Chapter 1
Introduction

Abstract The study is the first book to present a sociology of Roman Catholic canon law from the perspective of canon law studies. By modelling a theoretical sociology to study canon law with the aim of better understanding the function and reality of the law in the Roman Catholic Church, it follows the methodology of a descriptive sociology as applied frequently in the sociology of law. The study receives the manifold approaches to a sociology of the law and discusses their merit in contributing to a sociology of canon law. In drawing on empirical findings from the sociology of law and the sociology of religion, the study substantiates its theoretical arguments by drawing on knowledge about both the reality of the church and the reality of law.

Keywords (Roman Catholic) canon law · Canon law studies · Roman Catholic Church · Sociological theory · Sociology of law · Sociology of canon law · Sociology of religion · Theology

This book is a sociology of canon law. It seeks to comprehend the *reality* of canon law. It is a book about ecclesiastical law *as it is*—and not about how canon law might be or should be. It focuses on the canon law of the present day, and not on its glorious past. By taking this approach, my study is also an experiment. It is a product of canon law studies. However, unlike most contributions by scholars of canon law, my study does not comment on canon law with the purpose of showing its merits and demerits in regulating ecclesiastical issues. Instead, it attempts to study the legal reality of the church. Of course, as a canonist I am not trained to analyse this reality from the outside as a sociologist would. Instead, by arguing from the viewpoint of canon law studies, my study represents an approach which is devoted to examining the law of the church from "within," that is from the point of view of theology as an academic discipline which seeks to understand the connection between God, faith, and the law.

I view canon law studies as being part of theology. As a theo-legal discipline, it is unique insofar as it examines the law of the church from the perspective of theology and from the perspective of legal studies. In my opinion, its essential interdisciplinary shape also requires canon law studies to become proficient in using the tools of

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the sociology of law. To understand canon law as it is we must learn to analyse its reality with the help of sociological theory and methodology. This helps us to understand canon law somewhat better; but it also helps us to understand more of theology. As canon law studies is theology, a canonist's sociology of canon law is also a contribution to the debate on the status of sociology in theology and on the value of sociological findings for theology. The following introduction seeks to provide a little more clarity to this interdisciplinary field by locating the sociology of canon law at the intersection of the disciplines of canon law studies, theology, and sociology.

1.1 Canon Law Studies as Theology

In the academic culture in which I spent my formative years, canon law studies was and remains a subdiscipline of theology. It is the discipline which studies the law of the church as a law rooted in church and which is designed to serve ecclesiastical purposes. Theology understands the concrete earthly church as an embodiment of the heavenly church. Canon law studies is therefore tasked with clarifying how the organisation and legal structure of the earthly church as fact connects with the heavenly church as norm. Hence, similarly to ecclesiology, canon law studies engages in scholarly study about the church. However, it focuses in particular on the earthly church as fact which takes on a concrete form with the help of norms, and, in particular, legal norms. In consequence, one may understand canon law studies to be a continuation of ecclesiology. Canonist Robert Ombres put this finding as follows, "Canon law may be usefully understood as applied ecclesiology."[1] This statement acknowledges the connection between law and ecclesiology; and it also highlights the reason why canon law studies is essentially perceived as practical theology. Hence, in contrast to other suggestions made by practical theologians about why canon law is a practical discipline, I propose understanding canon law studies as a discipline of practical theology not so much because it studies the law as a field of ecclesial practice, but because it studies the legal structure of the church as the practical embodiment of the heavenly church. Canon law studies, I would like to suggest, is practical theology because it analyses how the church as norm becomes fact, and does so with the help of those facts which we call "norms." I will return to this thought in Sect. 2.1.11.

The classification of canon law studies as theology has become manifest in two tasks assigned to canon law studies after the Second Vatican Council, as canonist Sabine Demel points out. Demel states that it is the task of canon law studies to consistently analyse two problems. First, canon law studies constantly has to ask whether there are new theological findings which prove to be legally relevant—and must consequently be adopted into canon law. Second, canon law studies has to

[1] Ombres (2016, p. 137); see also Doe (1992, p. 336).

constantly review existing law to establish whether it adequately expresses the current findings of theology.[2] If it is the task of canon law studies to understand the legal order of an organisation which provides its members with law to structure the social but which is also relevant for salvation, then canon law studies cannot rely solely upon the arguments of legal philosophy, history, and sociology to understand the law as a social phenomenon. For canon law, reference to its own traditions and to analogous norms in the secular legal system is most certainly enlightening. Nevertheless, the roots and reasons of canon law must also be grounded in theology. Post-conciliar canonical thought is therefore in a constant search for a theologically grounded foundation of canon law. This requires canon law studies to have a solid grounding in theology. However, its essential interdisciplinary structure also requires canon law studies to be familiar with legal studies as a source of knowledge about the law and about legal methodology. This dual perspective of theology and legal studies has led to heated methodological debates among scholars of canon law still seeking agreement on where to locate the discipline and how to outline its theory and methodology. Different points of view collide. It is a matter of lively debate whether canon law studies is a legal discipline with legal methods,[3] a theological discipline with legal methods,[4] a theological discipline with theological methods,[5] or a theological-legal discipline with both theological and legal methods.[6] None of these approaches appears to be fully convincing inasmuch as they either undermine the character of canon law studies as theology or as a legal discipline, or muddy the waters with respect to methodology. With a view to these problems one approach stands out, as I find. Its most prominent proponent was canonist Winfried Aymans. Aymans focused his attention on the genuinely theological character of canon law studies without losing sight of the fact that theology is not methodologically monistic, but is reliant on the methodological resources of other disciplines. Aymans consequently defined canon law studies as a discipline of theology, albeit one which relies upon legal methods, yet doing so in the interest of and within the boundaries set by theology.[7] I agree with Aymans in this respect but want to open up his approach a little more, as I will suggest shortly.

[2] See Demel (2012, p. 15).

[3] E.g. Fürst (1977, pp. 500–501); Hervada (2004, pp. 57–68).

[4] E.g. Eichmann and Mörsdorf (1964, p. 36).

[5] E.g. Corecco (1994, p. 16).

[6] E.g. May and Egler (1986, pp. 17–22); Sanders (2000, p. 394). For overviews of the complex methodological debate in canon law studies see e.g. Cattaneo (1993, pp. 52–64); May (1999, p. 92 fn 2); Graulich (2006, pp. 248–249); Neudecker (2013, pp. 467–468).

[7] See Aymans and Mörsdorf (1991, p. 71); Aymans (1995, p. 370).

1.2 . . .Using Methods of Legal Studies

In line with Aymans's definition of canon law studies as theology which uses legal methods in the pursuit of canonical knowledge, canon law studies avails itself of legal methodology to study the legal shape of the church. This choice of methodology is not the only way to proceed, but it is necessary if canon law studies seeks to claim with any justification that it can shed light on canon law *as law*. In order to understand what canon law is, canon law studies must have legal methods at its disposal as part of its methodological repertoire. But what is *the* methodology of the law? We cannot really refer to legal methodology as though it were a single concept. This is because questions of legal history, foundation, philosophy, dogma, language, and sociology all require a methodology of their own. Studying the law therefore requires a plurality of methods. This is evident in canon law studies inasmuch as it employs text-hermeneutic and linguistic methods of interpretation for its legal exegesis; employs philosophical and analytical approaches to studying the foundations of canon law, its underlying principles, and the relation between law and justice in its study of legal dogma, theory, and philosophy; employs historical approaches to studying legal history; and employs social theory and social research in its sociology of law to study the social reality of the church and its law.[8] My study is about precisely the latter sociological dimension of canon law studies.

1.3 . . .Using Methods of the Sociology of Law

As a sociology of canon law by a canonist, my book is a canon law study and as such a theological endeavour, yet an endeavour using methods taken from the *sociology of law* to gain theological insights. This finding underscores the essential interdisciplinarity of the sociology of canon law as a field of research. Admittedly, this interdisciplinarity might not appear particularly exotic from the perspective of the sociology of law, as this discipline always stands at the intersection between several disciplines: it has links to general sociology, empirical social research, and legal theory. In the following I will therefore outline what these links mean for the sociology of canon law.

1.3.1 The Sociological View of the Law

The first point that I feel compelled to make is that the relationship between the sociology of law and general sociology is a rather fraught one. And it is likewise not easy to draw a clear line between the two. General sociologists tend to look at the

[8] On the "non-legal" aspects of canon law studies see also May and Egler (1986, p. 25).

role of the law in their study of groups, such as societies or communities, and to examine the law as a social phenomenon. In contrast to general sociology, the sociology of law has a narrower focus, as it focuses specifically on the law. In this light, legal scholar David Schiff describes the sociology of law as the "sociological study of specific legal phenomenon [sic], e.g. specific legal situations or the social relations associated with certain legal rules".[9] In trying to identify the social significance of the law, sociologists of law tend to focus their attention on the legal system, its professionals ("lawyers, judges, the jury, the officials of a legal system"), and the places of the law ("the court room, the solicitor's office, the jury room"[10]). There are several approaches to exploring the interplay between the law and society from the perspective of the sociology of law. Socio-legal scholar Manfred Rehbinder categorises them as follows: One may either reference legal norms and examine the degree to which they influence group behaviour, or study group behaviour to ask what norms it is based on, or refer to the legal authorities' behaviour and study the institutions responsible for upholding the law in order to identify situations in which the legal authorities react to certain types of social behaviour and sanction breaches of law.[11] Rehbinder finds all of these perspectives important for gaining a sociological understanding of what the law is and how the law functions. However, those often highly focused studies by the sociology of law tend to overlook the interplay between society and the law, as Rehbinder also notes. This interplay is more an issue for general sociology, even though general sociologists tend not to be primarily interested in law. Nevertheless, David Schiff's list of the foremost general sociologists in whose work the law played a significant role includes inter alia Émile Durkheim, Eugen Ehrlich, Max Weber, and Karl Marx.[12] Other names also spring to mind; this certainly not exhaustive list might also include Michel Foucault, Pierre Bourdieu, Niklas Luhmann, and Jürgen Habermas. Schiff believes that if one's intention is truly to comprehend the law, it is necessary to take both perspectives into account, namely the specialist interests of sociologists of law with their focus on legal phenomena, and the study of the law as a normative phenomenon with an enormous impact on society, as undertaken by general sociologists. Scholarly enquiry into the law has always rested, as Schiff states, on a *dual* approach: first, on the question of what constitutes the social ("what is society?"), and, second, on the question of what brings about the legal reality which confronts us as members of social groups ("what is law?").[13]

[9] Schiff (1976, p. 294).

[10] Schiff (1976, p. 294).

[11] See Rehbinder (2014, p. 38).

[12] See Schiff (1976, p. 295).

[13] Schiff (1976, p. 297).

1.3.2 Empirical Approaches to the Law

However, delving into the field of the sociology of law, one encounters some disagreement about what constitutes the right approach to this endeavour. One major difference of opinion revolves around the status of *empirical* approaches in the sociology of law. Its theories and methodologies necessarily have to reflect that the sociology of law deals with the reality of law. This explains its interest in empirical social research.[14] Many of its representatives therefore understand the sociology of law as an empirical field of scholarly enquiry which draws on methods used in empirical sociology in order to study the social reality of the law. However, empirical approaches do not necessarily involve *experimental* methods. Legal scholar Martin Shapiro made this point when he described the difficulty of conducting simulated and experimental research on the law under laboratory conditions as the "impossibility of putting laws and nations in test tubes and bubble chambers."[15] In addition, field research methods have also frequently proven inadequate, despite the finding that some sociologists of law such as Rüdiger Lautmann have been successful in demonstrating that participant observation can yield quality results at the highest level. Lautmann's famous study, entitled *Justiz—die stille Gewalt* [*Judiciary—The Silent Force*],[16] in which he documented his observations on the decision-making methods of judges, has become a classic piece of empirical research on adjudication. The study is rare and special as Lautmann, a scholar with both legal and sociological training, was able to conduct his research from his own position as a judge, and was therefore practically invisible as a sociologist for his fellow judges. Lautmann admits that his study would be virtually impossible to replicate under current conditions. Whilst it was possible in the early 1970s for a sociologist and qualified lawyer to work as a judge for a while in order to pursue his research, sociologically trained lawyers today would find it very difficult to occupy the position of a judge for a short period of time, at least in the German judicial system, due to the current terms of recruiting tribunal staff. Sociologist Thorsten Berndt, for instance, who in his 2010 study documented the self-perceptions and self-images prevalent among German judges, could not rely on the method of participant observation to do so, but had to rely on interviews as his method of choice. It is therefore clear that the circumstances of the time play at least some part in determining what is methodologically feasible. These challenges place a burden of responsibility on the sociology of law to identify the most appropriate empirical methods for engaging in empirical research on the reality of the law. Sometimes an

[14] E.g. Blankenburg (1975). Blankenburg's volume is a compilation of socio-legal contributions which were written based on the methods of observation, interview, and documentary analysis. On the empirical methods used in the sociology of law see also Carbonnier (1974, pp. 176–195, for documentary analysis, and pp. 196–230, for empirical data collection); Röhl (1987, pp. 105–118); Rehbinder (2014, pp. 48–64); Baer (2021, pp. 279–290).

[15] Shapiro (1981, p. VII).

[16] First edition 1972; second edition 2011.

experimental approach is possible and expedient; sometimes textual analysis and comparative study make more sense. Martin Shapiro shares this view. In his study *Courts* he used comparative law research to examine the idiosyncrasies of various judicial systems. Shapiro, for his part, described his approach as "a substitute for the experimental method"[17]. Whilst admitting the limited effectiveness of this substitute, Shapiro regarded it as without alternative as an experimental approach was not an option for his research.

1.3.3 Law as Doctrine, Law as Practice

The importance of empirical studies might be evident for the sociology of law; yet it is not uncontroversial. Sociological approaches which understand the law primarily as a social practice are clearly drawn to empirical methods. Yet approaches which examine the law primarily as a *doctrine* have trouble warming to them; sociologist of law Jean Carbonnier subsumes these theories from the sociology of law under the heading of "philosophies of the sociology of law".[18] Similar feelings of reticence towards empirical studies are, however, not exclusive to philosophical approaches in the sociology of law, but also exist in legal studies in general. A brief look into legal practice reveals this reticence as well, as most legal practitioners hold sociological knowledge in rather low esteem. Socio-legal scholar Roger Cotterrell, commenting on the results of empirical studies, states that everyday legal life constantly relies on non-legal expert opinions, for instance in the form of medical, psychological, or technical reports; however, lawyers seldom refer to sociological findings and, if they do, they tend to do so with scepticism. Cotterrell suspects the reasons behind this in the fact that the social sciences—in contrast to the other non-legal disciplines which legal studies draw on—cast doubt on legal expertise because they offer a *competing narrative* about social reality, as Cotterrell suggests, "Social scientific and legal knowledge compete in the interpretation of social relationships".[19] Whilst lawyers understand themselves as intermediaries between legal doctrine and social practice, social scientists tend to be more sceptical about the relevance of doctrine as a force for shaping social practice. Cotterrell therefore sees the roots of this conflict between the law and sociology in the tensions between approaches which take a doctrinal view of law, and those which view law primarily as a social practice. However, these antipathies among legal practitioners have not led to their complete loss of interest in the social sciences, according to sociologist Doris Mathilde Lucke. Lucke believes that legal practice operates in two moves. Whilst the law uses its expertise to make itself immune to infiltration by other fields of scholarship, at the same time it also embraces the selective expertise it needs from other fields by drawing that expertise into the legal domain. Hence the law digests external expertise, but in the mode of

[17] Shapiro (1981, p. VII).
[18] Carbonnier (1974, p. 21).
[19] Cotterrell (1984, p. 209).

appropriating it. Lucke explains, "In a sophisticated combination of operating a *closed shop* policy in relation to its own knowledge, and keeping an *open source* policy towards outside knowledge, it has become possible for the law to appropriate the knowledge of other disciplines in something akin to annexation and, stripped of its disciplinary identity beyond recognition, to pass it off as its own."[20] Hence, the law overcomes its coyness towards the social sciences, according to Lucke, by assimilating sociological knowledge. However, lawyers tend to take this knowledge seriously only if it appears to be genuinely legal. Sociological knowledge must therefore conceal its sociological roots to find acceptance within the realm of the law. Lucke observes, "The more it conceals its sociological identity, the more sociology increases its potential to bring about change. . . . In the end, the lawyers can then not only say they already knew everything *themselves*, but that they have also—and always—known it *better*."[21]

1.3.4 Dogmatic and Empirical Approaches

The sociology of law is closely aligned with legal studies, and particularly with its subdiscipline of legal theory.[22] The educational backgrounds of socio-legal scholars often reflect this proximity, as many of these scholars happen to have sociological and legal training. Hence, sociologists of law are often also legal scholars.[23] Nevertheless, the relationship between sociology and legal studies is anything but harmonious. Niklas Luhmann speaks of an ambivalence in the relationship between the disciplines.[24] In a similar vein, legal realist Karl Llewellyn notes that it is hard to reconcile the two, stating, "The two realms of thought and discourse mix no more

[20] Original quote, "In einer raffinierten Verbindung aus einer—auf das eigene Wissen bezogenen—*closed shop*-Politik—und einer—auf fremdes Wissen bezogenen—*open source*-Politik wurde es . . . möglich, sich das Fachwissen anderer Disziplinen annexionsartig anzueignen und es, seiner fachlichen Identität bis zur Unkenntlichkeit entkleidet, als das ureigene auszugeben", Lucke (2010, p. 83).

[21] Original quote, ". . .entfaltet soziologisches Wissen sein praxisveränderndes Potenzial umso wirkungsvoller, je mehr es seine fachliche Identität verliert. . . . Am Ende haben die Juristen dann nicht nur alles *selbst*, sondern vor allem alles—und zwar immer schon—*besser* gewusst", Lucke (2010, p. 83).

[22] For an approach which conceives of legal philosophy, legal theory, and the sociology of law as being intrinsically interlinked, see Kunz and Mona (2006).

[23] In the revised 2011 edition of his 1972 book *Justiz—die stille Gewalt* [*Judiciary—The Silent Force*] Rüdiger Lautmann describes his own formation as a legal scholar and sociologist and his biographical development as shifting between jurisprudence and sociology. Most fascinatingly, Lautmann asks what influence these two perspectives exerted on his own study. He also recollects the irritations which his dual qualification in law and sociology caused, particularly among other lawyers, see Lautmann (2011, pp. 10–12, 22).

[24] See Luhmann (1986, p. 9).

comfortably than oil and water".[25] We may detect this conflict also by studying the academic backgrounds and self-conceptions of socio-legal scholars within their disciplines. Manfred Rehbinder noted this by stating that it is possible to place sociologists of law into two categories, those who understand themselves more as legal scholars, and those who understand themselves more as sociologists.[26] In a similar vein, Jürgen Habermas identified a dualism between normative and objectivist approaches to the law, which he found highly problematic, noting,

> Tossed to and fro between facticity and validity, political theory and legal theory today are disintegrating into camps that hardly have anything more to say to one another. The tension between normative approaches, which are constantly in danger of losing contact with social reality, and objectivistic approaches, which screen out all normative aspects, can be taken as a caveat against fixating on one disciplinary point of view.[27]

Within legal studies there is some similar disharmony in the field of legal theory, namely between those legal theories which are anchored in legal dogma on the one hand, and legal theories rooted in empirical observations and sociological findings on the other. Doctrinal or dogmatic normative theories of law conceive of the law as a system derived from legal doctrine, as the conceptual result of the rules, principles, and values underlying the law, as Roger Cotterrell explains, stating, "By normative legal theory I mean theory which seeks to explain the character of law solely in terms of the conceptual structure of legal doctrine and the relationships between rules, principles, concepts and values held to be presupposed or incorporated explicitly or implicitly within it".[28] According to normative legal theories, the law arises out of doctrine and only acquires its significance as law in doing so. However, David Schiff rightly points out that the underlying doctrinal basis of legal theorists who argue along these lines is by no means homogenous. It is actually dependent on philosophical decisions such as whether to align oneself with a natural law, positivist, or realist school of thought. Schiff explains the consequences of these differences with regard to normative theories of law by stating,

> Natural law philosophy searches for an a priori legitimacy for legal phenomena and involves studies into the ideas of justice, nature, etc. Positivist legal philosophy involves the study of the identification of legal phenomena, their normative structure and validity in human, if not empirical terms. Realist schools of legal philosophy are concerned with the interpretation of laws in terms of social or psychological facts, replacing the normative by the causal.[29]

However, irrespective of the philosophical approach chosen to establish a doctrine of the law, there is one demerit that all of these approaches share, as Cotterrell maintains. The problem is that all dogmatic approaches towards the law only really hold water if one's viewpoint does not venture beyond the legal system itself, and only really make sense to legal professionals who are participants in the doctrinal

[25] Llewellyn (1940, p. 1356).

[26] See Rehbinder (1963, p. 470); see also Carbonnier (1974, pp. 18–20).

[27] Habermas (1996, p. 6); see also Carbonnier (1974, p. 274).

[28] Cotterrell (1983, p. 241).

[29] Schiff (1976, p. 297).

debates about the law. In contrast, empirical theories of law have attempted to study law, including legal doctrine, in its historical context and with regard to its social meaning. Cotterrell explains this approach by noting, "By empirical legal theory I mean theory which seeks to explain the character of law in terms of historical and social conditions and treats the doctrinal and institutional characteristics of law emphasized in normative legal theory as explicable in terms of their social origins and effects".[30] Cotterrell believes that empirical legal theories also permit outside observers to understand aspects of the law without necessarily having participated in the doctrinal debates about the law. The consequence, however, is that empirical legal theories tend to exist at one remove from legal professionals and their practice, even though it is precisely this practice which provides empirical theories of law with a basis for drawing conclusions about the reality of the law.

In arranging legal theories as he does, Cotterrell clearly adopts Luhmann's observation that legal scholars and legal professionals view law from the *inside*, whilst sociologists tend to view it from the *outside*.[31] Whilst legal scholars view law primarily as doctrine, sociologists consider it a social practice. At the same time, however, Cotterrell also points out that Luhmann's interdisciplinary observation has *intra*disciplinary parallels, insofar as it is not only the disciplines of legal studies and sociology that are in dispute about the primacy of doctrine or empirical facts; these fault lines also extend across legal studies and the sociology of law themselves, dividing legal theories or sociologies of law according to whether they prefer a doctrinal or empirical starting point for approaching the law. These conflicts have a history. The problematic relationship between doctrinal approaches and those empirical or sociological approaches more focused on reality were to no small degree influenced by the socio-legal scholars of the past. Eugen Ehrlich, for example, as one of the founders of the sociology of law, provoked doctrinal thinkers in the foreword to his *Fundamental Principles of the Sociology of Law* by claiming that the legally immanent workings of the law, namely legislation, adjudication, and administration are actually fairly immaterial for the development of law.[32] Of far greater influence is society, as Ehrlich claimed. Consequently, the sociology of law, in studying the reality of law, is actually the true scholarly field of legal study, according to Ehrlich.[33] Ehrlich's thesis unleashed a controversy which culminated in a serious confrontation between himself and legal positivist Hans Kelsen in 1915, which became known as the "Kelsen-Ehrlich debate."[34] "Debate," it must be said, is a rather friendly term to describe the fury with which Kelsen responded to Ehrlich's thesis, whereas Ehrlich felt misunderstood and hurt by his fellow disputant's harsh attacks. Their controversy might serve as an emblematic example of the deep rifts

[30] Cotterrell (1983, pp. 241–242).

[31] See Luhmann (1986, pp. 19–20; 2004, p. 59); on this subject also Sandberg (2016, pp. 66–77).

[32] See Ehrlich (1936, p. XV).

[33] See Ehrlich (1936, p. 25).

[34] See Kelsen and Ehrlich (2003).

between doctrinal and sociological legal theories. In modern-day legal studies here in Germany, this rivalry plays out primarily to the detriment of the sociological approaches, because legal studies frequently puts more emphasis on normative doctrinal approaches. As a consequence, the sociology of law suffers in the broader landscape of legal studies due to its precarious status in the canon of the various fields of legal study, with their primarily dogmatic footing. In Germany, its relegation to the periphery of legal scholarship is reflected in the training given to law students, in which sociological issues, at present, occupy only a subordinate position.[35] However, cultivating a dualism of doctrinal and sociological legal theories might prove to be detrimental to both approaches, as it might lead to blind spots in knowledge about the reality of the law. It is therefore most interesting to note that for Roger Cotterrell and other scholars seeking to comprehend the reality of the law, dogmatic *and* empirical approaches are equally valuable in the quest to obtain a viable understanding of law. Their mixed approaches contain the idea that those seeking to grasp the law in all its complexity must possess a knowledge of legal doctrine as well as of legal practice. Cotterrell believes that legal theories often suffer from the underrepresentation of one or the other of the two perspectives. He believes the solution to this problem lies in educating legal theorists to be at one and the same time trained experts in doctrine who view the law from the inside, and experts schooled in sociology who view the law from the outside. Cotterrell approaches this duality from a sociological perspective, proposing, "The legal sociologist must become a lawyer in order to challenge or go beyond lawyers' conceptions of law."[36] In addition, giving legal experts a grounding in sociology might prove to be just as expedient. The above-mentioned phenomenon—that many modern-day socio-legal scholars have received a legal and a sociological education—is an opportunity to overcome the mutual suspicions that exist between those who advocate dogmatic approaches, and those who advocate sociological approaches to the law.

1.3.5 Pure or Applied Sociology of Law

One aspect of the debate between legal studies and the sociology of law about whether to start with doctrine or with practice in the process of understanding law has been the long-standing question about what *purpose* is served by seeking to understand the reality of law.[37] The question behind this issue is whether plumbing the depths of legal reality is seen to be a descriptive or a normative undertaking. In research by German-speaking scholars, this is a bone of contention between two approaches, namely the merely descriptive approach of the *sociology of law*—as a

[35] See Röhl (1987, p. 1); Machura (2010, pp. 382–383).
[36] Cotterrell (1983, p. 244).
[37] See Rehbinder (1963, pp. 470–471).

distinct socio-legal school—and the normative endeavour of *sociological jurisprudence* in the tradition of Eugen Ehrlich (who nevertheless stated himself that the sociology of law was a mere "science of observation").[38] Jean Carbonnier makes a similar differentiation between the more academic pure sociology of law and the more practical applied sociology of law and tries to find a synthesis between the two, noting—in slightly flamboyant wording—,

> The truth belongs to itself. It may be useless or even detrimental, but does not forfeit an inch of its truthfulness. Therefore, the sociology of law could content itself with being a pure science which finds its raison d'être in its scientific function. But it wants to be more, wants to assume a practical function and to become an applied science. Even more than sociology in general, it has a desire to serve because it finds itself in the situation to socialise with lawyers whose knowledge is fully focused on practice, and who would find it ungraceful to understand jurisprudence as a purely luxurious undertaking.[39]

The approach taken by the sociology of law—or Carbonnier's pure sociology of law—seeks to discover more about the reality of law unimpressed by heteronomous interests such as improving the law. It is mainly a descriptive approach which seeks to comprehend how law and reality are reciprocally pervasive, without deriving any normative claims from its findings.[40] Carbonnier understands it as the task of a pure sociology of law to provide knowledge about law, to explain law, and criticise it.[41] "The sociology of law benefits—itself," writes Niklas Luhmann, adding, "One may hardly expect any benefit from sociology for legal practice."[42]

In contrast, sociological jurisprudence—or the applied sociology of law, according to Carbonnier—serves a normative purpose, namely improving the law, primarily legislation and adjudication, by understanding its social context, meaning, and functioning. Its practical purpose has its roots in the debates surrounding empirical law research ("*Rechtstatsachenforschung*"), with its roots in Eugen Ehrlich's work. Empirical law research enjoys greatest influence in Anglo-American legal circles due to the major relevance of legal practice for the development of common law. The most renowned exponents of sociological jurisprudence include legal scholar Roscoe Pound as well as Supreme Court Justices Oliver Wendell

[38] Ehrlich (1936, p. 473).

[39] Original quote, "Das Wahre genügt sich selbst. Mag es auch unnütz oder gar schädlich sein, so verliert es doch keinen Zoll seiner Wahrheit. Die Rechtssoziologie könnte sich folglich damit begnügen, eine reine Wissenschaft zu sein, die eine volle Daseinsberechtigung in ihrer wissenschaftlichen Funktion findet. Sie will aber noch mehr sein, eine praktische Funktion übernehmen und eine angewandte Wissenschaft werden. Sie empfindet sogar in noch viel stärkerem Maße als die allgemeine Soziologie dieses Bedürfnis zu dienen, weil sie von ihrer Lage her gezwungen ist, mit den Juristen zu verkehren, deren Wissenschaft ganz auf die Praxis ausgerichtet ist, und die es als eine Schande empfinden würden, wenn die Jurisprudenz eine reine Luxuswissenschaft wäre", Carbonnier (1974, p. 252); for Carbonnier's definition of pure and applied sociology of law see Carbonnier (1974, pp. 231–290).

[40] See Raiser (2007, p. 7).

[41] See Carbonnier (1974, pp. 235–251).

[42] Original quote, "Die Rechtssoziologie nützt—sich selbst"; "Ein Nutzen für die Rechtspraxis ist von Soziologie kaum zu erwarten", Luhmann (1986, p. 44).

Holmes and Benjamin Cardozo. Their conception of law is primarily functional and instrumental. Law should demonstrate social utility and be judged accordingly. Roscoe Pound, in one of his famous quotes, spoke pointedly of "jurisprudence . . . as a science of social engineering".[43] As a consequence, sociological jurisprudence is not an interpretive sociology in the strict sense of Max Weber,[44] but a school of thought in legal theory which, like other validity theories, seeks to pave the way for the *advancement* of the law. In doing so, however, it does not seek answers in the prepositive normative sphere as prepositive theories of the law do, or in positive law as positivist theories do, but seeks them on a prepositive *descriptive* level. With this in mind, socio-legal scholar Gunther Teubner questions whether sociological jurisprudence can really be considered a sociological field of enquiry or if it is actually more of a genuinely legal field, as Teubner finds, "The constructs of sociological jurisprudence . . . are hybrid creatures which the legal process produces with authority borrowed from the social sciences."[45]

1.3.6 Interdisciplinary Fields of Research

As these references show, we may not place the sociology of law within any single discipline without compromising the complexity of its fields of enquiry. In Anglo-American research, therefore, the diverse approaches contributing to the sociology of law are frequently collected under one common heading of *Law and Society* or under the banner of *socio-legal studies*. As collective endeavours of scholars from various backgrounds these fields are proof that socio-legal questions frequently overlap with those of political science, economics, ethnology, anthropology, psychology, and the historical sciences. One related cultural studies approach to law is to perceive *law as culture*.[46] Niklas Luhmann was one of the first scholars to point out that law is a generator of culture, noting, "The law is one of the many areas in which social communication not only takes place, but communicates extensively about itself. This creates, to some degree epigenetically, cultural assets, which are consistently in use and being replicated, reproduced, and modified."[47] Legal scholar Bernhard Losch describes the culture that law gives rise to as "that section of the

[43] Pound (1923, p. 152).

[44] See Weber (1978).

[45] Original quote, "Die Konstrukte der soziologischen Jurisprudenz . . . sind hybride Kreaturen, die der Rechtsprozeß mit von den Sozialwissenschaften geborgter Autorität produziert", Teubner (1990, p. 140).

[46] E.g. Cotterrell (2004, pp. 1–14); Mezey (2001, pp. 35–67); Gephart (2006); Losch (2006); Witte and Striebel (2015, pp. 161–198); Olson (2017, pp. 233–254); Reimer (2017, pp. 255–270).

[47] Original quote, "Das Recht ist einer der vielen Bereiche, in denen gesellschaftliche Kommunikation nicht nur abläuft, sondern extensiv über sich selbst kommuniziert. Dabei entsteht, epigenetisch gewissermaßen, Kulturgut, das ständig in Gebrauch genommen, repliziert, reproduziert und abgewandelt wird", Luhmann (1986, p. 11).

totality of culture ... which contains the elemental and universally valid rules of order and communication which can, where necessary, be compulsorily enforced."[48] Whether his understanding of law as a rule system that can be imposed by force truly bears scrutiny is a discussion which I will take up in Sect. 2.1.6. Nevertheless, Losch does make the indisputable point that law occupies a unique place in cultures. However, viewing law as culture in this way, as Losch continues, poses a twofold challenge. It challenges cultural studies to engage in the cultural criticism of law, and it challenges legal studies to engage in the legal criticism of culture.[49]

1.3.7 Sociological Research on Canon Law

Its multidisciplinary embedding gives the sociology of law a particularly high degree of connectivity with other fields, among them the sociology of canon law. However, at the same time, its pluridisciplinarity makes the field of the sociology of law into something of a minefield, as evidenced by the conflicting views mentioned about its methodology and the purpose of its research. So whilst the sociology of law is integrative and unites research methods of different provenance, it also demands that those involved in the debates on the sociology of law clarify their standpoint with regard to their theory and methodology. A similar challenge confronts the sociology of canon law, which must reconcile a sociological approach to law with a normative theory of law. One way of dealing with this dilemma is Roger Cotterrell's proposal, which suggests averting conflicts between sociology and legal studies by entrusting the sociology of law to scholars equipped with both a solid grounding in sociology as well as in law. Placing the sociology of canon law in the hands of researchers versed in sociology and canon law studies would be equally beneficial to canon law studies as it seeks to comprehend the reality of canon law in the light of its normative legal theory and its practical shape. The main stumbling block, however, is the dearth of people equipped with a training in both canon law studies and sociology. Further research on canon law in the nexus between legal dogma and legal practice is therefore much to be desired. The consequence of this state of affairs is that sociological approaches to canon law are scarce. Those few contributions that do exist are frequently sociologists' studies and not authored by canonists; one example is sociologist Simon Hecke's fabulous 2017 book on legislation and the legal structure of canon law.[50] It is worth noting, however, that some canonists—such as Werner Böckenförde, Norbert Lüdecke, and Georg Bier—pursue their work with a sociological bent. Their work on canon law exhibits a clear interest in sociology,

[48] Original quote, "denjenigen Ausschnitt aus der Gesamtheit der Kultur ..., der die elementaren und allgemeingültigen Ordnungs- und Kommunikationsregeln enthält, die notfalls auch zwangsweise durchgesetzt werden können", Losch (2006, p. 34).

[49] See Losch (2006, pp. 207–230).

[50] See Hecke (2017).

even if this is not their main line of enquiry. Instead of gathering data about the reality of law in the church themselves, these authors are receptive to data from the sociology of religion.[51] As a consequence, they confront the law with reality[52]—however, and even more often, they confront reality with the law.[53] Norbert Lüdecke's most recent book is a profound description of how the German bishops have dealt with the Catholic laypeople's constant demands for church reform which have been voiced repeatedly and with increasing insistence since the Second Vatican Council.[54] Lüdecke explains why many of the lays' present hopes of church reform seem rather futile from the perspective of canon law. He suggests critical Catholics study the law to recognise the structural foundations upon which the church is constructed with the aim of better understanding how the church is shaped by its law and why this connection is so resistant to reform. Whilst Lüdecke himself is very critical of how church authorities have instrumentalised the law to hermetically enclose the church in a way which defies reform, he regards it as his duty as a canonist to explain canon law's function in this respect without imposing his own opinion on others. As a canonist, Lüdecke sees it as his mission to inform his readers about the legal order of the Catholic Church and its functioning without permitting his own opinion to dominate. That is clearly an approach which accords with a descriptive sociology. Hence, even though authors such as Lüdecke and Bier do not explicitly acknowledge the sociological significance of their contributions to a sociology of ecclesiastical institutions, their studies are—upon greater scrutiny—clearly discernible as sociologically relevant. As insights on the interrelationship between the law and the reality of the church, these studies contribute to the sociology of canon law. It would therefore be inaccurate to speak of a sociological vacuum in canon law studies, even if specifically sociological contributions are rare.

1.3.8 Theological and Canonical Considerations

Canonists' reticence to contribute to the sociology of canon law is understandable, as the academic spectrum of canon law studies has only limited connectivity with sociological studies. The sociology of law plays virtually no role in canonists' training. Among the canonical treatises which students of theology and canon law study and which canonists cite as key objects of their research, the sociology of canon law does not appear at all. Canon law studies takes a primarily doctrinal and systematic approach to the legal order of the Catholic Church. Canonical treatises include the study of the seven books of the Code of Canon Law (the main legal

[51] E.g. Lüdecke and Bier (2012, p. 93).

[52] E.g. Böckenförde (2006b, p. 147).

[53] E.g. Böckenförde (2006a, pp. 121–124); Lüdecke and Bier (2012, pp. 13–14, 27, 175, 188–189, 191–192, 204, 237–239).

[54] See Lüdecke (2021).

source of global law of the Roman Catholic Church promulgated in 1983; hereinafter abbreviated to: CIC/1983): the general norms of canon law, its constitutional law, sacramental law, the teaching function of the church, property law, penal law, and procedural law. In addition, canon law studies draws on legal theory and legal philosophy by studying the foundations of canon law and legal theology, incorporates an historical perspective on the law by studying the history of canon law, and examines canon law in relation to other legal systems, particularly in relation to the state as expressed in the law of state and church relations. It is therefore most apparent that canon law studies is actually deeply involved in interdisciplinary bridge-building, not least by examining canon law in the context of theological, philosophical, historical, jurisprudential, and comparative approaches to law. This finding makes the absence of a bridge to sociology all the more striking. Most studies in canon law fail to address the aspect of legal reality at all, or deal with it only marginally. This becomes clear upon inspecting the handbooks and introductions to canon law studies. Whilst some of their authors point out that canon law must eventually come to terms with its limited effectiveness in modernity—which is a sociological observation—,[55] most of them pass no comment on this problem and on other sociological issues at all. My remark is only an observation, and not a lament or reproach. And neither do I want to suggest that canonists are careless about or ignorant of the reality of canon law. Admittedly, a small number of canonists give the impression that they are not interested in the reality of canon law because this would call into question the traditional grandeur of canon law and touch upon sensitive areas of their own professional identity. However, I find that most canonists I know do not belong to this group. Most of my colleagues are actually deeply interested in knowing more about the reality of the law which they study. Yet they do not believe this field of enquiry lies within their own professional remit, mostly because we canonists, as mentioned, lack a repertoire of sociological theory and methodology as the result of our limited training. Adding to this is the fact that canonists must overcome a twofold feeling of estrangement before they can engage with sociological issues, as they must endure the same tensions between the more dogmatic and the more sociological approaches to law to which I alluded in my previous considerations. For canon law studies, these tensions are exacerbated by the somewhat problematic relationship between theology and sociology, one of the relics of Neo-Scholastic anti-empiricism, which had a marked effect on canon law studies and continues to influence it today. This problematic Neo-Scholastic inheritance exists throughout the theological disciplines, but is particularly burdensome for the normative theologies, such as moral theology and canon law studies. For canon law theory, the consequence is that it has to date largely drawn its main thoughts and theories from dogmatic theology whilst largely overlooking legal practice, leaving an *empirical* knowledge gap about ecclesiastical practice, but also a theoretical knowledge gap with regard to the theoretical and theological implications of ecclesiastical practice. What significance the legal practice of the

[55] E.g. Demel (2014, pp. 21, 45); Brosi (2013, p. 19).

church has for the theory of canon law is therefore largely unanswered. This situation has not changed much despite the church discovering after the Second Vatican Council that ortho*doxy* and ortho*praxy* are inseparable, thereby attributing to ecclesiastical practice a dogmatic significance. So if we assume that the legal practice of the church as part of this larger frame of ecclesiastical practice has dogmatic significance too, it is glaringly obvious that it should become an object of canon law research. With the aim of allowing theology to learn more not only about the practice of the church, but also about the dogmatic value of this practice, theologians have increasingly come to ask themselves over the past couple of years how to go about connecting sociology and theology.[56] Fundamental theologian Magnus Striet, for instance, recently outlined the significance of sociology for theology. Striet finds that it is no longer possible to claim an understanding of social actors without reference to sociology. Insofar as we have to conceive of the church as a social actor and as composed of manifold social actors, we must also learn to analyse the church—in the interests of theology itself—by using a sociological repertoire.[57] As a theological discipline, canon law studies shares this interest. We are therefore invited to rely on sociological theories and methodologies to provide us with a point of access to studying the reality of canon law. In doing so, we acknowledge a conception of canon law which accepts that modern theological thinking must be mindful of orthodoxy and orthopraxy not only to understand practice but to argue convincingly with regard to orthodoxy, too. There is no doorway to orthodoxy without an understanding of practice. Most obviously, the task of reflecting on the connection between doctrine and practice is one which canon law studies cannot leave to other disciplines such as the sociology of religion. Instead, it is an integral part of canon law studies itself as a field of theological research which is committed to understanding the law of the church in the light of modern theology.

1.3.9 Descriptive and Normative Interests

Locating the sociology of canon law within the research landscape of canon law studies also serves to provide an answer, albeit an indirect one, to the question about what purpose we serve by studying the reality of canon law. Both approaches which I have introduced—namely the descriptive approach represented by the sociology of law in a narrower sense which seeks to understand what law is, and the normative approach represented by sociological jurisprudence which seeks to better understand

[56] On the relation between theology and sociology see e.g. Striet (2014a); on the significance of empirical approaches for theology see e.g. Müller (2006, pp. 216–220); Campbell-Reed and Scharen (2013, pp. 232–259); on the significance of empirical approaches for *practical* theology see e.g. Werbick (2015, particularly pp. 497–598).

[57] See Striet (2014b, p. 17).

the law itself with the aim of improving it—are legitimate approaches to a sociology of canon law. Furthermore, the two approaches to the sociology of law are not mutually exclusive and may even complement each other, as legal scholar Thomas Raiser convincingly argued.[58] For the sociology of canon law, they might represent two incremental steps, reflecting the dual purpose of a sociology of canon law: Whilst understanding more about the reality of canon law entails utilising the descriptive methods of the sociology of law, the knowledge hereby acquired about the reality of canon law may then serve to constitute the basis for normative considerations. Both steps are of genuine interest to canon law research. Whilst it might be conceivable to locate research on the reality of canon law within the sociology of religion, it would be inconceivable for any discipline other than canon law studies to research the connection between the reality of canon law and its legal theory, doctrine, and norms with its descriptive interest in understanding their relationship better and with its normative thrust towards improving the legal theory, doctrine, and norms based on this knowledge.

1.4 Approaching a Sociology of Canon Law

My book serves as an introduction to the sociology of canon law. Due to its narrow focus, I have limited my study to the *descriptive* concerns of a sociology of canon law. Under the hermeneutic and methodological umbrella of the sociology of law in general, I will take a first step on the path to acquiring a deeper understanding of the legal reality of canon law.

1.4.1 Theories in Monographic Form

A project of this kind can be approached in a number of different ways. In the preface to his textbook *Rechtssoziologie* [*Sociology of Law*] Klaus Röhl, for example, identifies three common approaches to producing a monographic study on the sociology of law.[59] One could, as Niklas Luhmann did most prominently, start by formulating a comprehensive theory and then supplement it with empirical knowledge. One might also start with empirical data and collate empirical research findings irrespective of the plurality of theories underlying them. Or one could gather the diverse approaches to the sociology of law and use them to provide an overview of the academic spectrum of contributions; indeed, this is the approach taken by many

[58] See Raiser (2007, p. 8).

[59] See Röhl (1987, p. V).

textbooks on the sociology of law.[60] The second and third approaches are not realistic options in my case. There is currently no established field of a "sociology of canon law" which studies the reciprocal influence of canon law and ecclesiastical reality. Empirical research examining the law of the church is also rare.[61] Hence, there is neither a broad base of sociological theory which may provide a theoretical basis for understanding phenomena of canon law, nor is there a body of empirical data on canon law to be compiled which might deliver greater sociological insights. I have therefore come to the conclusion that developing a comprehensive introduction to the sociology of canon law is only possible at the current time by following the first approach proposed by Röhl and by blending it with the other approaches. Hence, I will attempt to formulate a sociological theory of canon law. I will do so by gathering and discussing theoretical approaches to the sociology of law put forward by other scholars and by referring to the empirical findings procured by others to test the relation of my theory to reality. In doing so, I hope to provide an overview of the relevant questions under discussion in the sociology of law and to show their relevance for canon law and canon law studies. My study therefore sets out to understand what "law" is or can be in church. It surveys the functions of law in church. It asks how ecclesiastical legal institutions contribute to fulfilling these functions. It examines the conditions underlying the legal validity of canon law. It discusses the problems surrounding the ecclesiastical legal subjects' recognition and acceptance of canon law. It studies the phenomenon of compliance and, even more so, of non-compliance. It speculates about the future of a legal order which has been rapidly losing its effectiveness in recent decades. At present, we may ask ourselves whether the canon law of the future, should it exist, will still have a claim to being canon "*law*." We should ask ourselves what conditions have to be met to retain this claim. A sociology of canon law today is well positioned to suggest some answers to these questions already in the here and now.

1.4.2 Learning from Existing Research

It is certainly not my intention to propose an overarching theory such as Luhmann's systems theory. Instead, my work represents a humble experiment which tries to forge, from existing socio-legal research, a sociological theory of canon law which examines the relation between canon law and the reality of the church. To this end, I have surveyed the literature and findings of the sociology of law, which has been

[60] E.g. Cotterrell (1984); Röhl (1987); Kunz and Mona (2006); Raiser (2007); Struck (2011); Rehbinder (2014); Baer (2021).

[61] One example from canon law studies is Andreas Weiß's interview-based study of the permanent deaconate, see Weiß (1992), and his unpublished study on judicial decision making in ecclesiastical marriage annulment procedures (see Weiß, 1995). Another example is the empirical study which I conducted together with Thomas Schüller and Christian Wode on the reporting of issues related to canon law in the media: see Hahn et al. (2013a); Hahn (2013b; 2015).

endeavouring to clarify the relationship between law and society for over a hundred years, to establish the degree to which these works may contribute to a better understanding of canon law. Under these circumstances, my approach requires a preliminary remark: Studying the diverse sociologies of the law shows that these studies tend to focus almost exclusively on *state* law. In drawing on them, my approach proceeds from the assumption that the sociology of canon law is capable of learning from studies about state law; I will examine this challenge in greater detail in Sect. 2.2.4. My approach is of course only plausible if one considers canon law and state law to be comparable to some degree. If we understand canon law to be an order which serves the Catholic Church as a religious organisation on a spiritual mission, this begs the question whether there is enough comparable data to compare canon law with law which organises plural societies and secular states. Many idiosyncrasies of canon law might suggest otherwise, as examples might illustrate. Canon law theory, for example, understands canon law as serving the church and its members with regard to their earthly goods, but also with regard to their spiritual well-being and their salvation. Canonical penal law prohibits and sanctions practices which are unacceptable to the faith community and incompatible with a life of faith. These ideas and purposes are fairly alien to secular state law. Because canon law exists to serve a religious community and its very specific purposes, it is not per se evident why a sociology of canon law benefits from sociological studies on state law. Nevertheless, because canon law and state law overlap in many ways, it is fair to assume that mutual learning is possible. One may for instance observe that canon law fulfils similar functions to state law. This is particularly obvious with regard to its functions of creating order and solving conflict. One key commonality that both legal systems share at the foundational level is due to their character *as law*, namely that they are both *positive* laws. Canon law is positive law. Just like state law, it is made by human beings. Although canon law sometimes speaks of "divine law" and refers to norms deriving directly from God, this does not change the fact that positive canon law is the result of human legislation. This is also true for those norms which have their roots in divine law. Their roots may lie in the prepositive realm, but they become positive canon law through processes of human legislation. This characteristic of canon law, that it is positive and human just like all law, allows us to assume that it shares many commonalities with other law, religious and secular alike. This commonality makes it comparable even with modern state law. So while canon law as the law of the church has a markedly different purpose to state law, the two are similar enough in their origins in human legislation, in their structure deriving from this origin, and in their function of providing human groups with order and with access to organised conflict resolution to invite comparison, as I want to suggest. Adding to this is the observation that questions of validity and effectiveness of law are also key issues for canon law, as much of its "success" or "failure" to provide the church with order and with feasible instruments of conflict resolution depends on its legal subjects' willingness to abide by the law. Canon law studies therefore has an interest in understanding the conditions under which legal subjects accept laws and the conditions under which they reject them. It needs to know why individuals abide by the law or disregard it. Identifying these and other similarities between canon law

and state law helps us to understand the law of the church. It therefore seems to me both plausible and adequate for a sociology of canon law to learn from the general sociology of law.

1.4.3 Selecting Sociological Theories

My study draws on a number of theoretical works on the sociology of law. Proceeding in this way by building on existing material makes it necessary to identify criteria to determine which approaches to use, and which to set aside. I decided to give approaches consideration based on how well they are suited to understanding canon law *as law*. I did not choose approaches simply because they discuss religious law—very few actually do—but mainly because they do not exclude religious law as a variety of law, whether they discuss it or not. Admittedly, it is a risky strategy upon which to base a discussion on the proposition of canon law being in fact law, as this is already a preliminary decision of a theoretical nature. Approaching the sociology of law in the light of legal theory places the quest for sociological knowledge into a normative mould. But at the same time, it is virtually impossible to avoid such theoretical decisions, as Thomas Raiser finds insofar as he views a dual theoretical framing of the sociology of law as a necessity: on the one hand, the sociology of law, as Raiser states, has always drawn its theory from the theories of general sociology, which enables it to discuss society including its legal dimension.[62] On the other hand, it draws its theory from the theory of law, enabling the sociology of law to discuss law and matters juridical, including the dogmatic background of law.[63] In a similar vein, I allowed myself to be guided by canon law theory in the process of selecting suitable socio-legal approaches for my study. Admittedly, this is a limitation from the outset. Yet this decision seemed necessary if I was to make reliable statements about canon law and its unique legal characteristics. I therefore excluded avowed monistic approaches to the sociology of law, which consistently align the law with statehood. Most certainly, these approaches can be highly instructive about the development of law in modernity. But they are not well suited as a theoretical foundation for understanding non-state law such as the law of religious communities. From my point of view, we may only find a constructive link between the sociology of law and canon law theory in sociological approaches which are at least open to the idea of non-state law. But conversely, selecting sociological theories based on legal theory also means relying on a legal theory which adopts a favourable stance towards the sociology of law. For me, this meant referencing a legal theory which is theoretically open to the sociology of law. In order to meet this requirement, my study draws on a theoretical approach to law which places ecclesiastical practice

[62] See also Carbonnier (1974, p. 17).

[63] See Raiser (2007, p. 9).

at the heart of its considerations.[64] As I mentioned above, I am not interested in ecclesiastical reality alone; I also consider practice to be a key contributor to theory-building. Deploying a practice-orientated theory of this kind in order to probe the usefulness of sociological approaches for the purpose of developing a sociology of canon law therefore seems not only possible, but expedient. Knowledge about what theoretically and theologically constitutes the law of the church therefore served as my basis for defining criteria to decide whether a socio-legal theory is suitable for enhancing our understanding of canon law in its interaction with the life of the church.

My study draws on a range of socio-legal contributions including works from legal studies, general sociology, politics, organisation theory, and institutional theory. The two latter perspectives are particularly instructive about the church as an organisation and institution. It would be possible to create an entirely separate sociology of law for the church based on organisation sociology.[65] The church clearly exhibits many characteristics which are typical for organisations, such as bureaucratic consolidation, formalisation, and specialisation. Jurisprudence and law and society scholar Brian Tamanaha observes that these are typical for legal communities taking on an organisational shape in the nineteenth and twentieth centuries, noting, "The shift to regular payment tied to offices, growth of legal education institutions, specialization of legal knowledge, creation of specialized courts, and so on, were not unique to state law but aspects of commensurate developments across society."[66] These typical organisational elements in the field of law are also clearly manifested in the Catholic Church; indeed, some of them have existed for longer in the Catholic Church than in many other religious communities. The typical organisational effects of consolidation, formalisation, and specialisation such as the establishment of professional legal offices, institutions for legal training, and specialised court systems have existed in church at least in some degree since the twelfth century. Organisation theory and sociology therefore have a part to play in my study, even if they are not my primary focus. Neither is my study a comprehensive sociology of canon law *institutions*. As a study which seeks to lay the groundwork for a sociology of canon law, my book does not seek to scrutinise adjudication in church in greater depth, neither does it posit a specialist sociology of ecclesiastical administration or legislation.[67] It goes without saying, however, that the sociology of ecclesiastical legislation does have a role to play in discussing how canon law comes into being. And it is impossible to speak of the practical consequences of canon law without recourse to ecclesiastical adjudication and administration. I will touch upon these topics, but not as an exercise in developing my own institutional theory of canonical institutions. However, future studies might undertake this task.

[64] E.g. Hahn (2012a; b; 2014a; b; 2019).

[65] On understanding religious communities as organisations e.g. Petzke and Tyrell (2012); on the organisational challenges of the Catholic Church e.g. Gabriel (1989).

[66] Tamanaha (2017, p. 119).

[67] On this classification in relation to state law see Rehbinder (2014, pp. 135–201).

1.4.4 Learning from Empirical Data

In addition to drawing on existing theoretical works on the sociology of law, my study also draws on the *empirical* findings of others. Whilst their knowledge does not necessarily provide any direct answers to issues of canon law, it does frequently ask the right questions which are relevant for canon law, too. For example, Rüdiger Lautmann's renowned study *Justiz—die stille Gewalt* [*Judiciary—The Silent Force*] does not provide any insights into *ecclesiastical* adjudication and judicial decision making, but it does clarify which questions would be most enlightening to ask of ecclesiastical adjudication, too, and suggests methods which might be useful for the sociology of canon law to study these questions. Because my study is not an empirical study, it does not test any of these empirical methods, nor does it provide any answers to questions asked of canon law which require an empirical mode of enquiry. Instead, my study is merely a starting point which provides a theoretical basis for future empirical projects that aim to address these issues. In my study, the survey of empirical studies procured by other scholars primarily serves to establish the plausibility of my theoretical findings. Empirical findings might help to determine the degree to which a theory relates to reality. In my book, empirical studies from the sociology of law fulfil this test function of determining the degree to which my sociological theory on canon law relates to the legal reality in church. Empirical studies of the sociology of religion and, in particular, of church sociology, fulfil a similar function. These studies, which examine the life of the church, frequently touch upon legal aspects of ecclesiastical life, too.[68] They address matters of legal relevance, even if they do not study the law *as law* but as a part of the social reality of the church. These studies are therefore a rich source of knowledge for the sociology of canon law.

Distilling the relevant information from them is sometimes an arduous process, albeit a rather insightful one. The following finding might serve as an example. It derives from the famous empirical study on American Catholicism *American Catholics Today*, prepared by a group of church sociologists; I will discuss the study in greater detail in Sect. 5.2.3. *American Catholics Today* examined a number of issues including the degree to which Catholics in the United States agree with the magisterial teachings on sex and gender and ecclesiastical marriage and family doctrine.[69] The study showed that the vast majority of respondents *did not* endorse the magisterium's teachings. For the sociology of canon law, which examines the reception of *legal* norms, these findings on the acceptance of *moral* norms are most interesting. We cannot, however, simply take these findings on the church members' non-endorsement and non-compliance of moral norms out of their context and readily apply them to the law. Yet there is reason to suspect that this knowledge of the Catholics' stance towards ecclesiastical moral norms tells us something about their handling of legal norms as well. The scepticism of many church members

[68] E.g. D'Antonio et al. (2007); MDG-Trendmonitor (2010; 2021).

[69] See D'Antonio et al. (2007, pp. 95–104).

towards the official church's moral standards suggests that there is also a low level of acceptance of legal norms, particularly of those which have received much public criticism. *American Catholics Today* does not provide any empirical data to prove this claim exactly. But it does provide empirical data on moral norms which allow for an educated guess with regard to legal norms. In a similar vein, in the newest MDG-Trendmonitor of 2021, a huge empirical study on Catholicism in Germany, 70% of Catholics questioned in representative interviews stated that they find the church tends to stick with outdated norms.[70] Yet again, the study makes no particular mention of *legal* norms. Nevertheless, it does provide us with some hints how German Catholics at present perceive of canon law. Hence, while studies in church sociology do not usually provide direct results for the sociology of canon law, they often provide us with strong indicators of the legal reality in church. They are therefore of indispensable help in demonstrating the plausibility of my sociological theory, which I will elaborate in the following.

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[70] See MDG-Trendmonitor (2021, p. 46).

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