

## **Catholicism**

### ***Church tribunals in Roman Catholic canon law***

#### **1. Courts, Tribunals and other adjudicative structures.**

##### **Court and tribunals**

In the Roman Catholic Church the terms 'court' and 'tribunal' are both used for the ecclesiastical judicial courts, although there is also provision made in canon law for administrative tribunals. The term 'tribunal' in general covers the whole of the judicial organisation for dealing with any case, whereas the term 'court' is used to denote the specific set of persons designated to hear an individual judicial case, or the hearing itself.

##### ***Hierarchical Structure***

The 'grade' of a tribunal is the position the tribunal holds in the hierarchy. There are four grades of church tribunals: the first is diocesan; the second, metropolitan; the third, regional; and the fourth, the Holy See. The grade of tribunal does not necessarily coincide with the grade of hearing. E.g., a tribunal of second grade could hear a case at First Instance (canon 1417). If, for example, a case is heard on appeal and it becomes clear that whilst the case cannot be proven on the alleged grounds, other grounds are more appropriate, the court can hear the case on new grounds as if at First Instance.

The '**kind**' of tribunal is the particular class to which it belongs and usually depends on how many judges sit: one, three, or five; or it can indicate whether it is an ordinary or administrative tribunal; a religious or diocesan, inter-diocesan (or in the case of the Eastern Churches, inter-Church) tribunal.

##### **Other adjudicative structures**

Provision is also made for hierarchical recourse. Draft canons which were to cover this area were removed from the 1983 Code immediately prior to its promulgation. However, canon 1400, para 2 refers to the possibility of recourse to an administrative tribunal (although not to a judicial tribunal) against a 'dispute arising from an act of administrative power'. Canon 1445, para 2 refers to the competence of the Supreme Tribunal of the Apostolic See in these matters.

While conciliation and arbitration, are not, in themselves, a form of hierarchic recourse, because hierarchic recourse involves an authoritative resolution of the dispute by the hierarchical superior, they can nonetheless be very effective ways of resolving issues, but the person concerned cannot be denied the protection of hierarchic recourse or access to an administrative tribunal.

*Pastor Bonus* (Apostolic Constitution, 1988) clarifies that recourse is to the Sacred Congregations and after that to the Apostolic *Signatura*.

## 2. Jurisdiction.

The Roman Catholic Church claims competence to judge cases which refer to matters which are spiritual or linked with the spiritual (canon 1401, 1°) and cases involving violation of ecclesiastical laws to determine guilt and impose penalties (canon 1401, 2°). However, only Roman Catholics are bound by the Code of Canon Law. As marriage is a spiritual matter, the Church claims comprehensive competence over marriages of Catholics, even if only one party is Catholic.

However, if the other party is baptised, the law of the ecclesial community to which he/she belongs also governs the marriage if that community has its own marriage law (*Dignitas Connubii*, Art 2§2, 1°), or if not, the law used by that community (*Dignitas Connubii*, Art 2§2, 2°). In cases where neither party is Catholic, the courts will only hear cases in which it is necessary to establish the freedom of one party before the Catholic Church (*Dignitas Connubii*, Art 3§2). Civil authority over the merely civil effects of marriage is recognised (canon 1059).

The vast majority of judicial cases heard worldwide are marriage cases, but provision is made in the Code to pursue or vindicate any right of physical or juridical persons or to declare juridical facts (canon 1400§1, 1°) and to impose or declare penalties for offences (canon 1400§1, 2°). Disputes arising from administrative acts are dealt with administratively (canon 1400§2).

Tribunals can be established for all types of cases or for some types only (eg, marriage), (canon 1423§2).

Certain serious offences are reserved to the Holy See (John Paul II, Apostolic Letter (*Motu proprio*), *Sacramentorum sanctitatis tutela*. (Rome, 2001) and Congregation for Divine Worship and Discipline of Sacraments, Instruction, On certain matters to be observed or to be avoided regarding the Most Holy Eucharist, *Redemptionis Sacramentum*, (Rome, 2004), para 179.

## 3. Legal representation

### Advocates and procurators

A party can respond personally unless the judge considers the services of an advocate or procurator to be necessary. The party can freely appoint advocates (whose duty is to safeguard the party's rights by arguments regarding the law and facts) and a procurator (whose duty is to perform judicial business, by legitimate mandate in the name of another, i.e., by proxy (canon 1481§1). In penal trials the accused must be invited to appoint an advocate within a specified time limit (canon 1723§1). The appointment of an advocate in a penal trial is mandated, so if the accused does not appoint one personally, the judge must allocate one (canons 1481§2, 1723§2). In contentious trials concerning a minor or the public good, the judge is *ex officio* to appoint a legal representative for a party who lacks one, except in marriage cases (canon 1481§1).

'As far as possible', each tribunal is to appoint permanent legal representatives, who receive a salary from the tribunal, who can exercise the office of advocate and procurator for parties who may wish to choose them (canon 1490).

Only one procurator can act (canon 1482) for a party. However, several advocates can be appointed (1482§3). The personal qualities, academic requirements, norms for discipline, legal requirements for carrying out their functions, and provisions for dismissal and punishment are governed by canons 1483-1489. In penal trials canon 1725 affords the advocate or procurator the right to speak last.

### **Experts**

Expert evidence is permitted and in certain circumstances mandated (canon 1574). It is the judge's function to appoint experts after consultation with the parties, but he may do so at the request of the parties (canon 1575), who may designate their own experts to be approved by the judge (canon 1581). The judge defines the specific issues to be addressed by the expert (canon 1577). Canons 1577-1581 govern the role of the expert and the requirements for expert reports.

## **4. Selection of decision-makers**

In theory at least, Roman Catholic Church tribunals consist of personnel trained in canon law. In the absence of a sufficient number of trained personnel, the Apostolic *Signatura* can issue dispensations, allowing untrained personnel to practice under the supervision of trained canonists. The (21) Eastern Churches *sui iuris* have also experienced problems implementing the system in its entirety due to lack of personnel and infrastructure.

In diocesan tribunals, personnel are appointed by the diocesan bishop; in inter-diocesan tribunals, by the groups of bishops concerned or by the Bishops' Conference (*Dignitas Connubii*, Art 33). Appeal tribunals are constituted in the same way as First Instance tribunals (canon 1441). The tribunals of the Holy See are governed by their own norms (canon 1402).

The personal qualities of, and academic requirements for, tribunal personnel are set out in the canons (judicial vicar, canon 1420; judges, canon 1421; auditors, canon 1428; promotor of justice and defender of the bond, canon 1435).

## **5. Practice and procedure**

Canon 1446§1 obliges all the faithful to avoid law suits and §2 obliges judges to encourage the parties to litigation to avail themselves of alternative dispute resolution, including mediation, and arbitration (canon 1713) if he considers there is hope of a successful outcome. Emphasis is placed throughout the Code on such avoidance (concerning the oral contentious process (c 1659); in marriage nullity

cases where there is hope of reconciliation (c 1676); in cases involving separation of spouses (c 1695); in contentious matters (c 1713 -1716); in penal cases (c1720); when a person is aggrieved by an administrative decree (1733); and in cases involving the removal of a pastor (1742 and 1748). This emphasis on the avoidance of trials is also found in the Code for the Eastern Churches – CCEO 1103. Equitable solutions, mediation, negotiated settlements and even arbitration are recommended at the outset of a trial and should be encouraged to continue during the trial if possible.

General norms for the judicial procedures are set out in Book VII, Part I, covering: the object of trials; competent forum; grades and kinds of trials; discipline; the parties; actions and exceptions. Provisions for contentious trials are covered in Book VII, Part II, whilst special processes (eg, marriage nullity, including documentary process; dissolution of marriage; separation of spouses; presumed death of spouse; nullity of sacred ordination); are dealt with in Part III. Part IV covers the penal process, including action for damages. A penal process is a judicial process to investigate the allegation of an offence and to determine whether or not to impose (*ferendae sententia*) or declare an automatic (*late sententia*) penalty for that offence (canon 1314). However, it is preceded by an administrative process to investigate the allegation and a decision is taken regarding: (a) whether or not a process to impose or declare a penalty can be initiated; (b) whether or not this would be expedient, bearing in mind canon 1314 (which requires that it be a last resort), and (c) if all else fails, whether a judicial process or an extra-judicial decree is to be used. If a judicial process follows, the investigator cannot act as judge (canon 1717§3). Part V of Book VII governs the procedure in administrative recourse and in the removal or transfer of parish priests.

Book VI of the 1983 Code deals with sanctions in the Church: Part I covering offences and punishments in general, whilst Part II covers particular offences. The establishment of tribunals; jurisdiction; competence; and the personal qualities, academic requirements and appointment of personnel are covered by canons 1419-1437.

Canons 1438-1441 deal with appeal tribunals and canons 1442-1445 govern the Apostolic Tribunals. Discipline (duplication of roles, personal interest, refusal of gifts, expeditious conclusions, taking of oaths, observations of secrecy, punishment for breach, etc) of tribunal personnel is covered by canons 1446-1457 and the ordering of the hearing by canons 1458-1464.

### **Level of proof required**

The onus of proof lies with the person making the allegation (canon 1526§1). A judge must reach 'moral certainty' (canon 1608§1), which is comparable to the level of proof required in the civil criminal court, that is with the concept of 'beyond reasonable doubt'. This level of certainty must be reached from the acts and the proofs (canon 1608§2) before giving judgment. Otherwise, the judge must find in favour of the respondent, or the law in matters which enjoy the favour of the law (canon 1608§4).

## 6. Provisions for appeal and enforcement

### Appeal

An appeal is made from diocesan tribunals to the Metropolitan (canon 1438) and from the Metropolitan to the Holy See or to the court appointed by the Holy See. If the First Instance tribunal is inter-diocesan, the appeal is to the tribunal established by the Bishops' Conference with approval of the Holy See (canon 1439). If the tribunal is that of a religious community and the case was heard at First Instance by the provincial Superior the appeal is to the supreme Moderator, or if heard before the local Abbot, it is to the Abbott Superior (canon 1438, 3°).

The appeal process is governed by canons 1628-1640.

Marriage nullity cases must have two conforming affirmative decisions before a decree of nullity is reached. Therefore, there is an 'ex officio' appeal against an affirmative decision of a First Instance court. If a Third Instance decision is required, the case is heard by the Roman Rota or by a tribunal approved by it. Marriage cases never become '*res iudicata*' (canon 1643), leaving open the possibility of appeal at any time. Any party may approach the Roman Rota as tribunal of Second Instance (*Dignitas Connubii*, (Rome, 25 January 2005) Art 257§2).

Provision is also made for a plaint of nullity against a sentence (canon 1619-1627). A judgement can be remedially or irremediably null. Total reinstatement of a case is provided for by canon 1645-1648 when two conforming sentences have been reached but the injustice of the judgement is clearly established (canon 1645).

In penal cases, the promotor of justice (whose role is to safeguard the public good) can appeal if he considers that the reparation of scandal or the restitution of justice has not been sufficiently provided for (canon 1727).

### Enforcement

The role of canon law is ultimately the salvation of souls and the faithful have personal responsibilities. Therefore, they have a moral as well as a canonical duty to conform to canon laws in order to live out more fully their Christian vocation and incorporation in Christ.

The Code places an obligation on the bishop to urge the observance of all ecclesiastical laws (canon 392) and the Church claims its own inherent right to punish those who commit offences (canon 1311). Medicinal penalties are designed to correct the offender's behaviour and his/her reintegration into the full life of the Church. Expiatory penalties seek to compensate for harm done. The application of sanctions, therefore, does not necessarily rely on decisions of the courts. All crimes are sinful, but not all sins are crimes. For example, ecclesiastical office holders can be removed by the law itself for certain offences (canon 194) and a bishop who ordains another's subject without dimissorial letters, is, *ipso facto*, prohibited from

ordaining for a year (canon 1383). Furthermore, *latae sententiae* penalties are incurred automatically upon the commission of specific offences (canon 1314). Furthermore, canon 221§3 states that no canonical penalty may be inflicted upon the faithful except in accordance with the law and the law does not mandate punishments except in the case of serious offences (see eg, canons 1370-1374, 1376, 1377, 1379-1381, 1385-1389, 1397). Clerics can incur further penalties (eg, canons 1364, 1390§1, 1392, 1395).

Apart from those offences specifically mentioned in the law, canon 1399 states the principle that a penalty can be imposed for any external violation of divine or canon law provided it is objectively very serious and there is a genuine need to repair or prevent scandal.

There is no specific provision in the Code for enforcement of judicial decisions. However, marriage cases merely determine the status of persons and their freedom to marry. Therefore, enforcement is not an issue. In penal trials, the accused are mainly clerics and therefore, incardinated in a diocese or religious community. Enforcement, therefore, could be achieved administratively. In cases of vindication of rights, this lack of provision for enforcement is a weakness in the law. Likewise, in administrative cases the removal of the draft canons leaves gaps in the provision for redress.

## **7. Review by secular courts**

The civil courts will intervene in ecclesiastical matters if a civil wrong has occurred (*Forbes v Eden* (1865) 4M 143; (1867) 5M (HL) 36. *Rt Rev Mark Dilworth v (First) Lovat Highland Estates Ltd and (Second) Trustees for St Benedict's Abbey, Fort Augustus* [1999]).

Many civil court cases have been heard involving Roman Catholic bodies on issues such as education (mainly admissions to schools policies), employment, adoption, taxation, immigration and asylum, but rarely has canon law been considered. Courts have considered Roman Catholic canon law in an immigration case where the claimant applied for judicial review on the grounds that his relocation would breach Article 9 ECHR as it would impede him from hearing Mass in a language he understood, which was important to him. Leave for judicial review was refused as the obligation was to attend Mass and although the claimant struggled with spoken English, the words and phrases used in the religious service were repeated frequently and would therefore be more easily understood than would normal conversation (*R (on the application of Kazema) v Secretary of State for the Home Department*, [2002] EWHC 2151 (Admin), CO/2674/02, [2003] Imm AR 100).

In *Pelligrini v Italy*, the European Court of Human Rights was critical of the Italian civil courts for ratifying a decision of the Roman Catholic ecclesiastical court when natural justice rights had been infringed (*Pelligrini v Italy*, Application no: 30882/96; Judgment 20 July 2001). Contrary to popular belief, the ECHR was not critical of the

provisions of Roman Catholic canon law; rather the problem arose from its incorrect application.

The Code is at the same time highly detailed, yet non-specific. The detail provides the basis for ensuring uniformity throughout a world-wide Church and compliance within the context of widely differing legal systems.

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