**Comments and Recommendations on Administrative Detention and Imprisonment**

The Coalition for an Independent and Transparent Judiciary was formed on April 29, 2011 under the project *Civic Initiative for an Independent Judiciary* and currently united 32 member organizations. The goal of the Coalition is to strengthen the capacity of legal professional associations, legal rights NGO, business associations and the media in monitoring relevant judicial practices and advocating for an independent judiciary. The project *Civic Initiative for an Independent Judiciary* is funded by USAID and is implemented by the Eurasia Partnership Foundation through a partnership with the East-West Management Institute.

The Coalition created several working groups working on different legal issues. One of the working groups works in the area of criminal law. Currently the criminal law working group works on the outstanding issues in the area of administrative law. More specifically, the group works on the draft Code of Administrative Offences, the Working Group focused on administrative imprisonment and pertinent issues – regulations for enforcement of administrative detention and imprisonment and their compliance with basic requirements of human rights.

Administrative imprisonment is an intense form of intrusion in freedom of an individual, applied in an even of violations that are not equal to criminal actions in terms of their gravity. Furthermore, statistics of administrative imprisonment demonstrate that such sanction is frequently applied. [[1]](#footnote-1) According to the practice developed by the European Court of Human Rights, it is clear that administrative imprisonment is a criminal justice sanction, which means that access to guarantees granted in the criminal proceedings should certainly be ensured in the process of application of the sanction. Similar positions are expressed in the recent reports of the Human Rights Watch and the UN Working Group on Arbitrary Detention which also highlight other major shortcomings of administrative imprisonment. [[2]](#footnote-2)

Regulations of administrative imprisonment as well as administrative detention, as envisaged by the existing Code, fail to fulfill the minimum requirements that should necessarily be met in an event of intrusion in individual’s freedom with such intensity. For instance, they fail to ensure guarantees of freedom of an individual and the right to a fair trial, as envisaged by Articles 5 and 6 of the European Convention on Human Rights. However, in consideration of the fact that no essential differences are evident between the existing Code and the draft Code in this regard, this document focuses on major shortcomings of the Draft and lays out recommendations about the current edition of the draft. However, most of the comments in this document are also relevant to the existing regulations of the administrative imprisonment and detention.

* **Administrative Detention**

The draft increases duration of administrative detention to up to 24 hours. Furthermore, grounds for detention as formulated by the draft are still broad and general, which - just like the existing practice - will supposedly generate an automatic link between detention and administrative imprisonment and detention will still serve as a precondition for imprisonment. The draft allows imprisonment if “**an administrative agency motions for administrative imprisonment as an administrative punishment for an administrative offender and it is impossible to immediately bring the individual concerned before court”.**

Administrative imprisonment should serve as an exceptional measure and it should be applied in certain cases only, when strictly determined grounds are evident and no other means can ensure timely and due administration of justice and prevention of a new crime. The draft should clearly stipulate about an exceptional nature of detention and strictly determine circumstances that may serve as the basis for detention of an individual before the trial.

It should be taken into account that the draft does not provide for an opportunity to release of the person before the trial in return for undertaking certain measures. It is important to formulate several types of guarantees for assuring that a person will appear on trial. Furthermore, deprivation of freedom of an individual will no longer be needed for achieving the noted purpose.

Unlike the existing Code, the draft no longer contains the list of agencies authorized for detention. Therefore, an agency authorized for detention when an offence is committed is unclear. The Constitution of Georgia allows detention only by an authorized individual. The Article regulating detention stipulates that protocol of detention is drawn up by an individual authorized to issue an order on sentencing a person to an administrative penalty. If the noted entry implies that an individual authorized to issue an order of detention and an individual authorized for detention are in fact one and the same person, it turns out that unlike the existing Code, the list of agencies authorized for detention are significantly expanded. It is necessary for the draft to envisage a strict list of agencies that are authorized for detention.

As for the right of a detained person, it constitutes one of the weakest points of the draft. Applicable Article fails to list the all the rights that a person is entitled to upon detention (Habeas Corpus guarantees), including, the fact that the draft does not envisage an obligation of an authorized person to clarify to a detainee grounds for the detention at the time of detention or to familiarize him/her with his right to an attorney, which is the most problematic issue. Circumstances that necessitated detention of an individual are indicated in protocol of detention signed by an individual concerned who is provided with a copy of the protocol immediately after it has been drawn up; however, the time-frame for drawing up the protocol is unclear. In view of a general term of detention, it could be 24 hours. Therefore, if a person concerned can learn about grounds for the detention only from protocol of detention, he or she may not be aware at all about motives of the detention during the 24 hours. In this light, the draft should envisage the obligation of a detaining individual to clarify detention grounds to a detainee immediately after the detention, clearly and in a language that he/she understands, and that he/she has the right to an attorney immediately after his/her freedom has been restricted.

Although the draft stipulates that the right to inform his/her family/attorney about his/her whereabouts should be explained to a detained person, the norm fails to indicate the term for realization of the rights. Therefore, it allows for explaining to a detainee the right to inform a person of his choice about his/her whereabouts only several hours after he/she was detained. This may not be deemed as provision of adequate guarantees to a detainee. Together with specifying the time, it is necessary for the norm to indicate obligation of a person authorized for detention to undertake all necessary measures for realization of the right.

It is also noteworthy that the draft envisages a person’s right to receive compensation in an event of unlawful detention. However, such stipulation does not apply to other measures, such as personal examination, seizure of items and/or documents, alcohol testing and temporary seizure of the car. Similar guarantees should be created for all of the actions enumerated above.

* **Examination of the case of administrative imprisonment**

As we have already noted, administrative imprisonment clearly is a criminal justice sanction and according to the law, it can be applied for offences that are not criminal in nature. Due to its nature, administrative offences do not call for such degree of intrusion in freedom of an individual and therefore, question the proportionality of such sanction, which in its turn produces the need to review administrative imprisonment as a sanction. Similar recommendation was already expressed in the latest report of the Human Rights Watch stating that as part of the ongoing reforms of the Code of Administrative Offenses, it should also consider abolishing administrative imprisonment as a penalty for administrative offenses. [[3]](#footnote-3) In this regard it is interesting to consider experience of foreign countries, including Armenia. The latter completely abolished the system of administrative imprisonment after applications against Armenia were filed in ECHR. Therefore, it is important to share existing practice and recommendations, which should ultimately be translated into abolishment of such type of sanction.

Duration of administrative imprisonment is related to proportionality of sanction. Currently, duration of administrative imprisonment in Georgia – 90 days – is the longest among the states where similar sanction is practiced. Therefore, at the initial stage it is important to consider reduction of the term of imprisonment among immediate changes.

As for the age of liability, it should be noted that the draft Code decreased age for imposition of administrative imprisonment. In compliance with the draft, juveniles within the age of 16-18 can be sentenced to administrative imprisonment for up to 30 days. This should be examined within the context of proportionality of application of administrative imprisonment in general, particularly with regard to juveniles; however, we should also consider the obligation of the Interior Ministry to ensure isolation of juvenile offenders from adult offenders. Currently, it is unknown whether pre-trial isolators allow for fulfillment of the requirement.

As for other matters, most of the problems in administrative imprisonment still remain pressing. Time for preparing defense remains to be problematic. According to the draft, motion to sentence an individual to administrative imprisonment or administrative imprisonment and fine is examined by judge immediately after it has been filed. Motion should be filed no later than within 24 hours upon detention. Therefore, time for the defense to prepare for court is limited to 24 hours. As it was noted above, the draft does not allow for release of an individual in return for measures of security. Examination of a case within such short period of time will fail to ensure adequate time for the defense to prepare its position, which ultimately violates the right to a fair trial. In order to ensure adequate guarantees for the defense, duration of proceedings should be increased. However, as we have already noted, detention before trial should not be an automatic measure and freedom of an individual should be ensured, apart from exceptional circumstances.

Access of the defense to case materials remains a problem. According to the draft, a motion on imprisonment or imprisonment and fine is indicated in the order on imposition of administrative penalty. Therefore, it is assumed that the procedure for filing a motion coincides with the general procedure for drawing up an order. Therefore, it is assumed that the order on filing a motion should be drawn up in presence of an individual concerned. However, such type of access to motion is insufficient for interests of the defense. The persons concerned as well as his/her lawyer should have reasonable time prior to a trial to familiarize with the motion of an individual authorized to issue an order, which would allow him to submit counter arguments and evidence. The draft fails to indicate the time when motion is drawn up or the obligation to provide the person concerned with a copy of the motion. In order for the defense to have an adequate opportunity for preparing its position, the draft should envisage provision of copies of the motion filed and report of the police as well as all other documents to the defense. Furthermore, it should clearly determine the timeframe for submitting the aforementioned documents to the defense.

Issues pertinent to evidence remain to be particularly problematic. The draft does not contain definition of evidence. Furthermore, it fails to determine formalities of evaluation of evidence and examination of admissibility of evidence. The does not make any mention of the stage when admissibility is examined. In this light, it is uncertain what may serve as the basis for court’s decision, as the notion of lawful and unlawful evidence are not determined at all; furthermore, the draft does not make any mention of equality of legal force of evidence submitted by both parties. It is important to clearly determine the notion of evidence in administrative proceedings. Regulation of the noted issues is important for determining standard of proof as well as for substantiating court’s decision.

Although the draft contains a provision stipulating that burden of proof falls on the agency issuing the order, it fails to indicate that any doubt is resolved in favor of defendant.

The draft failed to eliminate the problem of standard of proof. Therefore, according to the current practice it is assumed that court will still have an opportunity to make decisions on sentencing a defendant to administrative imprisonment solely based on a motion and a statement of a person that drew up the motion. In view of the fact that 24 hours remain before court makes its final decision, it is assumed that solicitation and examination of audio/video evidence by the defense will remain to be a problem. Furthermore, according to the draft, examination of injuries inflicted to the individual concerned will not be a concern of court. The latest report of the UN Working Group on Arbitrary Detention expresses a position over the timeframe of proceedings, saying that “the short length of the procedure that requires adjudication of the case within 24 hours is not considered to be in conformity with international human rights standards”.[[4]](#footnote-4) In order to avoid standard decisions and analogous substantiation, it is important to determine standard of proof and furthermore, in order to provide the defense with more leverage for examining a witness and submitting evidence before court, it is necessary to increase length of proceedings.

As for the procedure for appealing court’s decision, the draft removed artificial barrier hindering the process – obligatory signature of defendant on the appeal. However, certain problematic issues were produced, including: the draft makes no mention of the period of time when court’s decision or trial minutes should be provided to a party. Although the 48-hour period for appealing starts running after decision is submitted, it should be taken into consideration that during the noted period of time a person is deprived of his/her liberty and is in pretrial custody. Therefore, it is important for the draft to specifically determine the period of time for submitting court’s decision and trial minutes to a party. It is important that these terms are reasonable.

Another issue pertinent to appealing is related to removal of admissibility criteria from the draft. Unlike the existing Code, the draft no longer provides criteria for determining admissibility of appeal, which no longer allows the defense to estimate grounds that may serve as the basis for court’s refusal to deem application admissible. It also creates the risk of unsubstantiated decisions of court. Therefore, it is important to provide unambiguous list admissibility criteria.

* **Administrative agreement**

The draft introduces the institute of administrative agreement for the first time and it the working examined it closely to it due to the fact that administrative agreement may determine administrative imprisonment, as well as administrative imprisonment and fine. According to the draft, **“administrative agreement is concluded with an administrative agency. In an event of use of administrative imprisonment or administrative imprisonment and fine as an administrative penalty, an agreement reached with an administrative agency shall be approved by court”**. As the noted stipulation demonstrates, based on administrative agreement administrative imprisonment as well as administrative imprisonment and fine can be prescribed as a penalty.

Although under the draft, administrative agreement is considered and decision is made in compliance with the procedure for prescribing administrative imprisonment, due to the nature of administrative agreement, approval of the agreement by court may not be deemed as analogy of procedure serving as the basis for prescribing administrative imprisonment to an individual by court. “Approval” notes that it will be a formal episode where court will not get involved in examination of evidence of violation and determination of expediency of imposing concrete penalty on an individual concerned.

According to the draft, petition for approval of an administrative agreement that an administrative agency applies to court contains **“evidence that are sufficient for a founded suspicion that a person concerned has committed the offence”**. It is necessary to consider ambiguity of the standards as well as the fact that standard of proof is already low in examination of administrative cases allowing a judge to treat police’s statement and factual circumstances contained by his/her petition as independent pieces of evidence.

In view of the noted, leaving the form of administrative agreement intact will jeopardize adequate legal guarantees for an individual concerned.

* **Conditions for enforcement of imprisonment**

As for the conditions for enforcement of imprisonment, the draft includes new applicable regulations. Furthermore, the December 28, 2011 order of the Ministry of Interior Affairs adopted 4th additional instruction regulating temporary detention isolators, which envisages certain improvements affecting serving of the prison time including: it determined minimum of 3 square meters of living space per inmate (however, the CPT recommends 4 m²per prisoner). The obligation to separate juveniles, women and men was determined. The Minister’s order determined the right to a walk, a shower and an appointment. However, each of the noted rights are limited according to the term of imprisonment. For instance, the right to take a shower and a walk is granted solely to those inmates only who have been subject to administrative imprisonment for more than 7 days (in case of juveniles – more than one day and one night). The right of appointment can be enjoyed only by those inmates who are serving more than 30 days (in case of juveniles – more than 15 days) at the isolator.

Despite the latest amendments, certain issues that need to be further improved remain; for instance, the right to take a shower and a walk should be enjoyed by everyone who is serving more than 24 hours at the isolator. It is necessary to determine an obligation to isolate a toilet from the main part of the isolator. Furthermore, the minister’s order should determine grounds for moving an inmate from one isolator to another and the obligation of the isolator’s administration to notify a close relative or a counselor of an inmate about his/her transfer to another isolator should be determined.

* **Final Recommendations**

With regard to administrative detention, these are the following changes that should be made:

* The draft should envisage exceptional nature of detention and strictly determine that it can be applied only in cases when none of the other measures are adequate for achieving the goal that has been devised. Furthermore, the draft should introduce several types of guarantees;
* The list of agencies authorized for detention should be clearly determined;
* The draft should envisage the obligation of a detaining authority to inform a detainee of the detention grounds immediately after the detention, clearly and in a language that he/she understands, and be informed that he/she has the right to an attorney immediately after his/her freedom has been restricted.
* The draft should provide a reasonable time for a detainee to notify his/her family about his/her detention and whereabouts;
* The chapter regulating detention should clearly stipulate the right of all detainees that they are entitled to upon detention (Habeas Corpus guarantees). Furthermore, detainees should be informed about these rights.

As for administrative imprisonment and procedures for examination of case, these are the following changes that should be adopted:

* Review proportionality of administrative imprisonment and start working for its eventual abolishment;
* Abolish an opportunity of sentencing administrative imprisonment on the basis of administrative agreement;
* Consider reduction of the term of imprisonment among immediate changes;
* Ensure adequate time and opportunity for the defense for preparing its position. To this end, length of court proceedings should be increased.
* The defense should have access to all necessary materials, including copies of motions filed and reports of police, and the obligation to provide the defense with the noted materials within reasonable time before trial should be determined;
* The notion of lawful and unlawful evidence should be determined, together with the stage for examining admissibility of evidence;
* Determine standard of proof;
* The defense should be provide with more opportunities for examining witnesses and submitting evidence;
* Reasonable timeframe for providing a decision of the court of first instance and trial minutes to a party;
* Determine admissibility criteria for applications filed in the court of appeals.

For the purpose of enforcing conditions of administrative imprisonment, it is necessary to take the following additional measures:

* Increase the size of living space per inmate so that it meets with the CPT recommendations;
* All individuals that are serving more than 24 hours at the isolator should have the right to a shower and a walk;
* Obligations of administration of an isolator with regard to provision of hygienic conditions should be clearly determined together with an obligation to isolate a toilet from the main part of the isolator;
* Obligation of the isolator’s administration to notify a close relative or an attorney of an inmate about his/her transfer to another isolator should be determined.

Most of the recommendations regarding administrative detention and imprisonment should be reflected in the legislation in a timely manner, in order to ensure realization of basic requirements of human rights during court proceedings and enforcement of sanctions.

***The views expressed in this document do not necessarily reflect the views of the United States Agency for International Development (USAID), United States Government, or EWMI.***

1. Administrative imprisonment in 2010 was applied against 4397 persons, official statistics available here: <http://www.supremecourt.ge/files/upload-file/pdf/kari22010.pdf> [↑](#footnote-ref-1)
2. Report of Human Rights Watch <http://www.hrw.org/sites/default/files/reports/georgia0112ForUpload.pdf>, Report of the Working Group on Arbitrary Detention

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.57.Add.2_en.pdf> [↑](#footnote-ref-2)
3. <http://www.hrw.org/sites/default/files/reports/georgia0112ForUpload.pdf> [↑](#footnote-ref-3)
4. Report of the Working Group on Arbitrary Detention, para. 64 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.57.Add.2_en.pdf> [↑](#footnote-ref-4)