

# THE *MEDIANEDO* IN THE LOCAL *FUEROS*: A SPANISH MEDIEVAL INSTITUTION FOR THE RESOLUTION OF THE LAWSUIT FOR KIDNAPPING WITH A POSSIBLE GERMANIC ORIGIN<sup>1</sup>

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## SUMMARY

I. INTRODUCTION; II. KIDNAPPING IN THE MIDDLE AGES; III. THE PROCEDURE OF MEDIANEDO; IV. THE PROCEDURE OF MEDIANEDO IN THE FUEROS; V. CONCLUSIONS; VI. SOURCES AND BIBLIOGRAPHY.

## ABSTRACT

This article will analyse the crime of kidnapping in the Middle Ages, and in particular in certain fueros which include a procedure that was previously unknown in the Iberian Peninsula: the proceeding of *medianedo*. Its characteristics and the requisites for its being carried out and the manner of its regulation are examined in detail, as well as the criminal consequences for the kidnapper and for the kidnapped woman, who has the power of choice in this procedure.

## KEYWORDS

Defence of the democratic constitution. Law of exception. Comparative law. Martial law. *Habeas corpus*. Spanish constitutional history. Suspension of constitutional guarantees. States of prevention, alarm and war. Public Order Acts.

## I. INTRODUCTION.

Kidnapping was a crime that did not alter its constitutive structure through the centuries until its decriminalization in the Spanish Penal Code of 1995. Basically, since its origin it has consisted in the abduction and subsequent transport to a safe place of a woman –the kidnapped woman–, by a man –the kidnapper–, by means of coercion or force. This force should not be understood only in the strict sense as physical violence against the victim, but also included kidnapping the woman against the will of her parents, regardless of her collusion in the act.

There could be one of two purposes in committing the kidnapping: either the man kidnapped with a sexual aim –rape– or with that of marriage. However, it has to be specified that it was not necessary to reach for the kidnapper to achieve his aim in order for the crime to be consummated.

The legal interest protected with a penalty for kidnapping was hardly affected by the times and remained largely invariable. Family honour, on the one hand, essentially that of the father or husband –if the kidnapped woman was married– and on the other hand, the kidnapped woman’s decency and chastity which in the case of kidnapping was demeaned, are legally protected interests. If the woman were unmarried or *Deus dedicatæ*, the legal interest to be protected was also that of her virginity. These legally protected interests were intimately related to each other, as it was understood that what happened to one member of the family –in this case the daughter

or the wife– not only affected this member, but also the family honour.

Society’s concept of the family throughout history, and especially of women and matrimony, as well as the moralizing influence that the Catholic Church itself exercised from the first autonomous regulation of the crime in the 4<sup>th</sup> century<sup>2</sup> can be considered decisive factors in the manner kidnapping has been considered throughout history. However, even if its own criminal morphology has practically not changed since the first regulations in the Roman Dominate, what has changed is the scope of its persecution and the classification of the punishment to be imposed. Its consideration as a private or a public crime, that is, indictable at instance of the party or *ex officio* by the public power, brought about an important change, not only when exercising the *iurisdictio* but also in the model of legal proceedings, the procedural characteristics and the penology. It is the intention of this article to study a medieval institution that made it possible to prosecute kidnapping at a time when this crime was considered to be private: the proceeding a *medianedo*.

## II. KIDNAPPING IN THE MIDDLE AGES.

The Middle Ages on the Spanish Peninsula are marked by some very specific factors which caused great legal diversity. The conquest by the Muslims and the subsequent Christian Reconquista and repopulation led to a situation where each conquered territory had its own local laws –in the area of the local councils, *fueros*<sup>3</sup>– which,

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2 Constitution of Constantino 320 (C.Th. 9.24.1 Constantini M. *Edictum aduersus raptum Virginum I. (Imp. Constantinus A. Ad Populum)*). Vid., QUESADA MORILLAS, Y. *El delito de raptio en la historia del Derecho castellano*. Doctoral Thesis. Madrid: Dykinson, 2018, p. 81 and ss.

3 We use the term “Fueros” without translation referring to the texts of municipal local law in the Middle Ages, or local legal code, typical of the autonomous models to the royal law.

in turn, had extremely different legal systems.

Considering the social concept of family that existed then and, in particular, the position of women, the legal sources which regulated kidnapping, manifest, as Hinojosa points out, the strict "subjection of the women under the domestic authority during the first centuries of the Middle Ages, which are partly explained by the rude and semi-barbarian customs of those times and by the lack of a strong and tough public power that protected the person and assets of the subjects"<sup>4</sup>. Under this authority, and unlike the provisions in the preceding Visigoth Kingdom where married women were part of society, in the early middle Ages adult unmarried women and widows were included in the domestic guardianship, because it was understood that "the risks that constantly assail women, of which the highly frequent mentioning of kidnapping in the *fueros* gives us some idea, makes it understandable that the guardianship of the [female] sex was a necessity of the times"<sup>5</sup>.

Women's chastity was a very highly prized legal interest, since it meant honour and a good reputation. Its loss affected not only the woman but it extended to the whole family. The family was the connecting link and what happened to one of its members affected also the rest, but especially the acts of women, whether married or not, had direct consequences for her relatives, since female honour was considered to be "a passed-on gift that the woman received from the man, be it the

father or, after marriage, the husband, therefore, when this quality was lost or damaged, the males who were linked to that woman, the real owners of honour, felt directly affected"<sup>6</sup>. Consequently, "the woman's good reputation, her inclusion in the group of honourable women, played an outstanding role in the medieval period with regard to the protection of her honesty, even of her life. The virgin, the nun, the widow or the married woman of good customs were socially, religiously and legally defended"<sup>7</sup>.

In the *fueros* it can be observed how the family group, and in particular, women and matrimony, were praised. A woman was doubly protected, due to, as Muñoz García indicates, "the constant risks that assailed her"; the woman receiving double guardianship, that of the family and that "of sex out of the times' mere necessity"<sup>8</sup>. Consequently, kidnapping with the aim of marriage acquired a special importance in those times, in an "environment of great military and repopulating activity which called for matrimony as a social imperative for reproduction and stabilization". This is the origin of the so-called "Frontier solution"; in the interest of consolidating repopulation, which favours the abandonment of celibacy and access to matrimony, regardless of the form, being accompanied by a series of privileges aimed at fomenting a stable and long-lasting residence in the frontier territories<sup>9</sup>.

Under these conditions until the transition of the 11<sup>th</sup> and 12<sup>th</sup> century, a period that brought

4 HINOJOSA Y NAVEROS, E. de. *Sobre la condición de la mujer casada en la esfera del Derecho Civil*. Obras. T. II. Madrid: 1955, p. 360.

5 *Ibidem*, p. 360.

6 RODRÍGUEZ ORTIZ, V. *Historia de la violación. Su regulación jurídica hasta fines de la Edad Media*. Madrid: 1997, p. 252.

7 *Ibidem*, p. 252.

8 MUÑOZ GARCÍA, M.J. *Las limitaciones a la capacidad de obrar de la mujer casada: 1505-1975*. Madrid: 1991, p. 65.

9 An enumeration of the above benefits is set out in BERMEJO CASTRILLO, M.A. *Parentesco, matrimonio, propiedad y herencia en la Castilla altomedieval*. Madrid: 1996, pp. 151 and ss. The quotation is from p. 153.

about the defence of the individual interest of marriage, the union of man and woman was controlled by the family and, in consequence, their authorization and consent was indispensable, even though, as Otero affirms, "the right to marry one's daughters is not a constituent of parental authority; and the *fueros* reveal clearly that the consent is a consequence, not of the authority, but of the right to inherit"<sup>10</sup>. Thus, when the inheritance will inevitably pass to the female line, i.e. the daughter, her parents choose a marriage, a husband who is appropriate due to his social status, so that their assets remain in good state<sup>11</sup>.

Precisely in a society where matrimony constitutes the "basic family cell", one of the forms to break the defence of their interests, or that of family lineage and, definitely, family protection, was that of kidnapping which established itself as an alternative to the system of the anticipated choice of marriage. We agree with Barthélemy when he affirms that in the early Middle Ages matrimony was an instrument that was capable of providing "legal and social differences between people that, considering the role played by family and the robustness of personal dependencies, acquire such uncommon dimensions that they constitute an authentic peculiarity in Law"<sup>12</sup>. In this context, consented kidnapping was the way out that a woman sometimes had in order to break this inbred circle of social relationships, trying to avoid the agreed union and thus taking on her own role in

the choice.

This is why generally in historiography the affirmation can be found that in Europe, "kidnapping played havoc until the 12th century: but must we see it solely as a barbaric trait, an oppression suffered by women? Frequently they themselves are the instigators; at least their complicity makes success more probable (...). For a couple in love, kidnapping may be the means to make their personal decision win over their families; and if they afterwards acknowledge the consummated facts, it is a happy ending"<sup>13</sup>. This assessment can lead to considering the kidnapper as a liberator of the woman he abducted or of an abused wife, therefore, in kidnapping a manifest conceptual ambivalence triumphs, and at the same time, in the "alienation of those who see themselves obliged to resort to it as one of the most efficient means of emancipation"<sup>14</sup>.

This approach makes us think that sometimes kidnapping was an escape route, a way out of forced situations or those that were maintained only for reasons of respect or "fear" of a family authority of a social morality. This consideration leads Morán Martín to specify that "marriage indeed could adopt the form of kidnapping, therefore in the case of a lawsuit by the woman's relatives, she had to decide whether she was to be united with the kidnapper or whether she chose her relatives"<sup>15</sup>. Morán Martín reminds us that

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10 OTERO, A. La patria potestad en el Derecho Histórico español. *Anuario de Historia del Derecho Español (AHDE)*, 26 (1956), p. 226.

11 Vid. RÁBADE OBRADÓ, M.P. La mujer en las crónicas reales castellanas del siglo XV. *Anuario de Estudios Medievales (AEM)*, 17 (1987), p. 540.

12 Barthélemy even provides examples of procedures outside direct abduction, such as the kidnapping of the father himself, to condition the granting of marital authorization, Vid. Parentesco. *Historia de la vida privada* 3, Madrid: 1991, p. 130. See in this respect, BERMEJO CASTRILLO, "Parentesco, matrimonio", cit., pp. 148 and next.

13 BARTHÉLEMY, Parentesco, cit., p. 146.

14 *Ibidem*, p. 146.

15 MORÁN MARTÍN, R. *Historia del Derecho privado, penal y procesal, Tomo I, Parte Teórica*. Madrid: 2002, pp. 339-340.

at that time it was the influence of the Church itself, which after the Gregorian Reform occupied once more the leading position it had lost at the beginning of the medieval period, that caused this situation to be reduced progressively, "in favour of a solemn or blessed matrimony"<sup>16</sup>. However, it has to be specified that the consent of the kidnapped woman to go with her kidnapper was taken into consideration once the kidnapping had been consummated. In this case, it is not a strictly consented kidnapping, since the consent is a *posteriori*, after the kidnapping, with the woman already returned. There's a rupture between the kidnapping –crime– and the consent of the woman kidnapped for matrimony which made it free and independent from the criminal act.

However, we must ask ourselves, in an environment where the capacity to resolve the questions attached to the consent for marriage fell on the *pater familias*, what was the nature of the jurisdiction and the proceedings that had to prosecute behaviours that contradicted the family's decision. In this sense, the Early Middle Ages were characterized by blood vengeance, not recognized in the *Liber Iudiciorum* (a. 654), since "it does not mention explicitly the institution of breaking private peace, the subsequent *inimicitia* and the right to private vengeance"<sup>17</sup>. This blood vengeance, as Alonso Romero affirms, is the "starting point of

the appearance of forms of very privatized proceedings where, however, this initial relationship between offender and offended is replaced by the triangular relationship, constitutive of the proceedings, between the two confronted parties and the third, impartial one, who pronounces the result of the trial"<sup>18</sup>. As a consequence, it is the trial itself "which then appears as the necessary legal act that legitimates the punishment"<sup>19</sup>. Thus there exists "the enormous privatization of the procedural forms with the underlying idea that the punishment of those who attacked the established order of co-existence has to be primarily the task of the offended individual"<sup>20</sup>. Therefore, as Gibert points out, the law of that period eliminated the inquisitive principle, the *ex-officio* action, so that "what remains in force is precisely that family revenge that Constantine incited in his constitution. Now it is up to the family itself to decide if they execute their vengeance or if they make peace with the kidnapper"<sup>21</sup>.

In this sense, it is quite common that crimes against honour and pride, where the victims were women, were sometimes considered to be equal to homicide. That was the case in the crimes of kidnapping and rape, which could be punished with death, whereas homicide meant a financial penalty<sup>22</sup>. To be exact, in the framework of the right to vengeance, the enmity –*inimicitia*– was

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16 *Ibidem*, pp. 339-340.

17 ALVARADO PLANAS, J. El problema de la naturaleza germánica del derecho español altomedieval. In IGLESIA DUARTE, J. I. (coord.), *VII Semana de Estudios Medievales: Nájera, 29 de julio al 2 de agosto de 1996*. Logroño: 1997, p. 136.

18 ALONSO ROMERO, M.P. *El proceso penal en Castilla (Siglos XIII al XVIII)*. Doctoral Thesis. University of Salamanca: 1982, p. 3.

19 *Ibidem*, p. 3.

20 *Ibidem*, p. 4.

21 GIBERT Y SÁNCHEZ DE LA VEGA, R. El consentimiento familiar en el matrimonio según el derecho medieval español. *AHDE*, 18 (1947), p. 756.

22 Vid. MORÁN MARTÍN. *Historia del Derecho privado*, cit., p. 446. As can be seen, among others, in the *Fuero Refundido of Toledo* (1116), 31. *Similiter, et nullus eti rausus rapere mulierem, ex mulieribus, mala si fuerit aut bona, nec in civitate aut in via neque in villa. Et qui unam ex illis rapuerit, norte moriatur in loco*, in GARCÍA-GALLO, A. Los Fueros de Toledo. *AHDE*, 45 (1975), p. 479; also in *Fuero of Córdoba* (a. 1241), 27. *Similiter et nullus erit ausus rapere mulierem de mulieribus eorum, mala si fuerit*

a consequence that was generally derived from committing precisely these crimes, kidnapping and rape, that is, serious offences against honour, apart from homicide<sup>23</sup>.

With regard to the nature of the trial, one of the characteristics of the *fueros* is the frugality of information they offer us. Not only because they do not inform us about the proceedings, but, as a general rule –with the exception of the proceeding of *medido* as a possible conciliatory route between the disputing parties– they did not pay any attention to the regulation of questions such as procedural legitimacy, procedural time limits, types of evidence, carrying out the verdict, etc.

### III. THE PROCEDURE OF MEDIANEDO.

Certain *fueros* of the territories of Castile, Aragon and Navarra mention the practice after a kidnapping of placing the woman –the victim– between her relatives and her kidnapper so that she could choose freely whether she wanted to follow one or the other<sup>24</sup>. This procedure, which gave the woman the liberty of decision, was only possible when she was an unmarried woman –identified in those *fueros* mainly as “maiden”, “mulier” or

“girl”– even though exceptionally some *fueros* also extended it to the widow<sup>25</sup>. López Ortiz, in his classical work on trials in the reigns of the Early Middle Ages, draws attention to the fact that the proceeding of *medianedo* was discovered in the remnants of some rather ancient formalisms in a lawsuit for kidnapping<sup>26</sup> and Hinojosa had already anticipated that this special procedure after the lawsuit for kidnapping was meant for those crimes that attacked the woman’s honour<sup>27</sup>. Gibert y Sánchez de la Vega specify that the *medianedo* responds to the fact that “the relatives persisting with the lawsuit, there is a manifestation of an opposition of wills between them and the kidnapped woman”, and the *fueros* had the tendency to accept the freely manifested will of the kidnapped woman<sup>28</sup>. According to Ficker, the procedure of *medianedo* is possibly of Germanic origin, since Jakob Grimm, in his study on *Notnunft an Frauen*, mentions it, alluding to the custom that “in the Germanic territories it can be confirmed of the most diverse kinds of Law, according to which the seduced woman is placed between her parents and the seducer and depending on whether she inclines to him or to them, she becomes his wife or the seducer is condemned as a kidnapper”<sup>29</sup>.

In the resolution of the procedure of *medianedo*

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aut bona, non in ciuitate nec in uilla nec in uia. Et quicum que aliquam ex illis rapuerit, morte moriatur in eodem loco, in HURTADO DE MOLINA DELGADO, J. *Delitos y penas en el Fuero de Córdoba y Molina*. University of Córdoba: 2004, p. 335; or in the *Fuero of Zorita de los Canes* (a. 1180), 248. “De aquel que muger forçare (1). Tod aquel que muger forçare, o la leuare rabida contra uoluntad de sus parientes, deue recibir muerte por ello (...)”, in UREÑA Y SMENJAUD, R. DE. *El Fuero de Zorita de los Canes según el Códice 217 de la Biblioteca Nacional (siglo XIII al XIV) y sus relaciones con el Fuero Latino de Cuenca y el romanceado de Alcázar*, en *Memorial Histórico español colección de documentos, opúsculos y antigüedades que publica la Real Academia de la Historia*, tomo XLIV. Madrid: 1911, pp. 147-148.

23 Thus, by way of example in the *Fueros* of Cuenca, *Usagre* (54), *Zorita* (248), or the Aragonese *Calatayud* (8), *Teruel* (364), *Daroca* or *Molina* (24.20).

24 *Fuero of Sepúlveda* “aduganla de cabo á medianedo”; *Fuero of Calatayud* “paretillam in medianeto ante suos parentes et vicinos de Calatayub”; *Fuero General of Navarra* “et deven poner áeylla estos fieles en medianedo entre los parientes deyllola et daqueillqui la levó”, among others.

25 *Fuero Viejo of Alcalá de Henares* (9).

26 Vid. LÓPEZ ORTIZ, J. *El proceso en los reinos cristianos de nuestra reconquista antes de la recepción romano-canónica*. *AHDE*, 14 (1942-43), p. 206.

27 HINOJOSA, E. de. *El elemento germánico en el Derecho español*. *Obras*. T. II. Madrid: 1955, p. 421.

28 GIBERT Y SÁNCHEZ DE LA VEGA. *El consentimiento*, cit., p. 756.

29 FICKER, J. *Sobre el íntimo parentesco entre el derecho godo hispánico y el noruego-islandico*. Translation J. Rovira Armengol.

do, the kidnapped woman's decision is important for the consequences it has for the parties. In the framework of guardianship and the protection of the family's honour and decency, her condition as enemy is also assumed, especially when the *fides* is betrayed, not accepting the orders of the parents or of the family "council," as happens when the woman consents to the kidnapping with the aim of marriage. According to Ficker, "even though here generally a man is supposed to be the criminal, there is not the least idea that the same would happen to a woman if she were a guilty of the same crime, since in the cases where beforehand it can only be a woman, she is explicitly threatened with proscription. This is often the case of a *rapta* who consents"<sup>30</sup>.

On the other hand, where the kidnapped woman, now free again, decided to go back to her parents, the penal consequences for the kidnapper established in the *fueros* worsen. However, when her choice was to stay with the kidnapper, then she could marry him and sometimes also make the lawsuit for kidnapping void or the criminal consequences for the kidnapper were softened. In some *fueros*, motivated by the need to attract new settlers to the dangerous border territories with Al-Andalus, even the right to private vengeance was not favoured and the regulation itself of kidnapping was decriminalized<sup>31</sup>. So, the *Fuero* of Sepúlveda punished only the enmity and the kidnapper chosen by the kidnapped woman in a *medianedo* did not have to pay any economic compensation at all.

As mentioned, the decision of the kidnapped woman who was put in *medianedo* not only had

consequences for the kidnapper, but also for herself. On many occasions the family turned to the only means of (economic) pressure they had left: disinheritance. So, if in the procedure of *medianedo* she chose the kidnapper, she was excluded from the right to inherit assets that belonged to her family.

However, this was not the only consequence that could fall upon her. In some *fueros* we find the establishment of a more severe punishment for the kidnapped woman, or even the same that was foreseen for the kidnapper: *inimicitia*. It has to be kept in mind that one of the basic characteristics of Criminal Law of that period is the private action with regard to the crime's consequences. The medieval society is characterized by this idea of vengeance that Orlandis describes graphically: "homicides, disgrace, crimes against a woman's honour caused the enmity of the offended party, whose aspiration and aim from that moment on was and could only be family vengeance, the restorer of broken peace and violated legal order".

Now, that did not mean that justice could be taken into one's own hands, a previous declaration of enmity by the legal authority, dictated after a trial, was necessary. After this declaration of *inimicitia* of the kidnapper, the offended parties could take private actions of persecution and death of the offender, which were justified and carried no criminal responsibility. For this reason, the family, and ultimately, the parental ties, assume the protection of the honour of all its members. As Montanos Ferrín indicates, "the criminal provisions contained in the Castilian *fueros* in the late Middle Ages assigned capital importance to

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30 *Ibidem*, p. 86.

31 Vid. HINOJOSA, El elemento germánico, cit., p. 424-425 y ORLANDIS, J. Sobre el concepto del delito en el Derecho de la Alta Edad Media. *AHDE*, 18 (1947), p. 138.



the entire family. In the short *fueros* as well as in the lengthy ones there are numerous rules dedicated to the protection and guarantee of parental solidarity in criminal occasions of diverse nature. On these occasions, the relatives intervene in order to defend certain "legal interests" of the family or to avenge aggressive and harmful behaviour towards the family". On these considerations, the *fueros* limited the declaration of enmity to a reduced number of crimes, such as those that attacked the physical integrity of the individual, as *verbi gratia* homicide, but soon they also included crimes against honour for their social seriousness, especially those against a woman's honour like kidnapping or rape. Sometimes, their punishment was even more severe.

With regard to the origin of this declaration of enmity, Alvarado Planas understands that the *inimicitia* which was recognized during this medieval period, was only a "vulgarization of the Visigoth *traditio in potestatem*"; consequently arguing that "until the beginning of the 11<sup>th</sup> century, the profiles of private vengeance and the *inimicitia* might have been due to the adaptation or transformation of the punitive system from the *Liber* to the needs of practice and not so much a dramatic fight between the suppressed customary law and a non-applied official legislation. On the other hand, the richness of nuances with which the *inimicitia* is regulated from the 12<sup>th</sup> century onwards does not seem to go back to an oral Goth tradition, but rather to an autonomous evolution of the *Liber*'s legal tradition, stimulated, to a certain degree, by extra-peninsular influences"<sup>32</sup>.

On the other hand, the criminal consequences outside the geographical limits where the crime had taken place are not known, since the –local–

jurisdiction only reached the limits of the municipality itself. And if to this we add the effects of the Frontier Law that was designed to attract population by means of conceding privileges, among others, that of the non-enforcement of the inflicted punishments, it would seem there was an exemption of punishments or asylum. As Orlandis points out, it was understandable that the attraction of "[enemies] fled from their hometown was a factor of utmost importance in the repopulation policy. The fugitive was often offered all kinds of security and guarantees. Nothing is demanded of him for the committed crime. (...) The enemy, who persecuted by his opponents, managed to reach the town limits of the new municipality, was safe, because once inside those limits, he could not be "seconded" any longer". So it was a common practice that either the kidnapper on his own or accompanied by his choice of kidnapped woman, whether manifested in *medianedo* or not, moved to other territories, exiled because of the *inimicitia*, where then they were welcomed due to the repopulation needs of that time. Explicit asylum for the kidnapper can be found in many *fueros*, which are not included here since it is outside the scope of this investigation.

Therefore, considering the *inimicitia*, we have to specify that the declaration of enmity put the kidnapper into a position of legal defencelessness against the victim or her parents and the execution of vengeance was considered not only a right but a family obligation. Thus, ample possibilities were opened for acts of non-judicial self-help. Therefore, sometimes exile was not so much a punishment as a way out for those who were declared *inimicus*, because when they were far from the village, they were safe, it may even have saved their lives. Exile could be temporary,

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32 ALVARADO PLANAS, J. *El problema del germanismo en el Derecho español. Siglos V-XI*. Madrid: 1997, p. 241.

so that, after a certain time, he or they could come back without any kind of consequence; or it could be indeterminate, in which case it only ended if there was reconciliation.

#### IV. THE PROCEDURE OF MEDIANEDO IN THE FUEROS.

We shall now analyse in detail some *fueros* that include the procedure of *medianedo*.

In the Crown of Castile, the *Fuero of Sepúlveda* (a. 1076) includes this procedure:

35. "De omme que forzare muger. Todo omme que demandáre que levó muger á fuerza, si lo negare, salvese con doze: é si él dixiere, que se fue ella de su grado, adugan la muger á medianedo, é fablen los parientes con ella, é ella seyendo segura de ellos; et después aduganla de cabo á medianedo, é si se fuere de cabo á los parientes, peche aquel que la levó forzada cincuenta maravedís á ella, é vaya por enemigo por siempre de ella é de sus parientes; é si el salvo non cumpliere, así como sobredicho es, peche las calonnas, é vaya por enemigo: é si ella fuere el forzador, sea deseredada, et el forzador non peche nada: et si alzada quisiere por al Rey, dengela los Alcaldes"<sup>33</sup>.

This *fuego* considers kidnapping and rape with "force" to be the same crime. Here the kidnapper is offered the possibility of saving himself by

denying that he committed the crime, supported by twelve neighbours. Now if the alleged kidnapper claims that the kidnapped women went voluntarily with him, the procedure calls for placing the kidnapped woman between the kidnapper and her relatives. This *Fuego* adds the following particularity to the procedure: before placing her between her relatives and the kidnapper in order to choose between them, -a *medianedo*-, her relatives could talk to the kidnapped woman. As Pastor de Togneri indicates, this is a process that permits the kidnapper and the kidnapped woman to negotiate should the two of them want to re-incorporate into the community, in general, both having to "present themselves before the woman's relatives, and she puts herself between her family and the man and, mediating between the parties, the pact is made"<sup>34</sup>.

So then, after the kidnapped woman has talked to her family, she proceeds to her election. If the woman chose her relatives, the kidnapper had to pay 50 Spanish maravedís to the kidnapped woman and additionally, he remained her enemy and that of her family forever. If he did not fulfil the pact, he had to pay the *caloñas* (court fees) and leave as an enemy. However, the situation changed if she chose the kidnapper, because in such a case she was punished with disinheritance whereas the kidnapper was free from any kind of economic compensation.

Another Castilian *fuego* which included this procedure was the *Fuego viejo of Alcalá de Henares* (a. 1135), signalling that:

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33 Vid., in this respect, REGUERA VALDELOMAR, J. de la. *Extracto de las Leyes del Fuego Viejo de Castilla, con el primitivo Fuego de León, Asturias y Galicia. Se añaden el antiguo Fuego de Sepulveda; y los concedidos por S. Fernando á Córdoba y Sevilla*. Imprenta de la viuda e hijo de Marín. Madrid: 1798, p. 174 y ss.

34 PASTOR DE TOGNERI, R. *Para una historia social de la mujer hispano-medieval. Problemática y puntos de vista. La Condición de la mujer en la Edad Media: Actas del coloquio celebrado en la Casa de Velázquez del 5 al 7 de noviembre de 1984*. Madrid: 1986, p. 205.

9. "Todo omne dalcála [Todo omne dalcála o de so termino] o de so termino qui mulier rabiere [qui mulier rabiere.] apriete al iudez. & los fiadores dados querela faganla sacar amedianedo. & quando lasacaren. amedianedo. Siexiere asuos parientes. peche el otro. c. & viii. Morauidis. & exca enemigo. & destos. c. Morauidis. prenda el sennor el tercio. & el rencuroso. el otro tercio. & los fiadores el otro tercio. & si isiere almarido sea desheredada. & si en cabelo fuero. & lo suio sea de sos parientes. & si fuere bidad case. o quisiere & si el iudez. & los fiadores non quisieren ajudar aprientes delarabida. elos lo pechen al señor del tercio. & aprientes delarabida so tercio"<sup>35</sup>.

It offers the possibility for the kidnapped woman and her relatives to agree on a marriage with the kidnapper. It establishes that the kidnapper had to be brought before the judge, the relatives initiating a lawsuit that had to be accompanied by the corresponding deposit of *caloña* (court fees). Then the procedure of *medianedo* took place. If the kidnapped woman chose her relatives, the kidnapper had to pay one hundred and eight Spanish maravedís and had to leave as an enemy. The amount of the *caloña* was distributed in thirds: one for the feudal lord, one for the plaintiff and one for the guarantors. In case the kidnapped woman chose the kidnapper, she was punished with disinheritance. If the woman was a girl, she lost all her assets to her relatives. However, if she was a widow, she did not suffer any consequences if she chose matrimony. In the event that the guarantors and the judge did not help the kidna-

pped woman's relatives, they were fined with the payment of the corresponding thirds which the kidnapper had to pay to the feudal lord and the kidnapped woman's relatives.

This procedure is very well and thoroughly documented in the *fueros* of Navarra and the *Fuero General of Navarra* and the information included is very important for understanding the institution of *medianedo*, also called *meanedo*–, apart from its influence on the creation of certain *fueros* in the region of La Rioja.

The *Fuero General de Navarra* (a. 1237) includes and broadly describes the procedure of putting the kidnapped woman a *medianedo*:

4.3.1: "Quoando alguna dueyna saylle con fidalgo et los parientes deylla dizen que por fuerza la sacó et eyll diz que nó, que debe ser feyto. Dueyna si se fuere con fidalgo ninguno, diziendo los parientes deylla que por fuerza la lieva, diziendo el ynfanzon, non por fuerza mas con placer deylla, debe ser puesta en meanedo desta manera: los parientes deyll et deylla deven poner bonos ombres por fieles, III ó V, poniendo plazo en logar sabido entranbas de las partidas; et deven poner á eylla estos fieles en meanedo entre los parientes deyloa et daqueill qui la levó; et deven mostrar el padre ó la madre si los ha, et si nó á los mas zercanos parientes deylla desent adaqueill qui la levó. Desent dévenla tornar de cara que sea por comunal á entrambas las partidas; et si fuere á los parientes debe

35 Vid. SÁEZ, C., CABALLERO, A. and TORRENS, M. J. *Fuero de Alcalá de Henares*. Alcalá de Henares: 1992, pp. 73-74; and TORRENS ÁLVAREZ, M. J. *Edición y estudio lingüístico del Fuero de Alcalá (Fuero Viejo)*. Alcalá de Henares: Fundación Colegio del Rey, 2002.

The *Fuero Nuevo*, granted by Cardenal Cisneros in 1509, contains no regulation about kidnapping. Vid., the text editing of PÉREZ BUSTAMANTE, R. *El Fuero "nuevo" de Alcalá de Henares*. *Cuadernos de Historia del Derecho*, 2 (1995), pp. 267-304.

yssir por enemigo el yfanzon qui la levó, et el Rey debe emparar lo suyo; et si fuere con aqueill qui la levó, el hermano debe emparar lo suyo et desheredarla”<sup>36</sup>.

The *Fuero General* contemplated that, after contrasting the evidence of both parties on the use of force during the kidnapping, both parties had to choose between three and five good men in order to initiate the procedure of *medianedo*, indicating the corresponding period for appearance of both parties and to explain themselves. The onus of proof that she was abducted by the kidnappers and of the force used is on the parents, or the closest relatives. If the kidnapped woman chose her relatives, the kidnapper had to leave as an enemy and the King kept all his assets. If the woman, however, decided to stay with the kidnapper, it was her brother’s duty to disinherit her and to seize the assets. From this *Fuero* we can infer the consequence of the woman losing peace, although not explicitly.

The *Fuero* of Navarra, of *Viguera* and *Val de Funes* (a. 1110) requires that the relatives bring a lawsuit for kidnapping in order to proceed a *medianedo*, as its own title indicates:

470. “*Quereylla de parienta*. Et si alguno se quereyllare que tiene su parienta por forzada ó la leva por fuerza debenla por mandado del seynnor poner en medio, é si eylla fuere al otro los parientes pierdan quereill dell. Et si fuere á los parientes sea

su persona á merce del seynnor del”<sup>37</sup>.

The previous lawsuit of the woman’s relatives for kidnapping was brought before the feudal lord who was the one to order to proceed a *medianedo*. The text announces the loss of the lawsuit if the kidnapped woman chose to stay with her kidnapper once she is put between him and her relatives; or, on the contrary, if she chooses her family, the kidnapper is at the feudal lord’s mercy. It does not mention any other punishment for either of the cases.

In the territory of the Kingdom of Aragon, this procedure is also included in its legal texts<sup>38</sup>. Thus the *Fuero* of Calatayud (a. 1131) mentions the procedure of a *medianedo*:

8. “Et nullo vicino qui rapuerit sua uicina, qui sit de Calatayub, paret illam in medianeto ante suos parentes et vicinos de Calatayub; et si voluerit illa ire ad suos parentes, pectet ipso aravitore ad parentes de muliere D solidos, et postea sit homiciero, et si illa voluerit stare cum illo vivant se, ut melius potuerint, et illa sit homiciera”<sup>39</sup>.

This *Fuero* describes the procedure of placing the kidnapped woman in the centre, specifying that the kidnapped woman be put between the relatives, the neighbours, and the kidnapper. If she chose the kidnapper, she would suffer the same punishment, the *inimicitia*, and they had to live together outside Calatayud, because of the

36 *Fuero General de Navarra*, Edición sistemática realizada conforme a la obra de D. Pablo Iñarregui y D. Segundo Lapuerta. Año 1869. Pamplona: 1964, pp. 165-166.

37 Vid. RAMOS Y LOSCERTALES, J.M. *Fuero de Viguera y Val de Funes*. Salamanca: 1956, p. 86.

38 AGUDO ROMEO, M.M. El rapto de mujer en la legislación foral medieval aragonesa. *Aragón en la Edad Media*, XX (2008), pp. 47 y ss.

39 MUÑOZ Y ROMERO, T. *Colección de Fueros Municipales y Cartas Pueblas* Tomo I. Madrid: 1847, p. 459; and translation by ALGORRA HERNANDO, J.I. and ARRANZ SACRISTAN, F. *Fuero de Calatayud*. Zaragoza: 1982, p. 34.

punishment inflicted, which included exile. If she chose her family, the kidnapper was punished—consisting of paying 500 Sols to the woman's relatives, as Orcastegui Gros points out, "more than for any homicide" and be declared enemy—sower of discord<sup>40</sup>.

Similarly, the *Fuero of Daroca* (a. 1142) establishes the same procedure as in *Calatayud*

*Item, si quis invitis parentibus mulieren aliquam rapuerit, alcaldes dent illi spatium XXX dierum in concilio, ut veniat, et satisfaciat iuxta forum Darocae; et siusque ad XXX diez non venerit, sit deinceps inimicus concilii, et omnia sua sint incorrupta; et si exierit ad parentes, raptor pectet homicidium, exeat homicida. Si autem ad raptorem exierit, absolvatur raptor: illa vero nihil amplius hereditet in facultatibus suorum parentum*<sup>41</sup>.

The novelty of this *fuero* consisted in decriminalizing the kidnapper when the woman went with him. He was acquitted and the family's only way of punishment was that of disinheriting the woman, so that only she suffered the consequences of her choice. If she stayed with her family, the kidnapper paid a fine and had to leave as an enemy.

The *Fuero of Jaca* (a. 1063-1077) also offers the procedure of *medianedo* in cases of kidnapping:

187. "D'omne qui rabis muiller. Si nin-

gún omne rabis ninguna filla de prodomne lo prodomne se clama al seynnor li deu far dreyt lo dreyt es atal: que metan la macipa deuant lo payre deuant les parentz deuant les alcaldes deuant lo seynor de la uila, digal l'alcalde a la macipa: "Cal uols tu mays anar, a ton payre o ad aquel qui te rabi?" Si ela ditz: "A mon payre", lo qui la arrabi deu peytar CC. mor., isca per draydor de la uila. E si la mancipa uol anar ab aquel qui la rabi, lo payre lo deu asegurar ab totz ses parentz que iamays non sian re[n]curantz"<sup>42</sup>.

This *Fuero* explains how the procedure of *medianedo* has to be carried out, giving details on who had to intervene, what question the kidnapped woman had to be asked and the consequences depending on her reply. So, if she opted for her family, the kidnapper had to pay a financial penalty of two hundred Spanish maravedís and leave the village as an enemy. However, if she decided to go with him, the parents had to assure the rest of the relatives that they would never initiate a lawsuit<sup>43</sup>.

It has to be said that this procedure of *medianedo* also took place outside the municipal environment. In fact, the regional law, to be exact, the *Fuero Viejo de Castilla* (a. 1356), says in its text:

2.2.1. "Esto es *Fuero de Castiella*: Que si un Cauallero, o Escudero, u otro ome lieva una Dueña robada, e el padre, o la madre, o los ermanos, o los parientes se querellan que la levò por fuerça, deve el Cauallero,

40 Vid. ORCASTEGUI GROS, C. La mujer aragonesa en la legislación foral de la Edad Media. *Las mujeres medievales y su ámbito jurídico*, Actas II Jornadas de Investigación Interdisciplinaria. Madrid: 1990, p. 119. Vid., also, GUALLART DE VIALA, A. *El Derecho penal histórico de Aragón*. Zaragoza: 1977, p. 187.

41 MUÑOZ Y ROMERO. *Colección de Fueros*, cit., p. 537.

42 This is the wording found in Paris in National Archives, J.J.N.N. in MOLHO, M. *El Fuero de Jaca*. Zaragoza: 1964, p. 255.

43 Vid. AGUDO ROMEO. *El rapto de mujer*, cit., p. 54.

o Escudero, u otro ome aducir la Dueña; e el atreguado, deven venir el padre, o los ermanos, o los parientes, e deven sacar fieles, e meter la Dueña fuer al cauallero, de vela levar, e ser quito de la enemistat, e si la Dueña fuer a los parientes, e dijier que fue forçada, deve ser el cauallero, o escudero enemigo dellos, e deve salir de la tierra, e si el Rey lo poder auer, deuel justiciar”<sup>44</sup>.

The same procedure is established as in the local laws. The family lawsuit is necessary and after this the procedure of *medianedo* will take place. If the kidnapped woman chooses her family, the kidnapper will be declared an enemy and has to leave the area, not being safe if the King can capture him, for then, as the text says, he will be tried. If she chooses the kidnapper, there will be no punishment for either of them, being freed from the declaration of enmity<sup>45</sup>.

## V. CONCLUSIONS.

Kidnapping is a behaviour that has been present throughout humanity’s history, although it has always had a negative connotation and has been considered a serious crime, essentially due to the legal interest guarded by its regulation, since it damaged the family honour, mainly that of the father or husband, even though the kidnapped woman’s honour and chastity was also tainted.

However, the procedure of *medianedo* that is described in the *fueros* gives us another vision of kidnapping, especially when in this procedure the kidnapped woman chooses to stay with the kidnapper. It gave her the possibility to choose without

being subjugated to the choice of her relatives for her marriage although with consequences for her. Nevertheless, when the kidnapped woman favoured her family, the harm to the legal interest was even greater, especially for herself, since her honesty and chastity were tarnished, even though the kidnapper did not achieve his end. On the other hand, when she chose to go with her kidnapper, this damage was somehow overcome, or at least softened, especially in the eyes of society, since she was about to start a new life she herself had chosen

With regard to the procedure of *medianedo*, described in the *fueros*, a lawsuit or legal act always had to occur beforehand. There was a previous procedural act which makes it possible, in one way or another, for the judge –in the royal *fueros* conceded by the King, in the *senorial fueros* conceded by the feudal lord himself– to proceed to this act of placing the kidnapped woman in the centre between her relatives and her kidnapper.

The kidnapped woman, now set free, could choose between her family and the kidnapper, and the choice was generally punished by identical penalties in the *fueros*. So, should she opt for her relatives, the corresponding punishment for the kidnapper was a financial penalty –whose quantity varied, depending on the *fuero*– and the *inimicitia*, in some cases only as the family’s enemy, in others as that of the whole village. The punishment is different in the *Fuero of Viguera* and *Val de Funes* where the kidnapper was at the mercy of the feudal lord.

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44 *El Fuero Viejo de Castilla*, with historical and legal notes D. Ignacio Jordán de Asso y del Río, and D. Miguel de Manuel y Rodríguez. Madrid: 1771, pp. 65.

45 Vid. SANCHEZ TEJERINA, I.S. El delito de raptó en el Código penal español. *Revista General de Legislación y Jurisprudencia (RGLJ)*, 144 (1924), p. 551.

The general rule when the kidnapped woman chose to go with her kidnapper was that of inflicting the punishment of disinheritance. We have already underlined that the importance of the family's consent, especially the father's, did not derive from parental authority, but the right to inherit, something that is coherent with the punishment imposed. The *Fuero de Viejo of Alcalá de Henares* made a provision to this punishment; when the kidnapped woman was a widow, she was not punished with disinheritance. On other occasions, this penalty was accompanied by the *inimicitia*, even though it must be admitted that in the procedure of *medianedo* it was almost the exception. So, the *Fuero of Calatayud* only mentions this penalty for the kidnapped woman, and not her disinheritance; and the *Fuero General of Navarra* infers the woman's loss of peace, however, it is not explicitly indicated.

Nevertheless, and consequently, when the woman goes voluntarily with her kidnapper, she shares his destiny, punished with the *inimicitia*. Therefore, although she was only sanctioned with disinheritance, she could not return to her relatives if the enmity was definite. Although the woman's enmity was not explicitly mentioned, she did suffer its consequences of exile, because due to the choice she had made, she followed her kidnapper on whom this punishment had been inflicted.

The kidnapper who was chosen by the woman he kidnapped, in the procedure of *medianedo*, receives a softer punishment. Normally he did not receive a financial penalty, but suffered the punishment of *inimicitia*.

The conclusion that we can draw is that with

this procedure of *medianedo* the criminal consequences after the kidnapping lay in the hands of the kidnapped woman. Even though how to proceed and the need for the relatives to initiate a trial with the lawsuit is regulated, the final result of the whole procedure is decided by the kidnapped woman's choice. This is a key aspect, since in the background of this regulation what was really included in a medieval text was liberty –although with consequences– a woman's liberty to choose her future, translated into a way of breaking parental authority. Not many of the *fueros* include this procedure of *medianedo* in their text, but what can be observed is that they cannot be pinned down to a certain territorial area. It happened in the Crown of Castile, in the Kingdom of Navarra and the Kingdom of Aragon, without any existing precedent on the Iberian Peninsula. Therefore we point towards a possible Germanic origin, an area on which we are working at the moment, based on the information Ficker has provided on the work of Jakob Grimm in his study on *Notnunft an Frauen*<sup>46</sup>.

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46 FICKER. *Sobre el íntimo parentesco*, cit., p. 5.

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