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From France to the Church. The generalization of parish registers in the Catholic countries

Abstract

The generalization of the registration of baptism and marriage in the Catholic countries is shown to be the result of a process in which France used the authority of the Council of Trent to impose on the whole Church a system of public registration it had started to implement through temporal law at home in 1539 so that the clerics in charge of the registration be subject to canonical penalties if they failed to comply. The registration of baptism and marriage was integrated into the Decree on the Reformation of Marriage that France maneuvered to impose on the Church to curb clandestine marriages which had dire effects on estate planning in France given the peculiarities of its inheritance and matrimonial law.

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Introduction

In most of Europe over the 16th century, the registration of life events such as birth, death and marriage, until then uncommon and purely local where it existed, became widespread. According to the prevailing view, the increasing sophistication of the European States that started with the Renaissance and the religious reforms initiated by Luther and Calvin led the former to require more accurate information about their population and the various Churches to enforce a better control of their people. More specifically, reading, say, Jedin's article¹ and Mols's chapter² on the history of parish registers leaves the reader with the notion that the generalization of parish registers within the Catholic Church was the natural outcome of a limited number of early local initiatives. However, a close examination of the sociopolitical and economic context in which the registration of death, baptism and marriage has been introduced in France and later instituted by the Catholic Church lead to conclude otherwise.

The process that led to the generalization of the registration of life events in Catholic countries was initiated by France. The registration of burials was instituted as a tool for the king of France to control the allocation of ecclesiastical benefices. The registration of baptism was implemented for substituting written proof to oral testimony in trials where legal majority had to be proven. The registration of marriage was part of a series of means to put marriage under the control of parents in the legal context of French and, more generally, of continental Civil law, where freedom of testation did not exist and children could not be disinherited by their parents. France took advantage of the Council of Trent to push the Church to impose on the clergy the solemnization of marriage and the registration of baptism and marriage against the opinion of a large fraction of Catholic theologians and prelates who did not want to look to follow the Protestants who had put marriage under the control of parents. The generalization of the registration of baptism and marriage in the Catholic countries occurred as the

Decree on the Reformation of Marriage became part of Canon law and as such became part of the law of most Catholic countries.

This article substantiates this alternative view. We begin by examining the circumstances of the introduction of the registration of death and baptism in France, where it was imposed on the Church by temporal law as early as 1539. We then look at the circumstances that lead to the registration of marriage. We begin by a sketch of the development of the Catholic doctrine of the formation of marriage and a section in which we contrast inheritance law in England, where marriage registration remained problematic at least until 1753, and France, where it was settled two centuries earlier. We continue by summarizing the circumstances of the inclusion of registration of marriage in the Decree on the Reformation of Marriage passed by the Council of Trent, focusing on the demand of the king of France, and the circumstances of the introduction or the solemnization and registration of marriage in France through temporal law, almost fifteen years after the adoption of the Council's decree on marriage. We continue and conclude by setting the advent of registration in the context of the transformation of the French State during the Renaissance, and the way France maneuvered during the Council of Trent to impose it on the Church in the context of the development of Gallicanism. The annex contains some of the legal material we comment in the text.

The introduction of the registration of burial and baptism in France in the 16th century

Although this may seem counterintuitive, the introduction of the registration of death and baptism in France was an element in a wider process by which the king of France, then Francis I, actually reduced the autonomy of the Church within his kingdom. The purpose of the lengthy Royal Order of 1539 in which the institution of burial and baptism registration is a somewhat minor point was to reform the judicial system of the kingdom deeply with two general goals: first, to strengthen the power of the king

and thus reduce the judicial powers of the Church and of the local authorities — mainly the parliaments of the French provinces; second, to make justice more efficient.

One of the most important points of the reform was to reduce the jurisdiction of the Church courts. The order forbade laypeople to ask Church courts to settle matters that were not of strict ecclesiastical substance and limited the jurisdiction of the Church courts on clerics in more or less the same way. The order also imposed the use of the French language in all legal and administrative documents — something that fostered the use of a variety of French dialects in such documents until the end of the 18th century as French was not yet a unified language. The order also included many detailed changes, among which several dealt with the advancement of the use of written evidence in legal proceedings³.

Sections 50 and 52 to 57 institute the registration of the burial of individuals holding an ecclesiastical benefice. The immediate purpose of the registration is clear from the text: providing written evidence of the time of the death of the incumbent. The practical reason why such information was of importance is absent from the text, but is known from a later detailed comment on the royal order by G. Bourdin, a lawyer and “procureur général en la Cour de Parlement de Paris”. Some people were hiding the death of incumbents and using the income from the benefice for themselves. Imposing on local ecclesiastical authorities to register the burial of deceased incumbents and sending a copy of the register to the archives of the nearest royal officer of justice — what Bourdin refers to as “faire registre public” (proceed to the public registration of) — was thought useful to curb that kind of fraud⁴. The intriguing question is why the king of France was so interested in 1539 about the death of the incumbents of ecclesiastical benefices. Properly answering this question takes us back first to the 11th and

12th centuries, the Investiture Controversy and the Gregorian Reform, and then to the Battle of Marignano and the Concordat of Bologna.

In principle, an ecclesiastical benefice is a right, conferred by the Church to a cleric, to receive revenue from church property for some office or spiritual function⁵. The Church had started accumulating property soon in her history and more after she was granted privileges by the Roman authorities such as the right to receive bequests⁶. Secular benefices were attached to secular offices, such as bishoprics, and canonries, whereas regular benefices were attached to abbeys or functions related to abbeys⁷. In theory, at least according to the Church, benefices should be conferred by the Church. However, by the middle of the 11th century, benefices were frequently conferred by temporal authorities, especially in the then still new Holy Roman Empire. This situation had emerged from a variety of causes, among which two seem to have been of more importance: first, the fact that many religious establishments originated as private initiatives from wealthy families who remained the owner of the property whose income financed the benefice attached to the religious establishment; second, the will of the Holy Roman Emperors to manage the Church as if she was part of their state⁸. One consequence of the situation was that the Church became deprived from the authority of conferring many important religious offices as they were bound to benefices she did not control; a related consequence was that many important religious offices were conferred to individuals favored by the temporal authorities who managed these offices and benefices as sources of income similar to a temporal estate, but were unfit for them in the eyes of the Church. What is known as the Gregorian Reform is the effort by the Church, which culminated during the pontificate of Gregory VII, to reform herself and her relations with the Holy Empire and other kingdoms. The reform led to the unification of the churches of Europe under the central power of the pope with little room for the intervention of the temporal authorities into the

Church's affairs. Among other things, the Church reclaimed the power to confer alone ecclesiastical offices and their benefices⁹.

From the beginning of the 16th century, the French kings attempted to take hold of the Duchy of Milan, in Northern Italy, and then part of the Holy Roman Empire. At the same time, the popes were expanding the territory of their state, whose northern border was close to the Duchy of Milan. The French won the duchy in 1499, but lost it ten years later. When newly crowned King Francis I attempted to win it again, in 1515, Pope Leo X took sides against him. King Francis won the Duchy of Milan at the Battle of Marignano in 1516 and in the wake of his victory, imposed on the pope what is known as the Concordat of Bologna by which the King of France got the power to choose the incumbents of the major ecclesiastical offices, about 150 bishoprics and archbishoprics, and about 500 abbeys or priories. According to the concordat, the king would nominate a candidate in the six months of the vacancy of the benefice and the pope would confer the benefice to the nominee chosen by the king. This concordat remained in force until the French Revolution¹⁰.

According to a Catholic historian, Francis I used his newly right to nominate the holders of the major ecclesiastical benefices of his kingdom as an instrument of power and used loyalty to himself as much as religious qualification to make his choice¹¹. This is certainly true, although likely not as novel as it may sound: major ecclesiastical benefices had long been used by the king and noble families for their own purposes. From the king's perspective, nominating the holders of the ecclesiastical benefices was of prime importance for a variety of reasons among which the most significant was that these benefices could not be transmitted by inheritance or otherwise. Unlike other sources of income which were transmitted without the intervention of the king or the Church, such as most estates, ecclesiastical benefices became free to be conferred anew to someone else upon the death of the holder. Having the power to choose the holders of ecclesiastical benefices, the king had the power to choose several hundred people exerting

some form of control or authority in various parts of the kingdom who got their function and income through the good will of the king rather than to their family's fortune. In a context where the king was constantly working at asserting his authority against those of the nobility, the Church and the local parliaments, being able to place his own people within the hierarchy of the Church was a clear victory. From this perspective, being timely informed of the vacancy of each and every benefice was an important administrative task.

Unlike the registration of the death of holders of ecclesiastical benefices, which is detailed in seven sections of the Royal Order of 1539, the registration of baptism is dealt with in a single short section. The purpose of the registration is stated in the section that institutes it, in a simple and direct fashion:

“art. 51. Aussi sera faict registre en forme de preuve des baptesmes, qui contiendront le temps de l'heure de la nativite, et par l'extraict dud. registre se pourra prouver le temps de majorité ou minorité et fera plaine foy a ceste fin.”

The time of the birth, including the exact hour, is registered so that an official copy of the register may serve to prove the time at which a subject reaches the age of legal majority. The purpose is clear and simple. Registering the time of the birth is replacing oral testimony by administrative written testimony for legal purposes. Bourdin provides the same interpretation¹².

As interesting as the mandatory content of the baptism register is the information related to baptism whose registration is not required. The king's interest focuses on the time of the birth and a way to ascertain and prove it for temporal purposes. He shows no interest in recording information about the godfather and the godmother of the newly baptized, despite Canon law considering that being the 'sponsor' of a baptized person was a spiritual relationship that created an impediment to marriage between the sponsor and the child, and between the sponsor and the child's parents¹³. Poor information

about the spiritual relationship arising from baptism contributed to litigation about the validity of marriage¹⁴ and recording the names of the godfather and the godmother could have made justice more efficient. However, the validity of marriage was the main aspect of matrimonial causes that 16th century French law left to the Church jurisdiction and, apparently, the king and his chancellor chose not to use their power over the clergy to simplify the dealings of ecclesiastical courts¹⁵.

With the exception of section 51 on the registration of baptism, all the sections detailing how registration should be implemented are written with reference to the registration of death. This short portion of the royal order reads as a piece of legislation intended for the registration of the death of the holders of ecclesiastical benefices motivated as a means to allow the king using his power to nominate holders in which someone would have added the registration of baptism as an extra feature intended solely at improving the efficiency of the administration of justice by introducing written evidence as a proof of age. The commentary by Bourdin basically states that the purpose of the registration of baptism is simply the one written in the section that institutes it¹⁶. Section 53 requires copy of the registries be sent once a year to the nearest royal officer of justice so that they are available for the administration of justice if needed. Chancellor Poyet, who drafted the royal order¹⁷, is described by his biographers as devoted to the defense of the king's authority against local powers and the Church as well as a practitioner willing to make justice more efficient. Our interpretation is a conjecture, but given the context, it is a likely one that we discuss further in one of the last sections of the article¹⁸.

The burden of maintaining the registers is placed upon the clerics because they are the 'officers' of the kingdom's administration closest to the people, and because they are involved in the religious ceremonies accompanying birth and death. By imposing this burden on the clerics, the king clearly marks his temporal authority on the personnel of the Church within his kingdom. The desire to register the birth comes from the king, not from the Church, and the purpose is temporal and administrative, not

religious. Apparently, the Church as a whole did not feel so strong a need for written proof of baptism as did the king for a written proof of the time of birth. The fact that the imposition of registration of baptism came in an ordinance that reduced the authority of the Church's courts and imposed the use of French rather than Latin in official acts, including the newly instated baptism register, had nothing to please the Church and the Roman authority. Finally, there is no hint of an interest to compile the information collected in the register for whatever kind of statistical purpose — as there is no hint of any such purpose in the development of early parish registers¹⁹.

Consent and the formation of marriage in Roman law and in Canon law

In classical Roman law, marriage is a purely private matter²⁰. Among the wealthy, it is a form of economic alliance between two families. The choice of the spouse is something debated between the child, their parents and other relatives; friends may be involved too²¹. The formation of the marriage is a matter of intention and facts; its continuity is a matter of intention²². Marriage is based primarily on *affectio maritalis* — the fact that both spouses consider each other as spouses. In other words, marriage lies on the *continuous* mutual consent of the spouses. Marriage is a condition from which any spouse must be able to free itself. A marriage contract that would forbid divorce or provide for compensation in case of divorce was void²³. Legally speaking, getting married occurs without any formalities²⁴. Starting to live together as husband and wife is usually accompanied by religious rites and a celebration, often a contract, but neither common life nor the rites or the celebration, not even the marriage contract are legally required, solely the will to live together as husband and wife²⁵. Similarly, marriage ends without any legal formality, either by mutual consent — *divortium* — or by the will of either spouse — *repudium*. When there is no more mutual consent, marriage ends²⁶. In Roman law, property remains separate during the

marriage and spousal support after *divortium* or *repudium* does not exist. In many ways, the marriage from Roman classical law is closer to modern unmarried cohabitation than to modern Western marriage²⁷.

As Gaudemet puts it, the scriptural foundations of the Christian doctrine on marriage are few: two sections in Genesis, some verses of the synoptic gospels which relate the words of Christ that forbid divorce and some verses of Paul's epistles. The doctrine derives from some sections of Genesis that marriage is monogamous; it takes from a few verses of the Gospels and two sections of Paul that marriage is indissoluble. Still the doctrine draws from the Epistles of Paul that marriage is a remedy for concupiscence and that each spouse has the right to use the body of the other²⁸. The Scriptures provide about the substance of marriage, but not about how marriage is made.

On that topic, the Church developed its doctrine using elements from Roman law and from the laws of some of the tribes that invaded the Roman Empire. As a consequence, the canonical doctrine on the formation of matrimony is a mixture. Church law keeps from Roman law that it is the consent of the spouses that creates the matrimonial bond. It takes from the Scriptures that marriage is a sacrament and that once made, the matrimonial bond is indissoluble. It takes from the laws of some tribes which had settled in the Roman Empire that sexual intercourse contributes to the formation of the matrimonial bond — something totally alienate to Roman law. The combination of these principles led to the following rule, developed by the 'decretists': mutual consent, once expressed — even in private and without witnesses, even without parental consent — and followed by sexual intercourse, commits the spouses until death²⁹. According to this theory, marriage is a sacrament in which the spouses are the ministers of the sacrament. The religious ritual is the exchange of consents and the blessing by a priest, although commendable, is not required for the sacrament to be valid³⁰. Given this theory, the Church, through ecclesiastical courts, will play a central role in the appreciation of the validity of marriage — mainly by asserting whether consents were truly and freely exchanged and whether the spouses were not

impeded to marry by real or spiritual kinship — but the presence of a priest is not essential for the formation of marriage, at least not until the Council of Trent.

Inheritance law in England and in France around the time of the Council of Trent

By conferring Roman citizenship to all free inhabitants of the Empire in 212 AD, the *Constitutio Antoniniana* gave to all the people of the Empire the possibility to use Roman private law in their family affairs. Modern scholarship believes the huge work on Roman Law made by Ulpian just before the proclamation of the edict was motivated by the coming change of the scope of Roman Law³¹. The way Ulpian rooted in a very anti-Ciceronian conception of natural law the newly created reciprocal duty of maintenance between parents and children — still a distinctive feature of Civil law and one of the pillars of English-like social assistance since its import in English Law through the Elizabethan Poor Laws — has been interpreted as a clever way of generalizing to the whole Empire an innovation introduced in Roman private law through equity³².

Despite this effort, the march towards a unified private law for all the people of the Empire was impaired by the traditional ‘laissez-faire’ approach of the Roman administration which let matters of private law to local institutions and mediation, stopped by the invasions — the invading peoples kept their laws and actually codified them as soon as they took root in Roman territory³³ —, and, somewhat paradoxically, by the decision by Constantine to forbid appealing to imperial courts from the decisions of Christian diocesan courts which, from the Roman perspective, operated as courts of local law or mediators³⁴. Several centuries later, the compilation of the *Corpus iuris civilis* and of the more recent imperial constitutions — *Novellae Constitutiones* — was part of a larger project of the Eastern Empire to reconquer the West and expand to the entire territory of the ancient Empire the law and institutions of the developing Byzantine Empire³⁵. The compilation was a success, but the military attempt failed and in

the West, the final blow to the very possibility of a unified law came with the dismantlement of the Carolingian Empire. From that moment and for several centuries, there would be no authority in the West with the power to enact new legislation except the Church, and very little material infrastructure to maintain and transmit what was left of legal knowledge. The variety of local customary laws emerged in Europe in this context³⁶.

The unification of law started much earlier in England than in France, during the reign of Henry II who initiated a judicial reform that is traditionally considered to have begun in 1166. This reform aimed at strengthening the royal justice, particularly criminal justice. One of its most important elements was that the king's judges were itinerant, heard cases in different parts of the kingdom and that their decisions were compiled to form a jurisprudence that applied to the entire kingdom, even though at the time there were several different local customs on the territory of England. The royal orders and later the acts of Parliament applied to all England. English law has thus unified by gradually centralizing the exercise of judicial power, without ever being written or codified. It remained a customary law at its core, written in a myriad of judicial decisions, but unwritten in the sense that it has never been codified³⁷.

One of the distinctive features of English private law, when compared to continental Civil law, is the almost absolute freedom with which the individual — in 16th century England, this meant an adult man — can use his property and the ways in which this property may be accrued. Upon marriage, all property owned by the wife — with the exception of paraphernalia, i.e. clothing and jewelry appropriate to her station — becomes property of the husband. By law, the husband has to maintain his wife, but not his children nor any other relative³⁸. By law, the individual enjoys complete freedom of testation which implies, among other things, that the father may deprive his children of any inheritance and divert part or whole of his property to any person or society, especially the Church or a religious order.

Things were quite different in France. The territory of modern France suffered the collapse of the Carolingian Empire and lived through the development of local customary law as much of the rest of the former Western Roman Empire, but its territory was late to unify in a consistent way. By the time the royal power could have envisioned the kind of centralization of judicial power that had been initiated in England in the 12th century, local powers had developed their own institutions and the various customs had become established. In most provinces of the kingdom, preserving and making changes to the custom became the prerogative of the local parliament — not an elected legislative body, but an appeal court with several important additional powers including that of promulgating royal orders in the province. In Ancient France, the king was deemed ‘le gardien et le protecteur des coutumes du royaume’ — guardian and protector of the kingdom’s customs³⁹. The meaning and scope of this protection changed over time. Until the 15th century, customary law is unwritten and must be established by the parties during the trial as part of the evidence. Two royal orders of the second half of the 15th century, one by King Charles VII in 1454 and the other by King Charles VIII in 1498, require that the customs be ‘accordées par les praticiens du pays’ and ‘décrétées et confirmées par le roi’ — agreed upon by the legal practitioners of the land (i.e. the province, city or county), then decreed and confirmed by the king. Practically, the custom was written down by the practitioners, then submitted to the king’s commissioner, passed by the assembly of the three orders of the land, i.e. clerics, nobles and bourgeoisie, and finally decreed by the king⁴⁰. The intervention of the king’s commissioner, sometimes several of them, allowed the royal administration to intervene in the substance of the customs and, among other things, placed them under the influence of the rediscovered Roman law now taught in the universities of the kingdom⁴¹.

Summarizing matrimonial property law in Ancient France is a convoluted endeavor, as it entails distinctions between customs which kept the dowry ‘regime’ from Roman law — mostly Southern

provinces — and, among the customs which did not keep this feature of Roman law, further distinctions between customs that preferred common property, and those which gave more importance to separate property. However, whatever the peculiarities of the local custom, married women remained owner of whatever property they had at the beginning of the marriage or received through inheritance or bequests afterwards, even in a community regime, although in most cases women lost the power to manage their property to their husband for the duration of the marriage⁴².

Summarizing inheritance law in Ancient France is even worse. Ourliac and de Malafosse state bluntly that the variety of inheritance law in medieval French customs was a disparate collection of rules, at times truly bizarre, some based on the condition of the people or their relationship to the deceased, other varying according to the nature or the origin of each component of the estate⁴³. However, behind all this variety lied a common principle: the family was more important than the individual. Estates had to *go back* to the family, and any intent by the individual to divert a portion of the estate away from the family was suspect. The individuals barely had transitory rights on their wealth which truly belong to the family⁴⁴. How much of their wealth individuals could divert from the family varied across customs, but it was always limited to a fraction of the estate, usually a small one⁴⁵. Depriving a child from their inheritance was not permitted except in very special circumstances and courts of justice were extremely reluctant to allow it⁴⁶. A large number of customs imposed the estate to be equally distributed among the surviving children⁴⁷.

The origin of the striking difference in the principles of inheritance law between the English common law and the various French customs has been recently related to the history of their family forms by E. Todd⁴⁸. In his book, he interprets the geographical dispersion of the variety of family systems over the world as the result of a spatial diffusion process similar to that of languages. The inheritance law typical of English law would be a late development of an earlier ‘custom’ in which

parents were contributing to the establishment of their children more or less in the order they reached the age to form a family of their own, much of the relevant transmission of property occurring before the death of the parents. The equalitarian principle that governs French inheritance law even today would have developed as a reaction against a former truly patriarchal system. England, because its situation at the periphery of Eurasia has protected it from the diffusion of the 'full' patriarchal system, would have kept a very ancient system of intergenerational transmission of property whose remnants can be found among American First Nations, which were also protected from the diffusion of the patriarchal system by their geographical situation.

One consequence of the very different principles of inheritance law in France and in England is that making a will, at least for chattels, was almost a requisite in England, whereas in France, successional matters were dealt with primarily in the marriage contract⁴⁹, which, by law, had to be concluded before the wedding and could not be modified afterwards⁵⁰.

The Council of Trent and the reformation of marriage

The Fifth Council of the Lateran ended in March 1517 without proposing the reforms some had been already waiting for. Later in the same year, Martin Luther started what would become the Reformation by issuing his 95 theses. The Council of Trent was the answer of the Catholic Church to the Reformation, but it did not open before 1545 and once started, could not proceed uninterrupted. The Council had three distinct periods of activity, from 1545 to 1549, from 1551 to 1552 and from 1562 to 1563. Although one of the main motivations for the Council was to reform the Church in a way that would allow her to remain united and Protestants were invited to attend it, this attempt failed. The most emblematic sign of this failure is that the last period of the Council occurred after the 1555 Peace of

Augsburg, the treaty which recognized the division of the Holy Roman Empire between Catholic and Protestant states, the subjects of each state having to profess the faith of the sovereign.

Although the Council finally passed a series of decrees of reformation, many of them dealing with sacraments, theology or Canon law, most of the debates and politics of the Council revolved around the then many-faced relation between the Church and the State. The most contentious points were, again, the right of the sovereigns of Catholic states to nominate bishops and other incumbents of ecclesiastical benefices — as well as a series of related issues such as limiting the then common accumulation of benefices and forcing the holder of a benefice to reside in the locality to which the benefice was attached —, the right of the sovereigns to accept or reject new decrees from the Church in their state — a power the king of France had gained with the Pragmatic Sanction of Bourges in 1438 but had renounced, in theory, in the Concordat of Bologna —, whether the authority in the Church belonged to the councils or to the pope, and the extent of the autonomy of bishops and abbots relative to the pope.

Compared to these issues, the debates about ‘pure’ matters of theology or Canon law were of secondary importance during the Council despite the truly theological nature of many of the Luther’s theses that fueled the Reformation and led to the Council. This context helps understand how the Council was organized and who attended it. The attendees were clerics, but some, the legates, were representing the pope who stayed in Rome, others were ambassadors from the Catholic nations — among which the ambassadors of France were very active in the last period of the Council —, while others were delegates from their nation, but as theologians or canonists rather than as representatives from their sovereign. Matters of theology were debated by assemblies of theologians, but the decisions that would become part of the decrees were usually made during assemblies where ambassadors and legates were prominent⁵¹.

There is a large literature on the canonical doctrine of marriage before the council of Trent, of which the most authoritative remains the work by Esmein⁵². However, Coontz provides a very convenient summary of the doctrine that made clandestine marriage possible:

“The Lombard doctrine boiled down to this: A freely given consent to marry trumped all other formalities that the [IV] Lateran Council had laid out so carefully. If a couple said, using the present tense, ‘I take thee as my husband’ and ‘I take thee as my wife’, they were married, with or without witnesses, banns, blessings or anything else, whether they said the words in a chapel, in a kitchen, a field, or a barn, and whether or not they had ever had sex or taken residence together.

The Church viewed a clandestine marriage as disobedient, illicit, even reprehensible, but nonetheless valid. The core principle of Christian marriage was that an unbreakable bond was created by the consent of the two parties. Consequently, although marriage was seldom a matter of free choice in any sense recognizable today, it was easier in medieval Western Europe to get married without the permission of parents and social superiors than it had been in the past or was in most other contemporary kingdoms or empires.

But while there were now more ways to get into a legally recognized marriage, there were fewer ways to *get out* of it.”⁵³

This doctrine was of limited consequence in England where fathers could control their children’s behavior through the threat of disinheritance, either implicit or explicit⁵⁴. However, it had the most unfortunate consequences in France where successional matters were dealt with in the marriage contract that had to be finalized before the marriage occurred and where disinheriting a child was next to impossible. Children marrying without the consent of their parents imposed on their lineage, not only

their close family, an economic alliance with another lineage, not just another family, the parents had not chosen, deprived them of the main instruments of estate planning by marrying without a marriage contract and without having negotiated what portion of their wealth each family would transfer to the new couple. In a society based on the accumulation and transmission of wealth and status, children marrying without the consent of their parents were a disaster for at least one lineage and potentially two.

Marriage was debated for the first time in the Council in 1547, during its first period, by an assembly of theologians. However, the debates that lead to the Decree on the Reformation of Marriage were held in 1563, during the last period of the Council. Between the first and second periods, Henry II, then king of France, published the Royal Order of 1556 against clandestine marriages⁵⁵. According to this decree, children who got married without the consent of their parents should be deprived of their inheritance and lose all donations they may have received from their parents, through their marriage contract or from their marriage through the customs and statutes of the kingdom. The introductory chapter of the order makes clear that this piece of legislation had been enacted as an answer to requests from fathers from a large social section of the kingdom. Clandestine marriages were a problem because of the provisions of inheritance law and of matrimonial law, on the one hand, and of Canon law, on the other, and the royal order was an attempt at curbing them. However, disinheriting children ran strongly against the principles of French customary law and despite the provisions of the royal order, received little support from the courts and did not contribute significantly to reduce the number of clandestine marriages.

Early in February 1563, the legates ‘proposed’ the eight articles on marriage that theologians were to examine the following week⁵⁶. Pallavicini illustrates how the topics debated by the Council were chosen⁵⁷. Requests to discuss a topic were presented to the pope’s legates by the ambassadors of the nations which were taking part in the Council, and the legates then retained the topics they saw fit for debate, routinely

trying to dismiss those they thought would provoke a confrontation between the pope and the sovereigns of the Catholic nations. The eight articles on marriage to be debated by the theologians had been selected in this way, originating as requests from at least one embassy and retained by the legates as not too sensitive. They were: 1) whether or not marriage is a sacrament, 2) whether or not fathers and mothers may annul the clandestine marriage of their children and whether the Church should consider such marriages null in the future; 3) whether the husband may marry another woman after repudiating his wife for fornication and whether there are other legitimate causes for divorce; 4) whether Christian men may have more than one wife and whether forbidding marriage at certain times of the year is a pagan superstition; 5) whether marriage is better than celibacy and whether God grants more grace to married people than to other people; 6) whether priests from the Western Church may get married; 7) whether the prohibited degree of kinship for marriage should be restricted to those found in chapter 18 of the Book of Leviticus; 8) whether impotency and ignorance at the time of contracting marriage are the only cause for its dissolution, and whether matrimonial causes were jurisdiction of the temporal princes⁵⁸.

Hefele provides a series of reference to the works of Protestant theologians related to these articles⁵⁹. More specifically, Esmein and Le Bras summarize the ideas of Luther, Calvin and Erasmus on clandestine marriages: all of them thought they were invalid or should be annulled, either by the Church or by the parents⁶⁰. The second article was rather proposing a radical solution —as well as temporal and private — to the long-lasting problem of clandestine marriage that several councils had tried to curb down notably, and with limited success, through the imposition of banns. Although none of the authors of the three authoritative histories of the Council specifies the origin of the second article, their reports about the future debates would make clear it was strongly supported by the French ambassadors.

The account historians offer of the dispute around the organization of the debate on the articles about marriage is fun reading, but provides relevant information about the power of the head of the French embassy even in the organization of a theological debate. At that time, the French embassy to the Council was headed by Charles de Lorraine, cardinal of Guise. He was born in 1524, and held the title of duke of Guise before becoming archbishop of Reims in 1538, still aged 13. He and his brother had managed to govern France during the short reign of young King Francis II. In 1563, he was still the archbishop of Reims and had been cardinal since 1547. His appointment as archbishop is a nice example of the use of the right to nominate holders of ecclesiastical benefices by the king of France. According to one of his biographers, the various benefices he held provided him 300,000 'écus' in annual income⁶¹.

The legates were in charge of organizing the theological debates. In order to restrain the duration of the debates, they had decided to group the theologians into four commissions, to assign the debate of a limited number of articles to each commission and to forbid theologians of each class to debate articles assigned to another commission. This organization had been devised by the legates jointly with cardinal de Lorraine. According to Jedin, the theologians who had been assembled to debate the articles on marriage were among the best of the Catholic nations. He also points out that most of the group was coming from France and Spain, but only a few from Italy. The debate extended until 22nd March⁶².

Jedin provides a summary of the debate on clandestine marriage⁶³. Most theologians understood clandestine marriage as the exchange of consent by minors without the consent of their parents and usually without witnesses, but some of them understood the expression as referring to all exchange of consent without witnesses. All but three agreed that such marriages were valid and all rejected the notion that fathers and mothers could invalidate them. Most agreed that the Church had the capacity to invalidate clandestine marriages. This capacity could be implemented either by declaring null marriages that were not conducted as a public act, or establishing lack of publicity as a diriment impediment.

Tallon provides an analysis showing that during the debate on marriage that took place during the first period of the Council, most French theologians hold that clandestine marriages were valid, whereas during the debate that occurred in the third period, most of the French theologians who debated the articles on marriage held the opposite view, but, as he puts it, in a way that let them “reconcile their conscience as bishops and their duties as subjects”⁶⁴.

On 21st June, a conciliar commission was mandated to prepare the proposal of the Decree of Reformation of Marriage, based on the conclusions of the theological debates, which would be later submitted to the council plenary. Matters to be presented to the plenary were agreed on between the legates who debated them first with Charles de Lorraine and then with the other ambassadors⁶⁵. The proposal comprised eleven canons and a decree on clandestine marriage, and was distributed to the prelates on 20th July. Canon 3 said that marriages contracted freely, but without parental consent were valid and that fathers and mothers could not declare them null. However, the accompanying decree declared null marriages contracted without witnesses as well as marriages contracted without parental consent by sons younger than 18 and daughters younger than 16⁶⁶.

On 24th July, the French ambassadors presented to the council a request on clandestine marriages originating from the Royal Council. The king wished that clandestine marriages be considered null and if, for some reason, they could not be all considered null that at least marriages contracted without the presence of the vicar and of at least three witnesses be considered null, as well as marriages contracted without parental consent. Acknowledging that some parents were delaying the marriage of their children only to avoid establishing them — that is, providing daughters with a dowry and sons with a portion of the family’s estate —, the king further requested that the council prescribe the age at which sons and daughters could get married without their parents’ consent⁶⁷. Not surprisingly, Charles de Lorraine supported the notion that clandestine marriages should be considered null, and added that the age at

which children should be allowed to get married without their parents' consent should be 25 for sons and 20 for daughters⁶⁸. Hefele also reports that some of the prelates supported clandestine marriages as they were a way to avoid forcing young men and women whose parents delayed marriage into having illicit sexual relations⁶⁹. He also refers to the French Royal Order of 1556 against clandestine marriages in his account of the debates of the plenary as an explanation of the importance French ambassadors gave to the matter⁷⁰.

According to Le Bras, the debates were clearly dominated by the fear of giving the impression that by accepting the nullity of clandestine marriages, the Church was accepting the Protestant ideas on marriage⁷¹. Despite their length and some turmoil, the conclusions of the new series of debate were not substantially different from the conclusions of the debates by the theologians. Marriage was a sacrament in which the spouses were the ministers of the sacrament and thus, a marriage without witnesses and without the consent of the parents was valid even if illicit. However, without changing the nature of the sacrament, the Church could make future clandestine marriages invalid by imposing a new diriment impediment, that is declaring that exchanging vows in presence of witnesses would be required for a valid marriage in the same way as having reached a given age, not being already married, not being a close relative of the other spouse and not acting under constraint. This was one of the main elements of the Decree of Reformation of Marriage and this is the solution the Council finally agreed on. The vicar was to be among the witnesses not because he was becoming the minister of the sacrament, but because he was now required as a witness and because he was given the task of investigating the existence of other impediments and preparing the banns that had been required since the Fourth Lateran Council and were now required as part of the publicity of the marriage⁷². The final versions of the canons and of the decree were polished during the following weeks.

The French Royal Council had stated its wishes clearly in the request presented on 24th July. The goal was to make marriage without the consent of the parents impossible. If changing the canonical requirements of a valid marriage was impossible, adding administrative requirements to the truly canonical requirements could be a way to make marriage without the consent of the parents practically impossible and maybe even ‘administratively’ invalid. The debates had made clear that explicitly adding the consent of the parents to the canonical requirements of marriage was not feasible, but that adding administrative requirements was possible. Thus, the French authorities drafted a new proposal to make invalid a marriage that would take place without witnesses, without the vicar as one of the witnesses and without an official attestation that the spouses had exchanged their vows in front of these witnesses. The French did not create these requirements from thin air. They copied them from a constitution of Emperor Justinian I dated 538 AD in which, to avoid uncertainty about their marital situation, high officers of the Empire are required to get married in a church, in front of the bishop and at least three priests, and have an attestation of the wedding be signed by the bishop⁷³. From the perspective of the French, it was a precedent that showed that supplemental administrative or formal requirements that do not change what makes a marriage truly valid were acceptable for the Church.

According to Rassicot, the Decree on the Reformation of Marriage was actually written by François de Beaucaire, bishop of Metz and secretary of Charles de Lorraine⁷⁴. This and the insistence of the French ambassadors to have clandestine marriages declared null give some motive to start looking at the decree from the perspective of the French administration.

The Decree on the Reformation of Marriage did not change the canonical doctrine of marriage, but added the administrative requirements requested by the French to the conditions that make a marriage valid. From the perspective of the Church, the spouses remained the ministers of the sacrament and the vicar was a witness whose presence was required for the exchange of the vows to make a valid marriage.

Almost by passing, the decree adds that

“The parish priest shall have a book, which he shall keep carefully by him, in which he shall register the names of the persons married, and of the witnesses, and the day on which, and the place where, the marriage was contracted.”

In this formulation, the written attestation of the imperial constitution becomes an inscription in a register. The technique has already been used in the Royal Order of 1539 for the registration of deaths and baptisms. However, the registration of marriage does not seem to have been debated by the theologians or during the plenary, and if it was ever debated, none of the historians who wrote about the Council has bothered to report such debates. In other words, the registration of marriage was added to the requirements for a valid marriage by the French embassy without any discussion by the theologians, the canonists, the legates or other embassies.

Unexpectedly, the second chapter of the Decree on the Reformation of Marriage introduces the registration of baptism. This is quite intriguing as the Council had adopted new canons on baptism in its seventh session and there was not a hint of an interest in these canons for the registration of baptism. Again, there is no hint of a debate of the registration of baptism during the debates on marriage, but the decree simply states that the vicar should register the baptism and the names of the godfather and the godmother as a way to simplify the control of the impediments to marriage that arose from the spiritual relation created by baptism. According to Canon law, the person who administers baptism, usually but not necessarily a priest, as well as the godfather and the godmother of the baptized contract with the child and with their parents a spiritual relationship that is an impediment to marriage that would make the marriage void without a dispensation. The use of the registration of marriage that was of no interest for the king of France in the Royal Order of 1539 now becomes the justification of the registration of

baptism. At first sight, this may look awkward, but given the nature of the relation between the Church and the State in France at that time, it makes sense. The king viewed the Church, in his kingdom, as a part of his kingdom and felt he had the power to use the clerics as if they were civil servants. That said, the French clerics were part of the Church and had a genuine interest in the Church. Adding the registration of baptism to the duties of the clerics through ecclesiastical law did not deprive the king of any of its prerogatives, but make the requirement more palatable for the Church. Adding to the baptism register the names of the godfather and of the godmother was of no use for the administration of temporal law, but made sense for the administration of ecclesiastical justice as the affinity was an impediment to marriage and the validity of marriage was one of the few matters related to matrimony that the temporal law left to ecclesiastical justice. By adding the registration of baptism and recording the names of the godfather and godmother to the decree of the reformation of marriage, the French embassy to the council gave the Church the kind of tool that France had started to implement for the enhancement of temporal justice. The clerics from the French embassy were both subjects of their king and high-ranking members of the Church. By introducing the registration of baptism in the Decree on the Reformation of Marriage, they did their best as subjects and as clerics. They gave their king what he wanted, and used the opportunity to give the Church something useful that she had not bothered to consider by herself.

The Royal Order of 1539 had instated the registration of the death, actually the burial, of holders of ecclesiastical benefices as well as that of baptism. As we have seen earlier, the most pressing desire of the king was apparently to instate the registration of the deaths of the holders of benefices, useful for the exercise of the power to nominate the holders of major benefices, while the registration of baptism, a means to make justice more efficient by providing a written proof of age, was likely an opportunistic addition by the chancellor. The Royal Order of 1539 imposed penalties on the persons who do not

report the death of the holder of a benefice to the local Church authorities, but did not impose penalties on the clerics who did not register death or baptism. This would have been difficult without provoking a fight with the Church which considered that she had a complete, sole and unalienable power of justice over clerics for matters related with their actions as clerics. Making the vicar responsible for the publicity of marriage, the presence of witnesses, his own presence, forbidding him of marrying people who were not his own parishioners, and finally making him responsible for the registration of baptism and marriage as part of his duties as a cleric in a decree from a Council made possible imposing penalties on him if he did not abide by the new rules. The decree imposes penalties to the clerics who do not abide by all the new rules impose by the decree, including the registration of baptism and marriage. The registration system initiated in the Royal Order of 1539 rested upon clerics and on local royal justice officers —“*baillif et sénéchal royal*”. The royal justice officers, unlike the members of the higher courts of justice, such as Parlements and Conseils souverains, were king’s men rather than members of the nobility who resisted total allegiance to the king’s will. Officers of the king were subject to the discipline of the prince in the way clerics were subject to the discipline of the Church. The Decree on the Reformation of Marriage gave the king of France almost what he wanted — parental consent was still not required —, the registration of marriage, and penalties against the clerics who would not apply the new rules including the registration of baptism and marriage⁷⁵. There was nothing in the decree of the Council on the registration of deaths or burials. Given than the death of the former spouse makes a married person free to marry again, it would have been easy to relate the registration of death with the validity of marriage and thus to include its registration in a decree on marriage. However, the registration of burial in France was still limited to the death of incumbents of ecclesiastical benefices who, by the very nature of their office, were barred from marriage, and had been instituted to help the temporal authority appoint the holders of these offices, one of the most contentious issued debated during the

Council. By 1565, the extension of the registration of burial to all was almost certainly already planned by the French administration, but if, however unlikely, the jurists of the French State Council had attempted to implement it first through Canon law, the French ambassadors to the council or the legates in charge of weeding out the proposals that might provoke a confrontation between the pope and the sovereigns would probably have thought advisable to avoid the matter completely. The registration of burial had to wait.

The introduction of marriage registration in France

In theory, the king of France had renounced his right to accept or reject new decrees from the Church for his kingdom in the Concordat of Bologna. Now, in Trent, the king of France had managed to get a reformation of the marriage that almost perfectly suited his needs and wishes, but on more core issues, many decisions of the Council were far from what he was willing to accept. The king acted as he still had the freedom not to promulgate the decrees of the Church in his kingdom. Consequently, France never promulgated the Council of Trent and the decisions of the Council of Trent were never made part of the law of France. Not promulgating the Council implied that in France, Canon law remained as if the Council had never taken place, clandestine marriages remained valid and thus, children could get married easily without the consent of their parents with the dire consequences for estate planning that the Decree on the Reformation of Marriage was supposed to eliminate. Given the importance of the matter, French authorities proceeded to deal with it using temporal law.

This was done as part as of the Royal Order of 1579⁷⁶, a piece of legislation almost as large and ambitious as the Royal Order of 1539. The royal order imposes in France, through temporal law, ‘administrative’ conditions for marriage very similar to those that had been included in the decree of reformation because of the insistence by the French to have them included in Canon law. These

conditions include the publication of banns, the public solemnization of marriage before several witnesses including the vicar, as well as registration. It also introduced provisions that explicitly condition the possibility of marriage to the formal consent of the parents, which the Church had rejected. In the royal order, all the pieces of the French vision of the formation of marriage fit in five sections, numbered 40 to 44: the goal is to insure that children cannot get married without the consent of their parents, solemnization and registration are means so that the goal could be met.

Interestingly, the registration of marriage also appears in section 181 of the order. Unlike sections 40 to 44 which have at time quite a sinister tone — children who get married without the consent of their parents should be disinherited and adults who would help children to marry without the consent of their parents should be put to death —, section 181 is rather neutral. In order to provide justice with written evidence of important life events, parish priests are indirectly required to maintain registers of baptisms, marriage and burials, and directly required to transmit a copy of these registers once a year to royal officers of justice so that they could use for the administration of justice.

In the Royal Order of 1539, the registration of baptism is introduced in a simple straightforward way, without much context, right in the middle of a series of sections dealing with a sensitive topic — the power of the king to assign ecclesiastical benefices that became free by the death of their holder — in which the tone of the legislator is almost as menacing as in the sections on marriage in the Royal Order of 1579. Likewise, in the Decree on the Reformation of Marriage and in the Royal Order of 1579, registration appears as a kind of appendix to the important provisions, primarily the solemnization of marriage and, in the latter, making parental consent a condition of marriage.

The capacity to manage ecclesiastical benefices freed by the death of their holder was of outmost importance for the king. Maintaining their capacity for estate planning was of outmost importance for all

wealthy parents of the kingdom. These topics were 'hot' and, as the second proved more difficult to tackle than the first, justified that a lot of the dealings of France during the Council were spent on it and that later, very strong provisions had been included in the Royal Order of 1579. The number and the tone of the sections of the two royal orders make the reader feel the importance of the topics which were dear to the king himself and too many of his subjects respectively. Truly, the king and large social section of the kingdom were behind these sections.

The tone of the unique section on baptism registration in the Royal Order of 1539 and the tone of the unique section on the registration of baptism, marriage and burial in the Royal Order of 1579 points to a different source. Finding a way to get better written evidence of life events for the sake of the administration of justice may be important, but it is not something that can foster passion as the power to distribute sources of income or the power to manage one's estate properly. It is something only officials may truly believe important. The tone of these sections conveys the feeling that some bureaucratic personnel within the French administration envisioned the introduction of a kingdom-wide system of registration of life events using the Church as manpower, but for the benefice of the temporal judicial system. The way they are woven into sections about more passionate topics convey the feeling that these bureaucrats took advantage of the passion invested in ecclesiastical benefices and estate planning to introduce what they were interested in as part of the solution of the more passionate problems.

The institution of registers and the transformation of the French royal administration during the Renaissance

The early local parish registers studied by Mols were implemented for a variety of reasons that, in most cases, are not well known. However, given the circumstances in which they were implemented in France

and those in which they were ‘adopted’ by the whole Church, it is clear that the generalization of parish registers in the Catholic countries had nothing to do with the will of the developing Renaissance states or of the Church to control their people or to know more about them. The registration of burial was implemented as a tool to help the king of France take advantage of his power to choose the incumbents of major ecclesiastical benefices. The registration of baptism was implemented first a tool to help streamline and accelerating the administration of temporal justice by substituting written evidence to oral testimony for a factual matter, the time of birth of someone. The registration of marriage was implemented as one of the administrative means that put the parents in control of the marriage of their children — actually a secondary means, as the solemnization of marriage in the presence of the vicar and other witnesses was the primary one. In this case, the Church only reluctantly accepted to impose this form of control on children and the French had to fight against the traditional pastoral view that the freedom to get married without the consent of the parents was a way the doctrine of the Church offered to children to circumvent parents who were unduly postponing or preventing the marriage of their children for material reasons. The French State did not push on the registration of marriage to gather information of its people or to control their behavior, it promoted it because it wanted to give families control over the marriage of their children.

Before the Council of Trent, the Church showed very limited interest in developing, or imposing on herself, a system of registration of life events. Mol’s painstaking study of early instances of parish registers show that they were local initiatives, in a parish or in a diocese, taking a variety of forms, registering different sets of events, keeping different sets of information on each event and whose real purposes are not always known. However, church courts in all Catholic countries, even in Gallican France, had to decide on the validity of marriage and the impediments that could invalidate a marriage included the age of the spouses at the time of marriage, the people who were their godfather and

godmother, whether they had already been married and, if so, whether their spouse had died. In other words, generalizing the registration of baptism, marriage and burial would have been in the best interest of the administration of ecclesiastical justice. The fact is that Church courts, as temporal courts of all sorts, had a long tradition of oral testimony and that Church courts, each of them an isolated body within a diocese, were not in a position to impose the administrative changes needed to move towards the use of written proof. The Church, in her fear of the development of national churches, never favored strong coordination between dioceses and never instituted a hierarchical level between the diocese and the Holy See. That said, whatever the reasons, no one, in the Church herself, did what Chancellor Poyet did in France: beginning the implementation of public registers that would provide written evidence of factual events and hopefully accelerate and streamline the administration of justice. Such a decision was unlikely to be taken by anyone in the Church in those years, but it was in line with the nature of the transformation that the French royal administration was undergoing then.

During the Renaissance, the French royal administration developed by incorporating highly educated people. At that time, universities, and typically the Université de Paris, had four faculties: arts, law, medicine and theology. Given the nature and purposes of the royal administration, the only relevant source of highly educated people was the faculty of law. Thus, the royal administration developed by incorporating jurists and became what R. Mousnier dubs a judiciary state⁷⁷. This was done in a peculiar way. The royal administration needed highly educated personnel, but maneuvered in such a way that the various administrative and judicial offices that comprised the new administration had to be bought and could only be kept by paying annual royalties. Once acquired, an office could be transmitted as an inheritance; the offices of the judiciary state thus became hereditary. Some of the most prestigious offices were that of members of the local parliaments. The new elite of the royal administration was soon officially integrated into the nobility and became known as “noblesse de robe”, literally Nobles of

the Gown, coexisting with the traditional nobility of military extraction that became known from then on as ‘noblesse d’épée’, Nobles of the Sword. As university trained jurists, Nobles of the Gown had studied Roman law, the main topic of studies in law in Europe universities since the rediscovery of the *Corpus iuris civilis* in the late 11th century. In the tradition of Roman law and of continental customary law, they were also familiar with the uncontentious legal practice of the notary, a public officer of private law specialized in the drafting and conservation of contracts and invested with the power of delivering authentic copies of such documents. Chancellor Poyet, as later President Bourdin, were Nobles of the Gown. Such people had the knowledge and held positions that enabled them to envision the use of written proof and systematizing this use in a system based on the registration of information, its conservation and the deliverance of authentic copies when needed.

The influence of this section of the French nobility on the topics we discuss in this article might have been even larger than what we already explored. A. Burguière suggests that the legislative initiatives to curb clandestine marriages as well as the heavy involvement of France in the preparation of the Decree on the Reformation of Marriage were steered by the Nobles of the Gown as part of a wider move to impose a patriarchal legal system of private law that would help them secure the intergenerational transmission of their wealth and offices⁷⁸. Nobles of the Gown were wealthy and had a vested interest in controlling the intergenerational transmission of their wealth and offices. Thus they had the knowledge, hold the positions and, in this case, had the interest to steer the evolution of private law and they may very well have acted as A. Burguière suggests⁷⁹. They devised a solution based, among other things, on a piece of late Roman law in which elite citizens are required to have their marriage solemnized in presence of the bishop and witnesses, and the marriage itself confirmed in an official document. That said, Nobles of the Gown were not the only ones affected by clandestine marriages. Merchants, craftsmen and even small land owners were affected as well and thus royal action aiming at

enforcing parental control over marriage may have been steered by Nobles of the Gown, but it was supported by a very large fraction of the people.

France and the Church: Gallicanism.

From a political perspective, the Reformation is the process by which several Catholic countries severed their political link with the Roman authority. In medieval and Renaissance Europe, the Church was both an international organization and a collection of national organizations, and within each country, it exerted some form of temporal power. Sovereigns typically tried to limit the power of the Church in their land, the most contentious issues being usually the extent of the jurisdiction of the ecclesiastical courts and the power to choose the incumbents of ecclesiastical benefices. Reformed countries came to deal with the issue in a radical way by nationalizing the Church. France acted in a different way by developing what is known as Gallicanism. Gallicanism is a practical way to organize the relations between the State and the Church as well as a theory of such organization⁸⁰. Practically speaking, it operated partly as a coalition between the king and officials of the Church of France against the Roman authority with a strong insistence on the notion that the supreme authority of the Church belonged to the councils, general and local, rather than to the pope, and partly through royal orders, such as those of 1539 and 1579, and the action of the parliaments which aimed at limiting the judicial powers of the Church to a narrow definition of the spiritual. The Pragmatic Sanction of Bourges was a royal order promulgated by King Charles vii after having been debated and passed by the general assembly of the Church of France. Through it, the king became the guardian of the freedom of the Church of France against the encroachments of the Roman authority. Among other things, it gave France the power to promulgate, or not, decisions of the councils on its territory. The Pragmatic Sanction was an autonomous decision of the Church of France clearly intended at limiting papal authority and was never

accepted by Rome. The Concordat of Bologna was a diplomatic convention between France and Rome and thus, from the start, it was recognized by the pope. In order to get the concordat, King Francis I had to revoke the Pragmatic Sanction. On important matters, such as the promulgation of the Council of Trent, the king of France would act as if the Pragmatic Sanction was still in force.

The relation between the State and the Church operated in a complicated way that might involve cooperation when interests were not diverging and outright fights when they were. Reformed countries put an end to that cycle. Gallicanism is the way France developed to get as much control as it needed over its Church without breaking away from Rome. In Trent, it allowed France to maneuver so that the council passed the Decree of Reformation of Marriage its officials had drafted and it allowed France not to promulgate the council without being chastised by Rome.

Conclusion

Registers became generalized in the Catholic countries through a series of specific events in which the Church had a passive role and the main agent was the French royal administration. French jurists of the royal administration appear to have envisioned as soon as 1539 a registration system of the major life events designed to substitute written proof to oral testimony for factual information in order to streamline the administration of justice. Parallel to this rather abstract project, the political life of the time revolved around the interest of the king and those of the prominent families, and two problems, the power of the king to choose the incumbents of major ecclesiastical benefices and the difficulties that the canonical rules on the formation of marriage created for French families under French inheritance and matrimonial law could be solved, at least in part, by the institution of the public registration of marriage. Jurists of the royal administration who drafted the royal orders of 1539 and 1579 implemented the registration system they had devised, partly as solutions for the problems of the king and of the

families, partly for the more abstract sake of streamlining the administration of temporal justice. The registration of baptism and marriage was imposed on the Church by the French as secondary means to implement indirectly parental control of marriage. With this, France, and presumably the jurists of the judicial state, maneuvered so that the clerics who had the burden to maintain the registers did so under Canon law, which made them punishable by Church courts if they failed to do so. To make the new burden palatable to the Church, the French included the registration of information useful for the administration of ecclesiastical justice to the information of a more temporal nature originally required in the system they had devised. The Church would progressively understand the advantages of the mission she had received as she became, for the lay people, the depository of information that would become routinely required for administrative purposes. The addition of the registration of burials to the duty of the clerics outside France came from the Church herself, as those of first communion and confirmation, important events from the perspective the Catholic Church, but deprived of any interest from that of temporal justice.

Gallican France did not promulgate the Council of Trent. The other Catholic countries just let the Church do her business and thus let their vicars implement the registration of baptism and marriage as required by the council, further letting the Church add the registration of burials, first communion and confirmation when she decided to implement them. At the end, by imposing the registration of marriage and baptism on the Church mainly to ensure that this registration would be done properly by the clerics in their own country, the French managed to generalize parish registers in all Catholic countries, something that would not have been possible without resorting to the international nature of the Church and the universal and top-down authority of a general Council.

Controlling the behavior of its people by the Church and the will to gather statistical information about the population by the State played no role in the process that led to the generalization of parish

registers in the Catholic countries. The first may have been a factor in Reformed countries as early as in the 16th century. The second could not have been one anywhere in Europe before the advent of economic policy and the active involvement of public administration in matters of production and provision roughly a century later. Mercantilism required having a population policy and thus having information about the population⁸¹. It became the main economic policy in 17th century Europe, at a time France royal administration transformed itself and moved away from being a judicial state towards something more involved in economic matters. It could very well have been the motivation for the Swedish administration to use its national Church to implement a form of census in the late 17th century through the use of registers of parishioners and to create what amounts to the first official national statistics agency a few years later⁸². But by then, parish registers had been implemented in the Catholic countries for more than a century.

Notes

¹ JEDIN, Hubert. 1943. “Le origini dei registri parrocchiali e il concilio di Trento”. *Il Concilio di Trento*, anno 2 no 4, p. 321–336.

² MOLS, Roger. 1956. *Introduction à la démographie historique des villes d'Europe du XIV^e au XVIII^e siècle, 3 volumes*. Gembloux (Belgique): Éditions J. Duculot S. A., p. 1-71–102. Mols rightly insists on the difference between registers of parishioners— i.e. people (*libri status animarum*) —and registers of birth, death and marriage — i.e. events. Both were maintained by parishes. Both appeared first as local diocesan initiatives. Unlike registers of birth, death and marriage, registers of parishioners were never generalized to the whole Catholic Church. Interestingly, some Reformed countries generalized the use of registers of parishioners, the most comprehensive of these being the Swedish ones (see note 5, p. 1-73 in III-26–27). Also see note 82.

³Ordonnance du 25 août 1539 enregistrée au Parlement de Paris le 6 septembre 1539 sur le fait de la justice (Ordonnance de Villers-Cotterêts). We use the text from JOURDAN, Athanase-Jean-Léger, Nicolas[?] DECRUSY, François-André ISAMBERT et Alphonse-Honoré TAILLANDIER (ed.). 1828. *Recueil général des anciennes lois françaises depuis l'an 420 jusqu'à la révolution de 1789, 29 volume*. Paris: Belin-Le Prieur, p. XII-600–XII-640). Despite its importance, there is no recent scholarly research on this royal order. The Royal Order of 1539 was largely the work of the then chancellor, Guillaume Poyet. Although this piece of legislation is by far the most important element of Poyet's work as chancellor, his biographers do not devote much of their own work on it. The

biography by Parrot contains a short sketch of the content of the order similar to the one we provide and some comments on the resentment of the Church and parliaments: PARROT, Armand. 1867. *Messire Guillaume Poyet, chancelier de France*. Paris: E. Dentu, libraire, p. 17–18. There are only two pages on the order in the biography by Porée and not much useful information on the circumstances of the introduction of registration of death and baptism: PORÉE, Charles. 1898. *Guillaume Poyet 1473–1548*. Angers: Germain et G. Grassin, p. 85–86. There is not much more in the biography by Deubel, who focuses on the criminal procedure and barely notes the introduction of death and baptism registration: DEUBEL, Maurice. 1900. *Guillaume Poyet, avocat et chancelier*. Versailles: Société anonyme des imprimeries Gérardin. The recent book by A. Rousselet-Pimont on chancellors in 16th century France does not discuss the circumstances in which the Royal Order of 1539 was written: ROUSSELET-PIMONT, Anne. 2005. *Le chancelier et la loi au XVI^e siècle*. Paris: De Boccard.

⁴ The “Procureur général en la Cour de Parlement de Paris” is the king’s prosecutor in the highest court of the kingdom and the highest-ranking prosecutor. “Nous estimons la cause pour laquelle le contenu en cest article a esté ordonné estre assez cognuë à vn chacun. Car plusieurs embaumoyent les corps de ceux qui estoient pourueuz de quelques bénéfices, & les gardoient & recelloient cachez & absconsez longuement en leurs maisons, afin que leur mort ne vint en euidence, & cependant qu’ils peussent obtenir & impétrer les bénéfices. Or ceux qui commettent telles fraudes sont griefuement punissables par les ordonnances, & encourent la peine qui a esté instituée & irrogeee par l’edict, & de telle sorte, qu’encores que tels receleurs de corps morts soient Ecclésiastiques, toutesfois ils sont tenus de subir quant à ce la iurisdiction séculière, &c doiuent estre condamnez comme pour cas priuilegié. Et en cela ne peuuent décliner la iurisdiction laye, car pour ceste seule raison, qu’ils ont violé l’ordonnance, ils sont subiects à la Cour séculière comme pour delict priuilegié, & y peuuent estre puniz : & ainsi a esté iugé n’agueres par arrest en vne cause pendante en la Cour pour vne Chanoinye de Langres. Adioustant vne autre raison qui est, parçe que celuy des litigans, qui est trouué auoir violé & enfrainct ceste ordonnance, doit estre décheu de la possession du bénéfice, & de tout le droict par luy pretendu én iceluy, & ne peut plus rien quereller ou questionner au possessoire, ce qui ne peut estre décidé que par la sentence du Iuge lay qui cognoist du possessoire. Et parce que par les precedens articles on auoit suffisamment obuié & pourueu à la fraude de ceux, qui de fois à autre receloient & cachaient les corps morts, afin que le iour de leur mort ne fust cogneu, d’autant qu’en cela retombe principalement la question & difficulté des parties, de sçauoir au vray le iour du trespas & deces de celuy, des benefices duquel est question, lees vns disans iceluy estré precedé, les autres affermans estre decedé par apres. A ceste cause attendu que toute la difficulté & question se tournoit en ceste question de faict, & afin que la contention des parties ne retombast plus là, il a esté ordonné par ce dernier article, qu’il sera faict registre public de la mort & sépulture des personnes tenans bénéfices, afin que si quelquesfois il est question de la mort du dcffunct, on puisse tirer foy & vérité de tels registres publics, ausquels faudroit demeurer & s’arrester à tout le moins pour l’adiudication de la recreance.” BOURDIN, Gilles. 1606. *Paraphrase de M. Gilles Bourdin, sur l’ordonnance de l’an 1539*. Paris: J. Houzé, p. 121–122.

⁵ “Popularly the term benefice is often understood to denote either certain property destined for the support of ministers of religion, or a spiritual office or function, such as the care of souls, but in the strict sense it signifies a right, i.e. the right given permanently by the Church to a cleric to receive ecclesiastical revenues on account of the performance of some spiritual service. Four characteristics are essential to every benefice: 1) the right to revenue from church property, the benefited cleric being the usufructuary and not the proprietor of the source of his support; 2) a twofold perpetuity, objective and subjective, inasmuch as the source of income must be permanently established and at the same time the appointment to the benefice must be for life, and not subject to revocation, save for the causes and in the cases specified by law; 3) a formal decree of ecclesiastical authority giving to certain funds or property the character or title of a benefice; 4) an annexed office or spiritual function of some kind, such

as the care of souls, the exercise of jurisdiction, the celebration of Mass or the recitation of time Divine Office.”
CREAGH, John. 1907. “Benefice”. *The Catholic Encyclopedia*. Vol. 2. New York: Robert Appleton Company.

⁶ GAUDEMET, Jean. 1947. “La Législation religieuse de Constantin”. *Revue d’histoire de l’Église de France*, vol. 33, n° 122, p. 25–61, at p. 32.

⁷ Depending on the context, ‘secular’ may be understood by contrast with ‘religious’, in which case it is closely related to ‘lay’ — marriage as a contract is the province of secular law — or by contrast with ‘regular’, in which case it refers to clerics who do not belong to a religious order, ‘regular’ being the condition of those who belong to an order. Thus, yes, a secular benefice is an ecclesiastical benefice and the Investiture Controversy revolved around ecclesiastical benefices, some of them secular as opposed to regular, being conferred by the secular, in the sense of temporal, authorities — the king or some noble families— rather than by the Church. To avoid confusion, wherever possible, I use ‘temporal’ rather than ‘secular’ when ‘secular’ would be contrasted with ‘religious’, keeping ‘secular’ when it is opposed to ‘regular’.

⁸ BLUMENTHAL, Uta-Renate. 1988. *The investiture controversy*. Philadelphia: The University of Pennsylvania Press, p. 28–41.

⁹ BLUMENTHAL, U.-R., *op. cit.*, note 8, p. 167–173.

¹⁰ BOULET-SAUTEL, Marguerite. 2010. “Le Roi et l’Église”, *Vivre au royaume de France*, p. 357–367. Paris: Presses universitaires de France, p. 363.

¹¹ THOMAS, Jules. 1910. *Le Concordat de 1516. Ses origines, son histoire au XVI^e siècle*, 3 vol. Paris: A. Picard, p. III-182–III-183.

¹² BOURDIN, G., *op. cit.*, note 4, p. 123 *ss.*

¹³ FANNING, William. 1907. “Baptism”. *The Catholic Encyclopedia*. Vol. 2. New York: Robert Appleton Company.

¹⁴ BOLOGNE, Jean-Claude. 1997. *Histoire du mariage en Occident*. Paris: Hachette, p. 41–50.

¹⁵ When discussing the motives that may have led some local ecclesiastical authorities to initiate the registration of baptism, Mols stresses that the only motivation that can be derived from Canon law is gathering information about kinship, real and spiritual, and provides a clear example. In his episcopal order dated from 3rd June 1406, Henri, bishop of Nantes, orders the registration of baptisms in his diocese explicitly to avoid illicit marriages resulting from spiritual kinship (MOLS, R., *op. cit.*, note 2, p. 1-86 and note 6). Apparently, registers of baptism including information relevant for the ecclesiastical courts but not for the secular ones existed or, at least, had existed in some parts of France when chancellor Poyet and his staff wrote the Royal Order of 1539. Keeping records of the spiritual relationships arising from being godmother or godfather — as well as keeping records of marriages — is routinely considered one of the main motives of the early development of parish registers even in England; see for instance DICKENS, Arthur Geoffrey, 1989, *The English Reformation*, 2nd edition, p. 150–151. However, Dickens does not provide any reference to sustain his interpretation which reads as if it had been copied from the Decree of reformation of the Marriage. Thomas Cromwell wrote his 1538 *Injunctions to the clergy* as Henry VIII’s Vicar-General. The *Injunctions* are a series of pastoral orders of which the paragraph in which curates and vicars are ordered to register all “weddyng christnyng and buryeng made within yowr parishe for yowr tyme” is the last and definitely of a very different nature from the rest. Furthermore, this paragraph details at length *when* the information must be written down and *how* the register must be kept, but is mute on *what* must be registered about marriages, baptisms and burials and *why* such information should be registered. A historian of English parish registers reports that the institution of the registration of marriages, baptisms and burials was accompanied by a rumour that its purpose was the institution of a tax on sacraments.

See MERRIMAN, Roger Bigelow. *Life and letters of Thomas Cromwell*, 2 vol. Oxford: Clarendon: 1902, p. II-151–155 for the full text of the *Injunctions*. COX, John Charles. *The parish registers of England*. London: Methuen and Co: 1910, p. 1.

¹⁶ BOURDIN, G. *op. cit.*, note 4, p. 124–125.

¹⁷ See note 3.

¹⁸ Reading these sections of the Royal Order of 1539 leaves with a feeling that someone in the French royal administration had already conceived the scheme of a complete system of registration of births, deaths and marriages by the clerics, including the requirement to periodically transmit copies of the registers to the secular authority, but had not been able to implement it at once. This is not unlikely. We already mentioned that parish registers of baptisms had already been implemented by various local diocesan authorities in France, and there had been similar attempts by in Spain and Italy (see MOLS, R., *op. cit.*, note 2, p. I-76–I-102), and that Th. Cromwell's 1538 *Injunctions* called for parish registers of births, deaths and marriages (see note 15). However, the registers initiated by diocesan authorities had been put in place by ecclesiastical authorities for their own use and the registers called for by Th. Cromwell, whatever their motivation, were to be kept by the local church. None of these registers were supposed to be copied and transmitted to secular authorities whereas the registers of burial and baptisms implemented by the Royal Order of 1539 were put in place to support the King's rights and secular justice and had to be copied and transmitted to the closest King's officer of justice. In the provisions he Royal Order of 1539 on the registration of burials and baptisms, the King's administration uses the Church for its own secular purposes. In other words, in France, the implementation of the registration of burial and baptisms by the Church was not an initiative of the Church, but one of the secular authorities for secular motives. The system that started to be implemented in France at that time had a precedent in Siena, where parish registers of births had been implemented in 1379 and, from 1381, been copied and transmitted to the *Biccherna*, the permanent committee of the commune in charge of its finances, but also of a series of other matters such as the supervision of the maintenance and repair of streets, fountains and bridges, construction of public buildings, the inspection and replenishment of the stock of war material and the appointment to various public offices. The *Biccherna* received copies of the parish registers until 1817 (MOLS, R., *op. cit.*, note 2, p. I-80; see DOUGLAS, Robert Langton. *A history of Siena*. London: John Murray: 1902, p. 112 for the remits of the *Biccherna*; see OTTOLENGHI, D. "Studi demografici sulla popolazione di Siena dal secolo XIV al XIX", *Bollettino Senese di storia patria*, vol 10/3 (1903), p. 297–358, at 298 for a description of the *Registri della Biccherna*). The exact circumstances in which the registration of baptisms started in Siena are not known, but the prevailing interpretation is that it was put in place at the request of the *Biccherna* as a means to establish the citizenship of the new born, something of outmost importance in a republic. Under Francis I, the *Conseil d'État* — State Council — and the Chancery were responsible for the writing of the kingdom's legislative material — *ordonnances, déclarations, édits ou arrêts* — and had a staff of 119 king's secretaries and king's notaries for accomplishing this task, the king himself being known as the 120th member, the one whose signature authenticated the documents (GARRISSON, Janine. *Royauté, Renaissance et Réforme 1483–1559*. Paris: Seuil: 1991, p. 172–174). The chancellor or any one of the secretaries and notaries, most if not all of them trained in Civil law, might have known about what would have been the 'best practices' of their time.

¹⁹ MOLS, R., *op. cit.*, note 2, p. I-86.

²⁰ RIVIER, Alphonse. 1891. *Précis de droit de famille romain*, Paris : Librairie nouvelle de droit et de jurisprudence, p. 119.

²¹ TREGGIARI, Susan. 1991. *Roman Marriage. Iusti coniuges from the time of Cicero to the time of Ulpian*, Oxford: Oxford University Press/Clarendon, p. 125.

- ²² GIRARD, Paul-Frédéric. 2003. *Manuel élémentaire de droit romain*, réédition de la 8^e édition de 1929. Paris : Dalloz, 2003, p. 167.
- ²³ EVANS GRUBBS, Judith. 2002. *Women and the law in the Roman Empire*. London: Routledge, p. 82, 188. OURLIAC, Paul and Jehan de MALAFOSSE. 1968. *Histoire du droit privé*, tome III, *Le droit familial*. Paris: Presses universitaires de France, p. 166 sq.
- ²⁴ RIVIER, A., *op. cit.*, note 20, p. 180. NOAILLES, Pierre. 1948. *Fas et jus. Études de droit romain*. Paris: Les Belles-Lettres, p. 30. EVANS GRUBBS, J., *op. cit.* note 23, p. 82.
- ²⁵ VEYNE, Paul. 1999. “L’Empire romain”, in Philippe ARIÈS and Georges DUBY (dir.), *Histoire de la vie privée*, tome 1, *De l’Empire romain à l’an mil*. Paris: Seuil, p. 43. TREGGIARI, Susan. 1991b. “Divorce Roman style”, in Beryl RAWSON (dir.) *Marriage, divorce and children in ancient Rome*. Oxford: Oxford University Press/Clarendon, p. 31–33.
- ²⁶ GIRARD, P.-F., *op. cit.*, note 22, p. 176. OURLIAC, P. and J. de MALAFOSSE, *op. cit.*, note 23, p. 176. Yes, women could repudiate their husbands as men could repudiate their wives. Yes, in classical Roman law, divorce could be unilateral. No, courts were not involved in divorce itself as marriage was a private matter, not a public one.
- ²⁷ LAPLANTE, Benoît. 2014a. “L’union de fait comme mariage romain : l’Angleterre avant 1857 et la situation actuelle en Angleterre, en France et au Québec”, *Revue juridique Thémis*, vol. 48, n° 2, p 291–327. LAPLANTE, Benoît. 2014b. “L’union de fait comme mariage romain : Rome, l’Église et la France d’Ancien Régime”. *Revue juridique Thémis*, vol. 48, n° 1, p. 89–145.
- ²⁸ GAUDEMET, Jean. 1987. *Le mariage en Occident*. Paris: Les Éditions du Cerf, p. 43–47.
- ²⁹ GAUDEMET, J., *op. cit.*, note 28, p. 176–177. ESMEIN, Adhémar. 1891. *Le Mariage en droit canonique*, 2 volumes. Paris: L. Larose et Forcel. 1-95–137 provides a comprehensive account of the evolution of the Church’s theory of the formation of marriage. A shorter account may be found in REYNOLDS, Philip P., “Marrying and its documentation in pre-modern Europe: Consent, celebration, and property”, in Philip P. REYNOLDS and John WRITE Jr. (eds.), *To have and to hold. Marrying and its documentation in Western Christendom, 400–1600*. Cambridge: Cambridge University Press; 2007, p. 1–42, at p. 3–15.
- ³⁰ Interestingly, the Eastern Church developed different rules on the formation of marriage which made clandestine marriage almost impossible. To be valid, marriage requires the consent of the parents as well as that of the spouses, and, from the time of Emperor Leo VI, it is not valid without a religious ceremony (LAIYOU, Angelika E. 1992. *Mariage, amour et parenté à Byzance aux XI^e–XIII^e siècles*. Paris: Éditions de Boccard, p. 12–13; VISCUSO, Patrick Demetrios. 2008. *Sexuality, marriage, and celibacy in Byzantine law*. Brookline MA, p. 32–33.)
- ³¹ HONORÉ, Tony. 2002. *Ulpian. Pioneer of human rights*, 2nd edition. Oxford: Oxford University Press, p. 76–93.
- ³² THOMAS, Yan. 1988. “L’institution juridique de la nature”. *Revue d’histoire des facultés de droit et de la science juridique*, n° 6, p. 27–48, at page 34.
- ³³ GAUVREARD, Claude. 2004. *La France au Moyen Âge du V^e au XV^e siècle*. Paris: Presses universitaires de France, p. 6 sqq.
- ³⁴ GAUDEMET, J., *op. cit.*, note 6.
- ³⁵ SCHIAVONE, Aldo. 2011. *Ius, l’invention du droit en Occident*. Paris: Belin.
- ³⁶ OURLIAC, Paul and Jean-Louis GAZZANIGA. 1985. *Histoire du droit privé français de l’An mil au Code civil*, Paris: Albin Michel, p. 31–48.
- ³⁷ HUDSON, John. 1996. *The Formation of the English common law*. London: Longman, p. 126 sqq.
- ³⁸ BLACKSTONE, William. 1893. *Commentaries on the laws of England*, Philadelphia: J. B. Lippincott Company, p. 350, 353. KIPPEN, Kim. 2013. “Poor Law, coverture, and maintaining relations in King’s Bench, 1610–1834”, in Tim

STRETTON and Krista J. KESSELRING (dir.), *Married women and the law. Coverture in England and the common law world*, Montreal and Kingston, McGill-Queen's University Press, p. 64–87. This is still true in common law, in England and in all territories which have received common law. Thus, in each such territory, the legislator who wishes otherwise must maintain whatever it wishes through statute law. If the acts establishing the rules that divert from common law were simply repealed, the rules from common law would simply fill the space. In territories where customary law has been replaced by a Civil Code, repealing the code would leave a void that nothing could fill until the legislator pass a new Code.

³⁹ OURLIAC, P. and J. de MALAFOSSE, *op. cit.*, note 23, p. 1.

⁴⁰ OURLIAC, P. and J. de MALAFOSSE, *op. cit.*, note 23, p. 7–8.

⁴¹ BURGUIÈRE, André. 2011. *Le mariage et l'amour en France de la Renaissance à la Révolution*. Paris: Éditions du Seuil, p. 143–146.

⁴² OURLIAC, P. and J. de MALAFOSSE, *op. cit.*, note 23, p. 131–156. POTHIER, Robert-Joseph. 1822. *Traité du contrat de mariage et de la puissance du mari. Œuvres de Pothier, tome 7*. Paris: Siffrein, p. 473–480.

⁴³ OURLIAC, P. and J. de MALAFOSSE, *op. cit.*, note 23, p. 389.

⁴⁴ “En droit moderne, la transmission de la succession est fixée par la loi et on donne pour fondement à celle-ci soit le « devoir moral et social qui incombe à chacun envers ses proches » [...], soit la volonté présumée du défunt. On rejoint par là la tradition romaine et la prépondérance qu'elle a toujours reconnue au testament. Pour le droit coutumier, au contraire, l'individu ne compte guère et la volonté d'un testateur est toujours suspecte. Pour une société éprise d'ordre et de stabilité, la famille seule est permanente. La solidarité qui existe entre parents leur impose de défendre en commun leur vie et leur honneur mais aussi leurs biens. Dans cette vue des choses, l'individu n'a plus sur son patrimoine qu'un pouvoir transitoire ; les droits de la famille existent avant les siens et sa mort, plus qu'une succession, ouvre un « retour » des biens à leur origine.” OURLIAC, P. and J. de MALAFOSSE, *op. cit.*, note 23, p. 389–390.

⁴⁵ OURLIAC, P. and J. de MALAFOSSE, *op. cit.*, note 23, p. 493.

⁴⁶ OURLIAC, P. and J.-L. GAZZANIGA, *op. cit.*, note 36, p. 317–356.

⁴⁷ OURLIAC, P. and J. de MALAFOSSE, *op. cit.*, note 23, p. 396.

⁴⁸ TODD, Emmanuel. 2011. *L'origine des systèmes familiaux, volume 1*. Paris: Gallimard.

⁴⁹ OURLIAC, P. and J.-L. GAZZANIGA, *op. cit.*, note 36, p. 301. POTHIER, R.-J., *op. cit.*, note 42, p. 1–4.

⁵⁰ OURLIAC, P. and J. de MALAFOSSE, *op. cit.*, note 23, p. 261–262. POTHIER, Robert-Joseph. 1822. *Traité de la communauté. Œuvres de Pothier, tome 8*. Paris: Siffrein, p. 4–5.

⁵¹ For the sources of the first three paragraphs of this section, see notes 56 and 57.

⁵² ESMEIN, A. *op. cit.*, note 29.

⁵³ COONTZ, Stephanie. 2005. *Marriage, a History*. New York: Viking, p. 107–108.

⁵⁴ This article focuses on the generalization of parish registers in the Catholic countries and discusses clandestine marriages and parental consent as a remedy against them because this problem and the need for this solution motivated the involvement of the French in the passing of the Decree of Reformation of the Marriage and the establishment of parish registers in all Catholic countries. The fight against clandestine marriages in Reformed countries is beyond its scope and the references to England are there to underline the differences between the consequences of clandestine marriage of minor children for the intergenerational transmission of wealth in the context of English law and of French law. This does not mean that clandestine marriages were not a concern in England. They were, even though their consequences were not as dire as in France and that the threat of

disinheritance was a means to discourage them although certainly imperfect. Thus, there were initiatives to curb clandestine marriages in England, especially from the time of the Reformation. That said, the situation must have been much more bearable for English families than for the French because clandestine marriages were not dealt with in a reasonably efficient manner by requiring the solemnization of marriage until the Marriage Act of 1753, almost exactly two centuries after they had been efficiently outlawed in France (see, for instance, OUTHWAITE, Richard Brian. 1995. *Clandestine marriage in England 1500–1850*. London: Hambledon Press). There are reasons to believe that in other areas of continental Europe that shared with France the main features of its inheritance and matrimonial law, for instance some parts of Germany, clandestine marriages had the same consequences as in France and these may have motivated the insistence of the Protestants on curbing them. However interesting and related with our topic, this, again, is beyond the scope of this article.

⁵⁵ Édît de février 1556 contre les mariages clandestins enregistré au Parlement de Paris le 1^{er} mars 1556; in JOURDAN, A.-J.-L. *et al.*, *op. cit.*, note 3, p.: XIII-469–471.

⁵⁶ SARPI, Paolo. 1771. *Histoire du concile de Trente*, trad. Pierre-François Le Courayer, 6^e édition, 2 volumes. : Oxford, p. II-474. JEDIN, Hubert. 1972. *Historia del concilio de Trento*, 4 volumes [*Geschichte des Konzils von Trient*]. Pamplona: Ediciones Universidad de Navarra, S. A, p. IV-II-150 *ss*. The literature on the Council of Trent is a truly large body. The authoritative collection of historical documents related to the council is SOCIETAS GOERRESIANA PROMOVENDIS INTER GERMANOS CATHOLICOS LITTERARUM STUDIIS, *Concilium Tridentinum : Diarorum, actorum, epistularum, tractatum nova collection*, 13 tomes in 17 volumes. Freiburg im Breisgau: Herder 1963–2001. That said, writing the history of the Council proved contentious. The first large-scale account was written by P. Sarpi, but published in 1619 in London under a pseudonym. It was very critical. The ‘competing’ official version is that of S. Pallavicini, published in 1664, explicitly written against that of Sarpi (see note 57). The third authoritative history of the Council of Trent was written by H. Jedin and motivated partly by the 400th anniversary of the conclusion of the Council and by the Second Vatican Council. We use all three, as well as some more special accounts.

⁵⁷ PALLAVICINI, Sforza. 1844. *Histoire du concile de Trente*, 2 volumes. Montrouge: Imprimerie catholique de Migne, p. III-145–148.

⁵⁸ SARPI, P., *op. cit.*, note 56, p. II-475. JEDIN, H., *op. cit.*, note 56, p. IV-II-150 *sq*.

⁵⁹ HEFELE, Charles-Joseph. 1938. *Histoire des conciles d’après les documents originaux*, tome 10, 1^{re} partie. Paris: Letouzey et Ané, p. 508.

⁶⁰ ESMEIN, A., *op. cit.*, note 29, p. II-122–127. LE BRAS, Gabriel. 1927. “Mariage”. *Dictionnaire de théologie catholique*. Paris: Letouzey et Ané, p. 2224–2227.

⁶¹ GUILLEMIN, Jean-Jacques, *Le Cardinal de Lorraine, son influence politique et religieuse au XVI^e siècle*, Paris: Joubert, 1847, p. 480.

⁶² PALLAVICINI, S., *op. cit.*, note 57, p. III-148 *ss*. JEDIN, H., *op. cit.*, note 56, p. IV-II-150 *ss*

⁶³ JEDIN, H., *op. cit.*, note 56, p. IV-II-153.

⁶⁴ TALLON, Alain. 1997. *La France et le concile de Trente (1518–1563)*. Rome: École française de Rome, p. 679–686.

⁶⁵ PALLAVICINI, S., *op. cit.*, note 57, p. III-398.

⁶⁶ JEDIN, H., *op. cit.*, note 56, p. IV-II-158. HEFELE, C.-J., *op. cit.*, note 59, p. 524–525.

⁶⁷ SARPI, P., *op. cit.*, note 56, p. II-519; PALLAVICINI, S. *op. cit.*, note 57, p. III-401, 461; HEFELE, C.-J., *op. cit.*, note 59, p. 526.

⁶⁸ JEDIN, H., *op. cit.*, note 56, p. IV-II-161; HEFELE, C.-J., *op. cit.*, note 59, p. 526. The Royal Order of 1556 defined as clandestine a marriage contracted without the consent of the parents by a man aged less than 30 or a woman aged less than 25. See note 55.

⁶⁹ HEFELE, C.-J., *op. cit.*, note 59, p. 526.

⁷⁰ HEFELE, C.-J., *op. cit.*, note 59, p. 545.

⁷¹ LE BRAS, G., *op. cit.*, note 60, p. 2239.

⁷² ALBERIGO, Giuseppe (ed.). 1994. *Les Conciles œcuméniques. Les Décrets, volumes 2* and 2***. Paris : Les Éditions du Cerf, p. II-I-258[550].

⁷³ *Novella Constitutio n°74*. See the Annex.

⁷⁴ RASSICOD, Étienne. 1706. *Notes sur le Concile de Trente touchant les points les plus importants de la discipline ecclésiastique et le pouvoir des évêques, les décisions des SS. Pères, des conciles et des papes et les résolutions des plus habiles avocats sur des matières avec une Dissertation sur la réception et l'autorité de ce concile en France*. Köln: Balthasar d'Egmont, p. 294.

⁷⁵ Not surprisingly, section 40 of the Royal Order of 1579, which implements rules similar to that of the Decree of Reformation of Marriage that were not yet implemented in France because France never promulgated the Council of Trent, explicitly refers to “the penalties instituted by the councils”. Gallicanism was as flexible as powerful.

⁷⁶ Ordonnance rendue sur les plaintes et doléances des états-généraux assemblés à Blois en novembre 1576, relativement à la police générale du royaume, faite à Paris en 1579 (Ordonnance de Blois); in JOURDAN, A.-J.-L. *et al.*, *op. cit.*, note 3, p. XIV-380–461.

⁷⁷ MOUSNIER, Roland. 2005. *Les Institutions de la France sous la monarchie absolue, 1598–1789*. Paris: Presses universitaires de France, p. 724 *ss*.

⁷⁸ BURGUIÈRE, A., *op. cit.*, note 41, p. 143–146.

⁷⁹ The patriarchal system described by Burguière involved a strict control of the marriage of children and an important limitation of the rights that women enjoyed in many customs. This system had little to do with classical Roman law, in which the *patria potestas* had been tweaked to give children and women a fair amount of freedom both in everyday life and in civil matters (see TREGGIARI, S., *op. cit.*, note 21 and EVANS GRUBBS, J., *op. cit.*, note 23). The new system made a heavy use of *novellae* dated about two centuries after the fall of Rome, for instance the one that allows the deportation of the adulterous woman in a convent, something inconceivable in classical Roman law. What was implemented in 16th century France was based on early Byzantine law rather than on classical Roman law.

⁸⁰ THOMAS, Jules. 1910. *Le Concordat de 1516*. Paris: Alphonse Picard, p. I-7–9 provides a short overview of Gallicanism. The most recent scholarly study of the topic is TALLON, Alain. 2002. *Conscience nationale et sentiment religieux en France au XVI^e siècle*. Paris: Presses universitaires de France.

⁸¹ HECKSCHER, Eli F. 1935. *Mercantilism*, 2 vol., translated by Mendel Shapiro. London: George Allen and Unwin.

⁸² LE BOUTEILLEC, Nathalie and Jean-Marc ROHRBASSER (Eds.). 2017. *Naissance des sciences de la population. Les savants du royaume de Suède au XVIII^e siècle*. Paris: Institut national d'études démographiques. Also see note 2.

Annex

1. Excerpt from Novella Constitutio n°74 which imposes public solemnisation of marriage in a church and written attestation of marriage to high officers of the Empire

Nov. LXXIV Quibus modis naturales filii efficiuntur legitimi et sui supra illos modos qui superioribus constitutionibus continentur (AD 538)

4.1. In maioribus itaque dignitatibus et quaecumque usque ad nostros est senatores et magnificentissimos illustres neque fieri haec omnino patimur, sed sit omnino et dos et antenuptialis donatio et alia omnia quae honestiora decet nomina. Quantum vero in militiis honestioribus et negotiis et omnino professionibus dignioribus est, si voluerint legitime uxori copulari et non facere nuptialia documenta, non sic quomodocumque et sine cautela effuse et sine probatione hoc agatur, **sed veniat ad quandam orationis domum et fateatur sanctissimae illius ecclesiae defensori, ille autem adhibens tres aut quattuor exinde reverentissimorum clericorum attestationem conficiat declarantem, quia sub illa indictione illo mense illa die mensis illo nostri imperii anno consule illo venerunt apud eum in illam orationis domum ille et illa et coniuncti sunt alterutri.** Et huiusmodi protestationem si quidem accipere volunt aut ambo convenientes aut alteruter eorum, et hoc agant et subscribant ei et sanctissimae ecclesiae defensor et reliqui tres aut quantoscumque voluerint, non tamen minus trium, litteris hoc significantibus. (Nov. 74, c. 4, 1)

Nov. LXXIV In what way natural children may become legitimated and independent, in addition to the methods prescribed by former constitutions

4.1 Therefore We forbid persons who are occupying high positions, no matter what they may be—and this applies to Ourselves, as well as to Senators and persons of illustrious rank—to marry without any dotal contract. We also desire that a dowry and an ante-nuptial donation shall, by all means, be

stipulated for, whenever marriages of persons of this description take place, as well as everything that is proper and becoming under such circumstances. But so far as others who occupy places of less importance and discharge honorable duties, or are members of respectable professions are concerned, if they should desire to lawfully marry women without entering into ante-nuptial contracts, they shall not do so indiscriminately, without security, and without proof; but they must repair to some house of worship, and declare their intention to the defender of the Most Holy Church, who, in the presence of three or four most reverend ecclesiastics, must draw up a statement in which shall be set forth that, during a certain indiction, month, day of the month, and year of Our reign, under Such-and-Such a Consul, So-and-So and So-and-So appeared before him in such-and-such a place of worship, and were united with one another. If both the parties interested approve of this attestation, whether they both appear or only one, they shall subscribe the above-mentioned statement, along with the defender of the holy church, and the three other ecclesiastics, or more of the latter if it is desired, but never less than three. (Translation Samuel P. Scott. *The Civil Law*, XVI. Cincinnati: The Central Trust Company: 1932).

2. Excerpt from the French Royal Order that institutes the registration of baptism

Ordonnance du 25 août 1539 enregistrée au Parlement de Paris le 6 septembre 1539 sur le fait de la justice (Ordonnance de Villers-Cotterêts)

Art. 50. Que des sépultures des personnes tenans bénéfices, sera fait registre en forme de preuve, par les chapitres, collèges, monastères et cures, qui fera foi, et pour la preuve du temps de la mort, duquel temps sera fait expresse mention esdicts registres, et pour servir au jugement des procès où il seroit question de prouver ledit temps de la mort, au moins, quant à la récréance.

Art. 51. Aussi sera fait registres, en forme de preuve, des baptêmes, qui contiendront le temps et l'heure de la nativité, et par l'extrait dudict registre, se pourra prouver le temps de majorité ou minorité, et sera pleine foy à ceste fin.

Art. 52. Et afin qu'il n'y ait faute auxdits registres, il est ordonné qu'ils seront signés d'un notaire, avec celui desdicts chapitres et couvents, et avec le curé ou vicaire général respectivement, et chacun en son regard, qui seront tenus de ce faire, sur peine des dommages et intérêts des parties, et de grosses amendes envers nous.

Art. 53. Et lesquels chapitres, couvents et cures, seront tenus mettre lesdicts registres par chacun an, par devers le greffe du prochain siège du baillif ou sénéchal royal, pour y estre fidèlement gardés et y avoir recours, quand mestier et besoin sera.

Art. 54. Et afin que la vérité du temps desdicts décès puisse encore plus clairement apparoir, nous voulons et ordonnons qu'incontinent après le décès desdicts bénéficiers, soit publié ledict décès, incontinent après icelui advenu par les domestiques du décédé, qui seront tenu le venir déclarer aux églises, où se doivent faire lesdictes sépultures et registres, et rapporter au vrai le temps dudict décès, sur peine de grosse punition corporelle ou autre, à l'arbitration de la justice.

Art. 55. Et néanmoins, en tout cas, auparavant pouvoir faire lesdites sépultures, nous voulons et ordonnons estre faite inquisition sommaire et rapport au vrai du temps dudit décès, pour sur l'heure, faire fidèlement ledict registre.

Art. 56. Et défendons la garde desdicts corps décédés auparavant ladicte révélation, sur peine de confiscation de corps et de bien contre les laïz qui en seront trouvés coupables, et contre les ecclésiastiques, de privation de tout droit possessoire qu'ils pourroient prétendre ès bénéfices, ainsi vacans, et de grosse amende à l'arbitration de justice.

Art. 57. Et pour ce qu'il s'est aucunes fois trouvé par cy-devant ès matières possessoires bénéficiales, si grande ambiguité ou obscurité sur les droits et titres des parties, qu'il n'y avoit lieu de faire aucunes adjudications de maintenue, à l'une ou l'autre des parties : au moyen de quoy estoit ordonné que les bénéfices demeureroient séquestrés, sans y donner autre jugement absoluire ou condemnatoire sur l'instance possessoire, et les parties renvoyées sur le pétitoire pardevant le juge ecclésiastique.

3. Excerpt from the French Royal Order that institutes the registration of marriage

Ordonnance de mai 1579 enregistrée au Parlement de Paris le 25 janvier 1580, rendue sur les plaintes et doléances des états-généraux assemblés à Blois en novembre 1576, relativement à la police générale du royaume (Ordonnance de Blois)

Art. 40. Pour obvier aux abus et inconveniens qui adviennent des mariages clandestins, avons ordonné et ordonnons que nos sujets de quelque estat, qualité et conditions qu'ils soient, ne pourront valablement contracter mariage sans proclamations précédentes de bans faites par trois divers jours de festes, avec intervalle compétent, dont on ne pourra obtenir dispense, sinon après la première proclamation faite : et ce seulement pour quelque urgente et légitime cause, et à la réquisition des principaux et plus proches parens communs des parties contractantes, après lesquels bans seront épousées publiquement : et pour pouvoir témoigner de la forme qui aura esté observée desdits mariages, y assisteront quatre personnes dignes de foy, pour le moins, dont sera fait registre; le tout sur les peines portées par les conciles : enjoignons au curez, vicaires ou autres de s'enquérir soigneusement de la qualité de ceux qui voudront se marier; et s'ils sont enfans de famille, ou estant en puissance d'autrui, nous leur défendons étroitement de passer outre à la célébration desdits mariages, s'il ne leur apparoit du consentement des pères, mères, tuteurs ou curateurs, sur peine d'estre punis comme fauteurs du crime de rapt.

Art. 41. Nous voulons que les ordonnances ci devant faites conter les enfans contractans mariage sans le consentement de leurs pères, mères, tuteurs ou curateurs soient gardées; même celle qui permet en ce cas les exhérations.

Art. 42. Et néanmoins voulons que ceux qui se trouveront avoir suborné fils ou filles mineures de vingt-cinq ans, sous prétexte de mariage ou autre couleur, sans le gré, sçû vouloir ou consentement exprès des pères, mères et des tuteurs, soient punis de mort, sans espérance de grace et pardon : nonobstant tous consentemens, que lesdits mineurs pourroient alléguer par après, avoir donné audit rapt lors d'icelui ou auparavant : et pareillement seront punis extraordinairement tous ceux qui auront participé audit rapt, et qui auront porté conseil, confort et aide en aucune manière que ce soit.

Art. 43. Défendons à tous tuteurs accorder ou consentir le mariage de leurs mineurs, sinon avec l'avis et consentement des plus proches parens d'iceux, sur peine de punition exemplaire.

Art. 44. Pareillement défendons à tous notaires, sur peine de punition corporelle, de passer ou recevoir aucunes promesses de mariage par paroles de présent.

Art. 181. Pour éviter les preuves par témoins, que l'on est souvent contraint faire en justice, touchant les naissances, mariages, morts et enterrements de personnes : enjoignons à nos greffiers en chef de poursuivre par chacun an tous curez, ou leurs vicaires, du ressort de leurs sièges d'apporter dedans deux mois, après la fin de chacune année, les registres des baptêmes, mariages et sépultures de leurs paroisses faits en icelle année. Lesquels registres lesdits curez en personne ou par procureur spécialement fondé, affirmeront judiciairement contenir vérité : autrement et à faute de ce faire par lesdits curez ou leurs vicaires, ils seront condamnés ès dépens de la poursuite faite contr'eux, et néanmoins contraints saisis de leur temporel, d'y satisfaire et obéir : et seront tenus lesdits greffiers de garder soigneusement lesdits registres pour y avoir recours, et en délivrer extraits aux parties qui le requèreront.

4. Excerpt from the Decree on the Reformation of Marriage by the Council of Trent

CHAPTER I.

The form prescribed in the Council of Lateran for solemnly contracting marriage is renewed.—Bishops may dispense with the bans.—Whosoever contracts marriage, otherwise than in the presence of the Parish Priest and of two or three witnesses, contracts it invalidly.

Although it is not to be doubted, that clandestine marriages, made with the free consent of the contracting parties, are valid and true marriages, so long as the Church has not rendered them invalid; and consequently, that those persons are justly to be condemned, as the holy Synod doth condemn them with anathema, who deny that such marriages are true and valid; as also those who falsely affirm that marriages contracted by the children of a family, without the consent of their parents, are invalid, and that parents can make such marriages either valid or invalid; nevertheless, the holy Church of God has, for reasons most just, at all times detested and prohibited such marriages. But whereas the holy Synod perceives that those prohibitions, by reason of man's disobedience, are no longer of avail; and whereas it takes into account the grievous sins which arise from the said clandestine marriages, and especially the sins of those parties who live on in a state of damnation, when, having left their former wife, with whom they had contracted marriage secretly, they publicly marry another, and with her live in perpetual adultery; an evil which the Church, which judges not of what is hidden, cannot rectify, unless some more efficacious remedy be applied; wherefore, treading in the steps of the sacred Council of Lateran celebrated under Innocent III., it ordains that, for the future, before a marriage is contracted, the proper parish priest of the contracting parties shall three times announce publicly in the Church, during the solemnisation of mass, on three continuous festival days, between whom marriage is to be celebrated; after which publication of bans, if there be no lawful impediment opposed, the marriage shall be

proceeded with in the face of the church; where the parish priest, after having interrogated the man and the woman, and heard their mutual consent, shall either say, “I join you together in matrimony, in the name of the Father, and of the Son, and of the Holy Ghost;” or, he shall use other words, according to the received rite of each province. But if upon occasion, there should be a probable suspicion that the marriage may be maliciously hindered, if so many publications of banns precede it; in this case either one publication only shall be made; or at least the marriage shall be celebrated in the presence of the parish priest, and of two or three witnesses: Then, before the consummation thereof, the banns shall be published in the church; that so, if there be any secret impediments, they may be the more easily discovered: unless the Ordinary shall himself judge it expedient, that the publications aforesaid be dispensed with, which the holy Synod leaves to his prudence and judgment. Those who shall attempt to contract marriage otherwise than in the presence of the parish priest, or of some other priest by permission of the said parish priest, or of the Ordinary, and in the presence of two or three witnesses; the holy Synod renders such wholly incapable of thus contracting and declares such contracts invalid and null, as by the present decree It invalidates and annuls them. Moreover It enjoins, that the parish priest, or any other priest, who shall have been present at any such contract with a less number of witnesses (than as aforesaid); as also the witnesses who have been present thereat without the parish priest, or some other priest; and also the contracting parties themselves; shall be severely punished, at the discretion of the Ordinary. Furthermore, the same holy Synod exhorts the bridegroom and bride not to live together in the same house until they have received the sacerdotal benediction, which is to be given in the church; and It ordains that the benediction shall be given by their own parish priest, and that permission to give the aforesaid benediction cannot be granted by any other than the parish priest himself, or the Ordinary; any custom, even though immemorial, which ought rather to be called a corruption, or any privilege to the contrary, notwithstanding. And if any parish priest, or any other

priest, whether Regular or Secular, shall presume to unite in marriage the betrothed of another parish, or to bless them when married, without the permission of their parish priest, he shall-even though he may plead that he is allowed to do this by a privilege, or an immemorial custom,-remain ipso jure suspended, until absolved by the Ordinary of that parish priest who ought to have been present at the marriage, or from whom the benediction ought to have been received.

The parish priest shall have a book, which he shall keep carefully by him, in which he shall register the names of the persons married, and of the witnesses, and the day on which, and the place where, the marriage was contracted.

Finally, the holy Synod exhorts those who marry, that before they contract marriage, or, at all events, three days before the consummation thereof, they carefully confess their sins, and approach devoutly to the most holy sacrament of the Eucharist.

If any provinces have herein in use any praise-worthy customs and ceremonies, besides the aforesaid, the holy Synod earnestly desires that they be by all means retained.

And that these so wholesome injunctions may not be unknown to any, It enjoins on all Ordinaries, that they, as soon as possible, make it their care that this decree be published and explained to the people in every parish church of their respective dioceses; and that this be done as often as may be during the first year; and afterwards as often as they shall judge it expedient. It ordains, moreover, that this decree shall begin to be in force in each parish, at the expiration of thirty days, to be counted from the day of its first publication made in the said parish.

(Translation: Theodore Alois Buckley. *Canons and decrees of the Council of Trent*. London: George Routledge and Co: 1851, p. 179–182)