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ALIENATION OF CHURCH PROPERTY UNDER THE NEW CODE OF CANON LAW

REVEREND DONALD HEINTSCHEL*

I deeply appreciate the invitation to address such an august group of lawyers. I must begin with a disclaimer. Perhaps that's the best way for me to express it.

As you know, the new Code of Canon Law makes provision in 84 of the Canons for Conferences of Bishops to make particular law for their own countries.

Our own Conference of Bishops has been doing a great deal over the last three or four years to develop particular law in applying the general law of the Church to the United States.

One area that has been of considerable concern was the whole area of the temporal administration of church property, including alienation and what we call ordinary and extraordinary administration.

The Canonical Affairs Committee of the Conference of Bishops, plus a special ad hoc committee made up of bishops who were canon and civil lawyers, spent two years developing an exegesis and setting forth numbers on the whole issue of the question of alienation and ordinary and extraordinary administration.

This was discussed at last November's general meeting of the Bishops, and, as is done in these cases, the proposal was submitted to the Holy See in December for what is called a "Recognitio." This means that the Holy See reviews it and either authorizes it, rejects it, or is willing to consider other methods of implementing the law.

I had built my presentation upon that proposed legislation. Only last Thursday we received word from Rome that the "Recognitio" needed to be reconsidered, and for that reason, we had to begin another study which would enable us in some way to meet what seems to be the best

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estimate of the Congregation for the Clergy on what alienation should be.

In sharing this information with you I urge that you keep it confidential until something is worked out. My presentation was originally based upon the position of the Conference, and now there is no "position" and we have no numbers. It is very difficult to know what to say when you do not have numbers because numbers are essential.

Secondly, I would say this because there has been some confusion in the minds of some attorneys, concerning as well some documents after the Second Vatican Council, to the effect that what the Conference of Bishops does in no way affects religious communities of men or women. That is a separate entity in and of itself; we understand its final resolution will be settled by the Congregation for Religious, based upon geographical regionalization.

Traditionally there had been a common number which was shared by dioceses and by religious communities. That is no longer true. The offices in Rome which grant the *Nihil Obstat*—the permission, if you will, for alienation—are two separate offices.

For dioceses it is the Congregation for the Clergy, and for religious communities it is the Congregation for Religious. Our concern here, then, is the issue of where and for whom the law is written.

The questions raised by Tom are very important civil law questions, with some canon law issues involved; but the primary thrust of the canon law concerns the pastoral ministry of the bishop as steward and trust officer of the treasury of the Church.

This is reflected in the language prior to the Code in a document that is entitled "The Directory on the Pastoral Ministry of Bishops."

The concern of the law on alienation or leasing and extraordinary administration is about that office of the bishop, that facet of the bishop's office. The bishop's office is described as the office of teacher or prophet, of governor or king, and then as communicator of the reality of the good news. But here we find, in this document written by and approved by Pope Paul VI, the underlying spirit of the law on alienation.

The bishop should take suitable measures that the faithful may be educated to a sense of participation and coordination also as regards the temporal goods which the Church needs to fulfill her purpose so that all, according to their individual capacities, consider themselves co-responsible both for the economic support of the Church community and its works and charities, as well as the preservation, increase, and proper administration of corporate temporalities.

Because of his position as head of a particular church, the bishop sees that he is serving charity and ecclesial fellowship by assuming his responsibility for the care and supervision of the administration of temporalities which are ordered to divine worship, charity, and the apostolate of the Church.

Then it goes on to describe in five numbers the areas that this temporal administration is to be directed towards; how the bishop is to exercise this corporate, fiscal, temporal management.

Implicit in the new law also are new structures which are applications, as it were, of the principle of subsidiarity but likewise applications of the principles of co-responsibility.

In many temporal issues the bishop is forbidden to act alone. He is surrounded in the new law by three different kinds of advisors or experts. He may have in his chancery a financial advisor, a fiscal officer, lay or clerical, male or female, whose primary task is the day-to-day sharing with the bishop in the temporal administration of the local church.

At the second consultative level we have the Financial Council. This is a group of lay experts in finance and law—at least three—who are appointed for a term of five years to advise the bishop in all temporal matters of major moment.

Secondly, the bishop must have his diocesan consultors. This is one of the areas of conflict in the redrafting of the law and has yet to be resolved within the law. It was hoped in the redrafting that the priests' council or priest senate would be identical with the consultors.

In the consultations on the schema this was not clear. So the document, the law, compromises: the consultors must be chosen by the bishop from the priest senate, but the priest senate is not necessarily the consultors.

Now these two groups—the group that is the Financial Council and the group that is the consultors—in matters of major moment or what we would call technically extraordinary administration (and this is where numbers come in, and I have no numbers to give you) are required for the validity of the act. The bishop cannot act independently of seeking the consent and counsel of his financial advisor or Council and his diocesan consultors.

Now there's a question here of civil law record. It would seem to me that traditionally in chancery policy in these kinds of meetings, the secretary is present—perhaps the chancellor, to act as secretary and to record the vote—so that there would be a record, at least in canon law certainly valid, but also in civil law. Thus, there are minutes of a formal decision as valid to the procedure on alienation.

What is alienation?

One of the difficulties we face is to define the term. There are many definitions. In canon law we say *auctores scinduntur*: the authors are split. The new Code does not give a direct definition as such, but rather speaks about it as something which is encumbering or conveying the stable patrimony of the Church or doing something which makes the liquid assets or the assets of the local church less than they were prior to this particular action.

At last November's meeting of the Bishops, as well as in meetings of the Committee, there was a great deal of discussion as to the meaning of the word "alienation" and the meaning of the word "stable patrimony" for the simple reason that implied in the canon law is a different system of governance and management and possession than is true of common law countries.

The basis of the canon law is founded in real property. The whole foundation comes out of the benefice system of the Middle Ages which was a concept of real property.

When you come to the management of a local church, certainly there is real property, but there is also property which may be capital investment in stocks or other forms of investment that are not, in a sense—at least as this law would see it—to be considered as real property.

Likewise, the law is concerned about establishing what are called minimums (and this is new to the new Code) and maximums. Now on a line, for example, from one to ten, if one to five is the minimum, that means that within that limitation the local bishop may make for his own church specific legislation by which he will deal with the minimums.

Many dioceses have rules, either in virtue of synod law or particular law promulgated by the bishop, which cover, for example, building a church or building a school or some kind of investment which alienates the assets of the diocese but, say, at a minimal amount.

Now, once you go from minimum to maximum you get into an area where not only are diocesan regulations necessary for the fulfillment of the law of the Code, but also the direct intervention of the Holy See. It then is concerned that this act of alienating the stable patrimony of a diocese not be harmful to the diocese itself.

The purpose of the law is that what the Church has been given remain for her use in proclaiming the good news, and that all who stand in any area of temporal administration not use what they have for themselves. They are servants and stewards of the assets, and the assets must be used for carrying out the mission and ministry of the good news. That is the reason for the checks and balances.

You will also find in the Code of Canon Law that you could have a question of serious alienation involving something that, as far as actual worth is concerned, may be minimal.

I can think of an example: a battered sterling silver chalice that was used by the Jesuit martyrs of North America, a precious relic, in and of itself without much intrinsic value—\$5 or \$10—yet in the eyes of the Church a great treasure. To alienate that kind of treasure would more than likely require the permission of the Holy See; and it probably would not be granted. For example, if it were to be given to a museum to be displayed as a part of the history of, say, Northern Michigan or Ontario and it is in the possession of the Church, permission would not be given.

So what we are dealing with here is not only the actual fact of the ownership of property or money, but also precious relics or what are called votive offerings or gifts given to the Church in virtue of a vow.

We do not have much of that in this country, but there are people who in prayer promise funds if their prayer is answered. It is a Christian token, a vow made to give to the Church so much money or a building or something like that.

It is more than a contract. It is a sacred contract. The law speaks of it as a vow, and vows are types of contracts—but sacred contracts rather than purely civil contracts.

The other issue is what constitutes for the Church ordinary administration. This is the day-to-day business of the Church. It is like that area below the minimum numbers; while that which is called extraordinary administration is beyond the ordinary, everyday kind of care of the diocese.

Another area often defined as stable patrimony is designated funds. For example, many dioceses today will have a designated fund for the retirement of priests or a designated fund for some other purpose within the Church, a fund set aside for a specific purpose.

It is, I would say, the common opinion of canonists that although those funds may not be real property—they merely may be designated accounts—they constitute the stable patrimony. The reason in canon law for this stability is to protect the vested interest of those who are guaranteed some kind of protection through the use of these funds.

It is most difficult to go much beyond that. The hope of the Committee on Canonical Affairs, and more particularly the task force on alienation, is to come up with some specific definitions of these realities which could become particular law for the United States.

I was surprised, very surprised, at the interest of the U. S. Bishops in the whole area of alienation. Traditionally, going back into the 19th Century (and we must remember that we are a very young country), when the Church was under a mission mandate rather than under the Congregation for Bishops, bishops freely moved funds and alienated and borrowed and so forth without seeking permission. That kind of attitude seemed to have come into the mind of the Church and the living of this part of the law within the Church. Yet there is an awareness, to which you diocesan lawyers must be sensitive, among the bishops today that this law has become quite concrete; they are seriously concerned about its implementation.

Hardly a week goes by when I do not receive a question from someone in a chancery or the bishop himself with regard to the question of alienation. The difficulty has been that we did not have the numbers. We had what had been the numbers—one million dollars—and that is all we had. We are now somewhat in that same position, so it is difficult to clar-

ify this matter. Perhaps the better thing for me to do would be just to bring this to a close and listen to your questions and try to answer them. Please realize that I do not necessarily have all the answers. There is much work yet to be done in this part of the law. If I were to have Bishop Maida and Bishop Griffin and three or four other canonists up here who worked on this, I am sure that I could get a different opinion from each with regard to the specific issues.

That is one of the reasons we need to clarify the points where there is confusion and misunderstanding.

