

7. THE PARTICULAR JURIDICAL ORDER OF AFRICAN CHURCHES: APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY AND DECENTRALIZATION

Masengo Nkinda

Introduction: Preliminaries

To speak of the particular juridical order of African Churches is certainly to pose the famous question, namely, whether African Churches can have a Code proper to them just as there is discussion about having an African theology, an inculturated liturgy, and so on. There is no doubt about having a proper Code one day but there are prerequisites. If the theologian can formulate and defend certain theses already, if the liturgist can proceed with experimentation, the canonist—who is not a legislator—will wait for the theologian to present his conclusions and for the legislator, in view of these conclusions, to present him with his plans for laws; then, and only then, will the canonist get to work to give juridical form and style to these projects. So it is putting the cart before the horse to ask the canonist to invent an African Code. The Code is born of the lived faith of the collectivity of its difficulties and conflicts, of its concern to protect its fundamental truths, of its everyday activity.

Another question is to find out if there already exists a certain particular juridical order arising from the points in the New Code of Canon Law that are left to the initiative of the Episcopal Conferences of each country. Here allow me also to invoke another principle of Law, "*Lex instituitur cum promulgatur*", law exists only from (the time of) its promulgation. In other words a bill which is not yet promulgated is not yet law. I do not know if other African countries have yet done the work of completing the new Code by particular norms. In any case there has been no mention of the promulgation of these dispositions, which must have Rome's *placet*. As for Zaire, the Episcopal Conference had asked the committee of canonists to elaborate these particular

norms. That was seven years ago and there is no news of what happened to that text, which was never promulgated. The committee itself has not been asked since to meet. Besides, since each bishop is legislator for his own area there are certainly particular norms for his faithful. With communication difficulties it is not easy to know what one's neighbour does, and sometimes positions are contradictory. What about all Africa then? We would need another Gratian to compile the different legislations, bringing concord where there is discord. This could unleash the movement to elaborate a particular juridical order for our Churches. Note that the publication of Synodal Acts does not give these Acts the force of law.

Faced with the lack of documentary sources, I decided, in order to meet the expectations of the organizers of this Theology Week, to explore the constitutive sources, that is to say, all the physical and moral persons who have the task of framing the laws in our Churches, to see if they are disposed to take part in building up an emancipated African Church, even if in this process codification only enters in the last place. There is certainly an *ad hoc* juridical order in each diocese, which we cannot examine now for want of time and means. As for a systematic juridical order, that is a long-term job needing decades of years of clear-sighted work. Moreover, to create new structures presupposes mastering the functioning mechanism of the structures one wishes to replace. That is why I have thought it good to examine the structures of the African Churches which will surely condition the flowering of a particular juridical order.

1 The Juridical Order of the African Churches

A question will help us to grasp what is at stake in this theme of a juridical plan. Have the particular Churches of Africa a juridical organization, structures pointing to the genius and need of this people, or are they content to copy the juridical structures of the old churches that evangelized us? In other words, preoccupations about inculturation necessarily touch upon this apparently untouchable area too. First of all it must be said that all the African Churches follow to the letter the structure of the

Church exactly as the Code of Canon Law prescribes it, in three strata:

diocesan organization,
infradiocesan organization,
supradiocesan organization.

Note that the organization of the Church is in no way opposed to the charismatic aspect. On the contrary it is connected with the nature of the Church as People of God incorporated into Christ through Baptism - making each one in his own way share in the priestly, prophetic and royal function of Christ. Each baptized person is called, according to his or her own state, to exercise the mission which God has confided to the Church to accomplish in the world (cf Canon 204). Church structures have for their object to allow all of Christ's faithful to find satisfaction and fulfilment in realizing their mission, their baptismal vocation. One cannot do without these structures without doing harm to that mission, just as one cannot misuse them without frustrating the faithful in their legitimate aspirations.

As a supradiocesan organization, all our particular Churches are organized in provinces, in national conferences and even in regional conferences which regroup the national conferences of some neighbouring countries of linguistic or geographical affinity. These regional associations are:

- : Association of Episcopal Conferences of the Congo, the Central African Republic and of Chad (ACECCT)
- : Association of Conferences of the Bishops of Central Africa (ACEAC)
- : Association of Member Episcopal Conferences in Eastern Africa (AMECEA)
- : Regional Episcopal Conference of French-speaking West Africa (CERAO).

And to promote relations and pastoral cooperation for the whole continent, Africa has not hesitated to give itself a structure which regroups all the Episcopal Conferences called the Symposium of Episcopal Conferences of Africa and Madagascar (SCEAM).

On the diocesan and infradiocesan level a glance at the directories of the different African countries shows that all the particular Churches are well structured and dispose of all the organs needed for functioning well and facilitating the work of the apostolic workers. The latest Zaire directory (1983-4) seems to be a model of perfection. All dioceses present an impeccable "organigramme", division into deaneries, parishes, apostolic centres, and so on, offices and organs like the diocesan curias, ecclesiastical tribunals, pastoral diocesan centres, vicars general and episcopal vicars, council of priests, council of consultors, economic council, pastoral council, and so on. The only thing missing is the chapter of canons. Is there a reason?

II The Principle of Subsidiarity

The very term, subsidiarity, seems to be a neologism not found in French dictionaries. The principle of subsidiarity was introduced into the Church's social doctrine by Pope Pius XI and was alluded to by Pope John XXIII in the encyclical, "Mater et Magistra". It is a principle applicable in the domain of government. It requires that "every task which can be satisfactorily done at a lower level should not be usurped by a higher level". In other words, superiors should not take on everything or wish to do everything alone, they should leave to subalterns the satisfaction of doing their duty in what concerns them. Although this principle forms part of the Church's social doctrine, it is surprising that the official Church has never applied it to its governing. The Second Vatican Council used it three times:

- : about relations between the super powers and the poor countries (Gaudium et Spes. 86)
- : in the question of teaching, to protect parents, schools and local authorities from abusive interference by the State (Gaudium et Spes 3 and 7.)

No reference is made to it in the ecclesiology developed in "Lumen Gentium" or "Christus Dominus".

This leads us to ask questions about the nature of institutional

power in the Church. Up to now the Church has conceived its power as a monarchy, its style is monarchic, and theological arguments are not wanting in support of this. This power is of divine right, it comes from God and not from human beings; the Church is not a democracy, the Pope and bishops do not receive their power from the people and are not deputies of the people, but ambassadors of Christ. This is the "Christomonist" model, in which Christ transmits his full powers to Peter and the other apostles; Peter and the apostles in their turn transmit them to their successors, the bishops and priests; these exercise their powers over Christians. The Second Vatican Council tones down this concept by developing an ecclesiology which gives pride of place to the notion of Church as People of God. Certainly the Pope and bishops do not receive their power from the people, but henceforth they must conceive the monarchical character of their power in another way. The rediscovery of the notion of the common priesthood leads us to recognise in each member of Christ's faithful the right and obligation to share in the building up of the Church, the Body of Christ, each in his or her place according to vocation and charism. The decree on the Apostolate of the laity is a fine illustration of this right being recognized. One might have expected the principle of subsidiarity to be invoked in this decree but the term is not used.

Such an attitude of reserve towards this principle preached by the highest ecclesiastical authority calls for justification. It seems that the principle of subsidiarity does not form part of communion in the strict sense. Nevertheless on examining the New Code of Canon Law we notice that the legislator was largely inspired by this principle in nearly all the canons that concern the exercise of power of government or administration.

III Decentralization

In administrative law "decentralization" means giving certain powers to collectivities or local entities. On the part of a centralized power, it is a question of the will to allow entities far removed from power to function more easily, swiftly and efficaciously. There can be no talk of decentralization without according, at the same time, some real autonomy in the management of public affairs. Decentralization aims, then, at procur-

ing well-being for the group concerned.

In the Church's juridical order we know that before the Second Vatican Council the ecclesiology of the unicity and primacy of Peter had led Rome to an extreme centralized juridical order. All decisions emanated from Rome, residential bishops had only apparent power. "Roma locuta, causa finita". The Vicars Apostolic in charge in our countries had to be still more submissive to Rome for the simple reason that they were only vicars and therefore had power vicariously and not of themselves. The very term, "particular Churches", in its modern connotation is one of the great innovations of the Second Vatican Council, which states that particular Churches are not "a part" of the universal Church, the consequence of a distribution; nor does the universal Church come from the addition of particular churches; the local Church has not its source in topography, even though most of the time it is circumscribed by a territory, but it is inscribed into the very mystery of Christ's Church.

This affirmation of "Lumen Gentium" has important consequences. One could say that here is the theological foundation of the principle of subsidiarity and decentralization. I would go further and say, this affirmation admits that the power of these particular Churches is usurped by Rome. *Mutatis mutandis*, the same logic ought to apply in the relationships between diocese and parishes, between parishes and Living Christian Communities. Decentralization aims not only at the division or sharing of powers which can only have positive effects by applying the principle of subsidiarity but also at the territorial division of ecclesiastical circumscriptions into entities that are manageable. These two aspects of decentralization have the same objective; the improving of pastoral activity in order to attain the proper end of the Church, the salvation of souls.

IV Some Innovations in the Universal Church

The Second Vatican Council and the New Code of Canon Law, starting from the principle of the Church as People of God, have instituted new organs to facilitate pastoral activity in both the universal Church and particular Churches. There are not only new structures but also a certain revamping of the juridical

order. First of all there is the fact that *Lumen Gentium* situates the episcopal ministry within the ministerial structure of the community (LG 4; 3 and 6; 12:2; 18; 1:30) without denying its role of pastor for all that.

The decree *Apostolicam Actuositatem*, for its part, speaking of the laity, states that there is diversity of ministries in the Church but unity of mission (no.2), so much so that lay people hold from their very union with Christ, the Head, the duty and right to be apostles (3). Indeed lay people as sharers in the priestly, prophetic and royal functions of Christ assume their part in the Church and world in the mission of the whole people of God (2). I say that these statements come to revamp the juridical order of the Church in the sense that certain attributions which were reserved only to those who had received the sacrament of Orders are now accessible to lay people, like the functions of judge in ecclesiastical tribunals (can 1421:2), promoter of justice and defender of the bond (can 1435), admission to ecclesiastical offices and functions (can 228).

In what concerns relations between Peter and the bishops, the affirmation of the collegiality of bishops also creates another kind of power. The bishop is no longer confined to his diocese, he becomes pastor for the world and exercises his ministry of teaching everywhere. The creation of the Synod of Bishops also testifies to the will of the Roman Pontiff for "decentralization—participation". To be in charge does not necessarily mean to do things oneself but to remind each one of his or her share in responsibility for the particular area of a function.

V The Position of the African Particular Churches Relative to the Principle of Subsidiarity and Decentralization

A fact first of all: there is a general complaint of both clergy and laity that the structures of power-sharing and dialogue recommended by the Church are either not working or simply are not existing in the greater part of our dioceses. Here in Zaire as elsewhere, indeed, many dioceses have no Vicar General or, if one exists, he is often a simple figurehead. The diocesan curia seems to be an unknown quantity, the deaneries only exist on paper, with no one appointed in charge. Let us not mention the

council of priests, the pastoral council or the college of consultants, since Rome had sent a circular to the Ordinaries of Africa to please decide to set up these bodies. What is to be said of the ecclesiastical tribunals, which nevertheless are the place of a very important specialized apostolate? The faithful do not even know that an ecclesiastical tribunal exists; the former organization which linked the six ecclesiastical provinces exists no more. Nobody knows who to approach in the first or second instance. Now the juridical procedure must be scrupulously observed to avoid positing acts that are null. I could continue the list. But it all leads me to put a question: why this apathy of our African particular Churches in the face of these structures of participation and dialogue? Why are our pastors refractory to the principle of subsidiarity and decentralization?

It is hard to give a succinct answer to this series of questions if motivations are to take account of circumstances of time and place different from one country to another. Some pastors invoke the argument of shortage of priests, others speak of the incapability of the local clergy to take up certain charges (lack of specialists, who, incidentally, decline to be trained). Others, finally, justify their attitude by appealing to the juridic argument of the power of customary chiefs. They say, "In a village there were not two customary chiefs. The customary chief has all the power, even of life and death, over his subjects, he does not share his power with another". Note that this argument is very attractive because it resembles the concept of Church power as monarchic, not only from the fact that the ecclesiastical authority is not a deputy of the people but also because in fact in the Church the three powers, in particular, the legislative, executive and juridical, are exercised by one same person (the Roman Pontiff or the bishop). This whole charge is placed on the Pope's poor shoulders in response to the principle of unicity and primacy. In principle he exercises the three powers but in reality he disposes of a whole arsenal of services to do so. In this point the Roman curia is a model of decentralization, after the image of the most advanced Western democracies. As for the principle of the customary chief's power, it must be recognized first that authentic customary chiefs have become rare as a result of the destabilization caused by the Belgians and consummated by the one party state. True customary chiefs had always a well-

organised court and government where each person had his proper function and grade. He never dealt with money or provisions. He had many interdicts from the fact of his sacred power. Before taking a decision, he consulted his members and if he became tyrannical his court or the council of the wise men of the family could advance someone else and depose him. So one may not have recourse to this argument to reject the establishment of juridical order for common law, or if recourse is had to it in the sense of inculturation for new structures many principles must be dropped.

Our particular Churches cannot ignore the present evolution of the world or the democratic current that touches our whole continent. It is a question of applying the democratic principles that even modern constitutional monarchies practice. The principle of subsidiarity and decentralization means in practice power-sharing where the law foresees it. Contrary to the 1917 Code the New Code leaves enough free space to particular Churches to create their own law. Unfortunately a certain apathy, I might call congenital, prevents us from daring to. Likewise the immense size of certain dioceses does not help in exercising pastoral responsibility; territorial decentralization must be envisaged as Vatican II demands.

Conclusion

As a conclusion to these considerations on the juridical order in our particular Churches we shall look at some positive experiments realized by the African legislator.

Let us be clear first that in canon law it is not the canonist who is the legislator but the bishop, who can have recourse to the services of the canonist to guide his inspiration into juridical forms. The creation of living ecclesial communities in 1961, that is to say, before the Council, was a bold initiative even if the arrangements in the juridical order were fixed only some years later, in contact with the organisation of the basic communities of Latin America.

The initiative of the Bakambi, popularly called lay clerics, made the Roman canonists turn pale since at that time it involved going against the law. It must be recognized that, when looked at more closely, the institution of the Bakambi causes more concern than it does harm. It was not against the law; but accor-

ding to the law that would be explicitly stated in the New Code of Canon Law: "If a diocesan bishop should decide that due to a dearth of priests a participation in the exercise of the pastoral care of a parish is to be entrusted to a deacon or to some other person who is not a priest or to a community of persons, he is to appoint some priest endowed with the powers and faculties of a pastor to supervise the pastoral care" (Can 517:2).

Not all Episcopal Conferences have opted for the institution of the permanent diaconate or for the Chapter of Canons. This shows that the African episcopate has not always blindly followed what is done in Europe.

An apparently innocent fact like the change in habit for African women religious shows great boldness and faith in inculturation as a plank of salvation for depth-evangelization. Our apprehensions for the African Synod stem from this that a good number of our pastors do not believe in inculturation. They are more afraid of it than Rome itself, which seems to have taken the lead is carrying them along.... And yet there is a radical difference between a Synod and a Council.

The fact that in certain dioceses the Zaire rite of the Mass is not even mentioned illustrates what we say. African pastors, just like some so-called intellectual Christians, seem to be more Roman than Rome itself. There we find the draw back on the opening to a juridical order of our own in the African particular Churches. "Cish cidyadya lukunde, cidi munda mwa lukunde" (The worm that gnaws the bean is inside the bean). The request for an African Council remains pertinent.

Translated from the French by M. L. Fay
C.S.Sp.