National Report

on current legislation and practice with respect to the rights of children in conflict with the law in Ukraine

By All-Ukrainian Foundation for Children's Rights

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CONTENTS

Introduction

At present, Ukraine has no holistic system of justice for children[1] in conflict with the law[2] – it is presented in a fragmentary way in the form of legally established peculiarities of the administration of justice in cases involving children. However, over the years of its independence, Ukraine has taken a number of measures to implement its international obligations on the protection of the rights of children in conflict with the law and the resolution of problems with juvenile delinquency. In particular, the state approved the Concept for the Development of Criminal Justice for Minors in Ukraine and adopted a number of laws that focus on the enhancement of the protection of rights and the re-socialization of minors in accordance with the relevant international norms and standards.

In addition, over the last five years, Ukraine has adopted a number of other important regulatory acts aimed at improving the national legislation on the protection of children's rights, enhancing preventive and prophylactic work, and establishing an effective system for the rehabilitation of minors in conflict with the law. Moreover, in August 2017 in Kyiv, a national conference was held that was dedicated to the development of the Strategy for reforming the juvenile justice system, within the context of the Interagency Coordination Council on Juvenile Justice. Its purpose was to consider the key aspects of the current juvenile justice system that need to be changed and brought closer to the international standards in this area, as well as recommendations on relevant legislative changes and models of work with minors in the conflict with the law.

This report is based on the comprehensive Analysis of the strengths and weaknesses of the current national legal framework and the Expert evaluation of current practices in Ukraine, which were performed by the All-Ukrainian Foundation for Children's Rights (AUFCR) in 2018 within the framework of the Matra-project "Child Protection System Strengthening for Children in Conflict with the Law".

[1]Here and hereinafter, "any person under the age of majority has the legal status of a child" and, accordingly, "a child is considered a juvenile when aged fourteen to eighteen years" and "a child is considered a minor until he or she reaches the age of fourteen years" (paragraphs 1, 2 of Article 6 of the Family Code of Ukraine at http://zakon.rada.gov.ua/laws/show/2947-14 , Articles 31, 32 of the Civil Code of Ukraine at http://zakon.rada.gov.ua/laws/show/435-15).

[2]The term 'children in conflict with the law' refers to anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence (see UNICEF, Child Protection INFORMATION Sheet on Children in Conflict with the Law at https://www.unicef.org/chinese/protection/files/Conflict_with_the_Law.pdf; Save the Children, "Children in conflict with the law" at https://resourcecentre.savethechildren.net/keyword/children-conflict-law.)

Part 1. Overview of the national legal framework - as a basis for the development of a justice system concerning children in conflict with the law

1.1. General conclusions

The national criminal and criminal procedure law provides for certain peculiarities in the administration of justice as regards children in conflict with the law. They are laid down in separate sections of the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine and, first of all, determine the types of punishment (which are more lenient than the ones for adults), as well as the possibility of a relief from criminal responsibility with the use of coercive measures of an educational nature. Secondly, they establish special procedural procedures, such as the obligatory participation during interrogation of a legal counselor, a legal representative, an educator or a psychologist and, if necessary, a doctor. In particular, the state of the pre-trial investigation in criminal proceedings in cases involving minors is regulated by Chapter 38 of the Criminal Procedure Code of Ukraine "Criminal proceedings with respect to minors". During the pre-trial investigation and judicial examination, in addition to the information about the juvenile and circumstances of the criminal offense, there is also a need to establish other data relevant for the proper decision-making in the best interests of the minor, taking into account his/her age and peculiarities of development, and, if necessary, a comprehensive psycho-psychiatric and psychological examination should be called for. Also, any detention and remand into custody of a minor shall be used as the pre-trial restriction only in a case when the minor is suspected or accused of committing a grievous or extremely grievous crime, provided that the imposition of another pre-trial restriction does not ensure the prevention of the risks of the minor's evasion from the investigation or trial and/or his/her commission of new crimes.

When drafting the regulatory acts that constitute the national legal framework for the functioning of the justice system as regards children in conflict with the law, it was foreseen to create a legal mechanism for the possibility of applying the EU law that was also useful in the assimilation of a number of approaches to protecting the rights of the child.

One of the principal international instruments on the treatment of children in conflict with the law is the UN Convention on the Rights of the Child which, along with other international instruments, is the focus of attention of the existing legislation on the administration of justice are regards children in Ukraine.

At the same time, the UN Committee on the Rights of the Child calls on Ukraine: to introduce a juvenile justice system as provided for by the National Action Plan for the implementation of the UN Convention on the Rights of the Child for the period up to 2016; and to thereby take all measures to ensure that the new system fully complies with the relevant standards (in particular the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), the United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"), the United Nations Rules for Protection of Juveniles Deprived of their Liberty ("The Havana Rules"), and the Vienna Guidelines for Action on Children in the Criminal Justice System).

1.2. Identified gaps and issues of concern in the national legal framework

Conformity with international standards

The results of AUFCR's 'Analysis on the national legislative framework of Ukraine regarding the existing system for protection of children in conflict with the law'[3] aimed at understanding how the juvenile justice system works have revealed incomplete correspondence of the existing legal and regulatory acts with international norms and standards[4] with respect to ensuring the best interests of the child in conflict with the law. This is an indication that, in the presence of decisions on the implementation of these standards in the legal system of Ukraine, the process of adoption of legal acts has not taken into consideration the specific features of child-friendly justice, in particular:

a) The best interest of the child should be a primary consideration in all actions concerning children. Article 3 of the UN Convention of the Rights of the Child does not make any exception for children in conflict with the law. However, a proper definition of what constitutes best interests has not been defined in the current national legislation concerning the justice system and this is perhaps a contributing factor to justifications of gross violations of children's rights in the name of 'best interests'.
b) The multidisciplinary approach brings the contributions of various disciplines to mingle and interact with each other, because most domains in which children come into contact with justice require interdisciplinary approaches. In Ukraine there is a lack of a holistic approach to the implementation of children's rights through maximization of resources and efforts and, thus, there is a lack of integration of services on an interdisciplinary basis.
c) Restorative justice is framed by significant international standards on the protection of the rights of children involved with the criminal justice system[5]. The findings revealed that, though much work had been done after restorative justice was introduced in Ukraine in 2009, it had not advanced much. Moreover, due to the problems experienced, a tendency can be observed towards a decrease of the restorative justice practice. The major challenges include the absence of sufficient financing of the mediation centers, and lack of cooperation of the law enforcement structures and the system of justice with mediators.

This applies in particular to the Criminal Law and Criminal Procedure Codes, the Code of Administrative Offenses, the Laws on the Prosecutor's Office and the National Police, and others.

Availability of a variety of dispositions

The list of non-custodial sentences being applied with respect to juveniles is too limited and does not comply with the international standards on the availability of a wide range of corrective actions. Due *inter alia* to the absence of an effective system of re-socialization for children in conflict with

[3]The full version of the materials on the Analysis of the national legal framework of Ukraine on the current system of protection of children in conflict with the law can be found here.
[4]International and European legal framework for the Matra-programme "Child protection system strengthening for children in conflict with the law" under the auspices of "MATRA" / 2018, at https://resourcecentre.savethechildren.net/library/save-childrens-definition-child-protection.
[5] These include the CRC, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (General Assembly resolution 40/33, annex); the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (Assembly resolution 45/112, annex); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Assembly resolution 45/113, annex); and the Guidelines for Action on Children in the Criminal Justice System (Economic and Social Council resolution 1997/30, annex).

the law, there is still a norm on bringing a minor to criminal responsibility and recording a second conviction for him/her for avoiding serving a sentence that is not related to imprisonment.

Diversion, alternative measures and children below the minimum age of criminal responsibility

While analyzing the procedural rules for compliance with the relevant standards, it can be stated that at present there is no mechanism for bringing the consideration of cases involving children in conflict with the law into the extra-criminal proceedings (procedures for non-criminal proceedings). After all, both criminal and criminal procedural legislation provide for the possibility of a relief from criminal responsibility for a child who has committed a criminal offense only by a court in a court session. At the same time, this procedure is possible only when the child commits intentional crimes of minor gravity and careless crimes of moderate gravity. In addition, even the prosecutor, who carries out the procedural oversight for the pre-trial investigation[6], is not entitled to make an independent decision on bringing the child out of the criminal justice system with the application of alternative measures, which would more effectively contribute to the de-stigmatization of the child committing the offense. Although there is, in fact, a provision for the use of coercive measures of an educational nature for children aged 11 years or older who have not yet reached the minimum age of criminal responsibility[7].

Deprivation of liberty

Another key issue is the procedure of child's detention and keeping children at places for deprivation of liberty. For example, the period of detention of a person of any age, without an order from the investigating judge or the court, cannot exceed 72 hours from the moment of detention. However, in accordance with relevant international standards, a child suspected of committing an offense shall appear before the court for a decision on the pre-trial restriction not later than 24 hours from the moment of detention.

Interrogation

The procedure for interrogation remains child-unfriendly. The current legislative acts do not provide a unified approach to the rules of interrogation of children, regardless of whether they are suspects, victims or witnesses. The existing norms only provide for the mandatory questioning of the child by the court, and do not allow instead for the use of video records of their interrogation during the pre-trial investigation in order to avoid unnecessary traumatization of juveniles.

Placement in social rehabilitation institutions

When analyzing the national legal framework governing the administration of justice with respect to children in conflict with the law, the procedures for application of an alternative punishment were also studied, such as the use of coercive measures of an educational nature with the placement of a child in a social rehabilitation institution. One of the major inconsistencies with international standards (particularly the "Havana Rules") is the norm contained in the Provisions on social rehabilitation facilities concerning the visits to pupils (boarders) by parents, or persons substituting them, or other relatives: these visits are only allowed with the permission of the school principal or

[6]Article 36 of the Criminal Procedure Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/4651-17.
[7]Article 22 of the Criminal Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/2341-14.

the person substituting the school principal. According to relevant international standards, any restrictions on, or deprivation of, contacts with the family for any purpose must be prohibited.

In addition, despite the general need to build up a network of special institutions (centers) for working with children who demonstrate deviant behavior or are inclined to committing offenses, there has been no compromise stricken between the mechanism to ensure the rights of the child and the arrangement of optimal conditions for the correction of his/her deviant behavior and the prevention of offenses. In particular, in the last 5 years: there have been virtually no regulatory acts on the regulation of activities of such institutions; there has been no mechanism developed for referral of pupils with a deviant behavior to these institutions; and both special correction programs for children with deviant behavior and special training programs for staff are still not available.

Criminal procedure

While studying the current administrative legislation concerning the procedures for its application with respect to a child committing an offense, it has been found that such legislation does not contain any norms on:

- The presumption of innocence;
- Keeping a child separate from adults in administrative detention;
- The right of the child to the mandatory participation of a defense counselor in the proceedings;
- The right to recuse a judge or other authority; and
- The right of the child being brought to administrative responsibility to refuse to give an explanation and to ask questions to witnesses.

Training

A separate issue of concern is the (lack of) training of experts working in the justice system. Currently, the analyzed regulatory acts do not contain any norms regarding: the investigating judges who make decisions at the pre-trial stage; judges who consider cases on crimes involving child victims; judges for conducting the proceedings on administrative offenses; and judges of the Supreme Court. The specialization of investigators has been provided for the police only[8]. However, neither this norm nor the corresponding order of the Ministry of Internal Affairs of Ukraine[9] contain any requirements on the possession, by the candidates, of the necessary knowledge and skills, and their compliance with certain qualification requirements, such as availability of working experience, special training, etc. At the legislative level and in the departmental regulations, there are no common standards regarding the training of specialists in the justice system concerning children in conflict with the law, namely the terms for special training, certification based on the training results, and the monitoring of the quality of such specialists' activities.

[8]Article 484 of the Criminal Procedure Code, at http://zakon.rada.gov.ua/laws/show/2341-14.
[9]On the organization of activities of the bodies of pre-trial investigation at the National Police of Ukraine, at http://zakon.rada.gov.ua/laws/show/z0918-17.

1.3. Proposals and recommendations

1. Based on the results of the Analysis of the national legal framework on justice concerning children in conflict with the law, the main recommendation is the need to adopt a framework law on the juvenile justice.
2. In particular, such a law should provide for:
    - fundamental rules, based on the synergy of children's rights and a justice system in respect of children in conflict with the law;
    - ensuring of special separate proceedings;
    - the possibility of bringing of a child in conflict with the law out of the criminal justice system at the pre-trial stage with the imposition of alternative sanctions;
    - the application of restorative justice;
    - alternative sanctions and corrective actions for children of different categories and bodies that implement them.
3. At the same time, it is necessary to broaden the category of crimes committed by children which may be resolved with a view of bringing the child out of the criminal justice system, as well as supplementing the measures of an educational nature applicable to children with sanctions like the obligation to undergo correctional programs (trainings, courses) aimed at rehabilitation of the minor, imposition of restrictions on leisure-time activities, limitation of the time for outdoor activities, establishment of special requirements for the behavior of the minor, etc.
4. It is also necessary to introduce norms at the legislative level and in departmental regulations on uniform standards for training of experts in the justice system concerning children in conflict with the law.
5. An important issue that needs regulation is the creation and operation of multidisciplinary teams at different levels to ensure coordination and cooperation between the legal system actors, social services and the public.
6. Another important issue is the regulation of activities of social rehabilitation institutions with children of different categories.
7. All changes should be aimed at the implementation, at the legislative level, of the basic principle of "the best interests of the child" and, accordingly, should be addressed at the departmental level.

Part 2. Overview of practices – in the implementation of the procedures in criminal proceedings involving children in conflict with the law and the compliance of these practices with international standards on child-friendly justice

2.1. General conclusions

The practices of applying the legislation on criminal responsibility and counteracting offenses by participants of the prevention activities, bodies of the pre-trial investigation, and the courts of Ukraine are an integral part of the justice system for children in conflict with the law. In order to identify the existing problems in the implementation of norms of the Ukrainian legislation, and international treaties which are a part of the national legislation, in the field of counteracting juvenile delinquency, the All-Ukrainian Foundation for the Protection of Children's Rights has

conducted a 'Study on the pre-trial practices and judicial practices for application of the Ukrainian legislation on the criminal responsibility of minors'[10]. This study was conducted based on the research on the existing practices for pre-trial investigation, legal counselors' practices for criminal proceedings and judicial practices for consideration of cases involving children, the results of a survey for experts (employees of the juvenile preventive units and investigators from the National Police of Ukraine, prosecutors, legal counselors, and judges), materials of preventive programs and practices, and statistical data. The study addresses the most significant problems in existing practices of justice for children, in particular:

- Children's rights and child-friendly procedures;
- Pre-trial prevention procedures;
- Trainings of juvenile justice specialists.

A general conclusion from the research findings is that there is an urgent need to develop mechanisms for the application of international standards and best child-friendly practices[11] concerning children in conflict with the law.

[10] The materials of the study can be found here

[11] Hereinafter the concept of practice includes preventive programs, procedural actions for the pre-trial investigation, procedures for consideration of cases in courts, and procedures for imposition of punishments for children.

Chart 1. Opinion of experts (legal counselors (98%), judges (92%), prosecutors (87%), and investigators (85%)

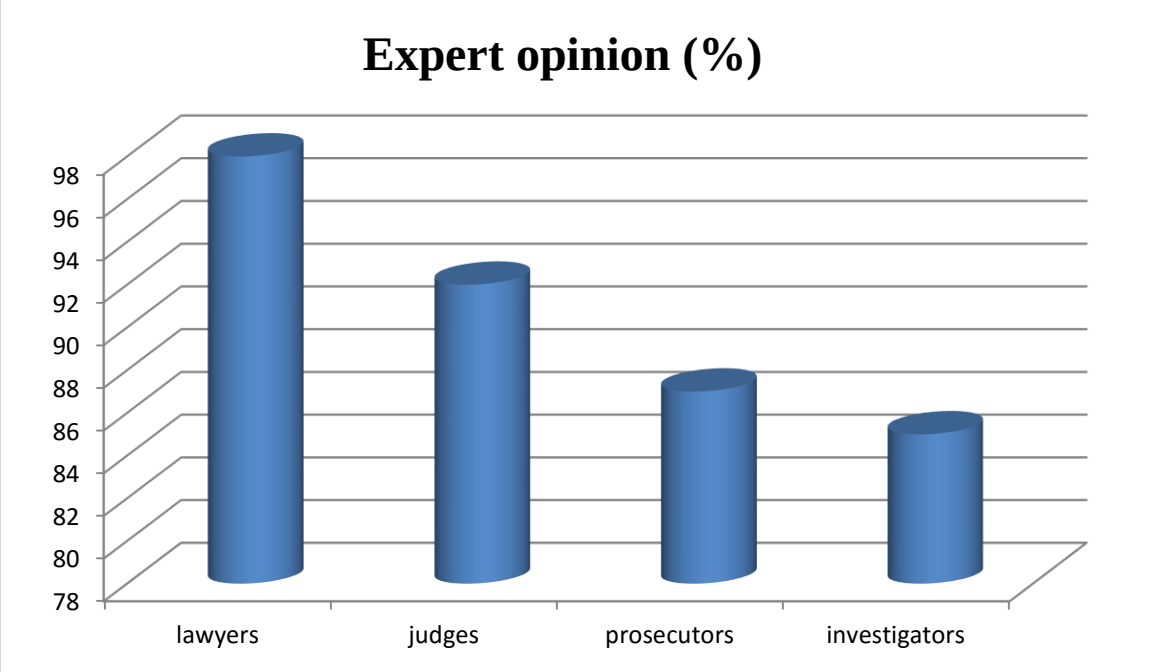
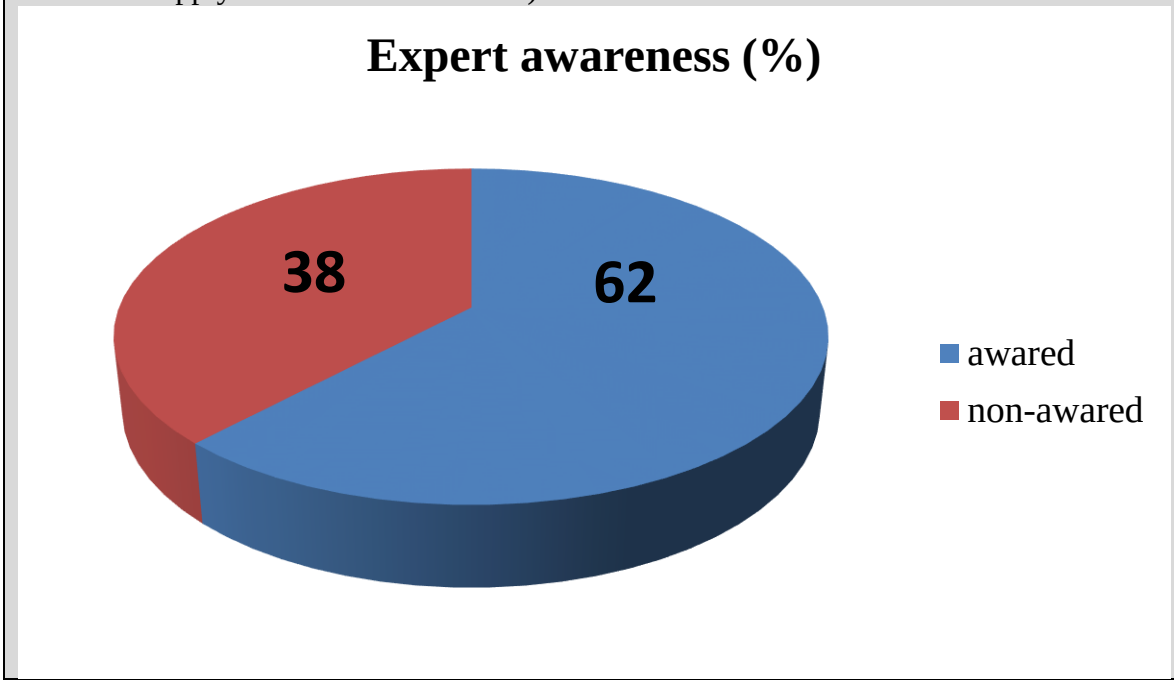


Chart 2. Professional knowledge of international standards and best practices concerning children in conflict with the law (62% know the UN Convention on the Rights of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice, and the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 38% – do not know these standards and do not apply them in their activities).



The extent of the need to implement and apply child-friendly practices (procedures) is evidenced by the statistics. For instance, during 2017, the bodies of the pre-trial investigation of the National Police of Ukraine considered 4,508 persons aged 14 to 18 years as suspects. At the same time,

5,087 children acted as witnesses and/or victims in the criminal proceedings. Consequently, nearly 10 thousand children were involved in pre-trial investigation and judicial proceedings.

Preventive practices

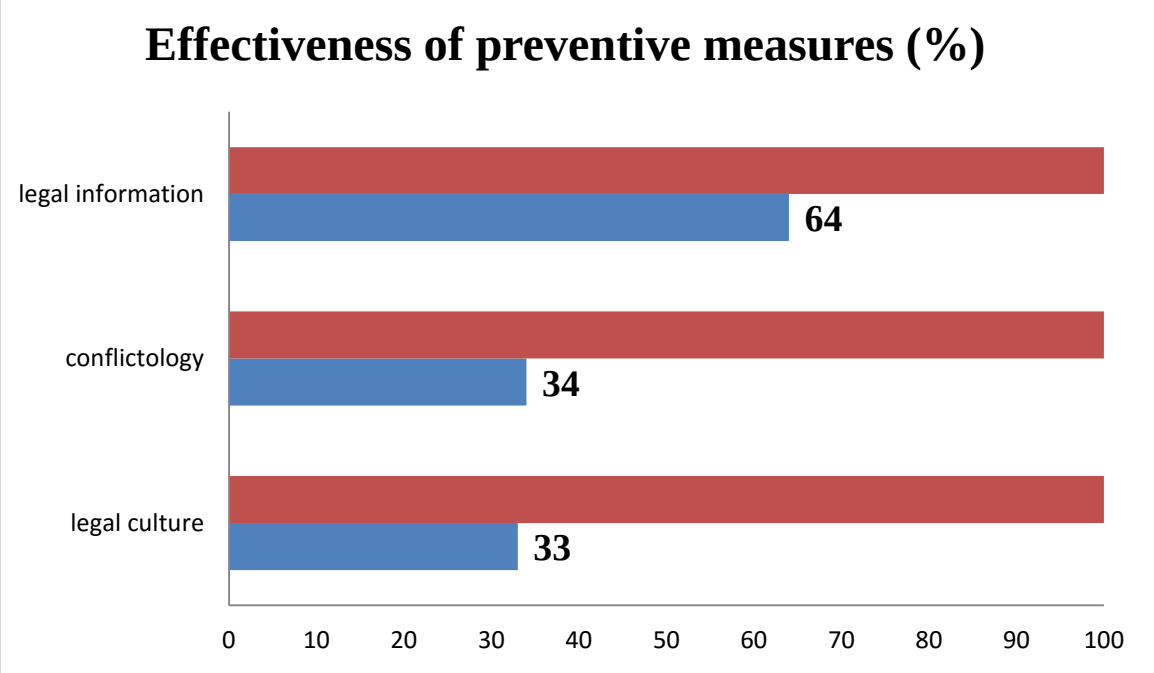
Preventive (prophylactic) activity with respect to children who commit, or are at risk of committing, offenses is recognized by the international standards as the basic and integral element of the system for protection of children in conflict with the law and is one of the main means for influencing children, their legal education, and crime prevention[12].

The generalization of activities of the preventive agencies and bodies with respect to children makes it possible to single out more than 20 basic forms of preventive practices: from conducting personal interviews with children by the police officers, to designing and maintaining themed-based websites[13]. According to the results of a survey for upper-form pupils and students[14] regarding the organization of effective preventive work aimed at reducing the number of offenses and crimes, they consider preventive and corrective programs to be most effective (64%).

The list of the least effective measures in the opinion of children in terms of reducing the number of offenses and crimes includes the prohibition of movies and programs popularizing criminal behavior (35%) and regular visits of the police officers to school (51%).

[12] United Nations Guidelines for the Prevention of Juvenile Delinquency (the “Riyadh Guidelines”).
[13] http://hit-live.info/, https://pustunchik.ua/, http://posnayko.com.ua/
[14] Survey for upper-form pupils and students of the first and second category higher education institutions on the topic "Youth and unlawful behavior", conducted by the Ukrainian Research and Guidance Center for Practical Psychology and Social Work in 2015. Total number of respondents – 10743 persons.
http://www.psyua.com.ua/doc/project/mon_analis_prot_poved.pdf

Chart 3. Effectiveness of preventive measures
Lectures on the legal culture fostering (33%); improvement of the psychological climate in the class (34%); introduction of quality preventive programs and provision of legal information on the consequences of the commission of crimes (64%, respectively).



Pre-trial investigation practices

When assessing the child-friendliness of practices / procedures with respect to child in conflict with the law being used by the National Police investigators during the legal proceedings, attention was first given to their: comprehensiveness; consideration of peculiarities of the child's development and psychological states; possibility for, and availability of, protection of their rights; support for the family; and consideration of the best interests of the child[15]. In this case, the best interests of all children participating in the same procedure or case must be separately assessed and balanced in order to resolve the possible conflict of interests of the children.

It can be stated that, while issuing resolutions on the suspicion, selecting a pre-trial restriction, or drawing up of an indictment, investigators (in their overwhelming majority – 81%) explain to the child the essence of their actions, their procedure and meaning. However, almost half of the respondents (41%) do not consider it expedient to specify in the indictment the extended biographical information of a child suspected of committing an offense (information about parents, structure and living conditions of the family, place of studies of employment, state of health, and the level of the child's development). The fact that only 37% of interviewed investigators consider the participation of an educator, psychologist, or doctor in criminal proceedings with respect to

[15] While mentioning the best interests of the child in criminal proceedings, the UN Guidelines provide for due care to be taken of the views and opinions of children victims or participants of the proceedings; unconditional respect for the rights of the child such as the right to dignity, freedom, and equal treatment; adoption of an integrated approach by all relevant bodies for the proper consideration of the interests of all parties at risk, including psychological and physical well-being, as well as the legal, social, and economic interests of the child.

juveniles as the means to enhance the effectiveness of the investigation results in the absence of an integrated approach to the selection of methods and forms of child-friendly procedures in the criminal proceedings with respect to children in conflict with the law. After all, only half (51%) of investigators consider it necessary to have a comprehensive study of the personality of the child (use of forensic methods of investigation, clarification of conditions of the child's life and studies, consultations and use of the conclusions by a psychologist and an educator, and inclusion of materials from the welfare agencies and doctors) with respect to whom the procedures of the criminal proceedings are applied. This is also confirmed by another survey. Thus, only 11% of the interviewed investigators fully agree with the mandatory involvement of experts (psychologists, social workers, educators, representatives of the Service on minors, and doctors) during the conduct of procedural actions (pre-trial investigation procedures), and another 28% rather agree than don't agree. At the same time, 39% of investigators are more likely not to engage such experts, while 22% completely disagree with such practices. Attention should be drawn to the fact that only 23% of the interviewed investigators consider that the participation of the healthcare staff in cases where a child is involved in the proceedings should be mandatory, even without a request from the child's legal representatives. Thus, during the pre-trial investigation, attention is focused on the age and development characteristics of juvenile, and not on the best interests of the child.

Defense attorney's practices

The most important aspect of ensuring the observance of children's rights and standards of child-friendly justice is the mandatory participation of a defense attorney in the criminal proceedings involving children, whose functions can be performed exclusively by a legal counselor[16].

According to the results of the survey[17] concerning criminal procedures in respect to children, during the administration of criminal proceedings with the participation of children, defense attorneys' level of activity is as follows: very active – only in every tenth case, active enough – in every second case, and acting formally – in every fifth case. In fact, the procedure or practice of involving a defense attorney in a case concerning a child is very sophisticated and formalized. It is no different from the procedure for assigning a defense attorney to an adult, which fact does not comply with the principles of the child-friendly justice.

A special issue is the demand by a defense attorney towards an investigator and/or a judge to ensure the respect to the standards of child-friendly justice during the conducting of the pre-trial investigation procedures, the judicial consideration, and the imposition of a punishment. But this is possible only when the defense attorney has a clear understanding of the child's status in the criminal proceedings, the function of the defense attorney himself/herself, the possibilities of exercising the rights that the child and his/her legal representative can use, and the rules of conduct. However, no specialization for a defense attorney participating in the defense of a child in the criminal proceedings has been foreseen.

The obligation to involve a defense attorney / defense counselor for the dock defense purposes, or for conducting an individual procedural act, is entrusted to the investigator, prosecutor,

[16] Law of Ukraine "On the Defense Attorneys and Advocacy Activities", at http://zakon.rada.gov.ua/laws/show/5076-17
[17] V.V. Romanyuk. Criminal proceedings with respect to minors: monograph / V.V. Romanyuk; Ministry of Internal Affairs of Ukraine, Kharkiv National University of Internal Affairs. - Kharkiv: "Madrid Publishing House", 2016. – 252p.

investigating judge, or the court. At the same time, a decision or resolution by a judge or the court orders to assign a defense attorney for the dock defense purposes and to ensure his/her arrival to a specified place at a specified time for participation in the criminal proceeding (as a rule, this order is addressed to the Center for the provision of the free-of-charge legal aid)[18]. The Center is obliged to assign such a defense counselor immediately[19]. Having received the Center's assignment, the defense attorney should do the following:

1. Review the materials of the criminal proceedings;
2. Conduct a confidential meeting with the client, during which the attorney clarifies the client's rights;
3. Investigate the circumstances of the criminal offense as expounded by the client;
4. Get the legally significant information from the client;
5. Coordinate the legal position with the latter; and
6. Draw up a corresponding protocol based on the results of the aforementioned activities.

The procedure for the provision of the free-of-charge secondary legal aid also does not comply with the principles of the child-friendly justice as regards children in conflict with the law. The Law states[20] that, together with the recourse for the provision of such aid, the legal representative of the child shall submit documents confirming the belonging of the person, concerning whom the legal representative files a recourse, to one of the vulnerable categories of persons[21]. In such a way, a restriction is imposed, as there may be no such documents available, or the legal representative of the child may not be willing to gather them. In addition, conducting an urgent investigative action deletes the possibility of a prompt assignment of a defense attorney in case the legal representative does not have all the necessary documents during his/her first visit to the local Center for the provision of the free-of-charge secondary legal aid.

Judicial practices

While considering the judicial practices, it should be noted that the Law[22] provides for the specialization of judges for administration of criminal proceedings, where a child is a defendant. In addition, such specialization exists in the criminal proceedings on the appeals or cassation procedures regarding the review of the judgements of courts made on the above issues.

The general picture of the procedures for judicial consideration of the criminal proceedings concerning children is such that, in accordance with the requirements of the Ukrainian legislation[23], this category of cases is considered by judges specifically authorized for the consideration of such cases, which is quite positive for the issue of establishment of the relevant specialization of judges.

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[18] Part 1 of Article 49; paragraph 1, Clause 1, Part 2 of Article 52 of the Criminal Procedure Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/4651-17
[19] Clause 3, Part 1 of Article 17, part 6 of Article 19 of the Law of Ukraine "On the Free-of-charge Legal Aid", at http://zakon.rada.gov.ua/laws/show/3460-17
[20] Clause 4 of Article 18 of the Law of Ukraine "On the Free-of-charge Legal Aid", at http://zakon.rada.gov.ua/laws/show/3460-17
[21] Part 1 of Article 14 of the Law of Ukraine "On the Free-of-charge Legal Aid", at http://zakon.rada.gov.ua/laws/show/3460-17
[22] The Law of Ukraine "On the Judicial Administration and Status of Judges", at http://zakon3.rada.gov.ua/laws/show/1402-19/print1511818025657558
[23] Part 10 of Article 31 of the Criminal Procedure Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/4651-17

An important aspect is that judges, in their practice of imposition of punishments and during the judicial consideration of cases, try to take into account the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules").

However, according to the registry of judicial decisions: the cassation instance in Ukraine referred to the specified international document only in three cases[24]; the appellate courts referred to them in approximately 500 cases; while the first instance courts passed approximately 150 sentences with the corresponding reference, and 9 times in 2018[25]. These statistics demonstrate the lack of understanding the UN Standard Minimum Rules for the Administration of Juvenile Justice by the judges.

However, in many cases, such references only underline the lack of full understanding of their scope and possibilities of use. These norms are used as a general thesis without disclosing the content and detailed justification of the relevant standards. Therefore, they look superficial and are not effective in protecting the rights of the child, indicate a misunderstanding of their essence[26], are quoted out the context, and are not in accordance with the purpose of the relevant standard(s), or are not relevant to the situation considered[27].

Such a procedure as the drafting of a pre-trial report has become a positive innovation in the national legislation, which has significantly reinforced the guarantees for a fair trial in criminal proceedings involving children. Its execution is mandatory for criminal proceedings involving children[28]. When getting a case for a judicial consideration, in most instances, judges indicate in their resolutions the need for the execution of a pre-trial report and its submission to the court[29]. However, in practice, there are situations where the pre-trial report in a case involving a child accused of committing an offense has not been executed, which fact has become a subject matter of the cassational review of the case by the Supreme Court. In practice, the content of the pre-trial report is taken into account by judges, and they expressly state this fact in their sentences[30].

The study has showed that courts rarely use the practice of the application of a pre-trial restriction that is not related to taking into custody, when the prosecution applied for such an action but the child's defense attorney opposed the use of such a restriction. Judges do not want to undertake the responsibility and issue a decision on this matter, taking into account the documents attached to the petition for the application of the pre-trial restriction. Meanwhile, temporary detention facilities are not child-friendly towards a child who: has been detained, but without any sufficient information on the commission of a criminal offense; is suspected of committing a criminal offense, but without the proper reasoning; has been legally detained, but has not been found guilty yet.

General measures of criminal law nature in the form of a punishment are imposed on persons who have already reached the age from which a criminal prosecution may be initiated – that is, 16 years. Thus, diversion could be implemented only for juveniles before 16 and the list of sanctions that may

[24] http://reyestr.court.gov.ua/Review/53162997; http://reyestr.court.gov.ua/Review/38140298; http://reyestr.court.gov.ua/Review/32030740
[25] Statistical data have been taken from the registry of judicial decisions, at http://reyestr.court.gov.ua/
[26] http://reyestr.court.gov.ua/Review/38140298
[27] http://reyestr.court.gov.ua/Review/64779580
[28] Article 314-1 of the Criminal Procedure Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/2341-12
[29] http://reyestr.court.gov.ua/Review/73432192 , http://reyestr.court.gov.ua/Review/71142231
[30] http://reyestr.court.gov.ua/Review/71541951, http://reyestr.court.gov.ua/Review/73725116

be imposed on a child who, at the time of the commission of the offense, has reached the age of 16 is exhaustive. These are the main types of punishment, such as fines, compulsory community service, corrective labor, arrest, and deprivation of liberty for a certain period. The list of additional sanctions includes deprivation of the right to occupy certain posts or to engage in certain activities[31].

According to the Criminal (2012) and Criminal Procedural (2012) Codes of Ukraine, measures of criminal law nature may also be applied with respect to persons who have not yet reached the age from which a criminal prosecution may be initiated. In some cases[32], these are children aged between eleven and sixteen.

For these categories of children who have committed an act prohibited by the criminal law, coercive measures of an educational nature (which are not the criminal liability measures) may be applied.

2.2. Identified areas of concern arising in the process of the application of practices / procedures in criminal proceedings involving children

Preventive practices

Programs of preventive activities concerning children in conflict with the law can be structured according to the level of their implementation: national, regional and local. This necessitates the development and subsequent consecutive implementation of both comprehensive programs and programs in separate areas at all three levels.

The study and analysis of the effectiveness of programs implemented at different times and at different levels in Ukraine allows us to identify a number of shortcomings and problems during the implementation of these programs.

The list of the major shortcomings includes, firstly, the lack of systemacity: these programs are not always systemic; they are implemented on specific issues, have no connection with each other, and do not take into account the results of the implementation of previous programs. Thus, the National programmes are not based on holistic multiagency approach. Secondly, the lack of consistency or ensuring the sustainability of results: it does not always happen that, based on the results of the implementation of such programs or in connection with them, the state agencies take additional measures of the law enforcement, social, or informational nature driven by the conditions and results of the programs' implementation. Unfortunately, after realization of innovative actions or projects, best practice does not become a tendency or tradition.

The list of the major problems in the implementation of such programs includes poor finance support and unreadiness (both of the society as a whole and of the target audience – that is, children who are in the risk zone for commission of an offense or are already in conflict with the law) for being proactively involved in such programs because the national legislation does not have proper information and awareness-raising content in respect to children's rights.

Investigative practices

[31] Article 98 of the Criminal Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/2341-16
[32] Part 2 of Article 22 of the Criminal Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/2341-12

The list of the areas of concern for the pre-trial investigation procedures includes, first of all, failures to take the best interests of the child into account. The procedural rules that regulate, for example, the procedure for interrogation of a child during a pre-trial investigation from the Guidelines' standpoint are rather formal in their compliance with the principles. For instance, while establishing the "circumstances to be established in a criminal proceeding"[33], an investigator cannot reveal complete and comprehensive information about the personality of the juvenile, his/her age, state of health and development level, conditions of life and education, and attitude to the offense committed, as well as other socio-psychological traits of the person due to the absence of mechanisms by which the investigator can do this. Because the norm does not contain them. Similarly, there are no mechanisms for the application of another norm[34] aimed at protecting the privacy and family life of a child in conflict with the law.

Another example of a failure to take the best interests of the child into account is the procedure for conducting a comprehensive psycho-psychiatric and psychological examination of juvenile suspects and accused[35]. At present, the obligation to carry out certain procedures related to finding out the state of a child suspected of committing an offense is not mandatory, and the investigator takes this decision individually and at his/her own discretion. The child is not getting ready for such procedures. Often, the information on their conduct is conveyed only to the child's legal representative or defense attorney.

Some rules bear the marks of not taking into account the interests of the child but helping the investigator, such as the participation of a legal representative, educator, psychologist, or doctor in the interrogation of a minor suspect or accused. While assessing the implementation of this norm, it should be noted that, as a rule, it is complied with. First of all, because the absence of the above-mentioned persons makes it impossible to present the results of the investigatory actions to the court as the evidence.

There is also a problem with the absence of the officially approved unified techniques that can be used by specialists involved in the criminal proceedings as witness experts. A comprehensive forensic psycho-psychiatric and psychological examination of a child suspected or accused of committing an offense is conducted only if necessary. Most importantly, as noted above, it is conducted not for the purpose of identifying the interests and needs of the child, but for the purposes of the pre-trial investigation and for determining the future criminal justice measures. For instance, a psycho-psychiatric examination shall be conducted to address the issue whether the juvenile suspect or accused has a mental illness or mental retardation and is capable of realizing, fully or partially, the meaning of his/her actions and of directing them in a particular situation. A psychological examination shall be conducted to determine the level of development and other socio-psychological traits of the juvenile's personality, which must be taken into consideration when imposing a punishment and choosing a measure of an educational nature.

At the same time, the investigator is not entrusted with an obligation to gather all the experts who could provide a comprehensive assessment on the fact of offense commission by the child. Similarly, the study of all the circumstances of commission of the offense by the child, his/her

[33] Article 485 of the Criminal Procedure Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/2341-12
[34] Article 487 of the Criminal Procedure Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/2341-12
[35] Article 486 of the Criminal Procedure Code of Ukraine, at http://zakon.rada.gov.ua/laws/show/2341-12

psychological state after its commission, understanding of his/her guilt, and the desire to clean up his/her act, and never repeat such actions again may have certain influence on the decision of the judge. Instead, the absence of such materials significantly affects the objectivity and consequence of the judicial decision.

Defense attorney's practices

As a rule, when establishing the identity of the child who has committed a criminal offense, or directly during its commission, the authorized person taking the child into custody is obliged to immediately inform his/her parents or adoptive parents, guardians, trustees, and the guardianship authorities. However, before the arrival of a legal representative, police officers are talking with the child – they question this minor, which is not a procedural act, they receive explanations, which are documented and allow to officially register the fact of the committed criminal offense. A child who is restricted in movement and is suspected of committing an offense is not always familiar with his/her right not to testify against himself/herself; therefore, before the legal representative arrives and the status of the suspect is obtained, the child may be interviewed as a witness, which interviewing is carried out without the mandatory participation of the defense attorney.

Despite the fact that a defense attorney is the only person authorized to represent the child in court[36], there is a restriction on the representation of the child when it comes to criminal proceedings involving juvenile witnesses, victims and civil claimants. In this case, their right to receive a professional legal assistance is limited, since there is no obligation to involve a defense attorney for representation of their interests, and the circumstances when such defense attorney may be assigned are not specified.

Judicial practices

As of today, the majority of the court premises are not suitable for consideration of cases involving children. There are no appropriate courtrooms and special rooms for interrogation of juvenile victims or witnesses of crimes (the so-called "Green rooms"), which adversely affects the consideration of this category of cases. The exception is the Ivano-Frankivsk City Court, the Lutsk City Court and the Bakhmach District Court of the Chernihiv region, which created conditions for interrogation of children and improved the conditions for children's stay at the courts.

The procedure for determining the specialization of judges for consideration of cases involving children is still a problem. In particular, determination of specialization must not be influenced by the availability of a 10-year period of service as a judge, which does not always speak for the effectiveness of such a requirement for a specialized judge.

Despite the fact that at different times the issue of the peculiarities in consideration of cases involving children and the application of special practices has drawn special attention of the highest judicial authorities[37], in practice such judicial practices are outdated on numerous occasions and do not take into account the contemporary international standards.

[36] Article 131-2 of the Constitution of Ukraine, at http://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[37] Resolutions by the Plenum of the Supreme Court of Ukraine No. 5, dated April 16, 2004, " On the practice of application of the juvenile delinquency laws by the courts of Ukraine", at

One of the main issues of concern in the implementation of child-friendly practices and principles with respect to children in conflict with the law during the judicial consideration is the training of judges. This is confirmed, among other things, by the fact that, in the popularity rating for topics offered by judges (with criminal specialization) for retraining and advanced training, the "Criminal proceedings with respect to minors" topic was ranked 10th among 20 most relevant topics. In turn, with 135 consolidated topics (civil and criminal specialization), the topic on application of new norms with respect to children in conflict with the law was ranked 23rd, while consideration of cases of juvenile delinquency was at the 47th place[38].

Among the problems of using child-friendly practices with respect to children in conflict with the law, the judges themselves identified the following: a formal approach to the selection of a punitive measure; ineffectiveness of punishment in the form of coercive measures of an educational nature; the lack of the possibility to individualize punishments due to the limited number of punitive measures that can be applied with respect to minors; and the lack of a realizable control during the probationary period[39].

2. 3. Proposals and recommendations

1. Preventive activities should not be regarded as the exclusive competence of the law enforcement agencies (the national police and the probation bodies). The purpose of such activities include the protection of children's rights and ensuring their enjoyment, and the creation of conditions for the comprehensive development of the child and a safe and child-friendly environment. Therefore, the resources and capabilities of the Ministry of Youth and Sports of Ukraine, territorial communities, self-government bodies of the higher education institutions, youth councils of the territorial communities, children's and youth organizations, and other entities *need to be more actively included* in the provision of the social component of the preventive activities' content.

2. All agencies of the preventive activities, bodies of the pre-trial investigation, and courts need to be more widely informed about the use of the relevant international standards and the experiences in the administration of child-friendly justice in practice, in particular the

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http://zakon4.rada.gov.ua/laws/show/va005700-04; No. 12, dated December 23, 2005 " On the practice of application of the laws on de-institutionalization by the courts of Ukraine", at http://zakon5.rada.gov.ua/laws/show/v0012700-05 ; No. 2 dated May 15, 2006 "On the practice of judicial consideration of cases on the use of coercive measures of an educational nature, at http://zakon2.rada.gov.ua/laws/show/v0002700-06; Letters of the Superior Specialized Court of Ukraine for Civil and Criminal Cases No. 223-1134 / 0 / 4-13, dated July 18, 2013 "On certain issues for conduct of criminal proceedings with respect to juveniles", at http: / /zakon4.rada.gov.ua/laws/show/v1134740-13, and No. 223-66/0/4-17, dated January 16, 2017 "On the practice of conduct of criminal proceedings with respect to juveniles", at http: // zib. com.ua/ua/print/127476-list_vssu_vid_16012017_223-6604-17_pro_praktik_zdiysnennya_.html, "On the practice of meting out the pre-trial restriction in the form of detention for juveniles and ensuring the high-priority judicial consideration of criminal proceedings with respect to this category of persons" – generalization of the judicial practices of the Supreme Court of Ukraine in cases of juvenile delinquency and their involvement in criminal activity, dated August 29, 2003, at http://zakon4.rada.gov.ua/laws/show/n0082700-03

[38] Judicial practice analysis for 2013-2015. Examination of the qualification requirements for a judicial candidate. Final report on the results of the study. USAID "Fair Justice" project; High Qualification Commission of Judges of Ukraine; International NGO "Universal Examination Network"; S.O. Mudruk. – Kyiv, 2015.

[39] E. Nazimko. Results of the survey for appellate court judges on the effectiveness of the application of punishments with respect to minors and the possibility of their use in the legislative and law-enforcement activities / E. Nazimko // Viche. - 2014 – No. 6. – p. 20–22.

introduction of innovative techniques and action programs as well as special training for staff.

3. As regards the training of experts working with children in conflict with the law, there is a need to elaborate the issue of coordination of activities, and the exchange of training and methodological materials, plans and programs, between the centers for training and advanced training of the National Police, the centers for training and qualification improvement of the State Penitentiary Service of Ukraine, and the Academy of Judges.
4. Most of the norms of the current Criminal Procedure Code which regulate criminal proceedings in cases involving minors formally correspond to the relevant international standards including the Guidelines on child-friendly justice. The problem is the lack or low specification of the mechanisms for their implementation. The situation with the harmonization of procedures at all stages of the criminal proceedings would be substantially improved with the specialization of investigators, defense attorneys, and judges – and not a formal one, but a legally regulated specialization supported by effective mechanisms for its implementation. Of course, the best option would be the *establishment of family courts*, which would enable bringing a child in conflict with the law out of the criminal justice system.
5. The variety of punitive and non-punitive criminal justice measures provides a judge with a possibility to individualize the response to an offense committed by the child. However, the problem is that the overwhelming majority of the non-punitive criminal justice measures concerning children in conflict with the law can only be applied if they commit crimes for the first time. In addition, the crime must be either a minor offence or a medium gravity crime. The penal system for children who have committed offenses does not have peculiarities but differences from the system being applied for adults. Therefore, a *system of specific types of criminal sanctions must be created*. Such sanctions should apply to children in conflict with the law, taking into account the peculiarities of their development[40]. For example, the imposition of a punishment in the form of a house arrest, payment of a fine by installment, and expanding the scope of imposition of the compulsory.

[40] N. Miroshnichenko. Certain suggestions to improve the legislation with respect to the criminal justice measures regarding juveniles. Published in: Legal influence on the unlawful behavior: actual thresholds (monograph). Mykolaiv: Ilion, 2016, pp.194-196.