

# КРИМІНАЛЬНЕ ПРАВО І КРИМІНОЛОГІЯ

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## PECULIARITIES OF APPLICATION OF COMPULSORY MEDICAL MEASURES TO MENTALLY ILL PERSONS WHO HAVE COMMITTED A CRIMINAL OFFENCE IN THE USA

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**Purpose:** to analyse the legislation of the United States of America (hereinafter - the USA) regulating the application of compulsory medical measures to mentally ill persons who have committed a criminal offence.

**Research methods:** analysis and synthesis, cognitive and analytical, methods of systematisation and generalisation. **Results:** the analysis of the criminal and procedural legislation of the United States made it possible to assert that the concept of insanity and sanity for persons with mental disorders is a set of criteria (mental and legal) that undoubtedly require further study, clarification and improvement from the point of view of medicine, theory of criminal and procedural law, forensic practice. **Discussion:** components of a comprehensive approach to the application of compulsory medical measures to mentally ill persons in the United States.

**Key words:** compulsory medical measures; foreign experience; forensic psychiatric examination; insanity; partial sanity; hospitalisation.

**Problem statement and its relevance.** Ukraine is nowadays moving quite actively towards integration into the modern European society and the international community, and it is therefore imperative to bring its criminal and criminal procedure legislation in line with the requirements of international legal acts. Therefore, there is a need to rethink many provisions of criminal procedure legislation, including the specifics of the application of compulsory medical measures. Knowledge of the peculiarities of the application of compulsory medical measures will be definitely incomplete if we do not pay attention to similar scientific and applied problems and phenomena that occur abroad. Foreign experience is as important as any human experience. Comparative research is of

particular value in this regard, as it is a necessary element of the development of science, including criminal procedure.

**Analysis of recent research and publications.** Certain theoretical and practical issues of application of compulsory medical measures in criminal procedure were considered in scientific works on criminal law and criminal procedure by M.I. Bazhanov, S.E. Beklemyshev, M.Sh. Globenko, I.V. Zhuk, L.V. Golovko, B. Derdiuk, S. Sharenko, O. Yamkova and others. However, scholars have studied the application of compulsory medical measures in international instruments only fragmentarily, mainly in the context of substantive (criminal) law.

Summary of the main research material. The history of international cooperation in the field of criminal and criminal procedure law, in particular on the issues of sanity and treatment of mentally ill persons who have committed crimes, is quite long. A critical awareness of legal approaches in different countries to the problem under consideration contributes to building their own vision and consolidating the use of compulsory medical measures for persons with mental illness and disorders who have committed criminal offences in the national legislation of individual countries [1, p. 174].

Agreeing with the scientific opinion of O.O. Yukhn, G.I. Globenko, T.G. Fomina and E.N. Ruda, it is worth citing the reasonable opinions of these scholars, namely: "the issue of the use of compulsory medical measures is still relevant today, as the international community monitors this area, taking into account certain abuses of power in these matters during the former USSR" [2, p. 93].

The system of applying compulsory medical measures to mentally ill persons in the United States is interesting, as it differs significantly from that provided for in national legislation.

Having started the study of the peculiarities of the application of compulsory medical measures to mental patients in the United States, it should be noted that the American legislator refers to them as security measures. Legal support for security measures in the United States is provided on the basis of separate special laws in force in different states. The Sexual Offences Act is in force in half of the states of the country, and it first appeared in Illinois in 1938 (later, in 1997, the Sexual Offenders Act was adopted to complement this law). Other states actively apply special laws on criminalisation of sexual offences. For example, in Minnesota, the Psychopathic Personality Act was passed in 1939, and the Sexually Dangerous Persons Act in 1994.

The peculiarity of security measures applied to mentally ill persons in the United States is that in each state such measures are defined differently. For example, in Maryland, these measures are called "isolation of defective offenders". The peculiarity of the criminal codes of individual states

is that they do not contain legislative norms regulating this legal institution.

The range of circumstances to be established in cases involving the use of compulsory medical measures for mentally ill persons is not clearly regulated in American law, unlike national legislation. It is the accused who bears the burden of proving his or her insanity by presenting clear and convincing evidence.

Criminal proceedings on the application of the compulsory medical measures to mentally ill persons, in accordance with the legal requirements of the United States, are considered by a presiding judge and a jury. The trial of this category of persons is conducted in open court and is public. However, this is not a good experience of the United States, because a trial involving a person with mental disorders should be closed, since during the consideration of this category of proceedings, information that constitutes medical confidentiality is always investigated and analysed.

With regard to the forensic psychiatric examination, the national legislator took the opposite approach to the US legislator, clearly legislating for a mandatory forensic examination to establish the mental state of a suspect or accused person if there are doubts about his or her sanity. According to US law, a forensic psychiatric examination is not mandatory when applying compulsory medical measures to mentally ill persons. The decision to conduct an examination and engage an independent expert may be made only in exceptional cases.

When deciding whether the accused has a mental illness or mental disability, American experts use the Diagnostic and Statistical Manual of Mental Disorders prepared by the American Psychiatric Association.

The accused bears the burden of proving insanity by clear and convincing evidence, and psychiatrists provide this evidence. Psychiatrists, following the rules of adversarialism, participate in the process by speaking against each other, and the defence side counteracts the prosecution side. In such cases, the psychiatrist is perceived not as a specialist in his or her field, but as a representative of the party, of course, whose opinion is well paid, and possibly bought. Even psychiatrists with

extensive experience sometimes cannot agree on the issue of insanity, namely because of the complexity of establishing a mental disorder and the periods of the disease.

There is no single definition of insanity in US law, so the legal interpretation of insanity is made by the courts, in particular by a jury. That is, in some cases, it is the jury that has to determine the sanity or insanity of the defendant.

Therefore, "insanity" is understood not as a scientific fact, but as a certain system of rules of morality and ethics.

As a result of court proceedings in criminal proceedings against persons who are legally recognised as insane, two types of decisions may be made, depending on the territorial jurisdiction, namely: "not guilty by reason of insanity" or "guilty but mentally ill". Moreover, in some states, the court may render a verdict of "not guilty by reason of insanity", while in other states, it may render a verdict of "guilty but mentally ill".

The purpose of the "guilty but mentally ill" verdict is to prevent insane persons from being found innocent. A verdict of "guilty but mentally ill" is delivered by a jury. It should be borne in mind that without legal skills, jurors often face great difficulties in determining actual guilt and the ability of defendants to assess the ability to understand the consequences of their actions, so the imposition of such a verdict has become a so-called "guarantee" for them that persons evading criminal liability by means of the "insanity defence" will not be able to avoid legal punishment.

In the American doctrine, there is an opinion that a verdict of "not guilty by reason of insanity" is more dangerous than a verdict of "guilty but mentally ill". After all, persons convicted under the first type of sentence, namely "not guilty by reason of insanity", do not bear any criminal responsibility and may leave psychiatric institutions after a while and start committing criminal offences again. This is due to the following reasons: 1) persons sentenced to compulsory treatment due to insanity are released on the same grounds as other citizens and are entitled to due process and judicial procedures. Their rights correspond to those of civilian patients, and this creates difficulties for a longer detention of an individual in hospital after

recovery from mental illness; and 2) the effectiveness of psychiatric treatment [3, p. 73].

The consequences of a verdict of "not guilty by reason of insanity" entail the placement of a person in a closed psychiatric institution, the conditions of detention in which are not much different from those in prison. Therefore, it is no coincidence that defendants rarely resort to the plea of insanity, and those who do (mainly persons facing the death penalty or life imprisonment) rarely succeed [4, p. 302].

The question of the constitutionality of the use of the phrase "guilty but mentally ill" in relation to persons legally declared insane remains open.

Having analysed the peculiarities of the "guilty but mentally ill" sentence, one may come to the conclusion that this type of sentence is best suited to the public consciousness of the US population. After all, a person who has committed a criminal offence is found guilty of committing a criminal offence despite the fact that he or she has a mental disorder. It remains unclear how a person can be found guilty if he or she has already been legally declared insane. For the jury, such a verdict is a simple compromise. They believe that the person has committed a criminal offence and deserves a certain punishment. In this case, the person seems to be found guilty, but at the same time, his or her mental illness does not allow him or her to bear full responsibility for the offence. Therefore, the question arises: why can't the conditions of partial sanity be established by law?

It is worth citing an argument against the "guilty but mentally ill" verdict, namely: according to American authors, it is a common fraud, in which persons found insane do not undergo any special treatment or rehabilitation, but remain locked in cages for a long period of time [5].

In the American doctrine, there is an opinion that a verdict of "not guilty by reason of insanity" is more dangerous than a verdict of "guilty but mentally ill", so let's consider how much this is true. In the case of the former, there is a high probability that a person found not guilty by reason of insanity will be released after a short period of time and will commit a criminal offence due to his or her illness, especially given the data of the American Academy of Psychiatry that the vast

majority of defendants released from criminal liability by reason of insanity suffer from schizophrenia or another mental illness [6].

In the United States, defendants who are acquitted by reason of insanity are not eligible for release. For example, in Connecticut, in cases where a person is acquitted by reason of insanity, the presiding judge determines the period of time that the person must be held in a mental health facility until he or she is found to be adequately cognizant of the circumstances of the offence. In this case, the judge transfers control over the convicted person to the state board of supervisors until the end of the specified period. In other states, such persons must be held in a psychiatric hospital until their mental state ceases to be a danger to society [7].

The duration of such isolation is usually not set in advance. Such persons are held in special medical institutions until they are fully recovered or until they are no longer dangerous to society. Patients who are considered dangerous are sent for a longer period to a psychiatric hospital, where the main function of the staff is to supervise the dangerous behaviour of such persons. If a person has recovered from a mental disorder before the end of their sentence, they remain in prison to serve the remainder of their sentence.

**Conclusions.** The study of the US international experience in the application of the compulsory medical measures to mentally ill persons allows us to draw certain conclusions, namely: a feature of the American criminal procedure system is that the issue of insanity of the defendant is within the jury's competence and is decided by them in the form of a special verdict; in the criminal law sense, the fact of insanity is the fact of mental illness, lack of awareness of the danger of one's actions, lack of

ability to fully control one's actions, and the existence of these signs must be proved.

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## ОСОБЛИВОСТІ ЗАСТОСУВАННЯ ПРИМУСОВИХ ЗАХОДІВ МЕДИЧНОГО ХАРАКТЕРУ ДО ПСИХІЧНО ХВОРИХ, ЯКІ ВЧИНИЛИ КРИМІНАЛЬНЕ ПРАВОПОРУШЕННЯ, В США

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**Мета:** проаналізувати законодавство Сполучених Штатів Америки (далі – США), що регламентує застосування до психічно хворих осіб, які вчинили кримінальне правопорушення, примусових заходів медичного характеру. **Методологічною основою дослідження** є методи аналізу і синтезу, пізнавально-аналітичний, методи систематизації та узагальнень. **Результати:** аналіз кримінального та процесуального законодавства США дав можливість стверджувати, що поняття неосудності та осудності для осіб із психічними розладами представляє собою сукупність критеріїв (психічного та юридичного), які, безсумнівно, потребують подальшого вивчення, уточнення та вдосконалення з точки зору медицини, теорії кримінального та процесуального права, судово-слідчої практики. **Обговорення:** складові комплексного підходу щодо застосування примусових заходів медичного характеру до психічно хворих у США.

Дослідження міжнародного досвіду США щодо застосування примусових заходів медичного характеру до психічно хворих, дозволяє зробити певні висновки, а саме: особливістю американської системи кримінального процесу, питання про неосудність підсудного належить до компетенції присяжних і вирішується ними у формі спеціального вердикту; в кримінально-правовому розумінні фактичною стороною неосудності є факт наявності психічного захворювання, відсутність усвідомлення небезпеки своїх дій, відсутність можливості повною мірою керувати своїми діями, більш того наявність цих ознак повинна мати місце лише в суворо визначений проміжок часу, а саме у момент вчинення злочину; відсутні будь-які перешкоди у сфері доказування цих фактів за участю присяжних; заборона оскарження фактичної сторони неосудності в суді присяжних, тобто обвинувачений в певних ситуаціях позбавлений можливості захищатися від пред'явленого обвинувачення; покладання тягаря доведення своєї неосудності на обвинуваченого; проведення судово-психіатричної експертизи тільки у виняткових випадках; нерідко довільне утримання осіб, які страждають психічними захворюваннями і які вчинили кримінальне правопорушення, у спеціалізованих лікувальних закладах; існування двох різних видів вироків у межах території однієї країни, а також, визнання винними у скоєнні кримінальних правопорушень неосудних осіб.

**Ключові слова:** примусові заходи медичного характеру; зарубіжний досвід; судово-психіатрична експертиза; неосудність; часткова осудність; госпіталізація.

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