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The Specificity of Criminal Prosecution in the Crime of Abducting a Minor without Violence or Deception: A Comparative Study

خصوصية المتابعة الجزائية في جريمة اختطاف القاصرة –دراسة مقارنة–

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Abstract:

The abduction of persons, particularly minors, is a serious offense that threatens public safety. Accordingly, the Algerian legislator established specific provisions in the Penal Code to criminalize all forms of abduction, whether committed through deception, violence, or other means. When such means are used, the act constitutes a felony punishable by severe penalties.

In contrast, abduction without these means is classified as a misdemeanor punishable by imprisonment. When the abduction of a minor is followed by marriage to the victim, some comparative laws restrict moved to a complaint by a person with an interest in annulling the marriage.

Keywords:

Minor; Marriage; Abduction; Prosecution; Exemptio; Complaint; Crime; Public Prosecution.

ملخص:

يعد فعل الاختطاف لاسيما ذلك الذي يقع على القصر ظاهرة خطيرة تهدد المجتمع. لذا، وضع المشرع الجزائري نظاما قانونيا خاصا في قانون العقوبات يقضي بتجريم والعقاب على جميع صور الاختطاف، سواء تمت بتحايل أو عنف أو استدراج أو بدون ذلك. واعتبر الصورة الأولى جناية تتراوح عقوبتها بين السجن المؤبد أو المؤقت والإعدام أما صورته الثانية فهي جنحة معاقب عليها بعقوبة الحبس.

غير أن خطف القاصرة ثم الزواج بها في معظم القوانين المقارنة يمنع النيابة العامة من تحريك الدعوى العمومية ومباشرتها، إلا بناءا على شكوى من طرف الشخص الذي له مصلحة في إبطال الزواج، كما أن صفح الضحية أصبح يضع حدا لمتابعة الجاني جزائيا في الأحكام الراهنة لقانون العقوبات الجزائري.

كلمات مفتاحية:

قاصر.، الزواج.، الاختطاف.، متابعة.، إعفاء.، شكوى.، جريمة.، النيابة العامة.

Introduction

The crime of abducting minors is considered among the most serious offenses, as it has become a phenomenon that threatens the fabric of society and affects its security, and it is currently observed that it has spread rapidly. While previously the abduction of minors was considered an exceptional occurrence, rarely happening, the situation has changed, and it now occurs almost continuously and daily, prompting the sounding of the alarm[1].

Moreover, the matter does not stop at abduction alone, but extends to the commission of other crimes that may include murder, removal of the victim's organs for trafficking, sexual assault, or abduction for the purpose of obtaining money through extortion of the victim's family and demanding ransom, among other crimes associated with the crime of abducting minors[2].

Thus, the Algerian legislator criminalized the act of abduction generally, and even increased the penalty for the perpetrator when committed against a minor under the age of eighteen (18), granting judicial authorities all powers to investigate, examine, and impose the appropriate criminal penalty on the abductor[3]. However, the abductor's marriage to his abducted minor victim without violence or deception restricts the Public Prosecution from initiating public action and prevents the adjudicating authorities from imposing criminal punishment thereon[4].

The importance of studying this subject appears in that the victim in the crime of abducting a minor is female, considered physically weak and sensitive, and preventing criminal prosecution of the abductor by reason of his marriage to her may harm her more than it provides protection, although the legal provisions issued in this regard were previously aligned with the nature of Algerian society. However, societal development renders such provisions protective of the abductor and erases the shame affecting the victim's family rather than the victim herself, which led some comparative laws to abolish such legal provisions and subject the abductor to criminal liability in all cases, whether he married the abducted minor or not.

The analytical method was employed through the examination of the provisions of the Penal Code related to the crime of abducting minors, in addition to the descriptive method by defining the concept of this crime and elucidating its forms and elements, as well as the comparative method by comparing the Algerian Penal Code with certain Arab laws, notably the Jordanian law, the Egyptian law, and also the French law.

This subject raises a central problematic, which is: **What constitutes the particularity of the crime of abducting a minor, and to what extent is it possible to prosecute the abductor after marrying her?**

To address this problematic, the discussion initially focused on **defining the nature of the crime of abducting a minor in (Section One)**, then on **the elements of the crime of abducting a minor and clarifying the methods of carrying out the abduction in (Section Two)**, and finally, the issue of **the abductor's marriage to his abducted minor and the extent of the impossibility of prosecuting him criminally was addressed in (Section Three).**

Section One: Defining the Nature of the Crime of Abducting a Minor

The crime of abducting a minor is considered one of the most serious crimes as it affects society as a whole, and the abductor may perpetrate this crime through the use of violence, deceit, or without them. Therefore, the research will initially examine the concept of abduction or kidnapping and clarify who falls within the category of minors in (1), then subsequently determine the motives and causes of abducting minors in (2).

1- The Concept of the Crime of Abducting a Minor

Formulating a concept for the crime of abducting a minor **necessitates defining abduction linguistically and technically in (A)**, and **clarifying who falls within the category of minors in (B).**

A- Definition of Abduction or Kidnapping

The Algerian legislator in the Penal Code did not specifically define the crime of abduction or kidnapping but merely criminalized the act. Accordingly, from a linguistic standpoint, it is: "seizure, and it has been said taking rapidly and forcibly, and 'he abducted him' and 'kidnapped him' in the same sense, and 'kidnapped' as if said 'he removed them'; and a man is called a kidnapper, i.e., abductor, and the term 'baz mukhtaf' means: he captures the prey"[5].

From a technical standpoint, some have defined this crime as: "the extraction of a tangible or intangible object from its place and its removal by obtaining control over it,"[6] and abduction has also been considered: "a sudden and rapid action, or the taking of that which can be a subject, relying upon an apparent or hidden material or moral force"[7].

B- Who is Considered a Minor

The term "minor" is a participial noun derived from the verb *qasara*, and: "al-qasr and al-qasru in everything is the opposite of height, and I shortened from the prayer. I shortened [something] forcibly, and al-qasir is the opposite of tall, and the plural is qusara', and the female qusar is short, and the plural is qusar, and al-aqasar is the plural of aqsar, like: smaller and lesser, and al-aqsar from the matter is shortened forcibly"[8]. This is regarding the minor from a linguistic perspective.

As for the terminological sense, some have defined the minor as: "a person of small age who has attained the age determined by law for discernment and has not exceeded the age determined by law for reaching the age of majority"[9]. However, giving a definition of the minor in this manner is considered subject to criticism, given that it sets the duration of minority between the age of discernment and the

attainment of the age of majority, whereas all persons who possess capacity of obligation without performance fall within the category of minors.

Accordingly, the minor may be a discernible or non-discernible boy, and within their scope are included the insane, the imbecile, and the foolish, which is confirmed by civil law in many provisions[10].

Consequently, the minor is anyone who has not attained the full age of nineteen (19) years, such that any person who has reached this age is considered legally of full capacity according to this law[11].

However, the age of majority under the Penal Code and the Code of Criminal Procedure is fixed at eighteen (18) full years; therefore, anyone under that age is considered a juvenile[12].

Referring to the Child Protection Law, the legislator has defined the child as: "any person who has not attained the full age of eighteen (18) years," and the same meaning applies to the juvenile[13].

It is observed, however, that there is a lack of consistency in the legal texts regarding the determination of the age of majority, as at times it is fixed at eighteen (18) years and at other times at nineteen (19) years[14]. Accordingly, the legislator is urged to intervene to amend these legal texts and reconcile them with each other, especially with respect to the determination of the age of civil and criminal discernment.

Accordingly, it may be stated that the minor is anyone who has not attained the age of majority as legally determined.

Consequently, the crime of abducting a minor female consists of forcibly removing the non-major victim from her place of presence and transporting her to another place pursuant to an order or condition, or it is any act intended to lure the abducted female by all methods of deceit and coercion, or by all forms of violence, threat, or trickery, aimed at depriving the abducted female of her personal freedom and liberty[15].

2- Characteristics and Distinctive Features of the Crime of Abducting a Minor Female

The crime of abducting a minor female possesses a number of characteristics, among which are the following:

The Crime of Abducting a Minor is a Composite Crime

Criminal law scholars[16] agree that the crime of abducting a minor is not a simple crime, which could be completed by a single independent act; rather, it requires multiple acts, each of which constitutes a crime in itself. Accordingly, the crime of abducting a minor is considered a composite crime[17], consisting of taking and removing the minor from her location to another place. The act of taking the minor is an independent act, and removing her constitutes a second independent act; yet, when combined, they fulfill the crime of abduction[18].

The Crime of Abducting a Minor is a Serious Crime

The Algerian legislator has prescribed varying penalties for the perpetrator of the crime of abducting persons, depending on the circumstances accompanying the crime, ranging from temporary imprisonment[19] to life imprisonment[20]. Furthermore, the law provides for the death penalty in cases where the abduction results in the death of the abducted person[21]. Legal scholars have therefore concluded that this crime constitutes a serious offense[22], and its severity is particularly evident in cases of minor abduction, for which the penalty is either life imprisonment or death[23].

The Crime of Abducting a Minor is a Crime of Harm

The crime of abduction is classified as a crime of harm because the crime does not occur without causing injury to the abducted minor. This crime produces tangible consequences resulting from the criminal act of the perpetrator, depriving the victim of her freedom for a certain period, whether short or extended. The purpose of the abduction is often to facilitate or execute another crime, particularly rape, murder, extortion, or physical assault[24].

Section Two: Elements of the Crime of Abducting a Minor Female and Methods of Execution

To impose a penalty on the perpetrator of the crime of abducting a minor female, the general elements of the crime must be present: the **material element** (actus reus) and the **mental element** (mens rea), in addition to a **special element** specific to the crime of abducting a minor female, which is that the victim is a girl under eighteen years of age. Abduction may take one of two forms: either with violence, threat, or deceit, or without these factors. This distinction affects the severity or mitigation of the penalty, or even exemption, as well as the legal classification of the crime. Accordingly, we will **address the elements of the crime of abducting a minor female in (1)** and **the methods of executing the abduction, and their importance for determining the legal classification and punishment, in (2)**.

1- Elements of the Crime of Abducting a Minor Female

As previously discussed, the crime of abducting a minor female consists of **material** and **mental elements**, and given that the victim is a minor female, this constitutes a special element. Accordingly, we begin with the **assumed element: the victim's status as a minor female(a)**, then **the material element (b)**, and finally **a brief discussion of the mental element (c)**.

a) Assumed Element: Victim's Status as a Minor Female

During childhood, the minor is in need of care due to a state of weakness, which may be **mental**, in terms of lacking judgment of consequences, or **physical**. Violating a child's freedom constitutes a serious assault on their liberty and removes them from the care of their legal guardians, regardless of the perpetrator's motive. The motive could be to extort the minor's guardian for personal gain, revenge against the family due to animosity, or sexual assault, particularly as rape of a minor female is common. Accordingly, the crime of abducting a minor female is among the most serious, as it affects the moral and social fabric of society[25].

The legislator, in **Article 293 of the Penal Code**, provides: *"Anyone who abducts or attempts to abduct a minor under eighteen (18) years by violence, threat, inducement, or other means shall be punished by life imprisonment. The penalties under paragraph one of Article 263 apply if the abducted minor is subjected to torture or sexual violence, or if the abduction is motivated by ransom demands or results in the death of the victim. The perpetrator does not benefit from mitigation provided by this Code, subject to Article 294."*

Article 326 of the same law states: *"Whoever abducts or removes a minor under eighteen (18) without violence, threat, or deceit, or attempts to do so, shall be punished with imprisonment from one to five years and a fine from 500 to 2,000 Dinars. If the abducted minor marries her abductor, criminal proceedings shall not be taken against him except upon complaint by those entitled to request annulment of the marriage, and he may not be convicted until the marriage is annulled".*

From the analysis of these provisions, it appears that the Algerian legislator **does not differentiate between male and female minors** in the crime of abduction[26]. However, Article 326, paragraph two, implies that it refers specifically to **female minors**, as only a marriage between the abductor and the abducted minor female can halt criminal proceedings, unless a complaint is filed by those entitled to annul the marriage.

A question arises whether this legal provision applies to **all minor females** or only to a specific category. While the legislator defines a minor female as under eighteen (18), **practical and social logic excludes applying this rule universally**, as minors of very small size and weak constitution cannot realistically be married. This aligns with **contemporary Algerian social norms**, where marriage of a minor male or female outside of exceptional cases requires judicial authorization and proof of capacity and interest in marriage[27]

b) Material Element of the Crime of Abducting a Minor Female

The material element of crimes generally consists of **three components**: the criminal act, the criminal result, and the causal link. The perpetrator may begin the criminal act without achieving the result due to external factors—this is considered an attempt. The crime may be committed alone or in collaboration with others.

Components of the Material Element for Abducting a Minor Female:

- **Criminal Act: The Act of Abduction**

The crime centers on the act of abduction, which involves removing the minor female from her environment—whether from her home, school, public road, recreational area, or any other place under the care of someone responsible—and transferring her to another location, concealing her from those responsible for her[28].

Algerian Penal Code Articles **293 bis(1)** and **326** emphasize the term “abducts,” signifying the taking of the minor female from her place of presence to another location. Abduction entails removing her from her environment and the authority of

her legal guardian, regardless of the distance, **without her consent**, using any means of coercion, whether physical or psychological[29].

- **Physical Coercion**

Physical coercion involves the abductor using force such that the minor cannot resist. Examples include forcibly grabbing the minor's arm, dragging her from a place to another, carrying her while she is asleep, unconscious, or drugged. The minor's young age is a significant factor in considering coercion[30].

- **Psychological Coercion**

Psychological coercion consists of all pressures exerted on the minor's mind and will. Examples include threats to reveal a secret that could cause major scandal, such as blackmail related to sexual conduct, even when the threatened action itself may be legally questionable. Fear induced by such threats negates legal consent. Sleep or unconsciousness of the minor also constitutes psychological coercion, as the act occurs without her awareness or will[31]. Thus, **both forms of coercion result in the commission of the abduction crime[32]**.

The kidnapper may also resort to **deception** against the minor victim, misleading her by claiming that he is capable of hypnosis and can completely deprive her of her will, then abducting her without resistance due to her loss of awareness and volition. It should be noted here that deception is not limited to minors but may also be directed at those responsible for their care. The essential element is that such deception enables the perpetrator to abduct the minor[33].

Thus, the act of kidnapping constitutes the conduct carried out by the offender to achieve the criminal result. This conduct may take various forms, appearing in two types: positive and negative. In the crime of kidnapping, the conduct is generally limited to the positive type, as it is inconceivable that this crime could occur through mere omission, except in the case of an accomplice whose role is limited to adopting a passive position that facilitates the offender's commission of the criminal act [34].

- **Result and Causal Link in the Crime of Kidnapping a Minor**

This section will first address the criminal result and then the causal relationship.

- **Criminal Result in the Crime of Kidnapping a Minor**

The criminal result refers to the effect resulting from criminal conduct and is achieved in positive crimes through any change occurring in the external world, whether material or psychological [35].

The result of the acts of taking and removing the minor in kidnapping is the infliction of harm upon her and her removal from her family and living environment. This harm may be physical, affecting her bodily integrity, or moral, affecting her emotions and feelings and instilling fear and terror within her. Accordingly, this constitutes a material fact affecting the essence of children's rights, whether male or female, particularly their right to a peaceful and stable life [36].

Accordingly, as some scholars correctly state, the criminal result of kidnapping constitutes an infringement on the individual's right to freedom of movement and choice [37].

Therefore, the result in the crime of kidnapping a minor is realized once the victim is removed from her location, regardless of whether the offender reaches the intended destination or whether the victim is detained, as long as the offender has violated the minor victim's right to freedom and movement[38].

○Causal Relationship in the Crime of Kidnapping a Minor

The causal relationship constitutes the third element of the material element of the crime. In its absence, criminal liability does not arise. It refers to the link connecting the result to the criminal conduct, such that the latter is considered the cause of the result. It is therefore a relationship between two material phenomena: the act and the criminal result[39].

Since kidnapping is based on two essential elements — taking and removal — these may be carried out by one person, in which case no issue arises regarding causation. However, if one person seizes and controls the minor victim in preparation for removing her from her location, and a second person later removes or transports or controls her, the question arises as to who is criminally responsible and with whom the causal link between conduct and criminal result is established.

To answer this question, a distinction must be made between two situations.

The first is where there is a criminal agreement between the two persons. In this case, both are considered principal offenders and are responsible for the criminal result. However, if one person takes and restrains the minor and places her in a vehicle in preparation for transporting and removing her, and a second person takes the vehicle without knowledge of what it contains and without intent to transport her elsewhere, this constitutes the second situation, where no criminal agreement exists between the two individuals [40].

To determine whether a causal link exists between the act of taking and the result of kidnapping in the latter situation, this link is assessed based on the theory of adequate causation. [41] The intervention of the second person, who has no criminal agreement with the first offender, is considered an abnormal and unforeseen factor, which interrupts the causal link between the act of taking and the result of kidnapping[42].

Attempt and Participation in the Crime of Kidnapping a Minor

This section will first address attempt and then participation in this crime.

•Attempt in the Crime of Kidnapping a Minor

Attempted kidnapping of a minor is punishable under the general rules of criminal law[43] .This occurs where the offender's will is directed toward committing the crime and he begins executing the material element, but the result does not occur due to reasons beyond his control. Legislators punish the offender at this stage because of his criminal intent; had the external factor not intervened, the crime would

have been completed. For example, where the kidnapper lures the minor toward his vehicle but is discovered, or the minor screams, preventing completion of the crime. In such cases, the crime is considered complete in its elements despite the absence of the result, because of the offender's criminal intent[44].

•Participation in the Crime of Kidnapping a Minor

The legislator did not explicitly address accomplices in the crime of child kidnapping under Article 293 bis of the Algerian Penal Code but referred to accomplices under Article 291 relating to kidnapping adults, limiting it to those who provide a place for detention or confinement of the victim. This is stipulated in paragraph two of Article 291, which states: "The same penalty shall apply to anyone who provides a place for the detention or confinement of the person".

It is also required that the accomplice possess criminal intent based on knowledge and will, meaning that the accomplice must know that the assistance provided to the principal offender will be used to commit the kidnapping crime[45].

Participation also includes concealing the minor, removing her, or helping her evade search efforts after kidnapping, as inferred from Article 329 of the Algerian Penal Code[46]. Concealment must occur after the kidnapping or removal. As for smuggling, it means hiding the victim from persons searching for her, whether they are legally entitled to demand her return, such as parents, or public authorities responsible for searching for missing persons or investigating crimes[47].

The crime of concealing a kidnapped minor is intentional and requires criminal intent, meaning that the offender commits the act voluntarily while knowing that the minor was kidnapped or removed from her location[48].

The accomplice's penalty in kidnapping a minor, based on general rules of participation under criminal law, ranges from one to five years' imprisonment and a fine ranging from 20,000 to 100,000 Algerian dinars[49].

c) The Mental Element (Mens Rea) in the Crime of Kidnapping a Minor

The crime of kidnapping a minor, like other intentional crimes, requires the existence of a mental element consisting of criminal intent. This intent is based on two elements: knowledge and will. The perpetrator must be aware that the victim is a minor who has not reached the legal age of majority and must direct his will toward abducting her and depriving her of her personal freedom[50].

Criminal intent is established once the offender is aware of the minor status of the victim and proceeds with the act of taking or removing her from her environment without legal justification. It is not required that the offender know the exact age of the victim, but it is sufficient that circumstances indicate her minority status[51].

The will element is fulfilled when the offender deliberately commits the act of kidnapping, regardless of the motive behind the act. Motives such as revenge, financial gain, or immoral purposes do not negate criminal intent but may affect the severity of the penalty[52].

Some jurisprudence holds that the crime exists even if the offender claims good intentions, such as marriage, since the protection granted by criminal law is directed primarily at safeguarding the minor's freedom and physical and psychological integrity[53].

2 – Methods of Kidnapping a Minor and Their Significance in Determining Legal Classification and Sentencing

Identifying the methods and forms of kidnapping a minor is critical in determining the legal characterization of the crime—whether it constitutes a felony or misdemeanor—and, consequently, the applicable penalties. The discussion will address: **(a) kidnapping through violence and deception**, and **(b) kidnapping without the use of violence or deception.**

A) Kidnapping a Minor through Violence and Deception

The Algerian legislator addressed this form in Article 293 bis, paragraph 1, which states: "Whoever kidnaps or attempts to kidnap a person by means of violence, threat, or enticement…". The legal text makes no distinction regarding the victim's gender or age (minor or adult).

The crime is established when the offender abducts the minor through coercion or deception and removes her to another location [54].

Deception is defined as "any act of fraud or misleading behavior by which the perpetrator manages to deceive the victim."[55] Coercion, on the other hand, is "the deprivation of the victim's free will,"[56] which may be material or moral.

This principle was confirmed by the Supreme Court in its ruling dated March 4, 1986, Case No. 42459, which emphasized that violence or threat is an essential element for proving the crime of kidnapping[57].

Article 293 bis provides penalties for kidnapping using violence, threat, or deception: imprisonment from 10 to 20 years and fines ranging from 1,000,000 to 2,000,000 DZD, with additional penalties under Articles 9 and 9 bis of the Penal Code.

Further aggravation is specified in paragraphs 2 and 3 of Article 293 bis[58], applying life imprisonment if torture is inflicted or if the kidnapping is motivated by ransom. Mitigation under Article 52 may apply if the perpetrator immediately ends the detention, custody, or abduction. The duration of detention affects the degree of penalty reduction[59].

B) Kidnapping a Minor Without Violence or Deception

This form is addressed in Article 326, paragraph 1: "Whoever kidnaps or removes a minor under the age of 18 without violence, threat, or deception, or attempts to do so…".

For this crime to exist, the general elements of kidnapping must be met, but coercion or deception is absent; the victim moves with her full and voluntary consent. [60]This legal characterization often leads to misdemeanor classification rather than felony.

The act of seduction, though a deceptive tactic, is treated differently from fraud. French law considers kidnapping via seduction punishable under Article 356[61] of the old Penal Code (now Article 227-8[62]), corresponding to Article 326 of the Algerian Penal Code.

Seduction involves words or promises (e.g., marriage) insufficient to constitute fraud or deception but aimed at inducing the victim to accompany the perpetrator.

Penalties under Article 326[63] for kidnapping without violence or deception range from one to five years' imprisonment and fines of 20,000 to 100,000 DZD [64].

The law follows a similar approach as French and some Arab legislations. For instance, French Article 227-8 provides imprisonment of up to five years and fines if a minor is removed without violence or fraud, and permits prosecution only if a complaint is filed to annul the marriage contracted with the kidnapper. in accordance with **Article 326 of the Algerian Penal Code**, instead of **Article 83-354 of the French Penal Code**, which corresponds to **Article 293 bis of the Algerian Penal Code**. **Enticement** consists of simple words that do not reach the level of fraud or deceit, such that they cannot be characterized as fraudulent methods; this is why **enticement** in the context of kidnapping constitutes a discourse directed **directly at the victim**[65], such as a promise of marriage.

Article 326 of the Algerian Penal Code punishes the **kidnapping or removal of a minor who has not reached the age of eighteen**, without violence, threat, or deceit, with **imprisonment from one to five years and a fine ranging from 20,000 to 100,000 DZD**. In this regard, the **Algerian legislator** has adopted the same approach followed by the lawmakers of other states, particularly certain **Arab laws**[66] as well as the **French Penal Code**, where **Article 227-8** provides: "If a person other than those mentioned in Article 227-7 seizes a minor child from the hands of those exercising parental authority over him, or entrusted with it, or with whom he ordinarily resides, without deceit or violence, they shall be punished by **imprisonment for five years and a fine of 75,000 euros**," in addition to the optional supplementary penalties provided for misdemeanors[67].

However, if the **kidnapped or removed minor marries her abductor**, **criminal proceedings against the latter may only be initiated upon a complaint from persons entitled to request the annulment of the marriage**, and the offender may only be **convicted after annulment of the marriage**[68].

It should be noted here that the **second paragraph of Article 326 of the Algerian Penal Code** is **inspired by the repealed Article 356 of the French Penal Code**[69], which provides: "Anyone who, without deceit or coercion, kidnaps or removes, or attempts to kidnap or remove, a minor under the age of eighteen, shall be punished with **imprisonment for a period ranging from two to five years and a fine of 500 French francs to 15,000 French francs**. When the kidnapped or removed minor marries her abductor, he may only be prosecuted upon a complaint by persons entitled to request annulment of the marriage, and may not be convicted except after annulment is decreed".

Moreover, certain **comparative Arab legislations** have also **abolished the possibility of refraining from criminal prosecution of the abductor following his marriage to the kidnapped minor**, such as **Egyptian law**[70] and **Jordanian law**[71]. Conversely, the **Moroccan**[72] and **Tunisian**[73]legislations still maintain this possibility, similar to the Algerian legislator.

Section Three – Marriage of the Kidnapper to the Minor and Criminal Immunity.

The current Algerian Penal Code provides criminal protection for women in general, and for minors in particular, in cases of sexual assault. However, the exemption of the abductor from punishment following his marriage to the kidnapped minor may harm the latter more than it benefits her. If the crime is serious and affects the psychological well-being of the victim and the fabric of society, the provision in the second paragraph of Article 326 of the Penal Code is even more severe. Accordingly, this study will address: **the nature of the abductor's exemption from criminal prosecution upon marrying his kidnapped minor in (1)**, and **the conditions and consequences arising therefrom in (2)**.

1. The Nature of the Abductor's Exemption from Criminal Prosecution upon Marrying His Kidnapped Minor

Penal codes of various Arab countries, as well as foreign jurisdictions, have addressed the issue of **child abduction and the criminalization of the act**. However, their **stances differ regarding the prosecution of the abductor in the event of his marriage to the kidnapped minor**. Some jurisdictions **completely exempt him from punishment**, while others **impose conditions on this exemption in addition to the marriage itself**. Certain laws are **particularly stringent in this domain**, stipulating that **the imposition of a penalty on the abductor is mandatory in all circumstances**. These divergent approaches have given rise to a **jurisprudential conflict**, with some scholars **supporting the exemption** and others **opposing it**.

a. The Reality of Abduction and the Legal Provisions Concerning the Abductor's Exemption from Criminal Prosecution upon Marrying His Kidnapped Minor in Algerian and Comparative Laws

Prior to its most recent amendment, **Article 326 of the Algerian Penal Code** provided that:

"Whoever abducts or removes a minor who has not reached the age of eighteen, without violence, threat, or deception, or attempts to do so, shall be punished by imprisonment from one to five years and a fine of 500 to 2,000 DZD. If the abducted or removed minor marries her abductor, criminal prosecution against him shall only be initiated upon a complaint by persons entitled to request annulment of the marriage, and no judgment may be issued against him except after annulment is decreed."

For purposes of comparison, it should be noted that this legal provision **derives from the former French Penal Code**, which provided:

"Whoever, without deception or coercion, abducts or removes, or attempts to abduct or remove, a minor under the age of eighteen, shall be punished by imprisonment from two to five years and a fine of 500 to 15,000 French francs. When the abducted or removed minor marries her abductor, prosecution may only proceed upon complaint by persons entitled to request annulment of the marriage, and no conviction may be issued except following such annulment"[74].

Similarly, the **Moroccan legislator** stipulated:

"Whoever abducts or deceives a minor under eighteen years of age without the use of violence, threat, or fraud, or attempts to do so, shall be punished by imprisonment from one to five years and a fine of 120 to 500 Dirhams. Nevertheless, if the abducted or deceived minor has reached the age of majority and marries her abductor or deceiver, prosecution may only proceed upon complaint by a person entitled to request annulment of the marriage, and no judgment may be issued against him except following such annulmen."[75].

The **Tunisian Penal Code** also includes provisions stating:

"Whoever, without trickery, violence, or threat, abducts or transfers a person from the place where he was placed by his guardians or those entrusted with his care, shall be punished by imprisonment for two years. The penalty increases to three years if the child abducted is between thirteen and eighteen years old, and to five years if the child is under thirteen years of age. Attempt is punishable[76]*. Marriage of the perpetrator to the minor he has abducted suspends the trial or execution of the penalty "*[77].

From an analysis of the aforementioned legal provisions, several aspects may be deduced:

- The act of **abducting or removing a minor, which permits the abductor to be exempted from criminal prosecution upon marrying her, is limited to cases carried out without violence, threat, or enticement.**
- The law grants the abductor the **opportunity to halt criminal prosecution and execution of the penalty, conditional upon the existence of a valid marriage with his minor victim**, without requiring the continuation of the marriage, unlike the prior provision in the **Jordanian Penal Code** before the repeal of Article 308, which stated:

"1. If a valid marriage is contracted between the perpetrator of one of the crimes in this chapter and the victim, prosecution shall be suspended, and if a judgment has been issued, execution of the imposed penalty shall be stayed. 2. The public prosecutor regains the right to pursue the public case and enforce the penalty within three years for misdemeanors and five years for felonies if the marriage ends in divorce without legitimate cause"[78].

- This provision **reveals the law's intent to support the abducted minor**, enabling her to attain a normal marital life free from the psychological and social complications caused by the act of abduction.

- The legislator's approach in determining the penalty for the act of abduction **without violence or deception**, and then granting the perpetrator the opportunity to **halt criminal prosecution and execution of the penalty upon marrying the abducted minor**, appears self-contradictory. The law **imposes a punishment and then rewards the abductor for his crime through marriage to the victim**, a feature that led the Frenc[79] and Egyptian[80] legislatures to repeal the statutory provision granting this opportunity. Consequently, this may be considered an **injustice initially inflicted on the abducted minor by the abductor himself, and subsequently by society and the law**, a situation that defies sound reasoning.

b. The Legal Doctrine on the Abductor Marrying His Abducted Minor and Exemption from Criminal Prosecution.

The purpose of the legal provisions that **suspend criminal prosecution and prevent the imposition of punishment on the abductor who marries his abducted minor**, according to the position paper prepared by the **Euro-Mediterranean Human Rights Monitor** [81]. is to **prevent scandal and protect the reputation of the girl and her family**. These provisions also afford the girl an opportunity for marriage **in light of social customs and traditions that stigmatize her with shame, despite her being a victim**, thus representing a consensual solution compatible with societal particularities and considered an acceptable resolution. This is particularly the case **if sexual intercourse occurs with the consent of both parties and the girl's family had previously opposed the marriage**. It further protects **the rights of any child that may result from such intercourse, whether with or without the minor girl's consent, in terms of lineage and family matters**[82].

Thus, some scholars argue that the legislator linked the **suspension of criminal prosecution against the abductor upon marrying his abducted victim** as a consideration of the **social and moral context**, leaving it to the offender to **rectify the wrongdoing and mitigate the harm caused by his criminal act**. The rationale behind this is intended to achieve multiple objectives [83]:

- **Rectifying the harm caused**, preserving the victim's reputation, and shielding her from public exposure, given that abduction **creates evident harm to the abducted minor, including threats and coercion, and generates psychological and social consequences for both her and her community, while depriving her of her right to marry due to the reluctance of many men to wed her**[84]**.**
- It also aims to **avert social stigma (the stigma of shame)** feared by families when one of their members is subjected to abduction, given the harm inflicted on the abducted minor as a result of the threats and coercion imposed upon her, the effects of which extend to her psychological state and her life within the surrounding social environment[85].

However, **the provision of Article 326 in its second paragraph**, along with certain similar provisions in comparative legislation, **harms the minor victim more than it protects her**, as evidenced by the following:

- A girl subjected to one of these crimes **suffers a further crime through coerced marriage**, usually to the abductor, and in some cases, the victim is already a minor.
- Nothing prevents the offender from subsequently **divorcing his victim**, who has become his wife after a short period of marriage. This implies that the offender, who would otherwise have been punished, for example, by imprisonment ranging from one to five years, [86]**may live freely and marry the victim for a period of his choosing, only to divorce her later**, thereby evading the penalty.

In the case of **abduction of a minor under the age of eighteen (a child)**, followed by the offender marrying the victim, **Article 326, paragraph two, validates the marriage and halts criminal prosecution against the perpetrator**. Yet the fundamental principle should be the **protection of the child and non-recognition of her consent to marriage with the offender**, as presuming the validity of her consent is **unjustifiable and inconsistent with the stance of the Algerian legislator in other Algerian laws**, such as the Civil Code, which considers **a minor's consent as inherently defective and voidable** [87].

This legal provision **offers the offender a legal escape**, granting him the opportunity—**if the girl refuses the marriage**—to abduct her without employing violence, threat, or deceit, thereby potentially compelling her, under **social and familial pressure**, to accept the marriage. This is often justified by the reasoning that **no one else will propose to her afterwards** [88].

Article 326, paragraph two, along with similar provisions in comparative laws, **raises further issues**, particularly when abduction is carried out by multiple individuals. **The legal benefit of exemption from criminal prosecution for marrying the abducted minor applies solely to the person who marries her**, not to all participants in the abduction. The other contributors remain **criminally liable**, on the one hand.

On the other hand, **differences in religion between the abductor and his victim prevent the application of the aforementioned provision**, as Algerian family law **does not permit the marriage of a Muslim girl to a non-Muslim**. Consequently, if the victim is a minor and married, [89]and has been abducted, the abductor **cannot under any circumstances benefit from Article 326, paragraph two, of the Penal Code**.

2. Conditions Required for Exempting the Abductor from Criminal Prosecution Upon Marriage to His Abducted Victim, the Victim's Forgiveness, and the Consequent Effects

Referring to **Article 326, paragraph one, of the Algerian Penal Code**, the legislator penalizes anyone who commits the act of abduction or removal of a minor under the age of eighteen **without violence, threat, or deceit**, without distinction as to whether the abduction involved sexual intercourse or not. However, **paragraph two of the same article, prior to the most recent amendment**, provides for the

possibility of **suspending criminal prosecution against the perpetrator** if the following conditions are met:

a. The occurrence of a valid marriage between the abductor and the abducted minor:

The abductor's marriage to his abducted victim **exempts him from punishment**, provided that the marriage is valid and complete in all its essential elements. The Algerian legislator did not address in **Article 326, paragraph two**, the case in which the abductor divorces the abducted minor **after the judgment exempting him from punishment has been issued**, implying that the legislator considers the abductor's marriage to the minor **a permanent bar to punishment**. This differs from the Lebanese and Iraqi legislations, which **require the continuation of the marriage for more than three years**, and in cases where the marital relationship ends before this period, the **public prosecutor resumes the right to initiate and conduct the public action**, thus preventing the abductor from evading punishment by marrying and then divorcing the abducted minor.

b. Non-submission of a complaint:

As a general principle, the law **does not require the filing of a complaint** to trigger public prosecution by the public prosecutor against offenders, except in legally specified exceptional cases. Among these is the **abduction or removal of a minor without violence or deceit**, followed by marriage to the abductor. In such cases, **criminal prosecution of the abductor does not proceed unless a complaint is submitted by persons entitled to request annulment of the marriage**. A petition for annulment must be filed before the **Family Court** by the guardian of the abducted wife. If a judgment annulling the marriage is issued, the interested party may then submit a complaint against the abductor. Subsequently, the public prosecutor may prosecute him criminally for the **abduction and removal of the minor without violence or deceit**.

c. Non-issuance of a judgment annulling the marriage contract:

It should be noted that **even if a complaint is filed**, punishment **cannot be imposed until a judgment annuls the marriage contract** of the abducted or removed minor. The rationale for imposing this restriction on the authority of the public prosecutor is **to ensure that the marital relationship remains intact so long as the marriage is valid and not tainted by nullity**, thereby safeguarding the **institution of the family and its cohesion** [90].

In other words, if the public prosecutor is entitled to initiate public prosecution merely upon the filing of a complaint by a person with standing to request the annulment of the marriage, the court **before which the case of minor abduction is brought must defer adjudication of the matter until a judgment annulling the marriage contract is rendered**. However, if the adjudicating authority disregards this rule and proceeds to rule on the case without establishing the annulment of the contract, its **conviction and sentencing are null and void**, as confirmed by the Supreme Court in a decision, which stated:

"…in the case of the abducted female marrying her abductor, prosecution only proceeds after the annulment of the marriage; consequently, the trial judges who convicted the accused without taking into account the marriage he contracted with the victim, on the basis that it was registered without the presence of the wife's guardian, even they themselves misapplied the law…"[91].

However, the legislator, in the current provisions of the Penal Code, amended **paragraph two of Article 326 of the Algerian Penal Code**, which now provides:

"The forgiveness of the victim and her legal representative places a limit on criminal prosecution".

Accordingly, **once the public prosecutor becomes aware of the commission of the crime of abducting a minor, even if it occurred without violence or deceit, they do not await the filing of a complaint**; rather, they initiate and pursue the prosecution **as if the abduction involved violence, deceit, or fraud**. However, **if the victim or her legal representative grants forgiveness**, this **terminates criminal prosecution of the abductor**, and the following consequences ensue:

- If the case file is at the level of the public prosecutor, the **procurer of the Republic will order the file to be closed**.
- If the file is before an investigating judge, a ruling of **"no grounds for prosecution"** will be issued.
- If the file is before the court, the **accused will be acquitted.**

Conclusion

- The crime of kidnapping a minor exists in two forms: kidnapping without violence, threat, or deception (misdemeanor), and kidnapping with violence, threat, or deception (felony).
- Felony kidnapping penalties can extend to life imprisonment or death if accompanied by aggravating circumstances.
- Kidnapping without coercion or deception followed by marriage to the minor stops prosecution except when a complaint is filed by a legal party.

Despite Algeria having a legal framework criminalizing child abduction, some provisions remain flawed or incomplete, necessitating reform:

- Repeal paragraph 2 of Article 326, which allows immunity if the kidnapper marries the minor.
- Align the age of criminal and civil majority to avoid ambiguity.
- Remove legal excuses that benefit kidnappers, as kidnapping is inherently damaging to minors.
- Establish specialized courts for prosecuting child abduction, especially when sexual crimes accompany the act.

This legal framework ensures protection of minors, upholds justice, and closes loopholes that previously allowed offenders to evade punishment.

In other words, if the Public Prosecutor is permitted to initiate public prosecution upon the mere filing of a complaint by the person entitled to request the annulment of

the marriage, the court seized with the case of the kidnapping of a minor is required **to defer adjudication of the case until a judgment annulling the marriage is rendered**. Conversely, if the judicial authority disregards this rule and adjudicates the case without establishing the annulment of the marriage, its ruling of conviction and sentencing is null. This was affirmed by the Supreme Court in a decision, which stated:

"... in the case where the kidnapped minor has married her kidnapper, prosecution is not initiated until after the annulment of the marriage. Therefore, the trial judges who convicted the defendant without taking into account the marriage he contracted with the victim, on the basis that it was registered without the presence of the minor's legal guardian, themselves misapplied the law..."

However, the legislator, in the current provisions of the Penal Code, amended the second paragraph of Article 326, which now provides:

"The pardon of the victim or her legal representative terminates the criminal prosecution".

Accordingly, as soon as the Public Prosecutor becomes aware of the commission of a crime of kidnapping of a minor, even if it was not committed with violence, deception, or fraud, the prosecution is **initiated and pursued as if the kidnapping had been committed with violence, deception, or fraud**.

However, **the pardon of the victim or her legal representative terminates the criminal prosecution of the kidnapper**, which entails the following consequences:

1. If the case file is at the level of the Public Prosecutor, the Prosecutor of the Republic shall order the **dismissal of the file**.
2. If the case is at the level of the investigating judge, it shall be ruled that there is **no basis for prosecution**.
3. If the file is at the level of the court, the court shall **acquit the accused**.

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[65] A-H. Ben Mecheri and M. Djagham, op. cit., p.43: "Seduction consists of simple words that do not reach fraud or deceit and do not describe fraudulent methods. This is why seduction in case of abduction is speech addressed directly to the victim, such as a promise of marriage." See also J. Pradel and M. Danti-Juan, Special Criminal Law, 6th ed., Cujas Edition, Paris, p.417.
[66] Article 291 paragraph 1 letters a and b of Jordanian Penal Code No.16/1960 and all amendments, published in Official Gazette No.1487 dated 1 January 1960, amended by latest law No.8/2011, Official Gazette No.5090 dated 2 May 2011 https://www.wipo.int/edocs/lexdocs/laws/ar/jo/jo064ar.pdf.
[67] Article 291 paragraph 2 letter c of Jordanian Penal Code No.16/1960
[68] Article 292 of Jordanian Penal Code No.16/1960
[69] Ahmed Al-Mashhadani, Previous Reference, p.120.
[70] Anis Haseeb Al-Sayed Al-Mahlawi, Previous Reference, p.145.
[71] Amhmedi Bouzina Amna, Previous Reference, p.14.
[72] Supreme Court of Jordan Decision No.123/1982, dated 5 April 1982, Jordan Official Gazette, Issue 2512, p.12.
[73] Article 294 paragraph 1 of Jordanian Penal Code
[74] Article 294 paragraph 2 of Jordanian Penal Code
[75] A-H. Ben Mecheri and M. Djagham, op. cit., p.46.
[76] J. Pradel and M. Danti-Juan, Special Criminal Law, 6th ed., Cujas Edition, Paris, 2010, p.420.
[77] Ahmed Al-Barak, Previous Reference, p.14.
[78] Article 295 of Jordanian Penal Code
[79] Amhmedi Bouzina Amna, Previous Reference, p.16.
[80] Article 296 of Jordanian Penal Code
[81] A-H. Ben Mecheri and M. Djagham, op. cit., p.47.
[82] Article 297 of Jordanian Penal Code
[83] Ahmed Al-Mashhadani, Previous Reference, p.125.
[84] Anis Haseeb Al-Sayed Al-Mahlawi, Previous Reference, p.150.
[85] Amhmedi Bouzina Amna, Previous Reference, p.18.
[86] Supreme Court of Jordan Decision No.145/1985, dated 15 May 1985, Jordan Official Gazette, Issue 2687, p.20.
[87] Article 298 of Jordanian Penal Code
[88] Article 299 of Jordanian Penal Code
[89] Ahmed Al-Barak, Previous Reference, p.20.
[90]A-H. Ben Mecheri and M. Djagham, Previous Reference, p.48.
[91] J. Pradel and M. Danti-Juan, Previous Reference, p.422.