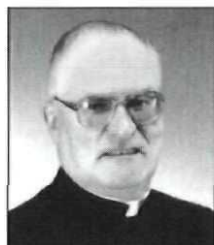


# ALIENATION AND ADMINISTRATION

## *System Restructuring Often Entails Four Types of Canonical Acts*

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For Catholic healthcare providers, following canon law as it pertains to changes in governance—joint ventures, the pooling of resources by Catholic and non-Catholic providers, and system restructuring—can be confusing. The canons on temporal goods were not drafted with the possibility of multicongregational or multidiocesan ownership of apostolic works in mind, and many contemporary situations do not fall easily into established canonical categories. Yet determining whether a transaction constitutes an act of alienation—a conveyance of goods—or an act of administration—an act undertaken to preserve goods—can be crucial to the transaction's validity.

Because many of the components of a healthcare system are incorporated separately, changes in governance at the system level do not necessarily affect the local property titles. Therefore, in a simplistic sense, there is no alienation of the actual

property itself (provided the proper reserved powers are retained). But while the title to property might remain intact when the system is restructured, the capacity to carry out the Church's mission within the system could be jeopardized by entry into nondenominational or for-profit systems. Canonists adopt different approaches to the question of alienation in such cases. To some, the loss of Catholic identity or the pooling of juridic persons' goods constitutes an alienation or an act jeopardizing the assets; to others, alienation does not occur if the property titles remain untouched. These differences of opinion arise because the situations are new and also because of a lack of familiarity within certain Church circles with the types of transactions and transformations taking place.

In instances of system restructuring, we are often dealing with four types of canonical acts, each with its proper procedures and formalities:

**Summary** When applying canon law to healthcare transactions, difficulties often arise in determining whether the transaction or restructuring in question constitutes a canonical act of alienation or an act of administration. Changes in system governance may leave local property titles untouched, suggesting that no alienation has taken place, but loss of Catholic identity or a reduced ability to carry out the Church's mission may indeed constitute alienation. Often in restructurings, four types of canonical acts are involved: alienation of property (alienation in the strict sense), acts that can jeopardize the stable patrimony (sometimes called alienation in the broad sense), acts of ordinary administration, and acts of extraordinary administration.

While alienation concerns the divestiture of ownership, the general purpose of administration

is to preserve goods. Acts of extraordinary administration require certain formalities of consent before they can be carried out. However, the intervention of the Holy See is not required, as it is for acts of alienation. The permission may be granted in principle, before a formal offer is received; after an offer is received; or, in some cases, by a "blanket" indult.

A restructuring can amount to an alienation unless care is taken to verify to maintain certain reserved powers, thus ensuring that the work is still under the direction or canonical control of the sponsoring religious institute or diocese. Joint ventures, however, seldom involve insoluble canonical problems.

Each situation must be evaluated individually and care taken to ensure that the requirements of both ecclesiastical and secular law are met.

- Acts of alienation of property (alienation in the strict sense)

- Acts that can jeopardize the stable patrimony (sometimes called alienation in a broad sense)

- Acts of ordinary administration

- Acts of extraordinary administration

There are similarities between acts of alienation and acts of administration, but legal requirements for the two are different. For

instance, there is no obligation to obtain the permission of the Holy See before carrying out an act of administration as there is for an act of alienation, nor are religious institutes required to approach the diocesan bishop when performing such acts. Also, these healthcare transactions operate on two levels: the ecclesiastical and the secular. We must carefully observe both sets of laws and their prescriptions to protect our works and assets.

This article will discuss three areas that relate to the concept of alienation in healthcare transactions. These are the canonical concepts of alienation and administration, the current requisites of law, and particular situations that should be addressed.

## ALIENATION

In the proper sense of the term, "alienation" refers to transfer of ownership, and is often called "conveyance." In a broad sense, the term is used to refer to acts that place the patrimonial state of a juridic person in jeopardy of being lost (c. 1295). These acts usually entail transactions such as encumbering the property with debts, mortgaging it, or giving up a significant part of the control over operations.

Through healthcare systems' transactions or restructuring, even though there is no readily verifiable transfer of individual ownership because the institutions involved are incorporated separately, the voluntary or involuntary transfer of "Catholicity" (or the eventual loss of Catholic identity) could entail the loss of a major part of an ecclesiastical juridic person's identity and patrimony. Even the transfer or change of a name can entail a significant change in the concept of full ownership. Some canonists call such changes acts of "virtual alienation," a category not mentioned in the code. No matter what term is used,

# An alienation

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canonists agree that there is an alienation, at least in a broad sense of the term, if a transfer necessarily results in the loss of Catholic identity. The work then is no longer identified as ecclesiastical, the Church has lost effective control over the undertaking, and the marketable dimensions are greatly diminished. For these reasons, and because of the amount of money involved, the permis-

sion of the Holy See is usually required before the changes are authorized.

Following former canonical traditions, some canonists might still consider the restructuring or reorganization of systems to be an act of extraordinary administration rather than an act to which the canonical prescriptions governing alienation apply, but their placement under canon 1295 in the revised code clearly demonstrates that they are not. Nevertheless, in many transactions, the line of demarcation is not clear, and it is difficult to determine whether we are dealing with alienation (either in the proper or in a broad sense) or with extraordinary administration.

The following acts are generally considered to constitute alienation in the proper sense of the term:

- Transferring title to property to another person (for instance, a sale of land or of goods)

- Spending immobilized (assigned for a specific purpose) goods for purposes other than those for which they were originally immobilized

- Transferring or selling notable cultural works or relics

- Acts that would result in the withdrawal of Catholic identity by a bishop (although they might be considered to be alienation in a broad sense)

Acts now usually considered to be acts to which the formalities for alienation apply include:

- Acts that could be a preparation for conveyance, such as giving a security, a mortgage, an option, compromise, or settlement

- Acts that subject church property to long-term burdens, such as easements

- Acts that establish a trust, since the goods are no longer at the sole disposition of the juridic person (however, some trusts can be established without alienating the property, provided the purposes of the trust are those for which the property

was originally purchased or retained)

• According to some canonists, acts that would result in the withdrawal of Catholic identity by a diocesan bishop

**Entrusted Goods** The rules on alienation apply only to goods that are part of the stable patrimony of a juridic person. They do not apply to goods that are held in trust for another entity—for example, a government or a municipality. Inventories of property administered by representatives of the Church must clearly distinguish between goods that are owned by the Church or one of its constituent parts and those which have been entrusted to it by public authority, or some other person, often for a specific use. Such goods can be acquired, retained, and administered, but they cannot be alienated. The transfer or conveyance of such goods is not subject to the detailed canonical norms, but to the intentions of the donors.

**Assigned Goods** The canons on alienation are concerned with goods that form part of the stable patrimony of a juridic person, not with liquid assets. Occasionally the question arises whether goods that have been assigned, or immobilized, for a specific purpose constitute part of the stable patrimony. Custom enters into play here. If, for many years, assigned property such as immobilized funds was considered by Church administrators to be part of the stable patrimony of a public juridic person, then the formalities of law should be observed if the funds were to be alienated, even

though there is no proof that when they were immobilized they were made part of the stable patrimony.

Immobilization's character of permanence makes it equivalent to an investment, which is generally considered to be part of the stable patrimony. Money in easily liquidatable bank accounts or stocks, however, is not considered to be an investment in the canonical sense of the term.

Investing money that is part of the stable patrimony in high-risk business ventures could constitute an alienation (at least in a broad sense). On the other hand, changing the nature of investments without affecting the patrimony itself does not constitute an alienation, provided the portfolio retains its value. The investment of free capital is not an act of alienation of stable patrimony, but an act of administration.

**Current Concerns** In situations that involve questions of alienation, what counts most today are not the bricks and mortar, the land, or the amount of debt, but the quality and catholicity of the work. Recently the Holy See has been paying special attention to three areas of concern:

- Who is responsible for seeing that qualified persons are appointed to the board of directors?
- Who is responsible for monitoring the application of the *Ethical and Religious Directives for Catholic Health Care Services* (or a similar document) and for correcting any irregularities?
- If there is a transfer of governance, will the sponsoring religious institute receive any compensation for its work?

## ACTS THAT ARE NOT ACTS OF ALIENATION

The following generally are not considered acts of alienation:

- Spending free capital
- Transferring goods within the same juridic person
- Registering assets under a new title
- Assuming mortgaged property
- Transferring title for a similar title
- Using ecclesiastical property as collateral for a loan
- Making a loan
- Renegotiating loans
- Selling furniture and equipment
- Observing the intentions of donors
- Curtailing property rights through negligence
- Refusing gifts
- Accepting foundations
- Involuntarily surrendering property
- Converting capital assets

These acts are acts of administration and are subject to the norms regarding administration (ordinary or extraordinary, depending on the case).

## ORDINARY AND EXTRAORDINARY ADMINISTRATION

While the concept of alienation concerns the divestiture of ownership, or is applied to the placing of ownership in jeopardy, the general purpose of administration is to preserve goods, to ensure that they produce the appropriate revenue, that they are properly supervised, and that they are used for the purposes for which they were obtained.

Ordinary administration covers a number of routine acts—paying bills, maintaining the property, providing lodging and food—and can be carried out without special permissions. Acts of extraordinary administration require certain special formalities (c. 638, para. 1; c. 1277). For instance, for the extraordinary administration of goods belonging to a diocese and for those subject to the diocesan bishop, the diocesan finance council and the college of consultors must consent before the bishop can authorize the act. However, as noted above, the intervention of the Holy See is not required for acts of extraordinary administration. In the case of goods belonging to religious institutes, canon 638,

para. 1, states that the institute's own law—its constitutions, finance directory, and so on—should determine what is needed for the validity of an act of extraordinary administration, who is to give consent, and what formalities are required.

Canon 1277 provides for a special category of acts—those which, in light of the diocese's financial situation, are to be considered acts of major importance. For such acts, appropriate consultation is prescribed. This is not mandated for religious institutes, but they are free to institute such a category in their administrative handbooks.

For goods belonging to dioceses and for those subject to diocesan bishops, the National Conference of Catholic Bishops established, in November 1985, a list of acts it considered to be acts of extraordinary administration (*Implementation of the 1983 Code of Canon Law*, Washington, DC, 1991, p. 21). However, this list did not receive the *recognitio* of the Holy See and is not binding. Furthermore, the list is seriously flawed because it refers almost exclusively to acts that are considered to be acts of alienation or similar acts and not acts of administration:

- Alienating goods that exceed the allowed amount
- Alienating goods donated through a vow, or which are of artistic value
- Incurring debt that exceeds the allowed amount
- Encumbering stable property beyond the minimum limit
- Leasing Church property, if the annual lease exceeds the allowed amount (currently \$500,000)
- Leasing Church property when the value of the leased property exceeds the allowed amount and the lease is for more than nine years

In certain cases, the first four of these transactions would require the intervention of the Holy See. It could also be argued that since leasing is mentioned in the code in the chapter on contracts and alienation (c. 1297), it does not fall under the concept of administration.

For religious institutes, canon 638, para. 1, provides that the law of the institute is to determine which acts exceed the purpose and manner of ordinary administration. No reference is made in the canon to the consent of the diocesan bishop

# Acts of ordinary administration can be done without special permission.

for carrying out such acts. Nevertheless, according to article 68 of the *Ethical and Religious Directives for Catholic Health Care Services*, the *nihil obstat* of the diocesan bishop is necessary in certain cases of joint ventures. Religious institutes can use the NCCB list or determine their own particular acts.

Acts that religious institutes (and dioceses, if they sponsor such works) could,

and possibly should, consider as acts of extraordinary administration, or at least acts of major importance, include:

- The reorganization of governance structures of a healthcare institution or system (provided the reorganization does not result in an alienation)
- The revision or termination of contracts (if alienation is not involved)
- Certain types of joint ventures and partnership agreements in the area of healthcare
- Certain management arrangements for institutions
- Entering into or responding to lawsuits (c. 1280)
- The acceptance or refusal of gifts to which conditions are attached (c. 1267)
- The establishment of cemeteries

The nature of the act, not the amount of money involved, primarily determines whether it constitutes an act of ordinary or extraordinary administration. Nevertheless, the law could state that nonrepetitive acts that cost more than a specified maximum sum—for example, the purchase of a car for more than \$30,000, or the purchase of a computer system—are to be considered acts of extraordinary administration, requiring special consent.

## GENERAL REQUISITES FOR ALIENATION

The first requisite for alienation is appropriate permission of the competent authorities, including the Holy See if the value of the goods involved exceeds the maximum amount allowed (currently \$3 million). This maximum need not be the same for religious institutes and dioceses (compare c. 639, para. 3, and c. 1292, para. 2; *Communicationes*, vol. 15, 1983, p. 71).

If the case needs the permission of the Holy See, the file containing the request to alienate property should include the following documents:

- An explanation of the just cause (c. 1293, para. 1)
- Written evaluations (c. 1293, para 1)
- An explanation of how other particulars of law have been observed (c. 1293, para. 2)
- The consent of intermediate bodies or councils—often in the form of minutes
- A statement regarding divisible goods (c. 1292, para. 3)
- The offer to purchase, if possible (c. 1294, para. 1);
- A statement of what is to be done with the proceeds (c. 1294, para. 2)
- Sometimes, a statement regarding the observance of the formalities of secular law (c. 1296)
- If the request is from a religious institute, a letter from the diocesan bishop stating that he has no opposition to the proposed transfer

A file containing a request to contract debts would contain similar, but not necessarily identical, elements.

In the case of goods belonging to a diocese, the code requires three interventions: the consent of the interested parties, the finance council, and the college of consultors. For religious institutes, the consent of the general council is sufficient. The intervention of a finance council in a religious institute, in addition to the consent of the general council, is not required; canonical tradition holds that one of the principal roles of the general council is to serve as a finance council (see S.C. Religious, Decree, *Inter ea*, September 15, 1909, para. V, in P. Bastien, *Directoire canonique à l'usage des Congrégations à vœux simples d'après les plus récents documents du Saint-Siège*, Abbaye de Maredsous, Maredsous, 1911, pp. 489-490). The same source also states: "Where a [general, provincial, or local] council already exists, it is this council which, according to the prescriptions of the constitutions and of the present decree, carries out the duties of the council of vigilance, without requiring that a special council be established" (pp. 362-363).

A letter from the diocesan bishop stating that he has no objection to an alienation is given in his personal capacity as diocesan bishop, not as the person in charge of the diocesan corporation or as administrator of the diocese's goods. He does not need the consent of the diocesan finance committee and the college of consultors to give this authorization because diocesan goods are not at stake here; rather, the goods belong to a religious institute.

#### PERMISSION PROCEDURES

There are three possible procedures when seeking permission of the Holy See for acts of alienation,

or for acts requiring the same formalities (c.1295). Approval "in principle" to convey the property or to contract debts may be requested before any formal offer of purchase or tender is received. When the formal offer is received, the Holy See is notified of the sale price or of the amount of debt to be incurred, and the original permission is confirmed, usually immediately. This allows transactions to be completed within the time that the offer holds.

Permission may be requested after a formal offer is received, but this does not always allow enough time for the request to be processed. Finally, in special cases, a "rolling" or "blanket" indulgent, which allows the accumulation of debts up to a certain maximum, may be obtained. However, this indulgent does not apply to alienation in the proper sense of conveyance, but only to the accumulation of debts (c. 1295).

At times, an indulgent to sell property contains conditions regarding its application. These conditions must be met for the transaction to be valid. However, the indulgent usually does not specify the name of the purchaser. Therefore the seller may accept another offer, provided the indulgent does not restrict the sale to one given party.

Similarly, the seller may accept a higher price than that in the indulgent. However, acceptance of a significantly lower price may require a review of the indulgent, depending on conditions spelled out in the original request or in the rescript. Obviously, the Holy See must rely to some extent on the evaluations of the property provided by those making the request. Factors for determining the value of alienated goods include their original cost, the declared value of the goods for taxation purposes, their replacement or insurance value, their depreciated value, and their market value at a given moment.

If the indulgent allows the petitioner to contract debts, then, again, the conditions spelled out in the reply must be respected. The debt ceiling and the terms for repayment are the most important factors.

#### PARTICULAR SITUATIONS

**Corporate Restructuring** A system restructuring could amount to an alienation or jeopardize the stable patrimony unless a sponsor's reserved powers are verified and maintained. The major reserved powers, as developed by canonists in recent years, are the powers to:

- Establish or change the philosophy and mission of the work
- Change the corporate documents and bylaws
- Appoint or remove the board of directors and the chief executive officer
- Lease, sell, or encumber corporate real estate

- Contract debts
- Establish subsidiary corporations
- Approve capital or operating budgets
- Appoint the auditor
- Be involved in mergers, closures, and so on, affecting the property or the work
- Engage in activities that would risk losing Catholic identity

If these, or similar, reserved powers are retained, restructuring does not cause alienation, because the work is still under the direction or canonical control of the sponsoring religious institute or diocese.

**Joint Ventures** In certain instances of joint ventures there is a risk of jeopardizing the patrimonial goods, and possibly of alienation, if the original sponsors are no longer able to control the work. However, most of the problems arising in joint ventures today are not canonical but pertain to the field of moral theology, in particular to the notion of cooperation.

#### SIX GUIDING POINTS

Six points become clear from the above discussion.

1. Clear distinctions between the types of canonical acts will enable canonists evaluating proposals to determine whether they are dealing with an alienation, and, if so, whether the *nihil obstat* of the diocesan bishop and the permission of the Holy See are required.

2. No two cases are alike. If permission is required in one case, it will not necessarily be required in the next.

3. If a work no longer is identified with "quality"—medical and religious—or no longer answers a need, then it probably should be alienated.

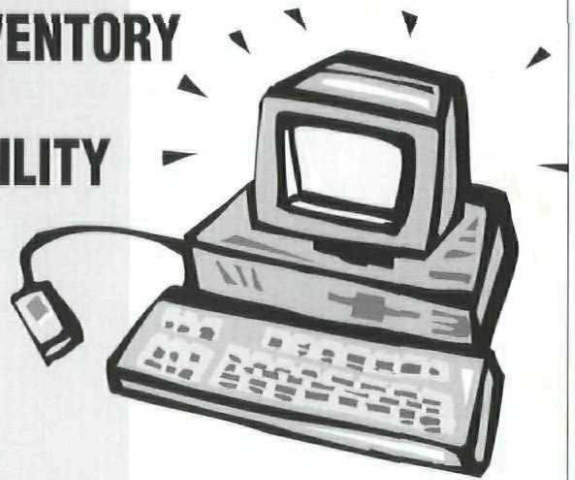
4. It is important for religious institutes and dioceses to specify what they consider to be acts of extraordinary administration, or at least acts of major importance, and to determine what is required for their validity.

5. Good finance councils can help evaluate a potential alienation before irrevocable steps are taken. To avoid conflicts of interest, the members of finance councils should not be those who provide services to the diocese or the religious institute.

6. Careful observance of both civil law and canon law will protect apostolic works and their administrators from future difficulties. □

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