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Legal Regulation of Defence Lawyer's Involvement in Criminal Proceedings Against Minors: Genesis of the Issue, Stages of Development

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Abstract

The relevance of the study is conditioned by the need to establish the genesis of legal regulation of the defence lawyer's involvement in criminal proceedings against minors, to identify correlations of this process with the regulation of legal activity in Ukraine. The purpose of the study is to investigate the history of legal regulation of the involvement of a defence lawyer in criminal proceedings against minors. The study used a set of scientific methods: historical, historiographic, terminological, system-structural, formal-logical, and comparative-legal. It was established that the origin of the institute of protection of the parties in legal proceedings begins in the times of Kyivan Rus with the established practice of speeches in court by "good people" who represented the plaintiff and the defendant. It was proved that the development of the institute of protection of minors in court took place in parallel and in close connection with the development of judicial representation and sureties. Based on the analysis of international acts in the field of criminal justice against children ratified by Ukraine, the need to introduce juvenile specialisation of defenders was indicated. Stages of development of legal regulation of the defender's involvement in criminal proceedings against minors: stage 1 – 1016–1529; stage 2 – 1529–1864; stage 3 – 1864–1917; stage 4 – 1917–1991; stage 5 – from 1991 to the present. The emergence of protection of the rights of minors in court was accompanied by the establishment of a regulatory condition for the involvement of a defender in the process on a gratuitous basis for certain categories of children. At the present stage, the law enforcement process embodies the principles and guarantees of involvement of a defender in criminal proceedings against minors, which are provided for by international treaties in the field of protection of children's rights ratified by Ukraine. The proposed predictive trends in the development of legal regulation of the involvement of a defender in criminal proceedings allow law enforcement agencies to plan their practical activities in the interaction with human rights organisations, take coordination measures between juvenile prevention bodies of the national police, investigators and prosecutors specialising in the investigation of juvenile delinquency, juvenile judges and lawyers for effective compliance with international standards for the protection of the rights of children in conflict with the law

Keywords:

minor; lawyer; defence lawyer; regulations; investigation of criminal offences of minors

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Introduction

The investigation of historical trends in the development of the Institute for the protection of minors in court proceedings and the identification of patterns of legislative regulation of this process are important not only for establishing the historical heritage of Ukrainian law but also for predicting the further development of juvenile justice, the involvement of lawyers in it.

Researchers have recently covered a number of issues related to improving the protection of minors in criminal proceedings.

The role of defence lawyers in reviewing court decisions on the application of a preventive measure in the form of detention in the special institutions for young people is covered by the Turkish researcher N. Kavur [1]. M. Clemente and D. Padilla-Racero considered the protection of children and the moral and ethical sphere of responsibility of minors before the law [2]. They raised the issue of the dangers of using certain judicial opportunities that affect the vulnerability of minors. R. C. Fauth and J. G. Winestone [3] covered the legal improvement of the juvenile justice system in the United States by introducing home visits by specialists to the families of juveniles who found themselves in conflict with the law. T. J. Holt, J. Cale, B. Leclerc, J. Drew disclosed the issues of legal provision of professional protection for children victims of crimes related to exploitation on the Internet [4]. J. Einbond, A. Diaz, A. Cossette, R. Scriven, S. Blaustein, M. R. Arden [5] considered the involvement of victim's defender in child trafficking cases for sexual exploitation. Legal regulation of relations in the justice system of American school police officers with other participants in the process was investigated by N. Ghavami, B. E. Thornton, S. Graham [6]. Certain regulatory problems of attracting specialists by defenders to conduct forensic medical examinations to determine the age of minors, its compliance with the child's development were disclosed by E. Sironi, S. Gitelson, S. Bozza, F. Taroni [7].

Therewith, the historical issues of the emergence of protection of minors in court proceedings, the genesis of its rulemaking, the analysis of the features of the defender's involvement in criminal proceedings against minors under martial law, which has existed in Ukraine since February 24, 2022, and forecasting the development of legal regulation of the defender's involvement in criminal proceedings against minors remain understudied.

The purpose of the study is to establish the genesis of legal regulation of the protection of the rights of a minor by a lawyer in criminal proceedings. To achieve this purpose, it is necessary to solve the following tasks: to identify the stages of development of legal regulation of the institute of protection in criminal proceedings against minors; to establish the origin of protection of the rights of minors in court proceedings, representation of their interests; to identify current trends in regulatory

support for the involvement of a defender in criminal proceedings against minors.

Literature Review

The investigation of the issues of defence lawyers' involvement in criminal proceedings against minors begins with the genesis of the development of the legislative framework for the relevant issues. At various stages of the development of the legal profession, provisions on the involvement of defence lawyers in court proceedings, their powers, and issues of the legal protection of vulnerable groups, especially minors, arose, changed, and improved.

At the monographic level of the dissertation research, a number of issues regarding criminal proceedings concerning minors and the development of the corresponding normative-legal maintenance were disclosed: the process of proving in criminal proceedings concerning minors – O. O. Levendarenko [8], M. O. Karpenko [9], N. M. Obrizan [10], H. V. Didkivska [11], O. Yu. Lan [12]; the features of the proceedings in the investigation of socially dangerous acts committed by minors who have not reached the age of criminal responsibility, – S. M. Zelen-skyi [13]; application of measures of procedural coercion to minors – S. V. Pastushenko [14] and other.

Certain aspects of the legal regulation of protection in criminal proceedings, including in criminal proceedings against minors, were considered in the dissertation research by O. M. Skriabin, who conducted a comprehensive regulatory study of the defender's activity in criminal proceedings [15], T. V. Varfolomeieva, who systematically analysed the organisational, procedural, and criminalistic problems of protecting the rights of participants in criminal proceedings by a lawyer, including minors [16]; A. B. Romaniuk, who examined the actual problems of protecting minors in criminal proceedings [17], A. M. Tytov – the principles and features of the defender's involvement in the pre-trial investigation, the legislation of Ukraine regulating the involvement of a defender in criminal proceedings from the standpoint of international standards [18], O. Yu. Khakhutsiak, who investigated the problems of legal regulation of the protection of the rights of minor accused in criminal proceedings and formulated a number of proposals for improving the current legislation and law enforcement practice [19], A. M. Biriukova, who developed recommendations for ensuring the legal right of the accused to defence in criminal proceedings and defined the requirements for legal regulation of lawyers' activities [20], T. V. Korcheva – analysed the activities of a defender in pre-trial proceedings and in the court of first instance, the features of legal regulation of the lawyer's activities-representative in criminal proceedings, and formulated practical proposals for improving the current criminal procedure legislation of Ukraine [21], R. A. Chaika, who described the involvement of the

defender in the pre-trial investigation, investigated the procedural features of the implementation of the defence in criminal cases against minors [22], Ye.I. Vybornova, who investigated the implementation of the right to defence at the stage of pre-trial investigation, identified the reasons for the unsuccessful legal regulation of the grounds and conditions for the involvement of the defender in the criminal process at the stage of pre-trial investigation [23], N.V. Borzykh – covered the activities of the defender to ensure the rights and freedoms of the suspect and accused in the criminal process, gave suggestions for improving the procedural status of the defender [24], P.V. Kuchevskiy who investigated the general provisions of the lawyer's activity in criminal proceedings, determined the specific features of lawyers' defence, representation, and provision of legal assistance to participants in the process [25], A.A. Akhundova, who examined the issues of protecting the rights of a suspect in criminal proceedings, analysed the new rules of legal relations between the defender, suspect, and pre-trial investigation bodies [26], I.V. Dubivka, who analysed the activities of a lawyer at the stage of pre-trial investigation, including the legal regulation of the defender's involvement in criminal proceedings under the legislation of foreign countries [27], O.V. Dudko, who identified and proposed a set of measures to prevent and eliminate lawyer mistakes in criminal proceedings [28], etc.

Materials and Methods

In the study, a number of general scientific and special methods were used. Using the historical method, it was possible to analyse the emergence of legal regulation of the bar on the territory of Ukraine in chronological order and legal practice for the protection of the rights of minors in court. The historiographic method provided an opportunity to comprehensively highlight the state of the development of the issue under study, the findings of researchers on the legislative regulation of the protection of the rights of minors in criminal proceedings at different times, and objectively characterise the connection between the development of the bar in Ukraine and the trends in the activities of defenders in criminal proceedings against minors. The terminological method allowed investigating the development of the concept

of "lawyer" in regulations of various historical periods. A systematic and structural method was used to provide a comprehensive scientific approach to the consideration of legal regulation of the defence lawyer's involvement in criminal proceedings against minors. The formal and logical method helped to analyse historical trends in the legal regulation of a lawyer's involvement in criminal proceedings against minors, identify modern features of this process, and predict trends in the development of Ukrainian legislation in the field of criminal justice in relation to children. To analyse the legal regulation of legal practice and the protection of the rights of minors in court on the territories of Ukraine, which at different times were part of different states, a comparative legal method was used.

To achieve the purpose of the study, a number of regulatory documents from different historical periods of the development of Ukrainian statehood were analysed: *pre-Soviet period* – Pravda Ruska, Statutes of Lithuania, "The rights under which the people of Little Russia are tried" [29], etc.; *the Soviet period* – criminal and criminal procedure codes (Criminal Code of 08/23/1922¹, Code of Criminal Procedure of 09/13/1922², Code of Criminal Procedure of 07/20/1927³), documents of the highest authorities on criminal liability of minors and the specific features of the investigation of their crimes, considering the involvement of defenders (Decree of the CPC of the Ukrainian SSR "On Commissions for Minors" of January 14, 1918; Decree of the CPC of the Ukrainian SSR of March 4, 1920 "On Cases of Minors Accused of Socially Dangerous Acts"; Decree of the CPC of the Ukrainian SSR of June 12, 1920 "On Liability of Minors", Resolution of the CEC and the CPC of the USSR of April 7, 1935 "On Measures to Combat Juvenile Delinquency") [30; 31] *period of development of independent Ukraine* – Constitution of Ukraine⁴, Criminal Code of Ukraine⁵, Criminal Procedure Code of Ukraine⁶, laws "On Bodies and Services for Children and Special Institutions for Children"⁷, "On the Bar and Legal Practice"⁸, "On Free Legal Aid"⁹, "On Preventing and Countering Domestic Violence"¹⁰, including international treaties ratified by the state: Declaration of the Rights of the Child¹¹, Convention on the Rights of the Child¹², UN Standard Minimum Rules on Juvenile Justice ("Beijing Rules")¹³, etc.

¹Criminal Code of the Ukrainian Socialist Soviet Republic. (1922, August). Retrieved from <https://textbooks.net.ua/content/view/1060/17/>.

²Criminal Procedure Code of the Ukrainian Socialist Soviet Republic. (1922, September). Retrieved from https://leksika.com.ua/10130506/legal/kriminalno-protseusualniy_kodeks_usrr_1922.

³Criminal Procedure Code of the USSR. (1927, July). Kyiv: Legal p.h. of the PCJ of the USSR, 1940. 174 p.

⁴Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

⁵Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>.

⁶Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

⁷Law of Ukraine No. 20/95-BP "On Bodies and Services for Children and Special Institutions for Children". (1995, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/20/95-%D0%B2%D1%80#Text>.

⁸Law of Ukraine No. 5076-VI "On the Bar and Legal Practice". (2012, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/5076-17#Text>.

⁹Law of Ukraine No. 3460-VI "On Free Legal Aid". (2011, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/3460-17#Text>.

¹⁰Law of Ukraine No. 2229-VIII "On Prevention and Counteraction to Domestic Violence". (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2229-19#Text>.

¹¹Declaration of the Rights of the Child. (1959, November). Retrieved from http://zakon2.rada.gov.ua/laws/show/995_384.

¹²Convention on the Rights of the Child. (1989, November). Retrieved from http://zakon1.rada.gov.ua/laws/show/995_021.

¹³United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). (n.d.). Retrieved from <https://resourcecentre.savethechildren.net/document/united-nations-standard-minimum-rules-administration-juvenile-justice-beijing-rules/>.

Results and Discussion

The analysis of regulatory documents (Ruska Pravda, Statutes of Lithuania, "The rights under which the people of Little Russia are tried", the Statute of criminal proceedings [29], criminal and criminal procedure codes of the Ukrainian SSR¹⁻³, Criminal Procedure Code of Ukraine⁴ monuments of the law of different historical periods allowed identifying separate stages in the development of legislative regulation of the institute for the protection of minors in the judicial process, the connection with the development of the legal profession in Ukraine in general.

Therewith, when investigating the stages of development of legal activity to protect the rights of minors in court proceedings, the periodisation of the development of criminal liability of minors and the investigation of their crimes was considered.

In particular, in the development of the sphere of juvenile justice, N.M. Krestovska identified the following periods: 1) the child in the legal field of traditional society – old Russian, High Middle Ages in Ukraine, Ukrainian post-medieval society (from ancient times to the middle of the 19th century); 2) the emergence of "children's" law and juvenile justice (from the second half of the 19th century to 1917); 3) the development of the Soviet system of juvenile legislation and juvenile justice (1917–1990) [32, p. 78–79]. A.O. Silkova cites her own periodisation: 1) from ancient times to 1864 – the origin of the features of criminal liability and punishment of minors; 2) the period 1864–1921 is characterised by the development of the first special norms on criminal liability of minors, their release from punishment and its serving; 3) 1922–1991 – codification of criminal law, considering changes in criminal liability of minors; 4) 1991 – the present – the development and establishment of the modern institute of criminal liability of minors [33, p. 28–29].

On the territory of Ukraine in the period of Kyivan Rus, the trial was adversarial. It was considered a dispute between the parties (plaintiff and defendant, victim and accused), which had to be decided by a judge (usually a prince). The criminal trial was no different from the civil one. A number of scientific sources note that during the time of Kyivan Rus, relatives and friends of the defendants acted in court as "lawyers" for the defence of the party and could vouch for it [34]. The same position was extended to the judicial proceedings of earlier states.

Among the ancient Romans, lawyers were initially relatives and friends of the accused, who tried to persuade the judges to decide the case in favour of the accused by their requests, sometimes by crying and pleading. Later in the Roman Republic, the defenders or *patrons* were real lawyers. In the ancient German

criminal process, there was a custom according to which the accused came to court with their friends and relatives as defenders [35, p. 72].

In the days of the origin of written systematised legislation and the rule of customary law, the function of the defender was reduced to *social assistance, not professional activity* [34].

In the time of Kyivan Rus, the issue of the administration of justice was regulated in the articles of Pravda Ruska – the oldest monument of Ukrainian law. In addition to the Pravda Ruska, a number of acts of the princes of certain lands were adopted, which developed the provisions on the judicial review of cases. The most famous acts: "Charter of St. Prince Vladimir, who baptised the Russian land, on the church courts", "Pskov Judicial Charter", "Novgorod Judicial Charter", "Sudebnik", and others.

Having studied the above-mentioned regulatory documents of the 10th–16th centuries and highlighted in them the provisions concerning the judicial resolution of legal conflicts, the gradual emergence and development of the institute of the bar in court proceedings, judicial representation and sureties as related institutes, the allocation of involvement of defenders in cases of minors were established.

In particular, in the norms of Pravda Ruska (expanded edition), considerable attention was paid to *children's rights*. A number of provisions were devoted to the protection of their civil rights and family relations. This applied to inheriting the house after the death of the father, including between children from the first and subsequent marriages. The issue of the complicity of children in an offence and bringing them to justice was addressed: "If a serf robs someone, the master should redeem him or hand him over with the one with whom he stole, but his wife and children are not responsible; but if they stole and hid with him, the master hands over them all..." [29; 35].

It is known that a considerable amount of evidence in the proceedings of that time were testimonies [36, p. 33]. The testimony of listeners and witnesses – persons who are connected with one of the parties to the process, eye-witnesses of the event that took place, and who could confirm or refute certain facts in their own words. Such witnesses were called *good people*.

Many historical documents about the court explicitly obliged "without good people, the court does not judge." For example, the Sudebnik of 1497 identified two categories of reliable witnesses: boyar children who swore an oath of the cross and ordinary Christians. In the Sudebnik of 1550, witnesses from among the "good people" were mentioned as personally free and who had not previously been brought to any responsibility by the court [35].

Then, the regulations specifically defined the circle of persons who could not be witnesses, since they

¹Criminal Code of the Ukrainian Socialist Soviet Republic. (1922, August). Retrieved from <https://textbooks.net.ua/content/view/1060/17/>.

²Criminal Procedure Code of the Ukrainian Socialist Soviet Republic. (1922, September). Retrieved from https://leksika.com.ua/10130506/legal/kriminalno-protsesualniy_kodeks_usrr_1922.

³Criminal Procedure Code of the USSR. (1927, July). Kyiv: Legal p.h. of the PCJ of the USSR, 1940. 174 p.

⁴Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

were not “good and impeccable”, namely: oath-breakers, cursed and excluded from the “Christian Assembly”, persons who did not take “holy communion and oath”, “secretly damaged the border landmarks”, “expelled from the State”, murderers, perverts, robbers, thieves, and other categories of criminals [37]. At that time, judicial representation in criminal cases was prohibited, but it was allowed in civil cases – in case of illness of one of the parties to the process. The institute of representation of the parties, including minors, in court was developed and enshrined in other historical documents. Art. 13 of Pravda Ruska (cut version), which described such a procedural action as a vault, was about the possibility of surety. The guarantor bore material and moral responsibility, along with the person for whom he vouched – the plaintiff or the defendant.

Good people who represented the side of the trial and testified to confirm its correctness were called differently in different principalities and at different times.

In the 15th century, on the lands of Kyivan Rus, the court continued to be adversarial. According to the Novgorod court charter (1471), the parties were asked before the court to hire “narrators” who tried to reconcile the plaintiff with the defendant in a pre-trial procedure. If the party did not agree to pre-trial reconciliation, a court was convened, which was attended by the plaintiff, the defendant, and the “narrators” hired by them.

The Pskov court charter (1462) noted that during the trial, representation of the parties was allowed, which was provided by “accomplices”. In particular, the interests of women, *children*, elderly people, and various categories of incapacitated persons in court were represented by “accomplices”. Yet they could not be officials or persons interested in the case.

In Article 17 of the Sudebnik of 1550, it was noted that the “mercenary” in court is a guarantor or hired representative of the plaintiff or defendant. The requirements for the “mercenary” were high. In particular, if one refused to perform their functions, the “mercenary” was deprived of the right to serve. The “mercenary” was not involved in a court battle.

After Hetman Bohdan Khmelnytskyi concluded a military alliance with the Tsar of Moscow in 1654, the influence of Moscow law, including the Sobornoe Ulozhenie (1649), intensified on the territory of Ukraine. In accordance with the Sobornoe Ulozhenie, adversarial proceedings were abolished in civil and criminal cases, judicial proceedings became inquisitorial, and criminal proceedings became investigative [35].

Therewith, the competitive process was preserved in the monument of Ukrainian law – “The rights under which the people of Little Russia are tried.” The document traces the inequality of the parties: the ruling elite had an advantage in court, and *settled* residents enjoyed greater rights than those who often moved and did not live in the area for a long time [38, p. 134]. As V.P. Didenko noted, referring to this document, “only

persons of the Christian faith, of any rank and title, *good* (*italics* – K. Yu.), who are not suspects, are *adults* (*italics* – K. Yu.) had the right to be witnesses...Persons under the age of 20 or over the age of 70 were not allowed to be witnesses” [38, p. 137].

Over time, good people who lived permanently in a certain area, whose parties (plaintiff and defendant) were invited to the trial to hear their testimony, acquired the status of “good” witnesses. Their testimony was used by the judges as the basis for making a decision on the case. Good people often acted as guarantors for the party (plaintiff or defendant) that invited them to court, so to speak, representing them in the process. They made speeches in defence of a certain person. That is, people who defended someone else’s interests, not their own, began to stand out [39].

Such judicial practice served as one of the prerequisites for the emergence of the institute of representation and protection, including of minors, in court, the emergence of a category of persons who represented a party to the process in a legal dispute.

Certain aspects of protecting the rights of the parties in the courts were contained in the Lithuanian statutes applied on the territories of Ukraine, which were part of the Grand Duchy of Lithuania and the Polish-Lithuanian Commonwealth. The documents mentioned a lawyer who spoke in court.

In the first Lithuanian statute (1529), a separate provision provided for restrictions for foreigners to act as *procurators* (lawyers) in court [38, p. 43].

The second Lithuanian statute (1566) somewhat expanded the provision of protection of defendants. It granted a person the right to use the help of the prosecutor’s office and regulated certain issues of the procedural activity of this defender. As noted by V.P. Didenko, “in Art. 13 and 31 of section 4 of the Statute mention the *commissioner in court*, who could represent the interests of the parties, i.e., it was the institute of the bar” [38, p. 55].

The third Lithuanian statute (1588) granted the prosecutor’s office the right to act in court as a representative of the party and its assistant. It also provided a *special government defender for orphans* who could not defend themselves [40, p. 16–18]. The threatened person could bring the perpetrator to court and demand *sureties* on the part of a third party, and if there was no such person, the perpetrator was subject to imprisonment until the surety for them was present. According to this regulation, a person who reached the age of 16 was brought to criminal responsibility for committing robbery with a fatal outcome or murder [38, p. 44–45, 54].

Thus, in fact, the functions of a lawyer were performed by a “procurator”, who could be a full-fledged resident of the city, well versed in written law, i.e., a professional lawyer. To enter the process, the procurator had to submit to the judge a certified document for the right to represent the interests of the party or oral confirmation of the party at the court session.

The Lithuanian statute of 1588 provided for a special government defender for *orphans*, and this defender acted on purpose without pay.

Evidently, the Lithuanian statutes (1529, 1566, and 1588) – ancient collections of European law that were in force on the territory of Ukraine during the rule of Lithuania and Poland, contained progressive norms on the activities of defence lawyers, which provided for the protection of orphans (minors). The beginning of a new stage of legal regulation of the defender's involvement in juvenile proceedings is associated with the operation of the Lithuanian statutes on the territory of Ukraine.

Analysis of the provisions of regulatory documents that were in force on the territory of Ukraine until the end of the 16th century shows that minor persons – children were not considered an independent subject of criminal law relations. Therewith, orphaned children were under the care of the state and in cases of need to protect their rights, defenders were involved in this, without payment for their work by the client.

In “The rights under which the people of Little Russia are tried” (1743), for the first time in Ukrainian law, the term “lawyer” in the sense of the defender of the rights of the party is used. [29] “A lawyer, patron, procurator, and attorney is one who in someone else’s case defends, answers, and disposes in court” (p. 1 of Art. 7, Chapter 8) [38, p. 135]. And p. 7 regulates the mandatory involvement of a defence lawyer and their responsibility for refusing to defend: the court appointed a lawyer to the *orphans* from among those who worked in this court. Such a lawyer worked in the case of a minor free of charge [38, p. 134–135]. Moreover, in “The rights ...” organisational issues of defenders’ activities are regulated in sufficient detail.

In the “The rights under which the people of Little Russia are tried”, the age from which criminal liability began was established: for men from the age of 16, for women – from the age of 13. The death penalty was not applied to minors [38, p. 80–83].

This monument of Ukrainian law preserves the institute of suretyship. Surety was applied by the court in case of threats. The perpetrator was handed over to one or two “reliable” persons living in the judicial district, who guaranteed in writing that the perpetrator would not carry out threats [38, p. 106].

The lawyer’s activities in court were also regulated. In particular, the lawyer helped the plaintiff to draw up a written claim; the prosecutor, lawyer, and attorney took part in the court session. Attorneys must be jurors, that is, they took the oath in a certain form. Judges, scribes, and officials sitting in the same court were not allowed to be attorneys. Clergymen and monks could not be attorneys in any court. In addition, the relevant restriction applied to the mentally retarded and *minors*. For widows and *orphaned minors*, the court appointed attorneys free of charge [38, p. 134–135].

In the second half of the 18th century, on the territory of Ukraine, the provision of legal assistance to residents, speeches in court by lawyers, jurors, and attorneys became more frequent. A.I. Pashuk noted that in the court documents, the following names are found: “lawyer”, “procurator”, “attorney”, and “sworn attorney” [41, p. 488–489]. In earlier sources, the rights of lawyers were also called “patron”, “narrator”, and “mercenary”. Free representation of minor orphaned children in court and protection of their rights in civil and criminal proceedings were maintained.

During the judicial reform (1864), which affected the Ukrainian lands as part of the Russian Empire, the right of the accused to defence was proclaimed and consolidated, and the Council of Jurors was established at the district courts and court chambers.

Attorneys were divided into jurors and private attorneys. The law defined the procedures for obtaining the status of a sworn attorney, requirements for applicants, the circle of persons who could not acquire the status of a sworn attorney, the number of members, powers of the Board of Attorneys, set the amount of fees, the grounds for bringing a sworn attorney to criminal responsibility.

A characteristic feature of the procedural status of a defender was the combination of the functions of law enforcement and judicial representation. According to the statute of criminal proceedings, the defence lawyer was allowed to take part in the case only during the judicial stages. One of the responsibilities of the defence counsel was to appoint court representatives on a gratuitous basis, in particular for orphans.

Lawyers (jurors and private attorneys) were united in collegiums attached to the courts, and the collegiums elected a council of jurors. Councils were created in judicial districts. On the territory of Ukraine, there were three councils of sworn attorneys: Kharkiv (since 1874), Kyiv, and Odesa (since 1904).

In 1874, Professor of the Kyiv University of St. Volodymyr O. F. Kistyakivskyi recognised the need to establish an *institute of lawyers for the poor in criminal proceedings*. “The Institute of lawyers for the poor should not be established for the sole purpose of protecting the poor during court proceedings, on the contrary, this institute should be a defence tribunal designed to guarantee the legal freedom of citizens, from the first moment when the danger of criminal proceedings arises against them” [36, p. 45].

In the criminal proceedings of Ukrainian lands, the idea of providing free legal assistance to vulnerable segments of the population continued to smoulder, among which, in particular, the category of orphaned children as minors remained.

Thus, in the second half of the 19th century, in criminal proceedings, the accused could defend themselves or with the help of a professional defender. The defenders were persons who belonged to jurors and private

attorneys. The judicial reform legally established the bar as an independent institute. Despite the rather broad rights of defence lawyers, the law did not provide for the possibility of their involvement in criminal proceedings at the stage of pre-trial investigation. Professional defenders were involved in the criminal process. The functioning of the bar was regulated in detail; lawyers actively acted in court proceedings; the institute of protecting the rights of the parties in court proceedings developed and improved. Regulations governed the involvement of a professional defender in the affairs of orphaned children on a gratuitous basis for their intended purpose.

Therefore, since 1864, a new stage has been beginning in the legal regulation of the involvement of a defender in criminal proceedings against minors. At that time, in the territories of western Ukrainian lands, the development of the institute of protection in criminal proceedings took place under the influence of Austro-Hungarian legislation. In 1873, a new Code of Criminal Procedure was approved [42], which existed with minor changes until the collapse of Austria-Hungary (1918). It, as V.P. Danevskiy notes, “provided for protection during the judicial investigation of *minors* and other persons: parents, guardians, and trustees – they were appointed a defender even against the will of these persons. The circle of persons from whom it was possible to choose defenders was also limited: only lawyers included in the lists of defenders and officials who were listed by the court” [43, p. 40–41].

The revolutionary events of 1917 affected the legal profession. By a decree “On the Court” No. 1 of November 24, 1917, the jury was abolished as a “bourgeois institution” without any replacement. Anyone who had civil rights was allowed to represent in court, that is, the bar became a free profession. In Ukraine, a new stage has begun in the development of the protection of the rights of parties in legal proceedings, including minors, representation of their interests in court – the Soviet period, which ended in 1991 – after the declaration of independence of Ukraine.

The Ukrainian Central Rada, reforming the judicial system, left the jury bar unchanged. Therewith, on January 4, 1918, the People’s Secretariat passed a resolution “On the introduction of the people’s court”, which abolished the jury and private bar, but in February 1918 the Central Council renewed the jury and private bar, which was liquidated again a year later. Thus, during the national liberation struggle of the early 20th century in Ukraine, the Institute of the bar did not develop, it underwent numerous changes and hardships.

On February 14, 1919, the Provisional Regulations on the People’s Courts and Revolutionary Tribunals of the USSR established collegiums of *human rights defenders*, their members were elected in counties by

executive committees from among citizens who met the conditions set for voters and in cities – by city councils.

At that time, the Council of People’s Commissars (hereinafter – CPC) of the USSR adopted a number of regulations relating to the criminal liability of minors. Thus, the decree of the CPC “On the Commission for Minors” of January 14, 1918, established that minors were persons under 17 years of age. The following year, the age of bringing minors to criminal responsibility was changed. According to the resolution of the board of the People’s Commissariat of Justice (hereinafter – PCJ) of August 4, 1920, minors were considered to be persons under 14 years of age, and they were not subject to trial or punishment. Only educational measures could be applied to them. The procedure for proceedings in criminal cases of minors was detailed by the decree of the CPC of the Ukrainian SSR “On cases of minors accused of socially dangerous acts” of March 4, 1920 [31].

The decree of the CPC of the Ukrainian SSR “On the Responsibility of Minors” of June 12, 1920, specified that persons under the age of 18 were considered minors, provided for a ban on conducting legal proceedings against minors and applying imprisonment to them. To punish minors who committed socially dangerous acts, commissions were created that had the right to apply medical and pedagogical measures to such persons [33, p. 203].

The Criminal Code of the Ukrainian SSR¹ defined tweens as under the age of fourteen, and minors between the ages of fourteen and sixteen. According to Art. 57 of the Criminal Procedure Code² (hereinafter – the CPC) of the Ukrainian SSR of 1922, as defenders, members of the board of defenders, close relatives of the accused, authorised representatives of institutes and enterprises, and other professional and public organisations had the right to take part in the case.

The institute of protection under the CPC of the Ukrainian SSR of 1927 was hardly changed³. Art. 51 provided that members of the panel of defenders, close relatives of the accused, legal representatives, representatives of state institutions and enterprises, and professional and public organisations were allowed to take part in the cases as defence lawyers.

The resolution of the Central Executive Committee (hereinafter – the CEC) of the USSR of December 1, 1934 “On the special procedure of proceedings in cases of terrorist acts” cancelled the participation of the defence lawyer in court. Special meetings at the People’s Commissariat of Internal Affairs also considered cases without counsel.

At that time, the criminal liability of minors was strengthened. In 1935, criminal liability (including execution) of minors who had reached the age of 12 was established for the commission of crimes against a person. The resolution of the CEC and the CPC of the USSR

¹Criminal Code of the Ukrainian Socialist Soviet Republic. (1922, August). Retrieved from <https://textbooks.net.ua/content/view/1060/17/>.

²Criminal Procedure Code of the Ukrainian Socialist Soviet Republic. (1922, September). Retrieved from https://leksika.com.ua/10130506/legal/kriminalno-protsesualniy_kodeks_usrr_1922.

³Criminal Procedure Code of the USSR. (1927, July). Kyiv: Legal p.h. of the PCJ of the USSR, 1940, 174 p.

"On Measures to Combat Juvenile Delinquency" of April 7, 1935, established that minors, starting from the age of twelve, convicted of theft, causing violence, bodily injuries, murder or attempted murder, are brought to criminal responsibility with the application of all measures of criminal punishment [44, p. 207–208].

According to T.N. Shatarska, in 1941 it was mandatory for praesidiums to appoint bar associations to take part in the consideration of cases in military tribunals. During this period, the list of cases of free legal assistance to military personnel and their families was expanded. Lawyers performed important educational activities, contributed to the solution of housing and pension issues, and were engaged in the employment of orphans [45].

The role of lawyers in protecting the rights of minors in family legal relations increased. In 1943–1944, new regulations in the field of family law appeared. The adoption procedure was facilitated, and in general, the Soviet state began to pay more attention to the protection of minors. Therewith, in criminal cases of juvenile delinquency, there were no changes in protection issues [31].

After the death of J.V. Stalin and the debunking of the "cult of personality of Stalin", in the Ukrainian SSR, a certain liberalisation began. In 1958, the age of criminal liability was raised – from 16 years.

In 1959, the UN General Assembly adopted the Declaration of the Rights of the Child¹. It states that the child should be provided with social protection by law. The child should be the first among those who receive protection and assistance, and protected from neglect, cruelty, and exploitation. This should have affected the implementation of the protection of minors during the pre-trial investigation and in court.

On November 29, 1985, the Ukrainian SSR signed an international treaty under which it undertook to comply with the UN Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules")². P. 2.1 of these rules emphasises the need for their impartial application. Compliance with international standards and improvement of current legislation are the main guarantees that the right to protection, especially for minors, is ensured at the proper level in the state.

In 1989, the UN General Assembly adopted the Convention on the Rights of the Child³, which Ukraine ratified on February 27, 1991. The Convention obliges states to take measures to ensure and protect the rights of children based on four basic principles: the priority of ensuring the interests of the child; ensuring the full life of children; involvement of each child in the life of the community; non-discrimination.

With the declaration of independence of Ukraine, a new stage in the development of the legal profession began. The provisions of human rights and representation activities in many areas, primarily the protection of the rights of minors, were changed. Ukraine continued to implement and ratify a number of new international treaties in the field of protection of children's rights: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which entered into force for Ukraine on 3 April 2003⁴; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which entered into force for Ukraine on 28 July 2004⁵; Recommendation CM/REC (2008) 11 of the Committee of Ministers of the Council of Europe to member states on European rules concerning juvenile offenders subject to sanctions or measures, adopted on 5 November 2008⁶; etc.

The institute of protection in criminal proceedings is reflected in the Constitution of Ukraine⁷ adopted on June 28, 1996. The issue of ensuring protection from prosecution in Ukraine was the subject of consideration by the Constitutional Court of Ukraine and the Supreme Court. The relevant practice of the European Court of Human Rights has been accumulated, which is actively used in court proceedings against children who are in conflict with the law.

On December 19, 1992, the Verkhovna Rada of Ukraine adopted the Law On the Bar⁸. According to it, the bar of Ukraine is a voluntary professional public association designed to promote the protection of rights and freedoms, represent the legitimate interests of Ukrainian citizens, foreigners, stateless persons, and legal entities, and provide them with legal assistance. The law referred to the professional rights of a lawyer as: representation, protection of the rights and legitimate interests of citizens and legal entities on their behalf in all bodies, institutes,

¹Declaration of the Rights of the Child. (1959, November). Retrieved from http://zakon2.rada.gov.ua/laws/show/995_384.

²United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). (n.d.). Retrieved from <https://resourcecentre.savethechildren.net/document/united-nations-standard-minimum-rules-administration-juvenile-justice-beijing-rules/>.

³Convention on the Rights of the Child. (1989, November). Retrieved from http://zakon1.rada.gov.ua/laws/show/995_021.

⁴Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography. (2003, April). Retrieved from https://zakon.rada.gov.ua/laws/show/995_b09#Text.

⁵Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. (2004, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_795#Text.

⁶Recommendation CM/Rec (2008) 11 of the Committee of Ministers to the Member States of the Council of Europe on the European Rules for Juvenile Offenders Sentenced to Penalties and Penal Measures. (2008, November). Retrieved from https://drive.google.com/file/d/1axs45Wzf04Wn8yYsFw2_zrJjONV-iqU/view.

⁷Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

⁸Law of Ukraine No. 2887-XII "On the Bar". (1992, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2887-12#Text>.

and organisations; collection of information about facts that can be used as evidence in civil, economic, criminal cases, and cases of administrative offences.

In accordance with the Law of Ukraine “On Bodies and Services for Children and Special Institutions for Children”¹ of January 24, 1995, services for minors were established, which were later renamed services for children. Art. 14 of this law is important, which states that the state provides special training and retraining of managers and specialists (teachers, social psychologists, sociologists, lawyers, medical workers, and law enforcement officers). This issue requires further development and the introduction of juvenile specialisation of defenders representing and protecting minors in criminal proceedings [46]. Thus, now there is a need to introduce juvenile specialisation of defenders of minors.

On July 5, 2012, the new Law of Ukraine “On the Bar and Legal Practice” was adopted². In accordance with p. 1 of Art. 23 of this law “professional rights, honour, and dignity of a lawyer are guaranteed and protected by the Constitution of Ukraine, the Law “On the Bar and Legal Practice”, and other laws”³.

The Criminal Code of Ukraine of 2001⁴ contains Chapter XV “Features of criminal liability and punishment of minors”. The circumstances that mitigate the punishment include the commission of a criminal offence by a minor (Art. 66 of the CC of Ukraine).

Criminal Procedure Code of Ukraine 2012⁵ in p. 2 of Art. 52 provides for the mandatory participation of defence lawyer: 1) in respect of persons suspected or accused of committing a criminal offence under the age of 18 – from the moment of the establishment of adolescence or the emergence of any doubt that the person is an adult; 2) persons in respect of whom the application of coercive measures of an educational nature is envisaged – from the moment of the establishment of adolescence or the emergence of any doubt that the person is an adult⁶.

The Law of Ukraine “On Prevention and Counteraction to Domestic Violence”⁷ of December 7, 2017, provides for the provision of assistance and protection to victims, primarily minors, compensation for damage caused by domestic violence. Art. 20 of the law defines that the assistance and protection to affected persons are provided in certain areas, including: the provision of affected persons with access to justice and other legal protection mechanisms, including

through free legal assistance in accordance with the procedure established by the Law of Ukraine “On Free Legal Assistance”⁸. The rights of victims are regulated in Art. 21, namely, the victim has the right to: appeal to law enforcement agencies and the court to bring abusers to justice; timely receipt of information about the final court decisions and procedural decisions of law enforcement agencies related to the consideration of the commitment of domestic violence against them, including those related to the isolation of the offender or their release, etc.

The Law of Ukraine “On Free Legal Aid”⁹ dated June 2, 2011, stipulates that free secondary legal aid includes the following types of legal services: protection; representation of the interests of persons entitled to free secondary legal aid in courts, other state bodies, local governments, before other persons; preparation of procedural documents. Certain categories of persons, including children, have the right to free secondary legal aid, including *orphans, children deprived of parental care, children in difficult circumstances, and children who have suffered as a result of military operations or armed conflict* (Art. 14 of the Law).

Currently, the Verkhovna Rada of Ukraine has adopted in the first reading the draft law “On compensation for damage and destruction of certain categories of real estate objects as a result of military operations, terrorist acts, sabotage caused by military aggression of the Russian Federation”¹⁰. In particular, it is proposed to supplement the current legislation with new provisions on compensation for losses caused by military operations, terrorist acts, and sabotage caused by military aggression of the Russian Federation. In addition, it is stipulated that legal representatives of minors and other persons are exempt from paying the court fee when considering relevant cases in all judicial instances.

Thus, the analysis reflects trends in the legal regulation of the defence lawyer’s involvement in criminal proceedings against minors, considering the armed aggression of the Russian Federation against Ukraine.

To summarise the interim conclusions, the legal regulation of public relations provides for a written form of fixing the mechanism of legal regulation. Therefore, the periodisation of the development of regulation of the defence lawyer’s involvement in criminal proceedings against minors should begin with written sources. The first such act, as was established, was Pravda Ruska (1016) [29].

¹Law of Ukraine No. 20/95-BP “On Bodies and Services for Children and Special Institutions for Children”. (1995, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/20/95-%D0%B2%D1%80#Text>.

²Law of Ukraine No. 5076-VI “On the Bar and Legal Practice”. (2012, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/5076-17#Text>.

³*Ibidem*, 2012.

⁴Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>.

⁵Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

⁶*Ibidem*, 2012.

⁷Law of Ukraine No. 2229-VIII “On Prevention and Counteraction to Domestic Violence”. (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2229-19#Text>.

⁸Law of Ukraine No. 3460-VI “On Free Legal Aid”. (2011, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/3460-17#Text>.

⁹*Ibidem*, 2011.

¹⁰Draft Law of Ukraine No. 7198 “On Compensation for Damage and Destruction of Certain Categories of Real Estate Objects as a Result of Military Operations, Terrorist Acts, Sabotage Caused by Military Aggression of the Russian Federation”. (2022, March). Retrieved from <https://itd.rada.gov.ua/billInfo/Bills/Card/39283>.

During 1917–1991, the issue of specialisation of defenders in juvenile affairs was not regulated or considered. In general, the protection of minors was provided by lawyers who represented the interests of adults in court. In the second half of the 20th century, the Soviet criminal process for minors was influenced by international acts and treaties that were ratified by the Ukrainian SSR.

Since 1991, Ukraine has been actively developing legislation both on the legal profession and on the protection of the rights of minors in criminal proceedings, usually considering the implementation of international treaties in the field of criminal justice in relation to children. The development of special legislation for the protection of children, including those in conflict with the law, should be recognised as positive during this period.

The current stage of regulatory support for the involvement of a defender in criminal proceedings against minors and its immediate development is characterised by the implementation of international treaties in the field of protection of children's rights and changes in national legislation, considering the norms of documents ratified by Ukraine. The relevant regulatory support will be improved in connection with the need to respond to the challenges of martial law, primarily to protect the rights of children affected by the military actions of the aggressor country.

Conclusions

The history of the development and establishment of legal regulation of the protection of minors in criminal proceedings is connected with the emergence of legislation in the field of protection in criminal proceedings in general. The regulation of the defence lawyer's involvement in the juvenile court took place in parallel and in close connection with the legal regulation of judicial representation and sureties.

Based on the analysis, the following stages in the development of the defence lawyer's involvement in criminal proceedings against minors were identified:

Stage I – 1016–1529. At this stage, the protection of minors in court was consistent with customary law and individual written acts. The minor was considered

an object of parental care, the child's representative in court was the father and individuals who performed the functions of representation, sureties, and protection.

Stage II – 1529–1864. During this period, on the territory of Ukraine, regulations began to govern the activities of a lawyer in court. For orphaned children, protection by the procurator (lawyer) was provided for by appointment on a gratuitous basis. The institute of a special government defender for orphaned minors was introduced in court proceedings.

Stage III – 1864–1917. At this time, the regulation of legal activity was effectively improved. Defence in court, including in cases of minors, became professional. Regulations established the provision of appointing a professional defender on a gratuitous basis to protect and represent the interests of the poor, in particular minors.

IV stage – 1917–1991: development of legal regulation of the Soviet legal profession in Ukraine. The protection of minors in courts was provided by lawyers, mainly by appointment, and the issue of introducing specialisation of defenders in juvenile affairs was not considered.

Stage V – since 1991 – current development of legal regulation of the defender's involvement in criminal proceedings against minors, which is related to the European vector of development of the Ukrainian state, considering the best international practices of juvenile justice.

Current trends in regulatory support for the involvement of a defence lawyer in criminal proceedings against minors are characterised by the improvement of legislation in the field of criminal justice in relation to children, considering the implementation of the provisions of ratified international treaties. The relevant legislation is being changed to respond to the current challenges of the armed aggression of the Russian Federation against Ukraine. The legal regulation of protection in criminal proceedings of orphaned children, children deprived of parental care, children in difficult circumstances, and children who suffered as a result of military operations or armed conflict through the system of free legal assistance by appointed defenders is being improved.

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Нормативно-правова регламентація участі захисника в кримінальному провадженні щодо неповнолітніх: генеза питання, етапи розвитку

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Анотація

Актуальність статті обумовлена необхідністю встановлення генези нормативно-правового регулювання участі захисника в кримінальному судочинстві щодо неповнолітніх, виявлення кореляційних зв'язків цього процесу з регламентацією адвокатської діяльності в Україні. Мета статті полягає в дослідженні історії нормативно-правової регламентації участі захисника в кримінальному провадженні щодо неповнолітніх. У статті використано комплекс наукових методів: історичний, історіографічний, термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. Встановлено, що зародження інституту захисту сторін у судочинстві бере початок із часів Київської Русі, зі сталої практики виступів у суді «добрих людей», які представляли позивача та відповідача. Доведено, що становлення інституту захисту неповнолітніх осіб у суді відбувалося паралельно та в тісному зв'язку з розвитком судового представництва й поруки. На підставі аналізу ратифікованих Україною міжнародних актів у сфері кримінальної юстиції щодо дітей констатовано потребу в запровадженні ювенальної спеціалізації захисників. Виокремлено такі етапи розвитку нормативно-правової регламентації участі захисника в кримінальному судочинстві щодо неповнолітніх: I етап – 1016–1529 роки; II етап – 1529–1864 роки; III етап – 1864–1917 роки; IV етап – 1917–1991 роки; V етап – з 1991 року донині. Зауважено, що становлення захисту прав неповнолітніх у суді супроводжувалося закріпленням нормативної умови участі захисника в процесі на безоплатній основі для деяких категорій дітей. Сучасний етап правозастосовного процесу передбачає втілення принципів і гарантій участі захисника в кримінальному провадженні щодо неповнолітніх, визначених міжнародними договорами у сфері захисту прав дітей. Урахування тенденцій розвитку нормативно-правового регулювання участі захисника в кримінальному провадженні дозволяє правозастосовним органам планувати власну практичну діяльність у контексті взаємодії з правозахисними організаціями, вживати заходів щодо координації роботи з органами ювенальної превенції Національної поліції, слідчими та прокурорами, які спеціалізуються на розслідуванні правопорушень неповнолітніх, ювенальними суддями й адвокатами для ефективного дотримання міжнародних стандартів захисту прав дітей, які опинились у конфлікті із законом

Ключові слова:

неповнолітня особа; адвокат; захисник; нормативно-правовий акт; розслідування кримінальних правопорушень неповнолітніх