

УДК 340

B.T. Abulkairova,
senior lecturer of the department of Legal disciplines
of the Kazakh academy of labor and social relations,
Almaty city, Republic of Kazakhstan

PROBLEMS OF DIFFERENTIATION CHILD SUBSTITUTION FROM ADJACENT STRUCTURES OF CRIMINAL OFFENSES

Annotation: This article discusses the problems of delimiting child substitution from related criminal offenses. Basically, the presented article examines the issues of delimiting the specified composition from kidnapping, trafficking in minors and other criminal offenses. In the article, the author pays special attention to the purpose of committing substitution of a child and other related criminal offenses as an important differentiating element. The article also discusses controversial issues concerning the age of a child of a criminal offense provided for in article 136 of the Criminal Code of the Republic of Kazakhstan. The author emphasizes the ways to distinguish the abduction of a minor from the substitution of a child. The author also believes that it is necessary not to take into account the subjective perception of the parent regarding the similarity or dissimilarity of the child, since it may be erroneous. The author emphasizes that the subjects of the criminal offences under consideration are common. The article also pays special attention to the objects of these related criminal offenses. The author also notes that when a child is substituted, another child is left in place of the substituted child, but when a minor is abducted, this is not the case. The article describes the difference between these types of criminal offenses on the subjective side. The article also describes that the analyzed elements of criminal offenses also differ in their objective aspect. For example, the substitution of a child is mainly carried out in maternity homes, and the abduction of a minor can take place everywhere.

Keywords: delineation, substitution, child, minor, abduction, trafficking in minors, freedom.

Б.Т. Абулкаирова,
старший преподаватель кафедры правовых дисциплин
Казахской академии труда и социальных отношений,
г. Алматы, Республика Казахстан

ПРОБЛЕМЫ ОТГРАНИЧЕНИЯ ПОДМЕНЫ РЕБЕНКА ОТ СМЕЖНЫХ СОСТАВОВ УГОЛОВНЫХ ПРАВОНАРУШЕНИЙ

Аннотация: В данной статье рассматривается проблемы отграничения подмены ребенка от смежных составов уголовных правонарушений. В основном в представленной статье исследуются вопросы отграничения указанного состава от похищений человека, торговли несовершеннолетними и других уголовных правонарушений. В статье автор особое внимание уделяет цели совершения подмены ребенка и иных смежных составов уголовных правонарушений как важный отграничивающий элемент. Также в статье анализируются спорные вопросы, касательно возраста подменяемого ребенка, рассматриваемого в ст. 136 УК РК. Автор особо отмечает способы отграничения похищения

несовершеннолетнего от подмены ребенка. Автор также считает необходимым при квалификации подмены ребенка не учитывать субъективное восприятие родителя касательно схожести, несхожести ребенка, поскольку оно может быть, ошибочным. Автор подчеркивает, что субъекты рассматриваемых составов уголовных правонарушений общие. В статье также особое внимание уделяется объектам данных смежных составов уголовных правонарушений. Автор также отмечает, что при подмене ребенка вместо подменяемого ребенка оставляют другого, а при похищении несовершеннолетнего такого нет. В статье описывается отличие данных составов уголовных правонарушений по субъективной стороне. В статье также анализируется тот факт, что помимо отличных объектов охраны, отграничить рассматриваемые составы можно и по признакам объективной стороны. Например, подмена ребенка преимущественно осуществляется в родильных домах, а похищение несовершеннолетнего может иметь место везде.

Ключевые слова: отграничение, подмена, ребенок, несовершеннолетний, похищение, торговля несовершеннолетними, свобода.

Б.Т. Абулкаирова,
Казакстан Республикасынын
Алматы шаарындагы Казак эмгек
жана социалдык мамилелер академиясынын
укук дисциплиналары кафедрасынын улук окутуучусу
Алматы ш, Казакстан Республикасы

БАЛА АЛМАШТЫРУУНУ ЖАЗЫКТУУ УКУК БУЗУУЛАРДЫН ЖАКЫН КУРАМДАРЫНАН БӨЛҮҮ ПРОБЛЕМАЛАРЫ

Аннотация: Бул макалада бала алмаштырууну жазыктуу укук бузуулардын жакын курамдарынан бөлүү проблемалары каралат. Негизинен бул макалада көрсөтүлгөн курамды адам уурдоодон, жашы жете элек балдарды сатуудан жана башка жазыктуу укук бузуулардан бөлүү маселелери изилденет. Макалада автор маанилүү бөлүүчү элемент катары бала алмаштыруунун жана укук бузуулардын башка жакын курамдарынын максатына өзгөчө көңүл бурат. Ошондой эле макалада, Казакстан Республикасынын ЖК 136-беренесинде каралган алмаштырылган баланын жашына карата тартыш суроолор талдалат. Автор жашы жетелек баланы уурдоону, бала алмаштыруудан бөлүү ыкмаларын өзгөчө белгилейт. Бала алмаштырууну квалификациялоодо ата-энелердин баланын аларга окшоштугуна же окшош эместигине карата субъективдүү кабылдоосун эске албоо зарыл деп эсептейт, себеби ал туура эмес болушу мүмкүн. Автор жазыктуу укук бузуулардын каралып жаткан курамдарынын субъектилери жалпы экендигин баса белгилейт. Ошондой эле макалада жазыктуу укук бузуулардын көрсөтүлгөн жакын курамдарынын объектилерине өзгөчө көңүл бурулган жана да, автор бала алмаштырууда анын ордуна башка бала калтырылуусун, ал эми жашы жетелек баланы уурдоодо мындай нерсе жок экендигин баса белгилейт. Макалада жазыктуу укук бузуулардын ушул курамдарынын субъективдүү тарабынан өзгөчөлүктөрү баяндалат. Макалада өзгөчө күзөт объектилеринен тышкары, каралып жаткан курамдарды объективдүү тараптын белгилери боюнча да бөлүү мүмкүн экендиги талдалат. Мисалы, бала алмаштыруу негизинен төрөт бөлмөлөрүндө аткарылса, ал эми жашы жете элек бала кайсы жерде болбосун уурдалышы мүмкүн.

Ачкыч сөздөр: бөлүү, алмаштыруу, бала, жашы жете элек бала, уурдоо, жашы жете элек балдарды сатуу, эркиндик.

Introduction. Article "Substitution of child" (from 136 of the Criminal Code of the Republic of Kazakhstan) implements the provisions of the Convention on the rights of the child (Article 7-9) - on the presence of a minor from the moment of birth of the right to know their parents, to maintain family ties, not to be separated from their parents, against their will, except as provided by law.

The purpose of this article is to analyze theoretical, legislative and law-enforcement criminal problems that distinguish the substitution of a child from related criminal offenses, and to develop proposals for improving criminal legislation on its basis.

In accordance with the goal, the task is allocated as the separation of the criminal offense provided for in article 136 of the criminal code from related criminal offenses.

Methods. The dialectic method of cognition of reality was taken as the basic. The article implements a system-structural approach to the study of related criminal offenses, which is why the methods of analysis and synthesis, induction and deduction were of particular importance.

We should mention the works of such authors as N. I. Zagorodnikov, A.R. Akiev, V.F. Kirichenko, L.D. Gaukhman, V.N. Kudryavtsev and etc.

Results. The issues of delimitation of related criminal offenses are the most relevant and difficult for the theory of criminal law. As noted V.N. Kudryavtsev "... in fact, the entire qualification process consists in sequentially delimiting each sign of a committed act from the signs of other related crimes" [1, p. 115].

It is necessary to distinguish the child substitution from a similar crime as abduction. In the first case, the perpetrator provides another baby, believing that no one will notice his actions. In the second case, the offender simply removes the minor from the parents. If a child left unattended is not replaced, but taken away, taken away, such actions should be considered as theft of a person (Article 125 of the Criminal Code).

Speaking about the composition of Article 136 of the Criminal Code of the Republic of Kazakhstan "Substitution of a Child", adjacent to it are Article 125 of the Criminal Code of the Republic of Kazakhstan (Section 5, Part 2 - abduction of a knowingly minor) and Article 135 of the Criminal Code of the Republic of Kazakhstan "Trade in Minors", which provides for liability for sale or other transactions in relation to a minor.

We think that this proposal is not quite reasonable, and we give the arguments that allow distinguish the compositions. Norms 125 and 136 of the Criminal Code of the Republic of Kazakhstan have independent objects of protection that cannot be reduced to the identity of a minor as a victim.

"For the part "substitution of children", the direct objects of protection are the interests of the whole family as a set of relations that ensures the child's right to grow up and live with their parents, as well the right of parents to educate their child and to remain with him against their will. As part of the "kidnapping" the immediate object of protection is the physical freedom of man" [2].

Speaking about the child as a victim in the norms under consideration, with respect to Article 125 of the Criminal Code of the Republic of Kazakhstan there are no restrictions on the age of the kidnapped child, he can be any person under the age of 18, whose age for qualification in the relevant part is associated with subjective awareness guilty that he abducts a minor. But, speaking about the composition of "substitution of the child", the question is much more complicated. Each scientist in his own way interprets the age of the child as a victim in relation to the "Child Change", some authors [3, p. 75] limit the general age framework of the child by offering different age thresholds and others [4, p. 66] speak of a minor as a person under the age of 18 years. Opinions N.I. Zagorodnikova and V.F. Kirichenko that "The replacement of the child is possible only in relation to the newborn", we consider it appropriate [5, p.239]. Since, in practice, the replacement of the child is performed in relation to newborns located in the perinatal centers. However, we believe that the general age limits of children should not be limited. Since, we must take into account that in life there can be different situations. In this regard, one should agree with the opinion of some authors who consider not limiting the age criteria of the child. Since, the disposition of the criminal law norm must take into account all possible options, because if the legislator wanted to limit the age of the child in the composition under consideration, he would do it as in other norms of the Criminal Code of the Republic of Kazakhstan (for example, part 4 of article 120 of the Criminal Code of the Republic of Kazakhstan, Article 100 of the Criminal Code of the Republic of Kazakhstan).

However, if it would be a substitution of a child at an older age, then there is need to take into account the subjective abilities of the child aware of the fact of his substitution, which may be limited by the presence of a child of any mental disorder, in which it reduced the ability to understand link between environmental phenomena, coupled with the fact that the child's parents were not familiar with it before.

Also, it is possible to delimit the considered compositions according to the signs of the objective side. Let's start with the method: during the abduction, it can be either secret or open, including violent, and the substitution of a child is always carried out secretly, including fraudulently. A distinctive feature of the norms under consideration is the fact that when a child is replaced, he is "replaced" with another child, and when the other child is abducted, they do not leave the kidnapped one [2]. And in cases where the offender, trying to hide the fact of the abduction of the child, leaves another child similar to the kidnapped one instead, then we need to talk about the totality of Articles 125 and 136 of the Criminal Code of the Republic of Kazakhstan, and if the child left to hide the abduction was also kidnapped, then each episode of the abduction requires independent qualification according to Article 125 of the Criminal Code of the Republic of Kazakhstan.

On the issue of delimiting the substitution from the abduction of a minor L.D. Gaukhan believes that for their distinction, the dissimilarity of the external features of the replaced children is important, and not the discovery of this dissimilarity by

the parents whose children were replaced, since the recognition of this dissimilarity reveals the abduction of a minor [6, p. 18].

We consider this statement controversial, because in life there may be times when a mother who did not know the sex of her child either before or after the birth can replace the boy with a girl or vice versa, it would be completely incorrect to raise the question of the similarity or dissimilarity of external trait of substitute children.

We think the opinion of A.R. Arbi justified in terms of uselessness binding criminal manifestations in the substitution of the subjective perception of the parent, as it is considered incorrect and does not reflect a subjective attitude to this criminal. At the same time, awareness and detection of child substitution fact parents should not influence either the qualifications or the ability to attract a person to criminal liability [2, p. 24].

Typically, kidnapping carried out in the following sequence: 1) capturing the child; 2) its movement; 3) retention.

A distinctive feature of child abduction of its replacement is a method of its commission, more precisely, the substitution is always done secretly and abduction may be performed by both overtly and witnesses (bystanders) [7, p. 38].

To distinguish substitution from the abduction of a child, in our opinion, the goal pursued by the offender is important, although it is not a mandatory constructive sign of any of the compositions. When substituting, when one child is replaced by another out of mercenary or other base motives, the person or parent (parents) who makes the substitution does not pursue the goal of further development of criminal intent, but wants, most likely, to have a child of the desired sex, or to have a healthy child, there may be cases of substitution of a stillborn child for a living one, therefore, replacing a living child with a dead one, the person pursues the goal of having and raising a child. When abducting a minor, the purpose of the offender is his subsequent retention in another place and, speaking of the minor, most often this is not only the goal of capturing and holding the minor, but, for example, demanding a ransom from the parents, or using the minor to remove organs and tissues or sexual exploitation etc., in such cases, the actions of the perpetrator should be qualified according to Article 125 of the Criminal Code of the Republic of Kazakhstan and the relevant norm of the Special Part of the Criminal Code of the Republic of Kazakhstan.

The subjects of these formulations of criminal offenses common, however, for the kidnapping ended legislator age limit for criminal responsibility for the committed criminal actions was reduced to 14 years, for the composition of the Article 136 of the Criminal Code the age of criminal responsibility of the general - 16 years.

Child substitution, made out of selfish motives, must be delimited from trafficking in minors (Article 135 of the Criminal Code of the Republic of Kazakhstan), the objective side of which is performed by two persons: the seller and the buyer. Based on the civil law understanding of the contract of sale, upon sale, one party (seller) undertakes to transfer the thing (goods) into the ownership of the other side, and the buyer undertakes to accept this goods and pay a certain sum of

money (price) for it. At the same time, it does not matter for what purpose the child was purchased by the buyer, for his personal purposes (desire to have a child bypassing the adoption procedure established by the state) or for further resale. When buying and selling, money is transferred to the seller for the fact of the sale of the child as goods, when replacing a child, money is transferred to the guilty person for committing actions to replace children. In addition, for the recognition of the sale as completed, it is necessary to transfer money for the received child. For the composition of the substitution, it is not necessary that selfish motives get their full realization as a result of a perfect substitution of the child. It is enough that the motivator of the person to commit the substitution of children was precisely selfish motives, and that these motives arose before the substitution was made. Responsibility under Article 135 of the Criminal Code of the Republic of Kazakhstan for both the purchase and sale of a child are borne by both the seller and the buyer. Art. 135, 136 for all the differences, they are similar in the main thing: in recognizing as punishable the use of minors or a child as an alienated object, thing.

In addition, attention should be paid to the fact that, when substituting, instead of a substitute child, another is left; this is not the case with abduction [2]. When the substitution of a child object of a crime can be also the personal freedom of a child's rights and legitimate interests and the legitimate interests and rights of parents. A crime inflicts harm on the physical and spiritual development of the child, especially since according to the meaning of the law a child is recognized as a person who has not reached the age of eighteen [8].

In a Greater Law Dictionary, the concept of child substituting is given as a "Crimes against family and minors", provided for by the relevant norm of the article of the Criminal Code. In this case, only substitution made out of mercenary or other base motives is criminally punishable. The subject of child substitution is any physical sane person who has reached 16 years of age, including the mother of the newborn or other relatives. In addition, art. 136 of the Criminal Code of the Republic of Kazakhstan means a special subject, the subject of a crime, which means workers of maternity homes, orphanages, as well as persons providing qualified medical care during childbirth outside a medical institution. We believe that the abduction of a child can be committed with both direct and indirect intentions, and the substitution of a child only with direct intent, this also indicates another difference in these *corpus delicti* on the subjective side of the crime.

In the meaning of the Criminal Code, substitution of a child is the replacement of one newborn child with another in the child's maternity hospital, as well as situations where the child's mother or other relatives or legal representatives are unable to identify her child and detect substitution. This may be replaced before the first feeding baby his mother, his father in the transmission or other legal representatives in the case of death of the mother, etc.[9, p. 494].

In this case the social danger of child substitution, in our view, lies in the fact that this action is roughly broken blood ties of kinship, violated profound moral universal relationships between parents and children, that is "broken natural relationship of parents with children"[10, p. 220].

According to G.Zh. Suleymanova, the difference between a child's substitution and a child's abduction lies in the objective side of these crimes, since the objective side of a child's substitution is the action that is implemented in the secret replacement of one child by another, which mainly occurs in maternity hospitals, orphanages or in other places (for example, if childbirth occurred at home) [11, p. 104].

Moreover, if we take, for example, part 1 of article 136 of the Criminal Code of the Republic of Kazakhstan, which refers to a deliberate substitution of a child, which, in our opinion, implies actions similar to kidnapping, where substitution does not simply mean moving or replacing one child with another, but it turns out before the child is replaced by the abduction. However, motives that may be different in this case are not always known. For example, exchanging a healthy child for someone else is not necessarily as healthy, but possibly with pathology, which, again, is possibly not changed for good purposes, for example, for organ transplantation, we can say that this is not becoming so a rare occurrence at the present time, or for other purposes (blackmail and the like) [2].

Conclusion. Therefore, law enforcement authorities in the classification of the substitution of the child and bringing the guilty persons to criminal responsibility are required; first of all, the right to determine the composition of substitution and to be able to differentiate it from related compounds.

Thus, the separation of substitution of a child from related criminal offenses should be based on the following directions:

1. substitution of a child is carried out primarily against newborn children, and the abduction and trafficking of minors against children of any age, including newborns;

2. we consider it expedient to link the criminal manifestation of substitution of a child to the subjective perception of the parent, since it is erroneous, since the parents' awareness and detection of the fact of substitution of a child should not affect either the qualification or the possibility of bringing the perpetrator to criminal responsibility;

3. the distinction between the substitution of a child and the sale of minors differs in that when buying and selling, money is transferred to the seller for the fact of selling the child as a commodity, when replacing a child, money is transferred to the guilty person for performing actions to substitute children;

4. it is necessary for the law enforcement agencies to carry out the correct classification limitations of subjective and objective signs of this criminal offenses;

5. It should be emphasized that substitution mainly takes place in hospitals and related compounds analyzed acts in different places.

Thus, it is important to distinguish the criminal offense of replacing a child from other similar compositions.

REFERENCES:

1. Kudryavtsev V. N. General theory of crime qualification/ V. N. Kudryavtsev.- Moscow: Legal literature, 1972. - 352 p.
2. Akiev A. Restriction of substitution of the child from funny structures of crimes [Electronic resource]. – Omsk:Electronic periodical "Legal technologies" ("Lawtech"), 2003. - Access mode:www.lawtech.ru– Caption from the screen.
3. Esipov V. V. Criminal law. The part is special. Crimes against the person and property / V. V. Esipov. - M., 1910. - 216 p.
4. Krasikov A. N. Criminal law protection of human rights and freedoms in Russia /A.N. Krasikov. - Saratov, 1996. – 99 p.
5. Zagorodnikov N. I., Kirichenko V. F. Criminal law. Part of the special / N. I. Zagorodnikov, V. F. Kirichenko. - M.: Legal literature, 1968. - 584 p.
6. Saveleva V. S. Abduction or substitution of a child/ V. S. Saveleva. - Moscow: Soviet justice, 1988. - № 28-29
7. Dontsov A.V. Human Abduction: Criminal and legal aspect: Diss. ...Cand. the faculty of law. Sciences: 12.00.08/ A. V. Dontsov. -Kislovodsk, 2000. - 155 p.
8. Code of the Republic of Kazakhstan dated December 26, 2011 On marriage (matrimony) and family [Electronic resource]. – Almaty: Legal information system of Regulatory Legal Acts of the Republic of Kazakhstan, 2020. - Access mode:<http://adilet.zan.kz/rus/doc> - Caption from the screen.
9. Piontkovsky A. A. The Doctrine of crime in Soviet criminal law/ A. A. Piontkovsky. - Moscow: Yurid. lit., 1961. - 666 p.
10. Borchashvili I. Sh. Criminal law of the Republic of Kazakhstan General Part: course of lectures. Book 1/ I. Sh. borchashvili. - Almaty: Zhety Zhargy, 2006. - 656 p.
11. Suleymanova G. Zh. Criminal responsibility for kidnapping: Diss. ...Cand.the faculty of law. Sciences: 12.00.08/ G. Zh. Suleymanova –Karaganda, 2009. – 27 p.

УДК: 340

Б.Т. Токтобаев, заведующий кафедрой
теории и истории государства и права
Кыргызского национального университета
им. Ж. Баласагына,
С. Б. Карабалаева, проректор
по учебно-административной работе УНПК «МУК»
г. Бишкек, Кыргызстан

НЕКОТОРЫЕ ВОПРОСЫ РАЗВИТИЯ ЭКОЛОГИЧЕСКОГО ПРАВОСОЗНАНИЯ ОБЩЕСТВА

Аннотация: Статья содержит актуальные вопросы правосознания и правовой культуры в обществе Кыргызской Республики. Отмечается, что одной из проблем правовой культуры связано правосознанием или отсутствием правовой идеологии.