi Radianskoyi Socialistichnoyi Respubliki* (Criminal Code of the Ukrainian Soviet Socialist Republic) (enacted Dec. 28, 1960) continues largely in effect as the *Kriminalniy Kodeks Ukraini* (Criminal Code of Ukraine) (on file with author) [hereinafter Criminal Code of Ukraine]. It should additionally be noted that all other laws passed under the Soviet regime continue in effect to the extent they do not conflict with the Constitution of Ukraine, or laws passed by the current, post-independence government. See *Postanova N. 1545, Verkhovna Rada Ukraina* [Resolution No. 1545 of the Supreme Council of Ukraine] (Sept. 12, 1991) (on file with author).

7. See, e.g., ROBERT RAND, *COMRADE LAWYER* (1991). Rand's description of the day-to-day practice of law in Soviet Moscow of the mid-1980s remains remarkably consistent with the practice today in Ukraine.

8. See KUZIO, *supra* note 2, at 110-31.

9. Many other components of the legislative reforms envisioned for Ukraine also remain in draft form. Ukraine continues to postpone enactment of a new Law on the Judiciary and a new Civil Code, as well as additional reforms in the commercial and economic sectors. In this respect, Ukraine lags behind many of the other former communist states. For example, Armenia and Moldova have both already adopted new Criminal Procedure Codes. This slow pace of legal reform in Ukraine also has begun to seriously tax the patience of the Council of Europe, which Ukraine joined in Oct. 1995. As one of the conditions for continued membership in this body, Ukraine must demonstrate a commitment to strengthening the rule of law, and must conform its legislation to European norms. Ukraine's continuing failure to make such reforms, including, particularly, revision of the Criminal Code and Criminal Procedure Code, have contributed to condemnatory reports by the Council and has prompted that body to begin setting deadlines for the initiation of serious reforms by Ukraine. Failing any substantial progress towards the mandated reforms in the near future, the Council has announced it will initiate steps to revoke Ukraine's membership. See, e.g., *Council of Europe Gets Strict with Ukraine*, KIEV POST, Jan. 28, 1999, at 1; *CE Committee to Propose Suspending Ukraine's Mandate*, BALTIC NEWS SERVICE, May 20, 1999, available in 1999 WL 18371163; *Europe Expects Change in Ukraine After October*, DEN [THE DAY], June 26, 1999, at 1; *Council Delays Decision on Ukrainian Suspension*, KIEV POST, July 1, 1999, at 3.

10. 1999 *Constitution Watch*, *supra* note 5, at 41 ("as many as 750 draft bills are currently waiting for parliamentary consideration, and only one of 48 decrees concerning urgent economic matters has been considered by Parliament this year.")

tion of such reforms, which would require retraining of all of Ukraine's judges, prosecutors and legal practitioners, is even further off.

In the meantime, piecemeal reform of the legal system is occurring. Advocates of reform have found that in the short term it is more feasible to amend the existing Codes than to seek agreement on their complete replacement. The enactment of a simplified form of bail¹¹ to augment the existing laws governing the "preventive measures" available to the prosecutors and courts for the pretrial handling of criminal defendants is an example of such an attempt at reform and innovation via amendment.¹²

Internationally accepted standards of human rights require that persons accused of a crime should be released from detention pending their trial and the consequent adjudication by a court of law of their guilt or innocence whenever possible.¹³ The introduction of a bail law into the Ukrainian Criminal Procedure Code provides criminal defendants in that country with a new mechanism to avoid unnecessary pretrial detention, and thereby moves Ukraine one step closer to compliance with international human rights norms. The opportunity for release on bail is particularly significant given the legendary Soviet-era abuses in this area. While empirical data on pretrial detention under either the Soviet system or the systems of its successor states is almost impossible to obtain,¹⁴ "there is no shortage of anecdotal evidence about wrongful arrests, crowded jails and prisons, and the mistreatment of criminal defendants."¹⁵ In short, the introduction of bail into the Ukrainian criminal justice system provides defendants with an avenue for release from pretrial detention that simply did not previously exist.

11. While the term "bail" is often broadly defined to refer to any sort of release to a suretor, *see* BLACK'S LAW DICTIONARY 127-28 (5th ed. 1979), for purposes of this Article, bail is used in the narrower sense of referring to the posting of a security (by defendant or a third-party) to obtain release from pretrial custody. Indeed, the federal statute governing pretrial release, while referred to as the "1984 Bail Reform Act," only uses the specific term "bail" while referring to the financial or other security posted to obtain release. *See* 18 U.S.C. §§ 3141-3156 (1994). The Act does not include a definition of bail. *See* 18 U.S.C. § 3156 (1994). The distinction is significant, because in modern federal practice, "bail" is now commonly used to refer to the whole range of "conditions" under which a defendant may be released pending trial, some of them financial in nature and some not. *See* 18 U.S.C. § 3142(c) (1994).

12. The law setting forth "preventive measures" applicable to defendants in criminal cases is set forth in Code of Criminal Procedure of Ukraine, art. 149. The amendments providing for a bail option are found in Code of Criminal Procedure of Ukraine, art. 154-1.

13. *See, e.g.,* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), art. 5 [hereinafter European Convention of Human Rights]. In general, prohibitions on arbitrary detention are considered among the most fundamental human rights. *See* Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, arts. 3, 9, G.A. Res. 217A, U.N. Doc. A/810 (1948).

14. *See, e.g.,* Todd Fogelson, *Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pretrial Detention in Russia*, 14 WIS. INT'L. L.J. 541, 546-47 (1996) ("Virtually all statistics compiled by the police are handled with some degree of secrecy and it is not easy to obtain any data from any state agency about the incidence of crime of its detection, rates of arrest and detention, or any other facet of police work and practice."). Indeed, many Soviet-era statistics on detention, pretrial or otherwise, are forever frozen under the permafrost in the mass graves of the Gulag in places like Magadan. A description of the horrors of the Soviet Gulag at Magadan, in far northeastern Russia, can be found in RYSZARD KAPUSCINSKI, *IMPERIUM* 199-216 (Klara Glowczewska trans., 1994).

15. *See* Fogelson, *supra* note 14, at 544.

However, its implementation has been slow and problematic. It offers an example of the problems of introducing new and Western concepts into the existing post-Soviet framework.¹⁶

Studying the bail statute and the efforts at its implementation is useful for several reasons. First, it highlights the initial confusion caused by bringing Western concepts into an alien system, as well as the difficulties in reeducating professionals who often are old and have vested interests in the existing system. Second, it demonstrates the problems of implementing any kind of change in a society almost devoid of any surplus physical resources. The process of introducing bail also provides a glimpse at some of the more fundamental issues involved in post-Soviet legal change: the ongoing conflict between the prosecutors and the courts over control of the criminal justice system and the push by the judiciary to become a more independent branch of government. Any increased independence for the judiciary largely would be at the expense of the prosecutors. Indeed, analysis of most post-Soviet change in the legal sector comes back to this tension and the jockeying for control between these two sectors.¹⁷

This Article will begin by reviewing, in Part I, the pretrial procedures that existed under the Soviet-era codes, and which continue largely in effect today in Ukraine. Part II examines the events that led to the enactment of amendments to the existing Criminal Procedure Code that provide for the use of bail.¹⁸ In Part III, the particular provisions of the Ukrainian bail statute are examined in detail. Part IV provides a critical comparison of the new Ukrainian bail law with older, Western law and with relevant provisions of the European Convention on Human Rights¹⁹ that deal with release from pretrial detention. Finally, Part V examines the Ukrainian experience in implementing its new bail statute. This section concentrates both on the actual attempts at application of the statute in specific cases and on the Supreme Court's efforts to provide further guidance on the use of the statute through its issuance of explanatory regulations in the form of a Plenum Resolution.

16. As Robert Sharlet notes in *Legal Transplants and Political Mutations: The Reception of Constitutional Law in Russia and the Newly Independent States*, E. EUR. CONST. REV., Fall 1998, at 59, "the reception of Western constitutional ideas did not proceed as smoothly as anticipated or hoped, by either donors or donees." Sharlet concludes that ultimately there cannot and will not be a wholesale transplantation of ideas from west to east, but that post-Soviet societies will pick and choose what suits them: "NIS elites found it essential to select, modify, synthesize and variously adapt ideas if they were to prove compatible with both local conditions as well as long-range ambitions." *Id.* at 66.

17. It is no great secret that, more than ever, access to power determines access to wealth in the former Soviet states. See, e.g., *Russian Organized Crime*, ECONOMIST, Aug. 28, 1999, at 17. It is, perhaps, one of history's great ironies that economic determinism continues to dictate social change in the former Soviet Union.

18. See *supra* note 13.

19. *Id.*

I. PRETRIAL PROCEDURES: THE SOVIET LEGACY AND UKRAINIAN PRACTICE

A. *Socialist and Civil Law Traditions*

The Soviet legal system is generally viewed as an outgrowth of the civil law tradition, largely because the pre-revolutionary Russian empire (of which Ukraine was a part) had historically been a civil law society.²⁰ Like most of continental Europe, the Russian Empire was heir to the Roman civil law tradition, which it received by way of the Byzantines.²¹ As one scholar notes, "the actual effect of [socialist] reform was to impose certain principles of socialist ideology on existing civil law systems and on the civil law tradition Soviet legislation builds on the civil law tradition of system and order."²² The most significant distinction between socialist and traditional civil law societies was the belief that law was ultimately only "an instrument of economic and social policy."²³ Nevertheless, "the rules of the Soviet system were highly codified,"²⁴ and the codes, not judicial opinions, remained the predominant source of law.²⁵ "As in other civil law countries, the codes were treated as comprehensive, that is integrated systems containing rules applicable to all situations."²⁶ This was often more theory than practice, however, as the higher courts in the Soviet Union (and in the successor states of Russia and Ukraine) do in fact expect their interpretations and directives to be followed.²⁷

B. *Investigative and Pretrial Procedures*

As noted, independent Ukraine continues to use the preexisting Soviet Criminal Procedure Code. The concept of bail was simply grafted onto this Soviet-era Code, which otherwise contains a comprehensive set of procedures for the treatment of accused persons during the pretrial proceedings.²⁸ The effort to understand the effects brought about by the addition of a bail op-

20. See, e.g., JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 1-4 (1985) ("an understanding of the civil law tradition is essential to an understanding of socialist law"); Scott P. Boylan, *Coffee from a Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution*, 4 U.C. DAVIS J. INT'L L. 103, 110 (1998).

21. See GENNADY M. DANILENKO & WILLIAM BURNHAM, *LAW AND LEGAL REFORM OF THE RUSSIAN FEDERATION* 5 (1999).

22. MERRYMAN, *supra* note 20, at 4.

23. *Id.* It should be noted that, prior to 1991, the socialist legal tradition, of which the Soviet system was the leading example, was considered by scholars of comparative law to be one of the world's three major legal traditions—the other two being the civil and common law traditions. See, e.g., MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* (1982). The accolade may have been somewhat overblown, however, given the rush by so many of the former socialist states to dismantle their distinctive legal tradition at the first possible opportunity.

24. DANILENKO & BURNHAM, *supra* note 21, at 5.

25. See *id.*

26. *Id.* at 6.

27. Fogelson, *supra* note 14, at n.9.

28. Code of Criminal Procedure of Ukraine, arts. 111-71.

tion to the Code warrants a short review of investigative and pretrial procedures under the Soviet criminal justice system, as continued in Ukraine.

Law enforcement functions in independent Ukraine are split between a variety of agencies, as was also the case during Soviet times. These agencies, like the criminal justice system generally, are "federalized," which means that even at the local level, police, investigators, prosecutors, and judges all function within the structure of centralized national bureaucracies run from Kiev. Basic police functions throughout the country rest with the Ministry of Internal Affairs (MVS),²⁹ a uniformed quasi-military police force which also conducts most routine criminal investigations.³⁰ Investigations of various kinds of economic crimes and anti-state activity (e.g., espionage) are handled, even at the outset, by the State Security Service (SBU),³¹ the Ukrainian successor agency to the infamous KGB.³² The Procurator General and his staff, the "procuracy,"³³ exercise oversight functions over the investigative branches of both the MVS and the SBU.³⁴ The procuracy also maintains its own extensive in-house investigative staff and has independent (and often exclusive) investigative responsibilities over broad categories of the most serious types of crimes.³⁵

The iron-fisted control of the procuracy over the Soviet criminal justice system and its Ukrainian successor cannot be overemphasized.³⁶ Primary

29. In Ukrainian, *Ministerstvo Vnutrishnik Sprov.*

30. See LOUISE I. SHELLEY, *POLICING SOVIET SOCIETY: THE EVOLUTION OF STATE CONTROL* 70 (1996). As Professor Shelley notes, the quasi-military, centralized structure of the MVD (the Russian acronym for the Ministry of Internal Affairs) dates to the tsarist period, and has long been used as a means of reinforcing a strong central authority, and of suppressing political resistance. See *id.* at 63-64.

31. In Ukrainian, *Sluzhba Bezpeky Ukrainy.*

32. See SHELLEY, *supra* note 30, at 71. In Ukrainian, the KGB was known as the KDB, *Komitet Derzhavneyi Bezpeky* (Committee for State Security).

33. Under the Soviet system and the surviving Russian and Ukrainian systems, the prosecutor is known as the *prokuror* (procurator). While the roles are analogous, the procurator's powers are somewhat greater than those of his Western counterparts. See, e.g., Anna M. Kuzmnik, *Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law*, 34 HARV. INT'L. L.J. 611, 613 (1993) ("procurators enjoyed an unparalleled degree of authority in relation to judges"); see also Boylan, *supra* note 20, at 111. For purposes of clarity, the English word "prosecutor" is used throughout this Article in lieu of "procurator."

34. See SHELLEY, *supra* note 30, at 71.

35. See *id.* at 70-71. The specific jurisdiction of the MVS, the SBU/KGB and the procuracy often overlap, and have changed from time to time as a result of reorganization and legislative changes. *Id.* A recent trend in Ukraine has been to attempt to reduce the role of the procuracy in the conduct and supervision of investigations. See, e.g., KONSTITUTSIA UKRAINI [Constitution of Ukraine], art. 121, which enumerates the powers of the General Prosecutor and specifically omits any investigative function. According to the provision,

the Procurator's Office of Ukraine is a unified system on which the following is placed: (1) state prosecution in Court, (2) representation of the interests of citizens of the State in courts, in cases envisaged by law, (3) oversight of legality of actions of bodies which conduct investigations, inquiries, preliminary requests, (4) oversight of observance of laws during the enforcement of court decisions on criminal cases, as well as during the implementation of other coercive measures related to the restriction of personal freedom of citizens.

Id. No direct investigative function, therefore, is envisaged by the 1996 Constitution.

36. Pre-revolutionary Russia's Prosecutor General, historically, had far greater powers over governmental activity than would normally be associated with such an office. See Inga Mikhailovskaya, *The Procuracy and its Problems: Russia*, 8 E. EUR. CONST. L.R. 98 (1999). From the reign of Peter the Great on,

responsibility and control, not only for the investigation, but for what we would ordinarily refer to as most "pretrial" matters as well, was left almost entirely to the prosecutor.³⁷ According to one expert,

[T]he procuracy officially maintained the upper hand in investigative work by authorizing searches and detention and verifying the legality of militia [MVD] work. It preserved its control unofficially by secretly instructing investigative personnel how to proceed in a case, as well as failing to prevent other governmental bodies from intervening in the investigative process. Dependent on the procuracy for their welfare, the militia could not act independently.³⁸

Such power and control historically led to great abuse. As one Western observer has noted, "the [Soviet] prosecutor directed a purely inquisitorial process in which coerced confessions, false, politically-motivated prosecutions, and falsification of evidence were routinely carried out."³⁹ Prosecutors often telephoned judges to direct the results of a trial, and frequently would not even deign to attend the courtroom proceedings.⁴⁰ Indeed, for Western observers, the prosecutor's preeminent role in the Soviet criminal justice system is among its most unusual and problematic features.⁴¹ The preeminence of the procuracy continues today in Ukraine, where, unlike in most Western systems, the judiciary does not become involved in a significant

the Prosecutor General functioned as the chief supervisory authority over the government: "the key agent of the central government, subservient only to the monarch." *Id.* at 99. Such power, in many respects, continues today; responsibilities of the modern day Prosecutor General in the Russian Federation include:

- (1) general supervision of compliance with the law . . . by federal ministries, legislative assemblies, and the executive of the members of the Russian Federation, organs of self-government, and the army;
- (2) the supervisions of the work of the police and criminal-investigation agencies;
- (3) monitoring the penitentiary system and detention centers;
- (4) prosecuting criminal cases . . . and
- (5) coordinating efforts to fight crime.

Id. at 101.

37. See Code of Criminal Procedure of Ukraine, arts. 111–71. See also Code of Criminal Procedure of Ukraine, arts. 94–233, providing for the conduct of the "preliminary investigation" by investigators and prosecutors. Much of what would be referred to as pretrial procedure in the American system, including the filing of formal criminal charges, the notification to defendants of the charges against them, the retention of expert witnesses, and decisions about bail and pretrial detention, are considered to be part of the "preliminary investigation," managed by the investigative agencies and the prosecutor. This feature of the Soviet criminal procedure system continues largely unchanged in modern Ukraine.

38. SHELLEY, *supra* note 30, at 70–72.

39. Stephen C. Thamen, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61, 66 (1995).

40. See *id.* at 67. As noted by Professor Shelley, *supra* note 30, at 81, Soviet law enforcement was "accountable neither to the population nor to the government [and] remained a tool of the Communist Party."

41. See, e.g., STEPHEN HANDELMAN, *COMRADE CRIMINAL: RUSSIA'S NEW MAFIA* 280 (1995); Gajik Ghazinyan, Dean of the Law Faculty, Yerevan State University, Remarks at Conference on Criminal Procedure Reform in Armenia at the American University of Armenia (June 25, 1999). This disproportionate power and influence on the part of the prosecutor continues to characterize the criminal justice system in Ukraine today. See, e.g., U.S. DEP'T OF STATE, *UKRAINE COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1997*, 1362–65 (1998).

way until the case is ready for trial.⁴² As a result, the judiciary provides almost no oversight during the initial events following an arrest.⁴³

The first step following an arrest is notification to the prosecutor by the arresting entity.⁴⁴ Notification must occur within 24 hours of the arrest.⁴⁵ It is then up to the prosecutor, acting at his or her own discretion, to review the case and issue a formal arrest warrant.⁴⁶ This must be done within 48 hours of the referral to the prosecutor by the arresting entity.⁴⁷ If the prosecutor declines to issue an arrest warrant, the arrested individual must be released. If an arrest warrant is issued by the prosecutor, the individual, at least for the time being, will remain in physical detention as the case proceeds.⁴⁸

Thereafter, formal charges will be filed⁴⁹ against the defendant.⁵⁰ At any point following the issuance of the arrest warrant or the filing of formal charges, the prosecutor or the investigator, who acts under the prosecutor's ultimate review,⁵¹ may reconsider whether detention is necessary. The prosecutor or investigator had only very limited options prior to the passage of the bail law in deciding whether a defendant should be detained or subjected to some lesser set of restrictions during the pendency of a criminal case.⁵²

These options were set forth in the law on "preventive measures," found at Article 149 of the Criminal Procedure Code.⁵³ The specific options were

42. See generally Code of Criminal Procedure of Ukraine, arts. 232, 234-56; see also KUZIO, *supra* note 2; Mikhailovskaya, *supra* note 36, at 103-04 ("That the procuracy today retains some of its old, institutional features illustrates clearly the incomplete, palliative nature of the reform of the judicial system.").

43. The problems inherent in unchecked prosecutorial authority are obvious, even to those who operate under it. "Few Soviet legal scholars believe the Procuracy was an objective or impartial referee of the pretrial process." Fogelsong, *supra* note 14, at 552.

44. Code of Criminal Procedure of Ukraine, art. 106 (part 3).

45. *Id.* The arresting authority must also submit to the prosecutor at this time the factual information upon which the arrest was based, along with any relevant evidence.

46. *Id.* See also Code of Criminal Procedure of Ukraine, art. 115.

47. *Id.*

48. *Id.* art. 106 (part 3).

49. *Id.* art. 131. Formal charges also can be filed against an individual who is not yet in custody. Such individual might then be arrested and detained, or might alternatively be subjected to some less restrictive form of pretrial measure, see discussion in text, *infra*.

50. The English word "defendant" is used herein to refer to the individual against whom criminal charges have been filed. Under the Ukrainian Criminal Procedure Code, however, there are three separate terms for an individual believed to have committed a crime, depending on the particular stage of the proceedings: (1) an individual against whom no formal charges have been filed is a "suspect" (*pidozruvaniy*), regardless of whether or not the individual has been detained. Code of Criminal Procedure of Ukraine, arts. 43, 43-1. (2) Following the filing of formal charges, and throughout the "preliminary investigation" stage, the individual is referred to as the "accused" (*obvinuvacheniy*); and (3) only when the case actually proceeds to trial before the court is the individual referred to as a "defendant" (*pidsudniy*).

51. In practice, the decision as to the appropriate preventive measure to be applied in a specific case is often delegated to the investigator handling the case, subject to the prosecutor's review and approval. See Code of Criminal Procedure of Ukraine, arts. 104, 114, 227-34.

52. See Code of Criminal Procedure of Ukraine, arts. 149, 165.

53. *Id.* art. 149. Article 149 was, of course, amended in 1996, by the addition of a bail option, the details of which are set forth in greater detail in Article 154-1 of the Criminal Procedure Code, see *infra* note 70.

(1) release of a defendant on his or her signed promise not to depart from the city or town of residence during the pendency of the case, (2) release of the defendant on the personal surety of a third party or a public institution (such as an employer) that defendant would behave properly and appear as obligated before the investigator, the prosecutor or the court, (3) assignment of defendant to military custody, or (4) detention.⁵⁴ Conditioning defendant's release on the posting of a security, the most common form of bail in the West, was not an option.⁵⁵

In making a determination as to which preventive measure should be applied in a specific case, the Criminal Procedure Code directs the prosecutor to consider whether there is sufficient reason to believe defendant will evade the investigation or trial, will interfere with that investigation, or will continue to engage in criminal activity.⁵⁶ In practice, and in contravention of Western stereotypes about the administration of Soviet justice, large numbers of criminal defendants were released from custody pending their trials at the initiative of the prosecutors, subject only to a signed promise to return.⁵⁷ This trend has continued in Ukraine after independence.⁵⁸ According to recent government statistics, up to seventy percent of criminal defendants continue to be released on their own recognizance, or that of a third party,

54. *Id.*

55. While definitions of the word "bail" vary, and while the term may in some cases simply refer to the obligation of a third party to ensure the appearance of a defendant at a later date (without the third party actually having to post a security), the term also commonly implies that release from custody may, at the very least, be conditioned on the taking of a security. See, e.g., BLACK'S LAW DICTIONARY 127 (5th ed. 1979) "To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and place certain, which security is called 'bail,' because the party arrested or imprisoned is delivered into the hands of those who bind themselves for his forthcoming." (emphasis supplied). See also *supra* note 12.

56. Code of Civil Procedure of Ukraine, art. 148.

57. Soviet era statistics are, of course, hard to obtain. However, according to RAND, *supra* note 7, at 31, by the late 1980s, in Moscow—after the reforms brought about by *Perestroika* had begun to have an impact—less than one third of criminal defendants were held in custody during the pretrial stages of their criminal proceedings.

58. Pretrial detention under Soviet rule was not necessarily based on a balanced look at the circumstances of the specific case, or an evaluation of such factors as risk of flight or danger to the community. Rather, if the crime charged was a serious enough one, detention was likely. This legacy persists in present day practices in both Ukraine and Russia. See DANILENKO & BURNHAM, *supra* note 21, at 476 ("[T]he measure of choice [in Russia] for serious crimes is pre-trial detention."). According to one expert, pre-trial detention in Russia is not, however, limited to the most serious crimes: "the Russian Code of Criminal Procedure effectively makes pre-trial detention *the rule* for a very broad range of offenses." Fogelsong, *supra* note 14, at 554 (emphasis supplied). According to Rand, however, even Soviet courts could show some flexibility with regard to who was held in pretrial detention, especially during the era of *Perestroika*. See RAND, *supra* note 7, at 31. "The trend [was] definitely towards liberalization Only those defendants dangerous to others [were] held." *Id.* Rand even cites to a Moscow case involving charges of intentional homicide in which the defendant was released on his personal recognizance pending trial. *Id.* at *passim*.

while they await trial.⁵⁹ In almost all cases investigators or prosecutors direct this release pursuant to the provisions of Article 149.⁶⁰

Traditionally, the decision as to whether the defendant would be detained or released pending trial was left solely to the prosecutor (and, by default, often to the investigator who was handling the case, subject only to prosecutorial review).⁶¹ The Soviet-era code did not provide for any kind of arraignment before a judge, or other judicial review, following an arrest.

In 1992, however, the law in Ukraine was amended to provide that once an arrest warrant has been filed, and a decision made to detain the defendant, the defendant may appeal it to the court on very limited grounds.⁶² The court will only undertake review of the warrant at this stage in those cases where the defendant initiates it. Thus, in practice, for many defendants, there is no prompt initial judicial review of either their arrest or their detention.⁶³ Even if the matter comes before the court at this stage, judicial review is limited to whether the prosecutor properly followed the laws and procedures governing issuance of the arrest warrant and the consequent detention of defendant.⁶⁴ The court cannot substitute its judgment for that of

59. Hon. Petro Pilipchuk, Judge, Criminal Collegium, Supreme Court of Ukraine, Remarks at an ABA/CEELI Workshop on Bail Reform, Chernivtsi Oblast Court, Chernivtsi, Ukraine (Mar. 26, 1999). Judge Pilipchuk was citing figures that he had obtained from the Ministry of Justice.

60. *Id.*

61. *See* Code of Criminal Procedure of Ukraine, arts. 106 (part 3), 165, 236-4.

62. Code of Criminal Procedure of Ukraine, art. 236-3. Judicial review at this stage assumes the detention of the defendant; in those cases where the defendant is not detained, there is no provision for judicial review of the militia stop, or the "arrest." Likewise, in the unusual (but not unheard of) event that the defendant is detained but the prosecutor fails to issue a warrant, the court would not have jurisdiction under the Criminal Procedure Code to review the prosecutor's malfeasance. Defendant's sole recourse would be to petition higher prosecutorial authorities.

63. This situation is exacerbated by the fact that many defendants, especially at the initial stages of a criminal proceeding, are not represented by counsel. Interview with Valeriy Podipaliy, Law Faculty, Kiev State University, in Kiev, Ukraine (May 18, 1999) [hereinafter Podipaliy Interview]. Without counsel, it is doubtful that such defendants know how to appeal an arrest and preliminary detention to the court, or even that they have a right to do so. Lack of adequate counsel is an increasingly problematic aspect of the Ukrainian legal system. Interview with Vladislav Kolny, Chairman of Kiev Collegium of Advocates, in Kiev, Ukraine (May 21, 1999). While a defendant has a right to counsel under Ukrainian law, from the time of arrest, *see* Code of Criminal Procedure of Ukraine, arts. 44, 106 (part 3), this does not create a corresponding obligation for the state to provide it, except where defendant is a minor, is incapacitated or faces capital charges. Code of Criminal Procedure of Ukraine, art. 46 (part 3). The American interpretation of right to counsel as meaning that one will be provided if necessary, *see* Gideon v. Wainwright, 372 U.S. 335 (1963), has not been given voice in Ukraine. Indeed, it probably could not, given the lack of any state resources to pay for such counsel. Whereas legal advice was relatively affordable and accessible during the Soviet era, when advocates worked directly for state run Collegiums of Advocates, this system has now broken down. It has been replaced by one where private lawyers are generally available only for hire—not unlike the system existing in the West, but without provisions for pro bono representation.

64. Code of Criminal Procedure of Ukraine, art. 236-4. This statute "governs the procedures for hearings on petitions to nullify an arrest warrant issued by a procurator." Valeriy Podipaliy, *Zminy v Zakonodavstvi Ukrainy Schodo Zastavy* [Implementation of Ukrainian Legislation on Bail] (1999) (unpublished article, on file with ABA/CEELI offices in Kiev) [hereinafter Podipaliy, Ukrainian Legislation on Bail]. The statute does not provide a specific standard of review, per se, to be employed by the court at this stage in reviewing the arrest and detention. It states, simply, that "during the review, the judge must establish whether the prosecutor who has issued the arrest warrant has followed the procedures set by articles 148, 150, 155, 156 and 157 of the Code . . ." In practice, judicial review of actions by the inves-

the prosecutor, nor can the court order an alternative form of detention at this stage.⁶⁵ Indeed, the prosecutor's decision as to the *form* of detention is unreviewable until much later in the proceedings if the arrest warrant is otherwise proper.

Thereafter, the case remains solely within the prosecutor's control until completion of what is often referred to in both Russian and Ukrainian as the "preliminary investigation" stage of the proceedings.⁶⁶ This appellation is somewhat misleading, because the arrest warrant has already been issued and detention of the defendant may have been ordered. A more accurate English translation is "pretrial." During this period, the prosecutor must file formal charges. Again, these charges are not judicially reviewable at this stage of the proceedings.⁶⁷ Indeed, a defendant may be held in detention for up to eighteen months while the prosecutor continues the "investigative" stage.⁶⁸ At this point, any further decisions about the preventive measures to be used regarding the defendant rest solely with the prosecutor. In practice, many of the decisions regarding conduct of the case at this stage, including decisions as to the detention of the defendant, are left to the discretion of the investigator handling the case, subject only to the prosecutor's review.⁶⁹ Only once the investigation is formally completed does the prosecutor refer the case to the court.⁷⁰

During the "investigative" stage, a defendant in detention, or defendant's counsel, may continue to petition the investigator or the prosecutor for release. For example, defendants often seek reconsideration of their detention based on deteriorating health conditions—a common phenomenon, given the condition of Ukraine's prisons.⁷¹ Based on changed circumstances or new

tigator and prosecutor at this preliminary stage is limited to a cursory review of whether the proper procedures were followed. Podipaliy Interview, *supra* note 63. Indeed, the court often does not even receive or review the case file or case materials at this point. *Id.* As noted by Professor Podipaliy, "the imperfections [of article 236-4] lie in the provisions that practically prohibit the court from voicing its opinion on the credibility and sufficiency of the evidence, the provability of indictment, [and] the role and degree of defendant's participation in commission of a crime."

65. Podipaliy, Ukrainian Legislation on Bail, *supra* note 64. The 1992 amendments fell far short of similar amendments which were made to the Russian Criminal Procedure Code in the same year. Specifically, Russian courts are now permitted to actually review, on petition of the defendant, the prosecutor's order of detention, and to substitute an alternative form of preventive measure (e.g., release from detention on conditions) pending trial. See DANILENKO & BURNHAM, *supra* note 21, at 476-79. Ukrainian judges simply do not have this much discretion at the pretrial stage.

66. The *poperednye slidstvo* in Ukrainian. See Code of Criminal Procedure of Ukraine, arts. 111-226; see also *id.* arts. 232, 237-56.

67. Code of Criminal Procedure of Ukraine, arts. 131, 133, 140.

68. Code of Criminal Procedure of Ukraine, art. 156. Detentions of 18 months duration require the approval of the Prosecutor General, while shorter detentions also require the approvals of various senior level prosecutorial officials. While defendants cannot be detained for over eighteen months during an investigation, there is no statutory limit on the length of an investigation itself.

69. See, e.g., Code of Criminal Procedure of Ukraine, arts. 104-234.

70. *Id.* arts. 232, 237-56.

71. See, e.g., Podipaliy, Ukrainian Legislation on Bail, *supra* note 64.

information, the investigator or the prosecutor may change the form of preventive measure to be used regarding the defendant.⁷²

Only once the case is formally referred to the court for a trial⁷³ may the judge review the preventive measure applied by the prosecutor to determine if the measure was "correctly selected."⁷⁴ In practice, this means *de novo* review, and the court can implement whatever statutory preventive measure it deems appropriate, regardless of the prosecutor's previous orders.⁷⁵ However, for many defendants this *de novo* review comes only after many months of detention.

II. ENACTMENT OF THE UKRAINIAN BAIL STATUTE

For some time, the implementation of bail in Ukraine has been a goal of the judges of the Supreme Court's Criminal Collegium. Early drafts of the proposed Criminal Procedure Code included provisions for bail prepared with input from the Court.⁷⁶ Indeed, bail is just one aspect of the sweeping and comprehensive criminal procedure reforms the Court has long advocated.⁷⁷ However, as the hopes for swift passage of a comprehensive new Criminal Procedure Code have dimmed, the Court has proceeded by seeking piecemeal changes to the laws on procedure.⁷⁸

The Supreme Court focused on the need for bail reform in 1995, when, during an annual review of issues facing Ukraine's criminal justice system, it addressed the recurring problems in the application of "preventive measures" to defendants awaiting trial.⁷⁹ Because the only preventive measures

72. Code of Criminal Procedure of Ukraine, art. 165.

73. Referred to as the "judicial investigation" or *sudove slidstvo* in Ukrainian. See Code of Criminal Procedure of Ukraine, arts. 297–317. At this stage, the judge now effectively conducts his or her own investigation of the evidence, among other things by interrogating defendants and witnesses.

74. *Id.* art. 242.

75. See KOMENTAR, KRIMINALNA PROTSESUALNOGO KODEKSU UKRAINI [COMMENTARY, CRIMINAL PROCEDURE CODE OF UKRAINE] 298 (1997) [hereinafter COMMENTARY] (providing commentary on Code of Criminal Procedure of Ukraine art. 242); Podipaliy Interview, *supra* note 63. In practice, judges are not hesitant to change the prosecutor's decision as to the preventive measure if they believe there has been an error. See, e.g., Remarks of Hon. Petro Pilipchuk, Judge, Supreme Court of Ukraine, speaking to *On the Scales of Justice* (Ukrainian Television broadcast, Nov. 13, 1998) (English language transcript on file with ABA/CEELI office, Kiev, Ukraine) [hereinafter *On the Scales of Justice*].

76. See, e.g., Robocha Grupa Kabinetu Ministriv Ukraini [Working Group of the Cabinet of Ministers of Ukraine], Proekt Kriminalna Protseualnogo Kodeksu Ukraini [Draft Criminal Procedure Code of Ukraine], art. 107 (Aug. 1996) (on file with author).

77. Among the other reforms being sought by the Supreme Court are the introduction of plea bargaining, the implementation of some form of jury trial, and the strengthening of the adversarial system. See, e.g., Hon. Vasyly Malarenko, Chief Judge of the Criminal Collegium, Supreme Court of Ukraine, Remarks at U.S. Department of Justice Conference of Criminal Procedural Reform, Kiev, Ukraine (May 20, 1999); Hon. Volodymyr Stefanuk, Deputy Chief Judge, Supreme Court of Ukraine, Remarks at ABA/CEELI Conference on Criminal Procedure Reform, Kiev, Ukraine (Sept. 16, 1998) [hereinafter Stefanuk Remarks].

78. This response to the Soviet legacy is similar to that of the Russian Federation, which, as of 1996, had amended its Code of Criminal Procedure over 444 times. See Fogelson, *supra* note 14, at 552.

79. *On the Scales of Justice*, *supra* note 75; Hon. Petro Pilipchuk, Judge, Criminal Collegium, Supreme Court of Ukraine, Remarks at ABA/CEELI Workshop on Bail Implementation, Kharkiv, Ukraine (Dec.

that were available for handling such defendants were release on a signed promise to return or detention,⁸⁰ the Court's study found that investigators and prosecutors did not have enough flexibility to deal with the wide variety of specific cases.⁸¹ The study concluded that the measures were being arbitrarily and ineffectively applied.⁸² On the one hand, many investigators and prosecutors used the signed promise in cases where defendants were flight risks. Thus, as many as 7000 defendants became fugitives each year.⁸³ At the same time, many investigators and prosecutors used detention in such a heavy-handed manner that the courts, once they finally got the cases, ordered the release of up to 10,000 defendants a year from pretrial custody in cases where they deemed it unnecessary.⁸⁴

In particular, the Supreme Court was concerned about the human rights consequences of so many apparently unnecessary detentions, given the ever-worsening conditions of Ukraine's prisons.⁸⁵ Clearly, prosecutors and judges alike needed more tools for handling defendants during the pretrial stages of a proceeding. As the Chief Judge of the Ternopil Oblast⁸⁶ noted succinctly: "Just look at the options under the old law: the defendant either gave a

2, 1998).

80. See Code of Criminal Procedure of Ukraine, art. 149; see also *On the Scales of Justice*, *supra* note 75.

81. See *On the Scales of Justice*, *supra* note 75; Remarks of Judge Pilipchuk, *supra* note 59.

82. *On the Scales of Justice*, *supra* note 75.

83. *Id.* ("In 1995, there were 55,000 suspects on the run" from Ukrainian courts.)

84. *Id.*

85. *Id.* As Ukrainian Supreme Court Judge Pilipchuk noted in his remarks to *On the Scales of Justice*, *supra* note 75, "Our government still cannot create adequate living conditions for those kept in preliminary detention centers . . . Suspects are kept ten to twelve to a cell, sometimes, even more. And these days there is no money to improve this situation." Other contemporary reports from Ukraine's prisons also paint a dire picture. According to a recent article in one of Kiev's leading newspapers, "[A]ll prisons are jammed far beyond their designed capacities. Ukraine's penitentiaries contain nearly 130,000 inmates practically doomed to starvation and death by epidemic." *Cages for Ukraine*, DEN [The Day], Apr. 14, 1999, at 4. Semen Hluzman, Director of the Ukrainian-U.S. Human Rights Bureau, who was interviewed in the same article, noted that "The problem is that Ukraine's penitentiary system corresponds to a country no longer in existence, the Soviet Union . . . [T]he situation has grown from bad to unbearably worse due to economic hardships. From what I know, some 3,000 inmates died of tuberculosis and [other diseases] last year." *Id.* The rise of new and untreatable forms of tuberculosis among Russian and Ukrainian prison populations has been well documented recently in many forums. See, e.g., *Alarm in West as Russia is Swept by Drug Resistant TB*, TIMES LONDON, Aug. 30, 1999, at 12. HIV disease is also becoming rampant.

Concerns about terrible prison conditions are also being voiced by prosecutors and prisons officials themselves. In the words of Oleksandr Tarasenko, the 37-year-old warden of a large penal colony in Cherkasy:

Sometimes I am not sure where I'll get the money to buy food for the prisoners the next day. Then, once in a while we have electric power or central heating cut off. Can you imagine a dark and cold prison camp with the alarm systems off? And full of cold, hungry and very angry prisoners?

Svyatoslav Rechynsky, *Keeping Order in the Zone*, UKRAINIAN, Feb. 1999, at 62. Prosecutors, too, are concerned about the situation. As one of Ukraine's leading prosecutors recently noted, when condemning current prison conditions, "Our job is to punish those who commit crimes, not destroy them." See Valentina Babkova, Deputy Chief Prosecutor, Kharkiv Oblast, Remarks at United Nations Day Conference on Human Rights in Ukraine, Kharkiv (Oct. 24, 1998).

86. An oblast is a "designation of administrative division" or a "region" or "district." MARCUS WHEELER, *THE OXFORD RUSSIAN-ENGLISH DICTIONARY* (1972).

signed promise not to depart, or was detained; there is a huge difference between these two preventive measures. Bail offers an option in between these two."⁸⁷

Enactment of the bail statute was facilitated by a then-existing quirk in Ukraine's laws. Until the adoption of Ukraine's new Constitution in June 1996,⁸⁸ the Supreme Court had the right of legislative initiative: the Supreme Court, acting on its own volition, could introduce legislation for consideration by the *Verkhovna Rada*, Ukraine's unicameral legislature.⁸⁹ Pursuant to this right, the Supreme Court drafted and introduced legislation to implement bail in the *Rada* in early 1996, just months before it lost its right to initiate legislation.⁹⁰ The "Law on Bail" was enacted as an amendment to the Ukrainian Criminal Procedure Code on November 20, 1996.⁹¹

III. THE BAIL STATUTE

Article 154-1 of the Criminal Procedure Code codifies the 1996 bail statute.⁹² It is relatively brief. It provides a definition of bail, and outlines in only general terms how the procedure will operate.⁹³ It leaves many questions unanswered.

The statute states the purpose of bail in broad terms: to ensure that the defendant remains at a known location during the pendency of the proceeding, and to ensure that the defendant appears as required before either the investigative service or the court. As the text of the statute specifies:

Bail consists of depositing money or other securities with the appropriate investigative service, or with the court, by a suspect, accused, defendant, or other physical person or entity, for the purpose

87. Remarks of Chief Judge Lydia Derkach, Ternopil Oblast Court, speaking to *On the Scales of Justice*, *supra* note 75 (Nov. 13, 1998).

88. The KONSTITUTSIA UKRAINI [Constitution of Ukraine] was adopted by vote of the *Verkhovna Rada* on June 28, 1996, five years after independence was declared. This replaced the Constitution of the Ukrainian Soviet Socialist Republic, which had remained in effect until that date.

89. See KONSTITUTSIA UKRAINSKOYI RADIANSKOYI SOCIALISTICHNOYI RESPUBLIKI [Constitution of the Ukrainian Soviet Socialist Republic] art. 103 (providing for the Supreme Court's right of legislative initiative); Zakon Ukrainskoyi Radianskoyi Socialistichnoyi Respubliki Pro Sudoustriy (Law on Judiciary of the Ukrainian Soviet Socialist Republic) (1981) (on file with author) art. 40 (also providing for the Supreme Court's right of legislative initiative). While the Soviet era Constitution was, of course, replaced in full by the 1996 adoption of the new Ukrainian Constitution, *see supra* note 88, the Soviet version of the Law on Judiciary continues in effect in Ukraine at the time of this writing (though draft versions of a new Law on the Judiciary have been circulated). Art. 40 of the existing law, dealing with the Court's right of legislative initiative, was, however, automatically repealed by the adoption of the new Constitution. Ironically, the reform oriented bail statute was one of the last opportunities for the Supreme Court to exercise this right.

90. *On the Scales of Justice*, *supra* note 75; Remarks of Judge Pilipchuk, *supra* note 59.

91. The text of the bail statute is incorporated into the Criminal Procedure Code at Article 154-1. Code of Criminal Procedure of Ukraine, art.154-1. The legislation also served to amend Article 149 of the Code, which lists the types of preventive measures available to the investigators, prosecutors and judges, by inserting the bail option. Code of Criminal Procedure of Ukraine, art. 149.

92. *See* Code of Criminal Procedure of Ukraine, art. 154-1.

93. *Id.*

of ensuring due conduct and fulfillment of the obligation not to leave the place of his permanent or temporary place of residence by the person with respect to whom these preventive measures [i.e., bail] has been applied, and to ensure his appearance on a summons before the investigative body or the court.⁹⁴

Both the investigative agencies (acting under prosecutorial supervision) and the courts have the authority to release a defendant on bail.⁹⁵ Consistent with existing statutory procedures, however, release on bail may be ordered by the prosecutor or investigator at the pretrial, or “investigative” stage of the proceedings. The court may direct release on bail only after the case has been referred to it by the prosecutor at the conclusion of the investigative stage.⁹⁶

The statute does not exclude any category of cases from those eligible for bail. Thus, in theory, bail is available to every defendant, regardless of the severity of the charges against him.⁹⁷ Nevertheless, the nature of the crime charged limits the discretion that the investigators and courts have to choose the amount of bail.⁹⁸ While they may “take into consideration the circumstances of the case,” they cannot set bail at less than a specified threshold amount, which varies with the gravity of the crime and the duration of the potential sentence.⁹⁹ Likewise, bail may not be less than the amount of damages claimed in any related civil suit.¹⁰⁰ There is no upper limit on the amount of bail that may be set.

94. *Id.* at part 1.

95. *Id.* See also Code of Criminal Procedure of Ukraine, arts. 148, 149.

96. See Code of Criminal Procedure of Ukraine, arts. 148–49, 232, 242.

97. Postanova Plenumu Verkhovnogo Sudu Ukraini, Pro Praktiku Zastosuvanya Sudami Zapobizhnogo Zakhodu u Viglyadi Zastavi [Resolution of the Plenum of the Supreme Court of Ukraine on the Practice of Implementing a Preventive Measure in the Form of Bail], Mar. 26, 1999, § 2, part 3 (on file with author) [hereinafter Plenum Resolution]. See also Hon. Vyacheslav Zhuk, Judge, Criminal Collegium, Supreme Court of Ukraine, Remarks at ABA/CBEELI Workshop on Bail Implementation, Yalta (July 2, 1999) [hereinafter Zhuk Remarks]. Compare discussion at *supra*, note 38 discussing Soviet restrictions on the use of pretrial release.

98. Code of Criminal Procedure of Ukraine, art. 154-1 (part 2).

99. *Id.* In cases of grave crimes which carry sentences of more than 10 years, bail must be set at a minimum of 1000 times the untaxed statutory minimum Ukrainian monthly income. *Id.* In cases of grave crimes which carry sentences of less than 10 years, or if the defendant has a previous criminal record, bail must be set at a minimum of 500 times the untaxed minimum monthly income. *Id.* Those crimes which are defined as grave (regardless of the duration of the sentence) are set forth in the Ukrainian Criminal Code, art. 7. In all other cases, the minimum is 50 times the minimum untaxed monthly income. Code of Criminal Procedure of Ukraine, art. 154-1 (part 2). The minimum untaxed monthly income in Ukraine is set by Presidential Decree. See Ukaz Presidenta Ukraini No. 1082 (Presidential Decree No. 1082) (Nov. 21, 1995) (on file with author). Since Oct. 1, 1995, the minimum untaxed monthly income in Ukraine, as set by law, has been 17 hryvna, or roughly \$4.50 at the National Bank rate as of September 16, 1999. *Id.* This means that the minimum amount of bail which may be set in a case involving a grave crime carrying a minimum sentence of more than 10 years is approximately \$4,500. To put this in perspective, the average monthly wage in Ukraine is approximately \$98. U.S. DEP'T OF COMMERCE, BUSINESS INFORMATION SERVICE FOR THE NEWLY INDEPENDENT STATES, UKRAINE—ECONOMIC AND TRADE OVERVIEW 2 (1997).

100. This seemingly innocuous insertion into the statute can actually end up setting vastly higher thresholds for the minimum bail amount in a given case than would otherwise be calculated by referenc-

Bail may be posted on behalf of defendant by a third party, referred to as a bailer.¹⁰¹ No particular class of persons is excluded from being a bailer, nor must the bailer meet any particular threshold requirements.¹⁰² The bailer must be advised of the crimes with which defendant is charged, and of the consequences of defendant's failure to fulfill his or her duties under the terms of the bail.¹⁰³ The bailer can be released from his obligations, but only if the bailer first causes the defendant to appear before the investigator or court (depending on the stage of the proceedings) so that a new preventive measure can be put in place.¹⁰⁴

The bail will be held by the investigative or judicial entity that set the bail.¹⁰⁵ This entity also is charged with explaining to the defendant or the bailer that the consequences of defendant's failure to comply with the terms of bail include forfeiture of the bail money.¹⁰⁶

Forfeiture of bail in the event a defendant violates his obligations can occur only with the permission of the entity that set bail (either investigative or judicial), *and* only after a hearing on the matter before the court.¹⁰⁷ This requirement represents a subtle, but extremely significant legal reform, as it gives the courts an unusual opportunity to exercise judicial oversight of conduct during the investigative stages of the proceeding. In other words, even in those instances where bail has been set by a prosecutor or an investigative entity, and is subsequently violated, neither the investigator nor the prosecutor can, on their own motion or initiative cause the bail to be forfeited. Rather, the investigator or prosecutor must petition the court on the matter, and the court will then conduct a hearing. This seemingly minor reform is anything but minor in a system where prosecutors routinely have the power, on their own motion, to issue arrest warrants, seize evidence, subpoena witnesses, set lengthy pretrial detention terms, and generally conduct unfettered and largely unreviewed pretrial proceedings.¹⁰⁸ The intro-

ing the potential sentence. Further, there is no statutory definition of how to calculate the amount of the civil suit, meaning that investigators and courts often take the amounts claimed by victims—which may be greatly inflated—at face value. Likewise, investigators themselves may often come up with a random, and extraordinarily inflated number for the potential civil damages. In such cases, it is up to the defendant to challenge the damage calculations, and to provide evidence in support of the lower numbers—all as a preliminary step to obtaining release on bail. Podipaliy Interview, *supra* note 63.

101. Code of Criminal Procedure of Ukraine, art. 154-1 (part 3).

102. See Petro Pilipchuk, *Pitannya Zastosuvannya v Slidichiy ta Sudoviy Praktitsi Zapobizhnogo Zakhodu u Vglyadi Zastavi* [Implementation of Bail in Investigation and Court Practices], 9 VISNIK VERKHOVNOGO SUDU UKRAINI [J. SUPREME COURT UKRAINE] 48, 53 (1998) [hereinafter Pilipchuk, *Bail Implementation*].

103. Code of Criminal Procedure of Ukraine, art. 154-1 (part 3). The bailer's obligation is only a financial one; he or she is not affirmatively responsible under the statute to ensure a defendant's good behavior or conduct, nor function in the role of "custodian." See Pilipchuk, *Bail Implementation*, *supra* note 102. The bailer simply suffers the financial consequences in the event defendant breaches the conditions of bail. *Id.*

104. See Pilipchuk, *Bail Implementation*, *supra* note 102, at part 5.

105. See *id.* at part 1.

106. See *id.* at part 3.

107. See *id.* at parts 4, 6.

108. See COMMENTARY, *supra* note 75, at 216–17.

duction of this kind of language and procedure into the statute clearly reflects the growing sensitivity on the part of the drafters to the notion of building a stronger and more independent judiciary in Ukraine.¹⁰⁹

In theory, bail is returned to the defendant at the conclusion of the case, if the conditions of bail were complied with and there is no ground for forfeiture.¹¹⁰ However, the final paragraph of the bail statute, which governs "return of bail," represents a wrinkle with the potential to undermine greatly the use and effectiveness of bail. Unlike forfeiture of bail for a defendant who violates the terms and conditions of bail, where "bail made by a . . . defendant may be forfeited and applied by the court toward the execution of the judgment,"¹¹¹ in this case, the court may decide to take the bail to satisfy a "judgment" or "penalties" even if the defendant has complied with all of the court's and the prosecutor's directives and has stayed out of trouble for the duration of the proceedings.¹¹²

However, there is one loophole to this otherwise Draconian provision. Specifically, the provision calling for application of bail towards a judgment or penalties does not apply to bail posted by third parties.¹¹³ The effect of this provision may be that most bail posted in Ukrainian criminal proceedings will be posted by third parties rather than directly by defendants,¹¹⁴ in order to avoid such confiscation by the state at the close of the proceedings.¹¹⁵

109. See KONSTITUTSIA UKRAINI [Constitution of Ukraine] arts. 6, 126. Efforts to implement reforms of this nature, which strengthen the power of the judiciary, are a clearly articulated goal of the Supreme Court of Ukraine. See, e.g., Stefanuk Remarks, *supra* note 77.

110. See Code of Criminal Procedure of Ukraine, art. 154-1 (part. 7). See also Pilipchuk, *Bail Implementation*, *supra* note 102.

111. Code of Criminal Procedure of Ukraine, art. 154-1 (part. 7).

112. It should be noted that bail which is forfeited because of a breach by defendant of his obligations goes to the public revenue, while bail which is forfeited by the court upon conviction of defendant goes to satisfy criminal penalties levied against defendant, or any civil judgment against him based on his criminal activities. The reasoning behind this somewhat contradictory distinction was explained to the author by one of the members of the Supreme Court's Working Group on Bail: When a defendant violates his obligations to the state, by not complying with the conditions of bail, the money reverts to the state; when a defendant honors his obligations to the state, but is found guilty (or liable) for the underlying crimes charged, the money goes to satisfy the judgments or penalties against him arising as a result of such underlying criminal behavior. In the latter instance, there is a strong possibility that the money may actually be directed to the victims rather than the state, but public policies are still served. Interview with Professor Valeriy Podipaliy, Criminal Law Faculty, Kiev State University, in Kiev, Ukraine (June 30, 1999) [hereinafter Podipaliy Interview, June 30, 1999]. Such a result is consistent with the exceptionally strong policy of recognizing victims' rights and promoting victim compensation which existed in the Soviet Union and which continues to exist in modern Ukraine. See Boylan, *supra* note 20, at 103, 110.

113. Code of Criminal Procedure of Ukraine, art. 154-1 (part. 7).

114. Preliminary experience bares this out. Of over one hundred bail cases surveyed by the Ukrainian Supreme Court, in only ten was bail posted by the defendants themselves. Pilipchuk, *Bail Implementation*, *supra* note 102.

115. Art. 154-1 (part 7) is ambiguous as drafted, in theory allowing for the possible interpretation that it applies only to those instances in which the bail has been forfeited because of violation by defendant of the bail obligations (discussed in part 6 of the statute), and allows the courts, in those instances only, to apply the forfeited bail money towards the execution of judgment or towards penalties, upon conviction. Such an interpretation, however, has not been favored by the Supreme Court, the statute's drafters, or Ukrainian experts. See discussion, *infra* accompanying notes 221-231. See also Valeriy Podipaliy, Criminal Law Faculty, Kiev State University, Remarks at ABA/CEELI Workshop on Bail Imple-

Attention should also be called to the use of the term "judgment" in this final statutory provision, which provides that bail may be forfeited and applied "toward the execution of judgment."¹¹⁶ This language suggests that bail also may be used by the courts to satisfy *civil* claims against a defendant that arose out of the crimes charged as well as any criminal penalties, regardless of whether there was a conviction.¹¹⁷ Indeed, the Supreme Court has adopted such an interpretation.¹¹⁸ This final distinction may be more important in theory than in practice, because virtually all trials end in conviction; as in the Soviet era, acquittals in Ukrainian courts are rare.¹¹⁹

Many questions are left unanswered by the bail statute—a particular problem in a civil code society such as Ukraine, where the statute itself is the primary source of guidance in application of the law. For example, in addition to money, just what kind of "securities" are acceptable as bail, and how should their value be determined? How should money or property posted as bail be secured, and by whom? What are a third party bailer's full responsibilities with regard to the defendant? The courts of Ukraine have only just begun to grapple with such issues, and it will be some time before the answers are clear and fully articulated.

IV. COMPARISON OF THE UKRAINIAN BAIL PROCEDURES WITH THE WESTERN MODELS

The new Ukrainian bail statute, even when read in the context of the other relevant provisions of the Ukrainian Criminal Procedure Code, incorporates only a portion of the common Western notions about bail and pretrial detention. As is so often the case when Western concepts are grafted piecemeal onto the Codes of the NIS countries, significant portions of the Western model were garbled or simply lost in the process.

A. *Western Concepts of Bail*

While specific procedures vary from country to country, certain basic principles governing the use of bail and pretrial detention have come to be widely accepted in the West, in both the civil and common law systems.¹²⁰ First, defendants in criminal proceedings generally are entitled to a prompt, often automatic, appearance before a magistrate or judge following their arrest, who will review the propriety of the arrest, and decide whether pretrial detention or imposition of some form of bail is appropriate.¹²¹ Second,

mentation, Yalta (July 2, 1999) [hereinafter Podipaliy Remarks].

116. Podipaliy Remarks, *supra* note 115.

117. *See, e.g.*, Zhuk Remarks, *supra* note 97.

118. *See id.*

119. *See, e.g.*, Thamen, *supra* note 39, at 67.

120. As noted in MERRYMAN, *supra* note 20, at 124, "substantive criminal law in Western, capitalist civil law countries does not differ greatly from that of common law countries."

121. For example, in Germany, arrested defendants must be brought before a magistrate who will decide on the issue of bail, or some alternative treatment of defendant pending trial, by the end of the day

there is normally a strong presumption in favor of pretrial release.¹²² Third, this presumption will normally be overcome only where a showing is made to the court that specific conditions warrant detention: for example, if the defendant poses a risk of flight, a risk to the conduct of the investigation or proceeding, or a risk of further criminal activity.¹²³ Fourth, the courts usually have a range of alternatives to pretrial detention available to them, which affords them flexibility in determining what sort of bail or other pretrial restriction, short of detention, is appropriate to the circumstances.¹²⁴ Finally, there is generally a belief that pretrial restrictions should be proportional to the particular case and the charges made against the defendant.¹²⁵

These shared Western principles are the outgrowth of diverse historical traditions, rather than the reflection of any coordinated attempts at drafting a universal model on bail and pretrial detention.¹²⁶ However, subsequent to their development and implementation on individual national levels, such principles have become integrated into various international agreements broadly guaranteeing basic human rights. For example, Article 5 of the European Convention on Human Rights¹²⁷ prohibits pretrial detention except where there is "reasonable suspicion" that such individual has "committed an offence or when it is reasonably considered necessary to prevent his

following the arrest. See Richard S. Frase & Thomas Wiegend, *German Criminal Justice As A Guide to American Law Reform: Similar Problems, Better Solutions*, 18 B.C. INT'L & COMP. L. REV. 317, 327 (1995) (citing Deutsche Strafprozessordnung [German Code of Criminal Procedure] [StPo] §§ 112, 128(1)). In the United States, the entitlement to a "prompt hearing" before a magistrate is deeply imbedded in the common law, see, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 114–16 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 59–62 (1991) (Scalia, J. dissenting). The trial court's responsibility to determine what sort of restrictions, if any, will be placed on defendant pending trial is set out at 18 U.S.C. § 3141 (1994). Likewise, in England, the defendant will be brought before a magistrate who is authorized to make a decision as to bail. See A.T.H. Smith, *England and Wales, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY* 73, 91 (Christina Van Den Wyngaert ed., 1993). The court's specific role and obligations in determining whether bail is appropriate for a given defendant are set, under English law, by statute. See The Bail Act (1976) (Eng.); Kurt Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practice in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L.R. 399, 415–16 (1996). In France, these protections are set out in the Code de procédure pénale [French Code of Criminal Procedure] [C. PR. PÉN.] arts. 137–38. For practices throughout the European Union, see generally CRIMINAL PROCEDURE IN THE EUROPEAN COMMUNITY, *supra*.

122. See Frase & Wiegend, *supra* note 121, at 328, citing StPo 112(1); 18 U.S.C. § 3142 (1994); Metzmeier, *supra* note 121, citing the Bail Act, ch. 44, § 4(1) (1976) (Eng.); C. PR. PÉN. art. 137.

123. See Frase & Wiegend, *supra* note 121, citing StPo § 112(1); 18 U.S.C. § 3142(e),(f)(1) and (f)(2); Metzmeier, *supra* note 121, citing the Bail Act, ch. 23, sched. I, pt. I, para. 2 (1976) (Eng.); C. PR. PÉN. art. 144.

124. See Frase & Wiegend, *supra* note 121, citing StPo § 112(1),(2); 18 U.S.C. § 3142(c) (1994); C. PR. PÉN. art. 138.

125. See 18 U.S.C. § 3142(g) (1994); Metzmeier, *supra* note 121, citing the Bail Act, ch. 23, sched. I, pt. I, para. 9 (1976) (Eng.).

126. For example, the idea that courts should have a range of alternatives to pretrial detention (including, particularly, non-monetary conditions) is a relatively modern development. In the United States, the ability to impose non-monetary conditions in connection with pretrial release was not formally established in the federal courts until passage of the Bail Reform Act of 1966. See Bruce D. Pringle, *Bail and Detention in Federal Criminal Proceedings*, 22 COLO. LAW. 913(1993).

127. See European Convention on Human Rights, *supra* note 13.

committing an offense or fleeing after having done so."¹²⁸ Article 5 additionally provides that an arrested or detained person "shall be brought promptly before a judge"¹²⁹ and is entitled to have the "lawfulness of his detention . . . decided speedily by a court."¹³⁰ Finally, Article 5 provides such judicial officer with the discretion to condition release on guarantees to appear for trial.¹³¹

If anything, the standards provided by Article 5 of the European Convention on Human Rights fall short of the common Western norm, and of the specific protections provided in many Western nations. First, Article 5, as written, would authorize pretrial detention solely upon a finding that there was "reasonable suspicion" that a defendant had committed the offense charged.¹³² By contrast, most Western nations do not permit detention solely on a reasonable suspicion that the crime was committed. Some additional finding is required that there was either a risk of flight or a danger to the community before authorizing sustained pretrial detention.¹³³ Additionally, the European Convention falls short of western norms, because Article 5, as drafted, contains no explicit requirement that there be proportionality between the pretrial restrictions selected and the crime alleged.¹³⁴

These drafting deficiencies in the European Convention largely have been remedied through decisions of the European Court of Human Rights, which is charged with interpreting and applying the Convention to its signatory states.¹³⁵ Though, as noted above, the European Convention would seem to allow detention based only on "reasonable suspicion" that a crime has been committed, the Court has found such an interpretation unacceptable in a succession of cases.¹³⁶ Rather, the Court has interpreted the language and intent of Article 5 in broader terms, as requiring governments to articulate "the existence of a genuine requirement of public interest justifying" their

128. European Convention on Human Rights, *supra* note 13, art. 5, para. 1(c). *See also* FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2d ed. 1996).

129. European Convention on Human Rights, *supra* note 13, art. 5, para. 3. *See also* JACOBS & WHITE, *supra* note 128, at 94.

130. European Convention on Human Rights, *supra* note 13, art. 5, para. 4; *see, e.g.*, JACOBS AND WHITE, *supra* note 128, at 82, 84–85.

131. European Convention on Human Rights, *supra* note 13, art. 5, para. 3.

132. Article 5, para. 1(c) of the European Convention on Human Rights specifically uses the unfortunate connector "or" when listing the circumstances when pretrial detention may be used, meaning that the paragraph may be read as allowing pretrial detention *either* (1) when there is reasonable suspicion that defendant has committed an offense, (2) there is reasonable suspicion that the detainee *might* in the future commit such crime, *or* (3) when it is reasonably considered necessary to prevent the flight of such person. *See* JACOBS & WHITE, *supra* note 128, at 90–91 ("[A] literal interpretation of Article 5(1)(c) and Article 5(3) would seem to authorize indefinite detention on remand merely on the ground that justified initial arrest, that is, in the usual case, suspicion of having committed an offense.").

133. *See supra* note 122.

134. *See supra* note 123.

135. *See, e.g.*, Jonathan L. Black-Branch, *Observing and Enforcing Human Rights Under the Council of Europe: The Creation of a Permanent European Court of Human Rights*, 3 *BUFF. J. INT'L L.* 1 (1996); Gregory P. Propes, *Wherefore Art Thou Difference? The European Court of Human Rights, Military Discipline and Freedom of Expression*, 19 *HOUS. J. INT'L L.* 281, 283–84 (1996).

136. *See e.g.*, JACOBS & WHITE, *supra* note 128, at 91.

pretrial detention decisions.¹³⁷ European governments have repeatedly been called to task by the Court for failure to state sufficient public interests.¹³⁸ These decisions suggest that a reasonable suspicion of a defendant's having committed an offense is insufficient for imprisonment. It also must be shown that a defendant poses a genuine risk to the community or a genuine risk of flight which cannot be met through bail or other guarantees and which warrants the pretrial confinement.¹³⁹

Likewise, though there is no "proportionality" requirement in the European Convention, the Court looks closely at the specific facts and circumstances of a case, the personal characteristics of the detainee, and the nature of the offenses charged.¹⁴⁰ Thus, in practice, despite apparent deficiencies in the text of the European Convention, the basic Western notions governing pretrial release are perhaps even more likely to be enforced by the European Court than its member states.¹⁴¹ Ukraine's tenuous membership in the Council of Europe¹⁴² and its expressed desire to conform to the terms of the European Convention make this rigorous enforcement all the more important.¹⁴³

B. Ukrainian Inconsistencies with the Western Models

With the enactment of the 1996 bail amendments, Ukrainian law, at least on paper, has taken a step closer to meeting the Western norms. However, the relevant Ukrainian provisions still fall far short of satisfying these norms, and arguably still fail to meet the standards set by Article 5 of the European Convention on Human Rights. In practice, the gap between Ukraine and the West is even wider than it appears on paper.

The single most striking difference between the Ukrainian and Western systems remains the role of the prosecutor in the initial determination of whether the defendant will remain in pretrial custody or be freed—with or without conditions. In Ukraine, this decision remains completely within the province of the investigator and prosecutor.¹⁴⁴ Any judicial review at this

137. Suzanne Galand-Carval, *The European Court of Human Rights Declares War on Unreasonable Delays*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 109, 119 (1996).

138. *Id.*

139. *Id.* at 118–19. See also JACOBS & WHITE, *supra* note 128, at 93 ("other grounds which have been accepted by the [European Court on Human Rights] as [a] principle justifying [pretrial] detention are the risk of suppression of evidence and collusion").

140. See Galand-Caval, *supra*, note 137, at 118–19. See also JACOBS & WHITE, *supra* note 128, at 93–94 ("The question in each case is: having regard to the person concerned, their means, and their relation to the sureties, if any, is there a sufficient deterrent to dispel any inclination on their part to abscond.")

141. See Galand-Caval, *supra* note 137, at 118–19.

142. See *supra* note 9.

143. *Id.*

144. It should be noted that this issue has been recognized in Ukraine, and change has been mandated, if not yet effected. Specifically, Article 29 of the Ukrainian Constitution provides that no one can be arrested or detained without a decision of a court and compliance with the law. See *supra* note 88. Clearly, this constitutional provision has not been enforced, and the existing laws have not yet been brought into compliance with it (a situation not unique to this particular point; as noted at the outset of this Article, actual implementation of reforms in Ukraine persistently lags well behind the intent to do

pretrial stage is limited to ascertaining whether the underlying arrest complied with procedural requirements.¹⁴⁵ Such review does not directly address either the propriety of the prosecutor's decision with regard to continued detention, or the possibility of substituting an alternative form of preventive measure to the defendant pending trial.¹⁴⁶ Further, even such limited pretrial review of the arrest is by no means automatic, but instead depends on the initiative of the defendant.¹⁴⁷ By contrast, in the West, the defendant is entitled to prompt judicial review of the detention decision.¹⁴⁸ While the prosecutor may make recommendations for alternative preventive measures, the decision as to the continuation and/or form of detention remains with an independent judicial officer.¹⁴⁹ On this fundamental point, the European Convention is quite clear: there "shall" be prompt judicial review.¹⁵⁰

The adoption of the 1996 Ukrainian bail law also fails to create a clear presumption in favor of pretrial release. While the mere fact that this law has now been added to the Criminal Procedure Code implicitly encourages the use of bail, the bail law lacks any clear direction as to how or when it should be used. Further, Article 148 of the Criminal Procedure Code, which governs the use of preventive measures indicates a reverse preference. Only absent any reasons for application of a preventive measure will a defendant be released solely on a "signed promise to return."¹⁵¹ The presumption is that a preventive measure will be applied.¹⁵²

so). In fairness, however, it must be additionally noted that the "Transitional Provisions" of the Constitution, set forth at Chapter 15, Section 13 thereof, mandate that "the existing procedure for arrest, detention, and house search will remain in effect for a five year term after this Constitution comes into force." As the Constitution was adopted in 1996, such procedures arguably may remain in effect only until 2001. In theory, Ukraine has less than two years left in which to adopt further sweeping changes to its criminal procedure laws in the area of arrest and detention. Alexander Volkov, Judge, Supreme Court of Ukraine, Remarks at ABA/CEELI Workshop on Bail Implementation, Yalta (July 2, 1999). Experience shows, however, that mandates in Ukraine, even constitutional ones, are flexible. It is perhaps as likely that the Constitution will yet be changed as that the laws will. Time will tell.

145. Code of Criminal Procedure of Ukraine, art. 236-3, *see supra* note 42.

146. Code of Criminal Procedure of Ukraine, art. 236-3. *See also supra* notes 43-45.

147. Code of Criminal Procedure of Ukraine, art. 236-3.

148. *See* discussion at *supra* notes 121-125.

149. *See* European Convention on Human Rights, *supra* note 13, art. 5, para. 3.

150. *Id.*

151. Code of Criminal Procedure of Ukraine, art. 148. This provision of the Ukrainian Criminal Procedure Code, which lays out the preventive measure options available to a prosecutor, begins with the direction that if there is any reason to apply a preventive measure to a defendant, the investigator or the prosecutor should do so. Supreme Court Judge Pilipchuk (a drafter of the bail law) has suggested, somewhat critically, that the law intends such a presumption in favor of use of a preventive measure, and is written in such a way that it subordinates the individual defendant's interests in remaining free pending trial to the state's overriding interest in successfully prosecuting the case. Petro Pilipchuk, Introduction, in *A Handbook of Preventive Measures* (July 1999) (unpublished manuscript on file with ABA/CEELI office, Kiev, Ukraine) [hereinafter Pilipchuk, Introduction]. It is important to clarify that the "signed promise to return," which defendant makes in those cases where there is no reason to apply a preventive measure is to be distinguished from "the signed promise not to depart" which is itself actually a preventive measure, albeit the mildest form of one. *See* Code of Criminal Procedure of Ukraine, art. 148 (part 3). The statute further clarifies that if there are no reasons to apply a preventive measure, then a defendant is simply to sign a promise to return and to inform the court of any change or residence.

152. Indeed, this was precisely how the Soviet Union's high courts had long directed that the statute

Third, the Ukrainian bail law fails to provide the prosecution or the courts with the genuine flexibility available to their Western counterparts in crafting pretrial measures. Unlike the American system, for example, a defendant's release cannot be conditioned on meeting non-financial obligations, such as continued employment, enrollment in a drug treatment program, or remaining at a personal residence except as authorized (home arrest).¹⁵³ Bail can be conditioned only on financial obligations, and even then a prosecutor or judge must abide by statutory minimums, regardless of the particular circumstances of the case.¹⁵⁴ The only permissible deviation allowed to the individual prosecutor or judge is to err on the side of caution by increasing the bail amount above the statutory minimum. While at first glance, the minimums do not appear large (about 850 hryvna, or \$225, in the case of "non-grave" crimes),¹⁵⁵ judges complain that for many defendants, this amount is far beyond their means.¹⁵⁶

At the same time, the bail statute introduces many important new concepts and many of the basic elements of bail to Ukraine. For the first time, prosecutors and judges are provided with an option between simple release or incarceration. In effect, they are provided with some of the flexibility implicit in Article 5 of the European Convention, which specifies that "release may be conditioned by guarantees to appear for trial."¹⁵⁷ Within certain bounds,¹⁵⁸ they are also given some flexibility to condition the release on the particular facts and circumstances of the case.

Further, an analysis of reform in the post-Soviet context requires attention to seemingly small and subtle changes. Two seemingly minor provisions of the statute, the inclusion of all cases in the category of those eligible for bail and the court's power to review bail, represent significant departures from traditional Soviet legal constructs by the statute's reform-minded framers¹⁵⁹

be interpreted. As one commentator has noted, Soviet courts (and their successors) have long adhered to rulings from the early 1960s that "required [them] to order detention when there was any doubt at all about the future conduct of the accused." Fogelsong, *supra* note 14, at 555. "In contrast to most American states where there is a statutory bias in favor of pretrial release . . . pretrial detention [is effectively] the rule for a broad range of offenses." *Id.*

153. Compare 18 U.S.C. § 3142(c) governing "release on conditions." While the American statute enumerates thirteen separate kinds of conditions which may be applied by a court in deciding the specific terms pursuant to which a defendant will be released, it ultimately leaves the matter of deciding what kind of release is appropriate completely at the court's control, concluding that the court may set "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B)(xiv) (1994).

154. Code of Criminal Procedure of Ukraine, art. 154-1 (part 2).

155. *Id.* (the minimum bail for non grave crimes is 50 times the minimum monthly untaxed income, presently around 17 hryvna). See also *supra* note 78.

156. Olga Shapovalova, Judge, Supreme Court of Crimea, Remarks at ABA/CEELI Workshop on Bail Implementation, Yalta (July 2, 1999) [hereinafter Shapovalova Remarks]. In Kiev, a schoolteacher makes as little as 75 hryvna (about \$20) a month; in rural Ukraine, many people function in what has effectively become a cashless society, subsisting by growing their own food, and by bartering for goods and services.

157. See European Convention on Human Rights, *supra* note 13, art. 5, para. 3.

158. See *supra* note 58.

159. See *supra* note 77.

and attempts to introduce novel concepts into Ukrainian law. First, the fact that no category of cases is automatically excluded from those eligible for bail, and the accompanying promotion of a case-by-case approach, directly contradicts long-standing Soviet-era directives that pretrial detention is the only appropriate option for defendants charged with the most serious crimes.¹⁶⁰ Perhaps for this reason, the provision has already come under attack from conservative elements within the legislature, and may become the subject of efforts to repeal it.¹⁶¹ Second, the power given to the courts under the statute to review any forfeiture of bail that arises from a defendant's breach of the terms and conditions of bail represents a major change. The courts hold this power even if the breach occurred during the so-called "investigative" stage of the case, during which all aspects of the case otherwise remain completely within the control of the prosecutor,¹⁶² and even if the prosecutor opposes the forfeiture. This provision is one of the rare instances since Ukrainian independence in which the Soviet-era code has been amended to give the courts authority to review prosecutorial decisions.¹⁶³ The inclusion of language providing the courts with this review power clearly reflects the broader agenda of a group of reform-minded individuals within the Ukrainian legal community who are committed to expanding judicial review over prosecutorial decisions at the pretrial stage.

V. IMPLEMENTATION OF THE BAIL STATUTE: DEVELOPMENTS

Despite the enactment of the law on bail in 1996, to date the statute has been little used by the prosecutors and the courts.¹⁶⁴ For example, in 1997, the first full year for which statistics are available, bail was used in only 110 cases of the approximately 230,000 criminal cases heard in Ukraine.¹⁶⁵

Further, the investigators' and the courts' use of the statute has been haphazard and arbitrary. This misuse is not surprising, given that the statute involves the introduction of an essentially foreign concept without any real effort to explain or educate practitioners about its use.¹⁶⁶ No comprehensive

160. See *supra* note 30.

161. See Zhuk Remarks, *supra* note 97. See also Pilipchuk, *Bail Implementation*, *supra* note 102.

162. See Code of Criminal Procedure of Ukraine, arts. 106 (part 3) and 115; *supra* note 46.

163. A similar 1992 amendment provided the courts with the power to review the propriety of arrests, upon petition by defendant, see *supra* notes 43-45; see also Code of Criminal Procedure of Ukraine, art. 236-3.

164. See U.S. DEP'T OF STATE, *supra* note 41, at 1365 ("The 1996 Amendment to the Criminal Procedures Code provides for bail, but to date it rarely has been used.").

165. *On the Scales of Justice*, *supra* note 75 (Hon. Petro Pilipchuk, Judge, Supreme Court of Ukraine, citing figures collected and maintained by the Ministry of Justice). According to Judge Pilipchuk, "[b]ail was used in 16 cases in Kiev in 1997, in nine cases in Ternopil and Chernivtsi, in eight cases in Dnipropetrovsk . . . and in Lviv . . . four." *Id.* As of 1998, the courts of the Autonomous Republic of Crimea, with a population of 2.5 million, had used bail in only six cases. Shapovalova Remarks, *supra* note 156.

166. It is not hard to understand why bail was absent from the socialist legal codes—the effectiveness

formal programs exist in Ukraine to educate members of the legal community in new developments in the law. Indeed, in a country where the courts sometimes lack such basic necessities as pens and paper, and where the payment of judicial salaries often lags four to five months behind, regular financing for continuing legal education programs is simply not available.¹⁶⁷ Nor does the statute itself include a directive that a defendant be informed of the availability of a bail alternative.¹⁶⁸ The fact that the statute is currently used at all has much to do with the efforts of a small number of innovative legal thinkers, particularly among the *advocats*, or private bar,¹⁶⁹ who have pushed to implement the bail provisions, often on a case-by-case basis.¹⁷⁰

Under the best of circumstances, Ukrainian prosecutors and judges have the hard copy texts of the statutes, the relevant commentaries, and institutional directives available to them. They do not have access of any sort to case law or case digests, as these simply do not exist, and there is no mechanism for, or practice of, reporting decisions. Nor can they realistically be expected to have any access to electronic or other databases. Dissemination

of bail, in its simplest form, relies on the incentive of the defendant to preserve private capital. When considered in these terms, the very concept of bail is at odds with socialist ideology, and would have had no place in a truly socialist legal system.

167. The numerous foreign donor programs at work there fill some of the gaps in money for training in Ukraine. For example, since 1999, ABA/CEELI's Criminal Law Program in Ukraine has organized and financed a series of one day workshops on bail reform, with particular emphasis on the innovations brought by the new statute, which are held at locations throughout the country. ABA/CEELI has also financed and distributed written and video materials on bail. Additionally, some leading Ukrainian judges and advocates have worked tirelessly to promote the new law, speaking and writing about it at every opportunity. Of particular note are the contributions of Supreme Court Judge Petro Pilipchuk, one of the statute's drafters, Judge Bohdan Poshva of the Ternopil Oblast Court, and Professor Valeriy Podipaliy of the Criminal Law Faculty of Kiev State University.

168. Podipaliy Interview, June 30, 1999, *supra* note 112.

169. The increasingly independent status of the private bar is an important factor in the implementation of bail reforms, for the simple reason that vigorous defense counsel are more inclined to aggressively exploit all available legal options on behalf of their clients. During the Soviet era, defense counsel, or *advocaty*, would have worked for a Collegium of Advocats, which was, in effect, a state run law office. Fees for legal advice and assistance were set by the Collegium (with appropriate government sanction) at levels that were affordable to the average Soviet citizen. Counsel's income came from these fees and from a regular salary received from the Collegium. Like everyone else in the Soviet Union, advocates were effectively state employees. *See, e.g.,* RAND, *supra* note 7, at 9–17. That system is now largely history. While the Collegiums still exist in theory (and still have a role in setting qualifications for advocates, and otherwise speaking for the profession), the practice of law is now closer to the Western model. Each lawyer is pretty much responsible for his own costs and overhead, and is free to take only the cases and clients he or she wants. Some lawyers still practice out of the Collegium offices, where they rent space, much like independent contractors, while others have begun to form completely private firms of a sort that would look quite familiar to an American lawyer. Podipaliy Interview, *supra* note 63; Interview with Sergei Osika, Director, "Prima" Law Firm, in Donetsk, Ukraine (Oct. 15, 1998).

170. While the initiative to grant release on bail rests with the investigator, prosecutor or court, "in reality the question of granting bail is raised only by a suspect, accused, defendant, his/her kin, or defense counsel." Pilipchuk, *Bail Implementation*, *supra* note 102. A number of private *advocats* are now exploring the possibility of creating bail bond firms, or some other association of bailers, to facilitate greater use of bail, especially among clients who might not have ready access to large amounts of cash. *See* Podipaliy Remarks, *supra* note 115.

of new information is slow and cumbersome.¹⁷¹ Training budgets are minimal, and as reforms begin to accelerate, competition over how these minimal training resources are to be used intensifies. The initial efforts at implementation of the bail statute are illustrative of the overwhelming task that Ukraine and other post-Soviet states have set for themselves—massive overhauls of their legal systems and institutions under nineteenth century conditions. The spotty and ineffectual implementation record of this one-page statute does not bode well for the proposed implementation of entirely new codes like the Criminal Procedure Code.

A. Application of the Statute in Practice

It is not surprising that investigators, prosecutors and courts, to date, have a record of infrequent and inconsistent application of the new law, as they operate for the most part with only the text of the statute itself. Even within the same oblast, practices vary from judge to judge, and from investigator to investigator. Some general observations may, however, be gleaned from the early usage of the statute. First, many investigators and judges continue to labor under basic misapprehensions as to the nature of bail or the place of bail in the existing system of preventive measures applicable to defendants pending trial.¹⁷² Second, there is a general failure on the part of investigators and judges to follow certain of the statutory requirements, for example, as to minimum bail amounts.¹⁷³ Third, investigators and judges often do not adequately explain to defendants or to their bailers their obligations and risks.¹⁷⁴ Fourth, both investigators and courts tend to be extremely sloppy about the record keeping related to the taking of bail.¹⁷⁵ Finally, perhaps reflecting their historically second class status in the criminal justice system, judges appear far less likely than prosecutors to use bail. They demonstrate a general unwillingness to alter the preventive measure ordered by the prosecutor.¹⁷⁶ Indeed, in only one of the cases studied did the court im-

171. In point of fact, there is little current legal publishing—or book publishing at all—going on in Ukraine today. See Olga Nedohibchenko, *Publish . . . And Perish: The Domestic Book Business*, EASTERN ECONOMIST, May 10, 1999, at 13. What was once a thriving industry has been devastated since independence by a variety of economic factors; today “the publishing sector is working at only 10–15% of 1990–1991 capacity.” *Id.* The lack of any significant domestic legal publishing industry means that practitioners must often rely on increasingly out of date materials.

172. See discussion at notes 179–189.

173. See discussion at notes 190–194.

174. See discussion at notes 195–204.

175. See discussion at notes 205–209.

176. Todd Fogelson noted a similar reluctance on the part of Russian judges to use a 1992 law allowing them to review the legality of arrests and pretrial detention of suspects, for the first time in Russian history. He concluded that this reluctance to use their newfound authority stemmed from fear of the procuracy and investigators, who sometimes used intimidation (in some cases physical), a hesitance to take responsibility for releasing potentially dangerous defendants, and basic “misgivings about their roles as custodians of pre-trial justice.” Fogelson, *supra* note 14, at 543, 578. As Fogelson suggests, it may take time for judges brought up under the Soviet system to adjust to new roles.

plement bail in the first instance.¹⁷⁷ Each of these problems is discussed in detail below.¹⁷⁸

1. Misunderstanding the Concept of Bail

Some prosecutors, investigators, and judges seem not to have grasped the basic purpose of bail or the statute's appropriate use. One common misapprehension is that bail is yet another strange, imported capitalist tool that allows wealthy defendants to buy their way out of pretrial confinement.¹⁷⁹ For example, one investigator was so suspicious that a defendant's anxious father could raise the \$10,000 bail amount¹⁸⁰ overnight by going to friends and family that the investigator revoked bail and remanded the unfortunate defendant to custody.¹⁸¹ There are equally troubling anecdotal reports of investigators who accepted the posting of large sums of money by young acquaintances of a defendant without any inquiry into the source of the money or the (clearly ambiguous) nature of the relationship of the bailer to the defendant.¹⁸²

177. See Podipaliy, *Ukrainian Legislation on Bail*, *supra* note 64, at 4–5.

178. A note on methodology is warranted. As judicial decisions in Ukraine are not collected or otherwise digested or published, there is no easy or consistent way to obtain case information. Indeed, the only record of a case is generally the actual case file, which is maintained in the custody of the relevant court. Such files are not normally open to the inspection of the public or non-parties. Access to such files without the cooperation of the relevant court would range from difficult to impossible. For this reason, the cases examined for this Article are from oblasts in which the author had established contacts with the courts. With the assistance of ABA/CEELI staff attorney, Vadim Galaychuk, and the judges of the relevant oblast courts, the author was able to review bail files from the Ternopil, Chernivtsi and Kharkiv oblast courts. These oblasts are geographically diverse, lying, respectively, in western, southwestern, and eastern Ukraine. The case sample is not meant to be a comprehensive survey of the bail cases handled by Ukrainian courts to date. However, the repetition of certain kinds of problems from one oblast to the next does indicate that the samples tapped into some common and recurring issues. Case information obtained by the author is identified herein by the name of the oblast and a Roman numeral (e.g., TERNOPIL II), and is maintained on file with the ABA/CEELI office in Kiev. Additional case synopses for the Kiev oblast were provided by Professor Valeriy Podipaliy of the Criminal Law Faculty at Kiev State University, and are based both on his own handling of such cases in the capacity of defense counsel, and on his own independent research in this area. Such cases are also designated by the name of the oblast (in this case, KIEV). Synopsis of the cases are included in Professor Podipaliy's unpublished article, *Implementation of Ukrainian Legislation on Bail (1999)*, which was widely distributed throughout Ukraine in photocopied form by ABA/CEELI, *see supra* note 64. A copy of the article is maintained on file at the ABA/CEELI office in Ukraine. Finally, the Supreme Court of Ukraine has, itself, collected information from the oblast courts on use of the bail statute, including in some cases, detailed factual synopses about the case. Judges on the Supreme Court have used the case information collected by the Court in both written and oral presentations made on the subject of bail implementation. *See, e.g.,* Pilipchuk, *Bail Implementation*, *supra* note 102.

179. This misconception—that bail is a way to buy one's way out of jail—arose repeatedly during question-and-answer components of bail education workshops in which the author participated during his year in Ukraine.

180. U.S. dollars are widely available and commonly used in Ukraine, in part because they offer a hedge against inflation and the erratic price fluctuations that perennially plague the hryvna. The bail statute places no restrictions on posting bail in foreign currency such as dollars, and the Supreme Court takes the position that this practice is permissible. *See* Zhuk Remarks, *supra* note 97.

181. *See* KIEV III, in Podipaliy, *Ukrainian Legislation on Bail*, *supra* note 64.

182. *See, e.g.,* Valeriy Podipaliy, Criminal Law Faculty, Kiev State University, Remarks at ABA/CEELI Workshop on Criminal Procedure Reform, Kiev, Ukraine, Sept. 15, 1998. Such practices were specifically

Many investigators, perhaps hesitant to use a new and unfamiliar procedure, are reluctant to use bail even in what would appear completely appropriate contexts. For example, in KIEV IV, bail was refused in a case involving an Armenian woman charged with smuggling \$10,000 in currency, on the grounds that she was a foreigner, and therefore a flight risk.¹⁸³ The investigator failed to consider, however, that the woman's family all resided in Ukraine, that her husband was employed there as an executive, that the couple had a permanent place of residence in Ukraine, and that her three small children (one an infant) were all at home. Bail was denied and the young mother remained in detention.

Events in some of the cases studied also indicate that a number of judges have difficulty understanding that bail is a separate preventive measure, rather than another restriction to be used in addition to one of the existing forms of preventive measure.¹⁸⁴ For example, in TERNOPIL II, the court increased the amount of bail set by the investigator, but also took from the defendant a "signed promise" not to depart the jurisdiction. Obviously, it believed the bail itself was not sufficient. Ironically, such an approach is closer to the Western (particularly the American) understanding of bail as a "combination of conditions" necessary both to assure the defendant's appearance before the court and to protect the community.¹⁸⁵ At sentencing in CHERNIVTSI III, the court noted that the defendant would remain free on his signed promise not to depart pending appeal. In fact, there was no signed promise not to depart filed in the case, and the defendant was freed on bail. The court, not recognizing that bail had been used, apparently assumed that an unincarcerated defendant must be free on a signature bond. Finally, at a preliminary hearing¹⁸⁶ in CHERNIVTSI IV, the court quashed an arrest warrant, which meant that defendant had to be released from detention,¹⁸⁷ but at the same time decided to set bail at 8,500 hryvnas. The court's decision was overruled, because it had exceeded its authority. The courts have no legal authority to set a preventive measure in place at the preliminary stage of the proceeding.¹⁸⁸ This decision is left to the investigators and the prosecutor.¹⁸⁹

criticized by Judge Zhuk, who, speaking on behalf of the Supreme Court, stated that not only should the identity of bailers be clear, inquiry should be made to establish that the bailer is "trustworthy." Zhuk: Remarks, *supra* note 97.

183. KIEV IV, in Podipaliy, Ukrainian Legislation on Bail, *supra* note 64.

184. The three primary preventive measures are the signed promise not to depart, the guarantee by a third party that defendant would behave properly, and detention. Code of Criminal Procedure of Ukraine, art. 149.

185. 18 U.S.C. § 3142(c)(1)(B) (1994).

186. *See* Code of Criminal Procedure of Ukraine, art. 236-4.

187. *See* Code of Criminal Procedure of Ukraine, art. 236-4 (part 5).

188. *Id.*

189. *Id.*

2. Failure to Follow the Statutory Requirements

Courts often give insufficient attention to the statutory minimums for bail amounts required under part 2 of Article 154-1.¹⁹⁰ In TERNOPIL II, defendant was accused of being a member of an organized crime ring, and was charged with multiple counts of theft, bribery, and fraud. The crimes charged were classified as "grave" and carried sentences of more than ten years.¹⁹¹ Under the statute, bail must be 1000 times the monthly minimum wage, or 17,000 hryvnas for such charges.¹⁹² Nevertheless, the investigator set bail at only 10,000 hryvnas, without any explanation as to how the amount was determined. In this case, the mistake was noticed and corrected by the judge when the case was referred for trial. The judge ordered that the bail amount be increased to comport with the statutory minimum, 17,000 hryvnas.¹⁹³ In many other cases, however, investigators simply set bail at the statutory minimum, without further explanation or inquiry into the particular circumstances of the case.¹⁹⁴

3. Treatment of Bailers

In every case studied, a third party posted bail.¹⁹⁵ Arguably, this practice clearly reflects defendants' awareness of the risk of putting up their own bail money, as it may be forfeited by the court following sentencing and applied towards the execution of any penalties or related judgments against defendant.¹⁹⁶ The reliance on bailers makes it even more critical that investigators and judges understand the role and obligations of the bailers.

Part 3 of Article 154-1 requires that the state explain to the defendant and any bailer their duties under the statute and the consequences for failure to fulfill them.¹⁹⁷ In some cases, investigators followed the statutory dictates

190. Zhuk Remarks, *supra* note 97.

191. *See* Criminal Code of Ukraine, art. 7.

192. *Id.* *See also supra* note 98.

193. The mistake by the investigator in TERNOPIL II as to the amount of bail was particularly surprising, given the meticulous attention paid in this case to other aspects of setting bail, such as the careful notification to the defendant and bailer of their obligations under the statute, and the consequences of a breach.

194. *See* TERNOPIL I, CHERNIVTSI II, CHERNIVTSI IV. This practice has been specifically criticized by Judges of the Supreme Court, who believe that it is the responsibility of the investigator or judge to inquire into the circumstances of the case and to set bail at an amount appropriate to the particular case. Zhuk Remarks, *supra* note 97. As noted by Judge Pilipchuk, in *Bail Implementation, supra* note 102: "The law envisages a minimum amount of bail. When determining it in each particular case, the . . . investigator, prosecutor or court should base their decision on the circumstances of the case and on the information about the [defendant] . . . and set the amount which would be an appropriate restrictive factor for this particular person."

195. Supreme Court Judge Pilipchuk has noted that the Court, in its own investigation of bail practices, found a similar trend. Pilipchuk, *Bail Implementation, supra* note 102. Specifically, in only 10 cases the court surveyed was bail posted by the defendants themselves. Bailers most often were relatives of the defendant, though on occasion bail was posted by legal entities and, in two instances, by the defendant's attorney. *Id.* There is no prohibition on the posting of bail by an attorney on behalf of a client.

196. Code of Criminal Procedure of Ukraine, art. 154-1 (part 7), *see also supra* note 95.

197. Code of Criminal Procedure of Ukraine, art. 154-1 (part 3).

conscientiously. For example, in TERNOPIL II, the investigator went to great lengths to document compliance with this provision. He had the defendant and the bailer, his father, sign protocols that carefully laid out their duties and obligations.¹⁹⁸ These documents were then signed by two witnesses (in the defendant's case) and by counsel (in the bailer's case). In the son's case, the signature was accompanied by a written statement of the son to the effect he had had the duties and obligations explained to him. A similar protocol was used in CHERNIVTSI I. The defendant, the bailer, defendant's lawyer, and the investigator handling the case each signed it. Such thoroughness, however, has been the exception rather than the rule. More commonly, bail has been memorialized in simple "Resolutions,"¹⁹⁹ which showed receipt of bail money from a bailer, but which were signed only by the defendant and which had no indication at all that the obligations of either party had been explained to them.²⁰⁰ This poor record-keeping may account for reports of bail money being improperly returned directly to the defendant rather than to the third party bailer following trial.²⁰¹ The Supreme Court's survey of local practices found that investigators and judges frequently failed to explain to the defendant and the bailer their obligations and the consequences of non-compliance.²⁰²

Standardized procedures and forms need to be developed so that there is greater consistency from one oblast to the next.²⁰³ Compliance by defendants with the conditions of their bail represents a positive measure of the communications being made by investigators to defendants and bailers. In very few cases is bail being forfeited to the state.²⁰⁴

198. Ukrainian Criminal Procedure Code Article 84 requires that all procedural actions taken during preliminary investigation and trial must be documented and described in the form of what is referred to by the statute as a "protocol."

199. Ukrainian Criminal Procedure Code Article 130 defines a "resolution" (as distinguished from a "protocol") as the document memorializing any decision made by the prosecutor or investigator during the preliminary investigation stage of the proceedings.

200. In CHERNIVTSI III, for example, the resolution memorializing bail is little more than a statement to the effect that 10,000 hryvna were received on defendant's behalf from a bailer.

201. See Zhuk Remarks, *supra* note 97.

202. Pilipchuk, *Bail Implementation*, *supra* note 102.

203. *Id.*

204. In 1997, defendants and bailers forfeited approximately 55,000 hryvnas (about \$13,500) to the state, primarily because the defendants had jumped bail. See Zhuk Remarks, *supra* note 97. In none of the cases mentioned in this Article was bail forfeited, though in KIEV V, which remained pending at the time of this Article was completed, there were allegations by the investigators and prosecutor that defendant had attempted to influence witnesses. Defendant had been rearrested as a result. The issue of forfeiture of the bail that had been posted in that case (500,000 hryvnas, a substantial amount), remained unresolved. See Podipaliy, *Ukrainian Legislation on Bail*, *supra* note 64. It should also be clarified that while bail forfeitures were not common, bail is on some occasions being used to satisfy civil damage claims following the conclusion of trial, a practice which is permissible under the statute. Code of Criminal Procedure of Ukraine, art. 154-1 (part 7). In at least one case, from the Poltava oblast court, bail posted by a third party bailer (the defendant's mother) was improperly used to satisfy civil damage claims. Zhuk Remarks, *supra* note 97.

4. Poor Record-Keeping

Failure to properly inform parties of their obligations related to the posting of bail reflects a more general failure of the investigators taking bail to adequately document their actions. For example, in several of the cases studied, there was no information at all about the bailer other than his or her name.²⁰⁵ In CHERNIVTSI II the name was absent from the file. Even more common was the investigator's failure to document or explain the bailer's connection to the defendant.²⁰⁶

Particular problems arose when defendants or bailers posted personal or real property as bail. In TERNOPIL III, investigators accepted an apartment posted by a wife on behalf of her husband, a city official who was accused of accepting a \$200 bribe in exchange for granting permission to open a kiosk. No attempt was made to assign a value to the apartment or even to state the amount of bail required in the case in monetary terms. Indeed, the case documents do not even clarify whether the woman was the owner of the apartment, but simply states that she was posting it as bail. Similarly, in a case reported from Kiev Oblast, a car was accepted as bail, but the only document in the court file to this effect was a written statement by the defendant that he was putting up the car.²⁰⁷ The vehicle itself was not seized physically, nor did the court obtain any papers indicating the ownership, or even the value of the car.²⁰⁸

Some cases showed more care in documenting property taken as bail. In TERNOPIL I, the bailer posted a house on behalf of a defendant who was charged with theft of pesticides from a chemical warehouse. The investigator made a serious attempt at valuation of the property, including in the file a notarized statement from the bailer attesting to the value of the house (though no attempt at an appraisal or at otherwise describing the house was made). However, the statement clarified that though the value of the house was 20,000 hryvnas, it was only securing a bail amount of 8,500 hryvnas.

In a country where many of the details relating to the privatization of real property still are unresolved, the mere fact that investigators were willing to accept private property as bail at all is novel. However, record-keeping deficiencies with respect to the value and ownership of property could cause serious problems should the state later seek to forfeit the bail.²⁰⁹

205. *See, e.g.*, CHERNIVTSI III; TERNOPIL I.

206. *See, e.g.*, TERNOPIL I.

207. *See* Pilipchuk, *Bail Implementation*, *supra* note 102.

208. As Judge Pilipchuk noted, "formally speaking, the car has not been accepted as bail, in the way the law demands it, and was still in defendant's possession." *Id.*

209. *See id.*

B. *The Plenum Resolution*

The Supreme Court has recognized problems in implementing the bail statute. On March 26, 1999, it adopted a Plenum Resolution on the Practice of Implementing the Preventive Measure of Bail.²¹⁰ According to a draft version of the Resolution, the Court was motivated by the "extraordinarily low levels of bail implementation and widespread mistakes in its application," which, in turn, was caused by the statute's novelty and "by the lack of explanation or guidelines for its implementation."²¹¹

The Criminal Collegium of the Supreme Court used the Plenum Resolution as an opportunity to articulate its strong conviction that pretrial detention should be viewed as a last resort, and that less restrictive alternatives, such as bail, should be used whenever possible. For example, in the final version of the Resolution, the Court directs that "bail must become a powerful preventive measure," and that judges "*shall* implement this preventive measure where there are sufficient grounds."²¹² A draft version was even stronger, and came close to echoing the Western norms found in such documents as the European Convention on Human Rights. For example, the Preamble to the Draft Resolution states that any preventive measure that "temporarily restricts the rights of the accused" must be carefully implemented.²¹³ As noted above,²¹⁴ and as some of the Supreme Court's own most reform-minded judges would concede,²¹⁵ the relevant statutory language on which the Plenum Resolution is based is far less compelling in this regard. Taken on their face, the statutes governing the use of preventive measures can be and have been read to suggest the opposite conclusion, namely that pretrial detention should be used *unless* there is some compelling reason not to do so.²¹⁶

The lack of clear statutory directives arguably makes the Court's statements in the Plenum Resolution all the more provocative. To a great extent, the Court is pushing the boundaries of reform well beyond what the legislature articulated. The idea of an activist court may not seem terribly unusual to Western observers, but it is without precedent in the Soviet tradition. It reflects a completely new way of thinking on the part of senior judges who are seeking to redefine their roles, and who are struggling to establish

210. Plenum Resolution, *supra* note 97.

211. Proekt Postanova Pro Praktiku Zastosuvanya Sudami Zapobizhnogo Zakhodu u Viglyadi Zastavi [Draft Resolution on the Practice of Implementing a Preventive Measure in the Form of Bail] Preamble (on file with author) [hereinafter Draft Resolution]. The Draft Resolution is undated, but was prepared and circulated by the Supreme Court during 1998.

212. Plenum Resolution, *supra* note 97, § 1, para. 1 (emphasis supplied).

213. Draft Resolution, *supra* note 211.

214. See discussion *supra*, notes 151–152.

215. See Pilipchuk, Introduction, *supra* note 151.

216. See *id.*

themselves, for the first time, as a genuinely independent branch of government.²¹⁷

Throughout the Plenum Resolution, the Court urges a bold and aggressive use of the bail statute. Wherever possible, the Court has encouraged the use of broad rather than narrow interpretations of the statutory language. The Court has also reemphasized that certain basic principles must govern application of the statute. First, the use of bail should not be ruled out in any case, though in cases where particularly grave or violent crimes are alleged, the Plenum Resolution directs that the judge must explain the particular circumstances that lead to the conclusion that bail is a sufficient restraining measure.²¹⁸ Second, the scope of review to be used by the courts when considering the choice of preventive measure made by the prosecutor or investigator is to be sweeping—effectively a *de novo* consideration.²¹⁹ “The courts shall decide the issue based on the character and gravity of the offense, background information on the defendant and other circumstances of the case”²²⁰ In particular, judges are directed to examine all cases in which bail was denied by a prosecutor or investigator, “and if the refusal [is] groundless,” to reconsider the issue.²²¹

The Plenum Resolution is also important because it significantly clarifies and expands the specific powers of the courts in a myriad of potential circumstances arising under the bail statute. The Plenum Resolution makes

217. The particularized reforms pushed by some of Ukraine's senior judges may reflect a serious and sustained effort to join in what has been recognized as a world-wide trend among both established and emerging democracies to vest increased amounts of power in the hands of the unelected judiciary. See generally *The Gavel and the Robe*, *ECONOMIST*, Aug. 7, 1999, at 43. Such a trend is generally viewed as strengthening democracy rather than the opposite. *Id.* As noted in *The Economist*, “the trend in Western democracies has been followed by the new democracies of Eastern Europe with enthusiasm.” Only the Russian experience remains the exception. *Id.* Perhaps for once, Ukraine can serve as an example for its larger neighbor.

218. Plenum Resolution, *supra* note 97, § 2, para. 2. The fact that the Courts are now empowered to take each case on its merits, and that no category of defendants are automatically condemned to pretrial detention represents an important step away from the dictates of Soviet era justice. See discussion at *supra* note 159. However, as noted by Judge Zhuk, in his remarks at the ABA/CEELI Bail Implementation Workshop held in Yalta (July 2, 1999), *supra* note 97, the statutory provision allowing bail in *any* category of case, including those involving the most grave crimes, has been highly criticized. A number of legislative proposals to eliminate some classes of cases from those eligible for bail are on the table. Speaking for the Court, Judge Zhuk reemphasized the Court's commitment to the principle that every case must be decided on its specific circumstances, and that even in cases involving very grave crimes bail might sometimes be appropriate. Judge Zhuk also pointed out that statistics show that bail is not being used in the most serious cases; in 1997, bail was used in only two cases involving “grave crimes” with a sentence of 10 years or more, and both of these cases involved large embezzlements. Judge Zhuk's underlying point here is one often stressed by the Court: if the Supreme Court is to be an equal, responsible partner in Ukrainian government, and if it is to be a truly independent branch of that government, it must be entrusted with the ability to exercise judicial discretion.

219. Plenum Resolution, *supra* note 97, § 2, para. 1. The power of the courts to decide on the appropriateness of bail (or any other preventive measure) in a given case is stated in sweeping terms: “The issue of implementation or non-implementation of bail is entirely delegated to the discretion of the person or agency that resolves the case.”

220. *Id.* § 2, para. 1.

221. *Id.* § 1, para. 2.

explicit many powers that were only implied under the statute. Such sweeping and decisive action by the Court may well prove critical to the future implementation of the statute and to whether there will be the regular use of bail in Ukraine. Because the judicial system in Ukraine is also a "top down" bureaucracy which often resembles a government agency more than an independent branch of government,²²² the adoption by the Plenum of such comprehensive and detailed procedures on how to use the bail effectively gives the "go ahead" to lower courts to begin aggressively implementing the statute.

Much of the Plenum Resolution concerns what types of property may be posted as bail and how property should be treated while in the court's custody. Such explanations are of particular importance in a country where the concept of private property is only eight years old, and where the laws governing such property are still being written.²²³ The Resolution also reflects the serious consideration given by the Court to the notion that bail may consist of items other than cash. Article 154-1 was vague on these issues, stating simply that bail could consist of "money or other assets."²²⁴ The Plenum Resolution defines this as meaning "any legally transferable property, which belongs to the bailer by right of ownership, and which can be alienated by him."²²⁵ This definition adds a requirement found nowhere in the statute: namely, ownership of the property by the bailer. The Resolution then narrows the definition further. Bail property may not be jointly owned, unless all owners consent or unless the common property can be "separated and posted in kind."²²⁶ Ownership must be properly documented.²²⁷ Seized or arrested assets may not be posted.²²⁸ Finally, and perhaps most significantly, the Plenum Resolution directs that the property posted as bail "shall have such characteristics, such quality and legal status that the execution of the court's decision regarding taking away the ownership right to it of the defendant or the bailer would not be obstructed by any difficulties."²²⁹ In the same vein, the courts are also directed to consider "whether difficulties or civil

222. In this regard, Ukrainian judges are typical of judges in a civil law system. As one expert notes, the judge in a civil law system is "a civil servant, a functionary." MERRYMAN, *supra* note 20, at 35. Joining the judiciary is simply one available career option for young law graduates:

Shortly after graduation . . . he will take a state examination for aspirants to the judiciary and, if successful, will be appointed as a junior judge . . . Before very long, he will actually be sitting as a judge somewhere low in the hierarchy of courts. In time, he will rise in the judiciary at a rate dependent on some combination of demonstrated ability and seniority . . . Judges of the high courts receive, and deserve, public respect, but it is the kind of public respect earned and received by persons in high places elsewhere in the civil service.

Id.

223. See, e.g., *Rada Rejects Law on Sale of State Assets*, KYIV POST, Sept. 23, 1999, at 7B.

224. Code of Criminal Procedure of Ukraine, art. 154-1.

225. Plenum Resolution, *supra* note 97, § 5, para. 1.

226. *Id.* § 6, para. 1.

227. *Id.* para. 2.

228. *Id.* § 8. The reverse situation, however, is permitted. In other words, money that has been posted as bail is subject to arrest and forfeiture. *Id.*

229. *Id.* § 5, para. 2.

legal controversy will arise if the property is later forfeited to the public revenue."²³⁰

The Plenum Resolution also recognizes the necessity of properly valuing property to be posted as bail.²³¹ This task is specifically left to the court, which "shall clarify" such value.²³² Expert testimony may be taken on this matter, but the bailer is responsible for any expenses connected with value determination.²³³ Article 154-1's statutory minimums for bail, which correspond to the gravity of the crime charged, make the proper valuation of the property posted as bail an issue of overriding importance. On this point, the Plenum Resolution is firm; the court may not deviate from the statutory minimums "even if there are extraordinary circumstances."²³⁴

However, in an apparent effort to limit the degree to which inflated civil damages claims may interfere with the feasibility of a defendant's obtaining release on bail, the Resolution supplies some important caveats to the statutory requirement that bail not be less than the amount of potential civil damages. First, "sufficient data" for the claimed civil damages must be presented.²³⁵ Second, the Plenum Resolution appears to be drafted in such a manner as to put the burden for presenting such evidence on the prosecution, particularly the investigators, rather than the defendant.²³⁶ Third, the Plenum Resolution excludes from the civil damage calculation claims for moral damages, claims against the defendant not connected with the specific criminal charges, and claims for the costs of bringing the civil suit.²³⁷ All of these interpretations by the Plenum are of great importance, because they are clearly designed to minimize the amount of relevant civil damages and thereby increase rather than diminish the number of cases in which the option of release on bail will be available.

The Resolution gives the actual mechanics for posting bail relatively short shrift. The taking of bail is to be documented, and such documentation is to

230. *Id.*

231. *Id.* §§ 5, 7. The Resolution does not, however, address a perennial Ukrainian problem, rapid devaluation of currency due to inflation. Because of Ukraine's high inflation rates, it is quite possible that currency posted as bail could lose much of its value during the pendency of the case—a risk which, apparently must be borne by the defendant and/or the bailer. See Podipaliy, *Ukrainian Legislation on Bail*, *supra* note 64 (discussion of case where one million hryvna posted as bail lost one half its value over the course of the criminal action). One means of avoiding this risk would be to post bail in dollars or other foreign currency which apparently is permissible (or at least, condoned by the Supreme Court), as neither the statute nor the Resolution addresses this issue. See Zhuk Remarks, *supra* note 97. Judge Zhuk noted that the Court was aware of at least ten cases in which bail was posted in foreign currency. *Id.*

232. Zhuk Remarks, *supra* note 97.

233. Plenum Resolution, *supra* note 97, § 7.

234. *Id.* § 9, para. 1.

235. *Id.* para. 2.

236. See *id.* The relevant text provides that "In all cases the bail amount cannot be less than the amount of the damages claimed in a related civil suit, *when sufficient data is presented.*" (Emphasis supplied). This language is of particular significance, because of charges by defense counsel that many investigators simply estimate an amount for the civil damage claim early in the case, without having any substantive basis for it. Podipaliy Remarks, *supra* note 115.

237. See *id.*

be accompanied by receipts or other papers indicating the amount of cash on deposit, or the value of the property.²³⁸ The defendant must also sign a statement that the provisions of Article 154-1 have been explained to him.²³⁹ If bail is posted by a third party, "explicit data about such person" shall be recorded.²⁴⁰ Beyond this, the Plenum Resolution states only that the courts shall clarify "how to ensure storage of the property posted as bail,"²⁴¹ and shall inform notary offices, vehicle registration agencies and government offices maintaining real estate records of the bail action as necessary.²⁴² Documents related to the taking and holding of bail by the court, regardless of the form of property in question, do not need to be notarized—an unusual exception from the normal handling of property transfers in Ukraine.²⁴³ No specific provision exists on who will hold the property, or under what conditions. Nor have any standardized forms been developed for use in taking and/or holding property as bail. Indeed, the Plenum Resolution, by its very silence, seems to direct each court to develop its own procedures for maintaining the bail property.

In discussing the forfeiture of bail, the Plenum Resolution mirrors closely the statutory language itself. The Resolution clarifies the somewhat ambiguous provisions in the statute governing the destination of forfeited bail money. In the case of forfeiture due to a breach of the obligations undertaken by the defendant, the money goes to the public revenue;²⁴⁴ in the case of forfeiture resulting from a conviction, the money goes to satisfy "any part of a sentence which provides for financial or property penalties."²⁴⁵ In the latter case, the court also is to use the money "first and foremost to execute the part [of the sentence] concerning the reimbursement of the damage caused by the offence."²⁴⁶

238. Plenum Resolution, *supra* note 97, § 3, para. 4.

239. *Id.*

240. *Id.* para. 5. See also Pilipchuk, *Bail Implementation*, *supra* note 102.

241. Plenum Resolution, *supra* note 97, § 5, para. 2.

242. See *id.* § 6, para. 2.

243. See *id.* § 10. It should also be noted that the Plenum Resolution, as written, is in contradiction with the Ukrainian Law on Collateral, which requires that any agreement involving collateral in connection with real property be notarized. Failure to do so will render the agreement invalid. See Zakon Ukraini Pro Zastavu [Law on Collateral], arts. 13, 14 (on file with author). This distinction is of particular mention because the Ukrainian word used for "collateral," *zastava*, is the same as the word used for "bail." Commenting on this lack of a notarization requirement, Supreme Court Judge Zhuk, *supra* note 76, stated that nevertheless the Court encourages the use of notarized documents to memorialize bail arrangements.

244. Plenum Resolution, *supra* note 97, § 12, para. 1, discussing Code of Criminal Procedure of Ukraine, art. 154-1 (part 6). The Plenum Resolution, indeed, specifically stresses that in such circumstances, "the court is not authorized to forfeit the bail to execute any component of the sentence which calls for financial or property penalties." Plenum Resolution, *supra* note 97, § 12, para. 1 (emphasis supplied).

245. Plenum Resolution, *supra* note 97, at § 13, par. 2, discussing Code of Criminal Procedure of Ukraine, art. 154-1 (part 7). The reasoning behind this apparent inconsistent treatment of forfeited bail money is discussed, *supra*, at note 91.

246. Code of Criminal Procedure of Ukraine, art. 154-1 (part 7).

The Plenum Resolution likewise addresses, but does not completely resolve, the question of the timing of the forfeiture or return of bail money after the proceedings.²⁴⁷ While the statute simply says that the matter is to be decided “during the hearing,”²⁴⁸ the Resolution clarifies that the decision as to return of bail shall be made at the time the verdict is announced.²⁴⁹ The courts are authorized, but not required, by the Resolution to direct that the bail order remain in effect and the defendant remain free during any appeal.²⁵⁰ The discretionary nature of this power and the lack of clear guidance on the handling of bail money during the pendency of an appeal has led to some confusion among the courts.²⁵¹ In theory, one judge might decide to forfeit the bail money at the time the verdict is announced and before the defendant has had a chance to file an appeal, while another might allow the bail to remain posted for the duration of a lengthy appeal process.²⁵² However, the practice of leaving bail in place during the appeal process and until the commencement of sentencing seems to be the more commonly favored approach.²⁵³

Finally, the Plenum Resolution also addresses issues surrounding the posting of bail by third parties. The Resolution confirms that the third party bailer is only financially responsible for the defendant, and has no further obligation “of ensuring due conduct of the defendant.”²⁵⁴ The third party may repudiate the obligations, but is only freed of them and obtains return of the bail after the court has set a new restrictive measure.²⁵⁵ If the new measure is pretrial detention, the third party can only recover the bail after the defendant has been detained.²⁵⁶ Significantly, the Resolution clarifies that in the event of a conviction, the court cannot forfeit bail posted by a third party to satisfy defendant’s financial obligations or fines.²⁵⁷ This provision creates a relatively easy mechanism for defendants to avoid potential forfeiture of their bail money following trial.

247. *Id.* § 13, paras. 1, 3.

248. Code of Criminal Procedure of Ukraine, art. 154-1 (part 7).

249. Plenum Resolution, *supra* note 97, § 13, para. 1.

250. *See id.* para. 3.

251. *See* discussion, *supra* at notes 150–154.

252. Generally, a defendant has only seven days to file an appeal after the sentence has been announced. Code of Criminal Procedure of Ukraine, arts. 347, 350. Filing the appeal, however, suspends execution of the sentence, and the sentence remains suspended for the duration of the appeal. *Id.* art. 352. Whatever preventive measure was applied to defendant at sentencing remains in effect during the appeal. *Id.* at arts. 324, 343. For example, if defendant was free on a signed promise, he will remain free during the appeal. Confusion arises, however, if the court forfeits the bail at sentencing (effectively terminating the preventive measure that was in place), but does not specify an alternate form of preventive measure to apply during any appeal and until actual commencement of the sentence.

253. *See* Zhuk Remarks, *supra* note 97. *See also* Pilipchuk, *Bail Implementation*, *supra* note 102.

254. Plenum Resolution, *supra* note 97, § 4.

255. *Id.* § 11.

256. *Id.*

257. *Id.* § 13, para. 2. The Resolution additionally notes that bail posted by a third party can be forfeited in the (albeit unlikely) event the third-party consents to the forfeiture.

CONCLUSION

It is easy to critique the Ukrainian bail statute as an imperfectly crafted effort that falls far short of providing criminal defendants with the kind of protections their Western counterparts enjoy. As has been shown, the statute is imperfect by any Western evaluation. Arguably, much got "lost in translation" as the concept of bail journeyed eastward. But, like most innovations in the post-Soviet world, the Ukrainian bail statute represents a compromise between the country's reformers and those elements of society that remain resistant to changes, particularly Western ones. By chipping away at entrenched prosecutorial powers, the statute also invites resistance from those sectors of society that stand to lose privilege and prerogatives they have long taken for granted.

The fundamental question remains—are such imperfect transplants of Western ideas onto post-Soviet systems useful or are they simply window dressing? Much of the answer to this depends on the motivation behind the adoption of the concept. As a number of legal scholars have pointed out, "transfer without theory cannot succeed."²⁵⁸ In other words, merely copying Western ideas, whether they be European or American, without a clear understanding of their place in the existing Ukrainian (i.e., post-Soviet) legal framework, would not likely be successful.²⁵⁹

As in the case of bail, however, where legal reformers with a clear agenda and a clear idea of how to integrate the new concepts into the existing legal framework back the reform, there is strong reason to believe that transplanting Western concepts to the post-Soviet systems can work effectively.²⁶⁰ Indeed, there was a long tradition of borrowing from the West by both pre-Revolutionary Russians and the Soviets.²⁶¹ The evidence to date shows that the adoption of bail developed from a perceived need and was consistent with a broader agenda of the Ukrainian judiciary to increase their independence and their oversight over procedural aspects of the criminal justice system. While there will be a period of trial and error before bail is widely understood and regularly applied, there is no reason to believe, so long as the judiciary remains committed to these objectives, that Ukrainian society will not be capable of the implementation of reforms.

Finally, to answer the question of the usefulness of introducing bail to Ukraine, we must look no further than to the plight of those defendants who, but for the introduction of the bail law, might have lingered needlessly long in one of Ukraine's uncomfortable prisons. While the number of per-

258. Sharlet, *supra* note 16, at 63, citing Armin Hoeland, *The Evolution of Law in Eastern and Central Europe: Are We Witnessing a Renaissance of 'Law and Development'?*, in *EUROPEAN LEGAL CULTURES* (Volkmar Gessner et al. eds., 1996).

259. *See id.*

260. *See id.* at 61 ("legal transplants have tended to occur historically as the result of initiatives taken by the recipient legal system."), citing Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 *AM. J. COMP. L.* 93, 97 (1995).

261. *See Sharlet, supra* note 16, at 61–63.

sons released under the bail statute remains low, these numbers likely will increase as long as courageous judges and advocates push for implementation, not just of bail, but of a broad range of procedural safeguards and protections.