CHAPTER FOUR

GERMANIC LAW:
IRREGULAR AND INFORMAL MARRIAGE

Abduction and elopement

Germanic law and the Theodosian code treat abduction¹ and elopement differently in two important respects.

First, Germanic law permitted the abductor to settle the matter by coming to an agreement with the woman and her family. Abduction was a serious crime, and the laws treat it as a grievous injury against both the woman concerned and her family, but a man who was guilty of either abduction or violation might evade punishment by paying composition.² Moreover, some of the Germanic codes permitted the abductor to make the alliance legitimate by obtaining the agreement of the woman’s parentes and paying something as composition or as dowry or as both. Where a system of the transfer of mundium operated, as under Lombardic law, the abductor could thereby become the woman’s mundwald.³ The Theodosian code strictly prohibited such agreements. Not only the abductor, but all those guilty of complicity in an abduction were to be severely punished, including the woman’s parents. Therefore the woman’s parents deserved to be severely punished if they came to an arrangement with the abductor and allowed him to keep the woman.⁴

¹ It should be noted that raptus in both Roman and Germanic law usually denotes abduction rather than sexual intercourse with a woman against her will. Abduction is called raptus regardless of whether or not it has been consummated.

² See for example Lex Gund. 12.1–2, p. 51, and Lex Baiuvariorum 8.3–7, pp. 355–57. On violation and rape (i.e. not abduction [raptus] but violent sexual intercourse), see Lex Frisonum 9.1, p. 664; Lex Alamannorum 56, pp. 115–16. Cf. Lex Romana Burgundionum 19.1, p. 142, which states that a rapist should be put to death.

³ Lex Vis. 3.3.7, p. 142 (but see also 3.3.1 with note 1, p. 140); Rothair 186–87, pp. 44–45; Rothair 190–91, pp. 45–46 (where another man’s sponsa is abducted); Lex Saxonum 49, p. 74 (but cf. 40, pp. 69–70); Lex Alam. 50.1, p. 109 (where the woman is married) and 51, p. 110 (where a sponsa is abducted); Capitula legibus addenda (from the Capitularies of Louis the Pious, AD 818 or 819), cap. 9, MGH Capit. 1, p. 282.

⁴ Cod. Theod. 9.24 (Brev. 9.19). The section consists of a constitution by Constantine with supplemental rulings by Constantius and Valentinian. See also Lex Romana Burgundionum 9.1–2, p. 132, which adopts the same position.
The second difference is this. According to the Theodosian code, a man who took a maiden as his wife without the consent of her parents was an abductor even if the woman herself consented. Her consent did not mitigate his crime but rather made her a partner in it, and thus liable to the same punishment. The willingness of the girl was a matter of degree. If she consented outright, she was as guilty as the abductor. But even if she was unwilling, there might have been some degree of complicity or responsibility on her part. If she was abducted while she was out of doors, she was guilty at least insofar as she should have remained safe indoors until her marriage. And even if the abductor broke into her house, she perhaps did not do enough to defend herself, or did not cry out to summon help from her neighbours. In such cases, the girl would not receive the full penalty, but she was to be punished by being disinherited. Abduction under Roman law was what scholars call *raptus in parentes*: that is, the taking of a woman who is *alieni iuris* without the agreement of her father or family. It follows that the law made no distinction between abduction and elopement.

Under Germanic law, on the contrary, the woman's consent mitigated the man's crime to a greater or lesser degree. Moreover the laws clearly distinguish abduction (where the girl was unwilling) from elopement (where the girl herself chose to run off with a man without the consent of her *parentes*). Those who compiled the codes considered the two cases to be related. They usually treated elopement alongside abduction, and they sometimes treated it under the heading of abduction. Nevertheless, the laws did not treat elopement as a form of abduction, and where there were penalties, these were usually much lighter. The laws on elopement varied considerably, but in general the codes were tolerant. They recognized that a marriage might be founded on the mutual agreement of the spouses instead of on an agreement between the suitor and the woman's *parentes*. Those who got married in this way were usually required to pay compensation. In certain circumstances, according to some of the codes, the girl might suffer disinheritance.

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6 See for example *Lex Gundobada* 12.4–5 (pp. 51–52), where elopement is treated under the heading *De raptibus puellarum*.
7 Cf. *Lex Thur.* 46 and 47, pp. 135–36; *Lex Gundobada* 12.1–3 and 12.4–5, pp. 51–52 (see also 101, p. 114); Rothair 186–87 and 188, pp. 44–45; *Lex Saxonum* 40, pp. 69–70 (see also 49, p. 74).
8 The penalty of disinheritance is applied in *Lex Gundobada* 12.5, p. 52