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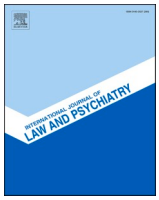

Identifying deficits in Ukrainian law: Forensic psychiatry misuse in proceedings of administrative offenses☆

Daniil Butenko [a,c,*], Slavka Dimitrova [b], Linda Gröning [a,c]

[a] Centre for Research and Education in Forensic Psychiatry, Haukeland University Hospital, Bergen 5036, Norway
[b] Law Faculty, Burgas Free University, Burgas 8001, Bulgaria
[c] Faculty of Law, University in Bergen, Bergen 5010, Norway

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ABSTRACT

Ukraine is actively denouncing and abandoning its Soviet legacy, with the legal process of decommunization being at the forefront of this process.[1] However, despite Ukraine's ongoing judiciary reformation process amplified by the signing of the Association Agreement between Ukraine and the European Union, Ukraine's legal system still contains inherited Soviet legal deficiencies that allow for human rights violations. Some of the most glaring deficiencies relate to the rules and regulations for assigning and conducting forensic psychiatric examinations in cases of administrative offenses.

With an aim to aid Ukraine in eliminating present legal deficiencies that allow for violations of human rights, here we discuss current definitions, rules, and regulations concerning appointment and execution of forensic psychiatric examinations in cases of administrative law violations. We place particular emphasis in our discussion on the European Court for Human Rights case "Zaichenko v Ukraine, No 2", and the reform bill that followed this case. This case is an 'in vivo' illustration of how Ukraine's legal deficiencies have created grounds for the violation of individual human rights.

Our assessment of the current rules and regulations for assigning and conducting forensic psychiatric examinations in proceedings of administrative offenses reveals that the legal deficiencies persist. The proposed reform bill is thus a highly warranted initiative, which however has several issues in its formulations and fails to address a few of the worst existing deficiencies. Ukraine's legislators must do further work to put through reforms that will safeguard individuals from unjustified forensic psychiatric examinations.

1. Introduction

Abuse of psychiatry is an egregious issue that is traditionally associated with authoritarian and totalitarian states, such as the Soviet Union (Bertelsen, 2014; Reich, 2014; van Voren, 2009), the Russian Federation (Global Initiative on Psychiatry, 2021), and the People's Republic of China (Mou & Gardner, 2022; Munro, 2000). It is then reasonable to expect that as the form of government transitions to a democratic one, the issue will eventually disappear along with the effects of the rule of law, division of powers, system's transparency and civil society.

This is the situation in which we find Ukraine – a former member of the Soviet Union that persistently works on reforming its state systems to achieve, among other goals, "medium-term high quality changes, improved wellbeing and a higher standard of living of citizens" (Cabinet of Ministers of Ukraine, 2023). However, when it comes to the legal system, Ukraine's still contains some provisions inherited from their Soviet past that must be eliminated to reassure democratic rule of law and secure membership in the European Union (Cabinet of Ministers of Ukraine, 2014). In particular, there are deficiencies and gaps within the

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* Corresponding author at: Centre for Research and Education in Forensic Psychiatry, Haukeland University Hospital, Bergen, Norway.
E-mail addresses: daniil.butenko@uib.no (D. Butenko), sdimitrova@bfu.bg (S. Dimitrova), Linda.groning@uib.no (L. Gröning).
[1] Two bills from 2015 regulate the process of decommunization: 'On denouncing the Communist and the National-Socialist (Nazi) totalitarian regimes in Ukraine and banning the propaganda of their symbols' and 'On access to archives of repressive bodies of the Communist totalitarian regime of 1917–1991'

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procedural rules and regulations for examining accountability[2] for administrative offenses. As the European Court for Human Rights (ECtHR') case 'Zaichenko v Ukraine, No 2' (European Court of Human Rights, 2015) illustrates, these gaps and deficiencies can lead to the misuse of psychiatry through the imposition of unjustified compulsory forensic examinations. Considering the fact that Ukraine is consciously orienting itself toward EU membership, having issues with such a basic legal procedure as accountability assessment is especially problematic. Thus, with an underlying aim to aid Ukraine in its pro-European efforts to strengthen and modernize its democratic legal system, in this article we discuss deficiencies in the Ukrainian rules and regulations relevant to the forensic psychiatric assessment of accountability in administrative offense proceedings. In our discussion, we will refer to the Zaichenko case and the weaknesses of the reform bill that was proposed to address the deficiencies this case illustrated. As such, we are not providing comprehensive legal doctrinal analysis, but we are rather drawing attention to problems that originate from the lack of regulations. To our knowledge, this is the first paper that problematizes this subject in English academic literature, and we hope that it will stimulate further legal analysis.

The paper is structured as follows. To ground our discussion in the Ukrainian context, Section 2 begins by outlining key characteristics of the Ukrainian legal order. In Section 3, we present the relevant legal rules and regulations and identify their deficiencies. With this background in place, in Section 4 we turn to the Zaichenko case to illustrate how existent deficiencies may allow for unjustified compulsory forensic examinations. In Section 5, we describe the reform bill that followed the case; and in Section 6 we discuss issues that the bill leaves unaddressed. Finally, in Section 7, we provide our concluding remarks.

2. Key characteristics of the legal order of Ukraine

Like the majority of European countries, Ukraine is a constitutional democracy with a civil law system. The Constitution of Ukraine is the pinnacle of the juridical acts' hierarchy, while laws and other normative rules are adopted based on the Constitution with an obligation to comply with its provisions. According to the Constitution, Ukraine is a sovereign, independent, democratic, social, law-based, unitary, semi-presidential republic (Verkhovna Rada of Ukraine (Ukrainian Parliament), 1996). Section 3 of the Constitution stipulates that a human being, their life and health, honor and dignity, inviolability and security are the highest social values of Ukraine. The actions and activity of the state are determined by and oriented toward human rights and freedoms. The affirmation and assurance of the rights and freedoms of a human being are the key duties of the state. The Section 6 of the Constitution, moreover, declares that the state power is divided into legislative, executive, and judicial branches and is exercised within the limits of the Constitution and in accordance with Ukrainian laws. The Parliament (Verkhovna Rada of Ukraine) exercises legislative power, while executive power is vested in the Cabinet of Ministers of Ukraine, ministries and other central bodies of the executive, local state administrations in regions (oblasti) and districts (rayony). Finally, the courts are the exclusive domain of judicial power. The president, directly elected by the citizens of Ukraine, is the head of the state and the guarantor of the Constitution. The president's authority, granted by the people for a period of 5 years, covers both internal and international affairs. Among other functions, the president signs laws adopted by the Parliament and has the right to veto them, except for laws on amendments to the Constitution. The president represents the country on the international arena, administers the foreign policy, and acts as the Ukrainian Army's Supreme Commander-in-Chief. According to Section 5 of the Constitution, the sole source of the state power is the Ukrainian people, who exercise it directly, through the state and local government bodies.

In this context, it is also important to note that Ukraine has adopted several international human rights treaties (Ukrainian Parliament Commissioner for Human Rights, 2023), among the ones most relevant to the subject at hand are: the Universal Declaration of Human Rights (UN General Assembly, 1948); the European Convention on Human Rights (ECHR) (Council of Europe, 1950); the International Covenant on Civil and Political Rights (UN General Assembly, 1966a); the International Covenant on Economic, Social and Cultural Rights (UN General Assembly, 1966); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN General Assembly, 1984); and the Convention on the Rights of Persons with Disabilities (UN General Assembly, 2007). Our discussion focuses on the ECHR and the Zaichenko case, in which the ECtHR found that Ukraine had violated Articles 5 and 8 of the Convention. Before proceeding to the case, we provide an overview of the Ukrainian rules and regulations relevant to accountability assessments in administrative offense proceedings.

3. Overview of the relevant rules and regulations

3.1. Unaccountability in the Administrative and the Criminal code

In order to discuss deficiencies in the rules and regulations of the law on administrative offenses, it is essential to outline the concepts of 'criminal' and 'administrative' liability and the way corresponding laws define unaccountability. Like many Eastern and Central European countries with Soviet background, Ukrainian law distinguishes administrative and criminal liability, regulating administrative liability through the Code on Administrative Offenses (Verkhovna Rada of the Ukrainian Soviet Socialist Republic, 1984) and via individual laws of Ukraine, while the Criminal Code regulates criminal liability[3] (Verkhovna Rada of Ukraine (Ukrainian Parliament), 2001). According to Section 9 of the Code on Administrative Offenses (hereafter the Administrative Code), "an administrative offense (misdeed) is an unlawful, guilty (deliberate or negligent) act or failure to act, which infringes on public order, property, citizens' rights and liberties, or established procedure of management, and for which administrative liability is provided in the law".[4] Administrative liability for offenses obtains if the offenses in their nature do not entail statutory criminal liability. A criminal offense, according to Section 11 of the Criminal Code, is "A publicly dangerous culpable act (action or omission) prescribed by this Code and committed by an offender".[5] Although an act or omission may formally have any elements of an act under the Criminal Code, it is not a criminal offense if, due to its considered insignificance, it does not pose 'public danger', i.e., it is considered neither to cause or be able to cause considerable harm to any natural or legal person, community, society or the state". As such, the main criterion distinguishing an administrative offense from a crime is the level of 'public danger' or how harmful to society the action is considered to be.

According to Section 20 of the Administrative Code, "a person who was in a state of not being eligible to be judged (unaccountable) at the time of committing an illegal act or omission, is not subject to

[2] In this paper we use the term "unaccountability" to refer to a defendant's capacity of being liable for violations of the law, cf. criminal acts. In the international, mainly Anglo-American discourse, the term "legal insanity" or "criminal insanity" is often used in this regard. Insanity is, however not used in any legal standard in Ukrainian law, but these standards utilize words that can be translated precisely to (un)accountability.

[3] Each code also has its own procedural code, with the Criminal Procedure Code of Ukraine governs criminal proceedings, while the Code of Administrative Procedure of Ukraine governs administrative proceedings.

[4] An example of an administrative offense is driving a vehicle while being intoxicated (Section 130 of the Administrative code).

[5] An example of a criminal offense is a murder (section 115 of the Criminal code).

administrative liability". The rule defines an unaccountable person as someone "who, during the commission of an illegal act or omission, could not have been aware of their actions or control them due to a chronic mental illness, temporary mental disorder, mental retardation or other illness". Thus, the rule allows for wide discretion about what mental conditions may produce unaccountability, which in turn allows for large discretion about when compulsory forensic examinations can be conducted.

The unaccountability rule in the Section 19 of the Criminal Code is somewhat more detailed and the criteria are semantically narrower than that of the Administrative Code. Contrary to the rule in the administrative code, this rule starts with a positive definition of accountability: "a person is considered to be accountable if they could have been aware of their actions (inactions) and control them during the commission of a criminal act". The second paragraph under this section elaborates the conditions of unaccountability: "a person is not a subject of criminal liability if during the commission of a publicly dangerous act they were in a state of unaccountability, i.e., they could not have been aware of their actions (inactions) or control them due to chronic mental illness, temporary mental disorder, mental retardation or other disordered state of psyche. Coercive medical measures may be applied to an unaccountable person by a court decision". Thus, while the definition in the Administrative Code semantically allows for any illness to become the ground for the mental deficiencies key to ruling someone to be unaccountable, the Criminal Code formulation restricts it only to mental disorders. In addition, the Administrative Code does not specify whether coercive medical measures may be applied to an unaccountable person. How and to what extent legal and forensic practice in Ukraine reflects these semantic differences is unclear, and thus it is a relevant question that should be addressed empirically in future.

The third paragraph of Section 19 of the Criminal Code states, "a person is not subject to punishment if they committed a criminal offense in a state of accountability, but before the verdict they became mentally ill with a state that deprived them of the opportunity to be aware of their actions (inactions) or to control them. Coercive medical measures may be applied to such a person by a court decision. If they recover, such a person may be subject to punishment". The third paragraph is yet another difference between the Criminal and the Administrative codes, as the latter one does not have such a rule.

Another difference between unaccountability rules in the Administrative and Criminal codes is the presence of rules about diminished accountability in the Criminal Code but not in the Administrative Code. According to Section 20 of the Criminal Code, "a person is criminally responsible if they were not able to be fully conscious of their actions (inactions) and (or) control them due to the presence of a mental illness during the commission of a crime". According to the second paragraph, "the status of diminished accountability is taken into consideration by the court during the assignment of a punishment to an offender and can be used as premises for assigning coercive medical measures".

The final difference between the codes that is relevant here is the Administrative Code's lack of a separate rule addressing the liability of those who commit administrative offenses under the influence of alcohol or drugs. The Criminal Code has such a rule in Section 21, which states, "a person who committed a criminal offense while in a state of intoxication resulting from the use of alcohol, narcotics, other intoxicants or medical substances that reduce attention and reaction speed is criminally liable".

One of the possible explanations for the discrepancies is that the Criminal Code was substantially revised in 2001, while the Administrative Code was adopted in 1985, during the Soviet period.[6] As seen in many post-communist countries, Ukrainian legal acts adopted during the 'communism' period can conflict with the Ukrainian modern legal order, as reflected in the current Constitution, international treaties and ECtHR practice. In our view, the outlined differences between the Criminal Code and the Administrative Code illustrate an inconsistency in the regulation of unaccountability and related compulsory measures. As these rules are essentially related to human rights and the same foundational legal principles, the rules should be similar across the codes to ensure fair and equal treatment of human beings within their jurisdiction. In comparison to the rules in the criminal law, one of the key problems in the administrative law is the lack of regulation of the use of compulsory forensic psychiatric measures. We will now turn our attention to this matter.

3.2. Regulation of forensic psychiatric examinations in administrative cases

Section 21 of the Ukrainian act about psychiatric services postulates that in proceedings on administrative offenses, "forensic psychiatric examinations must be appointed and conducted on the grounds of and according to the procedures prescribed by law" (Verkhovna Rada of Ukraine (Ukrainian Parliament), 2000). However, the relevant regulations and rules governing the procedures for appointing and conducting forensic psychiatric examinations are either poorly defined or completely absent, as will be demonstrated in the following sections. This ambiguity leaves substantial room for discretion and misuse.

To begin, the Code of Administrative Procedure (Verkhovna Rada of Ukraine (Ukrainian Parliament), 2005) that elaborates the general process of appointment of a forensic examination, does not contain specific regulations for how a forensic psychiatric examination should be commissioned and conducted.[7] The separate act about forensic examinations also does not regulate the commission and performance of forensic psychiatric examinations (Verkhovna Rada of Ukraine (Ukrainian Parliament), 1994). The Ministry of Justice's regulation of the approval of instructions on the commission and conduct of forensic examinations contains an entry about psychological forensic examinations, but not psychiatric ones. For psychological examinations, the regulation identifies eligible subjects and aims of the examination, methods that can be used during the examination, and questions that can be addressed to the expert by the party that assigned the examination (Ministry of Justice of Ukraine, 1998).

The procedure for forensic psychiatric examinations is somewhat outlined in a separate regulation from the Ministry of Health (Ministry of Health of Ukraine, 2018). In particular, the regulation stipulates that "the subject of the examination is the mental state of a person in certain legally important periods of time" (i.e., at the time of the act). However, the regulation does not spell out the factual premises for appointing the examination. Another issue is the fact that the regulation lacks a procedure to be followed in case a person completely refuses to be examined or refuses to be examined in a particular setting while not satisfying the

[6] The current Criminal Code of Ukraine was adopted on April 5, 2001 and came into effect on September 1, 2001. It replaced the Criminal Code of the Ukrainian Soviet Socialist Republic of 1960. The Code on Administrative Offenses, while edited multiple times since Ukraine gained independence, was written for the Ukrainian Soviet Socialist Republic and has been in effect since June 1, 1985.

[7] It should be emphasized that contrary to the Code of Administrative Procedure, the Criminal Procedure Code has separate regulations for forensic psychiatric assessment under Section 509, paragraph 3 of Section 242, paragraph 8 of Section 309, Section 486, Section 513, Section 514, and Section 515.

criteria for an involuntary psychiatric examination.[8] Furthermore, Section 10 stipulates that "the mental state of a person in certain legally important periods of time can be examined for the purpose of providing answers to questions posed by the person or the legal body that engaged the expert, or by the investigating judge or the court that commissioned the examination". However, neither this regulation nor others explicitly identify which questions an expert can be requested to answer, thus leaving this matter to considerable discretion.

The health ministry's regulation also stipulates that "a forensic psychiatric examination can be conducted either in an outpatient or inpatient setting". In addition, "if there is a need, the examination can take place at the location of the examinee, provided the expert has unimpeded access to the examinee". Furthermore, "the examination can be conducted by one expert or by a commission".[9] "The timeframe for conducting an outpatient examination is up to 30 working days from the date of receiving all necessary materials. Depending on the degree of complexity of the examination and the volume of objects submitted for examination, this term can be extended with the notification of the body (person) who appointed the examination and at whose request the expert was involved". The inpatient examination can last "up to two months, unless a shorter term is established by the decision of the investigating judge or the court". However, when it comes to the examinations in administrative offense cases, there are no clear regulations for choosing a setting (i.e., outpatient, inpatient) and or the type of assessment (i.e., single or by a commission).[10]

Despite the absence of the aforementioned clear regulations, forensic psychiatric examinations in cases concerning administrative offenses are being ordered and conducted, relying on the common procedural traditions and general approaches described in Ukrainian legal academic literature (Kikinchuk et al., 2019; Kofanov, Kobylyanskuy, Kuzmichov, Udovenko, & Hilchenko, 2017; Tsylmak, 2014). However, as the case Zaichenko v Ukraine, No 2 illustrates, the lack of clear legal guidance can allow for unjustified use of compulsory psychiatric measures. In this case, Vladimir Georgiyevich Zaichenko, a Ukrainian citizen, complained to the ECtHR about his involuntary psychiatric confinement and the police's collection of information about him in that context. The Court declared these parts of the application admissible[11] and eventually concluded that a violation of Articles 5 and 8 of the ECHR had taken place.

We will now take a closer look at the facts of this case and of the reasoning behind the conclusion that Ukraine had violated Zaichenko's rights. We will limit our discussion of the case to the breach of Article 5 through Zaichenko's involuntary psychiatric confinement.

4. The case '*Zaichenko v Ukraine, No 2*'

4.1. Facts in the case

The Zaichenko case had its background in incidents in Ukraine in 2009 cases (European Court of Human Rights, 2015). In July 2009, the applicant, Vladimir Georgiyevich Zaichenko, addressed several letters to the Regional Administrative Court that contained rude remarks about the judges involved in proceedings that he had initiated in domestic courts. The court drew up an administrative offense report in light of the letters, stating that the applicant was in contempt of court. The case was sent to the Krasnogvardiyskyy District Court, which ordered an in-patient forensic psychiatric examination of Zaichenko to be carried out by the regional psychiatric hospital to establish whether he could be held legally accountable. The judge here relied on Article 20 of the Code of Administrative Offenses and Section 21 of the Act about Psychiatric Services, which we have described above. It is important to note that the ruling about the examination stated that it was not amenable to appeal. On this basis, Zaichenko was thus confined, against his will, in a psychiatric hospital for an expert psychiatric assessment. The confinement took place during the periods from 23 to 24 July and 14 September to 8 October 2009 and lasted for twenty-five days in total.[12]

Eventually, Zaichenko applied to the ECtHR and complained that his placement and detention in a psychiatric hospital had been in breach of his rights under Article 5 of the Convention. The Court stated that Zaichenko "maintained that he had been deprived of his liberty in an unlawful and arbitrary manner. He contended that the regional Administrative Court had not been entitled to order his in-patient forensic psychiatric examination under the applicable legislation. Moreover, he argued that his right to be presumed in good mental health had been violated, and that the real purpose of his psychiatric confinement was to punish him for his active civil stance" (See Section 90 of the Zaichenko case).

4.2. The argumentation and judgment of the ECtHR

The ECtHR concluded that Article 5, Section 1 of the ECHR was violated. As the basis for its conclusion, the Court took Article 5 of the Convention is "in the first rank of the fundamental rights that protect the physical security of an individual and as such its importance in a democratic society is paramount" (see Section 92 of the Zaichenko case). It reiterated its established caselaw (see Section 93 of the Zaichenko case) that any deprivation of liberty that concerns Article 5 must therefore be deemed necessary in the particular circumstances, and can only be "justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or relevant public interest" (see Section 93 of the Zaichenko case).

Thereafter, the ECtHR noted that Zaichenko's confinement in the psychiatric hospital amounted to "deprivation of liberty" within the meaning of Article 5, Section 1 of the Convention (see Section 94–96 of the Zaichenko case). Although the confinement was not based, *stricto* sensu, on a finding that the applicant was of unsound mind, but rather had the aim of having him examined, the ECtHR found Article 5, Section 1(e) to be applicable. As such, confinement must comply with the purpose of protecting individuals from arbitrariness and with the aim of the restriction contained in Article 5, Section 1(e). Referring to its

[8] According to Section 11 of the aforementioned law about psychiatric services, "psychiatric assessment without an informed consent from the individual or their legal representative can be conducted when there is sufficient information for a reasonable assumption that the individual in question has a severe mental disorder due to which they: a) commit or demonstrate intentions to commit actions that represent an immediate danger to themselves or others, or b) are unable to independently fulfill their basic life needs at the level that ensures their existence, or c) will cause significant harm to their health due to the deterioration of their mental state if not provided with psychiatric treatment".

[9] A decision about the formation is made by the body which requested the assessment or by the leader of the forensic unit.

[10] It is important to note that contrary to the Administrative procedural code, the Criminal procedural code has such regulation, though rather vaguely described. The paragraph 2, section 509 stipulates that an inpatient psychiatric forensic assessment can be held in case of a need for a longitudinal observation and assessment of an individual.

[11] See sections 80–89 and 109–114 of *Zaichenko v. Ukraine No 2*. See also Sections 123–124 for other alleged violations of the conventions.

[12] In this context, the court instructed the police to collect information on the applicant's personality, which was required for the psychiatric hospital to establish his mental state. In particular, the police were instructed to collect any documentation relating to psychiatric treatment or drug therapy received by the applicant, as well as character references for him from his relatives, neighbors, and colleagues. The police collected this information without consent, and thus was considered a breach of Article 8 of the ECHR. See Sections 115–122 of the *Zaichenko* case.

established case law (e.g., Winterwerp v. the Netherlands, 24 October 1979, § 39, Series A no. 33), the Court here argued that at "an individual cannot be considered to be of 'unsound mind' and deprived of his liberty unless the following three minimum conditions are satisfied: firstly, he must reliably be shown by objective medical expertise to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of continued confinement depends on the persistence of such a disorder" (see Section 96 of the Zaichenko case).

In particular, the confinement of Zaichenko raised the issue of objective medical evidence. To this point, the court emphasized that "no deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5 § 1(e) if it has been ordered without seeking the opinion of a medical expert – even if the purpose of the detention is precisely to obtain a medical opinion". Although the particular form and procedure in this respect may vary depending on the circumstances, the Court found that the confinement of Zaichenko did not comply with what it required. The Court took into account that the only basis for Zaichenko's confinement was:

> The judge's doubts as to the state of his mental health ensuing from his insulting and rude statements about other judges. The judge ordered the applicant's in-patient psychiatric examination, which meant his confinement in a psychiatric hospital for up to thirty days, without having obtained any preliminary medical opinion and without there being any medical records or other documents in the case file necessitating such a decision (see Section 98 of the Zaichenko case).

The Court moreover emphasized that there was no reason to assume that the case was urgent or that the applicant had previous episodes of mental illness. The Ukrainian legislation provided for less invasive forensic psychiatric examinations, but these options had not been considered (see Section 100 of the Zaichenko case).

Of special relevance for our discussion is the fact that the ECtHR pointed to gaps in the current Ukrainian rules and regulations for forensic psychiatric examinations in proceedings of administrative offenses. The ECtHR in fact observed:

> There is a lacuna in the pertinent domestic legislation. While the applicable legal provisions contain quite specific safeguards in respect of expert forensic psychiatric examinations undertaken within criminal or civil proceedings, such examinations within administrative offense proceedings in fact remain unregulated (see Section 101 of the Zaichenko case).

As we have discussed above, Ukraine's Administrative Code does not provide detailed procedures regarding compulsory confinement to a psychiatric clinic for a psychiatric examination. Considering the view of the ECtHR, that seeking a medical opinion is not a legitimate precondition to ordering detention for compulsory psychiatric examination, the Ukrainian applicable legal provisions fall short of the required standard of protection against arbitrariness.

The Court also found that the applicant had no possibility of challenging the ruling of the Krasnogvardiyskyy Court ordering his inpatient forensic psychiatric examination, nor were there any mechanisms in place for him to seek his release from the psychiatric hospital (see Section 86 of the Zaichenko case). To be "in accordance with the law" and "in accordance with a procedure prescribed by law", the impugned measure should have a basis in domestic law that should be accessible to the person concerned and foreseeable as to its effects (see Section 118 of the Zaichenko case). The ECtHR found that these requirements were not fulfilled in the Zaichenko case and concluded that the confinement of Zaichenko amounted to a violation of Article 5 of the Convention.

In our view, the Zaichenko case thus clearly illustrates deficiencies and gaps in current Ukrainian rules and regulations for forensic examinations in administrative offense cases. Given the absence of substantial procedural safeguards and guidelines for forensic examinations, combined with wide room for discretion about what mental conditions are relevant, it is not surprising that unjustified compulsory psychiatric examinations can take place. These deficiencies must be taken seriously, as they concern fundamental individual rights and safeguards against arbitrary use of state power.

5. The reform proposal that followed the case

Ukrainian legislators recognized that the current deficiencies and gaps in law on administrative offenses needed to be addressed. In light of the ECtHR judgment, in 2020 a reform bill was introduced that proposes changes to existing rules, as well as enactment of new rules in the Code on Administrative Offenses (Cabinet of Ministers of Ukraine, 2020a). This bill aims to prevent both the unjustified appointment of a forensic psychiatric examination and the placement of persons subject to administrative liability in psychiatric institutions.

First of all, the bill proposes to change the definition of unaccountability in Section 20 of the Administrative Code by replacing the words "a chronic mental illness, temporary mental disorder, mental retardation or other illness" with the words "severe mental disorder" (Cabinet of Ministers of Ukraine, 2020a). As such, the new definition says that a person is unaccountable if, during the commission of an illegal act or omission, they could not have been aware of their actions or control them due to a severe mental disorder.

Furthermore, the bill proposes to add Section 280 to the Code on Administrative Offenses that would stipulate that a "legal body, which handles an administrative offense case, has a right to appoint a forensic psychiatric examination if there is sufficient evidence that an accused person may have been unaccountable during an illegal act or an omission". The appointment of a forensic psychiatric examination requires consent from an accused person or their legal guardian, or their request for the procedure.

> If consent is not provided, the body or official shall promptly submit the protocol on the administrative offense, along with the case materials, to the court for further consideration and decision making. This submission should take place urgently, but not later than 24 h. The court (judge) handling a case of an administrative offense appoints a forensic psychiatric examination either upon request from the individual facing administrative responsibility, or from their legal representative, or at the judge's own discretion. An evaluation of the need to conduct a forensic psychiatric examination must occur in the presence of the defense lawyer, who must be assigned to the person in question free of charge if the person hasn't arranged it themselves (Cabinet of Ministers of Ukraine, 2020a).

To this end, it is of uttermost importance to point out that the explanatory note that supplements the bill states, "if it is necessary and if there are sufficient premises, the court (judge) may appoint a forensic psychiatric examination without their [the individual's] consent" (Cabinet of Ministers of Ukraine, 2020b). By "sufficient premises", the authors mean "issued by mental healthcare institutions or by a psychiatrist's documents that confirm a) previous provision of psychiatric care to the person and/or b) the person's behavior during or after the commission of an illegal act or inaction that is or was inadequate[13] (impaired consciousness, disturbance of perception, thinking, will, emotions, intelligence, memory, etc.)".

The bill also proposes to add a new section to the Administrative Code dedicated to the mandate and obligations of forensic experts,

[13] It is important to point out that the formulation "inadequate behavior" used in the explanatory note is problematic, as it is an arbitrary category that risks stigmatizing individuals who experience mental health problems by implying that their behavior is normatively inadequate or subpar due to their condition. As such, usage of the term should be omitted.

including general clarifications on the forensic examination appointment process. According to the proposal,

> An expert must be assigned by a legal body (an official), a court (a judge) in an administrative offense case where there is a need for special knowledge. An [forensic] examination must be conducted either during a court hearing or outside of the house of the court if the character of an investigation requires it, or if an object of the investigation cannot be delivered to the court. An expert must provide a justified and objective written conclusion to the questions posed to them. An expert is also obliged to appear in case of a request from a legal body or a court and explain their conclusion, answering questions posed by the court or case participants. An expert has permission to study case materials that concern the obbject of their [forensic] examination and request additional materials needed for their conclusion. An expert is allowed to ask an accused, a victim, and witnesses questions related to the [forensic] examination after being permitted by a legal body or a court. Finally, an expert has a right to be present at a hearing (Cabinet of Ministers of Ukraine, 2020a).

Finally, the bill also introduces a new section that regulates the rights of individuals subject to administrative liability. The addition proposes that such individuals are to have the right to "get acquainted with the case materials, give explanations, submit evidence, give consent or refuse to undergo a forensic psychiatric examination, make a petition, including a petition regarding the conduct of a forensic psychiatric examination".

The bill was submitted in 2020 to the Parliament; however, it has yet to come up for a vote.

6. Issues that the bill leaves unresolved

While the bill presents a respectful attempt to improve the current regulations and provide clearer legal standards for the appointment of forensic psychiatric examinations in the proceedings dealing with administrative offenses, it doesn't resolve a number of substantial and procedural issues.

One of the key issues with the bill is that the criteria for appointing forensic psychiatric examinations allow for too much discretion. For example, the bill fails to provide clear procedures for courts to follow when an individual does not consent to be examined by psychiatrists. Another issue is the usage of "et cetera" at the end of the description of the 'inadequate behaviors' that can serve as sufficient premises for raising questions about the accountability of an individual.[14] Such wide room for discretion maintains the possibility for misuse of forensic examinations. To this end, it is important to point out that the explanatory note to the bill, if enacted, risks opening the gate for discrimination and violation of the law with regard to psychiatric services, the Constitution and human rights, by allowing involuntary psychiatric examination of people who merely utilize mental healthcare services. Involuntary psychiatric and forensic measures are state interventions that limit and potentially violate individuals' autonomy and rights. Despite the acknowledgement in some scenarios that involuntary psychiatric interventions might be indispensable for averting immediate harm, such measures ought to be contemplated only as a final recourse (Szmukler, Daw, & Dawson, 2014). The ethical appointment and conduct of these interventions is paramount, with the cardinal concern being safeguarding the welfare and rights of the individual involved.

Furthermore, in order to decrease the probability of misuse, it would be beneficial to further standardize the procedures surrounding forensic psychiatric examination. The legislature in this context must consider how it can ensure that experts are doing their examinations in a systematic and uniform way across the whole country – and that judges require this. For example, the aforementioned regulation from the Ministry of Health (Ministry of Health of Ukraine, 2018) could include requirements for the scientific validity and reliability of methods that forensic psychiatric experts can utilize when carrying out their task . . To this end, it is important to note that it is always the court that must decide whether a person is accountable or not, and the normative aspects of these decisions should also in our view be dealt with by judges – and not the experts. As such, forensic psychiatric experts should provide legally relevant information about the mental state of the individual in question, but not a conclusion as to their legal accountability.

The bill also does not identify formal premises for choosing the examination setting (i.e., outpatient, inpatient) and type of assessment (i.e., single or by a commission) in administrative offense proceedings. Inpatient psychiatric examination entails limiting one's liberty and is also a resource-demanding procedure. As such, it should be restricted to the most difficult cases, in which there are no circumstances under which the examinations could be held effectively in an outpatient setting.

Finally, an overall issue is that the bill does not resolve the issue of the existing discrepancy between the Administrative and Criminal codes in terms of regulations of accountability. The distinction between crimes and administrative offenses should not matter to the protection of the rights of offenders via procedures concerning their accountability and possible compulsory measures. In this connection, it is important to note that the national distinctions in administrative and criminal offenses also do not comply with the existing ECtHR practice regarding Article 5 of the Convention, as we see in Zaichenko case. One may even argue that the much wider scope of administrative accountability asks for better procedural safeguards in administrative procedures than in criminal procedures. Without such safeguards, the low threshold for an act to be considered an administrative offense, may easily be used as an entrance point to employing unjustified compulsory psychiatric measures. Instead, the definitions of unaccountability should be identical across the codes, while the administrative procedural code should employ the same procedural standards as the criminal procedural code.

7. Concluding reflections

Our analysis shows that deficiencies in the current rules and regulations for assigning and conducting forensic psychiatric examinations in administrative proceedings persist after the Zaichenko case. As a result, these rules and regulations do not provide enough guarantees against the misapplication or misuse of psychiatric services. The overarching issue is that the rules and regulations allow for too much discretion about when and against whom compulsory psychiatric forensic measures may be carried out in administrative case proceedings. A particularly notable problem is that, compared to criminal cases, unaccountability assessments in administrative cases are subject to lower procedural standards and less clear regulations.

At the same time, legal doctrines about who is accountable and not for their unlawful actions, whether they are crimes or administrative offenses, concern fundamental principles of justice. Across the world, these doctrines could be viewed as a response to a social call for fairness, arguing that certain defendants should not be held accountable for their actions due to their mental state at the time of the act (Gröning, Haukvik, Morse, & Radovic, 2022). It is then imperative that the relevant rules and regulations are sufficiently clear to secure legal certainty and equal treatment before the law.

As such, the reform bill proposed by the Ukrainian government is a highly warranted initiative as it aims to resolve the deficiencies that enable human rights violations. However, as we have discussed, this reform bill leaves several significant problems unsolved, especially

[14] It also must be noted that the formulation "inadequate behaviors" in the explanatory note to the bill does not correspond semantically with the provided examples of pathologic mental states as they are not examples of 'behaviors': impaired consciousness, disturbance of perception, thinking, will, emotions, intelligence, memory.

related to substantial definitions of accountability, procedural rules, and standards. Ukrainian legislators need to continue to work to reassure that in all cases – administrative or criminal –individuals are safeguarded from being unjustly assigned to forensic psychiatric examination or placed in a psychiatric facility for examination. As it follows from the consistent practice of the ECtHR, detention in mental healthcare institutions is a deprivation of liberty that must comply with human rights standards.

Reaching beyond the scope of this paper, it would be of significant value to further research Ukrainian legal and forensic systems in action. Of special interest would be comparative legal studies that can contribute to the advancement of both local and global legal frameworks, and of the pursuit of justice in an increasingly interconnected world (Gröning & Dimitrova, 2023). Such knowledge on legal and forensic practice would contribute to the efforts of the current study to aid Ukraine in crafting a robust legal system that functions in accordance with human rights requirements and European constitutional values.

Declaration of Competing Interest

None.

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