



*Asesorías y Tutorías para la Investigación Científica en la Educación Puig-Salabarría S.C.  
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RFC: ATII20618V12

**Revista Dilemas Contemporáneos: Educación, Política y Valores.**

<http://www.dilemascontemporaneoseducacionpoliticayvalores.com/>

**Año: VII Número:1 Artículo no.:102 Período: 1 de Septiembre al 31 de diciembre, 2019.**

**TÍTULO:** Valoración penal del secuestro. Aspectos teóricos y prácticos.

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**RESUMEN:** El artículo considera los problemas de calificación del secuestro, su correlación y diferenciación con otros delitos violentos contra la persona y la propiedad desde la perspectiva del derecho penal, la doctrina del derecho penal y la práctica judicial.

**PALABRAS CLAVES:** Libertad, posesión, violencia, captura, retención.

**TITLE:** Criminal law assessment of kidnapping. Theoretical and practical aspects.

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**ABSTRACT:** The article considers the problems of qualification of abduction, its correlation and differentiation with other violent crimes against the person and property from the perspective of criminal law, the doctrine of criminal law and judicial practice.

**KEY WORDS:** freedom, possession, violence, capture, retention.

## **INTRODUCTION.**

Freedom refers to the natural and inalienable human rights; its protection is a fundamental principle of modern international law. This right, along with other basic human rights, is enshrined in the Constitution of the Russian Federation, is ensured by Russian legislation, including criminal law.

In accordance with Art. 3 of the 1948 Universal Declaration of Human Rights, everyone has the right to security of person. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, proclaiming personal integrity, emphasizes that no one may be deprived of his liberty except in the following cases and in the manner prescribed by law. Similar provisions are enshrined in the International Covenant on Civil and Political Rights of 1966, the Convention of the Commonwealth of Independent States on Human Rights and Fundamental Freedoms of 1995.

Along with general international legal acts, at the 92nd plenary meeting of the 47th session of the UN General Assembly on December 18, 1992, Resolution 47/133 adopted a special document providing for the protection of individuals from enforced disappearances.

The Declaration expresses concern that abductions have occurred in many countries. This is a serious and flagrant violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and affirmed and developed in international documents relating to this field. Any such act causes grievous suffering to victims and their families. In this regard, this Declaration states that “no State shall ... permit enforced disappearances”.

In order to counter kidnapping, each state takes effective legislative, administrative, judicial and other measures. In particular, such actions under national law should be recognized as a crime punishable by taking into account its “extremely grave nature” (Article 4).

In accordance with Art. 20 of the Declaration on the Protection of All Persons from Enforced Disappearances, states are obliged to prevent and suppress the practice of abducting children whose parents “underwent enforced disappearance”, as well as children born during the “enforced disappearance of their mother”. It is emphasized that the act should be recognized as a crime of

"especially grave nature, which shall be punished as such." It is proposed to equate the falsification or destruction of documents proving the "true identity" of these children with this assault.

## **DEVELOPMENT.**

Criminal legal protection against enforced disappearances in Russian criminal law is primarily provided under Art. 126 of the Criminal Code of Russia. Formulating this criminal law norm, the legislator in a simple disposition only named the crime, without revealing its objective and subjective features, which led to a variety of different positions on determining the signs of kidnapping, both in the science of criminal law and in law enforcement practice.

In modern criminal law literature, the concept of "kidnapping" is interpreted in different ways. Professor A.V. Naumov defines abduction as a criminal act, which "includes two elements: abduction and imprisonment, which are in perfect aggregate, since abduction is also a deprivation of freedom" (Naumov, 1997).

Professor L.L. Kruglikov believes that this act constitutes "the deliberate removal and movement of a person against his will from his natural social environment to another place with the intention of keeping him in captivity at a certain time" (Kruglikov, 1999). Professor V.S. Komissarov believed that "the abduction of a person consists in his capture (possession) by any means and in the restriction of personal freedom by moving or placing him in some other room (place) for a while, where he is forcibly held" (Komissarov, 2002).

From the general concept of theft proceed V.I. Zubkova and I.M. Tyazhkova, who believe that the abduction of a person: "is it a secret or open, or by deception, taking possession of a living person with the subsequent restriction of his physical freedom for any period (from several hours to several days, weeks, etc.)?" (Zubkova & Tyazhkova, 2009).

In judicial practice, a certain concept of kidnapping has also been developed. Consider further judicial practice (The personal data of participants is reduced).

The Decree of the Presidium of the Supreme Court of the Russian Federation in case A said that "according to the law, kidnapping should be understood as unlawful intentional acts involving the

secret or open capture of a living person, moving him from a permanent or temporary location to another place and subsequent confinement. The main point of the objective side of this crime is the capture of the victim from the place of his location and moving for the purpose of subsequent retention in another place”.

It seems that in order to resolve existing conflicts, it is necessary to determine the objective and subjective signs of abduction.

The main object of the crime under Art. 126 of the Criminal Code of the Russian Federation advocates the constitutional right to human freedom. Personal freedom means the right to choose a place of stay, movement, residence, that is, "the condition of the person within which he carries out an action or inaction in accordance with his will and desired choice". This right is vested in all people, regardless of age, social status, sanity, criminal record and previous asocial behavior. With qualified types of this crime, in particular, in paragraph “c” of part 2 of article 126 of the Criminal Code of the Russian Federation, the life and health of the victim may be an additional object.

Mandatory features of the objective side of the composition of a person’s abduction should be determined by three consecutive actions of the criminal: capturing (seizing) a person, that is, depriving him of the right to choose his location and freedom of movement, moving to a place that is not his place of traditional and habitual finding, forcibly holding him in such a place.

Based on the analysis of judicial practice, including the practice of the Supreme Court of the Russian Federation, it should be concluded that the seizure of a victim and his forcible movement in space in order to commit a violent crime in another place against this victim do not constitute a *corpus delicti*, provided for in Article 126 of the Criminal Code of the Russian Federation.

The Oktyabrsky District Court of the city of Saratov sentenced to various terms of imprisonment the persons guilty of unlawful imprisonment, whose actions during the preliminary investigation were qualified as kidnapping.

During the judicial investigation, the court found that the criminals forcibly pushed the victim into the car, handcuffed him and headed for Kumysnaya Polyana, i.e., captured a living person and limited

his freedom; however, their goal was to clarify personal relationships and to recover debt from the victim, and the purpose of keeping him in a place other than his place of residence or permanent residence was not. These data established during the judicial investigation served as the basis for the re-qualification of the actions of criminals.

If the violent seizure of a victim and his removal do not have the purpose of holding him in a place determined by the offender and unknown to the relatives of the abducted person, then such actions cannot be qualified as kidnapping, but rather should be recognized as unlawful deprivation of liberty. Thus, the verdict of the Frunze district court of the city of Saratov, the defendants determined various terms of imprisonment for unlawful acts, expressed in the use of physical violence in the recovery of funds from victims. The victims were forcibly or fraudulently taken to the premises of the non-state pension fund "Russian Capital", and the victim R. periodically forcibly moved to the apartment of the Secretary of the B. Fund, where she was also forcibly held. The court qualified the actions of the defendants as unlawful deprivation of liberty.

Thus, the Judicial Collegium of the Supreme Court of the Russian Federation overturned the judgment in respect of B. and K. Made by the Beloyarsky District Court of the Sverdlovsk Region for the lack of corpus delicti in their actions under Article 126 of the Criminal Code of Russian Federation.

The convicts conspired among themselves to conspire to rape and commit violent acts of a sexual nature against B. For this purpose, they forcibly brought her to the village where they raped her, and B. committed against her violent sexual acts. Consequently, the transfer of the victim to the crime scene, which was covered by the intent of the convicts and constituted a condition for their conspiracy, is included in the objective side of the crimes provided for in Articles 131 and 132 of the Criminal Code of the Russian Federation as violence applied to V. The court did not establish evidence that V. was brought to the village and held there by convicts for other reasons. Therefore, the conviction of B. and K. according to Art. 126 of the Criminal Code of the Russian Federation recognized as unfounded.

Thus, on October 30, 2014, the Judicial Collegium for Criminal Cases of the Supreme Court of the Russian Federation ruled that the sentence of the Altai Regional Court of July 8, 2014 be unchanged without changing the part of the acquittal of convicts under Art. 126 of the Criminal Code of the Russian Federation for the lack of *corpus delicti* in their actions.

Medvedev, Vasilchenko were found guilty and convicted of the murder of B., committed on October 15, 2013 by a group of persons by preliminary conspiracy to conceal another crime.

In addition, Medvedev and Nurgametov were found guilty and convicted of B. intentionally inflicting moderate damage to health, which caused a long-term health disorder by a group of people; Vasilchenko - for intentionally causing minor harm to health, which caused a short-term health disorder.

On appeal, the public prosecutor Varlamova V.D. requested a cancellation of the verdict and referral of the criminal case for a new trial in connection with the discrepancy of the court findings with the actual circumstances of the case, significant violations of the requirements of the criminal procedure law, incorrect application of the criminal law, which led to unjustified acquittal of convicts under Art. 126 of the Criminal Code of the Russian Federation and the injustice of the punishment due to excessive leniency.

At the same time, the state prosecutor points out that the actions of Vasilchenko, Medvedev and Nurgametov aimed at seizing, moving and holding the victim were qualified by the investigating authorities under paragraph "a" of part 2 of Art. 126 of the Criminal Code of the Russian Federation as a kidnapping committed by a group of persons by prior conspiracy. In acquitting Vasilchenko, Medvedev and Nurgametov under this article, the court indicated that the actions of the defendants to seize and relocate the victim were not aimed at his abduction, but were covered by a single intention to continue to use violence against him with harm to health, which was continued by Vasilchenko and Medvedev upon arrival on the river bank, where Vasilchenko struck the victim, and then, together with Medvedev, deprived the victim of his life by drowning, dropping him into the river.

According to the state prosecutor, the court found that the convicts acted jointly and in concert, against the will of the victim, forcibly placed him in the trunk of the car, took him to a considerable distance, where he was forcibly held, thereby depriving him of freedom of movement and choice of location. The victim did not have the opportunity to open the trunk and leave the car, as well as to hide from the convicts, since he was severely beaten, and the attackers outnumbered him and completely controlled his actions.

When the convicts understood that the goal was to force the victim not to contact the law enforcement agencies, they did not achieve it, Medvedev suggested killing B., which Medvedev and Vasilchenko did by throwing him from the bank into the river. Moreover, the court's findings that the actions to seize and relocate the victim did not aim to abduct him, but were aimed at continuing to use violence against him, do not correspond to the factual circumstances established by the court, according to which the purpose of relocating the victim was to convince him not to contact the law enforcement authorities. The convicts considered it impossible to do this within the boundaries of a settlement and, to exert a psychological impact on the victim and force him to commit the actions they needed, were taken to a deserted place.

The actions of those convicted of capturing, moving the victim against his will and depriving him of the ability to move independently require additional qualifications under Art. 126 of the Criminal Code of the Russian Federation, since they are not included in the objective side of the crimes provided for by Articles 112, 115 of the Criminal Code of the Russian Federation, and the intention to kill B. arose after they had already taken these actions. In this connection, the conclusions of the court on the acquittal of convicts under paragraph "a" of part 2 of article 126 of the Criminal Code of the Russian Federation are unfounded.

The objection to the appeal representation lawyer Kareva I.G. in the interests of the convict Nurgametova K.N. requests leave the sentence unchanged.

After checking the case materials, after hearing the explanations of the convicted Medvedev, Vasilchenko and the lawyers Voloboeva L.Yew, Zhivova T.G., Krotova S.V., who did not support

the appeal, on the grounds set out in it, discussing the arguments of the appeals, the Judicial board finds the verdict court lawful and justified.

The arguments of the public prosecutor, set out in the appeal, about the unjustified acquittal of Medvedev, Vasilchenko and Nurgametov under paragraph "a" of part 2 of Art. 126 of the Criminal Code of the Russian Federation, in the opinion of the Judicial Board, cannot be considered wealthy, since the case materials are undeniably established and correctly reflected in the verdict by the court that, after the defendants inflicted several blows on various parts of the body of the injured B., they loaded the latter into the trunk of a car and taken to a site located on the right bank of the river to talk with him and convince him not to report the incident to law enforcement. There, Medvedev and Vasilchenko pulled the victim out of the trunk of a car and laid it on the ground, and Vasilchenko inflicted at least two kicks to B.'s head lying on the ground. These circumstances are confirmed by the evidence gathered in the case, in particular the explanations of the defendants themselves, which they gave both during the preliminary investigation and at the hearing.

From the materials of the case, it follows that all the defendants, including Nurgametov, according to their explanations during the preliminary investigation, did not have intent on kidnapping the victim, they only wanted to talk to him about whether he would contact the law enforcement authorities.

On the river bank, Vasilchenko inflicted two blows on the victim; however, these actions were not aimed at holding B. The arguments of the state prosecutor that the victim was taken to the river bank against his will are not confirmed by anything, since evidence is not provided the fact that he resisted or expressed any relation to what was happening, it follows from the testimony of the defendants that he did not try to get out of the car or run away from them. Nurgametov explained that it was not far from the village, about five hundred meters, Nurgametov suggested that after a conversation with B., they would leave that and the victim had the opportunity to leave them if he wanted to.

Neither in the course of the preliminary investigation, nor in the court session was evidence of the forced detention of the victim on the river bank. The fact that the victim was very drunk and the defendants outnumbered him does not in itself constitute the objective aspect of the offense under



Art. 126 of the Criminal Code of the Russian Federation, since in order to qualify the actions under this article in the case, it must be established that the accused deliberately used these circumstances in order to capture, move and hold the person.

As follows from the explanations of all the defendants, no one took any active actions aimed at keeping the victim on the river bank, B. did not restrict his freedom of movement, did not restrain him by force, and there was no talk of keeping the victim on place or preventing him from leaving.

Thus, analyzing the evidence gathered in the case, the court came to the correct conclusion that the actions of Nurgametov, Medvedev and Vasilchenko did not contain the corpus delicti provided for in Part 2 of Art. 126 of the Criminal Code of the Russian Federation and reasonably in this part issued an acquittal.

### **Results.**

The subjective side of kidnapping is characterized by direct intent. According to the above decision of the Presidium of the Supreme Court of the Russian Federation, the removal of a person during an abduction should pursue the goal of his subsequent detention in another place. The motives for subsequent retention, within the meaning of the law, including the commission of another crime against the victim in the retention process, do not affect qualification.

However, not in Art. 126 of the Criminal Code of the Russian Federation, neither the Decree of the Presidium of the Supreme Court of the Russian Federation clarified whether the goal should be realized in the future, or for qualification under Art. 126 of the Criminal Code of the Russian Federation, only having a target at the time of the victim's capture is sufficient. This inaccuracy entails an ambiguous interpretation in judicial practice.

The Moscow District Court of Kazan in a sentence No. 1-191 / 2017 of June 2, 2017 in the case No. 1-191 / 2017 established that Teplov Z.S., Mikhailov D.D., Kurtvelieva A.A. and Kapitonov V.I. extorted.

Teplov Z.S., Mikhailov D.D., Kurtvelieva A.A. and Kapitonov V.I. out of mercenary motives - intending to take possession of the money of the victim U. in the amount of 50,000 rubles, by extorting

them, entered into a preliminary criminal conspiracy, distributing roles in the crime in advance. According to the designated, Kurtvelieva A.A. role in the criminal plan, she met with the victim U. at the stop of public transport "Energy University" and went with him, supposedly for a walk, in the direction of the park "Kirlay". In turn, her accomplices had to drive a car under the control of V.I. Kapitonov, who, according to the criminal plan, carried out the movement of the group in his Opel Corsa car drove up to them, put her and the victim in the car, and drove off in the direction of the river cemetery, to demand under threat of violence from U. 50 000 rubles.

Kurtvelieva A.A. met with the victim U. and, in accordance with the role assigned to her, went with him towards the "Kirlay" park. Teplov Z.S., Mikhailov D.D., Kapitonov V.I., having driven up on the latter's car, put U. in it, placing him in the rear passenger seat. Kurtvelieva A.A. also got into the car, after which they drove towards the river cemetery, where Teplov Z.S. and Mikhailov D.D., they took the victim out of the car and took him aside, and A. Kurtvelieva and Kapitonov V.I. left to wait for them in the car. Teplov Z.S. and Mikhailov D.D., intending to break the victim's will to resist and facilitate extortion, they beat the victim by inflicting several blows with his hands and feet on different parts of the body — that is, using direct violence and threatening to further beat him, demanded that he give them 50,000 rubles. U., who was abused and fearing the continuation of the beating, was forced to agree to the demands of the extortionists, informing them that he allegedly had a bank loan of 50,000 rubles approved, and the next day after receiving the money he would transfer them to the extortionists.

Beating the victim, that is, using violence against him, Teplov Z.S. and Mikhailov D.D. acted independently, out of collusion with the other partners - V. Kapitonov and Kurtvelieva A.A., who did not know that, in addition to the previously agreed threats of violence, Teplov Z.S. and Mikhailov D.D. show direct violence to the victim.

Having received the consent of W. about the transfer of money to them, Teplov Z.S. and Mikhailov D.D. together with the victim returned to the car waiting for them, in which were Kapitonov V.I. and Kurtvelieva A.A., and having brought the victim to the house, they landed him.

Fearing further reprisal and not intending to fulfill the demands of the ransomware, that very evening, U. turned to law enforcement agencies with a statement about what had happened. Subsequently, all members of the criminal group were detained by the police.

The preliminary investigation of all the defendants was charged, including the commission of a crime under paragraphs "a", "c", "h" of Part 2 of Art. 126 of the Criminal Code of the Russian Federation - as a kidnapping committed by a group of persons by prior conspiracy, with the use of violence dangerous to health, out of mercenary motives.

Having examined the evidence presented by the prosecution, after hearing the participants in the trial, the court does not find signs of this *corpus delicti* in the actions of the defendants. As follows from the materials of the criminal case, the evidence investigated, the actions of the defendants in relocating U. were covered by the objective side of extorting money. The defendants did not have intent on abducting U., as well as on unlawful deprivation of his freedom.

The circumstances of the criminal case indicate that the intent of the defendants was aimed solely at the illegal demand for the transfer of money by extortion. None of the defendants, either during the preliminary investigation or in the court session, explained that they, in order to extort money, had agreed in advance on the capture of U. and his subsequent transfer to another place for subsequent retention.

The evidence refuting the foregoing, the prosecution did not submit to the court. In view of the foregoing, the court considers that the episode presented by the defendants Z. Teplov, D.D. Mikhailov, A.A. Kurtvelieva, V.I. Kapitonovu the charges under paragraphs "a, c, h" of part 2 of article 126 of the Criminal Code of the Russian Federation have not been confirmed and in this connection the court finds that it is necessary to order an acquittal on this episode because of the absence of *corpus delicti* in their actions under paragraphs "a, b, h" of Part 2 of Article 126 of the Criminal Code of the Russian Federation.

In the Appeal ruling No. 22-3742 / 2016 of May 20, 2016 in case No. 22-3742 / 2016, the Judicial Collegium for Criminal Cases examined in open court a criminal case on appeals by lawyers A.

Stasyuk. in defense of the convict Androsenko V.A., lawyer Ponomarev A.V. in defense of the convict Maltsev C., lawyer Varekhin V.M. in defense of the convict Zudov M.N., lawyer Strunova N.V. in defense of the convict Vetoshkina S.A., lawyer Lokshin Yu.V. in defense of the convicted Davydova A.A. to the verdict of the Dzerzhinsky District Court of Nizhny Tagil, Sverdlovsk Region dated February 2, 2016, which established that Zudov M.N., Davydov A.A., Vetoshkin S.A., Maltsev S.I., Androsenko V.A. after beating A. near a cafe, they entered into a conspiracy to subsequently beat the victim in order to find out from him the identity of A., as well as to avenge Androsenko, who claimed that A. and A. beat him, i.e. the intent of the convicts was not aimed at keeping A. in another place, but at beating him in a more secluded place.

The subject of a crime is a physical sane person who has reached the age of 14 years.

In addition, as regards the subject of “kidnapping”, two special criteria should be singled out here that exclude the possibility of bringing him to criminal liability:

- 1) Objective criterion - the presence of kinship or legal ties with the kidnapped, allowing to identify a specific person as a close relative;
- 2) A subjective criterion, characterized by the absence of the guilty of various base motives (demand for ransom, physical or mental pressure on the minor, benefits, etc.).

## **CONCLUSIONS.**

Based on a generalization and analysis of the judicial practice of the Supreme Court of the Russian Federation and the Sverdlovsk Regional Court of the Russian Federation, we can make an unambiguous conclusion that criminal law means abduction means unlawful intentional acts involving the secret or open taking (capture) of a living person, moving from his permanent place or temporary residence with subsequent retention against his will in another place.

When abducting a person, the victim is deprived of the opportunity to determine his place of residence of his own free will.

If the violent seizure and transfer of the victim in space was carried out with the aim of committing another violent crime, then the offense is covered by a sign of violence - a way of committing another crime, and according to the rules of competition, part and the whole does not require additional qualification under Art. 126 of the Criminal Code of the Russian Federation.

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**RECIBIDO:** 1 de agosto del 2019.

**APROBADO:** 16 de agosto del 2019.