

## ISSUES OF PROVIDING PARTICIPATION OF THE DEFENSE COUNSEL IN CASES REGARDING THE APPLICATION OF COERCIVE MEDICAL MEASURES

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**Annotation.** In this article, proposals and recommendations have been developed to provide a defense counsel who can adequately protect the rights and freedoms of people in cases when a socially dangerous act is committed by mentally retarded or mentally disturbed people or persons whose mental state is temporarily disturbed after committing a socially dangerous act, as well as that, some problematic issues arising in connection with the participation of the defense counsel in the judicial investigation practice are developed.

**Keywords:** defense counsel, participation of defense counsel, coercive medical measures, mental retardation, mental disorder, rights and obligations of the defense counsel, waiver of the defense counsel, provision of rights and freedoms.

In recent years, large-scale reforms aimed at ensuring the rights and freedoms of the individual and his rightful place in society have been implemented in our country, but there is an incomprehensible situation in the application of coercive medical measures against a person in the criminal-procedural legislation, due to the lack of full regulation of the relationship to the protection of the rights of the person. This shows that there is a need to provide legal assistance to a person who is subject to coercive medical measures, to protect his rights and freedoms on time by clearly specifying and strengthening them in the laws of our country.

In criminal-procedural theory, since the persons who are subjected to coercive medical measures are deprived of the opportunity to understand the true nature of their actions and to control them, taking into account that they are usually not prosecuted and accused of committing a crime, a group of scholars argues that this category of persons does not need protection.

In particular, V.D. Adamenko believes that “there is no defense without accusation, there is no meaning of defense without accusation”. [1] Another group of proceduralists concludes that if a person is not accused of a crime or a criminal case is not initiated against a person, there is no point in the defense of the person defending him. [2]

At the same time, other scientists, opposing the above opinions, put forward the opinion that the participation of the defender in cases where coercive medical measures are applied to a person does not come from the function of protection, but from the

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function of representation aimed at providing legal assistance to a person suffering from a mental illness. According to N.A. Dryomina, the right to defense of a person who is being investigated for the application of coercive medical measures is a real means of protecting a person from unreasonable restrictions and, at the same time, is a necessary guarantee of the fairness of the decision issued by the court. [3]

In our opinion, it is necessary to protect the rights and legal interests of a person who is being investigated for the application of coercive medical measures in order no less than other participants in the criminal process. In this regard, the concept of protection related to medical coercive measures cannot be excluded.

The law of criminal procedure indicates the ambiguity of the concept of defense in criminal proceedings. On the one hand, Article 18 of the Code of Criminal Procedure of the Republic of Uzbekistan provides for the protection of a person from the restriction of his rights and freedoms. On the other hand, Article 49 of this Code, defining the concept of a defender, states that this is a person who protects the rights and legal interests of suspects and accused persons in the prescribed manner and, at the same time, provides them with legal assistance in criminal proceedings.

According to some authors, as a result of the exclusion from the list of criminal subjects of persons who committed an act prohibited by the criminal law in a state of insanity or became mentally ill after the commission of a crime, the defenders of the use of coercive medical measures cease to be the defenders of the suspects (accused), and new participants in criminal-procedural relations become defenders of persons with mental illness and in need of compulsory treatment by court order. [4] In support of this opinion, it should be noted that under Article 3 of the Law of the Republic of Uzbekistan “On Lawyers” of December 27, 1996, No. 349-I, the defense attorneys, possibly within the framework of a criminal case, may provide qualified legal assistance in the form of representation.

When participating in the preliminary investigation of the category of cases under consideration, the defender’s attention should be drawn to several important circumstances that will later be examined by the court and may be the basis for deciding on the application of coercive medical measures.

It is known that the issue of a person’s mental deficiency is considered in the court process. However, during the completion of the preliminary investigation of the criminal case, i.e., the proceedings on the application of coercive medical measures and when sent to court to apply a coercive measure against a person, the investigator must prove that the mentally deranged person committed this act in a state where he could not understand the true nature and social danger of his actions due to chronic mental illness, temporary mental disorder, mental weakness or other mental illness, as well as the social danger of the person.

Coercive medical measures can be used if the person’s mental disorder poses a

danger to himself or others or is related to the possibility of causing them other serious harm. This situation is the subject of proof in cases of this category and must be determined during the investigation of a criminal case. Article 92 of the Criminal Code of the Republic of Uzbekistan excludes the use of coercive medical measures against this person due to direct instruction, failure to identify evidence indicating the mental state of a person who is capable of repelling dangerous actions or other serious harm to himself or others. Medical coercive measures can only be applied to mentally ill persons. The purpose of applying coercive medical measures is to treat these persons and prevent new socially dangerous acts that may be committed by them. Medical coercion is used to treat a person. In such a case, a “mentally ill” person must have committed the actions specified in Article 92 of the Criminal Code. [5] If necessary, treatment in such cases should be carried out by the general rules stipulated in the Law of the Republic of Uzbekistan “On Psychiatric Assistance”.

According to Chapter 46 of the Criminal Procedure Code of the Republic of Uzbekistan, which is devoted to the completion of the preliminary investigation, the criminal case is terminated if the nature of the committed act and the mental disorder of the person do not endanger him or other persons or cause them any other harm. It is known that the representative of the person who is being investigated for the application of coercive measures in the medical direction, rejecting the unreasonable conclusions of the preliminary investigation, helps to make a legal decision and prevents the corresponding measures from inconsistent application of the law.

In addition, the presence, level and nature of the mental disorder of the person, as well as the identification of the circumstances related to his social risk by the defender, may result in the deprivation of liberty against the person and procedural coercive measures provided for in part 1 of Article 268 of the Criminal Procedure Code of the Republic of Uzbekistan (admission to a psychiatric hospital) may help to assign precautionary measures, as well as to change previously selected measures to less severe measures.

In the research conducted by Y.V. Sukhoverova, it was shown that the defenders do not always pay enough attention to these elements of the subject of evidence. When appointing a forensic psychiatric expert in certain criminal cases, it was found that the questions about whether the mental disorder of a person poses a danger to himself or other persons or there is a possibility of causing serious harm to them is not included in the expert’s decisions. Accordingly, psychiatric experts did not address this issue in the conclusion, and the court applied coercive medical measures against these persons. [6]

The rule on mandatory participation of the defense attorney from the moment of issuing a decision on the appointment of a forensic psychiatric expert is a novelty in the current criminal procedural legislation. In the previous version, the participation of

a person from the moment his mental illness is detected was envisaged. The ambiguity of this phrase has caused much debate among proceduralists about when to allow a defense attorney to participate in a criminal case, and as a result, the law has varied in practice.

According to the conclusion of the forensic psychiatric examination, if the person under protection has become mentally ill after committing a crime or is mentally deranged, or if he has mental defects that do not exclude his sanity, but make it difficult for him to independently exercise the right to self-defense, the rule that the defender must participate in the case, provided for in the first part of Article 571 of the Criminal Code, continues to apply. [7] Later, if the person is found to be sane and mentally healthy based on the conclusion of the forensic psychiatric expert, the issue of the defense attorney's participation in the case will be resolved in a general manner. [8]

According to Article 18<sup>1</sup> of the Criminal Code of the Republic of Uzbekistan, a sane person who could not fully understand the significance of his actions (inactions) or was unable to control them due to a disturbed mental state at the time of committing a crime shall be held responsible, and a person whose mental state is disturbed in a way that does not exclude sanity, together with punishment by the court taking into account the fact that it is indicated that coercive measures in the medical field may be prescribed, the circumstances related to the mental disorder of a person, the danger to himself or other persons or the possibility of causing serious harm to them must be determined during the investigation of a criminal case, and in accordance with Article 571 of the Criminal Procedure Code, it is necessary to ensure the participation of the defender in the proceedings on the application of coercive medical measures from the moment of the decision to appoint a forensic psychiatric expert.

The guarantee of the mandatory provision of a defense attorney to those suffering from mental disorders is established by several articles of the Criminal Procedure Code, which contributes to its mandatory implementation. In particular, according to Article 571 of this Code, the participation of the defender in the proceedings on the application of coercive medical measures is mandatory from the moment the decision to appoint a forensic psychiatric expert is issued. This requirement is expressed in the mandatory participation of the defender under Article 51, Part 1, Paragraph 8 of the Criminal Procedure Code, from the moment the decision on the appointment of forensic psychiatric expertise is made, as well as in the cases provided for in paragraphs 1-4, 8, 8<sup>3</sup>, 8<sup>4</sup> and 9 of the second part of Article 52 of this Code, it is not allowed to waive the defender.

In addition, all the situations in which the participation of the defense attorney is mandatory are summarized in the decision of the Plenum of the Supreme Court of the Republic of Uzbekistan of December 20, 1996 "On the practice of applying the laws providing the right to protection".

Mandatory participation of a defense attorney in court hearings on the application of coercive medical measures, inability of the persons whose case is being processed to freely exercise their rights, justified by the purpose of strengthening the protection of the rights and legal interests of persons who need additional guarantees of self-defense due to their mental illness and the presence of the prosecutor during the court session. [9]

According to Article 116 of the Constitution of the Republic of Uzbekistan, although it is noted that receiving qualified legal assistance is not an obligation of a citizen, but a right, it is necessary to ignore the refusal of the defender by the person who is being processed for the application of coercive medical measures. The obligation of the defender to participate in these cases is related to the weakness of the rights, freedoms and legal interests of persons suffering from mental illnesses and the obligation of the state to ensure these rights. The purpose of ensuring the participation of a defender in cases of this category is to take into account not only the rights of the participants in the proceedings, but also the public interest that leads to ensuring the principles of legality and competitiveness. “The duty of the defender is not only private, but the public in nature. By performing the tasks assigned to him, the defense attorney contributes to the solution of the socially important problems of the judicial process, that is, he controls the correct application of the law”. [10] The fact that the investigator is not required to refuse a lawyer is a guarantee of the protection of the rights of persons suffering from mental disorders.

Despite the positive changes, the norms of criminal procedural law require further correction. Thus, the decision to appoint a forensic psychiatric examination cannot always be announced to the suspect (accused) because of “the fact that the accused could not objectively correctly perceive the real and legal aspect of this decision, the nature of his mental disorder, mental state and health at a certain time can lose the importance of the expertise”. [11] At the same time, in Article 571 of the Criminal Procedure Code of the Republic of Uzbekistan, the mandatory inclusion of a defense attorney in a criminal case “starts from the moment when a decision on the appointment of a forensic psychiatric examination against a person is issued”. In our opinion, since the last procedure is the most appropriate, it seems appropriate to supplement Article 51, Paragraph 8 of the first part of the Criminal Procedure Code of the Republic of Uzbekistan with the words “in the cases of the application of coercive medical measures, from the time when the forensic psychiatric examination is appointed”.

In our opinion, O.V. Golovano has established cases of mental disorder, but it is not possible to foresee whether the criminal case will be investigated according to the general rules or the established rules of the procedure for the application of coercive medical measures, views on allowing a lawyer to participate in a criminal case after receiving evidence indicating the presence of mental illness in a person are noteworthy.

[12] In cases of this category, the participation of the defender from the first stage of the preliminary investigation ensures the rights, freedoms and legal interests of persons with mental illnesses. In addition, the second part of Article 52 of the Criminal Procedure Code stipulates the mandatory participation of a lawyer if the suspect (accused) cannot independently exercise the right to a defense attorney due to mental illness. The basis for involving a defense attorney in a criminal case is a certificate of registration of this person in a psychiatric hospital or a request for help; the conclusion of the medical and social expert commission that he is a disabled person of any group defined for mental illness or mental disability; medical history or extract from other medical document showing that he is suffering from other mental illness or that he has organic brain damage etc. It should be remembered that under the first part of Article 45 of the Law of the Republic of Uzbekistan “On the protection of citizens’ health” adopted on September 14, 1996, a citizen’s request for medical assistance, information about his health and diagnosis, other information received during medical examination and treatment constitutes a medical secret. According to the Law of the Republic of Uzbekistan “On psychiatric care”, the presence of a mental disorder in a citizen, the facts of applying for psychiatric care and treatment in an institution providing such care, and other information about the state of mental health are medical secrets protected by law. Therefore, the seizure of medical records must be carried out within the framework of a criminal case by an investigator, prosecutor or court decision. In the future, the seized documents will also be used in the appointment of a forensic psychiatric examination.

Deliberate and inadvertent violation of the rights and legal interests of persons who are being investigated by the investigative bodies, the prosecutor’s office and the court for the application of coercive medical measures against them can be eliminated by the participation of highly qualified defenders of this category in the case. However, practice shows that often lawyers invited to participate in cases of this category treat their duties as a formality, and therefore the rights and legal interests of persons with mental illnesses are violated.

In most cases, the conclusions of psychologists and investigators about the depth and nature of a person’s mental state and his public danger are not questioned. In turn, it should be remembered that any evidence, including the conclusion of a forensic psychiatric examination, does not have predetermined force and must be evaluated together with other evidence collected in the criminal case.

In her research, Y.V. Sukhoverova wrote that “only a sufficiently qualified lawyer can protect a person with physical and mental disabilities”. [13] S.P. Shcherba proposed that the state allocate highly qualified lawyers in large legal consulting centers specializing in the defense of this category of cases. [14] We consider it appropriate to allocate not only the participation of qualified lawyers with rich practical

work experience, but also specialized investigators for the cases under consideration. Its necessity can be attributed to the specificity and complexity of the proceedings under Chapter 61 of the Criminal Procedure Code. In addition to the special evidence that a person with a mental illness may present after the crime has been committed, the defense must find a unique approach to the person with a mental illness.

To provide qualified legal assistance, the legislator gives the defense attorney several powers provided for in Article 53 of the Criminal Procedure Code. However, we need to talk about the duty, not the right, of the defense attorney to participate in the interrogation of the suspect (accused) suffering from mental illness, as well as other investigative activities conducted with his participation. It can be seen that in the cases of the category under consideration, the participant, legal representative and the person who is being processed for the application of coercive medical measures against him must have a general acquaintance with the information of the criminal case on the completion of the preliminary investigation and the decision to send him to court. To ensure the active participation of the defender in the proceedings on the application of coercive medical measures, K.S. Sefikurbanov suggests forcing the investigator to immediately notify the defender of the time and place of the investigative activities conducted with the participation of the accused. [15] This point of view seems correct, and in our opinion, it is appropriate not only to inform the defender of the person suffering from a mental disorder about it, but also to ensure his participation in the investigative actions conducted with the person's participation. Some authors emphasize the need for expanding the rights of the defense attorney during the preliminary investigation and the pre-trial stages of the criminal case process. [16]

The presence and active position of the defender during the investigation and other procedural actions with the participation of the person subject to the application of coercive medical measures prevents possible violations and abuse by officials.

One of the main means of influencing the bodies of preliminary investigation and qualified legal assistance by lawyers is the violation of material or procedural norms of the law; requests that may be related to ensuring the rights of persons suffering from mental illness, collecting additional evidence, changing preventive measures, etc. Unfortunately, we have to admit that there are very few cases of this type.

According to the results of studies, the protection of the interests of individuals is carried out by different defenders during the inquiry or preliminary investigation and the trial. At the same time, none of them submits any plea for wrongdoing. It is very difficult to provide comprehensive legal assistance to a person suffering from mental illness without knowing all the subtleties of the investigation. In this regard, in cases of this category, it is necessary to avoid changing the defenders as much as possible at all stages of the criminal proceedings. L.D. Kalinkina writes that "when a lawyer is appointed in the trial, it is necessary to introduce a norm on the mandatory meeting of

the defense counsel with the client. It is doubtful that the defendant's interests will be fully protected when he meets the defense attorney for the first time in court". [17] In support of this proposal regarding proceedings on the application of coercive medical measures, we propose to include in the Criminal Procedure Code a provision on the mandatory meeting of the person subject to the application of coercive medical measures with his defense counsel at any time during the criminal proceedings.

In most criminal cases, there were no active efforts by defense attorneys to provide legal aid to persons suffering from mental disorders, that is, they participated if they were appointed. Perhaps the lack of material interest predetermined the passive state of the defenders. "The presence of a passive lawyer in the pre-trial process is a useful factor for the investigative body. A large number of court and prosecutor's practice is based on the axiom that "the right to defense cannot be violated when a lawyer is present", and nobody cares about the behavior of the defender. It can be seen that the effectiveness of such a defender is zero and he is serving the client by his inaction. In fact, with such a defense, the defendant will be left without a defense attorney".

Thus, the current situation requires an increase in the role of the defender who participates in the proceedings on the application of coercive medical measures and participates in the processes of eliminating formalities in the implementation of the protection of persons suffering from mental illnesses. His participation in the investigation and preliminary investigation of this category of cases, starting earlier than when the decision to appoint a forensic psychiatric expert is issued, ensures the protection of the rights, freedoms and legal interests of persons suffering from mental illnesses. The introduction of specialization of defenders when applying coercive medical measures, reducing the level of their exchange during work to a minimum, as well as the mandatory meeting of the newly appointed defender with the client at any time will have a positive effect on the situation of the participants of the category under consideration. [18]

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