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***RES PRETIOSA* AS THE CHURCH'S CULTURAL PROPERTY:
THE ORIGIN AND DEVELOPMENT OF ECCLESIASTICAL LEGISLATION**

by
Duane L.C.M. GALLES, J.D.

A dissertation submitted to the Faculty of Canon Law
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Abstract

Among the rights proclaimed by the Universal Declaration of Human Rights and by article 60 of the Second Vatican Council's pastoral constitution on the Church in the modern world is the right to culture. Implicit in this right is the duty imposed on the public authority to preserve the tangible evidences of culture, cultural property. This study aims at exploring the origins and development of the notion of *res pretiosa* and asks if *res pretiosa* has become the cultural property of the Church in the 1983 Code of Canon Law.

The term cultural property comes from the civil law. It seems first to have appeared in the 1954 Hague Convention and it has become well developed in international law and, more recently, in Anglo-American common law. Chapter 1 traces the development of this law and summarizes the legislation for the preservation of cultural property internationally and in Britain and the United States.

Chapter 2 follows the notion *res pretiosa* from its *locus classicus* in the 1468 papal bull *Ambitosae* back to its cradle in the Roman law of tutor and ward, where it meant "valuable chattels," and then forward through its adoption in canon law. It also looks at its elaboration there, and its codification in the 1917 Code of Canon Law where it has been narrowed to include only chattels valuable for their artistic, historical or intrinsic worth character and the effects of Vatican II on it.

Chapter 3 looks at the notion of *res pretiosa* as found in the 1983 Code, the 1990 Eastern Code and in the suppletive documents, especially those of the Pontifical Commission for the Preservation of the Church's Cultural Heritage. The chapter concludes with a look at that agency and the other agencies of the Roman Curia having care of the Church's cultural heritage.

In the conclusion section the author answers the question whether in the 1983 Code *res pretiosa* has become the cultural property of the Church. He concludes that, while *res pretiosa* includes cultural property, the term *res pretiosa* remains broader than the term "cultural property." He also concludes that it would be desirable for the Supreme Legislator to amend the 1983 Latin Code and 1990 Eastern Code so that the terms *res pretiosa* might be used identically on both and that term and "cultural property" might become coterminous. He also suggests that the Historic Churches Committees developed by the Bishops of England and Wales and their procedures might usefully be adopted in North America to deal with cases of changes proposed to historic churches.

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Dedication

**To my kinsman,
Henry White (1499-1538),
of Farnham, Surrey,
educated at Winchester College and New College, Oxford,
BCL (Oxon, 1524), JCB (Oxon, 1527), DCL (Oxon, 1528),
Last Professor of Canon Law, Oxford University, 1528-1535,
Who taught canon law there until inhibited by the Royal Injunctions of the latter year**

Abbreviations

- AAS *Acta Apostolicae Sedis*
- Am. Jur. 2d *American Jurisprudence, Second Edition; A Modern Comprehensive Text Statement of American Law, State and Federal, Completely Revised and Rewritten in the Light of Modern Authorities and Developments*, 322 vols., Rochester, NY, Lawyers Cooperative Publishing Co., 1962-2002.
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- CAPARROS CAPARROS, ERNEST, MICHEL THÉRIAULT and JEAN THORN (eds.), *Code of Canon Law Annotated, Latin-English edition of the Code of Canon Law and English-language translation of the 5th Spanish-language edition of the commentary prepared under the responsibility of the Instituto Martín de Azpilcueta*, Montréal, Wilson & Lafleur Ltd., 1993.
- CARLO-STELLA CRISTINA CARLO-STELLA, "The Cultural Heritage of the Church Beyond Frontiers," in *Seminarium*, 39 (1999), pp. 415-418.
- CCEC *Code of Canons of the Eastern Churches: Latin-English Edition, New English Translation Prepared under the Auspices of the Canon Law Society of America*, Washington, Canon Law Society of America, 2001.
- CCEO *Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus*, Roma, Libreria Editrice Vaticana, 1995.
- CD SECOND VATICAN COUNCIL, decree *Christus Dominus*, 28 October 1965, in AAS, 58 (1966), pp. 673-701.

- CIC *Codex iuris canonici, Pii X Pontificis Maximi iussu Digestus, Benedicti Papae XV auctoritate promulgatus, praefatione, fontium annotatione et indice analytico-alphabetico ab emo Petro Card. Gasparri auctus*, Neo-Eboraci, P.J. Kenedy & Sons, Typographi Pontificii, 1918.
- CS PIUS XII, apostolic letter *Cleri sanctitati*, 2 June 1957, in *AAS*, 49 (1957), pp. 433-603.
- DDC RAOUL NAZ (ed.), *Dictionnaire de droit canonique*, 7 vols., Paris, Librairie Letouzey et Ané, 1935-67.
- DH SECOND VATICAN COUNCIL, declaration *Dignitatis humanae*, 7 December 1965, in *AAS*, 58 (1966), pp. 929-941.
- DELAFONS JOHN DELAFONS, *Politics and Preservation: A Policy History of the Built Heritage, 1882-1996*, E & FN Spon, London, 1997.
- Decreta* PLENARY COUNCIL OF BALTIMORE, *Decreta concilii plenarii baltimorensis tertii a.d. MDCCCLXXXIV praeside Illmo. ac Revmo Jacobo Gibbons, archiepiscopo Balt. et delegato apostolico*, Baltimore, Typis Joannis Murphy et Sociorum, 1886.
- EBC PONTIFICIA COMMISSIONE PER I BENI CULTURALI DELLA CHIESA, *Enchiridion dei beni culturali della Chiesa: documenti ufficiali della Pontificia Commissione per i Beni Culturali della Chiesa*, Bologna, Edizioni Dehoniane, 2002.
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- GASPARRI PETRUS GASPARRI (ed.), *Codicis iuris canonici fontes*, 9 vols., Romae, Typis Polyglottis Vaticanis, 1926-1939.
- GS SECOND VATICAN COUNCIL, pastoral constitution *Gaudium et spes*, 7 December 1965, in *AAS*, 58 (1966), pp. 1025-1120.
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- LG SECOND VATICAN COUNCIL, constitution *Lumen gentium*, 21 November 1964, in *AAS*, 57 (1965), pp. 5-71.
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- OE SECOND VATICAN COUNCIL, decree *Orientalium Ecclesiarum*, 21 November 1964, in *AAS*, 57 (1965), pp. 76-86.
- PALMER NORMAN PALMER (ed.), *The Recovery of Stolen Art: A Collection of Essays*, London, Kluwer Law International, 1998.
- PA PIUS XII, motu proprio *Postquam apostolicis litteris*, 9 February 1952, in *AAS*, 44 (1952), pp. 65-150.
- PB JOHN PAUL II, apostolic constitution *Pastor Bonus*, 29 June 1988, in *AAS*, 80 (1988), pp. 841-934.

- PC SECOND VATICAN COUNCIL, decree *Perfectae caritatis*, 28 October 1965, in *AAS*, 58 (1966), pp. 702-712.
- PETERS EDWARD N. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law in English Translation with Extensive Scholarly Apparatus*, San Francisco, Ignatius Press, 2001.
- PO SECOND VATICAN COUNCIL, decree *Presbyterorum ordinis*, 7 December 1965, *AAS*, 58 (1966), pp. 991-1024.
- RCIC *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Città del Vaticano, Libreria Editrice Vaticana, 1989.
- SC SECOND VATICAN COUNCIL, constitution *Sacrosanctum Concilium*, 4 December 1963, in *AAS*, 56 (1964), pp. 97-134.
- Schema* PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECONGNOSCENDO, *Schema codicis iuris canonici iuxta animadversiones S.R.E. cardinalium, episcoporum conferentiarum, dicasteriorum curiae romanae, universitatum facultatumque ecclesiasticarum necnon superiorum institutorum vitae consecratae recognitum*, Roma, Libreria Editrice Vaticana, 1980.
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- UR SECOND VATICAN COUNCIL, decree *Unitatis redintegratio*, 21 November 1964, in *AAS*, 57 (1965), pp. 90-112.

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Introduction

The Universal Declaration of Human Rights of 1948 proclaims that among other universal, indivisible, inter-dependent and inter-related human rights is the right to culture. Article 27 of the Declaration speaks of the right to participate in culture. But if there is a right on the part of persons to participate in culture, there must also be a correlative duty on the part of public authorities (or others) to make provision for access to culture and to preserve the extant cultural heritage. The property law aspect of this right is the law of cultural property and the proposed object of this study is specifically the development of the canon law of cultural property. Such a study is all the more apt inasmuch as the United Nations General Assembly by resolution (A/RES/56/8) upon motion by Canada and ten other countries proclaimed 2002 “United Nations Year for Cultural Heritage.” Later the Pontifical Commission for the Cultural Patrimony of the Church in a circular letter calling this fact to the attention of the presidents of the various episcopal conferences saw the event as a special occasion for encouraging Christ’s faithful to see the worth of the cultural patrimony of their own particular church.¹

While the right to culture does not explicitly appear in title 1 of Book II of the Code of Canon Law on the duties and rights of Christ’s faithful, the Second Vatican Council in its constitution on the Church in the modern world, *Gaudium et spes*, expressly recognized the right of all to the benefits of culture. Article 60 of *Gaudium et spes* begins with the heading—*ius ad culturae beneficia omnibus agnoscatur et in rem deducatur*, recognitionn of everyone’s right to culture and its implementation. The Council then states that Christians have the duty to work tirelessly in economic and political spheres on both the national and international levels to secure the recognition and implementation of the *ius omnium ad humanum civilemque cultum*, “the right of every man to human and civil culture in harmony with the dignity of the human person, without distinction of race, sex, nation, religion, or social circumstances.”² Later in the same article the

¹ PONTIFICAL COMMISSION FOR THE CULTURAL PATRIMONY OF THE CHURCH, letter “Proclamazione dalle Nazioni Unite dell’anno del patrimonio mondiale 2002,” 28 February 2002, in *Enchiridion dei beni culturali della Chiesa: documenti ufficiali della Pontificia Commissione per i Beni Culturali della Chiesa*, Bologna, Edizioni Dehoniane, 2002, p. 530.

² SECOND VATICAN COUNCIL, pastoral constitution *Gaudium et spes*, 7 December 1965, in *Acta Apostolicae Sedis*, 58 (1966), art. 60, p. 1081. Unless otherwise stated, I have used the English translation in AUSTIN FLANNERY (gen. ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents*, Northport, NY, Costello Publishing Co., 1975, p. 964.

Council declared, "We must do everything possible to make all persons aware of their right to culture."³

But if the right to culture is not expressly recognized in the Code of Canon Law, it is surely implicit in title 1 of Book II of the code or present in its penumbra. Thus the Christian faithful have a dignity and true equality founded in their baptism (c. 208) and the duty and, hence, the right to spread the Gospel message throughout the world (c. 211) and the right to the spiritual goods of the church (c. 213) and the right to their own (approved) form of spirituality (c. 214). Moreover, as participants in the mission of the Church, Christ's faithful have the right to promote works of the apostolate, even by their own efforts (c. 216). Called by baptism to conform to the doctrine of the Gospel, they have accordingly the right to a Christian education (c. 217) and a right to a just freedom of research (c.218). The same notion is also clear from canon 1136 which declares that parents have the most serious duty and the primary right to see to the physical, social, moral and cultural education of their children. Implied in all of this is a right to culture, for, if parents have a duty to see to the cultural education of their children, they must themselves have a right to culture. As Vatican II explained: "The word 'culture' in the general sense refers to all those things which go to the refining and developing of man's diverse mental and physical endowments."⁴ In short, *ubi homo, ibi cultura*: Thus, these duties and rights imply a cultural context and, hence, a right to culture. Indeed, the first foundation of cultural rights is the radical freedom of the human spirit based on freedom of conscience.⁵

In his 1995 address to the plenary meeting of the Pontifical Commission for the Cultural Heritage of the Church, Pope John Paul II provided a very wide definition of cultural property when he said,

³ GS, art. 60, p. 1081, "*Enixe insuper adlaborandum est ut omnes conscii fiant tum iuris ad culturam*"; FLANNERY, p. 965.

⁴ GS, art 53, p. 1075; FLANNERY, p. 958.

⁵ PAUL CARDINAL POUPARD, address, 8 October 1998, "The Second Cadenabbia Seminar: Cultural Rights and Cultural Identity in Europe. Christian Perspectives in Cultural Policy on the Threshold of the New Millennium," Cadenabbia, La Villa La Colina, 8-11 October 1998, in *Cultures and Faith*, 6 (1998), p. 280, where the President of the Pontifical Council for Culture stated, "In fact, if we question ourselves about the first foundation of cultural rights, we find it in the radical freedom of the human spirit based on freedom of conscience. The right to culture is basically linked to freedom of religion."

It was desired that the very concept of "cultural heritage" should be given a precise meaning and an immediately understandable content: thus it includes, first of all, the artistic wealth of painting, sculpture, architecture, mosaic and music, placed at the service of the Church's mission. To these we should then add the wealth of books contained in ecclesiastical libraries and the historical documents preserved in the archives of ecclesial communities. Finally, this concept covers the literary, theatrical and cinematographic works produced by the mass media.⁶

The concept of cultural property has developed fairly recently in western culture and to be truthful it is still in the course of development. Originally it consisted of the antiquities of the Classical Age. In the nineteenth century with the development of archaeology, prehistoric remains came within its ambit, and later the fine arts, the decorative arts and the architecture of more recent times were added to the canon of cultural property. Today, in fact, there is a tendency to substitute the term "cultural heritage" for "cultural property" to indicate that the former includes the intangible cultural heritage and so non-material items like folklore.⁷

The concept of culture first developed out of the notion of culture as a humanizing or civilizing process as in the phrase "a cultivated individual." Later "culture" came to be used in a broader and more anthropological sense to include all the material evidence of a particular culture. The former had a certain elitist sense which is entirely absent from the latter sense. "Cultural property," then, is the material and historical products of a culture and the "cultural patrimony" is the ensemble of such property produced by a certain society in a determined time and place. Thus understood cultural property provides a portrait of a society, its thought, its values, its art, its technology, its cuisine, its music. This is the record from which the history of a culture may be reconstructed. At the same time it can provide the historical memory of a society as well as its cultural identity.⁸

⁶ JOHN PAUL II, "Art Celebrates the Mystery of Faith," 12 October 1995, in *L'Osservatore Romano*: Weekly Edition in English (25 October 1995), p. 5.

⁷ P.J. O'KEEFE AND LYNDEL V. PROTT, "Cultural Property," in RUDOLF L. BINDSCHEDLER ET AL., *Encyclopedia of Public International Law*, 4 vols., Amsterdam, North-Holland, 1992, I, p. 890.

⁸ GIANCARLO MENIS, "Nozione e concetto di 'beni culturali'," in CLAUDIO BELLINATI (ed.), *Beni culturali ecclesiastici: significato, promozione, valorizzazione: manuale per studenti di scuole superiori e operatori nel patrimonio storico-artistico*, Padova, Consultà per i beni culturali ecclesiastici delle Tre Venezie, Giunta regionale del Veneto, 1994, pp. 29-30.

But even if culture is now viewed more in the anthropological than in the humanistic sense, its appreciation still begins with the appreciation of beauty. While a religion is usually thought to be in quest of truth and goodness, the third transcendental is always there present as well. As the Catechism says, "Even before revealing himself to man in words of truth, God reveals himself to him through the universal language of creation, the work of his Word, of his wisdom: the order and harmony of the cosmos...for the author of beauty created them." And created in the image of God, man also expresses the truth of his relationship with God the Creator by the beauty of his artistic works. Indeed art is a distinctively human form of expression.⁹ Christianity and especially Catholicism, moreover, are particularly apt for the promotion of art. As the Catechism points out, the sacred image "cannot represent the invisible and incomprehensible God, but the incarnation of the Son of God has ushered in a new 'economy' of images." Thus, "Christian iconography expresses in images the same Gospel message that Scripture communicates in words." Or, as the Second Council of Nicaea in 787 stated in its decree on the lawfulness of icons: "representational artwork...confirms that the incarnation of the Word of God was real and not imaginary."¹⁰

The literature of the canon law of cultural property is largely in Italian¹¹ and Spanish and for the most part it relates to that law in its Italian and Spanish contexts. There is also a body of literature in German which relates especially to cultural property in the German context. There is almost nothing on the subject in the literature in English nor relating to the Anglo-American context.

⁹ *Catechism of the Catholic Church*, St. Paul, The Wanderer Press, 1994, arts. 2300-2301, pp. 599-600. See also CLAUDIO BELLINATI, "Arte sacra e beni culturali ecclesiastici nel nuovo catechismo della chiesa cattolica," in CLAUDIO BELLINATI (ed.), *Beni culturali ecclesiastici*, pp. 3-7. The theology of beauty is beyond the scope of this work but on it see HANS URS VON BALTHASAR, *The Glory of the Lord: A Theological Aesthetics*, 4 vols., San Francisco, Ignatius, 1982.

¹⁰ *Catechism of the Catholic Church*, arts. 1159, 1160, pp. 299-300.

¹¹ Probably the premier work in the field is a compilation of sources of the canon law of cultural property put out by CESEN, the Centro Studi sugli Enti Ecclesiastici at the Università Cattolica del S. Cuore in Milan, and edited by Maria Vismara Missiroli and entitled *Codice dei beni culturali di interesse religioso* and published in 1993 by Giuffrè Editore of Milan. Regretably, the Pontifical Commission for the Cultural Heritage of the Church's very useful volume entitled *Enchiridion dei beni culturali della Chiesa: documenti ufficiali della Pontificia Commissione per i Beni Culturali della Chiesa*, published in 2002 in Bologna by Edizioni Dehoniane appeared too late to be of practical use to my research.

This is not really surprising. It is said that something like half of the inventoried cultural property in the world reposes in Italy, and Spain, too, is rich in cultural property. By contrast, in the United States interest in cultural policy and the preservation of cultural property is relatively recent. It was only in 1965 that the United States put in force the National Foundation on the Arts and the Humanities Act, which established its first national cultural policy public agencies, the National Endowment for the Arts and the National Endowment for the Humanities. The following year Congress enacted the National Historic Preservation Act, which established the National Register of Historic Places and was America's first comprehensive essay into the preservation of cultural property. And even in Britain, while preservation legislation goes back as far as 1882, it was only with the Civic Amenities Act 1967 and the Town and Country Planning Act 1968 with its provision for listed building consent that Britain's body of preservation legislation got real teeth and demolition of the built heritage was halted significantly. As recently as 1987 a writer could state that what archaeologists and anthropologists call cultural resources management law and what historians and architects call historic preservation law "has largely escaped the notice of scholars and legal commentators."¹² A recent Scottish work said, "heritage is a thoroughly modern concept...heritage belongs to the final quarter of the twentieth century."¹³

Not surprisingly, English-speaking canonists have been equally slow to look at a branch of the law which is both relatively new in canon law and very new to their secular legal colleagues. The aim of this work will be to begin to fill this void and survey the canon law of cultural property in the context of the English-speaking world and, particularly, of the United Kingdom and the United States. Within this English-speaking perspective, then, our question will be has *res pretiosa* become the law which in the Latin Church governs cultural property after the coming into effect of the 1983 Code of Canon Law and what is its origin and current norms.

Canon 1270 notes that there is both immovable and movable property. This distinction is in part based on the practical importance of physical characteristics. The fixed nature of an immovable has typically under the rules of private international law resulted in jurisdiction being given to the

¹² THOMAS W. LUCKE, "Trends and Current Issues in Cultural Resources Management Law," in RONALD W. JOHNSON AND MICHAEL G. SCHENE (eds.), *Cultural Resources Management*, Malabar, FL, 1987, p. 219.

¹³ DAVID MCCRONE, ANGELA MORRIS AND RICHARD KIELY, *Scotland—the Brand: The Making of Scottish Heritage*, Edinburgh, Edinburgh University Press, 1995, p.1. They note at p. 2 that half of Scotland's 400 museums have opened since the late 1970's.

court of the place where the immovable is located. But the principal reason for the distinction between immovables and movables arises from the feeling that certain things are more valuable than others as parts of individual estates and, hence, their conservation must be assured with greater care.¹⁴ Indeed, this value is precisely reflected in canon 1270 which makes special provision for the prescription of immovables and *pretiosae* or “valuable” movables. If we look to the dictionary, then, it is not surprising that the primary meaning of the adjective *pretiosus* is “valuable.”¹⁵ In a sense this study will take us from *pretiosus* in this etymological sense, which was indeed its earliest meaning, to its narrower and more proper meaning in the 1917 and 1983 codes of canon law, artistically or historically valuable property.

Such a study is necessarily a comparative law study. Property law in canon law has always been an area where there has been a mixed legal regime and the law of cultural property is no different.¹⁶ Canon law claims no exclusive regime here and, indeed, with respect to temporal goods there is something of a condominium with the state as well as the Church having rights. “Render to Caesar the things that are Caesar’s and to God the things that are God’s” implies a duality of authority, and this duality has been a distinctly Christian contribution to political theory. In the case of *res mixtae*, a number of juridic principles have been identified. The first is that in such cases the state may not legislate to the exclusion of the Church. Rather, both must proceed by mutual cooperation.¹⁷ With respect to mixed matters and their natural effects, both Church and state have the right to legislate with regard to their own proper ends. Civil society

¹⁴ CHARLES MARIE AUBRY, *Aubry & Rau Droit Civil Français, Property, Civil Law Translations*, Vol. II, 7th ed., 2 vols., PAUL ESMEIN (ed.), Saint Paul, West Publishing Co., 1966, II, p. 9.

¹⁵ EGIDIO FORCELLINI, *Lexicon totius latinitatis ab Aegidio Forcellini lucubratum, deinde a Josepho Furianetto emendatum et auctum, nunc vero curantibus Francisco Corradini et Josepho Perin emendatius et auctius melioremque in formam redactum*, 6 vols., Patavii, Typis Seminarii, 1940, III, p. 856, says *pretiosus* means *qui est multi pretii* or *dicitur qui magno pretio emit*, and adds that in Italian the adjective means *prezioso* or in English “valuable.”

¹⁶ ZOILA COMBALÍA, “Titulus II: de administratione bonorum,” in MARZOA, IV, p. 133, states “*los bienes eclesiásticos de interés histórico, artístico y documental son materia de interés común a la Iglesia y al Estado.*”

¹⁷ LEO XIII, encyclical *Immortale Dei*, 1 November 1885, in *Acta Sanctae Sedis*, 18 (1885), p. 174: “*In negotiis autem mixti iuris, maxime esse secundum naturam itemque secundum Dei consilia non secessionem alterius potestatis ab altera, multoque minus contentionem, sed plane concordiam, eamque cum causis proximis congruentem, quae causae utramque societatem genuerunt.*”

does not have the right to exercise its authority over the substance and the inseparable effects of supernatural or supernaturalized things, but merely over the separable temporal effects.¹⁸

Because the Catholic Church is a society with its own (spiritual) ends and with distinctive (and especially spiritual) means, it has its own body of canon law to govern its affairs. Part of that law governs church property which, as canon 1254 points out, the Catholic Church has an inherent right to acquire, possess, administer and alienate. At the same time, that property exists in the secular world and secular society has a legitimate interest (cf. cc. 1284 and 1290) in the same temporal goods and so its law too rightly affects church property. The *renvoi* created by these canons in fact appears to be an attempt by canon law to accommodate this temporal interest. Thus, in the present study we shall need to look at two bodies of the secular law relating to cultural property, international law and a selected portion of "municipal law," as international lawyers call national or state law.

For the most part this municipal law will be the law of Britain and of the United States. Today there are in the western world two great legal traditions, the Anglo-American common law tradition and the civil law tradition, that other great legal family based historically in great part on Roman law.¹⁹ While our focus lies mainly with the former, because canon law developed in the course of the last millennium largely in relation to the civil law tradition as a sort of Siamese twin, it will be necessary to look at the civil law system developments, too, in order properly to understand the character of canon law.

Throughout the Middle Ages it was the civil or Germano-Roman law, which, along with canon law, was taught at universities. Indeed, this Roman law along with canon law came to be known as the *ius commune* or law common to western Christendom, and one who had successfully studied both was a *doctor utriusque iuris*. These same bodies of law were also studied in the homeland of the common law system. In England in its two ancient universities at Oxford and

¹⁸ ALAPHRIDUS OTTAVIANI, *Institutiones iuris publici ecclesiastici*, editio tertia, 2 vols., Romae, Typis Polyglottis Vaticanis, 1947, II, pp. 196-199; AMLETO GIOVANNI CICOGNANI, *Canon Law*, Philadelphia, The Dolphin Press, 1934, pp. 120-121.

¹⁹ MARY ANN GLENDON, MICHAEL WALLACE GORDON AND CHRISTOPHER OSAKWE, *Comparative Legal Traditions in a Nutshell*, St. Paul, West Publishing Co., 1982, p. 5. This work presents concise overviews of both traditions.

Cambridge only canon law (until 1535) and Roman law were taught.²⁰ Since canon law developed in relation to Roman or civil law almost as a twin, it repeatedly looked to the civil law for suppletive law. But after the great codifications of the nineteenth century, Roman law lost this role and instead canon law has looked to the (codified) civil law tradition. Thus, for Anglo-American lawyers and laymen alike to understand canon law they need a background in both Roman law and the civil law tradition. Since Napoleon's *Code civil* of 1804, French law has been the leader in the civil law tradition and perforce it is to that law that we shall look.²¹

To answer our question of whether *res pretiosa* in the Latin Church has become the law which governs cultural property after the coming into effect of the 1983 Code of Canon Law we shall for additional reasons need to look beyond the covers of the Code of Canon Law. The first few canons and the first title of the Code of Canon Law form something of an essay on the sources of canon law. Like the Decalogue, the canons are phrased mostly in the negative yet their import is not reduced by their mode of formulation.

Canon 1 tells us that the canons of the Code of Canon Law only affect the Latin Church. Hence, in Chapters 2 and 3 we shall be dealing largely with the Latin Code's canons dealing with cultural property. Nevertheless, since today a great many of the members of the Eastern Catholic Churches are Anglophone²² and, because of the juridical importance of the oriental law as part of a *corpus iuris* with the 1983 Code and *Pastor bonus*, we shall refer to the law in the 1990 Code of Canons of the Eastern Churches.

²⁰ The teaching of canon law at English universities was ended by the Royal Injunctions of 1535 and thereafter only Roman law was taught at English universities. English common law was not taught at university in England until Blackstone first mounted the Vinerian Chair in Common Law in 1758. A curious relic of the influence of the *ius commune* in England remains to this day in the degrees which English and Commonwealth common lawyers get. At Oxford the common law degree is the BCL or bachelor of civil (Roman) law. At Cambridge (and most other Commonwealth universities) the common law degree is the LLB or bachelor in laws (i.e., Roman and canon). There are, however, bodies of English law which derive, not from English common law, but from Roman law. See DUANE L.C.M. GALLES, "The Civil Law," *The Jurist*, 49 (1989), p. 245.

²¹ PETER STEIN, *Roman Law in European History*, Cambridge, Cambridge University Press, 1999, pp. 51-52, 123. Stein notes at p. 128 that in the civil law world only the Republic of San Marino has rejected the notion of a civil code and still applies the uncoded *ius commune*.

²² VICTOR J. POSPISHIL, *Eastern Catholic Church Law*, 2d ed., Brooklyn, Saint Maron Publications, 1996, p. 2.

Canon 2 tells us that the Code for the most part does not determine liturgical rites, which are governed by liturgical law. We for the most part will not deal in this study with liturgical law. Canon 3 tells us that the conventions entered into by the Apostolic See and civil authorities remain in force and are neither abrogated nor derogated from by the Code. In Chapter 1 we shall look at the ecclesiastical exemption to cultural property law which represents a sort of informal concordat between Britain and certain of its churches. The Holy See has also acceded to certain multilateral cultural property treaties which we shall explore in the same chapter. Canon 5 tells us that customs *praeter legem* or *secundum legem* retain their force as do customs *contra legem* if centenary or immemorial or if the ordinary, given circumstances of time and place, judges that they cannot be removed. It is because of these canons 3 and 5 that we begin this work with a survey of the treaty and customary international law of cultural property.

Canon 6 tells us that the 1917 Code of Canon Law and prior canon law is abrogated. Nevertheless, to the extent that the norms of the 1983 Code of Canon Law reproduce the former law, the 1983 norms are to be assessed in the light of the canonical tradition. Canon 21, moreover, tells us that in doubt revocation of the pre-existing law is not to be presumed. Rather, the later legislation is to be related to the earlier legislation and harmonized with it to the extent possible. Canon 2 of the Eastern Code furthermore says where the canons of that code receive or accommodate themselves to the ancient law they are especially to be viewed in the light of that law.²³ These canons, along with canon 17 which tells us that interpretation is to take account of the proper meaning of words, provide the justification for Chapter 2. Canon 1292, §2, provides a description of *res pretiosa*, telling us that it is property valuable by reason of its artistic or historical character. This is a capsule definition of cultural property law but to understand its proper meaning in the canonical tradition we shall need to trace the development of the term from its use in the seminal papal bull *Ambitosae* of 1468 and then refer back to Byzantium and its use then in the Roman law of guardian and ward. Thereafter, in Chapter 2 we shall look at the canonical elaboration of the concept of *res pretiosa* until its transformation in the 1917 Code and until Vatican II.²⁴

²³ RENÉ METZ, "Preliminary Canons (cc. 1-6)," in GEORGE NEDUNGATT (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, Kanonika 10, Rome, Pontificio Istituto Orientale, 2002, p. 73, states that this "ancient" law referred to in CCEO 2 is not the "old" or prior law, but rather the canons as they existed in the first millennium up to the time of the Second Council of Nicaea in 787.

²⁴ ALAN WATSON, *Failures of the Legal Imagination*, Philadelphia, University of Pennsylvania Press, 1988, p. 22, argues: "Law has functions related to the practical life, but it also operates at the level of culture, especially regarding the culture of the lawmaking elite, which has the power to make changes in the law."

Canon 1284, §2, tells us that administrators are to ensure that ownership of church property is safeguarded in ways valid in civil law and canon 1290 tells us that contracts (sc. regarding church property) are to be subject to the norms of civil law to the extent that the latter are not contrary to divine or canon law. Canon 22 tells us further that wherever canon law remits something to civil law—or “canonizes” the civil law—the latter is to be observed in canon law with the same effects as in civil law, provided the civil law is not contrary to divine or canon law. These canons form the *raison d'être* of the last part of Chapter 1, which sets forth aspects of municipal or national law of cultural property and state law. Both of these bodies potentially place restrictions on the use of cultural property and to act in ignorance of these bodies of law would be hazardous, indeed, perhaps courting seizure of the *res* or buying a lawsuit.

Chapter 3 is the heart of the present work. It consists of a commentary on the canon law of cultural property structured around the norms of the 1983 Code which directly address the same. The commentary is preceded by an exposition of the general norms on church property, and its acquisition, administration and alienation in an Anglo-American context. This chapter includes brief comparisons between the canons on cultural property in the Latin and Eastern codes and some notes on the agencies of the Roman Curia which have a role in the oversight of cultural property.

Included also are a number of circular letters from the Roman Curia. This type of document is relatively new in canon law and the Church's general legislation does not provide for circular letters as an authentic source of law. Nevertheless, some of them do seem to intend to present new norms. Yet some, including the circular letter on church archives, libraries, museums and inventories issued by the Pontifical Commission for the Cultural Heritage of the Church and mentioned in greater detail in Chapter 3,²⁵ have never appeared in *Acta Apostolicae Sedis* and so,

And a living culture is not examined by those who live it. Three typical features of law as culture are...First, codified legal rules are resistant to removal or replacement. Second, society and lawyers on a day-to-day basis can tolerate much inappropriate, even absurd, law. Third, legal rules, when available in an accessible form, can readily be borrowed often without inquiry into their effectiveness.” The transformation of *res pretiosa* in canon law provides something of a test of Watson's thesis.

²⁵ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter, 2 February 1997, “La funzione pastorale degli archivi ecclesiastici,” in EBC, pp. 312-338; circular letter, 15 October 1992, “La formazione dei futuri prebiteri all'attenzione verso i beni culturali della chiesa,” in EBC, pp. 156-184; this document appeared in *Notitiae*, 28 (1992), pp. 714-73; circular letter, 19 March 1994, “Le biblioteche ecclesiastiche nella missione della chiesa,” in EBC, pp. 202-219; circular letter, 8 December 1999, “Necessità e urgenza dell'inventariazione e catalogazione dei beni culturali della chiesa,” in EBC,

in general, have not been promulgated in accordance with canon 7. Looking to their content as well, none of these circulars appears legislative in intention. One concludes, therefore, absent other showing, that such documents are not legislative documents but rather the intentions and policies of dicasteries.²⁶ We shall in Chapter 3 in particular look at the circular letters of the Pontifical Commission for the Cultural Patrimony of the Church on archives, museums, inventories and clerical education in cultural property.

With regard to the interpretation of law, canon 17 directs one in doubtful cases to parallel places. The equivalent canon in the 1917 Code said to “parallel passages of the Code.” Ellsworth Kneal has noted the difference in language and suggested that the language of the 1983 Code permits a wider survey to places outside the Code and even outside canon law.²⁷ Canon 19 further authorizes, outside penal matters, resort for suppletive law to laws in similar matters and to general principles of law as well as to the style of the Roman Curia. In the course of our three chapters but especially in Chapter 1 we shall see much of such suppletive law.

We conclude with a short chapter weaving together some strands which hopefully will have gained greater clarity after three rather diverse chapters have made their explorations in the law of cultural property drawn from different sources of law.

A note on style and usage. Dates are given new style. Usage with respect to the gender of pronouns follows the approach of canon 606 of the 1983 Code of Canon Law. Thus, the masculine includes the feminine unless the context or the nature of things dictates otherwise.

The methodology of the present work is largely historical but it is also comparative. Our wend from an apostolic constitution of 1468 back to a Byzantine imperial constitution of 332 and

pp. 399-437; this document also appeared in English: “The Inventory and Catalogue of the Cultural Heritage of the Church: A Necessary and Urgent Task,” *L’Osservatore Romano*: Weekly Edition in English 12 (1635), Special Insert (22 March 2000), pp. I-VIII; circular letter, 15 August 2001, “The Pastoral Function of Ecclesiastical Museums”, <http://www.vatican.va/roman_curia/po...rc_com_pcche_20010815_funzione-mussei_en.htm> (4/26/2002); in EBC, pp. 464-526.

²⁶ FRANCIS G. MORRISEY, *Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law*, Ottawa, Saint Paul University Faculty of Canon Law, 1992, pp. 32-33.

²⁷ ELLSWORTH KNEAL, “Interpreting the Revised Code,” in *The Jurist*, 42 (1982), p. 305. VELASIO DE PAOLIS, “Laws, Customs, Administrative Acts (cc. 1488-1539),” in GEORGE NEDUNGATT (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, Kanonika 10, Rome, Pontificio Istituto Orientale, 2002, p. 822, whilst commenting on the CCEO would limit parallel passages to “any document of the Church having a relevant juridical value.”

forward to the 1917 and 1983 codes could hardly have been accomplished in any other way. The hope will have been to have exposed the unity or at least the connectedness of these various aspects of the canon law of cultural property from an Anglo-American perspective. What success we will have had will be for the reader to determine.

Chapter 1. Culture, the Right to Culture and Cultural Property

Our question is whether *res pretiosa* has become the canon law of cultural property of the Latin Church after the coming into effect of the 1983 Code of Canon Law and what is its origin and what are its current norms. In answering this question it seems helpful first to begin with the notion of culture and the right to culture. Then we shall look at the law of cultural property as it has developed in the civil law, here in both international and Anglo-American law.

1.1. The Holy See as a Juridical Person

It has been pointed out that when the Code of Canon Law uses the expression "civil law," this is a sort of shorthand and includes international law as well as municipal or national law.¹ Especially in international law the concept of cultural property has developed over several centuries, as we shall see, and, moreover, it has been rendered more precise by at least four multilateral international treaties, to at least two of which the Holy See is a party. Moreover, it was in one of these treaties acceded to by the Holy See, the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict, that the expression "cultural property" first made its appearance in international legislation. The Holy See is a subject of international law, which is to say a juridical person in it, and it is through the Holy See that the Catholic Church is present and acts on the international scene.²

It is, therefore, helpful to begin this discussion on the right to culture in civil and international law by mapping out the place in international law of the Catholic Church and the Holy See. To do this, however, we must first begin with some canonical distinctions. Canon 113, §1, of the 1983 Code of Canon Law tells us that the Catholic Church and the Apostolic See each has by divine ordinance moral personality or is a legal entity. In the narrow sense, canon 331 explains "Apostolic See" or "Holy See" means the office of the Supreme Pontiff. Furthermore, canon 331

¹ PIO CIPROTTI, "Le <legge civili> nel nuovo codice di diritto canonico," in *Apollinaris*, 57 (1984), p. 281, notes that in the Code of Canon Law "civil law" is not to be construed narrowly to mean only statutes but also other norms laid down by other organs of state as well as other bodies of law received by it including international law, custom and foreign law. As canons of the 1983 Code in which international law is cited or presupposed, he cites RCIC canons 3, 22, 353 §4, 362-365, and 459, §2.

² HERIBERT FRANZ KÖCK, "Holy See," in RUDOLF L. BINDSCHEDLER ET AL., *Encyclopedia of Public International Law*, 4 vols., Amsterdam, North-Holland, 1992, II, p. 866. Köck notes that the international legal personality of the Church is based on the fact that the internal legal order of the Church is not derived from any State or subject of international law and that it is therefore sovereign.

explains that the Roman Pontiff by virtue of his office has supreme, full, immediate and universal ordinary power in the Church which, moreover, he may always freely exercise. But canon 361—like the corresponding canon 7 of the 1917 Code of Canon Law—explains that in the 1983 Code of Canon Law “Apostolic See” or “Holy See”³ can also include, depending on the context, not only the Roman Pontiff but also the Secretary of State and the other organs of the Roman Curia. Thus, again while the Holy See is a moral person distinct from the Catholic Church, nevertheless, through the person of the Roman Pontiff the two are necessarily linked.

The Catholic Church and the Holy See thus are distinct juridical entities. The former, as Leo XIII declared in 1885 in his encyclical, *Immortale Dei*, is a society of men, spiritual on account of its end and its means and thus distinct from civil society but also a complete society (*societas perfecta*) since by the will of its Founder it possesses all the means required for its well-being and functioning.⁴

Today the Church is atypical in comparison with the various states which make up the international legal order.⁵ After the Gregorian reform of the eleventh century and under such powerful prelates as Innocent III she had in fact become independent of princes, threatening to exercise jurisdiction over them in a manner perhaps reminiscent of supra-national bodies such as the United Nations in our day.⁶ Nevertheless, over a century ago Maitland stated of the medieval Church that as a political organism it was like a state:

³ JOBE ABBASS, *Apostolic See in the New Oriental Canonical Legislation*, Romae, Pontificium Institutum Orientale, 1992, studied the use of the term “Apostolic See,” “Holy See” and “Roman Pontiff” in a variety of documents emanating from Rome since the Second Vatican Council and, while noting at p. 48 that “Holy See” tends to be used in documents directed to the United Nations, he states at p. 50, “the possible argument that *Holy See* is a term used only in the context of international matters does not hold true on the facts.”

⁴ LEO XIII, encyclical *Immortale Dei*, 1 November 1885, in *Acta Sanctae Sedis*, 18 (1885), p. 174: “*Ecclesiam societatem esse, non minus quam ipsam civitatem, genere et iure perfectam*”; HYGINUS EUGENE CARDINALE, *The Holy See and the International Order*, Toronto, Macmillan of Canada, 1976, pp. 79-82; DOMINIQUE LE TOURNEAU, “Holy or Apostolic See,” in LEVILLAIN, II, p. 717.

⁵ MATTHEW N. BATHON, “The Atypical International Status of the Holy See,” in *Vanderbilt Journal of Transnational Law*, 34 (2001), p. 597; JEAN-LOUIS TAURAN, “Intervento conclusivo,” 24 May 2003, Convegno su <La Chiesa e l’ordine internazionale>, Pontifical Gregorian University <http://www.vatican.va/roman_curia/secretariat_state/2003/documents/rc_seg-st_20030524_tau...> (6/5/2003), p. 1 states: “La Chiesa Cattolica Romana è l’unica confessione religiosa che ha accesso alle relazioni diplomatiche.”

⁶ THOMAS GLYN WATKIN, “Church and State in a Changing World,” in NORMAN DOE, MARK HILL AND ROBERT OMBRES (eds.), *English Canon Law: Essays in Honour of Bishop Eric Kemp*, Cardiff, University of Wales Press, 1998, p. 85.

As a whole the constitution of this state may be unique, but there is hardly a feature in it for which we may not find analogies elsewhere. At various points it becomes a model for the constitutions of other and secular states, while itself reproduces many traits of the ancient Roman empire. Also the canonists, since they have Justinian's books before them, have been fostering this resemblance, and applying to the pope whatever has been said of the *princeps*.⁷

More recently the great scholar of the medieval papal revolution in law and government has noted that, after the Gregorian Reform of the eleventh century, the doctrine of the two swords adverted to by Pope Gelasius I (492-496) was transformed and the spiritual sword for the first time became embodied in a system and science of law, the canon law of Gratian. This canon law, with the institutional advances of the medieval papal government in the form of judicial, treasury and chancery support, provided what was needed to make the system work.⁸ Perhaps for these reasons of history states have been wont to deal with the Church and the Holy See and so they have come to be regarded as having international legal personality or, as international lawyers say, the status of subjects of international law.

1.2. The Right to Culture in Civil Law

Canon 1270 tells us that there is real property and personal property. Some authors have also suggested that cultural property may have become a distinct type of property governed by its own distinct body of law, as is the case with real property, personal property and intellectual property.⁹

⁷ FREDERICK WILLIAM MAITLAND, *Roman Canon Law in the Church of England*, New York, Burt Franklin Reprint, 1968, pp. 100-101.

⁸ HAROLD BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA, Harvard University Press, 1983, p. 521. In a letter of 494 A.D. which would later become influential with canonists, Pope Gelasius said: "There are two principles, august emperor, by which the world is ruled: the sacred authority of pontiffs (*auctoritas sacrata pontificum*) and the royal power (*regalis potestas*). For the former, the *pondus* of the priests is all the stronger since, in the Judgment Day, they are to be held accountable even for the kings of men." CLAIRE SOTINEL, "Gelasius I," in LEVILLAIN, II, p. 622.

⁹ RICHARD CREWDSON, "Cultural Property—A Fourth Estate?" in *Law Society Gazette*, 81 (18 January 1984), p. 126; LYNDEL V. PROTT, "Problems of Private International Law for the Protection of the Cultural Heritage," in *Recueil des Cours de l'Académie de Droit International de La Haye*, 217 (1989), pp. 301-312. PROTT at pp. 311-312 states, "...it can be expected that cultural heritage law will, at least for a few years, be regarded as an esoteric fringe subject, not really to be taken seriously. As with environmental law, the forces pushing for its recognition are so strong, and the amount of law directed to the policy of preservation

Later in this chapter we shall look at the municipal or national laws in the areas of historic preservation. They are important for our topic for they form servitudes, as it were, on the rights of owners of cultural property and create duties on the part of those owners. Since our focus in this study is the Anglo-American context, we shall look at the law of Britain and of the United States. But first we shall look at the right to culture.

“Culture” can be thought of in a number of ways. First, and this was perhaps chronologically first as well, culture can be considered as the accumulated material heritage of humanity. Second, culture can be thought of as the process of artistic and scientific creation. A third and newer notion of culture comes from anthropology and regards culture as the sum total of the material and spiritual activities and products of a given social group which distinguishes itself from other similar groups. The third notion of culture would result in a more diffuse notion of a right to culture, since while there are perhaps only 200 independent states in the world, there are perhaps 10,000 distinct ethnic groups and even more other groups which could become authors of culture. Cultures, moreover, are not static. Every identifiable culture is historically rooted and changes over time.¹⁰

The right to culture was first expressly set forth in the Universal Declaration of Human Rights. The Declaration was prepared by an international committee of experts which included Jacques Maritain and was chaired by Eleanor Roosevelt. It was adopted by the United Nations General Assembly on 10 December 1948. It is the first comprehensive human rights instrument to be proclaimed by a universal international organization. Its first article states that “all human beings

increasing so fast, that such attitudes will be overcome and increasing numbers of young scholars and lawyers attracted to a subject where there is still much research and formulation to be done.” In particular she advocates changes in private international law, the choice of law rules, where a case involves foreign law elements, where cultural heritage is the object of controversy—especially the *lex rei sitae* or rules governing immovables and movables in such cases. She notes, for example, at p. 263, that in *Winkworth v. Christie’s Ltd.*, [1980] 1 Ch. 496, a collection of Japanese netsuke was stolen in England and taken to Italy and there sold to a *bona fide* purchaser who under Italian law immediately acquired good title. The objects were then consigned to Christie’s in London where the owner discovered them and sued for their return. Ironically, an English court, looking to the *lex situs* under the rules of private international law, held that the Italian law of *bona fide* purchases was to be applied and so the former owner lost his case, even though, if English law had been applied, he would have won, since a thief cannot pass good title in English law.

¹⁰ RODOLFO STAIVENHAGEN, “Cultural Rights: A Social Science Perspective,” in HALINA NIEC (ed.), *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights*, Leicester, UNESCO Publishing and Institute of Art and Law, 1998, pp. 4-5.

are born free and equal in dignity and rights”¹¹ and that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Its Article 22 states that “everyone...is entitled to realization...of the...cultural rights indispensable for his dignity and the free development of his personality.” More specific is Article 27. It states,

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.¹²

The Declaration is not a treaty; it is a General Assembly resolution having no force of law. Its preamble says it aims at providing “a common understanding” of the human rights and fundamental freedoms referred to in the United Nations Charter and is to serve as “as common standard of achievement for all peoples and all nations.” Some argue in fact that the Universal Declaration is an authoritative declaration of those human rights which articles 55 and 56 of the United Nations Charter bind its Members to respect. Because it has become frequently over the last five decades a standard against which state conduct is judged, some have argued that it—or at least many of its provisions—have become customary international law.¹³ Other writers have seen it as reflective of a dynamic modern aspect of general principles of law.¹⁴

¹¹ MARY ANN GLENDON, “Foundations of Human Rights: The Unfinished Business,” in *American Journal of Jurisprudence*, 44 (1999), p. 13, argues “human rights are grounded in the obligation of everyone to perfect one’s own dignity which in turn obliges one to respect the given spark of dignity of others whatever they may have done with it.”

¹² “Universal Declaration of Human Rights,” arts. 1, 22, 27, in IAN BROWNLIE (ed.), *Basic Documents in International Law*, Oxford, Clarendon Press, 1967, p. 137.

¹³ HURST HANNUM, “Human Rights,” in OSCAR SCHACHTER AND CHRISTOPHER C. JOYNER, *United Nations Legal Order*, 2 vols., Cambridge, Cambridge University Press, 1995, I, p. 327; JAVAID REHMAN, *International Human Rights Law: A Practical Approach*, Harlow, England, Pearson Education Ltd., 2003, pp. 58-60.

¹⁴ JUAN CARRILLO SALCEDO, “Human Rights, Universal Declaration (1948),” in EPIL, II, pp. 922-926, argues that the Universal Declaration can be viewed as having the force of international law as being an expression of general principles of law, as customary international law or as an authentic interpretation of those human rights referred to in articles 55 and 56 of the United Nations Charter. As for the Holy See’s actions with respect to the Declaration and its right to culture, we may note that the Holy See is not a member of the United Nations nor has it acceded to either the International Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights. Nevertheless, on 1 May 1969 the Holy See acceded to the International Convention on the Elimination of All Forms of Racial Discrimination which the United Nations General Assembly had opened for signature in 1965 and which

In 1966 the United Nations General Assembly adopted and opened for signature two conventions which with the Declaration are viewed as constituting the International Bill of Rights. These are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.¹⁵ By 1 July 1995, 130 states had ratified the former and 132 states had ratified the latter.

Article 13 of the cultural covenant recognizes the right of all to education "directed to the full development of the human personality." More particularly, its article 15 recognizes the right of everyone "to take part in cultural life, to enjoy the benefit of scientific progress, and to enjoy the benefits from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." The steps to be taken under article 2 by parties to achieve the full realization of this right were to include those necessary for the "conservation, the development and the diffusion of science and culture." Its sister, the International Covenant on Civil and Political Rights, states in its article 27 that ethnic, religious and linguistic minorities are not to be denied their right "in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language." Both documents are treaties and so binding on signatories.¹⁶

entered into force 4 January 1969. In its article 5 the parties agree to eliminate racial discrimination in all its forms and to guarantee equality before the law *inter alia* in the right to equal participation in cultural activities. "International Convention on the Elimination of All Forms of Racial Discrimination," in UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, *The United Nations and Human Rights 1945-1995*, New York, United Nations Blue Book Series, 1995, p. 221. Similarly, on 20 April 1990 the Holy See acceded to the 1989 Convention on the Rights of the Child, which entered into force 2 September 1990. That Convention replicates part of the cultural rights language of the Declaration and under it parties expressly agree to respect the right of the child "to participate freely in cultural life and the arts". "Convention on the Rights of the Child," article 31, in *Ibid.*, p. 340. Moreover, during the international conference which produced the 1969 Vienna Convention on the Law of Treaties, the representative of the Holy See declared that the peremptory norms of international law or the *ius cogens* should be stated to include human rights. HENRI DE RIEDMATTEN, "Le catholicisme et le developpement du droit international," in *Recueil des Cours de l'Académie de Droit International de La Haye*, 151 (1976), p. 140. This suggests that the Holy See regards human rights as established in international law and the right to culture to be among them. REHMAN, *International Human Rights Law*, p. 61, however, notes: "At the same time, a number of rights are arguably not even part of customary law and categorising those as part of the *ius cogens* would be inaccurate." Among others, he then cites the right to participate in culture of Article 27 of the Universal Declaration.

¹⁵ "International Covenant on Economic, Social and Cultural Rights (CESCR)," in UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, *The United Nations and Human Rights*, pp. 232-238; and "International Covenant on Civil and Political Rights (CCPR)," in *ibid.*, pp. 239-245.

¹⁶ "International Covenant on Economic, Social and Cultural Rights (CESCR)," in UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, *The United Nations and Human Rights*, p. 232; and "International

Article 68 of the United Nations Charter requires the Economic and Social Council (ECOSOC) to establish a commission for the promotion of human rights. That was done in 1946 and today the Commission on Human Rights has 53 members. It is to make reports, recommendations and proposals to ECOSOC with respect to human rights. The Universal Declaration and the two Covenants, which are collectively known as the International Bill of Rights, are its work product. In 1994 the General Assembly further established a UN Commissioner for Human Rights with the rank of Under Secretary-General to work within the framework and overall competence of the General Assembly, ECOSOC, and the Commission on Human Rights.¹⁷ Both covenants require state parties to submit periodic reports on the measures taken to achieve or guarantee the relevant rights. In 1986 ECOSOC created the Committee on Economic, Social and Cultural Rights as a committee of experts to receive and review reports made under the cultural covenant. The civil covenant itself created an eighteen-member committee to examine reports submitted by state parties. Neither committee has power to make binding judgments but they do usefully report on state practice.¹⁸

We saw that Article 27 the Universal Declaration of Rights of 1948 and article 15 of the International Covenant on Economic, Social and Cultural Rights spoke of two aspects of this right. First was the right to participate in culture. But if there is a right on the part of persons to participate in culture, there must also be a correlative duty on the part of public authorities (or others) to make provision for cultural policy and to preserve the extant cultural heritage. Second is the right of authors and other creators of culture to enjoy the fruits of their creation.

Covenant on Civil and Political Rights (CCPR),” in *ibid.*, p. 239. The web site of the Office of the United Nations High Commissioner for Human Rights <www.unhchr.ch/html.int/inst.htm> on 2 May 2003 listed the ratifications: The following have ratified CESCR: Australia (1975), Canada (1976), India (1979), Ireland (1989), New Zealand (1978), Philippines (1974), United Kingdom (1976); the following have ratified CCPR: Australia (1980), Canada (1976), India (1979), Ireland (1989), New Zealand (1978), Philippines (1986) South Africa (1998), United Kingdom (1976), United States of America (1992).

¹⁷ THOMAS BUERGENTHAL, *International Human Rights in a Nutshell*, 2d ed., St. Paul, West Publishing Co., 1995, pp. 23-24, 29-37, 51-57, 78-96.

¹⁸ MATTHEW C. R. CRAVEN, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development*, Oxford Monographs in International Law, Oxford, Clarendon Press, 1995, p. 1; REHMAN, *Inter-national Human Rights Law*, pp. 122-132.

Cultural rights have been called an underdeveloped kind of human right.¹⁹ Recognizing the need for further elaboration of cultural rights, the Interdisciplinary Institute of Ethics and Human Rights of the University of Fribourg in cooperation with the Swiss National Commission for UNESCO examined cultural rights as an underdeveloped category and produced a draft declaration of cultural rights. Further in this regard the Conference on Cultural Policies for Development, meeting in Stockholm in 1998 recognized the right of all of access to cultural life and expressed the need for an inventory of cultural rights.²⁰

It is perhaps appropriate to close this section by quoting from the 1998 Stockholm Declaration of the International Council on Monuments and Sites, ICOMOS. This is an international, non-governmental organization dedicated to the conservation of the world's historic monuments and sites, which was founded in 1965. Its headquarters is in Paris and it operates as UNESCO's principal advisor in matters concerning the conservation and protection of monuments and sites. The Holy See participates. Marking the fiftieth anniversary of the Universal Declaration on Human Rights, it met in Stockholm in 1998 and it affirmed that the right to cultural heritage is an integral part of human rights. The declaration went on to set forth the rights ICOMOS considers essential:

¹⁹ JANUSZ SYMONIDES, "Cultural Rights; A Neglected Category of Human Rights," in *International Social Science Journal* (December, 1998), p. 559; JANUSZ SYMONIDES, "Cultural Rights," in JANUSZ SYMONIDES (ed.), *Human Rights: Concept and Standards*, Aldershot, Ashgate, 2000, p. 175.

²⁰ KISHORE SINGH, "UNESCO and Cultural Rights," in HALINA NIEC (ed.), *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights*, Leicester, UNESCO Publishing and Institute of Art and Law, 1998, pp. 149-150. The Draft Declaration of Cultural Rights is printed in appendix C, pp. 203-205. It proclaims at p. 204, *inter alia*, the right to a cultural identity, the right to knowledge of one's culture, and the right of access to one's cultural heritage. In this regard we may note that RCIC canon 214 proclaims the right of Christ's faithful to worship God according to the provisions of their own rite and to follow their own form of spiritual life, provided it is in accordance with Church teaching. CCEO canon 17 contains a similar provision. OE, art. 4, p. 77; FLANNERY, p. 443, moreover, said Orientals were to observe their discipline *ubique terrarum*. Nevertheless, comparing CCEO canon 373 and CCEO canon 758 and the practice regarding the ordination of married men outside the territory of the Eastern churches, GEORGE NEDUNGATT, "Celibate and Married Clergy in CCEO Canon 373," in *Studia Canonica*, 36 (2002), p. 163, concludes that, while in ecclesiology Orientals in the diaspora are equal to Latins in their rights to their ritual heritage, in canon law they are not. Likewise, we may note that while RCIC canon 515, which closely follows CD, art. 30, p. 688, FLANNERY, p. 581, describes a parish as *certa communitas christifidelium in Ecclesia particulari constituta*, the *sectio altera* of the Apostolic Signatura has declared that a group of parishioners—even as individuals—do not have standing to complain about the destruction of their cultural heritage in the course of the renovation of their parish church. SUPREMUM TRIBUNAL SIGNATURAE APOSTOLICAE, "Decretum de causa cincinnatensi renovationis ecclesiae paroecialis," 26 January 1990, in *Notitia*, 26 (1990), pp. 142-144. One might, therefore, regard cultural rights as "underdeveloped" in canon law as well.

- The right to have the authentic testimony that cultural heritage constitutes respected as an expression of one's cultural identity within the human family;
- The right better to understand one's heritage and that of others;
- The right to wise and appropriate use of heritage;
- The right to participate in decisions affecting heritage and the cultural values it embodies;
- The right to form associations for the protection and preservation of cultural heritage.²¹

1.2.1. Culture and Vatican II

In order to understand the import of these rights in canon law, we must first elaborate more clearly what "culture" and "person" mean. The Second Vatican Council contented itself with updating the church's understanding of its doctrine and attempting to speak directly to the age without making *de fide* declarations and pronouncing anathemas, as had most previous ecumenical councils. It was particularly desirous of speaking to the age and not merely to the faithful and to do so it developed and made use of certain concepts to build a bridge to the age.

One of the fundamental concepts the Council considered was the notion of culture. Culture occupies an increasingly important place in social life. Culture is perceived as the fundamental dynamism conditioning every form of social, economic, political, and international life. The modern notion of culture is the new paradigm, the conceptual tool, that guides our analysis of the social arena and our understanding of its vital dynamics. Culture reveals to us the characteristic traits of a human collectivity—its mentality, its lifestyle, its own peculiar way of humanizing its milieu. For us culture is the distinctive mark of a society, a social category, or a human community. Culture is the humanized universe created wittingly or unwittingly by a human collectivity. It is the group's own representation of the past and its plan for the future, its typical institutions and creations, its habits and beliefs, its characteristic attitudes and behavior patterns, its original mode of communicating, working, celebrating and creating the techniques and works that reveal its soul and its ultimate values. It is the human heritage transmitted from generation to generation. Every community enjoying a certain permanence possesses a culture of its own. Culture designates the community's way of behaving, thinking, judging, perceiving itself, and being perceived by others.

²¹ ICOMOS, "Declaration of ICOMOS Marking the 50th Anniversary of the Universal Declaration of Human Rights," 11 September 1998, <http://www.international.icomos.org/e_stocdec.htm> (2/14/2000).

"Culture" sometimes has more than one meaning. The older and narrower meaning was its classic or humanist meaning which had connotations of the intellectual and esthetic, of refinement of spirit, of the artistic and the literary. Generally this meaning had a normative sense and was indicative of a certain canon of art. The more modern meaning is the broader and anthropological sense in which culture is descriptive and describes a socio-historical or socio-cultural notion. This meaning developed in the nineteenth century. In 1871 Edward Taylor published his work *Primitive Culture* in which he describes such an understanding of culture as "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society." In this sense the term came into common use after the World War I. The Church itself now uses the language of cultural analysis to discern social realities and to translate the Gospel message of fellowship, charity and justice into the language of the present-day cultures. Indeed, the documents of Vatican II use the word "culture" 91 times.²²

The notion of culture is dependent on the theology of the person. In its document on the church in the modern world, *Gaudium et spes*, the council reminded all that man is a person made in the image of God. This image gave the council a wonderful bridge with which to connect with modern philosophy. Buber and other modern philosophers had recovered a personalist vision of man, rejecting the earlier view of man as an individual, a Cartesian subjective self-consciousness or a Hegelian independence absolutised. Following Feuerbach, Buber and the modern personalists came to realize that there simply cannot be a single person, existing within himself, but that existence as a person comes about only in the relationship between I and Thou.²³

²² HERVÉ CARRIER, *Gospel Message and Human Cultures: From Leo XIII to John Paul II*, Pittsburgh, Duquesne University Press, 1986, pp. 3-9.

²³ The concept of the person did not just happen to form a bridge between the church and the modern world. It could be that bridge because it was a philosophical concept bequeathed by Christianity to mankind. Before "person" was a philosophical concept it was a theological one. It went moreover, to the very heart of theology, to christology and to the doctrine of the Trinity. From its beginning as a word for the mask or the wearer of the mask at festivals in honor of Phersephone, the word acquired a more abstract and literary meaning of "role". But it was with the early Christian theologians that it came to imply at once dignity, uniqueness, and intimacy. As early as Tertulian we see it in his formulation of christological doctrine: "*Vidimus duplicem statum non confusum sed coniunctum in una persona Deum et hominem Jesum*", we see two natures, human and divine, joined but confused in one person, Jesus Christ. With the adoption of the concept in Trinitarian theology, the development of the theological concept reached maturity. There it was used to express the divine community of friendship which is more united than any unity we can conceive of and that divine mutual unity whose life is richer than any community we can imagine. Given this rich heritage, the concept of man as person was clearly a protean one as well as one apt for dialogue with modern man. HANS URS VON BALTHASAR, "On the Concept of Person," in

Culture is the activity by which man, acting upon or transforming the world around him, develops and transforms himself.²⁴ Man by nature is a social animal and culture is the complex of capabilities and habits that humans acquire as members of a society. True and full humanity in fact is achieved only in culture. As Vatican II explained: "The word 'culture' in the general sense refers to all those things which go to the refining and developing of man's diverse mental and physical endowments."²⁵ This conciliar vision clearly highlighted the value of culture and, by rejoicing in unity in diversity, the Council praised the "patrimony proper to each human community".²⁶ It follows, therefore, that man by nature is a cultural animal: "*Ubi homo, ibi cultura.*" But the processes of industrialization and urbanization and the technological developments in mass communications have served to create new mass cultures. Naturally this led to the Council's concern about changes "overthrowing traditional wisdom and endangering the character proper to each people" and not harmonizing with them. The Council rightly asked how is the dynamism and expansion of the a culture to be fostered without losing living fidelity to the heritage of tradition (*quin fidelitas viva erga traditionum haereditatem pereat*)?²⁷ Culture is the fruit of labor by which man works on nature imitating the Creator and attempting by his labor to improve nature for the benefit of man. Likewise, man labors in philosophy, history, the sciences with a view to understanding better, the good, the beautiful and the true and discerning more clearly the Eternal Wisdom which is before all else.²⁸

Communio: International Catholic Review, 13 (1986), pp. 19, 21, 24; KENNETH L. SCHMITZ, "The Geography of the Human Person," in *ibid.*, pp. 27, 30, 33. As one author has put it, the concept of person holds promise because it expresses distinctiveness without separation. It nourishes uniqueness, not by way of privacy with its exclusiveness and alienation, but by way of distinctness with its variety and abundance. It is upon the uniqueness of each person, then, and the diversity of all that human dignity and the rights and responsibilities of human persons rest: the dignity of all rests upon the original dignity of each. SCHMITZ, pp. 47-48. Secure in its personalist vision of man, which we have seen was rooted in Trinitarian and christological theology, the council developed its theology of the body, which we shall find holds a place analogous to its theology of culture. Man the Council saw is a body-soul composite. Squarely in the Catholic tradition, the Council was anti-dualist. Man is an inseparable corporeal-spiritual unity. It is this unity, moreover, which gives value to culture.

²⁴ ROBERT H. WINTHROP, *Dictionary of Concepts in Cultural Anthropology*, New York, Greenwood Press, 1991, p. 52.

²⁵ GS, art 53, p. 1075; FLANNERY, p. 958.

²⁶ GS, art. 53, p. 1075. English translation in FLANNERY, p. 958.

²⁷ GS, arts. 54, 56, p. 1076; FLANNERY, pp. 959-960.

²⁸ GS, art. 57, p. 1078; FLANNERY, pp. 961-962.

There are, moreover, multiple links between the Gospel and culture. God revealed himself at various times and places and finally in His Incarnate Son in ways suitable for the time and place. Likewise, the Church has preached the Good News to every people and time since then, using the resources of various cultures whilst being bound to no particular people or culture. The Good News of Christ, moreover, renews the life and culture of Fallen Man and never ceases to purify and elevate popular mores. Thus, in carrying out her mission, the Church stimulates and advances culture.²⁹

Since culture flows immediately from man's rational and social nature, the Council noted that culture is entitled to its own just autonomy and a certain respect and inviolability. The Council went on to acknowledge two orders of knowledge, faith and reason, distinct from one another and entitled to legitimate autonomy. Thus, culture is entitled to legitimate autonomy, and, provided that man respects the moral order and the common good, he may freely seek after truth, express and make known his opinions, and cultivate whatever art he pleases. For their part public authorities are to be more concerned with promoting the environment necessary for fostering cultural life rather than with determining its character. They are not to distort culture for political or economic ends.³⁰

The next article of *Gaudium et spes* begins with the heading—*ius ad culturae beneficia omnibus agnoscatur et in rem deducatur*, "recognition of everyone's right to culture and its implementation."³¹ The Council then states that Christians have the duty to work tirelessly in economic and political spheres on both the national and international levels to secure the recognition and implementation of the *ius omnium ad humanum civilemque cultum*, "the right of every man to human and civil culture in harmony with the dignity of the human person, without distinction of race, sex, nation, religion, or social circumstances."³² Later in the same article the

²⁹ GS, art. 58, p. 1079; FLANNERY, pp. 962-963.

³⁰ GS, art. 59, p. 1080; FLANNERY, pp. 963-964.

³¹ GS, art. 60, p. 1080; FLANNERY, p. 964.

³² GS, art. 60, p. 1081; FLANNERY, p. 964. It should be noted that an attempt was made to amend article 60 to substitute *postulatio* for *ius*. This was rejected "because a real right is involved. ROBERTO TUCCI, "The Proper Development of Culture," in HERBERT VORGRIMLER, *Commentary on the Documents of Vatican II*, 5 vols., New York, Herder and Herder, V, p. 272.

Council declared, "We must do everything possible to make all persons aware of their right to culture."³³

This view of man and culture also found a place in earlier conciliar documents. Article 4 of the constitution on the liturgy, *Sacrosanctum concilium*, declared that all recognized rites are of equal dignity. Moreover, the document declares that the Church "wishes to preserve them in the future and to foster them in every way."³⁴ This was recognition of the value of culture in liturgy and spirituality; the Council was showing to these spiritual forms of culture the same concern she would evince for natural culture and the external dangers to it. Moreover, that it was "recognized" rites which were declared to be of equal dignity was very important, for the draft text would instead have said "existing" rites. The amended and final text thus importantly left the future open for development.³⁵

In article 37 of the constitution on the liturgy the Council declared that the Church does not wish to impose rigid uniformity where faith and the common good are not imperiled. In a more affirmative fashion the Council went on to order to be "studied with sympathy and if possible retained" ancient traditions of a people's way of life. Article 40 opened the door to even more radical adaptations of the liturgy to popular cultural heritage. Article 118 ordered popular religious song to be fostered.³⁶

The new appreciation for culture manifested itself even more acutely in the decree on the Eastern Churches, *Orientalium Ecclesiarum*. In its very first article the decree declares that the "Catholic Church values highly the institutions of the Eastern Churches, their liturgical rites, ecclesiastical traditions and their ordering of Christian life". In the second article the decree explains the

³³ GS, art. 60, p. 1081, "*Enixe insuper adlaborandum est ut omnes conscii fiant tum iuris ad culturam*"; FLANNERY, p. 965.

³⁴ SC, art. 4, p. 98; FLANNERY, p. 2.

³⁵ JOSEF ANDREAS JUNGMAN, "Constitution on the Sacred Liturgy," in VORGRIMLER (ed.), *Commentary*, I, p. 9 points out that the initial draft of what became article 4 of *Sacrosanctum concilium* spoke of *ritus legitime vigentes*, lawfully existing rites, which was amended to read *ritus legitime agnitos*, lawfully recognized rites, thus "embracing the present and the future." One future development was the advent in the 1980's of the Anglican Use for former Episcopalians coming into full communion within the Latin Church in the United States. On this development see DUANE L.C.M. GALLES, "Anglican Use Church Music," *Sacred Music*, 116 (Spring, 1989), pp. 11-15.

³⁶ SC, arts. 37, 40, 118, pp. 110, 111, 129; FLANNERY, pp. 13, 14, 33.

reason for esteeming these different Churches, for “between those churches there is such a wonderful bond of union that this variety in the Universal Church, so far from diminishing its unity, rather serves to emphasize it”. Secure in this view of culture, the Council could declare of the churches, both western and eastern, “these Churches are of equal rank (*eadem pari dignitate*), so that none of them is superior to the others because of its rite” and “they have the same rights and obligations”. But while respecting the uniqueness of each, the Council in no way saw them as leading “private lives” cut off from one another: “Therefore the holy council not merely praises and appreciates as its due this ecclesiastical and spiritual heritage (*patrimonium*), but also insists on viewing it as the heritage of the whole Church of Christ”. The benefit of so goodly a heritage was not without its burdens. Thus, the Council declared that “all members of the Eastern Churches should be firmly convinced that they can and ought always preserve their own legitimate liturgical rites and ways of life, and that changes are to be introduced only to forward their own organic development.”³⁷

The same concern for culture and heritage can be seen in the Council’s decree on the religious life, *Perfectae caritatis*, where it is stated that in reforming religious institutes “the spirit and aims of each founder should be faithfully accepted and retained, as indeed should each institute’s sound traditions, for all of these constitute the patrimony of an institute.”³⁸

1.2.2. Culture and Human Rights and the Church

The endorsement of human rights by the Catholic Church has often been repeated. In 1963 in the encyclical *Pacem in terris*, Pope John XXIII made specific reference to the Universal Declaration of Human Rights and stated,

The Declaration solemnly acknowledges the dignity of the human person and before all nations it asserts the right of every individual freely to seek the truth, to follow the norms of rectitude, to fulfill the demands of justice, to live a life

³⁷ OE, arts. 1-3, 5, 6, pp.76-78; FLANNERY, pp. 441-443.

³⁸ PC, art. 2, p. 703; FLANNERY, pp. 612-613.

worthy of a human being and to enjoy the other rights connected with those mentioned.³⁹

The Christian foundation for human rights has its theological basis in the dignity of the human person. The declaration on religious freedom of the Second Vatican Council grounded this notion in the dignity of the human person.⁴⁰ This dignity has twin roots. Genesis 1:26 presents man as made in the image of God. This original image was then reinforced by the Incarnation. By taking on a human nature Jesus Christ bestowed a unique dignity on mankind. This is the theological foundation “from above.” The foundation “from below” is founded on the natural law and the foundation of human dignity there is based in human freedom and in human reason.⁴¹ The Universal Declaration of Human Rights also founded itself on the dignity of the human person.⁴²

One of the strongest endorsements by the Holy See of human rights and the right to culture came in 1995 in the address of Pope John Paul II to the fiftieth General Assembly of the United Nations. Speaking on the occasion of the Organization’s fiftieth anniversary, he stated that his words were to be regarded as “a sign of the interest and esteem of the Apostolic See and of the Catholic Church” for the United Nations.⁴³ He then referred to the Universal Declaration of Human Rights and called it “one of the highest expressions of the human conscience of our time,”⁴⁴ adding that “there are indeed universal human rights, rooted in the nature of the person, rights which reflect the objective and inviolable demands of a universal moral law.”⁴⁵

³⁹ JOHN XXIII, encyclical *Pacem in terris*, 11 April 1963, in *AAS*, 55 (1963), pp. 295-296; English translation in EDWARD J. GRATSCH, *The Holy See and the United Nations 1945-1995*, New York, Vantage Press, 1997, p. 96.

⁴⁰ DH, art. 1, p. 930; FLANNERY, p. 799.

⁴¹ PONTIFICAL COMMISSION JUSTITIA ET PAX, *The Church and Human Rights*, Vatican City, Pontifical Commission Justitia et Pax, 1975, pp. 32-37; WALTER KASPER, “The Theological Foundations of Human Rights,” in *The Jurist*, 50 (1990), pp. 154, 158.

⁴² MARY ANN GLENDON, “Foundations of Human Rights: The Unfinished Business,” in *American Journal of Jurisprudence*, 44 (1999), p. 12.

⁴³ JOHN PAUL II, address, “Freedom Cannot be Suppressed,” 5 October 1995, in *The Pope Speaks*, 41 (1996), p. 32.

⁴⁴ *Ibid.*, p. 33.

⁴⁵ *Ibid.*, p. 33.

He then went on to reflect on the “rights of nations, which are nothing but ‘human rights’ fostered at the specific level of community life.”⁴⁶ One such right is the right of a nation to exist and he quickly added a resounding endorsement of a nation’s right to preserve and develop its culture. He said,

Its right to exist naturally implies that every nation also enjoys the right to its own language and culture, through which a people expresses and promotes that which I would call its fundamental spiritual sovereignty. History shows that in extreme circumstances (such as those which occurred in the land where I was born) it is precisely its culture that enables a nation to survive the loss of political and economic independence. Every nation therefore has also the right to shape its life according to its own traditions, excluding, of course, every abuse of basic human rights and in particular the oppression of minorities.⁴⁷

Some of John Paul II’s finest words on culture came in his 1995 apostolic letter, *Orientale lumen*, which commemorated and expanded upon another document published a century earlier, *Orientalium dignitas*,⁴⁸ by Leo XIII to safeguard the significance of Eastern traditions. John Paul II noted that “one of the first great values embodied particularly in the Christian East is the attention to people and their culture.” He added,

At a time when it is increasingly recognized that the right of every people to express themselves according to their own heritage of culture and thought is

⁴⁶ Ibid., p. 36.

⁴⁷ Ibid., p. 36. Likewise, the Pontifical Council for Culture in its document “Toward a Pastoral Approach to Culture,” in *Origins*, 29 (1999), p. 67, stated, “Culture is so natural to man that human nature can only be revealed through culture.” Nevertheless, “if the fact that they share a common nature makes all people of one great family, the historical character of the human condition means that they have a more intense sense of attachment to particular groups, from their family to their people or nation. The human condition is thus located between universality and particularity in a lively tension that can be remarkably fruitful if it is lived in a balanced and harmonious way. This is the anthropological foundation for national rights, which are nothing less than human rights considered at this specific level of the life of the community....Its right to exist naturally implies that every nation also enjoys the right to its own language and culture, through which a people expresses and defends its cultural sovereignty.” Ibid., pp. 72-73.

⁴⁸ Leo XIII, apostolic letter *Orientalium dignitas*, 30 November 1894, in *Acta Sanctae Sedis*, 27 (1894), pp. 257-264.

fundamental, the experience of the individual Churches of the East is affirmed to use as an authoritative example of successful inculturation.⁴⁹

Later he adds,

Tradition is the heritage of Christ's Church. This is a living memory of the risen One met and witnessed to by the apostles who passed on His living memory to their successors in an uninterrupted line,...This is articulated in the historical and cultural patrimony of each Church,...We must show people the beauty of memory,...We must make them taste the wonderful things the Spirit has wrought in history.⁵⁰

In his message to UNESCO in 1971 on the twenty-fifth anniversary of its founding, Pope Paul VI made a declaration which forms both a paean to culture and a summary of the Church's reflection on culture. He said:

Education forms man; science provides him with tools for action; culture expands his horizons by familiarizing him with the past, rooting him in the present and opening him to the future....while culture cannot be reduced to the simple possession of some patrimony inherited from the past, the great experiences of mankind over millennia, together with all the testimony of art, thought, literatures, religion, science and technology are necessarily essential components of it. To deprive oneself of them would be to cut oneself off from one's roots; to renounce them would be to suffer grave mutilation.⁵¹

⁴⁹ JOHN PAUL II, apostolic letter *Orientale lumen*, 2 May 1985, *AAS*, 87 (1995), p. 752; "The Light of the East," in *The Pope Speaks*, 40 (1995), p. 361.

⁵⁰ Ibid., p. 362. Speaking of the Latin and Oriental Churches, he adds at p. 375, "I believe that one important way to grow in mutual understanding and unity consists precisely in improving our knowledge of one another." Accordingly, in our commentary in Chapter 3 on the canons regarding cultural property we shall have regard to the analogous canons of the Eastern Code.

⁵¹ PAUL VI, address, *Ad clarissimum virum Renatum Maheu, moderatorem generalem instituti v.d. UNESCO, quinto et vigesimo exacto anno ab eo constituto*, 1 November 1971, in *AAS*, 63 (1971), pp. 837-840; "UNESCO's Mission: Expanding Horizons Through Education: Message of Pope Paul VI to Rene Maheu, Director General of UNESCO, in *The Pope Speaks*, 16 (1971-72), p. 345.

1.3.1. The Commodification of Culture

The transformation of objects into heritage is a result of their coming to be valued, not merely for their material value, but rather for their artistic and historical value. To speak of art in a juridical sense we must in fact be able to speak of art as a commodity itself. Art must have ceased to be valuable merely for its material character and instead have become valuable for its artistic character. While today every ancient tomb and ancient monument is in danger of being plundered, merely because of the value on the world art market of all ancient works of art, this was not always so. In the past abandoned monuments were in danger solely for practical reasons—such as the raw material value of their marble—if they had any. And tombs were not in danger, even if left unguarded, unless they were thought to contain material treasures. Only where there was art collecting and art history were the tombs and monuments also in danger for the value of their works of art, as they are everywhere today. In most areas of the world and in most eras of history, however, there was no art collecting and so practical considerations were the sole test of what was to be plundered. Whatever was made of valuable material—any treasure above all—was always wanted.⁵²

There was in antiquity no special place for cultural property in ancient law. For the Greeks and Romans art, like other manufactures, was functional. Greek esthetic theory was, in fact, based on the twin ideas of suitability for purpose and technique. Thus Socrates might argue that a serviceable manure basket could be a beautiful thing and a badly fashioned gold shield an ugly thing. *Techne* or “art” was the capacity to make or do something with a correct understanding of the principles involved. “Art” was inferior to “science” or theoretical knowledge such as mathematics or philosophy. Thus, artists were conceived of as artisans or craftsmen and it was considered beneath the dignity of freeborn citizens to undertake such manual labor, rather as in Victorian times “trade” was beneath the dignity of a gentleman.⁵³ Plutarch had even declared, “much as we admire the work of art, we cannot help but scorn its creator.”⁵⁴

⁵² JOSEPH ALSOP, *The Rare Art Traditions: The History of Art Collecting and Its Linked Phenomena Wherever These Have Appeared*, New York, Harper & Row, 1982, pp. 11, 26, 50.

⁵³ HAROLD OSBORNE, *Aesthetics and Art Theory: An Historical Introduction*, London, Longmans, 1968, pp. 17, 18, 20.

⁵⁴ UDO KULTERMANN, *The History of Art History*, New York, Abaris Books, 1993, p 2.

Consequently, art held no special place in law. It was in antiquity the practice to raze to the ground the city of one's enemy. At the same time the *ius praedae* gave the victor legitimate title—just like sale or gift—to what he carried away in war. Nor was the law much different in the Middle Ages. Art remained functional and to be worthy had also to be didactic. Saint Paulinus of Nola saw in images chiefly a way of instructing the unlettered and engendering uprightness. In the same way Pope Gregory the Great had argued that images were word-pictures which enable the illiterate to read.⁵⁵ The notion regnant in the Middle Ages in the international law of war was that of the just war and so the greater interest was as to the *ius ad bellum* rather than the *ius in bello*. While this new concept injected a certain moral element into the law of war, there was little development of the law governing the conduct of war once commenced. Instead, the Middle Ages tended to follow Roman law in viewing art, like other things, as the product of an artisan rather than an artist, as the product of one who was of a servile rather than of a liberal profession. Hence, art enjoyed no special place or exemption in medieval law.⁵⁶

But with the Renaissance art came to be seen as the product of a liberal profession. It was no longer a work of an artisan but rather of an artist. It was an act of creation, a thing of the mind and intellect. One of the main purposes of Leonardo's book *Paragone*, which made elaborate comparisons between painters and poets, was to prove that painting and sculpture, like poetry, were "theoretical arts," affairs of the intellect rather than manual arts. Artists could now be accorded higher social status and with the birth of art history they came to be celebrated. Giorgio Vasari (1511-1574), who wrote *Le vite de più eccellenti architetti, pittori e scultori italiani* in 1550, became the father of art history and created the early heroes of the history of art.⁵⁷ Besides art history, there also needed to develop its Siamese twin, art collecting. In the Renaissance this also began with the appearance of Vasari's *Lives of the Most Excellent Artists*. The third condition was the development of an art market.⁵⁸

⁵⁵ OSBORNE, *Aesthetics and Art Theory*, pp. 88, 90 citing Saint Thomas's *Summa*, q. 5, art. 4 and q. 39, art. 8; BRAM KEMPERS, *Painting, Power and Patronage: The Rise of the Professional Artist in Renaissance Italy*, London, Penguin Press, 1992, p. 21.

⁵⁶ STANISLAW E. NAHLIK, "La protection internationale des biens culturels en cas de conflit armé," in *Recueil des Cours de l'Académie de Droit International de La Haye*, 120 (1967), pp. 66-68. See also JEANNE BELHUMEUR, ANGELO MIATELLO et ROBERTO SEVERINO, "Les atteintes aux biens culturels italiens pendant les conflits armés," in MARTINE BRIAT AND JUDITH A. FRIEDBERG (eds.), *Legal Aspects of International Trade in Art*, The Hague, Kluwer Law Institute, 1996, pp. 185-207.

⁵⁷ OSBORNE, *Aesthetics and Art Theory*, pp. 21, 92.

⁵⁸ ALSOP, *The Rare Art Traditions*, p. 112.

The current mania for art collecting in fact began in the western world at the time of the Renaissance with the rise of Humanism. The Humanists began collecting for both historical and artistic reasons. They wanted to collect in order to learn about the ancient past and to emulate and surpass its artistic output. It was especially in Italy among great personages like Lorenzo de' Medici or the Gonzagas of Mantua or the d'Estes of Ferrara that collecting became established.

Rome was regarded during the early modern period as the *teatro del mondo* (theatre of the world) and as the *patria commune* (common homeland) of Europe.⁵⁹ Not surprisingly, therefore, the popes had long undertaken measures for the conservation of cultural property. With Sixtus IV (1471-84) came the bull *Quum provida* of 1474, which forbade the destruction or mutilation of church buildings, imposing on offenders the penalty of excommunication. In 1480 by the bull *Etsi de cunctarum civitatum* Sixtus expanded the powers in the area of conservation of cultural property of the *camerlengo* or cardinal chamberlain, who headed the Apostolic Chamber and under whose direction the *conservatores camerae* worked.⁶⁰ In the seventeenth and eighteenth centuries papal cultural preservation law began new departures as legislation began to look to the control of the export of cultural property.

That there was a market for such works the papal edicts provide mute evidence. Interestingly, scholars have also brought to light a letter of Isabella d'Este addressed to her Roman agent explaining how the papal edict could easily be circumvented. She noted that one had only to borrow a friendly cardinal's mules, presumably because the cardinal's mules would pass the papal customs house without challenge.⁶¹

But, alas, amelioration of the position of cultural property in law did not occur at once. The very love of antiquity tended to make the Renaissance focus on the classical world with its minimalist view of the rights of art and artists and on the *ius praedae* or right of spoils. Only gradually in the

⁵⁹ GIANVITTORIO SIGNOROTTO and MARIA ANTONETTA VISCEGLIA, *Court and Politics in Papal Rome, 1492-1700*, Cambridge, Cambridge University Press, 2002, p. 1.

⁶⁰ PETER LEISCHING, "Roma restauranda; Versuch einer Geschichte des päpstlichen Denkmalschutzrechtes," in *Miscellanea historiae pontificiae*, 45 (1979), pp. 427-430. See also ORESTE FERRARI, "Preservation of Art Works," in *Encyclopedia of World Art*, 34 vols., New York, McGraw-Hill, 1966, 11, cols. 693-94 and CRISTINA CARLO-STELLA, "The Cultural Heritage of the Church beyond Frontiers," in *Seminarium*, 39 (1999), pp. 415-418.

⁶¹ ALSOP, *The Rare Art Traditions*, p. 112.

seventeenth century with the rise of the natural law school were jurists freed from excessive attachment to antiquity and its juridical prescriptions. Today the Coliseum in Rome is considered an architectural treasure. But only five centuries ago it was given to Pietro Cardinal Barbo, later the same Pope Paul II, who would issue the bull *Ambitiosae*, as a government today might grant a mining or quarry concession, in order to provide marble and other building stone for the Cardinal's new palace, now the Palazzo Venezia.⁶²

The best evidence of the development of an art market, however, comes with the development of art museums. Today these are institutions primarily for the preservation, display and study of works of cultural interest. The name "museum" goes back to ancient Greece where a *mouseion* was a temple dedicated to the muses of art and science. Later the name was used by Ptolemy I Soter (c. 367-289 B.C.) for his famous repository at Alexandria for preserving texts and objects. During the Renaissance it came to be applied to the *cabinets de curiosité* maintained by royalty, aristocrats and churchmen. There had long been princely collections and a famous early collection was that of Bishop Paolo Giovio (1483-1552) in his house at Como. This was a collection of busts and statues of famous men from antiquity and he wrote a series of biographies of them.⁶³ The catalogue of his *museo* was published posthumously in 1577 and it was this collection which in fact inspired Vasari to write his *Lives*, indicating the connection between art history and art collecting. Vasari himself accumulated paintings and sculptures and developed a collection of drawings, in the process endowing drawings for the first time with autonomous artistic value. Hitherto drawings had remained in the artist's workshop as mere tools for work and study. Now they were valued as "art" itself.

⁶² ALSOP, *The Rare Art Traditions*, p. 487. The Palazzo Venezia, said to have been designed by Leon Battista Alberti, was built in 1455 by the Venetian Cardinal Pietro Barbo, who later became Paul II. It occupies the west side of the Piazza Venezia and forms something of a transition structure between the more fortress-like structures of the medieval period and the Renaissance *palazzi*. After the accession of Paul II it became a papal residence and remained so until 1564 when it was given to the Republic of Venice and became the residence of the Venetian ambassador in Rome. The Treaty of Campoformio assigned it, along with Venice, to Austria and thereafter it was the residence of the Austrian ambassador in Rome until 1916 when Italy seized it during its war against Austria. Thereafter it became Mussolino's headquarters until after World War II when it was transformed into a museum. "Piazza Venezia," <<http://www.romainteractive.com/pzeenezi.htm>> (12/05/2001). Adjoining it is the Church of Saint Mark where in 1468 the bull *Ambitiosae* was issued.

⁶³ On Giovio (c. 1486-1552), who was bishop of Nocera dei Pagani, see T. C. PRICE ZIMMERMANN, *Paolo Giovio: The Historian and the Crisis of Sixteenth-Century Italy*, Princeton, Princeton University Press, 1995.

Before the eighteenth century almost all collections were private. The Vatican Museums, for example, were open to the public only one day a year, Good Friday. The exception was the Capitoline Museum formed of ancient bronzes in 1471 by Sixtus IV. The Uffizi would later in 1737 become the first public art museum, however, when the last of the Medicis, Maria Ludovica, Grand Duchess of Tuscany, willed her art collection to the city "as an ornament of the State, for the utility of the public and to attract the curiosity of foreigners." This collection still ornaments the Uffizi, the Pitti, and the Laurentian Library. Her Habsburg successor, Grand Duke Leopold, in 1765 brought order to the collection and began the practice, now common with museums, of organizing the collection's art chronologically and by school and displaying it in this organized fashion according to the principles of Johann Joachim Winkelmann (1717-1768). In 1789 the Medici collections were declared public property and regular visiting hours were established. Leopold influenced his brother, the Emperor Joseph II, to do likewise and in 1781 Joseph opened the Belvedere Palace in Vienna as a public art museum. In it he placed paintings from Habsburg collections drawn from castles all over the empire. They were then arranged there by Christian von Mechel according to the art historical principles laid out by Winkelmann. The collection itself was a history of art. Today it is the Kunsthistorisches Museum. Other public museums followed. The British Museum was founded in 1753, but it was not really open to the general public until the early nineteenth century. With the fall of the French monarchy in 1792, its Louvre Palace was declared public property and the following year was transformed into a public museum. Indeed, its being opened to all was seen as part of the right of all to participate in public life. The seized property of the monarchy, the aristocracy and the Church was augmented by spoils of conquests by Napoleonic armies, and fifteen other museums were established in various French cities with like spoils.⁶⁴

Before the new consciousness was fully developed about art collecting, the disciplines of art history and aesthetics had to come to birth. Vasari had seen Florentine art as the paradigm of revived antique glory. But for art history to have a consistent vision it was necessary for the art of all times and places to be related together. Johann Joachim Winkelmann (1717-1768) not only developed the notion of art as following a biological cycle of birth, maturity and decline. He also saw art as the emblem of the spirit of an entire culture and thereby art became the key to the history of peoples. While he saw Greek art of the classical period as the paradigm and other art

⁶⁴ LUIGI SALERNO, "Museums and Collections," in *Encyclopedia of World Art*, 34 vols., New York, McGraw-Hill, (1965), 10, cols. 379-390; JEFFREY ABT, "Museum I. History," in JANE TURNER (ed.), *The Dictionary of Art*, 34 vols., London, Macmillan, 1996, 22, pp. 355-359.

only in relation to it, nevertheless, in his *The History of the Art of Antiquity* published in 1764, he proposed a coherent evolutionary sequence of art history. In the language of canon 1497, §2, of the 1917 Code of Canon Law, art now had come to have value, not only *ratione materiae*, but also *ratione artis*. It had become a record of human endeavor and so now had value on artistic or historical grounds rather than merely material ones.

A few years before Winkelmann's work appeared Alexander Gottlieb Baumgarten in 1750 had published his *Aesthetica*, a six hundred page Latin treatise that coined the word "aesthetics" and had begun this field of study. In this work Baumgarten argued that there was a special cognitive domain of sensual thinking which was distinct from rational thought. Kant would take up this new way of knowing in his *Critique of Judgment*, arguing that judgments of taste arise from theoretical knowledge and morality which was universal. Hegel would add the notion that history is evolutionary and the instrument of the Spirit in transforming all to truth. This completed the evolutionary thrust of the discipline and enabled art historians to develop a coherent story line. Museology was now but applied art history and so art in museums came to be arranged now by school and period and art history came to be seen as a continuous story.⁶⁵

Beyond the commodification of art, there has also been the commodification of history. Books and documents and records have come to have historical value. The great Austrian art historian, Alois Riegl, at length pointed out in his landmark study *Der moderne Denkmalkultus*, published in Vienna in 1903, that the two processes, the commodification of art and the commodification of history, were in fact not only similar but related. Following in Winkelmann's footsteps and teasing out his ideas to their logical conclusion, Riegl argued that all works of art are at the same time monuments of art and historical monuments. He argued,

By common definition a work of art is any tangible, visible, or audible work of man of artistic value; a historical monument with any of the same properties will possess historical value...[But] we call historical all things that once were and are no longer...Every monument of art is, without exception, a historical monument as well, since it represents a particular stage in the development of the fine arts for which no entirely equivalent replacement can be found. Conversely, every historical monument is also a monument of art, since even such a

⁶⁵ DONALD PREZIOSI (ed.), *The Art of Art History: A Critical Anthology*, Oxford, Oxford University Press, 1998, pp. 16, 22, 26, 64, 110, 517.

subordinate monument of writing as a torn off strip of paper with a short, unimportant note contains, along with its historical value for the development of paper manufacturing, script, writing materials, et cetera, a whole series of artistic elements, the outward appearances of the slip of paper, the shape of the letters, and the manner of its composition.⁶⁶

Once art had become a commodity valuable in and of itself, the law began to develop protections for it. The French Revolution was particularly important here, both in terms of international law and municipal law. The French Revolution produced a monumental spoliation of cultural property and a massive destruction of cultural objects. Having ordered in 1792 the destruction of all monuments of the "feudal age," the French Revolutionaries, however, determined that some care at least was to be taken for public property of cultural importance. The Abbé Grégoire, Constitutional Bishop of Blois, delivered impassioned addresses arguing against the destruction of artistic works. It had been ordered, for example, that all Latin inscriptions be erased from public monuments as "unrevolutionary." Against this vernacularist intolerance, he argued that all art is an expression of human genius and freedom and so it should be respected. He said: "The productions of genius and the means of instruction are common property." He was successful only in part in his efforts and, in fact, he claimed to have coined the word "vandalism" to describe the senseless destruction of fine and beautiful things going on around him. Alas, the destruction did not end with the Revolution. The thousand-year-old abbey church at Cluny, the largest church north of the Alps, which had been privatized in 1798, was pierced by a roadway during the Revolution and later transformed into a stone quarry, but it was only destroyed in 1823. In 1831 an archeologist visiting Normandy came upon a medieval church, the lower half of which was now a stable, the upper half a granary and pigeon coop. When the archeologist upbraided the

⁶⁶ ALOIS RIEGL, "The Modern Cult of Monument: Its Essence and its Development," in NICHOLAS STANLEY PRICE ET AL., *Historical and Philosophical Issues in the Conservation of Cultural Heritage*, Los Angeles, The Getty Conservation Institute, 1996, pp. 69-70. One may cite as practical examples of Riegl's point a group of modest American churches, viz., Saint Luke's Church, Rochester, New York, Saint Paul's Church, Troy, New York, Saint James Church, Arlington, Vermont, and Saint Luke's Church, Lanesboro, Massachusetts, all of which depend for their architectural style on Ithiel Town's design for Trinity Church in New Haven, Connecticut. Individually they have modest artistic significance and the last two probably rank as vernacular architecture. As a group, however, they tell the history of the rise and diffusion of the Gothic Revival style in the United States and for this reason are highly significant. WILLIAM H. PIERSON, *American Buildings and their Architects Volume 2: Technology and the Picturesque: The Corporation and the Early Gothic Styles*, New York, Oxford University Press, 1986, pp. 129-134, 136-148.

farmer for this abuse of cultural property, the latter replied, "I have brought Jesus back to his original stable. He was born in a cowshed, and he can live perfectly well in a stable."⁶⁷

Nor was the destruction and theft of cultural property merely a domestic matter. Sometimes with a view to a cloak of legitimacy (cf. c. 125), the spoliations of an international character were written into the terms of an armistice or treaty of peace. For example, the Treaty of Bologna of 1796 bound the pope to deliver to the French Republic one hundred pictures, busts, vases or statues (including the Laocoön), at the choice of the French commissioners to be sent to Rome, along with five hundred manuscripts which also were to be at the choice of these same commissioners. While Napoleon did not busy himself with such treaty clauses, Baron Vivant-Denon, director of the Musée du Louvre, went wherever the imperial armies trod to select works that were worthy to be incorporated into the museum. In short order the Louvre became the richest museum that had ever been. But after Napoleon had met his Waterloo, the time of reckoning came and led by Lord Castlereagh, the British Foreign Secretary, the powers determined to set aside the spoliations made under cover of treaties and return pillaged property to the territory whence it had come.⁶⁸

In 1813 during the War of 1812 between Britain and the United States a British ship captured an American vessel, *The Marquis de Somerueles*, whilst the American ship was carrying European art objects, including twenty-one paintings and fifty-two prints, to the Pennsylvania Academy of Fine Art in Philadelphia, the earliest art gallery in the United States. The captured ship was taken as prize to the vice admiralty court at Halifax, Nova Scotia. The judge, Dr. (later Sir) Alexander Croke, released that part of the cargo, however, declaring,

⁶⁷ JOSEPH L. SAX, "Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea," in *Michigan Law Review*, 88 (1990), p. 1168. After the Revolution of 1830 the Ministry of Education, inspired by the *Lex Pacca* of the Papal States, established the office of Inspector General of Historical Monuments. Transformed in 1837 into the *Commission des Monuments Historiques*, it was charged with developing an inventory of the principal historical and artistic monuments to be maintained by the state. This function was codified in the law of 1887, which listed monuments belonging to the state and declared them inalienable and imprescriptible. ORESTE FERRARI, "Preservation of Art Works," in *Encyclopedia of World Art*, 11, col. 696. In 1905 the Law of Separation transferred to the French state all places of worship built before 9 December of that year and regulated their use for worship. This law continues as the basis under which today the Service for Historic Monuments is involved with such structures. ANDREW D. WEST, "Legal Status and Administrative Controls of Religious Organizations and Groups in France," in *Catholic Lawyer*, 33 (1990), pp. 285-304.

⁶⁸ DOROTHY MACKAY QUINN, "The Art Confiscations of the Napoleonic Wars," in *American Historical Review*, 50 (April, 1945), p. 437.

Heaven forbid, that an application to the generosity of Great Britain should ever be ineffectual. The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of the rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.⁶⁹

The rule of customary international law was summarized in 1846 by Wheaton,

By the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war.⁷⁰

In the course of the nineteenth century the interest in art grew and the art canon expanded notably. Besides the art of the classical world, the canon now came to include the art of the Renaissance and also medieval art. Non-European art would also enter the canon and at the same time there was a notable rise in the number and variety of museums. At the same time international law developed to protect this expanded cultural patrimony.

⁶⁹ "The Marquis de Somerueles, Vice-Admiralty Court of Halifax Nova Scotia Stewart's Vice-Admiralty Reports 482 (1813)" reprinted in *International Journal of Cultural Property*, 5 (1996), p. 319. JOHN HENRY MERRYMAN, "Note on *The Marquis de Somerueles*," in *International Journal of Cultural Property*, 5 (1996), p. 328 says that Sir Alexander was a DCL of Oxford University and a member of the College of Advocates, the Inn of Court of the Roman lawyers of England who practiced before the probate, admiralty and ecclesiastical courts and so would have been conversant with international law. ANDREA GATTINI, "Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War," in *European Journal of International Law*, 7 (1996), p. 70 says, "Scholarship is divided about the period in which the customary rules banning war booty were formed." She adds, "The best interpretation is that which traces the awareness of the unlawfulness of taking works of art as war booty back to the end of the Napoleonic Wars. Well known is Canova's contribution as Pope Pius VII's emissary for the recovery of the Vatican's works of art in Paris in 1815, and his sentence: 'Everything which regards the culture of art and science is above all rights of war and victory.'"

⁷⁰ HENRY WHEATON, *Elements of International Law*, 3d ed. (1846) quoted in ALAN MARCHISOTTO, "The Protection of Art in Transnational Law," in *Vanderbilt International Law Review*, 7 (1974), p. 694.

As legal positivism began to displace the natural law theories, which had only recently rescued cultural property from the clutches of the *ius praedae*, there arose a demand for the codification of the customary international law of war. The process matured at two Hague conferences held in 1899 and 1907 which resulted in two conventions codifying the international law of war and affecting the international law of cultural property. These conventions adopted the Enlightenment view that land warfare was the business of opposing armed forces and so forbade the bombardment of undefended places. They also abolished the rules followed since ancient times which permitted a place to be handed over to pillage. Since war was seen as the affair between combatants, private property was to be respected and not confiscated. As for public property, the occupying force was to consider itself the administrator and usufructuary only of the immovable public property of its enemy. As for the movable public property over which it hitherto had unlimited discretion, the convention provided that the occupier might seize only what was requisite for the needs of war. While the expression cultural property had not yet come to birth, structures dedicated to worship, the arts and science and works of art and science were singled out for special protection. Such property might be marked by special emblems to indicate its presence and to signify that it was to be treated as private property and so to be exempt from confiscation. These conventions provided significant protection for cultural property. Nevertheless, they had drawbacks. Their provisions only applied among the contracting powers and only if all belligerents were parties to the conventions. The latter provision is sometimes known as the *Si omnes* clause. Moreover, these conventions only applied to "wars" properly so declared and not to international police actions or domestic civil strife. Finally, the special protections given to cultural property only applied so long as combatants did not use it for military ends.⁷¹

The Hague Conventions represented the codification of the international law of cultural property and in large part evidenced the state of the law when World War II began. The Napoleonic Wars had seen massive looting of cultural property and had led to the crystallization of customary international norms forbidding the plunder of cultural property during war. Likewise, the massive plunder during World War II would have the ironic effect of advancing the development of the international law of cultural property. World War II broke out on 1 September 1939 with the invasion of Poland and it proved a massive destroyer of cultural property. There were

⁷¹ NAHLIK, pp. 87, 89-97. The texts of the Hague Conventions of 1899 and 1907, and 1954, including the 1999 Second Protocol to the 1954 Convention cited *infra* can be found in ADAM ROBERTS and RICHARD GUELFF (eds.), *Documents on the Laws of War*, Oxford, Oxford University Press, 2000.

reprisals and counter-reprisals and even *Baedecker* was looked to as a source of military targets. The cultural carnage proceeded with the total bombardment of numerous cities including Warsaw, Belgrade, Coventry, London, Cologne, Nuremberg, and Dresden. Moreover, in the East the destruction of entire cities was both mooted and set in train. Warsaw was razed block after block after the uprising of 1944 and a similar fate was planned for Saint Petersburg. In Poland the plunder was systematic and all collections of first rate importance were placed under protection and sent to Germany. The altarpiece of Our Lady of Krakow was sent to Nuremberg. Leonardo's Portrait of Cecilia Gallerani and Rembrandt's *Paysage au bon Samaritain* were found by the American troops in the private villa of the Governor General of Poland, Hans Frank. In their declaration of 5 January 1943 the allied forces declared that they refused to recognize as of any juridical value the pillage, open or covert, committed on the occupied territories and encompassing all sorts of property, especially works of art. After the war the matter of restitution proceeded.⁷²

One of the clearest lessons of World War II was that there was further need for codifying the international law of war. This would be done at Geneva in 1949 with regard to humanitarian law and at The Hague in 1954 with regard to cultural property. World War II also showed the need for collective measures to maintain peace, and the upshot was the creation in 1945 of the United Nations. At the same time the United Nations created a bevy of specialized agencies to carry out aspects of its programme for peace. That with a brief for cultural matters is the United Nations Education, Cultural and Scientific Organization, UNESCO. Among its essential functions set forth in article I, paragraph 2(c) of the UNESCO Statutes is to "assure the conservation and protection of the world's inheritance of works of art and monuments of history and science."⁷³

⁷² NAHLIK, pp. 105-110; GAIL M. GRAHAM, "Protection and Reversion of Cultural Property: Issues of Definition and Justification," in *International Lawyer*, 21 (1987), p. 765. See also NORMAN PALMER, *Museums and the Holocaust*, Leicester, Institute of Art Law, 2000. The plundering of art was not only on the German side. For a detailed study of the Russian plundering see KONSTANTIN AKINSKA AND GRIGORII KOZLOV, *Beautiful Loot The Soviet Plunder of Europe's Art Treasures*, New York, Random House, 1995. While it is thought that the prohibition on the plunder of cultural property had come to form part of customary international law, Germany in 1994 identified and sought the return of 200,000 works of art, 2,000,000 books and 3 kilometers of archives taken by the Russians from Germany after World War II. WILFRIED FIEDLER, "Safeguarding of Cultural Property During Occupation—Modification of the Hague Conventions by World War II?" in MARTINE BRIAT AND JUDITH A. FRIEDBERG (eds.), *Legal Aspects of International Trade in Art*, The Hague, Kluwer Law International, 1996, p. 183.

⁷³ UNESCO, Statutes, article 1, *United Nations Treaty Series*, 4, p. 275. Today UNESCO is an inter-governmental organization composed of some 180 states, including the Holy See, whose representatives make up its General Conference. This body meets every two years and selects the Executive Board which today is composed of 58 members and meets twice a year to manage the affairs of the Organization. Its executive branch or secretariat has its headquarters in Paris and is presided over by the Director General

UNESCO is charged with "preserving the independence, integrity and fruitful diversity of the cultures" of its member states, and it has promoted a number of important international agreements regarding cultural property as well as over a dozen recommendations and declarations. It has endeavored to impress upon its members the international character of culture and has exhorted governments to assume a species of trusteeship over their segments of the global fund of cultural property.⁷⁴ While the Holy See is not a party to all of the conventions, nevertheless, this group of agreements forms an important step in world cultural law development.

The most important of UNESCO's series of treaties is the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict done at The Hague 14 May 1954.⁷⁵ This was the first piece of international legislation to make use of the term "cultural property" (*biens culturels* in the French text). The earlier Hague conventions of 1899 and 1907 had spoken of artistic, scientific and educational endeavors. Not only did the 1954 convention update international legislation of the Hague conventions of 1899 and 1907 in terms of the more advanced technology of warfare, it also showed the advance of human rights measures. The convention declared in its preliminary clauses that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world." Article 1 of the convention defined cultural property to include

Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious

who is elected for a term of six years by the General Conference. By a 1946 agreement approved by UNESCO's General Conference and the United Nations General Assembly, UNESCO was recognized as a UN specialized agency "responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein". This document along with its charter and that of the United Nations provides the constitutional framework for its contribution to the elaboration and implementation of international law in the field of its competence. STEPHEN P. MARKS, "Education, Science, Culture and Information," in OSCAR SCHACHTER AND CHRISTOPHER C. JOYNER, *United Nations Legal Order*, 2 vols., Cambridge, Cambridge University Press, 1995, II, pp. 579-581; Carlo-Stella, pp. 418, 426-429.

⁷⁴ GAIL M. GRAHAM, "Protection and Reversion of Cultural Property: Issues of Definition and Justification," in *International Lawyer*, 21 (1987), pp. 766, 768.

⁷⁵ UNESCO, "Convention for the Protection of Cultural Property in the Event of Armed Conflict," 14 May 1954, in TOMAN, pp. 415-441.

or secular, archeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art, manuscripts, books and other objects of artistic, historical or archeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.⁷⁶

In the event of armed conflict, parties to the convention agree to respect cultural property situated in their territory or in the territory of another party by refraining from any use which might expose it to destruction or damage. Parties also agree to prevent and put a stop to pillage and any acts of vandalism against cultural property and to refrain from acts of reprisal against cultural property. The protections of the convention apply not only to cultural property but also to structures erected for their protection, such as museums, libraries and archives. The convention applies not only to wars, but also to any armed international conflict and to domestic civil conflict.

Besides this general protection accorded to cultural property, the convention also created a second or special type of protection. "Special" protection is available to a limited number of refuges which have to be located an adequate distance away from military objectives. These exist to protect movable cultural property of very great importance. This special protection, immunity, is granted by entry into the International Register of Cultural Property under Special Protection. Vatican City is one of only a few sites listed on this International Register and so is entitled to such special protection. Such specially protected cultural property is to be marked with the Blue Shield and is to enjoy immunity during armed conflict. The Holy See acceded to the convention on 24 February 1958.⁷⁷

⁷⁶ Ibid., p. 415.

⁷⁷ Ibid., pp. 415-441. The following have acceded to the 1954 Convention: Australia (1984), Canada, (1998), France (1957), Germany (1967), Holy See (1958). As of 9 April 2002 there were 103 state parties at <<http://www.unesco.org/culture/laws/hague/html.eng/page9.shtml>> (6/2/2003). Historically, not all restitutions have gone easily and, hence, the need for these detailed rules. During World War II, the bulk of the collection in the royal castle of Wawel in Cracow had been sent for safety to France and from there had been taken to Canada. When this property arrived in Canada in 1940, it was recognized to be property of the Polish state. However, when the accredited Polish envoy endeavored to collect this property in 1946, he was rebuffed, in part because of the interposition of the premier of Quebec. It was not until 1959-61 that Poland was permitted to reclaim these cultural treasures. On this affair see, STANISLAW NAHLIK, "Le cas des collections polonaises au Canada," in *Annuaire polonais des affaires internationales* (1959/60), p. 172 and SHARON A. WILLIAMS, "The Polish Art Treasures in Canada, 1940-60," in *Canadian Yearbook of International Law*, 15 (1977), p. 146.

To the Hague Convention is linked an optional Protocol, acceded to by the Holy See on the same date as the Convention. The Protocol governs the return of cultural property removed from the territory of an occupied party during an armed conflict. A party undertakes to prevent the export of cultural property during armed conflict from territories occupied by it. A party also undertakes to take into its custody cultural property imported into its territory either directly or indirectly from an occupied territory. Parties then undertake at the close of hostilities to return to the competent authorities of the territory previously occupied cultural property removed from that territory during armed conflict and in its custody. Such property may never be retained as war reparations. Where one party deposits cultural property coming into its territory with another party the latter is required to return the property at the end of hostilities to the competent authorities of the territory from which it came.⁷⁸

The Balkan conflicts in the 1990's made clear that the 1954 Hague Convention had a number of defects. The upshot was that in 1999 a second Protocol to the Hague Convention of 1954 was devised. This second Protocol, signed by the Holy See on 17 May 1999, attempted to define more precisely the parties' duties of safeguarding and respecting cultural property. It also introduced a new level of protection for cultural property called "enhanced" protection. Such protection is to be available to cultural property of the greatest importance for humanity which is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection. Such property may not be used for military purposes or to shield military sites. A party may propose cultural property for inclusion on the list of cultural property accorded enhanced protection. The list is maintained by a committee which the parties to the Protocol have established to oversee the list. Once on the list a cultural property retains the right to enhanced protection unless it loses that status or unless it becomes a military objective. Intentional damage to cultural property enjoying enhanced protection is a punishable offense.⁷⁹

⁷⁸ UNESCO, "Protocol for the Protection of Cultural Property in the Event of Armed Conflict, Done at The Hague, 1954," 14 May 1954, in TOMAN, pp. 443-446.

⁷⁹ UNESCO, "Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague," 26 March 1999, in *International Legal Materials*, 38 (1999) pp. 769-782. The Protocol, which was not in force as of 26 January 2003, is notable in that it makes provision for involving non-governmental organizations (NGOs) in the protection of cultural property. Such NGOs (see section 1.3.2 *infra*) may include the International Committee of the Blue Shield (ICBS), the International Center for the Study of the Preservation and Restoration of Cultural Property in Rome (ICCROM) and the International Committee of the Red Cross (ICRC).

The term “elginism” indicates the uprooting of ancient monuments piece by piece in their entirety and then exporting them under a guise of legality. The transfer is sometimes effected by an official transaction with the country of origin. The term derives from the exploits of Lord Elgin, British ambassador to Constantinople, who armed with certain documents from the Grand Vizier or vicar general of the Ottoman Sultan removed portions of the Parthenon and shipped them to Britain where since 1816 they have been incorporated in the collections of the British Museum. Similarly, in 1820 the French ambassador in Constantinople undertook certain measures to secure for the Louvre Museum the Venus de Milo.⁸⁰ Today such appropriation of the cultural heritage of another state is not regarded with equanimity. Elginism, in fact, is at the root of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by UNESCO’s General Conference in Paris in 1970.⁸¹ Hitherto the international law of cultural property had only concerned actions in wartime. Now the law moved to cover actions in peacetime as well.

The Convention calls on each state party to take measures to protect its own cultural heritage by prohibiting clandestine excavations and illicit exports. At bottom is the value of context to any art object. By removing an object from its context without proper care and study, it is ripped from its historical context and the world is deprived of its story. Article 1 of the convention defines cultural property to include rare collections of specimens of fauna, minerals and anatomy and objects of paleontological interest, property related to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance, products of archaeological excavations, elements of artistic or historical monuments or archaeological sites which have been dismembered, antiquities more than one hundred years old such as inscriptions, coins and engraved seals, objects of ethnological interest, property of artistic interest such as pictures, paintings, drawings, original works of statuary art and sculpture, original engravings, prints and lithographs, rare manuscripts, incunabula, old books, documents, postage, revenue and similar stamps, singly or in collections, archives, including sound, photographic and cinematographic archives, articles of furniture more than one hundred years old and old musical instruments.

⁸⁰ WILLIAMS, pp. 9-13.

⁸¹ “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,” 14 November 1970, in TOMAN, pp. 453-464.

Cultural property found within the national territory forms part of the cultural heritage of a state whether or not it was created by nationals of that state. To protect this cultural heritage a state party agrees to set up national services to identify and inventory it to protect this heritage and to introduce a system of export certificates. The national services are to devise a scheme of legal and administrative controls for the protections of cultural property, to promote museums, libraries, archives, laboratories and workshops to preserve and protect cultural property. The export of cultural property from the national territory without an export certificate is to be prohibited. Some states declare that cultural property is inalienable and imprescriptible and article 13 recognizes the right of states in international law to do so. States undertake to prevent museums from acquiring cultural property illegally exported after the coming into effect of the convention between the states concerned and to prohibit the import of illicitly exported cultural property after the coming into force of the convention and assist the state of origin in securing its return. In exchange for the return the state of origin agrees to compensate any innocent purchaser or person who has valid title to the property. The convention permits bilateral treaties to be entered into in furtherance of the convention and the United States and Mexico have done this. Article 9 permits a state party whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials to call upon other state parties for assistance. Other parties agree to participate in a concerted international effort to determine and carry out concrete measures. UNESCO is given oversight duties with respect to the convention and may act on its own initiative and even make specific proposals to states for the implementation of the convention.⁸²

In 1972 UNESCO put forth another convention to protect cultural property outside wartime, the Convention Concerning the Protection of the World Cultural and Natural Heritage. This convention was acceded to on 10 July 1982 by the Holy See. The convention set up a World Heritage Committee which was authorized to create a World Heritage List and a Fund for the Protection of the World Cultural and Natural Heritage of Outstanding Universal Value to protect

⁸² "Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property," 14 November 1970, in TOMAN, pp. 453-464; WILLIAMS, pp. 178-185, 224-229. As of 7 May 2003 99 states has acceded to the convention, including Australia (1989), Canada (1978), France (1997), Italy (1978), United Kingdom (2002), United States of America (1983) <<http://www.unesco.org/culture/laws1970/html.eng/page3.shtml>> (6/2/2003).

the properties on this list, should the need arise.⁸³ Under the convention some 730 cultural and natural properties have been listed for protection, including Vatican City in 1984. There are also a number of other Catholic church properties. The convention recognizes that “deterioration or disappearance of an item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world” and that “parts of the cultural or natural heritage are of outstanding interest and they need to be preserved as part of the world heritage of mankind as a whole.” Hence, by the convention the parties have adopted certain measures “for the collective protection of the cultural and natural heritage of outstanding universal value”. The convention defines cultural heritage⁸⁴ to include,

Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

⁸³ UNESCO, “Convention Concerning the Protection of the World Cultural and Natural Heritage,” 16 November 1972, in TOMAN, pp. 469-485. As of 14 March 2003 there were 174 state parties to the Convention, including Australia (1974), Canada (1976), Holy See (1982), Ireland (1991), New Zealand (1984), United Kingdom (1984), United States of America (1973) at <<http://whc.unesco.org/wldrat.htm>> (6/11/2003). The World Heritage List can be found at <http://www.unesco.org/whc/wldrat.htm>. As of 29 June 2002 the List included 730 properties. Of these 144 were natural sites, and some 70 (about 12 percent) of the cultural sites were in origin Christian religious sites. Furthermore, a number of World Heritage List sites, like the Bosphorus peninsula in Istanbul, Turkey, contain Christian religious sites like Hagia Sophia, the sixth century church which is mother church to the Byzantine rite.

⁸⁴ Terminology and definitions vary somewhat in these international instruments. See PATRICK BOYLAN’S ARTS, MUSEUMS AND HERITAGE ORGANISATION POLICY STATEMENTS SERIES, “Definitions of Cultural Property,” <<http://www.city.ac.uk/artspol/cult-def.html>> (7/27/00). “Cultural property” is used in the 1954 and 1970 UNESCO conventions and “cultural heritage” is used in the 1972 convention and in Council of Europe documents. LYNDAL V. PROTT AND PATRICK J. O’KEEFE, “‘Cultural Heritage’ or ‘Cultural Property’?” in *International Journal of Cultural Property*, 1 (1992), pp. 318-319. They argue at p. 319 for the use of the latter term inasmuch as it is used by historians, archaeologists, anthropologists and the term “property”, moreover, arguably does not cover such heritage items such as folklore. It seems fair to say that “heritage” has probably come to have wider currency in Commonwealth countries and it is the usage preferred by the Pontifical Commission for the Cultural Heritage of the Church (*Pontificia Commissio de Bonis Culturalibus Ecclesiae*) which translates the word *bona* in its name as “heritage”.

Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.⁸⁵

Under the convention each party recognizes that primarily to it belongs the duty of identifying, protecting, conserving, presenting and transmitting to future generations the cultural and natural heritage as described and situated in its territory. Hence, each party undertakes to do all it can to this end to the utmost extent of its own resources. To effectuate this undertaking each party agrees, to adopt a general policy which aims to give cultural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes; to set up one or more services for the protection, conservation and presentation of the cultural heritage with an appropriate staff and possessing the means to discharge their functions; to develop scientific and technical studies and research and to work out such operating methods as will make the party capable of counteracting the dangers that threaten its cultural heritage; to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, representation and rehabilitation of this heritage; to foster the establishment or development of national or regional centers of training in the protection, conservation and presentation of the cultural heritage and to encourage scientific research in this field. Parties agree also not to take any deliberate measures which might damage directly or indirectly the cultural heritage as described and situated in the territory of other parties to the convention.

The 1970 Convention was perceived to have a number of problems and it also failed to secure the adherence of some of the important art trading states like Britain (until 2002) and Switzerland. Hence, a movement began to draft another convention which would avoid the pitfalls of the 1970 convention and secure wider adherence. It was sponsored jointly by UNESCO and UNIDROIT, the International Institute for the Unification of Private Law, and it was concluded in 1995.⁸⁶

⁸⁵ UNESCO, "Convention Concerning the Protection of the World Cultural and Natural Heritage," 16 November 1972, in TOMAN, pp. 469-485.

⁸⁶ The International Institute for the Unification of Private Law (UNIDROIT) is an independent inter-governmental organization with headquarters in the Villa Aldobrandini in Rome. Established in 1926 by the League of Nations, it has 58 member states, including the Holy See. It is governed by a General Assembly of all members, a Governing Council composed of 26 members and a secretariat (headed by a Secretary General) which is responsible for its day to day operations. It produces draft conventions with a view to unifying international law in a certain area. UNIDROIT, "International Institute for the Unification

The Unidroit Convention on Stolen or Illegally Exported Cultural Objects seeks to establish a set of minimum international standards to promote the return of stolen or illegally-exported cultural objects.⁸⁷ These are defined by its article 2 as those “which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science.” It does this especially by resolving the problem of the divergent rules on prescription in force in common law and civil law countries. Article 3 of the convention bars claims to stolen works three years after the claimant knows the location of the object and the identity of its possessor and in any case 50 years after the time of the theft—although objects taken from public collections (defined to include those of religious institutions) are not subject to this fifty-year rule, if inventoried. States may, however, establish a seventy-five year rule with respect to such claims. With respect to illegally exported cultural objects the three and fifty-year rules apply without exception. Article 4 provides for “fair and reasonable” compensation to the possessor of the object reclaimed where the possessor “neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.” Article 6 makes a similar provision for compensation for illegally exported objects when reclaimed, provided the possessor “neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.” The convention gives states access to the courts of member states to secure the return of stolen objects.⁸⁸

1.3.2. The Conservation of Cultural Property

If the massive destruction of cultural property in wartime has lead to the development of uniform international legal rules to protect it, the destruction of cultural property in peacetime has lead to the development of conservation theory for its preservation. Inasmuch as RCIC canon 1189 and CCEO canons 887 and 888 require resort to experts before an ordinary can give permission for restoration work to proceed, we need to know something of the development and nature of this

of Private Law,” <<http://www.unidroit.org/english/presentation/pres.htm>> (11/19/2001); CARLO-STELLA, p. 418.

⁸⁷ “UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome,” 24 June 1995, <<http://www.unidroit.org/english/conventions/c-cult.htm>> (5/14/2002).

⁸⁸ Ibid. and LYNDEL V. PROTT, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995*, Leicester, Institute of Art and Law, 1997. As of 19 July 2002 eleven states had ratified and seven other states had acceded to the Convention. <<http://www.unidroit.org/english/implement/I-95.htm>> (6/2/2003).

theory and practice. Its first stirrings began in the eighteenth century when a number of important renovations and restorations were undertaken. In the Age of Reason Paris cheerfully tolerated four successive desecrations of the Cathedral of Notre Dame. In 1708 Robert de Cotte made fairly drastic alterations in the cathedral's fabric. In 1741-1743 most of the stained glass was removed and replaced with clear panes. In 1771 J-S. Soufflot made further alterations, partially destroying the tympanum of the Last Judgment. And in 1787 numerous damaged gargoyles and other ornaments were briskly scraped off and thrown away as refuse. Nor was this merely the work of vandals. Soufflot had composed a *Mémoire sur l'architecture gothique*, praising the gothic architect's boldness and ingenuity long before he mutilated the great tympanum, and Robert de Cotte had made an early neo-gothic design for the façade of the uncompleted cathedral of Sainte Croix in Orleans.⁸⁹

Meanwhile, at the same time that the desecrations of Notre Dame were occurring in Paris, similar renovations were taking place in England, especially at Litchfield cathedral in 1788, Hereford cathedral the same year, Salisbury cathedral in 1789, and Durham cathedral in 1791 under the architect James Wyatt (1746-1813). Wyatt was a good classical architect, but he had little feeling for medieval architecture which he desired to refine in a thoroughly Georgian way. At Durham he replaced the Perpendicular window of the east transept with an Early English rose window of his own design. He combined an appetite for demolition with one for display and, like the late Victorian restorers, had a taste for rebuilding in an eclectic manner. Pugin called Wyatt "this monster of architectural depravity." When he was proposed for fellowship in the Society of Antiquaries, the Rev. John Milner, a Catholic, published a paper in which he denounced the Salisbury renovation as "destructive caprice and false taste."⁹⁰

But if it was the vandalizing of Notre Dame and Salisbury cathedrals in the course of eighteenth-century renovations which sparked the rise of historic preservation, concern for preservation did not spread immediately to all art forms. The fourteen-century *Apocalypse* tapestry series of Angers cathedral provides an interesting example of this. In 1782 no one wished to buy these 782 square meters of tapestry and so they were put to the most utilitarian and prosaic uses. Some

⁸⁹ ALSOP, *The Rare Art Tradition*, pp. 11, 26, 48, 50; KULTERMANN, *The History of Art History*, p. 11.

⁹⁰ JOHN DELAFONS, *Politics and Preservation: A Policy History of the Built Heritage, 1882-1996*, London, E & FN Spon, 1997, p. 14; NIKOLAUS PEVSNER, "Scrape and Anti-scrape," in JANE FAWCETT (ed.), *The Future of the Past: Attitudes to Conservation, 1874-1974*, London, Thames & Hudson, 1976, pp. 37, 39.

sections were used to mask cracks in a wall; others were hung in the greenhouse of Saint Serge Abbey to protect orange trees from the cold; some were used as packing cloth and bedside rugs; and pieces were even put up in the bishop's stables to prevent horses from scraping themselves on the swinging bail. Still other fragments served to protect the floor when ceilings were being repainted. Moreover, as late as 1852 a coppersmith bought five Gobelins tapestries in Paris merely so that they might be burnt to recover their gold thread. Indeed, it was only in the late nineteenth century that the practice began to develop of collecting objects in precious metals principally or solely for aesthetic reasons. Hitherto such objects were also seen as a store of value to be melted down when a need for cash or a change of taste so indicated. Louis XIV and Charles I financed wars by recycling precious metal objects.⁹¹

Once art had become a commodity, the question arose as to the proper approach to its preservation. Winkelman and his progeny had persuaded the world of the worth of art history. The question now became one of the proper approach to conserve the past in order to study it. To a great extent the problem henceforth was to sort out what was meant by "restoration." The term comes ultimately from the Indo-European root stem *st(h)a*—meaning to stand, strengthen or make fast. To "restore" therefore in English early on acquired the meaning of to repair, and so Samuel Johnson in his *Dictionary of the English Language* (1755) defines "restoration" as "the act of replacing in a former state: To give back what has been lost or taken away." Similar was the notion embraced by the great French antiquarian and author, Prosper Mérimée who said, "*Par restauration nous entendons la conservation de ce qui existe et la reproduction de ce qui a manifestement existé,*" by restoration we understand the conservation of that which exists and the recreation of that which has definitely existed.⁹²

Imbedded here are two theories of restoration, to preserve an object and to return it to a prior state. The two theories would claim warring exponents throughout the nineteenth century. One

⁹¹ R.H. MARIJNISSEN, "Degradation, Conservation, and Restoration of Works of Art: Historical Overview," in NICHOLAS STANLEY PRICE ET AL., *Historical and Philosophical Issues in the Conservation of Cultural Heritage*, Los Angeles, The Getty Conservation Institute, 1996, pp. 278, 280; ROBERT CUMMING, "Collecting," in TURNER, 7, p 565. ROY STRONG, *Lost Treasures of Britain: Five Centuries of Creation and Destruction*, London, Viking Penguin, 1990, p. 80, states that King Charles I in 1625 sent to Amsterdam, pawned, and lost precious royal jewels, inherited in great part from the Tudors and worth some £200,000, to secure a loan of £92,400, which was to go to pay for English troops fighting the Thirty Years War.

⁹² STEPHEN TSCHUDI-MADSEN, "Architectural Conservation: The Triumph of an Idea," in YUDHISHTHIR RAJ ISAR (ed.), *Why Preserve the Past: The Challenge to Our Cultural Heritage*, Washington, Smithsonian Institution Press, 1984, pp. 143-144.

theory, championed by William Morris and John Ruskin, argued for a “repair rather than replace” approach. Somewhat more liberal was the notion sported by Eugène-Emmanuel Viollet-le-Duc (1814-1879), the great nineteenth-century French architect and restorer. He said, “to restore an edifice means neither to maintain it, nor repair it, nor to rebuild it; it means to reestablish it in a finished state, which may in fact never have actually existed at any given time.”⁹³ This is sometimes called the “unity of style” theory. It was the reigning theory of restoration in France between 1830 and 1870 and beyond. Viollet-le-Duc wrote this apologia for his view:

There are few buildings, especially those constructed during the Middle Ages, that were built overnight, though; or which, even if they did go up rapidly, did not undergo notable modifications later, either by additions, conversion, or partial changes of one type or another...often buildings or parts of buildings dating from a certain era have been repaired, sometimes more than once, and sometimes by workers who were not native to the province where the building was constructed.⁹⁴

This sort of renovation or restoration, as well as the similar ones in England of Sir Gilbert Scott (1811-1874), in time gave rise to the historic preservation movement as people began to see in old buildings historical value that needed to be protected. John Ruskin and William Morris were among the movement’s leaders. Ruskin provided the chief justification for the historic preservation effort, arguing that age itself justified preservation and defending the quasi-sacred character of that which had endured through generations of inhabitants and countless successions of events. Ruskin argued against “the indiscreet zeal for restoration. Restoration may possibly...produce good imitation of an ancient work of art; but the original is then falsified...no restoration should ever be attempted, otherwise than...in the sense of preservation from further injuries.”⁹⁵

He explained himself at greater length in his famous 1849 text, the *Lamp of Memory*,

⁹³ EUGÈNE-EMMANUEL VIOLLET-LE-DUC, “Restoration,” in PRICE, *Historical and Philosophical Issues*, p. 314.

⁹⁴ Ibid.

⁹⁵ PEVSNER, “Scrape and Anti-scrape,” in FAWCETT, p. 50.

Neither by the public, nor by those who have the care of public monuments is the true meaning of the word *restoration* understood. It means the almost total destruction which a building can suffer: a destruction out of which no remnants can be gathered: a destruction accompanied with false description of the thing destroyed...Do not let us talk of restoration. The thing is a Lie from beginning to end...Take proper care of your monuments, and you will not need to restore them. A few sheets of lead put in time upon the roof, a few dead leaves and sticks swept in time out of a ruin. Watch an old building with an anxious care; guard it as best you may, and at *any* cost, from every influence of dilapidation. Count its stones as you would jewels of a crown; set watches about it as if at the gates of a besieged city...it is again no question of expediency or feeling whether we shall preserve the buildings of past times or not. *We have no right whatsoever to touch them.* They are not ours. They belong partly to those who built them, and partly to all the generations of mankind who are to follow us. The dead have still their right in them: that which they labored for, the praise of achievement or the expression of religious feeling, or whatsoever else it might be which in those buildings they intended to be permanent, we have no right to obliterate. What we have ourselves built, we are at liberty to throw down; but what other men gave their strength and wealth and life to accomplish, their right over does not pass away with their death; still less is the right to the use of what they have left vested in us only. It belongs to all their successors. It may hereafter be a subject of sorrow, or a cause of injury, to millions, that we have consulted our present convenience by casting down such buildings as we choose to dispense with. That sorrow, that loss, we have no right to inflict.⁹⁶

In 1878 William Morris wrote *The Times* regarding the proposed destruction of Wren churches:

Four more churches are to be sacrificed to the Mammon-worship and want of taste of this great city [of London]...Is it absolutely necessary that every scrap of space in the City should be devoted to money-making, and are religion, sacred

⁹⁶ JOHN RUSKIN, "The Lamp of Memory," sections XVIII-XX in JOHN RUSKIN, *The Seven Lamps of Architecture*, London, J.M. Dent & Sons, 1913, pp. 199-202.

memories, recollections of the great dead, memorials of the past, works of England's greatest architect to be banished from this wealthy city?⁹⁷

Many cried "no" and soon there arose a succession of private institutions to administer the preservation movement. In 1877 William Morris founded the Society for the Protection of Ancient Buildings (SPAB). Its original members included Carlyle, Bentley, Ruskin, and Burne-Jones with William Morris as secretary. At a meeting of the Royal Institute of British Architects Morris attacked Scott as a restorer and said, "it is a delusion of restorers that their new work, because it is correctly medieval in style, is of any historical value." He referred to the removal of pews and galleries and the removing of plaster from walls and the last gave rise to the accusation of "scraping" which gave Morris's Society its popular name, the Anti-scrape Society.⁹⁸

The Society for the Protection of Ancient Buildings espouses the principle of conservative repair. In its view every effort should be made to retain surviving historic fabric, even when worn or incomplete and that the evolution of the building over time should be respected. Accordingly, the Society pioneered the revival of traditional materials such as lime (rather than Portland cement) in the repair of historic churches. In its casework it concentrates on medieval and post-medieval churches built before 1715. It remains today the premier "amenity" or preservation society in Britain and continues to sport its credo "repair not restoration."⁹⁹

Today the reigning theory of restoration is largely this, albeit a bit less romantic. The restorer is seen as a historian-archivist who seeks to identify with the original architect and re-create the monument based on a thorough examination of the evidence available. A monument is seen as having value not only for the architectural study but also as evidence of the history of peoples and nations. For this reason monuments should be repaired rather than restored and additions and renovations should be avoided. In 1931 at the International Conference on Restoration held in

⁹⁷ PEVSNER, "Scrape and Anti-scrape," in FAWCETT, p. 52.

⁹⁸ PEVSNER, "Scrape and Anti-scrape," in FAWCETT, p. 53; DELAFONS, p. 20.

⁹⁹ Terminology is important. Beyond common parlance, amongst preservationists terms have precise meanings. "Preservation" is the maintenance of a property without significant alterations to its current conditions. "Restoration" is the process of returning a building to its conditions at a specific time period, often to its original conditions. "Reconstruction" is the building of a historic structure using replicated design and or materials. "Rehabilitation" is adaptive reuse. NORMAN TYLER, *Historic Preservation: An Introduction to its History, Principles and Practice*, New York, W. W. Norton Co., 2000, pp. 22, 24, 27, 28.

Athens under the auspices of the League of Nations, the principles of this movement were accepted and enshrined by a body of experts in what is known as the Athens Charter. It recognized that historical sites should be protected by law and that restoration projects should avoid loss of character and historical value to structures. The Venice Charter of 1964 even more robustly endorsed Ruskin's "repair rather than replace" theory of restoration over Viollet-le-Duc's *unité de style* theory, and today the Venice Charter is the basis of all international restoration expert opinion.¹⁰⁰ Thus it was that the competition between the rival theories of the followers of Ruskin and Viollet-le-Duc came to a close.

It is said that some of the more effective contributions UNESCO has made have come, not through its conventions and recommendations, but through the statutes and functioning of its associated intergovernmental and non-governmental organizations (IGOs and NGOs). These are mentioned in article 71, on ECOSOC, of the United Nations Charter and since 1968 ECOSOC has had a formal system for NGO's to qualify for one of three types of consultative status. Today there is a myriad of such organizations and they operate rather like domestic lobbyists.¹⁰¹ One author uses the phrase "soft regulation" to cover the web of charters, guidelines, codes of practices and other instruments promulgated by these organizations which operate through agreement rather than coercion.¹⁰² In view of the requirement of RCIC canon 1189 and CCEO canons 887 and 888 for the use of experts in restorations of *res pretiosa*, this "soft law" is important to canon law.

¹⁰⁰ SOCIETY FOR THE PROTECTION OF ANCIENT BUILDINGS, "What is SPAB?" <<http://www.spab.org.uk/whatis.html>> (7/17/00) and "The Purpose of the SPAB," <http://www.spab.org.uk/whatis_purpose.html> (7/17/00); RENATO BONELLI, "Restoration and Conservation," *Encyclopedia of World Art*, New York, McGraw-Hill, 1966, 12, cols. 194-195; "Athens Charter," in *The Conservation Glossary*, <<http://www.trp.dundee.ac.uk/research/glossary/athens.html>> (7/12/02); ISABELLE LONGUET AND JEAN-MARIE VINCENT, "France," in ROBERT PICKARD (ed.), *Policy and Law in Heritage Conservation*, London, Spon Press, 2001, p. 101 reports that Viollet-le-Duc's restoration theory held sway in France until the 1960's when the Ruskinian theory embodied in the Venice Charter triumphed. French restorers now aim to conserve the entire building and its authenticity while respecting strata of history. In Italy Viollet-le-Duc's theory held sway during the nineteenth century but by 1932 Gustavo Giovannoni's Italian Restoration Charter had secured the triumph of Ruskinian theory. GIORGIO GIANIGHIAN, "Italy," in *ibid.*, p. 190.

¹⁰¹ PAUL SZASZ, "General Law-making Processes," in SCHACHTER AND JOINER, *United Nations*, I, pp. 56-56, 80.

¹⁰² DAVID THROSBY, "Making Preservation Happen: The Pros and Cons of Regulation," in J. MARK SCHUSTER ET AL. (eds.) *Preserving the Built Heritage: Tools for Implementation*, Hanover, NH, University Press of New England, 1997, p. 34.

Perhaps the senior of these organizations is the International Council of Museums (ICOM). It was established in 1946 and has around 15,000 members in 147 countries and is headquartered in Paris and is devoted to the promotion of museums and the museum profession at an international level. The Holy See participates. ICOM is a non-governmental organization maintaining formal relations with UNESCO. Under its statutes it is governed by a General Assembly composed of the members which meets every three years (Articles 19, 20). In the interval it is governed by an Executive Council and it operates through a secretariat headed by a Secretary General. It held its first General Conference in Paris in 1948 with museologists from fifty-three countries in attendance. In 1959 in association with UNESCO, it founded in Rome the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM). In 1970 it adopted the *ICOM Code of Ethics for Museums* which covers acquisitions. In 1977 it created an *ad hoc* Committee for the Restitution or Return of Cultural Property to the Country of Origin and in 1983 it resolved to support actively UNESCO's Inter-governmental Committee for the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. In 1986 it resolved to encourage the architectural, anthropological, archaeological and art history professions to recognize that no training in these disciplines be considered complete without at least an introduction to the basic principles of conservation.¹⁰³

¹⁰³ INTERNATIONAL COUNCIL OF MUSEUMS, "ICOM Organization," <<http://palimpsest.stanford.edu/icom/organization.html>> (8/3/2000); "Motion No. 16: International Study Centre for the Preservation and Restoration of Cultural Property," *Resolutions of International Council of Museums (ICOM), 1956, 4th General Conference and 5th General Assembly of ICOM, Geneva, Switzerland, 9 July 1956*, <<http://palimpsest.stanford.edu/icom/resolutions/eres56.html>> (8/3/2000); "Motion No. 29: Rome Centre," *Resolutions of International Council of Museums (ICOM), 1959, 5th General Conference and 6th General Assembly of ICOM, Stockholm, Sweden, 8 July 1959*, <<http://palimpsest.stanford.edu/icom/resolutions/eres59.html>> (8/3/2000); "Resolution No. 5: Return of Cultural Property to its Countries of Origin," *Resolutions of International Council of Museums (ICOM), 1983, 14th General Assembly of ICOM, London, UK, 1 & 2 August 1983*, <<http://palimpsest.stanford.edu/icom/resolutions/eres83.html>> (8/3/2000); CARLO- STELLA, p. 419.

ICOM also in 1986 officially adopted the *ICOM Code of Ethics for Museums*, which was revised in 2001 at its Barcelona meeting. This code reinforces the 1970 UNESCO Convention and provides that,

"A museum should not acquire any object or specimen by purchase, gift, bequest, or exchange, unless the governing body and responsible officer are satisfied that a valid title to it can be obtained. Every effort must be made to ensure that it has not been illegally acquired in, or exported from, its country of origin or an intermediate country in which it may have been legally owned (including the museum's own country). Due diligence in this regard should establish the full history of the item from discovery or production, before acquisition is considered." INTERNATIONAL COUNCIL OF MUSEUMS, *ICOM Code of Ethics for Museums*, section 3.2, § 2, <http://icom.museum/ethics_rev_engl.html> (7/12/2003).

"The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (1995) provide the principles on which museums should approach the return and restitution of cultural property. If a country or people of origin seek the return of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the

The International Council on Monuments and Sites, ICOMOS, is an international, non-governmental organization dedicated to the conservation of the world's historic monuments and sites. It was founded in 1965 on the basis of the Venice Charter for the Conservation and Restoration of Monuments and Sites adopted the previous year. Its headquarters is in Paris and it operates as UNESCO's principal advisor in matters concerning the conservation and protection of monuments and sites. Today it has National Committees in over 90 countries and some 5,500

principles of these conventions and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return." Ibid., section 4.4, §1.

The Rules of the International Association of Dealers in Ancient Art also bind members not to purchase or sell objects until they "have established to be best of their ability that such objects were not stolen from excavations, architectural monuments, public institutions or private property." NORMAN PALMER, "Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiquities," in PALMER, pp. 11, 25. Nevertheless, Palmer at p. 23 notes that such codes for lack of privity probably do not create contractual rights for dispossessed owners.

Besides these international codes of ethics, national bodies also have such codes. The Museums Association, established in 1889 and comprising some 700 museums, galleries and historic houses in Britain, has a *Code of Ethics for Museums* which was adopted in 2001 and which enjoins, under clause 5.7, museums to "exercise due diligence when considering an acquisition or inward loan. Verify the ownership of any item being considered for acquisition or inward loan and that the current holder is legitimately able to transfer title or to lend. Apply the same strict criteria to gifts, bequests and loans as to purchases." Museum professionals are further to "reject any item if there is any suspicion that it was wrongfully taken during a time of conflict, unless allowed by treaties or other agreements" or if it has been stolen, illicitly traded or "lacks secure ownership history." Arts. 5.8, 5.9, 5.10, 5.11. They should also, under article 5.16, "decline to offer expertise on, or otherwise assist the current possessor of any item that may have been illicitly obtained, unless it is to assist law enforcement or to support other organizations in countering illicit activities."

The American Association of Museums, founded in 1906 and today with some 3,100 institutional members, also has a *Code of Ethics for Museums*. This Code recognizes that "the distinctive character of museum ethics derives from the ownership, care, and use of objects, specimens, and living collections representing the world's natural and cultural common wealth". Hence, "stewardship of collections entails the highest public trust" and so "the museum is to ensure that: ...acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials". AMERICAN ASSOCIATION OF MUSEUMS, *Code of Ethics for Museums*, <<http://www.aam-us.org/aamcoe.htm>> (7/24/02).

The Canadian Museums Association, established in 1947 and now comprising some 2,300 institutional members, has likewise promulgated its *CMA Ethical Guidelines 1999*. Guideline E.2. on acquisitions declares that "When considering an acquisition, museums must ensure that legal title can be conveyed in written form and establish that the authenticity, source, and provenance of the object is fully documented and ethically acceptable. When objects are acquired from other organizations (such as religious congregations, etc.) museums should confirm that the disposal is in accordance with the policies of that organization." Regarding dispositions by museums Guideline E.4. recognizes dispositions that can "strengthen and refine the quality of a museum collection; but generally there is a strong presumption against the disposal of accessions to collections to which the museum has acquired legal title, particularly objects which have been certified by the Canadian Cultural Property Exports Review Board". CANADIAN MUSEUMS ASSOCIATION, *CMA Ethical Guidelines 1999*, <<http://www.museums.ca/ethics/policies.htm>> (7/24/02)

members. The Holy See participates. It is governed by a General Assembly of all members who meet triennially and officers and an Executive Committee of twelve members. There is also a secretariat, located in Paris, which is headed by a Director. ICOMOS aims to bring together specialists from all over the world and serve as a forum for professional dialogue and exchange and to work for the conservation and enhancement of the architectural heritage.¹⁰⁴

The Venice Charter of 1964 had been adopted at the Second International Congress of Architects and Technicians of Historical Monuments. As a document embraced by world experts in cultural property, its definition of historic monuments, in its article I, is of interest for it “embraces not only the single architectural work but also the urban or rural setting in which is found the evidence of a particular civilization,” a significant development or an historic event. This applies not only to great works of art but also to more modest works of the past which have acquired cultural significance with the passing of time. The ICOMOS theory of restoration is then set forth. “It is essential to the conservation of monuments that they be maintained on a permanent basis.” Moreover, conservation is facilitated by making use of them for some socially useful purpose. Conservation implies preserving a setting which is not out of scale and preferably one which does not require the monument to be moved. Restoration aims at preserving and revealing the aesthetic and historic value of the monument and is based on respect for original material and authentic documents. Moreover, the valid contribution of all periods to the building of a monument must be respected, since unity of style is not the aim of a restoration.¹⁰⁵ The Venice Charter is the foundation for internationally accepted conservation philosophy. While there have been developments since its promulgation, it represents the distillation of expert opinion.¹⁰⁶

In 1987 after twelve years of study ICOMOS launched a more comprehensive initiative with the adoption of the Washington Charter on the Conservation of Historic Towns. Following up on the

¹⁰⁴ INTERNATIONAL COUNCIL ON MONUMENTS AND SITES, “About ICOMOS,” <<http://www.international.icomos.org/about.htm>> (8/3/2000); “Aims and Activities,” <http://www.international.icomos.org/e_introd.htm> (8/3/2000); “ICOMOS Statutes,” <http://www.international.icomos.org/e_statut.htm> (8/3/2000); CARLO-STELLA, p. 419.

¹⁰⁵ ICOMOS, “The Venice Charter,” 31 May 1964, articles 4-7, 9, 11, <http://www.international.icomos.org/e_venice.htm> (8/3/2000). Developing on the work of the Venice Charter and giving greater specificity to its terminology is the Burra Charter, adopted by Australia ICOMOS, ICOMOS’ national affiliate in Australia, on 19 August 1979 at Burra, South Australia, and revised in 1981, 1988 and 1999. Its definitions are very useful and it can be found at <<http://icomos.org/docs/australia/burra.html>>.

¹⁰⁶ ROBERT PICKARD, “Introduction,” in ROBERT PICKARD (ed.), *Policy and Law*, p. 1.

1976 UNESCO "Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas," ICOMOS provided a set of principles for the conservation of "historic urban areas, large and small, including cities, towns and historic centers or quarters." It noted at the outset that such conservation had to be an integral part of overall urban planning and that the qualities to be preserved include the material and spiritual elements that express the area's historic character and these include urban patterns as defined by lots and streets, relationships between buildings and open spaces, formal appearance of buildings, the relationship between the urban area and its surrounding setting and the various functions of the town acquired over time. The conservation plan should aim at a harmonious relationship between the historic urban areas and the town as a whole. Continuous maintenance is crucial to the effective conservation of an historic town. When it is necessary to construct new buildings or adapt existing ones, the existing spatial layout should be respected, especially in terms of scale and lot size.¹⁰⁷

Earlier at its fourth General Assembly in 1975 ICOMOS had taken specific account of the conservation problems of smaller historic towns, and many of these observations would have application to the small towns of North America. Such smaller towns had often been passed by during the industrialization of the nineteenth century and often therefore contained an historic core where traditional social and economic life had continued. There is often a lack of economic activity and sometimes emigration to more prosperous centers has led to abandonment and decay. Even where there is stable population, traffic is often a problem and—where tourism is a possibility—there is the prospect of damage to the cultural heritage. Thus, measures are necessary to bring planning and conservation to bear to enhance the specific values of the town while respecting its existing scale, retaining the specific visual qualities of urban spaces, streets and squares not only in isolated "tradition islands" but throughout the town's fabric, avoiding the destruction of historic elements and searching for appropriate new uses for empty buildings which would otherwise be threatened by decay.¹⁰⁸

¹⁰⁷ ICOMOS, "ICOMOS Charter for the Conservation of Historic Towns and Urban Areas (Washington Charter)," October 1987, arts. 1, 2, 5, 7, 10, <http://www.icomos.org/docs/e_towns.htm> (8/3/2000).

¹⁰⁸ ICOMOS, "Resolutions of the International Symposium on the Conservation of Smaller Historic Towns," Rothenburg ob der Tauber, 29-30 May 1975, arts. 2, 5, 7, 10, <http://www.icomos.org/docs/small_towns.htm> (8/3/2000). In recent years in the United States the preservation movement has noted the rise of the "micropolitan" towns. These are towns like Camden, Maine, Shelburne Falls, Massachusetts, Driggs, Idaho, and Ashland, Oregon, that offer a "sense of place" but also "community without crush, services without stress." WAYNE CURTIS, "Too Good to Last," in *Preservation: The Magazine of the National Trust for Historic Preservation* (May/June, 2002) p. 44. An inter-American meeting of national ICOMOS committees of the Americas in 1996 produced the Declaration of San Antonio, which while rooted in the tradition of the Venice Charter focused on the application of its principles to the American hemisphere and

Convinced that a knowledge and understanding of the origins and development of human societies is of fundamental importance to humanity in identifying its cultural and social roots, ICOMOS in 1990 adopted its Charter for the Protection and Management of the Archeological Heritage. The archaeological heritage was defined as that part of the material heritage in respect of which archeological methods provide primary information and it includes all vestiges of human existence and remains of all kinds together with all the portable cultural material associated with them. It was noted to be a fragile and non-renewable cultural resource and, hence, its protection should be considered as a moral obligation upon all human beings as well as a collective public responsibility. Thus, policies for its protection ought to be an integral part of land use and development planning; such policies should be based on the concept of the archeological heritage as the heritage of all humanity and of groups of peoples. Legislation should thus require full archaeological investigation and documentation as well as proper maintenance and conservation of the archaeological heritage preferably *in situ*, for a transfer to another location violates the principle of preserving heritage in its original context.¹⁰⁹ These same principles received a new application in 1996 in the ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage adopted at Sofia, Bulgaria.¹¹⁰

The “canon” of recognized cultural heritage expanded greatly with the recognition of the worth of the vernacular cultural heritage. In October, 2000, at Mexico City ICOMOS adopted the Charter on the Built Vernacular Heritage. It began by noting that “the built vernacular heritage occupies a central place in the affection and pride of all peoples” and that “it has been accepted as a characteristic and attractive product of society.” It is informal but orderly, utilitarian but of interest and beauty, focusing on contemporary life and providing at the same time a record of the

at the same time sharpened its focus. The meeting declared that the authenticity of our cultural heritage is directly related to our cultural identity and so it admitted that “the Americas face the global problem of cultural homogenization which tends to dilute and erase local values in favor of those that are being advanced universally”. The understanding of the history and significance of a site over time are crucial elements in the identification of its authenticity. The material fabric of a cultural site can be a principal component of its authenticity. INTER-AMERICAN SYMPOSIUM ON AUTHENTICITY IN THE CONSERVATION AND MANAGEMENT OF THE CULTURAL HERITAGE, “The Declaration of San Antonio,” 27-30 March 1996, arts. 1, 2, 3, <http://www.icomos.org/docs/san_antonio.html> (8/3/2000).

¹⁰⁹ ICOMOS, “ICOMOS Charter for the Protection and Management of the Archaeological Heritage,” Lausanne, 1990, arts. 1, 2, 3, <http://www.international.icomos.org/e_archae.htm> (8/3/2000).

¹¹⁰ ICOMOS, “ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage,” Sofia, Bulgaria, 9 October 1996, <http://www.international.icomos.org/under_e.htm> (8/3/2000).

history of society. Hence, "the built vernacular heritage is important" and is "the fundamental expression of the culture of a community," albeit one threatened by "the forces of economic, cultural and architectural homogenization." Its hallmarks are use of traditionally established building types and traditional expertise in design and construction transmitted informally and often applied in response to social or environmental constraints.

Conservation of a vernacular structure should be carried out with respect for its cultural values and traditional character and this is often done by preserving groups of structures of a representative character in a fashion which makes them integral to the cultural landscape. Moreover, the vernacular embraces not only the physical form and fabric of buildings but also "the ways in which they are used and understood and the traditions and the intangible associations which attach to them." Thus any physical work should be cautious and preceded by a full analysis of form and structure and "alterations which legitimately respond to the demands of contemporary use should be effected by the introduction of materials which maintain a consistency of expression, appearance, texture and form throughout the structure and a consistency of building materials." Adaptations should respect the physical integrity of the structure. Conservations of vernacular structures, usually defined as indigenous buildings constructed of locally available materials, to local detail, and usually without benefit of an architect, requires training in the principles of the vernacular and in the craft skills upon which the making of the building or object is based.¹¹¹

¹¹¹ ICOMOS, "Charter on the Built Vernacular Heritage," Mexico City, 24 October 2000, <<http://www.international.icomos.org/VERNAC-ENG.html>> (8/3/2000); "Vernacular", in *The Conservation Glossary*, <<http://www.trp.dundee.ac.uk/research/glossary/vernacul.html>> (7/12/02). There are today many enthusiasts for vernacular architecture. In Britain the Vernacular Architecture Group was formed in 1952 to further the study of traditional buildings and it publishes *Vernacular Architecture*, a refereed journal, and holds an annual spring conference. CHRISTOPHER DYER, "History and Vernacular Architecture," in *Vernacular Architecture*, 28 (1997), pp. 1-8, <<http://www.bloxwich.demon.co.uk/vag/DYERVA.html>> (7/11/02) explores some scholarly uses of vernacular architecture. There is also an American vernacular group, the Vernacular Architecture Forum, established in 1980, which likewise holds an annual conference and then periodically publishes papers drawn from these conferences. Particulars may be located on its web site at <<http://www.vernaculararchitecture.org/rfrae.html>>. Much church architecture in North America clearly will be vernacular architecture. An interesting example of the re-valuing of vernacular art can be seen in the Chapel of the Convent of Our Lady of the Sacred Heart, better known as the Rideau Street Convent, of the Sisters of Charity in Ottawa, Canada. The English Perpendicular style pine vaults of the interior of the Chapel, inaugurated in 1888, faced destruction in 1970 but were salvaged and placed in storage and in 1988 became the centerpiece of the new National Gallery of Canada. LUC NOPPEN, *In the National Gallery of Canada 'One of the Most beautiful Chapels in the Land'*, Ottawa, National Gallery of Canada, 1988, pp. 7, 17.

ICOMOS, on the other hand, is by no means misoneist. In 1972 in a series of resolutions made in Budapest at its third General Assembly ICOMOS concluded that the introduction of contemporary architecture into ancient groups of buildings is feasible provided that the overall plan accepts the existing fabric as the framework for future development, that the use of present-day techniques and materials fit into an ancient setting without affecting the structural and aesthetic qualities of the latter, that authenticity of historic buildings be seen as the basic criterion, that in the revitalization of structures new uses for them are legitimate provided that such uses do not violate either their structure or their character as complete entities.¹¹²

A thorny set of questions was approached in 1999 by ICOMOS when it adopted its International Charter on Cultural Tourism, which was a revision of its 1976 Charter on Cultural Tourism.¹¹³ Clearly at issue are competing questions of heritage preservation and economic development, and the Church is often in the vortex of this discussion since cultural tourism often involves pilgrimages and shrines. While rather diffident towards pilgrimages in the earlier part of the twentieth century,¹¹⁴ since Vatican II the attitude of some churchmen to this expression of popular piety has become more benign and the rationalist deprecation of the practice inherited from the so-called Enlightenment has begun to dissipate. While article 97 of *Pastor bonus* places shrines are under the jurisdiction of the Congregation for the Clergy, article 151 gives to the Pontifical Council for the Pastoral Care of Migrants and Itinerant People the care of “journeys which Christians undertake for reasons of piety, study or relaxation”. One of the objectives of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People is to plan the celebration

¹¹² ICOMOS, “Resolutions of the Symposium on the Introduction of Contemporary Architecture into Ancient Groups of Buildings,” Budapest, 28 June 1972, <http://www.icomos.org/docs/contemporary_architecture.html> (8/3/2000).

¹¹³ ICOMOS, “International Cultural Tourism Charter,” Mexico City, October, 1999, <<http://www.icomos.org/tourism/charter.htm>> (8/3/2000); ICOMOS, “Charter of Cultural Tourism,” 9 November 1976, <<http://www.icomos.org/docs/tourism/charter.html>> (8/3/2000).

¹¹⁴ SACRED CONGREGATION OF THE COUNCIL, “Decree Governing Pilgrimages to the Famous Shrines,” 11 February 1936, in *AAS*, 28 (1936), p. 167, translation in *Canon Law Digest*, 2 (1943), p. 573. The World Tourism Organization (WTO) is an international inter-governmental organization that began in 1925 at The Hague as the International Union of Official Tourist Publicity Organizations. In 1967 it was transformed from an NGO to an IGO and became part of the United Nations family of organizations. Today has some 138 member states and some 350 affiliate members and the Holy See has a Permanent Mission to it. It sees tourism as the world’s largest growth industry, noting that in 1996 receipts from international tourism were \$435 billion. wWTOo, “World Tourism Organization,” <<http://www.world-tourism.org/offer.htm>> (8/3/2000).

of World Day of Tourism (27 September) and in 1999 that same Council issued a very positive document on the religious value of shrines.¹¹⁵

The 1999 Tourism Charter took the view that one of the major reasons for undertaking conservation is to make the heritage significance of a place accessible to the visitor. Earlier in 1967 in its meeting at Quito, Ecuador, ICOMOS had more gingerly taken the view that “intrinsic cultural values are neither weakened nor compromised by association with tourist interests”. By contrast the 1999 Charter held that, “the increased attraction of the cultural properties and the growing number of outside admirers confirm awareness of their importance” and so stimulate “understanding, harmony and spiritual communion” and “help enhance spiritual values however far removed from the intention to promote culture.”¹¹⁶

And so in 1999 ICOMOS adopted a set of six principles on cultural tourism. Since tourism results in the positive value of cultural exchange, conservation should provide responsible and well-managed opportunities for members of the host community and for visitors to experience and understand that community’s heritage and culture at first hand. Management will require that the past be conserved for the future, retaining its authenticity. While ensuring respect for the sanctity of spiritual places, conservation should be undertaken in a manner that the visitor experience will be worthwhile, satisfying and enjoyable. Host communities should be involved in the planning for conservation and tourism, which should be structured so as to benefit equitably the host community. Tourism should not only protect but also enhance the natural and cultural heritage.¹¹⁷ While these principles are not legislative in character, they do have value as the stated and considered views of experts (cf. c. 1189) and perhaps even as a parallel place in the sense of canon 17. In this wise they have potential canonical value.

¹¹⁵ JOHN PAUL II, apostolic constitution *Pastor bonus*, 29 June 1988, in *AAS*, 80 (1988), arts. 97, 151, pp. 884, 900; PONTIFICAL COUNCIL FOR THE PASTORAL CARE OF MIGRANTS, “Pontifical Council for the Pastoral Care of Migrants,” <http://www.vatican.va/romancuria/pontificalcoouncil/rc_pc_migrants_pro_20051996en.htm> (10/27/2000); PONTIFICAL COUNCIL FOR THE PASTORAL CARE OF MIGRANTS, circular letter *The Shrine: Memory, Presence and Prophecy of the Living God*, 8 May 1999, <http://www.vatican.va/romancuria/pontificalcouncils/migrants/documents/rc_pc_migrants_doc_19990525_shrine_en.html> (5/31/2003).

¹¹⁶ ICOMOS, “The Norms of Quito,” 2 December 1967, <<http://www.icomos.org/docs/quito67.htm>> (8/3/2000).

¹¹⁷ ICOMOS, “International Charter on Cultural Tourism,” October, 1999, <<http://www.icomos.org/tourism/charter.htm>> (8/3/2000).

A *leitmotif* running through most of the meetings of ICOMOS has been for the need for the availability of traditional materials and traditional building skills if conservation is to proceed responsibly and successfully. To this end ICOMOS has repeatedly called for the proper education of both professional conservators and skilled craftsmen with a suitable knowledge of the requisite materials and skills. To promote the establishment of standards and guidelines for this the General Assembly of ICOMOS, meeting in Colombo, Sri Lanka, in 1993, adopted a set of "Guidelines for Education and Training in the Conservation of Monuments, Ensembles and Sites." The Guidelines note that conservation is recognized as resting within the general field of environmental and cultural development and the object of conservation is to prolong the life of cultural heritage and, if possible, to clarify the artistic and historic messages therein without the loss of authenticity and meaning. Conservation is a cultural, artistic, technical and craft activity based on humanistic and scientific studies and systematic research. Hence, training must enable one to read a monument, understand its history and setting, locate sources to understand it, understand it, diagnose intrinsic and extrinsic causes of decay, know UNESCO and ICOMOS standards of conservation practice, make balanced judgments based on ethical principles, know when to get any necessary multi-disciplinary expertise, give expert advice on maintenance strategies, document work executed and work with inhabitants, administrators, and planners to resolve conflict and develop conservation strategies appropriate to local needs.¹¹⁸

In 1956 at its ninth General Conference in New Delhi UNESCO decided to establish the International Center for the Study of the Preservation and Restoration of Cultural Property, usually known as ICCROM. Its organization as an international inter-governmental organization was completed in 1959 and its headquarters were fixed in Rome. The Holy See is a member. Its purpose is to contribute to the worldwide conservation and restoration of cultural property. Its membership includes a hundred member states and some 103 associate members drawn from the world's leading conservation institutions. Since 1966 it has provided training courses for over 3,900 conservation professionals. It possesses one of the world's leading conservation libraries. It conducts research to promote technical standards and ethics in conservation practice.¹¹⁹

¹¹⁸ ICOMOS, "Guidelines for Education and Training in the Conservation of Monuments, Ensembles and Sites," 30 July-7 August, 1993, <http://www.icomos.org/docs/guidelines_for_education.htm> (8/3/2000).

¹¹⁹ ICCROM, "About ICCROM," <<http://www.iccrom.org/eng/today/icce.htm>> (11/6/2001); CARLO-STELLA, p. 419; a concise description of the work of ICCROM will be found in CERVAT ERDER, "ICCROM: An International Clearinghouse and Training Centre," in YUDBISHTIR RAJ ISAR (ed.), *The Challenge to Our Cultural Heritage: Why Preserve the Past?* Washington, Smithsonian Institution Press, 1984, pp. 131-139.

Realizing the importance of the proper training of conservators of cultural property and with the assistance of the Pontifical Commission for the Cultural Heritage of the Church, the Pontifical Gregorian University in Rome in 1991 established a diploma course in the cultural property of the Church. This two-year programme aims at increasing the knowledge of the Church's artistic and historical patrimony. It hopes that by conserving the past it will have helped to build a bridge to the future. It offers instruction in the history of Christian art as well as the canon and civil law of cultural property, museology, library and archival science, cultural property inventorying, and conservation theory and practice during the first year leading to the diploma in conservation of cultural church property. The second year provides more intensive study of Christian art history and theory and conservation technology plus seminars offering a close look the Sistine Chapel in the context of Renaissance theology or a look at San Carlo Borromeo and the Gesu. Completion of the second year leads to the higher diploma in cultural church property. Either or both diplomas can be taken as part of the licentiate or doctorate in church history.¹²⁰

While ICOMOS is perhaps the most important international organization with respect to this study, there are a number of others that need to be mentioned for the important standards they set. The International Federation of Library Associations and Institutions (IFLA) is a non-governmental organization and the leading international body representing the interest of library and information services. Established in Edinburgh in 1927, today it has some 1,623 members in 143 countries. Its headquarters are located in the Royal Library at The Hague. It is governed by its general assembly called the Council, and Executive Board, and a secretariat presided over by a Secretary General appointed by the Executive Board.¹²¹

The International Council on Archives (ICA) is the professional, international, non-governmental organization representing the interests of archives and archivists worldwide. It promotes the preservation, development and use of the world's archival heritage. Its creation was first mooted after World War I but it did not come to birth until 1948. Following the lead of ICOM, it was established in Paris and today has some 1,450 members in some 170 countries. It is governed by

¹²⁰ PONTIFICAL GREGORIAN UNIVERSITY, "Beni Culturali della Chiesa, Informazioni," <<http://www.unigre.urbe.it/pug/scuole/beni/informazioni.htm>> (11/07/01).

¹²¹ INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS, "More about IFLA," <<http://www.ifla.org/III/intro.htm>> (8/8/2000).

its General Assembly, which meets quadrennially, and an Executive Council, while the Secretary General, elected by the Executive Committee, presides over its secretariat.¹²²

In 1996 ICOM, ICOMOS, ICA, and IFLA by joint agreement established a joint body, the International Committee of the Blue Shield (ICBS). This NGO, which sees itself as “the cultural equivalent of the Red Cross,” takes its name from the symbol devised under the 1954 Hague Convention to Protect Cultural Property in Time of Armed Conflict. The Committee acts in an advisory capacity with regard to museums, libraries, archives and historic sites in cases arising under the Hague Convention and has certain oversight duties under the second Hague Protocol. It cooperates with UNESCO, ICCROM and the Red Cross to safeguard cultural property and to train experts at the national and international level to prevent and control such losses and to recover cultural property from disasters.¹²³

1.3.3. The Anglo-American Law of Cultural Property: History and Development

Whilst conservation theory and practice were being developed by the experts, in the meanwhile the historic preservation movement continued to make progress in devising legal measures to protect cultural property. The 1954 Hague Convention had expressly declared that “damage to the cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.” Cultural property thus bears a public property aspect, which recognizes the public significance of certain cultural materials and, for that reason, seeks their preservation.¹²⁴ If there is a right to culture, then there is a correlative duty on the part of public authorities to make provision to promote culture and to take measures to preserve the material cultural heritage. Therefore, we shall look briefly at the municipal legislation of Britain and the United States for the preservation of cultural property.

While the law of cultural property has deep roots in the nineteenth century, it is worth noting that during the last decades of the twentieth century this law has been transformed. Earlier it was a law of historic monuments. Beginning with 1975 which was European Architectural Heritage Year, it came to be transformed into an integrated law of cultural heritage. With the 1972 Paris

¹²² INTERNATIONAL COUNCIL ON ARCHIVES, “Mission and General Aims,” <http://www.ica.org/0101_e.html> (8/8/2000).

¹²³ INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS, “ICBS-Working for the Protection of the World’s Cultural Heritage,” <<http://www.ifla.org/VI/4/admin/protect.htm>> (6/25/2001).

Convention there was a move from sites to include also parks and gardens as well as landscapes and natural heritage. The field has thus come to embrace town planning and environmental science. These are all hallmarks of the more expansive and more integrated approach to the law of cultural property of the late twentieth century.¹²⁵

In common law countries the national legislation for the protection of the material cultural heritage has its own distinctive traits. The shade of Adam Smith has cast a long shadow which has retarded the development of cultural property law.¹²⁶ Indeed, one might attribute four characteristics to Anglo-American historic preservation law. We shall see that it was rather a late arrival. Partly for that reason some of the earliest initiatives for historic preservation came in the private sector and the importance of the private sector in the common law world is key. One might summarize this historic preservation legislation by describing what it accomplishes legally. As one author has described it, it impresses a negative easement or servitude on the property which obligates the owner—including public juridical persons created under canon law—to refrain from doing acts otherwise permitted to owners.¹²⁷ But if it imposes a servitude, it does this from its roots in zoning and planning law, which is a fourth characteristic of cultural property law in the common law world. This characteristic is seen most clearly in the historic district or conservation area where not only historic sites but whole districts are declared “historic” and so all property within the district, historic or not, must bear the burden of the designation. More recently the question of an unlawful “taking” of private property by public authority regulation without compensation has begun to be litigated.

¹²⁴ GEOFFREY LEWIS, “Cultural Property in the Community,” in *Museums and Europe*, 3 (1992), pp. 26, 32-33.

¹²⁵ RAYMOND WEBER, “Editorial,” in EUROPEAN COUNCIL ON CULTURAL COOPERATION, *European Heritage: Heritage and Society*, (1995) <<http://culture.coe.fr/infocentre/pub/eng/epe3.o.html>> (6/27/2002).

¹²⁶ In contrast to the more protective Continent, PETER MANDLER, *The Fall and Rise of the Stately Home*, New Haven, Yale University Press, 1997, p. 3, says: “In England the national history has been more taken for granted, and political interventions in the ‘heritage’ have been resisted and commercial development has been put above other considerations.”

¹²⁷ JOHN J. COSTANIS, “The Redefinition of Property Rights as a Tool for Historic Preservation,” in J. MARK SCHUSTER ET AL. (eds.), *Preserving the Built Heritage: Tools for Implementation*, Hanover, NH, University of New England Press, 1997, p. 87. BRYAN A. GARNER (ed.), *Black’s Law Dictionary*, 7th ed., Saint Paul, West Group, 1999, p. 1373, defines a servitude as “an encumbrance consisting in a right to the limited use of a piece of land without the possession of it.”

Among the oldest and most important private initiatives for historic preservation is the National Trust for Places of Historic Interest or Natural Beauty, which was incorporated in 1895 as a public, nonprofit company. Its first acquisition—for £10—was the fourteenth-century half-timber Clergy House at Alfriston, Sussex, although until the 1930's its chief interest was the conservation of rural landscape. It then began its country house scheme and by 1944 had acquired twenty country houses. The new entity proved a great success. By 1900 it had 250 members. By 1928 it had over 1,000 members. In 1950 membership was at 23,000 and by 1992 the Trust had over 2,000,000 members. The properties it owned also expanded. By 1900 it held 180 properties. By 1992 it held some 200 houses and owned 570,00 acres, being the largest private landowner in Britain and holding protective covenants over a further 78,000 acres. Its sister society, the National Trust for Scotland, was founded in 1931 and today has a membership of over 250,000, holding some 100,000 acres and some 100 properties in Scotland. There are also National Trusts in Ireland, the United States, Australia, and New Zealand.¹²⁸

There is a coterie of National Amenity Societies, as the preservation groups in Britain are known, and although voluntary and private organizations, they have been given legal standing in Britain's

¹²⁸ NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY, "The National Trust," <<http://www.nationaltrust.org.uk/main/nationaltrust/index.html>> (11/6/01); DELAFONS, p. 71. DELAFONS at p. 71 notes the importance of taxation in giving rise to the National Trust's country house scheme. In 1904 estate duty was 4 percent. In 1919 it was 40 percent. In 1930 it was 50 percent. Special legislation permitted a landowner to gift his house to the National Trust and retain a lifetime right of occupancy. He had to provide an endowment for the maintenance of the house during his lifetime and agree to have it open to the public 30 days a year. In return the property did not attract death duty when he died. For the fiscal aspects of cultural property in Britain, see Julia Simmonds, *Art and Taxation: A Guide*, Leicester, Institute of Art and Law, 2001.

An Taisce, the National Trust for Ireland, was created in 1948 and it is active in the protection of the built and natural environment. AN TAI SCE, "What We Do," <http://www.antaisce.org/what_we_do/faq/l.html> (7/2/2002). In 1949 the United States Congress chartered the National Trust for Historic Preservation, modeled on its English namesake, as a publicly funded private legal entity with public members (the Attorney General of the United States, the Secretary of the Interior, the Director of the National Gallery of Art) on its governing board. It grew from 10,700 members in 1966 to 260,000 members in 1997. WILLIAM MURTAGH, *Keeping Time: The History and Theory of Preservation in America*, Pittstown, NY, Main Street Press, 1988, pp. 52-53. In 1947 a branch of the National Trust, based on the English model, was established in New South Wales and another in South Australia in 1955, Victoria in 1956, Western Australia in 1959, Tasmania in 1960 and Queensland in 1963. A national coordinating body, the Australian Council of National Trusts, was formed in 1965 and today there are some 80,000 National Trust members nationwide and some 280 National Trust properties throughout Australia. NATIONAL TRUST OF AUSTRALIA, "History of the National Trust in Australia," <<http://www.nationaltrust.org.au/history.htm>> (6/4/02). The Historic Places Act was enacted in 1954 by New Zealand's parliament to identify and protect historic places in New Zealand and these may include traditional and archaeological sites. The act created the Historic Places Trust, which today has some 20,000 members and has classified some 6,000 sites. NEW ZEALAND HISTORIC PLACES TRUST, "The Register of Historic Places," <http://www.historic.org.nz/Register/about_the_register.html> (6/4/02).

heritage legislation and provide a valuable public service in the preservation of the nation's built heritage. The 1968 Town and Planning Act required that all applications in England and Wales for listed building consent, i.e. for requests for permission to modify historic structures listed as such, be notified to the National Amenity Societies. These private entities thus were given semi-public functions and *locus standi* in certain historic preservation procedures. The National Amenity Societies include—besides the Society for the Preservation of Ancient Buildings founded by Ruskin—the Ancient Monuments Society, the Georgian Group, the Council for British Archeology, the Victorian Society, and the Twentieth Century Society. They are private membership organizations with several thousand members, and they operate as charities or non-profit organizations headed by a committee of trustees. All have caseworkers whose principle role is to respond to listed building consent notifications. All have an education programme and issue publications. Since 1972 they have supported an umbrella organization called the Joint Committee of the National Amenity Societies, which is intended to coordinate the response of the separate groups on major issues. As we shall see in section 1.3.3.2 on the Ecclesiastical Exemption below, the Joint Committee is consulted by Diocesan Advisory Committees and the Listed Building Committees of other religious denominations over the appointment of one member to serve on each of these bodies.¹²⁹

¹²⁹ COUNCIL FOR THE CARE OF CHURCHES, "The National Amenity Societies—their Role in the Conservation of Anglican Churches," <http://churchcare.co.uk/atoz_amenity_soc.php> (11/6/01). The list of National Amenity Societies is set forth in Appendix A.15 in DEPARTMENT OF THE ENVIRONMENT, TRANSPORT AND THE REGIONS, *Planning Policy Guidance Note 15*, which can be accessed at <<http://www.dreamwater.net/leamington/spawater/conservarea/ppg15b.html>> (4/2/02).

The Ancient Monuments Society was established in 1924 for the study and conservation of ancient monuments, historic buildings and fine old craftsmanship. It is interested in buildings of all ages and types, including houses ("whether vernacular or polite"), barns, almshouses, dovecotes, mills, churches and chapels. It is particularly interested in redundant churches and in 1980 entered into a partnership with The Friends of Friendless Churches an organization which has become directly responsible for some thirty churches which would otherwise have been demolished. ANCIENT MONUMENTS SOCIETY, "About the Society," <<http://btinternet.com/~carolinesian/aboutams.html>> (11/6/01).

The Georgian Group, founded in 1937 by Lord Derwent, Robert Byron and Douglas Goldring, raised British consciousness about the worth of eighteenth century structures. While it does not advocate the preservation of every Georgian building, it was concerned to prevent wanton destruction and further unsympathetic alteration or the construction of inharmonious structures in the vicinity of Georgian ones. It pioneered the concept of "listing" in 1947 and it was Byron who introduced the term "amenities". The Georgian Group also helped to change the focus from individual buildings to architecture as a component of the urban scene. The Georgian Group exists to promote an appreciation of all products of the classical tradition in England from Inigo Jones to the present day but is particularly interested in structures dating from 1700 to 1840. In respect of churches it is solicitous about the saving of eighteenth and nineteenth century pews and important Georgian monuments and churchyard tombs. THE GEORGIAN GROUP, "The Georgian Group," <<http://www.heritage.co.uk/georgian>> (7/14/00); DELAFONS, p. 50. In Scotland the premier society for the preservation of the built environment is the Architectural Heritage Society of Scotland, established in 1956 as the Georgian Group of Edinburgh to forestall the destruction of George

The Civic Trust was established in 1957 by Duncan Sandys to stimulate an interest in the built environment and historic town centers through local trusts in much the same way that the National Trust had secured the rural landscape and country houses and their parks and gardens and as a new champion for the built environment. More generally the Civic Trust aimed "to preserve beauty, to create beauty, and to remove ugliness." It claims credit for the conservation areas or historic districts introduced into Britain by the Civic Amenities Act of 1967. There is as well a Scottish Civic Trust established in 1967 and now headquartered in the Tobacco Merchants

Square in Edinburgh's (eighteenth-century) New Town. In 1959 its range of interest spread beyond the capital and so it changed its name to the Scottish Georgian Society. By 1984 its interests had transcended the Georgian period and so it became the Architectural Heritage Society of Scotland. Today it has some 1500 members—many domiciled quite far from its New Town headquarters and it is an active participant in the preservation of Scotland's built environment. THE ARCHITECTURAL HERITAGE SOCIETY OF SCOTLAND, "The Story of the Society," <<http://ahss.org.uk/about/history.html>> (7/11/02). A more recent creation is the Irish Georgian Society, established in 1958 by The Hon. Desmond Guinness for the protection of buildings of architectural merit in Ireland. The society has some 3,000 members around the world. IRISH GEORGIAN SOCIETY, "Irish Georgian Society," <<http://www.irishgeorgiansociety.org>> (7/2/02).

The Council for British Archaeology was established in 1944 for the "safeguarding of all kinds of archaeological material and the strengthening of existing measures for the care of ancient and historic buildings, monuments, and antiquities". Its main roles are in the areas of research, conservation, education, information and publication. It is interested in all physical evidence of human development whether built or buried. Its interests cross all periods and it has strong church and churchyard interest. COUNCIL FOR BRITISH ARCHAEOLOGY, "A Brief History of the CBA," <<http://www.britarch.ac.uk/cba/history.html>> (11/6/01).

The Victorian Society, established in 1958 by Lady Rosse and Christopher Hussey with Lord Esher as chairman, looks to the preservation of significant structures of the Victorian and Edwardian periods from 1837 to 1914. Its thirty founding members include the noted architectural historian Sir Nicholas Pevsner and the poet laureate Sir John Betjeman. Its early labors included a campaign to save the Coal Exchange of London designed by J. B. Bunning and opened by the Prince Consort in 1849. With the Royal Academy, SPAB, and the Georgian Group it also labored to save the Euston Arch. Both were demolished in 1962 but their demise served to raise public consciousness and steel the preservation movement to its task. The Society's focus is buildings of the Victorian and Edwardian periods, 1840-1914. To achieve listing of building from these periods is rather more difficult, but the Victorian Society has labored on behalf of the structures by major architects, or parts of major groups of buildings or examples of pioneering forms of construction or rare survivals of specific types of buildings. Churches remain a particular interest of the Victorian Society because the importance of nineteenth-century churches is still insufficiently recognized and their architecture and fittings are undervalued. It employs, for this reason, a caseworker who specializes in churches. It collaborates with the Victorian Society in America. THE VICTORIAN SOCIETY, "The Victorian Society," <<http://www.btiinternet.com/~vicsoc.html>> (7/17/00); JOHN BETJEMANN, "A Preservationist's Progress," in FAWCETT, p. 84.

The Twentieth Century Society (originally the Thirties Society) was established in 1979 by a group of architects and conservationists who met at the Park Lane Hotel. At first it was interested in inter-war years architecture. Today it is interested in buildings, including churches, constructed since 1914. THE TWENTIETH CENTURY SOCIETY, "History," <<http://www.c20society.demon.co.uk/docs/about/history.html>> (11/6/01). The foundation dates of the junior National Amenity Societies—1924, 1937, 1959, and 1979—can be taken as markers for the expansion of the heritage preservation canon.

House in Glasgow. The Dublin Civic Trust was established in 1992 and is dedicated to identification, sensitive repair and minimal intervention as well as appropriate use of the city's historic building stock. Its Historic Heart of Dublin Project aims at inventorying all the historic buildings in the city's center.¹³⁰

Other groups lacking the same semi-public standing as the national amenities societies include SAVE Britain's Heritage, established in 1975 during the European Architectural Heritage Year. It declared, "The fight to save particular buildings or groups of buildings is not the fancy of some impractical antiquarians. It is part of a battle for the sane use of our resources." It strives to find new uses for old buildings and has a particular interest in historic cinemas. There is also the Historic Chapels Trust, which was established to take over the ownership of redundant chapels and other places of worship in England of outstanding architectural and historic interest. Its interest includes buildings of all denominations other than Anglican, which are eligible for vesting in the Churches Conservation Trust. One of its properties is Biddlestone Roman Catholic Chapel, near Netherton, Northumberland, a chapel once adjoining Biddlestone Hall, home of the Selby family who in 1820 built this chapel next to the Hall (since razed).¹³¹

A quasi-autonomous, nonincorporated government organization (QANGO) "responsible for securing the preservation of England's architectural and archaeological heritage" is English Heritage, officially known as the Historic Buildings and Monuments Commission for England. Created in 1983 by the National Heritage Act, in 1999 it merged with the Royal Commission on Monuments and Sites. It works with the Secretary of State for Culture, Media and Sports and in 2000-01 has some £114m. in public funding. The Secretary of State places buildings on the statutory lists of buildings of "special architectural or historic interest" under the Planning (Listed Buildings and Conservation Areas) act of 1990, on advice from English Heritage. There is a parallel organization in Scotland, called Historic Scotland which works with the Royal

¹³⁰ THE CIVIC TRUST, "A Brief History of the Civic Trust," <<http://www.civictrust.org.uk/about/history.shtml>> (11/6/01); SCOTTISH CIVIC TRUST, "About the Scottish Civic Trust," <[http://www.scotnet.co.uk/sct/about the.htm](http://www.scotnet.co.uk/sct/about%20the.htm)> (8/20/02); DUBLIN CIVIC TRUST, "Historic Heart of Dublin Project," [http://www.dublincivictrust.ie/partnership/hhod/ htm](http://www.dublincivictrust.ie/partnership/hhod/htm) (11/14/02).

¹³¹ SAVE BRITAIN'S HERITAGE, "Save Britain's Heritage," <<http://www.savebritainsheritage.org/editorial.htm>> (7/17/00); HISTORIC CHAPELS TRUST, "Historic Chapels Trust," <<http://www.hct.org.uk>> (7/17/2000); DELAFONS, p. 177; BETJEMANN, pp. 62, 69.

Commission on the Ancient and Historical Monuments of Scotland, established in 1908 by royal warrant.¹³²

Historic preservation in the United States began not to save the old but rather the patriotic. In 1818 there began a movement to save what is today called Independence Hall where the American Declaration of Independence and Constitution were signed, when the removal of Pennsylvania's capital to Lancaster and later Harrisburg, Pennsylvania, left the building, then called the Old State House, without a tenant. In 1828 the architect William Strickland designed the present tower for it to replace an earlier one which had deteriorated and had been removed in 1790. This was America's first restoration. Later patriotic movements arose in the 1850's. In 1850 New York paid \$2,000 to buy Hasbrouck House in Newburgh, where General Washington had his headquarters during a good part of the American War for Independence. It became the first publicly owned shrine to American patriotism. In 1853 the South Carolinian Pamela Cunningham organized the Mount Vernon Ladies Association to purchase and preserve Mount Vernon, General Washington's home on the Potomac River near Washington, DC.

As the nineteenth century moved to a close, historic preservation shifted its focus from patriotism to architecture. The Association for the Preservation of Virginia Antiquities was established in 1889 and is the oldest statewide preservation organization in the United States. It began the preservation of seventeenth and eighteenth century architecture. In 1910 William Sumner Appleton, an architectural historian, began the Society for the Preservation of New England Antiquities. In 1910 also the Essex Institute, established in 1848, moved to restore the John Ward House in Salem, Massachusetts, erected c. 1685.¹³³ The 1920's saw the opening of the American Wing of the Metropolitan Museum of Art in New York City with its twenty-five period rooms from the American colonial and federal periods and the opening of Fairmont Park in Philadelphia with its collection of restored eighteenth-century houses.

The late nineteenth-century had also seen the beginning of some care for America's natural heritage. In 1872 Yellowstone National Park was established by Act of Congress followed in

¹³² ENGLISH HERITAGE, "Who We Are," <<http://www.english-heritage.org.uk/about-us/who/index.html>> (7/14/00); ROYAL COMMISSION ON THE ANCIENT AND HISTORICAL MONUMENTS OF SCOTLAND, "What is RCAHMS?" <<http://www.rcahms.gov.uk/about.html>> (7/14/00).

¹³³ MICHAEL HOLLERAN, *Boston's "Changeful Times": Origins of Preservation and Planning in America*, Baltimore, Johns Hopkins University Press, 1998, provides a useful monograph on the origins of the preservation movement in New England.

1892 by the Casa Grande National Park. In 1892 John Muir established the Sierra Club to promote the establishment of national parks and in 1916 the National Park Service was established within the United States Department of the Interior. The Antiquities Act of 1906 authorized the President to set aside for protection historic landmarks on public property and established a system of permits for archaeological investigations on public lands. The Historic Sites Act of 1935 asserted that it was a national policy of the United States to preserve for public use historic sites, buildings and objects of national significance. In 1949 Congress chartered the National Trust for Historic Preservation, modeled on its English namesake, which grew from 10,700 members in 1966 to 260,000 members in 1997. In 1966 Congress enacted the National Historic Preservation Act. The act broadened the scope of federal interest in historic preservation to include sites of state and local interest as well as sites of national interest as in the 1935 act and the 1966 statute declared that "the preservation of this irreplaceable heritage is in the public interest." It established a National Register of Historic Places under the care of the Secretary of the Interior, created the Advisory Council on Historic Preservation, and by its famous section 106 required that where a project is federally sponsored or funded care must be taken to consider the impact of the project on sites listed or eligible for listing on the National Register.¹³⁴

The 1966 statute recognized the historic district as well as historic sites and so gave statutory recognition to four decades of development. The new departure had come in 1926 when Dr. William Goodwin, the rector of Bruton Parish Church in Williamsburg, Virginia, conceived of the idea of restoring the entire town to its appearance between 1699-1779 when it had been the colonial capital of Virginia and interested John D. Rockefeller, Jr., in expending \$79 million dollars on the project over the next decade. The restoration's main Duke of Gloucester Street was opened in 1934 by President Franklin D. Roosevelt. The restoration quickly became a major tourist attraction and by 1941 the 175-acre site had attracted 210,824 visitors. The original town had become a historic museum and a new phenomenon, the historic district, was born. Others soon followed. In 1920 Susan P. Frost of Charleston, South Carolina, had established the Society

¹³⁴ WILLIAM MURTAGH, *Keeping Time: The History and Theory of Preservation in America*, Pittstown, NY, Main Street Press, 1988, pp. 26-34, 52-53; DIANE BARTHELS, *Historic Preservation: Collective Memory and Historical Identity*, New Brunswick, Rutgers University Press, 1996, pp. 14-20; FRANCIS P. McMANAMON, "An Introduction to Heritage Resources Law," in SHERRY HUTT, CAROLINE M. BLANCO AND OLE VARMER (eds.), *Heritage Resources Law: Protecting the Archeological and Cultural Environment*, New York, John Wiley & Sons, 1999, pp. 5-11. See also CHARLES B. HOSMER, "Preservation—A Historical Perspective," in RONALD W. JOHNSON AND MICHAEL G. SCHENE (eds.), *Cultural Resources Management*, R. E. Kreger Pub. Co., Malabar, FL, 1987, pp. 5-20.

for the Preservation of Old Dwellings.¹³⁵ In 1931 preservationists got the city to place its Battery district under a permanent zoning law which required building permits and set up a board of architectural review to approve all exterior changes to structures within the district. This measure, which created America's first historic district, was followed up in 1941 with an architectural survey which made an inventory of some 1,168 buildings in the city. Another such development was the Vieux Carré district in New Orleans, which covered the 260 acres of the French town platted in 1721. The movement began as a study commission in 1925 and by 1936 the Vieux Carré Commission had legal powers not only to exercise zoning powers but also to preserve existing structures. In 1939 San Antonio, Texas, took measures to create an historic district to protect the Alamo and its Riverwalk district. The historic district made further progress in 1955 when the Commonwealth of Massachusetts created the Beacon Hill district, the first in a major metropolis, and at the same time the Supreme Judicial Court of Massachusetts advised that the creation of historic districts was a constitutional exercise of the state's general welfare power. The following year the Philadelphia Historical Commission was given statutory power to regulate alterations to any historic structure in the city. These early historic districts had been created by individual statutes. By 1980 most states had enacted general legislation authorizing cities to create and regulate historic districts. By 1991 there were some 58,000 sites on the National Register of Historic Sites. But structures within historic districts are not included in this number. It is estimated that inclusion of these sites would swell the number of listed sites to 800,000 properties.¹³⁶

1.3.3.2. The Law of Cultural Heritage: The United Kingdom

In Britain jurisdiction over culture is in the hands of the Secretary of State for Culture, Media and Sport, whose domain was created in 1992 as the Department of National Heritage. This department, Britain's youngest government department, like the French Ministry of Culture provides a variety of government grants to cultural institutions like museums, theaters, orchestra,

¹³⁵ The life of this estimable woman is recalled in SIDNEY R. BLAND, *Preserving Charleston's Past, Shaping Its Future: The Life and Times of Susan Pringle Frost*, Westport, CT, Greenwood Press, 1994.

¹³⁶ DAVID HAMER, *History in Urban Places: The Historic Districts of the United States*, Columbus, Ohio State University Press, 1998, pp. 4-10, 20; LYNDIA C. FRIEDMAN, "The Vieux Carré: The Administration of Municipal Laws," in *Pace Law Review*, 1 (1981), p. 585. See also WILLIAM E. PARRISH, "Management of Cultural Resources at the Local Level," in JOHNSON AND SCHENE (eds.), *Cultural Resources Management*, pp. 137-159. In 1994 there were some 62,000 listings on the National Register of Historic Places, "the nation's official list of historic places worth preserving", of which 71 percent were privately owned.

and dance companies. The Department has an annual budget for 2000-2001 of some £1 billion. The Secretary of State in charge of this Department, however, does not have jurisdiction outside England. In England, with respect to the architectural heritage, he works in conjunction with the Historic Buildings and Monuments Commission, which is usually called English Heritage. In 1999 English Heritage merged with the Royal Commission on the Historical Monuments of England, established in 1908.¹³⁷

The preservation of the built environment is regulated by statute—especially the Historic Buildings and Ancient Monuments Act of 1953, the Ancient Monuments and Archaeological Areas Act of 1979, and the National Heritage Act of 1983. The first such cultural property statute was the Ancient Monuments bill, introduced in 1873. It was a modest measure which provided for the designation of important antiquities and permitted the government compulsorily to purchase the property if it were threatened with destruction. The bill was denounced by Lord Percy as an attempt to take private property not for essential public purposes but “for purposes of sentiment, and it was difficult to see where that would stop.” Nevertheless, the measure became law in 1882—but without the compulsory purchase feature. It did not apply to inhabited buildings nor to church property. It was important legislation, however, for implicit in it was the notion that cultural property has two elements. It has economic value which belongs to the owner. It also has artistic or historical value which belongs to the nation. The statute implied that embedded in the 68 scheduled monuments was the history of Britain. In safeguarding this element, the nation was merely protecting what was the nation’s and not taking something from the owner. The statute remained modest until 1913 when a syndicate of Americans purchased the fifteenth-century Tattershall Castle and began dismantling it and selling it off piecemeal. The 1882 statute was then considerably strengthened and the Minister of Public Works was authorized to issue preservation orders for the protection of a scheduled monument. The Minister was also authorized to list buildings the preservation of which is a matter of public interest by reason of the

NATIONAL PARK SERVICE, *National Register of Historic Places 1966 to 1994 Cumulative List Through January 1, 1994*, Washington, National Park Service, 1994, p. vii.

¹³⁷ U.K. DEPARTMENT OF CULTURE, MEDIA AND SPORT, “Role of DCMS,” <<http://www.culture.gov.uk/role/intro.html>> (11/9/01); Since devolution has made its way, cultural heritage in Wales is under the jurisdiction of the Secretary of State for Wales which works with Cadw, the Welsh Historic Monuments, an entity analogous to English Heritage, and under the Royal Commission on the Ancient and Historical Monuments of Wales. In Scotland the Secretary of State for Scotland has jurisdiction and works in conjunction with Historic Scotland and the Royal Commission on the Ancient and Historical Monuments of Scotland. In Northern Ireland the Department of the Environment for Northern Ireland has jurisdiction. ABIMBOLA A. OLOWOFOYEKU, “Devolution: Conceptual and Implementational Problems,” in *Anglo-American Law Review*, 29 (2000), p. 137, defines devolution as the “delegation of governmental power without the relinquishment of sovereignty.”

historical, architectural, traditional, architectural or artistic interest attaching thereto. By 1931 some 3,000 ancient monuments—which could not include churches nor inhabited buildings—had been scheduled and by 1959 some 187 building preservation orders had been issued.¹³⁸

Today the Secretary of State for Culture, Media and Sport performs these functions and maintains two lists, scheduled monuments and listed buildings. “Listing” began in 1950 under the Town and Country Planning Act of 1944. Listed buildings are those found by the Secretary of State to be of aesthetic or historic value. In England listed buildings are divided into three grades, grade I (“of exceptional interest”), grade II* (“of particular importance”), and grade II (“of special interest”), based on the importance of the building concerned. This is determined partly by chronology. All pre-1700 buildings which survive in their original condition are listed. With respect to buildings dating from 1700 to 1840 listing is more selective. For buildings dating from 1840 to 1913 the requirements are more stringent and only those of high quality are listed. There is as well the “thirty year rule” under which such recent buildings are listed only if facing a threat and of significant quality to merit a grade I or grade II* status. Scotland has its own listing law and listing system. In general all buildings erected before 1840 which retain their original character will be listed and its listing categories differ from the English system. Category A includes buildings of national or international architectural or historic importance. Category B includes buildings of regional or more than local importance. Category C includes buildings of local importance or lesser examples of any other period or style or buildings which, if unaltered, would have been in a higher category.

Scheduled ancient monuments (mostly archaeological sites) may in no case be demolished or altered without receiving scheduled monuments consent. Where a building is listed (and by 1959 there were 73, 310 listed buildings), since 1967 the local planning authority has authority to grant or refuse permission to alter or demolish the listed structure. For the owner there is a right of appeal to the Secretary of State, who is advised by English Heritage. If the appeal is rejected, the owner can claim compensation if he can establish that because of the refusal the property has become “incapable of reasonably beneficial use” and serve a purchase notice on the local

¹³⁸ JOSEPH L. SAX, “Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England,” in *California Law Review*, 78 (1990), pp. 1549, 1554, 1566; DELAFONS, pp. 25, 29, 31, 79. The 1882 statute, the Ancient Monument Protection Act, is cited 45 & 46 Vict. c. 73; the 1913 Ancient Monuments Consolidation and Amendment Act, 3 & 4 Geo. 5, c. 32; the 1953 Historic Buildings and Ancient Monuments Act, 1 & 2 Eliz. 2, c. 49; the 1979 Ancient Monuments and Archaeological Areas Act, c. 46; the 1983 National Heritage Act, c. 47.

authority. In England fines for failure to comply with regulations may be levied of up to £20,000 and imprisonment of up to six months is possible, too. Movable heritage such as staircases, paneling, balustrades, door and window frames, wainscoting, and tiles are considered fixtures in England and are subject to listed building consent.¹³⁹

In England there are some 15,440 scheduled ancient monuments and some 443,000 listed buildings. Of these latter 9,000 are Grade I and 18,000 are Grade II* while 416,000 are Grade II. In Wales there are some 2,830 monuments and 12,256 listed buildings. In Scotland monuments number 6,138 and listed buildings of categories A and B number 28,317. In Britain for training centers to train craftsmen and conservators the Conference on Training in Architectural Conservation and the National Council for Vocational Qualifications have been active in this area. The Institute of Historic Building Conservation was established in 1997 as an umbrella agency for professionals in the historic conservation field. Members are bound by a code of conduct.¹⁴⁰

There are actually two bodies of legislation in Britain regulating modifications to heritage structures. The first is planning legislation, the Town and Country Planning Act 1990 and Town and Country Planning (Scotland) Act 1997 and their predecessors. This legislation covers only "development," defined not to include works to interiors. The Civic Amenities Act of 1967 introduced conservation areas or historic districts into British planning law. Conservation areas are those of special architectural or historic interest. The precincts of Westminster Cathedral are an example of a conservation area. Owners there need the consent of local planning authorities to demolish structures in such areas, which number some 9,000 today. In the Shimizu case the

¹³⁹ ROGER W. SUDDARDS, *Listed Buildings: The Law and Practice of Historic Buildings, Ancient Monuments, and Conservation Areas*, London, Sweet & Maxwell, 1988, p. 28; ENGLISH HERITAGE, "What Does Listing Mean?" <<http://www.english-heritage.org.uk/knowledge/conservation/whylist.asp>> (11/6/2001); ROYAL COMMISSION ON THE ANCIENT AND HISTORICAL MONUMENTS OF SCOTLAND, "About RCAHMS," <<http://www.rcahms.gov.uk/about.html>> (11/6/2001); HISTORIC SCOTLAND, *Scotland's Listed Buildings: A Guide for Owners and Occupiers*, n.d., Edinburgh, Historic Scotland, pp. 5-6. RUTH REDMOND-COOPER AND NORMAN PALMER (eds.), *Cultural Heritage Statutes*, Leicester, Institute for Art and Law, 1999, reprints in one handy volume of 306 pages the relevant British statutes affecting cultural heritage as well as the international conventions described in section 1.3.1 *supra*.

¹⁴⁰ EUROPEAN COUNCIL ON CULTURAL COOPERATION, "Report on Cultural Heritage Policies in Europe: United Kingdom," <<http://culture.coe.fr/pat/eng9698erev.htm>> (10/25/2001) pp. 2, 4-5, 7-9, 13; JOHN PENDLEBURY, "United Kingdom," in ROBERT PICKARD (ed.), *Policy and Law in Heritage Conservation*, London, Spon Press, 2001, pp. 294-295; INSTITUTE OF HISTORIC BUILDING CONSERVATION, "Objects of the Institute" and "Code of Conduct," <<http://www.ihbc.org.uk>> 7/18/2002).

House of Lords created a judicial exception so that planning consent is required for the demolition but not alteration of unlisted buildings in conservation areas. The historic preservation legislation, however, does include interiors and this legislation is embodied in the Planning (Listed Buildings and Conservation Areas) Act 1990 in England and Wales and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. Planning until the 1960's was interested largely with comprehensive redevelopment rather than conservation. Thereafter, a more integrated approach was taken and planning came to include conservation. This new approach was particularly fostered in 1970 when planning decisions, which had been a function of the Ministries of Housing and Local Government along with the Transport and Public Works Ministries, were combined and placed under the care of a single new Department of the Environment. At the same time the legal tools enjoyed by planners were increased. The 1944 Town and Country Planning Act had required owners of listed buildings to give notice of plans to modify them. Planners then had to secure a building preservation order to stop the proposed work. In 1968 the law was amended so that henceforth owners of listed buildings proposing to modify the structure needed to obtain listed building consent in order to alter the structure. As Circular 61/68 would declare, there was now a presumption in favor of preservation.¹⁴¹

1.3.3.2. The United Kingdom: The Ecclesiastical Exemption

There is in Britain a notable exception to the heritage (but not planning) laws known usually as the "ecclesiastical exemption." It dates back to 1913 and the passage of the Ancient Monuments Act and originally applied largely to Church of England structures used for worship. At that time the Archbishop of Canterbury, Randall Davidson, gave assurances that the Church of England's faculty jurisdiction would be reviewed so that "no harm shall arise to the ecclesiastical buildings whose value is so immeasurable" and a statutory exemption was grafted onto the act. This faculty jurisdiction is very similar to the "acts outside ordinary administration" of canon 1281, §1, for which a church property administrator needs a faculty from the ordinary in order validly to act. As of 1998 some 2,858 Church of England churches were listed Grade I (nearly 49 percent of the Grade I buildings) and a further 2,900 were listed Grade II*. Thus in the case of the Church of England the ecclesiastical exemption covers some of the nation's most important

¹⁴¹ SUDDARDS, *Listed Buildings*, p. 47; KATHRYN V. LAST and CAROLYN SHELBOURN, "Caring for Places of Worship? An Analysis of Controls Over Listed Buildings in England and Scotland," in *Art Antiquity and Law*, 6 (2001), pp. 113-115; Shimizu (UK) Ltd. v. Westminster City Council [1996] 3 W.L.R. 89; DELAFONS, pp. 59, 64, 82, 101.

historic buildings. As for listed Roman Catholic churches, there are some 39 Grade I buildings, some 109 Grade II* buildings, and some 502 Grade II buildings.¹⁴² The ecclesiastical exemption applies today to the Church of England and five other denominations including the Roman Catholic Church and applies only to places currently in use as places of worship. It serves a dual function and represents both a delegation of authority from the state to church bodies to make a state administrative decision and an exercise of ecclesiastical authority. A government report, usually known as the *Newman Report* in 1997 called for an end to the exemption but at this point it remains in place, upon conditions, by virtue of a 1994 statutory instrument, the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order. The conditions are that the proposed works to a listed building must be reviewed by a body independent of the local congregation or clergyman. That body must include people with expert knowledge of historic church buildings. The decision-making process must provide for consultation with planning and heritage authorities and the national amenity societies and there must be a public notice of details of the proposed work twenty-eight days before the meeting of the body to act on the proposal. There must also be an appeal process.¹⁴³

The ecclesiastical exemption is bottomed on three principles. The first is that a church is primarily for worship. The second principle is that successive generations have an interest in the church building, which they inherit from the past, hold as trustees for the present and pass on to the future so that the building is not the exclusive property of the congregation who worships there at any particular point in time. The third principle is that a church is a community building and so a feature in town or countryside and so there is a wider interest in how the building is cared for and what changes are to be made to it externally or internally. The result is that those "wider interest" views have to be taken into account where changes to the building are proposed.¹⁴⁴

¹⁴² I am grateful to Mr. Martin Foster of the Department of Christian Life and Worship of the Catholic Bishops' Conference of England and Wales for these statistics on listed Roman Catholic church buildings.

¹⁴³ See *A Review of the Ecclesiastical Exemption from Listed Building Control* conducted for the Department for Culture, Media and Sport and the Welsh Office by John Newman (September, 1997) and commonly referred to as the Newman Report. The conditions for exemption are set forth in section 8.4 and the religious bodies exempted are named in section 8.7 of DEPARTMENT OF THE ENVIRONMENT, TRANSPORT AND THE REGIONS, *Planning Policy Guidance Note 15*, which can be accessed at <<http://www.dreamwater.net/leamington/spawater/conservarea/ppg15b.html>> (4/2/02). The 1994 order is cited SI 1994/1771. The history of the ecclesiastical exemption is found in KATHRYN V. LAST, "The Privileged Position of the Church of England in the Control of Works to Historic Buildings: The Provenance of the Ecclesiastical Exemption from Listed Building Control," in *Common Law World Review*, 31 (2002), pp. 205-235.

¹⁴⁴ SHEILA CAMERON, "Re-ordering Historic Churches," in *Ecclesiastical Law Journal*, 6 (2001), p. 26.

Given these principles, it is necessary to consult the wider interest before making alterations to listed churches. This consultation has as its purpose to enable people to express their views. It is not necessary to have unanimous support to the proposed work. For it to proceed properly the proponent of the work must first answer three questions, why, how and when. First the proponent needs to identify the problems and the need for the change and then produce detailed plans and drawings showing how this is to be accomplished. Next he should present a feasibility study and give the approximate costs. Finally he needs to show when the work will be accomplished and point out any staging where this is done for cost reasons. In order for the work to go forward the proponent will need to show that the work is necessary for the pastoral well-being of the parish or for some other compelling reason. "Necessary" is "something less than essential but more than merely desirable or convenient." Once the question of need has been addressed, the next question is will the proposed work adversely affect the character of the church as a building of special architectural or historic interest. If so, the matter then becomes a balancing one of weighing the need against the adverse effect. Here a key aspect becomes whether the work is reversible. If fashion in liturgy changes, can the structure be restored to the *status quo ante*? Or at least can some of the material be salvaged and used in the structure or in a neighboring one?¹⁴⁵

The Church of England legislation has set the standard for procedures in other denominations. In the case of the Church of England, the faculty jurisdiction is regulated by Church of England legislation, enacted by the Church's General Synod and known as the Care of Churches and Ecclesiastical Jurisdiction Measure of 1991.¹⁴⁶ Where any alteration or extension of a church fabric is proposed, the church officials must first consult with the Diocesan Advisory Committee (DAC), a body of persons with knowledge of building history, liturgy, architecture, art and archeology appointed by the diocesan bishop after consultation with English Heritage, the local planning authorities and the amenity societies. The DAC considers each proposal and issues a certificate either recommending the work with or without provisos or declining to recommend it. In the case of a listed building, the matter then goes to the diocesan consistory court presided over

¹⁴⁵ CAMERON, "Re-ordering Historic Churches," pp. 31-33.

¹⁴⁶ For a rapid overview of the structures of the Church of England and its faculty jurisdiction, see PETER DELANEY, "The Legal Organization of the Church in England and its Relationship to the State," in *Österreichisches Archiv für Kirchenrecht*, 27 (1976), p. 234.

by the chancellor. He is a barrister with powers similar to those of the vicar general and judicial vicar in the Latin Church.¹⁴⁷

A judicial proceeding ensues begun by citation, which is displayed on the church building and published in a local newspaper. In the case of an alteration to a listed building, work affecting the archaeological importance of the church or demolition of an unlisted church in a conservation area (historic district), notice must also be given to English Heritage and the amenity societies. After the production of evidence, which may be presented in writing or orally at a hearing, the chancellor gives his decision. In order to succeed the proponent must prove that the work is necessary, which, as we have seen, means that the proposed work is "something less than essential but more than merely desirable or convenient." By contrast, absent heritage concerns the standard of proof is very different and the chancellor usually would grant the petition unless there are good reasons to say no. From the decision of the consistory court appeal lies to the metropolitan court, the Court of Arches or the Chancery Court of York. The Dean of the Court of Arches or the Auditor of the Chancery Court of York (who are the same individual) hears the appeal sitting with two diocesan chancellors.

A special measure governs works to cathedrals, the Care of Cathedrals Measure of 1990. Here each cathedral has a Fabric Advisory Committee which is akin to the DAC. Decisions on proposed works which would permanently alter the fabric or demolish any part of it or disturb archeological remains or dispose of any object designated as being of outstanding architectural, archaeological, artistic or historic interest requires the approval of a national body, the Cathedrals Fabric Commission. There are provisions for notice like those in the case of faculty jurisdiction and appeal lies to the metropolitan court.¹⁴⁸

The Roman Catholic Church is also exempt under the ecclesiastical exemption and has provided a set of procedures to enable it to continue to qualify for this exemption under the Ecclesiastical

¹⁴⁷ RHIDIAN JONES, *The Canon Law of the Roman Catholic Church and the Church of England: A Handbook*, Edinburgh, T&T Clark, 2000, p. 36, notes that the chancellor is appointed by the diocesan bishop after consultation with the Lord High Chancellor of England and the Dean of the Arches, who is the judge of the metropolitan court of appeal.

¹⁴⁸ MARK HILL, "Heritage and Holiness: Preserving the Balance with Buildings of the Church of England," in JOSEPH FOX (ed.), *The Administration of Church Property: A Jubilee International and Ecumenical Canon Law Conference*, Pittsburgh, Duquesne University The Law School, 2001, pp. 145-156. See also DELAFONS, pp. 119-129.

Exemption (Listed Buildings and Conservation Areas) Order of 1994. The Bishops' Conference of England and Wales has issued a *Directory on the Ecclesiastical Exemption from Listed Building Control*, the second edition of which appeared in 2001, establishing uniform procedures for the granting of the faculty required under canon 1281, §1. The ordinary of each diocese and religious institute in England and Wales then issued a decree which requires their subjects wishing to carry out works of extraordinary administration to a listed building to apply for a faculty pursuant to the *Directory*.

The *Directory* itself is under the oversight of the Conference's Sub-Committee for Church Patrimony. The *Directory* and its procedure apply to any listed church, oratory or chapel owned by a diocese or a public juridical person subject to the jurisdiction of the diocesan bishop and includes objects or structures within that building, unlisted objects or structures fixed to the exterior of that building, and unlisted objects within the curtilage of the building which, although not fixed, forms a part of the land. Also included is any listed ecclesiastical building which is for the time being used for ecclesiastical purposes and which is owned by a religious institute or society of apostolic life which has opted into the scheme described by the *Directory*. Relevant works include partial demolition, alteration, repairs or exterior work (but exclude total demolition) where the undertaking would affect the character of the relevant structure as a building of special architectural or historic interest or which would affect the archaeological importance of it. Like for like works of repair and maintenance generally do not require consent, however, and advice may be sought from the Historic Churches Committee on whether a faculty is needed.

While each diocese may have a Historic Churches Committee established by the bishop and with its own statutes, some dioceses share one. For example, the dioceses of the province of Southwark (plus Clifton in the province of Birmingham) employ the same committee and the dioceses of the (Welsh) province of Cardiff employ the same committee. Each committee acts by delegation from the bishop. The committee is to be independent and stable in its membership and is to include expertise from each area of interest upon which it is likely to need to rule. The model statutes of an Historic Churches Committee, for example, provides for representatives appointed for a three-year term from the art and architecture committee, the liturgical committee, the council of priests, a practicing architect with experience in conservation work on church buildings, a practicing artist with experience in work on churches, an architectural or art historian with knowledge of nineteenth or twentieth century ecclesiastical architecture and design, a person

with knowledge of the secular planning system, a vicar general, a person appointed after consultation with the national amenity societies, and a person appointed after consultation with English Heritage. Each committee has a chairman elected by the committee and a secretary appointed by the bishop. The secretary, who is not a member of the committee, needs to serve as the committee's executive arm and needs to be one versed in the planning system and its regulations as well as knowledgeable in the procedure of the *Directory*.

Where a significant alteration of a diocesan building is proposed, the applicant should obtain in advance the views of the diocesan Art and Architecture Committee and/or Liturgical Committee. In the case of a parochial building, the Parish Pastoral Council should be consulted. There may also be advance informal consultation with the Historic Churches Committee. The applicant then submits an application to the Secretary of the Historic Churches Committee using the standard form set forth in the *Directory* and including detailed plans and specifications and photographs. The Secretary of the Committee then gives notice of the proposed work which for 28 days must be posted on the exterior of the church and, unless the work concerns alterations to the interior of a Grade II listed building, the application must also be advertised in a local newspaper. Notice is also given to the local planning authority, to English Heritage or the Welsh Historic Monuments Commission, and to the six amenity societies. The observations of interested parties are then placed before the Historic Churches Committee for discussion and determination.

The Committee may approve, with or without provisos, or reject the application. If it approves the application, a faculty may not issue for 28 days from the date of the decision to enable interested parties to appeal. An interested party may appeal to the bishop against the decision of the Historic Churches Committee. Normally the bishop will not hear the appeal himself but will establish a commission of three persons to hear it on his behalf. This commission will include persons canonically qualified to preside at such appeals, professionals with experience of listed buildings, and persons involved pastorally with the care of church buildings. The Conference's Sub-Committee for Church Patrimony willingly advises bishops of suitable candidates for commissions. The appeal is lodged with the secretary of the Historic Churches Committee within 28 days of the date of the decision. The bishop then establishes the appeals commission within 28 days and the appeals commission hears the matter. Under canons 1734 and 1735 the "appeal" is a request to the bishop for emendation of a decision of his delegate. The Conference has also promulgated *Guidelines for Appeals*, which may be used in conjunction with this request for emendation. The procedure followed might be similar to that set forth for the oral contentious

process in canons 1656-1670. In at least one reported case from the Archdiocese of Cardiff, the appeal was successful and the proposed work was authorized with amendments.¹⁴⁹ Presumably an interested party feeling aggrieved of the second decision is free to pursue the procedure for recourse set forth in canons 1732-1739.¹⁵⁰

Scotland, while not a separate state in international law, is a distinct nation with its distinct laws and legal system and its own episcopal conference. The Scottish legal system is generally in fact viewed as a mixed common law-civil law country. Scotland also has its own scheme of heritage legislation. While the Scottish scheme is similar to the English scheme, it differs in some respects. Like the English system, section 54 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act of 1997, an act of the United Kingdom Parliament applicable to Scotland, creates, subject to the regulatory authority of the Secretary of State for Scotland, an ecclesiastical exemption for buildings used for worship. A procedure published by Historic Scotland provides guidance for a pilot scheme to control works to listed buildings in ecclesiastical use. The churches governed by this procedure enjoy exemption from listed building controls for their churches. The pilot scheme is intended to extend for the triennium from 1 January 2002 to 31 December 2004. It applies to some ten denominations, including the (Presbyterian) Church of Scotland, the Roman Catholic Church, the Scottish Episcopal Church, and the Methodist Church in Scotland. As in England, planning controls remain but the scheduled churches are exempt from aspects of listed building controls, provided that they undertake to implement their own regulatory scheme.

Under the Scottish scheme, the application proceeds to the local planning authority which has jurisdiction over planning permission and listed building consent. In the case of a category A or

¹⁴⁹ "Re St. Michael, Newport, Archdiocese of Cardiff Appeal Panel, 9/2001," in *Ecclesiastical Law Journal*, 6 (2001), p. 412.

¹⁵⁰ BISHOPS' CONFERENCE OF ENGLAND AND WALES, "Directory on the Ecclesiastical Exemption from Listed Building Control," <<http://www.liturgy.demon.co.uk/Pages/Hcdirect.html>> (1/6/2002) and BISHOPS' CONFERENCE OF ENGLAND AND WALES SUB-COMMITTEE FOR CHURCH PATRIMONY, "Guidelines for Appeals," at *ibid.* The "Directory" is reprinted below as Appendix 5 and the "Guidelines" as Appendix 6, with the permission of the copyright owner, the Catholic Bishops' Conference of England and Wales. It would seem that appeals of this kind constitute the only case in the English-speaking world where in the canon law of the Latin Catholic Church something akin to an administrative tribunal in the reference of canon 1400, §2, is to be found. KURT MARTENS, "La protection juridique dans l'église: les tribunaux administratifs, la conciliation, et du *due process*," in *Studia canonica*, 36 (2002), pp. 249-250, describes administrative tribunals and similar bodies established in Britain for the protection of rights. He makes no mention of Historic Churches Committees or their function under the Ecclesiastical Exemption and canon 1281, although their function would seem similar to others he describes.

B building, the planning authority must give notice of the proposed work to Historic Scotland to allow its Historic Buildings Inspectorate to consider the plan. In the case of category C(S) buildings, if the planning authority accepts the proposed work, the proposal is not notified to Historic Scotland. If the planning authority and the applicant cannot agree on the proposed work or, if Historic Scotland's Historic Buildings Inspectorate is not content with the proposed work and the applicant wishes to proceed with the proposed work, the matter goes before the Decision Making Body within the denomination concerned which then makes a final determination on whether the work is to proceed or not. The secretariat functions performed in England by the secretary of the DAC in Scotland are performed by the planning authority. The decision of the Decision-Making Body, presumably a national and not a local body, is final and there is no appeal procedure as in England.¹⁵¹

1.3.3.3. The Law of Cultural Heritage: The United States

In the United States cultural policy and the promotion of culture is more the province of civil society than of public authorities. Nevertheless, a welter of public agencies has been established to nurture culture. In a federal republic like that of the United States, they exist on both the federal and state levels. At the federal level, besides the Smithsonian Institution and its many bureaux—the National Gallery of Art, the National Portrait Gallery, and the John F. Kennedy Center for the Performing Arts—there is the National Endowment for the Arts and the National Endowment for the Humanities. In 1965 Congress enacted the National Foundation on the Arts and the Humanities Act, which set up both endowments to provide public funds for the encouragement of the arts and the humanities. Both agencies work with similar state arts and humanities councils, which have flourished after the advent of the federal agencies. Whereas in 1965 there were but 17 state arts councils, today there is one in each of the fifty American states. Most states also have a humanities council.

The National Historic Preservation Act of 1966 established the National Register of Historic Sites, which is maintained by the National Park Service, an agency of the United States Department of the Interior. In addition, in each of the fifty states there is a state historic

¹⁵¹ KATHRYN V. LAST AND CAROLYN SHELBOURN, "Caring for Places of Worship? An Analysis of Controls over Listed Buildings in England and Scotland," in *Art Antiquity and Law*, 6 (2001), pp. 129-131; HISTORIC SCOTLAND, *Pilot Scheme to Apply Listed Building Control for Exteriors of Churches in Ecclesiastical Use 2002 to 2004: Guidance Notes*, Edinburgh, Historic Scotland, May, 2002, pp. 5-6. I am grateful to Dr. Bangor-Jones of Historic Scotland for providing me with a copy of this document.

preservation officer and, since there are also some 130 recognized Indian tribes in the United States which in law are "domestic dependent nations" or autonomous federal exclaves,¹⁵² many of these autonomous tribes have tribal historic preservation officers and their own historic preservation laws. The National Historic Preservation Act also set up the Advisory Council on Historic Preservation as an independent federal agency to serve as a preservation watchdog and require federal agencies to give appropriate consideration to preservation values in their programs and expenditures.¹⁵³

In 1933 the American Buildings Survey catalogued some 12,000 structures in the United States and by 1970 half of these had been demolished. Concern for the cultural monuments of the United States in the wake of much destruction of them occasioned by federally-funded urban renewal and highway construction projects undertaken after World War II, led to the enactment in 1966 of the National Historic Preservation Act.¹⁵⁴ The act provides for the maintenance of the National Register of Historic Places by the Secretary of the Interior and it provides for the Advisory Council on Historic Preservation which is given authority to review and comment on all federal actions affecting properties listed or eligible to be listed on the National Register. Criteria making a place eligible for listing include: association with significant historical events or persons, representation of a distinctive type, period or method of construction or of a particular master's work, high artistic value or the likelihood of containing important historical or pre-historical information.¹⁵⁵ At least one author has suggested that a similar statute be enacted to

¹⁵² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 at 17 (1831); GORDON K. WRIGHT, "Recognition of Tribal Decisions in State Courts," in *Stanford Law Review*, 37 (1985), p. 1401. For an interesting work tracing American federal Indian law back to the decretal *Quod super his* of Innocent IV, see ROBERT A. WILLIAMS, JR., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence," in *Wisconsin Law Review* (1986), p. 219.

¹⁵³ LEONARD D. DUBOFF, *Art Law in a Nutshell*, 2d ed., Saint Paul, West Publishing Co., 1993, p. 158. On the Council see BRIT ALLAN STOREY, "The Advisory Council on Historic Preservation: Its Role in the Developing American Preservation Program," in JOHNSON AND SCHENE, *Cultural Resources Management*, pp. 21-48.

¹⁵⁴ 16 U.S.C. §§ 470-470w.

¹⁵⁵ JOHN A. GOSE AND ROBERTA R. KATZ, "Historic Buildings—Law and Practice in the United States," in *Real Property, Probate and Trust Journal*, 19 (1984), pp. 577-78. Cultural property is also protected by the requirement for the preparation of environmental impact statements of the National Environmental Policy Act, 42 U.S.C. §§4321-4347, and "section 4(f)" of the Department of Transportation Act, 49 U.S.C. §303, which forbids the Secretary of Transportation to proceed with an project adversely affecting the cultural heritage unless "there is no feasible and prudent alternative", and the Archeological Resources Protection Act of 1979, 16 U.S.C. §§470aa-mm.

protect works of art using a National Art Register maintained by the National Endowment for the Arts. The statute would provide for a right of access to privately-held works of art and there would be penalties for the physical abuse or neglect of nationally designated works of art.¹⁵⁶

At the same time that the federal legislation was improved in the 1960's, state and local governments were becoming increasingly active in the preservation of historic sites. The Minnesota Environmental Rights Act, for example, might be used to challenge the destruction of heritage. It gives a cause of action for declaratory or equitable relief to any Minnesota person for the protection of natural resources, defined to include historical resources, located within the state and grants the defendant the affirmative defense that there is "no feasible and prudent alternative" to the proposed conduct. There have also been a number of statutes forbidding the mutilation or destruction of art.¹⁵⁷

Generally more helpful than state laws are local ordinances. It is estimated that there are some 2,000 local preservation ordinances. These vary widely but in general they establish an historic preservation commission with power to review and deny requests to alter, demolish or remove historic sites or sites located in historic districts.¹⁵⁸ The upshot is that today there is a web of regulation on all three levels of government. Sometimes local regulation works in tandem with National Register designation and sometimes there is a state register of historic sites which is independent of the National Register. Moreover, while the placement of sites on the National Register remains a federal function, the faculty to nominate for placement on the National

¹⁵⁶ NICOLE B. WILKES, "Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute," in *Columbia-VLA Journal of Law and the Arts*, 24 (2001), p. 208.

¹⁵⁷ Minnesota Statutes §§ 116B.02-116B.04. The Minnesota Statute is based on Professor Joseph Sax's Model Environmental Protection Act, which has been enacted in Michigan as the Michigan Environmental Rights Act, Michigan Comp. Laws Ann. § 691.1201-07. During the first two decades after its enactment in 1971 only three of thirty cases invoking the Minnesota statute did so for its scenic and aesthetic provisions. TIMOTHY S. MURPHY, "Environmental Law—Protection of Scenic and Aesthetic Resources Under the Minnesota Environmental Rights Act," in *William Mitchell Law Review*, 17 (1991), p. 1191. The leading case under the act seems to be *State ex rel. Wacouta Township v. Brunkow Hardwood Corp.*, 510 N.W. 2d 27 (Minn. Ct. App., 1993) where the Minnesota Court of Appeals upheld an injunction granted under the act enjoining the disturbing of eagle roosts by the felling of trees under contract on privately-held land. Minnesota Statutes §138.51 further declares that "it is in the public interest to provide for the preservation of historic sites." Minnesota Statutes §138.664, subd. 99, includes on the state register of historic places St. John's Abbey and University Historic District, and so provides protection for the unusual Marcel Breuer abbey church there.

¹⁵⁸ JULIA H. MILLER, "Historic and Cultural Resources Protection under Historic Preservation Laws," in HUTT ET AL., *Heritage Resources Law*, p. 25.

Register came to be delegated to state historic preservation officers (called SHPOs), who are often officials of state historic preservation bodies. The federal aspect of this regulation tends to be limited to reviewing federally funded projects which affect sites on the National Register. Review is intended merely to promote reasoned discussion of the effects of such projects and a weighing of the benefits and burdens of going forward with the proposed project.¹⁵⁹

National Register sites tend to fall into two types. They are either landmarks (or individual sites listed on the Register) or historic districts which are entire geographical areas of historic significance. Generally a landmark will not be listed on the National Register against the wishes of its owner. A property within an historic district may, however, find itself so listed without any special notice of its status. Even a vacant lot located within an historic district may be included within its restrictions in order to preserve the historic quality of the district.¹⁶⁰ Whereas in 1978 only some 500 municipalities had enacted local preservation ordinances, today there are some 2,200 local preservation ordinances.¹⁶¹

Property owners have sometimes attacked such designations as restrictive of their rights as property owners. *Berman v. Parker* upheld the power of the states to enact historic preservation laws.¹⁶² One of the leading cases is the *Penn Central Transportation Co. v. City of New York* case in which the court held that the application of New York City's Landmarks Preservation Law to Grand Central Terminal in New York City did not amount to an unconstitutional taking of private property without just compensation.¹⁶³ The railroad had requested a certificate of appropriateness either to build a fifty-five-story office tower over the Terminal or to tear down part of it and build the tower on that land. The Landmarks Preservation Commission denied the railroad its certificate. The United States Supreme Court upheld the Commission's action and declared that it did not constitute a unlawful taking within the meaning of the United States

¹⁵⁹ NICHOLAS A. ROBINSON, "Historic Preservation Law: The Meets and Bounds of a New Field," in *Pace Law Review*, 1 (1981), p. 515.

¹⁶⁰ The creation of such districts with respect to the Vieux Carré district in New Orleans was upheld as a valid exercise of state power in *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976).

¹⁶¹ GEORGE B. ABNEY, "Florida's Local Historic Preservation Ordinances: Maintaining Flexibility While Avoiding Vagueness Claims," in *Preservation Law Reporter*, 18 (1999), p. 1009.

¹⁶² 348 U.S. 26 (1954).

¹⁶³ 438 U.S. 104, 98 S. Ct. 2646 (1978).

Constitution since it did not prevent the owner from realizing a reasonable return on its investment. It has also been held that the inclusion of a property in the National Register of Historic Places does not amount to a taking.¹⁶⁴

A large amount of litigation over historic preservation laws has been generated under freedom of religion claims. Perhaps the most celebrated case in this regard was the case of Saint Bartholomew's Church on Park Avenue in New York City. The church was designed in 1917 by the celebrated architect Bertram Goodhue, sometime partner of Ralph Adams Cram. The New York City Landmark Preservation Commission designated the church as a landmark in 1967, finding the church's architectural details "to be the finest of their kind in the City." Next to the church is its seven-story community house constructed in 1926 by Goodhue's successor firm. It too was designated as a landmark. To raise money for \$11,000,000 in repairs on the church and for its spiritual mission the church proposed to demolish the house and replace it with a fifty-five-story tower. A member of the Landmark Preservation Commission said the fifty-five story glass tower looked like "nothing so much as a noble work of man about to be crushed beneath a gargantuan ice cube tray," and the permit was refused.¹⁶⁵ The church then litigated the matter alleging unconstitutional abridgment of freedom of religion and an unconstitutional taking of property without due process of law. The court denied both claims.¹⁶⁶

The leading case on the "takings" issue is a New Orleans case in which the owner of a cottage in the city's Vieux Carré district was denied a demolition permit to raze the cottage and replace it with a seven-unit apartment building. There the court denied the owner's claims, holding that an unlawful taking does not occur merely because an owner is deprived of the maximum economic benefit of his property.¹⁶⁷ In *Society for Ethical Culture v. Spatt*, the Society challenged a

¹⁶⁴ *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va., 1980).

¹⁶⁵ NORMAN TYLER, *Historic Preservation: An Introduction to its History, Principles and Practice*, New York, W. W. Norton Co., 2000, p. 59.

¹⁶⁶ *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y., 1989), aff'd 914 F.2d 348 (2d Cir.), cert. den. 111 S. Ct. 1103 (1991). On St. Bartholomew, see BRENT C. BROULIN, *The Battle of St. Bart's: A Tale of the Material and the Spiritual*, New York, William Morrow & Co., 1988. See further MELANIE E. HOMER, "Landmarking Religious Institutions: The Burden of Rehabilitation and the Loss of Religious Freedom," in *The Urban Lawyer*, 28 (1996), p. 327 and TED L. WILLS, "Religious Landmarks, Guidelines for Analysis: Free Exercise, Takings, and Least Restrictive Means," in *Ohio State Law Journal*, 53 (1992), p. 211.

¹⁶⁷ *Maier v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975).

landmark designation arguing that it would effectively bar it from putting the building to its most lucrative use. Following *Maier*, the New York Court of Appeals held that the United States Constitution does not guarantee a landowner the most beneficial use of his property.¹⁶⁸

Following these cases, Congress in 1993 enacted the Religious Freedom Restoration Act, which attempted a statutory extension or interpretation of the religious freedoms guaranteed by the First Amendment of the United States Constitution.¹⁶⁹ The federal statute required that, in enforcing restrictions on religious entities, a state and local government permit religious conduct unless it could prove it had a compelling interest in applying the regulation and that the governmental restriction was the least restrictive means open to achieve its compelling interest. Where the state or local regulation could not meet both tests, it was held inoperative. The validity of the federal statute was quickly called into question when Saint Peter's Catholic Church in Boerne, Texas, was denied a building permit which would have damaged the exterior of its historic church. The Archbishop of San Antonio, who held civil title to the structure as corporation sole, invoked the federal statute and sued to force the City to comply with it and issue the permit. The United States District Court held that the federal statute was unconstitutional and the United States Supreme Court agreed.¹⁷⁰

A few states have applied freedom of religion clauses more restrictively and have held otherwise. In *First Covenant Church v. City of Seattle*¹⁷¹ the Washington State Supreme Court overturned a landmark designation as violative of the Free Exercise of Religion clause of the state constitution. Following this case the Washington Supreme Court in another case upheld a landmark designation but prohibited enforcing the preservation regulation until the building was no longer used primarily for religious purposes.¹⁷² The other notable case upholding Free Exercise

¹⁶⁸ *Society for Ethical Culture v. Spatt*, 415 N.E. 2d 922 (N.Y. 1990).

¹⁶⁹ 42 U.S.C. § 2000bb et seq.

¹⁷⁰ *Flores v. City of Boerne*, 877 F. Supp. 355 (1995), rev'd *Flores v. City of Boerne*, 73 F3d 1352 (5th Cir, 1996) but aff'd *Flores v. City of Boerne*, 117 S. Ct. 2157 (1997). A narrower statute, the Religious Land Use and Institutionalized Persons Act of 2000, was enacted in place of the 1993 law. 42 U.S.C. 2000cc. As for Saint Peter Church, Boerne, once the question of the federal statute had been resolved, the pastor and the City of Boerne quickly settled on an alternative design which did not destroy the historic character of the structure and the City issued the building permit. DOUGLAS LAYCOCK, "Conceptual Gulfs in City of Boerne v. Flores," in *William and Mary Law Review*, 39 (1998), p. 785.

¹⁷¹ 787 P.2d 1352 (Wash, 1990), vacated and remanded, 111 S. Ct. 1097 (1991), and decided on state grounds in 840 P. 2d 174 (1992).

¹⁷² *First United Methodist Church v. Seattle Landmarks Preservation Board*, 887 P.2d 473 (Wash. 1995).

concerned the interior of a Jesuit church in Boston. The Society of Jesus proposed to convert the Immaculate Conception church from worship into office, counseling and residential space. The Boston Landmarks Commission then designated portions of the interior of the church a landmark. The Massachusetts Supreme Judicial Court overturned this designation as restricting the Jesuits "from worshipping ...in the manner and season most agreeable to the dictates of [their] own conscience." The court found historic preservation worthwhile but, when balanced against religious freedom, decided the former had to yield to the latter.¹⁷³

The most comprehensive historic preservation legislation in the United States stems from local or municipal legislation. Some 2,200 municipalities have local preservation ordinances.¹⁷⁴ Philadelphia in 1955 was one of the earliest such ordinances which was citywide in scope and Philadelphia's ordinance might prove of interest as typical of such ordinances. Usually under these ordinances a quasi-judicial historic commission with expertise in historic architecture determines that certain sites, structures or districts are historically significant and the law then requires that the owner of the property must then obtain prior approval before the property is altered or demolished. Ordinances may also authorize certain bodies to issue orders for repairs in order to avoid "demolition by neglect."

The current Philadelphia ordinance dates to 1984 when the original ordinance was integrally revised. The powers are exercised by the Historical Commission which is appointed by the City's Mayor and includes a historic preservation architect, a historian or architectural historian, a real estate developer, a community development corporation representative, a representative of a community organization and two other persons learned in the historic traditions of the city. It includes as well certain ex officio members including the President of the City Council, the Director of Commerce, the Commissioner of Public Property, the Commissioner of Licenses and Inspections, the Chairman of the City Planning Commission, and the Director of Housing or their

¹⁷³ *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E. 2d 571 (1990). See further MELANIE E. HOMER, "Landmarking Religious Institutions: The Burden of Rehabilitation and the Loss of Religious Freedom," in *The Urban Lawyer*, 28 (1996), p. 342 and CHRISTOPHER D. BOWERS, "Historic Preservation Law Concerning Private Property," in *The Urban Lawyer*, 30 (1998), pp. 405, 434; ANGELA C. CARMELLA, "Landmark Preservation of Church Property," in *Catholic Lawyer*, 34 (1991), p. 41; DOUGLAS LAYCOCK, "State RFRAs and Land Use Regulation," in *University of California at Davis Law Review*, 32 (1999), p. 753 and cases cited in "Preservation Law Summary: The Establishment Clause," in *Preservation Law Reporter*, 18 (1999), p. 1037.

¹⁷⁴ A useful bibliography of historic preservation literature is GAIL I. WINSON, *Historic Preservation Law: An Annotated Survey of Sources and Literature*, Littleton, CO, Fred. B. Rothman & Co., 1999.

designees. The powers of the Philadelphia Historical Commission include the power to designate historic sites, objects, and buildings and delineate the boundaries of historic districts, prepare an inventory of these, review applications to alter or demolish any designated sites, objects or buildings and sites within historic districts. To be eligible for designation an item must have significant character, interest or value as part of the City's heritage. Before a property can be designated, notice of the proposed designation, including reasons for the designation, must be sent to the owner thirty days before the public meeting at which the designation is to be proposed. Any interested party may submit evidence at the public meeting. If at the meeting the Commission votes to designate the property, it is to be included in the register of historic sites which is open to public inspection both at the Commission's office and at the Department of Licenses and Inspections. There is also provision for the amendment or rescission of a designation. To alter or demolish a designated property the owner needs a permit from the Commission. The Commission, within sixty days of application, must decide to approve or deny the grant of the permit or it may order a six-month delay in alteration or demolition. If the owner can show that the property cannot be used for any purpose for which it is or may be reasonably adapted or that withholding the permit would cause unnecessary hardship, the Commission must grant the permit. The ordinance also provides for a duty to maintain the exterior of designated properties. Appeals from decisions of the Commission go to the Board of Licensing and Inspections Review and, having exhausted administrative remedies, to judicial review.¹⁷⁵

1.4. Conclusions

We can conclude this chapter with a distillation of fundamental principles of cultural property law as it has developed largely in the twentieth century. One of the problems of the law of cultural property is that international law knows no generally accepted definition of cultural property. The 1954 and 1970 UNESCO conventions, as we have seen, have rather different approaches. It has been said that the 1954 convention takes a "common heritage of mankind" or internationalist

¹⁷⁵ CHARLOTTE E. THOMAS, "New Steps to Preserve the Old: The Revised Historic Preservation Legislation for the City of Philadelphia," in *Villanova Law Review*, 32 (1987), pp. 402, 416, 427, 430-439, 441. This article includes much comparative material and forms a good indication of the variety of such municipal ordinances. The standard in the Philadelphia ordinance for a constitutional "taking" and so for a mandatory grant of the permit comes from *Maier v. City of New Orleans*, 516 F 2d 1051 (5th Cir., 1975), a case noted above and followed by the Pennsylvania Commonwealth Court in *First Presbyterian Church of York v. City Council of York*, 25 Pa. Commw. 154, 360 A 2d 257 (1957).

approach, whereas the 1970 convention takes a nationalist approach. In practice cultural property is what experts find it to include. We have, moreover, seen that the canon of cultural property has tended to expand and, in the twentieth century, it has expanded greatly. From classical (Greek and Roman) antiquities, it expanded to include Renaissance (European) art and later Baroque (European) art and later Oriental art and “primitive” or ethnic art. More recently vernacular art has begun its rise, helped in part by the Women’s Movement, which has promoted vernacular art forms like the quilt. There has also been a move to include intangible cultural heritage and this has led to a call for the abandonment of the term “cultural property” and its replacement by “cultural heritage.” Whether the law is served by this continued expansion is another question. By continuing to expand the canon one increases the chance that different cultural groups will compete for the same cultural object. At the same time by restricting itself to property—objects—the law may manage to avoid the spread of such conflicts.¹⁷⁶

We may note some distinctive features of cultural property. The context of an object it is argued is important. This is especially clear in the case of archeological sites where an object may have no cultural value apart from the site. The very term “cultural property” should make it clear that cultural property is related to culture and it is important therefore to see that cultural property is generated by cultures, by people. This helps distinguish the cultural heritage from the natural heritage, even if the 1972 UNESCO Convention covers both. And that it is “heritage” underscores that it is an inheritance from the past (and the present) and this underscores the legal duty to pass it on to the future.¹⁷⁷ Cultural property is generally delimited as being of “significance.” This is a difficult term to apply in practice, for someone must decide what is significant and in practice this determination is usually left to experts. But significance is a necessary delimitation unless all man-made objects are to be deemed cultural objects.¹⁷⁸

It is helpful to remember that cultural property includes not only works of art but also objects of historical interest. For this reason the state of preservation is not always key to its cultural value.

¹⁷⁶ FRANK G. FECHNER, “The Fundamental Aims of Cultural Property Law,” in *International Journal of Cultural Property*, 7 (1998) p. 378; JANET BLAKE, “On Defining the Cultural Heritage,” in *International and Comparative Law Quarterly*, 49 (2000), p. 63 also notes that “cultural heritage as a concept has grown so far that it may well have become greater than the sum of its constituent parts”. Further, at p. 64 she admits that “there is great difficulty in identifying the exact content and nature of intangible cultural heritage to be protected.”

¹⁷⁷ FECHNER, “The Fundamental Aims,” p. 379; BLAKE, “On Defining,” p. 69.

¹⁷⁸ FECHNER, “The Fundamental Aims,” p. 380.

An object lacking artistic value may have historic value. Nor is an object's economic value primary, even though some cultural property exports laws make use of threshold economic values for ease of administration. Nor is age *per se* a necessary element of cultural property, even if a "fifty year rule" or "hundred year rule" is of use for ease of administration.¹⁷⁹

Cultural property is distinguished by its social aspect and it is this aspect that justifies public interference in what is often private property. Because of this social aspect, cultural property law usually provides for public access to it. At the same time its cultural character makes it of interest to scholars for research purposes to expand the corpus of knowledge about human existence. This is particularly clear in the case of archaeological sites and archives and libraries, but it applies to other types of cultural property as well. The significance of an object as cultural property requires that it stem from and be related to a culture. Indeed, the peculiar characteristic of cultural property is that it helps to form the identity of individuals, groups, societies. It is both the symbol of cultural identity and an essential element in the construction of an identity. It is this linkage with cultural identity which at the same time gives rise to the duty to preserve it and the right the benefits of it.¹⁸⁰

But to which culture can be a thorny question. Does long residence at Woburn Abbey make Antonio Canova's *Three Graces* a national treasure to Britain such that the sculpture's export is proscribed under Britain's cultural property export norms? More complex is the question of who has the superior right to "Priam's Treasure," created by Anatolian Greeks and discovered millennia later in what had become the land of the Turks by Heinrich Schliemann and then removed to Germany until the Red Army lead to its removal to Russia in part as an indemnity for the massive and intentional destruction of Russian cultural property by the Germans. Such disasters, of course, are by no means things of the past and happened recently in the former Yugoslavia where the various combatants made war on their opponents' cultural objects as well as on their opponents. It also happened in Afghanistan where the Taliban government for religious reasons destroyed venerable Buddha sculptures.¹⁸¹

¹⁷⁹ Ibid., p. 381-382.

¹⁸⁰ BLAKE, "On Defining," p. 84

¹⁸¹ DARIO GAMBONI, "World Heritage: Shield or Target?" in *Conservation: The Getty Conservation Institute Newsletter*, 16 (Summer, 2001), pp. 5-6 <http://www.getty.edu/cgi-bin/getty_print.pl> (2/23/02).

In the course of this chapter on culture and the right to culture we have seen the wide ranging participation of the Holy See in the development of the international law of cultural property. The depredations sustained during the Napoleonic Wars—which were particularly severe on the part of the Holy See—crystallized the rule of customary international law that cultural property was not subject to the right of prize in war time. This rule would be codified in the 1899 and 1907 Hague Conventions. In 1951 the Holy See became a member of UNESCO and in 1958 it acceded to the 1954 Hague Convention and to its first Protocol. In 1982 the Holy See acceded to the Paris World Cultural Heritage Convention which seeks to protect cultural property in peacetime. It participates in UNESCO, ICCROM, the WTO, and ICOMOS. In fine, the Holy See has been an active player in the development of the international law of cultural property and we have seen, as a subject of international law, it has come to assume rights and duties with respect to its care and protection.

It was, therefore, sad to read the admission of the Congregation of the Clergy that the Church's internal law had failed to secure the protection of much of the Church's property after the Second Vatican Council. In 1969 the Congregation for the Clergy was forced to note that,

Christ's faithful lament as they perceive—much more than in the past—the many undue alienations, thefts, usurpations, destructions of the historico-artistic heritage of the Church. Many, indeed, unmindful of the warnings and dispositions which the Holy See has issued, have used the pretext of the very execution of the liturgical restoration to carry out incongruous changes in sacred places and to destroy and scatter about priceless works of art.¹⁸²

In order to see how the Church's internal law might have failed to live up to her international obligations, we need to look to her canon law and in particular the canon law of *res pretiosa* and trace its development. That will be our task in Chapter 2.

¹⁸² SACRED CONGREGATION FOR THE CLERGY, circular letter *Opera artis*, 11 April 1971, in *AAS*, 63 (1971), pp. 315-316; English translation in *CLD*, 7, p. 822.

Chapter 2. Res pretiosa, the Development of the Term

If one looks to the sources of canon 1292, §2 and its predecessor which forbids the alienation of valuable church property without the permission of the Holy See, one is directed to a fifteenth century decretal which came to form a part of the *Extravagantes communes*. The decretal introducing the prohibiting norm was the famous bull, *Ambitiosae*, promulgated in 1468 by Pope Paul II (1464-1471).¹ This apostolic constitution forbade churches, monasteries and pious places to alienate or by any contract directly or indirectly to transfer ownership (*dominium*) or use of their immovable or valuable movable property (*immobilia et pretiosa mobilia*) without certain legal formalities and without the prior permission of the Roman Pontiff. Those acting contrary to the bull were automatically excommunicated. In the case of prelates, they were also placed under interdict and, if within six months they had not repented, they incurred suspension from all ecclesiastical offices and were also deprived of their ecclesiastical benefices, which then became vacant and might be filled by whomever had the right to do so.²

The bull *Ambitiosae* was careful to say what it meant by “church property” and “alienation” and also who was subject to the legislation. Yet despite the severe penalties it threatened, it did not define what “valuable movable property” meant.³ The specter of “void for vagueness” was

¹ PAUL II, decretal *Ambitiosae*, 1 March 1468, in AEMILIUS FRIEDBERG (ed.), *Corpus iuris canonici*, editio Lipsiensis secunda, 2 vols., Lipsiae, Ex Officina Berghardi Tauchnitz, 1922, II, p. 1269. The text of this decretal is set forth in Appendix 1. Paul II had the care of Church's patrimony as something of a project for his pontificate. In 1466 he declared, *Cordi nobis est iura Camerae Apostolicae non modo conservare sed, ubi cum honestate et iustitia possit, ubilibet ampliare*, we have at heart not only to preserve the rights of the Apostolic Camera but where it can be done with honor and justice, everywhere to extend them. IAN ROBERTSON, *Tyranny under the Mantel of St. Peter: Pope Paul II and Bologna*, Late Medieval and Early Modern Studies 5, Turnhout, Brepols Publishers, 2002, p. 7.

² MARTINO BONACINA, *Opera omnia in tres tomos distributa*, 3 vols., Lugduni, Sumptibus FFr Anissonionem et I. Posvel, 1678, I, p. 708, commenting on the key place of this apostolic constitution, says alienation of church property is prohibited: “iure canonico, pluribus in locis praesertim in Concil. Trid. Sess. 22, cap. 11 et in extravag. *Ambitiosae*, de rebus Ecclesiae non alienandis, ubi non solum innovantur iura alienationem prohibentia verum etiam specialiter interdicetur et irritatur alienatio bonorum Ecclesiae, monasterium et locorum piorum tam immobilium quam mobilium pretiosorum quae servando servari possunt, si alienatio fiat inconsulto Summo Pontifice.” MARCELINO CABREROS DE ANTA, “La enajencion de bienes eclesiasticos,” in CONSEJO SUPERIOR DE INVESTIGACIONES CIENTIFICAS INSTITUTO ‘SAN RAIMUNDO DE PEÑAFORT’, *El patrimonio eclesiástico: estudios de la tercera semana de derecho canonico*, Salamanca, 1950, p. 161, says: “la Constitución ‘*Ambitiosae*’ ha sido el pilar granítico e inmovible sobre el que se ha apoyado la legislación canónica durante cerca de cinco siglos, o sea, hasta la promulgación del nuevo Código, y aun en éste aparecen hondos vestigios de aquella recia disciplina, además de papitar en él todo su espíritu y de quedar estereotipada alguna de sus frases.”

³ FRANCISCO SUAREZ, *Opera Omnia*, editio nova a M. André et Carolo Berton, 28 vols., Paris, Apud Ludicum Vives, 1856-78, VI, p. 255 states: “non invenio in iure declaratum neque ab auctoribus de illa re

happily overcome, however, because the term was well known in the canonical tradition. Fortunately, canonists then and since have recognized *res pretiosa* as a term of art. Whilst meaning literally “valuable” movable property, it had its own well-known proper meaning in Roman law. Hence, canonists have seen in *Ambitosae* an implicit canonical reference to a famous use of that term in an imperial constitution of Constantine on tutors and so have looked to the imperial constitution as a parallel passage for assistance in understanding the import of the apostolic constitution. Thus, to elaborate the meaning of *res pretiosa* we need likewise to resort to this parallel passage in Roman law for the proper meaning of *res pretiosa* and its elaboration there by outlining the Roman law of tutors.⁴ Next we will trace the debt of canon law to Roman law before looking at the development of canon law and the rise of the Roman Pontiff as its supreme legislator with the power to enact legislation like *Ambitosae*. This decretal marked at the same time a *volte face* from the millennium-old canonical norms and a codification of the canonical practice of recent centuries. Thereafter, we will look at the elaboration of the canon law of *res pretiosa*, certain civil law developments, the codification in the 1917 Code of Canon Law, and the effects of Vatican II.

2.1. The Proper Meaning

Sometimes more important than the use of rules of Roman law was the import into canon law of Roman legal concepts. One of the most important legacies of Roman law to canon law has been the concept of the tutor. *Tutela* was an authority, given by the civil law, for the protection of a free person who because of his age or other condition was unable to protect himself. It was related to the Roman concept of *patria potestas*, the power which the *paterfamilias* or male head of a Roman family had over the free subordinate members of his household. Early on this power included *ius vitae necisque*, which gave the *paterfamilias* the right to put his children to death as well as the power to betroth, marry and divorce his children or to imprison or sell them into slavery. Sons or other persons *alieni iuris*, by contrast, could not own property and even their

certa regula assignatur praeter quaedam exempla ex l. Lex, C. de Adminisr. Tut.—referring to the imperial constitution of Constantine discussed below.

⁴ Pope Alexander III in a decretal, X. 1.41.1, of an unknown date declared, “You know that it is not lawful for a bishop to cause loss to his church, and that the church should always be kept unharmed, according to the law relating to minors.” MARY CHENEY, “Inalienability in Mid-twelfth-century England: Enforcement and Consequences,” in STEPHAN KUTTNER and KENNETH PENNINGTON (eds.), *Proceedings of the Sixth International Congress of Medieval Canon Law, Berkeley, California, 28 July-2 August, 1980*, Città del Vaticano, Biblioteca Apostolica Vaticana, 1985, p. 467.

peculium (property given them by the father to manage) in law belonged to the father and his was any right of action with respect to the *peculium*. *Patria potestas* was extinguished by the death of the *paterfamilias* or *filiusfamilias* or by emancipation when the son became *sui iuris*.

Romans in classical law achieved their majority at age twenty-five and, in a society like theirs, which was frequently at war, a *paterfamilias* might die before his sons had reached that age. Hence, the law developed the means by which a father might by will appoint a guardian for his children. This guardian was called a *tutor testamentarius*. The testamentary appointment, however, might fail or the appointee might die and so the law also developed another type of tutor called the *tutor legitimus*, a guardian chosen by the magistrate from among the ward's nearest agnates or male relatives descended through the male line. Women, like minors, were not regarded as *sui iuris* and so they too had their tutors but for our purposes the most important type of *tutela* was that of minors, *tutela impuberum*.

Infants, originally those youngsters unable to speak, were incapable of any legal act. Once the minor had achieved the age of reason, however, he could participate in a legal act. But if the transaction was to be enforced against him, his judgment had to be supplemented by the authority of his tutor. This *auctoritatis interpositio* was necessary both to bind the ward to the contract and to release the other party when completing his part of the bargain to the ward. The characteristic feature of *auctoritatis interpositio* was that it did not render the tutor a party to the transaction. The act and its direct consequences appertained to the pupil. The tutor incurred no responsibility to the other party, though by giving *auctoritas* improperly he incurred liability to the pupil.

With respect to his ward's property, the tutor had not the power of the *paterfamilias*, but rather he had the duty to act in the interests of his ward. Generally he could manage the property of his ward and had to make an inventory of the ward's estate and file reports of his administration of the ward's property. He could not, however, act both as principal and tutor with respect to his ward's property nor alienate his ward's landed property. For his part, the ward might have an action against the tutor called an *actio de rationibus distrahendis* and for remedy receive double the value of anything embezzled by the tutor, if the latter had acted improperly. The upshot was that the tutor became a fiduciary charged with managing the estate of his ward in the ward's best interest.⁵

⁵ ALAN WATSON, *The Law of Persons in the Later Roman Republic*, Oxford, Clarendon Press, 1967, pp. 77, 98-101, 113, 117, 132-134, 139; ADOLF BERGER, *Encyclopedic Dictionary of Roman Law*,

On the Ides of March 326 A.D. the interests of the ward were further secured when the Emperor Constantine by imperial constitution laid down that in the future and in the interest of preventing fraud guardians, under pain of nullity, were not to sell and reduce to money the gold, silver, jewels and other valuable personal effects (*mobilia pretiosa*) as well as urban estates and slaves of their wards unless required to do so by necessity and pursuant to judicial investigation and decree. Under this constitution as codified by Justinian, guardians might, however, sell superfluous farm animals and what could not be preserved (*quae servando servari non potuerint*). Nor was the tutor to pledge the ward's property nor give it by way of donation *causa matrimonii vel dotendi*.⁶

The legislation explained its rationale in this way,

Philadelphia, American Philosophical Society, 1953, pp. 767-748; FRANCIS DE ZULUETA, *The Institutes of Gaius; Part II Commentary*, Oxford, Clarendon Press, 1968, p. 49.

⁶ C. V, 37, 22. The text, in relevant part is: "*Lex, quae tutores curatoresque necessitate adstrinxit, ut aurum, argentum, gemmas, vestes, ceteraque mobilia pretiosa, urbana etiam mancipia, domos, balnea, horrea atque omnia intra civitates venderent omniaque ad nummos redigerent praeter praedia et mancipia rustica, multum minorum utilitati adversa est. Praecipimus itaque, ut haec omnia nulli tutorum curatorumve liceat vendere, nisi hac forte necessitate et lege, qua rusticum praedium atque mancipium vendere vel pignolare vel in dotem dare in praeteritum licebat, scilicet per inquisitionem iudicis, probationem causae interpositionem decreti, ut fraudi locus non sit... Huic accedit, quod ipsius pecuniae, in qua robur omne patrimonium veteres posuerunt, fenerandi usus vix diuturnus, vix continuus et stabilis est: quo facto saepe intercidente pecunia ad nihilum minorum patrimonia deducuntur. Iam ergo venditio tutoris nulla sit sine interpositione decreti, exceptis his dumtaxit vestibus, quae detritae usu aut corruptae servando servari non potuerint. Animalia quoque supervacua minorum quin veneant, non vetamus.*" PAULUS KRUEGER (ed.), *Corpus iuris civilis, volumen secundum Codex iustinianus*, 3 vols., Apud Weidmannos, Berolini, 1970, II, pp. 223-224. Translation: "The law which requires guardians and curators to sell and reduce to money all gold, silver, jewels, clothing, and other valuable personal effects, as well as urban estates and slaves, buildings, baths, and warehouses and other property in the city, excepting rustic estates and slaves, is a rule which operates greatly to the disadvantage of minors. Hence, We order that no guardian or curator shall be permitted to sell any property of this description, unless required to do so by necessity, or by former laws, under which he is authorized to dispose of rustic estates and slaves, or pledge them or give them as a donation on account of marriage, or by way of dowry; this, of course, having been done after judicial investigation, proof of the case and rendition of a judgment, in order that there might be no room for fraud... It happened under the old law, by whose provisions the practice of loaning at interest money belonging to minors (on which the ancients based the entire force of patrimony), that this practice was no sooner temporary than it became permanent and established; and that the money loaned under such circumstances was often lost, and the inheritance of the minors reduced to nothing. Hence a sale of property made by a guardian without the authority of a decree shall be null and void, with the exception solely of such clothing as, being worn by use, or having been spoiled, can serve no purpose by being preserved. We do not forbid superfluous animals to be sold, even though they may be the property of minors. SAMUEL PARSONS SCOTT (ed.), *The Civil Law Including the Twelve Tables, The Institutes of Gaius, the Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and the Constitutions of Leo*, 17 vols., Cincinnati, Central Trust Co., 1932, VI, pp. 242-242.

Urban slaves who alone are familiar with the entire personal property shall by all means always be retained as a part of the estate and household, for good slaves prevent the commission of fraud and bad ones, where circumstances demand it, having been subjected to torture, can be compelled to reveal the truth; and all things shall be done in such a manner that the guardian cannot diminish, change, or suppress anything from the inventory. This is necessary with reference to clothing, pearls, gems, vases and other personal property.⁷

Further, by way of providing the *mens legislatoris* (and foreshadowing some modern justification for cultural property law), the Emperor added,

It is not permitted to sell the house in which the father died or the minor was brought up, for it would be sad enough not to see the statues of the family ancestors fastened therein or to have them torn away. Therefore the house and all other immovable property shall remain as part of the patrimony of the minors, and no building of any kind originally belonging to the estate shall be destroyed, or allowed to fall into ruin through the fraudulent acts of the guardian.⁸

2.2. Roman Law and its Influence on Canon Law

After the Edict of Milan in 312, the Christian church gained toleration and was at peace in the Roman Empire and the church developed rapidly. In the course of this development it seemed natural that she should be influenced by Roman law. Some of the church's great prelates, like Ambrose, bishop of Milan, and Pope Gregory the Great, had been trained as Roman civil administrators and, accordingly, they had been trained in Roman law. Not surprisingly, Roman law suffused their actions and writings and Roman law concepts were imported into the language and structure of the church's own norms or canons.

⁷ SCOTT, *The Civil Law*, VI, p. 242.

⁸ SCOTT, *The Civil Law*, VI, p. 242. It will be seen that this imperial constitution provides several key concepts. Besides the notion of *res pretiosa*, it gives us the measuring concept of *quae servando servari non possunt*.

After centuries of development, the Emperor Justinian began a codification of Roman law in 529. Having appointed a commission of jurists, that year they published in one *Codex* "a book of constitutions" that brought together imperial edicts from a variety of epochs up to the reign of Justinian himself. Next in 533 he published the *Digest*, giving in fifty short books a condensed version of passages from ancient Roman doctrine. The next year he produced a more complete revised version of the *Codex* divided into twelve books as well as a textbook of jurisprudence, the *Institutes*, divided into four books. Next came the *Novels* or *Novellae Constitutiones*, which included the more recent decrees published by Justinian up to his death in 565. While a magnificent project and one which would be known as the *Corpus iuris civilis*, its immediate effects were modest. In the West the disorder consequent on the barbarian invasions prevented its implementation. In the East it was extraneous to local custom and was never put into effect. In 740 it was formally replaced by a short collection of precepts in 144 chapters called the *Ecloga ton nomon* by the Emperor Leo III.⁹

As the barbarian invasions ensued, these strangers brought with them their own laws and the various peoples of Europe came to live each under their own customary legal regime. Some of this customary law was set down in written form, often by clerics, and in the process Roman law elements were sometimes admitted to it. The popular law during this period between the sixth and eleventh centuries, in fact, is often called vulgar Roman law to indicate that it was popular law with Roman elements.

This vulgar Roman law was, moreover, personal rather than territorial in its application, and in large part for the next thousand years law in western Christendom was personal. Thus, if members of the various Teutonic peoples lived each according to their own law—even in the same territory—the church retained as its personal law Roman law, giving rise to the maxim *secundum legem romanum ecclesia vivit*.¹⁰

⁹ MANLIO BELLOMO, *The Common Legal Past of Europe 1000-1800*, Studies in Medieval and Early Modern Canon Law 4, Washington, Catholic University of America Press, 1995, pp. 38-39; PETER STEIN, *Roman Law in European History*, Cambridge, Cambridge University Press, 1999, p. 35; for a rapid history of Roman law in the East after Justinian, see CHARLES SUMNER LORINGER, "The Continuity of Roman Law in the East," in *Tulane Law Review*, 4 (1930), p. 341.

¹⁰ HAROLD J. BERMAN AND CHARLES J. REID, JR., "Roman Law in Europe and the *Jus commune*: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century," in *Syracuse Journal of International Law and Commerce*, 20 (1994), pp. 3-5.

While canon law appears to provide many detailed norms on the administration of church property, in fact it contains great gaps.¹¹ This is for the reasons one commentator has pointed out, namely portions of the canon law of church property have developed somewhat recently.¹² Moreover, the church has not always felt a need to develop her own norms in this branch of law. Here she has been particularly open to the adoption of the law of various peoples.

“Ownership” (*proprietas* or *propriété*), as article 544 of the French Civil Code declares, is the right to enjoy and dispose of things in the most absolute way, provided that it is not used contrary to laws or regulations. Property, then, in Roman law—as in modern civil law—is the most absolute right in relation to a thing which the law allows to an individual. This civil code concept of ownership or *dominium* derives from Roman law, which had a similarly absolute concept of ownership.

Following Justinian’s *Institutes* and modern civil law, property may be either tangible or corporeal, such as land or chattels. Property is further divided into movable and immovable property. The latter includes not only land but also buildings and other structures attached to it. Movables, by contrast, are things which can be moved from one place to another, whether they are moved by a human being or, like animals, can move themselves. Movables by law are those obligations and actions which concern sums of money due on movables, shares and other interests in financial organizations.¹³

Things (*res*) are in law objects which can be owned, but not all things can be owned by all. Roman jurists spoke of *res in patrimonio*. These were things that could be owned by private persons. But some things could not be owned by private persons and so these things were *res extra patrimonium*. Objects in this category were further divided into *res divini iuris* and *res humani iuris*. *Res divini iuris* consisted of *res sacrae*, sacred things, which were things dedicated

¹¹ MARIANO LÓPEZ ALARCÓN, “De bonis ecclesiae temporalibus: Introducción,” in MARZOA, IV, at p. 24, notes, “La legislación civil ocupa una extensa parcela del Derecho patrimonial de la Iglesia.”

¹² VELASIO DE PAOLIS, “Alcune osservazioni sulla nozione di amministrazione dei beni temporali della Chiesa,” in *Periodica*, 88 (1999), p. 98.

¹³ JOHN BELL, SOPHIE BOYRON AND SIMON WHITTAKER, *Principles of French Law*, Oxford, Oxford University Press, 1998, pp. 278-281; JOHN E. C. BRIERLY and RODERICK A. MACDONALD, *Quebec Civil Law: An Introduction to Quebec Private Law*, Toronto, Emond Montgomery Publications, 1993, pp. 270-271. With the advent of the 1804 French Code civil, the *summa rerum divisio* or classical division of things became that between immovables and movables. *Ibid.*, p. 269. See section 2.6 below.

to the gods above. Another part of objects in this category were *res religiosae*, things dedicated to the gods below, the rulers of the spirit world of departed ancestors and this group included graves and tombs. The last category of *res divini iuris* were *res sanctae*, and these were boundary zones, city walls and gates which, although not dedicated to the gods, were regarded as under their special protection.

Res humani iuris extra patrimonium were things among the common property of mankind (or *res communes*) or things owned by the citizens of a particular state, *res publicae*. *Res communes* included the environment, the air one breathed, running water, the sea, and the seashore between high and low tides. *Res publicae* consisted of roads, rivers, market places, and public meeting places, places from which no citizen could be denied access. We have seen in Chapter 1 the notion that cultural property, or at least some of it, forms the common property of all mankind and we saw that in some civil law countries cultural property in public collections is considered public property and is inalienable and imprescriptible.

The Roman concept of ownership, *dominium*, is of crucial importance. It is said to have consisted of a triad of rights, the *ius utendi*, the *ius fruendi*, and the *ius abutendi*—sometimes described as the right to use, to take the fruits, and to abuse (or consume). This notion is a very wide concept of the right of ownership and it is the concept of ownership revived at the time of the French Revolution and embodied in the French *Code civil* of 1804 and it is the model for the 1917 Code of Canon Law.¹⁴

But while Roman and modern civil law conceived of ownership as absolute, they did recognize that one might acquire a lesser interest in property through servitude and other means. These lesser interests introduced restrictions on the owner's rights and lead to the recognition of other interests in property. One such restriction was possession. This might be physical possession or

¹⁴ THOMAS GLYN WATKIN, *An Historical Introduction to Modern Civil Law*, Aldershot, Ashgate, 1999, pp. 220-228. This system of absolute ownership of Roman law and of the modern civil law system following its revival in the *code civil* of 1804 is very different from that under feudal law, medieval civil law, and that current in the common law systems of law. In the common law world one speaks of property as real or personal, tangible or intangible. Real property can be either a present estate or a future estate, an estate of a legal interest or of an equitable interest. Real property interests are freehold estates and personal property interests are non-freehold estates. All land in England after the Norman Conquest was deemed to be held mediately or immediately from the king in exchange for specific services. The tenant held the land from the lord in exchange for some service and so his estate might vary by time, by quantity, and by quality and this flexibility remains today in the common law of property. CORNELIUS MOYNIHAN, *Introduction to the Law of Real Property*, St. Paul, West Publishing Co., 1962, p. 28; JOAN C. MCKENNA, "Property," in 63C *Am. Jur. 2d* (1997) 78; LAURA DIETZ ET AL., "Estates," in 28 *Am. Jur. 2d* (2000) 68.

the right to possession or *ius utendi*. Roman law came to recognize the difference and so styled the former mere detention while juristic possession came to be protected by various remedies. Possession was important, moreover, because it was a normal incident of ownership. An owner was expected to be in possession of his property and, as a result, one in possession might well be expected to be the owner.¹⁵

Besides possession, there was also recognized the right to take the fruit or produce of property or the *ius fruendi*. Classically and until perhaps the last three decades this right to use and enjoy the property of another is the most common form of real right. The right is called the usufruct and the one enjoying it is the usufructuary. The remaining reversionary interest belongs to the *nu-*

¹⁵ WATKIN, *An Historical Introduction*, p. 243. Indeed, possession came to be seen as one of the means of acquiring ownership and, with respect to movables, gave rise to a presumption of ownership. The Romans said that ownership could be acquired by usucaption or prescription. Ownership of property could be lost or acquired by *longi temporis praescriptio*. Originally prescription was extinctive only, but in the provinces it came also to be a means of acquiring property. If both former and new owners were resident in the same province, the passage of ten years sufficed for prescription to occur. If they were not resident in the same province, the period for prescription was twenty years. Besides possession for the requisite time, it was also required that the adverse possession had begun in good faith. But later it came to be held that, even absent good faith, one could take by prescription after *longissimi temporis praescriptio* or the running of thirty or forty years. In Anglo-American common law prescription is usually called "adverse possession". See generally THERESA LEMING ET AL., "Adverse Possession," in 3 *Am. Jur. 2d* (2002) 98 who says at common law the period for the prescription of land is generally twenty years. For personal property the period is three years in about thirty percent of American states, six years in another thirty percent and two, four or five years in the remainder, although in Rhode Island ten years. PATTY GERSTENBLITH, "The Adverse Possession of Personal Property," in *Buffalo Law Review*, 37 (1988/89), p. 122. The difficulty is deciding when the period begins to run. See PATTY GERSTENBLITH, "Recent Developments in the Law of Extinctive Prescription in the United States," in *American Journal of Comparative Law*, 42 (1994), pp. 61-78. Many jurisdictions follow the "discovery rule" under which the statute of limitations (or period for prescription) only begins to run when the plaintiff discovers or should have discovered the facts needed to recover his chattels. This "discovery rule" is in effect in the State of New York and has permitted many holocaust victims or their descendants to recover art stolen by the Nazis decades ago. ALEXANDRE A. MONTAGU, "Recent Cases on the Recovery of Stolen Art—The Tug of War Between War and Good Faith Purchasers Continues," in *Columbia-VLA Journal of Law and the Arts*, 18 (1994), p. 81. By contrast, in England the period of limitation is six years and runs from the date a *bona fide* purchaser acquires the object. In France under article 2279 of the civil code a movable is prescribed, three years from the date of loss or theft. Under article 7 of the European directive of 1993 on the return of cultural objects the period of limitation is one year from the time the requesting state became aware of the location of the cultural object and of the identity of its possessor but in no case more than thirty years from the date of removal from the territory of the requesting state. The UNIDROIT Convention provides that a proceeding for the return of a cultural object may be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor and in any case within fifty years from the time of the theft. LYNDAL V. PROTT, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects* 1995, Leicester, Institute of Art and Law, 1997, p. 37. The subject is quite complex and RUTH REDMOND-COOPER, "Time Limits in Actions to Recover Stolen Art," in PALMER, p. 146 divides the various countries into 'nemo dat' (common law) and 'good faith' (civil law) jurisdictions. Her essay is excellent and concisely explains this complex subject.

propriétaire or naked owner. The usufructuary has two of the three rights of ownership, the *ius utendi* and the *ius fruendi*, but he lacks the third right, the *ius abutendi* or the right to consume. The interests of the usufructuary and the naked owner are reconciled by giving the former only the rights concerning the day-to-day administration of the property. The usufructuary cannot take decisions which have a permanent effect on the value of the property and so article 595 of the French Civil code prevents him from leasing the property for more than nine years. The usufructuary is not allowed to diminish the substance of the thing and so it follows that one could not acquire the usufruct over a thing that was diminished by use and enjoyment, which is to say over consumable property. As we saw above, such property includes food and money. The usufructuary is expected to look after the thing, as would a conscientious family head, the standard of diligence being expressed as that of a *bonus paterfamilias*. The usufructuary is liable to the *dominus* if he fails to do so. Until fairly recently the usufruct is the most important of the civil law methods of providing a right of enjoyment that was less than ownership, and corresponds to the life interest under Anglo-American law with the *dominus* or naked owner of civil law being equivalent to the common law remainderman.¹⁶ As we shall see, the rights of church property administrator were greatly influenced by the law governing the usufructuary.

¹⁶ WATKIN, *An Historical Introduction*, pp. 260-261. Since our aim is to look at cultural property in the context of the Anglo-American common law system, it is useful to look to the rights and duties of the common law life tenants and remaindermen. The life tenant is the person enjoying a life interest in property and the remainderman is the person with the remaining property interest which becomes effective upon the death of the life tenant. Generally it is held that a life tenant holds the property in trust for the remainderman. A tenant for life is entitled to the full use and enjoyment of the property, provided that he does not permanently diminish in value the remainderman's interest by doing or neglecting to do what a reasonable man would do to preserve his own property. Thus, the life tenant, like the usufructuary, may not diminish the corpus of the property nor may he be deprived of the use of it to augment the corpus. The life tenant owes to the remainderman a duty not to commit waste, and so the life tenant has a duty to make all ordinary, reasonable and necessary repairs required to preserve the property or to prevent its decay or waste. Nor may the life tenant transfer the property for inadequate consideration. The relationship of the life tenant to the remainderman is considered a fiduciary one and is sometimes viewed as a quasi-trust. The life tenant is entitled both to possession and to the use of the property and has the right to all rents, issues and profits generated by the property during the life tenancy. At the same time he cannot permanently diminish the value of the interest of the remainderman and so improvements made by the life tenant on the property without the acquiescence of the remainderman are held made at the expense of the life tenant, even though the property is rendered more valuable. Many jurisdictions require the life tenant to furnish an inventory of the property to the remainderman and to render an account of property received. Generally a tenant for life may make a lease for any lesser term. Often the lease terminates with the death of the life tenant and hence it is held that that part of the lease is void which extends beyond the life of the tenant for life. While a life tenant may take a reasonable amount of wood from a property for firewood or for the necessary repairs of the buildings and fences on the premises, he may not cut timber to sell for profit, unless the property is a timber estate. Similarly, the general rule is that life tenants have no right to open and work unopened mines on a property, because such conduct would be a lasting injury to the remainderman's corpus. Where property of a life estate is an already opened mine, the rule is naturally otherwise and such mining royalties and bonuses belong to the life tenant. STEPHANIE GIGGETTS, "Life

The figure of the tutor acting in the interest of his ward also proved apt to describe the legal relationship of a bishop to his diocese. As early as the fifth century a prescription by Pope Gelasius described the office of the bishop with respect to his diocese as one of conservator rather than owner, *in patrimonium eiusdem non minuere studeat sed augere*, who should endeavor to augment rather than diminish his estate. This formula, in fact, passed later into an oath which bishops were required to take at their consecration and before assuming the government of their sees. Thus by the ninth century a bishop was described as *custos* or *tutor* of his diocese. Thereafter, papal texts regarding bishops often bore a strong Roman law flavor, with language reminiscent of the oath of the tutor to act in the interests of his ward. And just as the anointing of bishops and the giving of the miter and crosier at episcopal consecrations proved the origin of the unction and crowning rituals of kings, so the view of the bishop as tutor of his diocese was not only appropriated by canon law but also exported by it into civil law. The notion of kingship was thus transformed and the figure of the ruler as *tutor* became the most notable Frankish achievement in government theory. Built into the notion of the ruler as *tutor* was the notion of limited power and so began an important development in the history of western constitutionalism.¹⁷

By the eleventh century a revival of Roman law had begun in Italy led by Irnerius (died 1130) in Bologna. Justinian's *Corpus* was rediscovered and studied.¹⁸ By 1269 there were over 1,000 foreign students in Bologna and Bologna set the curriculum pattern for all other medieval European law schools. The *ius utrumque*, Roman law and canon law, is the law that was studied.¹⁹ The greatest of the early doctors or teachers of Roman law was Accursius (c. 1184-

Tenants and Remaindermen," in 51 *Am. Jur. 2d* (2000) 179 at 222-226, 228, 230, 232-233, 302, 351-54, 356.

¹⁷ WALTER ULLMANN, "A note on inalienability in Gregory VII," in WALTER ULLMANN, *The Church and the Law in the Earlier Middle Ages*, London, Variorum, 1975, pp. 125-137. Showing the Roman law undergirding of the great seminal constitutional document of the common law tradition is Richard H. Helmholz, "Magna Carta and the *Ius Commune*," in *University of Chicago Law Review*, 66 (1999), p. 297.

¹⁸ Interestingly, all surviving manuscripts of the *Digest* today derive ultimately from a sixth-century codex in Pisa, which was seized as war booty under the *ius praedae* by the victorious Florentines in 1406 and is now in the Laurentian Library in Florence. PETER STEIN, *Roman Law in European History*, Cambridge, Cambridge University Press, 1999, p. 43. As we saw in Chapter 1, today the international law of war would in no wise sanction a similar transfer of such a precious piece of cultural property.

¹⁹ HELMUT COING, "The Roman Law as *Ius Commune* on the Continent," in *Law Quarterly Review*, 89 (1973), p. 505.

c.1263). His gloss or set of writings on the *Corpus iuris civilis* became the *glossa ordinaria* or standard gloss on it and was held in the greatest respect. It was held *Quidquid non agnoscit Glossa nec agnoscit curia*, what the Gloss does not acknowledge, the court does not acknowledge either. It contains some 97,000 items. Under a brilliant series of Roman law teachers Bologna became the great center of Roman law studies in western Christendom.²⁰

The Roman law of *tutela* was not, moreover, merely of theoretical interest to canonists and Church tribunals. In England the ecclesiastical courts had probate jurisdiction over movables and so would have had frequent opportunities to apply this law where movables or personalty were bequeathed to minors. In other lands, even if the ecclesiastical tribunals lacked probate jurisdiction, they still had jurisdiction over matrimony, inasmuch as it was a sacrament, and so would have upon occasion needed to make provision during matrimonial causes for orphans and so would have needed to advert to this portion of Roman law. The Church courts also exercised jurisdiction over *miserabiles personae*, those who by reason of weakness or incapacity could not adequately protect their own rights. In some cases such persons would have been orphans and so the ecclesiastical tribunals would have been called upon to apply the Roman law of tutelage.²¹ In short, the Roman law of tutelage would have been of frequent practical interest to canonists of the Middle Ages and so tended to be known and used by canonists.

The canonical administrator of church property would in fact be something of an amalgam of the Roman usufructuary and the Roman tutor and the great doctors of canon law were aware of this legal ancestry. Martin Bonacina (c. 1585-1631), for example, noted that the cutting of trees was an act of *dominium*, an exercise of the *ius abutendi*. But the benefice-holder was not the *dominus* of the property of the benefice but rather, as he said, more like the usufructuary.²² Bonacina also adumbrated his theory of the powers of church property administrator while discussing the requisite formalities for alienation. He made the usual comments about *causa* (which we shall examine at greater length below) and asked if the pope could effect an alienation without *causa*.

²⁰ OLIVIA F. ROBINSON, T. DAVID FERGUS AND WILLIAM M. GORDON, *European Legal History: Sources and Institutions*, 3d ed., London, Butterworths, 2000, pp. 50, 58.

²¹ RICHARD H. HELMHOLZ, "The Roman Law of Guardianship in England, 1300-1600," in *Tulane Law Review*, 52 (1978), pp. 225-226. For the Irish scene, see W.N. OSBOROUGH, "Roman Law in Ireland," in *The Irish Jurist*, 25 (1990), pp. 212-268.

²² MARTINO BONACINA, *Opera omnia in tres tomos distributa*, 3 vols., Lugduni, Sumptibus FFr Anissonionem et I. Posvel, 1678, I, p. 710-713.

His response was the pope was not the *dominus absolutus* of church property but merely its administrator, albeit as God's vicar armed with the plenitude of power and not merely with the limited powers of a tutor or procurator.²³

Paul Laymann (1574-1635) was a Jesuit who taught philosophy, theology and canon law at several universities. He briefly discussed the question of legacies, noting that some might be for the benefit of the church, and some not. In deciding whether to renounce a legacy or not the prelate was to keep in mind that his role was like that of the tutor or curator of a minor. This applied to the pope as well he said. On the question of proper solemnities, he noted that the pope, strictly speaking was not bound like other prelates, however, both by natural law and divine law he was prohibited from making unuseful alienations, for he was not the owner of church property but its administrator, charged not with its dissipation but its conservation.²⁴

Heinrich Pirhing (1606-1679) was a Bavarian Jesuit who published a commentary on the Decretals. He explained the reasons for the restrictions on the alienation of church property: prelates and rectors of churches are not owners but rather stewards or administrators of church property and so they possess no absolute right to alienate it, except in the cases provided by canon law. At some length Pirhing compared the powers of the canonical prelate with those of the Roman tutor, noting similarities and differences. The tutor's job was for a limited time whereas the prelate's role was perpetual. The tutor could neither use nor enjoy the property of his ward whereas the prelate could both use and enjoy the property of the church where his rights were like those of a usufructuary. Wardship was a burden whereas prelature was an honor and dignity. Finally, the prelate has free and general administration of church property, which is more ample authority than that of the tutor who could not make gifts of his ward's property.²⁵

2.3. The Development of Canon Law

In his book, *Law and Revolution: The Formation of the Western Legal Tradition*, Professor Harold Berman presents the thesis that there have been five great revolutions in western history

²³ Ibid., p. 716.

²⁴ PAUL LAYMANN, *Theologia moralis quinque libros complectens*, 2 vols., Lugduni, Apud Petrum Valfray, 1703, I, p. 396. As for the pope's role, Layman said, "*cum bonorum ecclesiae [papa] non dominus, sed summus administrator a Christo constitutus sit, non ad dissipandum sed ad dispensandum.*"

²⁵ ERNRICO PIRHING, *Jus canonicum in V. libros decretalium distributum nova methodo explicitum*, Venetiis, Ex Typographia Remondiniana, 1759, III, p. 120-122.

and that the first of these was the development of canon law as a result of the Gregorian reform of the eleventh and twelfth centuries. In Berman's view the rise of canon law was fundamental in western legal development and it bequeathed to western civilization nothing less than the very concept of a legal system and the notion of a government of laws rather than a government of men. By legal system Berman means an articulated and rational set of legal norms developed at centers of legal studies by a corps of legal experts by appealing to a set of overarching legal principles.²⁶

To illustrate his point he notes how nearly a millennium later in the City of Danzig case,²⁷ the Permanent Court of International Justice would appeal precisely to this concept of a government of laws rather than men as a fundamental principle of law in its judgment overturning a Danzig criminal law which purported to outlaw all acts contrary to *gesundes Volksempfinden* or sound popular feeling. The court simply declared that to outlaw conduct so broadly as the statute purported to do provided no rational guide for conduct and so flew in the face of a basic principle

²⁶ HAROLD BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA, Harvard University Press, 1983, p. 25.

²⁷ PERMANENT COURT OF INTERNATIONAL JUSTICE, advisory opinion, 4 December 1935, "Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City," in *Permanent Court of International Justice Publications*, Series A/B, Buffalo, William S. Hein & Co., Inc., 1996, 3, pp. 41-73. The Danzig Senate had amended the penal code by the addition of two articles. These at p. 46 provided:

If an act which, according to sound popular feeling (*nach gesundem Volksempfinden*), is deserving of penalty is not made punishable by law, the Public Prosecutor shall consider whether the fundamental conception of any penal law covers the said act and whether it is possible to cause to prevail by the application of such law by analogy. If, in the course of the trial, it appears that the accused has committed an act which, according to sound popular feeling, is deserving of penalty but which is not made punishable by law, the Court must satisfy itself that the fundamental conception of a penal law applies to the act and that it is possible to cause justice to prevail by the application of such law by analogy.

The Court at p. 52 noted: "The Agent for the Free City contends that, according to the new conception of penal law, real justice will take the place of formal justice, and that henceforth the rule will be *Nullum crimen sine poena* instead of *Nullum crimen sine lege* and *Nulla poena sine lege*."

The Court noted, however, at p. 53 that "there is the possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offense, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and the judge." Nevertheless, it found at p. 54 that Danzig's Constitution "endows the Free City with a form of government under which all organs of the State are bound to keep within the confines of the law (*Rechtsstaat*, State governed by the rule of law) and, accordingly, at p. 57 it held that the two decrees were not consistent with the Free City's constitution and were violative of its provisions. For the same reason canon 17 forbids the resort to parallel places or analogy in penal cases.

of western civilization wherein a government was presumed to be one of laws and not of men. Accordingly, the court invalidated the statute.

The pivotal body of canon law emerged as a distinct discipline or field of study—and not merely as a species of pastoral theology—near the beginning of the second Christian millennium. About the year 1140 Gratian, a canon law teacher in Bologna, published his *Decretum* or *Concordance of Discordant Canons*.²⁸ It was the first attempt to gather together and study systematically the plethora of canons and decrees made by popes and Christian church councils and synods during the first millennium. To these canons Gratian would apply scholastic logic and reasoning much as Peter Lombard would apply it to theology in his *Sentences*. The two works soon became the textbooks in their respective fields, canon law and theology, and the upshot was the advent of canon law and systematic theology as distinct scholarly disciplines. Gratian's synthesis of 3,458 canons, albeit a private work, was an instant success and soon others began imitating his method in an attempt to study the canons systematically and make sense out of a mass of seemingly uncoordinated, and at times conflicting, canonical legislation.²⁹

In 1234, at the request of Pope Gregory IX, Saint Raymond Peñafort, a great Dominican canonist, published a further series of more recent canons systematically arranged in five books on the topics *iudex*, *iudicium*, *clerus*, *connubia*, and *crimen*. Pope Gregory officially promulgated this work of 1971 chapters as canon law and this first "code of canon law" is usually called the *Decretals* but sometimes it was known as the *Liber Extra* because the decretals it contained were outside (*extra*) Gratian's *Decretum*.³⁰

In 1298 a further book of canons, along with by way of supplement eighty-eight *regulae iuris*, the *Liber Sextus*, (or sixth volume) was promulgated by Pope Boniface VIII. In 1314 another volume, the *Clementinae*, was compiled by Pope Clement V and published in 1317 by his

²⁸ JOHN T. NOONAN, JR., "Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law," in *Traditio*, 35 (1979), at p. 172 concludes: "We have reason to believe that Gratian composed and commented upon a substantial portion of the *Concordia*. In such composition and commentary he revealed himself to be a teacher with theological knowledge and interests and a lawyer's point of view. He worked in Bologna in the 1130s and 1140s. Beyond these conclusions, we have unverified hearsay, palpable legend..."

²⁹ CONSTANT VAN DE WIEL, *History of Canon Law*, Louvain Theological and Pastoral Monographs 5, Louvain, Peeters Press, 1991, p. 98.

³⁰ *Ibid.*, pp. 105-106.

successor John XXII. Finally a further volume of twenty decretals promulgated by Pope John XXII between 1317 and 1324 and systematically arranged was published as a private collection and called therefore the *Extravagantes Joannis XXII*. This collection was later expanded to include further and later papal decretals (including *Ambitiosae*) in the final text. This was called the *Extravagantes communes* and was published privately in Paris by Jean Chappuis in 1500.³¹

Just as Justinian's *Institutes*, *Digest*, and *Codex iuris civilis* together with the *Novels* (or newer laws) form the *Corpus iuris civilis* or body of Roman law, so the *Decretum*, *Decretals*, *Liber Sextus*, *Clementinae* and *Extravagantes* form the *Corpus iuris canonici* or body of canon law. In 1582 Pope Gregory XIII had all of these canonical collections printed in an official edition after a commission had carefully examined their contents. Four years later in Frankfurt these collections appeared under the title *Corpus iuris canonici*. The 1582 edition remained the official Roman text until replaced by the *Codex iuris canonici* in 1917.³² For the balance of the Middle Ages and until codification scholars would continue to study, comment on, and systematize this body of canon law.

Roman law had enjoyed a contemporaneous revival, especially at universities like Bologna and Orleans, and like Roman law, medieval canon law was studied at the universities and was a subject for scholars. Thus the great canonists as well as the great civilians (or Roman law students) were to be found at universities and a wonderful and valuable cross-fertilization between canon law and Roman law took place. Indeed, recent research has suggested that there were two recensions of Gratian's *Decretum*, a shorter and a longer form. At least one author has suggested that the longer form was undertaken to incorporate Roman law texts to adjust the *Decretum* to the brave new world of the burgeoning study of Roman law.³³ Indeed, it was said, *canonista sine legibus parum valet; legista sine canonibus nihil*—a canonist without a Roman law background is handicapped; a Roman lawyer without study of the canons is worthless. Not only were canon and Roman law studied by scholars at university, but they also enjoyed an exalted place in the mind of jurists. In fact, in the Middle Ages the expression *ius commune* or “common law” referred, not to English common law, but to the norms of canon and Roman law

³¹ Ibid., pp. 107-110.

³² Ibid., pp. 110-111.

³³ CLARENCE GALLAGHER, *Church Law and Church Order in Rome and Byzantium: A Comparative Study*, Aldershot, Ashgate, 2002, pp. 118-121.

as discussed by legal experts at the new universities of Europe.³⁴ While statutes and custom might provide the particular law of a place, canon and Roman law were available as suppletive law in most of western Christendom and so were its "common law."

The rise of the papacy in western Christendom came to have an enormous effect on canon law and the way in which canon law developed in the west assisted the growth of papal power. Dionysius Exiguus had in the early sixth century produced a set of church canons which not only included conciliar decrees but also a series of papal decretals. These were papal replies in particular cases and by elevating these to the status of general law, Dionysius took an enormous step and his precedent would be followed in the west in later collections of canons, making it seem only natural for Gratian to use both conciliar decrees and papal decretals. Gratian, moreover, would come to see the pope as the supreme legislator and not long after Gratian the doctrine became common that a papal decretal could prevail over a canon—*decretalis praeualet canoni*.³⁵

Meanwhile, in the early Middle Ages the papacy enjoyed a splendid period when various popes dispatched missionaries to the remoter parts of Europe like Ireland and later to England, the Low Countries, Germany and eventually Scandinavia. But then came the Dark Age of the papacy when the Roman See became merely an economic prize for the various Roman aristocratic factions and religion in the City sank to low ebb. But fortunately there arose a reform movement and, with assistance from the abbey of Cluny and its numerous and widespread coterie of monastic affiliates, the papacy was reformed, especially under Pope Gregory VII (1073-85). Having reformed itself during the Gregorian Reform, the papacy then set out to free the Church from the toils of the secular powers and in the course of the Investiture Controversy succeeded handily and the Emperor Henry IV was forced to make his famous journey in 1077 to Canossa. The Investiture Controversy with the Empire was settled in 1122 by the Concordat of Worms. Based on two parallel declarations by Emperor Henry V and Pope Callixtus II, this accord brought an end to imperial investiture of prelates with ring and crosier and the emperor also promised to respect the freedom of ecclesiastical elections. Meanwhile Pope Nicholas II in 1059 had restricted the election of the Pope to the Roman cardinals and in 1179 Alexander III had

³⁴ MANLIO BELLOMO, *The Common Legal Past of Europe 1000-1800*, pp. 71-74, ROBINSON, 74-78; even in a common law country like England Roman law was not without influence. For Roman law influence in England see DUANE L.C.M. GALLES, "The Civil Law," in *The Jurist*, 49 (1989), pp. 241-248.

³⁵ GALLAGHER, *Church Law*, pp. 12, 131-132.

provided that this election would be by a two-thirds majority. The Gregorian Reform also strove against simony and clerical marriage in the Latin Church and a great byproduct of the Reform was a massive increase in the powers of the papacy over the Latin Church.³⁶

Gregory had claimed the power to legislate for the Church: his *Dictatus Papae* had boldly declared, "Only the pope may promulgate new laws" and by the thirteenth century, as we have seen, Gregory IX had acquired the place in canon law that the emperors had enjoyed in imperial Rome and could emit apostolic constitutions with like import in canon law to the imperial constitutions of late Roman law. A figure like Innocent III (1198-1216), moreover, ruled not only the Church but also wielded secular power. Whereas his predecessors had been *vicarius Petri*, he was *vicarius Christi* and the Roman Church was both *mater ecclesiarum* and *mater omnium Christifidelium*.³⁷

While not quite a theocrat in the vein of Boniface VIII, Innocent did insist on the right to intervene in temporal affairs *ratione peccati*. To avoid the tutelage of Magna Carta the wily English King John resigned his crown to this imposing pope who thereupon returned it to the king while absolving John of the obligations imposed upon him by the English barons at Runymeade. In 1204 he spoke of the Holy See as the sovereign of Christendom:

The Pope whom Saint Peter ordained as his vicar, conferring on him power and setting him over nations and kingdoms, to root up and tear down, to ruin and squander, to build and to plant.³⁸

³⁶ VAN DE WIEL, *History of Canon Law*, pp. 77-78.

³⁷ GERARD GIORDANENGO, "Canon Law," in LEVILLAIN, I, pp. 222-229; OLIVIER GUYOTJEANNIN, "Innocent III," in Ibid. II, pp. 785-789; MICHELE MACCARRONE, "Il papa "Vicarius Christi" testi e dottrina dal. Sec. XII al principio del XIV," in *Miscellanea Pio Paschini studi di storia ecclesiastica*, Romae, Lateranum, 1948, I, pp. 423-442 traces the expression "Vicarius Christi" from the ninth century Amalarius of Metz who used it with respect to all bishops till by the end of the twelfth century when it superseded the earlier title of "Vicarius Petri". Notably the SECOND VATICAN COUNCIL, constitution *Lumen gentium*, 21 November 1964, in *AAS*, 57 (1964), no. 27, p. 32 states, "Episcopi...ut vicarii et legati Christi regunt." J. DEREK HOLMES, *The Papacy in the Modern World, 1914-1918*, New York, Crossroad, 1981, p. 258 says Pope John Paul I rejected the use of the title "Vicar of Christ" in favor of "pope" or "bishop of Rome."

³⁸ INNOCENT III, bull *Romani Pontificis*, 24 February 1204, *Bullarum diplomatum et privilegiorum sanctorum romanorum pontificum*, Taurinensis editio, Augustae Taurinorum, Seb. Franco H. Fory et H. Dalmazzo Editoribus, 1848, III, p. 187: "Pontificem, quem in beato Petro sibi vicarium ordinavit, super gentes et regna constituit, evellendi, destruendi, disperdendi, dissipendi, et aedificandi, et plantandi ei conferens potestatem."

Bolstering the pope's legislative powers were his new administrative powers. Gradually he began to provide bishops to their sees in place of the earlier method of canonical election by the diocesan clergy confirmed by the area bishops. He also acquired supreme judicial power as it became established that there was the right of all the faithful to appeal their case to the pope.³⁹

These rights were rendered effective by the appointment of papal judges delegate and by the creation of an efficient papal chancery and fiscal system. The latter was operated by the apostolic chamber headed by the chamberlain or *camerlengo*. The papal fiscal system developed especially after the popes began to supersede the usual canonical elections and instead provide or appoint prelates and, increasingly lower clerics as well, to benefices. In exchange for his appointment the new incumbent paid various sums to the papal fisc—annates, first fruits and common services—and these papal provisions resulted in a stream and then a flood of revenues to the Apostolic Chamber presided over by the *camerlengo*.⁴⁰

If he was the supreme legislator, the pope could also grant privileges or private laws and even dispensations from the law in particular cases and for the good of souls. An enormous trade in papal favors grew up along with an efficient bureaucracy to organize the process. The papal chancery was the most efficient in Europe and the apostolic chamber organized the papal finances with similar efficiency as more and more revenues were needed to support the growing bureaucratic system. A remarkable system of international taxation was devised to support this apparatus and an efficient judicial system came about as more and more litigants turned their appeals to the pope for justice in their cause. The upshot was that whereas in the first millennium the Church had tended to legislate in general and particular councils, now papal decretals came to form at first suppletive law and later even new and abrogatory law.

The Council of Trent (1541-1563) brought a further epochal change to canon law. Its manifold reform decrees enacted over its eighteen year history changed much of canon law and, more importantly, it also changed the way in which canon law was done. It was decided to establish a body of official interpreters of the conciliar decrees and in 1588 this body became the Sacred Congregation of the Council, one of a number of commissions or standing boards of cardinals

³⁹ VAN DE WIEL, *History of Canon Law*, pp. 78-79.

⁴⁰ PIERRE TOUBERT, "Reform, Gregorian," in LEVILLAIN, III, pp. 1278-1284.

established that year by Pope Sixtus V by the bull *Immensa* to carry on the government of the Church.⁴¹ Hitherto, papal business had been conducted in consistory. As the word suggests, the Pope and his counselor-cardinals sat down together and discussed matters of church business and resolved them as a group. But doing business in "committee of the whole" as it were proved inefficient and ineffective. It prevented specialization and economies of scale and subjected outcomes to the vagaries of attendance. In the sixteenth century a number of special commissions of cardinals had come into being including in 1542 the Holy Office and in 1564 the *Sacra congregatio cardinalium concilii tridentini interpretum*. An eminently practical man, Sixtus V decided by the apostolic constitution *Immensa* of 1588 to divide up church affairs along subject matter lines and give jurisdiction to a number of standing committees of cardinals called congregations, each with a prefect or chairman in charge of it.⁴² This bureaucratic system of central church government remains to this day.

The Congregation of the Council became the official interpreter of the decrees of Trent and, because of Trent's numerous reform decrees and their wide range, this congregation came to have an enormous influence over the development of canon law. Other congregations also came to have the power of giving official interpretations within their own subject areas—like the Congregation of Rites in matters liturgical and the Congregation for the Propagation of the Faith in mission affairs. Thus a number of Roman congregations now acquired legislative and judicial as well as administrative powers and these congregations became the new engines for the development of canon law. For canon law the new structure of the Roman Curia meant that legal development in large part now proceeded bureaucratically. Decrees and instructions from Roman congregations came to provide suppletive law and we see the upshot of this in canon 19 which directs one for supplementary norms to *inter alia* the jurisprudence and practice of the Roman Curia.

By the nineteenth century canon law was once again the discordance of canons that Gratian had found in the twelfth century. At Vatican I in 1870 there was a great cry for a codification of canon law. Besides the decrees of Trent and of the Roman congregations there was a mass of regional and local law emanating from provincial councils as well as a plethora of customs in the

⁴¹ SIXTUS V, bull *Immensa*, 21 January 1587, *Bullarum diplomatum et privilegiorum sanctorum romanorum pontificum*, Taurinensis editio, Augustae Taurinorum, Seb. Franco H. Fory et H. Dalmazzo Editoribus, 1883, VIII, pp. 985-999.

⁴² VAN DE WIEL, *History of Canon Law*, pp. 139-141.

area of benefices and church property and an increasing body of concordat law brought into place by numerous church-state agreements since the Napoleonic settlement in 1802. The conquest of Rome by the Sardinians in 1870, however, served to postpone codification until the beginning of the next century.

Elected pope upon the death of Leo XIII in 1903, Pius X the next year by his *motu proprio Arduum sane munus* appointed a commission of cardinals to begin the codification of canon law. The nineteenth century had seen a bevy of legal codes arrive including the French civil code (1804), civil procedure code (1807), commercial code (1808), criminal code and criminal procedural code (1811), the German civil code of 1900, and the Swiss civil code of 1902.⁴³ In a sense Pius X's code of canon law would be the last of the great codifications. By his death in 1914 a draft code was nearly complete and in 1917 his successor, Pope Benedict XV, promulgated the Latin Church's first Code of Canon Law.

It was anticipated that a revision would be needed in twenty-five years but World War II prevented this and the call for revision had to wait until 25 January 1959. When he announced the calling of the Second Vatican Council, Pope John XXIII also appointed a code revision committee. At once it was realized that revision would have to await the closing of the council. Formally the revision was again entrusted to a commission of cardinals headed by Cardinal Felici but, as in 1904 with the first Code, the real work was done by the body of lower-ranking consultants working in small topical groups. They developed three draft revisions before a final draft text was arrived at in 1981 and presented to the Pope. After various revisions Pope John Paul II promulgated his revised text on 25 January 1983.

In 1927 it was anticipated that a code would be developed for the eastern churches in union with Rome. A commission of cardinals was appointed in 1929 to begin the drafting of it. Portions were in fact promulgated. Matrimonial law and procedural law sections appeared in 1949 and 1950.⁴⁴ The law of monks and nuns and patrimonial law appeared in 1952.⁴⁵ The law of persons

⁴³ For a rapid history of civil codification see WATKIN, *An Historical Introduction to Modern Civil Law*, pp. 134-147.

⁴⁴ PIUS XII, *motu proprio Crebrae allatae*, 2 May 1949, in *AAS*, 41 (1949), pp. 89-119 and *motu proprio Sollicitudinem nostram*, 6 January 1951, in *AAS*, 41 (1950), pp. 5-20.

⁴⁵ PIUS XII, *motu proprio Postquam apostolicis litteris*, 9 Feb. 1952, in *AAS*, 44 (1952), pp. 65-152.

was promulgated in 1957.⁴⁶ These four portions represented 1,590 of the proposed 2,666 canons. The death of Pope Pius XII in 1958 and the announcement by Pope John XXIII of the summoning of the Second Vatican Council in 1959 served to defer further work on the Eastern code until 1972 when a new papal commission was appointed. A draft appeared in 1986 and in 1990 Pope John Paul II promulgated it by the apostolic constitution *Sacri canones*⁴⁷ as the common law of the twenty-one Eastern Churches in full communion with the Apostolic See.⁴⁸ We shall take a comparative look at its law of *res pretiosa* in Chapter 3.

2.4. *Res pretiosa* in the *Corpus iuris canonici*

From its earliest days church property was regarded as property held in trust to promote divine worship, to maintain church fabrics, to support the clergy, and to succor of the poor.⁴⁹ Already in the Early Christian period there began to be decrees of various councils, such as that of the council of Ancira in 314, that priests and other sacred ministers were forbidden to alienate church property without the consent of the bishop. Likewise, the council of Agde, held in 506, decreed that no bishop might lawfully alienate church property without the agreement of three neighbouring bishops. The *Statuta ecclesiae antiqua* voided any alienation effected by a bishop without the consent and subscription of his clergy. Similarly, a directive of Pope Leo the Great in 477 to the bishops of Sicily forbade any sale, gift, or exchange of church property unless it improved the patrimonial condition of the Church and was effected with the consent of the clergy. These prohibitions on alienations without justifying cause and the requisite solemnities were repeated with increasing frequency at councils held in Meaux and Beuvais in the tenth century and at Lyons in the eleventh century and at the fourth Lateran council. The council of Lyons of 1274 added a new dimension to the law when it decreed that for alienations to secular persons bishops needed not only the consent of the chapter of canons but also the special permission of the Roman Pontiff. These conciliar decrees were at various times reinforced by imperial

⁴⁶ PIUS XII, apostolic letter *Cleri sanctitati*, 2 June 1957, in *AAS*, 49 (1957), pp. 432-603.

⁴⁷ JOHN PAUL II, apostolic constitution *Sacri canones*, 18 October 1990, in *AAS* (1990), 82, pp. 1033-1363.

⁴⁸ GERARD GIORDANENGO, "Canon Law," in LEVILLAIN, I, pp. 227-229; FRANÇOIS JANKOWIAK, "Code of Canon Law (1917)," in LEVILLAIN, I, pp. 362-366; FRANÇOIS JANKOWIAK, "Code of Canon Law (1983)," in LEVILLAIN, I, pp. 366-369; DOMINIQUE LE TOURNEAU, "Code of Canons of the Eastern Churches," in LEVILLAIN, I pp. 370-371.

⁴⁹ BRIAN TIERNEY, *Medieval Poor Law: A Sketch of Canonical Theory and its Application in England*, Berkeley, University of California Press, 1959, sketches the consequences of this four-part division of church revenues for the poor down through the Middle Ages.

legislation forbidding the alienation of church property.⁵⁰ The recognized exception to this general rule was alienation for reasons of charity.

This legislation was collected and digested in Gratian. No bishop or priest was to dare usurp the property of his benefice.⁵¹ Nor might a bishop or abbot transfer the property of his see or abbey into the hands of princes or others.⁵² Those persons who dared to invade church property or who unjustly possessed it or who perjured in an unjust defense against church title to property unworthily approached the altar.⁵³ Deacons or priests put in charge of a parish were not to dare to barter, sell or give away the property of their church, for it was recognized as property hallowed by God. If convicted in a church council of doing such, they were to be deprived of their living and required to make restitution from their own property.⁵⁴ Whenever a priest removed something from the property of his parish for sale, the sale was held null and void.⁵⁵ Alienations made by the bishop or abbot for simoniacal purposes or without the common consent of the clergy were void.⁵⁶ Abbots, priests and other ministers were not to alienate or obligate ecclesiastical property or things given over to the sacred ministry without the written permission of the bishop.⁵⁷ Priests were not to alienate church property unbeknownst to their bishop or bishops without consulting their chapter or presbyterate and without necessity. Nor was the bishop to sell, barter or give church property—unless to obtain something better by the transaction—without the discussion and consent of the whole clergy, lest the future of the church be cast in doubt. Rather, the bishop should view church property as merely entrusted to him and not as his own. Hence, sales or exchanges made without the written consent of the clergy were

⁵⁰ A. COULY, "Aliénation", in DDC, I, col. 404; MARCELINO CABREROS DE ANTA, "La enajencion de bienes eclesiasticos", in *El patrimonio eclesiástico: estudios de la tercera semana de derecho canonico*, Salamanca, Instituto 'San Raimundo de Peñafort', 1950, pp. 158-160.

⁵¹ D. c. XII, q. XVIII.

⁵² D. c. XII, q. XIX.

⁵³ D. c. XII, q. XXI.

⁵⁴ D. c. XII, q. XXXV.

⁵⁵ D. c. XII, q. XXXVI.

⁵⁶ D. c. XII, q. XXXVII.

⁵⁷ D. c. XII, q. XLI.

void.⁵⁸ Just as a church was not to lose its property so it must not lose the same by reason of the rapacity of another. After quoting this excerpt from a letter of Pope Gregory II to Bishop Boniface, Gratian added,

These authorities clearly show that no priest can lawfully give over church property and that one taking from the hands of a priest acquires no right to it. Rather he may be compelled to restore what he has unlawfully obtained. But it is to be noted that for exigent causes church property may be given over, e.g. where there is necessity coupled with the consent of the clergy or where the conveyance to obtain something better in return a priest may lawfully convey.⁵⁹

There was a *de minimis* exception to the rule against alienation, however. Small parcels of land or tiny vineyards or church lands of lesser utility or situated at a long distance might be alienated by the bishop without the consent of the clergy.⁶⁰ Likewise, fugitive serfs who deserted their homes and families and when recaptured could not be held, for like reason, might be manumitted by the bishop.⁶¹

Onto the skeleton of these norms later decretals and decrees would add sinew. The fourth council of Lyons decreed that no bishop or abbot should convey the property of one church to another, even if both churches were subject to his jurisdiction.⁶² No one was to alienate the immovable property of a church nor its houses nor fields nor gardens nor subject it to the claims of creditors. The word "alienate" was to be understood to include contracts, gifts, sales, barter, and conveyances in emphyteusis (or for a long or even perpetual annual rent).⁶³ Even where a prelate was bound by oath made at the order of the Holy See at his consecration not to alienate the property of his see he might still alienate the less useful to obtain the more useful with the consent

⁵⁸ D. c. XII, q. LI-LII.

⁵⁹ D. c. XII, q. XLIX.

⁶⁰ D. c. XII, q. LIII. This is the famous decretal, *Terrulas*, and is the origin of the *modicus valor* exception to the prohibition on alienation. It reads: "*Terrulas aut vineolas exiguas et ecclesiae minus utiles aut longe positas parvas episcopus sine consilio fratrum (si necessitas fuerit) distrahendi habeat potestatem.*"

⁶¹ D. c. XII, q. LIV.

⁶² X. III. XIII. I.

⁶³ X. III. XIII. IV.

of his chapter of canons.⁶⁴ When a certain canon of Exeter cathedral was found to have taken a cash payment in exchange for the perpetual lease of a property belonging to his benefice, it was held that the money was to be refunded to the lessee and the lease annulled lest the church suffer grave inconvenience by the transaction.⁶⁵ A lease for five years renewable for a further five years by ancient custom might be renewed and is deemed a “short” lease.⁶⁶ Gregory X at the second council of Lyons in 1274 forbade prelates to convey immovables of their see in feudal tenures for a long time or *ad tempus non modicum* without the consent of his chapter of canons and the special license of the Holy See and declared such contracts made without the requisite solemnities null.⁶⁷ Prelates who disobeyed this decree were suspended for three years and lay persons who forced prelates to make such contracts were excommunicated.⁶⁸ Clement V in a similar measure prohibited monasteries or convents of regulars to convey their property perpetually or for a long time unless the conveyance be made because of the need or utility of the institute and by the superior with the assent of the chapter. Those acting contrary to this measure were to be suspended from office. The measure expressly did not include leases or conveyances of usufruct for modest time periods.⁶⁹

Thus, since the days of the *Corpus iuris canonici* canon law had expressly prohibited the alienation of immovable and valuable movable property (*res pretiosa*). We will now trace the origin, development and meaning of the phrase “valuable” property from the fifteenth century. As we saw at the beginning of this chapter the decretal introducing the norm was the famous bull, *Ambitosae*, promulgated in 1468 by Pope Paul II. This apostolic constitution forbade churches, monasteries and pious places to alienate or by any contract directly or indirectly to transfer ownership (*dominium*) or use of their immovable or valuable movable property (*immobilia et pretiosa mobilia*) without certain legal formalities and without the prior permission the Roman Pontiff and provided severe penalties for lawbreakers. Those acting contrary to the bull were automatically excommunicated. In the case of prelates they were also placed under interdict and,

⁶⁴ X. III, XIII, VIII.

⁶⁵ X. III, XIII, IX.

⁶⁶ X. III, XIV, I.

⁶⁷ VI. III.IX.II.

⁶⁸ NORMAN P. TANNER (ed.), *Decrees of the Ecumenical Councils*, 2 vols., London, Sheed and Ward and Georgetown University Press, 1990, I, p. 325-326.

⁶⁹ Clem. III. IV.I.

if within six months they had not repented, they incurred suspension from all ecclesiastical offices and were also deprived of their ecclesiastical benefices, which then became vacant and might be filled by whomever had the right to do so.

To appreciate the effects of *Ambitiosae*, it is helpful to look first at the law before *Ambitiosae*. It had for centuries been laid down that church property could not be alienated. Early on it was laid down when Christianity was largely an urban religion that church revenues would be divided into four parts. One was for the bishop, one for his clergy, another was for the maintenance of the church fabric and to provide for divine worship. The last part was reserved for the poor. The church as we have seen early on took the figure of the Roman *tutor* as the model for the administrator of church property. The bishop was not the owner of church property; he was its administrator and steward. Canon 1518 of the 1917 Code would echo this notion with the words "*Romanus pontifex est omnium bonorum ecclesiasticorum supremus administrator et dispensator*," the Roman Pontiff is the supreme administrator and steward of all church property.

Nicholas de Tudeschis (1386-1445), also called Abbas Panormitanus because he was a Benedictine and later archbishop of Palermo, was one of the most distinguished canonists of the fifteenth century. He wrote commentaries on the decretals, the *Sextus* and the *Clementinae* and his works were among the most authoritative of his day and, indeed, his commentary was called the *lucerna iuris* or "Lamp of the Law."⁷⁰ His work also provides a convenient summary of the law in this area just before the promulgation of *Ambitiosae*.

The general rule he said was that church property could not be alienated. This applied to *res ecclesiae mobilis et immobilis*. Serfs he noted, by the way, were classed as immovable property for, inasmuch as they were deputed to cultivate the land, it communicated to them its own immovable character. But, as we saw in the case of the law regarding the Roman *tutor*, in respect to movable property the rule against alienation applied only to *quae servando servari non possunt*. Thus, as in Roman law, Panormitanus declared a prelate might alienate whatever movable property could not be conveniently kept. The latter included not only perishables like foodstuffs, but also things that were not durable such as clothes for daily use, and for authority he

⁷⁰ AMLETO GIOVANNI CICOGNANI, *Canon Law*, Philadelphia, The Dolphin Press, 1934, p. 336. See also VAN DE WIEL, *History of Canon Law*, p. 123.

cited the Roman law of tutors. As for rights *in personam*, Panormitanus thought these formed a third species of property and were neither immovables nor movables. But for purposes of the law on alienations he was content to liken them to the type of property—movable or immovable—to which they referred. He took a similar view of servitudes. As for money, he did not regard it as non-consumable, since, if retained, it produced nothing. Moreover, interpreting the Roman law with regard to its end, he noted that it was presumed that the *tutor* would amass money on behalf of the ward either by buying or selling. Thus, he deemed money to be likened to fruits and so at the disposition of the prelate.⁷¹

As for in what did alienation consist, he employed a broad understanding of the term and did not confine alienation to the ceding of *dominium*. More broadly alienation could occur with leases, exchanges, gifts, sales, and mortgages. Regarding leases, he asked what length of lease amounted to alienation. Only long leases were understood to result in an alienation and he regarded a lease for three years, for example, as not for a long time. Only leases for nine years or more, in fact, were to be regarded as alienations. Thus, “alienation” was to be understood most broadly.⁷²

Nevertheless, some alienations it was recognized could take place for certain reasons (*causae*) and with certain formalities and safeguards. The reasons justifying alienations were four. First there was necessity and this he explained would obtain if the church in question had debts and the revenues did not suffice to pay them. Without reaching the level of necessity the law also permitted the sale of one property in order to buy another and better one—in cases of evident utility. The flip side of this reason—unsuitability—also provided a legitimate reason for the sale of property and this occurred where retaining the property was more a burden than a benefit to the Church. This was the famous decretal, *Terrulas*, and such circumstances could happen, for instance, if the property were located in an isolated area or had simply become unproductive. Related to the third cause justifying alienation was one factor which the law recognized as an exception to the rule against alienation. This was the case of property of modest value. Such property might be alienated even without the usual formalities. Because it formed an exception to the usual rule, the “modest value” exception was to be interpreted strictly (cf. c. 18). The final

⁷¹ NICHOLAUS DE TUDESCHIS, *Lectura super quinque libros decretalium*, 8 vols., Lugduni, Apud Senetionios Fratres, 1547, VI, p. 95B.

⁷² DE TUDESCHIS, *Lectura*, VI, pp. 95, 96.

justification for alienation was "*pietas*" and Panormitanus gives the example of a sale to ransom captives.⁷³

As for the formalities, as in the case of the ward and tutor, there had to be interposed the authority of the superior and the consent of the chapter in addition to subscription of the cleric who was the administrator of the property of the benefice. Panormitanus added—doubtless referring to the details of Constantine's constitution—that in ecclesiastical alienations no judicial decree was required. He added also that, since the formalities were of the essence, their absence resulted in the nullity of the act. Besides the nullity of the act, the law also inflicted penalties on those who attempted or consented to unlawful alienations. Absent restitution, these malefactors were excommunicated.⁷⁴

It had become the practice along with papal provision of bishops and other prelates to their benefices to require of the appointee an oath against alienations. In 1193 Archbishop Hubert Walter of Canterbury took an oath of fidelity to the pope which included a clause that he would not alienate property of his *mensa episcopalis* without first consulting the pope.⁷⁵ Thereafter such clauses became increasingly common and the question thus arose whether those who had given such an oath could lawfully alienate any property of their benefices. With the spread of papal provisions in substitution for canonical elections by cathedral chapters, the oath had effects on an ever wider class of ecclesiastics and jurists like Panormitanus examined the question. He noted first that, given the purpose of the oath, viz. to safeguard church property, the oath did not apply where the proceeds of the alienation were to be used to buy replacement property of greater utility. Nor did the oath apply where the property to be alienated was of modest value or modest in terms of its usefulness. This followed from the end of the oath, viz. to bind by a further bond

⁷³ DE TUDESCHIS, *Lectura*, VI, pp. 95, 97B. He also at p. 96B described a further case in which church property might be alienated, although this was really another example of the *Terrulas* exception. Where land had become profitless or had ceased to be cultivated, it might be transferred in *emphyteusis*. This was a mode of land tenure borrowed by Roman law from the Greeks. The owner retained only *dominium directum*, a perpetual rent and the right to re-entry if the rent had not been paid for three years or two years in the case of an ecclesiastical owner. The lessee or *emphyteuta* had *dominium utilem* or all the other incidents of ownership and the duty to pay the taxes. The purpose of this form of land tenure was to encourage the bringing back into cultivation of sterile land and the *emphyteuta* had a duty of amelioration. WILLIAM R. JOHNSTON, "Emphyteusis: A Roman 'Perpetual' Tenure," in *University of Toronto Law Journal*, 3 (1939-40), pp. 338, 340.

⁷⁴ DE TUDESCHIS, *Lectura*, VI, pp. 95B-96.

⁷⁵ CHENEY, "Inalienability," p. 477.

the appointee to observe the law. But, as we just saw, property of modest value was an exception to the bann on alienations and so the oath had to be interpreted as countenancing such an exception. Finally, canonists noted that the language of the oath tended to include a promise not to alienate property without prior consultation with the pope and so a papal dispensation was already contemplated by the oath and in effect with papal license alienation was always possible.⁷⁶

Given Panormitanus' restatement of the law on alienations, we can see why, despite the severe penalties it imposed, the bull *Ambitiosae* perceived no need to define what the phrase "valuable movables" meant. Rather, it left this task to the canonical tradition. At the same time the apostolic constitution turned the thousand-year old canon law concerning alienation on its head. While stated as a negative, it clearly meant that with prior papal approval, an alienation could be effected. At the same time, the apostolic constitution merely codified the practice of recent centuries and brought to the text of the law the impact of the rise of the papacy in the centuries after the Gregorian Reform. We noted Panormitanus' discussion of the oath demanded of those papally provided to a benefice. Curiously, whilst intended to reinforce the millennium-old norm with an additional bond, the rise of the papal dispensing power had turned this bond instead into a solvent. For as he had bound, so the bearer of the power of the keys could also loose. Finally, we see the imprint of the rise of papal power if we look at the changes made in the requisite formalities. The *dramatis personae* of the imperial constitution were implicitly imported into the Pauline constitution. Thus, the church whose property was being alienated became the ward, the prelate became the tutor approving the transaction, and the pope became the judge who had to scrutinize the transaction before giving his *beneplacitum*, if he found the transaction in the ward's interest. The subject matter at hand, the property of the ward and his relationship with his tutor and others, however, remained the same.

2.6 *Res pretiosa* in the *Doctores iuris canonici*

With the law consolidated, it remained but to elaborate it and accommodate it to changing circumstances of time and place. That was largely the work of the doctors and *auctores probati* of canon law and in what follows we shall survey their refinements. Some supplementary law, however, did come from the Roman congregations and we shall survey that as well. Among the

⁷⁶ DE TUDESCHIS, *Lectura*, VI, p. 97.

most important canonists whose works we shall survey are Francisco Suarez (1548-1617), Franz X. Schmalzgrueber (1663-1735), and Anacletus Reiffenstuel (1611-1703). Whilst not the only canonists who wrote treatises on the subject, they were among the most eminent canonists of the period, but we shall look at others as well. In selecting works I have endeavored to use the works of eminent jurists whose works are frequently used and quoted by the Roman curia. I have also consulted some less well known and especially transalpine jurists with a view to taking a representative sample of all shades of juristic opinion.⁷⁷

The elaboration of this canonical concept of *res pretiosa* by the great doctors proceeded slowly. Even a century after *Ambitiosae*, Suarez declared that the law still had included no definition of “valuable movables”—beyond the Constantinian list of gold, silver, gems, ornaments and precious ecclesiastical vases. One of the pithiest descriptions of *res pretiosa* is to be found in the eighteenth-century treatise of Johann Georg (in religion Anacletus) Reiffenstuel, O.F.M (1611-1703), which describes valuable movables as *quae sunt de thesauro ecclesiae vel quae propter pretium, artem, seu antiquitatem, conferunt ecclesiae singularem splendorem*, i.e., as that property which by reason of its worth, artistic value, or antiquity confers renown on the church owning it. He then cites as examples the Constantinian list of gold, silver, gems, ornaments and precious ecclesiastical vessels.⁷⁸ Schmalzgrueber adds church ornaments fashioned from gold or gems, necklaces, collars, statues, carpets and tapestries.⁷⁹

For a millennium monasteries had maintained schools and libraries and were the light of learning in Europe and, because the bull expressly applied to monasteries, Suarez added extensive monastic libraries to the Constantinian list of valuable movables. The monasteries were, of course, the great centers of learning in the early mediaeval period. Beginning with his monastery at Monte Casino in 529, Saint Benedict became the father of western monasticism and it was largely through Benedictine monasteries that the Roman learning and liturgy were transmitted to the barbarian peoples of Western Europe through monastic foundations at Fulda, Reichenau,

⁷⁷ CICOGNANI, *Canon Law*, p. 111, gives, as examples of eminent jurists whose works are frequently used and quoted by the Roman Curia, De Luca, Barbosa, Reiffenstuel, Fagnani, Schmalzgrueber, Ferraris, Devoti, Pirhing, Sanchez, Suarez, Garcia and I have endeavored to consult the works of these authors especially. My biographical data on canonists cited also comes from CICOGNANI, pp. 383-412.

⁷⁸ ANACLETUS REIFFENSTUEL, *Jus canonicum universum complectens tractatum de regulis juris*, Parisiis, Apud Ludovicum Vives, 1867, IV, p. 102.

⁷⁹ FRANZ SCHMALZGRUEBER, *Jus ecclesiasticum universum*, Rome, Ex Typographia Rev. Cam. Apostolica, 1844, V, pp. 434-446.

Einsiedeln, Canterbury, and other places. As the hymn has it, "*Per te* (the Benedictines) *barbari discunt resonare Christum corde Romano*," through the Benedictines the barbarians learned to resound Christ with a Roman heart. Francisco Suarez, S.J. (1548-1617), noted expressly that, whilst individual or even several books might perhaps not qualify as "valuable" (and so might not fall under the prohibition on alienation), nevertheless to alienate an entire and sizable monastic library was a most grave matter and must be viewed as coming within the rubric of "valuable" movables.⁸⁰

Franz Xavier Schmalzgrueber, S.J. (1663-1735) pursued this category further and noted that, whilst individual books might not be deemed valuable property, libraries, at least if sizable, might be so classed. Then he provided a theory rationalizing the inclusion of this class of valuable, declaring that the law looked not to physical unity but to moral unity.⁸¹ This principle of moral unity could, of course, be applied to valuable collections of things other than books and so became the mother as it were of new types of valuable property.

Similarly, Suarez listed among collections of "valuable movables" flocks of sheep and cattle⁸² and other things capable of self-movement.⁸³ Schmalzgrueber likewise provided a theoretical basis for the inclusion of this group amongst valuable movables, likening their collective fertility to that of the earth as a means of support for their owner. Likewise, draft animals ordained for tilling the soil were to be regarded as valuable, for they, too, were ordered to its fruitfulness. On the other hand, if they were old or infirm and so no longer suited to their function, they might be regarded as superfluous and no longer suited to this end or "valuable." Fruitful aggregates of other things, even if not capable of self-movement, such as groves of fruit-bearing and non-fruit-bearing trees or plants, were also regarded as "valuable." This class included vineyards, olive

⁸⁰ SUAREZ, *Opera omnia*, VI, p. 255.

⁸¹ SCHMALZGRUEBER, *Jus ecclesiasticum universum*, V, p. 447. At the same time Schmalzgrueber was alert to the possibility that a single book (perhaps an ancient manuscript) might be *res pretiosa* if it *propter antiquitatem vel aliam similem causam ecclesiae vel monasterio afferrent specialem utilitatem aut splendorem*.

⁸² Clearly before the modern age cattle were among the chief valuable movables in any western society and this is mutely evident in the etymology of most of our current legal words for such valuables. "Chattels", for example, comes from "cattle". "Fee" comes from the German "*Vieh*", also "cattle". "Pecuniary" comes from the Latin "*pecus*", also "cattle". BERMAN, *op. cit.*, p. 298.

⁸³ SUAREZ, *Opera omnia*, VI, p. 255

groves, and groves of nut-bearing trees. Here Schmalzgrueber again provided a useful rule of thumb for determining which trees might be considered valuable. Trees which were either necessary or useful for the estate to the extent that, if cut down, the value of it was notably impaired were deemed valuable. Suarez, by contrast, merely excepted from valuable movables useless fruit-bearing trees or mere shade trees. In any case, once severed from the land, trees could no longer be deemed immovables nor, given their modest value, were they to be considered "valuable" movables.⁸⁴

Lawsuits dealt with the rights of the Church and so canonists determined that in the broad meaning of the word the settling a lawsuit resulted in an alienation. For similar reasons, an administrator might not begin a lawsuit and so potentially incur a liability without proper permission of his superior.⁸⁵ Authors also deemed valuable property to include certain legal rights, including rights of action, since obviously such actions might involve the acquisition or loss of the property itself. Thus they were viewed as likened to the property, movable or immovable, as the case might be, to which the right itself referred. In due course this would become a growth category, for, beyond rents and long-term annuities which might arise from profits in land, there were also debt instruments and investments in *monti di pietà* and later joint stock ventures. Some such rights in action were seen as immobilized movables and hence came to be classed as "valuable."⁸⁶

Whilst not listed by Suarez, other authors nevertheless declared notable relics of the saints to be valuable property, and Schmalzgrueber noted that notable relics like the head, arm, hand or foot and all the more so the entire body of a saint—which might be adorned with precious stones and precious metals—might not be alienated, as evidenced by the practice of the Roman Curia.⁸⁷

⁸⁴ SCHMALZGRUEBER, *Jus ecclesiasticum universum*, V, p. 448.

⁸⁵ ASCANIO TAMBURINI, *De jure abbatum et aliorum praelatorum tam regularium quam secularium episcopis inferium*, 4 vols., Coloniae Agrippinae, Joannem Balthasarem Coomans Typis Joannis Philippi Andreae, 1694, III, p. 241.

⁸⁶ ROBINSON, *European Legal History*, p. 103. By the end of the thirteenth century business was being conducted by correspondence and the bill of exchange was established in practice and for Italian firms money was regarded as a commodity. Joint stock companies first appeared in fourteenth-century Genoa and a public loan was raised in Genoa in 1346 with negotiable and inheritable shares. The shareholder had *dominium utile* in the stock. Maritime insurance contracts were also known in the fourteenth century. But it was not till the Age of Discovery that negotiable shares came into currency in northern Europe.

⁸⁷ SCHMALZGRUEBER, *Jus ecclesiasticum universum*, V, p. 446.

Indeed, some authors, like Agostinho Barbosa (1590-1649), argued that relics were priceless and so more valuable than precious metals.⁸⁸ Authors distinguished here significant relics from others, deeming a head, shoulder, hand or foot or, of course, an entire body of a saint to be “significant” and so “valuable”, even though no value in a temporal sense could be placed on relics. Indeed, they were beyond price. By implication, the more modest relics fell outside the “valuable” class.⁸⁹

Slaves also fell into the category of valuable movables, if they formed a notable part of the church's patrimony. However, if they were prone to escape, their utility was considered diminished and their inclusion among *res mobiles pretiosae* ceased and so did their character as valuable church property. In this situation they might be sold, for the proceeds of the sale would be more useful to the church than the slave. Moreover, the law permitted the manumission of slaves for certain valuable service rendered or should a prelate, using his own funds, choose to purchase the slave's freedom. In the latter case the law seems to have recognized a right to an exchange in which case one valuable property necessarily was substituted for another. Normally barter or exchange was deemed alienation but in the case of slaves the law permitted it, if the prelates paid double the slaves present value and so the patrimonial condition of the juridical person was deemed improved.⁹⁰

Finally Suarez proceeded to discuss those classes of movables not deemed “valuable.” In general property in this class was either of a type intended for consumption or it was property which by its nature was perishable and spoilt or deteriorated quickly. The character of the property rather than its intrinsic worth was key and thus this type of movable was not to be deemed “valuable,” even if in quantity it would fetch a large price. Into this class he lumped various types of property for consumption such as money, oil, wheat, wine and other fruits as well as clothes for daily use which were of no great value.⁹¹ This class included largely the sort of things that might be

⁸⁸ AGOSTINHO BARBOSA, *Pastorales solecitudines, sive de officio et potestate episcopi tripartita descriptio*, 2 vols., Lugduni, P. Borde, 1698, II, p. 381.

⁸⁹ FERDINAND KRINER, *Quaestiones canonicarum in quinque libros decretalium*, 5 vols., Augustae Vindelicorum, Sumptibus F. Schluteri, 1708, III, p. 271

⁹⁰ SCHMALZGRUEBER, *Jus ecclesiasticum universum*, V, p. 447; TAMBURINI, *De jure abbatum*, III, p. 240.

⁹¹ SUAREZ, *Opera omnia*, VI, p. 255.

regarded as income to a usufructuary or life tenant and with respect to such property there was no prohibition on alienation.

Beyond things ordained for consumption, there were some items made of valuable materials which might, nevertheless, be excluded from the ambit of *Ambitiosae*. Suarez called this group things useful and of no great value, (*magnae aestimationis non sunt*).⁹² Amongst items made of valuable materials but of no great value Reiffenstuel classed less useful silver cups (*pocula argentea minus utilis*) which might be disposed of, or old chalices (*veteres calices*) which might be refashioned into new ones in accordance with customary law of the place. Often this latter category was property which had deteriorated through use. Many authors offered some commentary on the meaning of the phrase "of no great value". While most authors realized that value was relative and varied according to circumstances of place and time, the rule of thumb commonly adhered to was that the phrase "of no great value" meant a value under ten gold scudi.⁹³

Although his description of valuable, "by reason of its worth", might suggest otherwise, Reiffenstuel excludes money from the prohibition on alienation of valuable movables. Money is clearly a movable, merely reposing in its coffer, but in the mediaeval and early modern view, being properly only a medium of exchange, it was thought to be sterile (*nullum fructum affert*) and not fruitful and so not "valuable".⁹⁴ But money might also be a store of value as in the case of money representing proceeds from the sale of immovables. With more good sense than logic such money continued to assess its erstwhile "immovable" character. Likewise, money officially set aside specially for the building of a church or money specially reserved for the gravest future needs was considered to possess presently its prospective character and so was "immobilized"

⁹² SUAREZ, *Opera omnia*, VI, p. 255.

⁹³ BARBOSA, *Pastorales solecitudines*, II, p. 381 noted that some authors held that "modest" meant up to 50 gold scudi, others up to 20 scudi and others up to 10 scudi. Others held that "modest" was relative to circumstances of time and place.

⁹⁴ JULIUS KIRSHNER, "Raymond de Roover on Scholastic Economic Thought," in JULIUS KIRSHNER (ed.), *Business, Banking, and Economic Thought in Late Medieval and Early Modern Europe: Selected Studies of Raymond de Roover*, Chicago, University of Chicago Press, 1974, p. 29, notes that the *idée fixe* of the Schoolmen that *pecunia non parit* was on the brink of obsolescence since the sixteenth century but that it was only officially declared so in the nineteenth century.

and not subject to alienation. The common feature of movables in this category was that they might provide part of the endowment or future income of a juridical person.⁹⁵

What is alienation? The doctors of canon law answered this question broadly, since the object of the prohibition was to favor the Church by conserving her property interests. Hence, they declared that alienation was any act by which *dominium* was directly or indirectly transferred. This included contracts for sale, exchange, barter or gifts or any other legal disposition which rendered less valuable the legal or economic condition of the property. Reiffenstuel added that the transfer must be voluntary for it to come under the meaning of "alienation," adding that a transfer ordained by a testator or by judicial sentence was not an alienation.⁹⁶ Furthermore, by its express language *Ambitiosae* forbade leases beyond three years, as well as pledges and mortgages, unless the permission of the Holy See had been obtained for the transaction. Clearly the object was to place comprehensive restrictions on the disposition of church property.

The first restriction flowed from the notion of the administrator. As we have seen, the Church early adopted the norm that the churchman was administrator, not owner, of church property. As such, he could not alienate what was needed for divine worship or for the decent support of her ministers, for then he would be, not its administrator, but its dissipater. His rights, moreover, were likened to those of the usufructuary and so he might have the use of a thing and enjoy its fruits, but he could not consume its substance, which was a right reserved to an owner.⁹⁷

⁹⁵ REIFFENSTUEL, *Jus canonicum universum*, IV, p. 103; BARBOSA, *Pastorales sollicitudines*, II, p.382. A well-known example of a specially reserved fund is the famous horde of gold and silver coin laid up by Sixtus V (1585-1590) in Castel San Angelo. This man, who found the papal coffers nearly empty on the day of his election, died five years later leaving in Castel Sant'Angelo an enormous horde of bullion such as had no pope before. The patrimony he left behind included three million gold scudi and over a million silver scudi. The gold was reserved as papal patrimony for a crusade against the Turks, to relieve plagues, or to repel invasions of the Papal States. The horde of silver could be used for genuine needs. Reputedly, Sixtus died the richest prince in Christendom. His horde won the papacy independence from the rival French and Spanish monarchs during the early modern period, and it survived until the French Revolutionary army invaded Rome and confiscated his horde. LUDWIG VON PASTOR, *The History of the Popes from the Close of the Middle Ages Drawn from the Secret Archives of the Vatican and Other Original Sources*, 40 vols., St. Louis, B. Herder Book Co., 1923-1969, xxi, p. 125; JEAN DELUMEAU, *Vie économique et sociale de Rome dans le seconde moitié du xvi siècle*, Bibliothèque des écoles françaises d'Athènes et de Rome 184, 2 vols., Paris, E de Boccard, 1957, II, p. 766.

⁹⁶ REIFFENSTUEL, *Jus canonicum universum*, IV, p. 101.

⁹⁷ TAMBURINI, *De jure abbatum*, II, pp. 237-239, 242; SUAREZ, *Opera omnia*, VI, p. 247: "*Limitatio autem huius potestatis... quia non ut dominus, sed ut dispensator potest praelatus alienare haec bona.*"

What were the requisites of canon law for lawful disposition of church property after *Ambitiosae*? The doctors answered that there must be a just cause and the necessary solemnities. From the text of the decretals they divined four causes which would serve to legitimate the alienation of church property. These four causes were necessity, evident utility, piety and inconvenience. Necessity seemed fairly clear. This meant overarching circumstances beyond the control of the beneficiary and might include the need to pay a debt or a judgment where no current income or other asset was available for the purpose. It was also deemed present if revenues proved insufficient to feed the Church's ministers or if there were lacking vessels needed for divine worship. The second cause was evident utility and this meant that it must be demonstrable that at the time the contract was concluded that the transaction would improve the position of the benefice. The third cause for alienation was piety. As we saw earlier, in the Early Christian period the revenues of each diocese were in theory divided into four parts for the bishop, the clergy, the maintenance of the fabric, and the benefit of the poor. Hence, it was held permissible to alienate church property to redeem captives or succor the poor in time of famine or to bury the dead. The last justifying cause for alienation was inconvenience. This might arise if the property in question was remote from the church or monastery owning it or if circumstances had so changed so that the property had ceased to provide a useful contribution to the patrimony of its owner.⁹⁸ Some writers noted that in fact the four causes could be reduced to two, utility and piety. In any case just cause remained a strict requirement of canon law and one, moreover, which in any transaction had to be proved.

The next requirement for lawful alienation was due form. There were several elements here and these varied somewhat depending on the circumstances of the owner of the property and local custom. There were basically three types of church entities that might effect alienations and the solemnities would vary with the structure or type of owner. First, the entity disposing of the property might be a diocese, in which case the bishop would approve the disposition and then needed the consent of his cathedral chapter of canons. Second, the alienating entity might be a religious institute such as an abbey. If exempt from the jurisdiction of the diocese, as was very frequently the case, the abbot then, like a bishop, needed the consent of the chapter of monks of the abbey. The third type was where the alienating entity was subject to the bishop. In this case, the entity's head needed the consent of his chapter of canons, if it was a collegiate entity, and also

⁹⁸ REIFFENSTUEL, *Jus canonicum universum*, IV, pp. 103-104; REINHARD BAUMGARTNER, *Conclusiones ex quinque libris decretalium deductae et ratione ac auctoritate breviter illustratae*, 2 vols., Romae, J.G. Salomoni, 1759, I, p. 315.

the consent of the bishop. If the subject entity were not a collegiate entity, i.e. one with a body of colleagues such as a chapter of canons (which would be usual in the case of a parish church), the alienation required the agreement of the church's rector and the consent of the bishop and of the cathedral chapter.⁹⁹

In obtaining the capitular consent, it was necessary that each voting member be given notice of a meeting to be held to discuss the alienation and whether there was just cause for it and whether the proposed alienation was expedient. Consent had to be express and not merely tacit. Each member of the chapter was free to speak on the matter. Since alienation is perpetual, the matter needed serious consideration. After discussion, the consent of the capitulars would be requested and that of a majority of those present was needed for the approval of the transaction. Also needed, of course, was the consent of the relevant bishop or abbot. Commendatory abbots, however, could not authorize alienations, being expressly forbidden to do so by the Holy See.¹⁰⁰

As to the form of the writing setting forth the transaction, it was necessary that it be signed by the prelate approving it and the capitulars who had approved it. In some places, however, customary law had modified the requirements in the matter of form and it sufficed if the notary drafting the writing set forth the circumstances and declared that at a meeting of the chapter the alienation was approved after due discussion by a majority of the canons present and voting. It was, however, considered good practice to apply the capitular seal to add firmer evidence of deliberation and consent and this plus the signature of the dean or other presiding officer should certainly be added where the notary had not personally been present during the vote. If there was no chapter—as in the case of most parish churches—the rector of the church had to give consent and the bishop of the diocese had to approve the transaction. The approval of the superior was of the essence to the transaction.¹⁰¹

⁹⁹ REIFFENSTUEL, *Jus canonicum universum*, IV, p. 104-105.

¹⁰⁰ REIFFENSTUEL, *Jus canonicum universum*, IV, p. 105; TAMBURINI, *De jure abbatum*, III, p. 240.

¹⁰¹ REIFFENSTUEL, *Jus canonicum universum*, IV, p. 105; KRINER, *Quaestiones canonicarum*, III, p. 277. The capitular secretariat was usually headed by a dignitary called the chancellor. This canon was often entrusted with the chapter's common seal and so its presence on a document would tend to provide mute evidence that the chapter's consent had been requested and received. For a brief description of the officers of chapters and their duties, see my "Music for the Collegiate Church Yesterday and Today," *Sacred Music*, 119 (Spring, 1992), pp. 9-18

The final requisite solemnity was the permission of the Holy See. Since the creation in 1587 of the Sacred Congregation of the Council, it had had subject matter jurisdiction in alienation matters and so it was necessary to structure the contract so that it became effective only when that permission was in fact given. The procedure was to make a report of the proposed transaction supplying the necessary financial information and requesting the needed permission. It was thus important to couch the transaction in such a way that it was only effective if approved by the Holy See. Once the approval was given, it was important to keep a record of it, since this permission was required for validity. However, if given and proof were lost, this permission as well as the other solemnities could be presumed, if there were in the record no contra-indications, after the usual time for prescription had run. The "statute of limitations" or time for prescription in such canon law cases was thirty years.¹⁰² A caveat should be entered at this juncture, however, inasmuch as not all regions had "received" the Pauline constitution *Ambitiosae* and admitted its force. Reiffenstuel, for example, notes that in parts of Germany *Ambitiosae* was not received and the same was true of France and what is now Belgium.¹⁰³

Martin de Azpilcueta, alias Navarrus (1491-1586), was a canon regular who taught at Toulouse, Salamanca and Coimbra. In his studies he treated the matter of alienation and noted that, after *Ambitiosae*, the canons forbade the alienation of *bona mobilia ecclesiae pretiosa*. Like Panormitanus, he saw the bann as including the transfer of *dominium directum* but also of *dominium utile* by long lease or by transfer in emphyteusis or for perpetual rent. At the same time he noted that alienations could be effected in the cases provided by law and with the observance of due canonical form. His justifying causes were the same as those of Panormitanus, although under the rubric of *pietas* he adds that church property may be sold to buy food for the poor as well as to ransom captives. He made some advances in his discussion of *res pretiosa*. The imperial constitution had defined this as *quae servando servari non possunt*. The law on tutors also excluded from valuable movables things consumed by use and things not fruitful. He further noted that things of little value were outside the bann on alienation and, noting that *Ambitiosae* only banned leases over three years, by analogy declared not valuable things with a life of less than three years.¹⁰⁴

¹⁰² BARBOSA, *Pastoralis solecitudines*, II, p. 385.

¹⁰³ REIFFENSTUEL, *Jus canonicum universum*, IV, p. 106.

¹⁰⁴ MARTIN DE AZPILCUETA, *Operum Martini ab Azpilcueta Doctoris Navarri*, 3 vols., Romae, Ex Typographia Iacobi Tornerii, 1590, II, 208-209. Where the sterile condition of land justified *emphyteusis*, BARBOSA, *Pastorales solecitudines*, II, p. 381, held that the long lease to be limited to three lives.

Ioannis Azorio Lorcitano (1535-1603) was a Jesuit who added somewhat to the law on alienation of valuable movables. Regarding the justifying causes of alienation, he further elaborated on *pietas* and argued that valuable church vessels might be broken up and sold not only to ransom captives and feed the poor, but also to bury the dead. As for utility, he argued that a fugitive slave, who if returned to his master could not be retained securely, might be given his freedom. As for what was *mobilis pretiosa*, he advanced a bit beyond Panormitanus. He argued that money set aside to buy immovables by authority of the superior and with the consent of the clergy was to be likened to immovables. He also argued that where the need was immediate and time would not permit recourse to the Roman Pontiff for his prior permission to alienate, this formality might be excused.¹⁰⁵

Agostinho Barbosa (1589-1649) is one of the *auctores probati* frequently quoted and used by the Roman Curia. A native of Portugal, he ended his days as a bishop in Italy. He added some noteworthy observations. The three-year limit on leases had he said in mind three crops. In the case of land leased for a crop that bore fruit only after three years, the lease might lawfully be made for nine years so that three crops might be taken. He further argued that where the removal of trees would be gravely detrimental to the land [sc. where needed to prevent erosion], they might be regarded as valuable movables. Similarly flocks of sheep and herds of horses and cattle could constitute valuable movables. The same was not true, however, of their individual fruits. Money, on the other hand, is not usually so regarded for it is retained for daily use as a means of exchange and bears no fruit. Nevertheless, if destined for the purchase of land or valuable movables or if secured in some coffer for future needs of the church and so designated by the church's prelate, it should be seen as belonging to the substance of the juridical person and so not subject to alienation. He also argued that money deposited in a bank could be regarded as an immovable, although here he may have had in mind the mortgage lending banks of the day and so this would have represented more investment capital rather than a mere deposit of cash. He also discussed whether prescription could cure a defect of form such as the absence of the permission of the Holy See. He argued that the more received opinion, which had the *placet* of Rotal jurisprudence, was that the running of thirty years after the death of the alienating prelate cured

¹⁰⁵ IOANNE AZORIO LORCITANO, *Institutionum moralium in quibus universae quaestiones ad conscientiam recte aut prave factorum pertinentes breviter tractantur*, 3 vols., Mediolani, Apud Pacifici Pontii et Ioan. Baptistam Piccoleum, 1617, II, pp. 609-612. One should note that in those days rules on promulgation sometimes required the consent of the secular power before canonical norms could be promulgated.

the defect by prescription, but he admitted that some argued that the running of a period of forty years was required.¹⁰⁶

Giovanni Francesco Leoni (1542-1613) made some contribution to the discussions about the exceptions to *Ambitiosae*. He noted that the law had traditionally permitted the alienation of immovables of little value and so this remained an exception of the law of the apostolic constitution. What this minimum sum was he suggested should be fixed by provincial or synodal decree. He further argued that land that had become infertile could be let at long lease in emphyteusis or for a perpetual rent. This form of land tenure had as its object to provide greater security to the tenant and so to encourage more careful husbandry and even investment in the land. In due course this would result in overall improvement of the land. Perhaps to provide a clearer understanding of the justifying cause of '*pietas*' he formulated what seems an epigram: *Gloria episcopi est pauperibus providere, ignominia sacerdotis est propriis studere divitiis*, the glory of a bishop is to provide for the poor, the ignominy of the priest is to quest for riches for himself.¹⁰⁷

Giovanni Carlo Antonelli (1600-1694) provided some succinct summaries of parts of the law of valuable church property. As for money, he stated that it is usually regarded as property which cannot be preserved. The case was otherwise, however, if it represented proceeds from the sale of immovables or valuable movables or where it had been destined either by the will of the superior or the donor or the testator for the purchase of immovables or valuable movables. A common example of the last was a nun's dowry, which was intended to be invested and used for her support. Another example of a valuable movable was money invested in the *monti di pietà* or mortgage banks where it bore interest and so was fruitful. As to whether *Ambitiosae* had been received everywhere, he noted that opinions seemed to vary. But he argued that, since it had been inserted into the *Corpus iuris canonici*, the presumption should be that it had been received.¹⁰⁸

¹⁰⁶ BARBOSA, *Pastorales sollicitudines*, II, pp. 377, 381, 382.

¹⁰⁷ GIOVANNI FRANCESCO LEONI, *Thesaurus fori ecclesiastici episcopalis ac eorum vicariis omnibusque ecclesiasticis, etiam in foro poenitentiali, iudicibus perutilis et maxime necessarius*, Bononiae, Apud Io. Baptistam Bellagambam, 1604, pp. 195-196.

¹⁰⁸ GIOVANNI CARLO ANTONELLI, *Tractatus de regimine ecclesiae episcopalis*, Venetiis, Ex Typographia Balleoniana, 1723, pp. 26,32.

Manuel Gonzalez Tellez, who died in 1649, was a doctor of Salamanca and a professor of law. He discussed at some length how the formalities for alienation were to be accomplished. Where the property to be alienated belonged to a capitular or collegiate body where each member of the chapter had an equal right to vote, the chapter was to be lawfully convoked pursuant to the customary notice. The superior or chairman was to explain the proposal, its justifying cause, and the details of the transaction including the reasons for the alienation. After discussion came the vote. This required a majority of those present and voting with at least two thirds of the capitulars present.¹⁰⁹

Cardinal Giovanni Battista De Luca (1614-1683) was a very learned jurist who amongst other topics discussed the alienation of valuable movables. In the first place in trying to determine if a thing were valuable, he advocated looking to the thing itself to see if it were of solid material and so suitable for preservation. But beyond that one should also look to the occasion of the alienation which was permissible where the object was to renovate the thing and produce a better and more modern result. This was frequently the case with chalices, pyxes, crosses and candlesticks wrought of gold or silver and, to the horror of art lovers today, he found this refashioning acceptable.¹¹⁰ It was in fact a commonplace in his day to refashion plate in newer styles. Until the development of art history and an art market, old silver gained no value as it acquired the patina of age, as we saw in Chapter 1.

Ludwig Engel (1634-1674) was an Austrian Benedictine and a *doctor utriusque juris*. He likewise taught that old silver and gold vessels could be alienated or exchanged for new and good ones. His argument proceeded at some length. While tutors could not do this under the constitution of Constantine, nevertheless prelates might do so for their powers were broader than were the powers of tutors. A tutor's authority lasted only for a time, during the minority or disability of his ward. A prelate's office, by contrast, was perpetual. For this reason Engel argued a prelate might from the free property of the church make modest gifts, a power which the tutor lacked entirely with respect to the property of his ward. Noting that *res pretiosa* could be said to be *quae sunt de thesauro ecclesiae vel quae propter pretium, artem aut antiquitatem*

¹⁰⁹ MANUEL GONZALEZ TELLEZ, *Commentaria perpetua in singulos textus quinque librorum decretalium Gregorii IX*, 5 vols., Venetiis, Apud Nicolaum Pizzana, 1699, III, p. 165.

¹¹⁰ GIOVANNI BATTISTA DE LUCA, *Theatrum veritatis et iustitiae*, 15 vols., Venetiis, Ex Typographia Belleoniana, 1734, VII, p. 213.

singularem splendorem ecclesiae conferunt, he was quite outspoken that relics of the saints were to be regarded as valuable movables.¹¹¹

Heinrich Pirhing (1606-1679) was a Bavarian Jesuit who published a commentary on the Decretals. He explained the reasons for the restrictions on the alienation of church property: Prelates and rectors of churches are not owners but rather stewards or administrators of church property and so they possess no absolute right to alienate it, except in the cases provided by canon law. Alienation was prohibited in the case of immovables and valuable movables. The latter included flocks of sheep and goats, for, while individual animals might be sold, the flock as a whole was to be considered fruitful and capable of replenishment. Likewise draft animals devoted to the cultivation of the land. Such could only be alienated if superfluous. By the same line of reasoning trees necessary or useful for maintaining the value of the land were not to be felled without the requisite formalities. In general valuable trees were fruit-bearing ones, but even these might be felled if they posed an obstacle to increasing the fruitfulness of the estate, whether by reason of their age or diseased condition. Regarding the justifying causes of alienation, Pirhing added to the stock of learning here. One met the standard of utility if one alienated to acquire something better or more useful for the Church, but it did not suffice that in the transaction the Church suffered no harm or loss. There must be some positive benefit. Regarding *pietas*, he added some prudent thoughts. Sacred vessels were only to be broken up and sold when other means of succoring the poor were not at hand. Moreover, he advised choose first things not destined for worship or at least those things which were superfluous. Consecrated or blessed articles should be alienated only for the most urgent reasons.¹¹² In sum Pirhing opined that the four causes, necessity, utility, piety, and unsuitability could all be reduced to the second—utility. As for the formalities, he declared that the consideration of the reasons for alienation could not be presumed. On the contrary it and the majority's consent had to be

¹¹¹ LUDWIG ENGEL, *Collegium universi juris canonici ante hac juxta triplex juris objectum partitum nunc vero servato ordine decretalium accuratius translatus et indice copioso locupletatus omnibus tam in foro quam in scholis apprime utile ac necessarium*, Venetiis, Apud Michielem Hertz, 1718, III, p. 227. Of relics Engel said, "*Reliquiae quoque sanctorum maxime vero ...inter mobilia pretiosa rectissime numerat et ita de stylo Curiae Romanae observari dicit.*"

¹¹² GARRETT J. ROCHE, "The Poor and Temporal Goods in Book V of the Code," in *The Jurist*, 55 (1995), p. 339, argues, "there will be some cases where the real needs of the poor can only be met by selling some goods that may be of historic or artistic significance. There will be cases where the money tied up in the preservation of artistic wealth is money that should be used for the poor. There will be cases where the 'embellishment of churches,' or even old church buildings themselves, need to be sold to address the urgent needs of the poor." This is true, but it would seem that the sort of triage indicated by Pirhing for *res sacra* must first also be done for *res pretiosa*.

expressly set forth and these persons had to subscribe to the act, unless by local custom the mention of consent by the notary was held to presume both consideration and consent. The formalities were presumed to have occurred after the passage of thirty years.¹¹³

Martin Bonacina (c. 1585-1631) added to the discussion about the question of money as *res pretiosa*. Like other canonists he held that money which was free capital and like fruits could be spent. However, some money—such as that invested in *monti di pietà*—was *pecunia non otiosa sed fructifera*. Likewise, money set aside for a nun's dowry and money which represented the proceeds from the sale of immovables or *res pretiosa* remained stamped with its former character and so might not be freely alienated. On the other hand, he held that money which represented oblations to sacred images did not represent *res pretiosa* because, unless in the form of gold or silver vessels, such property did not come within the definition of *quae servando servari possunt*.

Bonacina also discussed the question of trees. Here he opined that the question of alienability did not turn solely on whether they were fruit-bearing or not, for a growing tree fell within the definition of *res pretiosa*, viz., *quae servando servari possunt*. Moreover, he noted that the cutting of trees was an act of *dominium*, an exercise of the *ius abutendi*. But the benefice-holder was not the *dominus* of the property of the benefice but rather more like the usufructuary. He added that the cutting of trees by the beneficiary was not itself an act of alienation, however; rather, it was an act of usurpation. He added a few more points. In general he did not favor the cutting of non-fruit-bearing trees like oaks if the result would leave the estate in a less favourable condition than before. However, if the result was to remove an oak so that fruit-bearing trees might be planted or rendered more fruitful or if it were the case of removing old fruit-bearing trees to replace them with others more fruitful in the future, these were cases of lawful improvement.

A related question was the case where a specie change in a thing was to be effected, for example, melting down silver lamps to pay for necessary fabric repairs to the church. He noted that such property was properly *res pretiosa* and so it is an alienation and thus was prohibited. He also discussed the question of the alienation of relics. In the case of notable relics he saw these as analogous to *res pretiosa* and so took the view that they might not properly be alienated, noting that this was also the *stylus Curiae Romanae*. But he added an interesting distinction, viz., that in

¹¹³ ERNRICO PIRHING, *Jus canonicum in V. libros decretalium distributum nova methodo explicatum*, Venetiis, Ex Typographia Remondiniana, 1759, III, p. 120-122.

his opinion the alienation of relics did not attract the penalties laid down by *Ambitiosae*, for that bull only applied the temporal goods where a value could be measured.¹¹⁴

He further elaborated on the requisite formalities for alienation. Discussion had to precede decision and all those interested in the matter had to be convoked to a meeting to discuss the question. And reasons both pro and con had to be presented to see if the alienation was expedient. A majority of those present had to consent for alienation to be lawful and they ought to subscribe to the writing witnessing the transaction. On the other hand, if this were drawn up by a notary as a public authentic act, they need not subscribe if the notary affirmed their consent and local custom permitted such an alternative. The superior giving permission, however, must subscribe.¹¹⁵

Franz Widmann (1711-1775) provides some additional light on a number of points. Presaging canon 1295, he argued that "alienation" should be understood broadly and so it should be understood to include every agreement by which the Church is prejudiced or ownership is lost, whether directly or indirectly, or where another right (*ius in re vel ad rem*) or even immunity is burdened or even pledged or mortgaged. He declared those things "precious" or valuable which *propter aliquam excellentiam, artem, antiquitatem pertinet ad thesaurum ecclesiae*, because of some excellence, art or antiquity belongs to the treasury of a church. As examples he named notable relics, which is to say the head, arm, hand of some saint or a particle of the True Cross. He also listed as valuable gems, necklaces, vessels of great value or workmanship, great quantities of gold or silver, and things of great use to a church because they provide income each year like a flock of sheep or even a library, if sizable. Regarding money, his observations revealed the progress of economics. He noted that money was itself not fruitful following received opinion. As for money on deposit in a bank, he declared the matter was in dispute. His view was that if it was specially set aside then it could be regarded as valuable. If merely lodged in a bank *ad interim*, it should not be. As for the discussions that had to precede alienation, he advised that it be a diligent deliberation to determine whether there was just cause for the alienation, whether the manner of it was suitable and whether something less necessary might not

¹¹⁴ MARTINO BONACINA, *Opera omnia in tres tomos distributa*, 3 vols., Lugduni, Sumptibus FFr Anissonionem et I. Posvel, 1678, I, pp. 710-713.

¹¹⁵ *Ibid.*, p. 716.

first be alienated.¹¹⁶ In short movables not ordained for consumption which, moreover, could provide their owner with some income were regarded as “valuable” and for this reason set apart from movables not so classed.

2.6. *Res pretiosa* in the *Responsa* of the Roman Congregations, 1588-1917

The creation of the Roman congregations by Sixtus V changed in a significant way the manner in which canon law developed. Medieval canon law had developed through decretal and conciliar legislation and through doctrinal elaboration by the doctors and other canonical experts. Now a bureaucratic element entered the scene and assumed importance for canon law. In particular this new influence appeared through the Congregation of the Council, which had power to interpret the decrees of the Council of Trent—which covered nearly all major areas of the law—and the power to review the decrees of particular councils. Trent had not legislated in detail about *res pretiosa* or even about church property. But it did anathematize “any cleric or lay person, whatever the splendor of his rank, even if it be imperial or royal” who presumed to divert “the jurisdictions, goods, rents and rights, even feudal and of emphyteusis, and the incomes, emoluments or any revenues, of any church or institution, which should be applied to the needs of the ministers and of the poor” and ordered that the malefactor remain under anathema until he had made restitution and received absolution from the pope.¹¹⁷ While no direct reference was made to Paul II’s constitution *Ambitiosae*, this Tridentine decree certainly had the effect of reinforcing it. We must, therefore, look at some of the Congregations’ decisions which elaborated the law of *res pretiosa*.

The Roman Congregation of Indulgences and Relics fairly early declared relics to be “valuable.” In 1676 the Congregation held that license could be given by the ordinary for the permanent removal of a body of a saint to a worthier place in the same church. But to alienate or transfer outside the diocese these relics required the permission of the Roman Pontiff.¹¹⁸ Likewise, in

¹¹⁶ FRANZ WIDMANN, *Jus canonicum theotico-practicum utriusque foro, canonico et civili, accomodatum ac iterato cum indice ad omnes V decretalium libros editum*, 5 vols., Augustae Vindelicorum et Oeniponti, Impensis Josephi Wolff, 1760, III, pp. 280, 180-183.

¹¹⁷ COUNCIL OF TRENT, decree, 17 September 1562, session 22, c. 11 de ref. in TANNER, II, p. 741.

¹¹⁸ CONGREGATION OF INDULGENCES AND RELICS, decree, 17 November 1676, *Decreta authentica sacrae congregationis indulgentiis sacrisque reliquiis praepositae ab anno 1668 ad annum 1882*, Ratisbon, F. Pustet, 1893, p. 9; GASPARRI, VII, p. 555.

1878 the Congregation ordered that relics be neither bought nor sold whether in or outside Rome.¹¹⁹

Besides *res pretiosa*, another concept inherited by the Church from Roman law was that of privilege. The notion of privilege has always been somewhat troublesome for privilege, literally a private law, is opposed to the notion that laws are prescriptions of general application. Nevertheless, at least by imperial times the notion of privilege was well established in Roman law and continued in use during the age of vulgar Roman law until, with Gratian, it made a formal re-appearance in canon law. Thereafter, it was in frequent use in canon law and, after the Gregorian reform, monks and other religious, who were often protagonists of papal power, were the frequent recipients of privileges. Often the effect of such privileges was to exempt religious from the jurisdiction of the diocesan bishop and to make them immediately subject to the pope. As the number of privileges multiplied, the law of privileges was elaborated.

Many religious institutes were granted privileges,¹²⁰ exempting them from the forms requisite for the alienation of *res pretiosa*. Thus Pope Eugene IV gave a privilege to Cassinese Benedictine abbots authorizing them to alienate church property up to the value of 200 gold florins with the consent of the chapter and the permission of the Congregation's abbot general, but without the requirement of obtaining papal permission. In 1571 Pius V raised this limit to 50,000 scudi. Likewise Gregory XIII in 1576 gave the Jesuits the privilege of making any alienations whatsoever merely with the permission of the Society's general superior in Rome. Similarly he gave to the Carmelites and the Augustinians the privilege of making any alienations whatsoever, provided that two thirds of the friars or nuns of the convent affected consented to it and the general approved it.¹²¹

¹¹⁹ Ibid., p. 405.

¹²⁰ Privileges might be personal, real, or local, depending on whether they were attached to a person, a thing or a place. They derived from the legislator and usually involved a derogation of the general law in favor of an individual or group. Privileges might derive from the law itself or from a special concession of the legislator or, before the 1917 Code, they might be obtained by communication. Communication was a particularly advantageous method of obtaining privileges. It meant that a third party obtained the privilege originally granted to a second party, as well as any extensions or amplifications acquired by the second party, even if the second party had later lost the privilege entirely. CHARLES LEFEBVRE, "Privilege," in DDC, 7, cols. 226-229.

¹²¹ TAMBURINI, *De jure abbatum*, III, p. 246. These privileges would become the ancestor of the 30,000 franc limit of CIC canon 1532 or the maximum limit of RCIC canon 1292.

By the seventeenth century these privileges had become so extensive that they were working a disservice on the law. Therefore, despite the values enshrined in RCIC canon 4, it became necessary to abrogate these privileges of religious institutes. On 7 September 1624, therefore, on orders of Urban VIII, the Sacred Congregation of the Council promulgated a decree abrogating, within Europe, these privileges and re-instating the force of the 1468 Pauline constitution. At the same time the abrogating decree added new sanctions for those religious who dared to alienate church property contrary to the Pauline constitution. Henceforth such alienations required the prior written consent of the Sacred Congregation of the Council. Religious acting contrary to *Ambitiosae* were now declared deprived of all offices and of active and passive voice in their institute. This is to say they henceforth could not vote nor be elected to office in their institute and they were further declared forever incapable of doing so.¹²²

The force of the 1624 decree was upheld a few years later in 1666 in the case of a transfer of church property from one monastery to another where both belonged to the same institute and to the same province of the same institute. It was explained that the object of *Ambitiosae* was to ensure that each church and each religious house should have suitable support for divine worship and the religious there. Hence, it was not permitted to despoil one altar for the advantage of another.¹²³

On 27 July 1647 the Sacred Congregation of the Council answered a query of the Olivetani as to whether regulars might, without the permission of the Holy See, transfer the property of one monastery to another especially if both were of the same province and order. Citing the decretal of Benedict XII, the Sacred Congregation held that the proposed alienation might not be made without the requisite permissions.¹²⁴

In a further reply in 1666 to a query of the Order of Preachers the Congregation noted that while houses of the same order might make a mutually beneficial exchange of fruits between the two

¹²² TAMBURINI, *De jure abbatum*, III, p. 251; Sacred Congregation of the Council, decree, 7 September 1624, in GASPARRI, V, pp. 230-231; SACRED CONGREGATION OF THE COUNCIL, *Thesaurus resolutionum S.C. Concilii*, 65 vols., Monachii, Sumptibus Librariae J.J. Lenterianae, 1872, I, pp. 465-466.

¹²³ Ibid., decree, 27 February 1666, I, p. 466.

¹²⁴ Ibid., decree, 27 July 1647, I, p. 465.

houses, the alienation of immovables or precious movables might not be effected without the requisite permissions.¹²⁵

Many years later a group of regulars from Croatia tried to find a safe harbor in one of the traditional exceptions permitting alienation. The friars had alienated a number of precious objects including chalices and patens adorned with gold and gems which, however, were very old and no longer suitable for daily use. The Congregation answered that the alienation was not valid. It noted that the exception would have permitted only the re-fashioning of old vessels into new ones, but it would not authorize their alienation. Thus the friars were declared to have incurred the penalties set forth in the 1624 decree prohibiting the alienation of immovables and precious movables.¹²⁶

An interesting distinction was made regarding security interests or mortgages or pledges of church property. Such security interests it was held might be placed generally on the possessions of a monastery without permission of the Apostolic See, whereas to obligate a specific immovable or precious movable required the permission of the Holy See.¹²⁷ Presumably the general security interest was considered to be merely a pledge imposed on the fruits or income, rather than on the substance of the monastic property and so not subject to the prohibitions of *Ambitiosae*.

Where an alienation was made without the requisite permission of the Holy See the alienator was held to have incurred the penalties set forth in *Ambitiosae* and, as a condition for their remission, he was first required to repair any damage occasioned by the alienation. If alienation was invalid for lack of the requisite permission of the Holy See, the juridical person was to seek rescision or annulment of the conveyance. Where the conveyance was apparently valid but later appeared to be the cause of harm to the juridical person, the remedy of the latter was *restitutio in integrum*. In that case the juridical person must first refund what it has received under the contract. The other remedies of the juridical person would have been against the one wrongfully alienating and, to the extent that they possessed the fruits of his ill-gotten gain, his heirs. The juridical person or its

¹²⁵ Ibid., decree 27 February 1666, I, p. 466.

¹²⁶ Ibid., decree, 15 March 1692, I, p. 466.

¹²⁷ Ibid., 1, decree 2 October 1672, I, pp. 466-467.

successors might also pursue the possessor of the property alienated, seeking its restitution along with the lost fruits.¹²⁸

What might be alienated without the permission of the Holy See? This question recurred from age to age as the value of money changed. We saw the decretal *Terrulas* which permitted the alienation of things of modest value. On 11 January 1596 the Sacred Congregation of the Council expressly declared that *Ambitiosae* had not abrogated this exception.¹²⁹ The medieval gloss on this decretal had suggested that "modest" meant something worth twenty *solidi* or shillings. This was no trifling sum for in England in the fifteenth century the county franchise in elections to the House of Commons was restricted to 40 shilling freeholders. In 1613 the Congregation of Bishops and Regulars held that twenty shillings was then worth 25 gold scudi.¹³⁰ By the nineteenth century canonists were opining that modest value was anything up to 500 francs or about \$100.¹³¹

In 1788 a collateral question arose whether the *de minimis* or *Terrulas* exception operated to permit the exchange of property worth less than 25 scudi or ducats while the episcopal see was vacant if the vicar capitular and cathedral chapter consented to the exchange. The Sacred Congregation of Bishops and Regulars held that *Terrulas* did not form an exception to the venerable rule *sede vacante nihil innovetur*.¹³²

The whole business of the *de minimis* exception was reviewed and revised for religious shortly before the coming into effect of the 1917 Code in a 1909 instruction from the Sacred Congregation of Religious. The instruction forbade moderators of religious institutes to contract debts of notable value without the prior consent of the chapter or council and set a new sliding scale of values for *notabilis valor* for various levels of religious institutes, e.g., houses, provinces or entire institutes. In the case of individual religious houses or independent monasteries notable

¹²⁸ Ibid., decree, 6 March 1693, I, p. 468.

¹²⁹ Ibid., decree, 11 January 1596, I, p. 474.

¹³⁰ Ibid., decree, 29 November 1613, I, p. 474.

¹³¹ DOMINIQUE-MARIE BOUIX, *Tractatus de jure regularium*, Parisiis, Apud Jacobum Leoffre et socios bibliopolas, 1857, p. 290.

¹³² SACRED CONGREGATION OF BISHOPS AND REGULARS, decree, 14 June 1788, in GASPARRI, IV, pp. 843-844.

value was over 500 francs but under 1000 francs. In the case of provinces or quasi-provinces notable value was property worth over 1000 francs but under 5,000 francs. In the case of an entire institute notable value was a sum over 5,000 francs. Any house, province, or institute wishing to alienate property worth over 10,000 francs needed the *beneplacitum apostolicum*.¹³³ In 1919 the Sacred Congregation of the Council declared *valor modicus* to be a thousand gold francs or about \$200.¹³⁴

Another exception to the strict prohibition on alienation was the rule permitting the leasing of church property for up to three years or the alienation of fruits having a life of less than three years or of property which is consumed by use and does not bear fruit. There was further the case of urgent necessity where there was a need to feed the poor or redeem captives and there was danger in delay and the Roman Pontiff could not be reached with any ease. Likewise where property had not been incorporated into the property of the juridical person as in the case of a general legacy, it was held such property could be expended. The Sacred Congregation of the Council in 1622 also repeated the old safe harbor rule that an old precious chalice might be refashioned into a cross or a useless wood transformed into a fruitful olive grove. These were to be regarded as improvements in the patrimonial condition and not alienations. However, where there was a question of the cutting and sale of a large quantity of trees with a resultant notable decline in the value of the estate or the case where the trees were fruit-bearing (e.g., apples, olives, nuts) and the production of this harvest was their primary function. The taking of the wood in such a case the Congregation ruled would fall under the prohibition of *Ambitiosae*.¹³⁵

The Congregation was also alive to the practice of dividing the property into parts worth less than the modest value set forth under *Terrulas* and so *in fraudem legis* attempting to circumvent the prohibition of *Ambitiosae* by making the sale in several modest installments. The Congregation with the approval of Clement VIII easily pronounced this artifice a transparent fraud.¹³⁶ Regarding the forms of solemnity, in 1827 the Sacred Congregation held that the vicar general,

¹³³ SACRED CONGREGATION OF RELIGIOUS, instruction *Inter ea*, 30 July 1909, in GASPARRI, VI, pp. 987-990.

¹³⁴ SACRED CONGREGATION OF THE COUNCIL, response, 12 July 1919, in *AAS*, 11 (1919), p. 418.

¹³⁵ SACRED CONGREGATION OF THE COUNCIL, decree, 16 April 1622, *Thesaurus resolutionum*, I, p. 476.

¹³⁶ *Ibid.*, decree, 7 October 1602, I, p. 477.

without a special mandate of the bishop, in vain attempted to give the requisite permission for the alienation of church property.¹³⁷

Lucio Ferraris (d. 1763) was an Italian jurist remembered especially for his seven-volume canon law dictionary which forms a useful digest of many sources. He notes that the Sacred Congregation of the Council in a 1706 decision forbade the transfer of venerated images from one church to another without the prior permission of the Apostolic See. Similarly a 1738 Rotal decision held that sacred images and relics were not to be transferred (sc. within the same church or oratory) without the permission of the bishop, the rector of the church and the patron, especially if the image or relic had been given to preserve the memory of the donor.¹³⁸

We may summarize developments by looking at the works of two eminent nineteenth-century canonists, Dominique-Marie Bouix (1808-1870) and Franz Xavier Wernz (1842-1914). After discussing *Ambitiosae* and the 1624 decree of the Sacred Congregation of the Council withdrawing exemptions granted to religious institutes from it inside Europe, Bouix summarized the meaning of immovables and *mobilia pretiosa*. Immovables included lands, houses, fields and the like as well as servitudes or easements or attachments running with the land, such as rights to fish and hunt on lands and money set aside for the purchase of land or the building of churches. *Mobilia pretiosa* were things reposing in the treasury of the church, items which because of their price, art, rarity or antiquity conferred special splendor on a church. He then provided the traditional bill of particulars and listed as among them gold and silver vessels, jewels, valuable ornaments and vestments, sizable libraries, significant relics of the saints, and aggregates of things which produce an annual revenue like flocks of sheep and herds of cattle.¹³⁹ He further noted that sacred images much venerated by the people or otherwise of great value had likewise been determined inalienable by the Sacred Congregation of the Council.¹⁴⁰

¹³⁷ Ibid., decree, 21 July 1827, I, p. 479.

¹³⁸ LUCIO FERRARIS, *Bibliotheca canonica iuridica moralis theologica nec non ascetica polemica rubricistica historica editio novissima mendis expurgata et novis additamentis locupletata*, 7 vols., Romae, Ex Typographia Polyglotta S.C. de Propaganda Fide, 1888, IV, pp. 166, 169.

¹³⁹ DOMINIQUE-MARIE BOUIX, *Tractatus de jure regularium*, Parisiis, Apud Jacobum Lecoffre et socios, 1857, p. 285.

¹⁴⁰ Ibid., p. 292; where he speaks *de imaginibus sacris, quae sunt in magna veneratione apud populum, aut alia de causa in magno pretio habentur*.

Sacred images had long been deemed valuable by the Church. The Second Council of Nicaea in 787 had ended the iconoclasm controversy by decreeing,

With full precision and care that, like the figure of the honored and life-giving cross, the revered and holy images, whether painted or made of mosaic or of other suitable material, are to be exposed in the holy churches of God, on sacred instruments and vestments, on walls and panels, in houses and by public ways; these are the images of Our Lord God and Savior, Jesus Christ, and of Our Lady without blemish, the holy God-bearer, and of the revered angels and of any of the saintly holy men.¹⁴¹

Likewise, Trent in 1563 at its twenty-fifth session had decreed, “and they must also teach that images of Christ, the Virgin Mother of God and the other saints should be set up and kept, particularly in churches.”¹⁴²

Bouix also discussed whether, by virtue of a custom *contra legem*, the need for the permission of the Apostolic See imposed by *Ambitosae* and the 1624 decree of the Congregation of the Council had been abrogated outside Italy.¹⁴³ On this question all doubt was removed in 1869 by Pius IX who by the apostolic constitution *Apostolicae Sedis* confirmed *Ambitosae* to be universally in force and made the penalty for its breach—excommunication—universal. This legislation repealed the European geographical limitation of the 1624 decree.¹⁴⁴

Wernz provides a useful summary of the law of *res pretiosa* on the eve of codification. He likewise provides definitions of immovables and precious. Immovables were things that could not be moved and included fixtures like windows and doors and things which, although actually movable, are destined perpetually for the use of immovables and so civilly determined to be immovables. Movables, by contrast, are things which can be moved. Consumables are things

¹⁴¹ TANNER, I, pp. 135-136.

¹⁴² *Ibid.*, II, p. 775.

¹⁴³ BOUIX, *Tractatus de jure regularium*, pp. 301-307.

¹⁴⁴ PIUS IX, apostolic constitution *Apostolicae Sedis*, 12 October 1869, in *Acta Sanctae Sedis*, 5 (1869), pp. 287, 299; GASPARRI, III, pp. 24-30.

like grain, which are consumed by use and cannot be preserved. "Precious" are those things of great value, and this is contrasted with non-precious things or those of slender value.¹⁴⁵

With respect to prescription he declared that movables were prescribed after the passing of three years and immovables after 40 years, although in the case of immovables of the Holy See the period for prescription was a hundred years.¹⁴⁶ All movables and immovables were to be recorded in an inventory, a copy of which was to be sent to the bishop and placed in the episcopal archive.¹⁴⁷ While arguing that the Church has the right to alienate property independently of the civil power, Wernz also noted that as a moral person the Church, like a ward, could act only through agents, but that administrators might not alienate validly without proportionate cause.¹⁴⁸ Images greatly venerated by the people are not to be moved from one church to another nor alienated without prior permission of the Holy See.¹⁴⁹

2.6. Civil Law Developments

Certain civil law developments in the law of property during the nineteenth century greatly affected the canon law of *res pretiosa* and so we must now look at the civil law. Following Justinian's *Institutes* and modern civil law, property may be either movable or immovable property. The latter includes not only land but also buildings and other structures attached to it. By analogy growing crops and trees are treated as immovables, so long as they are not harvested or cut. There are also movables which are placed on land for the service and exploitation of the land and so by reason of their destination these are classified as immovables. Typical examples include draft animals for farming, beehives together with presses, barrels and other items necessary for the production of beer or wine, as well as tools necessary for forges and other manufacturing purposes. Immovables can also include certain rights which relate to the land (*ius ad rem*) such as a usufruct of an immovable or a servitude to land. Roman law had not made

¹⁴⁵ FRANCISCO XAV. WERNZ, *Ius decretalium*, 3 vols., Romae, Ex Typografia Polyglotta S.C. de Propaganda Fide, 1901, III, p. 155; where he speaks of fungibles as *si uno usu consumuntur atque servando servari non possunt* and *res pretiosa* as *sive magni valoris et non pretiosa sive exigui valoris*.

¹⁴⁶ Ibid., p. 176.

¹⁴⁷ Ibid., p. 184.

¹⁴⁸ Ibid., p. 189.

¹⁴⁹ Ibid., p. 399.

much of the distinction between immovables and movables.¹⁵⁰ But following the *Coutume de Paris*, the 1804 *Code civil* made it a fundamental distinction and the classification of immovables and movables became the *Summa rerum divisio*.¹⁵¹

Article 516 of the 1804 French Civil Code says that "all property is moveable or immovable." As for the latter, article 517 adds that "property is immovable either by its nature, or by its destination." Article 524 states that articles which the proprietor of a farm had placed thereon for the service and management of such a farm are immovable by destination and article 522 states that the live stock which the proprietor of a farm gives up to his tenant or farmer for the purposes of cultivation, whether valued or not, are regarded as immovable as long as they continue attached to the farm in pursuance to the agreement.¹⁵² On the other hand, when they become detached from the land where they had been located, they become movables and so become subject to the rules governing that type of property. Article 524 is recognized as a legislative innovation. Roman law had followed the rule that *instrumentalium fundi non est pars fundi*, objects assigned to the exploitation of agricultural land do not become immovables. In old French law in the custom of Paris immovables were called *héritages*. Movable property which brought an income to the owner and which was both substantial and durable was segregated on account of its importance and also termed *héritages*. Other movables, by contrast, were called *chateaux* or *cateaux* from the Latin *catalla*, apparently derived from *capitale*. In the South of France, the region of the written law, the law followed more closely the traditional Roman law rule. The 1804 French Civil Code adopted a uniform rule for the entire country and thus made a notable change in the law which hitherto had differed in the customary and written law regions of France. Many classes of *res pretiosa mobilis* now became immobilized, at least while still intended for the exploitation of the land or as plant or equipment intended for industrial or commercial production. This new French system penetrated into Italy and later Spain.¹⁵³

¹⁵⁰ W. W. BUCKLAND, ARNOLD D. MCNAIR and F. H. LAWSON, *Roman Law and Common Law: A Comparison in Outline*, second edition, Cambridge, Cambridge University Press, 1952, p. 60.

¹⁵¹ BRIERLY and MACDONALD, *Quebec Civil Law*, p. 269.

¹⁵² *Code Napoleon; or the French Civil Code Literally Translated From the Original and Official Edition, Published at Paris in 1804*, Baton Rouge, Claitor's Book Store, 1960, pp. 142-143.

¹⁵³ CHARLES MARIE AUBRY, *Aubry & Rau Droit Civil Français*, Property, Civil Law Translations, 7th ed., 2 vols., PAUL ESMEIN (ed.), Saint Paul, West Publishing Co., 1966, I, p. 20; MARCEL PLANIOL, *Treatise on the Civil Law*, 11th ed., 3 vols., St. Paul, West Publishing Co., 1959, I, pt. 2, pp. 296-297. How property is characterized has important consequences. In a recent French case the first instance court held that certain Cazenoves frescos were immovables by nature since they were fixtures to a building attached to land. The Court of Appeal in Montpellier, by contrast, held them to be immovables by intention. The Court of

Movables, by contrast, are things which are naturally movable and those which are movable by law. Movables by nature are things which can be moved from one place to another, whether they are moved by a human being or, like animals, can move themselves. Movables by law are those obligations and actions which concern sums of money due on movables, shares and other interests in financial organizations.¹⁵⁴

2.8. *Res pretiosa* in the 1917 Code

We come now to the great codification of 1917. How were all these centuries of legislation distilled out in that code? The term *res pretiosa* occurs in seven of the 1917 Code's 2414 canons. We will examine these canons—canons 534, 1280, 1281, 1497, 1511, 1522 and 1532.¹⁵⁵ But, if we are to appreciate the context of these seven canons, our view must also be broader than the few canons which include the terms *res pretiosa*. To see the link between the 1917 Code and the imperial constitution on tutors we may begin by noting that canon 100, §3, of the 1917 Code states that moral persons, whether collegiate or non-collegiate, are equivalent to minors under the law. The same rule was adopted in the oriental law.¹⁵⁶ This is said to be a venerable rule of Roman law¹⁵⁷, and it had the effect of bringing to juridical persons the whole panoply of protections developed under the law of guardian and ward—including the rules with respect to

Cassation at length held them to have become movables once they had become detached from the chapel where they had been located and so became subject to the (three-year) rule governing the prescription of movables and jurisdiction over them fell to the court of the place where the movable was located. LYNDEL V. PROTT, "Movables and Immovables as Viewed by the Law," in *International Journal of Cultural Property*, 1 (1992), pp. 389-391.

¹⁵⁴ JOHN BELL, SOPHIE BOYRON AND SIMON WHITTAKER, *Principles of French Law*, Oxford, Oxford University Press, 1998, pp. 278-281.

¹⁵⁵ The text of these canons appears in Appendix 2.

¹⁵⁶ PIUS XII, apostolic letter *Cleri sanctitati*, 2 June 1957, in *AAS* 49 (1957), pp. 432, 444. Canon 28, §3, reads: "*Personae morales sive collegiales sive non-collegiales minoribus aequiparantur.*"

¹⁵⁷ BERNARD F. DEUTSCH, "Ancient Roman Law and Modern Canon Law: Part Four," in *The Jurist*, 28 (1969), p. 464, quotes C. 11. 30 (29), 3, "*Rem publicam ut pupillam extra ordinem iuvare moris est*", in extraordinary proceedings it is customary for relief to be granted to the State in the same way as to a female minor. Interestingly, Deutsch does not make the link between Constantine's imperial constitution and the development of *res pretiosa* in canon law.

quae servando servari non possunt and *res pretiosa*. Thus, moral persons were held to enjoy the favor of the law and the rights and duties of their administrators were likened to those of tutors.¹⁵⁸

Within this context we may now look at the canons on *res pretiosa*. "Precious" is defined in canon 1497, §2, in a new way. Whereas in Constantine's constitution "valuable" was described by the same expression Wernz used to define non-fungibles, *quae servando servari possunt*, in the 1917 Code this usage is cut loose from *res pretiosa* and to the latter a narrower definition is given. The new definition in canon 1497, §2, is *quibus notabilis valor sit, artis vel historiae vel materiae causa*—what is of notable value by reason of its artistic, historical or material character.¹⁵⁹ This definition is similar to that definition given by Reiffenstuehl, which we saw earlier, *quae sunt de thesauro ecclesiae vel quae propter pretium, artem, seu antiquitatem, conferunt ecclesiae singularem splendorem*, what belonged to the treasury of a church or because of its value, art or antiquity conferred splendor on a church. By contrast to the prior law, under canon 1530, to alienate church property, whether immovable or movable *quae servando servari possunt*, one needs a valuation, just cause, and permission of the lawful superior. The lawful superior, under canons 534, §1, and 1532, §1, is the Apostolic See only in the case of *res pretiosa* (as defined in canon 1497) and property *quae servando servari possunt* worth more than 30,000 francs or lire. Reiffenstuel had seen as "valuable" those things which because of their age, history or artistic character lent splendor to a church. This definition was now simplified to say valuable by reason of its artistic, historical or material character. By splitting the concept of *res pretiosa* as developed in the old law in twain the 1917 Code found a deft way to codify the prior law, universalize the privileges of exemption from *Ambitiosae* by exempting alienations of

¹⁵⁸ GOMMARUS MICHIELS, *Principia generalia de personis in Ecclesia commentarius libri II Codicis juris canonici canones praeliminares 87-106*, editio altera, Parisiis, Desclée et socii, 1955, p. 467.

¹⁵⁹ After the promulgation of the 1917 Code the matter of votive offerings was taken up by the Sacred Congregation of the Council, which declared that, absent evidence to the contrary, offerings left at an altar or before a sacred image were to be presumed to have been left in payment of a vow and the permission of the Holy See was requisite for their valid alienation. The precise question put to the Congregation was whether votive offerings were to be considered part of the *res pretiosa* the alienation of which, under canon 1532, could not be accomplished without the permission of the Apostolic See and whether the phrase "notable value" which was part of the definition of *res pretiosa* in canon 1497 was to be determined by the Ordinary. The Congregation determined that "notable value" was to be taken to mean 1,000 francs and that the question was to be reformed to read, *an donaria votiva alienari absque beneplacito Apostolicae Sedis*, whether votive offerings might be alienated without the permission of the Apostolic See. The Congregation then replied in the negative. SACRED CONGREGATION OF THE COUNCIL, response, 13 July 1919, in *AAS* 11 (1919), pp. 416-419; *Canon Law Digest*, 1 (1934), p. 730. In effect, the Congregation had created a new and uncodified type of church property, *res votiva*, and one without the "notable value" threshold assigned to *res pretiosa* in canon 1497. On this type of church property, see RAOUL NAZ, "Ex voto," in *DDC*, 5, col. 790.

property worth less than 30,000 francs from Roman scrutiny, and at the same time to re-define *res pretiosa* in a new and narrower way aimed largely at the conservation of the Church's cultural heritage with a notable value.

Certain developments had made this possible. As Wernz had noted, flocks of sheep or herds of cattle were now deemed destined for the land perpetually and so were civilly held to be classed as immovables and so no longer needed to be included amongst precious movables. At the same time the new definition clarified the situation of money and investment securities. These were now clearly, under canon 1497, not "precious." The new definition also had the effect of rationalizing the rule on when permission of the Holy See was needed for alienation. After *Apostolicae Sedis*, it was clear that *Ambitiosae* and the 1624 decree of the Sacred Congregation of the Council applying it to religious institutes, henceforth, applied universally and without geographical limits. Thus, the only exceptions to the requirement of permission of the Holy See for alienations were the venerable exceptions of *modicus valor* and the exception under the decretal *Terrullas* for distant or exiguous immovables. Some countries, however, had won particular law exceptions to universal law. At the third plenary council of Baltimore in 1884 American bishops won the right freely to alienate church property up to a value of \$5,000.¹⁶⁰ We also saw the 1909 instruction which had authorized religious superiors at various levels to alienate property of their institute worth between 1,000 and 5,000 francs. Now by permitting alienations up to 30,000 lira or francs—about \$6,000—under canons 534 and 1532 these indults were in effect made universal.¹⁶¹

The narrowing of the definition of *res pretiosa* to property valuable by reason of its artistic, historical or material character no doubt reflected the great development of art history and the rise of cultural property law in the nineteenth century. We also saw that in the 1804 civil code France

¹⁶⁰ PLENARY COUNCIL OF BALTIMORE, *Decreta concilii plenarii baltimorensis tertii a.d. MDCCCLXXXIV praeside Illmo. Ac Revmo Jacobo Gibbons, archiepiscopo Balt. et delegato apostolico*, Baltimore, Typis Joannis Murphy et Sociorum, 1886, p. 16; it appears that in 1906 and again in 1916 the bishops of the USA got for a ten-year period an indult by which *Ordinarii non adstringantur ad servandas solemnitates a iure canonico statutas circa alienationem bonorum ecclesiasticorum seu quando agitur de bonis ac fundis dioeceseon [sic] permutandis, hypothecis imponendis aliisque agendis quae speciem alienationis prae se ferunt*. SACRED CONGREGATION OF THE COUNCIL, decree, 31 July 1916, in *American Ecclesiastical Review*, 55 (1916), p. 664.

¹⁶¹ It is worth noting here that the introduction of this monetary exception to the prior law of *Ambitiosae* was an historic event, albeit one with no easy application for the future. When canon 1532 was drafted in the days before World War I, a half-century of monetary stability and the Latin Monetary Union made this provision possible.

had immobilized the instruments of production associated with land used for commercial purposes and this had the effect of eliminating the need for most elements formerly included in the category *res pretiosa*. But at the same time cultural property was developing a special place in the law. We have already seen in Chapter 1 the codification of the international law of war in the Hague Conventions of 1899 and 1906, under which special protection was expressly conferred on artistic and historical property. Moreover, France in 1887 by law had classified cultural property belonging to the state, the departments, and the communes. It was deemed to be in the public interest to preserve property of interest from the point of view of history, art or science. Even more momentously in 1913 this special regime of legal protection had been extended to private property. Once classified, such property was imprescriptible even by a bona fide purchaser for value, and, if publicly owned, also inalienable. Italy in 1902 had introduced the beginnings of a similar legal regime on immovable and movable property of artistic or historical value which was implemented two years later. Likewise Spain, Austria and Belgium would adopt similar measures.¹⁶² Moreover, as we saw in Chapter 1, Vienna in 1903 had seen the publication of Alois Riegl's seminal art history work, *Der moderne Denkmalkultus*, the modern cult of monuments. It would be strange if these developments, as well as the depredations against the Church's artistic and historical patrimony during the Napoleonic wars and the secularizations that appropriated much of it during the nineteenth century, including the *Risorgimento*, had not moved the codifiers of 1917 to take advantage of this opportunity to secure special protection for the Church's artistic and historical patrimony. The Holy See had already in 1902 made certain dispositions regarding the custody of ecclesiastical archives and other church property.¹⁶³ Thus, it would seem that the time was ripe to take a term which had been in the Church's legal lexicon since the days of Constantine, *res pretiosa quae servando servari possunt*, sunder it in twain, and following the suggestion long latent in Reiffenstuel use the re-defined *res pretiosa* portion to provide greater protection for the Church's cultural patrimony.

This was done consistently. In canon 1522, §2, it was now provided that the inventory of church property, which each administrator was to have with a duplicate going to the diocesan archive,

¹⁶² HALINA NIEC, "Legislative Models of Protection of Cultural property," in *Hastings Law Journal* 27 (1976), pp. 1089, 1093; GIORGIO GIANIGHIAN, "Italy," in ROBERT PICKARD (ed.), *Policy and Law*, p. 186.

¹⁶³ SEGRETERIA DI STATO, *Lettera circolare ai Vescovi d'Italia con Forma di Regolamento per la custodia e l'uso degli Archivi e Biblioteche ecclesiastiche*, 30 settembre 1902, and SEGRETERIA DI STATO, *Lettera circolare per l'Istituzione dei commissariati diocesani per i monumenti custoditi dal clero*, 10 December 1907. The documents are cited in n. 8 of PONTIFICIA COMMISSIONE PER I BENI CULTURALI DELLA CHIESA, circular letter, *Le biblioteche ecclesiastiche nella missione della chiesa*, 19 marzo 1994, EBC, p. 209.

was to include *rerum immobilium et mobilium pretiosarum*, valuable movables and immovables. As Wernz had explained, the prior law had said the inventory should contain *immobilia et mobilia*. Thus, it would seem that the law was now changed so that the inventory would reflect only the immovable property and valuable movable property for which the prior permission of the Apostolic See was needed for alienation.

In the 1917 Code prescription was covered by canons 1508-1512 of the title *de bonis ecclesiasticis acquirendis*. In canon 1511 it was provided that in the case of *res immobiles et mobiles pretiosae* of the Holy See prescription could only occur after the lapse of a hundred years. In the case of such property owned by other moral persons the period for prescription for such property was now thirty years. As we saw earlier in Wernz, while previously the period for prescription of immovables had been forty years, there had been no mention of a special period for the prescription of *res pretiosa*. Wernz had merely reported that movables were prescribed after three years.¹⁶⁴ The 1917 Code thus extended to movables it deemed valuable—the Church's

¹⁶⁴ The history behind the development of the law enshrined in this canon is rather complex. Prescription in late classical Roman law is actually the conflation of two distinct institutes of Roman law, *usucapio* and *praescriptio*. *Usucapio* was a means of acquiring title to land through prolonged use where there had been a defect in formalities. It applied only to certain types of property and possession could not have begun through forces or violence. *Praescriptio* was originally liberative or extinctive only. It was a rule that an action to recover the possession of property, if not begun within a certain period, was barred. In 424 the Emperor Theodosius introduced a general rule on limitation of actions, holding them barred after *longissimi temporis praescriptio* which he set at thirty years. Justinian further rationalized the law of prescription. He unified *usucapio* and prescription, which henceforth became acquisitive and extinctive. The requisites for prescription now became *res habilis*, *titulus* or *iusta causa*, *possessio*, *fides*, and *tempus*. *Res habilis* means a thing suitable for prescription. Some things cannot be prescribed and so are not *res habilis*. *Titulus* means an act which but for a defect would have given the previous owner from whom one claims a good title—a colorable title. This might be a sale, a gift or even an abandonment. *Possessio* means the control by the one who usucapts and the possessor must behave as an owner. *Fides* means that the possessor must have the honest belief that he had acquired the thing from the owner through a legal transaction and this good faith must have begun from the first moment of possession. This has been the canonical rule since the fourth Lateran council in 1215. Lastly, there must be *tempus* or the requisite period of possession, three years for movables or ten or twenty years for immovables. ALBERT GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, Ottawa, Saint Paul University, Faculty of Canon Law, 1996, pp. 59-61. For the Lateran decree, see TANNER, I, p. 253.

These were the general rules of late classical Roman law, but special rules then began to be carved out for church property. In 491 the Emperor Anastasius created a special period of prescription of forty years for church property. With the progress of Christianity after Constantine some began to claim that church property was God's property or *res divini iuris* and so *res extra commercium* and imprescriptible. This notion was enshrined in an imperial constitution of 530 which set the period for prescription of church property at one hundred years, which was thought to be the longest practicable extent of human life. In 535 Justinian sent to Pope John II a piece of legislation addressed to the pope which came to be known as novel (or new post-codification law) 9. It referred to church property as *res divinae* and set the period of prescription for church property at one hundred years. The legislation clearly referred to all Catholic Churches, east and west, as well as the Roman Church. L. CHARVET, "Aux origines de la prescription de cent ans," in *Ephemerides juris canonici*, 19 (1963), pp. 152-156.

cultural patrimony—the same protection from prescription it accorded to immovables. It is all the more notable that movable cultural property enjoyed no such special protection under the French civil code.¹⁶⁵

But the new period of prescription soon came to be seen in practice as very inconvenient, and so in 541, by the novel 111, Justinian instead set the period for prescription of church property at forty years, which still accorded church property a privilege inasmuch as other property was prescribed after possession for thirty years. Another novel 131 of 545 further rationalized the norms on prescription, now covering both acquisitive and extinctive prescription, and set the period for prescription of church property at forty years. Pope Gregory the Great, a man trained as a Roman administrator and so likely to be conversant with Roman law, appears to have regarded the forty year as the operative one for all church property. Even later Pope Eugene II, in writing to the archbishop of Vienne between 824 and 827, explained the Roman law of prescription and the forty-year rule of novel 131. *Ibid.*, pp. 157-160.

The question arose again in 873 with regard to the Slovenes. Charlemagne had attached them to the German church but the pope had decreed that Moravia and Pannonia formed a distinct province under Archbishop Methodius. The German bishops accused Methodius of usurping their rights and organized a council in the presence of the Emperor Louis the German and Methodius was deposed and imprisoned for two years. Pope John VIII then took up the cudgels and sent legates with the report that, after a search of the registers it was determined that Methodius had been regularly appointed, that the pretensions of the German bishops went back no further than 75 years (to the intervention of Charlemagne), that churches enjoyed a privilege of one hundred years for prescription, and so the claims of the German churches had not yet ripened and so defeated the bounds laid down by his predecessor. Thus, it would appear that Pope John was resorting to novel 9, which was thought to be yet in force and provided for the hundred year rule for prescription of church property. It seems likely that a copy of Justinian's law of 535 addressed to Pope John II had been kept in the Lateran archives and was now being resorted to. At this point a further change occurred. In the West the novels were known largely through the *Epitome* of Julian. In it novels 9 and 111 appear in abbreviated form as numbers 8 and 104. Number 8 appears as follows: *Praesens constitutio, quae consulatu Basilarii, kal. Mai, data est, jubet quidem sacratissimam ecclesiam romanam centum annorum praescriptione solum in suis actionibus removeri. Nihil autem de ea latius exponemus quia innovata est ab alia constitutione quae data est consulatu Basilii.* Number 104 then repeats word for word novel 111 with the privileged period of prescription of forty years for church property. The rubric for novel 9 in the *Epitome* of Julian was even more telling: *De prescriptione centum annorum ecclesiae competente romanae civitatis.* It would seem, therefore, that the presence of both the text of novel 9 addressed to the pope and of the texts of novel 9 and novel 111 as digested in the *Epitome* of Julian in combination had led to the conclusion that novel 9 was intended as a perpetual privilege of the Holy See. From the eleventh century with the rise of papal power after the Gregorian reform, this centenary privilege was received into the law along with the forty-year rule for other church property. *Ibid.* pp. 160-165.

¹⁶⁵ ROBERT T. KENNEDY, "Book V: The Temporal Goods of the Church [cc. 1254-1310]," in BEAL, p. 1472, criticizes the use of special periods for the prescription of immovables and valuable movables instead of using those contained in civil law. Even if one admits the force of his logic with respect to immovables, we saw in Chapter 1 with respect to the 1995 Unidroit Convention compelling arguments for the use of special and long periods for the prescription of movable cultural property. One could also, however, urge Kennedy's argument against other special rules regarding prescription. As we saw in the previous note, since the Fourth Lateran Council in 1215, canon law has required continuous good faith as an element for prescription. But Roman law and the written law regions of France followed the rule *mala fides superveniens usucapionem non impedit*. By contrast, the rule in the customary law regions followed canon law and required continuous good faith. But in the civil code of 1804 in article 2268 declares "good faith is presumed; the party who alleges bad faith has the burden of proof." Moreover, article 2269 provides: "It suffices that the good faith existed at the moment of acquisition." GABRIEL BAUDRY-LACANTINERIE AND A. TISSIER, *Prescription: traité théorique et pratique de droit civil*, 4th ed., Civil Law Translations 5, St. Paul, West Publishing Co., 1972, pp. 342-344.

Canons 1280 and 1281 likewise reflected important changes in the law. The prior law had forbidden sacred images to be transferred permanently to other churches or alienated without the prior permission of the Holy See. Now canon 1281, §1, carried this same prohibition but with respect to precious images. We should note that under canon 1510 sacred things in private hands could be prescribed by other private persons and sacred things owned by moral persons could be prescribed by other moral persons. Unless they were also precious, sacred things under canon 1508 would be prescribed in the period set by civil law—often three years. Thus, it was important to refer to these images as precious in order to secure for them the greater protection of the thirty-year period for prescription and the requirement of permission of the Holy See for their alienation.

Canon 1280 also represents an innovation. Again referring to precious images rather than the term “sacred images” used in the prior law, the 1917 Code directs that precious images not be restored without the written permission of the ordinary who must first seek the advice of experts. No source is cited for this canon and, as we saw in Chapter 1, in fact the theory and techniques for such restoration had only been developed in the course of the nineteenth century. At the same time we noted in Chapter 1 that it was only in the course of the nineteenth century that old gold and silver vessels had come to be valued for their artistic and historical rather than merely for the material value. We saw earlier in this chapter the teaching of the doctors of canon law that old precious vessels might be re-fashioned into new one. Now—to the extent that such vessels were artistically or historically valuable—such refashioning might no longer occur and instead even their conservation now required the prior permission of the ordinary. Thus, it would seem that the rise of the notion of cultural property had produced a *pro tanto* derogation from the prior law.

One might note here that the description of these precious images varies slightly from the definition set forth in canon 1497. In canon 1280 the images are declared precious *vetustate, arte aut cultu*, by reason of their age, artistic or venerated character. It might be that in an attempt to adapt this and the following canon from sacred images venerated by the faithful to precious images, the word *cultu* got inserted as an appositive and a certain dissonance was created between *res pretiosa* of canon 1497 and the precious image of canon 1280. If this were the case, for reasons of *elegantia iuris*, the word *cultu* had better been omitted. One might also hypothesize why that *cultu* was purposely inserted. *Res sacra* under canon 1497, §2, are things destined for

divine worship by consecration or blessing. Arguably by inserting here in the definition of precious images the word *cultu* the law subsumed sacred images within the new category of precious images. Canon 1510 permitted *res sacra* owned by ecclesiastical juridical persons to be prescribed by other ecclesiastical juridical persons. To preserve in canon 1281 the old norm with respect to the inalienable character of sacred images it was necessary to bring them into canon 1280's definition of "precious," for canon 1510 did permit certain transfers of sacred images. Without the insertion of the word *cultu* in canon 1280 images would have been "precious" as defined under canon 1497, §2, and, inasmuch as some sacred images might not be valuable *artis vel historiae vel materiae causa*, transfer under that definition was only regulated by canon 1281 if they were precious as well as sacred. By the same token restoration of sacred images, given the definitions of canon 1497, §2, would only have been regulated by canons 1280 and 1281 if these canons had referred to *imagines sacrae et pretiosae*. Thus a sacred but not "precious" image would not have enjoyed protection from inexpert restoration. The solution seems to have been to insert *cultu* in the definition of precious image of canon 1280 and thus assimilate to precious images both sacred images and precious images as they would have been defined under the definitions of canon 1497.

As we shall see in Chapter 3, the former solution would be adopted by canon 887 of the 1990 Eastern Code. The latter solution was adopted here and, as we shall see in Chapter 3, would continue in use in the 1983 Latin Code. The upshot was a certain *inelegantia iuris*. *Res pretiosa* had one definition in canon 1497 (*artis vel historiae vel materiae causa*) whilst *imagines pretiosae* have another definition (*idest vetustate, arte, aut cultu praestantes*) in canons 1280 and 1281. In a highly systematized legal work like a code it is usually better for words to be used in the same way throughout. There is, however, no juridical reason why *imago pretiosa* could not be defined more broadly than *res pretiosa*, and this seems in fact to have been the course taken by the 1917 Latin Code. By inserting *cultu* in canon 1280 the drafters were spared the need to repeat the words *sacrae et* in both canons 1280 and 1281.

These canons are of some interest with respect to the old question of whether relics are precious church property or beyond price. We have seen that some authors regarded relics as precious. Others said they were beyond price but subjected relics to the same norms against alienation as precious property. Clearly by analogy to flocks of sheep a large collection of relics or the notable relic of a renowned saint could have great economic value to a church. Such relics might become the object of pilgrimage and many a medieval pilgrim proved most generous. Canons 1280 and

1281 do not clarify the discussion. These canons merely present norms hitherto in place for both sacred images and relics. Such norms are now made to apply to valuable images as newly defined as well as to relics.

We have now come nearly to the end of our course. We began with the chief source of the law of *res pretiosa*, the 1468 apostolic constitution of Pope Paul II, *Ambitosae*, discovered that it depended on a parallel place, an imperial constitution of Emperor Constantine from the year 326 A.D. on the law of wardship, and then traced the elaboration of the law by learned writers through to the codification of the canon law of the Latin Church in 1917. It remains but to survey the changes wrought by the Second Vatican Council before looking at the changes incorporated into the 1983 Code.

2.9 *Res pretiosa* and Vatican II

Vatican II really had no direct effect on *res pretiosa*. The Council did call for an end to the system of benefices,¹⁶⁶ but this system had been moribund for decades. Canon 1450 of the 1917 Code had abolished it prospectively in effect by interdicting the creation in the future of the rights of patronage upon which it was based. Moreover, the system had been predicated on an agrarian economy and a church-state relationship that had been given the *coup de main* by the Industrial Revolution, the rise of free trade and the economic theory of comparative advantage, and the French Revolution. The Vatican Council merely delivered the *coup de grace* in calling for the end of this moribund system, where it still survived.

The Council's effects on *res pretiosa* were only indirect. In its re-valuing of the notion of culture, which we saw in Chapter 1, and the notion of patrimony and in its liturgical reforms, the Council would have important indirect effects on *res pretiosa*. The artistic and architectural context—modernism—would also have an important impact on the Church's cultural patrimony.

The aspect of Vatican II that should have given a fillip to the Church's cultural heritage was the council's understanding of patrimony. The Vatican Council used "patrimony" in a new way. In the canonical tradition and in the civil law tradition from which it had been drawn, the word "patrimony" has a financial meaning. It meant the property and other economic rights and

¹⁶⁶ SECOND VATICAN COUNCIL, decree *Presbyterorum ordinis*, 7 December 1965, in *AAS*, 58 (1966), art. 20, p.1021; FLANNERY, p. 899.

obligations which one had or might have.¹⁶⁷ Prescinding from this narrow economic usage, the Council expanded the term to include within a church's or institute's spiritual and liturgical heritage. In article 5 of *Orientalium ecclesiarum* it insisted—in language that paralleled the common property of mankind language of the 1954 Hague Convention—that the theological and liturgical heritage of the Eastern Churches was the patrimony of the universal Church.¹⁶⁸

At the same time even in its traditional meaning “patrimony” was an important word here, for it is a juridical term and implies rights and duties. One's patrimony is the sum of those financial rights and interests to which one can lay claim. The notion of patrimony is a key concept of the civil law system. Patrimony (*patrimonium* or *patrimoine*) in the strict juristic sense means the collection of rights and obligations which one person may transfer to another in exchange for financial consideration. As such, *patrimoine* consists of the totality of rights and obligations, present and future, attaching to a person, regardless of any changes in the actual composition of the property. It includes the sum total of a person's rights and obligations, provided that these rights have a pecuniary value. Everyone who has legal personality in civil law legal theory has patrimony. A person may have very little. He may have no rights or property of any kind. Patrimony, in fact, is used in two senses to mean both the “container”, as here, and also as the contents. In the former sense, patrimony does not mean wealth. The “container” may be an empty purse and have nothing in it. It includes rights and property and obligations or debts and every other thing having pecuniary value. All universal transmissions of patrimony take place at death. “Patrimony” used in the sense of “container” is, therefore, indivisible and intransmissible and it is integral to the life of the person.¹⁶⁹ Thus by expanding the term patrimony to include spiritual and cultural heritage as well as financial interests, the Council was implicitly acknowledging one inalienable right to one's spiritual and cultural heritage.

¹⁶⁷ RAOUL NAZ, “Patrimoine,” in DDC, VII, col. 1265; BRIERLY and MACDONALD, *Quebec Civil Law*, p. 156: “Patrimonial rights are those that in their very essence have a monetary value.”

¹⁶⁸ In the documents of the Second Vatican Council it seems that, for the most part, the word *patrimonium* is used to mean “spiritual heritage.” See, for example, article 23 of *Lumen gentium*, in AAS, 57 (1965), p. 28; FLANNERY, p. 378, articles 1 and 5 of *Orientalium ecclesiarum*, in AAS, 57 (1965), pp. 76,78; FLANNERY, pp. 440, 443, art. 2 of *Perfectae caritatis*, in AAS, 58 (1966), p. 703; FLANNERY, p. 612, art. 53 of *Gaudium et spes*, in AAS, 58 (1966), p. 1079; FLANNERY, p. 958, arts. 14 and 15 of *Unitatis redintegratio*, in AAS, 57 (1965), pp. 101, 102; FLANNERY, pp. 464, 466.

¹⁶⁹ CHRISTIAN DADOMO and SUSAN FARRAN, *French Substantive Law: Key Elements*, London, Sweet & Maxwell, 1997, pp. 12-13; MARCEL PLANIOL, *Treatise on the Civil Law*, 11th ed., 3 vols., Louisiana State University, Baton Rouge, 1939, I: 2, pp. 265-266.

The social aspect of cultural property is perhaps clearer if one recalls in parallel fashion some of the teaching of Vatican II with regard to property. In the preceding chapters we have encountered the notion that cultural property is the common heritage of mankind. The Council itself taught that "God destined the earth and all it contains for all men and all peoples so that all created things would be shared fairly by all mankind under the guidance of justice tempered with charity." While private ownership contributes to the expression of personality and provides man with the opportunity of exercising his role in society and in the economy and so it to be fostered, it is to be exercised in accordance with and within the limits of the common good.¹⁷⁰ Thus, by its very nature private property has a social dimension which is based on the law of the common destination of earthly goods.

Two decades later the Holy See's delegate to UNESCO would argue even more emphatically for this concept of the common patrimony or heritage of mankind. While congratulating UNESCO for its work on the 1972 Convention on the World Cultural Heritage, he called this "only a partial expression of the concept of the heritage of mankind." Instead he argued for a broader concept, which he said was,

Pressed repeatedly in Holy See documents, of the universal destination of all goods, whether it is a question of natural resources, or of creations of the human spirit, works of art, certainly, but also scientific discoveries and techniques.¹⁷¹

The Vatican Council's call for a reform of the liturgy undoubtedly affected the Church's cultural patrimony. Nevertheless, the direct effects of the Council's own reform prescriptions for the liturgy can be overstated. The Council had declared both in the constitution on the liturgy, *Sacrosanctum concilium*, and in the decree on the eastern churches that the touchstone for liturgical reform was organic growth.¹⁷²

¹⁷⁰ GS, arts. 69, 71, pp. 1090, 1093; FLANNERY, pp. 975, 978. Thus art. 69 begins: "*Deus terram cum omnibus quae in ea continentur in usum universorum hominum et populorum destinavit, ita ut bona creata aequa ratione ad omnes affluere debeant, iustitia duce, caritate comite.*" Art. 71 adds: "*Ipsa autem proprietas privata et indolem socialem natura sua habet, quae in communis destinationis bonorum lege fundatur.*"

¹⁷¹ Apostolic Nuncio Ernesto Gallina, address to Twenty-first General Conference of UNESCO, 30 September 1980, *L'Osservatore Romano*: Weekly Edition in English (17 November 1980), p. 8.

¹⁷² SC, art. 23, p. 106; FLANNERY, p. 10; OE, art. 6, p. 78; FLANNERY, p. 443.

Moreover, the Council's own prescriptions for reform were limited. Rites were to be reformed to give them greater clarity (art. 34). The scriptures were to be opened up to Christ's faithful more copiously (art. 35). Latin was to be retained in the Latin Church (art. 36) and steps were to be taken so that the faithful should be able to sing in Latin those parts of the ordinary of the Mass which pertain to them (art. 54). Music was declared to be necessary or integral to the solemn liturgy and the musical tradition of the universal Church was stated to be a treasure of inestimable value (art. 112). Therefore, the treasury of sacred music was to be preserved and moreover cultivated *summa cura*, with the greatest care, and choirs were to be *assidue provehantur*, assiduously promoted (art. 114). Gregorian chant, recognized as the Roman Church's own—*liturgiae romanae proprium*, was to be given *principem locum* or lead spot (art. 116). Sacred polyphony was declared by no means forbidden, *polyphonia...minime excluduntur* (art. 116). The pipe organ was declared to be the traditional instrument of the western church, and its music received a short paean, and it was to be *magno in honore habeatur*, held in great esteem (art. 120). While *ecclesia nullum artis stilum veluti proprium habuit*, the church does not have its own style of art, nevertheless, the great treasury of art which the Christian faith had brought into being over the ages was to be preserved with every care (art. 123). At the same time art that was deformed or harmful to faith was to be banished from churches (art. 124). Ordinaries were to be vigilant lest sacred vessels and precious works be alienated or dispersed (art. 126). Commissions of sacred art and sacred music were to be established in each diocese and staffed by experts (arts. 46, 126).¹⁷³

Even as the Mass was in fact reformed—and many have argued that the Missal of 1969 went beyond the reforms requested by the Council—the Mass remained within the ambit of the western liturgical tradition. If still celebrated in Latin (cf. c. 928), with the propers, including the Gradual chanted after the first reading,¹⁷⁴ sung in Gregorian chant and the ordinaries sung in either

¹⁷³ SECOND VATICAN COUNCIL, constitution *Sacrosanctum concilium*, 4 December 1963, in *AAS*, 56 (1964), articles 34, 35, 36, 46, 112, 114, 116, 120, 123, 124, 126, pp. 109, 113, 128-132. ELISSA RINERE, "The *Graduale Simplex* in the Liturgical Renewal," in *The Jurist*, 58 (1998), p. 414 suggests that the use of the *Graduale Simplex* in smaller churches might have avoided the loss of the traditional texts of the Mass, Gregorian chant, and the use of psalmody and their substitution by four hymns which often have little connection with the Mass of the day.

¹⁷⁴ SACRED CONGREGATION FOR DIVINE WORSHIP, *Ordo cantus Missae*, 24 June 1974, "Introduction," in INTERNATIONAL COMMISSION ON ENGLISH IN THE LITURGY, *Documents on the Liturgy, 1963-1979: Conciliar, Papal, and Curial Texts*, Collegeville, The Liturgical Press, 1982, art. 5, p. 1346: "The gradual response is sung after the first reading..."

Gregorian chant or sacred polyphony and with “classical”¹⁷⁵ ceremonies especially from the solemn Mass tradition and with the assistance of one or more deacons,¹⁷⁶ the reformed rite remained squarely in the western tradition and presented no threat to the Church’s patrimony of cultural heritage.¹⁷⁷ The Council’s frequent call for the *participatio actuosa* of the faithful in no way required the abandonment of the Church’s liturgical and musical and artistic heritage.¹⁷⁸

It was, however, particularly unfortunate for the Church’s cultural patrimony that the liturgical reforms should come just as the western world had settled comfortably into the “Modern Movement.” This architectural and design movement deliberately refused the depleted artistic and architectural symbols of the nineteenth century and in so doing rejected the need for spiritual and emotional content as implicit or explicit motives of architectural expression. This rejection meant that the common cultural ground that had existed between earlier periods gave way to a serious divide that has never been overcome. Thus the natural fluidity between past and the future was blocked, stifling the creative communication between human beings and their cultural matrix and fragmenting the vision of the world. This, in turn, allowed rigid and fatal dichotomies to emerge with which we struggle today: “Modern” versus “Traditional,” “Rational” versus “Emotional,” “Cultural” versus “Technical.”¹⁷⁹

¹⁷⁵ PETER J. ELLIOT, *Ceremonies of the Modern Roman Rite: The Eucharist and the Liturgy of the Hours A Manual for Clergy and All Involved in Liturgical Ministries*, San Francisco, Ignatius Press, 1995, p. xiv.

¹⁷⁶ For a description of the role of the deacon in the reformed solemn liturgy, see DUANE L.C.M. GALLES, “Deacons and Church Music,” *Sacred Music*, 121 (Winter, 1994), p. 14. Even in the absence of a priest, where the human and material resources are sufficient, the Church’s treasury of art and music may still be employed in the Sunday liturgy. See DUANE L.C.M. GALLES, “‘Priestless’ Sunday Liturgies and the Church Musician,” *Sacred Music*, 127 (2000), pp. 5-10.

¹⁷⁷ DENIS CROUANS, *The Liturgy Betrayed*, San Francisco, Ignatius Press, 1997, pp. 40-49 argues that the changes made by the *novus ordo* to the Tridentine rite were actually quite modest. He notes at p. 41 that Psalm 42, *Introibo ad altare Dei*, did not form part of the rite of Milan, Lyons, or Toledo nor of the Premonstratensians nor the Carthusians, nor, during Passiontide, of the Roman rite.

¹⁷⁸ This term is often translated “active participation”. For a good study of the meaning of the term see COLMAN E. O’NEILL, “The Theological Meaning of *Actuosa Participatio* in the Liturgy,” in JOHANNES OVERATH (ed.), *Sacred Music and Liturgy Reform after Vatican II: Proceedings of the Fifth International Church Music Congress Chicago-Milwaukee, August 21-28, 1966*, Rome, Consociatio Internationalis Musicae Sacrae, 1969, pp. 89-108.

¹⁷⁹ STEFANO BIANCO, “Resources for Sustaining Cultural Identity,” in ISMAIL SERAGELDIN ET AL (eds.), *Historic Cities and Sacred Sites: Cultural Roots for Urban Futures*, Washington, The World Bank, 2001, p. 19.

Architectural modernism posited that superfluous decoration should be completely eliminated. It believed that function, the prime motivation of design, was the only valid element to express. It demanded that new construction techniques be used. It believed that architecture or design should be completely free of historical references and that a modern structure should advert to no period but its own. Its harbinger was Mies van der Rohe's German Pavilion at the 1929 Barcelona World's Fair. Its watchword was Mies van der Rohe's famous oxymoron *weniger ist mehr*, less is more. Modernism stood in stark contrast to the historic preservation movement. In Brent Brolin's words, "The modernist architectural code of ethics maintained that history was irrelevant, that our age was unique and therefore our architecture must be cut off from the past."¹⁸⁰

It was precisely this architectural modernism which carried the day with the liturgical design consultants who provided advice on the renovation of churches—even historic churches—in the post-conciliar period. In the United States the "bible" of such persons was a pamphlet published by the Bishops Committee on the Liturgy entitled *Environment and Art in Catholic Worship* (EACW). This document in its number 42 adopts the modernist architectural vision that a church is "shelter or 'skin' for liturgical action."¹⁸¹ Given this reductionist and anti-sacramental view, not surprisingly *Environment and Art in Catholic Worship* had almost nothing to say about the canons on cultural property and instead hewed to a different line and warned darkly that "many local Churches must use spaces designed and built in a former period, spaces which may now be unsuitable for the liturgy."¹⁸² Accordingly, it admonished that because the liturgy is "the action of a contemporary assembly, it has to clothe its basically traditional structures with the living flesh and blood of our times and our arts."¹⁸³ Attitudes like this set the stage for a re-ordering of

¹⁸⁰ NORMAN TYLER, *Historic Preservation: An Introduction to its History, Principles and Practice*, New York, W. W. Norton Co., 2000, pp. 134, 139.

¹⁸¹ NATIONAL CONFERENCE OF CATHOLIC BISHOPS COMMITTEE ON THE LITURGY, *Environment and Art in Catholic Worship*, [=EACW] Washington, National Conference of Catholic Bishops, 1978, p. 25. Such a view seems to belie the very notion of sacred place. During the code revision process some consultants complained of the very notion of "sacred place" in what would become title I of part III of book IV of the 1983 Code; *nonnulli dixerunt doctrinam huius schematis cuidam visioni indulgere de oppositione inter sacrum et profanum, quae quidem secundum hodiernos theologos refutanda videtur*. To these the group replied: *Consultores censent talem animadversionem fundamento carere sive in suis praesuppositis doctrinalibus sive ad meritum schematis quod attinent*. *Communicationes*, 12 (1980), pp. 321-322.

¹⁸² EACW, p. 25.

¹⁸³ *Ibid.*, p. 21. See DENIS MCNAMARA, "Liturgical Architecture as Sacramental Experience," in *Chicago Studies*, 41(2002), pp. 268-280. It would appear EACW had and continues to have extra-territorial effects. SIDNEY ROFE, "Vatican II, Church Architecture and 'Reform of the Reform,'" in *AD 2000*, 15 (July, 2002),

church fabrics in what we saw in Chapter 1 was much like the “re-order-to-taste” *unité de style* advocated by Viollet-le-Duc in the nineteenth century.

There were various opinions about the canonical worth of EACW. In 1985 in its newsletter the Committee stated “EACW has the force of particular law in the dioceses of the United States.” Later, in the same piece, the Committee stated that EACW and like committee documents “are analogous to the ‘*instructiones*’ issued by the various Roman dicasteries.”¹⁸⁴ A decade later it announced on its web site that EACW “does not have the force of law in and of itself” and that “it is not particular law for the dioceses of the United States of America”. Rather, EACW is merely “a commentary on that law by the Committee for the Liturgy.” It then added that the document had been withdrawn and was replaced by *Built on Living Stones*.¹⁸⁵ Meanwhile a leading liturgist and canonist published a canon law journal article also averring categorically that EACW “lacks, and there is no suggestion that it has, juridically binding or obligatory force.”¹⁸⁶ With respect to heritage preservation, the new document could be said to be an improvement on its predecessor. It concluded with a section entitled “Preservation of the Artistic Heritage of the Church” which is nearly a page long and it quotes authoritative documents warning against the destruction of the cultural patrimony of the Church.¹⁸⁷

p. 12, <http://www.ad2000.com.au/articles/2002/jul2002_p12_1060.html> (8/19/2002) says, “it is surprising how much credence EACW was given and continues to be given around Australia. An example of this was recently seen at one church in country New South Wales, where parishioners were given a series of ‘reflection sheets’ aimed at educating them about the liturgy and future changes to their church design. EACW is referred to extensively as if it were authoritative.” Regarding the historic as sacred, Dr. Jonas Salk, whilst researching a vaccine for polio, experienced a dead-end at every turn and he wanted to distance himself from his work. He then went on a retreat in a thirteenth century monastery in Assisi and the spirituality of the architecture was of such great inspiration that he was able to do intuitive thinking far beyond any he had ever done before. NORMAN L. KOONCE, “Stewardship: An Architect’s Perspective,” in ISMAIL SERAGELDIN ET AL (eds.), *Historic Cities and Sacred Sites: Cultural Roots for Urban Futures*, Washington, The World Bank, 2001, p. 30.

¹⁸⁴ NATIONAL CONFERENCE OF CATHOLIC BISHOPS COMMITTEE ON THE LITURGY, “The Role of Liturgy Committee Statements and Guidelines,” in *Newsletter* (August-September, 1985) p. 36.

¹⁸⁵ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS COMMITTEE ON THE LITURGY, “Environment and Art in Catholic Worship,” <<http://www.nccbuscc.org/liturgy/q&a/enviroment.htm>> (7/11/2002).

¹⁸⁶ FREDERICK R. MCMANUS, “Environment and Art in Catholic Worship,” in *The Jurist*, 55 (1995), p. 350.

¹⁸⁷ UNITED STATES CATHOLIC CONFERENCE, *Built of Living Stones: Art, Architecture, and Worship: Guidelines of the National Conference of Catholic Bishops*, Washington, United States Catholic Conference, 2000, pp. 77-78. It can be accessed on the Internet at <<http://www.nccbuscc.org/liturgy/livingstonesind.htm>>.

Nevertheless, before the status of the document had been clarified, re-orderings made under its guidance had led to a great destruction of historic buildings. Planners in North America envied their colleagues in Cologne, Berlin and Dresden who after the wartime destruction could begin again on an architectural *tabula rasa*. A sturdy political alliance of urban planners, city fathers, the building trades, and social science behaviourists was forged and it became an article of faith that, if the underprivileged could only be placed in a new and clean environment, sweetness and light would abound. This doctrine even had its effects in the Church. But fortunately there were some who refused to utter the modernist mantra. They declared openly that “less is less.” Architect Robert Venturi, for example, reflected on the sterile designs of modernism and called for “a conscious sense of the past.” The architect and teacher Robert A.M. Stern likewise attempted to counter the sterility of the modernists and bring historical references back to architecture.¹⁸⁸ Fortunately, one sees today the beginning of their influence in Catholic church design.

We have seen, then, the development of that portion of canon law which developed for the protection of the Church’s cultural heritage. We saw that the Church found in the Roman law of guardian and ward the juridical figure upon which she would pattern the church property administrator. In that same law’s concept of *res mobilia pretiosae* she found the concept of valuable non-fungible chattels apt for the support of her clergy, and the long-term care of the church fabric and its vessels and vestments needed for the celebration of divine worship. By sundering in 1917 *res pretiosa* from *quae servando servari possunt* the 1917 Code orchestrated a new departure. By narrowing the canonical meaning of *res pretiosa* from that of the canonical tradition, she fashioned a new notion of property valuable for its artistic, historical or intrinsic worth and she developed a new category of church property beyond the traditional *res sacra*. By the end of the twentieth century this new-found *res pretiosa* would have the marvelous growth pattern which we saw emerge in Chapter 1 and it emerged nearly three decades before the term “cultural Property” made its international debut in 1954. The development of the new *res pretiosa* was an enormously important juridical transformation.

The Romans and Roman lawyers in particular cherished the notion of elegance in law. They said that a question or distinction is elegant when it pinpoints in a dramatic or subtle way the exact limits of a rule, or when it shows by a nicely chosen example that a rule is not as tidy as it

¹⁸⁸ TYLER, *Historic Preservation*, pp. 30, 32.

seems.¹⁸⁹ It seems to me that by modeling the church property administrator on the Roman tutor and by taking from the Roman law of guardian and ward the notion of *res pretiosa* and then over the centuries refining it and refashioning it into the concept of cultural property defined by CIC 1497, canon law had similarly proceeded with elegance and fine juridical economy.

But no legal rule—no matter how well crafted—can ensure perfect compliance in any age. We noted at the end of Chapter 1 the melancholy tale told by the Sacred Congregation for the Clergy in 1971. We also noted that in property law there is something of a condominium and both church and state have an interest in it. We must now turn to the *ius vigens* and look at the 1983 Code.

¹⁸⁹ PETER STEIN, "Elegance in Law," in *Law Quarterly Review*, 77 (1961), p. 245.

Chapter 3. Patrimonial Cultural Property

3.1. The Concept of Church Property

We now come to the heart of this work which seeks to answer the question of whether *res pretiosa* has become the canon law of cultural property in the Latin Church after the coming into effect of the 1983 Code of Canon Law. We will be examining in detail *res pretiosa*, especially the six canons where the term *res pretiosa* appears, and we shall, with the benefit of the two previous chapters, comment at length on each of these canons and the related concepts of church property law with a view to setting forth the canon law of cultural property.

To do this we need first to explore in general the notions that underlie the Church's patrimonial law. The mission of the Church is religious, rather than political, economic or social.¹ But while she seeks the spiritual good of mankind, the Church needs and makes use of temporal goods in pursuit of her mission. The Church has the inherent right, independent of the civil power, to acquire, retain, administer, and dispose of property in pursuit of her supernatural mission. This mission is principally divine worship, the support of the clergy and ministers, and the works of charity and of the apostolate.²

This mission has special meaning for the Church's cultural property, for such property will have been created out of the needs of worship or for the works of charity or the apostolate. This must mean that the Church's interest in such property is specifically religious. Ultimately it was the faith which lead to the creation of this cultural property. This religious nexus suggests a principle which must be brought to bear in questions of the protection of cultural objects. There are at least two interests present. First there is the religious interest of the Church, since the object is in effect the cultural progeny of the faith. Second there is the cultural interest of society, usually represented by the state.³ The interests of both need to be accommodated.

¹ GS, art. 42, p. 1060: "Missio quidem propria, quam Christus Ecclesiae suae concredit, non est ordinis politici, oeconomici vel socialis: finis enim quem ei praefixit ordinis religiosi est." FLANNERY, p. 942.

² RCIC canon 1254; CCEO canon 1007.

³ BERNARD ARDURA, "Les biens culturels de l'église protection-conservation-mise en valeur," in *Décors et objets mobiliers chez les prémontrés: actes officiels du 19e colloque du Centre d'Études et de Recherches Prémontrées*, La Lucerne (Manche), Le Sénéquet, 1993, p. 7.

Furthermore, we noted in Chapter 1 in the section on the right to culture that there is a growing notion that culture and cultural objects belong to their author, which is to say, to the community which created them. Following this line of reasoning the faith community whose faith gave rise to the cultural property would be its author and so its owner. Here perhaps we see a congruence with canon 369 of the 1983 *Code* which, following the personalism of Vatican II, in canon 369 describes a diocese as a *populi Dei portio*, portion of the People of God, and in canon 515 describes a parish as a *certa communitas christifidelium*, a certain community of Christ's faithful.

3.2. The Subject of the Property Right

3.2.1. Ecclesiastical Juridical Persons

Canon 1257 lays down that church property derives its character from that of its owner; unless otherwise provided, e.g., in the statutes of a juridical person, only the property of public juridical persons is church property.⁴ As we saw in Chapter 1, according to canon 113, by divine law, the Catholic Church and the Holy See (cf. c. 361) are moral persons. Moreover, there are as well in the Church, besides physical persons baptized and in communion with her, juridical or fictive legal persons which are also the subject of obligations and rights.⁵ Juridical persons can be either aggregates of persons or aggregates of things (c. 115) and these are constituted for works of piety or of the apostolate either by the law itself or by grant of the competent ecclesiastical authority (c. 114).⁶ Public juridical persons, according to canon 116, are aggregates of persons or of things

⁴ MARIANO LÓPEZ ALARCÓN, "De los bienes temporales de la iglesia: introducción," in MARZOA, IV, pp. 55-60. CIC 99 made no distinction between public and private moral persons and the property of all ecclesiastical moral persons, under, CIC 1497, was church property. Likewise CCEO 921 does not distinguish public from private juridical persons and so CCEO 1009 makes the property of all (*scilicet* public) juridical persons church property.

⁵ PATRICK DU FAY DE CHOISINET, "Le propriétaire des biens en droit canonique," in *Praxis juridique et religion*, 2 (1985), pp. 202-211, traces the development of the notion of the juridical person in canon law.

⁶ RENZO CIVILI, "L'ente ecclesiastico nell'ordinamento canonico," in *Ephemerides iuris canonici*, 32 (1976), p. 207 notes that corporations or aggregates of persons go back to classical Roman law which knew *corpora politica* or "bodies politic" such as fora or castles, *corpora non politica* such as (public) associations of cavalry officers or legionnaires or vestal virgins, and *corpora privata* such as associations of tax-collectors or summoners. To form *corpora non publica* one needed three persons united in a common endeavour and intending to form a single unit. There was no need for recognition from any public authority. Foundations, by contrast, or aggregates of things were a later creation. The law of Justinian recognised *causae piae* and in the course of the Middle Ages foundations would be given juridical personality similar to that of corporations.

established by the competent ecclesiastical authority to act in the name of the Church and with a view to the public good. Other juridical persons are private.

Pre-eminent among the public juridical persons in the Church are the particular churches “in which and from which the one and only Catholic Church exists.” These are principally dioceses, as canon 368 points out, but, unless otherwise provided, equivalent to them are territorial prelatures, territorial abbeys, vicariates and prefectures apostolic, autonomous missions, and apostolic administrations.⁷ Every particular church, and so every diocese, *ipso iure* under canon 373, possesses juridical personality. In all juridical transactions of the diocese the diocesan bishop acts in the person of the diocese (c. 393). Each diocese is to be divided into distinct parts or parishes (c. 374) and each parish, under canon 515, §3, is *ipso iure* a distinct ecclesiastical juridical person. In all juridical matters the pastor (*parochus*) acts in the person of the parish, in accordance with the law, and especially in accordance with canons 1281 to 1288 (c. 532). Other public juridical persons include seminaries (c. 238), public ecclesiastical associations (c. 313), ecclesiastical provinces (c. 432), episcopal conferences (c. 449), and religious institutes along with their provinces and houses (c. 634).

3.2.2. Civil Legal Entities

Although they enjoy juridical personality in canon law, dioceses and parishes are not recognized as legal persons in American corporation law.⁸ This fact produced a long-standing conflict of law between canon law and American corporation law. Usually this conflict of law has been seen as a political problem of church-state relations. And so it is. But if one prescind from the politics of the matter and looks to the more purely juridical plane, the problem can also be viewed quite legitimately as a conflict of laws problem. Moreover, this is a conflict of laws problem of an

⁷ The canon law of autonomous missions has not been codified, but see DUANE L.C.M. GALLES, “Roman Catholic Missionary Prelates,” in *Ecclesiastical Law Journal*, 5 (2000), pp. 340-347.

⁸ BRENDAN FRANCIS BROWN, *The Canonical Juristic Personality with Special Reference to its Status in the United States of America*, Canon Law Series 39, Washington, Catholic University of America, 1927, p. 133; CARL ZOLLMANN, *American Church Law*, Saint Paul, West Publishing Co., 1933, p. 112 states: “The Catholic Church as such is not a corporation...Its dioceses or other territorial areas will not be juridically noticed or recognized as corporations...Our ecclesiastical systems being based on the voluntary [gathered church] principle can have neither legal capacity nor legal existence, and are incapable *sui juris* of having legal rights or temporal property.” Contrast this with canon 113 which states “The Catholic Church and the Apostolic See have juridical personality by divine ordinance” and with 1245 which states: “The Catholic Church has a natural right independent of the civil power to acquire, hold, administer and dispose of temporal goods to pursue its proper ends.”

unusual type in the experience of the Catholic Church. Customarily such conflicts have been resolved by a diplomatic accord or concordat between the organs of Church and state at the institutional level. Concordats typically provide that ecclesiastical juridical persons created under canon law are to enjoy juridical personality in civil law.⁹ But for reasons of history¹⁰ the conflict of laws between American corporation law and canon law could not be resolved in the usual fashion. Thus in the United States and in Britain there are usually civil corporations or trusts, distinct from the ecclesiastical juridical person, which hold civil title to church property.

3.3. The Object of the Property Right

As legal entities, fictive legal persons enjoy, according to RCIC canon 113, many of the rights and obligations enjoyed by physical or natural persons. In particular, ecclesiastical juridical persons, according to canon 1255, have the capacity to acquire, enjoy, administer, and dispose of property. Subject to the supreme authority of the Roman Pontiff, who is, under canon 1273 by virtue of his primacy of governance, the supreme administrator and steward of all church property,¹¹ ownership of church property is vested in the juridical person that acquired it lawfully.

⁹ In Germany major churches are public law corporations as are some in Austria and in (most) Swiss cantons. That said, the Church of England, albeit by law established, is not a legal person, and so cannot own property or sue or be sued. The same legal situation obtains for the established Churches of Sweden and Denmark. DAVID MCCLEAN, "Establishment in a European Context," in NORMAN DOE, MARK HILL AND ROBERT OMBRES (eds.), *English Canon Law: Essays in Honour of Bishop Eric Kemp*, Cardiff, University of Wales Press, 1998, pp. 134, 135.

¹⁰ The United States has been one of the last nations in the world to establish permanent, formal diplomatic relations with the Holy See. The nunciature in Washington was erected by JOHN PAUL II, apostolic letter *Quandoquidem*, 11 January 1984, in *AAS*, 76 (1984), p. 437. For an account of the halting and spasmodic relations between the United States and the Holy See, see ROBERT A. GRAHAM, *Vatican Diplomacy: A Study of Church and State on the International Plane*, Princeton, Princeton University Press, 1959, pp. 326, 327, 331, 333.

¹¹ Book V of the RCIC, like part VI of Book III of the CIC and title XXIII of the CCEO, speaks of *bona ecclesiae temporalia*. ABBASS, *Two Codes in Comparison*, p. 178, prefers CCEO's "ecclesiastical goods" to RCIC's "temporal goods". I have translated *bona* as "property" rather than more literally as "goods", to avoid confusion for Anglo-American lawyers to whom "goods" means personal property or personalty, that subset of property which in the civil law system is called movables. The U.K. Sale of Goods Act, 1977, § 61(1), 39 *Halsbury's Statutes*, 4th ed. (1995), p. 120 says,

"good" includes all personal chattels other than things in action and money, and in Scotland all corporeal movables except money, and in particular 'good' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Likewise, the (American) Uniform Commercial Code, see e.g. *Minnesota Statutes* § 336.2-105(1), says,

RCIC canon 1269 and 1270 speak of several types of church property—*res immobiles*, *res mobiles*, *res sacra*, *res pretiosa*—without defining these terms. Like CIC canon 1497, RCIC canon 1270 draws unconsciously on the civil law for the understanding of the first two terms. CIC canon 1497, on the other hand, defined the last two types of property, which are canonically important.¹² *Res sacra* were things destined by consecration or blessing for divine worship and we shall look at this kind of church property presently. *Res pretiosa*, as we saw in Chapter 2, were things of a notable value by reason of their artistic, historical or material character. We shall explore this type of church property at great length in section 3.2 of this chapter. While these types of church property are conceptually distinct, the set of property to which they refer need not be disjunct, and so the same property might be both sacred and precious.

Canon 1234, §2, speaks of a third and related type of property, *votiva artis popularis et pietatis documenta*, votive offerings of popular art and devotion, which are to be carefully safeguarded and displayed at shrines. Canons 638 and 1292 forbid the alienation of votive church property, i.e., *res ex votis Ecclesiae donatis*, without the permission of the Holy See. CCEO canons 1036, §4, and 1037 contain a similar prohibition. By contrast, the analogous canons of the 1917 Code, canons 534 and 1532, contained no express prohibition on the alienation of votive church property.¹³ After the promulgation of the 1917 Code the matter of votive offerings was taken up by the Sacred Congregation of the Council, which declared that, absent evidence to the contrary,

“Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action.

¹² RENE METZ, “Temporal Goods,” p. 693, makes the point that *res sacra* and *res pretiosa* are not necessarily church property, inasmuch as such property need not be owned by ecclesiastical public juridical persons.

¹³ It is worth noting that, whilst canons 564, §3, and 1243, §2, of the 1981 draft, which are comparable to RCIC canons 638 and 1292, did include the prohibition on the alienation of votive church property, the second paragraph of RCIC canon 1234 containing this description of *res votiva* and regarding the ordinary care of shrines did not appear in the corresponding canon 1185 of the 1980 *Schema* and represents an addition made by the Code Revision Commission in October, 1981. *Schema*, pp. 136, 264, 277. There was a fear that without such the addition popular or vernacular art would not be conceived as “valuable” and so would be destroyed or dispersed. *Communicationes*, 15 (1983), pp. 249-250. These three canons—638, 1234, and 1292—appear to be the only ones in the 1983 Code where votive church property appears. Ochoa, s.v. “votum” and “votivus”. VICTOR J POSPISHIL, *Eastern Catholic Church Law*, 2d ed., Brooklyn, Saint Maron Publications, 1996, pp. 629-631 notes that in the Near East church buildings tended to be rather small buildings and that the CCEO does not mention oratories, private chapels or shrines. Since there is no section in the CCEO on shrines, there is no equivalent there to RCIC canon 1234, §2.

offerings left at an altar or before a sacred image were to be presumed to have been left in payment of a vow and the permission of the Holy See was requisite for their valid alienation.¹⁴

RCIC canon 1171 and CCEO canon 1918 continue to describe *res sacrae* as objects set aside for divine worship by dedication or blessing. Under the usage of the 1983 Code persons are consecrated to God, while things are dedicated to Him. Sacred things, canon 1171 reminds us, are to be treated with reverence and, even if in private hands, are not to be given over to profane uses.

Sacred places, according to canon 1205, are those destined by dedication or blessing for divine worship or the burial of the faithful. Sacred places include churches, oratories private chapels, shrines, and cemeteries. Churches are sacred buildings destined for divine worship to which the faithful have a right of access especially for public worship (c. 1214).¹⁵ Where a church may not be used for worship, the diocesan bishop may permit it to be used for a profane but not sordid use. In other cases where grave reasons prevent a church from being used for worship, the diocesan bishop, having heard the presbyteral council and those who may have special rights, may hand it over to profane but not sordid uses (c. 1222). Sacred places which have been in great part destroyed or handed over by decree or by simple fact to profane uses lose their dedication or blessing and so cease to be *res sacrae* (c. 1212). Oratories are sacred places destined for divine worship by some community or group to which other members of the faithful may have access by permission of the competent superior (c. 1223). A private chapel is a place set aside for divine worship for the convenience of an individual or group by the permission of the local ordinary (c. 1226). A shrine is a sacred place frequented with permission of the local ordinary by the faithful as a place of pilgrimage (c. 1230). *Res sacrae*, it is clear from canons 1171 and 1269, can be privately owned by physical or juridical persons and so need not be church property. The

¹⁴ SACRED CONGREGATION OF THE COUNCIL, response, 13 July 1919, AAS, 11 (1919), pp. 416-419; *Canon Law Digest*, 1 (1934), p. 730. See Chapter 2, note 156.

¹⁵ CCEO canon 869 is slightly different and says that a church is a structure set aside exclusively for divine worship by dedication or blessing. By custom, in the Latin Church the law recognizes several different ranks of churches, major basilicas, cathedrals, minor basilicas, abbey churches, collegiate churches, parish churches, conventual churches and mission stations or chapels. See CHARLES AUGUSTINE BACHOFEN, *Liturgical Law: a Handbook of the Roman Liturgy*, St. Louis, B. Herder, 1931, p. 23.

blessing or dedication, however, imprints a sacred character on the property and prevents it from being given over to profane uses.¹⁶

3.3.1. The Concept of *Res pretiosa* in the 1983 Code

Having looked at the general property law categories, one may now—following canon 17—look at the text and context of *res pretiosa* as the term is used in the 1983 Code. CIC canon 1497, we have seen, had included definitions of *res sacra* and *res pretiosa*. The former were things destined by consecration or blessing for divine worship. The latter were things of a notable value deemed valuable by reason of their material, artistic, or historic character.¹⁷ There is no corresponding definition in the 1983 Code, which avoids definitions where possible. But the 1983 Code does provide descriptions. Moreover, RCIC canon 6, §2, tells us that to the extent that the canons of the 1983 Code reproduce the prior law, they are to be interpreted in the light of the canonical tradition and RCIC canon 21 tells us that revocation is not to be presumed where there is doubt rather the later law is to be related to the earlier law and, where possible, harmonized with it.¹⁸ Our task, then, is to look first to how *res pretiosa* is used in the 1983 Code and then determine the meaning of the term in light of its current usage and in light of the canonical tradition. The term in the 1983 Code appears in six canons.¹⁹

Canon 1292, §2, on alienations states that where it is a question of alienating property over the maximum limit or votive property or *de rebus pretiosis artis vel historiae causa*, for validity the prior permission of the Holy See is required. Likewise, in canon 638, §3, which is the corresponding canon dealing with alienations by religious institutes, it is said that for alienations of property above the maximum limit set by the Holy See or of votive property or *de rebus*

¹⁶ DANIEL TIRAPU, “De los bienes temporales de la iglesia: Título I de la adquisición de los bienes,” in MARZOA, IV, pp. 94-95.

¹⁷ The corresponding canon of the former Oriental law was PA canon 234, §2, p. 126, which read: “*Dicuntur sacra quae consecratione, benedictione, aliove modo iure particulari determinato, ad divinum cultum destinata sunt; pretiosa quae magni sunt momenti, artis vel historiae vel materiae causa.*”

¹⁸ Likewise, CCEO canon 2 ordains that its canons, which for the most part receive and adapt the ancient law of the Eastern Churches, are to be understood in accordance with these ancient laws.

¹⁹ XAVERIUS OCHOA (ed.), *Index verborum ac locutionum Codicis iuris canonici*, 2d ed., Città del Vaticano, Libreria Editrice Lateranense, 1984, s.v. “*pretiosus*”. IVAN ZUZEK, *Index analyticus codicis canonum ecclesiarum orientalium*, Roma, Pontificium Institutum Orientalium Studiorum, 1992, had no listing under *pretiosus*. Under *ars sacra*, he refers to CCEO canon 887, §2. Under *res pretiosa*, he refers to CCEO canons 1036, §3, and §4, and 1037, §4. Under *res sacra*, he refers to CCEO canons 205, §2, 872, §2, 1018, and 1441. The text of these canons will be found in Appendix 3 and Appendix 4.

pretiosis artis vel historiae causa the prior permission of the Holy See is required. In both cases the descriptions are the same and refer to property valuable by reason of its artistic or historic character.²⁰ These are descriptions which we have frequently encountered in Chapter 1 concerning cultural property. We note also that in both, in contrast to CIC canon 1497, §2, one no longer refers to the material character of the property. This is precisely the process described by Alsop in Chapter 1 above regarding the commodification of art. One moves from looking at the property's material value to viewing it for its artistic or historical value.²¹ Moreover, it is worth noting that the legislator of the 1983 Code has exhibited some care and inserted this new description, *artis vel historiae causa*, in both canons 638, regarding property of religious institutes, and 1292, regarding church property generally. By contrast, CIC canons 534 and 1532 spoke only of *res pretiosa*—without adding descriptive language. Of course, these canons of the 1917 Code need not have elaborated beyond using the term *res pretiosa* itself, for in the 1917 Code canon 1497, §2, defined the term *res pretiosa*. Arguably, the object in the view of the legislator of the 1983 Code in adding these descriptive phrases is to supply in RCIC canons 638 and 1292 for the lack in the 1983 Code of a definition like that provided by CIC canon 1497, §2, and so he carefully inserted this descriptor in each of these central canons.²² We see, for example, in RCIC canon 1171 as a description of *res sacra* what had appeared in CIC canon 1497, §2, as a definition of *res sacra*. We may note that the Oriental Code does a similar thing. PA canon 234 had supplied the same definition of *res sacra* and *res pretiosa* used in CIC canon 1497, §2. Now to avoid formal definitions the Oriental Code inserts in canons 1018 and 1019 descriptions taken from PA canon 234. CCEO canon 1018 describes *res sacra* as *quae scilicet dedicatione vel benedictione ad cultum divinum destinatae sunt*, things destined for divine

²⁰ The corresponding canons to RCIC canons 1292 and 638 in *Postquam apostolicis*, AAS, 44 (1952), pp. 84, 139 were canons 281 and 66 which speak only of *res pretiosa*.

²¹ Arguing for a similar distinction a half century earlier, the noted American Catholic church architect Charles D. Maginnis, FAIA, had said: "To say that the progress of Christian architecture is hindered by our lack of means is to maintain that there is an essential relation between the value of a work of art and the cost of the material of which it is composed. The most striking instance I have ever known to the contrary is that of the silver statue of the famous actress at the Chicago Fair, whose value was represented to be \$30,000. As a work of art, it was critically condemned as possessing no value whatever. It was in effect, therefore, a mere mass of precious metal debased by incompetent hands. In the deft hands of Mr. St. Gaudens, however, a cartload of New Jersey mud was always a rich investment. This is the alchemy of art." CHARLES D. MAGINNIS, "Catholic Church Architecture in America", *American Ecclesiastical Review*, 45 (1911), p. 522.

²² The corresponding canon in CCEO is canon 1036, §3, and §4, which speaks only of *res pretiosa* and gives its source as PA canon 281, §1. CCEO, p. 336.

worship through dedication or blessing. CCEO canon 1019 (like PA canon 234) describes *res pretiosa* as *quae scilicet magni sunt momenti artis vel historiae vel materiae causa*, things which are especially important due to artistic, historical or material value.²³ Except for these descriptions (and the norm on the period for the prescription of property of eparchies and churches *sui iuris*), CCEO canons 1018 and 1019 are identical to RCIC canons 1269 and 1270, respectively. Thus, we see the same process at work in both codes. Definitions are avoided and instead descriptive phrases are inserted in key canons to supply for them.

The legislative history provides few clues as to the meaning of the language. Already in 1970 the *Coetus studiorum de iure patrimoniale Ecclesiae*, the committee which drafted this section of the Code and which had begun its work in 1967 and completed it by 1970, had presented a draft of what would become RCIC canon 1292. By 1970 the draft was already using the expression *res artis vel historiae causa pretiosa*. Seemingly, there was no discussion about this new language. The new language, which supplanted CIC canon 1497, §2's expression *artis vel historiae vel materiae causa*, seemingly engendered no controversy. There was the suggestion that the norms on cultural property be collected in one title or chapter and that include a statement on the importance of cultural property for the Church along with a request that the norms of civil law—both national and international—be respected. This proposal was not adopted, however, and it was decided to leave the matter to particular law and not canonize the civil law.²⁴

The only controverted issue was on the issue of subsidiarity—whether alienations of *res pretiosa* could be effected with the permission of a committee of the local episcopal conference or whether the permission of the Holy See would continue to be required, as it had been since at least the promulgation in 1468 of the apostolic constitution, *Ambitosae*. At the same time it is worth noting that, if *res pretiosa* now no longer includes property valuable *materiae causa*, then precious metals and precious stones worth less than the sum limit can now be alienated without

²³ RENÉ METZ, “Temporal Goods of the Church (cc. 1007-1054),” in GEORGE NEDUNGATT (ED.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, Kanonika 10, Rome, Pontificio Istituto Orientale, 2002, p. 693 states that sacred and precious property are not necessarily church property and in order that they might not be confused with church property “CCEO, like [R]CIC, does not mention them in the canon which treats ecclesiastical goods, whereas the preceding legislation, CIC-17 (c. 1497, §2) and PA (c. 234, §2), treated them as special categories of ecclesiastical goods in the same canon.” If property valuable for its artistic or historical character is not peculiarly church property, there is nothing to distinguish it from other cultural property.

²⁴ *Communicationes*, 16 (1984), p. 27. It is worth noting, however, that the circular letter *Opera artis* of 1971 had drawn to the attention of diocesan bishops to the potential existence of civil norms for the care of cultural property. In *AAS*, 63 (1971), p. 317.

the permission of the Holy See and so come within the ambit of discretion gained by subsidiarity.²⁵

If we follow the injunction of RCIC 17 and look to the context—in this case the temporal juridical context—of the drafting of this canon, we perhaps find some illumination. We first need to recall from Chapter 1 Vatican II's singular appreciation of the pastoral value of culture and its warm endorsement of the right to culture. It is helpful as well to recall something of the international legal context. We saw the 1954 Hague Convention which had introduced the term "cultural property" into international legislation. Two further conventions, those of 1970 and 1972 on illicitly exported cultural property and regarding the peacetime care of the world cultural heritage, were just in course of elaboration and were using different terminology, "cultural property" and "cultural heritage." Moreover, the Sacred Congregation of the Clergy had just on 11 April 1971 issued its circular letter, *Opera artis*, reminding presidents of episcopal conferences that, in the course of liturgical updating, the artistic and historical patrimony of the Church was not to be destroyed or alienated. While not providing a definition of *res pretiosa*, the circular letter did refer to *rerum arte vel historia praestantium*.²⁶ This document clearly has as its focus "cultural property"—it evinced no interest in *res pretiosa materiae causa*—and it is cited as the source for canons 638 and 1292 and thus it would seem the new usage stems from this source.²⁷ We see in *Pastor bonus*, article 99, which defines the competence of the newly-created Pontifical Commission for Preserving the Patrimony of Art and History a similar focus on the *patrimonium historiae et artis totius Ecclesiae*.

Also, we should have regard for the Italian legal scene, inasmuch as, because of the large number of canonists and canon law faculties in Italy, Italian civil law developments affect more canonical thinking than the civil law developments of other lands. The expression *beni culturali*, "cultural

²⁵ *Communicationes*, 5 (1973), p. 100; ISABEL ALDANONDO SALAVERRÍA, "La iglesia y los bienes culturales," in *Revista española de derecho canonico*, 39 (1983), p. 466; RINALDO BERTOLINO, "Nuova legislazione canonica e beni culturali ecclesiali," in *Il diritto ecclesiastico*, 93 (1982), p. 301. Perhaps the rise of sophisticated grading systems and efficient secondary markets for such precious items like gold and diamonds had eliminated the need for Roman Curial oversight of this class of item in the context of alienations.

²⁶ SACRED CONGREGATION FOR THE CLERGY, circular letter, 11 April 1971, *Opera artis*, in *AAS* 63 (1971), p. 316; *Canon Law Digest*, 7 (1975), p. 821. RCIC, pp. 176, 350, 351.

²⁷ *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Città del Vaticano, Libreria Editrice Vaticana, 1989, pp. 177, 350.

property,” was only then maturing in Italy. Italy’s cultural property law of 1939 was known as the law on the protection of objects of artistic and historical interest and it had spoken of *cose mobili e immobili che presentano interesse artistico, storico, archeologico o etnografico*, movable and immovable property possessing artistic, historic, archeological or ethnographic interest. However, because article 9 of the Italian constitution assigned to the Republic a duty to care for the *patrimonio storico e artistico della Nazione*, the artistic and historical heritage of the nation, one typically for short one spoke of property of artistic or historical interest. It was only in 1964 that the Franceschini Commission had been appointed with a remit to report on measures for the care of the nation’s historical, archaeological, artistic, and landscape heritage. This commission would make its report in 1967 and its three-volume report was entitled *Per la salvezza dei beni culturali in Italia*. The commission and its report popularized the use of the term, *beni culturali* or cultural property, which was a general and open-ended term. The commission described cultural property as *bene che costituisca testimonianza materiale avente valore di civiltà*, property constituting material evidence of civilization, with the content to be determined by experts. But the new term did not achieve immediate currency and only in 1974 was Italy’s *Ministero per i beni culturali* or Ministry of Cultural Property created. It was in the decree-law creating that Ministry that the term *beni culturali* or “cultural property” first appeared in Italian law.²⁸ Thus this course of development was by no means complete in 1970 when the *Coetus* had completed its draft already using the expression *res pretiosa artis vel historiae causa*.

Moreover, the Holy See and Italy were then engaged in protracted negotiations with respect to the revision of the 1929 concordat and the matter of cultural property. It is said that half of the world’s inventoried cultural property is in Italy and that eighty percent of that sited in Italy—and this includes not only buildings but also artistic, historical, archaeological, and archival materials—belongs to the Catholic Church. Work on a revision of the concordat had begun in 1969 and by 1976 a draft text had been produced. A final text was not established and signed

²⁸ MASSIMO SEVERO GIANNINI, “I beni culturali,” in *Rivista trimestrale di diritto pubblico*, 26 (1976), pp. 5-6; LUCIA SCALERA, *Beni culturali et ‘nuovo concordato’*, Pubblicazioni della Facoltà di Giurisprudenza Dipartimento di Scienze Giuridiche Università di Modena 15, Milano, A. Giuffrè, 1990, p. 5. The formula of the Franceschini Commission, *bene che costituisca testimonianza materiale avente valore di civiltà*, is doubtless the source of the definition of cultural property contained in an amendment proposed in October, 1981, to what is now canon 1283. The proposed amendment would have described *bona culturalia* as *quae aliquo modo ordinario et extraordinario testimonium culturae a fide inspiratae praebent*. *Communicationes*, 16 (1984), p. 34. While the term *bona culturalia* was added to that canon, it was not thought necessary, however, to add such explanatory language.

until 1984.²⁹ One can guess that a notable change in the Latin Church's canon law of cultural property would not have been prudent while these important negotiations were taking place. We should also recall that most of the canon law of cultural property since 1902 was particular law enacted by the Holy See for the particular churches of Italy. A considerable body of instructions had been issued over three quarters of a century to govern the care of cultural church property in Italy and the Pontifical Commissions on Sacred Art and Ecclesiastical Archives in Italy had been created.³⁰

In this context it is not surprising that a canon law revision committee which had begun its work in 1967 and completed its initial draft by 1970 might have been very willing to use the term *res pretiosa artis vel historiae causa* to mean cultural property while eschewing the neologism *bona culturalia*, a term only then gaining currency in Italy. The former expression, after all, would be used in 1971 by the Congregation for the Clergy in its circular letter warning against the destruction of the Church's art-historical patrimony in the name of liturgical reform and it was this Congregation which had subject matter jurisdiction over the Church's artistic and historical patrimony. If we look to the sources of RCIC canons 638, §3, and 1292, §2, we find in each case a citation to the 1971 circular letter of the Congregation of the Clergy, which had used the

²⁹ BERNARD ARDURA, "Les biens culturels de l'église protection-conservation-mise en valeur" in *Décors et objets mobiliers chez les prémontrés: actes officiels du 19e colloque du Centre d'Etudes et de Recherches Prémontrées*, Le Sénéquet, La Lucerne (Manche), 1993, pp. 12-13. The 1984 accord is found at "Accordo tra la Santa Sede e la Repubblica Italiana che apporta modificazioni al concordato Lateranense", 18 February 1984, in *AAS*, 77 (1985), pp. 521-531. The Accord's, art. 12, 1, on cultural property at p. 530, reads:

La Santa Sede e la Repubblica italiana, nel rispettivo ordine, collaborano per la tutela del patrimonio storico ed artistico.

Al fine di armonizzare l'applicazione della legge italiana con le esigenze di carattere religioso, gli organi competenti delle due Parti concorderanno opportune disposizioni per la salvaguardia, la valorizzazione e il godimento dei beni culturali d'interesse religioso appartenenti ad enti ed istituzioni ecclesiastiche.

La conservazione e la consultazione degli archivi d'interesse storico e delle biblioteche dei medesimi enti e istituzioni saranno favorite e agevolate sulla base di intese tra i competenti organi delle due Parti.

It is notable that this article refers both to "patrimonio storico ed artistico" and to "beni culturali" and appears to regard the two as referring to the same objects.

³⁰ Much of this particular legislation appears in MARIA VISMARA MISSIROLI (ed.), *Codice dei beni culturali di interesse religioso*, Milan, Giuffrè Editore, 1993, pp. 188-211, but a fuller list of documents, which apparently were not published in *AAS*, can be found in the footnote 2 of PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter, 2 February 1997, "La funzione pastorale degli archivi ecclesiastici", *EBC*, pp. 313-314.

expression artistic and historical patrimony.³¹ Thus it would seem that usage had changed from that of CIC canon 1497 and that the Roman Curia was content to focus on the chattels valuable for artistic or historical reasons. Property intrinsically valuable—precious metals and precious stones for example—no longer appears to have been part of the Curia's focus; the words *vel materiae* did not appear in the 1971 circular letter of the Congregation of the Clergy. The Pontifical Central Commission for Sacred Art in Italy had long sponsored a series of conferences on sacred art called *Settimane per l'arte sacra*. Such conferences took place in 1956, 1961, 1965, 1969, 1970, and 1972. In 1981, 1982 and 1985 it held *Settimane sui beni storico-artistici della Chiesa*. And in 1974 it published a volume entitled *Tutela e conservazione del patrimonio storico e artistico della Chiesa in Italia*. The usage of the Roman Curia in 1988 in article 99 of *Pastor bonus* is similar: The newly-created Pontifical Commission for Preserving the Patrimony of Art and History of the Church, located within the Congregation for the Clergy, is given jurisdiction over the *patrimonium historiae et artis*, the artistic and historical heritage of the Church. Only in 1993 would the name of the Commission be changed to *Pontificia Commissio de Ecclesiae Bonis Culturalibus*, the Pontifical Commission for the Cultural Heritage of the Church.³² In sum, it would seem that during the 1970's and 1980's (and until 1993) the practice of the Roman Curia, in the meaning of canon 19, was to use expressions like art-historical patrimony to mean cultural property.

Looking at the other canons in which the notion *res pretiosa* appears, canon 1270 accords privileged periods for prescription to certain types of church property which otherwise would, under canon 197, be governed by the periods set by civil law. Canon 1270 specifies a period of a hundred years for the prescription of *res pretiosa* owned by the Apostolic See and of thirty years for such property owned by other public juridical persons.³³ Canon 1220, §2, requires that in churches ordinary care be taken for the safety and security of *bona sacra et pretiosa*.

³¹ *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus fontium annotatione et indice analytico-alphabetico auctus*, Roma, Libreria Editrice Vaticana, 1989, pp. 177, 350. This seems mute evidence that the intent with the new usage is to restrict the meaning of the term *res pretiosa* in the 1983 Code to property belonging to the artistic and historical patrimony.

³² CARLO CHENIS, "Introduzione," in EBC, p. 25.

³³ RCIC canon 1270 word for word repeats CIC canon 1511, except for updating the expression "moral person" or "juridical person". CCEO canon 1019, by contrast, which reports its source as PA canon 249 and is the canon corresponding to RCIC canon 1270, speaks of *res mobiles pretiosae, quae scilicet magni sunt momenti artis vel historiae vel materiae causa*. *Codex canonum ecclesiarum orientalium auctoritate Ioannis Pauli PP. II promulgatus fontium annotatione auctus*, Roma, Libreria Editrice Vaticana, 1995, p. 359. This is nearly the same language as the 1917 Code's definition of *res pretiosa* in canon 1497, *pretiosa, quibus notabilis valor sit, artis vel historiae vel materiae causa*. CONCEPCIÓN PRESAS BARROSA,

Canon 1189 deals with images. It provides that *imagines pretiosae, id est vetustate, arte aut cultu praestantes*, precious images, that is those distinguished by reason of age, art or cult, are not to be restored without the prior written permission of the ordinary. Here it would seem that *vetustas* is nearly a synonym for *historia*; this is, incidentally, the only canon in which the word *vetustas* appears.³⁴ The same phrase, moreover, had been used in the corresponding canon, canon 1280, of the 1917 Code, and we noted in Chapter 2 that the word *cultu* reflected the heritage of the law, since in the *ius novum* the prohibition had been on the alienation of sacred images, those destined by blessing or dedication for worship. But it is notable that in the corresponding canon 887, §1, of the Oriental Code there is subtle difference. CCEO canon 887 speaks of *sacrae icones vel imagines pretiosae, id est vetustate aut arte praestantes*, sacred icons or precious images, that is those which are outstanding owing to their antiquity or artistic character. Here the expression *aut cultu* had vanished and so the text is actually perfectly parallel to the usage *artis vel historiae causa* of the Latin Code canons 638 and 1292.³⁵

Canon 1283, §2, requires administrators of church property to make an inventory of the juridical person's property and requires that the inventory include the items of the following three classes of property: 1) immovables, 2) *rerum mobilium sive pretiosarum sive utrumque ad bona culturalia pertinentium*, and 3) other property. In view of what we have seen so far it would seem curious that in this canon "precious" and "cultural" property are here linked by the disjunctive

"El patrimonio artístico de la Iglesia en el <Codex Iuris Canonici> y en el <Codex Canonum Ecclesiarum Orientalium>. Aproximaciones al respecto", in PONTIFICIUM CONSILIIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Ius in vita et in missione Ecclesiae: acta symposii internationalis iuris canonici occurrente X anniversario promulgationis codicis iuris canonici diebus 19-24 Aprilis 1993 in civitate Vaticana celebrati*, Libreria Editrice Vaticana, 1994, p. 801 notes the different usage with respect to *res pretiosa* in CCEO canon 1019, but does not comment further on it. JOBE ABBASS, "The Temporal Goods of the Church: A Comparative Study of the Eastern and Latin Codes of Canon Law," in *Periodica*, 83 (1994), pp. 669-714 discusses a number of differences between the Latin and Eastern codes and at pp. 686 and 690 specifically discusses *res pretiosa*, but he does not advert to the different usage between CCEO canon 1019 and RCIC canons 638 and 1292.

³⁴ OCHOA, s.v. "*vetustas*".

³⁵ Canon 1189 was elaborated by the *Coetus studiorum <de locis et temporibus sacris deque cultu divino>*, a separate committee from that which elaborated the patrimonial canons. On 3 December 1979 the former approved without amendment what had been nearly the exact language of CIC canon 1280 and what would become RCIC canon 1189. *Communicationes*, 12 (1980), p. 373. Since two committees were involved here, one could see the continued presence of *cultu* as merely a redaction problem, a failure to update the text. No source is given for CCEO canon 887, §1, p. 321.

conjunction, *sive*. This might mean that the two are somehow different.³⁶ The legislative history on the phrase *ad bona culturalia pertinentem* shows otherwise. In the corresponding canon 1234 of the 1980 draft by the code revision commission, the phrase *rerum mobilium pretiosarum aliarumve* was used, just as in canon 1522 of the 1917 Code.³⁷

The new language entered the text at the October, 1981, meeting of the code revision commission. An intervention asked that the inventory be extended to include all church cultural property which in some way, either ordinary or extraordinary, represented a testimony of culture inspired by the faith. It seems the intervenor thought the adjective “valuable” was too limiting. With regard to cultural property, moreover, there was no need to place a value on such property which in any case would be difficult. A description sufficed. It was objected that in general obligations should be laid down in general terms and so the commission agreed to amend the text to read *accuratum...rerum mobilium sive pretiosarum sive utcumque ad bona culturalia pertinentium aliarumve cum descriptione...*³⁸ From this legislative history it would seem clear that the objection arose from the concern that the adjective “valuable” in the expression *res pretiosa* would mislead the inventory maker to exclude from the inventory cultural property not deemed valuable.³⁹ Thus, in adding the phrase *ad bona culturalia pertinentium*, presumably the code revision commission wished therefore to clarify that *res pretiosa* and *bona culturalia* are

³⁶ See the commentary by Mariano López Alarcón to canon 1283 in CAPARROS, p. 795, suggesting the two are distinct types of church property. Also ZOILA COMBALÍA, “Titulus II: de administratione bonorum,” in MARZOA, IV, p. 133.

³⁷ *Schema*, p. 274. The text of canon 27, the draft canon corresponding to canon 1283, as approved by the drafting committee at its 12 November 1979 meeting read *rerum mobilium pretiosarum aliarumve*. *Communicationes*, 12 (1980), p. 418. OCHOA, s.v. “culturalis,” shows only one other use of this adjective, viz., in RCIC 1136 on the rights and duties of parents in the education of their children. Nowhere else in the RCIC does the term *bona culturalia* appear.

³⁸ *Communicationes*, 16 (1984), p. 34, where the intervention reads: “*Inventarium sit universale, ad omnia scil. bona culturalia ecclesiastica extenditur, i.e. ad bona aliquo modo, ordinario et extraordinario, testimonium culturae a fide inspiratae, preabent. Criterium de <pretiositate> rerum nimis est restrictum. Ad bona culturali quod attinet, necesse non est ut in inventario de <aestimatione>, quae perdificilis est, agatur. Sufficit <descriptio>.*”

³⁹ In fact the intervention here and that at note 26 were part of a comprehensive presentation made by Cardinal Colombo, Archbishop Emeritus of Milan, on behalf of cultural property. CARLO AZZIMONTI, *I beni culturali ecclesiali nell'ordinamento canonico e in quello concordatario italiano*, Bologna, Edizioni Dehoniane, 2001, pp. 196-200. Notably the Cardinal's proposed amendment describes cultural property as *testimonium culturae*—the phrase used by the Francheschini Commission. That the code revision commission declined to adopt his proposal suggests that they considered their own term, *res pretiosa artis vel historiae causa*, adequate to cover the subject of cultural property.

identical. As we saw in the conclusions to Chapter 1, one of the marks of cultural property is that it may have little or no commercial value nor are there threshold values.

Even if the legislative history failed to shed light on the context, the Latin text itself is helpful. Latin has several disjunctive conjunctions with rather more subtle meanings than the English disjunctive conjunction, “or.” In Latin disjunctive conjunctions include “*aut*,” “*vel*,” “*sive*” or “*seu*” and the enclitic “*-ve*”. With “*aut*” the conjoined words are represented as essentially different in meaning and the use of one excludes the other. With “*sive*,” on the other hand, there is a distinction which is not essential or the speaker evinces uncertainty as to some matter of detail.⁴⁰ In canon 1283 the latter is used. Thus, the Latin makes no attempt to distinguish *res pretiosa* from *bona culturalia*. Indeed, in its proper meaning the Latin suggests only a non-essential difference—indeed a possible identity—between *res pretiosa* and *bona culturalia*.⁴¹

The key may also be in the word “*bona*.” If the intent were merely to contrast *res pretiosa* from *res culturalia*, there would be no need for this substantive. The text would simply have said *rerum mobilium sive pretiosarum sive culturalium*. Here the text seems to wish to include, besides *pretiosa*, other movables pertaining to cultural property. The latter could include fixtures which ordinarily would be considered destined by nature or intention to be part of immovables.⁴² Here, however, canon 1283 on inventory wishes to have them listed with precious movables rather than with immovables with a view to both kinds of property of this class being placed

⁴⁰ GEORGE M. LANE, *A Latin Grammar for Schools and Colleges*, revised edition, New York, American Book Company, 1895, p. 281. He gives useful examples: “*Aut vivam aut moriar et ita sive casu sive consilio deorum, quae pars calamitatem populo Romano intulerat...*” JAMES BRADSTREET GREENOUGH, *Allen and Greenough’s Latin Grammar for Schools and Colleges Founded on Comparative Grammar*, revised edition, Boston, Ginn & Co., 1887, pp. 136-137, states that while “*aut*” implies a choice between two alternatives; with “*sive*,” on the other hand, the conjoined words may be “two names for the same thing.”

⁴¹ Similarly in note 29 *supra* in article 12 of the 1984 Villa Madama Accord between Italy and the Holy See we noted an apparent identity between *patrimonio storico ed artistico* and *beni culturali*.

⁴² The law of fixtures in England in relations to cultural property has become very complex and JEREMY LE M. SCOTT, “Classification of Fixtures Under English Law: An Inspector’s Whim?” in *Art, Antiquity and Law*, 5 (2000), p. 331 declares, “What is happening here is the undermining or blurring of centuries-old legal principles relating to fundamental divisions between realty and personalty.” The problem is that if a chattel in a listed building is considered a fixture, then its removal is a “work” which requires listed building consent. In the case of *The Three Graces* sculpted by Canova for the Duke of Bedford and displayed in a specially designed gallery there, the Secretary of State held (p. 332) that where a piece of sculpture is designed to be an ornament or enrichment to a building, it is to be considered part of the building and subject to listed building control, but where a building is designed to house a sculpture the piece (as in the case of *The Three Graces*) can be deemed a chattel.

together. This type of placement would be useful for both practical and scholarly reasons. It would facilitate security and scholarly study. In this regard it is worth noting that canon 1522 of the 1917 Code merely demanded that the inventory include *rerum immobilium, rerum mobilium pretiosarum aliarumve*. In view of the earlier text, the interpolation of the new language on cultural property would have the effect of including fixtures deemed attached to immovables. Canons 1025 and 1026 of the Oriental Code refer only to *bona ecclesiastica* and *patrimonium stabile* and so make no demands for detail in the manner of the Latin Code.⁴³

We might also look outside the code to the special law of the Roman Curia.⁴⁴ On 25 October 1990 when Pope John Paul II presented the *Codex Canonum Ecclesiarum Orientalium* to the twenty-eighth General Congregation of the Synod of Bishops, he indicated that the new Eastern Code together with the 1983 Latin Code and the 1988 apostolic constitution of the Roman Curia, *Pastor Bonus*, formed one *corpus iuris canonici*.⁴⁵ We may, therefore, find in *Pastor Bonus* and the documents amending it legitimate assistance to help interpret the 1983 Code.

In 1982 by an autograph letter Pope John Paul II created the Pontifical Council for Culture and one of the innovations of *Pastor bonus*, the 1988 apostolic constitution by which Pope John Paul II reformed the Roman Curia, was the creation, within the Congregation for the Clergy, of the Pontifical Commission for the Conservation of the Artistic and Historical Patrimony of the Church. The Commission was charged with the care of the whole Church's artistic and historical patrimony. What was no longer in use was to be placed in suitable ecclesiastical museums. The historical patrimony, especially documents showing the pastoral care and rights and obligations of ecclesiastical juridical persons, was to be entrusted to competent curators in libraries and archives. The Commission was to work with particular churches and bishops to see that suitable

⁴³ CCEO, p. 361 gives the source of CCEO canon 1026 as PA canon 267, which required the inventory to include *rerum immobilium, rerum mobilium pretiosarum aliarumve cum descriptione atque aestimatione earundem*—as did CIC canon 1522.

⁴⁴ Canon 19 provides that where neither universal nor particular law nor custom provides an express provision in a matter, one may look to the jurisprudence and practice of the Roman Curia for suppletive law. Moreover, in the apostolic constitution, *Sacri canones*, by which Pope John Paul II promulgated the CCEO, he referred to that code, along with the RCIC and *Pastor bonus*, as a trilogy by which the canonical ordering of the entire church is completed and the reforms of Vatican II implemented. Thus, if the code permits resort to the jurisprudence and practice of the Roman Curia, it seems even more fitting to look to actual legislation emanating from the supreme legislator—especially when it appears in what John Paul II had called a *corpus iuris canonici* and so look to usage in *Pastor bonus* and its amending documents to help interpret the RCIC.

⁴⁵ POPE JOHN PAUL II, address, 25 October 1990, AAS, 83 (1991), pp. 486-493 at p. 490.

museums, archives and libraries were in place for the care of this artistic and historical patrimony. The Commission was to work with the Congregation for Catholic Education and the Congregation for Divine Worship so that the People of God might become more and more conscious of the need for the conservation of the artistic and historical patrimony of the Church.⁴⁶

Five years later in 1993 some further restructuring of the Roman Curia took place. The Pontifical Council for Culture was merged with the Pontifical Council for the Dialogue with Non-believers under the name of the former and the Pontifical Commission for the Conservation of the Artistic and Historical Patrimony of the Church was re-named the Pontifical Commission for the Cultural Heritage of the Church and separated from the Congregation for the Clergy and made an independent agency. The President of the latter was to be a member of the Council for Culture with which it was to work closely.⁴⁷ The work of the Commission with the artistic and historical property of the Church has not changed and so the name change from a commission on artistic and historical property to a commission on cultural property without any change of competence but with a grant of autonomy would seem to reflect the identity of the terms, *patrimonium artis et historiae ecclesiae* and *ecclesiae bona culturalia*, in the mind of the Apostolic See—with the latter now being the preferred term.

By reference to these two documents of the Roman Curia it seems reasonably clear that artistic and historical property has come to be understood as meaning cultural property. If our understanding is correct, then, with this retrospective we can say that the phrase *pretiosa artis vel historiae causa* is used in the 1983 Code to describe property valuable by reason of its cultural character. This new canonical usage of the Roman Curia seems to parallel accurately what we have seen in Chapter 1 in international law in the development of the term “cultural property.” At the same time we see that the new usage “cultural property” had not crystallized early enough to be used in the 1983 Code.

Little seems to have been written in commentaries on this matter of *res pretiosa*. In his commentary on canon 1257 Archbishop Myers describes precious church property in the

⁴⁶ PB, arts. 99-104, pp. 885-886. Translation in CAPARROS, p. 1231.

⁴⁷ JOHN PAUL II, *motu proprio Inde a Pontificatus*, 20 March 1993, in *AAS*, 85 (1993), pp. 549-552. The Latin name given at p. 551 for the revised commission is *Pontificia Commissio de Ecclesiae Bonis Culturalibus*.

language of canon 1497 of the 1917 Code and says "precious goods have intrinsic, artistic, or historical value," whereas in his commentary on canon 1292, §2 he speaks only of objects "of special historical or artistic value." Royce Thomas, also in the same American commentary, in his treatment of precious images of canon 1189 seems to assume that this canon refers to images forming part of the historico-artistic heritage. The British commentary seems to view "precious" as property valuable for its historical or artistic significance.⁴⁸

But some other views on the interpretation of *pretiosa* have appeared in the literature. Daniel Tirapu notes the different usage in canons 1189 and 1292. He sees, on the basis of this language, that property's precious character, principally if not exclusively, is due to its artistic and historical character. And so he says *res pretiosa* is almost identified with the cultural patrimony of the Church. Still, he sees that a definition of what is to be included within *res pretiosa* as an open issue to be decided by criteria given by the Holy See, the episcopal conference, the diocese affected and the civil norms.⁴⁹

Other authors appear less undecided. Kennedy, for example, notes the disparity of usage in canons 1189 and 1292. Canon 1189 refers to images "precious by reason of their age, art or cult," whereas canon 1292 refers to "property precious by reason of its artistic or historical significance." Arguably, an image might have cultic importance but no artistic or historical significance. In that case the descriptors used in the two canons would be different and there would be no single definition of "precious" in the 1983 Code. Moreover, he notes that CCEO canon 1019 uses basically the same definition as CIC canon 1497, §2. Thus, he suggests resorting to canon 6, §2, and the canonical tradition by which he means importing the definition of CIC canon 1497, §2, into the 1983 Code.⁵⁰

⁴⁸ JOHN J. MYERS, "Book V The Temporal Goods of the Church", in JAMES A. CORIDEN, THOMAS J. GREEN AND DONALD HEINTSCHEL (eds.), *The Code of Canon Law: A Text and Commentary*, Commissioned by the Canon Law Society of America, New York, Paulist Press, 1985, pp. 863, 881; ROYCE R. THOMAS, "Part II Other Acts of Divine Worship" in *Ibid.*, p. 841; GERARD SHEEHY, RALPH BROWN, DONAL KELLY AND AIDAN MCGRATH (eds.), *The Canon Law: Letter & Spirit: A Practical Guide to the Code of Canon Law Prepared by the Canon Law Society of Great Britain and Ireland in Association with the Canadian Canon Law Society*, Collegeville, Liturgical Press, 1995, (Enid Williamson), p. 352 regarding c. 628 §2, (Brian McLean), p. 675, regarding c. 1189, (Raymond Browne), p. 688 regarding c. 1220, (Francis Morrissey), p. 717 regarding c. 1270, (Francis Morrissey), p. 727 regarding c. 1283 §2, and (Francis Morrissey), p. 734 regarding c. 1292, §2.

⁴⁹ DANIEL TIRAPU, "De los bienes temporales de la iglesia: Título I de la adquisición de los bienes," in MARZOA, IV, p. 96.

⁵⁰ ROBERT T. KENNEDY, "Book V The Temporal Goods of the Church", in BEAL, pp. 1471-1472.

In this regard it is worth looking at the legislative history of CCEO canon 1019. Proposed in 1981, what is today CCEO canon 1018 on *res sacra* is identical to the language first proposed in 1981. What is today CCEO canon 1019, however, lacked the descriptive phrase *quae scilicet magni sunt momenti artis vel historiae vel materiae causa*. This descriptive phrase, which is very aptly located here, was not added until 1984—after the 1983 Code had been promulgated. At that time the reason for the amendment was explained as a desire to reflect PA canon 234, §4, which was the canon of *Postquam apostolicis*, like CIC canon 1497, §2, containing the definition of *res pretiosa*.⁵¹ There was apparently no thought to parallel the language of RCIC canons 628 and 1292, which had been promulgated the previous year. But inasmuch as the oriental consultants expressly declared their intention to retain their traditional Oriental language, their usage would not seem helpful in determining the mind of the Latin consultants who had seemingly opted for new language.⁵²

Martin de Agar reaches a similar result by slightly different reasoning. He defines *res pretiosa* as things of value by reason of their artistic, historical or intrinsic worth or simply for the reason of popular veneration, citing canons 1189, 1190 and 1292, §2. Precious property he notes cannot be valued solely for its material or economic worth. In addition one must also take into account the other reasons why it is rendered precious in the Church, viz. its connection to worship or its

⁵¹ *Nuntia*, 13 (1981), p. 34; *Nuntia*, 18 (1984), p. 53. Interestingly, a parallel development occurred during the elaboration of the Latin Code. In 1979 the predecessor of what is today RCIC canon 1269 consisted of three paragraphs, the third paragraph being *sacrae habentur res quae consecratione vel benedictione ad divinum cultum destinatae sunt*. One consultant proposed to amend it to read *res sacrae, quae scilicet dedicatione vel benedictione ad cultum divinum destinatae sunt...* and this formula pleased everybody. They next took up the predecessor of what is today RCIC canon 1270. Lamentably, no one suggested it too be amended to add as well a description such as *pretiosae quae scilicet magni sunt momenti artis vel historiae causa*. *Communicationes*, 12 (1980), pp. 406-407. As it happened, in the Latin Code the description for *res sacra* in the end was placed in RCIC canon 1171. Had these two descriptions wound up in canons 1269 and 1270 of the Latin Code—as they did in CCEO canons 1018 and 1019—the Latin Code would have avoided the present difficulty.

⁵² While he speaks of “precious” property and is engaged in comparing the Latin and Oriental codes JOBE ABBASS, *Two Codes in Comparison*, Rome, Pontificio Istituto Orientale, 1997, p. 188, makes no reference to the different descriptions of *res pretiosa* in the two codes. In his commentary on alienation VICTOR J POSPISIL, *Eastern Catholic Church Law*, 2d ed., Brooklyn, Saint Maron Publications, 1996, at p. 702 commenting on alienations by the patriarchal eparchy under CCEO canon 1037 merely says “the patriarch needs the consent of the synod of bishops if the value exceeds twice the maximum; of the permanent synod, if it is less the [sic] double amount or if it is a very valuable item or votive gift.”

popular veneration—as in *ex voto* offerings. Thus, he sees *res pretiosa* as including, but more extensive than, the category of cultural property referred to in RCIC canon 1292, §2.⁵³

This argument assumes that a word in various sections of a code will have the same meaning. This is usually true. Codes are carefully crafted legal documents and its various parts are intended to work together and this is one reason why canon 18 can advise in doubtful cases to resort to parallel passages. But “precious” in canon 1189 may well have been intended to have a broader usage than in canons 638 and 1292. In Chapter 2 we explained that *cultu* of canon 1289 of the 1917 Code appeared to have been inserted so that the expression “precious images” of that canon would include sacred images. CCEO canon 887 refers to *sacrae icones vel imagines pretiosae id est vetustate aut arte praestantes*. By adding the words “sacred icons” it did not need to include the descriptor *cultu*, since *res sacrae* by definition are things destined for divine worship. Thus, CCEO canon 887 hardly comes to the aid of the present argument, unless we are to overlook its value as a “second lung.”

Moreover, there is another problem to concluding that the broader description of “precious” in canon 1189 applies throughout the Code. Both canons 638 and 1292 forbid the alienation of votive property without the permission of the Holy See. Canon 1241 describes such property left at shrines and says it is to be cared for. This refers to property left as payment of a vow—usually in connection with a cure or the receipt of some favor prayed for. Vows, we may note, are included in canons 1199-1200, which is, entitled “other forms of worship.”⁵⁴ Thus, if canon 1189’s broader description of “precious” which includes *cultu* were included to apply to the entire code, the inclusion of votive property in canons 638 and 1292 would have been unnecessary. Yet votive property was expressly mentioned in canons 638 and 1292—as it was in *Opera artis* which had talked of *rerum arte vel historia praestantium* appearing in the inventory.⁵⁵ It seems likely that canons 638 and 1292 and *Opera artis* mention both *res pretiosa* and *dona votiva* because the

⁵³ JOSÉ T. MARTÍN DE AGAR, *Beni temporali e missione della chiesa dispense ad uso degli studenti*, Roma, Pontificia Università della Santa Croce, 1997, p. 14. However, if we regard objects valuable *cultu causa*, following RCIC canon 1189, as “valuable”, then it would seem that in RCIC canons 638 and 1292, §2, the phrase *res ex voto Ecclesiae donata* becomes mere surplusage.

⁵⁴ AMLETO GIOVANNI CICOGNANI, *Canon Law*, Philadelphia, The Dolphin Press, 1934, p. 433 notes that headings of sections and titles of the code, whilst not law, are official and may serve to interpret the law; “From red to black there is a valid inference”.

⁵⁵ SACRED CONGREGATION FOR THE CLERGY, circular letter, 11 April 1971, *Opera artis*, in *AAS*, 63 (1971) p. 316 speaks of *inventarium aedificiorum sacrorum, necnon rerum, arte vel historia praestantium, in quo*

former expression in both cases is intended to include only *res pretiosa artis vel historiae causa*. The broader usage in canon 1189 is thus intended to be confined to that canon only and the art-historical description is thus intended to apply to all other canons.

Martín de Agar's argument was more apt in the case of the 1917 Code than in the 1983 Code. CIC canon 1280 was located in the second part, *De locis et temporibus sacris*, while CIC 1497, §2, was located in the sixth part, *De bonis Ecclesiae temporalibus*, of Book Three, *De rebus*, of the 1917 Code and so one might well conclude that precious images were precious things. But the corresponding canons in the 1983 Code, canons 1189 and 1292, are no longer linked together in a book "On Things." Canon 1189 is part of Book IV on "The Sanctifying Office of the Church" and canon 1292 is part of Book V on "The Temporal Good of the Church." Thus, in the 1983 Code the link provided by the title of CIC's Book Three is gone and one may no longer use that heading to bolster one's argument.

In fine, one can say that had CIC canon 1189 and CCEO canon 887 both described precious images as *id est vetustate aut arte praestantes* as does CCEO canon 887, and had CCEO canon 1019 described precious property as that which is valuable *artis vel historiae causa* as in the case of CIC canons 638 and 1292, the meaning of the term "precious" would be much clearer. Indeed, a *motu proprio* from Pope John Paul II excising *cultu* from RCIC canon 1189 and *vel materiae* from CCEO canon 1019 would bring marvelous clarity to both codes. Alternatively, one might seek to amend RCIC canon 1270 and CCEO canon 1019 to begin *res immobiles, res mobiles pretiosae, quae scilicet magni sunt momenti artis vel historiae causa, iura et actiones....* At the same time the words *artis vel historiae causa* in RCIC canons 638 and 1292 would be deleted. In the meantime, it is clear that *res pretiosa* includes cultural property—even if some authors do not regard the terms as exactly coterminous.

3.3.2. The Acquisition of Church Property

Canon 222 states that the faithful have the duty to provide what is needed for divine worship, the apostolate, the works of charity and the support of church ministers. It follows, therefore, as canon 1261 says, that they have a right to donate property for the benefit of the church. Gifts to a public juridical person are not, under canon 1267, to be spurned except for a just cause and, in

ipsa singillatim describantur eorumque valor indicetur and at p. 317 says *res pretiosae, peculiariter dona votiva, minime alienentur absque licentia Sanctae Sedis*.

matters of greater moment, with the permission of the ordinary. By the same token gifts with conditions attached to them are not to be accepted without the permission of the ordinary. Unless the contrary is clear, offerings to the superior or administrator of church property are presumed to belong to the juridical person itself.

Where gifts prove insufficient for needs, canon 1260 would affirm the church's authority to resort to taxation. Historically this has consisted largely of certain fees for services and stole fees and these under canon 1264 are to be regulated by vote at a meeting of the bishops of the ecclesiastical province. But canon 1263 gives the diocesan bishop important new powers of taxation: After consulting his finance council and his presbyteral council, the diocesan bishop may levy a tax on public juridical persons subject to him. Such a tax must be "moderate" and "proportionate to the income" of the subject. Where a grave necessity exists and under the same conditions he may even levy an extraordinary tax on physical persons.

Canon 1302 requires that where a gift to pious causes made either *inter vivos* or *causa mortis*, the administrator is to inform the ordinary of the gift and any conditions attached to it. Canon 1304 further requires that for the valid acceptance of a pious foundation the prior written consent of the ordinary is required. While these canons apply only to gifts made to pious causes, they do suggest the potential for harm to the juridical person should a gift become onerous. While the outright gift of a work of art might not seem to entail such possibilities, those familiar with the fate of unprovenanced art could dispel such illusions. In a celebrated case mosaics stolen about 1974 were recovered in 1989.⁵⁶ Similarly a Chagall painting stolen by Nazis in 1941 and later bought in 1955 at a gallery in Paris was discovered in 1962 by descendants of the true owner and in 1966 recovered from the purchaser with the assistance of the New York courts.⁵⁷

The charitable deduction allowed under the United States Internal Revenue Code coupled with the stepped up basis permitted in such transactions makes the gift of appreciated tangible property quite attractive to wealthy donors. However, the donee in Anglo-American law acquires no better title than the donor had and so courts in those jurisdictions have been wont to return stolen

⁵⁶ *Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus v. Goldberg and Feldman Fine Arts Inc. and Peg Goldberg*, 717 F. Supp. 1374 (S.D. Ind., 1989), aff'd 917 F. 2d 278 (7th Cir., 1990). For the background to this case see NICHOLAS AUGUSTINOS, "The Protection of Cultural Heritage in the Event of Armed Conflict: The Cyprus Experience", in NORMAN PALMER (ed.), *The Recovery of Stolen Art: A Collection of Essays*, London, Kluwer Law International, 1998, pp. 217-260.

⁵⁷ *Menzel v. List*, 267 N.Y.S. 2d 804 (Sup. Ct., 1966).

property to the true owner even after the lapse of several decades.⁵⁸ The Seattle Art Museum, for example, in 1991 received by gift a painting, Matisse's *Odalisque*, which had been purchased by the donor in 1954 from a New York gallery. The painting unfortunately had been stolen in 1940 from the Paris home of its owner, Paul Rosenberg. After the museum had acquired the painting, Rosenberg's heir then reclaimed the painting from the Museum and the Museum tried to recover its loss by suing the gallery where it has been purchased in 1954 as successor to the donor's interest in the warranty of title made at the time of the 1954 purchase and through other claims. The Museum's case nearly failed.⁵⁹ Today many museums to avoid loss with respect to unprovenanced gifts or purchases undertake a "due diligence" enquiry in such cases checking appropriate registers of stolen and lost art before consummating transactions. Where a church is about to receive unprovenanced art, a similar enquiry would be prudent to avoid future loss. The Art Loss Register, established in 1976 by the International Foundation for Art Research and now maintained in London is a major resource in this endeavor.⁶⁰

Another problem faced by museums and others who have unwittingly received stolen chattels is the question of whether the holder can recover the cost of conservation. In Chapter 1 we noted that the 1995 UNIDROIT Convention would permit such recoveries if the law of the returning state made provision for such costs. The question is complex and greatly depends on the facts of the particular case.⁶¹

⁵⁸ RUTH REDMOND-COOPER, "Time Limits in Actions to Recover Stolen Art," in NORMAN PALMER (ed.), *The Recovery of Stolen Art: A Collection of Essays*, London, Kluwer Law International, 1998, pp. 145-162.

⁵⁹ COURTNEY S. PERKINS, "The Seattle Art Museum: A Good Faith Donee Injured in the Restoration of Art Stolen During World War II," in *John Marshall Law Review*, 34 (2001), pp. 615, 617, 625; SHIRLEY FOSTER, "Prudent Provenance—Looking Your Gift Horse in the Mouth," in *UCLA Entertainment Law Review*, 8 (2001), p.153. In the end the Museum settled with the gallery, got reimbursement for its legal fees (\$250,000), and got restitution by replacement—it could select one or more works of art from the gallery's holdings. PATRICIA YOUNGBLOOD REYHAN, "A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-faith Purchasers of Stolen Art," in *Duke Law Review*, 50 (2001), pp. 955-1043 explores the different results that can obtain when the law of more than one jurisdiction is involved in art loss cases.

⁶⁰ JULIAN RADCLIFFE, "The Work of the International Art and Antiques Loss Register", in NORMAN PALMER (ed.), *The Recovery of Stolen Art: A Collection of Essays*, London, Kluwer Law International, 1998, pp. 188-199.

⁶¹ NORMAN PALMER AND ANTHONY HUDSON, "Improving Stolen Art," in PALMER, pp. 127-144.

As for other means of acquiring church property, the church, under canons 197 and 1268, recognizes both acquisitive and extinctive prescription. The requisites for prescription are *res habilis*, *titulus* or *iusta causa*, *possessio*, *fides*, and *tempus*.⁶² As we have seen, objects set aside for divine worship by dedication or blessing are sacred objects. If in private hands, these may be acquired by private persons by prescription but may not be used for secular purposes unless they have lost their dedication or blessing. If however, they belong to a public juridical person such property may, under canon 1269, only be acquired by another public ecclesiastical juridical person. The periods for prescription are those of civil law, except for certain privileged types of property. This privileged property includes immovable property and valuable movable (*res pretiosa*) property and rights and legal claims. If owned by the Apostolic See the period for prescription is one hundred years. If owned by a public ecclesiastical juridical person the period is 30 years (c. 1270).⁶³ The Oriental Code—in canons 1018 and 1019 and canons 1540 to 1542—has the same norms on prescription except that, with respect to immovables and precious movables belonging to a Church *sui iuris* or to an eparchy, the period for prescription is fifty years.⁶⁴

In the 1917 Code prescription was covered by canons 1508-1512 of the title *de bonis ecclesiasticis acquirendis*. During its revision it was pointed out that prescription could be

⁶² ALBERT GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, Ottawa, Saint Paul University, Faculty of Canon Law, 1996, pp. 59-61. For the Lateran decree, see TANNER, I, p. 253.

⁶³ In French law one may acquire title to a thing by possessing it openly and peacefully over a long period. Where one acquires possession of immovable property in bad faith, e.g. by squatting, the period to acquire title is 30 years. Where one acquires possession of immovable property in good faith, the period is 10 years unless the original owner had moved outside the jurisdiction of the *Cour d'appel* in which case the period is 20 years. In the case of corporeal movables, under article 2279 the law is quite otherwise and it is said that possession for three years is a good as title. Possession is distinguished from detention. To rely on article 2279 the possessor must be in good faith. In the case of five Old Master paintings taken to a place of safety during World War II, the court held that the possessor could not have been unaware of the unusual origin of the paintings and so was held to have been in bad faith and so, for lack of good faith, the paintings were returned to their owner, a Stuttgart museum. But where the owner has been tricked out of his property by fraud rather than by theft, there is no similar right to reclaim them by revendication. See Bell, *op. cit.*, pp. 286, 288. Swiss law likewise provides that an owner of a movable loses title when five years have elapsed from the date of the theft and a third party purchases the property in good faith. *Bona fides* is presumed where the purchaser used 'good faith' which is to say proceeded reasonably under the circumstances. This rule has led to a large trade in Switzerland in stolen cultural property said to be worth \$2 billion annually. But recently the Swiss High Court has held that a person knowledgeable in the market is put to proving good faith once this has been questioned. Failure to do so rebuts the presumption of good faith. MICHELE KUNITZ, "Switzerland and the International Trade in art and Antiquities," in *Northwestern Journal of International Law and Business*, 21 (2001), pp. 533, 534, 538.

⁶⁴ PA canon 249, p. 129, set the period of prescription at one hundred years for property of the Apostolic See, fifty years for that of a patriarchate, and thirty years for that of other moral persons.

extinctive as well as acquisitive and so the canons on prescription should appear in Book One on General Norms.⁶⁵

3.3.3. Church Property Administration

The canons on church property provide a comprehensive legal system for the administration of church property. This is an ancient system which goes back to the Roman law rules drawn up for the administration of minors' estates in the Early Christian era. It relies heavily on Roman law rules and institutions and so canon 100, §3, of the 1917 Code likened the position of a juridical person to that of a minor. We saw in Chapter 2 how the ward might accomplish some juridical acts by himself, but for others needed the *auctoritatis interpositio* of his tutor and in some cases needed even the permission of a judge. In the 1983 Code of Canon Law, on the other hand, the law has been leavened by more recent developments in the Roman or civil law countries, but the traditional multiple levels of control on church property administration remain.

The canons are intended to provide a universal framework for the care of church property. It is understood that they may need to be supplemented by regional canon law norms and by secular law in the various localities.

Control of church property is exercised at three levels, supreme, mediate and immediate. The Roman Pontiff is acknowledged as the supreme administrator and steward of all church property by canon 1273. We saw the same term *dispensator* in the medieval law where the authors carefully distinguished it from *dominus* or owner. In general this supreme administration is exercised for the most part through the provision of universal canon law norms laying down the legal framework for patrimonial administration. Here, too, the Holy See performs its supreme administrative function by interpreting and harmonizing the law in its application. In accordance

⁶⁵ *Communicationes*, 9 (1977), p. 236. Article 3 of the 1995 UNIDROIT Convention provides in the case of stolen cultural objects a limitation period for the bringing of proceedings for recovery of three years from the time the claimant knew of the location of the cultural object and the identity of its possessor or in any case within fifty years from the date of the theft. However, property belonging to "public collections", defined to include property of religious institutions, is not subject to this fifty-year rule. A state may, nevertheless, at the time of ratification provide for an absolute limitation of seventy-five years from the date of the theft. LYNDEL V. PROTT, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995*, Leicester, Institute of Art and Law, 1997, p. 38. Should this seventy-five year rule become widely adopted by states, it may prove advisable to amend RCIC canon 1270 and CCEO canon 1019 to conform to the new international standard for the time for the prescription of cultural objects.

with the principle of subsidiarity, some of this legislative function has been delegated to episcopal conferences. Thus, for example, in canon 1292 the episcopal conference is authorized to set the monetary limits for alienations. Supreme administrative oversight is also seen in quinquennial reports to be filed by bishops in the course of their *ad limina* visits and, in a more active way, in supplying the permission needed under canons 638 and 1292 for canonical alienations over the monetary limits set for the region.⁶⁶

Mediate control over church property is exercised by ordinaries who, under canons 134 and 620, may be diocesan bishops or major superiors of clerical religious institutes or of societies of apostolic life of pontifical rite or their vicars. Besides the powers they may exercise immediately over the church property of the diocese or institute, ordinaries have many supervisory duties with respect to patrimonial law. Under canon 1276 an ordinary has the duty of supervising the administration of property of public juridical persons subject to him. This includes the right to prescribe instructions for property administration pursuant to canon 34 and, pursuant to canon 314, the right to approve the statutes of a public juridical person. Traditionally this power is described as a right of vigilance. Those who administer church property hold an ecclesiastical office and must execute it according to law and under the vigilance of their superiors. Vigilance includes the right of visitation and the right to demand reports, to inspect the records, and demand the correction of abuses.⁶⁷

Immediate control over church property is in the hands of the administrator of the juridical person which owns it. Under canon 393 the bishop of the diocese and under canon 532 the pastor of the parish acts in the person of the juridical person, whether diocese or parish, in all juridical matters. That means that he is the one to whom canon law ordinarily entrusts the powers of decisions with respect to diocesan or parish property. There are, however, some restraints on the administrator's discretion—as we shall see—but it is to him that canon law usually looks for decisions regarding the property of the diocese or parish.

⁶⁶ ZOILA COMBALÍA, "Titulus II: de administratione bonorum," in MARZOA, IV, p. 107.

⁶⁷ VELASIO DE PAOLIS, "De bonis ecclesiae temporalibus in novo codice iuris canonici," in *Periodica*, 73 (1984), p. 127.

Where in the light of the financial situation of the diocese something is of greater moment,⁶⁸ the diocesan bishop is obliged to consult the finance board and the college of consultors. For acts of extraordinary administration (to be defined by the episcopal conference), under canon 1277, he needs the consent of the finance board and college of consultors.

Immediate control of church property is the right of the administrator of the public juridical person. Nevertheless, the administrator acts invalidly, under canon 1281, if he goes beyond the limits of ordinary administration, unless he has in writing a faculty from the ordinary to do so. Acts of ordinary administration are described in canon 1281 §1 by their ends and by their means. The end or object of the act would include the maintenance, productivity and improvement of the property. The means would include the way or manner in which the end is achieved. In general acts which would be considered part of his usual duties would be considered "ordinary". Historically the collection and deposit of funds, the receipt of rents, interest and dividends, the buying and selling of what is required for daily life, and the making of ordinary repairs to real property are considered acts of ordinary administration.⁶⁹

In order to place acts of administration, which in the light of the economic situation of the diocese are of major importance, the diocesan bishop needs first to take the advice of his finance council and of the college of consultors. "Major importance" is described relatively and so would depend on the economic condition of the diocese involved. The Canadian Conference of Catholic Bishops, however, determined that transactions involving C\$50,000 to C\$100,000 should throughout Canada be considered acts of major importance. Under canon 127 the consultation is required for validity, but the bishop is not required to follow the advice proffered.⁷⁰

⁶⁸ Interestingly, at the final October, 1981, revision of the Code one member proposed amending canon 1228 of the 1980 Schema, which corresponds to RCIC canon 1277, to explain that the phrase *maioris momenti* includes *ex. gr. <ratione artis, valoris historici, vel oeconomici aut ob specialem populi devotionem, si de obiecto cultus agatur>*. The amendment would have made it clear that acts of administration regarding the art-historical patrimony and votive property are to be regarded as important as acts which concern large economic values. The code revision commission, however, decided against the proposed amendment, explaining *non possunt lege generali determinari quinam sint actus maioris momenti. Sufficit quod dicitur in canone: <attento statu oeconomico dioecesis>*. *Communicationes*, 16 (1984), p. 33.

⁶⁹ FRANCIS G. MORRISSEY, "Ordinary and Extraordinary Administration: Canon 1277," in *The Jurist*, 48 (1988), pp. 711, 716.

⁷⁰ *Ibid.*, p. 717.

Canon 1277 requires the consent of the finance council and the college of consultors before the diocesan bishop can validly perform certain transactions. These include those cases where universal canon law requires their consent (e.g. cc. 1292, 1295), where a foundation document requires it, and where the transaction is an act of extraordinary administration. At the same time canon 1281 permits the statutes of the juridical person to declare what acts go beyond ordinary administration and, where they are silent, the diocesan bishop, after consulting his finance council, may determine which acts go beyond the limits of ordinary administration.

The acts of "extraordinary administration" are under canon 1277 to be defined by the episcopal conference. Many have done so. In Australia, for example, any contract by which a diocese would be committed to an annual repayment of over A\$100,000 or forego an annual sum of A\$40,000 is determined to be an act of extraordinary administration for a bishop. In Canada there are a number of acts which have been determined to be acts of extraordinary administration, including, acts which under the Code require the approval of advisors, the acceptance or rejection of a gift or devise because of long-term obligations, non-cumulative acts over five percent of the maximum amount approved by the Episcopal Conference and recognized by the Apostolic See for the alienation of Church property, the erection of a cemetery, a court action, the purchase of real estate. In the Philippines an act of administration is extraordinary if it involves the sum of US\$20,000.⁷¹ In the United States the episcopal conference has not yet completed its work on precisely defining the acts which constitute extraordinary administration.⁷²

At the same time, the concept of extraordinary administration is a traditional canonical concept and one much discussed by commentators. Moreover, in 1856 the Congregation for the Evangelization of Peoples approved for the Dutch bishops a list of acts of extraordinary

⁷¹ "Complementary Norms to the Code Promulgated by English-language Conferences of Bishops" in CAPARROS, pp. 1312, 1331, 1407; CANADIAN CONFERENCE OF CATHOLIC BISHOPS, *Complementary Norms to the 1983 Code of Canon Law*, Ottawa, Canadian Conference of Catholic Bishops, 1996, p. 105. The USA complementary norms can be found at the web site of the United States Conference of Catholic Bishops at <http://www.usccb.org/norms>.

⁷² In 1986 the United States Conference of Catholic Bishops passed norms to implement this canon which did not receive the *recognitio* of the Holy See. These norms included as acts of extraordinary administration the following: 1) to alienate (in the strict sense of c. 1292) property of the stable patrimony which exceeds the minimum limit of \$500,000, 2) to alienate *res pretiosa* or property donated to the church through a vow, 3) to incur indebtedness over \$500,000, 4) to encumber stable property the value of which exceeds \$5,000,000, 5) to lease church property when the annual lease income exceeds \$500,000, 6) to lease church property when the value of the leased property exceeds \$500,000 and the lease extends beyond nine years. DAVID J. WALKOWIAK, "Ordinary and Extraordinary Administration," in KEVIN MCKENNA ET AL., *Church Finance Handbook*, Washington, Canon Law Society of America, 1999, p. 189.

administration, which have often been quoted and resorted to as a parallel text. This list includes: 1) acceptance or rejection of a devise or gift, 2) purchase of real estate, 3) the sale, exchange, mortgage, pawn or gift of an easement on real property or *res pretiosa* or lease of either for a term of over three years, 3) the borrowing of large sums of money or the making of onerous contracts, 4) the building, pulling down or rebuilding in a new form of any church building or the making of extraordinary repairs upon it, 5) establishing a cemetery, 6) starting or suppressing parochial institutions which are parish property, 9) imposing a per capita tax or launching a fund drive or giving to others property belonging to the parish church, entering a lawsuit as plaintiff or defendant.⁷³ Similarly, decree 279 of the third plenary council of Baltimore forbade rectors of churches to build churches, schools or rectories or alter or enlarge or raze or subject them to a security interest without the prior written consent of the ordinary.⁷⁴ In sum, extraordinary administration includes such acts as do not occur periodically and are of their nature of greater importance or acts which would put a long-term burden on the property of the juridical person.

The concept is "those acts which go beyond ordinary administration." That notion, as we have seen, is really allied to the notion of the *ius abutendi*, the right to consume the property, which right exceeds the rights of the usufructuary in Roman and civil law or of the life tenant at common law.

The problem is that both of these notions assume a rather static economy where the law may neatly divide property into corpus and income, principal and interest. Land in such a regime is presumed to be corpus. This is the notion undergirding church property law in the canonical tradition, as we have seen in Chapter 2, and the rules on alienation of the 1917 Code had been drafted with a similar world in view. The *rentier* living off the (fixed) income of his capital was a familiar figure in social and literary life. Well into the nineteenth century the most important source of income in Western Europe as well as the object of investment was land. Land gave one

⁷³ GASPARRI, VII, art. 20, pp. 347-348; translation in T. LINCOLN BOUSCAREN AND ADAM C. ELLIS, *Canon Law A Text and Commentary*, Milwaukee, The Bruce Publishing Co., 1957, p. 809.

⁷⁴ PLENARY COUNCIL OF BALTIMORE, *Decreta concilii plenarii baltimorensis tertii a.d. MDCCCLXXXIV praeside Illmo. Ac Revmo Jacobo Gibbons, archiepiscopo Balt. et delegato apostolico*, Baltimore, Typis Joannis Murphy et Sociorum, 1886, pp. 160-161; BARRETT, pp. 190, 195. CIC canon 6 (and RCIC canon 6) provide that after the coming into effect of the Code contrary universal and particular law is abrogated unless the particular laws expressly provide otherwise. Thus decrees of Baltimore which are *contra legem* are abrogated. Those *secundum legem* are not. Decree 279 appears to be one of the latter and so retains its force.

status and provided farms which could be rented out to provide stable and secure annual income as well as a store of value against which one could borrow in time of need. In Britain investment in private and public companies began to rise after 1860 and after 1870 investors even looked to foreign securities. But for the most part they were interested in debt securities with a safe four or five percent return. Such a figure was most secure at the time the 1917 Code was initially drafted and was based on the gold standard where the experience of the late nineteenth century has been secular or persistent deflation rather than inflation.⁷⁵ Moreover, as we saw in Chapter 2, the Latin Monetary Union had for a half century provided a stable currency for most of the Catholic world at that time and to this beneficent status quo ante one has only been recently able to return at this very time with the advent of the Euro.

Hence, if one looks to the economic history of the twentieth century, the 1917 Code's norms on church property in this respect were quickly rendered stillborn by the progress of events. The enormous inflations after World War I required constant tinkering with the limits on alienations and new concepts of investment like growth stocks burdened beyond bearing the older concepts of investment which rigidly distinguished principal or corpus from income. The law had no easy answer to the legitimate question of how to apportion capital gains between life tenant and remainderman. Nor had canon law seen investments in real estate as anything but long-term and so could not contemplate trading in such forms of property. The answer of the 1983 Code was to kill two birds with one stone and give free reign to subsidiarity and collegiality by leaving this legislation to complementary norms to be made by episcopal conferences. This essay in devolution does not seem to have been a great success in the English-speaking world: The United States, Britain and Ireland have made no complementary norms to implement this canon. Canada, perhaps wisely, has done so largely by continuing in place the 1856 Dutch norms offered by Propaganda. The upshot would seem to be that, pending action by episcopal conferences, acts for which a bishop would need the consent of his advisors are to be regarded as acts of extraordinary administration.⁷⁶ By the same token under canon 1281 what the diocesan bishop by norms of general application determines to be acts of extraordinary administration are to be regarded as such.⁷⁷

⁷⁵ CHARLES P. KINDLEBERGER, *A Financial History of Western Europe*, 2d ed., New York, Oxford University Press, 1993, pp. 174, 183.

⁷⁶ DE PAOLIS, *De bonis.*, p. 141.

⁷⁷ The bishop of Austin, Texas, for example, has a "Diocesan Policy on Extraordinary Expenditures". Under it administrators "may expend up to \$10,000 on any single expenditure without consultation or

The administrator of church property is required to act in accordance with the law and especially canons 1281-1288, and canon 1284 requires him to act with respect to church property like a *bonus paterfamilias* or *bon père de famille*,⁷⁸ as the term appears in the French civil law. This is a

consent of the Diocesan Finance Officer. For contracts and/or expenditures in excess of \$10,000 but under \$50,000, the Pastor or Administrator should advise the Diocesan Finance Officer before proceeding to finalize the transaction. If the contract pertains to the maintenance of parish-owned equipment (copier, air conditioning equipment, etc.), the Pastor may sign the contract if it does not exceed \$50,000. All contracts and expenditures in excess of \$50,000 require the written consent of the Diocesan Bishop or his delegate. This includes agreements with an architect and custom work such as artwork and interior items. Moreover, where title to real estate is involved, the Diocesan Bishop must act since he holds [civil] title to all real property of the parishes. The proper legal title to be used is: Gregory Ayrmond, Bishop of Austin and His Successors in Office." In "Diocese of Austin-Policies," <<http://www.austindiocese.org/policies/policies-n-z.htm>> (7/22/02). Inasmuch as canon 494, §3, only makes the diocesan finance officer responsible for the church property of the diocese, it appears that in the Diocese of Austin that he acts with respect to parishes as the bishop's delegate. Pursuant to synodal legislation of 27 March 1992, the document entitled "Policy Statement on Parish Pastoral Councils and Parish Finance Councils" requires a separate pastoral council and a finance council in each parish.

⁷⁸ The notion of patrimony and the role of the *paterfamilias* in it becomes clearer if one looks briefly at it in the context of family law within the civil law system and here it goes back to Roman law and the place of the *paterfamilias* in that law. Family here is not used in the narrow sense of a nuclear family but in a wider sense of persons descended from a common ancestor. The Roman family as we saw in Chapter 2, consisted of the *paterfamilias* and all those within his power or *potestas*. The former in Roman private law was the free Roman citizen, who could not only be relied upon to look after his own interest, but whose duty it also was to protect the (economically, socially, intellectually or emotionally) weaker members of the community—notably women, children and slaves—in so far as they belonged to his household. REINHARD ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, Clarendon Press, 1996, p. 256.

Those in his power included his children born of a lawful Roman marriage, both male and female, the grandchildren born of lawful marriages of his sons, and even the great-grandchildren born of lawful marriages of his grandsons. While daughters were in *potestas*, their children and children of granddaughters were in *potestas* of their agnatic ancestor. Generally the wife of the *paterfamilias* was not in his *potestas* and not a member of his family. The *potestas* of the *paterfamilias* continued until death and, during his life, those in his power were said to be *alieni iuris* or in the power of another and they only became *sui iuris* when he died or they were emancipated. This *potestas* meant as well that only the *paterfamilias* could be the subject of private law rights. The power of the *paterfamilias* over those in his power was considerable and he early on, at least, enjoyed the power of life and death, *ius vitae necisque*, over those in his power. His consent, for example, was necessary for their marriage.

But while powerful, the *paterfamilias* was not an autocrat. If insane or a spendthrift, he could be removed and he was expected to keep strict accounts. While his property was in theory his, he could not freely dispose of it and there was a forced share of his patrimony due to his children. A son in power could only by will be disinherited for cause and he had to be mentioned individually and by name. He had to get at least a quarter of what he would otherwise have expected or he could complain that the will was indutious—the procedure being called the *querela inofficiosi testamenti*. Legacies which attempted to deprive the heir of this forced share could be set aside. There is also an obligation in many modern civil law countries, traceable back to Roman law, to help needy members of one's family and this is part of the notion of patrimony. In Italian law the needy person's right extends against, in descending order, his spouse, children and remoter issue, parents and remoter ancestors, sons-in-law and daughters-in-law, father-in-law and mother-in-law, and brothers and sisters. THOMAS GLYN WATKIN, *An Historical*

term of art of the civil law and the same as the reasonable man standard of Anglo-American law.⁷⁹ So the law is clear that the administrator administers church property in accordance with a legally recognized standard and not as his own.

The canonical administrator is to keep the property secure and in good repair, well insured, the mortgage paid and the title clear. He must keep accurate financial records and file an annual report with the bishop. If required by diocesan law, he is to make a report in the required form to the parishioners (c. 1287). He is not to engage in litigation on behalf of the parish without first getting the permission of the bishop (c.1288). CCEO canon 1027, following PA canon 268, §1,

Introduction to Modern Civil Law, Aldershot, Ashgate, 1999, pp. 165-168, 202-205, 217; THOMAS GLYN WATKIN, *The Italian Legal Tradition*, Aldershot, Ashgate, 1997, p. 167.

ANDRÉ TUNC, "A Codified Law of Tort—the French Experience," in *Louisiana Law Review* 39 (1979), p. 1054 says in French contract law and tort or delictual law "fault is the departure from the behavior which is expected of a *bonus paterfamilias*, the good father of a family...[and so] a caustic writer has remarked that it imposes upon a music-hall girl or even a striptease girl the duty to perform her act 'as a good father of a family would do'".

As the Eastern Code was being elaborated it was suggested that the standard of care which appears today in CCEO canon 1028, §1, be amended and, instead of "*diligentia boni patrisfamilias*", the text read *magna diligentia et fidelitate*, for the reason that *illa imago ex mundo paternalistico desumpta non amplius nostro tempori correspondet. Praeterea pro mulieribus, quae administratores esse possunt, illa imago paternalistica vigere non valet*. However, the consultants resolved not to accept the proposed amendment because *l'espressione è tradizionale e chiara come modello da imitarsi da ogni uomo o donna che sono amministratori dei beni ecclesiastici*. *Nuntia*, 18 (1984), p. 58.

Nor are all owners of patrimony alike. The law, for example, as we have seen, recognizes as subjects of rights both physical or natural persons but also moral persons, the latter being fictive legal persons. Nor is legal capacity the same in all subjects of rights. Incapacity is twofold. First there is *incapacité de jouissance* or incapacity to enjoy certain rights. An example of this is that a girl under 15 in French law cannot marry. There is also *incapacité d'exercice* where the person has the right, but the incapacity—general or specific—may be determined by what he wishes to do. A minor, for example, assisted by a tutor, may indirectly exercise a right which alone he could not exercise. The law with regard to capacity also distinguishes by the type of act. There are acts of preservation, *actes conservatoires*, acts of administration or *actes d'administration*, and acts of disposition or *actes de disposition*. In the first case the person deemed lacking capacity or incapable may nevertheless act. In the second type of case he may be able to act with the assistance of a representative or tutor, there being a number of available choices and potential liability. In the third type of case he may be prevented from acting without the intervention of a judge or some counselor. These incapacities result not only from non-age but also from certain relationships which might produce undue influence. The notion of capacity helps one understand why canon 1281, §1, says that the administrator of a public juridical person acts invalidly when he goes beyond the limits of ordinary administration, unless he has in writing a faculty from the ordinary to do the proposed act.

⁷⁹ BRIERLY and MACDONALD, *Quebec Civil Law*, p. 446, "The description of that abstract standard of reasonableness took, early on, the shape of a reference to a hypothetical individual, the "prudent administrator" (*bon pere de famille*). It serves to announce the general standard of behaviour expected of various persons, including usufructuaries, managers of the business of others, persons holding the property of others, mandataries, and borrowers.

in addition requires that the administrator be bonded. Decree 275 of the third plenary council of Baltimore requires rectors of churches to maintain, besides the parish registers (cf. c. 535), a cash book in which all receipts and expenditures, credits and debits, are to be recorded. Decree 272 of the same further requires rectors of churches to send an annual report of assets, income, expenses and debts due by the mission to the chancery to be preserved in the diocesan archives. Decree 283 requires rectors of churches to maintain suitable casualty insurance on church buildings.⁸⁰

Under canon 537, each parish is to have a finance council of at least two members (c. 1280) which is to help the pastor in the administration of the property of the parish. Under canon 536, a parish may have a parish pastoral council. The parish council in canon law is but an advisory board. The pastor may consult its members, but the law does not require that. As we have seen, he must have a finance council and its members could be the same as those of the parish council. The finance council (however constituted) is the body he must consult, as set forth in diocesan or particular law, on certain financial matters, but, under canon 127, he is not required to follow their advice, even if unanimously given, where, in his opinion, an overriding reason to act otherwise exists.

3.3.4. Precious Images

In matters of “ordinary” administration, the administrator has, within the law, wide discretion and is pretty much free to do as he pleases. However, with respect to acts that have a long-term effect on the condition of church property he is less free. In this context we may look at canon 1189, which requires the written permission of the ordinary to restore precious images needing repair.⁸¹ These are images valuable by reason of their age or artistic or cultic character, which are exposed in churches or oratories for the veneration of the faithful.

⁸⁰ *Decreta*, pp. 156-158, 162; BARRETT, pp. 189, 191, 195, 196. In accordance with CIC canon 6 and RCIC canon 6, decrees 272, 275 and 283 would seem to retain their force. With regard to insurance on artistic works see JOHN ADAMS, “Insurance of Works of Art: Principles, Practice and Problems”, in NORMAN PALMER (ed.), *The Recovery of Stolen Art: A Collection of Essays*, London, Kluwer Law International, 1998, pp. 163-170.

⁸¹ JOHN M. HUELS, “Permissions, Authorizations and Faculties in Canon Law,” in *Studia canonica*, 36 (2002), pp. 33-34, notes that permission is a singular administrative act and is governed by the rules for rescripts.

Priests ought to have at least a modicum of education relative to cultural property. In 1992 the Pontifical Commission for the Cultural Heritage of the Church published a circular letter on the cultural property of the church in the formation of future priests.⁸² The letter, summarized here, noted that the object of education in general and priestly formation in particular is the integral development of the person and it did not so much call for new courses to be added to the *ratio studiorum* as for existing courses to be modified to cover this body of material. The object is not to produce specialists in the area of cultural property but rather generalists who could appreciate the value of cultural property, make use of it in their pastoral ministry, and, with respect to it, work with some level of comfort in dealing with experts in cultural property administration.

More specifically, during minor seminary or the propedeutic period before theology studies, some attention should be given to the history of civilisation, to art history, and to philosophy. During the study of philosophy some attention should be paid to aesthetics. In systematic theology attention should be paid to all three transcendentals, which is to say to the beautiful as well as to the true and the good. In courses on spiritual theology some attention might be paid to iconology and on the influence in general of aesthetics in elevating the Christian experience. In canon law courses attention should be paid to cultural property law which, in the Latin Code, would include, among others, canons 638, 1189, 1220, 1270, 1283, and 1292. Where possible special intensive courses on cultural property might be offered as electives and some episcopal conferences, like that of Italy, have done so. Also, where graduate study for seminary instructors is possible, there are a number of resources available, especially in Rome. But in general local resources might first be tapped and these include local universities, both Catholic and secular, as well as museums, libraries and archives. Moreover, the diocesan commission on sacred art should be made use of and one should not overlook the expertise available through visits to diocesan museums, libraries and archives.⁸³

⁸² PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter, 15 October 1992, "La formazione dei futuri presbiteri all'attenzione verso i beni culturali della chiesa," <http://www.vatican.va/roman_curia/po/rc_com_pcchc_19921015_futuri-presbiteri_it.htm>; also in EBC, pp. 167-184.

⁸³ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter, 15 October 1992, "La formazione dei futuri presbiteri all'attenzione verso i beni culturali della chiesa," <http://www.vatican.va/roman_curia/po/rc_com_pcchc_19921015_futuri-presbiteri_it.htm> arts. 11, 12, 20, 21-24, 26-28 and the canons cited in footnote 14.

In giving written permission for restoration, the ordinary in question will be the ordinary to which the juridical person owning the precious image is subject. Besides heads of particular churches, under canon 134 the term "ordinary" includes vicars general and episcopal and major superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right. In a 1994 circular letter to superiors general of religious institutes, the Pontifical Commission for the Cultural Heritage of the Church took note of the enormous cultural patrimony in the hands of religious families, but counselled cooperation between bishops and religious institutes to ensure its preservation and enhancement as well as its fruitful use in the new evangelization.⁸⁴

Before giving this consent for the restoration of precious images, canon 1189 requires that the ordinary consult experts. Such repair or restoration could easily impair or destroy the long-term value of the image. In this sense the restoration, if faulty, could be tantamount to a transaction described in canon 1295. Key here (and in c. 1216, which requires the advice of experts before churches may be built or restored) is the need for expert advice. We have seen in Chapter 1 how many times the need for expert conservationists and expert craftsmen has been underscored. The church has in the international arena in principle agreed to this development and we can hardly be surprised if in her canon law the church demands the presence of experts before irrevocable decisions regarding valuable images are made.

It is an elementary counsel of prudence to take advice before deciding upon an important act. Saint Thomas taught that law is a product of practical reason of those who have care of the community and so good law making (and administration) is the choice of the right means to an end. Enter Prudence. She is *recta ratio agibilium* and so enables one to select and put into operation the most suitable means to an end. Every prudent act has three parts or stages, first the taking of counsel, the painstaking enquiry about available options, possible consequences, and the variety of contingencies, secondly the judging or making a decision about which course to take, and thirdly the commanding or putting the results of the consultation and decision into operation.⁸⁵

⁸⁴ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter, 10 April 1994, "I beni culturali degli istituti religiosi," in EBC, p. 229.

⁸⁵ JAMES CORIDEN, "Rules for Interpreters," in *The Jurist*, 42 (1982), pp. 279-280.

The Code in many places requires that the views of experts be had before certain acts may be taken. Because of their baptism, all of Christ's faithful can contribute to the building up of the Body of Christ (c. 208) and all are to strive to extend the Gospel message (c. 211). They also have the right to a Christian education and to a just freedom in the field of sacred studies in which they are expert (cc. 217, 218). No special qualifications—not even baptism—are set forth in the canon but the requirement of expertise must be genuine if a fraud is not to be worked upon the law. We saw in Chapter 1 the sort of variety of experts available in the field of cultural property and clearly the ordinary must make a reasonable choice. Some canonists have noted that Vatican II's constitution on the liturgy requires that there be a diocesan commission on sacred art. They have concluded that this body ought to be consulted. The fact that the church requires the opinion of experts before undertaking the restoration of sacred art stands as mute testimony to the importance she invests in her cultural heritage.⁸⁶ In some countries this ecclesial concern will be reinforced by state norms for permission from state authorities before any restoration may be undertaken.

Indeed, during the October, 1981, revision of the draft code it was proposed that canon 1140 of the 1980 *Schema*, the canon corresponding to RCIC canon 1189, be amended to read that *restauratio fiat ad normam legis civilis et exigatur consultatio Commissionis Artis Sacrae*, the restoration was to be done in accordance with civil law and after consultation with the commission on sacred art, which the Second Vatican Council had urged each diocesan bishop to establish. The code revision commission, however, took the view that mention of the commission on sacred art would require mention of the other recommended commissions on sacred music and the liturgy. As for the reference to civil law, they took the view that it was not opportune, and was even dangerous, to canonize civil law here. Nor was the observance of civil law even to be commended even if it had to be obeyed.⁸⁷

Canon law distinguishes acts of administration from administrative acts. The former are acts of an administrator which, through delegation of the legislator, create general norms. Examples of

⁸⁶ MARIE BREITENBECK, "The Requirement for Experts in Church Law," in *The Jurist*, 50 (1990), p. 265.

⁸⁷ *Communicationes*, 15 (1983), p. 247: *Si mentio introducitur Commissionis Artis Sacrae etiam de aliis nempe Musicae et Liturgiae fieri debet mentio. Neque opportunum videtur leges civiles hac de re canonizare, immo esset periculosum. Neque commendanda est legum civilium observatio, etsi eis obsequium debeat.*

acts of administration include the general executory decrees of canons 31-33, statutes of canon 94, and ordinances of canon 95. For an act to be administrative it must be the unilateral act of an administrator which has a legal effect on specific persons outside the judicial sphere. According to canon 59, §2, unless otherwise specified, the provisions regarding rescripts apply with respect to the granting of permissions and so to the permission required by canon 1189. Rescripts are administrative acts and an administrative act is regarded as having four elements: its author, its content, its form (which must comply with procedures and formalities), and its object or *causa*. The last means that, in the use of discretion, the act must take into account the end of the Church and be the best possible solution for the specific situation following a proper assessment of the facts.⁸⁸ Of course, if the choice of expert is grossly deficient or if the rejection of expert advice amounts to an abuse of discretion the act may the more easily be impugned.

It is worth comparing the structure of RCIC canons 1189 and 1190 with the comparable canons (CIC canons 1280, 1281; CCEO canons 887, 888) in the 1917 and Eastern codes. RCIC canon 1189 and CIC canon 1280 are nearly identical in forbidding the restoration of valuable images without the written permission of the ordinary. RCIC canon 1190 then prohibits the sale of sacred relics and the alienation or permanent transfer of notable relics and other items greatly venerated by the faithful with the permission of the Apostolic See. RCIC canon 1190, §3, further states that this provision applies to images “greatly venerated in any church by the people.” Since the adjective *pretiosa* is not used here, to be included in prohibition of this canon such images or other items must also be *in aliqua ecclesia magna populi honorantur*. Thus, RCIC appears to apply only to items valuable *cultu causa* which is to say to votive property. By contrast, CIC canon 1281, whilst using almost the same language as RCIC canon 1190, §2, also included within the prohibition *imagines pretiosae* in the prohibition on alienations and perpetual transfers. Seemingly the purpose of the deletion of *imagines pretiosae* from RCIC canon 1190 and the introduction of RCIC canon 1190, §1, “sacred relics are not to be sold”, was to create two canons—one RCIC canon 1189 dealing with valuable images and another RCIC canon 1190 dealing with votive items.

⁸⁸ PAUL HAYWARD, *Administrative Justice According to the Apostolic Constitution “Pastor Bonus”*, Roma, Athenaeum Romanum Sanctae Crucis, 1993, pp. 152-154. The doctrine of *causa* is a venerable civil law notion founded in Roman law which had its origin, however, in the Middle Ages. Article 1131 of the French civil code still provides that promissory contracts are valid only if they have a *cause*. It is somewhat the civil law analogue to the common law doctrine of consideration. REINHARD ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, Clarendon Press, 1996, pp. 549-555.

It would seem, however, that the Eastern code has been more successful. CCEO canon 887, §1, forbids the transfer or alienation of sacred icons or valuable images by reason of their age or artistic character which are exposed in churches for the veneration of the faithful without the consent of the hierarchy, given in accordance with the canons on alienation. CCEO canon 887, §2, then forbids the restoration of sacred icons or valuable images without the written consent of the hierarchy given after consultation with experts. CCEO canon 888, §1, like RCIC canon 1190, §1, then forbids the sale of sacred relics and CCEO canon 888, §2, then forbids the alienation or perpetual transfer of important relics, icons or images greatly honored in some church with popular veneration without the consent of the Apostolic See or of the Patriarch with the consent of his permanent synod. CCEO canon 888, §3, then tells us that in the restoration of such icons or images CCEO 887, §2 is to be followed. Clearly the Eastern code has been successful in separating *res pretiosa* from *res votiva* in these two canons.

3.3.5. The Conservation and Security of *Res pretiosa*

Ordinary care, under canon 1220, §2, is to be taken for the conservation and security of sacred and precious property. This canon has not attracted much comment, but one might look by way of parallel passage to the distinction in medical ethics between ordinary and extraordinary means of bodily health conservation.⁸⁹ This comes close to the recipe for restoration advocated by Ruskin and the Society for the Preservation of Ancient Buildings and in *The Secretary of the Interior's Standard for Treatment of Historic Properties*.⁹⁰ These standards distinguish preservation from rehabilitation, restoration and reconstruction. Preservation seems analogous to ordinary care and is defined as:

The act or process of applying measures necessary to sustain the existing form, integrity and materials of an historic property. Work...generally focuses upon the ongoing maintenance and repair of historic materials and features rather than extensive replacement and new construction. New exterior additions are not

⁸⁹ PIUS XII, address to an International Congress of Anesthesiologists, 24 November 1957, in *AAS*, 49 (1957), pp.1027-1033; "The Prolongation of Life," in *The Pope Speaks*, 4 (1957-58), p. 396, "But normally one is held to use only ordinary means—according to circumstances of persons, places, times, and culture—that is to say, means that do not involve any grave burden for oneself or another. A more strict obligation would be too burdensome for most men..."

⁹⁰ 36 *Code of Federal Regulations* [=CFR] (2002) §68.

within the scope of this treatment; however, the limited and sensitive upgrading of mechanical, electric and plumbing systems and other code-required work to make properties functional is appropriate within a preservation project.⁹¹

Standards for preservation include the following:

The historic character of a property will be retained and preserved. The replacement of intact or repairable historic materials or alteration of features, spaces and spatial relationship that characterize a property will be avoided.

Changes to a property that have acquired historic significance in their own right will be retained and preserved.

Distinctive materials, features, finishes and construction techniques or examples of craftsmanship that characterize a property will be preserved.

Where the severity of deterioration requires repair or limited replacement of a distinctive feature, the new material will match the old in composition, design, color and texture.

Chemical or physical treatments, if appropriate, will be undertaken using the gentlest means possible. Treatments that cause damage to historic material will not be used.⁹²

In brief, these guidelines are summarized epigrammatically: "Better to preserve than repair, better to repair than restore, and better to restore than reconstruct."⁹³ We have seen similar guidelines in the recommendations of ICOMOS in Chapter 1 and thus we seem to have the uniform view of experts.

⁹¹ 36 CFR §68.2(a)

⁹² 36 CFR §68.3(a)(2), (3), (4), (5), and (6).

⁹³ STEPHEN TSCHUDI-MADSEN, "Architectural Conservation: The Triumph of an Idea," in YUDHISHTHIR RAJ ISAR (ed.), *Why Preserve the Past: The Challenge to Our Cultural Heritage*, Washington, Smithsonian Institution Press, 1984, p. 145.

By contrast, the *unité de style* approach championed by Viollet-le-Duc in the nineteenth century, often leads to the needless destruction of vast quantities of historic fabric and ancient craftsmanship, not least in the removal of perfectly sound external renders and internal plasters. In Ireland, for example, up to the second half of the nineteenth century almost all stone buildings were rendered externally (or given a protective coating) at the time of their construction. The trend to rip off external renders and internal plasters—often done to expose more “authentic” stonework—had the effect of exposing poor quality rubble stonework which is not only aesthetically displeasing but also historically incorrect and often as well detrimental to both the environmental performance and weathering properties of the building. While religious communities have rightly revived today the importance of the notion of *communio*, it would be wrong to dismiss church buildings as mere envelopes of environmental control and undervalue the depth of the expression of faith by our forebears and so to fail to see in the fabric of an old church not only the opportunity for communion among the present congregation but also communion with past congregations there who sat in the same pews and worshipped God there in former times.⁹⁴

Stained glass is frequently found in church buildings, although during the Renaissance and Baroque periods it was not used and the desire for well-lit churches even lead to the removal of much stained glass—as at Notre Dame de Paris as we saw in Chapter 1—from medieval churches. The nineteenth century revived a love of it and its proper conservation requires—à la Alois Riegl—that we see it not only as simply art in glass but also as a historic monument. The conservation of stained glass is an integrated process involving the care and repair of associated ferramenta and masonry and, even if one is not dealing with medieval glass, the generally accepted guidelines on the conservation stained glass are established by the *Corpus Vitrearum Medii Aevi*.⁹⁵

⁹⁴ JAMES HOWLEY, “Good Housekeeping-Maintenance is Cheap,” pp. 1-2 in THE HERITAGE COUNCIL OF IRELAND, *Taking Stock of our Ecclesiastical Heritage* <<http://www.heritagecouncil.ie/publications/ecclesiastical/housekeeping.html>> (8/16/2000). Howley notes that in Britain the Church of England’s Council for the Care of Churches has available a number of useful publications including, *How to Look after Your Church: A Guide to Church Inspection and Repair*, and *The Care and Conservation of Graveyards*. Dúchas, the Irish national monuments and historic property service, has available a similar publication, *Care and Conservation of Graveyards*.

⁹⁵ M. P. BAMBROUGH, “Stained Glass: Its Care and Maintenance,” pp. 1-2 in THE HERITAGE COUNCIL OF IRELAND, *Taking Stock of our Ecclesiastical Heritage* <<http://www.heritagecouncil.ie/publications/ecclesiastical/stainedglass.html>> (8/16/2000).

Ordinary care and repair imply some sort of inspection system to ferret out potential structural problems and devise a rational system of repair requirements. Since the Canons of 1603 the canon law of the Church of England has required the regular inspection of church fabrics—usually by the archdeacon, a figure who in the Roman Church for the most part vanished after the Council of Trent. At least one writer has suggested that this wise canonical measure may in part be responsible for the fact that of the 6,078 Grade I listed buildings in England 2,959 are churches. The Inspection of Churches Measure 1955 now requires quinquennial inspection of Anglican churches and the filing of a written report which is the basis of repairs. The inspection report covers the fabric of the church and any movable object of outstanding architectural, artistic, historic or archaeological value. The inspection is carried out by a licensed architect or chartered building surveyor chosen by the parish but the Diocesan Advisory Committee must confirm the appointment. The inspection follows a model outlined by the Council for the Care of Churches.⁹⁶ Such a system—at least for the more historic churches of a diocese and adapted for local conditions—would be a prudent measure of stewardship in Roman Catholic churches.

It is helpful to read canon 1220 in conjunction with canon 1216, which requires that in the building and restoration of churches the principles and norms of the liturgy and sacred art are to be followed and the advice of experts is to be sought.

While this canon 1220 appears in the title on sacred places, it would not seem that it is to be interpreted exclusively as applying to cultural property located in churches. The context might suggest that but the text does not so state. Moreover, in his 1995 address to the *plenaria* of the Pontifical Commission for the Cultural Heritage of the Church, Pope John Paul II provided a very wide definition of cultural property when he said:

It was desired that the very concept of “cultural heritage” should be given a precise meaning and an immediately understandable content: thus it includes, first of all, the artistic wealth of painting, sculpture, architecture, mosaic and music, placed at the service of the Church’s mission. To these we should then add the wealth of books contained in ecclesiastical libraries and the historical documents preserved in the archives of ecclesial communities. Finally, this

⁹⁶ JONATHAN GOODCHILD, “The Inspection of Church of England Churches,” in *Momentum: ICOMOS Canada*, 43 (1995) <http://www.icomos.org/canada/bulletin/vol14_no#_goodchild_e.html> (6/5/02).

concept covers the literary, theatrical and cinematographic works produced by the mass media.⁹⁷

This same wide definition the Pontifical Commission for the Cultural Heritage of the Church has followed in its documents on the cultural heritage. Others have said that the religious cultural heritage has an even wider range and includes buildings, parks, cemeteries, sites, shrines, statutes, reliefs, mosaics, frescoes, paintings, icons, enamels, drawings, illustrations, illuminations, stained glass, altars, pulpits, choir stalls, thrones, lamps, bells, drums, organs, gongs, vessels, cups, plates, reliquaries, tombs, censers, crowns, documents, manuscripts, printed books, archives, libraries, music—as composition and as performance—practical objects of penance or devotion, special languages, rites, liturgies and ceremonies.⁹⁸

The Pontifical Commission, it may be noted, has exhibited great concern for types of *res pretiosa* or cultural property other than those which would ordinarily be found in churches. In Chapter 1 we saw that books are frequently classed among cultural property and in Chapter 2 we saw that libraries were early on included in the list of *res pretiosa* and, not surprisingly, libraries were among the first areas of concern for the Pontifical Commission. In 1994 it issued a circular letter on ecclesiastical libraries.⁹⁹ To show the antiquity and centrality of books and libraries in the history of Christian evangelisation and the cultural life of Christendom the Commission began the letter by quoting from Saint Paul to Timothy (2 Tim. 4:13): “Bring the books and above all the parchments”.

To summarize the circular letter, libraries owned by the Church, where they are cared for and remain accessible, constitute an inexhaustible treasure of knowledge whereby the entire Christian community as well as civil society can garner in the present a knowledge of its past. Libraries are

⁹⁷ JOHN PAUL II, address “Art Celebrates the Mystery of Faith,” 12 October 1995, *L'Osservatore Romano*: Weekly English Edition (25 October 1995), p. 5.

⁹⁸ MARCEL CHAPPIN, “The Religious Cultural Heritage,” p. 3 of 5, in EUROPEAN COUNCIL OF CULTURAL COOPERATION, *European Heritage: Heritage and Society* (1995) <<http://coe.fr/infocentre/pub/eng/epe3.6html>> (6/27/02). Professor Chappin was director of the corso superiore per i beni culturali della chiesa at the Pontifica Università Gregoriana in Rome.

⁹⁹ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter (19 March 1994), “Le biblioteche ecclesiastiche nella missione della chiesa,” <http://www.vatican.va/roman_curia/po./rc_com_pcchc_19940319biblioteche-ecclesiastiche_it.htm>; in EBC, pp. 202-219. This document also appears in French in *Documentation catholique*, 91 (1994), pp. 510-516.

as well a leaven for evangelisation. By coming to appreciate their worth the Church will not only be in a better position to collaborate with civil authorities for their conservation and proper cataloging but also move forward to developing new policies for the more fruitful use of its book patrimony. This may involve collaboration in the Internet and information highway. The Church's reverence for books goes back to her earliest days and in a way is "constitutional." The peculiarly Christian concept sees "sacred scripture" as venerable, but not esoteric, books. These contain wisdom which is not only to be sought after but it is also to be universally communicated. Of necessity this view of scripture had the most widespread social and cultural consequences. One need but consider the influence of the Church's cathedral schools and monastic scriptoria, and of the erudition amassed by the Mendicant Orders, and the great Vatican and Ambrosian Libraries assembled during the Renaissance. While much was lost by imprudent alienations, war or confiscations in the course of the Reformation, the Enlightenment, the French Revolution and attendant secularizations, there remains a vast and precious library patrimony.¹⁰⁰ It would be helpful if in courses on church history, for example, an appreciation for church libraries and church archives could be inculcated in seminarians.¹⁰¹ Today the problem of such heritage is threefold: to safeguard it, to use it and to place it to greatest advantage. The patrimony is vast. There are libraries owned by all sorts of public juridical persons, dioceses, chapters of canons, parishes, universities, and religious and other institutes. Sacred pastors cannot put this great patrimony out of mind with the simplistic and superficial conviction that the care of souls takes precedence over such cultural property. Nor may sacred pastors wrongly conclude that the retention of cultural property is a luxury not essential to evangelisation.

What is to be done? Further to summarize the circular letter, where one is not already at hand, the library of every diocese and institute of consecrated life ought to make an inventory. They need as well to do proper planning not only for the care of the collection and its users but also for its prudent increase. One should also refresh one's appreciation for the role of the librarian in the process of evangelisation and the diffusion of culture. At the same time ordinaries should keep in mind the need on the part of staff for professional development in library science. The Vatican Archives operate a school of paleography, diplomatics and archival science and the Vatican

¹⁰⁰ On Irish ecclesiastical libraries and civil law questions involved where a legacy is involved, see W. N. OSBOROUGH, "On Selling Cathedral Libraries—Reflections on a Recent Cy-Près Application," in *The Irish Jurist*, 24 (1989), pp. 51-86.

¹⁰¹ JUDITH CHAMP, "'Training Seminarians to Care for the Cultural Heritage of the Church': The Value of Church Libraries and Church Archives," in *Seminarium*, 39 (1999), p. 402.

Library operates a school of library science. There is as well the graduate course in cultural property operated by the Pontifical Gregorian University in Rome. As for local endeavours, some dioceses may wish to organise a central diocesan library stocked with the principal new and old works of Christian thought. One should not overlook small libraries often maintained over the years in rural parishes and precious sources of Christian erudition for the local community. Today these might branch out into other media besides books to continue to be useful diffusers of Christian culture. Where there is a central diocesan library—which might include a library, archive and museum—it might be well to work in close contact with local ecclesiastical libraries to maximise effectiveness. Catholic library associations might also work with publishers to show in a positive way how useful and even necessary to culture the Christian community is. In fine, the Commission urged for the ecclesiastical library a new or clearer “public” face. Today the Holy Father considers as one of the “signs of the time” the universal flourishing of interest in culture. The Church, as an “expert in culture,” cannot but recognize its appeal.¹⁰²

Archives are the place of the memory of the Christian community and the makers of culture for the new evangelisation.¹⁰³ They are as well cultural property of prime importance. On one hand they contain a record of the twin process of inculturation and acculturation. On the other hand they contain a record of the development of the ecclesial community and its liturgical, educational and ministerial activity. In archives one finds a record of the Church’s Tradition and traces of the *transitus Domini* or footsteps of the Lord in human history. The Code of Canon Law makes numerous references to diocesan or parochial archives. Canon 486, §2, requires that there be in each diocesan curia in a safe place an archive in which the records of the spiritual and temporal affairs of the diocese are to be securely kept. The chancellor, under canon 482, has as his principal task the drawing up of acts of the curia and their safekeeping in the archive of the curia. Only the bishop and the chancellor are to have keys to the archive (c. 487) and documents are not to be removed from it without the permission of the bishop, or of both the moderator of the curia and the chancellor (c. 488).

¹⁰² PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter, 19 March 1994, “Le biblioteche ecclesiastiche nella missione della chiesa,” <http://www.vatican.va/roman_curia/po./rc_com_pcchc_19940319_biblioteche-ecclesiastiche_it.htm> arts. 1.2, 1.4, 2.1, 2.2, 2.4, 3.1, 3.2, 4.1, 4.2, 4.3.

¹⁰³ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter “La funzione pastorale degli archivi ecclesiastici,” 2 February 1997, <http://www.vatican.va/roman_curia/po./rc_com_pcchc_997_0202_archivi-ecclesiastici_it.htm>; EBC, pp. 312-338.

Parishes are also to have an archive, in accord with canons 535, §4, and 1284 §2, 9, under the care of the pastor. Canon 491, however, gives the bishop the duty of vigilance over the care of archives of churches of the diocese. The third plenary council of Baltimore likewise legislated on archives. The bishop was by decree 271 to have an archive and decree 278 required rectors of churches to have at least a secure iron safe to hold the parochial archives, including the parish registers, inventory, accounts and deeds and other documents of title.¹⁰⁴

To summarize the circular letter on archives, the Holy See has for its part, since the start of the twentieth century, made numerous dispositions on the safeguard of Italian ecclesiastical archives. The typology of ecclesiastical archives is various. There are diocesan, capitular, and parochial archives. There are archives of religious, eleemosynary and educational institutes. No plan of organization will be suitable for all, but whatever plan is settled upon must be coherent and open to technological developments. Nevertheless, in view of his duties of oversight under canon 491, §1, on the proper keeping of archives of churches of the diocese, the diocesan bishop has a key role to play in this regard. He should be alert to the danger to archives of defunct or moribund parishes or institutes. He might also serve by example to improve the archival procedures of Catholic entities in his territory not subject to his vigilance and the diocesan archive may wish to consider becoming a depository for the archives of individual Catholics and private ecclesiastical juridical persons (cf. c. 326) in the interest of their preservation. Where archives fall under civil norms for their preservation, one must follow the civil *ius vigens*.

Archives look not only to the past. The bishop should also look to the possibility of recording current events and recent pastoral initiatives. In regard to historical archives and archives of current events the bishop might fruitfully look at possible collaboration with civil entities and such joint ventures might be of mutual advantage to both Church and state. In devising this church-state collaboration there may be need for initiatives at the level of the episcopal conference. It is desirable that canonical norms on archives be harmonized with those of the state, preserving always, however, what must, under canons 489-490, needs be preserved in the case of the confidential diocesan archive.

¹⁰⁴ *Decreta*, pp. 155, 160; BARRETT, pp. 189, 190, 195. On the care and arrangements of diocesan archives a useful volume is JAMES O'TOOLE, *Basic Standards for Diocesan Archives: A Guide for Bishops, Chancellors, and Archivists*, Chicago, Association of Catholic Diocesan Archivists, 1991. On parish registers and their contents see DUANE L.C.M. GALLES, "The Church's Sacramental Registers," in *Homiletic and Pastoral Review*, 93 (December, 1992), pp. 68-71.

Beyond a careful enforcement of the canonical norms on archives, especially parochial archives, bishops should also take an interest in their archival staff and see to it that they are professionally trained. Besides the courses at the Vatican Archives and the Gregorian University noted above, there may be local training opportunities, and associations of ecclesiastical archivists should be alert to promoting opportunities for continuing professional training. Adequate provision should also be made for the physical and technological needs of archives. Proper inventories and arrangement of documents are requisite if archives are to be of use to scholars.

Beyond personnel and technological issues, church authorities also need to be convinced of the value of archives and the need to expend resources for their conservation. Unlike libraries, archives often contain the only copy of a document and so the only record of an event. For this reason its "conservation is a demand of justice which we today owe to those whose heirs we are." Beyond that, archival records exist not only for the benefit of those who created them but also in a wider sense they form part of the common heritage of mankind. They form the building block of the religious, civil, cultural and social history of the Christian people.¹⁰⁵

Besides her care of libraries and archives, the Church also cherishes the function of the ecclesiastical museum. With a view to conserving materially, safeguarding juridically, and putting to best advantage pastorally the important historical and artistic patrimony of the Church no longer in habitual use, the Pontifical Commission for the Cultural Heritage of the Church dispatched a circular letter on the pastoral function of ecclesiastical museums.¹⁰⁶ This is the last in a series of documents aimed at promoting a new humanism and a new evangelisation.

To summarize this circular letter, the Church in every generation has announced the Gospel message to the *hic et nunc* and in doing so has made use of different cultures to spread the Christian message. Thus, by its very nature the faith tends to express itself in artistic forms and in historical evidence and so makes its contribution to culture. The cultural property of the church

¹⁰⁵ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter "La funzione pastorale degli archivi ecclesiastici," 2 February 1997, <http://www.vatican.va/roman_curia/po..rc_com_pcchc_997_0202_archivi-ecclesiastici_it.htm> arts. 2.1, 2.2, 2.3, 2.5, 3.1, 3.2, 3.3, 4.1, 4.2. This document appears in French in *Documentation catholique*, 94 (1997), pp. 610-620.

¹⁰⁶ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter "The Pastoral Function of Ecclesiastical Museums," 15 August 2001, <http://www.vatican.va/roman_curia/po...rc_com_pcche_20010815_funzione-musei_en.htm> (4/26/2002); in EBC, pp. 464-526.

includes paintings, sculpture, architecture, mosaics, music and musical instruments, liturgical vessels and vestments, books and historic documents. It may also include literary, dramatic and cinematographic works. Museums provide a safe and secure place where such cultural property not in regular use can be protected and presented. At the same time such cultural treasures can be given a functional role of helping to rediscover what belongs culturally and spiritually to the community. Church museums thus need not merely be places of resort for tourists. Rather, they help the Christian community discover its past and at the same time nourish a sense of belonging to the world in which it lives. This, then, gives the ecclesiastical museum a sense of the pastoral usefulness of this patrimony. For this reason this patrimony belongs first and foremost to the Christian community. At the same time this patrimony, because of the universal dimension of the Christian message, belongs to the whole of humanity. This patrimony represents since apostolic times the individual and collective testimonies of faith of the Christian community and it expresses the continuity of the Church and the communion of saints over time.

These visible evidences of the memory of evangelization are therefore precious and so their abandonment, dispersal, or secularization must be avoided, and they must be safeguarded and used in a church environment. The importance of this patrimony to the Christian community's collective memory ensures that a church museum will never be merely a collection of objects. Instead its collection forms objects with a message—objects in dialogue with the broader cultural community—and this must be clearly understood if the collection is to be properly presented. Not only must the collection be safeguarded, inventoried and catalogued, it must also be understood in its original context while at the same time it must be related to the cultural and ecclesial experience of today. For this reason it ought, where possible, to be used upon occasion at least in a liturgical, or at least pastoral, way today. The church museum thus is not merely a depository of disused cultural property. Rather it is a center of cultural education, a place for the re-presentation of the cultural, charitable and educational activity of the Christian communities of the past. A visit to a church museum is therefore not merely a cultural or touristic experience. In a real sense it is also spiritual experience, for the objects in its collection are evidences of faith and traces of the *transitus Dei* in human history. In common with all museums church museums provide displays of beauty, but, because its collection is faith-based, its collection reminds people that the glory of God is the origin of all beauty and so the collection shows the transcendental link of beauty with truth and goodness.

Ecclesiastical museums have long existed. The earliest church museums were probably treasuries in cathedrals and collegiate and monastic churches where relics and their sumptuous reliquaries and precious liturgical vessels and vestments were safeguarded. The magnificent gold items amassed by Abbot Suger (1081-1151) for the treasury of the royal abbey church of Saint Denis, which were melted down by the French Revolutionaries, are a famous example. One might also mention the collection of antique bronzes created in 1471 by Pope Sixtus IV on the Capitoline Hill and the later Vatican museums—as well as the many diocesan museums created in the course of the nineteenth century. We also saw in Chapter 1 (and at greater length in Appendix 5) the increasingly detailed legislation enacted since the Middle Ages for the protection of cultural property enacted in the Papal States.

Since the Second Vatican Council, the number of ecclesiastical museums has been on the rise. It is therefore of increased importance that they be properly organized. They should be considered part of the apostolate of the particular church and their creation and the drafting of their statutes requires the prudent care of the bishop or other superior. The statutes would also wisely include policies on accessions, de-accessions, loans, copyright, and cooperation with other museums, including public ones. In drafting these superiors in turn will need the advice of experts in museology and they will need to have regard to the relevant secular law affecting such places.

The site for the museum should, if possible, express the museum's ecclesial character and so consideration should be given to using space in former churches, convents, or episcopal residences. Space should be organized functionally and care should be taken so that the collection can tell its "stories." Security of collections cannot be properly seen to without an adequate inventory in which the object is properly described and photographed. Recommendations from various international bodies, like the International Council of Museums, provide helpful guidance here. With regard to conservation, organizations like ICCROM have useful expertise to share.

Museums operated by dioceses or even ecclesiastical provinces can usefully provide centers where cultural property which would otherwise be at risk of loss or destruction can be concentrated, but care should be taken that such places do not become mere depositories for disused objects divorced from their original context. Through temporary loans they can return to the locale of origin to be used liturgically or at least pastorally to refresh the memory of the creating community. It would also be useful if advance planning could be done for the

educational role of the museum in the Christian community. Besides assisting in the cultural education of future clerics and religious, church museums can have a role in the continuing education of the clergy and of all Christ's faithful. Museums can also have a powerful role in the evangelization effort of the particular church. Advance provision should also be made for the education and continuing education of museum staff.¹⁰⁷

The Pontifical Commission regards the preservation of sacred music as part of its remit.¹⁰⁸ It has not, however, yet provided guidance in the form of a circular letter on the matter of music and church organs. Nevertheless, something might be said on the subject. As we saw in Chapter 2, in her constitution on the sacred liturgy the Second Vatican Council declared that the musical tradition of the Church was a treasure of inestimable value, forming a necessary or integral part of the solemn liturgy (art. 112). Thus this treasure was to be preserved and promoted with consummate care and choirs were to be assiduously promoted (art. 113). Gregorian chant, the Roman Church's very own music, was to have lead spot and sacred polyphony was by no means to be excluded (art. 116). In the Latin Church the pipe organ was greatly esteemed (art. 120). Ordinaries were to be vigilant lest precious works be alienated or dispersed and, in making judgments about works of art, ordinaries were to take advice from diocesan commissions on sacred art, music and liturgy (art. 126).¹⁰⁹ While one might argue these conciliar commands include both intangible and tangible heritage and so the repertoire as well as music manuscripts and music scores and musical instruments, we shall content ourselves with adverting only to the last.

For centuries the pipe organ has been the "king of musical instruments" and the pre-eminent church instrument. A church organ clearly may be *res pretiosa*. In Britain, moreover, the repair or replacement of church organs located in listed buildings or in conservation areas will be governed by the norms in place under the Ecclesiastical Exemption. In other places work that goes beyond occasional cleaning or minor repairs may well come under civil regulation. It will

¹⁰⁷ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter "The Pastoral Function of Ecclesiastical Museums," 15 August 2001, <http://www.vatican.va/roman_curia/po...rc_com_pcche_20010815_funzione-musei_en.htm> (4/26/2002), arts 1.1, 1.2, 1.3, 2.1.1, 2.2.2, 2.3.2, 2.4, 3.1.1, 3.2.1, 3.5, 3.6, 5.1, 5.21.

¹⁰⁸ CARLO CHENIS, "Introduzione," in EBC, p. 44.

¹⁰⁹ SECOND VATICAN COUNCIL, constitution *Sacrosanctum concilium*, 4 December 1963, in *AAS*, 56 (1964), arts. 112, 114, 116, 117, 120, 126, pp. 128-132; FLANNERY, pp. 31-35.

also be regulated by canon law and, under canon 1281, require a faculty in writing from the ordinary. The church organ is often the most valuable item in a church and, even from the perspective of prudence, expert advice would be advisable in connection with any major overhaul, re-building or replacement of a pipe organ.

The invention of the Greek organ, the *hydraulis*, is attributed to Ktesibios, who worked in Alexandria around 250 B.C. and Saint Jerome makes mention of an organ at Jerusalem which could be heard at the Mount of Olives, nearly a mile distant. Early organs were costly and elaborate machines frequently sent as gifts by potentates and church dignitaries. In 757, for example, the Byzantine Emperor Copronymus sent one to the Frankish King Pippin and this is one of the first pipe organs to be mentioned in Western Europe. At Winchester cathedral in the tenth century there was an enormous one worked, said the monk Wulstan, by seventy men "that the full-bosomed box may speak with its 400 pipes." After 1300 the development of the organ made rapid technical strides and the instrument spread across Christendom.¹¹⁰

In the United States organs were in use in the Southwest at the Spanish missions during the seventeenth and eighteenth centuries. In the Eastern and English colonies the first organ was in use in 1703 at Gloria Dei "Old Swedes" Church in Philadelphia. To the North in Quebec an organ was placed in the parish church in 1657. In 1820 the first commissioned church organ arrived in Australia and in 1840 a Bevington with a case designed by Pugin was installed in Saint Mary's Cathedral in Sydney.¹¹¹

A pipe organ is both a musical instrument and a refined piece of machinery. Often as well it is an integral part of a church's furnishings and organs in the baroque style have especially beautiful organ cases. With occasional cleaning and minor repairs, pipe organs may function efficiently for over a century. Church administrators should be alert to the possibility that the parish church

¹¹⁰ WILLI APEL, "Organ," in WILLI APEL (ed.), *Harvard Dictionary of Music*, Cambridge, Harvard University Press, 1961, pp. 530-531; WILLIAM MCVICKER, "BIOS Annual Residential Conference," in *BIOS Reporter*, 23 (October, 1999), p. 2 of 7 <<http://website.lineone.net/~glandy/BIOS/oct99/c1099.html>> (7/11/02).

¹¹¹ "Organ Historical Society," <http://www.organsociety.org/html/site/site_frame.html> (7/16/02); "Organs in Quebec," <<http://alambix.quebec.ca/musique/orgues/orgueqintr.html>> (7/16/02); JOHN MAIDMENT, "The Organ in Australia," <<http://home.vicnet.net.au/~ohta/other/austr.html>> (7/16/02); and DUANE L.C.M. GALLES, "The Hispanic Musical Presence in the New Evangelization in the United States", *Sacred Music*, 125 (Summer, 1998), p. 7.

organ may be an historic organ. Even in newer lands like the United States historic organs are far more numerous than one might think.

The British Institute of Organ Studies is a registered charity composed of persons knowledgeable about pipe organs and their history and it sees itself as a sort of Amenity Society with respect to historic organs. In 1995 it began to compile a National Pipe Organ Register of historic organs, which it sees as analogous to the national register of listed buildings. It receives nominations for the designation of historic organs and then appoints a committee to inspect the instrument and report on it. It suggests an organ is historic if it is a good and intact example of its style or period, if it incorporates material (e.g. pipework from an earlier instrument of good quality) or if it retains an interesting or architecturally distinguished case. In terms of age, for an organ dating to before 1840 it accepts as "historic" an organ with a substantial amount of unaltered original material. For organs made between 1840 and 1880 it looks for an unaltered and complete musical instrument and one which is a specimen of its maker's best work. For organs of the period after 1880 it looks for instruments of outstanding quality. By the year 2000 the Register included some 300 historic organs, including those in the Roman Catholic chapel at Everingham, Humberside, and Saint Mary Roman Catholic Church in Dufftown, Banff. Another church, Saint Gregory Roman Catholic Church in Aberdeen, was described by a member as a "magnificent Pugin sanctuary" and as "the original home of an exceptional 1820 Bruce organ in a fine oak case" and so as a "national treasure." The Institute also maintains the British Organ Archive, which contains information on all known organs in Britain.¹¹²

There is a similar organization in the United States called the Organ Historical Society, established in 1956, which maintains an archive of historic North American organs and organbuilders. Another similar organization is the Organ Historical Trust of Australia. Since its founding in 1977 the latter has developed a Gazetteer of Pipe Organs in Australia which now provides documentation on some 300 organs in Australia and New Zealand. All these groups provide advice on organ conservation. The British Institute of Organ Studies has a leaflet, *Sound*

¹¹² BRITISH INSTITUTE OF ORGAN STUDIES, "Sound Advice: The Care of Your Pipe Organ," <<http://www.dur.ac.uk/~dot7rdh.biosdadv.htm>> (2/19/02); BRITISH INSTITUTE OF ORGAN STUDIES, "Historic Organs Certificate Scheme," <<http://dur.ac.uk/~dot7rdh/hocs.htm>> (7/10/02) and MICHAEL SAYER, "Historic Organs Certificate Scheme," in *BIOS Reporter*, 21 (January, 1997) <<http://website.linone.net/~glandy/BIOS/jan97/e197.html>> (7/10/02); "Historic Organs Certificate Scheme," in *BIOS Reporter*, 25 (January, 2001) <<http://website.linone.net/~glandy/BIOS/jan01/j01.html>> (7/10/02); "BIOS Residential Conference 1997," in *BIOS Reporter*, 22 (April, 1998) <<http://website.linone.net/~glandy/BIOS/apr98/c498.html>> (7/10/02).

Advice: The Care of Your Pipe Organ. The Organ Historical Society published *Guidelines for Conservation & Restoration* in its newsletter in 1986 and the Organ Historical Trust of Australia in 1998 in conjunction with the New South Wales Heritage Office published *Pipe Organ Conservation and Maintenance Guide*. In Britain the Council for the Care of Churches, a permanent commission of the General Synod of the Church of England, also provides advice on the conservation and repair of organs.¹¹³

3.3.6. Inventories of *Res pretiosa*.

Canon 1283, §2, requires administrators of church property to make an inventory of the juridical person's property and requires that it include the items of the following three classes of property: immovables, *rerum mobilium sive pretiosarum sive utcumque ad bona culturalia pertinentium*, movables whether valuable or belonging to cultural property, and other property. The term "inventory" has a long history in the law and has a proper meaning. An inventory is understood to be an enumeration, description and valuation of the property belonging to a juridical or physical person. It is an important legal tool which permits an owner deprived of his property to reclaim it by showing his entitlement. The inventory is also important where elements of two patrimonies are in proximity, for then it enables one to prevent the confusion of the property of different owners.¹¹⁴ Thus the third plenary council of Baltimore laid down detailed norms on inventories to be maintained. Bishops and rectors of churches were to maintain two inventories, one of diocesan or parish property and another of their personal patrimony. Rectors of churches were to list both immovables and movables and to send annual updates of changes to the diocesan chancery. The measure also established the rebuttable presumption that that sacred vestments and vessels belonged to the parish, unless the contrary was explicitly shown.¹¹⁵

¹¹³ BRITISH INSTITUTE OF ORGAN STUDIES, *Sound Advice: The Care of Your Pipe Organ*, <<http://www.dur.ac.uk/~dot7rdh/biosdadv.htm>> (7/17/02); ORGAN HISTORICAL SOCIETY, "Guidelines on Conservation and Restoration," in *The Tracker*, 30 (1986) and <http://www.organsociety.org/htmlsite/site_frame.html>. (7/16/02); "NSW Heritage Pipe Organ Conservation and Maintenance Guide," <<http://home.vicnet.net.au/~ohta.document/preserv/orguide.html>>; COUNCIL FOR THE CARE OF CHURCHES, "Repair or Replace?" <http://www.churchcare.co.uk/atoz_organ.php>. A useful volume on the subject of pipe organ conservation is *Towards the Conservation and Restoration of Historic Organs*, London, Church House Publishing, 2000. It is the collected papers presented at a 1999 organ conference held in Liverpool and jointly organized by the Council for the Care of Churches, the British Institute of Organ Studies and the Institute of British Organ Building.

¹¹⁴ RAOUL NAZ, "Inventaire," in DDC, 6, col. 14.

¹¹⁵ *Decreta*, pp. 158-159; BARRETT, pp. 189, 190, 195.

We saw in Chapter 1 that the 1970 UNESCO convention on stolen and illegally exported cultural property, which refers to "designated property," is deemed to apply only to inventoried cultural property. Thus, to make a claim under that Convention a proper inventory will be a prime requisite. Likewise, under the 1995 UNIDROIT Convention one will need to describe the stolen object in detail and in practice provide photographs.

Thefts of religious cultural objects were greatly on the rise in the 1990's. In Russia by 1994 thefts from churches represented 43 percent of thefts of cultural objects. The Czech Republic has recorded the loss of 35,000 items from churches since 1986. In Italy since 1980 there have been some 89,000 thefts of cultural objects from churches, and such thefts represent 35 percent of all art thefts. Eighteenth-century confessionals have been transformed into bookshelves, gilded altarpieces have been made to adorn living rooms, and baroque altar volutes have been transformed into excellent bed heads, according to a report by Carabinieri Commander General Roberto Conforti. Worldwide INTERPOL in 1995 found that thefts from religious buildings amounted to a third of the theft notices issued by its Secretary General in 1995.¹¹⁶ The head of the Pontifical Commission for the Cultural Heritage of the Church has recently noted that worldwide the traffic in illicitly-exported art and archaeological objects is second only in value to the illicit traffic in drugs.¹¹⁷ Without an inventory the common experience is that few objects have been documented to a level that can materially assist in their recovery.

On 8 December 1999 the Pontifical Commission for the Cultural Heritage of the Church issued a lengthy circular letter providing detailed guidelines for the inventorying and cataloging of the cultural property of the Church.¹¹⁸ Summarizing the circular letter, one can say that the cultural patrimony of the Church includes works of architecture, paintings and mosaics, sculpture as well as liturgical vestments, vessels and furniture and musical scores and instruments. It can be

¹¹⁶ ROBIN THORNES, "Object ID: An International Documentation Standard for the Protection of Cultural Objects", p. 1 in THE HERITAGE COUNCIL OF IRELAND, *Taking Stock of our Ecclesiastical Heritage* <<http://www.heritagecouncil.ie/publications/ecclesiastical/objectid.html>> (8/16/2000); INSTITUTE FOR ART AND LAW, "Art Theft: No Respect for the Sacred," <<http://www.ial.com/news/010701b.htm>> (5/6/02).

¹¹⁷ FRANCESCO MARCHISANO, "Presentazione," in EBC, p. 12.

¹¹⁸ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter, 8 December 1999, "Lettera circolare sulla necessità e urgenza dell'inventariazione e catalogazione dei beni culturali della chiesa," <http://www.vatican.va/rom.../rc_com_pcchc_19991208_catalogazione-beni-culturali_it.htm> (10/29/2001); in EBC, pp. 400-437.

considered the creative side of the Christian community whence worship, catechesis, charity and culture have molded the environment in which Christian believers learn and live out their faith. The translation of faith into images enriches the relationship between creation and the supernatural by recalling biblical narratives and representing different expressions of popular piety. In addition, in archives, libraries and museums Christians have collected a great quantity of artifacts, documents and texts produced by non-Christian cultures throughout the centuries in order to respond to different pastoral and cultural needs. The Church's artistic patrimony is the witness to the artistic creativity and craftsmanship of Christians wishing to endow their places of worship and charity with the splendor of beauty. This artistic patrimony is huge both in its extent and variety.

The first step in coming to terms with this patrimony is to understand the worth of this patrimony. Then one might explore joint action by both church and state authorities, with each authority acting according to its own competence. Thereafter one can commence inventorying and even cataloging the elements within this patrimony. In general the circular letter, while addressed to bishops, is intended as well for religious superiors, and it outlines only the essential guidelines for inventorying. It aims at providing guidance for creating the "accurate and clear inventory" required by canon 1283, §2. Such an inventory is not only of administrative use in making possible the security and preservation of church property, but it also leads to an appreciation of the value of the cultural property. Furthermore, the descriptions contained in the inventory may lead eventually to the production of a true catalogue.

The Church has a long history of supporting the use of images in worship. We saw in Chapter 1 that Pope Gregory the Great (590-604) considered images to be the scriptures of the poor and illiterate and in Chapter 2 we saw that at the second council of Nicea in 787 the Church solemnly upheld the use of images in worship and so concluded the iconoclast controversy. As for norms on the care of church property, the third century prayer for the institution of a porter is considered among the earliest cultural preservation measures. It enjoined the porter to take care lest through his negligence church property perish. We saw in Chapter 1 some of the various other measures taken by the popes to guard against the destruction of the artistic patrimony.

Further to summarize the circular, inventories and catalogues have different aims and different methods. Inventorying involves listing for record purposes the various elements included in the patrimony. Cataloging goes beyond mere listing and includes an appreciation of the object's

context, significance and value. Thus, cataloging flows from inventorying and, indeed, a simple inventory is inadequate to protect artistic patrimony.

The object of the inventory is the listing of tangible cultural property owned by a public juridical person. Excluded are things forming part of the natural heritage and intangible cultural property such as language and customs. Typically tangible cultural property is divided into immovables, such as places of worship, monasteries, episcopal and parochial residences, and eleemosynary facilities, and movables, such as paintings, sculptures, liturgical vessels, vestments and furniture. Other types of cultural property such as archives and books use different methods of inventorying.

The method is basically that followed in the field of art history. First one identifies an object, then one analyses it, and finally one organizes these analyses into the inventory as a whole. This requires that one proceed systematically and with some common sense. The material aim is the inventory itself. The formal aim is the conservation of the patrimony, and in order to do that one needs to record an adequate description of the object, and it is helpful to know something about the geographical, historical and economic background of the object. With regard to the latter, it is desirable to know about its religious function as well as its material composition, for both are important for its conservation. Both lead to a greater appreciation for the object, its origin, function and meaning in a particular church. This produces, or can produce, a desirable interface between the church community and its patrimony. Every artistic object originally had a function in the spreading of the Gospel. Understanding this function is therefore the first step in appreciating its artistic worth as well as understanding its continued relevance to the Christian community. From this standpoint the cultural patrimony has both a pastoral and an educational function. It expresses the genius, the desires, the piety of the faithful and shows how they attempted to inculturate the faith in their own environment. It thus provides something of a material means for the Christian community of today to understand and even communicate with the saints of earlier ages. As a whole the patrimony has its own value which is apart from its constituent parts. The Gospel is to be preached to all nations and a particular church's cultural patrimony will give evidence of its peculiar genius and pastoral plan in the accomplishment of that endeavor.

Where cooperation between Church and state can be harnessed in producing inventories, this is desirable. Such cooperation eliminates duplication of effort and ensures that, while respecting

both social and pastoral needs, the enjoyment of the artistic patrimony in its different functions will be enhanced. Where such cooperation is not possible, the Church for her own pastoral purposes will wish nevertheless to proceed.

The decay of communities, pollution, and improper and even fraudulent alienations feeding on a runaway art market, not to mention the depredations due to wars and confiscations, have greatly endangered the cultural patrimony of the Church. In such a situation an adequate inventory provides both a deterrent to its dispersal and an aid in its recovery. Without an adequate inventory and good photographs it is often impossible to secure the return of stolen cultural property.

The inventory may be stored in hard copy or on computer according to the needs of the public juridical person owning it and where it is large portions (or copies of portions) may need to be kept in several places as need requires and in accordance with various national plans and regulations. The same can be said for the catalogue, but since this represents a continuation of the inventory and will doubtless expand as knowledge of the collection grows, in structuring it allowance should be made for such growth. Since such catalogues are useful for cultural and economic programmes undertaken by public or non-governmental bodies, it might be wise to lay plans in collaboration with such entities so as to share the work and the expense and to ensure a broader use for the end product. For this reason episcopal conferences may wish to promote such collaboration.

As for cataloguing methods, where state regulations do not prescribe a particular format, those recommended by the International Council of Museums or the Council of Europe may prove useful. Typically one adopts a uniform terminology and assigns each object a unique identifier. Then for each object one identifies the object by type of object (e.g. painting, sculpture, clock), materials and technique (e.g. brass, wood, oil), measurements (specifying units and the dimension to which the measurement refers), inscriptions or markings (e.g. signature, maker's marks), distinguishing features (e.g. damage, repairs, manufacturing defects), title (if any), subject (e.g. landscape, woman holding child), date or period (e.g. 1893, early 17th century), maker (e.g. Tiffany), and a short description of the object (e.g. colour and shape, where it was made). Where the catalogue includes objects of more than one owner, the owner of the object should be identified. Where the catalogue cover objects in more than one location, its location should be identified. In the case of immovables the legal description should be given. Photographs should

be included and, in the case of a building, plans and sections as well. Where an object undergoes study over the years, the various reports and critiques should be added. A copy of the inventory and catalogue should be kept in a secure place and other copies should be kept accessible for research.¹¹⁹

The compilers of the inventory need to have a working knowledge of the various types of cultural property—archaeology, architecture, art, liturgical vestments and vessels—represented in the inventory. They also need some knowledge of art history, church history, liturgy, theology and canon law. The job of the compiler of proper inventories is a profession for which a definite course of training is needed as well as periodic refresher courses. Training courses can be had at the Vatican Library and Archives, the Pontifical Gregorian University's graduate course in the cultural property of the Church, the University of the Sacred Heart in Milan, the Universidad Iberoamerica, Mexico City, and the Institut Catholique, Paris. However, sometimes volunteers, working under proper supervision, may prove useful.¹²⁰

The latter, in fact, is what a group in Ireland discovered. By using a group of volunteers working under guidance of professional inventory takers, the Heritage Council of Ireland was able to make at least the beginning of an acceptable inventory which included the development of a core data index of buildings and cultural objects at two churches in Dublin, Saint Mary's Pro-cathedral and Christ Church Cathedral. The record compiled by volunteers then became the point of departure for the full inventory completed by professional staff.¹²¹

¹¹⁹ One of the inventory methods recommended in note 36 of the circular letter is Object ID™, initiated by the J. Paul Getty Trust in 1993. It was developed under the aegis of UNESCO to combat art theft and now exists under the aegis of the Council for the Prevention of Art Theft, Stourton, Warminster, UK. Information about this system, including detailed information about the way to photograph objects and an extensive bibliography, can be downloaded from its web site at www.object-id.com.

¹²⁰ PONTIFICAL COMMISSION FOR THE CULTURAL HERITAGE OF THE CHURCH, circular letter, 8 December 1999, "Necessità e urgenza dell'inventariazione e catalogazione dei beni culturali della chiesa," arts. 2.1, 2.2, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1, 4.2, 5.2, <www.vatican.va/rom.../rc_com_pcchc_19991208catalogazione-beni-culturali_it.htm> (10/29/ 2001).

¹²¹ MARY O'ROURKE, "The Survey of Churches and Places of Worship in Ireland," pp. 1, 2 in THE HERITAGE COUNCIL OF IRELAND, *Taking Stock of our Ecclesiastical Heritage* <http://www.heritagecouncil.ie/publications/ecclesiastical/survey_church.html> (8/16/2000).

3.3.7. Property Alienation

Under canon 1292, in order to sell or encumber the stable property of a diocese or of a parish one needs the permission of the diocesan bishop and the consent of his finance committee and the college of consultors and those others concerned. In addition, if the value of the property is over the maximum limit or concerns *res pretiosa*, one needs the permission of the Holy See. Under canon 1290, it would seem canon law would canonize the civil law norms regarding historic preservation.¹²²

In its circular letter, *Opera artis*, of 1971 the Congregation for the Clergy declared that changes made in sacred places occasioned by liturgical reform should always be made with caution and always in keeping with the norms of liturgical restoration. Prior consultation should also be had with the commissions on sacred art and the liturgy and if need be, on sacred music and one should hear the advice of experts. Moreover, consideration should also be given to the civil law

¹²² This raises the interesting case of *Musées nationaux de Canada v. Fabrique de la paroisse de l'Ange Gardien* (1987) 2 R.C.C. IX. In the aftermath of Vatican II the pastor of l'Ange Gardien, a Quebec parish established in 1664, had sold for C\$800 a bunch of "old-fashioned things" then regarded to be of no great value but eleven years later considered worth C\$100,000. He sold the objects without the consent of the *marguilliers* or churchwardens and without the permission of the diocesan bishop. The buyer then re-sold the objects to local antique dealers and they were acquired by the National Gallery of Canada and the Musée de Québec. The pastor's successor arrived in 1973 and he discovered the sale of the objects and decided to question it. Under Quebec law, as under Roman law, *res sacrae* are *res extra commercium* and are imprescriptible and inalienable. Since the objects has not been returned to profane use by decree of the bishop, they were still *res sacrae* at and after the time of the sale and so the sale was illegal under the Quebec civil code. The *fabrique*, therefore, as their lawful owner, in 1976 began an action to have the sale set aside and the objects returned to it. Thanks to the *Inventaire des oeuvres d'art du Ministère des affaires culturelles du Québec* made by Gérard Morisset from 1937 to 1953, there was a detailed description of the *res pretiosa* of the parish. These included two gilt wooden Madonnas, six carved wooden candlesticks, one wooden crucifix above the high altar, two statues of Saint John and one of Saint Roch sculpted by Jacques Leblond dit Latour, who emigrated from France to Quebec in 1690. It also possessed a silver chalice, thurible, boat and holy oil vials made by the master silversmith, François Ranvoyzé (1739-1819) and a silver holy water stoup by Laurent Amiot (1764-1839) and ten carved wooden candlesticks by François Baillairgé (1759-1830) and a silver chalice and two cruets by François Sasseville (1797-1864). The judge at first instance held the sale void under canon law and Quebec civil law and ordered the return of the cultural property. This judgment was upheld by the Quebec Court of Appeal which agreed that the Superior Court judge had properly looked to canon law to determine whether at the time of sale the objects were still *res sacrae*. The National Gallery of Canada then applied to the Supreme Court of Canada for leave to appeal, which was denied on 17 December 1987 with the result that the judgment of the Quebec Court of Appeal stood and the *res pretiosae* were returned to the parish. BENOÎT PELLETIER, "The Case of the Treasures of L'Ange Gardien: An Overview," in *International Journal of Cultural Property*, 2 (1993), pp. 371-382. See also ERNEST CAPARROS, "L'affaire des trésors de l'Ange-Gardien," in *Ius Ecclesiae* 1 (1989), pp. 617-643 and ERNEST CAPARROS, "Le droit canonique devant les tribunaux canadiens," in MICHEL THÉRIAULT AND JEAN THORN (eds.), *Unico Ecclesiae servitio: études de droit canonique offertes à Germain Lesage, o.m.i. en l'honneur de son 75e anniversaire de naissance et du 50e anniversaire de son ordination presbytérale*, Ottawa, Saint Paul University, Faculty of Canon Law, 1991, pp. 307-342.

norms for the protection of notable artistic works. If there is need to adapt to the new liturgical laws works and treasures handed down over the centuries, this should not be done without real necessity and not to the detriment of the work of art. The same held for ecclesiastical buildings of notable architectural merit. Precious objects were not to be alienated and those acting wrongfully were not to be absolved without first repairing the damage inflicted. When submitting requests for alienations, the opinion of the relevant experts was to be clearly indicated.¹²³

In general a parish church renovation would be considered an act of extraordinary administration, where it goes beyond ordinary maintenance and repairs. Should it jeopardize the patrimonial condition of the parish—perhaps by requiring a large loan or by destroying property of artistic or historic value—the renovation might, under canon 1295, be deemed subject to the more demanding rules on alienation as well. Under canon 638 similar rules apply to religious institutes which are not subject to the diocesan bishop. Here the required permission for alienation must come from the relevant superior and consent must be given by the superior's council. Societies of apostolic life, under canon 741, are also governed by this canon, whereas, under canon 718, secular institutes are governed by the norms of book V of the Code.¹²⁴

3.3.8. Other Transactions

Besides the actual transfer of ownership a number of transactions can affect the value of patrimony and, under canon 1295, the requisites of canons 1291-1294 apply to any transaction by which the value of patrimony may be lessened. These may include mortgages, pledges, exchanges and also loans. Art loans are a frequent occurrence and present a number of legal problems. Beyond the specialized legal questions which are common to state law, art loans also

¹²³ CONGREGATION FOR THE CLERGY, circular letter *Opera artis*, 11 April 1971, in *AAS*, 63 (1971), pp. 315-317; *Canon Law Digest*, 7 (1975), pp. 821-824. Interestingly, in a letter of 13 January 1988 to the nuncio in Washington the Cardinal Prefect of the Congregation for the Clergy stated that some dioceses of the United States "have not been requesting the necessary authorization from the Holy See in order to alienate ecclesiastical goods" and he reiterated that under RCIC 1292 "such permission is required for validity." In *Canon Law Digest*, 12 (2002), pp. 750-751.

¹²⁴ J. HITE ET AL., *A Handbook on Canons* 573-746, Collegeville, The Liturgical Press, 1985, pp. 106-111.

present a case under canon 1295, a transaction by which the patrimonial condition of the juridical person is rendered the poorer. They may also involve leases under canon 1297.¹²⁵

The loan for use or *commodatum* was a well-known transaction in Roman law. Anglo-American law characterizes this transaction, if gratuitous, as a bailment. Nowadays art loans are seldom gratuitous transactions, the lender generally expecting to achieve some gain—even if not a direct financial one—from the transaction. Common provisions in contracts for art loans will be clauses regarding security, duty of care, insurance, choice of law clauses and such matters as warranties of title and authenticity and, where exhibit of the object is calculated to benefit the lender greatly, a duty to exhibit.¹²⁶ Some countries have anti-seizure laws, to be discussed presently, which prevent art works lent for exhibition from being seized by judicial process. Where there is any question as to the loaned object's provenance the provisions of such statutes should be invoked to prevent unanticipated detention of the object.¹²⁷

Given its large share of Italian cultural property, the Church in Italy has had to make provision for norms for art loans. In 1999 the Italian Episcopal Conference promulgated norms for art loans which would serve as useful parallel places for juridical persons in English-speaking lands contemplating art loans. Under these norms the ordinary *a quo* and *ad quem*, that is the ordinary diocesan bishop or major superior of a religious institute or society of apostolic life of pontifical right of the juridical person owning or having custody of the object to be loaned and the ordinary of the borrowing entity, both have oversight functions with respect to the loan. For transaction within Italy the *a quo* ordinary grants the license for the loan of the object having consulted first with the ordinary of the borrowing and exhibiting entity which entity will usually be a museum or other civil entity. Where the borrower is located outside Italy the authorization of the Pontifical Commission for the Cultural Heritage of the Church must be sought. There are detailed norms on the documents needed before the transaction can be concluded, including insurance provisions, and, since cultural property in Italy is closely regulated by the state, the *a quo* and *ad quem*

¹²⁵ Some episcopal conferences—Australia, Canada, the Philippines—have enacted complementary norms on leases which may be found in CAPARROS, pp. 1312, 1332, 1408.

¹²⁶ NORMAN PALMER, "Art Loans," in *University of British Columbia Law Review*, 29 (1995), pp. 288, 292-300, reprinted in MARTINE BRIAT AND JUDITH A. FRIEDBERG (eds.) *Legal Aspects of International Trade in Art*, Paris, ICC Publishing S.A., 1996, pp. 299-317.

¹²⁷ On provenance, see PATRICK J. O'KEEFE, "Provenance and Trade in Cultural Heritage," in *University of British Columbia Law Review*, 29 (1995), pp. 259-272.

Soprintendenze of the Ministry of Culture and the Environment will need to approve the transaction and be assured that the loan will not result in damage to the cultural object.¹²⁸

A development in recent years has been concern about seizure of loaned objects during exhibitions. France enacted legislation in 1994 which exempts art loans to cultural institutions from seizure by legal process and a number of other jurisdictions have similar legislation which may be of interest. The United States, the State of New York, and in Canada the Provinces of British Columbia, Manitoba, Ontario, and Quebec all have such legislation, and the utility of it was recently demonstrated during the loan of painting by Egon Schiele from the collection of the Leopold Foundation of Austria to the Museum of Modern Art in New York City in October, 1997. New York's anti-seizure law had been properly invoked but a third party claimed that the *Portrait of Wally*, as the painting came to be called, had been stolen from her family in 1938. The Manhattan district attorney issued a *subpoena duces tecum* ordering the Museum to produce the painting. The Museum moved to quash the subpoena and the Supreme Court of New York County ruled that under the anti-seizure statute the subpoena could not be enforced. On appeal the Appellate Division reversed the judgment of the trial court, holding that criminal process had precedence over the anti-seizure statute which was intended only to arrest civil process. The New York Court of Appeals then reversed the Appellate Division and held that the anti-seizure statute applied to criminal as well as civil process. While the New York anti-seizure statute had been invoked, the federal statute had not been, and so the United States Attorney for the Southern District of New York then obtained a seizure warrant under the National Stolen Property Act and the litigation moved to the federal courts. At length the United States District Court ended the prolix proceeding, ruling that the painting had not been "stolen" within the meaning of the federal act. There was a similar sort of case in Texas where a collection of Romanov jewels were on loan in Houston. In that case the descendant of a man whose real estate had been confiscated in Russia in 1917 moved to seize the jewels. In 1994 Russian law had agreed to restore confiscated land to its former owner and so the Act of State doctrine did not apply to forestall the suit in Texas. The federal anti-seizure statute had been properly invoked but the plaintiff asked not that the Romanov jewels be seized but only that the proceeds from their exhibitions—arguably a commercial aspect of the transaction—be seized and sequestered to the value of the real estate

¹²⁸ CONFERENZA EPISCOPALE ITALIANA, "Nuove disposizioni circa il prestito dei beni culturali di proprietà ecclesiastica," 24 March 1999, <[http://www.giurisprudenza.unimi.it/~olir/documenti/confessionali/chiesa cattolica/cei](http://www.giurisprudenza.unimi.it/~olir/documenti/confessionali/chiesa_cattolica/cei)> (7/26/02).

(\$234 millions) due her.¹²⁹ These cases demonstrate the problems of art loans and the sort of detail that needs to be worked out in advance if unpleasantness is to be avoided.

3.3.9. Responsibility for Damage to the Cultural Patrimony

A few words should be said about remedies for damage to the cultural heritage of the Church. Perhaps the first rule to be noted is that while the juridical person is liable for the valid juridical acts made on its behalf, under canon 1281, §3, it may have recourse against or recover damages from the administrator who places valid but illicit acts. Canon 128 is nearly identical to article 1283 of the French civil code on which most of that country's tort law is based. The canon provides that one who intentionally or negligently injures another by an unlawful act is bound to repair the loss. Canon 57, moreover, makes it clear that administrative acts are not shielded from this liability and, under article 123 of *Pastor bonus*, remedies in such cases can include money damages. "Illicit" here includes acts violative of universal law, particular law, personal law, customary law, or statutes and includes acts involving an abuse of power, an excess of power or a defect of competence.¹³⁰ Where there is a danger of scandal or recidivism or a loss of effectiveness in ministry, it may be necessary to remove the pastor making unlawful alienations, following the procedures of canons 1740-1747. In some circumstances there might even be a case for penal measures, invoking canon 1376 on the profanation of an immovable or movable sacred object or canon 1389 on the abuse of an ecclesiastical office or canon 1391 on the falsification of ecclesiastical documents.¹³¹

3.3.10. Pontifical Cultural Agencies

We conclude this chapter with an outline of the pontifical dicasteries with jurisdiction over cultural property. Over the centuries the popes have made use of various structures to assist them

¹²⁹ LAURA POPP, "Arresting Art Loan Seizures," in *Columbia-VLA Journal of Law and Art*, 24 (2001), pp. 216-219, 222, 223.

¹³⁰ HELMUTH FREE, "On Juridic Acts and Liability in Canon Law," in *The Jurist*, 58 (1998), pp. 495-515. The Civil law countries also recognize liability where there has been an abuse of right, i.e., the malicious, negligent, or antisocial use of one's rights. The concept developed in France in the early 1900's and has taken root in Quebec. BRIERLY and MACDONALD, *Quebec Civil Law*, p. 447.

¹³¹ ELIZABETH McDONOUGH, "Addressing Irregularities in the Administration of Church Property," in KEVIN E. MCKENNA ET AL (eds.), *Church Finance Handbook*, Washington, Canon Law Society of America, 1999, pp. 223-232.

in their pastoral office. Today the Roman Curia is a complex of dicasteries and institutes which help the Roman Pontiff in the exercise of his supreme pastoral office for the good of the whole Church and of the particular churches. It is a juridical organizational instrument dependent on the office of primacy. The Roman Curia is made up of dicasteries¹³² which are of four types, congregations, tribunals, councils and offices, as well as the Secretariat of State. The congregations are specifically entrusted with the vicarious, executive power of the Roman Pontiff with regard to the matters within their competence. The tribunals exercise the supreme judicial power of the Roman Pontiff. The pontifical councils are specifically responsible for the promotion, coordination and study of matters that do not concern the exercise of the supreme power of governance but which have to do with the pastoral government of the Church. The offices perform economic or general administrative functions for the benefit of the Curia. In general the dicasteries are juridically equal relative to each other. Within their area of competence the dicasteries have the function of addressing questions relating to the Holy See, studying pastoral problems that arise, promoting initiatives for the good of the Church, and resolving the contentious cases which come to the Apostolic See. Decisions of major importance, however, are to be referred for approval to the Roman Pontiff, except where the dicastery has special faculties. Dicasteries enjoy only vicarious executive power and that means that, while they can issue general executive decrees and instructions, they cannot issue laws or derogate from them. Conflicts of competence are to be resolved by the Apostolic Signatura.¹³³

In general a dicastery is composed of a prefect or president, a body of cardinals and bishops, a secretary, consultants, senior administrators, and a body of officials. Usually there are three groupings of members of a dicastery that make decisions for it. The *congresso* is composed of

¹³² GIUSEPPE ALBERIGO, "Serving the Communion of Churches," in PETER HUIZING AND KNUT WALF (eds.), *The Roman Curia and the Communion of Churches*, New York, Seabury Press, 1979, pp. 12-18, 24. Alberigo argues that this dicasterial system is to be criticized for obscuring the divide between legislative and executive functions and for the concept of *causae maiores*, which, tends to permit any subject deemed important to be taken up by the Roman Curia no matter how integral the matter is to particular churches. He also notes that the Roman Curia has grown greatly in size this century. In 1900 it included 185 officials. In 1932 the number had risen to 205. In 1962 officials numbered 1,322 and after the Pauline reform of 1967 their number grew to 3,146 in 1977. Ibid., p. 33. As the cardinals grew in power especially in the late Middle Ages some began to argue that the College of Cardinals existed by divine right. JOSEPH LÉCUYER, "The Place of the Roman Curia in Theology," in *ibid.*, p. 5, and BRIAN FERME, "Lyndwood and the Canon Law: The Papal *Plenitudo Potestatis* and the College of Cardinals," in NORMAN DOE, MARK HILL AND ROBERT OMBRES (eds.), *English Canon Law: Essays in Honour of Bishop Eric Kemp*, Cardiff, University of Wales Press, 1998, pp. 13-22.

¹³³ JUAN IGNACIO ARRIETA, *Governance Structures Within the Catholic Church*, Montreal, Wilson & Lafleur, Ltd., 2000, pp. 147-150.

the prefect, the secretary, the undersecretaries and the officials. The *ordinario* is a sort of executive committee session and includes as well the cardinal and bishop members present in Rome. The *plenaria* or plenary session includes all members and such meetings are held less frequently. Currently there are nine congregations and eleven councils, including the Pontifical Council for Culture.¹³⁴

Jurisdiction over culture and cultural property is exercised by several dicasteries. Sacred music and sacred art, under article 65 of the apostolic constitution *Pastor bonus* of 1988, are under the jurisdiction of the Congregation for Divine Worship, as, under article 69, are sacred relics and minor basilicas. The Congregation for the Clergy, formerly the Sacred Congregation of the Council, has under articles 97 and 98 jurisdiction over chapters of canons, churches, shrines, ecclesiastical archives and records. It also oversees the administration of church property and approves alienations.¹³⁵

The Pontifical Council for Culture has its remote origin in the Second Vatican Council. As we have seen, articles 53-62 of the pastoral constitution, *Gaudium et spes*, were devoted to the subject of culture, its importance for the integral development of man, its connection with the proclamation of the Gospel, and its mutual enrichment through the interaction of the Church with culture. Therefore in 1982 the Pontifical Council for Culture was created with an autograph letter of 20 May 1982 directed by Pope John Paul II to the Secretary of State.¹³⁶ This organ in 1993 was united with the Pontifical Council for Dialogue with Non-believers, which in turn had been created in 1965 as the Secretariat for Non-believers. The amalgamated dicastery thus has two sections, faith and culture and dialogue with cultures. It also coordinates the activities of the various pontifical academies, and it works closely with the Pontifical Commission for the Cultural Heritage of the Church.¹³⁷

¹³⁴ Ibid., pp. 151-157.

¹³⁵ PB, pp. 877, 878, 884, 885.

¹³⁶ JOHN PAUL II, apostolic letter *Fin dall'inizio*, 20 May 1982, in *AAS*, 74 (1982), pp. 683-688.

¹³⁷ JOHN PAUL II, motu proprio *Inde a Pontificatus*, 20 March 1993, in *AAS*, 85 (1993), pp. 549-552.

Today perhaps over a hundred nations have ministries of culture, which generally have the twin functions of promoting cultural affairs and preserving the cultural heritage.¹³⁸ The Pontifical Council for Culture has the former function and thus endeavors to promote the encounter of the Gospel with contemporary culture, which is often marked by unbelief or religious indifference. It endeavors to attest the profound interest of the Holy See in the progress of culture and for the dialogue of culture with the Gospel. It participates in the cultural activities of the Roman dicasteries and the cultural institution of the Holy See to facilitate their coordination. It dialogues with episcopal conferences to encourage fruitful exchanges and initiatives by local churches. It collaborates with international Catholic organizations such as universities or organizations in the field of history, philosophy, theology, science, or art with a view to encouraging their working together. It provides a presence by the Holy See at international educational, cultural and scientific congresses. It interests itself in the cultural policy and activities of governments around

¹³⁸ The French Ministry of Culture is the senior such ministry in the world. Established in July, 1959, under President Charles de Gaulle with writer André Malraux as *ministre de l'État*, the French Ministry of Culture in 1999 celebrated its fortieth anniversary and has been a huge success in its mission to encourage creativity in all its forms and to protect the archeological and artistic heritage of the French. Malraux's ministry, over which he presided for a decade, took over a number of existing functions (arts and letters, architecture, archives) which were hived off from the Ministry of Public Instruction and to which was added the Centre National de la Cinématographie, taken from the Ministry of Industry and Commerce. Its functions included operating the (some 800) national art and cultural history museums, the supervision of provincial museums, the oversight of subsidized theaters such as the Paris Opéra and the Comédie Française, and of a number of regional theatres. The novelty of the ministry was not in the state taking on new endeavors but in bringing together diverse sectors into a specialized ministry. During its first decade, the new ministry in 1964 established a National Register of Cultural Sites and Monuments, created a national archaeological excavation and site management service, and it could point to the systematic restoration of key national historic monuments, such as Versailles. Later would come a number of *grands travaux* or flagship building projects such as the Centre Pompidou with its extensive Musée National d'Art Moderne in the Beaubourg quarter of Paris and the Musée National des Arts et Traditions Populaires in the Bois de Boulogne. For the celebration of the Impressionist, post-Impressionist and Belle Epoque periods the railway station near the Assemblée Nationale on the Left Bank was transformed into the Musée d'Orsay, and the Grand Louvre project got underway as the Finance Ministry left its old quarters in the Palais du Louvre, opening vast new space for the museum. Nor were all developments in the capital. A Musée d'Art Moderne was built at Troyes and another contemporary art museum was located at Bordeaux. PATRICK J. BOYLAN, "Museum Policy and Politics in France, 1959-91," in *Museums and Europe 1992*, London, The Athlone Press, 1992, 3, p. 91.

The new ministry was also careful to build up a highly professional staff. New legislation brought about fundamental changes in the status, training and in the legal qualifications of the museum and heritage profession. The various types of staff were at length merged into a single professional classification called *conservateur du patrimoine* or heritage curator profession, which unifies the museum, archive, historic monuments, archaeology and national inventory documentation professions. Training for this field is accomplished at the *École Nationale du Patrimoine*, established in 1990. Besides training the *conservateurs du patrimoine*, the school also has trained, since 1978, private conservators through its *Institut de formation des restaurateurs d'oeuvres d'art*. This is a four-year programme training conservators in the specialties of glass and ceramics, graphic arts, textiles, metalwork, paintings, sculpture and photography. To attract quality staff pay for *conservateurs de patrimoine* was put on a par with that of other sectors of the civil service. See *ibid.*, pp. 108-109.

the world. It organizes a dialogue between the church and universities, artists, and scholars to promote and encounter their significance in the cultural universe. It brings to Rome people from around the world who desire to know better the cultural activity of the Church and to give the Holy See the benefit of their experience. It promotes the relations of the Holy See with the world of culture and for this reason this dicastery is the Holy See's designated representative to number of international inter-governmental organizations. In this respect it has coordinated cultural exhibits with the Council of Europe on the importance of monasteries in European culture. To an ecology exhibit it contributed an exhibit on the historical import and development of water and the baptismal font. Through the Organization for Cooperation and Security of Europe it has worked with other ecclesial communities and religious bodies on the important matter of theft of church cultural property. The dicastery also maintains relations between the Holy See and various episcopal conferences. It also works closely with the Pontifical Commission for the Cultural Heritage of the Church. The dicastery stands as mute testimony of Pope John Paul II's belief in the importance of culture. In November 1979 he told a consistory of cardinals specially convoked in Rome, "I intend to devote myself to the problems of culture, science, and the arts." Later in his 2 June 1980 address to UNESCO he said, "the future of man depends on culture."¹³⁹

The Pontifical Council for Culture is a small dicastery consisting of, at its offices in Piazza Calisto 16, a president, a secretary, an undersecretary and seven officials along with four administrative assistants. The Council itself includes, besides the president, eighteen cardinals and fourteen bishops drawn from throughout the Catholic world. It meets in plenary session once a triennium. The Council also enjoys the services of some twenty-five consultants drawn from throughout the world. It publishes a trilingual (French, English and Spanish) quarterly periodical called *Cultures and Faith*.¹⁴⁰

Charged with the preservation of the Church's cultural heritage is the Pontifical Commission for the Cultural Heritage of the Church. The Commission was originally created in 1988 by articles 99-104 of the apostolic constitution, *Pastor bonus*, as the Pontifical Commission for Preserving the Patrimony of Art and History of the Church and it was located within Congregation for the

¹³⁹ HERVÉ CARRIER, *Cultures: notre avenir*, Rome, Presses de l'Université Gregorienne, 1985, pp. 175-180.

¹⁴⁰ JOHN PAUL II, motu proprio *Inde a pontificatus*, 20 March 1993, in *AAS* 85 (1993), p. 551; *Annuario Pontificio per l'anno 2003*, [=Annuario] Città del Vaticano, Libreria Editrice Vaticana, 2003, pp. 1155-1156, 1713.

Clergy. The Congregation, under articles 97 and 98 of the same constitution, has subject matter jurisdiction over church archives and records as well as church property in general. In 1993, the Commission became an independent commission with the legal duty to cooperate with the Pontifical Council for Culture and its name was changed to the present one. Located in the Palace of the Apostolic Chancery, its staff consists of a president, a secretary, and five officials. The Commission includes ten cardinals and eighteen bishops along with sixteen other members and enjoys the services of some forty consultants. Its work includes the technical aspects relating to the preservation of cultural property and in this regard it works with UNESCO, the Council of Europe and other international inter-governmental organizations and non-governmental organizations involved in historic preservation.¹⁴¹

While amongst the most recent of Roman dicasteries, the Commission has antecedents, however, that take it back institutionally several decades. It has links with the Pontifical Central Commission for Sacred Art in Italy established in 1924 by Pius XI and the Pontifical Commission for the Ecclesiastical Archives of Italy. The former Commission was to guarantee the reasonable preservation of the art of the past and to promote the increase of good art while exercising vigilance against bad art. It established several divisions. The first was liturgy, archeology and history. The second was architecture. The third was painting and the fourth was sculpture. While the Commission was established for Italy alone, its work was made known to other lands as well. In the 1930's it endeavoured to maintain a sense of Christian art and devoted several Sacred Art Weeks to promoting sacred art. As a consequence of the destruction of World War II, thereafter it came to work for the reconstruction and restoration of damaged or destroyed church fabrics. The revision of structures after the Villa Madama accord in 1984 with Italy led the Italian Episcopal Conference in 1989 to establish the National Advisory Council for Ecclesiastical Cultural Property. At the same time *Pastor bonus* had created the Pontifical Commission for the Preservation of the Artistic and Historical Patrimony of the Church. The upshot was that the functions of the 1924 Commission were transferred to the Italian episcopal body. At the same time to expedite old business the officials of the new pontifical commission were put in charge of the 1924 body which continued to work with the Italian state. The Pontifical Commission for Archives passed out of existence *sub silentio* with the integral reorganization of the Roman Curia effected by *Pastor bonus*. In 1993 the Pontifical Commission for the Conservation of the Artistic

¹⁴¹ PB, pp. 884-886; *Annuario*, pp. 1176-1178, 1728.

and Historical Patrimony of the Church became the Pontifical Commission of the Cultural Property of the Church and was separated from the Congregation for the Clergy.¹⁴²

While these dicasteries have primary responsibility for promoting endeavors with respect to the promotion of culture and the preservation of the Church's heritage, with regard to the alienation of *res pretiosa* a number of other congregations have subject matter jurisdiction and we should briefly refer to them. With respect to property of dioceses and parishes, the Congregation for the Clergy has jurisdiction to approve alienations. Established in 1564 as the *Sacra Congregatio Cardinalium Concilii Tridentini interpretum*, the Sacred Congregation of Cardinals for the Interpretation of the Council of Trent, it remained the Sacred Congregation of the Council until 1967 when Paul VI changed its name to the Congregation for the Clergy. Its Office of the Clergy has jurisdiction over cathedral chapter, pastoral councils, presbyteral council, parishes, parish priests, and clerics as well as churches, oratories, shrines and ecclesiastical libraries and archives. Its Third Office has jurisdiction over alienations under canons 1292 and 1295.¹⁴³

The Congregation for the Evangelization of Peoples was created in 1622 as the Congregation for the Propagation of the Faith and it has competence for the church's missionary activity. As such it has jurisdiction over those mission lands, whether dioceses, vicariates or prefectures apostolic, or autonomous missions, and has competence to approve alienations there made under canon 1292.¹⁴⁴ The Congregation for the Eastern Churches was created in 1917 by separating from Propaganda its oriental section created in 1862. It has with respect to Eastern Catholics the powers of the Congregation for the Clergy and so has competence over alienations.¹⁴⁵ The Congregation for Institutes of Consecrated Life and Societies of Apostolic Life was established in 1586 as the Sacred Congregation for Consultations about Regulars. In 1908 it became the Sacred Congregation for Religious and in 1967 secular institutes were added to its charge. *Pastor bonus* changed its name to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life. It has jurisdiction over members of religious and secular institutes, members of

¹⁴² CARLO CHENIS, "I beni culturali della Chiesa: criteri generali e quadro istituzionale," in *Seminarium*, 39 (1999), pp. 262-266; JOHN PAUL II, motu proprio *Inde a Pontificatus*, 20 March 1993, in *AAS*, 85 (1993), p. 551; CARMELO CAPIZZI, "La Chiesa per il suo Patrimonio artistico e storico: a proposito di una nuova Commissione Pontificia," in *La Civiltà cattolica*, 141:2 (1990), p. 26.

¹⁴³ PB, pp. 884-885; *Annuario*, pp. 1702-1703.

¹⁴⁴ PB, pp. 881-883; *Annuario*, pp. 1701-1702.

¹⁴⁵ PB, pp. 874-876; *Annuario*, p. 1697.

societies of apostolic life, consecrated virgins and secular third orders. It also has jurisdiction over alienations by such institutes if of pontifical right.¹⁴⁶

This, then, has been a commentary on the canons on cultural property law of the Latin Code of Canon Law. On February 5, 1997 Monsignor Francesco Marchisano, President of the Pontifical Commission for the Cultural Heritage of the Church, addressed a conference entitled, "Taking Stock of Our Ecclesiastical Heritage", hosted at Kilkenny Castle by The Heritage Council of Ireland. Painting with a broad brush, he spoke of the measures taken by the Church over the centuries for the preservation of the cultural heritage. He noted the initiatives of Pope Zeferinus in the second century for the making of systematic inventories of church property, the care of Pope Gregory the Great for sacred art in the sixth century, the measures in the fifteenth century of Pope Pius II for the conservation of antiquities, and the famous edict of the Cardinal Camerlengo Pacca of 1820, which is the ancestor of much state cultural heritage legislation today. Not surprisingly, the themes he mentioned—information, awareness, training—were as old as the preservation movement itself. One needs to know about the cultural richness of one's heritage and the material evidence of it in one's possession. One needs also to understand how and why it came into being and—to the extent possible—one needs to know how it can continue in the cause of the Gospel message. Finally one needs training to know how to secure its conservation either by one's own efforts or by experts trained in a particular field.

As something of a proof text for the value of heritage, he quoted Pope John Paul II whom he said had told him the following many times:

If I was able to do some good to those afar when I was Archbishop of Cracow, it was because I always began with the cultural heritage, which has a language everyone knows and everyone accepts and using this language I was able to start a dialogue which would not have been possible otherwise.¹⁴⁷

¹⁴⁶ PB, pp. 886-888; *Annuario*, pp. 1703-1704.

¹⁴⁷ FRANCESCO MARCHISANO, "The Cultural Heritage of the Catholic Church," in THE HERITAGE COUNCIL OF IRELAND, *Taking Stock of Our Ecclesiastical Heritage*, <<http://www.heritagecouncil.ie/publications/ecclesiastical/cathchurch.html>> (8/16/2000), pp. 2,3,5.

One cherishes the hope that public authorities in the Church beneath the Supreme Pontiff will share his respect for and indeed enthusiasm for the Church's cultural heritage and that all those responsible for its care will become informed of its presence, aware of its value—including its potential for a protean role in evangelization—and trained or motivated to attract those trained for its conservation. Indeed the need remains for “information, awareness, and training.” One hopes as well that in the light of the norms on culture and the civil law of cultural property in Chapter 1, the canonical tradition set forth in Chapter 2, and the commentary of this Chapter that the canons on *res pretiosa* designed for the preservation of the church's cultural heritage will have deeper and more coherent significance.

that this church property ought not cease to have religious use nor merely be relegated to museums. Not only would the Church's collective memory and communion with the past suffer from such repose, but also where religious use ceases the property is liable to be appropriated by the public authorities of the state as cultural property. At the same time, these circular letters appear to recognize the legitimate interest of the state authorities in such property.

Our question is whether *res pretiosa* has become the canon law of cultural property of the Latin Church after the coming into effect of the 1983 Code of Canon Law and what is its origin and what are its current norms. We have explored the second part of the question in detail in Chapters 2 and 3 and looked at the first part of the question in the section of Chapter 3 on the meaning of *res pretiosa* in the 1983 Code. Now it is time to answer that part of the question succinctly.

We noted that canons 638 and 1292 follow the usage of the circular letter, *Opera artis*, and describe property valuable by reason of its artistic or historical character. Since that circular dealt with cultural property and since the circular is given as a source for both of these canons, it would seem that both the *ipsissima verba* and the source, the text and the context as canon 17 calls it, argue that the 1983 Code intends *res pretiosa* to have a new or, at least, narrower meaning than it had in canon 1497 of the 1917 Code. This suggests that that protean concept of *res pretiosa* has again proved its juridical agility and has again taken on a new meaning and now reflects the transformation that Alsop described of property valuable for its artistic or historical rather than its material character.

Yet there are contra-indications as well and these must be addressed. As we have seen in section 3.2 above, Kennedy has argued that the lack of a definition of "valuable" in the 1983 Code coupled with the competing description of valuable image in RCIC canon 1189 and the different description of "valuable" in CCEO canon 1019 (which is really the same as the CIC's definition of *res pretiosa* in canon 1497, §2) leads one, by way of the canon of interpretation in canon 6, §2, back to the definition contained in CIC canon 1497, §2. Martín de Agar, we have seen, came to a similar conclusion relying on the dissonance between RCIC canon 1189 and RCIC canons 638 and 1292.

The latter difficulty I do not find persuasive, inasmuch as there seems no a priori reason why "valuable images" need to be described in the same way as "valuable things." One might think

Conclusions

We have seen the rise of cultural property law first in the public international law of war and more recently in peacetime international law and with the rise of the right to culture now enshrined in the Universal Declaration of Human Rights and in international human rights law and we have seen that, in canon law as in civil law, the right to culture—*Gaudium et spes's ius ad beneficia culturae*—remains an underdeveloped right.

We have also seen the spread of historic preservation law to the common law world where, from its zoning law origins, it represents a mighty challenge to the brooding shade of Adam Smith and we have seen how rapidly the cultural heritage or historic preservation laws in the common law world have developed in the last four decades of the twentieth century. We noted as well that in Britain the Newman Report in 1997 recommended the ending of the ecclesiastical exemption and also we noted how in the Boerne and St. Bartholomew cases the American courts when balancing the respective merits of historic preservation laws and the Free Exercise Clause of the First Amendment opted in favor of the former. Indeed, we may say that cultural property now enjoys the *favor iuris*.

We also traced—in a fast gallop across sixteen centuries of legal history—the notion of *res pretiosa* from its origins in the Roman law of guardian and ward to its borrowing by canon law. The borrowed concept was then refined by generations of legists and canonists schooled in the *ius commune* and latterly transformed from all those valuable chattels—movable property *quae servando servari possunt*—to that property which is only valued *artis vel historiae vel materiae causa*. But in the course of this protean juridical development the mechanics of which we explored in some detail in Chapter 2, we also saw the doleful and melancholy lament of *Opera artis* after Vatican II.

We have seen the heightened concern for cultural property in the 1983 Code and have seen that in RCIC canons 638 and 1292 *res pretiosa* is described merely as property valuable for its artistic or historical character. In the circular letters of the Pontifical Commission for the Cultural Heritage of the Church we saw repeated pleas that the property born in faith and as a result of the caritative and other apostolic endeavors of Christ's faithful be continued in use, at least occasionally, so far as its state of conservation and liturgical and other norms permit. The sub-text in these pleas is

that valuable images would be a subset of valuable things, that images would be a subset of “things” and so valuable images a subset of valuable things. But it is not inconceivable that the law might describe valuable images to include images valuable by reason of their venerated character as well as images valuable by reason of their artistic and historical character—even if such character would not make them “valuable” things and thus that there might be valuable images that are not valuable things. The difficulty to my mind really comes when one looks to be “second lung”—in this case CCEO canon 887—and sees that CCEO canons 887 and 888 have removed the troublesome *aut cultu* found in RCIC canon 1189 and so solved the problem that Martín de Agar raises. Pope John Paul II has told us the 1983 and 1990 Codes are part of a *corpus iuris*. This suggests that RCIC canon 1189 contains, not a minor redaction problem, but a more fundamental drafting problem. When this is added to the robust adherence by CCEO canon 1019 to the language in PA canon 234 (and nearly that of CIC canon 1497, §2)—*quae magni sunt momenti, artis vel historiae vel materiae causa*—the argument based on text and context seems less compelling than the “second lung” and canon 6, §2, argument. Nor does the argument we rehearsed in section 3.2 that tries to link *Opera artis*, the descriptions in RCIC canons 638 and 1292, and the articles 99-104 of *Pastor bonus* and *Unde a pontificatus* seem sufficiently compelling to overcome the force of the “second lung” or *corpus iuris* argument and the canon of interpretation in RCIC canon 6.

The upshot must be that we answer our question of whether *res pretiosa* has become the canon law of cultural property in the negative, if we mean to ask if the expressions are equivalent. It must be clear that cultural property is included within the term *res pretiosa*. However, following via RCIC canon 6 our way back to CIC canon 1497, §2, we must conclude that under the 1983 Code *res pretiosa* still includes property intrinsically valuable as well as property valuable by reason of its artistic or historical character and so that “cultural property” and *res pretiosa* in the 1983 Code are not identical.

This result seems a misfortune, however. We have seen how the concept of *res pretiosa* has been usefully transformed from a synonym for valuable chattels in Roman law to a narrower usage in the 1917 Code designed to protect the Church’s artistic and historical patrimony, as well as certain other valuable chattels. Nevertheless, since Vatican II the documents about the Roman Curia and those emanating from the Roman Curia regarding *res pretiosa* seem to have referred more narrowly to cultural property—*res pretiosa artis vel historiae causa*—and so it would seem desirable to narrow the meaning of *res pretiosa* in the *ius vigens* to cover those artistic and

historical cases only. Hence, it seems needful for the Supreme Legislator to supply a remedy for this situation.

CCEO canons 887 and 888 have shown the way for reforming RCIC canons 1288 and 1289 so that venerated as well as artistic and historical images can be protected both from ill-considered restoration and transfer. It would seem advisable for the Supreme Legislator to amend RCIC canons 1189 and 1190 to use the language of CCEO canons 887 and 888, suitably Latinized. This amendment takes care of the troublesome *aut cultu* of RCIC canon 1189 and removes the dissonance in the use of *pretiosa* in the 1983 Code.

The next task is to provide a uniform description of *res pretiosa* in both the 1983 and 1990 Codes. Hence, CCEO canon 1019 should be amended to strike the words *vel materiae* in that canon. The aim here is to conform both Codes to international law and not to Latinize oriental law and so I do not see this change to the CCEO as objectionable. The reform of the Latin Code could be handled in a couple of ways. With the dissonant language removed from RCIC canon 1189, the words *artis vel historiae causa* in RCIC canons 638 and 1292 could be left to describe the parameters of what is now valuable. In view of the “second lung” interpretations, however, it might be better to strike this language in these canons and instead insert in RCIC canon 1270, the canon of the 1983 Code which corresponds to CCEO canon 1019, language identical to that which would now appear in the revised CCEO 1019, viz., *res immobiles, res mobiles pretiosae, quae scilicet magni sunt momenti artis vel historiae causa...* The amendment of the corresponding canon would make it clear that the terms, described in identical language in corresponding canons, are intended to have the same meaning in both codes. The upshot would then be that *res pretiosa* would be seen to have been narrowed to have become cultural property only in both the 1983 Latin Code and in the 1990 Eastern Code. These, then, are our conclusions with regard to universal canon law.

We also offer some suggestions for particular law. There is an old tradition of legal borrowing in the common law world. The similarity of heritage and intellectual property laws in the common law world is no accident. Nor has the spread of institutions like the National Trust, which exists, not only in England and Wales but also in Scotland, Ireland, the United States and Australia, been mere happenstance.

The time seems ripe for another borrowing—this time in the realm of canon law. Those who rule as vicars and legates of Christ the particular churches of the Latin Church in the common law world outside Britain would do well to borrow the institute known as the Historic Churches Committee and the set of procedures created by the Bishops' Conference of England and Wales and its Sub-Committee on Church Patrimony and put them in place in their own territories. These bishops would thereby implement the decree of Vatican II's *Sacrosanctum concilium*, articles 46 and 126, which ordered that in each diocese commissions on sacred art be established to provide expert advice on such matters. Such committees, if truly expert in art history and architectural history as well as liturgiology, would be invaluable. As developed by the English bishops, the Historic Churches Committee provides a flexible but sufficient body of experts who can knowledgeably evaluate proposed works to historic churches and judge their prudence *vel non* as the bishop's delegate under canon 1281. As we have seen these procedure comport with the canons on administrative acts and administrative recourse.

They also comport with the requirements of natural justice by providing for adequate notice of proposed work and an opportunity for a hearing. The proposed work must be clearly set forth and a short but reasonable time for the presentation of evidence is permitted. One of the greatest problems that the present writer has noticed in the course of fifteen years of advocacy work in canon law in the United States is that proposed church renovations in the United States rarely set forth clearly the proposed work. Nor are parishioners given adequate notice nor is there a structured proceeding in which evidence can be submitted by interested parties. Nor is the maxim *nemo iudex in causa sua* respected, for the pastor will generally serve as "promoter of justice" and adjudicator. Faced with a clergy shortage, Christ's vicar and legate will then usually rubber-stamp the pastor's proposal without benefit of a hearing and, if recourse is made to Rome, the proposed work will be marketed there as the considered opinion of the diocesan bishop adopted within his proper ambit of discretionary authority under current understanding of the principle of subsidiarity. Unless there is some obvious technical defect such as the failure of the bishop to hear the advice of his prebyteral council under canons 515, §2 or 1222, §2, the Roman dicastery will then "back the bishop" and confirm his decree. If the interested parties prove somewhat dogged, they may take an appeal to the second section of the Apostolic Signatura, which will then dismiss the appeal *in limine* and stamp it *manifeste caret fundamentum iuris*. The work will then proceed and some, perhaps many, of Christ's faithful will likely be soured on what has perhaps

been their first encounter with ecclesiastical justice, for they will never have had a chance to state their case.

It would prosper juridical economy and be far more pastoral and reflective of the last four words of the Code of Canon Law for Christ's vicars and legates to provide the people whose care is entrusted to them with a simple, intelligible and fair administrative process in church renovation cases modeled on that created by the English bishops. Not to do so, in the experience of many bishops, invites people to explore possibilities in the civil forum and litigation there is seldom as swift and cheap as a full and fair canonical administrative procedure would have been.

As in England, the Historic Churches Committee and its administrative procedure could be tailored to fit various ecclesiastical circumscriptions. In most places it would probably be prudent to structure the committee on a province-wide basis so as to attract the necessary expertise. In the fifty American States where there are thirty-three provinces and it may even be desirable there to base the committee on the region. The United States is divided into thirteen "regions" and region I, for example, includes the New England states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut. This forms an identifiable cultural unit, even if currently encompassing the two ecclesiastical provinces of Boston and Hartford, this might well prove a desirable circumscription for an Historic Churches Committee.¹⁴⁸ On the other hand, a Historic Churches Committee might just as well be established under the particular law of a diocese. If the diocesan finance committee provides continuity and ready recourse to expertise to ensure the financial health of a particular church, the creation of an Historic Churches Committee and a set of procedures similar to those devised by the bishops of England and Wales would provide continuity and ready access to expertise to ensure the preservation of the art-historical patrimony of a particular church.

This, then, has been a gallop across a section of the legal history of the West and a look at the canon law of *res pretiosa* from its origins in the Roman law of guardian and ward through to the present day along with a look at the secular law of cultural property in the context of international law and the municipal law of the common law world. The hope is that three disparate chapters have gained some coherence in the telling of the tale and that the reader now has a grasp of that portion of canon law with its secular law context. The context is too vast to be told in anything

¹⁴⁸ These regions are set forth in *The Official Catholic Directory Anno Domini 1994*, New Providence, NJ, P.J. Kenedy & Sons, New, 1994, p. lxi.

more than summary form but I hope my overview has answered more questions than it has raised—even if the painting was done with a broad brush. Inevitably my readers will be the judges of my success *vel non*.

Appendix 1.

The Apostolic Constitution *Ambitiosae*

Paulus Venetus Papa II.

Ambitiosae cupiditati, illorum praecipue, qui divinis et humanis affectati, damnatione postposita, immobilia et pretiosa mobilia Deo dicata, ex quibus ecclesiae, monasteria et loca pia reguntur illustranturque et eorum ministri sibi alimoniam vindicant, profanis usibus applicare, aut cum maximo illorum ac divini cultus detrimento exquisitis mediis usurpare praesumunt, occurrere cupientes, omnium rerum et bonorum ecclesiasticorum alienationem, omneque pactum per quod ipsorum dominium transfertur, concessionem, hypothecam, locationem et conductionem ultra triennium, nec non infeudationem vel contractum emphyteuticum, praeterquam in casibus a iure permissis, ac de rebus et bonis in emphyteusim ab antiquo concedi solitis, et tunc ecclesiarum evidenti utilitate, ac de fructibus et bonis, quae servando servari non possunt, pro instantis temporis exigentia, hac perpetuo valitura constitutione praesenti fieri prohibemus, praedecessorum nostrorum constitutionibus, prohibitionibus et decretis aliis super hoc editis, quae tenore presentium innovamus, in suo nihilominus robore permansuris. Si quis autem contra huius nostrae prohibitionis seriem de bonis et rebus eisdem quicquam alienare praesumserit: alienatio, hypotheca, concessio, locatio, conductio, infeudatio huiusmodi, nullius omnino sint roboris vel momenti, et tam qui alienat, quam is, qui alienatas res et bona praedicta receperit, sententiam excommunicationis incurrat. Alienanti vero bona ecclesiarum, monasteriorum locorumque piorum quorumlibet, inconsulto Romano Pontifice aut contra praesentis constitutionis tenorem, si pontificali vel abbatiali praefulgeat dignitate, ingressus ecclesiae sit penitus interdictus. Et si per sex menses immediate sequentes sub interdicto huiusmodi animo (quod absit) perseveraverit indurato: lapsis mensibus eisdem a regimine et administratione suae ecclesiae vel monasterii, cui praesidet, in spiritualibus et temporalibus sit eo ipso suspensus. Inferiores vero praelati, commendatarii, et aliarum ecclesiarum rectores, beneficia vel administrationem quomodolibet obtinentes, prioratibus, praepositis, praepositatibus, dignitatibus, personatibus, administrationibus, officiis, canonicatibus, praebendis, aliisque ecclesiasticis cum cura et sine cura saecularibus et regularibus beneficiis, quorum res et bona alienarunt duntaxat, ipso facto privati existant, illaque absque declaratione aliqua vacare censeantur, possintque per locorum ordinarios, vel alios, ad quos eorum collatio pertinet, personis idoneis, (illis exceptis quae propterea privatae fuerint,) libere de iure conferri, nisi alias dispositioni apostolicae sedis sint specialiter aut generaliter reservata; nihilominus alienatae res et bona huiusmodi ad ecclesias, monasteria et loca pia, ad quae ante alienationem huiusmodi pertinebant, libere revertantur. Nulli ergo omnino hominum liceat hanc paginam nostrae prohibitionis et innovationis infringere, vel ei ausu temerario contraire. Si quis hoc attentare praesumpserit: indignationem omnipotentis Dei, et beatorum Petri et Pauli Apostolorum eius se noverit incursurum. Datum Romae apud sanctum Marcum anno Dom. Incarn. MCCCCLXVIII. Kal. Mart. Pont. Nostri Ao. IV.¹

¹ AEMILIUS FRIEDBERG (ed.), *Corpus Iuris Canonici*, 2 vols., editio Lipsiensis secunda, Lipsiae, Ex Officina Bernhardi Tauchnitz, 1922, II, p. 1270. Inasmuch as with the Julian calendar then in use the year began 25 March, Friedberg notes that the year was more accurately 1467. In the Gregorian style it would be 1468.

Appendix 2.
Canons of the 1917 Code Containing the Word *Pretiosus*¹

Canon 534.

§1. Firmo praescripto can. 1531, si agatur de alienandis rebus pretiosis aliisve bonis quorum valor superet summam triginta millium francorum seu libellarum, vel de contrahendis debitis et obligationibus ultra indicatam summam, contractus vi caret, nisi beneplacitum apostolicum antecesserit; secus, requiritur et sufficit licentia, in scriptis data, Superioris ad normam constitutionum cum consensu sui Capituli seu Consilii per secreta suffragia manifestato; sed si agatur de monialibus aut sororibus iuris diocesani, accedat necesse est consensus, in scriptis praestitus, Ordinarii loci, necnon Superioris regularis, si monialium monasterium eidem subiectum sit.

§2. In precibus pro obtinendo consensu ad contrahenda debitu vel obligationes, exprimi debent alia debita vel obligationes, quibus ipsa persona moralis, religio vel provincia vel domus, ad eum diem gravatur, secus obtentu venia invalida est.²

§ 1. With due regard for the prescription of Canon 1531, if it concerns the alienation of precious goods or those [goods] whose value exceeds the sum of thirty-thousand francs or lire, or contracting debts and obligations beyond this indicated sum, the contract lacks force unless apostolic good pleasure has preceded it; otherwise, the permission of the Superiors according to the norm of the constitution, with the consent of the Chapter or the Council manifested by secret vote given in writing, is required and suffices; but if it concerns nuns or sisters of diocesan right, consent is additionally necessary from the local Ordinary given in writing and [that of] the regular Superior if the monastery of nuns is subject to him.

§2. In the request to obtain consent to contract debts or obligations, there must be expressed those other debts or obligations by which the moral person or religious [institute] or province or house is bound at that time; otherwise the consent is invalid.³

Canon 1280.

Imagines pretiosae, idest vetustate, arte, aut cultu praestantes, in ecclesiis vel oratoriis publicis fidelium venerationi expositae, si quando reparatione indigeant, nunquam restaurentur sine dato scriptis consensu ab Ordinario; qui, antequam licentiam concedat, prudentes ac peritos viros consulat.⁴

Precious images, that is, those outstanding by virtue of age, art, or cult, exposed in churches or public oratories for the veneration of the faithful, if sometimes they should require repair, shall

¹ ARTHUR LAUER, *Index verborum codicis iuris canonici*, Romae, Typis Polyglottis Vaticanis, 1941, p. 477 s.v. "pretiosus."

² *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XI auctoritate promulgatus, praefatione, fontium annotatione et indice analytico-alphabetico ab Emo Petro Card. Gasperi auctus*, Neo-Eboraci, P. J. Kenedy & Sons, 1918, pp. 153-154.

³ EDWARD N. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law in English Translation with Extensive Scholarly Apparatus*, San Francisco, Ignatius Press, 2001, p. 207.

⁴ CIC, p. 370.

never be restored without consent from the Ordinary given in writing, who before granting this permission shall consult wise and expert men.⁵

Canon 1281.

§1. Insignes reliquiae aut imagines pretiosae itemque reliquiae aut imagines quae in ecclesia magna populi veneratione honorentur, nequeunt valide alienari neque in aliam ecclesiam perpetuo transferri sine Apostolicae Sedis permissu.

*§2. Insignes Sanctorum vel Beatorum reliquiae sunt corpus, caput, brachium, antibrachium, cor, lingua, manus, crus aut illa pars corporis in qua passus est martyr, dummodo sit integra et non parva.*⁶

§1. Important relics or precious images and likewise other relics or images that are honored in some church with a great veneration of the people cannot validly be alienated or perpetually transferred to another church without the permission of the Apostolic See.

§2. The important relics of Saints or Blessed are the body, head, arm, forearm, heart, tongue, hand, leg, or other part of the body that suffered in a martyr, provided it is intact and is not little.⁷

Canon 1497.

§1. Bona temporalia, sive corporalia, tum immobilia tum mobilia, sive incorporalia, quae vel ad Ecclesiam universam et ad Apostolicam Sedem vel ad aliam in Ecclesia personam moralem pertineant, sunt bona ecclesiastica.

*§2. Dicuntur sacra, quae consecratione vel benedictione ad divinum cultum destinata sunt; pretiosa, quibus notabilis valor sit, artis vel historiae vel materiae causa.*⁸

§1. 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 are ecclesiastical goods.

§2. They are called sacred if with consecration or blessing they are destined for divine cult; [they are called] precious if they are of notable value by reason of art, history, or material.⁹

Canon 1511.

§1. Res immobiles, mobiles pretiosae, iura et actiones sive personales sive reales, quae pertinent ad Sedem Apostolicam, spatio centum annorum praescribuntur.

*§2. Quae ad aliam personam moralem ecclesiasticam, spatio viginti annorum.*¹⁰

⁵ PETERS, pp. 433-434.

⁶ CIC, p. 370.

⁷ PETERS, p. 434.

⁸ CIC, p. 436.

⁹ PETERS, p. 500.

§1. Immovable things precious movable things, rights, and action, whether personal or real, that pertain to the Apostolic See are prescribed by a period of one hundred years.

§2. Those of another ecclesiastical moral person [are prescribed] by a period of thirty years.¹¹

Canon 1522.

Antequam administratores bonorum ecclesiasticorum, de quibus in can. 1521, suum munus ineant:

1. *Debent se bene et fideliter administraturos coram Ordinario loci vel vicario foraneo iureiurando cavere;*
2. *Fiant accuratum ac distinctum inventarium, ab omnibus subscribendum, rerum immobilium, rerum mobilium pretiosarum aliarumve cum descriptione atque aestimatione earundem; vel factum antea inventarium acceptetur, adnotatis rebus quae interim amissae vel acquisitae fuerint;*
3. *Huius inventarii alterum exemplar conservetur in tabulario administrationis, alterum in archivio Curiae, et in utroque quaelibet immutatio adnotetur quam patrimonium subire contingat.*¹²

Before administrators enter into their office regarding ecclesiastical goods mentioned in Canon 1521:

1. They must offer an oath to [conduct] well and faithfully their administration in the presence of the local Ordinary or the vicar forane;
2. They must produce an accurate and detailed inventory of all subscriptions, immovable goods, precious movable goods, and other things, with a description and their valuation; or if they take an inventory already made, they shall note which things in the meantime have been lost or acquired;
3. One copy of this sort of inventory is to be preserved in the records of administration, another in the archive of the Curia; and in both any change should be noted that touches [negatively] the patrimony.¹³

Canon 1532.

1. *Legitimus Superior de quo in can. 1530, § 1, n. 3, est Sedem Apostolica, si agatur:*
 1. *De rebus pretiosus;*
 2. *De rebus quae valorem excedunt triginta millium libellarum seu francorum.*
2. *Si vero agatur de rebus quae valorem non excedunt mille libellarum seu francorum, est loci Ordinarius, audito administrationis Consilio, nisi res minimi momenti sit, et cum eorum consensu quorum interest.*
3. *Si denique de rebus quarum pretium continetur intra mille libellas et triginta millia libellarum seu francorum, est loci Ordinarius, dummodo accesserit consensus tum Capituli cathedralis, tum Consilii administrationis, tum eorum quorum interest.*

¹⁰ CIC, p. 439.

¹¹ PETERS, p. 505.

¹² CIC, pp. 442-443.

¹³ PETERS, p. 509.

4. *Si agatur de alienanda re divisibili, in petenda licentia aut consensu pro alienatione exprimi debent partes antea alienatae; secus licentia irrita est.*¹⁴

§1. The legitimate Superior mentioned in Canon 1530, §1, n. 3 is the Apostolic See if it concerns:

1. Precious things;
2. Things whose value exceeds thirty thousand lira or francs.

§2. If it concerns things whose value does not exceed thirty thousand lira or francs, it is the local Ordinary, having heard the Council of administration, unless the thing is of minimal importance, and with the consent of those who are interested.

§3. If, finally, the price of the goods falls between one thousand lira and thirty thousand lira or francs, it is the local Ordinary, provided he has the consent either of the cathedral Chapter or of the Council of administration, and of those who are interested.

§4. If it concerns the alienation of divisible things, in requesting the permission or consent for alienation there must be expressed those parts alienated beforehand; otherwise the permission is invalid.¹⁵

¹⁴ CIC, p. 446.

¹⁵ PETERS, p. 513.

Appendix 3.
Canons of the 1983 Code Containing the Word *Pretiosus*¹

Canon 638.

§1. *Ad ius proprium pertinet, intra ambitum iuris universalis, determinare actus qui finem et modum ordinariae administrationis excedunt, atque ea statuere quae ad valide ponendum actum extraordinariae administrationis necessaria sunt.*

§2. *Expensas et actus iuridicos ordinariae administrationis valide, praeter Superiores, faciunt, intra fines sui muneris, officiales quoque, qui in iure proprio ad hoc designantur.*

§3. *Ad validitatem alienationis et cuiuslibet negotii in quo condicio patrimonialis personae iuridicae peior fieri potest, requiritur licentia in scripto data Superioris competentis cum consensu sui consilii. Si tamen agatur de negotio summam a Sancta Sede pro cuiusque regione definitam superet, itemque de rebus ex voto Ecclesiae donatis aut de rebus pretiosis artis vel historiae causa, requiritur insuper ipsius Sanctae Sedis licentia.*

§4. *Pro monasteriis sui iuris, de quibus in can. 615, et institutis iuris diocesani accedat necesse est consensus Ordinarii loci in scriptis praestitus.*²

§1. It is for an institute's own law, within the limits of the universal law, to define the acts which exceed the purpose and the manner of ordinary administration, and to establish what is needed for the validity of an act of extraordinary administration.

§2. Besides Superiors, other officials designated for this task in the institute's own law may, within the limits of their office, validly make payments and perform juridical acts of ordinary administration.

§3. For the validity of alienation, and of any transaction by which the patrimonial condition of the juridical person could be adversely affected, there is required the written permission of the competent Superior, given with the consent of his or her council. Moreover, the permission of the Holy See is required if the transaction involves a sum exceeding that which the Holy See has determined for each region, or if it concerns things donated to the Church as a result of a vow, or objects which are precious by reason of their artistic or historical value.

§4. For the autonomous monasteries mentioned in can. 615, and for institutes of diocesan right, the written consent of the local Ordinary is necessary.³

Canon 1189.

*Imagines pretiosae, idest vetustate, arte, aut cultu praestantes, in ecclesiis vel oratoriis fidelium venerationi expositae, si quando reparatione indigeant, numquam restaurentur sine data scripto licentia ab Ordinario; qui, antequam licentiam concedat, peritos consulat.*⁴

¹ XAVIERUS OCHOA, (ed.), *Index verborum ac locutionum Codicis iuris canonici*, 2d ed., Città del Vaticano, Libreria Editrice Lateranense, 1984, p. 373.

² *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Città del Vaticano, Libreria Editrice Vaticana, 1989, p. 177.

³ CAPARROS, pp. 441-442.

The written permission of the Ordinary is required to restore precious images needing repair: that is, those distinguished by reason of age, art or cult, which are exposed in churches or oratories to the veneration of the faithful. Before giving such permission, the Ordinary is to seek the advice of experts.⁵

Canon 1190.

§1. *Sacras reliquias vendere nefas est.*

§2. *Insignes reliquiae aut itemque aliae quae magna populi veneratione honorantur, nequeunt quoquo modo valide alienari neque perpetuo transferri sine Apostolicae Sedis licentia.*

§3. *Praescriptum § 2 valet etiam pro imaginibus, quae in aliqua ecclesia magna populi veneratione honorantur.*⁶

§1. It is absolutely wrong to sell sacred relics.

§2. Distinguished relics, and others which are held in great veneration by the people, may not validly be in any way alienated nor transferred on a permanent basis, without the permission of the Apostolic See.

§3. The provision of §2 applies to images which are greatly venerated in any church by the people.⁷

Canon 1270.

*Res immobiles, mobiles pretiosae, iura et actiones sive personales sive reales, quae pertinent ad Sedem Apostolicam, spatio centum annorum praescribuntur; quae ad aliam personam iuridicam publicam ecclesiasticam, spatio triginta annorum.*⁸

Immovable goods, precious movable goods, rights and legal claims, whether personal or real, which belong to the Apostolic See, are prescribed after a period of one hundred years; for those goods which belong to another public ecclesiastical juridical person, the period for prescription is thirty years.⁹

Canon 1283.

Antequam administratores suum munus ineant:

1. *Debent se bene et fideliter administraturos coram Ordinario loci vel eius delegato iureiurando spondere;*

2. *Accuratum ac distinctum inventarium, ab ipsis subscribendum, rerum immobilium, rerum mobilium sive pretiosarum sive utcumque ad bona culturalia pertinentium aliarumve cum descriptione atque aestimatione earundem redigatur, redactumque recognoscatur;*

⁴ RCIC, p. 323.

⁵ CAPARROS, p. 743.

⁶ RCIC, p. 324.

⁷ CAPARROS, p. 743.

⁸ RCIC, p. 344.

⁹ CAPARROS, p. pp. 784-785.

3. *Huius inventarii alterum exemplar conservetur in tabulario administrationis, alterum in archivio curiae, et in utroque quaelibet immutatio adnotetur, quam patrimonium subire contingat.*¹⁰

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 all 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.¹¹

Canon 1292.

§1. *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 dioecesanus, cum consensu consilii a rebus oeconomicis et collegii consultorum necnon eorum quorum interest. Eorundem quoque consensu eget ipse Episcopus dioecesanus ad bona dioecesis alienanda.*

§2. *Si tamen agatur de rebus quarum valor summam maximam excedit, vel de rebus ex voto Ecclesiae donatis, ve de rebus pretiosis artis vel historiae causa, ad validitatem alienationis requiritur insuper licentia Sanctae Sedis.*

§3. *Si res alienanda sit divisibilis, in petenda licentia pro alienatione exprimi debent partes antea alienatae; secus licentia irrita est.*

§4. *Ii, qui in alienandis bonis consilio vel consensu partem habere debent, ne praebeant consilium vel consensum nisi prius exacte fuerint edocti tam de statu oeconomico personae iuridicae cuius bona alienanda proponuntur, quam de alienationibus iam peractis.*¹²

§1. Without prejudice to the provision 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.

¹⁰ RCIC, p. 347.

¹¹ CAPARROS, p. 795.

¹² RCIC, pp. 350-351.

§2. The additional permission of the Holy See is required for the valid alienation of good whose value exceeds the maximum sum, or if is a question of the 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.

§3. When a request is made to alienate goods which are divisible, the request must state that parts have already been alienated: otherwise, the permission is invalid.

§4. Those who must give advice about 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.¹³

¹³ CAPARROS, pp. 801-803.

Appendix 4.
Canons of the 1990 Oriental Code Containing the Word *Pretiosus*¹

Canon 887.

§1. *Sacrae icones vel imagines pretiosae, idest vetustate aut arte praestantes in ecclesiis venerationi christifidelium expositae, in aliam ecclesiam transferri vel alienari non possunt nisi de consensu scripto dato Hierarchae, qui eandem ecclesiam potestatem suam exercet, firmis cann. 1034-1041.*

§2. *Sacrae icones vel imagines pretiosae etiam ne restaurentur nisi de consensu scripto dato eiusdem Hierarchiae, qui, antequam eum concedit, peritos consulat.*²

§1. Sacred icons or precious images, that is, those which are outstanding due to antiquity or art, that are exposed in Church for the veneration of the Christian faithful, cannot be transferred to another church or alienated without the written consent given by the hierarch who exercises authority over that same church, with due regard for cann. 1034-1043.

§2. Sacred icons or precious images are also not to be restored without the written consent given by the same hierarch, who is to consult experts before he grants it.³

Canon 888.

§1. *Sacras reliquias vendere non licet.*

§2. *Insignes reliquiae, icones vel imagines, quae in aliqua ecclesia magna populi veneratione honorantur, non possunt valide quoquo modo alienari neque in aliam ecclesiam perpetuo transferri nisi de consensu Sedis Apostolicae vel Patriarchae, qui cum dare non potest nisi de consensu Synodi permanentis firmo can. 1037.*

§3. *Circa restaurationem harum iconum vel imaginum servetur can. 887, §2.*⁴

§1. It is not permitted to sell sacred relics.

§2. Well-known relics, icons or images, that are held in great veneration by the people in a certain church, cannot in any manner be validly alienated nor perpetually transferred to another church without the consent of the Apostolic See or by the patriarch, who can give it only the consent of the permanent synod, with due regard for can. 1037.

§3. Regarding the restoration of these icons or images, can. 887, §2 is to be observed.⁵

¹ IVAN ZUZEK, *Index analyticus codicis canonum ecclesiarum orientalium*, Roma, Pontificium Institutum Orientalium Studiorum, 1992, s.v. "*ars sacra*" and "*res pretiosa*".

² *Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus*, Città del Vaticano, Libreria Editrice Vaticana, 1995, p. 321.

³ CCEC, p. 332.

⁴ CCEO, p. 321.

⁵ CCEC, p. 332-333.

Canon 1019.

*Res immobiles, res mobiles pretiosae, quae scilicet magni sunt momenti artis vel historiae vel materiae causa, iura et actiones sive personales sive reales, quae pertinent ad Sedem Apostolicam, spatio centum annorum praescribuntur; quae ad aliquam Ecclesiam sui iuris vel eparchiam pertinet, spatio quinquaginta annorum, quae vero ad aliam personam iuridicam, spatio triginta annorum.*⁶

Immovable property, precious movable property, that is, those things which are of great importance on account of art, history or the subject matter, personal or real rights and actions, if they belong to the Apostolic See, are prescribed by a period of one hundred years; if they belong to some Church *sui iuris* or eparchy, they are prescribed by a period of fifty years; but if they belong to another juridic person, they are prescribed by a period of thirty years.⁷

Canon 1025.

Antequam administratores bonorum ecclesiasticorum suum officium init, debet:

1. *Coram Hierarcha loci vel eius delegato promissionem facere se proprium officium fideliter impleturum;*
2. *Accurato inventario ab Hierarcha recognito bonorum ecclesiasticorum suae administrationi subscribere.*⁸

Before taking office, an administrator of ecclesiastical goods is to:

1. Promise before the hierarch or his delegate to conscientiously fulfill his office;
2. Sign an accurate inventory, reviewed by the hierarch, of the ecclesiastical goods committed to his care.⁹

Canon 1026.

*Inventarii bonorum ecclesiasticorum alterum exemplar asservetur in archivo personae iuridicae, ad quam pertinet, alterum in archivio curiae eparchialis; in utroque exemplari quaelibet mutatio adnotetur, quam patrimonium stabile eiusdem personae iuridicae subire contingit.*¹⁰

One copy of the inventory of the ecclesiastical goods is to be kept in the archive of the juridic person to which they belong and another in the archive of the eparchial curia; any change which the stable patrimony of the same juridic person happens to undergo is to be noted on each copy.¹¹

⁶ CCEO, p. 359.

⁷ CCEC, p. 375.

⁸ CCEO, p. 361.

⁹ CCEC, p. 378.

¹⁰ CCEO, p. 361.

¹¹ CCEC, p. 378.

Canon 1036.

§1. Si valor bonorum ecclesiasticorum, quorum alienatio proponitur, continetur intra summam minimam et summam maximam a Synodo Episcoporum Ecclesiae patriarchalis vel a Sede Apostolica statutam, requiritur consensus:

- 1. Consilii a rebus oeconomicis et collegii consultorum eparchialium, si agitur de bonis eparchiae;*
- 2. Episcopi eparchialis, qui in casu eget consensu consilii a rebus oeconomicis et collegii consultorum eparchialium, si agitur de bonis personae iuridicae Episcopo eparchiali subiectae;*
- 3. Auctoritatis in typico vel statutis determinatae, si agitur de bonis personae iuridicae Episcopo eparchiali non subiectae;*

§2. In Ecclesiis patriarchalibus, si valor bonorum summam maximam a Synodo Episcoporum Ecclesiae patriarchalis statutam excedit, sed non duplo, requiritur consensus:

- 1. Patriarchae datus de consensu Synodi permanentis, si agitur de bonis eparchiae intra fines territorii Ecclesiae patriarchalis sitae, nisi ius particulare eiusdem Ecclesiae aliud fert;*
- 2. Episcopi eparchialis necnon Patriarchae datus de consensu Synodi permanentis, si agitur de bonis personae iuridicae Episcopo eparchialis intra fines territorii Ecclesiae patriarchalis potestatem suam exercenti subiectae;*
- 3. Patriarchae datus de consensu Synodi permanentis, si agitur de bonis personae iuridicae Episcopo eparchiali non subiectae, etsi iuris pontificii, quae fines territorii patriarchalis sita sunt.*

§3. In Ecclesiis patriarchalibus, si valor bonorum summam maximam a Synodo Episcoporum Ecclesiae patriarchalis statutam duplo excedit et, si de rebus pretiosis vel ex voto Ecclesiae donatis agitur, servetur §2, sed Patriarcha indiget consensu eiusdem Synodi.

§4. In ceteris casibus requiritur consensus Sedis Apostolicae, si valor bonorum excedit summam ab ipsa Sede Apostolica statutam vel approbatam et, si de rebus pretiosis vel ex voto Ecclesiae donatis agitur.¹²

§1. If the value of the goods whose alienation is proposed falls within the minimum and the maximum amounts established by the synod of bishops of the patriarchal Church or by the Apostolic See, consent is required of:

- 1. The finance council and the college of consultors of the eparchy for the goods of the eparchy;**
- 2. The eparchial bishop, who in such case needs the consent of the finance council and the college of eparchial consultors, if it concerns goods of a juridic person not subject to an eparchial bishop;**
- 3. The authority determined in the typicon or the statutes, if it concerns goods of a juridical person not subject to an eparchial bishop.**

§2. In patriarchal Churches, if the value of goods exceeds the maximum amount established by the synod of bishops of the patriarchal Church, but is twice the amount, consent is required of:

- 1. The patriarch with the consent of the permanent synod, if it concerns goods of an eparchy located within the territorial boundaries of a patriarchal Church, unless the particular law of the same Church determines otherwise;**

¹² CCEO, pp. 365-366.

2. The eparchial bishop as well as the patriarch with the consent of the permanent synod, if it concerns goods of a juridic person subject to an eparchial bishop who exercises his power within the territorial boundaries of the patriarchal Church;
 3. The patriarch with the consent of the permanent synod, if it concerns goods of a juridic person not subject to an eparchial bishop, even of pontifical right, which are located within the territorial boundaries of the patriarchal Church.
- §3. In patriarchal Churches, if the value of the goods exceeds twice the maximum amount established by the synod of bishops of a patriarchal Church, if it concerns precious goods or goods given to the Church by a vow, §2 is to be observed, but the patriarch needs the consent of the same synod.
- §4. In other cases, the consent is required of the Apostolic See, if the value of the goods exceeds the amount it established or approved by the Apostolic See itself and if it concerns precious goods or goods given to the Church by vow.¹³

Canon 1037.

Ad alienanda bona temporalia Ecclesiae patriarchalis vel eparchiae Patriarchae, Patriarcha indiget:

1. *consilio Synodi permanentis, si valor bonorum continetur intra summam minimam et summam maximam a Synodi Episcoporum Ecclesiae patriarchalis statutam et si de bonis Ecclesiae patriarchalis agitur; si vero nonnisi de bonis eparchiae Patriarchae agitur, servandus est can. 1036, §1, n. 1;*
2. *consensu Synodi permanentis, si valor bonorum summam maximam a Synodo Episcoporum Ecclesiae patriarchalis statutam excedit, sed non duplo;*
3. *consensu Synodi Episcoporum Ecclesiae patriarchalis, si valor bonorum eandem summam duplo excedit et si de rebus pretiosis vel ex voto Ecclesiae donatis.*¹⁴

To alienate temporal goods of a patriarchal Church or of the patriarch's eparchy, the patriarch needs:

1. The counsel of the permanent synod, if the value of the goods falls within the minimum and maximum amounts established by the synod of bishops of the patriarchal Church and if it concerns the goods of the patriarchal Church; if it concerns only goods of the patriarch's eparchy, can. 1035, §1, n. 1 is to be observed;
2. The consent of the permanent synod, if the value of the goods exceeds the maximum amount established by the synod of bishops of the patriarchal Church, but not twice the amount;
3. The consent of the synod of bishops of the patriarchal Church, if the value of the goods exceeds twice the same amount and if it concerns precious goods or goods given to the Church by vow.¹⁵

Canon 1038.

§1. Ii, quorum consilium, consensus vel confirmatio ad alienanda bona ecclesiastica iure requiritur, ne dent consilium, consensum vel confirmationem antequam exacte edocti sunt de

¹³ CCEC, pp. 381-383.

¹⁴ CCEO, p. 366.

¹⁵ CCEC, p. 383.

statu oeconomico personae iuridicae, cuius bona temporalia alienanda proponuntur, et de alienationibus iam peractis.

*§2. Consilium, consensum aut confirmatio pro non datis habentur, nisi in eis petendis exprimuntur alienationes iam peractae.*¹⁶

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

§2. Counsel, consent or confirmation is considered not to have been given, unless, in seeking them, previous alienations are mentioned.¹⁷

¹⁶ CCEO, pp. 366-367.

¹⁷ CCEC, p. 383.

Appendix 5

Directory on the Ecclesiastical Exemption from Listed Building Control

This Directory was approved by the Bishops' Conference of England and Wales at its Low Week meeting 1999. Second edition March, 2001 Text © 1999, 2001 Catholic Bishops' Conference of England and Wales. It is re-printed here with the permission of the Conference.

Introduction

1. Under the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994 certain buildings in the ownership of the Roman Catholic Church are exempted from some of the provisions of planning legislation subject to approved alternative controls and procedures being exercised by Church authorities. It has long been recognised that the right to religious freedom includes the right to freedom of worship, and that this has implications for the care of buildings built for such worship. On its part, the Second Vatican Council and directives of the Holy See have reminded bishops of their need to exercise vigilance over the remodelling of places of worship and to protect works of art and sacred furnishings. It is the right and duty of the Ordinary to supervise the administration of temporal goods within his jurisdiction and the duty of Trustees to protect trust property vested in them. This Directory sets out the procedures to be followed by those wishing to carry out building and related work to those buildings.

2. To establish the required procedures, the Ordinaries of the Dioceses and Religious Orders listed in the Schedule have each issued a Decree which requires persons wishing to carry out relevant works to apply for a faculty granted under the scheme described in this Directory. This Directory is issued by the Bishops' Conference of England and Wales and describes the scheme and the procedures which must be followed to obtain a faculty for any relevant works. This Directory supersedes all previous guidelines and will be subject to periodic review by the Department for Christian Life and Worship of the Conference. The Sub-Committee for Church Patrimony has been charged by the Conference with the oversight of the procedures and their implementation.

Definitions

3. An explanation of the terms used in this Directory is given in the Glossary (page XXX).

The Need for a Faculty

4. The Decree provides that no relevant works may be undertaken except with the authority of a faculty granted on behalf of the Ordinary in accordance with the procedures described in this Directory.

5. For the exact definition of relevant works, refer to the Glossary and the relevant Decree. The definition of relevant works extends to internal or external works (short of total demolition) carried out on:

- (a) any listed church, oratory or chapel owned by the diocese, a parish or any other ecclesiastical organisation which is subject to the diocesan Bishop and is being used primarily for worship; or
- (b) any listed ecclesiastical building (except a presbytery) belonging to a religious institute or a society of apostolic life which is being used for ecclesiastical purposes.

This definition extends to objects or structures which are fixed to the exterior or are in the grounds of such buildings unless they have been listed in their own right.

6. The relevant works are subject to the procedures described in this Directory because they are exempt from secular listed building control. Works to listed buildings which do not fall within the scope of this Directory will usually require statutory listed building consent from the local planning authority.

7. Most external works to buildings will *also* require planning permission from the local planning authority – there is no exemption from this requirement when it applies, and such consent must be sought in *addition* to a faculty under this Directory.

8. The ecclesiastical exemption does *not* apply to (and hence listed building consent will normally be required for):

- (a) Catholic chapels in, attached to, or within the boundaries of private houses (unless in the ownership of a diocese, parish, religious institute, society of apostolic life or of another ecclesiastical organisation subject to the jurisdiction of the diocesan Bishop);
- (b) cases of total demolition
- (c) works not undertaken by or on behalf of the owner of the building;
- (d) works to individually listed buildings within the boundaries of an exempt building;

9. Like for like works of repair and maintenance do not generally require consent.

10. Advice may be sought from the Secretary to the Historic Churches Committee on the need for a faculty and/or local authority consents. In cases of doubt administrators of buildings should consult the Historic Churches Committee and, if appropriate, the local authority.

Listed Buildings

11. A listed building is one of special architectural and historic interest which has been identified as such and included in a list published by the Secretary of State for Culture Media and Sport (formerly National Heritage) or the Secretary of State for Wales. Buildings are graded I, II* and II and are selected according to certain established criteria including age, architectural and historic significance and associations, building type, technological significance and authorship. All buildings constructed before 1700 and most constructed before 1830 are likely to be listed; following this the lists become selective during the nineteenth and early twentieth century and more selective for mid- and late-twentieth century buildings. Major churches of all periods and known authorship are likely to be listed.

The Historic Churches Committee

12. Each diocese has an Historic Churches Committee, established by the bishop with its own Statutes. A Committee may be set up for one diocese or may cover two or more dioceses. The Statutes of a Committee covering more than one diocese are approved by all the diocesan bishops concerned. Members of the Historic Churches Committee are appointed by the bishop or bishops concerned in accordance with the Statutes. The Committee acts in the name of the diocesan bishop in accordance with the Statutes.

13. The membership of the Committee is defined in the Statutes in accordance with several principles which ensure that the Committee is able to come to an independent view on matters before it. It will have a balance of members drawn from the various groups who have a legitimate interest in the Committee's decisions. (It is in order to retain this correct balance at all times that the Statutes will provide for the Committee's membership to be stable rather than rotating. The actual membership should therefore be easily definable at any one time.) The membership will be

comprehensive enough ordinarily to provide the necessary experience and expertise for most applications which the Committee will be called upon to decide.

14. The Committee will have a Secretary, appointed by the Bishop after consultation with the Chairman. The Secretary will not be a member of the Committee. The role of the Secretary is to be the executive arm of the Committee. The Secretary needs to be a person who is capable of carrying out the functions of being clerk to the Committee and to be the point of contact for all persons having business with the Committee. The Secretary needs to be sufficiently well versed in the planning system and the procedures described in this Directory to be able to provide the Committee and any persons having dealings with the Committee with an independent and reliable source of advice on proper procedures. The Secretary shall act as the person through whom any discretion to be exercised by the Chairman under the procedures is communicated.

15. A copy of the Statutes for every Historic Churches Committee will be lodged in the Archive of every Diocese which that Committee covers and with the Liturgy Office; and will be given to every member of the Committee within twenty-one days of being made. The Statutes form part of those records accessible under paragraphs 39-42. New members will be given a copy of the current Statutes on appointment.

The Procedure for Applications

16. Before an application is made, certain preliminary actions may be necessary. If significant alterations to a diocesan building are involved applicants should obtain in advance the views of the diocesan Art and Architecture Commission and/or Liturgical Commission. In the case of a parochial building, the Parish Pastoral Council (if any) should be consulted. For property belonging to a religious order, further consent or consultation may also be required. In all cases informal consultation with the Historic Churches Committee (and the Trustees) in advance of the formal application is welcomed, and in complex cases may be beneficial.

17. Applications must be submitted to the Secretary to the Historic Churches Committee using **form I** by or on behalf of the person responsible for the administration of the building ("the applicant").

18. For all but the most minor works photographs, professionally drawn plans and adequate specifications will be needed, sufficient to identify the building, illustrate its character, and explain the proposals. The application must be accompanied by four copies of these plans, photographs, drawings and specifications, including a 1:1250 or 1:2500 location plan with the position of the building, its curtilage and ownership boundaries clearly marked. (In the case of minor works, advice should be sought from the Secretary whether these requirements can be relaxed.)

19. A copy of the most recent quinquennial report should be included if not already in the possession of the Historic Churches Committee. This document will normally have been commissioned by the diocesan finance or property board.

Acknowledgement and Notification

20. The Secretary to the Historic Churches Committee will send **forms II and III**, to the applicant, who must display form II for a continuous period of not less than 28 days in a prominent position on the exterior of the building on or near its main entrance. (If the building is not the Parish Church, a copy of form II should be sent to the Parish Priest for display for a

similar period in the Parish Church.) Unless the application relates only to internal alterations to a grade II building, the application must also be advertised in an appropriate local newspaper, using the wording on form III.

21. The Historic Churches Committee Secretary will consult the local planning authority, English Heritage or Cadw and the national amenity societies. This process will take 28 days and should be undertaken concurrently with the public notices detailed above.

22. If the proposal includes works of demolition the Secretary will also inform the Royal Commission on the Historical Monuments of England or the Royal Commission on the Ancient and Historical Monuments of Wales. In the case of total demolition the Historic Churches Committee may comment on the proposals, but is unable to receive an application (see paragraph 6) as listed building consent will be required.

23. The applicant, all those consulted in accordance with this procedure and any person who submits written representations to the Secretary to the Historic Churches Committee in any particular application are referred to hereafter as "interested parties" with respect to that application.

The Procedure for Determination

24. The Secretary to the Historic Churches Committee will ensure that the application, observations received as a result of the consultations, and written representations received from other interested parties are put before the Historic Churches Committee for discussion and determination.

25. Subject to anything specifically contained in this Directory or the Statutes of the Historic Churches Committee, the procedure adopted for determination of any application is to be determined by the Historic Churches Committee.

26. The applicant and/or up to two representatives are entitled to attend when the relevant application is being discussed and determined by the Historic Churches Committee. They may present their proposals to the Historic Churches Committee and answer questions but may not participate in the discussion by the Historic Churches Committee unless requested to do so.

27. The Committee may request the bishop to appoint a suitable adviser to advise it on applications requiring specialist expertise (for example those affecting organs, stained glass or archaeological remains). The Committee will normally make such a request when such specialist advice cannot be obtained from among its existing members. The Committee will normally consult any adviser who has been appointed for that purpose. An adviser will continue to be available to the Committee on future occasions for the duration of his or her appointment.

28. In determining the application, the Historic Churches Committee may decide to refuse or approve the application (whether fully or partially). If it approves the application or any part of it, it may grant a faculty either in the form applied for or as modified by the Historic Churches Committee in any way. The Historic Churches Committee may also make the faculty subject to any conditions it thinks fit. A faculty will normally be subject to a time limit of three years. In cases involving substantial works, the conditions will normally require the counter signature of the applicant's architect, surveyor or other professional adviser in addition to that of the applicant on the completion form(s) (form VII).

29. All interested parties will be advised of the decision by the Secretary to the Historic Churches Committee, using **form IV**. In order to allow time for interested parties to lodge an appeal against the Historic Churches Committee decision, the faculty will not be issued and no work may therefore commence for at least **28 days** after the date of the decision notice. After 28 days, the Secretary will issue the faculty using **form V**, at which point the applicant may proceed in accordance with that document.

The Procedure for Appeals

30. Any interested party may appeal to the bishop against the decision of the Historic Churches Committee. The bishop will not normally hear the appeal himself, but will normally establish a commission to hear the appeal on his behalf. Such a commission will consist of three persons, one each drawn from the following categories:

- (a) persons canonically qualified to preside at such appeals,
- (b) professionals with experience of listed buildings, and
- (c) persons involved pastorally with the care of church buildings.

The Sub-Committee for Church Patrimony is willing to advise bishops on suitable candidates for commissions.

Submission and Acknowledgement

31. An appeal must be lodged with the Secretary to the Historic Churches Committee, using **form VIII**, within 28 days of the date of the decision notice. The appeal must be accompanied by three stamped addressed envelopes for subsequent communications (unless the appeal is from the applicant). Copies of form VIII are available on request from the Secretary to the Historic Churches Committee.

32. The Secretary to the Historic Churches Committee will acknowledge receipt of the appeal by sending **form IX** to the appellant. Copies of all forms VIII received and forms IX sent out will be sent to all other interested parties.

Appeal Hearing

33. Following a **further 28 day period** the bishop will normally establish a commission to consider the appeal.

34. Once a commission has been established, it will conduct the appeal in accordance with the procedure determined by the president of the commission. The procedure will usually follow canonical norms. The Secretary to the Historic Churches Committee will act as Secretary to the commission.

35. The appellant and any interested party may avail themselves of the services of an advocate or procurator. The commission may allow them to be represented in any other way.

36. The decision, which will be final, is to be notified to all interested parties by the Secretary to the Historic Churches Committee, using **form X**. If necessary, the Secretary will also issue the appropriate faculty, using form V.

Unauthorised works

37. Where relevant works are commenced without the authority of a faculty or in breach of any conditions attached to a faculty, the Ordinary, acting also on behalf of the Trustees, should order work to cease, by the service of **form XI** on the person who is responsible for the administration of the building. That person must follow the directions contained in the order and any subsequent directions of the Historic Churches Committee.

38. The position must then be regularised by following the procedures described in this Directory. The building must either be restored to its original condition or an application submitted to the Historic Churches Committee in the normal way. Such an application will not necessarily be approved, and if it is refused in whole or in part, the necessary remedial works to restore the building to its original condition must be undertaken without delay. In all these matters the directions of the Historic Churches Committee must be followed.

Monitoring and Records

39. Within fourteen days of commencement of the relevant works the applicant must submit **form VI** to the Secretary to the Historic Churches Committee. On completion of the relevant works, applicants must submit **form VII** to the Secretary to the Historic Churches Committee. Form VII must be signed by the applicant, and, where required by the Historic Churches Committee, countersigned by the applicant's architect, surveyor or other professional advisor, declaring that the work has been carried out in accordance with the faculty. (In the case of large, long or multiple works, the Committee may require that more than one forms VI and VII are to be submitted.)

40. The Secretary to the Historic Churches Committee shall keep a record of all proceedings of the Historic Churches Committee together with copies of all forms sent or received in accordance with this Directory. The Secretary shall also keep copies of the relevant current Decrees and Statutes relating to the Committee. These records shall be kept in the diocesan offices (or an alternative venue designated by the Historic Churches Committee) in a form accessible to those with a right to see them.

41. Interested parties or their representatives have the right to see the records relating to the application or applications in which they have such an interest. The diocesan bishop or religious superior or their representatives and designated members of the Sub-committee for Church Patrimony have a right to see all records of the Historic Churches Committee. Members of the public may apply to the Secretary for access to the records, which will normally be arranged at a convenient time. The Historic Churches Committee should only refuse access to members of the public if they have good reason for doing so.

42. An annual summary report is to be produced and a copy sent to the Liturgy Office. Copies need only to be sent to the DCMS or Cadw, the Joint Committee of the National Amenity Societies and English Heritage if requested. The format of the report should follow that recommended by the Sub-committee for Church Patrimony. The annual report is to cover the calendar year and is to be submitted by the following 1st March.

Emergency Procedures

43. In cases of genuine **emergency** (i.e. where the interests of safety, health or the preservation of a building would be seriously prejudiced by waiting until the next meeting of the Historic Churches Committee) a provisional faculty may be granted (using **form XII**) by the Chairman in consultation with the Vice-Chairman and the Vicar-General member (or equivalent) of the Committee. In extreme cases this may be granted orally by the Chairman or Vice Chairman (and later confirmed in writing on form XII). Such approval will only be given **for those works that are necessary to carry out the emergency measures** and are subject to a subsequent formal application covering the work undertaken plus any consequential work, which **must be submitted immediately** in the normal way.

Buildings no longer in use for Worship or other Ecclesiastical Purposes

44. The Directory does not apply to churches, oratories or chapels no longer used for worship or ecclesiastical buildings closed for all purposes, as the ecclesiastical exemption will cease to apply. If demolition is proposed it should be noted that total demolition is not normally exempt as the building is held to be no longer in use for ecclesiastical purposes.

45. The bishop may allow a church to cease to be used for divine worship, after consulting the council of priests, obtaining the consent of those who could lawfully claim rights over that church, and satisfying himself that the good of souls would not be harmed. (These requirements do not apply where the church cannot in any way be used for divine worship and there is no possibility of its being restored.)

46. Where the church is a listed building, the following additional procedures should be followed. The diocese should, following consultation with the local congregation, commission an expert report describing in detail the architectural and historic interest of the building and its contents. This report will form the basis of the consultation with the Historic Churches Committee. If, following this consultation the diocese decides to proceed, the canonical consultation described above should be undertaken.

47. If, after the canonical consultation the bishop decides that the church shall cease to be used for divine worship, the Historic Churches Committee should be notified. This notification will allow it to inform the local planning authority and English Heritage (or Cadw) that the building will no longer be covered by the ecclesiastical exemption, and to make recommendations to the bishop about the future use of the church. Such a recommendation may be that the church should be preserved intact by handing over to a trust or similar; that it should be retained for some secular but not unbecoming purpose; or that it may be demolished. Recommendations may also be made on the disposal of objects from the church. Such disposals should be in accordance with the principles set out in the *"Memorandum on the disposal of objects from churches"* published by the Bishops' Conference as Appendix B of *"The Parish Church"* (1984).

48. Those responsible for oratories and private chapels which are listed buildings should follow similar procedures to those set out above.

Glossary

relevant structures means:

- (a) any listed church, oratory or chapel owned by a diocese or a public juridical person subject to the jurisdiction of the diocesan bishop, including:
 - (i) any object or structure within that building;
 - (ii) any unlisted object or structure fixed to the exterior of that building; or
 - (iii) any unlisted object or structure within the curtilage of that building which, although not fixed to that building, forms part of the land;
- (b) any listed ecclesiastical building (except a presbytery) which is for the time being used for ecclesiastical purposes and which is owned by a religious institute or society of apostolic life (or province or house thereof) which has opted into the scheme described in this Directory;

relevant works means:

- (a) any works (including partial demolition, alteration, repair or extension but excluding total demolition) which would affect the character of the relevant structure as a building of special architectural or historic interest; or
- (b) any works affecting the archaeological importance of a relevant structure or archaeological remains existing within it or its curtilage;

bishop means the diocesan bishop;

the Conference means the Bishops' Conference of England and Wales;

the Liturgy Office means the Liturgy Office of the Conference;

English Heritage means the Historic Buildings and Monuments Commission for England;

Cadw means the Welsh Office agency known as Welsh Historic Monuments;

the Decree means the General Decree on the Ecclesiastical Exemption made by the relevant Ordinary;

Ordinary means the person having jurisdiction over the relevant structure or the administrator of that structure (cf. can.134);

Trustees means the body or persons in whom the legal title of the relevant structure is vested;

church, oratory or chapel means an ecclesiastical building which is for the time being used for ecclesiastical purposes and whose primary use is as a place of worship;

listed building has the same meaning as in the Planning (Listed Buildings and Conservation Areas) Act 1990;

Appendix 6.
Catholic Bishops' Conference of England and Wales
Subcommittee for Church Patrimony

GUIDELINES FOR APPEALS

Introduction

1. The Catholic Church in England and Wales has exemption from certain controls over listed buildings. The terms upon which Parliament has allowed this exemption to continue oblige the Church to operate a system of internal control based on its own procedures. These procedures operate at diocesan level and form part of canon law. They involve a Historic Churches Committee (HCC) making a decision on behalf of the Bishop. Sometimes two or more dioceses operate their procedures jointly. The procedures are described more fully in the Directory on the Ecclesiastical Exemption from Listed Building Control ("the Directory") issued by the Bishops' Conference of England and Wales.

2. After an application is made to the HCC for work to be carried out to an exempt building there is a period of consultation.

3. After the HCC has met and made its decision the Secretary sends out Form IV (Determination of Application) to the applicant, English Heritage or Cadw (Welsh Historic Monuments), the local authority, the national amenity societies and to all those who sent written representations to the Secretary during the consultation period.

4. What is an appeal?

The "appeal" described in the Directory is against a decision of a Historic Churches Committee in its exercise of administrative (or executive) power delegated to it by the Bishop. Since in the Church judicial authority does not judge executive authority, the "appeal" is in fact a hierarchical recourse to the Bishop against an executive decision made on his behalf by his delegate (the HCC). This is referred to in the Directory (and will from now on be referred to in this document) as an "appeal" because this is more likely to be understood by those using the document.

The appeal described in this document is therefore the administrative procedure which is put in place by the Bishop to resolve such a hierarchical recourse. Accordingly, the procedure must comply with the principles set out in canon law including any general norms regarding administrative acts and any norms laid down by the Bishop. Subject to such norms, the commission has power to regulate its own procedure, and this guidance is intended to assist them in doing so. Because, by their nature of appeals can polarise opinions, it is important that the process must not only be fair and just in itself but must also be seen to be so.

Although the commission has a wide discretion in deciding upon its own procedure, the norms within which this discretion operates have certain important implications for those unfamiliar with canon law procedures:

- the process for the appeal is not confrontational nor adversarial - this may differ from expectations based on experience of secular hearings (for example planning (or listed building consent) appeals);
- some of the terminology used in connection with canon law has specialised meaning, but the appeal commission (or its Secretary) will be happy to explain any terms that may be unfamiliar.

5. Who can appeal?

- The applicant.
 - All those consulted before the HCC made its decision (the local planning authority, the national amenity societies, English Heritage or Cadw and also the relevant Royal Commission if the works include works of demolition).
 - Any person who submitted written representations to the HCC during the consultation period.
- All these people are referred to in the Directory as "interested parties".

6. How is an appeal made?

By sending Form VIII (notice of appeal) to the HCC Secretary within 28 days of the date on Form IV. The notice of appeal must contain valid reasons or grounds for appeal (see below). Form VIII is available from the HCC Secretary if it has not already been sent out to the interested parties.

7. What can be appealed against?

- The merits of a decision of the HCC.
- An error in the procedure used to make a decision.

If the appeal is on the merits of an HCC decision the notice of appeal must be accompanied by reasons for the challenge to that decision. If the appeal is based on procedural error then the notice of appeal must contain the grounds upon which the procedural error is alleged. (The appeal may be based both on the merits and on questions of procedure, in which case both of the above comments apply.) The Secretary to the HCC, or the HCC itself, may treat as invalid any notice of appeal which does not contain the reasons or grounds described above.

8. Who hears the appeal?

The appeal is heard by an appeal commission of three members commissioned by the diocesan Bishop (or Ordinary) to act in his name.

The members of the commission are appointed by the Bishop to provide a balanced panel with expertise in the relevant areas. The Directory provides that the commission should consist of three persons, one of each with:

- canonical qualifications and experience which will enable them to preside at an appeal;
- relevant architectural knowledge and practical experience of listed buildings;
- practical pastoral involvement in the care of church buildings.

The Subcommittee for Church Patrimony is willing to assist bishops to find persons suitable for appointment to appeal commissions and early consultation with the Subcommittee is strongly encouraged.

9. Is a new commission appointed for an appeal relating to the same project which has already been the subject of an appeal against a previous decision of the HCC?

It is recommended that, unless there are good reasons for not doing so, the same commission hears each appeal which is related to the same project because of the prior knowledge of the project which they will have acquired.

10. Who else can get involved and how?

After the 28 day period has elapsed (cf. Paragraph 6) the Secretary sends out Form IX (Acknowledgement of Appeal and Notification of Hearing) to all interested parties (i.e. those listed in 5 above) giving details of the appeal. Interested parties other than the appellant may submit material at this point. The commission may wish at its preliminary meeting to seek the views of other parties (see below).

11. How does the rest of the process work?

The appeal commission may or may not decide to have a preliminary meeting to look at the submissions and to decide the format of the appeal. There then follows the main part of the appeal process at the end of which the commission makes known its decision to all parties. This decision is then published with reasons.

12. What is the timescale?

The commission should be appointed within 28 days of Form IX being sent out and the appeal should be determined in 6 months unless there is agreement between all parties for an extension.

13. Can a party be represented?

Any party to the appeal (see 10 above) is entitled to be represented by a procurator or an advocate. The judicial vicar (or officialis) of the diocese concerned will be able to supply details of those approved as procurators or advocates for the diocese. The commission may allow a party to be represented by another person. If a party wishes to be represented by a civil lawyer, the commission will wish to be satisfied that he or she is sufficiently competent in his or her understanding of the canonical procedures.

The Appeal

14. How is the appeal organised?

The appeal will be determined by an administrative hearing in accordance with the norms of canon law. It should be noted here that "hearing" consists of the whole process beginning with the submission of a valid Form VIII and including the gathering of relevant evidence and the discussion and decision of the commission (the use of the word does not therefore imply the use of an oral process) However, to avoid confusion this guidance tries to use the word "hearing" only in relation to that part of the oral process where all parties are present. The Commission has the choice of proceeding either by written process or by oral process — see paragraphs 19, 21 and 23 below

15. Where is the appeal held?

Although the meetings of the appeal commission may be held at any convenient place, it is recommended that, where possible, they are held at or near to the building in question. The commission can then familiarise themselves with the issues raised and (especially if there is an

oral process) points can be demonstrated and details checked. This will, however, be unnecessary in appeals solely relating to procedural points.

The Preliminary Meeting

16. Who attends the meeting?

The three members of the appeal commission and the Secretary of the HCC who will act as Secretary to the commission. The Secretary plays no part in the decision making process but acts on behalf of the commission in any administrative matters. The Secretary is the first point of contact for anyone having dealings with the commission.

17. What documents are available to the commission?

- The original application, and all papers originally presented to HCC (including representations from consultees and interested parties).
- The minutes of the HCC recording its decision.
- The appellant's Form VIII. This will include the appellant's submissions on the appeal.
- Any subsequent documents submitted by any party following Form IX. This will normally consist of the submissions of other parties in response to the appellant's submissions.

The commission will not normally expect substantial new evidence to be submitted at this stage, as it is assumed that parties ensure that all relevant facts are put before the Historic Churches Committee in the first place. If new evidence is submitted, the commission may decide to refer the matter back to the Historic Churches Committee for a fresh decision.

18. What is at issue in the appeal?

The commission will need to identify the nature of the appeal — whether it is on procedural grounds or against the merits of a decision of the HCC or a mixture of both. In the light of this information they will then decide whether the appeal concerns the whole of the original application or just part of it.

19. What will be the subsequent format of the appeal?

Following the identification of the nature of the appeal, the commission has a wide scope as to the format of the appeal. There are two main formats for the appeal: a written process or an oral process. Matters of procedure might best be dealt with by a written process; appeals on the merits of a decision of the HCC with an oral process. But the commission is at complete liberty to decide on the format taking into account the individual nature of the case.

20. Can the commission reject a notice of appeal?

A notice of appeal can be rejected by the commission if they consider that:

- there are no reasons or valid grounds given in Form VIII; or
- there has been a previous appeal on the application and no new case has been presented.

Written Process

21. Further submissions

Any party to the appeal (including the statutory consultees) may make a written submission to the hearing and such submissions will be circulated in advance to all other parties, each of whom may comment — in writing— on that submission.

22. What procedure is followed?

The business of the commission is to study the documentation and come to a decision. Details of the nature and format of the decision are common to both procedures and are detailed below.
Oral Process

23. Who may attend?

- Any party to the appeal (see 10 above).
- Any procurator or advocate representing a party (see 13 above).
- Any other person permitted to attend by the commission. The commission will need to notify those it wishes to attend an oral hearing.

Witness will not normally be invited to attend unless the commission has decided that the proofs are to be gathered at the oral hearing.

24. What procedure is followed?

The point of the oral part of the hearing is to clarify points identified by the commission from its examination of the submissions. With this objective the commission will initially meet together to agree the points to be raised with each party. This part of the hearing is not, and should not be seen as, a trial with cases being presented by each party and an adversarial atmosphere.

Each party will be interviewed by the commission in turn. After asking any questions on that party's submission they may invite the party briefly to add any further observations they wish to make. If the situation allows observations may be demonstrated in situ. The commission should make it clear to each party before this part of the hearing what format the interview will take and what opportunity, if any, they will have to make any further points.

Questions are normally asked by the members of the commission. Unless the commission provides otherwise, the parties are to ask questions by submitting them through the commission.

The Determination

25. How is a decision reached?

The decision of the commission is a collegiate decision. Though a 2–1 majority is acceptable all must sign the final decision.

The simple decision, without reasons, will normally be made known to all parties at the end of an oral hearing or by post following a written process.

A full determination will normally be made available to all parties within 28 days.

26. What is the format of the Determination?

The decision will be recorded and communicated initially by means of Form X.

The full determination of the appeal commission will contain a brief record of the procedure that has been adopted. This will be followed by the reasons for the conclusions reached. Each Commission will need to consider how much detail the determination should cover. It is not necessary for the determination to enter into a detailed discussion of all the evidence before the commission. A short list describing each point requiring a decision together with the reasoning behind the decision made may well be sufficient. It may be helpful if the determination follows the grounds of appeal set out in the original notice of appeal, but the commission has complete liberty to use the format which best suits the needs of the case.

27. What possible determinations are there?

The decision of the appeal commission is final. Subsequent applications to the HCC may, of course, be appealed against.

There are four possible determinations.

a. Upheld:

The appeal is upheld. If it is the applicant who lodged the appeal, the building scheme is deemed approved. If a third party lodged the appeal, the applicant will be obliged (if he so wishes) to submit a new application to the HCC taking note of the points of the appeal.

b. Dismissal:

The appeal is dismissed and the decision of the HCC is upheld.

c. Application remitted to HCC for full rehearing:

This will usually be the case where it has been established that the correct procedure was not followed.

d. Remit part of the application for rehearing:

If the commission is satisfied that part of a scheme should be reconsidered. The full procedure for application is followed.

28. 'Vexatious Litigant'

The appeal commission may identify an appellant as a 'vexatious litigant', for example, where an appellant has had an appeal dismissed due to insufficient grounds on two separate applications.

29. For the reasons outlined in the Introduction, this advice is subject to and should be read in conjunction with canonical norms.

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