

**ՔՐԵԱԿԱՆ ԴԱՏԱՎԱՐՈՒԹՅՈՒՆ/CRIMINAL PROCEDURE/
УГОЛОВНЫЙ ПРОЦЕСС**

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ԱՌՆՈՒԴ ՎԱՐԴԱՆՅԱՆ

*ՀՀ Վճռարեկ դատարանի իրավական փորձաքննությունների
Ծառայության գլխավոր մասնագետ,*

*ԵՊՀ իրավագիտության ֆակուլտետի քրեական դատավարության և
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**PROCEDURE FOR THE APPLICATION OF MEDICAL ENFORCED
MEASURES AS A SPECIAL TYPE OF CRIMINAL PROCEDURE**

**ԲԺՇԿԱԿԱՆ ԲՆՈՒՅԹԻ ՀԱՐԿԱԴՐԱՆՔԻ ՄԻՋՈՑՆԵՐԻ
ԿԻՐԱՌՄԱՆ ԸՆԹԱՑԱԿԱՐԳԸ ՈՐՊԵՍ ՔՐԵԱԿԱՆ ՎԱՐՈՒՅԹԻ
ՀԱՏՈՒԿ ԴՐՍԵՎՈՐՈՒՄ**

**ПОРЯДОК ПРИМЕНЕНИЯ ПРИНУДИТЕЛЬНЫХ МЕР
МЕДИЦИНСКОГО ХАРАКТЕРА КАК ОСОБЫЙ ВИД
УГОЛОВНОГО ПРОИЗВОДСТВА**

Among the positive obligations of each legal state is the elimination of harmful behavior. The State is endowed with a wide range of legal measures for the proper performance of this obligation. These include security measures, which are also referred to as preventive measures and the jurisdictional procedure termed as preventive justice.¹ In this context “prevention” recognized as *the significant reduction of (potentially) harmful behavior, or the reduction of (potentially) harmful behavior to a tolerable level.*² This definition reflects the extensive application of preventive

¹ See Andrew Ashworth and Lucia Zedner, *Preventive Justice*, The United Kingdom, Oxford University Press, 2014, page 5.

² *Ibid.*

measures.

Particularly, preventive measures, among other goals, protect public health, thus forbidding the spread of infectious diseases.³ Moreover, preventive measures serve as a tool to neutralize the danger that emanates from persons suffering from mental illness, alcoholics, drug addicts and vagrants.⁴ In the mentioned cases, the legal basis for restricting human rights is stipulated in Article 5 §1 (e) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter - also European Convention). As a result of the interpretation technique of “Travaux préparatoires”⁵, it becomes clear that the founder-fathers of the European Convention initially prescribed the use of preventive measures without specifying the cases of restricting the human right to freedom. However, based on observations submitted by experts of Council of Europe, this framework has been revised and, based on proposals from the governments of the United Kingdom, Denmark and Sweden, the groups of persons subject to security measures have been clarified, namely, those suffering from infectious diseases, mental illnesses, alcoholics, drug addicts and vagrants.⁶

The use of preventive measures that restricts the right to freedom by applying Article 27 §1 (6) of the Constitution of the Republic of Armenia and Article 5 §1 (e) of the European Convention to neutralize the danger posed by mental patients is prescribed in civil procedure, except in cases where they are charged with committing an act prohibited by criminal law. In this case, the procedure established by the Criminal Procedure Code of the Republic of Armenia is applied.

In the theoretical literature the restriction of the right to freedom of persons suffering from mental illness in the framework of criminal procedure perceived ambiguously, based on the legal nature of compulsory medical measures (hereinafter - also CMM). Particularly, some scientists are inclined to the approach that relations arising from the use of medical measures are outside the criminal legal field, since: a) persons suffering from mental diseases cannot commit criminal crimes,⁷ b) CMM does not pursue the purposes prescribed by the criminal law, does not correct persons who have committed an act prohibited by the criminal law, and does not cause a criminal record.⁸ At the same time, we note that some theorists believe that the use of CMM should be organized within the criminal procedure system, taking into account the peculiarities of procedure.⁹

Our research shows that in the case of persons suffering from mental illness, the use of CMM under criminal procedure is not considered acceptable also in some

³ See *Lawrence O. Gostin*, *Public Health Law-Power, Duty, Restraint*, the United States of America, University of California press, 2008, page 4.

⁴ See *Guzzardi v. Italy*, judgment of the European Court of Human Rights of 6 November 1980, application no. 7367/76, § 98.

⁵ See *M. Ris*, *Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, *Boston College International and Comparative Law Review*, Volume 14, Issue 1, 1991, page 112.

⁶ See *Preparatory work on Article 5 of the European Convention on Human Rights*, European Commission of Human Rights, Strasbourg, 1956, pages 7-13.

⁷ See *Petrova O.G.*, *Criminally legal relations*, M., VYUZI, 1986, page 18.

⁸ See *Smirnova M.E.*, *On the procedural nature of legal proceedings on the application of compulsory medical measures*, *Law and Justice, Siberian Law Journal*, 3 (38) 2007, page 58.

⁹ See *Educational-practical commentary on the Criminal Code of the Russian Federation / under commonly. ed. Zhalinsky E.A.*, M., 2005, page 268.

foreign countries. In particular, in France, China and Japan, CMMs are envisaged by civil or administrative law.¹⁰

Taking into account the peculiarities of the institutions of criminal law, we are convinced that the presented theoretical statements about the legal nature of relations arising from the use of CMM are not justified.

Firstly, it should be stated that the key fact underlying the application of CMM in relation to insane persons is the commission of a criminal act in a state of insanity, which excludes not the wrongfulness of the incriminated act, but the person's guilt in this act. The theory of guilt in the material law is based not only on the forms of intent or negligence, but also on the conditions of guilt, which includes the sanity of the individual. That is, a person is not held criminally liable for committing an act prohibited by criminal law, since insanity precludes his guilt in this act, and not its illegality. For a more imaginative presentation, it should be noted that insanity in institutional terms is, in fact, identified with the infliction of harm under the influence of physical or mental coercion. In this case, a person is not subject to criminal liability for lack of guilt.

Meanwhile, the Criminal Codes of post-Soviet countries prescribe the aforementioned cases among a number of circumstances that exclude the criminality of an individual's act.¹¹ Based on this, the established theory also excludes the criminality of acts committed by the insane. However, in the mentioned cases criminal liability is excluded, and not the criminality of the committed act. It is for this reason that Chapter 6 of the draft new Criminal Code of the Republic of Armenia, which is currently in circulation, considers these cases not as circumstances precluding the criminality of the act, but as circumstances precluding criminal liability.¹² Therefore, it must be stated that committing a criminal act and causing a harm to the relations protected by criminal law, serve as a legal basis for initiating criminal proceedings and applying legal measures. As a result, the State prevents the commission of further crimes, which is one of the goals pursued by the criminal law. Consequently, preventive justice contributes to the person's social rehabilitation and treatment, which leads to the prevention of further commission of other illegal acts.¹³

The study of legal regulations of the countries of the continental legal system shows that in the countries where CMM is used with the involvement of Criminal procedural tools, the process as a whole is distinguished by the following conceptual features: Firstly, the appointment of a CMM in some cases is accompanied by the use of a special procedure. That is, the form of criminal proceedings in these cases differs from the form of legal proceedings conducted on general grounds.¹⁴ The legal

¹⁰ See *Dodonov V. N.*, Comparative criminal law, General part / under general. ed. Shcherby S.P., Yurlitinform, M., 2009, page 345.

¹¹ For example see the Chapter 8 of the Criminal Code of the Republic of Armenia, adopted in 2003 by the National Assembly of the Republic of Armenia, available at: <https://www.legislationline.org/documents/action/popup/id/8872/preview>, [accessed 22 January 2020].

¹² See the draft new Criminal Code of the Republic of Armenia, developed by the Ministry of Justice of the Republic of Armenia in 2019, available at: <https://www.e-draft.am/projects/2115>, [accessed 22 January 2020].

¹³ See *Gorobtsov V. I.*, Compulsory medical measures for mentally ill patients under the Criminal Code of the Russian Federation: Textbook, Krasnoyarsk: KVSh Ministry of the Interior of Russia, 1997, page 32.

¹⁴ For example see the Chapter 14 of the Criminal Procedure Code of the Republic of Armenia, adopted

literature offers various criteria for differentiating the procedural form, such as social or objective necessity due to the characteristics of public relations that are subject to regulation.¹⁵ The need to establish a differentiated procedural form in CMM cases is justified by the nature of the public relations to be regulated.¹⁶

In addition, the scope of guarantees of CMM proceedings includes the mandatory participation of a lawyer and legal representative. According to the European Court of Human Rights, the need for mandatory participation of the defender is based on the interests of justice and vulnerable position of the accused. It aims to ensure that a person suffering from mental illness is able to perceive the essence of prosecution and participate effectively.¹⁷

Moreover, in various sources, the specialized training of a lawyer, an investigator, a judge and a prosecutor is put forward. Although the European Court of Human Rights does not explicitly state a requirement for specialized counsel to participate in CMM enforcement proceedings, it finds that the specialized proceedings in general may justify the participation of specialized counsel.¹⁸ Subjects of criminal proceedings working in the European Union with vulnerable persons are required to undergo special retraining.¹⁹ In this regard, in post-Soviet countries, legislation is still under development and legal guarantees for the participation of procedural subjects who have received special training in CMM proceedings are not provided.

In our opinion, the scope of guarantees for the application of CMM needs to be supplemented with the requirement of mandatory participation of a psychologist, which will facilitate the course of the proceedings involving a person suffering from mental illness. Particularly, this guarantee will allow to explain certain procedural actions to a person suffering from a mental illness in a more accessible way, which is reflected also in the judgements of the European Court of Human Rights.²⁰ The legal basis for the participation of a psychologist is usually not prescribed in the codes of the continental legal system, including the Code of Criminal Procedure of the Republic of Armenia. Meanwhile, a psychologist using appropriate methods can enter into communication with a mentally ill person and provide him with the necessary advice and explanations about the legal system and the justice process.²¹

in1998 by the National Assembly of the Republic of Armenia, available at: https://www.legislationline.org/download/id/6358/file/Armenia_CPC_1998_am2016_en.pdf, [accessed 22 January 2020].

¹⁵ See *Mishchenko E. V.*, Problems of differentiation and unification of criminal procedural forms of proceedings for certain categories of criminal cases, Orenburg, 2014, page 153.

¹⁶ *Ibid.*, pages 199-200.

¹⁷ See Handbook on European law relating to access to justice, European Union Agency for Fundamental Rights and Council of Europe, 2016, page 70,

S.C. v. the United Kingdom, judgment of the European Court of Human Rights of 15 June 2004, application no. 60958/00, § 29, *Quaranta v. Switzerland*, judgment of the European Court of Human Rights of 24 May 1991, application no. 12744/87, § 32-36.

¹⁸ See *Meftah and Others v. France* [GC], judgment of the European Court of Human Rights of 26 July 2002, applications no. 32911/96, 35237/97 and 34595/97, § 47.

¹⁹ See European Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32013H1224%2802%29>, [accessed 22 January 2020].

²⁰ See *Vaudelle v. France*, judgment of the European Court of Human Rights of 30 January 2001, application no. 35683/97, § 65.

²¹ See *R. Rosner*, Principles and practice of forensic psychiatry, second edition, The United Kingdom, 2003, page 7.

The distribution of the procedural burden of proof is the next conceptual feature of the countries of the continental legal system. Thus, in this countries the criminal prosecution authorities have the responsibility to find out the person's mental illness excluding criminal responsibility. In particular, if a person is suspected of having a mental illness, the prosecution is obliged to take measures to find out and ensure the application of the CMM to the person.

The obligation to acquire evidences excluding the possibility of criminal responsibility by the prosecution has been the subject of discussion in the literature. Particularly, it was noted that this is one of the problems of the current criminal procedure model of the Republic of Armenia, which leads to a violation of the logic of a separation of procedural functions.²²

In contrast, the distribution of the burden of proof for a person suffering from mental illness in the countries of the Anglo-Saxon legal system is different from the countries of the continental legal system. In particular, the burden of prove of a mental illness excluding a person's mental health is borne by the defense in the majority of those countries. Historically in the United States in 1895, according to *Davis v. The U.S.* Supreme court's decision, the burden of proof of the circumstances related to the sanity was largely entrusted to the Prosecutor's office.²³ However later, in 1952, the Supreme court in the case of *Leland V. Oregon* found that the state may require the accused to prove his insanity.²⁴

As a result, the burden of proving innocence was fully borne out by the 1984 Insanity Protection Reform Act.²⁵ The U.S. Supreme court in the case of the *Freeman* found that the new settlement of the burden of proof in the Act is in accordance with the U.S. Constitution²⁶. In fact, the adoption of this Act aimed to tighten the legal possibility of obtaining a verdict of acquittal based on insanity. Moreover, even some States during this period abandoned insanity altogether. Consequently, the legal possibilities for obtaining a verdict of acquittal due to insanity have become so tough that often the accused avoid choosing this defense, since, according to official statistics, in 1% of criminal cases jurors render an acquittal based on the verdict of insanity.²⁷

However, it should be mentioned that new regulations on the distribution of the burden of proof in the countries of the Anglo-Saxon legal system, made it possible to implement the principle of classical competition. Particularly, the criminal prosecution authorities are exclusively engaged in the acquisition of evidence that substantiates the person's accusation, and the justification of insanity for exemption from criminal liability is a special defensive tactic.

Thus, summarizing the above, we note that the study of Romano-Germanic and Anglo-Saxon legal features of CMM application is an additional incentive for reforming the procedural model of CMM application in the Republic of Armenia.

²² See A. Hovsepyan, A. Tamazyan, A. Ghambaryan, V. Shahnazaryan, *Relations of Public Participants in Criminal Proceedings*, Yerevan, Asoghik, 2015, page 10.

²³ See *Davis v. United States*, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895).

²⁴ See *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952).

²⁵ See R. Simon, H. Ahn-Redding, *The insanity defence, The world over*, a division of Rowman & Littlefield Publishers, Inc., The United States of America, 2006, page 37.

²⁶ See *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986).

²⁷ See R. Rogers, D. Shuman, *Fundamentals of forensic practice. Mental health and criminal law*, The United States of America, Springer, 2005, page 18.

Аннотация. Основная цель данной научной статьи – прояснить концептуальные особенности превентивных мер в уголовном судопроизводстве Республики Армения. Автор фокусируется на порядке применения принудительных мер медицинского характера как особого вида превентивных мер. Автор анализирует нормы уголовного судопроизводства в странах континентальной правовой системы и проводит параллели со странами англосаксонской правовой системы. На основании заявлений, сделанных в научной статье, автор также обосновывает необходимость реформирования процессуальной модели применения принудительных мер медицинского характера в Республике Армения.

Ամփոփում: Սույն գիտական հոդվածի հիմնական նպատակը Հայաստանի Հանրապետության քրեական դատավարությունում պրևենտիվ միջոցառումների հայեցակարգային առանձնահատկությունների հստակեցումն է: Հեղինակն ուշադրության է արժանացրել բժշկական բնույթի հարկադրանքի միջոցների կիրառման կարգը՝ որպես պրևենտիվ միջոցառումների կիրառման հատուկ տեսակ: Հեղինակը վերլուծում է մայրցամաքային իրավական համակարգի երկրներում քրեական դատավարության նորմերը և զուգահեռներ անցկացնում անգլո-սաքսոնական իրավական համակարգի երկրների հետ: Գիտական հոդվածում արված դիտարկումների հիման վրա հեղինակը նաև հիմնավորում է Հայաստանի Հանրապետությունում բժշկական բնույթի հարկադրանքի միջոցների կիրառման դատավարական մոդելի բարեփոխման անհրաժեշտությունը:

Բանալի բառեր – պրևենտիվ միջոցներ, բժշկական բնույթի հարկադրանքի միջոցներ, անմեղսունակության պաշտպանություն, հոգեբանի մասնակցություն:

Keywords: preventive measures, compulsory medical measures, insanity defense, participation of a psychologist.

Ключевые слова: превентивные меры, принудительные меры медицинского характера, защита невменяемости, участие психолога.

Ա. Վարդանյան - ՀՀ Վճռաբեկ դատարանի իրավական փորձաքննությունների ծառայության գլխավոր մասնագետ, ԵՊՀ իրավագիտության ֆակուլտետի քրեական դատավարության և կրիմինալիստիկայի ամբիոնի ասպիրանտ, էլ. փոստ՝ arnoldvardanyan@gmail.com

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