

REVIEW ARTICLE
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INTERNATIONAL STANDARDS FOR APPLICATION OF COMPULSORY MEDICAL MEASURES

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ABSTRACT

Introduction: The study of the international standards of compulsory medical measures' (CMM) application to persons who have committed socially dangerous acts is relevant problematics of medical law.

The aim: of the research is to define international standards for the implementation of CMM, as well as assessing the state of their implementation in Ukrainian law and medical practice.

Materials and methods: The study is based on international acts, ECHR decisions, legislation of Ukraine and foreign countries, scientific articles in the fields of law and psychiatry as well as empirical materials that illustrate application of CMM in Ukraine. Dialectical, comparative-legal, statistical, induction and deduction, legal modeling, sociological research were used in this research.

Conclusions: As a result of the research the concept of the international standards of CMM application is defined, their scope in the law-enforcement and medical practice of Ukraine is determined, the system and meaning of these standards are formulated.

KEY WORDS: compulsory medical measures, psychiatric disorder, psychiatric care, mentally ill person, involuntary hospitalization

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INTRODUCTION

Legal regulation of compulsory medical measures (hereinafter - CMM) is of extraordinary importance in medical law as they are applied to persons who have committed socially dangerous acts and provide for forced restriction of their freedom. However, both in Ukraine and in foreign countries, there are numerous, but typical problems, which causes the international community a need to develop certain standards of their application.

THE AIM

The aim: of the scientific article is to define international standards for the CMM implementation, taking into account international legal documents, decisions of the European Court of Human Rights (hereinafter - ECHR) and some states' experience, as well as assessing the state of their implementation in Ukrainian law and medical practice.

MATERIALS AND METHODS

The legal basis for the study is the International Covenant on Civil and Political Rights (1966) (hereinafter - the Covenant), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (here-

inafter - the Convention), "Principles for the Protection of Persons with Mental Illness and the Improvement of Psychiatric assistance", as approved by UN General Assembly Resolution No. 46/119 of 17.12.1991 (hereinafter - the Principles), ECHR decisions, legislation of Ukraine and foreign countries (Austria, Italy, Latvia, Poland, Germany, San Marino) in the field of CMM. The theoretical basis is the scientific researches on using of CMM and forensic psychiatry. The empirical basis is: 1) statistics of the Prosecutor General's Office of Ukraine on CMM implementation in 2014-2019; 2) results of public examination of the activity of the Ministry of Health of Ukraine; 3) results of the authors' survey of Ukrainian judges, prosecutors and lawyers on practical application of international standards for CMM; 4) results of the authors' summary of 50 t decisions of the Ukrainian courts on CMM application. The study is based on such methods as dialectical, comparative-legal, statistical, induction and deduction, legal modeling, sociological research.

REVIEW AND DISCUSSION

The increase in the number of people being subjected to compulsory psychiatric treatment is a pan-European tendency that has been observed for the last 20 years

[1]. At the same time, democratic countries' legislation attaches particular importance to the rights' protection of the mentally ill and assumes compulsory treatment as an absolutely exceptional measure [2]. This is due to the fact that the implementation of such measures involves the emergence of a number of ethical issues regarding the compulsory nature of treatment and the restriction of patients' personal freedom [3].

Such problems are most acute when using CMM, which is quite common in Ukraine. Thus, in 2014 940 petitions were submitted to the court for CMM implementation, 946 – in 2015, 866 – in 2016, 1110 – in 2017, 1070 – in 2018 [4]. In each such case not only the national law's rules but also the international standards must be strictly observed. At the same time, a survey of Ukrainian judges and prosecutors involved in deciding on CMM implementation showed that only 43% of judges and 27% of prosecutors recognize the importance of international standards in the CMM application; only 19% of judges and 13% of prosecutors are aware of ECHR practices in CMM using; and less than 5% refer to it proceeding decisions. The situation is somewhat better for lawyers, with more than 85% of respondents recognizing the importance of using such international standards; 70% are aware of practices in the field of CMM and more than 60% refer to it in practice. This can be explained by lawyers' interests in improving the legal status of their clients while CMM applying.

At the same time, the analysis of jurisprudence of Ukraine in the field of CMM makes it possible to conclude that in the relevant court decisions there is almost no reference to the international standards and practice of the ECHR in this area. This is a major drawback, since the principles of the rule of law and legality in Ukrainian criminal proceedings must be applied taking into account the ECHR practice.

International standards do not consolidate the concept of CMM, considering it in the context of forced confinement. Their basis is Art. 9 of the Covenant, according to which restriction of human freedom in any form is possible only by court's decision and Art. 5 of the Convention, which stipulates that no one shall be confined except in the established cases and by court's decision. Such cases include the lawful detention of mentally ill persons (item "e" Part 1 of Art. 5 of the Convention). Some ECHR practices have been developed regarding the application of this provision, which clarifies and develops a system of international standards for CMM implementation. The international standards for CMM implementation are closely related to protection of mentally ill persons' rights, to whom such measures are envisaged. Therefore, such system should include the Principles that provide standards for the rights of persons with mental illness, definition of such diseases, their treatment, etc.

In Ukraine the CMM concept enshrined in Art. 92 of the Criminal Code (hereinafter – the Criminal Code), is in fact determined by the variants of relevant measure and an indication of the purpose of their application. CMM are measures of criminal nature that are an alternative to crim-

inal punishment for mentally ill persons. They, according to V.I. Borisov and V.S. Batyrgareeva, are manifestation of the society's reaction to socially dangerous actions by borrowing measures and means inherent in medicine, psychiatry, psychology and other related spheres [5].

CMM's purpose is compulsory treatment of a person to prevent him/her from committing socially dangerous acts. This dual purpose is driven by the combination of medical and legal factors that determine CMM use. Thus, the medical (or more precisely, medical and social) factor determines the need for healthcare for mentally ill persons in accordance with the constitutional right of everyone to healthcare and medical care (Article 49 of the Constitution of Ukraine). The reference to CMM's medical purpose corresponds to scientists' position, according to which psychotropic drugs' use for socially dangerous mentally ill persons only to control their behavior and without therapeutic intent is unethical and contrary to the purpose of psychiatry [6]. However, in the Ukrainian legislation, CMM's medical purpose was formulated unsuccessfully, as it indicates a process (treatment) rather than a result (some positive changes in the health status of a patient being treated) [7]. Considering this, CMM's purpose should be to identify the cure or improvement of such persons' health status, the achievement of which is related at the same time to the complex of social rehabilitation measures and to pharmacological and other medical impact on patients' health whose care is required by court decisions [8]. The organization of treatment-rehabilitation and preventive process belongs to the field of psychiatry as a branch of medicine, which deals with diagnosis, therapy and prevention of mental illness [9]. Accordingly, medical aspect of CMM implementation in Ukraine is regulated by the Law on Psychiatric Care of 22.02.2000, which defines legal and organizational principles of providing individuals with psychiatric care, as well as by-laws of the Ministry of Health of Ukraine.

The legal factor takes into account the social dangers of persons who have expressed themselves in committing socially dangerous acts to those around them and to themselves, and determines the need to completely or partially isolating these persons from society and to correct their behavior to prevent them from committing other socially dangerous activities, as well as impossibility of bringing such persons to criminal liability in a general manner. The ECHR emphasizes that "legitimate" concept covers both procedural and substantive rules (p. 39 of the ECHR decision in Winterwerp's case, v. the Netherlands) [10], from which it can be concluded that this criterion has two components: criminal-legal and criminal procedural.

The criminal-legal component envisages committing a socially dangerous act by a relevant person, stipulated by the law on criminal liability, as a result of which CMM are applied instead of criminal liability, to which these persons cannot be prosecuted (in Ukraine, CMM types, grounds and conditions of their usage are regulated by Art. Art. 92-95 of the Criminal Code). According to this criterion, CMM differ from emergency compulsory outpatient or

inpatient psychiatric care in psychiatric institutions provided to patients who, by their mental health status, are dangerous to themselves or others but have not committed any socially dangerous acts, [8]. Therefore, it seems controversial that CMM using is based not on the fact of committing a socially dangerous act by a person, but on his/her mental illness [11], because without the fact of such action CMM are not used.

The criminal-procedural component stipulates that CMM have been applied to a person by a court order in accordance with the procedure established by law (in Ukraine such procedure is regulated by Chapter 39 of the CPC). In the ECHR's view, the formula "in the order prescribed by law" indicates the need to follow due process in accordance with national law [10]. This necessity is due to the fact that compulsory hospitalization of a person in a psychiatric institution often leads to interference with his/her private life and physical inviolability through medical interventions against his/her will (p. 53 of the ECHR decision in Zagidulina's case, v. Russia) [12].

Thus, CMM can be defined as an alternative to criminal punishment criminal-legal measures of a medical nature, which in the established criminal procedural law apply to mentally ill persons who have committed socially dangerous acts, provided by the law on criminal liability, with the purpose of their treatment and minimization of publicity.

Three minimum conditions that the ECHR has provided for assessing lawfulness of deprivation of freedom for mentally ill persons for CMM use: (1) competent authority has established the existence of a mental disorder on the basis of objective medical examination; (2) mental disorder must be of such a nature or degree as to justify forced deprivation of freedom; (3) The validity of long-term confinement depends on the persistence of such a disorder (p.39 of the ECHR decision in Winterwerp's case, v. the Netherlands) [10].

These criteria are further detailed in ECHR decisions. For example, the first criterion is complex and implies that procedure for deciding on CMM using requires three mandatory conditions: (1) presence of a person's mental disorder; (2) evidence of his/ her impartial medical examination; (3) establishment by the competent authority.

The presence of a mental disorder requires its establishment and proof in accordance with the law, based on the presumption of person's mental health. According to Art. 3 of the Law of Ukraine "On Psychiatric Care", each person is considered to be one who has no mental disorder, until its presence is established on the basis and in accordance with lawful procedure. With respect to criminal liability the effect of this presumption is quite clearly disclosed in the McNaughton rules, which operate in the Anglo-Saxon legal system, according to which a person is presumed to be mentally healthy and possessed of reasonable level of responsibility to be held accountable for his/her crimes unless otherwise is proven. A person is not criminally responsible for his/her behavior due to mental illness or inferiority, he/she has no ability to understand or evaluate its nature and consequences [13]. Therefore, presumption of mental

health implies CMM use as a condition for exclusion of a patient with a mental disorder from the general rules and procedures for criminal prosecution.

Definition of the competent authority is carried out by national legislation. According to the Principle 17 "Supervisory Authority" is a judicial or other independent and third-party body, created and functioning in accordance with the procedures established by national legislation. During decision-making it uses the assistance of one or more qualified and independent practitioners in the field of psychiatry and takes their advice into account. In Ukraine such a competent authority is the court that has exclusive powers in CMM which in itself is an effective guarantee of the rights of the mentally ill persons.

Special medical knowledge not possessed by a court or other competent authority is needed for an objective medical examination. In Ukraine, deciding on CMM application, law provides for obligation of forensic psychiatric examination, which, according to Art. 509 of the CPC of Ukraine, should be conducted if: 1) according to medical document a person has a disorder of mental activity or mental illness; 2) behavior of a person during or after committing a socially dangerous act was or is inadequate (mental confusion, perception disorders, etc.).

In accordance with Principle 4, "Diagnosis of Mental Illness" diagnosis of a person suffering from a mental illness is made in accordance with internationally recognized medical standards. He/she cannot be treated for any other reason that is not directly related to mental health. In Ukraine, according to paragraphs 17-18 of the Procedures for conducting forensic psychiatric examination, in order to determine presence or absence of person's mental disorder, experts conduct a psychiatric examination, evaluate an objective history, including data on inheritance of mental disorders, features of mental development, family and social status, features of reacting to different life situations, mental traumas, peculiarities of mental state and behavior during the examination and in the course of actions concerning the proceedings in this case, etc. [14].

Therefore, psychiatric examination's conclusion plays an extremely important role in deciding whether to use CMM. The ECHR emphasizes that no one shall be deprived of his/her freedom as a "person with a psychiatric disorder" without a medical opinion stating that his or her mental state justifies compulsory hospitalization (p.39 of the ECHR decision in Winterwerp's case, v. the Netherlands) [10]. However, the ECHR admits that in urgent cases or when a person is detained as a result of aggressive behavior, it may be acceptable to obtain such a conclusion immediately after being detained. In all other cases, it must be preliminary. Where it is not possible, medical examination should at least be assigned and, if it is not done, the presence of person's mental illness has not been substantially proven (p. 97 of the ECHR decision in Zaichenko's case, v. Ukraine) [15].

In this case, the conclusion of psychiatric examination is a necessary but not sufficient condition for CMM using and should be carefully reviewed by the courts in conjunction

with other evidence in the case. In this regard, the ECHR notes that its task is to verify that national courts have examined the relevant findings with due diligence and whether they have duly substantiated their decision to compel the applicant to psychiatric institution (p. 71 of the ECHR decision in *Raudevs' case, v. Latvia*) [16]. The lack of evidence of such a critical review by courts is the basis for concluding that national authorities did not establish in a convincing manner and with necessary procedural guarantees the existence and persistence of a genuine psychiatric disorder, nature or extent of which justified the applicant's placement in psychiatric institution (p.112-119 of the ECHR decision in the case of *Anatoliy Rudenko v. Ukraine*) [17]. The Ukrainian courts practice stands on a similar position, stipulating that CMM can be applied only with assurance of a reasoned psychiatrists' opinion, which should be critically evaluated by court in terms of its scientific validity, persuasiveness and motivation. When such conclusions are unclear, incomplete or need to clarify additional issues, court should summon a psychiatrist expert or order additional or re-examination [8].

Regarding the second criterion, considering the issue of the proportionality of mental disorder and forced deprivation of freedom, it is necessary to evaluate a person's threat to others and himself/herself. According to the Principle 16 "Compulsory hospitalization", it can only be applied if a qualified psychiatric specialist determines that a person is suffering from mental illness and determines that: (a) there is a serious threat of direct or indirect harm or (b) in a person's case whose mental illness is severe and his or her mental capacity is impaired, refusal of hospitalization may result in serious impairment of his or her health or disability of proper treatment using.

For example, in the case of *Vershynin (v. Russia)* according to the forensic psychiatric examination, the patient was suffering from chronic mental illness - paranoid personality disorder - and required compulsory treatment in a specialized psychiatric institution. This was justified, *inter alia*, by the applicant's "intrusive ideas", numerous complaints to various authorities, attempts to find the truth, etc. However, the ECHR stated that although these aspects of mental health and behavior may justify the need for specific specialized treatment, they did not clearly demonstrate that the applicant was in any threat and that nature or extent of his/her mental illness required involuntary deprivation of liberty (p. 26 of the ECHR decision in *Vershynin's case v. Russia*) [18]. Scientists say that having a mental disorder is not in itself a reason for compulsory psychiatric treatment; it must be combined with need of treatment as well as patient's threat [19].

Given this, it is important to ensure in national law that CMM are only applicable to people who are socially dangerous. In most European countries, the legislator adheres to this rule. Thus, according to § 63 of the Criminal Code of Germany, a court passes a decision on referral to psychiatric hospital if the aggregate assessment of an offender and his/her actions proves that due to his/her state, he/she can be expected to commit serious unlawful

acts, and therefore he/she is a threat to society. Compulsory treatment in psychiatric hospitals also applies to offenders with psychiatric disorders associated with drug use, and its effectiveness is evidenced by an absolute 19.9% reduction in the risk of new convictions [20]. According to Part 1 of Art. 94 of the Criminal Code of Poland, a court decides on the placement of non-convicted person to relevant psychiatric institution if he has committed a prohibited act that constitutes significant public harm and is highly likely to commit another such act. In Ukraine, according to Part 4 of Art. 503 of the Criminal Procedural Code, CMM apply only to persons who are socially dangerous. However, there are examples of its ignoring: according to Part 2 of Art. 69 of the Criminal Code of Latvia, compulsory treatment and type of medical institution are determined by a court depending on person's mental illness and act committed by him/her, that is, the degree of public danger of a person is not taken into account.

The degree of person's social danger influences not only CMM use to them but also the choice of a specific measures in case of their variability. Thus, in Ukraine, the law provides for CMM in the form of: outpatient compulsory psychiatric care, which does not provide for isolation of a person, as well as 3 types of hospitalization in psychiatric care hospital (hereinafter - PCH), which differ in personal restriction's degree and isolation [21]. However, it is worth noting that CMM, such as hospitalization for PCH with enhanced supervision, where it is prohibited to go beyond PCH without healthcare provider's assistance to patients, applies to a person who due to his/her mental state is not a threat to society (Part 4 Article 94 of the Criminal Code of Ukraine). This is seen by the Ukrainian legislature as not complying with the criterion of proportionality of mental disorder and forced deprivation of liberty.

With regard to the third criterion, the ECHR takes into account imprisonment's duration for a mentally ill person. However, legislation of Ukraine does not specify the application's terms of CMM. This is due to the fact that treatment's duration in each case is different and cannot be determined in advance. The same approach applies in some European countries' legislation, in particular, according to Part 1, § 25 of the Criminal Code of Austria, the measure of persons' with mental disorders detention to correction facility is prescribed indefinitely and must be performed for as long as required. However, there is also an approach in European countries that foresees determination of such term by court within the time limits set by law. For example, according to Art. 219 of the Criminal Code of Italy, detention to a special psychiatric hospital applies for a period of not less than two years. According to Art. 131 of San Marino Criminal Code, detention in a psychiatric hospital for a minimum of one year and a custodial clinic for a minimum of 6 months.

In the absence of the CMM's validity period it is important to consolidate the mechanism for reviewing the decision on their application. Thus, in Ukraine, based on Art. 95 of the Criminal Code and Art. 19 of the Law "On Mental Health Care", the grounds for continuation,

modification or termination of CMM using by the court are those changes in a state of person's mental health, in which there is no need to apply a previously prescribed measure. In order to establish this basis, patients are to be reviewed by psychiatrists' commission at least once every 6 months, after that CMM using is continued every time for this period. Therefore, there is a continuous monitoring of a person's mental health, which is the subject of court control. Such a mechanism is in line with Principle 17 of the Supervisory Authority, according to which such a body periodically reviews cases of involuntary hospitalization, determining whether the criteria for forced hospitalization are still met, and if not, a patient should be discharged.

There are two reasons for a court to consider extending, modifying or discontinuing the CMM using. First, it is the statement of a representative of psychiatric care hospital (psychiatrist) to which psychiatrist commission's conclusion is attached, which substantiates the need to continue, change or discontinue of CMM. Secondly, it is a person's to whom CMM are applied (or his/her advocate or representative) statement. Such a statement shall also be added by PCH's psychiatrist commission's conclusion in which a person is receiving psychiatric care, but a patient may add to an application his/her independent psychiatrist's conclusion. This protects patients' rights on the basis of an impartial examination of their health state outside psychiatric clinic by personally initiating a court review of CMM replacement or its termination.

This possibility is part of Principle 17, the Supervisory Authority, and is consistent with the ECHR's view that a person forcibly hospitalized for psychiatric treatment should be guaranteed the right to pursue the legality of such a measure on his/her own initiative, and his/her access to a judge should not depend on goodwill of detaining authority and on medical staff's discretion or administration of medical institution (p. 44-45 of the ECHR decision in *Gorshkov's case v. Ukraine* [22], p. 197 of the ECHR decision in *Kucheruk's case v. Ukraine*). [23]). At the same time, subsidiary laws of Ukraine on CMM use do not contain mechanisms for referring a patient to a specialist in order to obtain an alternative point of view about the treatment process [24]. Therefore, in practice, this possibility is hardly used. This is confirmed by attorneys, prosecutors and judges interviewed by authors, as well as the case law generalization, where we did not find any court decision to change or cancel CMM on the basis of person's application.

CONCLUSIONS

International standards for CMM implementation are a set of generally accepted principles for treatment of mentally ill persons who have committed socially dangerous acts with the aim of treating them and minimizing their social danger as enshrined in the ECHR's legal instruments and practices. They include the following areas: (a) harmonizing of grounds procedure varieties for CMM legal implementation; (b) CMM designation for specific socially dangerous activities; (c) procedure and conditions for CMM use for a particular mentally ill

person; (d) CMM continuation, modification or termination. There are three basic conditions for CMM to be applied: (1) competent authority must establish the existence of a mental disorder on the basis of an objective medical examination; (2) mental disorder must be of such a nature or degree as to justify forced deprivation of liberty; (3) validity of long-term imprisonment depends on the persistence of such disorder. Failure to meet these criteria of CMM application is a grave violation of mentally ill persons' rights.

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