

EVERYBODY'S TALKIN' 'BOUT GOD'S LITTLE ACRE: WHO OWNS THE PROPERTY WHEN A SEGMENT OF A CHURCH LEAVES THE DENOMINATION?

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Abstract

The departure of a segment of a church or an entire parish that leaves the denomination presents the problem of property ownership, particularly real property. Does the departing faction or the denomination have rightful title? This can be more problematic in an American jurisdiction where the courts are reluctant to enter into an intra-church dispute because of the constitutional non-establishment of religion clause. An added decisive element is reflected in the hierarchical governmental structure of a church. For example, the Roman Catholic Church hierarchy provides control at the diocesan level, whereas, in a more locally ruled Baptist church, a regional body exercises little, if any, authority over a parish. This paper focuses primarily on the ongoing litigation involving the Diocese of Virginia of the Episcopal Church USA (Anglican Communion). Because of what more conservative members regard as fundamental doctrinal shifts at the national level, several parishes opted to leave the denomination, claiming property ownership. The atypical result is a costly, protracted, and embittered court battle pitting the mother church against the local churches. Similar legal issues in other denominations in the United States and Christian and Christian-Moslem property disputes in the Balkans are more summarily addressed.

Key Words: Law, religion, history, culture, political science.

HERKES TANRI'NIN KÜÇÜK KİLİSE BAHÇESİNİ KONUŞUYOR: BİR ZÜMRE KİLİSE BİRLİĞİNDEN AYRILINCA MÜLKİYET SAHİPLİĞİ KİMDEDİR?

Öz

Bir zümrenin bağlı olduğu kiliseden, kısmen ya da tamamen ayrılmasıyla ortaya çıkan isim değişikliği durumunda, ortaya hak sahipliği, özellikle de gayrimenkullerin sahipliği sorunu çıkmaktadır. Ayrılan zümre mi hak sahibidir, yoksa ilk isim sahibi mi? Bu durum mahkemelerin, anayasanın dinsel işlere karışmama hükmünden dolayı, kiliseler arası anlaşmazlıklara dahil olmakta isteksiz olduğu Amerika'da daha da problemli olmaktadır. Kiliselerin hiyerarşik idari yapısı belirleyici bir çözüm sunabilmektedir. Örneğin Roma Katolik Kilise hiyerarşisi kontrolü piskoposluk düzeyinde sağlarken, öte yandan daha yerel bir şekilde yönetilen Baptilist Kilisesi'nde bölgesel birim, papazlığın yetki alanında yok denecek kadar az otorite kullanmaktadır. Bu makale, ABD'de Virginia bölgesinde piskoposlar tarafından yönetilen kilisenin (Anglikan Komünyonu) dâhil olduğu ve halen devam eden bir hukuk davasına odaklanmaktadır. Daha muhafazakâr üyelerin temel doktrinsel değişimleri ulusal düzeyde değerlendirmelerinden dolayı, bazı piskoposluk bölgeleri isim haklarından mülk sahipliği talep ederek feragat etmek istemişlerdir. Alışılmamış bir çözüm, ana kiliseyi yerel kiliselerle maliyetli, gereğinden fazla uzayan ve acı duygular uyandıran mahkeme savaşları cehenneminin ortasında bırakmaktadır. Çalışmada özet olarak Birleşik Devletlerdeki diğer "isim ayrılmaları" ve Balkanlardaki Hıristiyan ve Hıristiyan-Müslüman hak sahipliği anlaşmazlıklarına da değinilmiştir.

Anahtar Kelimeler: Hukuk, din, tarih, kültür, siyaset bilimi.

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*And Abraham said unto Lot, Let there be no strife, I pray thee,
between me and Thee, for we are brethren. Then Lot chose him
all the plain of Jordan, and...Abraham dwelled in the land of Canaan.
Genesis 13: 8-12, THE BIBLE.*

Introduction

When dissension arose between Abraham and his nephew Lot, Abraham deferred to his younger relative regarding which land he would take. When the greedier Lot chose the more fertile lands of Jordan, Abraham conceded and went his way. Unlike this Biblical lesson in compromise, property disputes in recent internecine battles within Christian churches in the United States have not been so amicably settled.

In Erskine Caldwell's controversial 1933 American novel, *God's Little Acre*, one sanctimonious character was somewhat akin to the self-centered Lot. Deciding to dig for gold on his arable property rather than more sensibly to farm the land, he piously announced that one acre would be set aside for God. He intermittently changed which acre this would be, assuring that God would not possess the gold. The contemporary counterparts of recent church property disputes have resembled Lot and the fictional Caldwell figure rather than the conciliatory Abraham.

In particular, principals of the Episcopal Church USA (hereinafter, TEC) have conceivably spent as much time in the courtroom as in the church over property rights when a parish secedes. Lawsuits in California, New York and Virginia have been most publicized.

Section I is a short explanation of the history and hierarchy of the Anglican Communion, of which TEC is a part. The governing structure varies among denominations and is a significant factor in settling property disputes in such fissures.

The primary focus is in Part II, emphasizing the Virginia litigation. A subsection includes lawsuits in other states that reflect somewhat different reasoning among state courts and the crucial role played by denominational hierarchy.

Section III addresses in a more summary fashion Christian and/or Christian/Islamic property disputes in the Balkans. Government involvement distinguishes these battles from those on American turf because of state ownership in formerly communist countries.

1. Historical and hierarchical significance in church property ownership

Some liturgical scholars loosely separate church hierarchies as either Episcopal or Presbyterian. The episcopal form has a ruling prelate, subordinate bishops, and local churches under the control of the prelate. A Presbyterian hierarchy uses an ascending, rather a descending order of authorities. Each body has representatives from both clergy and laity (Massey, 2009, p. 6).

Others more specifically divide church hierarchies into four groups (Welch, pp. 67-78.). These "types of polity" are monarchical, episcopalian, presbyterian, and congregational.

The sole monarchical church is the Roman Catholic Church, headed by the pope. His control is exercised in geographic regions through his appointed cardinals and bishops.

In the episcopalian form, hierarchy is not vested in one person. Church leaders determine doctrine, with local churches and regional bodies held responsible to the hierarchy of the denomination regarding the conduct of church affairs.

A regional body has authority over churches in the presbyterian form. Guidance, but not control, comes from the denomination in general. Affairs are conducted by local elected presbyters.

Finally, the congregational form recognizes local congregations as completely free from any hierarchical body. The church itself determines its own rules of conduct, with leaders appointed or elected, acting independently from influence outside the local church. The quintessential example is the Baptist Church.

These divisions of church polity decipher how denominational doctrine is determined. However, they are not always decisive in intra-church property disputes.

Three United Supreme Court decisions provide a collective genesis for direction from the Court. In *Watson v. Jones* (1872), the Court did not adhere to the ruling of *Craigdallie v. Aikman*, an English case (1813) that had adopted the doctrine of implied trust in conflicts over church property ownership. Under this reasoning, all church property is in trust for the faction that is most faithful to the traditional doctrine of the denomination. Referred to as the “departure from principle” rule, ownership is vested in the segment that is “faithful” to established church doctrine. In *Watson*, the Court avoided any subjective venture into a church’s “true doctrine.” First, the court must determine if the church is hierarchical. Second, the court addresses the determination of the highest ruling body in the hierarchy. *Watson* applies the “deferral to hierarchy” principle. One legal commentator critically described this doctrine as “freez[ing] doctrine at the insistence of the state (Stern, 2009).

A look at the U.S. Supreme Court’s ruling in *Lemon v. Kurtzman* (1971) is imperative in understanding the American constitution non-establishment doctrine and derivative reluctance of the judiciary to encroach upon a church’s resolution of its disputes. The non-establishment clause prohibits the government from recognizing any establishment of religion (U.S. Const. Amendment I (1791), consistently construed by the judiciary to encompass any state favoritism of one religion over another. Justice Burger’s opinion established a three-part test as determinative of whether governmental action meets constitutional muster, a test that is in the disjunctive, not the conjunctive. That is, if evidence is presented that any one of the tests has been met, the state action is unconstitutional. State action is unconstitutional if it (i) has no “clear secular purpose”; (ii) its “primary intent [either] advances [or] inhibits religion”; or (iii) “fosters an unnecessary entanglement with religion” (*Lemon*, p. 614). A strict reading of *Lemon* arguably might make the courts decline to exercise jurisdiction over any of the property cases.

Finally, in *Jones v. Wolf* (1975), the Court decided that the same principles of secular property disputes apply to church property disputes. Known as the “neutral principle rule,” this rule is used by a majority of states. Since *Jones* did not overrule *Watson*, a state might apply either the deferral or the neutral principles rule.

2. The Virginia Litigation

Some history of the Episcopal Church and its connection to the worldwide Anglican Communion is insightful. In many American colonies, the Church of England was the official state church prior to American independence and the 1791 adoption of the Bill of Rights.

2.1 Anglican Church and Anglican Communion

The history of the beginning of the Anglican Church itself is controversial, especially when posited alongside the reasons these parishes have left TEC. The mother Anglican Church itself was such a breakaway denomination.

The rather notorious Henry VIII of England (1491-1547) bemoaned having no male heir to the throne. His wife, Catherine of Aragon, had borne six children, but the only one to survive was a female, later to become Queen Mary I.

The king's recourse was to seek an annulment, or, in the alternative, a divorce from Catherine in order that he might marry maid of court Anne Boleyn. When Pope Clement VII refused to sever the Henry-Catherine union, the king persuaded Parliament to enact the Act of Supremacy, 1534. This statute abolished the authority of the pope in the English church and instituted the king as "the only supreme head in earth of the Church of England." The divorce and remarriage ensued, and what had been a political marriage became a very public political divorce (Luminarium, 1996). The information about King Henry a little bit unnecessary, so it should be leaner..

a) Church of England

This Church of England, the mother church of the Anglican Communion, further developed distinctions from the Roman Church. In 1558, the church adopted a new Book of Common Prayer and enacted the Thirty-Nine Articles, the latter enunciating differences between the Anglican and Roman churches. Article Twenty-Five recognizes two sacraments, baptism and holy communion, excluding confirmation, penance, holy orders, matrimony, and unction, all which are sacraments in the Roman Church. Article Twenty-Eight expressly rejects transubstantiation (a basic doctrine of the Roman Church), the change of the communion elements of bread and wine into the actual body and blood of Jesus Christ. Article Thirty-Four authorizes every national church to change or abolish church ceremonies and rites, a subliminal denunciation of the pope's authority in such matters. Other contents reiterate basic beliefs to which the Roman Church, and indeed most Christian denominations adhere: the Holy Trinity, the virgin birth of Christ, His crucifixion and resurrection, the sufficiency of the scriptures, and the acceptance of the Apostles, Nicean, and Athanasius Creeds.

b) Anglican Communion

The Anglican Communion is a base of community among like members, loosely combining churches in 165 countries as members. The head, the Archbishop of Canterbury, is perhaps more aptly described as a chief executive officer, since his authority in no way resembles that of the Roman Church's pope. His sole duty is to serve as the "Focus for Union of the Instruments of Communion: (i) The Primate Meeting (sessions of archbishops every two-three years); (i) the Lambeth Convention (meeting of all bishops and clergy every 10 years); and (ii) the Anglican Consultative Council (including the lay persons) (Official website of the Anglican Communion. www.anglicancommunion.org).

c) The Episcopal Church USA (TEC)

TEC is one of some 38 groups, or provinces, of the Anglican Communion. It is neither under the direction of nor subject to the authority of that Communion.

The Church in colonial America arrived shortly after the renaissance of the Anglican Communion. British settlers brought the Church of England to the Virginia colony in 1607. Not until the 1789 ratification of the United States Constitution did the church (now the Episcopal Church U.S.A.) adopt its own revised Book of Common Prayer and canons. Henceforth, it was a separate self-governing church body with membership in the Anglican Communion (World Book Encyclopedia, year, p .264). According to the National Council of Churches, the Episcopal Church USA had about 2,006,000 members in February, 2011, a 2.48% reduction from the prior year. A Rutgers University study cited this figure at 3,615,000 in 1965 (www.rci.rutgers.edu/_lcreew/dojustice/j325.html). Primary references must be given instead of internet resources.

Some history of Truro and The Falls Churches, lead plaintiffs in the Virginia property dispute, is germane with regard to the historic value of the properties. Truro was established when government and church intertwined, a relationship that became unconstitutional after the adoption of the First Amendment in 1791. Parish, or local, boundaries were established by statute, and vestrymen (church leaders, or “legislators”), elected by taxpayers. Vestrymen were a quasi-close corporation that not only adjudicated parochial issues, but also shared with the County Court in deciding issues that affected local government. The Rev. Philip Slaughter’s History of Truro Parish commended the early parish with having chosen a vestry hat was perhaps the “most distinguished in its personnel... and (most) fully qualified” than any other in the Colony of Virginia. Several were also elected members to the Virginia legislature. Later vestrymen included General and first President of the United States George Washington and Revolutionary War Colonel George Mason. Somewhat ironically, this historian credited them with the ability to achieve the “reconciliation of diverse policies” (Slaughter, 1907).

The 1734 wooden edifice that was the first church property on land donated to Truro Parish and incorporated by the state General Assembly. The current 1769 brick building that replaced the older structure is replete with historic significance. The church was used as a Revolutionary War recruiting station for soldiers, and Thomas Jefferson’s Declaration of Independence was read from the church steps. Another vestryman was Francis Scott Key, composer of “The Star Spangled Banner,” the national anthem. There are memorial pew markers to George Washington and Confederate General Robert E. Lee (The Falls Church website, www.thefallschurch.org). Its monetary value as a historic site is probably immeasurable.

Perhaps not comprehending the importance of this history, the Most Rev. Katharine Jefferts-Schori, Presiding Bishop of the Episcopal Church U.S.A., reportedly intimated during the discovery phase that her preference would be to deconsecrate the property, sell the churches and give the proceeds to the departing congregations (Van Biema, 2008). This same reporting journalist pondered which group George Washington would choose, were he alive. Regardless of which faction that might be, his conclusion was that “like almost everyone else, he would be saddened by the increasing rancor.”

Episcopal property cases usually refer to the Dennis Canon, drafted by attorney-Suffragan Bishop of the Diocese of New York. This rule, adopted at the 66th General Convention of the Episcopal Church USA (1979), was the national church's response to the departures of parishes because of the church's decision to ordain women and the consecrations of some bishops whom these parishes regarded as heretics. The Dennis Canon expressly states that parishes, through their elected vestries, hold property in trust for the diocese and the national church. Delegates to the Convention viewed this rule as expressly confirming an existing implied trust rule, and one court has so held (*Trinity-St. Michael's Parish*, 1993).

In accordance with the Dennis Canon, the Diocese of Virginia approved of Canon 15. This rule states that "all real and personal property held by or for the benefit of any Church or Church under the Supervision of the Bishop of this Diocese is held in trust for The Episcopal Church and the Dioceses of Virginia. Canon 15 sec. 1 also establishes the Executive Board (of the Diocese) as the authority of the church regarding property and vests it with the right to petition a state court to appoint trustees to hold such diocesan property. It prohibits the "alien[ation], [sale], encumb[rance], or ... trans[ferral]" of such real estate for any purpose whatsoever, unless the Executive Board consents (Canon 15, sec. 5).

This same canon also requires for such transfer or encumbrance the consent of the congregation (Canon 15 sec 2). Perhaps this subsection was intended to require the consent of both the Board and the congregation, but it is arguable that the two might be construed in the alternative, rather than the cumulative. One interpretation might be that this section permits the converse, that is, "exchange" of ownership—to the departing church—should the congregation itself so decide. The canon is silent on whether or not this "consent" must be unanimous.

The rules adopted by a denomination might be compared with a collective bargaining agreement in labor law, which the courts have called the "law of the sop". These constitutions and canons are the "law of the church," intended not to replace governmental law, but to implement it.

The Dennis Canon addressed the 1970's departing churches' decision as based in part upon the national church's acceptance of women as clergy. More conservative members viewed this as another step away from the Roman Church and in contravention to the Scriptures. Regarding the alleged bishopric "heresies," one controversial such bishop was John Shelby Spong of the Diocese of Newark. His speeches denounced much standard Christian biblical doctrine that was contained in the Thirty-Nine Articles. Spong's later books expanded upon his doubts (and even rejection) of such unquestioned Christian positions as the virgin birth (Spong, 1992); the crucifixion and resurrection of Jesus (Spong, 1993); and extra-marital sexual relations and homosexuality as biblically acceptable (Spong, 1990).

The 74th General Convention (2003) approved of the consecration of openly homosexual V. Gene Robinson as Bishop of New Hampshire. At that same session, the national church permitted individual dioceses to decide whether to bless same-sex unions, triggering the spate of more recent departures of parishes from the national church.

The Anglican Communion's October, 2004, rejoinder was the Windsor Report. The rebuke recommended an official "letter of regret" from TEC to the Communion, expressing remorse for its incitement of intra-church divisions. Second, the Report asked the U.S. church to cease consecrating homosexual bishops and/or

ordaining homosexuals to the clergy and to stop blessing of same-sex unions until the Communion had adopted a position on these issues. The Report concluded that “[t]here remains a very real danger that we will not choose to walk together.” This was a not-so-tacit warning of possible expulsion of the TEC from the Anglican Communion. In a classic example of the distinction between the power of the Anglican Communion and the Roman Church people is the reaction of the TEC. No letter of regret ensued. In February, 2005, the House of Bishops announced a one-year suspension of such consecrations and blessings, a moratorium with a termination date, rather than the indefinite suspension the Windsor Report had recommended. In the Roman Church, the statement from Rome would have been a directive. Moreover, at the 2009 General Convention, the House of Bishops and the House of Delegates (elected lay representatives) reversed the 2005 suspension. All levels of ministry--both bishops and clergy--were opened to lesbians, gays, bisexuals, and transsexuals, and blessings of same sex unions could proceed.

Act 1 in the intra-Episcopal Church controversy had concluded. Parishes continued to depart from the national church, claiming rightful ownership to church property. The stage was set for Act 2. The venue was the courtroom.

2.2 The Virginia dispute

During the waning months of 2006 and early 2007, eleven churches in northern Virginia voted to leave the Diocese of Virginia because of these deep-seated doctrinal differences. One might infer from the Windsor Report that the Anglican Communion impliedly agreed with the departing churches, which joined the Convocation of Anglicans in North America (hereinafter CANA), a mission of the Anglican Church of Nigeria established expressly for orthodox Anglicans in the United States. The vote to split from the diocese by parishioners of the two largest among these churches, Truro Church and The Falls Church, respectively, 92% and 90%. Both churches voted 94% to retain church property (Virtue, 2010).

The churches joined CANA. A Virginia-based non-profit organization established upon TEC’s rejection of Windsor, CANA is described on its website as a “lifeboat,” an “indigenous ecclesiastical structure,” and a “gift of love to American Anglicanism” [canaconvocation.org].

TEC and Diocese filed a joint petition in the Circuit Court of Fairfax County, Virginia, seeking a declaratory judgment that the property rightfully belonged to the Diocese. Significantly, under TEC canons, a disaffiliation with the diocese is also a disaffiliation with TEC (McElroy, 2008, p. 333).

Virginia is unique among such property battles because of a post-American Civil War state statute that governed property distribution for churches that had split because of doctrinal differences relating to slavery and states rights (Va. Code Ann. Sec. 57-7, year). This law provides that a majority of the church will determine which of the two factions resulting from a split it will join, and all church property remains vested in that faction. It is germane that this statute was enacted four years prior to the Supreme Court’s Watson decision. Moreover, it is directly contrary to the Dennis Canon.

In 2008, the trial court applied the statute, holding that the departing church-defendants owned the church properties. TEC and the Diocese appealed. On June 10, 2010, in a 32-page opinion, the Court unanimously reversed and remanded to the Fairfax Circuit Court for trial.

If sec. 57-9 were determinative, the issue would have been settled, and the lower court order affirmed. The Supreme Court construed the statute as containing two evidentiary requirements: (i) a division within a church had occurred; and (ii) the departing congregation has affiliated with a branch deserved that same church. The Court found that only the first requirement was met. The defending churches had joined CANA, a branch of neither TEC or the Diocese of Virginia. They had not joined a polity resulting from the split. CANA was formed in response to, not as a result of, intra-TEC disputes, not as a result of such dispute (Chambers and McBeth, 2010, p. 141).

Significantly, the decision was not a substantive ruling for the petitioners on the merits, but rather on the inapplicability of the statute. The Court did not address its constitutionality.

On January 11, 2012, on remand, the Fairfax Circuit Court held for the Diocese and TEC in a 113-page opinion (The Washington Post, Richmond Times-Dispatch, January 12, 2012, p. B-2). After the earlier Virginia Supreme Court ruling to remand, each party had already spent an estimated \$5 million in attorneys' fees and costs (MacDonald, April. 7, 2010). Whether the parishes will appeal is uncertain.

2.3 Disputes in states other than Virginia

States have decided these issues differently, even when applying the same doctrine. Notably, none has a statute similar to the Virginia law.

d) California

In an arcane judicial turnaround, the California Supreme Court held that St. James Anglican Church is entitled to trial in its property litigation with the Diocese of Los Angeles and TEC. The Court reversed a 2007 ruling that the judiciary must defer to church doctrine (here, the Dennis Canon), regardless of secular property law. The parish had bought and maintained the property to which it had held sole title for fifty years. The highest court's remand rebuked the lower court for having ignored trust law and California's adherence to the neutral principles rule (Rasmussen, 2011).

In a Methodist Church case, a state court applied California corporation law in holding that the property belonged to the local congregation. Although the regional body had adopted a rule that local churches hold property in trust for the region, statutory law specifically stated that a general church is not authorized to create such a trust for itself. Since the local parish had deeded its property back to itself, no trust for the regional body existed. [California-Nevada Conference v. St. Luke's United Methodist, 2005) Arguably, this does not bode well for TEC in the California litigations, since the Dennis Canon contravenes this legislation.

e) Connecticut

In *Trinity-St. Michael's Parish v. Episcopal Church in the Diocese of Connecticut* (1993), the Supreme Court of Connecticut applied the Dennis Canon and held it to have codified the pre-existing implied trust rule in TEC. Under this interpretation, even without the Dennis Canon, the diocese and national church would own parish property in such disputes.

More recently, the retroactive applicability of the 1981 Dennis Canon was questioned by a departing parish that had joined with CANA in (224 Conn. 804 (2011)). The historic 1875 Seabury Mission Church, granted independent parish status by the diocese in 1956, built property in 1965 over which it claimed ownership after its

departure. Because the implied trust doctrine predated Dennis, the property was held to be that of the diocese (Gauss, 2011).

f) New York

In *Episcopal Diocese of Rochester v. Harnish* (2008), the New York state appellate court faced somewhat different litigating roles. “Serious theological disputes” between the church leadership and the diocese resulted in the diocese’s declaration that the parish was “ecclesiastically extinct.” The diocese’s petitioned for declaratory judgment that the Dennis Canon rendered the parish property as held in trust for the diocese. Similarly to the Connecticut church in Gauss, the parish argued that the Dennis Canon (effective in 1981) cannot be retroactively effective. This parish was organized in 1927 and recognized as a diocesan parish in 1947. However, applying the neutral-principles-of-law rule, the court ruled that the parish had expressly agreed to conform to the diocesan and TEC constitution and canons, viewing the absence of objection by the parish to the Dennis Canon as pertinent. Additionally, to avoid conflict with the Establishment Clause, New York courts will not review a strictly ecclesiastical decision of a place of worship. The court cited *Congregation Yetev Lev D’Samar v. Kahana* (2007), in which a New York court had refused to decide a Jewish synagogue squabble over which set of directors representing two split factions was official. The court held that the rabbi’s determination that the synagogue was extinct was strictly ecclesiastical and constitutionally inappropriate for judicial review.

The significance of denominational rule distinctions was evident in another New York case. . In *First Presbyterian Church of Schenectady v. United Presbyterian Church US* (1984), a departing faction was held to have the right to retain its property provided that it not ceded title to the denomination. The Presbyterian Book of Order does not contain an express trust clause similar to the Dennis Canon in the Episcopal Church rules. This same distinction had been made in *Presbytery of Hudson River of the Presbyterian Church US v. Trustees of First Presbyterian Church and Congregation of Ridgeberry* (2006) in which the New York court reminded that the tradition of John Calvin produced a different form of church governance than that of the Episcopal Church, and a showing of the intent of the parties was necessary for a trust to exist.

g) South Carolina

In perhaps a stand-alone decision, the highest court of South Carolina (*All Saints Waccamaw*, 2009) rejected the Dennis Canon and any church canonical implied trust. Looking instead to language in the 1734 deed that the court held prevailed over Dennis and applying state law on trusts, parish property was held vested in the departing parish. This case shows that the neutral principle doctrine can achieve different results.

Professor C.R. McElroy has decried the Court’s adherence to three contradictory principles: (i) church governance in accordance with constitutional freedom of religion; (ii) restraint from judicial action to avoid violation of the non-establishment clause; and (iii) federalism’s assurance of the autonomy of the state to balance and accommodate the first two of these principles (Massey, 2009, p. 231). He suggests that the Virginia statue show a preference for congregational choice, which he commends for following the “eminently democratic principle of majority rule” (Massey at 234, 244). He argues against judicial deference to hierarchical rule, a sectarian preference prohibited by the Court in *Larson v. Valente* (1982).

Another legal commentator commends the deference doctrine for avoiding both unnecessary court involvement in church governance and a limitation on free exercise. A drawback, however, arguably encroaches upon the Establishment Clause by recognizing church adjudicators as the final arbiter, imposing court approval of a particular group (Belzer, 1998, pp. 122, 133). Another regards the court as the appropriate forum to consider five factors: (i) the party that had paid for the property; (ii) the reasonable expectations of parishioners; (iii) the balance of power when coercive church rules were adopted; (iv) the flow of funds between hierarchical levels; and (v) changes in membership (Reeder, 2006, p. 125).

Would a biblical Solomon-like settlement be equitable? When two women professed to be the mother of the same child, King Solomon ordered that the child be severed into two parts, one given to each. The prescient king knew that the real mother's love for her child would be dispositive. When she insisted that the child be given to the other, the king awarded her the child.

There are two reasons that such a process would be ineffective. First, there is no indication of love or affection between the warring factions. Second, how would the properties, especially historic ones, be divided? Liquidation would not be a viable remedy because of an implicit consensus that it must remain intact. Moreover, dual occupation would be impractical, if not impossible. Additionally, in either a tenancy in common or a joint tenancy, the entire property would be subject to one owner's debts.

2.4 Settlements

Some settlements before final court determination are Pyrrhic victories for the parishes. For example, conditions for St. Philip's Church in Pennsylvania to remain in its property were payment to the diocese of a "substantial fee" and severance of ties with the Anglican Church of North America for five years (Church Property Settlement 'Heartbreaking', 2011).

In neighboring New Jersey, negotiations between St. George's Anglican Church (affiliated with CANA) and the Episcopal Diocese were more amicable. The diocese permitted the church to retain its building and tangible personal property for an agreed upon monetary settlement (New Precedent Set. December 23, 2010).

Even in Virginia some churches settled with the diocese, but most deemed the agreement one-sided. Church of Our Saviour and Church of the Word will lease back their properties from the diocese. (Virtue, Liberal Episcopal Dioceses, February 21, 2011) Conditional is their disaffiliation with any Anglican convocation for five years (Harmon, Apr. 18, 2011).

Two Canadian churches that left the Episcopal Diocese of Ottawa agreed that one parish would transfer its building to the diocese, and the other would keep title to its property. In a division of assets that satisfied all parties, the two churches have now joined and changed the name to reflect the merger (Settlements and appeals in Canadian church property cases, February 18, 2011).

2.5 Anglicanorum Coetibus

In direct response to the Episcopal Church fracture, Pope Benedict XVI, in a November, 2009, statement that he "could not fail" to "guarantee... the universal communion," issued *Anglicanorum Coetibus* (groups of Anglicans). Emphasizing the Catholic Church's claim as "the one, holy...and apostolic church," he authorized these Episcopal churches and their clergy (many who were married) to be part of an

ordinariate that effectually permitted them to retain some of their Anglican worship structure, but made them part of the Catholic Church. A patent inclusion is the recognition of the Catholic Catechism as the authoritative doctrine. The Thirty-Nine Articles are omitted.

St. Luke's Episcopal Church in Maryland became the first such ordinariate [du Lac and Boorstein, Oct. 9, 2011]. The Episcopal Diocese of Washington contracted for St. Luke's to use the church property in a lease-purchase agreement (Christian Post, June 7, 2011).

As of January, 2012, 1300 Anglicans, including 100 clergy, had applied for admission to an ordinariate (Vatican welcomes Anglican priests, Richmond Times-Dispatch, January 1, 2012).

3. Church property disputes in the Balkans

These issues are markedly different from those in breakaway American churches. There is no counterpart to the American constitutional non-establishment provision that hinders the judiciary. Historically, national governments were literally fused with churches, often by an official establishment of a state church.

In formerly communist regimes, returning title to the former churches can be problematic. One uncertainty arises from some equitable sense of compensation owed because of the earlier governmental divesting of ownership. This is compounded by an ecclesiastical history that is ancient in contrast to the relatively fledgling United States.

The paradigm of southeastern Europe morphed from 14th century Christian independence, to subjugation by the Islamic movement, to 19th century nationalism. The Christian church that had been the "undisputed shepherd of the people of the Balkans" became viewed as a "thoroughly corrupt, and usurious body" that had considerably "augment[ed] the ever-increasing misery of its flock" (Vaknin. 1999). This dichotomy and subsequent political divisions have scripted church-mosque property disputes.

a) Croatia

Predominately Catholic Croatia is an independent country of post-Milosevic Yugoslavia, now experiencing an intra-Catholic property dispute over monastic property donated in the 19th century to the Italian Benedictine Order of Praglia. At the onset of communism, the property came under Yugoslav state ownership. After the fall of communism and the divisions of sectors of the former Yugoslavia into independent countries, the 1999 Croatian government ceded the property to the Catholic diocese of Porec-Pula. Although approved by the Vatican, title had not been affirmed by the prior Benedictine order.

Pope Benedict XVI convened a 2008 commission to resolve the dispute, but the problems were intensified by the local bishop's sale of part of the monastery land to a company with plans to build a golf course. The contending parties now were three: the Benedictines, the Diocese of Porec-Pula, and the supposed purchaser.

The papal commission decided to return the land to the Benedictine order, which would also be reimbursed by the diocese 25 million Euro for taxes and litigation costs and any property that had been wrongfully sold. Further complications arose when the bishop of Porec-Pula refused to sign the order, claiming it would

bankrupt the diocese. Pope Benedict bemoaned the perception that the problem was political, stressing that it was “strictly ecclesiastical” (Speciale, November 26, 2011).

One fear of Croatians is that a decision pope would provide an impetus for similar requests by Italians. Italy had ruled the Croatian territory during World War II. The dissension has been an unfortunate devilment in otherwise warm relations between Croatia and the Vatican, which had supported Croatia in her bid for EU membership (CBS news, August 11, 2011).

b) Kosovo

When formerly nationalized property in Kosovo was allotted to religious groups for the building of houses of worship, groups that received less valuable or inferior land predictably claimed governmental discrimination. The dispute is primarily between Christians and Muslims.

Kosovo is predominately Islamic, with only about 5% of its two million population being Christian. The site that serves as a mosque in Dardana, a district in Kosovo’s capital city of Pristina, is a communist-era small and cramped building. In contrast, the state granted the minority Catholic population both a suitable land mass and substantial monetary resources to build a cathedral. In 2002, the government rejected the petition of Dardania’s Muslim for land for a new and larger mosque.

Many Muslims in Kosovo perceive the actions of the government as its pro-Christian tendency to influence the European Union in Kosovo’s question for membership. Interestingly, not all Muslims agree. During the terrible Milosevic military dictatorship, Islam was the accepted religion. Some Muslims assess the governmental policy as equalizing rights for Christians. One imam in neighboring Macedonia has labeled this dispute a “political initiative” that “has nothing to do with religion” (Erebara, October 4, 2010).

Also in dispute is title to religious objects and land that had been the property of the communist government. Nehat Krasniku, Professor of Ottoman studies at the University of Pristina, has opined that religious objects rightly belong to the community in which they are situated and that the community has the authority to determine what is done with such property (Erbara). In comparison, this deference to locality rule would prove ineffective in the Virginia setting. The result would be—in basketball jargon—a literal slam-dunk for the breakaway parishes, contrary to the Dennis Canon.

c) Serbia

The 2006 enactment by the Serbian federal government of the Law on the Restitution of Property to Churches has not quieted demands of churches. By July, 2011, the government had transferred to various churches 20% of claimed property, but the recipients understandably contest the sufficiency.

The Democrat Party government cites economic conditions as its reason for not having returned more property, claiming that such action would make the already fragile government insolvent. In response, church representatives estimate remaining unreturned former church properties as only 3% of government assets. A Balkan Insight report has quoted these church spokesmen as having said that without a governmental return of the properties soon, they will file an action in the “European courts” (Barlovac, July 25, 2011). Whether they are referring to the European Court of

Human Rights or the European Court of Justice is unclear. Also unclear is the specific ground of illegality.

Conclusion

The acrimony generated when churches litigate against departing segments seems anomalous. It is perhaps implausible that the God of the Old Testament and the Christ of the New Testament would view favorably such strife and friction. Instead of Christ “three-godhead” is an alternative.

After TEC and some other mainline Protestant churches in the United States adopted liberal-leaning policies aversive to many more conservative members, a continuing number of entire parishes have left the denominational flocks. TEC appears to be most litigious among these groups, and the rather arcane Virginia statute initially complicated—and therefore, protracted—that litigation. Both the consumption of time and the escalation of costs were reflected in the lengthy appeal on that issue alone. Most recently, the trial court on remand ruled for the diocese, and whether the local parishes will appeal is conjecture. The legendary fat lady simply refuses to sing in this dispute.

Balkan countries also contend with church property disputes between different Christian churches, Muslims and-Christian in determining post-communist ownership of former religious properties, or churches and the government. The American cases, on the other hand, address intra-denominational departures of entire parishes because of doctrinal disputes, requiring the courts to interpret and apply canonical law. The unique federalism of the United States is evidenced by the different outcomes in different states of seemingly identical issues. Since 1872, the United States Supreme Court has rejected the British “departure from doctrine” doctrine that awards property to the branch that has remained true to the adopted church doctrine in beliefs and practices, perhaps because of American courts’ constitutional reluctance to intervene in doctrinal issues. The Court has permitted the states to determine which of two doctrines is to be applied in these property disputes: (i) deferral to the church hierarchy rather than to the judiciary to determine which faction represents the enigmatic “true church”: or (ii) the “neutral principle” rule followed by the majority of states, that treats church property disputes as any property dispute, seeking the parties’ intent as to ownership in the event of a division.

Eastern Europe is experiencing its own religious property squabbles. The demise of communism with its state ownership of property—including churches, synagogues, and mosques—has given rise to some comparable dissension in Eastern Europe. Even the Vatican has found itself involved in these battles.

Two truisms are to be learned from this study of strange bedfellows in the courtroom setting. First, many of these claimed followers of the God of the New Testament have clearly abandoned His proclamation that “God is love” (1 John 4:8). A second lesson is that much of the wealth of these battling churches is now that of their respective lawyers.

Costs continue to escalate commensurately with the acrimony. God may indeed never have His “little acre”.

Genişletilmiş Özet

Bir zümrenin bağlı olduğu kiliseden, kısmen ya da tamamen ayrılmasıyla ortaya çıkan isim değişikliği durumunda, ortaya hak sahipliği, özellikle de gayrimenkullerin sahipliği sorunu çıkmaktadır. Ayrılan zümre mi hak sahibidir, yoksa ilk isim sahibi mi? Bu durum mahkemelerin, anayasanın dinsel işlere karışmama hükmünden dolayı, kiliseler arası anlaşmazlıklara dâhil olmakta isteksiz olduğu Amerika’da daha da problemli olmaktadır. Kiliselerin hiyerarşik idari yapısı belirleyici bir çözüm sunabilmektedir. Örneğin Roma Katolik Kilise hiyerarşisi kontrolü piskoposluk düzeyinde sağlarken, öte yandan daha yerel bir şekilde yönetilen Babtist Kilisesi’nde bölgesel birim, papazlığın yetki alanında yok denecek kadar az otorite kullanmaktadır. Bu makale, ABD’de Virginia bölgesinde piskoposlar tarafından yönetilen kilisenin (Anglikan Komünyonu) dâhil olduğu ve halen devam eden bir hukuk davasına odaklanmaktadır. Daha muhafazakâr üyelerin temel doktrinsel değişimleri ulusal düzeyde değerlendirmelerinden dolayı, bazı piskoposluk bölgeleri isim haklarından mülk sahipliği talep ederek feragat etmek istemişlerdir. Alışılmamış bir çözüm, ana kiliseyi yerel kiliselerle maliyetli, gereğinden fazla uzayan ve acı duygular uyandıran mahkeme savaşları cehenneminin ortasında bırakmaktadır. Çalışmada özet olarak Birleşik Devletlerdeki diğer “isim ayrılmaları” ve Balkanlardaki Hristiyan ve Hristiyan-Müslüman hak sahipliği anlaşmazlıklarına da değinilmiştir.

Makalenin birinci bölümünde Anglikan Komününün hiyerarşik yapısı ve kısa tarihi anlatılmıştır. Bu yapıda komünü oluşturan her bir kilisenin idari yapısı farklılaşmaktadır. Bu farklılık gayrimenkul anlaşmazlıklarında önemli bir belirleyici etken olmasından dolayı önem taşımaktadır. İkinci bölümde Virginia hukuk davası üzerinde durulmuştur. Ayrıca California, Connecticut, New York ve South Carolina’da yaşanan benzer davalar da açıklanmıştır. Üçüncü bölüm, Balkanlardaki Hristiyan ve/veya Hristiyan-Müslüman gayrimenkul anlaşmazlıklarını özetlemektedir.

ABD’de yaşanan anlaşmazlıklara paralel bir şekilde Balkan ülkelerinde de farklı kiliseler arasında ve de Hristiyanlar ile Müslümanlar arasında mülkiyet anlaşmazlıkları yaşanmaktadır. Bu ülkelerdeki hükümetlerin konuya dâhil olmaları, ABD’den farklılaşmakta ve bu ülkelerdeki bir önceki dönemdeki komünist rejimin etkisi ve devlet mülkiyeti anlayışı nedeniyle çok çeşitli şekillerde olabilmektedir. Diğer taraftan ABD’nin kendine özgü federalizminden dolayı, benzer davalar farklı federe devletlerde değişik şekillerde sonuçlanabilmektedir. Doğu Avrupa ise kendi dinsel mülkiyet sorunları ile yüz yüzedir. Devlet mülkiyetinin komünizmin çöküşü ile birlikte sona ermesi ve bu değişimin ibadethanelerin gayrimenkullerini de kapsaması Doğu Avrupa’da yeni uyuşmazlıklar ortaya çıkarmıştır. Hatta Vatikan bile kendisini bu mücadelenin ortasında bulmuştur.

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