

THE RECEPTION OF MARITAL CONSENT IN THE MIEVIEV LEGISLATION OF SPAIN AND NORVAY

A Comparative Approach to the Castilian *Siete Partidas* and the
Norwegian *Landslög*

ANICETO MASFERRER

University of Valencia

Abstract

The Castilian king Alphons X the Wise and the Norwegian king Haakon IV the Law-Mender were both eager legislators, pursuing to use law as a tool for political and legal unification of their kingdoms. They knew each other well and the family ties they created contributed even further to this. They were both fully aware of the canon-law doctrine of marital consent, and were willing to endorse and receive it in their kingdoms. However, while the Castilian bishops allowed Alphons the Wise to legislate canon-law matters, the main archbishop of Norway, Jon the Red, rejected the Norwegian king Magnus's involvement in ecclesiastical legislation, keeping him away from having to get into the doctrinal intricacies of canon law. This explains why the Magnus Code of 1274 did not contain any rule revolving around the celebration of marriage and merely covered the patrimonial and hereditary aspects connected to marital consent. The present article seeks to make a comparative analysis of a particular aspect of marriage – marital consent – in both codes, the Castilian Siete Partidas and the Norwegian Landslög. This topic will enable us to explore the influence of canon law in both legal texts. In doing so, references are made to other contemporary legal sources, both Castilian and Norwegian.

Keywords

comparative legal history, law of marriage, marital consent, civil law, canon law, medieval law, Castile (Spain), Norway

1. Introduction: Alphons the Wise and Haakon IV as Law-Makers of Castile and Norway

The thirteenth century witnessed the emergence of legislative enactments stemming from a variety of institutions, particularly from parliaments and kings. Roman law granted to kings the political and legal legitimacy that enabled them to make laws,¹ and the exercise of that prerogative reinforced their public authority or *potestas*.² This explains the approval of the first European codes at that time, from Sicily (1231) to Iceland (1281).³ In this vein, some kings were particularly committed to drafting and approving codes: Frederick II (*Liber Augustalis*, 1231, for Sicily), Jaume I (*Fori Valentiae*, 1238, for Valencia; *Fori Aragonum*, 1247, for Aragon), Valdemar Sejr (*Jyske Lov*, 1241, for the provinces of Jylland and Fyn in Denmark), Alphons X the Wise (*Fuero Real*, 1255; *Espéculo*, 125?; *Siete Partidas*, 1265; *Setenario*, 1253, all for Castile), and Magnus Lagabøter (*Landslög*, 1274, for Norway), among others.⁴

This legislative activity could not be explained without the influence of the *ius commune*, a legal science based upon Roman and canon laws. The gradual discovery of the Justinian compilation (what in the sixteenth

¹ Kenneth Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition*, Berkeley, 1993. DOI: <https://doi.org/10.1525/9780520913035>.

² In this regard, two Roman-law brocards are quite revealing: “Princeps legibus solutus est” (Dig. I, 3, 31) and “Quod principi placuit legis habet vigorem” (Dig. I, 4, 1 et Inst. I, 2, 6); see also Dieter Wyduckel, *Princeps legibus solutus. Eine Untersuchung zur Frühmoderne Rechts- und Staatslehre*, Berlin, 1979. DOI: <https://doi.org/10.3790/978-3-428-44413-7>.

³ On this matter, see Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung*, Stockholm: Acta Universitatis Upsaliensis, 1960. DOI: <https://doi.org/10.2307/2849853>; see also the classical works by Armin Wolf, “Die Gesetzgebung der entstehenden Territorialstaaten in Europa”, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, ed. Helmut Coing, Band 1: Mittelalter (1100–1500), München 1973, pp. 517–800; “Legislación y codificaciones”, *Revista de Estudios histórico-jurídicos* 9 (1984), pp. 81–109; “El movimiento de legislación y de codificación en Europa en tiempos de Alfonso el Sabio”, *Alfonso X el Sabio. Vida, obra y época*, vol. 1 (Actas del Congreso Internacional), Madrid 1989, pp. 31–37.

⁴ Other kings approved laws that are not proper codes, such as Luis IX (*Réformation des mœurs dans le Languedoc*, 1234, for France), Edward I started to approved Statutes in 1267, etc.

century would be called the *Corpus iuris civilis*), particularly the Digest, and canon laws – the Decree of Gratian (1140) and particularly the Decretals of Gregory IX (1234), were at the core of the medieval legal landscape. These laws were carefully studied and taught at the University of Bologna first and at many others that were created in the thirteenth century in Italy, France and Spain.⁵ At that time there were over a thousand students in Bologna.

Kings resorted to lawyers who, after receiving their university degrees in civil or canon law (or both, *utrumque ius*),⁶ were appointed and commissioned to draft codes with the hope of being approved by the king, sometimes with the consent of the states in parliament. Even if these codes strove to contain the laws of the land, the influence of civil and canon law was somewhat inevitable since their drafters were notably acquainted with these highly regarded laws. As such, civil laws were regarded as the *ratio scripta*.⁷ References to civil and canon law were not rare, and some codes even opened for the possibility to resort to them as subsidiary law.⁸ Moreover, in Christian kingdoms, the laws of the church were considered fundamental, and this explains why some codes devoted their first part to canon law. The prologue of the Norwegian *Landslög* (1274) reads as follows:

The first part of the book is the Christianity section, so people understand that the Christian faith is the basis and beginning of all good things, and that obedience to the holy church and its leaders is a light and guide for all lawful justice and merciful conduct.⁹

⁵ In Italy: Padua (1222); in France: Paris, Montpellier (1260), Orleans (1230), Avignon (1256), Orange (1265); in Spain: Palencia (at the end of 12th century), Salamanca (1218).

⁶ On this matter, see Anders Winroth, “Law Schools and Legal Education,” A. Winroth & J. Wei (eds.), *The Cambridge History of Medieval Canon Law*, Cambridge: Cambridge University Press, 2022, pp. 262–284. DOI: <https://doi.org/10.1017/9781139177221.015>

⁷ On this matter, see Aniceto Masferrer & Juan A. Obarrio, “The *Ius Commune* as the *ratio scripta* in the Civil Law Tradition: A Comparative Approach to the Spanish Case,” *Comparative Legal History* (“Research Handbooks in Comparative Law” collection), Edward Elgar Publishing, 2019, pp. 212–241. DOI: <https://doi.org/10.4337/9781781955222.00016>.

⁸ *Ibidem*.

⁹ *Landslög*, 1274, Prologue.

Alphons X the Wise, king of Castile, and Magnus Lagabøter, king of Norway, were two relevant law makers who strove to reign with the aid of – more or less – comprehensive laws, so all legal cases or disputes could be settled “according to the laws that were valid in the land at the time when those matters occurred.”¹⁰ They both sought to achieve legal unification in their kingdoms through the approval of a code enforceable in their whole territories. In doing so, they resorted to lawyers who drafted the codes in accordance with their own legal tradition, albeit under the influence of *ius commune*.

The differences between Alphons X the Wise and Magnus Lagabøter as law makers are evident: while the legislative undertakings of the former began earlier and were much more idealist, ambitious, articulated and comprehensive, the latter was more realistic, simple and attached to the law of the land. However, they both longed for legal unification. Moreover, they knew each other well because both monarchies were drawn together and became very close as a consequence of the marriage between Alphons's brother, Felipe, and Magnus's sister, Princess Kristine, on 31 March 1258. In fact, this marriage was a way to consolidate a relationship between two monarchies with mutual – though different – political and economic interests in thirteenth-century Europe.¹¹ Although Kristine passed away without offspring in Seville in 1262, and the imperial enterprise of Alphons the Wise was vanquished in 1273,¹² both monarchies remained somewhat close, and the prestige of Alphons the Wise as a law maker did not diminish.

The differences between some Castilian laws such as the *Fuero Real* (1255) and *Siete Partidas* (1265) on the one hand, and the Norwegian *Landslög* (1274) on the other, are evident, but the Castilian codes might have prompted the idea and the feasibility of drafting a Norwegian code. If Castile was able to do it – as other Spanish and European kingdoms

¹⁰ *Landslög*, 1274, Prologue.

¹¹ On this matter, see Ángel G. Gordo Molina, “La princesa Kristina de Noruega en la Corte del Rey Alfonso X de Castilla y León. La persecución de objetivos políticos e ideológicos por la vía de las alianzas matrimoniales”, *Intus-Legere Historia*, 2007, vol. 1, n.1/2, pp. 175–190.

¹² Juan Carlos Monterde García, “El sueño imperial alfonsí en las siete Partidas”, *Revista Murgetana* 117 (2007), pp. 9–18, p. 11.

such Sicily, Valencia and Aragon had –, why not Norway?¹³ In fact, King Magnus succeeded in drafting and approving a code, putting his kingdom among the first European territories with a more or less comprehensive code.

The present article seeks to make a comparative analysis of a particular aspect of marriage – marital consent – in both codes, the Castilian *Siete Partidas* and the Norwegian *Landslög*. The choice is not fully discretionary. This topic will enable us to explore the influence of canon law in both legal texts. In doing so, references will be made to other contemporary legal sources, both Castilian and Norwegian.

After the “Introduction” (1), the paper will begin with “The role of the parental consent in the early-medieval laws” (2), describing the common legal rule in the European legal tradition. Then I will describe “The introduction of marital consent in canon law” (3), followed by the “The reception of marital consent in secular laws” (4), both in the “Kingdom of Castile and other Spanish territories” (4.1) and in the “Kingdom of Norway” (4.2). I will end with some “Concluding remarks” (5).

2. *The Role of the Parental Consent in the Early-Medieval Laws*

Roman law made clear that in marriage, consent really did matter.¹⁴ After the Republic, a period in which marriage was patriarchal and consent was a *pater potestas* issue, women were supposed to marry freely: “A betrothal, like a marriage, is made with the consent of the contracting parties,

¹³ Such argument is repeatedly found in the sources in the context of the nineteenth-century codification movement, also in common law jurisdictions; on this matter, see my works, “The French Codification and “Codiphobia” in Common Law Traditions”, *Tulane European and Civil Law Forum*, vol. 34 (2019), pp. 1–31, particularly p. 13; “Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation”, *American Journal for Legal History* 50.4 (2008–2010), pp. 355–430, particularly p. 388. DOI: <https://doi.org/10.1093/ajlh/50.4.355>; “The Passionate Discussion among Common Lawyers about postbellum American Codification: An approach to its Legal Argumentation” *Arizona State Law Journal* 40, 1 (2008), pp. 173–256, particularly pp. 224 and 234.

¹⁴ Susan Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian*, Oxford: Clarendon Press, 1991. DOI: <https://doi.org/10.1086/ahr/98.1.144>.

and therefore, as in the case of marriage, a son under paternal control must agree to it.”¹⁵ Gaius asserted that “lawful marriages are those which involve consent, if they are between Roman citizens.”¹⁶ Two centuries later, Modestinus defined marriage as “the union between a man and woman, an association for the whole of life in which they share the same rights, both divine and human.”¹⁷ The statement “[n]ot copulation, but consent creates marriage” did not give much room for interpretation.¹⁸ Here, marital consent seemed to be contrasted with mere coitus and ravishment.

However, the fundamental principle of consent was not conceived to undermine filial piety. As has been asserted, “[i]n these matters a son was expected to obey his father. The notion that a boy or girl must consent did not exclude their being made to consent.”¹⁹ Although the Digest allowed a son to object without any specific reason if his father made a poor choice,²⁰ or a daughter to object if her father selected as spouse someone of unworthy character,²¹ if a father made his son obey, the marriage was valid.²² Moreover, Justinian introduced a law granting the parents the possibility of disinheriting their daughter who – before the age of 25 – who, rejecting their proposal for marriage, preferred to lead a “luxurious life.”²³

The balance in Roman law between marital consent on the one hand and the role of the parents on the other was always difficult. Such difficulty remained in the context of early-medieval and feudal society, in which parental or family consent tended to control or at least play a predominant role in the choosing of a spouse throughout Europe. That was the case in the early-medieval laws of the Iberian Peninsula (Spain and Portugal) and of Scandinavian jurisdictions, for example, where parental

¹⁵ D. 23.1.11.

¹⁶ Institutions of Gaius 1.4.

¹⁷ D. 23.2.1.

¹⁸ Digest 30.1.17: “Nuptias non concubitus sed consensus facit”.

¹⁹ John T. Noonan, Jr., “Power to Choose”, *Viator* 4 (1973), pp. 419–434, p. 426.
DOI: <https://doi.org/10.1484/j.viator.2.301658>.

²⁰ D. 23.1.13.

²¹ D. 23.1.12.

²² D. 23.2.22

²³ Novel 115, cap. III, n. 11:

or family consent was the general rule.²⁴ In Spain, the *Liber Iudiciorum* (a Visigothic code promulgated in 654 and in 681 in its second version) did not allow women to marry without familial consent;²⁵ first, her father; if he was dead, her mother; if she was dead, her brothers or uncle.²⁶ Brothers were not allowed to delay their sister's marriage if she proposed for the third time someone who was "*suis equalem crediderit expetendum*": if the brothers still remained silent about their sister's proposal, she could marry him without being disinherited.²⁷ If a woman took the initiative to come to any gentleman in such a condition that she might acquire him as her husband, he should first talk with the woman's parents; and if she obtained that she may have a wife, the price of a dowry to her parents just as it is, it could be fulfilled; if not, it seems that marriage could take place without her parents' consent, but she would be disinherited.²⁸

Early-medieval Spanish and Portuguese laws laid down the rule that consent to marry should be given by parents or family, which did not necessarily exclude the son or daughter's consent. In that period sources show that marriage was a family matter.²⁹ Most of the Spanish and Portuguese Fueros established that if a daughter married a man without the consent of her parents or relatives, she would be disinherited and regarded as an enemy ("*inimicus*") of the family, as provided in the

²⁴ For Spain and Portugal, see Rafael Gilbert, "El consentimiento familiar en el matrimonio según el derecho medieval español", *Anuario de Historia del Derecho Español* 18 (1947), pp. 706–761; Paulo Merêa, "Notas sobre o poder paternal no direito hispânico ocidental durante os séculos XII e XIII", *Anuario de Historia del Derecho Español* 18 (1947), pp. 15–33; for Sweden, see Mia Korpiola, *Between Betrothal and Bedding: Marriage Formation in Sweden 1200–1600*, Leiden: Brill, 2009, pp. 19–88. DOI: <https://doi.org/10.1163/ej.9789004173293.i-437>.

²⁵ *Liber Iudiciorum* (LI) 3, 1, 2.

²⁶ LI 3, 1, 7.

²⁷ LI 3, 1, 8.

²⁸ LI 3, 2, 8; on this matter, see Gilbert, "El consentimiento familiar...", pp. 319–322; see also the works by Paulo Merêa, "Sobre o casamento 'sine consensu parentum' no direito visigótico", *Boletim da Faculdade de Direito* (Coimbra) 24 (1948), pp. 79–105; "O poder paternal na legislação visigótica", *Boletim da Faculdade de Direito* (Coimbra) 15 (1938–39), pp. 297–317.

²⁹ Emma Montanos Ferrín, *La Mujer I: Disposiciones jurídicas en la Historia de la Corona de Castilla y en la legislación codificada española*, Madrid: BOE, 2020, pp. 27–29; I will use some of the legal texts the author provides on p. 30 ff.

Fueros of Alarcon,³⁰ Alcaraz,³¹ Alfayates,³² Bejar,³³ Brihuega,³⁴ Cáceres,³⁵ Castelo Melhor,³⁶ Castelo Bom,³⁷ Castell Rodrigo,³⁸ Coimbra,³⁹ Coria,⁴⁰ Cuenca,⁴¹ Fuentes de la Alcarria,⁴² and Fuero de Zorita de los Canes,⁴³ among others.⁴⁴ The *Libro de los Fueros de Castilla* also prescribed that any woman who married without her parents' consent would lose her right of inheritance forever.⁴⁵ Some Fueros required familial consent above and beyond parental consent – Fuero General de Navarra,⁴⁶ Fuero de Sepúlveda,⁴⁷ Fuero de Thomar,⁴⁸ Fuero de Usagre,⁴⁹ and Fuero de Viguera y Valdefunes,⁵⁰ among others. The Fueros of Fuero de Viguera y Valdefunes and of Toledo stated that nobody was allowed to marry a woman or provide her the necessary means or goods for that purpose without the consent of her parents.⁵¹ However, Fueros usually allowed widows to marry without her kin's consent.⁵²

As can be seen, the Roman-law precedent of disinheritance constituted a powerful way of persuading women to obey, particularly considering that few men would accept to marry a woman without dowry.

³⁰ Fuero of Alarcón (1186), 300.

³¹ Fuero de Alcaraz, 4. 96.

³² Fuero de Alfayates, 44.

³³ Fuero de Béjar, 404.

³⁴ Fuero de Brihuega, 217.

³⁵ Fuero de Cáceres, 65.

³⁶ Fuero de Castelo Melhor, 133.

³⁷ Fuero de Castelo Bom, 62.

³⁸ Fuero de Castell Rodrigo, 4.1.

³⁹ Fuero de Coimbra, 1.25.

⁴⁰ Fuero de Coria, 1208–1210, 60.

⁴¹ Fuero de Cuenca, XIII. 9.

Fuero de Cuenca (forma sistemática), 9.

⁴² Fuero de Fuentes de La Alcarria, 116.

⁴³ Fuero de Zorita de los Canes, 315.

⁴⁴ In the kingdom of Aragon, the Fuero of Daroca (1142), for example, also prescribed that a woman who married without her parents' consent would be disinherited.

⁴⁵ Libro de los Fueros de Castilla, 1.

⁴⁶ See, for example, the Fuero General de Navarra, 4.1.2.

⁴⁷ Fuero de Sepúlveda (romanceado), 55.

⁴⁸ Fuero de Thomar, 1.

⁴⁹ Fuero de Usagre, 67.

⁵⁰ Fuero de Viguera y Valdefunes, 321.

⁵¹ Fuero de Viguera y Valdefunes, 321.

⁵² See, in the message above, most of the cited Fueros; note how the Fuero de Usagre peculiarly tried to combine both aspects – the free consent of the widow to marry and will of the family: Fuero de Usagre, 67.

In Norway, many sagas show that women were passively married off without mention of their consent, unless “the woman expressly and adamantly refused [the man],” in which case it was considered “foolish to disregard her feelings, as the marriage could end in dishonour and disaster.”⁵³ What do Norwegian legal sources prior to 1140 say on marital consent? After the conversion of Norway around 1000, Norwegian kings began to enact laws based upon local customs. In fact, before the promulgation of Magnus’s code in 1274, there were the four local laws for each county of Norway, namely, laws of Gulathing, Frostathing, Borgarthing and Eidsivathing.⁵⁴ All these laws reflected the variety of legal customs of the different regions of Norway. King Magnus also used these laws when drafting and approving his code for the whole realm of Norway.⁵⁵

Exploring these laws has its own difficulties.⁵⁶ Leaving aside that the precise year of their promulgation is not entirely clear, it is even more difficult to ascertain the specific year of the different laws contained in each code, since all of them are the result of “a long process of change and development”⁵⁷ that can at least be dated from the beginning of the eleventh century – with the legendary legislation of King Olaf II, later St. Olaf⁵⁸ – to the second half the twelfth century, when the reception of canon law – particularly of the Decree of Gratian (1140) – was already present. That is particularly relevant here, since here and now I purport to describe how Norwegian laws regulated marital consent before the

⁵³ Birgit Sawyer – Peter Sawyer, *Medieval Scandinavia. From Conversion to Reformation, circa 800–1500*. The Nordic Series, 17, Minneapolis: University of Minnesota Press, 1993, pp. 176–177.

⁵⁴ I’m using the following version of these laws: *The Earliest Norwegian Law. Being the Gulathing Law and the Frostathing Law* (translated from the old Norwegian by Laurence Marcellus Larsen), Columbia University Press, 1935; *The Borgarthing Law and the Eidsivathing Law. The Laws of Eastern Norway* (translated and edited by Lisa Collinson, Torgeir Landro, and Bertil Nilsson). London – New York, Routledge, 2021. DOI: <https://doi.org/10.4324/9781003125617>.

⁵⁵ *The Earliest Norwegian Law. Being the Gulathing Law and the Frostathing Law*, Introduction, p. 21.

⁵⁶ To begin with, not all these laws have been entirely preserved; *The Earliest Norwegian Law. Being the Gulathing Law and the Frostathing Law*, Introduction, p. 25.

⁵⁷ *The Earliest Norwegian Law. Being the Gulathing Law and the Frostathing Law*, Introduction, p. 26; Larsen was referring to the laws of Gulathing and Frostathing, but the statement would also be perfectly applicable to the laws of Eidsivathing and Borgarthing.

⁵⁸ *The Borgarthing Law and the Eidsivathing Law*, Introduction, p. 5.

reception of canon law. The Older Gulathing Law is clearly older than the Frostathing Law,⁵⁹ as it is the Borgarthing Law in comparison to the Eidsivating Law. Let us briefly describe now how these two old Norwegian laws – Gulathing and Borgarthing – regulated marital consent before its reception in the Norwegian medieval tradition.

The Older Gulathing Law contains three relevant provisions on marriage, all of them located in two sections: two provisions in the “Church Law” section and another in the “Merchant Law” section. The first provision, entitled “That a man shall possess one wife,” makes clear its main concern, namely, that each man “shall possess one wife, the one that a man has bought with the mund and according to agreement,” and penalties are provided for any man who “keeps a bondwoman [free woman] as a concubine and [keeps her] by his own fireplace, or whatever kind of woman he keeps in addition to his wife.”⁶⁰ The provision uses the expression “agreement” and refers explicitly to the *mund*, that is “[a] sum of money (...) that was paid at the nuptials by the bridegroom when he received the bride,”⁶¹ but does not mention either the consent of the bride or that of her relatives. The fact that “the mund was paid to the bride herself” and that no dowry was required to be paid by the bride’s relatives, might lead one to think that the woman was supposed to consent, or that her acceptance of the mund could at least be considered as tacit consent. If a bride only received a poor man’s mund, she could alone consent to the marriage, and did not need her father’s approval.

A second provision contained in the same section does not provide any further details on the matter since it deals with the requirement of taking wives “at proper and not at improper times.” In doing so, it prescribes penalties for the man who takes “*a wife with the mund and according to agreement* but at an improper time or at a time when the bishop has forbidden us to take wives.”⁶² Although the canon-law flavor of this provision is undeniable, no explicit reference is made to marital consent, as will be seen from the end of the twelfth century onwards as a conse-

⁵⁹ *The Earliest Norwegian Law. Being the Gulathing Law and the Frostathing Law*, Introduction, p. 26.

⁶⁰ Gulathing Law, “The Church Law”, n. 25.

⁶¹ *The Earliest Norwegian Law. Being the Gulathing Law and the Frostathing Law*, Glossary, p. 422.

⁶² Gulathing Law, “The Church Law”, n. 27.

quence of the influence of the Decree of Gratian and the legislation of Pope Alexander III.

The provision contained in the “Merchant Law” is probably the most important one, not only for its extension and detailed regulation, but because it shows the old Norwegian tradition that was in force and applied perhaps even before the conversion of Norway. The reason the provision is located in that section is due to the patrimonial consequences of marriages, particularly concerning the ways in which men “shall buy (...) wives with the mund in order that a child may be capable of inheriting property.” It is important to keep in mind that the whole regulation has that particular purpose: “then the child that is born after that shall be capable of inheriting.”⁶³ In fact, the procedure also changes depending on the outlay of the mund given by the man to the woman, so if “a man may wish to arrange a marriage that calls for greater outlay,” then “the father shall himself betroth his daughter, if she is a maid.” If the father was dead, then the brother should betroth her. The text goes on to describe what happens “[i]f the father refuses to wed his daughter to the man who has betrothed her” and “to let him have her,” in which case “he [the fiancé] shall make a formal demand for his betrothed and summon him [the father] before the thing for robbery; and it shall be the duty of the thingmen to declare him an outlaw.”⁶⁴ And the text adds here the following statement:

A maiden has by no means the right to decide whether she will fulfill the obligation. The man [who controls the marriage] shall keep an affianced woman twelve months for her betrothed.⁶⁵

Since only a widow was allowed to betroth herself,⁶⁶ every man had “his betrothed if she is affianced to him by the one who has the right to give her in marriage.” Otherwise, that is, “if a man pledges a woman whose marriage is not in his control, he shall pay three marks to the man to whom he pledged her.” Here the regulation becomes notably casuistic

⁶³ Gulathing Law, “The Merchant Law”, n. 51.

⁶⁴ Gulathing Law, “The Merchant Law”, n. 51.

⁶⁵ *Ibidem*, *in fine*.

⁶⁶ Gulathing Law, “The Merchant Law”, n. 51.

and complex,⁶⁷ but it clearly shows the concern for patrimonial fairness and legal security. This explains, for example, the relevant role of the thingmen when a man refuses to wed his betrothed, or a woman fails “to come on the day agreed upon to marry the man to whom she had pledged herself,” in which cases the man would be declared “an outlaw” and the woman would “be outlawed at the thing, and (...) shall leave the land.”⁶⁸ The concern for patrimonial fairness and legal security is also at stake when the text provides a rule for the case that “a hostile force invades the land,”⁶⁹ or another for the case that “a man takes another man’s betrothed and has her [as his own].”⁷⁰ Ironically enough, here the text explicitly refers to the woman’s consent. If she had consented to be betrothed by another man (having her own), then she would be outlawed by the thingmen; if not, then she had nothing to answer for before the thingmen.

The thirteenth-century Younger Gulathing Law made by King Magnus makes some mention of woman’s consent. It established penalties to “those men who take women by force or (carry off) other men’s women or betrothed women, or people’s daughters without the consent of those who are entitled to make decisions about their marriage, *or without their own (consent).*”⁷¹ However, this was a thirteenth-century addition that shows the reception of canon-law rule of marital consent. The Older Gulathing Law shows that “the institution of marriage was in Norway in the eleventh and twelfth centuries still primarily a matter of contracts between families,”⁷² and that “the individual will of the partners was in the marriage process only one point to be taken into account and, as it seems, regard to individual will had in the Older Gulathing Law to yield to national tradition.”⁷³ In this regard, it is fully true – as will be seen – that “the Gulathing Law differs from the Eidsivating and Frostathing Laws in which the principle of mutual consent is stated.”⁷⁴

The Borgarthing Law is also quite old and might serve for this purpose

⁶⁷ Gulathing Law, “The Merchant Law”, n. 51.

⁶⁸ Gulathing Law, “The Merchant Law”, n. 51.

⁶⁹ Gulathing Law, “The Merchant Law”, n. 51.

⁷⁰ Gulathing Law, “The Merchant Law”, n. 51. The marriage of women, *in fine*.

⁷¹ The Laws of Gulathing: “The Book on Church Law”, n. 32.

⁷² *The Older Gulathing Law*, commentary essay by Torstein Jørgensen, pp. 67–68. DOI: <https://doi.org/10.4324/9781003134459>.

⁷³ *The Older Gulathing Law*, commentary essay by Torstein Jørgensen, p. 68.

⁷⁴ *The Older Gulathing Law*, commentary essay by Torstein Jørgensen, p. 67.

because, although the revision of this law was done between 1215 and 1250, “a series of indications suggest that the bulk of the content (...) does date to the time prior to 1150,” one of them being the fact that “whereas marriage regulations in the Eidsivathing Law reflect the consensus doctrine promoted by Pope Alexander III (1159–1181), there is no sign of this novelty in the Borgarthing Law.”⁷⁵ In this vein, this law contains no provision containing marital consent as a necessary requirement to marriage. Some manuscripts containing Version Two of the Borgarthing Law include several additions, one of them stating as follows:

Now, a man goes to request a marriage agreement. Then he shall seek out the one who is her heir, for the marriage agreement. The man (heir) shall stipulate the marriage conditions for his female relative, and the dowry. They (couple) shall take each other by the hand and he shall address her by her name: “I betroth myself to this unmarried woman who shall be my lawful wife, with the stated dowry”. They should confirm this with those who hear this as legal witnesses.⁷⁶

As can be seen, although the text uses the expression “marriage agreement,” the man has to “seek out the one who is her heir,” who has to “stipulate the marriage conditions for his female relative, and the dowry.” Afterward, only the man pronounces the words of betrothal. Does this mean that women could be forced to marry against their will? In theory, yes; in practice, however, no, because a forced marriage could end, as has been pointed out, “in dishonour and disaster”⁷⁷ since the woman could legally divorce. In this regard, an additional provision contained in some manuscripts of the Borgarthing Law prescribes the possibility of breaking the marriage agreement if “someone [either man or woman] wishes” to do so, and “the marriage agreement is thereby ended.”⁷⁸ Women’s faculty to freely break the marriage agreement might in practice preclude the possibility of forcing her to marry, even though no legal provision protected her from being forced by her family to marry someone against her will. As can be seen, some manuscripts of the Borgarthing Law contained antagonistic regulations on the stability of the marriage agree-

⁷⁵ *The Borgarthing Law and the Eidsivathing Law*, Introduction, p. 7.

⁷⁶ *The Borgarthing Law*, Additions, n. 1.

⁷⁷ See the fn n. 53.

⁷⁸ *The Borgarthing Law*, Additions, n. 4. *Here Bessi’s Law discussed*; italics are mine.

ment. While this provision allows any party “who wishes to break it” with the payment of three marks in silver, returning to a situation “as if the agreement had never been made,”⁷⁹ the former stated that “[n]o one may break this agreement, except under one of the three conditions [referring to insanity, leprosy or impotence, and epilepsy].”⁸⁰

Another additional law did make clear that “[a] widow for whom marriage-arrangers secure household resources through marriage has authority to decide to marry whichever man she wishes, according to the stated law.”⁸¹ This prescription shows the validity of an old legal rule of the Norwegian tradition, as it was in other early-medieval kingdoms and territories of Europe.

3. *The Introduction of the Marital Consent in Canon Law*

Family played a pivotal role in early-medieval feudal society.⁸² Properties and assets belonged to families, so laws contributed to protect and consolidate the families’ heritage. This explains, for example, why the feu-

⁷⁹ *Ibidem*.

⁸⁰ See the fn n. 76.

⁸¹ *The Borgarthing Law and the Eidsivathing Law*, Additions, n. 2.

⁸² On this matter, see Henry Ansgar Kelly, “Clandestine marriage and Chaucer’s *Troilus*,” *Viator* 4 (1973), pp. 435–457. DOI: <https://doi.org/10.1484/j.viator.2.301659>; Henry Ansgar Kelly, *Love and Marriage in the Age of Chaucer*, Cornell University Press, Ithaca-London, 1975; Jean-Baptiste Molin & Protas Mutembe, *Le rituel du mariage en France du XIIe au XVIe siècle*, Beau-chesne, Paris, 1974. DOI: <https://doi.org/10.14375/np.9782701000602>; Jean Leclerc, *Monks and Love in Twelfth-Century France*, Oxford: Clarendon Press, 1979. DOI: <https://doi.org/10.1017/s0022046900036241>; Christopher N.L. Brooke, “Aspects of marriage law in the Eleventh and Twelfth Centuries”, *Proceedings of the Fifth International Congress of Medieval Canon Law*, ed. Stephan Kuttner y Kenneth Pennington, Biblioteca Apostolica Vaticana, Città del Vaticano, 1980, pp. 333–344; Georges Duby, *Medieval marriage*, Baltimore-London: The Johns Hopkins University Press, 1978. DOI: <https://doi.org/10.1086/ahr/84.2.439-a>; Robert I. Burns, “Canon Law and the Reconquista: Convergence and symbiosis in the kingdom of Valencia under Jaume the Conqueror (1213–1276)”, *Proceedings of the Fifth International Congress of Medieval Canon Law*, Biblioteca Apostolica Vaticana, Città del Vaticano, 1980, pp. 387–424; Anne Lefebvre-Teillard, *Introduction historique au droit de famille*, Paris: Presses Universitaires de France – PUF, 1998; J. Goody, *La evolución de la familia y el matrimonio*, Valencia: Publicacions de la Universitat de Valencia, 2009; Phillip L. Reynolds & John Witte Jr (eds.), *To Have and To Hold: Marrying and Its Documentation in Western Christendom, 400–1600*, Cambridge: CUP, 2012 (containing various articles on parental consent). DOI: <https://doi.org/10.1017/s0038713400014421>

dal world insisted on the convenience of transmitting patrimony to the first-born son. For the same reason, endogamous marriage – marriage between relatives – was well regarded because this made it possible to increase the familial patrimony, or perhaps to collect what had previously been divided. The adultery of the wife was considered as a grievance to the family and a threat to its patrimony; that partly explains why adultery was conceived as a crime against the family, as a more than sufficient reason for the marriage to be annulled. Hence, for the feudal world, marriage could be dissolved: since marriage was supposed to primarily serve the family – rather than the individual – if the family needs it, marriage could be annulled and replaced.

Besides, following Roman tradition, marriage was considered a civil act, and furthermore – due to the Germanic practices that reinforced and sustained feudal institutions – it was strongly linked to the father. It was the father who, watching over the interest of the family, decided the marriage of the children. In this vein, marriage was actually a pact by which a woman was handed over to a man so that he ennobled or enriched his family with her and, above all, ensured their offspring. The woman also carried the trousseau that her father provided her with, and the rights she might have in relation to the family she was leaving. The husband, for his part, guaranteed the economic security of the wife by donating some earnest money that consisted of land, goods, or money.

Summing up, that was how the early-medieval marriage was perceived and understood before the twelfth- and thirteenth-century canon-law reform after Gregory VII's pontificate (1073–1085). In his *Dictatus Papae* of 1075, he declared the political and legal supremacy of the papacy over the entire church, the ultimate supremacy also in secular matters, as well as the church's independence from secular control. Later on, between 1050 and 1200, canon law would become “the first modern Western legal system.”⁸³ The birth of classical canon law would not have

⁸³ See, for example, Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge (Mass.) – London: Harvard University Press, 1983, pp. 199–215. DOI: <https://doi.org/10.1017/s0008197300112681>; Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800* (Studies in Medieval and Early Modern Canon Law 4), Washington, DC: Catholic University of America Press, 1995, pp. 58–65; here I'm following Korpiola, *Between Betrothal and Bedding...*, pp. 57 ff.

been possible without medieval universities, first Bologna (1088), which were created around the recently rediscovered Justinian laws.⁸⁴

The church started to claim jurisdictional competence over a variety of matters: all crimes committed by clerics, sexual crimes, crimes against the faith (blasphemy, heresy), matrimonial causes and legitimacy, usury, sabbath violations, tithes, wills and testaments.⁸⁵ In addition, the church began to regulate the marriage and, more particularly, its formation. The process of the sacralization of marriage formation was slow because it took time to change the social mentality that understood marriage as a secular matter. Moreover, the growing ecclesiastical concern about marriage brought with it controversies of considerable political magnitude.

As far as marriage is concerned, twelfth-century canon law introduced three main reforms and fought for their transplant into secular laws: marital consent, indissolubility, and the prohibition of incestuous marriages.⁸⁶ The implementation of these reforms in secular laws could be called as the “sacralization” or “Christianization” of marriage in the western legal tradition.

The church defended, first of all, the free will of the spouses. As will be seen, theologians and canonists insisted, with the support of Roman law, that consent is what makes marriage. Gratian, in the middle of the twelfth century, posed the problem in the following terms: “Can a daughter be married against her will?” Relying on traditional affirmations and recent decisions of the popes, he decided to answer that

⁸⁴ Bellomo, *The Common Legal Past of Europe*, pp. 58–60 and 112–113; Berman, *Law and Revolution*, pp. 120–164; Anders Winroth, *The Making of Gratian's Decretum*, Cambridge Studies in Medieval Life and Thought, 49, Cambridge: Cambridge University Press, 2000, pp. 156–174 and 195–196; Anders Winroth, “Law Schools and Legal Education”, *The Cambridge History of Medieval Canon Law* (A Winroth & J.C. Wey, eds.), Cambridge: Cambridge University Press, 2021, pp. 262–284; see also the recent work by Nicolás Álvarez de las Asturias Bohorques Heredia & Joaquín Sedano Rueda, *Derecho Canónico en perspectiva histórica. Fuentes, ciencia e instituciones*, Pamplona: Eunsas, 2022.

⁸⁵ James A. Brundage, *Medieval Canon Law*, London-New York: Longman, 1995, pp. 70–97 (I'm not using the 2nd edition, by James A. Brundage / Melodie H. Eichbauer, *Medieval Canon law*, London: Routledge, 2022). DOI: <https://doi.org/10.1017/s0022046997315838>; Richard H. Helmholz, *Roman canon law in Reformation England*, Cambridge: Cambridge University Press, 1994, pp. 6–11. DOI: <https://doi.org/10.2307/3168613>

⁸⁶ Joaquín Gimeno Casalduero, “Alfonso el sabio: el matrimonio y la composición de las Partidas”, *Nueva Revista de Filología Hispánica*, 36, 1, 1981, pp. 203–218, particularly, pp. 211–215.

question in a radical way, going even much further than the canon-law sources he used: "These authorities clearly show that no woman should be married without her free will."⁸⁷ Gratian asserted that "Those who are to be of one body ought also to be of one spirit, and therefore no woman who is unwilling ought ever to be joined to anyone."⁸⁸ That principle determined the attitude that in relation to marriage the church adopted from then onwards, despite the fact that secular laws managed to find some means to prevent its enforcement, and hence notable differences emerged between theory and practice.

Second, and connected to the free consent and to the sacramental dimension of the marriage, that would be formally declared at the Council of Lyon, 1274, canon law stressed the indissolubility of marriage. That was in contrast to the feudal belief that it accepted dissolution based on the idea that, as a contract, marriage could be undone. Classical Roman law also asserted that when marital affection disappeared, marriage could be dissolved. The church, on the contrary, relying on the classical doctrine rooted in the Gospel,⁸⁹ defended the indissolubility of marriage, a principle that would provoke many clashes between kings and popes from the twelfth and the thirteenth centuries onwards.⁹⁰

And third, confronting the endogamous medieval marriage, the church prohibited the link between relatives up to the seventh degree of kinship first, so incestuous marriages could be dissolved if consanguinity was demonstrated. The feudal world collides, as in the previous cases, with the church. The history of Western Europe from the eleventh century was also shaken by the conflicts that arose from that canon-law rule. Realizing that the seventh-degree requirement might constitute an easy path to dis-

⁸⁷ *Decretum Gratiani*, c. 31, q. 2, t. 2: *His auctoritatibus euidenter ostenditur, nisi libera uoluntate, nulla est copulanda alicui.*

⁸⁸ *Decretum Gratiani*, c. 31, q. II, 3; see also c. 27, qu. 2, c. 1–2, Friedberg, I, col. 1063. The principle was further developed in the Decretals of Pope Alexander III (1159–81).

⁸⁹ "*Quod ergo Deus coniunxit, homo non separet*", Matthew, XIX, 6.

⁹⁰ See, for example, John T. Jr Noonan, "Marital Affection in the Canonists", *Studia Gratiana* XII, Collectanea Stephan Kuttner II, 1967, pp. 481–509; see also Constance M. Rousseau, "The Spousal Relationship: Marital Society and Sexuality in the Letters of Pope Innocent III", *Mediaeval Studies* 56 (1994), pp. 89–109. DOI: <https://doi.org/10.1484/j.ms.2.306418>.

solve many marriages,⁹¹ the church reacted immediately and, at the Lateran Council of 1215, reduced the impediment to the fourth degree and further facilitated and increased the dispensations from then onwards.

The free consent to marry was, probably, the most important contribution of canon law to the making of marriage in the western legal tradition, from the Middle Ages to today. It is undeniable that the twelfth-century canon-law free consent to marry was based upon Roman law.⁹² In this vein, some Roman-law statements were on the basis of canon-law free consent.⁹³ However, canon law notably changed the meaning of some notions. Roman-law consent, for example, did not only refer to the persons who had to consent to a marriage. There were, in fact, more people involved in that consent: if the principals were under guardianship, the *paterfamilias* or tutor had to consent to the marriage, even though it was presumed that the father consented unless he explicitly refused. A daughter was only allowed to dissent to her *paterfamilias'* choice if the proposed groom was morally disreputable, and if she kept silent her consent was deduced. The role of the daughter or woman was more or less passive at the betrothal: she, unlike the groom, was promised (*sponsa*). A son could not be forced to marry by his father, but if the latter had employed force, the marriage was valid. Only children who were *sui juris*, legally major and free from guardianship, could contract marriage without regard to the opinion of their relatives.⁹⁴ In fact, some scholars

⁹¹ Surprisingly, the feudal world took over the position of the church after the initial clashes. The reason was because feudal lords understood that consanguinity offered a way out of the indissolubility of marriage, a somewhat easy way out because of the excess of consanguinity's limits: a seventh degree that was not even in the provisions of Leviticus (XX, 10–21). The church reacted immediately. Having to choose between indissolubility and kinship, it opted for the former; on the matter, see Gimeno Casaldueiro, "Alfonso el sabio: el matrimonio y la composición de las Partidas", p. 215.

⁹² Joseph N. Perry, "The Canonical concept of marital consent: Roman law influences", *The Catholic Lawyer* Nr. 3, Vol. 25, Summer 1980, 3, pp. 228–236.

⁹³ D. 23.1.4: *Sufficit nudus consensus ad constituenda sponsalia*, and D. 35.1.15: *Nuptiae enim non concubitus, sed consensus facit*. See also D. 24.1.32.13.

⁹⁴ See D. 23.1. 7.1; D. 23.1.10–13; D. 23.2.2; D. 23.2.9–11; D. 23.2.16.1; D. 23.2.21–22; D. 23.2.25; and Korpiola, in *Between Betrothal and Bedding...*, p. 64, who added: "However, if the *paterfamilias* or guardian abused his position of authority by wrongfully preventing his offspring from marrying, remaining passive instead of actively negotiating for a marriage or refusing to endow the child, the proconsuls or provincial governors could force them either to marry or endow the child (D 23.2.19)".

asserted that Roman-law marriage did not become really consensual until the late Empire.⁹⁵

As said, the Classical-Roman-law notion of marital affection was not supposed to necessarily be a lifelong reality, so if the marital affection disappeared (that is, when one did not perceive anymore the spouse as a spouse, but just as a concubine, lover or whatsoever), the marriage could be dissolved. On the contrary, in canon law, free consent implied a decision that created a valid and indissoluble conjugal bond.⁹⁶

It has been argued that, in Christianizing marriage and making it a sacred matter, marriage “was controlled by the church and not by the family,”⁹⁷ but it is also true that the church empowered individuals within the family.⁹⁸ In fact, the four limitations on free choice (in order to avoid coerced consent) recognized by Gratian reveal both the Christian character of the marriage and the power of individuals over their families: 1) believers could not marry infidels; 2) those who publicly vowed to celibacy could not marry at all; 3) children under the age of seven could not contract marriage; and 4) those related within seven degrees by blood, affinity or baptism could not marry each other.⁹⁹ In summary, “[t]he individual was given power as the social structure of the world was subordinated to the church. Consent informed by marital affection

⁹⁵ Jean Gaudemet, *Sociétés et mariage*, Strasbourg: Cerdic-Publications, 1980, pp. 18–19 (cited by Korpiola, *Between Betrothal and Bedding...*, p. 64, fn n. 52). DOI: <https://doi.org/10.15581/016.21.20138>.

⁹⁶ See fn n. 90; see also James A. Brundage, “Concubinage and Marriage in Medieval Canon Law,” *Sexual Practices and the Medieval Church* (Vern L. Bullough and James A. Brundage, eds.), Buffalo: Prometheus Books, 1982.

⁹⁷ Noonan, “Power to Choose”, p. 429.

⁹⁸ Murray, “Individualism and Consensual Marriage: Some Evidence from Medieval England”, Constance M. Rousseau and Joel T. Rosenthal, *Women, Marriage, and Family in Medieval Christendom: Essays in Memory of Michael M. Sheehan*, Medieval Institute Publications, 1998; Colin Morris, *The Discovery of the Individual 1050–1200*, London: SPCK, 1972. DOI: <https://doi.org/10.1017/s0034412500008854>; Aaron Gurevich, *The Origins of European Individualism*, Oxford-Cambridge (Mass.), Blackwell, 1995; Michael M. Sheehan, *Marriage, Family and Law in Medieval Europe: Collected Studies*, Toronto-Buffalo: University of Toronto Press, 1996, pp. 39–40 (showing how canon laws in late medieval society pushed men and women towards a more individualistic view of marriage). DOI: <https://doi.org/10.1017/s0038713400139648>.

⁹⁹ Gratian, dictum ante c. 1, C. 32, q. 2 (age); dictum post c. 43, C. 27, q. 2 (those bound by public vows); dictum post c. 14, C. 28, q. 1 (infidels); dictum post c. 1, C. 35, q. 1 (blood relatives); dictum post c. 22, C. 35, q. 2 (spouses’ relatives); dictum post c. 1, C. 30, q. 1 (spiritual relatives); see Noonan, “Power to Choose”, p. 429.

overcame the fundamental law of the Roman Empire that a slave lacked civil capacity to marry.”¹⁰⁰

As it is well known, two different schools on marriage appeared in the twelfth century: the Bolognese and the Parisian.¹⁰¹ The controversy between the school of Bologna in the tradition after Gratian, making consent and consummation the two necessary conditions of marriage, and the school of Paris in the tradition after Peter Lombard, claiming only free exchange of marital consent in the present tense by the couple makes the marriage, was solved by Alexander III (1159–1181). Papal decretals decided the matter in practice and canonists followed suit. Even the famous glossators Azo (c. 1150–1230) and Accursius (c. 1182–1260) accepted the principle of the papal decretals making consent alone the decisive moment of marriage.¹⁰² From then onwards, “the exchange of matrimonial consent became the sole decisive factor and instance in marriage formation as far as the church was concerned. A prior present-tense exchange of marriage vows always took precedence over a posterior union even if the latter had been solemnized and [even] consummated.”¹⁰³

New canon laws reflected the new paradigm of marriage based exclusively on free consent, and the ecclesiastical courts enforced it.¹⁰⁴ It might be surprising how little was required by canon law for a binding, indissoluble marriage from the twelfth century onward.¹⁰⁵ For canon

¹⁰⁰ Noonan, “Power to Choose”, pp. 429–430.

¹⁰¹ See Heinrich J.F. Reinhardt, *Die Ehelehre der Schule des Anselm von Laon. Eine theologie- und kirchenrechtsgeschichtliche Untersuchung zu den Ehetexten der frühen Pariser Schule des 12. Jahrhunderts. Beiträge zur Geschichte der Philosophie und Theologie des Mittelalters*, Neue Folge, Band 14, Münster: Verlag Aschendorff, 1974.

¹⁰² Korpiola, *Between Betrothal and Bedding...*, pp. 67–68; on this matter, see particularly p. 68 ff., which I’m now following; see also Charles jr. Donahue, “The Case of the Man Who Fell into the Tiber: The Roman Law of Marriage at the Time of the Glossators”, *American Journal of Legal History* 22 (1978), pp. 1–53, particularly 28–34. DOI: <https://doi.org/10.2307/845232>; Charles jr. Donahue, “The Dating of Alexander the Third’s Marriage Decretals: Dauvillier Revisited after Fifty Years”, *ZRG, KA* 99 (1982), pp. 70–124, particularly pp. 202–207. DOI: <https://doi.org/10.7767/zrgka.1982.68.1.70>.

¹⁰³ Korpiola, *Between Betrothal and Bedding...*, p. 68.

¹⁰⁴ X 4.1.31; see also Richard H. Helmholz, *Marriage Litigation in Medieval England*, Cambridge: Cambridge University Press, 1974, pp. 57–58. DOI: <https://doi.org/10.1017/s0022046900073267>.

¹⁰⁵ Charles Donahue Jr., *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts*, Cambridge: CUP, 2007, p. 2. DOI: <https://doi.org/10.1017/s0038713409990194>.

law, “[f]ree consent alone sufficed to make a valid marriage. Not only that; any marriage made under coercion, if it could be sufficiently established, was grounds for an annulment.”¹⁰⁶ This is what has been called the “steady man” doctrine.¹⁰⁷ Gratian, Alexander III and Innocent III radically changed the existing paradigm: from now on, the principle was “consent alone.”¹⁰⁸

Coerced consent made the marriage invalid,¹⁰⁹ although not all violence sufficed to annul a marriage.¹¹⁰ If a party thought that s/he had undergone coercion, it was necessary to file a timely suit against the marriage unless s/he preferred to prevent the lapse of time being interpreted as tacit consent.¹¹¹ The rules and casuistry concerning coerced consent were considerable.¹¹²

Consent needed to be manifested by some external signs,¹¹³ usually by words.¹¹⁴ Canon laws considered the marriage invalid – not in the penitential internal forum though – if words had been used to seduce a woman, leading her to believe that the man wanted to marry her.¹¹⁵

Another relevant consequence of making essential the free consent of the couple was the legal irrelevance of the family’s or parents’ consent: from Gratian onwards, parental consent might be fine and even recom-

¹⁰⁶ Sara McDougall, “Marriage: Law and Practice”, A. Winroth & J. Wei (eds.), *The Cambridge History of Medieval Canon Law*, Cambridge: CUP, pp. 453–474, p. 462. DOI: <https://doi.org/10.1017/9781139177221.025>.

¹⁰⁷ On this matter, see John T. Noonan Jr., “The Steady Man: Process and Policy in the Courts of the Roman Curia,” *California Law Review* 58 (1970), pp. 628–700. DOI: <https://doi.org/10.2307/3479612>, and “Marriage in the Middle Ages: I. Power to Choose,” *Viator* 4 (1973), pp. 419–434 (cited by McDougall, “Marriage: Law and Practice”, p. 462, fn n. 32).

¹⁰⁸ Tancred, *Summa de matrimonio*, ed. Wunderlich, 46: *solo consensu*; Raymond, *Summa* 2.2 (cited by McDougall, “Marriage: Law and Practice”, p. 461, fn n. 25).

¹⁰⁹ X 4.1.14. See also X 4.2.9 and C. 31, q. 2, c. 1–4.

¹¹⁰ X 4.1.6.

¹¹¹ X 4.1.15; X 4.1.28.

¹¹² On this matter, see Korpiola, *Between Betrothal and Bedding...*, pp. 68–69 and the references contained in the footnotes.

¹¹³ Words were not an absolute formal requirement. In fact, the mute and deaf were allowed to express their consent to marry. Then, consent alone sufficed for marriage, and the parties could express it by using signs instead of words (X 4.1.23, *quod verbis non potest signis valeat declarare*).

¹¹⁴ X 4.1.25.

¹¹⁵ X 4.1.26; the difficult interpretation of this provision, see Korpiola, *Between Betrothal and Bedding...*, p. 69, who cites Helmholz, *Marriage Litigation in Medieval England*, pp. 42–44.

mendable, but not a condition *sine qua non* to marriage. In this regard, Bernard of Pavia stated in the early thirteenth century that paternal consent was a solemnity that added to “honesty,” but was not at all necessary. Arguments could be made about the moral obligation to acquire parental consent, but there was no binding legal obligation to do so.¹¹⁶ That was a novelty indeed. In the early church, parental consent constituted a prerequisite of valid marriage both in Roman and Germanic law. However, in the post-Gregorian church, when marriage started to become part of the sacraments, the consent of the contracting parties themselves became the essential element.¹¹⁷ The rest was secondary: sexual intercourse and physical consummation of the marriage, the popular belief in procreation as the essence of marriage, parental consent, and so on.

There was a clear link between the consideration of marriage as a sacrament – that was officially declared in the Council of Lyon (1274) – and the need for the free consent of those who marry. The administration of sacraments required the free decision of those who receive them. That was the rule in the reception of all sacraments with the exception of the ancient custom of baptizing children.¹¹⁸ Consequently, the church

¹¹⁶ Korpiola, *Between Betrothal and Bedding...*, p. 69; see also Noonan, Jr., “Power to Choose”, pp. 419–427; Joseph Freisen, *Geschichte des Canonisches Eherechts bis zum Verfall der Glossenliteratur*, Tübingen: Verlag und Druck von Franz Fues, 1988, pp. 316–323.

¹¹⁷ This is the interpretation of Richard H. Helmholz, *The Spirit of Classical Canon Law*, Athens – London: The University of Georgia Press, p. 239, and Freisen, *Geschichte des Canonisches Eherechts...*, pp. 598–599, and accepted by Korpiola, *Between Betrothal and Bedding...*, p. 70.

¹¹⁸ The reason for that exception was “the forgiveness of sins.” For Origen, St. Cyprian had St. Augustine, this custom confirmed the Church’s belief in original sin, and this in turn showed still more clearly the necessity of infant Baptism (Origen, In Leviticum hom. VIII, 3: PG 12, 496; In Lucam hom. XIV, 5: PG 13, 1835; St. Cyprian, Epist. 64, 5: PL 3, 1018; ed. Hartel, CSEL p. 720; St. Augustine, De peccatorum meritis et remissione et de baptismo parvulorum, I, XVII–XIX, 22–24: PL 44, 121–122; De gratia Christi et de peccato originali, I, XXXII, 35; *ibid.*, 377; De praedestinatione sanctorum, XIII, 25: *ibid.*, 978; Opus imperfectum contra Iulianum, V, 9: PL 45, 1439). Some Popes such as Siricius and Pope Innocent I made interventions in this line of thought (Pope Siricius, Epist. “Directa ad decessorem” ad Himerium episc. Tarraconensem, 10 Feb. i. 385, 2: DS, Denzinger-Schoenmetzer, Enchiridion symbolorum, definitonum et declarationum de rebus fidei et morum, Herder 1965, 184; Pope Innocent I, Epist. “Inter ceteras Ecclesiae Romanae” ad Silvanum et ceteros Synodi Milevitanae Patres, 27 ian. 417, 5: DS 219). The Council of Carthage in 418 condemned “whoever says that newborn infants should not be baptized,” and it taught that, on account of the Church’s “rule of faith”

fought for the free consent of the marrying couple, as Christ died on the Cross and gave himself up to the church with the full freedom of love. For St. Paul, the relationship between Christ and his church was the model of marriage as sacrament,¹¹⁹ whose grace enabled the spouses to live in accordance with the dignity of such mystery.¹²⁰

However, the sacramental – and hence mysterious – dimension of marriage was supposed to be administered to believers who were not angels but rather human beings who lived in society. Therefore, marriage also needed a legal framework in accordance with the sacrament: internal intention and free exchange of marital consent between those marrying, words or signs demonstrating the consent, evidence, etc., all of them relevant elements for the church's judicial system.¹²¹ It has been stated that “[t]he medieval church was incapable of resolving this inconsistency.”¹²² I do not agree with that statement. In fact, I do not see the inconsistency, since this is one of the peculiar traits of canon law, clearly distinguishable from secular laws: canon law is inextricably linked to theology, and sacraments are an important part of it. It might be argued that the mixture between the mysterious dimension of the sacrament on the one hand (the flow of divine grace upon the faithful, forgiveness of sins, etc.) and

concerning original sin, “even babies, who are yet unable to commit any sin personally, are truly baptized for the forgiveness of sins, for the purpose of cleansing by rebirth what they have received by birth” (Canon 2: Mansi, III, 811–814 and IV, 327 A–B: DS 233). This doctrine was reaffirmed and consolidated during the Middle Ages. In this vein, the Council of Vienna in 1312 stressed that the sacrament of Baptism has for its effect, in the case of infants, not just the forgiveness of sins but also the granting of grace and the virtues (Council of Vienne: Mansi, XXV, 411 C–D: DS 903–904). The Council of Florence in 1442 rebuked those who thought it better to postpone Baptism and declared that infants should receive “as soon as is convenient” the sacrament “through which they are rescued from the devil’s power and adopted as God’s children” (Council of Florence, sessio XI: DS 1349); on the matter, see the Instruction on Infant Baptism, *Pastoralis actio*, by Sacred Congregation for the Doctrine of the Faith, October 20, 1980 (text available at <https://www.vatican.va/romancuria/congregations/cfaith/documents/rcconcfaith-doc19801020pastoralisactioen.html>).

¹¹⁹ *Ephesians* 6:21–33.

¹²⁰ *Ephesians* 6:32–33: “This is a great mystery, and I mean in reference to Christ and the church; however, let each one of you love his wife as himself, and let the wife see that she respects her husband.”

¹²¹ Berman, *Law and Revolution*, p. 229.

¹²² Korpiola, *Between Betrothal and Bedding...*, p. 70.

the social – and legal – dimension on the other (parties, signs, words of present, priest, etc.), make the making of canon laws extremely difficult, particularly those relating to marriage. I cannot disagree, but that is precisely what canon law is about, that is its purpose and *raison d'être*.

4. *The Reception of Canon-Law Marital Consent in Medieval Secular Laws*

The reception of canon-law marital consent in medieval secular laws has been explored in many European jurisdictions, some more extensively than in others: Flanders,¹²³ England,¹²⁴ France,¹²⁵ Germany,¹²⁶ Italy,¹²⁷

¹²³ Myriam Greilsammer, “Rapts de séduction et rapts violents en Flandre et en Brabant à la fin du Moyen-Âge”, *Tijdschrift voor rechtsgeschiedenis* 56 (1988), pp. 49–84. DOI: <https://doi.org/10.1163/157181988x00156>; David Nicholas, *The Domestic Life of a Medieval City: Women, Children and the Family of Fourteenth-Century Ghent*, Lincoln: University of Nebraska Press, 1985. DOI: <https://doi.org/10.1086/ahr/91.5.1179-a>.

¹²⁴ Helmholz, *Marriage Litigation in Medieval England*, cited; Richard H. Helmholz, *Canon Law and the Law of England*, Worcester: The Hambledon Press, 1987. DOI: <https://doi.org/10.2307/4051183>; Diana O'Hara 1991: “‘Ruled by my friends’: aspects of marriage in the diocese of Canterbury, c. 1540–1570”, *Continuity and Change* 6 (1991), pp. 9–41. DOI: <https://doi.org/10.1017/s026841600000117x>; Shannon McSheffrey, “‘I will never have none ayenst my faders will’: Consent and the Making of Marriage in the Late Medieval Diocese of London”, *Women, Marriage, and Family in Medieval Christendom. Essays in Memory of Michael M. Sheehan* (Constance M. Rousseau and Joel T. Rosenthal, eds.), *Studies in Medieval Culture*, 37, Kalamazoo, 1998. DOI: <https://doi.org/10.1017/s0038713400203850>; Murray, “Individualism and Consensual Marriage: Some Evidence from Medieval England”, cited; Frederik Pedersen, *Marriage Disputes in Medieval England*, London-Rio Grande: The Hambledon Press, 2000. DOI: <https://doi.org/10.1086/ahr/107.1.268>; Pedersen, “Did the Medieval Laity Know the Canon Rules on Marriage? Some Evidence from Fourteenth-Century York Cause Papers”, cited; Christina Peters, “Gender, Sacrament and Ritual: The Making and Meaning of Marriage in Late Medieval and Early Modern England”, *Past & Present* 169 (2000), pp. 63–96. DOI: <https://doi.org/10.1093/past/169.1.63>.

¹²⁵ Berkhofer, “Marriage, Lordship and the ‘Greater Unfree’ in Twelfth-Century France”, cited; Georges Duby, *The Knight, the Lady and the Priest. The Making of Modern Marriage in Medieval France*, New York: Pantheon Books, 1983; John W. Baldwin, “Consent and Marital Debt: Five Discourses in Northern France around 1200,” *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies* (Angeliki E. Laiou, ed.), Washington, DC: Dumbarton Oaks, 1993; Gaudemet, *Sociétés et mariage*, cited.

¹²⁶ Peter Leisching, 1977: “Eheschliessungen vor dem Notar im 13. Jahrhundert”, *ZRG, KA* 94 (1977), pp. 20–46. DOI: <https://doi.org/10.7767/zrgka.1977.63.1.20>.

¹²⁷ Dean, “Fathers and daughters: marriage laws and marriage disputes in Bologna and Italy, 1200–1500,” cited.

Nordic and Scandinavian territories,¹²⁸ among others. The outcomes of these works varies somewhat from one place to another, as comparative legal history research usually shows.¹²⁹ In this regard, the reception of marital consent in secular laws was not an easy enterprise, but it did have an impact.

It has been stated that canon laws on marital consent constitute “a clear example of how the church’s doctrine effectively challenged the very foundations of the patriarchal family and the hierarchical structure that characterized medieval society,”¹³⁰ and that “[t]he rise of the new

¹²⁸ Lehmann, *Verlobung und Hochzeit nach den nordgermanischen Rechten des früheren Mittelalters*, cited; Birgit Sawyer – Peter Sawyer, *Medieval Scandinavia. From Conversion to Reformation, circa 800–1500*. The Nordic Series, 17, Minneapolis: University of Minnesota Press, 1993. DOI: <https://doi.org/10.1086/ahr/100.1.150-a>; see also the works by Jenny M. Jochens, “The Church and sexuality in medieval Iceland”, *Journal of Medieval History* 6 (1980), pp. 377–392. DOI: [https://doi.org/10.1016/0304-4181\(80\)90039-1](https://doi.org/10.1016/0304-4181(80)90039-1); “Consent in Marriage: Old Norse Law, Life, and Literature”, *Scandinavian Studies* 58 (1986), pp. 142–176; *Women in Old Norse Society*, Ithaca and London: Cornell University Press, 1995; and by Agnes Arnórsdóttir, “Two Models of Marriage? Canon Law and Icelandic Marriage Practice in the Late Middle Ages”, *Nordic Perspectives on Medieval Canon Law*, ed. Mia Korpiola, Publications of Matthias Calonius Society, 2, Helsinki, 1999, pp. 79–92; “Marriage in the Middle Ages. Canon Law and Nordic Family Relations”, *Norden og Europa i middel-alderen* (Per Ingesman and Thomas Lindkvist, eds.), Skrifter udgivet af Jysk Selskab for Historie, 47, Århus, 2001, pp. 174–202; “Icelandic Marriage Dispensations in the Late Middle Ages”, *The Roman Curia, the Apostolic Penitentiary and the partes in the Later Middle Ages* (Kirsi Salonen and Christian Krötzel, eds.), Acta Instituti Romani Finlandiae, 20. Rome, 2003, pp. 159–169; Agnes Arnórsdóttir & Thyra Nors, “Ægteskabet i Norden og det europiske perspektiv – overvejelser om især danske og islandske normer for ægteskab i 12.-14. århundrede”, *Ægteskab i Norden fra Saxo til i dag* (Kari Melby et al., eds.), Forskningsprogrammet Norden och Europa, Nord, 14, København, 1999, pp. 27–54; Bandlien, “The Church’s Teaching on Women’s Consent: A Threat to Parents and Society in Medieval Norway and Iceland?”, cited; Korpiola, *Between Betrothal and Bedding*..., cited.

¹²⁹ See, for example, Charles Jr. Donahue, *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts*, Cambridge: CUP, 2008. DOI: <https://doi.org/10.1017/cbo9780511511776>; in studying marriage litigation in five different courts applying the late medieval canon law of marriage correctly (the archiepiscopal court of York, 1300–1500; the episcopal courts of Ely, 1374–1381; the court of Paris, 1384–1387; the court of Cambrai, 1438–1453; and the court of Brussels, 1448–1459), statistical analysis of the cases and results confirms that there were substantial differences both in the types of cases the courts heard and the results they reached: marriages in England in the later middle ages were often under the control of the parties to the marriage, whereas those in northern France and southern Netherlands were often under the control of the parties’ families and social superiors.

¹³⁰ Murray, “Individualism and Consensual Marriage: Some Evidence from Medieval England”, p. 124.

canon law of marriage was a legal change that certainly had enormous social implications regarding, for example, serfs' freedom of marriage."¹³¹ This may be partly true. However, more nuanced views maintain that the new canon-law rule on marital consent brought with it a "tug of war (...) between the church and the lay authorities."¹³² Both regulations, the ecclesiastical and the secular one, were doomed to coexist as peacefully as possible; "what was allowed by the church was punished by the lay authorities and the two laws stood and were maintained side by side."¹³³

Although canon law opened a door for children to challenge parental authority in questions of choosing a spouse, it could not protect them from parental pressure.¹³⁴ Expectations – and even the necessity – of inheriting part of the family's assets played an important role in conditioning the free exercise of free consent to marry, or, in other words, "[e]conomic dependence may have been a critical factor" in the real exercise of parental control.¹³⁵

The new canon-law rule on marital consent was well known and received in most secular laws, but its effective application or real enforcement fell rather short because secular laws contained punishments for those who dared to marry without familiar or parental consent or against their will. How the canon-law rule on marital consent was received in Castile, particularly in the *Fuero Real* (1255) and the *Siete Partidas* (1265), and whether these precedents did have any impact in the regulation of the matter reception of that matter in Norway, particularly in Magnus's Code (*Landslög*, 1274), will be touched upon next.

¹³¹ Berkhofer, "Marriage, Lordship and the 'Greater Unfree' in Twelfth-Century France", p. 27.

¹³² Raoul C. van Caenegem, "Law in the Medieval World", *Tijdschrift voor rechtsgeschiedenis* 49 (1981), pp. 13–46, particularly p. 42. DOI: <https://doi.org/10.1163/157181981x00027>.

¹³³ *Ibidem*.

¹³⁴ Pedersen, "Did the Medieval Laity Know the Canon Rules on Marriage? Some Evidence from Fourteenth-Century York Cause Papers", p. 29.

¹³⁵ O'Hara, "'Ruled by my friends': Aspects of marriage in the diocese of Canterbury, c. 1540–1570", pp. 13–14; In this regard, see Korpiola, *Between Betrothal and Bedding...*, p. 117.

4.1. Kingdom of Castile and Other Spanish Territories

The reception of the canon-law rule on marital consent in Castile has barely been studied. Merêa and Gibert analyzed the matter from perspective of parental and familial consent.¹³⁶ Casaldueiro gave a general overview of the canon-law influence in the law of marriage contained in the fourth book of the *Siete Partidas*.¹³⁷ More recently, Montanos published a book which contained some Castilian legal sources – including the *Fuero Real* and the *Siete Partidas* – revolving around parental consent.¹³⁸ In her view, up until the twentieth century most Castilian laws required the need for family consent for the marriage of daughters. However, whereas in the early-medieval *Fueros* the power to approve a daughter's marriage resided in the "family group" in a broad sense,¹³⁹ the *Fueros* drafted and approved later in the context of the *ius-commune* influence limited the required consent of the father or parents. This explains – she follows on – why the *Fuero Real* and the *Siete Partidas* established the need for the parental – rather than the family's – consent.¹⁴⁰

As can be seen, Spanish scholars who have studied the matter have been more interested in familial or parental consent than in marital consent. They have paid more attention to the influence of Roman law than that of canon law, although they were fully aware of the importance of canon law in the legislative project of Alphons X the Wise,¹⁴¹ and par-

¹³⁶ See the references in the fn n. 24.

¹³⁷ See the reference in fn n. 86.

¹³⁸ See the reference in fn n. 29.

¹³⁹ On this matter, see also Emma Montanos Ferrín, *La familia en la Alta Edad Media Española*, Pamplona: Euns, 1980.

¹⁴⁰ Montanos Ferrín, *La Mujer...*, p. 27.

¹⁴¹ Raimundo Bigador, "El derecho de las Decretales y las Partidas de Alfonso el Sabio de España", *Acta Congressus Iuridici Internationalis. VII saeculo a Decretalibus IX at XVI a Codice Iustiniano promulgatis, Romae 12-17 novembris*, 1934, vol. III, Romae, pp. 297–313; Samaniego Dulanto, *Legislación eclesiástica en las Partidas de Alfonso el Sabio*, Moralia, 1955; José Giménez y Martínez de Carvajal, "S. Raimundo de Peñafort y las Partidas de Alfonso el Sabio", *Anthologica Annua* 3 (1955), pp. 201–338. DOI: <https://doi.org/10.59530/anthann.1955.3.4>; José Giménez y Martínez de Carvajal, "El Decreto y las Decretales fuentes de la I Partida de Alfonso el Sabio", *Anthologica Annua* 2 (1954), pp. 339–348; Antonio García y García, "Fuentes canónicas de las Partidas", *GLOSSAE. European Journal of Legal History* 3 (1991), pp. 93–101; Antonio García y García, Antonio: "La canonística ibérica medieval posterior al Decreto de Graciano", *Repertorio de Historia de las Ciencias Eclesiásticas en España* 1 (1967), pp. 397–434.

ticularly in the law of marriage contained in the fourth book of the *Siete Partidas*.¹⁴²

Alphons X the Wise followed the policy of legal unification of his father, Ferdinand III the Saint. In doing so, he drafted and approved the *Fuero Real* (1255),¹⁴³ which was granted as general law for the whole kingdom of Castile and as municipal law for many towns in the south, while others were being governed by the *Liber Iudiciorum* (654/681) or by its medieval Castilian translation, the *Fuero Juzgo* (1244).¹⁴⁴ In addition, the *Siete Partidas* (1265)¹⁴⁵ – a comprehensive legal text connected to the *Espéculo* and the *Setenario*, both incomplete –,¹⁴⁶ were supposed to have validity in the whole kingdom of Castile, but that was only achieved almost a century later thanks to the *Ordenamiento de Alcalá* (1348) by Alphons X's grandson, Alphons XI.

¹⁴² José Maldonado y Fernández del Torco, "La relación entre el derecho de las Decretales y el de las Partidas en materia matrimonial", *Anuario de Historia del Derecho Español* 15 (1944), pp. 589–643; Eduardo Fernández Regatillo, "El derecho matrimonial en las Partidas y en las Decretales", *Acta Congressus Iuridici Internationalis. VII saeculo a Decretalibus IX at XVI a Codice Iustiniano promulgatis, Romae 12-17 novembris 1934*, vol. III, Romae, 1936, pp. 315–384. DOI: <https://doi.org/10.7767/zrga.1936.56.1.373>; Esteban Martínez Marcos, "Fuentes en la doctrina canónica de la IV Partida del código del rey Alfonso el Sabio", *Revista española de Derecho Canónico* 18 (1963), pp. 897–926. DOI: <https://doi.org/10.36576/summa.4655>; *Las causas matrimoniales en las Siete Partidas del rey Alfonso X el Sabio*, Salamanca: C. S. I. C. – Instituto "San Raimundo de Peñafort", 1966. DOI: <https://doi.org/10.15581/016.7.22927>.

¹⁴³ On the *Fuero Real*, see Antonio Pérez Martín, "Fuero Real: estudio preliminar", *Fuero Real de Alfonso X El Sabio*, Madrid: Agencia Estatal Boletín Oficial del Estado, 2015, pp. IX–XXXIV; I'm using that edition of the *Fuero Real*.

¹⁴⁴ I'm using the edition of *Fuero Juzgo*, de Juan de la Reguera Valdelomar, 1798, Estudio preliminar de Santos M. Coronas González, Madrid: Agencia Estatal Boletín Oficial del Estado, 2015.

¹⁴⁵ See López, G., *Las Siete Partidas del sabio rey don Alfonso el IX, con las variantes de mas interés, y con la glosa del Lic. Gregorio López, del Consejo Real de Indias de S.M., vertida al castellano y estensamente adicionada con nuevas notas y comentarios y unas tablas sinópticas comparativas, sobre la legislación española, antigua y moderna, hasta su actual estado*, por D. Ignacio Sanponts y Barba, D. Ramón Martí de Eixalá y D. José Ferrer y Subirana, Barcelona, 1843; I'm also using the English version, *Las Siete Partidas*, translated by Samuel Parsons Scott, edited by Robert I. Burns, S.J., Philadelphia: University of Pennsylvania Press, 5 vols., 2001, particularly vol. 4 entitled *Family, Commerce, and the Sea: The Worlds of Women and Merchants of Las Siete Partidas*.

I'm using the English edition of the *Siete Partidas* ed. by Robert I. Burns,

¹⁴⁶ For the *Setenario*, I'm using the following edition: *Opúsculos del Rey Sabio: El Espéculo. Edición de la Real Academia de la Historia* (1836), Estudio preliminar de Antonio Pérez Martín, Madrid: Agencia Estatal Boletín Oficial del Estado, 2015.

Alphons X the Wise (r, 1252–1284) sanctioned and officialized canon laws in Castile from the very beginning of his reign. This is evident in the first code he approved, the *Fuero Real*. Its first legal provision of the Book III, Title I, regulating marriage,¹⁴⁷ stated as follows:

We establish and order that all marriages be performed with those words mandated by the Holy Church, and that those that wish to be married may do so free of sin; and, that all marriages are to be performed with consent in public and not in secret....¹⁴⁸

Another provision also mentioned explicitly the commands of the church, prescribing that nobody should marry against canon laws, and that if a legal dispute about a specific marriage arose, none of the parties would be allowed to marry up until the case was settled by the ecclesiastical court.¹⁴⁹

The *Fuero Real* stated that the promise to marry made by a couple should be fulfilled. However, if, after that promise, one of the parties gave his or her consent to marry someone else with words of present and becoming consequently married, that marriage prevailed over the one that had been promised before.¹⁵⁰

Men were not allowed to marry a woman without the consent of her parents, or,¹⁵¹ if they were not alive, of her brothers or relatives with the power to do so; otherwise, he would have to pay a fee, half of it to the family and the other to the king, and would be considered an enemy of the family.¹⁵²

A woman under 25 years old could not marry without her parents' consent, otherwise she would lose her inheritance, unless she was for-

¹⁴⁷ On the matter, see Michelle Martin de Figueroa, "Women in The Fuero Real of Alfonso X El Sabio: Thirteenth-Century Law and Society", Master's Theses, 1997, Western Michigan University, 4133 (available at <https://scholarworks.wmich.edu/mastertheses/4133>).

¹⁴⁸ FR 3, 1, 1.

¹⁴⁹ FR 3, 1, 7.

¹⁵⁰ FR 3, 1, 10.

¹⁵¹ On the expression "manceba en cabellos," see José Luis Pérez de Castro, Elsa P San Martín, "El cabello femenino en la tradición asturiana", *Boletín del Instituto de Estudios Asturianos* 41, n. 123 (1987), pp. 803–824, in particular pp. 806–809; see also Heath Dillard, *Daughters of the Reconquest: Women in Castilian Town Society, 1100–1300*, Cambridge: CUP, 1989, pp. 18–19.

¹⁵² FR 3, 1, 14.

given by her parents, in which case she would receive her whole part. If she was forgiven by just one – father or mother –, both being alive, then she would receive the part of the one who forgave her. If she was forgiven by the only one who was still alive, in that case she would receive half of the inheritance of both parents.¹⁵³ If the woman reached the age of 25 and her parents and brothers did not marry her to someone, then she was free to choose the person she wanted to marry without facing any punishment.¹⁵⁴ Another – long and articulated – provision regulating how brothers should behave when their parents were not alive and hence had the responsibility of giving the consent for her sister to marry: if their behavior might reveal, for whatever reasons (malice, greed, etc.), a lack of interest in allowing their sister to marry, she could marry without or against her brothers' consent, and would not be disinherited for that reason.¹⁵⁵

Any woman who, being betrothed according to the law, dared to marry, or commit adultery with, someone else, would first be disinherited, and then she and her patrimonial assets would be delivered to the betrothed man so that he might do whatever he wished with her – except taking her life – and with her goods if neither of them had any child as heir.¹⁵⁶

Widows could freely marry without any punishment of patrimonial consequences, either when their parents were alive,¹⁵⁷ or when they were dead and she married someone in defiance of her brothers' views or commands.¹⁵⁸

All these provisions show that a woman under 25 was not allowed to marry without her parents' – or, if they were dead, her brothers' – consent. One might argue that a woman's consent to marry did not seem to matter at all, and, consequently, the canon-law provision whereby a woman should not be coerced or forced to marry did not play any role in the *Fuero Real*. That conclusion would be false for two reasons: First, because provisions punishing women that marry without parental

¹⁵³ FR 3, 1, 5.

¹⁵⁴ FR 3, 1, 6.

¹⁵⁵ FR 3, 1, 2.

¹⁵⁶ FR 4, 7, 2.

¹⁵⁷ FR 3, 1, 4.

¹⁵⁸ FR 3, 1, 3.

consent did not necessarily imply that parents did not care about their daughter's wishes, and even less that parents might be willing to force their daughter to marry against her will; second – and linked to the first –, because these provisions of book III, title I need to be complemented and interpreted in the light of the rest of Code's provisions. In this regard, book IV, title X, law 8, explicitly punished parents or anyone who forced a woman to marry someone against her will. That provision not only prescribed the payment of a fee for those who committed that crime, but also declared that marriage null, unless the woman later approved of it.¹⁵⁹

The *Siete Partidas* made the canon-law influence in regulating marriage even stronger than the *Fuero Real* did.¹⁶⁰ Alphonso the Wise adopted most of the principles stemming from the canon law in his *Siete Partidas*, putting marriage at the center of the whole code. In this vein, instead of placing the institution of marriage in the *Partida* V following the *Partida* IV dealing with contracts (as the Decretals of Gregory IX did),¹⁶¹ he decided to put marriage at the center, in the *Partida* IV, before dealing with contracts.¹⁶² Alphons X the Wise maintained that marriage was the first sacrament because it had been instituted in the beginning of the world, as Genesis shows it, and all the other sacraments stemmed from it. Besides, he also walked in Paul's footsteps in describing marriage with the metaphor of the unity of Christ with his church.¹⁶³

The *Siete Partidas* introduced the main three canon-law reforms on marriage, namely, the free will of spouses,¹⁶⁴ the indissolubility of marriage,¹⁶⁵ and the prohibition on marrying anyone within the fourth degree of kinship.¹⁶⁶ Alphonso the Wise, following the Decretals and the

¹⁵⁹ FR 4, 10, 8.

¹⁶⁰ In addition to the references contained in the fn nn. 86 and 142, see Marilyn Stone, *Marriage and Friendship in Medieval Spain: Social Relations According to the Fourth Partida of Alfonso X* (American University Studies), Peter Lang Inc., International Academic Publishers, 1990.

¹⁶¹ Gimeno Casaldueiro, "Alfonso el sabio: el matrimonio y la composición de las Partidas", pp. 208–210.

¹⁶² Introduction to the *Partida* IV: "Pusimos la partida que fabla del casamiento en medio de las otras seys partidas deste libro."

¹⁶³ *Partidas* IV, 1, 5.

¹⁶⁴ *Partidas* IV, 2, 5.

¹⁶⁵ *Partidas* IV, 2, 7.

¹⁶⁶ *Partidas* IV, 6, 4. On the matter, see Gimeno Casaldueiro, "Alfonso el sabio: el matrimonio y la composición de las Partidas", pp. 215–217.

Digest, introduced marital consent in a categorical way: “*Consent only, with the will to marry, makes marriage between the man and the woman.*”¹⁶⁷ Let us see whether the regulation of marriage contained in the *Partida* IV was in conformity with this statement. A general overview of the provisions show that the *Siete Partidas* took consent to marry very seriously. In defining marriage, for example, consent is taken for granted when the text refers to the intention of the couple to live as if there were one.¹⁶⁸ Touching upon the words whereby the parties express their consent, Alphons X’s text established the distinction between the promise to marry and marriage,¹⁶⁹ why some words of present (it might be also present tense. Do whatever you think it’s better) might not constitute the marriage,¹⁷⁰ and why they might be as valid as the physical union of the couple.¹⁷¹ In addition, *Partidas* is particularly explicit when, describing the three sacramental meanings of marriage,¹⁷² it states that through the exchange of words of present (it might be also present tense), “the wills of those who marry are united by consenting each other.”¹⁷³

Referring to those who are able (and unable) to marry, *Partidas* IV, 2, 4, asserted that only “those who have a sound intellectual capacity to consent to the marriage” may marry. Hence, the words of present (it might be also present tense) used by minors would be invalid “for not having the necessary understanding to consent.” Those suffering from permanent madness would also be unable to marry for the same reason,

¹⁶⁷ See fn n. 87.

¹⁶⁸ *Partidas* IV, 2, 1.

¹⁶⁹ *Partidas* IV, 1, 2.

¹⁷⁰ *Partidas* IV, 1, 3.

¹⁷¹ *Partidas* IV, 1, 4. On the regulation of sexuality in the *Siete Partidas*, see Roberto J. González-Casanovas, “Gender Models in Alfonso X’s *Siete Partidas*: The Sexual Politics of ‘Nature’ and ‘Society’,” *Desire and Discipline: Sex and Sexuality in the Premodern West* (Jacqueline Murray and Konrad Eisenbichler eds.), Toronto: University of Toronto Press, 1996, pp. 42–60. DOI: <https://doi.org/10.3138/9781442673854-005>; Eukene Lacarra Lanz (ed.), *Marriage and Sexuality in Medieval and Early Modern Spain*, London: Routledge, 2002. DOI: <https://doi.org/10.4324/9780203952849>; Shangching Cheng Huitzacua, “Licit and Illicit Sexuality in Medieval Iberia: A Survey of *Las Siete Partidas*,” A Thesis Presented to the Faculty of San Diego State University, In Partial Fulfillment of the Requirements for the Degree Master of Arts in History, Spring 2013 (available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1023.9819&rep=rep1&type=pdf>).

¹⁷² *Partidas* IV, 1, 6.

¹⁷³ *Partidas* IV, 1, 5.

but those who might have lucid intervals could marry in those moments of sound understanding.¹⁷⁴ In this vein, dealing with the impediments to marry, the 14th refers to the “lack of understanding to consent each other.”¹⁷⁵

Partidas IV, 5, 1 also adopted one of the most radical consequences of the canon-law paradigm of marriage as a sacrament. Sacraments did not take into respect persons since they were all equal in God’s eyes. Hence, a servant – of either sex – could marry a free man or woman, inasmuch as they knew about their social condition and s/he could give his/her consent against the will of his lord.¹⁷⁶

However, the main provision concerning marital consent is found in *Partidas* IV, 1, 10: “*Parents Cannot Betroth Their Daughters When They Are Not Present and Do Not Give Their Consent.*”¹⁷⁷ The text shows that marriage essentially concerns two consensual individuals, and the presence of the involved parties was required. This explains why parental, familial, and clerical involvement was somewhat absent in the regulation of the betrothal, since the law emphasized the binding effect of the parties’ consent. Consent was so crucial that parents were not allowed to betroth their daughter unless she was present. Any promise of betrothal made by the parents in the absence of the daughter would be void.

¹⁷⁴ *Partidas* IV, 2, 4.

¹⁷⁵ *Partidas* IV, 2, 17.

¹⁷⁶ *Partidas* IV, 5, 1.

¹⁷⁷ *Partidas* IV, 1, 10. The text continues: “Where one man promises another to take one of his daughters as his wife, such words do not constitute a betrothal, because none of the daughters was present, and does not specifically consent to take the party as her husband, any more than he does her as his wife, for just as matrimony cannot be contracted by one person alone, neither can a betrothal be so contracted. In matrimony it is necessary for those who desire to contract it to be present and each one must accept the other, or there must be two others who do this by their direction, and if a father swears or promises a party who has sworn to him that he would take that one of his daughters which he would give him as his wife, and afterwards none of his daughters gives her consent, or is willing to accept the party to whom the father had sworn, he cannot, for this reason, compel any of them absolutely to do this, although he has a right to reprove them, in order to obtain their permission. If, however, the party to whom the father wishes to marry one of his daughters was a desirable person, and the daughter would do well to marry him, although he cannot compel her to perform what he promised, he can disinherit her, for the reason that she was not grateful to her father for the benefit he desired to confer upon her, and caused him sorrow through her disobedience. And this is understood if thereafter she should marry another against her father’s will or commit carnal sin.”

A father only had power to arrange marriages for his children when the children gave parents their explicit consent and subsequently agreed to the betrothal. Besides, note the father's only recourse was to disinherit his daughter in a limited way – that is, only if the daughter, after refusing her father's proposal of someone who should be “a desirable person,” “marry another against her father's will or commit carnal sin.” Otherwise, the *Siete Partidas* did not allow a father to disinherit his daughter for refusing potential marriage partners. As read, a father “cannot (...) compel” his daughter to accept his proposal, “although he has a right to reprove them, in order to obtain their permission.”¹⁷⁸

The following provision¹⁷⁹ prescribed what would happen when a man, having sworn or promised to another that this other would receive one of the man's daughters as a wife and the daughter consented to her father's actions. If the identity of the future bride was not specified and the father had more than one daughter, he then possessed the authority to choose which daughter would be wed. However, the father would not be obligated to offer another daughter if the potential groom refused to marry the selected bride.

This regulation was in line with Pope Alexander III's effort to free marriage from familial control, and placed the ultimate power in the hands of the future married couple. Alexander's reform on the subject of betrothal combined matrimonial regulation and sentimental values conveyed by the courtly love that elevated marriage to a more personal relationship.¹⁸⁰

It has been stated that:

the *Partidas* [just] seems to make a conscious effort to treat women respectfully. It protects daughters from having their parents arrange a marriage for them without their presence or consent (Part. IV, Tit. I, Law X). However, since engagements could be made when a son or daughter reached the age of seven (Part. IV, Tit. I, Law VI), it is doubtful that a girl

¹⁷⁸ *Partidas* IV, 1, 10 *in fine*.

¹⁷⁹ *Partidas* IV, 1, 11.

¹⁸⁰ James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe*, Chicago: The Chicago University Press, 1990, pp. 332–333. DOI: <https://doi.org/10.1086/ahr/94.4.1072>.

of that age would have had the experience necessary to take advantage of her legal right to object.¹⁸¹

I do not agree with such a statement. *Partidas* contained nine reasons whereby betrothals could be annulled and not carried out,¹⁸² and forcing the marriage of a woman due to her betrothal when she was seven years old would not have complied with the paradigm of marriage that Alphons X the Wise desired for his *Siete Partidas*.

As seen, under Castilian law parents were not allowed to betroth a daughter when she was not present, or without her consent. The informed consent of both bride and groom was absolutely necessary for the marriage to be valid. A marriage contracted through force or intimidation of the bride could be annulled by the wronged party, though a woman could validate it if she so desired.

For the *Siete Partidas*, the consent of the woman's family was desirable, expected and even necessary, but not to the extent of neglecting, ignoring or forcing the woman's consent. However, for most of the Castilian laws, familial consent was regarded as necessary, and women who dared to disregard it were punished with disinheritance. In this regard, some early-medieval laws prescribing punishments for women who marry without parental or familial consent were confirmed by late medieval kings. The *Fuero Viejo de Castilla* (1248), for example, a compilation of Castilian laws, some of them approved in the reign of Alphons VIII (1158–1214), and confirmed by Ferdinand III, Alphons XI (1348) and sanctioned as general law by Peter I (1356), prescribed that a woman who married without the consent of her parents, brothers or relatives would be “fully disinherited forever” (“sea enagenada de todo eredamiento por todo siempre”).¹⁸³ However, it was cautious when dealing with the brothers' consent, establishing when they could disinherit her sister or not,¹⁸⁴

¹⁸¹ Lucy A. Sponsler, “The Status of Married Women Under the Legal System of Spain”, 42 La. L. Rev. (1982), pp. 1599–1628, p. 1603 (available at <https://digitalcommons.law.lsu.edu/lalrev/vol42/iss5/9>).

¹⁸² *Partidas* IV, 1, 8: “For How Many Reasons Betrothals Can Be Hindered, or Annulled, So as Not to Be Carried Out.”

¹⁸³ *Fuero Viejo de Castilla* 5, 5, I.

¹⁸⁴ *Fuero Viejo de Castilla* 5, 5, II

in line with the *Liber Iudiciorum* and the *Fuero Real*.¹⁸⁵ Note that the *Siete Partidas* was even more cautious on this issue, not allowing the brothers to disinherit their sister who married without or against their consent (*Partidas* IV, 3, 5). Juan II was less cautious and issued two provisions in 1422 and 1447, prescribing that the woman who married without her brothers' consent (in case her parents were dead), "pierda la herençia."¹⁸⁶

No other medieval Hispanic codes regulated marital consent as extensively as the *Siete Partidas*. In fact, other codes took for granted the new canon-law paradigm of marriage and marital consent, so they did not regulate it explicitly. This is what some codes such as the *Furs de València* (1238)¹⁸⁷ and the *Fueros de Aragon* (1247) show.¹⁸⁸ The *Furs de València* contained a provision prescribing that in the case that a woman married without the consent of her father, or, if he was dead, of her mother, her father or mother would have a period of time to disinherit her. Later, this law was reformed, requiring, when the father was dead, that two relatives of father's family should also give their consent.¹⁸⁹ The *Fori Aragonum* also contained some provisions punishing the woman who married without or against parental consent.

¹⁸⁵ See the provisions contained in the fn n. 155.

¹⁸⁶ *Ordenamiento de Montalvo* 5, 1, 4 and 5, 6, 1.

¹⁸⁷ I'm using the text edited by Vicent García Edo, *Furs de Jaume I (1238–1271)* (versió de treball a dia 12.6.2016 i per tant susceptible de modificacions, de la transcripció dels Furs promulgats al llarg el regnat de Jaume I), text edited within the general Project entitled *Furs de València (1238–1645), Transcripció, traducció i estudi de tots els furs promulgats per les Corts Valencianes al llarg de l'època foral*, Generalitat Valenciana. Conselleria de Transparència, Responsabilitat Social, Participació i Cooperació. Direcció General de Responsabilitat Social i Foment de l'Autogovern (available at <https://www.jaumeprimer.uji.es/cgi-bin/fursv/>).

¹⁸⁸ I'm using the edition contained in the *Legislacion Foral Argonesa. La compilación romance de Huesca (1247–1300)*. Estudio de Antonio Pérez Martín, Madrid: Agencia Estatal Boletín Oficial del Estado, 2016.

¹⁸⁹ FV 6, 9, 2 (see [92] D'AQUELLS ALS QUALS LES HERETATS SÓN TOLTES, AXÍ COM A PERSONES NO DIGNES; available at <https://www.jaumeprimer.uji.es/cgi-bin/fursv/>, p. 136).

4.2. *Kingdom of Norway*

For some scholars,

[t]he church's doctrine of the voluntary character of matrimony, expressed in the consent of the parties, has been described as "a serious threat to existing social order." The policy of consent could prevent or restrict the families' possibilities to further their own interests through marriage, because the girl's consent was decisive. Alternatively, she could choose a completely unsuitable person, even an enemy.¹⁹⁰

In this vein, it has been stated that "[i]n the western Scandinavian countries of Denmark, Norway and Iceland, the ecclesiastical quest for consent also found its way into thirteenth-century literary sources, which show that the question of consent provoked mixed feelings."¹⁹¹

It is undeniable that Norwegian bishops would do their best to enforce the canon-law rule on marital consent, but they might realize this should not be accomplished by excluding the kin's consent. In this regard, Lehman showed how

[t]he Norwegian Archbishop Eirik wrote to the Icelandic bishops in 1189 that marriage took place when, in the presence of witnesses, a man betrothed a woman "with her own expressed consent." The archbishop added, however, that this should take place with the kin's consent, which the priests should actively try to obtain.¹⁹²

In his view, in the early thirteenth century, a woman's consent to marry "found its way to the secular Norwegian laws."¹⁹³

¹⁹⁰ Korpiola, *Between Betrothal and Bedding*..., p. 110 (citing Birgit Sawyer & Peter Sawyer, *Medieval Scandinavia. From Conversion to Reformation, circa 800–1500*, p. 175).

¹⁹¹ Korpiola, *Between Betrothal and Bedding*..., p. 113 (Birgit Sawyer & Peter Sawyer, *Medieval Scandinavia. From Conversion to Reformation, circa 800–1500*, pp. 176–177).

¹⁹² Korpiola, *Between Betrothal and Bedding*..., p. 113 (citing Lehman, *Verlobung und Hochzeit nach den nordgermanischen Rechten des früheren Mittelalters*, p. 45).

¹⁹³ Korpiola, *Between Betrothal and Bedding*..., p. 114 (citing Lehman, *Verlobung und Hochzeit nach den nordgermanischen Rechten des früheren Mittelalters*, pp. 45–46, who referred to several sources: Eidsivathingsslov, I:22, Bruchstücke der Rechtsbücher des Borgarthings und des Eidsivathingss, pp. 94–97; *Bruchstücke der Rechtsbücher des Borgarthings*

Some scholars have emphasized the speed with which the canonical doctrine of marital consent was received in Norway and Iceland.¹⁹⁴ In this vein, Korpiola pointed out that the law of Eidsivathing, for example, prescribed that:

if a woman had been married (*gift*) against her will, she could have the union dissolved by protesting to her husband against it. But if she had cohabited with him for over a year, she could no longer dispute the validity of the marriage.¹⁹⁵

Is this scholarly account of the reception of marital consent in Norway and Iceland consistent? As seen, the oldest Norwegian laws, those of Gulathing and Borgarthing, did not contain any explicit requirement of woman's consent for marriage, which does not mean – as I argued – that it was ignored or that women were usually forced to marry. What did happen in the Norwegian legal tradition once the new canon-law rules on marital consent were well known and had spread all over Europe? What is the evidence given by the Norwegian legal sources enacted in the late twelfth and early thirteen centuries?

In order to answer these questions, three Norwegian laws will now be examined. First, the Laws of Frostathing and Eidsivathing, and only then King Magnus's Code (1274), which was drafted – resorting to the laws of Gulathing, Frostathing, Borgarthing and Eidsivathing – with the purpose of unifying the law of the whole realm of Norway.

und des Eidsivathings, ed. Rudolf Meißner. Germanenrechte, Neue Folge, 2. Schriften des Deutschrechtlichen Instituts, Abteilung Nordgermanisches Recht. Verlag Hermann Böhlau Nachf., Weimar, 1942).

¹⁹⁴ See, for example, Jenny M. Jochens, "Consent in Marriage: Old Norse Law, Life, and Literature", *Scandinavian Studies* 58 (1986), pp. 142–176, pp. 143–144; Agnes Arnórsdóttir, "Marriage in the Middle Ages. Canon Law and Nordic Family Relations", *Norden og Europa i middel-alderen* (Per Ingesman and Thomas Lindkvist, eds.), Århus, 2001, pp. 174–202, pp. 179–180 (cited by Korpiola, *Between Betrothal and Bedding...*, p. 114, fn 95).

¹⁹⁵ Korpiola, *Between Betrothal and Bedding...*, p. 114 (citing the following sources: Eidsivathingsslov, I:22, Bruchstücke der Rechtsbücher des Borgarthings und des Eidsivathings, pp. 96–97).

4.2.1 *The Laws of Frostathing and Eidsivathing.*

The Laws of Frostathing clearly underwent a later revision than the Older Gulathing Law. Although it contains some amendments that were probably accepted at the law thing celebrated at Frosta in 1260 under the reign of the elder Hakon,¹⁹⁶ the “Church Law” section mainly contains provisions by Archbishop Eystein, who sought “to bring the laws of the Norwegian church into a closer agreement with canon law which had quite recently been codified in Gratian’s Decretum.”¹⁹⁷ As will be seen, the provision concerning “How a marriage shall be arranged” reveals that Eystein’s purpose “was in great measure achieved.” Since the archbishop went into exile in 1180, the Christian law of the Frostathing book most probably dates before that year, which does not preclude the possibility that some provisions might have an earlier or even a later origin.¹⁹⁸

Only a few provisions of the Laws of Frostathing tackle marriage, but they are more than enough to perceive the change of paradigm – in line with the canon law – concerning marital consent. The most important one is located in the “Church Law” section (III). Although the text explicitly recognizes that a man has control over the marriage of a woman (“woman whose marriage he controls according to law”), the established procedure seeks to guarantee that the woman is given the chance to agree with the proposal made by “her legal guardian” with the presence of two witnesses.¹⁹⁹

Besides, the witnesses were in charge “with the duty of bearing this witness for a year and a day, and no longer.” That was the period of time within which the man could oppose the woman’s statement whereby she wished to break the engagement for having been bound “against

¹⁹⁶ *The Earliest Norwegian Law. Being the Gulathing Law and the Frostathing Law*, Introduction, p. 27.

¹⁹⁷ *The Earliest Norwegian Law. Being the Gulathing Law and the Frostathing Law*, Introduction, pp. 27–28.

¹⁹⁸ *The Earliest Norwegian Law. Being the Gulathing Law and the Frostathing Law*, Introduction, p. 28. On this matter, see Taranger, Absalon, “De norske folkelovboker (for 1263)” [The Norwegian National Codes (before 1263)], *Tidsskrift for retsvidenskap*, 1926 183–211 and 1928 1–68, pp. 39–40.

¹⁹⁹ Frostathing Law, “III. The Church Law”, n. 22.

her will.” If the man had no witnesses to oppose, the woman would be allowed to “deny upon oath that she was willingly [bound]” and, after paying “the man as much money as he was promised to get with her,” each one of them would be able to go his/her own way. However, if that separation came after the wedding, she would “lose her husband’s gift to the marriage portion.”²⁰⁰

As can be seen, without ignoring the old legal tradition that somehow granted the father or the parents the main role or the control over the marriage of a woman, the new canon-law principle of marital consent was explicitly established, so no woman should marry without giving her consent, or at least with her remaining silent. From then onwards, marriage with the sole consent of the kinsmen was not valid. Other provisions were supposed to be understood and interpreted in accordance with the new paradigm.²⁰¹ The shadow of the kinsmen remained present but without precluding or replacing woman’s consent.²⁰² In this vein, a criminal law provision concerning theft contained in the “Miscellaneous Provisions” section is quite revealing. It punishes those “men who take women by violence or as booty in warfare contrary to the laws of God and men, whether they take their kinswomen or the wives of *other men or take them without the consent of those who have the guardianship according to law or against the women’s own will*, no matter how their minds may change after they begin living together.”²⁰³ As can be seen, according to the laws of God and men, neither of either consents – the guardian’s and the woman’s – should be missed.

The Eidsivathing Law partly belongs to a later period than the Borgarthing Law and contained marriage regulations that “reflect the consensus doctrine promoted by Pope Alexander III.”²⁰⁴ Let us see if such a statement is consistent and in accordance with the content of this legal source. Chapter 22 is the most important one concerning marriage, and

²⁰⁰ Frostathing Law, “III. The Church Law”, n. 22.

²⁰¹ See, for example, Frostathing Law, “X. The Merchant Law”, 10.

²⁰² See, for example, Frostathing Law, “X. The Merchant Law”, 18.

²⁰³ Frostathing Law, “V. Miscellaneous provisions”, 45.

²⁰⁴ See fn n. 75; this law might have been in force between late twelfth to middle of the thirteenth century, before 1268, the year in which the new law came into force (*Njere Borgartings kristenrett*).

it is divided in different parts. The first provision contains two main ideas both coming from canon law: 1) that marriage should be based upon the consent of the couple (“the will of each of those who have come together”) – along with that of “other relatives” – and 2) the indissolubility of marriage. The provision seems to endorse Pope Alexander III’s thesis whereby the sole consent of the couple made the marriage, so no sexual intercourse was required for its validity.²⁰⁵ The reference to the consent of “other relatives” was part of a process whose first stage made it highly convenient not to break with the old legal tradition. As said, the explicit recognition of marital consent was already a big step whose full enforcement somehow needed a transitional period to replace the former paradigm.²⁰⁶ A Salomon solution was found:

And if a man wishes to seek marriage, then he shall seek the approval from her nearest relatives, to gain permission to marry, according to rightful law. *And next he shall find out what she desires.*²⁰⁷

The need for a suitor to approach the relatives of the woman he wished to marry was common in the old Norwegian law, as it was in other Nordic countries and in Europe. Canon law definitely contributed to the transition of the so-called marriage-man (the person responsible for a woman’s

²⁰⁵ *The Borgarthing Law and the Eidsivathing Law*, Notes on the text [*Eidsivathing Law*], pp. 122–123. Whether the consent (consensus) of both parties was enough to make a marriage valid was a question discussed energetically by theologians and canon lawyers during the twelfth century. Some maintained that, in addition to giving consent, the couple had to enter into union through sexual intercourse, in accordance with a view of marriage as a sacrament. During the latter half of the twelfth century, the consent theory was firmly established by Pope Alexander III (1159–1181), and was further strengthened by later popes”; on this matter, see Charlotte Christensen-Nugues, *Och de skall vara ett hjärta. Konsensusdoktrinen i medeltida kanonisk rätt*, Lund: Lunds universitet (Ugglan, Minervaserien 7) 2003, pp. 135–139, 158–165; Mia Korpiola, *Between Betrothal and Bedding: Marriage Formation in Sweden 1200–1600*, Saarijärvi: GummerusKirjapaino Oy, 2004, pp. 88–96.

²⁰⁶ *The Borgarthing Law and the Eidsivathing Law*, Notes on the text [*Eidsivathing Law*], ch. 22.1, p. 123. See also Christensen-Nugues, *Och de skall vara ett hjärta*, pp. 177–182; Korpiola, *Between Betrothal and Bedding...*, pp. 70–77.

²⁰⁷ *Eidsivathing Law*, ch. 22.6.

marriage contract)²⁰⁸ to the “consent of the couple-to-be.”²⁰⁹ However, it is undeniable that the Eidsivathing Law was an important step forward in that direction. In this vein, a provision regulating the betrothal meeting made sure that the woman would be allowed to have a say before two witnesses, who “shall hear whether she says no to this decision, or yes. And if she says yes to it, or stays silent, then a marriage bond may be made.”²¹⁰ Otherwise, “that marriage bond may not be made.”²¹¹ It has been stated that “[n]o more detailed rules concerning the so-called ‘betrothal meeting’ are found anywhere in the oldest Norwegian laws.”²¹² But, more importantly, the Eidsivathing Law managed – under the influence of canon law – to grant women “a legal right to refuse to enter into a marriage,”²¹³ or, in other words, the right to freely enter a marriage.

Besides, the indissoluble character of marriage is explicitly referred to in some provisions. As seen, Eidsivathing Law states clearly that “neither man nor woman shall separate them, even if they change their minds.”²¹⁴ Further it prescribes that even if “they have separated from each other, neither of them may take another spouse as long as they are both alive.”²¹⁵ It also stresses that “if a marriage bond is made, then it may never be broken whilst they are both living.”²¹⁶ Other texts describe the

²⁰⁸ *The Borgarthing Law and the Eidsivathing Law*, Notes on the text [*Eidsivathing Law*], ch. 22.6, p. 124. See also Lizzie Carlsson, ‘Jag giver dig min dotter’. *Trolovning och äktenskap i den svenska kvinnans äldre historia*, I (Skrifter utg. av Institutet för rättshistorisk forskning, Serien I. Band 8.), Lund, 1965, pp. 51–59; Korpiola, *Between Betrothal and Bedding*..., pp. 9–17.

²⁰⁹ *The Borgarthing Law and the Eidsivathing Law*, Notes on the text [*Eidsivathing Law*], ch. 22.6, p. 124. See also Christensen-Nugues, *Och de skall vara ett hjärta*, pp. 177–182.

²¹⁰ *Eidsivathing Law*, ch. 22.7. A similar content has the same provision in another manuscript, namely, *Older Eidsivathing law*, II 19 (Norges Gamle Love indtil 1387, Förste Bind, Christiania, 1846, pp. 398–399).

²¹¹ *Eidsivathing Law*, ch. 22.8.

²¹² *The Borgarthing Law and the Eidsivathing Law*, Notes on the text [*Eidsivathing Law*], ch. 22.7, pp. 124–125. See Carlsson, ‘Jag giver dig min dotter’, pp. 59–63; Korpiola, *Between Betrothal and Bedding*..., pp. 17–24.

²¹³ *The Borgarthing Law and the Eidsivathing Law*, Notes on the text [*Eidsivathing Law*], ch. 22.8, p. 125. See Christensen-Nugues, *Och de skall vara ett hjärta*, pp. 139–145.

²¹⁴ *Eidsivathing Law*, Ch. 22.1.

²¹⁵ *Eidsivathing Law*, Ch. 22.2.

²¹⁶ See fn n. 212; *The Borgarthing Law and the Eidsivathing Law*, Notes on the text [*Eidsivathing Law*], ch. 22.7, pp. 124–125. See Christensen-Nugues, *Och de skall vara ett hjärta*, pp. 173–177; James A. Brundage, *Law, Sex, and Christian Society in Medieval*

consequences of separation. In this regard, it finally regulates the inheritance consequences of separating and remarrying, laying down the same effects to men and women: children would be “not eligible to inherit anything.”²¹⁷ In addition, a fine is imposed to “whichever one of a couple causes a separation.”²¹⁸ It is evident that legislation endorsed the canon-law principle of indissolubility; however, the tendency in line with the Norwegian old legal tradition made it convenient to regulate the consequences of separation and remarriage. Other provision also touches upon the affinity and consanguinity requirements for a rightful marriage.²¹⁹

If a woman should freely enter a marriage, she could “announce her separation from her husband on whichever day she wishes.”²²⁰ Once the given period is over – “or one month longer” –, “then she never has any possibility of separation.”²²¹ The provision was the natural consequence of putting free consent at the forefront of marriage, in line with the canon-law doctrine.²²²

4.2.2 King's Magnus Code of 1274.

As said, King Magnus Haakonsson (1263–1280) rapidly envisaged the need for drafting and enacting a code for the whole realm of Norway. In doing so, he was called to unify the four laws then in force in each thing (assembly place or province). For this reason, he has been called King Magnus “Lagabøter,” The Law-Mender. The king knew perfectly well about the main codes approved in other European jurisdictions, particularly the *Fuero Real* and the *Siete Partidas* thanks to his family ties with Alphons X the Wise, whose brother Felipe married Princess Kristine, Magnus's sister.²²³

Europe, Chicago and London: University of Chicago Press, 1987, pp. 58, 199–203, 294–295. DOI: <https://doi.org/10.1086/ahr/94.4.1072>.

²¹⁷ *Eidsivathing Law*, Chap. 22.3.

²¹⁸ *Eidsivathing Law*, Ch. 22.4.

²¹⁹ *Eidsivathing Law*, Ch. 22.5.

²²⁰ *Eidsivathing Law*, Ch. 23.

²²¹ *Eidsivathing Law*, Ch. 23.1.

Eidsivathing Law, Ch. 23.2.

²²² *The Borgarthing Law and the Eidsivathing Law*, Notes on the text [*Eidsivathing Law*], ch. 23.1–2, p. 125. See Christensen-Nugues, *Och de skall vara ett hjärta*, pp. 182–186.

²²³ See fn n. 12.

Magnus Lagabøter was so eager to revise the laws of his whole kingdom that he started the project from the very beginning of his reign. However, only fragments have survived from this first phase of the legislative process. Fortunately, a law enacted in 1267 by him for Gulathing regulating how a marriage should be arranged has survived and shows that Magnus fully adopted the canon-law rule on marital consent, in line with the legal precedents of Frostathing and Eidsivathing, in a clear way: since “it is prohibited by God that a man marries an unwilling woman or girl,” such consent should be declared by herself before witnesses.

When Magnus presented the draft for consideration to the province of Frostathing in 1269, something unexpected occurred – namely, the new archbishop of that diocese, Jón rauoi (“Jon the Red”) (1268–1282), reacted against it, rejecting the king’s involvement in ecclesiastical legislation. It is not easy to understand the reason for the archbishop’s reaction. King Magnus’s legislation on church matters could not be accused or blamed as heterodox or blasphemous at all, as the 1267 chapter on marriage granted to Gulathing clearly proves. However, such opposition of the senior archbishop of the whole realm of Norway led King Magnus to remove the provisions of the “Church Law” section, where marriage’s rules were located, from his draft code. This explains why the Magnus Code of 1274 contains no rule about this matter. In fact, the code was enacted after the archbishop approved a Christian law of his own in 1273.

This Christian law approved by the archbishop is relevant for two evident reasons. First, because it was the law applicable concerning marriage in the time Magnus promulgated his code, so marriage issues were called to be settled by applying Jon the Red’s law, not Magnus’s code. And second, because the content of Jon the Red’s Christian law might give us a clue about the reasons that might explain why the archbishop fought against the king’s involvement in ecclesiastical legislation.

Chapter 40 touches “On the bonds of marriage and the announcement of a man that engages a woman.”²²⁴ After referring to marriage in Paradise, “before the Fall of Man,”²²⁵ this part of the chapter was per-

²²⁴ The Christian laws of Archbishop Jon the Red from the 1270s, probably 1273, ch. 40, in *Nyere norske kristenretter* (ca. 1260–1273) (Björg Dale Spørck, ed.), Oslo: Aschehoug, 2009, pp. 127–129.

²²⁵ *Ibidem*, p. 127.

fectly in line with the regulations of the Laws of Frostathing, Eidsivathing and Magnus's 1267 provision for Gulathing: the woman should be asked and have to the opportunity to say "yes" or "no" before two witnesses. Besides, the issue of hindrances was also clearly stated in Magnus's provision.²²⁶ This part of the chapter, in addition to reinforcing the marital consent by suggesting the gestures and words whereby the couple give or exchange their consent to marriage, contains two other relevant aspects: first, the distinction between the "announcement of the engagement," the "confirmation of the engagement" and, eventually, the "binding marriage." The reasons for such distinctions are twofold: first, to ensure that possible hindrances are adequately explored and tackled before the marriage is made through free exchange of consent of the couple; and, second – connected to the other relevant aspect –, to clearly endorse Alexander III's thesis whereby only consent makes the marriage. This explains the reason for the distinctions and why the text adds that once the marriage is completely binding through the exchange or display of consents, that bind is more powerful than any other that could be created afterward through "the same and complete the marriage with a bodily union." That was something missing in the Magnus's provision (1267) and might be a possible reason why the archbishop prevented the king from having to regulate such doctrinal intricacies of canon law.

Jon the Red emphasized the need for marital consent to get into marriage because – as Magnus's provision also stressed – "it is prohibited by God to enter an engagement with a girl or woman with force." Hence, if the engaged had left to her father or a relative on her father's side the decision, or to "any other man acting on her behalf, then the union is not valid before she herself consents."²²⁷ The archbishop neither ignored nor disregarded the relevance of the consent of woman's father or relatives. For him, the father's or family's consent of the woman was just a *conditio sine qua non*, but not sufficient indeed to make the marriage. This explains why in the beginning the provision makes reference to that initial requirement: "And if the father or other male relative consents to the man's request, he shall bring with him two witnesses when he informs

²²⁶ The Christian laws, Archbishop Jon the Red, 1270–1273, ch. 40, pp. 127–128; italics are mine.

²²⁷ The Christian laws, Archbishop Jon the Red, 1270–1273, ch. 40, p. 128.

the women about the request and who has made it.”²²⁸ Besides, the need for marital consent was applicable to “children of the age of seven [entering] marriage, but the engagement is not valid as marriage if she does not consent when she is 12 and he is 14 years old.”²²⁹

This regulation of marriage ends with a categorical statement about the indissoluble bond of marriage, “unless one of them enters a monastery to serve God for eternity,” in which case “the one left in this world, can then remarry if he or she wants to.”²³⁰

The need to explore the possible existence of hindrances or impediments was a powerful reason to forbid “secret marriages.” In fact, Jon the Red started this chapter declaring that “[t]he Holy Fathers have prohibited secret marriage,” a prohibition that can be found in many other jurisdictions. In Spain – as seen –, the *Fuero Real* expressly prescribed that “that all marriages are to be performed with consent in public and not in secret...”²³¹ It is true that “[u]ntil the Council of Trent, spouses did not need banns or a priest to marry, and they could indissolubly bind themselves with the exchange of a few words. The freedom in which such clandestine marriages could be made created opportunities for deceit, the concealment of illegal and invalid marriages, and a great deal of confusion.”²³² However, we do not really need to go back to the Carolingian capitularies requiring publicity to “recognize the radical nature of this doctrine of free consent.”²³³ In fact, the radical change was not the lack of publicity, but the impossibility of dissolving marriages made without parental consent.²³⁴ It is true, nonetheless, that although laws prescribed the need for publicity, many clandestine marriages emerged because such formality or procedural rules did not constitute the requirement of valid-

²²⁸ *Ibidem*.

²²⁹ The Christian laws, Archbishop Jon the Red, 1270–1273, ch. 40, p. 128.

²³⁰ The Christian laws, Archbishop Jon the Red, 1270–1273, ch. 40, pp. 128–129.

²³¹ See fn n. 148.

²³² McDougall, “Marriage: Law and Practice”, p. 461.

²³³ *Ibidem*.

²³⁴ McDougall, “Marriage: Law and Practice”, p. 461: “We can best recognize the radical nature of this doctrine of free consent by considering the earlier history of requirements for valid marriage as well as the history of the pre-modern family. Carolingian capitularies had required publicity, and marriages made without parental consent might be dissolved.”

ity.²³⁵ Hence the Tametsi decree of the Council of Trent constituted a clear recognition of the mistake of not requiring publicity as a *conditio sine qua non* for a valid marriage.²³⁶

Back to Norway, since the ecclesiastical authority had made these laws that were usually promulgated by the secular power (the king with the approval of the thing) and contained in the “Church Law” section of codes or body laws, as it happened with the Laws of Gulathing, Frostathing, Borgarthing and Eidsivathing, not much room was left for King Magnus in drafting and promulgating his code of 1274.²³⁷ In fact, only two provisions dealing with inheritance regulated some aspects connected to marital consent.

The first one touches upon “the marrying of women” or, in other words, who are to decide on the marriage of women from a patrimonial and succession perspective.²³⁸ The provision establishes that “[a] father and a mother are to decide on their daughters’ marriages if they are alive. But if they are dead, the closest paternal kinsmen are to decide.” What does it mean “to decide”? The text gives the answer to that question as follows:

The person responsible for the woman’s marriage is to determine a dowry and counter-gift for their kinswoman according to what they negotiate. And they are to decide the date of the wedding.

²³⁵ Jutta Sperling, “Marriage at the Time of the Council of Trent (1560–70): Clandestine Marriages, Kinship Prohibitions, and Dowry Exchange in European Comparison,” *Journal of Early Modern History* 8, no. 1–2 (2004), pp. 67–108. DOI: <https://doi.org/10.1163/1570065041268951>.

²³⁶ The purpose of the Tametsi decree was to prescribe a juridical form for a marriage to be valid. It required the presence of the parish priest (or his deputy authorized by him or the ordinary) and the presence of two or three witnesses. Besides, banns were to be read before the celebration of marriage. In addition, a record of marriage was to be kept. A liturgical form for marriage needs to be followed: couples newly married were expected to receive the priestly blessing in the church, having prepared by Confession and Communion; see W. Van Ommeren, “Tametsi”, *New Catholic Encyclopedia*, vol. 13 2nd ed., vol 13, 200; see also David L. d’Avray & Werner Menski, “Authenticating Marriage: The Decree Tametsi in a Comparative Global Perspective”, *Rechtsgeschichte – Legal History Rg* 27 (2019), pp. 71–89 (available at http://data.rg.mpg.de/rechtsgeschichte/rg27-71dAvray_menski.pdf). DOI: <https://doi.org/10.12946/rg27/071-089>.

²³⁷ One can imagine how painful it might have been for King Magnus to remove this part from his 1266 draft code after the opposition of Archbishop Jon the Red in 1269.

²³⁸ Magnus Code 1274, “The List of Inheritance” section, n. 1.

The dowry is the main issue covered by this provision. It lays down some rules to settle possible disagreements that might arise about the dowry and, in such case, how the person responsible for the woman's marriage should proceed.²³⁹ In this vein, it contains a different treatment "if daughters are their father's, mother's or brother's heirs, or whoever's heir they might be," whether they are unmarried or married and left home, etc.²⁴⁰

More relevant is the second provision because it lays down sanctions for a woman who "marries without the permission of her father and mother or brother."²⁴¹ This was something canon law could not prevent happening, as it did in most of the European jurisdictions, the various territories of the Spain among them. On the one hand, secular laws introduced the need for marital consent as a consequence of the canon-law influence, so women could not be coerced to marry; on the other, though, laws took for granted that the woman's consent should be combined with the family's consent, otherwise the woman would be economically damaged or handicapped. In short, although canon law empowered the woman to freely marry, secular laws still retained the possibility of somehow forcing woman to marry according to the will of her parents in order to avoid the threat of the economic penalties.

What was the sanction for the woman who married "without the permission of her father or brother or mother, or the person who is the rightful party to arrange her marriage"? Being "forfeited all the inheritance she could have acquired from then on." However, this could be prevented – the text continues – if she married a man that "sensible kinsmen (...) consider it an equal or better match and they can prove it with their oath."²⁴² As can be seen, the law provided alternatives that might help to find other equal matches "based on the judgment of twelve people" or that of the "sensible kinsmen." However, a women that had already received inheritance could not be deprived of this property, and could hence in principle marry whomever she wished.²⁴³

²³⁹ *Ibidem.*

²⁴⁰ *Ibidem.*

²⁴¹ Magnus Code 1274, "The List of Inheritance" section, n. 2.

²⁴² *Ibidem.*

²⁴³ *Ibidem.*

Unlike a maiden, “[a] widow may give herself in marriage to whom-ever she chooses with the blessing of some kinsman of hers.” However, some rules were provided concerning her dowry, particularly with “other people’s assets (...) counted as part of her dowry.”²⁴⁴ Women of bad reputation had “to pay a fine in accordance with the judgement of twelve people” or “to receive a punishment according to a lawful judgement.”²⁴⁵

The permission to marry given by the woman’s kin was important to prevent “all the inheritance” being forfeited, but also to allow her husband to “have authority over both her and her assets.”²⁴⁶ In addition to the inheritance, woman could also lose her dowry, since the person who arranged the woman’s marriage could “release the entire dowry with the same legal conditions” and there would “be no counter-gift in return for anything that needs to be claimed through lawsuits.”²⁴⁷

As can be seen, the Magnus Code of 1274 just covered the patrimonial and hereditary consequences when marital consent had been exerted by the woman without the permission of the woman’s kinsmen. In summary, the laws stated that a woman could not be forced to marry, that she had to enter marriage freely, but she needed her family’s permission in order to avoid the abovementioned economic sanctions. The exception was widows and women that had received inheritance, who in principle could marry whomever they wished.²⁴⁸

The legal regime of marital consent after the promulgation of the Magnus Code of 1274 was found in two main laws, namely in the Christian or canon law promulgated by Archbishop Jon the Red and in the two provisions contained in the “List of Inheritance” section of the Magnus Code. It is well known that the conflict about the Christian-law legislation between the archbishop and the king was somewhat settled thanks to an agreement – called *Sættargjorden* – that was reached in the Concor-

²⁴⁴ *Ibidem.*

²⁴⁵ *Ibidem.*

²⁴⁶ *Ibidem.*

²⁴⁷ *Ibidem.*

²⁴⁸ For the early modern age, see Maria Ågren & Amy Louise Erickson, *The Marital Economy in Scandinavia and Britain, 1400–1900* (Series: Women and Gender in the Early Modern World), Aldershot, Hants and Burlington: Ashgate, 2005 (whose chapter two deals with Norway). DOI: <https://doi.org/10.1353/ren.2008.0969>.

dat of Tunsberg (Tønsberg) in 1277.²⁴⁹ However, when the King Magnus died in 1280, it seems that “the anti-clerical regency government that followed him revoked the concessions given to the Church in the Treaty of Tunsberg and re-issued the old Christian law.”²⁵⁰ In any case, Magnus was not allowed to introduce the rule of marital consent in his 1274 Code for the whole realm of Norway and, in fact, he was forced to remove it from his draft codes from 1267–1268. He was nonetheless able to enact his code – with some variations – in Iceland,²⁵¹ where he clearly endorsed the marital-consent principle in some provisions.²⁵²

Other thirteenth-century Nordic laws show the reception of marital consent to marry. In Denmark, for example, the Law of Jutland (1241) contains two provisions related to it.²⁵³ The Law of Jutland stressed that the man “who wants to take a wife shall ask” her skin (father, son or brother) “and still with her yes and consent.” However, if “she marries without their consent, then they shall get the power over her property while she lives.” And “[i]f the woman does not have any kin, then she may ask whoever she wants to give her in marriage.”²⁵⁴ The other provision (Jutland 1:8) was designed to protect the woman from a brother

²⁴⁹ The *Settargjorden* (1277) was an agreement between the Norwegian king Magnus and the archbishop Jon the Red on the jurisdiction border between their exclusive jurisdictions; the text appears in Sverre Bagge, Synnøve Holstad Smedsdal and Knut Helle (eds.), *Norske middelalderdokumenter*, Universitetsforlaget, 1973, pp. 139–151.

²⁵⁰ *The Borgarthing Law and the Eidsivathing Law*, Introduction, p. 8.

²⁵¹ *Jónsbók: The Laws of Later Iceland*. The Icelandic Text According to Ms Am 351 Fol. Skálholtsbok Eldri, with an English Translation, Introduction and Notes by Jana K. Schulman, Saarbrücken (Germany): AQ-Verlag, 2010, Introduction, xiii. DOI: <https://doi.org/10.7767/zrgga.2011.128.1.592b>.

²⁵² See, for example, *Jónsbók* V, 7: Here begins the inheritance section [The First Inheritance] (V, 7–1), pp. 97–99. I am thankful to Már Jónsson, who let me know about this law enacted by King Magnus. Concerning the marital consent, see particularly the section “Here begins the chapter on marriage and inheritance” (pp. 85–95), particularly V, 1 (pp. 85–86).

²⁵³ The Law of Jutland was given at a meeting held in March 1241 by King Valdemar in the town of Vordingborg, in Zealand, in the presence of his sons and the bishops and with the consent of the best men of the kingdom; the text can be found in *The Danish Medieval Laws: The Law of Scania, Zealand and Jutland*, ed. by Ditlev Tamm and Helle Vogt, London-New York, Routledge, 2016; I am grateful to Helle Vogt, who gently provided me with a copy of it. DOI: <https://doi.org/10.1017/s0738248018000561>.

²⁵⁴ Law of Jutland 1:33.

who might intend to keep his unmarried sister with him as he wished. In that case, the king might intervene by letting her marry “according to her wish.”²⁵⁵

5. *Concluding Remarks*

That canon-law doctrine contained in the Decree of Gratian (1140) and Pope Alexander III’s legislation (1159–1181) on marital consent highly influenced the medieval secular law of European jurisdictions, it is undeniable. However, it should be noted that the canon-law influence started even much earlier than 1140 – as some secular laws show –,²⁵⁶ and that many secular laws made some attempt to seek for woman’s consent to marry for practical reasons, particularly because separation was an easy way out after the celebration of marriage. Anyway, there is no doubt that canon law highly contributed to empower woman to marry for herself. In this vein, it is true that also in this regard “[m]odern Western law owes a profound debt to the canon law of the Middle Ages.”²⁵⁷

As seen, the Roman-law principle that “consent alone” makes the marriage²⁵⁸ was fully embraced by twelfth- and thirteenth-century canon

²⁵⁵ Law of Jutland 1:8.

²⁵⁶ In King Canute’s law (enacted around 1020–1021), for example, the will of the woman is explicitly stated: “And no woman or maiden shall ever be forced to marry a man whom she dislikes, nor shall she be given for money, except the suitor desires of his free will to give something” (Canute II, 74, in *The Laws of the Kings of England from Edmund to Henry I* 1925/2009. Ed. and tr. Agnes J. Robertson. Cambridge: Cambridge University Press, p. 213); being the longest Anglo-Saxon law code, issued by King Cnut (reigned 1016–1035) with the advice of his counsellors, the manuscript contains a collection of laws from the Anglo-Saxon kingdoms and some excerpts from canon law and other texts composed by Archbishop Wulfstan of York (1002–1023), so the canon-law influence is uncontroversial. In fact, the code begins as follows: “I desire that justice be promoted and every injustice suppressed, that every illegality be eradicated from this land with the utmost diligence, *and the law of God promoted*”; italics are mine; see [https://www.bl.uk/collection-items/law-code-of-king-cnut#:~:text=This%20is%20the%20longest%20Anglo,1002%E2%80%931023\)%20of%20York;I%20am%20grateful%20to%20Matt%20Dyson,who%20helped%20me%20to%20date%20this%20Old%20English%20law.](https://www.bl.uk/collection-items/law-code-of-king-cnut#:~:text=This%20is%20the%20longest%20Anglo,1002%E2%80%931023)%20of%20York;I%20am%20grateful%20to%20Matt%20Dyson,who%20helped%20me%20to%20date%20this%20Old%20English%20law.)

²⁵⁷ Charles J. Jr Reid & John Jr Witte, “In the steps of Gratian: Writing the history of canon law in the 1990s”, *Emory Law Journal* 48, n. 2 (Spring 1999), pp. 647–688, p. 647; see also Eva M. Synek, “Ex utroque sexu fidelium tres ordines” – The Status of Women in Early Medieval Canon Law”, *Gender & History* 12(3) (Nov. 2000), pp. 595–621. DOI: <https://doi.org/10.1111/1468-0424.00202>.

²⁵⁸ See fn. n. 93.

law.²⁵⁹ The sacramental character or dimension of marriage played an important role, placing free consent at the core of marriage. As seen, in the early twelfth century Hugh of Saint Victor (1096–1141) already defended that true sacramental marriage only existed even though the couple had never had sexual intercourse.²⁶⁰ The sacramental dimension of marriage was formally declared at the Council of Lyon in 1274. In my view, this was the main reason why, in twelfth- and thirteenth-century canon law, the “radical nature of this doctrine of free consent” emerged.²⁶¹ Western secular and ecclesiastical laws prohibited secret marriages and established some formal rules – as seen both in Castile and Norway – but these provisions could not overrule the radical principle of free consent laid down by three major popes and canon lawyers, namely, Gratian, Alexander III and Innocent III. Such reform was done by the Council of Trent, that established a juridical form for a marriage to be valid (*Tametsi* decree, 1563).

Canon-law marital consent was fully received both in Spain and in Norway between the second half of twelfth century and the first half of the thirteenth century. While in Castile marital consent was clearly present in the *Fuero Real* and the *Siete Partidas*, in Norway it can be seen in the Laws of Frostathing and Eidsivathing before the enactment of the Magnus Code in 1274. The presence of marital consent in these two old Norwegian laws, whose main content dates back to eleventh and twelfth centuries, might even lead us to leave open the possibility that the reception of this institution could be even earlier in Norway than in Castile. At least – as far as I know – no twelfth-century Castilian local laws introduced marital consent as the mentioned old Norwegian laws did.

The Castilian king Alphons X the Wise and the Norwegian king Haakon IV the Law-Mender, were both eager legislators, pursuing to use law as a tool for political and legal unification of their kingdoms. They knew each other well and the family ties they created contributed to even further to this. Alphons X being more theoretical and Magnus more pragmatic, they both pursued legal unification throughout the promulgation

²⁵⁹ See fn. nn. 106, 107 and 108.

²⁶⁰ Korpiola, *Between Betrothal and Bedding...*, p. 66, fn n. 61 (citing Hugh of Saint Victor, *On the Sacraments* of Hugh of Saint Victor, 2.11.3).

²⁶¹ See fn n. 234.

of a code for their whole realms. Magnus, who knew the *Fuero Real* and the *Siete Partidas* well, took these laws as a model for legal unification and tried to follow in Alphons's footsteps, particularly with the *Fuero Real*, for two reasons: it was a legal text more than a practical one, less comprehensive and less doctrinal; and, more importantly, it had been drafted taking into account the existing laws in Castile. That was what King Magnus did with his Code of 1274: unifying the different laws in force in the four things or political units of Norway (Gulathing, Frostathing, Borgarthing and Eidsivathing).

As seen, Magnus's draft codes of 1267–1268 fully endorsed canon-law marital consent, but in 1269 the senior archbishop of Norway, Jon the Red, rejected the king's involvement in ecclesiastical legislation, so the archbishop approved a Christian law of his own in 1273, and the Magnus Code of 1274 did not contain any rule revolving around the celebration of marriage and just covered the patrimonial and hereditary aspects connected to marital consent. That was a relevant difference between Alphons X's codes and Magnus's Code: while the Castilian bishops allowed Alphons the Wise to legislate canon-law matters (as seen, the Fourth Partida was at the center of the whole project of *Siete Partidas*), the main archbishop of Norway thought differently and kept King Magnus away from the doctrinal intricacies of canon-law.

In spite of this, both Castile and Norway endorsed the canon-law principle of free consent to marriage and, consequently, a woman could not be forced to marry; otherwise, there were grounds for an annulment. As seen, *Partidas* IV, 5, 1 explicitly applied this principle to Christian slaves who wanted "to marry one another."²⁶² The fact that *Partidas* required the slave to be Christian in order to be protected by the free-consent principle somewhat reinforces my thesis that such a radical principle was due to the sacramental character of marriage.²⁶³

²⁶² See fn n. 185.

²⁶³ For this reason, I do not think that the main reason why Alexander III defended the free consent to marriage was the hope of somehow limiting the power of families and lords, as was suggested by Charles Donahue, "The Policy of Alexander the Third's Consent Theory of Marriage," *Proceedings of the Fourth International Congress of Medieval Canon Law Monumenta Juris Canonici*, Series c, Subsidia, vol. 5 (Vatican City, 1976), pp. 251–281.

The reception of marital consent in the laws of both jurisdictions did not imply the abrogation of family consent and, more specifically, the convenience of the marrying woman to have her kins' permission. Otherwise, patrimonial and hereditary penalties were imposed. The weight of the legal tradition was present and all secular laws regulating the patrimonial aspects of marriage and inheritance contained rules providing penalties for women who marry against the family consent, unless her kin or family were illegitimately intending to keep the woman from marrying whom she wished. Not even Archbishop Jon the Red's provision ignored or disregarded the relevance of the consent of woman's father or relatives, as seen.²⁶⁴

The canon-law principle of marital consent managed to go through to the secular legislation of the Christian medieval society, but could not derogate the patrimonial and hereditary penalties of the former secular laws, even though they might somehow jeopardize or put obstacles to the effective realization of the woman's free consent. However, canon lawyers did not seem to struggle against such penalties. In this regard, the reception of canon-law marital consent in secular laws clearly reflects how civil and canon laws were entangled and intertwined, even though they sometimes neither had the same spirit nor pursued the same goals.

This article was written while the author was a partner in the project Social Governance Through Legislation at the Centre for Advanced Study in Oslo, Norway (academic year 2021–2022).

²⁶⁴ See fn n. 228.