

Inna Rakipova*

National University “Odesa Law Academy” (Odesa, Ukraine)
innamudrak99@i.ua

Oleksandr Torbas**

National University “Odesa Law Academy” (Odesa, Ukraine)
torbasol@hotmail.com

Vladlena Voloshyna***

National University “Odesa Law Academy” (Odesa, Ukraine)
volvl77@hotmail.com

Denys Shylin****

National University “Odesa Law Academy” (Odesa, Ukraine)
shylindenys@outlook.com

Anastasiia Pidgorodynska*****

National University “Odesa Law Academy” (Odesa, Ukraine)
pidgorodynska@hotmail.com

**Ensuring Rights of Victims Under the
Criminal Procedure Code of Ukraine: Current
Issues and Prospects**

*Garantía de los derechos de las víctimas
en virtud del Código de Procedimiento Penal de Ucrania:
problemas actuales y perspectivas*

*Garantir os direitos das vítimas sob o Código de Processo
Penal da Ucrânia: questões atuais e perspectivas*

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* Ph.D., Associate Professor of the Department of Criminal Procedure, Detective and Operational Activities, National University «Odesa Law Academy». Area of scientific interests: victim in criminal proceedings, criminal procedural communication, human rights communication of the victim in criminal proceedings. ORCID: <https://orcid.org/0000-0003-2456-0515>

** Doctor of Legal Science, Professor of the Department of Criminal Procedure, Detective and Operational Activities, National University «Odesa Law Academy». Area of scientific interests: pre-trial investigation, discretion in criminal proceedings. ORCID: <https://orcid.org/0000-0002-1465-4238>

*** Ph.D., Associate Professor of the Department of Criminal Procedure, Detective and Operational Activities, National University «Odesa Law Academy». Area of scientific interests: research of the system of principles of criminal proceedings, peculiarities of the implementation of the principles of criminal proceedings at certain stages of the criminal process. ORCID: <https://orcid.org/0000-0001-8772-4172>

**** Ph.D., Associate Professor of the Department of Criminal Procedure, Detective and Operational Activities, National University «Odesa Law Academy». Area of scientific interests: theory of evidence in the criminal process, evidentiary law, prejudice in the criminal process. ORCID: <https://orcid.org/0000-0002-8990-3534>

***** Ph.D., Associate Professor of the Department of Criminal Procedure, Detective and Operational Activities, National University «Odesa Law Academy». Area of scientific interests: international cooperation in the criminal process; international criminal process. ORCID: <https://orcid.org/0000-0001-6822-2409>

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Abstract

Legal regulation and practical issues of ensuring of rights of victims under the Criminal Procedure Code of Ukraine are considered in the article. The criminal procedure legislation of Ukraine lacks legal regulation of the mandatory participation of a lawyer representing the victim in criminal proceedings. This situation puts the participants of proceedings in an unequal position. Victims during the trial and in court are unable to properly defend their legitimate interests due to lack of legal awareness. The authors also state that the participation of the victim's representative in the conclusion of the conciliation agreement should be mandatory. The cases in which victims can receive free legal aid have been analyzed. It is proposed to define the cases of mandatory participation of the representative of victims in the current legislation of Ukraine.

Keywords: Victim; Legal Representative; Free Legal Aid; Rights of Victims; Conciliation Agreement; Criminal Proceedings.

Resumen

La regulación legal y las cuestiones prácticas de garantizar los derechos de las víctimas en virtud del Código de Procedimiento Penal de Ucrania son consideradas en el artículo. La legislación procesal penal de Ucrania carece de regulación legal para la participación obligatoria de un abogado que represente a la víctima en los procesos penales. Tal situación pone a los participantes de los procedimientos en una posición desigual. Las víctimas durante el juicio y en los tribunales no pueden defender adecuadamente sus intereses legítimos debido a la falta de conocimiento legal. Los autores también afirman que la participación del representante de la víctima en la celebración del acuerdo de conciliación debe ser obligatoria. Se han analizado los casos en los que las víctimas pueden recibir asistencia jurídica gratuita. Se propone definir los casos de participación obligatoria del representante de las víctimas en la legislación vigente de Ucrania.

Palabras clave: víctima; representante legal; asistencia jurídica gratuita; derechos de las víctimas; acuerdo de conciliación; proceso penal.

Resumo

A regulamentação legal e questões práticas de garantia dos direitos das vítimas sob o Código de Processo Penal da Ucrânia são consideradas no artigo. A legislação processual penal da Ucrânia carece de regulamentação legal da participação obrigatória de um advogado que representa a vítima em processo penal. Tal situação coloca os participantes do processo em posição desigual. As vítimas durante o julgamento e em tribunal não conseguem defender devidamente os seus legítimos interesses por falta de

consciência jurídica. Os autores também afirmam que a participação do representante da vítima na celebração do acordo de conciliação deve ser obrigatória. Foram analisados os casos em que as vítimas podem receber assistência jurídica gratuita. Propõe-se definir os casos de participação obrigatória do representante das vítimas na atual legislação da Ucrânia.

Palavras-chave: vítima; representante legal; assistência judiciária gratuita; direitos das vítimas; acordo de conciliação; processo penal.

Introduction

Protection of the victim's rights, freedoms, and legitimate interests, based on Article 2 of the Criminal Procedure Code of Ukraine, is the main task of criminal proceedings; the essence of the criminal process. In criminal proceedings, the lawyer plays an important role in ensuring the rights and legitimate interests of not only the suspect or accused, but also the victim, whom they may represent during the pre-trial investigation and trial. After all, according to Part 1 of Article 58 of the Criminal Procedure Code of Ukraine, the victim in criminal proceedings may be represented by a representative: a person who is entitled to be a defense counsel in criminal proceedings. It seems that an important procedural condition for the realization of the rights and legitimate interests of the victim in criminal proceedings is to give them the right to professional legal assistance, guaranteed by Article 59 of the Constitution of Ukraine. In cases provided by law, this assistance must be provided at no cost.

It should be agreed that in some cases it is difficult for a person to fully exercise the rights guaranteed by the Constitution without the right to legal aid, as the procedural legislation of Ukraine is quite formalized (Shapoval, 2015, p. 355). In this regard, Hroshevyi (1998, p. 126) stressed that the procedural rights of the victim are, first, guarantees of the constitutional rights and freedoms belonging to this person. Therefore, such rights must be adequate to their fundamental rights and freedoms, i.e., be sufficient and suitable for their protection. Such guarantees are the right to qualified legal assistance, as well as the victim's right to access to justice and compensation for damage. Since the right to legal aid is constitutional, in the legal literature, there are propositions to add one more right for the victim in Part 1 of Article 56 of the Criminal Procedure Code of Ukraine: "to receive assistance from a lawyer at the expense of the state" (Solonyova, 2015, p. 141).

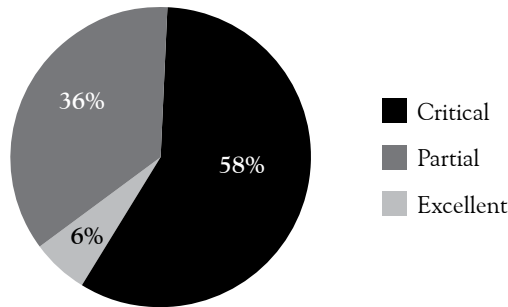
Methodology

The methodological basis of the article is determined by the purpose and methods used to solve the tasks of the research. The authors have used the general scientific and special-legal methods of scientific knowledge. Among the general scientific methods used were the dialectical method, which accompanied the entire process of this study and allowed for the consideration of the legal institute of representatives in the criminal procedure of Ukraine, formulate

ways for its improvement within the current legislation of Ukraine and propose ways to achieve these goals; and the method of system analysis, which gave an opportunity to investigate the nature of the institute of representatives. The special-legal methods include: the method of comparative legal analysis allowed comparing the system of the provision of free legal aid to victims in different countries. With the help of the formal legal method, the content of the norms of law regulating social relations in this area was disclosed.

Additionally, the sociological method was used to clarify the problems of certain issues under study. The questionnaire was addressed to both scientists and practitioners, as well as victims of criminal proceedings. Additionally, 31 investigators from the Investigative Department of the Main Directorate of the National Police of Ukraine in Odesa region were interviewed, including 19 investigators from the Transport Crimes Investigation Department of the Investigation Department of the Main Directorate of the National Police of Ukraine in Odesa region, 7 investigators from the Investigation Department of the Main Directorate of the National Police of Ukraine in Zhytomyr region, 36 victims, and 50 pedagogical staff. The results of the survey showed that the current state of ensuring the rights of victims in criminal proceedings is assessed as: 1) critical: rights are insufficiently provided (58%), 2) partial: rights are partially provided, and the mechanism of realization of certain rights of the victim is not provided by the Criminal Procedure Code of Ukraine (36%), 3) excellent: rights are fully provided (6%) (Figure 1). 95% of respondents unequivocally agreed on the need to recognize the victim as a subject of the right to free legal aid in criminal proceedings, if: 1) he/she is unable to engage a representative; 2) he/she will express such a wish; 3) the investigator, prosecutor, investigating judge, and court have come to this conclusion, pointing out, in particular, the need to clearly define in law the cases in which such legal assistance should be provided to a victim of a criminal offense.

Figure 1
Level of ensuring the rights of victims in criminal proceedings in Ukraine



Legal regulation of mandatory participation of the victim's representative in the criminal proceedings in Ukraine

The existence of legal conflicts and gaps in the current procedural law, the lack of systematic implementation of legal positions and the case law of the European Court of Human Rights indicate the need for reform of the Ukrainian national legislation in order to bring it in line with generally accepted European standards in the field of human rights (Mudrak et al., 2019a, p. 389).

Some European countries have linked the provision of free legal aid to victims to specific offenses, so that certain groups of victims have unconditional access to it or to some of its forms. The latter include victims of gender-based violence, terrorism, human trafficking (Spain), murder, grievous bodily harm, rape, children and dependents of the deceased (Romania). Other crimes include, for example, threatening witnesses and violence against civil servants (Denmark). Austria provides the right to free legal aid to victims if representation in court is in the interests of the administration of justice and the effective enforcement of claims for damages, and if they are unable to pay for their own legal services. Austria provides specialized legal aid to certain groups of victims, such as victims of crimes against sexual freedom and sexual integrity, violence or threats to life (§ 65 and § 66 of the Criminal procedure code of Austria).

The Criminal Procedure Code of the Czech Republic (Article 43) and the Law "On Victims of Crime" (§ 2) guarantee the provision of free legal aid to such categories of victims who are unable to pay the costs of representing

their interests in court, namely, particularly vulnerable victims of crime (for example, children, persons with physical, mental, psychological or sensory disabilities, victims of trafficking, victims of sexual violence or atrocities or threats of violence, if in a particular case there is an increased risk of secondary victimization due to their individual characteristics such as age, sex, race, nationality, sexual orientation, religion, health, maturity or ability to express themselves). Victims who have suffered significant damage to their health, relatives of individuals who died because of the crime, as well as children and minors are always entitled to free legal aid, regardless of whether they can afford to pay for their interests in court. Belgium provides free legal aid to all victims.

Timely involvement of a person as a victim in criminal proceedings, acquaintance with their procedural rights and actively participating in the proceedings as the victim and through representatives of their legitimate interests, such as a representative and legal representative, are important. This should be done to ensure that the rights and legitimate interests of the victim are considered throughout the criminal proceedings and in any procedural decisions made based on the results of such proceedings (Shybiko, 2013, p. 308).

At the same time, we believe that the issue of limiting the number of representatives of the victim in criminal proceedings should be resolved in a similar manner as Part 3 of Article 46 of the Criminal Procedure Code of Ukraine, which states that no more than five defense counsels of one defendant may participate in the trial at the same time. However, in our opinion, a limit should be set on the number of defense counsels - both defenders of the suspect and representatives of the victim - and at the stage of pre-trial investigation. This is due to the possibility of excessive delay (for example, when reviewing the materials of criminal proceedings, etc.), which can lead to violations of reasonable time of criminal proceedings. It is suggested that Part 3 of Article 46 of the Criminal Procedure Code of Ukraine should clearly state that no more than five defense counsels of one defendant may participate in criminal proceedings at the same time, which will be consistent with the title of this article. Also, Part 4 of Article 58 of the Criminal Procedure Code of Ukraine should be amended and worded as follows:

“4. The representative enjoys the procedural rights of the victim, whose interests he represents, in addition to procedural rights, the implementation of which is carried out directly by the victim and cannot be entrusted to the representative.

No more than five representatives of one victim may take part in the criminal proceedings at the same time”.

The criminal process is a legal mechanism that protects and ensures individual rights as per the law on criminal responsibility. Implementing of the procedural rights of the victim as a participant in criminal proceedings, restoring their property and other violated rights is a criminal procedural activity aimed at protecting the interests of the victim as a subject of criminal proceedings. In other words, we believe that it is a protective activity carried out by the victim or their legal representative.

The absence of mandatory legal representation for victims in criminal proceedings puts the participants in an unequal position. It follows that, on the side of the suspect, the accused in the cases provided for in Article 52 of the Criminal Procedure Code of Ukraine, there is a qualified lawyer. However, the victim does not have such legal assistance from the state, except as provided under the Law of Ukraine “On Free Legal Aid”. Therefore, it is quite logical to propose to settle the cases of mandatory participation in the proceedings of a lawyer - a representative of the victim, with the cost of such services being covered by the state budget. In the scientific literature, attention has been repeatedly drawn to the expediency of determining in the Criminal Procedure Code of Ukraine the cases in which the participation of the victim’s lawyer is mandatory (Herasymchuk, 2011; Ablamskyi, 2014; Iskanderova, 2016; Dubivka, 2017).

De jure, it can be stated that a victim in criminal proceedings in some cases may receive free secondary legal aid (Part 1 of Article 14 of the Law of Ukraine “On Free Legal Aid”). However, there is an urgent need to address the issue of increasing access to legal assistance for victims. Given the low subsistence level and high cost of legal services in Ukraine, it is impossible to guarantee free secondary legal aid to socially vulnerable groups of the population who are *de facto* victims. Furthermore, other categories of victims need such legal assistance.

It is worth noting the draft Law “On Amendments to Certain Laws of Ukraine on Facilitating Access to Free Legal Aid and Improving the Quality of Its Provision” dated September 7, 2015, the draft Law “On Amendments to Article 14 of the Law of Ukraine “On Free Legal Aid” to increase the availability of free secondary legal aid for individual participants in criminal proceedings”, dated October 20, 2015. These drafts are about facilitating access to such assistance for socially vulnerable groups, clarifying the legal status and powers of centers for free secondary legal aid, and so on. The Draft Law “On Amendments to

Certain Legislative Acts of Ukraine on Facilitating Access to Free Legal Aid and Improving the Quality of its Provision”, dated February 19, 2021, expanded the criterion of low-income for persons with disabilities to ensure their access to free legal aid, as well as the right to legal aid for victims of trafficking, domestic violence or gender-based violence.

Access to free legal aid is crucial for protecting the rights and interests of victims in criminal proceedings, particularly in preventing secondary victimization of vulnerable victims. Such a problem is especially relevant today and sounds extremely pressing in the conditions of martial law in Ukraine.

In an effort to resolve it, on May 3, 2022, amendments were made to the Law of Ukraine «On Free Legal Aid» to expand the list of persons entitled to free secondary legal aid. Thus, according to this law, victims of criminal offenses against sexual freedom and sexual integrity, torture or ill-treatment during hostilities or armed conflict have the right to free secondary legal assistance in criminal proceedings initiated as a result of the commission of such criminal offenses (Article 14 of the Law). It should be noted that legal assistance to victims, the scope of which is defined in the above-mentioned law, includes such types of legal services as representation in courts, other state bodies, local self-government bodies, drawing up procedural documents.

The need to provide victims of criminal offenses against sexual freedom and sexual integrity, torture or ill-treatment during hostilities or armed conflict with the right to free legal aid has arisen now because: 1) the criminal procedural law of Ukraine does not provide for mandatory participation of the victim's representative in criminal proceedings; 2) the above changes, in our opinion, will not be sufficient if the goal is to fulfill the tasks of criminal proceedings and effectively protect the victims' rights. First of all, because such changes to the Law of Ukraine «On Free Legal Aid» do not take into account all the components of representation of the victim in criminal proceedings, which are important at all stages of the criminal process, starting with the pre-trial investigation. Additionally, we believe that appropriate changes should be made to the Criminal Procedure Code of Ukraine in order to indicate exceptional cases of mandatory participation of the victim's representative at certain stages of criminal proceedings.

Practical problems of mandatory participation of the victim's representative in criminal proceedings

We emphasize the problematic nature of the objective determination of the level of material security of the person and the definition of the person as low-income, as income statements may not always indicate true information. Therefore, in our opinion, there may be cases of abuse of the right to free legal aid. And even if we assume that the relevant drafts would be adopted, the problem of providing the victim with legal assistance in criminal proceedings would not be resolved, as we should still talk about working out and regulating at the legislative level cases of mandatory participation of the victim's representative in criminal proceedings.

Thus, some believe that the mandatory participation of a lawyer representing the victim should be considered in certain cases: 1) when the victim is a minor who has no legal representatives; 2) when the victim is a person who has mental or physical disabilities, which complicates the performance of the procedural functions assigned to him; 3) when the victim does not speak the language of the proceedings (Tlepova, 2015, p. 98).

In this regard, Omelchenko (2004, p. 13) notes that the minor victim is one of the least protected participants in criminal proceedings. Therefore, the author proposes to provide in the law for cases of mandatory participation in the process of a lawyer to protect the rights and legitimate interests of the minor victim.

Krukevych (2017, p. 10) expresses the same opinion to ensure active participation in the criminal proceedings of juvenile victims. In turn, Herasymchuk (2008, p. 42) also emphasizes that the mandatory representation of the victim should be relied on a lawyer. The scientist adds that this statement stems from the grounds on which mandatory representation is appointed - physical and mental disabilities, juveniles, lack of knowledge of the language in which the proceedings are conducted. In these cases, the person desperately needs legal assistance, as it is necessary to compensate for the incomplete legal capacity of the person.

There were also propositions in legal literature to supplement the criminal procedure law with norms that would provide grounds and procedure of: a) the obligatory participation of the representative of the incapacitated or partially incapacitated victim; b) the participation of the victim's representative in the case not next to the victim, but instead of them, during the whole process

or in separate investigative or judicial actions; c) the suspension of the legal representative from participation in the case and replacement by his/her lawyer representative (Hoshovskyi & Kuchynska, 1998, p. 108).

Moreover, Kuchynska (2009, p. 10) also proposed to expand the list of cases provided by law for the mandatory provision of victims with legal aid at the expense of the state, which may be: 1) refusal of the prosecutor to support the state prosecution (the representative is provided to the victim at their request); 2) the victim is a minor (from the moment of committing an act against them); 3) the victim has physical or mental disabilities that do not allow them to sufficiently protect their rights; 4) the victim does not speak the language in which the proceedings are conducted; 5) in all cases of premeditated murder.

Tlepova (2015, p. 164) adds that the mandatory participation of a lawyer as a representative of the victim should be ensured by the state if, as a result of a criminal offense, a person is in a state that prevents their participation in the proceedings and has no close relatives or family members who could intervene as victims.

Kavun (2016, p. 15) points out that the Criminal Procedure Code of Ukraine should indicate the following cases of mandatory participation of the victim's representative in criminal proceedings as follows: 1) persons who have become victims of a criminal offense under the age of 18; 2) persons who at the time of the commission of a criminal offense against them were declared incapable or partially incapable; 3) persons who due to mental or physical disabilities (blind, deaf, dumb, etc.) are not able to fully exercise their rights, as well as those who are elderly (over 70 years); 4) persons who do not speak the language of the criminal proceedings; 5) persons who, as a result of a criminal offense committed against them, became disabled of the first or second group; 6) persons involved in criminal proceedings as successors, instead of the deceased victim of a criminal offense; 7) persons who are unable to engage a lawyer on their own due to lack of funds or for other objective reasons, but have filed a motion to engage a lawyer as a representative in criminal proceedings.

Tulyakov (2001, p. 34) drafted the Law of Ukraine "On Protection of the Rights of Victims of Crime", Article 10 of which provided for guaranteeing all victims of crime equal access to free legal aid necessary to ensure the protection of their rights.

In general, we can agree with such proposals, adding our own considerations of the following nature. According to the Law of Ukraine "On Amendments

to Certain Legislative Acts of Ukraine on Ensuring the Activities of the National Anti-Corruption Bureau of Ukraine and the National Agency for the Prevention of Corruption” dated February 12, 2015, it was rightly amended and supplemented Part 2 of Article 52 of the Criminal Procedure Code of Ukraine with the paragraph 9. This paragraph stipulates that in the case of an agreement between the prosecutor and the suspect or accused person to plead guilty, the mandatory participation of defense counsel is ensured in criminal proceedings from the moment of initiating such an agreement. In this regard, we believe that an urgent problem that needs to be addressed is the mandatory participation of the victim’s representative in criminal proceedings since the initiation of the conciliation agreement between the victim and the suspect or accused.

In our opinion, the victim during the initiation and conclusion of the conciliation agreement in criminal proceedings is unable to properly defend their legitimate interests due to lack of legal awareness. As a result, they are deprived of the opportunity to achieve the subjectively desired result that must occur after the conclusion and approval of such a reconciliation agreement. We come to such conclusions by analyzing the materials of judicial practice (Supreme Specialized Court of Ukraine civil and criminal cases, 2014), which show that it is quite common not to comply with the requirements of procedural law when concluding a conciliation agreement. And, for the most part, it is a question of disregard of requirements or the requirements of procedural law, leading to violations of the rights and lawful interests of the victim in criminal proceedings.

The question of *zero* criminal-procedural activity of victims in criminal proceedings is connected, first and foremost, with the physical and psychological conditions of victims who, in the period after the occurrence of a criminal offenses, are undergoing abrupt changes in the conditions of life, resulting in an overall deterioration of physical condition and well-being and an increase in mental stress according to the severity of the newly created situation of permanent or prolonged danger (Mudrak et al., 2019b, p. 35).

In addition, we believe that it is necessary to ensure the mandatory participation of the victim’s representative in criminal proceedings not only in the case of a conciliation agreement (since the initiation of the agreement), but also in case of non-compliance with the conciliation agreement; from the moment the victim applies for cancellation of the sentence. After all, the victim needs the help of a lawyer to prove that the convicts did not fulfill the terms of the agreement, if necessary, to appeal the refusal to grant the request to cancel

the sentence. If the agreement was initiated, for example, at the stage of pre-trial investigation, the lawyer would represent the interests of the victim in further pre-trial and trial proceedings.

We believe that the participation of the victim's representative in the conclusion of the conciliation agreement is mandatory due to the amendments made to Article 469 of the Criminal Procedure Code of Ukraine, according to which "a conciliation agreement in criminal proceedings for criminal offences related to domestic violence may be concluded only on the initiative of the victim, his/her representative or legal representative".

The Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine to improve the mechanisms for ensuring the tasks of criminal proceedings" dated March 16, 2017, made significant changes to Article 469 of the Criminal Procedure Code of Ukraine on the conditions for concluding plea agreements. Regarding the issue of conditional "participation" of the victim in the conclusion of a plea agreement, in this case we support the initiative of Hloviuk (2017a, p. 42). The scientist proposes to include elements of the content of the conciliation agreement in the plea agreement, such as the amount of damage caused by a criminal offense, the term of its compensation or a list of actions (not related to compensation for damages) that the suspected or accused are obliged to do in favor of the victim, and the term of their commission. We also believe that ensuring the interests of victims under the relevant conditions requires the mandatory participation of a lawyer, and this should be considered when making changes and additions to the Criminal Procedure Code of Ukraine in determining the grounds for mandatory participation of the victim's representative in criminal proceedings.

In accordance with paragraph 4 of Part 3 of Article 56 of the Criminal Procedure Code of Ukraine, "during judicial proceedings by court of any instance, the victim shall have the right to prosecute in court if the public prosecutor waives prosecuting on behalf of the state". Moreover, according to part 3 of Article 338 of the Criminal Procedure Code of Ukraine:

if the indictment with changed charges raises the issue of applying such Law of Ukraine on criminal liability as provides for liability for a less grave criminal offence, or of reducing the scope of charges, the presiding judge shall be required to advise the victim of his/her right to press charges in court in the previously announced scope.

Given the fact that, according to paragraph 19 of Part 1 of Article 3 of the Criminal Procedure Code of Ukraine, in the cases established by the law, the prosecution includes the victim, their representative and legal representative, we consider:

- 1) necessity to agree with the opinion on ensuring the mandatory participation of the victim's representative in criminal proceedings, in case the prosecutor refuses to support the public prosecution;
- 2) ensuring the interests of the victim and his/her criminal procedural activity (namely the ability to exercise the right to support the charges in the previously presented amount) requires the mandatory participation of his/her representative. In the case when the indictment with changed charges raises the issue of applying such Law of Ukraine on criminal liability as provides for liability for a less grave criminal offence or reducing the scope of charges, and the victim agrees to support the charges in the amount previously presented. In this context, each party should be given a reasonable opportunity to present its arguments in the case, under conditions that do not put it at a significant disadvantage vis-à-vis the opposing party. According to Hloviuk (2017b, p. 48), the principle of equality requires a "fair balance between the parties" (for example, *Batsanina v. Russia*, 2009; *Voloshin v. Ukraine*, 2013);
- 3) the right of the victim during the trial to support the charges in the previously presented amount if the prosecutor in the indictment with the amended charge raises the application of the Law of Ukraine on Criminal Liability, which provides for liability for a less serious criminal offense, or to reduce the amount of charges is outlined in paragraph 4 of Part 3 of Article 56 of the Criminal Procedure Code of Ukraine.

Osinska (2016, p. 99) highlights the fact that sometimes, as a result of a criminal offense, a person may be in a certain physiological state (amnesia, akinetic mutism, apallid syndrome, sopor, coma and lethargy), which lasts for an extended period of time, during which the person loses consciousness, reaction to external stimuli and the ability to express any will. Therefore, the scientist believes that, under such conditions, medical workers consisting of at least three people, one of whom must be the doctor of the victim, must draw up a written medical conclusion certified by law, on the basis of which the investigator,

prosecutor, court must recognize the person as a victim on their own initiative, if the person in this condition does not have close relatives or family members. It is clear that a person who is in one of these physiological states will not be able to exercise their procedural rights and perform procedural duties on their own. Therefore, it would be logical to provide them with a representative.

In our opinion, a special article (Article 58¹ of the Criminal Procedure Code of Ukraine) should provide for free legal aid and ensure the involvement of the victim's representative in criminal proceedings, as well as clearly regulate the cases of mandatory participation of the victim's representative in criminal proceedings. In addition, we believe that the absence or presence of close relatives or family members should not be considered a prerequisite for providing free legal aid. Family members who have applied for involvement as a victim should also be guaranteed legal aid in case they themselves are unable to provide it.

As Tulyakov (2001, p. 271) rightly notes, “ricochet” victims often suffer and show the same symptoms of psychological distress as the primary victims. Family members of murder victims, partners of raped persons, parents of robbed adolescents, and relatives of victims of theft and other crimes describe similar psychological symptoms as primary victims of crime. Excluding “ricochet” victims from the group of objects covered by the concept of “victim of crime” is not only unscientific, but also simply immoral.

According to the Part 5 of Article 55 of the Criminal Procedure Code of Ukraine, when a person, whose condition prevented them from filing an appropriate application, recovers and is able to exercise the procedural rights, they may file an application requesting to be engaged in the proceedings as a victim. If the investigator, prosecutor or court recognizes the person as a victim on their own initiative, there is no need to submit such application. In the future, the victim in criminal proceedings has the right to actively or passively participate in the proceedings according to their will. However, in our opinion, when their expression of will cannot be objectively determined due to a serious physiological condition, the victim of a criminal offense should be recognized as such, and not deprived of this right. Thus, Kuchynska (2017, p. 108) notes that maintaining uncertainty in the legal status of a victim of a crime deprives them of the opportunity to exercise the rights that constitute the procedural status of the victim, and, as a result, violates their rights to access to justice and judicial protection. We should also agree with Mykhaylova (2013, p. 204),

who notes that granting a person the legal status of a victim is a way of criminal procedural protection of their rights.

In addition, according to Part 7 of Article 55 of the Criminal Procedure Code of Ukraine, if a person did not file a report that a criminal offence has been committed against them or an application for bringing into proceedings as a victim, the investigator, public prosecutor and court may recognize such person as a victim subject to their written consent. In the absence of such consent, a person may, where necessary, be brought into proceedings as a witness. However, is it appropriate to point to a person who has been harmed by a criminal offense as a witness? The case law of the European Court of Human Rights shows that it is impossible and erroneous to recognize a person who has been harmed as a witness (*Romanov v. Russia*, 2005; *Sibgatullin v. Russia*, 2012).

The decision of the Supreme Specialized Court of Ukraine civil and criminal cases dated March 15, 2016 (case no. 127/25936/14-k) points to such a case of mandatory participation of the victim's representative in criminal proceedings as "in respect of persons who due to mental or physical disabilities (dumb, deaf, blind, etc.) are not able to fully exercise their rights". The decision found that chronic alcoholism and/or drug addiction were mental disorders and that the participation of defense counsel was mandatory. Thus, the Court of Cassation in its ruling noted that the materials of the criminal proceedings contain information from the medical institution about the defendant's inpatient treatment with a diagnosis of "mental and behavioral disorders due to alcohol and cannabis with harmful consequences" and "mental and behavioral disorders due to alcohol use".

In general, it should be noted that the category of "mental disabilities" is inherently legal and is practically not used by psychiatrists. Therefore, we believe that it would be more appropriate to indicate in paragraph 3 of Part 2 of Article 52 of the Criminal Procedure Code of Ukraine on "physical disabilities or mental disorders", as well as to indicate such a case of mandatory participation of the victim's representative in criminal proceedings as "for persons who due to mental disorders or physical disabilities (dumb, deaf, blind, etc.) are not able to fully realize their rights".

In our opinion, it is necessary to provide for the mandatory participation of the victim's representative during the trial in the application of the procedure of "abbreviated judicial investigation", provided for in Part 3 of Article 349 of the Criminal Procedure Code of Ukraine. The correctness of the victim's

understanding of the content of circumstances not disputed by them, the absence of doubts about the voluntary position of the victim, additional explanation to the victim that in this case they will be deprived of the right to appeal the circumstances both on appeal and in cassation can be provided if the victim has qualified legal assistance.

According to the conclusion of the Supreme Court (decision dated February 15, 2018), if in their testimony the accused sets out the facts in such a way that there are doubts that they correctly understands and does not dispute the facts that they consider established prosecutor, the court will have to re-examine the accused's position on the accusation, which is supported by the prosecutor, and once again decide on the possibility of an abbreviated trial. Therefore, we believe that, before deciding on the application of the procedure of "abbreviated judicial investigation", the court should interrogate the victim about the merits of the facts and explain to them the legal consequences of the application of the relevant procedure in court proceedings.

According to Article 49 of the Law of Ukraine "On Basic Principles of Social Protection of Labor Veterans and Other Elderly Citizens in Ukraine", the state is responsible for protecting the rights, freedoms, and legitimate interests of elderly citizens in court and in other manners prescribed by law. According to Art. 10 of the above law, elderly persons are those who have reached retirement age, established by Article 26 of the Law of Ukraine "On Compulsory State Pension Insurance", as well as persons who have no more than one and a half years left to reach the specified retirement age. At the same time, the provisions of Article 26 of the above Law determine the conditions for granting an old-age pension and establish that persons have the right to receive an old-age pension after reaching the age of 60 and the presence of the insurance period specified in the law.

We believe that a significant number of crimes against victims elderly victims are often related to social, psychological and biological characteristics of the elderly, which are conditions that may lead the offender to decide to commit a socially dangerous act against this category of persons.

What is important is not that a person has reached a certain age, but that due to old age there are significant physiological and psychological changes in the human body. In the process of aging, physical strength, psychological flexibility, and ability to adapt are gradually lost; intellectual abilities also weaken. In the literature it is suggested to consider a helpless state as a physical or mental state of a person in which he/she is not able to realize the nature and significance

of the actions taken against him/her or, realizing them, cannot protect his/her rights without assistance (Volodavska, 2016, p. 143).

The above facts give the right to assert that such a state of a person as old age should be considered when deciding on the mandatory participation of a representative of the victim - an elderly person in criminal proceedings. Thus, according to the age classification of the World Health Organization, when the average age ends and the elderly begins is at the age of sixty. We believe that it is advisable to ensure the mandatory participation of the representative of the victim - an elderly person in criminal proceedings for the persons concerned over 60 years of age.

Propositions of amendments to the criminal procedure code of Ukraine

In conclusion, we propose to amend the Criminal Procedure Code of Ukraine with a separate article 58¹, “Mandatory participation of the victim’s representative”, as follows:

- «1. The participation of the victim’s representative is mandatory in criminal proceedings in the following cases:
- 1) in respect of persons who have become victims of a criminal offense under the age of 18;
 - 2) in respect of persons who, at the time of the commission of a criminal offense against them, were declared incapable or partially incapable;
 - 3) in respect of persons who, due to mental disorders or physical disabilities (blind, deaf, dumb, etc.), severe physiological or psychological condition, are not able to fully exercise their rights;
 - 4) in respect of the elderly (over 60 years of age);
 - 5) in respect of persons who do not speak the language of the criminal proceedings;
 - 6) in respect of persons who, as a result of a criminal offense committed against them, have become disabled of the first or second group;
 - 7) in case of concluding a conciliation agreement (from the moment of initiating the conclusion of the agreement) and in case of non-fulfillment

- of the conciliation agreement (from the moment of the victim's application for reversal of the sentence);
- 8) in the case of concluding a plea agreement (in proceedings where the written consent of the victim to enter into a plea agreement) is provided - from the moment of initiating the conclusion of the agreement;
 - 9) in case of refusal of the prosecutor to support the state prosecution or change of the state prosecution - retraining for a less serious criminal offense or reduction of the scope of the accusation;
 - 10) in case the court finds it inexpedient to examine the evidence on those circumstances that are not disputed by anyone, during the trial - from the moment of initiating such a procedure in open court and the decision to conduct an abbreviated hearing;
 - 11) in respect to persons who have suffered from trafficking in human beings, a crime against sexual freedom and sexual integrity or a crime committed with the use of violence or threat of its use» (Rakipova, 2021, p. 371).

It is also necessary to oblige the investigator, prosecutor, investigating judge and the court to ensure the participation of the victim's representative at the expense of the state, if their participation is mandatory, but the victim did not involve them (Voloshyna & Kovalyov, 2018, p. 255).

It should also be noted that the Criminal Procedure Code of Ukraine does currently allow for defendants to choose their own lawyer when receiving state-funded legal aid. In this regard, Malakhova (2016) rightly proposes to amend part 4 Article 49 of the Criminal Procedure Code of Ukraine in the following reaction: "The suspect, the accused has the right to apply for the appointment of a lawyer to exercise the defense from among the persons specified by him/her" (p. 133).

We believe that such a proposal should be considered in order to ensure the right of the victim to apply for the appointment of a lawyer for representation by appointment from among the persons specified by him/her.

In this regard, in our opinion, the Criminal Procedure Code of Ukraine should be supplemented with a separate article 58², "Involvement of a representative by an investigator, prosecutor, investigating judge or court to carry out representation by appointment", as follows:

«1. An investigator, prosecutor, investigating judge or court is obliged to ensure the participation of a representative in criminal proceedings in cases where:

- 1) in accordance with the requirements of Article 58¹ of this Code, the participation of a representative is mandatory, and the victim, his/her legal representative, successor did not involve a representative;
- 2) the victim, his/her legal representative, legal successor has applied for the appointment of a lawyer to represent him by appointment from among the persons indicated by him/her, if he cannot involve one independently due to lack of funds or for other objective reasons;
- 3) an investigator, prosecutor, investigating judge or court decides that the circumstances of the criminal proceedings require the participation of a representative, and the victim, his/her legal representative, the successor did not involve him/her.

A representative of the victim, successor may be involved in criminal proceedings by an investigator, prosecutor, investigating judge or court in other cases provided by the law governing the provision of free legal aid.

2. In the cases provided for in part one of this Article, the investigator, prosecutor shall issue a ruling, and the investigating judge and the court shall issue a ruling instructing the relevant body (institution) authorized by law to provide free legal aid to appoint a lawyer to provide representation and ensure his arrival at the time and place specified in the resolution (decision) for participation in criminal proceedings.

3. The resolution (decision) on the order to appoint a lawyer shall be immediately sent to the relevant body (institution) authorized by law to provide free legal aid, and shall be binding for immediate execution. Non-execution, improper or untimely execution of the resolution (decision) on the order to appoint a lawyer entail liability established by law».

Based on paragraph 8 of Part 1 of Article 56 of the Criminal Procedure Code of Ukraine, we conclude that the legislator grants the victim the right not only to have a representative, but also to refuse their services at any time during criminal proceedings.

However, while the replacement or refusal of a defense counsel is regulated by Article 54 of the Criminal Procedure Code of Ukraine, the victim's right to refuse representation is only outlined in paragraph 8 of Part 1 of Article 56 of the Criminal Procedure Code. Article 78 of the Code deals exclusively with the grounds for challenging a defense counsel or representative in criminal proceedings.

It should be noted that, at any stage of criminal proceedings, the victim or the victim's legal representative has the right to voluntarily renounce the lawyer and independently defend their rights and legitimate interests in the process, or to replace the representative. The reasons for such refusal include the representative's behavior that leads the victim to believe they are indifferent or biased towards their interests, the representative's failure to exercise the victim's procedural rights, such as collecting evidence, appealing decisions, and addressing the actions or inaction of the investigator, prosecutor, investigating judge, court, as well as the representative's consistent failure to participate in proceedings.

We cannot disagree with the opinion that the criteria for the effectiveness of the lawyer of the victim in criminal proceedings are:

- ensuring the full implementation of the tasks of criminal proceedings and compliance with its basic principles;
- real restoration of the rights of the victim violated by a criminal offense, establishment and recovery of the damage caused by a criminal offense in full;
- prevention and/or cancellation of unfounded, illegal, and unjust decisions, as well as actions of investigative and judicial bodies;
- ensuring the full realization of the procedural rights of the victim and maximum satisfaction in the criminal proceedings of their legitimate interests (Chernenko & Shiyan, 2015, p. 303).

Of course, another reason for replacing a lawyer may be his refusal to perform his duties. Part 4 of Article 47 of the Criminal Procedure Code of Ukraine indicates the grounds for the defense counsel's refusal to perform his duties in criminal proceedings. Thus, After being assigned to a case, defense counsel may refuse performing their duties only in the following cases: 1) if there are

circumstances that, under this Code, disqualify them from participating in the criminal proceeding; 2) disagreement with the suspect or accused concerning the defense method he/she has chosen, except for cases when participation of the defense counsel is mandatory; 3) if the suspect or accused intentionally fails to comply with the terms of the agreement concluded with the defense counsel, with such failure consisting, in particular, in systematic disregard of lawful advices of the defense counsel, provisions of this Code, etc.; 4) if they justify their refusal by the absence of appropriate skills in rendering legal aid in a specific proceeding, which is particularly complicated.

After the representative's refusal, the victim, their legal representative, or legal successor must be informed of their right to invite another representative. If the victim, their legal representative wishes to have a representative again, they may at any time invite a new representative or demand the appointment of another representative.

In the case of a legislative settlement of the current issue of mandatory participation of the victim's representative in criminal proceedings, it should be noted that the possibility of unreasonable refusal by the victim's representative should be eliminated, and the obligation to appoint a representative for the victim should be imposed if the victim does not select one. In other words, if the victim, their legal representative or successor initially refused to have a representative, but later changed their mind and expressed a desire to have a representative or requested for the appointment of a representative, such desire should be honored.

We believe that this range of issues currently requires procedural regulation in order to ensure the realization of the rights and legitimate interests of victims in criminal proceedings. Therefore, Article 58 of the Criminal Procedure Code should be supplemented with a separate part 5 and set out as follows:

«5. The victim, his legal representative, successor has the right to refuse the representative or replace him. If the victim, his legal representative or legal successor refuses a representative whose participation in criminal proceedings is mandatory, and does not involve another representative, the representative must be involved in the manner prescribed by Article 58² of this Code, to represent him by appointment».

Conclusion

Representation is a crucial procedural safeguard for the protection of individuals involved in criminal proceedings, including the protection of the rights of the victim. It is an integral part of the procedural status of such individuals, and therefore must be fully considered by the legislator and regulated in criminal procedural law. The uniqueness of the right to representation of the victim in criminal proceedings is dictated, in our opinion, by its double significance. It combines the principles of law enforcement and human rights protection, which logically follow from the functional orientation of the representation of the victim. Human rights communication of the victim in criminal proceedings can be implemented precisely by ensuring the victim's right to representation. Such representation ensures the realization of the right to professional legal assistance, in particular, in the case when the victim needs it during criminal proceedings under martial law.

Providing the proposed amendments to the legislation of Ukraine, as outlined in the article, will contribute an increase in the level of protection of the rights of victims. Access to free legal aid is crucial in protecting the rights and legitimate interests of victims, allowing them in Ukraine to claim compensation for the damage caused by a criminal offense, and, particularly for vulnerable victims, to prevent their re-victimization during criminal proceedings. After all, a victim in criminal proceedings must feel protected from the moment they acquire the appropriate procedural status and be sure that they can count on the full protection of their rights during criminal proceedings.

References

- Ablamskiys, S. Y. (2014). Procedural status of victims' representative in criminal procedure. *Law and Safety*, 4(55), 80-84.
- Batsanina v. Russia: Judgement of ECHR. (May 26, 2009). European Court of Human Rights. Application no. 3932/02. <https://european court.ru/resheniya-evropejskogo-suda-na-russkom-yazyke/bacanina-protiv-rossii-postanovlenie-evropejskogo-suda/>
- Chernenko, A. & Shiyan, A. (2015). The role of the defense attorney in evidence during criminal proceedings. *Comparative and analytical law*, 5, 303-306.

- Dubivka, I. (2017). *Activities of the lawyer in the stage of pre-trial investigation* [PhD Thesis].
- Herasymchuk, O. (2008). Professional protection of the rights of the victim. *Lawyer*, 2, 40-45.
- Herasymchuk, O. (2011). Theoretical and practical aspects of professional protection of the victim. *Journal of the National University "Ostroh Academy"*, 1(3), 1-10.
- Hloviuk, I. (2017a). *Conclusion of plea agreements: specific issues in the context of updating the legislation* [Conference]. Theory and practice of combating crime in modern conditions, Lviv: LvStUIA, 40-42.
- Hloviuk, I. (2017b). *Some issues of compliance with the right to defense during the extension of the pre-trial investigation period* [Conference]. Procedural aspects of the pre-trial investigation, Odesa: OStUIA, 45-49.
- Hoshovskyi, M. & Kuchynska, O. (1998). *Victim in the criminal process of Ukraine*. Yurinkom Inter.
- Hroshevyy, Y. (1998). The Constitution of Ukraine and some problems of criminal procedural theory. *Bulletin of the Academy of Legal Sciences of Ukraine*, 2(13), 125–131.
- Iskanderova, H. (2016). Representation and protection by a lawyer of the rights of the victim in criminal proceedings on the basis of a reconciliation agreement. *Herald of criminal justice*, 2, 45-50.
- Kavun, D. (2016). *The criminal procedural mechanism for ensuring the rights of the victim (individual) in the pre-trial investigation* [PhD Thesis].
- Krukevych, O. (2017). *Administration of justice in criminal proceedings involving minors* [PhD Thesis].
- Kuchynska, O. (2009). Problems of the protection of the rights of the victim in the criminal process of Ukraine. *Lawyer*, 5, 10-12.
- Kuchynska, O. (2017). *Some issues of the procedural status of the victim according to the criminal procedural legislation of Ukraine* [Conference]. Actual problems of improving the criminal procedural legislation. Odesa, 107-109.

- Malakhova, O. (2016). *Implementation of the institution of assistance to the defense in criminal procedural evidence* [PhD Thesis].
- Mudrak, I., Podobnyi, O. & Vaschuk, O. (2019a). Compensation of damages to victim of criminal offence under Criminal Procedure Code of Ukraine. *Juridical Tribune*, 9(2), 377-391. <https://www.tribunajuridica.eu/arhiva/An9v2/8.%20Mudrak,%20Vaschshyk,%20%20%20Podobnyi.pdf>
- Mudrak I., Hloviuk, I., Murzanovska, A. & Voloshyna, V. (2019b). Physiological and psychological condition of victim of criminal offense in Ukraine. *Amazonia Investiga*, 8(19), 34-42. <https://amazoniainvestiga.info/index.php/amazonia/article/view/193/169>
- Mykhaylova, N. (2013). Institute for the Protection of the Victim's Rights under the New Criminal Code of Ukraine. *Law and society*, 2, 203-206.
- Omelchenko, T. (2004). *The constitutional right of a person to legal aid and its implementation at the pre-trial stages of the criminal process* [PhD Thesis].
- Osinska, O. (2016). Problematic issues of a person acquiring the procedural status of a victim in the criminal process of Ukraine. *Bulletin of the Kharkiv National University of Internal Affairs*, 4(75), 96-101.
- Parliament of Austria. (1975). Criminal procedure code. <https://www.wipo.int/wipolex/en/text/503966>
- Parliament of Czech Republic. (January 30, 2013). Law "On Victims of Crime" <https://www.zakonyprolidi.cz/cs/2013-45?text=zraniteln%C3%A9%20ob%C4%9Bti>
- Rakipova, I. (2021). *Human rights communication of a victim in criminal proceedings of Ukraine*. Helvetika.
- Romanov v. Russia: Judgement of ECHR. (October 25, 2005). European Court of Human Rights Application no. 69341/01. <http://europeancourt.ru/resheniya-evropejskogo-suda-na-russkom-yazyke/yurij-romanov-protiv-rossii-postanovlenie-evropejskogo-suda>
- Shapoval, V. (2015). International standards of regulation of citizens' right to legal aid. *Journal of the Kyiv University of Law*, 4, 352-357.

- Shybiko, V. (2013). The problem of ensuring the rights of the victim under the new 2012 Criminal Procedure Code of Ukraine. *Legal Journal of the National Academy of Internal Affairs*, 1, 307-313.
- Sibgatullin v. Russia: Judgement of ECHR. (April 24, 2012). Application no. 1413/05. <http://europeancourt.ru/tag/damir-sibgatullin-protiv-rossii/>
- Solonyova, O. (2015). Procedural status of the victim: problematic issues and ways of improvement. *Scientific Bulletin of the National Academy of Internal Affairs*, 1, 139-145.
- Supreme Court. (February 15, 2018). Application no. 664/2078/16-k. https://protocol.ua/ru/postanova_kks_vp_vid_15_02_2018_roku_u_spravi_664_2078_16_k/
- Supreme Specialized Court of Ukraine civil and criminal cases. (January 22, 2014). Generalization of judicial practice of conducting criminal proceedings on the basis of agreements dated. http://zib.com.ua/ua/print/92557-uzagalnennya_vssu_sudovoi_praktiki_zdiysnennya_kriminalnogo_.html
- Supreme Specialized Court of Ukraine civil and criminal cases. (March 15, 2016). Application no. 127/25936/14-k. [http://protokol.com.ua/ru/vssu_hronichniy_alkogolizm_ta_abo_narkomaniya_e_psihichnimi_rozladami_a_tomu_uchast_zahisnika_e_obov_yazkovoyu_\(sprava_127_25936_14_k_vid_15_03_2016\)/](http://protokol.com.ua/ru/vssu_hronichniy_alkogolizm_ta_abo_narkomaniya_e_psihichnimi_rozladami_a_tomu_uchast_zahisnika_e_obov_yazkovoyu_(sprava_127_25936_14_k_vid_15_03_2016)/)
- Tlepova, M. (2015). *Procedural position of the victim during the pre-trial investigation* [PhD Thesis].
- Tulyakov, V. (2001). *The doctrine of the victim of a crime: social and legal foundations*.
- Volodavska, O. (2016). The victim as a qualifying sign of abuse of authority by persons who provide public services. *Entrepreneurship, governance and law*, 10, 140-143.
- Voloshin v. Ukraine: Judgement of ECHR. (October 10, 2013). European Court of Human Rights. Application no. 5853/08. <http://consultant.parus.ua/?doc=090CJB1E2C>
- Voloshyna, V. & Kovalyov, A. (2018). Implementation of the right to professional legal assistance in criminal proceedings. In *Criminal Procedure Code of 2012: ideology and practice of law enforcement* (pp. 236-261). Helvetika.

