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## **ОСОБЛИВОСТІ ЗАСТОСУВАННЯ ЗАПОБІЖНИХ ЗАХОДІВ ЩОДО ОСІБ, ЯКІ СТРАЖДАЮТЬ НА ПСИХІЧНІ РОЗЛАДИ: НАЦІОНАЛЬНИЙ ВИМІР**

***Анотація.** Стаття присвячена дослідженню актуальних питань застосування запобіжних заходів стосовно осіб, щодо яких здійснюється кримінальне провадження по застосуванню примусових заходів медичного характеру (далі – COMPULSORY PSYCHIATRIC CARE) у контексті міжнародних стандартів та інтерпретаційної практики Європейського суду з прав людини (далі – ЄСПЛ). Метою даної роботи є виокремлення та аналіз особливостей обрання до особи, яка страждає на психічний розлад, запобіжних заходів на підставі матеріалів узагальнення вітчизняної правозастосовної практики у кримінальних провадженнях щодо застосування COMPULSORY PSYCHIATRIC CARE. Методи дослідження обрані з урахуванням мети, завдань та предмета дослідження. У роботі були використані загальнонаукові і спеціальні методи наукового пізнання (діалектичний, статистичний, порівняльно-правовий, аналізу, синтезу, узагальнення). Комплексне використання зазначених методів сприяло проведенню об'єктивного і всебічного наукового дослідження. На підставі аналізу чинного законодавства та судової практики виокремлені особливості обрання запобіжних заходів у кримінальних провадженнях щодо COMPULSORY PSYCHIATRIC CARE, а саме: а) застосовуються стосовно особи, яка страждає на психічний розлад; б) обираються лише в кримінальних провадженнях щодо застосування COMPULSORY PSYCHIATRIC CARE; в) мають специфічну мету, обумовлену наявністю психічного розладу, на який страждає особа. Вказана специфіка обрання передбачених ст. 508 Кримінального процесуального кодексу України (далі – THE CPC) заходів дозволила поставити під сумнів правомірність законодавчого підходу щодо віднесення їх до інституту запобіжних заходів у кримінальному провадженні. Зокрема, зроблено висновок, що на відміну від передбаченої ст. 177 THE CPC загальної мети застосування запобіжних заходів (щодо підозрюваного, обвинуваченого, засудженого), метою обрання передбачених ст. 508 THE CPC запобіжних заходів*

(щодо особи, стосовно якої передбачається застосування *COMPULSORY PSYCHIATRIC CARE*) є: 1) запобігання ризикам її можливої неправомірної поведінки; 2) надання їй кваліфікованої психіатричної допомоги; 3) забезпечення її безпеки та безпеки інших осіб. У цьому ключі слід зауважити, що обґрунтованій критиці юридичної спільноти піддається позиція вітчизняного законодавця щодо можливості застосування запобіжних заходів до осіб, які страждають на психічні розлади. Основним аргументом у цьому дискусійному питанні є те, що вказані особи не можуть бути суб'єктами, до яких застосовуються запобіжні заходи, оскільки останні за загальними правилами можуть бути обрані до чітко визначених суб'єктів кримінального процесу – підозрюваних, обвинувачених та засуджених.

**Ключові слова:** запобіжні заходи, кримінальне провадження, практика ЄСПЛ, примусові заходи медичного характеру.

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## **FEATURES OF APPLICATION OF PRECAUTIONARY MEASURES FOR PERSONS SUFFERING FROM MENTAL DISORDERS: NATIONAL DIMENSION**

**Abstract.** *The paper investigates topical issues of application of precautionary measures against persons subject to criminal proceedings for the application of compulsory psychiatric care in the context of international standards and interpretative practice of the European Court of Human Rights (ECHR). The purpose of this paper is to identify and analyse the specific features of applying precautionary measures to a person suffering from a mental disorder based on the materials of generalization of domestic law enforcement practice in criminal proceedings regarding the application of compulsory psychiatric care. Research methods are selected with consideration of the purpose, objectives, and subject of research. General scientific and special methods of scientific cognition (dialectical, statistical, comparative law, analysis, synthesis, generalization) were used in the work. The integrated use of these methods has contributed to an objective and comprehensive scientific study. Based on the analysis of the current legislation and judicial practice, the specific features of application of preventive measures in criminal proceedings regarding compulsory psychiatric care are singled out, namely: a) they are applied to a person suffering from a mental disorder; b) are selected only in criminal*

*proceedings concerning the application of compulsory psychiatric care; c) have a specific purpose conditioned by the presence of a mental disorder from which the person suffers. The specifics of the applying the measures envisaged by Art. 508 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC) allowed to question the legitimacy of the legislative approach as to their allocation to the institution of precautionary measures in criminal proceedings. In particular, it was concluded that in contrast to the general purpose of application of precautionary measures stipulated by Art. 177 of the CPC (concerning the suspect, the accused, the condemned), for the purpose of applying precautionary measures envisaged by Art. 508 of the CPC (concerning a person in respect of whom the application of compulsory psychiatric care is stipulated) are: 1) prevention of risks of their possible illegal behaviour; 2) provision of qualified psychiatric care to them; 3) ensuring the person's safety and the safety of others. In this regard, it should be noted that the position of the domestic legislator on the possibility of applying precautionary measures to persons suffering from mental disorders is subject to reasonable criticism of the legal community. The main argument in this debatable issue is that these persons cannot be subjects to which precautionary measures are applied, as the latter, according to the general rules, can be applied to clearly defined subjects of criminal proceedings – suspects, accused, and convicts.*

**Keywords:** precautionary measures, criminal proceedings, ECHR practice, compulsory psychiatric care.

## INTRODUCTION

The issue of deteriorating mental health of the population is currently relevant to many countries around the world. Official statistics show that as of January 1, 2017, in Ukraine 1,673,328 of its inhabitants were registered in connection with mental and behavioural disorders, of which 694,928 – due to disorders related to alcohol and drug use (or 3,9% of the population). In 2016, 182,415 patients were hospitalized in psychiatric care facilities with an average of 53.4 days in hospital<sup>1</sup>. Paul Hunt, the UN special rapporteur on the right to the highest attainable standard of physical and mental health, described individuals suffering from mental breakdown as “one of the marginal and most vulnerable groups in the world” [1]. However, a person's mental illness not only affects the adequacy of their own behaviour – it can manifest itself on a greater scale. In particular, these are socially dangerous acts committed by persons suffering from mental disorders. In view of this, the UN Declaration on the Rights of the Mentally Retarded of 20 December 1971<sup>2</sup> declared that in the event of prosecution in connection with any act, a mentally retarded person shall have the right to the due process of law, which takes full account of the degree of their mental development. This requirement is reflected in domestic legislation in the fact that in ch. 39 of Section VI of the CPC of Ukraine<sup>3</sup> criminal proceedings concerning the

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<sup>1</sup> Decree of the Cabinet of Ministers of Ukraine No. 1018-p “On the approval of the concept for the development of mental health in Ukraine for the period up to 2030”. (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1018-2017-%D1%80>.

<sup>2</sup> Declaration of the Rights of the Mentally Retarded. (1971, December). Retrieved from [https://docs.dktk.ua/ru/doc/995\\_119](https://docs.dktk.ua/ru/doc/995_119).

<sup>3</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from: <https://zakon.rada.gov.ua/laws/show/4651-17>.

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application of compulsory psychiatric care were defined as a special procedure of criminal proceedings, i.e. as a special legal procedure to be applied to persons suffering from mental disorders [2]. Its specificity is conditioned by the search for a reasonable balance between the public interests of the state in the performance of criminal proceedings and the private interests of a person suffering from a mental disorder and unable to bear responsibility for committing a socially dangerous act on general grounds. The current model of legal regulation of the status of such persons is based on international standards and interpretive practice of the ECHR.

One of the most important sources of international law in this regard is the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950<sup>1</sup>, the rules of which, combined with the legal positions of the ECHR, establish minimum standards of protection of the rights and legitimate interests of persons suffering from mental illness. Peculiarities of proceedings against persons suffering from mental disorders are embodied at the level of international regulations, such as: United Nations General Assembly Resolution No. 46/119 "Principles for the Protection of Persons with Mental Illness and the Improvement of Psychiatric Care" of 18 February 1992<sup>2</sup>; Recommendation of the Committee of Ministers to States Parties No. R (83) 2 on the legal protection of persons suffering from mental disorders who are involuntarily detained as patients of 22 February 1983<sup>3</sup>; Recommendation No. 1235 on psychiatry and human rights from 01.01.1994<sup>4</sup>, etc. However, despite the elevated level of legal protection of a person suffering from a mental illness, their constitutional rights and freedoms may be restricted to address the challenges of criminal proceedings. Thus, domestic criminal procedural legislation stipulates the possibility of applying precautionary measures against a person in respect of whom compulsory psychiatric care is envisaged or the issue of application of such measures was resolved (Article 508 of the CPC<sup>5</sup>). The matter of their application to a person in respect of whom compulsory psychiatric care is envisaged has not received widespread independent study in science. Factoring in that these are specific precautionary measures for vulnerable people, the specifics of their application are a priority. The purpose of this paper is to identify and analyse the features of applying precautionary measures to a person suffering from a mental disorder based on the generalization of domestic law enforcement practice in criminal proceedings concerning the use of compulsory psychiatric care.

## 1. MATERIALS AND METHODS

Writing of this paper involved: regulations of basic international standards in psychiatric care; the legal position of the ECHR on the observance of the rights of persons suffering

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<sup>1</sup> European Convention on Human Rights. (1950). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004](https://zakon.rada.gov.ua/laws/show/995_004).

<sup>2</sup> United Nations General Assembly Resolution No. 46/119 "On Principles for the Protection of Persons with Mental Illness and the Improvement of Psychiatric Care". (1992, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/v002p710-16>.

<sup>3</sup> Recommendation of the Committee of Ministers to States parties on the legal protection of persons suffering from mental disorders who are involuntarily detained as patients. (1983). Retrieved from [https://zakon.rada.gov.ua/laws/show/994\\_074](https://zakon.rada.gov.ua/laws/show/994_074).

<sup>4</sup> Recommendation No. 1235 "On psychiatry and human rights". (1994, January). Retrieved from [https://zakon.rada.gov.ua/laws/show/994\\_200](https://zakon.rada.gov.ua/laws/show/994_200).

<sup>5</sup>The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from: <https://zakon.rada.gov.ua/laws/show/4651-17>.

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from mental disorders in the context of the requirements of Articles 5 and 6 of the Convention<sup>1</sup>; criminal procedural legislation of foreign countries (Belarus, Kazakhstan, Kyrgyzstan, Lithuania, Moldova, the Russian Federation, Estonia, Uzbekistan).

The theoretical basis of the paper includes scientific articles of domestic and foreign lawyers in criminal law and procedure. The methodological basis of the study is the dialectical method of scientific knowledge and special methods – comparative law, analysis, synthesis, and generalization. The use of the dialectical method allowed to investigate the specific features of the application of precautionary measures against persons suffering from mental disorders, factoring in the integrity of the phenomenon and the interconnectedness of its individual elements. Comparative law analysis of the criminal procedural legislation of Ukraine and foreign countries allowed to state the terminological discrepancy in determining the legal nature of coercive measures that can be applied to persons suffering from mental disorders. The method of analysis allowed to study the statutory content of criminal procedural laws of foreign states and, with consideration of the specific features of the legal system of our state, provided an opportunity to formulate proposals to improve the special procedure of criminal proceedings for compulsory psychiatric care. The method of synthesis contributed to the systematic integration of the identified features of the application of measures to persons suffering from mental disorders under Art. 508 of the CPC<sup>2</sup>, which allowed to question the legitimacy of the legislative approach to their attribution to the institution of precautionary measures in criminal proceedings. Based on the analysis of judicial practice, the method of generalization allowed to establish the specifics of the application of precautionary measures against persons suffering from mental disorders and to formulate sound conclusions aimed at improving the regulations of the studied issues.

These methods were used holistically to ensure the objectivity, comprehensiveness of the study, and the reliability of its results.

## 2. RESULTS AND DISCUSSION

One of the criminal procedural guarantees of the constitutional rights and freedoms of a person suffering from a mental disorder is the implementation of a special procedure for criminal proceedings concerning the application of compulsory psychiatric care. A similar name for this institution of criminal procedure is contained in the CPC of Kazakhstan (Chapter 54)<sup>3</sup>, the CPC of the Kyrgyz Republic (Chapter 55)<sup>4</sup>; the CPC of Lithuania (Chapter 29)<sup>5</sup>, the CPC of Moldova (Section 3 of Chapter 2)<sup>6</sup>, the CPC of Uzbekistan

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<sup>1</sup> European Convention on Human Rights. (1950). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004](https://zakon.rada.gov.ua/laws/show/995_004).

<sup>2</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>3</sup> The Criminal Procedure Code of the Republic of Kazakhstan. (2014). Retrieved from [https://online.zakon.kz/m/document?doc\\_id=31575852](https://online.zakon.kz/m/document?doc_id=31575852).

<sup>4</sup> The Criminal Procedure Code of the Kyrgyz Republic. (1999). Retrieved from [https://online.zakon.kz/Document/?doc\\_id=30241915](https://online.zakon.kz/Document/?doc_id=30241915).

<sup>5</sup> The Criminal Procedure Code of the Republic of Lithuania. (2000). Retrieved from <http://okpravo.ru/zarubezhnoe-pravo/ugolovnoe-pravo-zarubezhnyh-stran/уголовный-кодекс-литвы.html>.

<sup>6</sup> The Criminal Procedure Code of the Republic of Moldova. (2003). Retrieved from [https://online.zakon.kz/document/?doc\\_id=30397729](https://online.zakon.kz/document/?doc_id=30397729).

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(Chapter 61)<sup>1</sup> and others. According to the criminal procedure legislation of some foreign states, the names “criminal proceedings concerning the application of coercive measures of treatment and security” are used to denote this institution of criminal procedure (Chapter 46 of the CPC of Belarus<sup>2</sup>); "Proceedings regarding the application of involuntary psychiatric treatment" (Chapter 16 of the CPC of Estonia<sup>3</sup>), etc.

As we consider the legal institution, the nature of which is common to most national legal systems, we shall note that the specifics of national legal awareness, the degree of proximity to European standards and other factors create variability in the regulation of the same issue in different countries. In a comparative aspect, we shall note that both domestic criminal procedural legislation and the CPC of most foreign countries, the possibility of applying, placement in a medical institution for psychiatric examination to persons suffering from mental disorders (Article 509 of the CPC of Ukraine<sup>4</sup>, Art. 443 of the CPC of Belarus<sup>5</sup>, Article 569 of the CPC of Uzbekistan<sup>6</sup>, Article 435 of the CPC of the Russian Federation<sup>7</sup>, etc.). Investigating the legal nature of this measure, O.A. Ruchina considers it a special measure of procedural coercion [3]. A broader understanding is offered by O.I. Tsokolova, who notes that being essentially a measure of procedural coercion, which lies in isolating the person who committed a socially dangerous act, it simultaneously acts as a measure of psychiatric care and treatment of the person. [4].

It should be noted that apart from placement in a medical institution for psychiatric examination, the domestic legislator envisages the possibility of choosing *precautionary measures* against persons in criminal proceedings concerning the application of compulsory psychiatric care, namely: 1) transfer under custody to guardians, close relatives, or family members with mandatory medical supervision; 2) placement in a psychiatric institution in conditions that exclude its dangerous behaviour (Part 1 of Article 508 of the CPC<sup>8</sup>). By way of comparison, the criminal procedural legislation of Kazakhstan contains a direct prohibition on the application of precautionary measures to persons who committed acts under criminal law and suffer from mental illness. However, it allows to apply *security measures* to the specified category of persons: 1) transfer of the patient under the supervision of relatives, guardians, trustees with notification of the health authorities; 2) placement in a special medical institution that provides psychiatric care

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<sup>1</sup> The Criminal Procedure Code of the Republic of Uzbekistan. (1994). Retrieved from <https://lex.uz/docs/111463>.

<sup>2</sup> The Criminal Procedure Code of the Republic of Belarus. (1999). Retrieved from [https://kodeksy-by.com/ugolovno-protssesualnyj\\_kodeks\\_rb.htm](https://kodeksy-by.com/ugolovno-protssesualnyj_kodeks_rb.htm).

<sup>3</sup> The Criminal Procedure Code of Estonia. (2015). Retrieved from <https://yurotdel.com/zakony/ugolovno-processualnyy-kodeks-estonii.html>.

<sup>4</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>5</sup> The Criminal Procedure Code of the Republic of Belarus. (1999). Retrieved from [https://kodeksy-by.com/ugolovno-protssesualnyj\\_kodeks\\_rb.htm](https://kodeksy-by.com/ugolovno-protssesualnyj_kodeks_rb.htm).

<sup>6</sup> The Criminal Procedure Code of the Republic of Uzbekistan, op. cit.

<sup>7</sup> The Criminal Procedure Code of the Russian Federation. (2001). Retrieved from [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_34481/](http://www.consultant.ru/document/cons_doc_LAW_34481/).

<sup>8</sup> The Criminal Procedure Code of Estonia. (2015). Retrieved from <https://yurotdel.com/zakony/ugolovno-processualnyy-kodeks-estonii.html>.

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(Article 507 of the CPC of Kazakhstan<sup>1</sup>). Comparative law analysis of these provisions of the criminal procedural legislation of Ukraine and Kazakhstan allows to state the terminological discrepancy in determining the legal nature of coercive measures that can be applied to persons suffering from mental disorders. However, these measures are almost similar in their essential general characteristics.

In general, pointing to the controversy of the domestic legislative approach to the attribution of transfer of a person under custody of guardians, close relatives, or family members with mandatory medical supervision and placement in a psychiatric institution in conditions that exclude the person's dangerous behaviour to the institution of precautionary measures, we shall note the following. Interpretation of the provisions of Chapters 18 and 39 of the CPC in their systematic connection allows to highlight the features of application of precautionary measures stipulated by Art. 508 of the CPC<sup>2</sup>, namely: a) they are applied to a person suffering from a mental disorder or mental illness; b) they are possible only in criminal proceedings concerning the application of compulsory psychiatric care; c) they have a specific purpose conditioned by the presence of a mental disorder from which the person suffers. We shall consider each of them in more detail.

1. *Application to a person suffering from a mental disorder.* Firstly, we shall note that, as follows from the content of Part 3 of Art. 508 of the CPC, the application of the envisaged precautionary measures is performed in accordance with the general rules stipulated by the CPC<sup>3</sup> – they may be chosen if there are grounds for clearly defined subjects of criminal proceedings: suspects, accused, and convicted persons. Therefore, in our opinion, persons suffering from mental disorders cannot be subjects to whom precautionary measures are applied.

Furthermore, the legislator links the potential possibility of applying the precautionary measures envisaged by provisions of Part 1 of Art. 508 of the CPC as soon as a person is diagnosed with a mental disorder or mental illness. The main mechanism for verifying a person's mental state is the mandatory psychiatric examination in cases established by law. At the same time, in accordance with Art. 242 of the CPC<sup>4</sup> the duty of the investigator or prosecutor to ensure that an examination is carried out to determine the mental state of a suspect arises in the presence of information that casts doubt on the person's sanity, or suggests their limited sanity. That is, the process of ensuring the examination actually depends on the subjective assessment of adequacy of the suspect's behaviour by the investigator or prosecutor, factoring in the circumstances of a particular criminal case. Moreover, it depends on their level of knowledge in psychiatry regarding sanity or insanity. However, timely detection of a person's mental illness based on an expert's opinion helps to ensure the person's rights with additional criminal procedural guarantees and allows to apply special precautionary measures to such person.

The case law of the ECHR has repeatedly emphasized that the deprivation of liberty of a person who is mentally ill cannot be considered as such that meets the requirements

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<sup>1</sup> The Criminal Procedure Code of the Republic of Kazakhstan. (2014). Retrieved from [https://online.zakon.kz/m/document?doc\\_id=31575852](https://online.zakon.kz/m/document?doc_id=31575852).

<sup>2</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>3</sup> *Ibidem*, 2012.

<sup>4</sup> *Ibidem*, 2012.

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of Art. 5 § 1 (e), if the decision on such deprivation was taken without the opinion of a medical expert (see: § 59 of the Case of Ruiz Rivera v. Switzerland<sup>1</sup>; § 31 of the Case of S.R. v. the Netherlands<sup>2</sup>). With that, the ECHR notes the systemic issue of case law concerning the de facto special status of expert opinions of psychiatrists, as their importance is unreasonably exaggerated by the courts themselves, especially in cases of psychiatric care provision. Indeed, domestic law enforcement practice demonstrates a rather superficial approach of judges to assessing the expert's opinion as a source of evidence in criminal proceedings concerning compulsory psychiatric care. Thus, in the vast majority of rulings, courts refer to the expert's opinion on a person's mental state, without paying attention to the analysis of their research part. Only in isolated cases do judges acknowledge non-compliance with the established regulatory requirements for the form of the expert's opinion, noting, for example, that "a copy of the outpatient forensic psychiatric examination No. 1557 regarding Person\_3 attached to the investigator's request, does not contain the date of examination and the date of issue of this act, it is not affixed with the seal of the expert institution with its details, and is not duly certified by an official.

These circumstances render it impossible for the investigating judge to reliably establish the fact of mental activity or mental illness of the suspect in court"<sup>3</sup>. In the context of the investigated subject matter, the issue concerning the possibility of application of precautionary measures to the person prior to the moment of reception of the expert opinion comes to the fore. Indeed, Part 2 of Art. 508 of the CPC allows to apply precautionary measures to a person from the moment a mental disorder or mental illness is established, as evidenced by national law enforcement practice. Thus, the investigating judges refuse to apply a *precautionary measure in the form of placement in a psychiatric institution in conditions that exclude dangerous behaviour of the person*, if "the claim contains no evidence to indicate the establishment of the fact of mental disorder or mental illness in Person\_2, as required by Art. 508 of the CPC of Ukraine"<sup>4</sup>.

However, is it legal to apply precautionary measures envisaged in Part 1 of Art. 176 of the CPC? Our study of judicial practice allowed to identify cases where investigators appealed to the court to apply for a preventive measure in the form of detention, citing the fact that the precautionary measures envisaged in Part 1 of Art. 508 of the CPC<sup>5</sup> are applicable to a person from the moment of establishing the fact of mental disorder or mental illness based on an expert opinion, therefore to the person must be subject to precautionary measures in the form of detention until such opinion is procured. Thus, for example, the decision of the investigating judge of the Khersonskyi City Court of

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<sup>1</sup> Judgment of the European Court of Human Rights, "Case of Ruiz Rivera v. Switzerland" (Application No. 8300/06). (2014, February). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-141434>.

<sup>2</sup> Decision of the European Court of Human Rights, "Case S.R. v. the Netherlands" (Application No. 13837/07). (2012, September). Retrieved from <http://hudoc.echr.coe.int/fre?i=001-113629>.

<sup>3</sup> Court decree of the Horlivka Central Municipal District court of Donetska Oblast, Case No. 253/74/13-k. (2013, January). Retrieved from <http://reyestr.court.gov.ua/Review/28567962>.

<sup>4</sup> Court decree of the Desnianskyi District Court of Kyiv, Case No. 754/16539/190. (2019, November). Retrieved from <http://www.reyestr.court.gov.ua/Review/85702284>.

<sup>5</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

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Khersonska Oblast dated February 14, 2019<sup>1</sup> denied the investigator's request for precautionary measures in the form of detention, "considering that the suspect Person\_2 is registered in a psychoneurological clinic diagnosed with bipolar affective disorder is currently being treated at the public institution Khersonska Regional Psychiatric Hospital, and considering that the investigator in the claim does not ask to apply the precautionary measures envisaged in Part 1 of Art. 508 of the CPC of Ukraine<sup>2</sup> to the suspect and did not attach to the materials of the claim the information on the possibility of applying precautionary measures under Part 1 of Art. 508 of the CPC of Ukraine to the suspect, and also considering that in the past the suspect was subjected to coercive measures of a medical nature, in connection with which the investigating judge concluded that the petition was not subject to satisfaction".

This decision was the subject of consideration at the Khersonskiyi Court of Appeal, which agreed with the arguments of the investigating judge, as information on the identity of the suspect raises reasonable doubts regarding their sanity and the possibility of being the subject of the incriminated offense. With that, as noted by the Court of Appeal, previously the suspect had already been subjected to coercive measures of a medical nature in the form of hospitalization in a psychiatric institution... According to the response of the public institution Khersonskiyi Regional Psychiatric Hospital No. 735 dated March 1, 2019, Person\_2 was undergoing compulsory treatment in the specified institution from August 4, 2014 to February 3, 2015. The specified information is crucial in this case, and therefore the arguments of the prosecutor regarding the absence of forensic psychiatric examination in the materials and the illegality of the application of precautionary measures envisaged by Part 1 of Art. 508 of the CPC of Ukraine<sup>3</sup> are unfounded<sup>4</sup>.

Giving a legal assessment to the above judicial approach, we must point to its doubtfulness. As follows from the provisions of Part 2 of Art. 508 of the CPC, the precautionary measures envisaged in part 1 of this article shall be applied by the court to the person from the moment of establishing the fact of mental disorder or mental illness. Therefore, before receiving the expert's opinion, an appeal to the investigating judge with a request to apply the precautionary measure provided for in Art. 508 of the CPC does not meet the requirements of criminal procedural law. The most logical scenario in this situation, from the standpoint of the general requirements of the CPC for the application of precautionary measures and in order to perform the tasks of criminal proceedings, is to file a petition with the court requesting to apply precautionary measures stipulated by the provisions of Art. 176 of the CPC until an expert opinion is procured. Because, according to the general rules, precautionary measures can be applied clearly defined subjects of criminal proceedings – suspects, accused and convicted if there are reasonable grounds for such measures (Part 2 of Article 177 of the CPC)<sup>5</sup>.

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<sup>1</sup> Court decree of the Khersonskiyi City Court of Khersonska Oblast, Case No. 766/2393/19. (2019, February). Retrieved from <http://reyestr.court.gov.ua/Review/79857804>.

<sup>2</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>3</sup> *Ibidem*, 2012.

<sup>4</sup> Court decree of the Khersonskiyi Court of Appeal, Case No. 766/2393/19. (2019, March). Retrieved from <http://reyestr.court.gov.ua/Review/80714662>.

<sup>5</sup> The Criminal Procedure Code of Ukraine, op. cit.

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2. *Possibility only in criminal proceedings concerning the application of compulsory psychiatric care.* Criminal procedural legislation of some foreign states does not formalize the beginning of the specified procedure of criminal proceedings by means of documentation [5]. In this part, the criminal procedural legislation of Ukraine is more progressive, as it links the moment of the beginning of criminal proceedings concerning the application of compulsory psychiatric care to the issuance of a separate procedural document – a resolution. As follows from Part 2 of Art. 503 of the CPC, if the grounds for the implementation of the specified special procedure of criminal proceedings are found *in the course of the pre-trial investigation*, the investigator, the prosecutor shall be obliged to issue a resolution to change the pre-trial investigation procedure and proceed in accordance with the rules of ch. 39 of the CPC of Ukraine<sup>1</sup>.

As R.M. Shagieieva points out, the resolution on initiation of proceedings, and not just on the appearance of a person in need for the application of compulsory psychiatric care, is conditioned by the fact that additional guarantees will operate within the framework of this special proceedings [6]. Considering the particular importance of this procedural document, some researchers insist on the necessity of providing its copy to a person suffering from a mental illness [7]. Of course, the issuance of a resolution to change the pre-trial investigation procedure is of exceptional importance, because: a) it formalizes the determination of the moment of the beginning of the specified special procedure; b) it facilitates the timely involvement of counsel and legal representative; c) it enforces other additional guarantees of the rights and legitimate interests of persons suffering from mental illness; d) it allows to apply special precautionary measures envisaged by Art. 508 of the CPC. Illustrative in this aspect are examples from judicial practice, where investigating judges, refusing to grant motions, note the following: "in violation of the specified requirements of the law, the procedure of pre-trial investigation at the time of the appeal to the investigating judge with a request to change the measure of restraint by resolution of the investigator or prosecutor is not changed (materials of the investigator's appeal contain no such data). Proceeding from the fact that the pre-trial investigation of the criminal proceedings is not conducted in accordance with Chapter 39 of the CPC of Ukraine, there are no legal grounds for the investigating judge to apply the precautionary measures specified in Article 508 of this Code<sup>2</sup> to the suspect".

In this regard, it is appropriate to remind that the legislator envisages the necessity of issuing a separate procedural document (decision to change the trial procedure) in case of identification of grounds for special criminal proceedings *in the course the proceedings* (Article 362 of the CPC of Ukraine)<sup>3</sup>, which is confirmed by generalization materials of the judicial practice<sup>4</sup>.

3. *Existence of a specific purpose conditioned by the presence of a mental disorder from which a person suffers.* According to the general rules, the purpose of the application of precautionary measures is to ensure the performance of the procedural obligations

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<sup>1</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>2</sup> *Ibidem*, 2012.

<sup>3</sup> *Ibidem*, 2012.

<sup>4</sup> Court decree of the Zhytomyrskyi Court of Appeal, Case No. 295/2444/18 (2020, January). Retrieved from <http://reyestr.court.gov.ua/Review/86983607>.

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imposed on the suspect, the accused, as well as to prevent attempts to: 1) hide from the pre-trial investigation and/or court; 2) destroy, hide, or distort things or documents that are essential for establishing the circumstances of a criminal offense; 3) illegally influence a victim, witness, other suspect, accused, expert, specialist in the same criminal proceedings; 4) obstruct criminal proceedings in any other way; 5) to commit another criminal offense or to continue a criminal offense of which the person is suspected or accused (Part 1 of Article 177 of the CPC). In comparison with the given general provision it is necessary to emphasize that the purpose of application of special precautionary measures envisaged by Art. 508 of the CPC<sup>1</sup> has certain features conditioned by the specifics of the procedural status of the subject to which they can be applied.

*Prevention of the risks of misconduct by a person suffering from a mental disorder as a purpose of applying precautionary measures to such a person.* As a rule, the nature of a person's mental illness determines their inability to comprehend the purpose, the nature of the precautionary measure applied and the procedural consequences of violating its conditions. In view of the above, it is quite logical to conclude that the actions of a person suffering from a mental disorder do not contain the intention to commit possible negative procedural behaviour within the meaning of Part 1 of Art. 177 of the CPC. This conclusion allows some researchers to express scientific opinions on the inhumanity of the application of precautionary measures to such persons in terms of moral aspects [3]. However, it should be noted that the general rules of application of precautionary measures do not bind the risks specified in Part 1 of Art. 177 of the CPC exclusively with a deliberate form of possible negative behaviour of the person. Thus, analysing the judicial practice, which is entirely based on the rules of current criminal procedural law, we shall note that in addressing the application of certain special precautionary measures envisaged by Art. 508 of the CPC<sup>2</sup> the judges state the very potential risks of possible negative behaviour of a person suffering from a mental disorder, without examining the matter of intentional nature of the person's possible actions<sup>3</sup>.

*Provision of qualified psychiatric care as a goal of applying precautionary measures to a person suffering from a mental disorder.* This goal is not explicitly stipulated in domestic criminal procedural law. With that, firstly, the case law of the ECHR has repeatedly emphasized that persons suffering from mental disorders “can be deprived of their liberty either for the purpose of medical treatment, or in connection with the needs of society, or in connection with medical and social grounds combined” (paragraph 37 of the Case of “Gorshkov v. Ukraine”<sup>4</sup>) [8-10]. Secondly, considering the essence of special

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<sup>1</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>2</sup> *Ibidem*, 2012.

<sup>3</sup> Court decree of the Pavlohradskyi Municipal District Court of Dnipropetrovsk region, Case No. 172/730/19. (2019, July). Retrieved from <http://www.reyestr.court.gov.ua/Review/83181965>; Court decree of the Koroliivskyi District Court of Zhytomyr, Case No. 296/8331/19. (2019, August). Retrieved from <http://www.reyestr.court.gov.ua/Review/84014997>; Court decree of the Darnytskyi District Court of Kyiv, Case No. 753/1454/20. (2020, January). Retrieved from <http://www.reyestr.court.gov.ua/Review/87390283>.

<sup>4</sup> Judgment of the European Court of Human Rights, “Case of Gorshkov v. Ukraine” (Application No. 67531/01). (2005, November). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-70855>.

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precautionary measures envisaged by Art. 508 of the CPC<sup>1</sup> – transfer into custody of guardians, close relatives, or family members with *compulsory medical supervision* and placement *in a psychiatric institution* in conditions that exclude the person's dangerous behaviour – it can be argued that the sole purpose of their application is to provide a person with qualified psychiatric care. Thirdly, despite the lack of regulation of this purpose in the domestic criminal procedural legislation, it is common in judicial practice.

Thus, along with other circumstances for the application of special precautionary measures, courts motivate their choice, in particular, by the necessity of ensuring the treatment of a person. Examples of such motivations are the following quotes from court decisions: “the judge considers the already specified conclusion of the forensic psychiatric examination, the gravity of the incriminated act, information on a person suffering from a persistent mental disorder, and agrees with the arguments that only such a measure will ensure proper procedural behaviour and *reception of medical treatment* by a person in criminal proceedings regarding the application of compulsory psychiatric care”<sup>2</sup>; “considering the fact that Person\_2 at present cannot be aware of their actions and control them, the court considers it necessary, factoring in his mental state and *the need for treatment* in a psychiatric institution, in order to prevent new crimes, apply precautionary measure for Person\_2 in the form of placement in a psychiatric institution under regular supervision, in conditions that exclude his dangerous behaviour...”<sup>3</sup>. In the light of the above, the analysis of the legal positions of the ECHR, the provisions of the current CPC<sup>4</sup> and generalization materials of domestic law enforcement practice in criminal proceedings on the application of compulsory psychiatric care allows to state the presence of a separate purpose of applying precautionary measures to a person suffering from mental disorder – provision of qualified psychiatric care [11-13].

*Ensuring the safety of a person suffering from a mental disorder and other persons as a purpose of applying precautionary measures to a person suffering from a mental disorder.* Analysis and generalization of the case law of the ECHR allows to identify the main causes of deprivation of freedom of persons referred to in Art. 5 § 1 (e) of the Convention<sup>5</sup>: on the one hand, such persons may pose a threat to society and, on the other hand, their own interests require isolation measures (Case of Witold Litwa v. Poland (paragraph 60)<sup>6</sup>; Gorshkov v. Ukraine (paragraph 37)<sup>7</sup>). In this respect, the ECHR, in the

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<sup>1</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>2</sup> Court decree of the Khersonskiy City Court of Khersonska Oblast, Case No. 766/7737/16-k. (2016, September). Retrieved from <http://www.reyestr.court.gov.ua/Review/61626189>; Court decree of the Shevchenkivskiy District Court of Zaporizhzhia, Case No. 336/3015/16-k. (2016, May). Retrieved from <http://www.reyestr.court.gov.ua/Review/58025862>.

<sup>3</sup> Court decree of the Zhovtnevyi District Court of Mariupol of Donetska Oblast, Case No. 263/11981/18. (2018, November). Retrieved from <http://www.reyestr.court.gov.ua/Review/77884916>.

<sup>4</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>5</sup> European Convention on Human Rights. (1950). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004](https://zakon.rada.gov.ua/laws/show/995_004).

<sup>6</sup> Judgment of the European Court of Human Rights, “Case of Witold Litwa v. Poland” (Application No. 26629/95). (2000, April). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-58537>.

<sup>7</sup> Judgment of the European Court of Human Rights, “Case of Gorshkov v. Ukraine” (Application No. 67531/01). (2005, November). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-70855>.

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case of *Hutchison Reid v. the United Kingdom*<sup>1</sup>, noted that the detention of a mentally ill person may be necessary not only in cases where a person needs therapy and other treatments to recover or improve their condition, but also when it is necessary to supervise such a person so that they do not harm themselves or others (paragraph 52) [14; 15]. Furthermore, as evidenced by the materials of the generalization of judicial practice, in applying precautionary measures envisaged by the provisions of Art. 508 of the CPC<sup>2</sup>, the courts provide the following reasoning, for example: "by the mental state and the nature of the committed socially dangerous act, the person poses a special threat to themselves and society"<sup>3</sup>; "the person's mental state can be a public threat"<sup>4</sup>; "considering the sufficiency of the grounds for the conclusion on the danger of Person\_2 for himself, other persons due to his mental state, as well as the possibility of him causing significant harm to others"<sup>5</sup>, etc.

In summary, it should be noted that there is a separate purpose of the application of special precautionary measures – to ensure the safety of a person suffering from a mental disorder and the safety of others.

## CONCLUSIONS

According to the results of studying the scientific articles of domestic and foreign lawyers in criminal law and procedure, the position of the domestic legislator on the possibility of applying *precautionary measures* to persons suffering from mental disorders is subject to reasonable criticism in the legal community. A key argument in this controversial issue is that people with mental disorders cannot be subject to precautionary measures. Because the latter, according to the general rules, can be chosen for clearly defined subjects of criminal proceedings – suspects, accused and convicted.

Application of precautionary measures to persons suffering from mental disorders has its own specific features. Clarification of the content of these features allows to doubt the legitimacy of the legislative approach regarding the attribution of measures envisaged by Art. 508 of the CPC to the institution of precautionary measures in criminal proceedings. In particular, in contrast to the general purpose of the application of precautionary measures, envisaged by the provisions of Art. 177 of the CPC (in respect of a suspect, accused, convicted), the purpose of applying the precautionary measures envisaged by the provisions of Art. 508 of the CPC (concerning a person in respect of whom the application of compulsory psychiatric care is envisaged) is as follows: 1) to prevent the risks of possible misconduct by the person; 2) to provide the person with qualified psychiatric care; 3) to ensure safety of such person and the safety of others.

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<sup>1</sup> Judgment of the European Court of Human Rights. Case of *Hutchison Reid v. the United Kingdom* (Application No. 50272/99). (2003, February). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-60954>.

<sup>2</sup> The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>3</sup> Court decree of the Suvorovskiy District Court of Odesa, Case No. 493/1305/18. (2019, December). Retrieved from <http://reyestr.court.gov.ua/Review/86338646>.

<sup>4</sup> Court decree of the Malynskiy District Court of Zhytomyrska Oblast, Case No. 289/427/19. (2019, May). Retrieved from <http://www.reyestr.court.gov.ua/Review/81537282>.

<sup>5</sup> Court decree of the Prydniprovskiy District Court of Cherkasy, Case No. 711/11142/18. (2019, June). Retrieved from <http://reyestr.court.gov.ua/Review/82447324>.

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