



Per Andersen, Kirsi Salonen, Helle Møller Sigh & Helle Vogt (eds), *Law and Marriage in Medieval and Early Modern Times: Proceedings of the Eighth Carlsberg Academy Conference on Medieval Legal History 2011*, DJØF Publishing: Copenhagen 2012, 301 pp.

The interdisciplinary conference held on 4–6 May 2011 at the Carlsberg Academy in Copenhagen brought together scholars from more than ten countries and set itself two tasks. The geographical focus being Europe, it offered a platform for the exchange of disciplinary viewpoints on medieval marriages as legal, theological, and everyday-life historical phenomena. Secondly the chronological range should preferably be extended to early modern times. By so doing, the effects of the Reformation and of certain lay practices on marriages could be fully integrated as part of the discussions at the conference.

Within a year of their oral presentations at the Eighth Carlsberg Academy Conference fifteen academics had their articles ready for publication in the present volume. Such efficient and speedy editorial efforts of both editors and contributors deserve nothing but praise. A preceding volume, *Law and Private Life in the Middle Ages: Proceedings of the Sixth Carlsberg Academy Conference on Medieval Legal History 2009*<sup>1</sup> benefited from the same clockwork precision.

The present book contains an introduction written by the four editors, a collection of fifteen articles, followed by the short biographies of its contributors. In the introduction, the editors provide a summary of each article. The first article (pp. 11–42) is by Philip L. Reynolds, entitled ‘When Medieval Theologians Talked About Marriage, What Were They Really Talking About?’. The article, based on his keynote lecture, examines how the viewpoint of theologians on marriage as one of the seven sacraments underwent changes from the early twelfth to the sixteenth century. The discourse on the theology of marriage started during the first half of the twelfth century. Marriage was located as a model within a Christian society where bishops and clergy had jurisdiction and responsibility. Reynolds discusses in detail the role of the sentential literature (*Sententiae*) in shaping from the twelfth century onwards the discourse on the

<sup>1</sup> Per Andersen, Mia Münster-Swendsen & Helle Vogt, eds., DJØF: Copenhagen, 2011; reviewed in *Mirator* 13 (2012), 71–73.

doctrine of marriage as a sacrament. The discourse remained neither fixed nor static and was finally formulated dogmatically at the Council of Trent in 1563 where the controversy about marriage not being a sacrament but a contract came to a head. A majority of prelates, invoking the interests of the Christian commonwealth (*res publica*), conceded that the Church had no power to alter marriage *as a sacrament* but did have the power to alter the conditions of marriage *as a contract*. Catholic theologians continued to work out the implications of the Tridentine doctrine.

Four more articles study medieval developments well into the sixteenth century. Inger Dübeck's article 'Concubinage and Marriage in Denmark between the Viking Age and the Reformation: A Comparison between Danish and European Medieval Law' (pp. 111–125) discusses a rule in the Law of Jutland from 1241 (book I, chapter 27) by which after three years an informal cohabitation is upgraded into a consummated marriage. Addressing the issue of European law on concubinage between 800 and 1600, Dübeck then turns her attention to Danish legal opinion in the fifteenth century. The 'Glosses to the Law of Jutland' written by Knud Mikkelsen (d. 1478/1488), a legal scholar (*doctor juris utriusque*) and bishop of Viborg, provide useful information about the status of legal thinking in medieval Denmark. Mikkelsen, in line with late-medieval opinions of European canonists on clandestine marriages, glossed disapprovingly the passage on the concubine rule of *LJ I, 27*. Although this Jutland rule was at odds with classical canon law, Mikkelsen, as a Danish bishop, accepted that cohabitation with a woman under specific given conditions was not only *de facto*, but also legally a marriage.

With the Reformation the Danish Catholic Church turned in 1536 into a Lutheran-Evangelical Church. The disapproval of Martin Luther (1483–1546) of *de facto* marriage made concubinage not only socially unacceptable during the late sixteenth century, but made it a crime for the next three centuries. In spite of this legislation, as documented through legal practice in the High Court and the King's Court, the Danish aristocracy remained attached to this century old concubine rule in *LJ I, 27* and preferred an informal marriage with lower-class women above an obligatory formal marriage before the local vicar and witnesses. In contrast with this privileged position of the higher nobility, burghers and farmers paid heavy fines for unmarried sexuality and bastard children. This class prejudice continued into the seventeenth and eighteenth centuries. Finally, in 1849 the first democratic constitution of Denmark abolished all privileges for the nobility and people of ranks, including the special marriage rules concerning informal or clandestine marriages for the nobility.

Maija Ojala's article 'Widows' Opportunities to Continue Craft Trade in Northern Baltic Cities during the 15th and 16th Centuries' (pp. 191–211) points out that craft ordinances in late medieval and early modern cities around the Baltic Sea offered artisan widows the opportunity to carry on their deceased husband's business. From ca. 1400–1600 altogether 152 craft ordinances survive for the cities of Lübeck (56), Riga (43), Stockholm (19) and Tallinn (34). This ample source corpus allows a detailed regional quantitative and qualitative analysis of the ways in which craft widows could as a single adult continue the professional

activity of their late husband. Although the craft ordinances are normative source material, they offer an in-depth insight into the various options of survival given to craft widows in an urban milieu. The author is well aware that more archival research is needed to answer the question of how closely these ordinances were adhered to in real life. The Stockholm evidence points to a satisfactory implementation of craft widow's rights, raising only a minority of disputes before the city magistrate.

Control over property rights by the peasant landowning elite in southern Norway through the late medieval and early modern periods is the issue of Lars Ivar Hansen's article 'Marriage among the Land-owning Peasants of Southern Norway: A Device for Social Reproduction of the Peasant Elite' (pp. 249–271). Drawing on Pierre Bourdieu's concepts of 'social space' and 'social field', the author gives an overview of the surviving sources of the parish of Fyresdal (situated in the county of Telemark, a region in Southern Norway). Through a presentation of genealogical charts the author highlights kinship relations and marital practices among the local juror families of Fyresdal. The conception of 'social field' is to be understood as a network of reciprocal obligations of actors who have differential access to various kinds of resources. On each farm in Fyresdal, a generational shift, triggered by the death of the resident peasant, started the process of redistributing landed property among the heirs. Securing the main residence for the oldest 'actor', the allodial heir, was of paramount importance. But the younger 'actors', both sons and daughters, got also part of the inheritance. By implementing marital and inheritance strategies, the peasant elite of the valley community of Fyresdal successfully prevented between 1300 and 1600 the necessity of scattering property rights to younger siblings on the death of the father. The economic and social capital of these younger siblings was secured through specific inheritance rights and strategic marriages. In this way all actors concerned could mobilize their 'social capital' and 'economic capital' to their mutual advantage.

In his article 'Clandestine Marriage and Parental Consent in John Calvin's Geneva: The Gradual Synthesis of Theology, Statutes, and Case Laws' (pp. 273–297), John Witte Jr. argues that although the necessity of parental consent to marriage was a major reform of the sixteenth-century Protestant Reformation, John Calvin (1509–1564), the Protestant Reformer of Geneva, and his fellow reformers took a more lenient view and warned parents and guardians against a too strict an application to the detriment of the child in question at this crucial stage in its life. Under the influence and guidance of Calvin, the Geneva Consistory and Council worked together to set out new guidelines concerning sex, marriage and family life in the city of Geneva. Part of these guidelines concerned the doctrine of parental consent to a child's engagement and marriage and were set out, first in the 1545 draft, and then revised in the 1546 Marriage Ordinance. John Witte analyses in detail the 1546 Ordinance and its further amendments of 1549 and 1560. Particularly interesting are a number of cases raising disputes over parental consent heard before the Genevan Consistory. Presided over by local ministers (including Calvin) and members of the city council, its proceedings were recorded by a notary in a register. The registers give

a vivid insight into the Consistory's handling of these delicate family matters in the light of the 1546 Marriage Ordinance. Not all questions were resolved in this 1546 Ordinance, and on occasion, Calvin abandoned his earlier position (especially on the issue of consummated clandestine marriages).

The other ten articles do not extend their research into the early modern times and are focused on developments in the Middle Ages. Anne Duggan turns (pp. 43–63) her renowned expertise regarding twelfth-century interaction between pope and the episcopate on Alexander III's (papacy 1159–1181) contribution to the standardization of the Christian marriage rules: 'The Nature of Alexander III's Contribution to Marriage Law, with Special Reference to *Licet preter solitum*'. She argues that clarifications and refinements in marriage law were proposed by local bishops and bishop's officials (consistory courts) in their correspondence with the pope on a particular problem. Rome integrated their questions and solutions as part of the Curial legal tradition. Four paragraphs on marriage questions in the mid-1177 letter *Licet preter solitum* from Pope Alexander III to Archbishop Romuald II of Salerno (episcopacy 1153–1181/2) are studied to illustrate and emphasize the interactive and consultative aspect of papal-episcopal relations and its contribution to the making of the new 'decretal law' concerning marriage. The study reveals that Alexander III had no drive to standardize by decree 'the law' on marriage. His willingness to discuss and give the support of his papal authority to local interpretations of marriage rules is characterized by the vocabulary used in *Licet preter solitum*. Through Alexander's pontificate, these rules in matters as sensitive as marriage were in the context of the learned law refined not by decree but through multiple exchanges between regional prelates and the Curia.

In 'On an Icelandic Parallel to Codex Justinianus 5.17.10 and Novella 22.6 in the Law Code Grágás' (pp. 65–76), Hans Henning Hoff studies a particular provision on divorce in the Icelandic law code known as *Grágás*, in force from 1118 until 1271/1273 when it was superseded by the law code *Járnsiða*. The provision stipulated that a wife could obtain an annulment of her marriage if after three years of marriage no children were born. The author links this unusual Icelandic provision of *Grágás* to a similar provision in the Justinianic legislation (*Codex Justinianus* 5.17.10 and amended by *Novella* 22.6). Unlike in Western Europe, the legal heritage of Justinian was still alive in eleventh-century Byzantium. The connection was established by a prominent Icelandic chieftain, Hafliði Másson, who as a young Iclander went in the late eleventh century to Byzantium where he received some legal education before entering into the service of the Emperor of Byzantium as part of the so-called Varangian Guard, protecting the Emperor in the palace and in the battlefield. After returning to Iceland, Hafliði Másson played an important role in reviewing and writing down the Icelandic laws for the first time in the winter of 1117/1118 at his farm in northern Iceland. Now almost sixty years old, he was well equipped to import provisions from Justinian legislation to Iceland at the beginning of the twelfth century.

In 'Married Couples in the Middle Ages? The Case of the Devil's Advocate' (pp. 83–109), Jan Rüdiger assigns himself the role of the Devil's

Advocate and is consoled with the knowledge that this role used to be an essential one in a Roman Catholic canonization process. He wants to argue the case against the idea that Marriage and the Married Couple were universal phenomena in the Western Middle Ages. His hypothesis is that ‘the married couple’ was an outlandish and rare concept in the social practices of Western European lay societies until the twelfth or thirteenth century, according to region. It is unlikely that ‘marriage’ would have been considered as exclusive and lasting by a high-medieval European warrior society. At most ‘marriage’ until the twelfth/thirteenth centuries is to be understood as a public acknowledgement of a relation intended to last only for a limited time. In particular, men of wealth favored the practice of having at a time more than one wife or female mate over being married to one person (polygyny vs. monogamy). Examples are given only by way of illustration. As the author puts it, the strength of an argument is not that you can find evidence to support it but that you can find no evidence to contradict it.

Dominik Budský’s ‘Matrimonial Cases Reflected in the *Processus iudiciarius secundum stilum Pragensem*’ (pp. 77–82) analyses a treatise compiled in the late fourteenth century by Nicolaus Puchnik (d. 1402), the official of the archbishop of Prague. Appointed in 1383, Nicolaus Puchnik, a Licentiate in Decrees, presided over the Prague archiepiscopal officiality and came in daily contact with a laity prone to collusion and all too eager to cover up their matrimonial entanglements. Puchnik was as a canon lawyer theoretically and as an ecclesiastical judge practically well placed to give advice and tips to the staff of an ecclesiastical tribunal on how to manage the notoriously heavy workload of a consistory court and on how to question litigants in matrimonial causes. Legal proceedings were time-consuming and cases could last months or even years. A real bonus in Puchnik’s treatise is the inclusion of many formulas to be used in documents issued at the different stages of the procedure. No wonder that the treatise catered to practical needs not only felt in Prague but also in other consistories of Central Europe. Several manuscript copies throughout the territory of wider Central Europe testify to its success. Dominik Budský is currently preparing a complete critical edition of the treatise as part of his PhD-thesis at the Catholic Theological Faculty of Charles University in Prague.

In ‘Did Medieval Canon Marriage Law Invent our Modern Notion of Rape? Revisiting the Idea of Consent before and after 1200’ (pp. 127–138), Hiram Kümper studies the conceptual change between the early medieval concept of *raptus* (an abduction for the purpose of marriage) and its later medieval meaning (forced sexual intercourse against the victim’s will). He considers the impact of the notion of free consent in twelfth-century marriage law as crucial for the creation of ‘modern’ secular rape-law. The author sets as his task the finding of the birthplace of modern notion of rape as a criminal sexual act. A variety of law and legal texts from the earlier Middle Ages, from the sixth to the twelfth century are surveyed. The picture that emerges stands out in contrast to the new ‘modern’ idea of rape that legal writings of thirteenth-century Europe convey. This observation leads the author to answer the pressing question: What might have happened in between? According to Kümper, the institutionalization of marriage

law in general and of marital consent in particular during the twelfth century led to the invention of the modern notion of rape in the following decades, with lack of consent as its core element. Kümper hopes to prove his proposal more fully in the future. This is, however, no easy task as a great variety of *summae*, glosses, and commentaries are only to be found in manuscripts, awaiting a critical edition.

Marriage impediments are scrutinized in two articles. In 'Two Models of Incest: Conflict and Confusion in High Medieval Discourse on Kinship and Marriage' (pp. 139–159), Christof Rolker concentrates on the prohibitions in force before the Lateran Council of 1215 concerning kin marriage. The notion of 'incestuous marriages' became a real issue in the eleventh century. Until then two ways of dealing with kin marriages coexisted. One discourse followed Augustine, focusing on the advantages of exogamy and not using terms such as *incestum*. The other discourse paid full attention to sexual relations between close relatives and gave the impression that all marriages within the prohibited degrees were incestuous. The two conflicting discourses eventually lead to a substantial reduction of these prohibited degrees by the Lateran Council of 1215.

In 'Re-defining Marriage Impediments: Tolerating Dubious Marriages through a Special Declaration from the Apostolic Penitentiary in the Late Middle Ages' (pp. 161–179), Kirsi Salonen explores the source material of the Apostolic Penitentiary in the fifteenth century. She finds that if marriage impediments caused problems for couples, the Apostolic Penitentiary did intervene and grant a declaration of tolerance. Thus, these impediments firmly defined in law by the mid-thirteenth century continued in the later ages to undergo changes in practice. The toleration cases handled by the Penitentiary include not the whole spectrum of impediments, indicating that most of the impediments were clear to all Christians and needed no intervention. Impediments found in toleration-type graces (*de declaratoriis* or declarations of tolerance) concern the impediment of spiritual relationship, proving that the regulations related to this particular impediment were significantly less clear. The twelve cases involving spiritual kinship (of which one is a case involving affinity *ex copula illicita* in the first degree) are each given detailed attention and make for fascinating reading. These cases involving spiritual affinity demonstrate that in the mid-fifteenth century the papal Curia and its Penitentiary in particular were still redefining marital impediments. In dubious cases the opinion of Rome brought final relief.

Material effects of marriage, such as dower and dowry, are discussed in the following essays. Paul Brand's article 'Competing for Dower in the English Thirteenth-Century Royal Courts' (pp. 213–229) points out that in English thirteenth-century royal courts not one (as might have been expected) but two female litigants, each claiming to have been the wife to the same deceased husband, launched their competing claim to their dower. This odd situation of conflicting claims resulted as an unintended consequence of appellate process in matrimonial litigation before a hierarchy of ecclesiastical courts, the papal court at Rome being the last instance.

Jakub Wyszmułek's article 'Wills as Testimony of Marriage Contracts in Late Medieval Krakow' (pp. 181–190) draws attention to a specific notion of a medieval 'last will' in the source material from Krakow. Those wills are not

preparations for death but marriage contracts made soon after the marriage whereby the couple stipulates an agreement concerning the dower to the widow and the division of property in case the couple had offspring. Dowry, not dower, is at the center of Thomas Kuehn's investigation in the article 'Dos Non Teneat Locum Legittime: Dowry as a Woman's Inheritance in Early Quattrocento Florence' (pp. 231–248). It is well known that in Italian communities dowered daughters were excluded from their inheritance. A woman's dowry, received at marriage, was considered as a legitimate portion. Studying cases of inheritance disputes in Florence, Thomas Kuehn demonstrates that a woman could not be disinherited from her right to a dowry.

This volume contains detailed case studies inspiring for all those whose scholarship involves arguments about the making and breaking of rules, not only from legal but also theological, cultural and socio-economic perspectives. Students and scholars engaged in marriage law will find in these studies answers about how dominant views about marriage in classical canon law traverse and connect European regional legal history and legal thought in the Middle Ages and the early modern times.

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