

Procedural status of the minor victim in criminal proceedings in Ukraine: the main issues

Процесуальний статус неповнолітнього потерпілого в кримінальному процесі України: основні питання

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One of the fundamental functions of criminal justice is to respect the rights and interests of victims. Given the fact of implementation by Ukrainian legislator of justice reform in general and criminal justice, in particular, very relevant question that arises today to scientists, scholars and practitioners is the protection of participants rights and interests of criminal proceedings, because of their physical and psychological characteristics need not only recognition of the special status, but also effective mechanisms of representation of their interests in criminal proceedings.

The development of mechanisms of the establishment, management and observance of the rights and legitimate interests of the population is one of the indicators of well-being or ill-being of society as a whole, especially those about persons who are most in need of state protection, for example, minors who make up a quarter of the population in our country.

Ratified on February 27, 1991 the Convention on the Rights of the Child, Ukraine has undertaken a number of commitments for the protection of minors, which reflected in national legislation. The issue of youth policy declared by the Constitution of Ukraine, the Declaration "On general principles of the state youth policy in Ukraine" in the Presidential Decree "On the National Program "Children of Ukraine", "On additional measures to ensure the implementation of the National Program "Children of Ukraine" for the period until 2005". However, the need to improve legislation on the rights and interests of minors in terms of criminal justice remains topical issues, as evidenced by the level of juvenile crime, which not only does not decrease, but rather increased.

The special position of minors in criminal proceedings confirmed enshrined in law, as the CPC of Ukraine of 1960 and in the current CPC of Ukraine, procedure of criminal proceedings against juvenile offenders. Thus, minors represent a particular social group, with a special legal status that provides legal restrictions as well as the installation of additional legal remedies and legal interests of such persons, as evidenced analysis of international legal instruments addressing children's rights (Convention on the Rights of the Child, the UN Standard Minimum Rules relating to the administration of justice regarding juvenile (Beijing Rules) and the relevant articles of the Criminal Code of Ukraine and Criminal Procedure Code of Ukraine.

The rights of juvenile suspects and the accused is being actively investigated by domestic and foreign scientists, lawyers and characterized by significant achievements in this area, as opposed to issues, relating to juvenile victims as participants in criminal proceedings.

As for juvenile victims, there is the issue of improper representation of their interests in criminal proceedings at the trial stage seems quite relevant.

Regard to the provisions of the Constitution of Ukraine, the current Criminal Procedure Code of Ukraine and the Criminal Code of Ukraine and international standards in the protection of children, minors are members of the criminal process, which not only endowed with common procedural rights and obligations, special, and unique to this category of people, which in practice often simply offset other participants in criminal proceedings.

In our view, the study of the problematic aspects of the procedural status of juvenile victims, in particular on the protection and representation of participants in criminal proceedings is essential to the task of criminal proceedings, as defined in Art. 2 Criminal Procedure Code of Ukraine.

Remain unresolved and unexplored issues concerning the legal status of juvenile victims, including the implementation of their procedural rights.

Under the provisions of Article 55 of the Criminal Procedure Code of Ukraine: "victim in criminal proceedings may be an individual, to which by criminal offense caused moral, physical or property damage, as well as a legal entity, to which by criminal offense caused damage to property".

The victim plays a significant role in the pre-trial investigation and in court proceedings. Providing information from victims to persons who engaged in investigation and pre-trial proceedings and activities of the victim proved promotes of criminal offense¹.

As of today there are several issues that need urgent attention and resolution in law, including lack of adequate rights protection and proper representation of the interests of minors' victims on trial.

The Constitution of Ukraine in the art. 52 establishes: "Children are equal in their rights regardless of their origin...". It should be noted that this provision is seen as a generalized rule on the empowerment of minors special rights that meet the specifics of their participation in legal relations and reflect the characteristic features of these persons.

Article 2 of the Criminal Procedure Code of Ukraine formulated the task of the criminal proceedings as follows: "The objectives of the criminal proceedings is to protect individuals, society and the state from criminal offenses, protection of rights, freedoms and legitimate interests of the participants of criminal proceedings ... and to each party of the criminal proceedings was applied due process". It can be concluded that the criminal procedural law intended to protect the rights and interests of all participants in the criminal proceedings, including victims. In this case, the legislation giving special status of all juvenile participants in criminal proceedings, juvenile suspects and defendants (Chapter 38 of Criminal Procedure Code of Ukraine) are given as a set of specific safeguards to protect their rights and interests. Appropriate consolidation seems necessary to declare of guarantees for other juvenile participants in criminal proceedings, including victims.

In view of the foregoing it is evident that minors who are given special status, which indicates a special approach in cases concerning minors are protected only if they are in criminal proceedings have the status of a suspect or accused. At the same time the minor victim, albeit legislator recognizes special subject and endowed with additional rights (special procedure for questioning, the institute offices, etc.), but they are insufficient for the best interests of the child in criminal proceedings.

Convention on the Rights of the Child of 1989 guaranteed in Art. 3 that in all actions concerning children, whether undertaken by public or private institutions, social welfare, administrative authorities or legislative bodies, primary consideration the best interests of the child.

In addition, Art. 12 provides that States Parties shall assure to the child, capable of forming their own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity. In accordance to this goal, to child, in particular, gives the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Art. 3 of the European Convention on the implementation of children's rights since 1996 found that a child who is recognized domestic law as having sufficient understanding, when considering judicial authority concerning her vested rights, the use of which it may require: receive all relevant information; get advice and be able to express their views; be informed of the possible implications of these views and the possible consequences of any decision.

According to Art. 4 of the European Convention on the implementation of children's rights child has the right to personally or through other persons or bodies petition for appointment of a special representative dur-

¹ Кучинська О.П. Потерпілий у кримінальному процесі України : [монографія] / О.П. Кучинська, М.І. Гошовський. – К. : Юрінком Інтер, 1998. – 189 с.

ing judicial authority proceedings regarding her when domestic legislation deprives right holders of parental responsibilities from representing the child as a result of they have a conflict of interest with the child.

Art. 5 of the European Convention concerning the rights of children perpetuates granting children additional procedural rights in connection with the judicial authority affecting children, including: the right to apply for assistance from the appropriate person chosen to express their views; right to apply themselves, or through other persons or bodies about appointing a separate representative, in appropriate cases – a lawyer; the right to appoint a representative; right to exercise some or all rights of parties to such proceedings.

The above rules are international safeguards aimed to protecting a particular subject in our case, criminal procedural relations, which is a child, no matter which party to the criminal proceedings, it appears, either the accused or the victims.

All these participants, if they are minor, endowed with special rights and protection needs, which will contribute to the best interests of the child.

Under the provisions of the Guidelines Committee of Ministers on justice, child friendly, adopted by the Committee of Ministers of 17 November 2010 on the 1098-th meeting of the Ministers' Deputies the principle of the best interests of the child is required to ensure proper and fair trial involving minors.

Thus, regarding the interests of the children involved in the trial or where the trial will have an impact, it is important that the following requirements: opinions and views of children should be properly taken into account; all other rights of the child, including the right to dignity, freedom and equal treatment must be respected at all times; all relevant authorities should apply an integrated approach in order to account of all interests that may be at risk, including the psychological and physical health, legal, social and economic interests of the child. The interests of all children can participate in a trial or the case must be evaluated individually and must be found balance in order to harmonize potential conflict of interest between children².

In Part 3 of Art. 18 Law of Ukraine "On the Judicial System and Status of Judges" states that local general courts and appellate courts has specialization of the conduct of criminal proceedings for juveniles³.

In this case, the judge authorized to criminal proceedings against minors, may be elected a judge with experience judge for at least ten years' experience of the criminal proceedings in court and be with high moral and business and professional qualities, and in the absence of court judges with the necessary work experience judge, authorized to carry out the criminal proceedings against juveniles, elected from among the judges who have the most experience as a judge.

Thus, cases of this category mandated to consider the most qualified and experienced judges. Implementation of that specialization due to age features of minors, which requires strengthening their legal protection.

But it is only the criminal proceedings where the accused is a minor. Therefore, we propose to expand the content of the specialization of judges conduct of criminal proceedings including juvenile and criminal proceedings here, where participants are underage victims, therefore we can provide the international standards for the protection of children.

This event is quite justified in view of the provisions of Art. 6 of the European Convention on the exercise of the rights of children.

Implementation and compliance provided by children's rights in the proceedings is possible only when the trial will be specially trained, qualified judge, as is done in cases where the accused is a minor.

This measure feels quite justified in view of the provisions of Article 6 of the European Convention on the exercise of children's rights which stipulates that the proceedings concerning the child before making a decision judicial authority: 1) determine whether it has sufficient information to make decisions in the best interests of the child and, if necessary, obtain further information, in particular from the holders of parental responsibility; 2) if the domestic law of the child is considered as having sufficient understanding: - establishes that the child

² Кочура А.В. Историчні аспекти розвитку поняття «неповнолітній потерпілий» у кримінальному судочинстві / А.В. Кочура, О.О. Кочура // Право і безпека. – Х. : Харк. нац. ун-т внутр. справ, 2011. – № 4. – С. 11–14.

³ Про порядок здійснення підготовчого судового провадження відповідно до Кримінального процесуального кодексу України : Лист Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ від 03.10.2012 № 223-1430/0-4-12 [Електронний ресурс]. – Режим доступу : <http://zakon4.rada.gov.ua/laws/show/v1430740-12>.

has received all relevant information; - Where appropriate, consults personally child (if necessary – private) itself or through other persons or bodies, in her understanding manner if it is clearly not contrary to the best interests of the child; - enables the child to express his or her views; 3) paying due attention to the views expressed by the child.

Another guarantee of the best interests of juvenile participants in criminal proceedings in this case minor victims involved is mandatory professional representative – a lawyer who will provide expert legal assistance and ensure adequate protection of the rights and interests of the participants.

The victim in criminal proceedings could represent representative – person which in criminal proceedings has the right to be the protector. With regard to the representation of juvenile victims in criminal proceedings, according to Art. 59 CPC of Ukraine, if the victim is a minor, to participate in the legal proceedings involved with him his legal representative.

As legal representatives may be involved parents (adoptive parents), and in their absence – guardians or trustees' person other adult relatives or close family members, and representatives of care, institutions and organizations in the care or custody of the minor (p. 2, Art. 44 CPC of Ukraine).

After analyzing the rights of the victims, which are enshrined in the current CPC of Ukraine and Art. 56, it can be argued that the victim has an active role in criminal proceedings, including not only the right to be present in court, but the present evidence, give explanations, testimony or refuse they give, acquaint with the materials etc.

Where the victim is a minor, very important to him held all proceedings in view of his age, level of maturity and intellectual capacities, and also to have taken measures that would enhance understanding of the trial by a juvenile and opportunities to participate directly in it.

Given the rather complicated procedure of the trial, a large number of juveniles with normal mental development are not able to fully understand all the difficulties and all the procedural changes that take place in the courtroom.

Moreover, given the psychological and physiological characteristics of children a number of rights that they are unable to realize independently, in fact not able to provide legal representatives who do not have a sufficient level of legal knowledge.

In view of the foregoing we need provide that representation of the interests of victims by juvenile representatives that in criminal proceedings might be defenders, lawyers, it's absolutely justified measure. Children should have the right to a lawyer and qualified representation in its own name, in the proceedings. This is especially true in cases where there is or may have a conflict of interest between the child and parents or between other interested parties. Therefore, children should have access to free legal aid on the same or more lenient than adult conditions.

In this regard it's important to implement the scientific development of a comprehensive approach to modernize the legal status of juvenile victims, as members of criminal procedural relations, and improving the system of guarantees of their rights, freedoms and interests.

Summary

The paper addresses the issues of improper representation of juvenile victims and their interests in criminal proceedings at the trial stage. The victim plays a significant role in the pre-trial investigation and in court proceedings. Where the victim is a minor, very important to him held all proceedings in view of his age, level of maturity and intellectual capacities. Author proposes to provide the representation of the interests of minor victims by juvenile representatives that in criminal proceedings might be defenders, lawyers

Анотація

Статтю присвячено дослідженню особливостей представництва інтересів неповнолітніх потерпілих у кримінальному провадженні. Потерпілий відіграє значну роль як у досудовому розслідуванні, так і в судовому провадженні. Необхідним є передбачення на законодавчому рівні обов'язкового представництва потерпілої особи, яка не досягла вісімнадцяти років, представником, а саме особою, яка в кримінальному провадженні має право бути захисником-адвокатом.

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