

# Alienation of Temporal Goods in Roman Catholic Canon Law: A Potential for Conflict

EITHNE D'AURIA<sup>1</sup>

Research Associate, Centre for Law and Religion, Cardiff University

*Alienation of church property is governed by both canon law and civil law, which may give rise to conflict. This paper addresses issues surrounding the Roman Catholic canonical requirements for alienation including the need to consult experts. Failure to consult, itself may give rise to concerns over the validity of the diocesan bishop's permission to alienate and, in turn, the lawfulness of the sale. This is not merely academic. Churches in the United States find themselves in the position where ownership of temporal goods is of increasing interest to the civil courts in the pursuit of compensation for successful litigants in the current wave of abuse cases.*

## INTRODUCTION

The management of the Roman Catholic Church's temporal goods has particular resonance for both canon law<sup>2</sup> and civil law. Alienation is a fundamental activity for the efficient management of goods and is defined as: 'conveyance' or 'transfer of ownership'.<sup>3</sup> However, the canons governing alienation apply to any transaction in which the stable patrimony<sup>4</sup> of a juridical person *could* be jeopardised.<sup>5</sup>

- 1 LLM Wales. I am very grateful to Professor Norman Doe and Professor Aidan McGrath for their help and guidance in preparing this paper and to the AHRC and ESRC for their funding.
- 2 The English translation of the canons of the current 1983 Code of Canon Law, hereafter referred to as 'canon', followed by the relevant number, is that in G Sheehy, R Brown, D Kelly, A McGrath (eds) *The Canon Law: letter & spirit* (London, 1995).
- 3 FG Morrissey, 'The alienation of temporal goods in contemporary practice', *Studia Canonica*, 29 (1995) 293–316, at p 294; or when strictly interpreted, as 'the transfer of the ownership of property from one person to another, e.g., by sale or by gift', see FG Morrissey in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 732, para 2572.
- 4 'Stable patrimony' is defined: by RT Kennedy, in JP Beal, JA Coriden and TJ Green (eds), *New Commentary on the Code of Canon Law* (NY, 2000), p 1495 as: '[A]ll property, real or personal, movable or immovable, 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. It is the opposite of free or liquid capital which is intended to be used to meet operating expenses or otherwise disposed of within a reasonably short period of time (within one or, at most, two years)'; by A Farrelly, 'The Diocesan Finance Council: functions and duties according to the Code of Canon Law', *Studia Canonica* 23 (1989) 149–166, at p 160 as: '[A]ll goods which are designated as constituting the minimum, reliable economic base by which the juridic person can subsist in an autonomous manner and take care of the purposes and services that are proper to it'; and by FG Morrissey, in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 732, para 2573, as: 'fixed capital'.
- 5 Canon 1295: 'The provisions of Cann 1291–1994 (sic) [1294], to which the statutes of juridical persons are to conform, must be observed not only in alienation, but also in any transaction whereby the

## BACKGROUND

The Roman Catholic Church claims the inherent right, to acquire, hold, administer and alienate its temporal goods for legitimate purposes.<sup>6</sup> This right is ‘independent of any secular power’, but the civil authority’s jurisdiction in this area is recognised and, given the universal nature of Roman Catholic canon law, the Church seeks to harmonise the laws of both jurisdictions as far as possible, provided that: (a) the civil law is not contrary to divine law; and (b) that canon law does not provide otherwise.<sup>7</sup> When canon law makes civil law its own it is referred to as the ‘canonization’ of civil law.<sup>8</sup>

This paper seeks to address the question as to whether or not the seeking of ‘an evaluation in writing by experts’, although not express consent, required by canon 1293§1, 2<sup>o</sup>,<sup>9</sup> for acts of restricted alienation, affects the validity of the diocesan bishop’s permission and therefore, the act of alienation itself.

patrimonial condition of the juridical person could be adversely affected’. See FG Morrissey, ‘The alienation of temporal goods in contemporary practice’, *Studia Canonica*, 29 (1995) 293–316, at p 311: ‘Three elements usually enter into account when determining whether there is a risk of jeopardy: (a) loss or diminishing of *ownership*; (b) loss or diminishing of *sponsorship*; (c) loss or diminishing of *control*’. (Emphasis in original). Also WJ Doheny, *Practical Problems in Church Finance* (Milwaukee, 1941) p 21: ‘The Canon Law regards all transactions, which may render the financial condition of the institute, province, or religious house less secure, as alienations’ (emphasis added), citing the Letter of Apostolic Delegate, 13 November 1936, NP 173/35. Further at fn 3: ‘It is to be borne in mind that the principles and rules enunciated in this Letter are really those of the Sacred Congregation for Religious, under whose authority the Letter was promulgated to the Ordinaries and to the Superiors of Religious Institutes in the United States’, emphasising its higher authority. Doheny further emphasises, at p 22, the broad interpretation of alienation intended by the 1917 Code: ‘It is clear from the ... definitions that alienation is to be considered in the broad sense. The authors are in agreement on this point; and Canon 1533, with unmistakable clearness, states: “The formalities demanded according to the rulings of Canons 1530–1532 are required not only in alienation properly so-called, but also in any contract in which the status of the church may become jeopardized’.

6 Canon 1254§1: ‘The catholic Church, has the inherent right, independently of any secular power, to acquire, retain, administer and alienate temporal goods, in pursuit of its proper objectives’.

7 Canon 1290: ‘Without prejudice to Can. 1547, whatever the local civil law decrees about contracts, both generally and specifically, and about the voidance of contracts, is to be observed regarding matters which are subject to the power of governance of the Church, and with the same effect, provided that the civil law is not contrary to divine law, and that canon law does not provide otherwise.’ Canon 1284§1: ‘All administrators are to ... 2<sup>o</sup> ensure that the ownership of ecclesiastical goods is safeguarded in ways in which are valid in civil law; 3<sup>o</sup> observe the provisions of canon and civil law, and the stipulations of the founder or donor or lawful authority; they are to take special care that damage will not be suffered by the Church through the non-observance of the civil law. ...’.

8 M López Alarcón, in E Caparros, M Thériault, J Thorn (eds), *Code of Canon Law Annotated* (Montreal, 1993), p 800.

9 Canon 1293§1: ‘To alienate goods whose value exceeds the determined minimum sum, it is also required that there be: 1<sup>o</sup> a just reason, such as urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason; 2<sup>o</sup> an evaluation in writing by experts of the goods to be alienated.’

## PURPOSE OF LAWS GOVERNING ALIENATION

The temporal goods of the Church are held by juridical<sup>10</sup> persons,<sup>11</sup> under the supreme authority of the Pope.<sup>12</sup> Temporal goods are considered ‘ecclesiastical’ when they belong to public<sup>13</sup> juridical persons.<sup>14</sup> In order to both protect Church property and avoid corruption and mismanagement, canon law regulates acts of alienation.

## CLASSIFICATION OF GOODS PROPOSED FOR ALIENATION

Alienation includes the transfer of ownership from one public judicial person to another, even though the goods remain ‘ecclesiastical property’.<sup>15</sup> Acts of alienation are restricted when the goods proposed for alienation form the stable patrimony of a juridical person and, further, according to the value of the object to be alienated.

- 10 Canon 113§2: ‘In the Church besides physical persons, there are also juridical persons, that is, in canon law subjects of obligations and rights which accord with their nature.’
- 11 Canon 1256: ‘Under the supreme authority of the Roman Pontiff, ownership of goods belongs to that juridical person which has lawfully acquired them’.
- 12 Canon 1273: ‘The Roman Pontiff, by virtue of his primacy of governance, is the supreme administrator and steward of all ecclesiastical goods’.
- 13 Canon 116§1: ‘Public juridical persons are aggregates of persons or of things which are established by the competent ecclesiastical authority so that, within the limits allotted to them, they might in the name of the Church and in accordance with the provisions of law, fulfil the specific task entrusted to them in view of the public good. Other juridical persons are private. §2: Public juridical persons are given this personality either by the law itself or by a special decree of the competent authority expressly granting it. Private juridical persons are given this personality only by a special decree of the competent authority expressly granting it.’
- 14 Canon 1257§1: ‘All temporal goods belonging to the universal Church, to the Apostolic See or to other public juridical persons in the Church, are ecclesiastical goods and are regulated by the canons which follow, as well as by their own statutes. §2: Unless it is otherwise provided, temporal goods belonging to a private juridical person are regulated by its own statutes, not by these canons’. Interestingly, the *Code of Canons of the Eastern Churches*, Latin-English Edition, prepared under the auspices of the Canon Law Society of America (Washington, 2001), the canons of which are hereafter referred to as *CCEO*, does not explicitly state that for goods to be considered ‘ecclesiastical’ they must belong to a ‘public’ juridical person. See *CCEO* 1009§2. The English translation of the 1917 Code, taken from EN Peters (Curator), *The 1917 or Pio-Benedictine Code of Canon Law* (San Francisco, 2001), the canons of which are hereafter referred to as *CIC*, defined ecclesiastical goods as: ‘Temporal goods, whether corporeal, both immovable and movable, or incorporeal, that belong to the universal Church and to the Apostolic See or to another moral person in the Church’, see *CIC* 1497§1. M Carragher, ‘Papal and Episcopal Administration of Temporal Goods’, in J Fox (ed) *Render Unto Caesar: church property in Roman Catholic and Anglican canon law* (Rome, 2000), 57–68 at p 61 explains that if a church where divine worship is practised is owned privately it is not considered ‘ecclesiastical’ property, ‘because it is not the sacredness . . . of the functions . . . which renders it ecclesiastical or not but ownership by a public juridical person’. See also J Hite, ‘Church law on property and contracts’ (1984) 44 *The Jurist* 117–133, at 119: ‘. . . A college or hospital that is a separate civil law entity and is managed or operated by diocesan personnel or a religious institute, . . . even though the facility may have a religious name . . . is not a public juridic person and its property is not church property’.
- 15 RT Kennedy, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, pp 1494–5.

Bishops' Conferences are authorised to set the thresholds of monetary values above which certain permissions are mandatory for valid alienation and the lawful authority, whose permission is required<sup>16</sup> when the value of the goods to be alienated falls between the determined minimum and maximum sums, is defined.<sup>17</sup> Additional permission of the Holy See is required for the valid alienation of goods whose value exceeds the determined maximum sum or when the goods to be alienated are the subjects of a vow, or are of artistic or historical significance, regardless of their monetary value.<sup>18</sup> The evaluation by experts, therefore, helps to determine the competent authority whose permission is required for valid alienation.<sup>19</sup>

### DEFINITION OF INVALIDITY

An invalid act is defined as: 'of no legal effect';<sup>20</sup> or is 'non-existent in the world of law';<sup>21</sup> or 'not recognised as legally existing'.<sup>22</sup> The requirement for validity can stem, not only from divine positive law or from natural moral law, but also from 'the positive or disciplinary norms by the church

- 16 Canon 1291: 'The permission of the authority competent by law is required for the valid alienation of goods which, by lawful assignment, constitute the stable patrimony of a public juridical person, whenever their value exceeds the sum determined by law'. Latin text, taken from E Caparros, M Thériault, J Thorn (eds), *Code of Canon Law Annotated* (Montréal, 1993): 'Ad valide alienanda bona, quae personae iuridicae publicae ex legitima assignatione patrimonium stabile constituunt et quorum valor summam iure definitam excedit, requiritur licentia auctoritatis ad normam iuris competentis'.
- 17 Canon 1292§1: 'Without prejudice to the provisions of Can. 638§3, when the amount of the goods to be alienated is between the minimum and maximum sums to be established by the Bishops' Conference for its region, the competent authority in the case of juridical persons not subject to the diocesan Bishop is determined by the juridical person's own statutes. In other cases, the competent authority is the diocesan Bishop acting with the consent of the finance committee, of the college of consultors, and of any interested parties. The diocesan Bishop needs the consent of these same persons to alienate goods which belong to the diocese itself.' Latin text: 'Salvo praescripto can. 638§3, cum valor bonorum, quorum alienatio proponitur, continetur intra summam minimam et summam maximam ab Episcoporum conferentia pro sua cuiusque regione definiendas, auctoritas competens, si agatur de personis iuridicis Episcopo dioecesano non subiectis, propriis determinatur statutis; secus, auctoritas competens est Episcopus dioecanus cum consensu consilii a rebus oeconomicis et collegii consultorum necnon eorum quorum interest. Eorundem quoque consensu eget ipse Episcopus dioecanus ad bona dioecesis alienanda.'
- 18 Canon 1292§2: 'The additional permission of the Holy See is required for the valid alienation of goods whose value exceeds the maximum sum, or if it is a question of alienation of something given to the Church by reason of a vow, or of objects which are precious by reason of their artistic or historical significance.' Latin text: 'Si tamen agatur de rebus quarum valor summam maximam excedit, vel de rebus ex voto Ecclesiae donatis, vel de rebus pretiosis artis vel historiae causa, ad validitatem alienationis requiritur insuper licentia Sanctae Sedis'.
- 19 E Caparros (ed), *Exegetical Commentary on the Code of Canon Law*, English Edition (Midwest Theological Forum, 2004), p 138: 'If is possible that it is not known whether a value [of goods to be alienated] exceeds or does not exceed [the minimum amount referred to in canon 1292] ... thus, expert evaluation will be the only means to dispel the doubt'.
- 20 A Mendonça, in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 9, para 28.
- 21 L Orsy, in JA Coriden, TJ Green and DE Heintschel, *The Code of Canon Law: a text and commentary* (NY, 1985), p 31.
- 22 JM Huels, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 62.

authorities'.<sup>23</sup> The operation of an invalidating law is automatic.<sup>24</sup> Generally, the State law of contract applies.<sup>25</sup> Difficulties can arise if the act of alienation is invalid, or even unlawful, in canon law, but valid in the civil forum, as sanctions can be applied<sup>26</sup> and must be so if the required permission is lacking.<sup>27</sup>

## REQUIREMENTS FOR VALIDITY OF ACTS OF RESTRICTED ALIENATION

Although the diocesan bishop has all the power required for the exercise of his *pastoral* office,<sup>28</sup> he cannot dispense from procedural law.<sup>29</sup> The only exception to this is if recourse to the Holy See is difficult *and at the same time* there is danger of grave harm in delay, *and* provided the dispensation is one which the Holy See is accustomed to grant.<sup>30</sup>

The principle is that *permission* of the competent authority is required for *valid* acts of alienation of goods which form the stable patrimony of a public juridical person if their value exceeds the sum determined by law.<sup>31</sup> Although canon 1292 does not itself explicitly refer to *valid* alienation, it determines the competent authority whose permission is required for *valid* alienation and to which canon 1291 refers.<sup>32</sup> When the value of the goods to be alienated falls between

23 M Carragher, 'Invalidating laws: *expresse vel aequivalenter*', A.A.VV., *Iuri canonico quo sit Christi Ecclesia felix* (Salamanca, 2002), 171–216, at 173.

24 *Ibid.*, 174.

25 Canon 1290: 'Without prejudice to canon 1547, whatever the local civil law decrees about contracts, both generally and specifically, and about the voiding of contracts, is to be observed regarding matters which are subject to the power of governance of the Church, and with the same effect, provided that the civil law is not contrary to divine law, and that canon law does not provide otherwise.'

26 Canon 1296: 'When alienation has taken place without the prescribed canonical formalities, but is valid in civil law, the competent authority must carefully weigh all the circumstances and decide whether, and if so what, action is to be taken, namely personal or real, by whom and against whom, to vindicate the rights of the Church'.

27 Canon 1377: 'A person who without the prescribed permission alienates ecclesiastical goods, is to be punished with a just penalty'.

28 Canon 381§1: 'In the diocese entrusted to his care, the diocesan Bishop has all the ordinary, proper and immediate power required for the exercise of his pastoral office, except in those matters which the law or a decree of the supreme Pontiff reserves to the supreme or to some other ecclesiastical authority'.

29 Canon 87§1: 'Whenever he judges that it contributes to their spiritual welfare, the diocesan Bishop can dispense the faithful from disciplinary laws, both universal laws and those particular laws made by the supreme ecclesiastical authority for his territory or his subjects. He cannot dispense from procedural laws or from penal laws, nor from those whose dispensations is specially reserved to the Apostolic See or to some other authority.'

30 Canon 87§2: 'If recourse to the Holy See is difficult, and at the same time there is danger of grave harm in delay, any Ordinary can dispense from these laws, even if the dispensation is reserved to the Holy See, provided the dispensation is one which the Holy See customarily grants in the same circumstances, and without prejudice to Can.291.'

31 Canon 1291: 'The permission of the authority competent by law is required for the valid alienation of goods which, by lawful assignment, constitute the stable patrimony of a public juridical person, whenever their value exceeds the sum determined by law.'

32 Canon 1292§1: 'Without prejudice to the provisions of Can. 638§3, when the amount of the goods to be alienated is between the minimum and maximum sums to be established by the Bishops'

the minimum and maximum sum determined by law, the competent authority for, inter alia, diocesan property is the diocesan bishop acting with the *consent* of the finance council, the college of consultors and interested parties. Examples of 'interested parties' are beneficiaries,<sup>33</sup> founders, donors and others whose rights might be affected,<sup>34</sup> for example, a parish priest in respect of parochial property.<sup>35</sup>

If the value of the goods to be alienated exceeds the maximum sum, the *additional* permission of the Holy See is required for *valid* alienation, though this permission also becomes necessary when the goods to be alienated are the subjects of a vow, or are of artistic or historical significance.<sup>36</sup>

In addition to permission, for the alienation of any goods exceeding the minimum determined sum,<sup>37</sup> (a) a just cause; and (b) a written evaluation by experts of the goods to be alienated are required.<sup>38</sup> Any other precautions stipulated by lawful authority are also to be followed in order to avoid any loss to the Church.<sup>39</sup> The question is whether or not these requirements, specifically the written evaluation of experts, go to validity of the bishop's permission and therefore, to the act of alienation itself.

#### WHAT DO THE WRITERS SAY?

The 1917 Code made similar provisions.<sup>40</sup> Augustine, giving no reasons for his opinion, held that 'valuation or appraisal is not required under pain of

Conference for its region, the competent authority in the case of juridical persons not subject to the diocesan Bishop is determined by the juridical person's own statutes. In other cases, the competent authority is the diocesan Bishop acting with the consent of the finance committee, of the college of consultors, and of any interested parties. The diocesan Bishop needs the consent of these same persons to alienate goods which belong to the diocese itself.'

33 According to JJ Myers, in Coriden, Green and Heintschel, *The Code of Canon Law: a text and commentary*, p 881, 'interested parties' are 'primarily beneficiaries'.

34 RT Kennedy, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 1499.

35 FG Morrissey in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 735.

36 Canon 1292§2: 'The additional permission of the Holy See is required for the valid alienation of goods whose value exceeds the maximum sum, or if it is a question of alienation of something given to the Church by reason of a vow, or of objects which are precious by reason of their artistic or historical significance.'

37 That is the minimum sum determined by the Bishops' Conference in accordance with canon 1292§1.

38 Canon 1293§1: 'To alienate goods whose value exceeds the determined minimum sum, it is also required that there be: 1° a just reason, such as urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason; 2° an evaluation in writing by experts of the goods to be alienated.'

39 Canon 1293§2: 'To avoid loss to the Church, any other precautions drawn up by lawful authority are also to be followed.'

40 CIC 1530§1: 'With due regard for the prescription of Canon 1281§1, for the alienation of ecclesiastical goods, whether immobile or mobile, that are such that they should be preserved, there is required: 1° An estimation of the thing by a thoughtful expert done in writing; 2° Just cause, that is, urgent necessity, or evident utility to the Church, or piety; 3° Permission of the legitimate Superior, without which the alienation is invalid.'

nullity'.<sup>41</sup> He nonetheless acknowledged, when commenting on *CIC* 105,<sup>42</sup> 'that diocesan consultors . . . must be called together for a meeting whenever their consent or counsel is demanded by law', without addressing the issue of validity.<sup>43</sup> Doyle, however, although not directly addressing the issue of nullity of alienation, at least considers the expert evaluation to be an essential prerequisite, which appears to protect both the Church's property and its reputation.<sup>44</sup> That it is an essential prerequisite is in keeping with an Instruction,<sup>45</sup> which pre-dates the 1917 Code and states:

In the sale of ecclesiastical goods a written valuation, to be made in writing by honest experts, is to be submitted; all those having an interest are to be consulted; there should be an evident need of the Church, or usefulness; [the goods] should be sold to the highest bidder, and not at a lower price than that estimated by the aforesaid experts.<sup>46</sup>

Breitenbeck concurs with Augustine, but simply cites canonists in support and no reasons are given;<sup>47</sup> nor does she address the issues of validity or liceity in her review of canon 1293§1 of the current Code, either in her doctoral thesis<sup>48</sup> or in her later publication on the subject of experts.<sup>49</sup>

López Alarcón, commenting on canon 1292§1, states:

- 41 CP Augustine, *A Commentary on the New Code of Canon Law* (8 vols, London, vol VI, 1921) p 595.
- 42 *CIC* 105: 'When the law requires that a Superior, in order to act, needs the consent or advice of various persons: 1° If consent is required, the superior invalidly acts against their vote; if only advice [is required] through such words as, for example, *from the advice of the consultors*, or *having heard the Chapter, pastor*, and so on, it is sufficient to act validly that the Superior shall hear those persons; although he is bound by no obligation of acceding to their vote, even if it is unanimous, still, great [care should be taken] when there are many persons to be heard, to deferring to their united opinions, nor from them, without prevailing reasons, in his judgement, [should he] depart.'
- 43 CP Augustine, *A Commentary on the New Code of Canon Law* (8 vols, vol II, 4th revised edition, London, 1923) at p 35.
- 44 E Doyle, 'The Consultation of Experts: an historical outline of the legislation and practice', *Doctoral Thesis* (Ottawa, 1949), at p 233: 'The experts employed in accordance with canon 1530 in the alienation of church property have the role of arbiters, for their valuation must be adopted, and the property may not be sold below the price set'.
- 45 Canon 34§1: 'Instructions, namely, which set out the provisions of a law and develop the manner in which it is to be put into effect, are given for the benefit of those whose duty it is to execute the law, and they bind them in executing the law. Those who have executive power may, within the limits of their competence, lawfully publish such instructions.'
- 46 Sacred Congregation *de Propaganda Fide* (Rome, 30 July 1867).
- 47 M Breitenbeck, 'The role of experts in ecclesial decision-making in the 1983 Code of Canon law', doctoral thesis (Washington, 1987), p 133, fn 457, citing JF Cleary, 'Canonical limitations on the alienation of church property', *Canon Law Studies*; 100 (Washington, 1936), p 63; W Doheny, *Practical Problems in Church Finance* (Milwaukee, 1941) p 28; and S Moran and MC De Ante, *Comentarios al Código de Derecho Canónico* (Madrid, 1964), 3: p 175.
- 48 M Breitenbeck, 'The role of experts in ecclesial decision-making in the 1983 Code of Canon law', p 269.
- 49 M Breitenbeck, 'The requirements for experts in Church law', *The Jurist*, 50 (1990), 257–288, p 271.

the competent authorities for granting the permission [for alienation] are determined according to the value – assessed by experts – of the object to be alienated and, in some cases according to its special condition . . .<sup>50</sup>

implying prior need for expert opinion for competence in granting permission, but simply asserts, when commenting on canon 1293§1, 2<sup>o</sup>, that expert evaluation is not required for validity of the act of alienation.<sup>51</sup>

Myers acknowledges: (a) that canons 1291–1298 set ‘invalidating requirements’ for alienation;<sup>52</sup> (b) ‘counsel or consent (the requirements of which are clarified in c127)<sup>53</sup> must be informed’;<sup>54</sup> and (c) experts must be consulted ‘so that everyone involved may be both accountable for the action and protected from charges of irresponsibility’.<sup>55</sup> Nevertheless, he still holds, despite these statements, including his reference to canon 127, and without giving any reasons, that these stipulations do not go to validity.<sup>56</sup> He does not comment on liceity, but, because alienation might be valid in civil law, he warns: ‘[i]t cannot be overemphasised that civil lawyers should always be consulted when administrators are entering into major contractual agreements in the name of ecclesiastical juridic persons’.<sup>57</sup>

Kennedy’s stance that the evaluation of experts is required only for liceity and not for validity is based on canon 10, which states:

Only those laws are to be considered invalidating or incapacitating which expressly prescribe that an act is null or that a person is incapable,

50 M López Alarcón, in E Caparros, M Thériault, J Thorn (eds), *Code of Canon Law Annotated* (Montreal, 1993), p 801.

51 *Ibid*, p 803.

52 JJ Myers, in Coriden, Green and Heintschel, *The Code of Canon Law: a text and commentary*, p 879.

53 Canon 127§1: ‘When the law prescribes that, in order to perform a juridical act, a Superior requires the consent or the advice of some college or group of persons, the college or group must be convened in accordance with Can 166, unless, if there is question of seeking advice only, particular or proper law provides otherwise. For the validity of the act, it is required that the consent be obtained of an absolute majority of those present, or that the advice of all be sought. §2: When the law prescribes that, in order to perform a juridical act, a superior requires the consent or advice of certain persons as individuals: 1<sup>o</sup> if consent is required, the Superior’s act is invalid if the superior does not seek the consent of those persons, or acts against the vote of all or any of them; 2<sup>o</sup> if advice is required, the Superior’s act is invalid if the superior does not hear those persons. The Superior is not in any way bound to accept their vote, even if it is unanimous; nevertheless, without what is, in his or her judgement, an overriding reason, the Superior is not to act against their vote, especially if it is a unanimous one’.

54 JJ Myers, in Coriden, Green and Heintschel, *The Code of Canon Law: a text and commentary*, p 881.

55 *Ibid*, p 881.

56 *Ibid*, p 881.

57 *Ibid*, p 878.



and he concludes: ‘nothing in canons 1293<sup>58</sup> or 1294,<sup>59</sup> either explicitly or implicitly suggests that any of their provisions affect validity; consequently they do not.’<sup>60</sup>

*CCEO*, although not limiting provisions to goods exceeding a determined sum, makes similar provisions to the 1983 Code for the alienation of goods. These include a written evaluation by experts, but it requires the competent authority’s *written* permission for validity.<sup>61</sup> Neither Pospishil nor Nedungatt address the specific issue as to whether or not the written appraisal of experts goes to validity of the act of alienation. However, Pospishil says: ‘The law establishes some basic requirements to be observed: just cause . . .; expert evaluation; written consent of competent authority for validity (c 1035),’<sup>62</sup> implying that they are prerequisites for the written consent required for validity. Nedungatt also implies, by stating:

one must avoid that the stable patrimony of a juridic person should suffer any damage by an alienation. To this end, the Code requires that before one proceeds with an alienation, one must be certain that the following conditions are met: (a) a just cause, which may be an urgent necessity, an evident advantage, or a pious, charitable or pastoral reason; valuation of the thing to be alienated, made by at least two experts and recorded in writing (c.1035§1 nn<sup>o</sup>-2<sup>o</sup>); (b) consent or advice or confirmation by the competent authority, which may not give its assent unless it is thoroughly informed of the economic state of the juridic person wishing to proceed with the alienation as well as the other alienations which it has already made, and of the consent of the person concerned (cc 1038 and 1039)<sup>63</sup>

that they are basic prerequisites. Moreover, his statement that breach of the Church’s law in this area, that is unlawful alienation, ‘does not cause the

58 Canon 1293§1: ‘To alienate goods whose value exceeds the determined minimum sum, it is also required that there be: 1° a just reason, such as urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason; 2° an evaluation in writing by experts of the goods to be alienated. §2: To avoid loss to the Church, any other precautions drawn up by lawful authority are also to be followed.’

59 Canon 1294§1: ‘Normally goods must not be alienated for a price lower than that given in the valuation. §2: The money obtained from alienation must be carefully invested for the benefit of the Church, or prudently expended according to the purposes of the alienation’.

60 RT Kennedy, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 1500, fn 155.

61 *CCEO* 1035§1: ‘The alienation of ecclesiastical goods, which constitute by legitimate designation the stable patrimony of a juridic person, requires the following: 1° a just cause, such as urgent necessity, evident advantage, piety, charity, or a pastoral reason; 2° a written appraisal by experts of the asset to be alienated; 3° in cases prescribed by law, written consent of the competent authority, without which the alienation is invalid’.

62 V Pospishil, *Eastern Catholic Canon Law*, Revised and Augmented Edition (New York, 1996), p 702.

63 G Nedungatt, SJ (ed) *A Guide to the Eastern Code: A Commentary on The Code of Canons of the Eastern Churches* (Rome, 2002), p 704.

invalidation of the alienation before civil law',<sup>64</sup> could be read as meaning that it invalidates it in canon law.

### Arguments in favour of the premise that seeking the advice of experts goes to lawfulness only

Canon 10 provides that only laws which 'expressly' prescribe that an act is null are invalidating and its purpose is to keep invalidating laws to a minimum and it is true that neither *CIC* 1530 nor the present canon 1293 explicitly states that the provisions within these canons go to validity.

### Arguments in favour of the premise that seeking the advice of experts goes to validity of the Bishop's act

Canon 10 uses neither the word 'explicitly' nor 'implicitly', but 'expressly', which has a specific meaning, as explained by Mendonça.<sup>65</sup>

The purpose of invalidating laws, which are an 'essential ingredient' in a legislator's power to care for the common good,<sup>66</sup> is to 'obviate fraud or to minimise public harm'.<sup>67</sup> Carragher warns that 'it is perilous to read the canons in isolation from one another'.<sup>68</sup> He says that 'canon 10 is deceptively simple in its declaration regarding the identification of invalidating laws'<sup>69</sup> and recalls that its 1917 equivalent, *CIC* 11, 'alerted the reader that invalidating laws could be phrased in multiple ways as the text. . . contained the words *vel aequivalenter*'.<sup>70</sup> He gives as an example, canon 1055§1<sup>71</sup> describing all the natural requirements for marriage. However, a marriage, even though entered into by two legally

64 Ibid, p 707.

65 A Mendonça, in Sheehy et al (eds), *The Canon Law Letter & Spirit*, para 29, p 9: 'The term *expressly* is a specifically canonical one and must be understood as such. If a matter is stated *explicitly*, then it is manifestly stated in an "express" manner: Can. 126 is a clear example among many in the Code. [Can 126: 'An act is invalid when performed as a result of ignorance or of error which concerns the substance of the act, or which amounts to a condition sine qua non; otherwise it is valid, unless the law provides differently. But an act done as a result of ignorance or error can give rise to a rescinding action in accordance with the law']. Equally "express", however, is a matter which is stated *implicitly*, as is exemplified in the following Can 127: it is explicitly stated that "for the validity of the act, it is required that the consent be obtained of an absolute majority of those present . . ." thereby stating that without such a majority the act would be invalid.'

66 M Carragher, 'Invalidating laws: *expresse vel aequivalenter*', at 189, citing Reiffenstuel, *Ius Canonicum universum complectans tractatam de regulis iuris, Parisiis, 1864, tit. 1, de constitutionibus*, §XI, n 239, F Suárez, *Tractatus de Legibus ac Deo Legislatore*, Neapoli, ex typis Fibrenianis, lib V, cap XIX, p 85, n 6 and E Roelker, *Invalidating Laws* (Patterson, NJ, 1995).

67 M Carragher, 'Invalidating laws: *expresse vel aequivalenter*', at 197.

68 Ibid, at 216.

69 Ibid, at 189, citing U Navarrete, "'Consensus naturaliter sufficiens, sed iuridice inefficax": Limiti alla Sovranità del Consenso Matrimoniale', *Periodica* 88 (1999) 361–389 at 376.

70 Ibid, at 190.

71 Canon 1055§1: 'The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament'.

capable people, can, even without their knowledge, nevertheless be invalid if the officiating person ‘is not duly qualified either by reason of office or by delegation’.<sup>72</sup> One has to look to canon 1108§1 for the invalidating clause.<sup>73</sup>

Another example might be canon 1277,<sup>74</sup> which does not mention, for example, that the requirement to obtain advice and in certain circumstance, consent, goes to validity, yet Morrisey, citing canon 127 as authority, is unequivocal:

... While he is not obliged to accept the advice given, he would act invalidly if he did not seek it. ... The diocesan Bishop cannot validly carry out any act which has been determined as one of ‘extraordinary administration’, unless he will first have had the consent ... both of the diocesan finance committee and of the college of consultors.<sup>75</sup>

Canon 127 *explicitly* states that if, for the superior’s performance of a juridical act, the law requires the prior consent or advice of certain persons, whether they be consulted as a group<sup>76</sup> or as individuals,<sup>77</sup> the superior’s act is invalid if such consent or advice is not sought; thus, *expressly* stating that such consent or advice is required for validity of the juridical act in question. The invalidity here, like the example of marriage given above, does not stem from any personal legal incapacity, but from the failure to observe the legal formalities, which seek to protect the Church’s interests. According to Carragher:

The preferred option chosen by the person completes the first stage of generating a juridic act. Next, that interior human act of choice must be translated into action externally. Here the legal order obtains when it specifies the formalities to be observed or the procedures to be adopted in order to guarantee that the declaration of the party’s intention will be accorded juridic status by the statutory authorities.<sup>78</sup>

72 M Carragher, ‘Invalidating laws: *expresse vel aequivalenter*’, at 173.

73 Canon 1108§1: ‘Only those marriages are valid which are contracted in the presence of the local Ordinary or parish priest or of the priest or deacon delegated by either of them, who, in the presence of two witnesses, assists, in accordance with the rules set out in the following canons, and without prejudice to the exceptions mentioned in Cann. 144, 112§1, 1116 and 1127§§2–3.’

74 Canon 1277: ‘In carrying out acts of administration which, in the light of the financial situation of the diocese, are of major importance, the diocesan Bishop must consult the finance committee and the college of consultors. However, in addition to the cases specifically expressed in the universal law or in the documents of foundation, for acts of extraordinary administration he needs the consent of the committee and of the college of consultors. It is for the Bishop’s conference to determine what are to be regarded as acts of extraordinary administration’.

75 FG Morrisey in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 723–724, para 2542.

76 Canon 127§1.

77 Canon 127§2.

78 M Carragher, ‘Invalidating Laws: *expresse vel aequivalenter*’, at 185.

When speaking specifically of canon 127 he says:

Failure to consult the proper college or individuals or to obtain the appropriate consent renders an action invalid.<sup>79</sup>

Following the leading canon in the Title on contracts and alienation in the 1983 Code,<sup>80</sup> which urges compliance with civil law,<sup>81</sup> are canons on *valid* alienation.<sup>82</sup>

Although canon 1293§1<sup>83</sup> does not *explicitly* mention validity, the use of the word ‘also’ signifies *additional* requirements<sup>84</sup> to those mentioned previously,<sup>85</sup> when the value of the goods to be alienated exceeds the determined minimum sum; such requirements being a just reason<sup>86</sup> and a written evaluation by experts. This implies that all these factors should influence the decision as to whether or not permission for alienation is forthcoming. They are, therefore, essential legal formalities and are pre-requisites for permission.<sup>87</sup> Noteworthy is the requirement that a request to alienate divisible goods must state what parts have already been alienated; otherwise any permission to alienate is *invalid*.<sup>88</sup> The aforementioned Instruction,<sup>89</sup> interestingly, placed the evaluation first in the list of prerequisites.

Both *CIC* 1530, although not limited to acts of *restricted* alienation, and canon 1291 of the 1983 Code, although limited to acts of restricted alienation, explicitly state that the competent authority’s permission is required for the *validity* of those acts of alienation.<sup>90</sup> When the value of the goods is between the minimum and maximum sums established by the Bishops’ Conference,

79 Ibid, at 190.

80 Book V, Title III, Canon 1290.

81 Canon 1290: ‘Without prejudice to canon 1547, whatever the local civil law decrees about contracts, both generally and specifically, and about the voiding of contracts, is to be observed regarding matters which are subject to the power of governance of the Church, and with the same effect, provided that the civil law is not contrary to divine law, and that canon law does not provide otherwise.’

82 Canons 1291–1292.

83 Canon 1293§1: ‘To alienate goods whose value exceeds the determined minimum sum, it is also required that there be: 1° a just reason, such as urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason; 2° an evaluation in writing by experts of the goods to be alienated’.

84 Latin: ‘requiritur insuper’, indicating a direct relationship between canons 1293 and 1292.

85 That is, (a) consent of the competent authority; (b) information regarding parts of divisible assets already alienated; (c) the requirement to give informed consent.

86 Canon 1293§1° defines a ‘just reason’ as ‘urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason’, the latter implying that the list is not exhaustive.

87 Canon 124§1: ‘For the validity of a juridical act, it is required that it be performed by a person who is legally capable, and it must contain those elements which constitute the essence of the act, as well as the formalities and requirements which the law prescribes for the validity of the act.’

88 Canon 1292§3: ‘When a request is made to alienate goods which are divisible, the request must state what parts have already been alienated; otherwise, the permission is invalid.’ Latin text: ‘Si res alienanda sit divisibilis, in petenda licentia pro alienatione exprimi debent partes antea alienatae; secus licentia irrita est.’

89 See fn 46, *supra*.

90 Canon 1291: ‘The permission of the authority competent by law is required for the valid alienation of goods which, by lawful assignment, constitute the stable patrimony of a public juridical person, whenever their value exceeds the sum determined by law.’

canon 1292§1 requires the consent of the diocesan bishop or other competent authority, as a prerequisite to *valid* alienation.<sup>91</sup> It explicitly states, *inter alia*, that for alienation of diocesan property, the competent authority is the diocesan bishop *acting with the consent of the finance committee, of the college of consultors, and of any interested parties*. It is clear therefore, that the diocesan bishop's competence to give permission for alienation depends upon this prior consent.<sup>92</sup>

## INFORMED CONSENT

Everyone whose consent or advice is required is obliged to give a sincere opinion<sup>93</sup> and further, *not* to give consent unless that consent is informed, in cases of alienation.<sup>94</sup> Carragher warns: the diocesan bishop is 'canonically bound' to inform the finance committee of any previous alienation so that the members are '*au fait* with the financial state of the diocese', otherwise the transaction is 'canonically invalid' even though possibly valid in civil law.<sup>95</sup> Commenting on the significance of canon 127 on the prior consent required by canon 1292§1, Hill holds that the bishop 'cannot validly' alienate the property even if the consultors are 'equally divided between consent and dissent; he cannot himself supply the required consent by breaking the tie'.<sup>96</sup> Moreover, the canon 'implicitly acknowledges their right to be fully informed', thus:

[f]ailure on the part of the consulting superior to present all the relevant substantive facts can readily vitiate the advice or consent of the consultors in such a way that they can be said not to have been consulted at all.<sup>97</sup>

Wijlens, commenting on canon 127, states:

... giving consent or counsel is not considered a mere formality, but is rather the exercise of a responsibility by the one who is being consulted or asked for counsel; it ought to be based on all the data possible,<sup>98</sup>

91 FG Morrissey in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 732, para 2571 and p 733, para 2575.

92 *Ibid*, p 734, para 2576.

93 Canon 127§3: 'All whose consent or advice is required are obliged to give their opinions sincerely. If the seriousness of the matter requires it, they are obliged carefully to maintain secrecy, and the Superior can insist on this obligation'.

94 Canon 1292§4: 'Those who must give advice or consent to the alienation of goods are not to give this advice or consent until they have first been informed precisely both about the economic situation of the juridical person whose goods it is proposed to alienate and about alienations which have already taken place'.

95 M Carragher, 'Papal and episcopal administration of temporal goods', in J Fox (ed) *Render Unto Caesar*, 57–68 at p 66.

96 R Hill, in Coriden, Green and Heintschel, *The Code of Canon Law: a text and commentary*, p 92.

97 *Ibid*, p 92.

98 M Wijlens, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 181.

[and] consent or counsel should be given in virtue of the knowledge, competence, and position that these persons have. Those who are to give consent or counsel must have full information . . .<sup>99</sup>

Furthermore, she explains that although the canon speaks of a ‘college or group’, the latter includes the former and therefore CCEO 934<sup>100</sup> is correct and less confusing, speaking solely of a group. To clarify, she explains that when giving advice or consent as a group, the superior acts alone. The consent is only ‘*a prerequisite for the validity of that act*’.<sup>101</sup> A ‘collegial act’ however, involves the superior as *primus inter pares* acting in accordance with the majority vote. When advice is required the superior can have the casting vote in the event of a tie. However, when consent is required the superior must act in accordance with the majority, even if he voted against it.<sup>102</sup>

It is clear that the diocesan bishop is only competent to give valid permission for alienation if he has the prior and informed consent of those parties mentioned in canon 1291§1. This informed consent regarding the economic status of the diocese would logically include the experts’ evaluation. Morrissey accepts that for the purposes of canon 1292§1: ‘the permission of the *competent* authority is required, *and for validity*’ and that canon 1293§1 ‘points to the considerations which *must be taken into account in determining whether or not that permission be given*’.<sup>103</sup> This is in keeping with the provisions of canon 1283, 2°, which obliges administrators of temporal goods to keep an inventory of property and its value.<sup>104</sup> In order to know whether any goods fall between the minimum and maximum sums determined by law, or exceed them, a current estimate of the value of the goods to be alienated must be available. Canon 1293§1, in dealing with the alienation of goods whose value exceeds the minimum sum, is dealing with those same goods, referred to in canon 1291, which deals with *valid* alienation.

99 Ibid, p 182.

100 CCEO 934§1: ‘If it is established by law that to place a juridic act an authority needs the consent or counsel of some group of persons, the group must be convoked in accord with the norm of can. 948, unless when it concerns seeking counsel only, particular law provides otherwise for cases stated by that law. For such a juridic act to be valid, however, it is required that the consent of an absolute majority of those present be obtained or that the counsel of all be sought, with due regard for §2, n3.’

101 M Wijlens, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 182.

102 Ibid p 182, fn 16.

103 FG Morrissey in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 735. Emphasis added.

104 Canon 1283: ‘Before administrators undertake their duties: 1° they must take an oath, in the presence of the Ordinary or his delegate, that they will well and truly perform their office; 2° they are to draw up a clear and accurate inventory, to be signed by themselves, of any immovable goods, of those movable goods which are precious or in any way of cultural value, and of any other goods, with a description and an estimate of their value; and they are to review any inventory already drawn up; 3° one copy of this inventory is to be kept in the administration office and another in the curial archive; any change which takes place in the property is to be noted on both copies’.

## APPLICABILITY OF CANON 127

As well as being an administrative act,<sup>105</sup> alienation is a juridical act,<sup>106</sup> governed by canon 127,<sup>107</sup> incorporating provisions which affect its validity. It is clear that both the finance committee and the college of consultors are ‘a college or group’ envisaged in canon 127, whose *consent* is required, and without which the bishop is not competent to give permission for alienation. Moreover, the bishop cannot supply this consent, even in the case of a tied vote.<sup>108</sup> A tied vote:

may not be interpreted as giving consent. Such a vote implies that consent is not given. Since a superior asks for consent from others, this superior cannot participate in the voting nor break a tie.<sup>109</sup>

According to Hill, commenting on canon 127, but not specifically on its effect on alienation:

This canon is applicable whenever the law of the Church, whether universal or particular or proper, requires the counsel or consent of groups of persons or of individuals before a decision is reached.<sup>110</sup>

Canon 1293§1 clearly mandates that experts be consulted for a written evaluation. The canon uses the plural form for ‘experts’, but the singular for ‘evaluation’,<sup>111</sup> implying agreement on the part of the experts, consulted as a group. In this case canon 127§1 is applicable not only to the finance committee and

105 Canon 39: ‘Conditions attached to an administrative act are considered to concern validity only when they are expressed by the particles “if”, “unless”, “provided that”’.

106 Defined by O Robleda, *De Conceptu actus iuridici*, p 51, translated by M Hughes in ‘A new title in the Code: juridic acts’, *Studia Canonica* 14 (1980) 391–403, cited by M Wijlens in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 177, as: ‘An externally manifested act of the will by which a certain juridical effect is intended’.

107 Canon 127§1: ‘When the law prescribes that, in order to perform a juridical act, a Superior requires the consent or the advice of some college or group of persons, the college or group must be convened in accordance with Can 166, unless, if there is question of seeking advice only, particular or proper law provides otherwise. For the validity of the act, it is required that the consent be obtained of an absolute majority of those present, or that the advice of all be sought. §2: When the law prescribes that, in order to perform a juridical act, a superior requires the consent or advice of certain persons as individuals: 1° if consent is required, the Superior’s act is invalid if the superior does not seek the consent of those persons, or acts against the vote of all or any of them; 2° if advice is required, the Superior’s act is invalid if the superior does not hear those persons. The Superior is not in any way bound to accept their vote, even if it is unanimous; nevertheless, without what is, in his or her judgement, an overriding reason, the Superior is not to act against their vote, especially if it is a unanimous one’.

108 R Hill, in Coriden, Green and Heintschel, *The Code of Canon Law: a text and commentary*, p 91.

109 Pontifical Council for the Interpretation of Texts, *Authentic Interpretation* of 15 May 1985, AAS 77 (1985) 771, cited by M Wijlens in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 181, fn 13.

110 R Hill, in Coriden, Green and Heintschel, *The Code of Canon Law: a text and commentary*, p 91.

111 Latin: ‘... aestimato rei alienandae peritis scripto facta’.

college of consultors but to the experts themselves whose *advice*, but not consent, is sought. Therefore, the experts must be convened, unless particular or proper law provides otherwise. Nevertheless, the advice of all must be sought for *validity* of the bishop's permission for alienation. Even if the experts were to be consulted as individuals, and therefore do not form a consultative body, canon 127§2, 2<sup>o</sup><sup>112</sup> would apply, requiring the advice of all to be sought and for *validity* of the bishop's permission for alienation. Hill, confirms this when commenting on canon 127:

[When] the law requires the advice or even consent of individuals who do not form part of a consultative body, . . . the superior acts invalidly without the advice or consent required.<sup>113</sup>

Wijlens agrees:

The second paragraph concerns the obtaining of consent or counsel from individuals. For the validity of the act, all of the individuals need to be asked.<sup>114</sup>

The *consent* of any 'interested parties' is also required by canon 1292§1. These, as a group would fall under the provisions of canon 127§1, but as individuals, would fall under the provisions of canon 127§2, 1<sup>o</sup>. Wijlens states:

. . . when they need to give consent every single individual must give consent. Even when only one does not do so, the act placed by the Superior is invalid.<sup>115</sup>

It is clear from canon 1294§1,<sup>116</sup> which generally prohibits the sale of goods for a price lower than that given in the evaluation,<sup>117</sup> that the provisions of canon 1293§1 are intended to influence the decisions of the requisite bodies and therefore they should be in possession of the relevant information, including the

112 Canon 127§2: 'When the law prescribes that, in order to perform a juridical act, a superior requires the consent or advice of certain persons as individuals: . . . 2<sup>o</sup> if advice is required, the superior's act is invalid if the superior does not hear those persons. The superior is not in any way bound to accept their vote, even if it is unanimous; nevertheless, without what is, in his or her judgement, an overriding reason, the Superior is not to act against their vote, especially if it is a unanimous one.'

113 R Hill, in Coriden, Green and Heintschel, *The Code of Canon Law: a text and commentary*, p 92.

114 *Ibid*, p 182.

115 M Wijlens, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 182.

116 Canon 1294§1: 'Normally goods must not be alienated for a price lower than that given in the valuation.'

117 This provision is also included in the aforementioned Instruction. See fn 46.



experts' evaluation, before giving the required consent. Moreover, canon 1294§1 implies that, at least generally, the evaluation by experts must be accepted. Doyle agrees.<sup>118</sup>

## CUSTOM

Given that commentators appear to consider expert evaluation unnecessary, the question arises as to whether or not any such practice of alienating goods omitting consultation with experts has gained the force of law through custom.<sup>119</sup>

Any such custom, if it existed under the 1917 Code, is suppressed by the 1983 Code as contrary to law.<sup>120</sup> The present Code is not in existence for a sufficient period for a custom to have developed without specific approval.<sup>121</sup> As canon 1293 is universal law, only the supreme legislator can give such approval. Moreover, as well as being 'common and constant', the practice must be reasonable.<sup>122</sup> Anything 'harmful to the common good . . . would be "unreasonable"'.<sup>123</sup> Given that the purpose of canon 1293§1, 2°, is to protect the stable patrimony of a diocese it concerns the public good and contravening it could be seen as an abuse. The community in which the practice exists must perform the action<sup>124</sup> with the intention of introducing law.<sup>125</sup> Therefore, a bishop would be required to observe this practice in each and every case, not on an ad hoc basis, in order for the practice to be considered 'common and constant'. Moreover, practice within a 'community' involves the majority,<sup>126</sup> not individuals. Even a body of bishops, if that constituted a 'community', would be

118 See fn. 44 supra.

119 A custom is defined, by A Mendonça, in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 21, as 'a common or constant mode of action adopted by a community'.

120 Canon 5§1: 'Universal or particular customs which have been in effect up to now but are contrary to the provisions of these canons and are reprobated in the canon of this Code, are completely suppressed, and they may not be allowed to revive in the future. . . .'

121 Canon 26: 'Unless it has been specifically approved by the competent legislator, a custom which is contrary to the canon law currently in force, or is apart from the canon law, acquires the force of law only when it has been lawfully observed for a period of thirty continuous and complete years. . . .'

122 Canon 24§2: 'A custom which is contrary to or apart from canon law, cannot acquire the force of law unless it is reasonable; a custom which is expressly reprobated in the law is not reasonable'.

123 A Mendonça, in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 22. Also JM Huels, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 89: 'Unreasonable customs are those that are against faith or morals, occasion sin, are opposed to the constitution of liberty of the Church, harm the common good or disrupt the "nerve of ecclesiastical discipline"', citing *Sacred Congregation for the Council*, response 14 December 1918, AAS 11 (1919) 128; *CLD* 1, 97–98.

124 JM Huels, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 90, describes this as 'a normative practice that the community wishes to observe and maintain', not 'a merely optional practice about whose observance and preservation the community is indifferent'.

125 The 'intention of introducing law' is defined by Augustine Mendonça, in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 23, as an intention 'to bind itself'.

126 JM Huels, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 9, holds that not only must a community intend, as distinct from tolerate, the norm, but it must be practiced by a majority, as distinct from a minority within the community.

required to apply the practice in each case. It is however, likely that an evaluation is sought when alienating property of obviously great value.

#### WHAT OF THE PROVISIONS FOR A DOUBT OF LAW?<sup>127</sup>

According to Mendonça, a doubt of law ‘arises when there is a positive and an objective doubt as to whether the law exists, as to what precisely it means, as to whom it intends to oblige, as to whether it may have been superseded, etc.’.<sup>128</sup> There is no doubt that canon 1293§1, 2<sup>o</sup> exists; its meaning is clear;<sup>129</sup> it applies to the competent authority to alienate; and there is no evidence that it has been superseded. Its purpose is to protect Church property and therefore to influence the relevant authority’s decision as to whether or not the required permission to alienate should be granted, such permission being required for *valid* alienation.<sup>130</sup> Moreover, the other ‘additional’ requirement, that of a ‘just reason’, if lacking appears to be invalidating if one looks to a parallel place.<sup>131</sup>

#### CONCLUSIONS

Augustine, without explanation, held that under the 1917 Code, the evaluation by experts was not required for validity. *CIC* 105, however, stated clearly that when the law required the superior to seek the advice or consent of others, he acted invalidly without such advice or consent and Augustine acknowledged that the consultors ‘must’ be called together.

Except for Myers, commentators on canons 1292 and 1293 make no reference to canon 127, or its 1917 Code equivalent, *CIC* 105. Kennedy alone gives the basis for his stance: canon 10. The more recent *CCEO* also requires those, whose counsel, consent or confirmation is required *by law*, not to give it *before* they have been thoroughly informed of the economic status of the relevant juridic

127 Canon 14: ‘Laws, even invalidating and incapacitating ones, do not oblige when there is a doubt of law. When there is a doubt of fact, however, Ordinaries can dispense from them provided, if there is question of a reserved dispensation, it is one which the authority to whom it is reserved is accustomed to grant.’

128 A Mendonça, in Sheehy et al (eds), *The Canon Law Letter & Spirit*, p 13.

129 Canon 17: ‘Ecclesiastical laws are to be understood according to the proper meaning of the words considered in their text and context. If the meaning remains doubtful or obscure, there must be recourse to parallel places, if there be any, to the purpose and circumstances of the law, and to the mind of the legislator.’

130 Canon 1291: ‘The permission of the authority competent by law is required for the valid alienation of goods which, by lawful assignment, constitute the stable patrimony of a juridical person, whenever their value exceeds the sum determined by law’.

131 Canon 90: ‘A dispensation from an ecclesiastical law is not to be given without a just and reasonable cause, taking into account the circumstances of the case and the importance of the law from which the dispensation is given; otherwise the dispensation is unlawful and, unless given by the legislator or his superior, it is also invalid.’

person<sup>132</sup> and specifically states that if information regarding prior alienations is not given, the counsel, consent or confirmation is considered not to have been given,<sup>133</sup> implying that fully informed counsel, consent or confirmation is required for validity.

Any practice of alienating property without the evaluation of experts has not gained the force of law through custom and there appears to be no doubt of law.

It can be argued, therefore, that canon 1293§1, although not explicitly stating that its provisions go to validity, nonetheless *expressly* provides that they do, given the following:

- i. The purpose of laws to regulate alienation of ecclesiastical goods is to protect the Church's patrimony and reduce risk of corruption and mismanagement. The advice of experts regarding the current value of the goods would therefore appear crucial, to protect both the church's property and its reputation.
- ii. Church property is held by juridical persons, for the use and benefit of the faithful. Therefore, alienation of such property affects the public good. It follows that the consent of representative bodies is mandatory for the validity of any alienation, which has the potential for adversely affecting the stable patrimony of the relevant juridic person and this is explicitly stated in canon 1292§1.
- iii. Without question, the permission of the *competent* authority is required for *validity* of the juridical act of restricted alienation.<sup>134</sup> Kennedy agrees that alienation 'is one of two instances in the code where permission, which ordinarily is required only for liceity, is said to be required for validity.'<sup>135</sup> But canon 1292§1 considers the diocesan bishop competent to give that permission for alienation only when he has the prior consent of the finance council, the college of consultors and interested parties.
- iv. Canon 127§1 requires that consent of a college or group, which includes the finance council and the college of consultors and interested parties if they form a group, be by absolute majority,<sup>136</sup> and that where advice only

132 CCEO 1038§1: 'Those whose counsel, consent or confirmation is required by law to alienate ecclesiastical goods, are not to give counsel, consent or confirmation before they have been thoroughly informed of the economic state of the juridic person, whose temporal goods are proposed for alienation, and of previous alienations.'

133 CCEO 1038§2: 'Counsel, consent or confirmation is considered not to have been given unless, in seeking them, previous alienations are mentioned'.

134 Canon 1291.

135 RT Kennedy, in Beal, Coriden and Green (eds), *New Commentary on the Code of Canon Law*, p 1496.

136 RR Thomas [1995] in Arthur Espelage (ed) *CLSA Advisory Opinions 1994–2000* (Washington, 2002) at p 12, defines 'majority' as 'any number over 50% or 50% +1'. Referring to *Black's Law Dictionary* (sixth edition), he says "majority" means "the greater number". If there are two candidates, then the greater number of votes. But the term "absolute majority" is used to clarify the difference between "majority" and "plurality". Therefore, when more than two candidates or positions are being voted on the "absolute majority" would be the number greater than half the total valid votes cast.'

- is sought, that is if the experts are consulted collectively, that the advice of all be sought for *validity* of the bishop's juridical act.
- v. Canon 127§2, 1° requires the consent of all individuals, that is interested parties if they do not form a group, for the *validity* of the bishop's juridical act.
  - vi. Canon 127§2, 2° requires consultation with all individuals, that is if the experts are consulted individually, for the *validity* of the bishop's juridical act.
  - vii. It is clear from canon 1294§1<sup>137</sup> that the provisions of canon 1293 are intended to influence the decisions of the requisite bodies and therefore they should be in possession of the relevant information, before giving consent.
  - viii. Canons 127§3 and 1292§4 oblige all those whose advice or consent is required to give sincere opinions, and canon 1292§4 obliges them *not* to give such advice or consent without knowledge of all the relevant facts, which would logically include the evaluation of experts.

Canon 1293 §1, 2° calls for a written evaluation of experts, which implies consultation for advice as to the value of the goods proposed for alienation, in order to assist the decision-making process. The representative bodies are required by law not to give consent to alienation until they have been fully informed of the prevailing circumstances, by virtue of canon 1292§4, and their consent is required for the *validity* of the bishop's act, by virtue of canon 127. Furthermore, canon 1292§1 expressly states that the bishop is not competent to give the permission required by canon 1291 for *valid* alienation, until he receives the consent of the representative bodies. Moreover, canon 127 states that if certain persons, whether as a group or as individuals, are to be consulted for advice, the seeking of such advice goes to validity of the juridical act.

Written evaluation of experts, therefore, appears to be required: (a) to determine the competent authority whose permission is required for validity, (b) for the validity of the representative bodies' consent and (c) consequently, for the validity of the bishop's permission. If the bishop's permission is invalid, the act of alienation is invalid, as it depends upon his permission for validity. It is a principle of the civil law of contract that all parties must have contractual capacity and legal power or authority to enter into the contract. The internal law applicable to the juridical person, therefore, must be followed.

137 Canon 1294§1: 'Normally goods must not be alienated for a price lower than that given in the valuation.'