

Die Frage der Befragung eines gesetzlichen Vertreters als Zeuge

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Zusammenfassung: Der Artikel analysiert die Regel, dass ein gesetzlicher Vertreter nicht als Zeuge in strafprozessualen Beziehungen befragt werden kann, und entwickelt mehrere Vorschläge und Empfehlungen zu diesem Thema.

Schlüsselwörter: Strafverfahren, gesetzlicher Vertreter, Verteidigung, Verteidiger, Zeuge.

The issue of questioning a lawful representative as a witness

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Abstract: The rule that a lawful representative cannot be questioned as a witness in criminal-procedural relations is analyzed in the article, several proposals and recommendations regarding this issue are developed.

Keywords: criminal proceedings, lawful representative, defense, defender, witness.

Studying the practice of ensuring the right to defense of the suspect and the accused, as well as the normative-legal documents regulating it, comprehensive analysis, as well as eliminating the existing problems in this sphere, will have a positive effect not only on the tasks of the criminal process, but also on the state's duty to the people. Therefore, in this article, we will study the issue of the possibility of questioning a lawful representative as a witness, which has a negative impact on the effective implementation of the right to defense.

The following provision is given in the third part of Article 61 of the current Criminal Procedure Code: "The lawful representative can be interrogated as a witness, as well as brought to participate in the case as the defense council, civil plaintiff or civil defendant" [1]. In our opinion, this provision allows a lawful representative who is a participant in criminal proceedings to represent not only the person he represents, but also the inquirer, investigator, and prosecutor. Because the inquirer, the investigator can call him at any time and ask for information such as whether the person he is representing has committed a crime or not, and where the traces of the crime have been left. The interrogator, the investigator, before the interrogation, must warn the lawful representative of the criminal responsibility for perjury (Article 238 of the Criminal Code) and refusal to testify (Article 240 of the Criminal Code). As can be seen from this example, under the pretext of protecting the interests of the person accused of committing a crime, we are attaching the representative of the investigator to him at the legal level.

I.S. Dikarev expresses the following opinions: "It is the duty of every citizen to testify about the circumstances of a criminal case known to him. At the same time, the legislator introduces certain exceptions to this general rule. For example, in some

cases, allows citizens to decide for themselves whether to testify or not and prohibits the possibility of questioning certain categories of persons as witnesses [2].

We agree with the views of this author. As an example, we can cite articles 115 and 116 of the current Criminal Procedure Code. Article 115 stipulates that judges, people's advisers, defenders, representatives, and persons who do not understand the situation relevant to the case due to mental or physical disability cannot be questioned as witnesses and victims. Article 116 states that close relatives of the suspect and the accused may be interrogated only with their consent [1].

K.P. Fedyakina asserts that a person participating in a criminal proceeding should have the right not to testify against not only his close relatives, but also his close people. In the research, he mentions that close people should be understood as people who can directly affect the health, life, and other important aspects of the interrogator [3].

In our view, when developing this proposal, K.P. Fedyakina approached the issue only one-sidedly. Because the proposal she developed makes the process of investigating a criminal case much more difficult. For example, any person who does not want to testify can say that I have a close relationship with the suspect, the accused, and the defendant. Also, this procedure causes a sharp increase in the attempts of the suspect, the accused to persuade the witnesses. In our opinion, close people should not be allowed to be questioned as witnesses only if they participate in criminal proceedings as lawful representatives.

L.V. Stolbina, A.V. Chursin, A.A. Rytkov, and I.V. Malykhin note the following: "Interrogation of a lawful representative as a witness is contrary to the principle of "dispute in court proceedings". After all, when the case is being heard in court, the tasks of prosecution, defense, and resolution of the case cannot be carried out separately and assigned to one body or one official. It does not make sense that a lawful representative can be interrogated as a witness while the defense cannot be interrogated as a witness under the law. Because, like a defense attorney, a lawful representative performs a protective function in criminal proceedings, and therefore the person under protection tells him all his secrets, that is, he trusts his lawful representative. In this case, if the lawful representative gives information to the inquirer, the investigator, which aggravates the situation of the person he represents, the trust between them will be lost. Therefore, it is necessary to define clearly in the legislation the circumstances in which the lawful representative can be questioned as a witness. That is, the lawful representative puts forward the opinion that the suspect, the accused, or the defendant can be questioned only concerning their characteristics, their living and upbringing conditions" [4].

We support the views of the above authors that questioning a lawful representative as a witness leads to a violation of individual rights. However, we cannot agree with the proposal to clearly define in the legislation the circumstances in which a lawful representative can be questioned as a witness. Because this way cannot effectively solve the above problem. For example, an investigator interrogates a lawful representative as a witness to determine the living and upbringing conditions of a person. In the course of this investigation, the suspect asks the lawful

representative about his close friends, who influenced the behavior of the accused, as well as with whom he spends a lot of time. When the suspect, and the close friends of the accused, were brought in and questioned by the lawful representative, evidence was found aggravating the situation of the person. From this example, it can be seen that the lawful representative has an indirect, not direct, influence on the collection of evidence that aggravates the situation of the person.

In our view, a lawful representative cannot be interrogated as a witness at all. Because this procedure, as L.V. Stolbina, A.V. Chursin, A.A. Rytkov, and I.V. Malykhin rightly noted, is contrary to the principle of “dispute in court proceedings”. Also, questioning a lawful representative as a witness does not meet the criteria of justice. For example, a lawful representative of a mentally retarded person participates in criminal proceedings on behalf of the person he represents. If a mentally challenged person is sane, he can actively use the presumption of innocence. That is, he has the right not to give instructions [5]. If a person is insane, the lawful representative participating in the criminal proceedings on his behalf does not have such a right. That is, he is obliged to testify about the person under his protection. From this example, it can be seen that a sane person will have an advantage in exercising the right to protection over an insane person. Also, the issue of questioning a lawful representative as a witness is contrary to the provisions of Article 61 of the Criminal Procedure Code. That is, in this norm, according to the Criminal Procedure Code, the lawful representative can bear all the procedural rights that the person he represents has. It follows that the suspect, the accused, and the defendant’s right not to testify can also be used by their lawful representative.

Our proposal also applies to close relatives participating as lawful representatives in criminal proceedings. Everyone knows that parents and adoptees can participate in criminal proceedings as lawful representatives. According to the provisions of the Criminal Code, these persons are among close relatives. Close relatives, according to the requirements of Article 116 of the Criminal Procedure Code, can be interrogated only with their consent. In our opinion, if a close relative participates in the criminal proceedings as a lawful representative, he should now be deprived of the right to give testimony at his discretion, as defined in Article 116 of the Criminal Procedure Code. Because, according to the legislation, no duties have been assigned to the close relative specified in Article 116 of the Criminal Procedure Code. However, a close relative who participates as a lawful representative is assigned the task of protecting the rights and interests of the suspect, the accused, and the defendant, as defined in the first part of Article 60 of the Criminal Procedure Code.

As for the international experience of the questioning of the lawful representative as a witness, in the **Russian Federation** (Article 428 of the Criminal Procedure Code) the lawful representative has the *right* to demand the questioning of the investigator as a witness [6]. It is stated in the legislation of the **Republic of Kazakhstan** (Article 78 of the Criminal Procedure Code) that the lawful representative of the suspect, the accused, and the defendant cannot be questioned as a witness of a convicted [7]. A different procedure applies in the **Republic of**

Ukraine (Article 65 of the Criminal Procedure Code). That is, together with the suspect, the accused, the lawful representative of the defendant, and the victim's lawful representative cannot be questioned as a witness either [8]. Although the legislation of the **Republic of Azerbaijan** (Article 101 of the Criminal Procedure Code) does not specify a single norm that a lawful representative cannot be questioned as a witness, it is established that the lawful representative should not act against the interests of the person he is protecting [9].

When a survey was conducted among practitioners on this issue, 76% of them confirmed our opinion.

Based on the above, we propose to introduce the following amendments to the current Criminal Procedure Code:

1) to delete the words “to be questioned as a witness, as well as” after the words “lawful representative” in the third part of Article 61 of the Criminal Procedure Code;

2) to state the second paragraph of the first part of Article 115 of the Criminal Procedure Code as follows:

“about the circumstances known to them as a result of performing their duties in connection with a criminal case – defender, lawful representative, as well as the representative of the victim, civil claimant, civil defendant”.

In conclusion, it can be said that clearly defining the rule of impossibility to interrogate a lawful representative as a witness in the Criminal Procedure Code and other normative-legal documents will serve to more effectively implement his right to defense, and has a positive effect on the application of principles such as truth-finding, legality.

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