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SECULAR CASES IN THE CHURCH COURTS: A HISTORICAL SURVEY

ROBERT E. RODES, JR.*

When students of legal history think of church courts, they may conjure up thoughts of some odd and obsolete tribunal about which Dickens wrote, while students of popular history may think of the people who burned Joan of Arc. In contrast, when Roman Catholics think of Church courts, they may think of tribunals which do no more than grant marriage annulments, while American Protestants may think of nothing at all. Church courts encompass the whole range of institutions used by different churches, including Jewish communities, for authoritative intervention into affairs of individual church members. Institutions of this kind have had a long history and a wide variety of concerns, including decision-making in cases concerning church personnel and property, access to the sacraments or other ministrations, and the sins of individual church members and their resultant penances. My primary goal for this paper, however, is to focus on the church courts' role as a means of alternative dispute resolution. In other words, I will attempt to explore the development of the church courts' part in the settlement of cases having non-church authority litigants or cases involving secular affairs of a type which the civil courts also handle.

A note on terminology before I begin. I will speak of disputes and cases somewhat interchangeably. When a dispute gets into court, it becomes a case without ceasing to be a dispute. Deciding cases is, of course, not the only way to resolve disputes, but it is the one which I am going to discuss.

Two main scriptural texts appear to give the Church authority over cases involving secular disputes between Christians. In Matthew 18, our Lord says that if you believe your brother has wronged you, see him privately and try to straighten the matter out. If that fails to solve the dis-

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pute, you are to return with one or two witnesses and try again. If you continue to receive no satisfaction, you are to tell "the Church." If your brother will not listen to the Church, he is to be excluded from membership—as if he were a pagan or a tax collector.¹ In First Corinthians 6, Saint Paul castigates the Christians of Corinth for litigating before unbelievers. He tells them that, if they must have disputes with one another, they should find some member of their own body to resolve them.² It seems likely that the early Church took these principles to heart and maintained some way of resolving the disputes of its members.

The text from Matthew envisages a situation in which it is already established who is in the wrong, while the text from First Corinthians envisages a situation where the rights and wrongs of the case have yet to be determined. Either way, the question cannot be left unresolved. Before treating someone as a pagan or a tax collector, we must inform him of his wrong and what amends he must make to be restored to good standing. Decisions must be made. If we follow First Corinthians, someone must be deputed to make such decisions. If we follow Matthew, the person so deputed must make his decision on behalf of the entity of the Church.

When the episcopal polity became universal in the early Church,³ the bishop, or someone acting on his behalf, resolved disputes between Christians and meted out the pagan or tax collector treatment—now called excommunication—to anyone who would not accept his decision.⁴ As the Church grew, the bishop's administrative responsibilities, including excommunication, became more complicated. To deal with them, he drew on the experience of the Roman imperial officials around him, often using both their substantive law and their procedures.⁵

When Christianity became the official religion of the Roman Empire, Saint Paul's rule against litigating before unbelievers no longer kept Christians from taking their cases to the imperial courts. The judges of these courts had become believers too. Nevertheless, Christians continued taking their cases before bishops, and bishops continued hearing them.⁶ The Christian emperors generally made no trouble about this exercise of jurisdiction by the bishops.⁷ In fact, imperial decrees ordered judges and

¹ Matthew 18:15-17.

² 1 Corinthians 6:1-6.

³ See 1 P. HUGHES, A HISTORY OF THE CHURCH 49-51 (1948); see also 1 K. ALAND, A HISTORY OF CHRISTIANITY 120-27 (J. Schaaf trans. 1985); 5 Dictionnaire de Droit Canonique, *Eveques* 570-71 (1953).

⁴ See 6 Dictionnaire de Droit Canonique, *Jurisdiction Ecclesiastique* 238 (1957); see also 5 Dictionnaire de Droit Canonique, *Evangelique (Denonciation)* 558 (1953).

⁵ See R. RHODES, JR., ECCLESIASTICAL ADMINISTRATION IN MEDIEVAL ENGLAND 9-10 (1977).

⁶ See 6 Dictionnaire de Droit Canonique, *supra* note 4, at 238-40; see also H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 468-69 (1965).

⁷ See *supra* note 6 and accompanying text.

officials to give *res judicata* effect to the judgments of bishops, and even to enforce them. A purported decree of the Emperor Constantine from 333 A.D. commanded a case to be turned over to the bishop at the request of either party, even if the case was already pending in a civil court, "[f]or the authority of sacrosanct religion searches out and reveals many things which the captious restrictions of legal technicality do not allow to be produced in court."⁸ Some scholars, however, regard this as a forgery because they cannot believe Constantine would go this far toward undermining his whole legal system.⁹ However, even if authentic, the decree must have given way to a more realistic division of jurisdiction before long since it is not included in the great compilation of laws prepared under the Emperor Theodosius in 438 A.D., although less exuberant recognitions of the bishop's jurisdiction are included therein.¹⁰

Meanwhile, in the fifth century, the Western Roman Empire started breaking up. Imperial officials lost power and authority, leading to anarchy in some places. In others, the only secular power was that of some barbarian king willing to deal justly with his new Roman subjects, but lacking the legal tools to do so.¹¹ In many places, therefore, only the bishop had both the legal education and the moral authority to decide the disputes that arose among the people.¹² Additionally, only the bishop had both the power and the ability to represent the local populace, especially the poor, against the barbarian chieftains who were in the process of becoming feudal lords.¹³ Often, therefore, the bishops heard cases in their courts, or delegated judges to hear them, whenever it appeared that one of the parties could not get justice either because that party was poor and friendless or because the civil rulers were not doing their job.

Upon the completion of the transition to medieval society and the institution of effective civil administration, the Church did not immediately relinquish the jurisdiction it had maintained during the earlier anarchic period. Inasmuch as judges and court officials, both lay and ecclesiastical, were paid on a case-by-case basis, every loss of jurisdiction represented a loss of income, which they naturally resisted. Medieval people also regarded jurisdiction as a kind of property. To take jurisdiction away from the Church therefore was to confiscate church property, and

⁸ SIRMONTIAN CONSTS., tit. I, in *THE THEODOSIAN CODE AND NOVELS AND SIRMONTIAN CONSTITUTIONS* 477 (Pharr ed. and trans. 1952).

⁹ See *THE THEODOSIAN CODE AND NOVELS AND SIRMONTIAN CONSTITUTIONS* 477 n.2 (Pharr ed. and trans. 1952); see also J. GAUDEMET, *L'EGLISE DAN L'EMPIRE ROMAIN* 231 n.3 (1958).

¹⁰ See *CODE TH.* 1.27.

¹¹ See P. KING, *LAW AND SOCIETY IN THE VISIGOTHIC KINGDOM* 1-22 (1972) (describing the development of the Visigothic Kingdom); see also H. JOLOWICZ, *supra* note 6, at 447-48.

¹² See 2 P. HUGHES, *supra* note 3, at 88.

¹³ See *id.*; see also 6 *DICIONNAIRE DE DROIT CANONIQUE*, *supra* note 4, at 247; H. JOLOWICZ, *supra* note 6, at 485-87.

appropriate to the state that which belonged to God. The state, for its part, might not have wanted to abolish a system that worked efficiently. There were often enough things going wrong which kept the civil magistrates as busy as they were able to be.

From the late eleventh century through the early thirteenth century, both legal doctrine and doctrine concerning the distribution of power between church and state systematically developed.¹⁴ The theoretical claims of the Church included jurisdiction under Matthew 18 over any dispute that arose because one person allegedly wronged another, jurisdiction to protect the poor and unfriended, and jurisdiction to compensate for the failure of the civil authorities to do justice, as developed in the declining years of the Roman Empire. The Church further claimed jurisdiction over hard and doubtful cases, a new category based on Deuteronomy, chapter 17, and perhaps deriving some plausibility from the period when the barbarian kings had no experience with Roman law and no adequate law of their own.

The lay authorities did not necessarily accept all claims of the Church. In fact, in England, they did not accept any of them.¹⁵ The lay courts, if asked, issued writs of prohibition to prevent the church courts from handling any civil case for which a remedy existed in the civil courts. However, that still left room for some important classes of cases over which the Church exercised jurisdiction. The contemporaneous secular courts gave no remedy for defamation, so the church courts continued to hear defamation cases into the nineteenth century.¹⁶ Until the Reformation, the church courts also heard cases concerning debts. The lay courts did offer a remedy for debt cases, but the process was cumbersome and expensive. In contrast, to get into the church court all one had to do was make the debtor pledge his faith as a Christian to pay the debt. Then, if the debtor failed to pay, he was guilty of *fidei laesio*, breach of faith, and the church courts gave redress. That proceeding was one which the lay courts could stop with a writ of prohibition, but the prohibition proceeding, like all proceedings in the secular courts, was expensive. It was usually better for a debtor to litigate in the church court and pay if he lost.

Two types of cases, generally regarded today as secular, were exclusively within the jurisdiction of the church courts during the Middle Ages because they were treated as religious matters. One was marriage. Since

¹⁴ See 6 Dictionnaire de Droit Canonique, *supra* note 4, at 255-59; see also J. Bourque, THE JUDICIAL POWER OF THE CHURCH 37-57 (1953).

¹⁵ See R. Rhodes, Jr., *supra* note 5, at 58; see also R. Rhodes, Jr., LAY AUTHORITY AND REFORMATION IN THE ENGLISH CHURCH 12-29 (1982).

¹⁶ See R. Rhodes, Jr., *supra* note 15, at 204-06; see also 1 R. Burn, ECCLESIASTICAL LAW, Defamation (1763).

marriage in Roman Catholic doctrine was, and is, a sacrament of the Church, the question of who was married to whom was regarded as an exclusive concern of the church courts. In fact, the civil courts have been involved in matrimonial cases only since it was decided that a pluralist society should have a uniform matrimonial law. The English ecclesiastical courts retained their matrimonial jurisdiction until 1857.¹⁷ The courts of the Roman Catholic Church still hear matrimonial cases, although the decisions are without effect except on the consciences of the parties and their ability to remarry within the church. In some countries, though, all the religious groups maintain their own marriage courts and the civil authorities give effect to their judgments.

In England, the church courts also had exclusive jurisdiction over probate cases. The origin of that jurisdiction is obscure; authority indicates that the first wills were oral and heard by the priest that heard the dying person's confession. They were then administered by the church courts because they had more control over the priest than did the state.¹⁸ When people started writing their wills, the church courts retained jurisdiction because they had the personnel experienced in the subject matter. That jurisdiction also lasted until 1857.¹⁹

The enforcement of the judgments of medieval church courts was not limited to spiritual sanctions. Offending persons could be forced to apologize and do penance. They also could be required to restore things wrongfully taken or to pay debts wrongfully withheld. Failure to comply with the court's orders on any of these matters could result in excommunication. If they still failed to comply, the bishop would notify the royal chancery. The chancery would then order the sheriff to arrest them and detain them in jail until they complied.²⁰

During the Reformation, the courts of the medieval Church and their jurisdiction were retained with only minor changes by the Church of England. However, it would probably be misleading to say that they continued to offer an alternative to the civil courts in handling certain types of cases. Rather, most notably in probate and matrimonial cases, they *were* the civil courts. The law which church courts administered was the same law that the royal courts administered when they took over the jurisdiction, and the same law that the American courts have always administered.

Stricter Protestant bodies, those taking their inspiration from the polity established by Calvin at Geneva, had no interest in this kind of

¹⁷ See 20-21 Vict. ch. 85 (1857).

¹⁸ See W. LEACH, *CASES AND TEXT ON THE LAW OF WILLS* 2 (1949); see also J. DUKEMINIER & S. JOHANSON, *FAMILY WEALTH TRANSACTIONS* 10-11 (2d ed. 1987).

¹⁹ See 20-21 Vict. ch. 77 (1857).

²⁰ See R. RHODES, JR., *supra* note 15, at 58.

ecclesiastical jurisdiction. They were interested, however, in the pastoral correction of sinners.²¹ They were prepared to include in this category people who wronged their neighbors and refused to make amends, or even people who were wronged and refused to forgive, after suitable apology and compensation. Calvin assigned this ministry of correction to the pastor of each parish, assisted by a group of parishioners called elders.²²

There was some effort to introduce this form of pastoral correction, along with other aspects of Calvinist polity, into the Church of England.²³ The medieval Church possessed a system of pastoral discipline which the Anglican Church continued. It involved annual visits to each parish by either the bishop or the archdeacon. Certain parishioners, called churchwardens, would inform the visitor of the sins committed since the last visit and, if the accusations were established, the sinner would have to do penance. The system was similar to that used by the justices of the peace taking reports from the parish constables. Generally, it did not deal with disputes between parties, except in the case of a problem occurring between a husband and wife. If the churchwardens reported that a married couple were not living together, the bishop or archdeacon would try to reconcile them, and, that failing, would order them back together.

In the century following the Reformation, this process deteriorated greatly because, for the most part, it cost more to have the sheriff enforce it than the average parish was willing to pay for correcting its sinners. It finally degenerated to the point where it was scarcely used except to force fathers to support their illegitimate children in order to protect parish welfare funds. The Calvinists scorned it, calling it the Bawdy Court.

During the reign of Elizabeth I, some bishops who were sympathetic to the Calvinist model tried a couple of expedients to modernize the old machinery. One of these was including in the report given to the bishop or the archdeacon the names of those people who wronged their neighbors or who were out of charity with each other, and requiring that the bishop or archdeacon attempt to reconcile them. Another was allotting the parish priest power to refuse to allow such people to join in communion. The latter was an innovation, and resembled Calvinist ideals.

The medieval priest probably had the power to repel public sinners from communion, although he probably did not utilize it. That power was made explicit in one of the rubrics to the first official Anglican liturgy, the Book of Common Prayer of 1549. It was followed by a second rubric ordering the minister to deal in the same way with enemies who refused to be reconciled—a power that the medieval priest did not have. Both ru-

²¹ See 2 P. HUGHES, *THE REFORMATION IN ENGLAND* 317-20 (1954).

²² See J. McNEILL, *THE HISTORY AND CHARACTER OF CALVINISM* 162-64 (1954).

²³ See R. RHODES, JR., *supra* note 15, at 137-40, 170-74 and material cited therein (the following three paragraphs summarize the material therein).

bricks have been retained in the Book of Common Prayer to this day.²⁴ They also appear in the original version used by the American Episcopal Church and the updated version it is using now. Granting this power to the priest, instead of the bishop, was consistent with the Calvinist understanding of pastoral correction. It was made more so by at least one bishop who ordered the minister to take the matter up with some of his "better stayed" parishioners, perhaps the nucleus of the Calvinist eldership, before acting.

The attempt to introduce a Calvinist polity into the Church of England was finally turned back in 1660 with the Restoration of Charles II.²⁵ The Calvinist polity was established in the Presbyterian Church of Scotland, but the English Presbyterian Church never got itself fully organized as a separate dissenting body.²⁶ The Anglicans kept the Prayer Book rubric that they had introduced as a concession to Calvinism, but then modified it by having the minister report to the bishop for instructions as soon as he repelled anyone.²⁷ The rubric's potential use in dispute resolution has never been realized.

The Calvinists, the Anglicans, and the Roman Catholics shared a common goal: to organize a total Christian society. Their attitude toward church dispute resolution was determined accordingly. Other Protestant bodies envisioned themselves as groups separated from the wider society. They tended to revert to Saint Paul's text against litigating before unbelievers, and attempted to avoid bringing their cases in the regular civil courts. Instead, they often used the procedure laid down in Matthew 18. The tradition, still followed in some branches of the Mennonite Church, is to literally apply this procedure. If one church member has a grievance against another, he sees him privately. If that fails to correct the wrong, he gathers two witnesses and again visits the alleged offender. If that also fails, they come into a meeting of the congregation and discuss the matter until a consensus develops as to what is required. If either party refuses to follow the agreed upon solution, he is out of the Church.

Medieval Jewish communities were reluctant to litigate before gentile courts for the same reasons Saint Paul was reluctant to litigate before pagans.²⁸ The rabbinical court, the Beth Din or House of Judgment,²⁹ was

²⁴ See ANNOTATED BOOK OF COMMON PRAYER 163-64 (Blunt ed. 1866) [hereinafter ANNOTATED BOOK].

²⁵ See C. WHITING, *STUDIES IN ENGLISH PURITANISM* 1-42 (1931); see also I. GREEN, *THE RE-ESTABLISHMENT OF THE CHURCH OF ENGLAND 1660-1663*, at 13-35 (1978).

²⁶ See C. WHITING, *supra* note 25, at 43-81; see also J. MCNEILL, *supra* note 22, at 326-30.

²⁷ See ANNOTATED BOOK *supra* note 24, at 164.

²⁸ See *supra* note 2 and accompanying text.

²⁹ See 4 *ENCYCLOPAEDIA JUDAICA*, *Beth Din and Judges* 719, 720-28 (1971); see also Kirsh, *Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court*, 9 *OSGOODE HALL L.J.* 335, 342-43 (1971); *Rabbinical Courts: Modern Day Solomons*, 6 *COLUM. J.L. &*

set up in some places by community leaders and in others by government charter. In still others, the various rabbis heard cases on submission by the parties. The more formal proceedings of some of these bodies are recorded in the books that make up the body of Jewish legal literature. In the way of less formal proceedings, Isaac Bashevis Singer wrote a book, *In My Father's Court*,³⁰ describing his experience watching his father, a Warsaw rabbi. Harry Kemelman's Rabbi David Small, the amateur detective from an imaginary suburb of Boston, has also settled a case or two.³¹ It appears that dispute resolution in accordance with Jewish legal tradition is part of the regular work of a rabbi.³² There is also a book about the Jewish Conciliation Board in New York, a more formal dispute-resolution body, which operates on a binding arbitrator's submission from the parties and applies a combination of rabbinical tradition, New York law, and common sense to settle its cases.³³ A few years ago a Beth Din was convened in Boston to deal with a case between a slum landlord and his tenants.³⁴ The Jewish communities had, and to some extent still have, in their Beth Din a flexible compassionate institution worthy of careful examination by anyone interested in alternative dispute resolution. I cannot forbear to quote a bit of Singer's tribute to it:

It is my firmest conviction that the court of the future will be based on the Beth Din, provided the world goes morally forward instead of backward. Though the Beth Din is rapidly disappearing, I believe it will be reinstated and evolve into a universal institution. The concept behind it is that there can be no justice without godliness, and that the best judgment is one accepted by all the litigants with good will and trust in divine power. The opposite of the Beth Din are all institutions that employ force, whether of the right or the left.

The Beth Din could exist only among a people with a deep faith and humility, and it reached its apex among the Jews when they were completely bereft of worldly power and influence. The weapon of the judge was the handkerchief the litigants touched to signify their acceptance of the judgment. I have not attempted to idealize the Beth Din or to endow it with conditions and moods that were not a part of my direct experience. The Beth Din not only differed in every generation, but every Rabbi who participated in it colored it with his character and personality. Only that which is individual can be just and true.

Soc. PROBS. 49, 56-60 (1970).

³⁰ See I. SINGER, *IN MY FATHER'S COURT* vii (1965).

³¹ See H. KEMELMAN, *FRIDAY THE RABBI SLEPT LATE* 1-32 (1964).

³² See 13 *ENCYCLOPAEDIA JUDAICA*, *Rabbi, Rabbinate* 1445, 1446-47 (1971); see also Carlin & Mendlovitz, *The American Rabbi*, in *UNDERSTANDING AMERICAN JUDAISM* 103, 104-05 (Neusner ed. 1975); Feldman, *Functions of the Synagogue and Rabbi*, in *id.* at 165, 174-75.

³³ See J. YAFFE, *SO SUE ME! THE STORY OF A COMMUNITY COURT* 7-14 (1972).

³⁴ See *Rabbinical Courts: Modern Day Solomons*, *supra* note 29, at 49-50; see also Kirsh, *supra* note 29, at 350-51.

At times I think that the Beth Din is an infinitesimal example of the celestial council of justice, God's judgment which the Jews regard as absolute mercy.³⁸

This paper was to serve as a historical survey, therefore I will not dwell on its significance for the future. However, a few things need to be pointed out. Most importantly, just about any religious body can find, in its own tradition, a basis for resolving disputes among its members—not merely for exhorting them to be reconciled if they wish to remain in good standing in the church. The Roman Catholic Church has its tradition of bringing people who wronged their neighbors into the bishop's court for correction. These courts still exist and need not be limited to marriage cases. The Anglicans have, theoretically, a mandate for repelling people from communion if they will not be reconciled with one another. The Mennonites have their tradition of invoking Matthew 18. The Jews have their Beth Din, which is still a live tradition.

In addition, the reasons for church bodies to involve themselves in alternative dispute resolution are not exhausted when we consider that it is desirable for church members to love one another, or that our litigious procedures are carried on with unseemly acrimony. Important cases arise in which the substantive law administered in the civil courts fails to work justice or even works injustice. These cases may become more numerous if our society continues moving away from its Judeo-Christian roots. As in the case of the Beth Din and the slum landlord, alternative dispute resolution may be a way of confronting some of the more comfortable members of society with some of the less comfortable demands of the religion they profess to follow. Most religious bodies can recover this tradition if they look into their past.

³⁸ See I. SINGER, *supra* note 30, at viii.