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**INTERDIOCESAN TRIBUNALS IN SOUTHERN AFRICA**

by

Rev. Clifford C. Stokes

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.

Ottawa, Canada, 1984



Rev. Clifford C. Stokes, Ottawa, Canada, 1985.

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This study is dedicated to my parents.

### BIOGRAPHICAL NOTE

Rev. Clifford Stokes was born in Cape Town, South Africa, on October 1, 1945. After studying civil law at the University of Cape Town, he entered Saint John Vianney Seminary in Pretoria, South Africa, and was ordained to the priesthood for the Archdiocese of Cape Town on December 9, 1977.

He received a Bachelor of Arts degree from the University of Cape Town in 1970, a Bachelor of Sacred Theology degree from the Urbaniana University in Rome, through Saint John Vianney Seminary, in 1977, a Master of Canon Law degree from the University of Ottawa in 1981, and a Licentiate in Canon Law from Saint Paul University, Ottawa, in 1981.

He is presently Judicial Vicar of the matrimonial tribunal of the Archdiocese of Cape Town, a position which he has held since 1981, and consultant to the Southern African Catholic Bishops' Conference for canonical matters.



## ABBREVIATIONS

<u>AAS</u>	Acta Apostolicae Sedis
<u>ASS</u>	Acta Sanctae Sedis
<u>AC</u>	L'Année canonique
<u>AdC</u>	L'Ami du clergé
<u>AKK</u>	Archiv für Katolisches Kirchenrecht
<u>CC</u>	La Civiltà Cattolica
<u>CIC</u>	Codex Iuris Canonici
<u>CLD</u>	Canon Law Digest
<u>CLSA Proceedings</u>	Canon Law Society of America, Proceedings
<u>CLSN</u>	Canon Law Society of Great Britain and Ireland Newsletter
<u>EIC</u>	Ephemerides iuris canonici
<u>IC</u>	Ius canonicum
<u>IDE</u>	Il diritto ecclesiastico
<u>IER</u>	Irish Ecclesiastical Record
<u>LCBC</u>	Lesotho Catholic Bishops' Conference
<u>ME</u>	Monitor ecclesiasticus
<u>NCE</u>	New Catholic Encyclopaedia
<u>NRTh</u>	Nouvelle revue théologie
<u>OAK</u>	Österreichisches Archiv für Kirchenrecht
<u>Per.</u>	Periodica de re morali canonica liturgica
<u>RCBC</u>	Rhodesian Catholic Bishops' Conference
<u>RDC</u>	Revue de droit canonique

ABBREVIATIONS

REDC

Revista española de derecho canonico

SACBC

Southern African Catholic Bishops' Conference

SC

Studia canonica

SRR Dec

Sacrae Romanae Rotae Decisiones seu sententiae

TPS

The Pope Speaks

TyV

Teologia y Vida

ZCBC

Zimbabwe Catholic Bishops' Conference

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## INTRODUCTION

An encouraging trend in recent years has been the growing interest shown by members of the clergy, religious communities and the laity to the many situations currently confronting marriage and family life. This pastoral concern serves to bring understanding, sympathy and support into situations of marital conflict with its frequent disruption of family harmony. Agencies devoted to this task, however, often soon exhaust their ability to render assistance, for, not infrequently, the outcome of the conflict is separation and divorce.

Sadly, to-day, with marital breakdown increasing at an alarming rate, one of the most pressing priorities facing bishops throughout the world is the necessity of employing all the pastoral means at their disposal to help avoid such breakdowns; if they do occur, then, to assist those who suffer the anguish of a failed marriage and to assure them of the Church's caring concern. As Pope John Paul II's Apostolic Constitution, Familiaris consortio, reminds us:

The Church, which was set up to lead to salvation all people and especially the baptised, cannot abandon to their own devices those who have been previously bound by a sacramental marriage and who have attempted a second marriage. The Church will therefore make untiring efforts to put at their disposal her means of salvation.<sup>1</sup>

The Pope then delivers a strong plea:

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<sup>1</sup> Cf. JOHN PAUL II, Apostolic Exhortation, "Familiaris consortio," November 22, 1981, in AAS, 74 (1982), art. 84, p. 158. English translation by Canadian Conference of Catholic Bishops, p. 158.

Together with the Synod, I earnestly call upon pastors and the whole community of the faithful to help the divorced, and with solicitous care to make sure that they do not consider themselves as separated from the Church, for as baptised persons they can, and indeed must, share in her life.<sup>2</sup>

A very serious obligation is thus placed upon the whole Christian community, but perhaps most especially upon bishops as the proper pastors of each particular Church, to see to it that appropriate measures are adopted to ensure the place in the community of those who have experienced the trauma of divorce and have perhaps entered a second union. Although generally unable to live a full sacramental life, such people are to be encouraged to attend Mass regularly, to join parish organisations and to ensure that their children are educated in the faith.<sup>3</sup> Indeed, parish priests who constitute the primary source of pastoral contact should exercise careful discernment of each situation, for there is a vast difference between those who have sincerely tried to save their first marriage and have been unjustly deserted and those who, through their own culpability, have attempted to destroy a canonically valid union. In addition, there are those who have entered another union for the sake of their children's upbringing, and who are sometimes subjectively certain that their previous and irreparably destroyed marriage had never been valid.

It is at this stage, that other pastoral agencies, such as the matrimonial tribunal, can come into play. One of the significant roles of such courts is to assist those who have had to adjust to the heartbreak of failure in marriage and

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<sup>2</sup> Cf. ibid., p. 159.

<sup>3</sup> Cf. ibid., p. 158.

who have attempted a second union or are contemplating such a step. As one of the "caring agencies" within the Church, the matrimonial court is established specifically to investigate petitions submitted to it to determine whether the parties previously involved in a particular marriage are free to enter into a sacramental union in the Church. Practically speaking, however, in many instances such parties have already attempted a new union outside the Church.

One objective of the tribunal is to ascertain whether a party may be assisted to resume, or enter into, or continue his or her life within the Church on a fully sacramental basis. In many cases, this is possible, but regrettably, especially where innocent parties to broken marriages are involved, sometimes it is not. The proper sphere of activity of a matrimonial court is limited within the confines of adjudicating the validity or nullity of a marriage. The Church holds marriage to be "an intimate partnership of life and love [...] rooted in the conjugal covenant of irrevocable personal consent."<sup>4</sup> Marriage is thus essentially a union which is absolutely indissoluble if it is valid, sacramental and has been consummated. The courts are to question whether the union under consideration meets these characteristics. It is precisely in situations where an innocent party cannot be admitted to a full sacramental sharing, that the pastoral solicitude of a caring Church, seeking to reflect the mercy and compassion of a loving Redeemer, should be manifested to the full. This service is usually rendered under the auspices of diocesan offices.

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<sup>4</sup> Cf. VATICAN COUNCIL II, Pastoral Constitution, "Gaudium et spes," December 7, 1965, in *AAS*, 58 (1966), art. 48, p. 1067. English translation in The Sixteen Documents of Vatican II, p. 561.

It is in the context of a caring Church, that the Southern African Catholic Bishops' Conference (SACBC), desiring to promote more effective pastoral assistance to the people of God within its territory, has undertaken a reorganisation of its inter-territorial tribunal structures in accordance with the provisions of the 1983 Code of Canon Law. When these supradiocesan matrimonial courts were first established by the Sacred Congregation of the Sacraments in 1939 for the entire territory of the Apostolic Delegation in Southern Africa, it was in response to certain pressing pastoral needs of the time.<sup>5</sup> The vastness of the territory subject to the Apostolic Delegation (3,028,215 square kilometres), the serious shortage of priests available for tribunal work, together with the missionary thrust of a young Church, made the constitution of diocesan matrimonial courts almost an impossibility.

When the matrimonial courts were rearranged in 1951,<sup>6</sup> following the erection of the hierarchy in South Africa, Lesotho and Swaziland, and then again in 1958,<sup>7</sup> it was also so that the needs of the people of God could be addressed more adequately.

One of the issues that has confronted the SACBC over recent years has been a partial breakdown in the functioning of some of its matrimonial courts. This breakdown may be attributed in part to the non-functioning of the inter-territorial tribunal situated at Maseru in Lesotho. In as much as this court has

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5 Cf. S.C. OF THE SACRAMENTS, Letter (Prot. N. 426/39), July 4, 1939.

6 Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter (Prot. N. 4319/51), March 9, 1951.

7 Cf. ID., Letter (Prot. N. 3449/58), September 29, 1958.

been unable to operate for the past fifteen years, serious consequences have resulted both for the dioceses assigned to it in first instance and for the Durban inter-territorial tribunal for which it was designated court of second instance. Accordingly, the inactivity of the Maseru tribunal has rendered most difficult the conclusion of cases of matrimonial nullity arising within two of the five ecclesiastical provinces that were subject to the SACBC at the time of the reorganisation of matrimonial courts in September, 1958.

A further problem connected with the functioning of the Southern African tribunals has been the somewhat unclear juridical position of the Johannesburg diocesan court. Although matrimonial nullity cases originating within the diocese of Johannesburg had been assigned in first instance to the newly-created Pretoria inter-territorial tribunal in 1958, the Johannesburg court, formerly the first instance court for the province, has continued processing its own formal matrimonial nullity cases. To ascertain the precise legal situation of the Johannesburg court, the juridical nature of the Southern African inter-territorial tribunals will necessarily have to be determined, for only in the light of this, will it be possible to pronounce upon the position of the Johannesburg court, and to restructure the supradiocesan courts themselves.

During the course of this study, an attempt will be made to respond to certain questions raised with respect to the Southern African courts, for indeed it will be only in view of these responses that a thorough reform of the tribunal structures can be undertaken.

To situate the Southern African tribunals within the broader context of the Church, it is proposed to approach this study firstly from the perspective of

the origin and development of interdiocesan courts in the Church in general. Thus, in the first chapter, an overview of matrimonial procedures and tribunals, from apostolic times until the present, will be presented. In chapter II, the origin and development of interdiocesan courts in Southern Africa will be studied, and in chapter III, the particular law applicable to these courts will be considered. Chapters IV and V will be devoted to a discussion on the provisions of the 1983 Code of Canon Law for interdiocesan courts, and in chapter VI, which concludes the dissertation, the provisions of the new law will be applied specifically to the Southern African situation, and the terms of a decree, approved by the SACBC on September 27, 1984, for the reorganisation of its tribunals, will be examined.<sup>8</sup>

It is earnestly hoped that this study will prove to be of some small assistance to the SACBC in its task of promoting the pastoral care of the people of God entrusted to it.

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<sup>8</sup> Cf. SACBC, Minutes of plenary session, 1.19 B.M.2, September 27, 1984.

## CHAPTER I

### INTERDIOCESAN TRIBUNALS IN THE CHURCH: THEIR ORIGIN AND DEVELOPMENT

To situate interdiocesan matrimonial tribunals within the judicial structure of the Church, a brief historical survey of the development of canonical procedures connected with the marriage bond is necessary. A detailed description of ecclesiastical courts and procedures is lacking in the sources up to the twelfth century, and very little is recorded with respect to the procedure adopted in matrimonial nullity cases. There is, however, sufficient evidence to indicate that the Church was gradually evolving a system which would develop up to the twentieth century. To understand clearly, then, the nature, development and organisation of interdiocesan tribunals which are of relatively recent origin, they must be examined against the background of a judicial process that has evolved over a period of nineteen hundred years. The major developments of this period and their influence upon subsequent judicial structures will be discussed under three principal headings: A. From the Time of the Apostolic Church to the Council of Trent, B. Post-tridentine Legislation to the 1917 Code of Canon Law, and C. Interdiocesan Tribunals prior to the 1983 Code of Canon Law.

#### A. From the Time of the Apostolic Church to the Council of Trent

##### i. The Apostolic and Post-apostolic Church

A careful study of the New Testament reveals that there is some evidence, even if given only in an indirect and very obscure manner, of the origins

of canonical procedures which slowly evolved into those to be used in ecclesiastical trials. D. Bouix notes that within the apostolic Church certain elements of an ecclesiastical trial already existed: the judge in the external forum, the plaintiff, the defendant, the witnesses, the examination of the evidence, the decision and its execution.<sup>1</sup> Such elements are found in the gospel of St. Matthew who declares:

If your brother sins against you, go to him and show him his fault. But do it privately, just between yourselves. If he listens to you, you have won your brother back. But if he will not listen to you, take one or two other persons with you, so that every accusation may be upheld by the testimony of two or more witnesses, as the scripture says. And if he will not listen to them, then tell the whole thing to the Church. Finally, if he will not listen to the Church, treat him as though he were a pagan or a tax collector.<sup>2</sup>

In the early Church, disputes among the Christian communities were probably rather rare. St. Paul, however, points to certain forms of misconduct, among which he lists drunkenness, greed, immorality, violence and lack of hospitality.<sup>3</sup> The initial harmony of the early Church was also gradually disrupted by several heresies which demanded immediate attention.<sup>4</sup> In such instances, the apostles themselves, in the presence of the whole community, both rendered and enforced judgment.<sup>5</sup>

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1 Cf. D. BOUIX, Tractatus de iudiciis ecclesiasticis, I, p. 30.

2 Cf. Matt. 18:15-17. English translation from Good News Bible.

3 Cf. Titus, 1:6-8, Eph. 4:17-21, Gal. 5:19-21, 1 Cor. 5:1-2, 1 Cor. 6:15, Col. 3:5-9, Gal. 5:14.

4 Cf. 1 Tim. 1:4, 2 Tim. 2:14.

5 Cf. Acts 5:9, 1 Tim. 5:20.

In the post-apostolic era, the judicial function in the Christian community was exercised by the local bishop.<sup>6</sup> With a minimum of formalities, the bishop conducted the hearing orally in the presence of his presbyters and rendered judgment.<sup>7</sup> It would seem, however, that when cases involved violations of the clerical state, a "synodal" procedure was adopted. Since excommunication or condemnation was possible, such trials were held in synods or during a council of bishops, rather than before a single judge.<sup>8</sup>

In addition to being able to discern evidence for the origin of procedures to resolve contentious cases generally, there is also some evidence of the gradual evolution of a judicial procedure to investigate and decide matrimonial problems, whether these be concerned with the separation of spouses or challenges to the validity of the marriage bond itself. By reason of Christ's teaching on the indissolubility of marriage, Christians did not resort to the Roman practice of divorce.<sup>9</sup> The early Church had, accordingly, to develop a procedure of its own whereby matrimonial causes could be resolved.

The Church held that only where one of the spouses had committed adultery was a permanent separation possible, and such permission did not

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6 Cf. F.X. FUNK, ed., *Didascalia et constitutiones apostolorum*, I, pp. 84-144; D. BOUIX, *op. cit.*, p. 30: "Ergo pastoribus Ecclesiae contulit Christus potestatem cognoscendi de litibus inter fideles ortis, et sententiam ferendi, et Reum contumacem, seu judici ecclesiastico non obedientem, ab Ecclesia ejiciendi."

7 Cf. A.C. DIACETIS, The Judgment of Formal Matrimonial Cases: Historical Reflections, Contemporary Developments, and Future Possibilities, pp. 11-12.

8 Cf. *ibid.*, pp. 12-13.

9 Cf. Matt. 19:6.

necessarily include the right to remarry. St. Paul, however, did permit separation with the right to remarry when a convert, previously party to a pagan union, found it impossible to live in peace and harmony on account of the hostility of the pagan spouse.<sup>10</sup>

On the basis of the Pauline epistles especially, certain scripture scholars conclude that there is sufficient evidence in the New Testament to support indirectly the evolution of judicial institutions such as the marriage tribunal.<sup>11</sup> The legal existence of the Church was not recognised in the early centuries, much less its exclusive competence in the matrimonial cases of Christians. During the centuries of persecution, the trials held in the early Christian communities were very simple and the principles governing them drawn mainly from the scriptures and natural law.<sup>12</sup> Few, if any, formal matrimonial trials, as we term them to-day, were conducted at this time. Where it had been alleged that a particular marriage was invalid, the claim was investigated using the existing ecclesiastical procedure for clerical trials. Accordingly, in the post-apostolic and pre-Constantinian period, matrimonial cases involving the validity of the bond were

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10 Among the earliest cases heard were those in which St. Paul himself was invited to intervene, viz., the case of the incestuous man (1 Cor. 5:1-5), and the status of a marriage contracted in infidelity where the pagan spouse refused to cohabit peacefully with the convert (1 Cor., 7:10-16).

11 Cf. 1 Cor. 6:1; G. MacRAE, "New Testament Perspectives on Marriage and Divorce," in Divorce and Remarriage, ed. L. Wrenn, p. 2: "The point here is not really whether one can find some biblical precedent for the marriage tribunal, nor whether Paul would have felt more or less at home with our modern tribunals, but rather that the Pauline 'Church Order' allows for the Church taking the responsibility, even formally, and almost institutionally, for the management of its own affairs."

12 Cf. F.X. WERNZ, and P. VIDAL, Ius canonicum, VI, p. 4, n. 2.

frequently defined by colleges of bishops in provincial councils and synods. In less serious matrimonial cases, such as those involving the separation of spouses, the local bishop was the sole judge.<sup>13</sup>

## ii. The Peace of Constantine

In the year 313 the emperor Constantine accorded State recognition to episcopal jurisdiction in civil matters, granting a quasi-judicial authority to bishops. Parties to a case could agree to approach a bishop for arbitration and to accept his decision which admitted of no appeal. It seems that matrimonial cases were among those admitted to bishops acting in this capacity.<sup>14</sup>

One aspect of episcopal jurisdiction in the early Church was what was termed episcopalis audientia.<sup>15</sup> Of major importance here was the bishop's role as arbitrator for peace in accordance with the Christian principle of equity.<sup>16</sup> His task was to try to effect a peaceful settlement of disputes among the faithful. Under Constantine, episcopal jurisdiction reached a new stage, for in terms of Constantine's decree, not only was the settlement of a dispute mutually agreed to in the presence of the bishop, but now it was also recognised by the State, and the bishop's decision had to be executed. Although it is not clear whether bishops, in deciding these cases, were obliged to observe the civil law or whether they were

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<sup>13</sup> Cf. G. PERRONE, De matrimonio christiano, II, p. 351.

<sup>14</sup> Cf. G.H. JOYCE, Christian Marriage, pp. 215 ff.

<sup>15</sup> Cf. H. ZAPP, "Diocesan Jurisdiction: An Historical Survey," in Concilium, 107 (1977), pp. 10-11.

<sup>16</sup> This principle has been enshrined in canon 1446 of the 1983 Code of Canon Law. Cf. B. FRANCK, Vers un Nouveau Droit Canonique?, p. 180.

free to follow the law of the Church, it appears that they were not acting as official arbitrators of the State, and therefore not bound by the civil law. Under no circumstances, however, would a bishop have been involved in granting a divorce in the name of the State since under Roman Law, the matrimonial bond was not dissolved by a judge, and thus not a matter for court action.<sup>17</sup> Dissolution of marriage among the Romans remained a private matter to be effected by the parties themselves.<sup>18</sup>

### iii. Further Developments Prior to Gratian

In the period between the Peace of Constantine (313) and the Decree of Gratian (1140), formal marriage nullity cases played a small role in the development of matrimonial procedures. This could be attributed to the continuing struggle between Church and State for exclusive competence to regulate marriages.<sup>19</sup>

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17 Cf. G.H. JOYCE, *op. cit.*, p. 216.

18 A Roman Law marriage could be dissolved either by mutual consent of the parties, divortium ex consensu, or at the initiative of one of the parties, repudium. The latter dissolution could be based on such causes as insanity, old age or sterility. Cf. Justinian I, Corpus Iuris Civilis, Digesta, 24.1, 60-62.

19 G. H. JOYCE states that during the Middle Ages with respect to marriage, the Church determined questions of validity, constituted diriment impediments, and in certain instances, granted dispensations from them. Cf. *op. cit.*, p. 214. The cases determined by the State, however, differed from place to place. In the Visigoth kingdom in Spain, royal control was strikingly emphasised. Until the 7th century, licences to marry near kindred were granted by the king in individual cases. In 596, Childebert II issued a stringent law against marriages within prohibited degrees, and prescribed the death penalty for anyone who married his step-mother. Cf. G.H. JOYCE, *op. cit.*, pp. 217-218.

After the fall of the western empire in 476 in the wake of the migrations of peoples from the north, the one institution that remained was the Church. The imperial system of justice in the west ceased to exist. From the collapse of the social order, the prestige of the bishops emerged stronger than before, since the German monarchs relied upon their assistance in the reorganisation of their newly-acquired territories. Moreover, the Merovingian kings as recent converts, respected the authority of the bishops. The episcopal control over Christian marriage, however, was more disciplinary than legislative since both the Merovingian and Carolingian kings enacted legislation for marriage. As such, episcopal control was enforced by ecclesiastical and not civil penalties, although during certain reigns, if the Church's orders were defied, the secular authority enforced obedience.<sup>20</sup>

In the Frankish kingdom, judicial as well as legislative authority over marriage was exercised by the secular authority. It is apparent from Hincmar's De nuptiis Stephani that during the Carolingian era, matrimonial cases were heard in the royal courts.<sup>21</sup> Hincmar examines the matter on doctrinal grounds, explicitly stating that his views had no reference to the civil judgment, since the bishops had no interest in that. There is, however, considerable difference of opinion among authorities concerning Hincmar's views as to the precise limits of secular and ecclesiastical jurisdiction.<sup>22</sup>

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20 Cf. ibid., pp. 216-217.

21 Cf. ibid., p. 218.

22 Cf. ibid., pp. 56-57. Hincmar, as Archbishop of Reims, was the most eminent of the Frankish prelates and wrote much on the Church's doctrine on

It is almost impossible to determine exactly when the Church achieved a proper judicial competence in matters connected with the matrimonial bond. A. Esmein suggests that the process by which the Church was given its rightful jurisdiction was complete by the end of the tenth century.<sup>23</sup> G.H. Joyce, however, holds that the Church gained exclusive competence over matrimonial cases only by about the middle of the eleventh century.<sup>24</sup>

#### iv. The Decretum of Gratian

In the year 1140, the Camaldolese monk, Gratian, completed the compilation of his collection of laws, the Concordantia Discordantium Canonum, which work came to be generally known as the Decretum Gratiani.<sup>25</sup>

The second section of the Decretum treats of the procedural laws in effect at that time. Gratian's own treatment of procedural law, however, concentrates primarily on the criminal process. When discussing the procedures for such trials involving clerics, he cites the canons of the ancient councils which stipulated that a court of several judges should be convoked to hear cases where a bishop, priest or deacon was charged.<sup>26</sup> This prescription, and the rationale

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marriage. The occasion of this work was the divorce sought by Stephen, an Aquitanian noble, from the daughter of Regimund, another noble. Hincmar, misinterpreting the writings of St. Augustine and St. Leo, differed widely from the teachings of Pope Nicholas I (851-857).

23 Cf. A. ESMEIN, Le mariage et droit canonique, I, p. 11.

24 Cf. G.H. JOYCE, op. cit., p. 224.

25 Cf. S. KUTTNER, "The Father of the Science of Canon Law," in The Jurist, I (1941), pp. 2-19.

26 Cf. c. 1, 2, C. III, q. 8.

behind it, reflect the strong belief that agreement among several persons would provide some guarantee of a correct decision in serious matters.

Gratian's work provides invaluable insight into the function of judges in ecclesiastical trials. The judge's primary duty was to base his decision upon an evaluation of the evidence presented to him. Judges were admonished not to be overly influenced by the number of witnesses, but rather by the reliability of the testimony presented.<sup>27</sup> The judge was to examine each case thoroughly by means of a full inquiry, during which the parties were permitted to formulate questions and to raise objections.<sup>28</sup>

Between the eleventh and thirteenth centuries, there was a gradual growth in the Church's understanding of the sacramental nature of marriage. This deeper insight into marriage, coupled with the renaissance of Roman Law and the German legal tradition, confronted the early scholastics with the problem of whether the consensus or the copula constituted the marriage.<sup>29</sup> In their attempts to resolve this conflict and determine precisely how the marriage bond was established, the scholastic theologians also clarified the grounds upon which the validity of a marriage could be challenged. With the new insights into the nature of marriage, and the relationship between consent and copulation in constituting the bond, matrimonial jurisprudence began to recognise invalidating

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27 Cf. c. 3, C. IV, q. 2-3.

28 Cf. c. 11, C. XXX, q. 5.

29 Cf. A.C. DIACETIS, op. cit., p. 54..

grounds that existed before the marriage took place. Among these were sacred orders, solemn vows, the bond of a previous marriage and impotence.<sup>30</sup>

It was inevitable that the gradual development of a jurisprudence for matrimonial nullity would have considerable effect upon the procedural law, especially as regards the manner of conducting such cases and the number of judges required.

Where Gratian treats of matrimonial cases in his Decretum, he quotes canon 26 of the Council of Agde (506) which required that such cases be heard by the bishops of the province.<sup>31</sup> It would seem from an investigation into matrimonial procedures used at the time of Gratian, that only cases involving an attack upon the bond itself were decided by a number of bishops in council or synod. Where there was obvious invalidity, as in a union contracted despite the impediment of sacred orders, or in cases where no challenge was directed against the bond, such as the separation of spouses, the bishop acting alone or his duly appointed delegate would hear and decide the issue.

Gratian's Decretum was the most widely known canonical collection prior to the publication of the decretals of Pope Gregory IX in 1234. The Decretum, though not an authentic collection, was to have great influence on subsequent legislation and jurisprudence, and significant elements of it were incorporated into the 1917 Code of Canon Law.

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<sup>30</sup> Cf. C. LEFEBVRE, "Origines et évolution de l'action en déclaration de nullité de mariage," in RDC, 26 (1976), p. 28.

<sup>31</sup> Cf. c. 1, C. XXXIII, q.2; H.T. BRUNS, Canones apostolorum et conciliorum saeculorum, II, p. 151.

v. From the Decretals to the Council of Trent

On September 5, 1234, the first authentic canonical collection, the Decretales, was promulgated by the Bull, Rex pacificus, of Gregory IX (1227-1241). Together with two other collections, the Liber sextus of Boniface VIII (1294-1303), and the Constitutiones of Clement V (1305-1314), the Decretales remained generally in force until the promulgation of the 1917 Code of Canon Law. Thus, they became one of the authentic sources of procedural legislation; this lasted for almost seven hundred years.<sup>32</sup> The procedural law observed during this period was largely similar to that described in the Decretum. The decretalist age presents an elaboration of, rather than a change in, the earlier procedural legislation.

From the time of the Decretales to the Council of Trent, three factors which greatly influenced matrimonial procedures become apparent. Firstly, and perhaps most importantly, competence for matrimonial cases moved from the provincial council to the local bishop, and in time to the lower courts of the archdeacon and dean.<sup>33</sup> Sadly, however, these lower clerics were often deficient in their knowledge and understanding of matrimonial causes and judicial procedures in general.

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32 Cf. F. ROBERTI, De processibus, I, p. 21: "Nihilominus ex tempore quo per bullam Rex Pacificus 5 Sept. 1234 Gregorius IX collectionem promulgavit, usque ad nostram fere aetatem, systema legum processualium Ecclesiae substantialiter immutatum permansit; et doctores ad illud illustrandum operam navarunt, plerumque ipso titulorum ordine servato. Bonifacius VIII paucis tantummodo normis processum perfecit."

33 Cf. A.E. LYONS, The Collegiate Tribunal of First Instance with Special Reference to Matrimonial Causes, p. 10.

The archdeacon and dean enjoyed either delegated or ordinary power to hear matrimonial cases in first instance, and any appeal was directed to the local bishop.<sup>34</sup> The metropolitan was the court of appeal for cases originating in the bishop's court. In time, however, appeals from the archdeacon directly to the metropolitan became so general that special limitations were decreed to ensure that more cases were referred to the bishop. From the era of Innocent III (1198-1216) until the Council of Trent, there was a continuous struggle to restrict the authority of these lower clerics, especially the archdeacon, over the major causes, among which matrimonial cases were prominent. In time, the archdeacon, as ordinary judge for episcopal causes, was displaced by the newly-created officialis.<sup>35</sup>

The second factor was the introduction of a summary procedure to counter the often long delays in ecclesiastical trials. In the wake of the rediscovery of the Digest of Justinian in 1070 and renewed interest in Roman Law, both ecclesiastical and civil law procedures were affected. The discovery of an abbreviated informal procedure in the Digest, despite papal prescriptions that formal procedures be observed in all cases, led to its use in many courts. However, Alexander III (1159-1181) and Innocent III were later to permit an abbreviated procedure to expedite matrimonial cases.

In 1306, however, with the promulgation of the Constitution, Saepe, Clement V prescribed that for specific cases, among which were matrimonial

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<sup>34</sup> Cf. cc. 7, 9, 10, X, de officio archidiaconi, I, 23.

<sup>35</sup> For an extensive bibliography on the development of the offices of officialis and vicar general, cf. F. ROBERTI, op. cit., p. 249, footnote 1.

cases that could be proved easily by certain and authentic documents, a summary process could be used.<sup>36</sup> The advantage of this procedure, while reducing the judicial acts of the trial and retaining the demands for complete proof and protection of the parties, was the swift administration of justice.

The age of the decretals also witnessed the rise of the Roman tribunals. Since the alleged nullity of many marriages could not be proved by certain and authentic documents, numerous cases had to be judged using the formal matrimonial procedures which not only determined how a decision was to be reached, but also how the court was to be constituted. Among these tribunals was the Sacred Roman Rota, whose origin as a collegiate tribunal dated back to the early fourteenth century with the Constitution, Ratio iuris, of Pope John XXII (1316-1334) in 1331.<sup>37</sup> The gradual evolution of this tribunal into one of the principal collegiate tribunals in the Church exerted extensive influence on the eventually compulsory collegiate tribunal for formal matrimonial nullity cases.

The three hundred year period linking the Decretales of Gregory IX and the Council of Trent determined the direction that matrimonial procedural law would follow. The restrictions placed upon the archdeacon, the introduction of a summary process for certain matrimonial cases, and the collegial decision-making process of the rotal auditors, greatly influenced the future composition of ecclesiastical courts and the procedures to be observed in matrimonial trials.

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36 Cf. c. 2, de verborum significatione, V, II, in Clem.

37 Cf. E. CERCHIARI, Capellani Papae et Apostolicae Sedis seu Sacra Romana Rota, III, pp. 96 ff.

vi. The Council of Trent (1545-1563)

On November 11, 1553, the Council of Trent, after defining Christian marriage as a sacrament, stated that matrimonial causes fell within the exclusive competence of ecclesiastical judges, and that the tribunal of first instance for all cases, excluding those expressly excepted by law, was to be that of the local bishop exclusively.<sup>38</sup> Henceforth, archdeacons and other inferior prelates would be deprived of their ordinary jurisdiction in criminal as well as in matrimonial cases. However, this restriction did not prevent such clerics from being delegated to hear matrimonial cases, but meant that they could no longer act on their own authority. The Council declared that the bishop, the officialis or the vicar general, were the ordinary judges in matrimonial cases, and that the tribunal of second instance was to be that of the metropolitan.<sup>39</sup>

The Council, seeking to consolidate the reform legislation of Boniface VIII with respect to delegated judges, decreed that in each diocese there be elected in the diocesan synod or provincial council at least four judges, who were to be known as iudices synodales.<sup>40</sup> Should it be necessary to appoint additional judges prior to the convocation of another synod, the bishop, with the consent of his Chapter, would appoint substitutes, iudices pro-synodales. By means of this legislation, Trent sought to provide the bishop with well qualified judges to assist him in his judicial role. Where the Holy See had reserved the judgment of certain

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38 Cf. Council of Trent, session XXIV, de matrimonio, c. 12: "Si quis dixerit, causas matrimoniales non spectare ad iudices ecclesiasticos: A.S."

39 Cf. ibid., sess. XIII, de ref., c. 2.

40 Cf. ibid., sess. XXV, de ref., c. 10.

cases to itself, it could nevertheless delegate these judges to decide or instruct such cases on its behalf.

### **B. Post-tridentine Legislation to the 1917 Code of Canon Law**

While the Council of Trent clarified the sacramental nature of marriage and asserted the local bishop's exclusive competence in first instance for matrimonial causes, it omitted to resolve the uncertainty surrounding some judicial procedures to be observed in such cases.

#### **i. The Benedictine Reforms**

The judicial deficiencies which Trent had sought to remove were not immediately solved by its decrees. Many excesses which had marked the Church's judicial system at the time of the Council were to continue for the next two centuries, after which a programme of reform was to be introduced by Pope Benedict XIV (1740-1758).

To counter the excesses of certain judges, Benedict XIV published an Encyclical, Quamvis paternae on August 26, 1741.<sup>41</sup> Through this, he attempted to revive the tridentine legislation on the convocation of a diocesan synod and the appointment of synodal judges, chosen on account of their prudence, zeal for justice and doctrinal proficiency.

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<sup>41</sup> Cf. BENEDICT XIV, Encyclical, "Quamvis paternae," August 26, 1741, in Fontes, I, n. 315, pp. 689-691.

The urgent necessity of his programme and the need for new legislation were outlined in his Constitution, Dei miseratione, of November 3, 1741.<sup>42</sup> The pope asserted that judges were often delegated to hear cases despite their lack of canonical knowledge and moral integrity, and he condemned judges who, with little reason and too hastily, declared marriages null. To remove these abuses, Benedict created a new official, "the defender of marriages," whose presence was compulsory in all diocesan courts.<sup>43</sup> His role was to safeguard the integrity of the matrimonial bond and detect possible collusion between the parties. Benedict also stressed the necessity of two conform sentences before the parties could marry, and declared that the sentence in a case of matrimonial nullity was never to be considered definitive, since such cases could be reopened in the light of serious evidence.<sup>44</sup> Dei miseratione was to remain a major source of procedural legislation until the Code of Canon Law became effective in 1918.

## ii. Nineteenth Century Legislation

In the first half of the nineteenth century, the particular legislation of certain dioceses required a collegiate tribunal to define specified cases involving clerics, on the ground that conclusions reached by more than one person provide more guarantee of correctness.

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<sup>42</sup> Cf. ID., Constitution, "Dei miseratione," November 3, 1741, in Fontes, I, n. 318, arts. 1-4, pp. 695-697.

<sup>43</sup> Cf. ibid., art. 5, p. 697.

<sup>44</sup> Cf. ibid., art. 11, p. 699.

a. The Papal States

In 1831, Pope Gregory XVI (1831-1846) issued a Circular Letter in which he prescribed that in every diocese in the Papal States, an ordinary tribunal consisting of the bishop and four clerics be established for criminal cases involving clerics.<sup>45</sup> Such cases were to be decided by majority vote. Since, for a number of reasons, the letter was somehow disregarded in certain dioceses in the Papal States, the Sacred Congregation of Bishops and Regulars, on August 1, 1851, declared that if any bishop acted contrary to the law regarding the composition of his court, the sentence rendered would be invalid.<sup>46</sup>

On August 22, 1840, the Sacred Congregation of the Council issued an Instruction, Cum moneat glossa, applicable to the entire Church.<sup>47</sup> The Instruction, based upon the provisions of Dei miseratione, prescribed in detail the formalities for matrimonial nullity cases. In such cases, three active members, the judge, the defender of the bond and the notary were to constitute the tribunal.<sup>48</sup> The bishop, as ordinary judge, was personally or through a cleric

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<sup>45</sup> Cf. Acta Gregorii Papae XVI, Regolamentoo organico di procedura criminale, IV, pp. 74-113.

<sup>46</sup> Cf. S.C. OF BISHOPS AND REGULARS, Circular Letter, August 1, 1851, in ASS, XV (1898), pp. 547-552; A. BIZZARI, Collectanea in usum Secretariae Sacrae Congregationis Episcoporum et Regularium, p. 172.

<sup>47</sup> Cf. S.C. OF THE COUNCIL, Instruction, "Cum moneat glossa," August 22, 1840, in Fontes, V, n. 4069, pp. 345-350. This Instruction is also found in S.B. SMITH, Elements of Ecclesiastical Law, II, p. 436. The numbering of the paragraphs of "Cum moneat glossa" follows Smith's numeration.

<sup>48</sup> Cf. Instruction, "Cum moneat glossa," n. 1612: "[...] pars nullitatem matrimonii allegans comparebit [...] coram Iudice, adstante Defensore matrimonii et Cancellario."

delegated by him, not only to pronounce sentence, but also to preside at the trial. The absence of the defender of the bond, when his presence was required, invalidated the sentence.

The Instruction provided that appeals were to be made according to Dei miseracione, and that the bishop, as judge of first instance, was to submit an authentic copy of the acts to the judge of second instance.

#### b. Austria

Among other documents which reflect the trend towards the collegiate tribunal is the Instructio pro iudiciis Imperii Austriaci quoad causas matrimoniales, of May 4, 1855, and commonly referred to as "the Austrian Instruction."<sup>49</sup> This Instruction, promulgated by Joseph Cardinal Rauscher (1797-1875), Archbishop of Vienna, for his archdiocese, was later approved in forma ordinaria by the Holy See for the whole of Austria. The Instruction repeated that matrimonial cases belonged exclusively to ecclesiastical judges, and declared that the proper judge was the bishop of the diocese where the husband was domiciled. But significantly for the judicial procedure for matrimonial nullity cases, after referring to a preliminary inquiry, it prescribed that the bishop select a collegiate tribunal of at least four, and not more than six members, to define such cases.<sup>50</sup> The defender of the bond was to be heard, and the decision of the tribunal was to be reached by an absolute majority of votes.

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<sup>49</sup> Cf. Acta et Decreta Sacrorum Conciliorum Recentiorum, Collectio Lacencis, V, pp. 1286 ff.

<sup>50</sup> Cf. ibid., art. 97, pp. 1298-1299: "Episcopus in tractandis causis matrimonialibus utitur tribunali, quod ex praeside et consiliariis ad minimum quatuor constare debet."

The Austrian Instruction subsequently exercised great influence on the particular legislation of other countries as well as on universal legislation concerning the mandated collegiate tribunal.

### c. The United States of America

During the Second Plenary Council of Baltimore, October 6-20, 1866, it was enacted that for the criminal trials of clerics, a court consisting of the bishop or his vicar general and two priests be constituted.<sup>51</sup> On July 20, 1878, the Sacred Congregation for the Propagation of the Faith in an Instruction, Quamvis concilium, intended for the United States, provided that for such cases, the bishop's tribunal was to comprise five priests, or where this was impossible, at least three, who were to constitute a Commission of Investigation.<sup>52</sup> The role of this Commission, whose members were to be selected in synod, was to investigate cases presented to the bishop. After discussing the merits of the case, each member was to write his opinion in extenso, together with the relevant reasons. A vote to determine the majority opinion of the court was then required, and this along with the acta of the case, was to be submitted to the bishop for definitive sentence.<sup>53</sup>

In 1883, the same Congregation, in a further Instruction, Cum magnopere, also issued for the United States, made provision for the organisation of

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51 Cf. A.E. LYONS, op. cit., p. 8.

52 Cf. S.B. SMITH, op. cit., pp. 415-421, for the text of the Instruction.

53 Cf. ibid., p. 420.

ecclesiastical courts and the procedures for criminal trials involving clerics.<sup>54</sup> The prescriptions of Quamvis concilium, similar to those of Cum magnopere, were superseded by the latter Instruction in most parts of the United States.

Although Cum magnopere had been intended to regulate only the criminal cases of clerics, the Third Plenary Council of Baltimore, November 9 to December 7, 1884, extended its provisions to prescribe a general procedure for all ecclesiastical trials in the United States, including formal matrimonial cases of nullity.<sup>55</sup>

Both Quamvis concilium and Cum magnopere were to influence future legislation since the Commission of Investigation, which they established, was to play an important part in preparing for the mandated collegiate tribunal and the synodal judges of the 1917 Code of Canon Law. Significantly, Cum magnopere is mentioned in Cardinal Gasparri's edition of the Code in the footnote for canon 1574 on synodal judges.<sup>56</sup>

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54 Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Instruction, "Cum magnopere," 1883 (exact date not given), in Collectanea S. Congregationis de Propaganda Fide seu decreta, instructiones, rescripta pro Apostolicis missionibus, II, n. 1586, p. 169. Hereafter referred to as Collectanea.

55 Cf. A. DIACETIS, op. cit., p. 99. The Council also treated of matrimonial cases specifically, and incorporated into its decrees the legislation of the Instruction, "Causae matrimoniales," of the S.C. FOR THE PROPAGATION OF THE FAITH, 1883. Cf. Collectanea, II, n. 1587, pp. 172-179.

56 Cf. Codex Iuris Canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus. Praefatione, fontium, annotatione et indice analytico-alphabetico ab Emo. Petro Card. Gasparri auctus, p. 457, footnote 5.

### iii. The 1917 Code of Canon Law

Since much of the procedural law for matrimonial nullity cases, as reflected in Book IV of the 1917 Code, is repeated substantially in Book VII of the 1983 Code to which two chapters of this study are devoted, the procedural law of the 1917 Code will not be discussed here. It must, however, be noted that most of the matrimonial procedural legislation, enacted from the time of the Council of Trent, was incorporated into the 1917 Code. In particular, the post-tridentine concern for safeguarding the integrity of the marital bond through the defender of the bond and the use of experts, collegiate deliberations and the mandatory appeal, resulted in much of the legislation for formal matrimonial nullity trials found in the Code.

### C. Interdiocesan Tribunals Prior to the 1983 Code of Canon Law<sup>57</sup>

The picture that has emerged with respect to jurisdiction over matrimonial causes in which invalidity of the bond was alleged, is a complex one.

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<sup>57</sup> Three distinct phases may be determined in the evolution of interdiocesan tribunals prior to the 1983 Code of Canon Law:

- a) 1938-1959: in this period, commencing with the erection of regional tribunals in Italy and concluding with the announcement of Vatican Council II, interdiocesan courts were also established in the Philippine Islands (1940), Canada (1946) and Brazil (1959).
- b) 1959-1965: the conciliar period. During the Council, much discussion was devoted to difficulties concerning the administration of justice in the Church generally, and in interdiocesan tribunals in particular. These discussions would influence the development of interdiocesan courts. For an excellent synthesis, cf. C. ZAGGIA, "I tribunali interdiocesani o regionali nella vita della Chiesa," in Dilexit iustitiam: studia in honorem Aurelii Card. Sabattani, ed. Z. Grochowski and V. Carcel Orti, pp. 124-128.
- c) 1965-1983: the post-conciliar period. This period is marked by the following:
  - i) the meeting of the Synod of Bishops in 1967, and the approval of ten principles which would direct the revision of the Code of Canon Law. Two of

Initially, with colleges of bishops deciding such cases, judicial competence was linked to a synod or provincial council. Such jurisdiction may be described as "regional" or "interdiocesan" in the current sense of this terminology in as much as a number of bishops acted jointly in the decision-making process. When the local bishop emerged as the competent court of first instance, his jurisdiction over matrimonial causes was juridically connected to the territory of his diocese. However, with the advent of interdiocesan tribunals in 1938, competence to define both formal and sometimes informal matrimonial nullity cases moved from the local bishops to the assembly of bishops of the relevant territory. Jurisdiction for such cases has become "supradiocesan."

#### i. Interdiocesan Tribunals

The term "interdiocesan," in the broad sense, embraces all tribunals established with supradiocesan competence. It thus includes the three categories of such courts currently found in the Church: regional, interregional and, in the strict sense, interdiocesan.

During the Second Vatican Council, supradiocesan tribunals were often referred to as "interdiocesan," "regional" or "national," and sometimes as

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these, respectively concerning subsidiarity and the territorial arrangement of the Church, would have particular influence on the future law for interdiocesan courts. Cf. *Communicationes*, I (1969), pp. 77-85.

ii) the work of the Pontifical Commission for the Revision of the Code of Canon Law;

iii) the norms for interdiocesan tribunals, both particular and general, emanating from various dicasteries of the Holy See.

"interritual" or "linguistic."<sup>58</sup> In the general norms issued by the Apostolic Signatura in 1970, it is significant that the term "interdiocesan" was mentioned first, followed by "regional" and "interregional."<sup>59</sup> Indeed, it would appear that the current preference of the Apostolic Signatura is for the expression "interdiocesan," since it is indeterminate and may be used more comprehensively. The term may thus be used to describe the following courts:

- a) common tribunals, established by several bishops whose dioceses do not constitute an ecclesiastical province or region;
- b) provincial tribunals, erected by bishops of the same ecclesiastical provinces;
- c) interprovincial tribunals, established by bishops of several ecclesiastical provinces;
- d) regional tribunals, established by bishops of the same ecclesiastical region;
- e) interregional or national tribunals, constituted by bishops of several ecclesiastical regions, or of an entire nation, or for all the territory of an episcopal conference: the latter could even include several nations.<sup>60</sup>

From a construction of articles 2 and 3 of the general norms of the Apostolic Signatura for supradiocesan courts, M. Pesendorfer defines the boundaries of the terms "interdiocesan," "regional" and "interregional":

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<sup>58</sup> Cf. C. ZAGGIA, loc. cit., p. 138.

<sup>59</sup> Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, "Normae pro Tribunalibus interdiocesanis vel regionalibus aut interregionalibus," December 28, 1970, in AAS, 63 (1971), pp. 486-492. Hereafter cited as "Normae pro Tribunalibus." These norms are reproduced in appendix I.

<sup>60</sup> Cf. C. ZAGGIA, loc. cit., p. 139.

Accordingly, regional tribunals are constituted in accordance with the territory of a bishops' conference. The term "regional jurisdiction" has now received a specific new significance. [...]. Interdiocesan tribunals are those which are constituted for several dioceses, but not for the whole territory of a bishops' conference. Interregional tribunals are those which encompass, besides the jurisdiction of a bishops' conference, at least one more diocese.<sup>61</sup>

Interdiocesan tribunals may be described as those established by the Holy See for a specific territory at the request of the bishops concerned, with competence to decide all cases, or only certain types of cases. I. Gordon describes them as:

[...] tribunals constituted by the Holy See for some territory or region, including at least several dioceses, and having ordinary jurisdiction to define either cases of matrimonial nullity alone, or perhaps all types of cases, both criminal and contentious, arising within the boundaries of that same territory.<sup>62</sup>

K. Mörsdorf depicts such courts well when he observes:

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61 Cf. M. PESENDORFER, "Regionale kirchliche Gerichtshöfe. Ein Strukturproblem des kirchlichen Verfassungsrechts," in *OAK*, 25 (1974), pp. 259-260: "Demnach sind regionale Gerichtshöfe jene, die für das Territorium einer Bischofskonferenz errichtet werden. Der Terminus regionaler Gerichtsbarkeit hat damit nunmehr einer ganz bestimmte, neue Bedeutung erhalten [...]. Überdiözesane Gerichtshöfe sind jene, die für mehrere Diözesen gemeinsam, jedoch nicht für das gesamte Territorium einer Bischofskonferenz errichtet werden. Überregionale Gerichtshöfe sind jene, die über das Jurisdiktionsgebiet einer Bischofskonferenz hinaus wenigstens noch eine Diözese umfassen."

62 Cf. I. GORDON, "De nimia processuum matrimonialium duratione: factum, causae, remedia," in *Per.*, 58 (1969), p. 552: "[...] tribunalia a S. Sede constituta pro aliquo territorio vel regione, plures saltem dioeceses comprehendente, et cum iurisdictione ordinaria ad definiendas vel solas causas nullitatis matrimonii, vel fortasse omnes omnino causas tum criminales tum contentiosas, quae intra limites eiusdem territorii exsurgant."

A regional tribunal is [...] not a Metropolitan court, but one that has been established as a common tribunal in first instance for all the dioceses concerned, so that each respective diocese has, in the regional tribunal, a court of first instance.<sup>63</sup>

With particular reference to the Italian tribunals, F. Roberti states:

These tribunals are of first and second instance. In so far as they are competent for cases of matrimonial nullity, they completely substitute for the ordinary diocesan tribunals.<sup>64</sup>

On these tribunals, A. da Sant'Elia a Pianisi writes:

Regional tribunals are, in fact, ordinary matrimonial tribunals for the whole of a conciliar region, and are not common diocesan tribunals for all the dioceses of a region.<sup>65</sup>

Regional courts were initially constituted in Italy on December 8, 1938, by the Motu Proprio, Qua cura, of Pope Pius XI.<sup>66</sup> In the motu proprio, the pope declared that for many years the Sacred Congregation of the Sacraments had been preparing for such tribunals by gathering information on tribunals and matrimonial

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63 Cf. K. MÖRSDORF, Lehrbuch des Kirchenrechts auf Grund des Codex Iuris Canonici, III, p. 58: "Ein Regionalgericht ist [...] kein Metropolitangericht, sondern ein für die beteiligten Bistümer gemeinsames Gericht, erster Instanz, so das jedes beteiligte Bistum in dem Regionalgericht sein eigenes Gericht erster Instanz besitzt."

64 Cf. F. ROBERTI, op. cit., pp. 404-405: "Haec tribunalia sunt primae et secundae instantiae; eaque quoad causas nullitatis matrimonii tribunalia ordinaria dioecesium plene substituunt."

65 Cf. A. DA SANT'ELIA a PIANISI, I tribunali ecclesiastici regionali per le cause di nullità matrimoniale in Italia, pp. 12-13: "I tribunali regionali, infatti, sono tribunali matrimoniali ordinari di tutta una regione conciliare e non tribunali diocesani comuni per tutte le diocesi della regione."

66 Cf. PIUS XI, Motu Proprio, "Qua cura", December 8, 1938, in AAS, 30 (1938), pp. 410-413.

cases.<sup>67</sup> The Congregation had, by its Circular Letter, In plenariis, of July 1, 1932, for the first time regulated its "vigilance" over matrimonial courts by obliging local Ordinaries to submit annual reports on the status and activity of their tribunals.<sup>68</sup>

The expression "regional tribunal," although not in the 1917 Code, occurs frequently in Qua cura as well as in the executory norms for the Italian courts.<sup>69</sup> To understand the origin of this terminology, it must be recalled that in 1919, the Sacred Consistorial Council constituted eighteen conciliar regions in Italy.<sup>70</sup> With their creation, obstacles connected with convening plenary and regional councils as prescribed by the Code were eliminated, since bishops would attend the council arranged for their particular region. When, almost twenty years later, eighteen regional tribunals were established for Italy, it was natural that their territory and the extent of their jurisdiction corresponded to the regions.

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67 Cf. ibid., p. 411.

68 Cf. S.C. OF THE SACRAMENTS, Circular Letter, "In plenariis," July 1, 1932, in AAS, 24 (1932), pp. 272-274.

69 Cf. ID., "Normae pro exsequendis litteris apostolicis 'Qua Cura' die 8 dec. 1938 motu proprio datis," July 10, 1940, in AAS, 32 (1940), pp. 304-308.

70 The division of Italy into conciliar regions was effected by the Sacred Consistorial Council in three enactments: Decree, "Pro celebratione conciliorum et appellationibus in regionibus Italiae," February 15, 1919, in AAS, 11 (1919), pp. 72-74; Circular Letter, "All'Episcopato Italiano in esecuzione del decreto 'Pro conciliorum celebratione in regionibus Italiae' del 15 Febbraio 1919," March 22, 1919, in AAS, 11 (1919), pp. 175-177; Decree, "De earumdem dioecesium adscriptione ad ecclesiasticam regionem Beneventanam," September 29, 1933, in AAS, 25 (1933), p. 466. Cf. A. PUGLIESE, "Regione conciliare," in Enciclopedia Cattolica, X, col. 653, ID., "Le nuove norme sui tribunali ecclesiastici regionali," in Revista del Diritto Matrimoniale Italiano, 8 (1941), pp. 97-108; A. DA SANT'ELIA a PIANISI, op. cit., p. 8.

## ii. The Intervention of the Holy See

It is a general principle of the Code of Canon Law that every diocesan bishop has the right to establish a local court. Why, then, is the intervention of the Holy See required when a number of bishops decide that a supradiocesan tribunal would best serve the common good? The answer is deeply rooted in the nature of the episcopal office and the potestas iudiciaria which is an essential element of that office, for with the creation of an interdiocesan court, the local bishops, albeit voluntarily, are deprived of the exercise of their judicial competence for cases for which the new court has been established.

How, then, is it possible to reconcile what is asserted in article 27 of the Dogmatic Constitution on the Church, Lumen gentium, with this restriction upon an aspect of the episcopal potestas which has its origin in the divine law?

The bishops as vicars and legates of Christ govern the particular Churches assigned to them [...] by the authority and sacred power which indeed they exercise [...]. This power, which they exercise personally in the name of Christ, is proper, ordinary and immediate [...].<sup>71</sup>

Canon 391, §1 of the 1983 Code, which corresponds to canon 335 of the 1917 Code, reinforces article 27 of Lumen gentium:<sup>72</sup>

It is the role of the diocesan bishop to rule the particular Church committed to him with legislative, executive and judicial power, in accord with the norm of law.<sup>72</sup>

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71 Cf. VATICAN COUNCIL II, Dogmatic Constitution, "Lumen gentium," November 21, 1964, in AAS, 57 (1965), art. 27, pp. 32-33. English translation in A.P. FLANNERY, ed., Documents of Vatican II, pp. 382-383.

72 Canon 391, §1: "Episcopi dioecesani est Ecclesiam particularem sibi commissam cum potestate legislativa, exsecutiva et iudiciali regere, ad normam iuris."

The same principle is affirmed, both in canons 334, §1 of the 1917 Code and 381, §1 of the 1983 Code. Canon 381, §1 declares that:

A diocesan bishop in the diocese committed to him possesses all the ordinary, proper and immediate power which is required for the exercise of his pastoral office, except in those matters which the law or a decree of the Supreme Pontiff reserves to the supreme or to some other ecclesiastical authority.<sup>73</sup>

The office of diocesan bishop, endowed by divine law with ordinary, proper and immediate power, is so constituted to enable the incumbent to exercise his pastoral role in the service of the people of God. With the suspension of the exercise of the greater part of his judicial power, his office is fundamentally modified.

Is the potestas iudiciaria a necessary and integral element of the episcopal office? To respond, it must be noted, however, that following the constitution of an interdiocesan tribunal, diocesan bishops do not forfeit the exercise of the totality of their judicial power. Canons 381, §1 and 391, §1 of the 1983 Code of Canon Law are to be interpreted broadly, since the judicial power of a residential bishop must be understood to include, in addition to criminal and contentious cases, the administrative ones, and, in some instances, the summary ones, where a sizable part of his judicial power remains in force.

M. Pesendorfer, however, maintains that the restrictions upon the judicial

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<sup>73</sup> Canon 381, §1: "Episcopo dioecesano in dioecesi ipsi commissa omnis competit potestas ordinaria, propria et immediata, quae ad exercitium eius muneris pastoralis requiritur, exceptis causis quae iure aut Summi Pontificis decreto supremae aut alii auctoritati ecclesiasticae reserventur."

competence of diocesan bishops, once an interdiocesan court has been established, may be justified by the same article of Lumen gentium, which continues:<sup>74</sup>

This power which they exercise personally in the name of Christ, is proper, ordinary and immediate, although its exercise is ultimately controlled by the supreme authority of the Church, and can be confined within certain limits should the usefulness of the Church and the faithful require that.<sup>75</sup>

The implication is that while there is a transfer of power, the bishop is in no way divested of his ordinary judicial power, the exercise of which is merely suspended in certain instances. Indeed, where a bishop, with the consent of the Holy See, withdraws from the interdiocesan arrangement, the exercise of his judicial power in its fullness revives. In essence, the exercise of jurisdiction by an interdiocesan tribunal flows from the voluntary abdication by diocesan bishops of their principal judicial responsibilities for the benefit of the supradiocesan organism.<sup>76</sup>

On the other hand, it must be stressed, that while a diocesan bishop may be deprived of a substantial part of his judicial power, as a member of the assembly of bishops, his judicial competence transcends his diocese, extending to all the dioceses of the territory. Furthermore, the bishops in their assembly

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74 Cf. M. PESENDORFER, loc. cit., p. 259.

75 Cf. A.P. FLANNERY, ed., op. cit., p. 383.

76 Cf. M. DESDOUITS, "Origine, institution et nature des tribunaux ecclésiastiques régionaux en France," in RDC, 20 (1970), p. 4: "[...] toute la substance de la réforme opérée par l'institution des officialités régionales repose sur le dessaisissement de l'évêque diocésain de ses principales responsabilités judiciaires au profit d'un organisme supra-diocésain."

designate officers not only for their respective dioceses, e.g., for the instructory courts, but also for the entire territory. It may well be asked how this can be done in so far as a bishop enjoys jurisdiction only within his own diocese. F. Roberti responds by stating that such responsibilities involving supradiocesan jurisdiction may only be accomplished "auctoritate Romani Pontificis."<sup>77</sup>

On this point, the coetus on procedural law of the Commission for the Revision of the Code of Canon Law, in response to a proposal that an episcopal conference be empowered to constitute interdiocesan tribunals without the prior authorisation of the Holy See, asserted that an episcopal conference, as such, lacked the necessary capacity to confer on a supradiocesan body jurisdiction which belongs to individual bishops.<sup>78</sup> Accordingly, it must be concluded that with regard to the special nature of the jurisdiction of such courts, the transfer of power may take place only upon the authorisation of the highest authority. It is in virtue of his primacy of jurisdiction that the Roman Pontiff is able to restrict the exercise of episcopal powers, whether legislative, executive or judicial, and assign these powers to new organisms created by him.

In the case of Italy, regional tribunals were constituted by a motu proprio of Pius XI. Why, then, in other nations where interdiocesan courts have been established was the erection by virtue of a decree of a Congregation, or, after

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77 Cf. F. ROBERTI, "Annotationes ad motu proprio d. 8 dec. 1938," in Apollinaris, 12 (1939), p. 23. Cf. also M. PESENDORFER, loc. cit., p. 262: "Da es sich um eine Rechtshandlung im überdiözesanen Bereich handelt, kann die Rechtsgrundlage, die das Errichtungsdekret der Bischöfe trägt, nicht die bischöfliche, sondern nur die oberste kirchliche Gewalt sein."

78 Cf. Communicationes, 10 (1978), pp. 232-233.

March 1, 1968, of the Apostolic Signatura?<sup>79</sup> It would seem that, once the principle of limiting the exercise of the judicial power of bishops in their own dioceses, and of bestowing upon them supradiocesan judicial competence had been admitted, direct papal intervention was no longer required.<sup>80</sup>

### iii. Legislation Applicable to Interdiocesan Tribunals Prior to 1983

To determine the nature of interdiocesan courts prior to the 1983 Code of Canon Law, it is necessary, in part, to determine what legal texts were applicable to them.

#### a. The Decree of Erection and Executory Norms

Since an interdiocesan tribunal is a special court, it requires an express constitution for its establishment. Thus, wherever such tribunals have been established, the fundamental legal documents endowing them with juridical existence and defining their rights and duties, have been either a decree of erection as well as executory norms formulated by the Holy See, or, since March 25, 1971, when the general norms for interdiocesan tribunals became effective, a decree of erection prepared by the bishops concerned and approved by the Holy See.

With the sole exception of Italy, interdiocesan tribunals constituted prior to March 1, 1968, were established by a decree of the Sacred Congregation of the

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<sup>79</sup> On March 1, 1968, the Apostolic Constitution, "Regimini Ecclesiae universae," became effective.

<sup>80</sup> Cf. M. DESDOUITS, "Origine, institution et nature des tribunaux ecclésiastiques régionaux en France," in RDC 18 (1968), p. 194.

Sacraments, and in a separate document of the same Congregation, executory norms were granted to regulate the organisation of the courts.<sup>81</sup> To this Congregation was also attached an Office of Vigilance for matrimonial tribunals.<sup>82</sup> However, with the reorganisation of the Roman Curia by the Apostolic Constitution of Paul VI, Regimini Ecclesiae universae, the First Section of the Apostolic Signatura assumed responsibility both for the establishment of interdiocesan and interritual tribunals and for the Office of Vigilance, the competence of which was extended to all ecclesiastical courts.<sup>83</sup>

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81 The initial grant of executory norms for interdiocesan courts was made by the S.C. of the Sacraments in 1940 for the Italian regional tribunals [cf. "Normae pro exsequendis litteris apostolicis 'Qua Cura' die 8 dec. 1938 motu proprio datis," in AAS, 32 (1940), pp. 304-308]. In successive grants for other courts by the same Congregation, the norms were largely analogous, but for matrimonial causes only. The norms which emanated from that Congregation for all tribunals erected until March 1, 1968, were later practically absorbed and reformulated in the "Normae pro Tribunalibus interdiocesanis vel regionalibus aut interregionalibus," issued by the Apostolic Signatura on December 28, 1970. These general norms have largely been superseded by the provisions of the new Code.

82 The Office of Vigilance of the S.C. of the Sacraments was created on May 24, 1939.

83 Cf. PAUL VI, Apostolic Constitution, "Regimini Ecclesiae universae," August 15, 1967, in AAS, 59 (1967), art. 105, p. 921; O. ROBLEDA, "Decisionum quarundam Supr. Tribunalis Signaturae Apostolicae commentarius," in Per., 61 (1972), p. 93. At pages 92-94, Robleda discusses the establishment of interritual tribunals of second instance. With respect to courts for the Oriental rite, Pius XII had provided for the erection of tribunals of first instance for several eparchies or regions. Such erection was reserved to the Holy See or to the particular synod of bishops with the approval of the Holy See. However, once a regional tribunal had been constituted, the bishops could not validly establish a tribunal ("pro quibus tribunal regionale erectum est nequeunt tribunal collegiale sua in eparchia valide erigere.") Moreover, bishops with jurisdiction in the same territory of a patriarchate could establish a single interritual tribunal "quod causas sive contentiosas sive criminales fidelium cuiusvis ritus alicui ex iisdem locorum Hierarchis subiectorum, cognoscat." Cf. PIUS XII, Motu Proprio, "Sollicitudinem nostram," January 6, 1950, in AAS, 42 (1950), pp. 5-120, especially arts. 38 and 39, pp. 13-14; C. ZAGGIA, loc. cit., pp. 135-136.

With respect to the establishment of interdiocesan courts, two significant differences between the practice of the Sacred Congregation of the Sacraments and the Apostolic Signatura must be noted:

- i. The Sacred Congregation of the Sacraments issued decrees of erection at the request of, or at least after having heard, the bishops concerned. The Apostolic Signatura, however, after initially adopting the practice of the Congregation in its first period prior to the publication of the general norms (1968-1970), largely reduced its own direct intervention through the concession of a "nihil obstat," which authorised the bishops to prepare a decree of erection appropriate to their particular needs.<sup>84</sup>
- ii. Since the proper competence of the Congregation had been prescribed by canon 249 of the 1917 Code of Canon Law, it established interdiocesan tribunals with competence solely for matrimonial causes. The majority of the courts established by the Apostolic Signatura, on the other hand, are competent to handle all cases. Moreover, the Apostolic Signatura has extended the competence of several courts, erected prior to 1968, to include all cases.

The practice of establishing interdiocesan tribunals, governed by two distinct documents, continued until the general norms became operative. However, since March 25, 1971, the Apostolic Signatura, upon receipt of a petition for the erection of interdiocesan courts, has forwarded to the bishops the "nihil obstat," together with an outline to assist them in drawing up a decree of erection which would best respond to local requirements. This decree, to become effective, had subsequently to be approved by the Apostolic Signatura.

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<sup>84</sup> Cf. "Normae pro Tribunalibus," art. 2.§2, p. 487.

**b. The Code of Canon Law**

Since 1938, the judicial procedure followed in interdiocesan matrimonial tribunals has been the one observed in ordinary diocesan tribunals, that is, the procedure prescribed in the 1917 Code of Canon Law and subsequent procedural enactments. This appears to have been expressly provided in the executory norms of all interdiocesan courts erected before March 25, 1971. For example, article 1 of the executory norms for the Italian, Philippine, Canadian, Columbian and Parisian-Versailles tribunals declares, with respect to the moderator of the tribunal:

[..] to him are attributed all the rights and duties, which belong to local Ordinaries as regards their own tribunals, according to the sacred canons and the Instruction of this Sacred Congregation for the discipline of the Sacraments, of 15 August, 1936, unless some other provision is made below, or the matter shall so require.<sup>85</sup>

After March 25, 1971, specific reference is made to the general norms in particular decrees. Thus, for example, article III of the decree for Zimbabwe explicitly refers to article 4 of the general norms when clarifying the role of the moderator. Article 11 of the general norms had provided that, in handling cases, the prescriptions of law were to be observed, but with the additions and changes stipulated in the norms themselves.<sup>86</sup>

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<sup>85</sup> "[..] eidemque omnia iura et officia attribuuntur quae Ordinariis locorum, ad normam sacrorum canonum et Instructionis Sacrae huius Congregationis de disciplina Sacramentorum diei 15 Augusti 1936 circa proprium tribunal competunt, nisi aliter infra cautum sit vel subiecta materia aperte exigat."

<sup>86</sup> Cf. "Normae pro Tribunalibus," art. 11, p. 490.

c. Subsequent Enactments of the Holy See

1. The Instruction, Provida mater

The Instruction, Provida mater, did not abrogate any of the procedural law of the 1917 Code.<sup>87</sup> Rather, its purpose was to provide a co-ordinated restatement of the matrimonial procedures of the Code which would assist judges to adapt the general procedural principles of the Code to individual cases. Although Provida mater had originally been intended for diocesan tribunals, it was specifically extended to interdiocesan courts by the Motu Proprio, Qua cura.<sup>88</sup> In the appendix to Provida mater, two previous prescriptions, issued by the same Congregation and applicable to interdiocesan tribunals, were cited. The first of these was the Instruction, De competentia iudicis in causis matrimonialibus ratione quasi-domicilii, of December 23, 1929.<sup>89</sup> The other was the Circular Letter, In plenariis, of July 1, 1932, addressed to diocesan bishops and those equivalent to them, which prescribed that in January of each year, a comprehensive report on the status and activity of matrimonial courts in the preceding year was to be submitted.<sup>90</sup> In this report, among other matters,

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87 Cf. S.C. OF THE SACRAMENTS, Instruction, "Provida mater," August 15, 1936, in AAS, 28 (1936), pp. 313-372.

88 Cf. PIUS XI, Motu Proprio, "Qua cura," December 8, 1938, in AAS, 30 (1938), p. 410.

89 Cf. S.C. OF THE SACRAMENTS, Instruction, "De competentia iudicis in causis matrimonialibus ratione quasi-domicilii," December 23, 1929, in AAS, 22 (1930), pp. 168-171.

90 Cf. ID., Circular Letter, "In plenariis," July 1, 1932, in AAS, 24 (1932), pp. 272-274. A synthesis of the annual reports received by the S.C. of the Sacraments was published annually in the Adunanza Generale of the Office of Vigilance. See appendix II for a synopsis of the statistics of matrimonial cases handled in respect of Asia, Africa and Oceania for the years 1962 and 1963.

mention was to be made of the names and academic qualifications of tribunal personnel, money paid to the tribunal by the parties, the honoraria paid to advocates and experts, the statistics of cases introduced and defined both in first and second instance with the grounds of nullity, and details of the activity of the defender of the bond.

## 2. The Circular Letter of the Apostolic Signatura

On December 28, 1970, the Apostolic Signatura addressed a Circular Letter to the presidents of episcopal conferences. In this letter, local Ordinaries were exhorted to consider the establishment of interdiocesan courts in order that the administration of justice, especially as regards matrimonial cases, be more expeditiously handled.<sup>91</sup> This letter also required that annual and quinquennial reports on the status and activity of all tribunals be submitted to the Apostolic Signatura by tribunal moderators of both the Latin and Oriental Churches.

## 3. The Norms for Interdiocesan, Regional or Interregional Tribunals

Also on December 28, 1970, as previously mentioned, the Apostolic Signatura published general norms for interdiocesan tribunals.<sup>92</sup> These twenty-

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91 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, "Litterae Circulares ad Praesides Conferentiarum Episcopaliarum de Tribunalium Ecclesiasticorum statu et activitate," December 28, 1970, in AAS, 63 (1971), pp. 480-486. Cf. P. FELICI, "Address to Twelfth General Congregation," October 6, 1980, in L'OSSERVATORE ROMANO, October 20, 1980, p. 14, where Cardinal Felici made a strong plea for episcopal conferences to establish interdiocesan tribunals within their territories.

92 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, "Normae pro Tribunalibus," in AAS, 63 (1971), pp. 486-492; F.G. MORRISSEY, "Regional Tribunals," in NCE, 16, p. 375.

two norms, arranged in five chapters, regulated the establishment and functioning of such courts. The initial step was for the bishops concerned to petition the Holy See for a "nihil obstat." In their request, they were to include their reasons for wishing to erect these tribunals, the competence required and the number of tribunals of first and second instance, together with details of the dioceses for which the courts were to be constituted.

#### 4. The Motu Proprio, Causas matrimoniales

To expedite matrimonial processes, Paul VI promulgated Causas matrimoniales on March 28, 1971.<sup>93</sup> This legislation which included, among others, certain norms for constituting tribunals and determining the competent forum, applied to all matrimonial courts, whether diocesan or interdiocesan.

#### iv. The Juridical Nature of Interdiocesan Tribunals

Having considered interdiocesan tribunals from the perspective of the legal texts applicable to them, it is appropriate to examine their juridical nature to determine their position among the various species of tribunals.

I. Gordon attributes three juridical qualities to interdiocesan courts: supradiocesan, special and ordinary.<sup>94</sup> F. Roberti similarly describes them as regional, special and ordinary,<sup>95</sup> while M. Desdouts characterises them as

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<sup>93</sup> Cf. PAUL VI, Motu Proprio, "Causas matrimoniales," March 28, 1971, in AAS, 63 (1971), pp. 441-446.

<sup>94</sup> Cf. I. GORDON, "De tribunalibus regionalibus cum respectu ad iudicum delectum et ad processus breviationem," in Per., 56 (1967), p. 586.

<sup>95</sup> Cf. F. ROBERTI, De processibus, I, p. 406.

collegial, regional, special and ordinary.<sup>96</sup>

a. Collegial

Writing prior to Causas matrimoniales which, under certain circumstances, permitted the constitution of a single clerical judge tribunal for formal cases of matrimonial nullity, M. Desdouts refers to interdiocesan tribunals as "collegial" in nature. Although this can no longer be asserted absolutely, the ideal, nevertheless, for the adjudication of formal matrimonial nullity cases in diocesan and in interdiocesan courts remains the judicial college.

b. Supradiocesan/Regional

The terms "supradiocesan" or "regional" refer essentially to the jurisdiction exercised over a particular territory by an interdiocesan tribunal. On this point, I. Gordon states:

[...] whether they are sometimes competent for several dioceses, or even for several ecclesiastical provinces or regions, the nature of these tribunals is supradiocesan.<sup>97</sup>

F. Roberti, with special reference to the Italian courts asserts:

These tribunals are regional [...], not common diocesan tribunals for several dioceses. Accordingly, their power is only confined by the

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96 Cf. M. DESDOUITS, "Origine, institution et nature des tribunaux ecclésiastiques régionaux en France," in RDC, 19 (1969), pp. 6-11; Cf. also C. ZAGGIA, loc. cit., pp. 139-140.

97 Cf. I. GORDON, "De nimia processuum matrimonialium duratione: factum, causae, remedia," in Per., 58 (1969), pp. 552-553: "[...] natura horum Tribunalium est superdiocesana, seu pro pluribus dioecesibus, immo etiam pro pluribus provinciis vel regionibus ecclesiasticis aliquando sunt competentia."

boundaries of a region; and, although the judges and officers are chosen by all the bishops assembled together, they may handle any case in any part of the region, but, principally, as is clear, in the seat of the regional tribunal.<sup>98</sup>

By the term "regional tribunal" is therefore understood the judicial jurisdiction established over the territory of several dioceses that constitute an ecclesiastical region. Such tribunals are "regional" in the same way that the jurisdiction that they exercise is more extensive than that of a diocesan court, whose jurisdiction is restricted to diocesan boundaries.<sup>99</sup>

The word "regional," however, may also be used in a wider sense. Its usage here is equivalent to "supradiocesan" and may refer to the jurisdiction of an interdiocesan court over a number of dioceses, or even over a whole nation.

When interdiocesan tribunals were introduced into Italy, the Philippine Islands and Canada, it was explicitly provided in article 11 of their executory norms that the tribunal "for matrimonial cases is both a common one for the dioceses of its region (province), and the proper one for each diocese of the region (province)."

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98 Cf. F. ROBERTI, *De processibus*, I, pp. 406-407: "Haec tribunalia sunt regionalia [...] non dioecesana communia pluribus dioecesibus. Ideo eorum potestas tantum limitibus regionibus coarctatur; et, quamvis iudices et ministri ab omnibus simul Episcopis eligantur, quaslibet causas agere possunt in qualibet regionis parte, maxime vero, uti patet, in sede tribunalis regionalis."

99 Cf. for example, S.C. OF THE SACRAMENTS, "Normae pro exsequendis litteris apostolicis 'Qua Cura' die 8 dec. 1938 motu proprio datis," July 10, 1940, in *AAS*, 32 (1940), p. 305: "[...] ad matrimoniales causas, est commune pro dioecesibus Regionis simulque est proprium singulae cuiusque dioecesis Regionis."

c. Special

When discussing the nature of ecclesiastical courts, a distinction must be drawn between a general court that has universal competence to define all cases, i.e., contentious and criminal, and a special court which is solely competent within a specific area. In his commentary on the Italian tribunals, C. Bernardini declared that a regional tribunal is special "in so far as it was constituted exclusively to decide matrimonial cases of nullity."<sup>100</sup>

F. Roberti states that where regional tribunals have been erected for matrimonial nullity cases, they substitute for the diocesan court.<sup>101</sup> I. Gordon, however, mentions an exception to this principle in Brazil where, under certain conditions, both interdiocesan and diocesan tribunals are competent in first instance for formal and informal cases.<sup>102</sup> Moreover, since 1971, both diocesan and interdiocesan courts in Canada have been competent for informal cases.<sup>103</sup>

Prior to May 18, 1965, when the Sacred Consistorial Congregation extended the competence of the Toulouse regional tribunal to include all cases, interdiocesan tribunals were competent for matrimonial cases alone, and

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100 Cf. C. BERNARDINI, "Annotationes ad normas S.C. de Sacramentis d. 10 iul. 1940," in Apollinaris, 13 (1940), p. 170: "[...] quatenus ad matrimonii nullitatis causas exclusive disceptandas constitutam."

101 Cf. F. ROBERTI, De processibus, I. p. 405.

102 Cf. I. GORDON, "De tribunalibus regionalibus cum respectu ad iudicium delectum et ad processus breviationem," in Per., 56 (1967), pp. 585-586.

103 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Rescript, "Canada: Jurisdictional Changes for Tribunals," March 4, 1971, in CLD, 7, pp. 927-929.

accordingly, special in nature.<sup>104</sup> Where interdiocesan courts have been granted universal competence, they become general and, as a rule, render diocesan courts incompetent with respect to all contentious and criminal cases.

It would seem that at least since 1968, most interdiocesan tribunals have been constituted with universal competence. An example is the case of Zimbabwe in Southern Africa where the decree states that the tribunals of first and second instance are competent "to handle all cases, that is to say, not only cases of nullity of matrimony, whether formal or summary, but also cases of the separation of spouses, as well as contentious and criminal cases."<sup>105</sup>

#### d. Ordinary

In his analysis of the Italian regional tribunals, F. Roberti describes their jurisdiction as ordinary in the same way that the jurisdiction of diocesan tribunals is ordinary.<sup>106</sup> These courts exist prior to the matrimonial cases submitted to them and were established precisely for such cases. Accordingly, no delegation is required from any bishop of the region for the court to be competent to study a

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<sup>104</sup> Cf. SACRED CONSISTORIAL CONGREGATION, Decree, May 18, 1965, in AAS, 57 (1965), pp. 1006-1007; I. GORDON, "De nimia processuum matrimonialium duratione: factum, causae, remedia," in Per., 58 (1969), p. 552.

<sup>105</sup> "[...] ad pertractandas causas universas, scilicet non tantum causas nullitatis matrimonii, sive formales sive summarias, sed etiam causas separationis coniugum necnon causas contentiosas et criminales." The Zimbabwe decree which is unpublished was approved by the Apostolic Signatura in a rescript (Prot. N. 4534/73 V.T), dated December 11, 1973.

<sup>106</sup> Cf. F. ROBERTI, "Annotationes ad motu proprio d. 8 dec. 1938," in Apollinaris, 12 (1939), pp. 23-24; F.G. MORRISEY, loc. cit., p. 375.

case arising in his diocese, since the tribunal is competent to hear all cases of matrimonial nullity having their origin in any of the dioceses of the territory.

I. Gordon characterises interdiocesan tribunals as ordinary "since they judge in virtue of ordinary judicial power by which individual diocesan bishops, for whom such tribunals are proper, are able to judge together with the other bishops in the same province, region or nation."<sup>107</sup> A. Caron, however, is more precise in his definition of the nature of jurisdiction exercised in interdiocesan courts, for although he defines it as ordinary, he qualifies this by adding that it is jurisdiction "a iure officio adnexa."<sup>108</sup>

Though the jurisdiction in an interdiocesan tribunal is ordinary, it is vicarious since its exercise is on behalf of the bishops of the territory. Indeed, M. Desdouts classifies this power as vicarious, since the tribunal exercises it:

[...] in virtue of its function, but in the name of the Ordinaries of the assembly of the region, just as the officialis exercises his jurisdiction in the name of the diocesan bishop with whom he forms one and the same tribunal.<sup>109</sup>

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<sup>107</sup> Cf. I. GORDON, "De tribunalibus regionalibus cum respectu ad iudicium delectum et ad processus breviationem," in Per., 56 (1967), p. 586: "[...] siquidem iudicant vi potestatis iudicialis, qua pollent singuli Episcopi dioecesani, qui talia TT. ut propria habent, simul cum aliis Episcopis eiusdem provinciae, regionis vel nationis." Cf. also A. DA SANT'ELIA a PIANISI, op. cit., p. 11.

<sup>108</sup> Cf. A. CARON, "Regional Tribunals," in The Jurist, 23 (1963), p. 426; C. BERNADINI, loc. cit., p. 171: "[...] de ipsorum natura est locutus, quam ordinarium, quatenus a iure officio adnexam."

<sup>109</sup> Cf. M. DESDOUITS, "Origine, institution et nature des tribunaux ecclésiastiques régionaux en France," in RDC, 19 (1969), p. 9: "[...] en vertu de sa fonction, mais au nom de l'assemblée des Ordinaires de la région, tout comme l'official exerce sa juridiction au nom de l'évêque diocésain, avec qui il ne forme qu'un seul et même tribunal (canon 1573,§2)."

Where an interdiocesan court is solely competent for matrimonial nullity cases, it could be delegated by a bishop of the territory to hear a contentious case, other than one of marriage, or even a criminal case. In such cases, the jurisdiction of the tribunal would be delegated rather than ordinary.<sup>110</sup>

#### v. The Particular Establishment of Interdiocesan Tribunals

Writing in 1967, I. Gordon maintains that it is not an easy task to provide an exhaustive list of the nations where interdiocesan tribunals have been established since most decrees have not been published in the Acta Apostolicae Sedis, nor have commentaries on all appeared in canonical journals.<sup>111</sup> He lists eight nations where such courts have been constituted since their establishment in Italy in 1938: the Philippine Islands (1940), Canada (1946), Brazil (1959), France (1965), Algeria (1965), Tunisia (1965), Columbia (1967) and Chile (1967).<sup>112</sup>

In an article published in 1974, Cardinal ~~Luigi~~ Gino Staffa, then prefect of the Apostolic Signatura, details the first and second instance tribunals recently established, as well as those reorganised more appropriately in the light of local requirements.<sup>113</sup> In his first category, entitled "Tribunalia interdiocesana ex

<sup>110</sup> Cf. J.R. WINDLE, A Study of Regional Tribunals in Canada for Cases of Nullity of Marriage, p. 21.

<sup>111</sup> Cf. I. GORDON, "De tribunalibus regionalibus cum respectu ad iudicium delectum et ad processus breviationem," in Per., 56 (1967), p. 580.

<sup>112</sup> Although not mentioned by I. Gordon, interdiocesan tribunals were established in Australia on June 19, 1952. Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Rescript, June 19, 1952, in CLD, 9, pp. 964-966.

<sup>113</sup> Cf. D. STAFFA, "De tutela iudiciali administrativa i.e. de iustitia administrativa apud S. Tribunal Signaturae Apostolicae deque ordinatione tribun. interdioces.," in Per., 63 (1974), pp. 169-177.

novo erecta," Staffa mentions the following nations: Algeria, Bolivia, Central African Republic, Columbia, Cuba, Dominican Republic, France, Greece, Iran, Ivory Coast, Jugoslavia, Korea, Mauritania, Mexico, Nigeria, Peru, Puerto Rico, Scotland, Turkey, Upper Volta and Zimbabwe.<sup>114</sup>

In the second category, "Tribunalia autem interdioecesana renovata," are cited: Brazil, Chile, France, and the Philippine Islands.<sup>115</sup> Moreover, Staffa states that several petitions, either for the establishment of, or the reordering of existing interdiocesan courts, had been received from Costa Rica, Equatoria, Haiti, Italy (appeal tribunals), Madagascar, Nicaragua, Papua New Guinea and Paraguay.<sup>116</sup>

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114 Cf. ibid., pp. 176-177: Algeria (1 of 1st inst); Bolivia (4 of 1st and 2 of 2nd inst); Central African Republic (1 of 1st and 1 of 2nd inst); Columbia (5 of 1st inst); Cuba (2 of 1st and 2 of 2nd inst); Dominican Republic (1 of 1st inst); France (6 of 1st and 6 of 2nd inst); Greece (1 of 1st and 1 of 2nd inst); Iran (1 interritual of 1st inst); Ivory Coast (1 of 1st inst); Jugoslavia (1 of 1st and 1 of 2nd inst); Korea (3 of 1st and 3 of 2nd inst); Mauritania (1 of 1st inst); Mexico (1 of 1st inst); Nigeria (3 of 1st and 1 of 2nd inst); Peru (4 of 1st and 2 of 2nd inst); Puerto Rico (1 of 1st inst); Scotland (1 of 1st inst); Turkey (1 of 1st and 1 of 2nd inst); Upper Volta (3 of 1st and 1 of 2nd inst); Zimbabwe (2 of 1st and 2 of 2nd inst); Interdiocesan tribunals were also established in Germany on December 6, 1978. A tribunal of first instance was erected in Erfurt and one of second instance in Bautzen. Cf. CLD, 9, pp. 917-918; AKK, 148 (1979), pp. 151-160.

115 Cf. D. STAFFA, loc. cit., p. 177: Brazil (14 of 1st inst); Chile (7 of 1st and 3 of 2nd inst); France (2 of 1st and 2 of 2nd inst); the Philippine Islands (6 of 1st and 6 of 2nd inst). While it has not been possible to determine the exact number of interdiocesan tribunals established in the Church, the Secretary of the Supreme Tribunal of the Apostolic Signatura, in a recent article, stated that the Apostolic Signatura had been involved in the erection of interdiocesan tribunals in approximately 50 nations. Cf. Z. GROCHOLEWSKI, "Linee generali della giurisprudenza della Segnatura Apostolica relativamente alla procedura nelle cause matrimoniali," in ME, 107 (1982), p. 263.

116 Cf. D. STAFFA, loc. cit., p. 177.

It would seem appropriate to discuss briefly the establishment and reorganisation of certain characteristic interdiocesan tribunals, i.e., those in Italy, the Philippine Islands, Canada, Australia, Brazil, France and Zimbabwe. The norms issued for other countries generally follow the same provisions.

a. Italy

As mentioned previously, in virtue of Qua cura, eighteen regional tribunals of first and second instance were established in Italy on December 8, 1938, and norms to execute the motu proprio were published on July 10, 1940.<sup>117</sup> The right of direct appeal to the Sacred Roman Rota in terms of canon 1599, §1,1° remained intact. However, since appeals from the tribunal of the Vicariate of Rome were also heard by the Rota, the number of cases referred to it in second instance grew to the extent that a Pontifical Rescript from the Secretariate of State, dated October 16, 1954, suspended canon 1599, §1,1° ad tempus for

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117 Cf. supra, footnotes 66 and 69 respectively. For commentaries on the Italian tribunals, cf. E. BERGH, "Motu proprio de S.S. Pie XI sur l'organisation des tribunaux ecclésiastiques en Italie pour les causes en nullité de mariage," in NRTh, 66 (1939), pp. 334-338; ID., "Organisation des tribunaux régionaux italiens pour les procès en nullité de mariage," in NRTh, 68 (1946), p. 459; C. BERNARDINI, "Annotationes ad normas S.C. de Sacramentis d. 10 iul. 1940," in Apollinaris, 13 (1940), pp. 170-175; L. CAPALTI, "Nuovo ordinamento dei tribunali ecclesiastici per le cause matrimoniali," in IDE, 49 (1938), pp. 499-505; ID., "Sulle norme di attuazione dei tribunali regionali matrimoniali," in IDE, 51 (1940), pp. 250-257; Cf. P. CIPROTTI, "Adnotationes motu proprio de ordinandis tribunalibus ecclesiasticis Italiae pro causis nullitatis matrimonii decidendis," in Archivio di Diritto Ecclesiastico, 1 (1939), pp. 315-319; L. M. DE BERNARDIS, "Sulla giurisdizione dei tribunali ecclesiastici regionali," in Archivio di Diritto Ecclesiastico, 5 (1943), pp. 24-39; F. ROBERTI, "Annotationes ad motu proprio d. 8 dec. 1938," in Apollinaris, 12 (1939), pp. 22-25.

matrimonial nullity cases defined in first instance in Italy.<sup>118</sup> Accordingly, such cases were to be submitted only to the second instance court designated in Qua cura. Canon 1599, §1,2°, however, continued to apply for third instance matrimonial nullity cases.

The rescript also made provision for the constitution in the Vicariate of Rome of an appeal court, distinct from the first instance court. To this appeal tribunal were to be referred all matrimonial nullity cases heard in first instance in the Vicariate, as well as those from the courts at Naples and Cagliari, in virtue of Qua cura. On February 10, 1969, however, when the rescript was suspended, the right of direct appeal to the Roman Rota in second instance was reinstated for Italy.<sup>119</sup>

In terms of the Apostolic Constitution, Vicariae potestatis, of January 6, 1977, the tribunals of the Vicariate of Rome were reorganised. Two distinct courts were constituted in the vicariate:

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118 Cf. SECRETARIATE OF STATE, Pontifical Rescript, "De causis nullitatis matrimonii, quae a tribunalibus ecclesiasticis regionalibus Italiae in primo gradu tractatae fuerint ac de institutione tribunalis appellationis in vicariatu urbis," October 16, 1954, in AAS, 46 (1954), pp. 614-615. Cf. P. FEDELE, "Annotationes ad rescriptum pont. et ad normas tribunalium vic. urbis," in Apollinaris, 27 (1954), pp. 321-322; E. GRAZIANI, "Considerazioni sui recenti provvedimenti pontifici circa le cause matrimoniali italiane," in IDE, 65 (1954), pp. 361-373; ID., "Il primo decennio del tribunale d'appello del vicariato dell'urbe," in IDE, 75 (1964), pp. 299-308; A.G. OLIVERO, "Dai tribunali ecclesiastici regionali al Tribunale d'Appello del Vicariato dell'Urbe," in IDE, 76 (1965), pp. 242-252.

119 Cf. SECRETARIATE OF STATE, Pontifical Rescript, "Rescriptum pontificium diei 16 oct. 1954 suspenditur, et causas nullitatis matrimonii appellari possunt in Italia aut ad S.R. Rotam aut ad tribunal regionale appellationis," February 10, 1969, in Leges ecclesiae, IV, n. 3716.

- a. the ordinary tribunal of the Diocese of Rome, with competence for all cases able to be settled in the canonical forum, with the exception of cases of nullity of marriage;
- b. the regional tribunal of the Lazio conciliar region, with competence for cases of nullity of marriage.

Appeals from both these courts were to be directed to the Sacred Roman Rota.<sup>120</sup>

#### b. The Philippine Islands

A decree of the Sacred Congregation of the Sacraments of December 20, 1940, established for the Philippine Islands three first and three second instance "provincial" tribunals, without prejudice to the competence of the Sacred Roman Rota by virtue of canon 1599, §1.<sup>121</sup> The executory norms granted for these tribunals were essentially identical to those for Italy.<sup>122</sup>

On December 31, 1956, the same Congregation rearranged the distribution of tribunals through the establishment of seven first instance courts, each

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<sup>120</sup> Cf. PAUL VI, Apostolic Constitution, "Vicariae potestatis," January 6, 1977, in AAS, 69 (1977), pp. 5-18, especially arts. 12-23, pp. 15-18.

<sup>121</sup> Cf. S.C. OF THE SACRAMENTS, Decree, "De ordinandis tribunalibus ecclesiasticis Insularum Philippinarum pro causis nullitatis matrimonii decidendis," December 20, 1940, in AAS, 33 (1941), pp. 363-364.

<sup>122</sup> Cf. ID., "Normae pro exsequendo decreto diei XX decembris MDCCCCXXXX de ordinandis tribunalibus ecclesiasticis Insularum Philippinarum," April 28, 1941, in AAS, 33 (1941), pp. 364-368. For commentaries on the Philippine tribunals, cf. V. BARTOCETTI, "Annotationes ad normas pro exsequendo decreto diei 20 dec. 1940," in Apollinaris, 15 (1942), pp. 223-224; E. BERGH, "Tribunaux régionaux aux Iles Philippines pour les causes en nullité de mariage," in NRTh, 68 (1946), pp. 459-460.

corresponding to an ecclesiastical province.<sup>123</sup> Also erected by this decree was a single national appeal tribunal in Manila.

c. Canada

On January 28, 1946, the Sacred Congregation of the Sacraments established in Canada seven first instance provincial matrimonial tribunals, each competent for the dioceses of one or two ecclesiastical provinces, as well as four second instance tribunals.<sup>124</sup> Executory norms, almost the same as those for Italy and the Philippine Islands, were granted on May 13, 1946.<sup>125</sup> These courts, like those of Italy and the Philippine Islands, were competent for formal and informal cases of matrimonial nullity.

123 Cf. ID., Decree, "De ordinandis tribunalibus ecclesiasticis Insularum Philippinarum pro causis nullitatis matrimonii decidendis in primo et secundo gradu," December 31, 1956, in AAS, 49 (1957), pp. 163-164. Norms were issued by the same Congregation on the same date (cf. AAS, 49 (1957), pp. 165-169); V. BARTOCETTI, "Annotationes ad decretum et normas de tribunalibus ecclesiasticis Insularum Philippinarum," in Apollinaris, 30 (1957), pp. 422-424; J. ORTEA, "The Superior Court of Appeal for Matrimonial Cases of Nullity in the Philippines," in Boletín Eclesiástica de Filipinas, 31 (1957), pp. 790-792.

124 Cf. S.C. OF THE SACRAMENTS, Decree, "De ordinandis tribunalibus ecclesiasticis ditionis Canadensis super causis nullitatis matrimonii decidendis," January 28, 1946, in AAS, 38 (1946), pp. 281-283.

125 Cf. ID., "Normae pro exsequendo decreto diei XXVIII ianuarii MCMXLVI de ordinandis tribunalibus ecclesiasticis ditionis Canadensis," May 13, 1946, in AAS, 38 (1946), pp. 283-287; V. BARTOCETTI, "Annotationes ad decr. S. Congr. de discipli. Sacram. d. 28 ian. 1946," in Apollinaris, 19 (1946), pp. 225-227; J. CASORIA, "Brevis explicatio decreti S.C. de disciplina Sacramentorum quoad ordinanda tribunalia ecclesiastica ditionis Canadensis super causis nullitatis matrimonii decidendis," in EIC, 2 (1946), pp. 343-346; J. WINDLE, A Study of Regional Tribunals in Canada for Cases of Nullity of Marriage; Cf. Also F.G. MORRISEY, "The Development of Canon Law in Canada Since the Second Vatican Council," in IDE, 89 (1978), pp. 197-198; ID., "The Development of Particular Canonical Legislation in Canada," in Église et Théologie, 11 (1980), pp. 241-242; ID., "Le développement récent du droit de procédure en Amérique du Nord," in Prawo Kanoniczne, 24 (1981), pp. 238-253.

The dioceses of Newfoundland were added to the provincial tribunals in Halifax and Quebec in first and second instance respectively on August 7, 1950,<sup>126</sup> and, following the establishment of the province of Sherbrooke on March 2, 1951, the dioceses of this province became subject to the Montreal court in first instance, and the Ottawa court on appeal.<sup>127</sup> On December 14, 1955, a first instance tribunal was erected in Edmonton for the Edmonton province, terminating the competence of the Vancouver tribunal in first instance over the Edmonton province.<sup>128</sup>

In 1965, with the establishment of an appeal court in Montreal for cases defined in first instance in Montreal, Quebec and Toronto, the number of appeal tribunals was reduced to three: Toronto, Quebec and Montreal.<sup>129</sup>

In a rescript of March 4, 1971, among other concessions, competence for informal matrimonial cases was granted to diocesan courts, without prejudice to the competence of the regional ones.<sup>130</sup>

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<sup>126</sup> Cf. S.C. OF THE SACRAMENTS, Decree, August 7, 1950, in AAS, 44 (1952), pp. 280-281.

<sup>127</sup> Cf. ID., Decree, March 25, 1952, in AAS, 44 (1952), pp. 281-282.

<sup>128</sup> Cf. ID., Decree, December 14, 1955, in AAS, 48 (1956), pp. 59-60.

<sup>129</sup> Cf. L. DEL AMO PACHON, "Novisima tramitación de las causas matrimoniales," in REDC, 27 (1971), p. 384.

<sup>130</sup> Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Rescript, March 4, 1971, in CLD, 7, pp. 927-929.

On November 1, 1974, matrimonial procedural norms were granted for the Canadian tribunals,<sup>131</sup> and on May 20, 1977, revised norms were approved.<sup>132</sup> A national appeal court with universal competence was established in Ottawa on November 23, 1983.<sup>133</sup>

#### d. Australia

Regional tribunals were established in Australia by a rescript of the Sacred Congregation for the Propagation of the Faith on June 19, 1952.<sup>134</sup> Five courts of first instance, corresponding to the five ecclesiastical provinces, and four of second instance were erected for formal cases of matrimonial nullity.

On August 31, 1970, special procedural norms for matrimonial nullity cases were granted to the Australian Episcopal Conference,<sup>135</sup> and in a further rescript of November 1, 1974, Australia was provided with norms similar to those granted for Canada.<sup>136</sup> A national appeal tribunal was constituted in Sydney on

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131 Cf. S.C. FOR PUBLIC ECCLESIASTICAL AFFAIRS, Rescript, November 1, 1974, in CLD, 8, pp. 1169-1170.

132 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Norms, May 20, 1977, in CLD, 8, pp. 1173-1176.

133 Cf. ID., Rescript, November 23, 1983, unpublished.

134 Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Rescript, June 19, 1952, in CLD, 9, pp. 964-966. In certain territories, then subject to the S.C. for the Propagation of the Faith, the establishment of interdiocesan courts was effected by that Congregation in conjunction with the S.C. of the Sacraments.

135 Cf. S.C. FOR PUBLIC ECCLESIASTICAL AFFAIRS, Rescript, August 31, 1970, in CLD, 9, pp. 967-974. These procedural norms were the same as the American ones.

136 Cf. ID., Rescript, November 1, 1974, in CLD, 9, pp. 976-978.

November 22, 1974,<sup>137</sup> and, on February 4, 1975, universal competence was granted to the Australian courts.<sup>138</sup>

**e. Brazil**

In so far as the territorial organisation of the Church in Brazil had not yet been finally determined, when provincial tribunals were introduced in July, 1959, twenty-seven first instance courts, eleven of which were also of second instance, were established ad experimentum for ten years; the territory of each first instance court corresponded to an ecclesiastical province.<sup>139</sup> Although, when interdiocesan tribunals are constituted for cases of matrimonial nullity, diocesan tribunals generally lose their competence for such cases, in Brazil, however, notwithstanding the interdiocesan courts, diocesan bishops retain their competence for matrimonial cases under certain determined conditions.<sup>140</sup>

**f. France**

Following the creation of pastoral regions in France in 1961, when regional courts were established in 1965, their territories coincided, as far as

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137 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Rescript, November 22, 1974, in CLD, 9, p. 916.

138 Cf. ID., Rescript, February 4, 1975, in CLD, 9, pp. 916-917.

139 Cf. L. DEL AMO PACHON, loc. cit., pp. 384-385. Although the decree for Brazil has not been published, a commentary is available. Cf. "Nova organização dos tribunais eclesiásticos," in Revista Eclesiástica Brasileira, 19 (1959), pp. 990-91 (author not given); I. GORDON, "De tribunalibus regionalibus cum respectu ad iudicium delectum et ad processus breviationem," in Per., 56 (1967), pp. 582-583.

140 Cf. I. GORDON, loc. cit., p. 585-586.

possible, with those of the pastoral regions.<sup>141</sup> On February 17, 1965, matrimonial tribunals of first and second instance for the seven dioceses of the Mediterranean region were constituted in Marseilles and Aix respectively, for ten years ad experimentum.<sup>142</sup> On the same date, matrimonial tribunals of first and second instance for the eleven dioceses of the Southern region were established at Toulouse and Rodez respectively.<sup>143</sup> Universal competence was granted to these latter courts on May 18, 1965,<sup>144</sup> in what seems to be the first example of an extension of competence.<sup>145</sup>

Further matrimonial courts for the Northern pastoral region, with seats of first and second instance respectively in Reims and Amiens, were established on

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141 Cf. L. DEL AMO PACHON, loc. cit., p. 385.

142 Cf. S.C. OF THE SACRAMENTS, Decree, February 17, 1965, in Leges ecclesiae, III, col. 3261. These tribunals were definitively established on April 22, 1975, with the approval of a decree by the Apostolic Signatura (Rescript, Prot. N. 240/68 V.T.); B. DE LANVERSIN, "Erection de tribunaux régionaux pour les causes matrimoniales dans le Midi de la France," in RDC, 15 (1965), pp. 350-357; L. BONNET, and M.A. THERME, "Note sur l'érection de tribunaux régionaux dans le Midi de la France," in RDC, 16 (1966), pp. 74-83.

143 Cf. S.C. OF THE SACRAMENTS, Decree, February 17, 1965, in Leges ecclesiae, III, n. 3260. These tribunals were also established ad experimentum for ten years; C. LEFEBVRE, "Tribunaux matrimoniaux régionaux de la région pastorale de Toulouse," in AC, 10 (1965), pp. 295-305.

144 Cf. SACRED CONSISTORIAL CONGREGATION, Decree, May 18, 1965, in AAS, 57 (1965), pp. 1006-1007.

145 Cf. AAS, 63 (1971), p. 481, n. 8: "Primo extensio facta est in favorem aliquorum Tribunalium Regionalium in Gallia per Decretum diei 18 maii 1965." Cf. also J. GORDON, "De nimia processuum matrimonialium duratione: factum, causae, remedia," in Per., 58 (1969), p. 552; F.G. MORRISSEY, "Regional Tribunals," in NCE, 16, p. 375.

December 22, 1966,<sup>146</sup> while on February 22, 1968, matrimonial courts were constituted in Paris and Versailles, in first and second instance respectively.<sup>147</sup>

In addition, the following tribunals have been erected:

- on June 5, 1968, general tribunals of first and second instance for the Central region in Bourges and Sens respectively,<sup>148</sup>
- on November 8, 1968, general tribunals of first and second instance for the East-Central region, with both seats, though distinct, in Lyons;<sup>149</sup>
- on January 2, 1971, matrimonial tribunals of first and second instance for the region of Aquitaine in Bordeaux and Angoulême respectively.<sup>150</sup>

Moreover, decrees were approved for "interdiocesan" courts with universal competence in first and second instance respectively in Bayeux and Rennes,<sup>151</sup> in Angers and Bayeux<sup>152</sup> and in Rennes and Angers.<sup>153</sup>

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<sup>146</sup> Cf. S.C. OF THE SACRAMENTS, Decree and Norms, December 22, 1966, in Leges ecclesiae, III, nn. 3507 and 3508 respectively.

<sup>147</sup> Cf. ID., Decree and Norms, February 22, 1968, in Leges ecclesiae, III, nn. 3630 and 3631 respectively. In virtue of the Apostolic Constitution, "Qui volente," of October 9, 1966, the ecclesiastical province of Paris, together with five new dioceses, was constituted. Cf. AAS, 59 (1967), pp. 212-214.

<sup>148</sup> Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree, June 5, 1968, in Leges ecclesiae, III, n. 3662. These tribunals were definitively erected on January 7, 1980. Cf. ID., Rescript (Prot. N. 226/78 V.T.), January 7, 1980, unpublished.

<sup>149</sup> Cf. ID., Decree, November 8, 1968, in Leges ecclesiae, III, n. 3697.

<sup>150</sup> Cf. ID., Rescript (Prot. N. 452/70 V.T.), January 2, 1971, unpublished.

<sup>151</sup> Cf. ID., Rescript (Prot. N. 3397/72 V.T.), September 25, 1972, unpublished.

<sup>152</sup> Cf. ID., Rescript (Prot. N. 4725/73 V.T.), November 14, 1973, unpublished.

<sup>153</sup> Cf. ID., Rescript (Prot. N. 4910/73 V.T.), November 15, 1973, in Leges ecclesiae, V, n. 4239.

g. Zimbabwe

Two regional tribunals with universal competence, acting as appeal courts for each other, were constituted in Zimbabwe (formerly Rhodesia), on December 11, 1973.<sup>154</sup>

Initially, in 1939, when two Southern African tribunals with extended competence were established in first and second instance in Cape Town and Johannesburg respectively, they were competent for formal cases of matrimonial nullity arising in Zimbabwe.<sup>155</sup> Following the reorganisation of the Southern African courts in 1951, the Johannesburg and Maseru tribunals decided the Zimbabwe cases in first and second instance respectively.<sup>156</sup> In 1958, however, in a further reorganisation, a court with competence in first instance for the whole of Zimbabwe was established in Harare (formerly Salisbury).<sup>157</sup> Appeals from this first instance tribunal were to be heard in the Pretoria inter-territorial tribunal in South Africa.<sup>158</sup>

vi. Reasons for the Establishment of Interdiocesan Tribunals

L. del Amo Pachon states four principal reasons for the establishment of interdiocesan courts:

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<sup>154</sup> Cf. ID., Rescript (Prot. N. 4534/73 V.T.), December 11, 1973, unpublished.

<sup>155</sup> Cf. S.C. OF THE SACRAMENTS, Letter (Prot. N. 426/39), July 4, 1939, unpublished.

<sup>156</sup> Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter (Prot. N. 4319/50), March 9, 1951, unpublished. The provisions of this letter are discussed in chapter II, pp. 79-81.

<sup>157</sup> Cf. ID., Letter (Prot. N. 3449/58), September 29, 1958, unpublished.

<sup>158</sup> The Zimbabwe tribunals are discussed in chapters II and III of this study, pp. 89-90 and 124-128, respectively.

- the non-functioning of some tribunals on account of the small size of the diocese, the limited Catholic population and the lack of cases;
- the shortage of well-trained priests able to dedicate themselves to this pastoral ministry;
- the harmful delays in the administration of justice;
- the obligation upon the Church to provide guarantees concerning correctness and integrity in the administration of justice.<sup>159</sup>

In his Motu Proprio, Qua cura, Pius XI presents the following motives for constituting interdiocesan courts in Italy:<sup>160</sup> the large number of dioceses, many of which were small with few priests, and the serious and insurmountable difficulties confronting Ordinaries in constituting tribunals with properly trained officers.<sup>161</sup>

The decrees establishing interdiocesan tribunals in the Philippine Islands and Canada express the same motivation: the small number of cases of matrimonial nullity in many diocesan courts, and the difficulty commonly experienced in establishing proper tribunals staffed by competent and experienced

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159 Cf. L. DEL AMO PACHON, loc. cit., p. 400.

160 Cf. PIUS XI, Motu Proprio, "Qua cura," December 8, 1938, in AAS, 30 (1938), p. 411.

161 Cf. E. BERGH, "Motu proprio de S.S. Pie XI sur l'organisation des tribunaux ecclésiastiques en Italie pour les causes en nullité de mariage," in NRTh, 66 (1939), p. 336, where it is stated that in 1936 there were 278 dioceses in Italy. The number had increased to 291 when regional tribunals were introduced in 1938. Cf. P. FEDELE, "Motu proprio de ordinandis tribunalibus ecclesiasticis Italiae pro causis nullitatis matrimonii decidendis," in Archivio di Diritto Ecclesiastico, 1 (1939), p. 315.

officers.<sup>162</sup> In his commentary on the Canadian decree, V. Bartocchetti observed that in 1946, even without considering the vicariates apostolic, ten Canadian dioceses had no tribunal, while thirty had some kind of judiciary organisation ("aliqualem organisationem iudicarium.")<sup>163</sup> Only ten Canadian dioceses at that time could be considered as having properly constituted and active courts.

While the number of matrimonial nullity cases has increased significantly, the difficulties in constituting diocesan tribunals persist, as is evident from article I of the Zimbabwe decree:

[...] considering the serious difficulties, especially on account of the shortage of priests engaged in tribunal work, which bishops in these days are experiencing in establishing proper and suitable tribunals in individual dioceses [...].<sup>164</sup>

#### Conclusion

Almost fifty years have elapsed since interdiocesan tribunals were introduced in Italy. It cannot be denied that these courts have overcome numerous difficulties and been advantageous in many ways. They have solved the problems confronting many small dioceses where a lack of suitably qualified

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<sup>162</sup> The Philippine Islands consist of about 7000 islands and cover a total land area of approximately 300,000 square kilometres. Cf. Encyclopaedia Britannica, 15th ed., 14, p. 231.

<sup>163</sup> Cf. V. BARTOCCHETTI, "Annotationes ad decr. S. Congr. de discipli. Sacram. d. 28 ian. 1946," in Apollinaris, 19 (1946), p. 226; A. CARON, loc. cit., pp. 423-424.

<sup>164</sup> Cf. Decree, "The Establishment of Regional Tribunals in Rhodesia," December 11, 1973: "[...] perpensis gravibus difficultatibus, praesertim ob penuriam sacerdotum qui in iudicalem laborem incumbant, quas Episcopi in hodiernis adiunctis experiuntur ad propria ac idonea Tribunalia in singulis Diocesisibus constituenda [...]."

personnel rendered impossible the establishment of diocesan courts. Interdiocesan tribunals, while providing more competent judges and better organised courts, have served to reduce not only the number of judges required within a particular territory, but also, in many instances, the delays in the decision-making process. Through the institution of these courts, the integrity of the sacrament of matrimony has been safeguarded, and a more universal respect accorded to the judicial organs of the Church.

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## CHAPTER II

### INTERDIOCESAN TRIBUNALS IN SOUTHERN AFRICA: THEIR ORIGINS AND DEVELOPMENT

Prior to any investigation into the origins and development of matrimonial tribunals within Southern Africa, it would be important to treat briefly of the beginnings of the Church in Southern Africa so that the tribunals may be situated within the context of the overall expansion of the Church. In this way, the matrimonial tribunal, which constitutes only one aspect of the Church's pastoral concern, may be viewed more realistically against the missionary thrust of a Church that often had to struggle for survival in the face of persecution, an insufficiency of priests and the vastness of its territory. At times, because of these hardships, the establishment of matrimonial tribunals became a low priority, if not an impossibility.

It was only when the Church became more established that the need for matrimonial tribunals was fully recognized, and even then, there still remained in many vicariates and prefectures apostolic the difficulties of constituting a proper tribunal staffed by competent and experienced officials. Out of these difficulties and even in spite of them, there was to emerge a system of interdiocesan tribunals for Southern Africa.

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## A. The Origins of the Church in Southern Africa from 1514 to 1951

### i. The Period from 1514 to 1818

The period we are considering extends from the placing of the Cape of Good Hope under the jurisdiction of a diocesan bishop in 1514, to the establishment of the Vicariate Apostolic of the Cape of Good Hope and Adjacent Territories in 1818.

#### a. The Portuguese Explorers

The Portuguese explorers were interested in the continent of Africa in so far as it might provide a shorter route to the riches of the East. During the second half of the fifteenth century, several expeditions sailed down the west coast of Africa. The most significant one was led by Vasco da Gama (c. 1460-1524) who in 1497 rounded the Cape, erected a cross at St. Blaise (now Mossel Bay), and then sailed on to a bay which he named Port Natal (present-day Durban).

One of the consequences of da Gama's return to Lisbon in 1499 was the reorganisation of the ecclesiastical jurisdiction affecting the Cape. Pope Nicholas V (1447-1455) had constituted King Alphonso V (1432-1481) patron of all Churches he should erect in Africa and India.<sup>1</sup> Jurisdiction over these Churches

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<sup>1</sup> Cf. Bullarium Romanum, V, pp. 110-115. That this was not a personal grant valid for the lifetime of Alphonso is evident from the text of the grant (p. 113): "[...] harum serie [i.e., the territories acquired] declaramus etiam ad ipsos Alfonsum regem, successores suos ac Infantem, et non ad aliquos alios spectasse et pertinuisse, ac in perpetuum spectare et pertinere de iure."

had originally been entrusted to the Vicariate of Thomar, near Lisbon.<sup>2</sup> In 1514, however, Leo X (1513-1521) extinguished the Vicariate of Thomar and constituted the Diocese of Madeira which had formed part of this vicariate. Thus, the Cape came under the jurisdiction of a diocesan bishop.<sup>3</sup>

#### b. The Dutch Colonisation of the Cape

By the end of the sixteenth century, Dutch and English seamen, like the Portuguese, had also begun to trade with the East by way of the Cape route. It was, however, St. Helena, that eventually became the main port for English shipping.<sup>4</sup>

The Dutch East India Company had, in the meantime, obtained a virtual monopoly over the East Indian spice trade. For several decades, Dutch ships had

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2 Cf. S. WELCH, The History of the Church in South Africa, p. 138. Relying on the authority of the Chronica of Alphonso V, and F. D'ALMEIDA, Historia da Igreja em Portugal, I, pp. 337-340, Welch shows how Thomar came to be connected with the Portuguese territories overseas. In 1162, the Knights Templar established a house in Thomar, and when the Order was suppressed throughout Europe, King Denis re-established it in Thomar under a new name - the Order of Christ. By royal charter of 1434, Prince Henry entrusted to these knights "todo o espiritual das ilhas da Madeira e Porto Santo e da ilha Deserta." As Henry was technically prior of the Order, he could delegate jurisdiction to his subordinates, and it is in this sense that "espiritual" should be understood. Cf. also L.M. JORDAI, Bullarium Patronatus Portugaliae, I, p. 36. The author mentions the Bull of Calixtus III of March 13, 1455. By this, Henry was empowered to excommunicate his subjects and to carry out "omnia alia et singula quae locorum Ordinarii in locis in quibus spiritualitatem habere censentur, de iure vel consuetudine facere, disponere et exsequi possint et consueverunt."

3 Cf. B. GAMS, Series episcoporum Ecclesiae Catholicae, p. 471. The first bishop of the newly-erected vicariate was Didacus Pinheiro, former Vicar Apostolic of Thomar.

4 Cf. Encyclopaedia Britannica, 14th ed., 21, p. 49.

put into Table Bay situated at present-day Cape Town, to take on fresh water and barter meat from the Hottentot inhabitants. Then in 1652, an expedition under Jan van Riebeeck set out from Holland bound for the Cape. Its primary task was to build a fort and develop a vegetable garden to supply the ships of the Company.

The Dutch force which settled at the Cape was anti-Catholic and when in 1660, the Bishop of Madagascar, Monsignor Nicolas Etienne, was shipwrecked in Table Bay, he was forbidden to celebrate Mass.<sup>5</sup> In 1688 Huguenot refugees, fleeing religious persecution in France, began to arrive in the Cape. Their arrival strengthened the resolve of the enemies of the Catholic Church, and it is doubtful whether Mass was celebrated on Southern African soil for at least the next hundred years.

### c. The Juridical Position of the Church from 1688 to 1818

From 1688 to 1804 the official Catholic Church disappeared from the pages of Southern African history. The struggle between England and France for domination in India once again emphasised the strategic importance of the Cape. In 1794, the Dutch East India Company went bankrupt, while the Netherlands, torn between pro-French and pro-Orangist factions, was attacked by the armies of republican France. The Cape was captured by British forces in September 1795, nominally on behalf of the Prince of Orange who had taken refuge in England. The British considered it essential to prevent the Cape from falling into French hands. In February 1803, by the terms of the treaty of Amiens, the Cape was

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<sup>5</sup> Cf. W.E. BROWN, The Catholic Church in South Africa, p. 4; J. VAN RIEBEECK, Journal, III, p. 220. The entry is dated May 20, 1660.

returned to the Dutch. By this time, however, the Dutch East-India Company had ceased to exist, and the Dutch government - the Batavian Republic organised by the French in 1795 after the conquest of the Netherlands - assumed control of the Cape.

Two officials of the Batavian Republic, Governor J.W. Janssens and Commissioner-General J.A. de Mist, were sent out to the Cape to inculcate a new spirit of toleration in accordance with French revolutionary ideals.<sup>6</sup> In a report, Janssens informed headquarters that "far and away the greater part of the military here, below the rank of officer, are members of the Catholic religion."<sup>7</sup> He concluded by requesting that a priest be sent out to serve the Catholic community in Cape Town. The sequel to this was the arrival in October, 1805, of three Dutch priests, one of whom, Father Joannes Lansink, was appointed prefect apostolic. These were the first officiating priests at the Cape.<sup>8</sup>

But, in January, 1806, the British under Major General Sir David Baird, again occupied the Cape, this time on a permanent basis. Baird, a Scots Presbyterian, at once ordered the expulsion of the priests, barely three months after their arrival.

As early as November, 1806, negotiations concerning the reinstatement of the missionaries began between the Holy See and the Vicar Apostolic of the

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<sup>6</sup> Cf. E.A. WALKER, A History of Southern Africa, p. 134.

<sup>7</sup> Cf. J.E. BRADY, Princes of his People: The Story of our Bishops, 1800-1951, p. 1.

<sup>8</sup> The other priests were Fathers Jacobus Nelissen and Lambertus Prinsen.

London District, Bishop John Douglas. Nothing was achieved, however, until 1816<sup>9</sup> when his successor, Bishop William Poynter, approached the colonial secretary, who in turn consulted Lord Charles Somerset, governor of the Cape.<sup>10</sup> Lord Somerset agreed that a priest be allowed to minister to the Catholics at the Cape, and after prolonged negotiations, Pope Pius VII (1800-1823) erected the Vicariate Apostolic of the Cape of Good Hope and Adjacent Territories, including Australia and New Zealand, in 1818.

## ii. The Period from 1819 to 1951

The second period begins with the establishment of the Vicariate Apostolic of the Cape of Good Hope and concludes with the erection of the hierarchy in South Africa, Lesotho and Swaziland. It was an era of intensive missionary activity which saw the establishment of many ecclesiastical territories.

### a. First Vicar Apostolic of the Cape of Good Hope

Bishop Edward Bede Slater, an English Benedictine, was appointed first Vicar Apostolic of the Cape of Good Hope, but permission for him to reside at the Cape was refused by the British authorities. Accordingly, his Brief of

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<sup>9</sup> It was only after the British possession of the Cape had been confirmed that an attempt was made to find a successor to Father Lansink. Under the general settlement at Vienna in 1814, Britain relinquished most of its colonial conquests, but retained the Cape and part of Guiana.

<sup>10</sup> Cf. G.M. THEAL, Records of the Cape Colony, 1793-1827, II, pp. 193-194.

Appointment was amended, appointing him Vicar Apostolic of Mauritius, the Cape of Good Hope and Surrounding Islands.<sup>11</sup>

Together with three priests, Bishop Slater arrived in Cape Town on December 1, 1819. When he departed three weeks later, he left Father Patrick Scully to minister to the Catholics at the Cape. Almost immediately, Scully encountered difficulties with his congregation who insisted on administering finance and church properties. Eventually, unable to continue, he left the Cape in July, 1824, never to return.

In 1826 a Dutch priest, Father Theodore Wagenar arrived at the Cape and in the following year, he was joined by an English Benedictine, Father Thomas Rishton. In time, the health of each deteriorated, and by 1832, both had returned to Europe.<sup>12</sup>

After the death of Bishop Slater in 1832, William Placid Morris succeeded him. Like Slater, he was not permitted to reside at the Cape, but proceeded to Mauritius.

#### b. Southern Africa's First Resident Bishop

After many petitions addressed to the Holy See over a period of several

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<sup>11</sup> Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Decree, January 21, 1819. This decree extended Bishop Slater's appointment making him in addition, first Vicar Apostolic of Mauritius, and also of Madagascar; he retained the latter post until 1829.

<sup>12</sup> After the departure of Fathers Wagenar and Rishton, there was no priest in Southern Africa until 1836, when for a few months, a Spanish Dominican ministered to the Catholics at the Cape.

years,<sup>13</sup> Pope Gregory XVI (1831-1846) on June 6, 1837, constituted the Cape of Good Hope a separate vicariate and appointed Raymond Patrick Griffith, the first resident vicar apostolic.<sup>14</sup> When Griffith arrived at the Cape on April 14, 1838, he was accompanied by two priests. His territory was vast, stretching from Cape Town to Port Elizabeth, a distance of over eight hundred kilometres.<sup>15</sup>

### c. The Establishment of Further Ecclesiastical Territories

In 1847, the Holy See, on the recommendation of Bishop Griffith, subdivided his territory and appointed Aiden Devereux, Vicar Apostolic of the Eastern District of the Cape of Good Hope. Early in his episcopate, Bishop Devereux urged Pius IX (1846-1878) to create a further vicariate apostolic in Natal, and proposed that it be entrusted to a religious congregation to ensure both continuity in personnel and financial support. By 1850, Devereux had but three priests to minister to the 1275 Catholics in his extensive vicariate.<sup>16</sup>

The third Vicariate, Natal, which was entrusted to the Oblates of Mary Immaculate, was erected on October 5, 1850. It extended from the Kei river in

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<sup>13</sup> Cf. J.E. BRADY, "History of the Church in South Africa," in The Catholic Church and Southern Africa, p. 116. The author attributes the eventual appointment of a residential bishop to the intervention of a Monsignor John Brady. Cf. also W.E. BROWN, op. cit., p. 8.

<sup>14</sup> Cf. J.E. BRADY, Princes of his People: The Story of our Bishops, 1800-1951, p. 1.

<sup>15</sup> See appendix III for a map depicting the extent of Bishop Griffith's vicariate.

<sup>16</sup> Cf. J.E. BRADY, "History of the Church in South Africa," in The Catholic Church and Southern Africa, p. 117.

the south to Quilemane beyond the mouth of the Zambesi river in the north.<sup>17</sup> In March, 1852, Bishop Jean François Allard, O.M.I., arrived in Natal with four Oblate priests. They began their missionary work at Pietermaritzburg, the capital of the Natal Colony and about 100 kilometres from Durban. With the establishment of the Zambesi Mission in 1879, part of Bishop Allard's vast vicariate was given to the Jesuits; even then, the territory of the new Mission still covered the whole of present-day Zimbabwe and Zambia.

The Prefecture of the Central District of the Cape of Good Hope was detached from the Vicariate of the Western District of the Cape of Good Hope by a decree of May 24, 1872. The territory, which covered over 113,000 square kilometres, was successively assigned to the "Missionaries for African Missions of Lyons," the Oblates of St. Francis of Sales, and finally, to the Pious Society of Missions; it was renamed the Prefecture of Oudtshoorn in 1939.<sup>18</sup>

As early as 1880, the Holy See had been petitioned to re-divide the Natal Vicariate. This was effected on June 1, 1886, when Leo XIII (1878-1903) erected the Vicariate Apostolic of the Orange Free State which included the whole of the Orange Free State, Lesotho, and the Diamond Fields (now Kimberley).<sup>19</sup> The Prefecture Apostolic of the Transvaal was established on the same day.

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17 Cf. Catholic Directory of Southern Africa, 1982/1983, p. 261. See appendix IV for a map illustrating the extent of the Natal Vicariate.

18 Cf. ibid., p. 121.

19 Cf. ibid., p. 261.

In 1882, the Missions of Namaqualand which had formed part of the Prefecture of the Central District of the Cape of Good Hope were entrusted to the Oblates of St. Francis of Sales. The territory was established a separate vicariate in 1894, and in 1898, became the Orange River Vicariate.<sup>20</sup> Included in this vicariate was the present-day Vicariate of Keetmanshoop in South West Africa.<sup>21</sup> The territory of Cimbebasia and Windhoek was confided to the Oblates of Mary Immaculate in August, 1892, as the Prefecture of Lower Cimbebasia; it was renamed the Windhoek Vicariate in 1926.<sup>22</sup>

**d. The Establishment of the Apostolic Delegation, the Erection of the Hierarchy and an Episcopal Conference**

An event of major importance for the Church in Southern Africa was the establishment of the Apostolic Delegation on December 7, 1922. There followed a period of great expansion<sup>23</sup> and many new ecclesiastical territories were erected.<sup>24</sup>

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20 Cf. *ibid.*, p. 273.

21 Cf. *ibid.*, p. 289.

22 Cf. *ibid.*, p. 293.

23 From just over 300 priests in Southern Africa in 1921, the number had increased to 700 by 1936, and to 1625, including those in Lesotho and Zimbabwe, by 1981. See appendix V for a map of the ecclesiastical territories subject to the Apostolic Delegation in 1927.

24 The territories erected after 1922, beginning with the current name, and reflecting various changes in name and status, if any-MANZINI: Pr. Ap. of Swaziland (1923), Vic. Ap. of Swaziland (1939), D. of Bremersdorp (1951), D. of Manzini (1961); ALIWAL: Pr. Ap. of Gariep (1923), Vic. Ap. of Aliwal (1936), D. of Aliwal (1951); LYDENBURG-WITBANK: Pr. Ap. of Lydenburg (1923), Vic. Ap. of Lydenburg (1948), D. of Lydenburg (1951), D. of Lydenburg-Witbank (1964);

On January 11, 1951, Pius XII (1939-1958) constituted the hierarchy in Southern Africa. The erection included South Africa, Lesotho and Swaziland, but

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KROONSTAD: Pr. Ap. of Kroonstad (1923), Vic. Ap. of Kroonstad (1935), D. of Kroonstad (1951); ESHOWE: Vic. Ap. of Eshowe (1923), formerly Pr. Ap. of Zululand, D. of Eshowe (1951); WINDHOEK: Vic. Ap. of Windhoek (1926), formerly Pr. Ap. of Cimbebasia; HARARE: Pr. Ap. of Salisbury (1927), formerly Pr. Ap. of Zambesi and Zambesi Mission, Vic. Ap. of Salisbury (1931), ArchD. of Salisbury (1955), ArchD. of Harare (1982); UMTATA: Pr. Ap. of Umtata (1930), Vic. Ap. of Umtata (1937), D. of Umtata (1951); BULAWAYO: Bulawayo Mission (1931), Pr. Ap. of Bulawayo (1932), Vic. Ap. of Bulawayo (1937), D. of Bulawayo (1955); KOKSTAD: Pr. Ap. of Mount Currie (1935), Vic. Ap. of Kokstad (1939), D. of Kokstad (1951); QUEENSTOWN: Pr. Ap. of Queenstown (1938), Vic. Ap. of Queenstown (1948), D. of Queenstown (1951); CAPE TOWN: Vic. Ap. of Cape Town (1939); formerly Vic. Ap. of the Western District of the Cape of Good Hope, ArchD. of Cape Town (1951); PORT ELIZABETH: Vic. Ap. of Port Elizabeth (1939), formerly Vic. Ap. of the Eastern District of the Cape of Good Hope, D. of Port Elizabeth (1951); OUDTSHOORN: Pr. Ap. of Oudtshoorn (1939), formerly Pr. Ap. of the Central District of the Cape of Good Hope, Vic. Ap. of Oudtshoorn (1948), D. of Oudtshoorn (1951); PIETERSBURG: Abbey Nullius of Pietersburg (1939), formerly Pr. Ap. of the Northern Transvaal; KEIMOES: Vic. Ap. of Keimoes (1940), formerly Vic. Ap. of the Orange River, D. of Keimoes (1951); GWERU: Pr. Ap. of Fort Victoria (1946), Vic. Ap. of Fort Victoria (1950), D. of Gwelo (1955), D. of Gweru (1982); PRETORIA: Vic. Ap. of Pretoria (1948), ArchD. of Pretoria (1951); JOHANNESBURG: Vic. Ap. of Johannesburg (1948), formerly Vic. Ap. of the Transvaal, D. of Johannesburg (1951); BETHLEHEM: Vic. Ap. of Bethlehem (1948), D. of Bethlehem (1951); KEETMANSHOOP: Vic. Ap. of Keetmanshoop (1949), formerly Pr. Ap. of Great Namaqualand; DURBAN: ArchD. of Durban (1951), formerly Vic. Ap. of Natal; BLOEMFONTEIN: ArchD. of Bloemfontein (1951); MASERU: D. of Maseru (1951), formerly Pr. Ap. of Basutoland, ArchD. of Maseru (1961); KIMBERLEY: D. of Kimberley (1951), formerly Vic. Ap. of Kimberley in Southern Africa; MARIANNHILL: D. of Mariannhill (1951), formerly Vic. Ap. of Mariannhill; LERIBE: D. of Leribe (1952); MUTARE: Pr. Ap. of Umtali (1953), D. of Umtali (1957), D. of Mutare (1982); WANKIE: Pr. Ap. of Wankie (1953), D. of Wankie (1963); DE AAR: Pr. Ap. of De Aar (1953), D. of De Aar (1967); UMZIMKULU: D. of Umzimkulu (1954); DUNDEE: Pr. Ap. of Volksrust (1958), D. of Dundee (1983); GABORONE: Pr. Ap. of Bechuanaland (1959), D. of Gaborones (1966), D. of Gaborone (1970); QACHA'S NEK: D. of Qacha's Nek (1961); LOUIS TRICHARDT-TZANEEN: Pr. Ap. of Louis Trichardt (1962), D. of Louis Trichardt-Tzaneen (1972); INGWAVUMA: Pr. Ap. of Ingwavuma (1962); KLERKSDORP: Pr. Ap. of Western Transvaal (1965), D. of Klerksdorp (1978); RUSTENBURG: Pr. Ap. of Rustenburg (1971); CHINHOYI: Pr. Ap. of Sinoia (1973), Pr. Ap. of Chinhoyi (1982); MOHALE'S HOEK: D. of Mohale's Hoek (1977).

excluded the territories of South West Africa and Zimbabwe.<sup>25</sup> When almost twenty years later, the Southern African Catholic Bishops' Conference (SACBC) was established on April 28, 1970, a new phase in the life of the Southern African Church was inaugurated; it had come of age!

### B. The Sacrament of Matrimony: the Beginnings of an Ecclesiastical Regulation

#### i. The Nineteenth and Early Twentieth Centuries

It is in the context of a missionary Church that the matrimonial tribunals in Southern Africa must be viewed and assessed. Although there is no recorded evidence of the establishment of a tribunal anywhere in Southern Africa during the nineteenth century, and little evidence during the early part of the twentieth century, this is in no way an indication that the bishops and prefects apostolic were not involved in upholding the Church's discipline with respect to the sacrament of matrimony. A few examples illustrate this.

Shortly after his arrival in Cape Town on his way to the Natal Vicariate in 1852, Bishop Allard wrote to Bishop Devereux of the Eastern District of the Cape of Good Hope to inquire of him the canonical position and practice with regard to concubinage in South Africa.<sup>26</sup> Bishop Allard had read in a report prepared on his new vicariate that drunkenness, debauchery and indifference were to be found among nominal Catholics, and that in some cases of concubinage, the parties were

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<sup>25</sup> See appendix VI for a map depicting the ecclesiastical territories in Southern Africa following the establishment of the hierarchy.

<sup>26</sup> Cf. J.F. ALLARD, Letter Book, p. 10.

not free to marry. Bishop Devereux replied that the Decree, Tametsi, of the Council of Trent had not been published in South Africa, but that the clergy had been instructed to do what they could be secure that the marriages of Catholics would be civilly recognised.<sup>27</sup> He also stated that if a marriage were celebrated before a priest and two witnesses, registered, and a copy of the marriage document sent to the civil authority, it would be civilly recognised.

Finding themselves in an essentially Protestant environment, many of the pioneer bishops were concerned about the frequency with which Catholics married Protestants. In a pastoral letter dated June 21, 1880, Bishop John Leonard of the Vicariate of the Western District of the Cape of Good Hope unequivocally stated the Church's opposition to such marriages.<sup>28</sup> On one occasion he refused the sacraments to a Catholic girl who had married in an Anglican Church. A notice was read to the effect that the marriage was "illicit, sinful and sacrilegious, although valid and binding."<sup>29</sup>

In these early years up to the 1930's, there is scant evidence of any formal matrimonial nullity trials. The often difficult circumstances surrounding the organisation of a vicariate or prefecture apostolic; especially where its territory was extensive, and the non-availability of priests for tribunal work, made the constitution of an ordinary tribunal almost an impossibility.

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<sup>27</sup> In areas where this decree concerning clandestine marriages had not been published, the Church recognised the validity of ceremonies which satisfied the civil requirements and did not positively exclude the Catholic concept of marriage.

<sup>28</sup> Cf. J. LEONARD, Letter Book, I, s.d. June 21 and 23, 1880; ID., Letter Book, VII, s.d. September 17, 1885.

<sup>29</sup> Cf. W.E. BROWN, op. cit., p. 94.

## ii. The Need for Inter-territorial Tribunals

As early as 1933, the general synod of the Ordinaries subject to the Apostolic Delegation had been informed that the difficulties experienced in constituting diocesan tribunals would largely be overcome were a system of inter-territorial tribunals to be established.<sup>30</sup> At that synod, the Apostolic Delegate, Archbishop Bernard Gijlswijk, O.P., had stated that if two tribunals of first and second instance respectively, were constituted within the Delegation, they would be competent to treat of "all matrimonial cases," and their decisions, if conform, would be decisive.<sup>31</sup>

The matter was raised again at the general synod in January, 1937, but it seems that no approach was made to the Holy See until February, 1938.<sup>32</sup> However, a letter from the Sacred Congregation of the Sacraments of August 20, 1937, requesting information concerning matrimonial cases handled in the Apostolic Delegation, may indirectly have served to expedite matters.<sup>33</sup> In his reply of February 1, 1938, the Apostolic Delegate reported that apart from the Vicariate Apostolic of Kroonstad, there were no ecclesiastical territories where

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30 Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter (Prot. N. 234/38), October 3, 1938. In this letter to the Vicar Apostolic of the Western District of the Cape of Good Hope, the Apostolic Delegate refers to the 1933 meeting which he had chaired. See appendix VII.

31 Cf. ibid.

32 Cf. ID., Letter to the S.C. of the Sacraments (Prot. N. 123/38), February 1, 1938.

33 Cf. S.C. OF THE SACRAMENTS, Letter (Prot. N. 2022/32), August 20, 1937.

regular matrimonial tribunals had been established, and that during 1937, no formal matrimonial nullity cases had been handled within the Delegation.<sup>34</sup> Two reports were enclosed with his letter, one prepared by the Vicar Apostolic of Mariannahill and the other by the Vicar Apostolic of Kroonstad.<sup>35</sup>

In his report, De tractatione causarum matrimonialium, of December 24, 1937, Bishop M.A. Fleischer, C.M.M., of Mariannahill, stated that since a difficult case "super matrimonio rato et non consummato" had been presented, a collegiate tribunal had been established in the vicariate in 1924. The priests, however, who had constituted that tribunal had since died or returned to Europe, and, as no formal matrimonial nullity cases had been submitted in the intervening years, new officers had not been appointed. The report continued by mentioning that at the beginning of 1936, an occasion for constituting a tribunal had occurred, but prior to its establishment, the petitioner had contracted a civil marriage since he was not prepared to wait.

After mentioning instances where the summary process for the excepted cases of canon 1990 had been used, as well as details of fees requested for such cases and for dispensations from matrimonial impediments, Bishop Fleischer made a plea for the establishment of "an Ecclesiastical Regional or Provincial Court." This court was to be constituted within the territory of the Apostolic Delegation in order that "marriage cases or processes" be handled more expeditiously "as the

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<sup>34</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter (Prot. N. 259/38), February 1, 1938. See appendix VIII.

<sup>35</sup> It has not been possible to obtain a copy of the report submitted by the Vicar Apostolic of Kroonstad.

priests whom we would have to appoint as officials [...], if such a process happens to be conducted, are already overburdened with other important duties."

An official request for information concerning the advisability of constituting a "regular" matrimonial tribunal for Southern Africa was addressed to the Sacred Congregation of the Sacraments by the Apostolic Delegate in a second letter dated February 1, 1938:<sup>36</sup>

On the occasion of the celebration of the General Synod of the Ordinaries of this Delegation last January, the question was raised whether it would be advisable to establish in Southern Africa a regular tribunal for matrimonial causes. But before taking any decision in this regard, the Ordinaries wish to be informed concerning the competence of such a tribunal.

For this reason, the Synod humbly requests:

1. if in mission countries a regular tribunal would have competence to introduce and conclude all the matrimonial causes which are enumerated in Modulo III as grounds of nullity;<sup>37</sup>
2. whether the aforesaid causes could be settled definitively in the local tribunals of first and second instance, without first submitting them to the tribunal of the relevant S. Roman Congregation.<sup>38</sup>

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<sup>36</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter (Prot. N. 123/38), February 1, 1938. See appendix IX.

<sup>37</sup> Modulo III refers to the report of the Vicariate of Kroonstad.

<sup>38</sup> "In occasione del Sinodo Generale degli Ordinarii di questa Delegazione celebrato nel gennaio u.s., si è trattato della questione se sarebbe opportuno d'istituire nell'Africa meridionale un regolare tribunale per le cause matrimoniali. Ma prima di prendere una decisione al riguardo, gli Ordinarii desideravano di essere informati circa la competenza di un tale tribunale.

"Per questa ragione il Sinodo domanda umilmente:

1. se nei paesi di missione un regolare tribunale abbia la competenza d'introdurre e definire tutte le cause matrimoniali che sono enumerate nel Modulo III come capita nullitatis;

On May 29, 1938, the following reply was drafted by Monsignor Vittorio Bartocchetti, later sub-secretary of the Office of Vigilance:

[...] I hasten to indicate that it would certainly be opportune that at least one regular tribunal be constituted in that region for matrimonial cases. This tribunal or - if more than one - these tribunals would certainly be competent to define every matrimonial case of any kind, and if there were at least two tribunals, one of first instance and one of second instance, matrimonial sentences could be executed after obtaining two conform sentences of nullity, without either the defender of the bond having to appeal in further instances, or, as in the rest of the world, without the necessity of resorting successively to the tribunals of the Holy See [...].<sup>39</sup>

In a letter of November 25, 1938, the Apostolic Delegate officially informed Bishop Francis Hennemann, P.S.M., Vicar Apostolic of the Western District of the Cape of Good Hope, that the majority of Ordinaries had agreed that two inter-territorial matrimonial tribunals should be established within the Delegation, with seats of first and second instances in Cape Town and Johannesburg respectively. Since it had been proposed that such a tribunal be established within Bishop Hennemann's vicariate, the Apostolic Delegate

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2. se le sopraddette cause essendo definite dai locali tribunali di prima e seconda istanza ottengano l'effetto senza prima sottoporle al tribunale della rispettiva S. Congregazione Romana."

<sup>39</sup> Cf. S.C. OF THE SACRAMENTS, Minuta (Prot. N. 300/38 St), May 29, 1938. The rough draft of V. Bartocchetti's reply in his own hand is at the bottom of the letter received from the Apostolic Delegate to Southern Africa (Prot. N. 123/38): "[...] mi reco a premura a significarle che sarebbe certamente opportuno che in codesta regione venisse costituito almeno un regolare tribunale per le cause matrimoniali. Detto tribunale o - se più di uno - detti tribunali certamente sarebbero competenti a definire qualunque causa matrimoniale di qualsiasi genere e se costì esistessero almeno due tribunali, uno di prima ed uno di seconda istanza, le sentenze matrimoniali diverrebbero esecutive dopo ottenutene due conformi per la nullità, senza che sia intervenuto appello od ulteriori istanze di parte del difensore del vincolo, come avviene per il resto del mondo senza che occorra ricorrere successivamente ai tribunali della Santa Sede [...]." See appendix X.

requested him to make the necessary preparations, and to inform him as to the names of those to be appointed to the tribunal, together with "their academic degrees or titles, or at least a statement regarding their knowledge of canon law."<sup>40</sup> This information was to be submitted to the Sacred Congregation of the Sacraments.

On February 6, 1939, on behalf of the Ordinaries of the Delegation, the Apostolic Delegate requested approval for the establishment of inter-territorial tribunals.<sup>41</sup> In a reply dated February 23, 1939, Cardinal Domenico Jorio, the Prefect of the Sacred Congregation of the Sacraments, offered some suggestions to overcome the anticipated difficulties connected with the constitution of collegiate tribunals.<sup>42</sup> These difficulties had been mentioned in the letter of the Apostolic Delegate.

Although it has not been possible to obtain any further documentation with respect to these preparatory stages, it appears from the Protocol Book of the Congregation that a definitive request for the erection of two inter-territorial

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<sup>40</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter (Prot. N. 234/38), November 25, 1938. In Bishop Hennemann's reply of December 1, 1938 (Prot. N. 3/2), he proposed that the courts "should not [...] be designated 'First and Second Instance Courts,' but rather as Regional First Instance Courts, and act [...] as Second Instance Courts for each other." In a further letter of December 16, 1938 (Prot. N. 234/38), the Apostolic Delegate stated that since the decision had already been made by the Ordinaries, any revision of that decision would have had to be agreed to by them. Had Bishop Hennemann's proposal been accepted, a system of tribunals similar to the regional ones erected in Zimbabwe in 1973 would have resulted.

<sup>41</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter (Prot. N. unknown), February 6, 1939.

<sup>42</sup> Cf. S.C. OF THE SACRAMENTS, Letter (Prot. N. 65/39 St), February 23, 1939. See appendix XI.

matrimonial tribunals was received from the Apostolic Delegate on July 3, 1939.<sup>43</sup> This request was approved in a letter of July 4, 1939.<sup>44</sup>

### C. Inter-territorial Tribunals in Southern Africa

#### i. The Letter of July 4, 1939

In a letter dated July 4, 1939, the Sacred Congregation of the Sacraments empowered the Apostolic Delegate to Southern Africa to establish two inter-territorial tribunals for formal matrimonial nullity cases within the territory of the Apostolic Delegation. A court of first instance was to be established at Cape Town and one of second instance at Johannesburg.<sup>45</sup>

#### a. The Tribunal of First Instance

With the constitution of a first instance tribunal in Cape Town, the Vicar Apostolic, Bishop Hennemann, assumed the role of chairman of the court or

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<sup>43</sup> According to the Protocol Book of the S.C. of the Sacraments, the Prot. N. of this letter was 65/39. Since a copy of this letter is not available, it has not been possible to determine its date.

<sup>44</sup> Cf. S.C. OF THE SACRAMENTS, Letter (Prot. N. 426/39), July 4, 1939. Although it has not been possible to locate a copy of this letter, its contents have been deduced from secondary sources. Cf. *infra*, chapter III, footnote 3.

<sup>45</sup> Cf. O. McCANN, Cardinal, "Report re Matrimonial Tribunal of the Archdiocese of Cape Town," March 28, 1983 (unpublished), p. 1: "There had been attempts to handle marriage cases before this. I remember hearing that Monsignor John Colgan, who was the Administrator of the Cathedral, took evidence of a petitioner in a marriage case and sent it to Rome. Rome, evidently Propaganda, wrote back saying "Observe the Procedure." I do not think anybody knew about the Instruction of 15 August 1936 published by the Congregation of the Sacraments: "Provida Mater Ecclesia" [..]."

officialis.<sup>46</sup> Two associate judges, a promotor of justice, a defender of the bond and a notary were appointed to assist him in the task of directing the tribunal.<sup>47</sup> For the next twelve years, the Cape Town tribunal, in so far as it was competent, was the only first instance court for all formal cases of matrimonial nullity arising within South Africa, Zimbabwe, South West Africa, Swaziland, Botswana and Lesotho, a total area of 3,028,215 square-kilometres.<sup>48</sup>

During the first decade following the establishment of the tribunal, only two or three cases were judged annually.<sup>49</sup> The grounds upon which most affirmative decisions were based were either defect of consent on account of force or fear, or partial simulation where one of the goods of marriage, i.e., the bonum prolis, the bonum fidei or the bonum sacramenti, was excluded by a positive act of the will.<sup>50</sup>

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46 Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to Ordinaries of the Delegation (Prot. N. 131/39), August 7, 1939.

47 Cf. O. McCANN, art. cit., p. 1; APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to Vicar Apostolic of Cape Town (Prot. N. 131/39), October 7, 1939.

48 Cf. H. EMMERICH, Atlas hierarchicus: descriptio geographica et statistica Ecclesiae Catholicae tum occidentis tum orientis, pp. 34-36. The total area of South Africa: 1,214,626 sq. kms.; South West Africa: 803,102 sq. kms.; Swaziland: 17,363 sq. kms.; Bechuanaland (Botswana, as from September 30, 1966): 574,980 sq. kms.; Basutoland (Lesotho, as from October 4, 1966): 30,348 sq. kms.; Southern Rhodesia (Zimbabwe, as from April 18, 1980): 387,796 sq. kms. Henceforth, except when quoting from official documents, the current names of the territories will be used. This also applies to ecclesiastical territories (cf. supra, footnote 24).

49 Cf. O. McCANN, art. cit., p. 2.

50 Cf. ibid., p. 2.

In these early years, several informal cases as well as ones involving defect of canonical form were also presented to the tribunal.<sup>51</sup> Cases where non-consummation was alleged or the Privilege of the Faith involved, were instructed by the tribunal and forwarded to the Holy See for decision.<sup>52</sup> Prior to the establishment of the court, informal matrimonial nullity cases involving the documentary process, as well as cases concerning the defect of canonical form, had been handled by parish priests without the necessity of recourse to the bishop.<sup>53</sup>

In 1950, when Bishop Owen McCann succeeded Bishop Hennemann, he appointed an officialis to take charge of the tribunal.

#### b. The Tribunal of Second Instance

The chairman or officialis of the Johannesburg appeal tribunal was Father E. Varrie.<sup>54</sup> Like the Cape Town court, the competence of the Johannesburg tribunal was for all formal matrimonial nullity cases originating within the territory of the Apostolic Delegation, and heard in first instance in Cape Town.<sup>55</sup>

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51 Cf. ibid., p. 2.

52 Cf. ibid., p. 1.

53 Cf. ibid., p. 1.

54 Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to Ordinaries of Delegation (Prot. N. 131/39), August 7, 1939.

55 Since the archives of the Diocese of Johannesburg were destroyed by fire on the night of September 14, 1945, very little information on the organisation and activities of the Johannesburg matrimonial tribunal during its early years, is available.

## ii. The Letter of March 9, 1951

Following the establishment of the hierarchy in South Africa, Lesotho and Swaziland on January 11, 1951, the Sacred Congregation for the Propagation of the Faith authorised the erection of two additional inter-territorial courts of first instance.<sup>56</sup> In its letter, the Congregation stated that in a private audience, Pope Pius XII had approved the following plan:

1. that there be erected three tribunals of first instance for the entire delegation, namely,
  - a. Cape Town
  - b. Johannesburg
  - c. Maseru (Roma in Basutoland)<sup>57</sup>

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<sup>56</sup> Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter (Prot. N. 4319/51), March 9, 1951, in appendix XII. The establishment of two additional courts was the culmination of proposals formulated at a meeting of the Conference of Ecclesiastical Authorities in Southern Africa in Mariannhill in March, 1947. In view of the increase in the number of Catholics in the Delegation and the consequent burden upon the Cape Town tribunal, a request was made for the erection of two further first instance courts. The Apostolic Delegate in a letter (Prot. N. 2/16/13/50) of November 11, 1947, stated that: "We are convinced that the work of Marriage Courts will be appreciably simplified if certain Courts are established to deal with cases involving Africans, and other Courts to deal with Europeans and others." This statement reflected a resolution of the administrative board of the Conference of Ecclesiastical Authorities in Southern Africa of July 14, 1947 (cf. Archives Volume 1, p. 14.2; henceforth referred to as A.V.1). It had been resolved to petition for two matrimonial tribunals at Mariannhill near Durban, and Roma in Lesotho, which would act reciprocally as courts of first and second instance. The S.C. for the Propagation of the Faith in a reply (Prot. N. 4437/47) of December 9, 1947, stated that tribunals which drew "a complete line between Natives and Europeans [would be] unbecoming of the universality of the Church," and proposed that three first instance tribunals at Cape Town, Johannesburg and Roma be established. The acceptance of this proposal was conveyed to the Congregation by the Apostolic Delegate in a letter dated September 16, 1948 (Prot. N. 2/16/2/48).

<sup>57</sup> Since there were many more priests in Maseru, the tribunal was established in that diocese rather than in the Archdiocese of Bloemfontein. This factor also played an important role in the 1958 redistribution of inter-territorial courts. In a letter to the S.C. for the Propagation of the Faith (Prot. N. 551/58),

2. that the courts of second instance will be the same tribunals, but with the following order:
  - a. Cape Town will appeal to Johannesburg
  - b. Johannesburg to Maseru
  - c. Maseru to Cape Town.<sup>58</sup>

In a letter to the Apostolic Delegate dated March 15, 1952, the same Congregation conveyed its approval of a proposal, submitted by the Ordinaries for the designation of ecclesiastical territories subject to the jurisdiction of each matrimonial tribunal.<sup>59</sup> The distribution of the territories was as follows:

CAPE TOWN	JOHANNESBURG	MASERU
Cape Town	Johannesburg	Maseru
Aliwal	Bulawayo	Bethlehem
Keetmanshoop	Durban	Bloemfontein
Keimoes	Gweru	Eshowe
Oudtshoorn	Harare	Kokstad
Port Elizabeth	Kimberley	Kroonstad
Queenstown	Lydenburg-Witbank	Mariannhill
Windhoek	Pietersburg	Manzini
	Pretoria	Umtata

dated July 24, 1958, the Apostolic Delegate wrote: "E' da notare che nella provincia ecclesiastica di Bloemfontein la sede del tribunale sta a Maseru per la ragione che l'arcidiocesi di Bloemfontein ha solamente 18 sacerdoti e Maseru ha 118."

<sup>58</sup> The Apostolic Delegate informed the meeting of the administrative board, April 20-26, 1951, that since each tribunal had full jurisdiction for all formal matrimonial cases arising in the territory of the Apostolic Delegation, any of the three tribunals could be chosen as court of first instance by any diocese, vicariate or prefecture apostolic (cf. Minutes, I.4. A.V.1, p. 54). At this stage, the distribution of ecclesiastical territories for each tribunal had not yet been effected.

<sup>59</sup> Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter (Prot. N. 829/52), March 15, 1952, in appendix XIII. The Congregation in an earlier letter (Prot. N. 4319/50) of December 19, 1951, had requested the Apostolic Delegate for information as to the "dioceses, archdioceses (other ecclesiastical divisions) that will belong to each tribunal [..]."

In the initial petition to the Holy See for additional tribunals, it was requested that an inter-territorial court be established at Durban. On this point, the letter of March 15, 1952, stated:

With reference to Archbishop Hurley's request, i.e., to erect a tribunal at Durban, for the time being, Propaganda would like to leave things as they are. The tribunals of second instance will remain as stated in [the] letter of March 9, 1951.

### iii. Re-arrangement of Tribunals, September 29, 1958

When the need for an inter-territorial tribunal at Harare in Zimbabwe became apparent, it was necessary to re-arrange the existing courts in Southern Africa. This was effected by the Sacred Congregation for the Propagation of the Faith in a letter dated September 29, 1958, which also authorised the erection of new courts at Durban and Pretoria.<sup>60</sup> With respect to the tribunal at Harare, it was stated that:

[..] this Sacred Congregation grants with this letter the establishment of a judicial court for matrimonial causes at Salisbury, which would have jurisdiction over the ecclesiastical circumscriptions of Southern Rhodesia (namely, Gwelo, Bulawayo, Umtali and Wankie).<sup>61</sup>

A consequence of the redistribution of tribunals was the inclusion of Botswana within the jurisdiction of the newly-erected Harare court. Prior to its

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60 Cf. ID., Letter (Prot. N. 3449/58), September 29, 1958, in appendix XIV.

61 Cf. ibid.: "[..] questa S. Congregazione, concede, con la presente, l'erezione della corte giudiziaria per le cause matrimoniali a Salisbury, a cui faranno capo le circoscrizioni ecclesiastiche della Rhodesia meridionale (cioè Gwelo, Bulawayo, Umtali e Wankie)."

constitution, formal matrimonial nullity cases originating in Botswana were presented to the Johannesburg tribunal, since Botswana formed part of the Kimberley diocese whose court of first instance was situated in Johannesburg.

A further consequence of this re-arrangement was the termination of the supradiocesan jurisdiction of the Johannesburg tribunal, and its replacement in the Pretoria ecclesiastical province by the Pretoria inter-territorial court. Although subject to the Pretoria tribunal for the handling of formal matrimonial nullity cases, the Johannesburg court, while lacking competence for such cases, appears to have continued processing them independently.<sup>62</sup>

The new distribution of territories was as follows:

CAPE TOWN	PRETORIA	DURBAN	MASERU	HARARE
Cape Town	Pretoria	Durban	Maseru	Harare
Aliwal	Dundee	Eshowe	Bethlehem	Bulawayo
De Aar	Johannesburg	Kokstad	Bloemfontein	Gaborone
Keetmanshoop	Lydenburg-	Mariannahill	Keimoes	Gweru
Oudtshoorn	Witbank	Umtata	Kimberley	Mutare
Port Elizabeth	Manzini	Umzimkulu	Kroonstad	Wankie
Queenstown	Pietersburg		Leribe	
Windhoek				

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<sup>62</sup> The juridical position of the Johannesburg diocesan tribunal is somewhat uncertain. The judicial vicar of the Pretoria tribunal in a letter of April 13, 1984 states: "A matrimonial case dated 24 January, 1961, was submitted to the Pretoria tribunal. The libellus, however, had been addressed to the Johannesburg Curia, but without any explanation, the case was transferred to Pretoria. As far as matrimonial cases were concerned, nothing was found in the archives of the Archdiocese of Pretoria with regard to the Johannesburg court becoming independent again. When I was appointed in 1974, the Johannesburg matrimonial tribunal was fully operational." The juridical position of the Johannesburg court is discussed in detail in chapter III, infra, pp. 133-135.

The second instance tribunals were designated in the following order:

The tribunal of second instance for Cape Town will be Pretoria, for Pretoria, Durban, for Durban, Maseru, for Maseru, Cape Town and for Salisbury, Pretoria.<sup>63</sup>

Since this redistribution of territories, several additional dioceses and prefectures apostolic have been established.<sup>64</sup> These have, as their first instance tribunal, the court of the territory in which they were included prior to their separate establishment.

In a further rescript of February 2, 1967, the same Congregation designated the tribunal at Durban as court of first instance, and that at Maseru as court of second instance for the Prefectures Apostolic of Volksrust and Ingwavuma.<sup>65</sup> This rescript had been granted so that all the territory of the Durban ecclesiastical province should coincide with the territory of the Durban tribunal. In terms of the 1958 re-arrangement of tribunals, the Prefecture Apostolic of Volksrust, created earlier that year, and which formed part of the Durban province, had been included within the jurisdiction of the Pretoria court. The Prefecture Apostolic of Ingwavuma, previously part of the Diocese of Eshowe, had been established within the Durban province on November 12, 1962.

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63 Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter (Prot. N. 3449/58), September 29, 1958: "Il tribunale di seconda istanza per Cape Town sarà Pretoria, per Pretoria, Durban, per Durban, Maseru, per Maseru, Cape Town e per Salisbury, Pretoria."

64 Cf. *supra*, footnote 24.

65 Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Rescript (Prot. N. 604/67), February 2, 1967, in appendix XV.

#### D. The Need for a Reform of Tribunal Structures

In view of the expansion of the Church in Lesotho, the Lesotho Catholic Bishops' Conference (LCBC) was established in January 1972, bringing to an end Lesotho's twenty-one year association with the SACBC. The establishment in Lesotho of a separate bishops' conference had, in itself, no juridical effect upon the arrangement of the courts in Southern Africa. However, even before Lesotho's departure from the SACBC, the Maseru tribunal had, for all practical purposes, ceased to function. The consequences of the non-functioning of this court were far-reaching, since the territories for which it had been designated as court of first instance in 1958, together with the new Dioceses of Qacha's Nek and Mohale's Hoek in Lesotho, were without a matrimonial tribunal. Moreover, the Durban tribunal lacked a second instance court to which cases heard in first instance could be directed on appeal. In the light of these shortcomings which affected the processing of matrimonial causes in two of the five ecclesiastical provinces, an internal investigation into tribunal structures and a plan for their reform was called for.

##### i. An Investigation of Tribunal Structures<sup>66</sup>

A meeting to determine the state of matrimonial tribunals in Southern Africa was convened in Pretoria on July 18, 1972. Three ecclesiastical documents

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<sup>66</sup> During the years 1972 to 1984, the Southern African tribunals are frequently referred to as "regional" in the minutes of the SACBC, the administrative board and committees established to investigate tribunal structures. It would appear, however, that these tribunals (excluding the Zimbabwe ones), are "diocesan" in nature with extended territorial competence and not "regional" in the technical sense. This is discussed fully in chapter III, *infra*, pp. 110-114.

and their consequences for the Southern African courts formed the basis for discussion:

- a. The provisions of the Letter of the Sacred Congregation for the Propagation of the Faith, September 29, 1958 (Prot. N. 3449/58), were considered;
- b. The "Norms for Interdiocesan, Regional or Interregional Tribunals" of the Apostolic Signatura were studied, together with their implications for Southern Africa;<sup>67</sup>
- c. The provisions of the Motu Proprio, Causas matrimoniales, March 28, 1971, were examined, especially with regard to competence for formal matrimonial nullity trials, and the constitution of a collegiate tribunal under certain circumstances.<sup>68</sup>

At its conclusion, the meeting resolved that the following recommendations be submitted to the administrative board of the SACBC:

- a. The Apostolic Signatura be informed of the partial breakdown of the Southern African tribunal structures;
- b. The SACBC be informed that it might permit for the adjudication of formal matrimonial nullity cases, in both instances, the constitution of a college of two clerics and one lay man, where a college of three clerics could not be formed; where a college of two clerics and one lay man could not be formed, a single clerical judge could be permitted to study such cases;

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67 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, "Normae pro Tribunalibus interdiocesis vel regionalibus aut interregionalibus," December 28, 1970, in AAS, 63 (1971), pp. 486-492.

68 Cf. PAUL VI, Motu Proprio, "Causas matrimoniales," March 28, 1971, in AAS, 63 (1971), pp. 441-446.

c. Tribunal expenses, office accommodation and equipment receive immediate attention.<sup>69</sup>

a. **Administrative Board Meetings, September 6-7, 1972; February 5, 1973**

At the administrative board meeting of September 6-7, 1972, matrimonial tribunals were reviewed and the proposals formulated at the meeting of July 18, 1972, considered. It was resolved that a commission comprising delegates from each tribunal be established to draft recommendations for the reorganisation of the courts. Following this resolution, the Archbishops of Cape Town and Durban, as well as the Bishop of Johannesburg, were requested to submit the report of the meeting of July 18, 1972, to their tribunal officers for comments and suggestions.<sup>70</sup>

The proposals received were generally in favour of the continuation of the existing system, although one court viewed this only as an interim measure, since they urged a radical reappraisal of the rationale underlying matrimonial tribunals.<sup>71</sup> It was strongly recommended in the proposals that the episcopal

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<sup>69</sup> Cf. Report, "Regional Matrimonial Tribunals of First and Second Instance," July 18, 1972, in the archives of the General Secretariate of the SACBC.

<sup>70</sup> Cf. SACBC ADMINISTRATIVE BOARD, Minutes, 1.7. A.V.3, p. 78, September 6-7, 1972.

<sup>71</sup> In section II of the memorandum, "Suggestions for reappraisal of Matrimonial 'Tribunals'", a plea was made for the abolition of matrimonial tribunals in their present form, as well as a complete reform of matrimonial procedural law. It was proposed that instead of matrimonial courts, there should be "regional marriage commissions" consisting of priests, marriage counsellors and

conference apply the faculties of Causas matrimoniales for the constitution of tribunals in formal matrimonial nullity cases. On the question of mandatory appeals, it was proposed that if a defender of the bond had no objections to raise against an affirmative sentence, it be left to his discretion as to whether or not an appeal was to be lodged. Moreover, it was also suggested "that tribunals of second instance should accord automatic confirmation [..]," since such a procedure was viewed as within the "spirit" of Causas matrimoniales. With respect to competence for formal matrimonial nullity cases, the opinion was expressed that both the "regional" and the diocesan courts were equally competent. It was proposed that lay women be appointed notaries to lessen the workload upon priests in tribunals. As far as office accommodation and tribunal expenses were concerned, the consensus was that in the absence of full-time personnel, office accommodation was unnecessary, and that if possible, each petitioner should contribute to expenses.

These recommendations were studied by the administrative board on February 5, 1973. At this meeting it was resolved that the proposals be submitted to the plenary session of the bishops' conference meeting at that time.<sup>72</sup>

**b. Administrative Board Meeting, October 23-25, 1973**

A report on matrimonial tribunals was considered at this meeting. After

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psychologists. It was envisaged that these commissions would have full decisional authority for all formal matrimonial nullity cases, as well as cases involving non-consummation and privilege of the faith.

<sup>72</sup> Cf. SACBC ADMINISTRATIVE BOARD, Minutes, 1.8. A.V.3, p. 85, February 5, 1973.

stating that the Zimbabwe bishops were considering the establishment of their own courts, and that the majority of South African tribunal personnel had favoured the continuance of the existing tribunal system in South Africa, the report recommended that:

1. The faculty of Mission Ordinaries be applied to reduce tribunal personnel in first instance formal matrimonial trials, to a single judge, a defender of the bond and a notary;
2. The officialis of the second instance tribunal be empowered to appoint for single cases, the two associate judges, one of whom could be a qualified lay man;
3. Judicial competence for cases of nullity be extended to include the tribunal of the diocese in which the petitioner habitually resides.<sup>73</sup>

With respect to the proposals previously submitted by the tribunals, the board resolved that the following comments be placed upon the agenda of the plenary session of the SACBC, scheduled for February, 1974:

- a. The Durban recommendations for a reappraisal of Marriage Tribunals (section II of Memorandum) are outside the scope of the present inquiry, since they envisage a radically new approach to the Rule of Law, and must therefore be introduced and examined by a higher authority;
- b. We feel that cases of nullity concluded in a court of first instance, should be submitted to a court of second instance for ratification or retrial. We find no grounds for automatic confirmation of sentence;
- c. The question of court expenses raised by the Johannesburg diocesan tribunal, has not been adequately considered in the replies received.<sup>74</sup>

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73 Cf. ID.; Minutes, 1.9. A.V.3, p. 89, October 23-25, 1973.

74 Cf. ibid.

### c. Regional Tribunals in Zimbabwe

The Rhodesian Catholic Bishops' Conference (RCBC, now ZCBC), on October 1, 1973, submitted to the Apostolic Signatura a decree dated September 6, 1973, for the establishment of regional tribunals in Zimbabwe. This decree was approved on December 11, 1973.<sup>75</sup>

With its approval, regional courts with universal competence were constituted for the first time in Southern Africa. Two first instance tribunals, which were to act as courts of second instance to each other, were erected in the Archdiocese of Harare and the Diocese of Gweru. While the tribunal in Harare was competent for all cases arising in the Archdiocese of Harare and the Diocese of Umtali, that in Gweru was competent for all cases arising in the Dioceses of Gweru, Bulawayo and Wankie.

Prior to the introduction of regional tribunals, the inter-territorial court of the Archdiocese of Harare, like the other Southern African courts, was solely competent for formal matrimonial nullity cases. A consequence of the universal competence accorded to these new tribunals was that the bishops whose territories were subject to each court, forfeited the exercise of their competence for other contentious cases (including informal matrimonial ones) and criminal

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<sup>75</sup> Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Rescript (Prot. N. 4534/73 V.T.), December 11, 1973. See appendix XVI for copies of the decree and rescript, as well as a map depicting the ecclesiastical territories in Zimbabwe as in 1984.

cases. Indeed, diocesan tribunals, where they existed, were rendered largely superfluous in view of the establishment of instructory courts in each diocese.<sup>76</sup>

The establishment of regional tribunals in Zimbabwe resulted in the Diocese of Gaborone in Botswana being without a first instance court. An attempt to remedy this would be made in 1984 in the proposed decree for the erection of interdiocesan tribunals in South Africa.

In recent years the Harare court has been inactive and, on occasions, it has requested the Pretoria tribunal to handle formal matrimonial nullity cases on its behalf.<sup>77</sup>

## ii. Further Resolutions on Matrimonial Tribunals

### a. Administrative Board Meetings, February 10, 1976; May 3, 1976; February 2, 1977.

During the plenary session of the SACBC in February, 1976, much discussion was again devoted to tribunals. On February 10, 1976, the administrative board resolved that a committee be constituted to prepare a memorandum on tribunals for submission to the plenary session in February, 1977. This memorandum, if accepted, was to be referred to the Holy See. The committee was to consider tribunals in terms of three points:

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<sup>76</sup> The provisions of the Zimbabwe decree are discussed in chapter III, *infra*, pp. 124-128.

<sup>77</sup> Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Rescripts (Prot. N. 14.334/82 V.T.), May 17, 1982, and June 8, 1983. These rescripts, for a year at a time, prorogued the competence of the Pretoria tribunal to handle cases for which the Harare tribunal is competent. See appendix XVII.

a) the lack of personnel, as well as the training and time required to staff tribunals;

b) even with available personnel, the time, skill and effort required for processing matrimonial nullity cases is totally disproportionate in comparison with the general demands of the ministry;

c) the operation of marriage tribunals seems irrelevant to contemporary pastoral needs.<sup>78</sup>

On May 3, 1976, the committee presented its proposals to the administrative board. The board, however, was of the opinion that the terms of reference had not been observed, and that the question of tribunals had not been approached "in a sufficiently radical manner." It was felt that recommendations which were "within the old structures which were completely outdated and unsuitable in the present pastoral situation" had been formulated. What had been called for were suggestions which would assist those in tribunal work, and which would also serve to help the Pontifical Commission for the Revision of the Code of Canon Law.<sup>79</sup>

At this session, it was proposed that a meeting of priests engaged in tribunal work be convened. Their recommendations, together with those of the committee, were to be presented at a later session of the board.

On February 2, 1977, two memoranda, representing two schools of thought, were submitted to the administrative board. The supporters of one view held that there should be a "streamlining" of regional tribunals "as they are within

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<sup>78</sup> Cf. SACBC ADMINISTRATIVE BOARD, Minutes, 1.10. Bound Minutes, 1, p. 4, February 10, 1976; hereafter referred to as B.M.1.

<sup>79</sup> Cf. ID., Minutes, 1.11. B.M.1, May 3, 1976.

an existing system," while those of the other maintained that any overhaul of the existing system would be a "waste of time," and that the Holy See should be made aware of the pastoral problems involved in having to work within a system which, in their words, was "outdated, obsolete and harmful to the faithful."<sup>80</sup>

**b. Plenary Session of the Southern African Catholic Bishops' Conference, February, 1977**

During the plenary session of February, 1977, a further report on tribunals was presented for consideration. This report favoured a system of diocesan courts in preference to regional ones, since the efficiency of the "regional" courts had been questioned. It was further recommended that as an alternative to regional matrimonial tribunals in first instance, episcopal conferences appoint "legal advisers" to local bishops, since this "would avoid a lot of red tape / and / would also help the appeal courts when cases forwarded to the same are accompanied by the right evaluation of an expert."<sup>81</sup>

In the course of this session, a memorandum on tribunals was submitted by the Durban court.<sup>82</sup> "A radical reappraisal of the whole system of matrimonial tribunals" was called for. Quoting a resolution of the administrative board of February 10, 1976, to the effect that "the operation of marriage tribunals appears less and less relevant to the pastoral needs of the People of God in our time,"<sup>83</sup> the report referred to:

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<sup>80</sup> Cf. ID., Minutes, 1.12 B.M.1, February 2, 1977.

<sup>81</sup> Cf. SACBC, Minutes of plenary session, 1.12. B.M.1, Appendix G, p. 83, February 9, 1977.

<sup>82</sup> Cf. ibid., pp. 84-89.

<sup>83</sup> Cf. SACBC ADMINISTRATIVE BOARD, Minutes, 1.10. B.M.1, February 10, 1976.

the whole concept of a "tribunal" as presented by the Code of Canon Law [...] as being completely foreign to the true nature of the Church as has emerged from Vatican II. With regard to marriages, just as for other matters, it pertains to the community of the people of God to decide what can and should be done in Christ.<sup>84</sup>

At the conclusion of the memorandum, four proposals were submitted to the bishops' conference. These, if implemented, would have served to introduce a radically new approach to the marriage nullity process:

1. In each region, instead of a matrimonial tribunal, there would be a group of representatives of the community appointed by the bishops of the region, and consisting of priests, marriage counsellors, psychologists and the like;

2. This body (which might be called the "Regional Marriage Commission") would have as its aim the fulfillment of the ministry to married people as outlined in 2(a) above;<sup>85</sup>

3. It would follow the general guidelines issued by ecclesiastical authority, and aim at the greatest possible expeditiousness in the solution of marriage cases, the "bonum animarum" (not excluding the common good of the community), being the prime consideration;

4. It might seem necessary (saving the principle of subsidiarity) to consider the appointment of a "Marriage Secretary" for the whole country, attached to the General Secretariate. His functions, not rigidly determined, would be those of co-ordinator, animator, general consultant and resource person. If he can facilitate the work of regional bodies, these in turn will function more efficiently and with a minimum of personnel.<sup>86</sup>

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<sup>84</sup> Cf. SACBC, Minutes of plenary session, 1.12. B.M.1, Appendix G, p. 87, February 9, 1977.

<sup>85</sup> Cf. ibid., p. 88. Art. 2 (a) provided that those who would represent the community in taking decisions concerning matrimonial matters "should be appointed by the Bishop as leader of the community, and some of them, at least, should belong to the presbyterium [...]."

<sup>86</sup> Cf. ibid., pp. 88-89.

The memorandum continued that, should it not be possible to implement these proposals within a reasonable period, authorisation should be sought to abolish mandatory appeals, and to permit "all cases" to be handled by a single judge. The plenary session referred the memorandum to the administrative board for study and action.

**c. Administrative Board Meeting, May 24-26, 1977**

In the light of the recommendations of the Durban memorandum, the administrative board resolved that:

1. A preliminary recommendation be submitted to the Commission for the Revision of the Code of Canon Law, to the effect that a radical revision of the approach to marriage problems is required, with a view to transforming the traditional juridical procedure into a more pastoral approach, involving pastoral commissions with a variety of competences;

2. A more complete report be promised after discussion in the plenary session of February, 1978.<sup>87</sup>

In addition, it was decided that, in the interim, a petition be addressed to the Holy See for a dispensation from the requirement of mandatory appeals in formal matrimonial cases, and for permission for all cases to be studied by one judge in both instances.

**d. The Dublin Conference, August 15-19, 1977**

On November 3, 1976, the Schema canonum de modo procedendi pro tutela iurium seu de processibus was distributed by the Pontifical Commission for

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<sup>87</sup> Cf. SACBC ADMINISTRATIVE BOARD, Minutes, 1.13. B.M.1, May 24-26, 1977.

the Revision of the Code of Canon Law to all episcopal conferences for comment. In the light of widespread dissatisfaction concerning the proposed procedure for cases involving matrimonial nullity, an inter-episcopal conference meeting was held in Dublin in August, 1977. Represented at this meeting were eight episcopal conferences, including the SACBC.<sup>88</sup>

The presentation of the procedure for marriage nullity cases was viewed by the Dublin Conference as simply a variation of the "contentious procedure," and "probably the one single factor which most seriously inhibits the Schema from adapting its matrimonial processes to the real needs of to-day" (p. 9). Since in a matrimonial nullity case, there is scarcely the resolution of a controversy between two persons, which is the essence of the contentious procedure, matrimonial nullity cases demand a special procedure designed specifically to determine whether or not the alleged nullity of the bond has been established. What was called for was a procedure which would achieve a balance between a speedy and abbreviated process, and the guaranteed protection of both the public and private good. Accordingly, the conference proposed that serious consideration should be given to the incorporation of elements of the summary process into marriage nullity procedures.

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<sup>88</sup> Represented were the Episcopal Conferences of Australia, Canada, England and Wales, Ireland, New Zealand, Scotland and South Africa. The Episcopal Conference of the United States of America sent an observer. In a 23 page report, the Inter-Episcopal Conference rejected the Schema and called for a revised draft. The report was submitted to the various episcopal conferences concerned.

iii. The Committee for Matrimonial Tribunals

a. Seminar for Tribunal Personnel, August 17-21, 1981

At the request of the Southern African Council of Priests, that a competent canonist be invited to address the bishops and other interested persons on the proposed new law for marriage and matrimonial procedures, the administrative board decided to invite Father Francis Morrissey, O.M.I., then Dean of the Faculty of Canon Law at Saint Paul University in Ottawa, Canada, to lecture throughout Southern Africa in 1981.<sup>89</sup> This decision was conveyed to the plenary session of the bishops' conference on February 12, 1980.

The series of lectures presented in South Africa and Lesotho awakened new interest in matrimonial procedural law. It was, however, at a seminar for tribunal personnel that the foundations for a reordering of tribunals were laid. At a meeting to consider the state of the courts in Southern Africa, it became evident that the situation needed clarification and that an investigation was called for.<sup>90</sup> An ad hoc committee of seven priests involved in tribunal work was appointed for this purpose. The terms of reference were:

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<sup>89</sup> Cf. SACBC ADMINISTRATIVE BOARD, Minutes, 1.14. B.M.2, February 5, 1980.

<sup>90</sup> At this meeting attended by five bishops, the non-functioning of the Maseru tribunal and its consequences were discussed. It was asked whether Lesotho was to be considered in any reorganisation of tribunals in Southern Africa, or whether separate tribunals were to be established. The Bishop of Leribe undertook to raise the matter at the plenary session of the LCBC and convey the decision to the SACBC.

- a. to ascertain the present situation;
- b. to make recommendations to ensure that the pastoral needs regarding marriage tribunals be treated expeditiously in terms of Canon Law;
- c. to take into account the pastoral needs of cultural regions.<sup>91</sup>

Father Morrisey further suggested that:

- a. the position of diocesan tribunals be clarified;
- b. there be a contact person in each diocese;
- c. the Maseru regional tribunal continue to function as such for Lesotho;
- d. the SACBC keep itself informed about what other conferences of bishops were requesting in the way of indulgences;
- e. where an officialis had been appointed for a diocese, he also be appointed vice-officialis of the regional tribunal;
- f. such a tribunal officer could handle informal matrimonial cases for the diocese, and could also form a branch office of the regional tribunal;
- g. a Canon Law Society for Southern Africa be established.<sup>92</sup>

At a meeting of the committee on September 18, 1981, the following recommendations were proposed for submission to the administrative board:<sup>93</sup>

1. that the Southern African Catholic Bishops' Conference request the Apostolic Signatura for an indult authorising a diocese to remain part of the regional tribunal and, at the same time, retain the right to establish a diocesan court for formal as well as informal cases;

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91 Cf. AD HOC COMMITTEE ON MATRIMONIAL TRIBUNALS, Minutes, August 21, 1981; SACBC ADMINISTRATIVE BOARD, Minutes, 1.15. B.M.2, October 27-29, 1981, pp. 4-5.

92 Cf. AD HOC COMMITTEE ON MATRIMONIAL TRIBUNALS, Minutes, August 21, 1981.

93 Cf. ID., Minutes, September 18, 1981.

2. that the Southern African Catholic Bishops' Conference request that the competence of the regional matrimonial tribunals be extended to include all cases, not merely formal matrimonial cases, but a universal competence embracing administrative, criminal and contentious cases, other than matrimonial ones;

3. that the Durban regional matrimonial tribunal refer cases which it has heard in first instance to the Cape Town regional matrimonial tribunal in second instance;<sup>94</sup>

4. that assuming Lesotho, as a separate episcopal conference, establishes its own system of tribunals, either there should be established a regional matrimonial tribunal within the Bloemfontein Province, with the Cape Town regional matrimonial tribunal its tribunal of second instance, or, the dioceses of Bloemfontein, Bethlehem and Kroonstad, be attached to the Durban regional matrimonial tribunal, the dioceses of Keimoes and Kimberley to the Cape Town regional matrimonial tribunal, and the diocese of Gaborone to the Pretoria regional matrimonial tribunal;

5. that the indult, mentioned in 1. above, should also include the faculty to erect new tribunals and the authorisation to alter existing boundaries and courts of second instance, as often as is deemed appropriate;<sup>95</sup>

6. that courts of first and second instance operate on the basis of a single clerical judge only;

7. that Ordinaries take proper steps to equip suitable people, including lay men and women, to work in matrimonial tribunals;

8. that an association of tribunal personnel be established with a view to providing in-service training for those involved in matrimonial tribunals.

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94 This was deemed urgent since the Durban tribunal had been without a second instance court for some years. The arrangement would be terminated once a regional tribunal had been established in Bloemfontein.

95 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree, "Canada: Jurisdictional Changes for Tribunals," March 4, 1971, in *CLD*, 7, pp. 927-929. In virtue of this decree, the Canadian Conference of Catholic Bishops was granted the faculty "to erect new tribunals and to change their boundaries as often as is deemed appropriate [..]."

**b. Administrative Board Meeting, October 27, 1981**

The proposals of the committee were discussed by the administrative board on October 27, 1981. The board resolved to make the following recommendations to the plenary session of the SACBC:

1. that an indult be requested from Rome authorising the erection of new tribunals and the alteration of existing boundaries and courts of second instance, whenever the SACBC judged it necessary;

2. that Ordinaries take proper steps to equip suitable people, including lay men and women, to staff marriage tribunals;

3. that an association of tribunal personnel be established to meet once a year, with a view to providing in-service training of personnel;

4. that the ad hoc committee be made a permanent body under the direct control of the board, and that the Vice-President of the Conference be the liaison between the Marriage Tribunals Committee and the Board.<sup>96</sup>

The administrative board requested the committee to prepare proposals concerning regional and diocesan courts in both instances, as well as a plan for the reordering of tribunals in Southern Africa. These were to be submitted to the plenary session of the SACBC in February, 1982.

**c. Recommendations of the Committee, January 11, 1982**

The committee met in January 11, 1982, to formulate a plan for the reorganisation of tribunals.

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<sup>96</sup> Cf. SACBC ADMINISTRATIVE BOARD, Minutes, 1.15. B.M.2, October 27-29, 1981.

Much discussion was devoted to proposals by the Ordinaries of the Bloemfontein ecclesiastical province for the establishment of two independent regional matrimonial tribunals within the province, each acting as court of second instance to the other. It had been proposed that one tribunal would have its seat at Kroonstad and would handle all formal matrimonial cases originating in the Dioceses of Kroonstad, Bloemfontein and Bethlehem, while the other would be situated at Kimberley and would handle all such cases originating in the Dioceses of Kimberley, Keimoes, and Gaborone in Botswana. The reasons advanced for the proposal to establish two separate regional matrimonial courts within the Bloemfontein province were threefold:<sup>97</sup>

1. The cultural homogeneity of each of the two areas indicated;<sup>98</sup>
2. The vast distances which would otherwise hamper the work of the tribunal;<sup>99</sup>
3. The small number of available tribunal personnel who would work more efficiently in each of the two smaller groupings, as all are fully pastorally engaged.

The bishops of the Bloemfontein province further proposed that the training of tribunal personnel be organised at the level of the bishops' conference,

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97 Cf. BLOEMFONTEIN PROVINCIAL MEETING, Minutes, November 24-25, 1981.

98 The territory to have been served by the proposed Kroonstad tribunal is largely inhabited by the Sotho ethnic group, while that of the proposed Kimberley tribunal, by the Tswana group.

99 The total area of the Bloemfontein ecclesiastical province is 1,106,954 sq. kms. Cf. Annuario Pontificio, 1984.

and that suitable religious and lay persons be included among such tribunal officers.

After considering these proposals, the committee recommended the following to the SACBC:<sup>100</sup>

1. Only one regional tribunal should be established within the Bloemfontein province with the Archbishop of Bloemfontein as the moderator of this regional tribunal. In view of the large area to be covered, two seats should be established for this tribunal by a meeting of the bishops of the province, e.g., Kroonstad and Kimberley;<sup>101</sup>

2. Having regard for the apparent lack of experience of the personnel who will be involved in this regional tribunal, all cases handled in first instance by this tribunal should be referred to a more experienced tribunal in second instance. The Cape Town regional tribunal is a possible choice;<sup>102</sup>

3. When a certain cultural expertise is required to understand the complexities of a formal matrimonial case, the Bloemfontein regional tribunal should be permitted to approach, on an ad hoc basis, a second instance tribunal other than that assigned to it in second instance.

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<sup>100</sup> Cf. COMMITTEE ON MATRIMONIAL TRIBUNALS, Minutes, January 11, 1982.

<sup>101</sup> In establishing one regional tribunal in the province, the bishops would be adopting the same arrangement as in the other three provinces within the SACBC. The apparent lack of experience of those who would staff the tribunal also seemed to indicate that there be but one tribunal with its seat in Bloemfontein, the Archbishop acting as moderator, and all the bishops of the province responsible for its functioning.

<sup>102</sup> Considering the apparent lack of formal training and experience of those who would be involved in tribunal work in the province, the committee stressed that it would be unwise if the two courts proposed were to function in second instance for each other. The Cape Town tribunal had been designated appeal court for the Maseru tribunal in 1958. Since the territory to be served by the Bloemfontein tribunal, excluding Gaborone, was identical to that served by the Maseru tribunal, the Cape Town tribunal was proposed as appeal court for the Bloemfontein tribunal.

The committee then recommended that the SACBC request from the Apostolic Signatura:<sup>103</sup>

1. The faculty to erect and alter the boundaries of regional tribunals and to reorganise the tribunals of second instance, as often as is deemed appropriate;
2. Competence for the regional tribunals not only to handle formal matrimonial cases, but also all other cases (criminal and contentious), saving the right of the diocesan tribunals to decide the summary cases and to instruct cases of Privilege of the Faith and non-consummated marriage cases;
3. The authorisation to enable the Cape Town regional tribunal to function as tribunal of second instance for all cases heard in first instance by the Durban regional tribunal;<sup>104</sup>
4. The authorisation to establish the Bloemfontein regional tribunal with two separate seats in view of the extent of the territory under its jurisdiction. This regional tribunal is to have as its moderator the Archbishop of Bloemfontein, and would handle all the formal matrimonial cases originating in the province;
5. The authorisation to enable the Cape Town regional tribunal to function as tribunal of second instance for all cases heard in first instance by the Bloemfontein regional tribunal.

In addition the committee proposed the following for local action:

1. The training of tribunal personnel be organised at Conference level as an urgent priority. In making this recommendation, the committee strongly supports the proposal submitted by the Bloemfontein province;
2. Ordinaries should ensure that suitable people, including religious and lay people receive adequate canonical training [...].<sup>105</sup>

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<sup>103</sup> Cf. COMMITTEE ON MATRIMONIAL TRIBUNALS, Minutes, January 11, 1982.

<sup>104</sup> This was to be only a temporary measure until such time as the Bloemfontein court was fully established, after which it would act as appeal tribunal for the Durban court.

<sup>105</sup> Cf. COMMITTEE ON MATRIMONIAL TRIBUNALS, Minutes, January 11, 1982.

d. **Plenary Session of Southern African Catholic Bishops' Conference, February, 1982**

On February 1, 1982, two members of the committee on matrimonial tribunals addressed the plenary session of the SACBC on the proposals submitted.

The conference approved the following resolutions:

To facilitate the handling of marriage cases, the conference resolves to request the Apostolic Signatura, through the President, for an indult granting faculties detailed and amended on page 5 of the Report on Marriage Tribunals (PS B9/82).

The conference resolves to empower the President for the time being to grant, on an "ad hoc" basis, permission for tribunals to refer cases in the second instance, for certain reasons to be specified, to any Regional tribunal other than the one designated.

The conference resolves that the Marriage Tribunal Committee prepare a memorandum on the training of tribunal personnel in the territories served by the SACBC, bearing in mind:

- a. the use of local resources for short-term training courses;
- b. long-term training;
- c. the selection of possible personnel from amongst the priests, deacons, religious and laity;
- d. practical suggestions as to how the above can be implemented;
- e. the formation of an association of tribunal personnel, with a view to the eventual establishment of a Canon Law Society.

The conference recommends that the Ordinaries of each ecclesiastical province in the conference determine eventually a common policy with regard to the defrayal of expenses incurred by the tribunal.<sup>106</sup>

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<sup>106</sup> Cf. SACBC, Minutes of plenary session, 1.16. B.M.2, Appendix H, pp. 127-131, February 1, 1982. Henceforth, these members of the committee constitute the sub-committee for matrimonial tribunals.

In addition, the plenary session requested the sub-committee to prepare a memorandum on procedures for informal matrimonial nullity cases, cases involving the privilege of the faith, and non-consummation matrimonial cases.

**e. Administrative Board Meeting, May 27, 1982**

On May 27, 1982, the sub-committee presented the steps being taken to implement resolution 1.6.2 of the plenary session of February 1, 1982.<sup>107</sup>

A proposal for a seminar on tribunals to which priests, religious and lay persons would be invited, was discussed. Such a seminar would serve to involve more people in tribunal work, and in the course of such short-term training, potential candidates for further training could be discerned. The association of tribunal personnel would eventually be formed from among those who had undergone some training. The seminar held from August 23-26, 1982, was attended by over sixty participants.

**f. "Nihil obstat" of the Apostolic Signatura, October 6, 1982**

In a letter dated April 8, 1982, the President of the SACBC requested the Apostolic Signatura for a "nihil obstat" to reorganise the tribunals in Southern Africa. A reply granting this request was sent to the Apostolic Delegate for transmission to the SACBC.<sup>108</sup> The following was provided in the letter of the Apostolic Delegate to the President:

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<sup>107</sup> Cf. SACBC ADMINISTRATIVE BOARD, Minutes, I.17. B.M.2, p. 6, 25-27 May, 1982.

<sup>108</sup> Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Letter (Prot. N. 1776/71 V.T.), October 6, 1982.

1. The Apostolic Signatura willingly grants its 'nulla osta' for the reorganisation of the ecclesiastical tribunals in South Africa.

The Bishops may therefore go ahead with their proposal, and to this end a sample decree is enclosed, which will serve as a model for the document which has to be drawn up in Latin, signed by all the bishops concerned and forwarded to the said Apostolic Signatura for definitive approval by the Holy See.

The sample decree is only included by way of example, and may be modified by the bishops in any way that they consider opportune, having in mind local circumstances.

2. In so far as the ecclesiastical Province of Bloemfontein is concerned, it would seem necessary to suggest to the Bishops of that area that they set up two interdiocesan tribunals at Kroonstad and at Kimberley, rather than the tribunal at Bloemfontein having two seats in the said suffragan dioceses.

In any case, the petition as presented leaves some doubt about the nature of the proposed tribunals at Kroonstad and Kimberley:

- if these are to be merely places where cases are juridically prepared "sedi istruttorie," then there is no need of any approval by the Holy See;
- but if they are to be places where cases are accepted and judgment given, having competence 'iuxta loca,' then they are in fact to be interdiocesan tribunals and will need approval as such.<sup>109</sup>

g. **Plenary Session of the Southern African Catholic Bishops' Conference, January/February, 1983.**

In February, 1983, a decree for the constitution and reorganisation of tribunals in Southern Africa was adopted by the plenary session of the SACBC and forwarded to the Apostolic Signatura for definitive approval.<sup>110</sup> The decree

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<sup>109</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter (Prot. N. 3034), October 20, 1982.

<sup>110</sup> Cf. SACBC, Minutes of plenary session, 1.18. B.M.2, January 25, 1983. The decree was adopted by the SACBC in terms of Resolution 1.4 of February 2, 1983. However, the decree which had included the Diocese of

specified that a first instance regional tribunal with universal competence be established in the Archdiocese of Bloemfontein for the six dioceses within the province, and that its appeal court be the "regional" tribunal in Cape Town. The Cape Town tribunal would also act in second instance for the Durban "regional" court.

While extending the competence of the three existing "regional" tribunals, the decree confirmed what had been determined for them in the 1958 redistribution of courts.<sup>111</sup> In as much as the Diocese of Manzini in Swaziland had elected to withdraw from the competence of the Pretoria tribunal, and, since additional territories had been erected in the intervening years, these factors were reflected in the decree.

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Johannesburg within the competence of the Pretoria tribunal, was being examined by the Apostolic Signatura when a request for an indult was received from the Johannesburg diocesan tribunal. In as much as the diocese of Johannesburg had elected not to be included within the "regional" arrangement, the decree had to be redrawn, and once again approved by the Ordinaries concerned. Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Letter to Apostolic Delegate to Southern Africa (Prot. N. 12.528/80 V.T.), August 13, 1983; APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to President of the SACBC (Prot. N. 3754), August 29, 1983. A new decree dated November 24, 1983, was submitted to the Apostolic Signatura for approval, but this too had to be altered, since the diocese of Manzini had later signified its intention of withdrawing from the competence of the Pretoria tribunal. The matter was discussed at the plenary session of the SACBC on January 26, 1984, and the necessary alteration effected, without a new decree being prepared. Cf. SACBC, Minutes of plenary session, 1.19 B.M.2, January 26, 1984. The decree of November 24, 1983, was subsequently withdrawn (cf. SACBC, ADMINISTRATIVE BOARD, Minutes, 1.19 B.M.2, May 1-3, 1984), and a new decree was approved by the SACBC at an extraordinary plenary session held from September 24-28, 1984. This decree received definitive approval on October 25, 1984. Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Rescript (Prot. N. 1776/71 V.T.), October 25, 1984, in appendix XXIII.

<sup>111</sup> Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter (Prot. N. 3449/58), September 29, 1958.

The provisions of this proposed decree, together with the reasons for its subsequent withdrawal and the need for a new decree, are discussed in chapter III.

### **Conclusion**

Much has been achieved in Southern Africa both with respect to the expansion of the Church, and the development of its tribunal structures since the erection in 1939 of two matrimonial courts with inter-territorial competence.

With the establishment of a further tribunal in the Bloemfontein province and the reorganisation of the existing courts, there exists the possibility of an even greater involvement of the Church in its pastoral concern to assist, through this healing ministry, primarily those whose marriages have failed. The Southern African tribunals have received new life, and this at the time of the new Code.

### CHAPTER III

#### THE NORMS FOR THE ESTABLISHMENT AND ORGANISATION OF THE SOUTHERN AFRICAN TRIBUNALS

At the time of the establishment of inter-territorial tribunals in Southern Africa in 1939, the only precedent for ordinary matrimonial tribunals with competence that transcended diocesan boundaries was the constitution of regional matrimonial tribunals in Italy during the previous year. When such courts were introduced into Italy, it was the Motu Proprio, Qua cura, of Pius XI that effected their establishment,<sup>1</sup> and when, almost two years later, the executory norms in terms of which these tribunals would function, were granted, they were incorporated into a decree of the Sacred Congregation of the Sacraments.<sup>2</sup>

Yet, when matrimonial tribunals with extended territorial competence were constituted in Southern Africa, notice of papal approval for their establishment was conveyed to the Apostolic Delegate simply in a letter of the Sacred Congregation of the Sacraments.<sup>3</sup> This letter authorised the Apostolic

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1 Cf. PIUS XI, Motu Proprio, "Qua cura," December 8, 1938, in AAS, 30 (1938), pp. 410-413.

2 Cf. S.C. OF THE SACRAMENTS, "Normae pro exsequendis litteris apostolicis 'Qua cura' die 8 dec. 1938 motu proprio datis," July 10, 1940, in AAS, 32 (1940), pp. 304-308.

3 Cf. ID., Letter (Prot. N. 426/39), July 4, 1939. Despite considerable research, however, it has not been possible to obtain a copy of this letter either in Southern Africa or in the archives of the Congregation in Rome. The Protocol Book of the S.C. of the Sacraments records that the letter conveyed to the Apostolic Delegate approval for the erection of two matrimonial tribunals in Southern Africa. In the "Riduzione tribunali Sud Africa," prepared by the Secretary of the Congregation on January 7, 1984, the following is noted: "A seguito di nuova risposta (Prot. n. 65/39) del Delegato Apostolico arrivata in

Delegate to constitute two inter-territorial tribunals with jurisdiction over the entire territory of the Apostolic Delegation for Southern Africa. A court of first instance was to be erected at Cape Town and one of second instance at Johannesburg. No motu proprio or formal decree of erection was published, nor were executory norms, as such, granted for the constitution and organisation of these tribunals. The letter sent by the Congregation merely stated that the establishment of and the procedures to be observed in these courts were to be governed by the Instruction, Provida mater.<sup>4</sup> Thus, in the absence of any particular law, these tribunals were to function in terms of the common law applicable to all diocesan courts.

What had been requested from the Holy See in 1938 was the establishment of one "regular" tribunal (of first instance) for matrimonial causes.<sup>5</sup> The

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data 3.7.39, La S. Congregazione il 4 luglio 1939 scriveva al medesimo Delegato Apostolico per significare (Prot. n. 426/39) che il Dicastero approvava l'istituzione di due Tribunale matrimoniali nel Sud Africa. Questo (Prot. n. 426/39) appare da una annotazione nel libro del Protocollo. Ma in Archivio non é stata trovata copia del documento inviato alla Delegato Apostolico." It has, however, been possible to deduce the provisions contained in that document from secondary sources: Minuta (Prot. N. 300/38), May 29, 1938, of Mons. V. Bartocetti of the S.C. of the Sacraments, replying to the initial request for information concerning a "regular" tribunal; the "Instruction regarding matrimonial cases and trials within the territory of the Delegation" (see appendix XVIII), sent to Ordinaries in Southern Africa by the Apostolic Delegate, under cover of Circular Letter (Prot. N. 153/40), January 5, 1941; correspondence between the Apostolic Delegate and Ordinaries of the Delegation; letter of the Rhodesian Catholic Bishops' Conference to the Apostolic Signatura regarding the erection of regional tribunals, May 3, 1973; a study, "Regional Tribunals in Southern Africa," September 10, 1974, by a former secretary at the Apostolic Delegation, Mons. J.C. Perisset.

<sup>4</sup> Cf. ID., Instruction, "Provida mater," August 15, 1936, in AAS, 28 (1936), pp. 313-372.

<sup>5</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to S.C. of the Sacraments (Prot. N. 123/38), February 1, 1938.

necessity of addressing this petition to the Holy See was twofold. It flowed both from the fact that the tribunal sought was to have extended competence, and since the hierarchy had not yet been erected in Southern Africa, there were no metropolitan sees in which appeal courts could be established in virtue of the common law.<sup>6</sup>

#### A. The Juridical Nature of the Southern African Tribunals

The "regular" matrimonial court with competence for the whole of Southern Africa, referred to both by the then Apostolic Delegate, Archbishop Bernard Gijlswijk, O.P., in his letter of February 1, 1938, to the Sacred Congregation of the Sacraments,<sup>7</sup> and by Monsignor V. Bartocetti, in his draft reply of May 29, 1938, does not appear to be a "regional" one in the strict sense of the term as would be applied to the Italian tribunals later that year.<sup>8</sup>

While the courts in Southern Africa were, like the Italian ones, "supradiocesan," in so far as their judicial competence transcended the boundaries of the territories subject to them, nevertheless certain major juridical differences distinguished them from the Italian courts. In so far as the competence of the Italian tribunals was limited to formal and informal matrimonial nullity cases,

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<sup>6</sup> It was only on January 11, 1951, that the hierarchy was established in South Africa, Lesotho and Swaziland.

<sup>7</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter (Prot. N. 123/38), February 1, 1938.

<sup>8</sup> Cf. S.C. OF THE SACRAMENTS, Minuta (Prot. N. 300/38), May 29, 1938.

they were special in nature.<sup>9</sup> On the other hand, the Southern African tribunals were general courts for their own territory, and also special in that their competence extended to other vicariates and prefectures apostolic solely for formal cases of matrimonial nullity. Furthermore, unlike Italy, where the bishops, whose dioceses constituted each conciliar region, forfeited the exercise of their competence for both formal and informal matrimonial nullity cases, the vicars and prefects apostolic in Southern Africa, while losing their competence for formal cases, retained it for informal ones.<sup>10</sup>

The nature of the power exercised by the moderator of an Italian regional tribunal was ordinary, since it was attached to an office by law, and vicarious, in that its exercise was in the name of the bishops of that particular conciliar region.<sup>11</sup> With respect to the Southern African courts, the bishop who directed each one, since it was his tribunal, enjoyed proper ordinary power.<sup>12</sup> In the relevant articles of Provida mater, there was no question of these bishops

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9 Cf. ID., "Normae pro exsequendis litteris apostolicis 'Qua cura' die 8 dec. motu proprio datis," July 10, 1940, in AAS, 32 (1940), arts. 10, 15, pp. 305, 306.

10 Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, "Instruction regarding matrimonial cases and trials within the territory of the Delegation," p. 1; ID., Letter to Ordinaries of the Delegation (Prot. N. 131/39), August 7, 1939, in appendix XIX. This letter also provided details of the annual reports to be submitted to the S.C. of the Sacraments by the "chairman" of each tribunal. Cf. also "Instruction regarding matrimonial cases and trials within the territory of the Delegation," where the compilation of the annual report, together with the requirement that rogatory commissions be established in each vicariate and prefecture, is discussed.

11 Cf. A. DA SANT'ELIA a PIANISI, I tribunali ecclesiastici regionali per le cause di nullità matrimoniale in Italia, p. 25.

12 Cf. canon 1572, §1 of CIC 1917.

administering the tribunals on behalf of the vicars and prefects apostolic of Southern Africa.

The judicial power in an Italian regional tribunal, although in practice entrusted to its moderator, was reserved to all its bishops of the particular region for collegial exercise. Accordingly, in theory, each bishop had the capacity to exercise his judicial power in the adjudication of cases for which the court was competent. This was not the case in the Southern African tribunals where the exercise of judicial power was reserved to the respective vicars apostolic and the judges of each court. Moreover, the particular law of the Italian courts required collegial action for the appointment of all tribunal personnel. In addition, the removal from office of the officialis, judges, promoters of justice, defenders of the bond and their substitutes could only be effected by the moderator for a grave reason, and after consulting the bishops of the territory.<sup>13</sup> In the Southern African tribunals, the two vicars apostolic were alone competent for the appointment and removal of personnel.

That the courts in Cape Town and Johannesburg, although "supradiocesan," were not "regional" may, it seems, also be safely presumed from the relevant documentation originating in the Holy See and in Southern Africa between the years 1938 and 1970. The word "regional" does not appear in any communication at hand between the Holy See and the Apostolic Delegation during this time. Rather, the tribunals were referred to simply as "matrimonial

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<sup>13</sup> Cf. S.C. OF THE SACRAMENTS, "Normae pro exsequendis litteris apostolicis 'Qua cura' die 8 dec. 1938 motu proprio datis," July 10, 1940, in AAS, 32 (1940), arts. 2 and 7, pp. 304, 305.

tribunals." A rescript of the Sacred Congregation for the Propagation of the Faith dated February 2, 1967, appears to support the view that these courts were not "regional," since, in designating two newly-created ecclesiastical territories to a matrimonial tribunal both in first and second instance, it explicitly referred to "tribunal archidioecesis Durbanianae," and "tribunal [..] archidioecesis Maseruanae."<sup>14</sup>

In the light of the foregoing, it seems reasonable to conclude that the two tribunals with compétence for the whole territory of the Apostolic Delegation, while having some resemblance to the Italian courts, cannot be considered "interdiocesan" or "regional" in the strict canonical sense of the term.<sup>15</sup> These tribunals should rather be viewed as diocesan ones to which an extended competence had been granted.

The juridical situation of the courts remains the same to the present. Even though there was an adjustment of the territories subject to them, as well as

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<sup>14</sup> Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Rescript (Prot. N. 604/67), February 2, 1967.

<sup>15</sup> Cf. V. BARTOCETTI, "Annotationes ad normas pro exsequendo decreto diei 20 dec. 1940," in *Apollinaris*, 15 (1942), pp. 223-224. In his commentary on the executory norms for the tribunals in the Philippine Islands, Bartocetti, involved in the establishment of the Italian, Southern African and Philippine courts, states that the constitution of regional tribunals in the Philippine Islands on December 20, 1940, was the first such establishment after the Italian tribunals. The Southern African tribunals had been erected 18 months previously. Cf. also F. ROBERTI, *De processibus*, I, pp. 404-416; in his discussion on regional tribunals, no mention is made of their establishment in Southern Africa; I. GORDON, "De tribunalibus regionalibus cum respectu ad iudicium delectum et ad processus breviationem," in *Per.*, 56 (1967), p. 80, and D. STAFFA, "De tutela iudiciali administrativa i.e. de iustitia administrativa apud S. Tribunal Signaturae Apostolicae deque ordinatione tribun. interdioces.," in *Per.*, 63 (1974), pp. 176-177. Both Gordon and Staffa, when discussing the nations where regional courts have been constituted, make no mention of Southern Africa.

the establishment of additional courts in 1951<sup>16</sup> and 1958,<sup>17</sup> the nature of the tribunals has remained unchanged.

The discussion which follows concerning the relevant law to be observed in the constitution and organisation of these tribunals, as well as for the determination of their competence, will treat of three principal periods in their evolution: i. the period from 1939 to 1951, ii. the period from 1951 to 1958, and iii. the period from 1958 to 1983.

## B. The Constitution, Procedures and Competence of the Tribunals

### i. The Period from 1939 to 1951

#### a. The Constitution of the Tribunals

The constitution of the tribunals of first and second instance at Cape Town and Johannesburg respectively was governed by the relevant articles of Provida mater.<sup>18</sup> In terms of this Instruction, the organisation of each court was the sole responsibility of the bishop of the place where it was situated.<sup>19</sup>

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16 Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter to Apostolic Delegate (Prot. N. 4319/50), March 9, 1951; ID., Letter to Apostolic Delegate (Prot. N. 829/52), March 15, 1952.

17 Cf. ID., Letters to Apostolic Delegate (Prot. N. 3449/58), September 5, 1958, September 29, 1958.

18 Cf. S.C. OF THE SACRAMENTS, Letter (Prot. N. 426/39), July 4, 1939; APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to Bishop Hennemann (Prot. N. 131/39), October 7, 1939, in appendix XX; ID., "Instruction regarding matrimonial cases and trials within the territory of the Delegation," p. 1.

19 Cf. S.C. OF THE SACRAMENTS, Instruction, "Provida mater," August 15, 1936, in AAS, 28 (1936), arts. 13-33, pp. 317-320.

Accordingly, the appointment of the officialis and vice-officialis (art. 14, §2), defender of the bond (art. 15, §1) and promotor of justice (art. 16, §2), was the exclusive responsibility of the bishop of the respective vicariate apostolic. With respect to the other judges, there was no need for any special appointment since the officialis was authorised to designate them in rotation from among the synodal judges (art. 14, §4). The notary who acted as recorder in matrimonial cases (art. 17), as well as the couriers and apparitors (art. 18, §1), were also appointed by the bishop. Article 19, §1 empowered the bishop to appoint substitutes for the judges, promotor of justice, defender of the bond, courier and apparitor, either at the beginning or during the course of the trial, provided that the same judges heard and decided a particular case.

Although article 23, §1 provided that the bishop could appoint auditors either permanently or for a particular case, it also permitted the officialis to make the appointment for a definite case only.

#### b. The Procedures to be Observed

As far as the procedures for the Italian tribunals were concerned, article 10 of the executory norms for Italy stated that Provida mater was to be observed exactly, with only certain additions and amendments.<sup>20</sup> Hence, the procedures prescribed for the handling of matrimonial nullity cases in the Italian tribunals were largely identical to those prescribed for the Southern African courts, and indeed, for all diocesan matrimonial courts.<sup>21</sup>

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<sup>20</sup> Cf. ID., "Normae pro exsequendis litteris apostolicis 'Qua cura' die 8 dec. 1938 motu proprio datis," July 10, 1940, in AAS, 32 (1940), p. 305.

<sup>21</sup> Cf. A. CARON, "Regional Tribunals," in The Jurist, 23 (1963), p. 427.

### c. The Competence of the Tribunals

In the letter of the Sacred Congregation of the Sacraments of July 4, 1939, it was stated that the competence of the two tribunals, each in its particular instance, was

1. for formal trials concerning the nullity of the matrimonial bond, and,
2. over the whole territory of the Apostolic Delegation.<sup>22</sup>

Following the constitution of these tribunals, the vicars and prefects apostolic, whose territories constituted the Apostolic Delegation, forfeited the exercise of their judicial competence for formal matrimonial nullity cases in their own courts.<sup>23</sup> However, they retained their competence for all other contentious and criminal cases, and to this extent, their courts, where they existed, were general in nature. Hence, as far as informal matrimonial nullity cases were concerned, they maintained their competence in virtue of canons 1990-1992 of the Code of Canon Law and articles 226-231 of Provida mater.<sup>24</sup>

The letter made it clear that the Sacred Congregation of the Sacraments alone was competent for non-consummation cases, and the Holy Office for cases

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<sup>22</sup> Cf. S.C. OF THE SACRAMENTS, Letter (Prot. N. 426/39), July 4, 1939; APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to Ordinaries of the Delegation (Prot. N. 131/39), August 7, 1939.

<sup>23</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to Ordinaries of the Delegation, (Prot. N. 131/39), August 7, 1939, where the Apostolic Delegate stated that, with the establishment of the new tribunals, "the matrimonial tribunals existing in [...] Vicariates are now dissolved, the respective Ordinaries being supposed to submit [...] matrimonial cases to the aforesaid tribunals, without prejudice to the right of the Ordinary to declare the nullity of marriage in cases mentioned in canon 1990."

<sup>24</sup> Cf. S.C. OF THE SACRAMENTS, Instruction, "Provida mater," August 15, 1936, in AAS, 28 (1936), arts. 226-231, pp. 358-359.

involving dissolution of the natural bond. The Apostolic Delegate, however, was authorised to permit local Ordinaries to prepare each process.<sup>25</sup>

The right of direct appeal from a first instance decision to the Sacred Roman Rota in terms of canon 1559, §1 remained intact.

## ii. The Period from 1951 to 1958

With the reorganisation of matrimonial tribunals on March 9, 1951, two additional first instance matrimonial courts were established in Johannesburg and Maseru.<sup>26</sup> Until March 15, 1952, when a plan for the distribution of ecclesiastical territories was approved, each of the three courts was competent for all formal matrimonial nullity cases arising within the delegation.<sup>27</sup> The arrangement of March 9, 1951, however, determining the courts of second instance, remained unaffected.

### a. The Constitution of the Tribunals

Similarly, as in the case of the tribunals established in 1939, the constitution of these courts as well as the appointment of personnel remained the responsibility of the bishop in whose diocese the court was to be erected.

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<sup>25</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to Bishop Hennemann, Vicar Apostolic of Cape Town (Prot. N. 153/40), January 5, 1941. The Apostolic Delegate explained that his faculty for such authorisation was "personal" and "cannot be transferred to the competency of the tribunal."

<sup>26</sup> Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter to Apostolic Delegate (Prot. N. 4319/50), March 9, 1951.

<sup>27</sup> Cf. ID., Letter to Apostolic Delegate (Prot. N. 829/52), March 15, 1952.

**b. The Procedures to be Observed**

The procedures for the handling of formal matrimonial nullity cases continued to be governed by Provida mater.

**c. The Competence of the Tribunals**

The competence of these matrimonial tribunals was for formal nullity cases arising in the territories assigned to each court in first and second instance. Moreover, the competence of each tribunal for the diocese in which it was situated was universal since that tribunal, in as much as it was the local diocesan one, was able to judge all cases not reserved to the Holy See.

**iii. The Period from 1958 to 1983**

With the second re-ordering of tribunals in September, 1958, five first instance tribunals became available for formal cases of matrimonial nullity.<sup>28</sup> Following this reorganisation, the supradiocesan jurisdiction of the Johannesburg tribunal ceased, its place within the Pretoria ecclesiastical province being filled by the newly-created tribunal of the Archdiocese of Pretoria. For the Durban province, a matrimonial tribunal with extended competence was erected in the Archdiocese of Durban, and for Zimbabwe as well as Botswana, a matrimonial court with extended competence was established in the Archdiocese of Harare.

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<sup>28</sup> Cf. ID., Letter to Apostolic Delegate (Prot. N. 3449/58), September 29, 1958.

### a. The Constitution of the Tribunals

In a letter of July 2, 1959, addressed to all residential bishops and prefects apostolic within the Apostolic Delegation, Archbishop Celestine Damiano stressed:

The establishment of the Regional and Appeal Courts is the responsibility of the Ordinary of the place where such court is situated ordinarily. The 'Instruction' of the S.C. of the Sacraments, August 15th, 1936, AAS 28-313 governs procedure in this matter [...].<sup>29</sup>

Accordingly, the bishops, in whose dioceses the tribunals were situated, were responsible for the establishment of their respective courts and the appointment of personnel. As had been the case since 1939, the bishops and prefects apostolic of the territories subject to each court had no direct share in its constitution and administration, nor in its judicial function.

### b. The Competence of the Tribunals

The jurisdiction exercised by the five tribunals coincided largely with the territory of the five ecclesiastical provinces in Southern Africa.<sup>30</sup> Thus, for the first time in the evolution of the Southern African tribunals, there is perceived over a substantial part of the territory of the Apostolic Delegation, the identity between a determined ecclesiastical province or region and the jurisdiction of a

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<sup>29</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter to Ordinaries of Delegation (Prot. N. 855), July 2, 1959. It appears that the use of the term "regional" in the paragraph quoted is incorrect.

<sup>30</sup> The competence of the Cape Town and Harare tribunals, however, while co-extensive with their ecclesiastical provinces, also included the Vicariates Apostolic of Windhoek and Keetmanshoop (Cape Town), and the whole of Botswana (Harare).

court established for that particular territory. The competence of these tribunals, both with respect to the territories subject to them and to the dioceses in which they had been erected, remained unchanged.

**c. Uncertainty concerning the Nature of the Tribunals**

The Apostolic Signatura in a letter of February 1, 1971, requested the then Apostolic Delegate, Archbishop John Gordon, to provide a comprehensive report on the organisation of tribunals within the territory of the Apostolic Delegation in Southern Africa and the Apostolic Nunciature in Lesotho.<sup>31</sup> On the second page of his reply of May 4, 1971, Archbishop Gordon stated that:

[...] the present-day arrangement of ecclesiastical tribunals remains identical to what was established by the Sacred Congregation for the Propagation of the Faith in 1958, and communicated to the most excellent Ordinaries by this Pontifical Representation by means of letter N. 855 of July 2, 1959, [...].<sup>32</sup>

It appears, however, from paragraph (d) on the third page of the reply, that the juridical nature of the tribunals was uncertain:

It is not clear whether the existing ecclesiastical tribunals had been established with exclusive or cumulative jurisdiction. In the diocese of Johannesburg, for example, there is a matrimonial tribunal

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<sup>31</sup> Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Letter (Prot. N. 1254/71 V.T.), February 1, 1971.

<sup>32</sup> Cf. APOSTOLIC DELEGATE TO SOUTHERN AFRICA, Letter (Prot. N. 6482), May 4, 1971:  
" [...] l'assetamento odierno dei Tribunali ecclesiastici rimane identico a quello stabilito dalla Sacra Congregazione de Propaganda Fide nel 1958 e comunicato agli Ecc.mi Ordinari da questa Rappresentanza Pontificia mediante la lettera N. 855 del 2 luglio 1959, [...]."

of first instance, distinct from the one in Pretoria, the regional tribunal.<sup>33</sup>

In the margin adjacent to paragraph (d), an official of the Apostolic Signatura recorded the comment "non va" ("this is not correct").<sup>34</sup> The implication of this remark was that if the Pretoria tribunal had been constituted as a regional one, the Johannesburg court, assigned to it in virtue of the 1958 reorganisation, could not have been juridically "distinct," nor could it have exercised parallel competence with Pretoria for formal cases of matrimonial nullity.

Throughout the five page report, the Apostolic Delegate only once used the word "regionale," preferring to speak of "tribunali ecclesiastici," "ecclesiastica giudiziaria," "singoli tribunali" and "tribunali matrimoniali." This inconsistency seems to indicate some uncertainty as to the nature of the tribunals.

At the conclusion of his letter, Archbishop Gordon wrote that "more complete information" about "the juridical arrangement" of the courts could be obtained from the "Sacred Congregation for the Evangelization of Peoples."

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33 Cf. ibid., "Non è chiaro se i Tribunali matrimoniali esistenti fossero eretti con giurisdizione privativa o cumulativa. Nella diocesi di Johannesburg, per esempio, c'è un Tribunale matrimoniale di prima istanza distinto da quello di Pretoria, il Tribunale regionale.

34 A photocopy of the original letter was obtained directly from the Apostolic Signatura.

It appears from these letters that, as late as 1971, the juridical status of the Southern African tribunals was unclear. It must, however, be borne in mind that, since the original establishment of the courts and their reorganisation had been effected by the Sacred Congregation of the Sacraments and the Sacred Congregation for the Propagation of the Faith respectively, the Apostolic Signatura may not have been fully apprised of the situation of the tribunals in Southern Africa. It was only in 1968 that the Apostolic Signatura assumed responsibility for the Office of Vigilance, formerly exercised by the Sacred Congregation of the Sacraments.

In the documents available to us that were issued by the Apostolic Signatura after 1970, the tribunals are referred to as "regional," yet in the archives of the SACBC, there is no record of any approach to the Apostolic Signatura for the establishment of such courts. Besides, in a study on "Regional Tribunals in Southern Africa," by a former secretary of the Apostolic Delegation, no mention is made of any such request to the Apostolic Signatura, nor of any document specifically erecting the tribunals as regional.<sup>35</sup> It would seem, however, highly unlikely that regional courts would have been imposed unilaterally.

What conclusion, then, may be deduced concerning the nature of the tribunals between the years 1971 to 1983? In spite of what has been widely assumed, it would seem on the basis of the documentation available, that the Southern African courts (excepting the ones in Zimbabwe) have never been

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<sup>35</sup> Cf. J.C. PERISSET, "Regional Tribunals in Southern Africa," September 10, 1974, in archives of the Apostolic Delegation to Southern Africa.

constituted as "regional" ones, but have retained the "diocesan" status originally accorded to the two inter-territorial tribunals in 1939.

It is significant, nevertheless, that following the publication of general norms for interdiocesan tribunals in 1970, the SACBC commonly referred to the Southern African courts as "regional."<sup>36</sup> It appears from the minutes both of the plenary sessions of the conference and of the administrative board, that the general norms were considered to apply to these tribunals. Moreover, the bishops in whose dioceses the tribunals were situated, commenced administering them in terms of the general norms.

In the absence of any indication of their formal constitution as "regional," could it be argued that these inter-territorial courts, while "diocesan" in nature, were "interdiocesan" in function, and that once general norms for "interdiocesan" tribunals had become effective, these norms became the general law for the Southern African courts? To admit this would be to concede that, with the coming into effect of these norms, the character of the Southern African tribunals automatically evolved from "diocesan" to "interdiocesan" in the full canonical significance of the term. Indeed, there can be no support for such a view, since nothing suggests that the general norms were intended to have any more than a "general" application, supplementing the particular law of interdiocesan courts constituted after March, 1971. In fact, after 1971, decrees of erection for such tribunals were less detailed, and specific reference to these

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36 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, "Normae pro Tribunalibus interdiocesanis vel regionalibus aut interregionalibus," December 28, 1970, in AAS, 63 (1971), pp. 486-492.

norms was made in them. Any theory, therefore, that the general norms were in some way applicable to the Southern African tribunals to justify frequent reference to these courts as "regional," cannot be sustained.

#### d. Regional Tribunals in Zimbabwe

On December 11, 1973, a decree comprising eight articles was approved for the establishment of regional tribunals in Zimbabwe.<sup>37</sup>

##### 1. The Constitution of the Tribunals

In the preamble to the decree, it is stated that the decree concerns:

[...] the constitution in Rhodesia of regional tribunals of first and second instance in the dioceses of Salisbury and Gwelo, and also the constitution of regional tribunals of second instance in the same dioceses of Salisbury and Gwelo for handling all cases, not only matrimonial nullity cases, whether formal or informal, but also cases of the separation of spouses, as well as contentious and criminal cases.<sup>38</sup>

Article I of the decree declares that the Episcopal Conference of Zimbabwe, after obtaining the "nihil obstat" of the Apostolic Signatura, had decided to establish regional tribunals of first instance in the Archdiocese of Harare and in the Diocese of Gweru.<sup>39</sup> The tribunal of Harare was to be

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<sup>37</sup> Cf. ID., Rescript (Prot. N. 4534/73 V.T.), December 11, 1973.

<sup>38</sup> "[...] de constituendis in Rhodesiaë, Tribunalibus Regionalibus primae instantiae in Diocesibus Salisburiensi et Guelensi, et Tribunalibus Regionalibus secundae instantiae eisdem in Diocesibus Salisburiensi et Guelensi ad pertractandas causas universas, scilicet non tantum causas nullitatis matrimonii, sive formales sive summarias, sed etiam causas separationis coniugum necnon causas contentiosas et criminales."

<sup>39</sup> Cf. "Normae pro Tribunalibus," art. 2, p. 487.

competent to define all causes arising in the Archdiocese of Harare and the Diocese of Mutare; the tribunal at Gweru was to have similar competence for the Dioceses of Gweru, Bulawayo and Wankie. In addition, following its establishment on February 22, 1974, the Prefecture Apostolic of Chinhoyi, formerly part of the Archdiocese of Harare, became subject to the jurisdiction of the first instance tribunal at Harare.

In article II which treats of the second instance tribunals, it is provided that the tribunals of first instance are to function as second instance courts for each other.<sup>40</sup> Thus, the Harare tribunal is competent to receive appeals and recourses in second instance against first instance sentences of the Gweru tribunal, and vice versa. The right of direct appeal to the Sacred Roman Rota in second instance, however, remains unaffected.

The role of the tribunal moderator is defined in articles III and IV. The moderator of the Harare tribunal is the Archbishop of Harare, while the Bishop of Gweru fulfills that role in the Gweru tribunal. Each moderator governs the tribunal in his diocese in the name of the Zimbabwe Catholic Bishops' Conference, and to each "is attributed all the rights and duties which belong to local Ordinaries relative to their own tribunal."<sup>41</sup> The judges and other officers are

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<sup>40</sup> On the question of reciprocal tribunals of appeal, cf. F. ROBERTI, De processibus, I, p. 405: "Quoad hierarchicam ordinationem opportune cautum est ut tribunalia appellationis numquam invicem constituerentur."

<sup>41</sup> Cf. "Normae pro Tribunalibus," art. 4, p. 488.

appointed by the moderators who may also select personnel from among those who have functioned in diocesan tribunals.<sup>42</sup>

In article V, it is stipulated that in every diocese, excepting those where the regional tribunals are situated, a judge, a promotor of justice, a defender of the bond and a notary are to be appointed as additional members of each regional tribunal. Such officers, while not constituting a diocesan court distinct from the regional one, are to discharge whatever tasks are committed to them either by the regional tribunal itself or by other ecclesiastical courts, e.g., the instruction of matrimonial cases or the establishment of rogatory commissions. Article VI prescribes that these officers are to be appointed by the local bishop. However, those appointed require the approval of the moderator of each regional court. In as much as they are members of the regional tribunal, these officers may be called upon by the moderator to exercise their roles in the regional tribunal itself.

In articles V and VI, the desire of the Holy See that "sedi istruttorie" or instructory tribunals be established in the territories subject to interdiocesan tribunals is apparent. These instructory tribunals are equivalent to the "branch offices" found in certain regions of Canada. The principal task of the personnel in such "branch offices" has been to introduce and instruct formal cases of matrimonial nullity on behalf of the regional tribunal. The actual judging, however, as far as possible, should take place in the seat of the tribunal.

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<sup>42</sup> Article IV of the decree, in assigning the appointment of tribunal personnel to the moderator, departs from the usual practice of reserving to the assembly of bishops, at least the appointment of the officialis, judges, promotor of justice and the defender of the bond.

Moreover, article VII states that those who form the instructory tribunal may also act as delegates or subdelegates of the local bishop in handling administrative cases involving priests, and cases concerning the non-consummation of marriage.<sup>43</sup>

Since the decree is silent in certain areas regarding the constitution and organisation of the tribunals, and in so far as it specifically refers to the general norms, these were to be considered supplementary legislation, except where the terms of the decree indicated otherwise, until the coming into force of the 1983 Code of Canon Law.<sup>44</sup> One example where the norms did not apply concerned the appointment of the judicial vicar, associate judges, promotor of justice and defender of the bond. Article 5, §1 of the norms provided that such officers and their substitutes were to be appointed by an absolute majority of votes cast in the assembly of bishops, while article IV of the decree authorises the moderator to appoint all personnel independently of the assembly.<sup>45</sup> Nonetheless, it appears that the procedures for removal of the judicial vicar, judges, promotor of justice, defender of the bond and their substitutes, contained in article 8, §1 of the norms, were applicable in the Zimbabwe tribunals until the new Code became effective,

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<sup>43</sup> The administrative cases of priests include those concerning the removal or transfer of pastors.

<sup>44</sup> Reference is made to article 4 of the general norms in article III of the decree.

<sup>45</sup> Cf. "Normae pro Tribunalibus," art. 5, §1, p. 488; cf. *infra*, chapter IV, pp. 141-145 for an analysis of the implications of the new law for interdiocesan tribunals established prior to the coming into force of the 1983 Code.

since the decree makes no provision for their removal.<sup>46</sup> Thus, although the decree excludes the role of the assembly in the appointment of these officers, the intervention of the assembly seems to have been required in their removal from office.

## 2. The Procedures to be Observed

Article 11 of the general norms had stated that "in the handling of cases, the prescriptions of law should be accurately observed, but with the additions and changes stipulated below."<sup>47</sup> Since most cases heard in ecclesiastical tribunals concern matrimonial nullity, the relevant procedural law for such cases is now contained in the 1983 Code of Canon Law. The procedures for other contentious cases and criminal ones are also to be found in the 1983 Code.

## 3. The Competence of the Tribunals

Since the regional tribunals were established with universal competence, their jurisdiction included all contentious and criminal cases, not expressly reserved to the Holy See. To the extent that the competence granted to the regional tribunals was exclusive, the local diocesan courts were rendered largely redundant. In fact, in as much as the instructory tribunal in each diocese may be delegated or subdelegated by the local bishop to handle those causes for which he remains competent, the need for a diocesan court ceases.

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<sup>46</sup> Cf. *ibid.*, art. 8, §1, p. 489.

<sup>47</sup> Cf. *ibid.*, art. 11, p. 490; cf. *infra*, chapter V, pp. 222-223, for the procedures to be observed in interdiocesan courts according to the 1983 Code of Canon Law.

#### iv. The Period Commencing in 1983

Subsequent to the January/February 1983 plenary session of the SACBC, a decree, approved by the conference for the reorganisation of tribunals within its territory, was submitted to the Apostolic Signatura for definitive approval.<sup>48</sup>

##### a. The Decree of the Southern African Catholic Bishops' Conference

Primarily, the terms of the decree sought to address the deficiencies long experienced in two principal areas:

- a. it provided for a first instance tribunal for the dioceses of the Bloemfontein ecclesiastical province (including Gaborone in Botswana) with its seat in the Archdiocese of Bloemfontein;
- b. it made provision for the constitution of a second instance "regional" tribunal to which the first instance courts in Bloemfontein and Durban could refer cases on appeal.

The proposed decree which comprised thirteen articles was arranged in two distinct sections: articles 1 to 5, and articles 6 to 13. The first section sought to confirm, as far as possible, the arrangements made for the "regional" tribunals in Cape Town, Pretoria and Durban in the 1958 reordering of matrimonial courts, and also to extend their competence to universal causes. However, since the tribunals established in 1958 were, in fact, diocesan with extended territorial competence, and not regional, the decree in seeking to confirm their existing status so as to incorporate them as "regional" into a single document with the

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<sup>48</sup> Cf. SACBC, Minutes of plenary session (Resolution 1.4), 1.18. B.M.2, February 2, 1983.

proposed Bloemfontein regional court, would fail in its objective. That decree, in simply affirming the existing nature of the tribunals could not constitute them "regional."

The second section of the decree concerned the constitution of a first instance regional tribunal in Bloemfontein. Article 6 provided that the Archbishop of Bloemfontein was to be the moderator of the court, and that in this capacity, he would govern the court in the name of the assembly of the Ordinaries of the Bloemfontein province, "iuxta Art. 4 Normarum pro Tribunalium Regionalium Ereptione." To the moderator, article 6 attributed "all the rights and duties which local Ordinaries have with respect to their own tribunals."<sup>49</sup>

Article 7 of the decree prescribed that judges as well as other tribunal officers, i.e., the judicial vicar, associate judicial vicars, if any, associate judges, the promotor of justice, the defender of the bond, notaries, as well as their substitutes, were to be selected ("deligantur") in the assembly of the Ordinaries of the province.

There was no mention in the decree of any specific procedures for the removal of personnel, as had been the case in article 8, §1 of the general norms and also in the particular law available to us of courts established prior to the general norms. In so far as the decree was silent on this point, and since it explicitly referred to the general norms, it would seem that the procedures prescribed in article 8 of those norms were to be applied in the dismissal of

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<sup>49</sup> Cf. "Normae pro Tribunalibus," art. 4, p. 488.

personnel. Thus, the removal of at least the judicial vicar, associate judges, promotor of justice, defender of the bond and their substitutes was to be reserved to the assembly.

As had been the case with the tribunals in Zimbabwe, article 8 of the Bloemfontein decree stipulated that, with the exception of the Archdiocese of Bloemfontein, an instructory tribunal was to be constituted in every diocese of the region. Article 9 stated that the officers who would form such a court were to be appointed by the local bishop, but unlike the case in Zimbabwe where the moderator was authorised to approve those designated, the approval of the assembly of the Bloemfontein province was required.

In article 10 which corresponds to article VII of the Zimbabwe decree, it was stated that those who constituted an instructory tribunal were able, as delegates or subdelegates of the local bishop, to deal with administrative cases involving priests, as well as cases of non-consummation of marriage. Article 11 of the decree was a particularisation of canon 152 of the 1983 Code on incompatible offices. It provided that officers who had exercised a role in the Bloemfontein tribunal could, upon the termination of that office, undertake the representation of clients, i.e., as advocates or procurators, on condition that such officers had not been formerly involved in those cases as judge, promotor of justice, defender of the bond or notary, in the same court.

Provision was made in article 12 for the selection of judges and other officers for the second instance court at Cape Town. Such officers were to be chosen in the regional assembly of the Cape Town province; those who had served in diocesan courts in any capacity were eligible for appointment.

**b. Observations on the Decree**

It seems that the proposed decree fails to respond to the basic requirements of the 1983 Code of Canon Law for the establishment of regional tribunals. In its present form, the decree labours under a number of disadvantages:

- a. it fails to clarify the fact that all of the Southern African tribunals are indeed regional tribunals and not diocesan ones with extended competence;
- b. it introduces a dual system of tribunals into Southern Africa by affirming in its first section the status of the established courts, and by constituting in its second section a new court with its own particular law;
- c. it provides for dual appointments in the Bloemfontein tribunal so that officers could be appointed to more than one court, but makes no such provision for the other three tribunals;
- d. it provides for the establishment of instructory tribunals within the Bloemfontein province, but makes no similar provision for the territories of the other tribunals;
- e. it constitutes each tribunal, except the Bloemfontein one, in first and second instance;
- f. it fails to reflect the flexibility of canon 1423, §1, by continuing to create a necessary juridical link between the office of moderator and the diocese in which the tribunal is situated;
- g. it makes no reference to the diocesan tribunals in the dioceses of Johannesburg and Manzini, especially with respect to their appeal courts; it would

make for a more complete picture were all the dioceses, vicariates, etc., provided for in the one document.

These observations which were conveyed to the President of the SACBC, were discussed in a meeting of the administrative board, May 1-3, 1984.<sup>50</sup> It was resolved that the decree awaiting the approval of the Apostolic Signatura be withdrawn, and that a new decree reflecting the requirements of the new Code, be prepared for approval at the extraordinary plenary session of the conference to be held in September, 1984.

The provisions of this decree for the establishment of interdiocesan tribunals in Southern Africa are discussed in chapter VI of this study, which treats of the application of the 1983 Code of Canon Law to the Southern African courts.

#### v. The Johannesburg Diocesan Tribunal

With the reorganisation of matrimonial tribunals in 1958, the extended territorial competence of the Johannesburg tribunal was terminated.<sup>51</sup> In virtue of this reorganisation, formal matrimonial nullity cases arising in the Diocese of Johannesburg were assigned to the newly-created tribunals in Pretoria and Durban in first and second instance respectively. It is not clear to what extent the Diocese of Johannesburg ever submitted such cases to the Pretoria tribunal, or whether the Johannesburg tribunal simply continued handling such cases in first

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<sup>50</sup> Cf. SACBC ADMINISTRATIVE BOARD, Minutes, 1.19. B.M.2, May 1-3, 1984.

<sup>51</sup> Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter (Prot. N. 3449/58), September 29, 1958.

instance.<sup>52</sup> What is certain, however, is that for a considerable number of years the Johannesburg tribunal, in its handling of formal cases of matrimonial nullity, has acted independently in first instance.<sup>53</sup>

In as much as the Diocese of Johannesburg had been placed under the jurisdiction of the Pretoria court, an indult would have been required for it to withdraw from that court and regain its own competence for formal matrimonial cases. Although such an indult has not been discovered, this does not necessarily mean that one was not granted.<sup>54</sup> Yet, in the absence of any authorisation by the Holy See, it would appear that the Johannesburg tribunal has been defining these cases without the required judicial competence. It seems, however, that the Apostolic Signatura views this apparently anomalous situation as legitimate. In a rescript dated August 27, 1980, authorising a temporary faculty to substitute the regular appeal court of the Johannesburg tribunal, the Apostolic Signatura refers

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<sup>52</sup> It has been difficult to obtain details concerning the functioning of the Johannesburg court, subsequent to the establishment of the Pretoria matrimonial tribunal as court of first instance for cases arising in Johannesburg. In as much as the officialis at that time is deceased, it has not been possible to secure direct information. Cf. supra, chapter II, footnote 62, for comments of the judicial vicar of the Pretoria tribunal.

<sup>53</sup> It is significant that in the comments of the Johannesburg court on the report of the meeting on matrimonial tribunals of July 18, 1972, it was asserted that the inter-territorial and diocesan tribunals were equally competent for formal matrimonial nullity cases. The same assertion had been made by the officialis of the Johannesburg tribunal at the meeting of July 18, 1972. Cf. supra, footnote 33, where it appears that in May, 1971, the Apostolic Delegate was uncertain whether the jurisdiction of the inter-territorial courts was exclusive or cumulative.

<sup>54</sup> Cf. S.C. FOR THE PROPAGATION OF THE FAITH, Letter (Prot. N. 4989/83), March 30, 1984, which indicates that no such indult was granted by this Congregation. It has also been ascertained that there is no record of such a grant in the archives of the S.C. of the Sacraments.

explicitly to the metropolitan tribunal of the Archdiocese of Pretoria as that regular tribunal:

Having considered the urgent request - forwarded here by the Apostolic Delegate in Southern Africa - in which the Most Excellent Bishop of Johannesburg asks that, for a time, it be possible for appeals to be made from the diocesan tribunal to the Durban regional tribunal rather than to the Pretoria metropolitan tribunal; [...].<sup>55</sup>

Since its status as a diocesan tribunal is to continue, no reference was made to the Johannesburg tribunal in the proposed decree.<sup>56</sup>

#### Conclusion

The caseload in the Southern African matrimonial courts, particularly those in South Africa, has increased considerably over the last ten years and much pressure placed upon tribunal personnel. These factors, as well as the breakdown of certain provisions of the 1958 reorganisation of tribunals, necessitated an extensive reform of court structures. This was partially accomplished in 1973 when regional tribunals were constituted in Zimbabwe. However, following the erection of those courts, the diocese of Gaborone, previously subject to the inter-

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55 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Rescript (Prot. N. 12528/80), August 27, 1980: "Visa instantia - huc transmissa per Delegatum Apostolicum in Africa Meridionali - qua Exc.mus Episcopus Joannesburgensis petit ut, ad aliquod tempus ab eiusdem Foro appellari possunt ad Tribunal Regionale Durbanianum potius quam ad Tribunal Metropolitanum Praetoriense; [...]."

56 In view of the uncertainty surrounding the Johannesburg tribunal, however, it would seem prudent to make reference to the tribunal as diocesan in the decree. The same applies to the tribunal at Manzini. This would ensure that all the territories of the SACBC are included in a single document, and that provision is made for an appeal court for cases handled in the first-instance tribunals at Johannesburg and Manzini.

territorial tribunal at Harare, was left without a first instance court. Moreover, with the non-functioning in both instances of the tribunal at Maseru, the dioceses of the Bloemfontein province had no tribunal of first instance, and the Durban first instance court was without an appeal court. To remedy these shortcomings, the SACBC resolved to establish a regional tribunal in the Bloemfontein province, and to extend "regional" status with universal competence to the existing diocesan courts. To this end, after having withdrawn an earlier decree, the SACBC approved a new decree which was confirmed by the Apostolic Signatura on October 25, 1984.

Once these tribunals have been constituted, the shared responsibility of the bishops of each provincial assembly, both with regard to the supply of personnel and financial assistance for their interdiocesan court, will greatly contribute to the smooth and efficient functioning of the tribunals. Without doubt, the considerable potential of these proposed structures, not only with respect to the establishment of instructory courts in each diocese subject to the tribunal, but also for the more expeditious handling of cases, will be fully utilised in future years.

## CHAPTER IV

### INTERDIOCESAN TRIBUNALS ACCORDING TO THE 1983 CODE

Book VII of the 1983 Code of Canon Law provides the legislation which regulates two specific kinds of procedures in the Church, namely judicial<sup>1</sup> and administrative ones.<sup>2</sup> When compared with the corresponding Book of the 1917 Code, Book VII is considerably reduced with respect to the number of canons. While Book IV of the 1917 Code contained 643 canons, Book VII now contains only 353 canons.

The reduction in the number of canons, therefore, indicates that the new law on procedures has been somewhat simplified, although with regard to the matrimonial nullity process, the Church's concern for safeguarding the integrity of the matrimonial bond has in no way been diminished. Many of the procedures that were prescribed for marriage nullity trials in the 1917 Code have indeed been streamlined and greater emphasis placed upon the more expeditious handling of such cases.<sup>3</sup>

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1 Cf. canons 1400-1731.

2 Cf. canons 1732-1752.

3 The new Code reflects the norms of the Motu Proprio, "Causas matrimoniales," March 28, 1971, in AAS, 63 (1971), pp. 441-446. The motu proprio extended the sources of competency (art. IV, §1, c), empowered an episcopal conference to permit the constitution of a panel of two clerics and one lay man in both instances where a panel of three clerics could not be formed (art. V, §1), and where such a panel could not be formed even by the addition of a lay man, to permit the appointment of a cleric as sole judge, but only in first instance and in individual cases (art. V, §2). The motu proprio also authorised the ratification of a

## A. The Spirit and Implications of the New Law for Interdiocesan Tribunals

### i. The Spirit Underlying the New Law

To appreciate the factors that influenced the formulation of the new law for interdiocesan courts, it is necessary to consider certain directive principles which were to assist in the revision of procedural law.

At the instigation of the Pontifical Commission for the Revision of the Code of Canon Law, a study of the decrees of the Second Vatican Council and the general principles of law was undertaken at the conclusion of the Council with the collaboration of theologians and canonists.<sup>4</sup> Certain principles that could direct the revision process resulted from the study and were presented to the Synod of Bishops for approval.<sup>5</sup>

During its first meeting on September 30 and October 4, 1967, the Synod of Bishops approved ten principles which were to guide the members of the Code Commission in the task of revision. Two of these principles directly concern this study, and treat respectively of subsidiarity and the territorial arrangement of the Church.<sup>6</sup>

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first instance decision by decree under certain circumstances (art. VIII,§3), and extended the summary process to include all diriment impediments, as well as defect of canonical form and defect of valid mandate on the part of the proxy (art. IX).

<sup>4</sup> Cf. R.G. CUNNINGHAM, "The Principles Guiding the Revision of the Code of Canon Law," in The Jurist, 30 (1970), pp. 447-455.

<sup>5</sup> Cf. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Communicationes, 1 (1969), pp. 77-85.

<sup>6</sup> Cf. ibid., art. 5, p. 80 and art. 8, p. 84.

In a synthesis of the ten principles, prepared by the "coetus studiorum de processibus" of the Commission, certain innovations to be introduced into the procedural law of the revised Code were enumerated.<sup>7</sup> Two areas are of special interest, the first, concerning regional tribunals, and the other, the application of the principle of subsidiarity. With respect to article 11 of the synthesis on regional tribunals, the following was affirmed:

Episcopal Conferences have been able to establish Regional Tribunals, not only to handle cases of nullity of marriage, but also all cases not reserved in first and second instance; each tribunal was to be assigned an appropriate territory.

Conferences of Bishops are to determine where these tribunals are to be situated, and are to appoint their officers.

This provision extends to the entire world, and there have been evident benefits which, over the past decades, have been noted by the many nations which had previously established regional tribunals.<sup>8</sup>

On the application of the principle of subsidiarity, article 13 stated:

Decentralization (as it is referred to), is to be understood in a dual sense:

a) by Judicial Statutes, which must be promulgated by an Episcopal Conference, in which will be determined the arrangement of the tribunals, their location, the procedures concerning the

7 Cf. Communicationes, 2 (1970), pp. 181-194.

8 Cf. ibid., p. 184: "11. Tribunalia Regionalia, non solum ad causas nullitatis matrimonii, sed ad omnes causas non reservatas in primo et altero gradu pertractandas, constituere poterunt Conferentiae Episcopales, assignata cuilibet tribunali opportuna circumscriptione.

"Conferentiae Episcoporum erit sedes horum tribunalium determinare et officiales constituere.

"Per hanc provisionem extenduntur ubique, et quoad omnia negotia iudiciaria, indubia beneficia quae, hisce novissimis decenniis, ex regionalibus foris nonnullis nationibus provenerunt."

appointment of officers and their reimbursement, the admission of advocates and their remuneration, as well as the assistance the dioceses will provide with respect to personnel and finances;

b) by Directories, defined by the Conference, in which all matters not decided by the Code and left to particular law, as well as practical arrangements for the operation of tribunals, are determined.<sup>9</sup>

The substance of these two articles was clearly reflected in the Schema canonum de modo procedendi pro tutela iurium seu de processibus, published on November 3, 1976, as well as in the Schemata of the Code of Canon Law of 1980 and 1982, and finally, in the 1983 Code of Canon Law.<sup>10</sup>

With respect to the application of the principle of subsidiarity, not only does the new Code make provision for several bishops to decide upon the establishment of interdiocesan courts, but also authorizes them to determine the practical arrangement of such courts, and the types of cases for which the courts will be competent. The role of the Apostolic Signatura, as has been noted, and as will be seen in this chapter, is not primarily concerned with the actual establishment of the tribunals, but rather with the confirmation of the decree

<sup>9</sup> Cf. ibid., p. 185:"13. Decentralizatio (quae dicitur) dupliciter habebitur:

a) per Statuta iudiciaria, a Conferentia Episcopali promulganda in quibus ordinatio tribunalium, eorum sedes, procedura quoad nominationem officialium, eorum retributionem, admissio advocatorum, eorum emolumenta, concursus dioecesium circa personas et oeconomica subsidia, determinabuntur;

"b) per Directoria, in quibus omnia quae a Codice indeterminata relinquuntur, quae demandantur statuenda a iure particulari et practicus ordo agendi (regolamento) tribunalium, definientur a Conferentia."

<sup>10</sup> Cf. ID.; Schema canonum de modo procedendi pro tutela iurium seu de processibus, p. VII. Art. 6 of "Nonnullae praecipuae immutationes" indicates that the principle concerning regional tribunals had been incorporated in canons 22 and 40 of the Schema, now respectively canons 1423 and 1439 of CIC 1983.

prepared by the bishops. Indeed, the principle of subsidiarity may also be reflected at the immediate level, since the assembly may agree to grant greater autonomy to the moderator by committing to him the appointment and removal of personnel, either by including such a provision in the decree or by delegating this function to him as a special mandate.

## ii) The Implications of the New Law

A factor that should be borne in mind at the outset of this analysis of the new law for interdiocesan tribunals is that the norms, provided in the 1983 Code of Canon Law for the constitution and organisation of such tribunals, are altogether new when compared with the 1917 Code which made no provision for supradiocesan courts.

Indeed, the norms for interdiocesan courts in the new Code are highly innovative and, to this extent, largely replace the particular executory norms granted for all interdiocesan courts by the various dicasteries of the Holy See over the last forty-five years. In addition, the general norms of the Apostolic Signatura, which had constituted the basis for the establishment and functioning of such tribunals from 1971 until the coming into force of the new Code, have also lost much of their juridical force. Most of the provisions contained in the twenty-two articles of those norms have been modified by the new discipline for interdiocesan courts, and, accordingly, such provisions are no longer applicable.

Canon 1402, the third canon of Book VII, states that "all tribunals of the Church are governed by the canons which follow, without prejudice to the norms of the tribunals of the Holy See." However, with respect to the former law, canon

6 sanctions the abrogation not only of the 1917 Code, but also of "other laws, whether universal or particular, which are contrary to the provisions of this Code, unless it is otherwise expressly provided in respect of particular laws" (§1,2°). Moreover, also abrogated are "any other universal disciplinary laws concerning matters which are integrally reordered by this Code" (§1,4°).

When considering the extensive innovations with respect to interdiocesan tribunals as reflected in Book VII, it is apparent that the 1983 Code has integrally reordered the law relating to such courts. Accordingly, contrary norms, both general and particular, formulated under the former law, must be held to have lost their preceptive force. It thus appears from a construction of canons 6 and 1402 that, unless the particular law of interdiocesan tribunals expressly provided otherwise, or had been granted after November 27, 1983, all interdiocesan tribunals are to be governed solely by the provisions of the Code of Canon Law. This general principle is reinforced by canon 1423,§1 on the establishment of interdiocesan courts, which, with respect to the procedural norms, seems to equate diocesan and interdiocesan courts:

With the approval of the Apostolic See, several diocesan Bishops can agree to establish one tribunal of first instance in their dioceses, in place of the diocesan tribunals mentioned in canons 1419-1421. In this case, the group of Bishops, or a Bishop designated by them, has all the powers which the diocesan Bishop has for his tribunal.<sup>11</sup>

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11 Canon 1423,§1: "Plures dioecesani Episcopi, probante sede Apostolica, possunt concordés, in locum tribunalium dioecesanorum de quibus in cann. 1419-1421, unicúm constituere in suis dioecesibus tribunal primae instantiae; quo in casu ipsorum Episcoporum coetui vel Episcopo ab eisdem designato omnes competunt potestates, quas Episcopus dioecesanus habet circa suum tribunal." All canons refer to the 1983 Code of Canon Law, unless otherwise stated.

Although the terms of the new law have largely replaced both the general and particular executory norms granted by the Holy See prior to the coming into force of the new Code, it nevertheless appears that the spirit of certain provisions, formerly applicable to interdiocesan courts, should still be observed since these provisions stressed the joint responsibility of all the bishops and the quasi-collegial nature of the courts.

One such area is the appointment of personnel, previously reserved to the majority vote of the assembly, except where something else had been provided in the particular law. Special procedures for the appointment of officers in interdiocesan courts are not specifically mentioned in the new law. However, if one were to draw a parallel between what C. Zaggia maintains with respect to the intervention of the assembly in the formulation of particular norms to determine tribunal finances, a task now entrusted to the moderator by canon 1649, an argument could also be made for the continued involvement of the assembly in the appointment of personnel.<sup>12</sup> The necessary intervention of the assembly in the appointment of tribunal officers should thus be regarded as a condition for appointment, unless this task is directly committed to the moderator by particular law, or specifically delegated to him by the assembly. Even in the absence of any direct provision in the new canons for the involvement of the assembly in this area, it would seem to be breaking with juridical tradition to exclude its role altogether.

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<sup>12</sup> Cf. C. ZAGGIA, "I tribunali interdiocesani o regionali nella vita della Chiesa," in *Dilexit iustitiam: studia in honorem Aurelii Card. Sabattani*, ed. Z. Grocholewski and V. Carcel Orti, p. 148; cf. also *infra*, pp. 156-158.

Indeed, canon 6,§2 supports this view in so far as it provides that "to the extent that the canons of this Code repeat the former law, they are to be assessed also in the light of canonical tradition." While according greater security of tenure to tribunal officers, the new canons regarding the appointment of personnel largely repeat the former law. To this extent, it appears that the canonical tradition for the appointment of officers in interdiocesan courts, involving the intervention of the assembly, is to be observed; the spirit of the prescriptions of article 5 of the general norms, although the norms are no longer generally in force, should be followed. Certainly, the Holy See seems to stress the continued role of the assembly in such procedures, for in the decree establishing an interdiocesan court of appeal in Detroit in the United States of America, article 7 states:

The judicial vicar, judges and the other officers of this second instance tribunal are selected by the diocesan bishops of the abovementioned territories by means of a vote. Those who obtain a majority of votes are considered elected.<sup>13</sup>

The same principle applies with respect to the removal of personnel in interdiocesan courts. Accordingly, in tribunals established prior to November 27, 1983, the intervention of the assembly is also called for in the removal of tribunal officers, unless something else had been provided in the particular law of the court. It would thus seem that the provisions of article 8 of the general norms, although abrogated as such, should be observed, since they provide clear operating

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<sup>13</sup> Cf. Decree, "The Establishment of an Ecclesiastical Court of Appeal for the Ecclesiastical Province of Detroit," effective November 28, 1983, art. 7: "Vicarius Iudicialis, Iudices et alii huius Tribunalis Secundae Instantiae ministri ab Episcopis diocesanis circumscriptionum supranominatarum per suffragium eliguntur. Electi habentur qui maiorem suffragiorum partem obtulerint. [...]."

principles. Moreover, with regard to courts established after the coming into effect of the new Code, the prescriptions of article 8 should also be followed, but only where no specific procedures for removal had been included in the decree of erection.

Having very briefly examined the structure of Book VII of the 1983 Code, together with the factors that motivated the orientation of the new canons and the practical implications of the new law, the establishment of diocesan and interdiocesan tribunals will now be discussed.

#### B. Diocesan and Interdiocesan Tribunals

The ordinary tribunal for the adjudication of matrimonial nullity trials is, and has been, the diocesan tribunal. Nevertheless, the new Code provides for the establishment of interdiocesan courts. One consequence of this is the partial derogation from a fundamental principle of judicial competence, namely, that the diocesan bishop has jurisdiction for all criminal and contentious cases arising within his diocese, excepting those which have been exempted by law.<sup>14</sup> Where an interdiocesan tribunal has been established for a number of dioceses in a particular territory, the right of each bishop to decide cases for which the interdiocesan tribunal is now competent has been suspended; henceforth, the right is to be exercised "collegially" in the common assembly of the bishops of that territory.<sup>15</sup> Thus, following the constitution of a common court, the bishops

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<sup>14</sup> Cf. canon 1419, §1.

<sup>15</sup> Cf. F. ROBERTI, De processibus, I, p. 405.

whose dioceses constitute the territory forfeit the individual exercise of their judicial power, at least over formal matrimonial cases where the tribunal is special in nature, and over all contentious and criminal cases when it is general in nature.

#### i. The Establishment of a Diocesan Tribunal

Canon 1419,§1 states the general principle that in every diocese and for all cases not expressly excepted by law, the diocesan bishop is the judge of first instance; he may elect to exercise his judicial function either personally or through others appointed by him.<sup>16</sup> Thus, the sole judge in Canon Law is nato iure the diocesan bishop.<sup>17</sup>

However, while the bishop is in fact the primary judge in his diocese, the law strongly recommends that this office be performed through others.<sup>18</sup> In all cases where he is not bound to administer justice in person, the bishop should be represented by his judicial vicar, whose office entails ordinary vicarious jurisdiction. The judicial vicar, therefore, acts in the name of the bishop and fulfills on his behalf the function of sole judge and, sometimes, presiding judge of

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<sup>16</sup> Canon 1419,§1: "In unaquaque dioecesi et pro omnibus causis iure expresse non exceptis, iudex primae instantiae est Episcopus dioecesanus, qui iudicalem potestatem exercere potest per se ipse vel per alios, secundum canones qui sequuntur."

<sup>17</sup> Cf. F. DELLA ROCCA, Canonical Procedure: Philosophical-Juridic Study of Book IV of the Code of Canon Law, p. 90.

<sup>18</sup> Although canon 1578 of CIC 1917 is not repeated in the 1983 Code, the fundamental principle, reaffirmed by the S.C. OF THE SACRAMENTS in the Instruction, "Provida mater," August 15, 1936, in AAS, 28 (1936), art. 14,§3, p. 317, must be viewed as constant.

the collegiate tribunal. Since the judicial vicar constitutes one court with the bishop, there can be no appeal from the judicial vicar to the bishop of the diocese.<sup>19</sup>

With the 1983 Code of Canon Law, there remains open to every diocesan bishop, provided the matter has not already been decided by his predecessor, the option either of constituting within his own diocese an ordinary tribunal of first instance, or of joining with a number of other bishops in petitioning the Holy See for the establishment of interdiocesan courts of first and second instance. Such common tribunals, when established, enjoy judicial competence in the territory of the bishops concerned.

#### ii. The Establishment of Interdiocesan Tribunals

Canon 1423 introduces a far-reaching innovation into the establishment and organisation of interdiocesan tribunals.<sup>20</sup> This canon states in §1 that, with the approval of the Holy See, several diocesan bishops may agree to establish for their dioceses, a single court of first instance in place of their ordinary diocesan courts established in virtue of canon 1419.<sup>21</sup> The canon provides that where a

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<sup>19</sup> Canon 1420,§2: "Vicarius iudicialis unum constituit tribunal cum Episcopo, sed nequit iudicare causas quas Episcopus sibi reservat."

<sup>20</sup> Canon 1423,§1 reflects a juridical option that has existed with respect to ecclesiastical courts since the establishment of interdiocesan tribunals in 1938. While introducing a far-reaching innovation, the canon largely restates what had been provided in articles 1 and 4 of "Normae pro Tribunalibus," in AAS, 63 (1971), pp. 486 and 488 respectively.

<sup>21</sup> Art. 2,§3 of "Normae pro Tribunalibus" had prescribed that where interdiocesan courts in the strict sense were to be established, the decision of the bishops concerned was to be unanimous, and that where regional courts were

group of bishops has constituted an interdiocesan tribunal, the assembly of bishops, or a bishop designated by it, enjoys in respect of that tribunal, all the powers which a diocesan bishop has for his own court.<sup>22</sup>

#### a. The Intervention of the Holy See

Article 1,§1 of the general norms had prescribed a dual intervention of the Holy See in the establishment of interdiocesan courts, namely, the necessity on the part of the bishops concerned of obtaining a prior "nihil obstat" and the need for definitive approval of the decree of erection. With respect to the new law, however, canons 1423 and 1439, on the establishment of first and second instance tribunals respectively, merely prescribe that the courts be established "probante Sede Apostolica." In the context of these canons, it could be argued that the phrase refers exclusively to the approval of the decree.

The formula "probante Sede Apostolica" is less explicit than what was provided in the general norms which had prescribed that the decree of erection

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involved, the decision of the episcopal conference was to be approved by at least a two-thirds majority; the provisions of the 1983 Code are essentially identical. Canon 1423,§1 requires unanimity in the case of the erection of interdiocesan tribunals of first instance. However, canon 455,§2, which provides that for validity, general decrees of an episcopal conference must be approved by a two-thirds majority of those with a deliberate vote, is applicable to decrees of erection for regional or provincial courts as well as for appeal tribunals where the involvement of the entire episcopal conference is required (canon 1439,§1). Cf. C. ZAGGIA, loc. cit., p.<sup>2</sup> 144.

<sup>22</sup> Henceforth, whenever the bishop designated to direct the tribunal is referred to, the assembly of bishops is also to be understood, and where diocesan bishops are mentioned, those equivalent in law according to canon 381,§2, are to be understood as well.

would "not have force except after approval by the Holy See."<sup>23</sup> The Roman approval, therefore, was a necessary element for the validity of the act. Furthermore, canon 455,§2 of the 1983 Code establishes that general decrees of an episcopal conference "do not oblige until they have been reviewed by the Apostolic See and lawfully promulgated." It would thus seem possible to deduce logically that, with respect to tribunals of appeal established by an episcopal conference according to canon 1439, the approval of the Holy See must be considered as necessary before the decree can be implemented.

The same cannot be affirmed with as much certainty for decrees of erection for interdiocesan courts of first instance, arising from the voluntary agreement of several diocesan bishops ("plures dioecesiani Episcopi") according to canon 1423,§1. The reasons for this are threefold: 1) the phrase "probante Sede Apostolica" does not expressly indicate an invalidating norm, 2) the bishops in such a case are acting in virtue of their office, and 3) the general principles in canons 14 and 18 provide that "laws, even invalidating and incapacitating ones, do not oblige when there is a doubt of law," and "laws which [...] restrict the free exercise of rights [...] are to be interpreted strictly."<sup>24</sup>

What, then, would be the situation where the several diocesan bishops referred to above, in fact constitute the episcopal conference as is the case with

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23 Cf. "Normae pro Tribunalibus," art. 1,§1:"Si erectio fiat petentibus Episcopis, oportet ut Episcopi quorum interest, petito et accepto "nihil obstat" Supremi Tribunalis Signaturae Apostolicae, decretum erectionis ferant, quod tamen vim non habebit nisi post Sanctae Sedis approbationem."

24 Cf. C. ZAGGIA, loc. cit., p. 144; F.J. URRUTIA, De normis generalibus, adnotationes in Codicem: Liber I, pp. 17, 19-20.

the decree of erection for the Southern African courts? Since that decree provides for the erection of both first and second instance courts, it follows that the approval of the decision is required before the decree can be implemented.<sup>25</sup>

#### b. The Designation of a Moderator

The first paragraph of canon 1423 indicates a marked progression over what had been provided in article 4 of the general norms for interdiocesan tribunals. According to that article, an interdiocesan court was subject to the authority of the bishop of the place where the court had its seat, or, if that see were vacant, of the senior bishop of the respective territorial circuit. That bishop, as moderator of the tribunal,<sup>26</sup> governed it in the name of the bishops for whose territory it was constituted, and to him alone belonged all the rights and duties of local Ordinaries relative to their own tribunal.<sup>27</sup>

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<sup>25</sup> Cf. C. ZAGGIA, *loc. cit.*, p. 144.

<sup>26</sup> Although the new law omits the term "moderator" when treating of the bishop who takes charge of the interdiocesan tribunal, the use of the word is justified for it appears in all the decrees and norms for such tribunals since their introduction. The word was also used frequently in "Normae pro Tribunalibus." The use of "moderari" in canon 1649,§1, in reference to a bishop in his own tribunal, applies equally to diocesan and interdiocesan courts.

<sup>27</sup> Cf. "Normae pro Tribunalibus," art. 4, p. 488: "Tribunal interdiocesanicum, regionale, interregionale subest auctoritati Episcopi Dioecesanici loci in quo situm est, vel, si sedes episcopalis vacet, Episcopi senioris respectivae circumscriptionis. Qui Episcopus, utpote Moderator Tribunalis, idem regit nomine omnium Episcoporum pro quorum territorio est constitutum, eique omnia iura et officia attribuuntur quae Ordinariis locorum circa proprium tribunal competunt ad normam sacrorum canonum, necnon ad causas nullitatis matrimonii quod attinet, ad normam Instructionis Sacrae Congregationis de disciplina Sacramentorum, Provida Mater, diei 15 augusti 1936, nisi aliud peculiariter cautum sit, vel subiecta materia aperte exigat."

The provision in article 4 for the senior bishop to assume control of the court on behalf of the assembly, in the event of a vacancy in the see where the court was situated, appears to have been the forerunner of the prescription in canon 1423,§1, which authorises the assembly to appoint any bishop of the territory to direct the court. Hence, the diocese of the bishop designated could well be far distant from the seat of the tribunal. Indeed, there seems to be nothing in the canon to prevent the assembly from appointing an auxiliary or coadjutor bishop of the territory to the moderatorship.

For all practical purposes, once the court has been established and the officers appointed, there is little, apart from his involvement in tribunal finances and the overall supervision of personnel, that should require the direct attention of the moderator.<sup>28</sup> Consequently, no great difficulty would be experienced if the see of the bishop selected as moderator were located at some distance from the seat of the court. The judicial vicar, appointed either by the assembly or by the moderator, depending upon the terms of the decree, would, in effect, manage the affairs of the tribunal and be responsible for its efficient functioning. Thus, for example, if the Bishop of Oudtshoorn were designated moderator of the Cape Town regional tribunal, notwithstanding that Oudtshoorn is five hundred kilometres from its seat, the everyday affairs of the court would be adequately provided for.

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<sup>28</sup> Cf. canon 1649,§1, on the establishment of norms for judicial expenses, free legal aid, reduced expenses, etc.

**c. The Authority of the Assembly**

As already mentioned, canon 1423,§1 authorises the assembly, as a body, to take charge of the tribunal. In such cases, the assembly of bishops collectively enjoys all the powers which a diocesan bishop has for his own court. Where the assembly has assumed responsibility for the tribunal directly, the role of the judicial vicar as the officer entrusted with the practical administration of the court achieves greater prominence, since in the absence of a moderator, there is no single authority over the tribunal, but rather the equivalent of a collegial body. For this reason, the judicial vicar, as in the case where the moderator resides at some distance from the seat of the tribunal, should also be granted, in addition to all the rights and powers attributed to his office in the Code, special mandates enabling him to perform specific functions which the common law does not assign to him. Such mandates would lead to the more efficient functioning of the court, and consequently, to the more expeditious handling of cases.<sup>29</sup>

**d. The Responsibility of All the Bishops Concerned**

In addition, canon 1423,§1 would seem to envisage the possibility of the moderatorship passing from one bishop to another within a certain specified period. Such a provision, incorporated into the decree of erection, would ensure a greater degree of participation by all the bishops in the direction of the court. This has significant consequences, in so far as it appears that, sometimes, the bishops of the territory have left to the moderator the resolution of most of the

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<sup>29</sup> For a list of the special mandates that may be granted to a judicial vicar, cf. infra, chapter V, pp. 195-196.

practical issues connected with the administration of the tribunal, and have, in effect, had a limited participation in its affairs. By committing the direction of the court either to the assembly of bishops itself, or by enabling the assembly to assign bishops to the moderatorship for definite periods, the law appears to encourage a greater degree of involvement by all the bishops of the territory.

The powers enjoyed by the moderator with respect to the tribunal differ in nature from those of the assembly. Although canon 1423,§1 attributes to both the bishop appointed to govern the tribunal and to the assembly itself where it has assumed direct control, all the powers which a diocesan bishop enjoys in his own court, the powers conferred by law upon the moderator are not as extensive as those of the assembly. This may be explained by the fact that the moderator exercises his office not in his own name, but in the name of the assembly which retains a general supervisory role.

#### e. The Competence of the Tribunals

The second paragraph of canon 1423 provides that interdiocesan tribunals be established either with universal competence or with competence only for certain types of cases, e.g., formal matrimonial nullity cases.<sup>30</sup> From a study of the particular law of numerous tribunals, however, it is evident that the majority of interdiocesan courts constituted after 1965 have been granted competence for all contentious and criminal cases.<sup>31</sup>

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30 Canon 1423,§2:"Tribunalia, de quibus in §1, constitui possunt vel ad causas quaslibet vel ad aliqua tantum causarum genera."

31 When the S.C. of the Sacraments established interdiocesan tribunals in Columbia on June 17, 1967, (cf. CLD, 7, pp. 905-913), these were granted

#### f. The Role of the Individual Bishop

At its meeting on April 18, 1978 the coetus on procedural law of the Commission for the Revision of the Code of Canon Law discussed certain recommendations concerning canon 22 of CIC Schema 1976 (now canon 1423).<sup>32</sup> It was proposed at this session that, with respect to canon 22, an episcopal conference be empowered to constitute interdiocesan tribunals without the prior authorisation of the Holy See. This proposal, however, did not find favour with the majority of the consultors, since they were of the opinion that an episcopal conference, as such, lacks the capacity to confer jurisdiction which belongs to individual bishops on a supradiocesan body.

During this particular session, some of the consultors recommended that the word "concordes," presently in canon 1423,§1, be suppressed. This proposal was rejected since "a bishop, who might not be in agreement, cannot be deprived of his own jurisdiction" and of his right to establish a local tribunal.<sup>33</sup> This view corresponds to the theological understanding of the episcopal office, since the

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universal competence, and this appears to have been the case with the majority of tribunals erected since then. In the case of the Columbian courts, the intervention of the Sacred Consistorial Congregation was required since the S.C. of the Sacraments was only competent to erect matrimonial tribunals.

<sup>32</sup> Cf. Communicationes, 10, (1978), pp. 232-233. The special coetus on procedural law met on 39 days between April 3, 1978 and May 18, 1979 to rework the Schema in the light of comments from numerous consultative bodies. Cf. T. GREEN, "The Revision of the Procedural Law Schema: Implications for Tribunal Practice," in The Jurist, 40 (1980), p. 350.

<sup>33</sup> Cf. Communicationes, 10, (1978), p. 232.

local bishop is the proper, ordinary and immediate pastor in his own diocese,<sup>34</sup> where it is his "role to rule the particular Church entrusted to him, with legislative, executive and judicial power, in accord with the norm of law."<sup>35</sup>

The coetus approved a further suggestion that §3 of canon 22 be withdrawn "since it is superfluous and it is not possible to restrict the right of a bishop to constitute a tribunal within his own diocese to handle a case in which he is competent." It had been provided in §3 that, even where interdiocesan tribunals had been established:

[...] every bishop is still able to constitute within his own diocese, a tribunal for judging in first instance, cases which are handled according to the summary contentious process, unless a plaintiff prefers to present his petition to the tribunal competent in accord with the norm of §§1 and 2.<sup>36</sup>

What, however, would be the position of a diocesan bishop who has voluntarily ceded to the interdiocesan tribunal the actual exercise of his own judicial power, if he were to refer to his own tribunal a particular case for which common tribunal is exclusively competent? That a judicial act is valid when all the constituent elements are present, is without doubt. One such element for the

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34 Cf. VATICAN COUNCIL II, Dogmatic Constitution, "Lumen gentium," November 21, 1964, in AAS, 57 (1965), art. 27, pp. 32-33; ID., Decree, "Christus dominus," October 28, 1965, in AAS, 58 (1966), arts. 8a and 11, pp. 676, 677; Canon 381, §1.

35 Canon 391, §1: "Episcopi dioecesani est Ecclesiam particularem sibi commissam cum potestate legislativa, executiva et iudiciali regere, ad normam iuris."

36 Cf. Communicationes, 10 (1978), p. 232: "[...] potest tamen unusquisque Episcopus in sua dioecesi tribunal constituere, cuius sit iudicare in primo gradu de causis quae processu contentioso summario tractantur, nisi actor malit petitionem coram tribunali ad normam §§1 et 2 competenti proponere."

validity of a judicial act, for example, the rendering of a sentence in a formal matrimonial nullity case, must obviously be judicial power. Accordingly, it follows that in instances where the exercise of that power has been suspended for certain cases, a bishop, although he retains the nuda potestas itself, lacks the capacity to discharge his judicial function in those particular areas.

A key question upon which the validity or otherwise of such a judicial sentence depends is whether a bishop who has voluntarily abdicated the exercise of his judicial powers, may voluntarily withdraw that abdication, and, if in fact he does so, whether any judicial act performed by him would be valid. Since, according to canon 10, only those canons which specifically prescribe something for validity are invalidating, and since canon 1423 does not speak of validity, it could not be argued definitively that such an act would be invalid, unless the decree establishing the court so provides.<sup>37</sup>

#### g. Finances in Interdiocesan Tribunals

Canon 1649 treats of the financial arrangements to be observed in diocesan and interdiocesan courts. Although this single canon covers the complex material to which the 1917 Code of Canon Law had devoted nine canons,<sup>38</sup>

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<sup>37</sup> Cf. PIUS XII, Moto Proprio, "Sollicitudinem nostram," January 6, 1950, in AA6, 42 (1950), art. 38, p. 13. Article 38 explicitly provides that once a regional court has been constituted, the respective hierarchs may not validly establish local tribunals ("pro quibus tribunal regionale erectum est nequeunt tribunal collegiale sua in eparchia valide erigere.")

<sup>38</sup> Cf. canons 1908-1916 of CIC 1917.

Provida mater, nine articles<sup>39</sup> and the general norms, four articles,<sup>40</sup> it appears to address adequately the financial regulation of the courts, leaving to particular norms a certain adaptation to local circumstances.

The canon in §1 deals specifically with the necessary formulation by the moderator of certain particular norms. These norms determine the liability of parties for judicial expenses, the honoraria for advocates, experts and interpreters, the expenses of witnesses, the granting of gratuitous and semi-gratuitous legal aid, the recovery of damages, and monies to be deposited for the payment of expenses.

Without doubt, the former legislation, since its scope was more comprehensive, may assist moderators of diocesan and interdiocesan courts in formulating appropriate norms; what had been prescribed in earlier norms, however, should be retained only as a guide and not as a precept, since such prescriptions are no longer in force.

With respect particularly to interdiocesan courts, the moderator could draw inspiration from articles 17-20 of the general norms, since they provide clear operating principles. It would seem unnecessary to stress, however, that the very nature of interdiocesan tribunals suggests that the moderator request the cooperation of the assembly both in establishing a fund upon which the burden of meeting the expenses connected with gratuitous or semi-gratuitous legal

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39 Cf. S.C. OF THE SACRAMENTS, Instruction, "Provida mater," August 15, 1936, in AAS, 28 (1936), arts. 232-240, pp. 359-361.

40 Cf. "Normae pro Tribunalibus," arts. 17-20, p. 491.

assistance might devolve, and in determining in what proportion each diocese should assist the first and second instance courts with respect to the supply of personnel and financial assistance.<sup>41</sup> Indeed, it would seem appropriate for the assembly to be consulted in all financial matters concerning the tribunal.

### C. The Competence of Diocesan and Interdiocesan Tribunals

In the same way as civil courts have a body of rules which concern jurisdiction and competency, so too, ecclesiastical tribunals follow definite norms in determining judicial competence according to territorial districts, the nature of the case, the persons concerned and the instance. The general rule for competence, however, is based upon territorial limits. The competent judge in a penal case, for example, is the judge of the territory in which the respondent has a domicile or quasi-domicile, or in which the offence was committed.<sup>42</sup>

The concept of competency in Canon Law is analogous to that of jurisdiction in civil law systems, although "jurisdiction" would seem to have a more refined meaning in Canon Law. In the civil law tradition, jurisdiction is defined as "the authority by which judicial officers and courts take cognizance of and define cases."<sup>43</sup> As far as Canon Law is concerned, however, the two terms must not be confused since jurisdiction is essentially an abstract notion, while competence is its concrete application.

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<sup>41</sup> Cf. *supra*, p. 143; *Communications*, 2(1970), art. 13, p. 185, where explicit provision is made for the role of the assembly of bishops in the financial affairs of the tribunal.

<sup>42</sup> Cf. canons 1408 and 1412 respectively.

<sup>43</sup> Cf. H.C. BLACK, *Black's Law Dictionary*, p. 766.

### i. The Notion of Competence

The concept of competence may be defined as "the extent or measure of jurisdiction, related to the power possessed by a judge with respect to a cause submitted to him."<sup>44</sup> Competence, consequently, in the canonical tradition, is the capacity of an ecclesiastical judge or tribunal to exercise jurisdiction in giving cognizance to and defining a controversy. Competence with respect to the judge or tribunal is determined in law by the territorial extent of jurisdiction, the nature of the case, the persons involved and the instance.

#### a. The Territorial Extent of Jurisdiction

Competence for trials in general is determined by territory in non-reserved cases. The qualifying factors of domicile, quasi-domicile, place of actual residence, place where the subject matter of litigation is located, place where the contract or obligation was entered into or is to be fulfilled, as well as the place where an offence was committed or an act of administration effected, become the determining elements.<sup>45</sup>

#### b. The Nature of the Case

Certain cases are reserved to specific authorities, regardless of territorial jurisdiction. Thus, cases involving dissolution of a marriage in favour of the faith

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<sup>44</sup> Cf. A. VERMEERSCH and J. CREUSEN, *Epitome iuris canonici*, III, p. 9: "Competentia est ambitus seu mensura iurisdictionis, et dicitur in specie de potestate quam iudex relate ad causam sibi propositam possidet."

<sup>45</sup> Cf. canons 1408-1414.

are reserved to the Sacred Congregation for the Doctrine of the Faith,<sup>46</sup> and cases concerning dispensation from ratified and non-consummated marriages, to the Sacred Congregation of the Sacraments.<sup>47</sup> To these Congregations is entrusted the task of advising the Holy Father on the merits of each case.

### c. The Persons Involved

In instances regarding the public good, the cases of certain "privileged" persons are reserved to the Holy See.<sup>48</sup> Accordingly, cases involving Heads of State, cardinals, legates of the Apostolic See, bishops, abbots primate or abbots superior of monastic congregations, the supreme moderators of religious institutes of pontifical right, dioceses and other ecclesiastical persons, physical or juridical, which have no superior other than the Roman Pontiff, are excluded from the jurisdiction of diocesan or interdiocesan tribunals.<sup>49</sup> On the practical level, these restrictions placed upon the competence of local tribunals obviate difficulties for them when such arise. In as much as cases so reserved are directly related to the public good, or because there is a risk of conflict of interest, only the highest tribunals may judge them. Such cases are exceedingly rare.

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<sup>46</sup> Cf. S.C. FOR THE DOCTRINE OF THE FAITH, Instruction, "Ut notum est," December 6, 1973, in CLD, 8, pp. 1177-1184. Canons 1104 of CIC Schema 1980 and 1150 of CIC Schema 1982 on papal dissolution in favour of the faith were omitted in the 1983 Code of Canon Law.

<sup>47</sup> Cf. canon 1698.

<sup>48</sup> Cf. canon 1405.

<sup>49</sup> Cf. ibid.

#### d. The Instance

Ecclesiastical tribunals may be distinguished by reason of jurisdiction or subordination. Accordingly, tribunals may be established in first, second or third instance, and the degree of jurisdiction exercised by a particular tribunal determines its place of order in the hierarchy in relation to other tribunals. A court may define a case only in the particular instance for which it is competent. A first instance tribunal may not, therefore, judge a case in second instance, since it would be acting outside its competence. The incompetency is absolute if competency can in no way be supplied or prorogued; the acts of this court are invalid. The incompetency is relative when competency may be prorogued; the acts, in this case, may possibly be sanated. Generally, incompetency regarding certain specified persons, the object of the case and the instance is absolute, and in these cases, the competency cannot be prorogued. Indeed, canon 1440 states that if competence by reason of the grade of trial is not observed, the non-competence of the judge is absolute. Incompetency regarding territory and persons in general, however, is not considered absolute and competency may be prorogued.

#### ii The Competent Forum for Matrimonial Nullity Cases

The determination of the competent forum for matrimonial nullity trials is becoming more complex. This is largely due to the increased mobility of peoples, for it is not uncommon for individuals to change residence in their own country several times, nor is it uncommon for them to immigrate to other countries.

Formal, as well as informal cases of matrimonial nullity, excluding those of Heads of State, are defined in first instance either in diocesan tribunals or in interdiocesan tribunals of particular territorial units. Prior to the promulgation of the Motu Proprio, Causas matrimoniales, territorial competence for matrimonial nullity cases was restricted to two factors: the place where the marriage was solemnised, and the domicile or quasi-domicile of the respondent.<sup>50</sup> Causas matrimoniales, however, introduced a new element into the general law, namely, the place where the majority of proofs were to be found. This ground for determining competence, as well as one included in the procedural norms for certain countries which gave competence to the tribunal of the residence of either party, is incorporated into the 1983 Code.<sup>51</sup>

The competent forum for formal and informal nullity cases is determined by canons 1671-1673 of the new Code. These canons apply equally to both diocesan and interdiocesan tribunals. Canon 1671, which corresponds to canon 1960 of the 1917 Code, omits the word "exclusive" in asserting the Church's right over matrimonial cases of the baptised,<sup>52</sup> and leaves it to canon 1672 to treat of the civil effects of marriage.<sup>53</sup> This omission in canon 1671 eliminates a largely

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<sup>50</sup> Cf. PAUL VI, Motu Proprio, "Causas matrimoniales," March 28, 1971, in AAS, 63 (1971), art. IV, §1, c, p. 443.

<sup>51</sup> Cf. canon 1673, 4°.

<sup>52</sup> Canon 1671: "Causas matrimoniales baptizatorum iure proprio ad iudicem ecclesiasticum spectant."

<sup>53</sup> Canon 1672: "Causae de effectibus matrimonii mere civilibus pertinent ad civilem magistratum, nisi ius particulare statuat easdem causas, si incidenter et accessorie agantur, posse a iudice ecclesiastico cognosci ac definiri."

outdated element, since matrimonial cases are not always concerned with nullity, but often concern other matters more appropriately handled by the civil courts. It is, however, canon 1673 which provides the basis for deciding territorial competence in cases of matrimonial nullity.

a. The Place where the Marriage was Celebrated

Canon 1673,1°<sup>54</sup> is a particular application to matrimonial cases of the norms found in canon 1411,§1 on trials in general.<sup>55</sup> It provides that a petitioner may submit a libellus to the tribunal of the place where the marriage was solemnised.

b. The Domicile or Quasi-domicile of the Respondent

A further ground for competence is the place where the respondent has a domicile or quasi-domicile.<sup>56</sup> This is stipulated in canon 1673,2°, which is in accord with the maxim "actor sequitur forum rei."<sup>57</sup> The principle underlying this

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<sup>54</sup> Canon 1673: "In causis de matrimonii nullitate, quae non sint Sedi Apostolicae reservatae, competentes sunt: 1° tribunal loci in quo matrimonium celebratum est."

<sup>55</sup> Canon 1411,§1: "Ratione contractus pars conveniri potest coram tribunali loci in quo contractus initus est vel adimpleri debet, nisi partes concorditer aliud tribunal elegerint." The wording of canon 1411,§1 clarifies an ambiguity that existed in canon 1565,§1 of CIC 1917. Canon 1565,§1 in specifying "Ordinarii loci" left some doubt as to which Ordinary was to be approached. The new law in stating "tribunali loci" makes it clear that it is the diocesan bishop who is to be approached in the case of a diocesan tribunal, and the moderator where an interdiocesan tribunal has been established.

<sup>56</sup> The norms regarding domicile and quasi-domicile are found in canons 1408 and 1409.

<sup>57</sup> Canon 1673,2°: "tribunal loci in quo pars conventa domicilium vel quasi-domicilium habet."

maxim is of the greatest importance in matters relating to competency, and has its origin in the concession generally made to the respondent. However, canon 1407,<sup>53</sup> reserves to the petitioner selection of the competent tribunal whenever the respondent may be heard in more than one court.

### c. The Domicile of the Petitioner

Provided that both the petitioner and the respondent reside within the territory of the same episcopal conference, canon 1673,3° grants competence to the tribunal of the place where the petitioner is domiciled.<sup>58</sup> In addition, canon 1673,3° requires that the judicial vicar of the respondent, having heard the respondent ("ipsa audita," ) is to consent to this ground of competence. Since the use of "dummodo" in the canon no longer signifies that these conditions are for validity, their non-fulfillment would not render the tribunal of the domicile of the petitioner absolutely incompetent.<sup>59</sup> However, where the respondent had never been approached, and his or her whereabouts were known, the respondent's right of defence might have been denied.<sup>60</sup> Thus, in virtue of canon 1620,7°, the

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<sup>58</sup> Canon 1673,3°: "tribunal loci in quo pars actrix domicilium habet, dummodo utraque pars in territorio eiusdem Episcoporum conferentiae degat et Vicarius iudicialis domicili partis conventae, ipsa audita, consentiat."

<sup>59</sup> Unlike canon 11 of CIC 1917 which stated that acts could be rendered invalid by law expressly or equivalently, canon 10 makes no provision for laws which invalidate equivalently.

<sup>60</sup> The determination of the tribunal of domicile of the respondent is impossible where the respondent cannot be traced. In a case where the respondent could not be located, the petitioner, who wished to approach a tribunal other than that of the respondent, submitted a request to the Apostolic Signatura for a papal commission. The reply of April 16, 1973, provided that the case could be handled in the tribunal requested without a papal commission. Cf. CLD, 8, pp. 1196-1197. From this reply, it appeared that in similar circumstances, a

sentence would be rendered irremediably null.<sup>61</sup>

When referring to the respondent, canon 1673,3° avoids the term "consent," providing simply that the respondent "be heard." Accordingly, should the judicial vicar of the respondent consent to this ground of competence, even in spite of the reasonable objections of the respondent, it would seem that no further redress is available to the respondent in first instance. This could conceivably result in inconvenience for the respondent, especially if the tribunal approached by the petitioner were situated in another nation, although within the same episcopal conference.<sup>62</sup>

#### d. The Place where Most of the Proofs are to be Collected

A fourth source of competence is found in canon 1673,4° which states that "the place in which, in fact, most of the proofs are to be collected" may

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petitioner could expect to be authorised to approach either his own court or one best suited to handle the case.<sup>3</sup> This principle has been incorporated in canon 1409,82.

61 Canon 1620,7°: "Sententia vitio insanabilis nullitatis laborat, si: ius defensionis alterutri parti denegatum fuit."

62 Injustices could result from the application of canon 1673,3°, since one episcopal conference might extend over a number of nations (the SACBC, for example, includes South Africa, Botswana, Swaziland and South-West Africa), or a number of episcopal conferences might be included in one nation. Clearly then, when considering these two extremes, it becomes apparent that the position of the plaintiff could be favoured. Canon 1625,3) of CIC Schema 1980, which corresponds to canon 1673,3° of CIC 1983, specified that as a condition, both parties should reside "in territorio eiusdem nationis." While canon 1625,3) of CIC Schema 1980 and canon 1673,3° of CIC Schema 1982 provided that the necessary consent should be given by the tribunal of the place where the respondent had a domicile, canon 1673,3° of the new Code entrusts this responsibility to the judicial vicar of that tribunal.

constitute a competent forum.<sup>63</sup> It is now generally accepted that the "majority" of proofs is to be interpreted rather in a qualitative than in a quantitative sense. It thus includes those proofs most important to the search for truth, and not necessarily the greatest number of proofs.

This possible source of competence is subject to two conditions: 1) an approach to the respondent by the judicial vicar of his or her domicile to determine whether the respondent has any objections to raise against the choice of court, and 2) the consent of the same judicial vicar to the acceptance of this ground of competence. As was the case in canon 1673,3°, the fulfillment of these conditions is not for validity; consequently, their disregard would not result in the incompetency of the tribunal. However, since canon 1673,4° clearly seeks to assure the respondent's right of defence, and in so far as this right might have been denied, the sentence rendered would be irremediably null in terms of canon 1620,7°. The respondent could, of course, be contacted during the course of the trial.

On the other hand, had the judicial vicar of the domicile of the respondent questioned the respondent, but disregarded any legitimate objections prior to giving his consent to the adoption of this forum, it appears that, since the requirements of the law have been satisfied, the respondent is without further remedy in first instance as regards the choice of the court.

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<sup>63</sup> Canon 1673,4°: "tribunal loci in quo de facto colligendae sunt pleraeque probationes, dummodo accedat consensus Vicarii iudicialis domicilii partis conventae, qui prius ipsam interroget, num quid excipiendum habeat."

To expedite the handling of matrimonial nullity cases, it would seem practical for the tribunal moderators within a particular episcopal conference to delegate their authority to each other so that they, in turn, could delegate it to their judicial vicars. This would enable the judicial vicar of the domicile of a petitioner to approach the respondent directly, and so fulfill the conditions of canon 1673,3° and 4°.

#### D. The Authorities in Interdiocesan Tribunals

Various ecclesiastical authorities have specific roles to fulfill in the establishment, internal organisation and functioning of interdiocesan tribunals. To understand the nature of the relations among these authorities and with respect to the interdiocesan tribunal itself, it is appropriate to discuss the following: i) the diocesan bishop, ii) the assembly of bishops; iii) the tribunal moderator, and iv) the Supreme Tribunal of the Apostolic Signatura.

##### i. The Diocesan Bishop

With the constitution of an interdiocesan tribunal, there is suspended, for the time being, the exercise of part of the judicial power of each diocesan bishop whose territory is subject to the jurisdiction of the common tribunal.

Notwithstanding the suspension of the exercise of his jurisdiction for all contentious and criminal cases where the interdiocesan tribunal has been granted universal competence, the following functions, connected with his judicial role, remain the responsibility of the diocesan bishop:

- a) to decide whether or not to initiate a judicial or administrative process for the imposition or declaration of penalties;<sup>64</sup>
- b) to instruct beatification and canonisation causes;<sup>65</sup>
- c) to issue a declaration that death is presumed, after having achieved moral certitude in a case concerning the presumed death of a spouse;<sup>66</sup>
- d) to accept a petition seeking a dispensation from a ratified and non-consummated marriage, and to arrange for the instruction of the process on behalf of the Holy See;<sup>67</sup>
- e) to accept a petition requesting a dissolution of the bond of marriage in favour of the faith, and to prepare the process for submission to the Holy See;<sup>68</sup>
- f) to decide, through his judicial vicar, informal cases of matrimonial nullity where both the interdiocesan and diocesan courts are competent.<sup>69</sup>

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64 Cf. canon 1341.

65 The procedures for the instruction of beatification and canonisation causes are governed by special pontifical law (cf. canon 1403). Pope John Paul II, in an Apostolic Constitution, "Divinis perfectionis magister," January 25, 1983, in AAS, 75 (1983), pp. 349-355, promulgated the new law for such causes. For the procedures to be observed, cf. S.C. FOR THE CAUSES OF SAINTS, "Normae servandae in inquisitionibus ab Episcopis faciendis in causis sanctorum," February 7, 1983, in AAS, 75 (1983), pp. 396-403; cf. also C. ZAGGIA, loc. cit., pp. 136-138.

66 Cf. canon 1707,§§1 and 2. Recourse is had to such an administrative process in instances where death cannot be proved from authentic ecclesiastical or civil documents.

67 Cf. canon 1699, §1. According to canon 1701,§1, the intervention of the defender of the bond is required in the instruction of such cases.

68 Cf: S.C. FOR THE DOCTRINE OF THE FAITH, Instruction, "Ut notum est," December 6, 1973, in CLD, 8, pp. 1177-1184. The intervention of the defender of the bond is required in the process.

69 Cf. canons 1686-1688.

For the discharge of these responsibilities, then, two distinct possibilities, depending upon the terms of the decree, present themselves. In so far as it appears that the particular law of tribunals established before March 25, 1971, makes no provision for mandatory instructory tribunals within the dioceses subject to the interdiocesan court, each bishop is to establish a diocesan tribunal.

On the other hand, according to the decrees where instructory tribunals are mandated for each diocese, such tribunals constitute part of the interdiocesan court, and may be delegated or sub-delegated by the local bishop "to handle the administrative cases of priests, and to instruct cases of ratified and non-consummated marriage."<sup>70</sup> However, since the officers who form the instructory tribunal are appointed by the diocesan bishop from among personnel in his own territory, it would seem possible for him to delegate to this tribunal the discharge of his other residual responsibilities as well, and so obviate the need for a diocesan court. In fact, especially in areas where there is a shortage of personnel, the establishment of an instructory court may render impossible the erection of a diocesan one.

In addition, each diocesan bishop as a member of the assembly, has certain rights and responsibilities with respect to the interdiocesan tribunal itself:

a) to intervene in the appointment and removal from office of at least the principal officers of the tribunal;<sup>71</sup>

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<sup>70</sup> It is clear from the decree outline sent by the Apostolic Signatura to any group of bishops requesting the establishment of interdiocesan tribunals that, notwithstanding the establishment of such tribunals, an instructory tribunal is to be constituted in each diocese of the territory, with the exception of the diocese in which the interdiocesan tribunal has its seat.

<sup>71</sup> Cf. supra, pp. 143-145.

- b) to be involved in the appointment of permanent advocates;<sup>72</sup>
- c) to be consulted, if possible, where a guardian or curator, appointed by civil authority to assist a party subject to him, is to be admitted by an ecclesiastical judge;<sup>73</sup>
- d) to be consulted, as bishop of the domicile of the spouses, whenever the exceptional cases of canon 1686 are handled in the interdiocesan tribunal.<sup>74</sup>

## ii. The Assembly

Although direction of the tribunal is largely entrusted to the moderator where one has been designated, the assembly continues to exercise a major role in the administration of the tribunal. For this reason, it is essential to determine a) the juridical nature of the assembly, b) its membership, and c) its powers and responsibilities.

### a. The Juridical Nature of the Assembly

M. Desdouts maintains that the territorial assembly of bishops does not constitute a "college" in the strict sense of the term.<sup>75</sup> Relying upon S. Dockx

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<sup>72</sup> Cf. canon 1490. The quasi-collegial nature of the assembly suggests that each bishop be consulted with respect to the appointments.

<sup>73</sup> Cf. canon 1479.

<sup>74</sup> Although the necessity of obtaining the opinion of the bishop of the domicile of the spouses is not explicitly required in canons 1686-1688 on the documentary process, the nature of the inquiry seems to recommend that the judicial vicar or a judge appointed by him should approach the bishop of the domicile of the spouses, who would generally be the Ordinary of the place where the marriage was celebrated. Article 16 of "Normae pro Tribunalibus" had explicitly called for the opinion of the bishop of the domicile of the spouses.

<sup>75</sup> Cf. M. DESDOUITS, "Origine, institution et nature des tribunaux régionaux en France," in RDC, 20 (1970), pp. 7-8.

who states that:

Power is not exercised collegially, except under two conditions: 1° that an indicative injunction (legislative power), or an imperative injunction (executive power), emanates from the assembly of the bearers of the power: 2° that the members of the assembly not possess the power fully as individuals, but only in so far as they participate in decisions taken by the assembly as such,<sup>76</sup>

Desdouts continues that it is essential to a "college" to be composed of equal members and to possess collectively, power over a particular territory or over determined subjects. As far as the assembly of bishops for an interdiocesan tribunal is concerned, the conditions for membership clarify that it is a body of equals.<sup>77</sup> Nevertheless, the assembly as such, has no judicial power for the individual ecclesiastical territories as a whole.<sup>78</sup>

The origin of an interdiocesan tribunal and the exercise of judicial power in that tribunal proceed rather from a particular concession of the Supreme

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76 Cf. *ibid.*, p. 7, footnote 13: "Le pouvoir ne s'exerce collégalement qu'à la double condition: 1° que l'injonction indicative (pouvoir législatif) ou impérative (pouvoir exécutif) émane de l'ensemble des porteurs de pouvoir; 2° que personne dans l'assemblée ne possède ce pouvoir pleinement par lui-même, mais seulement en tant qu'il participe aux décisions prises par l'assemblée comme telle." (S. DOCKX, "Essai sur l'exercice collégial du pouvoir par les membres du corps épiscopal," in La Collégialité épiscopale, Unam Sanctam, n. 52, Paris, 1965, p. 307).

77 Cf. *infra*, pp. 175-177.

78 Cf. M. DESDOUITS, *loc. cit.*, p. 7; A. DA SANT'ELIA a PIANISI, I tribunali ecclesiastici regionali per le cause di nullità matrimoniale in Italia, pp. 12-13: "I tribunali regionali, infatti, sono tribunali matrimoniali ordinari di tutta una regione conciliare e non tribunali diocesani comuni per tutte le diocesi della regione."

Pontiff, expressed in a decree, and not in virtue of any "collegial" activity, strictly so-called:<sup>79</sup>

With what body of bishops could the assembly be identified? Article 253 of the general norms for interdiocesan tribunals stipulated that "as often as there is question of regional tribunals, the assembly [...] is the respective episcopal conference [...]."<sup>80</sup> Yet, the assembly does not conform to the episcopal conference as far as its competence,<sup>81</sup> membership<sup>82</sup> or juridical nature<sup>83</sup> is concerned. Would it be accurate to identify the assembly with provincial councils regulated by express legislation,<sup>84</sup> and enjoying juridical personality<sup>85</sup> and the power of governance?<sup>86</sup> Indeed, the assembly does not necessarily correspond to a provincial council with respect to its powers,<sup>87</sup> composition<sup>88</sup> or nature.<sup>89</sup>

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79 Cf. M. DESDOUITS, *loc. cit.*, p. 7.

80 Cf. "Normae pro Tribunalibus," art. 2, §3, p. 487.

81 Cf. canon 455.

82 Cf. canon 450.

83 Cf. canon 499.

84 Cf. canons 431-434.

85 Cf. canon 432, §2.

86 Cf. canon 445.

87 Cf. canons 434 and 445.

88 Cf. canon 443.

89 Cf. canon 445.

Moreover, in the Decree, Christus dominus,<sup>90</sup> on the pastoral office of bishops in the Church, and in the Apostolic Letter, Ecclesiae sanctae, which implemented the decree, no reference is made to the assembly of bishops when episcopal conferences and provincial councils are discussed.<sup>91</sup>

! Article 2,§3 of the general norms continued that "if there is question of interdiocesan tribunals which are not regional, the assembly is understood as the meeting of the bishops concerned." The terminology of this paragraph appears to indicate that the assembly is, in fact, a freely constituted body of bishops, lacking any necessary formal erection and structures, since it would seem possible for even two or three diocesan bishops to petition the Holy See for approval for the establishment of a common tribunal "in order to promote the common good and the good of individual Churches."<sup>92</sup>

Indeed, while not mentioning the assembly of bishops, article 36 of Christus dominus provides a theological basis for the joint exercise of judicial episcopal power within a number of specific ecclesiastical territories, e.g., a region, since it stresses the role that bishops, as heads of particular Churches, can fulfill together, not only as members of the college of bishops united with the Roman Pontiff, but more especially as collaborators for the common good of

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90 Cf. VATICAN COUNCIL II, Decree, "Christus dominus," October 28, 1965, in AAS, 58 (1966), art. 36, p. 692.

91 Cf. PAUL VI, Moto Proprio, "Ecclesiae sanctae," August 6, 1966, in AAS, 58 (1966), pp. 757-787.

92 Cf. VATICAN COUNCIL II, Decree, "Christus dominus," October 28, 1965, in AAS, 58 (1966), art. 36, p. 692.

several Churches. The assembly of bishops, while enjoying no juridical personality as such in the sense of canon 116, has, through the establishment of interdiocesan tribunals, contributed much to the common good. On the nature of the assembly, it may thus be concluded with Desdouits that it

[...] is a simple association of fact, to which other bishops are free to aggregate themselves, that it has no powers other than those which are recognised by the Holy See, that it does not constitute a moral person in terms of the definition of canon 99 (of CIC 1917), since it has not been erected by a formal decree; it may, however, be considered as a "college" in a broad sense, without the power of jurisdiction.<sup>93</sup>

What, then, is the source of the power exercised by the assembly over the tribunal? That a diocesan bishop enjoys ordinary power in his tribunal is without doubt, since that power is attached by law to his office. Indeed, if the power exercised by the assembly is also to be considered ordinary, it must necessarily be attached to an office by law, but to which office? Does the assembly itself constitute the office from which the ordinary nature of its power arises?

These questions become especially important in the light of canon 1423,§1 which authorises the assembly to govern the tribunal directly. To answer them, the position of the moderator must be considered. From the time of the introduction of interdiocesan tribunals, it has commonly been held that the moderator exercises ordinary jurisdiction, in so far as the exercise of his power is

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93 Cf. M. DESDOUITS, *loc. cit.*, p. 8: "[...] c'est une simple association de fait, à laquelle d'autres évêques sont libres de s'agréger, qui n'a d'autres pouvoirs que ceux qui lui sont reconnus par le Saint-Siège, qui ne constitue pas une personne morale, aux termes de la définition du can. 99, puisqu'elle n'a pas été érigée par un décret formel, mais que l'on peut regarder comme un "collège" au sens large, sans pouvoir de juridiction."

attached to an office by law. Since the powers of the assembly are ordinary, and in as much as canon 1423,§1 implies an equality between the assembly and the moderator as far as the direction of the tribunal is concerned, could it be argued that the association of bishops who form the assembly constitute an office? This view cannot be sustained since it would seem that the assembly is rather a "collectivity," and that, as such, its power derives from the law itself. Unlike the office of diocesan bishop, the assembly does not constitute a juridical person.

#### b. Membership of the Assembly

With respect to membership of the assembly, it must be determined which bishops of the respective territorial circuit constitute the assembly. Canon 1423,§1 declares that where an interdiocesan tribunal is established, either the assembly itself ("ipsorum Episcoporum coetui,") or a bishop designated by it has all the powers which a diocesan bishop has for his own tribunal ("omnes competunt potestates, quas Episcopus dioecesanus habet circa suum tribunal.")) It would, accordingly, appear that it is only the diocesan bishops of the territory and those equivalent to them in law who form the assembly, since only they have a right under the common law to establish a tribunal.<sup>94</sup> The same principle was affirmed in article 4 of the general norms for interdiocesan tribunals which stated that the moderator directed the common tribunal "in the name of all the bishops for whose territory it was constituted, and to him belong all the rights and duties which belong to local Ordinaries, relative to their own tribunal."

The terminology, both of canon 1423,§1 and of article 4 of the general

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94 Cf. canon 381.

norms, therefore serves to clarify the position of coadjutor and auxiliary bishops vis-à-vis the assembly. Such bishops, even though possibly Ordinaries in virtue of an appointment as vicar general or episcopal vicar, are not included among the membership of the assembly, since those who constitute the assembly have one distinctive factor in common: each has contributed to the juridical existence of the interdiocesan tribunal through the voluntary abdication of the exercise of a portion of his judicial power. The coadjutor and auxiliary bishops of the territory, in as much as they do not have the care of an ecclesiastical territory entrusted to them, and consequently possess no proper judicial power, cannot be considered as having contributed to the existence of the new supradiocesan juridical entity. Thus, although it would seem possible for a coadjutor or auxiliary bishop to be designated as moderator of the court, it does not appear that such a bishop would be entitled to membership of the assembly.

The assembly, therefore, is constituted exclusively by those to whom a particular Church has been entrusted by the Holy See, and who, rather than establish local tribunals, have chosen the alternative provided by canon 1423,§1, of uniting in the constitution of an interdiocesan tribunal. Consequently, those who form the assembly of bishops of the particular territory for which a common tribunal has been established are the diocesan bishops, territorial prelates, territorial abbots, vicars apostolic, prefects apostolic, apostolic administrators and personal prelates (e.g., military vicars) in the territory, if any.<sup>95</sup> In addition, diocesan administrators during the vacancy of the see,<sup>96</sup> and the cleric who

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95 Cf. canon 368.

96 Cf. canon 427.

succeeds to the governance of the impeded see<sup>97</sup> may temporarily be admitted to membership of the assembly.<sup>98</sup>

### c: The Powers and Responsibilities of the Assembly

The assembly of bishops, acting as a body, has important functions to fulfill in connection with the constitution and administration of an interdiocesan tribunal:

- 1) to approach the Supreme Tribunal of the Apostolic Signatura for a "nihil obstat," following a decision to establish an interdiocesan court;<sup>99</sup>
- 2) to prepare a decree of erection, reflecting the particular requirements of local circumstances, for example, whether the tribunal is to be governed directly by the assembly or through a moderator, the number of tribunals of first and/or second instance, and the competence required;<sup>100</sup>
- 3) to promulgate and execute the decree, once approved, through the president of the episcopal conference (where regional tribunals are concerned), or through some other person so designated;

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<sup>97</sup> Cf. canon 414.

<sup>98</sup> Where an interdiocesan tribunal has not yet been established for a particular territory, it would seem that, although the cleric who takes charge of the impeded see or the diocesan administrator may join with a group of bishops in petitioning the Holy See for such a court, it may be inadvisable, since during the time that the see is vacant or impeded, there may be no innovation. Cf. canons 414 and 428 respectively.

<sup>99</sup> Although not directly stipulated in the new law as a prerequisite for the establishment of interdiocesan courts, it would appear from a construction of canon 6,§2, that a "nihil obstat" must still be requested from the Apostolic Signatura.

<sup>100</sup> Cf. canons 1423 and 1439. Although art. 2,§2 of the general norms is not repeated in the new law, its prescriptions could be observed since they provide clear operating principles.

- 4) to intervene in the appointment of at least the "qualified" officers of the tribunal, i.e., the judicial vicar, associate judges, promotor of justice, defender of the bond and their substitutes;<sup>101</sup>
- 5) to intervene in the removal of such personnel, observing the same procedures and only for a legitimate and serious reason;<sup>102</sup>
- 6) to intervene in the establishment of norms to determine judicial expenses;<sup>103</sup>
- 7) to be involved in determining the remuneration for judges and other tribunal officers;<sup>104</sup>
- 8) to intervene in the establishment of norms for a fund to provide for gratuitous or semi-gratuitous legal assistance;<sup>105</sup>
- 9) to be involved in determining the proportion in which each diocese shall assist the courts of first and second instance, both with regard to personnel and financial contributions.<sup>106</sup>

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101 The term "qualificati" is used by A. DA SANT'ELIA a PIANISI, op. cit., p. 19, to refer to the officialis, associate judges, promotor of justice and defender of the bond. L. del AMO PACHON, loc. cit., p. 396, in his discussion on the general norms, held that the active involvement of the assembly in the appointment of the "qualified" personnel was for validity. While this could be asserted for certain of the French tribunals, e.g., Paris-Versailles and Reims-Amiens, where "ad validitatem" is included in the appropriate articles of the decrees, this cannot be asserted universally (cf. canon 10).

102 Cf. supra, pp. 144-145.

103 Cf. canon 1649, §1, 1°.

104 Cf. canon 1649, §1, 1° and 2°; C. ZAGGIA, loc. cit., p. 148.

105 Cf. canon 1649, §1, 3°; C. ZAGGIA, loc. cit., p. 148.

106 Cf. C. ZAGGIA, loc. cit., p. 148. Such contributions could be proportional to the number of Catholics in each diocese and to the number of cases arising in each. This provision may be included in the particular law of the

Although the role of the assembly in relation to the interdiocesan court is primarily administrative, involving the exercise of executive power, there would seem to be nothing to exclude the members of the assembly from exercising a judicial role in the adjudication of cases referred to the tribunal and for which the tribunal is competent.<sup>107</sup> Accordingly, where the assembly has assumed direct control of the court, it would appear possible for a number of bishops to constitute a college for formal matrimonial cases of nullity, or even to define such cases, or any other formal cases, as single judges. However, the intent of the law would seem to recommend strongly that the assembly appoint a judicial vicar, especially since the judgment of informal cases is committed to him as ordinary judge. It would appear that the best interests of the tribunal would be served if the bishops of the assembly were not to involve themselves directly in the judicial process, leaving the definition of all cases to the judicial vicar and the associate judges.

The implications of canon 1423,§1, as alluded to, suggest that the assembly retains a general supervisory competence over the affairs of the tribunal

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tribunal. Cf. S.C. OF THE SACRAMENTS, "Normae pro exsequendo decreto 10 Febr. 1968 de ordinandis Tribunalibus provincialibus ecclesiasticis Parisiensi in primo jurisdictionis gradu et Versaliensi in secundo jurisdictionis gradu ad decidendis causas nullitatis matrimonii [...]," February 10, 1968, art. 19 (unpublished).

<sup>107</sup> Certain writers have disputed whether the moderator (and, presumably, the assembly) may fulfill a judicial role in the tribunal. M. DESDOUITS, "Origine, institution et nature des tribunaux régionaux en France," in *RDC*, 20 (1970), p. 11, holds that the moderator may act as judge, since no restriction has been placed upon the exercise of his judicial power. However, J. WINDLE, *A Study of Regional Tribunals in Canada for Cases of Nullity of Marriage*, p. 68, and A. CARON, "Regional Tribunals," in *The Jurist*, 23 (1963), pp. 427-428, assert that the power of the moderator is mostly of an administrative order.

and over the bishop who acts as moderator. For a grave reason, it would thus seem that the assembly could remove the moderator from office prior to the expiry of his term, where such a term had been stipulated in the decree, or indeed even where no such term had been mentioned, since canon 1423, §1 confers wide powers upon the assembly. In such a situation, the assembly could, depending upon the decree, either designate another moderator, or take charge of the tribunal directly. The Apostolic Signatura should be informed concerning any such changes.

A similar choice would confront the assembly upon the death, transfer, incapacitation, resignation or removal from office of the bishop appointed to govern the tribunal. In such circumstances, direct control would immediately devolve upon the assembly, unless some other provision had been included in the decree.

The diocesan administrator, however, elected by the college of consultors to take charge of the diocese during the vacancy of the see, although equivalent in law to a diocesan bishop, does not succeed to the vacant office of tribunal moderator since this particular office no longer has any necessary juridical connection to the vacant diocese per se. Indeed, while there had been a factual relationship between the former bishop, designated to direct the tribunal, and his own diocese, this gives no prior claim to the vacant see to continue the administration of the tribunal in the person of the diocesan administrator. The assembly's appointment of a bishop as moderator is a "personal" one, not attached directly to his office as bishop of a particular see. However, were the decree to provide that the assembly appoint as moderator, the bishop of the place where the

tribunal was situated, it would seem that the situation existing prior to the new law would be maintained. In fact, even under the former law, the diocesan administrator did not succeed to the moderatorship. Rather, this role was fulfilled by the senior bishop of the respective circuit.

### iii. The Moderator

The role of the bishop chosen to administer the affairs of the tribunal is discussed under the following headings:

#### a. The Nature and Extent of his Powers

The judicial power which the moderator enjoys is ordinary in nature since it is attached to an office by law, and vicarious in so far as its exercise is in the name of the assembly. In addition to the rights and obligations conferred upon the moderator by the common law, the decree establishing the tribunal may further clarify his role by the grant of other powers. Thus, for example, the Zimbabwe decree departed from general practice by reserving to the moderator of each first instance tribunal, and not to the assembly, the appointment of tribunal personnel.

#### b. The Responsibilities of the Moderator

Apart from what is provided in the Code of Canon law concerning the juridical position of the moderator, the only other source for determining the full extent of his rights and duties is the particular law of the tribunal.<sup>108</sup>

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<sup>108</sup> The particular law of tribunals established since the 1983 Code became effective would determine the procedures for the appointment of personnel; however, in courts established prior to November 27, 1983 the new canons are to be assessed in the light of juridical tradition.

Accordingly, among the responsibilities of the moderator are:

- 1) to appoint notaries; in some tribunals, however, the appointment of these officers may also be reserved to the assembly;
- 2) to receive the oath of office from all who assist in the tribunal; this task may be discharged by the judicial vicar of the tribunal or by any other delegate of the moderator;<sup>109</sup>
- 3) to suspend the judicial vicar, the associate judges, the promotor of injustice, the defender of the bond and their substitutes in cases of urgent necessity;<sup>110</sup>
- 4) to be involved, as a member of the assembly, in the appointment of permanent advocates;<sup>111</sup>
- 5) to establish norms for the payment of judicial expenses, honoraria for advocates, experts and interpreters, as well as norms for free legal aid and reduced expenses;<sup>112</sup>
- 6) to receive, as competent judge, when fulfilling this role directly, a libellus introducing a cause;<sup>113</sup>
- 7) to entrust more difficult cases or those of greater importance to a tribunal of three or five judges;<sup>114</sup>

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109 Cf. canon 1454.

110 The provisions in art. 8,§2 of "Normae pro Tribunalibus," could be followed since they present clear directive principles.

111 Cf. canon 1490.

112 Cf. canon 1649,§1. However, the intervention of the assembly may be required in the establishment of such norms (cf. supra, pp. 156-158).

113 Cf. canon 1502.

114 Cf. canon 1425,§2.

- 8) to commit formal matrimonial nullity cases to a sole clerical judge in first instance, under determined conditions and with the permission of the episcopal conference;<sup>115</sup>
- 9) to execute the judgment of the first instance tribunal, as moderator of that court, either personally or through another;<sup>116</sup>
- 10) to receive appeals against sentences in both formal cases (contentious and criminal) and informal matrimonial nullity cases as judge of second instance;<sup>117</sup>
- 11) to submit to the Apostolic Signatura, the annual and quinquennial reports on the status and activity of the tribunal.<sup>118</sup>

As was the case with the assembly, although the role of the moderator is mainly administrative, he may exercise a judicial role and conduct the affairs of the tribunal personally. It would, however, again be more practical if he were to be entirely detached from the judicial process.

In virtue of the particular norms granted to interdiocesan tribunals until the new Code became effective, and of article 4 of the general norms, the office of moderator derived automatically from the law itself. Now, the very act of designation by the assembly confers upon the one chosen the office of moderator.

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115 Cf. canon 1425,§4.

116 Cf. canon 1653.

117 Cf. canons 1628 and 1687.

118 Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, "Litterae Circulares ad Praesides Conferentiarum Episcopaliū de Tribunalium Ecclesiasticorum statu et activitate," December 28, 1970, in AAS, 63 (1971), art. 6, p. 482.

#### iv. The Supreme Tribunal of the Apostolic Signatura

The reorganisation of the Apostolic Signatura was effected by articles 104-108 of the Apostolic Constitution, Regimini Ecclesiae universae, of August 15, 1967.<sup>119</sup> In terms of article 105, the First Section of the Apostolic Signatura assumed responsibility for the Office of Vigilance for all ecclesiastical tribunals, for the extension of their competence, and for the establishment of regional and interregional courts.<sup>120</sup>

With respect to the role of the Apostolic Signatura, canon 1445,§3 now provides:

This Supreme Tribunal is also competent:

- 1° to have vigilance over the proper administration of justice, and, should the need arise, to discipline advocates and procurators;
- 2° to extend the competence of tribunals;
- 3° to promote and approve the establishment of the tribunals referred to in canons 1423 and 1439.<sup>121</sup>

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<sup>119</sup> Cf. PAUL VI, Apostolic Constitution, "Regimini Ecclesiae universae," August 15, 1967, in AAS, 59 (1967), pp. 885-938, which became effective on March 1, 1968.

<sup>120</sup> The Office of Vigilance of the S.C. of the Sacraments, created on May 4, 1939, had been responsible for the supervision solely of matrimonial tribunals.

<sup>121</sup> Canon 1445,§3:"Supremi huius Tribunalis praeterea est:  
 1° rectae administrationi iustitiae invigilare et in advocatos vel procuratores, si opus est, animadvertere;  
 2° tribunalium competentiam prorogare;  
 3° promovere et approbare erectionem tribunalium, de quibus in cann. 1423 et 1439."

While canon 1445,§3° states that the Apostolic Signatura is competent to promote and approve the establishment of the tribunals mentioned in canons 1423 and 1439, this was not the original formulation of this section of the canon. The corresponding canon in the 1976 Schema, canon 45,§2,3), stipulated that it was the responsibility of the Apostolic Signatura "to provide for the establishment of the tribunals mentioned in canons 22 and 40."<sup>122</sup>

Canon 1397,§3,3) of the 1980 Schema, however, presented a modified formulation to the effect that the Apostolic Signatura was "to attend to the establishment of the tribunals mentioned in canons 1375 and 1392."<sup>123</sup> This formulation also lacked clarity and, as it was observed by a member of the Commission, "[...] a certain confusion is introduced between erection and constitution."<sup>124</sup> With respect to this comment, the Relatio of 1981 stated:

The observation has some foundation. The Apostolic Signatura does not of itself establish tribunals, and not in the case of canon 1375; it merely approves the erection or constitution. In order that the matter be clearer, the canon is amended as follows:"§3,3): it promotes and approves the establishment [...]."<sup>125</sup>

<sup>122</sup> Cf. canon 45,§2,3) of CIC Schema 1976:"de tribunalibus, de quibus in cann. 22 et 40, erigendis tractare."

<sup>123</sup> Cf. canon 1397,§3,3) of CIC Schema 1980:"curare erectionem tribunalium de quibus in cann. 1375 et 1392."

<sup>124</sup> "[...] quaedam confusio datur inter erectionem et constitutionem." Cf. C. ZAGGIA, loc. cit., p. 142.

<sup>125</sup> Cf. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Relatio complectens synthesim animadversionum ab Em.issis atque Ex. mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et consultoribus datis, p. 314:"Animadversio aliquod fundamentum habet. Signatura Apostolica per se non erigit tribunalia, neque in casu Can. 1375; tantum approbat erectionem seu constitutionem. Ut res clarius pateat, canon ita corrigitur: '§3,3): promovet et approbat erectionem [...].'"

This wording appeared unaltered in canon 1445,§3,3° of the 1982 Schema and, as has been noted, also in canon 1445,§3,3° of the new Code.

What is affirmed in canon 1445,§3,3° reflects a substantial change from what had been provided both in the Apostolic Constitution, Regimini Ecclesiae universae, and in the general norms for interdiocesan tribunals, concerning the role of the Apostolic Signatura in the establishment of interdiocesan courts. While article 105 of Regimini Ecclesiae universae stated that the First Section of the Apostolic Signatura "provides for the establishment of regional and interregional tribunals,"<sup>126</sup> article 1,§1 of the general norms asserted that the establishment of interdiocesan tribunals could be either at the request of the bishops concerned, "or also, if the case so warrants, at the decision of the said Supreme Tribunal of the Apostolic Signatura."<sup>127</sup>

This change, reflecting the principle of subsidiarity, is significant for it emphasises the prominence accorded to diocesan bishops in the free exercise of episcopal power where "plures dioecesani Episcopi [...] possunt concordēs [...] unicūm constituere in suis dioecesibus tribunal primae instantiae." No longer is provision made for the imposition of such tribunals at the decision of the Apostolic Signatura.<sup>128</sup>

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126 Cf. PAUL VI, Apostolic Constitution, "Regimini Ecclesiae universae," August 15, 1967, in AAS, 59 (1967), art. 105, p. 921:"[...] tribunalium regionalium vel interregionalium erectionem curat [...]."

127 Cf. "Normae pro Tribunalibus," art. 1,§1, pp. 486-487:"[...] sive etiam, si casus ferat, ad eiusdem Supremi Tribunalis Signaturae Apostolicae decisionem."

128 Cf. C. ZAGGIA, loc. cit., p. 144.

The supervisory role of the Office of Vigilance is exercised essentially through the information received in the annual and quinquennial reports which, in terms of canon 1423,§1, are to be submitted by tribunal moderators.<sup>129</sup> In the annual report, details are to be provided concerning all cases concluded, whether by formal or summary process, as well as details of those pending.<sup>130</sup> The Apostolic Signatura is also to be informed as to whether the tribunal officers have been properly appointed, collegiate procedures used and a list of judicial fees drawn up. In addition, information concerning the particular grounds upon which nullity of marriage had been declared in both formal and informal cases is to be included in the report.

The report to be submitted every five years is to cover seven specific points, including whether the diocese has its own first instance tribunal, or whether, with respect to matrimonial cases, use is being made of an interdiocesan court, the names and academic qualifications of tribunal officers, details of fees paid, together with details of remuneration for tribunal officers, and whether provision has been made for legal assistance to the poor.<sup>131</sup> Should any irregularities be observed in the reports, remedies would be proposed by the Apostolic Signatura after further investigation.

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<sup>129</sup> Cf. canon 1445,§3,1°.

<sup>130</sup> Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, "Litterae Circulares ad Praesides Conferentiarum Episcopaliū de Tribunalium Ecclesiasticorum statu et activitate," December 28, 1970, in AAS, 63 (1971), arts. 8 and 9, pp. 482-483.

<sup>131</sup> Cf. ibid., art. 11, p. 484.

Where interdiocesan courts had originally been established with competence solely for cases of matrimonial nullity, the Apostolic Signatura may now, at the request of the bishops concerned, extend the competence of these tribunals to universal causes.<sup>132</sup>

The intervention of the Apostolic Signatura is also required should a bishop, whose diocese is not subject to an interdiocesan court, request the moderator of that tribunal to process a particular case. In so far as the tribunal is incompetent to decide such a case in virtue of a lack of territorial jurisdiction, a petition for prorogation of competence should be submitted to the Apostolic Signatura.<sup>133</sup> It would also be possible, however, for the bishop to appoint the personnel of the interdiocesan tribunal to his own court, so that they could process the case on his behalf.

### Conclusion

Essentially, interdiocesan tribunals are governed by the same body of law as diocesan ones, except in those areas where the quasi-collegial nature of the tribunal is involved. Indeed, the new law stresses this aspect of the nature of the

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<sup>132</sup> Cf. canon 1445, §3, 2°.

<sup>133</sup> Cf. - SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Rescript (Prot. N. 14.334/82 V.T.), June 8, 1983: "[...] vi art. 105 Constitutionis Apostolicae "Regimini Ecclesiae Universae" decernit:

1. Prorogatur ad aliud annum - seu usque ad diem 30 maii 1984 - competentia Tribunalis Praetoriensis ad pertractandas et definiendas causas Archidioecesis Hararensis in Zimbabwe.
2. Exc. mus Moderator Tribunalis Hararensis provideat ut, saltem intra terminum de quo supra, nominetur Officialis."

court more forcibly in providing that the bishops who constitute the assembly may elect to govern the court directly, rather than through a moderator.

The control of the assembly over the tribunal, even where a moderator has been designated, appears somewhat strengthened since, unlike in the former law, the assembly as a body may determine which bishop is to take charge of the common tribunal and for what length of time. This possibility, while emphasising the amplified role of the assembly, seems to have as its ultimate objective, a greater participation of all the members of the assembly in the affairs of the tribunal.

Having studied the provisions of the 1983 Code on the establishment of interdiocesan courts, we must now consider, in the light of the new law, the officers who constitute the tribunals, together with their roles, both in its seat and in the instructory courts.

## CHAPTER V

### THE INTERNAL ORGANISATION OF INTERDIOCESAN TRIBUNALS ACCORDING TO THE 1983 CODE

An interdiocesan tribunal does not differ radically from an ordinary diocesan one with respect to its constitution and internal organisation.<sup>1</sup> In so far as the general law relative to the organisation of ordinary diocesan tribunals applies equally to interdiocesan ones in both instances, it follows that such tribunals comprise officers similar to those found in diocesan courts. The roles of the judicial vicar, associate judges, promotor of justice, defender of the bond and notaries in an interdiocesan tribunal are discussed below.

#### A. Personnel of the Interdiocesan Tribunal

##### i. The Judicial Vicar

As was the case in a diocesan court, the appointment of a judicial vicar is mandatory in an interdiocesan one, since it is essentially through him that the judicial process will be discharged.<sup>2</sup> Hence, there is the very serious

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<sup>1</sup> Cf. F. ROBERTI, "Annotationes ad motu proprio d. 8 dec. 1938," in Apollinaris, 12 (1939), p. 23, art. III: "Constitutio horum tribunalium a ceteris non differt; ideo iisdem constabunt officiis quibus tribunalia dioecesana; atque eadem erunt simul tribunalia appellationis, nimirum ut accidit in tribunalibus dioecesanis;" A. DA SANT' ELIA a PIANISI, I tribunali ecclesiastici regionali per le cause di nullità matrimoniale in Italia, p. 18.

<sup>2</sup> The choice of the term "judicial vicar," proposed in canon 19 of CIC Schema 1976 to replace "officialis," provoked much discussion when the special coetus on procedural law met on April 7, 1978. The consultors finally agreed to include both "judicial vicar" and "officialis" in the new law; cf. Communicationes, 10 (1978), pp. 229-230. Canon 1420,<sup>51</sup> reflects this decision: "Quilibet Episcopus

responsibility of selecting a suitable and well-qualified judicial vicar who, as Pope Pius XII has declared, "is, as it were, the personification of justice."<sup>3</sup>

#### a. Qualifications for Appointment

The qualifications required for the office of judicial vicar are prescribed in canon 1420,§4, which states that the candidate should be a priest of good repute, at least thirty years of age, and possess a doctorate or at least a licentiate in Canon Law.<sup>4</sup> The appointment, which must be for a specified period,<sup>5</sup> is generally to be made in the respective assembly of bishops by an

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diocesanus tenetur Vicarium iudicalem seu Officium constituere cum potestate ordinaria iudicandi, a Vicario generali distinctum, nisi parvitas dioecesis aut paucitas causarum aliud suadeat." Prior to the 1917 Code, the officialis was regarded as an Ordinarius in as much as his role was bound up with the administrative function in a diocese (cf. S.C. OF THE HOLY OFFICE, Decree, April 20, 1898, in Fontes, IV, n. 1198). Since the 1917 Code, however, that an officialis could no longer be considered an Ordinarius was evident from the provisions of canons 198,§1 and 1946,§2 of CIC 1917. The fact that he exercised ordinary jurisdiction, "cum potestate ordinaria iudicandi," in no way constituted him an Ordinarius. Cf. W.J. Doheny, Canonical Procedure in Matrimonial Cases, I, p. 58. While the role of the judicial vicar as vicar of the bishop is enhanced in the new law, his juridical position, although more stable as regards tenure of office, appears to be essentially the same as in the 1917 Code. Cf. canon 134,§1 of CIC 1983 which corresponds to canon 198,§1 of CIC 1917. Throughout this study, whenever reference is made to the judicial vicar, the associate judicial vicar is also to be understood.

<sup>3</sup> Cf. PIUS XII, Address to the Sacred Roman Rota, "Matrimonial Trials in Relation to the Ends of the Church," October 2, 1944, in AAS, 36 (1944), p. 283.

<sup>4</sup> Canon 1573,§4 of CIC 1917, after prescribing that the officialis should possess a doctorate in Canon Law, added the phrase "vel ceteroqui periti." Since this phrase is not repeated in canon 1420,§4 of CIC 1983, an indult from the Apostolic Signatura is required for liceity of the appointment of a candidate not in possession of the required academic qualification.

<sup>5</sup> Cf. canon 1422 which provides that a definite period is to be specified for liceity of the appointment. Moreover, for liceity, the appointment to any ecclesiastical office must be in writing (cf. canon 156).

absolute majority of votes, unless something else has been provided in the particular law of the tribunal.<sup>6</sup>

Although "priesthood" is prescribed for this office, since canon 1420,<sup>54</sup> does not explicitly state that it is for validity, an argument could be made that the assembly, on account of a shortage of priests, could appoint a deacon as judicial vicar. While such an appointment would be illicit, as would be the appointment of a priest who lacks the required academic qualifications, acts of jurisdiction performed by the deacon in this role would be valid. In some cases, an Apostolic indult could be requested to ensure liceity.

That a deacon has the requisite jurisdictional capacity for the office of judicial vicar seems clear from the reasoning of G. Ghirlanda. Having affirmed that "munera laicalia" are essentially different from "munera clericalia," he declares that strictly clerical offices require for their exercise, the power of orders or the power of ecclesiastical governance connected with sacred orders.<sup>7</sup> In the latter case, the sacred order is a condition for the conferment of clerical offices and the transmission of the power of governance for their fulfillment. Ghirlanda then concludes:

This raises a question concerning deacons. A deacon is a cleric since he has received the first degree of the sacrament of orders, which, however, is not directed towards priesthood, but towards service.

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<sup>6</sup> Cf. supra, chapter IV, pp. 143-144. Since they provide clear directives, the prescriptions of art. 5,§1 of "Normae pro Tribunalibus," should be observed.

<sup>7</sup> Cf. G. GHIRLANDA, "De potestate iuxta schemata a Commissione Codici recognoscendo proposita," in Per., 70 (1981), p. 408.

As regards deacons, we may most surely say this about clerical and sacramental offices, but not about priestly offices, because a deacon performs solemnly even what a lay person may do in a non-solemn way. But this question does not touch upon the discipline surrounding the capacity for the reception of the power of jurisdiction: indeed, it treats of a theological and not a practical question.<sup>8</sup>

On the basis of Ghirlanda's reasoning, it appears that since the office of judicial vicar cannot be considered a "priestly" office in the strict sense, the priesthood, as such, should not be viewed as constitutive of the office of judicial vicar. What, however, is constitutive of this office would seem rather to be the capacity for the exercise of jurisdiction. Without doubt, a deacon has the necessary capacity for judicial jurisdiction since canon 129,§1 states that those in sacred orders are capable of the power of governance,<sup>9</sup> and canon 274,§1 states that only clerics can obtain offices requiring the power of orders or the power of governance.<sup>10</sup>

Canon 149,§2, on the provision of an ecclesiastical office, clarifies that the appointment to an office of one who lacks the requisite qualities is invalid only if the qualities are expressly required for validity by universal or particular

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<sup>8</sup> Cf. ibid.: "Hic exurgere potest quaestio de diaconis. Diaconus est clericus, quia primum gradum sacramenti ordinis recepit, qui tamen ordinatur non ad sacerdotium, sed ad ministerium. "Relate ad diaconos certo certius loqui possumus de muneribus clericalibus et sacramentalibus sed non de muneribus sacerdotalibus, quia diaconus sollemniter facit id quod etiam laicus modo non sollemni facere potest. Sed quaestio haec non tangit disciplinam circa capacitatem ad potestatem iurisdictionis recipiendam: agitur vero de quaestione theologica, non practica." Cf. also J. BEYER, "De diaconatu animadversiones," in Per., 69 (1980), pp. 441-460.

<sup>9</sup> Cf. infra, footnote 50.

<sup>10</sup> Canon 274,§1: "Soli clerici obtinere possunt officia ad quorum exercitium requiritur potestas ordinis aut potestas regiminis ecclesiastici."

law.<sup>11</sup> On the basis of what is affirmed in this canon, it appears that since canon 1420,§4 does not expressly state that priesthood is required for the validity of an appointment as judicial vicar, the appointment of a deacon to this office would be valid. However, canon 149,§2 does provide that such an appointment, though valid, may be rescinded by a decree of the competent authority or by the judgment of an administrative tribunal. Until such rescission, it appears that acts performed by a deacon in the role of judicial vicar would be valid.

Canon 833,5° requires that a judicial vicar make a profession of faith according to the formula approved by the Apostolic See, before either the moderator of the tribunal or his delegate. It would seem that the profession should be made prior to the exercise of his office, although the canon is silent on this point. Moreover, canon 1454 prescribes that he take an oath of office.

#### b. The Role of the Judicial Vicar

As far as possible, the judicial vicar should preside over the collegiate tribunal,<sup>12</sup> and in constituting a turnus, it is his task to assign judges for individual cases by rotation, unless the moderator has determined otherwise.<sup>13</sup>

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<sup>11</sup> Canon 149,§2: "Provisio officii ecclesiastici facta illi qui caret qualitatibus requisitis, irrita tantum est, si qualitates iure universali vel particulari aut lege foundationis ad validitatem provisionis expresse exigantur; secus valida est, sed rescindi potest per decretum auctoritatis competentis aut per sententiam tribunalis administrativi."

<sup>12</sup> Cf. canon 1426,§2. This canon mitigates ("quatenus fieri potest") the strictness of canon 1577,§2 of CIC 1917 which prescribed that either the officialis or the vice-officialis was to preside over the collegiate tribunal for liceity.

<sup>13</sup> Cf. canon 1425,§3. Without a special mandate, however, the judicial vicar may not appoint judges.

In instances where the judicial vicar fulfills the role of presiding judge, he may designate auditors to instruct particular cases; moreover, at the meeting to pronounce sentence, he is to assign one of the judges as relator or ponens.<sup>14</sup>

Where a party alleges that a judge has a personal interest in the matter to be decided, and that judge does not refrain from exercising his office in the case, the judicial vicar is to investigate the objection.<sup>15</sup> The same would apply if objections were raised against the promotor of justice, the defender of the bond or any other officer.

In addition, the judgment in "documentary processes" is entrusted to the judicial vicar as ordinary judge or to a judge designated by him.<sup>16</sup> In terms of such a process, a marriage may be declared invalid, omitting most of the formalities of the ordinary procedure, on the basis of documents that are certain and not open to contradiction or exception. Depending upon the decree of establishment of the court, responsibility for this procedure may fall within the exclusive competence of the interdiocesan tribunal, or be exercised in both the interdiocesan and diocesan courts of the particular territory.

Furthermore, as already mentioned, the judicial vicar could also be granted special mandates to enable him to accomplish specific functions, not assigned to him in virtue of his appointment. Among such special mandates, we could mention:

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14 Cf. canon 1429.

15 Cf. canon 1449.

16 Cf. canons 1686-1688.

- 1) to appoint for all or only for individual cases, associate judges, promoters of justice, defenders of the bond, notaries and their substitutes;
- 2) to receive the oath of office from all who assist in the court;
- 3) to suspend, in cases of urgent necessity, associate judges, promoters of justice, defenders of the bond and their substitutes, leaving their removal to the assembly or to the moderator, as the case may be;
- 4) to remove any of the above from office for a legitimate and serious reason; such a mandate, however, would seem to be contrary to the spirit of the law;
- 5) to remove notaries;
- 6) to appoint permanent advocates to the tribunal;
- 7) to determine the remuneration for judges and other officers;
- 8) to establish a fund for gratuitous or semi-gratuitous legal assistance;
- 9) to establish norms for the payment of judicial expenses, honoraria for advocates, experts and interpreters, as well as for free legal aid and reduced expenses;
- 10) to determine the proportion in which each diocese of the territory shall assist the tribunal with respect to personnel and financial contributions;
- 11) to entrust more difficult cases, or those of greater importance to a college of three or five judges;
- 12) to commit formal matrimonial nullity cases in first instance to a sole clerical judge, under determined conditions and with the permission of the episcopal conference;
- 13) to execute judgments of the first instance tribunal;
- 14) to submit to the Apostolic Signatura, the annual and quinquennial reports on the status and activity of the court.

The law also provides for associate judicial vicars.<sup>17</sup> Since no restriction is placed upon the number who may be appointed, it seems expedient that an instructory tribunal under the direction of an associate judicial vicar be erected in every diocese subject to the interdiocesan tribunal. Such an arrangement would facilitate the more expeditious handling of cases submitted to the court, since the associate judicial vicar would accept and instruct cases locally. Generally, such an associate judicial vicar, while a member of the interdiocesan tribunal, could also act as judicial vicar in the local diocesan court. The two tribunals, however, are juridically distinct.<sup>18</sup> It must be stressed, however, that the instructory tribunals or "branch offices" referred to above are optional, to be distinguished from the "mandated" ones provided for in decrees establishing courts after March 25, 1971.<sup>19</sup>

### c. The Nature of his Powers

The judicial and, sometimes, executive jurisdiction which the judicial vicar exercises is ordinary<sup>20</sup> since it is attached to an office by law,<sup>21</sup> and

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17 Cf. canon 1420,§3.

18 Cf. F. ROBERTI, *loc. cit.*, p. 23: "Quaeri potest utrum in sedibus tribunalium regionalium servanda sint distincta tribunalia dioecesana. De iure certe semper distincta manent, sicut tribunal generale natura est distinctum a tribunali speciali; fieri autem potest ut utrumque munus, et ordinarium et speciale, de facto in iisdem personis cumuletur; sed haec munerum cumulatio minus expedit, et nescio an futurae regulae S. Congregationis de Sacramentis talem cumulationem sint permissurae." A system of instructory tribunals has been in operation throughout parts of Canada for some years.

19 Cf. *supra*, chapter III, pp. 126-127, for a discussion on mandatory instructory tribunals in Zimbabwe.

20 Cf. canon 1420,§1.

21 Cf. canon 131,§1.

vicarious in that its exercise is ultimately in the name of the assembly, even where the assembly has designated a moderator. As in the case of a diocesan tribunal, the moderator may restrict the jurisdiction of the judicial vicar by the reservation of certain cases.<sup>22</sup> This reservation, however, should not be so extensive as to alter the character of the office of judicial vicar, or divest him in reality of his ordinary jurisdiction.<sup>23</sup>

#### d. Procedures for Removal

Generally, the judicial vicar may be removed from office only by an absolute majority of votes of the assembly and for a legitimate and serious reason.<sup>24</sup> The moderator, however, in a case of urgent necessity, may suspend the judicial vicar, but must later provide for his removal or substitution by the assembly.<sup>25</sup> The office of judicial vicar is thus more stable in the new law than it was under the 1917 Code which provided that the officialis could be removed from office "ad nutum episcopi" for any reasonable cause.<sup>26</sup> Since his appointment in both diocesan and interdiocesan tribunals must be for a specified period, the judicial vicar is accorded security of tenure. Indeed, as is the case in most interdiocesan tribunals, the involvement of the assembly in both the appointment


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22 Cf. canon 1420,§2.

23 Cf. P. NOVAL, Commentarium Codicis Iuris Canonici: de processibus, I, n. 114, p. 60.

24 Cf. supra, chapter IV, pp. 144-145; canon 1422 on the judicial vicar, associate judicial vicar and associate judges states: "[...] nec removeri possunt nisi ex legitima gravique causa."

25 Cf. "Normae pro Tribunalibus," art. 8,§2, p. 489.

26 Cf. canon 1573,§5 of CIC 1917. 

and removal of the judicial vicar, while stressing the "collegial" nature of the tribunal, also provides some further measure of security.

## ii. The Associate Judges

In discharging his role, the judicial vicar is assisted by associate judges. Canon 1421,§1, which applies equally to interdiocesan courts, prescribes that in each diocese, the bishop is to appoint diocesan judges who are to be clerics. Since the canon mentions "clerics" and not "priests," it follows that a deacon may be appointed an associate judge.

The second paragraph of canon 1421 generally repeats the faculty granted by article V,§1 of the Motu Proprio, Causas matrimoniales.<sup>27</sup> In virtue of this canon, with the permission of the episcopal conference, lay persons may be appointed as judges and, where necessary, one may be chosen to constitute a college with two clerical judges.

As prerequisites for appointment, associate judges, both cleric and lay, must be of good repute and possess a doctorate or at least a licentiate in Canon Law.<sup>28</sup> The procedures for appointment as well as removal of associate judges

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<sup>27</sup> Cf. PAUL VI, Motu Proprio, "Causas matrimoniales," March 28, 1971, in AAS, 63 (1971), art. V,§1, p. 443: "Si nec in Tribunali dioecesano nec in Tribunali regionali, ubi erectum sit, collegium trium iudicum clericorum efformari possit, Conferentia Episcopalis facultate instruitur permittendi in primo et secundo gradu constitutionem collegii ex duobus clericis et uno viro laico." While art. V,§1 of "Causas matrimoniales" and canon 1372,§2 of CIC Schema 1980 both restricted the constitution of a collegiate tribunal to two clerics and one lay man, both canons 1421,§2 of CIC Schema 1982 and 1421,§2 of CIC 1983 extended this possibility to all lay persons.

<sup>28</sup> Cf. canon 1421,§3. With respect to the requirements for the appointment of synodal and pro-synodal judges, canon 1574,§1 of CIC 1917 made

would generally be determined in the particular law of tribunals established after the coming into force of the new Code. However, it would seem that the relevant procedures in tribunals established prior to 1983 are now governed by the provisions of the 1983 Code of Canon Law, with the intervention of the assembly where this had constituted the juridical tradition of the tribunal.<sup>29</sup>

For liceity, a definite period must also be specified in the appointment.<sup>30</sup> Furthermore, prior to the exercise of their office, associate judges must take an oath of office.<sup>31</sup> While article 7 of the general norms had provided that the oath be taken before the moderator of the tribunal or his delegate, the new law is more flexible, since it does not specify before whom the oath is to be taken.

An associate judge, like the judicial vicar, has security of tenure for his period of appointment and may not be removed from office, "except for a legitimate and grave reason,"<sup>32</sup> after the formalities prescribed in the particular law of the tribunal or, as the case may be, in the Code of Canon Law, interpreted in the light of canonical tradition, have been observed.<sup>33</sup>

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no reference to academic qualifications; merely providing that such judges be "presbyteri probatae vitae et in iure canonico periti." Since the coming into effect of the 1983 Code, however, an indult is necessary for the licit appointment as associate judge of any candidate not in possession of the required academic qualifications (cf. supra, footnote 4).

29 Cf. supra, chapter IV, pp. 143-145.

30 Cf. canon 1422.

31 Cf. canon 1454.

32 Cf. canon 1422.

33 Cf. "Normae pro Tribunalibus," art. 8, p. 489.

A serious duty entrusted by canon 1446,<sup>31</sup> to all ecclesiastical judges, flows from an axiom of Canon Law which states that "all Christian faithful - and especially the bishops - must scrupulously ensure that, with due regard for justice, disputes among the People of God are avoided, and that, as soon as possible, they are settled in a peaceful manner."<sup>34</sup> The second paragraph of this canon instructs the judge concerned, even in the early stages of litigation, or indeed at any other time that he might foresee the possibility of a successful resolution of the dispute, to encourage and assist the parties to seek an equitable solution through discussion ("communi consilio") and, if necessary, by way of mediation. Should the dispute concern the private good of the parties, the judge is to discern whether an agreement or a judgment by an arbitrator might resolve the controversy (§3).

The spirit of canon 1446 is applied specifically to the matrimonial nullity process in canon 1676 which urges the judge, before accepting a case, to use pastoral means to persuade the spouses; whenever there appears to be hope of success, to validate their marriage, if this is possible, and resume conjugal life.<sup>35</sup>

#### a. Ordinary or Delegated Power

Unlike the ambiguous situation that existed under the 1917 Code where noted commentators were in disagreement over the nature of the power exercised by synodal and pro-synodal judges, the wording of canon 1422 leaves no doubt as

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<sup>34</sup> Cf. B. FRANCK, Vers un Nouveau Droit Canonique?, p. 180; cf. also supra, chapter I, pp. 5-6, for a discussion on the episcopalis audientia.

<sup>35</sup> Cf. also canon 1695 on cases involving the separation of spouses.

to the nature of the jurisdiction enjoyed by associate judges.<sup>36</sup> Canon 1422 asserts that:

The judicial vicar, the associate judicial vicars and the other judges are appointed for a specified period of time, without prejudice to the provision of canon 1420,§5. They cannot be removed from office except for a lawful and grave reason.<sup>37</sup>

and canon 1420,§5 stipulates that:

When the see is vacant, they do not cease from office, nor can they be removed by the diocesan administrator. On the coming of the new bishop, however, they need to be confirmed in office.<sup>38</sup>

These two canons, read in conjunction with canon 131,§1 which states that "ordinary power of governance is that which by virtue of the law itself is attached to a given office,"<sup>39</sup> and canon 145,§1 which declares that "an ecclesiastical

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36 Cf. G. GRAHAM, *Synodal and Pro-synodal Judges*, pp. 74-83. In his treatment of the nature of the power exercised by synodal judges, Graham cites commentators such as Vermeersch, Wernz-Vidal and Cappello, and lists their arguments in favour of the delegated jurisdiction of such judges. Then, citing Coronata and Roberti, he presents their reasons for adducing the ordinary power of synodal judges. Graham, himself, then concludes: "[...] for these reasons, it is the opinion of this writer that synodal and pro-synodal judges have ordinary power. They form the ordinary tribunal of the bishop of the diocese, and so their power is vicarious ordinary power. From this point of view, it would seem evident that the words of canon 1574 (of CIC 1917), "potestate ab Episcopo delegata," are misleading, and should be deleted from the canon in any future revision of the Code" (p. 82).

37 Canon 1422: "Vicarius iudicialis, Vicarii iudiciales adiuncti et ceteri iudices nominantur ad definitum tempus, firmo praescripto can. 1420,§5, nec removeri possunt nisi ex legitima gravique causa."

38 Canon 1420,§5: "Ipsi, sede vacante, a munere non cessant nec ab Administratore dioecesano amoveri possunt: adveniente autem novo Episcopo, indigent confirmazione."

39 Canon 131,§1: "Potestas regiminis ordinaria ea est, quae ipso iure alicui officio adnectitur; delegata quae ipsi personae non mediante officio conceditur."

office is any function which by divine or ecclesiastical disposition is established in a stable manner to further a spiritual purpose," clarify a long-standing dispute among canonists regarding the nature of the power exercised by associate judges.<sup>40</sup> That such power is ordinary accords with the fact that the judicial vicar exercises ordinary jurisdiction,<sup>41</sup> and that the college renders its sentence as a unit.<sup>42</sup> It would seem incomprehensible for one member of the college to enjoy ordinary power while the power of the others was only delegated.

Although canon 135,§3 on the power of governance provides that "judicial power which is possessed by judges and judicial colleges [...] cannot be delegated, except for the performance of acts preparatory to some decree or judgment,"<sup>43</sup> this prescription is not absolute. It does not apply, for instance, to the diocesan bishop who, as judge of first or second instance, whether in his own tribunal or as moderator of the interdiocesan one, may delegate his judicial power for the handling of any case for which he is competent.<sup>44</sup>

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40 Canon 145,§1: "Officium ecclesiasticum est quodlibet munus ordinatione sive divina sive ecclesiastica stabiliter constitutum in finem spiritualem exercendum."

41 Cf. canon 1420,§1.

42 Cf. canon 1426,§1.

43 Canon 135,§3: "Potestas iudicialis, qua gaudent iudices aut collegia iudicialia, exercenda est modo iure praescripto, et delegari nequit, nisi ad actus cuius decreto aut sententiae praeparatorios perficiendos."

44 Cf. F. URRUTIA, De normis generalibus, adnotationes in Codicem: Liber I, pp. 92-93. In his commentary on canon 135, Urrutia writes: "Episcopus dioecesanus potestatem iudicalem delegare potest."

The restriction in canon 135,§3 applies to the judicial vicar, associate judges and judicial colleges. Accordingly, even where the exercise of judicial power is executive in character, judges are bound by this prescription.<sup>45</sup> It would be possible, however, for a diocesan bishop in his own court or a moderator in an interdiocesan one, to empower the judicial vicar or an associate judge, by special mandate, to appoint other judges to study specific cases.

In restricting the capacity of the judicial vicar to delegate his power, canon 135,§3 has also resolved a point of dissent that arose from the 1917 Code.<sup>46</sup> Some commentators, following the general principle that one who possessed ordinary jurisdiction could delegate it in whole or in part, unless the law expressly provided otherwise, held that the officialis could delegate his judicial jurisdiction.<sup>47</sup> Other commentators, however, maintained that the special nature of the office and the qualities required, together with the fact that any number of vice-officiales could be appointed, seemed to indicate that the intent of the law was that there should be no delegation of powers where jurisdiction had been granted industria personae.<sup>48</sup>

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<sup>45</sup> Ibid., pp. 92-93: "Quoad iudicalem, iudices etiam collegiales:  
1) Servare tenentur iuris praescripta, etiam ex characterem executivo potestatis iudicialis; nequeunt delegare ("ex iuris praescriptio,") nisi ad actus praeparatorios (cf. c. 43)."

<sup>46</sup> Cf. W. DOHENY, op. cit., p. 60.

<sup>47</sup> Cf. canon 199,§1 of CIC 1917.

<sup>48</sup> Cf. F. ROBERTI, De processibus, I, pp. 252-253, n. 111: "At quamvis in Codice non habeatur expressa prohibitio, officium non potest aliis delegari, quia datur industria personae (c. 199,§2), nisi agatur de articulo non iurisdictionali (c. 199,§4)."

### b. Lay Judges - a Restricted Competence?

Since the judicial power exercised by all ecclesiastical judges is ordinary and vicarious in nature, the question could justifiably be posed as to the reasons for the obvious restrictions of canon 1421,<sup>§2</sup> upon lay persons in the exercise of their judicial role. Perhaps some light could be brought to bear upon this apparent inconsistency through a study of canon 1421,<sup>§2</sup>, in conjunction with canon 129 on the power of governance in the Church.<sup>49</sup> Canon 129 declares that:

§1 Those who are in sacred orders are, in accordance with the provisions of the law, capable of the power of governance, which belongs to the Church by divine institution. This power is also called the power of jurisdiction.

§2 Lay members of the Christian faithful may co-operate in the exercise of this same power in accord with the norm of law.<sup>50</sup>

One of the principal issues raised by canon 129,<sup>§2</sup> concerns the status of the laity in regard to the governing power of the Church.<sup>51</sup> The canon is

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49 Canon 1421,<sup>§2</sup>: "Episcoporum conferentia permittere potest ut etiam laici iudices constituentur, e quibus, suadente necessitate, unus assumi potest ad collegium efformandum."

50 Canon 129: "§1 Potestatis regiminis, quae quidem ex divina institutione est in Ecclesia et etiam potestas iurisdictionis vocatur, ad normam praescriptorum iuris, habiles sunt qui ordine sacro sunt insigniti.

"§2 In exercitio eiusdem potestatis, christifideles laici ad normam iuris cooperari possunt."

51 It appears that canon 129 of CIC 1983 is more restrictive with respect to the exercise of jurisdiction by lay persons than canons 126 of CIC Schema 1980 and 129 of CIC Schema 1982 were. Although canons 126 and canon 129 of the respective Schemata permitted the exercise of "eam partem" of the power of governance which the supreme authority in the Church concedes "singulis pro causis," no mention was made of the element of co-operation ("cooperari possunt,") found in canon 129,<sup>§2</sup> of the new Code. It may thus be assumed that in the final revision process in 1982, this further restrictive element was introduced.

significant in that, after discussing in its first paragraph the exercise of the power of governance by those in sacred orders, it then assigns to members of the laity a restricted capacity for co-operation in jurisdiction in both the judicial and executive spheres. It is also significant that it contrasts the "habilitas" of the clergy for the exercise of the power of governance with the mere "co-operation" of the laity in the exercise of that power.

To what extent, then, has lay participation in the power of governance been recognised in the new law? To attempt to answer this question adequately, a study of the background to canon 129 is essential. Canon 129 which had a rather stormy history during the revision process underwent a number of drafts, and reflects a cautious moving away from the previously held positions. It is evident that the text, as it now stands, is not the last word on the matter.

While the 1917 Code of Canon Law made it clear that the laity had no share in the governing power of the Church,<sup>52</sup> the Second Vatican Council made it

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Even though certain cardinals at the October 1981 meeting of Code Commission proposed a fundamental objection against canon 126, as well as canons 244 (on clerical offices) and 1373,<sup>52</sup> (on lay judges) of CIC Schema 1980, the wording of canon 126 was not altered in the 1982 Schema. Had the amended text for canon 126, proposed at that meeting, been accepted, there would have been no possibility of lay participation in the power of governance: "Potestas regiminis, quae quidem ex divina institutione est in Ecclesia et etiam potestas iurisdictionis vocatur, ad normam praescriptorum iuris, habiles sunt qui ordine sacro sunt insigniti." Cf. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Relatio complectens synthesim animadversionum ab Em. mis atque Ex. mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et consultoribus datis, pp. 37-41; hereafter cited as Relatio; ID., Communicationes, 14 (1982), pp. 146-149.

<sup>52</sup> Canon 118 of CIC 1917 was most explicit in asserting that only clerics were capable of obtaining the power of jurisdiction, a power which canon 196 of CIC 1917 equated with the power of governing ("Potestas iurisdictionis seu regiminis.")

equally clear that lay persons do share actively in the total mission of the Church: teaching, sanctifying and governing.<sup>53</sup> Indeed, this active participation in the apostolate of the Church was described by the Council as the laity's "right," a right which flowed from "their union with Christ the Head."<sup>54</sup>

It is in this context of the divergent approaches to the role of the laity in the Church, that both the merit and the inadequacy of canon 129 should be understood and appreciated. The merit of the canon derives firstly from its position, together with the entire section De potestate regiminis, in Book I of the new Code.<sup>55</sup> The canons which treated of the power of jurisdiction in the 1917 Code were to be found in Book II in the section De clericis.<sup>56</sup> Their situation in this section of the Code was consistent with the view that all governing authority in the Church resided in the clergy alone. The relocation of the canons on the power of governance in the General Norms of Book I of the 1983 Code is a significant recognition of the teaching of the Council that all the People of God have a rightful share, according to their situation, in the threefold mission of the Church.

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<sup>53</sup> Cf. VATICAN COUNCIL II, Dogmatic Constitution, "Lumen gentium," November 21, 1964, in AAS, 57, (1965), art. 31, p. 37; ID., Decree, "Apostolicam actuositatem," November 18, 1965, in AAS, 58 (1966), art. 2, pp. 838-839.

<sup>54</sup> Cf. ID., "Apostolicam actuositatem," art. 3, §1 p. 839: "Laici officium et ius ad apostolatam obtinent ex ipsa sua cum Christo Capite unione."

<sup>55</sup> Book I, Title VIII, canons 129-144 of CIC 1983.

<sup>56</sup> Book II, Title V, canons 196-210 of CIC 1917.

Moreover, there is merit in that canon 129,<sup>52</sup> explicitly acknowledges that members of the faithful, not in sacred orders, may nonetheless "co-operate" in the exercise of the power of governance.

Yet, canon 129 appears to be somewhat inadequate from both ecclesiastical and canonical perspectives. It is evident that we are dealing with a compromise text. While recognising under certain conditions ("ad normam iuris cooperari") the exercise of governmental power by persons not in sacred orders, the canon restricts the capacity for such power to the ordained alone. Only those in sacred orders are habiles for the power of governance, though others may co-operate in its exercise. This canon produces, then, a juridical anomaly in permitting the exercise of the power of governance by those who are intrinsically incapable of possessing such power.<sup>57</sup>

With respect to the juridical position of lay judges, that they function in virtue of ordinary vicarious power has been established. Nevertheless, canon 1421,<sup>52</sup> obviously assigns to them a lesser role in the judicial process. The canon provides that, with the permission of the episcopal conference, lay persons may also be appointed judges, but that only where necessity suggests, may they constitute a collegiate tribunal with two clerical judges.<sup>58</sup> Accordingly, in terms

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<sup>57</sup> Cf. Relatio (ad Can. 126), p. 37: "Infelici modo distinctio inter clericos et laicos statuitur. Si laici sunt inhabiles, quomodo possunt illam potestatem exercere?"

<sup>58</sup> Art. 2,<sup>53</sup> of "Normae pro Tribunalibus" provided that where a regional tribunal is concerned, the assembly of bishops is the respective episcopal conference. Canon 1423,<sup>51</sup> however, authorises the assembly of bishops, with the approval of the Holy See, to take charge of such a tribunal directly. In such a case, where permission for the appointment of a lay judge to constitute a

of the general law, lay judges may not constitute a sole judge tribunal, whether for formal or informal cases.<sup>59</sup>

How is one then, to construe and reconcile the apparent anomaly in the distinction between the exercise of the power of governance by those in sacred orders (§1),<sup>60</sup> on the one hand, and by lay persons on the other (§2)?<sup>61</sup> What does "cooperari" mean in the context of this canon? Does it imply a two-tiered standard of jurisdiction, one whereby a cleric exercises his jurisdiction in an

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collegiate tribunal is to be sought, the anomalous situation of the assembly, i.e., the episcopal conference, having to approach the episcopal conference would be encountered. It appears, however, that only those members of the episcopal conference, who have contributed to the juridical existence of the tribunal through the voluntary transfer of part of their judicial power, constitute the assembly. Cf. supra, chapter IV, pp. 175-177.

59 However, cf. J. BEYER, "De natura potestatis regiminis seu iurisdictionis recte in Codice renovato enuntianda," in Per., 71 (1982), p. 99: "A fortiori unum laicum esse iudicum unicum, uti speciali facultate quibusdam in nationibus est concessum."

60 In his commentary on canon 129, F. URRUTIA maintains that canon 129,§1 seems to affirm that clerics exclusively are capable of the power of governance, and that the wording of canon 274,§1 (cf. supra, footnote 10) confirms this view. He continues that canon 129,§2 does not permit this exclusivity to be understood absolutely, since, in order that lay persons be able to "co-operate" in the exercise of "eiusdem potestatis," they necessarily ought to have the capacity for that power. Urrutia concludes that "the power of governance, therefore, appears to be reserved to clerics by ecclesiastical law, on account of the connection with the power of orders" (cf. op. cit., p. 89); G. GHIRLANDA, "De potestate iuxta schemata a Commissione Codici Recognoscendo proposita," in Per., 70 (1981), pp. 402-404; ID., "De laicis iuxta novum Codicem," in Per., 72 (1983), pp. 63-64.

61 The role of the diocesan oekonomus (canon 494 of CIC 1983) was cited as an example of the inconsistency of the new law at the October 1981 meeting of the Fathers of the Commission. The point was made that since the oekonomus had juridical stability ("ne amovetur nisi ob gravem causam,") this implied executive power ("bona dioecesis sub auctoritate Episcopi administrare") which could be exercised by a lay person. Cf. Relatio, p. 37; Communicationes, 14 (1982), p. 146. It would seem, however, that the role of the oekonomus does not, strictly speaking, involve the exercise of jurisdiction, but of administration.

individual capacity, and the other, whereby a lay person is enabled to exercise jurisdiction, but only in association with two clerics to form a college? In so far as clerical and lay judges enjoy ordinary jurisdiction, does this dissimilarity suggest that the quality of jurisdiction of a lay judge is so radically subordinate, that lay jurisdiction can only be exercised in the context of a collegiate tribunal to which canon 135,§3 attributes ordinary judicial power?

Is not this restriction somewhat reminiscent of the spirit of canon 118 of the 1917 Code of Canon Law where sacred orders were considered a prerequisite to the exercise of jurisdiction? Indeed, from a construction of canons 129, 274,§1 and 1421 of the 1983 Code, it appears that only those in sacred orders have the capacity for the power of governance, and that when lay judges are appointed, they exercise no jurisdiction until called upon to form a judicial college as a third member. It seems, then, that it is only their assignment to a turnus that would activate their jurisdiction.

The full implications of these questions are extensive for, if lay judges enjoy jurisdiction solely in the context of being juridically connected to a collegiate tribunal for a particular case, it could legitimately be asked whether the actual appointment as associate judge also includes the immediate conferral of jurisdiction. It seems, therefore, that it is not simply their appointment that makes it possible for lay judges to decide cases, but rather their designation to a turnus. Accordingly, then, it would be the judicial vicar who, through his assignment of a lay judge to a college, in fact activates the jurisdiction the lay person has been granted "in potentia." For this reason, it appears that it is not the assembly of bishops nor the tribunal moderator, as the case may be, nor is it

the episcopal conference that is the authentic and ultimate grantor of jurisdiction. Rather, it is the actual designation as a member of the collegiate tribunal, in whose judicial power a lay judge shares, that makes it possible for such a judge to "co-operate" in the judicial process.

In his allocution to the judges, advocates and officers of the Sacred Roman Rota on February 4, 1977, Pope Paul VI declared that:

[...] ecclesial communion is made up of the faithful and their pastors together. The faithful, in virtue of their common priesthood, working by word and counsel with their pastors for the good of the Church, are not to be regarded merely as subjects, but rather as co-operators with the hierarchical order to which, in all its grades, they give reverent assistance.<sup>62</sup>

In the light of such statements, as well as many similar pronouncements of the Second Vatican Council, there were those who hoped that the limited concessions made to members of the laity by Causas matrimoniales would be expanded in the new law.<sup>63</sup> But this wish was not to be fulfilled, since canon

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62 PAUL VI, Address to the Sacred Roman Rota, "The Juridical Structures in the Life of the Church," February 4, 1977, in *AAS*, 69 (1977) pp. 150-151: "[...] *communio Ecclesiae a fidelibus et pastoribus simul constituitur, ita ut fideles, sacerdotio communi praediti et communicationibus et consiliis cum pastoribus in bonum Ecclesiae operantes, non tantum subditi habentur, sed etiam cooperatores ordinis hierarchici, cui obsequiosum auxilium praestant in omnibus eius gradibus.*"

63 Even when the Motu Proprio, "Causas matrimoniales," was published in 1971, there were those who held that its treatment of lay participation in the exercise of jurisdiction was inadequate. Cf. C. de DIEGO-LORA, "La reforma del proceso matrimonial canónico," in *IC*, 12 (1972), pp. 107-188 and J. SOUTO, "Las líneas generales de la reforma," in *IC*, 12 (1972), pp. 93-106. Both authors, writing shortly after the publication of "Causas matrimoniales," maintained that the motu proprio was still too restrictive. Souto (pp. 99-100) claimed that there was no reason why the laity could not exercise jurisdictional functions in the Church, and he characterised the modification of the old law as a "limited concession." Diego-

1421,§2, while admitting the possibility of appointing both lay men and women as associate judges, faithfully reflects article V,§1 of the motu proprio.<sup>64</sup>

Although the 1983 Code has indeed moved a long way in recognising the role of the laity in the total mission of the Church, there still appears to be too great a juridical connection between sacred orders and the capacity for the exercise of jurisdiction. This connection has produced serious difficulties in providing explanations concerning the nature and extent of jurisdiction exercised by lay judges.

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Lora (p. 128) also believed that the innovations did not go far enough, and that "Causas matrimoniales" manifested a timidity on the part of the ecclesial legislators to recognise the right and the capacity of the laity to participate fully in the Church.

<sup>64</sup> In its project report of 1970, the coetus for the revision of procedural law made explicit reference to both Reiffenstuel and Schmalzgrueber, as well as to art. 33,§3 of "Lumen gentium," and relied upon these to justify its cautious introduction of lay men into the decisional process [cf. Communicationes, 2 (1970), p. 189]; I. GORDON, "De nimia processuum matrimonialium duratione: factum, causae, remedia," in Per., 58 (1969), pp. 514-518, supported this approach, since for him the judgment of a matrimonial nullity case involves a distinctly priestly power, and a lay person is "absolute incapax ad suscipiendam et exercendam omnem potestatem stricte sacerdotalem;" W. AYMANS, "Laien als kirchliche Richter?," in AKK, 144 (1975), pp. 3-20, questioned whether the provisions of "Causas matrimoniales," on lay judicial activity, adequately considered the close relationship that exists between sacred orders and ministerial power in the Church, and he strongly urged that the full implications of the lay exercise of ministerial power be seriously examined prior to the implementation of any definitive changes in the law. Indeed, following the promulgation of the 1983 Code, Aymans views the juridical position of lay judges as "an insoluble contradiction in the new Code itself" ("[...] ein unaufhebbarer Widerspruch im Gesetzbuch selbst [...].") and calls upon the legislator to clarify the matter. He sees the participation of lay persons in the power of jurisdiction as an emergency provision. Cf. W. AYMANS, "Die Leitung der Teilkirche," in The New Code of Canon Law: 5th International Congress of Canon Law, II, p. 183.

Perhaps the continued restrictions upon lay persons in the exercise of the power of governance may best be interpreted as a reflection of uncertainty on the part of the Church regarding the nature of jurisdiction and its relation to sacred orders. However, in view of the progress made, and considering that canon 129 should be seen as a compromise and interim text, it would seem unfair to criticise too harshly the obvious anomaly between the exercise of jurisdiction by clerics on the one hand, and lay persons on the other.<sup>65</sup>

### iii. The Promotor of Justice and the Defender of the Bond

The roles of the promotor of justice and the defender of the bond remain essentially unchanged in the new Code. The need for the active involvement of these officers in those cases referred to respectively in canons 1430 and 1432 is brought out clearly by canon 1433 which provides that:

In cases in which the presence of the promotor of justice or of the defender of the bond is required, the acts are invalid if they were not summoned. This does not apply if, although not summoned, they were in fact present or, having studied the acts, were able to fulfill their role at least before the judgment.<sup>66</sup>

Primarily, the promotor of justice is the custodian and vindicator of the law, whose principal function is the safeguarding of the public order. His or her involvement is required in all penal cases and in contentious ones where the public

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<sup>65</sup> Cf. A.C. DIACETIS, The Judgment of Formal Matrimonial Cases: Historical Reflections, Contemporary Developments, and Future Possibilities, p. 229.

<sup>66</sup> Canon 1433: "In causis in quibus promotoris iustitiae aut defensoris vinculi praesentia requiritur, iis non citatis, acta irrita sunt, nisi ipsi, etsi non citati, revera interfuerint, aut saltem ante sententiam, actis inspectis, munere suo fungi potuerint."

good is at stake.<sup>67</sup> The defender of the bond, however, must be involved in all cases concerning the nullity of ordination or the nullity or dissolution of marriage,<sup>68</sup> and present all that can be reasonably argued against nullity or dissolution.<sup>69</sup>

Canon 1435 prescribes the qualifications for appointment to these offices:

[..] They are to be clerics or lay persons of good repute, with a doctorate or licentiate in Canon Law, and of proven prudence and zeal for justice.<sup>70</sup>

Where lay persons fulfill these positions, no difficulties concerning the exercise of jurisdiction are encountered, since it is commonly held that these offices do not involve the exercise of jurisdiction, properly so-called.

With respect to the number of defenders of the bond in any tribunal, the Code is silent. There seems to be no objection, however, to the appointment of additional defenders of the bond either in diocesan or interdiocesan courts. This

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67 Cf. canon 1430.

68 Cf. canon 1432. The words "or dissolution" in canon 1432 which did not appear in canon 1586 of CIC 1917, stress the role of the defender of the bond in cases involving dissolution of the bond of marriage and dispensation from ratified non-consummated marriages.

69 Cf. PIUS XII, Address to the Sacred Roman Rota, "Matrimonial Trials in Relation to the Ends of the Church;" October 2, 1944, in AAS, 36 (1944), p. 284.

70 Canon 1435: "[..] qui sint clerici vel laici, integrae famae, in iure canonico doctores vel licentiati, ac prudentia et iustitiae zelo probati." Cf. SRR Dec, 13 (1921), p. 130. Since the defender of the bond had not been present at the hearings in a matrimonial nullity case, but had merely examined the acts of the case after it had been finalised, it was necessary for a sanation of the sentence to be granted by Pope Benedict XV.

possibility is especially significant where instructory tribunals are established as part of the interdiocesan court since, in some instances, formal matrimonial nullity cases are not only accepted and instructed, but also concluded there.

Similarly, as in the case of judges in interdiocesan tribunals, the procedures for the appointment and for the removal from office of the promotor of justice and the defender of the bond are to be found in the particular law of the tribunal, or if established prior to November 27, 1983, in the new Code of Canon Law interpreted in the light of canonical tradition. Generally, however, unless the moderator is the competent authority for the appointment and removal of such personnel, provision should be made for the intervention of the assembly.<sup>71</sup> Canon 1436,<sup>§2</sup> which provides that the appointments of the promotor of justice and the defender of the bond may be made "ad universitatem causarum" or "ad singulas causas," states that such officers may only be removed for a just reason. The law does not refer to the necessity for the appointments to be for a specified time, but does require that an oath of office be taken.

#### iv. The Notary

Canon 1437 calls for the presence of a notary at every trial to the extent that both the "acta causae" and the "acta processus" are invalid unless signed by a notary. With the presiding judge, the notary is also to countersign all decrees, citations, notifications, interlocutory sentences and the definitive sentence. Where a judge has admitted on oral plea, he may direct the notary to record the

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<sup>71</sup> Cf. "Normae pro Tribunalibus," arts. 5,§1, p. 488 and 8,§1, p. 489.

matter in writing.<sup>72</sup> Whenever witnesses provide evidence, their replies are to be recorded by a notary,<sup>73</sup> and mention should be made in the acts whether an oath was administered, as well as anything worthy of record that may have occurred during the examination.<sup>74</sup> Acts drawn up by a notary, regarded as a testis qualificatus, constitute public proof and have the value of public documents.<sup>75</sup>

Both clerics and lay persons may be appointed notaries, although in cases involving the reputation of a priest, the notary should also be a priest.<sup>76</sup> No exercise of jurisdiction is connected with the office of notary.

The procedures for the appointment of notaries varied in interdiocesan tribunals erected prior to 1971; in some courts, the intervention of the assembly was prescribed, as in the case of the appointment of judges, promotor of justice and defenders of the bond, while in others, the particular law provided that notaries were to be appointed by the moderator in terms of the common law.<sup>77</sup> However, it appears that in most courts established after March 25, 1971, the notary, together with the other tribunal officers, was to be appointed in the

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72 Cf. canon 1503,§2.

73 Cf. canon 1567,§1.

74 Cf. canon 1568.

75 Cf. canon 1437,§2.

76 Cf. canon 483,§2.

77 For example, art. 2 of the norms for the Italian regional courts (cf. AAS, 32 (1940), p. 304), prescribed the intervention of the assembly in the appointment of all tribunal officers, while art. 2 of the norms for the regional courts at Reims and Amiens, established in 1966, entrusted the appointment of notaries to the moderator (cf. Leges ecclesiae; III, n. 3508).

assembly of bishops. Nevertheless, in virtue of canon 485, notaries may be freely removed by the moderator without formality, unless the particular law of the tribunal or canonical tradition, as the case may be, determines otherwise.

## B. The Ordinary Tribunal of First Instance

### i. Preliminary Notion

Canon 1419,<sup>§1</sup> states the general principle that in every diocese and for all cases not expressly excepted by law, the local Ordinary is the judge of first instance. With respect to an interdiocesan court, canon 1423,<sup>§1</sup> affirms the same principle in so far as the bishop designated to direct the court is concerned.

The ordinary tribunal of first instance<sup>e</sup> may be either a sole judge tribunal, in which case one clerical judge presides as in the documentary process of canons 1686-1688, or a collegiate tribunal where several judges constitute a college, as for formal matrimonial nullity cases.<sup>78</sup> The Code makes provision for three types of tribunals, depending upon the nature of the case and, in certain instances, upon the permission of the national episcopal conference.

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<sup>78</sup> The term "tribunal" is utilised in two distinct senses in Book VII of the new Code. With respect to an interdiocesan tribunal, the term may signify the entire judicial system in the territory, both at the seat and at the branch offices, if any. Included within this understanding would be the tribunal officers, i.e., the judicial vicar, associate judicial vicar(s), associate judges, both lay and clerical, as well as the promoters of justice, defenders of the bond and notaries. In other instances, the word is strictly limited to the tribunal itself, as an organ of judgment.

### a. The Sole Judge Tribunal

Canon 1425 requires a collegiate tribunal for certain specified cases (§1),<sup>79</sup> but indicates that in first instance, if a college cannot be established, and for as long as the impossibility persists, the episcopal conference may permit the appointment of a sole clerical judge who should be assisted, wherever possible, by an assessor and an auditor (§4).<sup>80</sup>

### b. The Sole Judge with Assessors

Because of a possible lack of diversity of perspectives, there is potential danger of error where a single judge decides à case. Canon 1424, therefore, authorises such a judge to associate with himself two assessors who may be clerics or lay persons.<sup>81</sup> Ideally, as in a matrimonial nullity case, the experts who assist the tribunal could be appointed assessors. Hence, for example, an elder of a particular tribe, well-versed in its culture, could fulfill the rôle of assessor in certain rural areas in Southern Africa.

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<sup>79</sup> Cf. *infra*, footnote 86.

<sup>80</sup> Canon 1425,§4: "In primo iudicii gradu, si forte collegium constitui nequeat, Episcoporum conferentia, quamdiu huiusmodi impossibilitas perduret, permittere potest ut Episcopus causas unico iudici clerico committat, qui, ubi fieri possit, assessorem et auditorem sibi asciscat." While canon 1425,§4 generally reflects the faculty that was granted to episcopal conferences by article V,§2 of "Causas matrimoniales," it does not restrict the exercise of the faculty to "singulis casibus" as was the case with "Causas matrimoniales" and canon 1377,§4 of *CIC Schema* 1980. Cf. *Communications*, 10 (1978), p. 233. The wording of canon 1425,§4 of *CIC Schema* 1982 is, however, similar to canon 1425,§4 of the new law.

<sup>81</sup> Canon 1424: "Unicus iudex in quolibet iudicio duos assessores, clericos vel laicos probatae vitae, sibi consulentes asciscere potest."

The choice whether or not to involve assessors in the decision-making process rests with the judge alone. Although the role of an assessor is to assist the judge in processing the acts and examining the cause, as well as in framing the sentence, the judge retains his independence throughout the process.

### c. The Judicial College

Notwithstanding cases which may be decided by a single judge, the Code stresses the obligation to establish a collegiate tribunal in certain situations. In the territory served by an interdiocesan court, such a college would be constituted by the moderator or his judicial vicar in association with at least two other judges, one of whom could be a lay person. Canon 1425,§1 insists on the gravity of the obligation to establish such a court, since it specifies the types of cases reserved to a judicial college.<sup>82</sup> Thus, canon 1622,1°, which treats of the ordinary contentious trial, declares:

A judgment is null with a nullity that is simply remediable, if:  
1° contrary to the requirements of canon 1425,§1, it was not  
given by the lawful number of judges;<sup>83</sup>

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<sup>82</sup> Canon 1425,§1 prescribes the constitution of collegiate tribunals for more serious cases to ensure judicial objectivity and diversity of perspectives. However, as has been seen, in certain circumstances, the authorisation of sole judge tribunals is possible for such cases (cf. canon 1425,§4).

<sup>83</sup> Canon 1622: "Sententia vitio sanabilis nullitatis dumtaxat laborat, si: 1° lata est a non legitimo numero iudicum, contra praescriptum can. 1425,§1." A sentence which is remedially null is automatically sanated if a complaint of nullity is neither introduced, nor the sentence emended within three months of notification of the publication of the sentence. Cf. canons 1626,§2 and 1623. In canon 1896,1° of CIC 1917, irremediable nullity resulted where a sentence had been rendered by less than the required number of judges. Unlike the case of remediable nullity where an automatic sanation takes place in virtue of a fiction of law, where a sentence is vitiated by irremediable nullity, only a sanation, granted by the Apostolic Signatura, can validate it.

Remediable nullity, on account of a lack in the lawful number of judges, may be incurred in the following circumstances:

- a sentence is rendered by one clerical judge in first instance without the prior authorisation of the episcopal conference;
- a sentence is rendered by one lay judge in first instance, even where prior authorisation has been granted by the episcopal conference for the use of one clerical judge;
- a sentence is given in second instance by one judge, either clerical or lay;
- a sentence is rendered in either first or second instance by one clerical judge and two lay judges.

With respect to the procedure to be observed in the judicial college, canon 1426,§1 provides that "a collegiate tribunal must proceed in collegiate fashion and give its judgment by majority vote." Thus, a collegiate tribunal of three or more judges must proceed as a single composite body, and should pronounce its decision according to majority vote. Prior to the rendering of the definitive sentence, each judge is to prepare a written opinion on the merits of the case, stating reasons both from fact and law that prompted the decision. Once each judge has expressed an opinion, the court may then discuss the case and pronounce its judgment according to majority vote.

With respect to the presidency of the court, canon 1426,§2 prescribes that "as far as possible, the judicial vicar or an associate judicial vicar must preside over the collegiate tribunal."<sup>84</sup> Where the diocesan bishop or the moderator of

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<sup>84</sup> Canon 1426,§2: "Eidem praeesse debet, quatenus fieri potest, Vicarius iudicialis vel Vicarius iudicialis adiunctus."

the interdiocesan tribunal, as the case may be, elects to associate himself personally in the judgment of a case for which a college is required, he should assume the presidency.

The cases referred to the collegiate tribunal may be divided into two categories:<sup>85</sup>

- cases reserved to the tribunal by law (mandatory reservation);
- cases which may be submitted to the tribunal (optional reservation).

Canon 1425,§1, on mandatory reservation, states:

The following matters are reserved to a collegiate tribunal of three judges, any contrary custom being reprobated:

1° contentious cases: a) concerning the bond of sacred ordination; b) concerning the bond of marriage, without prejudice to the provisions of canons 1686 and 1688;

2° penal cases: a) for offences which carry the penalty of dismissal from the clerical state; b) concerning the imposition or declaration of an excommunication.<sup>86</sup>

As regards optional reservation, canon 1425,§2 provides:

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<sup>85</sup> A distinction is found in the Code between a mandated collegiate tribunal, i.e., one which must be constituted by prescription of law, and a facultative one, i.e., one which may be established at the discretion of the moderator of the interdiocesan tribunal, or of the judicial vicar where a special mandate had been granted.

<sup>86</sup> Canon 1425,§1: "Reprobata contraria consuetudine, tribunalii collegiali trium iudicum reservantur:

1° causae contentiosae: a) de vinculo sacrae ordinationis; b) de vinculo matrimonii, firmis praescriptis cann. 1686 et 1688;

2° causae poenales: a) de delictis quae poenam dimissionis e statu clericali secumferre possunt; b) de irroganda vel declaranda excommunicatione."

The bishop can entrust the more difficult cases or those of greater importance to the judgment of three or five judges.<sup>87</sup>

Thus, irrespective of the cases referred to in canon 1425,§1, other cases, on account of their complexity or the far-reaching consequences of a decision, may be entrusted to a judicial college of three or five judges. The commission of such cases to a collegiate tribunal remains at the discretion of the diocesan bishop or the tribunal moderator, as the case may be, unless this has been delegated to the judicial vicar.

Difficulties arise concerning the constitution of a five-judge tribunal. Where a case has been reserved to such a college, would it be possible to constitute it using three clerical and two lay judges? Since canon 1421,§2 makes no qualification as to the size of the college, in providing that "[...] laici iudices [...] e quibus [...] unus assumi potest ad collegium efformandum," it would seem to limit the constitution of a five-judge court to four clerics and one lay person. It appears, however, that there is a possible lacuna in the law since, when referring to a "collegiate tribunal," it generally intends a three-judge college.

#### d. The Procedures to be Observed

With respect to the procedures to be observed in interdiocesan courts, the norms of the Code of Canon Law are to be followed. Article 11 of the general norms had prescribed that "in the handling of cases, the prescriptions of law should be accurately observed, but with the additions and changes stipulated

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<sup>87</sup> Canon 1425,§2: "Episcopus causas difficiliores vel maioris momenti committere potest iudicio trium vel quinque iudicum."

below." Three canons in the new Code, however, replace certain procedural provisions contained in the general norms.

While article 12 of the norms had provided that the libellus was to be presented to the moderator of the competent tribunal, canon 1502 now prescribes that it is to be submitted to the competent judge. This canon obviously seeks to expedite the handling of cases, particularly in terms of canon 1606 which authorises a judge, under certain circumstances, to pronounce sentence at once.

Canon 1686 permits a judicial vicar or a judge delegated by him, to decide matrimonial causes handled according to the norms governing the documentary process. Article 16 of the general norms had reserved such cases to the tribunal moderator. Moreover, canon 1479 now provides that a judge may appoint or confirm the civil appointment of a tutor or guardian. This function had also been reserved to the moderator by article 14 of the general norms.

## ii. The Definitive Sentence and Mandatory Appeal

### a. The Definitive Sentence

The definitive sentence in a principal case, tried in judicial form, is the act by which the court defines and announces in the manner prescribed by law that, in terms of the acts and proofs submitted, either the claim in the libellus is proved, or not established.<sup>88</sup> That a judge must have moral certitude concerning the matter to be decided is stated in canon 1608, which prescribes that this

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<sup>88</sup> Cf. canon 1607.

certitude be drawn from the acts of the case and the proofs, and that these be evaluated according to the conscience of the judge, unless the law declares the efficacy of some proof.<sup>89</sup> In the absence of moral certitude, the judge is to pronounce a "non constat."<sup>90</sup>

Although a collegiate tribunal proceeds as a composite body, certain roles within the college may be fulfilled by individual judges. Thus, among the judges involved in a formal matrimonial nullity case, the presiding judge is generally the judicial vicar or an associate judicial vicar. His task is to designate a ponens or relator whose responsibility is to present the case to the college and later commit the sentence to writing.<sup>91</sup>

During the session of the court, the ponens briefly summarises the case, mentioning the proofs submitted. Then, in a matrimonial nullity suit, for example, having read the formula of the doubt, "an constet de matrimonii nullitate in casu," and having recalled the ground(s) upon which the petition for nullity is founded, he presents his written conclusions. After that, the presiding judge and the other associate judge introduce their written conclusions.<sup>92</sup> The majority opinion prevails, although oral discussion is permitted, and during the course of this, a judge may alter his opinion.<sup>93</sup> Even where the decision is not

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<sup>89</sup> Cf. canon 1608; PIUS XII, Address to the Sacred Roman Rota, "Moral Certitude in Marriage Cases," October 1, 1942, in AAS, 34 (1942), pp. 338-343.

<sup>90</sup> Cf. canon 1608, §4.

<sup>91</sup> Cf. canon 1429.

<sup>92</sup> Cf. canon 1609, §3.

<sup>93</sup> Cf. canon 1609, §4.

unanimous, the opinion of the majority is the decision of the college as a body.<sup>94</sup>

The written conclusions of the judges are to be preserved with the acts of the case, and these, together with the discussion prior to the pronouncement of sentence and the individual votes, are subject to secrecy.<sup>95</sup> However, in a collegiate decision, canon 1609,<sup>§4</sup> now permits a judge who disagrees with the sentence to demand that his conclusions be submitted to the second instance tribunal if the decision is appealed. This is a radical departure from the former law which required absolute secrecy as to the opinions of the judges. While article 203 of Provida mater prescribed that these opinions were to be preserved in the secret archives for ten years after which they could be destroyed, canon 1609,<sup>§4</sup> merely provides that they be joined to the acts of the case and kept in secret.<sup>96</sup> In as much as a formal matrimonial nullity case is now appealed ex officio, the opinions of each judge are assigned greater prominence and, in an appeal, a minority opinion may be considered.<sup>97</sup>

With respect to the sentence itself, canon 1611 stresses: 1) it must settle the controversy and provide appropriate responses to the questions raised; 2) it is to determine the obligations of the parties, stating how these are to be fulfilled; 3) it must contain motives in law and in fact, and apportion the expenses.

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94 Cf. canon 1426,<sup>§1</sup>.

95 Cf. 1609,<sup>§2</sup>.

96 Cf. S.C. OF THE SACRAMENTS, Instruction, "Provida mater," August 15, 1936, in AAS, 28 (1936), art. 203, p. 352.

97 Cf. D.C. KLEMME, "Tribunal Forms: An Update," in CLSA Proceedings, 1981, p. 220.

**b. The Mandatory Appeal**

Canon 1628, on the appeal in the ordinary contentious trial, states a general principle in procedural law:

Without prejudice to the provisions of canon 1629, a party who considers him or herself to be injured by a judgment has a right to appeal from the judgment to a higher judge; in cases in which their presence is required, the promotor of justice and the defender of the bond have likewise the right to appeal.<sup>98</sup>

The terms of this canon imply no obligation for any of the parties to a particular case to appeal the judgment rendered in first instance. However, the final section of this canon which treats of the right to appeal, conceded to the promotor of justice and the defender of the bond, must be read in conjunction with canon 1682,§1 concerning the mandatory appeal for cases involving the nullity of marriage, and with canon 1712 which provides that a second instance decision is required to confirm a judgment declaring the nullity of ordination.

With respect to the mandatory appeal for matrimonial nullity cases, canon 1682,§1 directs that:

The judgment which has first declared the nullity of a marriage, together with the appeals, if there are any, and the judicial acts, are to be sent *ex officio* to the appeal tribunal within twenty days of the publication of the judgment.<sup>99</sup>

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98 Canon 1628: "Pars quae aliqua sententia se gravatam putat, itemque promotor iustitiae et defensor vinculi in causis in quibus eorum praesentia requiritur, ius habent a sententia appellandi ad iudicem superiorem, salvo praescripto can. 1629."

99 Canon 1682,§1: "Sententia, quae matrimonii nullitatem primum declaraverit, una cum appellationibus, si quae sint, et ceteris iudicii actis, intra viginti dies a sententiae publicatione ad tribunal appellationis ex officio transmittatur."

Accordingly, even where a first instance decision has declared a marriage invalid in the face of irrefutable proofs, and where no doubt existed in the minds of the judges or the defender of the bond, canon 1682,§1 obliges the tribunal to appeal its own decision ex officio.<sup>100</sup> It should be stressed, however, that in cases in which the nullity of marriage is declared, invalidity is not necessarily self-evident. Situations could arise where, on account of an apparent lack of substantial evidence or the apparent unreliability of certain witnesses, the defender of the bond may not be convinced that nullity has been adequately established. Here, exercising his prerogative under canon 1628,§1, he may appeal the decision, although such an appeal would be somewhat superfluous in the light of the mandatory appeal by the tribunal itself. However, the appeal court would take the matter much more seriously if the defender of the bond also were to appeal. So too, in virtue of canon 1628,§1, where a respondent may wish to contest a declaration of nullity, redress through the appeal process is possible.

With respect to informal matrimonial cases decided by the documentary process, canon 1687,§1 provides that if the defender of the bond prudently judges that the defects mentioned in canon 1686 or the lack of dispensation are not certain, he should appeal to the second instance tribunal. Provision is also made in canon 1687,§2 for any aggrieved party in such a case to approach the appeal court.

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<sup>100</sup> Cf. I GORDON, "De nimia processuum matrimonialium duratione: factum, causae, remedia," in *Per.*, 58 (1969), pp. 724-728. The author tends to underemphasise the manifest character of many declarations of nullity, especially in cases where ample medical documentation has been submitted.

Without doubt, one of the most controversial issues faced by the Code Commission during its revision of procedural law was the question of the mandatory appeal, even in its simplified form which permitted the ratification by decree of a first instance affirmative decision.<sup>101</sup> A major consideration of those who sought the abolition of a mandatory second instance process was the desire to expedite matrimonial nullity cases and so hasten clarification of the sacramental status of the parties concerned. Where nullity had been satisfactorily demonstrated, it was considered unjust to insist upon a second instance process, especially where neither of the parties nor the defender of the bond had any desire to lodge an appeal. A principal factor in the procedural delays in most tribunals to-day, together with the consequent pastoral problems in dealing with the divorced and "remarried," has been the necessary appeal of an affirmative decision, even where nullity is plainly manifest.

### C. The Ordinary Tribunal of Second Instance

#### i. The Designation of an Interdiocesan Tribunal of Second Instance

With respect to the designation of an interdiocesan court of second instance, canon 1439 directs that:

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<sup>101</sup> Much of the discussion on procedural law reform concerned the mandatory appeal of the defender of the bond against an affirmative sentence in first instance. A crucial issue behind this discussion was the attempt to reconcile the prevention of needless delays in matrimonial cases with an adequate protection of the marriage bond. In Communicaciones, 11, (1979), pp. 265/ff., there are indications that many organs of consultation had requested that the defender of the bond be dispensed from the obligation of appealing a sentence of nullity. For an excellent review of the proposals of various authors, cf. T. GREEN, "Marriage Nullity Procedures in the Schema de Processibus," in the The Jurist, 38 (1978), pp. 345-348.

§1 If a single tribunal of first instance has been constituted for several dioceses, in accordance with the norm of canon 1423, the episcopal conference must, with the approval of the Holy See, constitute a tribunal of second instance, unless the dioceses are all suffragans of the same archdiocese.

§2 Even apart from the cases mentioned in §1, the episcopal conference can, with the approval of the Apostolic See, constitute one or more tribunals of second instance.

§3 In respect of the second instance tribunals mentioned in §§1 and 2, the episcopal conference or the bishop designated by it has all the powers that belong to a diocesan bishop in respect of his own tribunal.<sup>102</sup>

Generally speaking, with the establishment of interdiocesan tribunals, provision is made in the same decree for both first and second instance courts. However, the norms which govern the establishment of such second instance tribunals are found in canon 1439 which entrusts to the episcopal conference of the nation or ecclesiastical region, the designation of appeal courts with the approval of the Holy See. This provision is similar to article 2,§3 of the general norms which had asserted that "as often as there is question of regional tribunals, the assembly mentioned in §2 (of art. 2) is the respective episcopal conference [...]".<sup>103</sup>

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102 Canon 1439: "§1 Si quod tribunal primae instantiae unicum pro pluribus dioecibus, ad normam can. 1423, constitutum sit, Episcoporum conferentia debet tribunal secundae instantiae, probante Sede Apostolica, constituere, nisi dioeceses sint omnes eiusdem archidioecesis suffraganae.

"§2 Episcoporum conferentia potest, probante Sede Apostolica, unum vel plura tribunalia secundae instantiae constituere, etiam praeter casus de quibus in §1.

"§3 Quod attinet ad tribunalia secundae instantiae, de quibus in §§1-2, Episcoporum conferentia vel Episcopus ab ea designatus omnes habent potestates, quae Episcopo dioecetano competunt circa suum tribunal."

103 Cf. "Normae pro Tribunalibus," art. 2,§3, p. 487.

Where the dioceses constituting the territory of the interdiocesan tribunal are suffragan sees of the same archdiocese, and where that archdiocese has been selected as seat for the second instance tribunal, the intervention of the episcopal conference is not required since canon 1438,1° provides for such an arrangement. However, where first instance interdiocesan courts have been established by bishops whose dioceses are not subject to the same metropolitan see, for example, regional, interregional or interprovincial tribunals, the respective episcopal conference, with the approval of the Holy See, is to constitute a tribunal of appeal for each first instance court.

Considering the provisions of canons 1423,§1 and 1439,§1, it would seem theoretically possible for the same assembly to take charge of both first and second instance tribunals, enjoying with respect to each "all the powers which belong to a diocesan bishop in respect of his own tribunal." However, in view of canon 1447, a judge is precluded from the exercise of his judicial role in the same case in two instances. Likewise, the intervention of the Holy See in the approval of the decree would prevent such an arrangement were the assembly inadvertently to specify it. Thus, in the case of regional tribunals, where the assembly has elected to direct the first instance court, it must necessarily designate a bishop to govern the court of second instance.

That it is possible to establish more than one interdiocesan appeal tribunal for a first instance interdiocesan court is apparent from the terms of canon 1439,§2. The canon provides that the approval of the Apostolic See is to be sought

by the episcopal conference should it be necessary to constitute further second instance courts.<sup>104</sup>

Notwithstanding what is asserted in canon 1439 on the constitution of an ordinary interdiocesan tribunal of second instance, the law does not oblige an aggrieved party or, in the case of a mandatory appeal, the first instance tribunal ex officio, to approach that tribunal designated in second instance. Since canon 1443 states that "the ordinary tribunal constituted by the Roman Pontiff to receive appeals is the Roman Rota,"<sup>105</sup> either an aggrieved party or the first instance tribunal ex officio may refer a case on appeal directly to the Roman Rota. This right is made explicit by Canon 1444,§1 which states:

The Roman Rota judges:

- 1° in second instance, cases which have been judged by ordinary tribunals of first instance and have been referred to the Holy See by lawful appeal;

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<sup>104</sup> Canon 1632 provides that where there is no indication of the tribunal to which an appeal should be directed, that appeal is presumed to be made to the tribunal mentioned in canons 1438 and 1439 (§1). Where a party has resorted to another appeal tribunal, the tribunal of the higher grade is to determine the case, without prejudice to canon 1415 (§2).

<sup>105</sup> Canon 1443: "Tribunal ordinarium a Romano Pontifice constitutum appellationibus recipiendis est Rota Romana." Generally, the right of direct appeal to the tribunal of the Roman Rota would be utilised if it were deemed more expedient, and particularly in cases of great importance. Where either of the parties or the first instance tribunal itself has appealed to the Roman Rota, the appeal is to be prosecuted exclusively before that tribunal. Even where an appeal has been directed to the regular second instance interdiocesan tribunal within the time specified by law, either party or the first instance tribunal itself retains the right to petition the tribunal of the Roman Rota to judge the case, provided that the legal citations have not already been issued by the appeal tribunal. However, if these citations have been issued, the possibility of direct appeal to the Roman Rota is suspended until the instance is duly concluded. The likelihood of any conflict of jurisdiction is averted, since the authority of the Roman Rota supersedes and excludes that of any second instance court.

- 2° in third or further instance, cases which have been processed by the Roman Rota itself or by any other tribunal, unless there is a question of an adjudged matter.<sup>106</sup>

The competent tribunal of appeal in third or further instance is also the tribunal of the Roman Rota.<sup>107</sup> Accordingly, where a matrimonial nullity case has been given an affirmative decision in first instance, followed by a negative one in second, since two conform sentences are required for a declaration of nullity, an aggrieved party may appeal to the Roman Rota in ~~third instance~~ unless an indult has designated another third instance tribunal.<sup>108</sup>

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106 Canon 1444,§1: "Rota Romana iudicat:

1° in secunda instantia, causas quae ab ordinariis tribunalibus primae instantiae diiudicatae fuerint et ad Sanctam Sedem per appellationem legitimam deferantur;

2° in tertia vel ulteriore instantia, causas ab ipsa Rota Romana et ab aliis quibusvis tribunalibus iam cognitae, nisi res iudicata habeatur." The right of direct appeal is specifically retained in decrees of erection for interdiocesan tribunals. Cf. for example, art II of the decree for the Zimbabwe regional tribunals in appendix XVI: "incolumi semper manente facultate provocandi in secunda instantia Tribunal Sacrae Romanae Rotae, iuxta provisiones can. 1599,§1 CIC."

107 In addition to the tribunal of the Roman Rota, the Supreme Tribunal of the Apostolic Signatura is also competent to hear appeals in second or further instance. Canon 1445,§1 assigns to the Apostolic Signatura the hearing of complaints of nullity, petitions for total reinstatement and other recourses against rotal judgments (1°), as well as recourses in cases concerning the status of persons which the Roman Rota has refused to admit to a new examination (2°). When causes are referred to either the Roman Rota or the Apostolic Signatura in second instance, these tribunals are viewed as extraordinary tribunals.

108 Where two concordant sentences have been rendered in a case which concerns the status of persons, an aggrieved party may have recourse to a tribunal at any time, provided that new and important evidence is submitted (cf. canon 1644). The right to open such a case is based upon the fact that cases concerning the status of persons never become irrevocably adjudged (cf. canon 1643). Public good, however, may demand that after a case has been sufficiently examined, an end be put to litigation. Cf. I. GORDON, De iudiciis in genere, II, p. 119.

ii. The Constitution of an Interdiocesan Tribunal of Second Instance

Since canon 1441 states that a second instance tribunal is to be constituted in the same way as one of first instance, what has already been stated concerning the establishment of a first instance interdiocesan court applies equivalently to one of second instance. Therefore, the same norms, whether situated in the Code or in the particular law of an interdiocesan court, appropriately adapted where required, are to be observed in the constitution of a tribunal of second instance.

Canon 1441 continues by providing that "if a sole judge has given a judgment in first instance in accordance with canon 1425,<sup>54</sup> the second instance tribunal is to act collegially."<sup>109</sup>

iii. The Procedures to be Observed

With respect to the procedures to be observed by the tribunal of second instance, canon 1640 on the ordinary contentious process provides:

With the appropriate adjustments, the procedure at the appeal grade is to be the same as in first instance. Unless the evidence is to be supplemented, however, once the issue has been joined in accordance with canon 1513,<sup>§1</sup> and canon 1639,<sup>§1</sup>, the judges are to proceed immediately to the discussion of the case and judgment.<sup>110</sup>

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<sup>109</sup> The second instance tribunal must be collegiate since canon 1425,<sup>54</sup> limits the use of a sole judge to first instance.

<sup>110</sup> Canon 1640: "In gradu appellationis eodem modo, quo in prima instantia, congrua congruis referendo, procedendum est; sed, nisi forte complendae sint probationes, statim post litem ad normam can. 1513,<sup>§1</sup> et can. 1639,<sup>§1</sup> contestatam, ad causae discussionem deveniatur et ad sententiam."

However, canon 1639,§1 states:

Without prejudice to the provision of canon 1683, a new ground cannot be introduced at the appeal grade, not even by way of the useful accumulation of grounds. So the joinder of issue can concern itself only with the confirmation or the reform of the first judgment, either in part or in whole.<sup>111</sup>

With particular reference to the matrimonial process, canon 1683 declares:

If a new ground of nullity of marriage is advanced in the appeal grade, the tribunal can admit it and give judgment on it as at first instance.<sup>112</sup>

These canons leave no doubt that, with the exception of matrimonial cases, new claims are not the direct concern of the appeal tribunal which deals only with the confirmation or reversal of the earlier sentence. In a matrimonial case, however, a new ground of nullity may arise during the course of the appeal proceedings. E. Hudson maintains that if this were to happen, the new ground could be admitted provided that there were no objections from either party, the defender of the bond or the tribunal itself.<sup>113</sup> However, if valid objections were raised and duly sustained by the tribunal, the matter concerning this new ground of nullity would have to be remanded to the first instance tribunal if one of the parties were to choose to proceed on this particular ground. Nonetheless, where

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111 Canon 1639,§1: "Salvo praescripto can. 1683, in gradu appellationis non potest admitti nova petendi causa, ne per modum quidem utilis cumulationis; ideoque litis contestatio in eo tantum versari potest, ut prior sententia vel confirmetur vel reformetur sive ex toto sive ex parte."

112 Canon 1683: "Si in gradu appellationis novum nullitatis matrimonii caput afferatur, tribunal potest, tamquam in prima instantiâ, illud admittere et de eo iudicare."

113 Cf. J.E. HUDSON, Judicial and Matrimonial Procedure, p. 242.

the question may be decided by the appeal tribunal, the sentence is to be pronounced as in first instance.<sup>114</sup> Were an appeal to be lodged against the sentence of the second instance tribunal, it seems that the entire case with both grounds of nullity would have to be submitted to the tribunal of the Roman Rota or to another court. Only in this way would it be possible to obtain the two concordant sentences required for a declaration of nullity.

#### iv. The Competence of the Tribunal: Formalities of Full Appeal or Ratification of Sentence

Prior to Causas matrimoniales, the only avenue open to a second instance court was to admit a matrimonial nullity case referred to it on appeal to the ordinary examination of second instance.<sup>115</sup> The appeal tribunal was to study the case denuo et integro, judging it on its own intrinsic merits, independently of the first instance decision. Since 1971, however, if the defender of the bond of the appeal tribunal has no significant objections, and if the judges are in agreement, the first instance decision may be confirmed by a decree of ratification without further formalities. This provision of Causas matrimoniales is restated in canon 1682,§2 which asserts:<sup>116</sup>

If the judgment given in first instance was in favour of the nullity of the marriage, the appeal tribunal, after weighing the observations of the defender of the bond and, if there are any, of the

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114 Cf. W. DOHENY, op. cit., p. 539.

115 Cf. canon 1986 of CIC 1917.

116 Cf. Paul VI, Motu Proprio, "Causas matrimoniales," March 28, 1971, in AAS, 63 (1971), art. VIII,§3, p. 444.

parties, is by its decree, either to ratify its decision at once, or to admit the case to ordinary examination in the new instance.<sup>117</sup>

As to the extent of the review, the law as expressed by canon 1682,§1 is not clear. It provides that the first instance judgment, any appeals lodged, and the other acts of the judgment ("ceteris iudicii actis") are to be submitted to the appeal court. What constitutes the "other acts of the judgment?" That these should include both the acta causae and the acta processus may be reasonably presumed, although not definitely affirmed, from the wording of canon 1472,§1:

Judicial acts must be in writing, both those which refer to the merits of the case, that is, the acts of the case, and those which refer to the procedure, that is, the procedural acts.<sup>118</sup>

The decision of the appeal tribunal, either to ratify the first instance sentence or to remand the case for ordinary examination in second instance, must

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117 Canon 1682,§2: "Si sententia pro matrimonii nullitate prolata sit in primo iudicii gradu, tribunal appellationis, perpensis animadversionibus defensoris vinculi et, si quae sint, etiam partium, suo decreto vel decisionem continenter confirmet vel ad ordinarium examen novi gradus causam admittat."

118 Canon 1472,§1: "Acta iudicialia, tum quae meritum quaestionis respiciunt, seu acta causae, tum quae ad formam procedendi pertinent, seu acta processus, scripto redacta esse debent." However, since the legislator uses "iudicii actis" in canon 1682,§1 and "acta iudicialia" in canon 1472,§1, it cannot definitely be concluded on the basis of canon 1472,§1 that the acta causae and the acta processus must be sent to the appeal tribunal. Cf. PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CODE OF CANON LAW, Reply, January 31, 1942, in AAS, 34 (1942), p. 50, where it was declared that all the judicial acts were included under the words acta causae of canon 1890 of CIC 1917; this canon corresponds to canon 1634,§3 of CIC 1983 which states: "Interea iudex a quo debet acta ad normam can. 1474 iudici appellationis transmittere;" A. COLAGIOVANNI, "Motu proprio Causas Matrimoniales," in ME, 98 (1974), p. 42: "At hinc maxima diligentia adhibenda est a Defensore Vinculi apud Tribunal Secundae Instantiae qui animadversiones suas exarare debet sive in sententiam priorem sive in acta."

be recorded in a decree. If the decision is to ratify the sentence, this is signified in a decree of ratification. However, in so far as canon 1682, §2 requires that the observations of the defender of the bond (and of the parties, if any) be considered, the appeal judges, having heard the defender of the bond, may immediately ratify the sentence by decree since the court is not bound by the objections of the defender of the bond. Nonetheless, canon 1644, §1 provides that where two conform sentences have been given in cases concerning the status of persons, recourse to a tribunal of appeal may be made at any time, provided that it is supported by new and serious arguments which furnish substantial doubt against the correctness of the sentence and its ratification. Thus, the defender of the bond or either of the parties may have recourse to an appeal tribunal which, within thirty days of receiving the new evidence, is to declare by decree whether or not a new presentation of the case is to be admitted.

Clearly, the decree of ratification must include the summary reasons which motivated the judges to ratify the sentence.<sup>119</sup> In the absence of such reasons, the decree is ineffective, and a complaint of nullity may be lodged against it.<sup>120</sup> The motives for the decision to ratify also provide the basis for any recourse.

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<sup>119</sup> Cf. PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE DECREES OF VATICAN II, Reply, February 14, 1974, in AAS, 66 (1974), p. 463, where it is stated that the reasons both in law and in fact must be expressed in the decree, at least in summary fashion.

<sup>120</sup> Cf. ID., Reply, July 1, 1976, in AAS, 68 (1976), p. 635.

### Conclusion

From our study of the new law for interdiocesan tribunals, it may be concluded that the discipline for such courts in the 1983 Code of Canon Law is unique when compared with the 1917 Code which had not even anticipated the possibility of their establishment. Although the actual erection of interdiocesan tribunals under the auspices of various dicasteries of the Holy See had indeed been accomplished in many nations prior to the new Code, the provisions of the new law which touch the very structures of these courts are so innovative and far-reaching, that they must be seen as integrally reordering the former dispensation for such tribunals. Among these innovations, the following may be considered as of primary importance:

- a. the law entrusts the establishment of interdiocesan courts of first instance entirely to the discretion of the bishops concerned;
- b. the bishops of the assembly may agree to govern the tribunal jointly, or to designate a moderator to direct it on their behalf;
- c. with respect to the competence of these courts, the bishops are to determine whether they are to be special or general tribunals;
- d. when interdiocesan courts of first instance are established by several bishops who are not all suffragans of the same metropolitan see, the episcopal conference is to constitute courts of second instance;
- e. the moderator of the tribunal, no longer bound by the norm prescribing that he be the bishop of the place where the court is situated, may be designated from among any of the bishops of the territorial circuit, for a determined period;

- f. the determination of norms for the financial arrangements of the interdiocesan court, formerly entrusted to the assembly, is now largely the responsibility of the moderator with the intervention of the assembly, where required;
- g. certain faculties, previously reserved to the moderator, are now committed to the judicial vicar or an associate judge, e.g., the reception of the libellus, the handling of cases involving the documentary process, and the appointment of guardians and curators;
- h. unlike in the former law, certain academic qualifications for the offices of judicial vicar, associate judge, promotor of justice and defender of the bond are now formally prescribed;
- i. under certain conditions, episcopal conferences may authorise the appointment of qualified lay persons as associate judges;
- j. provided that they meet the requirements for each office, lay persons may be appointed as promoters of justice and defenders of the bond.

The possible designation of a lay persons to fulfill certain roles within the tribunal is a welcome measure that will serve to assist the processing of cases in already overburdened courts. Hopefully, the role of lay judges, while presently restricted, will be amplified in due course.

It now remains for the provisions of the new law for interdiocesan courts to be applied in the Southern Africa context.

## CHAPTER VI

### THE APPLICATION OF THE 1983 CODE OF CANON LAW TO THE SOUTHERN AFRICAN TRIBUNALS

Having examined the origins and development of tribunals in the Church in general, and in Southern Africa in particular, and having studied the provisions of the 1983 Code for interdiocesan courts, it is appropriate, in this concluding chapter, to apply the new law for such tribunals in the Southern African context.

During the last decade especially, there has been a considerable increase in the number of cases of matrimonial nullity submitted to the courts in South Africa.<sup>1</sup> This increase may be attributed principally to two specific factors:

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<sup>1</sup> The following information concerning the number of formal matrimonial nullity cases concluded in the tribunals at Cape Town and Pretoria between 1974 and 1983 was obtained from the annual reports submitted to the Holy See. Since the Cape Town tribunal is court of appeal for the non-operative court in Maseru, no cases were decided in second instance in Cape Town during this period. The Pretoria court functions as court of appeal for the tribunals at Cape Town and Johannesburg.

	CAPE TOWN		PRETORIA	
	First	Second	First	Second
1974	1	0	2	2
1975	no report		2	3
1976	no report		2	10
1977	no report		5	15
1978	12	0	3	30
1979	29	0	7	36
1980	21	0	14	31
1981	60	0	15	45
1982	79	0	13	56
1983	11	0	19	78

- 1) an alarmingly high proportion of incidents of marital breakdown; in certain urban areas in South Africa, the divorce rate has reached almost fifty per cent of marriages contracted within any single year;
- 2) a greater awareness of the role of ecclesiastical courts and of the possibility of petitioning them for declarations of matrimonial nullity, so that marriages, civilly contracted, might be rectified, or sacramental unions celebrated.

With the increase of petitions, serious delays, together with consequent uncertainty on the part of the parties concerning their sacramental status, have often resulted. As in other parts of the world, such delays may be attributed to inadequate tribunal structures and to a lack of trained personnel. Indeed, in the Southern African situation, these difficulties are further complicated since the region is populated by diverse cultural and language groups. Apart from the White (mainly of English and Dutch origin), Coloured (mixed race) and Asiatic population groups, the Black group comprises eleven separate ethnic divisions, each with its own language and cultural understanding of marriage and its obligations, arising from the customary law of the particular nation.<sup>2</sup> In many instances, consent is exchanged by the families of the parties, sometimes with the consent of the parties themselves and sometimes without it.<sup>3</sup> Moreover, the actual consent of

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2 Cf. Encyclopaedia Britannica, 15th ed., IX, p. 370.

3 Cf. I. SCHAPERA, "Law and Justice," in The Bantu-speaking Tribes of South Africa, ed., I. Schapera, p. 202: "The main essentials of a legal marriage are the consent of the two families concerned, as reflected in the formalities of betrothal; payment of lobola; and the handing over of the woman by her people to those of the husband. Any form of cohabitation between a man and a woman not satisfying these conditions is treated as concubinage." Cf. also E.J. KRIGE, "Individual Development," in The Bantu-speaking Tribes of South Africa, ed., I. Schapera, pp. 111-112: "[...] marriage is primarily an affair between groups,

the parties, when a constituent element, would usually be exchanged during the preliminary negotiations between the families, long before the ecclesiastical ceremony. It is, therefore, highly expedient that matrimonial nullity cases involving such parties be decided by a judge fully conversant with the particular language and culture. The necessity, therefore, in the revised decree, approved by the SACBC in September, 1984, for provision for a competent judge to handle culturally complex cases becomes obvious. Such a provision will undoubtedly assist in the search for truth and the attainment of moral certitude.

The application of the new law, as an instrument to expedite cases of matrimonial nullity within the territory of the SACBC, will now be discussed under two principal headings: A. The Decree for Interdiocesan Tribunals, and B. ~~Future Projects~~ for Implementing the 1983 Code.

#### A. The Decree for Interdiocesan Tribunals

A draft decree, proposed for consideration by the SACBC, was approved at an extraordinary plenary session on September 27, 1984, and submitted to the Holy See for definitive approval.<sup>4</sup> This decree, consisting of seven articles, will

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involving the two families concerned even more than the individuals. The personal predilections of the couple do not carry nearly the same weight as the good name of the family of the girl, her ability to bear children, [..]. The choice of a partner in marriage is thus not surrounded by the romantic conceptions of many Europeans. Further, if the individual concerned belongs to the Sotho group, he will have known all his life whom he is destined to marry, for here a man is expected to marry his mother's brother's daughter [..]. Individual choice is further limited among the central tribes by infant betrothal."

<sup>4</sup> The final formulation of the decree was discussed at length with Bishop Zenon Grocholewski, Secretary of the Supreme Tribunal of the Apostolic Signatura, on August 21, 1984, during the 5th International Congress of Canon Law held in Ottawa.

form the basis for an analysis of the proposed courts in terms of the following: i) the constitution of the tribunals, ii) the procedures to be observed, iii) the competence of the courts, and iv) an assessment of the tribunals.

### i. The Constitution of the Tribunals

#### a. The Courts of First Instance

The decree envisages the establishment of four interdiocesan courts, each of first and second instance, with seats in the Archdioceses of Cape Town, Pretoria, Durban and Bloemfontein. Each tribunal is to have universal competence.<sup>5</sup>

The first article of the decree, after recalling the serious difficulties experienced by the Southern African bishops in establishing proper and suitable tribunals in individual dioceses, especially on account of a shortage of priests involved in tribunal work, and having mentioned that a "nihil obstat" had been obtained from the Supreme Tribunal of the Apostolic Signatura, states that the SACBC has decided to erect interdiocesan courts of first instance.

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<sup>5</sup> Cf. preamble to Decree, "The Establishment of Interdiocesan Tribunals in Southern Africa." The tribunals are referred to as "interdiocesan" in the strict sense of the term, rather than "regional," since, in view of the decision to establish diocesan courts in Johannesburg and Manzini, the competence of the interdiocesan courts, at least in first instance, is not co-extensive with the territory of the SACBC. Cf. *supra*, chapter I, p. 24. The decree is reproduced in appendix XXI, a letter (Prot. N. 1776/71 V.T.) of October 26, 1984, from the Prefect of the Apostolic Signatura to the President of the SACBC concerning the definitive approval of the decree, in appendix XXII, and the rescript of approval (Prot. N. 1776/71 V.T.) of October 25, 1984, in appendix XXIII. The territory covered by each tribunal is as follows: Cape Town - 1,161,765 sq. kms; Pretoria - 259,888 sq. kms; Durban - 167,759 sq. kms; Bloemfontein - 1,106,954 sq. kms. (cf. *Annuario Pontificio*, 1984). A map showing the territories of the SACBC in 1984 is included in appendix XXIV.

The decree provides the following distribution of ecclesiastical territories for each tribunal in first instance:

CAPE TOWN	PRETORIA	DURBAN	BLOEMFONTEIN
Cape Town	Pretoria	Durban	Bloemfontein
Aliwal	Klerksdorp	Dundee	Bethlehem
De Aar	Louis Trichardt-Tzaneen	Eshowe	Gaborone
Keetmanshoop	Lydenburg-Witbank	Ingwavuma	Keimoes
Oudtshoorn	Pietersburg	Kokstad	Kimberley
Port Elizabeth	Rustenburg	Mariannhill	Kroonstad
Queenstown		Umtata	
Windhoek		Umzimkulu	

Thus, in article I, the decree makes provision for all the territories of the SACBC, with the exception of the Dioceses of Johannesburg and Manzini which have elected to establish diocesan courts. However, as shall be observed, article VII of the decree explicitly designates a second instance tribunal for those courts.

#### b. The Courts of Second Instance

Article II, which treats of the courts of second instance, states that the four first instance tribunals are also to function as courts of second instance for each other. These courts will be competent to decide appeals and recourses in second instance submitted by the duly designated first instance tribunal, without prejudice to the right of direct appeal in second instance to the tribunal of the Roman Rota, in accordance with the prescription of law.<sup>6</sup> The arrangement of the appeal courts is as follows:

To the tribunal at Cape Town, are to be referred cases handled in first instance at the Bloemfontein tribunal; to the tribunal at Bloemfontein, those handled by the Durban tribunal; to the tribunal

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<sup>6</sup> Cf. canon 1444, §1, 1°.

at Durban, those handled by the Pretoria tribunal; to the tribunal at Pretoria, those handled by the Cape Town tribunal.<sup>7</sup>

### c. The Designation of a Moderator

In article III, provision is made for the appointment of a moderator of the interdiocesan court by the assembly of bishops of each region. Since canon 1423,§1, specifically mentioned in the article, does not explicitly state that the moderatorship is to be entrusted to a particular bishop of the territory, any such bishop may be designated to fulfill the role. Indeed, from the wording of the canon, it would seem possible for an auxiliary or coadjutor bishop, although not a member of the assembly as such, to be designated to the office. At the discretion of the assembly, such an appointment may be for a specific term.

Although article III restates what is provided in canon 1423,§1 concerning the powers enjoyed by the bishop designated to the moderatorship, these powers, as mentioned previously, are to be interpreted in the light of the general supervisory competence of the assembly. They are also to be construed in the light of the spirit of the 1970 general norms. These norms, which attributed to the moderator all the rights and duties that belong to local Ordinaries relative to their own tribunals, had reserved to the assembly definite

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<sup>7</sup> Cf. Decree, art. II, paragraph 2: "Ad Tribunal Capetounense deferentur causae quae in prima instantia tractatae sunt apud Tribunal Bloemfonteinense; ad Tribunal Bloemfonteinense, quae apud Tribunal Durbanianum; ad Tribunal Durbanianum, quae apud Tribunal Praetoriense; ad Tribunal Praetoriense, quae apud Tribunal Capetounense."

functions, including the appointment of certain officers.<sup>8</sup> This restriction upon the moderator is repeated in article IV of the decree.

**d. The Appointment of Personnel**

Article IV prescribes that the judicial vicar, judges and other tribunal officers are to be selected ("deligentur") for a period of five years in the assembly of the Ordinaries of each respective territory. Since article IV does not distinguish between the "qualified" and "non-qualified" personnel, as was the case with article 5 of the general norms and with the particular law of tribunals established before the publication of those norms, it appears that all tribunal officers are to be appointed in the assembly of bishops of each province. Article IV is thus more restrictive than the corresponding article 5 of the general norms, which merely reserved to the assembly the appointment of the officialis, associate judges, promotor of justice, defender of the bond and their substitutes, leaving to the moderator the appointment of notaries. However, the appointment of all the officers, or of certain ones, could be delegated to the moderator although such a special mandate would seem to be contrary to the spirit of the law.

How is the selection of the "vicarii iudiciales, iudices ceterique ministerio iudiciali addicti [...]" to be made in the assembly of bishops? The phrase "ad maiorem suffragiorem partem," found in article 5 of the general norms, is omitted in the decree. Are the Ordinaries of each assembly bound to select the officers for their tribunal by majority vote? In so far as the phrase in article 5

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<sup>8</sup> Cf. "Normae pro Tribunalibus," art. 5, §1, p. 488.

appears only in the particular law of certain interdiocesan tribunals established prior to the promulgation of the general norms, and since the terminology used in the decrees and executory norms of various courts to convey the notion of appointment is not consistent, it does not appear that the intent of the legislator is to require an election in the strict canonical sense.<sup>9</sup> In practice, however, in view of the general shortage of qualified personnel, it seems that in most assemblies a vote would not even be necessary. All that is required is that the appointments be made in the respective assembly, and that those selected possess the requisite qualities for each office. In instances where officers, designated for service in the court, lack the prescribed academic qualifications, an indult for the liceity of the appointment should be requested from the Apostolic Signatura.

Since the officers of an interdiocesan tribunal have no necessary juridical connection with the see of the moderator, their position in the tribunal is not affected by the vacancy of that see, as was also the case in the former law. In the event of such a vacancy, as observed, responsibility for the court reverts to the bishops of the assembly who, at their discretion, could immediately designate another moderator or, in the meantime, assume control of the tribunal directly in terms of canon 1423,§1.<sup>10</sup>

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<sup>9</sup> An examination of the terminology denoting appointment in the decrees and executory norms available reveals this inconsistency. In the particular law for the Italian, Philippine and Canadian courts, the following is observed: deligere (Decree, art. III), eligere (Norms, arts. 3, 4 and 6), constituere (Decree, art. III), Norms, arts. 2, 6), nominatio (Norms, art. 5); in the particular law for the tribunals in Reims and Amiens, in France, the following is found: deligere (Decree, art. III), eligere (Norms, art. 4), seligere (Norms, art. 3), constituere (Decree, art. III, Norms, art. 2), constitutio (Norms, art. 2), nominatio (Norms, art. 5).

<sup>10</sup> The requirement of canon 1420,§5 that tribunal personnel be confirmed in office by the new bishop does not apply to interdiocesan tribunals.

Prior to the exercise of their respective roles, the tribunal officers are to take an oath to discharge their office faithfully. Although the oath is not specifically referred to in the decree, it is provided for in canon 1454 of the Code of Canon Law. While canon 1454 does not specify before whom the oath is to be taken, article 7 of the general norms had prescribed that it be taken before the moderator or his delegate, for example, the judicial vicar, or even the vicar general of the diocese where the tribunal is situated.<sup>11</sup> Such a practice could still be followed.

#### e. The Removal of Personnel

No mention is made in the decree of any specific procedures for the removal of personnel, as was the case in article 8 of the general norms and also in the available particular law of tribunals established before the publication of those norms. Since the decree is silent on this particular point, the procedures prescribed in article 8 of the general norms, observing the provisions of canons 1422 and 1436,§2, should be followed.<sup>12</sup>

Does the fact that article IV of the decree stipulates that the selection of all the tribunal personnel is to be made in the assembly, and article 5 of the general norms reserved to the assembly the appointment of only the "qualified"

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<sup>11</sup> In addition, canon 833,5° prescribes that the judicial vicar make a profession of faith.

<sup>12</sup> Canon 1422 provides that the judicial vicar and the judges may not be removed from office except for a lawful and grave reason. The promotor of justice and defender of the bond may be removed only for a "just reason" (cf. canon 1436,§2). Cf. *supra*, chapter IV, pp. 143-145, on the necessity to assess the new canons on the appointment and removal of tribunal personnel in the light of canonical tradition.

personnel, suggest that the procedures for removal in article 8 of the general norms would apply to all the personnel in each court? Such a construction does not seem to reflect the intent of the legislator if what was provided in the executory norms for the regional tribunals in Italy (1940), the Philippine Islands (1941), Canada (1946) and Columbia (1967), to mention but a few examples, may be applied to the Southern African courts. In the executory norms of those earlier tribunals, the appointment of all tribunal officers was reserved to the bishops of the particular region or province, while the removal of only the officialis, judges, promotor of justice and defender of the bond, together with their substitutes, by the moderator, solely for a grave cause, was subject to a "consultation" involving, in the case of the Italian,<sup>13</sup> Philippine<sup>14</sup> and Canadian courts,<sup>15</sup> the bishops of the territory, and in the case of Columbia,<sup>16</sup> the Apostolic Nuncio. In those particular norms, as well as in terms of the general norms, the removal of the "non-qualified" personnel was assigned to the moderator acting alone. It would thus seem reasonable to apply this general principle to the Southern African tribunals. Accordingly, the removal of at least the judicial vicar, associate

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13 Cf. S.C. OF THE SACRAMENTS, "Normae pro exsequendis litteris apostolicis 'Qua cura' die 8 dec. 1938 motu proprio datis," July 10, 1940, in AAS, 32 (1940), art. 7, p. 305.

14 Cf. ID., "Normae pro exsequendo decreto diei XX decembris MDCCCXXX de ordinandis tribunalibus ecclesiasticis Insularum Philippinarum," April 28, 1941, in AAS, 33 (1941), art. 7, p. 365.

15 Cf. ID., "Normae pro exsequendo decreto diei XXVIII ianuarii MCMXLVI de ordinandis tribunalibus ecclesiasticis ditionis Canadensis," May 13, 1946, in AAS, 38 (1946), art. 7, p. 284.

16 Cf. ID., Norms, "Ecclesiastical Tribunals in Columbia," August 22, 1967, in CLD, 7, art. 6, p. 910.

judges, promotor of justice, defender of the bond and their substitutes is to be reserved to the assembly. Such removal, however, is to take place only for "a legitimate and grave reason" in the case of the judicial vicar and judges, and, for "a just cause," in the case of the promotor of justice and the defender of the bond. The eventual application of the principle, contained in article 8 of the general norms to the courts in Southern Africa, would stress the "collegial" nature of the tribunals by involving the assembly in both the appointment of all personnel and the removal of at least the "qualified" officers, and would also provide some measure of security of tenure since the possibility of arbitrary dismissal is excluded.

In cases of urgent necessity, article 8, §2 of the general norms had authorised the moderator to suspend any "qualified" officer. His or her removal or substitution was, however, to be effected in the assembly. This principle should continue to be observed as part of canonical tradition, in the absence of any other provision. In the annual report to the Apostolic Signatura on the status and activity of the tribunal, reference should be made to the appointment and removal of such "qualified" personnel.

#### **f. Mandatory Instructory Tribunals**

As was the case in Zimbabwe, the first paragraph of article V prescribes that, with the exception of the dioceses in which each interdiocesan court has its seat, an instructory tribunal, consisting of an auditor, a promotor of justice, a defender of the bond and a notary, be established within every diocese of the territory of the interdiocesan court, except in the diocese where the court is situated. Such instructory tribunals are to be constituted distinctly from the

diocesan ones where they might still exist.<sup>17</sup> The primary task of these officers, who form part of the interdiocesan tribunal, is to discharge within their respective dioceses whatever duties are committed to them either by the interdiocesan tribunal or by other ecclesiastical courts. These could include the instruction of matrimonial cases or the constitution of rogatory commissions.

The final sentence of the first paragraph of article I was formulated to facilitate the handling of matrimonial cases within certain regions of Southern Africa where diverse cultural and language groups reside:

In cases in which a cause has been instructed in a language which is unknown to the judges appointed to the tribunal, the moderator may appoint for each case a judge who is expert in that language.<sup>18</sup>

This faculty, entrusted to the moderator, may, by a special mandate, be delegated to the judicial vicar of the tribunal. It could have far-reaching consequences since the cases referred to may not only be instructed outside the seat of the interdiocesan court, but could, where special reasons require this, also be concluded locally.<sup>19</sup> Indeed, where a judge has been appointed directly by the

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17 Cf. Decree, "The Establishment of Regional Tribunals in Rhodesia," December 11, 1973, art. V.

18 Cf. Decree, "The Establishment of Interdiocesan Tribunals in Southern Africa." art. V, paragraph 1: "In casibus in quibus causa instructa est in lingua ignota iudicibus nominatis pro Tribunali, Moderator nominare potest ad casum iudicem qui eandem linguam callet."

19 The application of this faculty will be especially beneficial in the processing of matrimonial nullity cases in the Bloemfontein ecclesiastical province which is largely inhabited by the Tswana and Sotho speaking peoples, and which extends over 1,106,954 sq. kms. Cf. *supra*, chapter II, pp. 100-101, where the bishops of the province, at their November, 1981, provincial meeting, suggested the establishment of two interdiocesan courts in view of the cultural homogeneity found in each of the two regions of the province. Although the

moderator to constitute a tribunal to study a specific case on account of his knowledge of a particular language and his understanding of the culture of the parties involved, that judge, in the judicial process, may associate with himself two local assessors to advise him on tribal custom. The practical consequences, therefore, of being able to decide such cases anywhere within the territory of the interdiocesan court, in special circumstances, become readily apparent, although ideally, the judgment should be rendered in the seat of the tribunal.<sup>20</sup>

It would seem that the word "lingua" could be interpreted broadly to include difficulties based on cultural understanding as well. As far as possible, therefore, the officers who constitute the local instructory tribunal should be conversant with the particular culture of the parties whose cases they will be called upon to instruct and, sometimes, decide.

The second paragraph of article V provides that officers designated to serve in the local instructory tribunals are to be appointed by the local bishop, and also provides that before each may fulfill his or her particular role, the appointment is to be approved by the assembly of bishops of each province. This procedure differs from the one prescribed for Zimbabwe where the moderator, and not the assembly, was authorised to approve the appointments of those named.<sup>21</sup>

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decision should be rendered at the seat of the court, the law seems to recognise situations where this would not be possible. Cf. canons 1468 and 1609, §1.

20 Cf. F. ROBERTI, De processibus, I, pp. 406-407: "Ideo eorum potestas tantum limitibus regionibus coarctatur; et, quamvis iudices et ministri ab omnibus simul Episcopis eligantur, quaslibet causas agere possunt in qualibet regionis parte, maxime vero, uti patet, in sede tribunalis regionalis."

21 Cf. Decree, "The Establishment of Regional Tribunals in Rhodesia," December 11, 1973, art. VI.

In as much as the officers in the instructory courts are members of the interdiocesan one, the third paragraph of article V states that they may be called upon by the presiding judge of the interdiocesan court to exercise their specific roles in that tribunal in individual cases. In the Zimbabwe decree, on the other hand, it was the moderator and not the presiding judge who was authorised, in individual cases, to include such officers in the actual judicial process of the interdiocesan court.<sup>22</sup>

The final paragraph of article V states that, in addition to the duties already indicated, the officers of the instructory tribunal may, as delegates or subdelegates of the local bishop, instruct processes for the dispensation from a ratified and non-consummated marriage. Notwithstanding this provision, canon 1700,§1 authorises any diocesan bishop to assign the instruction of the process to his own tribunal, to that of another diocese, or to a suitable priest. Since the intervention of the defender of the bond is required in the instruction of such processes, and since few diocesan tribunals have been established in the territory of the SACBC, the clarification provided in this paragraph concerning the possibility of entrusting the instruction of these processes to the instructory court is expedient.

Article VI of the decree is a particularisation of canon 152 on incompatible offices. It provides that officers, who have exercised a role within an interdiocesan tribunal either in its seat or in a local instructory court, may, upon the termination of that office, undertake the representation of clients as

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22 Cf. ibid.

advocates or procurators, provided that such officers were not formerly involved in those cases as judge, promotor of justice, defender of the bond or notary. Such a situation could arise where a procurator, representing a party in second instance, had already acted as judge in first instance, or vice versa: a procurator is now promoted to the office of judge.

Article VII, the concluding article of the decree, determines the second instance tribunal for decisions rendered in the diocesan courts at Johannesburg and Manzini. In so far as both these dioceses are situated within the Pretoria ecclesiastical province, the Pretoria interdiocesan court was selected as their court of appeal. The inclusion of this provision in the decree consolidates in a single document the full competence of the four interdiocesan courts in both instances, as well as all the territories subject to the SACBC. Should the Johannesburg diocesan tribunal require a further second instance court on account of the number of cases handled, this could be granted by special indult.

#### **g. The Constitution of Particular Tribunals**

The ideal for the adjudication of formal matrimonial nullity cases, based on the legislator's desire for a diversity of perspectives, remains the judicial college of three judges. Nevertheless, where the constitution of a college proves impossible in first instance, the episcopal conference may, for as long as the impossibility persists, permit the moderator of the tribunal to entrust such cases to a sole clerical judge. However, canon 1425,§4 states that, where possible, the sole judge is to associate with himself an assessor and an auditor.

In as much as the law provides for the establishment of courts constituted by a sole clerical judge in first instance where a shortage of personnel necessitates this, it is strongly recommended that the SACBC consider authorising the appointment of sole clerical judges for the study of formal matrimonial cases within its territory. The need for such authorisation is indeed urgent in South Africa because qualified lay persons are not generally available to constitute a college with two clerical judges. Especially where cases involving parties of a particular culture are to be decided, it is desirable that the sole judge associate with himself at least one assessor who is fully conversant with that culture's conception of marriage and its consequent obligations. In a rural environment, the headman or an elder of a particular village could well fulfill this role. In cases involving parties of a western background, the sole judge should endeavour to enlist the assistance of a psychologist or a social worker, as the needs of each case demand. Such a qualified expert could sit as an assessor and assist the judge in his search for truth and the attainment of moral certitude.

#### **h. Judicial Expenses in Interdiocesan Courts**

Canon 1649,§1, on judicial expenses, gratuitous and semi-gratuitous legal assistance, prescribes that the bishop responsible for governing the court is to establish certain norms. These norms concern, among other matters, the liability of parties for the payment or the reimbursement of judicial expenses, honoraria for advocates, experts and interpreters, the expenses of witnesses, the granting of free legal aid and the reduction of expenses.

Although articles 17-20 of the general norms required the involvement of the assembly in determining the finances of the common tribunal, canon 1649, in so far as it is also applicable to diocesan courts, makes no mention of the assembly.<sup>23</sup> Nevertheless, the very nature of an interdiocesan tribunal would seem to demand the intervention of the assembly in such matters.<sup>24</sup>

Although articles 19 and 20 of the general norms are not repeated in the new law, their prescriptions could be observed since they provide clear operating directives.<sup>25</sup> Article 19 provided that the assembly was to establish a fund upon which the burden of meeting the expenses of gratuitous or semi-gratuitous legal assistance would devolve. Article 20, on the other hand, required the assembly to determine the proportion in which each diocese was to assist the respective interdiocesan courts of first and second instance, both with regard to the supply of personnel and financial contributions.

With respect to the Southern African courts particularly, it would seem highly expedient for the four moderators, as delegates of each assembly, to determine a common policy concerning all aspects of tribunal finances. Once agreed upon, such a common policy could be presented to the bishops of each assembly for their comments and for eventual publication in their respective dioceses.<sup>26</sup>

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<sup>23</sup> Cf. "Normae pro Tribunalibus," arts. 17-20, p. 491.

<sup>24</sup> Cf. C. ZAGGIA, "I tribunali interdiocesani o regionali nella vita della Chiesa," in Dilèxit iustitiam: studia in honorem Aurelii Card. Sabattani, ed. Z. Grochowski and V. Carcel Orti, p. 148.

<sup>25</sup> Cf. supra, chapter IV, pp. 157-158.

<sup>26</sup> Cf. C. ZAGGIA, loc. cit., p. 148.

## ii. The Procedures to be Observed

Since the decree is silent with respect to the procedures to be observed in the tribunals, the norms of the Code of Canon Law are to be followed in accordance with canon 1402.<sup>27</sup>

## iii. The Competence of the Tribunals

The decree provides that the tribunals are to enjoy universal competence in both instances. In the preamble to the decree, it is stated that the courts are competent "to handle all cases, that is to say, not only cases of nullity of matrimony, whether formal or summary, but also cases of separation of spouses, as well as contentious and criminal cases."<sup>28</sup>

In instances where individual bishops whose dioceses are subject to an interdiocesan court have retained their local tribunals, the extent of the residuary competence of such local courts has already been discussed.<sup>29</sup> However, in view of the possibility of delegating this competence to the local instructory tribunal, the need for a diocesan court largely disappears.

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<sup>27</sup> Cf. *supra*, chapter V, pp. 222-223.

<sup>28</sup> Cf. Decree, "The Establishment of Interdiocesan Tribunals in Southern Africa," preamble: "[...] ad pertractandas causas universas, scilicet non tantum causas nullitatis matrimonii, sive formales sive summarias, sed etiam causas separationis coniugum necnon causas contentiosas et criminales."

<sup>29</sup> Cf. *supra*, chapter I, p. 28; chapter IV, pp. 167-170.

#### iv. An Assessment of the Tribunals

The decree responds to the basic requirements of the 1983 Code of Canon Law for the establishment of interdiocesan tribunals. It reflects the particular requirements of Southern Africa and has the following advantages:

- 1) it clarifies the fact that the tribunals of Southern Africa are indeed interdiocesan tribunals and not diocesan ones with extended competence;
- 2) it clearly states the types of cases for which the interdiocesan tribunals are competent;
- 3) it consolidates in a single document all the territories of the SACBC, including the Dioceses of Johannesburg and Manzini;
- 4) it settles the question of the appeal courts by clearly defining the competent tribunals, including the one for the diocesan courts in Johannesburg and Manzini;
- 5) it provides for flexibility by not necessarily identifying the position of the moderator of the court with that of the archbishop of the see where the tribunal is situated;
- 6) it ensures security of tenure for tribunal officers by stipulating that their appointments be for a five-year period;
- 7) it provides for instructory tribunals to be established in the various ecclesiastical territories to assist in instructing cases; this is especially important in those areas where diverse cultural and language groups are resident;

8) By authorising the moderator of the tribunal to appoint a judge competent in the particular language and culture, it addresses the difficulties experienced in instructing the matrimonial cases of certain cultural and language groups.

Although the decree appears to reflect a very practical formulation in terms of the possibilities and requirements of the new law, it would seem to be lacking in two specific areas; considering the vast territory of some of the proposed courts:

- a) it makes no provision for the exercise of parallel competence for informal cases of matrimonial nullity in interdiocesan as well as diocesan tribunals, where they might still exist;<sup>30</sup>
- b) it makes no direct provision for the judge, appointed by the moderator of the tribunal on account of linguistic expertise, to conclude locally the particular case entrusted to him.<sup>31</sup>

Nevertheless, notwithstanding these inadequacies, the decree should prove to be an effective instrument in promoting the pastoral care of the faithful served by the SACBC.

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<sup>30</sup> As far as informal matrimonial nullity cases are concerned, it would appear that the Holy See desires to ensure a separation between administrative cases involving lack of form which can be handled in the chancery, and the judicial cases of canons 1686-1688 involving defect of form. The latter cases, in view of their possible complexity, are to be decided only in the interdiocesan courts by properly qualified judges.

<sup>31</sup> Although the decree makes no direct provision for cases to be concluded outside the seat of the interdiocesan court, this is not absolutely precluded by the common law. Canon 1468 which states that, "as far as possible," the tribunal should sit in the court's established seat, would seem to envisage circumstances under which this was not possible or expedient. Cf. also canon 1609,§1, which requires that the meeting of the judges be held in the seat of the tribunal, unless a special reason suggests otherwise ("nisi peculiaris causa aliud suadeat.")

## B. Future Projects for Implementing the 1983 Code

Like all episcopal conferences, the SACBC is faced with the challenge of implementing the new Code of Canon Law within its territory. The establishment of interdiocesan tribunal structures is just one aspect of this implementation. However, in order that these structures function adequately as organs of pastoral concern, certain other related factors must also necessarily be considered by the conference.

### i. An Urgent Need for the Training of Personnel

Since the coming into force of the 1983 Code, certain academic qualifications are prescribed for ~~most~~ offices within the tribunal. As we have seen, for the licit appointment as judicial vicar, associate judge, promotor of justice and defender of the bond, a doctorate or at least a licentiate in canon law is required. In the Southern African situation, as in some other parts of the world, few officers presently engaged in tribunal work fulfill these academic requirements. For this reason, the academic formation of tribunal officers should be regarded as an urgent priority since it would be unreasonable to suppose that the Holy See will indefinitely be disposed to granting indulgences for the appointment of unqualified personnel. It is therefore proposed that serious consideration be given to the training, in every two-year cycle, of at least one officer from each province to the level of licentiate in Canon Law.<sup>32</sup> While this will involve

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<sup>32</sup> Cf. COMMITTEE ON MATRIMONIAL TRIBUNALS, Minutes, January 11, 1982. The recommendations proposed at this meeting with respect to the training of personnel were accepted in principle at the plenary session of the SACBC in February, 1982.

sacrifice in view of the shortage of personnel, it should be regarded as an investment in the more efficient functioning of the courts.

Moreover, local tribunal workshops could be arranged periodically on a national level for in-service training. At these workshops which could extend over a week, sessions on procedural law, matrimonial jurisprudence and interviewing techniques might be presented. In addition to clerics, encouragement is also to be given to lay persons, religious and seminarians to attend such workshops. Furthermore, courses on matrimonial law and judicial procedures should be offered during seminary training to prepare future priests for involvement in the work of the tribunals, either directly or indirectly.

#### ii. Mandatory Marriage Preparation Programmes

Clearly, as a reaction to the high rate of matrimonial breakdown, canon 1063 strongly encourages remote, proximate and immediate preparation for marriage.<sup>33</sup> Pastors are obliged to assist in this regard principally:

- by preaching and giving catechetical instruction adapted to children, young people and adults in order to convey the meaning of Christian marriage and the role of Christian spouses and parents (1°);
- by personal preparation for entering marriage (2°);
- by the fruitful celebration of the marriage liturgy (3°);
- by help given to those who have entered marriage that they may achieve a holier and fuller family life (4°).

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<sup>33</sup> Cf. JOHN PAUL II, Apostolic Exhortation, "Familiaris consortio," November 22, 1981, in AAS, 74 (1982), art. 83, p. 184.

With respect to the immediate preparation for marriage, it is proposed that mandatory programmes for matrimonial preparation of at least three months' duration, designed to meet the needs of the particular group, be offered in various centres in each of the ecclesiastical territories within the SACBC. It is also recommended that bishops consider establishing within their dioceses a norm that, unless special circumstances suggest otherwise, a definite period of notice be given of an intention to marry, especially where one of the parties is under eighteen years of age.<sup>34</sup> Such a period would serve to reduce "hasty" marriages, especially in cases of pregnancy, and this, coupled with a well presented marriage preparation course, could contribute much to reducing incidents of marital breakdown.

### iii. Formation of a Canon Law Society

It is hoped that, in due course, a Canon Law Society for the territories of the SACBC, LCBC and ZCBC may be established.<sup>35</sup> Such a society could provide invaluable assistance to the various episcopal conferences, especially with respect to the implementation of the Code, and would provide an international forum for

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<sup>34</sup> Mandatory periods of notice of an intention to marry have been introduced in a number of dioceses in Canada and the United States of America. Cf. CLD, 8, pp. 639-666, where details are found of pastoral guidelines, implemented in four dioceses in the United States of America, to screen prospective marriages between teenagers in an effort to reduce the mortality rate of such marriages. In the Archdiocese of Detroit, for example, a six-month period of notice is required for such marriages. On August 29, 1984, Statistics Canada announced that the average age for divorce in Canada was 38 years for men and 35 years for women, and that, on the average, a marriage in Canada lasted for 12 years.

<sup>35</sup> Cf. AD HOC COMMITTEE ON MARRIAGE TRIBUNALS, Minutes, August 21, 1981.

discussion on various aspects of the law, including the work and practice of matrimonial courts.

#### iv. A National Appeal Tribunal

It is ultimately envisaged that a national second instance tribunal be constituted for the four Southern African interdiocesan courts.<sup>36</sup> This collegiate tribunal, which should be formed by officers who have at least a licentiate in Canon Law, would contribute to a more expeditious handling of formal matrimonial nullity cases and to the unification of jurisprudence.

#### Conclusion

With the definitive approval by the Holy See of a decree for the establishment of interdiocesan tribunals in Southern Africa, a process to expedite matrimonial nullity cases, begun in 1939, has achieved yet another step. Initially, when two diocesan courts with supradiocesan competence were established, their jurisdiction in first and second instance respectively, was co-extensive with the territory of the Apostolic Delegation in Southern Africa. This arrangement continued until March, 1951, when two additional inter-territorial tribunals of first instance were constituted, each competent for all formal cases of matrimonial nullity arising within the Apostolic Delegation. It was only in March of the following year, however, that specific territories were assigned to each of the three courts in first and second instance.

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<sup>36</sup> National second instance tribunals have been established in the Philippine Islands (1956), Australia (1974) and Canada (1983). Cf. supra, chapter I, pp. 47-48, 50-51.

The situation remained unchanged until September 1958, when three new inter-territorial tribunals were established, necessitating a major redistribution of ecclesiastical territories. Apart from the erection of regional courts in Zimbabwe in 1973, there have been no further developments with respect to the Southern African courts to the present time.

As early as 1971, however, the SACBC had begun, in the light of the non-functioning of the Maseru tribunal and the resultant hardships for all the dioceses of the Bloemfontein and Durban provinces, which were without a first and second instance court respectively, to examine the tribunal structures within its territory with a view to their reorganisation. On September 27, 1984, this desire for a radical reform finally culminated in the approval by the SACBC of a decree for the establishment of interdiocesan tribunals. This decree, confirmed by the Apostolic Signatura on October 25, 1984, reflects the requirements of the 1983 Code of Canon Law and takes into account certain needs peculiar to Southern Africa.

The serious task of establishing the new courts will have to be faced soon. As far as the interdiocesan tribunals are concerned, their constitution by the assembly of bishops of each province must necessarily take account of certain pressing demands. In making appointments to the court, the most competent personnel within the territory should be considered, and where no qualified persons are available, immediate and remote provision should be made for their training. The importance of making such provision, not only on account of the academic qualifications required for liceity, but also in view of a developing matrimonial jurisprudence and the growing complexity of many cases, cannot be

over-emphasised if the tribunal is to function efficiently and render justice to the parties concerned.

With respect to the instructory courts, each diocesan bishop should select local officers well acquainted with any particular cultures within the specific territory. Such officers would render invaluable assistance to the interdiocesan tribunal in the instruction of cases submitted to that court. Indeed, also at the diocesan level, serious consideration should be given to the implementation of norms for mandatory periods of notice of an intention to marry. Marriage preparation programmes should be offered during these periods.

At the national level, remote provision could also be made for the establishment of a national appeal court. With the establishment of such a court, the full potential of the new law for interdiocesan tribunals will largely have been realised in Southern Africa.

## CONCLUSION

With the introduction of interdiocesan tribunals into the judicial structures of the Church in 1938, a solution was provided for the almost insurmountable obstacles which, at that time, had prevented the establishment of competent matrimonial courts in many dioceses in Italy. Among the factors which impeded the constitution of such tribunals were the lack of adequately trained personnel, the large number of dioceses, many of which were small with few priests, and the relatively small number of cases submitted annually. These factors made the establishment of diocesan courts extremely difficult for the bishops concerned, and even where such courts had been established, shortages of personnel inevitably resulted in considerable delays in the administration of justice, with consequent prejudice to the good of souls.

Undoubtedly, the subsequent erection of interdiocesan courts in many parts of the world has given rise to several obvious advantages. Among these are the following:

- a) a substantial reduction in the number of tribunal officers required for any specific ecclesiastical province or region;
- b) the financial savings resulting from the elimination of some full-time personnel in diocesan courts;
- c) the provision in interdiocesan tribunals of more qualified judicial officers, better equipped to address the complexities of matrimonial cases submitted to the courts;
- d) the more expeditious handling of cases;

- e) the possibility of providing adequate financial remuneration for judges and other officers;
- f) the rendering of more competent decisions by properly trained judges, which has led to a greater respect for the Church's matrimonial courts.

While recognising that interdiocesan courts have contributed much to the more efficient administration of justice in the Church, and that greater certainty concerning the correctness of sentences rendered has followed, it must, however, be mentioned that certain disadvantages, though minor in comparison with the advantages gained, have also resulted:

- a) the easy accessibility of diocesan court personnel to the parties in a case is usually not possible in an interdiocesan tribunal, except in the diocese where the court has its seat; such lack of direct contact between the tribunal officers and the petitioner, for example, could lead to an unsatisfactory formulation of the libellus and other procedural documents, as well as the inadequate instruction of the case;
- b) the often considerable distances between the seat of the court and the domiciles of the parties and witnesses frequently impede communications and can, to some extent, increase the costs involved in processing cases;
- c) if an interdiocesan tribunal is not functioning properly, the faithful in many dioceses are deprived of judicial redress.

In the light of these difficulties connected with the instruction of cases, the need for efficient rogatory courts becomes apparent. Indeed, the insistence by the Holy See that, even where interdiocesan tribunals have been established, local instructory courts should be constituted, is incorporated into decrees

approved after 1971, and is founded upon the hope that such courts would instruct cases on behalf of the interdiocesan tribunal, or on behalf of any other court.

With the promulgation of the 1983 Code of Canon Law, a greater flexibility has been introduced into the practical organization of interdiocesan courts. This flexibility, as has been observed, permits the assembly of bishops the option of assuming responsibility for the tribunal directly, or of designating a moderator to direct the court on its behalf. Unlike in the former law, there need be no juridical connection between the diocese of the bishop chosen and the seat of the court. The increased flexibility of the new law also facilitates, and seems to encourage, a greater involvement in the affairs of the tribunal by all the bishops of the assembly. Furthermore, canon 1423,§1 envisages the possibility of the moderatorship passing from one member of the assembly to another after a predetermined period.

Flexibility also extends to the actual territorial arrangement for interdiocesan courts. Although where such tribunals have been constituted, they are generally "regional" in both instances, it is also possible to establish interdiocesan courts that are "regional" in first instance and "national" or "international" in second instance. Moreover, with the coming into force of the 1983 Code and the simultaneous abrogation of the American procedural norms, the obligation of submitting affirmative decisions in formal cases of matrimonial nullity to mandatory review has devolved upon all first instance tribunals in the United States of America. While retaining diocesan courts in first instance, regional courts have been established in second instance in many parts of the

United States to expedite the appeal process and to avert an accumulation of cases awaiting confirmation.

With respect to the Southern African courts in particular, it was stated at the outset of this study that, on account of some uncertainty concerning the juridical nature of the courts and the extent of their competence, an investigation was called for. During the course of the research connected with this study, much regarding the Southern African tribunals, hitherto not generally known, has come to light, and considerable ambiguity has been eliminated. Documentation relating to the initial establishment of inter-territorial matrimonial courts has revealed, despite the contrary opinion held for many years by the Apostolic Signatura and the SACBC, that the courts established in 1939 were not "regional" in nature, but rather "diocesan" with extended territorial competence, and that in the subsequent rearrangements of the courts in 1951 and 1958, their diocesan nature remained unaltered.

Clarity has also been achieved with respect to the Johannesburg diocesan tribunal which continued processing its own formal matrimonial nullity cases, after the loss of its supradiocesan competence and its replacement in the Pretoria province by the newly-created Pretoria inter-territorial court. It appears from the minutes of certain meetings that the officialis of the Johannesburg tribunal had considered the competence of the Pretoria matrimonial court, to which Johannesburg was subject, as non-exclusive, whereas, in fact, it has been determined that its competence was indeed exclusive. It has also been ascertained that no indult was granted to the Johannesburg diocese, either by the S.C. of the Sacraments or by the S.C. of the Propagation of the Faith, to enable it

to process formal matrimonial cases in first instance, independently of Pretoria. Whether such an indult was granted by the Apostolic Signatura, has not been possible to establish, although it seems unlikely at least before 1971.<sup>1</sup> It thus appears that the Johannesburg diocesan tribunal has been judging formal matrimonial cases at least until 1971, but more likely until the present, without the appropriate competence for such cases.

One practical consequence of the findings concerning the juridical nature of the Southern African courts was the withdrawal by the SACBC of its decree, approved in November, 1983, and awaiting definitive approval by the Apostolic Signatura. That decree, while establishing a regional tribunal for the Bloemfontein province, had, on the assumption that the existing courts were "regional," merely affirmed their current juridical position.

A new decree, approved by the SACBC in September, 1984, seems to address the present needs of the Southern African situation reasonably well.

1. The formulation of the decree leaves no doubt as to the juridical nature of the courts:
  - a) the tribunals are "regional" or "supradiocesan" in the broad sense of the term, and "interdiocesan" rather than "regional" in the strict sense;

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<sup>1</sup> Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Letter to Apostolic Delegate to Southern Africa (Prot. N. 1254/71), February 1, 1971, and the reply of the Apostolic Delegate (Prot. N. 6482), May 4, 1971.

- b) they are general rather than special courts, in so far as they are competent to handle all cases, not expressly excluded by law.
- c) they are ordinary courts, since their establishment derives from the law itself;
- d) the jurisdiction exercised in the courts is vicarious, in as much as it is exercised on behalf of the assembly.

2. An advantage of the decree is its consolidation within one document of all the territories of the SACBC, even though the Dioceses of Johannesburg and Manzini are not included in the project for interdiocesan tribunals. The incorporation of those two dioceses in the decree removes the possibility of any future uncertainty concerning the nature of their courts.

3. The decree clearly determines the tribunals of second instance for the territory of the SACBC and indicates the competence of each court. Provision is also made for the diocesan courts of Johannesburg and Manzini since cases decided in first instance in these courts are to be referred on appeal to the Pretoria interdiocesan tribunal. The explicit inclusion of an article defining the court of second instance for the two dioceses mentioned will serve to clarify their position and remove any possibility of confusion.

4. The wording of article III of the decree on the appointment of a moderator for each tribunal reflects the flexibility of the new law. While not insisting that the position of moderator be identified with the archbishop of the diocese where the court has its seat, the decree, nevertheless, makes possible the continuance of the former practice whereby the moderatorship was entrusted to the metropolitan

of each province. In making specific reference to canon 1423,§1, the decree clearly defines the competence of the moderator vis-à-vis the tribunal.

5. In providing that all tribunal personnel are to be appointed in the assembly of bishops, and that their appointments are to be for five years, the decree introduces a greater measure of security. Moreover, it would seem that the removal of tribunal personnel may generally be effected in the assembly of bishops, and then for a legitimate and grave reason.

6. The decree addresses the difficulties encountered in the instruction of formal matrimonial nullity cases outside the seat of the tribunal through the establishment of interrogatory courts. By providing that instructory tribunals consisting of local personnel be constituted as part of the interdiocesan court in each diocese subject to that court, these problems should largely be simplified.

7. In providing that the moderator of each tribunal may, for a particular case, appoint a judge with a certain linguistic and cultural expertise when the language of the parties is not known to the judges of the interdiocesan tribunal, the decree expressly recognises the special needs of the multi-cultural society in Southern Africa. The application of this provision, where necessary, especially in the Bloemfontein province, will undoubtedly assist in the search for truth and serve to expedite the process.

During the half century since interdiocesan courts were first organised in the Church, they have contributed much to the more rapid and efficient handling of matrimonial nullity cases for which they were initially constituted. Although the vision which led to the introduction of these common tribunals as the response

to certain grave difficulties experienced by residential bishops is relatively recent, the new law, especially canon 1423/51, takes that vision a step further. This canon is sufficiently broad in its terminology to permit greater flexibility with respect to the direction of the court, to give more freedom to the assembly in its administration of the court and to encourage a greater degree of participation in its affairs by individual bishops. How this flexibility, freedom and desired participation will be utilised in the furtherance of this increasingly important aspect of the Church's pastoral mission remains a challenge which cannot be ignored.

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APPENDIX - I

Normae pro Tribunalibus interdioecesanis vel regionalibus aut interregionalibus.<sup>1</sup>

CAPUT PRIMUM

DE TRIBUNALIUM ERECTIONE  
DECERNENDA

Art. 1

§1. Ut causarum iudicialium, praesertim matrimonialium, accuratior et celerior pertractatio evadat, in Ecclesia habeantur Tribunalia interdioecesana, regionalia vel interregionalia; horum erectio a Supremo Signaturae Apostolicae Tribunali curatur,<sup>2</sup> sive ad Episcoporum, etiam Ecclesiarum Orientalium, quorum interest, petitionem, sive etiam, si casus ferat, ad eiusdem Supremi Tribunalis Signaturae Apostolicae decisionem.

§2. Erectio, constitutio et ratio procedendi horum Tribunalium reguntur normis quae sequuntur, salvo iure Ecclesiarum Orientalium.

Art. 2

§1. Si erectio fiat petentibus Episcopis, oportet ut Episcopi quorum interest, petito et accepto "nihil obstat" Supremi Tribunalis Signaturae Apostolicae, decretum erectionis ferant, quod tamen vim non habebit nisi post Sanctae Sedis approbationem.

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1 Cf. AAS, 63 (1971), pp. 486-492.

2 "Supremum Tribunal Signaturae Apostolicae tribunalium regionalium vel interregionalium erectionem curat" (Paulus VI, Const. Apost. Regimini Ecclesiae Universae, 15 aug. 1967, n. 105, in AAS, 59 [1967], 921).

Norms for Interdiocesan or Regional or Interregional Tribunals.<sup>1</sup>

CHAPTER I

DECISION TO ESTABLISH TRIBUNALS

Art. 1

§1. In order that the handling of judicial cases, especially marriage cases, may be taken care of with greater care and speed, there should be had in the Church interdiocesan, regional or interregional tribunals. Their establishment is provided for by the Supreme Tribunal of the Apostolic Signatura<sup>2</sup> either at the request of the bishops concerned, including those of the Oriental Churches, or also, if the case so warrants, at the decision of the said Supreme Tribunal of the Apostolic Signatura.

§2. The establishment, constitution and method of procedure of these tribunals are governed by the following norms, without prejudice to the law of the Oriental Churches.

Art. 2

§1. If the establishment is made at the request of the bishops, the bishops concerned, after having sought and received the "nothing hinders" of the Supreme Tribunal of the Apostolic Signatura, draw up the decree of establishment which, however, will not have force except after approval by the Holy See.

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1 Cf. CLD, 7, pp. 920-926.

2 "The Supreme Tribunal of the Apostolic Signatura provides for the establishment of regional and interregional tribunals" (Paul VI, Ap. Const., Regimini Ecclesiae Universae, 15 Aug., 1967, n. 105, in AAS, 59 [1967], 921).

§2. Ad "nihil obstat" petendum oportet ut Episcopi quorum interest, in respectivo coetu adunati, conveniant inter se et ad Supremum Tribunal Signaturae Apostolicae referant:

1) De rationibus propter quas Tribunalia erigenda statuerunt.

2) De iudiciis seu causis pro quibus haec Tribunalia eriguntur, sc., utrum pro solis causis matrimonialibus, sive nullitatis sive separationis, an etiam pro causis iurium et criminalibus.

3) De numero Tribunalium primae et secundae instantiae erigendorum, clare indicatis dioecesibus (proprio suo nomine "de Curia") pro quarum territorio commune Tribunal primae et secundae instantiae sit constituendum.

4) De sede ac territorio uniuscuiusque Tribunalis, adiecta tabula geographica, in qua petita sub art. 2, §2, n. 3, describantur.

§3. Quoties agitur de Tribunalibus regionalibus, coetus, de quo in §2, est respectiva Conferentia Episcopalis, ac decisio ferenda est per duas saltem ex tribus partibus suffragiorum, ad normam decr. Christus Dominus, n. 38, 4;<sup>3</sup> si vero agitur de Tribunalibus interdioecesanis, quae regionalia non sunt, coetus intelligitur conventus Episcoporum quorum interest, qui quidem unanimes quoad singula puncta supra indicata esse debent.

§4. In litteris executivis decreti erectionis, de quo in art. 2, §1, mentio fiat de Sanctae Sedis approbatione.

§2. In order to request the "nothing hinders," the bishops concerned, united in their respective assembly, must agree among themselves and report to the Supreme Tribunal of the Apostolic Signatura:

1) on the reasons why they decided that tribunals must be established.

2) on the trials or cases for which these tribunals are being established, namely, whether for marriage cases only, whether of nullity or of separation, or also for cases of rights and for criminal cases.

3) on the number of tribunals to be established for first and second instance, with clear indication of the dioceses (with their own proper "curial" name) for whose territory the common tribunal of first and second instance is to be constituted.

4) on the seat and territory of each kind of tribunal together with a geographical map on which is described what is sought for under art. 2, §2, n. 3).

§3. As often as there is question of regional tribunals, the assembly mentioned in §2 is the respective episcopal conference and the decision must be passed by at least two-thirds of the votes in accord with the decree, Christus Dominus, n. 38, 4.<sup>3</sup> On the other hand, if there is question of interdiocesan tribunals which are not regional, the assembly is understood as the meeting of the bishops concerned who, indeed, must be unanimous regarding the individual points indicated above.

§4. In the executory letter of the decree of establishment referred to in art. 2, §1, mention should be made of the approbation of the Holy See.

<sup>3</sup> Cf. AAS, 58 (1966), p. 693.

<sup>3</sup> Cf. AAS, 58 (1966), p. 693.

## Art. 3

Si erectio fiat promovente ac decidente Signatura Apostolica, haec secundum suum stylum et praxim procedit.

## CAPUT SECUNDUM

DE TRIBUNALIUM MODERATORE,  
IUDICIBUS ET ADMINISTRIS

## Art. 4

Tribunal interdioecesanum, regionale, interregionale subest auctoritate Episcopi Dioecesani loci in quo situm est, vel, si sedes episcopalis vacet, Episcopi senioris respectivae circumscriptionis. Qui Episcopus, utpote Moderator Tribunalis, idem regit nomine omnium Episcoporum pro quorum territorio est constitutum, eique omnia iura et officia attribuuntur quae Ordinariis locorum circa proprium tribunal competunt ad normam sacrorum canonum, necnon ad causas nullitatis matrimonii quod attinet, ad normam Instructionis Sacrae Congregationis de disciplina Sacramentorum, Provida Mater, diei 15 augusti 1936, nisi aliud peculiariter cautum sit, vel subiecta materia aperte exigit.

## Art. 5

§1. Officialis, Iudices, Promotor Iustitiae, Defensor Vinculi, necnon eorum Substituti, constituuntur ad maiorem partem absolutam suffragiorum, quae conferantur oportet in coetu communi Episcoporum respectivae circumscriptionis territorii, pro quo tribunal est erectum.

§2. Ceteri ministri a Moderatore Tribunalis constituuntur ad normam iuris communis.

## Art. 3

If the establishment takes place at the instigation and decision of the Apostolic Signatura, this tribunal will proceed according to its own usage and practice.

## CHAPTER 2

THE MODERATOR, JUDGES AND OFFICERS  
OF THE TRIBUNALS

## Art. 4

The interdiocesan, regional or interregional tribunal is under the authority of the diocesan bishop of the place where it is located, or, if the episcopal see is vacant, of the senior bishop of the respective circuit. This bishop, in as much as he is the moderator of the tribunal, governs it in the name of all the bishops for whose territory it was constituted, and to him belong all the rights and duties which, according to the sacred canons, belong to local Ordinaries relative to their own tribunal. This also holds regarding cases of nullity of marriage in accord with the Instruction, Provida Mater, of the Sacred Congregation for the Discipline of the Sacraments, 15 August, 1936, unless some other special provision has been made, or the matter under consideration clearly so demands.

## Art. 5

§1. The officialis, judges, promotor of justice, defender of the bond, as well as their substitutes are appointed by an absolute majority of the votes which must be cast in the common assembly of the bishops of the respective territorial circuit for which the tribunal has been established.

§2. The other officers are appointed by the tribunal moderator in accord with common law.

§3. Officialis, Iudicum, Promotoris Iustitiae et Defensoris Vinculi nominatio nota fiat Supremo Tribunali Signaturae Apostolicae.

## Art. 6

Omnes praedicti:

1. sint ordinarie dignitate sacerdotali aucti, integritate morum praestantes et, saltem ad Iudices quod attinet, laurea in iure canonico praediti;

2. scientia et experientia iudiciali vere polleant;

3. debitum tempus impendere valeant muneri sibi collato rite obeundo.

## Art. 7

Iidem iusiurandum de officio rite fideliterque implendo praestare tenentur coram Moderatore vel eius delegato.

## Art. 8

§1. Officialis, Iudices, Promotor Iustitiae, Defensor Vinculi (necnon eorum Substituti, nisi per modum actus sint deputati) removeri nequeunt ab officio nisi gravi de causa et a respectivo coetu communi Episcoporum, eodem modo quo constituti sunt.

§2. In casu tamen urgentis necessitatis ipse Moderator Tribunalis eos suspendere potest, sed de eorundem remotione ac substitutione provideatur iuxta art. 5 §1, harum Normarum.

§3. De remotione autem semper edocenda est Signatura Apostolica.

§3. The nomination of the officialis, judges, promotor of justice, and defender of the bond should be made known to the Supreme Tribunal of the Apostolic Signatura.

## Art. 6

All the aforesaid persons:

1. should, as a rule, possess the rank of priests, be outstanding in integrity, and, at least as far as judges are concerned, have a doctorate in canon law.

2. should really possess judicial learning and experience.

3. should be able to spend the necessary amount of time in the proper discharge of the duty conferred on them.

## Art. 7

They are obliged to take an oath before the moderator or his delegate regarding the due and faithful discharge of their office.

## Art. 8

§1. The officialis, judges, promotor of justice, defender of the bond (as well as their substitutes, unless the latter were deputed by way of act) cannot be removed from office, except for a serious reason and by the respective common assembly of bishops in the same way in which they were appointed.

§2. On the other hand, in a case of urgent necessity, the tribunal moderator himself can suspend them, but should provide for their removal or substitution according to art. 5, §1 of these norms.

§3. The Apostolic Signatura must always, however, be told of the removal.

## Art. 9

§1. Nemo iudicis munere fungi poterit qui advocati vel procuratoris munus in eodem Tribunali exercuerit aut in quolibet Tribunali actu exerceat, sive directe sive per interpositam personam.

§2. Idem valet quoque de Promotore Iustitiae et Defensore Vinculi.

§3. Omnes de quibus in art. 8 districte vetantur in quaslibet causas extra munus suum se quomodolibet ingerere.

## Art. 10

Moderator Tribunalis, collatis consiliis cum ceteris Episcopis respectivae circumscriptionis territorii, album conficiat advocatorum et procuratorum; de quibus servanda sunt praescripta can. 1655-1666, itemque si iidem munus exercere debeant in causis nullitatis matrimonii, praescripta art. 47, § 4; 48, §§ 2-4, 53, §2 praefatae Instructionis Provida Mater.

## CAPUT TERTIUM

DE MODO PROCEDENDI IN CAUSIS  
PERTRACTANDIS

## Art. 11

In causis pertractandis accurate serventur Iuris praescripta, his tamen additis vel mutatis quae infra statuuntur.

## Art. 12

Libellus porrigatur Moderatori Tribunalis competentis.

## Art. 9

§1. No one can perform the function of judge who shall have exercised the function of advocate or procurator in the same tribunal, or is actually exercising such function in any other tribunal, whether directly or by substitute.

§2. The same thing holds true regarding the promotor of justice and the defender of the bond.

§3. All those mentioned in art. 8 are strictly forbidden to inject themselves in any way whatever into any kind of case outside their assignment.

## Art. 10

After having taken counsel with the other bishops of the respective territorial circuit, the tribunal moderator should draw up a register of advocates and procurators with reference to whom the prescriptions of canons 1655-1666 must be observed and, likewise, if they must exercise their duty in cases of nullity of marriage, the prescriptions of articles 47, §4; 48, §§2-4; 53, §2 of the aforesaid Instruction, Provida Mater.

## CHAPTER 3

MANNER OF PROCEDURE IN  
HANDLING OF CASES

## Art. 11

In the handling of cases the prescriptions of law should be accurately observed, but with the additions and changes stipulated below.

## Art. 12

The bill of complaint should be laid before the moderator of the competent tribunal.

## Art. 13

Causae ita inscribantur: primum ponatur nomen Tribunalis, videlicet regionalis vel interdioecesani vel interregionalis, dein nomen dioecesis a cuius Tribunali causa pertractanda fuisset in prima instantia ad normam iuris communis; postremo titulus causae; ex. gr. Florentina seu Pistorien. Nullitatis matrimonii (N.N.); Lugdunen. seu Gratianopolitan. Nullitatis matrimonii (N.N.).

## Art. 14

§1. Moderatoris Tribunalis erit tutorem vel curatorem admittere aut designare ad normam can. 1648 et 1651 et salvo praescripto art. 78, §3, praefatae Instructionis Provida Mater.

§2. Quoad procuratorem, autem, minorum servetur praescriptum can. 1648, §3.

§3. Idem tamen Moderator de his decernet collatis consiliis cum Ordinario partis cui tutor vel procurator constituendus est.

## Art. 15

Ordinarius loci de quo fit sermo in art. 37-41 Instructionis Provida Mater intelligendus est Ordinarius domicilii coniugum; qui quidem antequam proprium iudicium ferat, opportune cum moderatore tribunalis aget.

## Art. 16

§1. In casibus exceptis, de quibus can. 1990-1992, quaelibet petitio remittatur ad Moderatorem Tribunalis, qui, praehabito voto Episcopi domicilii coniugum, de eadem videat ad normam art. 226-231 superius citatae Instructionis Provida Mater.

§2. Itemque, Officialis de quo in art. 228 est Officialis eiusdem tribunalis.

## Art. 13

Cases should be registered as follows: first, there should be placed the name of the tribunal, namely, regional or interdiocesan or inter-regional; then the name of the diocese in whose tribunal the case should have been handled in first instance according to the common law; in the last place, the title of the case; for example, Florence, that is, Pistoia. Nullity of marriage (N.N.); Lyons, that is, Grenoble. Nullity of marriage (N.N.).

## Art. 14

§1. It will belong to the tribunal moderator to admit or to designate a tutor or guardian in accord with canons 1648 and 1651, and without prejudice to art. 78, §3 of the above-mentioned Instruction, Provida Mater.

§2. With regard to a procurator for minors, however, the prescription of canon 1648, §3 should be observed.

§3. On the other hand, the said moderator will decide these matters after having taken counsel with the Ordinary of the party for whom a guardian or procurator is to be appointed.

## Art. 15

The local Ordinary referred to in articles 37-41 of the Instruction, Provida Mater, must be understood as the Ordinary of domicile of the spouses. But before he passes his own judgment, he shall opportunely deal with the tribunal moderator.

## Art. 16

§1. In the exceptional cases provided for in canons 1990-1992, every petition should be remitted to the tribunal moderator who, after having obtained the opinion of the bishop of domicile of the spouses, should review it in accordance with articles 226-231 of the above-cited Instruction, Provida Mater.

§2. Likewise, the officialis referred to in art. 228 is the officialis of the said tribunal.

## CAPUT QUARTUM

DE MINISTRORUM TRIBUNALIUM ET  
ADVOCATORUM AC PROCURATORUM  
REMUNERATIONE, NECNON DE TAXIS ET  
EXPENSIS IUDICIALIBUS

## Art. 17

Iudicum et ministrorum remuneratio determinetur in coetu Episcoporum respectivae circumscriptionis territorialis, probe consideratis munerum, locorum temporumque adiunctis et causarum numero.

## Art. 18

§1. Eodem modo et iuxta eandem normam praestituatur notula cum taxarum et expensarum iudicialium, tum emolumentorum ad advocatos et procuratores spectantium.

§2. Eiusmodi autem notula litigantibus distincte notificari debet inde ab exhibitio libello litis introductorio.

## Art. 19

Quoties gratuitum vel semigratuitum patrocinium concessum fuerit, onus solvendi expensas devolvitur ad fundum constituendum a respectivo coetu Episcoporum.

## Art. 20

In eodem coetu decidendum erit qua mensura seu proportione unaquaeque dioecesis relativis Tribunalibus primae et secundae instantiae opem feret, tum idoneos sacerdotes ad munera Iudicum et ministrorum suppeditando, tum pecuniariam contributionem solvendo, ex qua et ex Tribunalium introitibus stipendia personarum ac uniuscuiusque Tribunalis sumptus solvi possint.

## CHAPTER 4

REMUNERATION FOR TRIBUNAL OFFICERS,  
ADVOCATES AND PROCURATORS;  
FEES AND JUDICIAL EXPENSES

## Art. 17

Remuneration for judges and officers should be determined in the assembly of the bishops of the respective territorial circuit, after having considered well the circumstances of the assignments, places and times, and the number of cases.

## Art. 18

§. In the same way, and according to the same norm, there should be determined a list of fees and judicial expenses, and of emoluments, pertinent to advocates and procurators.

§2. Such a list, however, must be made known clearly to the litigants from the moment the introductory bill of complaint is exhibited.

## Art. 19

Whenever gratuitous or semi-gratuitous legal assistance has been granted, the burden of meeting the expenses devolves upon a fund established by the respective assembly of bishops.

## Art. 20

The same assembly shall decide in what measure or proportion each of the dioceses shall provide assistance to the respective tribunals of first and second instance, both by supplying suitable priests for assignments as judges and officers, and by paying a monetary contribution from which, as well as from the entrance money of the tribunals, the stipends of persons and the costs of each tribunal can be paid.

## CAPUT QUINTUM

NORMAE TEMPORANEAEE  
SEU TRANSITORIAE

## Art. 21

Decretum, quo constituuntur Tribunalia interdioecesana vel regionalia aut interregionalia, sive primae sive secundae instantiae, a Sancta Sede approbatum, per Praesidem Conferentiae Episcopalis executioni quamprimum mandetur, die ab eodem statuenda.

## Art. 22

Quod attinet ad causas die executionis decreti pendentes apud Tribunalia dioecesana ordinaria respectivae circumscriptionis territorialis, haec serventur:

1. Causae quae agitantur in prima instantia, deferantur ad novum Tribunal primae instantiae si dubia nondum fuerint concordata ad normam iuris communis; deferri vero eidem possunt quae nullitatem matrimonii respiciunt et in phasi instructoria versantur, accedente consensu utriusque coniugis et Defensoris vinculi.

Sin autem iam editum sit praefatum decretum conclusionis in causa, sententia definitiva proferri debet a Tribunali apud quod causa introducta est.

In utroque casu appellatio interponatur apud novum Tribunal appellationis, salva tamen facultate de qua in can. 1599, §1, n. 1.

2. Idem fiat, congrua congruis referendo, in causis quae agitantur in gradu appellationis.

## CHAPTER 5

## TEMPORARY OR TRANSITORY NORMS

## Art. 21

The decree, whereby interdiocesan or regional or interregional tribunals of either first or second instance are constituted, and which has been approved by the Holy See, should be committed to execution as soon as possible by the president of the episcopal conference on a date to be determined by himself.

## Art. 22

With regard to cases which, on the date of execution of the decree, are pending in the ordinary diocesan tribunals of the respective territorial circuits, these norms shall be observed:

1. Cases which are being acted upon in first instance, should be turned over to the new tribunal of first instance, if the issues have not yet been defined in accordance with common law; cases, however, which look to nullity of marriage and are only in the instructory stage can be turned over to the same tribunal if the consent of each of the spouses and of the defender of the bond is obtained.

On the other hand, if the decree of closing in the case has been already declared and issued, the definitive sentence must be pronounced by the tribunal before which the case was introduced.

In each case, appeal is lodged with the new appellate tribunal, without prejudice, however, to the faculty referred to in canon 1599, §1, n. 1.

2. With the appropriate changes having been made, the same procedure should be followed in cases which are being acted upon at the appellate level.

Praesentes Normae suos plenarios et integros effectus obtinebunt a festo Annuntiationis B.M.V., id est a die XXV martii anni MCMLXXI.

Datum Romae, in Sede Supremi Tribunalis Signaturae Apostolicae, die XXVIII decembris MCMLXX.

The present norms shall obtain their full and entire effects on the feast of the Annuntiation of B.V.M., that is, on the 25th day of March, 1971.

Given at Rome, at the seat of the Supreme Tribunal of the Apostolic Signatura, the 28th day of December, 1970.

Tav. III

Specchio statistico delle cause matrimoniali  
anno 1962 (Asia - Africa - Oceania)

TRIBUNALI	Percentuali delle relazioni inviate	
Asia		
1 Isole Filippine	0/ 8	
2 Vietnam	1/ 21	nessuna attività
3 Pakistan	1/ 10	
4 Stati diversi	0/318	
Africa		
5 Algeria	3/ 5	nessuna attività
6 Basutoland		
Sud-Africa		
Swaziland	1/ 28	emessa una sentenza
7 Tunisia	1/ 1	nessuna sentenza emessa
8 Stati diversi	0/261	
Oceania		
9 Australia	4/ 28	nessuna attività
10 Melanesia	0/ 0	non vi sono Trib. costituiti
11 Micronesia	0/ 3	
12 Nuova Guinea ed Arcipel. Bismark	3/ 17	nessuna sentenza
13 Nuova Zelanda	1/ 14	nessuna attività
14 Polinesia	0/ 8	
Tot.	15/722	

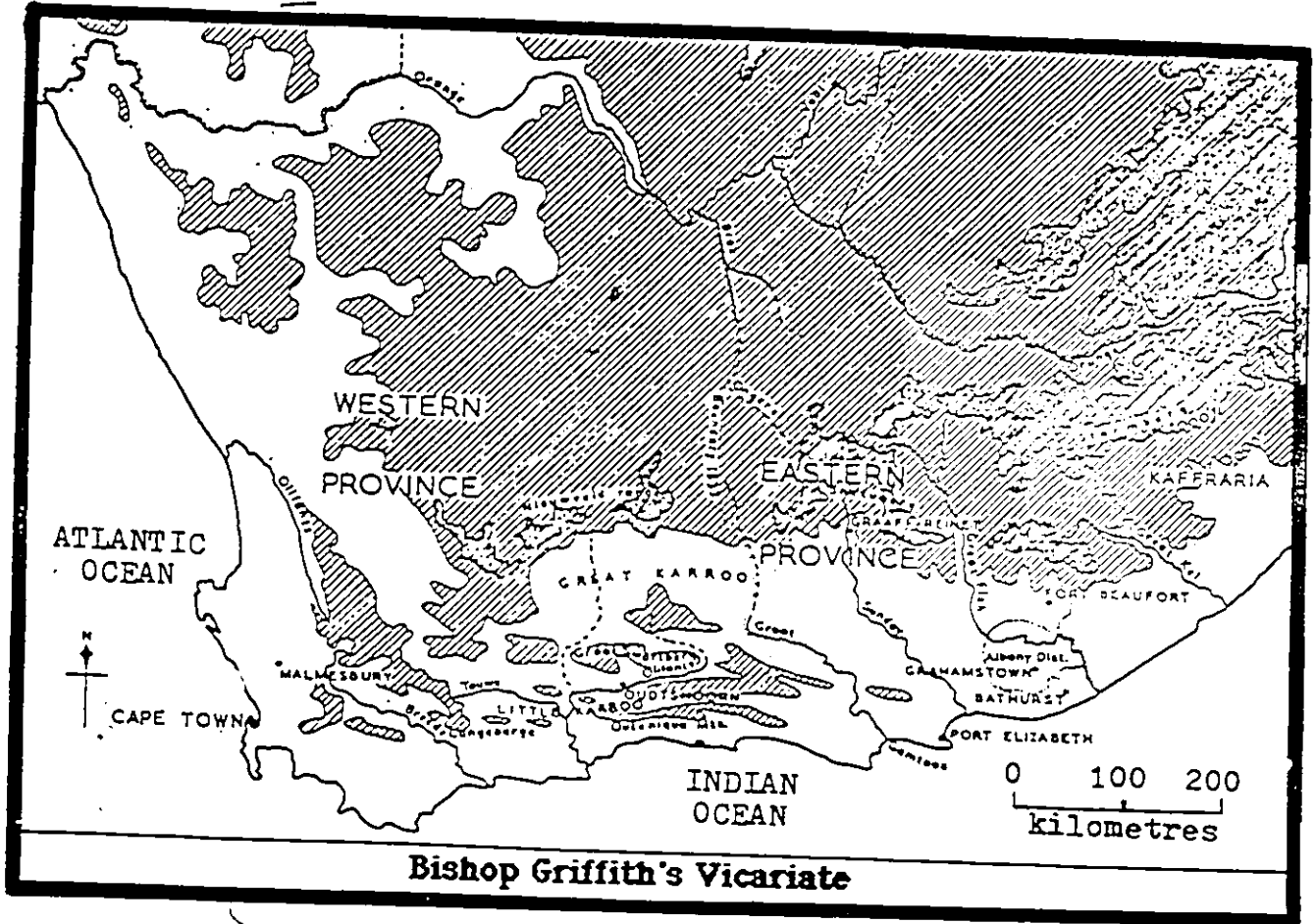
Cf. S.C. OF THE SACRAMENTS, OFFICE OF VIGILANCE, Adunanza Generale, XXV, March 16, 1964.

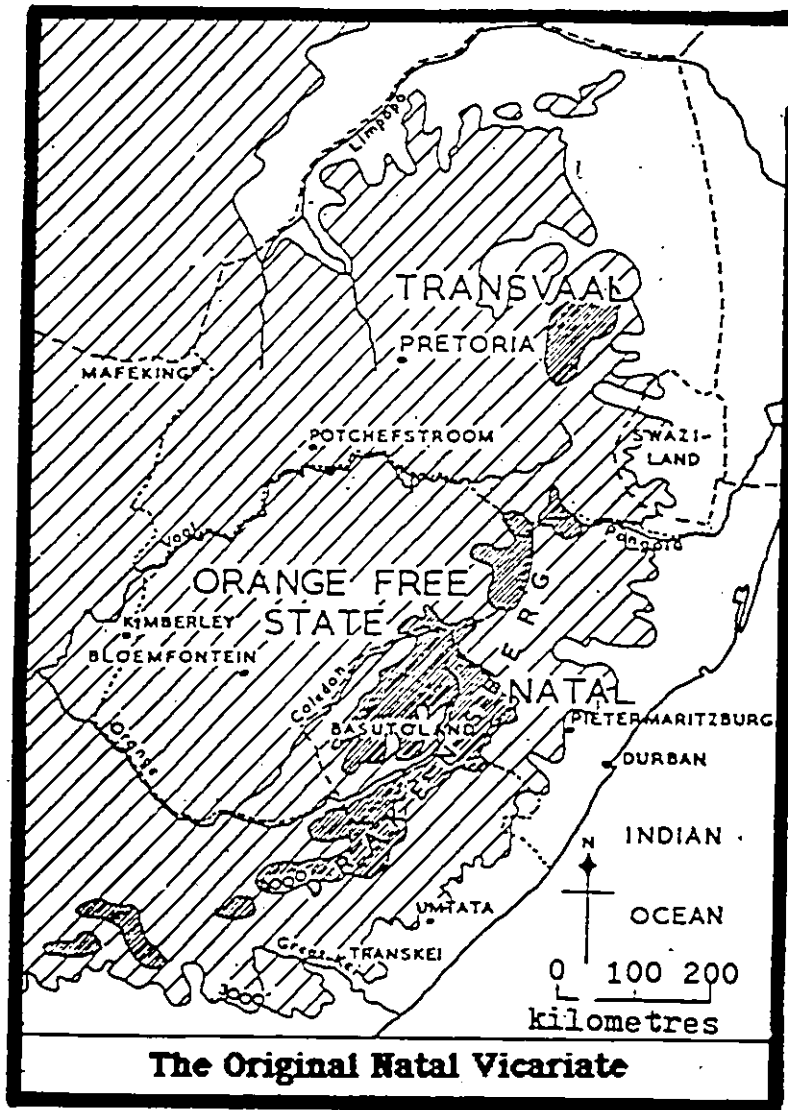
Tav. III

**Specchio statistico delle cause matrimoniali  
anno 1963 (Asia - Africa - Oceania)**

TRIBUNALI	Percentuali delle relazioni inviate	
<b>Asia</b>		
1 Isole Filippine	0/ 8	
2 Vietnam	0/ 21	
3 Pakistan	1/ 10	Nessuna attività
4 Stati diversi	0/318	
<b>Africa</b>		
5 Algeria	1/ 5	Una sola sentenza (Orano)
6 Basutoland	1/ 3	Due sentenze (Maseru)
Sud-Africa	0/ 25	
7 Tunisia	1/ 1	Una sola sentenza (Cartagine)
8 Stati diversi	0/261	
<b>Oceania</b>		
9 Australia	4/ 28	Nessuna attività
10 Melanesia	0/ 0	Non vi sono Trib. costituiti
11 Micronesia	0/ 3	
12 Nuova Guinea ed Arcipel. Bismark	1/ 17	Nessuna sentenza
13 Nuova Zelanda	0/ 14	
14 Polinesia	0/ 8	
Tot.	9/722	

Cf. S.C. OF THE SACRAMENTS, OFFICE OF VIGILANCE, Adunanza Generale, XXVI, March 24, 1965.

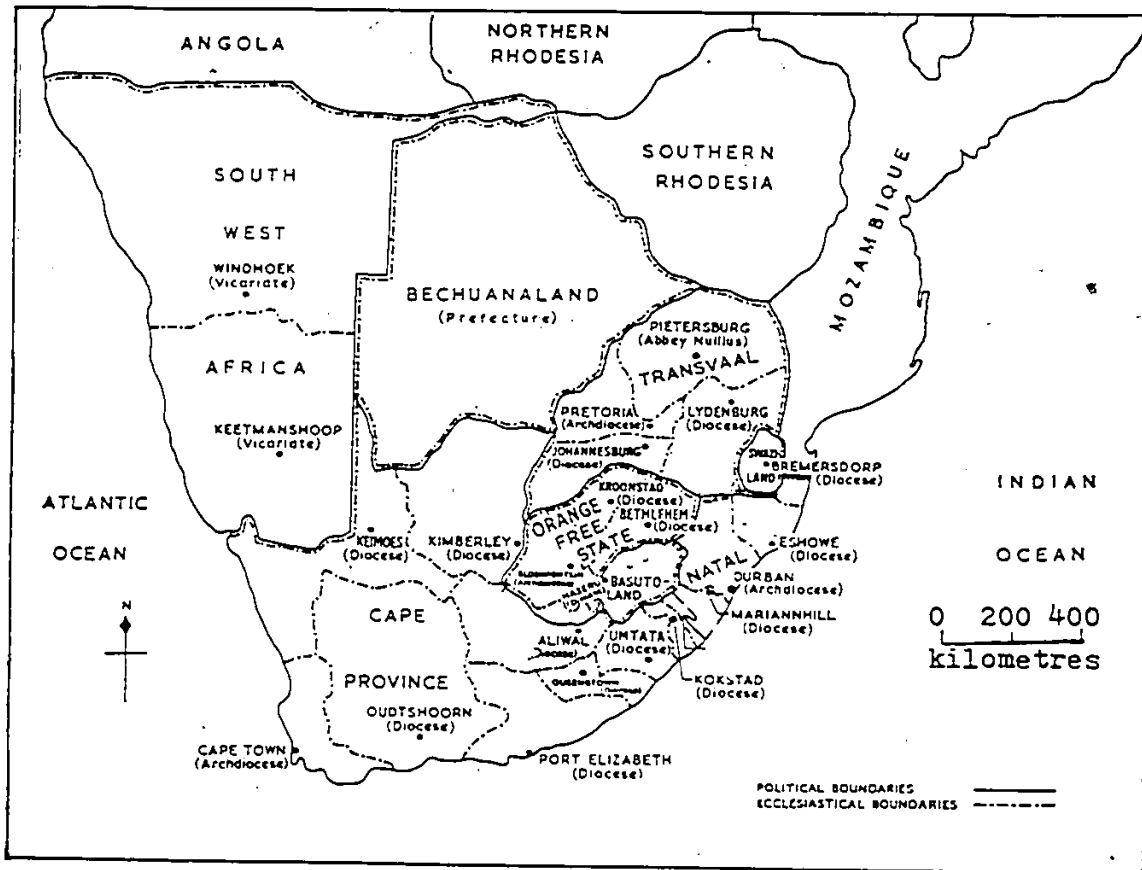






The Ecclesiastical Territories of the Apostolic Delegation to Southern Africa - 1927

POOR PRINT  
Epreuve illisible



**The Ecclesiastical Territories of the Apostolic Delegation in Southern Africa Following the Establishment of the Hierarchy on January 11, 1951**

File No. 3/2  
 234/38 Received 6/11/38.  
 Answered .....

Bloemfontein, Oct. 3 1938

My Lord

In consequence of my correspondence with the Sacred Congregation of the Sacraments regarding the desirability of establishing in S. Africa one or two tribunals for matrimonial cases, I am able to reiterate that the aforesaid Congregation would appreciate very much when the Ordinaries saw their way to establish such institutes.

What I have explained at the general meeting of the Ordinaries in 1933 on the matter by means of a Circular, and again expounded on the occasion of the last general meeting in 1938, has been confirmed by the aforesaid Congregation ("Instruction" 11 June 1938) viz. that a tribunal of first and second grade to be established in this Delegation, will be competent to handle all the matrimonial cases, which I have enumerated at the past general meeting, and that their verdict, if conform, will be decisive, without first having recourse to Rome. The establishment of only one court of first grade makes it necessary to forward the cases to Rome for final decision.

Such tribunals, therefore, will be of great advantage to the Ordinaries, having only to deal with a local tribunal, which will be able to clear the matrimonial cases in a shorter space of time.

For this purpose I beg to propose and would appreciate Your approval thereof, that two tribunals, one of first instance and one of second instance, are to be founded in this Delegation, the former to be established in Cape Town, the latter in Johannesburg. No sooner have I received Your approval, I will make the necessary arrangements to the effect.

Meanwhile the existing local tribunals, if there be any, keep on functioning, until the proposed organisation has come about.

Lastly, I remind Your Lordship of the decision of the S. Congregation of Sacraments, whereby each Ordinary is obliged to forward to this Delegation before the end of the current civil year the report on matrimonial cases which are tried during this year, and also the pending cases

With kindest regards  
 sincerely Yours

*B. J. Gijlswijk*  
*Sec. ap.*

Replied: no cases  
 tried - no pending cases.  
 2 - DEC 1938

(Letter from the Apostolic Delegate to Southern Africa, Archbishop B. Gijlswijk, O.P., to the Vicar Apostolic of the Western District of the Cape of Good Hope, Bishop Francis Hennemann, P.S.M.)

Bloemfontein, 1 Febbraio, 1938.

DELEGATIO APOSTOLICA  
IN AFRICA MERIDIONALI

125/37

259/38

A Sua Eminenza Reverendissima

D. Card. Jorio.

Prefetto. Roma.

Eminenza Reverendissima,

Riferendomi alla lettera Prot. 2022/32 in data 20 agosto '37 ho l'onore di rimettere, qui accluso, uno Modulo N. III proveniente dal Vicariato di Kroonstad dipendente da questa Delegazione Apostolica dell'Africa meridionale.

Negli altri territori ecclesiastici di questa Delegazione non ci sono regolari tribunali per le cause matrimoniali. Ma tutti i rispettivi Ordinari mi hanno informato che non hanno trattate cause matrimoniali durante l'anno 1937.

Cui aggiungo un rapporto proveniente dal vicariato di Mariannhill (Natal), ~~che~~ il cui Ordinario mi ha domandato d'inviarlo a cotesta S. Congregazione.

Con sensi di ben distinta e sincera stima

di Vostra Eminenza Reverendissima

umile servitore

*B. J. Gijlswijk*  
*Det. Ap.*



(Letter from the Apostolic Delegate to Southern Africa, Archbishop B. Gijlswijk, O.P., to the Prefect of the Sacred Congregation of the Sacraments concerning matrimonial cases handled in the Apostolic Delegation in 1937)



A S. Ec. R. Mons.

Giordano Gijlswijk, O.P.

Deleg. Ap.o Bloemfontein (Orange Free State  
Pancrossd 29

Sud Africa

Ecc, Rev.

Roma 29.5.38

In possesso della pregiata Sua del 1 Febbraio n. 123/38, mi reco a premura a significarle che sarebbe certamente opportuno che in codesta regione venisse costituito almeno un regolare tribunale per le cause matrimoniali. Detto tribunale o - se più di uno - detti tribunali certamente sarebbero competenti a definire qualunque causa matrimoniale di qualsiasi genere e se costi esistessero almeno due tribunali, uno di prima ed uno di seconda istanza, le sentenze matrimoniali diverrebbero esecutive dopo ottenutene due conformi per la nullità, senza che sia intervenuto appello od ulteriori istanze di parte del difensore del vincolo, come avviene per il resto del mondo senza che occorra ricorrere successivamente ai tribunali della Santa Sede.

Qualora invece costi funzionasse un solo tribunale collegiale di prima istanza, dalle sue sentenze si dovrebbe appellare in II istanza alla S. Romana Rota a meno che non venisse fissato dal Santo Padre qualche altro tribunale di appello in Sede più vicina. Al Vic. Ap.co del Natal potrà rispondere che per cose matrimoniali da Lui accennate potrà rivolgersi alla Sacra C. ne di Propaganda Fide, la quale a sua volta li potrà rimettere alla Sup. S. C. ne del Sant'Uffizio a cui la materia dei matrimoni misti e di privilegio paolino è esclusivamente riservata. Mentre auguro frattanto a codeste missioni sempre maggiori sviluppi, profitto dell'occasione ...

(A transcription of the handwritten draft reply of Monsignor V. Bartocchetti; this reply is at the bottom of the letter received from the Apostolic Delegate to Southern Africa [Prot. N. 123/38], February 1, 1938. Cf. appendix IX.)

SACRA CONGREGATIO  
DE SACRAMENTIS.

No. 65/39 St.

Rome.

23rd Feb. 1939.

Your Excellency,

Your esteemed letter of the 6th instant has been duly received by this S. Congregation, and while I thank Your Excellency for the steps you have taken relative to the eventual trial of matrimonial cases in the Apostolic Delegation, I hasten to convey to you the opinion of this S. Congregation regarding the proposals and requests made in the said letter.

Your Excellency states that the Ordinaries desire that two Tribunals should be established, one of the First Grade in Capetown, and one of Appeal in Johannesburg, but that the required personnel (efficient) is lacking, and that it would be better to establish Tribunals, each with only one Judge.

Your Excellency knows perfectly that the Code of Canon Law was introduced in order to reserve the trials of cases of Nullity of Marriage to a College of Three Judges, on account of their gravity and difficulty: it does not therefore seem opportune to depart from this fundamental norm. If it should really prove impossible to find suitable subjects to form two Tribunals, would it not be possible, in the meantime, to establish only one Court (of the First Grade), especially in view of the insignificant number of formal processes which it will - presumably - be required to handle: the appeal; then, could be sent direct to the Roman Rota, in terms of Can. 1599, I.

The exigencies of the personnel of a Tribunal should, at the same time, not be exaggerated. When, in fact, one has an Official and a Defensor Vinculi who are both really efficient and superior to every exception, it does not seem difficult to find a notary and two co-Judges. These latter, in fact, do not take any part in the examinatory ("istruttoria") part of the case directed by the Official and the Defensor Vinculi, but take part only in certain few and well-determined processual acts and principally at the pronouncement of the sentence.

It does not appear excessively difficult that such Judges, having examined the complete process, pronounce (after the "relatio" of the Official) their vote for the sentence.

In anticipation of further communication from you, I remain, etc.

D. CARD. JORIO

(Letter from Cardinal Domenico Jorio, Prefect of the Sacred Congregation of the Sacraments to Archbishop B. Gijlswijk, O.P., Apostolic Delegate to Southern Africa)





SACRA CONGREGAZIONE "DE PROPAGANDA FIDE"

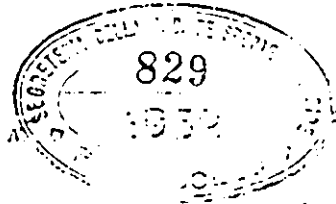
Rubrica e Sottorubrica

N. 46 / 2

Rubr. AFRICA MERIDIONALE

Sottorubr. AFFARI COMUNI

Protocollo



Riassunzione

Oggetto:

Comunica le diocesi che fanno parte di ciascun tribunale matrimoniale, inoltre chiede che oltre i tre tribunali già approvati che sia istituito un altro a Durban così seguendo le provincie ecclesiastiche.

PROT. F. 4319/50

*M. M. ...*

Contenuto del documento

Allegati:

Persone o località principali a cui si fa cenno:

Provvista

*In Congregazione  
del 14 Martii 1952  
Si sta all'udienza  
4319/50*

Numero, luogo e data del documento: 2/16/2/52

PRETORIA 22 FEBBRAIO 1952

Scrittore e sua qualifica:

S.E. REV. MA MONS. MARTINO LUCAS S.V.D.  
DELEGATO APOSTOLICO NELL'AFRICA MERIDIONALE

Esecuzione

Provenienza

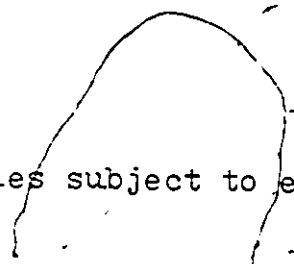
Data di registrazione:

829

Prot.

*20FE*

(The designation of ecclesiastical territories subject to each matrimonial court)



*MINUTA*

S. CONGREGAZIONE < DE PROPAGANDA FIDE >

N. 46 / 2-

Roma, MARCH 15 19 52

Rub. (c.) • Sotto. (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z) (aa) (ab) (ac) (ad) (ae) (af) (ag) (ah) (ai) (aj) (ak) (al) (am) (an) (ao) (ap) (aq) (ar) (as) (at) (au) (av) (aw) (ax) (ay) (az) (ba) (bb) (bc) (bd) (be) (bf) (bg) (bh) (bi) (bj) (bk) (bl) (bm) (bn) (bo) (bp) (bq) (br) (bs) (bt) (bu) (bv) (bw) (bx) (by) (bz) (ca) (cb) (cc) (cd) (ce) (cf) (cg) (ch) (ci) (cj) (ck) (cl) (cm) (cn) (co) (cp) (cq) (cr) (cs) (ct) (cu) (cv) (cw) (cx) (cy) (cz) (da) (db) (dc) (dd) (de) (df) (dg) (dh) (di) (dj) (dk) (dl) (dm) (dn) (do) (dp) (dq) (dr) (ds) (dt) (du) (dv) (dw) (dx) (dy) (dz) (ea) (eb) (ec) (ed) (ee) (ef) (eg) (eh) (ei) (ej) (ek) (el) (em) (en) (eo) (ep) (eq) (er) (es) (et) (eu) (ev) (ew) (ex) (ey) (ez) (fa) (fb) (fc) (fd) (fe) (ff) (fg) (fh) (fi) (fj) (fk) (fl) (fm) (fn) (fo) (fp) (fq) (fr) (fs) (ft) (fu) (fv) (fw) (fx) (fy) (fz) (ga) (gb) (gc) (gd) (ge) (gf) (gg) (gh) (gi) (gj) (gk) (gl) (gm) (gn) (go) (gp) (gq) (gr) (gs) (gt) (gu) (gv) (gw) (gx) (gy) (gz) (ha) (hb) (hc) (hd) (he) (hf) (hg) (hh) (hi) (hj) (hk) (hl) (hm) (hn) (ho) (hp) (hq) (hr) (hs) (ht) (hu) (hv) (hw) (hx) (hy) (hz) (ia) (ib) (ic) (id) (ie) (if) (ig) (ih) (ii) (ij) (ik) (il) (im) (in) (io) (ip) (iq) (ir) (is) (it) (iu) (iv) (iw) (ix) (iy) (iz) (ja) (jb) (jc) (jd) (je) (jf) (jg) (jh) (ji) (jj) (jk) (jl) (jm) (jn) (jo) (jp) (jq) (jr) (js) (jt) (ju) (jv) (jw) (jx) (jy) (jz) (ka) (kb) (kc) (kd) (ke) (kf) (kg) (kh) (ki) (kj) (kk) (kl) (km) (kn) (ko) (kp) (kq) (kr) (ks) (kt) (ku) (kv) (kw) (kx) (ky) (kz) (la) (lb) (lc) (ld) (le) (lf) (lg) (lh) (li) (lj) (lk) (ll) (lm) (ln) (lo) (lp) (lq) (lr) (ls) (lt) (lu) (lv) (lw) (lx) (ly) (lz) (ma) (mb) (mc) (md) (me) (mf) (mg) (mh) (mi) (mj) (mk) (ml) (mm) (mn) (mo) (mp) (mq) (mr) (ms) (mt) (mu) (mv) (mw) (mx) (my) (mz) (na) (nb) (nc) (nd) (ne) (nf) (ng) (nh) (ni) (nj) (nk) (nl) (nm) (nn) (no) (np) (nq) (nr) (ns) (nt) (nu) (nv) (nw) (nx) (ny) (nz) (oa) (ob) (oc) (od) (oe) (of) (og) (oh) (oi) (oj) (ok) (ol) (om) (on) (oo) (op) (oq) (or) (os) (ot) (ou) (ov) (ow) (ox) (oy) (oz) (pa) (pb) (pc) (pd) (pe) (pf) (pg) (ph) (pi) (pj) (pk) (pl) (pm) (pn) (po) (pp) (pq) (pr) (ps) (pt) (pu) (pv) (pw) (px) (py) (pz) (qa) (qb) (qc) (qd) (qe) (qf) (qg) (qh) (qi) (qj) (qk) (ql) (qm) (qn) (qo) (qp) (qq) (qr) (qs) (qt) (qu) (qv) (qw) (qx) (qy) (qz) (ra) (rb) (rc) (rd) (re) (rf) (rg) (rh) (ri) (rj) (rk) (rl) (rm) (rn) (ro) (rp) (rq) (rr) (rs) (rt) (ru) (rv) (rw) (rx) (ry) (rz) (sa) (sb) (sc) (sd) (se) (sf) (sg) (sh) (si) (sj) (sk) (sl) (sm) (sn) (so) (sp) (sq) (sr) (ss) (st) (su) (sv) (sw) (sx) (sy) (sz) (ta) (tb) (tc) (td) (te) (tf) (tg) (th) (ti) (tj) (tk) (tl) (tm) (tn) (to) (tp) (tq) (tr) (ts) (tu) (tv) (tw) (tx) (ty) (tz) (ua) (ub) (uc) (ud) (ue) (uf) (ug) (uh) (ui) (uj) (uk) (ul) (um) (un) (uo) (up) (uq) (ur) (us) (ut) (uu) (uv) (uw) (ux) (uy) (uz) (va) (vb) (vc) (vd) (ve) (vf) (vg) (vh) (vi) (vj) (vk) (vl) (vm) (vn) (vo) (vp) (vq) (vr) (vs) (vt) (vu) (vv) (vw) (vx) (vy) (vz) (wa) (wb) (wc) (wd) (we) (wf) (wg) (wh) (wi) (wj) (wk) (wl) (wm) (wn) (wo) (wp) (wq) (wr) (ws) (wt) (wu) (wv) (ww) (wx) (wy) (wz) (xa) (xb) (xc) (xd) (xe) (xf) (xg) (xh) (xi) (xj) (xk) (xl) (xm) (xn) (xo) (xp) (xq) (xr) (xs) (xt) (xu) (xv) (xw) (xx) (xy) (xz) (ya) (yb) (yc) (yd) (ye) (yf) (yg) (yh) (yi) (yj) (yk) (yl) (ym) (yn) (yo) (yp) (yq) (yr) (ys) (yt) (yu) (yv) (yw) (yx) (yy) (yz) (za) (zb) (zc) (zd) (ze) (zf) (zg) (zh) (zi) (zj) (zk) (zl) (zm) (zn) (zo) (zp) (zq) (zr) (zs) (zt) (zu) (zv) (zw) (zx) (zy) (zz)

MOST REV. MARTIN H. LUCAS. ?SV??  
Apostolic Delegate to South Africa  
Fretoria South Africa

S. C.  
C. P.  
M. S.

Prot. 829 / 52

Your Excellency :

*Objetto:  
Le costituzioni di diversi Arcidiocesi sotto  
i tre tribunali - si sommano e si  
ora non si fa un altro tribunale a  
Durban e si chiama lettera  
prot. 4314/50*

I have received your letter regarding the list of dioceses and archdiocese which will fall under the three Matrimonial Tribunals. The Sacred Congregation " de Propaganda Fide " accepts them= hereby place the following archdioceses and dioceses under the erected Tribunals:

Capetown	Johannesburg	Maseru
Kelmoes	Pretoria	Mariannhill
Oudtshoorn	Fort Victoria	Umtata
Port Elizabeth	Bulawayo	Bremersdorp
Keetmanshoop	Salisbury	Eshowe
Windhoek	Lydenburg	Kokstad
Aliwal North	Pietersburg	Kroonstad
Queenstown	Kimberley	Bethlehem
	Durban	Bloemfontein

Vedi precedenti N. \_\_\_\_\_

Alligati:

*Damas*

File

With reference to Archbishop's Hurley's request i.e. to erect a tribunal at Durban, for the being Propaganda would like to leave things as they are ~~as the need of the times demands~~ as the need of the times demands.

*The tribunals of the same nature will remain as stated in letter of March 9, 1952 prot. 4314/50 - namely - Capetown - Johannesburg to Maseru - Maseru to Capetown. With best wishes and regards, I remain Very sincerely yours in Christ.*

A mano  
Procuratore  
Fidei ordinaria  
Raccomandata  
Assicurata

(The designation of ecclesiastical territories for each matrimonial court, March 15, 1952.)

S. U. - de Propaganda Fide  
MINUTA

3449/58

Roma, 29 settembre 1958.

Eccellenza Reverendissima,

Con Rapporto del 24 luglio 1958, N. 551/58, l'E.V. Rev.ma ha qui trasmesso l'istanza dell'Ecc.mo Mons. Arcivescovo di Salisbury, il quale chiede che il tribunale per le cause matrimoniali venga costituito nell'arcidiocesi suddetta. In pari tempo V.E. ha presentato per l'approvazione un particolareggiato piano per i tribunali di seconda istanza nel territorio soggetto a codesta Delegazione Apostolica.

Al riguardo, mi prego rendere noto all'E.V. che questa Sacra Congregazione, concede, con la presente, l'erezione della corte giudiziaria per le cause matrimoniali a Salisbury, a cui facendo capo le circoscrizioni ecclesiastiche della Rhodesia meridionale (ciò Gwelo, Bulawayo, Harare e Umtata).

Per quel che riguarda i tribunali di seconda istanza, Le faccio presente che questo Sacro Dicastero approva il piano presentato da V.E., secondo il quale il tribunale di seconda istanza per Cape Town sarà Pretoria, per Pretoria, Durban, per Durban, Maseru, per Maseru, Cape Town e per Salisbury, Pretoria.

Mentre prego V.E. di informare di quanto sopra gli Ordinari interessati, profitto dell'occasione per porgerLe distinti ossequi.

Dell'Eccellenza Vostra Rev.ma  
dev.mo nel Signore

*P. B. Card. Agagianian*  
Pro-Prefetto  
+ *P. Ligiermond*  
Segr.

A Sua Eccellenza Reverendissima  
Monsignor CELESTINO DAMIANO  
Delegato Apostolico dell'Africa  
Meridionale..

(The second re-ordering of matrimonial tribunals,  
September 29, 1958)

In Reply Please Quote

No. 551/58



APOSTOLIC DELEGATION  
800 PRETORIUS STREET  
PRETORIA

TEL. 4-2489 P.O. Box 327  
TELEX. ARR. "VAFICOL"

PROGETTOSede del Tribunale.Personale.

CAPE TOWN	{ Alival North Oudtshoorn Port Elizabeth Queenstown De Aar Windhoek Keetmanshoop }	{ Forte numero di sacerdoti ex-alunni del Collegio Urbano.
DURBAN	{ Eshowe Kokstad Mariannhill Umtata Umzimkulu }	{ Scolastico degli O.M.I. Professori del Seminario Regionale di Pavensy.
MASERU	{ Bloemfontein Bethlehem Keiwoes Kimberly Kroonstad Leribe }	Seminario Minore e Maggiore.
PRETORIA	{ Bromersdorp Johannesburg Lydenburg Pietersburg Volksrust }	Seminario Regionale.
SALISBURY	{ Gwelo Bulawayo Umtali Wankie }	Seminario Regionale e Collegio.

3440

(The proposed distribution of ecclesiastical territories for the second re-ordering of matrimonial tribunals, September 29, 1958)

## SACRA CONGREGATIO DE PROPAGANDA FIDE

Prot. N. 604/67

BEATISSIME PATER,

Cardinalis archidiecesis Durbanianae,

ad pedes Sanctitatis Vestrae provolutus, humiliter petit ut pro  
 Praefecturis Apostolicis VOLKSRUSTENSI et INGWAUVUENSI  
 tribunal archidiecesis Durbanianae officio fungi pos-  
 sit tribunalis primae instantiae pro causis matrimonia-  
 libus, - tribunal vero archidiecesis Maseruanae offi-  
 cio tribunalis secundae instantiae seu appellationis.

Et Deus...

Sacra Congregatio de Propaganda Fide, vigore facultatum sibi a  
 Sanctissimo Domino Nostro P A U L O  
 Prov. Div. Pp. VI tributarum, attentis expositis, benigne adnuit  
 pro gratia iuxta preces.

Datum Romae, ex Aedibus eiusdem Sacrae Congregationis de  
 Propaganda Fide, die 2 mensis februarii a. D. 1967.

(Gratis quocumque titulo)

*Typ. + Debit. Typographia*  
*cc Secs*

(Rescript designating matrimonial tribunals of first and second  
 instance for the Prefectures Apostolic of Volksrust and Ingwavuma,  
 February 2, 1967)

DECRETUM

de constituendis in Rhodesiae, Tribunalibus Regionalibus primae instantiae in Dioecesis Salisburyensi et Guelensi, et Tribunalibus Regionalibus secundae instantiae eisdem in Dioecesis Salisburyensi et Guelensi ad pertractandas causas universas, scilicet non tantum causas nullitatis matrimonii, sive formales sive summarias, sed etiam causas separationis coniugum necnon causas contentiosas et criminales.

- I CONFERENTIA EPISCOPALIS RHODESIAE, perpensis gravibus difficultatibus, praesertim ob penuriam sacerdotum qui in iudicalem laborem incumbant, quas Episcopi in hodiernis adiunctis experiuntur ad propria ac idonea Tribunalia in singulis Dioecibus constituenda, 'nihil obstat' Supremi Tribunalis Signaturae Apostolicae, letteris datis Romae die 11a Iunii, 1973, (Prot No. 4534/73 V.T.) acceptis, erigenda decernit Tribunalia Regionalia primae instantiae sedem habentia in Dioecibus Salisburyensi et Guelensi quae competentiam habeant ad universas causas ut supra in prima instantia pertractandas, et quidem Tribunal Salisburyensis pro Dioecibus Salisburyensi et Umtaliensi, et Tribunal Guelensis pro Dioecibus Guelensi, Bulawaensi et Vankiensi.
- II Insuper decernit ut haec Tribunalia Regionalia primae instantiae sint ad invicem Tribunalia secundae instantiae: nempe, Tribunal Regionale quod sedem habet in Dioecesi Salisburyensi competentiam habeat ad appellationes et recursus in secunda instantia recipiendos adversus decisiones latas a praedicto Tribunali Regionali primae instantiae sedem habenti in Dioecesi Guelensi; et eodem modo, Tribunal regionale, quod sedem habet diocesi Guelensi, competentiam habeat ad appellationes et recursus in secunda instantia recipiendos adversus decisiones latas a Tribunali Regionali primae instantiae sedem habenti in diocesi Salisburyensi, incolumi semper manente facultate provocandi in secunda instantia Tribunal Sacrae Romanae Rotae, iuxta provisiones can. 1599 #1, CIC.

2/ 111 Pro Tribunali Regionali...

(The Decree of Establishment for Regional Tribunals in Zimbabwe)

- 2 -

- III Pro Tribunali Regionali sedem habenti in Dioecesi Salisburiensi, Ordinarius illius Dioecesis, nempe Archiepiscopus Salisburiensis, sit Moderator Tribunalis et idem regit nomine Conferentiae Episcopalis Rhodesiae (iuxta Art. 4 Normarum pro Tribunalium Regionalium Ereptione). Idem, mutatis mutandis, Episcopus Guelensis pro Tribunali Regionali Guelensi. Illis Moderatoribus attribuuntur omnia iura et officia quae Ordinariis locorum circa propria tribunalia competunt.
- IV Iudices ceterique ministerio iudiciali addicti his in Tribunalibus Regionalibus delignantur Moderatore Tribunalis respectivi, nomine Conferentiae Episcopalis Rhodesiae. Poterunt deligi etiam qui huiusmodi operam in Tribunalibus dioecesanis praestiterunt.
- V In unaquaque Dioecesi (illis exceptis in quibus sedem habeant Tribunalia Regionalia) sint unus iudex, unus promotor iustitiae, unus defensor vinculi et unus notarius, annumerandi tanquam substituti inter Tribunalium Regionalium membra, quorum munus praecipuum sit exsequi in sua quisque Dioecesi mandata a Tribunalibus Regionalibus vel ab aliis Tribunalibus ecclesiasticis sibi commissa, quin tamen Tribunal dioecesanum a respectivo Tribunali Regionali distinctum constituent.
- VI Personae addictae huic ministerio iudiciali locali proponuntur ab Episcopo loci, et approbentur oportet a Moderatore Tribunalis Regionalis illa in regione. Vi eorum annumerationis inter membra Tribunalium regionalium, iidem adhiberi poterunt ab horum Tribunalium Moderatoribus ad suum quisque munus exercendum in ipso Tribunali Regionali in singulis casibus.
- VII Praeter munera supra indicata, nihil impedit quominus iidem munus explorare possunt ut delegati vel subdelegati Episcopi loci ad causas administrativas sacerdotum pertractandas et ad causas super matrimonio rato et non consummato instruendas.

/ VIII Hoc decretum .....

- 3 -

VIII Hoc decretum vim habebit a die approbationis a Sancta Sede.

Datum Salisburiensis, die 6a Septembris, 1973.

Rev. mus D. nus Franciscus W. Markall, S.J.  
Archiepiscopus Salisburiensis

Rev. mus D. nus Aloysius Haene, S.M.B.  
Episcopus Guelensis


Rev. mus D. nus Adolphus G. Schmitt, C.M.M.  
Episcopus Bulauaisiensis.

Rev. mus D. nus Donal R. Lamont, O. Carm.  
Episcopus Umtaliensis

Rev. mus D. nus Ignatius Prieto, S.M.I.  
Episcopus Vankiensis.

[Tabula Geographica annexa ad praescriptum Normarum pro  
Tribunalium Regionalium erectione]

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SUPREMUM  
SIGNATURAE APOSTOLICAE  
TRIBUNAL

PALAZZO DELLA CANCELLERIA  
00120 CITTA' DEL VATICANO

Prot. N. 4534/73 V. T.

SUPREMUM SIGNATURAE APOSTOLICAE

TRIBUNAL

- viso ac mature perpenso Decreto diei 6 septembris 1973 quo Conferentia Episcoporum Rhodesiae erigit duo Tribunalia Regionalia primae et secundae instantiae in dioecesibus Salisburiensi et Guelensi ad pertractandas causas universas, scilicet non tantum causas nullitatis matrimonii, sive formales sive summarias, sed etiam causas separationis coniugum necnon causas contentiosas et criminales; et quidem Tribunal Salisburiense primae instantiae pro dioecesibus Salisburiensi et Umtaliensi, et Tribunal Guelense primae instantiae pro dioecesibus Guelensi, Bulauaensi et Vankiensi;
- attento quod Tribunal Regionale Salisburiense secundae instantiae competentiam habet ad appellationes et recursus in secundo gradu recipiendos adversus decisiones latas a Tribunali Regionali Guelensi primae instantiae; et eodem modo, Tribunal Regionale Guelense secundae instantiae competentiam habet ad appellationes et recursus in secundo gradu recipiendos adversus decisiones latas a Tribunali Regionali Salisburiensi primae instantiae;
- vi art. 105 Constitutionis Apostolicae "Regimini Ecclesiae Universae", et attento art. 2, par. 1 Normarum ab hoc Supremo Tribunali editarum die 28 decembris 1970;
- perpensa instantia Exc. mi Archiepiscopi Salisburiensis, Praesidis Conferentiae Episcoporum Rhodesiae, diei 1 octobris 1973, ad obtinendam adprobationem Sanctae Sedis;
- petitam adprobationem concedit ut praefatum decretum vim habeat et executioni mandetur

- Eadem Conferentia Episcoporum per decretum eiusdem Præsidis decernat de tempore quo nova Tribunalia vigere incipiant et de regimine causarum nunc pendentium apud Tribunalia dioecessana, iuxta art. 22 earundem Normarum huius Supremi Tribunalis.

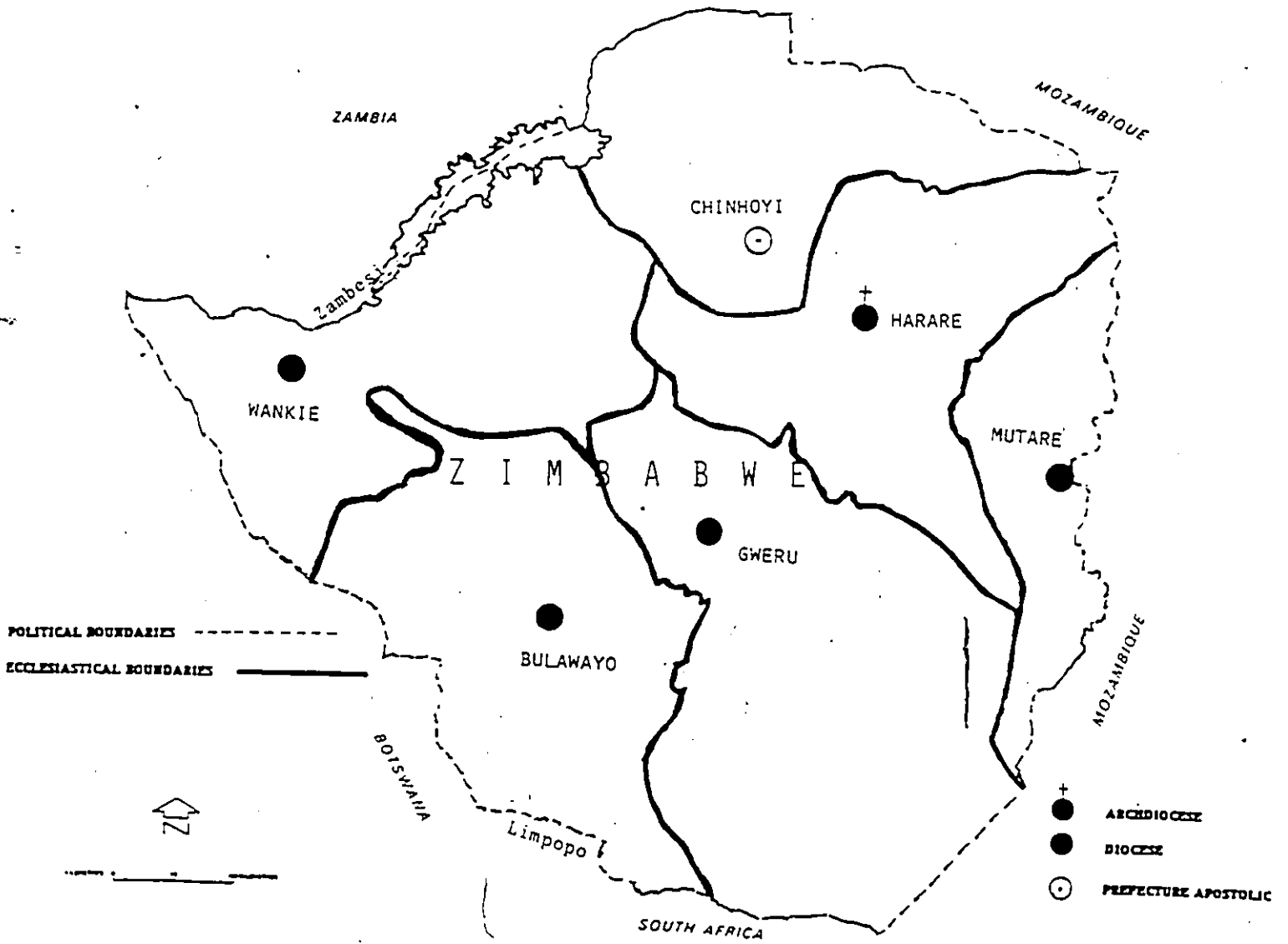
Datum Romae, e sede Supremi Signaturae Apostolicae Tribunalis, die 11 decembris 1973. -

*Archiepiscopus Johannes Dukuwa*

*Hubertus Schickel*

*Sec.*

(The Rescript approving the Decree of Establishment for Regional Tribunals in Zimbabwe, December 11, 1973)



TERRITORIES OF THE ZIMBABWE CATHOLIC BISHOPS' CONFERENCE  
1984



SUPREMUM  
SIGNATURAE APOSTOLICAE  
TRIBUNAL

PALAZZO DELLA CANCELLERIA  
00120 CITTA DEL VATICANO

Prot. N. 14.334/82 V.T.

Visa instantia qua Exc.mus Moderator Tribunalis Regionalis Salisburiensis significat idem Tribunal - propter promotionem officialis ad regimen dioecesis Umtaliensis - pro nunc activitatem suam exercere haud posse; atque petit ut, hanc ob rationem, nonnullae causae urgentes praedicti Fori pertractari possint apud Tribunal Praetoriense;

Perpenso quod adducta ratio cogens apparet;

Attento consensu Exc.mi Moderatoris Tribunalis Praetoriensis;

Considerato quod S.Congregatio pro Gentium Evangelizatione seu de Propaganda Fide, transmittens ad hanc Signaturam Apostolicam praefatam instantiam, nullam exceptionem movet circa concessionem petitaе gratiaе;

Perspecta necessitate ut, causae, praesertim matrimoniales, sollicitate definiantur;

Audito R.D. Promotore Iustitiae deputato,

SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL

decernit:

1. Prorogatur ad annum - seu usque ad diem 30 maii 1983 - competentia Tribunalis Praetoriensis ad pertractandas et definiendas causas, pro quibus competens est Tribunal Regionale Salisburiense.
2. Exc.mus Moderator Tribunalis Salisburiensis provideat ut, saltem intra terminum de quo supra, nominetur Officialis.

Datum Romae, e sede Supremi Signaturae Apostolicae Tribunalis, die 17 maii 1982.

*+ Aurelius Sabatani*  
Secr.

CONCORDAT CUM ORIGINALI  
die 19 maii 1982  
- J.P. Scampini  
Ioannes Paulus SCAMPINI



(Rescript extending the competence of the Pretoria matrimonial tribunal to enable it to handle cases on behalf of the Harare court)



SUPREMUM  
SIGNATURAE APOSTOLICAE  
TRIBUNAL

PALAZZO DELLA CANCELLERIA  
00120 CITTA DEL VATICANO

PROT. N. 14.334/82 V.T.

Visa et mature perpensa instantia diei 25 aprilis 1983, qua Exc.mus Archiepiscopus Hararensis in Zimbabwe petiit ad aliud annum prorogationem rescripti ab hac Signatura Apostolica die 17 maii 1982 dati, circa facultatem concessam Tribunali Praetoriensi pertractandi ac definiendi causas suae Archidioecesis;

Perspecta ratione adducta seu impossibilitate ex parte praedicti Archiepiscopi Hararensis inveniendi personam idoneam ad munus Officialis;

Attento consensu Tribunalis Praetoriensis;

SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL

vi art.105 Constitutionis Apostolicae "Regimini Ecclesiae Universae"

d e c e r n i t :

1. Prorogatur ad aliud annum - seu usque ad diem 30 maii 1984 - competentia Tribunalis Praetoriensis ad pertractandas et definiendas causas Archidioecesis Hararensis in Zimbabwe.
2. Exc.mus Moderator Tribunalis Hararensis provideat ut, saltem intra terminum de quo supra, nominetur Officialis.

Datum Romae, e sede Supremi Signaturae Apostolicae Tribunalis, die 8 iunii 1983.

Aurelius Card. Sabattani  
Praefectus

CONCORDAT CUM ORIGINALI

10 iunii 1983  
P. P. Scamporrino Not.  
P. P. Scamporrino  
Notarius Apostolicus Not.



*[Handwritten signature]*  
Fini

(Rescript extending the competence of the Pretoria matrimonial tribunal to enable it to handle cases on behalf of the Harare court)

APOSTOLIC DELEGATION OF SOUTH AFRICA.INSTRUCTION REGARDING MATRIMONIAL CASES AND TRIALS WITHIN THE TERRITORY  
OF THE DELEGATION.

By letter No.426/39 ST dated the 5th of July, 1939, the Sacred Congregation of the Sacraments granted to His Excellency the Apostolic Delegate of South Africa and the Rhodesias the necessary permission for the erection of two inter-territorial tribunals for Matrimonial cases within the limits of the Apostolic Delegation, namely, one, of the First Instance, at Cape Town, and one, of the Second Instance, at Johannesburg. These Tribunals having in consequence been set up and commenced to function, it is necessary to delineate their competency and to determine their mutual relations, as well as the relations between the Ordinaries of the Delegation and the Tribunals.

At the outset, for convenience, the various documents, supplementary to the Code of Canon Law, relating to procedure in marriage cases and trials are enumerated, viz:

For Formal and Summary cases;

- |      |  |              |
|------|--|--------------|
| I.   | Instruction of S. C. of Sacrs. of Aug. 15, 1936. | (AAS 28-313) |
| II.  | " " Mar. 27, 1929.                               | (AAS 21-490) |
| III. | " " Dec. 23, 1929.                               | (AAS 22-168) |
| IV.  | Letter " Jul. 1, 1932.                           | (AAS 24-272) |

For dispensations super matrimonium ratum et non-consummatum;

- |     |  |              |
|-----|--|--------------|
| I.  | Instruction of S. C. of Sacrs. of May 7, 1923. | (AAS 15-389) |
| II. | " " Mar. 27, 1929.                             | (AAS 21-490) |

I. THE COMPETENCY OF THE TRIBUNALS.

By virtue of the faculty granted by the S.C. of the Sacraments the two Tribunals have jurisdiction, in the First and Second Instances respectively, over the territory of the whole Apostolic Delegation in Formal trials concerning the nullity of the marriage bond. The respective Ordinaries of the whole Delegation still retain their competency in cases to be dealt with in terms of Art. 226-230<sup>n</sup> (Can. 1990)

<sup>n</sup> Whenever an article is quoted by number without further reference, it is taken from the Instruction of the S.C. of the Sacrs. of Aug., the 15th., 1936 (AAS 28-313 et seq.)

(Sent under cover of Circular Letter (Prot. N. 153/40), January 5, 1941)

2) .....(Canon 1990)

and of Art. 231 respectively. Moreover the S.C. of the Sacraments alone has competency in cases concerning a dispensation super matrimonium ratum et non-consummatum. His Excellency the Apostolic Delegate however has the faculty of committing to the Ordinary the drawing up of the process in these cases and application for such commission is to be made directly to him. The Holy Office continues to handle matters connected with the Pauline Privilege and all communications on that point should be addressed to it. Furthermore the exceptions enumerated under Canon 1557 remain reserved to the Supreme Pontiff and the Tribunals of the Holy See, while the right of a direct appeal to the S. R. Rota from a sentence of the Court of the First Instance is still unimpaired.

## II. MUTUAL RELATIONS OF THE TRIBUNALS OF THE FIRST AND SECOND INSTANCE.

The mutual relations of the Tribunals of the First and Second Instance, though largely fixed and circumscribed by the Code of Canon Law and the Instructions already quoted, require in view of the peculiar circumstances now holding in the Delegation to be further elucidated and determined. The following additional matters have therefore been arranged:

I. At the end of each calendar year, the Official of the Tribunal of the Second Instance at Johannesburg must inform the Official of the Court of the First Instance at Cape Town regarding:

- (a) The number and nature of cases which have been handled during the year by the Tribunal of the Second Instance;
- (b) The number and nature of cases pending<sup>x</sup>;
- (c) The names of the personnel of the Tribunal.

For the conveyance of this information use is to be made of forms II and III of the S.C. of the Sacrs. If no cases have been handled and no change of personnel has occurred, an ordinary letter from the Official notifying the Official of the Tribunal of the First Instance to that effect will suffice.

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<sup>x</sup> Pending means that the Tribunal has accepted the case but not passed sentence.

3) ..... suffice.

II. Regarding financial matters, the costs to be charged are Five pounds five shillings, (£5.5.0), plus 2<sup>5</sup>/<sub>6</sub> (2/6d) for incidental expenses of stationery, postage, etc., for each trial. This fee does not include extraordinary expenditure (v.g. witnesses' travelling expenses, etc.). This, should the occasion arise for such expenditure, must be met by the parties concerned.

In cases tried by the Tribunal of the Second Instance on an appeal by the Defensor Vinculi of the Tribunal of the First Instance, the parties are not required to submit a fee for the second trial, but the revenue from the first trial is to be shared equally by the First and Second Instance Tribunals.

If however the appeal is made by one of the parties, then the costs of the further trial are to be borne by the parties themselves, in accordance with the terms of Art. 232 seq.

### III. RELATIONS OF LOCAL ORDINARIES THROUGHOUT THE DELEGATION TO THE TRIBUNALS.

The Local Ordinaries in their respective Vicariates and Prefectures will be required according to the needs of the Tribunals to arrange for the judicial examinations of the parties and witnesses, as well as matters connected with the introduction of the cases to the Tribunals.

It will be necessary for them to set up each a Regatory Commission consisting of a Judge-Instructor, Defensor Vinculi, and Actuary. (Art. 98). The Ordinary can himself assume the position of Judge-Instructor (Examining Judge-) or he may appoint a qualified priest to act as such. (Art. 23). In addition he must nominate a priest to act as Defensor Vinculi and Actuary - one to perform both offices, if it is not possible to have a separate Defensor and a separate Actuary. (Art. 15 & 17). These must be summoned for the sessions at which the parties or witnesses are examined and must assist the Judge-Instructor thereat. (Art. 71, 72, 73).

This Commission only functions when the "contestatio litis" and judicial examinations, etc. are to take place. Work on the case relative to its introduction to the Tribunal as set out on the next

4) ..... next

page will be carried out by the Ordinary or his delegate.

In cases where the party or witness to be examined cannot appear before the Rogatory Commission by reason of the distance to be travelled and the consequent expense entailed, then, if the Judge-Instructor cannot go to the place, he can delegate a suitable priest, who, with the assistance of another priest - if that is possible - or some other reliable person, acting as Notary, will carry out the Examination. The Judge-Instructor should give opportune instructions to the priest undertaking the examination. (Art. 98 and Can. 1770 par. 4).

Consequent to what has been stated in the paragraph on the Competency of the Tribunals, the Local Ordinaries still have to deal fully with cases not requiring Formal trial, i.e., those enumerated under Art. 226-230 (Canon 1990) and Art. 231. Furthermore the Ordinaries themselves must transmit petitions for dispensations *super matrimonium ratum et non-consummatum* and from the bond of natural marriage, as well as the acts of any process drawn up by them on these cases, and also matters relating to the Pauline Privilege.

If the cases first considered under Art. 226 (Canon 1990) and Art. 231 are to be referred further, as provided for in Art. 227-229 and Art. 231, either by the Ordinary or by the Defensor Vinculi, then such cases are to be sent in every instance to the Official of the FIRST INSTANCE Court in Cape Town.

Procedure: Introduction of Case.

In Formal cases the procedure to be followed by the Local Ordinaries is as follows:

Matrimonial cases for introduction to the Tribunals must be presented to the Local Ordinary under whose jurisdiction the petitioner falls. The Ordinary concerned will then make the necessary enquiries for the purpose of ascertaining in a general manner whether the case warrants being brought before the Tribunal. This enquiry must not be exhaustive, but sufficient to establish that the case has not been presented temerarily. (Art. 57).

When therefore it has been ascertained that there is a reasonable

5) ..... reasonable

case, the Ordinary should instruct the petitioner to draw up an Introductory Bill of Complaint containing the following information:

- (a) The Name of the Court before which the cause is to be introduced; (Cfr. Art 57-60).
  - (b) The object of the petition, namely, that the marriage between N. and X. be declared null and on this or that ground; for example, because of fear, conditional consent against an essential property of marriage, viz: bonum prolis, etc. or several grounds, if there are diverse grounds of nullity.
  - (c) In a general way the facts and the law upon which the petitioner bases his claim. There is no need for a long exposition of the evidence, nor need it be exhaustive.
  - (d) The date and place of the marriage; approximate length of courtship; and engagement; particular difficulties or misunderstandings before marriage; length of married life; time when dissensions arose; time and reason for separation; grounds for civil divorce (if already granted); number of children.
  - (e) Precise proofs by which statements can be substantiated. If proof is by document or letters, then these should be presented with the Introductory Bill of Complaint, and sent with it to the Court, or if that is not possible, indication should be given of where they can be obtained.
  - (f) If proof is by witnesses then the names and complete addresses must be given, as well as the particular facts on which they are each especially well-informed.
  - (g) If divorce proceedings have taken place then the full documents must be sent as well.
  - (h) Baptismal certificates must be obtained, as well as an authentic copy of the Marriage certificate.
  - (i) Detailed information must also be given about the domicile and quasi-domicile of both parties, as well as their complete addresses and the place where summons may be served.
  - (j) This Bill of Complaint must be signed by the Petitioner and dated.
- U.

6) ..... dated.

Certificate of Identity.

The Ordinary in accepting this Bill of Complaint must see to it that the identity of the person attacking the marriage is clearly established in terms of the Instruction of the S. C. of the Sacraments of Mar. 27th, 1929, (AAS 21. 490.), and forward a certificate to that effect with the Bill of Complaint. Both these documents must be sent to the Official of the Court of the First Instance at Cape Town.

Citing of Parties for Determination of Matter for Trial.

In due course the Official of the Court of the First Instance will advise the Ordinary whether the Bill has been accepted or rejected by the Court. In the event of its acceptance the Court will delegate the Ordinary to cite the parties for the determination of the doubt, which is effected by their appearing before him and by the formal denial of the plaintiff's petition by the defendant. If the plaintiff and the defendant are living in different territories they will have to appear before their respective Ordinaries unless they both can conveniently travel to the seat of the Court, or the plaintiff to the place where the Ordinary of the defendant lives. The Official (Chairman) of the Court of the First Instance will issue the necessary instructions on this point. The fact of the formal denial by the defendant must be communicated to the Official who will arrange for the Presiding Judge of the Court to effect the Concordatio Dubii.

Examination of Parties and Witnesses.

(a) Method.

For the examination of the parties and witnesses, the Court will forward sets of questions drawn up by the Defensor Vinculi of the Court, together with any questions that the Presiding Judge may have to put. It will be necessary, as already stated, for the Ordinary to appoint a priest as Defensor Vinculi for the hearings and to cite him for the "contestatio litis" and the examination of the parties and witnesses. This Defensor Vinculi has the right and duty of asking questions, through the Ordinary (or Judge-Instructor), in addition to those drawn up by the Defensor Vinculi of the Court. They should be such as are required in the defence of the Marriage Bond. The Ordinary (or Judge-Instructor) will actually put the questions proposed by the Defensor to

7) ..... to

the person being examined. The Ordinary (or Judge-Instructor) has himself the right and duty to ask any questions he may deem necessary for the ascertaining of the truth or to secure a fuller exposition of it. (Cfr. Art. 101.)

(b) Summons.

The parties and witnesses must be summoned by the Ordinary (or Judge-Instructor) according to the terms of Art. 74-92. Care must be taken in citing the defendant that all the requirements of Art. 76 are fulfilled; otherwise the summons will be invalid.

(c) Procedure in Examination.

At the actual examination which should take place in formal manner, the following procedure must be adopted: (Art. 96 - 154).

(1). The parties and witnesses are to be identified by means of a document or some other instrument, as determined in Art. 58 and the Instruction of the S.C. of the Sacrs. of Mar. 27, 1929. (AAS 21-490). N.B. Each is examined separately by herself or by himself. (No persons other than the Officials of the Commission and the person being examined may be present). If confrontation is necessary - and the Court will notify if that is so - it must be done in terms of Art. 133.

(2). The parties and witnesses, after having been instructed of the sanctity of the oath and of the gravity of the crime of perjury, shall be required to take the oath to speak the truth.

(3). The Ordinary (or Judge-Instructor) shall then open the sealed envelope containing the questions of the Defensor Vinculi and proceed to interrogate the person being examined. He shall also propose the questions drawn up by the Presiding Judge, then any that the local Defensor Vinculi present wishes to ask, and finally those he desires to put himself, as previously explained. The replies are to be consigned to writing by the Notary immediately, not only in substance, but even in identical words if the Examining Judge deems it necessary or expedient. On the completion of the questioning the replies are to be read to the person being examined who should be asked whether he confirms the testimony recorded. Additions, etc. may be made then in the recorded replies. When the person examined has declared that he

8) ..... he has nothing more to add, then oath "de veritate dictorum et de secreto servando" must be administered. The deposition must then be signed by the person himself, by the Examining Judge, i.e. Ordinary or Judge-Instructor, while the Defensor Vinculi and Notary must each add his signature. Finally the Bill of Complaint or petition of the Plaintiff is to be read over to the Plaintiff when he is examined, and he should be asked whether he wishes to confirm it in all its details. He should be asked to suggest points or questions about which the defendant should be particularly examined. Similarly the Bill of Complaint should be read over to the defendant after examination and he should also be asked whether there are any comments or objections, and also whether there are questions or points on which the plaintiff should be interrogated. If both parties agree, i.e., the defendant replies that there is no objection to be interposed the Examining Judge should investigate "ex officio" in a prudent manner as to the reason for the agreement.

These statements, as well as all acts and documents prepared under care of the Ordinary (or Judge-Instructor) are to be typewritten in duplicate. Every official act and document should be signed by the Examining Judge, and Defensor Vinculi, and Notary.

(d) Testimonial Re Character.

In addition to the examination the Ordinary (or Judge-Instructor) must secure information about the religious character, trustworthiness and probity of the parties and witnesses. These testimonials are usually obtained from the parish priest, other prudent priests, or from those persons who are in a position to know the parties or witnesses well. In the case of non-catholic parties or witnesses the Tribunal will determine the norms for securing the information. These letters are to be requested and furnished "sub secreto".

Despatch of Documents.

All the documents thus prepared, which must include an official statement, or minute, or act, of each session of the Local Ordinary's Commission for the contesting of the case and for the taking of evidence, should be sent to the Official of the Court in Cape Town

9) ..... Town

without delay. All questions and doubts regarding procedure should likewise be referred to the Official of the said Court.

Annual Returns.

Furthermore, at the end of each calendar year, the Local Ordinary is required to submit a statement showing:

- (a) The number and nature of cases dealt with in terms of Art. 226 (Canon 1990), with the following details:

The names of the parties - plaintiff and defendant (in full);

The grounds of competency for the Ordinary to have made the decision, i.e., place of marriage and/or domicile;

The grounds on which the marriage was declared null and void, i.e., the name of the impediment for which no dispensation was granted, v.g., consanguinity;

The date of the marriage; the date of introduction to the Ordinary for decision; the date of his decision; the date of notification to parties of freedom to marry;

The name of the Defensor Vinculi cited for each case.

- (b) The number of cases dealt with in terms of Art. 231.

This statement is to be sent to the Official of the Court of the First Instance at Cape Town.

Note on the Compilation of Forms for the Annual Report to the Sacred Congregation of the Sacraments.

- (a) Each Tribunal is to complete forms ll and lll separately.
- (b) On form ll, the Prefecture or Vicariate of the "Pars Conventa" must be added to the name, and similarly the Prefecture or Vicariate of the place of marriage or domicile, as the case may be, in the column showing the grounds of competency of the Tribunal must be added.
- (c) Regarding form lll, the Tribunal of the First Instance will have to provide the following information thereon:

Constitutio Tribunalis;

Causae introductae in 1<sup>o</sup> gradu;

Causae introductae iuxta Can. 1990 (Pro omnibus Vic. et Praef.)

Causae solutae iuxta Art. 231 Inst. (

10) ..... Praef.)

For the last two items the information already asked for from each Ordinary in this instruction (page 9) will enable the form to be completed.

The Tribunal of the Second Instance will have to enter only the following on form III:

Constitutio Tribunalis;

Causae introductae in 11<sup>o</sup> gradu.

(The Ordinary of the Vicariate of the Transvaal will have to furnish the Official of the Tribunal at Cape Town directly with the information required concerning Cases under Can. 1990 and Art. 231.)

(d) The Ordinaries no longer have to submit a report to Rome. The information furnished by them to the Tribunal in Cape Town is sent to the Sacred Congregation on the appropriate forms.

Appendix.

Ordinarii consulere oportent ne constitutio Tribunalium indiscriminatim divulgetur, speciatim inter indigenos, quoniam scandalum oriri possit, quod cogitant, quamvis falso, Sanctam Matrem Ecclesiam vigilantiam de sanctitate et indissolubilitate matrimonii relaxasse.

Casus ergo non admittendi sunt, nisi offerunt allegationes tam graves ut detur vera probabilitas de nullitate matrimonii. Sacerdos ad quem causa defertur videat ne ad spem inanem partes incitet. In mente tenendum est matrimonium presumi validum donec contrarium probatur, et iudices certitudinem moralem de nullitate requirere, antequam declarare possunt matrimonium esse nullum et invalidum ab initio.

Porro cum casus ad Tribunal missus sit curandum est ut partes intelligant questionem non esse de solutione vinculi existentis sed de investigatione utrum vinculum revera existat, et declarationem iudicum tantum hanc respicere. Post editionem sententiae Tribunalis, partes moneri debent ut terminos rectos adhibeant, i.e. matrimonium nullum et invalidum ab initio fuisse, et vinculum solvi non posse. "Quod ergo Deus conjunxit homo non separet".

131/39

Bloemfontein, August 7th, 1939

## TO THE ORDINARIES OF THE APOSTOLIC DELEGATION IN SOUTH AFRICA

By letter No 426/39 St. dated July 5th 1939 the S. Congregation of the Sacraments has granted the favour to establish in South Africa on behalf of the territories depending on this Apostolic Delegation two matrimonial tribunals: one of the first instance at Cape Town and one of the second instance in Johannesburg.

In consequence of this favour, which has been requested by the General Meeting held in Cape Town 1938, the matrimonial tribunals existing in some Vicariates are now dissolved, and the respective Ordinaries being supposed to submit the eventual matrimonial cases to the aforesaid tribunals, always, however without prejudice to the right of the Ordinary to declare the nullity of matrimony in cases mentioned in Canon 1990, and to the right of direct appeal to the Sacred Roman Rota according to the provisions of Canon 1599.

In order to promote the regular procedure of both the tribunals, the Ordinaries are requested to appoint in their respective territory an Instructor whose duty it is to hear the parties concerned, the witnesses, and to prepare the documents which will be necessary or helpful to the tribunals in handling the cases with that thoroughness and order which is required.

All data and documents should be forwarded to the Official or Chairman of the tribunal in Cape Town, which is His Lordship F. Hennemann and during his absence Mons. J. Morris, Vicar Delegate. It may also be well for you to know that the Chairman of the tribunal of the second grade in Johannesburg is the Very Rev. Father E. Varrie.

Further I beg to advise that the Instruction given by the S. Congregation of the Sacraments, whereby the Ordinaries were obliged at the end of every calendar year to notify the Apostolic Delegate about the matrimonial cases which were handled or pending, is not in force anymore, as this duty will now be complied with by the tribunals,

(PTO)

131/39

II

The order, however, promulgated by the same S. Congregation, that the Ordinaries should attach to the statistics to be sent to Rome a report on the matrimonial cases, whether favourable or unfavourable, to the claim of nullity, both in the first and second instance, which were tried in the tribunals concerning parties subject to their jurisdiction, holds still good.

With kindest regards  
sincerely Yours in Xo

+ B. J. Cyprian  
Del. Secy

131/39

Bloemfontein, October 7th, 1939

MyLord

In addition to my letter dated August 7th, 1939, to the chairman of the tribunal for matrimonial cases I deem it opportune to recommend to the members of the tribunal the reading of the Instruction issued by the S. Congregation of the Sacraments concerning the procedure of the tribunal. (See Acta Apost. Sedis, year 1936, vol. XXVIII, Sept. 10, number 10)

It may also serve a good purpose to give some information gathered from a letter (febr. 3<sup>d</sup> 1939) of the aforesaid Sacred Congregation relative the duties of the personnel of the tribunal.

The tribunal composed of 5 members: the Official (Chairman), 2 judges, the Defender of the bond and the Notary, need not always assemble for the discussions of an eventual case. The preliminary examination of a case may be conducted by the Official and the Defender of the bond who, having examined the case and put in writing their findings and reasons for their sentence, allow these papers to circulate among the other two judges, thus enabling them to study the case. Both these judges have also to write down their sentence and the reasons on which it is based.

Only, when the case has sufficiently been prepared, the tribunal should meet in full session for pronouncing the verdict for which the equal vote of two judges is required. Their vote being in favour of nullity of the bond, all the documents must be forwarded to the tribunal of the second instance, which after the regular procedure gives the final decision.

/ (PTO)

131/39

II

I hereby enclose an Instruction of the S. Congregation of the Holy Office to be kept in the Archives of the Tribunal. And under separate cover I forward to the Chairman the forms to be used according to the directions I have given by my former letter, August 7th, '39. If the tribunal has not operated during the year, it will be sufficient to inform me about the fact through an ordinary letter at the end of each calendar year.

With kindest regards

sincerely Yours in Xo

*B. Gijlswijk*  
*Del. Ap.*

(Letter from the Apostolic Delegate to Southern Africa, Archbishop B. Gijlswijk, O.P., to the Vicar Apostolic of Cape Town, Bishop Francis Hennemann, P.S.M.)

## D E C R E T U M

De constituendis, in Africa Meridionali, Tribunalibus Interdioecesanis primae et secundae instantiae in civitatibus Capetounensi, Praetoriensi, Durbaniana et Bloemfonteinensi ad pertractandas causas universas, scilicet non tantum causas nullitatis matrimonii, sive formales sive summarias, sed etiam causas separationis coniugum necnon causas contentiosas et criminales.

- I CONFERENTIA EPISCOPALIS AFRICAE MERIDIONALIS, perpensis gravibus difficultatibus, praesertim ob penuriam sacerdotum qui in iudicalem laborem incumbant, quas Episcopi in hodiernis adiunctis experiuntur ad propria ac idonea Tribunalia in singulis Dioecesibus constituenda, "nihil obstat" Supremi Tribunalis Signaturae Apostolicae obtento litteris datis Romae 6a octobris 1982 (prot. n. 1776/71 VT), erigit Tribunalia Interdioecesana primae instantiae sedem habentia in Dioecesibus Capetounensi, Praetoriensi, Durbaniana et Bloemfonteinensi, quae competentiam habeant ad universas causas ut supra in prima instantia pertractandas, et quidem Tribunal Capetounense pro Dioecesibus Capetounensi, Alivalensi, De Aarensi, Oudtshoornensi, Portus Elizabethensi, Queenstounensi et pro Vicariatibus Apostolicis Keetmanshoopensi, ac Vindhoekensi; Tribunal Praetoriense pro Dioecesibus Praetoriensi, Klerkpolitano, de Louis Trichardt-Tzaneen, Lydenburg-Witbankensi, Pietersburgensi et pro Praefectura Apostolica Rustenburgensi; Tribunal Durbanianum pro Dioecesibus Durbaniana, Dundee, Eshovensi, Kokstadensi, Mariannhillensi, Umtatana et Umzimkulensi et pro Praefectura Apostolica Ingvavumensi; Tribunal Bloemfonteinense pro Dioecesibus Bloemfonteinensi, Bethlehemensi, Gaboronensi, Keimoesana, Kimberleyensi et Kroonstadensi.
- II Insuper decernit ut haec eadem Tribunalia Interdioecesana sint ad invicem Tribunalia secundae instantiae, quae competentiam habeant ad appellationes et recursus in altero gradu recipiendos adversus decisiones a praedictis Tribunalibus primae instantiae latis - incolumi semper manente facultate provocandi in secunda instantia ad Tribunal Rotae Romanae iuxta legis praescripta - scilicet:

2.

Ad Tribunal Capetounensi deferantur causae quae in prima Instantia tractatae sunt apud Tribunal Bloemfonteinense; ad Tribunal Bloemfonteinense, quae apud Tribunal Durbanianum; ad Tribunal Durbanianum, quae apud Tribunal Praetoriense; ad Tribunal Praetoriense, quae apud Tribunal Capetounense.

III Coetus Episcoporum uniuscuiusque regionis Moderatorem designabit cui "omnes competunt potestates quas Episcopus dioecesanus habet circa suum tribunal" (iuxta can. 1423,1 C.I.C.).

IV Vicarii iudiciales, iudices ceterique ministerio iudiciali addicti in praefatis Tribunalibus deligentur in Coetu Ordinariorum circumscriptionis pro qua unumquodque Tribunal est constitutum. Nominatio erit ad quinquennium.

V In unaquaque Dioecesi (illis exceptis in quibus sedem habent Tribunalia Interdioecesana) sint unus auditor, unus promotor iustitiae, unus defensor vinculi et unus notarius, annumerandi tamquam substituti inter Tribunalium Interdioecesanorum membra, quorum munus praecipuum sit exsequi in sua quisque Dioecesi mandata a Tribunalibus Interdioecesanis vel ab aliis Tribunalibus ecclesiasticis sibi commissa, quin tamen Tribunal dioecesanum a respectivo Tribunali Interdioecesano distinctum constituent. In casibus in quibus causa instructa est in lingua ignota iudicibus nominatis pro Tribunali, Moderator nominare potest ad casum iudicem qui eandem linguam callet.

Personae addictae huic ministerio iudiciali locali proponuntur ab Episcopo loci, et approbentur oportet a Coetu Interdioecesano Episcoporum antequam suum quisque munus exercere valeat.

VI eorum annumerationis inter membra Tribunalis Interdioecesani iidem adhiberi poterunt ab huius Tribunalis Praeside ad suum quisque munus exercendum in ipso Tribunali Interdioecesano in singulis casibus.

Praeter munera supra indicata, nihil impedit quominus iidem munus explere possint delegati vel subdelegati Episcopi loci ad causas super matrimonio rato et non consummato instruendas.

3.

VI Qui aliquo munere in Tribunalibus, sive in sede Interdioecesana, sive in Dioecesi, hucusque vel in posterum functi fuerint, possunt, cessato munere, causarum patrocinium suscipere, dummodo ne agatur de causis in quibus quolibet modo, durante munere, partem habuerint.

VII Pro Dioecesibus Joannesburgensi et Manziniensi, Tribunal primae Instantiae est Tribunal proprium. Forum appellationis pro iisdem Tribunalibus erit Tribunal Interdioecesanum Praetoriense.

VIII Hoc Decretum vim habeat a die approbationis a Sancta Sede.

In aedibus Seminaril S. Petri apud Hammanskraal, Africa Meridionalis, hac die 27a mensis Septembris, anno Domini 1984.

*+ Ave. Contance Kaufman*  
ARCHIEPISCOPUS CAPETOUNENSIS

*+ Denis E. Hurley*  
ARCHIEPISCOPUS DURBANIANUS ET  
 ADMINISTRATOR APOSTOLICUS UMZIMKULENSIS  
 PRAESES CONFERENTIAE EPISCOPALIS

*+ W. F. Meyer O.F.M.*  
EPISCOPUS KOKSTADENSIS  
 VICE-PRAESES CONFERENTIAE

*+ J. H. M. J. M. J. M.*  
ARCHIEPISCOPUS BLOENFONTEINENSIS

*+ G. S. ...*

ARCHIEPISCOPUS PRAETORIENSIS

*+ ...*

EPISCOPUS BETHLEHEMENSIS

*Fr. R. ...*

nomine JOSEPHI DE PALMA, SCJ  
EPISCOPI DE AARENSIS  
 ADMINISTRATORIS APOSTOLICI ALIVALENSIS

*+ Michael V.P. ...*

EPISCOPUS DUNDEENSIS

*+ ...*

EPISCOPUS ESHOVENSIS

*+ B.R. ...*

EPISCOPUS GABORONENSIS

*+ R. ...*

EPISCOPUS JOANNESBURGENSIS

*+ ...*

EPISCOPUS KEETMANSHOOPENSIS

*+ John P. ...*

EPISCOPUS KEIMOESANUS

*+ ...*

EPISCOPUS KIMBERLEYENSIS

5.

+ *D. V. ...*  
EPISCOPUS KLERKPOLITANUS

+ *H. P. ...*  
EPISCOPUS KROONSTADENSIS

+ *H. Slattery*  
EPISCOPUS ELECTUS DE LOUIS TRICHARDT/TZANEEN

+ *M. P. ...*  
EPISCOPUS LYDENBURGENSIS-VITBANKENSIS

+ *P. T. ...*  
EPISCOPUS MARIANNHILLENSIS

+ *E. R. Adams*  
EPISCOPUS OUDTSHOORNENSIS

*F. W. Van Rensburg*  
 nomine FULGENTII LE ROY, OSB  
ABBATIS-EPISCOPI PIETERSBURGENSIS

+ *John G. ...*  
EPISCOPUS PORTUS ELIZABETHENSIS

+ *Robert N. ...*  
EPISCOPUS QUEENSTOUNENSIS

+ *A. Z. ...*  
EPISCOPUS UMTATANUS

6.

*+ R. Daushikwa*

VICARIUS APOSTOLICUS VINDHOEKENSIS

*+ Stephen Naidoo C.S.C.*

EPISCOPUS AUXILIARIS CAPETOUNENSIS

*Dominicus Joseph Mlamale, O.S.A.*

EPISCOPUS AUXILIARIS DURBANIANUS

*Michael M. O'Shea, O.S.M.*

PRAEFECTUS APOSTOLICUS INGVAVUMENSIS

*Pastor Hellelt. C.S.R.*

PRAEFECTUS APOSTOLICUS RUSTENBURGENSIS

*Tom J. J. J.*

ADMINISTRATOR APOSTOLICUS MANZINIENSIS



SUPREMUM  
SIGNATURAE APOSTOLICAE  
TRIBUNAL

Die 26 octobris 1984

PALAZZO DELLA CANCELLERIA  
00120 CITTA DEL VATICANO

PROT. N. 1776/71 V.T.

Excellentissime Domine,

Hisce adiunctum litteris mitto Excellentiae Tuae Reverendissimae, tamquam Praesidi Conferentiae Episcopalis, exemplar authenticum Decreti diei 25.X.1984 quo hoc Supremum Tribunal adprobat erectionem Tribunalium Interdioecesanorum primae et secundae instantiae, pro ista Natione.

Curet Excellentia Tua Reverendissima ut notificentur huic Signaturae Apostolicae nominationes (pro singulis Tribunalibus) Vicarii Iudicialis, Iudicum, Promotoris iustitiae et Defansoris vinculi (art.5, par.3 "Normarum..") una cum eorum brevibus curriculum vitae (art.13 Litterarum Circularium "Inter cetera" in AAS 63, 1971, pp.480-486), necnon ut significantur tituli academici iuxta praescripta Codicis Iuris Canonici (can.1420, par.4; 1421, par.3 et 1435).

Velit praeterea Excellentia Tua invitare Vicarios Iudiciales istorum Tribunalium ut unoquoque anno mittant ad hanc Signaturam Apostolicam relationem de propria activitate, redactam iuxta schemata pariter hisce, in duplici exemplari, adnexa.

Occasionem nactus, cuncta fausta Tibi adprecor ac permaneo

Excellentiae Tuae Reverendissimae

*add. my*

*Aurelius Card. Sabattani*

*Reef*

Exc.mo Domino  
D.no Eugenio D.HURLEY  
Archiepiscopo Durbaniano  
Praesidi Conferentiae Episcopalis  
Africae Meridionalis

(cum insertis)

*+ Juan Fochler*  
*Sc.*





SUPREMUM  
SIGNATURAE APOSTOLICAE  
TRIBUNAL

PALAZZO DELLA CANCELLERIA  
00120 CITTÀ DEL VATICANO

PROT. N. 1776/71 V.T.

Decreto diei 27 septembris 1984, Conferentia Episcoporum Africae Meridionalis erigit, in natione v.d. Sud Africa, quattuor Tribunalia Interdioecesana primae instantiae ad pertractandas causas universas, scilicet non tantum causas nullitatis matrimonii, sive formales sive summarias, sed etiam causas separationis coniugum necnon contentiosas et criminales et quidem in civitatibus Capetounensi, Praetoriensi, Durbaniana et Bloemfonteinsi.

Eodem decreto statuitur praeterea Tribunal Capetounense tanquam forum appellationis pro causis cognitis in prima instantia a Tribunali Bloemfonteinsi; Tribunal Bloemfonteense pro causis definitis in prima instantia a Tribunali Durbaniano; Tribunal Durbanianum pro causis pertractatis in primo gradu a Tribunali Praetoriensi; Tribunal Praetoriense pro causis cognitis in prima instantia a Tribunali Capetounensi necnon pro illis quae iudicatae sunt a Tribunalibus Dioecesanis Ioannesburgensi et Manziniensi, incolumi semper manente facultate provocandi in secunda instantia ad Tribunal Rotae Romanae iuxta legis praescripta.

SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL

Viso ac mature perpenso praedicto decreto;

Vi can.1445, par.3, 3<sup>o</sup> Codicis Iuris Canonici et attento art.2, par.1 "Normarum pro Tribunalibus Interdioecesanis, vel regionalibus aut interregionalibus" ab hoc Supremo Tribunali editarum die 28 decembris 1970;

Considerata instantia Exc.mi Archiepiscopi Durbaniani diei 8 octobris 1984, qui, nomine Episcoporum Conferentiae de qua supra, petit adprobationem Sanctae Sedis;

Auditis insuper Congregatione pro Gentium Evangelizatione seu de Propaganda Fide, necnon Delegatione Apostolica in Africa Meridionali;

decernit:

"petita adprobatio conceditur ut praefatum decretum vim habeat et executioni mandetur".

61.

-2-

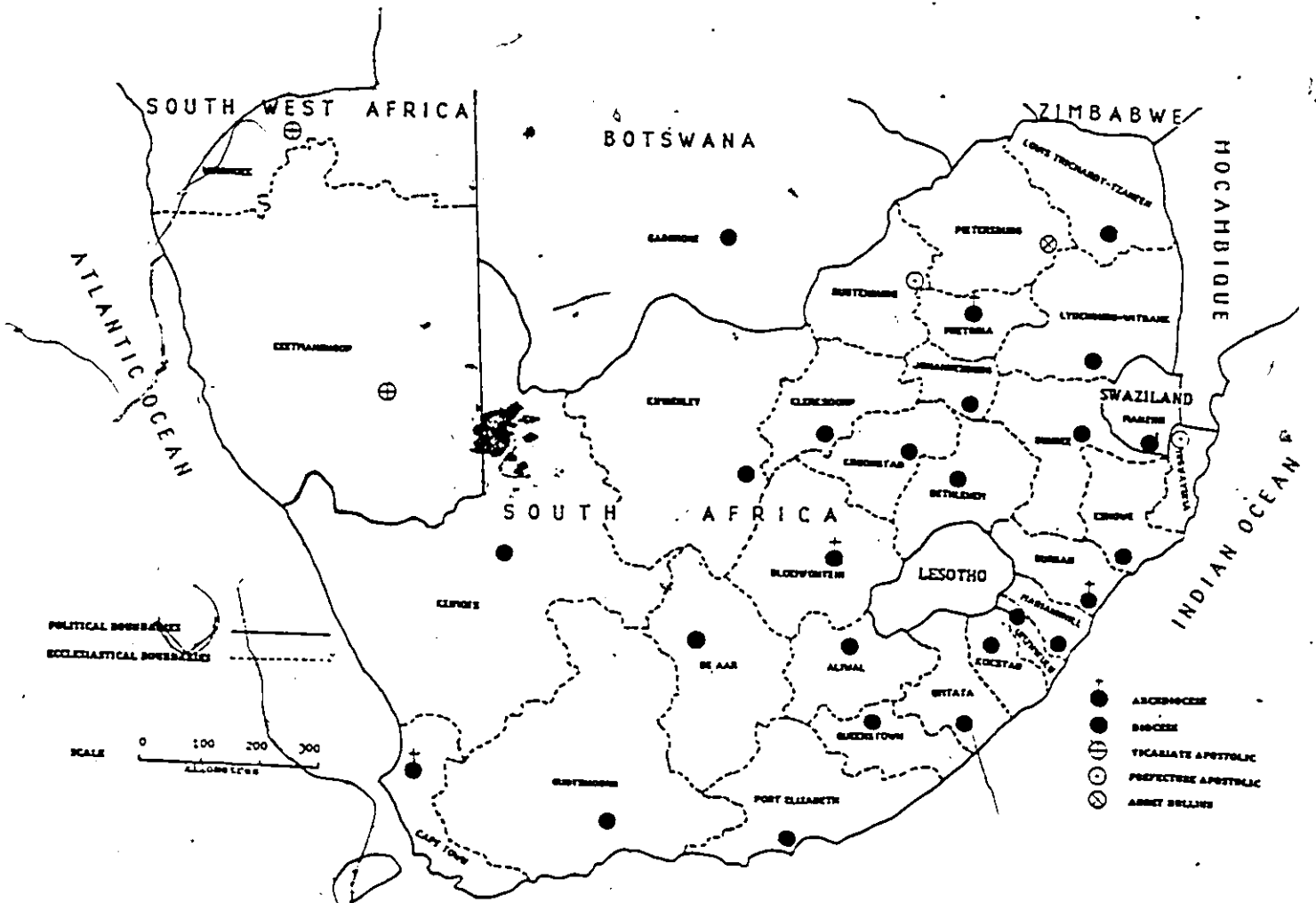
Conferentia Episcoporum per suum decretum decernat de tempore quo nova Tribunalia Interdioecesana vigere incipiant et de regimine causarum pendentium apud Tribunalia existentia, iuxta art.22 earundem Normarum huius Supremi Tribunalis.

Datum Romae, e sede Supremi Signaturae Apostolicae Tribunalis, die 25 octobris 1984.

Aurelius Card. Sabotini  
Præf.

+ Canon Fuchsler, ph.  
La.

25-X-1984  
Umberto Sacconi



TERRITORIES OF THE SOUTHERN AFRICAN CATHOLIC BISHOPS' CONFERENCE  
(Excluding Lesotho, Zimbabwe and Mozambique)

1984

POOR PRINT  
Epreuve illisible