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Authenticating Marriage: The Decree *Tametsi* in a Comparative Global Perspective

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Abstract

The most common form of global history traces the growing power of the West and tries to explain it. There is a parallel story of the expansion of Christianity, in which the influence of the Council of Trent on the world as a whole deserves a more prominent place than it has received. But there is another kind of global history: the comparative sort. This article looks at the Council of Trent's solution to the problem of clandestine marriages in a comparative perspective, showing how the problems it faced are paralleled in three other societies, but also that a unique mechanism for dealing with them was created, the *Congregatio Concilii*.

Keywords: Tametsi, Sharia, Pakistan, Trent, Hardwicke



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Global history takes two forms. The first is structured chronologically, the second comparatively. The focus of the (very broadly) chronological sort is on seminal developments and influences. Questions about how the West became more powerful and richer than the rest tend to dominate, but the approach also works for religious history, not least for the spread of Christianity as a world religion throughout the globe. Under this large rubric the history of the Council of Trent's influence deserves a prominent position, for missionary work was almost a Catholic monopoly in the early modern period, and the effect of the Council of Trent's decrees on the areas missionised, in general and with special reference to marriage, ought to be a major theme in that story. In fact, the proportion of historical importance to research undertaken is higher for this topic than for most, and most of the contributions to this Focus section help to redress that.

It is also possible, however, to study the Council of Trent's marriage decrees in the framework of the other sort of global history, that is to say, comparatively. By looking at responses of different societies to approximately the same problem, one can begin to discern patterns of similarity but also of specificity. It is the aim of the present essay to ask such questions.

The Council of Trent attempted to change a situation in which couples could get married validly without any formalities. Here we look at that attempt in the light of other societies that had to face the same problem: medieval Europe, which addressed it wholly ineffectually; modern Pakistan, which has still to overcome a conviction aired in

the discussions before the Council of Trent's decree *Tametsi* on marriage: viz., that positive law lacks the power to impose an extra condition for the validity of marriage; and eighteenth-century England, which tried to solve the problem along lines somewhat similar to those laid down by the Council of Trent. It emerges forcibly that this was no easy problem to solve: that is common to all four cases. There is also a finding about the specificity of the Counter-Reformation solution. Difficult though the problems created unintentionally by *Tametsi* were, the creation of the *Congregatio Concilii* as the body with the task of implementing the Council's non-dogmatic decrees provided a way of dealing with them. Administrative in character rather than legal in the *ius commune* sense, the *Congregatio Concilii* seems to have been relatively nimble in responding to and resolving the problems that new legislation invariably generates.

Under the aegis of Pope Innocent III, with the medieval papacy arguably at the peak of its power, in the context of across-the-board reforms, as then conceived, the Fourth Lateran Council of 1215¹ revolutionised marriage law in that it reduced the »forbidden degrees« within which a valid marriage could not be contracted from seven (sixth cousin) to four (third cousin) and required that banns be read before marriages, in the hope that impediments would be revealed before the knot was tied.² What Lateran IV did not do was make the prior reading of the banns, or any form of public ceremony or registration, a condition for a marriage to be actually valid – banns were required but breaking that rule would not be a ground for annulment. It left the rule established in preceding

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1 For general background on this council, see e. g. FOREVILLE (1965).

2 Fourth Lateran Council decrees 50, 51, 52; TANNER (1990) 257–259; BALDWIN (1970) 332–337.

decades that free consent was sufficient to make a marriage valid,³ and the consequences unfolded over the next centuries. Until the Counter-Reformation a couple could validly get married entirely on their own – without priest, magistrate, or even witnesses – in Catholic Europe: Church authorities did not like it, but they recognised the *faits accomplis*. Granted that Lateran IV changed so much, it is good to think about the major negative fact that the thirteenth-century council missed what might seem to the modern observer an excellent opportunity to anticipate the Council of Trent's ruling on marriage in church: for it is well known that in the sixteenth century the Council of Trent made a priest's presence a *sine qua non* for a valid marriage between Catholics (decree *Tametsi*).⁴ The later medieval marriage law's unwilling acceptance of unauthenticated marriages is the point of contrast with three *comparanda*: modern Pakistan, eighteenth-century England, and Tridentine Catholicism, all of which faced the same problem and tried to fix it by making formal authentication procedures a *sine qua non* for a valid marriage.

The first part of this essay explores the consequences of the medieval Church's inaction, but we then go on to ask what the alternatives were. Only comparative analyses can make this relatively concrete. They all show how hard it was to move from the assumption that divine law alone determined what constituted a marriage to the regulation of validity by positive human law – without breaking the link with the religious system, as modern Western states do. Comparison and contrast with modern Pakistan suggests that the Western Church was better placed to legitimate such a change at least with the religious elite, but also that religious assumptions about the minimum requirements for a valid marriage would not have been easy to alter, granted a widespread assumption that unofficial contracts were valid in the eyes of God. Eighteenth-century England suggests that even an apparently

well-crafted law could create entirely unforeseen problems: thus, even if the Fourth Lateran Council had passed such a law, they would have faced a host of unforeseen problems. The aftermath of the Council of Trent also makes the same point, which is brought home by soundings in a little-known *fondo* of the Congregation set up to implement Tridentine decrees. The same soundings also show a method of resolving them quite different from that of classical medieval canon law, and raise the question of whether this wider range of changes was even conceivable in the thirteenth century.

The comparative method used here is combined with a certain sort of counterfactual analysis. It is a different sort from speculations about what would have happened if Napoleon had won the battle of Waterloo, and equally far from the attempts at counterfactual quantification of the »New Economic History« that was in vogue especially in the 1960s and 1970s. It is closer to the approach of Geoffrey Hawthorn,⁵ whose method deserves more sustained attention from historians. Hawthorn's method was to ask whether a given counterfactual scenario was within the realm of plausibility at a given time. Did people making decisions at the time have enough room for manoeuvre to bring about this other outcome? He argues, for instance, that the Black Death was unstoppable by human agency when it first hit Europe in 1348. A couple of generations later, however, people knew that a really ruthless cordon sanitaire could keep it away from a given city or region. There was an alternative, though it required harsh decisions. Where a regime was in place capable of enforcing such decisions, but did not do so, a different outcome, escape from the plague, is plausibly counterfactual. The objection to some counterfactual statements, that they do not answer *historical* questions, need not hold with Hawthorn's methodology or with the variant of it employed here. We offer *modal* statements about the past in answer to *modal*

3 D'AVRAY (2008) 125–127.

4 Council of Trent, Sessio 24, De Matrimonio, *Canones super reformatione circa matrimonium*, in: ALBERIGO (1972) 755–757. For context see JEDIN (1975), ch. 5 *passim*, and 156–158, 160–162, and LOMBARDI (2008) 100–105.

5 See above all HAWTHORN (1991), making a formidable case for counterfactual history.

historical questions,⁶ defining modal as »involving the affirmation or negation of possibility, impossibility, necessity, or contingency« (to quote the *Oxford English Dictionary*).

The variant of Hawthorn's approach adopted here is to explore the range of other plausible outcomes with the help of the comparative method, by investigating the ways in which three societies tried to confront and surmount the problem that the Western Church failed to face in 1215, at the Fourth Lateran Council. The concrete comparisons make it easier to envisage the other paths that were not taken in 1215. An essential basis for the comparison is a common starting point in all four cases: comparison has to be carefully framed to match like with like. In all the cases studied, marriage is regarded as a religious institution, and the legislative body – a great medieval Church Council, an Islamic State, the eighteenth-century Crown in Parliament, and an early modern Church Council – treats this institution as within its purview.

The comparisons show us that the alternative to tolerating one set of problems was to generate a different set, which we can characterise with some specificity. The *comparanda* adopted here do not exhaust all the possible ways of attempting to deal with the problem facing the medieval church, but they do bring out in their different ways how elusive the solution to the problem was, unless – and it is the final comparison that brings this out – change in marriage law had been accompanied by fundamental changes in the Church's decision-making system.

In the centuries between the Fourth Lateran Council in 1215 and the Council of Trent (1545–1563) the marriage system of the medieval Church achieved in some respects a high degree of ration-

ality, if we define the term to mean internal consistency governed by general principles. The internal contradiction by which the rules about consanguinity and affinity were used to undermine the principle of indissolubility had been more or less resolved.⁷ A positive law of marriage – that is, a man-made law designed to implement divine principles, but not coterminous with them – was included in the easily accessible corpus of canon law (the law of the medieval Church), and a network of courts all over Europe was staffed by men who knew enough to apply it.⁸ Papal justice could reach all over Europe through a system of judges delegate,⁹ and could be meticulous about the formal rules of procedural law.¹⁰

On the particular point that concerns us, however, the social outcomes of the system were highly irrational, in the sense that they were chaotic and contrary to the intentions of those who had made and who administered the law. It was often hard to be sure whether or not a couple had been married, if the alleged consent had been exchanged in informal circumstances and if one partner had subsequently married someone else. The Church deeply disapproved of clandestine marriages and in some regions at least the spiritual penalties for them were severe, but these contracts were recognised as true marriages rather than a mass said by a priest in mortal sin was recognised as valid.

Marriage customs varied widely across Europe, and in parts of Italy, for instance, it was quite normal to get married without a priest or religious ceremony: this did not necessarily imply any disrespect for the Church, since the Fourth Lateran Council made no regulations at all about a church ceremony,¹¹ as opposed to banns before marriage. It should be said, however, that even the rule about the banns seems to have been ignored in some

6 Cf. BULHOF (1999) 145–168.

7 D'AVRAY (2008) 112–121.

8 For a sample of the vast bibliography on the ecclesiastical law of marriage in theory and practice see *IBID.*, ch. 2 *passim*, adding notably LOMBARDI (2008); GOTTLIEB (1980) 49–83 (a good short survey of a body of cases from southern Champagne, on which see now McDUGALL [2012]; DEUTSCH [2005]; SCHMUGGE [2008]; CRISTELLON [2010]; SEIDEL MENCHI/QUAGLIONI [2006]; REYNOLDS/WITTE [2007]; DONAHUE [2007] and

LOMBARDI [2008], ch. 1). For canon law in general HELMHOLZ (1996) is particularly good.

9 See e. g. HAGENEDER (1967), ch. 2, »Der Papst als Richter«; SAYERS (1971) and HERDE (2002) 20–43.

10 D'AVRAY (2005) 987–1013, at 993–994.

11 D'AVRAY (1998) 107–115. (On marriage in later medieval Italy see also KLAPISCH-ZUBER [1979] 1216–1243.) We find a remarkable heterogeneity even of permitted ways of entering marriage, with different regions fol-

lowing different rules. Cf. DEUTSCH (2005) 59; »entwickelte die kanonistische Lehre keine rechtlich verbindliche, die sakramentale Ehe ausschließlich begründende Eheschließungsform. Hieraus ergab sich die Notwendigkeit entsprechender Ergänzungen durch partikularrechtliche Regelungen oder durch die Integration säkularer zeremonieller Handlungen – etwa beim Abschluß einer »rechten Ehe.«

regions, not only by disobedient lay couples, of which more below, but also apparently without the local ecclesiastical authorities making an issue of it.¹²

Quite apart from legitimate local custom where the actual ceremony was concerned, and even apart from the failure of some regional churches to enforce the Lateran IV rule about banns, the situation was almost out of control, due precisely to this lack of any system for officially authenticating marriages. Without the help of such a system, the ecclesiastical courts that had come to maturity in the twelfth and thirteenth centuries constantly had to decide whether or not a marriage was valid. The consequence was a mass of tricky litigation in the ecclesiastical courts. Cases about alleged prior contracts were extremely common in the church courts of the later Middle Ages and have been well studied by historians – notably by Richard Helmholz (the pathbreaking pioneer),¹³ Frederik Pedersen¹⁴ and by Charles Donahue in a recent monumental study of five courts.¹⁵ For the law was open to abuse. At the cost of some perjury, the law that all marriages, even clandestine ones, were unbreakable could be turned into a way of breaking a marriage, by the type of suit known as the »marriage and divorce case«, *causa matrimonialis et divorcii*.¹⁶ The husband or wife who wanted to get out of a marriage in order to marry a third party could invent a story of a clandestine marriage to the third party, one which allegedly took place before the marriage that he or she was attempting

to get annulled. If witnesses could be induced by friendship or cash to swear to a plausible story, the court might be convinced and declare the existing marriage to be null. Obviously, this could only work if the age of the third party did not rule it out: a man who had been married for twenty years could not claim that he had married a twenty-year-old girl before that!

It must have been possible to abuse the system in a different way: by using it for purposes of seduction. Helmholz discusses a case that came before Innocent III, in which a man »contracted marriage under a fictitious name in order to extort sexual intercourse from a girl«. ¹⁷ Innocent decided that the marriage was invalid if the man simply used the contract as a trick without any internal intention of making it a marriage. On the other hand, a consensus developed that church courts should uphold such marriages:¹⁸ the ecclesiastical court could only annul a marriage on the basis of proof. A man's declaration that he had not meant what he had said could not be grounds for an annulment. On the other hand, a marriage's existence or non-existence was an objective fact which the court's judgement could not affect.

The situation could easily arise where the church court upheld a marriage which one party knew to be invalid. If the person in question had married someone else with real consent after the marriage based on feigned consent the situation was worse. The other partner to the marriage which had been upheld by the court could demand re-

12 Significant remark in an apparently unstudied formulary of the Apostolic penitentiary: »CCCLXXXI [...] ipsi olim ignorant quod aliqua esset consanguinitas inter eos que posset matrimonium impedire publice in facie ecclesie bannis *ut moris est in partibus ipsis* premissis [...]« (British Library [hereafter BL] Add. MS 24057, fol. 45r). The passage I have italicised implies that reading the banns was not a universal practice but a local custom – not what one might expect from a rule instituted by a general council. (This formulary has material that must be later than the formulary edited by LEA [1892], but has fewer entries than, and probably antedates, the formulary of Benedict XII analysed by GOELLER [1907] 32–33.) Conversely, a later source

shows it was not everywhere customary to have the banns read: »[...] ipsi olim ignorant aliquod impedimentum inter eos existere, quominus possent invicem matrimonialiter copulari, matrimonium inter se per verba, legitime, de presenti § iuxta morem patrie ban-<n>is non editis, cum in partibus illis banna e[*d*]di non consueverunt, servatis tamen sol-<l>empnitatibus nubi servari consuetis § invicem contraxerunt publice [...]« (MEYER [1979] number 826, 460). Cf. also the following passage from the Penitentiary Registers: »alias matrimonium inter se nulla proclamatione bannorum in parrochiali ecclesia, ut mos in illis partibus est, facta, et forsan clandestine per verba de presenti, alias tamen rite, contraxerunt« (Archivio Segreto Vaticano

[hereafter ASV], Penitenzieria Apostolica 60, fol. 181v, cited in D'AVRAY (2005) 989, n. 6).

13 HELMHOLZ (1974).

14 PEDERSEN (2000).

15 DONAHUE (2007).

16 »The *causa matrimonialis et divorcii* could be used as a weapon of fraud, as a tool for dissolving long-standing marriages unjustly« (HELMHOLZ [1974] 64). He tells the story of an unhappy marriage dissolved after a third party had been bribed to swear that he had contracted a prior marriage with the wife: *IBID.*, 162. A somewhat similar case is the subject of a vivid preaching *exemplum*: see D'AVRAY (2008) 119–120.

17 HELMHOLZ (1974) 42.

18 *IBID.* 42–43.

stitution of conjugal rights, but to comply would be to commit adultery.¹⁹ Or again: Helmholz mentions the case of a man called John Paynamita living in London whose first wife was seen alive in Bayeux. Even if he wanted to leave the second wife, to do so legally he had to somehow prove to a church court that it really was his first wife in Bayeux, which might be hard.²⁰

The further rule that betrothal followed by sexual intercourse counted as evidence for consent to a marriage must also have been a potential source of ambiguity; and it could have generated situations similar to those outlined above. The intercourse did not actually constitute consent: it was merely thought normally to be overwhelming evidence of consent when preceded by an engagement. As Aquinas puts it:

[...] we can speak in two ways about marriage. In one way with respect to the forum of conscience; and in this way the truth of the matter is that carnal union does not have the power to perfect a marriage which has been preceded by an engagement in words of the future tense, if mental consent is lacking; since even words in the present tense expressing consent do not make a marriage if mental consent is lacking [...]. In another way with respect to the judgement of the Church: and since in an external judgement, judgement is passed according to what can be seen from the outside, carnal union following betrothal is judged to make a marriage according to the judgement of the Church unless some explicit signs of trickery or fraud are apparent.²¹

A little later he specifies »signs [...] such as if they are far apart in status, either with respect to nobility, or to fortune«. These comments evoke *Tess of the d'Urbervilles*-like scenarios – seduction of simple girls by cynical upper-class men. There was not a lot to be done about them unless the law was modified.

The law did not work in a uniform way all over Europe: in fact, there was much variety. In the bishopric of Regensburg, for instance, there was a much more tolerant attitude to informal marriages than, say, in Salisbury.²² The magisterial study of marriage litigation by Charles Donahue brings out some striking regional differences between England, Paris, and Belgium, the areas he studied.²³ His arguments are too substantial for précis here but the following schema may be risked: the more that family interests controlled marriage at point of entry, the smaller the room left for exploiting the openings left by canon law. The converse is to be expected where the extended family was relatively weak and social attitudes relatively »individualistic«: the easier it was to get married without prior public knowledge, the higher the risk that one partner might deny that the marriage had ever taken place and get away with it, and the greater the temptation to escape from a marriage by pleading a previous contract and demonstrating it to a court through friends prepared to perjure themselves. On this model, parental or extended family control, on the one hand, and individualistic anarchy, on the other, varied inversely.

For all the regional variety, the absence of an official authentication system was a problem common to the whole Latin West. Family structures might vary; local church authorities might be laissez-faire and lenient, or tough and prescriptive; the fact remains that a couple who had reached puberty and who were not too closely related could get married at any time and place by exchanging words of free consent. This was not likely to please parents any more than it did the authorities, and in due course there was a powerful reaction against it.

In the sixteenth century, forces as different as the French monarchy and Martin Luther wanted parental control to be enforced by law. If Sarah Hanley is right, mid-sixteenth-century French juries were asserting the right not only to punish marriages contracted without parental consent but to actually annul them, as well – a very different

19 Cf. *IBID.* 62–63.

20 *IBID.* 62.

21 In 4 *Sententiarum Dist.* 28 q. 1 art. 2, »Respondeo« section, in: TOMMASO D'AQUINO (2001) 292.

22 Contrast Statutes of Salisbury IV (1257) [24], in: POWICKE/CHENEY

(1964) 559 with DEUTSCH (2005)

317: »Evoziert wurde [...] Konfliktlösung.«

23 The following lines try to give a nutshell synthesis of some of the principle arguments of a study too massive and rich for me to do it justice.

matter.²⁴ A French royal edict of 1556 »forbade young men under the age of thirty and young women under twenty-five to marry without obtaining the consent of their parents or relatives«, with severe penalties for disobedience: loss of inheritance and other property rights (e. g., gifts might be taken back),²⁵ and »peines arbitraires«.²⁶ The Edict of Blois laid down that to marry someone under twenty-five against their family's wishes was rape and punishable by death; the consent of the »minor« did not alter the case.²⁷

To make parental consent a necessary condition for a valid marriage was one answer to the problem. To go along with this idea the Church would have had to reverse a long tradition of emphasis on individual choice, especially pronounced from the twelfth century onwards.²⁸ At Trent, the Council Fathers were not prepared to do so, despite strong pressure from the French king to make parental consent a condition for a marriage of minors (»filii et filiae familias«).²⁹

Luther seems to have thought that lack of parental consent invalidated a marriage, and came to the view that even subsequent parental consent did not make it a real marriage.³⁰ A partial concession to the medieval canonists' point of view was his belief that subsequent consummation created a valid marriage.³¹ His position is complicated by his use of the word »Verlöbniß«, which one would normally translate as »betrothal«. Does he mean a promise to marry in the future, or present consent? The solution appears to be that he collapsed the distinction between betrothal and marriage so that all betrothals were marriages unless the contract was explicitly subject to a condition or a time limit.³² Luther's marriage doctrine does not lend itself to simple summary.³³ His views are, however, certainly symptomatic of a widespread sense that marriage by consent alone was not working.

The actual solutions worked out in Protestant Germany must be left to one side here. It is hard to generalise about a country with many different

24 HANLEY (2003) 1–40, at 7: »subject to nullification«; »nullified a clandestine marriage«.

25 TRAER (1980) 33.

26 GAUDEMET (1974) 15–30, at 18.

27 TRAER (1980) 34.

28 NOONAN (1973) 419–434; DONAHUE (1976) 251–279; BRUNDAGE (1987) 335–336; D'AVRAY (2008) 125–126; for the early Middle Ages see WEBER (2001): she argues that consent did not mean just the consent of the couple.

29 JEDIN (1975) iv/2. 105; LOMBARDI (2008) 100.

30 DIETERICH (1970) 58: »versteift sich Luther darauf, daß die Nichtigkeit infolge fehlenden Elternkonsenses auch nicht durch nachträgliche Genehmigung seitens der Eltern geheilt werden könne«, citing his remark, in a sermon, to the effect that »Will also verdampft haben nicht allein das heimlich Verlöbniß der Kinder, sondern auch der Eltern Bewilligung, so hernach allererst folget« (IBID. 58 n. 232).

31 IBID. 58: »An dieser Heilung des Mangels der Heimlichkeit durch nachfolgenden fleischlichen Vollzug wird deutlich, daß Luther sich in Wahrheit gar nicht so weit vom kanonischen Recht entfernt, wie es zunächst scheinen möchte.«

32 »[...] Sponsalia per verba de futuro (Verlöbniße im engeren Sinne) will er nur dort annehmen, wo der Vertrag ausdrücklich bedingt oder betagt wird. Alle übrigen Desponsationen sollen sponsalia de praesenti, also eigentliche Eheschließung sein« (IBID., 54). LOMBARDI (2008) 107, formulates it a little ambiguously: »Lutero considerò la promessa come un vero e proprio matrimonio, a patto che venisse fatta pubblicamente, alla presenza di almeno due testimoni e con il consenso dei genitori, e fosse solennizzata in chiesa [...]«; this does not quite spell out whether the couple were already deemed to be married after the »Verlöbniß« and before the ceremony, though Lombardi goes on to say, *ibid.*, that »anche in area protestante la tendenza ad attribuire maggiore importanza alla cerimonia religiosa alla presenza del pastore fece sì che molto lentamente, tra il XVII e il XVIII secolo, promessa e matrimonio cominciassero a distinguersi«. On subject the following full analysis has still not been superseded: FRIEDBERG (1865) 304–305 (summarizing a lengthy preceding discussion); cf. also FRIEDBERG (1876) 64–70.

33 IBID. 58–59, passage beginning »Sein Standpunkt läßt sich mit den Begriffen der Kanonistik folgendermaßen

umschreiben [...]« and ending »[...] eine Einbruchsmöglichkeit eröffnet wird«. In the last three medieval centuries a marriage by present consent (clandestine or not) was a »matrimonium ratum«, between »initiatum« and »consummatum«. A »matrimonium initiatum« was nothing but a betrothal, to be taken more or less seriously according to the local custom, but certainly never indissoluble. I doubt whether Dieterich thinks he is talking simply about betrothals, however, since he speaks of clandestine *marriages* almost in the same breath.

regimes, and more research is needed to put together an overall interpretation.³⁴ In any case three *comparanda* are enough. In each of the cases chosen, the problem facing the authorities was practically the same as with the medieval Church, but they chose action rather than inaction and in different ways show the range and limits of what the medieval Church could have done about the problem.

All three systems to be compared with that of the late medieval church attempted a rationalisation³⁵ of entry into marriage through the imposition of a clear-cut system under public control. The fact that the public control is that of the State in two cases and the Catholic Church in the other two makes surprisingly little difference: neither modern Pakistan nor eighteenth-century England recognised a *Church – State* or even a *Religious – Secular* distinction such as non-academic Westerners believe to be universal, and the medieval and early modern Church acted as »the government« where the validity of marriage was concerned, getting its claims fairly generally accepted in Catholic Europe, moreover, with the notable exception, to be discussed below, of France.

So, in each of these three cases – modern Pakistan, eighteenth-century England, Counter-Reformation Catholicism – a body claiming religious authority within the system in question tried to put an end to the chaos arising from religious recognition of informal marriages by requiring official authentication as a condition of validity. In each case the authority worked within the religious system rather than against it; so we are not looking at anything like a *Church v State* or *Religious – Secular* conflict. In each case the solution brought its own problems, though in one case a mechanism was devised for solving them relatively smoothly. We will begin at a distance and in the present, with modern Pakistan; come closer to medieval Europe chronologically and geographi-

cally by looking at the abolition of clandestine marriages in eighteenth-century England; and end back in sixteenth-century Catholic Church, with the Council of Trent's solution to the problem of unauthorised marriages.

Modern Pakistan is an Islamic state³⁶ which has found itself facing difficulties of much the same sort as troubled the later medieval Church: it was and is difficult to tell who is married and who is not. Marriages unauthenticated by any official body were of unquestioned validity in religious terms – provided one could tell who was married to whom. To introduce some order, a body claiming supreme authority within a system of sacred law, as well as over State law, which is officially integrated into the sacred law, has purported to declare that unregistered marriages are invalid. Against this, many people doubt whether a marriage *can* be invalidated if it fulfils the essential requirements of the Sharia'h law. Pakistan has taken the course that the Fourth Lateran Council implicitly rejected but which, as we shall see, the Council of Trent adopted. The fact that we are dealing with Islamic rather than Christian sacred law does not invalidate the comparison: it works at all the essential points.

Can a Muslim state make Muslim laws and put itself above God's law? Pakistan is the one jurisdiction in the world which has had to determine such questions within a postcolonial legal framework of reference. It becomes a matter of defining the identity of the Islamic Republic of Pakistan how questions of marriage, divorce and other matters are decided by state courts. When Pakistan became independent in 1947 it aimed to provide a homeland for the subcontinent's Muslims. A national Convention decided already in 1949 that the basic principles of Pakistani law should be those of Islam. This set up a tricky predicament for Pakistani state courts: the judges have to do the job of traditional Muslim jurists.

34 On marriage law in Protestant Germany see FRASSEK (2007) 372–392; BURGHARTZ (1999); HARRINGTON (1995); ROPER (1989); WITTE (1986) 293–351; ROPER (1985) 62–101 (note good bibliography on 64, n. 9, and 66, n. 12); SAFLEY (1984); OZMENT (1983); DIETERICH (1970) (not replaced for the new Protestant law of marriage); MICHAELIS (1968) 43–62. FRIEDBERG

(1876) is still worth reading; RICHTER (1967); WITTE (2002) 199–256.

35 It should be emphasised here that talk of rationalisation need not imply a value judgement. The word is used in its Weberian sense, which was a neutral sense. There is a point of view from which any public control of private sexual lives seems unjustified, and it would be possible to hold that

view without dissenting from the conclusions of this essay.

36 For another Islamic case study, see CAMMACK/YOUNG (1996) 45–73.

In 1961 the Muslim Family Laws Ordinance (MFLO) was promulgated.³⁷ This is what section 5 says about the contract of marriage:

5. Registration of marriages:

(1) Every marriage solemnised under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

What does this mean in practice and in law? The MFLO evidently recognises that a Muslim marriage will be celebrated first of all under Muslim law, as a solemn contract before Allah. The Muslim state of Pakistan could not possibly have disregarded this. But what is the relationship between the traditional Muslim family law, the shariat, and the state-made rule of law that says that such a marriage shall be registered under the legal provisions made by the state? When does a Muslim marriage in Pakistan become legally valid – on completion of the Muslim contract, or on registration of the marriage in accordance with state law? This means we are asking whether the state's law or God's law is superior.

If we read the provision again, it seems to give us an answer: section 5 (1) avoids the word »contracted« for marriage, but uses »solemnised«, which seems to suggest that a religious marriage will only be legally valid under Pakistani law if it is duly registered with the state authorities. This impression is also reinforced by the use of the word »shall« for the requirement to register.

Does it mean that a Muslim marriage contract in Pakistan will only be legally valid if that contract is ratified by the state? By no means! There is not a single case *from Pakistan* that would tell you that an unregistered Muslim marriage is not legally valid.³⁸ The MFLO has always been challenged by Muslim fundamentalists in Pakistan as an un-Islamic law, and in 2000, the Federal Shariat Court of Pakistan finally tried to resolve the many challenges to the MFLO. It undertook a national reconciliation exercise, as the Court went to all major cities in the country, inviting anyone with any views to come and tell them, so that the matter could be decided in the public interest, helping to

construct a proper Islamic system of governance in Pakistan.

The case of *Allah Rakha v. Federation of Pakistan*, PLD 2000 FSC 1, therefore became candid proof that Pakistan has two types of Islamic law and that, if it comes to the crunch, Islamic natural law is superior to Islamic positivist law.³⁹ The case concerns succession of orphaned grandchildren, marriage, bigamy, and divorce. We are only looking here at the marriage aspects, sufficient to give the essential picture. The Federal Shariat Court was told by certain petitioners that the requirement in s. 5 MFLO to register Muslim marriages under Pakistani law was un-Islamic and violated the Qur'an and Sunna. With considerable subtlety, the Court managed to hide the key question at issue here: Is a traditional Muslim marriage contract entered into in Pakistan legally valid by itself, or does it need the sanction of the state? It is a clear question: cannot the Court give a clear answer? Section 5 (1) seems to suggest that a marriage must be registered, but we have already seen that if we read »shall« as »must«, we are privileging state law over shariat law, and that would indeed be un-Islamic. The Federal Shariat Court gets out of this: they find that there is nothing in Qur'an and Sunna to say that a marriage should not be registered. So, a legal requirement to register a marriage would not in itself be un-Islamic, and in fact the Sunna recommends that important transactions should be documented in writing.

That line of reasoning does not, however, solve the issue of when a Muslim marriage contract becomes legally binding. In fact, where there is a conflict between the state-sanctioned shariat law and the state-made MFLO, the rules of the shariat will always prevail. Thus, »shall« in the MFLO does not mean »must«, but rather something like »should«, or »should please«, or maybe »Inshallah, if God wills«. The result is that the so-called legal requirement to register a Muslim marriage in Pakistan under the provisions of the MFLO is in fact optional. As in the early days of Islam, a modern Islamic state is also today not in a position to override God's law. If the simple rule of contract of marriage in Islamic law is that a man

37 Cf. e. g. MENSKI (2006) 372 and n. 159; it is an ordinance not an act because a military dictator promulgated it: *IBID.* 372.

38 The attitude of the British Home Office, deciding immigration cases, is another matter.

39 Cf. MENSKI (2006) 378.

and a woman may contract a marriage in front of God and at least two witnesses, then no Islamic state can deny that contract legal validity on the ground that it does not comply with some formalism of state law. Thus, in Pakistan, we have a *soi-disant* Islamic government laying down an extra condition for a valid marriage, but failing to carry weight with the learned men who mattered and the general population.

Is this what would have happened if the Fourth Lateran Council had tried to make some kind of registration of marriage a requirement for validity? The question forces us to think about authority structures in the two religions but also about the relation between those structures and popular feeling. On the one hand, it seems likely that the requirement could have been legitimated in the eyes of the religious elite in thirteenth-century Western Europe. On the other hand, it is not so clear that the elite could have carried popular feeling with them.

The religious elite would probably have accepted that a General Council had the power to impose a new condition for validity, because there were precedents. The Second Lateran Council (1139) had declared that a priest could not get married validly.⁴⁰ Furthermore, the changing of the boundaries of the forbidden degrees at Lateran IV implied that impediments to a valid marriage existing up until that point had been positive, i. e., human law, which the Church had made and could unmake. Subsequent dispensation practice presupposed that the impediments removed were those that the Church itself had created – and these were impediments that invalidated a marriage.⁴¹ Logically and theologically, no insuperable theological obstacle stood in the way, if the will had been there. If the Fourth Lateran Council had decreed (say) that no marriage was valid unless registered by the parish priest or a notary, it seems likely that the Council's own authority would have given the decision more authority than the Pakistani State's law seems to have had. However Islamic it may claim to be, the Pakistani State does not possess within Islam (even within the borders of Pakistan) the kind of authority that a General Council possesses within Catholic Christianity.

Whether the population of Christendom would have understood the logic is another matter. We have seen that there were regions of Europe where the clergy were not even involved in the marriage ceremony – where such involvement had not even been required by the Church so far as the actual ceremony was concerned. It is doubtful whether it was high time to win acceptance for so drastic a change.

When the change was finally made in the sixteenth century by the Council of Trent the atmosphere was different. By that time, the clerical elite could at least draw support from the patriarchal reaction to the »consent makes a marriage« anarchy of the later medieval centuries. While the Council Fathers parted company from the French monarchy and Martin Luther, among many others, when it came to parental consent, they could at least agree with both about the danger of clandestine marriages. In the thirteenth century that patriarchal backing might have been lacking. The power that the consent doctrine gave to couples had not yet had time to penetrate the general consciousness and subvert family authority. The legitimation by the highest Church authority of the doctrine that consent between a couple made a marriage, and the enforcement of that doctrine through a network of Church courts, was still relatively new.⁴² Potentially it put power in the hands of young people to defy their parents' wishes. A general consciousness of that power would have taken time to take hold. It had well and truly done so by the sixteenth century, and as we have seen this had provoked a reaction. The reaction surely softened public opinion and made it ready for marriage reform by the Church. Heads of households in particular must by then have been acutely aware of the advantages of eliminating informal entry into marriage. Parental control would be best of all but proper procedures with a religious ceremony were a lot better than nothing; there would be every opportunity to counter romantic plans. In 1215 the Church could hardly have counted on the same kind of support. We cannot assume that the Fourth Lateran Council would have been able to do what the Council of Trent just about managed to achieve.

40 MIRBT (1934) no. 307, 163.

41 See e. g. KROPPMANN (1937).
For background, BRYS (1925).

42 D'AVRAY (2008) 124–128, with
further references.

Comparison with Islam draws attention to the problem of public opinion. Our next comparison considers the difficulty of drafting legislation to reform a marriage law, which was descended from, and more or less the same as, that of the medieval Church. This case, in eighteenth-century England, shows that even if public opinion was not a real problem, it was still extremely difficult to frame a law of authentication in such a way as to avoid paradoxical results.

In England⁴³ the marriage law of the Catholic Middle Ages survived the Henrician and Edwardian Reformations, so that we find it still operating, entirely recognisable, in the first half of the eighteenth century. It was only finally abolished in 1753 by the Hardwicke marriage act.⁴⁴ This made marriage by a clergyman necessary for validity,⁴⁵ with certain other strict conditions attached to give parents and guardians their due. In its intentions, the act seems remarkably in tune with the religious and moral values of its time. Reading the 1753 Act without the benefit of hindsight, one would think it to be watertight. Clause XI, notably, looks like a careful piece of drafting:

And it is hereby further enacted, That all Marriages solemnised by Licence, [...] where either of the Parties, not being a Widower or Widow, shall be under the Age of Twenty one Years, which shall be had without the Consent of the Father of such of the Parties, so under Age (if then living) first had and obtained, or if dead, of the Guardian or Guardians of the Person of the Party so under Age, lawfully appointed, or One of them; and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guard-

ian or Guardians of the Person appointed by the Court of Chancery, shall be absolutely null and void to all Intents and Purposes whatsoever.⁴⁶

Who could have foretold the trouble to which this clause would lead? The passionate attempt to reform the Act by Dr Joseph Phillimore nearly three-quarters of a century later⁴⁷ shows how even most carefully framed acts could generate paradoxical legal situations. Just like the previous marriage law, it was open to abuse, which the courts had little choice but to endorse. For it appears to have been easy to give a false age when obtaining a licence. If someone pretended to be over 21 when they were not, there was nothing to stop them marrying without parental consent. If they subsequently revealed the truth about his age, the marriage was automatically void, and they were free to marry again.⁴⁸ Phillimore argues that men and women commonly used this rule to get out of a marriage long after it had taken place.⁴⁹ He gives examples, for instance *Wattle v. Hathaway*, where:

the woman was a minor at the time of the marriage; the husband obtained the license by making oath that she was of age. They cohabited some years, and had issue four children; when being in great poverty and distress he went to India, and there realised a considerable fortune. He returned to England [col. 1338]; and, after his marriage had subsisted twenty-seven years, instituted a suit for a nullity of the marriage, on the ground of his wife having been a minor at the time he had sworn her to be of age, and he succeeded in his suit.⁵⁰

Another kind of problem arose. What was the status of the consent of an illegitimate child's

43 This section owes much to the bibliographical help of Julian Hoppit.

44 For a good overview, see OUTHWAITE (1995). Note also the following: LEMMINGS (1996) 339–360 (arguing that the debates about the bill in the House of Commons lend no support to the thesis of a »rise of affective individualism« in the eighteenth century); PROBERT (2002) 129–151 (arguing that the courts interpreted the Act in a spirit of substantial rather than formal legal rationality, in that they took a strict line when clandest-

tine marriages of minors were in question, while favouring the validity of long-standing marriages); WADDAMS (2000) 59–82 (analysing the continued role of ecclesiastical courts and suggesting that they were sympathetic to the interests of women). For reflections of practice in literature see JACOBS (2001).

45 OUTHWAITE (1995) 84.

46 The 1753 Act [XI], *IBID.* 176.

47 *IBID.* 150–153; The Parliamentary Debates, NS, vi, London, 1822, cols. 1326–1362.

48 The Parliamentary Debates, NS, vi, London, 1822, cols. 1333–1334.

49 »those who are acquainted with the proceedings of the courts in which such facts are most likely to be developed, will know that I am not indulging in an exaggerated statement, or referring to facts of rare and unfrequent occurrence« (*IBID.* col. 1334).

50 *IBID.* cols. 1337–1338.

father? It should be remembered that in English law marriage did not retroactively legitimise a child: if a child was born out of wedlock, it was a bastard even if the couple were joined in matrimony shortly afterwards. Courts decided by legal logic that an illegitimate person's father's consent did not meet the requirements of the Act. Instead, a guardian had to be appointed by the High Court of Chancery.⁵¹ Only such a guardian could give the requisite consent. Logical this may have been, but it could produce a bizarre chain reaction: invalidating one marriage after another within the same family without anyone intending it. He gives as an example of a real case where two minors married with full parental consent, without knowing that the man had been born before his parents married. The couple had children, one of whom married as a minor with her father's consent. When his own illegitimacy came out, his own marriage was invalidated because his natural father was not entitled to give consent. Consequently, his own consent to his daughter's marriage was moreover without legal force, so it would be no marriage and her children too would be bastards.⁵²

Our second *comparandum* thus shows that unpredictable cases were likely to arise out of any attempt to create a rational law of marriage registration. The Hardwicke Marriage Act was passed two centuries after Trent's attempt to remedy the

abuses of clandestine marriage, and presumably with the benefit of that vicarious experience.⁵³ The point here is different from the Pakistani case. The authority of the Crown in Parliament over the Church of England was broadly accepted – unlike the authority of the Pakistani State over shariat law. Winning public acceptance of the law's legitimacy was probably not a major problem. In eighteenth-century England, Church and State were united quite effectively under one sovereign body. Even so, Parliament's attempt to put a working law in place regarding clandestine marriage still opened a can of worms. It would hardly have been different with the Fourth Lateran Council, even if it had been sufficiently sure of its power over the fundamentals of marriage to take any such step. It is true that the illegitimacy paradoxes were less likely to arise in Catholic canon law, in which bastards were legitimised by subsequent marriage of the parents. Even so, the Council of Trent's reform of the medieval system also led to hard cases unforeseen by the Council Fathers.

Our third *comparandum* reinforces the argument of the second: it shows how hard it is to frame a law of authentication that really works, while satisfying religious requirements. The problems that arose out of the new law created by Trent have not yet been adequately studied.⁵⁴ A few scholars have started to trace the effort to make

51 Phillimore comments that »[...] it was only after long and elaborate arguments in various courts of justice, and after doubt and hesitation on the part of some of the learned judges, before whom this question has been at different times argued, that the point was finally determined« (IBID. col. 1340).

52 IBID. cols. 1352–1353.

53 Cf. the comment of Dr Joseph Phillimore, who tried to reform the reform: »The terms in which the nullity is denounced are probably borrowed from an enactment of nullity, which is to be found in one of the decrees of the council of Trent to those marriages which are performed without the intervention of a minister in holy orders, and without the presence of two or three witnesses; that is, it defines what ceremony shall constitute a marriage; it does not as in the case we are considering, make the nullity depend on the conduct of the party

who has at once the power of creating it, and the power of concealing it.« The Parliamentary Debates, NS, vi, London, 1822, col. 1336.

54 For an important exception, a fascinating discussion of specific cases, from the point of view of social honour, see RUGGIERO (1993) (my thanks to Catherine Rider for the reference) 26–28 (Adriana Savorgnan) and 60–61 (case of Elena Cumano). Elena definitely did not match up to Tridentine requirements for validity. Ruggiero claims the same for Adriana, on the grounds that the banns were not read. In fact Adriana may have been validly married even under the new law, as interpreted by the cardinals of the Congregation of the Council: *Novae Declarationes Congregationis S.R.E. Cardinalium ad Decreta Sacros. Concil. Tridentini, iisdem Declarationibus conserta*, Lyons 1633 [British Library call no. 1600/181] 340: »Si omittantur de-

nunciaciones per hoc Matrimonium non est irritum, si fuerunt servata caetera requisita.« This source does not name the date of the decision, so perhaps the point had not yet been settled at the time of Adriana's marriage (1581). An anonymous referee of this paper points out other dimensions of the problem that cannot be explored here: far-reaching differences of theological opinion about marriage within the ecclesiastical milieu, and resistance to the Tridentine rules after they had been formulated; also that in Catholic (and indeed Anglican) regions efforts to get out of a failed marriage via the ecclesiastical courts focused on trying to find flaws in the original marriage contract, given that, if valid, it was indissoluble.

the new decree work »on the ground«. ⁵⁵ This effort has been handicapped by the unfamiliarity of the scholarly community as a whole, again with some exceptions, with a crucial source for studying hitches in the implementation of the new legislation. ⁵⁶ This is the archive of the Congregation of the Council, the curial body headed by cardinals which was entrusted with the task of interpreting the reform legislation of the Council. ⁵⁷ Some examples from this archive reinforce the point that it is hard to make registration necessary under a sacred law regime; this even with general acceptance of the Council's power to make all future unregistered marriages null.

It would have taken an astute historian to predict from the decree *Tametsi* alone the problems to which it would give rise over the centuries. In a

nineteenth-century compilation of the decisions of the Congregation, presented in a summary form without the documentation that lay behind them, they take up 110 pages. ⁵⁸ These pages are full of human interest. Readers of Manzoni's *I promessi sposi* may remember that when the parish priest decided to delay a wedding (after being threatened by a local noble who had designs on the bride), the impetuous bridegroom tried to trap him unawares into witnessing an exchange of vows. ⁵⁹ The Congregation actually had to decide whether a valid marriage could emerge from such a scenario, and determined that the marriage should stand. ⁶⁰

Another problem was: did the new rules hold good for France? *Tametsi* only applied to regions where the decisions of the Council of Trent had been promulgated. The French monarch prevented

55 ALBANI (2005) (I have not seen this but Dr. Albani kindly furnished me with her abstract); using the statutes of diocesan synods: JEMOLO (1993) 70–74. (This is a reprint of a book published in 1941 [Milan], aiming to explain the canon law of marriage to the lay intelligentsia – see the interesting preface by GAUDEMET [1974] 11–22 – so it represents the scholarship of two generations ago, but it still retains some value.) RASI (1953–1954) 189–207 (he argues on 206–207, summarising an earlier study, that it was far from easy to make the new rules work in practice and that the new principles were widely ignored or misunderstood).

56 Alert researchers, notable among them Schutte, Albani, Cristellon, are already well aware of the riches in this great archive. (Since this essay was drafted, Dr CRISTELLON has published *Does the Priest have to Be There?*, *IBID.* [2009] 10–30).

57 PARAYRE (1897); ROMITA (1989) 13–50. Cf. PRODI (1972) 191–223, esp. 198–199 (my impression from this article is that Prodi had not worked on the actual archival fondi of the Congregation of the Council). On the fondo containing the archive of this Congregation see CAIAZZA (1992) 7–24; BLOUIN et al. (1998) 21–27, and, especially, JACOBSON SCHUTTE (2006) 51–79, with an invaluable introduction to the relevant ASV series: 59–60; and now *IBID.* (2011). With Albani, editor of this

Focus section, Schutte was a pioneer of the use of this rich body of documentation. See too Vatican Secret Archives Collection Index and Related Description and Research Resources, Vatican City 2006, 28. On the neglect of the fondo cf. ZARRI (1996) at 465 n. 85: »Non mi risulta che la giurisprudenza della Sacra Congregazione del concilio riguardo al matrimonio sia stata esaminata.« She herself makes use of a three-volume manuscript synopsis of decisions of the Congregation of the Council, compiled in the eighteenth century: BUB [Bibliotheca Universitaria Bologna] 537: see *IBID.*, 465–466, 470, 477–478. The archive is, however, one of the sources for the thesis of ALBANI (2008–2009), notably section II.4.1. John Noonan and his then research assistant Richard Helmholtz managed to consult the archive before it was deposited in the Vatican Archives, for NOONAN (1972), *Power to Dissolve*. RASI (1953–1954), uses the decisions of the Congregation published by RICHTER/SCHULTE (1853). See now also D'AVRAY (2010) Appendix, and CRISTELLON (2009).

58 S. PALLOTTINI, *Collectio Omnium Conclusionum et resolutionum quae in causis propositis apud Sacram Congregationem Cardinalium S. Concilii Tridentini Interpretum Proderunt ab eius Institutione anno MDLXIV ad annum MCCCCLX*, 13, Rome 1887 [BL call number 5018 c. 1], 145–255.

59 MANZONI (1960) ch. 8.

60 PALLOTTINI (1887) 151, passage beginning: »47. Quapropter proposito dubio: V. Si adsit Sacerdos, dum contrahitur Matrimonium, casu non cogitans, se esse ad id vocatum [...]« and ending: »[...] Valere, etiamsi Parochus aliam ob causam adhibitus sit ad illum actum – in *Giennen. die 16 Iulii 1582 lib. 3 Decretorum pag. 59 a tergo*«. Cf. LOMBARDI (2008) 117.

its formal promulgation in France.⁶¹ There was a tendency in France for the monarchy and secular law to assert control over marriage.⁶²

The seriousness of the problem for contemporaries and its importance for historians of modern France can easily be underestimated. True, the French monarchy demanded marriage in Church, just like the Council of Trent; and it is also true that a priest who ignored the secular rule demanding parental consent was taking such a personal risk by defying the regime that marriages valid by Tridentine rules which were not also valid according to royal jurisprudence were unlikely to occur: that is to say, any marriage in front of the parish priest was likely to be a marriage for which parental consent had been obtained.

But a crucial point needs to be made here. *If* Tridentine rules did not apply in France, in the eyes of the Church, then marriages by consent alone would still be valid *so far as canon law was concerned*. The old medieval rules would still apply. The State could hardly prevent such marriages. It was one thing to put the frighteners on the parish clergy, and quite another to remove all possibility of personal and private exchanges of consent, below the radar of officialdom. In the eyes of the Church, however, such clandestine marriages would, *if* the Council of Trent was not canon law in France, invalidate any subsequent marriage in Church, even if it otherwise met all the requirements of Church and State. The medieval situation would still obtain, with all the power of clandestine marriages to out-trump any later ceremony. This consideration rules out the hypothesis with which some historians may have been implicitly

content, viz. that the Council of Trent's rules did not apply, but that this hardly mattered. For if it really were the case that they did not apply, so that clandestine marriages remained theologically valid, that would matter a great deal. Banns were read before marriages. If clandestine marriages were valid in ecclesiastical eyes, there would have been nothing to stop jilted spouses putting a spoke in the wheel of any subsequent, and more regular, marriage projects of their partner by telling the priest about the clandestine marriage.

Modern scholarship appears to have skirted around this major issue up until now. This may be because the Congregation of the Council has received too little attention. The decision seems to have been taken by the Congregation that *Tametsi* did apply there.

The key fact is that at the beginning of the seventeenth century the Congregation decided that promulgation of the Council of Trent was to be presumed in any parish where that decree (*Tametsi*) had been in fact observed as a decree of the Council of Trent – i. e., the parish's practice was the litmus test.⁶³ From then on the decision was available in the Congregation's archives for reference purposes. Centuries later, when France was in the throes of revolution, and many of the parish clergy were compromised by their adherence to the »Civil Constitution of the Clergy« (which had been condemned by the pope), we find this decision being cited in a letter from Rome to the bishop of Luçon, who had written asking what to do.⁶⁴ The bishop had proposed, as a solution to be considered, the line that since it could not be established with certainty that the

61 GAUDEMET (1974) at 24. See above, at notes 26–28, for French royal pressure on the Council Fathers to make parental consent a *sine qua non*.

62 Cf. HANLEY (1997) 27–52, at 30–31 and n. 12, and HANLEY (2003). Not all of the data she cites implies a head-on conflict with canon law. Thus Jean Chenu's views as she describes them seem to accept the validity *per se* of a marriage in accordance with canon law but not with French law: the violation of the latter, however, voided it of civil effects – crucial of course for property: *IBID.* 22. Such a situation will be familiar to medievalists: notably, in later medieval England a bastard was legitimized by

the parents' subsequent marriage in canon law but not in common law. But Hanley also says that French jurists »nullified marriages in civil courts« (*IBID.* 21), and discusses (30–32) the *cause célèbre* of the Bourbon-Lorraine case of 1634. Annulment *tout court* by a secular court, as opposed to nullification, so far as civil effects were concerned, was indeed in direct conflict with canon law. GAUDEMET (1974), though earlier than Hanley's articles, is still well worth reading on some points: e. g. 22–23 on the 1634 case.

63 »Secundo, publicationem praesumi, ubi id decretum fuerit aliquo tempore in parochia tanquam decretum

Conc. observatum.« ASV, Congr. Concilio, Libri Decret., 10, fol. 47v (in margin).

64 Epistola ad Episcopum Lucionensem (1793), in a booklet bound into BL Add. MS 8338, fols. 114r–119v, at fols. 117v–118v.

Council of Trent had been promulgated in France, its rules were not binding.⁶⁵ The »select committee« of cardinals given the task of replying to the bishop would have none of his ingenious suggestion and referred to, precisely, the Congregation's archival record of its decision, and to its exact date, 26 September 1602.⁶⁶

There is much research to be done on the reasoning behind such decisions, which seem to have been the result of rational exchanges of opinion. An instance may be cited to give an idea of the kind of material to be found in the Con-

gregation of the Council *fondo. Tametsi* had specified that the couple should be married by the parish priest. But suppose a family not only had a town house but also a *pied-à-terre* in the country? What if the marriage were conducted by the parish priest of their second dwelling? Such a case occurred at Florence. The case needs more investigation, but it would seem to have been initiated by the woman, who proposed that the marriage was null on the grounds that the real parish was the urban one.⁶⁷ Presumably she had changed her mind about the man. The kinds of consideration

65 »Primum animadvertis, non posse certo statui, notissimum Concilii Tridentini Decretum, quod legitur *Sess. 24 de Reformat. Matrim. Cap. I*, publicatum reapse fuisse in singulis Galliarum Ecclesiis, quam quidem publicationis formam expresse requirit Tridentinum, ut post triginta dies a publicatione facta, incipiat obligare.« (Epistola, in BL Add. MS 8338, p. viii, fol. 117v).

66 »Frustra quaestionem modo moveri, num Tridentini Concilii Decretum publicatum in singulis Galliarum Ecclesiis fuerit. Cum enim certo certius constet in Ecclesiis Galliarum jam usu receptum esse, ut Matrimonia celebrentur coram Parocho, et duobus, vel tribus Testibus tamquam in executionem Decreti Concilii Tridentini, hoc profecto satis debet esse, ut praesumatur facta ejusdem decreti publicatio, sicut aperte legitur in resolutione edita a S. Congregatione Concilio die 26. Septembris Anni 1602., quae refertur Lib. 10. Decretorum pag. 47. *Publicationem praesumi, ubi id Decretum fuerit aliquo tempore in Parochia tamquam Decretum Concilii observatum*; Idemque statutum legitur in alia resolutione die 30. Martii Anni 1669« (Epistola, in BL Add. MS 8338, p. ix, fol. 118r). Cf. ZAMBONI (1816) 240 n. 84, and (still valuable) FRIEDBERG (1865) 502–509. For the whole background, see GAUDEMET (1974). A pastoral handbook with a Saint-Omer place of publication, POSSEVINO (1617) [I have used BL 1568/5483: according to the catalogue this is »an edition of the work originally entitled ›Praxis curae pastoralis«] includes a long list (518–556) of the Congregation of the Council's decisions on marriage,

which suggests that the Council was deemed to be the law for France.

67 Slash-signs are mine and represent new paragraphs in the document. »Illustrissime et Reverendissime Domine. / In causa matrimoniali que vertitur inter Antonium Petri de Ugolinis, et Dianoram Iacobi Domini Petri de Victoriis, presupponendum est pro facti intelligentia quod Domina Dianora una cum Patre et Avo domicilium habebat et morabatur tempore quo de huiusmodi asserto matrimonio tractari cepit in domo posita Florentiae in Parochia Sanctae Mariae super Arnum, in qua etiam ad presens manet. / In qua quidem domo sacramenta semper ministrat Parochus dictae Ecclesiae Sanctae Mariae super Arnum. / Item presupponendum est quod Antonius de Ugolinis eodem illo tempore suum habebat domicilium in quo assidue permanebat, in Parochia Ecclesiae Sancti Felicis in Platea eiusdem Civitatis in qua una cum omnibus suis sacramenta suscipere consuevit. / Hoc stante cum de huiusmodi matrimonio contrahendo tractaretur, licet denunciationse debuissent fieri in Parochia utriusque sponsi: / Nihilominus in parochia Sancti Felicis pro parte dicti Antonii nullo modo fuerunt factae. / Sed potius in fraudem (ut pretenditur) fuerunt ommissae, ne sponsi furor in vicinia notus detegeretur. / Minusque fuerunt factae in Parochia dictae Dominae Dianorae, videlicet in Parochia Sanctae Mariae super Arnum. / Sed ad instantiam Parochi dictae Ecclesiae Sanctae Mariae fuerunt factae in Ecclesia Sanctae Felicitatis, de dicta tamen Parochi admissione, nulla obtenta licentia ab ordinario. / Rebus sic se habentibus et

sponsi et sponsa ad villam accesserunt, uterque tamen ipsorum in sua propria, quae longe etiam ab altera distat. / Aliquibusque elapsis diebus, Antonius cum aliquibus suis paucis coniunctis, dictae D. Dianorae villam petierunt, in qua fuit pretensum hoc matrimonium de quo agitur in domo privata contractum, quibusdam paucis coniunctis ex utraque parte presentibus, non facta convocatione omnium ut fieri solet. / Ibidemque matrimonio asserto contrahendo presens fuit Plebanus Ecclesiae Sanctae Ceciliae ad decimum [?: x^{mum}MS] in cuius populo sita est villa Domini Petri de Victoriis nulla habita licentia, neque a Parochis d. Sanctae Mariae super Arnum, neque Sancti [fol. 169v] Felicis in Platea, neque etiam ab ordinario. / Ex quibus dicta domina Dianora pretendens assertum matrimonium nulliter fuisse contractum, nullumque et invalidum esse iudicandum, tanquam contractum absente Parocho proprio, contra formam traditam a Sacrosancto Concilio Tridentino, petiit per infra-scriptum libellum ab illustrissimis et Reverendissimis Dominis Cardinalibus Sacrosancti Concilii Tridentini Congregationis pretensum matrimonium dissolvi. / Tenor vero libelli talis est. / Illustrissimi et Reverendissimi Domini. Presupponitur in facto contractum fuisse quoddam assertum matrimonium, inter Antonium Petri de Ugolinis, et Dianoram neptem ex filio Domini Petri de Victoriis, Nobiles Florentinos, sed quia huiusmodi matrimonium non fuit iuxta formam Concilii Tridentini denunciatum, neque in Parochia viri, neque etiam in Parochia mulieris, neque etiam contractum coram proprio alicuius

that might affect the judgement are laid out: how often and for how long the family went to their country place; whether they kept the Florence house open when they did so, whether the country place was kept in good order continuously, where they did their Easter duties of confession and communion; the implications for many marriages of the precedent that would be set by annulling this marriage are noted; it is suggested that the tribunal of the Rota be consulted before the Congregation of the Council reaches a decision on how the case stands in relation to decrees of the Council of Trent.⁶⁸

A letter of enquiry was sent out to the Archbishop of Florence to ascertain the facts.⁶⁹ In the end, the Congregation's decision seems to have been that marriages conducted by the parish priest of country cottages which were not a principal residence did not meet the requirements for a valid marriage as laid down by *Tametsi*.⁷⁰

All three of our *comparanda* show how difficult it is to devise a working law of marriage registration within a system where marriage also has religious significance. In a system of purely positive law, that is, where law is simply what the Sovereign State calls law and where the legislative sea is clear

ipsorum contrahentium Parocho, nulla obtenta licentia, petitur nomine dictae Dominae Dianore dissolvi tamquam clandestinum, et contra formam ipsius Concilii attentatum. Huiusmodi autem libellum, tum de iure, tum de consuetudine iustificatur: [...]« [arguments follow] (ASV, Congr. Concilio, Positiones 2, fol. 169r–v).

68 »Dubium est an matrimonium contractum coram presbitero rurali inter cives Florentinos habentes urbanum parochum proprium sit nullum, quasi non coram proprio paroco celebratum. / Resolutio pendet ex multis in facto consistentibus de quibus non liquet. Nam pro nullitate matrimonii supponitur: illos de Victorii raro, et per xv, aut xx dies solitos esse rusticari, eodemque tempore habere etiam Florentiae domum apertam. Pro validitate matrimonii supponitur contra: illos ipsos solitos esse quotannis per duos tresve menses in villa commorari, ibique continenter domum instructam tenere prout consueverunt etiam alii nobiles Florentini, quorum domos rurales incolunt oekonomi absentibus dominis. / 2^o Pro nullitate matrimonii supponitur sacramenta paenitentiae et eucharistiae tempore Paschatis cives Florentinos non suscipere a paroco rurali nisi de licentia proprii urbani, et multo minus matrimonia inter cives per parochos rurales celebrari. Et praeterea [pr^aMS] supponitur Florentiae proprios civium parochos reputari passim urbanos, et non rurales, ad quod probandum plures attestaciones episcoporum, parochorum, aliorumque producuntur. / Pro matrimonio utrumque asseritur in

contrarium, probaturque testimoniis, et exemplis plurimis rurales presbiteros tamquam proprios parochos ministrare consuevisse civibus rus inhabitantibus, predicta, et alia sacramenta, sine licentia urbani parochi; nec ullas a 50 retro annis expostulationes, aut querelas urbanorum contra rurales exauditas fuisse. / Cum igitur factum unde ius oritur incertum sit, nec constet de consuetudine, quae ius interpretatur, vix ulla videtur certa ferri posse sententia, quae cum omni maturitate, et discussione ferenda est in causa dubia, et exemplari. Verendum est enim ne, si contra matrimonium pronuntietur, patefiat ianua ad impugnanda, et rescindenda infinita matrimonia; pro quibus ut respondeatur [fol. 168v] in dubio omnis aequitas, et ratio suggerit. Tractatur etiam de tollenda consuetudine inveterata in quamplurimis diaecesibus, et provinciis. / Quamobrem expediret universam huius causae [sic] cognitionem et discussionem reservare Auditoribus Rotae, qui mature visis atque examinatis [after deletion] iis quae in facto, et iure consistunt, controversiam de iure communi definiant, quae definitio numquid obstet Decretis Concilii Tridentini postea poterit videri. Nam in presenti non apparet, quae nam interpretatio sacri Concilii expetatur a Congregatione. Et sic fuit resolutum.« (ASV, Congr. Concilio, Positiones 2, fol. 168r.)

69 Archiepiscopo Florentino 298: »Illustris ac Reverendissime Domine. De hoc libello cum actum esset in sacra Congregatione Cardinalium Tridentini Concilii interpretum, ea censuit Amplitudini tuae eum mit-

tendum, ut [fol. 79r] quae in ipso continentur intimari curet illi Antonio Petro de Ugolinis, eiusque legitimis procuratoribus, quaeraturque ex utraque parte quas afferant rationes, praecipue autem super veritate huius facti probationes accipiat. An scilicet matrimonium huiusmodi fuerit per verba de praesenti contractum coram proprio paroco contrahentium, an vero coram sacerdote, qui nec erat illorum proprius parochus, neque licentiam ab Amplitudine tua, eiusve Vicario, aut proprio paroco contrahentium habebat: deinde omnia ad eandem congregationem concilii in scriptis referat. Quare Amplitudo tua ita faciet, et in Domino bene valebit. Roma die V Iunii, 1578« (ASV, Congr. Concilio, Libri. Litter. 3, fols. 78v–79v).

70 PALLOTTINI (1887) 13, 207, passage beginning »266. Siquidem – Sacra Congregatio, inhaerendo declarationibus alias factis [...]« and ending »[...] non animo ibi domicilium contrahendi – in *Urbinate*. *Matrimonii die 1 Decembris 1640 lib. 16 Decretorum p. 456.*«; cf. ZAMBONI (1816), »Matrimonium § XVII«, 245, passage beginning »26. S.C. inhaerendo declarationibus alias factis respondit, Parochum ruralem [...]« and ending »[...] coram eo celebratum fuisse nullum firmatur: Florentina *ibid.*« If »*ibid.*« implies 1640 and is not a mistake these would seem to be different cases: a problem to be resolved here. Cf. also the discussion – using DE LUCA (1673) 115.

of the rocks and currents of norms and values, rules for authenticating marriage become much easier. Even so, the current controversies about gay marriage, and the controversies which soon should be expected (in countries with large Islamic populations) about polygamous marriage, show that few modern legislatures can count on such easy sailing. The modern Pakistani State, the eighteenth-century English parliament, and the General Councils of the thirteenth and the sixteenth centuries all had to work around strong religious value systems, and we have seen they did not have it easy. The Fourth Lateran Council took the line of least resistance and did not tie authentication to validity: the system of bans was fine in principle but did not always work because marriages outside these rules were recognised as valid. The Pakistani law's power to bind is contested and its religious status full of ambiguity. England continued the medieval system until the eighteenth century, then created a new law that produced some egregious paradoxes quite unintended by the legislators. The Council of Trent's new law threw up a host of problematic situations equally unforeseen when the law was passed.

That said, this last *comparandum* stands out in that we find not only a host of problems but also a mechanism for dealing with them relatively efficaciously. The Pakistani State's law seems quietly ineffective against the authority of a multitude of religious legists. The Hardwicke Marriage Act could not be reformed without a further act of Parliament, with all that this entailed. The Congregation of the Council, on the other hand, dealt with hard cases administratively so to speak, though after consultation with theologians or lawyers. The Congregation deserves a much more prominent place than anyone has given it in the history of Sacred Law. Its workings, as we have observed them above, fit very well with a thesis of Max Weber's about papal history that gets less attention than his famous and more questionable

argument about Protestantism and capitalism, viz. that:

everything was subject to the control of the central administrative bodies of the Curia, and the elaboration of binding ethical social norms could only take place via the highly flexible directives of these bodies. In this way a unique relationship between sacred and secular law grew up: namely that canon law actually became for secular law one of its guides on the path to rationality. And this was a result of the rational »institutional« character, of the Catholic Church, with which nothing comparable can be found in world history.⁷¹

Weber's reference to the »Central Administrative Bodies« (*die zentralen Behörden*) of the Curia might be an allusion to the system of Congregations set up by the Counter-Reformation papacy.⁷² It is not likely that Weber knew much if anything about the workings of the Congregation of the Council but he may have been aware that it (and other »Congregations« set up during the sixteenth-century reform of the papal curia) made legal decisions.⁷³ At any rate, his general description fits the developments outlined in this essay uncannily well: not least their uniqueness, which a series of comparisons has brought into sharp relief. Parayre described the Congregation of the Council as an »Organe originale d'une administration sans modèle et sans copie«, adapting itself »avec aisance aux mille besoins d'une société cosmopolite«,⁷⁴ and the *Positiones* fondo of the Congregation, which scholars are only just beginning to explore, tends to bear out this striking claim. Of course, it should not be forgotten that at the level of local tribunals there were many inconsistencies between practice and the underlying principles of the system, as an eighteenth-century attempt at reform (by Benedict XIV) makes clear.⁷⁵ Nor were his efforts crowned with success, at least in the short term. That said,

71 WEBER (1976) ii, 480–481, passage beginning »alles unterstand hier [...]« and ending »[...] der sonst sich nirgends wiederfindet«.

72 RABIKASKAS (1998) 156; PO-CHIA HSIA (1998) 100.

73 Cf. WEBER (1976) 181, notes to »480 [...] 7 v. o.«, references to works edited by Pietro Gasparri.

74 PARAYRE (1897) xii.

75 PLÖCHL (1966) 399–403.

it remains true that at the apex of the system, the Congregation took much of the chaos out of the administration of values, shared by the medieval and Counter-Reformation Church, which had been constantly frustrated by clandestine marriages which it had to recognise.

We have come to a point where the counterfactual comparative method with which we began has transcended the original question about what might have happened if clandestine marriages had been invalidated after 1215. The original question has indeed been answered. It is fairly clear that one way or another a host of problems would have arisen, as they did when such a step was taken in modern Pakistan, in eighteenth-century England, and at the Council of Trent: most of these problems could hardly have been foreseen in detail, even if the Council Fathers of the Lateran sensed them in outline. They could hardly have found a neat and clinical solution, though things would have been easier if something like the Congregation of the Council had been set up three and a half centuries earlier. The Congregation's archive is testimony to both the problems generated by the Tridentine solution and a mechanism for fixing them. ■

The original question about the later Middle Ages has thus thrown the spotlight on a remarkable post-medieval institution. Almost in passing we have been able to provide new data on the Congregation of the Council's decision on whether Tridentine marriage law should be deemed to have been promulgated in France, and we have been drawn into post-Tridentine intellectual discussions, preparatory to decisions, of a sort that historians would give anything to have as background to medieval decretals. Such shifts in focus should be welcomed in comparative counterfactual history, for it may often happen that a question that preoccupies historians of one period gets too little attention from historians of another, and that a comparative investigation originally intended primarily to illuminate one society ends up advancing our understanding of another society with which it has been compared. To make the most of this methodology historians have to risk venturing far beyond their personal comfort zones. The payoff is greater dialogue between different sectors of the profession and, often, unexpected discoveries.

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