Human Rights in Mental Health

Mailing address:
P.O. Box 1956
1200 BZ Hilversum
The Netherlands

e-mail: rvvoren@gip-global.org
website: www.gip-global.org
facebook: Federation Global Initiative on Psychiatry

Draft Law on Amendments to Certain Legislative Acts of Ukraine Concerning Improvement of the Procedure for Submission and Consideration of Applications for Involuntary Psychiatric Care № 3536 dated 25 May 2020

Expert statement

July 20, 2020

In light of Ukraine's international obligations and various recommendations issued to improve the rights of persons whose freedom(s) are restricted due to mental impairments, the proposal to amend the Civil Procedure Code and the Psychiatric Care Act is positive.

However, the proposals included into the Draft Law on Amendments to Certain Legislative Acts of Ukraine Concerning Improvement of the Procedure for Submission and Consideration of Applications for Involuntary Psychiatric Care № 3536 dated 25 May 2020 **do not comply with international standards** and recommendations made to Ukraine, including those in response to violations found by the European Court of Human Rights (hereinafter – the ECHR).

Ukraine is a signatory, among others, to the European Convention on Human Rights, the Convention on the Prevention of Torture, the Convention on the Rights of Persons with Disabilities (hereinafter – the CRPD), and the Covenant on Economic, Social and Cultural Rights and has reiterated its commitment[1] to improve the implementation of its human rights obligations. In addition, the Ukraine government has bound itself to uphold the Sustainable Development Goals, among them SDG 3 on good health.[2]

International commitments and obligations require that Ukraine immediately[3] ensures non-discrimination by providing legal protection for all persons whose freedom(s) are restricted due to mental impairments and gradually[4] improves its service provision at community level for persons with mental impairments.[5]

Accordingly, the following issues have to receive priority in legislative amendments:

Least restrictive alternatives
Core legislation on restriction of liberty has to specify the obligation to review the possibilities of measures that are less restrictive than the one ultimately chosen and document the reasoning why a less restrictive measure was not taken. The stricter limitation of liberty has to be justified in both its intensity and duration.[6]

Effective guarantees against arbitrary involuntarily hospitalisation
Meaningful independence has to be ensured to provide persons whose liberty is potentially arbitrarily restricted with the requisite legal protections.[7]

GIP Federation Global Initiative on Psychiatry

Community services
In line with Ukraine's draft Mental Health Action Plan, all legislative amendments have to support the delivery of services in communities – rather than institutions. [8]

Prevention of crisis
Most mental health issues develop gradually and – provided there are low-threshold services – can be addressed early on to prevent a threat to self and others with potentially dire consequences. The aim of legislation has to be to support prevention, including services aimed at mitigating mental health crises.

Mobile crisis teams
State-of-the-Art service provision for persons with mental health impairments is delivered in the community. This requires multi-professional teams, which work in the community rather than a predominantly medical team operating inside institutions.

Principle of rehabilitation and resocialization rather than isolation[9]
Persons with mental health impairment can thrive and contribute, provided they receive state-of-the-art therapy that is focused on their recovery and provided in the community that enables them to integrate. Isolation due to perceived "dangerousness" or potential of harm only enlarges the spiral of violence.

The draft amendments do not support or strengthen any of these principles. On the contrary: it would lower the legal standards and would deteriorate the standards of implementation further. The draft amendment is not in line with international standards and recommendations that have been made to Ukraine.

1. **Compulsory in-patient treatment ordered by the court (Article 339 of the Code of Civil Procedure).**

As of now, only a psychiatrist can initiate the compulsory inpatient treatment before the court.

The draft law proposes that also the police should be empowered to do that if "a person with *signs of mental disorder* systematically poses a danger to himself or others".

This proposal places responsibilities on police officers that are far outside their competences and skills. The complexities of mental health, including "signs of mental disorder" require the assessment of at least one medical professional; in addition to overburdening police officers, this is a slippery slope toward political abuse of alleged mental health issues.[10]

2. Compulsory outpatient treatment ordered by the court (Article 12 of the Psychiatric Care Act, Article 339 of the Code of Civil Procedure)

As of now, only a psychiatrist can initiate the compulsory outpatient treatment before the court.

The draft law proposes that also the police and literally anyone (but only Ukrainian citizens), systematically "disturbed" by a person with a mental disability, should be allowed to initiate compulsory outpatient treatment.

A person cannot be detained simply because his or her views or behaviour deviate from established norms.[11] Treatment should always be applied in response to a recognised clinical symptom and have a therapeutic aim. It must correspond to a medical need rather than to a social, family or economic need[12].

In addition, the procedures envisaged by the proposed law allow the court seven days to decide on the compulsory assessment and/or outpatient treatment, whereas the "urgency" relied on by the authors of the amendments ("for example, a person with antisocial behavior simply refuses to communicate with a psychiatrist, locks inside an apartment, etc." [13]) will not necessarily persist for seven days.[14]

Also, as of now, the law only allows the compulsory outpatient treatment pursuant to the court order if a person "*will* cause significant damage to his or her health due to the deterioration of mental condition if not treated", whereas the proposed law contains the phrase "*may* cause significant damage to their health or *pose a danger* to themselves or to others".

The proposed law has a much lower threshold.

A person may be admitted involuntarily only if a qualified mental health practitioner authorized by law determines that, because of that mental illness, there is a "serious likelihood of immediate or imminent harm to that person or to other persons".[15]

The proposed phrasings "may" (as compared to "will" in the current version of this law) and "pose a danger" are vague in light of the cited international standards and raise concerns over the rule of law compatibility.

3. Compulsory psychiatric assessment ordered by the court (Article 11 of the Psychiatric Care Act, Article 339 of the Code of Civil Procedure)

Currently, the compulsory psychiatric assessment may be initiated before the court only by a psychiatrist, whereas the draft law proposes that also the police and literally anyone (but only the Ukrainian citizens), systematically disturbed by a person with a mental impairment, would be allowed to initiate compulsory psychiatric assessment.

Also, as of now, the compulsory psychiatric assessment may be carried out if a person with mental disorder:

- commits or manifests an actual intention to commit an act which constitutes an imminent danger to her or himself or others; or
- is unable on her or his own to meet her or his basic vital needs at the level necessary to sustain her or his life; or
- will cause significant harm to her or his own health in the event that the psychiatric assistance is not provided.[16]

The proposed amendments supplement this list with the following ground: "if the person with a mental disorder systematically disturbs the normal life of others and public order".

It is important to note that the main purpose of these proposed amendments, according to the authors' explanation note, is to enable any doctor to facilitate a court order on the compulsory assessment and/or treatment in case of an acute crisis because, according to them, the current law does not provide for a compulsory psychiatric assessment without a court order, which is inefficient in time of acute crisis.

This is incorrect, compare Article 11 §§ 4 and 6 of the Psychiatric Care Act.[17]

4. Presence in court and the right to be heard (Article 341 of the Code of Civil Procedure).

The proposed amendment would allow the court to rule in favor of one's compulsory treatment, inpatient or outpatient, without the person present if, after being properly informed about the date and time of the hearing, they have failed to show up in court twice.

As of now, there is no way a case may be heard without the patient in question.

This proposal violates basic standards of fair trial (Article 6 ECHR) and contradicts the principle of reasonable accommodation on grounds of a mental impairment (Articles 2 + 4 of the Convention on the Rights of Persons with Disabilities, hereinafter - CRPD).[18]

5. Specialist whose opinion may be the sole basis for a court decision on compulsory assessment and outpatient treatment (not inpatient) (Article 340 of the Code of Civil Procedure).

As of now, only a psychiatrist's (and not any other doctor's) opinion is valid in court when hearing the cases on compulsory assessment and outpatient treatment.

The draft law proposes that any doctor, after a preliminary assessment of the mental state of the person, would be allowed to give their conclusion as to one's mental state, and these conclusions would be valid in courts.

It is a generally accepted principle that the patient be examined by a psychiatrist or a medical doctor having the requisite experience and competence[19], in particular as regards risk assessment, in order for a decision on involuntary placement or treatment to be taken. Such decisions must be based on a valid and reliable psychiatric opinion – even in emergency situations[20].

When it comes to deprivation of liberty, and in particular where the person confined had no history of mental disorders, it is indispensable for the assessment to be carried out by a psychiatric expert[21]. Opinion of a medical expert is necessary even if the purpose of detention is precisely to obtain a medical opinion[22]. Moreover, it is a must to seek an alternative independent medical assessment of the patient when it comes to compulsory hospitalisation.[23]

In light of Ukraine's obligations and international recommendations made, the draft amendments are counter-productive and undercut ongoing efforts – draft Mental Health Action Plan – to support persons with mental health impairments with state-of-the-art treatment.

It is therefore strongly advised that the draft amendment is replaced in its entirety with a comprehensive regulation in support of community-based rehabilitation of persons with mental health impairments.

It is recommended that the analysis of international standards, including European Court of Human Rights judgments concerning Ukraine, related to deprivation of liberty for persons with mental impairments be used as a basis for reform. Earlier this year, Federation Global Initiative on Psychiatry was commissioned by the GFA led "Mental Health 4 Ukraine" project to prepare a detailed analysis. It could serve as a basis for state-of-the-art amendments to modernize the treatment of persons with mental impairments in line with the World Health Organization's CBR-Guidelines.[24]

References

[1] "The Ukrainian Government [strives] to develop economic, social and cultural, as well as social and political rights with the aim at ensuring better life quality for all. Compliance with international legal standards and the establishment of a system of protection of human rights [is an] essential element of the Government's action." OP 5, Report of the Working Group on the Universal Periodic Review: Ukraine, 2008, A/HRC/8/45; see also Report of the Working Group on the Universal Periodic Review – Ukraine, 2018, A/HRC/37/16.
[2] Compare, OHCHR, Report on the human rights situation in the Ukraine, November 2019-February 2020, § 40 https://www.ohchr.org/en/countries/enacaregion/pages/uareports.aspx.
[3] Article 4 (2) of the CRPD.
[4] Principle of progressive realization (Article 2 of the International Covenant on Economic, Social and Cultural Rights).
[5] Articles 4, 19, 25, 26 of the CRPD.
[6] *M. v. Ukraine*, no. 2452/04, § 63, 19 April 2012, about the least restrictive alternatives; *Stanev v. Bulgaria* [GC], no. 36760/06, § 143, ECHR 2012; *Zaichenko v. Ukraine* (no. 2), no. 45797/09, § 93, 26 February 2015.
[7] *I.N. v. Ukraine*, no. 28472/08, § 81, 23 June 2016.
[8] Article 25 (c) of the CRPD.
[9] See the CPT Report to the Ukrainian Government on the visit to Ukraine carried out by the CPT from 2 to 11 April 2019 (§ 33 on "genuine individual treatment and rehabilitation plans"); Article 26 of the CRPD.
[10] As per Articles 14/1b and 26/1a of the CRPD: avoid/minimize forced treatment, initiate rehabilitative measures as soon (within hours) as possible; involve peers (Article 26 of the CRPD) and multi-disciplinary teams (see Concluding Observations on Ukraine, CRPD/C/UKR/CO/1, § 49). Ensure that rules are in line with Articles 14/1b and 26 of the CRPD to be least restrictive, recovery focused and community based; CRPD Committee Guidelines on Article 14, 2015; CRPD Committee, General Comment 1, §§ 27 and 37; also: CoE Rec(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder; Articles 12 + 17/1/iv + 19 of the CRPD.
[11] *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33.
[12] "White paper" on the protection of the human rights and dignity of people suffering from mental disorder, especially those placed as involuntary patients in a psychiatric establishment, DI R/JUR (2000)2 https://www.coe.int/t/dg3/healthbioethic/Activities/08_Psychiatry_and_human_rights_en/DIR-JUR(2000)2WhitePaper.pdf.
[13] Page 1 of the Explanatory note to the analysed Draft Law.
see Articles 20 and 21 of the CoE Recommendation Rec(2004)10; Article 14 (1)(b) of the CRPD.
[14] The ECHR held that the relevant time at which a person must be reliably established to be of unsound mind, for the requirements of sub-paragraph (e) of Article 5 § 1, is the date of the adoption of the measure depriving that person of his liberty as a result of that condition (*Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 134, 4 December 2018; *O.H. v. Germany*, no. 4646/08, § 78, 24 November 2011);
see Articles 20 and 21 of the CoE Recommendation Rec(2004)10; Article 14 (1)(b) of the CRPD.
[15] Principle 16 of the UN Principles for the Protection of Persons with Mental Illnesses and for the Improvement of Mental Health Care of 17 December 1991.
[16] Article 11 § 3 of the Psychiatric Care Act.
[17] "The decision to conduct a psychiatric examination of a person without his or her informed consent or without the consent of his or her legal representative shall be made by a psychiatrist on the basis of an application containing information that provides sufficient grounds for such examination" - Article 11 § 4 of the Psychiatric Care Act.
"In urgent cases, where the information available provides sufficient grounds for a reasonable assumption that the individual suffers from a severe mental disorder, as a result of which she or he commits or manifests an actual intention to commit an act which constitutes an imminent danger to her or himself or others, or is unable on her or his own to meet her or his basic vital needs at the level necessary to sustain her or his life, the application for a psychiatric examination of a person may be oral. In these cases, the decision to conduct a psychiatric examination of a person without his or her informed consent or without the consent of his or her legal representative shall be made by the psychiatrist independently and the psychiatric examination shall be performed by him or her immediately" - Article 11 § 6 of the Psychiatric Care Act.
[18] *M. v. Ukraine*, cited above, § 60, on participation in a court hearing.
It is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (*M.S. v. Croatia* (no. 2), no. 75450/12, §§ 152 and 153, 19 February 2015; *N. v. Romania*, no. 59152/08, § 196, 28 November 2017).
Also: CoE Recommendation Rec(2004)10, Article 20 (1)(i); Article 13 of the CRPD.
[19] Article 11 of the CoE Rec(2004)10 on the competence of medical specialists; Article 4 of the Convention on Human Rights and Biomedicine.
[20] "White paper", DI R/JUR (2000)2, cited above.

[21] See *Luberti v. Italy*, 23 February 1984, § 29, Series A no. 75; *C.B. v. Romania*, no. 21207/03, § 56, 20 April 2010; and *Ťupa v. the Czech Republic*, no. 39822/07, § 47, 26 May 2011.

[22] *Varbanov v. Bulgaria*, no. 31365/96, §§ 47 and 48, ECHR 2000-X;
It may be acceptable, in urgent cases or where a person has been arrested because of his violent behaviour, for such an opinion to be obtained immediately after the arrest. In all other cases a prior consultation is necessary. Where no other possibility exists, for instance due to a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind (*Zaichenko v. Ukraine* (no. 2), cited above, § 97).

[23] Principle 17 § 1 of the UN Principles for the Protection of Persons with Mental Illnesses and for the Improvement of Mental Health Care, cited above; *M. v. Ukraine*, cited above, § 62.

[24] WHO Community-Based Rehabilitation Guidelines, 2010, https://www.who.int/publications/i/item/community-based-rehabilitation-cbr-guidelines.