

History of Tribunals

Did you ever try to play a board game with someone who thinks the rules are different from the rules you know? It can be very frustrating if there are no simple guidelines to direct the action in the game. Such is true also in life. Rules facilitate people doing things together. Even for made up games, children quickly create basic rules to follow. For most formal meetings, adults rely on for Robert's Rules of Order.

I was asked to present to you today a history of tribunals in the Church and also an idea of how the tribunal process works. The history of tribunals will form this first presentation and the tribunal process will be the focus of the next session.

Courts and trials have been part of Church life from the very beginning. Matthew says **Jesus** himself drafted the first **procedural Church law**. On a **personal note**, coming from a family as the only girl with four brothers, I like Jesus' example in Mt. 18 about a brother in the wrong! If your brother should commit some wrong against you, go and point out his fault, but keep it between the two of you. If he does not listen, summon another, so that every case may stand on the word of two or three witnesses. If he ignores them, refer it to the church. If he ignores even the church, then treat him as you would a Gentile or a tax collector. I assure you, whatever you declare bound on earth shall be held bound in heaven, and whatever you declared loosed on earth shall be loosed in heaven. Mt. 18:15-18

The **early Church** followed that model for conflict resolution. While he regretted that there would ever need to be litigation among the followers of Jesus, St. Paul re-states that mandate to have 2-3 witnesses in his second letter to Corinth and his first letter to Timothy (2Cor. 13: 1 and 1 Tim. 5:19). Law was an important aspect of the **Jewish tradition** in which Jesus was embedded, the tradition from which Christianity arose.

The 19th psalm (7-10) tells us, The Law of the Lord is perfect, refreshing the soul; The decree of the Lord is trustworthy, giving wisdom to the simple. The precepts of the Lord are right, rejoicing the heart; The command of the Lord is clear, enlightening the eye. The fear of the Lord is pure, enduring forever; The ordinances [the laws] of the Lord are true, all of them just.

So **law** has been an **important** part of Christian life from the days when Jesus walked among us. A rich young man came to Jesus asking what he needed to do to share in eternal life. The Gospel of Mark notes that Jesus told the **rich young man** (Mk. 10: 19) to keep the commandments. Jewish converts brought with them into Christianity much of the Law of Moses. Law was important for Christians even before the organized institution we call the Church.

Jesus respected the law. However, Jesus also said, "Woe to you lawyers" (Luke 11:47). But, despite those harsh words about lawyers, **Jesus insisted** "not one little stroke is to disappear from the law until all its purpose is achieved." (Mt. 5:18)

There is much **scholarly literature** about marriage in the New Testament especially studies of isolated texts. What did the disciples announce about marriage as part of the **Good News** of Jesus Christ? We know there was a **marked difference** between the law of Jesus and the Law of Moses which **permitted divorce** (Mk 10:2-8).

A professor of law at Harvard, Charles Donahue Jr, wrote in 2005 that the **Council of Jerusalem** (Acts 15; Gal. 2) was called to settle the question of whether Gentiles who became Christian had to be circumcised and whether they had to follow Jewish dietary laws. Donahue says The Council of Jerusalem indicates that the very **early church** saw a need to have an **authoritative body** to resolve questions about what should and what should not be taken into Christianity from the law of Moses. This is the early precursor of the Church tribunal system.

The **primitive Church** believed that God was present and active wherever a **marriage** came into being (Mk 10:9) so marriage for Christians has a **sacred dimension** from the beginning of the Church (Jn.2:1-11).

For centuries the church grappled with Jesus saying, “What therefore God **has joined together**, let no man put asunder” (Mk 10:9) and the clause of exception found in Matthew (Mt.19:9) which says whoever divorces his wife sins **except** in the case of *porneia* which is sometimes translated as unchastity, sometimes translated as adultery, and sometimes translated as incest or any gross immorality. Either way, the exception justified only **separation** not remarriage.

To have laws about marriage, one needs to decide what makes marriage. Marriage, according to the customs of the Jews, as well as the traditions of the Greeks and Romans, all of which influenced the early Church, required **mutual consent**. However, consent is internal so law must determine signs by which such consent is recognized externally. The early Church used the Roman form of **contract** to deal with marriage. That idea of contact was theologically enriched during Vatican II and expanded to include the concept of **covenant**. For Christians, consent to the marriage contract was expressed through **wedding vows**.

At the end of the **2nd century**, Tertullian in his *Apology* written in the year **197 AD** refers to the Christians and their **laudable court system**. There are detailed instructions about how the bishop-judge is to handle the case of someone falsely accused, and how judges must not accept bribes, must hear both sides, and must not favor any person. Around the **2nd century** Christians struggled against **Gnosticism** an amorphous movement that proposed dualism: teaching that the material world including the human body was evil. This heresy penetrated many aspects of thought including ethics, metaphysics, and theology. Gnosticism rejected procreation as evil. The Gnostics taught that good and spiritual persons would avoid both procreation and marriage. The Church rejected Gnosticism as a heresy but Gnosticism still influenced Christian thought.

In the **3rd century** Eusebius, sometimes called the earliest Church historian, records in the year **268** the **trial of a bishop** accused of not being a just judge, depriving the injured of their rights, and extorting money. So, there were **Church courts from the beginning** of the organized church – used and abused, admired and detested but always part of the structure of the church.

By the 3rd century, Christian writers such as Tertullian and Cyprian used juridical concepts from Roman Law in their theological writings. Remember that the Church was in the cultural milieu of Roman law as Church institutions evolved. For example, Tertullian designates clergy with the word *ordo*, the word used in Roman law for municipal officials, (root word for ordination).

By the 4th century, Christianity was accepted by the **Roman Empire** first as AN official religion and then as **THE official religion** at a time when the concept of separation of Church and state would have seemed bizarre. **Councils** of the Church not only solved theological questions but also passed the rules, canons, which were necessary for administration of a state religion. The earliest such council for which we have a record is **Elvira** around the year **306**. The 4th century also brought the beginnings of legislation formulated directly for the Christian Church and there was a definite influence of Roman secular law involved such as prohibition of ordination to a higher order without ordination to the lower degrees first which rules paralleled the rules for men involved in Roman civil service.

The symbols of **Episcopal authority** also parallel those of Roman secular officials. Much of that could be **merely cultural** influence. However **papal decretals** from the 4th century follow closely in language and style the decrees of Roman emperors. In the 4th century, St. Augustine was teaching 3 goods of marriage the *bonum prolis* – children, the *bonum fidei* – fidelity, and the *bonum sacramenti* – indissolubility or permanence. Later theology would add the *bonum coniugum* - the good of the spouses.

While Augustine discussed the goods of marriage, he clearly saw marriage as less good than virginity. Human beings suffered from concupiscence so marriage was necessary for many. Even within marriage, taught Augustine, sexual relations rarely happened without at least venial sin. (You can see the continued influence of Gnosticism.)

Dissolutions of marriages came from a petition to the Pope. For over 500 years **Popes declared null marriages** that could be proven never consummated, called “full divorce by papal will.” No modern system of law, however, could operate with a single chief determining the disposition of every individual case. The volume of business alone prevented continued exercise of such personal discretion by the Pope himself.

The 5th century brought the fall of the Roman Empire (Some historians would say that happened 1000 years later in 1453 when Byzantium fell to the Turks). But the year 476 saw the settlement of formerly Roman territory by largely Germanic peoples for whom consent did not make marriage. For them, marriage came about after several steps in a process: the man or his father petitioning the father of the woman for her hand in marriage, betrothal by public agreement of the families, provision of a dowry to the woman’s family, the handing over of the woman to the man and the physical consummation of the union. (You can see the beginning of several trappings that are still part of many marriages today such as the groom asking the bride’s father for her hand, or the father walking the bride down the aisle and giving her to the groom which people do not even realize is rooted in Germanic tradition.)

All those steps were necessary for a marriage to be complete and there was no exchange of consent. Decisions about the legitimacy of children depended on whether or not a marriage existed so the Church took charge of decisions about marriage. It emerged that marriage required both consent and consummation (*ratum et consummatum*). Papal decisions moved the power to contract marriage from the families to the spouses themselves and marriage was understood as a contract.

From the middle of the **9th century**, the use of **Roman law** by the Church **increased**. The Roman Pontiffs referred to Roman law frequently. Collections of Roman law texts were published for the use of clergy with the Popes insisting that recourse to Roman civil law was subordinate to pontifical authority. However, in the 9th century the prestige of Roman law was very high with Church authority. At this time much of **Roman law** penetrated into Church law **especially regarding procedures**.

By the **11th century**, the Church came to regard **negatively** involvement with various ruling regimes which previous practice had basically turned bishops and abbots into feudal barons who received their symbols of office including ring and staff from the king or emperor to whom they did homage.

To situate this in some sense of history, remember that this part of the middle ages following what some called the Dark Ages from the end of the 5th century to the 11th was a time of feudalism: serfs, rich landowners guilds of craftsmen, peasants, etc.

The first inclusion of marriage as one of the 7 sacraments came with the Council Of **Verona in 1184**. Previously, theologians spoke of marriage as a sacrament for the baptized but it was unclear whether it was a sacrament on a par with baptism and Eucharist and whether it was a cause of grace.

After the **12th century**, greater legal sophistication developed with revival of Roman law. It was “discovered” that a marriage could have been null from the very beginning. That led to the development of Church tribunals to do justice, to determine whether or not there was a valid exchange of consent in the first place For what reasons might a marriage be declared null? In the **Middle Ages**, emphasis was on the **good of children** and the welfare of society as far more important than the relationship of the spouses. In the **12th century**, there also arose a more scientific canon law leading to the *Decretum* of **Gratian** in 1140 which used Roman law especially in regard to sources of law, marriage, and procedures.

Gratian said that imperial Roman laws where they were not contrary to Church law were worthy of reverence. That led to the current Code’s **canonization of civil law**, provided it is just, stated in canon 22, and, for marriage, canon 1059. So from the 12th century, the marriage of a Catholic was regulated by **divine law**, **canon law** and **civil law**.

The Sacred Roman **Rota** dates back at least to the 12th century although in those days it was composed of the **Pope’s chaplains** who sat in an auditorium and recorded testimony while only the Pope judged the cases.

In the **13th century**, in 1234, **Gregory IX** collected centuries of ecclesiastical laws and arranged them in a collection called the *Decretals*. By the **14th Century**, this group was called the **Sacred Roman Rota**. *Rota*: the Roman “wheel” is most likely a reference to the Judges originally sitting in a circle or it may be so named because there was a circle on the floor of the chamber at **Avignon** where they met. At Avignon, the title is first known to have been used around 1350AD. Or the name *Rota* could have been used because the cases under consideration were moved from judge to judge on a bookstand which was on wheels. The Rota still uses the **wheel** as its letterhead insignia.

The 16th century Council of **Trent** declared that marriage **cannot** be dissolved for **adultery** of a partner and neither spouse, not even the innocent one, could contract a new marriage as long as the other spouse lived. (canon 7) The proclamations of **Trent** were mostly focused on its goal to uphold the Catholic faith against the Reformers. The Reformers alleged that marriage was not primarily a sacred and religious reality so the Council of Trent reaffirmed the **power of the Church** over the sacred **marriage bond**.

To situate yourself in history, remember that the 16th century was Elizabethan England, the time of Shakespeare. In the **16th century**, after the council of **Trent**, the Church withdrew into herself and made internal rules such as setting up **impediments** to marriage. At Trent, the Church maintained that since marriage is one of the 7 sacraments, the Church has authority to regulate it. These included a specific **canonical form required** for the marriage of Catholics which is the origin of Lack of Form cases. As the Age of Enlightenment dawned, the Church taught: the Church had jurisdiction over marriage as a sacrament, and the State had jurisdiction over marriage as a contract.

In the **early modern period**, there came about the academic **separation of theology and canon law**. Then came the **French Revolution** which was a terrible blow to the Church in the **18th century**. By 1815, the Church was expected to go away like other *ancien régime* institutions. In fact, that did not happen. The Church revived remarkably in the 19th century. Reacting to the **18th century** French revolution and the Italian national movement in the **19th century**, the church further turned inward. During that time, the **law** of the Church became basically administrative characterized by extensive and detailed **top-down regulations** parceling out powers and functions largely among clerics with papal power increasingly exercised by a Vatican **bureaucracy** not well defined in ecclesiology

The Sacred Roman Rota handled marriage cases for the world until the 19th century when the Italian army invaded Rome in **1870**, and the doors of the **Rota** were closed and did not re-open until **1908** when the Rota was revived by **Pius X** (just about 100 years ago).

Cases increased with the worldwide increase of divorce and attempted re-marriage. Prior to 1883 there was no requirement for tribunals in the United States and, presumably, none existed.

An instruction in **1883** from the **Congregation for the Propagation of the Faith** called for marriage cases in this mission land (the **USA**) to be decided by ecclesiastical **tribunals** but there was no rush to establish them.

The Third Plenary Council of **Baltimore** in the next year, **1884** decreed an *ipso facto* **excommunication**, reserved to the Ordinary (diocesan bishop), for any **Catholic who attempted marriage after** obtaining a **civil divorce**. [That penalty was revoked by **NCCB** in **1977** to foster healing and reconciliation for Catholics remarried after divorce.] That change raised the **need for** well functioning **tribunals**. For the 1917 Code, there was a hierarchical order of the goods of marriage: 1st the procreation and education of children, 2nd mutual assistance and the remedy of concupiscence

The **1917 Code** of Canon Law was the Code of the **First Vatican Council** which was largely **triumphalist** and extraordinarily **papalist** at a time the papacy was not so powerful. The 1917 Code followed the Roman law plan of **Gaius and Justinian** in its organization and which **institutions of law** are presented. This is particularly **evident in** the 1917 (and 1983) **Codes** in the following: general principles about the sources of law and interpretation of juridical texts, rules governing juridical acts, matrimonial law except for opposing Roman law's allowance for dissolubility (divorce) and principals governing jurisdiction and judicial procedures.

The **greatest influence of Roman law** on canon law is found in **procedural law** from which there is no dispensation, laws about things like witnesses, proofs, the sentence of the Judge. The volumes of Sacred Roman Rotal Decisions show the increase in numbers of cases worldwide: 1923 has 36 decisions; 1933 has 77 decisions; 1943 has 93 decisions and 1953 has 126 decisions of the 178 decisions rendered that year.

Decisions of the Rota are considered to be interpretations of the law and **safe to follow** while this does not rob diocesan tribunals of their independence. You need to know that canon law, Church law, is not a law of precedents like US civil law. We do not argue a case based on past decisions of previous judges or juries. We are obligated to apply the law to each case individually. It is possible to use patterns of thought particularly from the Rota which have stood the test of time as proven good jurisprudence. But for each case, we must argue how the law does or does not fit this particular case, what evidence is corroborating and what evidence is contradictory. That includes showing how a person may contradict him or herself in personal testimony and how witnesses or documents corroborate or contradict.

Arguments in a decision from the Rota have a kind of **seal of approval** from the official Church so may safely be followed by diocesan tribunals. The **real value** of any jurisprudence in a decision is not where it originates but the internal merits of its **legal arguments**.

As the 19th century moved into **20th century**, tribunals did not function well worldwide. The Congregation for the Sacraments issued *Provida mater* in 1936 which contained 240 new rules to guide tribunal judges. That did not cause tribunals to process more cases in less time. In 1938 **Pius XI** authorized **regional or inter-diocesan** tribunals since diocesan ones were not functioning well. Such tribunals arose throughout the world in the 1940's and following decades

most often at the initiative of the Holy See. Regional tribunals were established in at least 25 nations and eventually recognized in the 1983 Code of Canon Law.

Meanwhile **Vatican II** came at the end of a long period of European and some American intellectuals opening up to the **modern world** in the 1960's. One of their complaints was that the Church was **too legalistic** which prevented healthy development. Most criticized were things like the *Enchiridion Liturgicum* published in **1961** which offered 500 pages of Latin asking whether failure to perform some rubric during Mass was **mortal sin** and whether it would **invalidate** the celebration of Eucharist.

The Second Vatican Council also brought insight into the nature of the marriage covenant and accepted the development of the **mental health sciences** and their insights into **psychic disorders** and the effects of these disorders on the ability of people to **consent** to marriage and to **live out** the obligations. For Vatican II there was no hierarchy of goods of marriage but the documents always mention first the good of the spouses and then the good of children likely because the opposite was previously done.

In 1968 the prefect of the Signatura asked the American Bishops if they wanted a system of regional tribunals but they stayed with the request of **CLSA** for **simpler norms**. That was granted in **1970**. A report to the **1969** convention of the Canon Law Society of America indicated that most **American tribunals** took, on average, three and a half years to render a first instance decision. The law called for decisions within two years. According to the report, in 1968, 95 of 134 tribunals responding rendered two or fewer decisions in the preceding year. 58 tribunals rendered no decision at all in 1968.

In the Fall of **1968**, **CLSA** had drafted 27 norms to modify existing rules for tribunal procedures. Those were revised in 1969 by the **National Conference of Catholic Bishops** and sent to the Apostolic See. 23 norms were approved by **Paul VI** for an experimental three year period in the USA starting 1 July **1970** (later extended also to Australia, England, Canada, and France).

In the interest of speeding up the process so that justice was not delayed (and, thereby, denied) **lay persons** were able to function in tribunals: men as notaries, judges, assessors, auditors and women only as notaries. Also introduced was the possibility of cases being handled by **sole Judges** instead of the usual 3 Judges and the possibility of **ratification** instead of a full second instance processing. **That lit the fuse for an explosion of marriage cases.**

By **1975** statistical reports indicate that 95% of all marriage cases were completed in just **11 countries**: Australia, Canada, Colombia, France, Great Britain, Italy, Netherlands, Poland, Spain, USA and West Germany. For many in the world in 1975, no tribunal was available to them at all.

Trying to achieve ecclesiastical order resulted in The **1983 Code** of Canon Law which tries to incorporate both **Vatican I's** supremacy of the papacy and **Vatican II's** collegiality of bishops especially expressed in 1964, *Lumen gentium*.

The **1983 Code** of Canon Law begins with all of Christ's faithful followed by specific canons about the **laity**. Without the beautiful theological phrasing of *LG* comes language of **rights, duties**, powers, privileges. Basically this is a bill of rights for the Christian faithful, something quite new to be clearly expressed directly in the code of canon law. The Code uses the Latin word *ius* which means both right and responsibility. One is not conceived without the other. Every right implies a responsibility. I will list only a few of those rights/responsibilities enumerated in the Code, the ones which flow from natural law. The Christian faithful have the right/responsibility: to teach (218), to do research (218), to choose a personal state in life (219), to protect one's reputation (220), to protect individual privacy (220), to vindicate and defend one's rights before a Church court (221), to pursue one's rights in accord with the norm of law (221), to be judged in accord with the prescriptions of law to be applied with equity (221), not to be punished with canonical penalties except in accord with the norm of law (221), and to receive just remuneration for work (231).

All the rights/responsibilities of the Christian faithful now included in the *Code of Canon Law* would need to be a whole other presentation. The 1983 Code of Canon Law has 1752 canons and of those, it has 111 canons on marriage, more than any other sacrament.

Since the 1970's Tribunal procedures have brought peace of mind, recognized marriage, and sacramental reconciliation to hundreds of thousands of American Catholics. Although most experience the process as somewhat painful, most people also find it deeply healing. The tribunal process is official, legal, and in keeping with Church rules.

Sources: I did not do this as a scholarly result of research with footnotes but those who are interested in the topic will find the following sources of value. I am grateful to those from the canon law Listserve who suggested the article I had not already located. SVV

Beal, John *et al.* New Commentary on the Code of Canon Law 200, Paulist Press.

Coriden, James. Jurist 59 (1999): 1, "The Tribunal as Last Resort" 60-77 (includes many other references).

Donahue, Charles. Jurist 65 (2005): 1, "A Crisis of Law? reflections on the Church and the Law over the Centuries" 1-30.

Gauthier, Albellrt. Roman Law 1996, St. Paul University Faculty of Canon Law, Ottawa, Canada.

Green, Thomas. Studia canonica 8 (1974) "The American Procedural Norms – an Assessment" 316-347.

Kelleher, Stephen. Jurist 26 (1966) "The Dignity of Persons in a Marriage and the Dignity of their Marriage" 243-245.

Noonan, John. Power to Dissolve 1972, Belknap Press of Harvard.

Orsy, Ladislav, SJ Jurist 40 (1980) "Christian Marriage: Doctrine and Law" 282-348.

Provost, James. Jurist 40 (1980) "Intolerable Marriage Situations Revisited" 141-196.

Wrenn, Lawrence. Annulments 1st edition, 1970 (and later editions).