

Approaching the Legal Regime of Consensual Abduction Through History

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Abstract

Abduction was considered a way to access marriage in the ancient world. Even if it wasn't lawful, Mythology leaves us traces of this conduct, which was acceptable in Roman society when the kidnapped woman's consent was present. Constantine, for reasons that we can only suppose harshly prohibited this practice, punishing it with the death of all those involved (even the raped woman). Its regulation went back to the Middle Ages but it was modulated, accepting the remission of the sentence in case of agreement between the parties. This way, a private crime was established in modern times which allowed the woman to take action against the abductor unless they married, thus forcing him to fulfil his marriage promises.

Keywords: Abduction; consent; marriage; women in Rome; Roman criminal law.

1. Matrimonial consent and *auctoritas*

1.1 In Rome

In archaic Rome, marriage was arranged by the parents of the consorts, often without the consent of the spouses.¹ They -alieni iuris of their *patres familias*- lacked the necessary independence to determine their marriage, although in classical times the consent of both the *pater familias* and the spouses was required, as detailed by Paullus:

D. 23,2,2

Paulus book 35 ad Edictum

Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt.

Marriage cannot take place unless all agree, i.e. those who are joined and those in whose power they are.

Although over the centuries and depending on the social class of the families, the greater or lesser involvement of the bride and groom in the formation of the matrimonial consent may have varied, we know that the freedom of the parents to decide the marriage of their children was reduced as the relevance of the consent of the bride and groom was strengthened. The *leges Iulia et Papia*, it seems, allowed the *filii* to appeal to the praetor to substitute parental consent in case of unjustified refusal.² As a result of this evolution, the Emperor Diocletian configured the intervention of the *pater familias* as a right of veto over the

free choice of the children, with certain limitations,³ as stated in CJ. 5,4,12 and CJ. 5,4,14:

CJ. 5,4,12

Imperatores Diocletianus, Maximianus. Ne filium quidem familias invitum ad ducendam uxorem cogi legum disciplina permittit. Igitur, sicut desideras, observatis iuris praeceptis sociare coniugio tuo quam volueris non impedis, ita tamen, ut in contrahendis nuptiis patris tui consensus accedat * DIOCL. ET MAXIM. AA. SABINUS. * <A 285A. II ET ARISTOBULO CONSS.>

The discipline of the law does not permit a son of a family to be forced to take a wife against his will. Therefore, as you request, you will not be prevented from marrying whom you wish, provided your father consents.

CJ. 5,4,14

Imperatores Diocletianus, Maximianus. Neque ab initio matrimonium contrahere neque dissociatum reconciliare quisquam cogi potest. Unde intellegis liberam facultatem contrahendi atque distrahendi matrimonii transferri ad necessitatem non oportere * DIOCL. ET MAXIM. AA. ET CCJ. TIT. * <>

No one can be forced to enter marriage or to reconcile after dissolution. You will understand that it is not appropriate to make the free choice to enter and dissolve a marriage a necessity.

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¹ ASTOLFI, R., *La lex Iulia et Pappia*, 2nd Ed., Padua, 1986, p. 140.

² CORTÉS, VC, Alcance del consensus del paterfamilias en el matrimonio de su filia in potestate, in LÓPEZ ROSA R. and del PINO TOSCANO, F., *El Derecho de Familia. De Roma al Derecho actual*, Huelva, 2004, p. 91.

³ Vid. DÍAZ-BAUTISTA CREMADES, AA., La sociedad en los rescriptos de Diocleciano, in Lázaro Guillamón, C., *Administración, estado del bienestar y políticas socioeconómicas*, Castellón, 2019, pp. 71-96.

1.2 In the Middle Ages

The parental veto in marriage consent would not disappear in the course of history, as we can see in Law 49 of the Elizabethan Compilation:

Toro XLIX,

...e que esta sea justa causa para quel padre e la madre puedan desheredar si quisieren a sus fijas quel tal matrimonio contraxeren, lo qual otro ninguno no pueda acusar syno el padre, e la madre muerto el padre.

The Partidas seem to reinforce in the Wise King's definition of marriage the importance of the consent of the spouses:⁴

Partidas 4,2,5

Consentimiento solo, con voluntad de casar, faze matrimonio entre el varón, e la muger. E esto es por esta razón, porque maguer sean dichas las palabras, segund dicen, para el casamiento, si la voluntad de aquellos que las dizen non consientieron las palabras, non vale el matrimonio, quanto para ser verdadero, como quier que la Iglesia judgaria que valiesse, si fuessen las palabras prouadas, por razón, que fueran dichas, en la manera que se hizo, el casamiento por ellas; non se prouando, que las palabras fueran dichas en otra manera, que por voluntad de casar, assi como si fuessen dichas por juego, o por mostrar por que palabras se puede fazer el casamiento...

1.3 In the Modern and Contemporary Ages

The struggle against paternal intercession appears in the literature of the 18th⁵ and 19th⁶ centuries and even in the 20th century,⁷ although this debate already appears in Don Quixote.⁸

We know of a famous example of the tension between the bride's consent and the parental veto through an event that took place in Seville in the 17th century. It is the so-called *abduction of the "roldana"* recorded by Montoto de Sedas.⁹ Luisa Roldán de Villavicencio was the daughter of the Sevillian sculptor Pedro Roldán, whom she helped in the family workshop. It seems that in the family workshop, she had an affair with another apprentice, Luis Antonio Navarro de los Arcos, to whom she was betrothed, but her father was opposed to this. The groom sued Luisa in court to demand the fulfilment of the marriage promise, bringing witnesses to the promise. Before the judicial

authority, the defendant declared "that she had never been married, that she was a young maiden, that she was not related to Luis Antonio, that she had no vow of chastity and that despite having given her promise of marriage to Luis Antonio, she could not fulfil it due to her father's refusal to marry her". Because of this, the judge ordered the custody of the bride by a third party (the master gilder Lorenzo de Ávila) authorising, without paternal authority, the celebration of the marriage. Although, as we can see, this was not a real abduction, the people of Seville coined the story as "the abduction of the roldana".

And there is still one case in our Constitution where the parental veto is maintained, albeit in a very particular case:

Article 57 Spanish Constitution

4. Aquellas personas que teniendo derecho a la sucesión en el trono contrajeran matrimonio contra la expresa prohibición del Rey y de las Cortes Generales, quedarán excluidas en la sucesión a la Corona por sí y sus descendientes

For its part, women's marital consent is a special case throughout history because it is framed within the particular consideration of the status of women, their reification by the male (father or husband) and their lack of contractual independence. This denial of women as subjects of law independent of men has, as we know, undergone multiple variations over time and social classes. As we have already explained elsewhere,¹⁰ women reached certain levels of social and legal independence during the Republic, only to find themselves once again subjected to men (more or less effectively) at the beginning of the principality, and once again began the struggle for their independence during the second and third centuries, their emancipation being broken again with the reign of Constantine.¹¹

2. The abduction of virgins

In the primitive context of the father's patrimony over his daughters, widespread conduct among the peoples of antiquity is framed, such as the abduction¹² of virgins which, as we shall see, is much more than an illegal detention for sexual purposes. The mechanism obeys a social rule with a very long tradition in the Western mentality: women could only marry in a state of virginity; therefore, the man who lay with a virgin woman made her undesirable for other men and contracted the duty to marry her (the only way to repair, in some way, the damage

⁴ Regarding matrimonial consent in the Partidas, vid. GIMENO CASALDUERO, J., Alfonso el Sabio, el matrimonio y la composición de las partidas, in *Nueva Revista de Filología Hispánica*, vol. 36, 1988, pp. 203-218.

⁵ Cf. ae. MARIVAUX, P. de, *Escuela de madres*, 1732.

⁶ FERNÁNDEZ DE MORATÍN, L., *El sí de las niñas*, 1806.

⁷ GARCÍA LORCA, F., *La casa de Bernarda Alba*, 1936.

⁸ PERLADO, P. A., Casamientos, bodas y matrimonio en El Quijote, in Strosetzki, CJ., *Visiones y revisiones cervantinas, actas selectas del VII Congreso Internacional de la Asociación de Cervantistas*, Madrid, 2011, pp. 735-748.

⁹ MONTOTO DE SEDAS, S., *El casamiento de La Roldana*, Seville, 1920, vol. IV, pp. 144-148

¹⁰ DÍAZ-BAUTISTA CREMADES, A. A. and BAELO ÁLVAREZ, M., Lenguaje inclusivo en Roma. Un apunte sobre la condición de la mujer en las fuentes jurídicas romanas. In: *Revista de Derecho Romano*, vol. 1, 2019.

¹¹ DÍAZ-BAUTISTA CREMADES, Adolfo A., La mujer en las constituciones de Constantino recogidas en el Código de Justiniano. In *RIDROM*, vol. 30, 2023.

¹² The word „raptus -a -um“ is the participle of the verb „rapio“ which comes from the Proto-Italic *rap-i-, a term related to the Ancient Greek ἐρέπτοιμαι meaning (“to devour”, “to take away”). DE VAAN, M., *Etymological Dictionary of Latin and the other Italic Languages*, Leiden, 2008, v. *raptus*. Its first meaning refers to “to snatch, to take away, to steal” and only in the second meaning does it mean “to kidnap or abduct”. In the legal field, the *actio vi bonorum raptorum* is well known, which typifies robbery committed with violence.

caused). In a world where a woman's consent was irrelevant, a man who wished to marry a virgin woman had only to lie with her, thereby acquiring the duty (and the right) to marry her.¹³ This brutal practice appears in the Greco-Latin ideology through myths such as the abduction of Persephone by Hades¹⁴ or the legend of the abduction of the Sabine women.¹⁵ The casus belli of the mythical Trojan War is also the abduction of Helen by Paris. But if we analyse these mythical stories, we will see with perplexity that the abduction is not generally resolved with the punishment of the abductor and the restitution of the maiden to her father, but with the conformity of the victim with her aggressor and, in many cases, with the satisfaction of the father. This is so, under the primitive mentality of these peoples, firstly because the main offence is not the violation of the victim's sexual freedom or the forced removal of her virginity (which does not admit real reparation) but the violation of the family's honour, which can be satisfied by compensation. After all, if the abductor marries his victim, there is no longer any harm since the woman will not be unfit for marriage, as she will already be married.¹⁶

This execrable custom has survived over time and continues to be practised today in countries ranging from Central Asia, the Caucasus, parts of Africa, Pakistan, Kyrgyzstan and the Amazon jungle in South America. In our law, such an act constitutes the crime of illegal detention or aggravated kidnapping, which is punishable by between fifteen- and twenty-five-years' imprisonment (art. 166.2. b CP).

3. Consensual abduction

From very early on, the practice of virgin abduction coexisted with another variety in which the bride-to-be consented to and participated in the act. This consent of the bride would for us exclude unlawfulness (provided that the victim is of age and capable) but it was considered abduction precisely because the consent of the abducted woman was irrelevant. The unlawful

element was precisely to lie with a maiden without the father's permission.¹⁷

3.1 Regulation in Roman Law

Despite being a common practice in the ancient world, the different legal systems did not consider consensual abduction a lawful practice,¹⁸ being forbidden in texts from Exodus¹⁹ and Deuteronomy.²⁰

Being, as we suppose, a frequent practice throughout history, it is surprising that consensual abduction does not appear expressly regulated throughout the Roman experience²¹ until very late times. Even Augustus, who regulated unconsented sexual relations or contrary to moral order through various laws²² does not seem to have referred specifically to consented abduction.

In particular, the *Leges Iuliae de vi publica et privata*²³ would include the case of abduction, but without specifying the possible consent of the victim, according to the institutions of Marican reproduced in the Digest:

D.48,6,5,2 (Marcian. 14 inst.)

Qui vacantem mulierem rapuit vel nuptam, ultimo supplicio punitur et, si pater iniuriam suam precibus exoratus remiserit, tamen extraneus sine quinquennii praescriptione reum postulare postulare poterit, cum raptus crimen legis Iuliae de adulteris potestatem excedit

He who abducts an unmarried or married woman is punished with capital punishment, and if the father had pardoned his wrong by supplication, yet a stranger can reclaim the culprit without the prescription of five years; for the offence of abduction exceeds the power of the law of Julia against adulterers.

The transcribed text does not mention the consent of the abductee. It could be interpreted that this was legally irrelevant, i.e., that the protected legal right was the paternal (or marital, as the case may be) authority and that therefore it mattered

¹³ Although the cliché describes the male abductor, it is not impossible to find references in mythology to abductions perpetrated by women, as in the case of Eos, the Titan goddess of dawn, who abducted Orion, Cleitus, Cephalus and Titionius. Homosexual abductions are also mentioned, such as that of Chrysippus by Laius and that of Hyllas by Hercules.

¹⁴ HESIOD, *Theogony*, 912.

¹⁵ TITUS LIVIUS, *AUC*, 9-11.

¹⁶ AVILA, A., El mito de Hylas y la tradición épica en la literatura latina, Una hipótesis de lectura de Juvenal I.162-7. *VII Jornadas de Estudios Clásicos y Medievales*, 7-9 October 2015, Ensenada, 2015, pp. 1-11.

¹⁷ This possibility of abduction with the woman's consent is one of the elements that separate it from rape, since rape is an act that is always conducted by force and without the woman's consent. Vid., Rodríguez Ortiz, Victoria, *Historia de la violación. Su regulación jurídica hasta fines de la edad media*, (Madrid, 1997), pp. 126 et seq.

¹⁸ THONISSEN, J. J., *Études sur l'histoire du Droit Criminel Des Peuples Anciens, Inde Brahmanique, Egypte, Judée*, vol. II, Paris, 1869, p. 202.

¹⁹ Exodus 21.16, 22.15 and 22. 16. In this regulation, anyone who abducts a person is condemned to death, but if the victim is unmarried, he can escape the penalty by marrying her and paying the dowry.

²⁰ Deuteronomy 22.28-29 and 24. 7.

²¹ QUESADA MOLINA, YM, *El delito de rapto en la Historia del Derecho castellano*, Madrid, 2017, p. 53.

²² Lex Iulia de Maritandis Ordinibus, 18 BC, and the leges Iuliae de Adulteriis Coercendis, de Iudiciis Privatis and de iudiciis publicis, 17 Bc. On these laws in general, see GIRARD, PF, Les leges Iuliae iudiciorum publicorum et privatorum, ZSS, vol 34, 1923; QUERZOLI, S, La puella rapta, paradigm of retori e apprendimento del diritto nelle Istituzioni di Elio Marciano, *Amali Online Lettere*, vol. 2, n. 1, 2011, p. 157, p. 157, notes on the origin of the leges Iuliae iudiciorum publicorum et privatorum, ZSS, vol. 34, 1923, p. 157, points out the origin of the regulation of abduction, "It is possible that at the origin of the treatment of the abduction of a woman - according to rules that are constantly repeated in the sources of the law, at least until the second century AD - there were normative provisions in the law of abduction, which are not always in use, and that the law of abduction is not always in use. were normative provisions of Greek law, but unfortunately, not all of them can be safely enforced. In Attic legislation, there remain traces of a rule that required the rapist to marry the woman who had been raped if she refused to pay the expected amendment".

²³ Also from 17 Bc.

little whether the abductee consented or not; it could also be thought that in the description of the criminalised conduct, the lack of consent of the abductee is implicit and therefore that our consensual abduction was alien to this crime, but it seems to us a less coherent interpretation with the context. On the other hand, it is surprising that the agreement with the father (which would probably occur in the event of marriage) does not exclude the possibility of a third party denouncing even without being subject to the five-year limitation period.

Amunátegui²⁴ suggests that the acquisition of the *manus* by *usus* of one year could derive from a very ancient marriage by abduction that would have existed in the period before the Law of the XII Tables and that would remedy the abduction of the bride with the subsequent nuptials, but we do not know why such a regulation could have disappeared from the sources we know.

In this context, we can assume that custom coined a legal regime in which the *pater familias* of the abducted daughter could claim the abductor for the act unless an agreement satisfactory to all parties was reached, which would often include the conclusion of a marriage bond.

However, the Emperor Constantine²⁵ would break with this custom, punishing consensual abduction very harshly and preventing the father from reaching a nuptial agreement as a way of solving the abduction, as we will see in the following text from the Theodosian Code.

Th. 9,24,1 [=brev. 9,19,1].

Imp. Constantinus a. ad populum.

pr. Si quis nihil cum parentibus puellae ante depectus invitam eam rapuerit vel volentem abduxerit, patrociniū ex eius responsione sperans, quam propter vitium levitatis et sexus mobilitatem atque consilii a postulationibus et testimoniis omnibusque rebus iudicialiis antiqui penitus arcuerunt, nihil ei secundum ius vetus prosit puellae responsio, sed ipsa puella potius societate criminis obligetur.

1. Et quoniam parentum saepe custodiae nutricum fabulis et pravis suasionibus deluduntur, his primum, quarum detestabile ministerium fuisse arguitur redemptique* discursus, poena immineat, ut eis meatus oris et faucium, qui nefaria hortamenta protulerit, liquentis plumbi ingestione claudatur.

2. Et si voluntatis assensio detegitur in virgine, eadem, qua raptor, severitate plectatur, quum neque his impunitas praestanda sit, quae rapiuntur invitae, quum et domi se usque ad coniunctionis diem servare potuerint et, si fores raptoris frangerentur audacia, vicinorum opem clamoribus quaerere seque omnibus tueri conatibus. sed his poenam leviolem imponimus solamque eis parentum negari successionem praecipimus.

3. Raptor autem indubitate convictus si appellare voluerit, minime audiatur.

4. Si quis quis vero servus raptus raptus facinus dissimulatione praeteritum aut pactione transmissum detulerit in publicum, Latinitate donetur, aut, si Latinus sit, civis fiat

Romanus, parentibus, quorum maxime vindicta intererat, si patientiam praebuerint ac dolorem compresserint, deportatione plectendis.

5. Participes etiam et ministros raptoris citra discretionem sexus eadem poena praecipimus subiugari, et si quis inter haec ministeria servilis condicionis* fuerit deprehensus, citra sexus discretionem eum concremari iubemus.

Dat. kal. april. Aquileia, Constantine a. VI. et Constantine CJ. coss.

Interpretatio. Si cum parentibus puellae nihil quisquam ante definiat, ut eam suo debeat coniugio sociare, et eam vel invitam rapuerit vel volentem, si raptori puella consentiat, pariter puniantur. Si quis quis vero ex amicis aut familia aut fortasse nutrices puellae consilium raptus dederint aut opportunitatem praebuerint rapiendi, liquefactum plumbum in ore et in faucibus suscipiant, ut merito illa pars corporis concludatur, de qua hortamenta sceleris ministrata noscuntur. Illae vero, quae rapiuntur invitae, quae non vocibus suis de raptore clamaverint, ut vicinorum vel parentum solatio adiutae liberari possent, parentum suorum eis successio denegetur. Raptori convicto appellare non liceat, sed statim inter ipsa discussionis initia a iudice puniatur. Quod si fortasse raptor cum parentibus puellae paciscatur, et raptus ultio parentum silentio fuerit praetermissa, si servus ista detulerit, Latinam percipiat libertatem, si Latinus fuerit, civis fiat Romanus. Parentes vero, qui raptori in ea parte consenserint, exsilio deputentur. Qui vero raptori solatia praebuerint, sive viri sive feminae sint, ignibus concrementur.

If anyone, without prior agreement with the parents of the girl, should abduct her, either against her will, or with her consent, believing the answer of one who, because of her weak nature and fickle character peculiar to her sex, our ancestors excluded her from judicial affairs and from giving evidence, to be sufficient, let not the answer of the girl, under the ancient law, be protected, but rather let her be guilty of participation in the crime. And as the custody of the parents is often circumvented by the evil teachings and counsels of the nurses, whose odious influence on the young girl is proved, let the punishment fall on them first of all, that their mouth and throat from which evil counsels came to be closed by the ingestion of liquid lead. If it is found that there was consent on the part of the girl, let her receive the same punishment as her abductor; and if she was abducted without her will, let her also not go unpunished, for she could have remained in her house until the wedding day. If the abductor had dared to break down the door, she could have cried out for help and defended herself with all her might. In this case, however, we impose a lighter punishment, and that is that she is only deprived of the legal succession of her parents. As for the convicted abductor, he shall be denied the right of appeal. And if the slave shall give public notice that the crime has not been denounced by the parents of the girl either through negligence or through an understanding between them and the abductor, let him be rewarded with the Latin right, and if he is a Latin, with Roman citizenship. If the parents, to whom vengeance was especially due, have

²⁴ AMUNATEGUI PERELLÓ, C., El origen de los poderes del „paterfamilias“, II El „Paterfamilias“ y la „manus“ in *REHJ*, vol. 29, 2007, pp. 58.

²⁵ Some authors suggest the possibility that this regulation does not belong to Constantine but to Constantius. Vid. FERNÁNDEZ UBINA, J., Privilegios episcopales y genealogía de la intolerancia cristiana en época de Constantino. In *PYRENAE*, vol. 40, n. 1, 2009, p. 90.

borne their grief with resignation, they shall be punished with exile; the same punishment shall be inflicted on the accomplices²⁶ and companions of the abductor, without distinction of sex. If there are any slaves among them, they shall be, without distinction of sex, sent to the stake.²⁷

The doctrine has discussed with perplexity the reasons for this violent reaction that the emperor establishes not only against the one who violently abducts a woman but also against the one who consents to the act.²⁸ The first impression would lead us to think that Constantine intended to reinforce the power of the *pater familias* and to strengthen the daughter's submission to parental authority.

Bernard Segarra²⁹ points that this constitution is one more in the group of provisions enacted by Constantine aimed at the family and social spheres, to adapt them to the emperor's conception, and in which we can already see some ideas whose origin is to be found in the Christian ideology. In the same sense, reinforcing Constantine's eagerness to impose his conception of the family and marriage on Roman society, Lázaro Guillamón points out that the emperor prohibited concubinage, until then common in Rome, as is stated in CJ.5.26.1.³⁰

CJ. 5,26,1

Imperator Constantinus A. ad populum. Nemini licentia concedatur constante matrimonio concubinam penes se habere

No one shall be allowed to have a concubine in a constant marriage.

However, the issue is more complex. On the one hand, Emperor Constantine himself issued rules restricting the power of the *pater familias* over descendants:

CJ. 8,46,10

Imperator Constantinus. Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas olim erat permissa, eripere libertatem non liceret. * CONST. A. AD MAXIMUM PU. * <A 323 D. XV K. IUN. THESSALONICA SEVERO ET RUFINO CONSS.>

The Emperor CONSTANTINUS, Augustus, to Maximus, Prefect of the City -- So much was looked upon by the predecessors in favour of liberty, that it is not lawful for parents, who once had been allowed over their children the right of life and the power of death, to take away their liberty.

However, a different interpretation is possible. Pastor de Arozena,³¹ after an exhaustive analysis of the language used in the constitution, which he compares with other later provisions (especially those of Theodosius) concludes that the rule was especially intended to proscribe marriages between Christians and Jews. In this sense, Fernández Ubiña³² cites a law attributed to Constantine, but which could also have been issued by Constantius (CTh, 16, 8, 6, from 329 or 339), in which Jews are forbidden to unite with Christian women, and the latter are warned that if in the future they adhere to Jewish infamies (*flagitiis*) they will be condemned to death. It is certainly difficult to venture the deeper reasons for legislation whose practical application we may suspect.

Emperor Constantius reiterates the prohibition of validating abduction by the consent of the victim, although, according to the *interpretatio*, this could refer only to consecrated virgins.

Th. 9,25,1 [=brev. 9,20,1].

Imp. Constantius a. ad Orfitum...

Eadem utrumque raptorem severitas feriat, nec sit ulla discretio inter eum, qui pudorem virginum sacrosanctarum et castimoniam viduae labefactare scelerosa raptus acerbitate detegitur. Nec ullus sibi ex posteriore consensu valeat raptae blandiri.

Dat. XI. kal. sept. Constantio a. VII. et Constante CJ. coss.

Let the same severity strike the abductors, and let there be no discrimination between those who are exposed by the bitterness of a criminal abduction to undermine the modesty of the sacred virgins and the chastity of a widow. No one should be flattered to be abducted by subsequent consent.

Interpretatio. Quicumque* vel sacratam deo virginem vel viduam fortasse rapuerit, si postea eis de coniunctione convenit, pariter puniantur.

Whosoever shall have abducted a virgin consecrated to God, or a widow, if he has afterwards consented with them to the union, shall be equally punished.

With regard, however, to the specific regulation of the abduction of consecrated widows, Wilkinson warns of the possible corruption of the texts, stating that the canonical and legal recognition of the widow's vow only begins to emerge in the 5th century.³³

Thus, everything seems to point in the direction, according to Muñiz Pérez,³⁴ of the elevation of marriage to a sacrament

²⁶ PULIATTI, S., La dicotomía vir-mulier e la disciplina del ratto nelle fonti legislative tardoimperiali. In: *SDHI*, vol. 61, 1995, p. 473.

²⁷ Trad. NUÑEZ PAZ, MI, Agresiones sexuales en las fuentes jurídicas romanas. Violencia como arquetipo de la identidad femenina. In: FERNÁNDEZ TERUELO, J. G., FONSECA FORTES-FURTADO, R. H., *Violencia de género, retos pendientes y nuevos desafíos*, Cizur Menor, 2021, p. 15.

²⁸ EVANS-GRUBBS, J., Abduction Marriage in Antiquity, A law of Constantine (CJ. Th. 9. 24. 1) and its social context, *JRS*, vol. 79, 1989, 59-83.

ARJAVA, A., *Women and Law in Late Antiquity*, Oxford, 1996.

²⁹ BERNARD SEGARRA, L., La posición jurídica de la mujer con relación a los delitos de rapto, estupro, violación y adulterio en el edicto de Teodorico, *Anuario da Facultade de Dereito da Universidade da Coruña*, vol. 22, 2018, pp. 21

³⁰ LÁZARO GUILLAMÓN, C., La monogamia como fundamento de las estructuras conyugales en los sistemas jurídicos occidentales, un aporte romanístico. In: *RIDROM*, vol. 28, 2022, p. 336.

³¹ PASTOR DE AROZENA, B., Retórica imperial, el rapto en la legislación de Constantino. In: *Faventia* vol. 20, n. 1, 1998, p. 79.

³² FERNÁNDEZ UBIÑA J., Privilegios episcopales y genealogía de la intolerancia cristiana en época de Constantino. In: *PYRENAE*, vol. 40, 2009, p. 90.

³³ WILKINSON K. W., Dedicated Widows in Codex Theodosianus 9.25? In: *Journal of Early Christian Studies*, vol. 20, n. 1, 2012, pp. 141-166.

³⁴ MUÑIZ PÉREZ, JC, *Los conceptos jurídico-políticos en la obra de San Agustín, problemas de creación teológica y jurídica*, Doctoral tesis, Murcia, 2015, p. 369 ff. URI, <http://hdl.handle.net/10201/47796>

as a reflection of the union of Christ and the Church and which determines multiple elements of marriage in the Church such as its indissolubility, monogamy, consent or the reference to marriage tablets. Theological elements that determine the juridical configuration of marriage and its contours³⁵ and that will determine the development of other juridical institutes in the future.³⁶

Constantine's crude law in Th. 9.24.1 is not reiterated in the constitutions of Justinian's code. However, we find concordance in a fragment in which freedom is granted as a reward to the slave who denounces the abduction of a *forgotten or covenanted* virgin.

CJ. 7,13,3

Imperator Constantinus. Si quis quis servus servus raptus virginis facinus dissimulatione praeteritum aut pactione transmissum detulerit in publicum, libertate donetur. * CONST. A. AD POP. * <A 320 D. PRID. K. APRIL. AQUILEIA CONSTANTINO CJ. CONSS.>

If any slave has publicly denounced the crime of abduction of a virgin, forgotten or sent away by covenant, his freedom shall be given to him.

It is possible that this rule, complementary to that contained in the Theodosian code, is intended to make effective a prohibition (that of consensual abduction) which would be very difficult to enforce since if the bride and groom and the parents agree with the marriage following the abduction, no one will report the act, and if they are not, the report would carry its penalty. On the other hand, this provision encourages the slave to report the agreement to obtain freedom, thus establishing a possibility of prosecution.

Subsequently, a constitution of the emperors Valentinian I, Valens and Gratian in 374, established five years (already established by Augustus) for anyone to file a complaint for abduction. As a result, once the aforementioned period had elapsed, the offence was time-barred and the marriage celebrated as a result of the abduction was validated.

CTh 9,24,3. Impppp. Valens, Gratianus et Valentinianus aaa. ad Maximinum pf. p. Qui coniugium raptus scelere contractum voluerit accusare, sive propriae familiae dedecus eum moverit seu commune odium delictorum, inter ipsa statim exordia insignem recenti flagitio vexet audaciam. Sed si quo quo casu quis vel accusationem differat vel reatum, et opprimi e vestigio atrociter commissa nequiverint, ad persecutionem criminis ex die sceleris admissi quinquennii tribuimus facultatem. quo sine metu interpellationis et complemento accusationis exacto, nulli deinceps copia patebit arguendi, nec de coniugio aut sobole disputandi. Dat. XVIII. kal. deCJ. Gratiano a. III. et Equitio coss.

Whoever wishes to accuse the abducted spouse of the crime committed, whether moved by the dishonour of his own family or by the common hatred of the wrongdoers, among the same beginnings, will

have a remarkable audacity with a recent crime. But if by chance anyone postpones the accusation or guilt, and is not suppressed from the track of those committed, we grant the possibility of five years for the prosecution of the offence from the date of the admission of guilt. So that, without fear of being interrupted, and the exact accusation completed, there will be no room for anyone to accuse, nor to argue about the spouse or the child.

For his part, the Ostrogothic King Theodoric (if we follow the traditional attribution of his authorship), included the prohibition of abduction in the *Lex Romana Ostrogothorum* following the tradition of Constantine, especially in the harshness of the penalties, but included some modifications typical of his time, such as the intervention of colonists in the abduction.³⁷

17. De raptore ingenuae mulieris aut virginis.

Raptorem ingenuae mulieris aut virginis, cum suis complicibus vel ministris, rebus probatis iuxta legem iubemus extingui, et si consenserit rapta raptori, pariter occidatur.

We command that the abductor of an ingenuous woman or a virgin, together with his accomplices or servants, be put to death according to the facts proved according to law, and if the abductee consents to the abduction, that she also be put to death.

20. De raptu intra quae tempora concludatur.

Raptum intra quinquennium liceat omnibus accusare, post quinquennium vero nullus de hoc crimine faciat quaestionem, etiam si intra supra scriptum tempus egisse aliquid de legibus doceatur, maxime cum et filii de hoc matrimonio suscepti exacto quinquennio legitimorum et iure et privilegio muniantur.

Within five years everyone is allowed to accuse the abductor, but after five years no one can enquire this crime, because about this time the laws teach us something, that the children abducted from this marriage are protected by legitimate rights and privileges for exactly five years.

The emperor Justinian accepts the Constantinian regulation and reproduces it, clarifying why, in his opinion, the consent of the abductee should not be considered, making a marriage with the abductor impossible, *quia hoc ipsum velle mulieri ab insidiis nequissimi hominis qui meditatur rapinam inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenerit, non facit eam velle in tantum dedecus sese prodere*

CJ. 9,13,1

Imperator Justinianus. Raptores virginum honestarum vel ingenuarum, sive iam desponsatae fuerint sive non, vel quarumlibet viduarum feminarum, licet libertinae vel servae alienae sint, pessima criminum peccantes capitis supplicio plectendos decernimus, et maxime si deo fuerint virgines vel viduae dedicatae (quod non solum ad iniuriam hominum, sed ad ipsius omnipotentis dei irreverentiam committitur,

³⁵ MUÑIZ PÉREZ, JC "Islamic and Christian Theology in Legal Hermeneutics, In search of a Theology of Law". In: MASUD, MH, JALLOUL MURO, H. (eds). *Sharia Law in the Twenty-Fist Century*, London, 2022.

³⁶ MUÑIZ PÉREZ, JC., *El trust, Herramienta de elusión fiscal internacional*, Cizur Menor, 2022.

³⁷ BERNARD SEGARRA, L, *op. cit.*, pp. 50.

maxime cum virginitas vel castitas corrupta restitui non potest), et merito mortis damnantur supplicio, cum nec ab homicidii crimine huiusmodi raptores sint vacui.

1. Ne igitur sine vindicta talis crescat insania, sancimus per hanc generalem constitutionem, ut hi, qui huiusmodi crimine commiserint et qui eis auxilium tempore invasionis prae-buerint, ubi inventi fuerint in ipsa rapina et adhuc flagrante crimine comprehensi a parentibus virginum vel viduarum vel ingenuarum vel quarumlibet feminarum aut earum consanguineis aut tutoribus vel curatoribus vel patronis vel dominis, convicti interficiantur.

1a. Quae multo magis contra eos obtinere sancimus, qui nuptas mulieres ausi sunt rapere, quia duplici crimine tenentur tam adulterii quam rapinae et oportet acerbius adulterii crimen ex hac adiectione puniri.

1b. Quibus connumerabimus etiam eum, qui saltem sponsam suam per vim rapere ausus fuerit.

1c. Sin autem post commissum tam detestabile crimen aut potentatu raptor se defendere aut fuga evadere potuerit, in hac quidem regia urbe tam viri excelsi praefecti praetorio quam vir gloriosissimus praefectus urbis, in provinciis autem tam viri eminentissimi praefecti praetorio per Illyricum et Africam quam magistri militum per diversas nostri orbis regiones nec non viri spectabiles praefectus Aegypti vel comes Orientis et vicarii et proconsules et nihilo minus omnes viri spectabiles duces et viri clarissimi rectores provinciarum nec non non alii cuiuslibet ordinis iudices, qui in locis inventi fuerint, simile studium cum magna sollicitudine adhibeant, ut eos possint comprehendere et comprehensos in tali crimine post legitimas et iuri cognitatas probationes sine fori praescriptione durissimis poenis adficiant et mortis condemnent supplicio.

1d. Quibus et, si appellare voluerint, nullam damus licentiam secundum antiquae constantinianae legis definitionem.

1e. Et si quidem ancillae vel libertinae sint quae rapinam passae sunt, raptores tantummodo supra dicta poena plectentur, substantiis eorum nullam deminutionem passuris.

1f. Sin autem in ingenuam personam tale facinus perpetratur, etiam omnes res mobiles seu immobiles et se moventes tam raptorum quam etiam eorum, qui eis auxilium prae-buerint, ad dominium raptarum mulierum liberarum transferantur providentia iudicum et cura parentum earum vel maritorum vel tutorum seu curatorum.

1g. Et si non nuptae mulieres alii cuilibet praeter raptorem legitime coniunguntur, in dotem liberarum mulierum easdem res vel quantas ex his voluerint procedere, sive maritum nolentes accipere in sua pudicitia remanere voluerint, pleno dominio eis sancimus applicari, nemine iudice vel alia quacumque persona haec audente contemnere.

2. Nec sit facultas raptae virgini vel viduae vel cuilibet mulieri raptorem suum sibi maritum exposcere, sed cui parentes voluerint excepto raptore, eam legitimo copulent matrimonio, quoniam nullo modo nullo tempore datur a nostra serenitate licentia eis consentire, qui hostili more in nostra re publica matrimonium student sibi coniungere. Oportet etenim, ut, quicumque uxorem ducere voluerit sive ingenuam sive libertinam, secundum nostras leges et antiquam consuetudinem

parentes vel alios quos decet petat et cum eorum voluntate fiat legitimum coniugium

3. Poenas autem quas praediximus, id est mortis et bonorum amissionis, non tantum adversus raptores, sed etiam contra eos qui hos comitati in ipsa invasione et rapina fuerint constituimus.

3a. Ceteros autem omnes, qui conscii et ministri huiusmodi criminis reperti et convicti fuerint vel eos susceperint vel quacumque opem eis intulerint, sive masculi sive feminae sunt, cuiuscumque condicionis vel gradus vel dignitatis, poenae tantummodo capitali subicimus, ut huic poenae omnes subiaceant, sive volentibus sive nolentibus virginibus seu aliis mulieribus tale facinus fuerit perpetratum.

3b. Si enim ipsi raptores metu atrocitatis poenae ab huiusmodi facinore temptaverint se, nulli mulieri sive volenti sive nolenti peccandi locus relinquatur, quia hoc ipsum velle mulieri ab insidiis nequissimi hominis qui meditatur rapinam inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenerit, non facit eam velle in tantum dedecus sese prodere

3c. Parentibus, quorum maxime vindicta intererat, si patientiam prae-buerint ac dolorem remiserint, deportatione plectendis.

4. Et si quis inter haec ministeria servilis condicionis fuerit deprehensus, citra sexus discretionem eum concremari iubemus, cum hoc etiam Constantiniana lege recte fuerat prospectum.

5. Omnibus legis Iuliae capitulis, quae de raptu virginum vel viduarum seu sanctimonialium sive antiquis legum libris sive in sacris constitutionibus posita sunt, de cetero abolitis, ut haec tantummodo lex in hoc capite pro omnibus sufficiat.

6. Quae de sanctimonialibus etiam virginibus et viduis locum habere sancimus. * IUST. A. HERMOGENI MAG. OFF. * <A 533 D.XV K.DECJ.CONSTANTINOPOLI DN.IUSTINIANO PPA.III CONS.

We decree that for committing the most grievous crimes, the abductors of honest or ingenuous virgins, whether they have been previously married or not, or of any widowed women, even if they are freedwomen or slaves of others, are to be condemned to the last penalty; And a fortiori if they have been virgins or widows consecrated to God (which is not only committed to the injury of men, but also in irreverence to the omnipotent God himself, especially since virginity or chastity cannot be restored when defiled), and they are rightly condemned to the death penalty, since not even from the crime of murder are such abductors exempt. Therefore, that such insanity may not grow without punishment, We order by this general constitution, that those who have committed such a crime, and those who have aided them at the time of the invasion, shall be put to death, being convicted, as soon as they have been found in the same abduction and caught in flagrante delicto, by the parents of the virgins, or of the ingenuous, or the widows, or any women, or by their consanguine, or guardians, or curators, or patrons, or masters. Which much more reason We order to govern against those who have dared to steal married women, because they are subject to a double crime, that of adultery as well as that of abduction, and it is fitting that by this addition the crime of adultery should be more severely punished. Among these, we also count him who would at least have dared to

steal by force from his wife. But if, after committing such a detestable crime, the abductor has been able either to defend himself by his power or to escape by flight, let the same effort be made with great solicitude in this royal city, both the most eminent male prefects of the praetorium and the most glorious male prefect of the city, and in the provinces, both the most eminent male prefects of the praetorium of Illyria and Africa, and the military masters of the various regions of our orb, and also the respectable male prefect of Egypt, and the Count of the East, and the vicars, and the proconsuls, and all the respectable male dukes, and the most eminent male governors of the provinces, and the other judges of any order that may be found in those places, so that they may seize them, and subject those imprisoned for such a crime, without exception of jurisdiction, to the most severe penalties after the legitimate trials recognised by law, and condemn them to the torture of death. To whom, even if they had wished to appeal, We do not give them any permission to do so, according to the provision of the ancient law of Constantine.

1. And if the free slaves who have been abducted are indeed free slaves, the abductors shall be punished only with the aforesaid penalty and shall not suffer any diminution of their property. But if such a crime is perpetrated on a naive person, all the movable or immovable property of the abductors, as well as that of those who have assisted them, shall be transferred to the dominion of the stolen free women, by order of the judges and by the care of their parents, or their husbands, or of their guardians or curators. And if unmarried women should be lawfully united by anyone else, except the abductor, let the same property, or as much of it as they wish, go in dowry to the free women, and if, not wishing to accept a husband, they prefer to remain in their chastity, We order that it be awarded to them in full dominion, without any judge or any other person daring to disregard this.

2. and let not the abducted virgin, or the widow, or any other woman, have the power to ask her abductor for her husband, but let her parents join her in lawful wedlock to whom they will, except the abductor, because in no way and at no time is a licence given by our serenity to give consent to those in our republic who endeavour to be joined in marriage by hostile means. For it is expedient that whosoever would take a wife, whether naive or free, should, according to our laws and ancient custom, apply to the parents, or to those to whom it is due, and that with their consent the lawful union should be made.

3. Moreover, the penalties which we have said above, that is, death and forfeiture of property, we establish not only against the abductors but also against those who have accompanied them in the invasion itself and the abduction. But to all others, who have been found accomplices and assistants in such a crime, and have been convicted, or who have harboured them, or have given them any assistance, whether male or female, of whatever rank or rank or dignity, We subject them only to capital punishment, so that all are subject to this penalty, whether such a crime has been perpetrated willingly or unwillingly, whether the virgins or the other women. For if the abductors themselves refrain from such a crime for fear of the atrocity of the penalty, no woman, whether willing or unwilling, shall be left an occasion to sin, because this very thing, the willingness of the woman, is inspired by the wiles of the most wicked man, who meditates the abduction. For if he had not solicited her, if he had not deceived her with hateful arts, he would not make her want to give herself up to so

much dishonour. The parents, who were chiefly interested in revenge, should be punished with deportation, if they had been patient, and had soothed her grief.

4. But if any of these auxiliaries should be slaves, We command that they be burned without distinction of sex, for this also had been rightly provided for in the law of Constantine. All the chapters of the Julian law concerning the abduction of virgins or widows or nuns, which were included either in the ancient law books or in the sacred constitutions, are henceforth abolished so that this law alone shall be sufficient for all in this chapter, for We order that it shall apply to nuns as well as to virgins and widows.

Given at Constantinople on the fifteenth of the Kalends of December, under the third Consulate of Justinian, Perpetual Augustus. [533]

3.2 Consensual abduction in the Middle Ages

The *Liber Iudiciorum* in 3,3,1 contains the same prohibition of marriage with the abductor, including the loss of all property in favour of the victim and the reduction of the abductor to the status of a servant of the parents or the abducted woman herself.

Liber 3,3,1

Si ingenuus ingenuam rapiat mulierem, licet illa virginitatem perdat, ste tamen illi coniungi non valeat. Si quis ingenuus rapuerit virginem vel viduam, si, antequam integritatem virginitatis aut castitatis amittat, puella vel vidua potuerit a raptore revocari, medietatem rerum suarum ille, qui rapuit, perdat, ei, quam rapuerit, consignandam. **Si vero ad immunditiam, quam voluerit, raptor potuerit pervenire, in coniugium puelle vel vidue mulieris, quam rapuerat, per nullam compositionem iungantur** sed omnibus traditis ei, cui violentus fuit, et CC insuper in conspectu omnium publice hictus accipiat flagellorum et careat ingenuitatis sue statum, parentibus eiusdem, cui violentus extiterat, aut ipsi virgini vel vidue, quam rapuerat, in perpetuum serviturus.

If a man abducts an unmarried girl (virginem) or a widow (viduam), if they can be rescued from abduction before they have lost their virginity or chastity (virginitatis aut castitatis), he who has committed the abduction loses half of his property, which is assigned to the person who was abducted. **But if the abductor can consummate the dishonesty (immunditiam) which he pursued, he shall not, using any indemnity (nullam compositionem), marry (iungatur) that girl (puella) or that widow**, but shall be given with all his goods to that person whom he violated (violenter fuit) and who, in addition, shall receive in public two hundred hundred and fifty dollars (**nullam compositionem**), and to receive two hundred lashes in public before all, to lose his status as a free man (ingenuitatis sue statum), and to be forever under the servitude (serviturus) of the parents of the one he raped or of the same girl or widow whom he abducted; so that he can never again unite (coniugium) with her whom he abducted.

As can be deduced from the text highlighted in bold, the prohibition on redeeming the crime by marriage is limited to the case in which the rapist has consummated the rape. *A sensu contrario*, therefore, it would be possible to make a compromise if the rape had not taken place. This is probably why, after a lengthy regulation of abduction that goes beyond the scope

of this work, the text ends up admitting the possibility of an agreement between the abductor and the victim's parents to compensate, through marriage, for the dishonour:

Liber Iudiciorum 3,3,7

Raptorem virginis vel vidue infra XXX annos omnino liceat accusare 4 Quod si cum puelle parentibus sive cum eadem puella vel vidua de nuptiis fortasse convenerit, 20 inter se agendi licentiam negari non poterit. Transactis autem XXX annis, omnis accusatio sopita manebit.

The abductor of an unmarried girl (virginis) or of a widow can be fully charged within thirty years³⁸. But if he makes an agreement with the girl's parents or with the girl herself or with the widow to marry (de nuptiis) her, they cannot be refused permission (licentiam) to deal with each other. However, after thirty years have elapsed, any accusation shall be without effect (accusatio sopita).

The Wise King, in the Partidas, sanctions the possibility of the abductor marrying his victim, thus excluding the penalty of death and loss of property imposed on the aggressor (unless the woman was already married or religious).

Partidas IV,20,3

Ley 3, Raptando algún hombre mujer virgen o viuda de buena fama o casada o religiosa, o yaciendo con alguna de ellas por fuerza, si le fuere probado en juicio, debe morir por ello, y además deben ser todos sus bienes de la mujer que así hubiere robado o forzado, **fuera de si después de eso ella casase de su grado con aquel que la forzó o robó, no habiendo otro marido**; y entonces la mujer forzada, si ellos no consintieron en la fuerza ni en el casamiento; y si probado les fuere que habían consentido en ello, entonces los bienes del forzador deben ser del padre y de la madre de la mujer forzada, si ellos no consintieron en la fuerza ni en el casamiento; y si probado les fuere que habían consentido en ello, entonces deben ser todos los bienes del forzador de la cámara del rey; pero de estos bienes deben ser sacadas las arras y las dotes de la mujer del que hizo la fuerza y otrosí las deudas que había hecho hasta aquel día en que fue dado el juicio contra él. Y si la mujer que así hubiese forzado o robado fuese monja o religiosa, entonces todos los bienes del forzador deben ser del monasterio de donde la sacó.

The Partidas, with the didactic and exemplary tone that characterises Alfonso X, explains the legal right protected by the crime of abduction, especially in the variety of consensual abduction that we are analysing here:

Partidas IV,20,1

Ley 1, Forzar o robar mujer virgen, casada o religioso o viuda que viva honestamente en su casa, es yerro y maldad muy grande; y esto es por dos razones, la primera es porque la fuerza es hecha contra personas que viven honestamente

a servicio de Dios y por bienestar del mundo; la otra es que **hacen muy gran deshonra a los parientes de la mujer forzada**, y además hacen muy gran atrevimiento contra el señorío, forzándola en menosprecio del señor de la tierra donde es hecho.

In the words of the Wise King, and following the regulation he establishes, inherited from previous sources, abduction is unlawful because of the force against free persons it contains, but, when it is consented to by the victim, it is still rejectable because of the violation of the father's right to decide on the daughter's nuptials. For this reason, the solution of marriage is possible when the abduction has been consented to and an agreement is reached with the relatives. This Alphonsine argumentation would coincide with the motivation that we suppose for the texts of Constantine and Justinian, although the latter denied the possibility of remission by marriage.

This development is probably due to social practice which, despite the very harsh legal prohibition, continued to practise consensual abduction and to agree on a marriage with the parents that would satisfy all parties and make recourse to the courts unnecessary. In such a case, despite the prohibition, if no one were dissatisfied, it would be unlikely that the crime could be prosecuted, unless some slave reported it to obtain freedom as a reward as prescribed by CJ.7.13.3 (vid. supra).

Although, as we have said, in Constantine's regulation we can think of the persecution of marriages between Christians and Jews, in the context of the Spanish Middle Ages the problem would arise, with great vehemence, in the case of marriages with Muslims, giving rise to many legends of Christian maidens abducted by Moors and vice versa, despite which (or precisely because of the frequency of the case) the regulation ended up admitting remission by marriage, which probably already occurred in the past and, as we shall see, was maintained until very recent times.

3.3 Modern legal regime

This practice of consensual abduction and subsequent nuptials, as we have already mentioned, has been maintained over time and continues almost to the present day. The legal mechanism, in recent times, in which consensual abduction operated is provided by the penal code of 1848:

Artículo 369

El rapto de una doncella menor de 23 años y mayor de 12, ejecutado con su anuencia, será castigado con la pena de prisión menor.

Artículo 371

No puede procederse por causa de estupro sino a instancia de la agraviada, o de su tutor, padres o abuelos³⁹ (...)

In all the cases of the present Article, the offender is released from the penalty by marrying the offended party, and the pro-

³⁸ Note how the limitation period, traditionally five years, has been extended here to thirty years.

³⁹ The crime of abduction, in contrast to the classical regulation, became a private crime that required the exercise of the action by the victim or his relatives to be prosecuted.

ceedings shall cease at any stage of the proceedings at which the offender marries her.

The regulation was maintained with slight differences in the Penal Codes of 1870 (Articles 461 and 463), 1928 (Articles 612 and 614), 1932 (Articles 442 and 443). The 1944 Penal Code maintained the legal concept of abduction with consent (Article 441), introducing an aggravated subtype for cases in which the woman was older than 12 and younger than 16, maintaining the possibility of remission by the forgiveness of the offended party, which is presumed in the case of marriage. This regulation was reiterated in the 1973 revised text, but was finally repealed with the entry into force of the 1995 Penal Code.⁴⁰

Consensual abduction therefore consisted in the removal of the bride from the paternal home, with her consent, for sexual purposes. Once this had occurred, the bride had the (almost exclusive) power to initiate criminal proceedings against the groom, which would cease in the event of a marriage, which, in practice, served to force the groom to fulfil his promise of marriage.⁴¹ This practice is very frequently reported in the 19th and 20th centuries.⁴² When the bride's parents were against the marriage or when they did not have the necessary assets to celebrate the event, it was therefore in the interest of the spouses (and even their families) to use legal coercion of the marriage as a solution to the abduction.

One might ask, and this would take us much further away from the intention of this article, whether this mechanism by which the virginity of women in marriage is demanded and which ultimately legitimises abduction through the celebration of a marriage, is a whim of our ancestors born at the dawn of Western civilisation (Jewish world, Greece and Rome) and which remains throughout the centuries almost to the present day, extending across the width of the globe as a result of the expansion of Western civilisation.⁴³ In such a case, an anthropological study could be carried out to find out whether there are cultural alternatives to such a demand in the different civilisations. It is possible that the need for the woman to be a virgin at marriage, as well as the greater pressure on the wife to maintain chastity - to whom greater fidelity has been demanded over the centuries than to the man - is due not only to a consequence of the ancestral and universal patriarchy that has dominated male-female relations throughout history but also

to the need to preserve the lineage of the father for inheritance purposes. The axiom *mater Semper certa est, pater est, quem nuptiae demonstrant*,⁴⁴ in force until very recent times.⁴⁵

4. Conclusions

In the ancient world, women's consent to marriage was strongly linked to paternal authority. Although the autonomy of the will of the contracting parties was probably strengthened over the centuries. This circumstance, together with the social necessity of the bride's virginity determined that -although it may seem paradoxical- the best solution in the case of the abduction of a nubile woman was a marriage between the abductor and the victim.

This probably led to a practice that has been very common in the West over the centuries and which has survived almost to the present day: consensual abduction. This means that the bride escapes from the paternal home together with the groom and of her own free will, thus forcing the *pater familias* to accept the marriage. Such an act constituted a crime in Spain until 1995 when the current penal code was approved. The configuration of this offence meant that it could only be prosecuted at the request of the victim or her relatives and that criminal liability was extinguished if the marriage took place, which was used by the bride and her family to demand that the abductor in love fulfil his promise of marriage.

Although abduction is very present in Greco-Roman mythology, we do not find a positive regulation until Augustus' *leges Iuliae de vi publica*, which, however, does not contemplate the case of consensual abduction that we are studying here. It was Constantine who, it seems, regulated this institution for the first time and, although it was frequent in his time, he punished the abductor and his accomplices, the bride who consented to the abduction and her parents, with a cruelty that attracted the attention of scholars, who offer different explanations.

Constantine's regulation on abduction would survive in subsequent legal systems, but the *Liber Iudiciorum* and above all the *Partidas* would introduce the possibility of the abductor redeeming his penalty by marrying the abductee, giving legal status to what we believe would be carried out, *de facto*, in practice, outside the legal prohibition.

⁴⁰ The abduction of the bride was a popular institution in rural Spain in the 20th century and was more or less accepted by the society of the time. Vid. FRIGOLÉ REIXACH, J., *Llevarse la novia y salirse con el novio, una interpretación antropológica*. *Areas. Revista Internacional de Ciencias Sociales*, vol. 5, 1985, p. 51-67.

⁴¹ It should be borne in mind that the current wording of Article 42 CC comes from 1981, *The promise of marriage does not produce an obligation to contract the marriage or to fulfil what has been stipulated in the event of its non-conclusion*. *An application for enforcement shall not be admissible*.

⁴² There are still those who say that the modern custom of the „honeymoon“ suppress repetition is a reminder of the abduction of the bride in earlier times. Vid. LANGLE, E., *Should adultery constitute a crime?* Barcelona, 1922, p. 41.

⁴³ On the contrary, AMADOR BORRERO finds an institution of the bride „stealing“ in the Nahua civilisation that responds, point by point, to our „consensual abduction“. Vid. AMADOR BARRERO, M., *La migración interna en mujeres indígenas: un estudio cualitativo de la mujer náhuatl*, doctoral thesis, Sevilla, 2014, p. 109. https://rio.upo.es/xmlui/bitstream/handle/10433/1181/marina_amador_tesis.pdf

⁴⁴ D.2,4,5 (Paul. lib. IV ad Ed.)

⁴⁵ Vid. DUPLA MARÍN, M^a T., *El principio mater semper certa est “a debate” La nueva legislación sobre reproducción asistida y sus consecuencias*. In: SÁNCHEZ, G. J., *Fundamentos romanísticos del derecho contemporáneo*, Madrid, 2022, pp. 883-894.