

УДК 343.21/.22 (574)

**НЕКОТОРЫЕ ВОПРОСЫ СУБЪЕКТА ПОДМЕНЫ РЕБЕНКА
ПО УГОЛОВНОМУ ЗАКОНОДАТЕЛЬСТВУ РЕСПУБЛИКИ КАЗАХСТАН**

Б.Т. Абулкаирова

Рассматривается понятие субъекта подмены ребенка, предусмотренного ст. 136 Уголовного кодекса Республики Казахстан. Субъекты данного противоправного деяния своими неправомерными действиями посягают на права ребенка жить и воспитываться в семье, а также нормально развиваться и расти. Целью данной статьи является всестороннее исследование некоторых спорных преступлений. Субъектом подмены ребенка может быть признан только человек, который, совершая какое-либо преступное деяние, способен понимать значение и смысл наступивших или могущих наступить вредных последствий, осознает характер своего деяния и может руководить им или в силу психического расстройства не в полной мере может осознавать характер своего преступного деяния и руководить им. Автор особо отмечает, что подмена ребенка совершается в основном должностными лицами, в частности медицинскими работниками. Виновными в подмене ребенка могут быть родители, опекуны, усыновители, а также представители администрации учреждения образования или здравоохранения.

Ключевые слова: субъект; ребенок; преступление; подмена ребенка; Республика Казахстан; родильный дом.

**КАЗАКСТАН РЕСПУБЛИКАСЫНЫН КЫЛМЫШ-ЖАЗА МЫЙЗАМДАРЫ БОЮНЧА
«БАЛА АЛМАШТЫРУУ» СУБЪЕКТИНИН АЙРЫМ МАСЕЛЕЛЕРИ**

Б.Т. Абулкаирова

Бул мақалада Қазақстан Республикасының Қылмыш-жаза кодексінің 136-беренесінде қаралған баланы алмаштыруу субъекті түшүнүгі қаралат. Бул уқуққа қаршы жосұндардың субъектітері өзүнүн уқуққа жат аракеттері менен баланың үй-бүлөде жашоо жана тарбиялануу уқуғуна, ошондой эле қадимкидей өнүгүүге жана өсе берішіне қол салат. Бул берененің мақсаты бала алмаштырып жатқан субъектінің айрым талаш маселелерін ар тараптуу изилдөө болуп саналат. Қандайдыр-бір қылмыш жосұндарын жасап жатып, аның маанисін жана терс кесепеттерін, өзүнүн жасап жатқан аракетин түшүнген жана өзүн башқара алған же психологиялық жақтан жабырқағандан улам өзүнүн қылмыштық жосұнун толук түшүнө албаған жана өзүн башқара албаған адам ғана баланы алмаштырып жатқан субъекті қатары эсептелет. Автор баланың алмашышы қызмет адамдары, негизінен медицина қызметкерлері тарабынан жүргүзілгендүгүн өзгөче белгілейт. Ата-энелер, қамқорчулар, асырап алуучулар, ошондой эле билим берүүчү мекеменің же саламаттық сақтоонун администрациясының өкүлдерү баланы алмаштырууға күнөөлүү болушу мүмкүн.

Түйүндүү сөздөр: субъект; бала; қылмыш; бала алмаштыруу; Қазақстан Республикасы; төрөт үйү

**SOME QUESTIONS OF THE «CHILD SUBSTITUTION'S» SUBJECT
BY THE CRIMINAL LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN**

B.T. Abulkairova

This article discusses the concept of the subject of child substitution, provided for in Article 136 of the Criminal Code of the Republic of Kazakhstan. The subjects of this illegal act by their unlawful actions infringe on the rights of the child to live and be brought up in the family, as well as to develop and grow normally. The purpose of this article is a comprehensive study of some controversial crimes, only a person who, committing a criminal act is able to understand the meaning and meaning of the harmful consequences that have come up or could come in, is aware of the nature of his act and can lead it, or due to mental illness fully aware of the nature of his criminal act or lead it. The author emphasizes that the substitution of the child is carried out mainly by officials, in particular medical personnel. Parents,

guardians, adoptive parents, as well as representatives of the administration of an educational or health institution may be guilty of child substitution.

Keywords: subject; child; crime; child substitution; Republic of Kazakhstan; maternity hospital.

Under the child substitution should be understood fraudulent acts committed unnoticed, secretly or fraudulently, as a result of which one child is replaced by another. The basis of criminal liability is the commission of an act containing all the signs of a crime, which are provided for by criminal law. One of the mandatory elements of a crime is the subject of the crime, which has the appropriate characteristics. In domestic criminal law, the subject of a crime is a person (individual) who committed a criminal act [1].

M.S. Rakhimov believes that the subject of a crime is one of the necessary elements of a crime. "The subject of a crime is not an abstract legal concept. The subject of a crime is a person who lives and carries out criminal acts in the society of other people" [2].

The subject of substitution of a child can only be a sane person [3, p. 78]. Insanity is established retrospectively and correlates with the time the socially dangerous act was committed. The subsequent recovery of a person is not a reason for bringing him to criminal liability [4, p. 78].

One of the main conditions to attract a person to criminal liability is to reach a certain age. According to the criminal law of the Republic of Kazakhstan young children may not be the subjects of a criminal offense.

As a result of this socially dangerous act, enormous moral harm is inflicted on the child and parents. The child is illegally separated from his parents, thereby depriving him of the right to live and be raised with his family, sisters, brothers and other relatives. Article 136 «Child Substitution» of the Criminal Code of the Republic of Kazakhstan provides for liability for this crime. It is carried out by replacing one child, mainly one infant with another. The victims are parents and a newborn child, mainly without pronounced external features. Mothers, in turn, after the birth of a child in some cases, are in a state of psych emotional stress, due to which they cannot remember the distinctive features of their child. In this regard, a criminal offense is usually committed during the first days after the birth of the baby. Making substitution of children encroaches on social relations related to the interests of the family. The right to joint stay of the infant with his parents, guaranteed at the international and domestic levels is violated [5].

Among the mandatory elements of criminal offenses against the family and minors is the subject of the crime. The subject of a crime is a person who is able to bear criminal responsibility in cases of

committing a deliberate or reckless socially dangerous act provided for by criminal law. Only sane individuals who has reached the established age [1] are subject to criminal liability. The substitution of the child is mainly committed intentionally. When replacing a child, a person who has reached 16 years of age may be prosecuted. Usually, the offender's age for substituting a child is established on the basis of an appropriate document (passport, birth certificate, etc.). If such a document is missing, other documents are used up to the forensic examination. In this case, the date of birth of the perpetrator should be considered the last day of the year, called experts. When sentencing, the court should proceed from the minimum age of the person alleged by the examination.

Along with the establishment of the age required for the recognition of the person subject to the offense, it is required to establish a sign of sanity, which in criminal law is understood as the state of mind of an individual at the time of committing a crime, affecting the criminal behavior of a person [6, p. 129].

The subject of child substitution, according to the legislation of most foreign countries, as in Kazakhstan, is the general subject of the crime, that is, the physical sane person who committed the crime at an age from which criminal liability may occur). The only exception is the Criminal Code of the Republic of Azerbaijan, where the subject is a special subject, that is, a person who has the responsibility to protect the child and take care of him.

When the subject of the substitution is an official (for example, the head of the department of the maternity hospital), then his actions are qualified according to the aggregate of Art. 136 of the Criminal Code of the Republic of Kazakhstan and under the article on official criminal offenses.

The subject of child substitution can be any sane person who has reached the age of sixteen. In criminal law, the concept of "sanity" is used in a special sense - as an antithesis to the concept of "insanity". A person who has committed socially dangerous criminal offenses against family and minors in a state of insanity may be ordered by the court to enforce compulsory medical measures provided for by the criminal law of the country. The concept of insanity, i.e. the determination of the signs in the presence of which the person who committed the crime is not able to bear criminal responsibility for his mental state is also not the same in different states. The subject of a crime is a physical person who has reached a certain age and

has committed a socially dangerous act guilty under the criminal law. In practice, these are almost always employees of the maternity hospital, orphanage, etc., or a person assisting in childbirth or caring for a newborn outside a medical institution [7, p. 109].

The onset of criminal responsibility is possible only for those who are aware of the actual nature of his actions (inaction) and understand their social value [8, p. 180]. The detection of substitution and the return of the child to a legal family does not exclude the responsibility of those responsible under Art. 136 of the Criminal Code of the Republic of Kazakhstan.

Juvenile persons, who due to their age are not able to fully realize the danger of their actions (inaction) or lead them, can not be recognized as subjects of crime and are not criminally responsible for their socially dangerous acts [9, p. 186]. And the instigator of the substitution of the child, prompting the executor to substitute the child for material reward (for example, the mother of another child), is responsible for the incitement, i.e. under Art. 29 and 136 of the Criminal Code of the Republic of Kazakhstan.

If the person who carried out the child substitution then undertakes extortion from the parents, without whose knowledge and consent the substitution has been carried out, these actions are qualified according to Articles 136 and 194 of the Criminal Code of the Republic of Kazakhstan.

Subjects of child substitution can be parents, medical personnel of maternity hospitals and children's institutions, as well as other interested parties - that is, both private individuals and officials who use their official powers, although the disposition of the article itself does not mention this [10]. In the role of a special subject of a crime, medical workers are most often conceivable [11].

E.V. Denisova believes that, depending on who is the subject, the substitution of the child's possible both in hospitals and medical facilities, as well as outside (in the case of abandonment of the child in the street or in the park unattended), which is very difficult. Most often, the subject of the crime are medical workers of a maternity hospital [12]

As practice shows, the child substitution is carried out mainly by medical workers, more precisely by obstetrician-gynecologists and other persons. Therefore, in Part 2 of Art. 136 of the Criminal Code of the Republic of Kazakhstan, it is necessary to add the qualifying composition "... using the official position". This will help prevent the substitution of the child committed by medical workers. For example, on August 21, 2017, doctors at the perinatal center No. 4 of Shymkent replaced babies. Doctors gave the mother the body of someone else's child with the wrong sex. For this they were fired [13]. We believe it is necessary

to toughen the punishment for such an unlawful act. As correctly noted by G.M. Minkovsky, encroachments on the rights of children on the part of persons with special educational responsibilities, as it were, double the violation of these rights [14, p. 115].

For example, the State Duma of the Russian Federation began work on a bill that would introduce criminal liability for nurses of maternity hospitals, who inadvertently replaced children [15]. In this regard, apparently, it will be correct too, the legislative bodies of the Republic of Kazakhstan to provide a norm providing for responsibility for the substitution of a child.

References

1. Kurs sovetskogo ugovnogo prava (Chast' Obshhaja). T. 1. LGU, 1968. 355 p.
2. *Rahimov M.S.* Sub#ekt prestuplenija trgovli ljud'mi. Institut gosudarstva i prava AN RT. URL: <https://cyberleninka.ru/article/n/subekt-prestupleniya-torgovli-lyudmi> (data obrashhenija: 20.09.2019).
3. *Azybaev A.N.* Kilmystyk kыkыk: Okulyk. Almaty: Zheti zharry, 1998. 288 b.
4. *Azarenko G.V.* Jevoljucija ponjatija nevmenjaemosti // Gosudarstvo i pravo. 1993. № 2. S. 69.
5. URL: <https://pravonarushenie.com/prava-chesti-dostoinstvo/semya-deti/podmena-rebenka-i-otvetstvennost-po-uk-rf> (data obrashhenija: 21.10.2019).
6. *Dajshutov M.M., Dineka V.I.* JuRIDIChESKIE NAUKI: Priznaki sub#ekta prestuplenija i ego pravovye kriterii. M., 129 s.
7. Ugolovnoe pravo RK (Osobennaja chast') / pod. red. d. ju. n., prof. I.I. Rogova i k. ju. n. S.M. Rahmetova. Almaty: TOO «Baspa», 2001. 536 s.
8. *D'jakov S.V., Ignat'ev A.A., Luneev V.V., Nikulin S.I.* Ugolovnoe pravo. M.: Izdatel'skaja gruppа NORMA INFRA-M., 1999. 416 s.
9. *Naumov A.V.* Rossijskoe ugolovnoe pravo. Obshhaja chast'. Kurs lekci. M.: Izdatel'stvo BEK, 1996. 560 s.
10. *Jerdelevskij A.M.* Kompensacija moral'nogo vreda: analiz i kommentarij zakonodatel'stva i sudebnoj praktiki. 3-e izd., ispr. i dop. M.: Volters Kluver, 2004.
11. *Sirik M.S.* Kratkaja harakteristika normy ob ugovnoju otvetstvennosti za podmenu rebenka. URL: <https://elibrary.ru/item.asp?id=24376715> (data obrashhenija: 19.10.2019).
12. *Denisova E.V.* Ugolovno-pravovaja harakteristika podmeny rebenka v Rossijskoj Federacii. URL: <https://elibrary.ru/item.asp?id=29664397> (data obrashhenija: 19.10.2019).

13. Podmena mertvogo mladenca v Shymkente. URL: <https://mdjournal.info/2017/09/21> (data obrashhenija: 15.10. 2019).
14. Min'kovskic G.M. Otvetstvennost' roditelej i drugih lic za nenadlezhashhee otnoshenie k detjam // Ohrana prav nesovershennoletnih. M., 1983.
15. *Lysenko Ja.* Chuzhie deti: akusherok posadjat za podmenu. URL: <https://www.gazeta.ru/social/2018/02/28/11666239.shtml> (data obrashhenija: 15.10. 2019).