

**BEATA WOJCIECHOWSKA**

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## ***RAPTUS PUELLAE AS IMPEDIMENT TO MARRIAGE IN DECRETUM GRATIANI***

Marriage has always been a matter of concern for the Church. The Christian doctrine has given the *matrimonium* a sacred meaning, though at the same time it has fully endorsed the "consensual" Roman law concept. The mutual decision to marry determined its importance. The Church in the first centuries considered marriage unbreakable and strived to adjust the norms of the secular law to the Christian Science<sup>1</sup>. In the *Apostolic Constitutions*, the lifetime durability of marriage was emphasised, adultery and debauchery were warned against and the problem of relations between the spouses was raised, encouraging to support each other and show mutual respect and love<sup>2</sup>. St Augustine in his work *De bono coniugali* indicated marriage as an institution of natural law accepting human weakness with the help of the grace of God's sacrament<sup>3</sup>. Marriage had its specified goals and inner goods: *proles, fides* and *sacramentum*<sup>4</sup>, which made up for the Augustinian concept of marriage adopted by theologians and canonists.

The Church pushed forward its own vision of marriage, often falling into conflicts, especially with the mighty. The Church excommunicated the guilty for violating the basic norms of marriage. The Roman law and the Frankish law punished the violations of certain provisions of the marriage law with death<sup>5</sup>.

Since the early middle ages, there has been an even deeper reflection on marriage as a sacrament. The canons of the first ecumenical councils and synods referred to various aspects of marriage, such as the prohibitions against repeated relationships, cohabitation, separation, adultery or incest, at the same time emphasising unity, unbreakability and sanity of marriage. Kidnapping and marrying sacred virgins, widows and girls, who, out of their love for Christ,

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<sup>1</sup> W. Góralski, *Pierwotna dyscyplina Kościoła w sprawie małżeństwa*, „Roczniki Teologiczno-Kanoniczne”, 30/1983, z.5, pp. 73-85; E.A. Clark, *Adam's Only Companion: Augustine and the Early Christian Debate on Marriage*, in: *The Olde Daunce: Love, Friendship, Sex and Marriage in the Medieval Word*, ed. R.E. Edwards, S. Spector, State University Of New York Press, Albany 1991, pp.15-31.

<sup>2</sup> *Constitutiones apostolorum*, developed by A. Baron, H. Pietras, Kraków 2007, pp. 4-5, 10-11, 152, 176.

<sup>3</sup> St. Augustine, *Wartość małżeństwa (De bono coniugali)*, translated by W. Eborowicz, in: *Pisma św. Augustyna o małżeństwie i dziewictwie. Przekład i komentarz*, ed. A. Eckmann, Lublin 2003, p. 75.

<sup>4</sup> C. Burke, *Św. Augustyn o pożyciu małżeńskim*, „Communio”, 18/1998, z. 1, pp. 42-60; M. Cieśluk, *St. Augustine on the indissolubility of marriage in De coniugiis adulterinis*, in: *Apud patres. Prawo rzymskie w literaturze wczesnochrześcijańskiej*, ed. A. Dębiński, M. Wójcik, Lublin 2011, pp. 19-28.

<sup>5</sup> O małżeństwie w świetle prawa rzymskiego, germańskiego i kanonicznego, see P. Lyndon Reynolds, *Marriage in the Western Church: The Christianization of Marriage During the Patristic and Early Medieval Periods*, Leiden 1994, passim.

decided to put on religious vestments, was also prohibited. A failure to observe these canons was punishable by excommunication<sup>6</sup>

The Synod of Elvira (306) ordered the separation of those partners, who had broken their engagement, from the community of believers for a period of three years. In the canon of the 11<sup>th</sup> Synod of Ancyra (314) it was decided for the *engaged virgins, abducted by other men, to be returned to their primary fiancés, even if the abductors raped them*<sup>7</sup>. The sanctions for adultery, ranging from the death penalty, banishment, exile, to the separation of a spouse, were described in detail in the *Legum collatio*, dating back to the turn of the 4th and 5th centuries<sup>8</sup>. The Synod of Tours, in the year of 567, prohibited the act of kidnapping a girl, against the father's will, and ordered the kidnapped to escape to the church and not to make any commitments until she returns under the supervision of the father. Such an action made it possible for her to marry<sup>9</sup>. *Libri poenitentiales*, for the abduction of a virgin or a widow, provided for a penance on bread and water for 3 years<sup>10</sup>. Hinkmar (800/810-882), the Archbishop of Reims and the expert in law, opposing the kidnappings, indicated the secular practices leading to reaching a settlement (*desponsatio*) between the two families who determined the conditions of the marriage<sup>11</sup>. Burchard's *Dekretum* (965-1025), the Bishop of the Imperial City of Worms, prohibited taking a woman, abducted by force against her and her parents' will, for a wife and he commended penance on bread and water for 7 years. It was emphasised that *there should be no legal marriage without the consent of both parents, and whoever embezzles it, should remain unmarried*<sup>12</sup>.

In the medieval writings of the scholastic period, theological-moral reflections on marriage gave away to the legal issues, especially those concerning the moment of the conclusion of marriage, its validity and indissolubility. The moral aspects and the functions of marriage were paid attention to by philosophers, theologians and canonists in their writings<sup>13</sup>. Ivo of Chartres (1040-1116) put pressure on the consent given by the fiancés, which constituted the indissolubility of the relationship. He strongly opposed the kidnappings which could have led to concubinage. In the letter to the Bishop of Auxerre, he referred to the abduction of a girl who had already been promised to a knight. Because of that event, the fiancé resigned from

<sup>6</sup> W. Góralski, *Pierwotna dyscyplina Kościoła*, pp. 73-85; K. Burczak, *Małżeństwo w prawodawstwie synodów galijskich IV-VII wieku*, in: *Wokół problematyki małżeństwa w prawie rzymskim. Henrico Insadowski (1888-1946) in memoriam*, ed. A. Dębiński, M. Wójcik, Lublin 2007, pp. 21-51; B. Wojciechowska, *Proles – fides – sacramentum. Małżeństwo w średniowiecznym prawie kanonicznym*, in: *Kobieta i mężczyzna jedna przestrzeń – dwa światy*, ed. B. Popiołek, A. Chłosta-Sikorska, M. Gadocha, Kraków 2015, pp. 17-26.

<sup>7</sup> *Acta synodalia ab anno 50 ad annum 381*, developed by A. Baron, H. Pietras, Kraków 2006, pp. 58, 65.

<sup>8</sup> *Zbiór prawa Mojżeszowego i rzymskiego [Prawo Boskie, które Pan przekazał Mojżeszowi]*, translated by A. Dębiński, Lublin 2011, pp. 73-85.

<sup>9</sup> K. Burczak, *Małżeństwo w prawodawstwie*, p. 50.

<sup>10</sup> *Libri poenitentiales*, developed by A. Baron, H. Pietras, Kraków 2011, p. 265, 268, 273, 281, 293, 309, 319, 337, 421, 467.

<sup>11</sup> Hincmari Archiepiscopi Rhemensis, *De divortio Lotharii regis et Tetbergae reginae*, *Patrologiae cursus completus* (later quote PL), ed. J.P. Migne, vol. 125, Paris 1852, szp. 720-745.

<sup>12</sup> *Libri poenitentiales*, p. 378; G. Duby, *Knight, woman and priest. Marriage in feudal France*, translated by H. Geremek, Warszawa 1986, p. 66.

<sup>13</sup> M. Michalski, *Coitus albo consensus, czyli co stanowi o ważności małżeństwa. Relacja z pewnej dyskusji z XI-XIII wieku*, in: *Nihil superfluum esse. Prace z dziejów średniowiecza ofiarowane Profesor Jadwidze Krzyżaniakowej*, Poznań 2000, pp. 159-166; D. Poirel, *Miłość boska, miłość ludzka – Hugo ze św. Wiktora i sakrament małżeństwa*, „Communio”, 18/1998, pp. 61-70; C.N.L. Brook, *The Medieval Idea of Marriage*, Oxford 1989, passim.

the marriage, while the next candidate feared the accusation of bigamy. Ivo, downplaying the physical relationship between the kidnapped and the kidnapper, which was not a determining factor about the marriage, emphasised the declaration of consent<sup>14</sup>.

The *Decretum Gratiani* also indicated a consensus which was the basis for concluding a marriage and constituted its validity, while an intercourse was its complement<sup>15</sup>. In this 12th-century collection of the canonic law, various aspects connected with marriage, such as: impediments to marriage, mistakes, kidnappings, engagements, relationships with non-Christians, martial abuse, affinity and kinship issues, including spiritual ones, were discussed<sup>16</sup>.

The *Decretum Gratiani* thoroughly addressed the issues connected with kidnappings and their consequences in the legal and ethical aspect<sup>17</sup>. The punishment of the kidnapper with a public penance was ordered and he was forbidden to marry. It was possible for a fiancé, who refused to take back the abducted fiancé, to marry another one. It was emphasised that in the engagement, there was a possibility of marrying another person. Marriage was indeed initiated by the engagement but it was confirmed and validated by means of an intercourse<sup>18</sup>. It was indicated that engaged girls, kidnapped by other men, should be freed and be able to return to those whom they were previously engaged with, even if they were raped by their kidnappers<sup>19</sup>. However, in this case, when a girl did not want to leave the kidnapper and come back to her fiancé, it was her and the abductor, who should have been excluded from the community. At the same time, a significant difference was emphasised between withdrawing from the marriage contract and kidnapping which was associated with disgrace<sup>20</sup>. It was explained that kidnapping was an illicit physical relationship, inducing evil and depravity, and the one who committed such an act found pleasure in rape<sup>21</sup>. It was clearly indicated that in such a situation, the girl was introduced not as kidnapped but engaged. Referring to the common law, it was explained that the kidnappings referred to the girls who did not have any matrimonial plans<sup>22</sup>. However, it was stated that a girl who was engaged to one man, could not be married by another. If however, marriage was concluded, the married couple should have been excommunicated and the act of an intercourse should not have been allowed. It

<sup>14</sup> Ivonis Carnotensis episcopi, *Epistolae*, PL, vol. 162, *Epistola 166*, szp. 169-170. W innym liście Iwo napisał: *Desponsata viro, coniugis nomen accepit, cum enim initiatur coniugium tunc coniugii nomen assumitur non enim defloratio virginitatis facit coniugium, sed pactio coniugalitatis*, therein, *Epistola 246*, szp. 253-254.

<sup>15</sup> A. Winroth, *The Making of Gratian's Decretum*, Cambridge: Cambridge UP 2000, passim; Corpus iuris canonici (later quote CIC), ed. E. Friedberg, vol. 1-2, Graz 1955, vol.1: *Decretum Gratiani* (later quote *Decretum Gratiani*), C.27 q.2.1., szp.1063: *Matrimonium quidem non facit coitus sed voluntas, et ideo non solvit illud separatio corporis sed voluntatis*. C.29 q.1., szp.1091: *Item consensus utriusque matrimonium facit*.

<sup>16</sup> *Ibidem*, C.27 q.1.; q.2.; C.28 q.1.-3.; C.29 q.1.-2.; C.30 q.1-5.; C.31 q.1.-3.; C.32 q.1.-8.; C.33 q.1-5.; C.34 q.1.; C.35 q. 1.-10.; C.36 q.1.-2.

<sup>17</sup> Problematyce tej w historiografii zachodniej poświęcono uwagę w kontekście funkcjonowania prawa oraz seksualności w różnych społecznościach, a także w piśmiennictwie średniowiecznym: J.A. Brundage, *Law, Sex and Christian Society in Medieval Europe*, Chicago and London: U. Chicago P. 1987, pp. 208-210; C. Saunders, *Rape and Ravishment in the Literature of Medieval England*, Cambridge: P.S. Brewer, Cambridge 2001, pp. 76-92.

<sup>18</sup> *Decretum Gratiani*, C.27 q.2.33.; C.27 q.2.34., szp.1073.

<sup>19</sup> *Ibidem*, C. 27 q.2. 36., szp. 1076.

<sup>20</sup> *Ibidem*, C.27 q.2.37., szp.1077.

<sup>21</sup> *Ibidem*, C.27 q.2.48., szp.1077: *Quid sit raptus? Raptus est illicitus coitus, a corrumpendo dictus; unde qui rapto potitur stupro fruitur*.

<sup>22</sup> *Ibidem*, C.27 q.2.49., szp.1077.

was emphasised that the person, who was taken out of her house, altogether with her fiancé, and covered with a veil and blessed, could not have been admitted to subsequent vows<sup>23</sup>.

A case of a girl who, without her father's knowledge, was lured with gifts for a party and then raped by a young man, was considered. When her parents found out, the girl was handed over to the man and publicly married. It was being considered whether that man committed the act of kidnapping and whether the kidnapped could marry the kidnapper upon the father's consent. Gratian stated that such a secret seduction was commonly considered a kidnapping<sup>24</sup>. Referring to the *Etymologies* by Isidore of Seville, an abduction was defined as an illegal act which should have been associated with rape<sup>25</sup>. The secular law indicated that a kidnapping was committed where a girl, whose wedding was not known, was abducted. However, it was emphasised that not every forbidden sexual intercourse and not every virginity deprivation can be referred to as a kidnapping. The necessity for a division between a fornication, rape, adultery, incest and kidnapping was pointed out. Fornication (*fornicatio*) was taken as a kind of each unauthorised intercourse with another woman and not with a wife, it was especially understood as making use of the services of widows, prostitutes or concubines. Rape is an unauthorised deprivation of virginity of young women, without a prior marriage contract. Adultery was referred to as insulting someone else's marriage bed, while incest was defined as an intercourse of relatives or in-laws<sup>26</sup>. A kidnapping was treated as an abduction of a girl from her father's house against her will that, after being depraved, she could have been considered a wife. It was connected with raping the girl and the consequences it had for her parents. The death penalty was provided for such an enslavement of a girl, unless the kidnapper, together with the kidnapped, escaped to the church, where the *privilegium ecclesiae* guaranteed the right to be released from the death penalty<sup>27</sup>.

At the same time, it was decided that the kidnapper with the kidnapped, who had been previously raped, should find an asylum in the church and she had to be immediately freed from the kidnapper. And he, after being pardoned from death and other penalties or after being freed from duty, should get the option of buying himself out. A situation was also assumed, in which the girl reached an agreement with the man kidnapping her and then she should have been freed from her father's will while the kidnapper should have been obliged to redress the situation. Gratian concluded that in such a situation, the rape was done to the parents, and not to the girl who settled for such a relationship. It was also noted that sometimes both parties experienced humiliation when the violence was perpetrated by the woman. Harm was made to the girl who, out of her father's will, was abducted by force and forced to an unlawful physical relationship to which she never agreed. Such circumstances were referred to as the essence of double plunder when the thing itself was abduction along with the benefit and profit derived from it<sup>28</sup>.

Following these considerations, the question was raised whether after clearing himself of the charge of abduction, the kidnapper could take the kidnapped girl for his wife. The answer

<sup>23</sup> Ibidem, C.27 q.2.50, szp. 1077-1078.

<sup>24</sup> Ibidem, C.36 q.1.1., szp.1288.

<sup>25</sup> Ibidem. See also. Sancti Isidori Hispalensis Episcopi *Etymologiarum libri XX*, PL, vol. 82, ks. V, c. 36, szp. 210: *Raptus proprie est illicitus coitus a corrupendo dictus, unde Virgilius: Raptor potitur, id est, stupro fruitur*.

<sup>26</sup> Decretum Gratiani, C.36 q.1.2, szp. 1289.

<sup>27</sup> Ibidem.

<sup>28</sup> Ibidem, C.36 q. 1.3., szp. 1289.

was negative. Abductors of girls or women, under the guise of living together and cooperating or indulging the kidnappers, if they were laymen, they would have been anathema and if they were clergy, they would have lost their dignity<sup>29</sup>. The cursed and excluded from the community included those abducting widows and virgins, especially those baptised to God<sup>30</sup>. It was emphasised that if someone tried to kidnap the holy virgins in the aim of concluding a marriage, he was to be punished with death<sup>31</sup>. The order for exclusion from the community and an anathema to the kidnappers and their accomplices as well as the legal prohibition against marriages between the kidnappers and the kidnapped is emphasised in the following chapter<sup>32</sup>. Those who would become engaged to or marry a kidnapped virgin or widow, were subject to anathema. It also applied to those who favoured this type of violence<sup>33</sup>.

It was decided that it would be the most appropriate for the girls, who were kidnapped upon the will of their parents under the guise of engagement or married for the sake of dowry, to be freed from the marriage, to be able to return to their parents and to be forced to a public penance. And only after completing it and obtaining the approval of both parents, marriages could be matched. However, if the marriage, concluded as a result of a kidnapping or any other coercion lasted, then in the case of death of one of the spouses, the survivor should have undergone a public penance and could not renew the *matrimonium*, unless after obtaining the consent of the bishop. It follows from this passage that the relationships of the kidnapped with the kidnapper were forbidden but they were allowed to marry another person after repentance<sup>34</sup>.

In the following chapter, it is explained that, according to the law, after the repentance, the kidnapper could marry the one he kidnapped but only upon her father's consent. The deciding role of the father's consent was emphasised, at the same time stating that marriages should have been concluded with the mutual consent of the spouses and those whom they were previously subordinate to. In this matter, referring to the civil and natural law, it was implied that marriages were concluded by mature men and women capable of *matrimonium* but with the approval of the parents who had looked after them. This injunction was of paramount importance<sup>35</sup>.

*Decretum Gratiani* clearly indicated that the *raptus puellae* was an impediment which prevented marriage. The reason was the duress of abduction, which was contrasted with free will, voluntary consent and the approval of father, parents or guardians.

### ***Raptus puellae* as impediment to marriage in *Decretum Gratiani*** **Summary**

Marriage has always been a concern of the Church. The Christian doctrine gave *matrimonium* sacred meaning and at the same time fully endorsed the concept of mutual consent which

<sup>29</sup> Ibidem, C.36 q. 2.1., szp.1290.

<sup>30</sup> Ibidem, C.36 q. 2.2., szp.1290.

<sup>31</sup> Ibidem, C.36 q. 2.3., szp.1290.

<sup>32</sup> Ibidem, C.36 q.2.4., szp.1290.

<sup>33</sup> Ibidem, C.36 q.2.5., szp. 1290.

<sup>34</sup> Ibidem, C.36 q.2.10., szp. 1291-1292.

<sup>35</sup> Ibidem, C.36 q.2.11., szp. 1292.

originated from the Roman law. The act of abduction with its legal and ethical consequences was described in detail in the *Decretum Gratiani*. The punishment for the abductor was public penance and prohibition of marriage. If the fiancé was unwilling to take back the abducted bride he was allowed to marry another woman. However, if the fiancé and the bride wanted to get married afresh, they were to be both excommunicated until they had made their reparation. The *Decretum Gratiani* clearly indicated that the *raptus puellae* was an impediment which prevented marriage. The reason was the duress of abduction, which was contrasted with free will, voluntarily consent and the approval of father, parents or guardians.

**Keywords:** marriage, impediment to marriage, abduction, *Decretum Gratiani*

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