What Is in a Name?: "Our French Law"

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In her book on Michel de L'Hôpital (1507–1573), chancellor of France (1560–1568), Marie Seong-Hak Kim explored the chancellor's reformist political views, including attempts to use limited religious tolerance to

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foster political unity fractured by religious wars (1562–1598).[1] Following up in "Michel de L'Hôpital, Legal Humanism, and the Ideals of Legal Unification in Sixteenth-Century France," Kim holds that L'Hôpital also directed a second effort to achieve legal unity in France during the last half of the sixteenth century, thus planting the seeds, in effect, for the "Civil Code" (1804). Referring to three types of juridical instruments—the "doctrinal," or scholarly works of jurists; "jurisprudence," or the court decisions of judges; and "legislation," the edicts and ordinances of kings,[2] through which, she holds, the chancellor pursued "legal unification," Kim stakes out two main themes. First, that the "close link between the yearning for national unity during the religious crisis and the rise of the notion of French law" during the "last half of the sixteenth century" spurred the "reforming zeal to rationalize and systematize law" so as to effect "legal unification" in France. Second, that no one was "better suited" than Michel de L'Hôpital to "pull different approaches to legal unification together and present a direction towards a unified French law backed by royal authority." Whereas readers will weigh Kim's evidence, interpretations, and arguments supporting these themes, the commentators must mull over the interesting materials and raise questions that will further inform debate on the topic. Holding to my own maxim, "Debate is always good," the comments below address several problems that push Marie Kim's main theme—crediting Michel de L'Hôpital with directing a drive toward "legal unification" during the last half of the sixteenth century—off the historical course. That is: the problems touching the alignment of contradictory legal systems (Roman law as "poison"); the application of a modern concept ("legal unification") to this early modern area of the 1500s; and finally, the most difficult problem, attributing to one figure, Chancellor L'Hôpital, direction of a juridical "unification" project in the late sixteenth century (a project not actually taken up until the waning years of the 1790s and only actualized in 1803–1804). The query: What is in a name?—"our French law"—colors the following discussion that also suggests an answer.

1. See Seong-Hak Kim, *Michel de L'Hôpital: The Vision of a Reformist Chancellor during the French Religious Wars* (Kirksville, Mo.: Sixteenth Century Journal Publications, 1997).

2. For a study of the way these three instruments—(i) case-law decisions (binding precedents), (ii) juridical treatises (teaching, lobbying, and scholarship), and (iii) legislation (issued by kings)—worked to facilitate a project of legal reform, 1500s through the 1650s, which was heavily dependant, at the outset (1520s–1550s), on one of them—case law (arrêts, or court decisions pronounced), see Sarah Hanley, "The Jurisprudence of the Arrêts: Marital Union, Civil Society, and State Formation in France, 1550–1650," *Law and History Review* 21 (2003): 1–40, which informs the discussion below.

Contradictory Legal Systems. For all the complaints, amendments, and the like, French jurists managed to align a complex system of French law that recognized older elements of Roman law, canon law, feudal law, and customary law into a system repeatedly classified as "our French law" and operating in consort with the times. In this alignment, Roman law (an influential written corpus) remained a healthy part, not a sore, on the body politic. What L'Hôpital (in tune with other men of law) "lamented" in his statement about "poison" was not Roman law, or even its selective use in French law, but the confusing glosses piled up over centuries. The glosses (not the law) were the "poison" that introduced confusion into the French system of legal education. After all, he wished to prepare a "synthesis of Roman Law" and said so (as Kim points out), no doubt because a work of that sort would provide him with scholarly credentials. So he found utility (not poison) in the labor—teaching Roman law precepts of reason and equity; recommending Roman principles of procedure, contract, and so on—sorting laws out, adapting some for use, others not, in the French legal system. With ancient Rome long defunct, moreover, there were no officials to impede vigorous efforts to accept, amend, or discard elements unfitting (as there surely were in the canon law bailiwick of the Church very much alive). Take it or leave it: French jurists did both. In fact (as Kim notes), L'Hôpital was a "Romanist" who held on occasion that Roman rules worked better in settling law suits than the French ones.

This said, one juridical venue, Roman law, did not have to be suppressed (as poison) for the other, French law, because jurists knew exactly what references to "our French law" (and particularly the "our" there) meant. The tangled legal picture was sorted out in France with the advance of legal humanism in the 1500s, which spotlighted things French in history, law, and institutions, the stuff of the ancient constitution,[3] and French language, which was legally required in writing legal decisions and procedures by 1539.[4] The national shift to "our French law" was in progress during the

3. On legal humanism in France, see Donald R. Kelley, *The Foundations of Modern Historical Scholarship: Language, Law and History in the French Renaissance* (New York: Columbia University Press, 1970, especially chap. 5–8; on the institutional parallel, French institutions, and French constitutional precepts identified, see Sarah Hanley, *The Lit de Justice of the Kings of France: Constitutional Ideology in Legend, Ritual, and Discourse* (Princeton, N.J.: Princeton University Press, 1983; French ed. 1991), chap. 1–4, and table 1, tracing the creation of a new French constitutional assembly, the extraordinary *Lit de Justice*, to 1527.

4. All part of the "national legal theme" set forth in the early decades of the 1500s (in Hanley, "Jurisprudence," 5–20); the ordinance of 1539 required that legal decisions (*arrestz*) and procedures in all courts must be rendered in French (13).

1520s, 1530s, 1540s, and 1550s. Jurists gave examples, from research, of French laws that owed little or nothing to Rome (citing specific French customs, as well as French inheritance laws, such as that guarding *propres* in families (immovables deemed inalienable) that were totally unknown in Rome (as avocats liked to point out). Conversely, they were quite willing, when in need, to adopt precepts (that is, the "spirit") of Roman law, and did so when seeking ballast for concerted efforts to break down canon-law rules and back up new French laws-in-the-making. Although it was not possible to completely extricate French law from Roman law, legal humanists with a sharp historical eye managed to forefront the peculiar elements that constituted French law, because they grounded what they called "our French law" (as noted below) in law practice carried out in French courts, and they informed the public thus duly supplied with local knowledge on the streets. To their early notion of "our French law," first indebted to law practice, then translated into edicts, generations of jurists through the 1600s were enormously indebted and repeatedly said so in print!

Modern concepts and historical context. It is possible in the historical context of the 1500s to speak about various efforts at legal reform, or perhaps rationalization, or even the business of effecting coherence in law practice, but it is not possible to plant the notion of "legal unification"—as linked to the Civil Code (1804)—in the minds of scholars, practitioners, avocats, and judges, without leaping out of that early era. In fact, the decisive reform actions taken by jurists steadily, albeit incrementally, during the first half of the sixteenth century (not the last half), had already set the juridical stage upon which L'Hôpital and his cohorts stood later, along with successors in the 1600s. To be sure, French customs were redacted in 1510, but that year L'Hôpital was only three years old; a second major redaction took place in 1580, but this was twelve years after the chancellor left office and seven years after his death. The attempt to collect and publish French edicts and ordinances in limited "codes" covering specific reigns—like that of Barnabe Brisson for Henry III (the one Kim notes)—was not in full swing during the 1500s; with no comprehensive collections of French written laws available, notions of "unification" faced a dry well. Finally, men of law thanked and praised Chancellor L'Hôpital, but this stock rhetoric, some of it quite florid, accompanied works whose authors rather wantonly claimed public figures as mentors to facilitate publication (requiring royal approbation) and feather patronage networks. Far from exhibiting "well-defined reformist schemes" linked to the "conscious desire to precipitate legal unification," the more modest reform notions and actions set forth from the turn into the 1500s into the 1550s were the product of working jurists who argued cases, made decisions, wrote about them, and effected change.

Creating heroes in history. It is problematic to credit one figure (in this case, the chancellor, Michel de L'Hôpital) as the director, mover, mentor of a "legal unification" effort during the later sixteenth century, and even more so when the figure was beset with such enormous political problems, including efforts to sustain political unity in the face of religious disruption. But the French kingdom was in crisis during the 1560s because of the religious fractures inflicted upon the body politic (not because of legal disunity in the polity). In this era, moreover, legal disunity in the realm, the norm, was tolerable; indeed, the condition existed alongside periods of national unity and disunity right up to the demise of monarchy. To be sure, L'Hôpital was trained in law, held posts, off and on, in the Parlement of Paris (1537–1547, 1553), and became chancellor (1560–1568). But he was not, for all his merits, a legal scholar well positioned, intellectually and professionally, to contemplate, still less to lead, an effort to unify French laws (not even properly collected).[5] Consequently, to overstate the chancellor's competence, ambitions, even abilities on the law front displaces him, along with the jurists who lived alongside him, as well as those who lived before, from an operable historical context into a danger zone of history. In that danger zone, the one man, his repute overinflated, becomes a hero, while his living cohorts and dead predecessors fade out in contrast. That kind of history, once skewed, produces negative outcomes.

To begin, L'Hôpital, once made into a hero—already noted for pursuing limited religious tolerance to foster political unity and then crowned as the director of legal unification aimed at securing national unity—is assigned a task impossible to execute, hence set up for failure in public terms (his supposed task of "unification" not realized) and in private terms (his inability to attain credentials as a legal scholar competent to direct such an enterprise). In addition, his cohorts, contemporary jurists active in attaining bits and pieces of legal reform (not unification) are rudely cut out of the main focus by the heroic chancellor (with a bigger goal). Finally, and most unsettlingly, the two generations of jurists active earlier—1520s through the 1550s—who harkened in print to notions of "our French law," elevated French law as a national theme suited to state formation, distinguished the national brand from Roman and canon law precepts, and carried out an impressive legal reform project that inspired later generations, also disappear from a historical rostrum overshadowed by in the heroic chancellor. Yet the events may be told differently.

5. L'Hôpital never completed his projected study of Roman law, or any other scholarly work; his collected *Oeuvres* (ed. P. J. S. Dufey, 5 vols., Paris 1824–25) contain practical items related to politics (not jurisprudence): harangues, remonstrances, epistles, and a treatise on the "reformation of justice."

As has been shown in findings that directly impinge on the themes Kim sets forth in her article, earlier jurists active in the first half of the sixteenth century (when L'Hôpital was still marching through childhood) were already working steadily from the 1520s through the professional venues staked out—court decisions, scholarship, and legislation—to bring legal reform and national repute to French law, not across the board, but in particular areas of jurisprudence that vexed men of law.[6] Among those reformers were authors of law books, practitioners, and judges (later lauded by successors for their contributions): including Gilles Le Maistre, judge in the Parlement of Paris, who (it has been shown) sketched out a "national legal theme" featuring "our French law"; Jean Papon, reputed jurisconsultant and author of a primer teaching French law; the revered Charles Dumoulin, expert on customary law and critic of canon-law marital dispositions; Barnabe Le Vest (father), distinguished judge in the Parlement of Paris; and the renowned Jean de Coras, an erudite president in the Parlement of Toulouse and a legal scholar and teacher reputed in Europe.[7] From the 1520s into the 1550s (before L'Hôpital entered the halls of government), they and other like-minded colleagues carried out an astonishing reform project applicable to a specific area of French law: marital affairs.

A legal reform project: 1520s–1550s. French jurists advocated and accomplished the first stage of serious legal reform (not "unification"), during the first half of that century, from the 1520s to the 1550s (before L'Hôpital took office as chancellor); and those early efforts were continued, in stages, through the later period, from the 1560s into the 1650s (after the chancellor left office in 1568). Negotiating the complex legal landscape (by amending customary law, drawing on the "spirit" of Roman law to dismiss canon law, and lobbying for new legislation), those avocats, judges, and jurisprudents aggressively broke with tradition (customary law and Church rules) in order to outlaw acts of clandestine marriage in France (a union conducted by minors with couple consent but lacking parental consent) that were allowed by the Church in Rome

6. The details that follow about this extraordinary early reform movement, the first stage from the 1520s through the 1550s (of special interest for this commentary), as well as other stages from the 1550s through the 1650s, have been fully tracked in Hanley, "Jurisprudence," 1–40, with findings that have a direct impact on Kim's theses.

7. Jean de Coras, so well introduced by Natalie Zemon Davis, was a judge in the Parlement of Toulouse who heard the Martin Guerre-Arnaud du Tilh case on imposture and later wrote a commentary on it, *Arrest memorable* …, in 1561; see *The Return of Martin Guerre* (Cambridge, Mass.: Harvard University Press, 1983). Coras, a law professor, taught at universities in Toulouse, Angers, Orleans, Valence, and Paris, and also at Padua and Ferrara in Italy, before becoming a judge.

(and in France), wreaking havoc on French families (as angry jurists complained). In effect, this early push for reform, which came from families demanding legal relief (influential jurists among them), provides a good example of Pierre Bourdieu's theory of the way power, or authority, is always "negotiated" by contending parties (in this case, families and the state) and not simply applied top down (by an influential figure or leader).[8]

How did this early reform effort unwind? Not top down certainly, but across a negotiated trajectory. First, as has been demonstrated already, from the 1520s to the 1550s, jurists piled up case law from law practice (judicial decisions [*arrêts notables*], or law on the ground, which created legal precedents soon treated as binding). Then, during the same decades, they articulated in tracts and treatises firm and reasoned reform demands (like the one laid out in a tract by Jean de Coras).[9] Finally, from the 1550s into the 1650s, they steadily lobbied for royal edicts, or black letter law, that would confirm the case-law precedents and add to them (creating all told a Marital Law Compact). By the time king and government promulgated the innovative first marital edict of 1557—which changed French custom (by raising the age of majority) and defied Church rules (by declaring marriages that lacked parental consent before the union illegal)—men of law for three decades (from the 1520s) had already piled up judicial decisions that nullified clandestine unions, collected and printed those rulings (the "notable arrêts"), and therewith pressured kings (and chancellors) to promulgate a whole series of edicts from 1557 on that wrote the legal precedents into "our French law." This marital law reform process, which moved from case-law practice to legislation (not the opposite route usually tagged),[10] informed what jurists called "our French law," a

8. For a working theory about the way authority is always negotiated (not issued top-down), see Pierre Bourdieu, *Practical Reason: On the Theory of Action* (Stanford, Calif.: Stanford University Press, 1998; French ed. 1994), chap. 3, "Rethinking the State," where he adopts as an example of his theoretical stand (9), the negotiation of a "family-state compact," which is shown in Sarah Hanley, "Engendering the State: Family Formation and State Building in Early Modern France," *French Historical Studies* 16 (1) (1989): 4–27 (French trans.: "Engendrer l'etat," *Politix: Revue des Sciences Sociales du Politique* 32 (1995): 45–65).

9. The process is outlined in Hanley, "Jurisprudence" (an article dedicated to Bourdieu). The rare tract of Coras (in precarious condition) is *Des Mariages clandestinement, et irreverement contracte par les enfans de famille, au deceu, ou contre le gre, vouloir, & consentement de leurs peres et meres* … (Toulouse, 1557) (its contents explored by Hanley, "Jurisprudence," 9–10). On the "French way" of using "precedents," see John P. Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968).

10. For the edict of 1557 (old style 1556, February) (art. 1–5), consult Francois Andre Isambert et al., *Receuil generale des anciennes los francaises depuis l'an 410 jusqu'a la revolution de* 1789 (Paris: Belin-Le-Prieur, 1821–33), 13:469–71; there it speaks of deliberations that took a "long time" (art. 1) and of the "public integrity" involved and [public]

system that steadily interwove judicial decisions pronounced with edicts and ordinances promulgated and one that would be defended not only by eminent men of law not working to effect reform in progress but also by successors over the next two centuries who were proud of what their predecessors accomplished.

Lobbying for better access to recorded legal decisions ("notable arrêts") pronounced in French courts, hence an end to judicial secrecy, Papon (who read the works of Le Maistre and Coras) thought that one could not learn the law merely by reading canon-law texts, or by relying on the letter (instead of the "spirit") of Roman law, or by reiterating French customary law (as redacted). Legal learning in keeping with the times, he insisted, required access to precedent-setting French arrêts ("notable legal decisions") that constitute "our French law." When challenged by the Church on provocative marital law changes, esteemed men of law like Etienne Pasquier replied that "the pope is a foreigner in France." When faced later with the Church's defiant stand in 1563, after the Council of Trent's marriage regulations recommended, but refused to require, parental consent for a valid marriage, the venerable Charles Dumoulin lobbied the French government to boycott Tridentine rules (by not signing on to that section), an action in fact taken.[11] The product of case law practiced early on, the French Marital Law Compact, legislation begun in the 1550s and amplified into the 1650s, was defended, even applauded, by

utility" served by the new law (Hanley, "Jurisprudence," 13). In fact, given several factors—the collections of notable arrêts that show parental consent was being required by French courts decades prior to the edict of 1557 (establishing case-law precedents eventually treated as precedents); the intense lobbying by jurists for the edict [of 1557], and the admission that deliberations were lengthy, render the old assertion (given long before these findings and aligned with the top-down theories of power criticized by Bourdieu, see note 9 above) untenable: that is, the claim that Henry II issued the Edict of 1557 because the pope delayed annulling the clandestine marriage of Francois de Montmorency, to whom the king wished to marry his illegitimate daughter, Diane de France, an opinion given many decades ago by Paul Ourliac and J. de Malafosse, *Histoire du droit prive* (Paris: Presses Universitaires de France, 1968), vol. 3, pt. 2, chap. 2, sec. 3, 204–5, then picked up by historians, including James F. Traer, *Marriage and Family in Eighteenth-Century France* (Ithaca, N.Y.: Cornell University Press), 33; Andre Burguiere, "The Formation of the Couple," *Journal of Family History* 12 (1987): 39–53; even more recently repeated by Janine M. Lanza, *From Wives to Widows in Early Modern Paris: Gender, Economy, and Law* (Burlington, Vt.: Ashgate, 2007), 28–30.

11. Ibid., 14; at the Council of Trent, after bishops voted to deny the request of French delegates to require parental consent (already required by law in France), the anger of French jurists was palpable, none more so than that of Dumoulin, whose response, *Conseil sur le faict du concile de Trente* (Lyon, 1564), argued for refusing those new church rules.

jurists as a system of marital law justly dubbed "our French law"—and practiced in "civil society" for the next 200 years.[12]

What is in a Name?: "Our French law." During the first half of the sixteenth century (not the last half pinpointed by Kim), jurists breached tradition and launched—first by case law, then by legislation—an astonishing French legal reform project that eventually altered a particular area of law—marital affairs—to suit growing national views of how marital unions were the pillars of society and the polity. And since the tendency to establish "our French law" by addressing specific subareas of the law, weaving case law and edicts together (as "ours"), and establishing special law courts to deal with variants, continued through the 1500s, 1600s, and 1700s;[13] without putting any grand plan for legal unification in place, it would appear that legal activism colored by the spirit of reform (not unification) headed law dockets in early modern France. In reconsidering these events, therefore, it would appear that placing an impossible burden, "legal unification," on the shoulders of Michel de L'Hôpital, chancellor of France, who was struggling during eight years in office to manage political affairs amid religious wars, tends to tip the scales of history, if not in the wrong direction, then in one too narrow. With the historical scales thus askew, readers are doubly misled. On the one hand, they tend to expect from L'Hôpital what more than one man, even one so admirable, could deliver (and in fact did not deliver). On the other hand, they also tend to neglect the groups of jurists—avocats, judges, jurisprudents—who actually did accomplish serious legal reform in a particular area of law (for example, marital law) before and also after Michel de L'Hôpital stepped onto the political stage. Finally, the reform of one crucial segment of French jurisprudence, marital law, gradually refashioned a system of French civil law (unique in early modern Europe), gave new meaning, as well as longevity, to the term "our French Law," as well as to the

12. For later applause for the Marital Law Compact as an integral part of "our French law" going back to the early 1550s, see Claude Le Prestre in 1645 (Hanley, "Jurisprudence," 34–37). On the theory of "local knowledge," consult Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

13. For just three examples among many: Lanza, *From Wives to Widows*, which assesses the edict of 1560 (on second marriages); Diane Margolf, *Religion and Royal Justice in Early Modern France: The Paris Chambre l'Edit, 1598–1665* (Kirksville, Mo.: Truman State University Press, 2003), which recounts the French establishment of special courts staffed by Catholic and Protestant judges; and Amalia D. Kessler, *A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* (New Haven, Conn.: Yale University Press, 2007), which traces the rise of the special French Merchant Court (the *jurisdiction consulaire*) devised from the 1660s into the 1700s to handle commercial disputes (the only French court to survive the political Revolution of 1789).

later related term, "civil society,"[14] the one bandied about to identify a multifaceted French law venue, the other formulated to identify the commonly shared civil locale for practice, and both terms related to local knowledge that was well publicized in the courts and the streets during the 1600s.

14. Of interest here is Sarah Hanley, "The Pursuit of Legal Knowledge and the Genesis of Civil Society in Early Modern France," highlighting the shift from "judicial secrecy" to "judicial publicity" begun in the early 1500s and completed by the 1630s as configured by the avocat Antoine Furetiere's *Universal Dictionary* (worked on from 1648 to the 1670s, finished in 1684), chap. 4, in *Historians and Ideologies*, ed. Anthony T. Grafton and J. H. M. Salmon (Rochester, Minn.: University of Rochester Press, 2001).