CHAPTER 2
LEGAL RELATIONS: FROM THEORY TO PRACTICE

ADMINISTRATIVE AND LEGAL ENSURE OF "THE BEST INTERESTS OF THE CHILD" IN THE FIELD OF JUNIOR JUSTICE

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Abstract. *Today, the concept of "best interests of the child" is recognized as one of the guiding principles of ensuring the rights of children in all spheres of social relations. The object of this study is social relations in juvenile justice as a specific area of children's rights. The aim of the article is to clarify the meaning of the concept of "best interests of the child" as well as to define the features of administrative and legal provision of this principle in the field of juvenile justice. To achieve this goal, general scientific and special methods of scientific research are used. The author argues that the definition of "best interests of the child" in the field of juvenile justice should only be generally oriented to guaranteeing child's vital and social needs as a participant in jurisdictional proceedings, taking into account his or her age, biological and social characteristics. Under any circumstances, the list of such interests cannot be exhaustive. In view of the public-service nature of administrative and legal relations, an important role in the current and future ensure of the best interests of the child in any type of jurisdictional proceedings belongs to the administrative and legal means. The priority of attention to administrative and legal means in ensuring the best interests of the child in the field of juvenile justice is due to the wide range and relative universality of administrative and legal regulation, which allows to meet the procedural needs of children within purely jurisdictional proceedings as well as to facilitate other organizational and legal issues of social protection of children.*

Keywords*: child, children's rights, best interests of the child, administrative and legal ensure, juvenile justice.*

JEL Classification: K23, K38, K41, K42

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Introduction. The analyses of the state of human rights in each country and in the world as a whole shows that children are one of the most vulnerable categories of society. Among the reasons for this situation, J. Todres draws attention to the reduced ability of children to report violations of their rights, due to lack of sufficient verbal or communication skills needed to be heard. They are often seen as easy targets for abuse by others because of their vulnerability. Therefore, it is necessary not only to develop instruments such as the UN Convention on the Rights of the Child (1989) (hereinafter – CRC), but also to ensure their proper implementation [1]. M. Alinčić emphasizes the universality of the CRC which provides for the protection of all important human values, regardless of age, and takes into account the special needs

and nature of psychophysiological development of the child until adulthood: it outlines non-child rights (e.g. political) and establishes additional responsibilities of adults to support children with their needs taken into account [2, p. 77-79].

Today, the principle of "*best interests of the child*" at both international and national level is recognized as the main framework of ensuring children's rights in all spheres of social relations. According to Article 3 of CRC, *"[In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*" [3]. This principle acquires specificity in the field of juvenile justice, where the child's behavior may conflict with the public interests or rights (private interests) of others. The above-mentioned CRC article also asserts that in order to provide such protection and care for the child, the state must take all appropriate legislative and administrative measures. The Ukrainian doctrine of protection of children's rights is based on Western (European) legal and cultural values. At the same time, the Ukrainian national system for responding to these social challenges does not have a proper administrative and legal organization. Currently dominant in Ukraine criminal law (mostly punitive) approach to solving delinquency problems among children takes into account their interests very formally and has a retrospective character.

Literature review. Considering principles enshrined in the CRC K. Hamilton, L.A. Barnes Macfarlane emphasize the principle of "best interests of children" as it applies to any aspect of children's rights provision [4, p. 24; 5]. J. Muncie considers it to be the basic principle of juvenile justice [6]. In the context of the study of the legal status of the child, the concept of "interests of the child" are clarified by such Ukrainian scientists as I. Dubrovska, N. Opolska, etc. However, despite the attention of scholars and human rights activists to this principle, many questions concerning its optimal understanding and practical implementation remain unclear.

Aims. The aim of the article is to clarify the meaning of the concept of "best interests of the child" and determine the features of administrative and legal ensure of this principle in the field of juvenile justice.

Methods. To achieve this goal, general scientific and special methods are used, which are tools of scientific research (structural-functional and systemic, formal-logical, hermeneutic, etc.).

Results. The child exists, develops, goes through socialization and personality formation as part of society. It's the legal society where his or her subjective rights and freedoms are objectively embodied, which is the way to pursue the child's interests – natural and spiritual needs according to psychophysiological development. According to N. Opolska, the interests of the child is a broader concept than rights and freedoms, because they are claims to social benefits, not always covered by the content of rights and freedoms. In this vision, the rights and freedoms of the child are legal ways to pursue his or her interests [7, p. 11; p. 18-19]. I. Dubrovska defines the interests of the child as a subjectively determined need of the child in favorable

conditions of its existence. Such needs objectively depend on his or her age, state of development. Meanwhile, the child due to the inherent objective and subjective features is not always aware of his or her interests, so their content is determined by the characteristics of the actions of the child's legal representatives, authorized state bodies (officials) [8, p. 84].

Even in legal relations arising from the child's misconduct, the procedure and outcome of the decision taken by the state competent authority should not be contrary to the best interests of the child, in particular, taking into account his or her age or social status. Article 40, paragraph 1, of the CRC states: "*States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society*" [9].

The decision on the application of the rights of the child in specific social relations should take into account his or her best interests, which follows from several international agreements. But as L. Dane notes, there is no detailed definition of this principle in the international acts. The fact that this principle does not contain a clearly defined content is not problematic itself. However, this raises questions. Can we assume that the principle of "*best interests of the child*" is optimal in all areas of law? Does the meaning of "*best for the child*" change depending on the jurisdiction in which this principle is applied? What can be considered the best for an individual child will not necessarily have the same effect for another child [10, p. 193]. When assessing the best interests all aspects of the child's life in general should be regarded. This means that in different cases the circumstances considered may differ and may be assessed differently depending on specific factors [10, p. 220-221].

The term "*best interests of the child*" mentioned in the CRC has been further disseminated in the field of juvenile justice by the 2010 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice. Of course, this document mentions the prohibition of torture, inhuman or degrading treatment of children or punishment. When assessing the interests of children in the field of juvenile justice, due attention should be paid to their views and opinions; children should count on equal treatment regardless of social status, nationality, race, religion; to take due account of the interests of all parties of the conflict, the authorities must take a comprehensive approach and take into account the risks involved, the psychological and physical well-being of the child, and his or her legal, social and economic interests. At the same time according to the Guidelines all minors involved in the proceedings (offenders, victims, witnesses) fall in this category of children [11]. These principles have been adopted as a practical tool for member states in adapting national judicial and extrajudicial systems to the specific rights, interests and needs of children. Referring to the case law of the European Court of Human

Rights, U. Kilkelly emphasizes that the identification and assessment of the best interests of the child is primarily the task of national authorities [12, p. 220]. For example, in Scottish children's law, the best interests of the child (or "welfare", a common Scottish synonym for best interests) are declared "priority" for the court. This means that the welfare of the child is the most important and central principle for the court. The 1995 Law also prioritizes the welfare of the child which is expressed in the positive obligation of courts to give only orders that are beneficial to children. Section 11 (7) (a) provides that the court: "*Shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all*" [5]. So, apparently, the concept of "*best interests of the child*" has a framework (indicative) nature, but can it provide a specific list of interests?

Today, Ukrainian legislation does not contain a direct definition of this principle, but its understanding is given through the concept of "*ensuring the best interests of the child*". According to the provisions of the Law of Ukraine "On Childhood Protection", these are actions and decisions aimed at meeting the individual needs of the child according to his or her age, sex, health, development, life experience, family, cultural and ethnicity and take into account opinion of the child, if he or she has reached the age and level of development that he or she can express it (Article 1) [13]. For comparison, Georgian law defines the term "*best interests of the child*" in both the 2019 Code of the Rights of the Child and the 2015 Code of Juvenile Justice. By the way, the main purpose of the latter, among other things, is to protect the best interests of juveniles in the justice process. In this case, the "*best interests of juveniles*" in the Juvenile Justice Code of 2015 are understood as the interests of security, welfare, health, education, development, resocialization and rehabilitation and other interests of juveniles, based on international standards and individual characteristics of juveniles as well as his or her thoughts [14].

In criminal proceedings (under Ukrainian law) the best interests of the child are ensured by the requirements for mandatory participation of a lawyer; maximum time of interrogation of juveniles (up to two hours a day); involvement of a legal representative, teacher, psychologist or doctor; detention of a juvenile only in cases if he or she is suspected or accused of committing a serious or particularly serious crime; the priority to place the juvenile suspect or accused under supervision, etc. Prior to placing a juvenile suspect or accused under the supervision of others, the court must collect information about the identity of the parents, guardians or custodians, their relationship with the juvenile and ensure that they can properly supervise the juvenile. In order to take into account the individual characteristics of each child in criminal proceedings, the law or some bylaws provide for appropriate additional specialization of judges, investigators, prosecutors. As proved in our other publications, a significant part of all these guarantees in the field of juvenile justice is provided by combining the rules of criminal procedural law with the mechanism of administrative and legal regulation.

For example, the juvenile specialization of certain participants in criminal proceedings should be achieved by establishing in administrative law requirements for candidates, conditions and procedures for their appointment (election or obtaining status); approval of common training standards for "juvenile" specialists; approval of instructions or recommendations on the organization of work of the relevant specialized units or officials, etc. [15, p. 87-88]. Clarification of living conditions of a juvenile participant in criminal proceedings requires creating appropriate specialized bodies, legalization of their status, regulation of the procedure of interaction of such bodies with pre-trial investigation bodies, other public administration bodies, etc. [16, p. 58-59].

In its Concluding Observations and Recommendations for Ukraine, the UN Committee on the Rights of the Child in 2011 recommended to analyze the legislation, policies and programs related to juvenile justice and childcare systems, in order to ensure full consideration of the best interests of the child [17, p. 8]. The National Strategy for the Reform of the Juvenile Justice System 2019-2023 (approved by the Government of Ukraine in December 2018) contains the comments of the international community on the existence of norms in the current Ukrainian legislation on the actual prosecution of children under the age of criminal responsibility, in particular, the appointment by the court of coercive measures of an educational nature. At the same time, in order to solve these problems, the Strategy embraces only the measures to ensure equality of rights of children who have committed socially dangerous acts under the age of criminal responsibility with the rights of suspects, accused [18].

However, in our opinion, the reform of justice for children should radically change the procedure of response to such socially dangerous acts and bring them beyond the limits of criminal law relations. Instead of the current court proceedings and the imposition of coercive measures of an educational nature, the new procedure for taking extrajudicial measures against such persons, should close criminal proceedings (after a pre-trial investigation and inquiring into all the circumstances of a socially dangerous act) due to the fact that the subject of the act is under the age of criminal responsibility, and provide out-of-court application of administrative and legal measures to such children aimed at their social rehabilitation. This response should be based on the proposed set of measures for preventive care of a child with behavioral problems. These are measures of administrative and legal intervention, including educational support, health care, social, psychological and other services for both the child and his or her parents (persons replacing them), to achieve positive changes in the child's behavior, distraction from antisocial habits and inclinations, creation of conditions of its necessary socialization. This package includes measures of minimal and moderate preventive care for the child, as well as comprehensive assistance to family members when the child is prescribed minimal preventive care. To implement moderate preventive care for children in the system of special institutions for children in Ukraine it is necessary to create children's socialization

centers – specialized educational institutions for children with persistent behavioral problems, where the educational process is combined with the correction of aggressive behavior of minors and restoration of social communication ties [19, p. 135].

Discussion. Of course, if we consider the best interests of the child in the field of juvenile justice, we should keep in mind that this area covers not only the legal relationship of children committing criminal offenses or socially dangerous acts (under the age of criminal responsibility), but also the commission of administrative offenses. Legal regulation of proceedings in cases of administrative offenses in Ukraine today has many problems in ensuring the rights and best interests of the child as a participant in this kind of legal relations. A detailed analysis of Ukrainian legislation shows that today the Code of Ukraine on Administrative Offenses requires:

– to provide the grounds and procedure for releasing a juvenile offender from administrative liability in case of insignificance of an administrative offense, in particular out of court;

– to release the juvenile offender from paying the court fee in case the court makes a decision to impose an administrative penalty;

– to expand the list of rights of juveniles brought to administrative responsibility, in particular concerning compliance with the principle of presumption of innocence and proof of guilt (currently a significant part of administrative materials drawn up by police on juveniles does not contain any evidence other than administrative or police report); involvement of legal representatives (parents or other adults) of the juvenile in the process of investigating the circumstances of the administrative offense and registration of relevant materials; effective access of juveniles to free secondary legal aid by improving the mechanism of rapid involvement of counsel, etc.

– to outline the circumstances that must be taken into account when imposing penalties or applying measures of influence for administrative offenses to juveniles.

Considering the phenomenon of the rights and freedoms of the child, we should not forget his or her certain responsibilities connected with the age peculiarities of a particular period of childhood. By the way, in taking care of the rights and interests of the child the state may resort to prohibitions, restrictions or obligations that apply to minors and other individuals or legal entities.

In our opinion, the general age of administrative liability for all types of administrative offenses in Ukrainian law should be reduced to 14 years, provided that persons who have committed an administrative offense between the ages of 14 and 16 are subject only to educational and restitution measures. This does not contradict to the best interests of the child and the general direction of juvenile justice, as the inclusion of adolescents into administrative-tort relations and the application of educational measures will have a subjective effect – it will have a preventive effect, promote a child's sense of personal responsibility and inevitability of punishment in

the future (in the case of other misdemeanors in old age), and as a consequence it will prevent the recurrence of illegal behavior in any of its manifestations. Aside of the subjective effect, the proceedings in the case of an administrative offense for a juvenile offender at the age of 14 will also have an objective (external) effect. It is embodied in drawing the attention of the system of administrative juvenile justice to the causes of such behavior on the part of the child and the conditions that contribute to destructive changes in his or her behavior. These can be unfavorable conditions in the family environment, poor care or maintenance of children, antisocial ties, which ultimately affects the interests of the child and even his or her safety. As a result, the timely response of the authorized state bodies to the identified negative determinants will prevent both the commission of other offenses by the child and restore his or her normal socialization, provide the necessary care and development in appropriate social conditions.

Conclusions. We should remember that the "*best interests of the child*" are the basic principle of ensuring the rights of children. In view of this, we believe that the definition of this concept in the field of juvenile justice should contain only a general guideline for guaranteeing child's vital and social needs as a participant in jurisdictional proceedings, taking into account his or her age, biological and social characteristics. The best interests of the child are an ideal category, so making a complete list of all the needs in one definition is a difficult and impractical task. Under any circumstances, the list of such interests cannot be exhaustive.

The real interest of the child precedes the rights and responsibilities, whether it is directly enshrined in law or simply subject to "legal protection by the state". Accordingly, such an interest enshrined in the norms of positive law can be called the "*legitimate interest of the child*". The best interests of all children, in general and in each case, should be assessed separately and balanced in order to reconcile possible conflicts of public interests as well as the interests of other children. Given the public-service nature of administrative-legal relations, an important role in the current and future provision of the best interests of the child in any type of jurisdictional proceedings belongs to the administrative legal means. The priority of attention to administrative means of ensuring the best interests of the child in the field of juvenile justice is determined by a wide range of actions and relative universality, combined with the efficiency of administrative regulation. This allows to meet not only procedural needs of children within purely jurisdictional proceedings, but promote solution of other organizational and legal issues of social protection of children. Today, this sphere of social relations has numerous flaws and problems that should undergo a scientific and legal expertise. Their list is certainly not limited to the issues discussed in this article, so the need to improve the administrative and legal support of the best interests of children determines the prospects for our further research in this area.

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