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## COURT TUTORS' BODY AS AN ELEMENT OF JUVENILE JUSTICE

*The article is devoted to topical problems of implementation in the practical activity of courts and law enforcement agencies of the Institute for caregivers of minors. In the article an author's pays attention to insufficient level of scientific worked out questions of the issues apply to minors of compulsory measures of an educational nature, as one of exemption from punishment. Proposals on improving the relevant provisions of the criminal law are made.*

*Today, the state should introduce more progressive system of social rehabilitation of children who have entered into conflict with Law, which meets modern requirements. International and domestic practice shows that the introduction of juvenile justice is an important factor that has a positive impact on society and contributes to strengthening the position of local communities. Effective composition of juvenile justice is a restorative justice program.*

*Besides that, before to implement juvenile justice on practice in Ukraine, it would be advisable to work out and to make legislative changes in legal norms, which concern criminal and legal regulation of the usage of educational influence for minors, thereby bringing them into compliance with the provisions of international legal instruments on the administration of justice in relation to minors.*

**Key words:** *juvenile, juvenile justice, punishment, tutors, court educators, tutorial impact.*

**Target setting.** Juvenile crime has always been and remains an acute legal and public concern that constantly attracts scientists and practitioners' attention. It is a component of general crime and confirms the tendencies of its development in future. Social and economic crisis in Ukraine, unemployment, unresolved tasks of cultural and educational character negatively affect the formation of younger generation. In some cases, these phenomena cause minors' alienation from official institutions of socialization.

The results of recent criminological studies indicate that nowadays youth is one of the most affected economically and socially legal disadvantaged social community, which lives in conditions of high

tension and psychological discomfort. As a consequence of this situation there are more and more facts of growing crime, drug addiction, substance abuse, alcoholism, prostitution in youth environment. This statistics shows that every eighth - the ninth crime in Ukraine is committed by minors. The level of juvenile delinquency, threatening trends in its structure, requires new approaches to counteraction. It seems that this problem should be solved both at general social level and by improving the proceedings in cases of crimes, socially dangerous acts committed by minors.

Periodically, in the information space of Ukraine, the issue of the need for juvenile justice is introduced. Moreover, unfortunately, the reason for the actualization of this the most important problem is not comprehensive understanding of necessary changes in approaches and the system of children's rights protection, but rapid quantitative increase in juvenile delinquency, which objectively defines it as a priority and causes the urgent need for the development of a special system of Justice.

At present, the courts of Ukraine have introduced specialization of judges dealing with juvenile delinquency cases, and this is a significant shift, but the issue of minors' social adaptation, that is, the creation of conditions that would allow them to resist, including those that promote recidivism, remains a problem. Undoubtedly, the construction of a system that would be logically verified and scientifically grounded in practice requires considerable resources, both temporal and material.

Although it seems to us that national legislation already contains a number of progressive ideas on organizing correction and re-socialization of juvenile convicts, which could serve as a prerequisite for the formation of Juvenile Justice in Ukraine.

**Actual scientific researches analysis** suggests that a large amount of attention has been paid to the issue of juvenile criminal responsibility and that a lot of scholars' scientific papers have been devoted. They were the subject of criminal legal analysis in the works of V. M. Burdin, Ye. M. Vecherova, T. O. Honchar, N. M. Myroshnychenko, A. A. Musyka, N. A. Orlovska, V. O. Navrotskyi, Ye. S. Nazymko, L. M. Paliukh, Ye. L. Streltsova, N. S. Yuzykova, O. O. Yamkova and others. The authors specify the issues of analysis

and modeling of further changes and additions to Section XV of the General Part of the Criminal Code (hereinafter - the CC) of Ukraine, the use of compulsory educational measures for minors with mental retardation and other issues of general theoretical nature.

However ambiguous legislative decisions regarding the regulation of the minors' tutor body make it advisable to address the criminal and legal and criminal and procedural aspects of this issue in view of the development of the Juvenile Justice System in Ukraine.

**The purpose of this article** is to formulate a position on the problems of regulating the minors' tutor body in the CC and the CPC of Ukraine, as well as outlining ways to improve criminal and criminal and procedural legislation.

**The statement of basic materials.** Generally accepted goal of the Juvenile Justice System, as proclaimed in all relevant international human rights law, is child's rehabilitation and social reintegration. The UN Convention on the Rights of the Child (Article 40) states: "States Parties recognize the right of every child who is believed to have violated Criminal Law, is accused or found guilty of violating him, on such behavior that promotes the development of child's sense of dignity and strengthens respect for human rights and fundamental freedoms of others, and which takes into account child's age and the desirability of promoting its reintegration and fulfilling its useful role in society".

In the Criminal Justice System for minors, there are Minimum Standard Rules for the Administration of Juvenile Justice ("Beijing Rules") [4]. Specified international legal act defines the principles for dealing with juvenile offenders at all stages of Criminal Justice, including criminal prosecution, and also emphasizes the need to improve the Juvenile Justice System and, at the same time, adopt measures to develop progressive social policy for minors. The Rules do not refer to the age at which minors may be held liable for an offense or recognized by adults, but indicate that efforts should be made to extend the Juvenile Justice framework to young people.

In accordance with the Part 1 of Article 97 of the CC of Ukraine, compulsory measures of educational nature are reserved for minors who have reached the age from which criminal liability may occur, that is, from 16 years, and in some cases - from the age of 14 years.

The same measures, in accordance with Part 2 of Article 97 of the CC of Ukraine, may also be applied to a minor who has not reached the age from which criminal liability may occur. The application of compulsory measures of an educational nature to such person is not connected with its release from criminal liability, since it, without being the subject of a crime, is not subject to such liability.

The provisions of this article correspond with the requirements of Article 498 of the Criminal Procedural Code of Ukraine (hereinafter referred to as the CPC of Ukraine) concerning application of compulsory measures of educational nature, setting a minimum age limit for the attainment of which criminal liability may arise in any case, regardless of the degree of gravity of the offense.

Consequently, compulsory measures of educational nature in respect of a person who has not reached the age from which criminal liability may occur, shall be carried out following such conditions:

1) a minor is 11 years old; 2) the person committed an act that falls under the features of an act prescribed by the Special Part of the Criminal Code.

In accordance with the paragraph "a" Part 2 of Article 2 of the Beijing Rules, minors are defined as individuals who, within the framework of the existing legal system, may be prosecuted in a form different from the form of adult persons' responsibility.

According to the paragraph 10 of the General Comment No. 10 (2007) of the UN Committee on the Rights of the Child entitled "Children's rights in the System of Justice for children", the example of the best interests of the child is a practice where traditional aims of Criminal Justice, such as punishment, give way to rehabilitation and restorative purposes of Justice in cases of child offenders. This is also noted in paragraph 23.2 of CM / REC (2008) 11 of the Committee of Ministers of the Council of Europe to the member states on "European rules concerning juvenile offenders subject to sanctions or measures", in particular that the benefits should be given to such sanctions and measures, which can have an educational effect.

There is no doubt that effective legal measures that courts apply to juveniles can actually prevent them from committing new crimes and correcting adolescents. The release of a juvenile from criminal responsibility is not a goal that should be sought when considering

any criminal case. As a general rule, any person who committed a crime should be held criminally liable and punished. However, specified type of exemption from liability is a specific measure that applies to juveniles who have committed crimes and provides for the latter to be remedied without isolation from society.

At the same time, there are problems in the legal regulation and effectiveness of the use of compulsory educational measures. Thus, a list of compulsory measures of educational nature, provided by Article 105 of the Criminal Code of Ukraine, is unchanged for a long time. The analysis of the content of these measures showed that in today's conditions of economic and social development of the country, some of them do not meet the requirements of ensuring many principles under minors' criminal responsibility. It seems to us that because of the loss of effectiveness of influence on a juvenile offender from the list of compulsory measures of an educational nature, it is necessary to exclude the reservation at all, and a compulsory measure in the form of restraint of leisure and the establishment of special requirements for the behavior of a juvenile requires clear legal regulation with the inclusion in the rules of Criminal Law a list of requirements for the order of execution of specified measure [3].

In accordance with Part 2, Clause 3 of Article 105 of the Criminal Code of Ukraine, the court may apply to a minor, in particular - a compulsory measure of educational nature in the form of a transfer of a minor under the supervision of parents or persons who replace them, or under the supervision of a teaching or work collective with his consent, as well as individual citizens at their request. At the same time, according to Part 4 of Article 105 of the Criminal Code of Ukraine provides for the possibility of appointment a tutor for the minor in order, prescribed by Law. Proceeding from legal construction of these norms, in the first case - a list of educational measures, in particular the transfer of minors to individual citizens at their request, is mandatory for use by the court, in the second case - the appointment of a tutor to a minor is a right.

According to the explanations set forth in paragraph 4 of the resolution of the Plenum of the Supreme Court of Ukraine No. 2 of 15.05.2006 "On the practice of reviewing cases by courts of the use of compulsory measures of an educational nature" regarding the applica-

tion of coercive measures provided for in Part 2 of Article 105 of the CC of Ukraine it is understood that along with the application of one or more of them, the court may, in accordance with the procedure prescribed by Law, appoint a tutor for a minor, taking into account positive data about certain person and his ability to positively influence at minor's behavior [9]. This person must confirm in the court session his consent to be a tutor. That is, it should be noted that practically in both cases the subjects of influence on minor's behavior is the tutor.

Current Ukrainian legislation provided for two types of tutors - public and judicial, with their inherent exclusivity, forced influence on minors.

By the Decree of the Presidium of the Supreme Soviet of the Ukrainian SSR No. 284-VII of August 26, 1967, "On Approval of the Provisions on Public Tutors of Juveniles", the procedure, grounds and conditions for their appointment are regulated in detail. In accordance with the requirements of the above-mentioned Decree, public workers may be the most active workers, employees, collective farmers, representatives of the creative intelligentsia, servicemen, students, pensioners and other citizens who, by their business and moral qualities, are able to fulfill the duties assigned to them, have necessary general education training, life experience or work experience with children, subject to their consent to assume the responsibilities of a community educator.

The participation of a public educator in the re-education of a minor is also regulated by separate norms of the CPC of Ukraine, one of which is Article 368, in paragraph 11 of Part 1 it is stated that during the court's approval of a sentence the issue of the appointment public tutor for a minor may be decided.

At the same time, the legislation of Ukraine also defined legal status of a person, which was entrusted with the implementation of a set of measures related to the enforcement of judgments concerning minors, their parents (adoptive parents), guardians (trustees) - court tutor. Thus, according to Part 3 of Article 6 of the Law of Ukraine "On the bodies and services for children and special institutions for children", before the last changes to it were envisaged, the court tutors' body was formed at courts. In pursuance of the aforementioned Law, the Regulations on Teachers [7] were approved by a joint order of the Chairman of the Supreme Court of Ukraine, the Ministry of

Justice of Ukraine, and the Ministry of Education of Ukraine of 15.11.1995.

The main tasks of court tutors' body were eliminating the causes and conditions that contributed to the commission of unlawful actions, the prevention of offenses; the education of proper legal culture, the upbringing of minors who have committed an offense, through the formation of a conscious attitude of minors to the Law, the provision of assistance to parents (adopters) or guardians (trustees) in the education of their minor children.

A court tutor is appointed by the court on the basis of a decision, judgment or ruling of the court in case of necessity to prevent the neglect and the offense (relapse) of minors who have committed crimes but are exempted from criminal punishment by age or in connection with the inappropriate application of criminal punishment measures if sending them to a special educational institution is not necessary, conditional convicts or sentenced to non-custodial sentences, or sentenced to incarceration with delayed of execution a sentence.

It is difficult to deny the prediction of exclusively positive impact on the activities of court tutors, since the most common method of combating juvenile delinquency is to prevent it. Based on the provisions of Article 68 of the Constitution of Ukraine and current legislation, courts are called to use fully and effectively the possibilities of preventive and educational influence of judicial processes in criminal and civil cases. Of great importance for the prevention of juvenile delinquency would also be extra-procedural activity of judges conducting criminal proceedings. Effective legal measures that court tutors could apply to minors would certainly help to prevent them from committing crimes.

However, for unclear reasons, the specified norm was excluded on the basis of the Law No. 609-V of February 7, 2007 "On Amendments to Certain Legislative Acts of Ukraine, regarding bodies and services for juvenile and special institutions for minors".

Thus, today in the current Law of Ukraine "On the bodies and services for children and special institutions for children" there is no reference to the body of court tutors. After the introduction of amendments to the above-mentioned Law the provisions of the court tutors as a subordinate legal act, despite the fact that it was adopted in

accordance with the Law, the norm of which is excluded, remains valid. However, neither the CC of Ukraine nor the CPC of Ukraine nor any normative act regulates the procedure for the appointment of court tutors, which virtually eliminates practical application of the courts of this institute.

Thus, in accordance with the provisions of clause 3 of Part 2 of Article 105 of the Criminal Code of Ukraine and Part 4 of Article 105 of the Criminal Code of Ukraine, taking into account current legislation and normative regulation of the institution of educator, in fact the minor can be transferred to the supervision of individual citizens at their request, which is covered by the concept only as a public tutor. However, legal regulation of the appointment of a court tutor in modern realities is more progressive institution, since it does not contain obligations of the latter's consent to its appointment.

Separate argument for the appropriateness of appointing court tutors is the fact that such appointment does not relieve parents or persons who replace them from performing duties for the upbringing of children and responsibility for their behavior, but at the same time it clearly demonstrates the position of the state and society in relation to the violation of criminal penalties by a child, will provide for proper control of the behavior of a such child and the implementation of specific educational effects. Moreover, the Jurisprudence shows that a forced educational measure in the form of a transfer under the supervision of parents is in a lot of cases ineffective, since many of these minors have long been left under the control of parents or the parents themselves have negative influence on them and are unable to bring up their children properly.

It should also be noted that the CPC of Ukraine does not actually provide for a mechanism for appointing a court tutor. Instead, the appointment of the public tutor of a minor in case of adoption of a sentence (Article 11, paragraph 1, Article 368 of the CPC of Ukraine) is regulated, this moment is indicated in the reasoning part of the sentence if the person is found guilty (Paragraph 2 of Article 37 of Article 374 of the CPC of Ukraine) [1].

Given the range of effective powers of court tutors, it would be advisable to supplement Part 4 of Article 105 of the Criminal Code of Ukraine on the mandatory appointment by a juvenile court of a court

tutor in case of the usage of juvenile coercive measures of educational character, which will be an important step in the development of the Juvenile Justice System in Ukraine.

It must be acknowledged that without a mechanism for the proper enforcement of compulsory educational measures and appropriate control, these measures are perceived by minors as an opportunity to prevent punishment. At the same time, current legislation does not specify the body or official on which the control over enforcement of a court decision on the use of juvenile coercive measures of educational influence would depend on.

According to paragraph 19 of the Resolution of the Plenum of the Supreme Court of Ukraine dated May 15, 2006, No. 2 "On the practice of consideration by courts of cases on the application of compulsory measures of educational nature," the court in timely manner informs it about the implementation of the decision on the application of a compulsory measure of educational nature the decision of the authorized persons of the service for juvenile and criminal minors in juvenile cases.

Representatives of the juvenile body, which are responsible for executing of a judicial decision on the use of juvenile coercive measures of educational nature, are required to maintain effective control over their conduct and, in the event of evasion from the use of court measures, to analyze and eliminate the causes of evasion constantly and to prevent it in future.

At the same time, among the authorities of the bodies and services for children, which are regulated by the Law of Ukraine "On bodies and services for children and special institutions for children", there is no mention of the obligation to enforce the court decision on the use of juvenile coercive measures of educational nature. Such legal regulation obviously does not contribute to the effective implementation of relevant court decisions [6].

We also want to pay special attention to the need of clearly indicating on the legislative level of the duration of all term types of educational measures provided for in Article 105 of the Criminal Code of Ukraine. Yes, according to Part 3 of Article 105 of the Criminal Code of Ukraine in case of application of educational measures provided for in paragraph 2 (limitation of leisure and establishment of special

requirements for the behavior of a minor) and paragraph 3 (transfer of a minor under the supervision of parents or persons who replace them, or under the supervision of a pedagogical or labor collective with his consent, as well as individual citizens at their request) (Part 2 of this article, the court shall establish their duration [8]). The analysis of the contents of specified legal norm does not allow determine either minimum or maximum term of the duration of corresponding educational activities, which causes legal uncertainty for the participants in criminal proceedings and the ambiguity of judicial practice. There are not even cases involving the use of minors by the courts provided for in clause 3 of Part 2 of Article 105 of the Criminal Code of Ukraine compulsory measures of an educational nature without indicating in their decision their duration.

As of today, only the explanation contained in paragraph 7 of the resolution of the Plenum of the Supreme Court of Ukraine of May 15, 2006, No. 2 "On the practice of consideration of cases by courts of the use of compulsory measures of an educational nature," directs the courts to establish a period of supervision provided for 3 Part 2, Article 105 of the Criminal Code of Ukraine, for a term not less than one year and not longer than before reaching a person of full age, which obviously does not correspond with the principle of legal certainty.

The foregoing suggests that the whole complex of powers of the court tutor will definitely act as an effective body in order to prevent committing of a new offender by a minor and to promote this person's education in the spirit of respect for the state laws. The main problem with this is, unfortunately, that although mentioned body, received some legal regulation, but only on paper, not in practice.

The court tutors' body with its specific characteristics exists in many countries of the world and has positive work experience. For example, the important feature of the juvenile court in the United States was that the judge carried out governance of the juvenile guardianship agencies directly, while maintaining wide-ranging cooperation with the population of the judiciary. The peculiarity of this collaboration was, first of all, that juvenile courts used the information collected by these societies on the conditions of life of offender children and even gave appropriate instructions to these organizations [2].

Somewhat different from American one is French model of Juvenile Justice, the main feature of which is that the judge is the central and the most important link in both preventive work with the teenager and the official justice that decides the child's future. Moreover, the judge deals not only with offenders, but also with children who fell into socially dangerous situations even before committing an unlawful act. The judge, noted the researchers, mainly does not work in the courtroom, but in his office. It is there that the judge tries to establish contact with the child, and then, together with her, seeks out ways out of the situation, turning for help to individual social services. A formal judge can be rarely judged by a judge - only in cases where all other possibilities of help are over. An important aspect of the French system is that the judge "leads" the teenager from the first case of a complicated situation. Therefore, the judge is always well acquainted with the history of the teenager and his family and knows more than anyone else how to help this family or teenager in a difficult situation. In such system, the judge combines the functions of "official justice" and a social worker by launching a "formal justice" extremely rarely [10].

The systemic division of existing state institutions dealing with juvenile delinquency in Ukraine is not conducive to achieving positive results in reducing the level of juvenile delinquency and in protecting the child from the criminal environment. The overcoming of such a situation is seen in the unification of the efforts of various state bodies and structures, as well as public organizations in a single vector of a holistic system of juvenile justice. The path to such justice, which includes juvenile courts, specialized lawyers, an independent system of investigating facilities, educational institutions, social institutions and educational institutions involved in the education of heavy adolescents, already requires at the present stage of solving many practical and theoretical issues [5, p. 61].

Today, the state should introduce more progressive system of social rehabilitation of children who entered into conflict with Law that would meet modern requirements. International and domestic practice shows that the introduction of Juvenile Justice is an important factor that has a positive impact on society and contributes to strengthening the position of local communities. An effective component of Juvenile Justice is restorative justice programs: it's educational impact on the

perpetrator, and the prevention of repeated offenses, and the promotion of social adaptation and reintegration of offenders into society [11].

Besides that, before real introducing of Juvenile Justice in Ukraine, it would be advisable to work out thoroughly and to make legislative changes in advance to legal norms, concerning criminal and legal regulation of the usage of educational measures for minors, thereby bringing them in accordance with the principles of international and legal Acts on the administration of Juvenile Justice.

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### **ІНСТИТУТ СУДОВИХ ВИХОВАТЕЛІВ – ЕЛЕМЕНТ ЮВЕНАЛЬНОЇ ЮСТИЦІЇ**

*Стаття присвячена розгляду актуальної проблеми впровадження в практи-чну діяльність суду та правоохоронних органів інституту вихователя неповно-літніх. У статті автори звертають увагу на недостатній рівень наукової роз-робленості питань застосування до неповнолітніх примусових заходів виховного характеру як одного із видів звільнення від покарання. Висловлюються пропозиції щодо вдосконалення відповідних положень кримінального законодавства.*

**Ключові слова:** неповнолітні, ювенальна юстиція, покарання, вихователі, судові вихователі, виховний вплив.

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### **ІНСТИТУТ СУДЕБНИХ ВОСПИТАТЕЛЕЙ – ЭЛЕМЕНТ ЮВЕНАЛЬНОЙ ЮСТИЦИИ**

*Статья посвящена рассмотрению актуальной проблемы внедрения в прак-тическую деятельность суда и правоохранительных органов института воспи-тателя несовершеннолетних. В статье авторы обращают внимание на недос-таточный уровень научной разработанности вопросов применения к несо-вершеннолетним принудительных мер воспитательного характера как одно-го из видов освобождения от наказания. Высказываются предложения по совер-шенствованию соответствующих положений уголовного законодательства.*

**Ключевые слова:** несовершеннолетние, ювенальная юстиция, наказание, воспитатели, судебные воспитатели, воспитательное воздействие.