THE CATHOLIC TRIBUNAL SYSTEM IN THE BRITISH ISLES

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"The claim to have succeeded in covering every side of Church life at the conclusion of the herculean labour of codification on this scale would indeed be a bold one, and one very uncongenial to the spirit of English law", comments the report entitled 'The Canon Law of the Church of England'.[1] Despite the production of a Code of Canon Law for the Church of England, the provisions of law as applying to the Church of England are much more complex, involving not only the provisions of the Code, but also Common Law, Statute Law, judicial decisions and occasional survivals from Mediaeval Canon Law. For this reason although the ecclesiastical courts of the Church of England and of the Roman Catholic Church have common origins and features, there are also many differences, not only in structure, but in the material that comes before them.

While both the 1917 and 1983 Codes of Canon Law are more comprehensive than that of the Church of England, and in theory any right can be vindicated before a Church Court,[2] in practice the area of life that comes before them is very restricted. It is possible to obtain statistics from the Annuario Statistico published by the Holy See, and for Great Britain and Ireland from the Canon Law Society Newsletter. Significantly, since 1985, the Holy See no longer asks for the number of penal cases or causae iurium because they are so infrequent. In the last year for which figures were published, there were only two penal cases in the whole world, and causae iurium just about reached three figures. The reason for this is fairly obvious; apart from Concordat arrangements in some countries, the decisions of ecclesiastical courts cannot be given effect in civil law. Consequently most cases of a contractual nature, or involving other rights are taken before the civil courts. However the Code is structured in such a way that this kind of case is treated as the basis for procedural law. It would be wrong to think that such provisions are altogether redundant, and it may be that there will be increased use of this forum, if it can be seen as a viable alternative to dragging Church matters before the secular courts. There has recently been a case of defamation tried before the Vancouver Regional Tribunal. Three instances of defamation by a parish priest were proved, and an apology ordered.[3]

In practice almost all cases dealt with by Catholic Tribunals are marriage nullity cases, which would of course never come before the ecclesiastical courts of the Church of England since they were transferred to the civil courts in the last century. Some statistics may prove enlightening. In 1985 58,797 marriage nullity cases were concluded worldwide, by the formal process; of these the great majority were from the English speaking world – 44,170 in the USA, 1925 in Great Britain, 663 in Ireland. At appeal 30,906 cases were concluded. Additionally 19,144 nullity cases were concluded by the summary or documentary process. By concluded is meant closed in any way, including abandonment. If we look at

1. S.P.C.K., London 1947, p.82.
2. Can. 221. 1.
3. Jurist 49 (1989) p.289.

the figures of cases actually brought to judgement, we see that in 1987 out of 1809 cases closed in England and Wales, 991 received affirmative decisions at first instance, 163 received negative decisions, and the remainder were abandoned. The number of cases handled or judged by a Tribunal will vary considerably according to the size and Catholic population; the smallest number of cases judged in 1987 was by Wrexham at 17, and the largest by Westminster at 164.[4] This difference is naturally reflected in the staffing level of each Tribunal. Some would have a sizeable staff including a number of lay people and several priests or religious on a full time basis; others would rely entirely on part time and largely unpaid help. In my tribunal of Brentwood, for example, there are five priest judges (including myself), all of whom have parochial commitments, and some of whom have to wear other hats for different cases, such as advocate or defender of the bond, and another priest who does advocacy work; we have one fulltime and highly competent lay secretary, and a certain amount of additional help with typing. Only the lay people are paid. We have also a pool of priest and lay auditors who take evidence. Despite the difficulties involved in this kind of situation, we were able to judge 59 cases in 1987. Inevitably much burning of midnight oil is required both prior to judgement sessions, and afterwards in writing the judgements.

The law on the discipline of ecclesiastical courts is to be found in Book VII of the 1983 Code, entitled 'De Processibus', which is equivalent to Book IV of the 1917 Code, but with some changes simplifying and speeding processes. As a book it falls into five sections:

Part I: Trials in General
Part II: The Contentious Trial
Part III: Certain Special Processes
Part IV: The Penal Process
Part V: The manner of procedure in Administrative Recourse and in the Removal or Transfer of Parish Priests.

The first part deals with what might be called the 'static' element, that is the structure and personnel of the courts, whereas part two covers the processing of a case from its first introduction to its conclusion. Part III applies special norms to marriage cases, and makes brief reference to trials for the nullity of Holy Orders, and the use of arbitration as a substitute for a trial.

The first question to be considered is that of jurisdiction, or, what is called in Catholic canon law, 'competence'. This is a matter both of geography and degree. In mediaeval canon law there was a four tier system, with appeal from the archidiaconal court to the Bishop's, to the Province, and then to the Pope. This was maintained in England until recently, but with the substitution of the Judicial Committee of the Privy Council for the Pope. However the archidiaconal courts were abolished by the Council of Trent, and the present Code reflects this three tier system. The final court of appeal for the whole Church is the Roman Rota (with certain exceptions for which particular arrangements obtain, e.g. cardinals, heads of state, and Spain, which has its own Third Instance Court of the Rota). There is also a supervisory body called the Apostolic Signature, but its role is a disciplinary one with regard to the other Tribunals rather than to look at the merit of a case. The ordinary second instance appeal courts are normally the metropolitan tribunals; in the case of metropolitan first instance courts another tribunal

4. Canon Law Society of Great Britain & Ireland, Newsletter, 76 (Dec. 1988) 90-105.

is designated permanently as their court of appeal, or occasionally (as at Southwark), the Holy See will permit the establishment of a separate bench of appeal judges within the same tribunal. The first instance court is that of the Diocese. However in some places lack of resources has led to the formation of regional tribunals of first instance, which would judge cases that would appear before the courts of the individual dioceses that constitute the region. Thus there are four regional marriage tribunals for the whole of Ireland: Armagh, Dublin, Galway and Cork. Competence at each level is restricted to that grade; a court competent for first instance cases would act invalidly if it heard a case at second instance.

Competence on a geographical basis is, however, relative, rather than absolute, and intended to secure speed of justice; incompetence on this basis is healed automatically if no objection is lodged within the time limit. The rules of competence are laid down in canons 1407-1414, and for marriage cases, canon 1673. The principles followed are 'actio sequitur forum rei', and the place of contract, or where the offence was committed. Consequently only that tribunal where the marriage took place, or where the respondent party is now domiciled can process a case. There are, however, two additional grounds of competency for marriage cases, which take into account the mobility of modern populations. Provided that both parties reside within the jurisdiction of the same Episcopal Conference, the tribunal of the domicile of the plaintiff or petitioner is competent. So also is the place where most of the proofs may be gathered, regardless of the domicile of the parties. However, in both cases the respondent must be asked if he has any objection, and the respondent's tribunal must give its consent. This is to preserve the respondent's right of defence. In these islands, for example, the Westminster Tribunal could adjudicate a case where the petitioner lives in North London, but the respondent lives in Wales and the marriage was celebrated in Durham; however if the petitioner lives in Glasgow, the Scottish National Tribunal could not do so, unless the majority of the potential witnesses live in Scotland, and then only with the consent of the appropriate Welsh Tribunal after consulting the respondent.

In each Diocese the Bishop is judex natus; however it is most unusual for him to judge cases personally. He is obliged to appoint a judicial vicar or officialis with ordinary power to judge. He constitutes one tribunal with the Bishop, so there is no appeal from him to the Bishop as in the former archidiaconal courts. He may, but need not, be given an assistant. In addition there are to be other judges. The number is no longer specified. The Council of Trent had required that at least four Synodal or Prosynodal judges had to be appointed. Appointment is now for a specified period of time, although they continue in office during an interregnum. Two other important officials are the Promoter of Justice, whose role is to protect the public interest in penal and contentious cases, and the Defender of the Bond. The latter was introduced by Benedict XIV to defend the marriage bond ex officio, lest cases go by default when both parties wished a marriage to be declared null. His intervention is required for validity in all marriage nullity cases. An innovation in the present Code is that all these must have an academic title in canon law; previously it was sufficient for them to have good practical experience and knowledge. Given the difficulty of sparing priests for two or three years to obtain the necessary degrees, this poses some problems for the future staffing of Tribunals. Episcopal Conferences have been granted the faculty of allowing the appointment of lay people as judges, provided they have the necessary qualifications. They may also take on the office of Promoter of Justice

and Defender of the Bond, but not Judicial Vicar or assistant judicial vicar. Behind this provision lies a controverted theological point that has given rise to much debate. According to the school of thought which predominated at the Second Vatican Council, power within the Church is passed on through Holy Orders; was it, then, possible for a lay person to participate in or exercise such power even in a delegated way? Another school of thought, dominant in the Middle Ages and until recently, held that such a restriction applied only to sacramental power, and that other kinds of authority, judicial and executive both could be, and historically had been, exercised by properly authorised lay people. As a whole the Code does not settle this argument, but on this particular point reflects the teaching of the Roman school rather than the German.

In principle only one judge is required for a contentious case (amongst which marriage is counted), but for more serious matters a collegiate tribunal of three or more judges is required. A collegiate tribunal is always required for marriage cases,[7] but if because of a shortage of judges this is impossible then the Episcopal Conference may authorise the use of a sole judge, if possible with an assessor and auditor.[8] Decisions are reached by majority vote.[9] To ensure a fair distribution of cases, and that no preference is shown, the Roman Rota operates a rotating system: case one is judged by A, B and C, case two by B, C, and D. Most diocesan tribunals operate a less formal system, and the Code requires that normally the judicial vicar or his assistant should preside. Although the Episcopal Conferences of Scotland, England and Wales have authorised the use of sole judges, there is great reluctance to avail of this facility out of the feeling that prudence requires a collegiate decision in matters of such gravity. However, dire statistics of divorce in USA mean that American tribunals have little choice but to make extensive use of this faculty. One of the judges in a hearing will be designated 'ponens' or 'relator', and it is his responsibility both to present the case at its hearing, and also to write the sentence, incorporating the views of the other judges.[10]

The other figures who are involved as court officials in preparing a case are the auditors. The procedure required in marriage cases is the iudicium sollemne that we find in the Decretum and Decretals, and is consequently a written rather than oral procedure. The oral, summary process introduced by Clement V in 1304,[11] still exists (cf. cans 1656-1670), but may not be used for marriage cases. The witnesses do not appear before the collegiate tribunal in person. One of the judges, or a clerical or lay auditor, is commissioned to instruct the case and gather all necessary evidence. It is his role to prepare the questions. The parties and their advocates are not permitted to question the witnesses directly; this must be done through the judge or auditor. Judgement sessions therefore are a discussion of the dossier of the acta of the case previously distributed. This is probably the biggest single difference between our courts and those of the English legal tradition. The witnesses will have been interviewed either at the Tribunal Office, or elsewhere by rogatorial commission. This is of particular importance since the Tribunals do not have the power to subpoena people to ensure their appearance at a particular place or time.

7. Can. 1425.1 1°
8. Can. 1425.4
9. Can. 1426.1
10. Can. 1429
11. Clem.5.tit.11 cap.2

Cases are not heard in open court. Only those persons may be present whom the judge decides to be necessary.[12] Equally the judicial acts and documents are confidential and copies may not be passed on without an order from the judge.[13] However the parties and their advocates are entitled to see the acts before the case is brought to a conclusion; for serious reasons the judge may restrict access to some of the acta, provided that the right of defence is upheld,[14] e.g. if there is a danger of physical assault on a witness. Witnesses are usually required to take an oath not only to tell the truth, but also to respect confidentiality. This arises not only from the sensitive nature of a marriage case, but also the need to prevent collusion when there may be a considerable time lapse between the interviewing of parties and witnesses.

All sorts of people approach the tribunal. According to the Code not only Catholics, but any person, baptised or not, can plead before the Court,[15] and the Court will investigate any marriage in which at least one party was baptised, but not the marriage of two unbaptised persons, since they fall wholly outside the scope of the Church's law. Quite often a tribunal is asked to adjudicate the status of a non-Catholic, previously married to another non-Catholic. Although the declaration of a Catholic Tribunal has no consequences in civil law in this country, we would not normally look at a case until a civil divorce or annulment has already taken place. However the situation in Ireland differs in this regard, as also where Church annulments have civil effects in Concordat countries.

When someone contacts the Tribunal, he will be interviewd by a judge or auditor. On this basis, and if necessary, further information, a decision will be reached as to whether there is a prima facie case ('fumus boni iuris'). This is normally done informally, but there is an appeal to the collegiate tribunal, and even to the court of appeal, if a negative decision is given at this point. Following this a formal petition or libellus is submitted by the petitioner, indicating the object of the plea and its legal basis as well as the names and addresses of the parties and other details; this is a written redaction of the oral plea made at the interview. The next stage, assuming that the tribunal is competent, is for the respondent to be cited, usually by letter, but possibly by public advertisement if the address is not known. The issue before the court will then be agreed, usually on the basis of the petitioner's allegation, unless the respondent has indicated alternative grounds. During the process the parties may be assisted by a procurator and an advocate. In this country the advocate would usually be a priest attached to the tribunal, but on the Continent they are frequently civil lawyers with a qualification in canon law, especially where there may be serious implications for property and status in civil law.

Another major difference from English law lies in the nature of the evidence which may be admitted. In cases such as marriage, which involve the public good, the judicial or extrajudicial confessions of the parties do not amount to a sufficient proof. However the principle 'unus testis, nullus testis' is no longer rigorously applied. Moreover the judge exercises much greater freedom with regard to witnesses. Not only does he examine the witnesses, he may also

12. Can. 1470.1
13. Can. 1475.2
14. Can. 1598.1
15. Can. 1476

introduce new ones ex officio.[16] It is almost entirely up to him how he evaluates the evidence; hearsay evidence is explicitly permitted,[17] and frequently of the greatest importance in marriage cases. Character witnesses may also be admitted to establish the credibility of the parties, or of testes de scientia. Frequently, in nullity cases involving psychological disorders, it is his responsibility to appoint a court expert to examine the party/parties and/or acta, and make a report. Not infrequently the respondent does not cooperate, but the obligatory role of the Defender of the Bond means that this is not treated as an undefended case. The trial proceeds in the absence of the respondent, and the validity of the bond is upheld and the arguments of the petitioner challenged by the Defender of the Bond.

Once all the evidence has been gathered, or at least what the judge regards as sufficient evidence, and once the pleadings and comments of the parties and their advocates have been received, the acta are distributed for consideration at the next judgement session. Each judge will come with a prepared written votum, but may accede to the position of the other judges after discussion. The ponens will outline the case and the evidence, and the other judges proffer their views. The judges must then decide 'an constat de nullitate matrimonii in casu'? The degree of proof required is moral certainty; otherwise the law presumes that the marriage is valid. By moral certainty is meant more than the balance of probability required in English civil cases, but it is not quite the same as the 'beyond reasonable doubt' of criminal cases. It is not required that no other explanation is possible or reasonable, but that the judge himself is in no doubt as to the correct explanation. It is not enough for the judges to agree that the marriage is null; they must also be agreed on the legal basis of nullity, where more than one possible ground has been alleged. In their judgement the judges must answer all and only the questions put to them; if they think that the case has been wrongly prepared, they must defer it for the addition of new grounds or further evidence. Once a decision has been reached the ponens will prepare a written judgement setting out both the law and the facts.

In a case other than marriage, the judgement of the first instance tribunal, if unchallenged, becomes adjudged matter and is put into execution. However judgements on the status of persons never become adjudged matter,[19] and in marriage cases where there has been an affirmative decision, there is a mandatory appeal.[20] The appeal court may simply ratify the decision, if satisfied with the first instance judgement, or may remit the case to a full hearing, which is obligatory for an appeal against a negative decision. Once there have been two conforming sentences the matter becomes adjudged, or, in marriage cases, although not adjudged, can be reopened only with new and serious arguments. Should the first and second instance courts disagree, then the third hearing will be before the Rota in Rome, unless special permission is given for a delegated third instance hearing locally. However, now that the Rota has sufficient judges versed in English to accept cases without translation, such delegation is not easily given. In fact, though, a very small number of cases go before the Rota, since if there is sufficient

16. Can. 1660
17. Can. 1572
18. Can. 1680
19. Can. 1643
20. Can. 1682.1

evidence for the first instance tribunal to reach certainty, in most cases it will be ratified by the appeal court without much difficulty. Problems tend to arise either where a conflict in the evidence has been resolved differently, or where there is a disagreement on a point of law. Although there are no figures for cases going to the Rota in 1987, of cases judged in Great Britain at second instance, 1028 were ratified, and only 60 were subjected to the full procedure (7 receiving affirmative decisions, 53 negative). The Rota judged 139 cases at full trial in 1987 (81 negative and 53 affirmative decisions); these were taken from the whole world and included some second instance cases appealed from the Rome and Lazio Tribunals.[21]

In addition to the full examination of marriage nullity by means of the ordinary contentious process, the Code also provides four other forms of procedure that may be applied in different circumstances. The most commonly used is the documentary process, which is similar to the shorter iudicium Clementinum, in that many formalities can be omitted. It is used when "A marriage can be declared invalid on the basis of a document which proves with certainty the existence of a diriment impediment, a defect of lawful form or the lack of a valid proxy mandate".[22] Such a case may be decided by a single judge, and without a mandatory appeal. Almost all cases involve either the marriage of a Catholic outside the Church without permission, or the impediment of prior bond, which may exist canonically, even though a person was civilly free to marry. This nearly always applies to a non-Catholic, because a Catholic would not have been able to marry in Church in this situation, unless he had tricked the priest. Such cases merely require the assembly of the appropriate documents, and time for the citation and reply of the other party, and so are usually dealt with in weeks rather than months. The Code also provides for judicial separation and presumption of death.[23] The former is rarely used today outside Catholic countries, although in principle Catholics are normally required to obtain permission from the ordinary before separating.[24] The presumption of death procedure is also rarely necessary where there is adequate registration of death. However the civil law criterion of seven years absence is not acceptable canonically. Evidence must be provided as to the approximate date and circumstances of death, e.g. in battle or at sea, before such a presumption can be made. The actual procedure is governed still by the norms contained in the Instruction of the Holy Office issued in 1868.[25] In 1987 there were only two separation cases in England and Wales, and one of presumption of death.

There are, however, two remaining types of marriage case which involve our tribunals, and in a significant number of cases. Neither of these is treated judicially. The first is non-consummation. In canon law this is not a ground for nullity, although it may be an element in proof of impotence. It does however give rise to the possibility of a 'dispensation super rato', which is given by the Pope. The actual judgement on whether non-consummation has been proved is reached by the Congregation for the Sacraments on the basis of an investigation carried out by the local tribunal. Because it is an administrative procedure seeking a favour from the Holy See various special rules apply to the elements of proof,

21. Newsletter, loc. cit.
22. Can. 1686
23. Can. 1692-1696; 1707
24. Can. 1153
25. Acta Apostolicae Sedis 2(1910) pp199-209

questions of confidentiality, and other procedural norms,[26] and these are contained in a circular letter from the Congregation, expanding the norms given in the Code. A second kind of administrative procedure arises where one or both parties were not baptised, and the marriage is consequently not sacramental, and therefore extrinsically rather than intrinsically indissoluble. Where the requirements of the Pauline Privilege are fully met, viz. neither party baptised, and subsequent conversion and baptism of one party, the second marriage of the converted party automatically dissolves the first in favour of the faith. The tribunal may be involved on behalf of the ordinary in establishing the facts and other procedural elements.[27] Where some, but not all, of these points are verified, e.g. only one party unbaptised, or lack of conversion, but a desire to marry a Catholic, such dissolution is not automatic, by virtue of the Pauline Privilege, but must be referred to the Holy See for an extrinsic dissolution by the power of the keys exercised in favour of the faith. No figures are available for privilege of the faith cases, but in 1987 five non-consummation cases were sent to Rome from England and Wales.

I commented earlier on the lack of penal cases or rights cases handled by tribunals. One of the reasons for this is a preference for administrative methods in such situations. Where a cleric commits an offence against canon law, the formalities and burden of proof in a formal penal trial are so great that a less formal administrative or executive approach is preferred. The same is true where a bishop deems it necessary to remove a parish priest. Generally more scandal would be caused by a formal trial than a combination of patience and persuasion. A rather more problematic area is when there is a conflict not between equals, who might resolve the issue in the civil courts, but between inferior and superior, where there is no question of actual breach of the law, for example a priest or lay person with a grievance against the Bishop, or a religious against his/her superior or Order. If the superior has acted invalidly, then there can be recourse through the appropriate tribunal, in most cases the Rota. However if the rightness but not legality is challenged, what then? Before 1917 there was a single system of justice, which meant that Bishops, and others who were in some sense one's hierarchical superiors, could be challenged through the ordinary courts. However the 1917 Code was heavily influenced by the Code Napoléon and Continental administrative law, and this right of appeal through the courts was taken away. All that was available was hierarchical recourse, i.e. an appeal first to the superior to change his mind, and then to his superior, ultimately to the appropriate Congregation in Rome. When the revision of the Code was undertaken, the intention was to establish a formalised system of administrative tribunals at different levels, but as promulgated in 1983 this provision had disappeared. All that was left was a formalised set of norms applying to hierarchical recourse, but giving local Episcopal Conferences and Bishops the possibility of establishing a system for their area.[28] A consequence of this is that many of the cases dealt with by Consistorial courts in the Church of England, such as various kinds of faculties, are wholly outside the jurisdiction of our tribunal system. If, for example, a parish priest wished to sell some land and use the proceeds to build a Church Hall, parishioners would have no recourse against him on that basis through the diocesan tribunal; they could

26. Can. 1697-1706
27. Can. 1141-50
28. Can. 1732-1739

only appeal to him, then to the Bishop, and then to Rome. Unless he had not obtained the necessary approval from the Diocesan authorities to spend the money, or the Diocesan authorities had themselves acted unlawfully, no judicial review would be possible. However if the parish priest simply went ahead without consulting anyone, he could be sued before the diocesan tribunal certainly by the Promoter of Justice, and possibly individual parishioners if they could establish a legal interest. If it was the Bishop, or an agent of his such as the Financial Secretary, who had acted unlawfully, then the case would have to be brought before the Rota. This is not, in the view of many Anglo-American canonists, a very happy state of affairs. I have no wish to see tribunals burdened with litigation of this kind, but at present there is a distinct hollowness to the claim of canon 221.1 "Christ's faithful may lawfully vindicate and defend the rights they enjoy in the Church, before the competent ecclesiastical forum in accordance with the law".

By way of conclusion, I must say that a description of the working of a tribunal has a distinct resemblance to Ezekiel's valley of the dry bones, before life was breathed into them! As a lived experience it is a great privilege to be allowed into intimate contact with the lives of so many people, and a source of great satisfaction to know that some at least one has been able to help resume a normal part in the life of the Church through the judicial process. There are many heartbreaking cases of disastrous but valid marriages, but there are also the letters of thanks, and even wedding photographs or pieces of cake that compensate to some extent.

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