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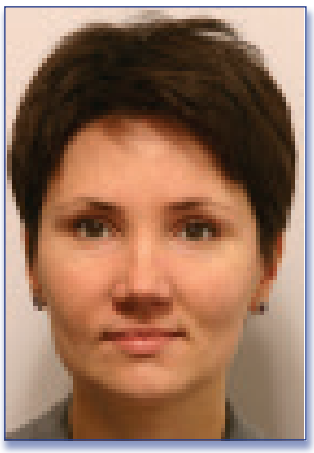
Inga Kudeikina

**Inga Kudeikina,**
Assistant Professor, Riga Stadiņš University Faculty of Law,
Doctor of Law, Riga, Latvia
ORCID: http://orcid.org/0000-0002-7895-4264
e-mail: Inga.Kudeikina@rsu.lv



Marina Losevicha

**Marina Losevicha,**
Masters of Law (Mg.iur.); Doctor Psychiatrist,
Riga Psychiatry and Narcology Center -Doctor Psychiatrist, University of Latvia – Lecturer,
Riga, Latvia
e-mail: Marina.Losevica@lu.lv

# Legal assessment of responsibility while outpatient forensic medicine examination of intellectually disabled people

**Formulation of Research Problem**. Capability provides an individual for an opportunity to be a full entity of law, to conclude transactions independently and to exercise their rights in other legal ways, as well as to bear responsibility for the acts committed. Nevertheless, not all natural persons have capability. In accordance with Article 141 of the Civil Law of Latvia (hereinafter referred to as the CL), minors do not have capability, and persons whose capacity has been limited by court due to mental illness (mental retardation) have limited capability[1]. Age and imposed restrictions established by law are legal facts that do not require a complex evidentiary foundation. It is easy to establish facts with the help of a birth certificate or a court judgment. In addition, it should be noted that court judgments on limiting capability are publicly exposed, they are published in the official publication Latvijas Vēstnesis[2]. A much more complicated situation arises in cases where it is needed to evaluate an act or transaction committed by a person in state of insanity. At the same time it should be borne in mind that the lack of capability or limited capability a priori is not a criterion of insanity. Thus, a disable person can be sane in relation to a committed criminal act or in relation to a committed transaction. The evidence of incapability occurs in the course of civil or criminal proceedings through the use of legal evidence, usually based on the report of a forensic medicine examination (outpatient or inpatient).

Capability and responsibility are independent institutions. The criteria for capability are specific legal facts, the state of insanity is established on the grounds of a forensic medicine examination in each particular case.

The Article purpose is the analysis of legal regulation and legal practice on the aspects of relationship between the capability and responsibility institutions, which undergo forensic outpatient psychiatric examination in relation to natural persons with mental disorders, behavior disorders and intellectual disability.

**Main Content Presentation**. When studying the corresponding norms of law, scientific papers of law theorists, along with judicial practice, the authors of the article concluded that while conducting an outpatient forensic

[1] Civillikums. Ceturtā daļa. Saistību tiesības (1937). Valdības Vēstnesis, 46, 26.02,1937.

[2] Latvijas Vēstnesis. Oficiālie paziņojumi. Tiesu nolēmumi. URL: https://www.vestnesis.lv/oficialie-pazinojumi/tiesu-nolemumi (date accesses 07.07.2020).

medicine examination for a person sanity whose ability is restricted due to mental disorders or intellectual disability, the fact of limiting the capability of a person may be an independent criterion in itself. As it was mentioned above, capability is a legal institution, responsibility, in turn, contains not only legal aspects, but also medical components. When conducting a forensic medicine examination, state of health, chronic diseases of a person in respect of whom a forensic medicine examination is carried out are assessed. As stipulated by the Law On forensic experts[3], only forensic medical examiners are competent enough to conduct forensic medicine examination. Thus, the issue of sanity or responsibility is resolved by forensic experts with medical education. This confirms the assumptions that responsibility / insanity also contains medical aspects.

There is the so-called presumption of mental health (legally enshrined in legislation of some countries)[4] in psychiatry. Proof of otherwise occurs within the framework of the diagnostic process (while delivering medical care or during, for example, labor market analysis) using clinical diagnostic methods and criteria.

Responsibility is a key aspect for the legal assessment of a natural person's act. The grammatical interpretation of the term responsibility indicates that this is a component of legal capacity, in particular, in relation to a person's awareness of his actions and their consequences[5]. A similar opinion was expressed by the University of Latvia professor Balodis Kaspars, who attributes responsibility to capability, emphasizing that capability is the possibility of an individual to control his actions, be aware of them, and also understand a cause and effect relationship between actions and their consequences[6].

The consequences of insanity are provided for in every branch of law. Thus, in accordance with Article 1409 of the CL, transactions conducted by persons in an unconscious state, either when it is impossible to be aware of their actions or to manage them, are not valid. In turn, in criminal law, on the basis of Article 13 of the Criminal Law, a person who at the time of a criminal act commission was in a state of insanity, i.e. in view of mental disorders or intellectual disability, could not be aware of his actions and manage them therefore cannot be prosecuted[7]. Instead of criminal liability with regard to such persons, compulsory involuntary commitment can be enforced.

Accordingly, when comparing the legal regulation of civil and criminal law, it may be concluded that in criminal law the content of the insanity institution is revealed in broad terms and more fully. The term insanity is not used in civil law, although it is exactly insanity that is a more precise and specific definition.

It is crucial to indicate that the concept of insanity includes the fact that a particular state of an individual is caused by mental disorders, or intellectual disability, i.e. mental disorders and intellectual disability are independent criteria that must be established while a forensic psychiatric examination.

But there is no doubt that both institutions – limitation of capability and insanity – serve the purpose of protecting persons suffering from mental disorders or intellectual disability. Restriction of capability also helps to defend property rights of relatives and family members of a person.

Nevertheless, it is needed to take into consideration various subjects of civil and criminal law regulation. The subject of criminal law is the protection

[3] Tiesu ekspertu likums (2016). Latvijas Vēstnesis, 42, 01.03.2016.

[4] Shishkov, S., Skibina, N. (2017). Prezumpcija psihicheskogo zdorovja: mozhno lji schitatj jeje obosnovannoi. Zhurnal nevrologii i psihiatrii imenji S.S.Korsakova. Tom: 117, Nr.5. p.p. 109-115. .

[5] Pieskaitāmība. URL: http://termini.lza.lv/term.php?term=pieskait%C4%81m%C4%ABba&list=pieskait%C4%81m%C4%ABba&lang=LV. (date accesses 07.07.2020).

[6] Balodis, K. (1997). Ievads civiltiesībās. Rīga: Izdevniecība Zvaigzne.

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**Inga Kudeikina,**
**Marina Losevicha**

## LEGAL ASSESSMENT OF RESPONSIBILITY WHILE OUTPATIENT FORENSIC MEDICINE EXAMINATION OF INTELLECTUALLY DISABLED PEOPLE

While legal capacity emerges at the moment of a person birth and he as a natural person and legal entity possesses it throughout all his life, capability is an institution with much more nuanced nature. Not all natural persons are endowed with capability, what is more a person may lack or be deprived of capability. However, it should be stressed that people with limited capability continue to live in society, to participate in legal proceedings when it is possible, as well as to commit crimes, that is their legal status differs from actual. Evaluation of acts competence committed by persons with limited capability plays an important role both in civil and criminal proceedings. In civil proceedings the issue as to transaction legal effect has to be resolved, in criminal proceedings the issues as to a person's responsibility committed a crime and, accordingly, as to his penalty have to be addressed.

The article is devoted to the role of outpatient forensic medicine examination while assessing the acts committed by persons with limited capability and in a state of insanity.

Keywords: outpatient forensic medicine examination, capability, insanity, intellectual disability.

**І. В. Кудейкіна,**
**М. О. Лосевич**

## ПРАВОВА ОЦІНКА ОСУДНОСТІ ПІД ЧАС АМБУЛАТОРНОЇ СУДОВО-МЕДИЧНОЇ ЕКСПЕРТИЗИ РОЗУМОВО ВІДСТАЛИХ ОСІБ

Осудність є ключовим інститутом як у цивільних, так і в кримінальних правовідносинах. Тільки осудна особа може нести кримінальну відповідальність і відповідати за наслідки цивільної угоди. Неосудність на відміну від дієздатності встановлюється в кожному конкретному випадку і щодо конкретного

злочинного діяння або угоди під час проведення судово-психіатричної експертизи. На відміну від випадків, коли судова експертиза проводиться задля отримання висновку експерта як доказу важливих обставин у справі, судово-психіатричну експертизу проводять задля встановлення можливості провадження у справі взагалі. Аналіз судової практики Латвії свідчить про деякі проблеми під час проведення судово-психіатричних експертиз, які згодом можуть призвести до обмеження прав осіб, котрі страждають на розумову відсталість або слабоумство. Метою статті є аналіз правового регулювання та судової практики щодо аспектів взаємозв'язку інститутів дієздатності й осудності, які перевіряються амбулаторною судово-психіатричною експертизою стосовно фізичних осіб, котрі мають психічні захворювання або розумову відсталість.

Оцінка діянь осіб, які страждають психічними захворюваннями або слабоумством, не може обмежуватися лише юридичною оцінкою. Необхідно індивідуалізувати покарання, а також відповідальність загалом на підставі висновку судово-психіатричної експертизи, зокрема виносячи рішення про призначення особі примусових заходів соціальної та психосоціальної реабілітації, що дійсно могло б мати превентивний сенс у майбутньому.

Для захисту прав й інтересів осіб із розумовою відсталістю та їхніх неповнолітніх дітей необхідне уведення нових правових інститутів, які б уніфіковано оцінювали здатність особи реалізовувати свої права, виконувати обов'язки і нести відповідальність.

Ключові слова: амбулаторна судово-медична експертиза, дієздатність, неосудність, розумова відсталість.

of the society interests, the subject of civil law in turn is the protection of the rights and interests of private individuals. Therefore, in civil law an excessive restriction of a person in his rights is unacceptable in comparison with criminal law. Having conducted a historical assessment, it is clear that the institution of capability was transformed in Latvia at the beginning of the 21st century. Thus, by the Decision of the Constitutional Court of the Republic of Latvia of December 27, 2010, the CL norm which provided for deprivation of capability was accepted as unconstitutional[8]. The Decision was based on the argument that deprivation of capability violates the constitutional right – the right to privacy, which is guaranteed by the fundamental law of the Republic of Latvia – the Constitution (Satversme)[9]. It should be summarized that capability is associated with constitutional human rights that must also be taken into account when conducting a forensic psychiatric examination, considering the fact that declaring a person insane will eventually entail consideration of transaction as invalid in civil law, and imposition of compulsory involuntary commitment in relation to a person in criminal law. It is obvious that the consequences of admitting insanity in criminal law relations are much more severe in regard to a person whose insanity is admitted.

Despite individual insanity differences mentioned above in civil and criminal legal relations, the integrating factor is that the state of insanity is defined only by means of a forensic psychiatric examination. It is only within the competence of a forensic expert to admit that a natural person was in a state of insanity at the time of a specific act commission.

Historically, in the legal doctrine of Western countries, when assessing responsibility, the criterion for the ability of the accused and examinee to understand the illegal nature of their actions while committing a socially harmful act dominated. It was reflected in the legislation as the concept of actus reus / mens rea and the M'Naghten rule. However, in Russian legislation, the basis for establishing the fact of responsibility was a person[10] free will. In the first Russian forensic medicine textbook for lawyers, compiled by the doctor (a native of the city of Jakobstadt, Courland Governorate (currently, Jēkabpils, Latvia) Blosfeld Georg Joachim, a satisfactory and quite modern definition of responsibility is given, which compensates for its vague legal criteria, as well as the methodology for conducting a forensic psychological and psychiatric examination[11] is suggested.

At present, it is still quite challenging to accurately determine the degree of mental retardation in accordance with the criteria of the International Classification of Diseases, Tenth Revision, since IQ indicators are provided without specifying the recommended methods. A person with intellectual disability may be declared by court to be fully sane, partially sane or insane. In the last two cases, compulsory involuntary commitment may be imposed in Latvia. Generally, people with moderate intellectual disability are declared insane or limited sane. People with moderate mental retardation, according to their mental age, are 6–9 years old which is much less than the formal biological age for juridical liability (in Latvia – 14). With the formal ability to read mechanically and conclude property transactions, the degree of capability limitation of a person with an average degree of intellectual disability is determined by his inability to plan a budget, to protect his

[8] Latvijas Republikas Satversmes tiesas spriedums lietā 2010-38-01 (2010). URL: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2010-38-01_Spriedums.pdf. (date accesses 07.07.2020).

[9] Latvijas Republikas Satversme (1922). Latvijas Vēstnesis, 43, 01.07.1993; Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs, 6, 31.03.1994; Valdības Vēstnesis, 141, 30.06.1922; Diena, 81, 29.04.1993.

[10] Spiridonov, V. (2018). Stranici biografii G.I. Blosfelda, avtora pervogo v Rosii uchebnika po sudebnoi medicinje dlja iuristov. Uchenie zapiski Kazanskogo universiteta. Seria Gumanitarnie nauki, vol. 160, no. 2, pp. 530-542.

[11] Belogric-Kotljarevskii, L. (1903). Uchebnik ruskogo ugolovnogo prava: Obschaja i osobennaja chastj. Kiev. P.p. 628.

property from infringement (relatives of such people are well aware of situations when persons left unsupervised, remained without livelihood "voluntarily" distributing money and valuable possession (phones, tablets) to casual acquaintances or neighbors a few hours after receiving disability allowance), as well as the inability to count and understand the meaning of the text read.

In criminal proceedings regarding entities with intellectual disability, doubts arise and forensic experts are addressed questions as to sanity during a socially harmful act commission, as to the criminal procedural and corrective labor capacity of a person at the present time in case of diminished responsibility (insanity or partial responsibility), as to the existence of a risk of committing a repeated socially harmful act in the future (which is connected with social danger of a person and the need to appoint, prolong, change or cancel compulsory involuntary commitment).

Usually, in the course of a forensic psychiatric examination, when answering the question about whether a suspect has a mental disorder at present, the ability to give reliable testimony and participate in court hearing is also assessed (the last two points also relate to victims and witnesses), de facto most often only the possibility of a person to be physically present without interfering with court and without the risk of affective decompensation is evaluated.

Today, the description of the method of conducting forensic psychiatric examination is a restricted information[12] in Latvia.

Not a single standardized tool (scale) is used to assess the risk of recurrent socially harmful act, criminal procedural or corrective labor capacity. According to the article authors, the report of a forensic medicine examination on the full responsibility of a person with moderate intellectual disability should invariably raise questions and doubts at court, a desire to test the methodology for conducting an examination and drawing up a report.

The presence of mental retardation per se is not a factor that reduces criminal liability, however, examination by court of a defendant personality traits and qualities for the penalty individualization is the main principle for criminal penalty appointment[13]. The need to consider mental retardation by court is stressed by many authors, as well as courts practice – for example, in the Atkins v. Virginia case the Supreme Court of the US abolished death penalty for a convict with mild mental disabilities, based on his low intelligence – IQ 59 (correspond to the age of 9 – 12 years old)[14].

The analysis of judicial practice in Latvia points to some problems while forensic psychiatric examinations which may consequently lead to infringement of the rights of persons suffering from mental disorders or intellectual disability. In the electronic system of anonymized court judgments on the site of the Latvian courts[15], a search for the final criminal procedural decisions was conducted, the time period is from 2013 to June 2020. In criminal proceedings, it was stated defendants have moderate intellectual disability or borderline between mild and moderate in 39 cases. Fortuitous Events demonstrate that less significant offenses of a mentally retarded person are replaced by more significant ones in particular cases, and also it was established that in comparative legal and medical conditions the reports of a forensic medicine examination were drastically different, pointing to the need to define criteria for assessing an examinee. Additionally, it is stipulated that when imposing a penalty, the opinion of a forensic expert (psychiatrist) is not taken into account, and in certain cases the question on the possibility of imposing a specific penalty was not addressed to a forensic

[12] Tiesu ekspertu likums (2016). Latvijas Vēstnesis, 42, 01.03.2016.

[13] Krimināllikums (1999). Latvijas Vēstnesis, 199/200, 08.07.1998.

[14] Atkins v. Virginia (2002). 536 U.S. 304, Brief Filed: 11/01, Court: Supreme Court of the United States Year of Decision.

[15] Portāls Manas tiesas (2020). URL: https://manas.tiesas.lv/eTiesas/ (date accesses 07.07.2020).

**JURISTISCHE WERTUNG DER ZURECHNUNGSFÄHIGKEIT BEI DER AMBULATORISCHEN GERICHTSMEDIZINISCHEN EXPERTISE VON GEISTIG UNTERENTWICKELTEN PERSONEN**

Die Zurechnungsfähigkeit ist eine Schlüsselinstitution sowohl in zivilen als auch in kriminellen Rechtsverhältnissen. Nur zurechnungsfähige Person kann strafrechtliche Verantwortung tragen und für die Folgen zivilen Geschäfts haften. Bei der Durchführung forensisch-psychiatrischer Expertise wird die Unzurechnungsfähigkeit im Unterschied zur Handlungsfähigkeit in jedem Einzelfall und in Bezug auf eine konkrete Straftat oder ein Geschäft festgestellt. Im Unterschied zu Fällen, in denen die forensische Expertise durchgeführt wird, um ein Gutachten als Beweis für wichtige Umstände in einem Fall zu erhalten, wird die forensisch-psychiatrische Expertise durchgeführt, um festzustellen, ob die Aufnahme des Verfahrens überhaupt möglich ist. Die Analyse der Judikatur in Lettland zeigt einige Probleme bei der Durchführung der forensisch-psychiatrischen Expertisen auf, die später zur Rechtsbeeinträchtigung von Personen führen können, die an der Retardation oder dem Schwachsinn leiden. Das Ziel des Artikels ist es, die Rechtsregelung und Judikatur in Bezug auf die Aspekte vom Zusammenhang zwischen Institutionen der Geschäftsfähigkeit und Zurechnungsfähigkeit zu analysieren, die bei der ambulatorischen forensisch-psychiatrischen Expertise in Bezug auf die Personen mit psychischen Erkrankungen oder der Retardation überprüft werden.

Die Beurteilung der Taten von Personen, die an den psychischen Erkrankungen oder der Retardation leiden, kann nicht auf die Subsumtion beschränkt werden. Es ist notwendig, die Bestrafung zu individualisieren, die Verantwortung überhaupt aufgrund des forensisch-psychiatrischen Sachverständigengutachtens zu individualisieren, u. a. wenn man seinen Ausspruch tut, einer Person Zwangsmittel zur sozialen und psychosozialen Rehabilitation vorzuschreiben, was in Zukunft wirklich präventiven Sinn haben könnte.

Um die Rechte und Interessen von Menschen mit der Retardation und ihren minderjährigen

Kindern zu schützen, müssen neue Rechtsinstitutionen eingeführt werden, die die Fähigkeit einer Person, ihre Rechte zu realisieren, Verpflichtungen zu erfüllen und Verantwortung zu tragen, einheitlich bewerten.

Schlüsselwörter: ambulatorische gerichtsmedizinische Expertise, Handlungsfähigkeit, Unzurechnungsfähigkeit, Retardation.

**И. В. Кудейкина,**
**М. А. Лосевич**

## ПРАВОВАЯ ОЦЕНКА ВМЕНЯЕМОСТИ ПРИ АМБУЛАТОРНОЙ СУДЕБНО-МЕДИЦИНСКОЙ ЭКСПЕРТИЗЕ УМСТВЕННО ОТСТАЛЫХ ЛИЦ

Вменяемость является ключевым институтом как в гражданских, так и в уголовных правоотношениях. Только вменяемое лицо может нести уголовную ответственность и отвечать за последствия гражданской сделки. Невменяемость в отличие от дееспособности устанавливается в каждом конкретном случае и по отношению к конкретному преступному деянию или сделке при проведении судебно-психиатрической экспертизы. В отличие от случаев, когда судебная экспертиза проводится для получения заключения эксперта как доказательства важных обстоятельств по делу, судебно-психиатрическую экспертизу проводят для установления возможности производства по делу вообще. Анализ судебной практики Латвии указывает на некоторые проблемы при проведении судебно-психиатрических экспертиз, которые впоследствии могут привести к ущемлению прав лиц, страдающих умственной отсталостью или слабоумием. Целью статьи является анализ правового регулирования и судебной практики по аспектам взаимосвязи институтов дееспособности и вменяемости, которые проверяются амбулаторной судебно-психиатрической экспертизой в отношении физических лиц, имеющих психические заболевания или умственную отсталость.

expert at all. This indicates the need to individualize a penalty on the grounds of the forensic psychiatric examination report, for example, by deciding on appointing coercive measures of social and psychosocial rehabilitation for a person, which could really have a preventive meaning in the future.

**Conclusions**. Based on the research, the authors of the article came to several important conclusions. Capability and responsibility of a natural person are related institutions, but not similar. Responsibility or insanity is determined in relation to an individual specific act and is also defined with the help of forensic psychiatric examination, i.e. by psychiatrists-forensic experts. Limitation of capability due to mental illness or intellectual disability a priori is not an independent cause for declaring person insane, but it is a factor that must be taken into account and which additionally testifies in favor of insanity.

As stated in the scientific literature, the question of whether the act was committed in a state of responsibility or insanity is resolved by court on the basis of a legal criterion, based on the report of a forensic medicine examination, which contains medical criteria – the severity and nature of a mental disorder[16]. Therefore, in contrast to cases when a forensic examination is conducted to obtain a forensic report as evidence on important circumstances in a case, a forensic psychiatric examination is carried out to establish whether it is possible to proceed with the case at all. Insanity excludes criminal prosecution in criminal legal relations. In civil legal relations disability, in turn, makes transaction invalid, non-existent, thus destroying the subject of a dispute.

The significance of a forensic psychiatric examination does not require evidence. However, the criminal procedural and corrective labor capacity (in short – the ability to enjoy their rights for defense and to pay corresponding penalty) of people with mental and behavioral disorders is one of the least studied areas in Latvian forensic psychiatry. Consequently, a kind of area of legal vacuum has been formed from the issues of criminal and civil law, where support and protection of persons with intellectual disabilities rights are not dully ensured. For example, when a person with intellectual disability (idiocy) and a stable inability to make decisions and take care of their health is enforced compulsory involuntary commitment in the form of outpatient treatment by a psychiatrist, a person apriori is at risk of failure to comply with medical recommendations, exacerbation, hospitalization or a recurrent socially harmful act[17] commission.

In addition, while hospitalization to a psychiatric hospital, the ability to make decisions and to give high-quality informed consent to treatment is not assessed not only in persons with severe mental disorder, but also in the mentally deficient, which can be considered the most common fact of human rights violations in psychiatry[18].

It must be borne in mind that mental disorder or intellectual disability is an objective factor that does not depend on a patient will, as well as that persons suffering from mental disorder and intellectual disability should undoubtedly be held responsible and consequently be punished according to the degree of their awareness of the committed illegal acts and the penalty purpose, but at the same time such persons must receive medical treatment. All these factors can only be established by a specialist (psychiatrist) when conducting a forensic medicine examination. Evaluation of acts of persons suffering from mental disorders or intellectual disability cannot be limited only to legal assessment.

16 Krastiņš U., Liholaja V. (2015). Krimināllikuma komentāri. Pirmā daļa. Rīga: Tiesu namu aģentūra.

17 Prüter-Schwarte, C. (2012). Autonomie und Fürsorge im Maßregelvollzug. // Forens Psychiatr Psychol Kriminol, 6, p. 201–207.

18 Ziņojums Latvijas valdībai par Eiropas Komitejas spīdzināšanas un necilvēcīgās vai pazemojošas rīcības vai soda novēršanai (CPT) vizīti Latvijā no 2016. gada12. līdz 22.aprīlim. (2017). European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasburgā, 2017. gada 29. jūnijā, URL: https://rm.coe.int/pdf/168072ce52 (date accesses 07.07.2020).

The analysis of judicial practice in Latvia points to some problems in the conduct of forensic psychiatric examinations which may subsequently lead to persons suffering from mental disorders or intellectual disability rights infringement.

To protect the rights and interests of people with mental retardation and their minor children, it is needed to introduce new legal institutions that uniformly assess the ability of a person to exercise their rights, fulfill duties and bear responsibility:

reduced criminal procedural capacity (with the possibility of appointing a representative for a person while criminal proceedings);

reduced corrective-labor capacity (with the possibility of imposing a penalty that best suits the personality and health condition of a person);

reduced ability to make decisions (with the possibility of appointing corresponding support in making decisions).

The grounds for reduced rights and obligations application in regard to people suffering from mental disorders or intellectual disability, should be the report of a forensic psychiatric examination conducted using scientifically confirmed and unified criteria.

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Надійшла до редколегії 13.08.2020


Оценка деяний лиц, страдающих психическими заболеваниями или слабоумием, не может ограничиться только юридической оценкой. Необходимо индивидуализировать наказание, а также ответственность вообще на основании заключения судебно-психиатрической экспертизы, в том числе вынося решение о назначении лицу принудительных мер социальной и психосоциальной реабилитации, что действительно могло бы иметь превентивный смысл в будущем.

Для защиты прав и интересов лиц с умственной отсталостью и их несовершеннолетних детей необходимо введение новых правовых институтов, унифицировано оценивающих способность лица реализовывать свои права, выполнять обязанности и нести ответственность.


Ключевые слова: амбулаторная судебно-медицинская экспертиза, дееспособность, невменяемость, умственная отсталость.

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