

October 2017

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Recommended Citation

Reverend Edward L. Buelt and Charles Goldberg (1995) "Canon Law & Civil Law Interface: Diocesan Corporations," *The Catholic Lawyer*. Vol. 36 : No. 1 , Article 6.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol36/iss1/6>

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CANON LAW & CIVIL LAW INTERFACE: DIOCESAN CORPORATIONS

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INTRODUCTION

Several years ago, the Archdiocese of Denver formally adopted written canonical statutes to establish certain of its civil corporations as public juridic persons. This discussion focuses on the canon law requirements for juridic persons and the reasons for creating canonical statutes. It also reviews the Archdiocese's articles of incorporation and by-laws and discusses the role they play in limiting the civil liability of the Archdiocese, while preserving its Catholic autonomy.

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I. DEVELOPMENT OF THE ARCHDIOCESAN CORPORATION: THE ARCHBISHOP'S CONCERNS

Early in his administration, J. Francis Stafford, the Archbishop of Denver, mandated that the Archdiocesan counsel study the status of all archdiocesan corporations.¹ Specifically, the Archbishop desired that archdiocesan corporations be structured civilly to protect against internal or external threat to their Catholic autonomy. He desired that they be truly Catholic in law, and not simply in fact or in name. Finally, he sought to ensure that the laity's role in the life of the Church, a role which the Second Vatican Council² and the Code of Canon Law³ acknowledges and promotes, be respected and enshrined in all activities of these corporations.

As the counsel's study revealed, it appeared that the revised Code of Canon Law created an entirely new entity in the life of the Church—the public juridic person.⁴ Thus, the most effective response to the Archbishop's concerns was to establish archdiocesan corporations as both public juridic persons according to the provisions of the Code of Canon Law,⁵ and as civil corporations. First, to preserve Catholic autonomy, we sought a means to ensure that all archdiocesan corporations understood, accepted, and advanced the doctrinal and moral teaching of the Catholic Church in their governance, management, administration, and activity.

¹ See ADAM J. MAIDA & NICHOLAS P. CAFARDI, CHURCH PROPERTY, CHURCH FINANCES, AND CHURCH-RELATED CORPORATIONS 128 (1984) ("The civil law status of dioceses . . . depends on what legal structure is assigned to them by action of the Church, acting in accordance with the applicable civil law."). Today, the corporation sole is the device used by many American jurisdictions to allow for the incorporation of the Church as a distinct civil law entity. See Paul G. Kauper and Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1500, 1541 (1973). Some states, however, do not permit the corporation sole; therefore, a diocese could create a corporation to hold title to its assets under the states' nonprofit corporation law. *Id.* at 1554. Notwithstanding the existence of the corporation sole and nonprofit corporation statutes, many dioceses choose to operate through common law charitable trusts. See MAIDA & CAFARDI, *supra*, at 130.

² See DECREE ON THE APOSTOLATE OF THE LAITY, reprinted in THE DOCUMENTS OF VATICAN II 489 (Walter M. Abbot gen. ed. & Joseph Gallagher trans. ed., 1966) (urging laity's increased role in Church).

³ See JAMES A. CORDEN, AN INTRODUCTION TO CANON LAW 35 (1991) ("The key and controlling document in the canon law of the Western church is the Code of Canon Law which was promulgated by Pope John Paul II in 1983."); Reverend Francis G. Morrissey, *The Laity in the New Code of Canon Law*, in THE NEW CANON LAW: PERSPECTIVES ON THE LAW, RELIGIOUS LIFE, AND THE LAITY 36, 47 (1983) ("[L]aypeople share in the church's threefold mission of teaching, sanctifying, and governing."). In contrast to the 1917 Code of Canon Law, the 1983 Code devoted far greater attention to the laity and their rights and obligations in the Church. *Id.*

⁴ See *infra* Part II (discussing public juridic persons).

⁵ See MAIDA & CAFARDI, *supra* note 1, at 148. Despite popular misconceptions to the contrary, it does not necessarily follow that all Church corporations are public juridic persons. *Id.*

We also desired that these corporations function in accordance with the canon law of the Church. Therefore, we decided that the doctrinal and moral teachings of the Catholic Church and the Archbishop of Denver would be the founding principles of all our archdiocesan corporations—their *raison d'être*. We also determined that the governing principles of these corporations would be the canon law of the Church and the particular norms of the Archbishop. Defining the founding and governing principles in this manner, in effect, assured that these corporations would be, by their nature, Catholic.

With respect to the Archbishop's second concern, we sought a means to ensure that this Catholic naturehood was respected in both canon and civil law—not merely *de facto*, but also *de jure*. While it was essential that all archdiocesan corporations be owned, controlled, affiliated, or sponsored by the Archdiocese of Denver, it was imperative that their governance, management, administration, and ministry be in the name of the Archbishop of Denver. We sought a means to ensure that their activity was truly the ministry of the Archbishop. To achieve this goal, it was necessary that Catholicism be enshrined in law—first canonical, and then civil. Constituting archdiocesan corporations as public juridic persons presented a new means to canonically inculcate the governance, management, administration, and activity of the entity with its Catholic naturehood. Furthermore, it provided the means to establish a bridge between the juridic person canonically constituted and the civil incorporation of the same.

With regard to the Archbishop's third concern, preserving the role of the laity, we needed to ensure respect for the broadest role of apostolic action on the part of the laity in the life of the Church. By the use of juridic persons, it is possible for the laity to function on behalf of the Church, in the name of the Church, and as the Church.⁶

II. JURIDIC PERSONS UNDER THE CODE OF CANON LAW

A. Definition

The canon law governing juridic persons is found in the Code of Canon Law, Book 1, General Norms.⁷ According to canon 113, the Church contains entities known as "juridic persons."⁸ While the nature of the juridic person is not specifically defined, canon 113 notes that a juridic

⁶ Cf. CORIDEN, *supra* note 3, at 58 (citing 1983 CODE cc.224-231). The 1983 Code lists the rights and responsibilities specific to lay members of the Church, which fall into two categories: the rights and duties proper to the lay state and those related to knowledge of the teachings of the Church. *Id.*

⁷ See 1983 CODE cc.113-123.

⁸ *Id.* c.113, § 2. This canon clearly separates juridic persons from physical persons, thereby establishing the "fictitious person" concept in canon law. *See id.*

person is the subject of obligations and rights which correspond to its nature.⁹ Canon 114 specifies that juridic persons are ordered toward a purpose congruent with that of the Church, and transcending the purpose of the individuals who constitute it.¹⁰ From this and other indications in canons 113 and 114, there are four essential elements that constitute a juridic person:¹¹ A juridic person is (1) an aggregate of persons or things; (2) an artificial entity distinct from the physical persons who constitute it, administer it, or benefit from it; (3) established either by the law itself or by a competent ecclesiastical authority for pious, apostolic, or charitable purposes; and (4) endowed with juridic capacity, in the sense that it is a subject of rights and obligations in the Church.

Juridic persons are either aggregates of persons or things.¹² In canon law, an aggregate of persons is comprised of people. Thus, persons are the foundation of an artificially conceived reality.¹³ As an aggregate of persons, a juridic person is "created" when at least three physical persons intentionally join together and unite in a common pious, apostolic, or charitable objective.¹⁴ As an aggregate of things, on the other hand, consists of goods, property, or physical or spiritual resources dedicated to a pious, apostolic, or charitable end.¹⁵

As noted, juridic persons must have a purpose that is in accordance with the mission of the Church and which transcends the purpose of the individuals who constitute it, administer it, or benefit from it.¹⁶ Canon 1254 states that "the following ends are especially proper to the Church: to order divine worship; to provide decent support for the clergy and other ministers; to perform the works of the sacred apostolate and of charity, especially towards the needy."¹⁷ Thus, for an aggregate of persons to qualify as a juridic person, the intention to unite as a juridic person must be an intention, at least in a broad capacity, which is congruent with and in the service of these ends. Likewise, for an aggregate of goods to qualify as a juridic person, all goods and resources must be dedicated to ends congruent with the mission of the Church.

⁹ *Id.* "The main point to note about this description is that juridic persons are referred to as the subject of their own rights and duties." MAIDA & CAFARDI, *supra* note 1, at 22.

¹⁰ See 1983 CODE c.114, § 1.

¹¹ See *id.* cc.113-114.

¹² See *id.* c.115, § 1.

¹³ See MAIDA & CAFARDI, *supra* note 1, at 26. "A . . . juridic person is a creature of law, having no existence and no rights of its own apart from those given by law It is a person only in the legal sense, not in reality. Like a corporation, the . . . juridic person must act through human agents." *Id.*

¹⁴ See 1983 CODE c.115, § 2.

¹⁵ See *id.* c.115, § 3.

¹⁶ See *id.* c.114, § 1.

¹⁷ *Id.* c.1254, § 2.

Due to its juridical capacity, the juridic person can exercise rights and is bound by obligations in law.¹⁸ Such rights and obligations fall within two categories.¹⁹ First, they are rights and obligations of faith—those that arise from the Catholic nature of the entity and stipulate that all government, management, administration, and activity of the juridic person remain faithful to Catholicism.²⁰ Second, they are rights and obligations “of administration”²¹—rights and obligations to engage in activity which advances the specific civil goals of the juridic person, including the capacity to own property and enter into contracts, and the ability to sue or be sued.²²

B. *Public and Private Juridic Persons*

In canon law, there is a distinction between public and private juridic persons.²³ Canon 116 lists the four characteristics of public juridic personhood: A public juridic person (1) is an aggregate of persons or things;²⁴ (2) is constituted by the law or by a competent ecclesiastical authority;²⁵ (3) operates within express limits set either by the law or by such ecclesiastical authority;²⁶ and (4) fulfills a function which is entrusted to it by the Church, in the name of the Church, and in view of the common good.²⁷ When it is said that a public juridic person functions “in the name of the Church,”²⁸ such person functions in the name of the authority of the Church. This factor is central to understanding the nature of the public juridic person. According to Italian canonist Francisco Cacolpomario, to say that a public juridic person acts in the name of the Church means that “its activity is established by the Church; it is an action of the Church herself; it is the Church herself which acts in the public juridic person.”

The key to understanding the canonical difference between public and private juridic persons, therefore, lies in the degree of association

¹⁸ See *id.* c.113, § 2.

¹⁹ See MAIDA & CAFARDI, *supra* note 1, at 213 (noting that obligations of canonical stewards of religious institutes or dioceses include faith and administrative obligations).

²⁰ See *id.* “Sponsored apostolates should be publicly identified as Catholic and should act as corporations in conformity with the teachings of the Church.” *Id.*

²¹ See *id.*

²² See *id.* (noting that administrative obligations deal with canonical requirement that fiscal well-being of institution be protected, particularly against improper alienation).

²³ See 1983 CODE c.116, § 1. In the United States, however, private juridic persons are rare in the Church. MAIDA & CAFARDI, *supra* note 1, at 22.

²⁴ 1983 CODE c.116, § 1.

²⁵ *Id.* c.116, § 2.

²⁶ *Id.* c.116, § 1.

²⁷ *Id.*

²⁸ See *id.*

with the hierarchical authority of the Church.²⁹ A public juridic person is completely dependent upon the hierarchical authority for its governance, management, administration, and ministry.

The distinction between public and private juridic persons is entirely new to the revised Code of Canon Law.³⁰ The consequences of this new dichotomy in terms of understanding, defining, and administering the life of the Church, both in the canonical and civil spheres, have only recently started to be explored. Therefore, it is important to discuss the additional canonical implications of constituting aggregates of persons or things as public juridic persons.

C. Canonical Implications of Public Juridic Persons

Both dioceses and parishes are, under canon law, public juridic persons.³¹ They are, however, wholly distinct and separate public juridic persons. Similarly, canon law would not foresee, nor permit, the notion of corporation sole.³² Therefore, when a competent ecclesiastical authority constitutes an aggregate of persons or goods as a public juridic person, that public juridic person is *de facto* and *de jure* distinct, and, therefore, separate from the diocese.³³ Yet, that same canonical authority has the canonical power to oversee the public juridic persons dependent on him, establish specific limits for public juridic persons subject to him, and approve their statutes.³⁴

Consequently, this canonical authority can ensure that the public juridic person's rights and obligations defined in the Code of Canon Law are protected, and that all other rights and obligations accorded to it maintain their Catholic nature. Thus, the Catholic autonomy and Catholic activity of the public juridic person are preserved. Indeed, canon 1276 of the Code mandates strict supervision over the administration of the juridic persons' goods, with due regard for legitimate titles attributing even more significant rights to the bishop.³⁵

Public juridic persons function in the name of the competent ecclesiastical authority within the limits set by such authority.³⁶ Therefore,

²⁹ See MAIDA & CAFARDI, *supra* note 1, at 22-23 (noting distinctions between private and public juridic persons, and that public juridic persons can act in name of Church while private juridic persons cannot).

³⁰ Cf. 1983 CODE, c.6, § 1 (noting that provisions of 1983 Code abrogate any contrary provision in 1917 Code.)

³¹ See MAIDA & CAFARDI, *supra* note 1, at 23 ("A diocese or a parish would be an example of an aggregate of natural persons that is a . . . public juridic person.")

³² See *id.* at 25-26 (discussing 1974 Letter from Prefects of Roman Congregation of Religious and Catholic Education to President of National Conference of Catholic Bishops).

³³ See 1983 CODE c.114, § 1.

³⁴ See *id.* cc.114, 1276.

³⁵ See *id.* c.1276, § 1.

³⁶ See *id.* c.116.

constituting an aggregate that satisfies the criteria for status as a public juridic person³⁷ permits the bishop to exercise maximum supervisory and governing authority over those public juridic persons.³⁸ However, *de jure* public juridic persons are separate from the diocese because they bear a juridic capacity wholly separate from that of the diocese or any other juridic person. Therefore, canonically, it seems that the diocese's liability for the activities of the public juridic person may be eliminated altogether.

Additionally, when the law or the competent ecclesiastical authority constitutes an entity as a public juridic person, the so-called goods of that public juridic person *ipso jure* and *ipso facto* become ecclesiastical goods.³⁹ According to canon law, ecclesiastical goods are all "temporal goods which belong to . . . public juridic persons."⁴⁰ Therefore, the acquisition, administration, and alienation of all temporal goods⁴¹ of the juridic person must be entirely regulated by the provisions of the Code of Canon Law.⁴²

D. Organization of the Public Juridic Person

Canon 117 states that no aggregate of persons or things which seeks juridic personhood is to be constituted as such without approval of its statutes.⁴³ Canon 94 provides the necessary prerequisites for the drafting of those statutes.⁴⁴ "Statutes in the proper sense are ordinances which are established in aggregates of persons or things according to the norm of law by which their purpose, constitution, government and operation are defined."⁴⁵ To develop statutes for public juridic persons in the Archdiocese of Denver, we followed the outline provided in this canon.

³⁷ See *supra* subpart II(A) (discussing necessary criteria for aggregate of persons or things to qualify as juridic persons); see also 1983 CODE c.116.

³⁸ See 1983 CODE c.1279, § 1.

³⁹ See *id.* c.1257, § 1 ("all temporal goods which belong to . . . public juridic persons within the Church are ecclesiastical goods"); CORDEN, *supra* note 3, at 166 ("Goods which belong to individuals, lay or clerical, or to private juridic persons, are not ecclesiastical goods and therefore are not subject to these canons.").

⁴⁰ See 1983 CODE, c. 1257 § 1.

⁴¹ See CORDEN, *supra* note 3, at 165. "Temporal goods, in contrast to spiritual goods, are those which have economic value." *Id.* Real estate, money, personal property, and entitlements are examples of temporal goods. *Id.*

⁴² See 1983 CODE c.1254, § 1. The Catholic Church has the right to acquire, administer, and alienate temporal goods to conduct divine worship, to provide for the support of its ministers, and to perform works of the apostolate and of charity. *Id.*

⁴³ See *id.* c.117.

⁴⁴ See *id.* c.94, § 3. When juridic persons are regulated by statutes, emanating from legislative power, their structure is governed by canon law. *Id.*

⁴⁵ See *id.* c.94, § 1. "[Statutes] resemble articles of incorporation and by laws. They bind only the members or those who govern the juridic person." CORDEN, *supra* note 3, at 162.

With respect to the constitution of the aggregate, there are separate roles for those who exercise some canonical function in the administration of the goods of the juridic person: The Archbishop of Denver governs the juridic person, the board of directors manages the affairs of the juridic person, and the administrator functions as its day-to-day administrator.⁴⁶ The specific responsibilities in the governance of the juridic person include the management of the juridic person by the board of directors and the duties of the finance council,⁴⁷ which are required by canon law for every public juridic person.⁴⁸ Furthermore, the responsibilities of the administrator, as provided for in the Code of Canon Law and as established by the Archbishop of Denver, are specifically defined.⁴⁹ Lastly, the statutes also set forth the universal and local law governing alienation of the ecclesiastical goods, and establish miscellaneous but, nevertheless, necessary provisions for the effective operation of the entity.⁵⁰

III. CIVIL CORPORATIONS

A. *Background and Goals*

Prior to drafting the juridic person statutes, the Archdiocese of Denver was, and continues to be, a Colorado corporation sole⁵¹ with five or six additional nonprofit corporations.⁵² Presently, the Archdiocese remains a corporation sole, but has been streamlined to eliminate, to some extent, the nonprofit corporations which were no longer necessary under this reorganization.

⁴⁶ See MAIDA & CAFARDI, *supra* note 1, at 13 ("All canonical administrators are required to act in the name of the Church and in accord with the norm of the law in their administration of the property of their pertinent public juridic person.")

⁴⁷ 1983 CODE c.1280. Each public juridic person must, by law, establish its own financial council or at least two advisors to aid the administrators in their duties. *Id.*

⁴⁸ *Id.*

⁴⁹ See *id.* cc. 1282-1284.

⁵⁰ See *id.* c.1291. Canon law requires that all transfers of Church property, over a certain value, that is part of the "stable patrimony" of a juridic be authorized. *Id.* Minimum and maximum value amounts affecting alienation of property are set by conferences of bishops for each region. *Id.* c.1292.

⁵¹ See BLACK'S LAW DICTIONARY 342 (6th ed. 1990). Generally, a corporation sole is an "[u]nusual type of corporation consisting of only one person whose successor becomes the corporation on his death or resignation . . ." *Id.* A corporation sole was the common law device that enabled the Church to hold property in its own name, and which is still used as a form for incorporated dioceses. See HARRY G. HENN, HANDBOOK OF THE LAW OF CORPORATION 13 (1970); Kauper & Ellis, *supra* note 1, at 1520-21.

⁵² See *supra* note 1 and accompanying text (discussing possible structures of Church related entities); see also MAIDA & CAFARDI, *supra* note 1, at 117-123 (discussing history and structure of nonprofit corporations); see generally HOWARD L. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS & ASSOCIATIONS (1988).

When considering the development of canonical statutes for certain public juridic persons in the Archdiocese of Denver, it became apparent that there were many similarities between public juridic persons and civil nonprofit corporations.⁵³ This presented a marvelous opportunity to publicly record references to certain important religious principles upon which the Roman Catholic Church in Colorado was based, as well as the source of those principles. Furthermore, it provided a means to recognize those office-holders who could legitimately act for the Archdiocese of Denver, while noting the limitations on the authority of other individuals who might purport to act *ultra vires* on behalf of the corporation.⁵⁴ Finally, this endeavor provided an occasion to attempt to dissuade secular courts from intermeddling in religious affairs or to direct judicial attention to the proper canonical sources and authority.

We sought to develop appropriate structures to administer the affairs of the Archdiocese of Denver in compliance with both the Code of Canon Law and applicable Colorado law. Our goal, of course, was to develop structures that would lend themselves lawfully and efficiently to the administration of those corporate affairs.

The Archbishop of Denver insisted that certain items be included and addressed in these corporate entities. First, to prevent abuses in ecclesiastical discipline, the Archbishop requested that he be given the opportunity to monitor the offices of both the juridic persons and the remaining civil corporations. Second, in the event that an employee's activities were contrary to the magisterium of the Church,⁵⁵ he wanted the ability to intervene promptly. Third, he sought public recognition for the limitations on alienation that are imposed by canon law.⁵⁶ Fourth, he requested that he be empowered to authorize the transfer of funds where necessary to meet the fiscal needs of the Archdiocese of Denver or its

⁵³ MAIDA & CAFARDI, *supra* note 1, at 26. There are many similarities between public juridic persons and corporations:

Like a corporation, a public juridic person is a creature of law, having no existence and no rights of its own. . . . It has the status of "personhood," but it is an artificial construct. It is a person only in the legal sense, not in reality . . . [and] must act through human agents.

Id.

⁵⁴ See WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* § 4.01 (4th ed. 1988). An *ultra vires* act is a transaction outside the sphere of a corporation's power. *Id.* Such transactions are unenforceable by and against the corporation. *Id.*

⁵⁵ See CORIDEN, *supra* note 3, at 104. ("In the church, magisterium came to mean teaching authority, and gradually its meaning narrowed to refer to the pastoral teaching office of bishops . . .").

⁵⁶ See 1983 CODE cc.1291, 1295. Canon law requires authorization for the sale or transfer of Church property and for any transaction which may diminish the funds of the juridic person. *Id.* If permission is not granted, the transaction is canonically invalid. *Id.* See CORIDEN, *supra* note 3, at 168.

affiliated nonprofit corporations. He also wanted the faithful made aware that, under the Code of Canon Law, he could utilize funds of a related nonprofit corporation for the benefit of the Archdiocese of Denver if necessary. Finally, he wanted to attempt to develop a dispute resolution mechanism which, where practicable, would require civil courts to defer to the Code of Canon Law and the Church's due process tribunals and mechanisms in matters involving the Archdiocese of Denver.⁵⁷

B. *Structure of the Articles of Incorporation*

The civil articles of incorporation, which are publicly filed with the Colorado Secretary of State, contain departures from the information one would normally expect to find in these public documents. In revising the articles of incorporation, we attempted to reconcile, wherever possible, the canonical statutes of each public juridic person with those articles. Certain aspects of the canonical statutes, articles of incorporation, and by-laws of one of our nonprofit corporations, the Mount Olivet Cemetary Association, illustrate our attempt to achieve the Archbishop's objectives.

In the amended and restated articles of incorporation, under Article I, the incorporation name is listed as the Mount Olivet Cemetery Association. However, we further alerted the public to its dual status as a civil corporation and as a public juridic person under the Code of Canon Law of the Roman Catholic Church, which is also named the Mount Olivet Cemetary Association. Article II, entitled "Purposes and Powers," provides, in part, that the corporation was formed for the purpose of fulfilling the goals and aspirations of the Roman Catholic Church. This article also refers to the Archbishop's authority to transfer funds where necessary.

Article IV, which deals with the Board of Directors, limits directorship to those appointed by the Archbishop of Denver, thereby achieving the Archbishop's desire to retain absolute control over the Board in order to prevent *ultra vires* activities. Furthermore, board members are required to be practicing Catholics in good standing who have not been cited for any canonical sanction.⁵⁸ Moreover, all members of the board are charged with the duty to uphold and maintain the doctrinal and moral teachings of the magisterium of the Church.

⁵⁷ See 1983 CODE c.1401. Under canon law, the Church maintains jurisdiction over spiritual matters and violations of Church laws. *Id.* The tribunal which may hear a case is subject to careful regulation. *Id.* c.1403. There are three levels of Church courts: the diocesan tribunal, the Metropolitan, and the Holy See. *Id.* cc.1419, 1438-1439, 1442-1445.

⁵⁸ For a description of the four forms of canonical punishment, see CORIDEN, *supra* note 3, at 176-77.

Article IX, entitled "Resolution of Disputes," publicly enumerates the restrictions on alienation of property. The Archbishop of Denver has the exclusive authority to alienate property, which must be exercised in strict conformity with the Code of Canon Law.⁵⁹ This pronouncement was deemed essential to put title companies on notice that the Code of Canon Law must be complied with, particularly where *ultra vires* actions may be present. This article also provides that, as a public juridic person under the Code of Canon Law, all disputes or disagreements which may arise in connection with the operation and administration of the corporation shall be resolved by reference to the canonical statutes, to the extent allowed under Colorado or other applicable civil law. Finally, the by-laws were also drafted to adhere assiduously to the requirements of the Code of Canon Law.

C. Sensitizing Civil Authorities

What we hope to accomplish by these provisions in the articles of incorporation and by-laws is, of course, compliance with the Code of Canon Law. Furthermore, we hope to limit, where possible, secular court interference into those internal Church issues which should be resolved in an internal Church forum.⁶⁰ While there has not yet been a single case in which we have had the need to invoke the perceived benefits of these articles or bylaws, it is probable that they will be useful in certain

⁵⁹ Book V of the 1983 Code of Canon Law dedicates six canons to the issue of alienation. See MAIDA & CAFARDI, *supra* note 1, at 85-102 (detailing conditions for alienation).

⁶⁰ In *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), the United States Supreme Court held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest . . . church [tribunal] to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." *Id.* at 727. This rule is mandated by the First Amendment. See *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 712 (1976); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 447, 450-51 n.7. Furthermore, in dicta, the Supreme Court referred to the potential for "marginal civil court review" in cases where decisions of church tribunals involved fraud, collusion, or arbitrariness. *Gonzalez v. Roman Catholic Archbishops*, 280 U.S. 1, 16 (1929).

In *Milivojevich*, the Supreme Court further restricted the standard for marginal civil court review set forth in *Gonzalez*, stating that an "arbitrariness" exception to the *Watson* rule is inconsistent with the constitutional mandate that civil courts must accept as binding decisions of church tribunals on matters of "discipline, faith, internal organization or ecclesiastical rule, custom or law." *Milivojevich*, 426 U.S. at 713. The Court reasoned that a civil court's determination whether a particular action on the part of a church tribunal is "arbitrary" inherently entails inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judiciary to follow, or else into the substantial criteria by which they are supposed to decide the ecclesiastical question. *Id.* "But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." *Id.*

instances, such as employment disputes,⁶¹ disputes between religious orders, conveyance disputes, and cases involving principal-agent authority. Finally, we hope to sensitize civil courts to the fact that these disputes are religious matters, and that the Diocese has a detailed code of law that addresses these issues and which must be adhered to in their resolution. In certain cases, the articles of incorporation and by-laws may serve as a conflict of law or conflict of forum vehicle that could allow the Diocese to obtain a dismissal and insist that the dispute be resolved internally within Church tribunals.⁶²

D. Legislation for Nonprofit Organizations

Recently, there has been a wave of legislative activity in Colorado and throughout the nation regarding nonprofit corporations.⁶³ These legislative enactments were prompted by people who serve as volunteers within nonprofit organizations, by board members who are fearful of being sued,⁶⁴ and by progress in the area of tort reform.⁶⁵ The Archdiocese of Denver has attempted to utilize this legislation in drafting articles of incorporation and by-laws.

Colorado has enacted a number of statutes which limit the liability of directors, officers, and volunteers of nonprofit corporations. For example, a Good Samaritan Act has been enacted which provides that no board member of a nonprofit corporation shall be liable for actions taken or omissions made in the performance of his or her duties as a board member, except where the activity is a willful or wanton act or omis-

⁶¹ See *EEOC v Catholic Univ. of Am.*, 856 F. Supp. 1, 10 (D.D.C. 1994) (discussing "ministerial function" test). The "ministerial function" test has been developed by courts to determine whether a civil court can review a discrimination claim brought by an employee of a religious institution. *Id.* An employee whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship" must look elsewhere than to government agencies and courts for relief from race, sex, national origin, or age discrimination." *Id.*

⁶² See *Marich v. Kragulac*, 415 N.E.2d 91, 96 (Ind. Ct. App. 1981) (no jurisdiction where court must resolve questions of doctrinal propriety to determine who controls property). See generally *C.J.S. Religious Societies* § 85 (1994).

⁶³ See *OLECK*, *supra* note 52, §§ 15-22 (discussing recent state legislation on nonprofit corporations).

⁶⁴ See *Developments in the Law: Nonprofit Corporations*, 105 HARV. L. REV. 1579, 1681 (1992).

Historically, the number of lawsuits filed against nonprofit directors and officers . . . in their individual capacity has been very small. During the past decade, however, there has been a marked increase in the number of suits filed against individuals acting for nonprofit organizations . . . Plaintiffs frequently bring suit against individuals serving in the nonprofit sector because those individuals have "deeper pockets" than the organizations they serve."

Id. (citations omitted).

⁶⁵ See *id.* at 1683-89.

sion.⁶⁶ The legislature has also adopted a statute which limits the vicarious liability of officers and directors for torts committed by employees of nonprofit corporations.⁶⁷

Colorado has also enacted the Volunteer Service Act,⁶⁸ which creates immunity from civil liability for volunteers⁶⁹ who act in good faith and within the scope of their official functions and duties.⁷⁰ Furthermore, Colorado has codified the trust fund immunity doctrine,⁷¹ which provides that a tort action cannot be maintained against a charity where the judgement, if satisfied, would deplete the funds devoted to a charitable purpose.⁷² Therefore, in every sexual assault, abuse, or other tort case in which the Archdiocese of Denver or any other nonprofit corporation is a defendant, this statute may be pleaded as an affirmative defense. Thus, plaintiffs should be alerted that the Archdiocese of Denver is not going to hand over the keys to the kingdom even if a plaintiff succeeds in becoming a judgment creditor.

CONCLUSION

The amendments to the articles of incorporation and by-laws, combined with the liberal protection of Colorado statutory law, should serve to provide a significant shield against liability for the Archdiocese of Denver. At the same time, the creation of the public juridic person will help the Archdiocese to remain free of civil law influences that can threaten the Catholicity of the Archdiocese. In this way, the Archdiocese can stay focused on its ultimate mission—advancing the purposes, goals and aspirations of the Roman Catholic Church.

⁶⁶ COLO. REV. STAT. § 13-21-116(2)(b) (Supp. 1994).

⁶⁷ COLO. REV. STAT. § 7-108-402(2) (Supp. 1994).

No director or officer shall be personally liable for any injury to person or property arising out of a tort committed by an employee unless such director or officer was personally involved in the situation giving rise to the litigation or unless such director or officer committed a criminal offense in connection with such situation.

Id.

⁶⁸ COLO. REV. STAT. § 13-21-115.5 (Supp. 1994).

⁶⁹ *See id.* § 13-21-115.5(3)(c) (defining volunteer as "person performing services for a nonprofit organization, a nonprofit corporation, or a hospital without compensation, other than reimbursement for actual expenses incurred").

⁷⁰ *But see id.* § 13-21-115.5(4)(a)(II) (stating act does not exclude volunteers' willful and wanton misconduct). Furthermore, a volunteer may be liable for damages caused as a result of a negligent act or omission involving the operation of a motor vehicle during an activity, but only to the extent of insurance coverage maintained by or on behalf of the volunteer. *Id.* § 13-21-115.5(5).

⁷¹ COLO. REV. STAT. § 7-20-108 (1986).

⁷² *See* 15 AM. JUR. 2d *Charities* § 199 (1976). Immunity will apply with respect to property directly and exclusively used in the operation of the trust, but not to property which is only remotely connected with the purposes of the charity. *Id.*

