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Separate Problems of the Mechanism of Protection of Constitutional Rights of the Juvenile in the Kyrgyz Republic and the Republic of Kazakhstan (Criminal and Criminal Procedure Aspect)

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Abstract: The study is devoted to complex research of theoretical and applied problems of the mechanism of protection of constitutional rights and freedoms of juveniles at realization of norms of separate institutes in the sphere criminal proceeding in Kyrgyzstan and Kazakhstan. Study is considered actual problems concerning realization of the consolidated special norms, applied to juveniles at a stage of pre-trial procedure.

Key words: Juvenile, pre-trial procedure, constitutional rights and freedoms, theretical, Kazakhstan

INTRODUCTION

As the analysis of the criminal legislation of the CIS countries was shown concerning juveniles, there are observed consolidation of the special norms concerning, first of all, types of the punishments applied to them, where it is considered their specific features; terms of substitution of criminal liability and punishment by coercive measures of educational influence; about their conditional early release from service of sentence; about their release from serving punishment; about limitation periods and cancelation of conviction, concerning juveniles.

Thus, a question about applied to juveniles the coercive measures of educational influence is rather actual and demanding special approach (Article 84 of the Criminal Code of the Republic of Kazakhstan (CC RK), Article 83 of Criminal Code of the Kyrgyz Republic (CC KR), Article 90 of the Criminal Code of Russian Federation (CC RF) where important value has practical aspect of their realization.

It is reality for everybody that the spiritual and moral component at juveniles is as a rule, deformed at stay them in closed state establishments or junior penitentiary. Together with it not only environment is influenced and pushed on the juveniles but also bad atmosphere at which they are taken in all negative qualities from other persons there where the constitutional rights of the juvenile are not had the legal rights. It is specified and in the report on results of research of UNICEF, carried out in the Kyrgyz Republic that "there are widespread various forms of physical abuse and neglect in closed establishments and junior penitentiaries for children, there are had cases when the violence is shown in the extreme form in the form of tortures. So in 2012, there were fixed 24 facts of tortures concerning juveniles, 12 of them were made in establishments of junior penitentiary types". And in the report it was emphasized about application to children and such types of tortures as "physical beating (including by means of various things), dry suffocation with a plastic bag or hands, sensory tortures in the form of burying or long stay on the sun and also numerous types of psychological tortures".

In such conditions when the state is not taken effective measures on protection of juveniles in dangerous situations for them it is out of the question about implementation of the constitutional provisions concerning the rights and freedoms of the person.

So Article 22 of chapter 2 of the Constitution of the Kyrgyz Republic is run: "nobody can be subjected to tortures and another inhuman of cruel, inhuman or degrading treatment or punishment. Everyone who deprived of liberty has the right for humane treatment and observance of human dignity".

Proceeding from the above-stated of UNICEF results of research it is followed that this direction of activity demands an integrated approach to the solution of the questions connected with protection of children. And also at adjudication on taking measures of criminal and legal character it is necessary to consider the existing

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problems in closed and junior penitentiaries for juveniles and also that the corrective system is not adapted on their re-education.

DISCUSSION

Besides, at coincidence of norms of the general part of CC with norms which are related to juveniles, concerning an identical subject of criminal and legal regulation there are applied special norms of the last mentioned as they are more favorable for the allocated category of persons. Such provisions are conformable with the convention of the UNO on the rights of the child where it is specified in Article 3 about necessity of paying prime attention to the best provision of the child interests and for providing protection and cares, the state-participants have to take all appropriate legislative and administrative measures.

Therefore, marked by us chapter in CC of the CIS countries is not casual, namely: chapter 2, criminal offenses against a family and juveniles (chapter 2, CC RK); chapter 20, crimes against a family and juveniles (chapter 20, CC KR); chapter 20, crimes against a family and juveniles (chapter 20, CC RF).

Legislators of the CIS countries provided an autonomy of this section that it is spoken about recognition by them of the social and psychological features of the person of the juveniles, demanding application to them specific nature of punishment. And this chapter is grouped in two signs, the first is the provisions providing protection of a family, the second are the norms concerning protection of juveniles.

All conditions of formation of the child identity are depended on durability of marriage and wellbeing of a family. Therefore, the question about protection of the juvenile identity is integrally connected with a question of protection of the family relations.

Though in CC of the CIS countries there is provided responsibility for involvement of juveniles in commission of crime or other action threatening their normal development for infringement on the family relations, however this direction of work wasn't received the adequate measures from society and the state. For example, it is testified to it the researches, conducted by human rights and non-governmental organizations in the Kyrgyz Republic.

So, according to the researches conducted by UNICEF, the level of distribution of violence against juveniles in Kyrgyzstan is high and the following data provided by them is testified about it: "72% of children have to face with manifestations of violence in a family and/or impetuousness from parents. From 2132 interrogated children, 51% were faced with oral insults, 38.7% with psychological violence, 36.6% were exposed to physical and in 1.6% to sexual violence. In all cases the violence was made by family members". Such situation is given the basis to claim that many parents consider accep table similar measures of education and teaching to discipline. Same data are confirmed by public institutions of the Kyrgyz Republic. So, according to ministry of health of the Kyrgyz Republic, number of children who were subjected to family violence and owing to this they asked for medical care in the organization of health care and there were 727 children in 2012 in CFM (Center of Family Medicine), GFD (Group of Family Doctors) already 772 juveniles. The quantity of suicides and quantity of sexual crimes are grown. Such situation is caused by the weak mechanism of protection of children both at the legislative level and in practice.

In this course as human rights movement "Bir Duyno-Kyrgyzstan" is correctly specified": when government officials and establishments create justice system of juveniles there have no information on functioning of system or about the children who brought to the sphere of this action it will be able to lead to impunity, concerning physical abuse, violence and exploitation of children and the experience got by the child will hardly be equitable to its best interests. Inability carefully to register and quickly to use information, concerning justice concerning juveniles, generates inability to provide protection of the child who violated the law".

Certainly, one of the reasons which induced legislators to include such independent chapter into the criminal legislation where responsibility of juveniles is regulated is increasing criminalization of the teen-age environment. And it is observed a growth of crimes which were committed more by adult persons. So, E.N. Borisova is mentioned in the research: "... nearly two thirds of all robberies, thefts and plunders, made by a group of persons are occurred with the assistance of teenagers. Specific weight of persons younger than 16 years which weren't committing crimes earlier, not being in alcohol intoxication is grown in the total number of the children who committed crimes. Numerous cases of involvement of juveniles in activity of organized criminal groups, involvement into the adult criminal environment is testified that there isn't given due regard to work on the prevention and suppression of such crimes as involvement by adults of juveniles in criminal (Article 150, CC RF) and other antisocial activity (Article 151, CC RF)".

Therefore, criminal liability for the crimes, committed concerning juveniles is provided and in other chapters of the criminal legislation. It is about crimes against health of the population and public moral and also about crimes against freedom, honor and the dignity of the personality.

It is an important problem for government bodies that in reality, the criminal legislation isn't able to react to emergence of non-conventional, earlier unknown forms of juvenile involvement in the veiled pornobusiness, prostitution, leading to moral corruption and also infliction of harm to health.

The above is demanded not only adoptions of criminal measures but also an integrated approach to a problem from state and legal bodies, public organizations, etc. But thus, we don't urge to refuse from adoption coercive measures to this category of persons but there has to be a reasonable balance and the differentiated approach to each juvenile from judicial bodies as the state and society shouldn't bring up in them dependents and persons with criminal disposition.

We can't agree with point of view about necessity of decrease in age limit of criminal responsibility of juveniles which main argument is sharp rise in crime among juveniles (Zilber, 1998). But V.V. Kulanov's position is closed to us: "... nowadays conditions of the Russian penal system which doesn't facilitate to the achievement of the objectives of criminal penalty at all and in most cases on the contrary is made actually sharply negative impact on the personality condemned" (Kulapov, 2004).

Besides in this case, it is lost sight of age features which are characteristic for this period of life. And it is necessary to consider those psycho-physiological signs which are studied as a result of numerous researches of experts in the field of psychology, psychiatry, pedagogy, etc. It should be noted that the crime of children becomes one of the most serious problems of the world community. Without having the fixed philosophical principles, juveniles are subject to negative influences which exist in society" the child, owing to features of physical and intellectual development, can't fully and adequately understand, express and protect his interests".

It is known that juveniles are incapable to estimate reality. They are enraptured with a heroic act, can't control the negative emotions at contemplation of an amoral, immoral life situation. Adult members of society, possessing the life experience, increased in comparison with juvenile's intelligence are capable to disguise the true intentions. Therefore, juveniles are the most vulnerable; they are subject to influence of adults and frequent are involved in commission which is endangered their normal development.

However, according to researches carried out by non-governmental organizations in Kyrgyzstan, persons who reached 14 years are more sentenced to criminal liability in the form of imprisonment. According to their data it is made 65.2% and the term of imprisonment is fluctuated from 3-5 years. That is the judges use less an alternative punishments, concerning juveniles that can't but disturb society.

Other important problem is that on the one hand the state protects and cares of children and therefore according to the legislation, persons till 14 years aren't subject to criminal liability with another, according to the decision of the commission on affairs of children in case of commission of offenses by them, they are placed in special school where conditions of their stay as a rule, contain all signs of places of imprisonment.

In this case, it is pointed out by us that such teenagers have no opportunity to leave such establishment by their choice; their schedule is rigidly regulated by the internal schedule that is controlled by the personnel and they can't come back to a family by their wish. Besides it is no secret for anybody that there is already had own subculture in such establishments which negatively influences on the most part of juveniles.

It is necessary to concern the procedure of consideration of such cases, namely, firstly, the Commission on affairs of juveniles is guided by bylaws as its order isn't determined by the law. Secondly such bylaw doesn't provide presence of the lawyer, the right for refusal of submission against itself evidences, the right to be known with the charge against him and unconditionally, right to be presumed innocent.

It is important thing that not only substantive laws but also procedural as they are represented one of ways of providing and protection of the constitutional status of juveniles.

And it is quite right emphasized by V.O. Luchin that "... the constitutional norms, involving in an orbit of the functioning, sometimes a number of institutes of one and often several branches of the right are forced to work a legal complex where the branch belonging of components is taken a back seat. Crucial importance is got unity but not differentiation of norms on various branches of the right" (Luchin, 2002).

It is necessary to emphasize there that despite settlement of the number of provisions, the operating order of criminal proceeding concerning juveniles have many questions. Some problem aspects can't be ignored as in the criminal procedure code by the legislator is put a number of the constitutional guarantees, providing protection of the rights and freedoms for persons of this category. It should be noted that in this regard is natural that in the new criminal procedure code of the Republic of Kazakhstan there is provided the separate chapter 56: "proceeding on cases about criminal offenses" as realization of the right for judicial protection of

juveniles cant be settled only by their right for an appeal to the court. It is reasonable a position that the right for judicial protection of juveniles is embodied an aggregate of the authorities, providing to them the right to assert personally their rights and freedoms, providing the qualified legal assistance to achieve restoration in the rights, etc. Special juvenile process is provided in the criminal procedure code of the Kyrgyz Republic and the Russian Federation as well.

According to our opinion, the questions are the most vulnerable which connected with application to the juvenile of measures of restraint, proceeding of separate investigative actions (for example, interrogation, a confrontation, expert examination, submission for identification), pronouncement and execution of a sentence, etc.

The criminal procedure legislation of the CIS countries regulates conditions on application of measures of procedural coercion concerning juveniles. However, it is always caused reasonable polemic among theorists and practitioners. And in spite of the fact that concerning teenagers, legislators provided special requirements taking into account international legal acts, they are not always corresponded to the constitutional and international principles which are underlined in them.

So in Article 37 of the convention on the rights of the child it is specified that "... no child shall be deprived of his or her liberty unlawfully or arbitrarily. Arrest, detention or imprisonment of the child are carried out according to the law and should be used only as a measure of last resort and for the shortest appropriate period of time" (Assembly, 1989). According to it also in the new criminal procedure code of Kazakhstan, 2015 Article 541 "the detention and application of measures of restraint to juveniles" it is fixed that "the measure of restraint in the form of detention is applied to the juvenile only in cases when other measures of restraint on the circumstances can't be applied". The same provision is provided and in other criminal procedure code of the CIS countries. In addition for example in the code of the Kyrgyz Republic about children in Article 87 it is specified that "election of a measure of restraint in the form of detention and also punishments in the form of imprisonment have to be applied to children only as a last resort".

All above is testified to the undertaken legislative measures for protection of juveniles in the most vulnerable spheres.

The detention of the juvenile for the purpose of application to him of a measure of restraint including on suspicion to commission of criminal action is carried out by the general rules which were reflected in regulations of the criminal procedure code and it is certainly caused the questions. There are observed separate features for example, at checking of reasonableness of detention, the prosecutor conducts an interrogation personally of such juvenile and also his parents or legal representatives are informed about it. In each case, at the solution of a question about application to him of a measure of restraint, possibility of return of the juvenile under supervision has to be discussed. But at the same time, in our opinion in the criminal procedure legislation there is provided rather difficult procedure. So, in a case when the investigator decides to file the petition before court for election concerning the juvenile of a measure of restraint in the form of detention it is necessary to receive originally consent of the prosecutor that is tightened of the consideration of matter by court. This opinion is expressed also by other lawyers. For example, S. Popov and G. Tseplyaeva write: "... it would be more correct that interrogation of the suspect after his detention was made by court as there is assigned to court the solution of a question about imprisonment of the detainee into custody. Such order would become an original guarantee of inviolability of person".

In addition such position would be answered to international legal norms and the principles, including with item 10.2. Of the Beijing rules, according to which "the judge or other competent judicial functionary or body immediately consider a question of release". K.A. Avaliani writes about it as well.

It should be noted that in spite of the fact that the detention of the juvenile is provided in a separate chapter (Article 393 of the Criminal Procedure Code of KR and Article 541 of the Criminal Procedure Code of RK), any special procedures of carrying out of the detention are not regulated. And it is testified that the order, detention term, etc. are same as well as for adult persons that causes a fair complaint in the legal public.

As it was stated above in each case at consideration of a question of a measure of restraint, the most priority is his return under supervision. But despite reasonable approach of the legislator to the matter, an accurate regulation in the Criminal Procedure Code wasn't received. According to our opinion, till now such essential aspects aren't settled: who is decided and in what form this opportunity has to be discussed what procedural document should be made thus, etc., for example, whether will it be as motivated resolution of the prosecutor which will allow interested persons to appeal it in court or it will be resolution of the investigator, etc.

In our opinion, the "vague" interpretation of norms, allowing investigation authorities and court to make decisions only by their discretion is inadmissible concerning the juvenile. In the given matter the judge can

be guided by different motives at pronouncement of the decision including pursue selfish purpose or for the benefit of other persons but not protection of the rights of the juvenile.

Unfortunately, we quite often observe that the necessary or politically engaged decisions are taken place from judicial and law enforcement agencies concerning certain juveniles. As a rule it is connected first of all: first with oppositional activity of parents or close relatives, secondly, existence in judicial system of the "telephone right", existing including due to dependence of judges on Presidential Administration, Zhogorku Kenesh which have considerable opportunities for control of their appointment, thirdly, a widespread of corruption among judicial control that influences on pronouncement of the decision by them concerning juveniles. All this is interfered with activity of lawyers which becomes only profanation and the main objective isn't achieved, namely professional protection of the rights of juveniles isn't provided.

The international experts write about the same, who were carrying out monitoring in Kyrgyzstan on problems of judicial reform. They are specified: "for ordinary citizens the most important problem is the high level of corruption in justice sector. The bribery is undermined of the trust of society to judicial system and it is interfered with measures of increase of professionalism of lawyers. Many lawyers complain that their main task is not active protection of clients in court, but assistance to process (deal with corrupt judges)".

In our opinion, it is also wrong position of the law enforcement officers considering that it is necessary to practice more widely application to juveniles such measure of restraint as detention. They proceed from the fact that it can be used in the educational purposes. We adhere to the point of view that "... firstly, the measure of restraint doesn't pursue the aim of re-education of juveniles and in order that he doesn't disappear from investigation authorities or court, doesn't counteract investigation and doesn't continue to be engaged in criminal activity. Secondly, as a result of long stay in isolation ward the result can be opposite as not formed psyche of a teenager on the contrary will get quicker under influence of the criminal environment, prison subculture and he will leave a prison as already established criminal. The third this position is put the teenager in the worst situation, than category of adult persons, thereby violating the requirements, established by the modern legislation on protection of legal interests and the rights of juveniles. Therefore, at deciding on the application of a measure of restraint, investigation authorities need to consider damage of the injured person and interests of the state".

It is necessary to pay attention and to a palette of opinions among scientists and to possibility of application concerning the juvenile and non-conventional methods of interrogation for the purpose of exposing a juvenile in perjury. It is about a criminalistics hypnology. V.V. Obraztsov writes that "... obtaining the reliable focusing information which is earlier not reported by its carrier. This information is acted as the means promoting to the solution of a question of commission by given or other person of a crime, about the involvement of a particular person for a crime, other his guilty awareness in deeds" (Obraztsov, 1995). As the opponent of it was V. Khabalev who focused attention that "... it was established experimentally: as a result of hypnotic suggestion there can be committed a suicide. Under hypnosis people shot at themselves from the revolver (not loaded) and they did it as directly after hypnotic session and some hours later". We agree with points of view by Strogovich (1992), Z.K. Mirzoyeva and other authors, so we consider that application of hypnosis concerning this category of persons is inadmissible for the following reasons: firstly, application of such nonconventional method is attracted violation of constitutional rights of the juvenile who got to a consequence orbit, according to regulations of the Constitution both Kyrgyzstan and Kazakhstan. But thus it is necessary to consider that the voluntary consent can be concerned only adult part of society as juveniles owing to their age are not had a full procedural capacity and therefore they can't make such decision personally. Secondly, it is necessary to consider, the psycho-age features of juvenile organism and intrusion such way into the sphere of his mentality it isn't excluded that can be entailed also negative consequences for his health. Thirdly, the hypnosis mechanism isn't rather studied so far and there is no absolute guarantee that the data received thus are authentic. Fourthly, receiving in such way of punishment is violated also other constitutional provision, fixed in constitutions of Kyrgyzstan and Kazakhstan not to testify against himself. Fifthly, it is necessary to consider that hypnosis is the strongest and vulnerable form of mental violence and it shouldn't concern juveniles especially as owing to features of psycho-emotional development they are more subjected to hypnotic suggestion. Also, I.A. Makarenko wrote as well that it can be entailed biased evidences. Not less debatable question is application of a lie-detector concerning the juvenile. It is difficult to support a position of the Kazakh legislators who are provided in the departmental act "the instruction on application of lie detector researches in law enforcement agencies of Kazakhstan" the prohibition to conduct lie-detector research if the person didn't reach 16 years. And it

means that the person by means of lie-detector can be interrogated closely to 16 years. We consider that owing to indicated earlier by us the specified features for the persons who didn't reach 18 years such researches can be conducted only when they reach majority so full procedural capacity will be had by them. It is impossible to remember that hypnosis application is also attracted violation of the constitutional norms, providing protection of the rights of the juvenile.

The existing and other debatable problems of an admissibility and legitimacy of use of various methods concerning juveniles including non-conventional, must be, certainly, more deeply and scientifically investigated. First of all, legality, scientific character and morality have to be a basis of their permission.

CONCLUSION

Thus, it is possible to state the following: the mechanism of protection of constitutional rights of juveniles, depends on a number of factors which are influenced on its efficiency, namely: firstly, the rights of this category of persons have to be provided proceeding from an integrated approach to the legal mechanism of protection where the priority of the rights, put in the constitution has to become the defining direction of activity for legislative, judicial authority and executive power. Secondly, the institute of protection of the rights of juveniles, representing multilevel system has to be as united mechanism where at each its level there are realized the specific but meanwhile interconnected functions of the protection of the rights, given parts of society (international legal protection, interregional (for example, the CIS countries), interstate). Thirdly, the allocated stages of protection of the rights of juveniles, namely the prevention of offenses, judicial review and execution of punishments are testified to their interrelation where there must be concentrated other links of a subsystem, realizing functions according to specifics of a subject of their regulation. Fourthly, to overcoming of contradictions, filling the gaps in the sphere of legal regulation concerning protection to the rights of the juvenile are interfered insufficient study, including at the scientific level of intersubject and interindustry communication, despite a considerable mass of the regulations concerning considered spheres. Fifthly, it is necessary to develop in details and exclude the provisions of the criminal legislation and criminal procedure legislation, creating additional conditions for broad interpretation of the content of norms that gives the chance and for abuses of judicial authorities, public prosecution bodies and law enforcement bodies including use in the activity various forms of physical and psychological abuse. Sixthly, it is necessary to exclude distortion and inaccurate interpretation of the constitutional provisions and also international legal regulations in the legislative sphere.

Remedies of juveniles are first of all, measures material and legal and proceeding from this procedural and legal character that is assumed an activity of various subjects, determined by the legislation in its different forms and at the established levels and stages of protection. Proceeding from it the criminal legislation and criminal procedure legislation are offered the specific means and the legal mechanism of legal regulation of the relations in this sphere. But thus, the built system of protection of the rights of juveniles can't be effective if there not to be solved a problems without inclusion in it other institutes of society and the state and also in interrelation and in interaction with other branches of the right which are answered to principles of the constitution.

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