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Some Features of the Legal Status of a Minor who Committed a Criminal Offense According to the Criminal Procedure Law of Ukraine and the Republic of Poland: Comparative Analysis

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Дана стаття присвячена дослідженню правового положення неповнолітньої особи, яка скоїла кримінальне правопорушення, за кримінальним процесуальним законодавством України та Польщі. У статті розглянуто вік, з якого наступає кримінальна відповідальність для особи за українським та польським кримінальним законодавством, а також особливості досудового та судового провадження щодо неповнолітніх у Республіці Польща.

Ключові слова: неповнолітній, досудове розслідування, судове провадження, сімейний суд, кримінальна відповідальність.

Данная статья посвящена исследованию правового положения несовершеннолетнего лица, совершившего уголовное правонарушение, в соответствии с уголовным процессуальным законодательством Украины и Польши. В статье рассмотрены возраст, с которого наступает уголовная ответственность для лица по украинскому и польскому уголовным законодательствам, а также особенности досудебного и судебного производства в отношении несовершеннолетних в Республике Польша.

Ключевые слова: несовершеннолетний, досудебное расследование, судебное производство, семейный суд, уголовная ответственность.

A juvenile, who takes part in a criminal proceeding, requires a special attention to his personality during pre-trial investigation and trial procedures. Moreover, only compliance with all the requirements of the criminal procedural law during the work with minor suspects can bring such positive results as the adoption of the most equitable judicial decision and prevent the person from committing criminal offenses in the future. The new Criminal Procedure Code of Ukraine, adopted in 2012 in Chapter 38, regulates the procedure of conducting both pre-trial investigation and trial proceedings in criminal proceedings against minors. However, current Ukrainian legislation in this area still needs to be improved, since certain issues of the legal status of a juvenile suspect remain unresolved, and some, unfortunately, even unrealized. Therefore, the study of experience of other countries, in particular, the Republic of Poland, in this area is very important.

It is worth to mention, that the criminal and criminal procedure legislation of the Republic of Poland establishes a milder attitude towards a minor who committed a criminal offense, unlike Ukrainian laws. Thus, the Criminal Code of Ukraine establishes a wider range of criminal offenses for which a minor can be prosecuted. In addition, unlike Poland in Ukraine, a minor person may be prosecuted from the age of 16, not from 17 (and the lowered age of criminal liability is 14, not 15). Unfortunately, unlike the Republic of Poland, Ukraine does not still have a system of courts that would consider criminal proceedings against minors.

At the same time, it should be noted that the proceedings concerning minors in Ukraine are more systematic and regulated than in the Republic of Poland. The Criminal Procedure Code of Ukraine directly

establishes rules for both pre-trial investigation and juvenile trial, and the Criminal Procedure Code of the Republic of Poland does not contain such provisions and refers to various legislative acts.

Keywords: *juvenile, pre-trial investigation, trial proceedings, family court, criminal liability.*

Issue. A juvenile, who takes part in a criminal proceeding, requires special attention to himself as during pre-trial investigation and trial procedures. Moreover, only compliance with all the requirements of the criminal procedural law during the work with minor suspects can bring such positive results as the adoption of the most equitable judicial decision and prevent the person from committing criminal offenses in the future. The new Criminal Procedure Code of Ukraine, adopted in 2012 in Chapter 38, regulates the procedure for conducting both pre-trial investigation and trial proceedings in criminal proceedings against minors.

Analysis of recent research and publications. The problems of legal status of the juvenile in the criminal proceedings of Ukraine were explored by many Ukrainian scientists: B. Malyarenko, O. Kochura, V. Romaniuk, O. Ukhno, A. Golubov, G. Omelyanenko, D. Pismenniy, V. Zelenetskiy and others.

Unsolved problem. However, current Ukrainian legislation in this area still needs to be improved, since certain issues of the legal status of a juvenile suspect remain unresolved, and some, unfortunately, even unrealized. Therefore, the study of the experience of foreign countries, in particular, the Republic of Poland, in this area is very important.

The purpose of the article is to analyze and compare some specifics in legal status of a juvenile in criminal proceedings in Ukraine and Poland.

The main body. Therefore, first of all, one should define the concept of a minor and start with the definition specified in international legal acts. So, Art. 1 of the United Nations Convention on the Rights of the Child stipulates that a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier [1]. Art. 11 of the United Nations Rules for the Protection of Juveniles Deprived of their liberty states that a juvenile is every person under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law [2]. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") do not determine the age limit of adulthood, however, in Art. 2.2 contains the definition of

"juvenile", according to which a juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult [3]. This international document does not directly indicate the age limits of adulthood, because according to the comment of Art. 4.1 The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behavior. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behavior and other social rights and responsibilities (such as marital status, civil majority, etc.). Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.

The Criminal Procedure Code of Ukraine defines a minor as a juvenile or child at the age from fourteen to eighteen years. And a juvenile is defined as child till fourteen years (Part 11, 12 Art. 3 Criminal Procedure Code of Ukraine) [4].

The Criminal Code of Ukraine does not contain the concept of a minor, but the 16-year age is established, as an age of criminal liability (Part 1 of Article 22 of the Criminal Code of Ukraine). However, in some cases, persons who at the time of committing a crime have reached the age of 14 can be prosecuted. An exhaustive list of crimes for which criminal liability comes from the age of 14, is established in the provisions of Part 2 of Art. 22 of the Criminal Code of Ukraine [5].

A slightly different age of criminal prosecution for minors is set out in the Criminal Code of the Republic of Poland. Art. 10 of this Law provides that responsibility comes to the person who will commit a prohibited act after reaching the age of 17 years. Also, for certain, the most serious, prohibited acts a minor may be responsible from 15

years¹, but if the circumstances of the case, as well as the level of development of the guilty person, his or her individual characteristics and life conditions cause such a necessity, and especially if the previously used educational measures were unsuccessful.

Thus, it should be noted that the establishment of the minimum age of criminal responsibility at the level of 14-16 years in Ukraine and 15-17 years in Poland is due to the fact that at this age there is the formation of a teenager as a person, the transition from childhood to adulthood. In this age, minors can already understand and assess their actions, however, they are not always critical of their actions, are prone to imitation, and may commit offenses for praising others, often unable to withstand the negative influence of their environment. In this period, teenagers are characterized by turbulent energy, emotionality, impulsiveness, and susceptibility. At this age, the desire of a person to demonstrate ones independence is seriously manifested. Taking into account all this, the criminal procedural legislation of Ukraine and the Republic of Poland establishes certain peculiarities of pre-trial and trial proceedings with minors.

Consequently, the criminal procedural law of Ukraine has special requirements for conducting criminal proceedings against juveniles (Part 2 of Art. 484 of the Criminal Procedure Code of Ukraine):

- juvenile pre-trial proceedings should be carried out by an investigator who is specifically authorized by the head of the pre-trial investigation division to conduct such pre-trial investigations;

- procedural actions during criminal proceedings should be conducted in such a way that violates the least the usual way of life of a minor (for example, a minor should, if possible, be allowed to attend an institution where he or she studies, to communicate with friends, relatives and relatives, to engage in sports etc.);

- procedural actions should be carried out in an order that corresponds to the age and psychological characteristics of minors (for example, in the course of actions it is necessary to take into account the state of health and development level, educational level and social status of a person, the

ability to perceive the circumstances of the crime, to memorize and reproduce them [6, p. 125]);

- the investigator, the prosecutor, the court should explain the essence of the procedural actions, decisions and their significance to minors, listen to the arguments of the minor in the process of making procedural decisions, which is not only a manifestation of respect and recognition of minor as an individual, but also the provision of the opportunity to exercise fundamental rights, the right for defense [7, p. 64];

- in the course of criminal proceedings, measures should be taken to avoid negative impact on the minor. These should avoid criminalizing and penalizing a child for behavior that does not cause serious damage to the development of the child or harms to others [8].

The criminal procedure law of the Republic of Poland is somehow differs from the Ukrainian one in matters concerning the regulation of the procedure for juvenile delinquency. So, according to Art. 23 of the Criminal Procedure Code of the Republic of Poland, in cases where the crime was committed by minors, with the participation of a minor in circumstances that may indicate a demoralization of a minor or a bad influence on him or her, the court will consider applying the measures provided for by the rules of procedure for minors in accordance with the Family and Guardianship Code. At present time, most criminal proceedings against juvenile offenders are considered by family courts, with the exception of the most serious crimes that can be handled by criminal courts.

Polish family courts were organized in the latter half of 1970s on the principle that all matters related to a family should be settled by one court [9, p. 86].

The juvenile proceedings are governed by several legislative acts, but the special one is the Act on Juvenile Delinquency Proceedings - *Ustawa o postępowaniu w sprawach nieletnich* (hereinafter the Act), which extends to minors in the following cases:

1) if there is a need to prevent and combat demoralization - for persons under the age of 18;

2) criminal proceedings against persons who committed crimes after 13 years but have not reached the age of 17 years;

¹ Such crimes include murder, armed robbery, assassination of the President, serious bodily injury,

the creation of a life-threatening situation, piracy, rape, taking of hostages.

3) if there is a need to use educational or corrective measures - for persons to whom these measures were applied, but no more than before reaching the age of 21 years (Art. 1).

In accordance with the Act, each person, having found out any information about a juvenile offender, has a social obligation to notify the family court or the police about this (Article 4).

According to Art. 6 of the Act, a family court may apply to a minor, including a juvenile who committed a criminal offense, the following measures:

- 1) give a warning;
- 2) make a decision on conducting a particular proceeding, in particular, to remedy the damage, to perform certain work or services for the benefit of the victim or local community, to apologize to the victim, to study or work, to take part in appropriate educational, therapeutic or educational activities, refrain from visiting specific places, to stop drinking alcohol or using other means to enter intoxicating;
- 3) establish supervision of a parent or a guardian;
- 4) establish the supervision of a youth organization or other social organization, establishment or a trustworthy person;
- 5) use the supervision of the curator;
- 6) apply to the curatorial center, as well as to a social or educational institution that has previously provided counseling on educational, medical and educational measures that may be applied to minors;
- 7) prohibit driving;
- 8) confiscate things received in connection with the commission of a criminal act;
- 9) place a minor to a youth center or to a foster family who has completed a course on the care of minors;
- 10) place a minor in a correctional institution;
- 11) apply other measures envisaged by this Act, as well as are within the competence of the family court and provided by the Family and Guardianship Code, except for the transmission to foster parents, foster care families, orphanages.

Thus, minors who have committed a criminal offense at the age of 13 to 17 years are not subject to criminal liability according to the Polish law, although proceedings concerning them are considered by the family court, but there are possibilities to use only preventive and corrective measures. An exception to this rule is the commission of minors aged 15 years of one of the

grave crimes provided in Par. 2 of Art. 10 of the Criminal Code of the Republic of Poland.

The proceedings concerning minors are sent to the family court by the police, which collect the necessary materials for trial. In cases of committing a juvenile one of the serious crimes, the collection of material rests with the prosecutor, who directs them to the family court or criminal court.

According to Art. 15 of the Act, trial for juvenile proceedings are carried out by family courts, unless otherwise specified separately. In this case, the family court, which will handle the trial, is determined according to the place of residence of the juvenile (Art. 17 of the Act).

Consideration of proceedings concerning juvenile can be provided by criminal court, and not family court, in two possible cases: 1) there are grounds for bringing a juvenile to criminal liability in accordance with Par. 2 Art. 10 of the Criminal Code of the Republic of Poland; 2) a juvenile offender committed a criminal offense at the age of 13 and up to the age of 17 years, but the proceedings were commenced after the minor reached the age of 18.

Art. 18a of the Act stipulates that minors have the right:

- 1) to defense, including the right to assistance of a defensive counsel,
- 2) to refuse to provide explanations or answers to specific questions.

These rights should be explained to the minor before the proceedings begin.

At the same time Art. 19 of the Act establishes the principles for hearing the testimony of a minor, which include, in particular: the minor should be heard in a situation close to the natural, if this possible; a minor is given full freedom of expression; during the hearing it is necessary to avoid rehearing the circumstances that have already been established beyond doubt by other evidences.

Also, these rules apply to cases of interviewing a minor by the police. However, according to Art. 32f of the Act during the interviewing of the juvenile provided by the police must be present a minor's parent or a guardians, or a defender.

At the same time, like the Ukrainian criminal procedural law, the participation of a defender in proceedings against a minor in Poland is mandatory (par. 1 Art. 79 Criminal Procedure Code of the Republic of Poland), even if his or her interests may

be represented by the parents or the guardians. Although a minor may also apply for a defense counsel in the proceedings against him or her, and then the court appoints a counsel. In addition, Art. 32c of the Law establishes certain cases of compulsory participation of a lawyer in juvenile proceedings, in particular, the first - if the interest of the minor conflict with the interests of his parents or guardians and the juvenile does not have a lawyer, the court appoints a minor defense counsel. The second is the presence of minor malformations (dumb, blind, deaf). Third, it is the presence of substantiated doubts about the mental status of a minor when there is doubt about the possibility of a minor to exercise protection, to prepare for trial. And the fourth case when a minor was placed in a juvenile shelter.

Unlike the Ukrainian criminal procedural law, the Polish criminal procedure is contains less restrictive measures than that can be applied to a minor. In particular, the placement of a minor in a juvenile shelter that is regulated by Art. 27 of the Act. Such limitation can be applied in exceptional cases where corrective measures are necessary and there are grounds to consider that a minor will be hiding from court and serving a sentence or when a juvenile person is not identified. In addition, the placement of a minor in a juvenile shelter applies in the case when a minor committed grave crime stipulated in Par. 2 of Art. 10 of the Criminal Code of the Republic of Poland. The period during which the minor may be in the juvenile shelter is 3 months before the trial begins, although this time limit may be extended by a court decision for another 3 months. In general, the period of stay of a minor in a juvenile shelter before the final decision is taken by a family court should not exceed one year. However groundless absence of a minor in the shelter for more than 3 days, as well as the stay in a psychiatric examination do not count to the period of stay in the juvenile shelter.

The placement of a minor in the shelter may be preceded by other restrictive measures, in particular, in exceptional cases, the special police department may temporarily detain a minor and place it in a special room in the police station. Such detention is possible in cases where there is a reasonable suspicion of committing a juvenile another criminal offense, as well as the grounds for believing that a minor may be hiding, destroy

evidence or the identity of a minor is not established (Art. 32g of the Act).

In the case of a juvenile being detained for committing a criminal offense, the police are required to explain to the minor his rights, to interview the juvenile, to allow him to contact his or her parents, a defense counsel.

In case of detention of a juvenile, the police must draw up a report with designation of the time, date, place and reasons for the detention of a person.

In case of detention of the juvenile his or her parents, guardians must be notified immediately. The family court is also immediately notified, but not later than in 24 hours.

In general, a juvenile detained in a children's room may stay there not more than for 48 hours in accordance with the decision of the family court (Art. 32h of the Act).

At the same time, the child may stay in the police child's room and after the ending of the 48-hour, in particular, at his or her own request, until the transfer to the appropriate institution (hospital, shelter, correctional center, etc.), but not more than for 5 days.

Conclusions. Thus, it should be noted that the criminal and criminal procedural legislation of the Republic of Poland establishes a milder attitude towards a minor who has committed a criminal offense, unlike Ukrainian laws. Thus, the Criminal Code of Ukraine establishes a wider range of criminal offenses for which a minor can be prosecuted. In addition, unlike Poland in Ukraine, a minor person may be prosecuted from 16 years of age, not from 17 years (and the lowered age of criminal liability is 14, not 15 years).

In addition, unfortunately, Ukraine still does not have a system of courts that would consider criminal proceedings against minors, although the issue of their creation was long overdue.

At the same time, it should be noted that the proceedings concerning minors in Ukraine are more systematic and regulated than in the Republic of Poland. The Criminal Procedural Code of Ukraine directly establishes rules for both pre-trial investigation and juvenile trial, and the Criminal Procedural Code of the Republic of Poland does not contain such provisions and refers to various legislative acts.

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