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THE CRIMINAL LEGAL SIGNIFICANCE OF THE VICTIM'S WILL FOR THE RECOGNITION OF HIS CRIMINAL PROCEDURAL STATUS**

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Subject. The article is devoted to the issue of the legal significance of the victim's consent to harm and the impact of this circumstance on his criminal procedural status.

The purpose of the article is to propose an algorithm for determining the signs of the victim's free will to recognize his criminal procedural status.

The methodology. The authors used the axiological, dogmatic, comparative legal method, as well as the method of induction, deduction, and analogy.

The main results. A victim is a person whose rights and legitimate interests have been affected as a result of a crime committed. However, there is a long-term discussion in the scientific literature regarding the issue of recognizing the victim's consent to harm as a sign characterizing the victim, on which the criminal legal consequences and the criminal procedural recognition of a person as a victim depend. The Resolution of the Constitutional Court of the Russian Federation dated May 25, 2023 No. 26-P updated this issue. The essence of the decision is that a minor involved in the commission of a crime by an adult must be recognized as a victim under Article 150 of the Criminal Code of the Russian

Federation. Currently, investigative and judicial practice is following the path of recognizing such persons as witnesses with appropriate "curtailed" criminal procedural rights.

Conclusions. The freedom of will of the victim, being legally neutral for the criminal legal assessment of the actions of the perpetrator, nevertheless has a number of legislative exceptions that affect the recognition of the act as criminal, on the qualification, on the amount of punishment. The participation of a minor in a crime or the commission of antisocial acts under the influence of an adult should be the basis for recognizing a minor as a victim, regardless of the intensity of the adult's influence. The commission of similar actions by an adult under the influence of third parties must be assessed based on the intensity of such exposure.

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1. Introduction

The reason for writing the article was the Resolution of the Constitutional Court of the Russian Federation dated May 25, 2023 No. 26-P¹ which should transform the practice in the issue of criminal law protection of the rights of victims. The essence of the decision is that a minor involved in the commission of a crime by an adult must be recognized as a victim under Article 150 of the Criminal Code of the Russian Federation (hereinafter – the Criminal Code). Currently investigative and judicial practice is following the path of recognizing such persons as witnesses with appropriate "curtailed" criminal procedural rights. This issue updates a larger discussion on the recognition of the victim's consent to harm as a mandatory feature [1-3]. It is with the analysis of this feature that we start the study.

2. The victim's consent to harm and its criminal legal significance.

P.S. Dagel wrote that if there is a consent to harm, then it is impossible to talk about the figure of the victim neither in the criminal legal nor in the criminal procedural sense [4]. There are also modern followers of this position [5-7]. Thus, A.V. Sumachev believes that a sane person who has reached the age of criminal responsibility cannot be considered a victim if criminally significant harm is caused with his voluntary consent [8, p. 39]. S.V. Parkhomenko discusses the voluntary prior consent of a person in relation to the deprivation of his life, harm to his health, property and other protected interests within the authority of the person [9, p. 171]. The limits of authority are

understood by the author in terms of a person who has reached the age of criminal responsibility and has legitimate personal or property rights [9, p. 171]. As a mandatory sign of the victim, A.G. Korgulev calls the lack of consent to get harm through a crime [10, p.165].

One can agree with this approach only partially. Consent to harm has no criminal legal significance except in the cases expressly provided for by criminal law or arising from its meaning. In particular, the comment to Article 122 of the Criminal Code indicates the voluntary nature of putting at risk of HIV infection, expressed in the consent to commit actions that create danger, as a circumstance precluding criminal liability of a patient with HIV infection.

The lack of consent to the collection or dissemination of personal information is the basis for initiating a criminal case under Article 137 of the Criminal Code of the Russian Federation. Similarly, the lack of the author or applicant's consent on the public exposing the principle of an invention, utility model or industrial design is regarded as a criminalizing sign under Article 147 of the Criminal Code. The disclosure of commercial, tax or banking information secrecy without the consent of the owner are judged according to part 2 of Article 183 of the Criminal Code of the Russian Federation; secret of adoption according to Article 155 of the Criminal Code of the Russian Federation; while the criminal liability for the violation of the inviolability of the home (Article 139 of the Criminal Code) can arise in the absence of the consent of the dwellers. It does not matter whether an athlete has agreed to use a prohibited substance or a method to bring the coach, sports medic or other specialist in the field of physical culture and sports to criminal liability under Article 230² of the Criminal Code of the Russian Federation.

The consent of the victim to harm in some cases is important in distinguishing the elements of crimes. Thus, the illegal artificial termination of pregnancy (Article 123 of the Criminal Code of the Russian Federation) is distinguished from Article 111 of the Criminal Code of the Russian Federation with a similar criminal result precisely by the consent of the

¹ Resolution of the Constitutional Court of the Russian Federation dated May 25, 2023 No. 26-P "On the case of checking the constitutionality of Part Four of Article 150 of the Criminal Code of the Russian Federation and a number of provisions of Articles 42, 45, 145, 146 and 222 of the Criminal Procedure Code of the Russian Federation in connection with the complaint of citizens M.V. Zolotareva and V.V. Frolova". Collection of legislation of the Russian Federation. 2023. No. 23 (part II). Article 4272.

victim to carry out such manipulation with her body. The culprit's actions will be qualified as the rape of a minority status person (paragraph "a" of Part 3 of Article 131 of the Criminal Code), and (or) violent sexual acts against a minor (paragraph "a" of part 3 of Article 132 of the Criminal Code) only in the absence of the victim's consent to such sexual contacts, whereas similar contacts with a person under 16 with their consent are qualified under Article 134 of the Criminal Code of the Russian Federation, if a person is over 16 years, it is not a crime.

An attempt to bribe a person in the absence of the consent to take the bribe must be qualified as a provocation (Article 304 of the Criminal Code of the Russian Federation), whereas the consent "transforms" this wrongful act into an attempt to give a bribe. Such issues have been the subject of close attention of scientists [11-16].

The consent of the victim also affects the punishment, which is taken into account either in the sanctions of a Special part of the Criminal Code of the Russian Federation (again, an example of sexual relations with minors: the rape of a person under 14 can cause from 12 to 20 years in prison (paragraph "a" of part 4 of Article 131 of the Criminal Code), a sexual contact by mutual consent from a victim of a similar age – from 3 to 10 years in prison (Part 3 of Article 134 of the Criminal Code)); or stems from the practice of applying the circumstances aggravating or mitigating the punishment (Articles 61, 63 of the Criminal Code).

The most striking example is euthanasia. Traditionally the murder out of compassion for physical torment of a terminally ill person at his/her request (euthanasia) is assessed taking into account clause "d" of Part 1 of Article 61 of the Criminal Code of the Russian Federation under Part 1 of Article 105 of the Criminal Code, despite the fact that a terminally ill person is usually helpless, which should entail the liability under clause "b" Part 2 of Article 105 of the Criminal Code of the Russian Federation². Just the exclusion of the

motive of compassion can act as the basis for a re-characterization. In other words, the compassion motive conflicts with the aggravating circumstance provided for in paragraph "b" of Part 2 of Article 105 of the Criminal Code of the Russian Federation³.

3. Freedom of will of the victim in the criminal law sense

The freedom of will of the victim in the criminal law sense can be discussed from the standpoint of circumstances that exclude the criminality of the act if a number of conditions are met [17; 18, p. 139]. Thus, E.L. Sidorenko suggests that any harm to legitimate and freely available personal property or non-property rights that has been caused by another person under the conditions of voluntary, specific, true and prior consent of the rights'holder should not be considered a crime [19, pp. 365-366] (see also: [20]).

Such conditions may be as follows: a) the subject of consent, i.e. a group of conditions related to what it relates to. It usually refers to the consenting person ownership of the rights, the inadmissibility of encroaching on the government or public interests by the consent, etc.; b) the certainty of consent, i.e. a group of conditions related to the description of the permitted encroachment, the time of giving the consent, its form, etc.; c) the validity of consent, i.e. a group of conditions related to the use of freedom of the will of the consenting person [18, p. 193].

In other words, the victim's freedom of will to get harm must include the ability of a person to make such decision (therefore, excluded are the persons who are unable to make decisions due to mental illness, infancy, old age in conditions of dementia, in deep intoxication, etc.); the person must act with a complete awareness of the full range of possible action alternatives (be informed or act in the absence of a passive deception); and the decision must not be forced due to coercion by third parties. For all the simplicity of the construct, the voluntariness of the harm-doing taken as a circumstance excluding the criminality of the act has

² See, for example, the appeal ruling of the Tyumen Regional Court of December 18, 2014 in criminal case No. 22-3569/2014. Here and further judicial acts, unless otherwise indicated, are given
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according to the database "Judicial and Regulatory Acts of the Russian Federation" (<https://sudact.ru>).

³ See, for example, the verdict of the Zabaikalsky Regional Court No. 2- 26/2019 of December 27, 2019 in criminal case No. 2- 26/2019.

more questions than answers. What age of the victim can determine the voluntary nature of consent? What is the degree of deception? Should the victim act with due diligence, and, for example, check the reliability of information in other sources? What is the intensity of the coercion? etc.

Practice follows the path of non-recognition of the victim's will as a criminally significant circumstance even if the above criteria are met. For example, the court did not recognize the defense arguments that the purchase and sale of girls for further prostitution was carried out with their consent, which could exclude the qualification under Article 127¹ of the Criminal Code of the Russian Federation⁴. It is worth noting that in the context of recruitment, the greatest discussions run about the importance of the victim's free will. Their essence reduces itself to the issue whether the criminal liability can be excluded [18, p. 197; 21-25]. We don't believe this is the case. The candidate may be subjected to psychological or, in some cases, physical stress. Therefore, if the victim's will is under the influence of coercion, you can hardly think it has free nature.

Nevertheless, in individual cases the victim's freedom to harm-doing at will has to be crucial. This issue is defined through the idiom of criminal prosecution types. In accordance with Article 20 of the Criminal Procedure Code of the Russian Federation (hereinafter - CPC), the cases of private and private-public prosecution are initiated only if there is a statement from the victim (or their legal representative). The exemption is indicated in Part 4 of Article 20 of the Criminal Procedure Code of the Russian Federation. It means that only the injured person can "manipulate" a personal freedom at the stage of filing a statement about the committed crime. It does not seem to make sense to introduce a new circumstance excluding the criminality of the act, in view of the victim's consent to harm. The way out is seen in the expansion of the range of crimes that are related to the group of private prosecution.

Such a conclusion is consistent with the position of the Constitutional Court of the Russian

Federation, according to which the public nature of criminal law and the relations that develop on its basis do not exclude that when establishing a public danger of an act encroaching upon the rights and legitimate interests of a particular person, account must be taken of both the materiality of the violation of these rights and legitimate interests as seen by the victim, as well as the personal assessment of the harm severity and the adequacy of the legal measures to be applied to the perpetrator⁵.

4. The limits of the victim's freedom of will for the recognition of the criminal procedural status

Since we proceed from the premise of a certain general legal neutrality of the victim's free will, it seems that a person involved in committing a crime or antisocial offence (drug use, alcohol, prostitution, etc.) should be recognized as a victim in the absence of a proper volitional component to abandon this offence (act). What should be the disposition degree of one's will? It is obvious that a minor is less able to resist the "temptation" of using drugs, alcohol or easy money than an adult.

For this reason, the legislator establishes criminal liability for involving a minor into committing a crime (Article 150 of the Criminal Code of the Russian Federation) or committing antisocial acts (Article 151 of the Criminal Code of the Russian Federation) or increases the liability when "special incitement"⁶ is committed against a minor

⁵ Resolution of the Constitutional Court of the Russian Federation dated June 27, 2005 No. 7-P "In the case of checking the Constitutionality of the provisions of Parts Two and Four of Article 20, Part Six of Article 144, paragraph 3 of Part One of Article 145, Part Three of Article 318, Parts One and Two of Article 319 of the Criminal Procedure Code of the Russian Federation in connection with requests The Legislative Assembly of the Republic of Karelia and the Oktyabrsky District Court of Murmansk". Rossiyskaya Gazeta. 2005. July 8th.

⁶ This refers to situations where inflammatory actions constitute an independent crime: inducement to drug use (Article 230 of the Criminal Code of the Russian Federation), alcohol consumption (Article 151 of the Criminal Code of the Russian Federation),

⁴ The ruling of the Judicial Board for Criminal Cases of the Moscow City Court dated August 1, 2012 in case No. 22-9962/2012. "ConsultantPlus".

(paragraph "a" of Part 3 of Article 230 of the Criminal Code, Part 3 of Article 240 of the Criminal Code of the Russian Federation Therefore, the first aspect is *intellectual-and-volitional*.

One can be involved in a crime or antisocial behavior (act). Hence, the second aspect is the type of act (crime, offense or antisocial action). There is no doubt that a person involved in the commission of terrorist crimes cannot be recognized as a victim (Article 205¹ of the Criminal Code of the Russian Federation). The practice is uniform in this matter⁷. In the cases of the involvement in mass riots, the persons who agreed to take part in such actions are found guilty under Part 2 of Article 212 of the Criminal Code of the Russian Federation, while the persons who refused to participate in such acts are recognized as witnesses⁸.

The most difficult question is whether the minority status can be an "excuse" for non-recognize someone who has committed the crime to be its victim? When committing a crime in a group with a minor, the latter is considered to be the crime partner likewise the rest of the group (or a witness if the age of criminal responsibility is not reached). As for "special incitement", the judicial and investigative practice under Article 150 of the Criminal Code of the Russian Federation is meaningful in this sense. The minor is not recognized as a victim, but is a witness.

A typical example: a So-and-so's cousin involved her into shoplifting. In the verdict against this relative, the So-and-so was a witness. Her interests were represented by an employee of the

children's guardianship authorities, since the minor's mother died, and her father worked in another area and could not attend court sessions in a timely manner. However, Article 150 of the Criminal Code of the Russian Federation is aimed at protecting the development and upbringing interests of minors, which cannot be considered detached from the child's personality, with all the rights and freedoms. The resolution of the Constitutional Court of the Russian Federation, which we mentioned at the beginning of the paper, should change the widespread vicious investigative and judicial practice of not recognizing a minor as a victim under Article 150 of the Criminal Code of the Russian Federation.

5. The position of the Constitutional Court of the Russian Federation

This resolution states that within the meaning of Article 150 of the Criminal Code of the Russian Federation, taking into account its place in this Code, a minor involved in the commission of a crime in any way, including the cases without physical or mental coercion, in any case becomes the victim (victim in the criminal sense) of an independent criminal encroachment on the part of an adult, being under the adult's harmful influence that can form (strengthen) a false idea of the permissibility of illegal behavior, disdainful or negative attitude to the rights and freedoms of others, to the values of the society and state."⁹

The subject of consideration was the issue of non-recognition of a minor as a victim under Part 4 of Article 150 of the Criminal Code of the Russian Federation. An adult B. installed an app on Z's mobile phone. That app permitted the girl to communicate with a drug dealer to get drugs for their further distribution. The investigator did not recognize the minor Z as the victim, pointing out that the object of the crime provided for in Part 4 of Article 150 of the Criminal Code of the Russian Federation is not the personality of a minor, but a set of public relations in the field of the governmental policy of the realization of the rights and legitimate interests of the family and child and

prostitution (Article 240 of the Criminal Code of the Russian Federation), etc.

⁷ See, for example, the sentences of the Ust-Dzhegutinsky District Court of the Karachay-Cherkess Republic dated April 29, 2014 in criminal case No. 1-8/2014, the Sibaysky City Court of the Republic of Bashkortostan dated February 17, 2015 in criminal case No. 1-21/2015.

⁸ See, for example, the verdict of the Krasnokamensk City Court of the Trans-Baikal Territory of August 25, 2015 in criminal case No. 1-19/2015, the appeal decision of the Novosibirsk Regional Court of March 10, 2017 in criminal case No. 22-1221/2017

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⁹ Resolution of the Constitutional Court of the Russian Federation No. 26-P dated May 25, 2023.

the upbringing of the younger generation.¹⁰ Since no physical or mental violence was carried out against Z, and she committed a crime related to drug trafficking on her own free will, she could not be recognized as a victim.

This position of the investigator was supported by the courts when appealing the decision¹¹. As a result, according to Part 4 of Article 150 of the Criminal Code of the Russian Federation, B. was acquitted and convicted under Part 1 of Article 228¹ of the Criminal Code of the Russian Federation, and the minor Z, who had been convicted under Part 1 of Article 228¹ of the Criminal Code of the Russian Federation, could not count on the use of mitigating circumstances provided for in paragraph "e" of Part 1 of Article 61 of the Criminal Code of the Russian Federation.

The Constitutional Court of the Russian Federation noted that the priorities of state protection of the rights of minors **cannot change even when a minor has committed a crime**, and the factor of influence of third parties on a minor's decision to commit a crime cannot be ignored. "The public danger of the crime provided for in Article 150 of the Criminal Code of the Russian Federation is due, among other things, to the fact that the formation of a personality is considered incomplete before adulthood. The child and adolescent psyche is characterized by mobility, immaturity and instability to external influence (suggestibility), which is why such a negative impact on the part of an adult as involvement in the commission of a crime not only pushes the child to illegal behavior, but also disrupts the processes of his normal socialization and moral and mental development (maturation) of personality.

Establishing the responsibility of an adult for involving a minor in committing a crime, the legislator assessed the danger of such an act taking into account, among other things, the encroachment offence to normal physical, mental

and moral development and upbringing of a minor and the peculiarities of the child's perception of the social significance of their actions, the degree of suggestibility and malleability to external influences, even if they are less than typical characteristics of physical or mental violence, but capable of harming a developing personality."¹²

6. Involvement of the victim into illegal or immoral actions

It is another matter when the public danger of the act committed by a person involved is not a crime. We believe that in this case, by bringing the involving person to criminal responsibility for such an act (for example, under Articles 151, 230, 240, etc. of the Criminal Code of the Russian Federation), the involved person can be recognized as a victim taking into account the intellectual and volitional aspect. In other words, if an adult is inclined to drink alcohol, take drugs, go in prostitution, etc., s/he cannot be recognized as a victim, whereas if a minor is inclined to such actions, s/he shall be recognized as a victim.

An analysis of the practice has showed the following. If a minor is involved in committing antisocial acts (Article 151 of the Criminal Code of the Russian Federation), *the minor is always recognized as a victim*. For example, an S repeatedly offered a minor P. to drink alcoholic beverages, for which at various times he was brought to administrative responsibility under Part 1 of Article 6.10 of the Code of Administrative Offenses of the Russian Federation. Having failed to draw proper conclusions for himself and having the intention to involve a minor into the regular drinking of alcoholic and alcohol-containing products, he once again involved the minor into alcohol drinkinr. The victim and his representative did not present objections in court and asked to consider the case in their absence¹³. This practice is consistent¹⁴.

¹⁰ in the same place

¹¹ The appeal decision of the Moscow City Court dated December 2, 2021 in case No. 10-23709/2021; The cassation ruling of the Criminal Court of the Second Cassation Court of General Jurisdiction dated June 23, 2022 in case No. 7U-5028/2022[77-2137/2022] // SPS "Garant".

¹² Resolution of the Constitutional Court of the Russian Federation No. 26-P dated May 25, 2023.

¹³ The verdict of the Naro-Fominsk City Court of the Moscow region dated April 11, 2018 in criminal case No. 1- 100/2018.

¹⁴ See, for example, the verdicts of the Donetsk City Court of the Rostov region of March 30, 2017 in

However, the practice under Article 230 of the Criminal Code of the Russian Federation, when drug abusers in some cases are recognized as victims¹⁵, and not in the others¹⁶, is extremely inconsistent. The analysis of the sentences according to the crime constituents under consideration did not reveal any correlation between the circumstances of the cases when the person involved in the drug abuse was either recognized a victim or not.

A So-and-so6 involved a minor into the drug abuse. Being a drug addict himself and living with a minor So-and-so 2 he systematically used drugs in her presence, told her what feelings he was experiencing, and assured her that drug taking in small doses does not cause addiction. About a year after the start of their cohabitation, the minor So-and-so 2 agreed to take drugs, and So-and-so6 himself repeatedly injected her with the drug. So-and-so 6 was sentenced under paragraph "b" of Part 2 of Article 230 of the Criminal Code of the Russian Federation to three years in prison. Two circumstances look strange in this sentence: paragraph "b" of Part 2 of Article 230 of the Criminal Code of the Russian Federation provides for the liability for the involvement of two or more persons, and the sanction stipulated by this part provides for the imprisonment from five to ten years. At the same time, the verdict states that correction and rehabilitation of the defendant So-and-so6 is possible only in the institution of

confinement and when imposing the punishment, the court finds no reason to apply Article 73 of the Criminal Code of the Russian Federation or Article 64 of the Criminal Code of the Russian Federation."¹⁷

The minor in this criminal case was held as a witness.

When engaging in prostitution (Article 240 of the Criminal Code of the Russian Federation), the persons who have consented to illegal offers to go in prostitution are always recognized as victims. This is not affected by the presence or absence of any violence. Even when such persons leave the brothel of their own free will, they are recognized as victims¹⁸. In some cases, the made decisions, being formally legitimate, come into conflict with the principle of justice and reasonableness.

Thus, the prosecutor filed a civil lawsuit in favor of the minor K. for the recovery of moral damage. The minor K. was a victim under Part 3 of Article 240 of the Criminal Code of the Russian Federation. The parents, as legal representatives, did not file a civil claim. The court has supported the prosecutor's position, stating that the amount of compensation for moral damage is determined by the court depending on the nature of the physical and moral suffering inflicted on the victim, as well as the degree of guilt of the harm-doer in cases where guilt is the basis for the compensation for harm. When dividing the amount of compensation for harm, the requirements of reasonableness and fairness must be taken into account. The nature of physical and moral suffering is assessed by the court taking into account the actual circumstances in which moral harm was caused and the individual characteristics of the victim. A moral damage in the amount of 5,000 rubles was collected from a convicted person in the commission of a crime under Part 3 of Article 240 of the Criminal Code of the Russian Federation

criminal case No. 1-71/2017, of June 6, 2017 in criminal case No. 1- 108/2017.

¹⁵ Court of August 10, 2022 in case No. 22-4322/2022, the verdict of the Sverdlovsk District Court of August 8, 2022 in case No. 59RS0No.-12. See, for example, the verdict of the Pyty-Yahsky city Court of Khanty-Of the Mansiysk Autonomous Okrug-Yugra dated September 22, 2022 in criminal case No. 1-120/2022. ¹⁸ Verdict of the Stupisky City Court of the Moscow Region dated February 5, 2009 No. 1-23/2009.

¹⁶ See, for example, the verdict of the Pyty-Yahsky city Court of Khanty-Of the Mansiysk Autonomous Okrug-Yugra dated September 22, 2022 in criminal case No. 1-120/2022. ¹⁸ Verdict of the Stupisky City Court of the Moscow Region dated February 5, 2009 No. 1-23/2009.

¹⁷ The verdict of the Stupisky City Court of the Moscow region dated February 5, 2009 No. 1-23/2009.

¹⁸ See, for example, the verdict of the Kalininsky District Court of Novosibirsk dated July 9, 2020 in case No. 1-117/2020.

in favor of the minor K. (!)¹⁹

7. Conclusion

The freedom of will of the victim, being legally neutral for the criminal assessment of the actions of the perpetrator, nevertheless has a number of legislative exceptions that affect the recognition of the act as criminal, the qualification, and the amount of punishment. The participation of a minor in a crime or the commission of antisocial acts under the influence of an adult should be the basis for recognizing a minor as a victim, regardless of the intensity of the adult's influence. The commission of similar actions by an adult under the influence of third parties must be assessed based on the intensity of such exposure.

¹⁹ The decision of the Oktyabrsky District Court of Stavropol dated May 26, 2020 in case No. 2-759/2019.

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