Chapter 3
Functions of the Law

Abstract In seeking to identify which function lies at the root of the law, some approaches of the sociology of law see the main function of the law in its contribution to ordering the social, whilst others primarily understand the law as avoiding and solving conflicts. Both functions might also be understood as complementing each other: law creates order—by anticipating, avoiding, and solving conflicts. The sociology of law and the sociology of canon law therefore need to shed some light on "law and conflict." This research area studies how the law deals with conflicts: by providing instruments of legal counselling and mediation, institutions for administering justice, and adjudication. Similar to secular law, canon law requires specialist knowledge and therefore provides legal counselling for "legal lays." However, institutions of law enforcement such as the police are absent in church. This finding begs the question in how far canon law can become effective without being supported by what Max Weber called a "coercive apparatus." Similar to secular law, canon law also revolves around a differentiated system of adjudication to deal with conflicts evolving in church.

Keywords Law as order · Social construction · Law as conflict resolution · Mediation · Administration of justice · Police · Adjudication · Class justice · Male justice · Clerical justice

3.1 Law and Social Order

Law is a unique type of social phenomenon, as it permeates throughout human societies and communities. Legal philosopher Ronald Dworkin described most famously in the preface to his book *Law's Empire* the largely undisputed omnipresence of law in virtually all areas of individuals' lives and group activities. Dworkin states that law is an ever-present reality that actually makes us into who we are,

> We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the

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> name of what our abstract and ethereal sovereign, the law, has decreed . . . We are subjects of law's empire.[1]

3.1.1 Law Creating the Social

Dworkin describes law as a phenomenon of *constructive* significance for human existence and social life that penetrates into even the most intimate nooks and crannies of our private lives. Its omnipresence is a precondition for the constitutive social power of law. The sociology of law often reflects this constitutive function of the law by resorting to vivid images and dense narratives to describe the way law influences human social relations in all areas of life.[2] In his 2017 book *A Realistic Theory of Law*, Brian Tamanaha provides one such description of how law influences life, noting,

> Rent an apartment, take out a mortgage, hook up gas and electricity, acquire a credit card, obtain a loan, open a bank account, sign with a phone carrier, download a computer program, enter an employment relationship, purchase goods, attend a sporting event or concert—for these and innumerable other daily transactions, while price can be haggled and quality and quantity decided, the legal arrangement is preset.[3]

In a similar vein, Klaus Röhl, in his textbook *Rechtssoziologie* [*Sociology of Law*], a classic survey of the sociology of law, states that law

> not only regulates the constitution of the state, the organisation of its subsystems, and the citizens' transactions. It also deals with medical malpractice and the performance of organ transplantations; it is at hand when a director opposes changes to his opera production, when soldiers complain about their superiors, when neighbours start a dispute, and when students take exams or protest against nuclear power plants.[4]

Law assigns authority and defines roles. Eugen Ehrlich describes it as "an organization, that is to say, a rule which assigns to each and every member of the association his position in the community, whether it be of domination or of subjection (*Überordnung*, *Unterordnung*), and his duties".[5] As an order which encompasses not only all members of the legal community but also their standing in the social fabric, law organises and legitimises power relations in societies, communities, and other groups. It constrains asymmetries of power to safeguard

[1] Dworkin (1998, p. VII).

[2] See also Luhmann (1995, p. 331; 2014, p. 1); Rottleuthner and Rottleuthner-Lutter (2010, p. 20).

[3] Tamanaha (2017, p. 140).

[4] Original quote, "regelt nicht nur die Verfassung des Staates, die Verwaltung seiner Untersysteme, es befaßt sich nicht nur mit dem Tauschverkehr der Bürger untereinander. Das Recht kümmert sich um ärztliche Kunstfehler und die Durchführung von Organtransplantationen; es ist zur Stelle, wenn ein Regisseur sich gegen die Veränderung seiner Operninszenierung wendet, Soldaten sich über ihre Vorgesetzten beschweren oder Nachbarn in Streit geraten, wenn Studenten Examen ablegen oder gegen Atomkraftwerke protestieren", Röhl (1987, p. 3).

[5] Ehrlich (1936, p. 24).

freedom—for example by guaranteeing individual liberties. It links social relations with legal expectations, and assigns rights and duties to the members of the legal community. As a stable and reliable system of rights and duties, law generates security of expectation. On the one hand, this benefits individuals and groups who find themselves confronted by law; for them, security of expectation means there is no doubt about what the law expects of them, thereby giving them the choice whether to abide by or break the law. On the other hand, as Manfred Rehbinder stresses, security of expectation also means that the legal subjects may expect that others, when engaged in a legal transaction, behave in a predictable and reliable way.[6] In this respect, law guides human behaviour. In addition, it also seeks to avoid conflicts of interest and conflicts of distribution to ensure a secure society. It stabilises exchange relationships and increases their prospect of success. Should they fail, the law possesses instruments to bring about the orderly settlement of conflicts. Brian Tamanaha notes,

> Law serves a fundamental role in coordinating social behaviour and responding to conflicts between actors (individuals and entities). Legal rules on property, personal injuries, binding agreements, labor, spousal relations, and offspring address the basic conditions of human social interaction. ... All societies have rules on these matters, though they vary greatly depending on cultural and religious values, the economic system, the political system, and the level of social complexity.[7]

Law provides clearly defined options for action and it embeds them in an ordered structure. In this vein, legal scholar Bernhard Losch understands the legal order as opening up a *realm of action* where individual and collective action may take place based on reliable rules.[8] This reveals that law not only has a constraining function, it also serves as an enabler, as Niklas Luhmann explains, noting, "Law is often understood as a *restriction* on behavioural choices. Equally well, however, law can be understood as *support* for behaviour, support which would not be possible without law."[9] But the constraining function of law is also important. It discounts certain actions and sanctions certain behaviour. To do this, the law frequently has it its disposal a range of punishment mechanisms.

3.1.2 Creating Social Order

The sociology of law deals with the fundamentally constructive value of law for human social life primarily by referring to *order theories* which are rooted in action theory or systems theory. In the words of Klaus Röhl, these theories define law as a "phenomenon of producing and protecting a certain degree of conformity and

[6] See Rehbinder (2014, p. 104).
[7] Tamanaha (2017, p. 127).
[8] See Losch (2006, p. 34).
[9] Luhmann (2004, p. 151).

integration which creates the fact of society".[10] The contribution of the law to creating society can be seen in a number of its functions. Manfred Rehbinder identifies five functions of the law for the construction of the social: an organisational function, insofar as the law by organising and directing a group initiates activities which integrate the group; an ordering function, insofar as the law guides human behaviour; a constitutional function insofar as the law organises and legitimises political governance; a supervisory function insofar as the law enforces its order through the administration of justice; and a reactive function insofar as the law seeks to settle disputes.[11] These functions enable the law to contribute to the success of human affairs on a number of different levels. Interestingly though, law seems to be particularly effective when it exerts an influence on society without being directly perceptible as a social regulator. Klaus Röhl, for instance, observes that individuals frequently do not view their legal relations—such as the relations between contracting parties—as *legal* relations but rather tend to view them as mere social relations.[12] It may be precisely this invisibility of the law that gives it its tremendous power to form the social. Legal scholar Naomi Mezey picks up on this thought by saying that law achieves its effectiveness by hiding its constitutive function for shaping reality behind other mechanisms, noting, "legal ground rules are all the more effective because they are not visible as law. Rather than think of legal permission as law, we tend to think of it as individual freedom, the market, or culture."[13] Law is most effective, as Mezey asserts, when its effect is not perceived as an effect *of law*, but as individual power, the market logic, or mere convention. Nevertheless, "all human action, from going to bed to going to work, is either implicitly or explicitly defined and structured by law, which operates all the more effectively for appearing not to be law."[14] The rather veiled significance of law makes it quite difficult for the sociology of law to research law in its function of constructing the social. It makes studying the law and its interaction with social reality particularly challenging. It is for this reason that Klaus Röhl labels the sociology of law as "a hyphen-sociology of a special kind".[15] Whilst other sociologies—such as medical sociology or the sociology of art—can focus on a distinct segment of social reality, the sociology of law is tasked with studying law as a whole and how it permeates the reality of all areas of human activity. With this in mind, it seems necessary to discuss whether we are in fact dealing with a "hyphen-sociology" at all when speaking of the sociology of law. Niklas Luhmann, for instance, describes his work on law as a sociology of law, albeit as an approach which is actually not exclusively or even primarily interested in law itself, but rather in its

[10] Original quote, "Phänomen der Herstellung und Wahrung eines bestimmten Grades von Konformität und Integration, der die Tatsache der Gesellschaft ausmacht", Röhl (1987, p. 129).

[11] See Rehbinder (2014, p. 112).

[12] See Röhl (1987, p. 464).

[13] Mezey (2001, p. 48).

[14] Mezey (2001, p. 51).

[15] Original quote, "eine Bindestrich-Soziologie besonderer Art", Röhl (1987, p. 3).

function in *society*. For this reason, as Luhmann argues, it is adequate to understand his sociology of law as part of his theory of society.[16] With a view to Luhmann's general theory of society, it therefore makes good sense either to call the sociology of law a "hyphen-sociology" (along with a host of other "hyphen-sociologies" that contribute to the theory of society) or to say that such hyphen-semantics are misleading in themselves, because we are not just studying a single segment of social reality, but by studying law are actually trying to come to an understanding of society itself. Roger Cotterrell reacts similarly when he says, "If we understand law as a social phenomenon we understand much about the society in which it exists."[17] This statement, as I find, is also very true for canon law and therefore applies to the sociology of canon law as well. Comprehending the reality of the ecclesiastical legal order is key to understanding the modern-day church. Examining the legal reality of the church helps us to identify the current state of the church.[18] Due to this, the sociology of canon *law* is, in its own way, a sociology of the Catholic Church.

3.1.3 Law Creating the Church

Law is also an omnipresent phenomenon in church, and serves as a socio-constructive force within the church. Canon law, writes Anglican canonist Norman Doe, "exists to facilitate order in the Church, it exists to make the Church more visible in society . . ., and it exists to distribute duties and to confer and protect the rights of its members."[19] As a system of behavioural and decisive norms, canon law creates order within the church. Furthermore, Doe's argument that canon law gives the church social visibility points to the capacity of the law to create order not only by acting as a cohesive force in groups, but also by giving those groups a discernible shape which marks them out from other groups and from society as a whole. This is true for all legal communities, the church being no exception. Correspondingly, Norbert Lüdecke and Georg Bier write in their introductory book on canon law that canon law is omnipresent in church.[20] No action which takes place in church is far from the law. Whoever operates within the church does so within the legal space of the church. This might astonish some readers at first, but upon reflection it makes good sense if we recall the degree to which ecclesiastical structures are founded on canon law: Law regulates who is a layperson or a cleric, what conditions must be

[16] See Luhmann (2004, p. VII).

[17] Cotterrell (1984, p. 2).

[18] At present, no canonist is clearer about this connection than Norbert Lüdecke, see Lüdecke (2021). Lüdecke emphasises that understanding the law is understanding the church, whilst ignoring the law—as many Catholics do—leads to a critical lack of understanding about why the hierarchy acts in the way it does and why the church, at present, is in the state we find it in.

[19] Doe (1992, p. 336).

[20] See Lüdecke and Bier (2012, p. 14).

fulfilled to become the latter, and how this takes place. Law determines which powers church officials have. Law settles who has access to the sacraments—and who does not. Of course, these issues are not genuinely legal and are not decided in the medium of law in the first place; instead they are primarily issues of ecclesiastical doctrine. Nonetheless, they have come to find their way into the law; and here they crystallise into rules and structures and become part of the organisational framework of the church. The above-mentioned examples also serve to illustrate that canon law—in addition to creating order as all law does—supports the church in providing religious functions. Norman Doe notes, "canon law has, what might be described as its end, a purpose formulated by theological doctrine. The canon law exists to serve the purposes for which Christ instituted the Church . . ., it exists to enable and organise the constitutional, liturgical, sacramental, pastoral and proprietorial life of the Church".[21] Whenever the ecclesiastical constitution, the sacramental life of the church, pastoral issues, or financial matters are in dispute, canon law is never far away: it defines authority and roles; it specifies rights and duties; it organises ecclesiastical power structures; it seeks to avoid conflict and offers solutions which might defuse those conflicts that do arise. In doing these things, the law creates an arena of action, which enables the church to pursue its goals and within which the life of the church can unfold in an orderly manner. From the perspective of the sociology of law, it is therefore perfectly plausible to claim that one cannot operate within the church without finding oneself within the legal space of the church.

3.1.4 Ecclesiological Endorsement

Ecclesiastical legal theory supports this finding. The Second Vatican Council's ecclesiology supported a concept of church which encompasses the heavenly and spiritual church and the concrete and earthly church as an indivisible union. In the Dogmatic Constitution *Lumen gentium*, the council noted the church's view of itself as a single entity consisting of both a spiritual, salvific communion as well as of a hierarchical society,

> 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.[22]

Seeking to explain how one might conceive of this, the text in *Lumen gentium* draws on a Christological analogy. The intimacy of the heavenly and earthly church makes the church itself a phenomenon of the incarnation. The text states, "For this reason,

[21] Doe (1992, p. 336).

[22] No. 8. *Acta Apostolicae Sedis, 57,* 11; English version: www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html. Accessed 22 June 2021.

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".[23] This passage parallels the intimacy of the earthly church and the spiritual church with the two natures of Christ. In the same way that Christ is fully human and fully divine, the church is both an earthly entity and a community of heaven. Its two natures are, as in the Christological confession of the Council of Chalcedon, "unconfused, unchangeably, indivisibly, inseparably".[24] Using this Christological paradigm, *Lumen gentium* succeeds in creating a twofold identity for the church in which the sociologic of the church merges with its theo-logic, as systematic theologian Hans-Joachim Höhn describes, "Both dimensions, the sociological and the theological, are united in the church, 'unconfused' and 'undivided' (see LG 8). Therefore, this 'chalcedonensical signature' is the real reason why the social reality of the church may be interpreted sociologically as well as theologically."[25] One has to note though, that *Lumen gentium* does not mention the *law*. While the text accentuates the intrinsic connection between the church as a spiritual community and the church as a social entity, it does not qualify the earthly assembly explicitly as a legal community. However, the magisterium has traditionally considered the constitution of the concrete and earthly church to rest on law. *Lumen gentium* does not openly say so. Canonists, however, have read the magisterium's reference to the earthly church as a visible assembly and a hierarchical society as denoting the church as a social entity structured by law. In their understanding, they view canon law not as a merely facultative form of church organisation, but as an essential and indispensable characteristic of a church which exists in the world. In this light, trying to conceive of a church "without law" is impossible. Many canonists therefore argue that the church would and could not exist without its legal dimension. In fact, as they find, the spiritual church, when occupying a place in the world as a visible entity, always and by necessity becomes a legal entity.

In consequence, we may study the church as an earthly entity and as a legal institution by using the methodological approaches of the social sciences. And we may study its law by using the methodological approaches of the sociology of law. The law of the church is a human construct—and therefore open to academic endeavours to understand human institutions. Yet at the same time, due to the church not merely being an earthly but also a spiritual community, there is another side to its

[23] No. 8. *Acta Apostolicae Sedis*, 57, 11; English version: www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html. Accessed 22 June 2021.

[24] Council of Chalcedon, Christological Confession. In Migne (1863, p. 514D).

[25] Original quote, "Beide Dimensionen, die soziologische und die theologische, vereint die Kirche in sich gleichwohl 'ungetrennt' und 'unvermischt' (See LG 8). Diese 'chalzedonensische Signatur' ist daher der eigentliche Grund, daß die gesellschaftliche Wirklichkeit der Kirche sowohl einer soziologischen wie einer theologischen Interpretation unterzogen werden kann", Höhn (1986, p. 353).

law. According to traditional teaching, the law serves salvation. This aspect touches upon issues which only theology can investigate and understand. Canonist Eugenio Corecco expresses this as follows,

> As actual historical facts, the ecclesiastical law and the canonical institutions bear some of the content that tangibly expresses the legally binding dimension of the mystery of the incarnation and the church. As an ecclesial reality, which is formed by legal institutions in which the legally binding dimension of the church is realised in history, canon law is one of the essential conditions in which the tradition of the church and, hence, the truth contained in the Word of God and the sacraments is expressed by implied facts.[26]

According to Corecco, the law of the church is an expression of the divine reality. It reifies the divine in a contingent form, however, in a form which humans may experience in the real world. Corecco expresses this in his statement, "the legal fact—whenever it comprehends the mystery of the church precisely—is in itself an expression of theological truth."[27] Seen in this way, canon law acts to some degree as the historical substantiation of the revelation, "As a reality in which the experience of the church . . . is historically institutionalised, canon law—as an essential element in which tradition becomes real—carries with it at least part of the revealed truth, the meaning of which it attempts to understand using its own scientific instruments and its own way of thinking."[28] Such instruments must be theological. But whilst the theological dimension of canon law is admittedly quite alien to the social sciences, social science is most certainly still in a position to examine how and whether the law has a noticeable effect on legal practice and on the religious life of the church.

3.1.5 Concealed Canon Law

Similar to state law, which is most effective when hiding its constitutive function for the social behind other mechanisms, it also seems to be the case with canon law that it is most effective when it cannot be directly identified as law. Although canon law

[26] Original quote, "Als konkrete historische Fakten tragen das kirchliche Gesetz und die kanonischen Rechtsinstitute einen Teil des Inhalts in sich, indem sie die rechtsverbindliche Dimension des Mysteriums der Inkarnation und der Kirche greifbar zum Ausdruck bringen. Als kirchliche Wirklichkeit, die von Rechtsinstituten gebildet wird, in denen sich die rechtlich bindende Dimension der Kirche in der Geschichte konkretisiert, ist das kanonische Recht eine der wesentlichen Gegebenheiten, in denen sich die Tradition der Kirche und folglich die im Wort und Sakrament enthaltene Wahrheit durch konkludente Sachverhalte bekundet," Corecco (1994, p. 43).

[27] Original quote, "der rechtliche Sachverhalt—wenn er das Mysterium der Kirche genau erfaßt—in sich selbst Ausdruck der theologischen Wahrheit ist", Corecco (1994, p. 43).

[28] Original quote, "Als Wirklichkeit, in der sich die kirchliche Erfahrung . . . geschichtlich institutionalisiert, trägt das kanonische Recht als wesentliches Element, in dem sich die Tradition verwirklicht, wenigstens einen Teil der geoffenbarten Wahrheit in sich, deren Sinn es mit seinem eigenen wissenschaftlichen Instrumentarium und in seiner eigenen Denkweise zu erfassen sucht," Corecco (1994, p. 53).

permeates all aspects of ecclesiastical life and is of fundamental significance for the church, many Catholics are either completely oblivious to it, or view it as some kind of peripheral phenomenon with an exclusively selective significance for some specific individuals in church, such as ecclesiastical officeholders. In the 1970s, Patricia Goler used the example of black Catholics in the USA to point out that canon law had virtually no significance for them, noting, "canon law or canon lawyers—they aren't real to the average black Catholic."[29] This is just as true for the average white Catholic nowadays. Canon law plays no obviously significant role in the everyday life of many Catholics, and only few see it as having any constitutive effect on their individual, social, or spiritual life. Here, it might be interesting to add a personal observation from the viewpoint of academic theology. It appears to me that of all theological disciplines, it is in particular the theological disciplines which study the reality of the church that frequently overlook or neglect the legal side of the church. For example, in current pastoral theology, which is clearly most concerned with the reality of the church, the legal dimension of the church plays virtually no role at all, or is cast aside by many pastoral theologians as an obstacle to church development.[30] Most remarkably, many pastoral theologians do not focus on the law, even though this might allow them to address the often disruptive influence of the law on the pastoral reality of the church; instead they mostly ignore the legal dimension of this pastoral reality as if all of the problems associated with canon law might vanish by ignoring the law altogether. An anecdote may help to illuminate this phenomenon. In 2017, canonist Norbert Lüdecke caused something of a sensation at a pastoral-theological congress organised by the Bochum Centre for Applied Pastoral Research (ZAP), when he adamantly expressed the key role of canon law in giving the present church its current shape.[31] The irritation with which many conference participants reacted to Lüdecke's insistence on the major significance of the law in shaping the church reveals that for many practical theologians and active Catholics it is obviously uncommon to examine the law and to reveal its constructive and sometimes destructive function in church. Attempts to identify the underlying causes for this bring to light a number of sociological questions. We may wonder if and why there is less theological interest in the legal dimension of the church than we might expect in light of *Lumen gentium*'s ecclesiology; after all, the document alludes to the theological relevance of the earthly church as a concrete social entity organised by human instruments of social structuring, which traditionally include the law. We may likewise wonder if the law as a constitutive feature of the church has fallen into such disrepute that it is no longer regarded as capable of constituting and integrating the church by creating order and mediating in conflicts. We may discuss if many Catholics perhaps no longer trust the legislator to adapt and develop current law, feeling instead that a life with canon law is only possible if one ignores the law or those parts of it which seem impossible to change. We may

[29] Goler (1972, p. 295).

[30] E.g. Bucher (2018, pp. 160–164).

[31] See Lüdecke (2017).

discuss whether the refusal of many practical and pastoral theologians to deal with the legal structure of the church is also a criticism of canonists and canon law studies. We may critically ask ourselves if we have disappointed the faith placed in us by other theologians by using our scholarly apparatus mainly to whitewash current canon law and to defend the legal status quo. We may also ask ourselves if we have given our colleagues reason to suspect that we are the legislator's extended arm and have no genuine interest in studying canon law critically. It is difficult to identify the motives underlying many Catholics' and theologians' impression that it makes better sense to ignore canon law than to subject it to sociological scrutiny. However, this myopic attitude of overlooking the law brings with it a number of problems. Canonist Werner Böckenförde has addressed some of them. Böckenförde himself was greatly interested in initiating a reform of the church and its law.[32] He placed his hopes in critical Catholics with a "clear-sighted" view of the law as the engines of reform. Böckenförde believed that reform requires knowledge, hence ecclesiastical legal reform requires a thorough knowledge of canon law. For Böckenförde, in consequence, neglecting canon law or underestimating its importance is tantamount to actually holding back reform. He felt that trivialising the law is in fact a strategy for stabilising the existing system. According to Böckenförde, anybody who fails to recognise the law or who views it as something of little practical relevance is inclined to leave it as it is—and therefore not question those structures of the church which require contestation. According to Böckenförde, the absence of an active critical debate on the law is therefore an implicit acceptance of the church's organisational structure. Böckenförde's thesis abuts against Naomi Mezey's observation that law is frequently at its most effective when it is perceived less *as law* and more as everyday normativity, as tradition, culture, custom, or moral imperative. In a similar vein, Böckenförde believes that canon law is more effective when Catholic individuals and groups are largely unaware of it. However, his argument becomes rather more piquant when he says that he does not believe that the church members' legal myopia has emerged out of nowhere, but posits that church authorities have actually *fostered* and encouraged it. Drawing attention to the need for reform is clearly not in the interest of groups within the church that are in fact benefitting from the law in its current form. Ecclesiastical authorities who play down the significance of canon law as a medium of church organisation should therefore ask themselves where their interest lies, as Böckenförde finds, noting, "Anybody who trivialises structural issues must be prepared to answer the question whether he might be a beneficiary of the status quo."[33] Böckenförde also finds that just as we should treat statements which trivialise structural issues with scepticism, we should also be suspicious of strategies which try to occlude the law within theology or push it aside in favour of ethics. This is observable particularly within theological approaches to canon law. In fact, theologising or spiritualising the law, in Böckenförde's eyes, might be an attempt

[32] See Böckenförde (2006, pp. 153–154).

[33] Original quote, "Wer Strukturprobleme bagatellisiert, muss sich fragen lassen, ob er möglicherweise Nutznießer des Status quo ist", Böckenförde (2006, p. 154).

to relativise the very few official instruments which protect the church members from the authorities' despotism and to take away from them those measures that they do actually possess to assert their rights within church. By emphasising "community" and downplaying "the law," church authorities tend to bring their legal subjects to heel by making them feel comfortable and at home in church, as Böckenförde suspects. It seems fair to assume that people who feel at home in church are not going to be the ones who feel inclined to seek legal redress. For the ecclesiastical authorities, who profit from this stasis, this guarantees the status quo. Böckenförde adopts a similarly critical stance to lines of argument that accord only secondary importance to complaints about canon law and ecclesiastical legal structures in contrast to the truly burning issues in church. Such arguments, as Böckenförde notes, work with false alternatives, for instance by setting third world issues or the question of God against structural issues, thereby disqualifying those Catholics who complain about the law as less focused on pressing moral issues. Böckenförde, at least, is convinced that contrasting legal issues with third world problems is a bogus argument, as he does not see why somebody with an interest in solving structural issues in church should be uninterested in social issues or the question of God. Irrespective of whether the tactic is one of simple concealment, theological cloaking, or moral disqualification, Böckenförde believes certain circles in the church are actively involved in maintaining the status quo and preventing change. This is a rather suspicious and distrustful view of things. Nevertheless, coming from an insider—Böckenförde was a canon at the cathedral chapter of the Diocese of Limburg and managed the legal department of the diocese for many years—we should certainly not underestimate the sociological value of his observations.

To these observations one may add a further observation which has taken shape in recent years, namely that church authorities tend to render ecclesiastical law unrecognisable by hiding it behind the notion of *culture*. Those in charge then blame a certain established male culture or the traditional image of women in Catholic circles for the fact that there are too few women in leading positions in the church—and brush aside the canonical norms on the power of governance and ecclesiastical offices which structurally exclude women from senior positions in church (see canons 129 §1, 274 §1 CIC/1983). Many voices also dismiss celibacy as part of clericalism, of a male cult of purity and elitism, or as an expression of the church's discomfort with sexuality. This might all be true; however it misses the point that celibacy is actually a legal obligation (see canon 277 §1 CIC/1983) and might be overcome fairly easily by changing the law. Saying this does not of course mean that I want to drive a wedge between law and culture. The connection between law and culture is rather obvious. Law is never established in a vacuum, but emerges from traditional beliefs, cultural values, and social practices. In this light, working on problematic aspects of ecclesiastical cultures may well result in changes to these cultures and, in the long term, to changes in ecclesiastical law as well. However, this path is an arduous one. It is slow and difficult to establish more female leaders in church as long as the ecclesiastical structures disadvantage women. And it is hard to fight clericalism as long as the ecclesiastical structures support celibacy and with it a cult of purity, elitism, and discomfort with sexuality. Approaching reform the other

way around is much more effective. Whilst changing misogynist or clerical cultures is slow, changing the law disadvantaging women or banning married family men from entering clerical service might be done quickly, should the legislator perceive the need to change these norms of canon law. None of these norms are "divine law." They may be changed as soon as the legislator believes they should be changed. For church members afflicted by these and other laws, it is also much easier to target the law instead of initiating a cultural debate about what has to change in a particular ecclesiastical culture to make the church a place more welcoming to female leaders or to overcome a culture of clericalism. By veiling legal norms and hiding them well in the diffuse concept of culture, those who use this strategy make it difficult for others to identify the law and to criticise it. In this light, it is much harder for critical church members to target any resistance clearly and purposefully against specific norms of canon law. It is therefore apparent that dressing the law in the mantle of culture is also one way of protecting the law against change. Over the last couple of years it has become obvious how church authorities use this kind of cultural argumentation as an easy way of resisting reform. The key cultural argument used by the authorities pretends to be an expression of concern about the multiple cultures of the global world church. In the current reform debates, we often encounter the argument that western churches may be ready to accept women in leading roles in church, while many churches of the global South may not be ready to embrace female leaders. As the church is a unity, as many bishops argue, it is impossible to progress in the global North in those matters where the South disagrees.[34] In a similar vein, bishops ask their church members for patience with regard to blessing homosexual unions in church with the argument that they themselves would welcome that practice but that it would not find a positive reception in other parts of the global church and should therefore be rightfully sanctioned by Rome to protect the unity of the church.[35] It is rather astonishing that church representatives who usually shy away from culture and cultural arguments, suspecting them of promoting "relativist" positions, suddenly rediscover culture in this context and cultivate its function as a preserver of the status quo. We may understand both the strategies which Böckenförde discovered, as well as the protection of law by relying on the cultural argument, as diversionary tactics, which is what Böckenförde called them.[36] From the socio-legal perspective, they both reveal that some ecclesiastical authorities believe they can safeguard canon law and its effectiveness by concealing the law as a mechanism of control within the church. This concealment of its legal character means that canon law acquires its effectiveness in a unique way, namely by evading the deconstruction that would otherwise be possible if it were in fact clearly exposed

[34] Even liberal bishops argue that Catholics should be more patient with regard to women's ordination, as this decision applies not only to the western but to the global church, see Frank (2010). Instead of pointing at the justice problem connected with excluding women from ordination, they refer to *culture* as one impediment standing in the way of developing this issue in church.

[35] See Glenz (2019).

[36] See Böckenförde (2006, p. 154).

as law. Böckenförde identifies this finding as a call to action: active Catholics should always scrutinise structural aspects of the church carefully to excavate and reveal the legal structure of the church. My study, which as a sociology of canon law takes a largely descriptive approach, contributes to doing exactly this. Whilst I do insufficient justice to Böckenförde's normative concerns with church reform, I do wish, however, to lay the foundations of a sociology of canon law as an approach to the law within which Böckenförde stands as one of its pioneering minds.

3.2 Law and Conflict Resolution

The discussion thus far has been about law as a mechanism of order which serves to construct and integrate societies and communities. In the sociology of law, this perspective is at the forefront of approaches which we might subsume under the heading "order theories." These theories are supplemented—and occasionally criticised—by approaches which view law primarily as a mechanism of conflict resolution. Such conflict theories see the primary function of law in avoiding and pacifying conflicts. Most of these theories do not dispute that law is indeed a bringer of order, but they argue that this ordering function is secondary to the function of the law as a maker of peace. Thomas Raiser explains that sociological conflict theories see a threefold function of the law, of avoiding unnecessary conflict, of reacting to existing conflict, and of solving or containing conflict.[37] The sociology of law must not lose sight of the fact that legal conflicts can be highly complex. Vilhelm Aubert therefore divided them into conflicts of interest ("competing interests") and differences of opinion about norms or facts ("dissensus"); however, many conflicts are, as Aubert also admitted, a blend of both.[38] Conflict theories see the primal, founding moment of law in the social situations in which trust as the basis of all social relations diminishes to the degree that it is replaced by the law as "calculated mistrust",[39] as Klaus Röhl calls it. In this light, Aubert describes law as "a specific way of perceiving the participants in a conflict and the relationship between them."[40] According to conflict theories, the law arises from conflict or in anticipation of possible conflict. Nevertheless, this understanding of law reveals only part of the overall picture, as Niklas Luhmann observes when he states, "law develops its special instruments out of controversies about law."[41] Here, Luhmann stresses that law does indeed arise out of conflict, but he also makes clear that it arises out of conflicts about *what the law is*. Luhmann's observation ties in with the finding that law is not only concerned with settling conflicts, but is frequently actually the source

[37] See Raiser (2007, p. 274).

[38] See Aubert (1963, p. 26–42).

[39] Original quote, "kalkuliertes Misstrauen", Röhl (1987, p. 464).

[40] Aubert (1963, p. 26).

[41] Luhmann (2004, p. 153).

of conflict itself. His remark also indicates another characteristic of the law, namely that law precedes conflict about the law. If we read Luhmann's sentence in this way, order theory and conflict theory align. One might therefore conclude that the primary function of law is to bring order insofar as it is conflict about the ordering function of the law (among other things) that unleashes the potential of the law for conflict resolution. This observation also raises the point that law and its function as a bringer of order becomes *visible* primarily in conflictive situations. In this vein, Eugen Ehrlich points out that individuals only really see the law as law when they find themselves in critical situations. As members of a legal community frequently tend to understand their relations not as legal relations but as social relations characterised by mutual cooperation and trust, they tend to discover the legal nature of their relations only when conflict undermines their trust.[42] According to Ehrlich, conflicts therefore serve to reveal what was already the case: that many human social relations are rooted in law.

3.2.1 Subjective and Objective Conflicts

Even if my study examines the law primarily through the prism of order theory, the sociology of law must still provide answers which explain the most evident connection between law and conflict. Whether and how the law seeks to mitigate conflicts is an area of socio-legal research in itself. In the first place, as Klaus Röhl has pointed out, we should acknowledge that the understanding of "conflict" which is appropriate for describing the law's function as a responder to conflict is a limited one. The law is primarily interested in *subjective* conflicts; it consequently deals with conflict between individuals and between individuals and organisations, as Röhl observes.[43] Legal conflict resolution also does little more than end acute disputes, as Röhl states, noting, "From a juridical point of view conflict resolution has been successful when the acute conflict is over."[44] In doing so, the law in fact only touches the surface of conflicts. It frequently avoids addressing the structural roots of conflicts, such as justice problems which foster conflicts and afflict the social. This is at least the critical view put forward by *objective* conflict theories, as Röhl explains, as objective conflict theorists tend to trace legal conflicts back to more fundamental social conflicts. They tend to see the parties' fundamental social oppositions as lying at the root of many legal conflicts. Objective theories, for instance, tend to understand labour law cases as relying on the structural antagonism between employers and employees, tenant law suits as rooted in the fundamental disagreement between tenants and property owners, and many marriage cases as being rooted in the

[42] See Ehrlich (1936, pp. 23–24).

[43] See Röhl (1987, p. 515).

[44] Original quote, "Aus juristischer Sicht ist die Konfliktregelung gelungen, wenn der akute Streit beendet ist", Röhl (1987, p. 515).

structural discrimination against women.[45] Merely settling the legal disputes between the individual parties does not therefore contribute to resolving the actual social conflicts underlying the disputes. In consequence, law is not only relatively ineffective from an objective viewpoint, as Röhl emphasises; we may also actually view it critically as a form of suppression of the actual social conflicts or of the individualisation or personalisation of social conflicts.[46] This is virtually unavoidable from a legal standpoint, as Röhl contends. He acknowledges that there might be good reason to criticise the law's functional limitations in relating to the true conflicts underlying the individual disputes; however, he does not see an option for changing this problem.[47] In any case, from a socio-legal perspective we have to state that legal conflict resolution does little more than defuse the acute individual conflict itself. It is not within the power of the law to settle the objective conflicts; this is not the responsibility of lawyers but of politicians. It is up to legal politics to deal with objective conflicts, not up to the law itself.

This observation is likewise true with regard to canon law. From the perspective of the sociology of canon law we may therefore note the limited scope available to canon law for resolving conflicts in church. Whilst canon law can help to settle specific conflicts between ecclesiastical parties, we cannot realistically expect the law to resolve the structural problems which bring about many individual conflicts in church. In parallel to Röhl's observations with regard to the social foundation of secular legal conflicts, conflicts in church are also frequently rooted in objective problems which pit legal subjects of canon law against one another. Structural conflicts then come to a head in individual conflicts. I want to explain this by way of an example. One major source of structural conflict underlying individual conflicts in church is that magisterium and legislation use the division of church members into clergy and laity to ascribe fundamentally different rights and duties to these two groups. As already mentioned, under current law, only clerics can occupy leadership positions and can obtain offices attributed with the power to govern the church (see canons 129 §1, 274 §1 CIC/1983). In consequence, the law largely excludes lays from decision making in church. Not only do laypeople enjoy only limited rights within the church, they also have no access to the decision-making processes that might change this state of affairs. From these fundamental structural issues arise manifold individual conflicts in church. I would like to mention a concrete case to further elucidate my observation. It evolved between the diocesan bishop of the German Diocese of Regensburg and the lay organisations of his diocese in 2005–2006. The then-diocesan bishop of Regensburg, Gerhard Ludwig Müller (who later became the prefect of the Congregation for the Doctrine of the Faith), had fully reorganised the bodies of lay participation in his diocese in 2005, thereby considerably restricting the lays' rights to participate in diocesan decision making. One Catholic affected by this regulation, Johannes

[45] Examples given by Röhl (1987, p. 515).
[46] See Röhl (1987, p. 515).
[47] See Röhl (1987, p. 515).

Grabmeier, appealed to the Roman Curia against the bishop's reform by taking legal recourse (see canon 1737 CIC/1983). This recourse was unsuccessful. In 2006, the Congregation for the Clergy reaffirmed the bishop's decision formally and substantively.[48] Following these events, Grabmeier wrote a book on the case, revealing his major frustration with the curia's decision and its procedural standards.[49] Grabmeier voiced his displeasure particularly with his treatment as a plaintiff, above all with the congregation's refusal to talk to him personally. In his book he describes the curia as only protecting the members of the hierarchy, immunising them against laypeople's claims, whilst not even allowing individual Catholics a right to speak up and to explain their position in person. The events as Grabmeier retells them in his book describe an individual conflict. However, it is most obvious that there is a structural issue underlying it. This structural issue cannot be addressed adequately by relying on the law—ironically, it is the law itself that organises the ecclesiastical hierarchy and its rights in a way that is unfavourable for laypeople and their claims. Grabmeier's case would therefore not have changed the current hierarchical organisation of the church one iota even if he had been successful in winning his individual case—which he was not. The conflict resolution mechanisms available to law, including canon law, are not sufficiently effective to solve the structural issues underlying concrete conflicts. Instead, these issues need to be addressed at the political level. Yet this sphere of ecclesiastical legal politics is widely inaccessible to laypeople due to the hierarchical structure of ecclesiastical decision making, including legal politics. This creates something of a vicious circle. It is the law that brings about structural disadvantages for laypeople, including their exclusion from those political circles which could actually change the law. This state of affairs makes it very clear why canon law often fails to pacify even individual conflicts. As the mentioned example shows, the curia decided Grabmeier's individual legal case. However, this did not help to reconcile the parties and to settle their personal conflict, because it left Grabmeier seriously doubting whether the legal treatment he had received was truly fair.

3.2.2 Simple and Complex Structures

Law can only therefore function as a conflict resolution mechanism up to a point. To establish what law is actually capable of achieving in this respect, it helps to study the diverse applicable ways in which the law deals with conflict. In his work *The Division of Labor in Society* (1893), Durkheim examined which characteristics of legal conflict management are cross-cultural and what they indicate about the developmental state of a legal order. Richard Schwartz and James Miller used

[48] See Congregation for the Clergy (2006).

[49] See Grabmeier (2012).

Durkheim's findings as the basis for an empirical study of their own. In their study, Schwartz and Miller analysed the legal conflict resolution models of fifty-one peoples and tribal societies in the light of Durkheim's observations on societies with a low and high division of labour. They used three of the institutions of conflict management named by Durkheim by way of example: "mediation" as the participation of a neutral third party in settling conflicts; "police" or other agencies for the administration of justice equipped with the means of coercion to enforce the law; and "counsel" or advisory structures providing impartial and professional legal support for conflict parties. Schwartz's and Miller's empirical study of these three institutional approaches to conflict resolution found that even societies with a low division of labour contained restitution-orientated practices of mediation (Durkheim, on the contrary, had presumed they would only be found in societies with a high division of labour), whereas police or other agencies for the administration of justice were only evident in societies with a high division of labour (also contrary to Durkheim's assumption).[50] Legal counselling was also generally found only in societies with a high division of labour.[51] These findings are interesting in themselves—not least because they contradict some of Durkheim's assumptions. However, they tell us little about religious legal orders primarily because these do not fit neatly into Durkheim's system of societies with a high or low division of labour. Nevertheless, I believe it is possible to draw some tentative conclusions. Durkheim equates a high division of labour with complex modern societies; he equates a low division of labour with low levels of complexity. Certain parallels are therefore obvious insofar as it is possible to identify more or less complex groups among religious communities. Viewed through the lens of organisation theory, the Catholic Church is a fairly complex religious community. It exhibits a high level of functional differentiation, specialisation, and professionalisation—as can be seen in the highly differentiated structure of church ministries and offices. Parallels therefore exist to Durkheim's division of labour criterion. It therefore makes some sense to discuss Schwartz's and Miller's findings in the light of the sociology of canon law, too.

3.2.3 Counselling and Mediation

Schwartz and Miller found that virtually all societies had some kind of framework of *mediation* to settle social conflicts. This comes as no great surprise insofar as the sociology of law holds mediation to be the founding idea of adjudication across all cultures—Martin Shapiro commences his book *Courts* by calling mediation the "prototype of courts".[52] The core principle is that conflicting parties can call on the support of a third party in disputes they are unable to resolve themselves. The

[50] See Schwartz and Miller (1964, p. 166).
[51] See Schwartz and Miller (1964, p. 167).
[52] Shapiro (1981, p. 1).

roots of institutionalised conflict resolution therefore lie in the transition from the dyad of the conflicting parties to a *triad*, as legal sociologists such as Aubert and Shapiro state, drawing on the findings of philosopher and sociologist Georg Simmel.[53] Simmel stated that the triad was a fundamental prerequisite for the formation of certain types of social entity. He noted that some social structures require the "social constructing mediation of a third element".[54] The kind of third-party conflict management upon which the court system rests is one such social entity which can only be understood as a triad. Admittedly, it is not just the courts that are involved in conflict management. Nowadays, the sociology of law usually identifies four types of third-party involvement in conflict management: counselling, mediation, arbitration, and adjudication. Thomas Raiser explains the differences:[55] *Counselling*, as Raiser explains, means helping the conflicting parties to identify potential solutions, while letting them decide for themselves if and how they proceed with their issue. *Mediation* goes one step further. Here the mediator takes an active role in pointing out ways in which the conflicting parties might resolve their dispute. The mediator hence acts as a driving force in the conflict resolution process. However, the parties themselves must take the initial step of engaging in the mediation process. The result might then be an agreement between the parties, often in the form of a settlement. Canon law explicitly refers to agreements and reconciliations as ways of avoiding judicial contention in civil disputes (see canon 1713 CIC/1983). From the perspective of legal practice, mediation procedures such as conciliatory proceedings are of key importance for the administration of justice not just because successful mediation reduces the workload of the courts, but also because settlements are likely to enjoy the approval of both parties and often result in a greater level of pacification and satisfaction than court verdicts.[56] In church, the same motives are decisive in promoting mediation. However, as far as justice is concerned, not every case is suitable for mediation. Canon law therefore limits the possibility of resolving disputes through settlement to those cases in which only the parties' claims are in dispute, and which do not involve the interests of third parties. In matters about which the parties cannot make disposition freely or which affect the public good of the church, agreements or compromises are invalid (see canon 1715 §1 CIC/1983). Therefore, settlements are void when they pertain to matters related to the nullity of the sacrament of orders or of marriage, the separation of the spouses, or criminal matters. This is because the church holds that the primary aim of procedures in these cases is to establish the truth, it being only a secondary aim to bring about peace between the parties.

[53] See Aubert (1963, pp. 26, 33–42); Shapiro (1981, p. 1).

[54] Simmel (2009, p. 101).

[55] See Raiser (2007, pp. 286–287).

[56] See Raiser (2007, p. 288).

3.2.4 Arbitration and Adjudication

Arbitration is not dissimilar to mediation. It does however involve a greater degree of control. Arbitrators not only suggest a solution but truly settle the dispute, usually based on an arbitration agreement with the parties. Roger Cotterrell explains, "Between mediation and adjudication stands an intermediate process, arbitration, in which the third party's role can be seen as more explicitly directive and in which he is recognised as a decision-maker with responsibility for determining the rights and wrongs of the dispute rather than an honest broker for the disputants."[57] The arbitrators' decisions are frequently enforced by binding instruments such as the arbitration agreement; canon law refers to such instruments in canon 1714 CIC/1983. Even voluntary arbitration is more binding than mediation, as the parties bind themselves to the results of the arbitration by entering the arbitration agreement. However, there is also *compulsory* arbitration, in which the parties are not at liberty to choose whether or not to participate in the arbitration process. At the obligatory level, compulsory arbitration is similar to court verdicts. Hence, the degree to which arbitration and adjudication differ depends on whether the arbitration process is voluntary or compulsory and whether the result of the process is binding for the disputants or not. Nevertheless, arbitration, in contrast to adjudication, is usually less formal and more flexible.[58] This explains its widespread popularity as a method of conflict resolution in many legal areas, such as in international commercial disputes, even if arbitration remains somewhat ambivalent from the perspective of legal practice.[59] Whilst its flexibility can be seen as an advantage, arbitration often suffers from a lack of enforceability. This is because enforcing an arbitration award against the losing party requires the involvement of sovereign authorities with the power to enforce the decision. Yet most institutions of arbitration do not have access to authorities with a police function which could help them to enforce their decisions. A further serious disadvantage to arbitration is the lack of quality control, especially with respect to the arbitrators' qualifications and suitability. Hence, whilst arbitration has always been a more flexible and much-used alternative to adjudication throughout the history of institutionalised conflict resolution, it has never come to replace adjudication.

Arbitration also has an important function in church. Some local churches even provide fixed arbitration bodies to treat specific issues. In Germany, for instance, some dioceses have ecclesiastical arbitration boards that deal with disputes related to the pastoral life of the church or other local legal issues, such as conflicts arising from diocesan councils and committees. One arbitration board belonging to the German Conference of Superiors of Religious Orders deals with cases of hardship among former members of religious orders. In Germany, there are also ecclesiastical employment arbitration boards which deal with disputes about individual contracts

[57] Cotterrell (1984, p. 221).
[58] See Raiser (2007, p. 289).
[59] See Raiser (2007, p. 291).

of employment with the church and with conflicts arising from ecclesiastical employee participation law.[60] If ecclesiastical employers and their employees' representatives do not reach an agreement on matters in which the employees' representatives enjoy participation rights, it is mandatory according to ecclesiastical employee participation law to refer to the ecclesiastical arbitration bodies. The decisions of the arbitration bodies are binding. If the employer and the employees' representatives fail to come to an agreement, the arbitration board decides on their behalf.[61]

Adjudication is the most binding type of conflict management. A distinct feature of adjudication that sets it apart from less binding forms of institutionalised conflict resolution is that adjudication brings conflicts to a binding conclusion. We generally accept court decisions as final clarifications of legal disputes. Martin Shapiro notes, "one of the principal virtues of a trial is that it provides an official termination to conflict, relieving the disputants of the necessity of further reciprocal assertions or retributions."[62] While both adjudication and mediation aim at the common goal of resolving a conflict, courts differ from simple mediation agencies, particularly insofar as they are usually institutions of *sovereign* social control. Whilst mediation bodies focus on the interests of the parties, court decisions are based on the principle of sovereignty. While they decide single cases, their verdicts also have to keep the whole legal community in mind. In doing so, court decisions contribute to producing law, as Roger Cotterrell points out.[63] It is for this reason they are of decisive importance in the formation and ongoing development of legal doctrine. Court decisions address a specific case; however, in discussing this case in the light of the law and legal doctrine, courts also contribute to the shaping of doctrine.

As with all forms of institutionalised conflict resolution, adjudication is also originally rooted in the idea of managing conflict between two parties. However, of all the institutions of conflict resolution which share the triad as their point of departure, the court system has the most *complex* way of recreating the triadic structure common to all forms of conflict management. Contemporary societies in particular require elaborately structured judicial systems. Durkheim stated that initiating legal proceedings when social relations are disrupted is a characteristic reflex of complex societies. These require sophisticated *restitutive* mechanisms in order to generate social cohesion in the form of organic solidarity. Small, premodern societies, by contrast, according to Durkheim, are held together by mechanical solidarity. They can make do with the *repressive* subjugation of socially undesirable behaviour.[64] In this light, Martin Shapiro's hierarchy of courts from mediation agencies to modern adjudication correlates with Durkheim's observations on the development of societies from mechanical solidarity to organic solidarity.

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[60] See §§40–47 Rahmen-MAVO.

[61] See §§40 sect. 3; 47 sect. 3 Rahmen-MAVO.

[62] Shapiro (1981, p. 39).

[63] See Cotterrell (1984, p. 218).

[64] See Durkheim (1960).

3.2.5 A Triad or Two Against One?

In complex organisations such as the church, there are frequently a number of judicial structures that work in the interests of conflict management. However, as the sociology of law observes, there are also significant obstacles in the way of transforming the initial structures of mediation into an elaborate court system. Vilhelm Aubert and Martin Shapiro point out convincingly that this kind of evolution has created a fundamental problem of legitimacy. They observe that it has often been rather difficult to identify the original idea of triadic conflict management as the basis for the concept of judicial systems. Particularly in complex judicial systems, it is now relatively hard to discern the simple and plausible idea of the triad. Whilst Simmel's triadic model is still easily identifiable in mediation processes, the triad seems to dissolve as soon as models of conflict management take on a formal judicial character. The regular-shaped triangle which balances the powers and interests of the parties and the mediator then seems to change profoundly, apparently becoming a "two against one" situation. It therefore becomes highly unlikely that the losing parties will view the verdicts against them as the result of an impartial triadic exchange. Instead, they often see themselves as having been outvoted by a majority—an understanding between the judge and the opposing party—, as Shapiro observes, noting, "To the loser there is no social logic in two against one. There is only the brute fact of being outnumbered."[65] This explains why courts enjoy only limited effectiveness in the resolution of individual conflicts between the parties. Thomas Raiser connects this problem with the tendency of judicial decisions to always look back, explaining, "The court has to establish a past fact and has to legally assess it. It is not its duty to help to build the parties' relationship for the future."[66] The courts therefore largely ignore the social afterlife of their decisions. Admittedly, there are a few exceptions such as custody disputes, where the judges understand their duty not only to settle the existing legal conflict, but also consider what might be a fruitful solution for children and their families. However, court verdicts are frequently less focused on the future and more on the past. As a consequence, law is regularly in no real position to rehabilitate social relations between the parties. Roger Cotterrell also takes up this idea, noting that court decisions are not designed to offer an acceptable solution to both parties, but to declare one party right—thereby declaring the position of the other to be wrong, "The dichotomous right/wrong judicial solution is likely to appear as an imposed two-against-one solution which may make continuing relations between the disputants difficult or impossible."[67] This is certainly a thorny problem for ecclesiastical adjudication in particular, because canon law is primarily concerned with the

[65] Shapiro (1981, p. 2); see also Aubert (1963, p. 35).

[66] Original quote, "Das Gericht hat in der Regel einen abgeschlossenen Sachverhalt festzustellen und rechtlich zu würdigen. Die Beziehungen zwischen den Parteien für die Zukunft zu gestalten ist nicht seine Aufgabe", Raiser (2007, p. 299).

[67] Cotterrell (1984, p. 222).

individual's salvation and the welfare of the church as a community. It is most evident, in any case, that a two-against-one solution is regularly not well-suited to contributing to spiritual perfection or the common good. Hence, it is unsurprising that the church traditionally relies more on mechanisms for reconciling the parties than on adjudication. In this respect, Jesus's words in the Sermon on the Mount—that it is key to make peace between disputants (see Matthew 5:21–26)—have proven to be highly influential regarding the Christian response to conflict. According to Christian teaching, peace is a prerequisite for salvation. Jesus's words "So if you are offering your gift at the altar, and there remember that your brother has something against you, leave your gift there before the altar and go; first be reconciled to your brother, and then come and offer your gift" (Matthew 5:23–24) reveal that reconciliation in the Christian community is not just seen as an option in the resolution of conflicts, but as a necessary precondition for living a godly life. Ecclesiastical law and adjudication are also a means to this end. Ecclesiastical adjudication theory and research must therefore seek to mitigate the conflictual effects of ecclesiastical adjudication with its limited effects on resolving individual and social conflicts, not only for the legitimacy reasons of reconnecting ecclesiastical tribunals with Simmel's triad, but also for theological reasons.

3.2.6 The Problem of Impartiality

Hence, adjudication as a whole, and ecclesiastical adjudication in particular, require strategies that avoid giving the impression that the basic triadic structure of conflict resolution turns into a "two against one" scenario when courts become involved. Judicial systems all over the globe have been more or less successful in accomplishing this, as Martin Shapiro observes. Ancient Roman law avoided these legitimacy issues by allowing the parties to freely choose their preferred judge and procedure, and by obliging them to accept the judge's decision before the verdict. Today, courts try to avoid giving the impression of "two against one" by emphasising the parties' equality of opportunity and the judges' neutrality as guaranteed by procedural law. Judicial independence plays an important legitimising function in most modern judicial systems. The parties tend to consider judicial decisions as acceptable on the premise that the courts making the decisions are independent and not governed by third-party interests. However, neither carefully compiled procedural law nor judicial independence can conclusively prevent the losing party from doubting a court's impartiality. Shapiro sees this as a perennial crisis of legitimacy for adjudication, owing to the fact that it fails to resemble the original triad. He notes, "Contemporary courts are involved in a permanent crisis because they have moved very far along the routes of law and office from the basic consensual triad that provides their essential social logic."[68] Moreover, as Shapiro

[68] Shapiro (1981, p. 8).

finds, the latent distrust of adjudication is by no means irrational, insofar as procedural law is always an expression of certain vested interests, namely the interests of the state or the ruling class underlying the procedures, as Shapiro explains, stating, "To the extent that the judge employs preexisting rules not shaped by the parties themselves, he acts not independently but as a servant of the regime, imposing its interests on the parties to the litigation."[69] This problem also affects ecclesiastical adjudication. As the norms on the composition of ecclesiastical tribunals and the procedural law directing the tribunals' actions originate in canon law, one may suspect certain vested interests, in this case the ecclesiastical authorities' interests, to underlie ecclesiastical procedures. The impression that hierarchical interests play a role in the ecclesiastical adjudication system is therefore likely to undermine the legitimacy of ecclesiastical adjudication in the eyes of the legal subjects. By way of example, I want to recall the case of Johannes Grabmeier, to which I referred above when speaking about the limited capacity of the law to solve objective social conflicts.[70] This case is also a good example of the problems facing courts which raise suspicion about their impartiality. In his book, Grabmeier above all revealed that his frustration with the result of his case was rooted less in the fact that he eventually lost it, and more in his impression that the decision regarding his case had already been made before the congregation had even studied the facts. For Grabmeier, the congregation's refusal to hear him and talk to him in person served as proof that the decision about the bishop winning and him losing the case had already been made before the procedure started. It is not up to me to decide whether his impression was actually true. However, from a sociological perspective, we may note that impressions such as Grabmeier's are liable to undermine the legitimacy of adjudication in the eyes of the legal subjects.

3.2.7 Employing Elements of Mediation

The courts, hence, have a major interest in developing strategies which address their legitimacy problem. Martin Shapiro provides some insights into *how* courts in fact address this problem. He observes that the courts' primary approach is to invoke Simmel's triad. To avoid giving the impression of "two against one," adjudication must work to lend greater plausibility to its basic triadic structure. To do this, Shapiro states, the courts still make considerable use of elements of mediation.[71] Shapiro notes that, cross-culturally, a significant amount of the courts' business consists not of actual judicial decision making, but of negotiation and mediation, by which the courts fulfil their "original" role as mediators between two conflicting parties. Manfred Rehbinder adopts a similar line, arguing that the work of the courts is

[69] Shapiro (1981, p. 26).
[70] See Grabmeier (2012).
[71] See Shapiro (1981, pp. 8–9).

actually often an incremental process of counselling, mediation, arbitration, and adjudication, so that in fact, in many cases, the work of the courts ends before it reaches an actual legal verdict.[72] We can also observe this strategy of adjudication as a further back reference to the mediation triad in ecclesiastical procedural law. The Code of Canon Law actually introduces its whole chapter on ecclesiastical tribunals and the discipline to be observed in tribunals (see canons 1446–1457 CIC/1983) with canon 1446 §1 CIC/1983, a norm that urges all Catholics "to strive diligently to avoid litigation among the people of God as much as possible, without prejudice to justice, and to resolve litigation peacefully as soon as possible." §2 adds the duty of ecclesiastical judges "not to neglect to encourage and assist the parties to collaborate in seeking an equitable solution to the controversy and to indicate to them suitable means to this end, even by using reputable persons for mediation." The legislator is even more explicit in §3 where he advises all judges in cases which concern the private good of the parties "to discern whether the controversy can be concluded advantageously by an agreement or the judgment of arbitrators" following the canons on ecclesiastical arbitration (see canons 1713–1716 CIC/1983). Hence, canon law emphasises the advantage of amicable out-of-court settlements and of the peaceful resolution of disputes. It strongly favours out-of-court solutions over litigation, in those cases where this seems possible without violating justice. This approach has a longstanding tradition in church which reaches back as far as the times of the early church. When Paul was dealing with conflicts in the early Christian community of Corinth, he recommended the benefits of consensual conflict resolution to the Corinthians (see 1 Corinthians 6:1–11). Instead of relying on heathen adjudication, which Paul referred to as the "court before the unrighteous" (1 Corinthians 6:1), the apostle urged the congregation to settle their disputes amicably or through arbitration by other members of the community. For Paul, however, this instruction is less a reflection of his understanding of the secular courts as illegitimate, and more indicative of his wish to prevent the disputants' spiritual aberration. Establishing peace between fellow Christians is a religious priority. As Paul seemed to have understood that adjudication may well settle a concrete legal conflict but seldom solves the social problem underlying the actual conflict, he found the amicable out-of-court settlement to be the Christian way of coming to a satisfactory solution which could bring lasting peace to the disputants and the community. In a similar vein, the *Syrian Didascalia* from the third century underscores that the early Christians' preference for mediation and arbitration was religiously motivated. The *Didascalia* suspects that initiating legal proceedings encourages sinfulness because going to the courts can inflame sinful feelings of anger and hatred towards the opposing party.[73] Hence, the *Didascalia* recommends arbitration over adjudication, with the aim of bringing about peace between the disputants. The text calls to mind Jesus's words from the Sermon on the Mount that peace among Christians must precede an offering at the altar, to emphasise that reconciliation with one's

[72] See Rehbinder (2014, p. 155).

[73] See chap. 11. In Gibson (1903, p. 63).

neighbour is of key importance for salvation. Whereas conflict provokes sinfulness and is harmful, peace is regarded as a prerequisite for leading a Christian life.

3.2.8 *Penal Procedures as Social Control*

Martin Shapiro observes that emphasising the legitimacy of judicial decisions by pointing at elements of mediation is a particularly effective strategy in civil proceedings. This notwithstanding, it is considerably more difficult to reconstruct the triad in criminal proceedings. In criminal cases, it is most evident that the courts are not acting as impartial third parties, but have a vested sovereign interest in maintaining social order.[74] Manfred Rehbinder attributes this to the simple fact that criminal procedures are not primarily about conflict resolution, but about social control.[75] In this sense, criminal proceedings depart from the triadic structure underlying the justice system to a noticeable degree. The courts can therefore only rarely cite the principle of conflict resolution to defend their legitimacy. In fact, they must justify their legitimacy by emphasising their essential service to the group by fulfilling the function of social control. However, this justification is significantly more difficult than referring to the triad. In light of this finding, it is surprising that canon law attempts to prioritise extrajudicial conflict resolution not merely in civil proceedings but also in penal cases; ecclesiastical penal law maintains that ordinaries are to initiate penal proceedings only if fraternal correction, warning, or other pastoral measures have proven ineffective for the purposes of sufficiently restoring justice, reforming the offender, and repairing the scandal (see canon 1341 CIC/1983). Hence, the church still relies on the biblical *correctio fraterna* (see Matthew 18:15) as a way of dealing with conflicts arising from criminal offences. If peace can be restored to the individuals affected and to the community without resorting to a judicial or an administrative procedure, the legislator considers this path to be preferable. This approach is remarkably in line with the triadic conception of conflict resolution. This observation is interesting from a sociological perspective, because it might enable the church more easily than other legal orders to legitimise its criminal proceedings by reconnecting them with the triadic conception underlying all institutionalised mechanisms of conflict resolution. However, from the perspective of the sociology of canon law, the actual effect on legitimacy brought about by linking punishment and triadic conflict resolution is at present more negative than positive, as it seems. As things stand, one may hardly state that ecclesiastical criminal proceedings possess a high level of legitimacy in the eyes of many Catholics. Quite the reverse; many Catholics are very sceptical of ecclesiastical penal procedures, particularly due to the way in which many ecclesiastical authorities have dealt with sexual abuse over the past decades. As recent investigations on

[74] See Shapiro (1981, pp. 26–28).

[75] See Rehbinder (2014, p. 151).

how the authorities have dealt with sexual allegations against clerics and church officials have revealed, they made widespread use of extrajudicial instruments to avoid legal proceedings, before both secular courts and ecclesiastical tribunals.[76] They often chose not to prosecute cases of abuse at all, but to cover up the crimes. Disguised as fraternal conflict management, the outcome was often more a form of "conflict procrastination." With regard to ecclesiastical penal adjudication and its legitimacy issue, the triadic structure aimed at balancing the interests of the parties is therefore only of little help. Indeed, it can be rather counterproductive. Instead, the church can only counter the legitimacy issue of its penal proceedings by placing the focus less on triadic mediation and more on the fact that penal adjudication relies on sovereign power to investigate crimes and punish those found guilty in order to maintain and protect the social order. Due to this, ecclesiastical penal judges share the very same problems as secular criminal courts. Because conflict resolution can only play a secondary role where criminal prosecution is concerned, it is difficult to detect the triadic model underlying criminal adjudication. It is certainly particularly challenging for the church, as social control is obviously a good protected by the state, and a good which, in modernity, is connected with the church to an ever-diminishing degree. It is evidently more difficult to argue why the church needs instruments for social control than it is to argue why states require these measures. It is therefore unsurprising that many voices in the public debates demand that the church refrain from punishing church members with penal sanctions and leave this task to the state. Most certainly, from the inside perspective of the church and of canon law, it makes sense to argue that the church as a community is also dependent on instruments of social control. However, it is a matter of continued debate as to whether these instruments must be legal or—more precisely—*penal* ones. From the inside perspective, one may question whether the church today still has any need for penal adjudication, in light of the alternative options for dealing with wrongdoing and transgression. Whilst the church needs instruments to protect itself against the actions of its members which violate the physical and spiritual wellbeing of individual members and the community, one may debate whether this finding is a reason for possessing its own system of ecclesiastical penal adjudication. An alternative is at hand, as I want to sketch briefly. As it is, secular penal adjudication punishes crimes which violate the physical and mental integrity of others, including crimes committed in church. Within the ecclesiastical legal system, a feasible disciplinary law could respond to crimes and other deeds which prove clerics and ecclesiastical officeholders unqualified to fulfil their positions and duties. Actions incompatible with the Catholic faith and morals may be subjected to penitence rather than punishment. So one might well argue that there are other—and maybe even more adequate—means for responding to crimes and other forms of wrongdoing in church than maintaining an ecclesiastical system of penal adjudication. I am not writing this to decide this case and not even to promote my personal opinion on this issue. I mention these considerations at this point because they show, from a sociological

[76] For Germany see Dreßing et al. (2018).

point of view, why the church has and will continue to have a hard time proving the legitimacy of its adjudication system particularly in penal matters, and why it is more difficult for the church to argue in favour of its legitimacy than it is for secular adjudication to do so.

3.2.9 Adjudication and Legal Politics

The legitimacy problems which agents of conflict resolution face when they depart from the triad address the courts particularly in their function as *producers* of law, as this is where the impartial application of law merges with partisan legal politics. Martin Shapiro views this problem as particularly acute in common law traditions where courts are key developers of law. Nevertheless, civil law—with its stronger focus on statute law and the legislators as producers of the law—is also showing an increasing tendency to embrace judge-made law: in the German legal system, for example, the decisions of the Federal Constitutional Court are highly influential and shape the legal order profoundly; in a similar vein, European case law is leaving its mark on the ongoing development of the national laws of member states of the European Union. Hence, the courts not only make use of the law as they find it in statutes, they also contribute to creating the law. They are not operating exclusively within a framework of traditional legal doctrine, but are also pursuing political goals with their decisions. In doing so, they are shaping legal doctrine. On this point, however, Martin Shapiro and Roger Cotterrell agree that it is exactly this function of the courts as producers of law and shapers of legal doctrine which raises issues of legitimacy.[77] This is the case because the losing parties in a case might feel they have not lost their case for legal reasons but that they have become the victims of political expediency. This danger is comparatively low in the ecclesiastical legal system, not because ecclesiastical tribunals are more impartial or apolitical than state courts, but because they have only a small role to play in the development of canon law. As a civil law legal system deciding its cases based on codified law, canon law has, since 1917, used statutory law as its main source of law. Ecclesiastical tribunals lack independent authority as lawmakers as they do not create precedent law. The legislator explicitly states that the tribunals' verdicts do not have the force of law and only bind those persons for whom they are given (see canon 16 §3 CIC/1983). Yet the lawmaking capacity of ecclesiastical tribunals is even narrower than that of most other courts in civil law systems. The tribunals' task is limited to interpreting and applying statute law within the narrow system of interpretation rules which are also codified (see canons 17, 18 CIC/1983). By restricting even the tribunals' interpretation with the help of statutory law, the legislator ensures the tribunals have a minimal impact on the development of canon law. Admittedly, some exceptions apply to the Roman tribunals, such as the Roman Rota, the verdicts of which

[77] See Shapiro (1981, p. 36); Cotterrell (1984, pp. 260–261).

have some exemplary function for the lower tribunals and also have a political impact on the legislator and his development of the law.[78] However, even these tribunals have no direct impact on the legal development of the church in terms of a precedential function. Canonist Gerhard Neudecker examines this issue in his dissertation entitled *Ius sequitur vitam*.[79] In his book, Neudecker emphasises that the ecclesiastical tribunals' contribution to the development of canon law is largely limited to filling in the gaps in the law (see canon 19 CIC/1983). At this point in my study I will not examine what this restriction of the tribunals means for canon law itself—for its restricted ability to renew itself through legal change or its hampered ability to relate to the everyday life of the church. In this context, it is more important to note that ecclesiastical tribunals, insofar as they play virtually no role as active producers of canon law precedents, are not as far removed from the original idea of impartial triadic conflict resolution as are the courts in judicial systems in which they play a more important role in the ongoing development of law. At least in this respect, the legitimacy problem of canonical adjudication is less significant than that of judicial systems which rely more heavily on judge-made law.

3.2.10 Appeals as Approval

Martin Shapiro suggests one further remedy to address the legitimacy problem of courts, namely the losing parties' option to appeal judicial decisions. Shapiro speaks of the possibility of an appeal as "a psychological outlet and a social cover for the loser at trial. For appeal allows the loser to continue to assert his rightness in the abstract without attacking the legitimacy of the legal system or refusing to obey the trial court."[80] By launching an appeal, the losing parties are explicitly stating that they *accept* the legitimacy of the legal system, because "[a]ppealing to a higher court entails the acknowledgment of its legitimacy".[81] Legal scholar Piero Calamandrei makes a similar observation, namely that proceedings support the state's claim to legitimacy because going to court in fact means that the plaintiff believes in the state and in its legal system.[82] A similar effect applies to the courts and their legitimacy: trials and appellate proceedings benefit the courts, because they reflect the litigants' belief that, in the end, they will receive an impartial and just verdict. At the same time, as Shapiro emphasises, appellate courts also represent sovereign interests and are therefore not entirely free of third-party interests.[83] Here, too, the inevitable ambivalence of the way judicial structures have developed is apparent, as they

[78] See Heidl (2012/2013).
[79] See Neudecker (2013).
[80] Shapiro (1981, p. 49).
[81] Shapiro (1981, p. 49).
[82] See Calamandrei (1956, p. 96).
[83] See Shapiro (1981, p. 56).

clearly diverge from the original triad of conflict resolution. Hence, it is particularly dangerous with regard to their legitimacy if appellate courts and their decisions give the impression they are guided by political interests. This problem likewise applies to ecclesiastical adjudication. I want to refer once more to the example of Johannes Grabmeier, the Catholic who was very active in diocesan committees of lay participation in his Diocese of Regensburg, who published his experiences about his unsuccessful attempt to win a lawsuit in the ecclesiastical appeals process.[84] In his book, Grabmeier describes the impression he gained that the ecclesiastical instances were acting in the interests of the official church, namely to immunise church officials against the legal concerns of church members, particularly of laypeople, by rejecting the lays' judicial claims. Whether Grabmeier's view is just the one-sided opinion of a defeated plaintiff or provides an accurate insight into the interests that guide decisions in ecclesiastical proceedings is a matter for others to judge. Nevertheless, it is problematic enough in itself if ecclesiastical tribunals give the impression that they are not deciding impartially in the appeals process, but are guided by sovereign interests. Moreover, the fact that canon law did not establish channels of appeal for *all* types of proceedings—in church, adjudication deals with criminal cases, civil cases, and declaratory cases (see canon 1400 §1 CIC/1983) but has not yet established a thorough system of administrative procedure which allows to contest administrative acts on the diocesan level—reduces, from a sociological point of view, the chance of mitigating the legitimacy problem facing ecclesiastical tribunals. This is because the tribunals cannot always direct legal subjects burdened by an ecclesiastical decision towards a respective channel of appeal if there simply is none. If we accept Piero Calamandrei's remark as correct that active litigation is also a statement about the confidence the litigants have in the authorities, then the church, by lacking administrative procedures against administrative decisions taken at the diocesan level, is not only jeopardising the legitimacy of its adjudication system but is also foregoing an opportunity to engage in confidence building among the church members.

Irrespective of whether we are talking about state courts or ecclesiastical tribunals, the observations compiled in this section show that we must view the legitimacy of modern judicial systems critically, as contemporary adjudication is consistently at the edge of its capacity to manage conflicts. In light of this finding, Roger Cotterrell asks the obvious question why adjudication has nevertheless been able to establish itself so pervasively in our societies, wondering, "Why are such 'unstable' legal institutions nevertheless seemingly essential to developed legal systems?"[85] We may probably only answer this question by noting the contribution adjudication has made to reducing complexity in society. In complex modern legal communities and societies, an elaborate adjudication system makes it possible to manage conflicts in an orderly manner, including those cases which overburden the mediation triad. However, this observation does not explain how adjudication has

[84] See Grabmeier (2012).

[85] Cotterrell (1984, p. 221).

been able to overcome its persistent legitimacy problems throughout the course of history. It is probably impossible to answer this question conclusively. In Cotterrell's view, the state, or rather the political framework in which a court system exists, appears to be a significant factor in offsetting the legitimacy problems posed by the structure of adjudication. The state contributes to the stability of adjudication "by maintaining the integrity of the legal order itself—the ideological conditions upon which legal domination depends."[86] This assumption reflects Calamandrei's view, which sees adjudication as supporting the legitimacy of the state. It is therefore fair to assume that the state and trust in the political order lend support to the legitimacy of adjudication in return. Ideally, the same interdependency should also apply in church. Trust in the ecclesiastical authorities strengthens trust in ecclesiastical adjudication, while distrust in the ecclesiastical authorities weakens it. At present, many Catholics probably do not expect too much from either.

3.2.11 Sanctions and Police Function

Summing up the findings of the previous sections, we may observe that almost all societies and many larger groups contain agencies and bodies which work in a more or less triadic way towards the resolution of social conflicts; we may also find similar bodies in the church. Yet Richard Schwartz and James Miller observed that only societies with a high division of labour entrust official police forces or comparable agencies with the sovereign administration of justice. This finding is interesting from the point of view of the sociology of law, because it indicates that while institutionalised conflict management seems to be essential to every society and larger community, this does not likewise apply to the need to enforce conflict solutions. Schwartz and Miller therefore note that "mediation is not inevitably accompanied by the systematic enforcement of decisions."[87] Their observation contradicts the assumption that sovereign control and sanctions are of crucial importance for social coexistence. This finding merits further discussion, especially from a criminological perspective. Criminology usually alludes to three benefits of sovereign sanctions:[88] in their repressive function of specific or general prevention, sanctions have the effect of encouraging future compliance with non-observed norms; in their restitutive retributive function, they provide redress for the victims of crime; in their socio-psychological function, they endeavour to overcome the cognitive dissonance in the legal community, bridging the perceived variance between what is and what ought to be that has arisen as the result of a breach of law.[89] In view of this record, Schwartz and Miller's observation on the lack of a

[86] Cotterrell (1984, p. 247).

[87] Schwartz and Miller (1964, p. 166).

[88] E.g. Rehbinder (2014, p. 102).

[89] On the concept of cognitive dissonance, see Festinger (1957).

police function in many societies with a low division of labour begs the question how these societies engage in prevention, respond to retaliatory needs, and resolve the cognitive dissonance that a breach of law may cause among members of society. At first glance, one may find that this problem is not a pressing issue for the sociology of canon law, as the elaborate ecclesiastical adjudication system includes a sophisticated penal system, similar to those identified by Schwartz and Miller in complex communities. Although the church has significantly slimmed down in this field and—as I already explained in Sect. 2.2.3—cut back its massive former penal law to some degree, it has not fully renounced its fundamental right to impose punishments on its members (see canon 1311 §1 CIC/1983). Instead, in line with Schwartz and Miller's observations, the church proves to be an institution that manages its complexity—its high degree of functional differentiation, specialisation, and professionalisation—by relying on a system of sanctions. I did note in Sect. 3.2.8 though that it is open to debate whether this sanctioning function, which helps to control the social in church, must by necessity be a penal system. There are good reasons to debate whether it might be adequate to replace the ecclesiastical penal system by leaving criminal sanctioning to secular penal adjudication, while endowing the church with a robust disciplinary law and leaving all those actions incompatible with Catholic faith and morals to penitence rather than to ecclesiastical punishment. However, at this point in my study, I do not wish to discuss the pros and cons of the ecclesiastical penal system, but merely take the existence of this system as proof that the church concords with Schwartz and Miller's complex communities which provide elaborate penal systems. However, in light of Schwartz and Miller's results, the situation in church paints an ambivalent picture. This is because the church is completely devoid of a police force or alternative executive bodies that can enforce judicial decisions. In modernity, the church has been unable to establish a policing function over its own members, neither has it been able to cooperate with the modern nation states to establish any secular support to serve this purpose, as was common in mediaeval times. I already touched upon this point in the discussion about whether law requires coercion. Yet again, this lack of executive policing power in church raises questions in this context too—even if we dismiss Max Weber's idea that the law essentially requires a coercive apparatus that enforces legal claims in the legal community by sovereign means.[90] As I discussed in Sect. 2.1, I do not share Weber's view of the law as a coercive order by necessity. But we nevertheless need to think about the consequences deriving from the fact that the church is not even remotely likely to operate a policing function, as it does not have a police force at its disposal. This fact does not touch upon the issue of whether canon law is law, as the concept of law, as I argued, is not essentially connected with coercion. But it does touch upon the issue of effectiveness, insofar as a law without a police function may face challenges with regard to its very functioning as law. We must therefore discuss whether a penal system that has to manage without a police force has any chance of being effective at

[90] See Weber (1978, p. 313).

all and if and how verdicts and administrative decisions under canon law stand any chance of being heeded if there is no one to police their compliance. These questions are of particular interest to the sociology of canon law as a sociology studying a legal order with an exceptionally low level of coercion. I will return to these questions again in the sixth section of this study.

3.2.12 Coping with Complexity

In their study, Schwartz and Miller also found that we discover legal counselling predominantly in societies with a high division of labour, along with a police force or alternative executive bodies of legal enforcement.[91] The existence of legal counselling in these complex societies is understandable, says Roger Cotterrell, insofar as these societies often also have a complex legal doctrine and elaborate legal procedures whose rules are familiar only to the legal professions. In order to legally defuse conflicts under these complex conditions, it is therefore necessary "to call upon people with special knowledge of such matters for advice and aid."[92] Complex contemporary law requires experts particularly because legal conflict resolution necessitates successful legal communications. Hence it requires experts who speak "Legalese." The problem posed by legal language therefore plays a major role in the sociology of law, especially in sociological studies of adjudication and administration.[93] In his empirical research on the German adjudication system, Rüdiger Lautmann stressed the importance of legal language as a key factor separating professional and non-professional actors in the courtroom, observing, "The language of judicial trials is so specific that only professional parties (such as business people or lawyers) understand it and speak it; at best an educated individual from the upper middle class may follow and join in from time to time."[94] Lautmann views this as a social problem because it implies that making one's voice heard in courts, and in legal disputes in general, depends on the social status of those involved. For most disputants, it is virtually impossible to participate in their own cases, as Lautmann observes, "Those directly concerned are isolated and kept away from participating in solving the problem. Many of those who actually carry the [essential] information cannot take part and cannot intervene to correct the process of abstraction."[95] These observations also apply to the law of the church. Ecclesiastical law is also highly

[91] See Schwartz and Miller (1964, p. 167).

[92] Cotterrell (1984, p. 188).

[93] See Bourdieu (1987, pp. 819–821).

[94] Original quote, "Die Sprache einer Gerichtsverhandlung ist so spezifisch, daß nur professionell Beteiligte (etwa Kaufleute und Juristen) verstehen und reden können; allenfalls ein Gebildeter aus der oberen Mittelschicht kann hier folgen und gelegentlich sich einschalten", Lautmann (2011, p. 84).

[95] Original quote, "Die unmittelbar Betroffenen werden damit isoliert und von einer Teilnahme an der Problemlösung ferngehalten. Viele der eigentlichen Informationsträger können nicht mitreden und in den Abstraktionsprozeß korrigierend eingreifen", Lautmann (2011, p. 84).

specialised, and understanding it requires specialist canonical knowledge. If potential litigants wish to successfully contest a case under canon law, they require the expertise of legal professionals with a profound knowledge of canon law and the skill to speak ecclesiastical "Legalese." "Counsel"—one of the three categories examined by Schwartz and Miller—is one characteristic which clearly shows how complex ecclesiastical law is as a legal system.

3.2.13 Perplexing Selectivity of the Law

In addition to the problem of understanding legal language, as Klaus Röhl finds, successful legal communications also require expert knowledge to adapt people's general everyday understanding of the world to the *selectivity* of the law. Röhl illustrates this using the example of oral hearings in court proceedings. He notes that it is less a matter of language comprehension which creates the greatest difficulty for legal lays, and more the problem of differentiating between information that is legally relevant and that which is not.[96] In functionally differentiated societies, legal communications are only concerned with those selected aspects of the social that pertain to the law. It is hard for legal lays to tell this legally relevant information apart from other information pertaining to other social facts and social relationships. At the same time, non-experts are often confused or even irritated by the obvious disinterest of the law in the non-legal aspects of the social. Judges who trammel party or witness statements to restrict them to legally relevant information, for instance, are often criticised for not demonstrating an interest in learning the *whole* truth. It is hard to understand for legal lays that the law is indeed not interested in the "whole truth," but only in legal truth, that is in those facets of social reality which clearly pertain to the legal facts of a concrete case. This selectivity of the law may in fact raise fundamental criticism among legal subjects, especially in church. While many legal lays perceive the disinterest of secular courts in extra-legal realities as an irritant, they may still tolerate it. Church members, however, often expect church authorities to act more "holistically." This expectation includes ecclesiastical adjudication and administration, even in those cases in which ecclesiastical institutions, in a functionally differentiated church, act as agents of the law and therefore restrict their focus to legally relevant information. Yet as the church is not merely a legal system but a religious community, it is difficult to explain why church authorities act differently when fulfilling different functions in church. It is difficult to understand why the authorities present themselves as being interested in the full truth of human life, with all its personal and social facets when acting as religious leaders, while only showing an interest in fragments of the very same reality when acting as legal authorities. My belief that this twofold approach to dealing with reality in church is a source of specific tensions is based on my observations of many church members' reactions to

[96] See Röhl (1987, p. 507).

the legal handling of abuse cases by church officials. While many church members welcome the fact that ecclesiastical authorities now frequently address abuse cases legally, they often tend to receive the authorities' actions and decisions as insufficient. Some examples might help to illustrate these tensions. Many investigations answering to allegations end without a conviction or do not even go to trial in the first place, often due to the statute of limitations (see canon 1362 §1 no. 2 CIC/1983), sometimes despite obvious guilt. Whilst the statute of limitations, with its protection of legal certainty, is a plausible impediment to legal proceedings from a legal perspective, it is not easy to convey this restriction to the church members—particularly as many of them experience the church as a community that prioritises individual and communal salvation and well-being elsewhere. In those cases in which proceedings do lead to a conviction, church members often criticise ecclesiastical sentencing as inappropriate, even in those cases in which the authorities make full use of the penalties available under ecclesiastical penal law. It perplexes many church members to learn that the maximum penalty for clerical sex offenders is dismissal from the clerical state (see canon 1398 §1 CIC/1983). Many are also critical of the fact that the bishops or tribunals, when investigating accusations, limit their interests to the legal aspects of the cases, without examining the effects that abuse has on the victims and on the community, such as on parishes which have to deal with accusations against parish priests. In this light, many Catholics criticise the restricted legal view of abuse and the narrow view of penal procedures and verdicts as insufficient, one-sided, and of little benefit to the victims and the local communities. I do not refer to this common lack of understanding for the limitations of the law in order to complain about it. Nor do I want to express surprise that many church members do not seem to accept the selectivity of social subsystems that goes along with functional differentiation in the church as an organisation which transects various subsystems such as the law, the economy, politics, science, and art. Instead, I suggest that this common lack of understanding for the limitations of the law might have a specific edge in church. From the point of view of the sociology of law, one may indeed argue that a lack of understanding for the limitations of the law is rather common. However, as I want to argue, one may also find that a common misapprehension about how courts operate and what they can and cannot do is more troubling in religious legal communities, such as the church, than in secular legal systems. As religious communities promise to act in the interests of their members' salvation and well-being, it seems to disappoint many church members all the more whenever ecclesiastical authorities view a conflict merely through a legal lens. It is clear that there is not much alternative for a professional legal system. However, it is understandable that church members find it confusing that representatives of the official church at times act as agents of a professional legal system and at other times as leaders of a religious community, particularly as in church these positions are frequently filled by the very same individuals. Further study seems necessary to identify if and how it is possible to reconcile these two competing concepts of authority, legal and religious, without causing massive discord among the church members.

3.2.14 Ecclesiastical Adjudication Research

My study is not a sociology of canonical institutions. I therefore refrain from engaging in an in-depth study of ecclesiastical adjudication and forego developing an institutional sociology of the ecclesiastical tribunal system. Both approaches are of interest to the sociology of canon law, but a basic overview such as my book can do sufficient justice to neither. Nevertheless, I want to make some suggestions where further research might prove to be insightful to the sociology of canon law, by identifying topics discussed in socio-legal research on adjudication which potentially resonate with a sociology of ecclesiastical adjudication. First, I find it necessary to discuss which existing theories are suitable for providing a theoretical foundation for research on ecclesiastical adjudication. Rüdiger Lautmann stresses that research on adjudication does not make it easy for the sociology of law to choose one theoretical approach, given the plurality of theoretical approaches suitable for studying adjudication. There are several approaches to choose from, as Lautmann suggests,

> adjudication as professional action of professional judges; verdicts as outputs of the judicial system as an organisation; as an exercise of power; as an act of social control; as sanctioning of [unwanted] behaviour; as a solution of social conflicts; adjudication as a group process; as interaction or as role behaviour of those involved in the procedure; as communication between them; as evaluation; and as decision making.[97]

Lautmann's assemblage of approaches relating to legal institutions and organisations, to power issues, legal roles and professions, legal communications, and decision making, reveals how complex the field of adjudication and of court systems is. It is no less complex within the church, and therefore merits a study of its own.

3.2.15 Class Justice, Clerical Justice

One research question of major interest with regard to research on ecclesiastical adjudication is connected with the class issue, even though the class question is slightly different when raised with regard to ecclesiastical adjudication compared to secular adjudication. In the sociology of law, the class issue has repeatedly been at the centre of post-war sociological justice research. In the 1960s, German-British sociologist Ralf Dahrendorf, on the basis of data on the social origins of German judges, made the oft-cited statement "that in our courts one half of society is

[97] Original quote, "Rechtsprechen als Berufshandeln der Richterprofession; Urteile als Output der Organisation Justiz, als Ausübung von Macht, als Akt sozialer Kontrolle, als Sanktionierung von Verhalten, als Lösung sozialer Konflikte; Rechtsprechen als Gruppenprozeß, als Interaktion oder als Rollenverhalten der am Verfahren Beteiligten, als Kommunikation zwischen ihnen, als Bewertung und als Entscheiden", Lautmann (2011, p. 30).

authorised to judge over the unknown other half of society."[98] However, nowadays, there is little talk of "class justice" any more. The debates of the 1960s and 1970s surrounding this topic have cooled noticeably, particularly because empirical justice research was unable to prove that class and social status were decisive in court verdicts.[99] This does not mean, however, that the class issue in adjudication has been resolved across the board, just because it looks somewhat different today to the way it appeared in the 1960s.[100] In the 1990s, for example, Kai-Detlef Bussmann and Christian Lüdemann argued that adjudication touches upon class issues when studying criminal proceedings for certain types of offence. Criminal proceedings for white-collar crimes, which were brought against disproportionately large numbers of socially better-off defendants, regularly ended more favourably for the defendants than common criminal proceedings.[101] In many cases this was due to so-called "deals." This finding is not "class justice" in the conventional sense for several reasons: the phenomenon is neither the result of inequality in the conduct of the trials; nor due to the one-sided interpretation of the trial material; nor a result of a discriminatory reading of the law; nor of unequal sentencing. Nevertheless, Bussmann and Lüdemann observed an obvious imbalance between economic and other crimes which results in an inequality of opportunity for the defendants. In another study, sociologist Jochen Dreher found that parts of the German public perceived the verdicts in the 2005 Volkswagen corruption affair as class justice because they considered the different social status of the defendants as having been influential in the proceedings and their outcome.[102] Whilst defendants representing the employer Volkswagen entered deals to reduce their punishment, there was no deal with the former employee representative. Dreher does not propose that the Volkswagen verdicts were indeed examples of class justice. But he shows that there is a certain sensitivity in the public mind about the courts' different treatment of defendants in patterns of class justice.

One gap in research on ecclesiastical adjudication is the dearth of knowledge about the social background of ecclesiastical judges. It is equally unclear whether social criteria and class issues play a role in their decision making. What is clear, however, is that ecclesiastical adjudication is, in the main, clerical justice. It is therefore also male justice, since according to current ecclesiastical doctrine and law only men can become members of the clergy (see canon 1024 CIC/1983). The gender issue also plays a role in secular law and, consequently, in the secular sociology of adjudication. Ulrike Schultz and Gisela Shaw have made significant progress in this field by surveying the representation and underrepresentation of

[98] Original quote, "daß in unseren Gerichten die eine Hälfte der Gesellschaft über die ihr unbekannte andere zu urteilen befugt ist", Dahrendorf (1960, p. 275).

[99] For further references see Raiser (2007, pp. 301–302); Rehbinder (2014, pp. 137–139).

[100] See Gephart (2006, p. 19); Struck (2011, pp. 98–100).

[101] See Bussmann and Lüdemann (1995, pp. 151–154).

[102] See Dreher (2010, pp. 336–343).

women in the legal professions of individual countries.[103] In the church, however, the low proportion of female judges is particularly problematic, since the underrepresentation of women is not merely a consequence of the common social conditions in church, but is a direct consequence of legal regulation. This is because canon law prescribes the recruitment of ecclesiastical judges predominantly from the clergy, thus ensuring that ecclesiastical tribunals mostly consist of men. Ecclesiastical single judges must always be clerics, according to current canon law (see canons 1421 §1, 1673 §4 CIC/1983). In collegiate tribunals consisting of three judges, one lay judge can be included if the bishops' conference votes in favour of this arrangement (see canon 1421 §2 CIC/1983). So far, the bishops' conferences in only a handful of countries (for example, the German Bishops' Conference) have done so. However, in his *Motu proprio Mitis Iudex Dominus Iesus*, Francis paved the way for *two* lay women or lay men to act as judges in collegiate tribunals, even without a vote of approval by the bishops' conferences (see canon 1673 §3 CIC/1983).[104] In doing so, Francis also created the basis for ecclesiastical tribunals to become—or potentially become—more female. This also depends on the one hand on whether women choose to take the path of canonical qualification—despite the misogynous work setting—and, on the other hand, on whether the bishops do actually appoint more women to the relevant positions. So whilst one may argue that Francis has opened up ecclesiastical adjudication to make it more of a common workplace for laypeople, there are still regulations which make one wonder how welcome lay canonists truly are on the ecclesiastical benches. Lays may not decide as single judges. And they are systematically excluded from certain ecclesiastical proceedings, such as from penal proceedings against clerics. In these proceedings, only priests may be called upon as judges, promotors of justice, notaries, and chancellors.[105] The Congregation for the Doctrine of the Faith can grant a dispensation from this requirement for the aforementioned offices.[106] However, church authorities rarely rely on this option. After all, the regular restriction of the offices to priests testifies to the congregation's and the church authorities' reluctance to include laypeople as well as deacons in proceedings against clerics.

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[103] E.g. Schultz and Shaw (2003).

[104] *Acta Apostolicae Sedis, 107,* 961.

[105] See Congregation for the Doctrine of the Faith (2021, articles 13 and 20).

[106] See Congregation for the Doctrine of the Faith (2021, articles 14 and 21).

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