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Compulsory Medical Measures in the Criminal Law of the Republic of Kazakhstan²

Obowiązkowe środki o charakterze medycznym
w prawie karnym Republiki Kazachstanu

1. Introduction

The criminal law system of the Republic of Kazakhstan is an illustration of solutions that should be considered typical for the former USSR member states. To a large extent, the regulations contained in the criminal law of Kazakhstan display many similarities to the criminal law realm of the Russian Federation, with some peculiarities resulting from the cultural inheritance of the Kazakh people and divergences in the development of the health care system.

The topic of compulsory medical measures is an excellent exemplification of the influence of the Russian criminal law on the institution of insanity and protective measures, which will be subject to a more in-depth analysis. In the same instance, the author will also mention solutions binding in the criminal law of the Republic of Uzbekistan, which illustrates the traditional approach to compulsory medical measures in the sphere of post-Soviet countries.

This study is divided into several parts. The first concerns solutions related to the institution of insanity, limited sanity, and self-intoxication.

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The next part deals with the compulsory measures and the imposition and enforcement of compulsory medical measures.

2. Insanity, diminished responsibility, and self-intoxication and stupefaction

2.1. Institution of insanity in the Criminal Code of the Republic of Kazakhstan

Regarding the concept of sanity the Criminal Code of the Republic of Kazakhstan of July 3, 2014³ (*Уголовный кодекс Республики Казахстан*) contains a solution according to which a person is criminally liable if he or she reaches the proper age, becomes aware of the nature and social danger of the criminal act, and has a volitional capacity. Analogously to the solutions adopted in the realm of Russian criminal law, the concept of sanity has not been defined in CC RK. Notwithstanding, it is a mandatory and independent condition for assigning fault and criminal liability. In one of the most authoritative and earliest comments to the new CC RK, the authors indicate that „sanity can be defined as the ability of a person to become aware of the actual nature and social danger of their actions (omissions) and to direct them in the course of committing a crime”⁴.

When it comes to the notion of insanity, it is regulated in Article 16 Section 1 CC RK. It stipulates that a person who, at the time of committing the crime regulated in the special part of the CC RK, was in a state of insanity could not be aware of the real nature and social danger of his or her act (omission) or did not direct his or her conduct due to a chronic mental illness, a temporary mental health disorder, a mental disability or other mental disorder⁵. An in-depth analysis of the wording of the CC RK envisages that insanity is a state that excludes fault and criminal liability⁶. Kazakh criminal law provides two criteria of sanity, and thus defines insanity, which must occur simultaneously. The first criterion is the legal one, which is divided into intellectual and volitional.

³ Уголовный кодекс Республики Казахстан от 3 июля 2014 года № 226-V, hereinafter: CC RK.

⁴ А. Коробеев, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 97; similarly Н. Котова, *Уголовное...*, p. 55.

⁵ А. Тембербеков, in: А. Нагыбаев, Г. Баймурзин, И. Рогов, *Уголовное...*, p. 71.

⁶ А. Коробеев, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 98.

The intellectual factor obtains when the perpetrator realized the real nature of his act/omission or social danger, or he or she realized concomitantly the nature of their act/omission and its social danger⁷. In this situation, the perpetrator does not need to become aware of the unlawfulness of his or her act or omission⁸. Similar solutions are adopted in Russian Law and Uzbek criminal law. It is worth mentioning that in the Criminal Code of the Republic of Uzbekistan of September 22, 1994⁹, the notion of insanity is regulated in two Articles, 18 and 18¹, notwithstanding that at its core, the solutions are much alike.

The lack of volitional capacity occurs when the perpetrator had no possibility of directing his actions. Kazakh criminal law indicates that this is a situation in which certain mental health disorders weaken the volitional abilities of an individual to such an extent that he or she cannot refrain from acting or omitting at the moment in which action is required to prevent the occurrence of negative effects. In the literature on the subject, an example repeatedly given is the person suffering from kleptomania¹⁰.

As in the Russian and Uzbek criminal codes, the CC RK uses an exclusive disjunction clause between the legal and medical criteria, which sets the scene for the conclusion that it is enough for only one of the criteria to occur¹¹. The medical criterion is explicated in Kazakh law by enumerating diseases and mental health disorders that affect the intellectual and voluntary abilities of the perpetrator, causing insanity. Pursuant to Article 16 sec. 1 CC RK, the following mental health states may be the basis of insanity:

- a) chronic mental disorder,
- b) short-term mental disorder,
- c) mental disability,
- d) other mental health disorder¹².

A corresponding catalogue can also be found in the Russian and Uzbek Criminal Codes.

⁷ Н. Котова, *Уголовное...*, р. 56.

⁸ А. Коробеев, in: И. Рогов, К. Балатаев, *Уголовное...*, р. 98–99.

⁹ Уголовный кодекс Республики Узбекистан утвержден Законом Республики Узбекистан от 22 сентября 1994 года № 2012-XII.

¹⁰ А. Коробеев, in: И. Рогов, К. Балатаев, *Уголовное...*, р. 98–99.

¹¹ А. Коробеев, in: И. Рогов, К. Балатаев, *Уголовное...*, р. 99.

¹² А. Тембербеков, in: А. Нагыбаев, Г. Баймурзин, И. Рогов, *Уголовное...*, р. 77.

Moving on to a more detailed description of each of these conditions, one should start with a chronic mental health disorder. This term is understood as a state of prolonged mental health disorder characterized by a permanent deterioration in mental health and has a developmental tendency. It is indicated that these disorders may be of an internal or external nature. Internal ones include schizophrenia, epilepsy, and manic-depressive psychosis. Conversely, external ones consist of craniocerebral injuries, brain swellings, etc.¹³

A temporary mental health disorder is a condition from which a person recovers despite being mentally ill. This group is comprised of the states of alcoholic psychosis, *delirium tremens*, acute and transient mental disorders¹⁴. It is worth mentioning that oligophrenia is a condition that is understood as a state of decreased mental capacity caused by the development of a mental health disorder which is permanent in nature and is a congenital or acquired condition, e.g., in the first year of life as a result of neurological diseases. There are three degrees of mental disability: idleness, imbecility, and idiocy. It has been pointed out that, as a rule, idiocy in most cases excludes sanity, whereas imbecility and idleness exclude sanity only in a particular situation¹⁵.

The final kind of mental health condition considered within the medical criterion is referred to as other mental health disorders, among which the Kazakh legislator includes disease states and processes that are also characterized as a mental health disorder. Among these are acute hallucinatory states, the results of brain injuries, paroxysmal states, and some forms of psychopathy¹⁶.

2.2. The notion of diminished responsibility

The next institution regulated in the CC RK is the criminal liability of the individual suffering from a mental health disorder that does not exclude his or her sanity, i.e., a perpetrator was in a state of limited sanity causing diminished responsibility. Similar to Russian law, this provision was introduced into the criminal law of Kazakhstan only at the end of the

¹³ А. Тембербеков, in: А. Нагыбаев, Г. Баймурзин, И. Рогов, *Уголовное...*, p. 77.

¹⁴ А. Коробеев, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 100.

¹⁵ И. Борчашвили, *Комментарий...*, commentary to Article 16, < https://zakon.uchet.kz/rus/docs/T970000167_#z20 >.

¹⁶ Н. Котова, *Уголовное...*, p. 57.

20th century in the CC RK. As per Uzbekistan, the notion of limited sanity was introduced only in 2019 by the law of September 12, 2019¹⁷.

The institution of limited sanity is regulated in Article 17 CC RK. This article stipulates criminal liability of the perpetrator who, while committing the crime, could not be fully aware of the actual nature of the act or omission and the social harmfulness of the act, or could not direct his behaviour due to the mental health disorder. In the Kazakh doctrine, it is recognized that limited sanity is a type of sanity¹⁸. This is explained by the fact that the perpetrator's condition indicates that his or her volitional and intellectual capacities are only partially limited, thus the perpetrator is aware of the real nature and social harmfulness of the act he or she has committed; what is more, he or she can control their conduct. The intellectual criterion of limited sanity means a reduced possibility of realizing the nature of the actual act, as well as incomplete social awareness of the harmfulness of the act. The criterion of voluntariness is the limited ability to control of one's behaviour. The medical criterion concerns mental health disorders that affect the behaviour of the person but at the same time do not eliminate the possibility of controlling their behaviour, as well as being aware of the nature of the act and its social harm¹⁹.

Separate types of acts included in the special part of the CC RK indicate the state of limited sanity as an aggravating or mitigating prerequisite, e.g., homicide in affective state. The consequence of the state of limited sanity is taken into account by the court in the course of sentencing, and the penalty can be mitigated or the court can also send an individual for treatment within the framework of a compulsory measure²⁰.

2.3. Notion of self-intoxication and stupefaction

Article 18 CC RK stipulates that a person who has committed a crime under the influence of alcohol, drugs, psychotropic drugs, or other intoxicants is not exempt from criminal liability. This circumstance should

¹⁷ Закон Республики Узбекистан от 12 сентября 2019 года № ЗРУ-567 – Национальная база данных законодательства, 13.09.2019 г., № 03/19/567/3737.

¹⁸ И. Борчашвили, *Комментарий...*, commentary to art. 16, < https://zakon.uchet.kz/rus/docs/T970000167_#z20 >.

¹⁹ И. Борчашвили, *Комментарий...*, commentary to Article 16, < https://zakon.uchet.kz/rus/docs/T970000167_#z20 >.

²⁰ Н. Котова, *Уголовное...*, p. 57.

be considered by the court as an aggravating circumstance. It is emphasized that the court may recognize the commission of an offence under the influence of substances indicated in Article 18 CC RK as an aggravating circumstance or not, depending on the nature of the committed crime. The Kazakhstani legislation indicates that the perpetrator's state resulting from physiological intoxication with alcohol or other substances, even though the ability to be aware of the nature of the crime or to manage one's conduct is reduced, does not lead to insanity²¹.

Pursuant to Article 54 Section 1, point „m” CC RK, committing a crime under the influence of alcohol, drugs, or other toxic substances may be considered by the court as an aggravating circumstance. Pathological forms of intoxication, whether alcoholic, narcotic, or toxic (non-drugs), are included in the concept of other mental health disorders causing insanity²². The aforementioned condition may be of a paranoid or epileptic nature. In the epileptic form, the person has a disturbed perception of reality, dark thoughts, emotional elation, which together can lead to committing a prohibited act. Conversely, with the paranoid form, the person experiences hallucinations or anxiety. The person also has a disturbed perception of reality caused by a sense of fear, anxiety and willingness to defend against danger. This category of an offender can be subjected to compulsory medical measures²³.

3. Compulsory measures of medical nature in the CC RK

3.1. Introduction

The CC RK does not define a medical compulsory measure, specifying only their goals and the individuals who can be treated under the particular compulsory medical measures²⁴. Nonetheless, the doctrine

²¹ И. Борчашвили, *Комментарий...*, commentary to Article 18, < https://zakon.uchet.kz/rus/docs/T970000167_#z20 >.

²² И. Борчашвили, *Комментарий...*, commentary to Article 18, < https://zakon.uchet.kz/rus/docs/T970000167_#z20 >.

²³ И. Борчашвили, *Комментарий...*, commentary to Article 18, < https://zakon.uchet.kz/rus/docs/T970000167_#z20 >.

²⁴ This is a typical standpoint present in the legislation of the Russian Federation, Ukraine or the Republic of Uzbekistan.

attempts to propose such definitions. One of the most widely accepted states that these are coercive measures combining the limitation of legal status and medical influence, imposed by a court order or judgment against individuals who have committed a criminal offence under the influence of a mental health disorder that excludes or significantly limits the possibility of achieving the goals of punishment. Medical compulsory measures are referred to as „other means of punitive response”²⁵.

From a historical perspective, the customary law of the Kazakhs binding prior to the October Revolution regulated the increased responsibility of the relatives who were obliged to take care of a mentally ill family member. Consequently, people with mental disorders who had committed a crime were not criminally responsible, hence the principles of Sharia law applied to them. The first Code that included the institution of compulsory precautionary measures was the Criminal Code of the Kazakh Soviet Socialist Republic of 1959²⁶.

Currently, the institution of compulsory measures in Kazakh law is divided into two spheres:

- a) the sphere of influence on perpetrators of crimes,
- b) the sphere of providing medical assistance to these people.

In addition to the CC RK, these measures are regulated in the Code of the Republic of Kazakhstan on Health Care and the Health Care System of September 18, 2009, No. 193-IV²⁷.

Code of the Republic of Kazakhstan on Health Care and the Health Care System regulates the providing medical assistance as part of the provision of compulsory medical measures understood as a set of medical activities aimed at curing, stabilizing, or reducing the symptoms of the mental disease. Treatment under the CH may be voluntary or compulsory. The second category relates to compulsory medical measures which are regulated in Article 121 CH. In § 1 this article provides for the possibility of enacting compulsory medical measures on the basis of a court decision in relation to persons who have committed an offence described in the CC RK while suffering from mental health disorders.

²⁵ Н. Котова, *Уголовное...*, р. 207–208.

²⁶ А. Исмуганова, *Регламентация...*, р. 10.

²⁷ Кодекс Республики Казахстан от 18 сентября 2009 года № 193-IV „О здоровье народа и системе здравоохранения”, hereinafter: CH.

Article 121 § 2 CH duplicates specific therapeutic compulsory measures enumerated in the CC RK.

The CH regulates medical treatment as part of the compulsory medical measures regulated in CC RK, understood as a set of medical activities aimed at curing, stabilising, or reducing the symptoms of the mental ailment. Treatment in accordance with the CH may be voluntary or compulsory. The second category relates to medical compulsory measures, which are repeated after the CC RK in Article 121 § 2 CH. § 1 of the mentioned article provides the possibility of enacting medical compulsory measures based on a court ruling in relation to persons suffering from mental health disorders and a mental illness who have committed a crime described in the special part of the CC RK.

Article 92 CC RK regulates that the objective of the treatment within the framework of the compulsory medical measures is to cure a perpetrator and prevent him from committing further crimes. It follows that a perpetrator himself and his or her treatment are the primary value for the purposes of compulsory measures. The goals of medical compulsory measures are achieved by preventing the commission of another crime through isolation of a perpetrator from society and, in the end, improving the mental condition of an individual²⁸.

According to Article 91 Section 1 CC RK, medical compulsory measures are applied to:

- a) persons who committed an offence while being in a state of insanity,
- b) individuals who, after committing a crime, experienced a mental health disorder that prevents the execution or imposition of a penalty,
- c) people who committed a crime under the influence of a mental health disorder that does not constitute insanity,
- d) persons who committed a crime and are addicted to alcohol, drugs or other intoxicants and require addiction treatment.

As already mentioned, the first category of the individuals listed in Article 91 Section 1 CC RK are individuals who committed a crime in a state of insanity. Court practice proves that the vast majority of people who are treated within the framework of compulsory measures are suffering from a mental disorder that is a ground for insanity (following

²⁸ А. Коробеев, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 102.

point 5 of the normative ruling of the Supreme Court of the Republic of Kazakhstan of July 9, 1999, No. 8 on the judicial practice of using preventive therapeutic agents²⁹).

The Supreme Court also noted that committing one crime in a state of insanity does not exclude the possibility of committing another one in a state of sanity. The Court further pointed out that the commission of a crime by a perpetrator who was previously found to be in a state of insanity and thus released from criminal liability does not mean that there is no need to obtain another opinion of an expert psychiatrist to determine whether the perpetrator was sane at the time of committing subsequent crimes³⁰.

The ensuing category of individuals who can be treated under the compulsory medical measures per Article 91 Section 1 point 2 CC RK are the perpetrators against whom a medical protective measure is imposed in addition to penalty. These are individuals suffering from a mental health disorder that transpired before the court sentence was issued or during the proceedings. Most often, these people cannot participate in court proceedings, therefore, they are not aware of the importance and the character of the penalty that may be imposed on them. In this case, no penalty is imposed on such persons, and in the case of a perpetrator serving a sentence, he or she is exempt from serving the rest of it. After curing or stabilizing their mental health state, these persons are subject to criminal liability or serve the remainder of the sentence unless the limitation periods have already expired³¹.

As specified in Article 91 Section 1 point 3 CC RK, compulsory medical measures are applied to perpetrators who suffer from a mental health disorder that does not exclude their sanity. Such disorders include psychopathy, paranoia, epilepsy, states of hysteria, mild forms of disability, neurosis, the effects of craniocerebral injuries, myocardial infarctions, meningitis, encephalitis, chronic alcoholism, etc. The use of compulsory medical measures here is explained by the fact that:

²⁹ Нормативное постановление Верховного суда Республики Казахстан от 9 июля 1999 года № 8 О судебной практике по применению принудительных мер медицинского характера.

³⁰ Нормативное постановление Верховного суда Республики Казахстан от 9 июля 1999 года № 8 О судебной практике по применению принудительных мер медицинского характера.

³¹ Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 440.

- a) an individual had difficulties in controlling his or her behaviour, despite the lack of the state of insanity,
- b) it helps to present to the public the real significance of the committed act,
- c) it is difficult to achieve the goal of punishment in case of such perpetrators³².

These are cases of the previously mentioned limited sanity. In line with Article 17 CC RK, a mental disorder that does not exclude sanity may be considered by the court as a circumstance mitigating the punishment, but also may be the basis for the imposition of a compulsory medical measure. From the very notion of limited sanity as a category of sanity, the perpetrator is considered sane in this case. When examining the case files and the results of an expert psychiatrist's opinion, the court should decide whether to administer a compulsory measure and, if so, which of them exactly³³.

The only remaining category of individuals that can be referred for treatment under compulsory medical measure listed in Article 91 Section 1 point 4 CC RK are perpetrators addicted to alcohol, drugs, or toxic substances. In the Act of April 7, 1995, No. 2184 on Compulsory Treatment of Individuals Addicted to Alcohol, Drugs or Toxic Substances (Instruction), it is indicated that these diseases adversely affect the health of citizens, the development of society, and contribute to an increase in crime, which is the reason for the need to react to these phenomena. There seems to be a separate opinion regarding this category of offenders, indicating the need for treatment. The basic legal act regulating the issuing of opinions by both expert psychiatrists and expert narcologists is Article 61 „Forensic-medical, forensic-psychiatric and judicial-narcological opinion” CH. On the other hand, the procedural aspects of commissioning and issuing opinions by experts are based on the criminal and civil procedural laws, and the code regulating administrative offences.

As in Russia and Uzbekistan, the issuance of a narcological opinion based on Article 91 Section 1 point 4 CC RK is carried out in line with the Instruction, in the case of Kazakhstan approved by the Minister

³² Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 441.

³³ Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 441.

of Health of the Republic of Kazakhstan on February 24, 2016³⁴. Point 2 of the Instruction stipulates that such an opinion is ordered by the court conducting the criminal proceedings. It is carried out in accordance with point 3 on an outpatient basis. Under point 7, the expert narcologist sends the opinion to the court within three days of its preparation.

It should be underlined that such perpetrators are treated based on a compulsory measure in the form of outpatient supervision and treatment by a psychiatrist operating within the facility where the sentence of imprisonment is executed. Pursuant to Article 88 Section 1 point 1 CC RK, protective measures are imposed on such persons only as a consequence of a mental health disorder resulting in danger to themselves or their surroundings, or that may be the cause of significant material damage. If the court orders a perpetrator to undergo treatment under the compulsory medical measure, then, based on Article 117 of the Executive Criminal Code of the Republic of Kazakhstan of July 5, 2014³⁵, compulsory treatment is carried out as part of a period of imprisonment, and it takes place in the medical department of a given institution.

In practice, certain difficulties related to the use of compulsory medical measures in relation to perpetrators addicted to alcohol, drugs, and other substances are signalled. One of the main difficulties is the lack of addiction treatment for prisoners who have been conditionally released. That being so, a compulsory medical measure can only be enacted for the period of the duration of the sentence, and thus there are well-founded concerns about whether the goal of compulsory treatment will be achieved. A proposal to solve this problem is to include in the case files of the particular individual the opinion of an expert on the need to extend the treatment of the person at his or her place of residence for a period corresponding to the period of full penalty in the absence of release from serving the rest of the sentence³⁶.

³⁴ Инструкция по проведению судебно-наркологической экспертизы органами судебной экспертизы Министерства юстиции Республики Казахстан Утверждена приказом Министра юстиции Республики Казахстан от 24 февраля 2016 года № 94.

³⁵ Уголовно-исполнительный кодекс Республики Казахстан от 5 июля 2014 года № 234-V, hereinafter: EC RK.

³⁶ Инструкция по проведению судебно-наркологической экспертизы органами судебной экспертизы Министерства юстиции Республики Казахстан Утверждена приказом Министра юстиции Республики Казахстан от 24 февраля 2016 года № 94.

The Kazakh doctrine stipulates the need for three conditions for the imposition of protective measures:

- a) a person committing a crime regulated in a special part of CC RK,
- b) the perpetrator of the prohibited act suffers from a mental health disorder,
- c) the mental state indicates the need for treatment,
- d) there is a risk of causing significant damage or danger to himself or other people by the perpetrator³⁷.

It can be noticed that the mentioned conditions permit a certain amount of flexibility, hence they will allow the court to assess the need to impose the compulsory medical measures. In a case where the state of the person is not dangerous and cannot cause significant property damage, the court may, based on Article 91 Section 4 CC RK, transmit the case files to the relevant health authorities for them to decide on the need of treatment in accordance with the legislation on the protection of the health of citizens of the Republic of Kazakhstan.

This stance was confirmed in point 3 of the normative ruling of the Supreme Court of the Republic of Kazakhstan of July 9, 1999, No. 8 on the practice of applying therapeutic preventive measures. The Supreme Court emphasized that the mere fact of a mental health disorder resulting in a person not being aware of the real nature and social danger of the act or unable to direct his or her conduct is not always the basis for undergoing treatment under compulsory medical measure.

Therefore, in each case, the court should examine whether a crime was committed or whether the perpetrator was insane during the commission of the crime. The court should also determine each time whether the facts of the commission of the offence indicate that the perpetrator is a danger to himself and other persons or that there is a possibility of causing significant damage. The Supreme Court indicated that a person is considered a danger to himself and the environment if the degree of mental health disorder indicates the possibility of committing a violent crime against other people, or the perpetrator himself, or the possibility of committing crimes against property such as theft, destruction of property, arson. The Supreme Court added that the courts should take into account the overall of health of the perpetrator to answer the question whether the individual may commit the said crimes.

³⁷ Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, passim.

3.2. Types of compulsory medical measures

Article 91 CC encompasses four types of compulsory medical measures:

- a) compulsory outpatient supervision and treatment by a psychiatrist,
- b) general type of compulsory inpatient treatment,
- c) compulsory inpatient treatment of a specialized type,
- d) compulsory inpatient treatment of a specialized type with intensive supervision.

Courts send the individual to treatment under the compulsory medical measure based on his or her mental health, the degree of danger to himself and others, as well as the degree of probability of committing another crime. In turn, when choosing a specific measure, the court should consider the potential danger represented by the individual and the specific conditions of treatment, the type of facility where the treatment will take place (general or specialized, etc.).

The Supreme Court of the Republic of Kazakhstan in point 23 of the above-mentioned normative ruling recommended that the courts, when choosing a compulsory medical measure, should take as a starting point the objectives of imposing compulsory medical measures laid down in Article 92 CC RK, and examine the degree and nature of the mental health disorder, the degree of danger to the surroundings and oneself, or the possibility of causing significant harm. Another factor that the court should take into account is the need for treatment. The Supreme Court of the Republic of Kazakhstan emphasized that greater weight should be given to the question of the danger of a person to himself and other people, and the possibility of causing significant damage. In this connection, a kind of dissonance arises because the objectives of the application of the protective measures mention the need for treatment as the primary target of the application of the protective measures while the practice specifies that the protective measures are to take into account the danger of the perpetrator first.

The first measure under Article 94 CC RK is compulsory outpatient supervision and treatment by a psychiatrist. This measure is aimed at perpetrators who, due to their state of health, do not require placement in an inpatient psychiatric facility³⁸. It is assumed that the mental health of the person and the nature of the committed crime indicate a low risk if the

³⁸ Н. Котова, *Уголовное...*, p. 209.

perpetrator understands the meaning and content of the measure used. In practice, such measures are most often used in relation to people who:

- a) suffer from a mental health disorder that does not exclude sanity but indicates the need for treatment from alcoholism, drug addiction, and toxic addiction, or provides the basis for psychiatric treatment while serving a sentence,
- b) who underwent compulsory inpatient treatment with a positive result but still require outpatient supervision and treatment by a psychiatrist³⁹. This standpoint is also present in Uzbek and Russian law.

Such an individual is obliged to systematically report to a medical institution and undergo treatment. It is indicated that this measure is less invasive for the perpetrator and leaves the perpetrator in his environment, which is conducive to treatment. However, he or she is obliged to adhere to the treatment plan and, in the absence of progress, may be transferred to a compulsory inpatient treatment facility⁴⁰.

Another type of treatment is compulsory inpatient general psychiatric treatment, regulated under Article 95 Section 2 CC RK. Such treatment is performed in psychiatric hospitals, clinics, institutes, or scientific units that provide qualified psychiatric help not only to people for whom a preventive therapeutic measure has been administered but also to individuals treated on general terms. Concomitantly, the perpetrator's mental health does not require treatment combined with intensive supervision⁴¹. In practice, this measure is aimed at people with mild forms of mental health disorder who can be treated with the usual pharmacological agents but may have a moderate likelihood of committing an offence⁴².

The penultimate type of compulsory inpatient psychiatric treatment is the treatment of a specialized type, as regulated under Article 95 Section 3 CC RK. This can be applied to individuals with a mental health disorder who have committed a crime and are not dangerous to the health or life of other people, who require psychiatric treatment in stationary conditions, as well as to persons who have changed their

³⁹ Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 443–444.

⁴⁰ И. Борчашвили, *Комментарий...*, commentary to Article 90, < https://zakon.uchet.kz/rus/docs/T970000167_#z20 >.

⁴¹ Н. Котова, *Уголовное...*, p. 209.

⁴² Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 444.

treatment from general inpatient treatment to general psychiatric treatment. This measure is performed in a facility that is adapted to the specific disorder, leading to more effective treatment⁴³.

The last measure is compulsory inpatient treatment of a specialized type with intensive supervision. This is regulated under Article 95 Section 4 CC RK. It is performed in hospitals intended for people with a mental health disorder who have committed a crime and their health condition and the nature of the crime are particularly dangerous to society and require treatment with intensive supervision⁴⁴. Individuals suffering from severe mental health disorders who have a high probability of committing a crime are referred to there. The basis for the application of such a measure is, in practice, a commission of a particularly serious crime or repeated violation of the principles of treatment, which excludes the possibility of the general inpatient and specialized treatment type. This measure is performed under strict supervision with the use of force combined with the isolation of the person⁴⁵.

As standard not only in Kazakhstan but also in Uzbekistan and Russia, such compulsory medical measures are applied gradually, from the most isolating to specialized, then general and finally outpatient⁴⁶.

3.3. Prolongation, modification, and discontinuation of compulsory medical measures

The nature of the protective measures justifies the lack of time limits for their application. They are based on the goals of a compulsory medical measure to cure or improve a patient's health⁴⁷. The competent authority which decides to extend, change, or discontinue the application of a compulsory medical measure is the court, based on the opinion of a commission of expert psychiatrists. The administration of the institution where the treatment takes place conveys the opinion to the court⁴⁸.

The patient is subject to periodic examination at least once every six months by a psychiatrists' committee. The first examination is carried

⁴³ Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 444.

⁴⁴ Н. Котова, *Уголовное...*, p. 210.

⁴⁵ Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 445.

⁴⁶ Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 445.

⁴⁷ Н. Котова, *Уголовное...*, p. 210.

⁴⁸ Н. Котова, *Уголовное...*, p. 210.

out at the mental health institution within six months of arrival. If during the application of the measure the mental health of the individual has significantly improved, which gives rise to the change of the measure or its discontinuation, then the test should be carried out immediately. On the basis of the results of the examination of the commission of doctors-psychiatrists, the court may change the protective measure in the direction of increasing or reducing the intensity of supervision and isolation. When altering the measure, the mental health of the individual and the degree of danger to oneself or the surroundings are taken into account, while the perpetrator's behaviour itself may be taken into account only as a symptom of mental health disorder⁴⁹.

If an individual has undergone treatment, or their mental health has changed to such an extent that they are no longer dangerous to themselves and their surroundings, the administration of the psychiatric treatment institution sends a request to the court to discontinue the use of the protective measure. The cure is understood as a permanent improvement in mental health, as a result of which the person becomes aware of the nature of his or her actions, as well as being able to direct them⁵⁰.

In a situation where the mental health disorder occurred after the offence was committed, the period of treatment is included in the period of the imprisonment per day in a stationary treatment facility up to one day of imprisonment in accordance with Article 94 CC. This provision regulates the following conditions for the imposition of penalty after the application of a preventive therapeutic measure:

- a) the mental health disorder occurred after the crime was committed or while serving the sentence,
- b) the limitation periods have not passed,
- c) there are no other grounds for exempting a perpetrator from criminal liability.

It is worth noting that there are opinions in the legal doctrine that the time spent in stationary compulsory treatment should be counted towards non-custodial penalties⁵¹.

⁴⁹ Н. Щедрин, in: И. Рогов, К. Балатаев, *Уголовное...*, p. 446.

⁵⁰ Н. Котова, *Уголовное...*, p. 211.

⁵¹ И. Борчашвили, *Комментарий...*, commentary to Article 94, < https://zakon.uchet.kz/rus/docs/T970000167_#z20 >.

The issues related to the use of compulsory medical measures together with imprisonment are regulated in Article 95 CC RK. Article 95 Section 1 CC RK states that when imposing penalty of imprisonment, the compulsory medical measures will be applied in an institution serving penalty of imprisonment. If a person is sentenced to imprisonment, treatment as part of compulsory medical measures is carried out on the basis of CH. In the event of a deterioration of mental health which requires stationary treatment, the protective measure is changed in relation to this person based on CH. With the end of the term of imprisonment, the use of a compulsory medical measure is also discontinued as a result of a court decision⁵².

4. The procedural aspects of compulsory medical measures

The procedural aspects of compulsory medical measures are regulated in Chapter 54 of the Criminal Procedure Code of the Republic of Kazakhstan of July 4, 2014⁵³, „The process of applying protective measures to insane perpetrators”. Article 511 CCP RK establishes two grounds for the application of compulsory medical measures:

- a) committing the offence included in the special part of the CC RK in a state of insanity,
- b) occurrence of a mental health disorder after the offence was committed that prevents the imposition or execution of penalty.

The Supreme Court of the Republic of Kazakhstan, when scrutinizing the application of Article 511 CCP RK, adopted the position that the mere fact of committing a crime in a state of insanity is not the only basis for the imposition of compulsory medical measures. In this connection, the Supreme Court emphasized that the courts should examine whether it was proven that the perpetrator had committed the crime provided in the special part of the CC RK and whether the perpetrator was in a state that constitutes insanity at the time of the crime. Moreover, the Supreme Court indicated the need to determine whether, according to the facts, the perpetrator is a danger to himself and other people, or can cause

⁵² И. Борчашвили, *Комментарий...*, commentary to Article 95, < https://zakon.uchet.kz/rus/docs/T970000167_#z20 >.

⁵³ Уголовно-процессуальный кодекс Республики Казахстан от 4 июля 2014 года № 231-V, hereinafter: CCP RK.

significant material damage, as well as the need to investigate whether the perpetrator's health may lead to committing of new crimes⁵⁴.

Pursuant to Article 511 CCP RK, in relation to persons who have committed a crime while being insane or suffering from a mental health disorder after committing the crime, compulsory medical measures may be applied in the form of transferring the patient to the supervision of relatives, guardians, probation officers, or placement in a special medical treatment facility which provides psychiatric help. In accordance with point 8 of the decision of the Supreme Court of July 7, 1999, No. 8, the Supreme Court of the Republic of Kazakhstan indicated that the compulsory medical measures provided for in Article 137 CCP RK should be applied. The basis for the application of compulsory medical measures is information obtained during the course of the proceedings, indicating the danger of the suspect to himself, to other persons, or the possibility of causing other significant damage. If a compulsory medical measure is applied to the individual then at the end of the investigation or the initiation of court proceedings, the prosecutor or the court should issue an appropriate decision to transfer the accused to the place where the appropriate compulsory medical measure is to be performed. The Supreme Court of the Republic of Kazakhstan explained in point 9 that the medical organizations mentioned in Article 511 Section 2 CCP RK are, inter alia, psychiatric facilities with inpatient treatment of a general type, specialized type, or specialized type with intensive supervision⁵⁵.

A compulsory medical measure in the form of placement in a medical treatment facility is imposed by the court in the course of criminal proceedings in the form of an order that requires justification⁵⁶. In the case of the second compulsory medical measure, i.e., transfer under the supervision of relatives, guardians, or probation officers in accordance with Article 512 CCP RK, this takes place if the perpetrator is not

⁵⁴ Нормативное постановление Верховного суда Республики Казахстан от 9 июля 1999 года № 8 О судебной практике по применению принудительных мер медицинского характера, point 3.

⁵⁵ Нормативное постановление Верховного суда Республики Казахстан от 9 июля 1999 года № 8 О судебной практике по применению принудительных мер медицинского характера, points 8, 10.

⁵⁶ Нормативное постановление Верховного суда Республики Казахстан от 9 июля 1999 года № 8 О судебной практике по применению принудительных мер медицинского характера, point 9.

a danger to himself or other persons, and the nature of the mental health disorder and the perpetrator's mental health state indicates that he will not commit a crime. The perpetrator is transferred to the care of relatives, a guardian, or a probation officer based on their application submitted to the court. Individuals listed in Article 512 CCP RK are informed of the decision about the crime committed by the accused and about the responsibility related to the care of the perpetrator⁵⁷.

Under Article 523 CCP RK, "Discontinuation, modification and extension of the use of protective measures", the use of comparative medical measures may be changed, extended, or discontinued following Article 93 CC RK. As a rule, it is a repetition of the regulations from the CC RK. It stipulates that in matters regulated in Article 523 CCP RK it is the court that decides on the application of a specific protective measure in the form of an order⁵⁸.

5. Compulsory medical measures in the Executive Penal Code of the Republic of Kazakhstan

The application of compulsory medical measures at the stage of execution of penalties is regulated in Article 26 EC RK „Application of compulsory medical measures in relation to prisoners”. It states in Section 1 that in relation to perpetrators sentenced to deprivation of liberty who are addicted to alcohol, drugs, or other substances, as well as suffering from mental health disorders that do not exclude their sanity, the therapeutic measures listed in the CC RK are applied.

However, according to Section 2 in relation to prisoners serving their sentence in imprisonment institutions and requiring treatment for alcohol, drug, or other addictions, these establishments, following a court decision, apply compulsory medical measures. Pursuant to Article 26 Section 3 EC KR, there is also the possibility of imposing a compulsory medical measure in relation to an imprisoned individual for whom it has been established that he or she suffers from a mental health disorder. In such a case, the administration of the prison institution shall apply

⁵⁷ М. Когамов, *Комментарий...*, р. 707–708.

⁵⁸ Нормативное постановление Верховного Суда Республики Казахстан от 23 декабря 2005 года № 11 О применении норм уголовно-процессуального закона о протоколе судебного заседания.

to the court for the imposition of compulsory medical measures. In accordance with Article 26 Section 5 EC RK, the administration of the penitentiary institution sends to the court a request for an expert psychiatrists' opinion, not later than within 6 months of the end of imprisonment of a person deprived of liberty who has committed a sexual offence against a minor. The purpose of this opinion is to find out whether there are sexual dysfunctions and a tendency toward sexual violence. Based on the expert opinion, the administration of the facility shall submit an application for the imposition, extension, or discontinuation of protective measures in relation to such a prisoner. After receiving the court's decision, the prison administration within three days sends an individual to the health care institution, according to the prisoner's place of residence, for the purpose of implementing compulsory medical measures. This is, similar to Russia, a solution that allows the use of preventive medical measures even after the imposition of penalty and is the only substitute for a post-penal protective measure. Obviously, a significant systemic difference is a place where this measure is regulated, namely the EC RK, whereas in the influential Russian law it is the CC. As per Uzbek criminal law, such solutions are not regulated in criminal law acts.

6. Conclusion

The most distinctive solution adopted in Kazakhstan is the existence of the CH, which creates a coherent treatment system. Obviously, it does not exempt the system of compulsory measures from the need to adopt binding instructions, which may often fill legislative gaps and thus replace a statute. This is a negative solution from the point of view of constitutional guarantees, in particular from the point of view of ensuring patient rights and obligations.

The CH is the first stage in regulating a coherent health care system and, from the point of view of compulsory medical measures, it embraces provisions regulating the implementation of the aforementioned measures, as well as the preparation of a psychiatric opinion. CH regulates practically all spheres of health protection, including issues relating to health protection and periodic examinations of astronauts. The author is hesitant to state whether the CH, as the only systemic solution in the field of health protection, is correct, but at the same time the regulation

of all issues related to the administrative and legal aspect of compulsory medical measures, such as the preparation of opinions and the implementation of measures, applies systemic consistency because these provisions pertain to a situation where a person is temporarily arrested or requires treatment during the proceedings or the execution of the sentence. CH also serves to standardize the rights of patients who are subject to treatment. Moreover, in practice, it is a kind of general part of health care legislation and is detailed on the level of instructions addressed to the administration of the institutions where the treatment takes place.

From the point of view of Polish regulations, this solution is particularly interesting, because it indicates one of the possible directions for solving the difficulties related to the performance of broadly understood psychiatric treatment in relation to people at various stages of criminal proceedings, and for whom such treatment is required.

A separate issue is the place and form of regulation of the compulsory measure toward the sexual offenders. The choice made by the EC RK of the form of „smuggling” of a post-penal protective measure in the form of treatment for individuals who have committed sexual offences against minors is puzzling.

A stimulating solution from the point of view of the Polish legal realm is the possibility of imposing compulsory medical measures against persons who have not committed an offence in a state of insanity, yet such a state has occurred at the time of the court proceedings or while serving a sentence. According to the author of this study, this type of solution seems to be a valid answer to practical predicaments from the point of view of the organization of the treatment process of such perpetrators at various levels of proceedings, whether before the imposition of punishment or at the level of execution of imprisonment penalty. Such regulation permits the unification of the treatment process within the framework of uniform regulations. The current wording of Article 93g of the Polish Criminal Code⁵⁹ does not permit such a solution, because the condition for treatment under a compulsory medical measure is a commission of a crime in connection with mental disorders, as they are widely understood.

⁵⁹ Ustawa z dn. 6 czerwca 1997 r. – Kodeks karny, Dz.U. 1997, nr 88, poz. 553.

The justification for the application of compulsory medical measures also in relation to perpetrators whose state of insanity occurred after the crime was committed, is the assumption that the basis for introducing this type of possibility in Kazakh criminal law is the inability to execute penalty in relation to such individual or the impossibility to convict such a person due to the fact of unaware participation in the procedure. This means that the first conclusion that should be drawn from here is the fact that the Kazakh legislator assumes that penalty has an additional purpose apart from isolation. The lack of such a solution in the Polish system is eliminated at the level of criminal proceedings by the possibility of treating such a suspect or detainee until the obstacle, in the form of poor health or the state of mental health, ceases.

Summary

This study concerns the institution of compulsory medical measures in the criminal law of the Republic of Kazakhstan. Concurrently, the analysis will be juxtaposed to the regulations in force in the Russian Federation, as the leading system among the countries of the former Union of Soviet Socialist Republics, and the solutions in force in the criminal law of the Republic of Uzbekistan, as an exemplar of a traditional approach to the adopted solutions regarding compulsory medical measures.

The provisions adopted in the criminal law of Kazakhstan provide many interesting viewpoints. These include the codification of health protection legislation, and , from the position of the Polish system, regulations concerning the possibility of treatment as part of security measures for perpetrators whose mental health deteriorated during the proceedings before the court, and the perpetrator was sane at the time of the act.

Keywords

Kazakhstan's criminal law, compulsory medical measures, insanity, comparative law

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