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THE ROLE OF THE CIVIL LAWYER IN CHURCH COURTS

LAWRENCE X. CUSACK*

LESS THAN TEN YEARS AGO it probably would have been accurate to say that the civil lawyer, except one qualified as an Advocate of the Sacred Roman Rota in Vatican City, had no role to play in the Church courts and was likely never to have one. The same response might not be accurate if given today.

The Church and the world have been stirred into new patterns of thought by Popes John XXIII and Paul VI. We now hear talk about the "Age of the Emerging Layman." A new conception of lay activity in Church affairs seems to be replacing the centuries old picture of the mute, passive congregation led unquestioning by a better educated, paternalistic priesthood. In the United States today, we are beginning to observe an interaction between clerics and laymen that was virtually unthinkable a generation ago. A well-educated, sophisticated laity is asking to be invited into the councils of the Church, so that from the standpoint of their own disciplines and specialties, whether it be education, medicine, law, philosophy, science or some other such secular vocation, they can assist in shaping the dynamic modernization of the Church to cope with the revolutionary changes that are taking place in this atomic era.

No less than in other areas is this likely to be felt than in the updating of the Code on Canon Law and with it, perhaps, a revamping of the procedures of the Church courts. This is not likely to mean that the civil lawyer will, in the near future, play a leading role in the ecclesiastical tribunals. It may well mean, however, that the civil lawyer, who so far has had virtually no connection with the Church courts outside of Vatican City, will soon be offered the supporting

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role of assisting the officials of the Church courts in the process of their adjudications. Later, we will see some ways in which this change might be brought about.

Qualifications of an Advocate

Before the civil lawyer can give serious thought to playing a significant role in the Church court, he must realistically face up to the fact that, with a few exceptions, civil lawyers are not presently qualified to participate, except possibly in an ancillary way. The Code of Canon Law does not require that an Advocate in a Church court be a cleric, but it does specify that one must at least have a Doctorate of Canon Law or be otherwise truly skilled in the subject. The barrier that this presents to the civil lawyer can be brought home by looking to the requirements for obtaining a recognized degree of Doctor of Canon Law.

In the United States, the only university which has a School of Canon Law capable of giving degrees which are canonically acceptable is the Catholic University of America in Washington, D.C. Even before a candidate is admitted to the School of Canon Law he must show either that he has completed a four-year course in theology or that he is capable of passing an examination on the principles of moral philosophy, natural law, fundamental theology and the institutes of canon law. Even if he is accepted for admission to the School, there is the sobering fact that the Doctorate of Canon Law, the J.C.D. degree, is only conferred after three years of study culminated by the submission of a written dissertation. There are lesser degrees which might be sufficient to qualify him for limited recognition in the Church court, but, there too, the require-

ments are by no means insubstantial. Aside from the preliminary qualifications mentioned, he must spend two years of study to merit a Licentiate in Canon Law, the degree known as J.C.L., or one year of study to merit a Baccalaureate in Canon Law, the degree known as J.C.B. The course of study is itself a challenge, covering as it does such imposing sounding subjects as juridical science, public ecclesiastical law, the history of canon law, Roman law, comparative law, and methodology.

In Canada, the University of Ottawa has a faculty of canon law which has pontifical recognition. There, the requirements and courses are essentially the same as in the Catholic University of America, except for a shift of emphasis involving the interrelationship of canon law with Canadian civil law.

At both these universities, laymen would be admitted if they qualified for admission according to the indicated standards, but the practicalities of the matter are evidenced by the fact that in the history of the Catholic University of America, full doctoral degrees have been conferred upon only two laymen, and at the School of Canon Law of the University of Ottawa, there are no laymen studying at the present time, nor have there ever been.

Economic Considerations

If the American civil lawyer wishes to qualify for practice before Church courts, he faces a serious economic problem. After the usual sixteen years of study necessary to obtain his basic baccalaureate degree, and at an age when most men are going into business, he has already spent another three years obtaining his civil law degree and admission to the civil bar. If,

in addition to this, he spends several more years in becoming academically qualified as a canon lawyer, it is obvious that he has made an extraordinary additional investment of time, expense, and loss of earnings in order to be able to call himself a tribunal Advocate.

As matters stand today, it is unlikely that he will be able to recover his investment in dollars. First of all, canon law provides that the fees of Advocates may be fixed by a provincial council or convention of bishops, and in the United States there is a tradition of gratuitous services or only token fees. Moreover, the Church courts in this country have attempted to remove the economic burden from Church court proceedings. As a result, most dioceses subsidize the greater part of the expenses of their tribunals and of the proceedings before them. Parties seeking relief are usually asked to pay a small percentage of the actual costs, including fees of Advocates. In the Metropolitan Tribunal of the Archdiocese of New York, the priest-Advocates do not accept fees; they function gratuitously. This is generally the pattern throughout the United States. Where fees are taken, they usually can be classified as only nominal compensation. Moreover, under canon law, an approved Advocate must, at the request of the tribunal and upon appointment by the Ordinary, render gratuitous services for the poor whenever he is called upon to do so. Thus, it is apparent that unless a different tradition evolves, a layman who qualifies as an Advocate in a Church court in this country is likely to find that the financial recompense will not be sufficient to enable him to devote any substantial amount of

his practice to the representation of clients before a Church court.

In passing, we note that the Vatican City tradition is different. Before the Sacred Roman Rota, almost all of the Advocates are laymen, and they are compensated accordingly.

Auxiliary Role

It may be, therefore, because of the practical considerations mentioned, that the American civil lawyer must for the indefinite future face up to the fact that in the Church courts of this country he can play no more than an auxiliary role. As we shall see, however, the possibilities here are by no means insignificant. They hold out promise that American civil lawyers can, as at least to part of their practice, give a measurable degree of aid and assistance to the officials of the Church courts by sharing some of the burdens of the tribunal officials in areas that do not require expertise in substantive canon law or tribunal procedure. Such assistance might help alleviate the perennial problem of delay in the process of adjudication—a problem, as we know, not peculiar to Church courts—and might possibly free the tribunal officials and Advocates for other more important aspects of their work and, conceivably, in some cases, free priest-Advocates for duties in other fields of their ministry.

Lay Experts

One area in which laymen have been and will continue to be of assistance in the work of the Church courts is as experts on subjects other than canon law. The outstanding example is the physician. Canon law also recognizes that a lay witness may be called upon for expert testimony in regard to questioned documents,

for example, to establish the authenticity of the alleged handwriting of a party on a material instrument.

Although it does not frequently happen, there have been cases where civil lawyers have been called upon to render testimony as experts in matters involving a proper interpretation of civil law. This might happen, for example, in a case involving a contractual dispute between a cleric or a religious and some ecclesiastical organization or religious order or community. It could happen, as well, where questions involving the civil laws of wills and trusts might arise in connection with the provision of canon law that dictates ecclesiastical administration of pious bequests or foundations. In these matters, the lawyer would be giving testimony as a lay witness with regard to the rules and principles of civil law much in the same way as a medical doctor would be called upon to give testimony with regard to medical or psychiatric matters.

Acting as an expert on an informal basis is another possibility. The Church courts, particularly in matrimonial cases, often encounter obstacles or questions involving civil law and procedure. Here, the civil lawyer is in an excellent position to assist the court or the Advocates in reaching a sufficient understanding of the civil law aspects of a matter to a degree necessary for them to process the Church court case.

Procurement of Records

A real contribution could be made by civil lawyers in assisting the Church courts in the procurement of records pertinent to the issues in tribunal proceedings. At present, it is customary for the Church courts and their Advocates to devote a great deal of time and effort to the location

and procurement of these records. Even where there is no special problem in obtaining them, the civil lawyer can at least perform the useful function of acting as a fact-gatherer. It is true that, because of the international character of the Church, officials of tribunals and chancery offices have a world-wide network within the Church to assist them in obtaining records and proofs. A civil lawyer, at least by his own devices, is not in a position to obtain the same information as easily, as readily, or at the same minimal cost, but there is no reason why, with tribunal approval, a civil lawyer could not work through the same channels as well as through civil channels known to him. Public officials, and officials of certain organizations such as hospitals, are usually willing to co-operate with clergymen to a greater degree than with a civil lawyer, and sometimes they will provide information to priests on a confidential basis which they would not feel free to make available to laymen. Here again, however, if the lay lawyer is acting in a sense as a representative of a Church court, the way might be cleared for him to achieve substantially the same excellent results.

In certain respects, the use of a civil lawyer may be virtually indispensable. In some jurisdictions, certain medical, hospital and institutional records are required by law to be kept confidential unless proper consents are obtained or the records are directed to be made available by an order of a civil court of competent jurisdiction. A civil lawyer, willing to familiarize himself with the relevant law and procedure, can prove invaluable to a Church tribunal. In a particular case the civil lawyer may also be in a better posi-

tion because of his knowledge of civil law and procedure and his familiarity with the workings of the civil courts, to obtain records of civil proceedings, especially when they contain medical or psychiatric information or statements by doctors.

Role as Investigator

The lay lawyer also has a potentially important auxiliary role as an investigator. In many Church court proceedings facts are not provable by available documentary evidence and the testimony of witnesses is essential. Some common examples are the testimony of friends and relatives in cases involving allegations that a particular marriage was not validly contracted because of the insanity of one of the parties, or because one of the parties was induced to enter the marriage by force or fear, or because one or both of the parties simulated the required contractual consent. In these cases there is the problem of locating witnesses, of inducing them to testify and of refreshing their recollection. In all of these respects, most civil lawyers would be likely to have some expertise of their own. While there is no reason to believe that they would be better able to achieve results than a qualified curial Advocate, they would, nevertheless, be freeing the personnel of the Church court for other duties. Importantly too, in the case of a civil lawyer whose client is the petitioner in a Church court proceeding, he would have the satisfaction and advantage of not only relieving the tribunal officials of a burden but also of rendering a valuable service to and retaining the good will of his client.

Collateral Civil Proceedings

Another way in which the civil lawyer might be able to aid the Church court

would be in collateral civil law proceedings. One problem that faces the Church tribunals is the occasional refusal of a party or witness to give testimony. The Church court, having no civil jurisdiction, has no authority to punish for contempt except by imposing ecclesiastical sanctions. This could be efficacious as to a reluctant party-petitioner, since the Church could threaten to deny relief or tax him with the costs or expenses of the proceedings. As to a party-defendant or witness, however, the ecclesiastical sanctions are usually more theoretical than real. Ordinarily, the threat of an ecclesiastical sanction or its imposition has very little practical effect.

Here the civil lawyer might play a role. He might, for example, be able to use his persuasive powers to induce the witness to testify, perhaps by speaking to the reluctant witness in terms and at a level which would not be possible for a clerical Advocate. Moreover, in a particular case, it might be feasible for the civil lawyer, by the commencement of some kind of collateral civil action, to elicit testimony and obtain documentary evidence that might not otherwise be forthcoming. If the facts warranted it, he might, for example, represent the complainant in an action for separation, or a tort action to achieve legitimate civil law objectives, and then use the record and evidence adduced therein as collateral proof or as corroboration in a Church court proceeding. This might also open the door to certain public records. There are certain instances in which public officials decline to make confidential records or documents available unless they are satisfied that the same subject matter has already been made a matter of public knowledge as a result of

a civil court proceeding.

Channel for Referrals

A civil lawyer can sometimes perform a valuable task by referring his client to the appropriate Church office or official if his client has presented a legal problem that the lawyer recognizes to have religious overtones.

Where the lawyer detects that the problem is a matter of conscience and that the client is in need of spiritual counseling, he will refer him to his parish priest. The parish priest is trained and instructed not only in counseling but in the evaluation and referral of cases that are in need of services by some diocesan office. The priest can then act not only as a counsel but also as a screening agent. He knows the proper procedure and, in making a referral, is in a position to pass on to the diocesan office the knowledge of material facts obtained in the interview.

Where the lawyer recognizes that his client's problem does require spiritual counseling, it is valuable for him to know the referral procedure in his own diocese. In the Archdiocese of New York, the basic rules of a referral procedure are as follows :

(1) A person who desires to obtain permission to seek a civil divorce, civil annulment or civil separation, should be referred to his parish priest who will, if the circumstances warrant, refer the matter to the Family Life Bureau.

(2) A person who desires to seek a declaration of nullity of marriage on the ground of lack of canonical form, namely, that he was a Catholic at the time of the marriage but the marriage was not performed by a priest, should also be referred to his parish priest who is author-

ized to process that type of case.

(3) In all other cases where the person is seeking an ecclesiastical annulment or dissolution of marriage, he should be referred to the diocesan tribunal.

In the Archdiocese of New York, the tribunal has office hours for interviews Monday through Saturday, excepting holidays and holy days. In the case of people who live a long distance from the tribunal offices, there is a circuit court which conducts interviews at rectories in outlying areas of the Archdiocese.

Thus, the lawyer who is familiar with these distinctions and procedures is in an excellent position to assist his clients by making proper referrals.

Some Cautions

The civil lawyer's enthusiasm to alleviate the burdens of the Church court officials should, however, be tempered by the observance of a few cautions. First of all, he should frankly recognize that, whatever his sterling qualities as a civil lawyer, he is not competent either by education or experience to advise a client on canon law or Church court procedure. Most importantly, he is not in a position to render any knowledgeable and reliable opinion as to the prospect of success in any application by his client for ecclesiastical permission or relief. To attempt to do any of these would certainly amount to interference with the work of the Church court and could have the effect of prejudicing his client's attitude.

This frank recognition of lack of qualification of which we have spoken will also mean that the civil lawyer will not attempt to involve himself in a court proceeding as an Advocate or associate Advocate, or, unless specifically invited, as an assistant

Advocate. Nor, moreover, should he presume to act as an agent or intermediary of the Church court or of the officially appointed Advocate without express request or permission. To do otherwise would be an intrusion into the processes of the Church court in the same sense as a priest who attempted to interfere with the processes of a civil proceeding would be regarded as an interloper. To intrude in a Church court proceeding when he was not specifically requested to assist in some way would mean that the civil lawyer would probably only delay the proceedings, cause annoyance to the court and to the Advocate and would not necessarily be promoting his client's cause.

If the civil lawyer thinks he can make some contribution to the process of adjudication, and is willing to volunteer his assistance in the discretion of the tribunal, he will find that the tribunal officials will be sympathetic to his desire to assist them and his client. They certainly will not be unaware of his interest in retaining his client's goodwill. In a proper case, and within proper limits, the tribunal officials may be more than willing to have the assistance of a civil lawyer in taking some of the burden of the work of a case off their shoulders. In the Metropolitan Tribunal of the Archdiocese of New York, and this is probably true in most diocesan tribunals, the officials stand ready to discuss, with proper and obvious limitations, any pending proceeding in which a civil lawyer has a legitimate interest.

There are, however, some obvious courtesies and proprieties to be observed by the civil lawyer in dealing with tribunal officials. Actually, they are similar to the courtesies that a civil lawyer would expect

his client, or some other interested person, to observe with regard to a civil case that the lawyer was handling. From experience, it has been found that most inquiries can be answered by telephone, but this is not a universal rule and the civil lawyer should exercise his own best judgment as to whether in a particular case the communication might be better made by letter. This would certainly be true where there is some question as to the lawyer's entitlement to information or where, for example, he wishes to communicate to the tribunal a matter or statement of some length or complexity. To civil lawyers who live daily with the problem of work interruption, it is unnecessary to say that contacts with the Church court should be limited, if possible, to suitable intervals. Then, too, the experienced civil lawyer in communicating with the Church court, will not confuse argumentation and advocacy of his client's case with legitimate inquiry. Finally, the civil lawyer, with his presumed familiarity with the Canons of Legal and Judicial Ethics, would certainly be expected to observe the basic rule of propriety in dealing with a case that is at the stage of adjudication. Of course, it is inconceivable that he would improperly attempt to influence the judgment of the court.

A Look to the Future

We can say, then, that as matters now stand and as they are likely to stand for the immediate future, a civil lawyer will probably play only an auxiliary role in the Church courts. He is handicapped by lack of the required academic background, and by an absence of opportunity for training and experience in the work of the tribunals. He faces the economic barrier

involved in adding several years of schooling to his already long years of education, and also the tradition in the United States of gratuitous services or nominal compensation for Church court Advocates. For these reasons, the civil lawyer knows that he can currently aid and assist only in a supportive capacity, as an expert, as a procurer of records, as an investigator, perhaps sometimes as a civil lawyer in an ancillary proceeding, and as a knowledgeable referrer of cases. Nevertheless, in these lay capacities his talents, his experience, and his education as a civil lawyer can prove to be of great benefit to the Church courts by helping them in expediting their adjudications and freeing their personnel for other more important work. In these ways, too, he can sometimes provide a valuable service for his regular clients.

Is this, then, a state of facts that is likely to exist for the indefinite future? Not necessarily. In the first place, we have the tradition of lay advocacy before the Sacred Roman Rota. One of the possible changes in canon law that has been mentioned is the feasibility of in some way decentralizing the appellate jurisdiction of the Sacred Roman Rota. If this came to pass and there was, for example, established in the United States an appellate ecclesiastical court with jurisdiction equivalent to that now found only in Rome, this might lead to the development of a corps of American lay Advocates. Presumably, they would be permitted to charge reasonable fees that would encourage a sizable number of laymen to spend the years and funds necessary to qualify themselves as canon lawyers and develop a practice.

Even if this development did not come to pass, the change in attitude, typified by reference to the "Age of Emerging Laymen," might lead to a relaxation of canonical regulation that would permit civil lawyers or other qualified laymen to engage in some form of limited practice before the Church courts without first obtaining a doctorate in canon law. For example, it might be felt that a layman who had already earned a baccalaureate degree in civil law might achieve limited qualification as an Advocate, even though not as a tribunal judge, by the taking of a post-graduate course equivalent to what is now required in most universities for a master's degree. This arrangement could be further facilitated for civil lawyers if a number of the Catholic universities throughout the country were given pontifical authority to provide limited courses in canon law and give such special non-doctoral degrees.

Moreover, it is not unlikely that the officials of the Church courts in this country may conclude that they are in a position, without any change in canon law and with perhaps little or no changes in diocesan regulations, to encourage increased participation by civil lawyers in the work of the tribunals along the lines of the auxiliary services previously mentioned. Indeed, even today, as churchmen are becoming more attuned to the possibility of receiving assistance from laymen in those areas in which laymen have special qualifications and experience, and as laymen are becoming more alert to the fact that their services are needed and desired, there is no reason why the Church courts could not hold out a hand to the

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civil lawyers and ask them to bear part of the burden of their grave responsibility. Such co-operation might gradually lead to the point where civil lawyers could act side-by-side with tribunal Advocates as assistant counsel in the collection and presentation of evidence and in the preparation of briefs.

Conclusion

We may be at or fast approaching the first stage of an evolutionary process in the emergence and growth of the role of the civil lawyer in the Church courts. If

we are, the evolutionary process will run its natural course only if civil lawyers are willing to take an interest in the work and jurisprudence of the Church courts which, at least in this country, they have not heretofore taken. In addition, the officials of these ecclesiastical tribunals must recognize the tremendous potential for meaningful assistance that stands at their beck and call in the person of the American civil lawyer. It would be a tragedy for the Church if this evolution did not come to pass. As matters stand today in this country, the work of the Church courts is by force of tradition the private preserve of tribunal officials. Logically, the first move, if it is to be made at all, must be made by them. I am convinced that the American civil lawyer will respond enthusiastically.