

## Recent Trends in Ecclesiastical Disputes

By Philip C. L. Gray, JCL

*"[W]hat king, about to go to make war against another king, doth not first sit down and think whether he be able, with ten thousand, to meet him that, with twenty thousand, cometh against him" (Luke 14:31)?*

In this passage from the Gospel of St. Luke, Our Lord encourages us to be prudent in our dealings with men. He expects us to study a situation and understand options before making a prudent decision. As a canon lawyer with a full-time, private practice, I find it helpful to reflect on recent decisions given by the different dicasteries of the Holy See. It helps me to better understand the issues that are likely to obtain a hearing, and to formulate arguments on behalf of my clients. I become aware of these decisions not only from my own work, but also from discussion with colleagues and feedback from clients who have personally contacted Vatican officials. With the hope that it may be of some benefit in providing helpful insight for those in similar cases, I will focus on several matters of common concern that affect so many of us today.

### Marriage Nullity

Although the St. Joseph Foundation does not have the resources to provide direct assistance to those embroiled in marriage nullity disputes, almost every Catholic in the United States knows someone who is divorced and may find themselves in such a dispute. These cases constitute—almost exclusively—the work of ecclesiastical tribunals.

Depending on whom you talk to, 75% to 95% of marriage nullity petitions in the United States result in a declaration of nullity at the trial or first instance level. According to canon 1682, a sentence (i.e., a decision) by a first instance tribunal must be transmitted to the competent appellate or second



*Miracles of St. Ignatius, Peter Paul Rubens*

instance tribunal. Only after the first instance sentence is reviewed and confirmed are the parties free to marry (c. 1684). Whatever the circumstances surrounding the breakup of the marriage might be, it seems that in the majority of cases both parties seek freedom to marry and relatively few affirmative sentences are appealed. Sometimes, however, a party believes that the marriage is valid and mounts a strong defense of the bond. Canon 1417, §1 allows the defending party to bypass the appellate tribunal that would normally rule on an appeal of the first instance sentence and appeal directly to the Roman Rota in second instance.

Some years ago, the Rota established a special norm whereby second instance appeals from the United States are heard for a fee that is considerably lower than if the appeal originated elsewhere. Moreover, it does not depend on the means of the appellant. In other words, Bill Gates or Warren Buffett would be eligible while a Canadian of modest means would not.

On appeal, the Roman Rota will overturn about two-thirds of those cases submitted to it. Generally speaking, there are two reasons the cases are overturned: procedural irregularities, and insufficient merit. It is beyond the scope of this paper to discuss specific points about insufficient merit. A good canon lawyer acting as advocate can easily explain such things to a client. Relative to procedural irregularities, there are several helpful points to consider.

The Apostolic Signatura is the "supreme court" of the Catholic Church. It has the obligation of providing oversight and correction when a judge or tribunal violates norms of justice. In many cases, the Signatura never learns of abuses or violations of justice, simply because they are not reported. But, over the past year, the Apostolic Signatura has shown an

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From an Article by Andrea Tornielli in the Italian Newspaper, *il Giornale*, July 6, 2007:

## The Church of Christ is the Catholic One

The Church of Christ is not distinct or distinguishable from the Catholic Church, which is the only one to possess “all elements of the Church instituted by Jesus.” The Congregation for the Doctrine of the Faith will confirm it **next week**, responding to “doubts” [*dubia*] raised in the past few years. The doctrinal stand of the former Holy Office ... should be accompanied by an authoritative theological comment on the pages of *L’Osservatore Romano*. At the center of the debate is once again the meaning of the verb “subsists”, used by the Council in the Constitution *Lumen Gentium*, where it is said that the only Church

of Christ “subsists in the Catholic Church” (in Latin, “*subsistit in*”). Words which, in the course of the years, have suffered several interpretations, including the one according to which Jesus in reality had not thought of founding a Church and, in case he had, it would have afterwards divided itself in various Churches and ecclesial communities. Therefore..., there would not be the true Church of Christ anymore, but only several expressions of it. This recurrent thesis has already been repeatedly denied by the Popes. In 1973, with the declaration *Mysterium Ecclesiae*, of Paul VI; in 1985, with the *notification* of the Congregation for the Doctrine of the Faith on a book of liberation theologian Leonardo Boff; in 1992, with the Letter to the Bishops *Communio in Notio*, and, finally, in 2000..., with the declaration *Dominus Iesus*, approved by John Paul II.

[Thanks to the web site, *Rorate Caeli* (<http://rorate-caeli.blogspot.com/>) for the article and the translation. This is something more for Fr. McBrien to fume about. CMW]



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active interest by intervening when approached by people grieved over the acts of the tribunals in their nullity cases. This Supreme Court generally acts first by suspending the decisions of lower courts and investigating the complaints made. In many cases, after a relatively short period of investigation, the Signatura confirms its previous decree of suspension and directs the Roman Rota to hear the case in a new instance.

Breaches of a respondent’s right to defense have constituted the primary cause for the Signatura to intervene. Under canon 1620.7, if a person’s right to defense is denied, the final sentence or decision is invalid—it results in a mistrial. There are many reasons that a person’s right to defense may be denied, but here are a few common ones identified by the Signatura over the past year.

- *A person has a right to competent counsel:* In canon law, there are two kinds of counsel: A procurator and an advocate. A procurator is a person who holds power of attorney and acts in the name of the principal party who appoints him. An advocate is an expert in law who argues a client’s position in law and fact. In most cases, the procurator and advocate are the same person. Many tribunals have volunteers, who are not expert in law, act as procurators and advocates. These well-intentioned individuals usually have some training, but not enough to provide competent counsel, establish a legal strategy, and pursue it. They do not understand the nuances of procedure and jurisprudence, and are unable to lodge exceptions or argue a legal point. In some places, the court appointed advocates are trained canon lawyers, but they may or

may not defend a client’s position. As a result, if a principal party in a marriage nullity case asks for an advocate, and the tribunal assigns one, there is a good chance the person will not receive competent counsel and help. The Apostolic Signatura recently suspended the sentences of First and Second Instance courts when the respondent’s advocate, a trained canon lawyer, ignored his client’s stated intentions and filed an opinion in favor of the petition for nullity. If a tribunal assigns a procurator/advocate, that person must defend his client’s stated intentions and position or risk intervention by Rome on appeal.

- *Certain procedural acts do not take place:* A party to a marriage nullity case has a right to give testimony and present witnesses and other types of proof. The person does not have to exercise that right, but the possibility must be given. The principal parties have a right to review the entire file—both procedural and testimony—used by the tribunal during the process. This is called the publication of acts. It takes place after proofs are gathered and before defense briefs. After reviewing the acts, each party has a right to supplement the proofs in support of their positions in law and fact. After the publication of acts, the parties have a right to submit a defense brief, receive a copy of the opposing defense briefs, and submit a rejoinder argument. Finally, when the decision is made, both parties have a right to receive a copy—not just read a copy—of the final decision. If one of these procedural obligations are

omitted or denied, a breach of the right to defense has occurred. In several cases over the past year, the Apostolic Signatura has intervened when tribunals refused to publish the full acts to the parties, allow them a defense brief, and refused to provide a copy of the sentence to the respondent. These are considered serious abuses of discipline, and in each and every case, the Signatura remanded the cases to the Roman Rota for final hearing.

## Parish Closures

In the wake of the clergy sexual misconduct scandal, many bishops are selling property in order to pay off lawsuits or settle with accusers before a lawsuit is filed. It seems the Holy See encouraged this by raising the limit for extraordinary alienation of fixed assets without the permission of the Holy See. What this means is that a bishop can sell a piece of property worth \$10 million without asking the permission of the Holy See. Before the crisis began, the limit was set at \$3 million.

Some bishops have used this opportunity to merge parishes, close an existing church edifice, and sell it for diocesan profit. In similar scenarios, some bishops have simply told a pastor that a piece of property owned by the parish (a convent, school, house, etc.) would be sold and the money used by the diocese. Without any doubt, such acts are fraudulent in canon law.

While a bishop may “own” parish property under state or federal laws, he does not own it under canon law. A parish is a separately incorporated entity from the diocese, and it owns patrimony distinct from the diocese. The pastor is the proper administrator, and his obligations are those of a steward (cf. canon 1284§1).

In a recent document published last year from the Congregation for Clergy (prot. no. 20060481), the Vatican provides some much appreciated clarification of key points about parish and parish patrimony. First, the Congregation makes it absolutely clear that when we speak of a parish, we are speaking about people and not a “thing.” Quoting from canons 369 and 515, a parish is recognized as a community of God’s faithful. The letter goes on to note, “*While the parish church and the parish physical plant may be closed, and the name of a particular parish extinguished, the spiritual needs of the portion of the Faithful which once constituted that parish must continue to be provided for in accord with their rights in law.*” The Congregation continues to explain that a parish really never becomes extinct unless all its members become extinct. Even then, the law sets a time period of 100 years before the juridic entity becomes extinct by the law itself. With this in mind, the Vatican clearly notes that the assets of a parish MUST be used for the sake of the people who constitute that parish. And, if the parish is merged with another parish, the assets must be given to the parish or parishes that now provide pastoral care of the faithful who previously made up the extinguished parish. In other words, a diocese cannot close a parish and keep its assets.

The legal points and argumentation found in the Congregation’s letter are very similar to those used by the St. Joseph Foundation in previous cases that predate the clergy sexual abuse crisis. As those who have challenged a bishop’s decree

of parish suppression know, the chance of winning such cases is very low. However, it is refreshing to see the expressed intentions of the Vatican on this point. If we apply the principles, we must accept the fact that the assets of a parish are held in trust for the good of the parishioners. In recent cases from New England, the Vatican has revoked decrees issued by bishops who sought to dispose of parish assets to benefit their dioceses.

## Clergy Sexual Abuse

There is not much new to report here. As time goes on, the Vatican seems to be taking a slow but increasing interest in assuring that priests who are accused get a proper hearing. I wish I could say that the application of justice in these cases—both for the accused and the accusers—is improving. Unfortunately, I think it is simply too short a time to make any kind of observations like that.

In my personal opinion, I think the ecclesiastical judiciary has grown stagnant after the revolutions that swept Europe and the New World, forcing a separation of Church and State. While the Church continued to adjudicate cases related to various sacraments, the division between secular and ecclesiastical within the judiciary became a gaping void. Now, tribunals and chancery offices are forced to judge criminal cases in a matter that was generally left to secular courts.

As noted above, most tribunals do not follow disciplinary norms in marriage nullity cases. Why would we expect different in criminal investigations? Worse, the administrative hearing is frequently used in these cases, and officials applying the law frequently have less training than their counterparts in the tribunal. Most dioceses seem to have insufficient personnel to conduct reasonable and just preliminary investigations. Frequently, they neglect legal constructs such as “probable cause”, “proof beyond reasonable doubt”, and “right to defense.” In almost every case I am aware of, the dioceses attempted to use inpatient, psychological evaluations as the first response to an accusation, the ultimate determination of probable cause, and in some cases, of proof beyond reasonable doubt. Such an approach denies an objective evaluation in law. As a result, when the accused raises legitimate objections and defense, he is often branded with a personality disorder and considered overly contentious and a danger to ministry.

Until the Church in America abandons a stagnant approach to justice fraught with the illicit use of para-psychology, and replaces it with a dynamic approach in law that admits reasonable defense strategies and interventions by competent counsel, these cases will continue to cause scandal.

## Other Clergy Cases

In the recent past, the Congregation for Clergy has been proactive in protecting the rights of priests who were subject to illicit and controlling acts by their bishops. For example, it is a matter of jurisprudence that a priest who is given a transfer of assignment must receive a new assignment that is canonically equal or greater than his old assignment. This is particularly true of pastors who are transferred. A chaplaincy is not considered equal to a pastorate as it is not as stable a position. Consequently, the Congregation for Clergy would

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correct bishops who attempted to transfer a pastor to become a chaplain.

Additionally, the Congregation for Clergy would overturn a bishop's decree removing a priest from his position as pastor if there was indication of intimidation, threats, animus, or vague accusations. In short, the Congregation for Clergy was judicious in helping priests who found themselves compromised by their bishop's actions.

I use the terms "would", "was", and other past tense verbs simply because it best describes the current situation. In December 2006, His Eminence Dario Cardinal Hoyos retired as Prefect of the Congregation for Clergy, and His Eminence Claudio Cardinal Hummes replaced him. Soon after his appointment to this new office, Cardinal Hummes published a letter to priests assuring them that his approach would be very similar to Cardinal Hoyos'. Only time will tell what trends he will carve out during his tenure in this key position.

In the United States and Canada, there is a long-standing, illicit custom to use psychological evaluations when determining the suitability of a priest for ministry. Often, when any kind of complaint is made against a priest, his bishop wants him psychologically evaluated. A number of facilities specializing in such evaluations of priests and religious exist in the United States. Unequivocally, this general approach violates basic rights of priests and obligations of bishops. Only in limited circumstances and only within limited parameters can a bishop use this as a partial means of evaluating the suitability of a priest to minister. This is clearly noted in a number of Vatican documents and decisions (*Cf: Allocutions of Pius XII, 13 April 1953, 10 April 1958; Monitum of the Holy Office, 15 July 1961; Circular Letter of the Secretariat of State, 6 August 1976; jurisprudence from Congregation for Clergy, June 1998 and October 1999*).

While this general approach and practice does not have support in law, the clergy sexual misconduct scandal seems to have precipitated a more widespread use of psychological evaluations by bishops for a variety of situations. The consistent response by the Vatican has been to consider such demands illicit and beyond the scope of obedience. I have encountered a few bishops who were simply unaware of the Vatican position on this matter, and willingly sought other means of resolving a concern when the official position of the Church was explained. Other bishops have forced priests to appeal to the Vatican, placing their priests in a rather compromised situation. Unfortunately, there are also priests who, for various reasons, will not contest such actions and thereby help to perpetuate the injustices. It is my hope that as long as bishops use this generally illicit approach, priests will challenge them on it and obtain continued support from the Vatican to protect their privacy and dignity.

## **Canon 128**

Canon 128 provides the positive law statute on lawsuits in the Church. It simply states that if anyone is harmed by malice or negligence, he can pursue an action to repair that harm. In law, when a right must be vindicated, a tribunal is the proper forum to obtain remedy (canon 1400). However, the latter part of Canon 1400 notes that "controversies arising from an act of administrative power" are to be resolved through ad-

ministrative appeals. Broadly interpreting the phrase "controversies arising from an act of administrative power," the Congregations of the Holy See would hear denunciations and complaints against bishops under this provision. However, in a recent case involving a contract disputed by an aggrieved third party, the Congregation for Clergy cited canon 1400 and encouraged the people involved to approach the Roman Rota for remedy. It is unknown if this was merely a political move to avoid having to hear a difficult case, or if it signals a new trend that would require such cases to go the long and arduous road of a judicial hearing.

This is a significant issue to watch. As noted above, many tribunals do not follow basic procedural norms. This contributes to a certain loss in the sense of justice and an inability to apply consistent legal norms at trial. The judicial trial is a lengthier process than administrative appeal. Nonetheless, I prefer it because the process is better defined and predictable. However, when assigned judges simply don't know what to do, the judicial trial becomes an overly long exercise in patience, and a final decision on appeal may take many years. This makes it substantially more costly, and is simply not feasible for many people. For the sake of justice, I pray this recent decision is merely a political move to avoid hearing a difficult case.

## **Dicastery Changes**

Over the past year, and especially over the past six months, there have been a number of positions that changed hands at the Vatican. These include the Secretariat of State and the Prefect for the Congregation for Clergy. The latter dicastery has been in what seems to be a transition mode for over a year. Appeals made to that Congregation have been put on hold with appellants receiving letters stating that additional time is needed to study the matter. Perhaps now that the new prefect, His Eminence Claudio Cardinal Hummes, has selected a new Secretary and staff positions will be filled this summer, we will see movement on some of these cases.

## **One Final Thought**

Often, when we get embroiled in a dispute, our thoughts turn to how we can win. This is not a bad thing. But, we do have to understand what "winning" means.

The context of Our Lord's words quoted above is His discourse on discipleship. *"If any man come to me, and hate not his father and mother and wife and children and brethren and sisters, yea and his own life also, he cannot be my disciple. And whosoever doth not carry his cross and come after me cannot be my disciple"* (Luke 14:26). Winning is nothing less than living as a disciple of Our Lord, and following His way of mercy and peace.

When we suffer conflict in the Church, knowing what to expect from ecclesiastical authority is helpful. Defending Truth and pursuing Justice is necessary. But, let us defend Truth and pursue the Virtue of Justice with Charity in our hearts and a firm desire for Peace.

[Mr. Gray received his J.C.L. degree from St. Paul's University in Ottawa, Ontario, Canada. He has been a member of the Foundation's group of consulting canonists for some years and is a regular contributor to CHRISTIFIDELIS.]