

CHURCH LAW WITHOUT DARK SIDES? COMPARING CATHOLIC AND PROTESTANT POSITIONS IN GERMANY

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Abstract

A comparison between the internal laws of different religions reveals contradicting conceptions of law. From its beginning, Christianity has had an ambivalent attitude towards the law. The Protestant legal historian Rudolph Sohm (1841-1917) pointed out the dark sides of law (especially coercion). It is in this sense opposed to the spiritual nature of the church. The Munich school of Catholic canon law contradicts this. It states that the word of God and the sacraments have a legal dimension of their own. The author compares positions of Catholic and Protestant church law that were held in Germany in the 20th century. The main thesis is that the church also needs those facets of law which some people find disturbing.

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Keywords

Canon law - Law and religion – Spiritualism - Legalism

1. Positive and negative view of law in religions

A comparison between the internal laws of different religions reveals contradicting conceptions of law. In Judaism and Islam, law is, for the most part, perceived positively. Judaism is a religion in which the law plays a central role. Part of the essential content of the Sinai covenant, which has fundamental significance, is that the people of Israel has committed itself to a considerable quantity of legal norms. "What great nation has laws and rules as perfect as all this Teaching that I set before you this day?"¹ Judaism is a religion of practice, which is all about correct behaviour, i.e. conduct in accordance with the law.² As far as Islam is concerned, the Sunni branch in particular has the reputation of being a strictly law-focused tradition.³

In contrast, Daoists and Confucianists - whether they are religious or rather philosophical traditions, cannot be discussed here - regarded written law as a violation

¹ Deut 4:8.

² Berkmann (2021), 40.

³ Ibid. 44.

of the social order provoking disharmony. Daoism takes a critical stance towards the law, because laws simply serve interest groups and an increase of laws leads only to an increase in transgressions.⁴ The Confucian concept of law is that of *Lǐ*. This designates the totality of all forms of intercourse and behaviour which make for a good person and an intact social order. It is based on the natural order.⁵ For Confucianism, court cases are an evil, because it is better to make compromises than to insist on one's rights. ⁶It is directly opposed to the concept of law in Chinese legalism: *Fǎ*. According to this, law is what is created as law by the ruler.⁷ It is accompanied by official codes and a centralized bureaucracy.⁸ The legalists insisted on the complete equality of all people before the *Fǎ*, as opposed to the Confucian acknowledgement of the inequality of people.⁹ While Confucianism saw a law itself as a violation of the social order, legalism aimed consciously to destroy and remake the old social order.¹⁰ In the *Lǐ*, Confucianism offered a middle way between the scepticism of the law in Daoism and the positivism of the *Fǎ*.¹¹

2. Biblical and theological view of law in Christianity

From its beginning, Christianity has had an ambivalent attitude towards the law. Redemption is certainly not expected as a result of compliance with the laws. A certain degree of scepticism towards the law is evident in some passages of the New Testament.¹² The biblical statements, however, are by no means one-dimensional.

4 Cf. Glenn (2014), 317f.

5 Lee / Lai (1978), 205.

6 Ibid. 206.

7 Ibid. 203.

8 Ibid. 205.

9 Ibid.

10 Peerenboom (2002), 87.

11 Cf. Glenn (2014), 318.

12 E.g. Mark 2,27; John 1:17.

Jesus Christ emphasised that he did not come to abolish the law, but to fulfil it (Mt 5:17). Paul placed grace before law,¹³ while creating the first church orders for his congregations.¹⁴ Steps towards a legal order for the primitive Jerusalem church and the congregations founded by Paul are found already in the New Testament.¹⁵ As early as in the first centuries, collections of law, such as the *Didache* and the Apostolic Constitutions, came into being.¹⁶

Great figures of the Middle Ages had a positive view of law, especially canon law, which was associated with justice. Gratian, the outstanding canonist of the 12th century, handed down the dictum of Isidore of Seville: "Law is so called because it is just."¹⁷ Thomas Aquinas, the most influential theologian of the 13th century, regarded law as an ordinance of reason (*ordinatio rationis*) for the common good.¹⁸ He concluded that law is the object of justice.¹⁹ The roots of this concept of law lie in Greek philosophy and Roman law. For Aristotle, everything legal in the broadest sense is something just.²⁰ The important Roman jurist Ulpian (170-228) described law as the

¹³ Rom, 6:14 and 10:4, Gal 3:13.

¹⁴ E.g. 1 Cor 16:15-18; 1 Thess 5:12; Phil1:1; Eph 4:11; 1 Cor 12:28-30.

¹⁵ Acts 14:23; 1 Tim 3:2-7; 1 Tim 3:8-13; Titus 1:6-9.

¹⁶ Cf. May (1990), 3.

¹⁷ "Ius autem est dictum, quia iustum est." D 1, 2. Isidore Etymologiae, v. 2.

¹⁸ STh I^a-II^ae qu. 90 art. 4: "Thus from the four preceding articles, the definition of law may be gathered; and it is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated." English translation (1917).

¹⁹ "Unde manifestum est quod ius est obiectum iustitiae." STh II-II, q. 57, a. 1. "For this reason justice has its own special proper object over and above the other virtues, and this object is called the just, which is the same as 'right'. Hence it is evident that right is the object of justice." English translation (1917).

²⁰ Aristotle (1934): "Again, we saw that the law-breaker is unjust and the law-abiding man just. It is therefore clear that all lawful things are just in one sense of the word, for what is lawful is decided by legislature, and the several decisions of the legislature we call rules of justice." (1129 b 13).

art of goodness and equity.²¹ By justice he understood the constant and perpetual disposition granting to each person his right.²²

On the other hand, spiritualist tendencies, which have always existed within Christianity, have called canon law into question. Examples are Joachim of Fiore in the 12th century and Marsilius of Padua in the 14th century.²³ Similar ideas resurfaced around the Reformation, e.g. with Thomas Müntzer. Martin Luther burnt the medieval canon law in Wittenberg in 1520.²⁴ However, Melancthon published a selection from the *Decretum Gratiani* as early as 1530, which found Luther's sympathy and served as an ecclesiastical order for the early Evangelical parishes and schools.²⁵ In accordance with protestant ecclesiology, the hidden church of faith is not subject to regulation in law. Only historically concrete churches can therefore have a legal constitution. The content of church law was evaluated from the point of view of functionality.²⁶

At the beginning of the 20th century, the Protestant legal historian Rudolph Sohm took the separation of the spiritual and secular spheres further by positing that church law stands in contradiction to the nature of the church. For the essence of the church was spiritual, while the essence of the law was secular.²⁷ He was denying any separate right of existence to church law. He argued that the Early Church had no legal constitution, but was ruled by a power he called "charisma". Admittedly, his

²¹ "Ius est ars boni et aequi." Digesta I.1.1.

²² "Iustitia est perpetua et constans voluntas ius suum unicuique tribuendi." Digesta I,1,10.

²³ Marsilius of Padua (1324), Conclusions No. 14: "No bishop or priest has coercive authority or jurisdiction over any layman or clergyman, even if he is a heretic." No. 16: "No bishop or priest or body of bishops or priests has the authority to excommunicate anyone or to interdict the performance of divine services, without the authorization of the 'legislator'."

²⁴ Based on Luther's own statement (Weimar Edition 7, 180, 13-17), it can be assumed that he burned not only the papal decrees of the Middle Ages, but also the *Decretum Gratiani*, because as far as there was anything good in it, everything was to the detriment and strengthening of the papal regime, cf. Brecht (1983), 406; Kaufmann (2009), 53. Witte (2009), 53.

²⁵ Witte (2009), 72f.

²⁶ Berkmann (2021), 32.

²⁷ Cf. Sohm (1923), 1.

understanding of law corresponded to that of his time. At that time, law was seen primarily as a coercive order. The dark sides were therefore in the foreground and did not seem appropriate for the Church. His criticism triggered several attempts on both the Protestant and Catholic sides to justify the existence of Church law.

3. Approaches in the 20th century in Germany

3.1 Protestantism

3.1.1 Heckel

Johannes Heckel lived from 1889 to 1963 and was a Protestant legal expert. The title of his main work is programmatically: "Lex Charitatis", i.e. "Law of Love". He examines Luther's work for statements on canon law and finally arrives at a dualistic concept. His answer to Sohm could be summarised as follows: State and Church law are essentially different. He stated:

"The starting point is the eschatological dualism of Luther's teaching on natural law. A distinction must be made between divine natural law as the legal order of the kingdom of Christ and secular natural law as the supreme legal order of the kingdom of the world. The former was interpreted spiritually by Christ. The latter was given its material legal form by Moses in the Decalogue. Both legal systems have their unity in God's will of law. But it works differently in the two kingdoms, in the kingdom of Christ as *lex charitatis spiritualis* [law of spiritual love], in the kingdom of the world as *lex irae et mortis* [law of wrath and death]".²⁸

The bright and dark sides of the law could not be contrasted more vividly. The bright sides are assigned to the kingdom of Christ, the dark sides to the world. Heckel's thesis amounts to a spiritualisation and a theological exaltation of Church law.

Heckel, however, must assume an autonomous church law on the level of the visible church, which serves the external church regime. It is irrelevant to the Christian

²⁸ Heckel (1973b), 202f.

condition what this law looks like, and it cannot claim the label "spiritual law".²⁹ In this way, he himself admits that he cannot uphold the thesis of the fundamental difference in the concept of law.

3.1.2. Dombois

Hans Dombois lived from 1907 to 1997 and was a Protestant legal expert who used argumentation of legal theology to lay the foundations for an ecumenical church law. His three-volume major work is entitled: "Law of Grace. Ecumenical Church Law"³⁰. He looked at church law across denominational boundaries and historical epochs and tried to systematically establish an ecumenical church law.

In contrast to Heckel, he adheres to a uniform concept of law. However, his concept of law remains deliberately vague because he thinks that law cannot be defined.³¹ He tries to overcome the contrast between law and grace by deriving law directly from grace. He interprets church law as a complex of processes in which the relationship between God and man is performed directly.³² He stated:

"Grace is a legal process in which a destroyed legal relationship is restored between two persons or a new one is established. The unilaterally entitled giver, by virtue of his superior legal power, grants the non-entitled person a new foundation or an increase of legal status as a freely given, unconditional favour. The grace requires acceptance by the beneficiary. It is not dependent on the recipient's own performance. However, it obliges the recipient to be grateful in a legal sense. A violation of this obligation would lead to the forfeiture of the benefit."³³

²⁹ Heckel (1973a), 374f.

³⁰ In German: „Das Recht der Gnade. Ökumenisches Kirchenrecht“.

³¹ Dombois (1961), 216.

³² Germann (2016), 67.

³³ Dombois (1961), 178f.

However, the question remains whether grace can be grasped in legal terms at all. Ultimately, this too is a theological exaltation of law.

3.2 Catholicism

In Catholic theology, the principle of incarnation is applied to the Church. Just as Jesus Christ is both true God and true man, so too in the Church there exists one complex reality which coalesces from a divine and a human element.³⁴ The Church is therefore not only a spiritual community which has withdrawn from a legal regime, but also a visible assembly which, like any human society, needs a legal order.³⁵

3.2.1 Barion

On the Catholic side, Hans Barion, who lived from 1899 to 1973, dealt with Sohm's thesis early on. He recognised that a response to Sohm had to start from the concept of church and therefore had to be theological.³⁶ He stated: "Creed determines the concept of church, while the concept of church determines church law. Whoever professes Sohm's religious conviction finds it difficult [...] to justify church law; the Catholic must reject Sohm's thoughts and recognise church law from the own standpoint of faith, not for the sake of legal considerations."³⁷ Barion links the

³⁴ LG art. 8 para. 1: „Christ, the one Mediator, established and continually sustains here on earth His holy Church, the community of faith, hope and charity, as an entity with visible delineation through which He communicated truth and grace to all. But, the society structured with hierarchical organs and the Mystical Body of Christ, are not to be considered as two realities, nor are the visible assembly and the spiritual community, nor the earthly Church and the Church enriched with heavenly things; rather they form one complex reality which coalesces from a divine and a human element. For this reason, by no weak analogy, it is compared to the mystery of the incarnate Word. As the assumed nature inseparably united to Him, serves the divine Word as a living organ of salvation, so, in a similar way, does the visible social structure of the Church serve the Spirit of Christ, who vivifies it, in the building up of the body.”

³⁵ Berkmann, *Internal Law*, 17f.

³⁶ Müller (2015), 22.

³⁷ Barion (1931), 26f.

foundations of canon law to the regime in the Church. He goes on to say, "The hierarchy supports church law, while being supported by divine law."³⁸

Ultimately, however, Barion contents himself with the statement that Christ willed the Church and endowed it with a legal structure. Such an argument, however, would have been opposed by Sohm himself.³⁹ To counter Sohm, it would have been necessary to ground canon law in the nature of the Church.⁴⁰

3.2.2 Mörsdorf and Corecco

Klaus Mörsdorf, who lived from 1909 to 1989, made precisely this attempt. According to him, the nature of the Church is revealed in its essential practices, namely in the proclamation of the Word of God and in the celebration of the Sacraments. According to Mörsdorf, these themselves have a legal character.⁴¹ The proclamation of the Word in the Church possesses a legal character in that it takes place by the authority of the Lord.⁴² The legal claim of the proclamation is conveyed by the authorisation of the Apostles in the Jewish legal form of the *shaliach*.⁴³

Mörsdorf also explains the legal character of the Sacraments by means of the legal symbols. The Sacrament is not only a symbol of a salvific reality that is invisible in itself; it is also an efficacious symbol. This makes it related to the legal symbol, which has the power to say or effect something that is legally binding.⁴⁴ Firstly, several

³⁸ Barion (1969), 216.

³⁹ Cf. Müller (2015), 22.

⁴⁰ Cf. Krämer (1977), 62.

⁴¹ Mörsdorf (1965), 76.

⁴² Ibid. 79.

⁴³ Ibid. 51; id. (1965), 61.

⁴⁴ Aymans / Mörsdorf, (1991), 31.

Sacraments have immediate legal effects in the church. Secondly, they require a legal order to ensure their authenticity.

The strength of this approach lies in the fact that canon law is truly grounded in the nature of the Church. A weakness, on the other hand, is that the concept of law remains unclear. Law in the church is not the same as law in the state. For Mörsdorf, canon law is a *ius sacrum* (sacred law) that is completely different from secular law.⁴⁵

Corecco, a follower of Mörsdorfs theory, took this approach to an extreme. According to him, canon law is different from state law in the totality of its elements.⁴⁶ The difference of canon law is also reflected in the fact that it is less concerned with the virtue of justice than with the virtues of faith, hope and love.⁴⁷ Following Aquinas, the ecclesiastical tradition regarded law as an ordinance of reason (*ordinatio rationis*). In contrast to this, Corecco describes canon law unlike secular law as an ordinance of faith (*ordinatio fidei*).⁴⁸ He justifies this by saying that reason in our modern culture is detached from any structural connection to faith.⁴⁹ According to Corecco, the relationship between the faithful and the hierarchy is fundamentally different from that between the citizen and the state.⁵⁰ The autonomy that the citizen needs vis-à-vis the state cannot be applied in the same sense to the relationship between the faithful and the hierarchy, because both are part of the ecclesial communion.⁵¹ Therefore, in cases of dispute, it is more important to avoid litigation. The trial procedure, which is indispensable in a state upholding the rule of law, could be replaced in the Church by other instruments of sacred power.⁵² Such a view is very reminiscent of the position

⁴⁵ Mörsdorf (1976), 57f.

⁴⁶ Corecco (1980), 98.

⁴⁷ Corecco (1994a), 3-16.

⁴⁸ Corecco (1994b), 35.

⁴⁹ Ibid. 31.

⁵⁰ Corecco (1986), 171.

⁵¹ Ibid.

⁵² Ibid. 168.

of Daoism and Confucianism outlined at the beginning, which desires to avoid litigation in favour of harmony.

4. Dark sides of law versus dark sides of religion

The Protestant and Catholic positions presented in this contribution are very similar to each other in one point: they justify church law theologically. Some of them - especially Heckel and Corecco - go even further by making church law itself a theological reality that is fundamentally different from secular law. This result of the comparison may be surprising, since catholic and protestant ecclesiology diverge quite strongly.

Certainly, other positions are held in Germany, both in Protestantism and Catholicism, which have been disregarded here. But those mentioned are of particular interest with regard to the bright and dark sides of law. They recognise that law has both sides and find that the dark ones are not appropriate to the Church. As a result, they split the concept of law and develop their own theologically disguised and purified concept for the Church.

The emphasis on communion and love runs the risk of spiritualising the law and overemphasising harmony in the church at the expense of freedom and justice.⁵³ Conflicts arising between the hierarchy and the faithful, which should be resolved precisely through legal proceedings, would easily appear pathological.⁵⁴ The scandals of recent years in the areas of sexual offences, asset management and abuse of power show that the Church itself has dark sides. They are, among other things, a consequence of the disregard for church law and cannot be brightened by sacralising or spiritualising the power of governance. On the contrary, in order to shed light on them, the disturbing sides of the law must also be endured: litigation, condemnations and indemnity. Not only is law something ambivalent, but religion is as well. Law does not darken the nature of the church. Rather, the church becomes dark when she disregards the law.

⁵³ Cf. Maier (1989), 39 and 41.

⁵⁴ Cf. Maier (2005), 78.

Bibliography

Aristotle (1934). *Nicomachean Ethics*. English Translation by H. Rackham (Ed.), Aristotle in 23 Volumes, Vol. 1, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1934 at: <http://data.perseus.org/citations/urn:cts:greekLit:tlg0086.tlg010.perseus-eng1:1129b.1>

Aymans, Winfried / Mörsdorf, Klaus (1991). *Kanonisches Recht. Lehrbuch aufgrund des Codex Iuris Canonici, Vol. I, Einleitende Grundfragen und Allgemeine Normen*, Ferdinand Schöningh Paderborn.

Barion, Hans (1969). Reply: *Eunomia*. Friendly gift for Hans Barion on 16 December 1969, private print (s.l., n.d.).

Barion, Hans (1931). Rudolph Sohm und die Grundlegung des Kirchenrechts. Bonner Antrittsvorlesung 79 = Recht und Staat in Geschichte und Gegenwart, Issue 81. Mohr Tübingen.

Berkmann, Burkhard Josef (2021). *The Internal Law of Religions. Introduction to a Comparative Discipline (ICLARS Series on Law and Religion)*, Routledge London/New York.

Brecht, Martin (1983). *Martin Luther. Sein Weg zur Reformation 1483-1521*, Calwer Verlag Stuttgart.

Corecco, Eugenio (1986). *Ekklesiologische Grundlagen des Codex Iuris Canonici*, in: *Concilium* 22, 166-172.

Corecco, Eugenio (1980). *Theologie des Kirchenrechts. Methodologische Ansätze*, Paulinus Verlag Trier.

Corecco, Eugenio (1994a). *Theologie des Kirchenrechts*, in: Libero Gerosa / Ludger Müller (eds.), *Ordatio fidei. Schriften zum kanonischen Recht*, Ferdinand Schöningh Paderborn, 3-16.

Corecco, Eugenio (1994b). "Ordatio rationis" oder "ordatio fidei". Anmerkungen zur Definition des kanonischen Gesetzes, in: Libero Gerosa / Ludger Müller (eds.), Corecco, Eugenio, *Ordatio fidei. Schriften zum kanonischen Recht*, Ferdinand Schöningh Paderborn, 17-35.

Dombois, Hans (1961). *Das Recht der Gnade. Ökumenisches Kirchenrecht, Vol. 1*, Luther Verlag Witten.

Germann, Michael (2016). Die Diskussion über die Grundlagen des evangelischen Kirchenrechts, in: *Handbuch des Evangelischen Kirchenrechts*, Mohr Siebeck Tübingen, 46-80.

Glenn, H. Patrick (2014). *Legal Traditions of the World. Sustainable diversity in law*. Oxford University Press Oxford.

Heckel, Johannes (1973a). Kirche und Kirchenrecht nach der Zwei-Reiche-Lehre, in: id. *Lex Charitatis. Eine juristische Untersuchung über das Recht in der Theologie Martin Luthers*, Böhlau Cologne, 354-409.

Heckel, Johannes (1973b). *Lex Charitatis. Eine juristische Untersuchung über das Recht in der Theologie Martin Luthers*, Böhlau Cologne.

Kaufmann, Thomas (2016). *Geschichte der Reformation in Deutschland*, Suhrkamp Berlin.

- Krämer, Peter (1977). Theologische Grundlegung des kirchlichen Rechts. Die rechts-theologische Auseinandersetzung zwischen Hans Barion und Joseph Klein im Licht des II. Vatikanischen Konzils = Trierer Theologische Studien 33, Paulinus Verlag Trier.
- Lee, Luke / Lai, Whalen (2007). The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist, in: Barziali, Gad (editor), Law and Religion, Ashgate Aldershot, 203-225.
- Maier, Eva Maria (1989). Zum Zusammenhang von "Theologisierung" und Positivismus im kirchlichen Recht. Aktuelle Tendenzen kirchenrechtlicher Lehre und Entscheidungspraxis, in: Österreichisches Archiv für Kirchenrecht, 38, 37-51.
- Maier, Eva Maria (2005). Communio versus Gerechtigkeit? Österreichisches Archiv für Recht & Religion, 52, 63-87.
- Marsilius of Padua. Defensor Pacis (The Defender of Peace, 1324). English Translation by Oliver J. Thatcher et al., A Source Book for Medieval History, Scribners New York, 1905, at: <https://sourcebooks.fordham.edu/source/marsiglio1.asp>
- May, Georg (1990). Kirchenrechtsquellen. I. Katholische, in: Theologische Realenzyklopädie, Vol. XIX, Berlin, de Gruyter, 1-44.
- Mörsdorf, Klaus(1965). Wort und Sakrament als Bauelemente der Kirchenverfassung, in: Archiv für katholisches Kirchenrecht 134, 72-79.
- Mörsdorf, Klaus (1976). Kanonisches Recht als theologische Disziplin, in: Archiv für katholisches Kirchenrecht 145, 45-58.
- Müller, Ludger (2015). *Recht und Kirchenrecht*, in: Haering / Rees / Schmitz (eds.), Handbuch des Katholischen Kirchenrechts, Pustet Regensburg, 12-31.
- Peerenboom, Randall (2002). Law and Religion in early China, in: Huxley, Andrew (editor), Religion, Law and tradition. Comparative studies in religious law, Routledge London, 84-107.
- Sohm, Rudolph (1923). Kirchenrecht. Die geschichtlichen Grundlagen. Systematisches Handbuch der Deutschen Rechtswissenschaft. Achte Abteilung, erster Band. Hrsg. von Karl Binding. Duncker & Humblot Berlin.
- Thomas Aquinas. Summa Theologiae (1265-1274). English Translation by Fathers of the English Dominican Province, Benzinger Brothers Printers to the Holy Apostolic See New York/Cincinnati/Chicago 1917 at https://en.wikisource.org/wiki/Summa_Theologiae.
- Witte, John (2009). Law and Protestantism: The Legal Teachings of the Lutheran Reformation, Cambridge University Press Cambridge.