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The Offence of Abduction in Canon Law and Kidnapping in Polish Penal Law—Selected Issues

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Abstract: The article examines the issue of abduction and kidnapping in the modern world. This issue is analyzed in two legal systems: the canon law of the Latin Rite Catholic Church and Polish penal law. The choice of these two systems aims to highlight the consistency in understanding and penalizing the offence of abduction (kidnapping). A mixed-method approach, incorporating both analysis and synthesis, is employed in this study. The analysis is comprehensive and multifaceted, while the synthesis aids in organizing and integrating the findings on this topic.

Keywords: kidnapping; abduction; family; children; church penal law; Polish penal law

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1. Introduction

Man seems to possess an insatiable desire for power, a notion encapsulated by an old saying frequently used by Thomas Hobbes, "man is a wolf to man," originally appearing in its Latin form lupus est homo homini, non homo in the play *Asinaria* by Plautus (Plaut 2003, p. 71). History abounds in examples of human cruelty and extreme measures that individuals take to achieve their goals. Kidnapping and abduction have existed for as long as humanity itself. Throughout history, people have employed various strategies for different purposes, all to serve their own interests.

The article aims to examine two legal systems that function in Poland: the canon law of the Catholic Church and Polish penal law. It employs a mixed-method approach, incorporating both analysis and synthesis. The analysis is comprehensive and multifaceted, while the synthesis aids in organizing and integrating the findings on this topic.

2. The Offence of Abduction in Canon Law

The 1983 *Code of Canon Law* provides the following: Can. 1397, § 1. One who commits homicide, or who by force or by fraud abducts, imprisons, mutilates or gravely wounds a person, is to be punished, according to the gravity of the offence, with the penalties mentioned in Can. 1336, §§ 2–4. In the case of the homicide of one of those persons mentioned in Can. 1370, the offender is punished with the penalties prescribed there and also in § 3 of this canon. § 2. A person who actually procures an abortion incurs a latae sententiae excommunication. § 3. If offences dealt with in this canon are involved, in more serious cases the guilty cleric is to be dismissed from the clerical state (John Paul II 1983, Codex Iuris Canonici, Can. 1397).

The provisions in Book VI, Title VI of the 1983 *Code of Canon Law*, entitled "Offences Against Human Life, Dignity, and Freedom," protect the values that are of particular

importance to every human being, namely, life, good name, physical freedom, and bodily integrity. These values are briefly outlined by T. Pawluk, who asserts that Canon 1397 of the 1983 *Code of Canon Law* protects fundamental human rights: the right to life, freedom, and security. He rightly notes that offences against these human rights are typically prosecuted by the state, which is why canon penal law, when prescribing penalties for such offences, confines itself to strictly canonical sanctions (Pawluk 1990, p. 153). Given the focus of this article, we will concentrate on the aspect of physical freedom (Arent 2014, pp. 86–87).

On this issue, the Fathers of the Second Vatican Council teach: "Authentic freedom is an exceptional sign of the divine image within man. For God has willed that man remain under the control of his own decisions, so that he can seek his Creator spontaneously, and come freely to utter and blissful perfection through loyalty to Him. Hence, man's dignity demands that he act according to a knowing and free choice that is personally motivated and prompted from within, not under blind internal impulse nor by mere external pressure. Man achieves such dignity when, emancipating himself from all captivity to passion, he pursues his goal in a spontaneous choice of what is good, and procures for himself through effective and skillful action, apt helps to that end. Since man's freedom has been damaged by sin, only by the aid of God's grace can he bring such a relationship with God into full flower. Before the judgement-seat of God, each man must render an account of his own life, whether he has done good or evil" (Second Vatican Council 1965, no. 17). On the other hand, the Catechism of the Catholic Church cites St. Irenaeus' statement that man is rational and therefore like God; he is created with free will and is a master over his acts (Catechismus Catholicae Ecclesiae 1997, p. 411).

Drawing on the teachings of the Catholic Church, O. Arent defines freedom as the right to act or not to act, or in other words, the right to engage in voluntary actions. This right should be respected not only in the Catholic Church, but also recognized by state law and protected within the framework of the common good and public order.

The subject/actor in Can. 1397 is expressed by the pronoun qui (who), which refers to all acts prohibited under this canon. This implies that all offences enumerated in Can. 1397 may be committed by any individual who is criminally responsible under canon law. The direct object in all acts prohibited by Can. 1397 may be any living person born of a woman, irrespective of their health condition. Consequently, the victim may be a newborn capable of independent life outside the womb, an adult in full physical vigor, or a person who is disabled or elderly. It may be a person under parental authority or a person of legal age. The social status of the victim within the Catholic Church is also irrelevant. In other words, it does not matter whether the victim is a lay person, priest, or a member of religious orders. The victim may not even be baptized.

Can. 1397 penalizes three prohibited acts: homicide, deprivation of freedom, and mutilation. Each of them may involve abduction or detention. As for deprivation of liberty, it is committed by one who abducts or detains a person by force or deception. The criminal act in this case consists of taking away a person from the place where that person is voluntarily staying to another place against their will, or in the case of a minor against the will of those who have the lawful care or charge of that minor, for example, parents, grandparents, schoolteachers, or other legal guardians. Another form of deprivation of liberty specified in Can. 1397 is detention, which involves restricting a person's freedom to act within their place of residence, with no option to leave freely. It also includes detention of a person who has been abducted. A similar definition of detention is given by T. Pawluk, who states that detention consists of forcing a person to stay in their place of living, or in some other place where that person has come voluntarily. According to Pawluk, detention, like abduction, is intended to force someone to act in a certain way. For the existence of this offence, it does not matter what measures have been used to confine the victim, e.g., whether the victim has been tied up, chained to a wall, locked in a room, held under guard, or their clothes have been taken away. On the other hand, the imposition of a canonical penal sanction on a cleric, such as an injunction to remain in a specific place or territory, or a ban on staying in certain places, does not constitute the offence of detention. Unlawful

detention can occur not only through action but also through inaction, such as when the perpetrator fails to release the victim despite having an obligation to do so, like in the case of detaining an arrested person beyond the allowed period.

Deprivation of liberty by abducting and detaining a person requires that the perpetrator uses violence or deception. According to Pawluk, violence involves the use of physical force, while deceitful action is intended to deceive someone into behaving in accordance with the perpetrator's expectations. To commit the offence of unlawful deprivation of liberty through abduction or detention, the perpetrator must demonstrate a clear intent, typically evidenced by the use of physical force or deception. The ecclesiastical legislator provides penal sanctions for offences specified in Can. 1397, including the offence of depriving a person of their liberty. An ecclesiastical judge is legally obligated to punish the perpetrator with orders, prohibitions, or deprivations according to the severity of the offence, as specified in Can. 1336 of the 1983 *Code of Canon Law*. The law even provides for dismissal from the clerical state (Arent 2014, pp. 90–91).

It should be noted that the offences listed in Can. 1397 fall into the category of mixed crimes, i.e., they are penalized both under canon law and state law. Since they are prosecuted ex officio by the state, the ecclesiastical legislator seems to be exercising far-reaching restraint in penalizing them, which follows from the principle derived from natural law stating that one cannot be punished twice for the same offence. If the offender has already been sufficiently punished by a state court or is to be punished by a state judicial authority, the ecclesiastical judge may refrain from imposing any penalty or may impose a lesser canonical penalty. It is worth pointing out that all offences specified in Can. 1397 have a 7-year statute of limitations from the day the offence is committed (Can. 1362 §1 2° Code of Canon Law).

3. Kidnapping in Polish Penal Law

Art. 211 of the Polish Penal Code provides that anyone who abducts or detains a minor under the age of 15, or a person who is helpless due to a mental or physical condition, against the will of the person appointed to take care of or supervise him or her, is liable to imprisonment from 3 months to 5 years (Sklep LEX 2024, Penal Code 1997, Art. 211).

This offence is classified under the category of offences against the family and guardianship. The primary objective of the legislator is to safeguard the proper functioning of the family, particularly concerning its function to provide care and education. It should be noted that the offence of kidnapping can impact the family in a broader context, beyond the parent–child relationship. While parents, who typically hold parental authority, are most often the custodians, some other person may also be responsible for providing care or supervision (Majchrzak 2017, p. 174).

Art. 211 of the Penal Code protects the institution of care and supervision over a minor or a helpless person. It protects the proper and undisturbed exercise of the right to take care of a given person (Mozgawa et al. 2024, Art. 211).

The right to provide care and supervision should be based on a specific legal title. This can be a statute, court ruling, or a contract. Some specific factual circumstances can also form the basis for exercising custody or supervision. An example of entrusting custody of a child that is not based on any legal regulation is leaving a child temporarily in the care of a grandmother, friend, or neighbour. In such cases, detaining or abducting the child without the consent of that person constitutes an offence under Art. 211 of the Polish Penal Code. One must agree that expanding the group of individuals appointed to provide care or supervision to include those with actual caregiving responsibilities is more beneficial for the protection of children or helpless persons. Moreover, the appointment to supervision may be based on the special competencies of authorized individuals, such as those who manage children's homes, or medical professionals and support staff in closed medical facilities. Art. 211 clearly indicates the person appointed to provide care or supervision. It is important to distinguish here between the person who is appointed to provide care and the person who actually provides care or supervision. The person with lawful care of a minor is

typically a parent with full parental authority. However, it may also be an adoptive parent, legal guardian, or someone providing foster care. Additionally, the person appointed to provide care includes not only those with legal custody but also those authorized to care for the minor, even if they are not currently providing that care for various reasons (Majchrzak 2017, pp. 175–76).

The perpetrator of the crime under Art. 211 of the Polish Penal Code may be anyone acting against the will of the person appointed to provide care or supervision. This is a common offence that may be committed by anyone. Therefore, we cannot accept the view that the perpetrator must have a specific motive for their action and, consequently, that the offence could be classified as quasi-individual. According to the majority of doctrine and case law, parents with full parental authority cannot commit this offence unless their authority has been revoked, suspended, or limited in accordance with the provisions of the Family and Guardianship Code. The fact that parents do not live together does not deprive any of them of parental authority until a court entrusts this authority to one parent only (Mozgawa et al. 2024, Art. 211).

An interesting aspect of this issue is raised by M. Mozgawa, M. Kulik, and A. Szczekala. They note that if one parent who has full parental authority abducts the child, i.e., changes their place of residence without the consent of the other parent and thus prevents the other parent from exercising their right to care for and supervise the child (violates their right to custody), their conduct constitutes an offence under Art. 211 of the Penal Code. Parents with full parental authority must make joint decisions regarding where a minor resides, and this location should be agreed upon by both parents. Therefore, a parent with full parental authority may commit the prohibited act of detaining a minor under Art. 211 of the Penal Code. Deciding where a child will stay, whether permanently or temporarily, such as going on holiday abroad with one parent, is an important matter that must be agreed upon by both parents with full parental authority (Majchrzak 2017, pp. 176–77).

A perpetrator's act involves removal or confinement of a minor under the age of 15, or of an individual who is helpless due to their mental or physical condition, without the consent of a person responsible for their care or supervision. It should be noted that both abduction and detention involve removal from custody and assuming authority over a child or a helpless person for some time, against the will of those who are designated to provide care or supervision. Therefore, the abducted or detained individual must be under such care or supervision. Providing care entails overseeing a minor's or helpless person's daily activities and performing tasks they cannot manage due to their age or disability. Supervision, on the other hand, primarily involves controlling the actions of the person under supervision. This may be a minor under 15 years of age or someone who is helpless due to their mental or physical condition (Kosonoga-Zygmunt 2024, p. 1075).

The age of a helpless person is not important; what matters is their mental and physical condition. Some literature suggests that even a temporary disruption of independent behaviour, such as that caused by a high fever, could classify a person as helpless. However, this view is too far-reaching. A helpless person is someone who is unable to manage everyday life without assistance from others. This includes individuals who are mentally impaired, paralyzed, or elderly. The behaviour of the perpetrator is described by two verbs: to abduct and to detain. To abduct means to kidnap, to take away, or simply remove a person who is in someone's care from their current place of residence to another one. Abduction involves depriving the authorized person of the possibility to exercise their care or supervision over someone. It does not have to be accomplished by violence or deception, but can also be the result of taking advantage of the absence or inattention of the authorized person. Abduction can also occur when a person under care or supervision is taken away with their own consent. The legislator assumes that a minor or helpless person cannot make decisions for themselves. It is also worth emphasizing that abduction does not necessarily mean that the abductor starts to exercise authority over the abductee, e.g., the abductee may be later abandoned or given to a third party who does not take care of them (Kosonoga-Zygmunt 2024, p. 1075; Mozgawa et al. 2024, Art. 211).

Detention, on the other hand, refers to a situation when the perpetrator compels or forces a person in their care to remain in their current place of residence against the will of those responsible for providing care or supervision. For example, this could involve preventing a minor, who is temporarily staying with their father, from returning to the mother's place if the mother has been granted permanent custody. Therefore, detention also occurs when a person initially stays in a place legally but is then unlawfully confined there without the ability to leave (Kosonoga-Zygmunt 2024, p. 1075; Mozgawa et al. 2024, Art. 211). An example would be when a child goes to a school camp under the supervision of a camp counsellor, but after the camp ends, the camp counsellor does not return the child to their parents. Detention may or may not involve abduction. While abduction involves only action, detention can result from either action or inaction. According to doctrine, abduction occurs when someone is forcibly moved to another location, where either the abductor assumes care over them or they are left without care. This does not necessarily require a geographical move, such as to another town or city. Abduction or detention of a person in someone's care is an offence only if it is committed without the consent of the person appointed to provide care or supervision. The consent of a person in someone's care is not relevant here. For the offence to be committed, it is also not necessary to violate the rights of the person under care. Moreover, the perpetrator's motives are also irrelevant here. They are important, though, when assessing social harmfulness of an act (Majchrzak 2017, p. 179).

The offence under Art. 211 of the Penal Code is a consequence-based offence where the person responsible for providing care or supervision is unable to fulfil their duty as a result of abduction or detention (Mozgawa et al. 2024, Art. 211).

It is characterized by both dolus directus and dolus evantualis (consequent deceit). The perpetrator must intend both that the person is in someone's care or supervision, and that the person is a minor under 15 or is helpless due to their physical or mental condition. Moreover, the perpetrator must intend to change the place of residence of the person under care or supervision and to act against the will of those responsible for providing care and supervision. If the perpetrator is unaware of any of these elements, their criminal liability for kidnapping or detention is excluded, as the Penal Code does not penalize unintentional behaviour of this nature. For example, if the perpetrator is mistaken about the characteristics of the person who is the subject of the action, whether this mistake is excusable or inexcusable, their act will not constitute an offence. Once again, it should be emphasized that the motives of the perpetrator are irrelevant to the existence of the offence. The intention to kidnap or detain, even if the perpetrator acted out of compassion or a desire to help, does not alter the classification of their act. The offence under Art. 211 of the Penal Code is committed even if the perpetrator abducted a minor under 15 years of age with the intention of providing them with a better education than the one available under the care of parents or legal guardians (Majchrzak 2017, p. 180).

The offence under Art. 211 of the Penal Code is punishable with imprisonment from 3 months to 5 years. As a rule, the court may conditionally discontinue criminal proceedings when the conditions provided for in Art. 66 § 1 and 2 of the Penal Code have been met, i.e., if the fault and social harmfulness of the act are not significant, if there are no doubts about the circumstances under which it was committed, and if the attitude of the offender who has not previously been penalized for an intentional offence, as well as his or her personal characteristics and way of life to date, provide reasonable grounds to assume that even if the proceedings are discontinued, he or she will observe the legal order, and particularly that he or she will not commit an offence.

The penalty for kidnapping may include a ban on holding certain posts or performing certain professions (Art. 41 §1). As mentioned earlier, kidnapping or detaining a person under someone's care or supervision is an offence only when it is committed without the consent of the person entrusted with care or supervision. Consent or lack of consent on the part of a person under someone's care is irrelevant here. Nevertheless, if the abducted person does not consent, it would satisfy the elements of the offence under Art. 189 of the

Penal Code. This would result in a simultaneous application of provisions, specifically Art. 211 and Art. 189 of the Penal Code. Similarly, a concurrence of provisions under Art. 211 and Art. 191 § 1 of the Penal Code can occur when kidnapping or detention involves the use of violence or unlawful threats against the person responsible for providing care or supervision, or against a person subject to care or supervision. Furthermore, a cumulative charge under Art. 211 and Art. 160 of the Penal Code, in conjunction with Art. 11 § 2 of the Penal Code, is also possible when kidnapping or detention exposes the victim to immediate danger of loss of life or serious bodily harm. The offence of kidnapping or detention is prosecuted ex officio (Majchrzak 2017, pp. 181–82; Kosonoga-Zygmunt 2024, pp. 1075–76).

4. Conclusions

The 1983 *Code of Canon Law* refers to the act of abduction (kidnapping) twice. The first instance relates to marriage, where a man abducts or at least detains a woman with a view of contracting a marriage with her (in the Polish translation of the *Code*, the word *uprowadzenie* is used) (John Paul II 1983, Codex Iuris Canonici, Can. 1089). The second instance (*porwanie* in the Polish translation of the *Code*) refers to a situation where the perpetrator abducts a person through the use of force or deceit (Latin: *vi aut fraude)* from a safe place to another location, violating their right to freedom (John Paul II 1983, Codex Iuris Canonici, Can. 1397 § 1). In this provision, the legislator does not specify the purpose of abduction or who may be its victim (a man or a woman; a minor or an adult), thereby extending the protection of human dignity and freedom. Can. 1397 refers to any abduction, whether carried out with the use of force (physical violence) or deceit, which involves actions intended to mislead the victim. It is possible that deceit could be employed for the purpose of sexual abuse, as mentioned in Can. 1398, though it may also be used for other purposes. In most cases, the abductee is held as a hostage to achieve political aims, extort money, secure the release of other hostages or prisoners, or carry out acts of terrorism. Nevertheless, every abduction violates the dignity and freedom of the human person and is subject to punishment (Kaleta 2022, pp. 329–30; Pighin 2021, pp. 490–91).

For the offence of abduction, a mandatory ferendae sententiae penalty is provided, as specified in Can. 1336 §§ 2–4, which allows the judge to tailor the penal sanctions according to the gravity of the offence. If the perpetrator is a cleric, he is subject to the penalty of dismissal from the clerical state (Can. 1397 § 3). If the perpetrator is a member of a religious institute, he is subject to dismissal from the religious institute (Can. 695). The same applies to members of secular institutes (Can. 729) and members of societies of apostolic life (Can. 746) (Kaleta 2022, pp. 329–30).

In Polish penal law, kidnapping or detention of a minor or a person who is helpless due to their mental or physical condition against the will of the person entrusted with care or supervision constitutes an offence under Art. 211 of the Penal Code, even if the abducted or detained person consents to it or even wishes it. The offence disrupts the proper development of the family. By increasing the statutory penalty from imprisonment for up to 3 years to imprisonment from 3 months to 5 years, the legislator clearly indicates that family and caregiving are important values that deserve protection under penal law. The legislator's intention was to demonstrate that the previous penalty for kidnapping or detention of a minor or a helpless person was inadequate given the level of social harm it inflicts, and it did not do justice to the function of penal law to protect values such as family, care, as well as the safety and health of minors and helpless persons.

It is noteworthy that the family is irreplaceable for the proper development of all its members. It is an institution that has a permanent and profound influence on children. The parental responsibility to care for their children derives from divine commandments and the inherent nature of marriage. This duty is also codified in law, which defines the rights and responsibilities of both mother and father, compelling each to fulfil their obligations properly.

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