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CRIMINAL LAW PROTECTION OF PERSON'S FREEDOM: PROBLEMS AND SOLUTIONS

Mykhailo Akimov[1]

[1]*National Academy of Internal Affairs*
1 Solomjanska Square, 03035, Kyiv
E-mail: mike_hedgehog@ukr.net
Phone: + 38 (044) 246 94 91

Abstract. This article is concerning on problems of criminal law protection of person's freedom in Ukraine. This social value is among the most suffered in our country from negative changes of violent and economic crimes dynamics and structure. On author's opinion, it is doubtful that legal remedy provided for this type of social relationship proves to be efficient enough.

Some controversial issues of Articles 146 and 147 of Criminal Code of Ukraine have been analyzed in this research. It is worth noting that these crimes (illegal deprivation of freedom, kidnapping and hostage taking) are almost indistinguishable between themselves (current legal differences and scientific points of view of this matter are quite doubtful to be considered trouble proof). Moreover, coverage of identical social relation categories – personal (physical) freedom and personal inviolability – by two very similar regulations resulting in additional challenges related to its differentiation.

Solutions in the scope of applicable legislation amending have been suggested in order to eliminate the controversy in law enforcement practice and establish the grounds for separation of these crimes. Firstly, it is necessary to classify hostage taking as different crime category (other generic object). Secondly, amendments to Article 146 of Criminal Code of Ukraine with the aim to divide it in two parts (with differentiation of crime commission methodology) have been offered.

Keywords: freedom, illegal deprivation of freedom, kidnapping, hostage taking.

INTRODUCTION

Criminologists-researchers had long ago fixed the tendency for twofold increase of violent crimes number during heated social conflicts, primarily of the transitional period[1]. Large-scale social and political transformations and armed conflict in the south-eastern part of Ukraine which started in 2014 resulted in substantial crime rate aggravation. Total impoverishment of citizens, massive internal migration of residents of Crimea, Luhansk and Donetsk regions, growth of radicalization, illegal weapon circulation, disappointment in authority's policy and actions, citizens' frustration and lack of trust to recently reformed law enforcement structures' capacity and competence, resulted in negative changes of violent and economic crimes dynamics and structure.

We must note that number of infringements upon person's freedom and inviolability has increased dramatically. Illegal deprivation of freedom with ransom demands – almost every

[1] Терроризм: психологические корни и правовые оценки (круглый стол журнала "Государство и право") [Текст] // Государство и право. – 1995. – № 4. – С. 29.

day we get these horrible messages from the media. Therefore it is doubtful that legal remedy provided for this type of social relationship that was for the first time envisaged in separate chapter of Criminal Code's Special Part proves to be efficient enough. Law enforcement practices prove low efficiency of relevant regulations. We must note that numerous cases are known when identical actions are classified by law enforcement and courts with different articles of applicable criminal legislation (reclassification is performed during investigation).

We consider that latter can be explained with presence of substantial disadvantages (Articles 146 and 147 of Criminal Code of Ukraine). The key disadvantages, in our opinion, are:

- coverage of identical social relation categories – personal (physical) freedom and personal inviolability – by two very similar regulations resulting in additional challenges related to its differentiation;
- Article 146 envisages responsibility for two separate crimes – illegal deprivation of freedom and kidnapping;
- insufficient criminal law regulation of violence characterizing the abovementioned crimes.

ANALYSIS OF RECENT RESEARCH AND PUBLICATIONS

Few Ukrainian legal researchers tried to make a complex analysis of criminal law protection of person's freedom so far. Nevertheless it is worth to mention scientific works by Volodymyr Antypenko, Nataliia Boiko,Volodymyr Lipkan, Sergii Mokhonchuk, Anna Politova and Oksana Volodina.

The aim of this article is to analyze applicable legislation regulating criminal responsibility for crimes against person's freedom in order to improve criminal law protection of these public relations and to simplify the criminal law qualification of such acts according to current Criminal Code of Ukraine.

METHODS OF RESEARCH

Different methods of research were used in this work. Dialectical method allowed to research different norms of current criminal legislation of Ukraine in its interconnection. Logical-semantic method permitted to examine terms and definitions analyzed in this article. Formal-juridical method enabled to establish content and meaning of these terms and definitions as well as justify suggestions and conclusions onto their changes and amendments. Method of analysis and synthesis was employed to characterize different elements of the crimes

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according to Articles 146 and 147 of Criminal Code of Ukraine and their place at the structure of this Code's Special Part.

MAIN PART

We will start with the definition of object of criminal law protection. Many sources already stressed on incompliance of terms, namely the difference between constitutional definition of «freedom» and criminal law definition of crimes «against personal freedom»2. Traditionally freedom is defined as subjective opportunity to take actions or refuse to act based on constitutional rights and freedoms while freedom is an ability to choose aim of activity and consolidate efforts required for its achievement. These definitions are not identical – though according to Article 8 of the Constitution of Ukraine all legislation must comply with it and must be developed on its basis. Taking the abovementioned into consideration and due to absence of regulations regarding attacks upon honor and dignity in Chapter III of Special Part (Criminal Code of Ukraine) we consider it appropriate to change the title of this chapter – «Crimes against personal freedom».

Current version of Articles 146 and 147 of the Criminal Code of Ukraine allows to specify these crimes only with its subjective features: person is held liable for illegal deprivation of freedom starting from the age of 16, for hostage taking – starting from the age of 14. Also one of essential features of hostage taking as a crime is its commission with aim to stimulate the targeted persons to perform or refuse to perform certain actions as conditions of hostage release; this aim is absent in case of illegal deprivation of freedom or kidnapping. But can we consider the abovementioned optimal for correct differentiation? Our answer is negative and we will explain why.

Firstly, statistical data indicate that minors rarely are involved in commission of these crimes. Therefore the percentage of persons aged 14-16 among suspects is even lower. Secondly, simple offense elements according to Articles 146 and 147 of the Criminal Code of Ukraine are structurally formal – considered to be completed from the moment of actual deprivation of victim's freedom of movement. At this stage the aim of crime may not be detected at all; therefore, perspective of separation of illegal deprivation of freedom, kidnapping and hostage taking seems to be doubtful. More sufficient and evident grounds are necessary to distinguish the abovementioned crimes.

[2] Володіна О. О. Кримінальна відповідальність за викрадення людини (аналіз складу злочину) : автореф. дис. на здобуття наук. ступеня канд. юрид. наук : спец. 12.00.08 „Кримінальне право та кримінологія; кримінально-виконавче право" [Текст] / О. О. Володіна. – Х., 2003. – С. 8.

If we refer to objective aspect of the abovementioned crime elements, unfortunately we will not find any definition of its modus operandi in relevant dispositions. Theory of criminal law provides traditional interpretations of:

- illegal deprivation of freedom – illegal isolation of person against his/her will in a place where he/she has already been located or came voluntarily with any limitation of freedom of movement[3];
- kidnapping – illegal concealed or open, with use of force or trust abuse, extraction of person from his/her social environment against his/her will with further transportation to other place combined with any limitation of freedom of movement[4];
- hostage taking – illegal active behavior resulting in seizure of a person against his/her will followed by threats of violence or use of force;
- hostage detention – illegal active or passive behavior resulting in obstructions created for the person to change his/her location followed by threats of violence or use of force.

Taking the abovementioned we may conclude that kidnapping itself is a special regulation related to illegal deprivation of freedom and hostage taking is a special regulation related to both. But this fact is not a ground for its mutual separation.

Position of some scholars who think that the very fact of persons being captured or isolated during hostage taking and content of relevant demands made are not considered to be a secret comparing to covert demands and isolation typical for kidnapping[5] seems to be controversial. As it has already been proved by other experts, the abovementioned does not

[3] Бойко Н.В. Ответственность за незаконное лишение свободы по советскому уголовному праву : автореф. дис. на соискание научн. степени канд. юрид. наук : спец. 12.00.08 „Уголовное право и криминология, исправительно-трудовое право" [Текст] / Н.В. Бойко. – Х., 1989. – С. 15; Гаухман Л. Об ответственности за захват заложников [Текст] / Лев Гаухман, Сергей Максимов, Светлана Сауляк // Законность. – 1994. – № 10. – С. 45; Лысов М. Ответственность за незаконное лишение свободы, похищение человека и захват заложников [Текст] / Михаил Лысов // Российская юстиция. – 1994. – № 5. – С. 40.

[4] Володіна О. О. Кримінальна відповідальність за викрадення людини (аналіз складу злочину) : автореф. дис. на здобуття наук. ступеня канд. юрид. наук : спец. 12.00.08 „Кримінальне право та кримінологія; кримінально-виконавче право" [Текст] / О. О. Володіна. – Х., 2003. – С. 16; Габибова Г. Отграничение похищения человека от захвата заложника [Текст] / Гюльнара Габибова // Законность. – 2002. – № 11. – С. 50; Зубкова В. И. Ответственность за похищение человека по уголовному законодательству России [Текст] / В. И. Зубкова, И. М. Тяжкова // Вестник Московского университета. Серия 11 "Право". – 1996. – № 2. – С. 55.

[5] Зубкова В. И. Ответственность за похищение человека по уголовному законодательству России [Текст] / В. И. Зубкова, И. М. Тяжкова // Вестник Московского университета. Серия 11 "Право". – 1996. – № 2. – С. 54.

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stem from dispositions of mentioned regulations; therefore it extends the interpretation provided by criminal law and is not required for practical use[6].

In order to eliminate the controversy in law enforcement practice a legislative solution is required to establish the grounds for separation of these offenses. In our opinion this solution must envisage:

- classify hostage taking as different crime category (other generic object);
- presenting amendments to Article 146 of Criminal Code of Ukraine by dividing it in two parts (with differentiation of crime commission methodology).

First proposal is justified with the statement that key feature of hostage taking as a crime is not the fact of victim's deprivation of freedom but stimulation of third parties to take any actions or refuse to act as a condition of victim's release. Therefore, the suspect simultaneously inflicts damage to relevant social relations in the area of personal and public safety. Legislative structure of regulation disposition, nature and recipients of suspect's demands, high risk for everyone staying at specific time in specific location to become a hostage proves that this type of criminal offence may inflict damage to extended scope of social relations ensuring protection of person, his/her rights, freedoms and legal interests, optimal functioning of state power bodies, local self-governance bodies, enterprises, agencies and organizations. We think that regulation on responsibility for hostage taking must be transferred to Chapter IX «Crimes against public security» of Special Part of Criminal Code of Ukraine (with the relevant number of the article – 258-6).

Another factor makes in favor of it. Illegal deprivation of freedom, kidnapping and hostage taking – these formally defined crimes are also characterized as continuous. Thus we should distinguish not only the moment of crime completion from the legal point of view but also the moment of actual crime completion. But in the case of illegal deprivation of freedom between the abovementioned moments the suspect mostly does not perform any socially dangerous acts related to the committed crime (if performs these acts, they are classified cumulatively). In the case of kidnapping and hostage taking situation is different – victim already deprived if his/her freedom still cannot be formally considered as kidnapped because he/she is not extracted and transferred to another location (according to suspect's intention). In the second case victim's freedom is limited but the aim of crime commission – intention to

[6] Бриллиантов А. Похищение человека или захват заложника ? [Текст] / Александр Бриллиантов // Российская юстиция. – 1999. – № 6. – С. 43.

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persuade third parties – is still not achieved and any single act hasn't been performed by the suspect yet.

The solution, in our opinion, may be presented as identifying prompting during hostage taking as distinctive feature (essential element) of crime objective part. Its presentation as disposition of divisible crime will enable separating hostage taking from other related actions and adequately assess the committed crime from the criminal law point of view. Taking this into consideration, we offer to amend the formulation of disposition this offence as «seizure or holding person in the status of a hostage combined with prompting…». Firstly, it will allow to classify the suspect's actions (actual hostage taking followed by demands to be met in order to release the victim) as single crime without artificially established cumulation (taking into consideration that sanction imposed in case of hostage taking compared to other crimes that may be committed with prompting is still more strict); secondly, it is more appropriate to identify the moment of its actual completion. In our opinion it is impossible to correctly identify the content of the mentioned action and separate it from illegal deprivation of freedom and kidnapping without clear differentiation of legal and actual moments of hostage seizure as continuous crime, without referring to the period of time between the abovementioned moments (which can affect the classification of crime committed). It would be more appropriate to consider the hostage taking as legally completed action from the moment of prompting at least one of addressees to act or stay inactive regarding specific actions (it conforms more to the crime essence) and actually completed from the moment of hostage (all hostages) captivity termination or his/her (their) death.

Our second offer is preconditioned by the wish to refer to logic of general and special criminal norms formulation which has been ignored by Ukrainian legislators in the course of specific illegal actions criminalization (illegal deprivation of freedom, kidnapping and hostage taking). We consider that Article 146 of Criminal Code of Ukraine must be separated in two articles (illegal deprivation of freedom apart from kidnapping).

These two crimes are characterized as formal in terms of their structure and must be considered as completed from the moment of actual deprivation of victim's freedom (freedom of movement, selection of location etc). But, as it was mentioned previously, these crimes are also continuous. In case of illegal deprivation of freedom between the moments of crime actual and legal completion the suspect mostly does not commit any socially dangerous acts related to this crime. In the case of kidnapping victim who is already deprived of freedom formally is still not considered to be kidnapped before he/she is transferred to another location (decision made by the suspect). This interpretation is traditional for criminal law theory; if we refer to

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legislation, Part 1 of Article 146 of Criminal Code of Ukraine basically sets these acts as equal which his absolutely incorrect. Kidnapping is a much more complex crime and poses more serious threat to society than illegal deprivation of freedom.

We think that for appropriate criminal law evaluation of crimes against personal freedom these specific socially dangerous acts must be separated in different articles of Chapter III (Special Part of Criminal Code of Ukraine). The most optimal solution is to retain the provision on responsibility for illegal deprivation of freedom (under the title «Illegal deprivation of freedom») at Article 146 and present the responsibility for kidnapping at Article 147 (basically «released» in case if norm on responsibility for hostage taking is transferred to Chapter IX «Crimes against public security» of Special Part of Criminal Code of Ukraine). If disposition is presented as descriptive (in accordance with the abovementioned examples), separation of these acts will be facilitated by the objective elements.

Separate attention must be paid to issue of criminal law evaluation of violence in case of offences against the personal freedom. Part 2 of Article 146 of Criminal Code of Ukraine envisages specific circumstances of this crime commission – «in a way that poses threat to victim's life or health», «followed by physical suffering» and «during extended period of time». As the abovementioned definitions are absent in the law, it is unclear what the legislator's intention was by establishing the evaluation features and delegating the responsibility for definition of physical violence as suffering and specific period of time as extended to the court. The same situation is with the circumstance «using weapon»: does it pose any specific threat to victim's life or health in case of illegal deprivation of freedom and if it does, then is it possible to simultaneously accuse the suspect of two criminal offences with these duplicative features? In our opinion, in this case we can distinguish both aggravating and especially aggravating features. Therefore we need to systematize and modify it: «combined with violence which does not pose threat to life or health at the moment of infliction» is defined as aggravating, and «combined with violence posing threat to life or health at the moment of infliction» and «inflicted during extended period of time» – as especially aggravating. «Using weapon», in our opinion, should be excluded – these actions refer to another object of criminal law protection and classified cumulatively.

During the hostage taking with victims' isolation in specific cases suspects use violence against victims and any person attempting to obstruct the offence or terminate it. Some scholars consider that any type of violence goes beyond the limit of basic elements and requires

cumulative classification[7]. But we cannot agree with this opinion – why should the action taken by suspect who has deprived the victim of freedom (regardless of terms) be referred to basic elements, and any demonstration of violence – e.g. single strike – to be considered as separate crime and classified cumulatively?

In this case threat is posed to person's health requiring separate criminal law evaluation. But any violent actions which are not aimed at victim's homicide or to cause grievous bodily harm are covered by the definition of violence when person's actions are aimed at different objects but still essentially connected[8]. Hostage taking is a good example because the social aspect of this crime is not revealed in deprivation of freedom or posing threat to life or health.

In case of hostage taking suspects mostly threaten to kill the hostages responding to failure to meet one's demands (which defines the intimidation as classifying feature). But is there a proper justification for applicable legislative regulation of psychological violence as hostage taking classifying feature (limitation of violence by threatening to kill the victims)? It is obvious that there is no more dangerous threat than clear dependency of the suspect's aim from the intimidation intensity[9] with immediate use of the most «efficient» means of addressees' persuasion. But if we classify the crime as hostage taking using the psychological violence as a feature if threat is posed to two or more persons, how can we evaluate the same offence if only one person is threatened? Or if there are few hostages and only one of them is subject to such threats?

It is optimal to simplify the classification of physical and mental violence during hostage seizure. It requires extension of Article 147 of the Criminal Code of Ukraine with classifying feature «…combined with violence posing threat to health or life or with threats to use such violence…» (simultaneously excluding the feature «…combined with threat of physical elimination…»). In this case trivial injuries which did not result in short-term health problems or short-term loss of labor capacity including punching or battery which did not pose threat to life or health at the moment of occurrence will be taken as features of simple crime elements. Trivial injuries which resulted in short-term health problems or short-term loss of labor capacity or other violent actions posing threat to life or health at the moment of occurrence but haven't

[7] Афанасьев Н. Н. Международно-правовая база борьбы с терроризмом [Текст] / Н. Н. Афанасьев // Закон и право – 2001. – № 4 – С. 11; Бажанов М. И. Уголовное право Украины. Общая часть: Учебник [Текст] / Бажанов М. И. – Днепропетровск : Пороги, 1992. – С. 114.
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[9] Александер Й. Терроризм в современном капиталистическом обществе [Текст] / Йозеф Александер. – М. : ИНИОН АН СССР, 1987. – С. 44

led to the abovementioned consequences (including threats to use violence) are proposed to be characterized as aggravating condition.

Finally, we would like to note that the issue of criminal law classification of crimes against personal freedom requires urgent improvement of relevant legislative base and proper judicial interpretation of law enforcement practice.

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ASMENS LAISVĖS APSAUGA PASITELKUS KRIMINALINĘ TEISĘ: PROBLEMOS IR JŲ SPRENDIMO BŪDAI

Mykhailo Akimov*
Tarptautinių santykių nacionalinė akademija

S a n t r a u k a

Straipsniu siekiama aptarti tai, kaip kriminalinės tesės priemonėmis užtikrinama asmens laisvė Ukrainoje. Ši socialinė vertybė yra viena iš labiausiai pažeidžiamų mūsų šalyje dėl neigiamų pokyčių,

sukeltų smurtinių ir ekonominių nusikaltimų dinamikos ir jų sudėties. Autoriaus nuomone, abejotina, kad teisinės priemonės, numatytos tokio tipo socialiniams santykiams, yra pakankamos.

Keli kontraversiški Ukrainos baudžiamojo kodekso straipsniai (146 ir 147) analizuojami šiame tyrime. Svarbu pažymėti, kad tokie nusikaltimai (neteisėtas laisvės atėmimas, pagrobimas, įkaitų laikymas) yra sunkiai diferencijuojami (šiuolaikiniai teisiniai skirtumai ir mokslinis požiūris šiuo klausimu abejotini, kad juos būtų galima laikyti pagrįstais). Be to, identiškų socialinių santykių kategorijų aprėptis (asmeninės, t. y. fizinės, laisvės ir asmeninės neliečiamybės), grindžiama dviem skirtingais reglamentavimo būdais, sukelia papildomų iššūkių dėl jų diferenciacijos.

Pasiūlyti sprendimai siekiant pagerinti taikomąją teisėkūrą padės išvengti prieštaravimų griežtinant įstatymus ir nustatant gaires, pagal kurias būtų diferencijuojami nusikaltimai. Pirma, svarbu išskirti įkaitų paėmimo atvejį kaip atskirą nusikaltimo kategoriją. Antra, pasiūlytos Ukrainos baudžiamojo kodekso 146 str. pataisos siekiant išskirti dvi dalis (pritaikius nusikaltimo įvykdymo diferencijavimo metodiką).

Raktiniai žodžiai: laisvė, nelegalus laisvės apribojimas, grobimas, įkaitų paėmimas.

Mykhailo Akimov*, PhD in Law, Associate Professor, Associate Professor of Criminal Law Branch, National Academy of Internal Affairs
Mykhailo Akimov*, PhD, docentas, kriminalinės teisės sritis, Nacionalinė tarptautinių santykių akademija. Tyrimo sritys: kriminalinė teisė (bendroji ir specialioji), nusikaltimų skirstymas, tarptautinė kriminalinė teisė, tarptautinė humanitarinė teisė