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V. Yehorov,

PhD in Medicine, Psychiatrist at the Poltava Regional Clinical
Psychiatric Hospital named after A. F. Maltsev,
Poltava, Ukraine

ORCID: <https://orcid.org/0000-0002-0661-9985>
E-mail: tet-egorova@meta.ua

T. Yehorova,

Department Head of Poltava branch of KhRIFE, Poltava, Ukraine
ORCID: <https://orcid.org/0000-0002-3588-2475>
E-mail: tet-egorova@meta.ua

ISSUES OF CURRENT STATE OF FORENSIC PSYCHIATRY AND FORENSIC PSYCHOLOGY

The problem of determining the limits of competence of a forensic psychiatrist expert and a psychologist expert, the principles of interaction of law, forensic psychiatry and psychology in modern domestic expert practice remain relevant to the present day. The current legislation of Ukraine regulates expert compliance with the limits of competence. In jurisprudence and psychiatry, the issue of the definition of the concept of «insanity» is currently debatable, since the so-called «formula of insanity» contains medical (biological) and psychological (legal) criteria.

The purpose of this paper: presenting of the author's systemic model of ascertaining insanity, which delimits the competences of lawyers and an expert psychiatrist; A written description of the psychiatric criteria (diagnostic, criticality and anamnestic) of determining the mental state of a person in a legally relevant period of time is given; The definition of the concept of «insanity» is formulated.

No less urgent is the problem of further improvement and bringing into compliance of certain paragraphs the Procedure for conducting a forensic psychiatric examination of the current legislation of Ukraine and departmental regulatory acts governing the organization of forensic expert activity in state specialized expert institutions. Separate provisions of the Procedure for conducting a forensic psychiatric examination, which can create significant difficulties in the work of a forensic psychiatrist, are analyzed, and appropriate proposals are made to change the content of problematic provisions in the specified regulatory document.

Keywords: insanity; «Formula of insanity»; mental condition; severe mental illness; psychiatric criteria; legal criteria; criminal law circumstance; expert competence; forensic psychiatric examination; forensic psychological examination.

Formulation of Research Problem. The problem of defining the boundaries of competence of forensic psychiatrist and expert psychologist,

the principles of interaction between law, forensic psychiatry and psychology in modern domestic expert practice are still relevant.

In the criminal and criminal procedure legislation of Ukraine the activity of a court expert is normalized. Effective safeguards that ensure the expert's compliance with the limits of competence are the norms of Part 1 of Article 69, Parts 4, 6 of Article 101, Part 1 of Article 242 of the Criminal Procedural Code of Ukraine stipulating that expert in criminal proceedings conducts research and gives a conclusion on issues, concerning the sphere of his knowledge; the questions posed to the expert and his conclusion cannot go beyond the expert's specific expertise; expert in the opinion on the mental state of the suspect, accused has no right to state whether the suspect, the accused had such a mental condition, which is an element of a criminal offense or an element that excludes liability for a criminal offense; the expert is forbidden during the examination to decide the issue of law¹.

From an epistemological point of view, the procedural provisions on an expert's obligation to conduct research and to provide an opinion on matters within his field of knowledge mean that he, as a specialist in the relevant field of knowledge, should only use his specialty criteria to establish the truth. The criterion of truth (Greek: *κριτήριον* – the measure, the way of judgment) in epistemology means the way by which truth of knowledge is established and truth is distinguished from error. Each science has its own ways (criteria) of establishing the truth, and the use of criteria of other sciences («alien ways») means going beyond specialized expertise. Despite the rules of the current legislation, the document on the appointment of forensic psychiatric and forensic psychological expertise raises questions of a legal nature.

The following legal questions are often raised to address a forensic forensic psychiatry: whether a suspect (accused) should be considered convicted / not convicted; whether a person is subject to Articles 19 and 20 of the Criminal Code of Ukraine.

When appointing a forensic psychological examination, questions of a legal nature are also formulated, for example: about the presence of a strong emotional disturbance in the suspect (accused), about causing moral harm to the victim, etc.

Analysis of recent research and publications. According to Ella Simakova-Yefremian² the statement by legal investigative bodies of legal

¹ Kryminalnyi protsesualnyi kodeks Ukrainy [Criminal Procedure Code of Ukraine]: Zakon Ukrainy vid 13.04.2012 № 4651-Vi. Vidomosti Verkhovnoi Rady Ukrainy, 2013. № 9–10, № 11–12, №13. St. 88. URL : <https://zakon.rada.gov.ua/laws/show/4651-17> (data zvernennia 30.06.2019) [in Ukrainian].

² Simakova-Yefremian E. B. Kompleksni sudovo-ekspertni doslidzhennia: teoriia ta praktyka [Complex forensic research: theory and practice]: dys. ... d-ra yurydych. nauk: 12.00.09. Kharkiv, 2017. S. 46–47 [in Ukrainian].

issues is explained by a complex and voluminous regulatory regulatory framework in which the regulations do not correspond with each other, contain opposite interpretations.

Why the legislator in Part 6 of Art. 101 does the Criminal Procedural Code of Ukraine of Ukraine specifically point to the expert's restriction on the mental state of the suspect, accused, who is an element of a criminal offense or an element that excludes liability for a criminal offense? The stated provision of the law reflects the uniqueness of the functions of forensic psychiatric and forensic psychological examinations, and places a semantic emphasis on the fact that there is a rather fine line between the sphere of competence of the expert who determines the mental state of the suspect (accused) and the sphere of competence of the lawyer.

The subjective side of the crime includes such elements as the form of guilt (intent or negligence), motive and purpose of the crime. Therefore, the question of the function of the subjective side of the crime must be considered in the plane of its significance for criminal liability¹, which is the competence of legal professionals.

Since the subject of the crime is a natural convicted person who has committed a crime at an age from which, according to the Criminal Code of Ukraine, comes criminal responsibility, this person, in the aspect of investigation of the subjective side of the crime, is a common object of knowledge as a specialist in the field of jurisprudence, as well as specialists in the field of mental activity: psychologist and psychiatrist. At the level of the subject of maternal sciences – jurisprudence, psychology and psychiatry – the difference between the purpose of activity of the respective specialists and their tasks is determined.

Investigation by a lawyer of the activity of the suspect (accused) is aimed at establishing the subjective side of the crime (motive, intent to act, predicting the consequences of their own actions, etc.). The psychologist and psychiatrist's research focus on the same aspects of mental activity to determine their individual specificity, the presence of painful disorders, which may be the basis for the court's determination of limited conviction, conviction and guilt.

According to the results of forensic psychiatric examination, conclusions are drawn regarding the presence of mental disorders, their nature and severity – which may serve as a basis for a court to recognize a person's indecency in accordance with Part 2 of Art. 19 of the Criminal Code of Ukraine; according to the results of the complex psychological and psychiatric examination, it is established whether the disorder of the

¹ Panov N. I. Problemy sostava prestupleniya i ego funkciy v doktrine ugolovnoho prava [Problems of the composition of crime and its functions in the doctrine of criminal law]. Visnik Asociačii kriminal'nogo prava Ukraïni. Harkiv, 2013. № 1(1). S. 103–125. URL : http://nauka.nlu.edu.ua/wp-content/uploads/2015/07/1_7.pdf [in Russian].

mental state is a borderline mental disorder, which significantly influenced the mental activity in the legally relevant period of time – which may serve as a basis for the court's recognition of the limited conviction of the individual according to Art. 20 of the Criminal Code of Ukraine; on the basis of the results of psychological examination, the peculiarities of the mental activity of a person are established, which can be recognized by the court as mitigating or aggravating circumstances in accordance with Art. 66, 67 of the Criminal code of Ukraine¹.

In the science of criminal law, the set of signs of insanity provided for Part 2 of Art. 19 of the Criminal Code of Ukraine (2001), traditionally regarded as *insanity defense formula*², which in Art. 39 of the Criminal Code of 1903 is enshrined as a *mixed type* formula because it contains medical and psychological (legal) criteria³.

Subsequently, *insanity defense* formula has been repeatedly reviewed by jurists and psychiatrists⁴, but its structure has been unbroken for the past 50 years. The classical literature on forensic psychiatry identifies the main tasks to be solved by a psychiatrist using a method of clinical psychiatric analysis based on the evaluation of clinical symptoms of the disease: establishing a diagnosis of the disease, the obligatory determination of the nature of painful disorders of the psyche and the severity of their severity in time⁵.

This means that the psychiatrist expert, when completing these tasks, should conduct research and provide conclusions based on his or her specialist knowledge of psychiatry, using only psychiatric criteria.

Commonly acknowledged and undeniable are the views of V. Kh. Kandinsky⁶, who believed that during expert research a forensic

¹ Ibidem.

² Trahterov V. S. Formula nevmenjaemosti v sovetskom ugovnom prave (istoricheskij ocherk) [The formula of insanity in Soviet criminal law (historical outline)]: ucheb. posobie. Harkiv : Ukrainskaja juridicheskaja akademija, 1992. S. 37–38. URL : <https://lawdiss.org.ua/books/a1893.doc.html> [in Russian].

³ Ugolovnoe ulozhenie: Sobranie zakonov i rasporjazenij pravitelstva [Criminal Code: Collection of statutory and government orders]. 16 aprlja 1903 g. №88. S. 8. URL : http://pravo.by/upload/pdf/krim-pravo/ugolovnoe_ulogenie_1903_goda.pdf [in Russian].

⁴ Pervomajskij V. B. Novyj Ugolovnyj kodeks: starye i novye problemy sudebno-psihiatricheskoj jekspertizy [The new Criminal Code: old and new problems of forensic psychiatric examination]. Arhiv psihiatrii. Kiev, 2001. № 4. S. 49–52 [in Russian].

⁵ Lunc D. R. Problema nevmenjaemosti pri sudebno-psihiatricheskoj jekspertize. Sudebnaja psihiatrija [The problem of insanity in forensic psychiatric examination. Forensic Psychiatry]: uchebnik dlja juridicheskikh vysshih uchebnyh zavedenij / red. A. N. Buneev i dr. Moskva : Gos. izd-vo jurid. literatury, 1954. Gl. I. S. 15–36 [in Russian].

⁶ Kandinskij V. H. K voprosu o nevmenjaemosti [On the Issue of insanity]/ Sankt-Peterburgskaja psihiatricheskaja bol'nica sv. Nikolaja Chudotvorca.

psychiatrist should use two interdependent psychiatric criteria: First one being *separate* or *specific*, which consists in diagnosis of a specific mental disorder and is considered in the section of psychiatry called *separate psychiatry*; Second is *general*¹ that is a common, common to many different psychiatric disorders, a profound disorder of the psyche, and is considered in a section of psychiatry called *general psychiatry*.

V. P Serbsky² called the second criterion psychopathological, since the general patterns of mental disorders and the degree of depth of disorders in different mental disorders, refer to the subject of psychopathology (synonymous with general psychiatry). Forensic psychiatrist statement of a person's mental state according to the two above criteria enables the court to apply the rule of law correctly when deciding the issue of insanity.

At the same time, during Soviet era and later Ukrainian forensic psychiatry, the first criterion of *of insanity defense* formula followed by jurists, was also called *medical* or *biological* that is surprising because specialists in general medicine and biology do not have competence in establishing a psychiatric diagnosis. The second criterion of traditional *insanity defense formula* is *psychological (legal)*. In our opinion, in its essence, also refers to the competence of a psychiatrist who has special knowledge to determine the main task: establishing the degree of depth of mental disorder that deprives a person of ability Adequate awareness of the surrounding reality, their mental state and behavior (that is, determine whether a mental disorder is serious, according to the terminology provided by Article 1 of the Law of Ukraine: *On Psychiatric Aid*)³.

At the end of the twentieth century, the community of psychiatrists was de facto insensitively classified as psychiatry. Thus, in the Encyclopedic Dictionary of Medical Terms (1983), the concept of *insanity defense* is defined as the inability of a person because of a mental illness or temporary disorder of mental activity to realize or manage their actions; a person whose conviction was established by forensic psychiatric examination was exempted from criminal liability⁴.

K 140-letiju. Tom III. Sankt-Peterburg : izdatel'sko-poligraficheskaja kompanija «KOSTA», 2012. S. 321–343 [in Russian].

¹ibidem. P. 330

² Serbskij V. P. O sudebno-psihiatricheskoj jekspertize [On forensic psychiatric examination: Proceedings of the second congress of domestic psychiatrists]: Trudy vtorogo sezda otechestvennyh psihiatrov. Kiev, 1997. S. 122–124 [in Russian].

³ Pro psykhiiatrychnu dopomohu [On Psychiatric Care]: Zakon Ukrainy vid 22.02.2000. № 1489–iii. Vidomosti Verkhovnoi Rady Ukrainy. URL : <https://zakon.rada.gov.ua/laws/show/1489–14> [in Ukrainian].

⁴ Jenciklopedicheskij slovar' medicinskih terminov [Encyclopedic dictionary of medical terms], izd. pervoe / Gl. red: B. V. Petrovskij. Moskva : Sovetskaja jenciklopedija, 1983. T. 2. S. 218 b[in Russian].

Based on the content of the first part of this definition, insanity is established based on *inability* determining the mental state (categories of psychology, psychiatry) that is the competence of a psychiatrist expert; but in the second part of this definition, forensic psychiatric expertise is given the function of establishing non-judgment, thereby invalidating the role of the court. With respect to the current state of development of forensic psychiatric examination, it can be stated that it is lagging the evolution of Ukrainian judicial proceedings and in fact contradicts the above-mentioned norms of the current legislation of Ukraine, which regulate the activity of the psychiatrist expert in respecting the limits of his competence and prohibition to resolve the issues of law. This is due to the longstanding controversy in the field of forensic psychiatry and jurisprudence regarding the concept of *insanity defense*¹, but to date, some scholars and psychiatrists consider *immunity from prosecution* a category of forensic psychiatry forcing a psychiatrist expert to move beyond his or her competence and to resolve legal issues. In particular, S. V. Losich and K. A. Rutvian² note that the content of the legal *form* of insanity defense is filled by psychiatry; the authors, adhering to the traditional name of the first criterion of *insanity defense* is *medical* having come to the conclusion that it is possible to influence not only mental but also somatic disorders on the intellectual and volitional activity of the person, which, in their opinion, should also belong to medical grounds for insanity defense.

In our opinion, the fallacy of this conclusion lies in the fact that under the conditions of influence of somatic disorders on intellectual and volitional activity it is a question of the presence of somatogenic (or symptomatic) mental disorders, which are the competence of the psychiatrist. The inclusion of somatic disorders in the *medical* criterion as a basis for determining the court's insanity would lead to the inclusion of a specialist therapist (somatic diseases specialist) in the commission of experts.

Controversial is the content of Article 19 of the Criminal Code of Ukraine which states: «... A person who, while committing a socially dangerous act under this Code, was in a state of negligence shall not be criminally liable...». The meaning of the foregoing, upon careful reading, may mean that the criminal lawyer has established the fact of the criminal

¹ Pervomajskij V. B., ilejko V. R. Sudebno-psihiatricheskaja jekspertiza: ot teorii k praktike [Forensic psychiatric examination: from theory to practice]. Kiev : KiT, 2006. 394 s. [in Russian].

² Losich S. V., Rutvjan K. O. Problemi viznachennja medichnogo kriteriju neosudnosti v kriminal'nomu pravi Ukraïni [Problems of determining the medical criterion of insanity in the criminal law of Ukraine]. Pravovij chasopis Donbasu. Krivij Rig, 2018. № 4 (65). S. 185–192. URL : file:///C:/Documents%20and%20Settings/1%D0%9C%D0%BE%D0%B8%20%D0%B4%D0%BE%D0%BA%D1%83%D0%BC%D0%B5%D0%BD%D1%82%D1%8B/Downloads/pppd_2018_4_33.pdf. (data zvernennja: 02.06.2019) [in Ukrainian].

act and, having obtained the opinion of the psychiatrist expert on the state of the defendant's insanity, excludes his criminal liability.

Such wording in the current criminal legislation brings back a modern forensic psychiatric examination to the practice of the 1950s, when in Soviet times the main task of forensic psychiatric examination was to give a conclusion on the conviction or insanity of a person¹.

In addition, in our opinion, the use of the term *state of insanity* in Article 19 of the Criminal Code of Ukraine is contrary to the provisions of the Law of Ukraine: *On Psychiatric Aid* and scientific psychiatry. First, the mental state itself, which causes the emergence of a person's ability or inability to become aware of and act on their actions, is a psychiatric phenomenon, and therefore a priori cannot be a state of insanity. Second, the condition of a person who, due to a severe mental disorder at the stage of exacerbation, is unable to realize and manage their actions is a state of severe mental disorder, the establishment of which, according to Article 1 of the Law of Ukraine: *On Psychiatric Aid*, falls within the competence of a psychiatrist. Third, the legal significance of a state of serious mental disorder is actualized only in the presence of the fact of a criminal offense, which in time coincides with the state of serious mental disorder – based on which the court finds the recklessness of the person who committed a socially dangerous act.

The author cites the legal criteria of insanity and notes that the phenomenon of *insanity defense* does not apply to the subject of forensic psychiatry; psychiatrists do not have to state insanity because they are beyond their competence; only the court, having evaluated all the evidence (including the conclusion of the forensic psychiatric examination concerning the mental state of the person) having established all legally relevant circumstances, has the legal right to conclude that the suspect has no jurisdiction.

Article Purpose. The purpose of this work is to create a systemic model of insanity, which defines the psychiatric criteria of ascertainment in the opinion of the expert of the state of severe mental disorder of the person in the criminal-relevant period, as a psychiatric basis for the court's recognition of that person as not guilty.

Main content presentation. This article provides clarification on the basic provisions on issues of insanity, which are clearly illustrated in the system model of finding insanity (Fig. 1). Yu. approach of Yu. S. Bogomyagkov was taken as the basis of legal criteria for insanity defense

¹ Судебная психиатрия: Руководство для врачей [Forensic Psychiatry: A Guide for Physicians] / под. ред. С. М. Fejnberg и др. Москва : Медгиз, 1950. С. 41 [in Russian].



Рисунок 1. Системна модель констатації неосудності

As follows from the scheme above (Fig. 1), the finding of nonsense is the prerogative of a court that must apply two legal criteria. An expert psychiatrist applies three interdependent psychiatric criteria that allow one to conclude that there are (or lack of) psychiatric grounds for a court's admission of insanity.

The *first* psychiatric criterion should be called diagnostic, which is that the psychiatrist expert in the diagnosis of mental disorders should be guided by modern diagnostic features¹; the Law of Ukraine: *On Psychiatric Aid*² and data from scientific psychiatry.

The *second* psychiatric criterion is to determine the degree of depth of mental disorders as having deprived an individual of the ability to become aware of his or her actions and to manage them over a legally relevant period. This criterion is suggested to be called the criterion of criticality, since, in agreement with the opinion of I. A. Kudryavtsev³; it is the level of criticality that most fully characterizes a person's ability to realize their own actions and to manage them.

The *third* psychiatric criterion determines the peculiarities of the dynamics of mental disorder. Even when identifying a person with a severe mental disorder, it is necessary to determine what stage of the painful process took place during the criminally relevant period (exacerbation or remission of the painful process; compensation or decompensation of the pathological mental state).

A. V. Melnik⁴ points to the urgency of clarifying the psychopathological dynamics in time, the sequence of the development of the symptoms of the disease, especially in forensic psychiatric examination of temporary disorders of mental activity. If the offense

¹ Mizhnarodna statystychna klasyfikatsiia khvorob ta sporidnennykh problem okhorony zdorovia 10-ho perehliadu [10th international Statistical Classification of Diseases and Related Health issues]. URL : <http://www.surgery.org.ua/Documents/Details> (data zvernennia 06.06.2019 [in Ukrainian]).

² Pro psykhiatrychnu dopomohu [On Psychiatric Care]: Zakon Ukrainy vid 22.02.2000. № 1489–iii. Vidomosti Verkhovnoi Rady Ukrainy. 2000. № 19. St.143. URL : <https://zakon.rada.gov.ua/laws/show/1489-14> (data zvernennia 06.06.2019) [in Ukrainian].

³ Kudryavtsev I. A. Aktual'nye problemy medicinskoj psihologii v sudebno-psihiatricheskoj praktike [Actual problems of medical psychology in forensic psychiatric practice]. Psihologicheskaja diagnostika pri nervno-psihicheskikh i psihosomaticheskikh zabolevanijah: sb. nauchnyh trudov. Leningrad : izd. Leningradskogo nauchno-issledovatel'skogo psihonevrologicheskogo instituta im. V. M. Behтерева, 1985. Tom 112. S. 11–16 [in Russian].

⁴ Melnyk A. V. Shchodo tymchasovykh rozladiv psykhičnoj diialnosti [Concerning temporary disorders of mental activity]// Aktualni pytannia suchasnoi psykhiiatrii: materialy nauk.-prak. konferentsii, prysviachenoi 30-richchui kafedry psykhiiatrii, narkologii ta medychnoi psykholohii Ukrainiskoi medychnoi stomatolohichnoi akademii (m. Poltava). Poltava : «Vydavnytstvo «Poltava», 2005. S. 86–89 [in Ukrainian].

consists of a series of consecutive episodes, the expert provides for each episode separate expert assessments of the mental state of the person¹.

We have refined the content of this criterion and we propose to call it anamnestic, since this criterion concerns the history (history) of the development of mental disorder. Thus, the systemic model of insanity defense (Fig. 1) has clear criteria for its ascertainment, distinguishing between the areas of competence of a lawyer and an expert psychiatrist.

This systematic approach makes it possible to clarify the definition of *insanity* in accordance with the current legislation of Ukraine and the achievements of judicial psychiatry, which the authors of this publication propose in the following formulation:

insanity defense is a criminal circumstance that establishes committing a socially dangerous act by a person who, at the time of the tort, showed signs of a specific form of severe mental disorder in such a phase, when the mental disorders deprived her of the ability to realize and manage the public danger of their actions, and excludes the subject of the crime.

Equally relevant is the problem of regulatory regulation of expert activity in conducting forensic psychiatric examination.

The order of the Ministry of Healthcare of Ukraine dated on 8.05.2018 № 865 approved a new Procedure for conducting forensic psychiatric examination² (hereinafter referred to as Procedure).

The novelties of the Order are the content of paragraphs 6, 7 defining the form of forensic psychiatric examination (hereinafter referred to as FPE) – outpatient, inpatient and posthumous, as well as the conditions for conducting the FPE at the location of the individual.

Clause 9 of the Procedure states that, on organizational grounds, an FPE may be a single entity and a commission. Complex examinations, which in modern expertise are determined by forensic branches of expertise (expert specialties), are not mentioned at all in clause 9³. However, clause 15 of the same Procedure provides for carrying out complex examinations in an expert institution.

These contradictions, in our opinion, can disorganize expert activity in cases of admission to the institution of complex research.

¹ Morozov G. V. Problema nevmenjaemosti. Sudebnaja psihiatrija [The problem of insanity. Forensic Psychiatry]: rukovodstvo dlja vrachej. 2-e izdanie, pererabotannoe i dopolnenoe / pod. red. G. V. Morozova. Moskva : Medicina, 1988. S. 31 [in Russian].

² Poriadok provedennia sudovo-psykhiatrychnoi ekspertyzy [Procedure for conducting forensic psychiatric examination]: nakaz, poriadok, Forma typovoho dokumenta vid 08.05.2018. № 865. Ministerstvo okhorony zdorovia Ukrainy. URL: <https://zakon.rada.gov.ua/laws/show/z0719-18> (data zvernennia 06.06.2019) [in Ukrainian].

³ Simakova-Yefremian E. B. Kompleksni sudovo-ekspertni doslidzhennia: teoriia ta praktyka [Complex forensic research: theory and practice]: dys. ... d-ra yurydych. nauk: 12.00.09. Kharkiv, 2017. S. 114–119. [in Ukrainian].

In addition, the lack of a position regarding comprehensive examination is contrary to the procedural legislation of Ukraine (in particular, Article 112 of the Code of Administrative Proceedings of Ukraine).

The clarification in Item 10 of the Procedure regarding the purpose and subject of forensic psychiatric examination is positive: the mental state of a person at certain legally significant intervals¹. The previous version of the Order in item 7, concerning the subject of FPE, does not contain a reference to a legally significant period².

The content of clause 16 of the new Procedure is ambiguous, stating that in the case of documents containing information on the health status of the person to whom the MSE is assigned, the facts of his request for medical assistance, his diagnosis and family side of life, as well as other information obtained during her medical examination, the expert is obliged to request from the body (s) that appointed the examination (s) (expert), the consent of that person to the use of the said information³.

The Order has been added to the standard form of a document entitled: *Conscious consent of the accused, accused or convicted person*⁴ where the individual must certify that she has received information that during the course of her forensic psychiatric examination, forensic experts found psychiatric disorders that could result in mental disorders the use of torture and other cruel, inhuman or degrading treatment or punishment; the person is informed about the potential benefits, risks and possible limitations in case of forensic reports of this information to the body (person) who appointed the expert (attracted expert) and at whose request it was conducted; as well as agreeing to provide information in the form of

¹ Poriadok provedennia sudovo-psykhiatrychnoi ekspertyzy [Procedure for conducting forensic psychiatric examination]: nakaz, poriadok, Forma typovoho dokumenta vid 08.05.2018. № 865. Ministerstvo okhorony zdorovia Ukrainy. URL: <https://zakon.rada.gov.ua/laws/show/z0719-18> (data zvernennia 06.06.2019) [in Ukrainian].

² Poriadok provedennia sudovo-psykhiatrychnoi ekspertyzy [Procedure for conducting forensic psychiatric examination]: poriadok vid 08.10.2001. № 397. Ministerstvo okhorony zdorovia Ukrainy. URL : <https://zakon.rada.gov.ua/laws/card/z0219-02> (data zvernennia 06.06.2019) [in Ukrainian].

³ Poriadok provedennia sudovo-psykhiatrychnoi ekspertyzy [Procedure for conducting forensic psychiatric examination]: nakaz, poriadok, Forma typovoho dokumenta vid 08.05.2018. № 865. Ministerstvo okhorony zdorovia Ukrainy. URL: <https://zakon.rada.gov.ua/laws/show/z0719-18> (data zvernennia 06.06.2019) [in Ukrainian].

⁴ Usvidomlena zghoda pidslidnoho, obvynuvachenoho abo zasudzhenoho [Conscious consent of the defendant, accused or convicted person]. Dodatok do Poriadku provedennia sudovo-psykhiatrychnoi ekspertyzy (punkt 19): Forma typovoho dokumentu. URL : <https://zakon.rada.gov.ua/laws/card/z0719-18> (data zvernennia 06.06.2019) [in Ukrainian].

primary records of the presence of mental disorders that may have arisen as a result of torture and other cruel, inhuman or degrading treatment, treatment or punishment.

Undoubtedly, paragraph 16 of the new Order is aimed at the protection of fundamental rights and freedoms of the individual and the citizen, the right to non-interference with privacy, but contradicts the paragraph 3, 6 h. 2 Article. 7 of the Law of Ukraine: *On Protection of Personal Data* providing special requirements for the processing of personal data, namely: no ban on the processing of personal data necessary to protect the vital interests of the personal data subject or another person in the event of incapacity or restriction of civil the capacity of the data subject; no ban on the processing of personal data required for health care, medical diagnosis, care or treatment or medical services, etc.¹.

Paragraphs 17, 18 of the Procedure set out in detail the requirements for outpatient and inpatient examinations, but there is no reference at all to the neurological examination of a pediatrician, which is compulsory in accordance with current methods of clinical and psychiatric examination.

Section 19 of the Procedure states that during the FPE of different types; *expert shall involve a psychologist when necessary*. It should be noted that independent involvement of an expert by other specialists in performing the examination is not provided by the current legislation of Ukraine. In addition, current methods of clinical psychiatric examination, especially expert (both homogeneous and complex), include experimental and psychological research as a compulsory algorithm. In the case of the appointment of a complex forensic psycho-psychiatric examination, the court itself attracts a psychologist.

Comment in paragraph 19 of the New Order is raised by the position on the examination by the expert of psychiatric disorders that may arise because of torture and other cruel, inhuman or degrading treatment, treatment or punishment. The said expert point is obliged to inform the investigator (accused or convicted person or his legal representative), and, subject to his or her informed consent in a typical form², to pass this information on to the body (person) who appointed the expert (involved expert), regardless whether the question was asked. In our opinion, the application of this provision is impossible for the following reasons:

¹ Pro zakhyst personalnykh danykh [On protection of personal data]: Zakon Ukrainy vid 01.06.2010. № 2297–Vi. St. 481. Data onovlennia: 30.01.2018. URL : <https://zakon.rada.gov.ua/laws/show/2297–17> (data zvernennia 05.06.2019) [in Ukrainian].

² Usvidomlena zghoda pidslidnoho, obvynuvachenoho abo zasudzhenoho [Conscious consent of the defendant, accused or convicted person]. Dodatok do Poriadku provedennia sudovo-psykhiatrychnoi ekspertyzy (punkt 19): Forma typovoho dokumentu. URL : <https://zakon.rada.gov.ua/laws/card/z0719–18> (data zvernennia 06.06.2019) [in Ukrainian].

– Article 7 of the Law of Ukraine: *On Psychiatric Aid* stipulates¹ that diagnosis of mental disorder is established in accordance with generally recognized international standards for diagnosis and International Statistical Classification of Diseases and Related Health Problems (at the moment: ICD-10²). However, ICD 10 does not contain a taxon on mental disorders *specific* to the use of torture, cruel and degrading treatment. Therefore, even a probable conclusion that the use of torture and other cruel, inhuman or degrading treatment, treatment or punishment may be the cause of mental disorder will be in violation of international standards of diagnosis and the Law of Ukraine: *On Psychiatric Aid*;

– in modern psychiatry, principles of ambiguity of causality and polyetiology of mental disorders³: are generally accepted: different pathogenic factors can cause similar mental disorders in different persons; the same negative effects on the psyche cause different mental disorders in different persons (or may not cause them);

– it is common knowledge that the mere fact of presenting a person with a suspicion or charge of a criminal offense, or its punishment, are psycho-traumatic factors that in most cases adversely affect mental activity even in the absence of unlawful pressure (so-called «prison» psychoses). Researches of prisoners in English places of detention show that being in detention centers is detrimental to mental health⁴;

– determining etiology of mental disorder requires a detailed collection and objectification of anamnesis of the presence of various types of psycho-traumatic events and destructive factors in the person, and their subsequent comparison with the history of development and manifestations of the disease. Based on the evaluation of the whole set of medical records and clinical diagnostic features, conclusions about the

¹ Pro psykhiatrychnu dopomohu [On Psychiatric Care]: Zakon Ukrainy vid 22.02.2000. № 1489–iii. Vidomosti Verkhovnoi Rady Ukrainy. 2000. № 19. St.143. URL : <https://zakon.rada.gov.ua/laws/show/1489-14> (data zvernennia 05.06.2019) [in Ukrainian].

² Mizhnarodnyi klasyfikator khvorob MKKh 10 [international Classification of Diseases of iCD 10.] URL : <http://www.surgery.org.ua/Documents/Details/aa535505-419d-4d67-a9e7-5c6d4b8f1ced?title=MizhnarodniiKodifikatorKhvorobMkKh10> (data zvernennia 09.06.2019) [in Ukrainian].

³ *Snezhnevskij A. V.* Obshhaja psihopatologija: kurs lekcij [General psychopathology: a course of lectures]. 5-e izd. Moskva : «MEDpress-inform», 2008. S. 7–36; Nuller Ju. L. Smena paradigmy v psichiatrii [A paradigm shift in psychiatry]. Obozrenie psichiatrii i medicinskoj psihologii im. V. M. Behtereva. Sankt-Peterburg : Psihonevrologicheskij institut im. V. M. Behtereva, 1992. № 1. S. 13–18 [in Russian].

⁴ *Birmingem L.* Psihicheskoe zdorov'e zakljuchennyh [Mental health of prisoners]. Vestnik Associacii psihatrov Ukraini. Kiev, 2007. №1–2 (36–37). S. 137–159 [in Russian].

cause of the disease and the conditions that contributed to its occurrence are provided.

In the cases referred to in paragraph 19 of the New Order, the expert must first obtain objective information about the facts of *torture and other cruel, inhuman or degrading treatment, behavior or punishment against the person* and only then determine the presence or absence of causation between mental disorder and the use of illicit measures against a person; under these conditions, the psychiatrist may provide a categorical or probable conclusion. In the absence of objective information about the facts of torture, etc. with respect to a person, the obligation of the expert provided for in paragraph 19 of the Procedure may induce him to go beyond the competence and to give an objective conclusion. In view of the above, the application of this item under item 19 of the Procedure is inappropriate.

Paragraph 20 of the Procedure specifies the term of the outpatient FPE, as well as the possibility of extending the term of the examination, depending on the degree of its complexity and the volume of the investigated objects. At the same time, the Procedure does not define the criteria by which the degree of complexity of the FPE is determined that can cause unreasonable delay of its implementation.

Comparative analysis of the above provisions of the Procedure of conducting forensic psychiatric examination allows to establish the presence of separate positive changes. In addition, in the Procedure there are significant contradictions to the legal norms governing forensic activities. The foregoing may lead to errors in the organization of forensic psychiatric examination and the exit of the psychiatrist expert beyond his/her competence.

Separate provisions in the Procedure of forensic psychiatric examination concerning the category of complexity, terms of execution of expert examination, terms of execution of expert's requests, grounds for drawing up the report on impossibility of conducting the research, structure of expert's opinion, description of the research process, etc., do not correspond with the provisions of the Instruction on appointment and conducting of judicial examinations and expert researches (hereinafter referred to as Instruction), approved by the order of the Ministry of Justice of Ukraine of 08.10.1998 under №53/5 (as amended and supplemented) by introductions)¹. This significantly complicates the joint work of an expert psychiatrist and expert psychologist in the course of carrying out a comprehensive examination assigned to the forensic institutions of the Ministry of Health and the Ministry of Justice of Ukraine.

¹ Pro pryznachennia ta provedennia sudovykh ekspertyz ta ekspertnykh doslidzhen [On the appointment and conduct of forensic and expert investigations]: instruktsiia vid 08.10.1998. № 53/5. Ministerstvo yustytzii Ukrainy. URL : <https://zakon.rada.gov.ua/laws/show/z0705-98>. (data zvernennia 05.06.2019) [in Ukrainian].

Thus, it can be stated that the Procedure for conducting forensic psychiatric examination requires further improvement and alignment with the current legislation of Ukraine, the basic principles, methods and practice of modern psychiatry and forensic psychiatric examination.

Conclusions. The category of *insanity defense* is the prerogative of jurisprudence, since it means a criminal circumstance that establishes the commission of a socially dangerous act by a person who at the time of torture showed signs of a specific form of severe mental disorder in such a phase, when mental disorders deprived the person of the ability of the community and to rule them and exclude the subject of the crime.

Developed by the authors, the system model of ascertaining the most in line with Art. 19 of the Criminal Code of Ukraine, the provisions of classical scientific psychiatry and its modern achievements, allowing a clear distinction between the areas of competence of a lawyer and an expert psychiatrist.

Legal and regulatory support for the organization of forensic psychiatric examination requires further improvement and compliance with the current legislation of Ukraine and the departmental normative legal acts that regulate the organization of forensic activities in other specialized state expert institutions.

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В. В. Єгоров, Т. М. Єгорова

ПРОБЛЕМНІ ПИТАННЯ СУЧАСНОГО СТАНУ СУДОВО-ПСИХІАТРИЧНОЇ ТА СУДОВО-ПСИХОЛОГІЧНОЇ ЕКСПЕРТИЗИ

Проаналізовано чинне законодавство України, що регулює судово-експертну діяльність, зокрема, у галузях судової психіатричної та судової психологічної експертизи. В юриспруденції і психіатрії поняття «неосудність» трактується неоднозначно, оскільки критерії так званої «формули неосудності» до даного часу чітко не визначені. Надано авторську системну модель констатації неосудності, уточнено психіатричні критерії щодо визначення стану тяжкого психічного розладу як підстави для встановлення судом неосудності особи; сформульовано сучасне визначення поняття «неосудність». Проаналізовано чинний Порядок проведення судово-психіатричної експертизи; надано відповідні пропозиції щодо внесення змін до змісту проблемних положень зазначеного нормативного документа.

Ключові слова: неосудність; «формула неосудності»; психічний стан; тяжкий психічний розлад; психіатричні критерії; юридичні критерії; кримінально-правова обставина; компетенція експерта; прерогатива; судова психіатрична експертиза; судова психологічна експертиза.

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