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THE CRIMINAL ACT KIDNAPPING IN THE MACEDONIAN AND SERBIAN CRIMINAL LEGISLATION - THEORETICAL AND CRITICAL OVERVIEW¹

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ABSTRACT

Macedonian and Serbian Criminal Codes (CC) among other criminal acts contain the act kidnapping, systematized within the chapter “Criminal acts against the freedoms and rights of humans and citizens”. Having in mind the relevance of this act, the paper shall analyse its legal framework, similarities and differences between the two codes, as well as the criminal policy. In essence, the Paper shall give a theoretical and critical overview over the criminal act kidnapping in the domestic and foreign scientific literature, as well as of both codes, i.e. Article 141 of the Macedonian CC and Article 134 of the Serbian CC. Such overview shall enable to give concrete proposals whether the Macedonian provision needs to be amended.

KEY WORDS: Kidnapping; Criminal Code; Macedonia; Serbia.

INTRODUCTION

Originally, as John Heard (2015: 1) notes, the kidnapping was defined as the illegal capturing of a person with the intention of transporting him or her for slavery, and there was little differentiation between abduction and kidnapping. In the nineteenth century, the requirement for intercountry transport was eliminated. Nowadays, abduction is legally defined as the process of capturing someone by force or fraud. Kidnapping also involves illegally detaining another person, but it does not have to involve fraud.

¹ review scientific paper

Kidnapping usually involves detaining another person with the intent to illegally detain him or her for ransom. Using the individual as a hostage for financial or some other reason is typically also involved. Milošević (2008: 8-9) clarifies that in theory, the genesis of the word kidnapping is directly related to child abduction, with the explanation that in its private meaning it included the notion of this type of abduction, and that it was later extended to other modalities, so that today in Anglo-Saxon literature, the term “kidnapping” means any kind of kidnapping, or kidnapping in general.

Moreover, Soothill and Francis (2010: 395) elaborate that the most recent definition of kidnapping was provided by Lord Brandon in 1984 and contains four ingredients: (1) the taking or carrying away of one person by another, (2) by force or by fraud, (3) without the consent of the person so taken or carried away and (4) without lawful excuse. Having in mind the given definition, and as Chalmers (2014: 734) perceives - the cumulative requirements of force or fraud and the absence of consent operate to restrict the scope of the offence. Therefore, Krstić and Stanić (2015: 97) stress that etymologically under kidnapping is meant to snatch, capture, abduct by force and take away.

OVERVIEW OF THE LEGAL FRAMEWORK

If the Macedonian legislation is in question, then the criminal act kidnapping (in Macedonian language “Грабнување” / “Grabnuvanje”), is drafted in the Article 141 and is systematized in the Chapter 15 “Criminal acts against the freedoms and rights of humans and citizens” of the Criminal Code (CC) (1996, 1999, 2002, 2003, 2004, 2005, 2006, 2008, 2009, 2011, 2012, 2013, 2014, 2015, 2017, 2018). The same can be said for the Serbian CC (2005, 2009, 2012, 2013, 2014, 2016, 2019), i.e. the act kidnapping (in Serbian language “Отмица” / “Otmica”) is regulated by Article 134 within the Chapter 14 that has identical name as the Macedonian Chapter 15. Based on the narrower object of protection of the criminal acts within the these chapters, the following systematization of them into four groups can be made: (1) acts against equality of freedoms and rights, (2) acts against freedoms, (3) acts against personal rights and (4) acts against other rights, with a note that the kidnapping falls under the second group of acts (Kambovski, 1997: 101).

Concerning the nomotechnics used, it can be seen that the Article 141 of the Macedonian CC is composed of three paragraphs (basic form, aggravated form and preferential form), and the Article 134 of the Serbian CC is composed of five paragraphs (basic form and aggravated forms). Therefore, the Table 1 represents the distinction made between their basic forms:

Table 1. Basic form of the criminal act kidnapping

Macedonian CC Article 141 Paragraph 1	A person commits a kidnapping of another with intent: - to coerce him or someone else to commit, not to commit or to endure something ► Sentence: Imprisonment of one to ten years
Serbian CC Article 134 Paragraph 1	Whoever by use of force, threat, deceit or otherwise takes away or detains another with intent: - from that person or another to extort money or other property gain or - to coerce him or someone else to commit, not to commit or to endure something ► Sentence: Imprisonment from two to ten years

From the Table 1, it can be noted that the Article 141 Paragraph 1 of the Macedonian CC, by defining the basic form, prescribes that the act is performed by a person that has kidnapped another person, with an intent to coerce him or someone else to commit, not to commit or to endure something. As observed, Macedonian CC uses the formulation “a person that commits a kidnapping of another with intent...”, and by doing so - it does not define what is meant under “kidnapping”. Contrary to this, the Article 134 Paragraph 1 of the Serbian CC, is using “Whoever by use of force, threat, deceit or in any other way takes away or detains another with intent...”. Therefore, Marjanović’s comment (1998: 52) can be implied towards the Macedonian legislation - it is difficult to say that the requirement for precision of the Criminal law is satisfied by the so-called “simple” dispositions, which determine the criminal act only by name, without giving its characteristics.

Having in mind the legal formulation, Đorđević (2009: 50) stresses that kidnapping is a criminal act directed against freedom of movement and freedom of decision which contains elements of unlawful deprivation of liberty and coercion. Kambovski & Tupančevski (2011: 102-103) go further by observing that the act is also directed against fundamental personal freedom and human dignity. The authors conclude that despite the fact that this act is pointed towards the basic principles of the human as a person, this act is consisted of such treatment that destroys the victim and puts him or her on the level of an ordinary object (hence the illustrative name of the act, that associates with abduction, theft of objects). For this reason, Kambovski (1997: 110) explains that the kidnapping means to establish a factual power over a person, putting the person in a position to be treated as a mere object

that the perpetrator can dislocate, detain, take away etc., or in general to govern the person with full power of a master.

Jovanović and Jovašević (1995: 154), clarify the differences between to take away (to change the residence, i.e. to move away from the place where the person was and to stop at some other, most often hidden place) and to detain (to stay at the same place where the person was until then), with a remark that both of them must be performed by using force, threat or deception or in some other way.

In addition, Marinković (2013: 78-79) clarifies that as an incrimination *sui generis*, kidnapping is a complex criminal act (the so-called intrinsically complex criminal offence), which consists of the unlawful deprivation of liberty, coercion and extortion, the unlawful deprivation of liberty being a mandatory element of the offence. Given the fact that the passive subject is deprived of freedom of movement, and a variable motive or purpose for which it is done (coercion or extortion), kidnapping is classified as an act against human rights and freedoms of citizens.

Notable from the used wording by the Macedonian and Serbian CC, this provision is composed of two cumulative elements:

- First element - the perpetrator kidnaps a person (Macedonian CC) / the perpetrator by use of force, threat, deceit or otherwise takes away or detains another (Serbian CC) and
- Second element - the perpetrator has an intention to achieve something - he has some kind of demand to be performed / endured by the kidnapped person or someone else.

This also indicates that the perpetrator's intent is a crucial element, he has some kind of demand and in order to realize it - he kidnaps another person. Milošević (2010: 97) resumes that the perpetrator's intention is an element of the legal essence of kidnapping, since the unlawful deprivation of liberty is carried out with the intention of influencing the freedom of decision, i.e. to thereby force the kidnapped or other person to do something, not to do or to suffer. In the same line is Marinković (2013: 80) who observes that if the said intention of the perpetrator is not present, he shall not be guilty of this, but another criminal offence (unlawful detention or coercion). Therefore the criminal offence of kidnapping is characterized by direct intention. In essence, Mitrović (1997: 166) confirms that the kidnapping is unlawful deprivation of liberty, however that is not its goal at all. In kidnapping, the deprivation of liberty is a way of achieving a goal, i.e. the intent of the kidnapping. Based on Delibašić (2015: 502) the basic criteria for distinguishing the criminal acts unlawful deprivation of liberty and kidnapping is the selfish intent consisted of extortion of a property gain or coercion of other persons to commit, not to commit or to endure something.

He also addresses to Krušić's point of view (2001: 662), according to whom there cannot be a concurrence of criminal acts between kidnapping and unlawful deprivation of liberty, because unlawful deprivation of liberty and coercion are consumed by the kidnapping.

Since the kidnapping can be performed by any person, the act falls under the so-called *delicta communia* (Marjanović & Kanevčev, 2010: 102). Also, any person can be found in a role of victim of kidnapping. Another characteristic is that it is a permanent criminal act, which means that the act of execution lasts from the moment of taking away, i.e. detention, until the moment of actual release (Milošević, 2010: 99). Namely, its legal nature also covers the duration of the illegal consequence created by the act of execution (Kambovski & Tupančevski, 2011: 103). As Maršavelski (2011: 819) perceives, the criminal act kidnapping does not include the consequence of "doing, not doing or suffering", but the act is completed by deprivation or restriction of liberty with the aim of forcing someone to do, not do or suffer, and it is not decisive whether actions occurred.

Additional remark addressed to the basic forms of kidnapping, is that the Serbian Article 134 has a wider range because the demand of the perpetrator towards the kidnapped person or another is not just set on "to commit, not to commit or to endure something" (like Macedonian Article 141), but also includes "to extort money or other property gain".

When it comes to the prescribed sentence, it should be noted that the first version of the both articles for the basic form provided the same sentence (imprisonment from one to ten years), however in 2009 the Serbian CC raised the minimum from one to two years (imprisonment from two to ten years). Furthermore, the Table 2 gives an overview of the aggravated forms of the criminal act kidnapping:

Table 2. Aggravated forms of the criminal act kidnapping

Macedonian CC Article 141 Paragraph 2	A person commits the criminal act from Paragraph 1 against a juvenile A person who in order to achieve the aim of the kidnapping from Paragraph 1 threatens to kill the kidnapped person, or to inflict grave body injury ► Sentence: Imprisonment of at least three years
Serbian CC Article 134 Paragraphs 2 to 5	Paragraph 2 A person who in order to achieve the aim of the kidnapping from Paragraph 1 threatens to kill the kidnapped person, or to inflict grave body injury ► Sentence: Imprisonment of three to twelve years

	Paragraph 3 If the kidnapped person is held more than ten days or treated in cruel manner or his health is seriously impaired or other serious consequences resulted or whoever commits the act of the Paragraph 1 against a juvenile ► Sentence: Imprisonment of three to fifteen years Paragraph 4 If due to the acts specified in Paragraphs 1, 2 and 3, the kidnapped person has died or the act was committed by a group ► Sentence: Imprisonment of five to eighteen years Paragraph 5 If the act of Paragraphs 1 and 2 was committed by an organized criminal group ► Sentence: Imprisonment of at least five years
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In the Macedonian CC, the sentence is increasing from imprisonment of one to ten years (Paragraph 1), to imprisonment of at least four years if the act has been committed towards a juvenile, or the perpetrator in order to achieve the aim of the kidnapping threatens to kill the kidnapped person, or to inflict him a grave body injury (Paragraph 2). It should be noted that starting from 1996 when the code was adopted, the content of this Article was changed only once. Namely, in 2004 the sentence prescribed for the Paragraph 2, was increased from “at least three years imprisonment” to “at least four years of imprisonment”. Contrary to the “poor” aggravated forms of the Macedonian CC, the Serbian CC contains additional four paragraphs beside the first paragraph, and based on the level of the prescribed severity, as seen from the Table 2, it provides various sentences. Same as Macedonian CC, the Serbian CC was a subject of change in 2009, i.e. in the Paragraph 4 the word “organized” was erased, and another paragraph was added - the Paragraph 5.

Opposing to the above aggravated forms, the Table 3 represents the preferential opportunity, i.e. such opportunity is stipulated in Paragraph 3 of the Macedonian Article 141, meaning that if the perpetrator of the act as defined in Paragraphs 1 and 2, voluntary releases the kidnapped person before the demand is realized for which he committed the kidnapping, then he may be acquitted from sentence. However, the accent should be pointed towards the “voluntary release”, which indicates that the release must be voluntary and must be done before the realization of the demand. The

Serbian Article 134 does not contain a possibility for the perpetrator to be acquitted from punishment.

Table 3. Preferential form of the criminal act kidnapping

Macedonian CC Article 141 Paragraph 3	The perpetrator of the criminal acts of Paragraph 1 and 2, voluntary releases the kidnapped person before the demand is realized for which he committed the kidnapping ► May be acquitted from punishment
Serbian CC Article 134	/

Since the Macedonian and Serbian CC have the same legal background, the CC of Federal Republic of Yugoslavia (1976) should be mentioned. Yugoslav CC did not contain a separate criminal act kidnapping. Therefore, Nikolić (2018: 166) stresses that the complexity of the criminal act kidnapping is influenced by its composited legal conception, because of which this act represents a mixture of elements of extortion, coercion and unlawful deprivation of liberty. The incrimination of given elements of the act influenced the cases of kidnapping to be qualified as one of these criminal acts, which indicated the inaccuracy of the real insight into the number of perpetrations of these acts, until 1977 when the kidnapping was introduced as a separate criminal act in the criminal legislation. The same comment is given by Stojanović (2012: 451), i.e. the kidnapping was introduced into our criminal legislation in 1977, and until then, the cases of kidnapping were qualified as another criminal act.

If the CC of the Socialist Republic of Macedonia (1977) is in question, the act kidnapping was defined in the Article 54. The 1977 provision has almost the same dispositions and sanctions as the Article 141 of 1996. The two differences that 1977 CC contains are within the Paragraph 2 - there is one more aggravated form (...or in another particularly difficult case...) and in Paragraph 3 - there is one more privilege for the perpetrator (...he might be sentenced more leniently...). Compared to this, the CC of the Socialist Republic of Serbia (1977) prescribes more severe sanctions for the perpetrators than the 2005 CC. For example, the sentence for the basic form was imprisonment of at least three years, or the sentence for the aggravated form - the kidnapped person has died, was imprisonment of at least twenty years or imprisonment of forty years. The same remark can be addressed to the other aggravated forms. Also, the 1977 version of the CC contains a separate paragraph that stipulates the possibility the perpetrator to be acquitted from punishment if he voluntary releases the kidnapped person,

although the aim of the kidnapping has not been achieved (but it restricts it only to the acts as defined in Paragraphs 1 and 2).

Finally, as a common characteristic for both codes, is that the kidnapping or “Grabnuvanje” or “Otmica”, can be found as an element of other criminal acts, and some of them are given in the Table 4. Consequently, Ubiparipović (2016: 231) concludes that kidnapping is a complex criminal act, especially from the fact that it is an element of other criminal acts. Kidnapping is a characteristic for organized crime, as well as terrorism, taking hostages, international terrorism, endangering persons under international protection, etc., but in these acts the intent is different or the persons that are subject of kidnapping have a certain characteristic.

Table 4. Kidnapping as an element of other criminal acts

Macedonian CC	Serbian CC
Kidnapping representatives of the highest state authorities (Article 310)	Coercion (Article 135)
Terrorist organization (Article 394-a)	Hijacking an aircraft, ship or other means of transport (Article 293)
Terrorism (Article 394-b)	Crimes against humanity (Article 371)
Financing of terrorism (Article 394-c)	Terrorism (Article 391)
Trafficking in human beings (Article 418-a)	Endangering persons under international protection (Article 392)
Smuggling of migrants (Article 418-b)	Financing of terrorism (Article 393)
Trafficking in juveniles (Article 418-d)	
International terrorism (Article 419)	
Endangering persons under international protection (Article 420)	
Taking hostages (Article 421)	

At the end, an attention should be given to the Law on Criminal Procedure (LCP), i.e. the provision that regulates the special investigative measures. Both laws - Article 253 of the Macedonian LCP (2010, 2012, 2016, 2018) and Article 162 of the Serbian LCP (2011, 2012, 2013, 2014, 2019), stipulate that the special investigative measures can be ordered when there are grounds for suspicion for strictly listed criminal acts, among which is the act kidnapping.

CONCLUSION

A key difficulty with offences as kidnapping, according to Herring (2012: 343) is that the term covers a broad range of conduct. It may involve kidnapping as a prelude to sexual assault; as a means to seeking a ransom payment; as part of trafficking people; as an aspect of a family case where a father takes a child away frustrated at what he regards as inadequate contact arrangements, or a mother takes a child away to escape from abusive relationship. Based on all above, Ubiparipović and Tadić (2018: 69) conclude that the kidnapping is a very compounded and complex criminal act, and because of its character it exceeds the scope of the crimes that attack the freedom of movement and decision, and grows into an act that endangers the human life and body. They also remark that a special subjective feature of kidnapping is that the perpetrator acts with a certain goal, and this is indicated by his intention to force the kidnapped person or someone else to commit, not to commit or to endure something. The similar comment is given by Kambovski and Tupančevski (2011: 102-103), stressing that in its significance, the kidnapping goes beyond the framework of intrusion into fundamental freedoms and grows into a threat to life and bodily integrity, since its perpetrator, as a condition for the release of the victim, often sets powerful demands, supported by a threat of some grave evil.

Having in mind the structures of the Article 141 of Macedonian CC and the Article 134 of Serbian CC, and the comparison made between them, it should be pointed out that the Macedonian CC needs to be changed. First of all, the usage of so-called “simple” disposition in the Paragraph 1 (to describe the act kidnapping with “a person that kidnaps another person with intent...”), is not in the same line with the requirement the laws to be precise. Contrary to this, the Serbian CC is not just explaining the act in more detailed manner, but also emphasizes the most common reason for kidnapping by stipulating it first (to extort money or other property gain from the kidnapped person or another). When the aggravated forms are in question, the Serbian CC offers several different situations under which the performed act can be legally underlined and afterwards prosecuted. Prescribing only two aggravated forms in the Macedonian CC (the criminal act is preformed against a juvenile; the perpetrator threatens to kill the kidnapped person, or to inflict grave body injury), is not enough to cover the various life situations that may occur in practice. For example, what if the kidnapped person is detained for some time, what if the kidnapped person has died, what if the act is committed by a group? If there are more aggravated forms in the Macedonian CC, that have a corresponding sanctions, then not only the work of the public prosecutor will be facilitated, but also the work of the courts while imposing the sanctions. Finally, the existence of the preferential opportunity for acquitting the perpetrator from

punishment in the Paragraph 3 of the Macedonian Article 141, is a positive solution that can influence the perpetrator not to perform the act to its end.

REFERENCES

1. Aleksandar Maršavelski, Komentar sudske prakse, Hrvatski ljetopis za kazneno pravo i praksu, vol. 18, br. 2/2011, Zagreb, p. 819, 2011.
2. Brian John Heard, Kidnapping and Abduction: Minimizing the Threat and Lessons in Survival, Boca Raton, p. 1, 2015.
3. Criminal Code of Federal Republic of Yugoslavia ("Official Gazette of the Federal Republic of Yugoslavia" No. 44/1976).
4. Criminal Code of Republic of Macedonia ("Official Gazette of the Republic of Macedonia" No. 37/1996, 80/1999, 04/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 07/2008, 139/2008, 114/2009, 51/2011 - two changes and amendments, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 97/2017, 248/2018).
5. Criminal Code of Republic of Serbia ("Official Gazette of the Republic of Serbia" No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019).
6. Criminal Code of Socialist Republic of Macedonia ("Official Gazette of the Socialist Republic of Macedonia" No. 25/1977).
7. Criminal Code of Socialist Republic of Serbia ("Official Gazette of the Socialist Republic of Serbia" No. 26/1977)
8. Darko Marinković, Criminal Investigation of Extortion - Motivated Kidnapping, Bezbednost - Časopis Ministarstva unutrašnjih poslova Republike Srbije, god. LV, br. 3, Beograd, p. 80, 2013.
9. Đorđe Đorđević, Krivično pravo - Posebni deo, Beograd, p. 50, 2009.
10. Gjorgji Marjanović & Metodija Kanevčev, Makedonsko krivično pravo - opšt del (sedmo, izmeneto i dopolneto izdanje), Skopje, p. 102, 2010.
11. Gjorgji Marjanović, Makedonsko krivično pravo - opšt del (petto, celosno preraboteno izdanje), Skopje, p. 52, 1998.
12. Gordana D. Nikolić, Krivična dela iznude (doktorska disertacija), Univerzitet u Nišu, Pravni fakultet, Niš, p. 166, 2018.
13. Gordana Mitrović, Krivično pravo - Posebni deo, Beograd, p. 166, 1997.
14. James Chalmers, Offenses against the person, in Markus Dirk Dubber & Tatjana Hörnle (eds), The Oxford Handbook of Criminal Law, Oxford, p. 734, 2014.
15. Jonathan Herring, What's wrong with kidnapping?, Criminal Law Review, p. 343, 2012.

16. Keith Soothill & Brian Francis, Blackmail, kidnapping and threats to kill, in Fiona Brookman, Mike Maguire, Harriet Pierpoint & Trevor Bennett (eds), Handbook on Crime, Routledge, p. 395, 2010.
17. Law on Criminal Procedure of Republic of Macedonia ("Official Gazette of the Republic of Macedonia" No. 150/2010, 100/2012, 142/2016, 198/2018).
18. Law on Criminal Procedure of Republic of Serbia ("Official Gazette of the Republic of Serbia" No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019).
19. Ljubiša Jovanović & Dragan Jovašević, Krivično pravo II - Posebni deo, Beograd, p. 154, 1995.
20. Marko Krstić & Nemanja Stanić, Postupak otkrivanja i razjašnjavanja krivičnog dela otmice, CIVITAS - Časopis za društvena istraživanja, god. MMXV, br. 9, Novi Sad, p. 97, 2015.
21. Milan Milošević, Oduzimanje maloletnika kao vrsta otmice i samostalno krivično delo, NBP Nauka • Bezbednost • Policija - Časopis Kriminalističko-policijske akademije iz Beograda, br. 3, Beograd, p. 8-9, 2008.
22. Milan Milošević, Otmica uz pretnju ubistvom ili teškom telesnom povredom, Bezbednost - Časopis Ministarstva unutrašnjih poslova Republike Srbije, god. LII, br. 3, Beograd, p. 97, 99, 2010.
23. Slađan Krušić, Neki krivično-pravni i kriminalistički aspekti otmice, Bezbednost, vol. 43, br. 5, Beograd, p. 662, 2001.
24. Suzana Ubiparipović & Anđelko Tadić, Krivično djelo otmica u Krivičnom zakonu Republike Srpske s posebnim osvrtom na zakonska rešenja zemalja u okruženju. Anali poslovne ekonomije, br. 18, Banja Luka, p. 69, 2018.
25. Suzana Ubiparipović, Osnovni krivično-pravni aspekti otmice, Godišnjak Fakulteta pravnih nauka, god. 6, br. 6, Banja Luka, p. 231, 2016.
26. Veljko Delibašić, Krivično delo otmica u krivičnom zakonodavstvu Republike Srbije, Kultura polisa - Časopis za negovanje demokratske političke kulture, god. XII, br. 27, Novi Sad, p. 502, 2015.
27. Vlado Kambovski & Nikola Tupančevski, Kazneno pravo - Poseben del, Skopje, p. 102, 103, 2011.
28. Vlado Kambovski, Kazneno pravo - Poseben del (treto, potpolno izmeneto izdanje), Skopje, p. 101, 1997.
29. Zoran Stojanović, Komentar Krivičnog zakonika, Službeni glasnik, Beograd, p. 451, 2012.