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THE CONCEPT OF ALIENATION IN CANON-LAW

PhD thesis

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SUMMARY

I. Since it was founded the Church has been several times considered as the spiritual reality which, due to its spirituality and supernatural character is invisible. Due to its invisibility doesn't and can not possess worldly goods.

In spite of this, the II. Vatican synod explicitly teaches, in line with some well-known theologian who used to be active before and after the synod, the "society" (*societas*) character of the Church highlighting the unity and indivisibility of the relationship between the *secular* and the *grace* community.

The Catechism of the Catholic Church, in turn, quotes the interpretation of the other document in the synod: "Namely, it is the Church's own peculiarity to be worldly and divine, it is visible, but rich in invisible goods". (SC2)

In order to accomplish its task in the world, the Church does need material goods.

Its task is to fulfill the mission role: "Go therefore and make disciples of all the nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit and teach them to observe all things that I have commanded you".

The Church, which is not only invisible, but visible reality, since the beginning has always attempted to accomplish its mission in space and time by utilizing the goods came from the help of the congregation. The possession of material goods was supposed to ensure not just financing the costs arose while the Church worked for its mission, but was also supposed to provide the wider freedom of the church after a while.

This way, it is understandable, that for the Church which is rich in visible and invisible goods in the same time defining exactly its relation to the material goods has always been important, because it has always felt that if it had not found the proper way of handling these questions, it would have lost its ability to the achievements, its freedom and at last but not at least its credibility as the follower of Christ and the announcer of the Gospel. Thus, the Church has always tried to describe properly its relation to the material goods. These smaller and more significant regulations were integrated into the collections of Canon-law, and later, after being corrected ,according also to the actual period of time the regulations ,have become parts of Canon law-book number 17 and 83.

The CIC 1983 mentions in the 5th book the jurisdiction which concerns the property of the Church. Nevertheless, this book considerably follows, especially regarding the contents the jurisdiction in the 4th part of the 3rd book of the CIC 1917.

Here appears a difference which is easy to discover : While in the 1495th canon of CIC 1917 only three act of law are mentioned which are related to property :acquisition, ownership, (keeping), trusteeship, in the first paragraph of the 1254th book of the CIC 1983 distinguishes four different act of law :acquisition, ownership (keeping), trusteeship (administration), and alienation..

Naturally, this does not mean that the CIC 1917 didn't know alienation. This knew it as well, but regarded it in a different manner. It regarded the alienation as a contract, as a special type of a contract, which, according to the law of that period was strictly prohibited to make it with someone. Consequently, the alienation was ranged among the units were titled as the 29th (XXIX.), "About contracts".

The CIC 1983 however, according to the distinction was stated above, discusses in separate section the alienation, exactly: "About contracts, especially about alienation" under the 3rd (III.) headword. Although, in the new law book the distinction is done, alienation is regarded by the new law book as well as a special contract, which is continuously generally prohibited, but at the same time the interest, the mission, and the credibility of the Church are taken into consideration in this.

Wherever it was ranged in by the law creators, and whichever regulations were responsible for the acts of law related to property, the exact terms to describe them have never been given. This study attempts, following many authors who worked on it, to describe properly these terms, particularly to analyze the alienation, in order to deepen the knowledge about it, and to try to obtain the meaning by the description of the term as an act of law, thus to give a definition to alienation.

The concept of alienation for the first sight doesn't seem to be a type of expression of Canon-law which wouldn't appear to be totally clear or would require adjustment regarding any part of the available literature in the topic of Canon-law. But this is right just for the first sight. If we examine the topic more deeply, both in the life of the Church and in the Canon - law literature is easy to see the evidence that the term closely doesn't cover a clear, understandable and a non-problematic case. The definitions refer to this term have not been settled until today.

This is likely to be supported by the fact that until now newer and newer articles have been published in the topic examining alienation from very different aspects and bringing up newer and newer problems related to the topic. The concept of this word is unknown by many of the people, but even if it means something for them, they don't know the exact content and extent of it. Thus, it is not clear to which act of law, acts of law or what kind of material goods it refers to, namely, the ways as it is used in civil concept influence the canonical meaning of alienation, and in many cases just the concept used by civil jurisdiction is projected to explain alienation when it is used for Canon-law purposes, which, of course do not cover the same meaning. Let me mention an example from the recent past, and its effects have been influencing, in some parts, to the whole life of the Church: the secularization occurred in post-socialist and post-communist countries by which the Church lost so many chattels and landed property. It brings up the question, whether the giving up or the change of these goods to other ones counts as a case of alienation, or does not? And who is responsible for executing legal fairs in a case like this?

But several other similar examples can be found all around the world for a situation like this at local Churches, where the Church doesn't enjoy the state's honor, or when the Church is just tolerated by the State. Even in those lands and countries it is not obvious how to handle this where the Church finds itself in the middle of community which is getting to be more secularized day by day, and behind its institutions the congregation just disappears. Here the question is raised: Can the chattels and landed property of the Church be sold or hired out or not? If yes, what kind of act is that, and legally who is responsible for it?

Regarding Canon law, we also find questions related to alienation. Thus, for instance among expert authorities there is no homogenous point of view referring to the concept of alienation, namely, because according to regulations of Canon - law it is not a definition, it is valid for the different extents come from everyday interpretations of alienation , which are wanted to be counted among those concepts by some people, or it would like to be extended by some others, like Schuppe, who would change the term alienation as “ alienation and similar legal fairs to alienation”, and ,it is regarded by him a subcategory of trusteeship. Due to the mentioned cases it can be consciously said: this is likely not a topic which wouldn't require further studies.

This concept is not likely to be a term which does not require correcting, highlighting and description. That is to say, we can't call this Canon - law topic as settled one, even if it is not in the centre of interest. The recently published articles and the newer and newer books concerning the topic are also supporting this.

II. Noticeable, that only in the 90's or after were published essays, articles and books which dealt exclusively just with the alienation. Compared to other Canon-law areas just like marriage law or case law – in the topic of alienation have been constantly published general property-right books, handbooks, dissertations and articles , not only after the new Codex has come into force, but before and after as well.

The reason for why the canonical lawyers started to deal exclusively with alienation only after the 90's, would be difficult to figure out. Perhaps, this phenomenon is due to the circumstances were mentioned in the introductory part: nationalization- returning -surrenders, property-right questions and situations which were brought up by secularization caused the actuality of the topic.

Each of these publications tries to analyze the term alienation by highlighting the doubts related to it , and bringing up the problems to in order to find the answer. Roughly all of these attempt stay on the theory level, don't give the answer to the problem of alienation, aside from some exceptions these definitions don't give the answer. The proper answer is given maximally in an indirect way when the term itself and the acts are tried to be described with definitions, or just simply is highlighted and defined by descriptions, and in the meanwhile they are always alluding to the relevant canons of the Codex over and over.

Experiencing all this, I feel that there is a reason to bring through the term alienation setting out from the theoretical dimension to the different important and significant situation of life as referring to this case. By this, we are trying to show the practical direction to the competent authorities and persons of the Church at their own place and situation in order to make their decision properly, in line with the will of the Church, to serve the future and present objectives of the Church.

III. It is important to see clearly what does the alienation exactly refer to, especially from the point of view of Canon - law norms, namely, depending on that what we mean by alienation. Thus, we are searching the answer what alienation's value limit mean as well, because this can change the personal responsibility and the necessary permission too.

Having cleared the context of the term, we will be able to make decisions in a given situation which deals with property right. For example, we can decide easier in a specific case whether we need a permission or not, or rather above which value limit is it required.

In order to achieve our target, in the beginning of our study we take a bypass to the world of lay and civil law systems included Roman law, knowing that it was the first created law system, which was grounded for the actual Canon and Secular law systems. This way, through our investigation we have a kind of comparison of the different law systems, emphasizing the explanation of the concept of alienation. By this method, on one hand we can follow up the improvement process of alienation and the use of it, but on the other hand, we can highlight – of the concept of alienation - the differences and similarities which appear in the different law systems, particularly among the contents of secular and Canon - law approach.

After having investigated through all these sections can come the follow up of alienation within Canon- law, and the construction of the new concept of alienation by the help of the different authors and norms of law, which would like to be a clear guidance and this way a help as well to law creation, especially for those authorities who act roles in the use of law. The purpose of Canon-law is to serve the communities of the Church, by regulating the life of the Church making it more simple in order to accomplish its mission as completely as it is possible.

Lastly, such as a Bill, we prepare a legislative bill for those cases where the partial law deals with the term alienation and which is relegated to the competence of the Episcopal conference is missing. A similar situation came up in Romania for example.

IV. By our study we have done a review of the literature related to the concept and to regulation of alienation, and we recognized that the different aspects regarding the concept of alienation haven't been settled so far. Accordingly, we aimed as a target of our study to take steps toward in this field, so we would like to do the refinement of the term alienation used in Canon-law.

That is to define exactly what does the term include, in order to help the trustees in the discernment of their situation, and in order to allow them seeing clearly when they dispose with the decision competency and when they don't. By this, we would like to help see if the trustee has to ask for a permission or doesn't, and if it is necessary who does the trustee have to ask it from? Besides, we aimed as a target to make the trustees acknowledging their most important task which is to handle the goods of Church according to the intention of the

Church, and to guarantee for the goods of Church the support of the defined peculiar targets while they are doing their activity related to the chattels and goods of the Church.

In order to accomplish this project we compared the different law systems, terms and the concepts which are used to express alienation by these systems, starting with Roman law, through secular law until Canon - law. We could observe that the different law systems do use different aspects of the term alienation.

Regarding Roman law, the alienation can be found just in a primitive form and concept. Initially, the use of alienation was the right just of some citizens, or more accurately of Roman citizens and it was valid for tangible goods. Later this was extended to those goods which were not just tangible but which could be seized, thus the real estates were included as well. Basically it meant the grant of property right from one to another person.

In the secular law we find a more exact concept of alienation. In secular law alienation expresses the process of chaffer, by which a given matter changes its owner or when the matter is granted from one person to another.

Then we arrived to the Canon - law and we recognized that there wasn't always used the same concept either. Moreover, we saw that the Canon - law doesn't really deal with the meaning of alienation, especially earlier, where we saw that the Church rather emphasizes the prohibition of alienation by protecting its property, and doesn't use it "simply" as alienation, in those cases either when someone did the alienation. This situation anyway was regarded as a nullified act.

After a while the prohibition of alienation was softened, and at that time the laws started to deal about who, when and under which circumstances can alienate goods. Here and there different declarations were stated about alienation assisting to the different authors to define the term. In this point of view the *Ambrosian* constitution can be considered as the first significant regulation, which emphasized and made obvious some important aspects : "However, if someone presumes to alienate any kind of matter or good in spite of the prohibitions : resulting the subservience of chattel mortgage, concession, rental and inheritor by rental contract, we declare that these acts do not have the power of effectuating..."

In the Constitution for the first time were mentioned goods designated with the prohibition of alienation: real estates and valuable chattels. Then this was the first to serve with useful legal clarification of the alienation when it refers to those acts in which the ownership of the matter is assigned. However, it makes a distinction from those type of acts which doesn't result the assignment of goods, but because these are limiting the property rights, consequently in these cases the assignment equals to alienation.

After having analyzed the legal rules were in force before 1917, we have become familiar with the definitions of the authors of that period, who based on the available legal rules tried to describe the term of alienation, but under the effect of legal rules they weren't seeking to highlight the content of the term, but they rather targeted the protection of the Church property, by this enhancing the principle of alienation. But in their work appears a newer clarification as well, namely referring to the prohibition of alienation: which is nothing else, but prohibiting the alienation of the valuable chattels and real estates which are dedicated to God.

They enunciate, that: "those material goods, which have once become property of the Church, disposes with a sacred peculiarity, and these can never be deprived from the Church."

Summarizing the available definitions of the authors and legal regulations of that period can be concluded that the alienation used to mean in the period before 1917 the following: the sale or assignment by gifting of the Church's valuable chattels and real estates, the exchange, pledge, concession, and rental of goods, and included all those contracts which resulted subordination or copyhold of the Church's property, from the side of another person.

Regarding the period after the publication of CIC 1917 we can conclude that didn't appear significant changes in the meaning of the term alienation. The prohibition of alienation generally remained in force. According the contemporary authors, the alienation can be described with the followings : In narrow sense alienation means the complete assignment of goods, through which the direct ownership is assigned ; this includes gift, sale or change ; while in a broad sense alienation covers all acts by which the right of ownership of goods is just partially assigned to another person, or the ownership assigned by decreasing the direct ownership, this way this includes the : mortgage, special mortgage, lending, copyhold, rental – especially in case of a period of more than one year, the salvation of the real estate, or a one year taxation.

So we arrived to the II. Vatican Synod and to the CIC 1983 in the following period, and here we recognized the novelty, that the Church doesn't insist on owning its material goods as much as they used to do it earlier. The Church's pursuit is to use its goods in line and harmonized with its mission. The acquisition, possession, handling and alienation of goods depend on how does they meet with the Church's peculiar targets and mission. Do they help or hinder the targets? The Church enunciates that it is ready to give up all goods hinder or weaken its mission, credit, and its work which has been done for the Salvation of souls.

Nevertheless, neither the Synod and the CIC 1983 don't give the exact definition of alienation, they provide several new information to create a definition. This type of new

information and novelty are the concepts of permanent property, over and above the threshold of alienation is to defined by the Episcopal Conference. This way to the alienation is given a special Canon - law concept, with which the alienation can be explained only through the Canon-law dimensions. The alienation appears when the given goods of the Church are part of the legally appointed permanent property and exceed the alienation threshold defined by the Episcopal Conference and the Holy See.

V. Regarding the definition itself, the authors of the period mostly defined alienation dually: in narrow and broad sense. According to their opinion, the narrow sense means only the way as it is used in secular law. While in terms of broad sense it means all the acts, transactions with which the intact of direct ownership result the assignment of a given ownership. At the same time this action can modify the owner's property case (1295. k.) And includes: the exchange, the establishment of easement or debt, payment of perpetuity, the mortgage, the pawn of a right, of a legacy, or the give up of a gift, the guarantee...

Nevertheless, all things considered we have to tell that so many important information were left out form the definition's of the authors. This way, the lack of information doesn't enable to describe the term alienation as completely and specifically as it should be used in cases related to the Church and Canon law.

And if we don't see clearly, there is a danger of acting mistakenly, and even the risk of doing harms. That is why we decided to create a new definition, which, even if it isn't perfect, is able to present the concept of alienation by its complete meaning, in order to help those authorities who are responsible law enforcement regularly in the everyday life.

In order to see in details the richness and reliability of alienation we analyzed through deeply the definition that we created. After having done the analyses we can say that the new definition is really better and more complete than it was before, because it shows more clearly the Canon law concept distinguishing it from secular law, from a totally different legal concept. We were composing the concept the following way:

The alienation in narrow sense is a legal act by which the owner of the concerned goods (the Church) or the authorized person of the Church, with free will assigns to another person by sale, gift, or exchange the (valuable) chattel or real estate which is in the ownership of the Church, which is anyway included in its permanent property, but it is above the minimal value as it was defined by the Episcopal Conference.

The alienation in broad sense means the assignment of some parts of ownership to another person of a (valuable) chattel or a real estate which is part of the permanent property, while the direct ownership does not change. To this type of act are belonging all the acts,

activities, and transaction which might modify or make worse the property case of the legal person of Canon law (1295. k.). Particularly, when simultaneously appears the danger of lose of goods. Here can be mentioned the : rental, especially rental for a longer period, pawn, mortgage, copyhold, concession, establishment of servitude, obligation of paying perpetuity, or undertaking guarantee, give up inheritance or gift.

After our new definition was created, in our study we gathered and elaborated the laws deal with alienation, including the different partial laws which were legislated by the Episcopal conference. We did this not only for seeing the right way of reaction by the help of the new information, but also to create Bills and guiding principles for those countries, in which the partial law has not been existing so far due to the lack of its establishment from the side of the Episcopal Conference. It was the same in case of Romania as well.

While creating the Bill we took into consideration the traditions of Canon law and the regulations of Episcopal Conferences which have already existed.

All things considered, I can tell that the objectives have been successfully accomplished. By our study, several factors have come into view regarding alienation. I gathered both the old and the new information with the care of a parable like family man. But especially I succeed this, because based on the new information were gathered we could create a new definition through which in our opinion we could more clearly describe the concept and purpose of alienation. In favor of the Church, we could help by this process the concept's apprehension and importance. We did it so, in order to make kept in mind the Salvation of souls by the ecclesiastical trusteeship and the alienation. We also did this investigation for highlighting that the ecclesiastical trusteeship and alienation should serve all as it was ordered by the Redeemer and his examples, and which was drawn up by the ecclesiastical Code as the most important law.