Problems of legal regulation of processal relations in criminal proceedings of Ukraine

Malyarchuk Nazar
PhD, Assoc. Prof
Department of Criminal Law
and Criminal Process
National Aviation University

Logvinenko Alisa
Senior lecturer
Department of Criminal Law
and Criminal Process,
National Aviation University

Abstract. *The article is intended to investigate legal regulation issues contained in the criminal procedural law on such legal institutions as, the victim, the legal representative, minor person, juvenile, jury trial etc. Proper legal support of the said legal institutes, undoubtedly ensures the protection of the rights of the subjects involved in criminal proceedings, and therefore the scientific research on relevant subjects is relevant. According to the results of the analysis, the article proposes the possible options and ways of solving these inconsistencies in legal regulation.*

Keywords: *court, victim, minor person, juvenile, legal representative, jury trial, judicial decision.*

Problem statement

Objects that come under the protection of criminal offenses with the help of criminal procedural rules are: individual, society and state.

The objects of protection are the rights, freedoms and legal interests of participants of criminal proceedings. Under this protection should be understood as the necessary conditions for using of the rights, freedoms and legitimate interests satisfaction, their integrity and inviolability with a clear resolution of criminal procedural relations and the adoption of legal action to prevent violations of the rights of participants in criminal proceedings [Bandurka O.M., 2013, p. 567-571]. So incase presence disadvantages in legal regulation of criminal procedural relations it directly affects to the quality and level of protection the rights, freedoms and legitimate interests of satisfaction, as discussed above. Under such conditions, consider some problems of legal regulation in the Criminal Procedure Code of Ukraine (hereinafter - the Code of Ukraine), and offer possible ways to correct them.

Analysis of latest research where the solution of the problem was initiated. The analysis of scientific publications of recent years shows that the legal regulation of legal proceedings in the criminal proceedings in Ukraine considered the works of A. Voynarovycha S. Ivanytskiy, V. Kantsira, Y. Lysyuka, V. Nora, M. Olashin, I. Slovenskaya,

A. Solodkova, V. Tertyshnikova, V. Shishkina, O. Yanovskaya and others, who made a significant contribution to the development of this problem. However, there are many issues that need to be resolved or additional substantiation, in particular: the legal status of the subjects of criminal proceedings, whether the functioning of the jury institution in Ukraine in the present legislative framework is feasible or justifiable; what requirements should be met by so-called non-professional judges, etc.

Aims of paper. The purpose of this article is to research the problems of legal regulation which contained in the criminal procedural law according to such legal institutions as a victim, a minor, a juvenile, the institute of the jurors in Ukraine and the ways of their solution.

Exposition of main material of research with complete substantiation of obtained scientific results. Before we start it is necessary to remind some of the theoretical foundations that had studied by the students of legal institute's of higher educational institutions of our country. What does it means the legal status of a person? The theory of law gives to as such definition of that, it is the system of fixed legal acts and state-guaranteed rights, freedoms, duties, responsibilities, according to which the individual person as a subject of law coordinates his/her behavior in society [Skakun O.F., 2001, p. 377]. According to this definition, we can determine the following elements that develop the legal status of the person: it has rights, freedoms, duties, responsibilities [Skakun O.F., 2001, p. 380-381]. Legal literature also distinguishes the following types of legal status of a person, as general, special and individual. Finally, it should be explained why it was necessary for a brief digression on the theory of law.

The p. 6 of the art. 55 Criminal Procedure Code of Ukraine, fixed that in case of death of a person which caused by a criminal offense or if the health condition of a person makes it impossible to submit with the application form, the close relatives or family members of such person according to position of p. 1-3 have a right to do that [Kryminalnyi protsesualnyi kodeks vid 13.04.2012 r]. According to the art. 55 CPC of Ukraine victims in this way could be one of the native from among close relatives or family members who applied for her/his involvement in the proceedings as the victim. The question is how the close relatives or family members can get a victim status if p. 1 of the art. 55 CPC of Ukraine fixed that victim in criminal proceedings could be a person to whom caused by a criminal offense moral, physical or property damage. In this case we believe that the victim could be only an individual person that caused by a criminal offense moral, physical or property damage, but the relatives couldn't took such legal status [Malyarchuk N.V., 2012, p. 405-407].

In this case, it is advisable to give the status of legal representatives to the close relatives of the victim and provide for them specific rights and obligations by amending the art. 59 CPC of Ukraine.

Unfortunately the Criminal Procedure Code of Ukraine requires and other changes, corrections and improvements.

Next that would be interesting to discuss is the problems of legal regulation of a juvenile or a minor person in criminal proceedings.

The Criminal Procedure Code of Ukraine (hereinafter – CPC) in article 3 gives the definition of "minor person" in this context: minor – minor person and juvenile at the age of fourteen to eighteen.

It should be noted that entry to minor person civil capacity of the full 18 years in accordance with article 34, 35 of the Civil Code of Ukraine isn't a reason to refuse the application of art. 226 CPC.

It should be said that under the law of interrogation juvenile or a minor person performed necessarily involving a teachers, a psychologists, and if necessary the doctor. The corresponding obligation provided for in Article 226 of the CPC which noted that interrogation of juvenile or the minor person is performed in the presence of a legal representative, a teacher or psychologist if necessary – a doctor. CPC establish interrogation time limits of juvenile or a minor person. It can not continue without a break for more than one hour, and the average – more than two hours a day. Persons under the age of sixteen explained the duty of the necessity of giving truthful testimony, without notice of criminal liability for refusal to testify and for knowingly false testimony.

It should also be noted that the CPC provides for the obligation of participation above mentioned persons in pretrial (investigation) activities involving juvenile or

minors persons. Thus, in accordance with the article 227 of the CPC during the pretrial (investigation) activities involving juvenile or minors persons ensured necessarily involving of the legal representative, a teacher or a psychologist and if necessary – a doctor. Investigator is also explained to them their right for permission to ask clarifying questions to juvenile or minor person.

In exceptional cases where the participation of the legal representative can undercut the interests of the juvenile or minor person witness, investigator, prosecutor at the request of the juvenile or minor person or of its own motion has the right to restrict the participation of a legal representative in the performance of certain pretrial (investigation) activities or remove him from participation in criminal proceedings and involve the replacement of another legal representative.

We think that in p. 3. art. 227 CPC use the phrase "exceptional cases" is not sufficiently defined and estimated a character that can complicate the acceptance of the decision which should be taken in a particular case. It also should be noted that the arguable reasons for the right of a juvenile or a minor person for petition to the investigator or prosecutor about the initiation of the issue of limiting the legal representative pretrial activities or the existence of grounds for removal legal representative and his replacement by another in criminal proceedings. We also should understand that a juvenile or the minor persons in the case of their physical development may perceive reality in bad way or mistakenly perceive it. So it seems that the last appeal with the general request is unnecessary and the right to eliminate legal representative or replacing left only in the hands of the investigator or prosecutor who independently decides is there a particular case exceptional. It is also possible to predict elicit a psychologist and / or doctor for their intellectual development opportunities in the context to understand in the right way their surroundings by the juvenile or a minor person, which can minimize unfounded circumstances of this appeal and did not complicated the work of the investigator. Such procedure could also help establish which particular case exceptional.

We also should pay attention to the article 491 CPC on the participation of a legal representative, teacher, psychologist or doctor in the interrogation of a minor suspect or accused. In the first part if the art. 491 CPC provides that a minor who hasn't reached the age of sixteen or if the minor acknowledged mentally retarded, his interrogation by the decision of the investigator, prosecutor, investigator judge, court or at the request of the defender ensured participation of a legal representative, a teacher or a psychologist, and if necessary – doctor. The position of the legislators in our opinion is confusing and not consistent because when interrogation a juvenile or a minor person in criminal proceedings under the art. 226 CPC established duty to involve legal representative, teacher or psychologist and only provides the right to chose about participation of a doctor. The art. 226 CPC used during interrogation regardless of the procedural status of a juvenile or a minor person and their ages. Under these circumstances is unclear establishing in the art. 491 CPC age limit for a minor to involve a teacher, psychologist or physician moreover on the initiative of the investigator, prosecutor, investigator judge, court or at the request of the defender the suspect or accused. Especially inconsistency is that the part 2 of the article 226 CPC shall be carried out in any case, so why doesn't other parts of the article 226 CPC aren't obligatory for use. Even more that the that the name of the article 226 CPC contains the term "specifics" interrogation of a juvenile or a minor person, and the article 491 CPC refers to Chapter 38, paragraph 1, entitled "General rules for criminal proceedings against minors".

As a conclusion, which based on the analyzed articles of CPC they at least had to be coordinated and foresight in part 1 of the art. 491 age for a minor person is unreasonable because the art. 226 CPC didn't say about at all.

Another important problem that exists in the criminal procedural legislation of Ukraine is functioning jury.

The Criminal Procedural Code of Ukraine clearly defines criminal proceedings, which are considered by a jury trial in a court of first instance. These are proceedings about criminal offenses which provides for life imprisonment. At the same time, a jury trial consisting of two professional judges and three jurors shall be conducted exclusively in the event that a defendant's application was received during

the preparatory court hearing. Otherwise, the proceedings in general procedure trial will be considered collective by three judges. Criminal proceedings concerning several accused are tried by jury on all defendants, if at least one of them said the request for a review.

V. Fedorov writes that the introduction of the jury institute in modern realities is no more than the desire of the authorities to demonstrate the aspirations of European ideals of justice and human rights [Fedorov D]. The position of the author is not without the truth, as a jury in today's format can't be considered effective, because it has no clear regulation. In addition, there are a number of shortcomings that need to be resolved in order to provide the jury with an effective litigation.

According to V.S. Kantsir in Ukraine the situation on the real implementation of the jury wants the best, because the protection of the rights and legitimate interests of individuals in a legal state is impossible without a clear organization and functioning of the judiciary [Kantsir V.S., 2003, p. 263-266].

Unlike other countries, Ukraine claims to the jury is a bit formal because the jury could become a citizen of Ukraine who has attained the age of thirty and resident in the territory under the jurisdiction of the respective district court. It determines a well-defined list of circumstances that make it impossible for a citizen to participate: recognition by a court of a limited capacity or incapacitated; unwithdrawn or outstanding criminal record; presence of chronic mental or other diseases that interfere with performance juror; persons for which the administrative penalty for committing a corruption offense was imposed during the last year; achievement of sixty five years; persons who do not speak the state language. In addition, the jury couldn't be deputies of Ukraine, members of the Cabinet of Ministers of Ukraine, judges, prosecutors, law enforcement authorities (local police), military, court staff, other government officials, officials of local self governments, lawyers, notaries, members of the High Qualification Commission of Judges of Ukraine, High Council of Justice [Pro sudoustrii i status suddiv: Zakon Ukrainy vid 02.06.2016 r].

It is important that legal education is not required in order to become a jury. So we think that is the one most important factor why in Ukraine this system doesn't operate in full. Accordingly as a result, justice is exercised by a person who isn't oriented in law at all. At the same time, it has to be noted that the legislation of foreign states also has no restrictions on this. In such circumstances, in order for the jury to be able to take part in the consideration of the case and to solve the tasks assigned to it, he/she should at least be trained in law. However, in practice for some reason, such a mechanism is not used. That is why there is a greater tendency among jurors to make decisions based on emotions, and not on the law.

A similar position is expressed by V.M. Tertyshnyk who believes that offering people ignorant of law to judge purely on legal problems - in fact, discredit the idea jury [Tertyshnyk V.M., Solnyshkina N.S., 2012, p. 221-224]. In this case, it would be appropriate to recall the verdict of the Lychakivsky District Court of Lviv dated March 4, 2014, according to which the trial of the jury of the defendant citizen O. was acquitted in the commission of a deliberate murder of hooligan motives (Clause 7, Part 2, Article 115 of the Criminal Code of Ukraine) [Vyrok Lychakivskoho raionnoho sudu m. Lvov vid 4 bereznia 2014 r.]. At the same time, citizen O. found the jury only innocent, while two professional judges wrote separate opinions, in which they expressed their disagreement with the verdict of unprofessional colleagues. However, the verdict of the panel of judges of the judicial chamber in criminal cases of the Court of Appeal of the Lviv region of July 24, 2014 citizen O. was found guilty of the accusation under item 7 part 2 of the art. 115 of the Criminal Code of Ukraine and sentenced in the form of fifteen years of imprisonment.

The court's decision was motivated by the fact that the jury had "given faith only to the indictment of the accused" and did not take into account the witnesses' testimony and a number of contradictions in O.'s displays, which the latter constantly changed. In addition, when judging the judgment, the court made significant violations of the criminal procedural law (jurors, both the main and the emergency ones, during the break for a meeting in the meeting of judges communicated among themselves) [Vyrok kolehii suddiv sudovoi palaty u kryminalnykh spravakh Apeliatsiinoho sudu Lvivskoi oblasti vid 24 lypnia 2014 r.]. So the jury did not act in a professional and objective way, deciding

the acquittal, and, apparently, was guided by emotions.

However, the price of such a mistake is extremely high, since it affects the fate of people.

There is no unanimity regarding the optimal jury: the number of jury members varies in France (the court of first instance is 6, the appellate instance is 9), Austria, Germany 2; Italy - 6; Greece - 5. As a result of a study conducted at the University of Glasgow, it was concluded that 12 jurors reduce the effectiveness of the trial and, better, seven of them.

O. Yanovska notes that the reduction of the jury to only a few individuals significantly reduces the effectiveness of the jury and can not ensure the full participation of the citizen in the course of justice [Yanovska O.H., 2011, p. 137].

It is clear that Ukraine can hardly afford jury up to 12 people, but increase the number of jurors in the jury likely bring positive changes.

The next problem that we have to deal with is the social protection of the jury, which is at a rather very low level. So, first of all, we have to consider the mechanism of compensation, as funding for the maintenance of the institution requires considerable resources. At the same time, the Law of Ukraine "On the Judicial System and Status of Judges" of June 2, 2016 in Part 1 of the art. 68 fixed that the jury would have reimburse travel and accommodation expenses, as well as paid per day. However, according to the jury itself, the amount of compensation is several tens of hryvnias. Therefore, it is obvious that the budget program for the administration of justice by the territorial departments of the State Judicial Administration of Ukraine does not take into account all expenses that may be incurred by the jury in connection with the consideration of the case.

Direct participation of the people in the administration of justice is widely recognized as one of the hallmarks of the rule of law and is an important component of the development of a full-fledged civil society in Ukraine. In the current format, the Institute of Jurors in Ukraine has no clear regulation and is still formal, and its normative consolidation only creates the illusion of a developed mechanism for its functioning, therefore the introduction of a system of jury trials in Ukraine needs further elaboration.

Conclusion

Consequently, the described legal institutions, existing in the criminal procedural law, require further improvement not only by making appropriate amendments and additions to the legislation, but also for the full and objective implementation of these provisions in practice.

References:

1. Vyrok kolehii suddiv sudovoi palaty u kryminalnykh spravakh Apeliatsiinoho sudu Lvivskoi oblasti vid 24 lypnia 2014 r. Sprava № 1-kp/463/4/14. [Elektronnyi resurs]. – Rezhym dostupu: http://www.reyestr.court.gov.ua/Review/39879760.
2. Vyrok Lychakivskoho raionnoho sudu m. Lvova vid 4 bereznia 2014 r. Sprava № 1-kp/463/4/14. [Elektronnyi resurs]. – Rezhym dostupu: http://reyestr.court.gov.ua/Review/37461777.
3. Kantsir V.S. Problemy zaprovadzhennia sudu prysiazhnykh u natsionalnu systemu pravosuddia / V.S. Kantsir // Visnyk Khmelnytskoho instytutu rehionalnoho upravlinnia ta prava. – 2003. – № 3-4. – S. 263-266.
4. Kryminalnyi protsesualnyi kodeks vid 13.04.2012 r. № 4651-VI // Vidomosti Verkhovnoi Rady Ukrainy. – 2013. – № 9-10. – St. 88.
5. Kryminalnyi protsesualnyi kodeks Ukrainy. Naukovo-praktychnyi komentar: u 2 t.T.1 / [O.M. Bandurka, Ye.M. Blazhivskyi, S.P. Burdol ta in.]; redkol.: V.Ia. Tatsii, O.V. Kaplina, O.H. Shylo. – Kh.: Pravo, 2013. –768 s.
6. Malyarchuk N.V. Zakonnyi predstavnyk poterpiloho v kryminalnomu provadzhenni Ukrainy / N.V. Malyarchuk // Aktualni problemy kryminalnoho prava, protsesu ta kryminalistyky : materialy IV mizhnarodnoi naukovo-praktychnoi konferentsii, prysviachenoi 95-richchiu z dnia narodzhennia profesora M.V. Saltevskoho (m. Odesa, 2 lystopada 2012 roku). – Odesa : Feniks 2012. – S. 405-407.

7. Pro sudoustrii i status suddiv: Zakon Ukrainy vid 02.06.2016 r. № 1402-VIII (redaktsiia vid 15.12.2017 r.). [Elektronnyi resurs]. – Rezhym dostupu: http://zakon2.rada.gov.ua/laws/show/1402-19.
8. Skakun O.F. Teoriia derzhavy i prava : pidruchnyk / Per. z ros. / O.F. Skakun. – Kharkiv : Konsum, 2001. – 656 s.
9. Tertyshnyk V.M. Sud prysiazhnykh: sut idei ta yii mimikriia pry formuvanni kryminalnoho sudochynstva Ukrainy / V.M. Tertyshnyk, N.S. Solnyshkina // Pravo i suspilstvo. – 2012. – № 3. – S.221-224.
10. Fedorov D. Sud prisyazhnyih v Ukraine: strannyiy gibrid sovetskogo i evropeyskogo pravosudiya / D. Fedorov. [Elektronnyiy resurs]. – Rezhim dostupa: http://1k.com.ua/485/details/3/20.
11. Yanovska O.H. Kontseptualni zasady funktsionuvannia i rozvytku zmahalnoho kryminalnoho sudochynstva: monohrafiia / O.H. Yanovska. – K. : Pretsedent, 2011. – 303 s.