Francis G. Morrisey

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FRANCIS G. MORRISEY O.M.I.

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Introduction

One of the characteristics of the Church's legislation is that it does not exist in a vacuum. When the new canons were being prepared, various customs and practices that have marked the life of the Church in the many countries in which it exists had to be taken into account. This is why, on a number of occasions, the Legislator left matters to particular law,[1] so that the bishops involved could make informed decisions which would take local circumstances into consideration. Likewise, there were a number of canons which deferred to proper law governing persons,[2] or to special laws complementing the general legislation.[3] There was, however, another way of providing for local adaptation that was mentioned in the Code on occasion: the Legislator deferred to the applicable civil law.[4]

Because of this deference, in this study, we would like to look more closely at the place of civil law in the current canonical legislation, particularly as this concerns North America; see how it applies more particularly in the case of the canons found in Book V of the Code; and then examine a certain number of practical situations which the Church has to face today as it carries out its stewardship role in relation to temporal goods.

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[1] For instance, see canon 13.

[2] For instance, the numerous laws relating to religious institutes.

[3] For instance, the laws governing the functioning of the Apostolic See, c. 360.

[4] More particularly, canons 22 and 1290.

I. The recognition of civil law in canonical legislation

A. The context

It is not just the present Code which defers to civil legislation. The 1917 legislation had a provision rather similar to the principle enunciated in our present canon 22, although it was placed in a narrower context than in the present law (c. 1529, which enunciated the principle, was found in the section on contracts, not in the general norms relating to laws).[5] Not surprisingly, canon 1529 had numerous sources which went back in history.[6] In other words, the Church has, through the ages, „canonized" certain elements of the civil law, giving them the same effects in canon law as they would have in secular society.[7] It was particularly in the area of temporal goods that such a process was necessary, to make certain that the rights of the ecclesial community were duly recognized and respected. In fact, it would have been almost impossible for the Church to draw up legislation relating to contracts, without any reference to the society in which it is incarnated. This would have led to endless conflicts, unless there were concordats or similar agreements governing the same, and this would not have been beneficial to the community.

In North America, the custom of having concordats does not exist as it does in other parts of the world. The „doctrine" of separation of Church and State is so prevalent that it would not be politically possible to enter into such agreements. On the other hand, there is such a strong reliance upon the „fair play" provisions of the „Common Law" that this even imperceptibly influences the way the faithful examine and evaluate Church pronouncements and decisions.

Another factor to be kept in mind is that there is no State religion, and the Church often has to engage in endless struggles for recognition. Even today, indirect prejudice against Catholics and Catholic teaching can still be found in legislation. This is parti-

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[5] See J. MIĄAMBRES, „Il rinvio legislativo nelle decisioni della Rota: antecedenti giurisprudenziali del Canon 22", in Apollinaris, 1995, Nos. 1-2, pp. 171-182.

[6] For instance, the 1917 Code refers to a document from the Congregation for the Propagation of the Faith, December 15, 1840.

[7] See C. MINELLI, „La canonizzazione delle leggi civili e la codificazione post conciliare. Per un approccio canonistico al tema del rinvii tra ordinamenti", in Periodica, 85(1996), pp. 445-487.

cularly so when it comes to matters relating to health care and proscribed medical procedures.[8]

The Anglo-Saxon „Common Law" is, to a great extent, based on precedent, which is different from the approach taken in canon 16, §3 of our present legislation. Thus, when we integrate the civil law into our practices, we must also keep in mind the evolution of the law as interpreted by judges in cases which have already been decided. This approach can be rather confusing to someone who is not familiar with the system and who relies more on codified law. Various parts of Canada use both systems. For instance, in Quebec, a Civil Code governs the daily life of citizens, while in the other provinces, it is the Common Law system, derived from the English law, which prevails. For all provinces, however, there is one criminal code. When, in canon 22 and elsewhere, the Code speaks of *„ius civile"*, we can take it for granted that it does not limit itself to a civil code, but refers to a vaster complex of prescriptions, including administrative law, legitimate customs, jurisprudence, and so forth.[9] The expression would refer to laws enacted by a competent authority of the State, no matter which specific title is given to a statute or ordinance.

It follows that, when the Code of Canon Law defers to the civil law, it must be the civil law as it exists at the moment an act takes place or is being considered by the courts, not necessarily as it was in 1983 when the Code was promulgated. This makes it rather difficult to apply, particularly in matters such as labour law (c. 1286)[10] and laws relating to civil responsibility (c. 1296) which are con-

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[8] For instance, at the present time, there is great pressure on legislators not to recognize a „conscience clause" for Catholic hospitals, so that they would be obliged to offer abortion and sterilization procedures. The same can be said for pressures exerted on dioceses to extend full social benefits to partners, of either sex, with whom an employee is living. See Cardinal R. MAHONEY, „Statement on Proposition 22, Same-Sex Marriage Initiative", in Origins, 29(1999-2000), pp. 465, 467. See also W.W. BASSETT, „A Note on the Law of Contracts and the Canonical Integrity of Public Benefit Religious Organizations" (="Law on Contracts"), in CLSA, Proceedings, 59(1997), pp. 61-86, at pp. 75-81.

[9] See J. OTADUY, „Leyes eclesiásticas", in INSTITUTO MARTIN DE AZPILCUETA, Comentario exegético ad Código de derecho canónico (=Comentario exegético), Pamplona, Eunsa, 1996, Vol. I, pp. 411-416.

[10] See CANON LAW SOCIETY OF AMERICA, „Canonical Standards in Labor- Management Relations: A Report", in The Jurist, 47(1987), pp. 545-575.

stantly evolving.[11] Today, a number of civil lawyers are studying the canon law, but it would be important not to apply civil law norms and procedures when interpreting the canons. It is not easy to make the transition between the two mind sets.

B. Canon 22 and its role

It is important to keep in mind that the Code does not simply defer to all existing civil laws. Rather, canon 22 limits the scope of this „canonization" to those laws which are specifically mentioned in the Code. However, certain translations create an ambiguity which has had to be addressed in civil courts. For instance, even the new Canon Law Society of America translation reads as follows: „Civil laws to which the law of the Church yields are to be observed in canon law with the same effects..." It might have been preferable had the text read: „Those civil laws to which the law of the Church yields...", thus making it clear that not all civil laws are so recognized.[12]

There are two important restrictions or limitations found in canon 22. While the Code generally defers to the civil law in those matters which are explicitly noted, there are overriding principles. The first concerns the divine law – „insofar as they are not contrary to divine law" – and would have application in matters relating to natural justice. Thus, if, for instance, the secular law recognized a spoliation of church property at a time a new government took office, the Church would probably not recognize the legitimacy of such legislation because it goes against the natural right of ownership of property.[13]

The second restriction concerns contrary provisions in the canon law – „unless canon law provides otherwise." One practical example of this is found in the canons on prescription where, although the Code defers to the civil legislation (see c. 197), canons 1268 and following establish particular time periods for the norms to take effect.[14]

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[11] See J.J. FOLMER, „The Law on Personal Injury", in CLSA, Proccedings, 46(1984), pp. 46-65, at p. 61.

[12] See CLSA, Code of Canon Law Latin-English Edition. New English Translation, Washington, CLSA, 1999, p. 10.

[13] See J. MIÑAMBRES, „Analysis de la técnica de la remisión a otros ordenamientos jurídicos en el Codigo de 1983", in Ius canonicum, 32(1992), pp. 713-749.

[14] See N.P. CAFARDI, „Prescription", in K.E. McKENNA, et al., ed., Church Finance Handbook (=Churich Finance), Washington, CLSA, 1999, pp. 263-266.

Among the areas where the present legislation defers to civil law, and which are not directly related to temporal goods, we could mention the following: the civil effects of marriage (cc. 1059 and 1672), the appointment of guardians (c. 98), arbitration and compromise (c. 1714).

The Church does not exist in a vacuum. It lives in a human and secular society which it tries to animate by a Christian spirit (see c. 298). Where possible, then, it tries to take what is good in secular society and give it canonical recognition. This is what the law is doing by „canonizing" certain prescriptions of the civil law.

II. Canons in Book V referring to civil law

It is more particularly in the area of temporal goods and church finances that we find references to the civil law. This is the case in matters relating to the ownership of property, to funds, to contracts, to wills, to employment laws, and so forth.

A. The right of ownership

In many of the Anglo-Saxon countries, the Church does not, as such, enjoy civil recognition. Thus, even though canon 1254 speaks of the right of the Church to own property independent of civil authority, this provision is of little practical avail if it is not recognized civilly. We note that canon 1254 does not speak as such of civil laws, nor does it defer to them. But, nevertheless, it immediately places the canonical norms within the sphere of secular society. The norm was necessary in order to provide a basis upon which to vindicate eventually the rights of the Church.[15]

Yet, in order to allow the Church to operate within secular society, many of the Anglo-Saxon countries are willing to recognize corporations or trusts which act on behalf of the Church and which assume civil responsibility for its activities. These corporations are creatures of the State, not of the Church. Nevertheless, there is a close relationship between the two.[16] For this reason, canon 1284, §2, 2⁰ provides that the administrators of ecclesiastical goods are to

[15] See M. LÓPEZ ALARCÓN, „De Bonis Ecclesiae Temporalibus", in Comentario exegético, Vol. IV, 1, pp. 25-46, at p. 42.

[16] See M. DiPIETRO, „Incorporated Apostolates", in Church Finance, pp. 279-303, esp. pp. 291-300.

take the necessary steps to have ownership rights recognized by the secular authorities of the place. Not surprisingly, there were differing opinions on the subsequent status of goods that were registered civilly. Some maintained that they were henceforth merely civil goods, with no canonical ownership: the goods belonging to the corporation were owned by the corporation. Others held – and rightly so – that the civil registration was but a means to protect church interests.[17] We will retun to this matter later.[18]

The system has worked well and, in spite of certain minor problems, there is no call to have it revised.

B. The acquisition of goods

Canon 1259 speaks of means recognized either in natural or in positive law whereby it is lawful for the Church to acquire goods. Such positive laws would include not only the canonical legislation, but also civil legislation, provided it was not contrary to divine law.

Thus, for instance, there are many ways of acquiring goods legitimately which are not mentioned directly in the canons. Among these, we could note the following: occupancy, the results of intellectual labour (patent rights, copyrights), acts of forfeiture, succession, marriage, insolvency, intestacy, gift or sale, court order. In addition, there is also accession (increase, augmentation, addition) which entails the right to all which one's property produces, whether that property be movable or immovable. Such additions could be natural or artificial: v.g., abandoned river beds, rights of alluvion by accretion and reliction; crops, herds, fruit; improvements to existing property (landscaping), results of artistic works, and so on.

C. Registration of special funds

Canon 1274, §5 provides that when diocesan and interdiocesan funds are established to provide long-term support for clergy and other persons who serve the Church, they are to be given civil

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[17] For an illustration of the consequences of this approach, see Archbishop J. RIGALI, „St. Louis University Hospital Sold to For-Profit Corporation", in Origins, 27(1997- 1998), pp. 629, 631-633, at p. 629.

[18] On this issue, see R.L. KEALY, „Canonical Aspects of Catholic Identity in the Institutional Setting", in CLSA, Proceedings, 61(1999), pp. 195-209, at pp. 200-202.

recognition if possible. In particular, this refers to the registration of retirement and pension funds, as well as other types of compensation funds. There are a number of problems arising today in regard to eligibility for pension funds, and we will mention some of these in the third part of this study.

D. Responsibility for improper administration

Canon 1281, §3 speaks of bringing an action against administrators who have caused harm to the Church. While the obvious sense of this canon refers to an action before an ecclesiastical court, this is not the way that people would be inclined to think in countries where the church courts have no real power to enforce their decisions. It has been suggested that contracts concerning church goods contain a clause to the effect that conflicts regarding the matter would be resolved either in civil courts or before a canonical tribunal.[19]

E. Registration of property titles

As noted above, canon 1284, §2, 2° places an obligation on administrators to ensure that the ownership of ecclesiastical goods is safeguarded in ways which are valid in civil law.[20] If the country does not recognize church ownership as such, nor allows for the establishment of corporations, then a system of trustees or some other appropriate method is to be applied. In some mission territories, persons who are not citizens of the country may not own property. Thus, it sometimes happens that church representatives have to rely on the good offices of one or more individuals in whose name the property is registered. This, however, creates numerous problems is regard to estates when that person dies, to taxation requirements, and so forth. Also, in some places, outsiders cannot own property; it is considered to belong to the tribe or clam. In Canada, for instance, on the Indian Reservations, the Church can build churches, but does not hold title or ownership to them; the land cannot be ceded, although its use may be authorized. Therefore, the most the Church can hope for is some type of authorization,

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[19] See Z. COMBALÍA, in Comentario exegético, IV, 1, p. 129.

[20] See G.T. BITTNER, „Issues in the Relationship and Role of the Diocesan Attorney and the Diocese", in CLSA, Proceedings, 60(1998), pp. 44-67, at pp. 47-49.

allowing it to build a church or other establishment on the land. While this is far from satisfactory, sometimes it is the best that can be done.

F. Labour laws

Canon 1286 refers explicitly to civil laws relating to employment and social life. Such matters would include: eligibility for work (for instance, in the case of illegal aliens), minimum wages, pension and security benefits, termination of employment, working conditions (for instance, safety regulations). This is an area that changes constantly, and one which has to take into account also, as the canon provides, the Church's social teachings relating to employment conditions.[21]

G. Civil court proceedings

Canon 1288 refers to civil court proceedings, but it does not specifically mention the civil laws. However, if the matter is brought before the civil courts, the laws governing the transaction will be followed. There might be a deference to canonical or proper law, but it is up to the courts to decide.[22]

In many instances, it is preferable to resolve the matter out of court, if possible, so as to avoid establishing a precedent which might be unfavourable to the Church. Also, at times, the cost of a civil court action (especially if there is an appeal) far exceeds the amount of money being claimed, and it might be preferable in some instances simply to pay what is requested and to get on with life. This comes to the fore frequently in cases where a person is suing for damages arising from various forms of sexual misconduct. Nevertheless, others prefer to fight each case unless the matter is clearly proven beforehand and the Church's responsibility established.

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[21] For instance, JOHN PAUL II, Encyclical letter, „Sollicitudo Rei Socialis", December 30, 1987, in Origins, 17(1987-1988), pp. 641, 643-660; „Centesimus Annus", May 1, 1991, in Origins, 21(1991-1992), pp. 1, 3-24. See also, CONG. FOR CATHOLIC EDUCATION, „Guidelines for the Study and Teaching of the Church's Social Doctrine in the Formation of Priests", December 30, 1988, in Origins, 19(1989- 1990), pp. 169, 171-192.

[22] For instance, see M.H. OGILVIE, „Canadian Civil Court Intervention in the Exercise of Ecclesiastical Jurisdiction", in Studia canonica, 31(1997), pp. 49-73.

H. Contracts

Canon 1290, which parallels canon 22, is the opening canon in the section governing contracts. While, generally speaking, written contracts are being considered, the norm would also apply to oral agreements (note the cross reference to canon 1547). The canon does not restrict the application of the principle to matters relating to temporal goods, although this is obviously the primary context, but it would apply also to other matters which are subject to the power of governance of the Church.[23] This could include the opening and closing of churches, appointments to offices, and so forth. Canon 1290 would tie in with the provisions of canon 1286 regarding employment legislation.[24]

I. Civil validity of alienations

Canon 1296 addresses the possibility of conflicts between the civil and canonical legislation. The canon contains a prudential norm: the competent authority is to determine what is best to do in those cases where an alienation is valid civilly, but not canonically. Some church corporations have included in their by-laws, or even in their articles of incorporation, a sentence something like the following: „In the operation of the corporation, the canon law of the Roman Catholic Church (except where such is contrary to applicable civil law) shall be complied with and observed." In such instances, if the canon law was not observed, the contract would be invalid civilly. Some canonists are strongly opposed to such a formula, stating that it simply opens the door for the civil courts to interpret the canon law as they see fit. This is particularly true if the Code is presented exclusively as a law text, without taking into account its pastoral nature. However, my experience with the courts in Canada is that in such matters they have recourse to expert testimony to explain what are the applicable provisions of the civil law.[25]

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[23] See J. MANTECÓN, in Comentario exegético, IV, 1, p. 152.

[24] See W.W. BASSETT, „Law of Contracts", at pp. 63-67. „I think canon 1290 concerns not only express, but also the implied terms of facially-neutral employment contracts, where those implied terms become filled with the provisions of public, secular employment standards and policies" (p. 64).

[25] See F.G. MORRISEY, „Canon Law Meets Civil Law", in Studia canonica, 32(1998), pp. 183-202, at p. 196.

J. Gifts given *mortis causa*

Canon 1299, §2 addresses the delicate question of gifts made to the Church in contemplation of death. The civil formalities relating to wills and the capacity to bequeath goods are presumed in this canon (for instance, norms relating to the mental capacity of the person making the gift). The clause of canon 1290, which allows proof by witnesses, takes effect here in canon law if the civil formalities were not fulfilled. However, the canon wisely recognizes that it might not be possible to force the matter in the secular forum, and thus it resorts to recommendations to the heirs, leaving, as it were, the execution of the matter to their conscience.

K. The Ordinary as executor

Canon 1301, §3 contains a clause that might bring the Code in conflict with the civil law. It does not refer to the civil law, but it is one area where there might be conflicting provisions. A clause could be added to a civilly valid will, contrary to the canonical rights of the Ordinary, but which is recognized as civilly valid. In such an instance, even though the canon considers such a clause as non-existent, the Ordinary has little choice but to observe the conditions laid down in the will.

L. Other canons where there is an implied reference to the civil law

Canon 1261 speaks of the right of the faithful to donate temporal goods for the benefit of the Church. It can happen, though, that certain civil jurisdictions will not allow gifts for such purposes, or, if the gifts are made, there is a heavy tax imposed both on the donor and the receiver. Some places have legislation in effect that prevents gifts to charitable (and religious) organizations which exceed a certain amount or percentage. There are also „mortmain laws" which limit the capacity of church entities to own property. Thus, although the principle of canon 1261 can be applied, we must take into account any civil law consequences incumbent upon making the gift.

Canon 1281 is one that is used quite frequently today when church officials are brought to civil court to respond to the actions of the clergy, although this is not the direct meaning of the canon.

The civil doctrine of vicarious liability has taking on new meaning in recent times and the secular courts have been attributing responsibility to Church leaders for actions of their subordinates.[26] We will retun to this later.

Canon 1283 speaks of an inventory of all goods which are considered to be precious because of their cultural value.[27] The canon does not state who determines whether an object has cultural or historical value. It often happens today that secular authorities intervene to declare that a certain building or site is historical, and thus it cannot be changed. It seems that any good inventory would have to take such classification into account, because any action taken on the property without the appropriate civil permissions could cause great harm to the Church.[28]

Canon 1292 on alienation speaks of the intervention of „interested parties". While it is obvious from the text of the canon that such interested parties are those who have an ecclesiastical interest in the property, such as the parish priest or the local superior, the question can be asked to what extent such „interested parties" could also be groups external to the Church. In particular, historical societies and ecological groups might have a particular interest in what would happen to neighbouring property. Is their intervention acceptable? It is mandatory? Or, can it be said that they really do not have a canonical interest in the matter?[29] Personally, it seems that only those who have a legitimate ecclesiastical interest are to intervene. If the superior wishes to hear the others, this is fine, but their consent is not required for the canonical validity of the transaction. Of course, they might be able to have recourse to civil authorities to prevent the sale or transaction because of its ecological or historical consequences.

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[26] In this regard, see the recent decision of the Newfoundland Supreme Court – Trial Division, „John Doe v. Bennett", July 4, 2000, in which the diocesan bishop personally is held responsible for the actions of a priest; Court file [2000] N.J. No. 203. See also the decision of the Ontario Superior Court, „Swales v. Glendinning", July 17, 2000, where the diocesan corporation is held responsible for the actions of a priest, but not the „Roman Catholic Church" which was also sued in the action; Court file 33504.

[27] See E. CAPARROS, „L'Affaire des Trésors de l'Ange-Gardien", in Ius Ecclesiae, 1(1989), pp. 617-643.

[28] See L. DINARDO, „The Inventory of Property", in Church Finance, pp. 151-156.

[29] See, for instance, J. MANTECÓN, in Comentario exegético, IV, 1, p. 158.

Canon 1297 on the leasing of ecclesiastical goods would also have to take into account the existing civil legislation.[30] Otherwise, the owners might have great difficulty enforcing the provisions of the lease.

Canon 1310, on the reduction of obligations arising from wills and foundations, does not refer to the civil law. However, before an Ordinary could change the clauses of a foundation, especially one that has been recognized civilly for taxation purposes, the applicable civil law would also have to be observed. Otherwise, there would be a serious risk of court proceedings or something similar.

III. Particular situations that are now arising

In recent years, there have been a number of situations which have seriously tested the Church's relation with the civil law in matters of temporal goods. Some of these will now be addressed.

A. Pension plans for the clergy[31]

In many North American dioceses, not to speak of other places, dioceses have established what are known as „ecclesiastical societies" which provide a pension for retired or sick priests. Such societies administer funds to which the diocese, the priests and the faithful have contributed through the years. However, they are not registered as pension funds.

If a priest retires legitimately, he is eligible to receive payment from the fund. But, if, on the other hand, he retires without permission, or leaves the ministry, he is not eligible for payments. It follows that priests who leave the ministry after a number of years of service find themselves without any means of support other than personal goods they have accumulated during the years. In some cases, the amount which the priest contributed personally is returned (with or without interest), but this is not sufficient.

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[30] A number of Conferences of Bishops have integrated the civil law provisions or the equivalent into their decree on leasing. See, for instance, Argentina (p. 60), Australia (p. 61), Austria (p. 84), Canada (p. 145), Ecuador (p. 226), Philippines (p. 242), France (p. 283), etc., in J.T. MARTÍN DE AGAR, Legislazione delle Conferenze episcopali complementare al C.I.C., Milano, Giuffrè, 1990.

[31] See N.P. CAFARDI and J. HITE, „Civil and Canonical Requirements for a Clergy Retirement Fund", in P.J. COGAN, ed., CLSA Advisory Opinions 1984-1993, Washington, CLSA, 1995, pp. 416-418.

Priests who have resigned from ministry have lately been going to civil court to obtain redress. The results are generally in favour of the priests, not the dioceses. This is one area where Church administrators should take care to make certain that the good name of the Church is not affected. It seems that pension funds should be registered separately from the goods of the diocese. There is also the great advantage that if the diocese is sued, this fund is not part of the diocesan assets. On the other hand, the diocese loses „control" over the fund and, indirectly, over the life of the priest.

There are basic questions here of natural justice which should be addressed. The Code speaks of observing the civil laws relating to employment (c. 1286). Pension benefits should certainly be part of this, and they should not be subject to the „good standing" or not of a priest. Hopefully, this matter will be addressed by dioceses before too long, if it has not already been done.

B. Consequences of incardination

Canon 1274 speaks of providing the necessary subsistence to members of the clergy, and other church workers. As noted previously in relation to pension funds, there is another issue to be faced. The Code does not state to what extent the obligations arising from incardination bind for life. For instance, if a priest, one year after ordination, commits acts which will make it socially or politically impossible for him to return to ministry (even though there might not have been a canonical delict in the formal sense of the term), is the diocesan bishop responsible for him for the rest of his life? This does not seem fair, because incardination could be likened to a bilateral contract. If the cleric carries out faithfully the duties of ministry, then the diocese obviously has obligations towards him. But, if he doesn't fulfill his side of the bargain, then perhaps some adaptation could be made. Canon 1350 seems to make a distinction between a cleric who has been formally dismissed from the clerical sate, and one who is subject to a penalty, such as suspension. In the light of court cases in Canada, it can be asked whether the provision of canon 1350, §2 is a formal obligation, or more in the line of an act of charity. This is the difficulty which arises when the Code of Canon Law is introduced in civil court proceedings.

C. Civil incorporation of funds

In view of the fact that many dioceses and religious institutes have been the object of court suits for the actions of their members, they have taken steps to distinguish clearly between those goods which are at the service of the diocese, and those which are considered to be trust funds, to be used exclusively for a particular purpose.

When such trust funds are incorporated separately, it is recommended that the directors of the fund not be exclusively those who are the directors of the general diocesan or congregational fund. The business and mailing addresses should be different; the minutes book separate, and so forth. Otherwise, they are considered to be the same.[32]

However, the question arises as to whether the establishment of such separate corporations constitutes an alienation, or an act subject to the provisions of canon 1295, since the competent superior no longer holds full authority over the separately incorporated fund. The purpose of the action is to protect the ownership of ecclesiastical goods, so that they not be seized pursuant to certain court judgments (see c. 1284, §2. 2°). It seems that such an action is exactly the contrary of an alienation. Its purpose or effect is not to jeopardize the stable patrimony, but rather to make part of it more secure.

However, some canonists feel that the lessening of direct control constitutes an act subject to the provisions of canon 1295. The matter was recently brought to the Holy See for a decision. In the meantime, an indult *ad cautelam* was granted to proceed with the separate incorporation, without addressing for the moment the technical question of the nature of the action.[33]

It would be an entirely different matter if there were no reserved powers of any type, or if the purposes of the fund were not directly related to the purposes of the ecclesiastical juridical person. But, when the appropriate reserved powers are in place – such as those relating to changes in the corporate documents, the encumbrance

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[32] See, for example, the various court decisions relating to „Christian Brothers of Ireland in Canada", such as the decision of February 27, 1998, Ontario Court (General Division), in Ontario Reports (37 O.R. (3d), 367-413) and subsequent decisions.

[33] See, CONG. FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, Prot. No. 45174/2000, 45333/2000; July 24, 2000.

of property, and the designation of persons responsible for the corporation – it seems that there is no alienation. It will be interesting – and important – for the future to see how this matter evolves. It is certain that the more control the canonical entity exerts over the civil corporation, the less is the security arising from the separate incorporation. At times, it might be a question of determining which is more appropriate for the Church, given the circumstances in which it finds itself.

D. The responsibility of the Church for the actions of its representatives

In Canada and in the United States, there have been many, many court cases in recent years addressing the question of the vicarious liability of the Church for actions committed by clergy or employees. The question of the „deepest pocket" is one that arises frequently.[34]

In numerous instances, in addition to suing the perpetrator, the diocesan bishop is sued, and the religious superior if the person belongs to a religious institute, as well as the metropolitan archbishop of the province, the conference of bishops, the Apostolic Nuncio, the Holy See, the Pope, and the „Roman Catholic Church". There is a temptation, however, to try and mix the various corporations so that their assets may all be used in considering the amount of the settlement.

Contrary to other churches where property is held in common, the Catholic Church considers that property belongs to the juridic person which has lawfully acquired it (see c. 1256). Thus, the goods of a parish do not belong to the diocese, even though civilly they

[34] For instance, see SUPREME COURT OF CANADA, File No. 26013, June 17, 1999, „P.A.B. v. CURRY": „The test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing." See also, File No. 26041, June 17, 1999, „R. v. G.T.", a related case which also addresses in detail the issue of vicarious liability.

might be incorporated under one general title. Yet, on the other hand, again contrary to some other churches and ecclesial communities, the doctrine of the Church is highly centralized and not left to local interpretation.

Presently, in Canada, there have been a number of recent court decisions stating that the „Roman Catholic Church" cannot be sued, but only its constituent parts. On the other hand, though, there have also been decisions which consider that, indeed, the „Roman Catholic Church" can be sued and that it is responsible for the actions of the clergy.[35] It will be important to have this situation clarified. The matter is presently before the appeal courts.

The more we function as one united body, the greater will be the difficulty of having our distinctions upheld before the secular courts. Although the theory is clear, the practice is blurred, and this leads to confusion, at least in the minds of those who are seeking to appropriate church goods for themselves. In the coming years, we will have to pay particular attention to this point. We cannot have it both ways.

One other difficulty facing the Church in such matters is that the Code of Canon Law, which is primarily a pastoral document, is being used as a formal legal text. The courts do not always distinguish between „competence" to carry out an act and „responsibility" for doing so. A bishop may, for good pastoral reasons, decide not to act in a given situation. However, failure to act may entail responsibility. It is a delicate balancing act at this moment.

CONCLUSION

It is now time to bring these thoughts to a conclusion. Although there is a general reluctance on the part of the Church to defer to

[35] Among the decisions which hold the „Roman Catholic Church" responsible for the actions of its representatives, see Court of Queen's Bench of Alberta, January 21, 2000, Action No. 9901-15362, Madam Justice R.E. Nation (presently under appeal). Justice Nation determined also as follows: „[However,] to leave the 'Roman Catholic Church' named as the Fifth Defendant would not assist the Respondents as there would be no one to look for the document production and no identifiable individual who could be examined for discovery. As a result, I direct that the name of the Fifth Defendant be amended to read 'The Archbishop of the Catholic Archdiocese of Grouard-McLennan, as the representative of the Roman Catholic Church.' This will afford an identifiable individual who can address document production, provide evidence and answer questions relating to issues... „ See also the British Columbia Supreme Court decision, K.(W.) v. Pombacher, [1998] 3 W.W.R. 149 (B.C.S.C.).

other legal systems, it is evident that in the area of temporal goods, their ownership and administration, there is much in the Code of Canon Law which either defers directly to the operative civil law, or which, at least indirectly, takes such legislation into account.

The temptation for administrators is to observe meticulously the prescriptions of the civil law because of the practical consequences, while leaving the canonical norms in the background. In one sense this can be understood since the Church in North America has little means of enforcing its court decisions. On the other hand, though, this leads to a general disregard for all canonical legislation. There is a happy medium and it must be attained. Both sets of laws have to be observed. Or, to use the words of the Gospel out of context, „It is these you should have practiced, without neglecting the others" (Mt. 23, 23). If we do not observe our own laws carefully, we should not be surprised to see the civil authorities intervening more and more, and in the long run, diminishing the Church's capacity to carry out its mission unfettered.