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THE PARTICULAR LEGISLATION
OF THE CATHOLIC CHURCH IN MALAWI

by
Robert Tiyezge MWAUNGULU

A dissertation submitted to the Faculty of Canon
Law, Saint Paul University, Ottawa, Canada, in
partial fulfillment of the requirements for the
degree of Doctor of Canon Law



Robert Tiyezge Mwaungulu, Ottawa, Canada, 1991



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BIOGRAPHICAL NOTE

Rev. Robert Tiyezge Mwaungulu, a diocesan priest of Mzuzu Diocese, was born in Karonga, Malawi, Africa on March 10, 1960. After seven years of primary education at St. Anne's, Chilumba, he entered St. Patrick's Minor Seminary where he completed secondary education in June 1977. Subsequently, he pursued studies in philosophy and theology, as well as priestly formation, at Kachebere (St. Anthony's) Major Seminary, Mchinji and St. Peter's Major Seminary, Zomba from 1977 until 1984. He received a Diploma in Theology from Chancellor College (the University of Malawi).

On August 5, 1984 he was ordained a priest for ministry in Mzuzu Diocese. Having worked in a parish and taught at St. Patrick's Minor Seminary for two years, he followed a course in canon law and pastoral management at the Catholic Higher Institute of Eastern Africa (C.H.I.E.A.) in Nairobi, Kenya, Africa from September 1986 to June 1987. In September 1987 he commenced his studies in canon law at Saint Paul University, Ottawa, Canada and was awarded the degree of baccalaureate in canon law the following year. In 1989 he obtained his licentiate and master's degree in canon law; in the same year he proceeded with research and studies for a doctoral degree in canon law.

ABBREVIATIONS

A.A.S.	<i>Acta Apostolicae Sedis</i>
AFER	<i>African Ecclesial Review</i>
C.I.C.	<i>Codex Iuris Canonici</i>
E.C.M.	<i>Episcopal Conference of Malawi</i>
M.C.P.	<i>Malawi Congress Party</i>
N.A.C.	<i>Nyasaland African Congress</i>
S.E.C.A.M.	<i>Symposium of Episcopal Conferences of Africa and Madagascar</i>
U.M.C.A	<i>Universities' Mission to Central Africa</i>

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INTRODUCTION

Pope John XXIII in calling the Second Vatican Council sought and was determined to adapt the Church, its teachings and institutions to the needs of the day; it was an invitation to renewal and inculturation within the Church so that it could meet people's needs and conditions of the time and place. In *Ad gentes*, the Council taught that: "[...] faith should be imparted by means of a well adapted catechesis and celebrated in a liturgy that is in harmony with the character of the people; it should also be embodied by suitable canonical legislation in the healthy institutions and customs of the locality."¹ In implementing the Council, the 1983 *Code of Canon Law* has therefore placed much attention and significance on particular legislation at regional, national and diocesan levels. This thesis studies the participation of the Catholic Church in Malawi, represented by the conference of bishops, in the development of its particular law in the implementation of the revised Code.

The Church in Malawi, as elsewhere in Africa, faces four major challenges in the present socio-cultural context: the question of her cultural identity, the issues of justice and social promotion, that of ecumenism and dialogue with traditional African religions and Islam, and the challenge of greater economic viability and unity for independent Africa.² Similar to the difficult task of the young nations of Africa forging into a workable harmony the laws instituted by the European colonial governments and the traditional African customary laws, the young particular churches of Africa are faced with the strenuous challenge of

¹ SECOND VATICAN COUNCIL, Decree on the Church's Missionary Activity, *Ad gentes*, 19, December 1, 1965, in *Acta Apostolicae Sedis* (=A.A.S.), English translation in A.P. FLANNERY, ed., *Vatican Council II: The Conciliar and Post Conciliar Documents* (=FLANNERY), 1988 rev. ed., vol. I, Northport, NY, Costello Pub. Co., 1988, p. 835. (References to the conciliar and post conciliar documents will be from this translation by A.P. Flannery).

² See SECAM, "Acts of the Eighth Assembly of Episcopal Conferences of Africa and Madagascar (SECAM)," Lagos, July 12-19, 1987, pp. 12, 72-86.

implementing divine and merely ecclesiastical laws which have developed and been formed within a non-African cultural environment, and adapting them when this is possible.

The revised *Code of Canon Law* offers several possibilities, though admittedly limited, for adaptation and inculturation through particular legislation. There is greater recognition of the role of the diocesan bishop in legislating and issuing directives for his diocese with the help of synods and councils; a provincial council and the conference of bishops, a newly established canonical institute, have designated competence to legislate for their territories.

The purpose of this study is to show that, even though within very restricted parameters, the revised Code does provide opportunities for developing particular law, a necessary means for establishing authentic particular churches. The aim of our research is to indicate the validity of the proposed hypothesis in the norms of the bishops of Malawi which are based on the Second Vatican Council and the new Code. The treatise attempts to contribute concretely towards greater awareness of the issues involved in adaptive legislation in the particular churches in Malawi. Hopefully, this study will serve to show lawful openings for inculturation and for more involvement by the Episcopal Conference of Malawi (E.C.M.) and the particular churches.

One reason which determined this choice of the topic is that, while we wish the universal legislator had granted more legislative competence to diocesan bishops and conferences of bishops, it is surprising that in spite of the more than one hundred canons in various parts of the Code referring to culture, adaptation and particular law, the absence of profound

inculturation and the tendency of traditionalism of some particular churches is erroneously almost totally attributed to canon law. However, some people question why the Church should be seeking adaptation when the local people and their social institutions, including the legal system, are undergoing a steady trend of westernization. There appears to be a portion of people who display an attitude of non-acceptance of change and of ideas of inculturation and African theology. They prefer the Church *as received from the missionaries* with a uniformity of operation and expression throughout the world.

Another motivation for the choice of the topic and its subsequent examination flows from the occasional seeming discrepancy between the adaptation possibilities in the new Code and the practical life and norms of the Church in Malawi. It is surprising that while on the one hand cultural adaptation is sought by particular churches, on the other hand certain universal laws which permit inculturation are not locally implemented. Among the canons of the revised law, many address themselves directly to norms and decrees to be issued by the conference of bishops, but apparently not one decree has been promulgated, eight years after the Code came into effect.

It is necessary in a work of this kind to demarcate at the very outset a precise, and even limited, scope of the area to be considered. In this case, our field of investigation is restricted to the development of the particular law of the Church in Malawi, a competence of the Episcopal Conference of Malawi as stipulated by *Christus Dominus*, 38³ and canon 455 of the

³ SECOND VATICAN COUNCIL, Decree on the Pastoral Office of Bishops in the Church, *Christus Dominus*, October 28, 1965, in *A.A.S.*, English translation in *FLANNERY I*, p. 587.

1983 Code. Research on the broader question of the development of particular law in the Catholic dioceses in Africa, though important and instructive, would inordinately extend the project of the thesis beyond available time for research, and hence, it is not our concern here.⁴

Relatively little has been written on Church legislation in Malawi.⁵ The volume of literature on this question is comparatively small. Several canonical studies have investigated aspects of particular legislation in relation to diverse cultures.⁶ However, these studies have generally dealt with specific aspects of culture, universal law etc. To date there is no general analysis and research done on norms and directives stipulated by the bishops of Malawi after the Second Vatican Council and particularly after the promulgation of the revised Code. In a limited manner, we intend to represent and evaluate some of these directives.

The very division of the thesis explains the methodology adopted for this study. The thesis is divided into four chapters; in the first chapter we will study the history of the country and the missionaries who were instrumental in bringing Christianity and the Catholic Church

⁴ Also, the particular law of religious institutes and societies of apostolic life (the proper law or constitutions), special law, pontifical law, etc., although in a way expressive of the principle of subsidiarity and adaptation, are not the direct subject of this thesis.

⁵ Cf. C. MKONA, "Divorce Among the Anyasa of Blantyre Archdiocese and Church Law," J.C.D., diss., Rome, Pontificia Universitas Urbaniana, 1962. T. BANDA also wrote a thesis on Church's penal law in relation to Malawian traditions.

⁶ See J. M. HUELS, "Interpreting Canon Law in Diverse Cultures," in *The Jurist* 47 (1987), pp. 249-293. M. DE MUELENAERE, "Cultural Adaptation and the New Code of Canon Law," in *Studia canonica* 19 (1985), pp. 31-59.

to Malawi.⁷ Concurrently, we will summarily present the history of the Church and of the people of Malawi with specific details on the establishment of the hierarchy and the conference of bishops.

Chapter two considers the application of the universal law in Malawi. A brief exposition of the necessity and relevance of the universal law both to the individual dioceses and to the communion of the particular churches will be given. A section of this chapter provides examples of customs and values of the Malawian people which are incorporated into the Malawian common law (adapted from British common law) which includes Malawian customary law. The purpose of this is not only to elucidate the similarity that exists between adaptation of civil law and inculturation of ecclesiastical legislation, but also to show how certain customs of the people are in conflict with Christianity. A brief review of missionary faculties will be provided to show one way by which the Church attempted to adapt itself to the peculiar conditions of the missions. This will lead us to identifying the rediscovery of the importance of particular law as it finds a greater recognition in the revised Code.

The Code's constant reference to particular law at the national, regional and diocesan levels will provide a framework for chapter three which focuses on the directives of the Episcopal Conference of Malawi and the implementation of the new Code. A review of pastoral norms, practical for the Church in Malawi, passed by the Conference after Vatican II

⁷ For this section we are indebted to the works of I. LINDEN, *Catholics, Peasants and Chewa Resistance in Nyasaland*, London, Heineman, 1974, and R. VEZIEAU, *The Apostolic Vicariate of Nyasa, Origins and First Development 1889-1935* (= *The Apostolic Vicariate of Nyasa*), Rome, Archives of the White Fathers, 1989.

which are gathered in the *Compendium*⁸ will be made. Another document which will be treated in this chapter is the compilation of directives of the Episcopal Conference of Malawi on the implementation of the 1983 *Code of Canon Law* as reported in the minutes of its September 1984 meeting.

Finally in chapter four this treatise analyzes and evaluates the norms and directives issued by the Conference in the context of the aspirations of the Church in Malawi and the cultural changes that are taking place.

⁸ This is an abbreviated name for *A Compendium of the Decisions Taken by the Episcopal Conference of Malawi*, (= *Compendium*), Lilongwe, Likuni Press, 1983. The document has gathered together all major decisions taken by the Conference prior to the promulgation of the 1983 *Code of Canon Law*.

CHAPTER I

THE CATHOLIC CHURCH IN MALAWI

Introduction

In order to situate the establishment and development of the Catholic Church in Malawi in its proper setting, this chapter undertakes to provide briefly the necessary background. After giving a few geographical, economic and demographic details, mention will be made of the various tribes and their basic traditional religious beliefs. The beginning of the British influence in the land, its impact upon the local population and its society, as well as how the totality of these events gradually but resolutely led to independence and national unity will be discussed.

Once this has been stated, the chapter will give a quick look at principal missionaries to Malawi. The first stage of Christianity in Malawi, as in most of sub-sahara Africa, was set by Protestant missionary groups who quickly made significant progress. The coming of the Montfortans and Missionaries of Africa (White Fathers), the initial Catholic missionaries to Malawi, will be treated in detail. A major part of the chapter will be dedicated to the establishment of the Catholic Church and its hierarchy along with a few setbacks. Lastly, the focus will be on the formation of the Episcopal Conference of Malawi and its pastoral and legislative function in the growth of the Church in Malawi.

A. The Country and its Development

1. *Geographical and economic background*

Malawi¹ falls within the tropical region of south-east Africa. Bordered by Zambia to the west, Mozambique to the south and Tanzania to the east, the country covers an area of

¹ Until independence in 1964, Malawi was called Nyasaland. For the geographical position of Malawi in Africa, see Appendix 1.

118,485 square kilometres and is inhabited by 7,056,000 people.² Lacking in mineral resources, and with limited industrial development, the landlocked and basically agrarian country economically survives largely from an increasing agricultural productivity: crops under cultivation include maize (corn), sugar, tea, coffee, cotton, tobacco, groundnuts (peanuts), cassava and various tropical fruits.

Wild life is preserved in the country's picturesque game reserves with diverse sceneries of plateaus, mountains, plains, grasslands, covered with both deciduous and evergreen trees of rich foliage. The agricultural sector encourages animal husbandry aiming at greater and better production of cattle, pigs, chickens as well as goats and sheep to a lesser degree. An assortment of some 250 species of fish, most of which are used for human consumption, inhabit the fresh waters of Lake Malawi.

2. *Ethnic groups and traditional religions*

Archaeological evidence indicates occupation of the northern part of Malawi by succeeding Stone Age cultures from about 50,000 B.C.,³ and considerably later in the rest of the country. Some inhabitants of Malawi are thought to have settled around Lake Malawi in about 10,000 B.C. The earliest settlement by Bantu-speaking people appears to have occurred around the first century of the Christian era.

² See M. UPSHALL, B. FALCONER, eds., *The Hutchinson Pocket Encyclopedia*, London, Hutchinson, 1989, 2nd ed., p. 548. However, the 1987 Census shows the *de facto* population as 7,982,607 (see DEPARTMENT OF INFORMATION, *Malawi in Brief*, Blantyre, Blantyre Print and Packaging, 1989, p. 8).

³ It is said that the Kafula and Batwa entered Malawi somewhere between 8000 and 2000 B.C. (see B.R. RAFAEL, *A Short History of Malawi*, Limbe, Montfort Press, 1980, p. 95).

Malawi derives its name from one of the Bantu tribes, the Maravi who came from the southern Congo about 600 years ago and split into two groups at the top of Lake Malawi. One group, the modern day Chewas, moved south to the west bank, while the other, the predecessors of the Nyanja, moved down the east bank to settle in the southern region. A different pattern was followed by their northern neighbours, the Tumbuka who settled to the west of the lake, the Tonga on the lake shore, and the Ngonde to the north-west tip of the lake.⁴ Other tribes that settled in Malawi are the Nyakyusa, the Ndali, the Sukwa, the Lambya, the Sena and the Senga.

The first written records of Malawi have been found in Portuguese journals from seventeenth and eighteenth century travellers journeying across the southern part of the country.⁵ The Portuguese traded with the Maravi for hundreds of years and, at a later date, claimed that the lake country belonged to their territory. In the early nineteenth century, Malawi was the scene of two great invasions. From the north-east came the Yao,⁶ whose traditional home was in Tanzania, and who acted as intermediaries in the great slave and commercial trade with Arabs on the coast of east Africa. Through the Yao and the Arabs, Islam was destined gradually to take root in Malawi. From the south beyond the Zambezi River came another surge of people, the Ngoni. They entered the country in 1805 and settled

⁴ See J. McCracken, *Politics and Christianity in Malawi 1875-1940: The Impact of Livingstonia Mission in the Northern Province*, Cambridge, Cambridge University Press, 1977, pp. 2-3.

⁵ However, "[...] the first European to make contact with the area now known as Malawi may have been the Portuguese explorer, Gaspar Bocarro, whose diary published in 1492 made reference to the great inland lake in Central Africa" (DEPARTMENT OF INFORMATION, *Malawi in Brief*, p. 10).

⁶ See N. NORTHROP, "The Migration of Yao and Kololo into Southern Malawi: Aspects of Migrations in 19th Century Africa," in *International Journal of African Historical Studies*, 19 (1986), pp. 59-75. Cf. K. M. PHIRI, "Yao Intrusion into Southern Malawi, Nyanja Resistance and Colonial Conquest, 1830-1900," in *Transafrican Journal of History*, 13 (1984), pp. 157-176.

in central and northern Malawi. The arrival of the Ngoni and Yao tribes was not welcome. Indeed, the Ngoni, a well-organized warrior tribe, was a threat to the Tumbuka and Tonga tribes in the north as well as to the Chewa in the central region. The Yao caused distress to the Chewa and Nyanja in the southern part of the lake region.

Each tribe had its own distinct social political organization, independent of the other tribes.⁷ Though there were some similarities among the tribes, since they belonged to the Bantu group, there were noticeable differences in their political systems, the exercise of governance, the lineage and descent system, marriage customs, rites of passage (initiation, death etc.) and language, as well as in other social structures and cultural patterns of behaviour. The inter-tribal relationships were not always friendly; it was the rule of the day for tribes to seek political power and influence over other tribes.

Details of traditional religious beliefs and practices vary from one ethnic group to another, but their general characteristics are similar. They all include a belief in a creator God or Supreme Being, locally known as *Mulungu*, *Chiuta*, *Mphambe*, *Namalenga*, *Chauta*, *Leza*, *Kyala*, who is the principle of good in the world, and who stands in opposition to the evil force symbolized and represented by the very strong, and almost incorrigible belief in witchcraft and sorcery.⁸ The fundamental religious beliefs, which make no dichotomy between

⁷ See J. S. MBITI, *African Religions and Philosophy*, New York, Frederick A. Praeger, 1969, p. 103.

⁸ See T.C. YOUNG, "The Idea of God in Northern Nyasaland (Malawi)," in E.W. SMITH, ed., *African Ideas of God: A Symposium*, London, Edinburgh House Press, 1966, pp. 50-53, 58-60. See also E.B. IDOWU, *African Traditional Religion*, New York, Orbis Books, 1973, p. 175; and J.S. MBITI, *Concepts of God in Africa*, London, S.P.C.K., 1970, pp. 327-336.

the sacred and the secular,⁹ empower and inspire the preservation and increase of the often communally shared vital life force that is perceived to permeate everyone and everything. They are closely linked to the land and the chief as head and unity figure of the clan or family group, which includes not only the living members but also the living dead, ancestors and spirits (*vivanda, mizimu*)¹⁰ who are conceived to be genuinely involved in and concerned with the world of the living. Hence, important events of the life cycle (birth, puberty, marriage, death), seasons of cultivation, hunting, fishing, harvest, and prayers for rain or healing of disease were ritually and, at times, sacrificially celebrated through the intermediation of the ancestral spirits believed to be in constant communication with the High God.

3. *The early British influence*

For Malawi, greater contact with the west began in 1859 through the Scottish missionary explorer, Dr. David Livingstone. Having found Malawi in a state of slave-raiding and tribal warfare, he resolved to combat these social problems with Christianity and commerce. Under his influence, after 1875, both the Church of Scotland¹¹ and the Free Church of Scotland established missions in southern Malawi. One of the reasons for the founding of the African Lakes Company was to render slave trade economically unsound in the face of legitimate commerce. Besides the missionaries, other Europeans, traders, hunters

⁹ See J.S. MBITI, *Concepts of God in Africa*, p. 2.

¹⁰ Cf. E. IKENGA-METUIH, *Comparative Studies of African Traditional Religions*, Ibadan, Claverianum Press, pp. 145-158.

¹¹ In 1876, the Presbyterian Church of Scotland founded a mission in the Shire Highlands that they called Blantyre, after Livingstone's birthplace. Blantyre is now the largest city in Malawi with a population of 331,588 (1987 census).

and coffee planters visited Malawi. In 1883, a British consulate was established at Blantyre. However, tension soon developed between the Portuguese and the British missionaries, hunters and traders. The Portuguese considered the lake country as theirs; so, they made treaties with Yao chiefs and declared part of Malawi south of the Ruo river to be Portuguese territory. At the partition of Africa, the following year (1884), Malawi was brought under the rule of Great Britain.

By 1889, the British consul, Sir Harry Johnston,¹² had secured a number of treaties with the chiefs of the Shire River and Lake Nyasa regions to prevent further Portuguese expansion. He was also determined to fight the slave trade at its three centres: in Karonga led by Mlozi, in Nkhotakota organized by Jumbe and in the south under the Yao chiefs. On May 14, 1891, the area was proclaimed the Nyasaland Districts Protectorate by the British, with Johnston as commissioner and consul-general. On June 11, 1891, the Anglo-Portuguese treaty was signed and the western, southern and eastern borders fixed as they are today; the northern boundary had previously been set in 1890. The Songwe River became the boundary between Nyasaland and Tanganyika, then known as German East Africa. Not all chiefs, however, accepted British rule, so in 1896 an armed expedition was sent to the Yao chiefs Tambala and Mpemba and to the Chewa chief Mwase Kasungu, who had to recognize the British administration. Similarly, the Ngoni chiefs Mpezeni and M'mbelwa were forced to recognize British authority in 1898 and 1904 respectively.

¹² The shaping of the future Nyasaland Protectorate between 1889 and 1896 is largely attributed to H. Johnston (see I. LINDEN, *Catholics, Peasants, and Chewa Resistance in Nyasaland 1189-1939*, [= *Catholics and Chewa Resistance in Nyasaland*], Berkely, University of California Press, 1974, p. 10, footnote 55).

Sir Harry Johnston divided the country into four and afterwards into twelve districts. The leaders of these districts were at first called *collectors* then *residents* and finally *district commissioners*. They represented the government, and collected taxes and customs duties; they headed the police, the post office and the court of the district. Two courts were established in each district: one was for the Africans in which the assistance of the traditional chiefs was sought; the other court was for non-Africans. This eventually led to the subsequent two-system court structure in Malawi, namely: the High Court system and the Traditional Court system. At this stage there was no parliament; the commissioner held all the power and all decisions were made by him or at least with his approval. The land was therefore ruled directly and almost exclusively by Europeans for about twenty years.

Because it had minimal professional personnel, the government restricted its services to maintaining law and order. Education, religion, health services and agriculture were left to missionaries and other organizations. The foreign planters engaged in economic development. The African chiefs either gave or sold their land to planters and missionaries. Before British administration was in force, land transactions were directly a responsibility of the chiefs, the custodians of the tribal land. Later, these transactions had to follow the laws and directives of the new administration.

The enforcement of British administration fuelled a social revolution. A twofold allegiance was demanded of the people, to their traditional chiefs and to the commissioner in Zomba represented by district commissioners. These could not always be easily reconciled. Furthermore, a new form of trade was emerging. Instead of exchanging products like ivory, iron, etc., for other goods like salt, beads, calico, etc. on the barter market, money was

introduced and subsequently took over. People had to adjust to the money economy which could not be avoided since the government placed a head tax of six shillings per year on each adult male.

The chiefs and the missionaries made it clear to Johnston that the tax was much too heavy for the ordinary people in the villages. Most people were unwilling to pay; others could not afford to do so and the tax collectors either had the huts burned down or took from the people the equivalent of the six shillings.¹³ Common sense eventually prevailed and the hut tax was reduced to three shillings which, nevertheless, was a labourer's monthly salary on the tea estates. Those people unable to pay this tax could work on the estates and the landlord would take care of it for them. When the planters on the estates needed more labourers, they pressured the government to raise the tax. In 1901 it rose to twelve shillings per hut; thus compelling more people to work on the estates. Most nationals viewed this as forced labour and the system was popularly known as the *Thangata* system. More and more of the productive land was owned by Europeans and people on the estates became aware that they were living on the property of another land owner.

New people who went to work on the farms not only had to pay the hut tax, but also rent for living there. The majority paid through their work. Consequently, the tax and rent system affected the social order, for people found themselves driven and compelled to work primarily in order to obtain enough money to pay the rent and the tax. The migrant labour system began: men left their homes and often even their families to work in the south of

¹³ See *ibid.*, pp. 75, 79.

Malawi where most of the tea and cotton estates were established. Later, at the beginning of the twentieth century, others left their land of birth to work in Rhodesia and South Africa in the gold mines and on the farms where they received better wages.¹⁴ The social order was changing and this caused resentment in the majority of the population. Others saw the migrant labour system as providing new opportunities to leave the clutters of traditional, village life, to venture into the unknown, and try something new and different.

The country entered a new legislative era when, in 1907, Sir Alfred Sharpe was named governor of the Nyasaland Protectorate. A legislative council and an executive council were created. Three of the members on the legislative council were government officials, the other three were drawn from the missionaries, the traders and the planters. The missionary member, for many years the Rev. A. Hetherwick of Blantyre mission of the Central Africa Presbyterian Church, was to represent the interests of Africans. The governor was chairman of both councils, and the members of the executive council were all government officials.

Sir Alfred Sharpe has been credited for being less autocratic than his predecessor Sir Harry Johnston.¹⁵ Aware of the scarcity of British officials who could sufficiently understand African society, law and custom, and aware of the role the traditional rulers played, Sharpe moved a motion in the legislative council which materialized into the 1912 District Ordinance. According to this Ordinance, each district was divided into units which were further

¹⁴ In 1910 and 1913 there were nearly 20,000 and 25,000 Nyasaland workers respectively in Rhodesia alone (Cf. B.S. KRISHNAMURTY, "Land and Labour in Nyasaland: 1891-1914," Ph.D. diss., London, University of London, 1964, p. 305; and F.E. SANDERSON, "Nyasaland Migrant Labour in British Central Africa 1890-1939," M.A. diss., London, University of London, 1966, p. 43).

¹⁵ See B.R. RAFAEL, *A Short History of Malawi*, p. 53.

subdivided into villages, each with a village headman. The overseer of each unit was the principal village headman and was assisted by two councillors chosen from among the village headmen. This was still direct rule since "[...] the Principal Headmen could not make rules and tax collection was not done by them but by district officials [...]."¹⁶ Only with the consent of the district rulers could they try cases under African law. However, this was a definite step towards indirect rule to be effected after the 1914 War and the 1915 Uprising.

4. *The surge for political independence*

When the First World War broke out, people in Nyasaland were called upon to join the British in defending their colonies. The northern border of Nyasaland was in danger of attack by the Germans who were then ruling Tanganyika, German East Africa. Men with little or no training at all were enrolled and sent to the battle field in Karonga and to north and east Africa. Some are even reported to have gone as far as Europe and India. The irony of it all was that Africans were involved in a war that was not theirs. They found themselves fighting and killing each other for no reason other than for misunderstandings and hatred among European nations. The war heightened bitterness and misery in families. The fragility, weaknesses and divisions of the white people were exposed to the Africans during the war. A positive result was that Africans gathered confidence in themselves and became empowered through the war events.¹⁷

¹⁶ Ibid., p. 54.

¹⁷ Malawians' views about Europeans (the white people) as well as their practice of Christianity were significantly changed by the experiences of the war into which Africans were unwillingly drawn (see I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, pp. 107-113).

There was an uprising in 1915 in protest against social conditions on the estates of the white farmers in southern Malawi and also against the injustices done to the Africans by the First World War.¹⁸ The abortive uprising was led by Rev. John Chilembwe,¹⁹ a Yao who had been educated in the United States. The purpose of this insurrection was to improve working conditions and to provide political independence for Africans. This was the first major political activity organized against the colonial system. There existed also a loose network of local associations and independent churches that had similar goals, but within the colonial system. Out of this network, in 1944, the Nyasaland African Congress (N.A.C.), an organization with nationalistic aspirations, was formed. Ian Linden notes that the Congress was led entirely by products of the Protestant missions.²⁰

In the early 1900's, there was talk of amalgamation of Nyasaland with Northern and Southern Rhodesia.²¹ Some white settlers in Nyasaland viewed union as a means to gain security and greater prosperity, while others suspected that the more powerful partner, Southern Rhodesia, would drain the protectorate economically. The Africans of Nyasaland vehemently opposed amalgamation fearing that it would encourage the spread of the pro-white policies evident in Southern Rhodesia and South Africa. In spite of opposition from the African community, the Federation of Rhodesia and Nyasaland was formed in 1953.

¹⁸ See *ibid.*, pp. 80, 96-99; see also B.R. RAFAEL, *A Short History of Malawi*, p. 59.

¹⁹ John Chilembwe belonged to the Zambezi Industrial Mission which was started by Joseph Booth, an American Baptist, in 1892. Chilembwe later founded the Providence Industrial Mission.

²⁰ See I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, p. 137, footnote 91.

²¹ Northern Rhodesia is now Zambia and Southern Rhodesia is Zimbabwe.

Resistance to the federation continued. The steering committee of the Nyasaland African Congress invited Dr. Hastings Kamuzu Banda to return to Malawi to lead the N.A.C. party.

The arrival in 1958 in Malawi of Dr. Banda, an émigré physician who had spent 40 years in the United States, Ghana and Britain, influenced the Nyasaland opposition to the colonial government. In March 1959 the party was banned and its leaders arrested. Later, the nationalists reunited in a less militant form in the Malawi Congress Party (M.C.P.). After constitutional talks held at Lancaster House, London in 1960, the British government agreed to a new constitution which provided for the first direct election of Africans to the Legislative Council of Nyasaland. In the Malawi Congress Party Manifesto, prior to the 1961 general elections, a special note was made on the judiciary. The party spelled out its stand as follows:

The Malawi Congress Party believes in an independent and impartial Judiciary and regards it as a duty to the country and to the world to strive to secure freedom and justice for all, to respect the dignity and worth of the individual, irrespective of his race or colour or political opinion. To that end the Party will at all times establish and maintain the Rule of Law in the country.

The party will insist on the following:

1. That the appointment, promotions and removal of all judges of the High Court should be entrusted to a Judiciary Service Commission as more and more local lawyers become available.
2. That there should be a right of appeal against an unsatisfactory decision of the Commission to Her Majesty's Judicial Committee of the Privy Council.
3. That High Court Judges' salaries should be a fixed charge upon the national revenue of Nyasaland, so that such salaries should not be interfered with during the continuance in office of such judges.
4. That, at the Local Government and other levels the judicial functions should be separated from the purely executive and administrative ones, and that the Local or Customary Courts be re-organized for this

purpose: also that even at this level dispensation of justice must not have political bias attached.

5. That more and more Lay Magistrates be employed to administer justice in local courts.²²

The implementation and evolution of points 1, 4, and 5 have had much to bear on the court system in Malawi.

In January 1963, Nyasaland attained full self-government and H.K. Banda became the first prime minister in February. In December 1963, the Federation of Rhodesia and Nyasaland was dissolved and on July 6, 1964 the protectorate of Nyasaland became the independent state of Malawi. Two years later, on July 6, 1966 Malawi became a republic within the Commonwealth with H.K. Banda as its first president.

The common struggle for independence united the various local forces in Malawi into one party. However, soon after independence, the submerged political differences became apparent as progressive forces vied with conservative elements within the M.C.P. Some junior ministers were frustrated because of unresolved differences on foreign policies, the slow pace of Africanization and the government's reluctance to immediately adopt anti-colonial policies.²³ The government did not yield to the suggestions of the junior ministers. As a result, six dissenting ministers resigned in 1964 and Yatuta Chisiza attempted an invasion of

²² MALAWI CONGRESS PARTY, "Malawi Congress Party Manifesto, 1961," Lilongwe, Blantyre Print and Packaging Lilongwe Press, 1975, p. 11.

²³ President Banda said that he would appoint a person to a job only if he or she was qualified and not on the basis of race or colour of the skin.

Malawi in October 1967. President Banda effectively suppressed this attack and emerged even stronger from the crisis. His position was enormously consolidated in 1971 when he was sworn in as life president of the Republic of Malawi following a resolution passed at the 1970 Malawi Congress Party annual convention.²⁴

Like most African countries, Malawi is faced with the inevitable tensions of a newly formed independent state. It is a country that is constituted from several longstanding monarchically and hierarchically organized tribes. Within such cultural and historical context and in view of the adopted unprecedented national structures, Malawi has to devise political and governmental systems capable of appropriately addressing issues and concerns of modern Malawians. The country's development is influenced not only by the tribal, traditional structures, values and concepts²⁵ but also, and perhaps even more so, by western systems and ideologies latent in scientific theories, principles of education, technology, economics, social and political philosophies.

While the majority of Malawians relate better to traditional values and notions of leadership, authority, freedom, sharing, communal ownership of land, etc., there is a growing

²⁴ See DEPARTMENT OF INFORMATION, *Malawi in Brief*, p. 13. "The first President, having been duly elected to that office in accordance with the *Election of the First President of the Republic Act*, 1966, shall be Ngwazi Dr. H. Kamuzu Banda, who shall hold the office of President for his lifetime" (*Laws of Malawi*, The Republic of Malawi [Constitution] Act, s. 9).

²⁵ For instance, the centuries old tribal organization permitted only one form of government that maintained the unity and survival of the tribe through a system of hierarchically structured chieftaincy which was often hereditary and which, without explicit distinctions, vested legislative, executive and judicial powers in one person, the chief. The western multi-party political systems are therefore at variance with the traditional experience of the Malawian peoples. Thus, with the choice for a one party system, one who seeks to make a distinction between the role of a political party and a parliament or between the government and the party, may not find clear answers. Perhaps this might be because of the fundamental difference between a one party democratic system under the influence of African traditional patterns of political organization and the western democratic multi-party systems, whose structures function differently.

number of citizens who under the influence of western education and other nations express the desire for adopting new forms of democracy. They desire different models of government and social economic development which might deviate from the cultural patrimony as well as from what the majority would feel comfortable with. At the heart of this issue is the question of social and cultural change of a people within a historical context as they seriously strive to hold onto their valuable cultural heritage while engaging in a process of cross-cultural reception of new ideas, values and systems. The coming of Europeans in Malawi, accelerated inculturation at different levels of the civil society: in fields of economics, legal system, political organization, etc. Likewise, the arrival of the first missionaries caused the people to make adaptations and adjustments in their religious beliefs. The following section will treat the arrival of the first missionary groups and the beginning of the Catholic Church in Malawi.

B. The Arrival of the First Missionaries

1. *The Protestant missions*

The arrival in Malawi in 1859 of Dr. David Livingstone initiated a whole new age for Malawi. "With his exploration came the end of Catholic monopoly of missionary activity along the Zambezi."²⁶ Soon after his visit to the country, Livingstone made a moving speech at Cambridge University appealing for missionaries and traders to be sent to the Land of the Lake. The Universities' Mission to Central Africa (U.M.C.A.) was formed at Cambridge

²⁶ I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, p. 6. There was a strong presence of Portuguese Catholic missionaries along the Zambezi River in the area south of Malawi many years before the journeys of Livingstone.

University and, in 1861,²⁷ the mission sent Bishop Mackenzie to the Shire Highlands at Magomero. Later, in 1882, the U.M.C.A. mission permanently settled at Likoma Island.

In response to Dr. Livingstone's call for commerce and Christianity in Malawi, missionary enterprise sponsored both by the Presbyterian Church of Scotland and by the United Presbyterian Church of Scotland ventured into Malawi in the years 1875-1876. It was at Livingstone's funeral at Westminster Abbey in 1874 that the Free Church of Scotland decided to establish Livingstonia Mission in memory of this great missionary. In 1875, Dr. Robert Laws opened the mission at Cape Maclear. Due to health reasons, the mission was abandoned and in 1881 it moved to Bandawe in Nkhata Bay; in 1894, it was finally instituted at present day Livingstonia in northern Malawi.

In 1876, the established Church of Scotland founded Blantyre Mission in the south. For some time early missionary influence was limited to the south and then later it spread to the lake shore area at Nkhosakota, Likoma Islands, Bandawe and Livingstonia through the efforts of missionaries from Great Britain.

In 1889, the first Dutch Reformed Church Mission of South Africa was established in the central region of Malawi.²⁸ In 1892 Joseph Booth founded the Zambezi Industrial Mission. At the turn of the century, John Chilembwe, a Malawian, returned from the United States of America and formed his own Baptist mission at Magomero.

²⁷ See *ibid.*

²⁸ See *ibid.*, p. 43.

The Protestant missions made great contribution in education, medical work and especially in leading their followers to an outstanding knowledge of and familiarity with the Scriptures. It is also held that the tendency of the Scots missionaries to emphasize the link between Christianity and commerce effectively introduced Malawians into the western market economy.²⁹ Malawian Protestants during the colonial administration are said to have identified with Jewish nationalism through the reading of the Scriptures, and so have been more politically inclined than Catholics who generally took an apolitical stance.³⁰

2. *The Missionaries of Africa (White Fathers)*³¹

The first Catholic missionaries, from the Society of Missionaries of Africa (White Fathers)³² arrived in Malawi in 1889, apparently at the invitation of the Portuguese government which wanted Catholic missionaries for territories situated within the sphere of its influence, particularly in Mozambique.³³ A number of things went into play. Roland Vezeau reports that, "[B]y a rescript of His Holiness Pope Leo XIII, dated 24 February 1878,

²⁹ See *ibid.*, pp. 79, 160.

³⁰ See *ibid.*, pp. 87-88.

³¹ "Founded in 1868 at Algiers, Algeria, by Charles-Martial-Allemand Lavignerie, archbishop of Algiers and apostolic delegate to the Western Sahara and the Sudan. Later, while keeping the See of Algiers until his death in 1892, he was: 1871-1872, apostolic administrator of the Diocese of Constantine; 1878-1892, apostolic delegate to Equatorial Africa; 1881-1884, apostolic administrator of the Vicariate Apostolic of Tunisia which became in 1884, the Archdiocese of Carthage, the incumbent becoming primate of Africa, both titles which Lavignerie took and kept until 1892; in 1882, he was made a cardinal" (M. THERIAULT, *The Institutes of Consecrated Life in Canada from the beginning of New France up to the Present: Historical Notes and References* [= *The Institutes of Consecrated Life in Canada*], Ottawa, Bibliothèque nationale du Canada, 1980, p. 84, A78, s.v., The White Fathers).

³² See J. CASIER, "Missionari d'Africa," in *Dizionario degli istituti di perfezione*, G. PELLICCIA and G. ROCCA, eds., Roma, Edizioni Paoline, 1974, vol. V, col. 1430.

³³ Apparently, the Portuguese colonial government in the Zambezi area had misgivings about the Protestant infiltration into the Shire Highlands region (see I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, pp. 13-11).

Cardinal Lavigerie was given ecclesiastical jurisdiction or delegation over equatorial Africa.³⁴ Two mission territories, Nyanza and Tanganyika, were created at the same time in the region of Lakes Victoria and Tanganyika. On September 27, 1880 the Sacred Congregation for the Propagation of the Faith raised these two territories to apostolic vicariates with fixed boundaries. The southern extent of Lavigerie's delegation was defined as follows:

Rome gave as southern boundary of Lavigerie's delegation and of Tanganyika Pro-Vicariate: the Rukuru River from its mouth on Lake Nyasa [10° 45' latitude south] near its most southern point [12° 13'] near the boundary with Zambia; then from this latitude a straight line was drawn westwards to the outfalls of the Chambezi river into Lake Bangweolo [11° 45']³⁵

Vezeau thinks that the southern boundary was so drawn because Portugal claimed to have received that territory from Pope Alexander VI in the fifteenth century. This entailed a kind of politico-ecclesiastical jurisdiction over all the territory south of that line down to the Zambezi River. Cardinal Lavigerie's June 20, 1889 letter to the Cardinal Prefect of the Congregation for the Propagation of the Faith raised the issue of Portugal's claim to the territories which are now Zambia and Malawi.

I think it my duty to tell your Eminence confidentially, that the Portuguese government believes that the intervention of Propaganda is not necessary to give us jurisdiction on this territory, because it believes that it already possesses it by virtue of an ancient concession of the Holy See. It is none of my business to challenge these rights [...], but I also believe that my missionaries cannot take it upon themselves to start a new mission without having received the appropriate jurisdiction from your Eminence. To settle this question once and for all, I beg your Eminence to delegate me the necessary jurisdiction to send my missionaries there and to give them the ordinary spiritual faculties.³⁶

³⁴ R. VEZEAU, *The Apostolic Vicariate of Nyasa*, p. 5.

³⁵ Ibid.

³⁶ Ibid., p. 6.

Apparently, in the early days, because of the question of Portugal's jurisdiction, Lavigerie did not send his missionaries south of that imaginary line.

Even if Cardinal Lavigerie had been invited by the Portuguese government in Mozambique, the circumstances in east Africa in 1888 were such that he had to find an alternative missionary base.³⁷ The Arabs and their collaborators were determined to exterminate the whites in order to save their slave trade. Hence, there was on-going fighting in the region north of Nyasa, between Bagamoyo and the Congo, between Tabora and Khartoum. Compounded with health conditions, Catholic missionaries found it unsafe to work in the area and especially to travel from the Indian Ocean into the interior of the continent.

The Lake Nyasa region was reputed to be peaceful. Lavigerie decided to build a mission base in that region so that his missionaries could peacefully journey from there to the north to re-energize and replenish the dwindling and suffocating missionary resources. He was hopeful that Catholic Portugal would be pleased to offer hospitality to his missionaries. Actually, in Paris, in 1888, the ambassador of Portugal to France had assured Lavigerie that his missionaries would be well received by the Portuguese in Mozambique.³⁸ For the Portuguese, a Catholic presence in the Lake Nyasa region was favourable since it would be a visible expression of ownership and control of the territory which was rapidly being occupied by English and Scottish Protestant missionaries. On June 18, 1889, an accord was made between Portugal and Cardinal Lavigerie to the effect that a mission station was to be

³⁷ See I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, pp. 15-17.

³⁸ See R. VEZEAU, *The Apostolic Vicariate of Nyasa*, p. 8.

founded at Mponda. The contract was approved and signed by the Congregation for the Propagation of the Faith. On July 31, 1889 the same Congregation erected the apostolic vicariate of Nyasa including almost the whole of present-day eastern Zambia and Malawi.³⁹ Fr. Adolphe Lechaptois was appointed administrator of the vicariate.

*The Mponda mission*⁴⁰

Mponda village was situated to the south of Lake Nyasa, north of the present-day Mangochi Boma.⁴¹ The Lavigerie-Portugal accord to grant a place at Mponda for Catholic missionaries served the needs of both parties to the agreement. Lavigerie agreed to found a mission under the aegis of Portugal because his missionaries desperately needed a post on Lake Nyasa to open a water route to their missions in what is now Tanzania. This route would avoid the turbulent Tanzanian coast and the interior. The Portuguese, however, wanted to use the Catholic missionaries to offset the Scottish and the Anglican missionaries who had been in the region for over a decade. It was also a means of offsetting British designs around Lake Nyasa.

From the outset, the Catholic missionaries at Mponda were caught up in the political scramble between Great Britain and Portugal over the Shire Highlands and the Lake Nyasa region. Despite Sir Harry H. Johnston's declaration on August 15, 1889, that the area was a British protectorate, the question of the demarcation of colonial territories was not settled

³⁹ See Appendix 4 for the map of the vicariate of Nyasa.

⁴⁰ See, Appendix 2.

⁴¹ *Boma* is a term that is used for a district headquarters; originally, in the nineteenth century, it was the name for a fortified military station.

once and for all. Both the Protestant missionaries and the British were suspicious of the presence of Lavigerie's missionaries in the region.

The Mponda village was ruled by Chief Mponda II, the most powerful amongst the Yao chiefs of the Machinga clan. Being a Muslim,⁴² Chief Mponda had no interest in the religion of the white missionaries, Catholic or Protestant. Worse still, the missionaries and the directors of the African Lakes Corporation were resolved to eliminate the slave trade from which Mponda himself immensely benefitted. The only major gain the chief would hope to receive from either the Portuguese, the British, or the Catholic and Protestant missionaries would be protection against any internal or external usurpation of his chieftaincy.

No wonder the White Fathers experienced hardships and difficulties. Other missionary groups resisted them and there was little response from the indigenous people. Consequently, hardly any progress was made. It has even been said that the missionary group at Mponda "[...] did not build any church, did not convert a single adult, and baptized only one child [...]."⁴³ But the White Fathers were able to teach school to the children. They had serious doubts and uncertainties regarding the survival of the mission. And they knew that they would have to abandon the mission, with deep regret, because of the adverse, trying conditions. All the same, they felt much could be done at Mponda and in the surrounding villages.

⁴² The Mponda Mission Diary, April 23, 1890 entry mentions how strong Islam was at Mponda, "[...] there are meetings, ablutions and Muezzins' Call to Prayer [...] a great show of getting rid of their wives in Ramadan[...]" (R. VEZEAU, *The Apostolic Vicariate of Nyasa*, p. 13). Cf. I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, pp. 25-26.

⁴³ I. LINDEN, ed., *Mponda Missionary Diary 1889-1890*, Limbe, Montfort Press, 1989, p. 3.

Under the leadership of Fr. A. Lechaptois in June 1891, the three White Fathers who had remained at Mponda moved out and settled in Chief Mwene-Mambwe village in the north-east part of Northern Rhodesia. Mambwe village was at that time part of Tanganyika Vicariate and remained so until 1895 when Mambwe and Kayambi were integrated into the Nyasa Vicariate.⁴¹ The missionary team was well received by Chief Mambwe partly because the Bamambwe people wanted the missionaries to protect them from the fierce Babemba people to the west. After the disappointment at Mponda, the White Fathers had some consolations as a group at Mambwe showed interest in attending catechism classes. For at least the ten following years, Catholic presence would be limited to the north-east Northern Rhodesia part of the Nyasa Vicariate among the Bamambwe and Babemba.

On June 19, 1891, Fr. Adolphe Lechaptois was appointed apostolic vicar of Tanganyika Vicariate. He was, however, to remain at the same time administrator of the Nyasa Vicariate. Not long after, Bishop Lechaptois appointed Fr. Joseph Dupont to Mambwe with the special task of bringing the gospel to the Ubemba territory and of definitively founding the Nyasa Mission which had failed at Mponda.

The borders of the Nyasa Vicariate were re-organized by the December 10, 1895 decree of the Congregation for the Propagation of the Faith, taking into account the existing political boundaries. The new northern boundary was the German-Anglo frontier, that is the Nyasaland-Tanganyika border at the Songwe River instead of the Rukuru River. The Tanganyika Vicariate was to the north. Lake Nyasa and the Anglo-Portuguese border formed

⁴¹ See LES PÈRES BLANCS, "Histoire du Vicariat II," Lilongwe, Archives of Lilongwe Diocese, (year not indicated) p. 2.

the eastern limits. To the east was the prelature of Mozambique. In the south it was again the Anglo-Portuguese border as far as the intersection of 30° longitude east and 15° latitude south. In the west 30° longitude east from its intersection at 15° latitude south until almost the southern point of Lake Bangweolo, then the eastern area of the lake including Ubemba and Urungu and up north to the mouth of the Lovu River, south of Lake Tanganyika. The vicariate covered a huge area of almost 360,000 square kilometres.⁴⁵

The vicariate of Nyasa, until then administered by Bishop Lechaptois, became autonomous both *de facto* and *de iure* on January 18, 1896. Fr. Joseph Dupont was appointed apostolic administrator, but with only two priests, Fr. Guillé and Fr. Goestonwers, and Brother Antoine. On February 12, 1897, Fr. Dupont was appointed the first apostolic vicar of the vicariate and on August 15, of the same year, he was consecrated bishop. He worked very energetically for the spread of the gospel, but on October 16, 1899 he had to leave the vicariate for Europe because of ill health and was replaced by Fr. Mathurin Guillemé.

After unsuccessful attempts at establishing additional missions in north-east Northern Rhodesia, Fr. Guillemé decided to found one in the southern part of the vicariate. In August 1901, he appointed Fr. Schoeffer to Angoniland in central Nyasaland. But a few days before he was to leave for the south, it was reported that the Montfort Missionaries, who had been invited by Bishop Dupont as auxiliaries in the huge vicariate, were about to found a mission in the south. Seemingly, the agreement had been that the Montfortans would settle in

⁴⁵ See R. VEZEAU, *The Apostolic Vicariate of Nyasa*, p. 31; see also I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, p. 43.

Blantyre. However, they were to settle at Mzama, in the Angoniland, a site which had been designated for Guillemé.

Fr. Guillemé was set on founding missions in central Angoniland. In 1902, Mua and Chiwamba missions were opened. A year later Chiwamba mission was moved to another site at Likuni. In 1903, the Bua-Kachebere mission was founded right on the border between Fort Manning in Nyasaland and Fort Jameson in Northern Rhodesia. The next two mission stations to be established by the White Fathers in Nyasaland proper were Mtakataka on December 2, 1908 and Bembeke on December 8, 1910. On October 6, 1911 the vicariate had a reinforcement of missionaries with the White Sisters⁴⁶ arrival at Mua mission.

3. *The Montfort Missionaries*

Bishop Dupont entrusted his work to Fr. Guillemé and requested him to extend the mission to the south since he was particularly concerned with the British Protectorate of Nyasaland where the Protestants enjoyed a monopoly on evangelization. The Bishop was fully conscious of the shortage of White Father Missionaries as well as the vastness of the vicariate.

Hence, in Europe he entered into negotiations with Fr. A. Maurille, superior general of the Montfort Fathers and with Bishop Livinhac, superior general of the White Fathers and

⁴⁶ The Congregation of White Sisters, also called 'Sœurs blanches d'Afrique,' 'Sœurs de Notre Dame d'Afrique,' was "founded in 1869 at Algiers, Algeria, by Marie-Renée Roudaut (in religion: Mother Marie-Salomé) and Charles-Martial-Allemand Lavigerie, archbishop of Algiers as well as apostolic delegate to the Western Sahara and the Sudan [...]" (M. THIERIAULT, *The Institutes of Consecrated Life in Canada*, p. 184, B203).

decided to entrust to the Company of Mary (Montfort) Fathers⁴⁷ the evangelization of the southern section of his vicariate. They chose to leave the Congregation for the Propagation of the Faith out of the arrangement. It was, nevertheless, made clear that there was no official separation of the territory and the Montfort Missionaries would work under the jurisdiction of the Vicar Apostolic of Nyasa. On January 19, 1901, a contract was signed by the two superiors general and Bishop Dupont. The main section of the agreement spelled out that:

The Company of Mary undertakes to establish mission stations in the southern part of Nyasa Vicariate, called Shire region, limited by the northern border of the civil district of south Nyasa [which in those days included Ntchewu].

The Company of Mary binds itself to start foundations in the Shire region in the course of the present year 1901.

It pledges its word to cover all expenses of those foundations.

In return for the commitments and sacrifices incurred by the Company of Mary, the Vicar Apostolic of Nyasa pledges his word not to entrust any other missionary Society with any mission station in that region.

Finally, when the time comes to erect the Shire region into an independent Mission, his Lordship pledges his word to support the Company of Mary for the purposes of asking the Sacred Congregation for the Propagation of the Faith for that canonical erection.⁴⁸

Immediately, three Montfort priests were chosen for the Shire Mission: Pierre Bourget, an old friend of Bishop Dupont, Auguste Prézeau and Antoine Winnen.

They left Europe on May 24, 1901 after meeting Pope Leo XIII and Cardinal Ledochowski, the Prefect of the Congregation for the Propagation of the Faith. A month

⁴⁷ "[...] congregazione clericale fondata verso il 1705 a Poitiers (Francia) da s. Luigi-Maria Grignon di Montfort. Il 12.9.1748 fu approvata oralmente da Benedetto XIV. Il decreto di lode fu concesso il 20.5.1825" (A. RUM, "Compagnia di Maria," in *Dizionario degli istituti di perfezione*, G. PELLICCIA, ed., vol. II, col. 1442).

⁴⁸ R. VEZEAU, *The Apostolic Vicariate of Nyasa*, pp. 50-51.

later, on June 24, they reached the southern tip of Nyasaland and on June 29 were in Blantyre, the capital of the British protectorate. Having celebrated the Eucharist they consecrated their new mission to the Blessed Virgin.

The Protestant missionaries in the Shire region were far from being impressed by the intrusion of Catholics in an area under their influence. Judge Joseph J. Nunan, chief judicial officer of Nyasaland and Attorney General Griffin, both Catholics, supported the Montfort Missionaries.⁴⁹ They were first directed to the Chiradzulu District and the Meletta Estates and then to the Lunzu area for settlement. But Fr. Bourget decided on July 25, 1901 on a site in the area governed by Njobvuyalema, a subchief of Maseko Ngoni paramount Chief Gomani I. A small Catholic community was thus formed at Mzama and this first mission was called St. Mary of Mzama.

The missionaries at Mzama commenced their work by taking care of the sick and visiting the villages, thereby acquainting themselves with the surroundings and learning the local language and customs. The first school of the Montfortans in the region was opened on February 2, 1902. Reading, writing and catechism were taught. It did not take time for the Montfortans to learn that school centres were a primary means for spreading the gospel. They found themselves in a rare race for schools with the Protestants. Following the instructions of Cardinal Lavigerie, Bishop Dupont had imposed a four year period of catechumenate on the vicariate. Consequently, the first solemn adult baptisms were celebrated in December 1905.

⁴⁹ See J. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, p. 46.

However, mission activities had a setback in the Shire region. Cardinal Ledochowski, the Prefect of the Congregation for the Propagation of the Faith, had on July 5, 1901, placed an interdiction on other Montfort Missionaries being sent to the southern Nyasa Vicariate.⁵⁰ The White Fathers and the Montfortans had, according to the Cardinal, erred in procedure. Negotiations and agreements had been conducted and concluded without authorization of the Congregation for the Propagation of the Faith. The initial reaction of the Cardinal was to order the missionaries back. Subsequent to some discussions,⁵¹ however, he permitted them to remain but prohibited the superiors from sending other Montfortans. Later, the Cardinal Prefect sent out a circular letter explicitly forbidding apostolic vicars to introduce missionaries of another congregation into the territory of their jurisdiction without authorization from the Holy See. The situation was confused: mission work in the Shire region called for more labourers, yet the Montfortans could not send more of their missionaries.

Bishop Livinhac, the superior general of the White Fathers and Bishop Dupont, apostolic vicar of Nyasa held different views and interpretations of the Shire affair. Livinhac considered the White Fathers-Montfortan January 19, 1901 contract as valid. He held this opinion for two reasons. First, the agreement was not an official and canonical division of the territory. Secondly, at the time the contract came into existence, the Holy See had no definite regulations on receiving missionaries of a different society into an ecclesiastical region

⁵⁰ See R. VEZEAU, *The Apostolic Vicariate of Nyasa*, p. 52.

⁵¹ Bishop Dupont, apostolic vicar of Nyasa explained to Cardinal Ledochowski what necessitated the undertaking. There was need for multiplying mission stations. And he said he had acted out of good faith since there were no precise regulations on such questions. So he had been assisted to act by the various examples given by other apostolic vicars in several countries. Furthermore, before the missionaries had departed for the Shire they had an audience with the Cardinal and Pope Leo XIII, and had received a grant of Frs 6,000 from the Congregation to defray the expenses of the journey to Nyasaland (see R. VEZEAU, *The Apostolic Vicariate of Nyasa*, p. 52).

entrusted to another group of missionaries. He was therefore hopeful that in due course, especially after Cardinal Ledochowski would be out of office, Montfort Missionaries would be sent as auxiliaries into the Shire region. Also, he believed that efforts should be made to have the Shire region erected into an independent ecclesiastical circumscription for better evangelization.

Bishop Dupont paid great respect to the adage *Roma locuta est, causa finita est*. He did not think that the decision of Cardinal Ledochowski could be reversed or repealed. So, the Bishop believed that the Montfortan-White Fathers contract was null and void and hence not binding. Knowing that he could not send Montfortans, he arranged for a caravan of White Fathers to go to the Shire region with the sole intention of having a Catholic presence in Blantyre, the British administrative centre. In his correspondence with his superior general, Bishop Dupont tried to convince the mother house not to divide the vicariate. He reported that the British officials in Blantyre wanted only one ecclesiastical region so that they could deal with but one authority on the Catholic side.

Fr. Guillemé received instructions from Bishop Dupont to open a mission station in the Blantyre region. Guillemé bought a section of the Meletta Estates, twenty kilometres south of Blantyre, and in September 1903, founded the Nguludi mission on this site. But on November 11 of the same year, Fr. Guyard the superior of the mission died and Fr. Guillemé was compelled to remain in Nguludi. The following year on June 11, he handed that mission over to the Montfort Fathers. This was then possible because Cardinal Gotti had replaced Cardinal Ledochowski, and the Shire Mission was on November 24, 1903 declared autonomous and was entrusted to the Company of Mary. On December 3, 1903, the

Congregation for the Propagation of the Faith erected the Shire Mission as an apostolic prefecture with Fr. Auguste Prézcau as prefect apostolic. New Montfortans were then allowed in and on March 3, 1904, four Montfort missionaries arrived in the Shire Prefecture. In December of the same year, a group of four sisters belonging to the Congregation of the Daughters of Wisdom⁵² arrived in the Shire Prefecture to complement the Montfort missionary resources.

Thus, alongside various flourishing Protestant churches, the stage for the building of the Catholic Church in Malawi was set by the Missionaries of Africa, the Montfort Missionaries, the White Sisters and the Daughters of Wisdom. Gradually, more missionary groups of priests and sisters came in and local people were recruited for training towards ministries in the Church as catechists, priests, brothers and sisters. In the next section we will focus on the establishment of the local hierarchy in Malawi.

C. The Establishment of the Local Hierarchy

When the Shire Prefecture was erected on December 3, 1903, the Holy See entrusted South Nyasa to the Montfort Missionaries. Their jurisdiction covered the present-day dioceses of Blantyre, Chikwawa, Mangochi and Zomba including the Nchewu district. By 1904, there were twenty-four Catholic missionaries in Nyasaland including the four Daughters of Wisdom at Mzama. Thirteen White Fathers worked in the Likuni, Mua and Kachebere missions, while seven Montfortans were at Mzama and Nguludi, their administrative centre.

⁵² "Congregazione di diritto pontificio, fondata da s. Luigi Maria Grignon de Montfort e Maria Luisa Trichet[...] nel 1703[...] a Poitiers (Francia)" (G. ROCCA, "Figlie della sapienza," in *Dizionario degli istituti di perfezione*, G. PETERLIN, ed., vol. 4, col. 12). Cf. I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, pp. 70-71, 144-145.

The Nyasa Vicariate⁵³ had but four stations in the Ubemba land of Northern Rhodesia: Kayambi, Chilubula, Chilonga and Chilubi, which were founded between 1895 and 1904.

M. Guillemé succeeded Bishop J. Dupont on February 24, 1911. The Nyasa Vicariate was partitioned again on January 28, 1913 when the apostolic vicariate of Bangweolo was erected in north-east Zambia (Northern Rhodesia), under the direction of Bishop Etienne Larue.⁵⁴ The apostolic vicariate of Nyasa still contained a section of north-east Northern Rhodesia.⁵⁵ Missionaries were astonished at the dividing line established by the Holy See. Fr. Vezeau comments:

Bishop Dupont had already proposed the Luangwa River as the natural dividing line between the two eventual vicariates, the Luangwa Valley being so difficult to cross, especially during the rainy season. But in Rome they chose as the dividing line the division of waters between the Chambezi River (a tributary of the Congo River) and the Luangwa River (a tributary of the Zambezi River). Thus all the north western side of the Luangwa so difficult to reach from the south, remained attached to Nyasa Vicariate. This error was to be corrected only in 1937 when the Prefecture Apostolic of Fort Jameson was erected and detached from Nyasa Vicariate.⁵⁶

Reasons advanced for the division of the vicariate were the extent of the vicariate and the precarious state of communications, especially during the heavy tropical rainy season. For whatever reasons, the Holy See did not judge it opportune at the time to heed the recommendations of the missionaries in the territory.

⁵³ The apostolic vicariate of Nyasa, entrusted to the care of the White Fathers, originally embraced most of the Nyasaland Protectorate and the north-east section of Northern Rhodesia. See Appendix 5.

⁵⁴ See R. VEZEAU, *The Apostolic Vicariate of Nyasa*, p. 76; see also PIUS X, Apostolic Letter, January 28, 1913, *Magna est semper*, in *A.A.S.*, 5 (1913), pp. 233-234.

⁵⁵ See Appendix 6.

⁵⁶ R. VEZEAU, *The Apostolic Vicariate of Nyasa*, p. 108.

On May 23, 1933, the Mission *sui iuris* of Luangwa⁵⁷ was created from parts of Nyasa and Bangweolo Vicariates. The new mission included the northern part of the Nyasa Vicariate as well as Kasungu district, the Luangwa Valley territory in Northern Rhodesia and the northern part of the present Chipata Diocese. This new apportionment was inadequately devised: the political boundaries of the colonies had become permanent but church demarcations went beyond the civil frontiers. Thus, the Luangwa Mission *sui iuris* and the Nyasa Vicariate were civilly dependent upon two different administrations, the Nyasaland Protectorate and Northern Rhodesia. It became necessary to reorganize the ecclesiastical borders.

Consequently, on July 1, 1937, the Holy See erected the apostolic prefecture of Fort Jameson, entirely within Northern Rhodesia.⁵⁸ The new prefecture was detached from the Nyasa Vicariate; its borders coincided with those of the present-day diocese of Chipata in Zambia. The territory between the Luangwa and Chambezi rivers became the apostolic vicariate of Luangwa; on March 8, 1951, its name was changed to the apostolic vicariate of Abercorn. The northern part of Nyasaland which had been included in the Luangwa *sui iuris* mission was, in 1937, re-attached to the Nyasa Vicariate which then was totally within Nyasaland Protectorate.⁵⁹

⁵⁷ See PIUS XI, Apostolic Letter, May 23, 1933, *Quae catholica nomini*, in *A.A.S.*, 26 (1934), pp. 16-17.

⁵⁸ See PIUS XI, Apostolic Constitution, July 1, 1937, *Enascentium Ecclesiarum*, in *A.A.S.*, 30 (1938), pp. 10-12.

⁵⁹ See Appendix 8.

Bishop Oscar Julien, W.F., succeeded Bishop Guillemé in March 1935. Except for new mission stations, there were no new ecclesiastical divisions in the country until after the Second World War. Nevertheless, Bishop Julien's vicariate was still much too vast. On May 8, 1947 the North Nyasa Prefecture was established.⁶⁰ Fr. Marcel Saint-Denis, W.F., was appointed its first prefect apostolic and he resided at Katete, the first Catholic mission in the area. This prefecture contained the northern part of Nyasaland up to the Dwangwa River. From that time on, the predominantly Protestant northern Nyasaland had to face a more protracted Catholic missionary presence and influence.

The name of the Nyasa Vicariate was changed to Likuni Vicariate on July 12, 1951, and Bishop Joseph Fady, W.F., was appointed to replace Bishop Julien.⁶¹ On May 15, 1952, the Holy See erected the apostolic vicariate of Zomba, cut off from the Shire Vicariate, and appointed Bishop Lawrence Pullens Hardman, S.M.M., as its apostolic vicar. In the same year the vicariate of Shire was renamed vicariate apostolic of Blantyre. Three years earlier Bishop John Baptist Hubert Theunissen, S.M.M., had succeeded Bishop Ludovico Auneau as head of the vicariate.

A couple of years later, on April 29, 1956, the apostolic vicariate of Dedza was formed from the Likuni Vicariate. Bishop Cornelius Chitsulo, an indigenous priest was named its apostolic vicar; he was the first native-born Malawian bishop. On January 3, 1958 Msgr. Saint

⁶⁰ See PIUS XII, Apostolic Constitution, May 8, 1947, *Quo in Nyasaland*, in *A.A.S.*, 39 (1947), pp. 432-433.

⁶¹ See *Annuario Pontificio*, Romae, Città del Vaticano, Libreria Editrice, Vaticana, 1952, p. 687.

Denis of the North Nyasa Apostolic Prefecture was replaced by Msgr. Jean Louis Jobidon, W.F. Later that same year, Likuni's name was changed to Lilongwe Vicariate.

April 25, 1959, was a great date for the Church in Nyasaland. On this day Lilongwe, Zomba and Dedza were raised to the status of dioceses and Blantyre was made an archdiocese, with Bishop J.B.H. Theunissen S.M.M., as the first archbishop.⁶² Bishop James Chiona, a Malawian, consecrated on May 28, 1965, assumed the pastoral governance of the archdiocese on November 29, 1967. The North Nyasa Prefecture was raised to a diocese on January 17, 1961⁶³ with Bishop J.L. Jobidon as its first bishop. He shepherded it for some twenty six years. His resignation for health reasons was accepted by Pope John Paul II on November 10, 1987, and he was replaced by Msgr. John Roche, S.P.S., apostolic administrator.

On March 22, 1965, the diocese of Chikwawa⁶⁴ was born out of the southern part of the archdiocese. Bishop Eugene Joseph Frans Vroemen, S.M.M., was head of the new diocese until February 12, 1979, when Bishop Felix Eugenio Mkhori, a Malawian, took over. Zomba diocese was partitioned on May 29, 1969; its northern portion became the prefecture apostolic of Fort Johnston, which was eventually erected into Mangochi diocese on September 17, 1973, with Bishop Alessandro Assolari, S.M.M., as its first bishop.

⁶² See JOHN XXIII, Apostolic Constitution, April 25, 1959, *Cum christiana fides*, in *A.A.S.*, 51 (1959), pp. 793-796. See also *Annuario Pontificio*, Città del Vaticano, Libreria Editrice, Vaticana, 1960, pp. 152, 204, 298, 536.

⁶³ JOHN XXIII, Apostolic Constitution, January 17, 1961, *Fertilis arbor*, in *A.A.S.*, 53 (1961), pp. 587-588.

⁶⁴ See PAUL VI, Apostolic Constitution, March 22, 1965, *Ad Christi regnum*, in *A.A.S.*, 58 (1966), pp. 257-258.

Bishop Lawrence Pullen Hardman of Zomba was replaced by Bishop Matthias A. Chimole on September 21, 1970. Two years later on August 27, 1972 Bishop J. Fady, W.F., was succeeded by Bishop Patrick Augustine Kalilombe, W.F., in Lilongwe. Bishop Kalilombe, a Malawian White Father and a biblical theologian, proved to be very pastoral, original in thought and action. He was also very dynamic and instrumental in building small and basic Christian communities. His resignation⁶⁵ was accepted on December 20, 1979. Bishop Chimole of Zomba was transferred to Lilongwe to take over and Fr. Allan Chamgwera was ordained bishop on May 31, 1981, to assume episcopal duties in Zomba. Three years afterwards on September 30, 1984, Bishop Gervasio Moses Chisendera replaced Bishop Chitsulo of Dedza, who had passed away. In 1990, twenty-six years after independence and a century after the arrival of the first Catholic missionaries, Malawi has seven Catholic dioceses,⁶⁶ five of which are pastored by Malawian bishops.

The current map of the dioceses of Malawi indicates that the territories of Lilongwe diocese and especially of Mzuzu diocese are quite extensive. There have been suggestions to partition the archdiocese of Blantyre, and the dioceses of Mzuzu and Lilongwe for reasons of size and population. Further divisions will be needed in the near future for the better functioning and management of the dioceses. The establishment of the local hierarchy, a task well begun, is not completed in Malawi,⁶⁷ but the local hierarchy is challenged to look beyond the mere fact of being established. The institutions within the Church are geared to

⁶⁵ His resignation was considered an enormous loss to the Catholic Church in Malawi because of his great contribution in spearheading the building of small Christian communities.

⁶⁶ See Appendix 12, for the map of the dioceses of Malawi.

⁶⁷ Cf. canon 252 § 3 (C.I.C., 1917).

the service of Word and sacraments, a service of the people of God within the inherited and evolving structures of the Church. One area of major challenge for the hierarchy of Malawi is its legislative service to the local Church which can be exercised in varied manners, in councils, synods and in conferences of bishops, to which we now turn our attention.

D. The Establishment of the Conference of Bishops

The Nyasaland Episcopal Conference was formed in 1961, though without official recognition from the Holy See at that time. It comprised the bishops of the five dioceses⁶⁸ erected in the country. The bishops felt the need to gather together from time to time to discuss issues of common pastoral concern. A prominent matter at that time deserving a common policy was the Church's attitude to and involvement in the unfolding political movements towards independence. The bishops also wanted a forum for exchanging views on certain pastoral practices and approaches. The nature of participation for catechumens in the Church's sacramental life as well as the situation of persons in irregular marriages were crucial matter for the conference. The Church also had to find a proper pastoral approach towards local customs, like tribal initiation ceremonies. Such concerns brought the bishops together to share and to find counsel and support from each other.

With the surge towards independence in the country, and along with the civil adoption of the name *Malawi*, the bishops decided to change the name of the conference. Thus, on May 26, 1964, the new title, *Episcopal Conference of Malawi*, was approved by the Holy See.

⁶⁸ See CATHOLIC SECRETARIAT OF MALAWI, *Catholic Directory of Malawi*, Limbe, Montfort Press, 1977, pp. 11, 36, 45, 64, 74.

Malawi became an independent sovereign state on July 6, 1964. On May 21, 1966, the apostolic nunciature was established in Malawi, with the pro-nuncio's residence in Lusaka, Zambia. The ambassador of Malawi to the Holy See resides in Bonn, Germany.

The Conference has grown with the erection of two new dioceses. Hence, it now comprises one archbishop and six suffragan bishops. This is an example of an ecclesiastical province whose boundaries coincide with the territory of a nation.⁶⁹

The statutes of the Episcopal Conference of Malawi were approved by the Congregation for the Evangelization of Peoples in 1969,⁷⁰ in keeping with the directives of *Christus Dominus*, 38, concerning conferences of bishops. The decree of approbation outlines and defines the nature, purpose, membership, the need for statutes and the binding force of decisions of the conference. *Christus Dominus*, 38, and *Ecclesiae sanctae* I, 41, form the basis of the new legislation on conferences of bishops contained in canons 447-459 of the 1983 Code.⁷¹

⁶⁹ Cf. *Codex iuris canonici auctoritate Ioannis Pauli PP II promulgatus* Libreria editrice Vaticana, 1983, American version of English-language translation: *Code of Canon Law*, Latin-English ed., translation prepared under the auspices of THE CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1983, canons 439, 440. Unless otherwise indicated quotations of canons in this thesis are from the 1983 *Code of Canon Law*.

⁷⁰ Cf. SACRA CONGREGATIO PRO GENTIUM EVANGELIZATIONE SEU DE PROPAGANDA FIDE, Decree, October 1, 1969, "Episcoporum conferentias" Prot. N. 6155/69. See Appendix 13.

⁷¹ The 1983 legislation on conferences of bishops has no counterpart in the 1917 *Code of Canon Law*. As universal legislation, it is the direct result of the Second Vatican Council. But from the beginning of the Church there has been regional councils and synods. In recent times, the Church in America offers the example of the Baltimore Plenary Councils held in 1852, 1866, and 1884. Then "[t]he Plenary Council of Latin America launched in 1889 a prototype of the modern conference, the Latin American Episcopal Conference (CELAM), which has continued a program aimed at the study and coordinated solutions of common problems. France, Spain, and the United States established similar conferences on a national basis after World War I" (W.M. ABBOT, ed., *The Documents of Vatican II*, New York, Guild Press, 1966, p. 424, footnote 69). The Catholic Church in Ireland had episcopal meetings at the beginning of the nineteenth century. The Congregation for the Propagation of Faith

In canon 447 the Code recalls the purpose of conferences of bishops, stating:

The conference of bishops, a permanent institution, is a grouping of bishops of a given nation or territory whereby, according to the norm of law, they jointly exercise certain pastoral functions on behalf of the Christian faithful of their territory in view of promoting that greater good which the Church offers humankind, especially through forms and programs of the apostolate which are fittingly adapted to the circumstances of the time and place.

The purpose of a conference of bishops is therefore to furnish the bishops of a nation or a designated territory with the opportunity jointly to plan, discuss and resolve certain pastoral issues on behalf of the Christian faithful of their territory. It is important to note that instead of stating that bishops "[...] jointly exercise their pastoral office [...]" as the Council put it, the Code for juridical precision says "[...] jointly exercise certain pastoral functions [...]"⁷² Indeed, the conference of bishops is not to assume all pastoral functions in its territory and in the individual dioceses; rather it can exercise only certain pastoral duties. Thus, the autonomy and pastoral responsibility of the diocesan bishop in his diocese remains intact.

To safeguard the diocesan bishop's pastoral autonomy in his diocese, the legislator in canon 455 §1 defines the instances when the conference can issue general decrees and general executory decrees.⁷³ These occasions are: firstly, those cases in which the universal

approved their statutes in 1882.

⁷² Compare *Christus Dominus*, 38 with canon 447.

⁷³ According to canon 29, general decrees are laws, and these when legally promulgated by a conference of bishops, after having been reviewed by the Apostolic See, have binding force within the territory of the conference. Cf. canon 455 §2. General executory decrees determine more precisely how laws are to be observed and they urge the observance of laws (c. 31). On whether the expression *general decrees* in canon 455 §1 also includes general executory decrees (cc. 31-33), the Commission for the Authentic Interpretation of the *Code of Canon Law* responded in the affirmative (see *A.A.S.*, 77 [1985], p. 771; English translation in *Roman Replies and CLSA Advisory Opinions*, 1986, Washington, DC, Canon Law Society of America, 1986, p. 91).

law has prescribed it,⁷⁴ and secondly, those cases where a special mandate of the Apostolic See, given either *motu proprio*, that is, on the initiative of the Holy See, without being requested, or at the request of the conference, has been issued. The Code further specifies that, besides these instances neither the conference nor its president⁷⁵ may act in the name of all the bishops unless each and every bishop has given his consent (c. 455 §4).

The conference of bishops jointly exercises the defined pastoral functions on behalf of the Christian faithful of its territory for the purpose of promoting that greater good which the Church offers humankind. The conference should not be viewed in isolation from the Church community on whose behalf it acts and whose mission in the world it aims to promote. It would therefore be expected that there be open avenues, through diocesan and national committees and commissions between the conference and the Christian faithful, for it to act authentically on behalf of the people of God in the territory.

The conference does not exist solely for the internal ordering and functioning of the Church; the all important role of the Church in the world to promote the greater good it offers humankind must also be kept in mind (c. 447). This canon must certainly be understood within the context of the conciliar document *Gaudium et spes* on the role of the Church in the modern world. The conference therefore cannot always remain silent to the challenging economic, political, ethical and justice issues that have serious repercussions on the preaching

⁷⁴ Examples of these are: canons 891, 1083 §2, 1251, 1421 §2.

⁷⁵ No individual bishop, including the metropolitan or archbishop, may act in the name of all the bishops of the conference without proper mandate according to the norms of law. The peculiar duties of a metropolitan are clearly enumerated in the Code. Some of his tasks are spelled out in canons 377 §3, 395 §4, 413 §1, 415, 421 §2, 425 §3, 432, 436, 1438, 1°. Outside the competency described in canon 436 and other canons of the Code, the metropolitan has no other power of governance within the suffragan dioceses.

and interpretation of the Word of God in the region of the conference. To be faithful to its mission, the maturing local Church and conference of Malawi in its operation must not only be centripetal and introspective, but also and even more so, be centrifugal in responsibly responding to pastoral needs by issuing pertinent national directives, at times laws, where necessary.

Both the Council and the Code express the idea that the forms and programmes of the apostolate in which the conference engages must be fittingly adapted. Whereas *Christus Dominus*, 38, says "[...] especially through forms and programmes of apostolate which are fittingly adapted to the circumstances of the age," canon 447 states: "[...] especially through forms and programmes of apostolate which are fittingly adapted to the circumstances of the time and place." One may argue that there is hardly any difference between *circumstances of the age* and *circumstances of the time and place*. Nevertheless, the latter is more precise in its expression.

It is suggested here that the choice of *circumstances of the time and place* is fitting and proper for the nature and purpose of a conference of bishops. The advantage this phrase has over *circumstances of the age* is that it particularizes and localizes the task of the conference. The phrase *circumstances of the age* does not directly bring to mind the concerns of a particular area or place. For one who thinks in terms of a single world culture, the term *circumstances of the age* would be appropriate and would mean that similar adaptations of the apostolate need to be carried out periodically everywhere. If this were so, a world catechism or a world marriage ritual would raise few difficulties.

A major work of the conference is to adapt the forms and programmes of the apostolate effectively to suit the local conditions of the territory at a given particular time in history. It is a task of inculturating the gospel. In their ministry as a conference, the bishops have the duty of meaningfully implementing the universal laws of the Church in the local Church. Moreover, aware of the world cultural diversity, the legislator has recognized the need for and has permitted particular legislation at the conference level, where appropriate adaptation and inculturation can take place.

Conclusion:

In this chapter we have looked at the development of Malawi as a country. In the pre-colonial era the people that inhabited Malawi were organized into tribal groups which relatively varied according to language, customs and social-political organization. For some eighty years Malawi was a British protectorate, and during this period national awareness and identity developed leading to independence in 1964.

The early Protestant and Catholic missionaries evangelized the people amidst a threefold resistance atmosphere: the Muslim religion, the slave trade and local people who felt their land and traditions were being invaded by missionaries identified with the European settlers. The Congregation of the Propagation of the Faith gave the White Fathers and the Montfort Missionaries jurisdiction over Likuni Vicariate and Shire Vicariate respectively. The two vicariates were further divided and seven dioceses were erected by the end of 1973. The local hierarchy was established and in 1969 the Holy See erected the Episcopal Conference of Malawi. Over the last century or so the Church in Malawi has witnessed great strides of

growth. The 1987 statistics reveal the following: out of 7,875,486 Malawians there were 1,577,594 Catholics in 135 parishes, and they were served by 353 priests.⁷⁶

The second chapter will therefore study the importance of the universal law and how it has been and is applied to the Church in Malawi. It will be noted that certain customs and local concepts are inconsistent with the teaching, traditions and laws of the Church. Examples of cultural, economic differences that have presented difficulties in the application of Church laws and how mission faculties were introduced to respond to this need shall be pointed out. Finally, the point will be made that within a system of universal law, particular law is very important for the growth of particular Churches.

⁷⁶ See, *Annuario Pontificio*, 1990, which also gives the following 1987 figures for the dioceses in Malawi:

Diocese:	Blantyre	Chikwawa	Dedza	Lilongwe	Mangochi	Mzuzu	Zomba
Area:	9161	7676	4250	24025	11385	20000	3232
Pop.:	2303000	527000	735000	2345573	785000	723000	456000
Cath.:	553758	100581	185955	385377	117366	80000	154557
Parishes:	44	12	15	25	13	13	13
Male Rel.:	60	11	45	66	44	39	25
Female Rel.:	171	39	89	155	50	93	47
Rel. Priests:	32	10	19	57	26	29	15
Sec. Priests:	39	10	30	29	14	20	23
Seminarians:	53	19	25	45	26	32	18

Totals: area = 79729 Km² (this is land area only); population = 7,875,486; Catholics = 1,577,594; Parishes = 135; Male Religious = 290; Female Religious = 644; Religious Priests = 188; Secular Priests = 165; Seminarians = 218.

CHAPTER II

THE APPLICATION OF THE UNIVERSAL LAW TO THE CHURCH IN MALAWI

Introduction:

This chapter will focus on the application of the universal law to the particular churches in Malawi. In the first section the importance of universal law for the Church in Malawi will be discussed since the communion of particular churches cannot leave dioceses in isolation. Indeed, certain rules and regulations have to be applicable in the Church wherever it exists without overwhelming the churches with a multiplicity of universal laws. The second section examines the impact of Church legislation on the customs and customary law of the people of Malawi. When the Church finds itself in new cultural settings it has to make some adaptations and accommodations, even in the area of law, to the mentality, symbols and forms of expression relevant to the concerned people. Since the Church in Malawi, under the guidance of the Congregation for the Propagation of the Faith, has been governed by the common law of the Church and by missionary law in the form of apostolic faculties, section three of this chapter will make a brief study of the missionary faculties as applied in Malawi. Finally, in this context, the fourth section will discuss the significance of particular law for the Church in Malawi.

A. The Relevance of the Universal Law to the Church in Malawi

The Second Vatican Council reminds us that the Church is a communion, the people of God, hierarchically structured for service in the world where this pilgrim people is a sign and instrument of salvation.¹ The theology of communion brings all particular churches into

¹ See *Lumen gentium*, 1-4. There are a number of models and images that are used to describe the reality of Church. A. DULLES in his book *Models of the Church*, New York, Doubleday & Company Inc., 1974, pp. 13-30, expounds on such models as the Church as people of God, as communion, mystery, as a pilgrim people, as hierarchically structured, sacrament, and so forth.

the one fold of Christ. Even though the Church of Christ is present in each particular church, there is none which is fully the Church of Christ without or to the exclusion of other particular churches. An intrinsic union of Word and sacraments, of faith and doctrine, as well as basic structural union permeates all particular churches. Thus, the dioceses in Malawi share the essential elements of being Church with all other particular churches throughout the world.

According to John Paul II, the universal law of the Church, as expressed in the Code, is a serious attempt to translate the ecclesiology and teachings of Vatican Council II into canonical-juridic language.² The Code is no substitute for faith, grace and charism. But for a Church that is both divine and human, visible and invisible, holy yet imperfect, the Code intends to ensure order and doctrinal unity in the realization of its mission in the world. In speaking about the newness of the Code as based on the Council, John Paul II mentions some elements that characterize the authentic picture of the Church.

Among the elements which characterize the true and genuine image of the Church, we should emphasise especially the following: the doctrine in which the Church is presented as the people of God (cf. dogmatic constitution *Lumen gentium*, chapter 2) and hierarchical authority as service (ibid., chapter 3); the doctrine in which the Church is seen as a communion and which therefore determines the relations which are to exist between the particular churches and the universal Church and between collegiality and primacy; likewise the doctrine according to which all the members of the people of God, in the way suited to each of them, participate in the threefold priestly, prophetic and kingly office of Christ, to which doctrine is also linked that which concerns the duties and rights of the faithful and particularly of the laity; and finally, the Church's commitment to ecumenism.³

² See JOHN PAUL II, Apostolic Constitution, January 25, 1983, *Sacrae disciplinae leges*, in *A.A.S.*, Special, 75 (1983), pp. vii-xiv; English translation in *Code of Canon Law, Latin-English Edition*, Washington, DC, Canon Law Society of America, 1983, p. xiv.

³ JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, p. xv.

In stressing the newness of Vatican II's ecclesiology, the Pontiff underscores the doctrinal elements which universal legislation upholds in the 1983 Code. He proceeds to spell out the importance of the Code for the Church:

As a matter of fact, the *Code of Canon Law* is extremely necessary for the Church. Since the Church is organized as a social and visible structure, it must also have norms: in order that its hierarchical and organic structure be visible; in order that the exercise of the functions divinely entrusted to it, especially that of sacred power and of the administration of the sacraments, may be adequately organized; in order that the mutual relations of the faithful may be regulated according to justice based upon charity, with the rights of individuals guaranteed and well-defined; in order, finally, that common initiatives undertaken to live a Christian life ever more perfectly may be sustained, strengthened and fostered by canonical norms.⁴

Though the Church has always had some form of legislation, it is worthy of note that it survived many centuries without a Code. In fact, the first Code was promulgated in 1917, at a time when codification of law was a common practice in many European countries.

From the time of St. Clement, 97 A.D., the bishops of Rome governed largely by means of correspondence, deciding cases submitted to them and settling points of general discipline [...] moreover, other bishops enacted for their own dioceses such regulations as local conditions required. These regulations were not themselves general; but sometimes they spread from one diocese to another and ended by gaining universal recognition and thus became part of the general law.⁵

The legislative involvement of the bishop of Rome in other dioceses was largely through papal decretals which were written answers to particular questions, problems and points of discipline raised by individual bishops, abbots and other persons. Some of these answers were copied and applied in other dioceses and eventually gained universal

⁴ Ibid.

⁵ T.L. BOUSCAREN, A.C. ELLIS, F.N. KORTI, *Canon Law, A Text and Commentary*, 4th ed., Milwaukee, The Bruce Publishing Company, 1963, p. 1.

recognition. Another source of ecclesiastical legislation was ecumenical councils. These councils, with the approval of popes, "[...] not only defined points of faith [...] but also enacted numerous disciplinary laws for the whole Church."⁶ Councils and especially letters of popes became more frequent after the edict of Constantine in 313 when the Church was free to develop its own organization.

In the twelfth century, Gratian collected and attempted to put in order the mass of ecclesiastical legislation, rules and various texts available to him. He named his book *Concordia discordantium canonum*, but later it was called *Decretum Gratiani*. Though unofficial, Gratian's Decree brought order out of disharmony and discord. The earliest official and authentic collection of decretals were the Decretals of Gregory IX which were collected by the famous canonist St. Raymond of Pennafort, O.P. in 1234. Gradually, the Decree of Gratian was supplemented by several other collections which John Chappuis edited and synthesized to form the *Corpus iuris canonici*.⁷ Prior to the Council of Trent, this was a major source for canonical legislation.

The Council of Trent (1545-1563), a monumental landmark in the history of the Church and canon law, defined many points of faith and enacted many disciplinary measures. In the post-tridentine period, uniformity of Church discipline through conformity to canon

⁶ Ibid.

⁷ The *Corpus iuris canonici* contained Gratian's Decree, the Decretals of Gregory IX (*Liber extra*, in 1234), the *Liber sextus* issued by Boniface VIII in 1298, the *Clementinae* promulgated by John XXII in 1317, the *Extravagantes* of John XXII and the *Extravagantes communes* issued in 1500.

law was an established means of maintaining sound doctrine and unity of faith. However, even with the Council of Trent, there was not a unified implementation of Church law:

The implementation of the reform decrees encountered opposition in individual states, which led to legal confusion and legal disparities, especially for Catholics in Protestant territories where the Council decrees were not recognized at all.⁸

A typical example of Trent's decrees which were not uniformly implemented was *Tametsi* which attempted to remedy the abuses of clandestine marriages by establishing a canonical form for the celebration of marriages.⁹

Need was gradually felt to bring about a systematic order in the laws of the Church; thus in his encyclical *Arduum sane munus*, in 1904, Pius X announced that:

[...] he was determined to have a complete and orderly codification of all extant ecclesiastical laws, with the obsolete and outdated ones eliminated, and all others brought into conformity with modern conditions.¹⁰

The idea of codification arose as an answer to the state of Church law. Due to the multiplication of local customs and varied legislation in the different territories, the Church felt the need to unify its laws. After all, if the same laws were to operate everywhere it would most likely make for easier government and control. Indeed, in a sense, the 1917 Code can be viewed as:

⁸ P. LEISCHING, "The Council of Trent to the Code of Canon Law," in *New Catholic Encyclopaedia*, J. McDONALD, ed., vol. 3, New York, McGraw-Hill Book Company, 1967, p. 47.

⁹ It was only in 1907 that the decree *Tametsi* became universally binding with the papal decree *Ne temere*.

¹⁰ T.L. BOUSCAREN, *Canon Law, A Text and Commentary*, p. 4.

[...] the expression of an authority and a centralization that had reached their summit [...] a means whereby the central government of the Church was able to affirm itself and thus consolidate those very institutions.¹¹

Codification systematically unified and harmonized papal responses and official collections of laws and thus avoided a multiplicity of answers and practices to the same questions and problems. Furthermore, it effected a new and profound revision which eliminated norms that were no longer applicable and adapted legislation to the modern times.¹²

The advantages of codification are indisputable. But the ill-effects to the particular churches of a protracted and over-detailed universal legislation are beyond doubt, for canon law as it stands sometimes serves to conserve ready-made doctrinal statements and pre-defined liturgical norms. Some worthwhile local initiatives which would assist the emergence of true particular churches are sometimes curtailed by universal laws.

For the young Churches, like those in Malawi, which are only a hundred or so years old, there is little prospect for introducing new customs under current legislation. Indeed, the law at times halts the cultural contributions of the particular churches by expecting them to conform to one mode of being.

¹¹ F.G. MORRISEY, O.M.I., "The Significance of Particular Law in the Proposed New Code of Canon Law," in *C.L.S.A. Proceedings*, 1981, p. 1.

¹² See A. MOTILIA, "La idea de la codificación en el proceso de formación del *codex* de 1917," in *Ius canonicum*, 28 (1988), pp. 684-687.

The relevance of the universal legislation for the particular churches in Malawi is found in its function of safeguarding unity of faith and doctrine and in maintaining the structures and institutions of the Church, which have one basic purpose, namely, the salvation of souls.¹³ It is, however, not always apparent when and whether a law or an institution is of divine law and is therefore immutable.¹⁴ Obviously, a large part of the universal law consists of merely ecclesiastical laws, most of which do not have direct and immediate repercussion on strictly doctrinal considerations. Many of the universal laws are disciplinary, procedural and penal norms, such as those relating to the canonical form for the celebration of marriage, priestly celibacy, procedures for the declaration of nullity and laicization.

It would seem that many of the laws of the Church do not need to be universalized. People throughout the world, who form the particular churches, are culturally so diverse that detailed structural, disciplinary and liturgical uniformity is not necessary for a people freely to respond to the gospel and authentically express its faith with its own cultural resources.¹⁵

The Code did not intend to make all particular churches copies of any one particular church. Holding on to extraneous and expendable culturally conditioned rules, theological

¹³ Cf. canon 1752.

¹⁴ Authors debate whether for the valid celebration of the Eucharist, it is absolutely necessary to use bread made from wheat flour and wine from grapes. Cf. J.M. EIA, *African Cry*, Maryknoll, Orbis Books, 1986, pp. 4-8, where he argues that, "[T]he question does not pertain to dogma but is a matter of pure discipline"; whether canon 1024 which rules that "Only a baptized male validly receives sacred ordination," is a stipulation of divine law or the expression of a longstanding tradition that has been shaped and fostered by a culture and society that is predominantly patriarchal.

¹⁵ The gospel and faith have a history and tradition whereby they are transmitted and received. Certain historical and traditional aspects of the faith continue to be vehicles of cross-cultural faith communication while others are readily dispensable.

formulations and traditions could risk stifling the dynamism and even the legal autonomy of a vibrant particular church. At the heart of the question of the relevance of the universal law to the Church in Malawi is the basic discussion of the relationship of the particular church to the Church universal.¹⁶ Too much nonessential legislation from the universal Church would be inappropriate for the particular church. The following section will observe some effects of the encounter and dialogue between the universal law of the Church and the customary law of Malawi.

B. Universal Church Legislation and Customary Law in Malawi

In this section there will be an exposition of certain cultural characteristics of the traditions, customs and customary law of the people of Malawi which in one way or another come into conflict with the teaching and norms of the Catholic Church. Explanations of some social institutions and patterns of behaviour will be given in order to contextualize certain issues of the Malawian society and to show how these cultural elements are not always in harmony with the practice of the Church. This presentation seeks to suggest where some elements of the universal law might be modified and adjusted for better service of the people of God in the particular churches in Malawi. Mindful that the gospel is above culture and that it perfects customs, it is suggested that certain Malawian customs and traditions could be used in the development of particular law, especially by way of the local hierarchy's responsible pastoral response to cultural-theological phenomena.

¹⁶ See, A. D'ORS, "Iglesia universal e iglesia particular," in *Ius canonicum*, 28 (1988), pp. 295-303. John Paul II also acknowledged this polarity in his Apostolic Constitution, "Sacrae disciplinae leges," p. xv.

1. *Malawian customary law*

Much of the legislation of the Church is perceived to be a foreign entity when it is being applied in mission countries especially in non-western countries like Malawi. The application of universal law may be compared to the process of adopting an alien (European) system of civil law in an African country. For example, in Malawi, the British system of law has been adopted but with modifications, and in such a way that the customary law¹⁷ of the people of Malawi is still operative with some adjustments. Similarly, with the exception of unchangeable elements of Church law based on divine and natural law, some argue that the social-culturally conditioned ecclesiastical legislation could be subject to adaptation from country to country. Certain customs and values of Malawians which are in part protected by the preserved customary law¹⁸ can help the particular churches in Malawi in implementing the universal law as well as in developing a vibrant particular law.

¹⁷ In this chapter, *customary law* refers to a traditional system of law that has been in vogue for centuries among the people of Malawi. It emerged from customs after long usage or practice by the people, and as a result of lengthy series of constantly repeated actions which had become compulsory and so had acquired the force of law. It is mostly an unwritten body of legal rules which has governed the fulfilment of needs and duties of tribal members and has assisted the orderly functioning of social institutions like marriage, chieftaincy, inheritance, land and property. Its legal principles represent the interconnected value system of a socio-cultural group, normally within a delineated geographical area.

¹⁸ Some type of legal system has existed from earliest times among the people of Malawi in their tribal organizations, as is the case with any African people. But when colonization began, customary law entered a new phase. The western governments in Africa could not operate smoothly with a system of law which was alien to them. Furthermore, African customary law was often held to be inadequate in dealing with modern legal problems arising from the complex situation created by industrialization, trade, advanced economics and technology. Thus, remedies were sought in the legal systems of the west. The British in Malawi devised two courts in each district, one for Malawians where chiefs could use customary law and the other for non-Malawians. Authors and African governments have discussed and have come up with various solutions regarding the eventual role and destiny of customary law in African states. Cf. B.J. VAN NIEKERK, "Customary Law in Botswana: Substitution or Adaptation?" in *Comparative International Law Journal of Southern Africa (C.I.L.S.A.)*, 3 (1970), pp. 242-247; A.J.G.M. SANDERS, "How Customary is African Customary Law?" in *C.I.L.S.A.*, 20 (1987), pp. 405-450; W.C.M. MAQUITU, A.J.G.M. SANDERS, "The Internal Conflict of Laws in Lesotho," in *C.I.L.S.A.*, 20 (1987) pp. 377-404.

The British colonial administration in Malawi did not disregard customary laws completely. But due to their variety and multiplicity in the same country and the difficulty of harmonizing institutions and principles with those of the imported general law of British origin, the desire arose to reform, and where possible, to unify the local customary laws. This was part of a larger exercise of national development through programmes of social and economic reform. As a result, Malawi is governed by a compound system of customary law and the received English law.¹⁹

The existence of two legal systems of law is reflected in a dualism of the law courts which also shows the acceptance and importance of customary law in Malawi. Macnight R.E. Machika writes:

One of the unique features of the court system in Malawi is the existence, side by side, of two separate court structures that sometimes share jurisdiction over certain matters. I have chosen to call the two court structures the High Court system and the Traditional Courts system.²⁰

¹⁹ The ordinance under which English Law was adopted reads: "Subject to the provisions of this order and of any law for the time being in force in Nyasaland the civil and criminal jurisdiction of the High Court and of courts subordinate to the High Court, shall, so far as circumstances admit be exercised in conformity with a) the statutes of general application in force in England on the 11th day of August, 1902 and b) the substance of English common law and doctrines of equity and with powers vested in and according to the course of procedure and practice observed by and before courts of justice and justices of the peace in England" (J.D.A. BROOKE-TAYLOR, *Land Law in Malawi*, Zomba, Chancellor College, 1977, p. 1). For example, the *Land Act* of 1965 divides all land in Malawi into three categories, namely: public, private and customary. Customary land is vested in the president of the Republic of Malawi for the people of Malawi, but it is not state property; however, the minerals in, under or upon it belong to the State. Tribal or customary land is subject to the chiefs and village headmen/women whose task it is to allocate it, normally not to sell it, to members of the tribe and to others who wish to settle in the village (see *Laws of Malawi*, The Land Act Cap. 57:01. Also see, J.D.A. BROOKE-TAYLOR, *Land Law in Malawi*, p. 3).

By *Laws of Malawi* is meant the whole body of constitution and laws passed and amended by the parliament of Malawi, that is, the common law of Malawi.

²⁰ M.R.E. MACHIKA, *The Malawi Legal System: An Introduction*, Zomba, Chancellor College, 1983, p. 3. On the one hand, the High Court system is made up of the Malawi Supreme Court of Appeal, the High Court and the Magistrates' Courts. On the other hand, the traditional courts system comprises the National Traditional Appeal Court, Regional Traditional Courts, District Traditional Appeal Courts, District Traditional Courts and Grades A and B Traditional Courts (see *Laws of Malawi*, The Republic of Malawi (Constitution) Act, ss. 15, 62, 67, 69; Traditional Courts Act, ss. 3, 33, 34). Section 12 of the Traditional Courts Act provides for the law to be administered by Traditional Courts. Subject to this Act the court is empowered to administer:

The common law of Malawi does not contain a detailed written statement of all customary laws. The law consolidates customary law, partially reforms it, specifies where it is not applicable and explicitly outlines its domain. Therefore, by customary law is meant much more than what one finds in the laws of Malawi. The term includes all the unwritten legislation, principles of law, customs that govern the tribal and social institutions, provided they have not been reprobated. Traditional law is another term that is employed to embrace all the approved customary laws, including the customs that are used to interpret and understand pertinent legal issues in modern Malawi.

The civil law of Malawi has adopted the English legal system for the ordering of western institutions, but it has also retained major elements of the customary legal systems which embody special values of the local people. The Catholic Church has its own legal system based on divine and human elements and has historically developed in its western environment. The merely human elements of the Church's laws are historically and culturally conditioned. Thus, a particular church could make use of local usages and practices, if found suitable, and praiseworthy customs could be allowed to influence the development of the particular law.²¹

"(d) the customary law prevailing in the area of the jurisdiction of the court, so far as it is not repugnant to justice or morality or inconsistent with the constitution or any written law in force in Malawi" (*Laws of Malawi*, The Traditional Courts Act, s. 12).

An example of a prohibited traditional practice is trial by the ordeal of *muabvi*. The Act says: "Trial by the ordeal of *Muabvi* or other poison, fire, boiling water, or by any ordeal which is likely directly or indirectly to result in death of or bodily injury to any person shall be and is hereby prohibited" (*Laws of Malawi*, "The Witchcraft Act," s. 2).

²¹ See I. RUGAMBWA, cardinal archbishop of Dar es Salaam, Tanzania, "African Intervention in the 1980 Synod of Bishops," in *AFFER*, 23 (1981), p. 29.

2. *Universal legislation confronts the customary law of Malawi*

a) *Notion of marriage*

The Church's teaching and consequent legislation on marriage is an area which has occasioned tremendous tension and concern in Christian living and social life in Malawi. At first glance one immediately notes that the institution of marriage in Malawi has elements which the Church does not accept.²² While the notion of a monogamous marriage, is not incompatible with the Malawian concept of marriage, the Church's rejection of polygamous marriage, however, stands in stark contrast with Malawian culture, customary law and civil law which accept polygamy. In order to understand the status of both the Christian marriage and customary marriage in Malawi, we will briefly look at the country's civil legislation on marriage.

The Constitution and Laws of Malawi in chapter 25, makes provisions and regulations for marriages in Malawi. It has three Acts: the *Marriage Act*, the *Asiatics (Marriage, Divorce and Succession) Act* and the *African Marriage (Christian Rites) Registration Act*. These Acts were passed to respond to the different needs, beliefs and values of the multi-cultural population (Europeans, Asians, other non-Africans, Africans and Malawians) inhabiting the country.

²² See *Exultate Deo*, November 22, 1439, in H. DENZINGER, *The Sources of Catholic Dogma*, 702, hereafter *Denzinger*; Council of Trent, Session XXIV, November 11, 1563, in *Denzinger*, 969-972; PIUS XI, Encyclical, December 31, 1930, *Casti connubii*, in *A.A.S.*, 22 (1930), pp. 540-541. See also F.T. URRUTIA, "Can Polygamy be Compatible with Christianity?" in *African Ecclesial Review (=AFER)*, 23 (1981), pp. 276-280. Speaking of marriage as forming a community of persons, John Paul II states that: "Such a communion is radically contradicted by polygamy: this, in fact, directly negates the plan of God which was revealed from the beginning, because it is contrary to the equal personal dignity of men and women who in matrimony give themselves with a love that is total and therefore unique and exclusive" (JOHN PAUL II, Apostolic Exhortation, November 22, 1981, *Familiaris consortio*, 19, in FLANNERY II, p. 829).

Under the *Marriage Act*, marriage is available to all persons regardless of race or personal law. With some adaptations the Act regulates this type of marriage after the English law; thus it accommodates all those who believe in an exclusively monogamous marriage, be they Malawians or not. The Act states:

(1) A marriage may be lawfully celebrated under this Act between a man and the sister or niece of his deceased wife, but save as aforesaid, no marriage in Malawi shall be valid, which, if celebrated in England, would be null and void on the ground of kindred or affinity, or where either of the parties thereto at the time of the celebration of such marriage is married by customary law to any person other than the person with whom such marriage is had.²¹

Furthermore, section 36 of the Act says that a person who is married under this Act is incapable, during the continuance of such a marriage, of contracting a valid marriage under any customary law. Hence, under this Act polygamy is prohibited, and a monogamous marriage is mandatory. In fact, sections 43 and 44 of the Act stipulate that whoever is guilty of bigamy shall be liable to imprisonment for five years.

Then, there is the second Act, *The Asiatics (Marriage, Divorce and Succession) Act* on marriage which caters to non-Christian Asiatics (Muslims, Hindus, Bahai etc.), who also maintain varying beliefs and rulings concerning marriage. Marriage under this Act is apparently not open to Malawians and other non-Asians. Section 2, (1) of the Act regulates that:

The marriage in Malawi of non-Christian Asiatics, whether domiciled in Malawi or not, who are not related to each other in any of the degrees of consanguinity or affinity prohibited by the law of the religion of either party to the marriage, shall, if the marriage is contracted in the manner customary

²¹ *Laws of Malawi*, cap. 25:01, s. 34.

in Malawi among persons professing the religion of either party to the marriage, be deemed for all purposes to be a valid marriage.²⁴

Since the Act also safeguards the rules and beliefs of the pertinent religion, an Islamic husband can contract valid subsequent marriages while the previous marriage endures. Hence, unlike with the *Marriage Act*, under the *Asiatics (Marriage, Divorce and Succession) Act* spouses are not strictly bound to monogamy.²⁵

The third Act is *The African Marriage (Christian Rites) Registration Act*. Marriages under this Act are available only between Africans, whether they be Christians or not. The Act takes care of the many typical customary marriages, and the Christian Rites marriages are included among these. The law does not have detailed rulings, since regulations concerning the marriage institution vary from tribe to tribe and from one Christian Church to another. Precise rulings on capacity to marry and marriage formalities are to be determined by the rites of the minister who performs the marriage. The Act provides that:

(3) Notwithstanding anything contained in the Marriage Act it shall be permissible for any minister and at any place to celebrate marriage according to the rites of the Church, Denomination, or Body to which he belongs between two Africans:

Provided that the celebration of marriage under this Act shall not as regards the parties thereto alter or affect their status or the consequences of any prior marriage entered into by either party according to customary law or involve any other legal consequences whatever.²⁶

²⁴ *Ibid.*, cap. 25:03, s. 2 (1).

²⁵ This has possible effects on marriages of Catholic women to Muslim men whose mentality regarding marriage is different because of the acceptability of simultaneous or subsequent multiple marriages.

²⁶ *Laws of Malawi*, cap. 25:02, s. 3.

Section 2 of the Act points out how the word *minister* is to be interpreted in this Act. It says: *minister* means any person duly ordained, appointed or authorized by any Christian Church, Denomination or Body to celebrate marriage between Africans according to the rites of such Church, Denomination or Body.

The Act intently safeguards the culturally rooted polygamous marriage. It also protects the rights of parties, especially of women, who may easily be victims of unjust abandonment. Obviously, persons married under this Act, Christian or non-Christian, can contract a civilly valid subsequent concurrent marriage with another person under customary law.

Customary law upholds polygamy,²⁷ and civil legislation in Malawi has opted not to outlaw polygamy. It has adopted the strict, exclusive monogamous western model in *The Marriage Act*; but in the other two Acts the law acknowledges polygamy because the multiple types of polygamous marriages are enshrined and entwined with cultural, social and even religious values.²⁸

²⁷ Polygamy includes (1) polyandry, that is, marriage of one woman to several men, and (2) polygyny, in which case two or more women are married to one man. Strictly speaking the appropriate term for the Malawian marriage situation is polygyny (see L. BROOM and P. SELZNICK, *Sociology, a text with adapted readings*, 3rd. ed., New York, Harper and Row Publishers, 1963, p. 356).

²⁸ For instance, a fairly common cultural practice that often leads to polygamy in Malawi is widow inheritance. This means that upon the death of a husband, the widow is inherited by one of the brothers or paternal cousins of the deceased. To the western ear and to many others, the term *inheritance* speaks of property and ownership. When applied to a person, therefore, a human being seemingly becomes an object whose ownership is transferrable. Viewed in this manner, widow inheritance would certainly be against the dignity and freedom of the human person. However, for better comprehension, a social institution like widow inheritance must be analysed within its own socio-cultural context.

Widow inheritance offers social support and security for the widow and the children. Customary marriage determines ownership and usage of essential properties like land and houses which under tribal law were not shared or sold once a marriage came to an end by death or divorce. After the death of a spouse, if the widow (in a patrilineal and patrilocal tribal group) or widower (in a matrilineal and matrilocal society) decides to depart, he or she relinquishes rights to the land and house, usually even the custody of the children.

In the case of a levirate or sororate marriage, if prompted by the death of a spouse, some have expressed the opinion that there is no new marriage; it is the same marriage which continues. At the death of a spouse it enters into another phase. So the brother or sister who takes the place of the deceased spouse acts and raises children on his or her behalf. According to this opinion, then, there is no question of polygamy (see J.O. IBIK, *Restatement of African Law, Malawi: 3, Marriage and Divorce* [= *Restatement of African Law, Malawi: 3*], London, Sweet and Maxwell Press, 1970, p. 8; see also G.K. FALUSI, "African Levirate and Christianity," in *AFFER*, 24 [1982], pp. 303-304).

John M. Huels also alludes to this and he asks: "How does the missionary convince the people that the levirate is immoral when in their culture it is not only morally good but is even noble and virtuous? Is this an example where Church teaching and canon law are too closely tied to one cultural way of seeing things, or is this a case where the culture must be 'redeemed' and converted to genuinely Christian values which admit of no compromise?" (J.M. HUELS, "Interpreting Canon Law in Diverse Cultures," in *The Jurist*, 47 [1987], pp. 266-267).

The three Acts provide three forms of being civilly validly married in Malawi. Civil law places no obligation on Christians to be married according to the rite of their Church denomination, which, in any case, civilly has the same effects as a customary marriage. The majority of the people in Malawi follow the traditional marriage rites, hence, like in many parts of Africa, most Catholic parishes have very few marriages celebrated according to the canonical form because people prefer the rich cultural marriage rite. It is precisely because of this situation that some African bishops speak of revising the canonical form of marriage so that there is recognition of the local cultural marriage rite.²⁹

b) *Procreation and fecundity*

An intrinsic part of marriage is its important role of procreation and the nurturing of offspring in continuance of the human species. In the social institution of marriage, there is expressed and underscored the value of fecundity which is highly esteemed in the Malawian cultures.³⁰ Children are so much expected of married couples that when the hope for offspring appears to be shattered after several unsuccessful attempts at conceiving, the alternative frequently taken is marriage with another partner. While children are not the only reason for marriage, a childless marriage, to many Malawians, is not a complete marriage. Each person is expected, in one's own measure, to contribute to the propagation of the society, by bearing and rearing children.

²⁹ See B. YAGO, archbishop of Abidjan, Ivory Coast, and J.-C. BOUCHARD, bishop of Pala, Chad, "African Interventions in the 1980 Synod of Bishops," in *AFER*, 23 (1981), pp. 18, 31-32. See also T.P. KAPITO, "Yawo Resistance to Christian Marriage? Possibilities of a Local Theology of Marriage" (= "Yawo Resistance to Christian Marriage"), Ph.D. diss., Ottawa, Saint Paul University, 1989, pp. 448-450.

³⁰ See T.P. KAPITO, "Yawo Resistance to Christian Marriage," pp. 185-200. Cf. also P.P. DIERY, archbishop of Tamale on behalf of Ghana's Bishops Conference, "African Intervention at the 1980 Synod of Bishops," in *AFER*, 23 (1981), 38-39; F.A. ARINZE, archbishop of Onitsha, Nigeria, *ibid.*, p. 98; and F.T. URRUTIA, "The Canonical Matrimonial Doctrine Challenged From Africa," in *Studia canonica*, 23 (1989), pp. 14-15.

The institution of marriage is basically geared towards perpetuating the human race. In Malawi, when a child is born, as it were, the marriage bond is considered sealed or consolidated. Sexual consummation of marriage has relevance, but its primary role is the expression and fulfilment of the purposes of marriage, love (the good of the spouses)³¹ and procreation. The emphasis on procreation in no way should be taken to mean that every marital act is intended to bring about procreation. Rather, some of the marital acts ought to actualize the finality of the act, namely procreation, if the marriage is to be complete according to the Malawian concept of marriage.³² It is not being suggested here that Malawians do not value consummation. On the contrary, they do. This is evidenced by the

³¹ Love, not merely or primarily as affection, but as personal commitment to the other translated in the fulfilment of marital duties, is the concept that is understood, used and also that finds linguistic expression among Malawians, rather than *good of spouses*.

Customary law does not directly treat of conjugal love. Marital love (or the good of the spouses) is implied for example in the many grounds for divorce. Love is perceived and experienced through its elements which, if severely lacking, individually constitute grounds for divorce. Some of these deficient elements are: "[...] persistent cruelty, desertion by a husband or wife over a certain period, *kunyenga or kusonga*, that is undue familiarity between a spouse and another person of the opposite sex in circumstances from which immoral sexual relationship might be inferred [...] adultery is likewise seen as betrayal of conjugal love. The single act of adultery can constitute a cause for divorce but usually the petitioner will be asked to overlook the first act of adultery [...] willful neglect by husband to maintain wife or children. This means deliberately neglecting to house, feed, and support one's wife and children adequately" (J.O. IBIK, *Restatement of African Law, Malawi*: 3, p. 82).

The presence of these elements in a marital relationship, disrupts marriage life, and endangers the partnership of the whole of life and (love) the good of the spouses. However, great tolerance is shown when these first appear in a marriage and the elders, men and women in the village community, will counsel the party concerned. But if there is no change of behaviour, in spite of the admonitions, the customary law tribunal may grant a divorce, after proof is had of the alleged ground. Drastic failure to live up to the marriage commitment so seriously endangers marital life and village community life that customary law provides a legal solution in the form of divorce. Most divorced people, however, end up in polygamous marriages when they remarry (see C. MKONA, "Divorce Among the Anyasa of Blantyre Archdiocese and Church Law," J.C.D. diss., Rome, Pontificia Universitas Urbaniana, 1962, pp. 108-116).

³² Canon 1084 §3 of the revised Code stipulates that: "Sterility neither prohibits nor invalidates marriage [...]," however, in canon 1098, the Code says that a person contracts invalidly who enters marriage deceived by fraud, perpetrated to obtain consent, concerning some quality of the other party (e.g., infertility) which of its very nature can seriously disturb the partnership of conjugal life. Besides this possible cause of marriage nullity, it is conceivable, within the legal parameters of the Code, to contract conditional marriages, for example concerning the fertility of the party, provided the subject matter of the condition is of the present or the past, and the validity or invalidity of the marriage will then depend on whether the condition existed or not at the moment of marriage (c. 1102). Because of the importance attached to children, many Catholics in Malawi would find it acceptable if the Church were to permit granting dissolutions of some problematic infertile marriages, since rather than placing the fullness and completion of the marriage union on the act of consummation alone as Church tradition does, most Malawians perceive the fullness of marriage realized in the birth of a child.

fact that persistent refusal to consummate a marriage is sufficient ground for divorce or dissolution under customary law. However, the idea of consummation among Malawians goes much beyond the singular incident of sexual intercourse to include the fruition of the marriage. Likewise, sterility which results in childless marriages is under customary law a sufficient reason for divorce or dissolution of marriage.³³

³³ Infertility of women or the mere fact of a *childless marriage* is one of the common causes of polygamy; rather than going through a divorce or dissolution the husband may take a second wife, or if the husband is confirmed to be, or seriously suspected of being infertile then, in some cases, arrangements are socially made for a brother or cousin of the husband to beget children with his wife on his behalf.

However, polygamy, in spite of its social values, has its own disruptive potentialities. It is an option that very few people take. The majority of the marriages are, in fact, monogamous. Modern economic and urban life demands in the growing industrial communities make the practice of polygamy increasingly difficult. Today, more and more women are re-defining and enlarging their roles and identity in society. They still hold dear to their roles of mother and homemakers. But larger numbers of women than before join the work force outside the home and take on more independent and unconventional tasks. Such social factors serve to restrain polygamy.

Christianity has been a factor in lessening the frequency of instances of polygamous unions. Nevertheless, polygamy remains one of the few African institutions that when faced with the ideals of Christianity seem incorrigible. There are many canonical and theological questions with regard to the situation of a polygamous union; and thus, a relevant discussion on the development of the particular law of the Catholic Church in Malawi cannot totally disregard issues ensuing therefrom.

c) *The Church's law on baptism*

While in the beginning missionary activity was resisted for various reasons,³⁴ gradually the Christian Churches drew large populations into their folds. Many Malawians came to accept Christianity. They joined, and still enrol in the catechumenate; they follow Christian instructions for two or four years, but some of them, as is the case in many parts of Africa, only to find themselves at a dead end, unable to be baptized because of their irregular (especially polygamous) marriage situations.³⁵ Canon 1148 §1 of the revised Code directs that:

After he has received baptism in the Catholic Church, a previously non-baptized man who simultaneously has several non-baptized wives can keep one of them as his wife while dismissing the others if it is difficult for him to remain with the first. The same is true for a non-baptized woman who simultaneously has several non-baptized husbands.³⁶

³⁴ Missionaries' work in the three main areas initially had very disturbing effects to the local people: 1) in education (schools were perceived as disrupting Malawian traditional education and the transmittance of skills within the family setting, and they gave a different value and belief system); 2) medical care (in this field, missionaries tended to resist traditional (African) medicine which was often said to be associated with magic, witchcraft and divination and thus viewed as unacceptable to Christianity); 3) teaching of religion and the Christian faith (the teaching of catechism went against some traditional values, beliefs and practices like widow inheritance, polygamy, *nyau* society, *vimbuza* healing dance etc.) (see I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, pp. 60, 119, 126-128, 204).

³⁵ Cf. AMECEA Bishops' Consultation on Family Life, "Families: Truly Christian, Truly African," in *AFER*, 24 (1982), p. 269. F.J. Urrutia addresses the issue of *continuing to consider the acceptance of monogamy as a condition for baptism* in *AFER*, 23 (1981), pp. 281-283.

³⁶ Canon 1125 of the 1917 Code reads thus: "Ea quae matrimonium respiciunt in constitutionibus Pauli III *Altitudo*, 1 Jun. 1537; S. Pii V *Romani Pontificis*, 2 Aug. 1571; Gregorii XIII *Populis*, 25 Jan. 1585, quaeque pro peculiaribus locis scripta sunt, ad alias quoque regiones in eisdem adiunctis extenduntur." The canon extended the application of the three papal constitutions on polygamous marriages, initially issued for particular places, to all regions in the world with the same circumstances. This canon as well as its counterpart in the 1983 Code does not envision that a non-baptized man may simultaneously have several baptized wives; it considers only non-baptized wives or husbands. It was in light of this context that Bishop Joseph Fady, W.F., of Lilongwe Diocese, Malawi requested whether the constitution *Romani Pontificis* could be applied when the first wife wants to be baptized or even is already baptized (see J. FADY, bishop of Lilongwe, Malawi, *De sacramentis*, in *Acta Vaticano II Apparando*, 1-2-5 *Africa*, Città del Vaticano, Typis Polyglottis Vaticanis, 1960, pp. 366-367).

According to the Church's teaching and tradition as well as the prevailing Catholic practice in Malawi, with the exception of cases of danger of death, persons in polygamous marriages are not baptized or received into the Catholic Church unless they dismiss their other spouses or depart from the polygamous spouse.

Canon 865 §1 of the revised Code outlines the requirements for adults to be baptized:

To be baptized, it is required that an adult have manifested the will to receive baptism, be sufficiently instructed in the truths of faith and in Christian obligations, and be tested in the Christian life by means of the catechumenate; the adult is also to be exhorted to have sorrow for personal sins.³⁷

The meaning of canon 1148 §1, as it is clear from the Church's constant understanding, is that once baptized the person with multiple spouses is to keep only one. This will be congruent to the stipulations of canon 865 §1 which require that the candidate be tested in the Christian life and ought to be exhorted to have sorrow for personal sins: a sign of conversion to Christ.³⁸ Thus wanting and accepting baptism would, in normal

³⁷ Canon 788 §2 states that: "Through instruction and an apprenticeship in the Christian life catechumens are suitably to be initiated into the mystery of salvation and introduced into the life of faith, liturgy, charity of the people of God and the apostolate."

³⁸ A literal reading of the American translation of canon 1148 §1 seems to imply that a person, who concurrently has several non-baptized spouses, can implement the decision concerning the several spouses (choosing one and discharging the others) after baptism. If this interpretation were correct, it would mean that such persons may be baptized prior to dismissing their other spouses, and it could likewise be inferred that the wives too could be baptized before physically abandoning their husband. Such an understanding would be departing from the canonical tradition on this matter. The English translation which is closer to the latin text states: "When an unbaptised man who simultaneously has a number of wives, has received baptism in the catholic Church, if it would be a hardship for him to remain with the first of the wives, he may retain one of them, having dismissed the others. The same applies to an unbaptised woman who simultaneously has a number of unbaptised husbands." (*The Code of Canon Law* in English translation, prepared by The Canon Law Society of Great Britain and Ireland in association with The Canon Law Society of Australia and New Zealand and The Canadian Canon Law Society, Collins, 1983). The latin text stipulates: "Non baptizatus, qui plures uxores non baptizatas simul habeat, recepto in Ecclesia catholica baptismo, si durum ei sit cum earum prima permanere, unam ex illis, ceteris dimissis, retinere potest. Idem valet

circumstances, include complying with requirements of Christian living, in this case, abiding by the monogamous concept of marriage.

The sacrament of baptism incorporates and initiates persons into Christ and his Church. People are freed from their sins, reborn as sons and daughters of God and set on a personal and communal journey of growth towards wholeness and holiness in Christ. An unequivocal demand to live up to all the teachings of Christ before people receive baptism, in some situations would appear to be somewhat unrealistic. Hence, dialogue between the universal law and particular law legislators within the general dialogue of theology and culture should be encouraged so that a less rigid and severe interpretation could be considered regarding certain baptism cases in the particular churches.³⁹

d) *Admission to the Eucharist*

Attached to the foregoing is whether a baptized person who is or remains in a polygamous marriage should be admitted to the Eucharist. The implementation of universal law and the development of particular law in Malawi need to consider this question in greater

de muliere non baptizata, quae plures maritos non baptizatos simul habeat" (c. 1148 §1).

Most instances of polygamy would require strict application of the law: non-admittance to baptism prior to dismissal of, or withdrawal from, the polygamous spouses. However, certain cases especially of those advanced in age, would admit a flexible interpretation of canon 1148 §1, combined with pastoral sensitivity to the seriousness of the conversion process in the individual cases. But if a very strict interpretation is aligned to *sorrow for personal sins*, based on the traditional, categorical moral judgement of those in such marriages as being objectively in the *state of sin*, then baptism is delayed until the persons have moved out of *the situation of sin*. However, because of the stability and duration of the marriage, and the age of the spouses as well as the obligations towards children, dismissing the spouses often leaves the women at such psychological, social and economic disadvantage that, in most cases, the act would seem to be socially unjust if not unchristian.

³⁹ The general principle of not admitting parties to a polygamous union to baptism should remain intact, but particular churches could be sanctioned to make special norms which would single out certain extraordinary cases, for example elderly spouses, which would be considered for baptism (see M.F. KPAKULA, vicar apostolic of Monrovia on behalf of the Interterritorial Episcopal Conference of the Gambia, Liberia and Sierra Leone, "African Interventions at the 1980 Synod of Bishops," in *AFER*, 23 [1981], p. 96).

depth. Canon 912 welcomes all baptized persons who are not prohibited by law to partake of Holy Communion. Canon 915 appears to elucidate on the phrase *prohibited by law*.

Those who are excommunicated or interdicted after the imposition or declaration of the penalty and others who obstinately persist in manifest grave sin are not to be admitted to Holy Communion.

Persons in polygamous marriages, by the fact of polygamy alone, do not necessarily fall under the category of the excommunicated or the interdicted.

In Malawi, the standard practice concerning admittance to Holy Communion for those in polygamous unions is that if polygamy was entered after a valid Catholic marriage was contracted, then the first wife is free to participate in the Eucharist while the husband and any other wife are barred from it.⁴⁰ But how explicit is the law on this matter? Would a spouse in a polygamous marriage, excepting the first wife who is not necessarily in agreement with the situation, be said to be *persisting in manifest grave sin*, and so be refused Holy Communion? One would want to know what a manifest grave sin is.

Commenting on canon 915, Frederick R. McManus explains that:

A manifest sin is one which is publicly known even if only by a few; [...]. Clearly, those who are excommunicated or interdicted by an inflicted or declared sentence are regarded by the Church as grave and manifest sinners, and they are excluded from the sacraments by penal law as well (cc. 1331, §1, 2°; 1332). Other categories of manifest and grave sins are not so neatly discernible. The minister cannot assume, for example, that the sin of concubinage arising from divorce and remarriage is always grave in the

⁴⁰ Whereas canon 915 spells out those who should not be admitted to Holy Communion, canon 916 considers the situation of those who are conscious of grave sin: "A person who is conscious of grave sin is not to celebrate Mass or receive the Body of the Lord without prior sacramental confession unless a grave reason is present and there is no opportunity of confessing; in this case the person is to be mindful of the obligation to make an act of perfect contrition, including the intention of confessing as soon as possible."

internal forum. Any prudent doubt about either the gravity or the public nature of the sin should be resolved by the minister in favour of the person who approaches the sacrament.⁴¹

Analogously, it appears too simplistic to classify people in polygamous situations as being in manifest grave sin. The subject of sin essentially pertains to the internal forum, the level of conscience where God and the individual alone can penetrate and make a fair evaluation of all that is involved. But since the canon operates on the level of the external forum, it is possible that any *grave sin* would have to be evaluated purely on the level of the external forum. Nevertheless, it is easy enough and understandable to rank certain acts as sinful in the sense that they are actions which are objectively and morally contrary to Christian ideals and values as expressed by Catholic teaching.⁴² But the culpability of the individual cannot always be easily discerned and ascertained.⁴³

⁴¹ F. McMANUS, "Participation in the Most Holy Eucharist [cc. 912-923]," in J.A. CORIDEN, T.J. GREEN, and D.F. HEINTSCHKE, eds., *The Code of Canon Law, A Text and Commentary* [=American Commentary], commissioned by the Canon Law Society of America, New York, Mahwah, NJ, Paulist Press, 1985, p. 653. The canon excludes from Holy Communion those *who obstinately persist in manifest grave sin*. Frederick McManus says that "obstinate perseverance is indicated when a person persists in the sin or sinful situation and does not heed the warnings of Church authorities or adhere to Church teachings." But the matter seems less grave when one discovers that the reasons why the person continues to be in the *sinful situation* are not only humanitarian but also Christian. For instance, it would be a severe act of injustice in certain minds for a man, after baptism in accordance with canon 1148 §1, to break his marriage contract with his second wife and send her and the children away. In fact, the man and the second wife will persist in their polygamous marriage not with the resolute intention of obstinately sinning gravely in defiance of Catholic teaching and morals. They would not be adamantly rejecting warnings of the Church. Rather, their marital situation, which places new responsibilities and obligations upon them, will require of them to continue fulfilling their mutual rights and duties. Cf. J.M. HUELS, "Reception/Initiation of Non-Catholics in Irregular Marriages," in *Roman Replies and CLSA Advisory Opinions 1990*, Washington DC, Canon Law Society of America, 1990, pp. 95-97.

⁴² See JOHN PAUL II, Apostolic Exhortation, November 22, 1981, *Familiaris consortio*, 84, in *A.A.S.*, 74 (1981), pp. 185-186, English translation in FLANNERY II, p. 889.

⁴³ Such efforts seem formidable when the Church exists in societies where polygamous marriages have, for centuries, operated as part of the social structures. In these societies the economic, sociological, and demographic factors make the polygamous form of marriage somewhat socially acceptable. Without compromising the truths of the gospel and faith, it seems that the Church in such situations might even be able to accept or tolerate certain customary marriages while progressively leading all to the ideal monogamous marriage.

This is one of the areas where the implementation of the universal law by the particular churches needs exceptional pastoral sensitivity.⁴⁴ A pastoral approach which is faithful to the compassion of the eternal Pastor and to the doctrines of his Church may have to consider circumventing the rigorous exclusion from the table of the Lord of people who in good faith choose to remain in their customary marriages. While tenaciously teaching the ideals and values of Christian marriage, it may be within the Church's rights to refrain from rigid application of the law and to exercise special favourable pastoral judgement for the apparent good of the faithful.⁴⁵

c) Customary marriage consent

In Malawi, customary marriages require a double consent: firstly, the mutual consent of the spouses and, secondly, that of the parents or guardians or other relatives representing the families of the spouses. The two consents are considered to be mandatory and essential for a valid marriage. The parties are as much at liberty to withhold their consent as are the parents or their representatives who can express objection to the marriage and so void the possibility of marriage.

⁴⁴ Cf. F.T. URRUTIA, "The Challenges on Canonical Doctrine on Marriage Arising from Africa," in *Studia canonica*, 23 (1989), p. 21. The author addresses the issue of a pastoral attitude towards those who are living in irregular marriage situations; and he rightly broadens causes of invalid marriages to include causes such as lack of canonical form, a new union after divorce and polygamous unions. However, in line with the 1980 Synod of Bishops, he reasserts the traditional practice of the Church which admits them of participation in the life of Church but not Eucharistic communion. Cf. also E. HILLMAN, "On Polygamy: A Response," in *AFER*, 23 (1981), pp. 293-295. Addressing the issue of divorced persons who have remarried John Paul II in his apostolic exhortation states: "However, the Church reaffirms her practice, which is based upon Sacred Scripture, of not admitting for Eucharistic Communion divorced persons who have remarried. They are unable to be readmitted thereto from the fact that their state and condition of life objectively contradict that union of love between Christ and the Church which is signified and effected by the Eucharist. Besides this, there is another special pastoral reason: if these people were admitted to the Eucharist, the faithful would be led into error and confusion regarding the Church's teaching about the indissolubility of marriage" (JOHN PAUL II, *Familiaris consortio*, 84, in FLANNERY II, p. 889).

⁴⁵ See B. BATANTU, archbishop of Brazzaville speaking on behalf of the Episcopal Conference of the Congo, "African Interventions at the 1980 Synod of Bishops," in *AFER*, 23 (1980), pp. 42-43.

Canon 1057 of the 1983 Code states that marriage is brought about through the consent of the parties.⁴⁶ This consent which is demanded by the universal law of the Church is included in the Malawian dual customary marriage consent. But the customary marriage consent requires an additional assent of the parties' parents or their representatives. The universal law's ruling on marriage consent implicitly seems to diminish the involvement of parents and family in ratifying the consent of the parties by the parental consent. Thus a personalistic, as distinct from a communal, approach is enforced.⁴⁷ Consultation of parents and family prior to a marriage celebration, which used to be a given fact practically for all marriages, tends to lose its significance for the youth of today. The western, scholastic view of marriage consent is in vogue in the Church and the application of this view to the marriages in Malawi cannot but raise tension in social life and in the lives of most individuals concerned. However, the African predominantly communitarian view of marriage needs to be complemented by the western expression of marriage which emphasizes the personal dimension.⁴⁸

⁴⁶ While Roman Law influenced the development of the understanding of marriage as a contract (brought about by consent, hence the application of the Roman analysis of the elements of consent in contracts to the marriage-contract consent), Christianity contributed the quality of indissolubility to marriage, as opposed to divorce which was possible under Roman Law. Cf. JOHN PAUL II, Allocation to the Roman Rota, February 4, 1991, "Culture's Impact on Marriage," in *L'Osservatore romano*, 5 (1991) [= *Culture's Impact on Marriage*], p. 3; cf. also A. GAUTHIER, "Introduction to Roman Law for Canon Law Students," class notes, Ottawa, Saint Paul University, 1988, p. 22.

⁴⁷ See F.T. URRUTIA, "The Challenges on Canonical Doctrine on Marriage Arising from Africa," pp. 8-9. In his evaluation of what the bishop-members of the Symposium of Episcopal Conferences of Africa and Madagascar (S.E.C.A.M) say about marriage, the author rightly notes that marriage in Africa is both personal and communitarian, but apparently he implicitly quickly dismisses parental consent, as not constituting the *structural reality of marriage* but as merely an *expression* of the reality of marriage, the contrary is true in many parts of Africa where, in customary marriages, parental consent is much more than just a pertinent expression of the communitarian nature of marriage, affecting its validity according to customary law. (See *ibid.*, pp. 9-10).

⁴⁸ *Ibid.*, p. 9. Cf. JOHN PAUL II, "Culture's Impact on Marriage," p. 3 (The allocation discusses the impact of culture on marriage and it underlines the personal and contractual nature of consent).

The marriage consent of Malawian tribes illustrates this point. For all the tribes in Malawi, "[...] the consent of both spouses to marry each other is essential to the validity of marriage."⁴⁹ The second consent is also needed for the recognition of marriages in all the tribes, even though they differ as to who is to furnish this second consent.

J.O. Ibik uses the term *guardian* in his book. However, this term is not always appropriate because in law a tutor or a guardian is normally appointed for minors or infants as in canon 98 §2 or for persons who are incompetent due to an habitual lack of use of reason. H. C. Black describes a guardian as:

A person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs. One who legally has the care and management of the person, or the estate, or both, of a child during its minority.⁵⁰

One wonders if Ibik, by using the term *marriage guardians*, intends to suggest that before marriage the spouses or parties to the marriage are regarded as minors. This may be his way of explaining the need for a second consent over and above that given by the spouses. However, this would not hold since without the consent of the spouses themselves the marriage cannot be valid. The strict legal interpretation of the term *guardian* would not seem to fit here. But it ought to be noted that he does not say *spouse guardian*; rather he chooses the term *marriage guardian*, so that there are on both sides persons with the task of guarding the institution of marriage and in particular the specific marriage in the making.

⁴⁹ J.O. IBIK, *Restatement of African Law, Malawi*: 3, p. 9; cf. also pp. 31, 46-47, 67-68, 73, 183.

⁵⁰ H.C. BLACK, *Black's Law Dictionary*, St. Paul, MN, West Publishing Company, 5th ed., 1979, p. 635.

For the patrilineal societies of the Tonga, Tumbuka and Ngoni of Mzimba and Nchewu, parental consent is linked with the payment of bridewealth. The parents and relatives of both parties negotiate and decide on the bridewealth which is paid by the boy's parents to the girl's parents and family. Consent is held to be imperfect or incomplete without the bridewealth; its payment and reception is the presumptive proof of consent.⁵¹

The requirement of a double consent does not mean that the parties are denied freedom. The two consents, voluntarily given, of the parties and of the families are both required. Each party is free to withdraw his or her consent at any time before the marriage comes into effect, that is, even after all the transactions have been completed and the parties have acquired the right to cohabit.⁵² The idea of arranged marriages where the parties have no say at all is not the case here. For the validity of a marriage, each party is required to opt freely for that particular person even in those cases where the person may have been suggested. As a matter of fact, normally it is the boy and girl who will initiate the parents into the process of negotiations towards marriage. However, it is abundantly obvious that in the customary marriage transaction there is no distinct and prescribed manner of expressing this dual consent required for the validity of marriage.⁵³

Universal Church law in canon 1057 stipulates that consent be *legitimately manifested*. This mode of expressing consent is specified in canon 1108. The competent person assisting

⁵¹ While bridewealth is very significant in some societies, the dangers of abusing this social institution are evident and must be curbed against as Bishop Jean-Baptiste Gahamanyi pointed out in his intervention at the 1980 Synod of Bishops (see *AFER*, 23 [1981], pp. 104-105).

⁵² See J.O. IBIK, *Restatement of African Law, Malawi*: 3, p. 15.

⁵³ *Ibid.*

at a marriage, physically present at the ceremony, in the name of the Church, asks for and receives the contractants' manifestation of the consent, in the presence of two witnesses.

Indeed, once the consent has legally been exchanged, then the marriage covenant has taken place. The well defined nature of Church law in this realm of juridic acts is very evident. One can easily identify the point in time when the marriage comes into existence. Customary marriage consent is not viewed as happening at one specific moment. Rather it comes about through a number of events with the participation of the parties, parents and relatives. The consent of the parties and parents is celebrated stage by stage through events and symbols over some period of time. It is not a one moment consent but an on-going act of consent consisting of a constellation of events and formalities which allows the parties' consent to grow and be confirmed and ratified by the parents and community. In many instances, the process reaches its first pivotal moment at the jubilant celebration of the acquired right of cohabitation, which will later culminate at the fruition of the marriage by the birth of a child.⁵⁴

⁵⁴ In no way is it being suggested here that the birth of a child is necessary for the validity of the marriage; rather it marks the completion and fullness of the cultural marriage. With the legal exchange of consent, the validity, as well as for Christians the sacramentality of marriage begins to exist.

At the 1980 Synod of Bishops, bishops of Africa spoke about an African understanding of marriage: "The Marriage Bond as the Result of a Process" (Zaire), "Progressive Marriage and Admission to Sacraments" (Congo), "Marriage: A Series of Successive Stages in Community" (Mali), "Marriage in Stages Lived 'In the Lord'" (Gabon) (see *AFER*, 23 [1981] pp. 41-49) cf. also F.T. URRUTIA, "Challenges on Canonical Doctrine on Marriage Arising from Africa," pp. 11-14). Cf. also *Communicationes*, 9 (1977), p. 124 where a response was given to the suggestion of some bishops in Africa regarding the recognition of progressivity of African customary marriages. In discussing Malawian customary marriage as a process, Thomas Kapito distinguishes three phases: the phase of acceptability (the parties, marriage negotiations and bridewealth), the phase of ratification (duties of the guardians and marriage rite), and the phase of establishment (offspring as completion of marriage, guardians serving the stability of marriage) ("Yawo Resistance to Christian Marriage," pp. 112-113).

It is admitted here that some form of consent is required in all marriages. But it is being suggested that, in fairness to the various philosophical approaches to the marriage institution, the nature of consent and the mode of giving and manifesting consent cannot be totally defined by universal law.⁵⁵ The type of consent that the universal law demands expresses only one socio-historically conditioned philosophical approach to marriage and person. According to some that approach is not an intrinsic part of a Christian marriage. Western philosophy has developed and opted for that concept. But other societies have their own philosophies which could find acceptable legal expression in the Christian institution of marriage. Implementing the Code's concept of consent in some non-western particular churches, like in Malawi, tends to diffuse the many treasured traditional cultural values. For instance, the social, personal links and support which bridewealth and the double consent bring to the marriage, are undermined and threatened by extinction.

Processing marriage nullity cases on the ground of lack or defect of consent has its own problematics when dealing with two different ways of understanding consent as well as varying modes of giving and manifesting consent, that of the law and that of the people. One would hope that local legislation would have the competence to order Christian marriage consent attuned to, and expressed in, meaningful and comprehensible local concepts. The legislation would, however, provide alternative marriage rituals for others who would prefer a different ritual, to accommodate those who have adopted a western approach to marriage.

⁵⁵ The Church recognizes the need for adaptation in the celebration of marriages (see *Sacrosanctum Concilium*, 77, English translation in FLANNERY I, p. 23). The Council recommends to the various regions the use of other praiseworthy customs and ceremonies when celebrating the sacrament of marriage; a marriage ritual also could be drawn up, as stipulated in canon 1120 of the revised Code. The Council of Trent (Conc. Trident., Sess. XXIV, *De matrimonio*, can. 11, c.1) as well as the 1917 Code (c. 1100) suggested suitable adaptations in the celebration of marriage.

f) *Tribunals*

The *Code of Canon Law* spells out two objectives of ecclesiastical trials, namely: (1) to prosecute or to vindicate the rights of physical or juridic persons or to declare juridic facts and (2) to impose or declare the penalty for offenses.⁵⁶ The Church is concerned that all Catholics should have their states of life recognized, their rights defended and that offences be curbed by punishment. Hence the Church has procedures, some of which are handled by its courts.

Courts as such are welcome and in fact indispensable in a human society of rights and obligations for they constitute and provide a forum where grievances and issues of justice can be addressed. Not only the rights of the individual are vindicated but also the rights of the community which find their fulfilment when individuals attend to their obligations.

The procedures of ecclesiastical trials need to be adapted,⁵⁷ more specially when looked at as universal law to be applied in Malawi. These procedures are long, with elaborate, minute details, requiring highly-trained personnel to follow through them. The Church's procedural law, as it is, seems on the surface not to do justice to the many cases that arise

⁵⁶ See canon 1400 §1.

⁵⁷ In an allocution to the Rota, Pope Paul VI indicated his openness to procedural changes in marriage cases, a possible response to the requests of diocesan bishops mindful of the administration of justice in their particular churches (see Allocution, January 23, 1967, "Con grande compiacenza," in *A.A.S.*, 59 [1967], p. 143). Cf. also I. GORDON, "De nimia processuum matrimonialium duratione: factum, causae, remedia," in *Periodica*, 58 (1969), pp. 491-594, 641-735. The revision of Book VII on processes has resulted into the simplification of some procedures in the 1983 Code. (For the evolution of the revision process, see *Communicationes* 2 (1970), pp. 181-194; 4 (1972), pp. 35-38, 59-72; 5 [1973], pp. 235-243; 6 [1974], pp. 39-44; 8 [1976], pp. 183-200; 10 [1978], pp. 209-272; 11 [1979], pp. 67-162, 243-296; 12 [1982], pp. 188-200). However, in certain parts of the world more reform and adaptation is required (see S. BWANA, "The Impact of the New Code in Africa," in *Concilium*, 184 [1986], pp. 108-109).

in the Church in Malawi.⁵⁸ The very first reason is shortage of well-trained personnel to handle the elaborate, extensive procedural law. Dispensations may be given for unqualified persons to be appointed to the tribunals,⁵⁹ but all the same they are asked to work with an unfamiliar system of law. Cases tend to drag on as a result.

Even the manner of proceeding with the cases, especially marriage nullity cases, does not make it obligatory for all the parties to be present at the hearing (cc. 1513, 1559, 1598). Marriage nullity cases therefore easily become impersonal and secretive, and are lacking in the healing and reconciliatory thrust of the Malawian traditional courts. The involvement of the community is often not desired, since cases are confidential. Moreover, the parties to the case may merely have to answer a questionnaire and send the answers to the tribunal, as is the practice in some courts, although this is not according to the Code. Some of these tribunals may feel compelled to act in this way because of the heavy work load and understaffing.

In the Malawi traditional courts the fundamental objective of a trial is the reconciliation of the contesting parties. Writing on proceedings and evidence in African Customary Law, Max Gluckman says:

⁵⁸ This is the situation not only in Malawi, but also in many parts of the world and particularly in the young churches like in Africa as Archbishop Joachim N'dayen of Bangui, Central African Republic, stated at the 1980 Synod of Bishops (see *AFER*, 23 [1981], p. 93).

⁵⁹ In missionary territories, the local ordinary was granted, by virtue of the decennial faculties, the faculty "to reduce because of a dearth of officers, the number of officials in the tribunal of the first instance in such wise that the tribunal of first instance is constituted of three officials, namely, a sole judge, a defender of the bond, and a notary" (see *Canon Law Digest*, VII, p. 84). Also canon 1425 §4 of the revised Code states that the conference of bishops can permit a diocesan bishop to entrust cases to a single clerical judge in a first instance trial, as long as the impossibility of establishing a collegiate tribunal perdures. Dispensation from the qualification of judges (c. 1421 §3) can be obtained from the Apostolic Signatura.

Characteristics of African traditional customary law might be found in the ways in which disputes are tackled and settled. Some characteristics frequently alleged as typifying traditional African judicial procedure are: simplicity and lack of formality; reliance on 'irrational' modes of proof and decision; the fact that the parties and often the judges too are normally involved in complex or multiplex relations outside the court-forum; a common sense as opposed to a legalistic approach to problem-solving; the underlying desire to promote reconciliation of the contesting parties, rather than merely to rule on the overt dispute which they have brought to court; and the role of religious and ritual beliefs and practices in determining legal responsibility.⁶⁰

The preoccupation of the customary courts is not on the legalistic observance of procedural norms. Certain minimal but fundamental formalities have to be complied with, but these should never obstruct justice and the attainment of concord between parties or within the family or community. The universal law underlines certain procedural norms for the sake of safeguarding the proper administration of justice as well as for the protection of the rights of the parties to a case. The rights of a respondent in a marriage nullity case, such as the right to be cited, to produce proofs or at least to be heard, to appeal etc., are deemed so important that denying any of these affects the validity of the sentence. Protection of these rights must also be balanced with the guarding of the rights of the plaintiff. Concern for the procedure, however, must not be allowed to delay the judgement of the case if moral certitude can be obtained with the evidence at hand.

Customary law does have its own limited formalities to be observed. For instance, these courts require litigants to present their own cases and they also have their own manner of obtaining evidence and then there is the role of the judge. The forum for the hearing of

⁶⁰ M. GLUCKMAN, ed., *Ideas and Proceedings in African Customary Law*, London, Oxford University Press, 1969, p. 361. Cf. also, M. READ, *Children of their Fathers*, London, Methuen and Co. Ltd., 1959, p. 128.

the case is usually out in the open under some big tree which not only provides shade for the people, but also creates a circular, communitarian atmosphere.⁶¹ Under the tree where the adjudication of cases takes place, the important quality of openness is stressed: all and many persons can come. Justice must be rendered and nearly all can speak and testify if they have relevant matter. When the hearing begins the plaintiff is first heard and then evidence is heard from the other party. Parties are allowed to talk about many things which may appear irrelevant, incoherent, and illogical but which may later turn out to be critical.

Once the parties have been heard, witnesses are called to give their evidence. Witnesses are persons who, for example, were present at the time of the quarrel or dispute, who might have seen or heard something that has bearing on the case.⁶² The task of the witnesses is ordinarily not to defend the claimant or defendant but rather to tell the court what they know about the case. The role of the judge, who acts in consultation with counsellors, is primarily to restore social and interpersonal harmony in the community through a reconciliatory decision. In spite of the simple and less formal proceedings the traditional courts achieve similar forensic ends to those achieved in more structured and developed courts. The court procedure should be at the service of the purpose and goal of the hearing. If a simpler procedure can arrive at a similar or the same goal, reason would recommend that that procedure be put to use, provided the rights of the parties are reasonably respected.

⁶¹ See L.J. CHIMANGO, "Tradition and the Traditional Courts in Malawi," in *C.I.L.L.S.A.*, 10 (1977), p. 40.

⁶² See *ibid.*, pp. 40-41.

In traditional tribal Malawi, the presence of the community in the adjudication of cases is a great asset for the process of building and healing a community. People are present and they openly see the procedure being followed and they hear the solution to the case. In the Malawian Church, decisions rendered privately, for example some cases of *sanatio in radice*, internal forum pastoral measures etc., are sometimes sources of confusion because of the secrecy and privacy surrounding them. The Church's fear of scandal can also be reduced if some of the processes could be more open, allowing the community to know what is actually happening in particular cases. Societies differ in their consideration of what is to be held private or secret. Some cultural groups are so closely knit that what happens to one is in no time common knowledge. In these communities an open public approach to most issues would result into less scandal than otherwise.

It is hoped that universal legislation would give latitude to particular churches to develop adapted procedures for ecclesiastical trials, greater role for conferences of bishops in organizing tribunals within their regions, thus being able to express legitimate legal diversity regarding rules of evidence and manner of proceeding. Equally important is the challenging task of Church tribunals in Malawi to cultivate a matrimonial jurisprudence which, in its articulation and practice of sound principles of justice, takes into account cultural aspects of social and ecclesial institutions.

The encounter of Church legislation with the traditions and cultural patrimony of the people of Malawi raises a number of significant questions. Leading issues that arise from the encounter of Church and culture in Malawi are: the need for the universal law to be flexible and so be adaptable to the local situation; the possibility for the Church in Malawi to make

use of some of its cultural values in legislation and in Church practice. Other issues are: the riches of the Malawian marriage consent, influence of the local culture on tribunal practice especially the development of procedures for trials and also grounds for marriage nullity; the evolution of the traditions such as polygamy to evolve in respect of the principle of equality and dignity of all human persons. The response of the Church in Malawi to these issues shall be considered in chapters three and four. The next section will study the missionary law applicable to Malawi.

C. Missionary Law Applicable in Malawi

The Church in Malawi had been governed by the universal law which was embodied in the 1917 Code. Apart from the general universal law, since it was under the jurisdiction of the Congregation for the Propagation of the Faith, it was also governed by special missionary law which was expressed primarily in apostolic missionary faculties. The present section of this chapter studies some of the faculties which were applicable to the particular churches in Malawi.

Due to the Church's centralization of the power of governance, missionaries needed special power to evangelize and to perform certain acts in mission territories. Vicars and prefects apostolic were perceived as extensions and vicars of the bishop of Rome. In the missions, they acted on behalf of the Roman Pontiff, hence, the necessity for a missionary mandate and a continual flow of faculties from the Pope, the vicar of Christ, to missionary ordinaries. With the faculties, apostolic vicars and prefects and other missionaries had extra powers, at times much more than ordinaries in non-mission countries, in order to perform certain ecclesiastical functions lawfully and validly.

Mission faculties were further prompted by the conditions in the territories. Most of the ecclesiastical laws were made for the Catholic Church in the socio-cultural environment of Europe. With the missionary expeditions to the Americas, Asia, Australia and Africa, the Church found itself in very unique and dissimilar circumstances. The conditions in these places were so peculiar, adverse and extraordinary that the application of the universal law was oftentimes inexpedient. In many instances implementation of Church law was impractical and not promotive of the missionary cause. The mission situation necessitated modification of the regulations.

The adjustment of the laws, even if wholly contained in the faculties, took various forms. A typical mode was to grant priests the power, which normally they did not possess, to perform certain acts like matrimonial dispensations, administering confirmation, absolving from censures etc.⁶³ The faculties also permitted omissions and the use of shorter formulas. It was thus allowed to use the shorter formula to bless baptismal water; the Holy Week ceremonies could be celebrated in the short form. Holy oils could be consecrated with a limited number of ministers. The faculties also simplified the rituals for celebrating the sacraments. Portable altars, mass in the open, mass without a server, mass without candles, exposition of the Blessed Sacrament with only two candles, keeping the Blessed Sacrament without any light, use of vestments of any liturgical colour were allowed.⁶⁴ This type of permission alluded to the impracticality of having a fixed and unadaptable manner of

⁶³ See A. AB UTRECHT, "De facultatibus missionalibus," in *Laurentianum*, 25 (1985), pp. 121, 135, 151.

⁶⁴ Ibid., pp. 123, 125, 133.

celebrating the sacraments. The indults and faculties point to an important recognition by the Holy See that liturgical law must be adapted to the particular church.

Another apostolic directive that serves to argue for adaptation of Church life to local conditions was the faculty to allow Sunday Mass to be celebrated on week days during the whole span of the year. The Church was mindful of those Christian faithful who could not participate in an ordinary Sunday Mass because of distance or dearth of priests. A priest in a mission could therefore schedule masses during the week days at various locations in his territory.⁶⁵

Since many extraordinary circumstances prevented the normal observance of the laws of the Church in the mission countries, it was deemed necessary to provide the ordinaries and missionaries going to the missions with special privileges, indults and faculties. Such circumstances⁶⁶ included great distances, barriers in communication due to climate, lack of means of transportation and travel, which prevailed in the mission countries, and which were so adverse that they at times prevented the implementation and observance of the universal law and so necessitated special regulations and laws. For instance, laws of fasting, abstinence,

⁶⁵ A question may be posed as to whether a Christian is bound to fulfil the Sunday obligation by going to a Sunday Mass which has been transferred to a week day. In any case, the binding obligation of fulfilling the divine law of honouring the Lord God on the Sabbath may arguably be conscientiously satisfied on any day of the week.

⁶⁶ On peculiar circumstances in the foreign missions which prompt special apostolic faculties, J. De Reeper includes: the danger of irrelevance [understood, the irrelevance in individual cases of the common law to the missions], of the low moral and cultural standards. Regarding moral and cultural standards, it is apparently possible to distinguish what is morally acceptable from that which is culturally acceptable. Being culturally unacceptable does not always entail immorality. In fact cultural acceptability in itself is not a moral norm. Mission countries have in the past been said to have low moral standards, not always on the basis of facts but quite often because of misapprehension of the novel cultural phenomenon by the missionary, as well as because of differences in value systems (see J. DE REEPER, *A Missionary Companion*, Dublin, Browne and Nolan, 1952, pp. 1-2).

holy days of obligation and absolution of reserved cases were modified and adapted to the peculiar circumstances in the foreign missions. Thus, Pope Leo X in 1521 issued special faculties for the Franciscan missionaries going to Mexico.

Faculties of particular significance which allowed the dissolution of some valid marriages were later issued to missionaries. These were: the Constitutions of Pope Paul III (*Altitudo*) on June 1, 1537, of Pius V (*Romani Pontificis*) on August 2, 1571 and of Gregory XIII (*Populis*) on January 25, 1585.⁶⁷ These important constitutions shaped and embodied special regulations on marriage.⁶⁸ An incorporated and unified version of all the previously issued missionary faculties was promulgated by Pope Urban VIII⁶⁹ on February 10, 1637 after some assiduous work by a committee of five cardinals appointed by him in 1633.

With the promulgation of the Code in 1917 a new revision of those faculties became necessary, since several of the missionary faculties had been made common (universal) law by their incorporation into the Code. Revised mission faculties came about in three different forms: to countries around the Mediterranean; to the French and British colonies in Africa and to countries in Central America and New Zealand; and to all other countries under the

⁶⁷ See *Codex iuris canonici auctoritate Benedicti XV promulgatus*, Romae, Typis polyglottis Vaticanis, 1917, pp. 731-734.

⁶⁸ The provisions which the Constitutions initially made for mission situations were incorporated into the common law, for instance canon 1125 of the 1917 Code and canons 1148 and 1149 in the 1983 Code. See W.H. WOESTMAN, O.M.I., *Special Marriage Cases*, Ottawa, Saint Paul University, 1990, pp. 49-54.

⁶⁹ See X.M. PAVENTI, "Origo Congregationis Urbanianae super facultatibus missionariorum," *Commentarium pro religiosis et missionariis*, 24 (1943), pp. 288-300, 25 (1946), pp. 73-86; cf. also G. COLLINS, *De novis facultatibus missionariis*, Rome, 1943, pp. 28-30.

Congregation for the Propagation of the Faith.⁷⁰ They were issued on February 6, 1919 and came into force on January 1, 1920.

As conditions changed in mission countries with improved communication, the need for multiple forms of faculties diminished and the Congregation revised the faculties and issued two forms for all countries under Propaganda. The major form was issued for territories where the head of the mission had episcopal character and the minor form for places where he was not a bishop.⁷¹ New faculties became effective on January 1, 1941 and were granted to all mission ordinaries for ten years. These were later renewed regularly.

The 1917 Code had very few canons which directly referred to the missions.⁷² For instance, canon 1322 §2 expressed the right and duty of the Church to evangelize the nations; canon 1350 §1 pointed out the duty of parish priests to look after non-Catholics in their districts. Despite the Church's effort to make disciples of all nations, the Code in canon 1351 forbade the use of force when making conversions. The office of vicars and prefects apostolic who were mostly in mission territories was set out in canons 293-311.

The Apostolic See has, through the centuries, modified most of these faculties to ease the endeavours of the Church in missions. A substantial section of these faculties bear upon

⁷⁰ See A. VERMEERSCH, "Commentaria de formulis facultatum quas S. Congregatio de propaganda fide concedere solet," in *Periodica*, 11 (1922), pp. 47-65.

⁷¹ See X.M. PAVENTI, *Brevis commentarius in facultates S. Congregationis de Propaganda Fide*, Romae, Officium libri Catholici, 1944, p. 15.

⁷² Mission countries were governed by the common law of the 1917 Code, and in some parts specific norms were provided; but along with the Code, missions were governed by particular norms and faculties.

the celebration of marriage, a social institution which is central and pivotal to most societies.

It must be remembered that:

In canonical theory until Vatican II only the legislator, that is the Holy Father, had the inherent right to dispense from the universal law of the Church; local ordinaries had only that power of dispensing which was given them by the law itself or granted to them by special faculties from the Holy See.⁷³

The apostolic faculties gave the mission (local) ordinary and missionaries subdelegated by him powers to dispense from many impediments of ecclesiastical law.

The local mission ordinary and the missionary subdelegated by him were given the faculty to dispense from the impediment of mixed religion (*C.I.C.*, 1917, c. 1060).⁷⁴ The faculty was also granted to dispense from the impediment of disparity of cult (*C.I.C.*, 1917, c. 1070). These two faculties however could not be used in cases of the pauline privilege according to the August 29, 1866 and November 22, 1871 directives of the Holy Office.⁷⁵ A Catholic (*neocomversus*) who used the pauline privilege was bound to marry a Catholic (*C.I.C.*, 1917, cc. 1123-1124). This ruling has been somewhat relaxed by the new Code in canon 1147 where a Catholic who has recourse to the pauline privilege can now be permitted by the local ordinary to contract marriage with a non-Catholic even if non-baptized, but under the usual conditions (cc. 1125 and 1126).

⁷³ M. O'REILLY, O.M.I., "Sacramental Law, Marriage Impediments," class notes, Ottawa, Saint Paul University, 1989, p. 105. *Christus Dominus*, 8 b, states: "Individual diocesan bishops have the power to dispense from the general law of the Church in particular cases those faithful over whom they normally exercise authority," with due regard to reserved matters. Cf. canon 87 §1.

⁷⁴ See A. AB UTRECHT, "De facultatibus missionalibus," p. 140.

⁷⁵ See *Periodica*, 19 (1930), p. 77.

The two above-mentioned faculties were essential for the legitimate celebration of Catholic marriages in Malawi because of the impediments of disparity of cult and mixed religion. Moreover, the faculty to dispense from the diriment impediment of disparity of worship was required for the valid celebration of such marriages. These faculties had a key role to play because of the exceedingly low Catholic population⁷⁶ in comparison with Muslims, other Christian churches and sects, and African traditional religions. Interfaith marriages were and are almost inevitable.

Though dispensations could be obtained for mixed marriages, in Malawi several unions were invalid due to lack of canonical form since often the non-Catholic spouse would not agree with the requirement that both spouses promise that the children of the marriage be raised Catholic, and so would choose to marry elsewhere. For a country that is predominantly non-Catholic, the conditions the Catholic Church had established for mixed marriages seemed prejudicial to non-Catholics.

A mixed marriage is one opportunity where a couple can, without having to compromise their faith, exercise their Christian charity through positive tolerance of disparate faith expressions. The particular churches would be able to determine the kind of conditions that have to be fulfilled for mixed marriages to be celebrated in their regions. The nature and

⁷⁶ In 1970 the population of Malawi was 4,530,000 and Catholics were 806,000 (17.8% of the total population). In 1984 the Catholic population had risen to 1,444,000 while the country's rose to 6,840,000 (21.1% of the total population), (see *Annuarium Statisticum Ecclesiae*, Vatican City, 1984, p. 34). According to the diocesan statistics reported in *Annuario Pontificio*, 1990 there were 2,377,584 Catholics out of 7,875,486 Malawians (30.2% of the total population). The 1990 figures would not seem to include the refugees from Mozambique who have been coming into the country over the last three to four years.

the flexibility of the conditions will vary from one region to another depending on the attitudes and interfaith relations of the Churches in that locality.

Local ordinaries in countries under *Propaganda Fide* could also dispense from crime (C.I.C., 1917, c. 1075), and abduction (C.I.C., 1917, c. 1074).⁷⁷ Matrimonial faculties also authorized ordinaries to dispense from other impediments, such as consanguinity in the second and third degree of the collateral line⁷⁸ (C.I.C., 1917, c. 1076). The impediments of affinity in the direct line, if the marriage was not consummated, and in the collateral line (C.I.C., 1917, cc. 1077 and 97) could be dispensed. Besides the above, ordinaries could also dispense from public propriety even in the first degree (C.I.C., 1917, c. 1078), from the solemn vow of chastity made in a religious institute (C.I.C., 1917, c. 1073) and also from the impediment of spiritual relationship (C.I.C., cc. 1079, 768). Though some of these cases were quite rare, the legislator had delegated very broad dispensing powers to mission ordinaries; and most of these powers could be subdelegated. Only three marriage impediments, that of priesthood, affinity in the direct line *consummato matrimonio*, and nonage could not be dispensed.

While canon 1141 (C.I.C., 1917) said that a *sanatio in radice* could be granted only by the Apostolic See, the missionary faculties conceded to the mission ordinaries and the person whom they subdelegated power to grant sanation for those marriages which were invalid on account of one or more ecclesiastical impediments or for lack of form.⁷⁹ However,

⁷⁷ See A. AB UTRECHT, "De facultatibus missionalibus," p. 138.

⁷⁸ See *ibid.*, p. 139. (The degrees of the collateral line mentioned here are according to the mode of calculation enshrined in canon 96 of the 1917 Code).

⁷⁹ See *ibid.*, p. 140.

if consent were lacking or defective or if the marriage were invalid due to a natural or a divine law impediment, radical sanation could not be granted. The sanation included dispensation from the ecclesiastical law which was the cause of the invalidity; and it presupposed that the unlawfully exchanged matrimonial consent continued to exist when sanation was applied.

In Malawi, there have been numerous occasions when sanation could be used because of the many instances of invalid marriages due to lack of the canonical form. Reasons for the non-observance of the matrimonial form are ample. Parties of other religions or faiths (e.g., Presbyterians, Dutch Reformed Church, Muslims, Methodists, African Independent Churches) do not always agree to be married according to the Catholic ritual. Some couples choose to marry outside the Church temporarily to evade the customary requirement of bridewealth⁸⁰ which, in compliance with the local traditions, the Church tries to uphold. Some Christians prefer a marriage ceremony in their own village to one at the parish church which may be anything from eight to sixty kilometers away; (in rural areas, most people walk to their destination or when and where possible they use public means of transportation). This situation reduces the attendance at Church and it forfeits the truly communal celebration of marriage. The celebration at Church with possibly only a small group of mostly anonymous

⁸⁰ Bridewealth is an inherent part of some customary marriages. Until the total amount or a substantial portion of it is paid, the marriage is not fully recognized. If a couple wants to marry rapidly, for example due to pregnancy and the man does not have the requested bridewealth available, elopement may result, in which case the man informs the family of the wife of the act and pays a certain sum of money for acting contrary to the customary law and promises to abide by the bridewealth requirement. Where bridewealth transactions have not been satisfactorily completed, the marriage is deemed defective and the bride may either withdraw or be withdrawn. In cases of elopement a Church marriage is either avoided or the parish priest refuses to witness the marriage unless an agreement is reached by the parties and their parents. Some African bishops have expressed their concern regarding this question. Cf. S. KHOARAI, bishop, president of the Lesotho Episcopal Conference, "African Interventions at the 1980 Synod of Bishops," in *AFER*, 23 (1981), pp. 41-43.

members present, is sometimes devoid of the vital active participation of the village community.

In spite of this possibility to validate marriages by a *sanatio in radice*, there were and are very few sanations granted in Malawi. In some parishes, every year there are simple validations. But many couples either do not know how to proceed or they find it superfluous to go through another marriage ceremony. With greater awareness of the possibility and use of sanation, priests may be more interested to help many more couples to validate their marriages.

With regard to the sacrament of confirmation the faculty was granted that the local ordinary name some priests as extraordinary ministers of confirmation in normal cases.⁸¹ This faculty took care of the difficulties vicars and prefects apostolic had in reaching certain areas. It helped cut down the number of journeys to all the mission stations in an extensive area, especially when the bishop's health was not good or the roads were impassable. But the faculty insisted that only a few priests be given the power to confirm. The interpretation of *a few* would depend on how vast the region was, the number of priests and on those to be confirmed.

In 1948, Pius XII gave to all local ordinaries in territories dependent on the Congregation for the Propagation of the Faith the power to grant to all their priests who exercise the care of souls the faculty to administer confirmation validly to the faithful in

⁸¹ See A. AB UTRECHT, "De facultatibus missionalibus," pp. 121-122.

danger of death (*in periculo mortis*).⁸² This faculty was in fact an extension to the mission world of the common law apostolic indult issued in a curial decree in 1946.⁸³ The indult conceded power to confirm, as extraordinary ministers, to parish priests and others.⁸⁴ The power was granted for confirmation of persons in danger of death from sickness in cases in which the bishop was not available. A priest could exercise this power only within the limits of his territory.

This faculty was rarely used in the dioceses of Malawi, probably because the sacraments of anointing and viaticum were deemed more appropriate for a person in danger of death. Without confirmation the Christian initiation rite is incomplete. However, a priest who was invited to attend to a person in danger of death, was predisposed to concentrate on providing the basic spiritual help the dying person needed. Unless the sick person or friends and relatives asked for confirmation, many priests found the rite of anointing satisfactory for those *in periculo mortis*.⁸⁵ Nevertheless, bishops in Malawi, to some degree, have availed themselves of the powers to appoint a few priests as extraordinary ministers of confirmation in normal cases.

⁸² SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, Decree, December 18, 1947, *Post latum a*, in *A.A.S.*, 40 (1948), p. 41.

⁸³ SACRED CONGREGATION FOR THE SACRAMENTS, Decree, September 14, 1946, *Spiritus Sancti munera*, in *A.A.S.*, 38 (1946), p. 349.

The faculty could very well have been issued for the entire Church in 1946; but the question at stake was whether the Congregation for the Sacraments which issued the 1946 decree had jurisdiction to issue decrees for countries under the Congregation for the Propagation of the Faith. To avoid difficulty, it was, therefore, preferable that the extension of the faculty be made by the competent Congregation.

⁸⁴ See J. DE REEPPER, *A Missionary Companion*, p. 25.

⁸⁵ In Malawi, priests occasionally asked for the faculty to confirm, not for those in danger of death, but for some couples prior to the celebration of marriage in conformity with *C.I.C.*, 1917, c. 1021. Confirmation in danger of death like matrimonial dispensations in danger of death (see *C.I.C.*, 1917, cc. 1043, 1044) are very rarely sought in most Malawian parishes.

There were many other faculties which were granted; most of them are obsolete and may appear trivial with the change of the law.⁸⁶ The faculty was also conferred permitting the use of water only for the purification of the chalice, even though the law established that wine be used to purify the chalice. Religious sisters, who took public vows, received permission to wash palls, purificators and corporals. Until they were washed, common law forbade the touching of purificators, palls and corporals which were used at mass, by anyone except clerics or the persons who had custody of these articles (*C.I.C.*, 1917, c. 1306 §2). Another faculty permitted the carrying of the Blessed Sacrament to the sick and the dying without external solemnities.

Again, universal laws needed to be tempered to suit the social and cultural settings. The Holy See, therefore, empowered the ordinaries in missions:

[...] to permit clerics and religious to practice medicine and surgery for the sake of charity provided that they are truly skilled in these professions and that in caring for the sick they carefully avoid everything that is unbecoming to a cleric or religious, or that could cause scandal, and that they ask nothing for the professional service itself.⁸⁷

Some clerics and religious were proficient in western medicine. Working in rural African villages where there were usually no experts trained in western medicine,⁸⁸ these clerics and religious felt compelled to utilize their medical skills.

⁸⁶ Among these was the faculty to celebrate mass with one candle or without candles; and if beeswax was not obtainable, even an electric light would do. The liturgical rubrics prescribed two wax candles.

⁸⁷ SACRED CONGREGATION FOR THE EVANGELIZATION OF PEOPLES, 1971, "Decennial Faculties for Mission Countries," in *Canon Law Digest*, VII, p. 85.

⁸⁸ Note must be taken that African societies have specialists in medicines that deal with physical as well as psychophysiological properties and symptoms (see A. SHORTER, *African Culture and the Christian Church*, pp. 137-144). In Malawi, the very best of these experts are called *ng'anga* or *sing'anga*. Some of these medicine-persons or traditional healers are competent in divination; but not every expert in traditional medicine has the skills and techniques of a diviner.

Missionaries were concerned not only with preaching the gospel but also with the economic and health condition of the evangelized. They wished to help ease suffering by practicing medicine. But, doing so went against the 1917 Code. Understandably, the distribution of pain relievers, malaria drugs and dressing wounds were not condemned. What the Church strictly proscribed was the practice of medicine and especially surgery. The Church, therefore, altered its laws to accommodate the missions.

A cleric or religious, skilled in African traditional medicine, in similar adverse situations, would be permitted to exercise his or her expertise. But anybody who engages in such practice will have to acknowledge the priority of his or her ministry as a cleric or religious, over the social service.⁸⁰ Of course, these services can and should be inspired by the gospel. Therefore, they must be understood within the general context of a vocation, and must not overshadow the gospel. This train of thought does not advocate a dichotomy between body and soul. But it only recalls the fact that the services which people want are so many and often so imperative that a person may easily become almost totally immersed in something he or she did not directly and principally set out for. An evangelizer must find a proper balance between preaching the gospel and attending to socio-economic services which cannot be utterly divorced from the gospel.

⁸⁰ The author is aware of propositions for new models of priests which combine ministry with social work. To a degree we already have this in the Church, e.g., priests who are in the teaching profession. This, in itself, is a topic for a separate dissertation.

With the faculties, the Church also adapted its laws in respect to tribunals. Mission ordinaries could reduce the number of officials in tribunals of first instance.⁹⁰ In case of a shortage of personnel the first instance tribunal can be constituted of three officials only, a sole judge, a defender of the bond and a notary. Despite this worthwhile adaptation, tribunals have not been very functional. In the arena of ecclesiastical trials there is a whole range of elements that require rethinking and remodelling.

Prior to Vatican II, in using habitual faculties, diocesan bishops and their equivalent merely participated in the supreme legislator's power of governance. The 1917 Code, in canon 80, restricted the power of dispensing to the legislator, his successor, his superior and to whomever any of these delegated the faculty to dispense. The Second Vatican Council, in acknowledging the diocesan bishop as a Vicar of Christ, has rediscovered the proper theological framework through which to understand his ministry. Thus, in his diocese:

[...] a diocesan bishop possesses all the ordinary, proper and immediate power which is required for the exercise of his pastoral office except for those cases which the law or a decree of the Supreme Pontiff reserves to the supreme authority of the Church or to some other ecclesiastical authority.⁹¹

As a logical consequence of this theology, the new legislation places the dispensing power of a diocesan bishop within his ordinary and proper pastoral functions. And so, whenever the diocesan bishop judges that a dispensation will advance the spiritual welfare of the faithful, he can dispense from universal disciplinary laws and also from particular

⁹⁰ See A. AB UTRECHT, "De facultatibus missionalibus," pp. 147-150.

⁹¹ Canon 381. See also *Christus Dominus*, 8a; *Lumen gentium*, 27a, PAUL VI, *Motu proprio*, June 15, 1966, *De episcoporum muneribus*, in *A.A.S.*, 58 (1966), pp. 467-472, English translation in *Canon Law Digest*, VI, pp. 394-400.

disciplinary laws established for his territory or for his subjects by the supreme authority of the Church except procedural or penal laws or those laws whose dispensation is especially reserved to the Apostolic See or another authority (c. 87 §2).

The revised Code has incorporated almost all the missionary faculties into the universal legislation.⁹² The law on dispensations grants ample opportunity not only to the diocesan bishop (canon 87 §1) but also to any ordinary in reserved cases (canon 87 §2) to dispense from disciplinary laws if recourse to the Holy See is difficult and if there would be danger of grave harm in delay, provided that the matter concerns a dispensation which the Holy See usually grants with due regard to dispensation from the obligation of celibacy which is granted by the Roman Pontiff alone (c. 291). Furthermore, in canons 1078, 1079, 1080 the law gives the local ordinary, and in certain circumstances the parish priest, the officiating priest or deacon and the confessor the power to dispense from matrimonial impediments of ecclesiastical law. It would therefore seem that most of the faculties given to mission ordinaries are made redundant by the new legislation. One of the exceptions though is the faculty that mission ordinaries have by virtue of apostolic faculties and not by virtue of the Code in which they have the power to dispense from the matrimonial impediments of crime and diaconate. Under normal conditions, common law reserves the dispensation of these impediments to the Holy See (c. 1078 §2, 2°). Local ordinaries were informed that the faculties which they were granted in 1971 remain in force until a new formula is disseminated.⁹³

⁹² See A. AB UTRECHT, "De facultatibus missionalibus," pp. 121-160.

⁹³ SACRED CONGREGATION FOR THE EVANGELIZATION OF PEOPLES, December 1, 1980, "Proroga delle facoltà decennali," in *Bibliografia missionaria*, 44 (1980), p. 343.

The mission Church in Malawi had great opportunities to make use of the faculties. Most of them were applied, but surprisingly there are some which could have been used but were not utilized at all. This will be discussed in the evaluation below.

Apostolic mission faculties were the Church's response to a new setting and context. Economic, geographic, demographic and social factors caused the Church to review some of its laws. The Church could also have considered factors of language, symbols, and customs in formulating the faculties which modified the universal law. The mission faculties formed a block of quasi-legislation from the legislator for definite mission countries. In this way, it can be said that mission faculties were a kind of particular law from the universal legislator. For a particular church the significance of its particular law cannot be overemphasized. In the subsequent section the relevance of particular law for both the particular and universal Churches will be discussed.

D. The Significance of Particular Law

One of the more striking features of the revised Code is the amount of local legislation that is required to implement it appropriately. A number of items require the action of the diocesan bishops, while others call for the intervention of the conference of bishops; still others need the attention of the bishops within a province. These items include those that are optional in the sense that norms do not have to be issued, such as norms on preaching by priests and deacons (c. 764), ecumenical participation in certain sacraments (c. 844), a marriage ritual (c. 1120), and the administration of certain types of Church goods (c. 1265); as well as those that are in a certain sense required (cc. 522, 1277, 1292 etc.). It is

appropriate to explore in greater detail the Code's built-in options, opportunities, and even necessities which are available for particular legislation.⁹¹

Paul VI mandated a Pontifical Commission for the Revision of the *Code of Canon Law*: a) to adapt the Church's law to the new way of thinking proper to the Second Vatican Council; and b) to implement the decisions of the Council.⁹² Three sets of underlying principles may be listed as means of implementing these two objectives. The first is the need to adapt to the new way of thinking (*novus habitus mentis*) characteristic of Vatican II and of the Church in our times. The Church is seen as a communion in which all share a common dignity and equality of action flowing from baptism and in which all are called to participate in the mission. The Catholic Church is thus seen as a communion of particular churches.

A second source is the norms adopted for the revision of the Code.⁹³ These norms placed special emphasis on the need for local law-making. The power of the diocesan bishop, for instance, had to be considered in its proper light, the number of issues reserved to universal authority had to be reduced and the diocesan bishop's function as pastor serving a particular church with all the authority needed to do this had to be restored.⁹⁴

⁹¹ See J. H. PROVOST, "Preparing for Particular Legislation to Implement the Revised Code," in *The Jurist*, 42 (1982), pp. 348-349.

⁹² See PAUL VI, Allocation to Code Commission, November 20, 1965, *Communicationes*, 1 (1969), p. 41; cf. also the preface to the 1983 Code.

⁹³ *Communicationes*, 1 (1969), pp. 77-100; English translation of the principles in J. HITE et al., *Readings, Cases, Materials in Canon Law*, Collegeville, The Liturgical Press, (1980), pp. 70-78.

⁹⁴ Cf. Principle no. 4 for the revision of the 1983 Code in J. HITE, et al., *Readings, Cases, Materials in Canon Law*, pp. 73-76.

Principle No. 5, on subsidiarity provides a third rationale for decentralizing the Church's legal structure: the factual, cultural setting and particular circumstances in which the work of the Church is carried on today and in every age. James H. Provost calls this an "institutional adaptation to local circumstances."⁹⁸

The Church must be adapted to the customs and cultures of various peoples.⁹⁹ Historically, the institutionalization of Church life along cultural lines originally produced various ritual churches or rites, which today, form the universal Catholic Church.¹⁰⁰

The need to adapt to various cultures was recognized at Vatican II. The option of establishing new ritual churches was even raised there, and the authority to do so was specified as the supreme authority in the Church. Rather than creating a series of new ritual churches, the Council adopted an intermediate step whereby the bishops of various countries assumed greater responsibility to adapt the life and mission of the Church to their area through councils and conferences of bishops.¹⁰¹

Two major sources for structuring Church life, as indicated in the Code (cc. 7-28) are laws and customs. Laws are primarily understood as the codified universal legislation; but they

⁹⁸ J.H. PROVOST, "Preparing for Particular Legislation to Implement the Revised Code," p. 351.

⁹⁹ See *Ad gentes*, 5.

¹⁰⁰ Cf. *Lumen gentium*, 23; *Orientalium Ecclesiarum*, 2 ss; *Christus Dominus*, 11, 39. Cf. also W. ONCLIN, "Ordinatio Ecclesiae universae in specie ad ecclesias rituales sui iuris quod attinet," in *Revue de droit canonique*, 30 (1980), pp. 304-317.

¹⁰¹ See J.H. PROVOST, "Preparing for Particular Legislation to Implement the Revised Code," p. 352; cf. *Orientalium Ecclesiarum*, 11; *Christus Dominus*, 37-38.

also take the form of general decrees, as well as statutes for certain juridic persons (cc. 29, 94 §3). A general decree, a law, can be further specified by a general executory decree, a decree which does not set a new law but which determines more precisely the methods to be observed in applying the existing laws, or urge the observance of laws (c. 31). However, the expression *general decrees* in canon 455 §1 includes general executory decrees of the sort in canons 31-33. Instructions clarify the prescriptions of law. They elaborate on and determine an approach to be followed in implementing them (c. 34). Here is an area for adaptation, interpretation and pastoral concern.

A statute is an ordinance, an authoritative rule or a public injunction which binds the members of a specific aggregate of persons (c. 94). If it is issued in virtue of legislative power, then its prescriptions are governed by the canons on laws. It applies to a juridic person such as a diocese or a parish. It addresses the inner operations of that juridic person, its end or purpose, its organization or constitution, the governance within it, and the manner of carrying out the work of the juridic person (cf. cc. 94, 117, 314, 453, 499). The Code also mentions administrative acts (decrees, precepts or rescripts) issued in specific cases (cc. 35-75). Canon 95 provides rules of order (*ordines*) which specify how meetings are to be run.

Particular laws may be territorial or personal. They are not presumed to be personal, but territorial, unless the contrary is clear (c. 13). The universal law of the Church offers five possible sources of particular law for a particular church: laws established by the supreme authority of the Church for a particular territory (c. 87 §1); laws passed by the provincial council (c. 446); laws enacted by a plenary council (c. 446); decrees promulgated by the

conference of bishops (c. 455); and legislation of a diocesan bishop without or at a diocesan synod (cc. 391, 466).

Religious institutes and societies of apostolic life have another type of particular law. The proper or particular law of religious institutes and societies of apostolic life *per se* is not the concern of this dissertation.¹⁰²

Conclusion

This chapter has moved from underscoring the important function of universal law in particular churches to the ongoing discovery and emphasis on particular law for dioceses and regions of conferences of bishops within the Church. A need was felt in the history of the Church to unify and codify its existing laws. In this realization and expression of the Church's unity and universalism, less attention was paid to the plurality of the particular churches and to the pastoral implications of a rigid and strictly uniform law.

The Church's universal laws have not always been easily applicable in all regions of the world, especially when the Church began reaching out to mission lands where people's customs, their living conditions, their characteristic historical and anthropological components were very different from those in Europe.

¹⁰² The Church has general laws applicable to the different institutes of consecrated life and societies of apostolic life everywhere in the world. However, besides these general laws, each institute or society has the right to have its own constitutions and proper law (constitutions, directories, books of customs, of prayers, of ceremonies etc.) which are supposed to be adapted to the conditions of time and place while being faithful to the sound tradition and patrimony of the institute or society.

Special laws is another category forming a type of particular law; but like the proper law of religious institutes and societies of apostolic life it is not the subject of this thesis. See Appendix 14, (special law governing chaplains to the armed forces [or a military ordinariate] does have an impact on the particular law of the Church of Malawi; it is an area that the conference of bishops has to work more on.

Hence, gradually the Church made adaptations of some of its laws through apostolic faculties in order to provide for and to accommodate better the peculiar circumstances in mission territories. A study of mission faculties and the revised Code's emphasis on particular law reveals the Church's realization of the need to recognize and accentuate the diversity and pluriformity of particular churches within the one Church. Indeed, unity need not turn into stifling uniformity; and Catholicity does not have to be reduced to its geographical dimension.

In presenting some of the Malawian customs and customary law and in indicating how in certain instances they come in stark differences, and at times, contradiction, with Catholic teaching and practice, avenues have been pointed out for the continued particular intervention of the Conference of Bishops through its directives or particular legislation.

In and out of the particular churches the universal Church exists. The Church is an internally diversified community of faith where each region contributes through its special gifts to the other regions and to the whole. In this vision of the Church, one of the tasks of the Holy See and of the universal law is to protect legitimate differences while ensuring that such differences do not hinder unity but contribute to it.¹⁰³ The Second Vatican Council did not suggest that particular churches in different regions should profess different beliefs, but rather it insisted that the one faith ought to be proposed, lived and celebrated with different accents and nuances corresponding to the abilities, resources, and customs of each people and the variety of historical-cultural situations.

¹⁰³ See Vatican Council II, *Lumen gentium*, 13 and 23, English translation in FLANNERY I, pp. 365, 376.

The ensuing chapter considers the development of the particular law of the Church in Malawi. Since there is only one ecclesiastical province in Malawi, a provincial council would be a plenary council of all the dioceses in the country. No particular council has been held, hence, the main sources of particular legislation in Malawi are: the supreme authority of the Church, conference of bishops and diocesan legislation. The subsequent chapter will review some of the directives of the bishops of Malawi in relation to the principle of adaptive implementation of the revised *Code of Canon Law*.

CHAPTER III

TOWARDS PARTICULAR LEGISLATION IN MALAWI

Introduction

The Catholic bishops in Malawi have the collective function of jointly promoting the pastoral common good of the people of God within the territory of their conference. Since the conference of bishops was constituted in Malawi, time and again, matters of common interest surfaced which required deliberation by the bishops in order to establish common policies determining forms and methods for the Church's pastoral activities in the country.

At their plenary meetings the bishops discussed pastoral issues some of which had the prior review and suggestions of the national commissions or diocesan councils. They enacted norms and guidelines which were then transmitted to the dioceses for implementation to help pastoral workers in their ministry in the Church. Since no provincial council has been held in the country, the minutes of the conference's plenary meetings are the main source of particular legislation for the Catholic Church in Malawi.

In 1983 the bishops of Malawi assembled and updated all the major decisions of their plenary meetings since the beginning of the conference and published them as *A Compendium of the Decisions taken by the Episcopal Conference of Malawi (E.C.M.)*.¹ The task force for compiling the *Compendium* completed its work before the promulgation of the revised Code; hence the *Compendium* does not take into account the new law, but it does reflect the teachings of the Second Vatican Council. The first section of this chapter will examine these decisions.

¹ See *supra*, p. 22, footnote no. 8.

Another source of particular law comprises all the decisions and recommendations the conference of bishops has made regarding the 1983 Code. Although these decisions have not been promulgated as decrees, they serve to guide the Church in Malawi. In the second section of the present chapter an analysis will be made of these decisions.

A. The Compendium

The *Compendium* containing the decisions of the Conference of Bishops prior to the promulgation of the revised Code is divided into five parts. The first part describes the nature, purpose and authority of the Episcopal Conference of Malawi. In its second part, the *Compendium* deals with the different departments of the Catholic Secretariat of Malawi: namely education, lay apostolate, pastoral, religious (seminaries and religious institutes), communication, social service and development, and administration. Decisions on sacraments and liturgy form the third and fourth parts respectively; and the last part treats of a self-supporting Church.

In this section, we will treat of the bishops' guidelines on the sacraments in which some features of the developing particular law in Malawi is manifested.² These directives will be viewed in light of the universal law and within the context of the bishops' prerogative to enact particular law for their territories.

² Other issues, like Catholic lay apostolic movement, ecumenism, religious institutes, communication and social service department, which have been covered by the *Compendium*, even though important, will not be directly dealt with here, due to limitations of space.

1. *The sacrament of baptism*

a) *Infant baptism*

A section of Church law which has received detailed particular norms by the bishops of Malawi is infant baptism. The bishops' directives on this matter are based on their 1975 letter to the Christian faithful on infant baptism.³

Generally, for an infant to be baptized it is necessary that at least one parent or whoever lawfully takes their place agrees to the baptism,⁴ and that there be founded hope that the baby will be brought up in the Catholic faith. The bishops have directed that in certain circumstances, such as when it is not certain that the child will be raised in the Catholic faith or the situation of the parents causes scandal in the Christian community, infant baptism should be postponed. Eight situations have been cited as requiring postponement of baptism.

(i) *Children of non-practising parents*

The E.C.M. has directed that:

baptism of a child be postponed if parents have no interest and do not practice religion. However, the ordinaries make it clear in accordance with the principle which entitles every child to baptism, that in case of danger of death, the child must be baptized.⁵

³ See *Compendium*, pp. 49-51. These norms were drawn from the Catholic Bishops' letter to the Christian faithful in Malawi: AEPISKOPU A KU MALAWI, "Kalata ya Aepiskopi kwa Akhristu onse kuno ku Malawi, Za Ubatizo wa Ana," 1975, pp. 1-8. Cf. also canon 866.

⁴ An exception to this norm is found in canon 868 §2: "The infant of Catholic parents, in fact of non-Catholic parents also, who is in danger of death is licitly baptized even against the will of the parents."

⁵ *Compendium*, p. 49. Cf. SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Instruction, October 20, 1980, *Pastoralis actio*, 30-31, in *A.A.S.*, 82 (1980), pp. 1137-1156; English translation in FLANNERY II, pp. 103-115.

As soon as parents would show a steady practice of the faith which would ensure the infant's Christian growth, baptism would be conferred. Since sacraments are celebrations of faith, they operate fruitfully within the ambience of faith. The faith of parents or guardians is important for the celebration of infant baptism,⁶ because it is with and in this faith that children are brought up.

(ii) *Parents who do not educate their children*

The conference has also regulated that:

baptism be postponed if parents without any reason, neglect to send their older children to school, in case of danger of death, however, the child must be baptized.⁷

This ruling is meant to help parents to balance growth in faith with growth in wholesome human development. The Church is concerned not only with people's spiritual welfare but also with all that serves their total welfare. However, in so doing the Church in Malawi was in the past often perceived as using baptism and other sacraments to compel children to join its school system, and to bring them into the Catholic Church.⁸ To deter such misunderstandings pastoral workers, therefore, need to give good explanations of the rules, and emphasize that with this directive, the bishops attempt to foster integral social

⁶ It ought to be noted that the faith of the parents or guardians is not necessary for the validity of infant baptism. The law which requires that there be founded hope for the infant to be raised in the Catholic religion is only for lawfulness and not for validity. See B.P. DALY, "Canonical Requirements on the Part of Parents in Cases of Infant Baptism," J.C.D. diss., Ottawa, Saint Paul University, 1986, pp. 194-203.

⁷ *Compendium*, p. 49. Schools here mean institutions which give formal education for all citizens regardless of their religion, and they should not be understood as places where children receive Christian education; catechism is generally taught in churches.

⁸ In the early days of missionary activity, Church schools, which outnumbered government schools, tended to enrol only members of their Church, and pupils who went to mission schools were expected to join the church which ran that school.

development for the good of the persons themselves, the Church and for community and nation building.

(iii) *Parents who do not care to support the Church*

A third instance where the bishops have prescribed deferral of baptism is when parents neglect their duty of supporting the Church. The bishops state that:

baptism of children is again to be postponed if parents do not care to pay *mtulo* (Church support). In case of danger of death, however, the child must be baptized.⁹

Aware of the delicacy of linking baptism with tithes, the ordinaries have insisted that instructions be given why Christians have to support the Church; and that people must be made to realize that the deferral of baptism does not imply that the Church requires money for the administration of sacraments.

Tithing has been a thorny issue in the Malawian Church.¹⁰ In many parishes, baptism of babies is often delayed on account of parents not paying their annual contribution (*fee/mtulo*). Even though the Church does not want to appear like a business organization,

⁹ *Mtulo or Mthulo* is a kind of tithe or church tax, normally a minimum fixed sum of money per year, demanded of every Christian, even catechumens, for the sake of Church support.

The bishops have determined Church tax thus: "(i) Adult men and women and young people who are considered adults by the community are to pay annually the equivalent of three days' salary. For Christian children every diocese is left with the freedom to set up an appropriate amount for their Church tax. (ii) Those faithful who have paid-jobs are to pay each year a minimum of 10% of their monthly salary. (iii) Christians who are engaged in business (farmers, fishermen, shopkeepers, artisans and the like) are to pay an annual minimum of 10% of their monthly income. (iv) Catechumens pay their contributions as laid down in the rules of Church tax. (v) Pastoral workers must instruct the faithful that the payment of Church tax is a grave duty for each individual Christian" (*Compendium*, pp. 73-74).

¹⁰ The whole topic of Church tax has been and is strikingly significant to most dioceses in Africa. Cf. J. DE REEPER, "The Problem of Church Tax in the Missions," in *AFER*, 1 (1959), pp. 18-26; and S. OTTO, "The Problem of Church Tax Reviewed," in *ibid.*, pp. 182-188.

in any event, it must find ways of convincing people of their responsibility to support the Church.¹¹ In building a self-propagating, self-evangelizing and a self-supporting Malawian Church, it is of fundamental importance that members of the Christian community take an active role in financially and materially supporting the Church as an expression of their membership in the faith community. Nevertheless, each case must be looked at individually; a person or family may have inadequate resources or may be under heavy financial burdens. This norm applies to those who despite having comfortable financial means, do not care and neglect their obligation to support the Church.

(iv) Parents with children in invalid marriages

The bishops of Malawi have further determined that:

If it is clear that parents allow their older children to begin married life without making arrangements with the Church [...] the baptism of the children be postponed. In case of danger of death, however, the child must be baptized.¹²

The children referred to here are the younger children of the parents when these same parents allow their older children to be married without following the Catholic form for the celebration of marriage.

A basic presumption underlying the principle behind this directive is that parents to a degree share in their children's decision to marry outside the Church. If parents had no

¹¹ The topic of Church support will be examined below, where the application of canon 1264, 2° states: "Unless the law has provided otherwise, it is the responsibility of the bishops of a province: to set a limit on [to determine] the offerings given on the occasion of administering the sacraments and sacramentals," and canon 1274 which determines methods of raising funds for the support of the clergy, social security and insurance of the clergy and for other pastoral workers and for national and diocesan pastoral purposes will be seen. See canon 848.

¹² *Compendium*, p. 49.

decisive part to play in the marriages of their children, there would be no reason to impose a restriction on them for their children's choices. Somehow, the principle asserts that the parents have failed in their Christian parental tasks.

(v) Children of parents in invalid marriages

Regarding children born of parents living in concubinage, the Conference of Bishops has decided that:

If there is no possibility of arranging the marriage, the children born of parents living in concubinage cannot be refused baptism provided, of course, that no scandal is caused, the parents live as good people fulfilling their Christian duties to the extent possible, and it is likely that the children will be brought up as Catholics.¹³

In this directive, the bishops express a new attitude to concubinage situations; for many years baptism of children born of such marriages was delayed until later when they could join the catechumenate. However, one would also want to see that children born of those marriages which could be convalidated but the spouses are not ready for it, be admitted to baptism, provided they otherwise live good Christian lives. In addition to this, the above conditions must receive proper interpretation; scandal should not be made to include just any type of ill-informed embarrassment and negative feeling of individuals in the community; and it would seem, fulfilment of Christian duties does not have to be extremely rigorous.

(vi) Children of non-Catholics

The E.C.M. has also ruled on children of non-Catholics who intend to become Catholics. It states that:

¹³ Ibid., p. 50.

Children of non-Catholics wishing to join the Catechumenate may be refused [sic]¹⁴ provided there is no set opposition from the parents. An effort must be made to find out if there is an implicit or explicit consent from the parents. The community should be trusted as a guarantee of the spiritual development of the young catechumens.¹⁵

Since it is children of non-Catholics aspiring to join the catechumenate who are addressed, babies of non-Catholics are not the focus here. The consideration arises because in Malawi numerous unbaptized children and youth of ages five to fourteen seek incorporation into the Church. The suitable manner for them to join the Church, even if they are very young, five or seven years old, is not immediate baptism, but to follow a programme of the catechumenate. However, due to their young age the opinions and feelings of the parents need to be respected.¹⁶

(vii) *Children of unwed mothers*

Furthermore, the Conference has resolved that:

Children of unwed mothers may not be refused baptism if, in the opinion of the community the unwed mother is considered as a good christian and the case is accidental. The bishops stress that cases differ and that each case should be treated on its own merit according to circumstances. Baptism

¹⁴ Most probably it should read *admitted* or *may not be refused* instead of *refused*.

¹⁵ Ibid.

¹⁶ Even though non-Catholics are not bound by merely ecclesiastical laws (c. 11) canons 97 and 98 stipulate that minors remain subject to the authority of parents or guardians in the exercise of their rights with the exception of those areas in which minors by divine law or canon law are exempt from their power (c. 98 §2); and before the completion of the seventh year a minor is called an infant and is held to be incompetent (c. 97 §2). A six year old non-Catholic is not necessarily incompetent; and it can be argued that by divine law (c. 98 §2) non-baptized minors who freely seek baptism are exempt from obedience to their parents, but all the same, human and ecumenical sensitivity suggests respect for the possible contrary desire of parents.

shall have to be postponed if the mother does not practice her religion and having illegitimate children is habitual and not regretted.¹⁷

By *accidental case* is meant an unintentional and infrequent occurrence, in the sense that it is not a deliberate and a carelessly repeated action.

The concept of *illegitimate children* exists in Malawi but does not bear as much of a dishonourable connotation as in the western cultures. Begetting children outside the institution of marriage is frowned upon; nevertheless, any child finds a home with the parents, if they decide to settle in marriage, or the grandparents incorporate the child into their family.

(viii) *Children born from polygamous marriages*

With regard to children born in polygamous marriages, the Conference rules as follows:

In case of a simultaneous polygamy, in principle (i) no baptism may be given. (ii) In case of consecutive polygamy, no baptism may be given, because this case is like that of a concubinage marriage when parents do not practice their religion and do not care about their Christian duties. In such a case there is scandal and children are not assured of Christian education.¹⁸

The directive concerning children of polygamous parents is worded in a rather general way; the various possibilities within a polygamous relationship are thus not addressed. In simultaneous polygamy, the case of the first wife (or the legitimate wife according to the Catholic Church), if she is a validly married Catholic, is different from that of the second wife

¹⁷ Ibid.

¹⁸ Ibid., pp. 50-51.

(or other wife/wives), who is/are not married according to canon law. The first wife may be a practising Catholic, or a non-practising Catholic or a non-Catholic. If she is a practising Catholic then there is hope that her children will be raised Catholic, in which case they may be baptized. On this matter, the particular law of the diocese of Mzuzu says:

In the case of a polygamist, the children of the legitimate Catholic wife may be baptized, if she is faithful to her Christian duties. The children of the other wives should not be baptized as infants but can be followed up and helped enter the adult catechumenate after attaining the age of 12, if they so wish.¹⁹

The standard practice in Malawi is that children of the invalidly married wife (wives),²⁰ Catholic or non-Catholic, of a polygamist are not baptized as infants if their parents remain in irregular unions; instead they are encouraged to join the catechumenate once they come of age. The bishops' directive likens consecutive polygamy to "a concubinage marriage when parents do not practise their religion and do not care about their Christian duties."²¹ While this may sometimes be true, it is certainly not always the case. Some spouses in consecutive polygamous marriages or in simultaneous polygamous marriages are faithful to, and bring up their children in the Catholic faith.

The pastoral directory of the diocese of Mzuzu gives a special provision for children from some polygamous marriages. It provides that:

¹⁹ DIOCESE OF MZUZU, "Pastoral Directory, Partial and Provisional Draft, Infant Baptism (2)," Mzuzu, Archives of the Diocese of Mzuzu, 1983, p. 6.

²⁰ This equally applies to the children of an invalidly married wife, whether in a simultaneous or a consecutive polygamous marriage.

²¹ *Compendium*, p. 50.

Consistent with the regulations of the catechumenate (1/59-61) it may be possible to baptize children of polygamous parents who did the full catechumenate, practise the Christian commitments but judged that they could not embrace a monogamous union because of duties contracted to one another and the families. This, however, is only to be done after a period of trial, and on the condition that the community undertakes to instruct the children.²²

This provision takes care of only children of polygamists who have followed the catechumenate programme but have chosen to remain in their situation because of duties arising from the marriage commitments. But even for those who embrace polygamous marriage after baptism, they may have done so not in defiance of the Catholic faith, or because of human weakness, but sometimes it is in keeping with certain traditional values and customs which they feel they cannot abandon. If such Catholics practice their faith and there is assurance that they, with the support of the Christian community, can give their children a Catholic education, baptism of their children should be considered favourably. It is in these instances that the particular churches are called to show sensitivity to people and their cultural traditions which cannot be expected to evolve overnight.

In all the cases of infant baptism dealt with above, the Conference of bishops in Malawi guides that baptism must not be postponed should the infant be in danger of death. This is in agreement with the Code: "an infant in danger of death, is to be baptized without any delay" (c. 867 §2).

²² DIOCESE OF MZUZU, "Pastoral Directory, Partial and Provisional Draft, Infant Baptism (2)," 1983, p. 6.

b) *Baptism of adults*

The Conference has urged priests and other pastoral workers to take note of the purpose of the catechumenate, namely to help people make this transition from their initial desire of conversion to a more conscious adhesion to Christ, to prepare the converts' entry into the Church, and to assist them in their first steps in Christian initiation. The purpose of the catechumenate is not merely to expose doctrines and precepts but also to train and form the catechumens in the whole of the Christian life according to the mind of Christ and with the help of the Christian community.²³

The Conference has not set out general norms for admittance to adult baptism as there used to be in the early missionary period. For instance, Bishop Dupont from time to time sent instructions to the White Fathers in Nyasa Vicariate on categories of people ineligible for baptism, and this included:

"[...] confirmed drunkards, those who have caused scandal several times, those who do not know according to their intelligence, the Faith, and those who know it but are unwilling to carry out its precepts."²⁴

²³ See *Ad gentes*, 14. Cf. also *Compendium*, p. 51. *Ad gentes*, 13 highlights the importance of the proclamation of the Word and the mystery of Christ: that people are called to free conversion to Christ by the working of the Holy Spirit in their hearts and hence it is forbidden to force anyone to embrace the faith; and that conversion is a spiritual journey which brings about progressive change, a stage by stage transition celebrated by rites, hence *Rites of Christian Initiation for Adults* (R.C.I.A.).

²⁴ See D. ROY, "Règlements et instructions pour missionnaires du Nyasa," Lilongwe, White Fathers' Archives, MS, February 10, 1919, p. 3.

Also members of the *Nyau society*²⁵ and those in irregular marriages could not be baptized unless they renounced their state of life or rectified their marital situations.

(i) *Duration of the catechumenate*

Regarding the duration of the catechumenate, the E.C.M. has resolved that:

The Catechumenate shall normally last for 2 consecutive years and that the period of two years must be interpreted as a minimum. The conference stresses that nobody should be baptised or received into the Church within this period of two years. The maximum period of the catechumenate shall be determined by the circumstances of the individual candidate.²⁶

In the early missionary period, in some places until the late seventies, the catechumenate lasted for four years in the dioceses of Lilongwe, Dedza and Mzuzu, which were under the jurisdiction of the White Fathers.²⁷ In Blantyre, Zomba, Chikwawa and Mangochi dioceses, which were under the Montfort Missionaries, the catechumenate was only for two years.

²⁵ *The Nyau Society* is a social, religious institution of the Chewa people into which members were enrolled by initiation rites. The society celebrated key social events like the funeral-burial ceremony, marriage, harvest, enthronement of a chief etc. with a spirit dance *gule wamizimu* or *gule wankulu*; the dancers performed in special attire and masks. The *Nyau* resisted the missions, colonial administration as well as entry into western institutions like schools; they had their own courts and so they claimed immunity from public colonial prosecution for alleged immoral acts of the society (see I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, pp. 121-131).

²⁶ *Compendium*, pp. 51-52. The Second Vatican Council has restored the catechumenate (see *Sacrosanctum Concilium*, 64-65, *Ad gentes*, 15, in FLANNERY I, pp. 21, 829 respectively). However, in mission territories the catechumenate was already in use; it was gradually developed into established stages similar to those steps existing in the early Church.

²⁷ See R. VEZEAU, *The Apostolic Vicariate of Nyasa*, pp. 93-99; cf. also I. LINDEN, *Catholics and Chewa Resistance in Nyasaland*, pp. 52, 180.

(ii) *Christian name for baptism*

The bishops of Malawi have also ruled on the Christian name given at baptism. They have observed that:

More and more people present local names for their children at baptism. The Episcopal Conference of Malawi is not opposed to local names provided they do not contain meaning contrary to Christian thinking and provided a Christian name is added to the local name.²⁸

Taking a name is part of the baptism ceremony,²⁹ and Christian tradition recommends for those to be baptized and especially in mission countries, the taking of a new (Christian) name,³⁰ usually after a saint. In Malawi it has been noticed that more and more people choose indigenous names at baptism. It is understandable that some names may be forbidden for use at baptism because they seemingly connote un-Christian attitudes. In this category there are names such as *Komani* (kill), *Masozi* (tears), *Malizgani* (terminate); even if these names may have hateful feelings behind them, they do express very crucial life events of the family or individual. They are, like most African names, means of dealing with various events and of celebrating joyful moments.

The bishops prefer that a Christian name be added to a local name, but one would wonder why a Christian name should be attached to an approved local name. *Chimwemwe*

²⁸ *Compendium*, p. 51.

²⁹ Cf. SACRED CONGREGATION FOR DIVINE WORSHIP, January 6, 1972, "Christian Initiation of Adults," 88, in *The Rites of the Catholic Church*, English translation prepared by the International Commission on English in the Liturgy, New York, Pueblo Co., 1976, pp. 47, 92.

³⁰ See B.P. DALY, "Canonical Requirements on the Part of Parents in Cases of Infant Baptism," pp. 212-213 (Cf. c. 855); cf. also E. HILLMAN, "The Question of Names," in *AFER*, 9 (1967), pp. 45-49.

(joy), *Kondwani* (be happy), *Chikondi* (love), *Gomezgani* (trust, hope), *Wongani* (be thankful), *Mtendere* (peace) are examples of honourable names with Christian meaning.

(iii) *Registration of baptism*

Finally, the Conference has issued norms on the registration of baptism and the importance of prompt and proper transmission of information from parish registers.

Names of the newly baptized persons [are to] be entered into the baptism register by the ministers concerned as soon as possible (*quam primum*). Baptism given in *articulo mortis* must be recorded in a special register. The Conference requests all pastoral workers (parish priests and their assistants) to respond immediately with adequate attention to the requests of retransmission of documentation on baptism, marriage etc. from another parish or diocese. The Episcopal Conference of Malawi directs that in each parish there should be the following registers: of baptism, of confirmation, of defunctorum, of Status animarum -marriage, and any other book system which would facilitate proper administration of a parish in a diocese.³¹

The Code directs that, "each parish is to possess a set of parish books including baptismal, marriage, and death registers as well as other registers prescribed by the conference of bishops or the diocesan bishop [...]"(c.535 §1). It is within the rights of the Conference to determine other registers to be kept by each parish.

2. *The sacrament of the Eucharist*

a) *Anticipation of the Sunday liturgy*

The faculty has been granted to ordinaries in mission countries to give permission that the Sunday Mass be celebrated on a weekday, wherever due to a dearth of priests or distance

³¹ *Compendium*, p. 52. Cf. SACRED CONGREGATION FOR DIVINE WORSHIP, General Introduction to Christian Initiation, June 24, 1973, *Per initiationis christianae*, 29, in FLANNERY II, p. 27.

people cannot fulfil their Sunday obligation on a Sunday.³² In spite of being very practical, this faculty has not been utilized in Malawi, though the bishops have stated that:

As regards the anticipation of observing the Sunday obligation no general directive has been given but the bishops have ruled that particular circumstances should be brought to the notice of the local ordinary [understood as the diocesan bishop], who is entitled to grant this permission.³³

Most parishes are divided into smaller sections called outstations, and a parish may have from three to fifteen outstations ministered by two or four priests. Thus, on a Sunday only two or four of these Christian communities (outstations), celebrate the Eucharist. The other outstations have services of the Word, or Communion services, where these are permitted. If priests would ask for the use of this faculty, a few more of these Christian communities would be served with the Sunday Eucharist celebrated in anticipation.

b) National instructions on liturgical adaptations

The Conference of bishops in Malawi has also expressed the desire that a sub-committee of the national liturgical commission be formed. Its purpose has been defined as:

[...] to study and advise on the Africanization of Church music, namely use of African musical instruments, adoption of traditional tunes composed of/or the standardization of African tunes composed hitherto.³⁴

³² SACRED CONGREGATION FOR THE EVANGELIZATION OF PEOPLES, "Decenal Faculties for Mission Countries," 1971, in *Canon Law Digest*, VII, p. 83. See SACRED CONGREGATION OF RITES, Instruction, May 25, 1967, *Eucharisticum mysterium*, 28, in *A.A.S.*, 59 (1967), pp. 539-573, English translation in FLANNERY I, p. 119.

³³ *Compendium*, p. 53. See canon 1248 §1.

³⁴ Ibid. Cf. SACRED CONGREGATION OF RITES, Instruction, March 5, 1967, *Musicam sacram*, 69, in *A.A.S.*, 59 (1967), pp. 300-320; English translation in FLANNERY I, p. 97; Vatican Council II, Constitution, February 15, 1964, *Sacrosanctum Concilium*, 44, in *A.A.S.*, 56 (1964), pp. 97-138; English translation in FLANNERY I, pp. 1-40.

However, since the dioceses are so different in their liturgical expression, it would seem, the task of such a committee can be only to give general directives leaving particular rulings to individual dioceses. Aspects of the liturgy such as musical tunes and compositions, liturgical dance, use of drums and other musical instruments are not equally accepted in all the dioceses. Hence, a national committee would have a difficult task in giving and implementing detailed instructions.

Nevertheless, for the sake of uniformity in liturgical matters, the bishops directed that:

In public masses the faithful shall kneel as from the "Canon" to the "Our Father" (*Pater Noster*) where they stand, that the faithful shall stand for the first and the last prayer, and at the "prayer of the faithful," that the faithful shall receive Holy Communion kneeling. The conference forbids free composition/change of any part of the mass except for bidding prayers.³⁵

Truly, liturgical rites must be guarded from inappropriate spontaneous improvisations which distort the meaning of the rites, but this, it would appear, does not mean that people have always to bind themselves slavishly to prescribed texts even when the rite only gives them as an example or a formula. Of course, certain texts, like the eucharistic prayers, are standard; but prayers like those for the penitential rite, from time to time, could be adapted or conscientiously improvised as the celebration demands.³⁶

³⁵ *Compendium*, p. 53. Cf. *Sacrosanctum Concilium*, 39-40, in FLANNERY I, p. 14; General Instruction on the Roman Missal, 20-23, March 26, 1970, in FLANNERY I, pp. 167-168.

³⁶ Most of the prayers of Mass have been translated literally from the Roman Missal into the Chichewa and Chitumbuka languages. They are usually too brief and are structured in a foreign mentality; typical Malawians relate better to longer prayers which are inclined to be repetitious and are expressed in local imagery and symbolism. The Church in Malawi has to formulate its own prayers which must also serve as models and so must be open to on-going adaptation.

c) *Distribution of Holy Communion*

Concerning the distribution of Holy Communion to the faithful the bishops in Malawi have reasserted that the ordinary minister for this is a priest or deacon. However, because of the scarcity of priests and the frequency of instances when extraordinary ministers of the Eucharist are needed, the Conference has agreed:

To allow religious Brothers to assist in the distribution of Holy Communion [...] Sisters are also allowed in their own communities with the permission of the local ordinary; the conference is not prepared to extend this general indult. Parish priests can bring emergency cases to the attention of the local ordinary who may make an exception. Although it is theologically correct and within feasibility to use laymen [lay people] as extraordinary ministers of the Eucharist, pastorally, however, care must be exercised in applying the faculty because a feeling may develop that confession is no more necessary. Therefore, the Episcopal Conference of Malawi directs that this faculty be used only in those areas where the presence of a priest is really not possible after seeing to it that the lay minister and the community have a clear and constant formation about the real nature of this faculty and that the sick person is helped to arrive at perfect contrition with votum to go to confession as soon as possible.³⁷

Permission to assist in distributing Holy Communion is given to religious Brothers; and also to Sisters, but seemingly only in their own communities with the permission of the local ordinary, and thus appears strangely discriminatory. The directive is concerned more with the spiritual care of the sick than ensuring the availability of the eucharist to priestless communities. It permits extraordinary lay eucharistic ministers only in very rare instances. In one diocese or so Sisters are allowed to act as extraordinary ministers of the Eucharist outside their religious communities.

³⁷ *Compendium*, pp. 54-55. See SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction, January 25, 1973, *Immensae caritatis*, in *A.A.S.*, 65 (1973), pp. 265-267; English translation in *FLANNERY I*, pp. 226-228.

3. *The sacrament of confirmation*

a) *Minister of confirmation*

The E.C.M. reaffirmed that the ordinary minister of the sacrament of confirmation is the bishop, and that its extraordinary minister can validly be a priest delegated by the bishop. The Conference has decided that:

In spite of the fact that canon law allows a priest to confer this sacrament on the faithful when delegated by the bishop, the Episcopal Conference of Malawi has reservation of this permission. It is important to note that the priest should seek permission from the bishop or ordinary to confer the sacrament licitly.³⁸

Since the bishops spoke of priests conferring confirmation licitly, and not validly, they must be addressing those cases where the universal law allows a priest to administer confirmation. For instance, priests, who have been delegated to baptize adults or receive already baptized persons into the Catholic Church, have the faculty of conferring the sacrament of confirmation on those they have baptized (c. 883, 1°), as well as persons in danger of death who have not been confirmed (c. 883, 3°). Probably this reservation applies to the situations when a bishop delegates a priest to confirm young people who were baptized as infants. And it would appear that the bishops are merely expressing their wish that ordinarily, as much as possible, confirmation be administered by a bishop.

b) *Age for confirmation and time of its celebration*

The E.C.M. stated that:

The age for the sacrament of confirmation should be between 10 and 14 years of age, and not otherwise. Thorough preparation of the candidates

³⁸ *Compendium*, p. 57. Cf. SACRED CONGREGATION FOR DIVINE WORSHIP, August 22, 1971, *Ordo confirmationis*, 7-8, Civitate vaticana, Typis Polyglottis Vaticanis, 1971.

for the sacrament of confirmation is of vital importance. The sacrament of baptism and confirmation must be conferred separately and not on the same day.³⁹

The obvious advantage of administering baptism and confirmation on separate days is that each sacrament is highlighted and the candidates can assimilate better the Word and the symbolism of each sacrament. The bishops prefer celebrating baptism separately from confirmation in order to symbolize and to give more time for maturing in the Christian faith. However, they cautioned that the period between the celebration of the two sacraments should not be too long, in case the candidates would like to migrate. Nevertheless, this procedure breaks the link of the two sacraments; baptism finds its fullness in confirmation and it is theologically proper to celebrate them together. Incidentally, in some dioceses of Malawi there is a spacing of between one day and one week between the celebration of the two sacraments. In some parishes, the two sacraments have been celebrated in one ceremony.

4. *The sacrament of penance (reconciliation)*

The bishops have directed that "first communicants should first receive the sacrament of penance."⁴⁰ They have urged that the Christian faithful not only be taught about the

³⁹ *Compendium*, p. 57. Cf. SACRED CONGREGATION FOR DIVINE WORSHIP, August 22, 1971, *Ordo confirmationis*, 11, in *The Rites of the Catholic Church*, pp. 301-302.

⁴⁰ *Compendium*, p. 60. Cf. SACRED CONGREGATION FOR THE CLERGY AND SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Declaration, May 24, 1973, *Sanctus pontifex*, in *A.A.S.*, 65 (1973), p. 410; English translation in FLANNERY I, p. 241. After infant baptism, the dioceses in Malawi follow the traditional practice of celebrating the sacrament of penance prior to (immediately before) First Communion (at about age seven) which is followed by the sacrament of confirmation around age ten. Whether a child is obliged to celebrate the sacrament of penance prior to First Communion is merely an academic question and not a pastoral issue in Malawi. However, after receiving proper instructions, even children are to be free of coercion in approaching the sacraments. Cf. *Roman Replies and CLSA Advisory Opinions*, (1984), pp. 47-49; (1987), pp. 12-20.

sacrament of reconciliation but that false teachings which deny the necessity of sacramental confession be corrected. They reiterated that individual, integral confession and absolution remain the only ordinary way for the faithful to reconcile themselves with God and the Church, unless physical or moral impossibility excuses them from this kind of confession.

Furthermore, regarding absolution imparted in a general manner the bishops have decided that:

Apart from cases involving danger of death and where the ordinary has given explicit permission, the E.C.M. for the time being does not allow giving general absolution.⁴¹

5. *The sacrament of marriage*

a) *Pre-marriage catechesis*

The Catholic bishops of Malawi have strongly recommended pre-marriage catechesis,⁴² however, because of the diversity of marriage customs in the country they declined from making a national policy on engagement. They stated that "it is difficult to give a general policy on *chitomero* (first engagement) but a minimum of six months is required."⁴³ They have determined this period so as to ensure the likelihood that the couple get to know each other.

⁴¹ *Compendium*, p. 60. Cf. SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Pastoral norms, June 16, 1972, *Sacramentum poenitentiae*, in *A.A.S.*, 64 (1972), pp. 510-514; SACRED CONGREGATION FOR DIVINE WORSHIP, February 7, 1974, "Misericordiam suam," 31-35, in *Notitiae*, 10 (1974), pp. 44-62, English translation in *FLANNERY II*, pp. 35-50.

⁴² See J. CHIONA, archbishop of Blantyre on behalf of the Episcopal Conference of Malawi, "African Intervention at the 1980 Synod of Bishops," in *AFER* 23 (1981), pp. 48-51.

⁴³ *Compendium*, p. 61.

b) *Invalid marriages*

In dealing with invalid marriages the Conference of bishops has directed that there should be no immediate validation or any form of legalization prior to the fulfilment of the following conditions:

1) separation for a certain period, 2) specially organized instructions, 3) solving of all irregularities according to local customs to avoid that a marriage recognized by the Church is not accepted by the community. The only exception to the rule is the case of people who have given proof of understanding their obligation, by having regularly attended to their Sunday obligation and by having their children educated in a Catholic way. The Conference resolves that such older people are not obliged to undergo a period of separation.⁴¹

It would seem that the conclusion of *separation of the spouses for a certain period* may be wished ideally, but in the practical situations it is very unrealistic, especially if the couple has been together for some length of time and they have been living an active life of faith. Moreover, what is said of older couples could very well be true of younger couples too.

c) *Marriage dispensations*

Concerning marriage dispensations, the Conference has enjoined that:

The canonical form of mixed marriages [...] should not be dispensed from, except in very special circumstances of unsurmountable difficulties raised by the non-Catholic party. In these extraordinary circumstances it is accepted that a marriage be validly performed in a non-Catholic Church, in the presence, however, of a Catholic priest officiating. Practically many (?) are allowed, but problems arise afterwards, and sometimes marriages dissolved [broke down]. The Conference wishes to advise parish priests to be very strict and not to give in easily.⁴⁵

⁴¹ Ibid., p. 62.

⁴⁵ Ibid., pp. 62-63. See PAUL VI, Apostolic letter, January 7, 1970, "Matrimonia mixta," 9, in *A.A.S.*, 62 (1970), pp. 257-263; English translation in FLANNERY I, pp. 512-513.

The Catholic party in a mixed marriage, as far as possible, is expected to persuade the other party that the marriage be celebrated in the Catholic Church. However, the Church wishes to show sensitivity to the non-Catholic party who for good reasons may strongly want to celebrate the marriage in another church or elsewhere. The bishops have rightly counselled parish priests not to give in easily to requests for dispensation from the canonical form.

However, according to canon 1127 §§2-3, once the canonical form is dispensed from then, there is no requirement for the official presence of the Catholic minister, as the directive seems to suggest. In fact, he or she should not officiate, since it is exactly this, his or her intervention, that is being dispensed from. Nevertheless, there is supposed to be, for validity, some form of public celebration of the marriage.⁴⁶ Furthermore, the law requires that the dispensation from canonical form be recorded in the parish books according to the prescriptions of the Conference.

In order to avoid scandal and confusion, the Malawian bishops have decided not to allow non-Catholics to receive Holy Communion during the nuptial mass. The bishops have said that this does not apply to the "Orthodox Church."⁴⁷ Finally, the Conference ruled that the rite of marriage to be used is the one which is outlined in the Roman ritual.

⁴⁶ See PAUL VI, "Matrimonia mixta," 9, in FLANNERY I, p. 512; cf. canon 1127 §2.

⁴⁷ See VATICAN COUNCIL II, Decree, November 21, 1964, *Orientalium Ecclesiarum*, 27, 29, in A.A.S., 57 (1965), pp. 76-89; English translation in FLANNERY I, pp. 441-451. Cf. canon 844.

Conclusion

The Conference of Bishops in Malawi has issued the above pastoral directives, covering areas of immediate concern, in order to guide the pastoral endeavour of the particular churches in Malawi. The guidelines are not always in harmony with the new legislation, in part, because they were formulated before the promulgation of the 1983 Code. It is noted that these guidelines at times limit the diocesan bishops in instances where the universal law has given the diocesan bishops power to decide. However, it may be said that the bishops themselves have consented to restrict the exercise of their power in the particular areas for the sake of the common good of the Church in Malawi.

These directives are not issued as decrees in the sense of canon 455. They are pastoral decisions, directives or guidelines, and not laws in the strict sense; they have not received a *recognitio* of the Holy See, nor has the Conference promulgated them. Even if these decisions were laws with binding power on the bishops, canon 88⁴⁸ could be invoked by diocesan bishops in individual instances if the situation warranted a dispensation. All in all, the pastoral decisions of the bishops of Malawi gathered in the *Compendium* provide a convenient point of reference for pastoral workers in Malawi. It is, thus, easier to know the mind of the Catholic Church in Malawi on particular issues. The following section is going to view the implementation of the revised *Code of Canon Law* in Malawi.

⁴⁸ Canon 88 states: "The local ordinary can dispense from diocesan laws and, as often as he judges that a dispensation will contribute to the good of the faithful, from laws passed by a plenary or provincial council or by the conference of bishops."

B. Implementation of the 1983 Code

Introduction

When the 1983 *Code of Canon Law* was promulgated, the Episcopal Conference of Malawi decided to form a committee to study the Code and to make recommendations for its implementation.⁴⁹ The task of the committee included finding ways of adapting the new legislation to the apostolate of the Church in Malawi. The committee held its first meeting on November 11, 1983, and on September 12 and 13, 1984 the bishops studied the recommendations of the committee and drew up norms and directives pertaining to the studied canons. The committee met again on March 1 and 2, 1985 to clarify the meaning of certain canons as well as to elucidate the wording of some directives of the bishops. However, these directives have not yet been promulgated as decrees.

Although the committee divided the canons into three categories: 1) canons of more immediate concern, 2) canons of general pastoral care, and 3) canons on the sacraments, in this paper the canons will be regrouped as follows: laity, clergy, sacraments and other miscellaneous topics.

1. *The laity*

a) *Lectors and acolytes*

The *Code of Canon Law* in canon 230 §1 stipulates that:

Lay men who possess the age and qualifications determined by decree of conference of bishops can be installed on a stable basis in the ministries of

⁴⁹ The bishops of Malawi made this decision at their extraordinary plenary meeting held on August 16 and 17, 1983 in Blantyre. The members nominated to the committee were: Bishop M. Chimole, Fr. F.W. Scragg, S.M.M., Fr. H. van Breugal, W.F., Fr. R. Roy, W.F., Fr. T. Kahango, Fr. D. Magombo and Fr. L. M. Aspiroz, O.C.D.

lector and acolyte in accord with the prescribed liturgical rite; the conferral of these ministries, does not confer on these lay men a right to obtain support or remuneration from the Church.

Regarding this prescription, the committee recommended that there was no need to legislate on the requirements for the stable ministries of lector and acolyte since these were not locally applicable. The prevailing practice of selecting people from the Christian community to read at liturgical services and of having altar boys serve at the Eucharist is found to be sufficiently adequate. However, the bishops have given the following guidelines for those who act as lectors and acolytes:

They should be trained to read slowly, distinctively and clearly in public; they should have the quality and ability to convey the message clearly; they should have a moral good standing; and they should be properly dressed and should read from a presentable book (bible, *chitsime*). With regard to the acolytes, although we have the altar boys, the moral standard of the boys should be taken into account. One member in the parish team should be responsible for the training of altar boys (acolytes) and readers (lectors) in order to hold decent and orderly liturgical services.⁵⁰

The bishops require qualities of good public reading, personal presentability and good moral conduct.

The concern of canon 230 §1 is the stable ministry of lector and acolyte for lay men. In Malawi, apart from those who are accepted to these ministries as a step towards priesthood, no lector or acolyte has been installed. As this law stands it is only men who may

⁵⁰ EPISCOPAL CONFERENCE OF MALAWI, "Minutes of the Episcopal Conference of Malawi Meeting on Canon Law," September 12-13, 1984, p. 3. Hereinafter, E.C.M., "Minutes," 9/84.

be installed; lay persons, men or women, may fulfil the function of lector by temporary deputation, without installation (c. 230 §2).⁵¹

b) Lay preaching

On lay preaching the Code has regulated in canon 766 that:

Lay persons can be admitted to preach in a church or oratory if it is necessary in certain circumstances or if it is useful in particular cases according to the prescriptions of the conference of bishops and with due regard to can. 767 §1.⁵²

This canon gives room to lay people to preach the Word of God during liturgical services. The Episcopal Conference of Malawi confirmed that:

The normal preacher of the Word of God during any liturgical service is the ordained deacon or priest. In the absence of these ministers, preaching by lay persons should be under the control of parish priests who themselves give permission. In doing so, parish priests should be assured that lay persons are able to give the right doctrine.⁵³

In many cases lay people do preach; as a matter of fact, catechetical training centres in Malawi prepare lay people to preach the Word of God at funerals and at Sunday services, but normally, not at a Eucharistic celebration. Since there are numerous Christian

⁵¹ In Malawi the question of female altar servers has not arisen. Generally, boys serve at Mass, except at some big festivals when the Mass offerings and gifts are brought by men and women in procession to the altar, and some of those in procession act as altar servers at the offertory. Certainly, the question will gain more significance as the society grows in awareness of today's concerns of women.

⁵² Canon 767 §1 states: "Among the forms of preaching the homily is preeminent; it is a part of the liturgy itself and is reserved to a priest or to a deacon; in the homily the mysteries of faith and the norms of Christian living are to be expounded from the sacred text throughout the course of the liturgical year."

⁵³ E.C.M., "Minutes," 9/84, p. 21.

communities which cannot always be reached and served by priests, parish priests are to ensure that lay people are well prepared for the ministry of preaching.⁵⁴

c) *Appointment of lay judges*

For the appointment of lay judges in ecclesiastical tribunals canon 1421 §2 provides:

The conference of bishops can permit lay persons to be appointed judges; when it is necessary, one of them can be employed to form a collegiate tribunal.

The response of the Conference to this canon has been that it is not applicable to the situation of Churches in Malawi. It stated that:

The Conference justly remarked that no lay person has yet fulfilled the necessary conditions.⁵⁵

Even though it is true that tribunals in Malawi lack qualified personnel,⁵⁶ it is felt that there is no urgency to train persons in this line probably because of other pastoral

⁵⁴ See P.F. NORRIS, "Lay Preaching and Canon Law: Who May Give a Homily," in *Studia canonica*, 24 (1990), pp. 443-454. Canon 767 describes a homily as a preeminent form of preaching which is part of the liturgy itself and is reserved to a priest or a deacon. Normally lay persons are able to preach (but not a homily) or give a sermon during liturgical celebrations, and it would seem that on certain occasions they could be granted permission to preach during Mass. The Pontifical Commission for the Authentic Interpretation of Legal Texts of the *Code of Canon Law* responded in the negative to the question: whether the diocesan bishop is able to dispense from the prescription of canon 767 §1 by which the homily is reserved to priests and deacons see *A.A.S.*, 79 (1987), p. 1249, cf. *Roman Replies and CLSA Advisory Opinions 1990*, p. 114; J. FOX, "The Homily and the Authentic Interpretation of Canon 767§1," in *Apollinaris*, 62 (1989), pp. 123-169.

⁵⁵ E.C.M., "Minutes," 9/84, p. 25.

⁵⁶ There are four functioning tribunals in Malawi: Blantyre Archdiocese Metropolitan Tribunal with Fr. A. Nsope as judicial vicar (this tribunal also serves as an appeal tribunal for the suffragan dioceses), Lilongwe Diocese Tribunal with Fr. T. Banda as judicial vicar (Fr. H. van Breugal, W.F., is another qualified member of the tribunal; this tribunal is a second instance court for the tribunal of the archdiocese), Mzuzu Diocese Tribunal with Fr. R. Roy, W.F. as judicial vicar and finally the Zomba Diocese Tribunal with Fr. F.W. Scragg, S.M.M., as judicial vicar who, however, has been absent from the diocese for the last five years or so. Dedza Diocese should be soon setting up a tribunal as Fr. A. Timpunza is finishing his canon law studies in Rome.

necessities and often tribunal work is not considered a pastoral priority and so it is viewed as a waste of personnel in a diocese.

2. *The Clergy*

a) *Permanent deacons*

Universal law grants the conference of bishops the power to issue norms and a programme for the formation and training of permanent deacons in its territory. Canon 236 states:

According to the prescriptions of the conference of bishops, aspirants to the permanent diaconate are to be formed to nourish a spiritual life and instructed in the correct fulfillment of the duties proper to this order in this manner:

1° young men are to live for at least three years in some special house unless the diocesan bishop decides otherwise for serious reasons;

2° men of a more mature age, whether celibate or married, are to spend three years in a program determined by the conference of bishops.

The bishops of Malawi decided not to establish the permanent diaconate, because the ministry of catechists satisfactorily cares for the pastoral needs. They wrote:

For the time being, the Episcopal Conference of Malawi finds this canon irrelevant because throughout the country we have the married catechists doing the same thing. Each diocese in Malawi has established either a catechetical training centre or a pastoral centre whereby the catechists/Church elders, women instructors and other Church lay leaders are trained and follow specified programmes answering the needs of local Church.⁵⁷

⁵⁷ E.C.M., "Minutes," 9/84, p. 3.

The Catholic Bishops' Conference of Nigeria, in response to canon 236, has given norms for the formation of permanent deacons. However, the bishops have observed: "Most Bishops and even some lay people would want the Church in Nigeria to be cautious in introducing Married Deacons to Nigeria. They are of the opinion that it will kill vocations to the Ministerial celibate Priesthood. They say that serious thought should be given to nationwide *even* distribution of the Priests being ordained, hence, the National Missionary Seminary, situated at Iperu in Ijebu-Ode diocese and at Gwagwalade in the apostolic jurisdiction of Abuja, should be massively encouraged, and that this was bound to be a very effective solution to the scarcity of Priests in most parts of Nigeria. It is argued also that the financial burden of married ministers should be enormous" (J.T.M. DE AGAR, *Legislazione delle*

The decision to initiate the ministry of permanent diaconate in a diocese rests upon the diocesan bishop, even though a group of bishops can agree on a common policy, which however, would not have binding force on individual dioceses. The role of the conference according to canon 236 is to issue norms and to design a programme for the permanent diaconate.

b) *The programme of priestly formation*

The Code requires that each nation should prepare a charter of priestly formation.

In canon 242 §1, it thus declares that:

Each nation should have a program for priestly formation which is to be determined by the conference of bishops in light of the norms issued by the supreme authority of the Church and which is also to be approved by the Holy See; when new circumstances require it the program is to be updated with the similar approval of the Holy See; this program is to define the main principles for imparting formation in the seminary as well as general norms which have to be adapted to the pastoral needs of each region or province.

Conferenze Episcopali Complementare al C.I.C., Milano, Dott. A. Giuffrè Editore, 1990, p. 480). On permanent diaconate the Episcopal Conference of Rwanda has decided "l'institution du diaconat permanent n'est pas mûre en notre pays, pour le moment sa création ne semble pas opportune" (ibid., p. 749). The Ghana Bishops' Conference, even though they have not ruled on permanent diaconate (c. 236), agreed to bind permanent deacons to the Divine Office (ibid., p. 745). Although it is not clear whether in Bénin the ministry is established or not, the Conférence Episcopale du Bénin has issued guidelines for the permanent diaconate (ibid., pp. 733-734).

Two married men were ordained permanent deacons in the diocese of Pietersburg, South Africa on November 30, 1969 and on December 7, 1969 (see "News in Brief," in *AFER*, 11 (1970), p. 89). Cf. "The Second meeting of SECAM," in *AFER*, 12 [1970], p. 376.

In 1982 the situation of the ministry of permanent diaconate in Africa was thus: Algeria: 1, Central African Republic: 1, Chad: 1, Congo: 2, Egypt: 1, Djibouti: 1, Ivory Coast: 1, Kenya: 1, Liberia: 3, Mozambique: 1, Namibia: 14, Nigeria: 12, South Africa: 50, Sudan: 1, Tanzania: 1, Uganda: 1, Zaire: 2, and Zambia: 1; while in Canada: 250, and in the U.S.A.: 5,200 (see S. Brislin, *The Ministry of Deacons in an African Diocese*, Spearhead Series, vol. 76, Eldoret, Kenya, Amecca Gaba Publication, 1983, p. 56).

The bishops in Malawi have implemented this canon by adopting in 1987 a document on priestly formation, which is now awaiting approval from the Holy See. The programme considers the following: the usefulness of preparatory and minor seminaries, the requirements for entry into the major seminary; the training programme which includes pastoral experience; and an explanation of the role of the bishops and the staff.⁵⁸

c) *Appointments of parish priests*

The Code following the teaching of Vatican II re-emphasizes the importance of stability for the office of a parish priest.⁵⁹ On the question of whether a parish priest should be appointed *ad tempus* or for an indefinite period of time canon 522 prescribes that:

The pastor ought to possess stability in office and therefore he is to be named for an indefinite period of time; the diocesan bishop can name him for a specific period of time only if a decree of the conference of bishops has permitted this.

In reference to this matter, the Conference decided that:

For practical reasons [...] the individual bishop is entitled or has the power to change the parish priest at any time when it becomes necessary to do so. It is therefore the wish of the bishops in Malawi that parish priests are movable. The bishops hereby request the canonist to formulate this regulation clearly.⁶⁰

⁵⁸ The bishops' document on priestly formation is largely based on *Optatum totius*. See VATICAN COUNCIL II, Decree, October 25, 1965, *Optatum totius*, 4-21, in FLANNERY I, pp. 710-723.

⁵⁹ The Second Vatican Council enjoined the revision of the benefice system and abolished the distinction between removable and irremovable parish priests (see VATICAN COUNCIL II, Decrees, *Christus Dominus*, 31, and *Presbyterorum ordinis*, 20, in FLANNERY I, pp. 582-583, and pp. 898-899 respectively).

⁶⁰ E.C.M., "Minutes," 9/84, p. 17. However, the distinction which the 1917 Code made between removable and irremovable parish priests has been abolished by Vatican Council II (*Ecclesiae Sanctae* I, 20, in FLANNERY I, p. 603).

The Canon Law Committee in its meeting held on March 1-2, 1985, reformulated the directive to read:

The E.C.M. decides not to appoint a parish priest for a specific time but to follow the procedures of the Code (canons 1748-1752) in the matter of transfers.⁶¹

The Code intends to safeguard the stability of the parish priest and to check against possible arbitrary episcopal discretion; hence it prescribes detailed procedures for administrative recourse and for removal and transfer of parish priests (cc. 1732-1752). Stability in office does not rule out transfer or removal, only that these decisions should be made in fairness to the persons involved as well as for the good of the pastoral ministry and in accordance with the law. The Code also permits the bishop to limit the term of office of a parish priest by appointing him for a definite period of time, however, the diocesan bishop cannot do this unless the conference has, through a decree, permitted it after its ratification by the Holy See. Since the bishops of Malawi have decided not to legislate on this, it means that no parish priest can be appointed for a definite period of time in Malawi.

d) Determination of the ecclesiastical dress

On determining the ecclesiastical dress for clerics canon 284 directs that:

Clerics are to wear suitable ecclesiastical garb in accord with the norms issued by the conference of bishops and in accord with legitimate local custom.

In implementing this law the bishops gave the following guidelines:

⁶¹ CANON LAW COMMITTEE, "Minutes," 3/85, p. 2.

Regarding the clerical dress for the male religious, over and above what is given in the *Compendium*, it is ruled that: a) a priest working in an office should dress up decently; b) a priest or religious should always be presentable and wear a distinct sign at all official functions; c) the religious clergy, including major seminarians should dress presentably and use proper vestments at all liturgical celebrations and official functions; d) the clergy and the religious refrain from using all fashionable dress, e.g. *chitenje*, blue jeans, etc. It was decided that a letter be written to the clergy and religious on matters related to clerical and religious dress. It was also suggested that the matter be brought to, and pursued by, the regional and provincial superiors of the religious bodies.⁶²

Canon 284 legislates on ecclesiastical dress for clerics and not for all male religious or major seminarians. The law requires the religious to wear the habit determined by the proper law of their institute, while clerical religious whose institutes do not have norms with regard to a distinct habit are to wear the clerical garb prescribed by the conference of bishops for the region (c. 669). From their directive which makes reference to the ruling in the *Compendium*, it is obvious that the bishops have defined the clerical dress as "a decent black or dark suit with either roman collar or with tie and a cross; and a cassock at liturgical functions."⁶³

⁶² E.C.M., "Minutes," 9/84, pp. 5-6. The directive which the bishops gave in the *Compendium* stated: "With regard to clerical dress for priests, whether religious or secular, the conference lays down the following rules: they shall wear the *clergyman* (decent black or dark suit with either roman collar or with tie and a cross) as a normal distinctive dress. They shall wear the cassock at all liturgical functions, celebrations of sacraments and at public occasions and events when formal dress is prescribed for the invited guests. They shall use the clergyman at public functions of lesser importance and formality. The ordinaries forbid wearing short trousers (except for sports) or passing fashions." (See *Compendium*, pp. 40 and 66).

⁶³ The Canon Law Committee in its meeting held on March 1-2, 1985, suggested the following wording for the ruling of bishops on canon 284: "a) A cleric working in an office should dress decently. b) A cleric should always be presentable and should wear a distinct sign at all official functions. c) The clergy should dress presentably when acting in their capacity, and wear proper vestments at all liturgical functions. d) The E.C.M. directs the clergy to refrain from using extremes of fashionable dress." The reaction of the bishops to this suggestion, if it exists, is not available to the author.

c) *Norms for the statutes of the presbyteral council*

To assist the orderly functioning of the council of priests in its ministry of aiding the diocesan bishop in the governance of the diocese, canon 496 stipulates that:

The presbyteral council is to have its own statutes approved by the diocesan bishop, in light of the norms issued by the conference of bishops.

The bishops resolved to formulate norms for making statutes of the presbyteral councils in Malawi. They noted that:

[...] some dioceses already have proposed/prepared statutes for the diocesan council of priests. It was felt necessary to collect these prepared statutes in view of coordinating these constitutions on the diocesan level and later on the conference level. It was noted that the N.C.O.P. has its own approved statutes. The bishops asked the pastoral animator to collect all the statutes for the diocesan council of priests from the seven dioceses.⁶¹

For example, the diocese of Mzuzu has established statutes for the council of priests.⁶² Incidentally, the statutes consider the diocesan bishop as a member of the council, however, since the council of priests is a consultative body to the diocesan bishop, he cannot strictly be considered a member.

d) *Norms for the maintenance of retired parish priests*

The universal law requires that the diocesan bishop should ensure that a parish priest who has resigned has suitable provision for his livelihood in accord with the norms of the conference of bishops. Canon 538 §3 directs:

⁶¹ E.C.M., "Minutes," 9/84, p. 5. The National Council Of Priests (N.C.O.P.) is a group or a senate of priests who officially represent the body of priests in Malawi, and by their counsel and pastoral action, effectively assist the ordinaries and priests in guiding the Church in Malawi. Its purpose is to foster unity of mind and action between ordinaries and priests, and since it is an advisory body to the conference, it is not a decision making body (see *Compendium*, pp. 17-20).

⁶² See Appendix 15.

When a pastor has completed his seventy-fifth year of age he is asked to submit his resignation from office to the diocesan bishop, who, after considering all the circumstances of person and place, is to decide whether to accept or defer the resignation; the diocesan bishop taking into account the norms determined by the conference of the bishops, is to provide for the suitable support and housing of the resigned pastor.⁶⁶

At present, in Malawi every priest whether retired or active, gets his sustenance from the diocese to which he is incardinated. The upkeep of the clergy who work in the national institutions, like the major seminaries, is provided for by all the dioceses according to the ruling of the Conference. Members of religious institutes or societies of apostolic life, in some cases are fully provided for by their respective institutes or societies, depending on the kind of agreement they have drawn up with a diocese.

The Church in Malawi is concerned about planning and devising means and ways of making the Church self-reliant. The dioceses are run from funds generated locally as well as from donations from abroad. Even though the Malawian Church is not self-reliant enough to support its clergy entirely from its own resources, the bishops are determined to provide for them. They have stated that:

a) Every Malawian diocesan priest is ordained "ad titulum missionis" in which case the question of gratuity or pension falls out; b) the Malawian local priests are now provided with "Security Fund Scheme" "Opus Securitatis" to which each diocesan priest has to contribute by saying (celebrating) twenty-four masses every year. Moreover, when they reach the age of sixty-five years, a provision of local pension is made, to offer them a meagre nominal pension gift every year, towards which every diocese annually contributes some few kwachas; c) the sustenance of the retired priest/parish priest, and active priests comes from the diocese, and the dioceses support all priests for their medical services.⁶⁷

⁶⁶ See VATICAN COUNCIL II, Decree, *Presbyterorum ordinis*, 21, in FLANNERY I, p. 900.

⁶⁷ E.C.M., "Minutes," 9/84, p. 6.

At ordination the diocesan bishop or the competent religious superior is to judge whether the candidate is beneficial to the ministry of the Church (c. 1025 §2). In accepting a person to orders the diocesan bishop or the competent religious superior, in the name of the diocese or religious institute or society, accepts the responsibility of ensuring that the cleric's basic needs are met (c. 281), not only while fulfilling a ministry but also when he retires. This is why the Code requires that provision be made for the support and housing of retired parish priests (c. 538 §3) and all clerics (c. 291 §2).

The Conference had also decided that each bishop will act according to canon 1746 which states that:

When the pastor has been removed, the bishop is to provide for him through an assignment to another office, if he is suitable for this, or through a pension, as the case requires and circumstances permit.

Quoting this canon here may appear not quite appropriate since it deals with assignment or sustenance by way of pension for a parish priest who has been removed. Removal is different from resignation of a parish priest who has completed the seventy-fifth year of age (c. 538 §3). Canon 1746 and canon 538 §3 are similar, however, in so far as they both address the need to provide for the sustenance of a parish priest who is not in active ministry including clerics under certain penalties (c. 1350).⁶⁸

⁶⁸ The Canon Law Committee rephrased the bishops' directive thus: "On canon 538 §3, there is no need to legislate as the present practice is that a priest (cleric) must be sustained by the diocese into which he is incardinated. Further, the E.C.M. prescribed that all diocesan (Malawian) priests must subscribe to the 'Security Fund Scheme' *Opus securitatis* by celebrating twenty four Masses every year till the age of sixty-five. Lastly, the question of providing residence to retired clergy is being actively considered by E.C.M." CANON LAW COMMITTEE, "Minutes," 3/85, p. 2.

3. *Sacraments*

a) *Baptism*

(i) *The catechumenate*

Since Christian initiation requires an on-going preparation, canon 851, 1° enjoins that:

It is necessary that the celebration of baptism be properly prepared.

Thus:

1° an adult who intends to receive baptism is to be admitted to the catechumenate and, to the extent possible, be led through the several stages to sacramental initiation, in accord with the order of initiation adapted by the conference of bishops and the special norms published by it.

The Episcopal Conference of Malawi has prepared a ritual for adult baptism⁶⁹ with the steps of initiation as prescribed by the Roman ritual. It emphasizes the importance of conversion in administering the sacraments and in leading the catechumens towards baptism through the process and according to the new spirit of baptism (c. 788).⁷⁰

The bishops further observed that more and deeper instructions for children and youth in schools as well as school leavers or dropouts were needed. The ecumenical religious syllabus in the schools is a good introduction to religious education, however, it should not be taken to replace the catechumenate or Catholic education for the youth.⁷¹ The bishops gave the following directives regarding the catechumenate:

⁶⁹ *Mwambo wa Ubatizo wa Akulu* according to the requirements of canons 851, 1°, 788.

⁷⁰ See *Compendium*, pp. 51-52.

⁷¹ The Ministry of Education in Malawi has on the curriculum for Primary and Secondary Schools three periods of Religious Education each week. An ecumenical religious programme is drawn up to meet the general satisfaction of all Christian Churches. Since the programme is not intended for any one Church, each Church has to instruct their members outside school time. A course in Bible knowledge is given in Secondary Schools. Cf. VATICAN COUNCIL II, Declaration, October 28, 1965, *Gravissimum educationis*, 6-8, in FLANNERY I, pp. 731-733.

- a) The ECM endorses this canon (c. 788) and affirms that every effort should be made by all groups of pastoral workers to prepare the catechumens towards conversion of heart rather than knowledge of the doctrine.
- b) It is felt equally necessary that teachers (catechists, church leaders, *alangizi*, chairmen of basic christian communities) of catechism be trained for the teaching of Catholic faith to the catechumens and that the Christian communities should be involved in this preparatory work of catechumens. In other words, the teachers, lay people, pastoral workers if working in a team should feel responsible and devise ways and means of preparing these catechumens.
- c) It is commendable to have the pre-catechumenate period (six months).
- d) The bishops rule that before accepting a catechumen for inscription, the matter should be referred back to his/her home parish to get all the particulars required.
- e) All those catechumens, selected for baptism, should be examined to test their knowledge of Catholic faith.
- f) Members of the ECM have determined that only the following text books could be used in the catechesis course for catechumens: i) *Kasupe wa Moyo*, ii) *Katekismu wa a Katolika* iii) *Ulendo Wathu*.
- g) In case of catechumens being present in schools and the common religious syllabus is followed, the bishops commended that one class period out of the three on the timetable should be used for denominational teaching.
- h) It is reaffirmed that every catechumen enjoys the following prerogatives:
 - i) He/she has a right to have a Christian burial ii) He/she has a right to receive the ecclesiastical blessings.
 - i) The bishops agreed that teachers, church elders, catechists, chairmen or leaders of the basic christian communities, *alangizi* (women instructors) should be encouraged and called upon to follow specific courses at the catechetical/pastoral training centre.⁷²

Members of the Conference recommended to exchange amongst themselves the diocesan catechumenate programmes so that each diocese is aware of what is being done in other parts of the country.

Catechumens are not fully members of the Christian faithful since one becomes incorporated into the Church through baptism (cc. 96, 204 §1). Nevertheless, they are in

⁷² E.C.M., "Minutes," 9/84, pp. 8-9.

union with the Church in a special manner, and the Church grants them various prerogatives which are proper to Christians (c. 206). Thus, canon 788 §3 states:

It is the responsibility of the conference of bishops to issue statutes by which the catechumenate is regulated; these statutes are to determine what things are to be expected of catechumens and define what prerogatives are recognized as theirs.

Accordingly, the bishops have mentioned some of the rights which catechumens enjoy within the Christian community:

- (i) He/she has a right to Christian burial.
- (ii) He/she has a right to receive the ecclesiastical blessings.⁷³

The recognition of these and other privileges which may be delineated in future need to be translated into the reality of the everyday pastoral practice.

(ii) *Conferral of baptism*

In canon 854, the Code stipulates that:

Baptism is to be conferred either by immersion or by pouring, the prescriptions of the conference of bishops being observed.

It is left to the conference of bishops to make further determination; thus the bishops of Malawi have opted for baptism by pouring water on the forehead. They direct that:

The Episcopal Conference of Malawi wishes to keep the traditional way of conferring baptism which is by pouring water on the forehead, to be observed by all those who confer the sacrament of baptism.⁷⁴

⁷³ Ibid., p. 9. Cf. canons 1183 §1, 1170.

⁷⁴ E.C.M., "Minutes," 9/84, p. 21.

(iii) *Registering conferred baptism*

The ECM has endorsed the directives given in the *Compendium*,⁷⁵ concerning the duty of parish priests to ensure that baptisms are duly recorded in parish registers, however, the Code requires special care for children who are legally adopted. Canon 877 §3 states:

If it is a question of an adopted child, the names of the adopting parents are to be recorded, and also, at least if this is to be done in the civil records of the region, the names of the natural parents, in accord with §§1 and 2, with due regard for the prescription of the conference of bishops.

The bishops of Malawi have ruled that:

In case of proper adoption the names of the adopting parents could be registered in the parish books provided the local customs provided for adoption within the extended family are respected."⁷⁶

Legal adoption as such is rare among Malawians because the concept of family is much broader than the nuclear family, thus a child who has lost both parents will usually be taken care of by an uncle or an aunt or grandparents. Under normal circumstances, the child retains the name of his or her natural parents.

(iv) *Recognizing baptisms of other churches*

Another matter of concern with regard to baptism in Malawi is the criteria to be used in recognizing as valid baptisms of other Christian churches and communities. The universal

⁷⁵ "The Episcopal Conference of Malawi insists that names of newly baptized persons be entered by the ministers concerned in the register of baptism as soon as possible (*quam primum*). Baptism given in *articulo mortis* must be recorded in a special register.

⁷⁶ "The Conference requests all pastoral workers (parish priests and their assistants) to immediately respond with adequate attention to requests on retransmission of documentation on baptism, marriage, etc. from another parish or diocese. The Episcopal Conference of Malawi directs that in each parish there should be the following registers: baptism, confirmation, *defunctorum*, *status animarum* - marriage, and any other book system which would facilitate proper administration of the parish in a diocese" (*Compendium*, p. 52).

⁷⁶ E.C.M., "Minutes," 9/84, pp. 11-12.

legislator asserts that since sacraments are the same for the universal Church and they pertain to the divine deposit, it is for the supreme authority of the Church alone to approve or define those things which are required for their validity, as well as to determine what pertains to their lawful celebration, administration and reception (c. 841). Thus, in canon 849, it is prescribed that baptism is validly conferred only by washing with true water (either by immersion or pouring c. 854) together with the required form of words.⁷⁷ Although not mentioned in the Code, the Church admits that baptism by sprinkling can be valid.⁷⁸ Also required for valid baptism is the intention of the one to be baptized if it is an adult and that of the baptizing minister, as alluded to in canon 869.⁷⁹

The Code prescribes that ordinarily those baptized in a non-Catholic ecclesial community are to be received into the Catholic Church without having to be baptized conditionally. Conditional baptism is to be conferred upon them, only if there is a serious reason for doubting the validity of their baptism, either because of the matter and the form of words used, or the intention of an adult person being baptized or the intention of the minister of baptism (c. 869 §2).

⁷⁷ The prescribed words are: I baptize you in the name of the Father and of the Son and of the Holy Spirit, and in the Eastern Churches: the servant of God N. is baptized in the name of the Father and of the Son and of the Holy Spirit.

⁷⁸ "[...] concerning matter and form. Baptism by immersion, pouring or sprinkling, together with the trinitarian formula, is itself valid (cf. C.I.C. Canon 758)" (SECRETARIAT FOR THE PROMOTION OF THE UNITY OF CHRISTIANS, Directory, May 14, 1967, *Ad totam Ecclesiam*, in A.A.S., 59 [1967], p. 578, English translation in FLANNERY I, p. 488).

⁷⁹ Regarding the validity of baptism conferred by ministers of Churches and ecclesial communities separated from the Catholic Church, see *ibid.*, in FLANNERY I, pp. 487-490.

In its pastoral practice, the Catholic Church in Malawi recognizes only the baptisms of the mainstream non-Catholic Churches,⁸⁰ such as: the Church of Central African Presbyterians, the Dutch Reformed Church, the Anglicans, the Industrial Missions (the Baptists, Zambezi, Nyasa). Baptized members of the independent churches and other ecclesial communities which have broken away from the mainstream Protestant churches are usually either baptized conditionally or even (re)baptized. The validity of their baptisms is questioned and considered doubtful primarily because of the difficulties of verifying that a person was baptized. Most of these Churches do not always keep detailed and readily available Church records, consequently when proof of baptism is sought, in many cases Catholic ministers do not get certificates of baptism. However, what affects the validity of a baptism is a defect in the form and matter used or a defective intention on the part of the minister or the baptized adult.

While not denying the importance of ecclesiastical records and baptismal certificates, it may be said that probably a little too much is expected of these churches whose life styles and structures are very much adapted to the Malawian traditional life. Much of the traditional tribal groupings and institutions have functioned and still operate successfully with little or no written records at all. Actually, it is only since three decades that literacy and the keeping of written records has increased significantly. People trusted memory, the testimony of eyewitnesses as well as the varied modes of handing on tradition from one generation to the

⁸⁰ Documentation to this effect was not found, but it is a common pastoral approach to most Christian sects and independent churches in Malawi.

next, for establishing certitude or proofs of facts. Moreover, the law of the Church recognizes other ways of proving baptism besides written records.⁸¹

b) *Penance (reconciliation)*

(i) *The confessional*

Canon 964 §2 instructs the conference of bishops to issue norms regarding the confessional:

The conference of bishops is to issue norms concerning the confessional, seeing to it that confessionals with a fixed grille between penitent and confessor are always located in an open area so that the faithful who wish to make use of them may do so freely.

In their directive the bishops did not address the question of the confessional *per se*; they indicated that:

This canon deals with the availability of confessors and the proper place to hear sacramental confessions. This is taken care of by the Episcopal Conference as found in the *Compendium*, p. 61, no. 8.⁸²

In the *Compendium* the bishops do not treat of the confessional itself but they admonish priests to be readily available for the celebration of the sacrament of reconciliation. This perhaps indicates that the bishops did not feel it very necessary to give norms on the

⁸¹ Canon 876 states: "If it is not prejudicial to anyone, to prove the conferral of baptism, the declaration of a single witness who is above suspicion suffices or the oath of the baptized person, if the baptism was received at an adult age." In addition, in ecclesiastical trials, proofs by declarations (cc. 1530-1538) and by witnesses (cc. 1547-1548) are also accepted.

⁸² E.C.M., "Minutes," 9/84, p. 11.

confessional but they felt obliged to urge the priests to be available for the faithful who seek reconciliation.⁸¹

(ii) *Absolution imparted in a general manner*

On the role of a conference of bishops regarding absolution imparted in a general manner canon 961 §2 says:

It is for the diocesan bishop to judge whether the conditions required in §1, n. 2, are present; he can determine general cases of such necessity in the light of criteria agreed upon with other members of the conference of bishops.

The Canon Law Committee in their meeting held on November 11, 1983, recommended that the Conference should determine the criteria for its lawful administration which, in turn, can help the individual bishop to give the permission. The bishops have not given new directives on this, perhaps because they had already ruled on it in the *Compendium* where they had directed that:

⁸¹ Aware of the fact that canon 964 §2 deals with the confessional and not the availability of confessors, the Canon Law Committee suggested that the bishops' directive be expressed thus: "The E.C.M. adopts the wording of the Code which says: 'As far as the confessional is concerned norms are to be issued by the Episcopal Conference' with the proviso however that confessionals which the faithful who so wish may freely use, are located in an open place; and fitted with a fixed grille between the penitent and the confessor" (CANON LAW COMMITTEE, "Minutes," p. 2).

Four examples of rulings on this canon by African conferences of bishops: Episcopal Conference of Benin: "On veillera, dans l'aménagement du confessionnal, austère sacré et aux exigences du sacrement. Habituellement, on utilisera le confessionnal avec grille pour le sacrement de réconciliation (13)" (J.T.M. DE AGAR, *Legislazione delle conferenze episcopali complementare al C.I.C.*, p. 739-740.); Episcopal Conference of Rwanda, "1° Le lieu normal de la confession est l'église ou une chapelle publique. 2° Dans les églises et les chapelles publiques, il y aura un ou plusieurs confessionnaux avec grilles. 3° Dans le cas où il n'y a pas de confessionnaux, du moins en nombre suffisant, la confession se fera toujours en lieu visible. 4° Les confessions en chambre ne peuvent être qu'exceptionnelles" (Ibid., p. 752.); Ghana Bishops' Conference: "After discussing this paragraph, the bishops agreed that it does not apply in the Ghanaian situation" (ibid., p. 747.); Catholic Bishops' Conference of Nigeria: "1. Grates as of now are to be used and are to provide adequate privacy. 2. Other place may be used for a reasonable and just cause provided due precaution is taken. Causes are, for example, sickness, old age of the penitent" (ibid. p. 491).

Apart from cases involving danger of death and where the ordinary has given explicit permission, the ECM for the time being does not allow giving general absolution.⁸¹

The thinking of the bishops seems to have been made clear; they do not want absolution to be imparted in a general manner. However, they put forward two exceptions: in danger of death and where the ordinary (diocesan bishop) has given an explicit permission. The Code explicitly says that, "it is for the diocesan bishop to judge whether the conditions required in §1, no. 2 are present." The criteria agreed upon with other members of the Conference are to assist him in defining general cases of urgency.⁸⁵

Apart from cases of danger of death, the Conference's directive leaves the diocesan bishop with no criteria for deciding the feasibility of absolution conferred in a general manner. The bishops in Malawi seem to be disinclined to allow absolution imparted in a general manner most probably because it is thought that there is no serious necessity for it, since confessors are always periodically readily available to hear the confessions of the individuals in the parishes. Also, it may undoubtedly have the undesired effect of reducing the already declining individual confessions, since more and more, people's sense of sin and guilt is not as strong as it was in the past. Thus, it may be feared that absolution administered in a general fashion avails people of the occasion to avoid confronting their personal sins and guilt in front of a priest.

⁸¹ *Compendium*, p. 60.

⁸⁵ Cf. F.R. McMANUS, "The Sacrament of Penance [cc. 959-997]," in J.A. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL, eds., *American Commentary*, pp. 678-679.

c) *Marriage*(i) *Engagement*

The *Code of Canon Law* has determined that marriage engagement be regulated by particular law as established by the conference of bishops. Canon 1062 §1 says:

A promise to marry, be it unilateral or bilateral, called engagement, is regulated by particular law which has been established by the conference of bishops after it has taken into consideration any existing customs and civil laws.

The bishops have given directives on this matter in the *Compendium* as discussed above in section A of this chapter. Since customs concerning engagement vary from one ethnic group to another the bishops did not provide detailed regulations on marriage engagement; this could be best done at diocesan level. However, in view of engagement and the prenuptial investigations demanded by canon 1067, the bishops directed that there should be at least six months from engagement to the celebration of the marriage. They urged priests and pastoral workers involved with engaged couples to observe the following norms:

a) To give themselves enough time to investigate each marriage case thoroughly.

b) Time for *chitomero* (*ubwenzi*) should be given to both parties to study and know one another better i.e. if genuine love does exist.

c) The banns should be announced in church or in any other public place where the people know who the partners are. Fixing the announcement/notification on the notice board would be enough and guarantee the fulfilment of the law.

d) After the service the pastoral workers should see to it that the marriage is officially registered in the parish books and the government marriage register, *Mtchato*.⁸⁶

⁸⁶ E.C.M., "Minutes," 9/84, pp. 11-12.

The Canon Law Committee suggested the following wording for the bishops' ruling on canons 1062 §1, 1063 and 1067: "The E.C.M. directs that there should be a period of six months during which the boy and the girl come to know each other before the finalization of the marriage contract between the two parties. The E.C.M.

The bishops admonished pastoral workers to safeguard the traditional values of the marriage institution. They remarked that civilly registered and trial marriages are becoming more common today; very often these are *short circuited* marriages in which traditional customs are abandoned and usually girls are victimized and their womanhood is hardly given due respect. A merging of the traditional and the Christian values of marriage should ensure the dignity of persons entering into marriage as well as proper preparation for married life.

(ii) *Age for marriage*

In canon 1083 §1, the universal law defines the age for Catholics to celebrate marriage validly.

A man before he has completed his sixteenth year of age, and likewise a woman before she has completed her fourteenth year of age, cannot enter a valid marriage.

Conscious of the fact that psychological maturity is quite different from physical maturity, the Conference of bishops in Malawi has decided on a higher age for the lawful celebration of marriage:

- (a) A girl must have completed eighteen years.
- (b) A boy must have completed twenty years [...] in particular cases the authorization of the bishop would be required.⁸⁷

insists there must be a minimum period of about three months during which the boy and the girl get to know each other before the two families reach any further final agreement.

"The E.C.M. directs that the forms of prenuptial investigations must be used for every marriage. Further, banns of marriages are to be called in the parish Church and also in the place of residence of those who intend to marry if the latter is different. Hence, fixing the announcements on the notice board would not be enough" (CANON LAW COMMITTEE, "Minutes," 3/85, p. 2).

⁸⁷ E.C.M., "Minutes," 9/84, p. 22. While Malawian customary law does not determine a particular age for marriage but only places the condition of reaching puberty and maturity as judged by tribal and family group, in the *Marriage Act*, Malawi civil law prescribes: "That each of the parties to the intended marriage (not being a widower or widow) is twenty-one years or that if he or she is under that age the consent hereafter made requisite

In Malawi, the mean female age at first marriage is 17.7 years, according to a study done in 1977.⁸⁸

(iii) *Marriage ritual*

In 1984, the Conference decided eventually to draw up a ritual of marriage adapted to the Christianized local customs of Malawi. On this canon 1120 directs that:

The conference of bishops can draw up its own marriage ritual, to be reviewed by the Holy See: such a ritual, in harmony with the usages of the area and its people adapted to the Christian spirit, must provide that the person assisting at the marriage be present, ask for the contractants' consent and receive it.

One of the areas of the Church's sacramental life where inculturation and adaptation are openly encouraged is the marriage ritual.⁸⁹ The celebration of the marriage refers to the unfolding of the marriage ceremony itself into its various parts including the actual assisting

has been obtained in writing and is annexed to such affidavit [...]" (*Laws of Malawi*, Cap. 25:01, s. 11).

⁸⁸ See D.D. MOMBA (Mrs), *Fertility Levels in Malawi by Districts*, Zomba, University of Malawi, 1977, p. 23. She gives the mean age at first marriage of females in Malawi by districts. Districts of the northern region: Chitipa (18.5), Karonga (18.1), Nkhata Bay (18.1), Rumphu (19.4), Mzimba (18.2), the average age being 18.4; districts of the central region: Kasungu (17.6), Nkhosakota (17.6), Ntchisi (17.6), Dowa (17.9), Salima (17.9), Lilongwe (17.8), Mchinji (17.6), Dedza (17.7), Ntcheu (18.8), the average being 17.8; districts of the southern region: Mangochi (16.4), Machinga (16.5), Zomba (17.3), Chiradzulu (18.3), Blantyre (18.3), Mwanza (18.4), Thyolo (17.6), Mulanje (17.1), Chikwawa (17.1) Nsanje (17.3), the average age for these districts is 17.4.

In light of this, the age of eighteen for girls appears to be a little high if account is taken of many girls who enter marriage at an earlier age. As opportunities for secondary and university education increase, both girls and boys naturally tend to marry at a later age.

The Bishops' Conference of Nigeria has decreed that they accept "the ruling of canon 1083 §1 regarding the age for the validity of marriage but leave it to the judgement of each local ordinary to establish a higher age for the lawful celebration of marriage either in general or for individual cases within his jurisdiction" (J.T.M. DE AGAR, *Legislazione delle conferenze episcopali complementare al C.I.C.*, p. 494).

⁸⁹ The Second Vatican Council encouraged conferences of bishops to draw up their own rites for the celebration of marriage suited to their people and regions (see VATICAN COUNCIL II, Constitution, *Sacrosanctum Concilium*, 77, English translation in FLANNERY I, p. 23).

at the marriage by the officially recognized witness of the Church who in the name of the Church receives the consent of the parties.

Since the ritual has to be translated in order to be reviewed by the Holy See, and since persons who are responsible for approval are usually not quite acquainted with the local customs and language, it is very likely that the meaning of certain sections of the local ritual may be lost in the process. Nevertheless, with a local marriage ritual, the particular churches in Malawi have an occasion to include cultural elements into marriage celebrations. The bishops are aware that making a marriage ritual needs time and much study, with the invaluable resources of experts. The Canon Law Committee, in 1985, suggested the following as a ruling on canon 1120:

The E.C.M. directs that it be left to the diocesan bishop to formulate a local version of the marriage ceremony adapted to the culture of the people. Because of ethnic differences it is very difficult to work out a common marriage ceremony for the whole country.⁹⁰

If the bishops adopt this wording of the directive, then the national liturgical commission would be alleviated of the task of formulating a national marriage ritual which would incorporate the diverse marriage customs in the country. For a marriage ritual to be truly meaningful in Malawi, it must indeed be formed at diocesan level. However, an alternative, simplified national marriage ritual could still be drawn up to suit the general needs of Malawians. This ritual, which could be both in local languages and in the English language, would be used at the choice of the parties.

⁹⁰ CANON LAW COMMITTEE, "Minutes," 3/85, p. 5.

(iv) *Declaration and promises preceding the celebration of mixed marriages*

Canon 1126 prescribes certain preliminaries before officiating a mixed marriage:

The conference of bishops is to establish the way in which these declarations and promises, which are always required, are to be made, what proof of them there should be in the external forum and how they are to be brought to the attention of the non-Catholic party.

The bishops of Malawi have expressed the opinion that mixed marriages should be discouraged because a number of them result in unhappy situations.⁹¹ An uncompromising application of this directive, however, would be disastrous in a country that has a minority of Catholics.⁹² To regulate mixed marriages the bishops directed that:

- a) The promises made by the *two* [sic] partners should be done in writing.
- b) The non-Catholic partner should know/be instructed in advance concerning the obligations of his/her Catholic party.
- c) The non-Catholic party *has to acknowledge and accept* [sic] the conditions of the Catholic party regarding education of the offspring and freedom to practice her/his Catholic faith.
- d) *The Episcopal Conference of Malawi requests all parish priests to ask for a dispensation of mixed marriages* [sic] since the Catholic party has to give a *guarantee* [sic] of the future education of the children and his/her faith to be undisturbed.
- e) The printed common form of the questionnaire on marriage (*mafunsu a ukwati*) should be used in Malawi [...] the value of signature does not make the expected impact on our people.⁹³

According to the Code, the Catholic party is not required to *guarantee* the future education of the children as is stated in d); and in number a) it is only the Catholic party who

⁹¹ E.C.M., "Minutes," 9/84, p. 12.

⁹² According to figures reported by *Annuario pontificio*, 1987, there were 1,577,594 Catholics and 6,297,892 non-Catholics (i.e. 1 Catholic to 4 non-Catholics), the majority of whom are Christians of various sects and denominations.

⁹³ E.C.M., "Minutes," 9/84, p. 12. Emphasis added to indicate the part which needs correction.

has to make a promise. The directive demands more than what the general canon law stipulates in canon 1125, 1°:

the Catholic party declares that he or she is prepared to remove dangers of falling away from the faith and makes a sincere promise to do all in his or her power to have all the children baptized and educated in the Catholic Church.

What is demanded of the non-Catholic is to be aware of the obligation of the Catholic, but no formal acceptance is required (c. 1125 2°) as is stated by norm c) in the directive above; though in the same document the bishops accurately say that:

The non-Catholic party must be tactfully notified of the declaration and promise required from the Catholic party with its practical implications (*Matrimonia mixta*, no. 5). This should preferably be done at the time of the premarital instructions. No promise is to be demanded from the non-Catholic."

The declarations demanded by canon 1126 are applicable to two types of marriages: one between a Catholic and a baptized non-Catholic (c. 1125), and the other between a Catholic and a non-baptized person (c. 1086). While, the latter marriage situation involves the diriment impediment of disparity of cult which requires a dispensation for valid celebration, the former type of marriage does not need a dispensation, instead it requires only permission from the local ordinary (c. 1124). The two kinds of marriages cause confusion because they are both generally referred to as mixed marriages. Moreover, in the 1917 Code they both constituted an impediment, but under the revised Code it is only the marriage between a Catholic and a non-baptized person which requires a dispensation from the diriment impediment of disparity of cult.

⁹¹ Ibid., p. 13.

For mixed marriages the bishops have insisted that the parties be instructed, in particular on the sacred character of the marriage bond and its obligations of mutual, lifelong and exclusive fidelity of one husband and one wife. The parish priest of the place where the marriage is to be celebrated is to see that these instructions are given before the marriage celebration, even before the official prenuptial investigation.

(v) Dispensation from the canonical form

Universal law assigns the conference of bishops the task of issuing norms for granting dispensations from the canonical form in certain mixed marriages. In canon 1127 §2, the legislator states:

If serious difficulties pose an obstacle to the observance of the canonical form, the local ordinary of the Catholic party has the right to dispense from the form in individual cases, but after consulting the ordinary of the place where the marriage is to be celebrated and with due regard, for validity, for some public form of celebrations; the conference of bishops is to issue norms by which such a dispensation may be granted in an orderly manner.

For Catholics, the Church prescribes a canonical form for the valid celebration of marriage, that is, (1) the marriage is to be contracted in the presence of the local ordinary or the parish priest or another priest or deacon delegated by a competent authority, (2) that these ministers assist at the marriage by asking for and receiving in the name of the Church the contractants' manifested consent, and finally (3) that the ceremony takes place in the presence of two witnesses (c. 1108).

The legislator speaks of the possibility of dispensing from the canonical form in a marriage between a Catholic and a non-Catholic Christian, as well as between a Catholic and

a non-baptized person (c. 1129).⁹⁶ Consequently, the conference of bishops is invited to issue norms which should ascertain that these dispensations are granted in an orderly manner. Thus the bishops of Malawi directed the Canon Law Committee to formulate a norm taking into account what they had expressed in the *Compendium* in 1983. The Committee stated that:

The E.C.M. is of the opinion that these [mixed marriages between Catholics and non-Catholic Christians] should not be dispensed with, except in very special circumstances of unsurmountable difficulties raised by the non-Catholic party. It is left to the diocesan bishop to assess the reason. A Catholic priest should be present and register the marriage.⁹⁶

In individual cases the Church has the custom of relaxing certain merely ecclesiastical laws for the spiritual good of the Christian faithful (c. 85). Nevertheless, there must always be a just and reasonable cause for the application of a dispensation (c. 90 §1). In the case of a dispensation from canonical form the just cause comes about "if serious difficulties pose an obstacle to the observance of the canonical form" (c. 1127 §2).⁹⁷

⁹⁶ Dispensations from the canonical form are normally not given when the marriage is between two baptized Catholics. In some instances the Congregation for the Sacraments has granted this dispensation, for example, allowing two Catholics to marry in an Anglican Church before an Anglican minister. The reason for the dispensation was that the proper Catholic parish Church of the couple was too small and the next nearest Catholic Church was some miles away (see *CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND NEWSLETTER*, 78 [1989], pp. 2, 26-28; also 81 [1990], pp. 1-2).

⁹⁶ CANON LAW COMMITTEE, "Minutes," 3/85, p. 5.

⁹⁷ Some possible examples of just causes are: "When the non-Catholic party has a conscientious objection to a Catholic celebration; when there is a possibility of the non-Catholic party's estrangement from family or religious denomination; when the non-Catholic party requests that a parent or other close relative officiate at the ceremony; when the only church in the vicinity is a non-Catholic church; when a nominal Catholic marries a devout non-Catholic" (THE SOUTHERN AFRICA CATHOLIC BISHOPS' CONFERENCE [S.A.C.B.C.], "Mixed Marriages: Particular Norms for South Africa," in *Canon Law Digest*, VII, pp. 728-729). Cf. T.P. DOYLE, "Mixed Marriages [cc. 1124-1129]," J.A. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL, eds., in *American Commentary*, p. 805.

4) *Worship/liturgy and other disciplinary laws*

(a) *Altars*

The Code also requires the conference of bishops to determine certain matters affecting worship, liturgy and other general disciplinary laws. In this line, canon 1236 §1 invites conferences of bishops to specify the material that may be used for altars.

According to Church custom the table of a fixed altar is to be of stone, in fact of a single natural stone; nevertheless, even another material, worthy and solid, in the judgement of the conference of bishops also can be used. The supports or the foundation can be made of any material.

Hence, the bishops of Malawi have accordingly specified thus:

Members of the Episcopal Conference defined a fixed altar as being one built of cement blocks, hardened wood, bricks, steel or any solid material.⁹⁸

The Canon Law Committee has in its 1985 meeting suggested a simpler formula that reads: "the E.C.M. directs that any solid material can be used for a fixed altar."

(b) *Transfer of holy days of obligation*

Regarding abolishing or transferring certain holy days of obligations, canon 1246 §2 states that:

However, the conference of bishops can abolish certain holy days of obligation or transfer them to a Sunday with prior approval of the Apostolic Sec.

⁹⁸ E.C.M., "Minutes," 9/84, p. 23.

The bishops of Malawi agreed to endorse their 1983 decision which as recorded in the *Compendium* states that:

The Conference decides to suppress holy days of obligation except for Christmas in order not to burden Christians with obligations they can hardly follow, as the feasts of Ascension, Assumption and All Saints are usually full of meetings. The Conference rules that a repetition of the liturgical celebrations of these days be made on the Sunday following.⁹⁹

Two meanings could be read from this wording of the directive: first, that all holy days of obligation are suppressed except for Christmas, but that the liturgical celebrations of the mentioned feasts should be repeated on the following Sunday; second, that Christmas remains a holy day of obligation, and the other mentioned feast days (holy days of obligations) are transferred to the following Sunday. Probably it was because of this ambivalent meaning of the directive that the Canon Law Committee in its meeting of March 1-2, 1985, revised this tentative decree to read:

The E.C.M. rules that the obligation of the feasts of Ascension, Assumption, and All Saints be transferred to the following Sunday, and all other holy days of obligation are suppressed, with the exception of Christmas.¹⁰⁰

⁹⁹ *Compendium*, p. 71.

¹⁰⁰ CANON LAW COMMITTEE, "Minutes," 3/85, p. 5. For the sake of comparison, the decree of the Episcopal Conference of Nigeria is reported here: "In order to ensure greater participation in the celebrations, the National Episcopal Conference of Nigeria applied and obtained permission from the Holy See to transfer all these preceptive feasts, except Christmas, to the Sunday before or after the day when the feast actually falls (cf. Prot. N. 4512/83, Sacra Congregatio pro Gentium Evangelizatione seu Propaganda Fide, August 22, 1984). Later, however, on the receipt of a letter Prot. 1213/86 from the Congregation for the Evangelization of Peoples, dated 30th April, 1986, the CBCN reviewed this position and made another provision as follows.

"In accordance with the prescription of canon 1246 §2, the CBCN hereby provides as follows subject to the approval of the Apostolic See:

I. The following celebrations are to be retained as Holy days of obligation: the Nativity of Our Lord Jesus Christ, the Ascension of Our Lord Jesus Christ, the Assumption of Our Lady, and the feast of All Saints.

II. The following celebrations are transferred to a Sunday before or after the days on which they fall: the Epiphany and the feast of the Body and Blood of Our Lord.

III. The following celebrations are suppressed as Holy days of obligation and are to be celebrated as solemnities on the day on which they fall: the feast of Mary, the Mother of God, the feast of St. Joseph, the feast of the Apostles Peter and Paul and the feast of the Immaculate Conception."

This phrasing of the legislation to be is clearer than the former one.

(c) Fast and abstinence

The law on fast and abstinence is supposed to be determined further by the conference of bishops. Canon 1253 stipulates that:

It is for the conference of bishops to determine more precisely the observance of fast and abstinence and to substitute in whole or in part for fast and abstinence other forms of penance, especially works of charity and exercises of piety.¹⁰¹

The bishops of Malawi expressed the desire to restore the old rule of fast and abstinence in total or find something to substitute the law of penance. Before making any decision on this matter, members of the Conference thought it wise to seek for suggestions from the National Council of Priests (N.C.O.P.) and the Diocesan Councils of Priests (D.C.O.P.) in all the seven dioceses. The different groups of collaborators, like catechists, parish councils would be consulted and asked to suggest more particular ways of observing the law.¹⁰² The documents that were available to the author did not contain the bishops' final ruling on fast and abstinence.

Conclusion

In this chapter, two major phases in the development of the particular law of the Church in Malawi have been treated: decisions of the Episcopal Conference of Malawi made

¹⁰¹ "Abstinence from eating meat or another food according to the prescriptions of the conference of bishops is to be observed on Fridays throughout the year unless they are solemnities. Abstinence and fast are to be observed on Ash Wednesday and Friday of the Passion and Death of Our Lord Jesus Christ" (c. 1251).

¹⁰² E.C.M., "Minutes," 9/84, p. 24.

before 1983 and assembled in the *Compendium*, and the directives of the Conference on the revised *Code of Canon Law*. The *Compendium* gives several useful norms to guide pastoral workers, although the directives on infant baptism appear to apply very strict rules regarding the admittance of children to baptism. Concerning the priestly formation programme, very pragmatic decisions have been taken in retaining minor seminaries, in not requiring a too high standard for entry into the major seminary, in providing ample time and a variety of activities for pastoral experience. However, it would seem that the opportunities for inculturation allowed by canon 242 have not been fully utilized.

Even though the Conference has not issued any decrees as required by the Code, the provisional directives that have been used in this chapter do reveal the mind of the bishops on several issues. While the laity are very much involved in the life and ministries of the Church, the directives display a reluctance in accepting lay people into official ministries of the Church, such as: acolytes, lectors, extraordinary ministers of Holy Communion, lay judges, and lay persons assisting at marriages. There is preference shown for catechists over permanent deacons. In the celebration of the sacraments, beyond holding onto the valuable tradition of the Catholic Church as expressed in the directives, one would want to see a Malawian Church which is determined to use its rich culture to express the mysteries of faith, and even to be more practical in handling mixed marriages, through adaptation of Church law.

In its application of the law of the Church to the local situation, the Conference is perhaps influenced not only by the teachings of the missionaries handed on to them, but also by their own local traditional concepts and values. There appears to be a certain traditionalism in the Church in Malawi which most probably feeds on both the tendency of

the Catholic Church and that of traditional Malawi. In the fourth chapter we will evaluate the tentative legislation this chapter has elaborated, by focusing on: the recognition of the local customs and culture by the Church in the midst of social change, the role of particular law in promoting the growth and identity of a particular church within the universal Church, and finally on the possibilities and challenges facing the Church in Malawi.

CHAPTER IV

EVALUATION OF THE BISHOPS' DIRECTIVES

Introduction:

This chapter will evaluate the directives of the Episcopal Conference of Malawi as presented in the *Compendium* and in its minutes on the implementation of the revised Code, the material which chapter three presented. After discussing the state and nature of the assembled norms, we shall attempt to show: 1) how the bishops' guidelines express their recognition of Malawian cultures, and their partial unwillingness to adapt to the local cultures; 2) how a number of rules and regulations display rigid interpretation of universal laws; and 3) that, with the reality of cultural change, the development of particular laws of the Church in Malawi has to take into consideration not only the traditional culture and customs but also, and increasingly so, the new trends and values of the evolving modern Malawi.

A. The Status of the Directives

An overview of the development of the particular law of the Church in Malawi, raises a primary question concerning the nature and status of the assembled prescriptions. The directives which are contained in the *Compendium* clearly do not have the force of law as foreseen in canon 455 of the Code. Soon after the promulgation of the 1983 Code, the bishops of Malawi embarked on implementing it. They studied those things which the revised legislation invites and requires each conference of bishops to further determine for its region. This process of creating particular legislation, though well begun, is not completed. The Canon Law Committee, after reviewing the revised Code, made recommendations to the bishops who in turn formulated directives which were brought back to the Committee for clarifications¹ and precise wording of some would-be decrees. It is not clear whether or not

¹Two issues on which the Conference of Bishops required information were the meaning of *acts of extraordinary administration and alienation* (c. 1277) and *methods of avoiding judicial trials* (c. 1714). See Appendix 16.

the final copy of the decrees-to-be has been sent to the Apostolic See for review. The Programme of Priestly Formation was transmitted to the Holy See but it has not received the approval required by canon 242.²

What binding force do these directives have prior to the *recognitio* by the Holy See? Regarding directives which implement the 1983 *Code of Canon Law*, in line with the Code, as long as they are not promulgated as decrees subsequent to the Holy See's *recognitio* they have no legal force. They are merely directives or instructions to assist in the observance of the universal law. A conference of bishops cannot issue laws that bind the bishops and the people of their region without a prior review by the Apostolic See.

However, the status of the directives contained in the *Compendium* which were passed before the promulgation of the revised Code must be evaluated according to the power enjoyed by the conferences of bishops prior to the new Code: that is, according to the authorizations granted by the Second Vatican Council to the conferences to issue norms or decrees. Conferences of bishops as a juridic structure organizing groupings of particular churches in a region was established for the universal Church at the Second Vatican Council by the decree *Christus Dominus*.³ This decree determined that decisions of conferences of bishops shall have the force of law if they have been legitimately approved by at least two thirds of the votes of the prelates who have a deliberative vote and provided they have been

² Whereas canon 455 §2 states that general decrees (as well as general executory decrees) of the conference of bishops are to be reviewed (*recognitio*) by the Holy See prior to promulgation, the Code requires approval (*approbatio*) for the programme of priestly formation (c. 242 §1).

³ See Vatican Council II, Decree, October 28, 1965, *Christus Dominus*, 38; Paul VI, *Ecclesia sanctae I*, 41, in FLANNERY I, pp. 587 and 609 respectively.

reviewed by the Apostolic See. Such decisions could be passed only in those cases in which it was so prescribed by the common law or by a special mandate of the Holy See.

A significant aspect of the Church's life over which the Second Vatican Council gave competence to conferences of bishops is the regulation of the liturgy within certain defined limits.⁴ Some decisions in liturgical matters require to be reviewed by the Holy See;⁵ others merely need a legitimate approval by the conference.⁶ The Council gave conferences of bishops competence in yet other areas, which could also be divided into decisions and recommendations that are to be reviewed by, at times even decided upon by, the Holy See and those decisions which are finalized by the conference itself.⁷

⁴ Vatican Council II, Constitution, December 4, 1963, *Sacrosanctum Concilium*, 22, in FLANNERY I, p. 9.

⁵ Some examples are: radical adaptations of the liturgy, as may be the case in mission countries, should be submitted to the Holy See by whose consent they may be introduced (*Sacrosanctum Concilium*, 40); use of the vernacular (*Sacrosanctum Concilium*, 36); translation of liturgical texts (*Sacrosanctum Concilium*, 54, 63, 79); adaptation of ritual (*Sacrosanctum Concilium*, 63, 77); adaptations of the liturgical year to suit local conditions (*Sacrosanctum Concilium*, 107); etc. Various formulas are used for the act of the Holy See: *actis recognitis, actis probatis seu confirmatis, de consensu*, which according to some authors, should be interpreted in the light of postconciliar legislation (cf. J. MANZANARES, "De conferentiae episcopalis competentia in re liturgica, in schemate codificationis emendata," in *Periodica*, 70 [1981], pp. 469-497).

⁶ For instance, adaptations within the limits set by the typical editions of the liturgical books (*Sacrosanctum Concilium*, 39); setting up a liturgical commission (*Sacrosanctum Concilium*, 44); adaptation of the practice of penance during Lent (*Sacrosanctum Concilium*, 110); judgement about admittance into the liturgy of traditional popular music and musical instruments (*Sacrosanctum Concilium*, 119); etc.

⁷ Examples of recommendations and decisions which have respectively to be presented to and reviewed by the Holy See, and areas where the conference contributes to the decisions of the Holy See are: suggesting changes for boundaries of dioceses (*Christus Dominus*, 24); recommendation for the delimitation of provinces or erection of regions (*Christus Dominus*, 41); to decide whether and where it is opportune to establish the permanent diaconate (*Lumen gentium*, 29, *Ad gentes*, 16); to establish a programme for priestly formation (*Optatum totius*, 1); and decisions which do not need the *recognitio* of the Apostolic See: questions concerning the care of immigrants, refugees, exiles, sailors, aviators, and nomads (*Christus Dominus*, 18); certain concrete actions in ecumenical matters (*Unitatis redintegratio*, 8); employing suitable means of introducing younger clergy into the priestly life and apostolic activity (*Optatum totius*, 22); applying principles of Christian education (*Gravissimum educationis*, Introduction); pooling resources for the good of all; establishing norms to govern the relationship between local ordinaries and religious institutes; supervising arrangements designed to coordinate missionary activity in their territory (*Ad gentes*, 31, 32, 38, also 18, 20); to see to it that institutes or associations are found by which provision will be made for proper support and health care for presbyters suffering from sickness or old age (*Presbyterorum ordinis*, 21); etc. Conferences have also been granted competence through apostolic letters and other kinds of documents: for

The contents of the *Compendium* are largely pastoral directives agreed upon by the bishops of Malawi for use by pastoral workers. Strictly, they are not intended as laws but as norms of pastoral action, and indeed most of the guidelines are not required by the Council documents to be reviewed by the Holy See. However, some directives explicitly cover points of particular law and the application of universal law in which case they are merely normative guidelines in the absence of law.⁸

This also applies to the decisions of the Episcopal Conference of Malawi regarding the implementation of the revised Code. These norms together with the decisions enumerated in the *Compendium*, though not decrees, since they lack the *recognitio* by the Holy See and subsequent promulgation by the Conference,⁹ are in Malawi given the respect of laws. For instance, even though there is no official Roman *recognitio* concerning the Priestly Formation Programme, the bishops have implemented the document as norms for guiding the running of the major seminaries.

An individual bishop could legally enact some of the other directives as laws in his own diocese. However, this is not the case for all laws: for instance, setting a term of office

example, to issue norms regarding mixed marriage for the granting of dispensations from the canonical form and for declarations and promises (see PAUL VI, Apostolic Letter, January 7, 1970, *Matrimonia mixta*, 7, 10, in *A.A.S.*, 62 (1970), pp. 250-263; English translation in FLANNERY I, pp. 512, 513).

⁸ Regarding the general normative role of conferences of bishops, see T.J. GREEN, "The Normative Role of Episcopal Conferences in the 1983 Code," in T.J. REESE, ed., *Episcopal Conferences, Historical, Canonical and Theological Studies*, Washington, DC, Georgetown University Press, 1989, pp. 137-175.

⁹ Even though the manner of promulgation for the particular law of the Church in Malawi does not seem to have been determined, the most probable mode is either through circular letters of the Conference or the Newsletter of the Episcopal Conference of Malawi through which most of the directives have been passed on to the dioceses and parishes. Cf. canon 8 §2.

for parish priests, fixing the maximum and minimum sums for alienation, for validity, require the *recognitio* of the Holy See. However, the Conference's norms for the statutes of the presbyteral council, and its norms for marriage preparation etc., even though not reviewed by the Holy See could be used for legislation at the diocesan level because, in themselves, they do not bear upon validity. Since life in the dioceses cannot stop just because the conference of bishops has not issued decrees, diocesan legislation or diocesan pastoral action must take care of some areas that are not duly legislated by the conference, provided they are not beyond the diocesan bishop's competence.¹⁰

Whether it has occurred accidentally or not, it is, in a way, interestingly advantageous that the Episcopal Conference of Malawi has not hastily promulgated laws which would be destined to have a long term binding force for the whole territory of the Conference. Since decrees of a conference of bishops cannot be altered or revoked without the *recognitio* of the Holy See, bishops need ample time to allow mature considerations for making useful particular legislation for their region. One may speak of a certain autonomy enjoyed by diocesan bishops where the conference has not enacted laws.¹¹ In this light the delay of official promulgation of decrees tends to be agreeably beneficial.

¹⁰ If the conference of bishops has not defined and decreed the *acts of extraordinary administration* (c. 1277) and the *minimum and maximum amounts for alienation* (c. 1292 §1), as is the case in Malawi, it appears uncertain how a diocesan bishop and public juridic persons (a diocese, parish etc.) are to proceed in questions of extraordinary administration and canonical alienation. If there is no fixed sum by the Congregation for the Evangelization of Peoples, as it so seems for Malawi, could the definitions and amounts set by the conference, even though without the Holy See's official review, be used all the same?

¹¹ Some people think that the conference should make very few binding laws in order not to curtail the power of the diocesan bishop, just as at the Second Vatican Council, "For some the conference appeared to be a suspect juridical organ which would impede the power of bishops and restrict their freedom, and for this reason they regarded it as incongruous to propose granting juridical force to the decisions of a conference; the principle of subsidiarity was invoked in support of this critique" (R. SOBANSKI, "The Theology and Juridical Status of Episcopal Conferences at the Second Vatican Council," in *The Jurist*, 48 [1988], p. 91).

In fact, to a large extent, the bishops of Malawi have refrained from legislating on every possible law that the universal law has allowed to be further determined locally by each conference of bishops. They have found a number of canons, e.g., those on permanent diaconate, chapters of canons, to be non-applicable to the situation in Malawi. Laws should not be made just for the sake of covering all possible cases that may arise as is usually done in criminal and procedural law. For example, if the conference of bishops in Malawi has decided against establishing permanent diaconate for the time being, then it would be superfluous for the same conference to establish norms for a training programme for permanent deacons.

B. The Recognition of Malawian Cultures

It is important to note that while the term *Malawian culture* may be used, a more fitting term is *Malawian cultures* since the several tribes of Malawi, while consisting of similar behavioural and institutional patterns, portray a variety of distinct cultural features. It makes sense to speak of Malawian culture in so far as the history that has shaped Malawi as a nation: including the pre-colonial, colonial, post-colonial periods and the nation's subsequent development has constituted the people of Malawi into a somewhat homogeneous identifiable group. Some of the factors that have gone into the making of the Malawian culture are: the British and post-colonial influence, the common struggle for independence from British colonial rule, the post independence one party state (Malawi Congress Party), establishment of a national language (Chichewa) for the purpose of achieving unity for inter-tribal understanding, national feasts and holidays (Birthday of the President: May 14, Martyrs Day: March 3, Independence Day: July 6, Mothers' Day: October 17), during which traditional dances are performed.

1. Malawian customs and particular Church legislation

Some customary elements that have great bearing on Church life in Malawi and the development of particular legislation will now be reviewed. Special note should be taken of the influence of the Malawian strong sense of community on the directives of the Conference of Bishops.

a) *Importance of the faith community*

Traditionally Malawians belong to village communities of traceable kindred groups within identifiable tribes in which each person finds the meanings and values of life which are lived and achieved through an indispensable interpersonal co-existence. Because of this phenomenon, many African societies are known to exist within an ambience of a strong sense of community. In most African communities, life is participated and shared in solidarity with others and the individual's personality, without being annihilated by the community, finds its dominant expression in working for and in securing group harmony with the collective whole.¹²

This deeply rooted, archetypal sense of community which is a major cultural value for Malawians not only provides a good foundation for the reception of Christian community building but it also influences other Church structures and the interpretations of pastoral practice and legislation. It offers a strong basis for the development of an ecclesiology of Church as community of people of God, a basis which is at the same time challenged by the

¹² See A.B. CHIMA, "Religious and Moral Values in African Traditional Societies," in M. V. CHIRWA, ed., *Sisters of Eastern Africa Study Conference: Incarnational Formation of Religious Women for a Prophetic Call and Mission in the African Society*, Lusaka, Missionary Sisters of the Immaculate Conception, 1986, pp. 24-25.

Gospel's quality of universalism and openness to all people. Tribal or kin affiliation must remain open to other peoples within the Christian context and in the modern tasks of nation and community building.

Belonging to a community has its rights and obligations. Thus, in a traditional village community a merely nominal membership without active involvement in the communal works of the social group is unacceptable and deplorable. Social interdependence requires that the individual not only benefits from the community's services but that each member contributes to the welfare of the collective whole.

Hence, being part of a Christian community cannot be just a nominal reality but needs to be manifested and actuated in visible actions such as frequent attendance at liturgical services, participation in the apostolates and service ministries of the community and in supporting the Church financially or through other means. Failing to get involved in such major activities which help to sustain and express the faith is perceived as a distancing or a dissociating of oneself from the faith community. One's active fellowship and connectedness with the community of faith is exemplified by and through these activities, and this is a witness that gives founded hope for the education of children within the Christian community.

The Malawian sense of community also furnishes the particular churches with a holistic approach to sacraments. In spite of its importance and necessity for salvation, baptism, whether of infants or of adults, should not be celebrated in isolation from the demands of faith and its consequent social responsibilities. The social conditions of candidates for baptism, or parents in the case of infant baptism, enters into consideration when deciding whether one

is prepared for the celebration of the sacrament. It is, perhaps, for this reason that the bishops have suggested to delay the baptism of infants if parents fail in their social responsibility of educating their older children in compliance with the country's secular basic education programme; or if they deliberately neglect supporting the Church.

The deep-rooted sense of community is also illustrated in the catechumenate programme. A good portion of the Christian community gets involved in supporting and teaching catechumens on their faith journey, through common participation in liturgical celebrations, in the apostolates and in being sponsors at baptism. At least in each outstation, if not in each sub-station (also called small Christian community), there are teachers, catechizers, instructors of the catechumens, who receive periodic short courses at diocesan catechetical or pastoral centres to prepare them for the catechumenate programme.¹³

b) *Marriage consent*

For Malawians marriage consent is customarily twofold, both the consent of the immediate parties in the marriage and that of the parents or marriage guardians. Canonical marriage consent is limited to the man and woman who intend to marry. One would hope that particular church legislation would be allowed to develop and somehow embrace the broader Malawian communitarian concept of marriage consent, which upholds the rich cultural values of the marriage institution.

¹³ The catechumenate programme (R.C.I.A.) is scheduled by and followed at the church of the Christian community. If any instruction is given in schools, it is supposed to be supplementary and not a substitution for formal baptism preparation conducted at the small Christian community level.

Marriage consent as understood by the Church and as proposed by the magisterium contradicts the Malawian traditional understanding of marriage which seems to have no difficulty with a man consenting to marriage with two women at the same time. According to Malawian customary law, a legally married man who, while remaining with his first wife, later decides to marry a second wife is not presumed to have withdrawn his consent to the first marriage, and his consent is not viewed to be defective. Hence, as long as each party maintains consent to the other party, marriage is held to exist. According to canonical matrimonial consent, however, a man entering into a second marriage, while still with the first wife, would be excluding unity in the second marriage, an essential property of Christian marriage.

c) Acceptance of a polygamous notion of marriage

In its various forms, polygamy raises both theological and canonical questions which need to be addressed. According to Catholic doctrine and teaching, polygamy is not an open question; it is diametrically opposed to the divine law monogamous marriage. However, prudent pastoral adjustments to certain extraordinary cases brought about by this cultural phenomenon may be able to provide workable solutions to some issues of baptism and polygamy as well as polygamy and Holy Communion.¹⁴ Also, second wives are sometimes denied membership in some lay associations.¹⁵

¹⁴ Could a man who is married concurrently to two or more women or a woman who is a second or third etc., wife to a polygamous husband be admitted to baptism, particularly if they are extremely advanced in age; and if already baptized (for instance, a person who converts from another Christian Church and seeks to be received in the Catholic Church), could these persons occasionally, if not always, be admitted to the Eucharist?

¹⁵ *Wamama wa Chitemwano* (Ladies of Charity), a lay association in Mzuzu Diocese has had an on-going controversy on whether to admit into the association Catholic women in polygamous marriages who are not the first wife. The diocesan council of priests meeting held on November 29, 1989 (Minutes 23/89, pp. 3-4) stated: "The [Wamama wa Chitemwano] diocesan committee is very strong against any admission of *mitala* [women in

Another important question is the relation between the social acceptance of a polygamous notion of marriage and the Christian unequivocal concept of monogamous marriage, especially when viewed in the context of the annulment process in marriage tribunals. For a people who are raised in a cultural environment which embraces a polygamous notion of marriage, acceptance of the unity and exclusivity of Christian marriage cannot always be guaranteed. There may be cases, specially in mixed marriages, where a party may be consenting to a concept of marriage that includes divorce and polygamy. As much as it is worthwhile to study the effect of a divorce mentality on the spouses' consenting to an indissoluble marriage, so also the bearing of a polygamous mentality on the unity of marriage must be evaluated. Of course, if in the pre-marital investigations the parties asserted that they believed in the unity and indissolubility of marriage, the presumption will be for the validity of the celebrated marriage. However, because of the social acceptance of polygamy, and in line with canonical jurisprudence, in much of Malawi, it may be beneficial to take this cultural aspect into consideration when establishing grounds for certain marriage nullity cases, particularly in mixed marriages.

2. *Bishops in support of local customs*

The Conference of Bishops in several instances in its directives, has shown its determination to uphold certain Malawian cultural values and customs. It decided that certain issues be legislated at diocesan level because of the different cultural practices from place to

polygamous marriages other than the first wife] to their organization. However, the meeting saw this attitude as un-Christian and advised of some form of membership. Possibly there could be an initial probation period of about six months when the conduct and sincerity of a candidate would be assessed. The candidate would then be admitted to membership (without the right to hold office) by the *Wamama wa Chitemwano* committee together with the chaplain."

place in the country. The case of the marriage ritual is a typical example. Even though the idea of a national marriage ritual is exciting in terms of inculturation, it is found not practical for Malawi because of the diverse marriage customs in the country. For this reason the Canon Law Committee has suggested that the ritual be made at the diocesan level.

It is similarly significant that the bishops have prescribed that prior to validating irregular marriages it must be ascertained that the requirements of local customs have been satisfied. They have urged the clergy to adhere to the strictures of traditional customs regarding marriage, especially to the presence of the proper marriage guardian/*nkhoswe*, who certifies that the consent of parents of both parties is furnished. Pastoral workers have been requested to discourage the tendency of some of the educated (formal/western education) and the urban generation who ignore this requirement and invite anyone to function as *nkhoswe*. Since the traditional role of proper marriage guardians has the additional purpose of guaranteeing the stability of the marriage, their presence must be safeguarded and insisted on.

3. *Opportunities for adaptation and inculturation*

Like in the case of a national marriage ritual (cc. 1119, 1120), the Code gives several occasions for adaptations and inculturation to the local situations. One of the few direct references in the 1983 Code to adaptations to the needs of each region is in regard to the priestly formation programme (c. 242 §1).¹⁶

¹⁶ Allusions to cultural adaptations (inculturation) in the Code are: c. 447 role of the conference of bishops; c. 769, Christian doctrine to be proposed in an adapted manner; c. 787 §1, missionaries are to establish a sincere dialogue with those who do not believe in Christ and are to use methods that suit their characteristics and culture; c. 838 §3, translations of liturgical books are to contain appropriate adaptations; c. 1120, a marriage ritual which

a) *Priestly formation programme*

In the document: *Priestly Formation Programme*, the bishops of Malawi defined the main structures and principles for formation in the seminary. They specified many issues of local relevance, and guided by wisdom they legislated and gave guidelines only over elements of seminary life which are not controversial or do not cause uncertainties; though in so doing, probably, opportunities for inculturation have been missed.

The question of the identity of the diocesan priest in Malawi with respect to seminary formation has frequently been raised but without receiving an adequate answer. A statement on parameters of and training for inculturation in the seminary, as well as creative freedom of students to take part in legitimate liturgical celebrations and experimentations could have had some space in the programme. Also connected with lawful experimentations in a major seminary is the question of freedom of seminaries from interference by individual bishops especially when pastoral directives would restrict seminarians and a national seminary located in his territory.¹⁷

(i) *Formation*

In recent years, people have expressed their concern regarding the formation of priests in Malawi. Firstly, a major critique has been the multiplicity of societies and missionary

is in harmony with the usages of the area and people and adapted to the Christian spirit can be prepared by the conference; c. 1292 §2, also the permission of the Holy See is required for the valid alienation of goods which are especially valuable due to their artistic or historic importance, etc.

¹⁷ An example of this is when a bishop would disapprove particular liturgical adaptations, e.g., the use of drums and processional dance at liturgical celebrations, which would be in accordance with canon 838 § 4 which states: "It pertains to the diocesan bishop in the church entrusted to him, within the limits of his competence, to issue liturgical norms by which all are bound." The statutes of the seminary and its programme of priestly formation would determine some of these issues in major seminaries (cc. 242, 243).

congregations represented by the seminary staff.¹⁸ Although this could be a blessing in that it brings a rich variety of experience and spiritualities into the seminary, it would seem to some people that unity of formation is not ensured. Secondly, like most western education programmes, seminary formation is said to have the undesired effect of alienating most students from their cultural roots and patterns of thinking and behaviour, since the process inevitably instills western values and patterns of formation.

The majority of the formators and teachers being non-Malawians, some people suggest that it is unrealistic to expect them alone to redesign and implement an adapted training programme. Preparing more Malawian priests to staff the major seminaries in itself is not sufficient for establishing proper adaptation and inculturation of the formation programme. Apart from a staff that is culture-conscious, what is desired is an inculturated seminary programme that emphasizes a local image of a priest, and a programme which besides having a universal outlook, focuses on the particular needs and challenges of the Malawian society. Achieving such a goal is most likely when the seminary staff, with a majority of well trained Malawian diocesan priests, has the courage and vision to effect something new, according to the committed recommendations of the bishops, with the necessary input of the lay faithful.

The Church in Malawi hopes that its clergy assist in promoting a Church whose liturgical celebrations, service structures and ministries enable the faithful to fulfill their obligations and live their faith without unnecessarily having to give up their culture. A good

¹⁸ The seminary staff originally comprised the Missionaries of Africa (White Fathers) only; with the passage of time it has consisted of a mixture of White Fathers, Montfortans, Marianist Brothers, St. Patrick Fathers, diocesan priests, Comboni Missionaries, Carmelites, Franciscans and lately Jesuits.

number of clergy are still said to be functioning under the shadow of the *old* missionary Church; they have received the gospel, the rites and symbols of the faith but, it would seem, most of them have not sufficiently digested them for translation and transformation into the local situation, so much so that the face of the Church still appears very western.¹⁹

Just as it is expected of the particular churches, the local priest in Malawi must seek to discover his true identity, reformulate what he is and stands for. Somehow, he must refrain from resting satisfied with adjusting his ministry to the priestly image brought by the foreign missionaries, which although good, cannot fully contain and express the yearnings of the Church in Malawi. Formation is viewed as a great factor in this situation. Rather than limiting themselves merely to the fulfilment of the traditional formation demands, the local clergy need to remodel and restructure their ministry and pattern of life to suit their local conditions. As long as the clergy do not break ground towards a new self-identity as Malawian priests within their own particular churches with specific concerns and challenges, the future and authenticity of the Church in Malawi might remain questionable.

(ii) *Requisites for entry into the major seminary*

Canon 241 §1 states that the diocesan bishop is to admit to the major seminary only those who are judged capable of dedicating themselves permanently to the ministry in light of their human, moral, spiritual and intellectual characteristics, as well as their physical and psychological health and their ~~proper~~ motivation. Regarding intellectual and academic

¹⁹ There is a constant call for cultural adaptation (inculturation) in most of the documents of the Second Vatican Council especially those regarding the Church's missionary activity, the Church in the modern world and the celebration of the liturgy (e.g., *Sacrosanctum Concilium*, 37-40, 77; *Ad gentes*, 19, 22; *Gaudium et spes*, 44, *Optatam totius*, 1; also in *Musicae sacram*, 61, etc.).

requirements for entry into the major seminary,²⁰ some teachers of the major seminaries would prefer a higher standard than the current one, or at least they would not accept a student who did not pass the Malawi School Certificate of Education. Even though very significant, academic performance is certainly not the only criterion: priests need to have not only a satisfactory intellectual capacity but also a good loving heart and other qualities.

However, the seminary staff should be required to conscientiously exercise strict rules regarding academic performance not only when selecting students for entry into the seminary, but even much more throughout the training period. The seminary system in Malawi has been criticized because it seems to fail at motivating students to academic achievement. For many years the major seminaries of Malawi granted no diploma or degree; even today no diploma is required of a candidate to orders. In the mid-seventies a programme for an ecumenical diploma in theology was organized, and only interested students enrolled for it, but the programme was not equally supported by the seminary professors and the bishops.

It may well be in the interests of the particular churches that candidates for orders in Malawi qualify for a diploma of some sort, because with the rising of the education standard, the clergy too must engage in similar rigorous academic exercises to meet the challenges of the changing modern world. A diploma or degree would also offer incentives to study and help to break down the apparent complacent condition in the major seminaries.

²⁰ For admittance into Kachebere Major Seminary for priestly training the Episcopal Conference of Malawi has ruled that: "A Malawi School Certificate of Education (M.S.C.E.) or its equivalent shall be a requisite to enter the major seminary. Only in exceptional cases a bishop may recommend to the major seminary a candidate who has a Malawi General Certificate of Education (M.G.C.E.). If a student fails the secondary school exams and still wishes to pursue his vocation, he shall be given a chance to repeat" (E.C.M., *Priestly Formation Programme*, Lilongwe, Likuni Publishing House, 1989, p. 3). See also *Optatum totius*, 6.

Students have been described as lacking in originality and motivation; as waiting for something to happen to them; they seem not to want to control and determine their destiny, or to create their future.²¹ There are other ways of motivating the students besides the diploma or degree, but it would exert a major influence on the morale of the students and in building a local identity for the clergy.

(iii) *Assessment of students*

The principle of adaptation needs also to be properly applied in the assessment of students who wish to enter Kachebere and St. Peter's Major Seminaries.²² Even though physical and mental health have often been taken for granted, candidates for the major seminary in Malawi always have had to undergo a medical examination prior to entry into the seminary, to ensure that they are in good health. Prior to admitting students into the seminary, it is becoming necessary these days to include a test for *AIDS* because of its scope and possible effects on the ministry.

Psychological tests have not been demanded by the Conference of Bishops. Isolated cases in some dioceses have deserved the closer attention of experts in mental health care.

²¹ See, C. TUMI, archbishop's report, "Visit of Archbishop Christian Tumi of Garoua, Cameroon to Kachebere and Zomba National Major Seminaries, Malawi, at the Invitation of the Episcopal Conference of Malawi, from the 15th of January to the 4th of February, 1988" (Lilongwe, Malawi, pp. 1-20). This is a thorough report on the status of priestly formation and major seminaries in Malawi conducted by Archbishop Tumi in 1988, a process that was initiated by the Congregation for the Evangelization of Peoples, probably a consequence of the recent *ad limina* report of the bishops of Malawi.

²² On this matter the bishops have ruled that: "Final assessment of each candidate at the minor and major seminaries must be undertaken and signed by all members of staff as a group in view of his entry to Kachebere or St. Peter's Major Seminary as the case may be. Each student should have a file which should include intellectual abilities, character, spiritual qualities, social life, pastoral work, physical and mental health. More information from minor seminaries should be given on the application form" (*Priestly Formation Programme*, p. 20).

Some seminary professors suggest that a psychological test be obligatory for all candidates for the major seminary.

However, when these tests are made care would need to be taken that the persons who conduct them be true experts with certified qualifications in their fields. It is also vitally important that the psychologist be conversant with Christian faith, and that he or she be versed in the cultural traits of the Malawian society which usually give nuances to an individual's personality. Although behavioural patterns and personalities have cross-cultural meanings and interpretations, they are also very much determined and influenced by the socio-cultural and religious milieu. Hence, experts from abroad who have had little or no contact with Malawian cultures may be susceptible to misinterpret cultural behaviour.²³

In conducting psychological and medical tests, especially with regard to tests for *AIDS*, due protection of the candidate's privacy must be safeguarded (c. 220). Respect for the dignity of a person requires that the student, whether already in formation or intending to join the major seminary, freely and in full knowledge undertakes the test, and he would be entitled to see the results, which ought to be kept in strict confidentiality.²⁴ The consent of the seminarian or the candidate for the seminary must be obtained prior to carrying out the tests. The candidate must be aware of the need to comply with the requirements for entry

²³ Examples of such commonly misinterpreted behaviour for example would be: two men holding hands, a young man not looking directly into the eyes of his teacher or doctor, a young man not hugging or kissing his mother or sister, the role of family, tribe or group on reaching a personal decision, etc. These behavioural patterns may be construed as signs of homosexuality, dishonesty, lack of affection (or fear of women) or yielding to parental or peer pressure respectively, while this may not be the case at all. On the contrary they are accepted expressions of other social values.

²⁴ See F.G. MORRISEY, O.M.I., "La formation des séminaristes et le respect de la personne," in *Studia canonica*, 21 (1988), pp. 19-20.

into the seminary and understand that any institution has the prerogative to set its own standard for acceptance.

(iv) *Course of studies*

The bishops rightly reaffirm that seminary training should cover the three areas of prayer, study and apostolate;²⁵ and that these must be executed with the objective of the students' formation. Courses to be studied in the seminary include: philosophy, theology, Holy Scripture, psychology, church history, liturgy, canon law, homiletics, social communications, administration, and ecumenism. It is surprising that Islam and African traditional religions, courses which because of their local relevance have been included on the seminary curriculum now for more than ten years, are not enlisted by the Conference in its document on seminary training.²⁶ The impact of Islam, the influence of African independent churches (churches which have been formed after breaking away from the main stream Christian churches) and

²⁵ See VATICAN COUNCIL II, Decree, October 28, 1965, *Optatam totius*, 4, 8, 13-21, in FLANNERY I, pp. 710-711, 713, 717-723.

²⁶ One of the major innovations of the conciliar decree *Optatam totius* was to recognize that priestly formation had to become more related to local needs and circumstances so that priestly training will always answer the pastoral requirements of the particular area in which the ministry is to be exercised. See *ibid.*, 1, in FLANNERY I, p. 708.

the pervading traditional belief value system cannot be left unrecognized in any attempt at forming a clergy to serve the Malawian society.²⁷

b) *The marriage ritual*

Marriage is one of the central traditional institutions which hold and transmit tribal customs and values. In allowing for a national marriage ritual, the universal law intends to promote the incorporation of commendable customs of the people of a region into Christian marriage celebration.²⁸ The Canon Law Committee has indicated to the bishops of Malawi that such a ritual should rather be made at diocesan level if worthwhile adaptations are to be made with due regard to each diocese's variation of marriage customs.

Generally, some priests and lay faithful do not seem to be enthusiastic about substantial cultural adaptation, in our opinion, often for fear that inculturation and the use of tribal customs and elements may have a diluting effect on Christianity as received. Consequently, there is some reluctance at developing relevant local marriage rituals. Pastoral workers need to overcome any possible apprehension of being blamed for flooding the

²⁷ In 1980 the grouping of Malawians according to their religious affiliation was thus:
Religious and Church Affiliation/Identification of African (Malawian) in Percentages, 1980-81 Estimates.

Traditional Belief	32%	1,573,120
Protestant Churches (Ten Denominations)	24%	1,376,480
Catholic Church	23%	1,229,000
Muslims	10%	737,400
Independent Churches	11%	900,000

(J. C. CHAKANZA, "Continuity and Change: A Study of New Religious Movements in Malawi, 1900-1981," Ph.D. diss., Oxford, University of Oxford, 1985, p. 14).

²⁸ See VATICAN COUNCIL II, Constitution, December 4, 1963, *Sacrosanctum Concilium*, 77, in FLANNERY I, p. 23.

Church with customs foreign to the Christian tradition, if more work is to be done on the current adapted diocesan marriage rituals.

c) The catechumenate programme

The catechumenate is a sector of Church life that is well developed and moderately adapted to the Malawian situation. The period of first evangelization compelled the missionaries to concentrate on the catechumenate. The ancient rites of welcoming converts into the Church were adjusted to the new locality. Therefore, the programme was made to suit people's methods of learning; the periods of intensive Christian instruction, ordinarily a continuous two weeks, had to fall after harvest in respect of the agricultural cycle. Most of the catechetical classes were attended by whole families or community, because of people's communitarian sense of belonging.

The group-gearred and progressive mode of becoming a Christian through stages of the catechumenate with the participation of the community, which lasted from two to four years, in spite of being rigorous and in spite of offering resistance to traditional rites of passage, was generally well accepted largely because it resembled the traditional rites of initiation. Most of the diocesan provisional catechumenate programmes have been revised, and as work on the national programme continues, it is hoped that it will display a spectrum of values and principles which will enable it to be profitably used with ease in the multi-faceted society of Malawi.²⁹

²⁹ Several factors have to be considered in the complex exercise of formulating a national programme for the catechumenate: the variety of groups of people, tribes, languages; rural and urban life-settings, office workers, and those that are self-employed or work at home or on farms, differing levels and kinds of literacy etc. In the past, and to a limited extent today, it has been possible to have one large group of catechumens in one location progressively

4. *Directives which insufficiently respect cultural diversity*

The conference of bishops has displayed concern for the need to have some uniformity in liturgical adaptations; it has determined when to kneel and stand during the Eucharist.³⁰ As for postures at Mass or other liturgical celebrations, uniformity would be acceptable as long as the postures or gestures meaningfully speak to the people in the whole region.

Although the Conference directs standing for the three prayers at Mass (the collect, offertory and communion prayers), in some dioceses there is the practice of sitting down, because traditionally this is generally the posture for prayer. Also, the sitting position is considered to be proper for listening to the Gospel, since when an important person, in this case Christ, speaks, people sit; usually standing is offensive in these circumstances. The kneeling position for receiving Holy Communion is admissible, and presently it is the common practice in Malawi, even though in some churches the standing posture is used. It would have been desirable, in my opinion, if this question were left to be ruled upon at diocesan level or at least if the Conference had permitted the other option of standing.

It so appears that insufficient sensitivity to divergent local customs also has been shown on the issue of baptizing children born of polygamous unions. The bishops' directive

being led on a spiritual journey through the rites of Christian initiation until they are incorporated into the community of believers through baptism. However, modern circumstances and the divergent conditions of the catechumens present reasons for re-considering the traditional approach. Some instances may require smaller groups of catechumens or even a one-to-one catechumenate journey as the situation may demand. The task of making a catechumenate programme for the particular churches of Malawi is not as easy as it looks at first sight.

³⁰ See *Compendium*, p. 53. The Roman Missal directs that it is for the conference of bishops to adapt postures and gestures so that they accord with the sensibilities of their own people (see General Instruction on the Roman Missal, 21, in FLANNERY I, p. 167).

seems to put all cases of children from polygamous marriages into one category. For instance, all things being equal the children of the first Catholic wife could be baptized even though their father is polygamous. Since such marriages specially abound in particular areas of the country, the subtleties of these cases seem to escape the minds of those that are unfamiliar with them, let alone people from societies where polygamy is illegal and abhorred.

5. *Resistance to change*

One of the characteristics of most social groups is a built-in system of resistance to any dramatic change in the structures of their major institutions. Like most societies, the Church as well as the Malawian tribal groups revere their traditions and values and they insist on conserving and handing them on to later generations. The ways and patterns of Church life learned by Malawians in the last hundred years have just begun settling down in people's lives and within that same period significant changes have occurred, especially after the Second Vatican Council. While some of the reforms have been well received, for various reasons, the implementation of others has been difficult, and so deferred. Examples of these suggested changes will be examined below.

a) *Ministry of permanent deacons*

The growth of the Church in Malawi is greatly indebted to the active and significant participation of lay people, and especially the catechists. Right at the beginning of the Church in Malawi, the missionaries decided to engage the local people in teaching and assisting with the work of the Church. Lay ministries were further encouraged by the new spirit of the Second Vatican Council, and it is amazing how the lay faithful, both men and women, have quickly become involved in the life of the Church. This is especially true for women for whom

the Church and civil society apparently have opened new roles that seem to be breaking away from the customary traditions. While the Malawian Church has witnessed changes in laity's participation in the Church, there are also indications of unwillingness to launch new things and to part with conventional practices.

The first example of this is in the bishops' decision on the ministry of permanent diaconate (c. 236). The Conference finds the ministry of catechists satisfactory and hence permanent deacons are perceived unnecessary for the time being.³¹ However, although the role catechists play nearly encompasses that of a permanent deacon, through ordination, a deacon has extra powers: he can officiate at marriage (c. 1108 §1), he possesses the faculty to preach everywhere (c. 764), he has the privilege of preaching the homily (c. 767 §1), he is the minister of exposition of the Most Holy Sacrament and the Eucharistic benediction (c. 943), and he is the ordinary minister of baptism and of communion (cc. 861 §1, 910 §1).

Indeed, a lay person may, under certain conditions, perform most of the above. For instance, catechists do preach during liturgical celebrations.³² In a situation of necessity a catechist could be delegated to administer solemn baptism; a lay person can be a minister of exposition and reposition of the Blessed Sacrament without benediction (c. 943), and a lay person can be an extraordinary minister of Holy Communion (c. 910 §3). It is even possible

³¹ E.C.M., "Minutes," 9/84, p. 3.

³² Actually, in certain instances like, due to language problems or in masses with children a lay person may preach after the gospel (see SACRED CONGREGATION FOR DIVINE WORSHIP, Directory for masses with children, November 1, 1973, *Pueros baptizatos*, 24 in *A.A.S.*, 66 (1974), pp. 37-38.

with the revised legislation for a lay person to officially assist at a Christian marriage following the procedure laid down in canon 1112 §1.

Of course, since the diaconate is open only to men,³³ it would seem the ministry of catechists or other lay persons would be preferable, since it includes women who can likewise be duly commissioned to do most of what a deacon is competent to do. Though in Malawi officially commissioned female catechists are rare, in Uganda, Zaire and other African countries the phenomenon is not uncommon.³⁴ In a number of parishes in Malawi, apart from membership in several associations, committees and councils, women fulfil catechizing roles, give marriage preparation courses (*alangizi*), etc.

Although the possibility exists for catechists to do almost all that falls under a deacon's competence, in Malawi they do not yet have the permission to witness marriages or to be ministers of the exposition and reposition of the Blessed Sacrament or to be extraordinary ministers of Holy Communion, areas of Church life which they could propitiously serve.

Several reasons have been advanced for not accepting the permanent diaconate ministry in the Malawian Church. For instance: it has been argued that the promotion of the permanent diaconate might negatively affect vocations to the priesthood, and most people are not ready to accept married people officiating at marriages or being ministers of the Eucharist. Furthermore, the particular churches in Malawi have functioned fairly well with

³³ "Only a baptized male validly receives sacred ordination" (c. 1024).

³⁴ Cf. A.M. FINIFINI, "Le statut juridique du catéchiste en territoires de mission, structure et signification du canon 785 du *Code de droit canonique* de 1983," J.C.D. diss., Ottawa, Saint Paul University, 1988, pp. 175-228.

the concerted ministries of priests, catechists and lay leaders without permanent deacons. Nevertheless, without entirely dismissing these reasons as unconvincing or as signs that reveal an attitude of non-acceptance of renewal in the Church's ministries, the idea of permanent diaconate or at least the possibility of lay people assisting at marriage³⁵ and being extraordinary ministers of Holy Communion ought to be seriously studied.

b) *Lay judges*

The Code stipulates that the conference of bishops can permit lay persons to be appointed judges to take part in a collegial tribunal (c. 1421 §2). Regarding their appointment, the bishops of Malawi feel that lay people are not yet prepared for the ministry.³⁶ In the future, the question may have to be further investigated, since lay people would perhaps offer relief to the burdens of priests and the shortage of tribunal staff. With

³⁵ There is no report on the bishops' discussion of *lay people presiding at marriage* (c. 1112). A notation is made in the March 1-2, 1985 minutes of the Canon Law Committee: "The committee invites the E.C.M. to note two other ways of contracting valid and lawful marriages which fulfil the canonical form. (a) A lay person can assist at marriages (c. 1112), and (b) In the absence of a competent person, a marriage can validly and lawfully be contracted in the presence of witnesses only, provided that the conditions laid down in the Code are fulfilled" (c. 1116 §1).

The nature of canon 1112 §1 does not require a conference of bishops to issue a decree. A diocesan bishop can delegate lay persons to assist at marriages in his diocese if priests or deacons are lacking; however, he may do this only after he has the favourable opinion of the conference of bishops and the permission of the Holy See.

The extraordinary form stated in canon 1116 is permitted if the presence of or access to a person who is competent to assist at marriage is impossible without grave inconvenience: in the case of danger of death, as well as whenever it is prudently foreseen that such circumstances will continue to exist for a month. In either case, if another priest or deacon who can be present is readily available, he must be called upon to be present at the celebration of the marriage together with the witnesses. It would seem that with these conditions, there is the likelihood that in areas where there is a scarcity of priests and where communication is difficult some customary-celebrated marriages, may in fact be valid if it was prudently foreseen that a priest could not be present or reached for more than a month. Fr. Francisco T. Urrutia, in responding to questions on canonical form remarks that the extraordinary form of marriage should be looked at more seriously in Africa and other countries since the allegedly invalid customary marriages may in fact be valid according to Church law (see F.T. URRUTIA, in *Studia canonica*, 23 [1989], pp. 24-25).

³⁶ See E.C.M., "Minutes," 9/84, p. 25. This being a new phenomenon, not only in Malawi but generally in most dioceses of the world, it will most probably take a lot more time to be implemented. Permanent deacons once accepted in the particular churches after appropriate training could also offer assistance in tribunals as judges especially in view of canon 1421 which requires at least two clerical judges in a collegiate tribunal.

the present financial constraints, it has often been argued that the dioceses could not afford to pay decent wages for qualified lay judges. Nonetheless, with the scarcity of priests and if the Church in Malawi is to offer adequate pastoral service through its tribunals, the option of using lay judges and other lay personnel will soon have to be seriously considered.

Quite possibly, the operation of tribunals may have to be reworked, and remodelled into simpler structures, with less complex procedures and with specific adaptations to the local mentality, to enable greater involvement by people at the local level and for better pastoral service to the Church in Malawi.

c) *Lay distributors of Holy Communion*

Reluctance to sanction lay people to distribute Holy Communion is evident in the bishops' ruling in the *Compendium*.³⁷ The permission which the bishops grant in the directive is, apparently, given in view of bringing Holy Communion to the sick: "[...] and that the sick person is helped to arrive at perfect contrition [...]."³⁸ It does not envisage lay people distributing Holy Communion with a priest when there are great numbers of communicants; neither is the possibility of communion services considered.³⁹

³⁷ Cf. *Compendium*, pp. 54-55.

³⁸ Ibid.

³⁹ The Congregation for Divine Worship has issued directives on the celebration of Sunday liturgy in the absence of a priest which provide the possibility of including a Holy Communion service (CONGREGATION FOR DIVINE WORSHIP, Instruction, June 2, 1988, *Directorium de celebrationibus Dominicalibus absente presbytero Christi Ecclesia*, in *Notitiae*, 24 [1988], pp. 366-378).

The practice in some dioceses has been to allow major seminarians and Sisters to be extraordinary ministers of the Eucharist, both at Holy Mass as well as in outstations at the celebration of the liturgy of the Word (also called communion service).⁴⁰ Even though the Conference did not explain why it did not extend permission to other lay people besides religious Brothers and Sisters, it rightly advised that parish priests can bring emergency cases to the attention of the local ordinary (diocesan bishop) who may make an exception.⁴¹ Permitting lay people to distribute Holy Communion is an answer to the needs of a community, which may not have a priest or whose numbers are so large that the priest needs the assistance of the lay faithful, and not the mere creation of a new role for the laity.

C. Restrictive Norms

A number of the directives of the Conference of Bishops, in certain circumstances, tend to restrict people's participation in the sacramental life of the Church and their involvement in the service of the Church. Canon law stipulates that laws which establish a penalty or restrict the free exercise of rights or which contain an exception to the law are

⁴⁰ In Mzuzu diocese this general permission regarding Sisters and major seminarians giving Holy Communion in outstations at liturgy of the word celebrations has recently (March 1990) been revoked by the diocesan administration; but they can assist at a Eucharistic celebration. It has been said that the policy had to be temporarily changed in order to emphasize that Holy Communion has its full meaning within the context of the celebration of the Eucharist, and so as to underline the respect the Eucharist deserves since in some instances the conditions in the outstations are not conducive to this, to correct the probable tendency of thinking that the sacrament of penance (reconciliation) is no longer important as a means of preparation for Eucharistic communion etc. Even though some of these reasons individually are not convincing, the administration after due consultation found it pastorally appropriate to discontinue the practice.

⁴¹ It is worth noting that the Conference has also instructed that "the practice of receiving Holy Communion on the tongue should not be changed" (see *Compendium*, p. 56). In itself, this directive does not preclude other legitimate practices for receiving Holy Communion, like receiving it on the hand, provided the Conference has authorized it after obtaining permission or approval from the Holy See. (See SACRED CONGREGATION FOR DIVINE WORSHIP, Instruction, May 29, 1969, *Memoriale Domini*, in *A.A.S.*, 61 [1969], pp. 541-547; English translation in FLANNERY I, pp. 148-153).

subject to a strict interpretation (c. 18). Some of the directives which appear to be restrictive will now be briefly analyzed.

1. *Infant baptism*

The pastoral directives which the Episcopal Conference of Malawi has given on infant baptism⁴² deserve special evaluation because they portray very particular Malawian concepts and values which bear upon the understanding and practice of faith. Particular law can lay down prescriptions for postponing infant baptism should hope for the child to be raised Catholic be altogether lacking (c. 868 §1, 2°). A relevant question in this respect, however, is the connection between infant baptism and the faith of or the practice of religion by parents or guardians. When is it that the faith of parents (or guardians) provides adequate founded hope for the child's Catholic education not to cause deferral of baptism?⁴³

a) *Children of unwed mothers and baptism*

When the bishops of Malawi prescribe that "[...] the baptism of an unwed mother's child be deferred if she does not practice her religion and if having illegitimate children is habitual and not regretted,"⁴⁴ apparently they intend to stress the responsibility of parents to hand on the faith to their children. The actual life of the unwed mother is furthermore

⁴² See *Compendium*, pp. 49-51.

⁴³ See SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Instruction, "Pastoralis actio," 30-31, in *A.A.S.*, 72 (1980), pp. 1152-1154; English translation in FLANNERY II, pp. 113-114. The relation of faith to sacraments raises a similar question in the sacrament of marriage: should non-practising Catholics, or Catholics who admit that they no longer believe, but still want to be married in the Church, be accepted to celebrate a Christian marriage? Wouldn't their marriages be sacramental just the same since "[...] a matrimonial contract cannot validly exist between baptized persons unless it is also a sacrament by that fact" (c. 1055 §2)?

⁴⁴ *Compendium*, p. 50.

expected to be exemplary and relatively beyond reproach as is indicated by the words *if having illegitimate children is habitual and not regretted*. This norm would need very strict interpretation since it restricts the child's natural right to baptism. Of course, depending on circumstances, exceptions to this rule could be made, that practising guardians such as grandparents could assume the role of parents in bringing up the child according to the Catholic faith. But some communities are strict and they expect biological parents to assume the responsibility. However, some Christian communities may give different interpretations to *not practising her religion*. An 80% to 90% participation in the Sunday liturgy including making an offering to the Church may be expected, and so most baptisms are put off. All the same, care needs to be taken that these prerequisites are not overstretched, since what is important is to have the assurance that the child will be brought up in the faith.

b) *Children born from polygamous marriages*

Catholic parents in polygamous unions obviously are not living up to the Church's monogamous concept of marriage; consequently, particular norms suggest postponement of their infants' baptism. Although the lives of such parents depart from the Catholic teaching on marriage, in as far as raising their children as Catholics is concerned some of them have proved quite responsible. In most Christian communities, polygamy does cause scandal to some, but the element of scandal and its degree varies from community to community and is partially dependent upon the education and experience of the community.⁴⁵ Some people

⁴⁵ In treating of the question of scandal in the context of the suspension of priests, John Carr observes that the *Code of Canon Law* has avoided defining or describing scandal, and this adds to the difficulty of its interpretation (see J. CARR, "The Suspension of a Cleric by the Administrative Procedure According to the 1983 *Code of Canon Law*," J.C.D. diss., Ottawa, Saint Paul University, 1989, p. 195). Traditionally the Church has understood scandal to mean "an external act or word which either because it was wrong in itself or appeared wrong in the circumstances could lead another into sin or spiritual ruin" (E. McDONOUGH, "The Judgement of Scandal," in *Concilium*, English edition, 107 [1977], p. 88). The ill-defined nature of scandal and especially its lack of precise and good

even find the baptism of a child of a practising Catholic's first wife unacceptable on account of the polygamist father. This should not be the case since the practising party usually will nurture the infant in the faith. It would also seem that, where the risk of scandal can be averted, and the Catholic parent polygamist (husband or second wife) practises the faith sufficiently to ensure Catholic upbringing of their children, baptism of children should be permitted. In these cases the community and close relatives can be a further guarantee of the children's Christian education.

2. *Relation of tithing to infant baptism*

The bishops of Malawi have also decided that if parents do not care to support the Church financially, the baptism of their children should be postponed.⁴⁶ It ought to be remembered that the bishops' directive does not recommend deferral of infant baptism in all cases when parents fail to support the Church, but it is only when they *do not care* to support the Church. It is cases of unwarranted negligence that concern this ruling. Hence, the norm should not be broadly understood to mean anybody who does not support the Church. Rather, emphasis should be placed on the carefully phrased wording of the bishops, *parents who do not care to support the Church*, words which should be given strict interpretation.

But can particular law legitimately direct that infant baptism be postponed if parents do not care to support the Church? According to canon 868 §1, ordinarily for the licit baptism of an infant it is required that: (1) parents or at least one of them or the person who lawfully

juridical determination, and the elasticity of its meaning cause many people to include nearly anything that disturbs those in authority or a section of the community.

⁴⁶ See *Compendium*, p. 49.

takes their place consents, and (2) that there be founded hope that the infant will be brought up in the Catholic religion. Should such a hope be altogether lacking, the baptism is to be put off according to the prescriptions of particular law. In danger of death cases, baptism is allowed even against the will of parents, whether they are Catholics or non-Catholics.

The question arises whether baptism could be legitimately delayed in the case where parents or one parent or guardian(s) practise(s) the Catholic faith and raise their children in the Catholic religion but do not care to fulfil the requirement of supporting the Church. The query under consideration here is whether bishops could be justified in ruling that baptism of infants be postponed if parent(s) for no good reason fail to support the Church.⁴⁷

A very broad interpretation of *practising faith and hope for Catholic education* would include the requirement that parents fulfil their obligations of Church support. Hence, particular church discipline could attach sanctions to failure in fulfilling this basic Christian duty.⁴⁸ Requests for infant baptism made by parents who, without founded reasons, fail in their overall Christian obligations, which include supporting the Church, would thus not be admitted.

Canon 222 §1 expounds this essential Christian duty in this manner:

The Christian faithful are obliged to assist with the needs of the Church so that the Church has what is necessary for divine worship, for

⁴⁷ Cf. J. DE REEPER, "The Problem of Church Tax in the Missions," in *AFER*, 1 (1959), pp. 18-26. The author reasons from canon law and pastoral necessity in justification of Church tax.

⁴⁸ Another example of an obligation that affects infant baptism is sending children to school. In this social duty Catholic parents are expected to be exemplary to the society at large in fulfilling their parental duties of wholesome upbringing of offspring.

apostolic works and works of charity and for the decent sustenance of ministers.⁴⁹

The diocesan bishop is supposed to urge the Christian faithful to fulfil this obligation. More specifically, the Code mentions that "the faithful are to contribute to the support of the Church by collections and according to the norms laid down by the conference of bishops" (c. 1262). This ruling could obviously give the bishops a leeway to fix some form of a Church tax.

However, canon 1263 strongly suggests that the legislator is not keen on taxing physical persons. The law states that the diocesan bishop has the right to impose a moderate tax on public juridic persons subject to his authority. He may enforce an extraordinary and moderate tax on other physical and juridic persons only in cases of grave necessity and after consulting the finance and presbyteral councils. A regular ordinary tax would not fit in this description of an extraordinary tax in the normal situations of well-established particular churches. For the dioceses in Malawi, which, to a great extent, financially, still depend on assistance from the Churches in the West, their situations may fit the description of *cases of great necessity*, thereby making the imposition of an extraordinary moderate tax on physical persons appropriate until free will offerings can adequately sustain the Church, or until other viable means of supporting the Church are devised and satisfactorily established.⁵⁰

⁴⁹ Also canon 1260 states that: "The Church has an innate right to require from the Christian faithful whatever is necessary for the ends proper to it." Furthermore, "the Christian faithful may freely give temporal goods to the Church" (c. 1261 §1); and "the diocesan bishop is bound to admonish [urge] the faithful concerning the obligation mentioned in c. 222 §1 and to urge its observance in an appropriate manner" (c. 1261 §2).

⁵⁰ The bishops' regulation on Church tax and infant baptism is viewed by some as penal law. Obviously, it is not and it is not intended as such. However, diocesan bishops may legislate penal laws and attach penalties to them. Canon 1315 §1 stipulates that: "those who have legislative power can also issue penal laws; within the existing limits

Is it justifiable to restrict the natural rights of children for the failures of the parents?

Two views have been expressed in this regard: the first one claims that infant baptism cannot be postponed on account of parents not supporting the Church since it is the spiritual good of the children which is at stake and especially if one considers the deficiency of material means of the majority of the people concerned, which reduces their responsibility. The second view holds that Christian parents who persistently do not exemplify a holistic approach to the practice of their faith (including material support of the faith community) are bound to fail to provide wholesome faith education to their children. And, it would appear that their lukewarm attitude to faith will most probably affect the raising of the offspring and so the baptism of their children must be delayed until founded hope can be assured.

It would seem that deferral of infant baptism because of parents' non-involvement in the fiscal support of the Church should be used only rarely in the extreme circumstances where it is abundantly obvious that the parents can afford the tax and that it is only in bad faith that they obstinately refuse to assist the Church. Indeed, it is when parents *do not care* to support the Church, when in fact they have the necessary means, that baptism may be deferred, if the particular case warrants it. The entire policy, particularly the meaning of *parents who do not care to support the Church*, should be interpreted strictly, since we are

of their competence by reason of territory or persons, they can by means of their own laws safeguard with an appropriate penalty any divine law or an ecclesiastical law made by a higher authority."

In principle, a diocesan bishop could enact penal laws with penalties to safeguard laws of the Church such as the obligation to support the Church (cc. 222 §1, 1262, 1263). Whereas a diocesan bishop's competence to establish penal laws is clear, it is disputed whether a conference of bishops can issue penal laws. Normally, the conference legislates only in those areas where they have received an explicit mandate either by the law itself or by the Holy See. Thus, it would seem that with proper mandate a conference can establish penal laws; but they can also do so within their field of competence according to canon 1315. See *Communicationes*, 8 (1976), p. 171.

dealing with sacraments to which the Christian faithful have a right (cc. 213, 843).⁵¹ This disciplinary norm may sometimes be seen as a means of helping the faithful assume their duties within a particular church that may appear unduly dependent on foreign resources for its maintenance. However, other methods of catechizing the faithful towards supporting the Church could be designed so that sacraments do not appear to be means of coercing people to fulfil their duties.

3. *Liability of parents for their children's decisions*

It may sound peculiar that in Malawi infant baptism is usually postponed if parents allow their older children to marry outside the Church.⁵² From one viewpoint, one may wonder what the invalid marriage of an older child in the family has to do with the baptism of an infant in the same family. What is expressed here is the cultural expectation and responsibility of parental participation in major decisions of their children. When a son or daughter marries, the presumption is that it is with the agreement of parents. Hence for a young person who enters into an invalid marriage it is supposed that the parents consented, which means they failed to exert due influence or they were negligent of their obligation to direct their son or daughter to celebrate a valid marriage according to the Church's prescriptions.

At a marriageable age, that is after fourteen and sixteen years of age, in Malawi as well as according to Church law, children are not considered incapable of making their own

⁵¹ In any case, it would appear that if in the local Christian community or in the extended family of the infant there is a person who would ensure the Catholic upbringing of the child, baptism need not be deferred.

⁵² See *Compendium*, p. 49.

decisions.⁵³ But although they are competent to decide, the Malawian society demands that certain decisions, such as getting married, be made in consultation with and with the approval of parents or guardians. However, one wonders up to what age of the children would this principle remain applicable.⁵⁴ It would not be true to think that parents are always held responsible for the decisions of their children because society does punish the youth for their crimes, and usually the Church in Malawi does not place restrictions on parents if their children enter illegal second marriages.

Nonetheless, for certain offenses, mostly due to parental negligence, parents are held liable for violations of their children.⁵⁵ Thus, somehow parents are traditionally expected to exert significant influence on their children especially with regard to their first marriage: in choosing a spouse and the form of celebration.

4. *Duration of the catechumenate*

The bishops have fixed the minimum duration of the catechumenate and for receiving baptized non-Catholics into the Church as two years.⁵⁶ Even though the directive does not

⁵³ The civil law of Malawi, without prejudice to legitimate Malawian customary law, prescribes the completion of specified age for placing certain acts: for instance, the *Wills and Inheritance Act* states that any person of full age, that is 21 years, and sound mind may make a valid will (*Laws of Malawi*, Cap. 10:02, s. 4); and the *Marriage Act* also requires that each party to the intended marriage be 21 years of age (*Laws of Malawi*, Cap. 25:01, s. 11). These *Acts* do not directly interfere with Malawian customary law which has its own rules governing wills, inheritance, customary marriages, etc.

⁵⁴ There are obvious ramifications of this custom on the processing of marriage nullity cases on matrimonial consent. The involvement of parental consent may sometimes appear as an element of undue pressure (force) upon the person entering marriage, thus affecting one's judgement to consent.

⁵⁵ As a matter of fact a Chewa proverb states that: *Nkhuyu zodya mwana zimapota wamkulu* (The adult gets sick from the figs eaten by a child) which contrasts with the biblical saying: "The parents ate the sour grapes but the children got the sour taste" (Ezekiel 18: 1-2).

⁵⁶ See *Compendium*, pp. 51-52.

mention exceptions to this rule, the particular laws of some dioceses, for instance Mzuzu Diocese, do allow for cases where baptized non-Catholics may be received into the Church, and catechumens be admitted to baptism in less than two years depending on their age and the stage of their spiritual journey. The catechumenate not only exposes the doctrines and precepts of the Christian faith but also helps people make a gradual transition from their initial desire of conversion to a more conscious bonding with Christ and the Church community. Since this process takes a different pace from person to person, the two year catechumenate period may need to be applied with some flexibility depending on the age, background and condition of the candidates.

5. *Baptisms of other churches*

It has been stated above⁵⁷ that with regard to baptisms of other churches, the Catholic pastoral practice in Malawi is that only the baptisms of mainstream churches like the Anglican and the Presbyterian denominations are recognized as valid since they usually keep records and, generally, their manner of conferring baptism is consistent throughout the country.

Nevertheless, a categorical presumptive characterization of baptisms of other churches as invalid merely on the ground of the impossibility of producing a trustworthy baptismal certificate does not appear to be justified. It would therefore be expected that, in keeping with the traditional customs of Malawi where birth and nationality can be attested to by means other than written records, also in keeping with the Catholic Church's tradition of

⁵⁷ See *supra*, pp. 140–143.

accepting proof of baptism by declaration of a witness or an oath of the baptized person, and with the understanding that the form, the matter and the intention are valid, pastoral workers should judge proof of baptism of each non-Catholic Christian individually, with the presumption of valid baptism, (cc. 845, 876).

6. *Ruling of bishops on confirmation*

In indicating that the Episcopal Conference of Malawi has reserved permission [the faculty] to administer confirmation,⁵⁸ despite the fact that canon law in certain cases allows a priest to confirm, the bishops seem to put a restriction on universal law. It is normal that for a good reason a bishop would delegate a priest to confer the sacrament of confirmation (c. 882). Moreover, a priest who by reason of office or mandate of the diocesan bishop baptizes one who is no longer an infant or admits a baptized non-Catholic into full communion with the Catholic Church has the faculty by law to confirm the person(s) in question (c. 883, 2°).

It does not seem clear why the Conference decided to reserve the permission [faculty]. After all, in the final analysis it hinges upon the diocesan bishop to grant to priests the faculty to confirm in his territory, in accord with the norm of the law. The Conference may give instructions and recommendations on the matter, but it cannot restrict the legitimate powers of a diocesan bishop or even of a priest.

⁵⁸ See *Compendium*, p. 57. The meaning of reservation as used here is unclear, but most probably it indicates the bishops' desire and practice that the celebration of the sacrament of confirmation be the opportune pastoral occasion to visit the parishes.

7. *Dispensation from canonical form*

The Malawian bishops have instructed that dispensations from the canonical form in mixed marriages should not be granted, except when it is a case of unsurmountable difficulties raised by the non-Catholic party.⁵⁹ This directive also seems to be unduly restricting the diocesan bishop's right to dispense. Canon 1127 §2 requests the conference of bishops to issue norms on how dispensations from the canonical form of a mixed marriage are to be granted in an orderly manner, hence it still remains the task of the diocesan bishop or local ordinary to judge whether the cause is just and reasonable for granting the dispensation from form, he may even delegate this power to some priest(s) if he deems it pastorally proper.

Dispensations from form may be of great benefit in areas, like in much of Malawi, where mixed marriages are abundant and in which case the non-Catholic parties (Christians, Muslims or other non-Christians) frequently desire and insist that the marriage be celebrated in their church or on neutral ground. A common response of Catholic ministers to requests that a marriage be celebrated elsewhere other than in a Catholic church is refusal for fear that the Catholic will defect from the Church.

The policy of rejecting requests for dispensation from the canonical form is not totally without ground; the concern that the Catholic in a mixed marriage may convert to the religion of the spouse is not imaginary but real, since it has happened and it continues to occur. However, this concern appears to have developed into a *phobia of the non-Catholic*, which

⁵⁹ Ibid., p. 62.

sometimes impedes appreciation of the fact that there are successful mixed marriages, and that Catholics who have had their marriages in non-Catholic churches do not always defect.

What is unfortunate about being overly strict and rigid in granting dispensation from form is that a number of Catholics are unnecessarily left in irregular unions and so are precluded from receiving Holy Communion. Being of the opinion that the Church in Malawi could be more understanding with regard to the celebration of mixed marriages does not mean that all rules should be relaxed or that every request for dispensation from form should be admitted. Not at all; each case must be looked at on its own merits, but without being preconditioned by the misleading presumption that Catholics married to non-Catholics without canonical form convert to other religions. Actually, celebrating a mixed marriage in the Catholic Church is not always in itself a guarantee that the Catholic party will remain Catholic.

In some dioceses, residues of the old *anti-mixed marriage attitude* of the Catholic Church continue to operate in their unwritten policies. This may even take the form of refusing to issue baptismal certificates. For instance, Catholics who ask for their certificate of baptism in view of having their (mixed) marriages celebrated in a non-Catholic church often are refused the certificate. The alleged reason for refusing to issue a certificate in such cases is that most non-Catholic churches and religious sects are understood to equate such a certificate of baptism to a *certificate of transfer* from one religion to another. Clearly, this is a misapprehension of facts; but the Catholic Church does not have to react and respond with an outright denial. A person has a right to his or her baptismal certificate which is a

proof of one's status in the Church (cc. 96, 204).⁶⁰ However, when a baptismal certificate is issued in these circumstances, prudence would require that an annotation be appended to the document explaining that the certificate merely states the fact of baptism and that it is in no way an authorization to transfer from the Catholic Church.

In any case, even though the Code in no way states that a Catholic has the right to leave the Church, which would be contrary to the constant practice of the Church, it foresees the possibility, without condoning it, of a person leaving the communion of the Catholic Church when it declares that:

Without the express permission of the competent authority marriage is forbidden between two baptized persons, one of whom was baptized in the Catholic Church or received into it after baptism and has not left it by a formal act, and the other of whom is a member of a church or ecclesial community which is not in full communion with the Catholic Church.⁶¹

People sometimes leave the Catholic Church. The Church has an obligation to help the Christian faithful maintain communion with it, but it has no mandate to force people to remain in the Church, if in freedom they choose to depart. Some Catholics decide to join the church of their spouse for the sake of unity of worship; for the same reasons some non-Catholics convert to Catholicism. An extreme scenario is the case of a Catholic who approaches a parish priest and asks him to delete his or her name from the baptismal register

⁶⁰ Canon 487 §2 states that "It is a right of interested parties to obtain personally or through their proxy an authentic written copy or a photocopy of documents which are public by their nature and which pertain to the status of such persons."

⁶¹ Canon 1124. Also see canon 1117 which says: "[...] the form stated above is to be observed whenever at least one of the contractants was baptized in the Catholic Church or received into it and has not left it by a formal act." A distinction must be made between merely non-attendance in the Catholic Church and leaving the Catholic Church by a formal act. It is to be noted that these canons on formal departure from the Catholic Church are related to marriage primarily to avoid multiple invalid marriages.

since the person has or is determined to join another church. After weighing the seriousness of the situation and in compliance with particular norms, the proper action to be taken would not be to delete the name but to make a note of the fact of one's decision to leave the Catholic Church and join another church. Making this annotation in the baptismal register is not cooperating with the defecting party. Formal departure from the Catholic Church is not created by making an annotation in the baptismal book or by issuing a baptismal certificate, it occurs within the person and it finds its manifestations in the external act.⁶²

Pastoral workers are to assist the Christian faithful to resist undue coercion to leave the Catholic Church. The means chosen to keep the faithful in communion with the Church must be just and fair, with due respect to human freedom, dignity of the person and religious liberty. It is desirable that Catholics should stay in the Church because they want to be part and parcel of it and not just because rules are so tight that it is extremely difficult to get out. Rather than seeking to secure *our own house* we should primarily be announcing that all are invited to the household of God, and more than by anything else, people should be attracted to the Catholic Church by whatever beauty and blessings of God it represents and reflects.

The law of the Church leaves it to the diocesan bishop to discern the feasibility of applying the dispensation from form in mixed marriages. In large dioceses, in terms of population and/or distance, the bishop will often not be in proximity to the cases, so he may have to rely on the opinion of the parish priests or other priests who may have been delegated to handle these cases. Whoever takes care of the cases will need to show adequate

⁶² See P. COGAN, "The Understanding of Formal Departure from the Catholic Church in the 1983 *Code of Canon Law*," J.C.D. diss., Ottawa, Saint Paul University, 1991, 260 p.

respect and trust in the decisions and requests of people, respect for the freedom and maturity of people, as well as sensitivity to ecumenical concerns. Records of granted dispensations should be duly made according to the norms of the conference of bishops or diocesan bishop.⁶³

8. *Radical sanation or retroactive validation*⁶⁴

Connected with the prevalence of invalid marriages, which are predominantly due to lack of canonical form and the impediment of disparity of cult, is the amazing rare use of *sanatio in radice* for cases where the non-Catholic partner is unwilling to validate the marriage in a Catholic ceremony. Mindful of difficult marital situations, the Church's law provides radical sanation for the validation of invalid marriages. Retroactive validation takes place without a renewal of consent and it includes a dispensation from an impediment, if there was one, and from the canonical form, if it was not observed (c. 1061).

Just as it is preferred that mixed marriages be celebrated according to the canonical form rather than have the form dispensed, so also in case of validation the pastoral leaders favour to have the celebration (with the exchange of consent) in Church to granting radical sanation. However, in some cases non-Catholic partners, occasionally Catholics too, adamantly refuse to celebrate the marriage a second time, and thus without the use of sanation the Catholic spouses remain barred from the sacraments. A softening of the stand and pastoral practice on *sanatio in radice* would assist several Christians to benefit from the sacramental

⁶³ Cf. PAUL VI, Apostolic letter, January 7, 1970, *Matrimonia mixta*, 10, in *A.A.S.*, 62 (1970), pp. 257-263; English translation in FLANNERY I, p. 513. See canon 1121 §3.

⁶⁴ Cf. W.H. WOESTMAN, O.M.I., *Special Marriage Cases*, p. 95.

life of the Church. Application of sanation must, however, be in accord with the law, namely: the consent of each party must perdure at the time of the sanation (c. 1163 §1), any natural or divine positive law impediment must cease to exist (c. 1163 §2), and there should be the probability that the parties intend to persevere in conjugal life (c. 1161 §3).⁶⁵

D. Cultural Evolution and Particular Church Legislation

1. *Impact of cultural change*

The Malawian cultures and social-economic systems are not static: they are under constant dynamic change in face of intercultural dialogue with other societies. The changes are accelerated by the increase in the methods and quantity of communication, mass production of commodities and people's mobility in this day and age. The world has become, so to say, a global village with international communication and trade. Thus, the economy, political systems and events of one country or continent influence other countries or at least have a bearing on transcontinental institutions and corporations. Being part of a world community, Malawians must share and participate in finding solutions to some of the global concerns like: the quest for a cleaner environment, the problem of deforestation, the threat of extinction of certain species of animals, the so-called anxiety of population explosion, the

⁶⁵ Arguments have been raised in support of the practice of applying radical sanation to some polygamous marriages: for instance Alex (Catholic or non-Catholic) in 1987 enters a customary or a civil marriage with Christine (a Catholic). In 1990, while Christine seeks to have the marriage validated, Alex marries a second wife, Justina (Catholic or non-Catholic). Assuming that consent was validly exchanged according to customary or civil law, some contend that even though Alex is in a simultaneous polygamous union, his marriage with Christine can be sanated. A contrary opinion, which the author ascribes to, is that sanation cannot be validly applied to such a case because a logical analysis of the canonical concept of marriage consent includes unity and indissolubility. When marriage is being sanated, it is expected that consent to the essential properties of marriage must continue to exist, and when Alex entered the second marriage he rendered his consent to Christine defective. Rather than using *sanatio in radice* for such cases, the use of the pastoral internal forum solution could be explored, on a case by case basis, in favour of the first wife.

existence of rich and poor nations side by side, arms race and the threat of nuclear warfare, the likely depletion of the earth's resources etc.

Participation in and interaction with the world community cannot leave a country insulated from outside influence. For instance, the capitalistic drive that stimulates the self-interest of individuals and transforms it into a powerful instrument of social change targetted at the creation of wealth through the maximization of production at a profitable minimal cost is powerfully attractive to Malawians. However, it is based upon principles that have a dominant potentiality to gradually transform, if not erode, Malawian traditional values.⁶⁶ From one perspective, it may be said that uncritically opting for other patterns of social-economic development may lead to self and cultural alienation which eventually devoids a people of its heritage. However, although the evolution of any culture is inevitable, the course it takes, to a substantial degree, can be controlled by conscious, deliberated decisions of the members of the society.

For this reason, since independence the government of Malawi has taken decisive steps to preserve the cultural heritage of its people through its legislation and by maintaining

⁶⁶ The adoption of the western notion of private property, the drive for private investment and the acquisition of wealth through well-planned, skillful, competitive and efficiently monitored economic actions not only has the capacity to increase an individual's and a country's economic growth, thus expanding the availability of consumer goods and services for a more comfortable existence, but it also sets into the society new trends which counteract the traditional patterns of communal sharing and common ownership of essential assets, e.g., tribal land. People begin to value and perceive time and efficiency differently; the accumulation of goods for use by the most immediate (nuclear) family as opposed to the greater (extended) tribal family becomes more appealing to the younger generation which is prone to western influence. The modern institutions of education, medical care, labour and work-force in industries and other social services mobilize and regroup people into new structures, which thus tend to siphon the populace into urban areas, where traditional rules and behaviour are often no longer strictly applicable, because of the new conglomeration of people with differing cultural backgrounds.

certain traditional institutions.⁶⁷ Efforts at conserving the traditional social values take place alongside people's aspirations for modernity in the form of western values. These two movements, on the one hand conserving tradition and on the other hand adapting and adopting new models and styles of life occasionally produce tension. The tensions are evidently present not only in the civil society — politics, economic theories, town and civic planning, rural development programmes, education, medicine, etc. — but are also felt in the life of the Church. While there is a lot of talk about adaptation and inculturation of the faith to the local cultures, there is a great awareness of the fact that some Christian faithful are perfectly happy with the Church with its western features, they prefer to retain the Church as it has been handed on to them. Some tend to resist change and prefer to avoid the tensions that come with the task of having to give up centuries-old patterns of behaviour, beliefs and concepts and adjusting to new ideas.⁶⁸ Some of these tension-generating areas of Malawian cultures, faced in and without the Church, will now be discussed in brief.

2. *Position and role of women*

Traditional Malawi exhibits many explicit and implicit forms of precise role definitions for males and females based upon cultural expectations as handed down by each tribal

⁶⁷ The cultures of the peoples of Malawi are sustained through the tribal languages which fortunately have not been suppressed, by traditional dances, folklore, proverbs, witchcraft beliefs; as well as in rituals and customs surrounding marriage, death, sickness and healing by the intervention of local medicine-persons. Civil legislation has maintained, with some modifications, the traditional institution of chieftaincy, traditional courts of law, customary forms of marriage and tribal land governed by customary law, all of which help to link the people with their treasured past.

⁶⁸ Tensions of cultural change may be compared to the *birth trauma concept* in Sigmund Freud's developmental psychology in which he explains the first, major trauma or anxiety of a baby who has to be disconnected from its accustomed environment, leave behind the comfortable, sheltered womb of the mother for the unknown, hostile world.

group.⁶⁹ The advancement and extension of education in an increasingly industrialized world is creating new opportunities for diversified employment and development of skills which evidently have an effect on the roles believed to be culturally defined for men and women. As a result of this, combined with the infiltration of ideas about concerns of women as expressed in the west, Malawians are growing in awareness of a new, evolving image of woman, one that apparently departs from the conventional model.

Adapting or inculturating Church—life to Malawi through particular legislation has to deal with the question of how, with respect for the traditional culture, to implement the Gospel and the Code for a people whose cultural traits are changing. Should local legislation be formulated to preserve people's cultural heritage or should it inspire change towards the desired social and gospel values? For instance, if a Christian community is culturally disinclined to accept a certain group of people e.g., like women fulfilling some functions, e.g., of leadership, as catechists, or as extraordinary ministers of Holy Communion, should legislation respect such traditions of people or should the prescriptions of the Church be made to stimulate the appropriation of new values?

However, what the particular church regards as respect for and recognition of stratified social roles in the tribal society may be interpreted by others as social discrimination which infringes upon the principle of equality of all the baptized.⁷⁰ But, even if we are all

⁶⁹ There are things that men do and activities and roles which are attributed to women, of course, admitting of exceptions to the general, flexible, unwritten rule of role definitions.

⁷⁰ Canon 208 enunciates this principle: "[...] there exists among all the Christian faithful a true equality with regard to dignity and the activity whereby all cooperate in the building up of the Body of Christ in accord with each one's condition and function."

agreed that there is an equality in dignity for all the baptized,⁷¹ some structures which serve to foster a certain inequality remain operative because of the unfortunate inability to appreciate the relation and division between culture and nature. Some of the roles and functions, that culture and tradition have determined and assigned for men or women most probably, inaccurately have been said to arise from nature itself or even from the nature of the institutions themselves.

In any case, legislation in the Malawian Church has to grapple with the fact that people and their cultures are changing, even though at different rates for different social groups. For example, the rising consciousness of the equality in dignity of men and women and its translation into social life, apart from enriching and empowering the society, affect the marriage institution and other longheld traditions. Polygamy, for instance, is on the decline;⁷² primarily not because of Christianity but due to the new money-economy which favours smaller families, gradual achievement of independence and freedom for women, and the growing desire for social and economic self-aggrandizement etc. The guidelines and directives of the Church in Malawi will have, more seriously, to take into account the cultural changes underway, since these changes have repercussions on several social and ecclesial institutions.

⁷¹ Prior to the *equality in dignity of all the baptized*, there is the *equality (in human dignity) of all men and women*. Even though, the concept of equality (of all people) may be accepted by all nations, the actual experience of many societies reveals that numerous social and tribal groups function under the erroneous assumption of (natural or inherited) inequality, e.g., of sexes, of race, of one tribe over another, of caste system, of language, of culture.

⁷² While many people concede that, due to social, economic and religious reasons, polygamy is on the decline in modern Malawi, it is also contended that cases of polygamy exist in new forms among those who have adopted western value systems and live in urban areas where the cost of living is high.

3. *Individual responsibility*

The cultural changes which are occurring in Malawi bear upon people's personal image and identity within the social group. As values are re-defined, and people's world view is reconstructed and enlarged through contacts with other cultures, the understanding of personality and *personhood*, the relation of the person and the community are also altered. Thus, without necessarily totally departing from the original traits, a shift takes place in their personality traits:⁷³ for instance, from being submissive to being assertive, from being community-oriented to being self-oriented, from a sharing predisposition to a hoarding inclination, etc. Hence, the personal mode of operation and decision-making appears to switch from dominantly *community-conscious-decisions* to principally *self-conscious decisions* which essentially aim at satisfying the needs of the individual.

This alteration in the value system is most obvious in the development and escalation of *individual responsibility*⁷⁴ with a corresponding decrease in parental or group participation in a child's or individual's affairs among Malawians. For example, at their marriages, some youth do not involve parents as much as young people did twenty years ago. This means that the *double marriage consent*, which consists of the consent of the parties and that of their parents or marriage guardians, demanded by customary marriages is not always ensured. The enforcement of cultural traditions and particular church legislation must keep in mind that

⁷³ It is suggested that, without necessarily putting any value judgement on them, one can talk of a characterization of a *western personality*, *Chinese personality*, *African personality*, *traditional Malawian personality* as well as *modern Malawian personality*.

⁷⁴ Individual responsibility as used here should not be taken to imply that it was non-existent among Malawians, but rather that important personal decisions were consciously or even verbally participated in by others in one form or another. Advice and consultation would be sought, and at times they are mandatory, before making major decisions. However, the person who decides — be it a chief, a judge, or a young person intending to marry — appropriates the final decision, as well as the benefits or blame flowing from it.

today some youth would like to take absolute responsibility both for their decision to marry and for handling the stages leading to marriage.

In this connection we also need to address the issue of parental liability or responsibility and the postponement of infant baptism in the context of the detectable growing individual responsibility in Malawi. Liability for wrong doing receives a broader meaning in Malawi: in certain situations parents are held partially responsible for the mistakes of their children. At times children are deprived of spiritual assistance, for example, baptism is delayed, because parents have not fulfilled their Christian duties, e.g., unwed mothers, not caring to pay Church tax, polygamous parents etc. As people become more concerned about their individual responsibility and as young people distance themselves from parental surveillance and control, a process which contributes to the loosening of the communal ties, the Christian communities may become less concerned about the private lives of the parents and its effect on the baptism of children. This may therefore help change the culturally bound rigid interpretation of rules on postponement of infant baptism in Malawi.

4. *New social values*

With the emergence of new monetary resources, educational demands and economic means of survival new social values unfold. The green nature, animals, land and the ancestral spirit world, for ages revered and brought into harmony with seasonal cycles and activities of the tribal *munthu*,⁷⁵ are now perceived differently: hence, other ways of relating to them

⁷⁵ The term *munthu* is the Chichewa and Tumbuka languages equivalent of the Latin *homo* representing human being, human race; it makes the essential distinction between the human person (*munthu*) and other animals, it is inclusive of both male and female.

become imperative. Also, new problems surface on the scene: with the urge to have greater production, deforestation and over-cultivation of land result. As the traditional world view dissipates, a growing distinction between the mundane and the spirit world ensues thereby affecting religious beliefs. And with the transformation of the means and goals of production, the role and meaning of work and human labour also change. At the heart of it all, the family is affected: family relationships are being re-defined and the need to control the size of families, never seriously thought of before, is today a broadening concern.

These concerns will soon begin to be the focus of particular legislation in Malawi as the aforementioned issues exacerbate. For example, in spite of the great love for children among Malawians, social economic factors and responsible parenthood will be compelling them to find effective ways of limiting births. Family planning efforts may sometimes, and occasionally with external influence, lead to abortion. The question of *AIDS* and the medical recommendations for its prevention touch upon family life if a spouse or anyone planning on marriage is affected. These issues have bearing upon: marriage nullity cases,⁷⁶ the life of the Church and its teachings which must find local application in Malawi. The guidelines and directives of the bishops of Malawi which we studied did not address these concerns. It is expected that in the near future the bishops will take up these questions.

⁷⁶ Family planning in the form of limiting the number of births whether through the use of contraceptives or not is sometimes correlated to the notion of exclusion of children, or denial of or limiting the rights of parties to conjugal acts, which are open to procreation, and thus may impinge upon matrimonial consent (c. 1101 §2).

5. *Structures of authority*

With some variation from tribe to tribe, traditional authority structures were hierarchically organized at the village, clan and tribal levels, having a village headman/woman or chief who functioned in legislative, judicial and sometimes executive capacity. They governed with the help of *ndunas* (councillors) who were usually appointed by the headman or chief after due recommendations from the consulted, concerned *ndunas*. However, not all tribes were immune from despotic rulers who would forego the use of councillors as individuals or in council. After all, there were not many tribes that had strict rules of procedure for decision-making.

The Church's manner of governing partially resembles that of the Malawian traditional cultures.⁷⁷ However, other concepts of governing, for example, principles of democracy as incorporated in the political and business world are re-shaping the thinking and expectations of people.⁷⁸ Hence, even though the Church's style of governing is similar to that of traditional Malawi, some Christian faithful begin to resent any appearance of a monarchical, authoritarian mode of leadership in the Church, whether it be influenced by Malawian traditional models or by certain traditions of the Church. The governing service of the Church is an area of tension: while some, in the name of fidelity to the cultural heritage, still cling

⁷⁷ The diocesan bishop has, by divine institution, the three powers (legislative, executive and judicial) in himself; though he often exercises executive power through his vicar(s) general or episcopal vicars, and judicial power through a judicial vicar and judges (c. 391). He is appointed by the Roman Pontiff; and for certain decisions he needs the consent of or advice from defined councils or college of consultors.

⁷⁸ In this connection, we may speak of the desire of the particular churches to have greater explicit participation in the choosing of their bishops, with a more open process than is articulated in canon 377. Actually canon 377 §1 states that the Supreme Pontiff freely appoints bishops or confirms those who have been legitimately elected, which apart from recognizing what has existed as custom in the Church may also indicate the possibility in due time of granting to particular churches the power to elect their bishops. Cf. F.G. MORRISEY, "Episcopal Conferences and the Three *Munera*," in *The Jurist*, 48 (1988), p. 28.

to supposedly outmoded and unadapted concepts of leadership which are being modified or at least in need of re-interpretation, others are dissatisfied with submissively and unintelligently yielding to authority figures. As the Christian faithful yearn for greater and active participation in the Church in fulfilment of their rights and obligations, viable forms and structures of leadership and service must be designed to accommodate fully the faith which must be expressed in a plurality of modes in the diverse cultures of the world.

Conclusion

In this chapter, we have attempted to evaluate the guidelines of the Episcopal Conference of Malawi which have been treated in chapter three. Both the *Compendium*, a summary of pastoral decisions of the bishops of Malawi prior to 1983, and the directives of the Conference in response to the demands of the revised Code, have not been promulgated as laws in the sense of canon 455. Even though they are not decrees, they serve as pastoral guidelines for the Church in Malawi, and each diocesan bishop can adopt some of these directives as laws in his diocese provided it is a matter on which he has competence to legislate.

It has been observed that the bishops have expressed remarkable interest in maintaining local customs, for instance, in the celebration of Christian marriage. In other areas, however, the guidelines seem to have overlooked opportunities for inculturation, for instance in the *Priestly Formation Programme* and partially in the marriage ritual and the catechumenate programme. These are some of the chances the Code gives to particular churches to express their cultural diversity.

In an apparent effort to retain the traditional structures of the Church which are claimed to offer satisfactory services to the Malawian Church, the Conference of Bishops has resisted the introduction of the permanent diaconate and lay judges. Although lay distributors of Holy Communion may be used on few limited occasions (c. 910 §1), it is clear from the directives that the preferred option is that only priests do it.

Our review of the guidelines of the bishops has also indicated that there is a set of rules on infant baptism, the granting of dispensations, sanation, etc. which reveal a uniquely rigid interpretation, especially with regard to postponement of infant baptism for reasons of insufficient hope for the education of the child in the Catholic faith. Cultural elements do affect interpretation of universal law and the development of particular law.

Finally, leading customary elements that emerged in this evaluation are: some Malawian marriage customs and consent, importance of the community, parental liability and individual responsibility, and tendency to hold on to the traditions. The acceptance or non-acceptance of these and other cultural qualities have had an input in shaping the directives of the bishops in the process of creating particular laws for the Church in Malawi. However, the Malawian society is, like any other society going through cultural change as a result of the intermingling of peoples of the various cultures in the world. Consequently, new tensions and challenges arise. Hence the guidelines and laws of the bishops have to address not only the traditional, cultural heritage of Malawians but also the new realities that come to birth as Malawi evolves in the modern world.

CONCLUSION

In examining the norms and the development of the particular law of the Catholic Church in Malawi, this thesis has attempted to show the role of the conference of bishops and the significance of particular legislation and guidelines for the growth of distinctive and diverse particular churches in Malawi. Particular law is a useful and efficacious tool for safeguarding what is most precious and dear to a people, so that they are able to develop and to live according to that dynamic, evolving culture in which the Creator has placed them. It will also enable them to accept and respond to the call and challenges of the gospel with the resources of their cultural patrimony as well as with those of Christian tradition and the indispensable truths of Christianity. The Church respects and takes into account the legitimate differences of peoples whose diverse cultural identities not only should be preserved and be allowed to advance with time but also be incorporated and used for the enrichment of the Church in its structural and faith expression. The legitimate diversity of particular churches within the one Catholic Church has greater chances of being realized if the concept of particular law is broadened and taken more seriously at all levels of the Church.

The particular churches in Malawi, as in much of Africa and to some extent also throughout the world, experience a disparity between some of the laws and teachings of the Church and certain features of their local culture and traditions. The Catholic Church has been viewed by some people as propagating a uniform system of laws and patterns of Church structure everywhere in the world. While some of the merely ecclesiastical disciplinary laws are not absolutely necessary in all particular churches, the universal Church has the function, through its common law, of ensuring that basic divine truths of the Christian faith are safeguarded, so that peoples and their cultures are truly reformed and inspired by the fundamental Christian values. However, in most African countries there is a general

perception of much of Church law as being equivalent to colonial law of pre-independent Africa which in many respects was not supportive of the local customs and traditions of the people in their culturally different localities. Missionaries sometimes mistakenly identified the gospel and Christianity with their own culture and civilization, nevertheless they were right in proclaiming the gospel as the yeast of all cultures.

Aware of the difficulties of applying certain universal laws in missions, the Church and missionaries did make some adaptations in its laws. In the past, the universal Church addressed this issue by the provision of missionary faculties. These faculties were means of adapting the administration of Church life to the peculiar circumstances of the missions: a strong indication that not all laws of the Church could be applied identically and with the same vigour throughout the world. The faculties were not strictly a new body of laws (they could be called quasi-laws), but for the most part authorization of exceptions to the common law. In a way, the daily, common life of the Church in missions was considered temporary and an exception to the norm, hence the grant of special powers to local ordinaries.

The Second Vatican Council officially adopted the principle of adaptation especially in the constitution on the liturgy *Sacrosanctum Concilium*, the decree on missionary activity *Ad gentes* where diocesan bishops and conferences of bishops are granted power to draw up norms and sometimes even to legislate in defined areas. The revised *Code of Canon Law* following the teaching of the Second Vatican Council¹ and in accordance with the principles

¹ See *Christus Dominus*, 8, 38, *Lumen Gentium*, 27.

laid down for the revision of the Code,² re-established and re-emphasized that diocesan bishops have full pastoral competence in their dioceses and granted them extensive dispensing powers for the fulfilment of their pastoral office, and thus almost all missionary faculties have been made obsolete.

One of the major innovations in the 1983 Code is the role of conferences of bishops in particular legislation and their role of jointly exercising pastoral functions and thus appropriately adapting the apostolate of the Church to the diverse circumstances of the time and place.

Universal Church legislation is no longer primarily an instrument of bringing about uniform and inflexible ecclesiastical structures and institutions with a very centralized system of government, as the tendency has seemed to have been in the past. Polarity between the universal Church and the particular churches is still perceived to exist in some areas. However, on several occasions, Vatican II insisted on the communion and unity of the particular churches within the universal Church. A proper balance needs to be maintained between, on the one hand, structures and laws constituted to safeguard the unity and communion of the particular churches and, on the other hand, those laws and structures which have been devised to promote particular churches and to protect the right to their own distinctive characteristics. Unity, one of the Church's essential attributes, admits of diversity and hence the communion of the universal Church also has a place for the full flowering of

² Principle no. 4 guided that extraordinary faculties to dispense from general laws should be made ordinary with minimum of cases reserved to higher authorities and principle no. 5 called for a greater application of the principle of subsidiarity in the Church to ensure a healthy decentralization (see American Version of the English-Language translation, *Code of Canon Law*, Latin-English ed., p. xxi).

each particular church in its unique selfhood and cultural heritage. A continued balanced development of particular legislation in dioceses and regions of conferences of bishops holds a great promise for the enrichment of the Church through diversification and growth of the distinctive charisms and cultural patrimony of individual nations and countries.

In this dissertation, we have discussed how universal law has defined and limited areas on which the conference has competence in order to maintain some exercise of collegiality as well as to safeguard the competencies of diocesan bishops in their territories. The principle of subsidiarity expressed in the functions granted to conferences of bishops indicates a notable gesture of the universal legislator of supporting and advancing the growth of particular churches. Other areas for particular legislation could be included by the Holy See at its own initiative or at the request of the bishops (c. 455 §1).

This study has considered the role played by the Episcopal Conference of Malawi in legislating or in providing pastoral directives since its establishment. Two documents have been studied: the *Compendium* and the "Minutes of the Episcopal Conference of Malawi on the Implementation of the 1983 Code." The documents, even though not legal documents with binding power, are texts which deserve serious study and reflection for they deal with issues of special importance to the growth and development of the Church in Malawi. A study of these documents has revealed certain characteristics of the Church in Malawi.

This thesis has recognized the revised Code's openness to adaptation and inculturation through the provision of particular law at the national or regional level as well as at diocesan level. It may be said that the Code has not been as open to adaptation as Vatican II, and that

it could have left more areas of the Church's life for particular legislation. For instance, laws regulating tribunals, procedures, certain laws governing matrimonial consent, matrimonial jurisprudence, certain dispensations reserved to the Apostolic See e.g., clerical celibacy, greater participation by the particular church in the selection of a bishop, etc. could be further determined and decided upon at the local level.

The norms of the Episcopal Conference of Malawi have concern for the local culture: for example, the Conference has directed that local customs, especially with regard to marriage be respected; and because of cultural differences it has been suggested that there be diocesan marriage rituals. Nevertheless, we have observed that, in our opinion, it appears that the Malawian Church has missed a number of opportunities for formulating norms that would have particular cultural and social relevance to the local circumstances of the Church.

This investigation has also indicated that despite the voices from Africa for a change and modification of ecclesiastical laws so that praiseworthy African cultural values and customs could be incorporated into the structures and life of the Church, the Catholic Church in Malawi has not fully utilized the limited possibilities for inculturation and particular legislation within the current Church law: for instance, the marriage ritual and the Priestly Formation Programme. Ecclesiastical institutes and ministries like the permanent diaconate, extraordinary ministers of the Eucharist, lay people assisting at marriage, which among other reasons were re-instituted for situations like those in Africa where there is a shortage of priests, are unfortunately either not availed of or not put to greater use. Sanations and dispensations from canonical form in mixed marriages are rarely granted for fear of scandal

or loss of Catholics to other churches; consequently some Catholics unnecessarily remain in invalid unions and are not admitted to the Eucharist.

Greater initiatives must still be taken by the Church in Malawi. Within and under the present system of Church law, a lot more can be done than the particular churches seem to believe and think. For example, Fr. Francisco T. Urrutia notes that much of what the African bishops asked for at the 1980 Synod of Bishops is already granted by Vatican II and the Code.³ Fr. Richard Côté also remarks that much of inculturation depends on Africans themselves, noting that "[...] the real enemy of localization and religious inculturation lies within, not outside."⁴

In our analysis, we have noted that certain issues which seem to concern the everyday faith-life of many Catholics in Malawi are not the subject of the norms of the bishops. There appears to be a loud silence in the directives on the question of non-admittance to baptism and the Eucharist of numerous persons due to a variety of reasons, irregular marriage unions (e.g. due to polygamy or lack of canonical form) being principal among them. Aspects of universal law that are troublesome to particular churches need to be rethought and may even require to be more directly addressed by the churches in Africa, in dialogue with the universal legislator. Though not of frequent occurrence, the Holy See can grant other powers to conferences of bishops and diocesan bishops either *motu proprio* or at the request of the

³ Commenting on proposition 18 of the 1980 Synod of Bishops that Episcopal Conferences study the cultural elements surrounding marriage and family in order to accomplish a real inculturation of the Christian faith at the theological, pastoral, liturgical and disciplinary levels, Fr. F. T. Urrutia notes how ironical it is that 15 years after *Ecclesiae sanctae* III, 18, authorized this very idea a Synod of Bishops should propose just that (see "The Challenges on Canonical Doctrine on Marriage Arising from Africa," in *Studia canonica* 23 [1989], p. 12, footnote 9).

⁴ R.G. Côté, "Statement of the Third World Theologians, a Comment," *AFER*, 19 (1977), p. 224.

conference. However, our preference would be for a clear-cut grant of relatively broad areas of competence for diocesan bishops according to their role as vicars of Christ in their dioceses, but of course, with due respect for the common good of the universal Church.

The study has attempted to show that in the process of adapting and implementing the revised legislation, use of praiseworthy customs and values of the Malawian peoples should be made, however, keeping in mind that culture is not an absolute norm above the gospel, and that no culture is static. Cultures and people change, and we find some Malawians today who tend to be more at ease with the western modes of being and behaviour because of communication and the desire for affiliation with the global community. Even in the Church some Malawians express preference for traditional Catholicism and its traditional liturgy with minimal adaptation. Hence, at times a variety of modes or structures of Church life may be needed, e.g., multiple marriage rituals, a catechumenate programme that accommodates different conditions of people, acceptance of lay ministers or permanent diaconate on a diocesan, regional or even parish level, varying role of women in the Church depending on the preparedness of the people etc.

An area open to a more in-depth research is the systematic study of the proposals at Vatican II from the bishops of Africa and the rest of the world on inculturation and the importance of adapting Church law to the cultures of people. The incorporation of these recommendations in the documents of Vatican II as well as how they have been translated into the revised legislation could be a topic for further research. An investigation could also be made on the influence and participation of the particular churches of Africa in the 1983 Code revision process and possibilities for the development of a vibrant particular law for the

Church in Africa. Additional research could be made in the following fields: tribunals and the development of particular procedural law for various cases, the development of an inculturated programme of priestly formation in Malawi. Also, a consideration of the prospects of a future Code and what the Church in Malawi would hope to be broadened and redefined regarding the competence of conference of bishops and diocesan bishops for particular churches to be capable of determining their own legal unique cultural and theological identity. A brief look at the integration of Malawian customary law and the adopted British law, and how customary law was consolidated as well as reformed provides lessons of inculturation. This is an important aspect which requires further research. Such study could reveal why Malawi civil law has held onto certain longstanding customs and traditional institutions while setting others aside and what values are enshrined therein. Finally, a comparative study of inculturation in the Church and in the civil society can also offer a useful reflection on the trends, beliefs and values that drive the country and the Church in response to inevitable social and cultural change.

It has been stated that the norms and directives of the bishops of Malawi have not been promulgated as decrees in the sense of canon 455. In the *Compendium* the bishops explicitly assert that the contents of the document are directives and up-dated decisions to which pastoral workers should refer. Even though most of the issues dealt with are points which the universal law enjoins the conferences to enact particular law and to issue norms, it is obvious that the bishops did not strictly intend to legislate, but only to provide pastoral guidelines as they state in the preamble to the *Compendium*.⁵

⁵ See *Compendium*, p. 5.

We have raised the question of the status of the bishops' directives especially in view of the fact that the norms and *would be decrees* have not been promulgated according to canon 455. An answer to this query certainly appears to be that they have no legal binding force, however they have the jointly exercised pastoral authority of the bishops which serve as strong regional recommendations. In certain cases, the individual bishops could make these directives into legislation in their own dioceses; and bishops could implement such decisions, like the Programme of Priestly Formation, even though they have not received the Holy See's *recognitio* or approval.

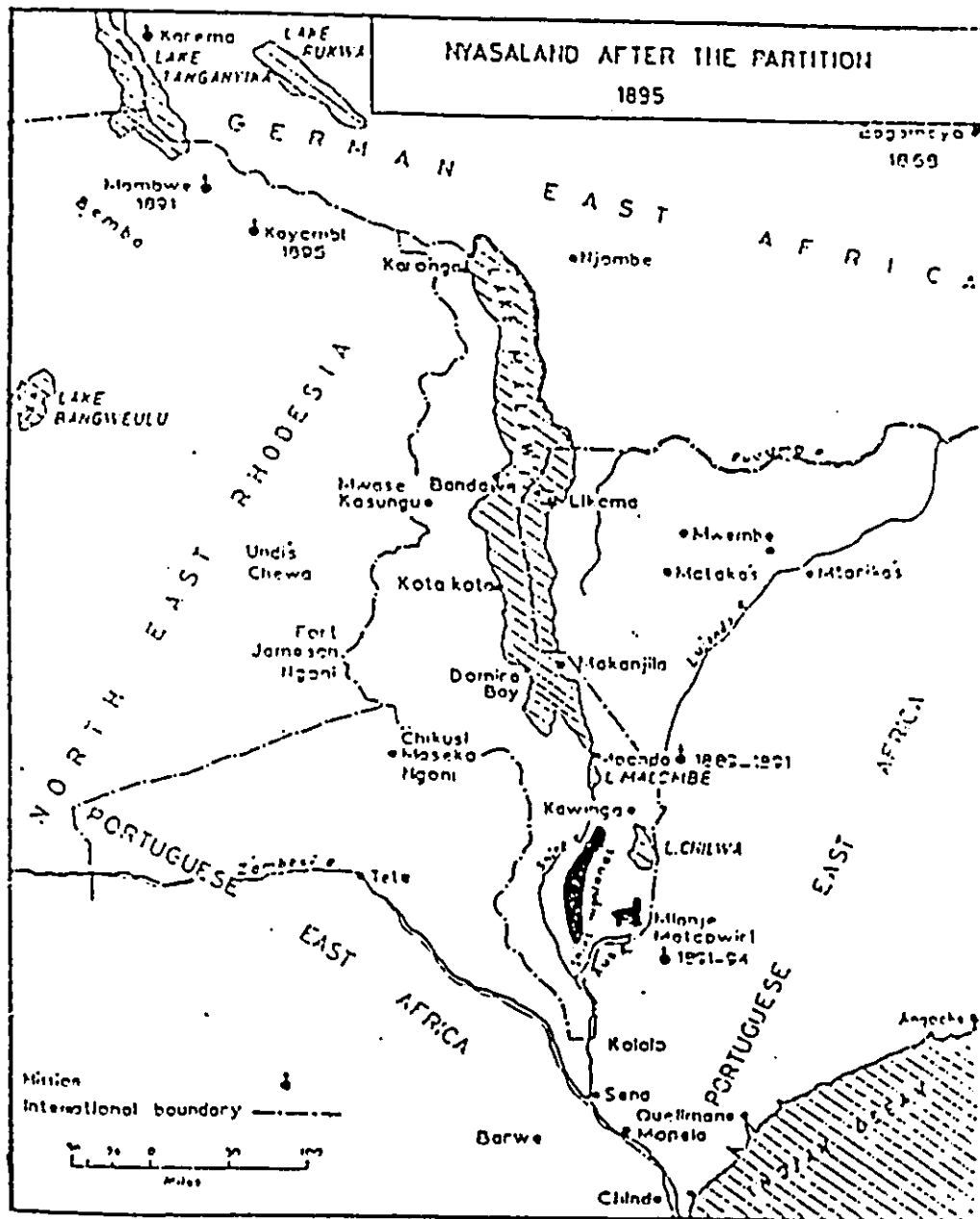
The thesis has noted that particular churches need not rush into issuing decrees; much time and consultative deliberation should precede such legislation. In fact, some bishops may prefer a minimum of laws by the conference so as to leave diocesan bishops with greater autonomy in their dioceses, in this way bishops could revise their directives more easily without first having to seek the *recognitio* by the Apostolic See.

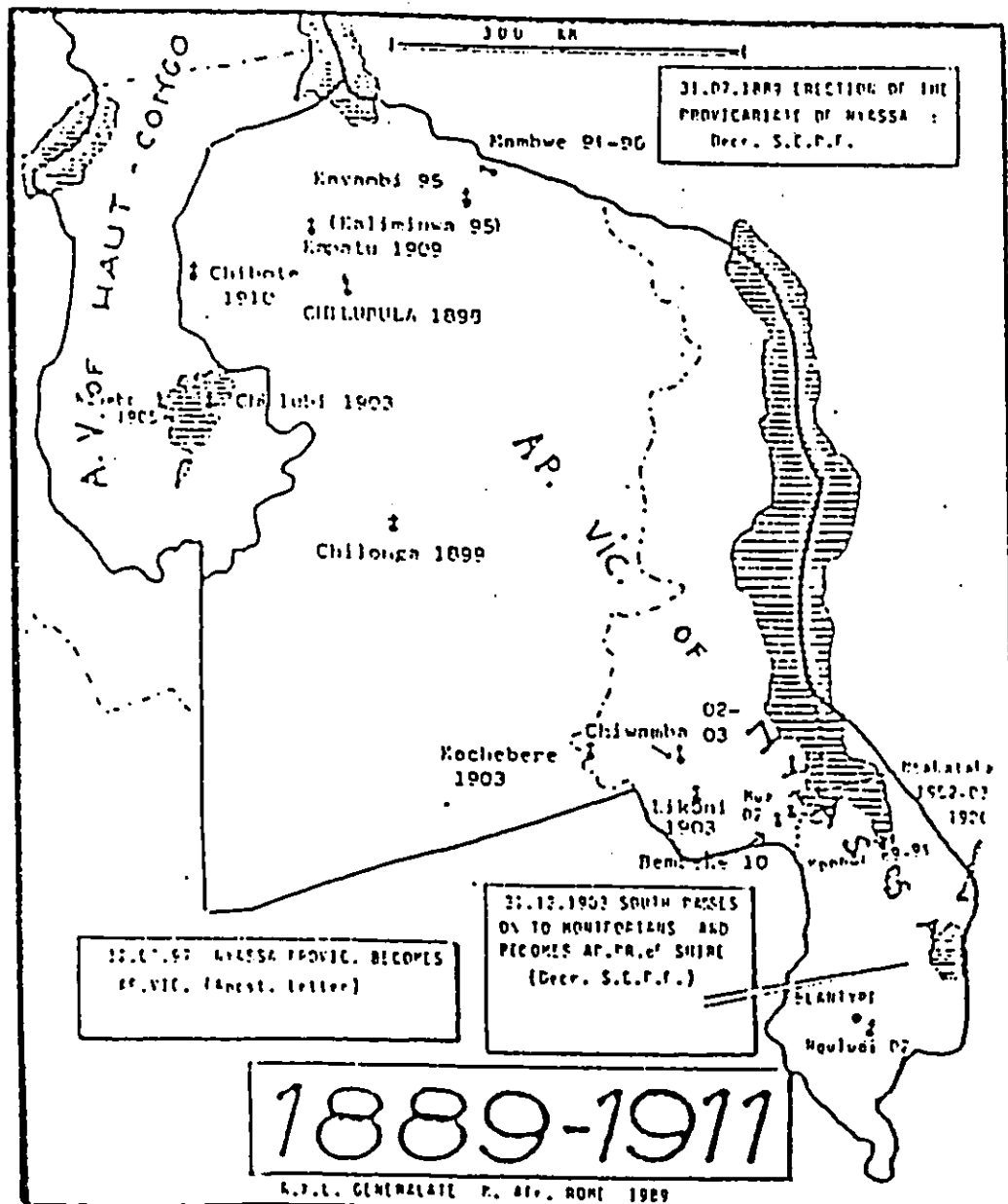
Even if the Episcopal Conference of Malawi does not appear to be inclined to favour laws as such, it may be necessary to see to the proper observance of some of the universal laws for the protection of rights of the Christian faithful, e.g., to enable people, who legally can, to participate in the Eucharist, as is the case for those whose marriages may be valid according to the extraordinary form of marriage, to safeguard the stability of parish priests for the good of the pastoral ministry as well as for the priest's security, the protection of rights of priests in suspension cases, for trials and procedures, recognition of valid baptisms from other Churches; greater flexibility concerning a rigid and extended catechumenate.

It is our hope that the revised Code will continue to be properly understood as an instrument at the service of order and common good in the community of the people of God. Deeper comprehension of the pastoral nature and purpose of law in the Church should be of assistance to the correct interpretation and implementation of the 1983 *Code of Canon Law*. The task of developing particular law and norms for the Catholic Church in Malawi as an element of the overall project of inculturating the faith, well begun by the Conference of bishops, should continue with the growing support of the Christian faithful at all levels.

APPENDICES

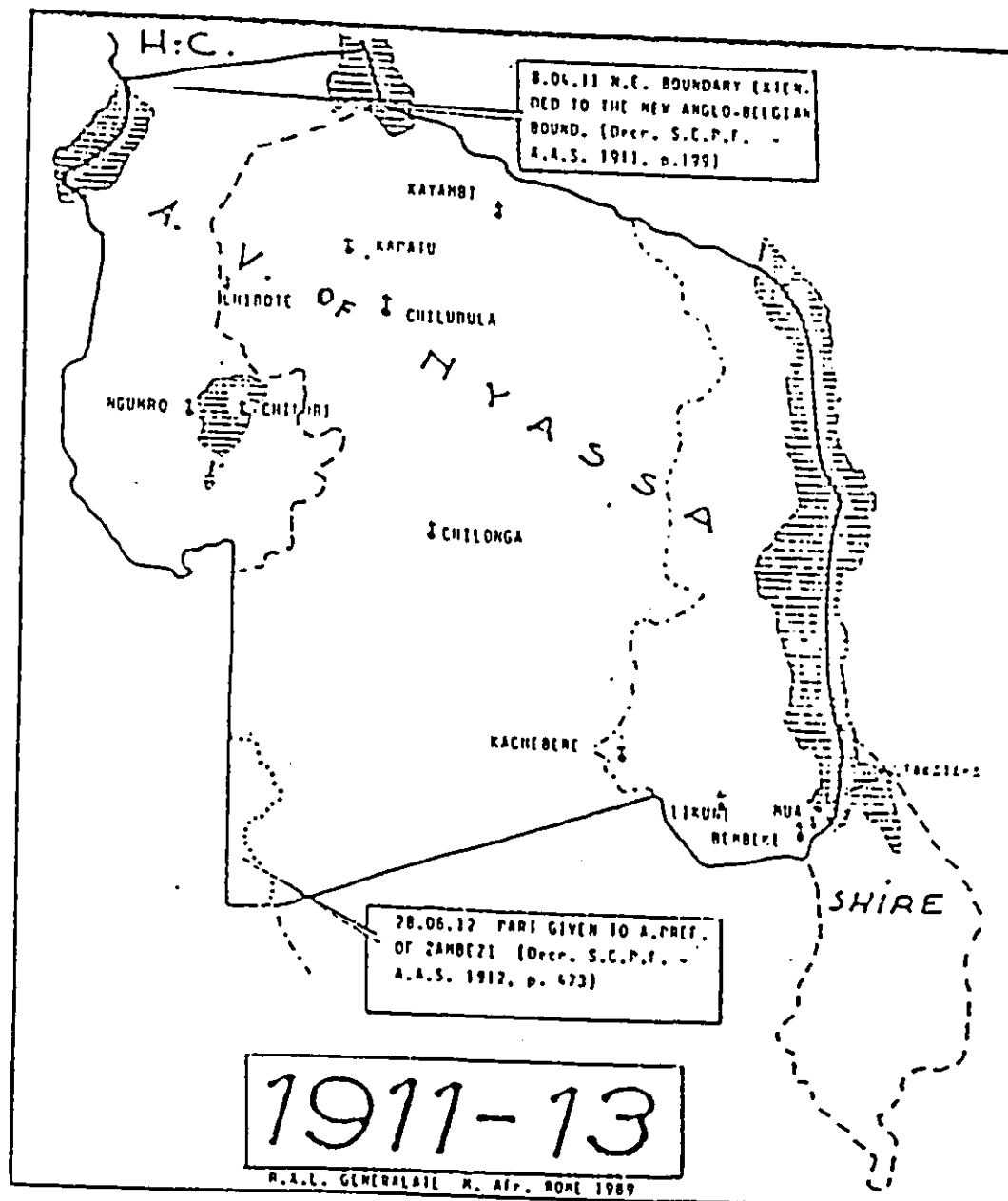


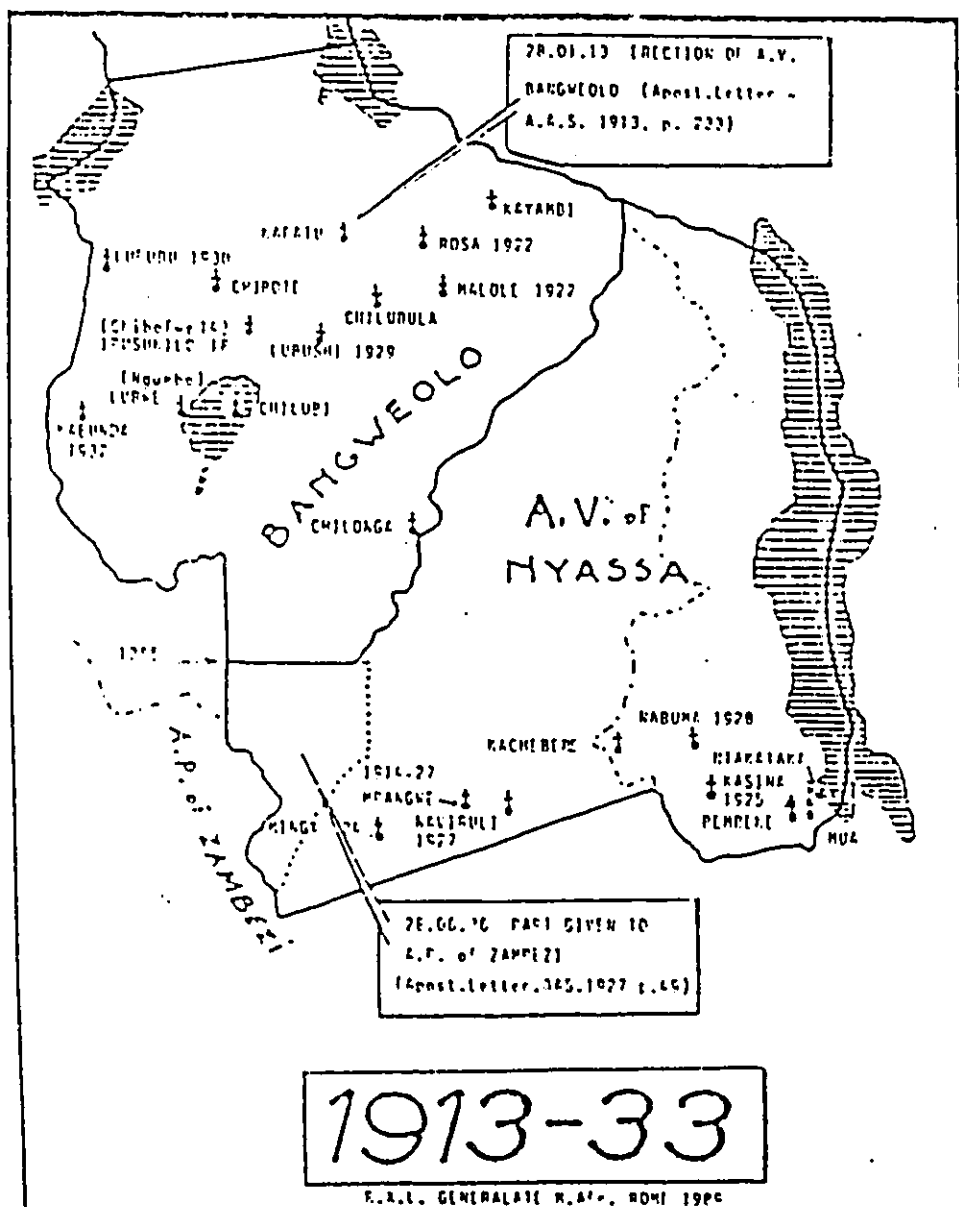


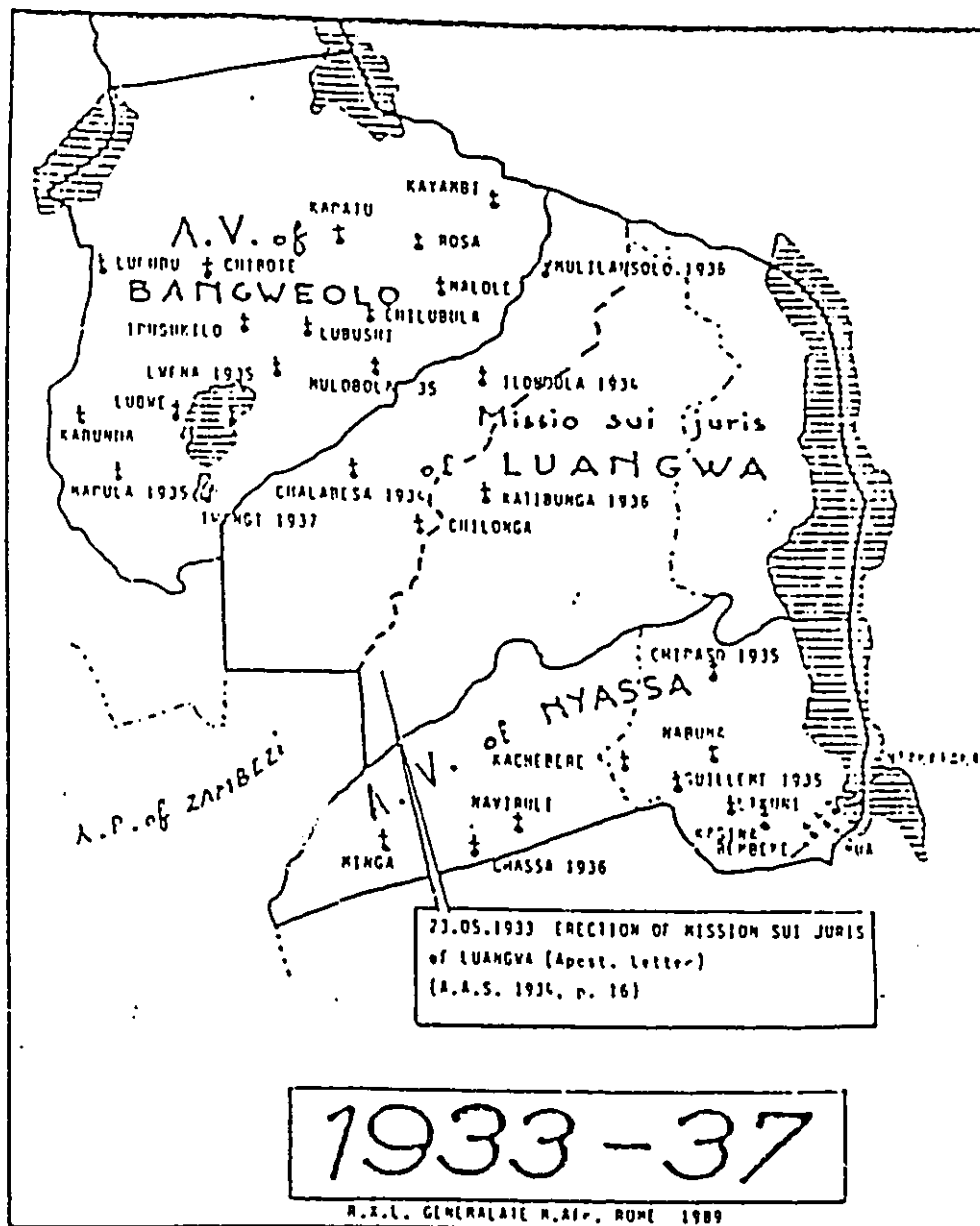


APPENDIX 5:
NEW BOUNDARY FOR THE APOSTOLIC VICARIATE OF NYASSA

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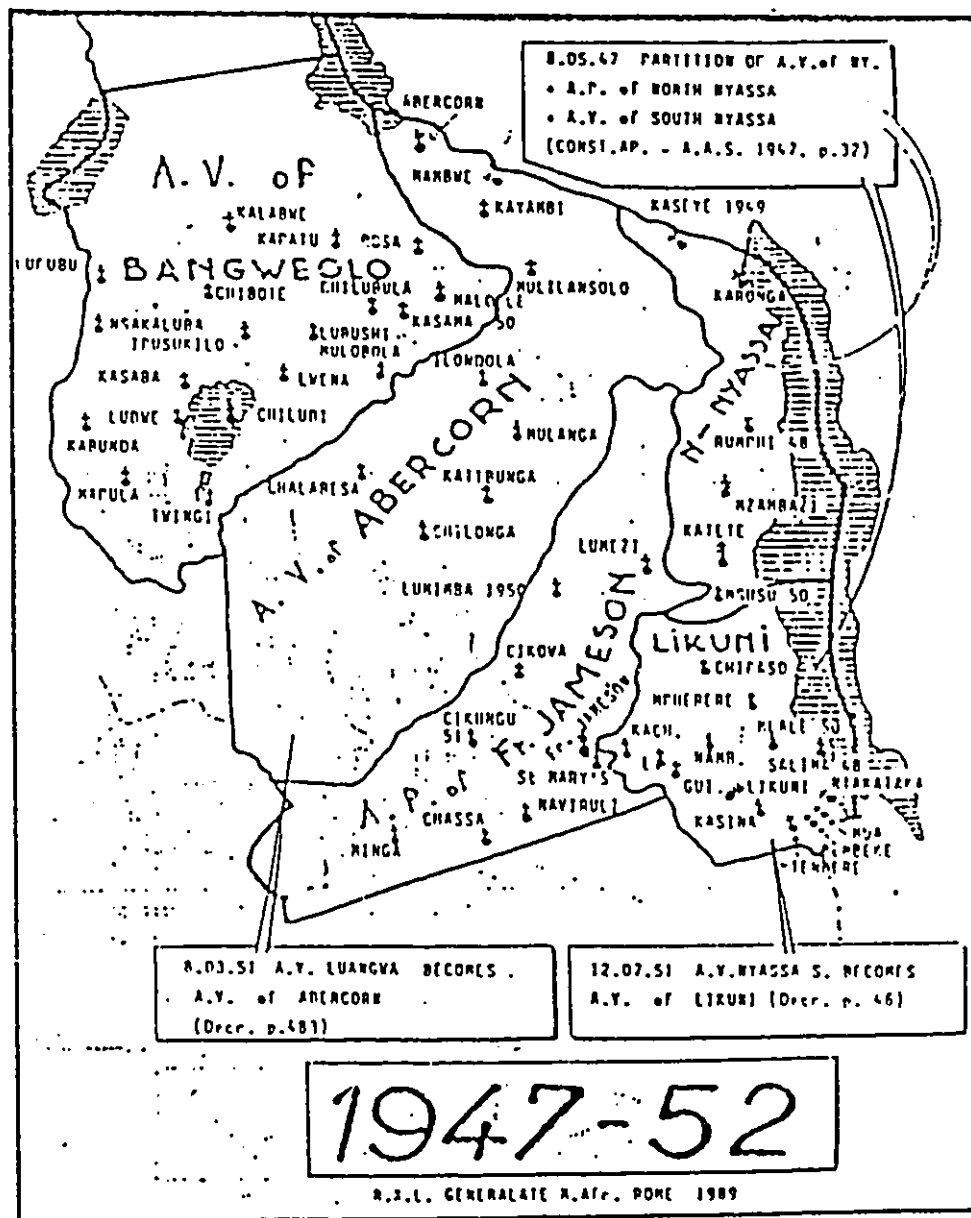






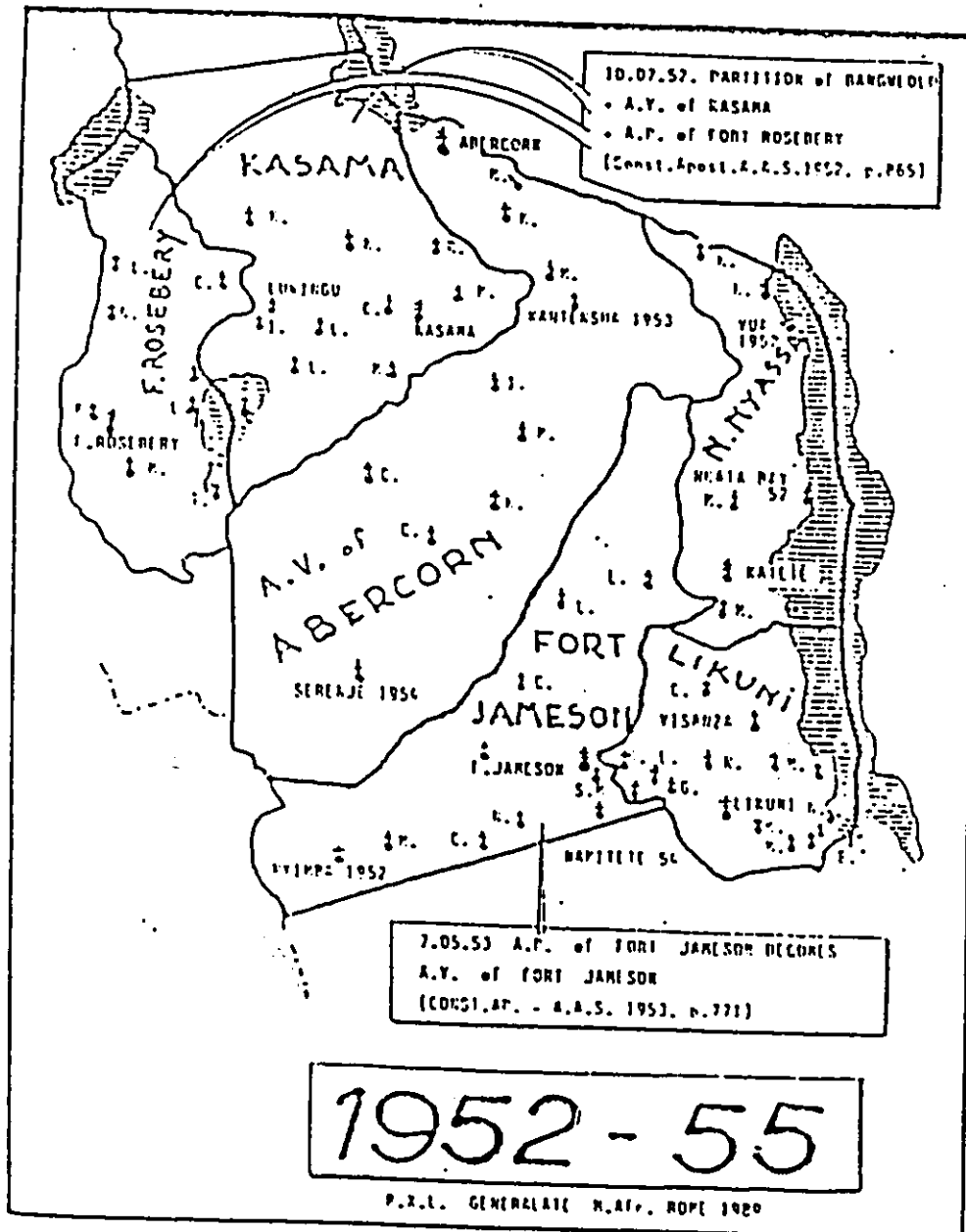
APPENDIX 9:
PARTITION OF THE APOSTOLIC VICARIATE OF NYASSA

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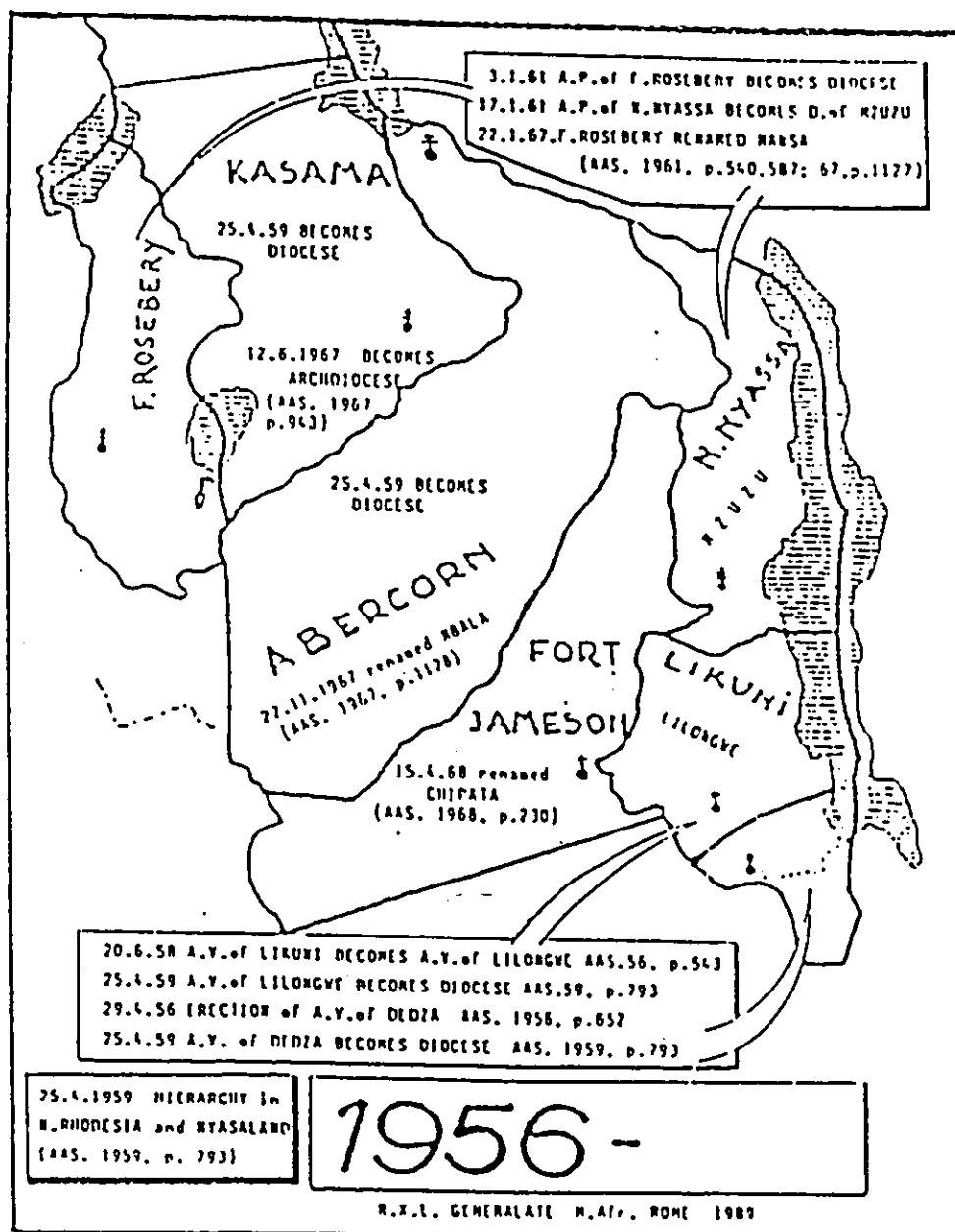
APPENDIX 10:
PARTITION OF THE APOSTOLIC VICARIATE OF BANGWEOLO

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APPENDIX 11:
FURTHER CHANGES IN THE VICARIATES OF THE REGION

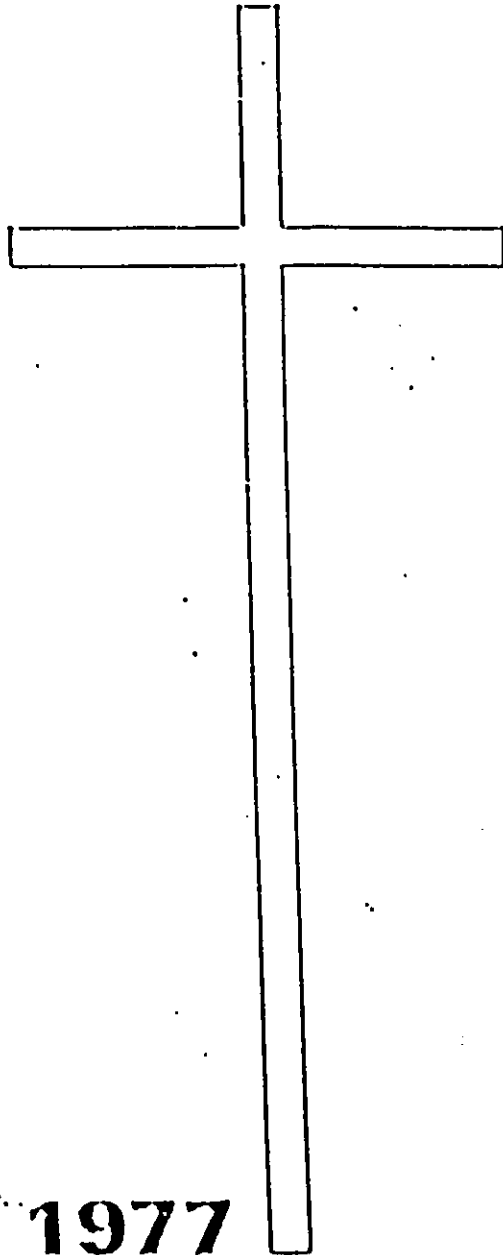
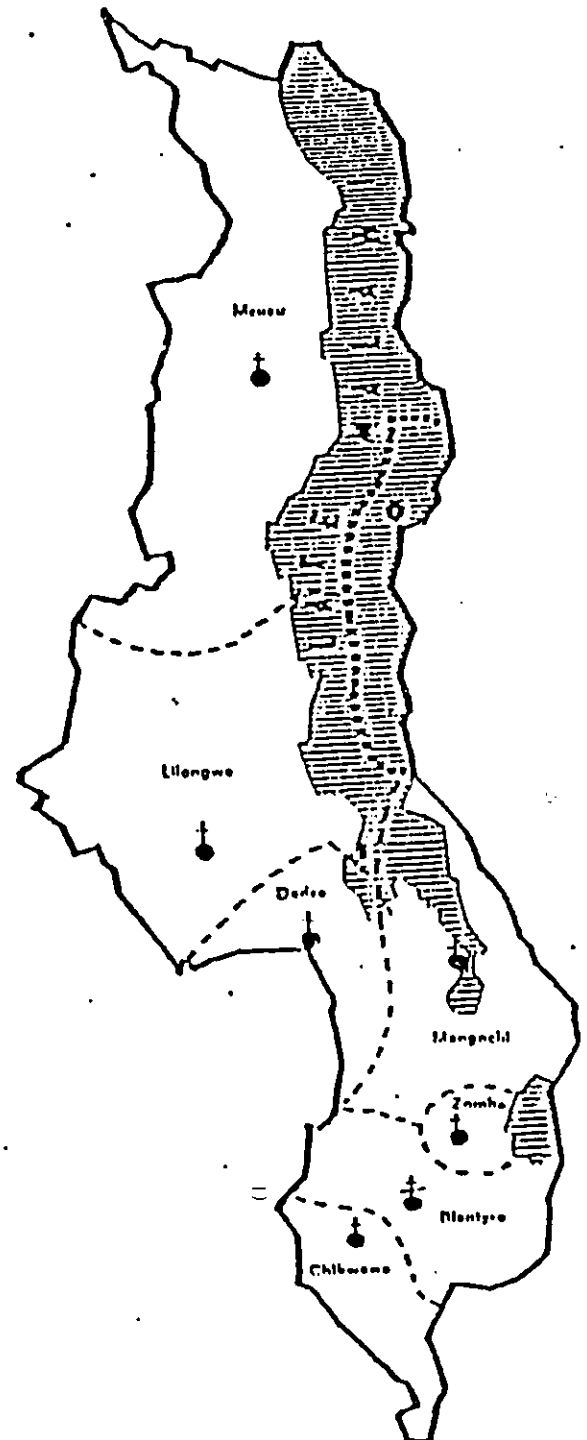
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THE CATHOLIC

DIOCESES

OF

MALAWI**1977**

= DIOCESES

Prot. N. 6155/69



SACRA CONGREGATIO PRO GENTIUM EVANGELIZATIONE
SEU DE PROPAGANDA FIDE

DECRETUM

Episcoporum Conferentias ad rem catholicam promovendam plurimè in nationibus iam constitutis, Summi Pontifices, labentibus annis, iterum atque iterum laudaverunt ac probaverunt, cum praeclara edidissent uberioris apostolatus argumenta.

Nuper vero Sacrosanctum Oecumenicum Concilium Vaticanum Secundum, Sacrorum Antistitum Coetus ubique terrarum aedulo constitui ac instaurari exoptans, Decreto "Christus Dominus" opportunas edidit normas, ab unaquaque Conferentia, in Statuto ab Apostolica Sede recognoscendo, fusius definiendas.

Haec ob causas, Sacri Antistites nationis vulgo "Malawi" appellatae modo ab Apostolica Sede expostulaverunt, ut novae Normae Conferentiae Episcopalis, ab ipsis confectae quaeque "STATUTES OF EPISCOPAL CONFERENCE OF MALAWI" nuncupantur, rite examinarentur et recognoscerentur.

Quam petitionem haec Sacra Congregatio pro Gentium Evangelizatione seu de Propaganda Fide, re mature perpensa atque audita Humiliatura Apostolica in illa natione, libenter suscepit et, vigore facultatum a Sanctissimo Domino Nostro PAULO Providentia Divina Papa VI sibi specialiter concessarum, praefatas normas, prout in adnexo exemplari continentur, ratas habuit et ad quinquennium, experimenti gratia, praesenti Decreto adprobavit.

Contrariis quibuslibet non obstantibus.

Datum Romae, ex Aedibus Sacrae Congregationis pro Gentium Evangelizatione seu de Propaganda Fide, die 1 mensis octobris a. D. 1969.

G. P. Card. Agagianian
Prof.

Emmanuel

Besides particular laws of dioceses and regions or territories of conferences of bishops and the proper law of religious institutes and societies of apostolic life there is a category of *special law*. In this grouping there are these examples:

a) When the Roman See is vacant special laws *lex specialis* enacted for these circumstances are to be observed (c. 335).

b) When the Apostolic See is vacant, the College of Cardinals has only that power in the Church which is granted to it by special law *lex peculiaris* (c. 359).

c) The constitution and competence of the various dicasteries of the Roman Curia (the Secretariate of State or Papal Secretariate, the Council for the public affairs of the Church, the Congregations, the Tribunals and other Institutes) is defined in special law *lex peculiaris* (c. 360).

d) Chaplains to the armed forces are governed by special laws *lex specialis* (c. 569).

e) Cases for the canonization of the servants of God are governed by special pontifical law *reguntur peculiari lege pontificia* (c. 1403 §1).

f) Concerning the granting and the use of indulgences, the other provisions contained in the special laws *lex peculiaris* of the Church must also be observed (c. 997).

g) Bishops, members of clerical religious institutes, and others are called to synod of bishops meeting, be it in ordinary general assembly or extraordinary general assembly or special assembly, according to the special law *ius peculiare* of the synod (c. 346).

h) A universal law does not derogate from a particular or special law *ius speciale*, unless the law expressly provides otherwise (c. 20).

i) *Ius pontificium*: In religious law, the English language translation for this term is pontifical right (cc. 589, 672, 968 §2, 1019 §1, 1196 §2, 1245, 1302 §3).

"Ex officio members are the bishop and his vicar general. Elected members are six priests, two from each deanery, elected by the priests of the deanery council, by secret ballot. A simple majority (i.e. half the quorum plus one) suffices for one to be elected. The results are communicated to the bishop. Appointed members are priests freely chosen and appointed by the bishop; they should not be more than four. Both the elected and appointed members sit on the council for a term of three years, renewable but not beyond six years. In addition to the members, certain officials or experts may be called in when matters of their competence are under discussion (e.g. the diocesan treasurer, the rector of the seminary, the director of the catechesis training college, etc.)

"While the bishop presides by right over the council of priests (c. 510), he may request that another member moderate the council meetings. The council decides on who will be its secretary.

"It is the prerogative of the bishop to convene the council of priests and to determine the matter to be discussed in it or to accept items proposed by the members. (c. 500 §1) In our diocese there will be as a rule, two ordinary meetings per year; additional meetings may be called by the bishop.

"The Council of Priests has only a consultative vote. The bishop is to consult it in matters of more serious moment, but he requires its consent only in the cases expressly defined by the law." (c. 500 §2) Hence the Council of Priests can never act without the bishop. The official minutes of its meetings, approved by the bishop, are the normal way of promulgating the latter's decisions." (*The Pastoral Directory of the Diocese of Mzuzu, partial and provisional draft*, Chapter Ten, Church Structures, Mzuzu, 1985, p. 7).

NB. 1. Concerning elections [with regard to collegial acts and unless provision is made otherwise by law or statutes], canon 119 speaks of absolute majority instead of relative or simple majority.

2. Manner of promulgation as indicated in the last paragraph is not satisfactory.



ALIENATION, ACTS OF EXTRAORDINARY ADMINISTRATION AND METHODS OF AVOIDING JUDICIAL TRIALS

The Episcopal Conference of Malawi has not acted on all the canons that the Code authorizes conferences to legislate on because the bishops needed more explication of some of them. They referred these canons to the Canon Law Committee whose opinion was reported in its minutes of the March 1-2, 1985 meeting.

1. *Acts of extraordinary administration and alienation*

The Committee was asked for the meaning of the term *acts of extraordinary administration* as used in canon 1277:

The diocesan bishop must hear the finance council and the college of consultors in order to perform the more important acts of administration in light of the economic situation of the diocese; he needs the consent of this council and that of the college of consultors in order to perform acts of extraordinary administration besides cases specifically mentioned in universal law or in the charter of foundation. It is for the conference of bishops to define what is meant by acts of extraordinary administration.

Upon deliberation, the Committee described an act of extraordinary administration thus:

An act of administration is said to be extraordinary when it is considered to be out of the routine acts of administration, e.g. establishment of a profit-making enterprise. An extraordinary act of administration depends on the level of competence, that is, a parish will have certain limits in financial affairs, a diocese will have a greater freedom to act, and the conference could have even greater liberty of action if they were to vote it to themselves.¹

One study explains what acts of ordinary and extraordinary administration meant according to the 1917 Code.

Acts of ordinary administration referred to normal transactions of business, i.e., things done routinely or regularly, such as maintaining property and checking accounts, receiving rent or interest income, accepting nominal gifts, paying bills, and making routine sales and purchases. Acts of extraordinary administration referred to activities that did not occur regularly or routinely, were of major importance, and were not covered within the meaning of ordinary administration. They included alienations, acceptance or rejection of major gifts, the purchase of land, the construction of new

¹ CANON LAW COMMITTEE, "Minutes," 3/1985, p. 3. Evidently this description requires to be refined in order to suit the Code's meaning of *acts of extraordinary administration*. Cf. cc. 1277, 1279, 1292.

buildings, the opening of cemeteries, the opening of schools or other institutions, and the taking of special collections.²

The 1983 Code has left it to the conference of bishops to determine the *acts of extraordinary administration* (c. 1277) and the *minimum and maximum amounts for alienation* of ecclesiastical goods (c. 1292). Once the acts of extraordinary administration have been determined, a diocesan bishop cannot validly exercise those acts without obtaining the consent of both the finance council and the college of consultors. However, for acts of major or more important administration the diocesan bishop has to consult the diocesan finance council and the college of consultors. It is only in acts of ordinary administration that the diocesan bishop is not required to consult or seek consent of anybody. The Canon Law Committee did not suggest any determination for the three categories of acts of administration in a diocese, namely: ordinary, more important or major administration and extraordinary administration.³

Canon 1292 §1 requires the conference of bishops to define the *maximum and minimum sum for alienation* in its territory. It states:

With due regard for the prescription of can. 638 §3, when the value of the goods whose alienation is proposed is within the range of the minimum and maximum amounts which are to be determined by the conference of the bishops for its region, the competent authority is determined in the group's own statutes when it is a question of juridic persons who are not subject to the diocesan bishop; otherwise, the competent authority is the diocesan bishop with the consent of the finance council, the college of consultors and the parties concerned. The diocesan bishop also needs their consent to alienate the goods of the diocese.

The Canon Law Committee not only described the maximum and minimum sum for alienation but also suggested figures for the different levels of administration. It stated:

The maximum and minimum sum in question is that which can be spent, or the value of property that may be alienated, before a higher authority is invoked. The sum varies from country to country and would seem to depend on what would be considered large or small in the business world.

² A.J. MAIDA and N.P. CAFARDI, *Church Property, Church Finances and Church-Related Corporations, A Canon Law Handbook*, St. Louis, Catholic Health Association of the United States, 1983, p. 12. Cf. also, W.J. DOHENY, *Practical Problems in Church Finance*, Milwaukee, Bruce Publishing Co., 1941, pp. 25-27.

³ The Catholic Bishops of Nigeria have decreed that: "[...] acts of extraordinary administration in canon 1277 are as follows: I. Transaction involving 10% of the annual revenue of the diocese or juridic body. II. Any transaction not in the approved annual budget." (J.T.M. DE AGAR, *Legislazione delle Conferenze Episcopali Complementare al C.I.C.*). The Conference of Bishops of Rwanda has decided that: "Selon le c. 1277, sont considérés comme actes d'administration extraordinaire: l'achat d'immeuble par le diocèse; l'achat de véhicule pour le diocèse; la construction d'églises paroissiales; l'hypothèque des immeubles; la création d'unité de production: menuiserie, usine, ferme; institution d'oeuvres diocésaines comme les petits séminaires, les centres d'accueil, les maisons de retraite, les hôpitaux et les autres oeuvres médicales" (ibid., p. 754).

We would suggest K500,000.00 before the conference has to ask Rome; K100,000.00 before a diocese has to go to the Episcopal Conference; K10,000.00 before the bishop needs the *consent* of his finance committee. For a parish, K10,000.00 before permission of the bishop is required, and K5,000.00 before the *consent* of the parish finance committee is needed.⁴

The conference of bishops is supposed to fix for its territory the maximum and minimum sum for alienation of ecclesiastical goods of public juridic persons subject to the bishops' authority. Thus, for example, the Bishops' Conference of England and Wales has decreed that: "The approved minimum sum for the alienation of ecclesiastical property in England and Wales is £ 100,000.00 and the approved maximum is £ 1,000,000.00."⁵ For religious institutes, it is the Holy See which defines the maximum amount for alienation (c. 638 §3). The set maximum sum is the property value above which the permission of the Holy See is required for the valid conveyancing (alienation) of the property after fulfilling other rules of procedure as demanded by the Code and the statutes of the particular juridic person.

At and below the maximum amount the permission of the Apostolic See is not demanded, however the internal procedures of the alienating juridic person must be followed for these minor alienations which fall between the minimum and maximum determined amounts. The statutes of a public juridic person normally specify who the competent authority is in matters of alienation. For instance, the statutes of religious institutes would include the prescription that the written permission of a specified competent superior and the consent of the council are mandatory for the validity of alienations which would adversely affect the institute's patrimonial condition (c. 638 §3). However, in the case of juridic persons which are subject to the authority of a diocesan bishop, the bishop needs the consent of the finance council, the college of consultors and the parties concerned prior to giving permission for any valid alienation of property whose value is above the fixed minimum sum.⁶

⁴ CANON LAW COMMITTEE, "Minutes," 3/1985, p. 3. (K1.00 is equivalent to \$0.50 Canadian). This suggested directive is inaccurate on four accounts: 1) the maximum and minimum sums for alienation seem to be inadvertently confused with acts of major or extraordinary administration; canon 1292 precisely deals with alienation; 2) canon 1292 does not explicitly require the conference to set a different sum for the alienation of goods/property belonging to the conference of bishops; one would presume that the same set sums are applicable for all public juridic persons within the territory, including the conference of bishops; but possibly the conference of bishops in Malawi is expressing the view that it needs a higher sum i.e., more than K100,000.00, before seeking the permission of the Holy See for alienation; 3) a diocese or a diocesan bishop does not need the permission of the conference for valid alienation; 4) the conference of bishops has no right by law to bind the spending power of the parishes outside the set minimum and maximum sums for valid alienation.

⁵ J.T.M. DE AGAR, *Legislazione delle Conferenze Episcopali Complementare al C.I.C.*, p. 362. The decree continues to state that: "In order to cater for variations in monetary values, these minimum and maximum sums are understood to be linked to the percentage increase (or decrease) in the cost-of-living Index and are subject to periodic review by the Bishops' Conference." The Catholic Bishops Conference of Nigeria "established the minimum and maximum sums for alienation in the light of can. 1292 §1 thus: the minimum sum is N 50,000.00 and the maximum is N 1,750,000.00" (ibid., p. 500).

⁶ The permission of the Holy See is also required for the valid alienation of goods whose value exceeds the maximum amount, goods donated to the Church through a vow or goods which are especially valuable due to their artistic or historic value (c. 1292 § 2).

According to canon 1292 it is only the maximum and minimum sums that have to be fixed. Therefore, from the suggested sums quoted above, the figures that would have to appear in the decree are K 10,000.00 as the minimum and K500,000.00 as the maximum. A diocese does not need any approval of the conference of bishops in matters of alienation; the conference's only major role is setting the minimum and maximum sums for alienation. In actual fact, the 1977 draft of the revised Code extended the role of the conference of bishops to include supervising and permitting certain alienations at diocesan level. Most consultors rejected this idea of having an intermediary authority between the Holy See and the diocesan bishop in matters of the patrimony of the diocese.⁷ Parishes as public juridic persons under the authority of the diocesan bishop are also bound to the minimum and maximum sums for alienation set by the conference of bishops. However, regarding minor alienations and other financial regulations in a diocese, for example spending limitations of a parish priest or a parish, it would be preferable that these are legislated at the diocesan level and not by the conference of bishops.

2. *Methods of avoiding judicial trials*

The bishops requested the canonists to give an explanation on the various methods of avoiding judicial trials as stipulated in canon 1714:

The norms chosen by the parties are to be observed in a settlement, a compromise or a trial by arbiters; or, if the parties choose no norms, the law enacted by the conference of bishops is to be observed if there is such, or the civil law in force in the place where the agreement is entered into.

The Canon Law Committee found it unnecessary for the time being for the Conference to enact a law governing the resolution of controversies by settlement, compromise or a trial by arbiters. No reason was given for their recommendation; probably it was because in many places the built-in traditional means of resolving disputes are still prevalently operative.⁸ In fact, the Code suggests use of the law enacted by the conference of bishops or the civil law in force in the place where the agreement is entered into, if the parties choose no norms; ordinarily the parties to the contention are to choose the norms to be observed in the settlement or compromise or in a trial by arbiters.

Canon 1733 §2 deals with a method of avoiding a specific type of contention, that between a (hierarchical) superior and a subject. The bishops requested the Canon Law Committee to elucidate on the canon. After the Committee discussed the canon, they decided that for the time being there was no need for the conference of bishops to require that in

⁷ See canon 37 of the 1977 draft, *Communicationes* 12 (1980), p. 424. See also J.J. MYERS, "The Temporal Goods of the Church," in J.A. CORIDEN, T.J. GREEN, D.E. HEINTSCHEL eds., *The Code of Canon Law; A Text and Commentary*, 1983, p. 880.

⁸ It is unusual that land disputes, cases of extra-marital pregnancies, serious squabbles between community members etc. would be sent for judicial hearing when they first arise. Normally, the parties endeavour to attain out of court agreements, and they will proceed to court only if a satisfactory solution has not been reached.

every diocese a permanent office be established with the purpose of finding and suggesting equitable solutions for contentions between persons with a grievance against administrative decrees⁹ and the authors of those decrees. The Committee was of the opinion that the diocesan bishop could appoint a council *ad tempus* as indeed the Code states: "if the conference has not done this, a bishop can establish a council or an office of this kind" (c. 1733 §2). Whereas canon 1714 deals with avoiding judicial trial, canon 1733 §2 is concerned with minimizing formal administrative recourse to the hierarchical superior. The task of this office or council would be to help the parties reach conciliation or a fair solution whenever a revocation or withdrawal or modification of a problematic decree has been sought.

In their directives, the bishops seem to indicate that within the dioceses in Malawi, there are already formal and informal vehicles for expressing grievances. They state:

This [instituting an office or council for conciliation] looks like luxury; you would need someone qualified to act as a counsellor. In the mission the bishop does this work himself. The missionaries have their regional/provincial superior, whereas with the approval of the diocesan associations the diocesan priests approach their own chairman or dean. In conclusion the conference feels for the time being there is no need for this special office for this matter.¹⁰

If the provincial/regional superiors and the chairmen/deans of associations of diocesan priests satisfactorily serve the purpose of the office or council mentioned in canon 1733 §2, then it is fair enough. However, if contentious issues are not fairly addressed, then one would wish that a formal and an inclusive council involving members of lay faithful, religious, and diocesan priests be formed to engage in conciliation and in conflict-resolution efforts.

Transfers, removals and suspensions of priests are prone to cause grievances and may therefore require a formally instituted diocesan office or council to act as a forum through which complaints can be evaluated. The preliminaries for objections against removal and transfer are well laid out in canons 1740 through 1752, and the actual procedure for administrative recourse is outlined in canons 1732-1739. In the instance that one disagrees

⁹ An individual decree falls within the category of singular or individual administrative acts which are issued, in the external forum, by persons with competent executive authority (e.g., diocesan bishops, vicars general, episcopal vicars cc. 135, 391, 479), affecting individual persons or groups by way of which a decision is given or a provision is made in a particular case (cc. 35, 48). Recourse against administrative decrees as discussed in canons 1732-1739 includes all particular administrative acts which are posited in the external forum outside a trial (e.g., an administrative decree suspending a cleric) with the exception of those issued by the Roman Pontiff or an ecumenical council (c. 1732).

¹⁰ E.C.M., "Minutes," 9/84, p. 25.

with a suspension,¹¹ for the possible reason of a decision based on insufficient grounds or false facts, a cleric should feel free to approach the conciliation office or council before proceeding with the recourse. Such a council which is ready to listen to parties injured by ecclesiastical administrative acts may assist the general administration of justice in the particular churches, in that, in certain problematic cases, authorities might want to take more time and caution prior to decision-making.

¹¹ In the process of hierarchical recourse against decisions of suspension an independent office or council would be desirable in Malawi, in order to provide suspended priests and other members of the Christian community with a board which could listen to their concerns. When recourse is made by priests and other Christian faithful who work in national institutions under the conference of bishops, any or a determined diocesan conciliation office could be used; but it would be more appropriate if there were also a national or interdiocesan office or council to serve as a conciliation body.

A suspension which under the new Code is a censure and not an expiatory penalty, can affect clerics alone (with the exception of the suspension of an advocate mentioned in canon 1488 §1) and it forbids either all or some acts of the power of orders and of governance, and the exercise of either all or some rights attached to an office (c. 1333 §1). A law but not a precept can establish an automatic suspension without any further determination or limitation (c. 1334 §2): for example, a cleric who uses physical force against a person possessing episcopal character (c. 1370 §2), a cleric, who while not having been promoted to priestly order, attempts to enact the liturgical action of the Eucharistic Sacrifice, or a cleric who attempts to impart sacramental absolution or hears sacramental confession when he cannot validly give sacramental absolution, (c. 1378 §2), a cleric who attempts even a civil marriage (c. 1394 §1) incurs automatic suspension; also a cleric is automatically (*ipso facto*) suspended from the order received if he is ordained by a bishop other than his own bishop, without legitimate dimissorial letters (cc. 1383, 1015).

In the above cases of automatic suspensions the penalty is incurred by the very commission of the offense, that is, once the conditions described by the law have been fulfilled, and then the competent authority need only to declare the suspension. However, in most other cases of suspension the penalty binds the guilty person, only after it has been expressly imposed by a competent person (c. 1314), following either a judicial or administrative procedure. A typical example of a suspension that is inflicted by a sentence is stated in canon 1395 §1 as follows: "Outside the case mentioned in can. 1394, a cleric who lives in concubinage or a cleric who remains in another external sin against the sixth commandment of the decalogue which produces scandal is to be punished with a suspension, [...]" (See also canon 1380: simoniacal reception or celebration of sacraments, canon 1387: solicitation, and canon 1390: false accusation of solicitation). But these cases usually require thorough examination before the sentence is imposed.

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