

Procedural guarantees of protecting minor's rights and legitimate interests within criminal proceedings in Ukraine

Процесуальні гарантії забезпечення прав і законних інтересів неповнолітніх у кримінальному провадженні в Україні

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Ключові слова:

кримінальне провадження, неповнолітні, забезпечення прав неповнолітніх, процесуальні гарантії, специфіка досудового розслідування.

Problem's setting. Recently there is a growth of juvenile delinquency, caused by difficult socio-economic conditions that accompany the modern period of the state's development. The issue of improving criminal proceedings under these conditions becomes very important. The maximum protection of the rights and legitimate interests of minors, who are within the scope of criminal procedural law, should be guaranteed.

The current Criminal Procedural Code of Ukraine defines the procedure for holding a person liable for commission of a criminal offense, and assigns additional procedural guarantees concerning the peculiarities of criminal proceedings in regard to minors. The need for providing additional rights and guarantees for minors is due to the fact that these persons are the most vulnerable category of people involved in criminal proceedings, because they alone can not fully protect their interests and use all the rights granted to them by the law as the result of their physical, mental and psychological development. According to this reason the cases in regard to minors are allocated in a separate proceeding with established additional procedural guarantees to protect their personal rights.

State of the problem's research. Scientific papers of scholars in the field of criminal procedure and criminalistics were devoted to some issues of criminal proceedings involving minors within legal literature. Among them there are Yu.V. Aleksandrov, R.S. Bielkin, V.M. Burdin, A.Ye. Holubov, V.L. Hrokholskyi, Yu.M. Hroshevoi, V.P. Yemelianov, V.A. Zhuravel, O.V. Kaplina, V.O. Konovalova, Ye.D. Lukianchikov, K.B. Melnykova, D.P. Pysmennyi, N.V. Pavliuk, V.V. Tyshchenko, V.V. Romaniuk, V.Yu. Shepitko, N.V. Shost and others. Despite the large number of scientific works of these and other scholars in this field and considering the complexity of the studied problem, it should be noted that most of them were published before the significant amendments in the criminal procedural legislation of Ukraine, and therefore do not fully reflect the specifics of the pre-trial investigation of crimes committed by minors under modern conditions.

Thus, **the objective of the article** is to determine and ground the list of procedural guarantees of the minors' rights within criminal proceedings of Ukraine based on the analysis of the norms of criminal procedural legislation of Ukraine and research papers. Address to this issue is dictated by the desire to show the specificity of the pre-trial investigation of these crimes in terms of the current criminal procedural legislation.

Main part. The problem of guaranteeing the rights and legitimate interests of minors is always in the spotlight of both the state authorities of Ukraine and scholars. Therefore, the Decree of the Cabinet of Ministers of Ukraine No. 1039-r dated from October 12, 2011 approved an action plan to implement the Concept of development of criminal justice in Ukraine, which stipulates the execution of specific actions on improving the prevention of juvenile delinquency system from 2011 to 2016, implementation of innovative methods and forms of work with children predisposed to commit offenses¹.

¹ On the approval of the action plan to implement the Concept of the development of criminal justice for juveniles : the Cabinet of Ministers of Ukraine dated from October 12, 2011 No. 1039-r / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : <http://zakon3.rada.gov.ua/laws/show/1039-2011-%D1%80>.

According to the current legislation of Ukraine the criminal proceedings in regard to minors is carried out in general manner considering the specifications under the Chapter 38 of the Criminal Procedural Code of Ukraine², and in compliance with the principle of ensuring the implementation by the minors of the right to use the additional guarantees established by domestic law and international treaties ratified by Verkhovna Rada of Ukraine, in particular the UN Convention on the Rights of the Child dated from November 20, 1989³, UN Standard Minimum Rules for the Administration of Juvenile Justice dated from November 29, 1985 ("The Beijing Rules")⁴, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950⁵, and other international and legal instruments on human rights and justice, which target the pre-trial investigation agencies, the prosecutor and the court to take into account the features of juvenile proceedings, including considering the practice of European Court on Human Rights. It should be noted if the norms of criminal procedural law are in conflict with international treaties, we have to implement the provisions of the relevant treaty according to p. 4, the Art. 9 of the Criminal Procedural Code of Ukraine⁶.

Special procedure of the criminal proceedings in regard to minors is primarily provided by the features of the subject of criminal offenses. The physical, mental and psychological development of minors is caused by instability of the character, the immaturity of thinking, tendency to imitate the behavior of older adults and other similar features, as well as the inability to fully protect own rights and legitimate interests.

Considering the above stated, the Criminal Procedural Code of Ukraine stipulates procedural guarantees of minors' rights within criminal proceedings, in particular:

- special procedure for criminal proceedings in respect of minors is enshrined;
- the list of circumstances to be proved is expanded;
- it is defined that detention of a minor and his arrest is permitted only in exceptional cases;
- features of the proceedings involving a minor, the procedure of using compulsory measures of educational nature are clearly regulated;
- the possibility to close criminal proceedings for the crime of small and medium gravity committed by a minor by concluding plea bargain and conciliation agreements is allowed;
- compulsory participation in the trial by the representatives of services for children and preventive activities;
- addressing by the court of additional issues while the judgment in a case concerning a minor (on the possibility to replace the punishment of imprisonment by the other penalties, not related to imprisonment).

To ensure the fulfillment of the tasks of criminal proceedings in regard to minors the Criminal Procedural Code of Ukraine stipulates the need for pre-trial investigation by an investigator, who is authorized by the head of the pre-trial investigation to carry out proceedings in regard to minors, that is specialized in this category of proceedings. According to the Art. 494 of the Criminal Procedural Code of Ukraine, if a minor is suspected of a criminal offense together with an adult, there should be the possibility to separate criminal proceedings in regard to a minor during the pre-trial investigation.

The current criminal procedural legislation, to carry out the criminal proceedings related to crimes committed by minors, stipulates a specific object of evidence. Thus, we should clarify, besides the circumstances provided by the Art. 91 of the Criminal Procedural Code of Ukraine within the criminal proceedings in regard to minors:

- 1) complete and comprehensive information on the identity of a minor: his age (day, month and year of birth), health and level of development, other social and psychological features of a person, which have to be considered while choosing an individualization of responsibility or educational measures. Having the data on mental retardation of a minor not related to mental illness we must also clarify whether he

² Criminal Procedural Code of Ukraine dated from April 13, 2012 No. 4651-VI / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : <http://zakon2.rada.gov.ua/laws/show/4651-17>.

³ Convention on the Rights of the Child dated from November 20, 1989 (amended edition, approved by the UN General Assembly Resolution 50/155 dated from December 21, 1995) / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : http://zakon2.rada.gov.ua/laws/show/995_021.

⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice dated from November 29, 1985 / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : http://zakon.rada.gov.ua/go/995_211.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms dated from November 4, 1950 / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : http://zakon0.rada.gov.ua/laws/show/995_004.

⁶ Criminal Procedural Code of Ukraine dated from April 13, 2012 No. 4651-VI / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : <http://zakon2.rada.gov.ua/laws/show/4651-17>.

- could fully realize the significance of the actions and to what extent he could manage them;
- 2) attitude of a minor to committed act;
- 3) the living conditions and upbringing of a minor;
- 4) the existence of adult instigators and other accomplices of a criminal offense (the Art. 485 of the Criminal Procedural Code of Ukraine).

It is also important to note that the prosecutor, the investigating judge, the judge involved in proceedings in regard to minors should have the necessary knowledge of such proceedings so that, to accomplish proceedings as an investigator, in a manner that at least breaks the normal way of life of a minor and consistent with his age and psychological characteristics, as well as to take all possible measures aimed at avoiding negative effects on a minor, including:

- making an order for separate detention in pre-trial detention institutions for juveniles suspect (accused) and adults and other participants of a criminal offense⁷;
- ruling (decision) on guaranteeing the safety of a juvenile suspect (accused)⁸;
- protecting minors from the negative influence on him by others in the course of the simultaneous interrogation of two or more persons previously interrogated by the investigator to determine the causes of discrepancies in their testimonies (p. 9, the Art. 224 of the Criminal Procedural Code of Ukraine);
- ensuring the participation of a legal representative, teacher or psychologist of a juvenile suspect or accused in the interrogation, and if necessary – a doctor (the Art. 491 of the Criminal Procedural Code of Ukraine).

In criminal proceedings in regard to persons suspected or accused of committing a criminal offense under the age of 18, the participation of a defense attorney is mandatory since establishing the fact of minor status or having any doubts that the person is an adult (c. 1, p. 2, the Art. 52 of the Criminal Procedural Code of Ukraine). It should be noted that, according to p. 7, the Art. 14 of the Law of Ukraine “On Free Legal Aid” dated from June 2, 2011 juvenile suspects, accused persons are subjects to the right to free legal aid⁹. Thus, on the basis of the Provisions approved by the Order of the Ministry of Justice of Ukraine dated from July 2, 2012 No. 967/5 the Centers of free secondary care have started to operate at the regional level from January 1, 2013¹⁰.

Among other legal services provided by such centers – are guaranteeing the participation of a lawyer during the pre-trial investigation and hearing criminal proceedings in the court in cases, when the participation of a defense attorney is mandatory under the provisions of the Criminal Procedural Code of Ukraine, and if the suspect, accused can not afford a defense attorney due to the lack of funds or other subjective reasons.

Therefore, if a defense attorney has not been involved (invited) for the protection of minors, then in accordance with Parts 2 and 3 of the Art. 49 of the Criminal Procedural Code of Ukraine, the investigator, prosecutor makes a decision, and the investigating judge or the court makes a ruling authorizing the Centre on free secondary legal aid to appoint a lawyer to make protection as intended and to ensure his arrival in the time and place specified in the decision (ruling) for participation in the criminal proceedings. The decision (ruling) on appointing a lawyer is mandatory for immediate execution.

Taking into account the specifics of minors’ liability, the law provides additional guarantees for establishing the truth, the protection of the rights and legitimate interests of minors, namely: first, in criminal proceedings involving a juvenile suspect or accused his parents or other legal representatives (the Art. 488 of the Criminal Procedural Code of Ukraine) necessarily take part. Second, besides the precautions, we can use the transferring under the supervision of parents, guardians or caregivers in regard to juvenile suspects or accused under the Art. 176 of the Criminal Procedural Code of Ukraine; as for minors brought up in a children’s institution we can use the transferring them under the supervision of the administration of this institution (the Art. 493 of the

⁷ On Pre-Trial Detention : the Law of Ukraine dated from June 30, 1993 No. 3352-XII / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : <http://zakon2.rada.gov.ua/laws/show/3352-12>.

⁸ On ensuring safety for persons involved in criminal proceedings : the Law of Ukraine dated from December 23, 1993 No. 3782-XII / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : <http://zakon4.rada.gov.ua/laws/show/3782-12>.

⁹ On free legal aid : the Law of Ukraine dated from June 2, 2011 No. 3460-VI / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : <http://zakon2.rada.gov.ua/laws/show/3460-17>.

¹⁰ On approval of the Provisions about centers of free secondary legal aid : the Order of Ministry of Justice of Ukraine dated from July 2, 2012 No. 967/5 / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : <http://zakon0.rada.gov.ua/laws/show/z1091-12>.

Criminal Procedural Code of Ukraine). Besides, the Criminal Procedural Code of Ukraine stipulates special reason for closure of criminal proceedings by the court – in connection with the use of compulsory measures of educational nature provided by p. 2, Art. 105 of the Criminal Code of Ukraine (c. 1, p. 2, Art. 284 of the Criminal Procedural Code of Ukraine).

Thus, in accordance with the Article 497 of the Criminal Procedural Code of Ukraine if the prosecutor concludes on the opportunity to correct a minor, who committed a criminal offense or a petty offense or careless crime of medium gravity for the first time, without using criminal punishment, he makes a move for the application of compulsory measures of educational nature for a minor and sends it to the court (the Art. 497 of the Criminal Procedural Code of Ukraine)¹¹.

Such a move can be compiled and sent to the court only if a minor and his legal representative have nothing against this.

During the trial the court having the grounds under the p. 1, the Art.497 of the Criminal Procedural Code of Ukraine, may take a positive decision and satisfy the prosecutor's move to appoint compulsory measures of educational nature for a juvenile accused.

It should be noted that the Criminal Procedural Code of Ukraine does not prohibit to enter both into conciliation agreements and plea bargain within criminal proceedings in regard to minors. However, it is unacceptable in any form to force the conclusion of agreements by juvenile suspects (accused) and the victims, their awareness of the consequences of such actions provided by the law, namely the obligation to reimburse material damage, limiting the rights to appeal the sentences.

The Supreme Specialized Court of Ukraine for Civil and Criminal Cases stressed in its newsletter "On Some Issues of Implementing Criminal Proceedings on the Basis of Agreements" dated from November 15, 2012 No. 223-1679/0/4-12 that the agreement, where a minor is a party, can be concluded with the participation of his legal representatives and defense attorneys¹². However, if the minor has reached the age of sixteen, he has the right to conclude the settlement agreement himself, but with the consent of his legal representative. If the minor has not reached the age of sixteen the settlement agreement is concluded by his legal representative with his consent. The settlement agreement within mentioned cases should mandatory contain the consent of the minor, his legal representative. The prosecutor should use the same approach, when the plea bargain is concluded with the juvenile suspect, accused.

Summarizing everything stated above, we can conclude that the existence of procedural guarantees of minors' rights within criminal proceedings stipulates the necessity of their compliance not only to prevent their criminal activity, but also to establish the true role of each subject in the commission of a criminal offense and a correct assessment of its actions, and therefore their fair solution, thus ensuring adequate legal protection of minors.

Summary

The author of the article has analyzed the legal regulation of criminal proceedings in regard to minors in Ukraine. The author has grounded the necessity of a special procedure for criminal proceedings in regard to minors due to the peculiarities of the subject of a criminal offense. Based on the analysis of criminal procedural legislation of Ukraine and research the author has determined a list of procedural guarantees of minors' rights within criminal proceedings.

¹¹ Criminal Procedural Code of Ukraine dated from April 13, 2012 No. 4651-VI / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : <http://zakon2.rada.gov.ua/laws/show/4651-17>.

¹² On some issues of executing criminal proceedings on the basis of agreements : the letter of the Supreme Specialized Court dated from November 15, 2012 No. 223-1679/0/4-12 / Official Web Portal of Verkhovna Rada of Ukraine [Electronic resource]. – Access mode : <http://zakon2.rada.gov.ua/laws/show/v1679740-12>.

Анотація

У статті здійснено аналіз правового регулювання кримінального провадження щодо неповнолітніх в Україні. Обґрунтовано необхідність особливого порядку кримінального провадження щодо неповнолітніх, що обумовлено особливостями суб'єкта кримінального правопорушення. На основі аналізу норм кримінального процесуального законодавства України та наукових досліджень визначено перелік процесуальних гарантій прав неповнолітніх у кримінальному провадженні.

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