PROCEDURAL PROVISION OF WITNESS PARTICIPATION IN CRIMINAL PROCEEDINGS OF UKRAINE: CHALLENGES OF THE PRESENT

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ABSTRACT

The authors of the article have studied peculiarities of procedural provision of participation of a witness in criminal proceedings under the legislation of Ukraine, have analyzed the mechanism of their implementation, disadvantages have been determined and propositions for the improvement of this institution of criminal proceedings have been formulated. It has been determined that implementation of such measures is directed at full, complete and effective investigation of criminal offences, implementation of tasks of criminal proceedings and as a result, prosecuting guilty persons. It has been suggested that procedural provision of witnesses in Ukrainian criminal proceedings should be understood as a procedure determined by Ukrainian legislation, for involving a witness at various stages of criminal proceedings, court proceedings, etc., which is carried out in certain forms and by certain participants in criminal proceedings under the Criminal Procedural Code of Ukraine. It has been established that the legislative provisions on the implementation of certain measures of procedural provision of witness participation in criminal proceedings do not fully correspond to the practical realities. Analysis of judicial and investigative practice proves that there are frequent cases, when the court obliges the defense to provide the attendance of witnesses at the trial. In this regard we offer to elaborate practical recommendations for involving a witness in criminal proceedings, which will significantly simplify the process of calling a witness and eliminate existing contradictions between legislative provisions and practice of their implementation.

Keywords: Criminal Proceedings, A Witness, Participant of Criminal Proceedings, Coercive Measures, Procedural Provision of Participation of Persons, Criminal Procedure, Measures of Provision of Criminal Proceedings.

INTRODUCTION

The witness is one of the participants in criminal proceedings that contribute to the full and effective process of criminal investigation. In particular, this participant plays a special role at the time of proving, since it helps to establish all the circumstances relevant to criminal proceedings.

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In practice, law enforcement agencies in Ukraine involve witnesses as participants in criminal proceedings in order to implement the tasks stipulated by the Art. 2 of the Criminal Procedural Code. However, there are cases where the pre-trial investigation agencies involve witnesses in criminal proceedings for illegal purposes, in particular to obtain information which is not relevant to the proceedings but important to the investigator for his or her personal purposes, etc. In such a case, the rights of the witness are violated, for example, when this participant does not understand his rights and obligations or has no opportunity to implement his right to protection.

The procedural status of the witness in Ukrainian legislation as a participant in criminal proceedings, his rights and obligations are defined in the Criminal Procedural Code of Ukraine (hereinafter – the CPC of Ukraine). According to the CPC of Ukraine the witness is obliged to comply with a certain algorithm of behavior, if he has information about a criminal offense. This creates certain difficulties in the daily life of a person, in connection with which persons are reluctant to participate in criminal proceedings.

In relation to the peculiarities of the procedural status of the witness and the importance of his participation in criminal proceedings, the issue of procedural provision of his participation in criminal proceedings is relevant today.

MATERIALS AND METHODS

The empirical basis for the scientific article is: provisions of normative legal acts of Ukraine and international law concerning observance of human and citizen's rights and fundamental freedoms; official statistical data on implementation of certain measures of provision of criminal proceedings against witnesses, who evade their procedural obligations; information from the Unified National Register of Court Decisions and data from the General Prosecutor’s Office. The theoretical basis of this article was the modern scientific developments of Ukrainian and foreign scientists on procedural provision of witnesses' participation as participants in criminal proceedings, as well as the improvement of legislation on this issue.

The research methods were determined according to the purpose, tasks, object and subject of the article. General scientific and special research methods were used during the research. Formal and logical methods were used for analysis of norms of the CPC of Ukraine, justification of conclusions and proposals on their supplementation and specification; systematic method enabled to determine forms of procedural provision of participation of a witness in criminal proceedings; statistical methods were used to confirm obtained theoretical conclusions with statistical data and to study dynamics of implementation of coercive measures on provision of witness participation in criminal proceedings. The method of synthesis and generalization were used to form conclusions.

RESULTS

Strengthening the rule of law is a major goal of states around the world, and all states must ensure that fundamental and human rights and legal protection are implemented equitably. (Teremetskyi et al., 2021a). Police effectiveness in dealing with crime is often largely dependent not on the operative and search measures and covert investigative (search) actions, but also on the witnesses who can play a vital role in helping the police and the prosecuting authorities to deliver justice. (Teremetskyi et al., 2021b).

A witness in criminal proceedings is any person who is aware of the circumstances of a criminal offence committed, if he or she witnessed the incident regardless of his or her position and has no interest in the final outcome of criminal proceedings. The witness provides information about the circumstances of the criminal offence, based on direct perception, or those

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perceived from other sources, but it is mandatory for him/her to indicate the source from which he/she became aware of the facts about which he/she tells (Lysyuk, 2014).

Note that the legal status of the witness in the criminal procedural doctrine is not fully determined. Having analyzed the procedural status of a witness, M. L. Yakub points out that it cannot affect the attitude to the case or affect other factors affecting the reliability of the statements. This is a circumstance that separates witness statement from such means of proof as the statement of the suspect, the accused, and the victim (Yakub, 1968).

S.M. Stakhivsky proves that the procedural status of the witness is largely unaffected by his attitude and the reliability of his statements. This does not mean that the witness cannot have a certain interest in the resolution of the case, but this interest is not due to his procedural status, but for reasons that are outside of the procedural relations (Stakhivsky, 2005). The same position is supported by A.P. Kuchinska, who notes that it would be more correct to talk about the witness's lack of interest in the results of the resolution of the case, but not at all about the lack of legitimate interest during his participation in criminal proceedings (Kuchinska, 2013).

The peculiarity of the procedural status of a witness, according to other scholars, is the lack of opportunities to influence the course of criminal proceedings, to make decisions about its direction, to challenge such decisions (Slinko, 2012).

According to the Ukrainian criminal procedure legislation, the witness has the following rights: 1) the right to know in connection with what and in what criminal proceedings he/she is questioned; 2) to use the legal assistance of a lawyer, whose authority is confirmed in accordance with the provisions of Article 50 of the CPC, when making statements and participating in the fulfillment of other procedural actions; 3) refuse to state about himself, close relatives and members of his family, which may be grounds for suspicion, accusation of committing a criminal offense by him, close relatives or members of his family, as well as statements about information in accordance with the provisions of Article 65 of the CPC may not be disclosed; 4) make the statements in his native language or another language he is fluent in and use the help of an interpreter; 5) use notes and documents when making statements in cases where the statements relates to any calculations and other information that is difficult for him to remember; 6) to get acquainted with the protocol of interrogation and to submit the petition for making changes, additions and remarks to it, and also to make such additions and remarks personally; 7) submit the petition for provision the security in cases provided by law; 8) introduce objection to the translator (Law of Ukraine, 2012).

Analysis of the list of these rights proves that the legislator determines a system of regulations which, firstly, create conditions to provide a witness quality preparation and presentation of data about the circumstances that are the subject of questioning; secondly, provide an opportunity to be free in deciding about the content of statement in morally difficult situations, when the subject of questioning are the circumstances provided in Paragraph 3 of Part 1 of Article 66 of the CPC of Ukraine, or when there are threats to his or her safety; thirdly, provide an opportunity to assess with the involvement of a lawyer the legal consequences of his statement and receive legal assistance from him on observance of the rights of the witness in criminal proceedings; fourthly, provide control by the witness of the accuracy of perception of the subject performing the interrogation of the information told by the witness (Lozinska, 2018).

The obligations of the witness, which provide the obtaining of that factual information about circumstances relevant to criminal proceedings from him or her, include: 1) to make truthful statements during pre-trial investigation and court proceedings; 2) not to disclose without permission of the investigator, prosecutor, court information directly related to the essence of criminal proceedings and procedural actions performed (performed) during it and became known to the witness in connection with the performance of his obligations Law of Ukraine, 2012).

We should note that the witness's performance of his/her obligations is on the plane of his/her lawfulness. But taking into account that the behavior of a witness may be both socially

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useful and socially harmful, the legislator has provided criminal liability of a witness in the Articles 384, 385, 387 of the Criminal Code of Ukraine for making knowingly false statement, refusal to make statements and for disclosure of pre-trial investigation data (Kharitonova, 2019).

In this regard, analyzing the position of witnesses in criminal proceedings, Y.V. Lysiuk notes that among all participants in criminal proceedings the figure of the witness is the most vulnerable, and legal relations between law enforcement agencies and other participants in criminal proceedings with witnesses in most cases are formed rather difficult. This is due to the fact that this subject of legal relations in the majority of cases possesses reliable and extremely important for the implementation of criminal proceedings information. In case if such a person can be identified in criminal proceedings, this can become a key moment in solving the tasks of criminal trial. Therefore, in today's conditions, the most important point for the witness should be the fact of provision his protection and safety, including, if necessary, to his relatives or close ones, because constantly the witness is most often exposed to various kinds of threats, blackmail and even attempts of physical influence (Lysiuk, 2014).

As is known, in practice there are many factors that make it difficult or prevent the participation of a witness in criminal proceedings, namely: 1) material inconvenience and costs associated with participation in criminal proceedings as a witness. The calling a witness for questioning by an investigator or a court distracts him or her from daily routine; the witness has to ask for leave from work, miss studying, be distracted from other daily activities; 2) performance of the obligation to make a statement is connected with considerable nervous and psychological stress on the witness, aggravation of his/her emotional state caused by the need to recall circumstances of a wrongful act; 3) in some situations, the potential for pressure on the witness, various kinds of threats from the side of the suspect, his relatives or other interested persons in order to induce the witness to make false statements causes a considerable difficulty in encouraging the witness to be active during the statement (Kuchinska, 2012).

That is why, given the declared tasks of criminal proceedings, namely, to protect individuals, society and the State from criminal offences, to protect the rights, freedoms and legitimate interests of participants in criminal proceedings, and providing a quick, full, and impartial investigation and trial so that everyone who has committed a criminal offense is prosecuted to the extent of their guilt, no innocent person is charged or convicted, no one is subjected to unwarranted procedural forcing, and due to that process of law is applied to everyone involved in criminal proceedings, representatives of law enforcement agencies are required to provide respect for the rights and freedoms of every person (Law of Ukraine, 2012).

In practice, witnesses are not always willing to appear on calling before an investigator, prosecutor, investigating judge or court. Let’s consider the following example. Court sessions in the Central District Court of Mykolaiv have been held, for several years now, on the criminal proceedings against former First Deputy Chairman of Mykolaiv Regional State Administration Mykola Romanchuk. He is accused of committing a criminal offense under Part 4 of the Art. 368 of the Criminal Code of Ukraine. At the time of writing this article the court had already completed clarification of the circumstances of the case, except for the examination of the last witness for the prosecution, citizen G. It was him, according to the indictment, that Mykola Romanchuk demanded unjustified benefits. However, the witness has not appeared in trial for more than a year and a half. In addition, on the day of the next trial he sent a letter to the e-mail address of the court, in which he indicated his inability to appear at the trial because he was outside the Mykolaiv region. The prosecutor told the court that he was unable to communicate with citizen G. and assured the court that the attendance of this witness at the next trial would be provided. However, the defender expressed doubts about the appearance of this witness and suggested proceedings to the judicial debates. The argument was that the court sessions had been postponed for almost a year and a half due to the latter's failure to appear. In addition, the proceedings file already contained about 10 similar statements from citizen G. about his inability to attend the trial (Central District Court of Mykolaiv, 2021). This situation described

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indicates the importance of applying measures to provide the participation of a witness, their proper legislative enshrinement and the establishment of a mechanism for their implementation. After all, the implementation of such measures is aimed at a comprehensive, complete and effective investigation of criminal offenses, fulfillment of the tasks of criminal proceedings and, as a result, prosecution of guilty persons. Therefore, we can state about inadequate legal provision of the implementation of measures to provide the participation of persons in pre-trial investigation, in particular in terms of clear regulation of the process of their implementation (Bondarenko, 2015).

In the context of the above-mentioned, it is necessary to consider measures of procedural provision of a witness in criminal proceedings, to analyze the mechanism of their implementation, to identify disadvantages and to make an attempt to make proposals to improve this institution of criminal proceedings.

As is well known, the procedural order of involving a witness in criminal proceedings is provided for in the current CPC of Ukraine. Thus, according to Article 133 of the CPC of Ukraine, during the pre-trial investigation an investigator, prosecutor have the right to call a witness for questioning, if there are sufficient grounds to believe that he or she may make statements of relevance for criminal proceedings. The person shall be called to the investigator, prosecutor, investigating judge, court by serving summons, sending it by mail, e-mail or fax, making the calling by telephone or telegram (the Art. 135 of the CPC of Ukraine) (Law of Ukraine, 2012). It should be noted that legislative provisions on calling a witness do not fully correspond to practical realities. Analysis of law enforcement practice proves that there are frequent cases when the court obliges the defense to provide attendance of witnesses at the trial.

Since it is possible to procedurally provide a witness by calling, the CPC of Ukraine provides an exhaustive list of persons who have the right to do so and to serve a summon about a call. Such summon is served to a person by a telecommunications officer, law enforcement officer, investigator, prosecutor as well as the secretary of the court session, if it takes place in the court facility (Part 5 of the Art. 135 of the CPC of Ukraine) (Law of Ukraine, 2012). Consequently, the defense is not an authorized subject with the right to call witnesses to the trial.

The CPC of Ukraine also provides for the possibility of calling a witness by telephone, but does not establish cases of confirmation of receipt of such callings by this participant of the criminal proceedings. Although in practice, investigators very often practice this method of calling a witness.

Practitioners assure that the most expedient and almost the only way to provide the calling a witness is to send a written communication by mail to the defense. However, there is no statutory requirement for written notification. Sending such a notification and receiving confirmation of its receipt will be sufficient proof of the fulfillment of the obligation stipulated by Part 2, Article 327 of the CPC of Ukraine.

According to Part 2 of the Art. 327 of the CPC of Ukraine, the arrival to court of an interpreter (except for his involvement by the court), witness, specialist or expert is provided by the party to the criminal proceedings who has stated a petition to call him. The court encourages the parties to criminal proceedings to provide the appearance of these persons by issuing a court calling (Law of Ukraine, 2012).

During the analysis of Part 3 of the Art. 23, paragraph 1 of Part 4 of the Art. 42, the Articles 65, 122, 221, Part 2 of the Art. 327, Part 6 of the Art. 352 of the CPC it may be concluded that to determine the party of proceedings, which should provide the appearance, such criterion as "first satisfied initiative to call a witness for questioning" applies.

In accordance with the order of proceedings, the court first ascertains the position of the prosecutor and then the defense on the list of witnesses to be questioned. Therefore, if the defense petition includes the requirements for examination of witnesses, already specified by the prosecution in the identical petition, and it was satisfied, one may assume that in the future the

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obligation set forth in Part 2 of the Art. 327 of the CPC of Ukraine should be relied upon by the prosecution.

In accordance with paragraph 2 of Part 2 of the Art. 327 of the CPC of Ukraine, the court encourages the appearance of participants of criminal proceedings by judicial calling. Therefore, we consider it advisable to develop practical recommendations for the involvement of a witness in criminal proceedings. In our opinion, this will greatly simplify the process of calling a witness and eliminate existing contradictions between the legislative provisions and practice of their implementation.

According to the provisions of the CPC of Ukraine, the proper confirmation of receipt by a person of a summon of calling or familiarization with its content by other means is the person's signature on the receipt of the summon, including on the postal notification, video recording of summon delivery, any other data confirming the fact of delivery to the person the summon of calling or familiarization with its content. If the person has previously notified the investigator, prosecutor, investigative judge, court about his e-mail address, the summon of calling sent to such address shall be deemed received if the person confirms its receipt by the appropriate e-mail letter. The fact of delivery of the summon must be further proved and may cause significant consequences. We are talking about the implementation of monetary penalties or reason, or the implementation of criminal liability to the witness in the case of malicious evasion of appearance (the Art. 139 of the CPC of Ukraine). With respect to criminal liability under the Art. 385 of the CC of Ukraine (refusal of a witness to make the statements) provides for the most severe punishment in the form of arrest for up to six months. However, such measures of procedural provision are hardly used today in Ukraine.

In general, representatives of law enforcement agencies practice to deliver the summon directly to the person, because this is the most reliable way to receive it. It is worth noting that the same procedure was in accordance with the provisions of the CPC of Ukraine in 1960.

Let us note that the practice of applying monetary penalties to witnesses is common in Ukraine. Here is an example. Thus, a jury trial in the Belyaivski District Court of the Odessa Region was held in the criminal proceedings against citizen M. (born in 1996) and citizen G. (1993) of committing a criminal offense under paragraphs 2, 12 of Part 2 of the Art. 115 of the Criminal Code of Ukraine, which qualifies as premeditated murder of a minor committed by prior conspiracy by a group of persons. On February 12, 2020 Bilyaivski District Court of the Odessa Region composed of two professional judges and three jurors granted the prosecutor's request to deliver on February 20, 2020 at 10:00 a.m. to Bilyaivski District Court of the Odessa region six witnesses, who evaded to appear in court and imposed on the victim a monetary penalty in the amount of 0,5 minimum subsistence level for able-bodied persons, i.e. 1 051 UAH, who, having been duly informed of the need to appear in court, does not appear on callings (discussion of the implementation of monetary penalties to the victim took place at the initiative of the court) (Bilyaivski district court, 2020).

The criminal procedural law provides for the size of the imposition of a monetary penalty. Thus, in the case of failure to appear for the calling by the investigator or prosecutor, the witness must pay from 0.25 to 0.5 times the subsistence minimum for able-bodied persons and from 0.5 to 2 times the subsistence minimum for able-bodied persons in the case of failure to appear for the calling by the investigating judge, court.

Analysis of law enforcement practice shows frequent cases of non-appearance of a witness on calling, in connection with which we consider it advisable to strengthen the procedural liability of this participant in criminal proceedings. In our opinion, it is advisable to amend the Art. 139 of the CPC of Ukraine “Consequences of non-arrival on calling”, which should be amended as follows: “If a suspect, accused, witness, victim, civil defendant, representative of a legal entity subject on which the proceedings is being implemented, which was called in accordance with the procedure established by this Code (if there is confirmation of receipt of the summon of calling or acquaintance with its content in another way), appeared

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without good reason or did not report the reasons for his non-arrival, he is fined in the amount of: from 1 to 2 subsistence level for able-bodied persons - in case of non-arrival at the calling of the investigator, prosecutor; from 2 to 5 subsistence levels for able-bodied persons - in case of non-arrival at the calling of the investigating judge, court" (Law of Ukraine, 2012).

We believe that strengthening the liability of witnesses for failure to appear on calling will encourage them to fulfill their obligations and not to abuse their rights.

In practice, there are cases where witnesses challenge the imposition of a monetary penalty for failure to appear on calling. Thus, in 2019 there was another trial on the case of the disappearance of funds from the cards of "Oshchadbank". Scheduled for October 3, 2019, the trial began with a petition from a witness to overturn a ruling to impose a fine of 960,50 hryvnia for failure to appear in trial without good reason. The chairman asked the applicant to provide the court with evidence that could confirm the reasons for his failure to appear in trial on the previously sent summons. The arguments of the witness were only his words about his absence at a certain time at the place of residence in connection with the conduct of business activities. These arguments were not persuasive, so the court denied the motion (Judicial power of Ukraine, 2020).

Bringing to court may be applied to a witness who fails to appear on calling without good reasons. Bringing to court is a forced escort of a person, to whom it is applied by a person who executes the order on the application of bringing to court to the place of calling at the time appointed in the order (Yesavulenko, 2021).

As we know, a minor can be a witness in criminal proceedings. According to the Art. 12 of the UN Convention on the Rights of the Child, the child has the right to be heard in any court proceedings concerning him/her, either directly or through a representative or an appropriate body, in the manner prescribed by the procedural rules of national law (General Assembly of UN, 1989). The age particularities of minors make it necessary to provide for additional instruments of legal protection for them in criminal proceedings, including in terms of obtaining statements from a minor in the procedural status of a witness. Such guarantees are not privileges for these persons and, accordingly, do not violate the principle of equality before the law and the court. According to paragraph 2 of the Art. 10 of the CPC of Ukraine, which describes the content of this principle in Ukrainian criminal proceedings, in the cases and under the procedure prescribed by law, certain categories of persons (minors, foreigners, mentally or physically disabled persons, etc.) use additional guarantees during criminal proceedings. The latter act as instruments of substitution, equalization of their reduced in comparison with other subjects of legal opportunities (Mamka, 2014). In this case, we can talk about the implementation of the principle of equality in criminal proceedings.

The sign that indicates the distinction of minors among the subjects of criminal proceedings is the age, which determines the natural reasons for enshrining additional guarantees. Moreover, the specific age affects the ability of a minor to implement his rights, and therefore it is fair to conclude that the peculiarities of a minor's participation in criminal proceedings should be determined taking into account the age periodization, which reflects the psychological characteristics of the child. The CPC of Ukraine takes into account the following age groups in determining the guarantees of a minor witness: until the age of fourteen; until the age of sixteen; until the age of eighteen (Lushpiienko, 2017).

The current CPC of Ukraine provides the following guarantees for the participation of a minor as a witness in criminal proceedings: 1) the procedure for calling in criminal proceedings: the summon for a minor is usually served to his father, mother, adoptive parent or legal representative (Part 4 of the Art. 135 of the CPC); 2) the impossibility of implementation of a reason to a minor witness (Part 3 of the Art. 140 of the CPC); 3) the peculiarities of questioning during the pre-trial investigation (CPC of Ukraine, 2012). We believe that the existing guarantees of procedural provision of a minor witness in Ukraine generally meet today's requirements and generally recognized international legal standards.

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CONCLUSION

The authors of the article believe that the limitation of the rights and freedoms of a person and citizen in criminal proceedings in Ukraine should be minimal. Using the existing measures of procedural provision in criminal proceedings in Ukraine the authorized person should proceed from the fact that their use should be aimed at collecting the necessary evidence, identifying a person who committed the criminal offence, facilitation of pre-trial investigation, but not deliberately limit the rights of individuals.

Procedural provision of a witness in Ukrainian criminal proceedings is understood as a procedure for involving a witness at various stages of criminal proceedings, court proceedings, etc., established by Ukrainian legislation and carried out in certain forms in the CPC of Ukraine and assigned to certain participants in criminal proceedings. With the help of this institution of criminal proceedings the implementation of the principles of legality, rule of law and immediacy of examination of evidence is provided.

Based on the practice of procedural provision of a witness in criminal proceedings, the following directions for the improvement of this institution can be formed: 1) strengthening the procedural liability of a witness for failure to appear for calling without valid reasons; 2) the need to develop practical recommendations for involving a witness in criminal proceedings.

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