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### **Theoretical and legal problems of legal representation institution of juveniles in criminal proceedings**

The purpose of the research in this article is to identify legal and practical problems of participation of legal representatives of a juvenile, to formulate proposals to resolve these problems; to develop a comprehensive mechanism to ensure the right to participate of the legal representative of a minor, by improving the procedural status of both the minor participant in criminal proceedings and his (her) legal representative. The use of general and private scientific research methods allowed us to assess the current state, patterns and main trends in the development of the legal representation institution of juveniles. As a result of the research, the existence of gaps in the legislative regulation and the existence of shortcomings in the mechanism for implementing the right of minors to legal representation were revealed. The content of the concept «legal representative of a minor participant in criminal proceedings» was analyzed, as enshrined in the criminal procedure legislation, which is recognized as truncated and not covering all options of individuals who can be involved as a legal representative; the lack of proper regulation of the procedural status of a minor's legal representative, in particular, the questions of legitimate representation of the interests of witnesses and witnesses entitled to protection remain without attention, the ineffectiveness of the activities of representatives of institutions or organizations in whose care the minor is, of the guardianship and trusteeship authorities is substantiated; the issues of granting legal representatives with witness immunity were considered. The key point in resolving the issue of admission to participate in criminal proceedings as a legal representative should be the interests of the minor, namely the degree of closeness of the legal representative with the represented person.

*Keywords:* minor, procedural status of a minor, juvenile justice, minor suspect, victim, witness, guarantees of rights, representation of interests of minors, legal representation.

#### *Introduction*

One of the most important guarantees of respect for the rights of minors involved in criminal proceedings is the institution of a legal representative.

Generally, the implementation of the rules on the participation of legal representatives of minors is provided with a fairly specific legal basis, theoretical validity, judicial and investigative practice. In other words, the institution of legal representation is a progressive guarantee of compliance with the rights of a minor, which meets the requirements of objective necessity, expediency, justification and corresponds to the goals and objectives of criminal proceedings. However, the analysis of the practice of criminal proceedings and industry legislation has revealed a number of problems that prevent the real implementation of the provision on the participation of a legal representative.

Official statistics speak in favor of the relevance of the study of legal problems of the implementation of criminal procedural guarantees, one of which is the right to participation of a legal representative. Recent statistics show a consistently high level of juvenile delinquency. So, in 2018, 3156 juveniles were brought to

criminal responsibility. In 2019, their number was 2,148. 2227 juveniles were involved in the orbit of criminal proceedings as victims in 2018, and 1827 juveniles were victims of the crimes in 2019, respectively [1].

In other words, the number of criminal cases involving minor suspects, accused persons, and victims is consistently high, and the study of problems of protecting their rights in criminal proceedings is relevant.

The object of the research is social relations formed in the course of criminal proceedings involving minors. The subject is empirical sources and the legal framework governing criminal proceedings involving minors.

The purpose of the research in this article is to identify legal and practical problems of participation of legal representatives of a minor, formulate proposals to resolve these problems; develop a comprehensive mechanism to ensure the right to participate of the legal representative of a minor, by improving the procedural status of both the minor participant in criminal proceedings and his (her) legal representative.

To achieve this goal, it is necessary to solve the following tasks: research of the legal norms underlying the implementation of this guarantee; disclosure of the meaning and content of the category «legal representative of a minor participant in criminal proceedings»; determination of the range of subjects referred to as legal representatives of a minor; determination of procedural problems of ensuring their participation in the criminal process by analyzing the procedural rules governing the procedure for attracting, directly participating, terminating the powers of the legal representative of a minor participant in the criminal process, etc.

In the course of the study, we found circumstances that indicate that there are contradictions in the legal regulation of ensuring a legal representative's right to participate. Conditionally, the main and the most discussed problems of participation of a minor participant's legal representative in criminal proceedings are presented in the following provisions:

1. The content of the concept «legal representative of a minor participant in criminal proceedings», which is fixed in the criminal procedure legislation, is truncated and does not cover all the options of individuals who can be involved as a legal representative. This circumstance, to some extent, devalues the institution of legal representative, since it creates obstacles to achieving its goals — the protection of the rights of a minor participant in criminal proceedings.

2. Incomplete scope of procedural rights of a minor's legal representative. In particular, there is no legal provision for the right of a legal representative not to testify against the person they represent. The absence of a statutory right to witness immunity of a legal representative is a potential threat to the protection of the rights of a minor participant in criminal proceedings.

3. The issue of including the representatives of institutions or organizations under the care of a minor, guardianship and guardianship bodies in the subject composition of legal representatives is being questioned. This provision is based on a doubt about the interest of these subjects and their concern for the fate of a minor participant in criminal proceedings, which is a prerequisite for a formal approach in performing their duties as a legal representative of a minor.

4. The dependence of the legal representatives' participation on the discretion of the body conducting criminal proceedings in certain procedural actions and even stages of criminal proceedings.

5. The legislation does not regulate in detail the procedural issues of entering a legal representative into criminal proceedings. The moment when the legal representative enters the criminal process may not coincide with the moment when the criminal proceedings actually begin.

6. The content of the procedural status of the legal representative of a minor participant in criminal proceedings requires improvement due to its incompleteness. There is no normative consolidation of the legal representative's powers that allow him (her) to fully realize his (her) goals as a considered participant in the criminal process.

7. There is no legal possibility to take into account the opinion of a minor participant in criminal proceedings when admitting a person to criminal proceedings as a legal representative.

This list is not exhaustive. Judicial and investigative practice and gap legislation on the participation of the legal representative of a minor participant in criminal proceedings contains many problems, controversial issues, contradictions, which negatively affects the functioning of the institution of the legal representative of a minor participant in criminal proceedings. These circumstances indicate the relevance of the research subject in this article.

#### *Methods and materials*

The research and conclusions are based on the materials of domestic and foreign science and practice in the field of juvenile justice. When analyzing the problems of ensuring the right of minors to qualified legal

assistance in criminal proceedings, formal and logical methods of induction, deduction, scientific generalization, and statistical analysis were used; historical-legal, comparative-legal method that allowed us to identify differences in the legal regulation of the right of individual juvenile participants in criminal proceedings to qualified legal assistance.

### *Results*

In the course of the study, the following circumstances were established that indicate the achievement of the goal of this study and affect its structure and content:

1. In our view, the institution of legal representation is not limited to the system of legal relations between the representative and the represented, but also includes legal relations that develop in the course of exercising their rights in conjunction with the bodies conducting criminal proceedings.

2. In accordance with article 7, part 13 of the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter — RK CPC) has an exhaustive list of individuals who may be allowed to participate in the proceedings as a legal representative of a minor. However, in practice, there are cases when this rule is interpreted broadly and other persons, in particular close relatives, are allowed to participate in the process. On the one hand, this is justified if it does not affect the interests of the minor; on the other hand, it is contrary to the norms of criminal procedure legislation. In this issue, we agree with opinion of the above author and believe that the interests of minors must be a procedure taking into account his (her) opinion in choosing a legal representative, but also to expand the circle of individuals referred to legal representatives, adding to their close relatives, the list of which is defined in article 7 of the RK CPC, as well as other close people. Other close people may include persons who are not part of the circle of close relatives, but are actually engaged in the upbringing and care of the fate of a minor [2].

3. It is inappropriate to involve representatives of bodies and organizations that are not interested in the child's fate in the case and may negatively affect the investigation. In this regard, we consider the authors' position to be fair that the participation of disinterested legal representatives cannot properly ensure the protection of a minor and is of a formal nature. Therefore, it is more appropriate to legislate the possibility of involving close relatives, relatives and other persons who actually take part in the upbringing and care of a minor suspect or accused.

4. We believe that participation in the assignment of the status of legal representative should give him (her) the right to use all legal opportunities due to the procedural status and interests of the represented person. In other words, the legal representative must have the same set of procedural rights and obligations as the represented minor participant in criminal proceedings. This approach resolves the question of the limits of participation, the scope of procedural rights and obligations, and more.

5. The participation of a legal representative is important not only when a minor is suspected of committing a criminal offense, but also when he (she) is a victim or witness. At the initial stage of the pre-investigation check, the procedural status is not defined, so there is a high probability of transformation of the victim into a suspect or a witness into a witness who has the right to defense.

6. At the initial stage of the investigation, the bodies conducting criminal proceedings have the opportunity to perform procedural actions outside the framework regulated by the Criminal Procedure Code of the RK. We are talking about resolving the issue of registering a report of a criminal offense in the unified register of pre — trial investigations (hereinafter-URPTI). At this stage the situation can unfold in two channels: 1) registration is made in the URPTI, the first urgent investigative action is performed, which means the beginning of the criminal process; 2) materials charged to indexed registered record (hereinafter -IRR), in the absence of reason of registration in URPTI under article 179, part 1, of the RK CPC. Our attention is drawn to the second scenario, because this scenario involves essentially procedural actions that circumvent the norms of criminal procedure legislation. When checking a report of a criminal offense, the authorities conducting criminal proceedings resolve the question of whether there are grounds for registration — the presence of signs of a criminal offense. There are procedural actions that are not regulated in the CPC of the Republic of Kazakhstan. When conducting a survey of individuals involved in a potentially criminal act, the criminal prosecution authorities conduct it without explaining the rights and obligations, do not follow the procedure, and deprive the subjects of procedural guarantees, since this part of the process is not regulated by the norms of the CPC.

Consequently, the effective functioning of the institution of legal representation of the rights of minors depends directly on determining the starting point from which this guarantee can be implemented. A detailed regulation of the procedural issues of admitting legal representatives of minors to participate in pre-

investigation review, that is, before registering a report of a criminal offense in the URPTI, is proposed, since it is at this stage that legally significant information about a criminal offense is collected.

7. When investigating the issue of termination of the status of a minor's legal representation, circumstances were identified that require improvement. There are cases when the participation of a legal representative in the interrogation of a minor is considered inappropriate. The legal representative may be removed from participation in the case if his (her) actions are detrimental to the interests of the minor. Moreover, this decision is made by the criminal prosecution authority that belongs to the prosecution side. In other words, an investigator who is concerned that the actions of a legal representative harm the legitimate interests of a minor has the right to remove him (her) from participation in the case, and instead appoint a representative of the guardianship and guardianship authority, who is not interested in the fate of the minor. In this regard, it is proposed to finalize this procedure by the fact that the actual basis for removing a legal representative from participation in the case should be the will of the represented minor, and the legal basis — the decision of the criminal prosecution authority based on the minor's will.

8. It seems that it is necessary to supplement the norms of criminal procedure legislation regulating the participation of a legal representative of a minor in criminal proceedings with a provision on witness immunity, expressing this with the following wording: the legal representative of a minor suspect, accused, defendant, or convicted person has the right to refuse to give evidence that can be used against the person represented by him (her) and cannot be held liable for such refusal. Such a proposal seems reasonable and logical, since it creates obstacles to using gaps in legislation against the interests of a juvenile participant in criminal proceedings.

### *Discussion*

Problems of ensuring the rights of minors in criminal proceedings are the subject of research by scientists around the world. Under international legislation and standards on children's rights, minors are provided with a wide range of guarantees that their rights are respected in criminal proceedings. The necessity of participation of legal representatives of minor participants in criminal proceedings is justified [3; 93–112].

The category of «Legal representative» is fixed in article 7, part 13 of the CPC, according to which legal representatives are recognized as parents (parent), adoptive parents, guardians, trustees of the suspect, accused, victim, civil plaintiff, as well as representatives of organizations and persons on care or dependence of which there is a suspect, accused or victim.

When defining legal representatives by listing them, the legislator clearly outlines the circle of individuals who fall under this category. This list is not subject to extensive interpretation and is exhaustive. That is, only the individuals specifically listed in article 7, part 13 of the RK CPC have the right to act as legal representatives. This position of the legislator is quite controversial. In the case of minors, this rule does not mention witnesses and witnesses entitled to protection who may be minors.

From the analysis of the norms of criminal procedure legislation, it can be seen that, as a guarantee of the protection of the rights of individuals participating in the criminal process, the right to the participation of a legal representative is granted primarily to minor participants in the criminal process (article 537 of the CPC) and persons suffering from mental disorders (article 516 of the CPC). In other words, the special rules of criminal procedure legislation specify that the general meaning of the concept of legal representative is much broader than that provided for in article 7, part 12 of the CPC. We believe that since the legislator has taken the path of listing the individuals recognized as legal representatives and represented, it is necessary to provide the most general formulations that allows for a broad interpretation of the list of individuals admitted as legal representatives. This could allow for a more complete description of the procedural status of the legal representative in criminal proceedings.

The Institute's legal representation in the theory of criminal process is understood as a system of relationships between a person lacking procedural capacity and a person specially specified in the law, which «is to protect the rights and legitimate interests of the person represented by the realization of their own inherent rights of legal representative, as well as assist in the implementation of the rights and legitimate interests of the represented» [4; 16–18]. This provision is questionable, because in our view, the institution of legal representation is not limited to the system of legal relations between the representative and the represented, but also includes legal relations that develop in the course of exercising their rights in conjunction with the bodies conducting criminal proceedings.

In accordance with article 7, part 13 of the RK CPC, an exhaustive list of individuals who can be admitted to participate in the case as a legal representative of a minor is defined. However, in practice, there are

cases when this rule is interpreted broadly and other persons, in particular close relatives, are allowed to participate in the process. On the one hand, this is justified if it does not affect the interests of the minor, on the other hand, it is contrary to the norms of criminal procedure legislation.

The legislator regulates the issue of allowing a legal representative to participate in criminal proceedings in a very ambiguous way. But in any case, the legal basis for his (her) entry into the case is the issuance of a special decision by the criminal prosecution authority. The fact of kinship or other close relations is not an automatic basis for recognizing a person as the legal representative of a minor. When admitting a person to participate in the process as a legal representative, the criminal prosecution authority must solve several questions: does the person have parents? If so, which of them will be allowed to participate? If there are no parents, who should be allowed to participate?

We believe that when choosing a legal representative, it is necessary to take into account the opinion of a minor.

In the legal literature, it is proposed to expand the range of persons who can act as the legal representative of a minor. Thus, A.A. Baev [5; 8–9], A.G. Nazarchuk [6; 201–205], E.V. Markovicheva [7; 24–26] believe that it is necessary to clarify the concept of a legal representative by including other close people in their number. Close individuals, close relatives who are actually engaged in the upbringing of a minor, could provide him (her) with more effective assistance than parents who are not engaged in the upbringing of their child. In this issue, we agree with opinion of the above authors and believe that the interests of minors must be a procedure taking into account his (her) opinion in choosing a legal representative, but also to expand the circle of persons referred to legal representatives, adding to their close relatives, the list of which is defined in article 7 of the RK CPC, as well as other close people. Other close people may include persons who are not part of the circle of close relatives, but are actually engaged in the upbringing and care of the fate of a minor.

According to article 7, part 13 of the RK CPC, legal representatives are also recognized as representatives of organizations and persons who have custody or dependents of a suspect, accused or victim. In practice, there is a question about the effectiveness of attracting representatives of these organizations, as well as guardianship and guardianship authorities as legal representatives, since their interest in the fate of the represented minor is questionable. Yes, on the one hand, there is no reason to doubt their integrity. On the other hand, for the guardianship and guardianship authorities, organizations on whose dependent the minor is — participation in the criminal process is an additional burden. In addition, these bodies and organizations do not have the main thing that is actually the basis for recognition as a legal representative — there is no intimacy with a minor. We believe that in such circumstances, it is inappropriate to involve representatives of authorities and organizations who are not interested in the child's fate in the case and may negatively affect the investigation. In this regard, we consider the authors' position to be fair that the participation of disinterested legal representatives cannot properly ensure the protection of a minor and is of a formal nature [8; 116]. Therefore, it is more appropriate to legislate the possibility of involving close relatives, relatives and other persons who actually take part in the upbringing and care of a minor suspect or accused.

One of the problems caused by the lack of regulation of the participation of minor participants' legal representatives in criminal proceedings is a legislative gap, which is expressed in the fact that not all participants in criminal proceedings are entitled to the participation of a legal representative. You can see this based on the analysis by using the classification of participants in criminal proceedings who may potentially be minors. If we assume that the institution of legal representation of the interests of minors is based on the psycho-physiological characteristics of the personality of a minor, then it is logical to conclude that any minor participant in criminal proceedings, regardless of the specific procedural status in a particular criminal case, should have the right to the participation of a legal representative. However, as the analysis of the norms of criminal procedure legislation shows, there is a difference in the provision of this guarantee depending on the procedural status of the minor.

Thus, according to article 537 of the RK CPC, if a minor suspect or accused has parents or other legal representatives, their participation in the case is mandatory. RK CPC contains a special rule, prescribing the mandatory participation of a defense counsel and legal representative during the interrogation of juvenile suspect (accused) (article 535 of the RK CPC).

Minor victim. To protect the rights and legitimate interests of victims who are minors, their legal representatives are required to participate in the process (art. 76, p. 2 of the RK CPC). The question arises — what does participation mean? What are the limits of participation? What procedural status does the legal representative of the victim have? We believe that any assignment of the status of a legal representative should

give him (her) the right to use all legal opportunities due to the procedural status and interests of the represented person. In other words, the legal representative must have the same set of procedural rights and obligations as the represented minor participant in criminal proceedings. This approach resolves the question of the limits of participation, the scope of procedural rights and obligations, and more.

The position of the domestic judicial and investigative authorities regarding the attitude to the legal representatives of minor participants in criminal proceedings can be traced from the materials published in official sources. The judge of the Almaty district court of Nur-Sultan R.N. Karagaev justifying the non-mandatory participation in the criminal process of legal representatives of minor victims and witnesses indicates that «in some cases, the behavior of legal representatives is due to the intention to minimize the testimony of their minor children, protecting them from any consequences in the future. Sometimes legal representatives themselves may be involved in the orbit of criminal proceedings in one or another procedural status. Of course, in such cases, the presence of a legal representative during the interrogation of a minor can negatively affect the veracity of the latter's testimony» [9].

A special rule, which determines the peculiarities of interrogation of minor victim, establishes the requirement of participation of a legal representative during the interrogation of a minor victim (art. 215, p. 1 of the RK CPC). Thus, according to this rule, the legal representatives of a minor victim may be present during the interrogation. In other words, the legislator establishes the right to allow legal representatives of a minor victim to participate in his (her) interrogation, but their participation is not necessary. The result is a situation in which on the one hand, the legislator obliges the body conducting the criminal proceedings to involve the legal representatives of the victim in the case, and on the other hand, recognizes the non-obligation of their participation in one of the most important investigative actions — the interrogation of the minor victim.

A minor witness. According to the norms of the RK CPC, there is no mandatory involvement of legal representatives of minor witnesses in the case.

The law only provides for the right of legal representatives of minor witnesses to be present during their interrogation.

A minor witness who has the right to defense. The law does not regulate in detail the cases when a minor is recognized as a witness who has the right to defense. Article 78, part 5 of the RK CPC only defines the circumstances under which a person acquires this procedural status.

According to article 113, part 2 of the RK CPC, the testimony of a witness who has the right to defense, is recognized as an independent source of evidence. However, neither Chapter 56 of the RK CPC nor certain articles of the criminal procedure law provide for a special procedure for questioning a minor witness who has the right to defense. Article 215 of the RK CPC regulates the features of interrogation of a minor witness or victim. The literal interpretation of this rule gives reason to believe that these rules apply to the subjects directly specified in the norm—the witness and the victim. Broad interpretation and application of the provisions of article 215 of the RK CPC to the cases of a minor witness interrogation entitled to protection appears to us to be unjustified in view of his (her) special status, in fact closer to the procedural status of the suspect.

The issues of ensuring the admission of a legal representative of a minor to criminal proceedings are interesting. As a general rule, admission and removal is carried out by the adoption of a procedural act — a resolution of the body conducting the criminal process. The debatable point is which person must be admitted as a legal representative.

In the course of the study, we found circumstances that indicate that there are contradictions in the legal regulation of ensuring the right to participation of a minor's legal representative. This raises the question of ensuring procedural guarantees for minors at the initial stage of the investigation, when deciding whether to register a report of a criminal offense in the Unified register of pre-trial investigations (hereinafter — URPTI) [10], since the legal regulation of this stage allows criminal prosecution authorities to perform legally significant, in fact, criminal procedural actions, bypassing the norms of criminal procedure legislation. The mechanism for ensuring the right to qualified legal assistance is quite effective. The juvenile justice system involves specialized juvenile courts that provide access to justice and juvenile legal advice that provides legal assistance to minors. The text of the norms of criminal procedure legislation clearly states the right to qualified legal assistance. However, practice shows that not everything is as smooth as it seems at first glance. R.M. Zhamieva's research, published during the adoption of the new Criminal Procedure Code of the Republic of Kazakhstan, is a true scientific forecast. Her work reveals the importance of stage of excitation of criminal case, gives a historical analysis of the emergence and functioning of the stage of criminal case excitation, reveals the legal nature of the pre-investigation review as regulated activities, which is an integral

part of a stage of criminal case excitation. The introduction of the criminal case initiation stage was a subsequent reaction to non-judicial, non-procedural unfounded criminal prosecutions that could be carried out during the period of repression on the basis of unverified information [11; 170–174].

Today, in practice, we see a situation where pre-investigation review is carried out in a non-procedural way. Verification of a report on a criminal offense for the presence of grounds for registration in the URPTI does not stand up to criticism. A minor participant in this procedure is deprived of all procedural guarantees provided for in the RK CPC, including the right to participation of a legal representative. The prerequisite for such a significant violation of the minors' rights is the non-procedural nature of the pre-investigation check. The criminal prosecution authority is not burdened with the obligation to conduct procedural actions in strict accordance with the norms of the criminal procedure code. At this stage, participants in the pre-investigation check are completely deprived of any regulated procedural status. Interrogations are made out as interviews, the procedural status of the interviewee is not determined, and accordingly, the rights, including the right to participation of a legal representative, are not explained to him (her) or ensured.

In this regard, it should be noted that the participation of a legal representative is important not only when a minor is suspected of committing a criminal offense, but also when he is a victim or witness. At the initial stage of the pre-investigation check, the procedural status is not defined, so there is a high probability of transformation of the victim into a suspect or a witness into a witness who has the right to defense.

Consequently, the effective functioning of the institution of legal representation of the minors' rights depends directly on determining the starting point from which this guarantee can be implemented. A detailed regulation of procedural issues of access to legal representatives of minors to participate in the pre-investigation review is proposed, that is, before registering a report of a criminal offense in the URPTI, because at this stage the collection of legally significant information about the criminal offense is made.

When investigating the issue of termination of the status of legal representation of a minor, circumstances were identified that require further elaboration. There are cases when the participation of a legal representative in the interrogation of a minor is considered inappropriate. The legal representative may be removed from participation in the case if his (her) actions are detrimental to the interests of the minor. Moreover, this decision is made by the criminal prosecution authority that belongs to the prosecution side. In other words, an investigator who is concerned that the actions of a legal representative harm the legitimate interests of a minor has the right to remove him (her) from participation in the case, and instead appoint a representative of the guardianship and guardianship authority, who is completely uninterested in the fate of the minor. In this regard, it is proposed to finalize this procedure by the fact that the actual basis for removing a legal representative from participation in the case should be the will of the represented minor, and the legal basis — the decision of the criminal prosecution authority based on the will of the minor.

The superficiality of legal regulation of the procedural status of a minor participant's legal representative in criminal proceedings is also expressed in the fact that he (she) is not entitled to witness immunity in respect of the person represented. Yes, obviously, it is possible to question a legal representative about a specific subject of evidence in minors' cases, in particular on the issues of establishing the age of a minor, the conditions of his (her) residence, the influence of environmental factors on him (her). But when it comes to the circumstances of the alleged criminal offense, the case takes a different turn and turns in a different, not at all positive direction from the position of compliance with the interests of the minor.

The position of N. Yu. Litvintsev that the norms of criminal procedure legislation regulating the participation of the legal representative of a minor suspect, accused, or defendant in the list of rights of the legal representative does not mention the existence of the right not to testify against the represented person is fair. The legal representative is not obliged, but has the right to give evidence, refuse to testify against himself (herself), his (her) close relatives and his (her) spouse. On the one hand, there are elements of witness immunity if he (she) represents the interests of his (her) son, who is part of a circle of close relatives. However, from the analysis of article 7, part 13 of the RK CPC, it is clear that legal representatives can also be guardianship and guardianship bodies, organizations that care for a minor. If the legal representative is not a close relative of a minor participant in criminal proceedings, he (she) does not have witness immunity. If he (she) is questioned, he (she) will be forced to inform the authorities conducting criminal proceedings of circumstances that may negatively affect the fate of the minor represented.

I.V. Smolkina logically argues the proposal to endow legal representatives with witness immunity by saying that «witness immunity should become an integral element of the right of procedural status of a legal representative» [12; 155].

It seems that it is necessary to complement the norms of criminal procedure legislation, regulating the participation of a legal representative of a minor in criminal proceedings, with a provision on witness immunity, expressing this with the following formulation — the legal representative of a minor suspect, accused, defendant, or convicted person has the right to refuse to give evidence that can be used against the person represented by him (her) and cannot be held liable for such a refusal. Such a proposal seems reasonable and logical, since it creates obstacles to using gaps in legislation against the interests of an imperfect participant in criminal proceedings.

### Conclusions

The analysis of scientific developments devoted to the study of the participation of minors in criminal proceedings, statistical data and investigative practices, allowed us to identify problems, the solution of which will contribute to the improvement of criminal proceedings with the participation of minors. Based on the results of the study, specific proposals were formulated to improve the legislation. It was stated that despite the fact that the special procedural status of a minor is based on his (her) personality, personal characteristics that are inextricably linked to him (her) and inherent in him (her) regardless of participation in criminal proceedings, there are significant differences in the scope of procedural rights granted to minor participants in criminal proceedings and their legal representatives. It is proposed to use a unified approach in regulating the participation of legal representatives of minors. Minors are equally represented by the defense in the person of criminal suspects and victims. Statistical data of the Republic of Kazakhstan for 2018 and 2019 shows that the number of minors, who have committed criminal offenses, and the number of minor victims are approximately the same. It follows that the criminal procedure legislation should be improved in terms of ensuring the rights of minor victims, witnesses and witnesses who have the right to protection from the position of the right to participation of a legal representative.

The article analyzes the concept of «legal representative» and gives recommendations on supplementing its content. The fact of incompleteness of the scope of procedural rights of a minor's legal representative is established. A critical assessment was given of the activities of representatives of institutions or organizations that have custody of a minor, guardianship and guardianship authorities in the matter of including them in the subject composition of legal representatives. It is proposed to allow them to participate in the case in exceptional cases, taking into account the opinion of the minor represented. The research offers options for determining the moment when legal representatives of minors enter the case and the procedure for their removal. The necessity of granting legal representatives of minors the right to witness immunity is justified.

It should be recognized that despite the fact that the overall functioning of the institution of legal representation is assessed as satisfactory, the development of criminal procedure legislation in the direction of improving the procedural status and procedure for the participation of legal representatives of minors in criminal proceedings has had a positive result.

### References

- 1 Сведения о зарегистрированных уголовных правонарушениях [Электронный ресурс]. — Режим доступа: <http://pravstat.prokuror.gov.kz/rus/o-kpsisu/deyatelnost-komiteta/analiticheskaya-informaciya>.
- 2 Уголовно-процессуальный кодекс Республики Казахстан от 4 июля 2014 г. № 231-V ЗРК [Электронный ресурс]. — Режим доступа: <http://adilet.zan.kz/rus/docs/K140000231>.
- 3 Stephanie Rap. A Children's Rights Perspective on the Participation of Juvenile Defendants in the Youth Court // international journal of children's rights 24 (2016) 93–112 [Electronic resource]. — Access mode: [https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/chil\\_023\\_03\\_06\\_rap.pdf](https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/chil_023_03_06_rap.pdf).
- 4 Тетюев С.В. Отзыв об автореферате диссертации Е.А. Ухаревой «Участие законного представителя несовершеннолетнего подозреваемого, обвиняемого в производстве следственных действий (правовые и организационные аспекты)» / С.В. Тетюев // Вопросы ювенальной юстиции. — 2011. — № 3. — С. 16–18.
- 5 Баев А.А. Представитель как субъект реализации конституционной гарантии на получение квалифицированной юридической помощи в уголовном судопроизводстве: автореф. дис. ... канд. юрид. наук / А.А. Баев. — Краснодар, 2016. — С. 8, 9.
- 6 Назарчук А.Г. Роль и участие законных представителей несовершеннолетних подозреваемых (обвиняемых) в уголовном процессе / А.Г. Назарчук // Общество и право. — 2009. — № 2 (24). — С. 201–205.
- 7 Марковичева Е.В. Проблемы назначения и замены законного представителя несовершеннолетнего в российском уголовном процессе / Е.В. Марковичева // Судья. — 2015. — № 7 (55). — С. 24–26.
- 8 Гуськова А.П. Уголовно-процессуальные вопросы организации ювенального судопроизводства в современной России: моногр. / А.П. Гуськова, В.А. Емельянов, Л.В. Юрченко. — Оренбург: Изд. центр ОГАУ, 2009. — 214 с.



9 Карагаев Р.Н. О некоторых вопросах совершенствования уголовного судопроизводства, связанного с участием в нем несовершеннолетнего [Электронный ресурс] / Р.Н. Карагаев. — Режим доступа: [https://online.zakon.kz/Document/?doc\\_id=35169504](https://online.zakon.kz/Document/?doc_id=35169504)

10 Приказ Генерального прокурора Республики Казахстан от 19 сентября 2014 г. № 89 «Об утверждении Правил приема и регистрации заявления, сообщения или рапорта об уголовных правонарушениях, а также ведения Единого реестра досудебных расследований» [Электронный ресурс]. — Режим доступа: // <http://adilet.zan.kz/rus/docs/V14W0009744>.

11 Жамиева Р.М. Начало досудебного расследования и негласные следственные действия трансформации в уголовном процессе // Актуальные вопросы противодействия коррупционным правонарушениям: теория и практика: материалы Междунар. науч.-практ. конф. — Караганда: Изд-во КарГУ, 2014. — С. 170–174.

12 Смолькина И.В. Актуальные проблемы охраняемых федеральным законом тайн в российском уголовном судопроизводстве / И.В. Смолькина. — М.: Юрлитинформ, 2014. — С. 352 с.

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## Қылмыстық процестегі кәмелетке толмағандарға заңды өкілдік ету институтының теориялық құқықтық мәселелері

Мақаланың зерттеу мақсаты қылмыстық процесте қатысушы кәмелетке толмағандардың заңды өкілдерінің процессуалдық мәртебесін жетілдіру арқылы, оның тиімділігін арттыру кезінде пайда болған құқықтық және практикалық мәселелерін анықтау, көрсетілген проблемаларды шешу бойынша ұсыныстарды тұжырымдау; кәмелетке толмағандардың заңды өкілінің қатысу құқығын қамтамасыз етудің кешенді тетігін әзірлеу болып табылады. Зерттеудің жалпы және жеке ғылыми әдістерін пайдалану негізінде кәмелетке толмағандардың заңды өкілдігі институтының қазіргі жай-күйін, заңдылықтарын және негізгі даму үрдістерін бағалауға мүмкіндік берді. Жүргізілген зерттеу нәтижесінде, кәмелетке толмағандар мен оның заңды өкілдерінің құқықтарын жүзеге асыру механизміндегі кемшіліктердің бар екендігі, заңнамалық реттеудегі олқылықтардың орын алғандығы анықталған. «Қылмыстық процесте қатысушы кәмелетке толмағанның заңды өкілі» ұғымының мазмұнына талдау жасалып, кәмелетке толмағандардың заңды өкілінің процессуалдық мәртебесінің жеткілікті құқықтық реттелмеуі, қылмыстық процестік заңнамада бекітілген заңды өкіл ретінде жіберілуі мүмкін тұлғалардың барлық нұсқалары қамтылмағаны анықталды, оның ішінде кәмелетке толмаған куәнің, қорғалуға құқығы бар куәнің құқықтарын жүзеге асыру барысында туындаған мәселелер, сонымен қатар, кәмелетке толмағандардың қорғаушылық және қамқоршылық органдары өкілдерінің қызметінің тиімсіз тұстары, заңды өкілдерді куәлік ету иммунитетімен қамтамасыз ету мәселелері қарастырылған. Қылмыстық процесте заңды өкіл ретінде жіберу туралы мәселе шешілу және кәмелетке толмағандардың мүддесін білдіру кезінде заңды өкілмен арадағы қарым-қатынасының жақындығы дәрежесі басты назарда болу керек.

*Кілт сөздер:* кәмелетке толмаған, кәмелетке толмағанның іс жүргізушілік мәртебесі, ювеналды әділет, кәмелетке толмаған күдікті, жәбірленуші, куә, құқықтардың кепілдігі, кәмелетке толмағанның мүдделеріне өкілдік ету, заңды өкіл.

Ж.Ж. Жұмабаева

## Теоретико-правовые проблемы института законного представительства несовершеннолетних в уголовном процессе

Целью исследования статьи являются выявление правовых и практических проблем участия законных представителей несовершеннолетнего; формулирование предложений по разрешению указанных проблем; выработка комплексного механизма обеспечения права на участие законного представителя несовершеннолетнего путем совершенствования процессуального статуса как самого несовершеннолетнего участника уголовного процесса, так и его законного представителя. Использование обще- и частнонаучных методов исследования позволило оценить современное состояние, закономерности и основные тенденции развития института законного представительства несовершеннолетних. В итоге проведенного исследования выявлено наличие пробелов в законодательном регулировании и недостатков в механизме реализации прав несовершеннолетних на законное представительство. Было проанализировано содержание понятия «законный представитель несовершеннолетнего участника уголовного процесса», закрепленного в уголовно-процессуальном законодательстве, который признан усеченным и не охватывающим всех вариантов лиц, которые могут быть привлечены в качестве законного представителя; неурегулированность процессуального статуса законного представителя несовершеннолетнего. В частности, остались без внимания вопросы законного представительства интересов свидетелей и свидетелей, имеющих право на защиту; обоснована неэффективность деятельности представителей учреждений или организаций, на попечении которых находится несовершеннолетний, органов опеки и попечительства; рассмотрены вопросы наделения законных представителей

свидетельским иммунитетом. Ключевым моментом при разрешении вопроса о допуске к участию в уголовный процесс в качестве законного представителя должны являться интересы несовершеннолетнего, а именно степень близости законного представителя с представляемым лицом.

*Ключевые слова:* несовершеннолетний, процессуальный статус несовершеннолетнего, ювенальная юстиция, несовершеннолетний подозреваемый, потерпевший, свидетель, гарантии прав, представительство интересов несовершеннолетних, законный представитель.

## References

- 1 Svedeniia o zarehistrirrovannykh uholovnykh pravonarusheniakh [Information about registered criminal offenses]. *pravstat.prokuror.gov.kz*. Retrieved from <http://pravstat.prokuror.gov.kz/rus/o-kpsisu/deyatelnost-komiteta/analiticheskaya-informaciya> [in Russian].
- 2 Uholovno-protsessualnyi kodeks Respubliki Kazakhstan ot 4 iiulia 2014 hoda No. 231-V ZRK [Criminal Procedure Code of the Republic of Kazakhstan. Code of the Republic of Kazakhstan dated July 4, 2014 No. 231-V 3RK]. *adilet.zan.kz*. Retrieved from <http://adilet.zan.kz/rus/docs/K140000231> [in Russian].
- 3 Stephanie Rap, (2016). A Children's Rights Perspective on the Participation of Juvenile Defendants in the Youth Court. *International journal of children's rights* 24 (2016) 93–112. Retrieved from [https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/chil\\_023\\_03\\_06\\_rap.pdf](https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/chil_023_03_06_rap.pdf).
- 4 Tetiuev, S.V. (2016). Otzyv ob avtoreferate dissertatsii E.A. Ukharevoi «Uchastie zakonnoho predstavitelia nesovershennoletneho podozrevaemoho, obviniaemoho v proizvodstve sledstvennykh deistvii (pravovye i orhanizatsionnye aspekty)» [Review of the author's abstract of the thesis of E.A. Ukhareva «Participation of the legal representative of a minor suspect, accused in the production of investigative actions (legal and organizational aspects)»]. *Voprosy yuvenalnoi yustitsii — Problems of juvenile justice*, 3, 16–18 [in Russian].
- 5 Bayev, A.A. (2016). Predstavitel kak subekt realizatsii konstitutsionnoi harantii na poluchenie kvalifitsirovannoi yuridicheskoi pomoshchi v uholovnom sudoproizvodstve [Representative as a subject of implementation of the constitutional guarantee to receive qualified legal assistance in criminal proceedings]. *Candidate's thesis*. Krasnodar [in Russian].
- 6 Nazarchuk, A.G. (2009). Rol i uchastie zakonnykh predstavitelei nesovershennoletnykh podozrevaemykh (obviniaemykh) v uholovnom protsesse [Role and participation of legal representatives of minor suspects (accused) in criminal proceedings]. *Obshchestvo i pravo — Society and law*, 2 (24), 201–205 [in Russian].
- 7 Markovicheva, E.V. (2015). Problemy naznacheniia i zameny zakonnoho predstavitelia nesovershennoletneho v rossiiskom uholovnom protsesse [Problems of appointment and replacement of the legal representative of a minor in the Russian criminal process] *Sudia — Judge*, 7, 24–26 [in Russian].
- 8 Huskova, A.P. (2009). *Uholovno-protsessualnye voprosy orhanizatsii yuvenalnoho sudoproizvodstva v sovremennoi Rossii* [Criminal procedure issues of the organization of juvenile justice in modern Russia]. Orenburh: Izdatelskii tsentr OHAU [in Russian].
- 9 Karahayev, R.N. (2018). O nekotorykh voprosakh sovershenstvovaniia uholovnoho sudoproizvodstva, sviazannogo s uchastiem v nem nesovershennoletneho [On some issues of improving criminal proceedings related to the participation of a minor in it]. *online.zakon.kz* Retrieved from [https://online.zakon.kz/Document/?doc\\_id=35169504](https://online.zakon.kz/Document/?doc_id=35169504) [in Russian].
- 10 Prikaz Heneralnoho Prokurora Respubliki Kazakhstan ot 19 sentiabria 2014 hoda No. 89 «Ob utvezhdenii Pravil priema i rehistratsii zaiavleniia, soobshcheniia ili raporta ob uholovnykh pravonarusheniakh, a takzhe vedeniia Edinoho reestra dosudebnykh rassledovaniia» [Order of the General Prosecutor of the Republic of Kazakhstan dated September 19, 2014 No. 89 «On approval of the Rules for the reception and registration of statements, reports or reports on criminal offenses, as well as maintaining a unified register of pre-trial investigations». *adilet.zan.kz*. Retrieved from <http://adilet.zan.kz/rus/docs/V14W0009744> [in Russian].
- 11 Zhamieva, R.M. (2014). Nachalo dosudebnoho rassledovaniia i nehlasnye sledstvennye deistviia transformatsii v uholovnom protsesse [Beginning of pre-trial investigation and covert investigative actions of transformation in criminal proceedings]. Topical issues of combating corruption offenses: theory and practice: *Mezhdunarodnaia nauchno-prakticheskaia konferentsiia — International Scientific and Practical Conference* (p. 170–174). Karaganda: Izdatelstvo Karahandinskoho universiteta [in Russian].
- 12 Smolkina, I.V. (2014). Aktualnye problemy okhraniemykh federalnym zakonom tain v rossiiskom uholovnom sudoproizvodstve [Actual problems of secrets protected by Federal law in Russian criminal proceedings]. Moscow: Yurlitinform [in Russian].