The Collaboration of Canon Law and Civil Law in Contract and Alienation

Though the concept of Church as *societas perfecta* is not that much prevalent as it was in nineteenth and in beginning of twentieth century, yet this idea is not completely absent in the Church today. Being instituted by Christ the Church, as community of faith, hope and charity, expresses herself as a visible organization in the society. Though she is the mystical body of Christ and spiritual community yet she is at the same time a visible society structured with hierarchical organs (cf. *LG* 8). Thus she presents herself as a society having all the means and inherent rights to realize her own objective, that is, the salvation of souls in the world. She is not opposed to the civil society - the State -, but demands that her system and structures be recognized by the State. She has got her own system of administering her own affairs through her juridical system which includes her own laws, process and courts.

The book V of the Code of canon law affirms the inherent right of the catholic Church, independently of any secular power, to acquire, retain, administer and alienate temporal goods, of course for pursuing her own objectives that are principally the regulation of divine worship, provision of fitting support for the clergy and other ministers and carrying out the works of sacred apostolate, and of charity (can. 1254). Affirming the Church's right on temporal goods clearly without any ambiguity, the Code directs the administrators of the ecclesiastical goods[1] to respect the provisions of civil laws in various undertaking.[2] Restricting ourselves to alienation, the fourth element of ownership of the temporal goods, we try to study the element of alienation which involves the contract in the light of the Indian civil legislations. The other transactions which are not strictly alienation, but affect the patrimonial conditions of the juridical persons also form the object of our study.

1. Contract

Entering into a contract is an everyday occurrence. By getting into a public bus and buying ticket, by taking a cup of tea in a restaurant, or getting a ticket from an automatic weighing machine, we enter into contract though we may not realize that we are entering into contracts. But it is more evident in the case of people in trade, commerce entering into contracts to regulate their dealings leally. In the administration of temporal goods, contract plays a vital role. Canon law also speaks of making contracts for effective administration of ecclesiastical

[1] All temporal goods belonging to the universal Church, to the Apostolic See or other public juridical persons in the Church, are ecclesiastical goods (can. 1257 §1).

[2] To cite a few examples: Observation of civil law in prescription (cann. 1268, 197 – 199), creating fund for the support of clergy that would have standing in civil law (can. 1274 §4), ensuring that the ownership of ecclesiastical good is safeguarded in civil law (can. 1284 §2, 2º), observation of civil law in general (can. 1284 §2, 3º), observation of civil law relating to labour and social life (can. 1286, 1º), involvement of civil litigation (can. 1288), observation of civil law in pious will (can. 1299 §2).

goods. The contract plays a vital role in the administration of the temporal goods of the Church especially in alienation of ecclesiastical goods (cann. 1291 – 1294), transactions which can worsen the patrimonial condition of a juridic person (can. 1295) and leasing of ecclesiastical goods (can. 1297). In fact, canon law canonizes civil law in matte of contract.

1.1. Canonization of civil law on contract

The provision of can. 22 of *CIC* 1983 (*CCEO* can. 1504) voluntarily remits some issue to the civil laws with condition that these civil legislations do not go against the divine law, and that these issues are not stipulated in canon law. This canonization of civil law is very much seen in the administration of temporal goods of the church regulated in Book V of the 1983 Code. And for our interest on contract and alienation, the very first canon 1290 of Title III: Contracts and especially Alienation repeats the principle elucidated in can. 22 regarding the contract.

Can. 1290 (*CCEO* can. 1034) remitting the matters concerning the contract to civil law of the country in detail makes its own 'with the same effect'. Thus the capacity to contract, mutual obligations of the parties to the contract, requisite formalities, and other aspects of contractual transactions are left to the civil law. Yet the canon proposes two exceptions in adoption of civil law that are already given in can. 22 are to be followed as well: the civil law in question 'is not contrary to divine law' and the canon law – even by particular law – 'does not provide otherwise' for specific aspects or transactions. Sometimes the civil provisions may go against divine law especially in areas such as health care and education. These provisions may confer morally objectionable civil rights on the citizens.[3] In the same way, though the Code defers to civil provisions for contract, it may regulate certain elements governing the contract. For example, there are norms that regulate the acts of extra-ordinary administration (cann. 1271, 1281), alienation (cann. 1291 – 1294) and related transactions (can. 1295) and leasing (can. 1297). These requirements must be followed while adopting the civil law.

Can 1290 adds one more exception in adopting the civil law into the ecclesiastical realm that the provision of can. 1547 must be respected. That is, the proofs by witnesses, though not recognised in civil law, are acceptable in canon law. In fact, in the ecclesiastical tribunal proofs by the testimony of witness under the supervision of the judges is always admissible. But civil law often requires documentary proof of the existence of terms and conditions of some kinds of contracts such as purchase, sale of real estate, etc.[4] But the mention of can. 1547 upholds without any doubt the validity of a contract concluded before witnesses only.[5] This canon – a procedural norm – leads us to clarify that the canonization

[3] Robert T Kennedy, "Book V – The Temporal Goods of the Church (cc. 1254 – 1310)," in Beal John et *ali* (ed.), *New Commentary on the Code of Canon Law*, New York, Paulist press, 2000, pp. 1492 – 1493.

[4] *Ibid*, p. 1493; John A. Renken, *Church Property. A commentary on Canon Law Governing the Temporal Goods in the United States and Canada*, Ottawa, St Paul, 2009, pp. 243 – 245.

[5] Ernest Caparros et *ali* (ed.), *Code of Canon Law Annoted*, Montreal, Wilson & Lafleur, 2004, p. 997.

operated by the canon refers to substantive civil law. As long as there is any controversy and an ecclesiastical tribunal intervenes under the terms of cann. 1400 and 1401, the applicable procedural norm will logically be canonical norms.[6]

Apart from these three exceptions, can. 1290 refers the matters regarding the contracts to the civil law of the territory where a contract is made. So, for entering, or voiding a contract in respect of ecclesiastical property, the administrators must refer to the provisions of the Indian civil law on contract. The law relating to contracts in the Indian sub-continent is "The Indian Contract Act, 1872".

1.2. Contract in the Indian Contract Act, 1872

The Act was passed by British India and it is based on the principles of English Common Law. It is applicable to all the states of India except the state of Jammu and Kashmir (sec. 1). Sec. 2 (h) of the said Act reads "An agreement enforceable by law is a contract". In the words of Sir William Anson a contract is a legally binding agreement between two or more persons by which rights are acquired by one or more acts or forbearances on the part of the others. The law of contract thus differs from other branches of law in a very important respect. It does not lay down so many precise rights and duties which the law will protect and enforce. It contains rather a number of limiting principles subject to which the parties may create rights and duties for themselves, and the law will uphold those rights and duties. Thus, we can say that the parties to contract, in a sense, make the law for themselves. Provided they do not transgress some legal prohibition, they can frame any rules they like regarding the subject matters of their contract and the law will give effect to their contract.

1.2.1. Agreement

An agreement is defined as "every promise or set of promises, forming consideration for each other is an agreement" (sec. 2 (e)). What is a promise? A promise is defined "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise" (sec. 2 (b)). So when there is an offer and acceptance, then there is an agreement. And when there is an agreement enforceable by law there arises the contract. Thus all agreements are not contracts, but all contacts are agreements. There are several agreements which do not give rise to legal obligations. They are, therefore, not contracts. Similarly, there are certain obligations which do not necessarily spring from an agreement, e.g., torts or civil wrongs, quasi contracts or judgements of courts. These obligations are not contractual in nature, yet they are enforceable. So the law of contract is not the whole law of agreements, nor is it the whole law of obligations. It is the law of those agreements which create obligations and those obligations which have sources in agreements.

1.3. Essential elements of a valid contract in the Indian Contract Act, 1872

[6] Joaquin Mantecon, "Title III. Contracts and Especially Alienation," in Angel Marzoa et *ali* (ed.), *Exegetical Commentary on the Code of Canon Law*, vol. IV 1-1, Montreal, Wilson & Lafleur, 2004, p. 128.

Sec. 10 of the Indian Contract Act, 1872 describes the essentials of a valid contract. "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void".

1.3.1. Free consent

For the creation of a contract, the parties must have given their free consent. The term 'consent' means 'agreeing upon a subject matter in the same sense and the same time'. Both the parties must have the same mind and thinking about the term of contract. A free consent can be vitiated by coercion, undue influence, fraud, misrepresentation or mistake (see sec. 14). In the absence of free consent, the agreement becomes void or voidable.

1.3.2. Competent or Capacity of parties to contract

The term 'competent to contract / Capacity of parties' refers to physical and mental capacity and not financial capacity, unless the law has declared a person as financially insolvent. The parties must be competent to enter into a contract. A minor[7], a lunatic, idiot, drunken persons and any legally disqualified person like insolvent are not eligible to enter into a valid contract because of the their incompetency. "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject" (sec 11).

1.3.3. Lawful consideration

An agreement without consideration is void (sec. 25). Consideration means 'something in return'. For existence of consideration, both the parties to the contract must have some gain and some loss. If one party always gains and another party always loses, then there is no consideration. The consideration need not always be in cash or in kind. Further the consideration may be executory, or executed. However, it must be real and lawful and should not be vague. If it is unlawful, then the agreement is void. For example, A promises to pay Rs. 2 lakhs to B in consideration of B murdering D. this consideration is illegal.[8]

1.3.4. Lawful object

The object of the agreement must be lawful. In other words, it must not be illegal, immoral or opposed to public policy.[9] The consideration or object of an agreement is lawful, unless— it

[7] A minor is a person who has not completed 18 years of age. An agreement with or by a minor is void *ab initio*.

[8] In *Abdul Azix* vs. *Masum Ali* A promised B to donate money to him for rebuilding a mosque, but he failed to pay the amount subsequently. Here, since 'something in return' is not present, there is no consideration and hence the contract was held void.

[9] In *Pearce* vs. *Brookes* a firm of coach builders hired out a carriage to a prostitute, knowing that it was used by her to attract men. The prostitute failed to pay the hire. The Court held that the coach builders could not recover the hire, as the agreement was for an illegal object.

is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." (sec. 23)

1.3.5. Agreement not declared void

The agreement must not have been expressly declared void by any law of our country. For example, agreement in restraint of the marriage of any person other than a minor (sec. 26), agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind (sec. 27), agreements, the meaning of which is not certain, or capable of being made certain (sec. 29), agreements by way of wager (sec. 30) are declared void as per the Indian Contract Act. Only such contracts which are not declared void are alone valid contracts and they are enforceable in a Court of law.

1.4. Other essentials for a valid contract

Besides the above five elements, the following factors must also be taken into consideration for a valid contract.

1.4.1. Two parties.

A contract is a legally binding agreement. When one person makes a proposal and when the other person – i.e. the person to whom the proposal (offer) is made – accepts it, then a contract is made out. Thus in a contract, there must be two or more parties to the transaction/s.

1.4.2. Certainty

An agreement must be certain and definite to constitute a valid contract. The terms and conditions of the contract must be specific and certain. For example, A agrees to sell his house to B, but A has not clearly mentioned which of his houses he is going to sell to B. Here the terms of agreement are uncertain and hence the agreement is void.

1.4.3. Legal formalities

An agreement may be oral or written. But if the law requires a contract to be in writing in stamped paper and/or registered, then such legal formalities must be compiled with. Only then, the agreement becomes a valid contract.

1.4.4. Intention to create legal obligation

The parties entering into an agreement must have an intention to create legal relationship. If there is no such intention to create legal relationship on the part of both the parties, then there is no contract between them. For example, invitation to marriage, invitation to dinner, etc. are

all only domestic or social agreement as there is absence of intention to create legal relationship.[10]

1.4.5. Capable of performance

The terms of the agreement must be capable of being enforced. If there is an agreement to do an act which is impossible, then such agreement is void. For example, A agrees with B to discover treasure by magic. Such an agreement to do an impossible act is void.

1.4.6. *Consensus ad-idem* (identity of mind)

The parties must have agreed upon the subject matter in the same thinking and sense. For example, A has got two cars – one Santro and the other Maruti. A offers to sell his Santro to B, but B believes that A has only Maruti car, agrees to buy the car. Here, the two parties are thinking about different subject matter. So there is no identity of thinking and hence the agreement is void.

1.5. Classification of Contracts in the Indian Contract Act, 1872

1.5.1. Voidable contract

An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others is voidable contract. In other words, a voidable contract can be made valid or void at the option of the affected party. It means the party whose consent is not free, may avoid the contract if he chooses so. For example, A promises to sell his car to B for Rs. 50, 000/-. B's consent is obtained by use of force or coercion. The contract is voidable at the option of B. He may either treat the contract as void or may elect to treat it as valid.

1.5.2. Void contract

A contract which is originally enforceable when it is entered into may subsequently become void. For example, a contract to import goods from a foreign country may subsequently become void when a war breaks out between the country of import and the country of export and export/import are prohibited by Government order.

1.5.3. Unenforceable contract

Unenforceable contract is one which cannot be enforced in a Court of law, because of some technical defect such as document not in writing or document without stamp or with insufficient stamps.

[10] In *Balfour* vs. *Balfour* case an agreement was made between the husband and wife that the husband would send £ 30 to wife every month. It is an agreement of domestic nature and not creating any legal relationship. Hence wife could not legally enforce the agreement.

1.5.4. Express and implied contracts

A contract may be made by two methods: by writing or by words of mouth, and by inferring from the circumstances of the case. If the terms of the contract are expressly agreed to be by the words either spoken or written, then the contract is called express contract. When the contract is not due to the result of any express promise (oral or written) of the parties, but can be inferred by the acts and/or conducts of the parties, then it is implied contract. For example, getting into a public bus and buying a ticket, or taking a cup of tea in a restaurant.

1.5.5. Quasi contract

There may be a transaction in nature of a contract, but not actually a contract and this is called quasi contract. A quasi contract is not a contract at all. It is a contract created by law. When one person receives a benefit from another person, equity and justice require that the other person must be compensated. In other words, there is a legal obligation on the party who received the benefit to compensate the other party. Quasi contract depends on the equitable principle that 'no one can enrich himself/herself unjustly at the expenses of another.[11] For example, A, a tradesman leaves his goods at C's house by mistake. C treats the good as his own. Hence, C is bound to pay A for the goods left in his house by mistake.

1.5.6. Standard forms of contract

Institutions like banks, insurance companies, government departments have standard formats of offer, acceptance, contract deeds, etc. in printed forms. Persons entering into contract with these institutions have to simply sign in the dotted lines, as the terms and conditions of the contract have already been printed and not subject to any alteration. Such contracts are called standard forms of contracts. They are also called 'Adhesive contract' or 'Company contract'. In interpreting the ambiguous terms of such contracts, the benefits of doubt is always given to the individual customers and not to the institutions.

1.5.7. E-Commerce contract

An E-commerce contract is entered between two parties through internet. Individuals/ companies create networks which are linked to other networks and contracts are entered through internet. This is called E-commerce contract.

1.5.8. Executed contracts

Once the terms and conditions of a contract have been executed and the obligations created by the contract have been performed by both the parties then it becomes an executed contract. For example, A agreed to sell his car to B for Rs. 5 lakhs. A sold his car and B bought it paying the required amount. Thus, both A and B having performed their obligations, the contract becomes an executed contract.

[11] See sec. 68 – 72 on the Indian Contract Act, 1872.

1.5.9. Executory contract

Here one or both the parties to the contract have not yet performed their obligations. As per the terms of the contract, something remains to be done either by one or both the parties and hence called executory contract. Thus, in the above example, if A has not yet sold the car and B has not paid the price for it, the contract is executory.

A contract may also be sometimes partly executed and partly excutory. For example, B has paid the amount for the car, but A has not sold the car.

On the basis of execution, the contract may be divided into two: unilateral contract and bilateral contract. In the unilateral contract, only one party has to fulfil his obligation at the time of formation of the contract; the other party has fulfilled his obligations before the formation of the contract or at the time of the contract. But in the bilateral contract, at the time of its formation, the obligations on the part of both the parties are outstanding. For example, A promises to sell his car to B after ten days, and B promises to pay the price on the delivery of the car.

2. Alienation

Alienation is one of the essential elements of ownership. In fact the Catholic Church has an inherent right independent of any secular power to alienate the temporal goods of the Church (cann. 1254 §1, 1255).

Alienation comes from the Latin verb *alienare* which means 'to make something another's'. Alienation of temporal goods is the transfer of ownership of property from one person to another, which is carried out by sale, gift or by exchange. Alienation may also result from the decision in an arbitration proceeding or settlement in a conciliation proceeding (see can. 1715). As a juridical act, alienation differs radically from administration whether ordinary or extraordinary. While the purpose of the administration is the preservation, proper use, improvement or enhanced productivity of the temporal goods, the alienation has as purpose the termination of ownership.[12]

Alienation includes not only the direct transfer of ownership, but also 'any transaction whereby the patrimonial condition of the juridical person may be adversely affected (can. 1295).[13] The acts like mortgaging, granting a right of way or an easement, leasing, taking loan of sum of money, etc. are not themselves alienation as they do not involve the transfer of

[12] Robert T Kennedy, pp. 1493 – 1494; Jean-Claude Périsset, *Les biens te,porels de l'Eglise : Commentaire de Code de Droit Canonique Livre V,* Paris, Tardy, 1996, pp. 198 – 202 ; Olivier Echappé, « Les biens temporels de l'Eglise », in Patric Valdrini et ali, *Droit canonique*, (2e édition), Paris, Dalloz, 1999, pp. 372 – 373 :

[13] The Motu Proprio *Pastorale munus* of Paul VI dated 30.11.1963 considered a number of acts to be equivalent to alienation, such as granting security, mortgages, long and short term leases and contracting debts that exceed the amount established by the Conference of Bishops (no. 32).

the ownership; they may constitute acts of extraordinary administration and thus they are subject to the norms governing such acts (see cann. 1277, 1281, 638 §1). But in some circumstances these acts may fall into the category of transactions which endanger the patrimonial condition of the juridical persons and thus are subject to the norms of can. 1295, even though the actions themselves are not acts of alienation.[14] Since they are subject to the norms governing alienation (can. 1295), some authors refer to such transactions as alienation "in the broad sense" and alienation as alienation "in the strict sense".[15] In the same way, the disposal of object of a worth which is special by reason of their market value or their artistic, historical, consecrated or votive nature, can also be considered as alienation in the broad sense.[16]

2.1. Restriction in alienation

Though the Code allows the alienation of the ecclesiastical goods, it takes extra care when the alienation involves the goods that are lawfully assigned to be part of the stable patrimony of the juridical person and that their value exceeds a determined sum by law. The law requires that the permission of the competent authority by law must be obtained for such alienation.

2.1.1. Stable patrimony

Stable patrimony is all property – real or personal, moveable or immoveable, tangible or intangible – that either of its nature or by explicit designation, is destined to remain in the possession of its owner for a long or indefinite period of time to afford financial security for the future.

There are four categories of stable patrimony: real estate (land, buildings), non-fungible personality (tangible moveable property that is not consumed in its use, such as automobiles, furniture, books, etc.), long term investment in securities (stocks, bonds, deposits, etc.), and restricted funds - even if comprised of cash or short-term securities - that have been set aside for specific purposes like for pension, building, education, etc.[17]

2.1.2. Lawfully assigned

The goods are to be lawfully assigned to be part of the patrimonial property of a public juridical person. This lawful assignment can be implicit or explicit. It is implicit when the property is acquired with the intention of retaining it for a long or indefinite period of time. For example, buying of land, building or books. It becomes explicit designation when assets

[14] While *CIC* 1917 had separate restrictive provisions for individual acts of mortgaging (can. 1538), pledging (can. 1538), leasing (cann. 1541, 1542) and contracting debts (can. 1538), the new Code grouped together all these acts under the banner of transactions that adversely affect the patrimonial condition of juridical person.

[15] Robert T Kennedy, p. 1494.

[16] Gerald Sheehy et *ali* (ed.), *The Canon Law. Letter and Spirit*, London, Geoffrey Chapman, 1995, 732.

[17] Robert T Kennedy, pp. 1495 - 1296

or funds are allotted to some specific purposes like pension, or corpus fund for an educational institution. When for example, a person donates money for a specific purpose, and this money may be invested in a safe fixed deposit to fulfil that purpose (mass intentions, formation of one seminarian, or of a novice, education of poor students, etc.). The competent ecclesiastical authority may formally designate the annual surplus from a parish or diocese, to be deposited as a corpus fund of that parish or diocese. Here it must be noted that the surplus does not automatically become fixed capital subject to the restrictions of alienation; it becomes so only by the formal designation by the competent authority. In case of doubt, the presumption is mostly in favour of the free capital. A decree of competent authority is needed to immobilize or stabilize a fund. Once it is immobilized, it becomes stable and it cannot be freely withdrawn, nor can be used as a free flowing fund.

In fact, the administrators before undertaking charge of the office must draw up a clear and accurate inventory on assets belonging to stable patrimony (can. 1283, 2º, 3º)

2.2. Competent authorities to grant permission

2.2.1. Establishment of minimum and maximum sum for alienation

The competent persons to grant permission for alienation differ according to the amount of the goods to be alienated. As Pope Paul VI had already by his Motu proprio *Pastorale munus* of 30 November 1963[18] directed, can. 1292 §1 decrees that the Conference of Bishops is to establish maximum and minimum amounts as pre-requisite for determining which authority shall grant the permission. For India, the Conference of Catholic Bishops of India (CCBI) has established on 25 September 2012 that the approved minimum sum for the alienation of ecclesiastical goods is Rs. 15, 00, 000/-, and the approved maximum sum is Rs. 1, 50, 00, 000" (1.5 crore).

For all the religious institutes, the minimum and maximum sum is determined by the Holy See (can. 638 §3).

2.2.2. Alienation of goods between minimum and maximum sum

2.2.2.1. Competent authorities

For the juridical persons not subject to the diocesan bishop, like inter-diocesan seminary, university, associations, the competent authority is determined by their own statutes. For juridical persons subjected to the diocesan bishop, for example, parishes, diocesan foundations, the competent authority is the diocesan bishop whose consent is required for the alienation of goods between minimum and maximum sum fixed by the Bishops' Conference. For the religious institutes the written permission of the competent superior is to be obtained for the alienation to be valid.

2.2.2.2. Manner of granting permission by the competent authority

[18] Paul VI, Motu Proprio *Pastorale munus*, no. 32.

Bishop gives his consent for such alienation after getting the consent of the diocesan finance committee (c. 492), the college of consultors (c. 502 § 1) and of any interested parties like founders, donors, beneficiaries, and others whose rights might be affected by the proposed alienation. Thus, for example, the consent of the parish priest in case of parochial property, of the original donor or anyone who might retain an acknowledged legal interest in the property in question is also to be sought. For the goods belonging to the diocese itself, apart from the other juridical persons subject to the diocesan bishop, bishop needs to get the consent of the above mentioned three bodies.

When there is an intention of alienating several assets at the time of alienating the first asset or when two or more assets alienated within a short period of time, say one month or less, or when various items are alienated for the same purpose – for example, to finance the construction of a new building -, then they must be taken together to calculate the minimum and maximum amount fixed CCBI.[19]

2.2.2.3. Requirements for the alienation of goods

Canons 1293 and 1294 (*CCEO* can. 1035) give a list of requirements to alienate goods whose value exceeds the determined minimum. While the consent needed from the consultative bodies and the interested parties is for validity of the alienation on the part of the competent authority to grant permission, these requirements are for liceity. The failure to comply any of these requirements leaves the alienation valid, but unlawful. For alienation of ecclesiastical goods, there must be just cause such as urgent necessity, evident advantage or religious or charitable or pastoral reason (can. 1293 §1, 1º); and a written appraisal of the value of the asset to be alienated must be obtained at least from two experts (can. 1293 §1, 2º). The concerned goods should not be alienated normally[20] below the appraisal by experts (can. 1294 §1). The proceeds from the alienation must be carefully invested for the benefit of the Church (can. 1294 §2). Additional other precautionary measures – such as national, provincial or diocesan law, constitution or statutes of particular juridical person, prescription of civil law – must be taken by the legitimate authority so that the Church does not suffer any loss by this particular alienation (can. 1293 §2).

2.2.3. Alienation of goods above the maximum amount fixed the Bishops' Conference

For the alienation of goods above the maximum sum fixed by the Bishops' Conference permission of the Holy See is required in addition to the permission already needed for the valid alienation of the goods between minimum and maximum sum. When the value of the

[19] Robert T Kennedy, p. 1498.

[20] But the word 'normally' indicates that there may be exception to this rule. In the case of a building or land which has become an expensive liability, it is prudent to dispose of it even at the lower price than the market value, thus greater expenses could be avoided at a later date. The goods may be alienated at a lower price to another charitable or apostolic purpose.

goods to be alienated exceeds the maximum sum fixed by the bishops' conference for its region, for the property subject to the diocesan bishop, the competent organ of the Holy See is the Congregation for the Clergy (PB 98), for the dioceses in Mission land, it is the Congregation for the Evangelization of the peoples. So for India, the diocesan authority is to seek the permission from the Congregation for the Evangelization of the Peoples for such alienation. For the religious, it is the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (PB 108 § 1) which is competent to grant permission for the alienation of good above the maximum level fixed by the Holy See. While granting permission for such act, it is the practice of the Holy See to require at least a "*nihil obstat*" from the diocesan bishop of the place where the property is located.[21]

The Roman Pontiff, the Pastor of the universal Church having supreme, full, immediate and universal ordinary power (can. 331), is the supreme administrator and steward of all ecclesiastical goods (can. 1273). Thus the intervention of the Holy See is an exercise of vigilance over the good so that their alienation does not result in impoverishment of the particular churches.[22]

2.2.3.1. Requirements to get permission

To get the permission from the Holy See, the competent authority in the diocesan level is to send to the Congregation for the Evangelization of the Peoples the following documents: a covering letter for permission and explanation of just cause, a written evaluation of the property, a report of the consent received from the three bodies, a statement about the divisible property précising what parts have already been alienated (c. 1292 § 3), a report on offer of purchase, how the money, that comes from alienation, is to be used (c. 1294), a statement about the civil law formalities (c. 1296). In case of religious Institutes, no objection '*nihil obstat*' certificate from the diocesan bishop of the place where property is located.

2.2.4. Alienation of goods of special category

There are goods the Church receives by reason of vow (see can. 1191) and also there are goods that are distinguished by reason of age, art or cult which are exposed in churches and oratories to the veneration of the faithful and these are considered to be precious because of their artistic or historical significance (see can. 1189). For the alienation of these goods as well, the permission of the Holy See is required as in the case of the alienation of the goods that exceeds the sum of the maximum level fixed for that purpose (can. 1292 §2).

2.2.5. Manner of seeking consent

[21] Gerald Sheehy et *ali* (ed.), 734.

[22] Joaquin Mantecon, pp. 135 – 136.

The members of the finance committee and of the college of counsultors and the interested parties are not to give consent without getting the proper and full information about the situation of the juridical person whose goods is proposed for alienation (can 1292 §4). They need to be told about the economic situation of the juridical person and about the alienations which have already taken place, so that the information given to them would help the superior to make an informed judgement. In fact this norm which is not found in *CIC* 1917, is added in the new Code for the sake of prudence and honesty in dealing with alienation.

3. Conflict between Civil law and Canon Law

As we have seen earlier can. 1290 speaks of the adoption of civil law in the matter of contract as well as alienation which is effected through contract, the Indian Contract Act, 1872 allows the parties to contract to make law for themselves which create rights and obligations on the part of the parties, without going against some well-defined principles given in the Act itself. That being the case, the statutes of the juridical persons can very well incorporate the norms of the Indian Contract Act and thus can make the contracts made under the prescription of canonical norms be valid also in the civil law. Thus we can avoid the unnecessary conflict between the civil law and canon law. It is for the administrator of the ecclesiastical goods to know the civil legislations and get advice of the advocates in dealing with alienation and the other transactions that may affect adversely the economic situation of the juridical persons.

It is imperative that the competent ecclesiastical authorities explore and adopt such measures as may be available in order to exclude or at least to minimise the risk of a clash between the two jurisdictions civil and canonical. A particular means of ensuring this can often be the insertion into the statutes of the juridical person or perhaps into the very contract itself of the alienation to effect that the transaction would be null even in the civil law if the transaction for validity at canon law had not been integrally observed.[23]

All the same, can. 1296 (*CCEO* can. 1040) foresees an alienation that is civilly valid but canonically invalid because of the non-observance of the canonical formalities. Here the competent authority is to see whether any action could be taken against this canonically invalid alienation. If he resolves to take action, he is to decide whether it should be real or personal action, by whom and against whom it should be brought to vindicate the canonical rights of the juridical person. Real action is the one which has its object as '*res*', that is, recovering the alienated property for example. A personal action has as its object a person against whom the action is to be taken. In other words, the action is taken against a person who is responsible for the invalid alienation. The Code prescribes punishment with just penalty for those who alienate ecclesiastical goods without proper permission (can. 1377).[24]

[23] Gerald Sheehy et *ali* (ed.), 737.

[24] For detail, see John A. Renken, "The Collaboration of Canon Law and Civil Law in Church Property issues", in *Studies in Church Law*, 4 (2008), pp. 447 – 454; John A. Renken, "Penal Law and Financial Malfeasance", in *Studia canonica*, 42 (2008), pp. 5 – 57; Francis G. Morrisey, "Challenges for the administration of Temporal Goods in the light of changing circumstances", in *Studies in Church Law*, 6 (2010), p. 46.

4. Leasing

Leasing is not alienation because there is no transfer of ownership. But it can affect the overall financial condition of the juridical person if lease is given for long term, and so it calls for the application of the norms on alienation (c. 1295). A lease is a contract by which property, whether movable or immovable, is let to another for use for a determined time at a specified price or rent. The Bishops' Conference is to issue norms for leasing that are to be followed.

For India, the CCBI in 1988 decreed that

The written permission of the diocesan bishop has to be obtained for every act of leasing.

1. The bishop has to consult the college of consultors and the finance committee if the value of the property to be leased is below the minimum approved by the conference in connection with can. 1292; if the value of the property is above the minimum amount, the bishop has to obtain the consent of the college of consultors and the finance committee;
2. The document of lease should always be made out in the form of a contract, if possible in a format also valid in civil law. It is recommended that every bishop, with the help of the finance committee, should determine the criteria for leasing, drawing up a list of properties that may be leased and specifying which among these may be leased on a long term basis and which on a short term basis.

The value of goods that requires prior permission for lease is the value of the goods to be leased and not the amount for which they will be leased.[25] The sum fixed by CCBI for leasing a property is the same as it is for alienation. So the competent authority is to consult the college of the counsultors and the finance committee members if the property to be leased is valued below 15 lakhs. If it exceeds that amount, then he is to get the consent of the same bodies for a valid act of leasing.

Conclusion

The competent authorities make often the contracts for various purposes starting from inviting the religious for the ministry in the dioceses, to the daily administration of temporal goods. Can. 681 §1 legislates that there must be a written agreement between the bishop and the competent superior of the religious institute to define expressly and accurately among other things the work to be done, the members to be assigned to it, and the financial arrangements. If this agreement could be made enforceable by law, especially for the question of finance, many unwanted problems affecting the relationship could be avoided so as to give joint witness to the proclamation of the gospels.

[25] Joaquin Mantecon, p. 147.

The days are gone when we used to take things for granted. For the temporal goods, unless we are vigilant, we may easily lose the ecclesiastical goods. Now a days we rent lot of ecclesiastical properties like buildings, halls, shops, malls, vacant land, etc.; unless we make proper contracts, the property may easily go out of our hands. There are incidents where the parish priests bought the same land thrice paying each time the amount without knowing that the land nearby the church school is already the diocesan land. The contracts must be made appropriately in such a way that they have standing in the Indian Contract Act, 1872, without neglecting the canonical norms on this subject.

Alienation is not something evil that is to be avoided. Contrary to the belief of some administrators who go to the length to avoid having a transaction regarded as alienation as if it were a prohibited evil, the Code does not view alienation as always undesirable. At times it is highly desirable, even encourage.[26] What the Code says is that alienation, as it involves the change of ownership, care must be taken by the competent authorities to safeguard the interest of the Church. Since the temporal goods are needed for the effective announce of the gospel, the ecclesiastical goods are to be protected well. Any transactions that affect the patrimonial condition of the juridic person must always be handled with discretion, caution and prudence.

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[26] Robert T Kennedy, p. 1495.