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CANON LAW IMPLICATIONS OF REAL ESTATE TRANSACTIONS—IMPACT OF THE NEW CANON LAW

REVEREND ADAM J. MAIDA, J.D.

I am here to talk about the canon law and its effect on civil law transactions, especially in the area of real estate. It was stated earlier that there are approximately 22 church property cases now being litigated in the country. That number probably can be multiplied by ten or twenty when the new Code of Canon Law is promulgated and everybody becomes aware of how remiss some of us have been in representing our respective dioceses.

The current Code of Canon Law was promulgated in 1918.¹ It remains operative today; it is the law of the Church by which we live. Unfortunately, lawyers for the Church have not been as aware of this law as they might have been. We have become accustomed to doing things our own way, ignoring the canon law. Since sanctions only rarely have been imposed as a result of not applying canon law in property issues, we have come to think that it has no meaning and that we can continue to do things the way we have been doing them. The reality, however, is that canon law is operative and must be applied when warranted.

In 1959, Pope John XXIII saw the need for a new law of the Church. Just as it was necessary for a Vatican Council to bring us up to date theologically, a new Code was necessary to put us in tune legally and

¹ See generally R. METZ, *WHAT IS CANON LAW?* 56-60 (1960). Prior to the current code, no official body of canon law had been devised since 1317. *Id.* at 56. Pope St. Pius X was the primary mover behind this undertaking. He ordered codification and appointed those who would be responsible for completing the task. E. JOMBART, *SUMMARY OF CANON LAW* 1 (1960).

practically. In 1964, Pope John established a commission to revise the 1918 Code.² In 1965, the Code Commission was formed; today, its work is complete. It has proposed a new Code of Canon Law that is now being evaluated by a select group of bishops throughout the world. The group will soon be gathering in Rome to comment on this proposed legislation which has evolved over these last 16 years. It is the best judgment of the experts that we will have a new Code by next year.

Just as in the currently operative Canons, the Universal Law of the Church is contained within the proposed Code of Canon Law. One small segment of that law, the administration of Church property, is contained in Canons 1205 to 1262 of the new Code. I will be talking about the aspects of these regulations that concern real estate transactions and conveyances. In the 1918 Code, there were only three Canons, Canons 1530, 1531, and 1532 which governed the alienation of Church property in real estate transactions.³ That has been expanded in the proposed New Code to nine Canons, Canons 1241 to 1249.

Although we are obviously bound by the law of a given jurisdiction, the reality is that we are Church people first. As an attorney representing a diocese, the law of the Church must be foremost in your minds if you are to represent your clients in their best interest. Therefore, it is incumbent upon you at least to be aware of these new canonical regulations concerning the conveyance of Church property.

As I mentioned earlier, some of us might have been negligent in this regard. With respect to religious orders, however, there has been greater canonical compliance in civil law conveyances and real estate transactions. Arguably, the reason for this is that many religious orders have their headquarters in Rome, right across the street from the Pope. They have, therefore, been more accountable to and more observant of the canon law. Actually, I have heard that about 60 percent of the religious congregations in our country do abide by the canons that affect the administration of Church property. And for the first time, within the last 2 years, a couple of dioceses have begun to recognize the need to comply with Church law in this area. They have surprised the people in Rome because they have sent in the proper petitions for the sale of Church properties. This has almost never happened in the United States. Usually we have conveyed property without any concurrence from the Holy See.

This is the framework for our analysis: there is a need for civil law transactions to comply with canonical reality and we must respond to that need. To facilitate our discussion, let us begin by defining some common concepts. The most important term or concept is that of the moral

² See HUIZING, *The Reform of Canon Law*, in 8 PASTORAL REFORM IN CHURCH GOVERNMENT 96 (1965).

³ See 2 J. ABBO & J. HANNAN, *THE SACRED CANONS* 735-39 (2d rev. ed. 1960).

person. In the new Code, we are going to call this legal construct a public-juridic person. The entire world in which the Church operates can be divided into a system of moral or public-juridic persons. Just as the United States is divided into states, counties, municipalities, and so forth, so is the Church. The whole Church is divided into these moral or public-juridic persons. The most inclusive public-juridic person is the Holy See because he is the public person who has jurisdiction over all other public-juridic persons. More practically, for our purposes, the law of the Church provides that when a diocese or parish is created, it automatically becomes a public-juridic person in the Church.

When a group of religious-minded people come together and ask to have a public identity in the Church, they send constitutions to Rome for approval. The Holy Father replies, "You exist as a separate entity within the Church." From the moment he accepts their constitution, they are a public-juridic person in the Church. When the Jesuits decide to create five or six provinces in a country, each one of those provinces, when they are constituted by the competent authority of the Jesuit Fathers, becomes a public-juridic person in the Church.

For property considerations, the significance of this concept is that all Church property belongs to some public-juridic person. Further, each public-juridic person in the Church has an administrator responsible for the property held by that public-juridic person. In a parish, this administrator is the pastor; in the diocese, it is the bishop; and in Rome, the Holy See. In a religious congregation, this administrator is the major superior and council, and in a province, the provincial and council.

This concept of a public-juridic person has been compared, in civil law, to the notion of a corporation, and we sometimes call this public-juridic person a canonical or Church corporation. A public-juridic person, like a corporation, is a legal construct, a person in law, but not in fact. Like a corporation, it can only act through its human agents, the administrators previously denominated. Just as corporate officials have a fiduciary obligation to their corporation, canonical administrators must hold all the property for the benefit of their public-juridic person in accordance with the law of the Church governing property administration.

That is the concept of a moral or a public-juridic person, together with its attendant concepts of how Church property is owned (only by public-juridic persons) and administered (only by the proper canonical administrator of the appropriate public-juridic person). Now, let us refine some of these concepts and definitions a bit further. The term "temporal goods," for our purposes, means nothing more than real or personal property, wherever it exists. The term, "ecclesiastical goods," simply means certain goods that are subject to the authority of the Church because they pertain to some moral or public-juridic person. As a result, the appropriate canonical administrator has the responsibility to administer those ec-

clesiastical goods according to the law of the Church.

When we talk about ownership in Church law, we refer to the right to enjoy it and to dispose of it, just as in civil law. When we talk about investments in canon law, we make a distinction between temporary and permanent investments. Some significant distinctions in the area of investments are between free capital and stable capital, temporary investments and permanent investments, working capital and fixed capital. If a canonical administrator is dealing with free capital, he can spend \$10 million tomorrow, and not be accountable to anyone. If the administrator of a hospital needs a CAT scanner which costs a million dollars, he or she does not need the permission of the Holy Father or anybody else in the Church since that CAT scanner is going to be paid from the operating capital of the hospital. There are no canonical restrictions on the use of working capital except that it be used for the proper purpose of the public-juridic person involved.

Suppose, however, that a bishop in the United States wants to sell a piece of real property to ABC Corporation and the sales price is \$20,000. Today, for a valid conveyance under canon law, the administrator must seek the permission of the Holy See. That is the state of the law—no permission is required for expending free capital, but it definitely is required for the expenditure of stable capital above a certain dollar amount. Thus, there is a different set of rules applicable to stable or fixed capital as compared to free capital.

We are discussing the “alienation,” which is referred to as “conveyance” in the New Code. When you deal with real estate, you deal with something that is stable, that belongs to the patrimony of the Church. This distinction goes back to pagan Roman times and the Roman law from which our first principles of canon law derive. To sell “sacred” property was a very significant act, since the pagans would not in any way want to challenge the gods or misuse this property in fear of the consequences in their own pagan mythology. The result was well-enunciated rules as to how to deal with “consecrated” property.

In the early Church, it was decided that if any property, which belongs to God and is in some way sacred, is going to be sold, no one person should ever be powerful enough to make that type of decision. Indeed, no one person is wise enough. The sale of such property has an importance beyond this world. Therefore, in the early Church, before a bishop could sell a piece of diocesan property, he had to consult with all the bishops of the dioceses that touched the boundaries of his diocese. After securing their concurrence, he could say, “I am acting prudently. I am acting out of necessity and in the best interests of the Church.” From this early Church practice arose the idea that whenever we alienate or convey Church property we need to be especially concerned that we do it with prudence.

Under the present law, whenever Church property is sold or encumbered so that the right of ownership is in any way compromised, if the property has a market value beyond \$15,000, the permission of the Holy See is necessary.⁴ In 1963, the Holy See declared that this institute did not make sense in an inflationary economy; that it must be updated. Since the economies of Africa, India, Western Europe, and the United States are all different, the Holy See went to the bishops of each country and asked, "What is the prudent amount, for your country, beyond which we should require the permission of Rome? What is the discretionary amount which should be decided by the local bishop?" The American bishops have not yet responded to that question. You can imagine the problem: We are talking about a rather large country, one with many differing economic regions and needs.

In Canada, the bishops have come together, and they have decided that \$300,000 is a reasonable sum. If there is to be a conveyance of real property worth more than \$300,000, the Holy See must grant permission for there to be a valid conveyance of the property. In the canonical opinions I have rendered, I have analogized to Canada since their economy is similar to ours. I have told bishops, "If the sum is \$300,000 or lower you can move on your own, without bothering the Holy See."

You might say, "That is fine, Father, but we have been selling \$1 million pieces of property and nobody has bothered us for canonical approvals." While that may be true, following the proper canonical regulations does make a difference. I have been in courtrooms concerning substantial property disputes, and each time, the rule of law applied to resolve the dispute has been the applicable canon law. The attorneys will ask the canonical administrator, the bishop or the pastor, for example, "Did you follow canonical procedures when you conveyed this property? Did you obtain the required ecclesiastical approval?" If they have not, the Church holds the transaction to be invalid. A decree from Rome can be obtained voiding such transaction *ab initio*, and such decrees are normally recognized in American courts.⁵

Bishops and other canonical administrators are charged with the responsibility of administering the properties of public-juridic persons pursuant to the laws of the Church, and these administrators get into trouble if they do not. You might say, "Father, it has always been done this way. There is no bishop in the country that does it your way." I can only say that the law of the Church *is* the law of the Church. It has not been abrogated, nor has it been modified for us. Even our practice of ignoring

⁴ See 2 J. ABBO & J. HANNAN, *supra* note 3, at 737. Under the present Code, Canon 1532 sets the monetary figure. *Id.*

⁵ See, e.g., *Canovaro v. Brothers of Order of St. Augustine*, 326 Pa. 76, 81-82, 191 A. 140, 144 (1937).

it will not make it go away. It is there and it is applicable.

Why will this problem be any different with the new law? The new law, when it is promulgated, will attract attention. People are going to read it because they are disgruntled with a Church transaction and are seeking a way to challenge it. We are living in a very litigious society, and there is no way we can avoid conflict in our civil forum if we do not follow our own rules. I would feel constrained to advise civil lawyers to be up to date on the canon law. I recently have authored a chapter in an Aspen Publications book on hospital contracts in which I describe the applicable canonical concerns for Catholic health care facilities. The publishers asked me to explain the canonical procedures that govern its property transactions because they perceive a need for civil lawyers to be informed so that in structuring transactions involving Catholic hospital property, they can construct the civil law documents in a way that would reflect canonical concerns.

In one particular chapter, for instance, "Entering into Bonding Agreements," I recommend that since bonding counsel are asked to give their opinion in writing that the bond issue complies with applicable laws, there be obtained a letter from a canon lawyer saying the laws of the Church have been followed. Before you go on with a \$10 million or \$30 million bonding issue, be sure that the proper Church authorities have been apprised and the circumstances of the investment disclosed.

One case has the Mother General attaching her signature, as Mother General of a religious congregation, to a \$30 million bond offering at some hospital. No religious congregation has those proceeds at its disposal. What the Mother General has done is effectively to tie her Order down for the next 30 years. Her Order will not, in the foreseeable future, have the freedom to administer its funds for the good of the Order. Such things happen, and if we follow canonical regulations, we will be alerted to concerns necessary for representing our clients in their best interests.

One final item in the New Code that I would like to discuss is the idea of a diocesan administrative council. The New Code requires the bishop of each diocese to have a council of administration which consists of three people, among whom are experts in civil law and financial matters. The function of the administrative council is to advise the bishop in the administration of the diocese. In addition, there are various activities, called extraordinary administrative transactions, which the bishop cannot undertake without the consent of the council.

In conclusion, I would like to suggest that since there are many areas that I see as a civil lawyer and canon lawyer that we must be conscious of, a significant portion of our meeting next year be devoted to the New Code.