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## **Constitutional and legal status of minors in the Republic of Kazakhstan**

This article sets the task of examining the real value attitude of the state towards a person, his rights and freedoms, taking into account the specifics of their various categories and groups, a special place among which is occupied by minors. The Constitution of the Republic of Kazakhstan enshrines the legal status of a person and a citizen of the Republic of Kazakhstan, recognizes and guarantees the inalienability of fundamental rights and freedoms, imposes the obligation of the state to support the family, motherhood, fatherhood and childhood. At the same time, in modern Kazakhstan there is a contradiction between the constitutional essence of the system for protecting the rights of minors and its actual functioning. The purpose of the work is to highlight the problems of interpretation of the constitutional status of minors. The lack of due attention on the part of the state to the problem of children may well be qualified as non-compliance by the Republic of Kazakhstan of certain provisions of international legal acts. First of all, it concerns the legal support of the status of minors, as well as the activities of authorized bodies that guarantee the implementation of the rights and freedoms of minors. The work says that declarativeness of juvenile legislation takes place, low degree of effectiveness of legal protection of children. Particular attention is drawn to the problems of determining the legal status of a minor and guarantees of the realization of his rights and obligations. The authors came to the conclusion that the effective implementation of guarantees of the rights and freedoms of minors ensures not only the progressive development of any society, the normal process of socialization of the future generation, but also is the key to the successful implementation for Kazakhstan of the task of creating a healthy new generation

**Keywords:** guarantee of the rights of minors, the realization of the constitutional rights and freedoms of juveniles, the interpretation of the terms «minor» and «child», a minor's constitutional rights and freedoms of minors, the Ombudsman, the general and special guarantees.

### *Introduction*

The legislation of the Republic of Kazakhstan, as well as international legal instruments widely uses the terms «minor» and «child». However, additional complexity creates the fact that regulations do not give precise definitions of these terms, and their differences from each other, therefore these concepts at first glance may seem identical. Basic guide to understanding the concept of «child» or «minor» in Kazakh law could be the relevant provisions of the Constitution of the Republic of Kazakhstan, but in the main law of the country they are absent.

However, in the Republic of Kazakhstan there are branches of the law, which provides some interpretation of the terms «minor» or «child», which allows a certain way to understand what these terms differ from each other. Interpretation of the terms «minor» and «child», for example, is in the civil code, the criminal code, and family code of the Republic of Kazakhstan.

### *Methods and materials*

Theoretical-methodological foundation of this article is scientific works of Kazakh and foreign scientists of the past and present in the sphere of constitutional law. The theoretical conclusions are made on the basis of statistical data processing, reports, and papers published in periodicals.

### *Literature review*

The theoretical basis of the study are the provisions of the constitutional law, as well as materials research, reflected in the works of E.B. Melnikova, Ye.A. Lukasheva, Ye. Mikitova. Regulatory framework are the Constitution of the Republic of Kazakhstan of August 30, 1995 year, the law of the Republic of Kazakhstan «On the rights of the child in the Republic of Kazakhstan» of August 8, 2002 year, Convention «On the rights of the child» of December 27, 1994 year, etc.

### *Main part*

History shows that each generation needs to protect the rights of the individual, that mankind still does not know the situation in which efforts would not be required to protect the rights of the individual, and that slogans about a happy childhood, not supported by legislative acts and not based on a just and strong state policy in the interests of children, on the full material and financial support, ensuring the normal development of the younger generation, remain empty declarations.

Foreign thought, compared with the domestic one, had previously realized the importance of the problem of children's rights, and international law also began to provide for special measures to protect the most vulnerable groups of society, all those who do not have equal opportunities to protect their rights. Primarily this category includes children. Immediately after the First World War, the International Association for the Care of Children was established within the framework of the League of Nations. In 1924, the Geneva Declaration of the Rights of the Child was adopted. In 1945, the UN General Assembly created the UN Children's Fund (UNICEF). In 1959, the UN declared the Declaration of the Rights of the Child.

Moreover, if in the Declaration of the Rights of the Child of 1924 children were considered solely as an object of protection, then the Declaration of the Rights of the Child of 1959 showed a tendency to recognize the child as a subject of rights, as evidenced by its individual provisions [1; 216]. On November 20, 1989, the UN General Assembly unanimously adopted the Convention on the Rights of the Child, enshrining it as a subject of rights [1; 217]. The Convention enshrines the various rights of the child - civil, political, economic, social and cultural, never before united in a single document. Its provisions take into account the diversity of cultures, traditions, religions, levels of economic development of various countries. All this, as well as the existence of a mechanism to monitor compliance with the provisions of the Convention, makes this document a unique tool for protecting the rights of the child. The Convention on the Rights of the Child has created a new model of attitudes towards children, has triggered a change in the position of the child in the family and society. The opinion expressed in this connection is of interest that «none of modern jurists doesn't dispute more the fact that a child is an independent carrier of rights — a special subject of law» [2; 219].

Analyzing the legal status of a minor, it should be noted that various scientists in the structure of the legal status (position) of the individual include a different set of elements [3]. These authors distinguish such elements as (legal principles, citizenship, general legal capacity, legitimate interests, a guarantee system, legal liability, etc.).

With regard to the types of the legal status of the child in accordance with the prevailing opinion in science, we can single out general (constitutional), sectoral, special (clan) and individual statuses. Regarding the first status, we would like to note its certain conditionality, indirectness due to the identification of the constitutional rights of adult citizens and children in the second section of the Constitution of the Republic of Kazakhstan [4; 27]. It seems that it would be more correct to speak not about the general (constitutional) status of the child, but about the constitutional foundations of his rights in the Republic of Kazakhstan.

Analyzing the relationship between the concepts of «protection», «assertion», «guaranteeing» and «ensuring» that are directly related to the rights of the child, using a special legal interpretation revealed their independence and interdependence and determined that «protection» is a combination of legal acts and a system of state, municipal and public events aimed at creating conditions for the realization of subjective rights and legally protected interests.

Protection is a complex system of measures applied to ensure the free and proper realization of subjective rights, including judicial protection, legislative, economic, organizational, technical and other means and measures, as well as self-defense of civil rights. Consequently, protection is a substantial, institutional phenomenon, and assertion is functional, instrumental. At the same time, both protection and assertion are ways of ensuring subjective rights [5; 27].

Legal support is inextricably linked with the warranty (summarizing the concept, meaning a set of guarantees) of the realization of subjective rights in the process of their exercise. Under guarantees should be understood the obligations of the state to create the necessary conditions and provide appropriate means to ensure the actual implementation and full protection of the rights and freedoms of everyone (economic, political, ideological and legal guarantees). Therefore, guarantees, along with protection and assertion, are also one of the ways to ensure subjective rights.

Moreover, they are not only a way of ensuring the actual realization of rights, but also including the way of the protection and defense of subjective rights themselves. And the provision, in our opinion, is a free

and proper, real and real, actual realization of subjective rights, achieved with the help of a set of guarantees, protection and assertion. Thus, «protection» includes «assertion», and together with «warranty» with their help, «ensuring» the rights of the child are achieved [5; 28].

The mechanism for protecting of the rights of the child should be understood as the system of interacting social and legal means used to ensure the realization of his rights. In other words, this is a system of means of social and legal protection of the rights of the child. At the same time, social protection is a system of economic, organizational, legal measures guaranteed by the state, providing children with conditions for overcoming a difficult life situation. And the concept of legal protection can be described as ensuring the rights and legal interests by legal means.

Ensuring the functioning of this mechanism largely depends on the effectiveness of the activities of entities that protect the rights of the child and the forms they implement. The complexity of the problem here lies, firstly, in the fact that there is no single system of subjects focused only on solving this socially important task. The second problem is the lack of interaction between the bodies designed to protect the rights of the child, that it is not possible to unite the links of a single mechanism of protection into one chain and distribute competences between them in accordance with the branches and levels of government, eliminating duplication and parallelism in work.

The constitutional legal basis for the status of a child is not separately enshrined in the Constitution, but is established on the basis of the main provisions of the constitutional legal status of a citizen. The legal status of a citizen is commonly understood as a certain set of rights that he has for entering into the intended legal relationship. This concept is synonymous with the concept of «legal personality».

Thus, the constitutional and legal status of a child is a set of rights, freedoms, and duties of the child and guarantees of their implementation, established by constitutional legislation, namely: the Constitution, the national legislation of the Republic of Kazakhstan, as well as laws and other regulatory legal acts of the RK subjects.

In Chapter 2 of the Constitution «Rights and freedoms of a person and a citizen», the concepts «child» and «children» are used only in Art. 27, which enshrines the obligation of the state and parents to take care of children, in other norms the child is implied as a subject of legal relations and is included in the terms «citizen», «everyone» [4].

Since February 16, 1994, the Republic of Kazakhstan is a party to the UN Convention «On the Rights of the Child». It considers a minor as a person endowed with relevant rights, capable to a certain extent of their self-realization and protection [5].

The Law of the Republic of Kazakhstan of August 8, 2002 No. 345-II «On the Rights of the Child in the Republic of Kazakhstan» (as amended up to 01.10.2017, consistently consolidated this approach to the child in accordance with the provisions of the UN Convention «On the Rights of the Child», by the Constitution of the Republic of Kazakhstan and the obligations of the Republic of Kazakhstan to ensure the full protection of the rights and legal interests of the minor [6].

Accordingly, from the mid-1990s, the regulatory legal framework on the protection of children's rights in the Republic of Kazakhstan began to undergo significant changes of a progressive nature that met the norms of international law and allowed to establish a certain legal status of minor citizens, subjects of legal reality.

The subjects of constitutional law are commonly understood as participants of constitutional legal relations endowed with constitutional legal personality.

The specificity of the considered branch of law is that the circle of subjects of constitutional legal relations is very wide, and some of them can only be participants of these relations and cannot be represented in other legal relations. Many subjects of legal relations are not required to take specific steps to indicate their participation in them.

The original legal concept is «man». The consolidation of this subject of law in the Basic Law aligns the Constitution of the Republic of Kazakhstan with such international legal acts as the Universal Declaration of Human Rights and Freedoms of 1948, international covenants on human rights and freedoms adopted by the UN in 1966, free from the principle of political affiliation a specific state [7].

However, methodologically correct and practical study of legal regulation of the status of the younger generations from a practical point of view objectively requires preliminary fixation of the leading terms «child», «teenager», «minor», »young», «youth» and their interrelationships between themselves. No less difficult is the problem of the legal definition of the status category «minor».

From a theoretical and legal point of view, according to the correct remark of E.B. Melnikova, a minor - is «a person who has not reached a certain age, with the achievement of which the law connects his full legal capacity, that is, the full realization of the subjective rights of legal duties proclaimed to a person and a citizen by the constitution and other laws of the country» [8; 56].

International legal acts dedicated to the problems of minors usually determine the final boundary of a minor at 18 years old; however, they often make the clause «if a different age is not established by national legislation».

Thus, in jurisprudence the concept of «minor» is in many ways a product of national legislation, and therefore we can meet its various synonyms: «child», «children», «teenager», «juvenile», etc. Thus, for example, in Kazakhstani criminal law, minors are persons who «are ... who, by the time the crime was committed, were fourteen years old, but not eighteen years old» [9]. The Law of the Republic of Kazakhstan of August 8, 2002 No. 345-II «On the Rights of the Child in the Republic of Kazakhstan» (with amendments and additions as of 01.10.2017 in Article 1 determines that «a child is a person before they reach the age of 18 (majority age)» [6].

Each of these categories of persons has the right to existence, application and theoretical explanation. But meanwhile, it is impossible to put an equal sign between them. In order to distinguish them, it is necessary to designate the characteristics inherent to the indicated categories of persons, which can serve as the basis for the formulation of the corresponding definitions. According to the author, the concept of «child» consists of the component concepts: «juvenile» and «teenager». As stated above, juveniles are understood persons who are under fourteen years old. The term «minor» should be used in relation to children from the moment of their birth to ten years (0–10). The category of «minors» is used when it is necessary to determine the position of the «child» in society from the moment of birth until the time when he can express his opinion in cases provided by law by himself (adoption, placement in a foster family). All responsibility for young children under domestic law lies with the parents or their legal representatives. Thus, at the age of 10 to 14 years old, a child can be considered a teenager and it is during this period that he will have certain rights that he is entitled to use without the help of parents or legal representatives [10]. The age criterion, which distinguishes a minor as a special subject of constitutional legal relations, gives us the opportunity to identify a number of specific features that allow us to characterize and differentiate this legal institution from many others.

It is natural that the constitutional legal status of a minor in Kazakhstan law is determined by the following timeframe:

- firstly, from the moment of birth until the age of 18;
- secondly, despite the legal capacity of a minor, which he has from the moment of birth, there is a restriction on the possibility of implementing the rights and freedoms established by law.

It appears that these restrictions are due to a number of facts, including:

- a) physiological and socio-psychological helplessness of minors;
- b) full or partial personal, legal and social dependence on parents (as well as on persons replacing them);
- c) low guarantee and security of legal regulations, which are often declarative.

When solving the priority problems of forming and strengthening the status of a child as a special subject of legal relations, a clear mechanism should be developed to establish the moment of birth of a person as the beginning of his life and legal capacity; expand and tighten the norms ensuring the child's right to life at earlier stages of its development, as well as make some additions to the legal norms establishing the equality of the child with other subjects of law.

The problem of determining the legal status of a child is in the spectrum of priority directions of state policy. Its effective solution provides not only the progressive development of any society, the normal process of socialization of the future generation, but also is the key to successful implementation in the coming millennium of a strategic task for the further development of the Republic of Kazakhstan task - the formation of a healthy new generation capable of becoming a carrier of a civic idea.

The definition of the legal status of a minor should be formulated taking into account conceptual approaches that have emerged in the theory of law and branches of legal science in determining the legal status and legal condition of an individual in general. The terms «legal status», «legal condition» are often used in legislation and scientific legal literature. They are usually used in the case when it comes to characterizing the state of a subject of legal communication, for example, an organ of a state or organization. In the consti-

tutional law, unlike other branches of law, along with the terms «general (constitutional) status» and «constitutional legal status», the concept of «the basis of the legal status of a person» is often used. Its application is due to the specifics of this branch of law as the leading branch in the system of Russian law, and this is reflected in the fact that this concept focuses on the fundamental elements that are basic to any branch status of a person and are accordingly taken into account in it [11; 15].

The constitutional legal basis for the status of a minor is not separately enshrined in the Constitution of the Republic of Kazakhstan, but is established on the basis of the basic provisions of the constitutional legal status of an individual, which allows us to speak of guarantees of equal protection of the rights of any person, regardless of age.

Thus, taking into account the specificity of the subject of legal relations under study - a minor, we believe that the constitutional legal status of a minor should be understood as the totality of rights, freedoms and duties of a person under 18 years of age guaranteed by the Constitution of the Republic of Kazakhstan.

Summing up the issue of legal regulation of the protection of the rights and freedoms of minors, we see the following **results**:

- firstly, the principle of the priority of childhood, declared at all levels of government, is not fully realized at any of them;

- secondly, there are three levels of legislation regulating the constitutional and legal status of minors: international, republican, regional;

- thirdly, the current legislation of the Republic of Kazakhstan basically corresponds to the generally accepted principles and norms of international law, however, for the effectiveness of its implementation it is required to eliminate the existing gaps.

- fourthly, inconsistencies of legal installations and the implementation of their content into life in this sphere of protection of the interests of the child; the lack of state control over the observance of the personal rights of the child in the family hampers the development of the whole society as a whole;

- fifthly, the absence of strict civil and legal responsibility of those who are obliged not only to ensure the realization of the personal rights and freedoms of children, but also those who are aware of their violation, undermine confidence in the institution of state bodies and their officials.

### *Discussion*

Formally, the concepts «child» and «minor» are identical. At the same time, according to the observations of some scientists, the concept of «child» is more spacious in its content than the concept of «minor», despite the fact that from a legal point of view, the concepts of «child» and «minor» are identical. If the first concept contains a characteristic of a very important stage in a person's life, the latter focuses attention primarily on the lack of a certain quality in a person, namely that the person has not reached a certain age line. On this basis, the concept of «minor» is used primarily in criminal, civil, administrative law (that is, in relevant legislation, in which such a formal aspect as age is of essential importance). In other branches of law, such as family law, for example, the term «child» is primarily used. The terms «child» and minor are used in constitutional law.

Thus, the distinction between the terms «child» and «minor» consists in the scope of opportunities to realize their legal rights and obligations due to psychological maturity.

### *Conclusions*

In our opinion, the following proposals will contribute to solving the above problems:

1. Legislative consolidation of the legal status of the child in the Constitution of the Republic of Kazakhstan.

2. Creation of a unified regulatory act governing the rights of the child.

3. Strengthening the responsibility of those responsible for ensuring the rights of the child or issues relating to their protection, that is, eliminating the formalistic approach of officials and organizations in general in solving problems of protecting motherhood and childhood.

4. Increasing the share of resources allocated for child support.

5. Development of the system of legal education of children and parents, raising the level of their legal awareness.

When translated into practice these proposals, we believe, the effectiveness of legislation regulating the legal status of children will increase, the mechanism of protection and realization of their rights will improve.

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Г.Б. Эбікенова, А. Лавничак

## Қазақстан Республикасындағы кәмелеттік жасқа толмағандардың конституциялық-құқықтық мәртебесі

Макалада мемлекеттің адамға, оның құқықтары мен бостандықтарына накты-күндыштық қатынасын олардың әртүрлі санаттары мен топтарының ерекшеліктерін ескере отырып қару міндеті қойылады, олардың арасында кәмелеттік толмағандар ерекше орын алады. Қазақстан Республикасының Конституциясымен Қазақстан Республикасы азаматының және адамың құқықтық мәртебесі бекітілген, негізгі құқықтары мен бостандықтарының болінбейі мойындалған және кепілдік берілген, мемлекеттің отбасын, ана болуды, әже болуды және балалық шакты қолдау міндеті жүктеледі. Сонымен қатар қазіргі Қазақстанда кәмелеттік толмағандардың құқықтарын қорғау жүйесінің конституциялық мәні мен оның нақты жұмыс істеуі арасында қарама-қайшылық сакталуда. Жұмыстың мақсаты – кәмелеттік жасқа толмағандардың конституциялық мәртебесінің мәселесін зерттеу. Мемлекет тарапынан балалар проблемасына тиісті қоныл болінбейі Қазақстан Республикасының халықаралық құқықтық актілердің жекелеген ережелерін сақтамауы ретінде әбден дәрежеленуге болады. Ең алдымен, бұл кәмелеттік толмағандардың мәртебесін құқықтық қамтамасыз етуге, сондай-ақ кәмелеттік толмағандардың құқықтары мен бостандықтарын іске асыруға кепілдік беретін үәкілдіктерінде қызметтіне қатысты. Жұмыста ювеналды заңнаманың декларативтілігі, балаларды құқықтық қорғау тиімділігінің төмен дәрежесі орын алуда делінген. Кәмелеттік толмағандардың құқықтық мәртебесін және оның құқықтары мен міндеттерін іске асыру кепілдігін анықтау проблемаларына ерекше назар аударылады. Авторлар кәмелеттік толмағандардың құқықтары мен бостандықтарының кепілдіктерін тиімді іске асыру кез келген қоғамның прогрессивті дамуын, болашақ үрпакты әлеуметтендірудің қалыпты процесін қамтамасыз етіп қана қоймай, сонымен қатар Қазақстан үшін салауатты жаңа үрпакты қалыптастыру міндетін табысты іске асырудың кепіл болып табылатынын бір шешімге келді.

*Кітт сөздер:* кәмелеттік толмағандардың құқықтарының кепілдіктері, кәмелеттік толмағандардың конституциялық құқықтары мен бостандықтарын жүзеге асыру, «кәмелеттік толмаған» және «балалардың үғымдарын түсіндіру», кәмелеттік толмаған, омбудсменнің конституциялық құқықтары мен бостандықтары, жалпы және арнайы кепілдіктер.

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## Конституционно-правовой статус несовершеннолетних в Республике Казахстан

В статье ставится задача рассмотреть реально-ценностное отношение государства к человеку, его правам и свободам с учетом специфики их различных категорий и групп, особое место среди которых занимают несовершеннолетние. Конституцией Республики Казахстан закреплен правовой статус человека и гражданина Республики Казахстан, признаны и гарантированы неотчуждаемость основных прав и свобод, вменена обязанность государства поддерживать семью, материнство, отцовство и детство. Вместе с тем в современном Казахстане сохраняется противоречие между конституционной сущностью системы защиты прав несовершеннолетних и её реальным функционированием. Цель работы — осветить проблемы трактовки конституционного статуса несовершеннолетних. Отсутствие должного внимания со стороны государства к проблеме детей вполне можно квалифицировать как несоблюдение Республикой Казахстан отдельных положений международных правовых актов. Прежде всего, это касается правового обеспечения статуса несовершеннолетних, а также деятельности уполномоченных органов, гарантирующих реализацию прав и свобод несовершеннолетних. Особое внимание обращается на декларативность ювенального законодательства, низкую степень эффективности правовой защиты детей, на проблемы определения правового статуса несовершеннолетнего и гарантий реализаций его прав и обязанностей. Авторы пришли к выводу, что эффективная реализация гарантий прав и свобод несовершеннолетних обеспечивает не только прогрессивное развитие любого общества, нормальный процесс социализации будущего поколения, но и является залогом успешной реализации для Казахстана задачи — формирование здорового нового поколения.

**Ключевые слова:** гарантии прав несовершеннолетних, реализация конституционных прав и свобод несовершеннолетних, трактовка понятий «несовершеннолетний» и «ребенок», конституционные права и свободы несовершеннолетнего, омбудсмен, общие и специальные гарантии.

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