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TOPICAL ISSUES OF CRIMINAL LIABILITY FOR UNLAWFUL DEPRIVATION OF LIBERTY OR ABDUCTION OF A PERSON (ARTICLE 146 OF THE CRIMINAL CODE OF UKRAINE)

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Purpose: criminal law characteristics of the legal elements of the crime provided for in the disposition of Article 146 of the Criminal Code of Ukraine. **Methods:** the study was conducted using a dialectical approach, methods of analysis, synthesis, as well as a number of general scientific and special legal research methods. **Results:** the author comes to the conclusion that Article 146 of the Criminal Code of Ukraine provides for criminal liability for a crime committed in two forms: illegal deprivation of liberty and kidnapping. And although their legal elements are provided for in the dispositions of the same article and they are the same in terms of the degree of public danger, each of these forms of crime has its own characteristics and certain qualifying features may be applied only to one of these two forms. The peculiarity of this crime is that its composition is formal, and the crime itself is ongoing. Although in some cases, the moment of the beginning and end of the crime coincide in time. Particular attention is paid to the study of the content of aggravating features provided for in Parts 2 and 3 of Article 146 of the Criminal Code of Ukraine. **Discussion:** the wording of the qualifying features of the legal elements of the crime provided for in the disposition of Article 146 of the CC of Ukraine was made in violation of the logic of the legislative perception of their real meaning and purpose: "method dangerous to the life or health of the victim", "causing physical suffering to the victim", "use of weapons". Even without going into details, one can see the existence of dissonance in their coexistence from the perspective of the ratio of their volume and content, since it is obvious that they are overlapping, that some features are reproduced by others.

Key words: corpus delicti; illegal imprisonment; kidnapping; weapons; violence.

Statement of the problem and its relevance.

One of the main human values, along with life and health, is freedom. It is a constitutional human right. It is protected by all branches of law, including criminal law. Article 146 of the Criminal Code of Ukraine (hereinafter - the CC of Ukraine) provides for liability for the crime of "Illegal deprivation of liberty or abduction of a person". At the same time, the analysis of this provision gives grounds to conclude that it is somewhat imperfect and needs to be improved.

Analysis of research and publications. issues related to the analysis and proposals for improvement of this criminal law provision have been con-

sidered in the national science by such authors as: Andrushko A.A., Boyko N.V., Borisov V.I., Volodina O.O., Kundeus V.G., Lyzogub Y.G. and others. They drew attention to the shortcomings of the wording of the disposition of Article 146 of the Criminal Code of Ukraine. However, despite numerous publications, there are still many problems with improving the provision on criminal liability for unlawful deprivation of liberty or abduction of a person.

The purpose. To provide a criminal law analysis of the provision contained in Article 146 of the Criminal Code of Ukraine, to study the content of the qualifying features of this legal corpus delicti

and to propose ways to improve it both in terms of disposition and sanctions.

Main material. Article 146 of the Criminal Code of Ukraine "Illegal deprivation of liberty or abduction of a person" consists of three parts. The disposition of Part 1 of Article 146 of the Criminal Code of Ukraine provides for the legal composition of a minor crime. The disposition does not contain aggravating circumstances, and this crime is punishable by restraint of liberty for up to three years or imprisonment for the same term. Article 146(2) and (3) of the Criminal Code of Ukraine provides for liability for crimes with qualified and especially qualified elements. The penalty under Article 146(2) of the Criminal Code of Ukraine is restriction of liberty for a term of five years or imprisonment for the same term. This is also not a serious crime. The punishment under Part 3 of Article 146 of the Criminal Code of Ukraine is imprisonment for a term of five to ten years.

The will of a person (individual) as an object of criminal encroachment means a guaranteed opportunity for an individual to exercise his or her individual constitutional rights and freedoms as a human being and citizen: the right not to be forced to do anything that is not provided for by law, the right to free development of one's personality, provided that the rights and freedoms of other people are not violated.

The main direct object in the legal composition of the crime provided for in the disposition of Part 1 of Article 146 of the Criminal Code of Ukraine is the physical freedom of a particular person. It should also be noted that in this legal corpus delicti, an additional direct object should be distinguished, which should be considered human life and health, personal safety, etc.

The objective side of the crime involves two alternative actions - illegal deprivation of liberty and kidnapping. That is, this crime is committed in two forms that differ in their characteristics.

Illegal deprivation of liberty is expressed in the commission of actions that consist in the actual deprivation or restriction of the victim's personal freedom, which are not related to his abduction, as well as in the previous abduction of a person with his further isolation.

It can also be a place where the victim was staying, but he or she is deprived of the opportunity to leave the premises and is forcibly kept there.

Deprivation of a person's freedom, and in our opinion, in some specific cases it is freedom of movement, not freedom of will, that is referred to in the disposition of this article, can occur with the use of violence, as well as with the creation of an environment where it is impossible to move or leave a certain territory: for example, leaving in an isolated, locked room, taking to a remote deserted place in the absence of the possibility of using transport and means of communication, bringing to a helpless state.

The victim's consent to his or her transfer to another place, which is not known to the persons interested in his or her release, excludes the existence of the elements of illegal deprivation of liberty. At the same time, the detention of a person who, due to mental disorders and/or illness, or a child who, due to his or her minor age, cannot realize the nature of the actions committed against him or her, constitutes this crime. Children are encouraged to stay in a certain place by playing with toys and animals, computer games, and thus a false impression can be created that the child has agreed to stay in that place.

Kidnapping is the secret or open removal of a person against his or her will from his or her place of residence (place of residence, hotel, vehicle, place of study) and transfer of such a person to another place determined by the kidnapper. For example, moving them to another apartment, a place that is not suitable for living. The place to which the person is moved does not affect the qualifications, the main thing is that it happens against his or her will. Such acts can be committed by intimidation, threats, or the use of violence. The victim may go with the kidnapper to the place where they will be held in captivity.

If the victim is deprived of his or her liberty after the kidnapping, the act does not constitute a plurality of crimes and is qualified as a single crime with an alternative action.

Kidnapping is considered completed from the moment of actual removal of the person from the place of stay (location) and establishment of control over him/her. Illegal deprivation of liberty is con-

sidered to be completed from the beginning of the person's forced detention. The crime for which liability is provided for in Part 1 of Article 146 of the Criminal Code of Ukraine has a formal and material composition (this is a generally accepted approach in the theory of criminal law of Ukraine). The period of the victim's stay in such a state does not affect the qualification for recognizing the crime as completed.

The subject of this crime is any individual who has reached the age of 16.

This crime can be committed in other forms, as well as by a special subject. This affects its qualification. For example, if these actions were committed by an official with the use of power or official authority, the act is subject to qualification under Article 365 of the Criminal Code of Ukraine "Abuse of power or official authority", or under Article 371 of the Criminal Code of Ukraine "Knowingly illegal detention, bringing, house arrest or detention".

The subjective side of the crime, the legal composition of which is provided for in the disposition of Part 1 of Article 146 of the Criminal Code of Ukraine, is characterized by direct intent: the perpetrator is aware of the illegality of his actions, namely the deprivation of a person's freedom or abduction, wishes to commit them and commits them.

Some researchers who analyze the objective side of the legal composition of the crime, namely "deprivation of liberty", use the phrase "restriction of liberty" in parallel [1, p. 333].

An analysis of the positions of other authors leads to the conclusion that in this legal composition of the crime, unlawful deprivation of liberty should be understood not as any restriction of freedom of movement, but only as one that is associated with the deprivation of the opportunity to leave a certain place by locking, tying, etc. For example, a person serving a prison sentence can also be unlawfully deprived of liberty.

According to some researchers, kidnapping is always committed through active actions, while deprivation of liberty can be committed through inaction [2, p. 302].

Particular attention should be paid to the term "illegal" both in the title and in the disposition of Article 146 of the Criminal Code of Ukraine. Obvi-

ously, the lawful deprivation of liberty (in the text of the law - freedom) should be understood as such cases as lawful arrest or detention of a person, lawful imprisonment of a person and other cases that are clearly listed in the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5) [3].

More problems arise when interpreting the term "kidnapping". This process is understood as a series of illegal actions that consist of seizing a person; removing him or her from the place of residence; taking possession of him or her; moving the victim from the place where he or she was to another place; and further detaining the victim in that place. These actions are committed sequentially and end in unlawful deprivation of liberty. In this particular case, the concepts are duplicated and kidnapping is a way of committing illegal deprivation of liberty. Of course, this is just one example. We disagree with those authors who necessarily understand kidnapping to mean such aggressive actions as seizure, taking possession, etc. [4, p. 66; 5 p. 44-45].

Physical violence, as understood by these terms, is not the only way to abduct a person. Other methods include mental violence, deception, abuse of trust, and exploitation of a helpless state. The term "kidnapping" in domestic criminal law is traditionally used in the legal corpus delicti of criminal offenses against property. For example, theft, robbery and, depending on the characteristics of another person's property, a number of other criminal offenses are committed by means of abduction. Therefore, such an author as V. Navrotskyi [6, p. 12] questions the correctness of the use of this term in the disposition of Article 146 of the Criminal Code of Ukraine.

We believe that one should consider the content of these concepts in the context of Article 146 of the CC of Ukraine as overcoming human resistance, which can be achieved, as we have already indicated, not only by physical means. Establishing control over a person, over his/her behavior can be achieved in different and not only physical ways.

The main factor in understanding kidnapping is the realization that control over a person's behavior has been established. A person who is illegally deprived of liberty is also under the control of the abductor. The objective side of both kidnapping and

deprivation of liberty is to establish control over a person's behavior, and control can be established in any way (by any means) - physical violence, mental violence, deception, abuse of trust, etc.

As A. Andrushko points out, the establishment of control over the victim in the case of unlawful deprivation of liberty is characterized by peculiarities, the main of which is that this establishment of control is often "contactless" (for example, locking a person in a certain room). In this regard, it should be noted that physical violence is less often used to create obstacles to free movement in the case of illegal deprivation of liberty not related to abduction [7, p. 305].

Most researchers consider illegal deprivation of liberty or kidnapping to be crimes with formal elements. The peculiarity of this legal composition of the crime, both deprivation of liberty and kidnapping, is that both the act and the consequence are denoted by the same terminology and practically coincide in time. The act committed in the form of illegal deprivation of liberty and kidnapping should be considered completed from the moment control over the person's behavior is established, which deprives him or her of the possibility of movement in accordance with his or her own will.

With regard to the degree of public danger of unlawful deprivation of liberty of another person and abduction, based on the analysis of the provision contained in Part 1 of Article 146 of the CC of Ukraine, we conclude that these two forms of crime have the same degree of public danger. In our opinion, these are two forms of the same act, which consists in establishing illegal control over the behavior of a person. Of course, the purpose of the kidnapping is of great importance for the qualification. This affects the qualification, often in conjunction with other acts for which liability is provided for in other articles of the Criminal Code of Ukraine.

The disposition of Part 2 of Article 146 of the Criminal Code of Ukraine provides for a qualified corpus delicti. The legislator has provided the following qualifying features: the victim is a minor child, as well as two or more persons; the method of committing the crime is complicity (by prior conspiracy by a group of persons), dangerous to the life or health of the victim, causing physical suffer-

ing to the victim, use of weapons; time - a long time; motive - mercenary.

Kidnapping or deprivation of liberty of a minor involves the commission of the above actions against a person under the age of fourteen.

The aggravating circumstance of mercenary motive is qualified when the perpetrator, while committing the crime, seeks to achieve any benefit of a material nature or to avoid material costs. In this case, a person can achieve material benefit both for himself or herself and for other persons. For example, material gain can be understood as an attempt to take possession of the victim's property, acquire certain property rights, etc.

Kidnapping or imprisonment of two or more persons involves the seizure and subsequent detention of two or more persons at the same time or at short intervals. But, of course, the main thing when applying this aggravating circumstance is that the actions against several persons are united by a single intent.

Committing a criminal offense by prior conspiracy by a group of persons means that the act was committed in complicity. In this case, all persons who form such a form of complicity as a group of persons by prior conspiracy are considered to be perpetrators, regardless of the type of actions that an individual performed within the framework of this criminal offense. For example, one person directly kept the victim in a certain place, others provided household services, and others provided the victim with food.

A method dangerous to the life or health of the victim should be understood as inflicting light bodily harm that caused a short-term health disorder or short-term disability, moderate or severe bodily harm, as well as other violent acts that, although they did not lead to the above consequences, were dangerous at the time of their infliction and actually created a risk of death or other harm to the victim's health.

Deprivation of liberty and abduction of a person may be accompanied by the use of physical suffering. This is a method that causes particularly negative physical or psychological feelings in a person: infliction of severe physical pain, torture, deprivation of food, water, sleep, threats to use such acts against the victim.

This traditional approach is not shared by all authors, and today the national legal literature lacks a common approach to understanding the content of certain qualifying features in this legal composition of the crime (part 2 of Article 146 of the Criminal Code of Ukraine).

According to some scholars, the wording of the qualifying features of the legal elements of the crime provided for in the disposition of Article 146 of the CC of Ukraine is made in violation of the logic of legislative perception of their real content and purpose: "method dangerous to the life or health of the victim", "causing physical suffering to the victim", "use of weapons". Even without delving into the details, one can see the presence of dissonance in their coexistence from the perspective of the ratio of their volume and content, since it is obvious that they are duplicated, some reproduction of the content of some features by others [8, p. 91-94].

In particular, in the theory of criminal law, there is an opinion that a method dangerous to the life or health of the victim should be understood as a method of illegal deprivation of liberty or abduction of a person that creates a real danger of the victim's death or the danger of causing serious, moderate or light bodily harm with a short-term health disorder or minor disability, as well as the danger of causing other harm to his or her health.

Another domestic scholar V. Borysov puts forward his own, more specific version of understanding the method dangerous to the life or health of the victim. He notes that this is a case of unlawful deprivation of liberty when there is a real threat of death or bodily harm to the victim, as provided for in Article 121 of the Criminal Code of Ukraine [9, p. 106-109].

The analysis of such qualifying circumstances as a method dangerous to the victim's life or health or causing physical suffering can be difficult to distinguish in practice. For example, what characteristic should be taken into account if the victim was tied up, deprived of the ability to breathe freely, which caused fainting? There are also signs of a method dangerous to the victim's life and health and causing physical suffering. Any case of using a method that is dangerous to the life and health of the victim simultaneously causes physical suffering.

In our opinion, it would be more appropriate to improve the provision contained in Part 2 of Article 146 of the CC of Ukraine by removing the signs of physical suffering from it. This will make it more specific and facilitate proper qualification.

Illegal deprivation of liberty or abduction of a person with the use of weapons increases the degree of public danger of this crime. Weapon means any edged or firearm. The use of weapons also means its demonstration, which has a negative psychological impact on the victim.

As Y. Lyzohub points out, the term "use of weapons" makes no sense, because it does not solve anything in essence and is a logical mistake of the legislator. Of course, the demonstration of weapons will affect the victim in terms of psychological pressure on the latter's will, but the demonstration of a kitchen knife, metal pipe, stick, air pistol, etc. will have a similar effect on him [10, p. 91-94].

Such a qualifying feature as "for a long time" applies only to illegal deprivation of liberty. Traditionally, in the case law of Ukraine, this time of isolation or actual restriction of freedom is at least several weeks. This feature may be taken into account when qualifying in conjunction with other aggravating features.

Part 3 of Art. 146 of the Criminal Code of Ukraine provides for liability for a particularly qualified crime. Particularly qualifying features are the commission of a crime by an organized group of persons or grave consequences.

The acts are qualified as illegal deprivation of liberty or kidnapping that caused grave consequences in case of death or suicide of the victim, loss of any organ or its functions, termination of pregnancy, mental illness, etc.

The mental attitude of the perpetrator to death can be either intentional or negligent. Causing death or serious bodily injury through negligence is fully covered by the meaning of "grave consequences" and does not require additional qualification. Also, grave consequences are considered to be those that occurred as a result of the victim's own actions (for example, he or she jumped out of the vehicle, tried to escape from the room where he or she was being forcibly held). In this case, the act is covered by Part 3 of Article 146

of the Criminal Code of Ukraine and does not require additional qualification.

Intentional infliction of death or grievous bodily harm to the victim is qualified as a combination of crimes (Article 115 "Intentional murder" and Article 121 "Grievous bodily harm" of the Criminal Code of Ukraine).

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АКТУАЛЬНІ ПИТАННЯ КРИМІНАЛЬНОЇ ВІДПОВІДАЛЬНОСТІ ЗА НЕЗАКОННЕ ПОЗБАВЛЕННЯ ВОЛІ АБО ВИКРАДЕННЯ ЛЮДИНИ (СТ.146 КК УКРАЇНИ)

Державне некомерційне підприємство
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Мета: кримінально-правова характеристика юридичного складу злочину, передбаченого у диспозиції статті 146 КК України. **Методи дослідження:** дослідження проводилося із застосуванням діалектичного підходу, методів аналізу, синтезу, а також низки загальнонаукових та спеціально-правових методів дослідження. **Результати:** автор доходить висновку, що у ст. 146 КК України передбачена кримінальна відповідальність за злочин, який вчинюється у двох формах: незаконне позбавлення волі і викрадення людини. І хоча їхні юридичні склади передбачені в диспозиціях однієї статті і вони є однаковиими за ступенем суспільної небезпеки, кожна із цих форм злочину має свої особливості і окремі кваліфікуючі ознаки можуть застосовуватися лише до однієї з цих двох форм. Особливістю цього злочину є те, що його склад є формальним, а сам злочин є триваючим. Хоча в деяких випадках момент початку та закінчення злочину співпадають у часі. Особлива увага приділена дослідженню змісту обтяжуючих ознак, які передбачені у ч.ч. 2, 3 ст. 146 КК України. **Обговорення:** формулювання кваліфікуючих ознак юридичного складу злочину, передбаченого у диспозиції ст. 146 КК України здійснені з порушенням логіки законодавчого сприйняття їхнього реального змісту та призначення: «спосіб, небезпечний для життя або здоров'я потерпілого», «спричинення потерпілому фізичних страждань», «застосування зброї». Навіть не заглиблюючись у деталі, можна побачити наявність дисонансу в їхньому співіснуванні під кутом зору співвідношення їхнього об'єму та змісту, адже є очевидним певне їхнє дублювання, певне відтворення змісту одних ознак іншими.

Ключові слова: склад злочину; незаконне позбавлення волі; викрадення людини; зброя; насильство.

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