

## 1 Introduction

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This study tries to uncover the rationalities underlying the ways popes dealt with the marriage problems of kings: above all with dissolutions and dispensations. In the long period from c. 860 to 1600 (and after) the personal life of kings became the business of popes, whose power could be ignored but not usually for too long. Whether it was a question of dissolving a marriage or of getting a dispensation to marry a relative, kings were not emperors in their own domains. Marriage is a central issue in Church–State relations.

### **The implications of Henry VIII v. Catherine of Aragon, 1529–34**

The case of Henry VIII and Catherine of Aragon makes an good starting point, in that the basic facts are well known, but full of significance for the intersecting themes of this study. The following points are almost too obvious to be noticed – yet they have implications which go a long way if unfolded. To list them before commenting further: first, Henry could not just take Anne Boleyn as a secondary wife. In most non-Western cultures secondary wives, if not full polygamy, were perfectly normal before Westernisation. In Africa and the Islamic world polygamy remains normal. Second, Henry could not in the modern sense divorce his wife: his efforts were directed towards proving that he had never been truly married to Catherine. This is even more remarkable in a broad historical context. Classical Greece and Rome were atypical in being monogamous, but they did allow easy divorce, which made monogamy easier for the restless patriarchal male. Third, again by contrast with ancient Rome, the stakes were high in terms of succession to high office: it was normal for Roman emperors to ensure succession by adoption, while in the medieval and early modern world biological inheritance was the norm, so that marriage was politically crucial, especially since women could take land and political power from one family's control to another – something hard to find in other civilisations. Fourth, to solve his

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problem he had to go to a power outside his lands and try to play by alien rules – rules that he ended by repudiating. The system Henry ultimately rejected subjected the personal life of powerful patriarchal men to an independent religious government with its own law. Fifth, this control of private life had indirect macro-political implications. Sixth, this law was highly technical and formal, with elaborate rules that had a life of their own. Finally, at issue among the technicalities was the formality peculiar to ‘dispensations’, which have few parallels in modern legal systems.

### **Polygamy**

(1) Polygamy was briefly and secretly condoned by Luther to help out a prince in moral difficulties,<sup>1</sup> but for Henry it was not an option, though for most princes in non-Western history it would have been the obvious answer to a predicament like his. Such comparisons are not frivolous. A good justification of any research is that it asks about uniqueness in world history. A unique pattern such as seems to obtain in the medieval and early modern Catholic world should command attention. Scholars focused exclusively on one period or subject tend to take it for granted that what they study is special, but they can easily overestimate the uniqueness of what they find, for which there are often parallels which they do not know; other scholars in a more comparative tradition will discern similar structures beneath period particularities, and will be all the more struck by non-trivial uniqueness. Uniqueness is unusual, so to speak! The really distinctive features develop fairly late on – hardly before the ninth century – and unevenly. Recent research has stressed that in early medieval Europe and even later in ‘peripheral’ Europe (especially Scandinavia) there was no taboo to stop a great man changing women several times in the course of a lifetime; furthermore it will be argued below that polygamy was not too far below the surface even in ‘core’ kingdoms. This fits into a pattern found in many ancient Near Eastern and oriental societies. Polygyny is all over history outside the Western tradition, and in it too, until the developments described here.

### **Easy divorce**

(2) Monogamy was the norm in classical Greece and Rome also but there it was tempered by easy divorce. For the most part, though for varying reasons and with interesting exceptions, one could say the same about the medieval West up until Innocent III. By the later medieval period it had

<sup>1</sup> F. L. Cross and E. A. Livingston (eds.), *The Oxford Dictionary of the Christian Church* (Oxford, 1997), s.v. ‘Philip (1504–67), Landgraf of Hesse’.

become very hard to get rid of a wife. The combination of monogamy and indissolubility that developed in 'core' Europe in the later Middle Ages is hard to parallel in literate civilisations.

### Succession to high office

(3) This combination increased the chances of a potential succession crisis because of the absence of an heir. Multiple wives or easy divorce could solve the problem of female infertility at least. A classical Chinese emperor had a designated empress whose eldest son should succeed, but if there were problems 'it was possible and legitimate for an emperor to nominate . . . a different woman to become his legal consort, and a different son to become his heir apparent'.<sup>2</sup> Roman emperors made a practice of adopting as a son the person they wanted to succeed them. In medieval Europe neither of these options was open.

### Popes and the private lives of kings

(4) Even more surprising to scholars who think comparatively should be the subjection of royal marriages to rules more or less outside the direct control of kings: namely, the papacy's. In how many other societies are the official sexual relations of rulers subject to rules controlled by a power outside their domains? Popes were at the apex of a legal system, functioning alongside the laws of secular kingdoms. How far kings could influence it is one of the issues to be investigated. That they had to play a game that was not of their making is indisputable.

### International implications

(5) Furthermore, the stakes of the marriage game were higher than in many or most societies because of another feature of medieval political society that may be unusual comparatively.<sup>3</sup> In the absence of a male heir, a daughter could inherit, and her husband would rule. This is how the kingdom of Navarre came to the French crown in the thirteenth century. For that to happen a papal dispensation was required (\*1275). Some men who were already married, say rulers of neighbouring domains, might aspire to acquire the heiress and their lands. This happened with

<sup>2</sup> Michael Loewe, *Imperial China: The Historical Background to the Modern Age* (London, 1966), p. 86.

<sup>3</sup> See, however, Michael H. Fisher, 'Political Marriage Alliances at the Shi'i Court of Awadh', *Comparative Studies in Society and History* 25 (1983), pp. 593–616, at p. 600, for something similar in Mughal India (my thanks to Rhea Mann for this reference).

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Brittany in the late fifteenth century: its union with the French monarchy under Louis XII depended on the annulment of his marriage to Jeanne de France (see *DRM*, chapter 16), so that he could marry the female ruler of the Duchy. So papal decisions could indirectly affect the political map, especially in the later part of the period. The papacy did not make the inheritance rules. When Navarre was separated from the French crown after the Capetian line died out, the rationale given was that the two kingdoms had different inheritance customs. Female inheritance did, however, enhance the indirect significance of the pope's power to decide what constituted a valid marriage.

### Formal rules

(6) The rules of the game constituted a closed system whose machinery, once started, tended to grind on automatically, controlled by a complicated legal software, so to speak. Naturally kings wanted to hack into the software to affect the result, but the defences of the system from the thirteenth century were surprisingly effective. Kings had their own experts, of course, to help them get the desired result within the formal rules. On monogamy and indissolubility, however, the rules were resistant.

### Layers of formality and discretion

(7) Finally, rigorous formality was combined with flexibility in a curious system which has few modern parallels. There are a few, such as telephone interception by the police, an analogy with medieval dispensations that will be fully explored below. In one way the rules became astonishingly flexible: by the end of the period there was nothing easier than to get a 'dispensation' to marry someone otherwise out of bounds because of blood relationship or some similar impediment. Henry VIII had to argue that his dispensation to marry Catherine of Aragon should never have been given. Dispensations figure much more prominently in canon law than in any other highly rationalised legal system. But the really distinctive thing is that they were suspensions of formal rules, yet highly formal themselves: the 'active ingredient' in later medieval dispensations is precisely calibrated in legal terms, and dispensations were construed strictly according to formal rules.

### Eleanor of Aquitaine

This is in sharp contrast with the quasi-dispensation granted in the mid-twelfth century to Eleanor of Aquitaine and Louis VII of France.

In an emotional scene, a pope told them that they could stay married and should not worry about being married within the forbidden degrees. Only a few years later a council of French bishops nonetheless dissolved the marriage on the grounds that it was within the forbidden degrees, no mention apparently being made of the papal 'dispensation'. Almost immediately afterwards Eleanor of Aquitaine married Henry II of England. He too was related to her within the forbidden degrees but she did not stop to wait for ecclesiastical approval.

The contrast between the marital histories of Eleanor of Aquitaine and Catherine of Aragon draws attention to change. In the sixteenth century Henry VIII found himself embroiled in the technicalities of procedure at the papal court. In the twelfth, Louis VII's marriage was dissolved by a council of his own kingdom's prelates, who were clearly in a cooperative mood. Clearly, the history of royal 'divorces' is not one of simple continuity. From the thirteenth century on, all the French cases are like that of Catherine and Henry VIII.

### 'Church and State'

These cases have considerable relevance to the 'problem of Church and State'.<sup>4</sup> It can be argued that the whole 'Church-State' dichotomy is a creation of late antiquity and the medieval West. American secularism and French 'laïcité' are unconscious heirs of the empire of Constantine and the Europe of Gregory the Great. Royal marriages take one beyond the abstractions of political theorists into the detailed workings of this complex relationship, in which dowries and marriage treaties lay outside the Church's purview, while validity of marriage became its business alone.

Royal marriage cases enable us to analyse the structure of Church-State relations in granular detail over long period. From the 'forerunner' case of King Lothar II of Lotharingia in the ninth century to Henri IV in the sixteenth we see common patterns constantly recurring. Thus the study of royal 'divorces' and dispensations is an opportunity to break down an unspoken apartheid between *histoire événementielle* and *longue durée* history: narrative history becomes structural history. 'Social life . . . may be treated as a set of *reproduced practices*',<sup>5</sup> and 'the production or constitution of society is a skilled accomplishment of its members'.<sup>6</sup>

<sup>4</sup> The bibliography is endless but a particularly original recent contribution deserves special mention: Alain Boureau, *La religion de l'état: la construction de la République étatique dans le discours théologique de l'Occident médiéval (1250–1350)* (Paris, 2006).

<sup>5</sup> A. Giddens, *New Rules of Sociological Method*, 2nd edn (Cambridge, 1993), p. 110.

<sup>6</sup> *Ibid.*, p. 108.

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Skilled navigation of the canon legal marriage system was increasingly important in the cases under investigation.

### **Formally rational law: *cui bono*?**

As already noted in connection with Henry VIII's case, canon law was unusual among the great sacred legal systems of world history in its 'formally rational' character, which made it in certain respects more like modern secular legal systems. The professionalisation and formalisation of law is one of the great facts of later medieval history, and hardly in dispute. What remains to be decided is how it affected royal marriage problems. We need to know how papal dispensations related to the growth of legal formality, and how the formalisation of law affected the chances of getting a marriage dissolved.

Granted that kings had access to the best legal advice, did the formalisation of law help rather than hamper them if they wanted to escape from one marriage into another? On the surface, it does not look as if legal developments favoured the stability of royal marriages. In the ninth century, Pope Nicholas I forced Lothar II of Lotharingia to take back the wife he had abandoned for an earlier partner whom he preferred. At the end of the fifteenth century, Louis XII got his annulment from Jeanne de France, as did Henri IV from Marguerite of Valois at the end of the sixteenth.<sup>7</sup> Since the rich and powerful tend to have excellent lawyers, we need to ask how the increasing technicality of law affected a monarch's chances of getting out of a marriage. A priori, one might suppose that a king's ability to assemble a crack legal team would give him every advantage. Pope Innocent III remarked in a somewhat patronising letter to Philip Augustus of France that the latter had plenty of experts in civil and canon law to advise him. When Louis XII sued to have his marriage annulled it was hard to find lawyers willing to take his wife Jeanne's cause, because the monarchy was feared. A central argument of the book, paradoxical in the light of those cases, is that this surface impression is misleading, and that indissolubility was in fact protected by legal formality.

### **Concepts in empirical research**

Notions like 'legal formality' or 'formal legal rationality' need to be explained or, rather, defined with some precision, to create a sharp-edged

<sup>7</sup> Alexander Murray made this point to me forcibly many years ago, and this study is in part a reply to him.

questionnaire. Concepts whose value has been tested elsewhere improve the focus of the questionnaire.<sup>8</sup> This history of royal marriages is an opportunity for theories of formal legal rationality and of other kinds of rationality to show what they can do in empirical action. In fact, the following may be asserted (though with fear of contradiction): the history of 'divorces' or dispensations could not easily be written well without some help from social theorising about rationalities, and also about legitimisation.

### Legitimation

Legitimation is a key concept. Within the framework of thinking about rationalities, an idea of Quentin Skinner clears many obstacles to analysis out of the way. More on this in Chapter 3, but, in a nutshell, if the justifications are incompatible with a given course of action, then the cost of taking it may be high in terms of public opinion – so the need to legitimate action tends to constrain it. To limit behaviour to what can be legitimated to other people whose opinion matters is often the rational choice irrespective of personal motivation.

### What public sphere?

The public opinion that mattered in the cases we shall study was not so much a generic public sphere (though such a thing certainly existed in the Middle Ages) as a public of legally literate clerics, whose support was a *sine qua non* of papal power. It mattered more to the papacy to show such men that an annulment had been granted or refused on respectable legal grounds than to justify its actions to the general public. In some of these cases the bar of public opinion was going to condemn the proceedings anyway. Villani reports the view that the annulment of Charles IV's marriage to Blanche of Burgundy was a sham.<sup>9</sup> There was widespread

<sup>8</sup> D. L. d'Avray, *Rationalities in History: A Weberian Essay in Comparison* (Cambridge, 2010), and *Medieval Religious Rationalities: A Weberian Analysis* (Cambridge, 2010).

<sup>9</sup> 'Cap. CLXXII. Come il re di Francia lasciò la prima moglie, e prese la figliuola che fue d'Arrigo imperadore. Nel detto anno MCCCXXII e mese di Settembre Carlo il giovane re di Francia, lasciata la prima sua moglie figliuola che fu del conte di Borgogna, perché si trovò in avolterio, prese per moglie la figliuola che fue dello'imperadore Arrigo e serocchia del re Giovanni di Boemmia. Compensò il papa il detto matrimonio opponendosi per la petizione che la madre della prima moglie, figliuola che fu del conte Artese, aveva tenuto a battesimo il detto re. Questa prova si disse che fu falsa, et che alla contessa d'Artese il convenne assentire per iscampare la figliuola di morte; e così del detto mese di Settembre a Tresi in Camagna sposò la detta seconda moglie vivendo la prima'. Giovanni Villani, *Nuova cronica*, ed. Giuseppe Porta, vol. II (Parma, 1991), libro decimo, CLXXII, pp. 365–6. Contrast *DRM*, chs. 14 and 15.

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outrage at Louis XII's discarding of Jeanne de France.<sup>10</sup> We need always to bear in mind, however, that popes did not have to worry about standing for re-election, but did need to keep the support of the clerical elite which it led. It was as if a modern government had to work by the rules of its higher civil service without worrying too much about the media. The analogy works particularly well if one thinks of states like Bismarck's Germany whose higher bureaucrats were mostly qualified lawyers.

### Motivation, legitimization and legal formality

Close attention to legal arguments therefore matters for historical analysis. Identifying the political motivation of the protagonists is not enough – such is the implication of 'Skinner's theorem'. The legal justification may be quite different, but no less causally relevant. These legal arguments do not alone explain what happened, but what happened cannot be explained if we do not understand the legal arguments. They are more than a smokescreen, for they had to be plausible. Without any plausible arguments, would a case even come to court? A quasi-Darwinian model may help here. Only those cases would be brought to trial for which reasonable legal arguments could be found. If a later medieval king wanted an annulment but lacked any plausible legal grounds for one, his advisers might well warn him that the attempt was futile and it would never be made. Thus surviving data is strongly biased in favour of successful attempts to secure an annulment. Only the fittest cases survived to go to trial. Conversely, since hopeless cases were less likely to go to trial, the total number of royal annulments is small, all things considered.

In consequence, one must read and understand formal legal discourse if one hopes to understand royal 'divorces'. Assessment of the political situation per se and of the aims of the actors is inadequate on its own. The texture of the argumentation deployed by the key 'players' in this very serious game is also important, and the historian must give his readers full access to it. This is hard without translations, since the Latin is too technical for even experienced scholars to appreciate its nuances without some help and a suitable apparatus. Maximum accessibility of as much as possible of the legal evidence is also the best corrective to that genially knowing worldly wisdom which is at times so antithetical to understanding other cultures. As a guide to these technicalities a short glossary is appended to the translations in *Dissolving Royal Marriages (DRM)*. These translations relate to the present study rather as 'description' has to 'interpretation' in anthropological research on non-literate

<sup>10</sup> F. J. Baumgartner, *Louis XII* (Stroud, 1994), p. 78.



societies.<sup>11</sup> There the difficulty was to translate orally explained concepts underlying social practices into academic prose. Here it is to do justice in English to a highly developed and technical Latin legal discourse – especially when we come to the later medieval centuries.

Legal formality is also a key concept for the analysis of dispensations. There is a paradox here, for dispensations were exemptions from the normal formal rules. As time went by, however, these exceptions came to be formulated with hair-fine precision.

Dispensations were, however, also granted with increasing readiness from the mid-thirteenth century, not long after changes which made it increasingly difficult for a king to obtain an annulment. It will be argued that the formal precision of dispensation documents became a further reason why getting an annulment became so hard. The book traces these two contrasting trends in turn. Taken together, they make a pattern like the sharp end of an open pair of scissors.

<sup>11</sup> For the 'description'–'interpretation' distinction in the school of Max Gluckman, see Lyn Schumaker, 'The Director as Significant Other: Max Gluckman and Team Fieldwork at the Rhodes-Livingstone Institute', in R. Handler (ed.), *Significant Others: Interpersonal and Professional Commitments in Anthropology* (Madison, WI, 2004), pp. 91–130, at pp. 119–20.