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Compulsory Educational Measures Applied to Minors: Debatable Issues of Legal Regulation

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Abstract. The need to find and develop humane and adequate measures to combat juvenile delinquency, to ensure strict individualisation in the choice of means of influencing children-offenders in combination with maximum respect for their legitimate interests, is indisputable, which is the relevance of this paper. The purpose of this study was to identify the shortcomings in the construction of norms regulating the closure of criminal proceedings against minors in connection with the application of compulsory educational measures to them, to provide recommendations for improving the relevant norms of criminal and criminal procedural legislation and the practice of their application. During the study, various methods of cognition were applied: dialectical, comparative, modelling, system-structural analysis, and dogmatic. It was proved that when applying compulsory educational measures, it is necessary to find out the attitude of a minor towards what they have done. It was noted that the effectiveness and efficiency of transferring a minor under supervision depends entirely on the capabilities and responsibility of the person assigned to supervise the minor. Therefore, even though the law does not require the consent of a legal representative to such a transfer, such consent is factually crucial. The legislators' approach was criticised, which, instead of clearly defining the lower and upper limits of the duration of such measures, is limited to indicating that the duration of compulsory educational measures prescribed in clauses 2 and 3 of Part 2 of Article 105 of the Criminal Code of Ukraine is established by the court that appoints them. It was stated that the optimal period for these measures is one, maximum two years. Therefore, it was proposed to amend Article 105 of the Criminal Code of Ukraine aimed at establishing the period for which compulsory educational measures can be imposed, as well as at determining the circumstances that the court must consider as the basis for choosing one of these measures. It was proposed that the performance of a minor's obligation to compensate for the damage caused should make provision for the following forms: 1) monetary, 2) in-kind – transfer of property, 3) labour. Furthermore, it was proposed that with these methods it is possible to compensate not only for property, but also for moral damage

Keywords: warning, transfer under supervision, assignment of the obligation of compensation for damage, restriction of leisure, special requirements for behaviour, referral to a special educational institution

Introduction

Juvenile delinquency is one of the key problems of any society (Ukrainian in particular). Therefore, the prevention of illegal activities of persons under the age of 18 is a priority task of the state. The Criminal Procedural Code [1], which governs the procedure for criminal proceedings against minors, pursues the purpose of creating favourable conditions for establishing the reasons for committing a criminal offence (or other socially dangerous act), searching for optimally effective measures of influence, considering information about the minor's personality and achieving their social rehabilitation.

The basis of international standards for the rights of minors is the principle of the best interests of the child. It means abandoning the conventional goals of criminal proceedings: prevention and punishment in favour of rehabilitation and restorative justice. International instruments for the protection of children involved in criminal procedural relations are also aimed at observing the principle of proportionality. This basis means that any measures of influence against a minor should be applied considering their identity and the nature of the illegal act committed by them [2, p. 213; 3, p. 159-161].

A.S. Habuda, V.R. Isakova [4, p.140-141], V.O. Merkulova [5, p. 127-128], A.M. Yashchenko [6, p.182-186], not without reason state that upon conducting criminal proceedings against minors, opportunities to ensure their rights and legitimate interests are not fully used. That is why improving the efficiency of judicial proceedings in the implementation of criminal proceedings against this category of individuals is important. These circumstances indicate the need for further development of both a theoretical concept for the implementation of criminal proceedings against minors, and specific recommendations for their use by law enforcement officers in practice.

Various issues related to criminal proceedings against minors on the use of compulsory educational measures were considered in scientific publications and studies by V.M. Burdin [7], O.V. Kuzmenko [8], L.M. Paliukh [9], A.I. Tergulova [10], P.V. Khriapinskyi [11], A.M. Yashchenko [6] and others. The studies of these researchers made a substantial contribution to the development of the science of criminal procedure. At the same time, they are devoted to certain aspects of legal proceedings against minors (including the subject

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matter of evidence in these criminal proceedings, the legal regulation of the closure of criminal proceedings against minors with the use of compulsory educational measures, socio-psychological aspects of criminal procedural proceedings against minors). Therewith, some studies are based on the norms of the previously existing national criminal procedural legislation [7; 9].

With the adoption of the new Criminal Procedural Code of Ukraine [1], many issues arise in criminal proceedings that were not previously the subject of comprehensive research. It is necessary to state that in the publications of scientists who are most involved in the investigation of the problems of the use of compulsory measures of an educational nature, namely V.M. Burdin [7], V.O. Merkulova [5], L.M. Paliukh [9], P.V. Khryapinskyi [11], insufficient attention is paid to: a) inconsistencies between the provisions of the Criminal Code and the Criminal Procedural Code of Ukraine regulating the grounds and procedure for applying these measures; b) discrepancies between the relevant norms of the Criminal Code of Ukraine and the Civil Code of Ukraine in terms of determining the age of a minor, who may be charged with the obligation to compensate for the damage caused to them; c) the need to legislatively consolidate a provision aimed at establishing the time frame for which these measures can be assigned; d) the need to expand the existing list of compulsory educational measures, considering the provisions of international acts ratified by the Verkhovna Rada (which, at the same time, was done by the author of this paper).

The purpose of this study was to investigate the problems of applying coercive measures of an educational nature to minors, as well as to develop a proposal for their solution.

Possibility of Correcting a Minor Without Applying Punishment. Recognition of Guilt By a Minor as a Condition for Closing Proceedings Using Compulsory Educational Measures

Compulsory measures of an educational nature can be applied by the court: a) in relation to a child who committed a socially dangerous act before reaching the age from which criminal liability may arise (Part 2 of Article 97 of the Criminal Code of Ukraine); b) when deciding on release from criminal liability (Part 1 of Article 97 of the Criminal Code of Ukraine); c) when releasing a minor from punishment (Part 1 of Article 105 of the Criminal Code of Ukraine) [12].

When deciding to apply compulsory educational measures to a minor, both with their release from criminal liability and with their release from punishment, it is necessary to make sure that the correction of such a child is possible without applying punishment. As for the fact that a minor can be corrected without criminal punishment, this circumstance is of an evaluative nature. It is subjective and depends not only on the real facts indicating the possibility of correction. This circumstance also depends on the discretion of the judge who decides to close (or, conversely, not close) the criminal proceedings. The absence of any legal regulation of the criteria for establishing such a possibility turns this condition into a subjective assessment category. Therefore, it is not surprising that this circumstance causes the greatest controversy among theorists and difficulties among law enforcement officers [9, p. 89, 127; 10, p. 157]. Determining the possibility of correcting a person is associated with a certain element of risk.

Making the right decision on the application of compulsory educational measures is possible only as a result of studying the identity of a minor, the conditions of their upbringing and life, identifying the causes and conditions that contributed to the commission of a criminal offence, and the possibilities of eliminating such. These circumstances allow concluding on the minor's pedagogical neglect and decide on the possibility of their re-education and correction by public influence or administrative penalties. The importance of identifying these circumstances in juvenile proceedings is no less important than collecting and consolidating evidence of children's guilt. An essential role in determining the probability of correcting a child without applying punishment is played by the identity of a minor, namely their psycho-emotional state, the motives that guided them during the commission of a criminal offence (or other socially dangerous act), the purpose of illegal behaviour [9, p. 91-94, 127]. When deciding on the possibility of correcting a teenager, one should also focus on their environment. The actions and decisions of a child largely depend on the microenvironment that formed it. Information about the people around the teenager and their possible adverse impact on the minor will be important for deciding on the possibility of applying compulsory educational measures that can lead to its correction. Thus, when deciding on the possibility of correcting a minor, data that characterise their personality and the act committed by them, the presence of an adequate and healthy household and family environment, an educational and/or labour collective, awareness of the act committed, and sincere remorse are important.

When finding out the living conditions and upbringing of a child in a family, it is worth paying attention to who was factually engaged in the upbringing of a teenager, what is the influence of the family and other relatives on the development of the child's aspirations, life attitudes and views. When studying the conditions of study (and/or work) of a teenager, it is necessary to find out whether the child studied; if so, in what institution, what is their behaviour and academic performance, what subjects they like, with whom they are friends. To get acquainted with the interests of a minor, one should answer the following questions: how a teenager spends their leisure time, what they like to do the most (whether they are fond of sports, what literature they are interested in), whether they have friends (if any – whether they know what the child in question is doing, whether they know about the violation committed by a teenager, how they react to it; what is the influence of friends on the teenager). It is also necessary to establish the following circumstances regarding the negative behaviour of a minor in the past: whether they had previously committed criminal offences, if so, when and how many, whether they were convicted and at what age and for what criminal offences, where they served their sentence, whether they were not subjected to non-custodial sentences, whether they were sent for re-education to a collective, whether they were in a special institution for minors (if so, for what and how long they were there). In addition, when closing criminal proceedings using compulsory educational measures, it is necessary to analyse the post-criminal behaviour of a minor, their attitude towards the committed criminal offence [3, p. 172].

The following may indicate in favour of the child:

1) the presence of several unfavourable circumstances at the same time. Often there are situations when a minor commits a criminal offence due to the occurrence of unfavourable

circumstances. This can be a difficult financial situation, in which a child from a dysfunctional family was deprived of attention and control from adults, and sometimes even malnourished or, in general, starving. Unfavourable circumstances can manifest themselves in a situation where the child has an acute conflict with the immediate environment, which can push them to commit a criminal offence);

2) *the fact that the illegal act was committed under the influence of adults.* It is sometimes beneficial for adult criminals to involve children as direct executors of the act prohibited by the Criminal Code of Ukraine [12], considering the fact that the latter will bear lighter responsibility (compared to adults) or they will not be held criminally liable at all);

3) *the fact that the child has not previously committed illegal acts.* Violation of the provisions of the Criminal Code of Ukraine committed by a minor [12] may be their only and first violation of the law. In this case, the use of compulsory educational measures is aimed at enabling the minor to develop in normal, familiar conditions);

4) *the presence of a positive characteristic at the place of study, work, or residence.* This circumstance should be considered next to the above. It is the characteristic of a minor that allows drawing up their final "portrait"; it helps determine whether compulsory educational measures can contribute to such correction and exact the necessary correctional influence on the minor. Sometimes the characteristic of a minor is negative. But it can also be concluded from it that despite the illegal actions of the victim, their cynicism, there are still activities and people interesting to such a person, capable of distracting them from negative company);

5) *sincere remorse and assistance in solving a criminal offence.* Sincere remorse and active assistance in solving a criminal offence may lie in appearing with a confession, exposing other participants in a criminal offence, providing assistance to law enforcement officers in exposing accomplices, searching for evidence in criminal proceedings);

6) *voluntary compensation for losses caused and compensation for damage caused by a criminal offence.* This circumstance can manifest itself in the return of stolen items by minors, restoration of damaged property or restoration of destroyed items, reimbursement of its value, etc.).

Some researchers note that it is impossible to close criminal proceedings against a minor if they plead not guilty [13, p. 103]. Indeed, if a person does not consider themselves guilty of committing the acts incriminated to them, then, obviously, they have nothing to correct in such behaviour. Failure to admit guilt calls into question the expediency of applying compulsory educational measures. Remorse implies a full admission of guilt on all points of suspicion (accusation) and sincere regret for what they did. The entire procedure of correction and re-education is based on a critical attitude towards the committed offence and a sincere confession. Neither the norms of criminal legislation nor the norms of criminal procedural law contain a direct indication that a guilty plea indicates the possibility of correction. However, this circumstance, undoubtedly, must be considered as one that describes a person. The degree of remorse of a minor determines the possibility of correction. At the same time, the child's admission of guilt should be considered as part of the proven possibility of correction by applying compulsory educational measures, and not as the main proof of their guilt. However, some researchers confuse such concepts as "non-admission of guilt by minors" and "their disagreement to close proceedings on this basis" [9, p. 143], factually identifying them. This is incorrect: it is possible that a teenager fully and sincerely repents, but at the same time categorically objects to the closure of proceedings against them on the grounds under consideration.

Problematic Issues of Applying Compulsory Educational Measures in the Form of a Warning and in the form of Restriction of Leisure and Establishment of Special Requirements for the Behaviour of a Minor

A warning (prescribed in Clause 1, Part 2 of Article 105 of the Criminal Code of Ukraine) [12] is the mildest coercive measure of an educational nature and is reduced to explaining to the juvenile offender the essence of the damage caused by them and the consequences of the committed act. This measure is usually applied in practice simultaneously with some other compulsory measure of an educational nature. Experts perceive it as low-performance, ineffective, such that it is incapable of exacting the proper influence on the violator, suggesting not to apply it independently [7, p. 81; 8, p. 12].

The reservation is not related to the performance of any duties by the minor (rather than the obligation to make amends for the damage caused or comply with certain requirements for restricting leisure time). Therefore, it would be advisable to exclude the reservation altogether from the number of compulsory educational measures applied by the court to minors and preserve the significance of this measure as a preventive measure. Given this, the authors of this study advises excluding Clause 1 of Part 2 of Article 105 of the Criminal Code of Ukraine [12].

Limiting leisure time and establishing special requirements for the behaviour of a minor offender (Clause 2, Part 2, Article 105 of the Criminal Code of Ukraine) [12] is, on the one hand, one of the strict coercive measures of an educational nature, and on the other hand, it provides great opportunities for differentiated influence on the child This measure is obviously one of the most effective, and it should be prescribed in the vast majority of cases.

Restriction of leisure activities and the establishment of special requirements for the behaviour of a minor may include a ban on visiting certain places, using certain forms of leisure (including those related to driving a vehicle), limiting staying out of the house after a certain time of day, travelling to a certain area, etc. The child may also be required to return to an educational institution or find a job. This list is not exhaustive. The court decision should indicate what specific requirements are established for the behaviour of a minor and for how long. This measure is related to the impact that is most real for the minor. Restriction of the child's freedom of action is a prevention of repeated commission of criminal offences.

Requirements for the behaviour of a minor violator should not be abstract, but, on the contrary, as clear and specific as possible. For instance, it is impossible to demand from the child the "respect for adults", "ideal behaviour" [13, p. 106]. The list of such requirements and restrictions is not exhaustive. This allows the court to apply the most effective measures, considering the identity of the minor and their living conditions, and set specific requirements. Any requirement for the behaviour of a minor offender within the framework of such a measure of influence as the restriction of

leisure time and the establishment of special requirements for their behaviour must be conditioned by the prevention of committing an offence.

Problematic Issues of Transferring a Minor Under Supervision as One of the Compulsory Measures of an Educational Nature

When *placing a minor under supervision* (prescribed in Clause 3, Part 2, Article 105 of the Criminal Code of Ukraine) [12], the legislator does not require obtaining the consent of legal representatives as a condition for the application of this measure. However, the application of the relevant measure without such consent is impractical, in this case it will definitely not give a positive result [13, p. 107]. The procedural form of such consent should be a request from a person or organisation to assume obligations to exercise supervision over a minor. Furthermore, it is necessary to verify the living conditions and social trustworthiness of the persons to whom the minor is transferred under supervision (for the possibility of entrusting them with responsibility for such a minor). When transferring a minor to supervision, the judge must ensure that the individuals concerned have a positive influence on the teenager, can ensure that they are monitored daily and that they behave appropriately. For this, it is necessary to request characteristics for them.

The efficiency and effectiveness of this measure depends entirely on the capabilities and responsibilities of the person assigned to supervise the minor. Therefore, even though the law does not require *the consent of a legal representative* to such a transfer, such consent is factually crucial. In the legal literature, the position is expressed, according to which the existence in the list of coercive measures of an educational nature of transfer under the supervision of *parents or persons who replace them* is ineffective. As for the transfer under supervision to other individuals, teachers or labour collectives, supporters of this approach generally have no objections. They explain this position by the fact that the content of the event under consideration repeats the requirements of family legislation. Assigning duties to the legal representatives of a minor to exercise educational influence in relation to them is, in their opinion, a formal norm, since the upbringing of children is already the responsibility of parents or other legal representatives [7, p. 86; 8, p. 13].

Furthermore, according to adherents of the corresponding approach, it turns out that legal representatives during the entire period of growing up of a teenager did not bother to instil in the latter the norms and traditions of cohabitation, law-abiding behaviour and morality, which is why the minor committed a criminal offence (or other socially dangerous act), but at the same time the legislator admits that the alternative to bringing to justice may be to leave the child among the same individuals without any special changes in the conditions of everyday life of the child. They ask questions about how seriously it will affect the worldview of the minor and their attitude towards the crime. And they themselves give the answer to it: it will not have a real impact. Therefore, it is proposed to formulate the relevant provision of the criminal law in such a way as to exclude the transfer of a minor violator under the supervision of legal representatives as a compulsory measure of an educational nature.

This approach seems too categorical. It is possible that the minor committed a violation of the requirements of the Criminal Code of Ukraine [12] for the first time, due to a combination of certain unfavourable circumstances, by negligence, by its nature this act does not pose a considerable public danger. Therefore, in such situations, it is probably not worth unequivocally asserting that legal representatives do not cope with their duties of exercising educational influence. At the same time, in any case, children who are married should not be placed under the supervision of parents or individuals who replace them. This is conditioned upon the fact that according to the norms of the Family Code [14], when minors enter into marriage, parental rights and obligations are terminated.

Problematic Issues of Obliging a Minor to Compensate for The Damage Caused as a Type of Compulsory Educational Measures

Another effective and efficient coercive measure of an educational nature is *imposing on a minor, who has reached the age of 15 and has earnings, property, or funds, the obligation to compensate for property damage caused* (Clause 4, Part 2, Article 115 of the Criminal Code of Ukraine) [12]. According to the current legislation of Ukraine [12], there are no restrictions on the appointment of this measure depending on the amount of damage. This obligation of the minor should not duplicate the civil claim and should not be too much for the child. When applying this measure, the judge must pursue the purpose of educational influence (i.e.is, the minor must compensate for the damage caused using their own funds). This measure is indefinite in nature; however, when applied, the judge can set (considering the capabilities of the minor) real deadlines for execution. By agreement with the victim and the minor violator, the judge can set the term and form of compensation for damage. When considering the content of this coercive measure of an educational nature, this refers to the priority of educational influence (parents and guardians should not bear material responsibility in this case; the property situation of the minor must be considered here).

Notably, according to the provisions of the Civil Code of Ukraine (namely, Parts 1 and 2 of Article 1179 of the Civil Code [15]), a minor aged 14 to 18 years is responsible for the damage caused to them independently on general grounds. And only if such a minor does not have sufficient property to compensate for the damage, it is compensated (either in the missing share, or in full) by their legal representatives. The approach reflected in Clause 4 of Part 2 of Article 115 of the Criminal Code of Ukraine [12] (which mentions the assignment of the analysed duty to a child over 15 years of age) corresponded to the provisions of previously existing civil legislation [16] but does not consider the provisions of the current Civil Code of Ukraine [15]. Considering the provision prescribed in Part 1 of Article 1179 of the Civil Code of Ukraine [15], it is recommended to amend the norm defined in Clause 3 of Part 2 of Article 105 of the Criminal Code of Ukraine [12], agreeing on the provisions of both codes [15; 16], and apply a compulsory measure of an educational nature in the form of imposing on a minor who has property, funds or earnings, the obligation to compensate for property losses, from the age of 14, and not 15 years.

Sometimes researchers claim that a necessary condition for applying this measure is to cause substantial property losses to the victim [10, p. 127]. This statement, admittedly, does not follow Ukrainian legislation. The amount

of damage that can be compensated for by a minor violator is not limited. Furthermore, this term ("substantial losses") requires criteria for its establishment because it is subjective. Some experts suggest imposing such an obligation on the violator-child, provided that the minor has independent earnings and the amount of losses does not exceed their average monthly earnings (income). Otherwise, compensation for damage should occur according to civil procedure [10, p. 128]. A similar approach is reflected in Clause 3 of Part 2 of Article 117 of the Criminal Code of the Republic of Belarus [17]. However, this approach seems unfounded. The corresponding funds can be given to the child, inherited by them, won, found, etc. This recommendation obviously does not consider the fact that receiving wages is not the only way to acquire property rights. Moreover, a minor may not have an income that would be defined as "average monthly". It can be one-time, random, or determined by a certain opportunity to earn money. In the end, a teenager could save and accumulate certain funds for a long time, and therefore the amount available to a minor may well exceed the amount of their average monthly earnings (if they have one) – salary, scholarships, etc.

If for a reservation (prescribed in Clause 1 of Part 2 of Article 105 of the Criminal Code of Ukraine) [12] the law absolutely justifies not setting a certain time limit (since its implementation takes place immediately in a court session), then the Criminal Code of Ukraine [12] unreasonably does not define the duration of the application of compulsory educational measures prescribed in Clauses 2, 3 and 4 of Part 2 of Article 105 of this Code [12]. This does not allow the court to properly monitor the implementation and prove the child's failure to comply with the analysed enforcement measures and does not contribute to the effective application of norms. Therewith, certain difficulties arise in establishing whether the child is trying to evade the use of compulsory educational measures and the possibility of bringing them to criminal responsibility under such conditions [13, p. 108; 18, p. 14].

The legislator, instead of clearly defining the lower and upper limits of the duration of these measures, is limited only to indicating that the duration of compulsory educational measures prescribed in Clauses 2 and 3 of Part 2 of Article 105 of the Criminal Code of Ukraine [12] (there is not even a mention of the measure prescribed in Clause 4 of Part 2 of this Article!) is established by the court that appoints them. It appears that the most optimal period for their application is a year, with a maximum of two years. During this time, it is probably possible to reach a relatively reliable conclusion either about the correction of the minor (or, conversely, about their attempt to evade the implementation of the compulsory measure of an educational nature applied).

Considering the above, it is necessary to amend Article 105 of the Criminal Code of Ukraine [12], aimed at establishing the period for which compulsory educational measures can be imposed, as well as at determining the circumstances that the court must consider as the basis for choosing one of these measures. Taking this into account, the author of this paper proposes the following wording of Part 3 of Article 105 of the Criminal Code of Ukraine [12]:

"3. A minor may be subject to several coercive measures of an educational nature, prescribed in Part 2 of this Article. The duration of compulsory educational measures prescribed in Clauses 2-4 of Part 2 of this Article is established by the court that appoints them, within up to two years. When assigning compulsory measures of an educational nature, the court must consider the nature and degree of public danger of the criminal offence, the identity of the minor, the circumstances mitigating and aggravating the punishment, the impact of the imposed measure on the correction of the minor".

As for the compulsory measure of an educational nature prescribed in Clause 4 of Part 2 of Article 105 of the Criminal Code of Ukraine [12], there are comments that bring up two more questions. First, it is surprising why the legislator prescribes the possibility of compensation only for property losses caused but is silent about the possibility of compensation to minors for physical, moral (non-property) damage caused. Furthermore, it appears quite acceptable to compensate for the damage caused not only with money or property, but also with personal efforts and work. Other researchers share these considerations [5; 7].

Therefore, the forms of performing the obligation to compensate for property damage, compensation for moral (non-property) damage should be (*de lege ferenda*): 1) monetary – compensation for the damage caused by money; 2) in-kind – the transfer of property of similar, equal value (and possibly more valuable) to the damaged or destroyed, 3) labour – compensation for the damage caused by personal labour, one's own efforts. Using these methods, it is possible to compensate not only for property, but also for physical and moral (non-property) damage.

Considering the above, it is recommended to state the provisions of Clause 4 of Part 2 of Article 105 of the Criminal Code of Ukraine [12] in the following wording: "imposing on a minor who has reached the age of fourteen the obligation to compensate for property damage, compensation for physical, moral (non-property) damage at the expense of their property, funds, or earnings or their labour". Furthermore, for the most full establishment of the information on the property status of a minor to ensure compensation for damage caused by a criminal offence, it is necessary to supplement the list of circumstances that must be proven in cases of criminal offences by minors (Article 485 of the Criminal Procedural Code of Ukraine of 2012) [1] with Clause 5: "*the presence of property, funds, or earnings of a minor or their ability to compensate for the damage caused by their labour*".

Problematic Issues of Applying the Placement of a Minor Violator in a Special Educational Institution for Children and Adolescents

Another coercive measure of an educational nature is *placing a minor in a special educational institution for children and adolescents* (Clause 5, Part 2, Article 105 of the Criminal Code of Ukraine) [12]. The ECHR in the decision "Blokhin v. Russia" [19] recognised that the procedure of placing a minor in a special educational institution has signs of criminal prosecution and must be accompanied by proper guarantees.

Analysis of the provisions of international documents regulating certain issues of protection of children's rights indicates that the stay of a minor in a special educational institution can be regarded as a type of deprivation of liberty. The UN Rules for the Protection of Minors Deprived of Liberty (adopted by the UN General Assembly on December 14, 1990), interpret the deprivation of liberty as "any form of detention or imprisonment of any person, or their placement in a state, or a private correctional institution, which the minor

is not allowed to leave at their will, based on the decision of any judicial, administrative, or other state body" [20]. It is obvious that the referral of a minor to a special educational institution is compulsory, and the child does not have the right to leave this institution. Therefore, the placement of a minor violator in a special educational institution is the strictest compulsory measure of an educational nature.

According to the requirements formulated in Clause 19 of the UN Standard Minimum Rules for Juvenile Justice (Beijing Rules), "the placement of minors in a correctional institution should always be a measure of last resort, applied within the "minimum possible period" [21]. Part 1 of Article 502 of the Criminal Procedural Code [1] covers the possibility of early release of a child whose behaviour indicates their re-education, from the compulsory educational measure applied to them. Incentive measures in the presence of socially approved behaviour, admittedly, are important and necessary. However, this model provision is not of a procedural but of a substantive nature. The Criminal Code of Ukraine (Part 3 of Article 3) directly, unambiguously, and absolutely reasonably states that "other criminal consequences" (along with crime and punishment of an act) can be defined in it, and not in any other regulation. There is no doubt that the advance release from the use of such measures of the violator-child, is nothing more than that "other consequence" of a criminal law nature. Therefore, the relevant provision must be reflected in the Criminal Code of Ukraine [12].

At the same time, all other provisions of Article 502 of the Criminal Procedural Code [1] (namely that: a) this decision can be made by a court at the location of the relevant educational institution; b) that such a request can be made by the minor themselves, their legal representative by law or the prosecutor; c) and that when considering it, it is necessary to find out the position of the council of this institution) are procedural issues. It is also necessary to pay attention to other shortcomings of the legal regulation of advance release from the application of these measures. First, the discrepancy between the text of Article 502 of the Criminal Procedural Code [1] (which refers to early release from any of the measures listed in Part 2 of Article 105 of the Criminal Code of Ukraine [12] –except a warning) and its name (which refers exclusively to the early release of a child from compulsory educational measures prescribed in Clause 5 of Part 2 of Article 105 of the Criminal Code of Ukraine) [12].

Furthermore, for some reason, the analysed article is placed in Clause 2 of Chapter 38 of the Criminal Procedural Code of Ukraine [1] under the title "Application of compulsory educational measures to minors who have not reached the age of criminal responsibility". Here the comments are raised by three nuances:

a) incorrect use of the term "age of criminal liability" – since criminal liability, admittedly, has no age, and cannot have it. The correct phrase is "the age at which criminal liability begins";

b) the term "*application*" used in the title of this clause is also noteworthy, as it denotes *only the final stage of the proceedings* in cases of this category and does not cover the procedural activities of the investigation of these proceedings;

c) attention is also drawn to the fact that the norm, which provides the grounds for the application of coercive measures of an educational nature to children who, before reaching the age from which *criminal responsibility may arise*, have committed a socially dangerous act that falls under the characteristics of the act, prescribed in the Special Part of the Criminal Code (Part 2 of Article 97 of the Criminal Code of Ukraine) is contained in the Article of this Code entitled: "Exemption from criminal liability with the use of coercive measures of an educational nature" [12]. But this category of children is not exempt from criminal liability, while the latter is excluded. The difference between "exemption from criminal responsibility" and "exclusion of criminal responsibility" (which is well-known and indisputable in the theory of criminal law) is that only a person whose act contains all the elements of a criminal offence can be exempted from criminal responsibility. Considering the above, it is recommended:

– to amend the title of §2 of Chapter 38 of the Criminal Procedural Code [1] as follows: "*Proceedings regarding the application* of coercive measures of an educational nature to persons who have committed socially dangerous acts before reaching *the age from which criminal responsibility may arise*";

– to exclude Part 2 from Article 97 of the Criminal Code of Ukraine [12];

– to supplement the Criminal Code of Ukraine [12] with a new Article 97^1 "Application of compulsory educational measures against a person who has committed a socially dangerous act before reaching the age from which criminal liability may begin" of the following content:

– "The court has the right to apply coercive measures of an educational nature, prescribed in Part 2 of Article 105 of the Criminal Code of Ukraine [12], to a minor who, before reaching the age from which criminal responsibility can be imposed, has committed a socially dangerous act that falls under the characteristics of an act prescribed in the Special Part of this Code";

– to supplement Article 105 of the Criminal Code of Ukraine [12] in Part 3^1 in the following wording: "A minor whose behaviour during their stay in a special educational institution for children and adolescents indicates their re-education may be prematurely released from this coercive measure of an educational nature in the manner prescribed by the Criminal Procedural Code of Ukraine" [1];

– to remove Article 502 from Section 2 of Chapter 38 of the Criminal Procedure Code [1];

– to supplement section 1 of Chapter 38 of the Criminal Procedural Code [1] with Article 497^1 of the following content:

"Article 497^1. Advance release of a minor from a special educational institution.

"A minor whose behaviour during their stay in a special educational institution indicates re-education may be released early from such a compulsory measure of an educational nature. A decision of a court within the territorial jurisdiction of which the relevant institution is located may be made based on the results of a request from a minor, their legal representative, defence lawyer, or prosecutor. Upon considering the application, the opinion of the council of the special educational institution where the minor is located must be clarified."

Expansion of The List of Compulsory Educational Measures

The list of compulsory educational measures is closed. At the same time, international legal norms make provision for

a broader list of measures of influence. Article 18 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) singles out a provision on work for the benefit of the public; resolution on participation in group psychotherapy and other similar measures [21]. Obviously, there is a need to expand the list of relevant measures, which is consistent with the principle of individualisation of influence. At the same time, their open list is unacceptable – an expansive interpretation of the norms of criminal law is an extremely undesirable phenomenon.

Considering the above, it is recommended to supplement Part 2 of Article 115 of the Criminal Code of Ukraine [1] with Clause 6, which would prescribe a new compulsory measure of an educational nature – "non-paid labour of an educational nature", and in a separate section of this Code (where the definition of the terms used in it would be specified) to indicate what the legislator implies (such labour could include cleaning parks, squares, feasible care for patients in state healthcare institutions, assistance in organising leisure activities for children in preschool educational institutions, etc.).

Conclusions

The above gives grounds for the following conclusions:

1. When deciding to apply coercive measures of an educational nature to a minor (both with their release from criminal responsibility and with their release from punishment), the court must make sure that his correction is possible without the use of punishment.

2. Neither the norms of criminal legislation nor the norms of the criminal procedural law contain a direct indication that the admission of guilt by a minor indicates the possibility of correction. However, the process of correction and re-education is based on a critical attitude towards the committed offence and its sincere recognition. And therefore, the non-recognition of guilt by minors calls into question the expediency of applying coercive measures of an educational nature.

3. The recognition of a minor violator's guilt should be considered as part of the proven possibility of correction by applying compulsory educational measures, and not as the main proof of their guilt.

4. The concepts of "non-admission of guilt by a minor" and "their disagreement to close the proceedings on this basis" are not identical. It is possible that the teenager fully and sincerely repents, while categorically objecting to the closure of proceedings against them with the use of compulsory educational measures.

5. The warning is not related to the performance of any duties by the minor. Therefore, it would be advisable to exclude it from the list of compulsory educational measures altogether and preserve the importance of this measure as a preventive measure. Taking this into account, it is recommended to remove Clause 1 of Part 2 of Article 105 of the Criminal Code of Ukraine.

6. Restriction of leisure time and establishment of special requirements for the behaviour of a minor violator is one of the most effective and efficient compulsory measures of an educational nature. Any requirement for the conduct of a minor offender within the framework of such a measure of influence must be conditioned by the prevention of the commission of an offence. Therewith, the requirements for the behaviour of a minor violator should be as clear as possible.

7. Even though the law does not require the consent of legal representatives to transfer a minor under their supervision, such consent is crucial.

8. The position, according to which it should be impossible to transfer a minor offender under the supervision of legal representatives as a coercive measure of an educational nature, has been criticised.

9. It was justified that children who are married should not be placed under the supervision of parents or persons who replace them.

10. Considering the provisions of Part 1 of Article 1179 of the Civil Code of Ukraine, it is necessary to change the norm specified in Clause 3, Part 2 of Article 105 of the Criminal Code of Ukraine, harmonising the provisions of both codes and applying a coercive measure of an educational nature in the form of imposing on a minor, who has property, funds or earnings, the obligation to compensate for property damage, from the age of 14, not 15.

11. The statement that a necessary condition for the application of a coercive measure of an educational nature, prescribed in Clause 3, Part 2 of Article 105 of the Criminal Code of Ukraine, is significant property damage to the victim, has been criticised. It was indicated that the amount of damage that can be compensated for by a minor violator is not limited.

12. Arguments were given regarding the proposal made in the legal literature to impose on the violator-child the obligation to compensate for the damage caused, provided that the minor has independent earnings and the amount of losses does not exceed their average monthly earnings (income).

13. It was proposed to amend Article 105 of the Criminal Code of Ukraine aimed at establishing the period for which compulsory educational measures can be imposed, as well as at determining the circumstances that the court must consider as the basis for choosing any of these measures.

14. It was established that with regard to the coercive measure of an educational nature, prescribed in Clause 4, Part 2, Article 105 of the Criminal Code of Ukraine, the legislator unjustifiably foresees the possibility of compensating minors only for property damage, but is silent about the possibility of compensation for physical, moral (non-property) damage caused by them. Furthermore, it would be acceptable to compensate for the damage caused not only with money or property, but also with personal efforts and work.

15. To fully clarify the data on the property status of a minor to ensure compensation for damage caused by a criminal offence, it is necessary to expand the list of circumstances to be proved in cases of criminal offences of minors (Article 485 of the Criminal Procedural Code of Ukraine 2012) with Clause 5: "Availability of property, funds, or earnings of a minor or their ability to compensate for the damage caused by their labour".

16. To improve the legal regulation of the application of compulsory educational measures prescribed in Clause 5 of Part 2 of Article 105 of the Criminal Code of Ukraine, it is recommended to introduce some changes and amendments to the Criminal Code and the Criminal Procedural Code of Ukraine.

17. The position on establishing an open list of compulsory educational measures has been criticised.

18. It was proposed to expand the existing list of compulsory educational measures by including "free educational work" in it.

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Примусові заходи виховного характеру, що застосовуються до неповнолітніх: дискусійні питання правового регулювання

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Анотація. Необхідність пошуку та напрацювання гуманних й адекватних заходів боротьби зі злочинністю неповнолітніх, забезпечення суворої індивідуалізації у виборі засобів впливу на дітей-правопорушників у поєднанні з максимальним дотриманням їхніх законних інтересів є беззаперечною, що й становить актуальність статті. Мета статті – виявити недоліки в конструкції норм, що регламентують закриття кримінальних проваджень щодо неповнолітніх у зв'язку із застосуванням до них примусових заходів виховного характеру, надання рекомендацій з удосконалення відповідних норм кримінального та кримінального процесуального законодавства та практики їх застосування. У процесі дослідження використано різноманітні методи пізнання: діалектичний, компаративістський, моделювання, системно-структурний аналіз та догматичний. Обґрунтовано, що під час застосування примусових заходів виховного характеру потрібно з'ясувати ставлення неповнолітнього до скоєного. Зазначено, що дієвість та ефективність передання неповнолітнього під нагляд повністю залежить від можливостей та відповідальності особи, котрій доручено наглядати за неповнолітнім. А тому, незважаючи на те, що закон не вимагає згоди законного представника на таке передання, фактично така згода має важливе значення. Піддано критиці підхід законодавця, який замість чіткого визначення нижньої та верхньої меж тривалості таких заходів обмежується вказівкою на те, що тривалість примусових заходів виховного характеру, передбачених у п.п. 2 та 3 ч. 2 ст.105 КК України, встановлюється тим судом, котрий їх призначає. Стверджується, що оптимальний строк для зазначених заходів – один, а максимум два роки. Тому запропоновано внесення змін до ст. 105 КК України, спрямованих на встановлення строку, на який можуть бути призначені примусові заходи виховного характеру, а також на визначення обставин, які суд зобов'язаний враховувати як підставу вибору якогось із зазначених заходів. Запропоновано, аби неповнолітній виконував обов'язок компенсувати заподіяну шкоду в таких формах: 1) грошовій, 2) натуральній – передання майна, 3) трудовій. Окрім того, пропонується, щоб за допомогою цих способів можливою була компенсація не лише майнової, але й моральної шкоди

Ключові слова: застереження, передання під нагляд, покладення обов'язку відшкодування шкоди, обмеження дозвілля, особливі вимоги до поведінки, направлення до спеціальної навчально-виховної установи