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The autonomy of bishops, and suing the Vatican

John L. Allen Jr. | May. 21, 2010

A lawyer has filed a request in a Kentucky court to depose Pope Benedict XVI to learn what he knew about sex abuse by clergy in the United States. (CNS photo)

At first blush, most people probably assume that the sexual abuse crisis will result in tighter control from Rome over local bishops. The logic is impeccable: The failure of some bishops to do the right thing is a core element of the crisis, and only the pope can really hold bishops accountable.

Yet at the moment, the ecclesiological fallout from the crisis, especially in the United States, seems to cut in the opposite direction -- promoting the autonomy of individual bishops and of the bishops' conference, if not so much theologically and canonically, then psychologically and culturally.

Especially since the election of Pope John Paul II in 1978, reform voices in the church have lamented what they see as excessive Roman centralization, calling for greater freedom of action for bishops and episcopal conferences. Ironically, the sexual abuse crisis may be succeeding where theological argument has often failed.

There are three reasons for that counter-intuitive result, one of which came into sharper focus just this week:

- **Legal**: Efforts to sue the Vatican in America courts over the crisis are premised on the notion that a bishop is an "employee" or an "official" of Rome, prompting Vatican lawyers to emphasize the independence of local bishops. In a filing on Monday in U.S. district court in Kentucky, Vatican attorney Jeffrey Lena insisted that the Holy See does not exercise "day-to-day operational control" over bishops, and that bishops are more akin to independent contractors or franchisees than employees. Anything that smacks of direct oversight could expose the Vatican to greater liability, creating an incentive for Rome to keep its distance.
- **Historical**: When the crisis erupted in the United States in 2002, the American bishops developed new canonical norms, the heart of which was the "one strike and you're out" policy. Those norms ran into a buzz-saw in Rome, derided by important Vatican voices as a betrayal of core canonical principles and an over-reaction to a passing storm. Eight years later, the take-away for many American bishops is that they were right and at least some in the Vatican were wrong on the most important issue to face the American church in their lifetime -- producing a greater skepticism about Roman sensibilities on many matters.

- **Bureaucratic**: Criticism of the Vatican's handling of sex abuse cases may be the most intense crisis in the papacy of Benedict XVI, but it's hardly the only one. The list is depressingly long: the Regensburg speech, the Good Friday prayer, the Holocaust-denying bishop affair, etc. There's a spreading consensus at senior levels that Benedict is a great teaching pope but not a governor, and that the regime under him led by Cardinal Tarcisio Bertone, the Vatican's Secretary of State, often doesn't have its act together. The corresponding tendency is to be less deferential; as one senior American prelate put it to me recently, "You think we get out of bed in the morning worrying about what Bertone thinks?"

To be clear, none of this implies that schism is on the horizon. When Benedict XVI recently found himself under fire for his role in the crisis, most American bishops rallied to his defense, suggesting a strong sense of corporate loyalty. Further, no serious voices in the conference are questioning Rome's authority on matters of faith and morals. There's no reason to believe that newly autonomous bishops in America are likely to ordain women in defiance of Rome, or to reject the new English translation of the Mass. Given the "evangelical" stamp of bishops' appointments over the last quarter-century, a more assertive conference hardly implies a more liberal conference.

Yet most decisions bishops face on a daily basis can't be directly settled by appeal to the catechism. In the vast arena of prudential judgment -- how to spend money, craft public messages, manage relationships in the church, and so on -- the dynamics of the crisis seem to have left many American prelates more willing to follow their own instincts, as opposed to looking over their shoulder at Rome. To pick just one example, that could have implications for how bishops decide to manage the end-game of the current Vatican-sponsored review of American nuns.

If the Vatican regards bishops as independent contractors, in other words, a growing number may be inclined to act like it.

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The latest development in this storyline was a massive filing on Monday in the case of *O'Bryan* vs. *the Holy See* by California-based attorney Jeffrey Lena, who represents the Vatican in American litigation. The hundreds of pages contained in these documents make for fascinating reading, with much of it pivoting on perhaps the most contentious issue in Catholic ecclesiology over the century and a half since the First Vatican Council: How to define the nature of the relationship between the pope and the bishops.

By way of background, the O'Bryan case was filed in U.S. District Court in Louisville, Kentucky, in 2004, on behalf of three men who say they were sexually abused as children by priests. Their attorney, William McMurry, wants to turn it into a class-action suit on behalf of thousands of sex abuse victims nationwide, and is seeking unspecified damages from the Vatican (in technical parlance, the Holy See).

Lena originally sought to have the suit dismissed under the 1976 Foreign Sovereign Immunities Act, which recognizes the basic immunity of foreign governments from being sued in American courts, but also lays out nine exceptions. The most common is commercial activity -- for example, the Bank of China isn't exempt from routine litigation simply because it's owned by the Chinese government.

The act also recognizes a "tort exception" to immunity, which allows actions against a foreign government for harms caused by its employees or agents in the United States. For example, in the late 1980s a federal court allowed the government of Nigeria to be sued under the tort exception for damages to an apartment officials had leased in San Francisco.

In 2008, a federal appeals court ruled that the O'Bryan case against the Vatican could go forward under the tort exception, if the plaintiffs can show that:

- American bishops who engaged in what civil law calls "negligent supervision" were acting as employees and/or agents of the Vatican;
- The bishops were following official Vatican policy, as opposed to exercising discretionary judgment.

Lena's filing on Monday focuses precisely on those issues. In trying to persuade the court that neither claim is correct, he relied on two memoranda from one of America's premier canon lawyers, Edward Peters, a layman who holds the Edmund Cardinal Szoka Chair at Sacred Heart Seminary in Detroit.

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Peters' memo on the "employee" question amounts to a sweeping vindication of the autonomy of the local bishop. He asserts that if the Kentucky court were to find that the Holy See wields "absolute and unqualified control and power" over bishops -- the language used by the lawyers for the plaintiffs -- it would, in effect, be "re-defining a core doctrine of the Catholic church."

Cynics might suggest it's awfully convenient to extol the dignity of the episcopal office only when it's in the Vatican's legal interests to do so, but that doesn't change the fact that the memo is one of the strongest endorsements of a bishop's independence you're ever likely to find in a semi-official Vatican statement.

Peters offers several arguments, none of which are new, but which he states concisely and forcefully:

- The College of Bishops plays a "vital governance role" in the church.
- The episcopacy itself is of divine origin, and bishops are successors to the apostles in their own right.
- To say that the pope has "full" power is not to say his authority is unlimited. In fact, popes are bound by church dogma, tradition, Scripture, and the principles of communion, collegiality and subsidiarity.
- The Second Vatican Council (1962-65), in its document *Lumen Gentium*, explicitly taught that bishops are not "to be regarded as vicars of the Roman Pontiff."
- Canon law repeatedly recognizes the power of the bishop to govern the affairs of the local church, from finances and the assignment of personnel to opening and closing parishes and supervising priests.

The overall conclusion is that styling the bishops as Vatican agents is "contrary to basic principles under the structure of the church."

In one sense, the memo represents no more than Peters' personal canonical judgment. Yet it also carries a Vatican seal of approval, since the thrust of Lena's filing is that Peters' analysis represents his client's official position. That suggests something new for theologians to chew over. For as long as anyone can remember, the relative level of authority in different church documents has been a debated point. Does an encyclical, for example, trump an apostolic constitution? Now there's another literary genre to consider: Where exactly does a Vatican motion in a civil lawsuit fall within the church's "hierarchy of truths"?

At the level of detail, there's a gem in Peters' memo worth highlighting.

Peters notes that canon law does not actually give the pope or the Holy See the power to remove a bishop against his will, at least in an explicit sense. Instead, canon 401 says that a bishop unable to fulfill his office for health or some other grave reason is "earnestly requested" to resign. It's a debated point among canonists whether there are any circumstances in which a pope can remove a bishop by fiat, or whether some form of consent is always required. That's relevant because the power to hire and fire is a standard secular test for an employer/employee relationship.

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While Lena lets Peters do the theological heavy lifting, he also argues that most of it ought to be irrelevant to the matter at hand, since trying to establish the relative balance of power between the pope and the bishops involves complicated theological questions and thereby crosses church/state lines. Instead, Lena argues, the court's standard for determining whether a bishop is a Vatican employee ought to be exclusively secular.

Based on common law, Lena lists fourteen such criteria, including:

- Who pays the individual's salary;
- Who provides benefits;
- Tax treatment;
- Who provides the worker's tools and "instrumentalities";
- Where the work is located;
- How much discretion the individual has over when and how long to work;
- Whether the work is usually done without supervision;
- Whether the parties believe they have an employment relationship.

By none of those tests, Lena contends, can a bishop be considered a Vatican employee. The Vatican doesn't pay his salary, it doesn't provide health insurance or other benefits, it's not responsible for withholding taxes, it doesn't provide an office or any tools, the work's not done in Rome, the Vatican exercises virtually no day-to-day oversight, and there's no employment contract. Legally speaking, dioceses are separate corporations with the bishop as the CEO.

To support that point in the specific case of Louisville, Lena includes a declaration from Brian Reynolds, the chancellor of the archdiocese, who states: "I do not believe the Archbishop is an employee of the Holy See. In addition, the Archbishop has never communicated to me, in any way, that he believes himself to be an employee of the Holy See."

Lena acknowledges that the Vatican and local bishops "cooperate" in the service of the worldwide Catholic church, but argues that "mere cooperation or coordination does not render a person an employee." In citing case law in support of that point, Lena offers the examples of independent contractors and franchisees to suggest that neither is an employee whose daily work is directly controlled by an employer.

In the same memo, Lena also insists that bishops are not Vatican officials. Among other things, he points to the *Regolamento Generale della Curia Romana*, essentially the Vatican's employee handbook, which contains a full list of Vatican officials -- and conspicuously, diocesan bishops are nowhere to be found.

Again, there are a couple of nuggets worth excavating.

First, Lena concedes there are numerous texts from ecumenical councils, papal documents, and Vatican instructions laying out policies bishops are supposed to follow. (Though he doesn't make the point, the Vatican's Congregation for Bishops actually holds an annual training session in Rome for newly appointed prelates from around the world.) Under civil law, Lena argues, the existence of such policies is usually considered evidence against an employment relationship -- since if an employer has the power to supervise a worker's daily activity, such detailed policies presumably wouldn't be necessary.

Second, Lena notes that bishops are appointed for life. (Official Catholic theology is once a bishop, always a bishop, which is why rogue bishops always raise the fear of schism.) That too, Lena says, supports the notion

that bishops aren't employees, since their irrevocable status implies independence.

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The other key issue in the O'Bryan case is whether bishops who reassigned predators and/or hid their crimes from the police were acting on the basis of explicit Vatican instructions. That's relevant because of something called the "discretionary exclusion" to tort liability -- basically meaning that a foreign state can't be held responsible for the personal judgment of its officials, but only their execution of official policy.

This is where the now-infamous Vatican document *Crimen Solicitationis* enters the picture. That document has been widely cited by critics, including the plaintiffs in the O'Bryan case, as a "smoking gun" proving that the cover-up stretched all the way to Rome.

First issued in 1922 and again in 1962, *Crimen* laid out procedures to be followed in cases involving solicitation of an immoral or illegal act in the confessional, not just for minors. In its final four paragraphs, the text asserted that the same procedures -- "with the change of those things which the nature of the matter necessarily requires" -- are also valid for the *crimen pessimum*, or "worst crime," which includes clergy sexual misconduct with children. Notoriously, the document insists that these procedures be surrounded by strict secrecy.

Peters puts *Crimen* under a microscope, concluding that nothing in it, nor in the 1917 Code of Canon Law which was in force at the time, prevented anyone from reporting priestly sex abuse to the police or other civil authorities. Further, he says, a review of all the documentation in the three cases in Kentucky which form the basis of the O'Bryan litigation reveal that *Crimen* was never invoked, and suggest that church officials may not have been aware it even existed.

Initially, Peters observes that neither the 1917 code nor *Crimen* expressly directed Catholics not to report crimes to civil authorities. The only other option is that it implicitly required not making a report, and he offers six arguments why that's not so:

- The provisions of *Crimen* apply only to formal canonical procedures, but nothing required a bishop to handle a given case formally rather than pastorally. If he went the pastoral route, the confidentiality provisions of *Crimen* wouldn't apply.
- Nothing prohibited a bishop from reporting a crime by a priest to the police before a canonical proceeding began.
- Church teaching explicitly includes a basic principle that Catholics should comply with all just laws in a civil society.
- A bishop could always suspend a canonical proceeding if he felt there was any conflict with reporting a crime to the police.
- The clause in *Crimen* about a "change of those things which the nature of the matter necessarily requires" provided plenty of flexibility for a bishop to cooperate with the police.
- Catholic moral and legal tradition recognizes certain exceptions to confidentiality requirements, including a risk to innocent third parties or if the secret is disproportionately burdensome to the bearer. (The only time those exceptions don't apply is the seal of the confessional.) A bishop could have invoked those exceptions to justify reporting sexual abuse of a minor to the police.

Though Peters never tries to answer the obvious question all this begs -- i.e., why bishops failed to report abuse to the police, if nothing stopped them from doing it -- his point is nonetheless clear: It wasn't because a Vatican policy tied their hands.

As background, Peters explains that the strong emphasis on secrecy in canon law is partly based on its

differences with the Anglo-Saxon common law tradition. In common law, much of the fact-finding process takes place at trial, through cross-examination before a jury and the public. Canonical proceedings are more akin to continental European systems, in which judges accumulate evidence in a series of hearings. In theory, that means the outcome should be less dependent on who's got the smarter lawyer, or who's better at plucking the right emotional chords in front of a jury. However, it also means the record is built over a long time, with correspondingly greater possibilities for contaminating witnesses. That's what confidentiality is meant to prevent, Peters says.

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In addition to the substantive issues, the District Court also has to resolve an explosive procedural question related to what lawyers call "discovery," meaning the process of taking formal depositions from potential witnesses and collecting documents.

The question before the court in Kentucky is whether to authorize plaintiffs' lawyers to depose Vatican officials, up to and including the pope himself -- and what to do if those officials refuse.

When *The New York Times* published documents back in March about the role of then-Cardinal Joseph Ratzinger, now Pope Benedict XVI, in the case of Fr. Lawrence Murphy in Milwaukee, McMurry swiftly filed a request to depose the pope, arguing that the Murphy documentation directly links him to sex abuse cases in the United States. McMurry has said he also wants to depose a host of other Vatican officials, including Cardinal Tarcisio Bertone, the Secretary of State; Cardinal William Levada, Prefect of the Congregation for the Doctrine of the Faith; and Archbishop Pietro Sambi, the pope's nuncio, or ambassador, in the United States.

Experts say that plaintiffs' lawyers in tort cases usually push for the broadest discovery process possible, on the theory that the threat of being forced to cough up embarrassing information is often enough to motivate defendants to seek a settlement.

Tom McNamara, a Denver-based attorney who specializes in litigation involving foreign governments, said it's an "real long-shot" that an American court would authorize deposing the pope himself, since there's a separate head-of-state immunity to such proceedings, and because the U.S. State Department would likely oppose it.

It's more realistic, he said, to think that a court might order depositions of other Vatican officials. American courts, McNamara said, have "an extremely broad standard" for approving requests for depositions -- usually, he said, the lone question is, "Can they discover something that might be relevant at trial?" (As a footnote, the loose standards for discovery are one reason that the Vatican arguably has more to fear from litigation in American courts than virtually anyplace else on earth.)

"I perceive a general shifting of the ground, with courts more amenable to these things," McNamara said, because of the adverse publicity surrounding the sexual abuse crisis.

Lena said, however, that when it comes to officials of foreign governments, courts have typically held that requests for depositions or for subpoenas for records have to be "narrowly tailored and circumspect," and that preference is usually given to the least invasive method possible of obtaining information.

One key issue in terms of discovery involves sequence. Will the court first rule on whether bishops are Vatican employees and whether they were acting under Vatican orders, and only then consider requests for depositions and subpoenas -- on the theory that there's no point wasting everybody's time if the suit is going to be tossed out? Or, will the court deal with depositions and subpoenas first, holding that some fact-finding is needed to answer those questions?

For obvious reasons, the defense inclines to the first view, the plaintiffs to the second.

Supposing the court does order some Vatican officials to be deposed, what happens if they say no? An American court can't compel someone in a foreign country to be deposed, but Joseph Dellapenna of Villanova University, who's written a book on suing foreign governments, said a court can do two things to force their hand:

- It can impose fines and then seize assets in the United States if the foreign party doesn't pay, though that would be tricky in the case of the Vatican. Technically, the only property in the United States directly owned by the Holy See is the papal embassy in Washington, and various diplomatic agreements treat embassies as exempt from such judgments.
- The court can also draw "adverse inferences" from a refusal to be deposed, which basically means it can assume the reason someone declined is because the evidence would be contrary to their interests. The court could then use that adverse inference as a basis for a negative judgment.

Dellapenna said that it's "rare, but not unheard of" for an American court to authorize depositions of foreign officials. In routine commercial cases, he said, foreign governments usually comply, but if they sense that the litigation is politically motivated, "they often just walk away."

"I suspect," Dellapenna said, "that would be the case with the Vatican."

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Looking down the line, it's not clear what the plaintiffs can realistically expect to collect, even if, against steep legal odds, they should somehow win a judgment against the Vatican. If the Vatican refused to pay, the plaintiffs could invoke a provision of the Foreign Sovereign Immunities Act that allows assets of a foreign government to be seized -- but those assets have to be located in the United States, and they have to be "related" to the action that produced the harm in the first place.

In other words, no court in America is going to put a lien on St. Peter's Basilica.

McNamara said that if the plaintiffs win a judgment, they could go the courts of another country where the Vatican has assets and ask for enforcement. However, the odds of, say, an Italian court compelling the Vatican to satisfy an American judgment are fairly long. Another possibility is that an American court could find that diocesan or parish property in this country somehow belongs to the Vatican, but Dellapenna said that a mounting body of case law wouldn't support that.

"When dioceses have gone bankrupt, judges have treated them as separate business enterprises. They haven't tried to bring the Vatican into it," he said. "It would be tough to explain why they ought to be treated differently in a tort case."

Of course, the promise of a payday is not the only reason abuse victims file these suits, and perhaps not the main one. For them, litigation is often about stimulating reform and preserving the historical record. Much of what we now know about the church's handling of sexual abuse cases is because civil courts or government commissions in various countries compelled dioceses to open up their files, and from the victims' point of view, the same logic would apply to the Vatican.

Lawyers also have many reasons for pursuing a given case, not all of which directly involve dollars and cents. Imagine, for example, the cachet that would come with being the first American attorney to depose the pope or

to win a judgment against the Vatican, even one that's ultimately impossible to collect.

In the same light, the Vatican has moved heaven and earth over the centuries to defend the pope's sovereign independence, and will almost certainly put up tenacious resistance to anything that might compromise that status -- almost regardless of what its real-world financial exposure might be.

In other words, this may be one of those lawsuits that really isn't all about the money.

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Finally, two points to ponder with regard to lawsuits against the Vatican, both of which fall into the category of possible unintended consequences.

First, let's assume a court holds that American bishops are actually agents of the Vatican. That might make it easier to hold the Vatican liable for the sexual abuse crisis, but consider its broader implication: Theoretically, it could mean that every bishop in the country, and perhaps every diocese, could assert sovereign immunity from most legal claims. In other words, this could be a classic case of cutting off one's nose to spite one's face -- making it far more complicated, not less, to hold the church accountable under American civil law for a vast range of matters.

Second, it's long been a key demand of victims' groups and other reformers that the Vatican should take a more direct role in resolving the crisis. For reasons outlined above, lawsuits against the Vatican arguably have the opposite effect. The more the Vatican seems to be exercising operational control over bishops and priests, the greater its legal exposure. Of course, one can argue that as a moral matter, fear of liability shouldn't be the primary concern. Still, the question can reasonably be asked: Are some reform pressures these days working at cross-purposes?

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