

REPORT OF THE INAUGURAL CONFERENCE OF THE CANON LAW  
COUNCIL

ANGLICAN CHURCH OF SOUTHERN AFRICA

JANUARY 21 - 24 2013

THE COLLEGE OF THE TRANSFIGURATION

GRAHAMSTOWN



## SUMMARY

*“In this age when the questions of human rights and freedoms looms so large  
In the thinking of people the world over, surely the Church  
should exert  
her leadership by ensuring those rights and freedoms among  
her own members.  
We should not be afraid, therefore, to examine closely our legal  
apparatus to see  
if it will stand the test of today’s needs and aspirations.  
We must listen to those who insist that our procedures are not  
adequate.  
Then, on the basis of actual fact rather than emotion  
or an effort to prove some preconceived idea,  
we must decide whether changes are needed and,  
if so, what kind. Only in this way will the Church’s  
credibility in this area remain intact.”<sup>1</sup>*

The College of the Transfiguration (COTT) in Grahamstown, the only Provincial Theological College in the Anglican Church of Southern Africa (ACSA) played host to the inaugural Conference of the Canon Law Council of ACSA from 21 – 24 January 2013.

The three and a half day Conference was the culmination of an initiative of the Synod of Bishops and the Provincial Trust Board after the latter found that “there is no doubt that a good understanding of Canon Law and its right use is invaluable to the healthy life of the Church.”<sup>2</sup>

A small group of four including the Provincial Executive Officer (PEO) Allan Kannemeyer, the Provincial Registrar, Henry Bennett, and two Canon Lawyers; Andrew Hunter and Matthew Esau, were invited to meet at Bishops court with the Archbishop on 29 February 2012. The Archbishop placed a number of concerns of a canonical nature on the agenda one of which was

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<sup>1</sup> Bernardin, Joseph L. New Commentary on the Code of Canon Law, Beal, Coriden, Green. 2004:1819

<sup>2</sup> Archbishop Thabo Makgoba *Message for the Inaugural Canon Law Council Conference* January 2013

to arrange for the inauguration of a Canon Law Society or Council.

The 'working group' set about organising a conference in addition to advising on cases passed on to them by either the Archbishop or the PEO.

The inaugural conference was the culmination of discussion over a number of years in ACSA on the need for a society of canon lawyers able to assist the Bishops in their tasks of pastoring the faithful and in the case of the Archbishop, 'pastoring the pastors'.

Archbishop Ndungane was at pains to ensure that ACSA provide Canon Law guidelines for ACSA and so initiated the beginnings of a Canon Law Society.

The Eucharist was the sacramental and theological underpinning of the Conference, from the opening Eucharist, when the Dean of the Province, Bishop Ruben Philip, presided and gave an opening address, through to the final morning of the Conference. The worship provided the spiritual base for discussions and deliberations. It also provided for a deep sense of fellowship and dignity.

In his opening address Prof Barney Pityana, contextualised Canon Law. He mentioned the significance of theology in the life of the Church and the need for the church to live by it. Archbishop Thabo, made the theological perspective clear; "For God's people live under grace not law: while Jesus came to fulfill the law, he was against legalism. Law makes a good servant but a poor master."<sup>3</sup>

The full report which follows herein gives more details of the presentations and deliberations of a happy, in-depth and frank conference, signifying that even in the Dioceses where we are experiencing canonical misunderstandings and challenges, we

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<sup>3</sup> ibid

have committed canon lawyers eager to serve the Church in their capacity of Chancellors, Registrars and legal advisors.

We trust that you will find the report helpful as we move forward to establish a body which will assist the Anglican Church of Southern Africa exert her leadership by ensuring (those) rights and freedoms among her own members.

Matthew Esau

On behalf of the Steering Committee

## INTRODUCTION

The College of the Transfiguration (COTT) in Grahamstown, the only Provincial Theological College in the Anglican Church of Southern Africa (ACSA) played host to the inaugural Conference of the Canon Law Council of ACSA from 21 - 24 January 2013.

The three and a half day Conference was the culmination of an initiative of the Synod of Bishops and the Provincial Trust Board after the latter found that “there is no doubt that a good understanding of Canon Law and its right use is invaluable to the healthy life of the Church.”<sup>4</sup>

A small group of four including the Provincial Executive Officer (PEO) Allan Kannemeyer, the Provincial Registrar, Henry Bennett, and Canon Lawyers; Andrew Hunter and Matthew Esau, were invited to meet at Bishops Court with the Archbishop on 29 February 2012. The Archbishop placed a number of concerns of a canonical nature on the agenda one of which was to arrange for the inauguration of a Canon Law Society or Council.

The ‘working group’ set about discussing and organising a conference in addition to advising on cases passed on either by the Archbishop or the PEO.

The inaugural conference was the culmination of discussion over a number of years in ACSA on the need for a society of canon lawyers able to assist the Bishops in their tasks of pastoring the faithful and in the case of the Archbishop, ‘pastoring the pastors’.

The focus on Canon Law as a ‘focus of unity’ came about in response to “the decisions of the Episcopal Church (ECUSA) to elect a priest in a committed same sex relationship as one of its bishops, and of the Diocese of New Westminster (Canada) as to

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<sup>4</sup> Archbishop Thabo Makgoba *Message for the Inaugural Canon Law Council Conference* January 2013

services for use in connections with same sex unions.”<sup>5</sup> The Archbishop of Canterbury appointed the *Lambeth Commission on Communion* in 2003 to address “the legal and theological implications” of the decisions of ECUSA and Canada.

In their Windsor Report the *Lambeth Commission on Communion*, proposed a solution “to seek to identify a mechanism which could be put in place in the life of the Communion which would articulate precisely what those precious things might be. The 20<sup>th</sup> century had seen a rapid evolution of International Law. While the nation states of the world were clearly sovereign, there nevertheless needed to be protocols, even laws, which would govern the way in which they related, and which could be used to arbitrate international disputes or legal conflicts. Was the time now ripe for the parallel development of a body of international Communion Law?”<sup>6</sup>

Archbishop Ndungane was at pains to ensure that ACSA provide Canon Law guidelines for ACSA and so initiated the beginnings of a Canon Law Society. Not much came of this and the Inaugural Conference in Grahamstown can be called a restart.

## THEOLOGY IS CANON LAW

“Theology provides the church with a vision and definition of its purposes and Christian values; and each church implements these in the form of law. Canon law provides norms of action to implement values designed to serve the purposes for which the church exists. So: canon law has a theological basis: theology works through law; canon law is applied ecclesiology; and for some it has a sacramental quality”<sup>7</sup>

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<sup>5</sup> Hill, Mark September 2012 *The Anglican Covenant: Where Next?*

<sup>6</sup> Ndungane, Njongonkulu *Faith in Action* 110

<sup>7</sup> Doe, N. *Canon Law and Communion* (2002) 6 *Ecc LJ* 241

when the Dean of the Province, Bishop Ruben Philip, presided and gave the opening address, through to the final morning of the Conference. The worship provided the spiritual base for discussions and deliberations. It also provided for a deep sense of fellowship and dignity.

The opening address by Prof Barney Pityana, Rector of COTT, further contextualised Canon Law when he spoke of the significance of theology in the life of the Church and the need for the church to live by it. *“Canon Law is, in my view, legislation and regulation of a special kind. It exists alongside the law of the land, and to a degree must be subordinate to it. It is voluntary in that one can opt out by ceasing to subscribe to its tenets and obligations. In that case one then ceases to remain a member of the body that is bound by such rules and laws. Its purpose and objective is to will the purpose of God and to realize the good news of the kingdom of God on earth in the redeeming life and work of our Lord Jesus Christ. Given this, therefore, canon law has Christ as the cornerstone and is an instrument of the church to realize the purposes of Christ’s mission. The foundation stone of Canon Law therefore is Christ, and the custodian thereof is the Church. For that reason, Canon law is not by and of itself the theology of the church. It is informed by the theology of the church, gives effect to it, and to the extent that it forms and shapes Christian life it shapes the theology of the church. In return, and to the extent that theology evolves through practice and experience, canon law also guides and judges the theology of the church.”*<sup>8</sup>

In his message to the Conference, Archbishop Thabo, made the theological perspective clear; “For God’s people live under grace not law: while Jesus came to fulfill the law, he was against legalism. Law makes a good servant but a poor master. St Paul also wrote about avoiding – and avoiding provoking – legislative procedures, especially in secular courts, wherever possible. Court cases should be a last resort, on spiritual, moral grounds, as well as being a terrible example to

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<sup>8</sup> N Barney Pityana GCOB Unpublished Opening Address 21 January 2013

the world around, and a shameful waste of parishioners' money. As our Morning Prayer passages so far this week, from Chapter 4 of the Letter to the Ephesians, remind us, we are those who live, and build one up, in love."

## CONFERENCE BUSINESS

SESSION 1 CHAIR: MATTHEW ESAU  
PRESENTER: HENRY BENNETT

### 1 INTRODUCTION

The founding documents, the Constitution and Canons of ACSA provide for an overarching structure under the Constitution, known in law as a voluntary association, incorporated within which is a trust for the holding of property.

#### **1.1 Highest Legislative Body is Provincial Synod (PS):**

“The Provincial Synod of this Church, which shall be constituted as hereinafter declared, shall be the Legislative body of the Church of the Province: and every enactment of the said Provincial Synod shall be a Law and Rule of the Church of this Province in those matters to which it may pertain.” [ACSA Constitution, Art. 11]

**1.1.1** The structure then divides itself into an operational function and a property/asset holding function. Article 1X of the Constitution provides for the operational structure:

“The Provincial Synod shall full power and authority to make all such regulations as shall be required for the order, good government, and efficiency of the Church of this Province; and no regulation of any Diocesan Synod shall have force in any Diocese of this Province, if it be contrary to, or conflict with an enactment of the Provincial Synod.” [ACSA, Con., Art IX]

The rules in the Canons as to hierarchy, management and pastoral care are integral to the voluntary association structured as the

Province with Dioceses, as sub-sets under Diocesan Bishops. Dioceses have a considerable degree of independence and authority, as the basic building blocks of the Provinces: this lies at the root of the problem that the Province has in intervening in a timely and appropriate manner with a Diocese in difficulty.

“The Diocesan Synod in each Diocese of this Province shall resemble, as far as possible, the Provincial Synod in its constitution and mode of procedure.” [ACSA. Con., Art. VIII]

**1.1.2** Articles XVI, XVIII and XX provide the necessary trust elements for property holding:

“All property, of what nature or kind so ever, whether movable or immovable, real or personal, which is or may be given, obtained, or held for the benefit of the Church of this Province, shall, whenever it be practicable, be transferred to a Trustee or Trustees acting on behalf of the Provincial Synod; and all such property thus transferred shall be in Trust, that such Trustee or Trustees shall and do hold the same, or otherwise shall and do transfer the same, upon and according to such Trusts, intents and purposes, whether Ecclesiastical, Missionary, Religious, Collegiate, Scholastic, or Charitable, as the Provincial Synod of the Church of this Province of Southern Africa shall from time to time direct or appoint in writing, under the hand of any person or persons authorised by the Provincial Synod on that behalf, subject, however, to any special Trust imposed by any Founder, Donor, Testator, or other benefactor.” [ACSA.Con.,Art. XVIII]

**1.1.3** The Provincial Chancellor and Registrar, and others, have concluded that ACSA's operational structure is that of a voluntary association and that the property/asset holding structure is that of a trust. Regulatory issues are involved in both. The Provincial structure of ACSA and each diocese are all registered as tax exempt public benefit organisations ("PBO's"), namely, as a voluntary association (the Province) or as parts or members of a voluntary association (the Dioceses). This "splitting" was permitted as a "group registration" for financial accountability reasons. The Income Tax Act permits only three kinds of PBO structures: a voluntary association, a trust, or a s.21 company (or non-profit company under the new Companies Act). The trust regulatory requirements require consideration by the Provincial Trust Board ("PTB") - i.e. Trust Moneys Control Act.

The powers of the PTB are set out in Article XIX:

"Every Trustee in whom any property, whether movable or immovable, real or personal, shall be vested, either solely or jointly with any other person or persons, for and on behalf of the Provincial Synod, shall hold the same with the powers and subject to the limitations, restrictions, declarations, and provisos contained in the several Clauses of the Schedule A hereunto annexed, so far as the same may be consistent with any special Trusts affecting such property; and any Synod, Board, Committee, or other Body, appointed by the Provincial Synod for that purpose, shall possess and may exercise any such of the powers belonging to the Provincial Synod as shall be by the Provincial Synod in that behalf prescribed."

Further necessary details are to be fleshed out in the Canons:

“The Provincial Synod shall have full power and authority to make, from time to time, such Canons, Rules, Regulations, and Bye-Laws for giving effect to the provisions of this Constitution as to the said Provincial Synod shall seem fit, and further from time to time, to amend, alter, and add to such Canons, Rules, Regulations, and Bye-Laws.” [ACSA. Con., Art. XXII]

**1.1.4** It is suggested that the role of the Province is overall leadership and “tone-setting”, external and internal advocacy, legislation including constitutional amendments, lobbying authorities and the provision and control of shared services, like the theological college; whilst that of a Diocese is operational within its area, comprising *inter alia* the parishes, community work, institutions and schools.

**1.1.5** The Diocesan Trustees (or Diocesan Synod, if there are no trustees) has delegated powers from the PTB in relation to property held in trust. Canon 42 deals with the Provincial Trusts and Provincial Trustees (section 1 to 11) and with Diocesan Trusts and Diocesan Trustees (sections 12 and 13), with sections 14 to 16 covering both sets of categories. The principal responsibility rests with the Provincial Trustees, in terms of the Constitution, who are answerable to Provincial Synod, while Diocesan Trustees have the same rights and responsibilities as the Provincial Trustees in relation to property in their Diocese. Although Diocesan Trustees are answerable in the first instance to Diocesan Synod, ultimately they are answerable to Provincial Synod - Canon 42 (14) to (16). By necessary implication, the Diocesan Trustees have delegated authority by virtue of the Canons over property

in their Diocese, with immediate oversight of Diocesan Synod, but ultimate oversight of the Provincial Trustees and Provincial Synod. The composition of the PTB is set out in Canon 42(2) and its powers in Canon 42(8). The composition of the Diocesan Trustees is left to Diocesan Synod while their powers are set out in Canon 42(12)(a) and (b).

**1.1.6** A Diocesan Trust Board may be thought to be a separate body from a Diocesan Finance Board (however designated), but in fact the finance board should be a standing sub-committee of the Trust Board. The chairperson at least of the Finance Board should be a trustee, and trustees should all be entitled (but not obliged) to attend Finance Board meetings, unless they are appointed to the Finance Board when attendance is obligatory. All trustees should receive Finance Board minutes, and the report of the Finance Board should be a standing item on each meeting of trustees.

## **1.2 Responsibility of Fiduciaries (i.e. Trustees, Councillors, Governors, Directors, etc.):**

The Third Report on Corporate Governance in Southern Africa (King III), released on 1 September 2009, codified the responsibilities of all persons holding fiduciary office (be it as director of a company, councillor of a public or private institution, governor of any controlling body, provincial or diocesan trustee, member of a Chapter or Senate, or any similar post - i.e. a "governor"). These individual responsibilities were previously gleaned from common law and case judgments, but now they are conveniently brought together, and have added to them those responsibilities accruing to directors in terms of the new Companies Act, 71 of 2008), which will not be dealt with in this presentation. Directors of non-profit companies (NPC's,

or the old s.21 companies) will need to refer to their own advisors to identify these specific statutory provisions.

**1.2.1** At the outset, King III made clear the wide embrace of its tenets, and that its principles of good governance cover all organisations of all kinds, however structured, and in all fields. It states:

“In contrast to the King I and II codes, King III applies to all entities regardless of the manner and form of incorporation or establishment. We have drafted the principles on the basis that, if they are adhered to, any entity would have practised good governance. For that reason, we have not focused on or discussed the implementation of the code and each entity should consider the approach that best suits its size and complexity.”

However, these principles need not be applied across the board and without question, on pain of penalty. This is simplistic and expensive, as has been demonstrated in the USA, with its “comply or else” approach.

King III is more nuanced in its approach, recognising that “one size does not necessarily fit all”, and calling for thought, judgment and explanation in cases where a particular principle cannot be applied, fully or partially, by an organisation. The key is that the issue in question has to be thought through, the decision needs to be rational and reasonable, and then communicated and explained to all parties concerned. Thus it calls for the principles to be applied, but if this cannot be fully affected, then to explain why and to what extent there is a shortfall in the application, i.e. a “comply or explain” approach.

“One of the legal duties of a board ..... is to act in good faith. This connotes several requirements, including the duty to act honestly and in the best interests of the [organisation], to not appropriate the

[organisation's] opportunities or receive secret profits, and to endeavour to fulfil the purpose for which [it] was established. .... In an 'apply or explain' regime, the board ....., in its collective decision making, can conclude that to follow a practice recommended in a code would not, in the particular circumstances pertaining at the time in regard to an issue, be in the best interests of the [organisation] and apply another practice. It must explain the practice it applies other than the recommended one and the reasons for applying. Hindsight is a perfect judge on whether the board's determination in applying another practice was justified as in the best interests of the [organisation]."

**1.2.2** King III puts governance and law into perspective as follows:

"There is always a link between good governance and law. Good governance is not something that exists separately from the law. It is entirely inappropriate to unhinge governance from the law."

The starting point of any analysis on this topic is that [governors] must discharge their legal duties.  
 .....

The duties of [governors] can be grouped into:

- (1) the duty of care, skill and diligence, in terms of which [governor] must manage the business of the [organisation] as a reasonably prudent person would manage his own affairs. The standard of care is a mixed objective and subjective test, in the sense that the minimum standard is that of a reasonably prudent person but a [governor] who has greater skills, knowledge or experience than the reasonable person must give to the

[organisation] the benefit of those greater skills, knowledge and experience; and

- (2) fiduciary duties, being the duty to act in the best interest of the [organisation], to avoid conflicts, to not take the [organisation's] opportunities or secret profits, to not fetter their votes and to use their powers for the purpose conferred and not for a collateral purpose.....”

**1.2.3** On the issue of sustainability, King III has this to say:

“The philosophy of the Report revolves around leadership, sustainability and corporate citizenship. To facilitate an understanding of the thought process, debate and changes in the Report, the following **key principles** should be highlighted:

- 1 Good governance is essentially about effective **leadership**. Leaders need to rise to these challenges if there is to be any chance of effective responses. Leaders need to define strategy, provide direction and establish the ethics and values that will influence and guide practices and behaviour with regard to sustainability performance.
- 2 Sustainability is the primary moral and economic imperative for the 21<sup>st</sup> Century, and it is one of the most important sources of both opportunities and risks for businesses. Nature, society, and business are interconnected in complex ways that need to be understood by decision makers.....”

Remember, although King III is talking to the secular world, the same principles apply to the stewardship of the operations and assets of a church: for “board” read whatever the controlling body is in your

organisation – synod, chapter, senate, board, council, governing body, committee, chamber, etc.

**1.2.4** As to the ethics of governance, King III points to the simple, key duties of a fiduciary:

“The ethics of governance requires that all decisions and actions of the board and executive management be based on the following four basic ethical values that underpin good corporate governance:

- **Responsibility:** The board should assume responsibility for the assets and actions of the company and be willing to take corrective actions to keep the company on its strategic path.
- **Accountability:** The board should be able to justify its decisions and actions to shareholders and other stakeholders who require it to do so.
- **Fairness:** In its decisions and actions, the board should ensure it gives fair consideration to the interests of all stakeholder of the company.
- **Transparency:** The board should disclose information in a manner that enables stakeholders to make an informed analysis of the company’s performance.

A [governor] is a steward of the [organisation]. The **ethics of governance** require that in this stewardship role, each [governor] be faithful to the four basic ethical values of good corporate governance (responsibility, accountability, fairness and transparency). In performing their stewardship

role [governors] need to exercise the following five moral duties:

- **Conscience:** A [governor] should act with intellectual honesty in the best interest of the company and all its stakeholders ..... Conflicts of interest should be avoided. Independence of mind should prevail to ensure the best interest of the [organisation] and its stakeholders is served.
- **Care:** A director should devote serious attention to the affairs of the company. Relevant information required for exercising effective control and providing innovative direction to the company needs to be acquired.
- **Competence:** A [governor] should have the knowledge and skills required for governing an [organisation] effectively. This competence should be developed continuously. Willingness to be regularly reviewed is a prerequisite for ensuring competence.
- **Commitment:** A [governor] should be diligent in performing ..... duties. Sufficient time should be devoted to [organisation] affairs. Effort needs to be put into ensuring [organisation] performance and conformance.
- **Courage:** A [governor] should have the courage to ..... act with integrity in all board decisions and activities”.

### **1.3 Arrangements with Provincial and Diocesan Institutions**

Anglican institutions, that are part of the Anglican family, but independently governed and managed (albeit, perhaps, with ACSA representatives on their boards), should have a written understanding with the Province or Diocese, setting out their respective expectations and obligations as well as a mechanism for disengaging with one another, should that necessity arise. This memorandum of understanding (“MoU”) incorporates a shared vision and mission, and acknowledges the importance of the Anglican “brand” (to use a secular expression). With certain institutions (e.g. mid to high-fee schools), where in addition to the “brand” the bishop is called upon to perform responsible duties, it could be recorded that an approach for a contribution to the Diocese might be made from time to time. An example of such an MoU drafted for the Diocese of Johannesburg was tabled.

### **1.4 Anglican Non-profit Institutions: NPCs, NPOs and PBOs**

On this subject there is an “Alphabet Soup” of Acronyms: “NPC” is a non-profit company under the Companies Act; “NPO” is a non-profit organisation under the Non-profit Organisations Act (“NPO Act”); “PBO” is a public benefit organisation under the Income Tax Act (“Tax Act”).

**1.4.1** The old s.21 companies under the old Companies Act have been replaced by non-profit companies (NPCs) under the new Act. An NPC is not automatically tax exempt: as a special form of company, which cannot distribute any of its income or property, it has to apply to SARS, like everyone

else, for tax exemption as a PBO, recognised as such in terms of s.10(1)(cN) and 30 of the Tax Act. In addition, if it is otherwise entitled to apply for state subsidies, it must also apply to the Non-Profit Organisations Director, under the NPO Act, for registration as an NPO. Thus an NPC must register with SARS as a PBO for tax exemption and with the NPO Director as an NPO for eligibility for state subsidies. These are three different purposes: the NPC is the starting point for tax exemption or subsidies or both (as are trusts and voluntary associations), to which can be added recognition as either or both a PBO or NPO, depending on the desired objectives. In addition, being a PBO property owning entity entitles it to discounted property rates levies (but not if it is only an NPO).

Of relevance to this paper is the PBO requirement that no single person (or entity) can directly or indirectly control the decision making power of the organisation, and that the PBO is not to be used in a tax avoidance scheme.

**1.4.2** The provisions for tax exemption are set out in the Tax Act. The critical concept here is that of a PBO, which by definition would also qualify as a NPO. Although conceptually these two (i.e. PBOs and NPOs) can be the same entity, these are terms of art, used differently for different legislated purposes. The PBO is the construct used in relation to tax exemption and the right to issue tax deductible receipts to donors, and also in relation to the right to be levied municipal rates on property on a lower formula than that applying to any other rateable property. The NPO is the construct used in relation to any right to apply for state grants or subsidies (and in some cases also municipal grants-in-aid), and NPOs are registered with the Department of Welfare under the NPO Act. PBOs are dealt with in

this section, while NPOs are dealt with in relation to subsidies.

**1.4.3** If subsidies are sought from the State, the applicant organisation must be registered as an NPO under the NPO Act. The statutory requirements of an NPO are fewer, but in some respects similar to those of a PBO, and were noted.

The NPO Act, in formulating its requirements of an NPO, really sets out a “good-housekeeping” list of matters that should be covered in an NPO’s constitution or founding document. An NPO must be structured as “a trust, company or other association of persons”, again, essentially the same structural requirements as for a PBO, differently expressed (by implication “company” in this context effectively means an NPC, as neither income nor property is distributable).<sup>9</sup>

However, nothing remains static for very long in the South African legislative framework. The Minister of Welfare has published a “Policy Framework on Non-profit Organisations Law” discussion document on 31 December 2012. It envisages a consultative process leading to changes to the NPO Act, floating off the NPO Directorate as a self-standing Regulatory Authority and the establishment of a Tribunal and Appeal body.

**1.4.4** The application of the law on property rating by municipalities is a muddled area of taxation (assuming that property rates are a form of taxation, as is often argued). This is because, while the general guidelines are set out in the Local Government : Municipal Property Rates Act, 6 of 2004 (“Rates Act”), the details in each municipality (of which there are about 280 throughout the country) are determined by each municipality for itself in its

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<sup>9</sup> s.1 of the NPO Act, def. of “non-profit organisation”

Rates Policy, which has to be reviewed and published annually.<sup>10</sup> Land registered in the name of ACSA and used as a place of worship and the residence of that place's office holder (i.e. the incumbent) are totally excluded from the rating legislation. The greatest difficulty in places, arises with diocesan schools, which as PBOs are entitled to a rate not exceeding 25% of the municipality's residential rate, but on which some municipalities levy rates at the commercial rate.

**1.4.5** Independent PBO diocesan schools charging fees that are less than 2.5 times the Provincial average estimated cost per learner of educating a child in an ordinary school in the Province concerned are entitled to apply for a subsidy. This can amount to a significant contribution to a mid to low-fee school's income and can greatly assist in the quality of teaching and learning. The details of this legislation were touched on, as were the problems experienced in its implementation.

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<sup>10</sup> s.3 to 6 of the Rates Act

## **SESSION 2: CANON LAW COUNCIL/SOCIETY/COMMISSION (“CLC”)**

**Chair: Henry Bennett**

**Discussants: Working Group**

**2.1 Purpose and Objectives of the CLC:** Bearing in mind that we live by grace and seek to be the best at what we are called to do, these can be separated into a number of areas, and there may be more as future experience dictates -

**2.1.1 Collegial** - the sharing of information, the ability to meet (personally or by other means of communication) to discuss matters of interest and possible solutions to problems and issues, etc;

**2.1.2 Opinions** - to assist bishops and others in authority in the ACSA in their decision making;

**2.1.3 Publications** - to record and make available studies and discussions relevant to the governance of ACSA and its life in this regard;

**2.1.4 Mentoring** - assisting and guiding new appointee chancellors and registrars;

**2.1.5 Archiving** - retaining and storing in retrievable form judgments of tribunals, other judgments of courts (or references to them) of interest and relevance, opinions of both the CLC and legal officers and professionals, etc; and

**2.1.6 Conferences** - to renew or establish acquaintance, across the Province, between legal officers and interested parties who are members of the CLC, to deliver papers and to workshop issues of the day.

**2.2 Position of the CLC within ACSA:** It was agreed that the CLC should be an operation within the body of ACSA, i.e. as an integral part of it and not as a discrete juristic entity, with a liaison bishop on its governing body. As such it should fall under the PTB, but also report to Synod and PSC on those occasions.

**2.3 Canonical Authority:** The CLC will, if it is to be an integral part of ACSA's structure, need canonical authority, perhaps as an Act of Provincial Synod in which its organizational rules will be set out (as with the Advisory Board on Theological Education for Training for Ministry in Act XIV). Any and all finances and accounts must be with and through the office of the Provincial Treasurer.

**2.4** We cannot remove **paradox and mystery** in these matters. In ACSA the dioceses are the basic building blocks of the structure, which is common across the communion, and there is a tension between what may need to be done in or with a diocese and the limitations on the ability of the Province to do that. The Province is akin to an association of dioceses. Then there is the collegiality of the bishops, who need to and do work together. There is at times a contradiction here. Some authority needs to be transferred to the Synod of Bishops, or perhaps the PTB (overwhelmingly composed of bishops), to overcome this.

**2.5 Membership** should be of all chancellors and registrars, ex officio, and all others interested in canon law, on application. There should be a liaison bishop, who need not be the chairperson, but perhaps the Provincial Chancellor should be.

## **SESSION 3: ISSUES FOR CONSIDERATION (POSSIBLE CANONICAL CHANGES)**

**Chair: Henry Bennett**

**3.1 Dioceses in Trouble:** At present this is critical, and costing the Province millions of rand over three dioceses, in addition to what it is costing the three dioceses concerned. Even perhaps more important than the financial drain, is the draining away of Anglicans to other denominations, with the accompanying reputational damage. The Canons at present do not seem to be empowering in a way that can facilitate effective intervention. Discussion:

**3.1.1** Supervising bodies are the Provincial Finance Committee and what used to be the Provincial Audit Committee. There is also the Provincial Trusts Board (“PTB”), which used to have an audit subcommittee and which has now been given the assistance of a Management Committee (“PTB Mancom”). None of these has power to intervene, but are responsible for assets and finance. Pastoral intervention during a disciplinary hearing is provided for in Canon 38(3)(c) at the discretion of the Metropolitan and also in Canon 21(3) at the discretion of the Synod of Bishops, where there may be no issue of discipline. However, these are processes, rather better fleshed out in Canon 38(3) than in Canon 21(3), which in the latter instance can be sidelined or proceed without result in the absence of co-operation from the targeted bishop.

**3.1.2** Some form of compliance mechanism is needed. Reference was made to the Higher Education Act in relation to public institutions governed by it: as soon as the Minister becomes aware of a problem, an assessor is appointed from a list provided by the Committee of Higher Education, who has complete

authority to examine anything, and the Minister is obliged to act on his/her recommendation. Admittedly, there is an hierarchical statutory relationship between the university and the Minister, which empowers his/her decision. An administrator can be appointed, who has to report back within 6 months. In the instant case in point the Vicar General has, it is believed, been undermined by the warring factions in the Diocese, who are still at large.

**3.1.3** It was thought that in cases, where charges could be laid against the bishop in terms of Canon 37, that Canon 38 disciplinary proceedings should begin (requiring charges subscribed to by three priests licensed in the Province **or** by two Diocesan Bishops). In the other cases, amendments are needed to Canon 21(3), to provide for a process similar to that with clerics under Canon 25 (6).

**3.2 Retirement Age of Bishops:** At present, clergy retire at 65 (66 for those ordained before 1 January 2003) in terms of Canon 25(9) with the right to apply to continue thereafter on a periodic basis at the discretion of the bishop, while bishops may retire at 65 in terms of Canon 14(3) with the right in their discretion to continue until 70. Discussion:

**3.2.1** In principle the retirement ages should be the same. Retirement constitutes a general view in a community as to a person's reasonable expectation of being able to fulfill the responsibilities of a post or office, particularly one of a fiduciary nature. Seniority is not a relevant issue here.

**3.2.2** There needs to be an application/consultative process with some form of relatively independent

decision making. Also to be taken into account are the current expectations of bishops in terms of the Canons, as they stand. A possible way forward would be that the bishops would apply to the Metropolitan for an extension of office a year before the age of 65. The Metropolitan would then consult with an appropriate body or bodies in the diocese for input, and report to the Synod of Bishops, who would make the decision as to the response to the application.

**3.2.3** A check must be made of the Pension Fund as to the implications of this, so that these can be factored in to the process.

**3.2.4** A recommendation only in this regard should be made to Synod, and then work begun on amendments to the Canons, if the recommendation is accepted.

**3.3 Election of Bishops:** Our present process is one that is supposed to be embedded in prayer, but in fact it is known that much lobbying takes place. In addition, the electorate, for the most part, knows little or nothing of the candidates, other than what is presented by the Advisory Committee based on submissions from the proposers and referees. Is there a better way? Discussion:

**3.3.1** There was general agreement that the present position was unsatisfactory.

**3.3.2** It should be proposed to Synod that a small body be put together to examine the processes of search in the secular world in Southern Africa, the processes of other churches in the region and the processes of the Provinces in the Anglican Communion, with a view to a recommendation being made to Synod in this regard.

**3.4 Representation at Synod:** At the moment there are two problems – first, the cost of the numbers and, second, the absence of any input by most members of Synod. Discussion:

**3.4.1** At the moment Synod is moving towards being a rubber stamp, owing to the second of these problems. The shortened 2010 Synod meant that 10 to 15 key members, vital to the debates, had to be sterilized from making any such contribution because Committee of Synod work had to be handled while the Synod session continued. The 2.5 days envisaged for Synod 2013 is hopelessly inadequate and will only exacerbate the problem.

**3.4.2** Standing Rule 8 specifically calls on the bishops of each diocese to call together its representatives for a study of the agenda issues before attending Synod. Preparation is the responsibility of each diocese and each representative, and this needs to be assured.

**3.4.3** A further problem, about which little can be done at the moment, is that of language, with the Portuguese speaking representatives particularly affected and to a lesser extent those to whom English is a second or third language. The suggestion was made that possibly the Province should be subdivided into regions, to make debate easier for individual representatives (taking into account also the time available normally for individual interventions).

**3.4.4** The article: “How to succeed at Synod” from the Publications Committee should be included in the Second Agenda book, and updated, Synod by Synod, as necessary.

**3.4.5** In view of the fundamental nature of the changes being proposed, Synod this year should be deferred until 2014 (Canon 1(1) only requires ordinary sessions of Provincial Synod to be held “approximately every three years”), and a PSC held this year. The summonses that have gone out can be withdrawn.

**3.5 The Anglican Covenant:** This is coming up for a second reading, as a matter affecting Standards of Faith and Doctrine under the Constitution. Matt Esau gave a brief overview of the Anglican Covenant. Explaining that it was a proposal of the Lambeth Commission on Communion which “made explicit and forceful the loyalty and bonds of affection which govern the relationships between the churches in the Communion”<sup>11</sup> Conference discussion followed.

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<sup>11</sup> The Windsor Report 2004 49: 118

## **SESSION 4: DISCIPLINARY CANONS, 37 to 41**

**Presenter: Bishop Peter Lee**

### **INTRODUCTION**

This session took the form of a workshop led by Bishop Peter Lee. Conference were divided into groups for discussions based on questions following a reading of Matthew 10: 1 - 17:

“Then he called his twelve disciples to him and gave them authority to cast out unclean spirits and to cure every kind of ailment and disease. These are the names of the twelve apostles: first Simon, also called Peter, and his brother Andrew; James son of Zebedee, and his brother John; Philip and Bartholomew, Thomas and Matthew the tax-gatherer, James son of Alphaeus, Lebbaeus, Simon, a member of the Zealot party, and Judas Iscariot, the man who betrayed him.

These twelve Jesus sent out with the following instructions: ‘Do not take the road to gentile lands, and do not enter any Samaritan town; but go rather to the lost sheep of the house of Israel. And as you go proclaim the message: “The kingdom of Heaven is upon you.” Heal the sick, raise the dead, cleanse the lepers, cast out the devils. You received without cost; give without charge.

‘Provide no gold, silver, or copper to fill your purse, no pack for the road, no second coat, no shoes, no stick; the worker earns his keep.

‘When you come to any town or village, look for some worthy person in it, and make your home there until you leave. Wish the house peace as you enter it, so that, if it is worthy, your peace may descend on it; if it is not worthy, your peace can come back to you. If anyone will not receive you or listen to what you say, then as you leave that house or that town shake the dust of it off your feet. I tell you this: on the day of judgment it will be more

bearable for the land of Sodom and Gomorrah than for that town.

‘Look, I send you out like sheep among wolves; be wary as serpents, innocent as doves. ‘And be on your guard, for men will hand you over to their courts, they will flog you in the synagogues, and you will be brought before governors and kings, for my sake, to testify before them and the heathen.”

## QUESTIONS AND DISCUSSION

The introduction and six questions read:

*“Clearly today’s clergy – or other servants of the Church – live at many removes of time and culture from this Gospel story. But can we still hear the Lord’s voice articulating some principles about our calling and ministry in today’s context?”*

*How do these principles still apply?*

1: What about Jesus’ words, ‘the worker deserves his keep’ (v9)?

Is it right that those who labour to serve Christ should be provided with a livelihood by the beneficiaries of their work?

Given the simplicity commended by Christ in v9, what level of ‘keep’ is appropriate?

How can today’s Christians offer the hospitality expected of them in v11?

Is it right to use the mechanisms of the world of organized labour – such as taxation, pensions, medical aid, pay slips, UIF and the like – to order the service of ordained workers? If so, how is this differentiated from ‘being employed by the Church’?

What is a *stipend* and how does it differ from other forms of remuneration or financial support? What does 'enough' mean?

2: The first disciples were called TO Jesus and sent FROM him to the world.

How did their being *called* affect the sense of power and authority with which they operated (vv1,8)?

How do today's messengers *embody* the fact that 'God's realm is upon you', as well as preach it?

3: What does it mean for today's ministers - lay, ordained, church-supported or not - to 'give without charge' because they have 'received without cost' (v8)? In today's circumstances, how is such an understanding to be lived out?

4: What is today's equivalent of - or the conclusion to be drawn from - the very focused instruction from Jesus in vv 5 and 6?

5: Is there a point in the juxtaposition of *serpents* and *doves* in v16, or the warnings of v17?

## **OPEN DISCUSSION BY CONFERENCE ON CONCERNS OF DIOCESES**

After the groups had reported back a lengthy period of discussion took place on a number of related issues, in particular the “non-employment” of clergy, and concerns by the Chancellors and Registrars from the three Dioceses mentioned in earlier discussions concerning the decisions made by the Bishops of these Dioceses.

## **WORKSHOP CONTINUED**

After the views of those particularly from affected Dioceses were expressed the workshop continued with the results of the “road-testing” of the 2010 amendments to Chapter 7 of the Canons (i.e. Canons 37 to 41). The following possible changes to those Canons were noted:

- 4.1 Canons 36(5)(a) - Presiding at Tribunals:** The word “Diocesan” should be deleted and allowance made for retired and suffragan bishops to be appointed, as they have experience and greater objectivity.
- 4.2 Canon 37(9) - the Engagement of Legal Counsel:** The blanket allowance of legal counsel at own expense was proving costly and time consuming. This is not a requirement of secular law. The concept of “bringing a friend or colleague” was attractive, but note was taken that at certain levels of seniority or severity of the accusations representation should be allowed. One member, Mr. David Scrooby, offered to investigate the possibility of establishing a list of Anglican volunteers, with legal background, prepared to assist in the defense of accuseds, from which accuseds could choose: this was lauded. There was also reference by Mr. Nigel

Tatham to a Western Cape decision, which will be followed up for guidance on this issue.

**4.3 Canon 37(11) - Evidence from Absent Witnesses:** This can be allowed in written form, but if there is no opportunity given for cross-examination, the weight to be accorded to it will be reduced.

**4.4 Canon 39(2) - Board of Preliminary Inquiry:** It needs to be made clear that members of this Board cannot also sit on the Tribunal.

**4.5 Canon 39 - Sentencing:** For noting only - although the Tribunal will make a finding and may recommend a sentence, it is the bishop who decides on the sentence. This is **not** an act of a bishop being a judge in his/her own case, as has been alleged sometimes. The finding is independently made; only the sentence is determined by the bishop, as the licensing officer, based on the finding.

**4.6 Canon 39(23) - Bishop's Pastoral Discretion:** The sweeping qualification of: "Nothing contained in this or other Canons ...." may be seen as opening the door to inappropriate pastoral intervention. It needs itself to be qualified in some way (e.g. "... always subject to his/her obligations in terms of the Canons ...."), or left out altogether.

**CLOSURE:** The Eucharist was again celebrated by all on the last morning of the conference bringing a fitting end to the Conference. Sincere thanks were expressed to a number of people responsible for the organization, hosting and management of this most successful inaugural conference at the College of the Transfiguration.

## **APPENDIX**

### **Archbishop Thabo Makgoba Message for Inaugural Canon Law Council Conference 21 January 2013**

Dear Bishops, Registrars, Chancellors, and interested clergy and laity – dear Brothers and Sisters in Christ,

I greet you in the precious name of our Lord and Saviour Jesus Christ, who has established God's new Covenant in his blood. Thank you for gathering for this inaugural conference of the Canon Law Council. Special thanks to Prof. Barney for COTT's hospitality, and to all who have worked to make this meeting possible. Please, join me in sending condolences to Dean Andrew Hunter on the passing of his father last week. Our prayers are with you Andrew and your family at time. I am grateful to you, Matt Esau and Henry Bennett for being the inaugural planning team at last year's meeting.

There is no doubt that a good understanding of Canon Law and its right use is invaluable to the healthy life of the Church. In particular we all need to know how and where to apply and implement canon law. So my first hope is that you will work towards compiling a user-friendly manual, for the use of clergy and people. We would benefit greatly from a better grasp of when and how to resort to canonically based action. For God's people live under grace not law: while Jesus came to fulfil the law, he was against legalism. Law makes a good servant but a poor master. St Paul also wrote about avoiding – and avoiding provoking – legislative procedures, especially in secular courts, wherever possible. Court cases should be a last resort, on spiritual, moral grounds, as well as being a terrible example to the world around, and a shameful waste of parishioners' money. As our Morning Prayer passages so far this week, from Chapter 4 of the Letter to the Ephesians, remind us, we are those who live, and build one up, in love.

Similarly, even when hard words must be shared, we must speak the truth in love and act in a godly way. This should especially be our yardstick in the fraught area of discipline. Vocational and employment matters are first a moral and then a legal question, and so I hope that we resort to this area of law as little as possible. And while the relationship between Bishops and clergy in terms of case law is not considered as one of direct employment, Bishops and the church more widely should treat clergy as well, if not better, than the best practices of any employment code. The same high, mutually respectful, standards of relationship, based on our sharing in the image of God, also go for relationships between clergy and congregations.

So, as is clear, there is plenty on the canon law plate for you to get your teeth into! May God bless your discussions – so that you, and your work, may be a blessing to God’s church and God’s people, in our ministry and mission to God’s world.

Thank you.

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## **PROF PITYANA'S ADDRESS**

### **THE THEOLOGY OF CANON LAW: Some South African Perspectives**

But mercy is above this scepter'd sway, -  
It is enthroned in the heart of kings,  
It is an attribute to God himself;  
And earthly power doth then show likest God's  
When mercy seasons justice.

- *The Merchant of Venice, Act IV, scene 1*

It is from Shakespeare that we learn that law should not be used as a scarecrow to cause fear to the innocent. Law is rather the social means to regulate human conduct, to balance rights and obligations, and to maintain law and order. In other words, for all to achieve their purposes in life. Ultimately the restrictive and coercive functions of the law are not and should never be its ultimate purpose. It is rather to secure human fulfillment in a peaceful and prosperous environment where the potential of each citizen is set free and realized, as the Preamble to the South African Constitution sets out. The writer of the Letter to Timothy states this cogently:

Now we know that the law is good, if anyone uses it lawfully, understanding this, that the law is not laid down for the just but for the lawless and disobedient, for the ungodly and for sinners, for the unholy and profane... and whatever else is contrary to sound doctrine, in accordance with the glorious gospel of the blessed God with which I have been entrusted.

- 1 Tim 1: 8-11

What we have here is only the reactive function of law rather than its proactive character of setting the conduct becoming of Christian life.

Canon Law is, in my view, legislation and regulation of a special kind. It exists alongside the law of the land, and to a degree must be subordinate to it. It is voluntary in that one can opt out

by ceasing to subscribe to its tenets and obligations. In that case one then ceases to remain a member of the body that is bound by such rules and laws. Its purpose and objective is to will the purpose of God and to realize the good news of the kingdom of God on earth in the redeeming life and work of our Lord Jesus Christ. Given this, therefore, canon law has Christ as the cornerstone and is an instrument of the church to realize the purposes of Christ's mission. The foundation stone of Canon Law therefore is Christ, and the custodian thereof is the Church. For that reason, Canon law is not by and of itself the theology of the church. It is informed by the theology of the church, gives effect to it, and to the extent that it forms and shapes Christian life it shapes the theology of the church. In return, and to the extent that theology evolves through practice and experience, canon law also guides and judges the theology of the church.

Canon Law must be viewed through the lenses of contextual theologies. That must be so if one has to rid the church of rigidity and the theologies it pronounces from becoming mere instruments of power and hegemony of the powerful and dominant ideas and viewpoints. Its contextualization, however, should reflect the progressive and evolving mind of the church about its theological and spiritual character, but also the exciting formulation and restatements of theology out of the engagement of the faithful with revelation. Though one must be wary of "defining" contextual theology or theologies, it is now universally agreed that contextualisations has two notions: a generalist and a particularist position. The first is that out of its own faith the church is in search of understanding. In other words it is faith wrestling with and engaging the implications of faith in 'real life' and the lived experiences of the faithful. It is therefore "standing in" rather than distanced from the theatre of faith. So understood, contextual theologies must be rooted in the social milieu of the faithful, must listen to the voices of faithful out of their own situations, in their own cultures and languages It requires, says Jim Cochrane, "that we honour the

history, tradition, cultural patterns, thought forms, conceptual frameworks and the language of the local community.” I doubt that this suggests an unfettered autonomy, but rather that faith must constantly evaluate and assess the context in the light of faith as has been received and developed. In return such a context also informs the faith and gives it shape and relevance. I suppose this can be viewed as what theologians sometimes style, “reading in” method of Biblical hermeneutics.

The particularistic position, gives epistemological priority to the human condition or situation: the poor, gender, suffering. In other words it allows faith to speak out of a particular human condition, from the experience of those who suffer that condition. In other words, it can provide a prophetic context that takes that condition seriously, and elicits a faith response to it. In this way, the voice of God speaks to the human condition, allows through faith the true Christ to shine through. To use the late Daniel W Hardy’s analogy to be a theologian is to serve the “walking church”, wander first and then think theologically and practically in response to what one experiences by one’s senses. Whoever and whatever turns up as they walk, whatever they find as they go along, these become the found realities in response to which they think and act (2010:86). In other words the church cannot be static, or merely monumental, fixed in one place, one milieu, one reality. It is, like a wandering Ataman, sent out to the unknown from the known. That is a refinement of what I call contextual theology.

But theology is not the objective of canon law. Ladislav Orsy (1992:162) speaks about theology being composed of affirmative judgments, and law being in the imperative mood. In other words theology offers no orders or prescripts but reason and faithfulness. It expresses insight and examines, searches for meaning and reaches out to the mind of Christ. Law, on the other hand, both enables appropriate conduct, sets perimeters and boundaries, and provides sanctions. That is the difference between the indicative and the imperative moods. In

the pastoral letters Paul sets out or codifies conduct appropriate to “a man of faith” in terms of sound doctrine, relationships, authority and ethics. In the epistles like Romans he sets out that “Christ is the end of the law...” (10:4) and “Do not be conformed to this world but be transformed by the renewal of your mind, that you may prove what is the will of God, what is good and acceptable and perfect” (12:2). Canon law derives its authenticity in the extent to which it expresses the theology of the church of grace and mercy, justice and peace, unity in the Body of Christ. It is about the Incarnation and sacramental life. By this is meant that it reflects the belief that all creation, and human life no less is embedded with God’s grandeur. It is kinetic in that God in Jesus Christ has become fused in the human. It is, as Libero Gerosa has it, “at the service of this meta-juridical reality (the church), in which it finds its ultimate foundation” (2002:13). It is also sacramental in that it is a sign of grace.

This purposive approach has become normative since Vatican II, especially in *Lumen Gentium: The Dogmatic Constitution of the Church* (1964):

*“This messianic people are invested with dignity and freedom of those who were born from God; the Holy Spirit dwells in their hearts as in his temple. Their law is the new commandment to love as Christ loved us. Their goal is the kingdom of God, inaugurated by God himself on earth, and to be extended further until it is brought to perfection by him at the end of time.”*

Unless we recognize this truth about the people of God we are likely to exercise authority in a manner that undermines the character of Christ, and law becomes a blunt instrument of power.

## ***Towards a Theology of the Church***

- **Vatican II: Theology of the Church**

*Lumen gentium* has established, I believe, that the church is no mere sociological reality, but rather *communio* meaning its corporate and communitarian is essential to its being. As *koinonia* the church is the gathering of God's elect. This idea of *koinonia*, of course, featured very strongly in the Final report of ARCIC I (1981). Its character is community not because of self-selection but as indicative of the will of God. God leads human kind to salvation not individually but by gathering all to become his people by divine covenant. "The juridical dimension of the Church", says *Lumen gentium*, "is no mere convenience or super structure, but a necessity without which the Church itself would not be comprehensible, just as it was founded by Christ." (19) Canon law begins with the church and cannot exist as such outside of the church. It must therefore seek to advance the purposes and mission of the church. It is for that reason that we need to be clear about what the church is truly about.

The church is an instrument of God's grace. It bestows on the faithful a duty and obligation as messengers and apostles of word and sacrament. It derives its mission not out of human convenience but out of Christ's will. The church therefore, getting back to Vatican II is a sign and instrument of communion with God and of the unity of God's creation. So understood

Therefore ecclesial law has juridical significance to the extent that it advances the purpose of the Church. The foundational will of Christ is the fundamental norm of juridical production in the Church, without it being extraneous norm to Canon Law, because divine law is Law in the Church. In other words canon law is theology in practice.

- **Canon Law as Sociological necessity**

Of course, it must also be accepted that Canon Law does have a sociological purpose. It manages human conduct, it seeks to understand and reveal the social forces and dynamics underlying particular ways of behaving, and seeks out that which best expresses society. The Canon law theologians who affirm this purpose like Eugenio Corecco believe that canon law needs to be de-mystified. There is, according to this view a need to de-theologise canon law.

So understood, canon law is a science like any other subject to the laws of science. It is changeable and adaptable. It is subject to precedent in order to assure rationality and order, and to avoid arbitrary application of law. It helps provide certainty and a road map that guides and directs. It has a function of service and pastoral effect in that it shapes the mission of the church. Just like any other society, therefore, it is now universally conceded that the church cannot do without obligatory rules, recognized and observed by all parties. Such rules then give substance to that idea of belonging together, *communio*.

Canon Law is an instrument of communion and as such it can neither be opposite to or a coordinate to theology as such but rather contemporary and inseparable elements of its constitutional structure, two sides of the same coin. If I may use the Anselmian formula as defining theology as faith seeking understanding, then Canon Law gives practical effect and meaning to theology. Theology, to use Evans' apt expression, is putting law into order. By this I believe she means that theology sets moral and spiritual foundations for law. Canon law is the human expression of the divine will; it commands actions to be performed, mediates decisions made by the ecclesiastical superior, hinges on the knowledge of the values necessary or useful for the community... Evans (2002:86) classifies three expressions of equity in mediaeval canon law. Of relevance for us is *aequitas canonica* which she says derives from the spiritual character of canon law By this is

meant fairness as justice tempered with mercy, “It is balanced, equitable: ... not in the sense of getting ‘the right result’, but in that of doing what is best for the soul of the guilty and for the victim and fulfilling in that way the most profound underlying principles of order.”

I believe that this theology of the church has become orthodox in the Anglican Communion if one judges by the ARCIC II Agreed Statement, *Salvation and the Church (1987)*. Paragraph 29 of the Statement affirms that the church is a *sign, steward* and *instrument* of God’s design for humanity and for the world. “For this reason”, it goes on to say, “it can be described as a *sacrament* of God’s saving work.” ARCIC II contains recognition not just that the church is an imperfect human institution, which it is, but also that the church is in need of repentance and continuous renewal, and in affirming that

Nevertheless the Gospel contains the promise that despite failures the Church will be used by god in the achievement of his purpose: to draw humanity into communion with himself and with one another, so as to share his life, the life of the Holy Trinity.

The groundwork for canon law is set: in a pastoral and sacramental setting.

### ***How then do Theology and Canon Law inter-relate?***

Canon law is, like all law, conservative in nature. It plays catch-up, especially if law is interpreted and applied merely to advance vested interests, and fails to take due account of developments in theology and in society. Its dynamism is of a different kind. At its best it seeks creative and innovative ways of maintaining the truths of the Church and the faith of the people. It assures the good ordering of the inner life of the church by means that are fair and just, and that are accountable and defensible in a rational and spiritual environment. Theology, on the other hand, if based on reason has more freedom to explore new insights of the truth and

revelation that may not even be accepted by the church at that stage. It therefore advances the church's theological discourse in the light of emerging scientific and social conditions. Theology can cause discomfort to the church, and even dissention within the church. Theology is a risky business.

South Africa: to what extent do the canons of the church reveal the profound developments that shape societal thinking:

South Africa has become a rights-based society. Its constitutional provisions somehow affect societal thinking and behavior. This means that South Africans can be aggressive about what they perceive to be their rights, they protest, march, demand... Access to the courts is a constitutional right, and at times a litigious culture has set in. It is my observation that this culture exists in society at large and is found in no lesser measure within the church. What always fills me with pride and confidence about our country is not so much the affirming values in the Founding provisions of the Constitution: "human dignity, the achievement of equality and the advancement of human rights and freedoms" important as those are, but the words of the Preamble with the promise to "improve the quality of life of all citizens and free the potential of each person." Such a statement is pregnant with theological significance.

At the same time, we live in a country that has enormous social problems of inequality, scandalous levels of poverty, and inadequate provision of public services in an environment where these are much needed in the light of unemployment, endemic levels of crime and social breakdown. In such an environment the church must constantly be rediscovering its mission and re-interpreting the message of good news. Indeed, social ethics becomes a valuable tool for understanding social dynamics and regulating societal morality. In such an environment trust becomes a significant value.

South Africa is also a modern society. Modern and advanced systems of communication and diffusion of knowledge are a

common factor, and accountability has become very diffused. But it means that people are capable of testing all knowledge and all assumptions and interrogating them in the light of the varieties of knowledge available to them. This means that leadership by control is no longer easy and rebellion is not uncommon.

With a more open society and access to knowledge skills and competencies of all kinds are available in the church to an extent perhaps never imaginable before. At the same time, with modernity cultures of experimentation and discovery are common. With that, of course, there are a variety of ways of believing that compete with the mainline or traditional expressions of faith. This amalgam of values and competing cultures can be confusing.

In all that the authority of the church has to be exercised judiciously. The church must come to understand for itself the meaning of becoming a democratic society, and how pseudo-democratic processes could subvert original intentions. I revert back to that ARCIC II Statement when it says

Only a reconciled and reconciling community, faithful to its Lord, in which human divisions are being overcome, can speak with full integrity to an alienated and divided world, and so be a credible witness to God's saving action in Christ and a foretaste of God's kingdom. Yet, until the kingdom is realized in its fullness, the Church is marked by human limitation and imperfection. It is the beginning and not yet the end, the first fruits and not yet the final harvest.

N Barney Pityana GCOB  
RECTOR: College of the Transfiguration  
Consultation of the Canon Law Council  
Anglican Church of Southern Africa  
Grahamstown, 21 January 2013.

**STEERING COMMITTEE FOR CANON LAW COUNCIL**

Mr Henry Bennett	Provincial Registrar
Reverend Matthew Esau	LLM (Cardiff)
Very Reverend Andrew Hunter	LLM (Cardiff)
Reverend Allan Kannemeyer	Provincial Executive Officer
Advocate Xolisa P. Ngwendu	Chancellor -Diocese of Ukhahlamba
Prof N. Barney Pityana	Rector - College of the Transfiguration

**LIST OF ATTENDEES**

<b><u>Diocese</u></b>	<b><u>Name</u></b>	<b><u>Position</u></b>
<b><u>Christ the King</u></b>	<b>The Rt. Revd Peter Lee</b>	<b>Bishop</b>
	<b>Adv. Mancha Manaka</b>	<b>Chancellor</b>
<b><u>Free State</u></b>	<b>Mr. John D Anderson</b>	<b>Registrar</b>
<b><u>George</u></b>	<b>Bishop Brian Marajh</b>	<b>Bishop</b>
<b><u>Grahamstown</u></b>	<b>Adv. Richard Brooks</b>	<b>Chancellor</b>
<b><u>Highveld</u></b>	<b>Bishop David Bannerman</b>	<b>Bishop</b>
	<b>Adv. Palesa Ncholo</b>	<b>Registrar</b>
<b><u>Johannesburg</u></b>	<b>Mr. Henry Bennett</b>	<b>Chancellor</b>
<b><u>Mbhashe</u></b>	<b>Adv. Lindelwa Booii</b>	<b>Registrar</b>
<b><u>Mthatha</u></b>	<b>Mr. Mbulelo S Jolwana</b>	<b>Registrar</b>
<b><u>Natal</u></b>	<b>Bishop Rubin Philip</b>	<b>Bishop</b>
	<b>Mr Nigel Tatham</b>	<b>Registrar</b>
	<b>Judge Nompumelelo Radebe</b>	<b>Deputy Registrar</b>
<b><u>Pretoria</u></b>	<b>Judge TM Makgoka</b>	<b>Chancellor</b>
<b><u>St Mark the Evangelist</u></b>	<b>Ms Matsaro Semanya</b>	<b>Chancellor</b>

<b><u>Ukhahlamba</u></b>	<b>Ms. Xolisa N. Ngwendu</b>	<b>Chancellor</b>
	<b>Mr. Mtutuzelo A. Zepe</b>	<b>Registrar</b>
<b><u>Zululand</u></b>	<b>Bishop Dino Gabriel</b>	<b>Bishop</b>
	<b>Mr James Scharnick</b>	<b>Registrar</b>
<b><u>INTERESTED PERSONS:</u></b>		
<b><i>False Bay</i></b>	<b>Sir Rupert Bromley</b>	
<b><i>Highveld</i></b>	<b>Canon Tom Amooore</b>	<b>Rector</b>
	<b>The Revd Hubby Kekane</b>	<b>Archdeacon</b>
	<b>Mr. Elton Madupe</b>	<b>Student at COTT/ Observer</b>
<b><i>Johannesburg</i></b>	<b>Ms Rosalie Manning</b>	
<b><i>Pretoria</i></b>	<b>Mr David Scrooby</b>	<b>Lay minister</b>
<b><i>St Mark the Evangelist</i></b>	<b>Mr Phillip Moseki</b>	<b>Student at COTT/Observer</b>
<b><i>Provincial Office</i></b>	<b>Mr Rob Rogerson</b>	<b>Provincial Treasurer</b>
<b><u>COMMITTEE:</u></b>		
	<b>Mr. Henry Bennett</b>	<b>Chancellor</b>
	<b>The Rt. Revd Peter Lee</b>	<b>Bishop</b>
	<b>The Very Revd Andrew Hunter</b>	<b>Committee/ Grahamstown</b>
	<b>The Revd Prof Barney Pityana</b>	<b>Rector of COTT</b>
	<b>The Revd Matt Esau</b>	<b>Committee</b>
	<b>The Revd. Allan Kannemeyer</b>	<b>PEO</b>

	<b>Canon Cynthia Botha</b>	<b>Interim Secretary</b>
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