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The evolution of penalization of abduction of minors in polish criminal law in the context of the amendment of article 211 cc

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Summary: On July 13, 2017, an amendment to the Penal Code entered into force, which aims, among other things, to tighten criminal liability for the crime of kidnapping minors. In such a state of affairs there is a need to assess these changes, but not only in the context of its righteousness, but above all in the context of the evolution of the penalisation of such offenses in Polish criminal law. This article therefore presents the differences in penalisation of these kinds of acts in various jurisdictions - namely, based on the Penal Code of 1932, the Penal Code of 1969 and the Penal Code of 1997.

Key words: criminal law, minor, abduction, care, supervision, amendment.

Ewolucja penalizacji uprowadzenia małoletnich w polskim prawie karnym w kontekście nowelizacji art. 211 KK

Streszczenie: 13 lipca 2017 r. weszła w życie nowelizacja Kodeksu karnego, która ma na celu między innymi zaostrzenie odpowiedzialności karnej za przestępstwo uprowadzenia małoletnich. W takim stanie rzeczy istnieje potrzeba oceny tych zmian, ale nie tylko w kontekście jej słuszności, lecz przede wszystkim w kontekście ewolucji penalizacji tego typu przestępstw w polskim prawie karnym. W niniejszym artykule zostały zatem przedstawione różnice w penalizacji tego rodzaju czynów w różnych stanach prawnych – mianowicie w oparciu o Kodeks karny z 1932 r., Kodeks karny z 1969 r. oraz Kodeks karny z 1997 r.

Słowa kluczowe: prawo karne, małoletni, uprowadzenie, opieka, nadzór, nowelizacja.

1. Introduction

In the science of law, the problem of criminal responsibility for the crime of abducting minors has been addressed so far, but it is worth re-examining this responsibility in the context of various legal situations. In the 20th century, three Criminal

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Codes were passed in Poland, which regulated the penalization of the crime in different ways. It seems that in the moment when the amendment of the Criminal Code was introduced by the Act of 23 March 2017 amending the Act – Criminal Code, the Act on Juvenile Proceedings and the Act - Code of Criminal Procedure (Journal of Laws of 2017, item 773), the analysis takes on importance. In this context, it can be assessed whether this amendment significantly deviates from earlier regulations - especially in relation to criminal liability for crimes of abduction provided for under the Criminal Codes in 1932² and 1969³ respectively.

2. Concepts of care and supervision

The adoption of this subject requires, in addition to other subsequent issues, approximation of the concepts of care and supervision. Explanation of these terms is extremely important, because the legislator, regardless of their legal status, used them to criminalize the abduction of minors among others. In order to determine the meaning of these concepts, please refer to the Family and Guardianship Code⁴. It is worth pointing out, however, that according to some representatives of the doctrine, these concepts in criminal law do not apply only to institutions resulting from family law⁵.

Care and the right to exercise it stems primarily from the parental authority of the child's biological parents. According to art. 95 § 1 of Family and Guardianship Code (FGC) parental authority includes, in particular, the obligation and the right of parents to exercise custody over the person and the property of a child and to raise a child, respecting their dignity and rights. The same applies to the relationship between the adopter and the adopted person, where, in accordance with art. 121 § 1 FGC the same relationship arises as between parents and children. Apart from these cases, the obligation of care may also arise on the basis of a court decision or contract⁶.

Supervision, unlike care, consists in allowing or not allowing a mentee to perform certain acts and may arise from a legal provision, court decision or contract. Supervision may result from, for example, being a minor in an organization or institution appointed for vocational training or from another institution providing partial custody of children, and in connection with placement of a minor in a foster family, a family orphanage, institutional foster care, entrusting the mentee temporarily to spouses or a person who does not fulfill the conditions for foster families in the scope of necessary training specified in the provisions on family support and foster care system, or in relation to ordering the placement of a minor in a nursing and care institution or in a rehabilitation facility⁷.

² Ordinance of the President of the Republic of July 11, 1932 - Criminal Code (Journal of Laws of 1932 No. 60, item 571, as amended).

³ The Act of 19 April 1969 - Criminal Code (Journal of Laws of 1969 No. 13, item 94, as amended).

⁴ The Act of February 25, 1964 - the Family and Guardianship Code (Journal of Laws of 2017, item 682) – hereinafter referred to as FGC.

⁵ K. Buczkowski, K. Drapała, *Porwania rodzicielskie - analiza umorzeń i odmów wszczęcia postępowania w sprawach o przestępstwo z art. 211 k.k. [Parental abductions - analysis of cancellations and refusals to initiate proceedings in cases concerning offenses under Art. 211 CC]*, „Pr. w Dział.” 2014, vol. 18, p. 108-109.

⁶ Ibidem.

⁷ Compare art. 109 § 2 points 4 and 5 of FGC.

3. The crime of abduction of minors and the amendment to art. 211 CC

In the Criminal Code of 1932 in art. 199 the legislator provided for criminal liability for anyone who, against the will of a person having the right to care or supervision, abducted or detained an underage under 17 or a person in custody or supervision due to abnormality or unconsciousness, which was a basis to ruling a prison sentence of up to 5 years. This provision was included in the chapter entitled: Crimes against care and supervision. In the Criminal Code of 1969, the offense of abducting minors was regulated in art. 188, which stipulated that whoever, against the will of the person called to care or supervision, abducted or detained a minor or a person, helpless due to their psychological or physical condition, was subject to imprisonment from 6 months to 5 years. This provision was included in the chapter titled: Crimes against family, care and youth. In the current Criminal Code⁸, the offense of abducting a minor is regulated in art. 211, which stipulates that, whoever, against the will of the person appointed to care or supervision, abducts or retains a minor under 15 years of age or a person helpless due to their mental or physical condition, is subject to the penalty of deprivation of liberty for up to 3 years.

Before assessing the criminal liability for the offense envisaged in the above-mentioned legal acts, it is necessary first to explain the basic concepts (phrases) contained in the presented regulations, which undoubtedly differ in their wording from each other. It should be pointed out here that in the Criminal Code of 1932, the legislator in art. 199 uses the term “underage”, where in later codes the legislator already used the term “minor”. If we were to evaluate these concepts based on the current legal status, we could come to completely different conclusions. Therefore, the assessment of the meaning of the term “underage” should first be made on the basis of the legal status existing at the time of application of the Criminal Code of 1932. It is worth noting that in the given code the legislator operated with this concept not only in art. 199, but in particular in art. 69, where he indicated who was not a subject to punishment⁹. This provision, in turn, indicates the age limits that allowed to determine the concept of “underage”. Such were considered persons who were under the age of seventeen. In this state of affairs, it can be assumed that the phrase “underage below 17 years of age” used in art. 199 of the Criminal Code of 1932, partly concerning the age limit, is deprived of a normative character. On the other hand, the term “minor” included in subsequent criminal codes, since none of them defined it, falls within the definition of a minor presented in the Civil Code¹⁰. Minors, in connection with art. 10 § 1 of the Criminal Code, was a person under the age of 18. The exceptions were and are women who married before the age of eighteen and are at least sixteen years old¹¹. It should be noted, however, that the Criminal Code of 1969 in art. 188

⁸ The Act of June 6, 1997 - Criminal Code (Journal of Laws of 2016, item 1137, as amended) - hereinafter referred to as CC.

⁹ Article 69 § 1 of the Criminal Code of 1932 provided that: A subject to a punishment cannot be: a) a minor who committed a criminal offense under age of 13; b) a juvenile, who is over age of 13 and under age of 17, committed such an act without discernment, i.e. not having achieved intellectual and moral development to such an extent that he could recognize the meaning of the deed and guide his conduct.

¹⁰ The Act of 23 April 1964 - Civil Code (Journal of Laws of 2017, item 459, as amended).

¹¹ Art. 10 § 2 of Civil Code in conjunction with art. 10 § 1 of FGC.

did not provide for the age limit of a minor, and thus the civilian definition was binding. However, in the current Criminal Code, the legislator has already introduced age limits for minors, covering only those under the age of fifteen. Another inaccuracy between the regulation of abduction crimes under the Criminal Code of 1932 and the following codes is the imposition of a prison sentence. Both in the Criminal Code of 1969 and of 1997, the legislator has not envisaged a prison sentence in a literal sense. In making, however, the analysis of the relevant provisions, we must conclude that the prison sentence is in principle identical to the concept of prison sentence provided for in the 1969 and 1997 codes¹². In the remaining scope, these regulations, in addition to the anticipated limits of criminal liability, basically do not differ.

In view of the above, it should be recognized that the arrangements for the crime of abduction of minors presented in science take effect regarding both previous and current regulations. The subject of protection of the art. 211 CC is the undisturbed exercise of the right of care over a particular person. In addition, art. 211 CC is intended to prevent the negative effects of international illegal abduction or detention and is a manifestation of the implementation of obligations under the Convention on the civil aspects of international child abduction prepared at The Hague on October 25, 1980 (Journal of Laws of 1995 No. 108, item 528). According to art. 3 of this Convention, the abduction or detention of a child is unlawful if there has been a breach of the right to custody granted by the legislation of the country where the child was habitually resident immediately before the abduction or detention, and in case when at the time of the abduction or detention that right was effectively enforced. Finally, the indicated provision allows to protect the right of the parent and the child to mutual contact¹³. In other studies it is indicated that the subject of protection in connection with art. 211 CC is the institution of care or supervision, and thus the good of the person who carries out this care or supervision. This means that it is not necessary to violate the good of the person being looked after to make the offense¹⁴. The crime of abduction is a common crime, which means that the minor's parents may also be the subject of the abduction. Already during the validity of the Criminal Code of 1969, it was assumed that the offense of abducting a minor could also be committed by his parents if their parental authority was withdrawn, suspended or limited¹⁵. This thesis remains valid until today. Therefore, in a situation where both parents have full parental authority, they cannot be subject to criminal liability for the crime currently provided for in Article 211 CC¹⁶. This is also not affected by the fact that parents may live separately and one of the parents may perform temporary care in a situation where the minor's habitual residence is with the

¹² Compare art. 39 § 1 of the Criminal Code of 1932, art. 30 and art. 32 § 1 of the Criminal Code of 1969 and art. 32 and art. 37 of CC.

¹³ V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz [The Criminal Code. Comment]*, Lex 2017 – commentary to the art. 211 of CC.

¹⁴ A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117-277 k.k. [The Criminal Code. Particular part. Volume II. Commentary to art. 117-277 of CC]*, 4th Ed., Lex 2017 – commentary to the art. 211 of CC.

¹⁵ Resolution of the Supreme Court of November 21, 1979, VI KZP 15/79.

¹⁶ Order of the Supreme Court of 18 December 1992, I KZP 40/92.

other parent¹⁷. It is worth noting that already during the validity period of art. 199 of the Criminal Code of 1932, it was assumed that the subject of the crime of abduction of minors may be a spouse who was not deprived of parental authority, but in the case of annulment of marriage the execution of parental authority was entrusted to the other spouse¹⁸. Offense under art. 211 CC is causative, where the driving force consists, among other things, in the fact that a minor is abducted under the age of fifteen, against the will of its guardian¹⁹. The crime of abduction is a causal crime, and the consequence of its commission is depriving a person called to care or supervision of exercising his right in relation to a minor under fifteen²⁰. It should be emphasized, however, that the perpetrator's entry into the sphere of the guardian's rights consists in depriving him (impeding) performing factual acts against the minor, not legal ones²¹.

Returning to the criminal liability of parents for the offense, regardless of the quite clear law and doctrine, the problem of so-called parental kidnappings is raised²². It seems, however, that until there is a clear reaction of the legislator, the current position should be accepted as binding, i.e. assuming that parents with full parental authority are not subject to criminal liability under art. 211 CC.

The abduction of minors, as previously indicated, in various legal states was subject to different responsibilities. In the Criminal Code of 1932, the lawmaker provided for imprisonment of up to five years for its commission, while it must be remembered that its minimum duration was six months²³. The same penal responsibility was provided for by the Criminal Code of 1969. In the current Criminal Code, by the date of the amendment coming into force on 23 March 2017, the legislator envisaged the penalty for committing the offense specified in art. 211 CC of up to three years of imprisonment - the minimum risk was one month²⁴. This means that the adoption of the Criminal Code of 1997 was associated with the mitigation of criminal liability for the offense. Unfortunately, in the explanatory memorandum to the draft of the act there were no indicated reasons for such action. Therefore, it is difficult to determine whether the legislator wanted in this way to reduce the importance of protecting goods covered by art. 211 CC or whether he assumed that the punishment for committing the offense specified in this provision is too harsh.

Evaluation of existing regulations is worth making in the context of the amendment to art. 211 CC effective from July 13, 2017. From that moment, art. 211 CC applies as follows: Whoever, against the will of the person appointed for care or supervision, abducts or retains a minor under 15 or a person who is helpless due to the

¹⁷ A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117-277 k.k. [The Penal Code. Particular Part. Volume II. Commentary to art. 117-277 CC]*, 4th ed., Lex 2017 – komentarz do art. 211 k.k. [commentary to art. 211 CC].

¹⁸ Resolution of the Supreme Court of July 21, 1960, VI KO 14/60.

¹⁹ M. Mozgawa (ed.), *Kodeks karny. Komentarz [The Criminal Code. Comment]*, 7th Ed., Lex 2017 – commentary to the art. 211 CC.

²⁰ *Ibidem*.

²¹ M. Nawrocki M., *Kidnapping*, „Prok. i Pr.” 2016, vol. 10, p. 102.

²² See, among others, M. Domagalski, *Czy karać więzieniem za porwanie rodzicielskie [Whether to punish with imprisonment for parental abductions]*, „Rzeczpospolita” PCD 2013/3, p. 25.

²³ Art. 39 § 1 CC of 1932.

²⁴ Art. 37 CC.

psychological or physical state, is punished by imprisonment of 3 months to up to 5 years. In the justification for the project of the amendment mentioned above it is indicated that: “*Committing a prohibited act typified in art. 211 CC reconciles not only with the institution of care and supervision, but also with the safety of legal goods of persons under care or supervision, i.e. life, health, bodily integrity, securing their intangible needs, and ensuring the proper development of their personality [...]the threat of a criminal sanction for committing a crime of abduction or detention of a minor or helpless person is inadequate to the degree of social harmfulness of the act and does not satisfy the obligation to protect the rightful good, which is not only family and care, but also health and safety of a minor under 15 or a person who is helpless due to the mental or physical condition. In this state of affairs, it is proposed to change the sanctions to imprisonment to: from 3 months to 5 years*”²⁵. Since art. 211 CC does not provide for any protection other than protection against the breach of care institutions or supervision, it is difficult to agree that this provision protects the health or life of minors under the age of fifteen in a legal sense. Therefore, assigning such protection by the legislator (the project creator) is of a non-legal nature, rather than legal, because “*the manner of action of the perpetrator of the abduction or detention does not belong to the statutory features of the offense under art. 211 CC. The perpetrator may use different methods, and the degree of their use may vary. If the perpetrator has used violence, a threat or a trick, the cumulative classification of the act may be involved (e.g. article 211 in the collection under article 191 § 1 of the Criminal Code). Detention may or may not be combined with abduction*”²⁶. Of course, it is difficult to disagree with the fact that minors as victims of abduction may experience various kinds of unthinkable factors affecting their health or life, but this does not fulfill the characteristics of the act specified in art. 211 CC. Any liability in this area should be sought in other criminal laws. This amendment should rather address criminal liability for the crime of abduction of minors as provided for in previous codes. As can be seen from the above, both in the Criminal Code of 1932 and of 1969, a penalty of imprisonment of up to five years was envisaged. On the other hand, the minimum threats to the responsibility of up to six months’ imprisonment resulted from general directives for determining this penalty. It follows that the previous regulations treated the offense specified in art. 211 CC more sharply than it has been since September 1, 1998²⁷.

Therefore, the tightening of this responsibility with the amendment of March 23, 2017 is not a novelty, all the more so since the minimum threat is less severe than in previous regulations, referring here to the Criminal Codes of 1939 and 1969. It would be better to think about it in terms of whether it was not a mistake to mitigate this penalty when adopting the 1997 Criminal Code. In particular, in the context of the objective which until then had been implemented by previous regulations.

²⁵ <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=846> [09.05.2017].

²⁶ M. Kulik, M. Mozgawa, A. Szczekala, *Przestępstwo uprowadzenia lub zatrzymania małoletniego lub osoby nieporadnej - art. 211 k.k. (ze szczególnym uwzględnieniem tzw. uprowadzeń rodzicielskich [Offense of the abduction or detention of a minor or a helpless person - art. 211 of CC (with special emphasis on so-called parental abductions)]*, „Pr. w Dział.” 2013, vol. 16, p. 11.

²⁷ The date of entry into force of the Criminal Code of 1997.

Summary

In the light of the above, one can ponder on the validity of the amendment of art. 211 CC. Since the previous codes provided for stricter liability for committing an act specified in this provision, it should be recognized that the legislator, by introducing the amendment in question, in a way, corrected the mistake from the entry into force of the 1997 Criminal Code. In fact, this validity should be sought especially for minors who are actually victims of the abduction - regardless of the fact that their possible damage does not constitute the subject of protection provided for in art. 211 CC. Criminal law, apart from punishing for committing specific acts, also has a preventive function. In this context, the tightening of the penalty for abduction may have the effect of sufficiently deterring potential perpetrators and thus protecting minors from undesirable factors.

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