Chapter 6
The Effectiveness of the Law

Abstract Laws are effective when individuals abide by them or, alternatively, when they do not, but have to face legal sanctions for their non-compliance. The effectiveness of canon law in that respect is partially weak. Whilst the constitutional norms of the church are rather effective for structuring the church, laws tend to be ignored whenever abiding by them depends on the church members' individual decision. Church members tend to ignore their legal duties; the authorities, however, sanction non-compliance only very rarely. Church members also tend to neglect opportunities provided by canon law. To understand the underlying causes of this, it is necessary to study the reasons which motivate individuals to abide by the law in general. The sociology of law particularly relates to the knowledge of the law among members of the legal community, their expectations of sanctions, and their idea of legitimacy. Many canonical laws are rather unknown to church members. The church has no police to coerce offending members to follow the law and rather weak penal authorities to punish them with sanctions. Adding to this is that the degree of normative variance (that is the degree to which the normative ideas of church members differ from the normative ideas expressed in canon law) is exceptionally high with respect to many issues, as canon law does not provide the same legal standard as secular liberal states with regard to individuals' rights and freedom, and is regarded as culturally insensitive and theologically deficient by many church members. They respond to their finding by refusing to abide by the law.

Keywords Effectiveness of the law · Sanctions · Expectations · Legal knowledge · Normative variance

Studying canon law reveals that the sociology of law cannot content itself with simply studying the validity of law, and that it must also examine the conditions which make law effective. Whilst valid law may be mere law on paper, it is the effectiveness of law which brings it to life and allows it to shape the social. When we speak of "effective" law, what we mean is the power of the law to influence individuals and groups. Law is effective when it is powerful enough to impact the social. Accordingly, sociologist Gerhard Wagner describes law as a normativity that is "in force." Law, as he states, is about the enactment of norms, their coming into

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force, their being in force as well as their ceasing to be in force. Wagner interprets this "force" metaphor as expressing the power of the law to influence social interaction. He observes that the law, in a similar vein as physical nature, seems to bring about causal effects, as it impels individuals or groups to conform to its norms.[1] Discussing the effectiveness of the law, as Wagner finds, is a response to this quasi-physical experience of legal force. Examining the reality of law sociologically therefore means perceiving law as an effective medium of human social formation. However, as one may also find, law is in fact not always successful in shaping the social. Naomi Mezey observes, echoing Ronald Dworkin's observations in *Law's Empire*, "law is a colony in culture's empire, and sometimes a rather powerless one."[2] Manfred Rehbinder's comment that norms fully detached from facts are in fact dead law points to the same phenomenon.[3] The fact that law aims to shape the social but is not necessarily successful in doing so means it falls to the sociology of law to investigate the conditions, mechanisms, and limits of legal effectiveness. In the following section. I will therefore seek to identify the conditions which make canon law effective, how it achieves its effectiveness, and what causes its effectiveness to fail.

6.1 Effectiveness as Compliance

Law is effective when it affects the legal community. The sociology of law therefore often equates effectiveness with legal compliance: the law shapes reality because its legal subjects adjust their behaviour to comply with it. However, legal subjects regularly fail to comply with the law. This does not pose a significant problem for the effectiveness of the law, as most sociologists find. Nevertheless, at least some compliance is essential for the law to be effective, as Eugen Ehrlich emphasises, "The order of the social machine is continually being interfered with. And though it does its work with much creaking and groaning, the important thing is that it shall continue to function."[4] Yet it is important to note that breaches of law may also contribute to the effectiveness of law, namely in cases in which a legal community sanctions those breaches of law. Hence, we may consider law as effective when it has an effect on the legal community's social reality—be it that the law effectuates some legal subjects' lawful behaviour, or be it that the law effectuates the legal community to sanction breaches of law. Summing up, one may find that legal norms are effective when they are observed at least by some legal subjects or when their violation is sanctioned; and they are ineffective when they are not observed and

[1] See Wagner (2010, p. 145).
[2] Mezey (2001, p. 52).
[3] See Rehbinder (2014, p. 2).
[4] Ehrlich (1936, p. 58).

when their non-observance has no consequences, insofar as no one sanctions breaches of law.

6.1.1 Non-Compliance and Causality

Compliance with the law means that the law induces its legal subjects to act in accordance with legal norms. If they comply with a law, this law takes effect, albeit only in cases where the legal norm and their behaviour are causally linked. Sociologist Theodor Geiger points out that it is therefore incorrect to conclude that a legal norm is effective based on the legal subjects' behaviour according with the norm. This is because a certain behaviour can occur independently of a legal norm. Due to this, one can only consider a legal norm to be effective if the legal subjects' compliance actually occurs *because of* the norm.[5] Consequently, sociologist Andreas Diekmann only speaks of the effectiveness of a law in cases where compliance with the law is actually a direct consequence of the law.[6] This is also the case when legal subjects regularly fail to abide by a law, but comply with it occasionally. Infrequent compliance also contributes to the effectiveness of a law, as Diekmann argues, as a law which legal subjects follow occasionally is more effective than laws which completely lack compliance.[7] A legal norm is therefore effective, as Diekmann maintains, if it increases the level of a certain behaviour as mandated by the law, even if only to a small extent. Following on from his observation, we may also find that the legal subjects' behaviour may fully correspond with a legal norm, but the norm is nevertheless ineffective, because it does not in fact cause the lawful behaviour. On the contrary, legal norms which individuals rarely observe are effective because they have an effect on at least some legal subjects' behaviour. The sociology of law therefore broadly shares a gradual perception of the effectiveness of legal norms. Theodor Geiger introduced this idea in his *Vorstudien zu einer Soziologie des Rechts* [*Preliminary Studies on the Sociology of Law*], by noting, "A norm is not per se valid or invalid, but it is valid to a greater or lesser degree. Certain norms are more strictly, others are less strictly followed and enforced."[8] Applying this idea to elucidate the effectiveness of law, Andreas Diekmann proposes, "We may say that a law is effective to the degree by which

[5] See Geiger (1964, p. 87).

[6] See Diekmann (1980, p. 23).

[7] See Diekmann (1980, p. 23).

[8] Original quote, "Eine Norm ist nicht schlechthin gültig oder geltungslos, sondern verbindlich in höherem oder geringerem Grad. Gewisse Normen werden strenger, andere minder konsequent befolgt und durchgesetzt", Geiger (1964, p. 72).

the legal measures influence legal subjects' behaviour with respect to the norm stipulated by the law."[9]

6.1.2 Abiding by Legal Norms

Examining the effectiveness of legal norms on the basis of compliance yields a very heterogeneous picture, depending on the type of legal norms involved. There is an obvious difference in what compliance with legal norms means depending on whether these norms are commands, prohibitions, permissions, exemptions, authorisation rules, or procedural norms. With regard to procedural law, a further differentiation may be made by distinguishing between norms which allow for direct state action and norms for decision, as Eugen Ehrlich noted.[10] Many legal norms also simply provide legal subjects with invitations for the legal regulation of their affairs, insofar as they offer institutional frameworks for organising social relationships. They regulate social relations by offering the legal subjects rules and legal institutions which allow them to organise their relations in legal terms. Sociologist Stefanie Eifler illustrates this by citing a number of different examples: property law which provides legal subjects with rules regarding the acquisition of property; marriage law which provides legal subjects with access to the institution of marriage; or inheritance law which provides legal subjects with a reliable procedure for arranging how their inheritance is passed on to their heirs.[11] Abiding by a prohibition by refraining from acting in the prohibited way or complying with a penal norm by not committing a crime is markedly different from accepting such a regulatory mechanism, for example, by entering into a marriage or making a will. Eifler therefore differentiates between compliance with criminal and regulatory laws on the one hand, and compliance with private laws on the other. In the case of criminal and regulatory norms, abiding by the law frequently entails the failure to act in a forbidden or criminal way, be it by acting lawfully or by preventing criminal action. Abiding by private law, on the contrary, frequently means that legal subjects accept the invitation of the law to legally organise their social relationships. When Catholics enter into an ecclesiastical marriage, for example, they are complying with canon law insofar as they are accepting the church's invitation to give their relationship a legal form. Hence, as abiding by the law describes different forms of the legal subjects' behaviour, it comes as no surprise that legal subjects tend to exhibit a different degree of inclination to abide by these norms. Eugen Ehrlich was among the first sociologists of law to point out that it is unrealistic to expect the legal subjects to

[9] Original quote, "Wir können sagen, ein Gesetz ist in dem Grade wirksam, in dem die gesetzlichen Maßnahmen das Verhalten gegenüber der vom Gesetz vorgeschriebenen Norm beeinflussen", Diekmann (1980, p. 23).

[10] See Ehrlich (1936, pp. 371–372).

[11] See Eifler (2010, p. 96).

show the same readiness to comply with different types of norms. Ehrlich found prohibitions to be particularly effective in this respect, as he observed, "The commands of the state are most effective when they are exclusively negative, when it is not a matter of compelling people to act but of constraining them to refrain from action".[12] Compulsions to act, on the contrary, often come to nothing. Either people do what the law tells them to do anyway—because a certain instruction of behaviour corresponds with social custom—or they tend not to abide by the commands at all. We may observe a similar effect in church. This is partly due to the fact that canon law does not consistently draw a clear connection between breaches of laws and sanctions. Whilst canon law commands many things, it often does not bother either to invalidate the result of illegal actions or to criminalise the non-compliance with its commands. Canon law thus contains many legal norms which are so-called "imperfect laws" ("*leges imperfectae*") as they forbid or command a certain action but neither render illegal actions invalid nor threaten offenders with sanctions. Canon law, for instance, prohibits suspended clerics from exercising their power of orders (see canon 1333 §1 no. 1 CIC/1983); however, a suspended priest who breaks that law to celebrate the Eucharist does so validly. The law also obliges all Catholics to confess their grave sins at least annually (see canon 989 CIC/1983); yet it does not provide for a penal norm punishing those Catholics who do not abide by that obligation. In these cases where the law fails to sanction non-compliance with its norms either through invalidation of illegal actions or with punishments threatening the offenders, we should not be too surprised if many legal subjects do not follow these norms too closely or do not even abide by them at all. Saying this, I do not want to imply that most suspended priests tend to go on to exercise their power of orders. And neither do I want to suggest that no Catholics go to confession regularly. Most suspended priests cease to administer the sacraments and many Catholics go to confession, yet hardly anybody acts in the way prescribed by the law *because the law tells them so*. Priests who leave the pastoral ministry usually do so after having decided to leave the priesthood to work in other fields. Those Catholics who go to confession regularly or at least once a year tend to do so for spiritual reasons or because they have the habitual practice of going to confession yearly, for example before Easter. Here we may observe the phenomenon to which Andreas Diekmann alluded, namely that behaviour that accords with a legal norm does not necessarily result from that norm. Hence, those suspended priests who refrain from exercising their power of orders and those Catholics who go to confession regularly behave lawfully but they do not contribute much to the effectiveness of canons 1333 §1 no. 1 and 989 CIC/1983.

With regard to civil law, there are two main reasons why legal subjects are inclined to accept institutional invitations made by the law, as Stefanie Eifler observes, namely to prevent or to solve conflict. Eifler elucidates that laws either serve to avoid conflicts before they arise, for example by making a marriage contract

[12] Ehrlich (1936, p. 375).

or a will, or to solve existing conflicts.[13] One might add that the creation of order might serve as a similar motive encouraging individuals to use institutions provided by the law to organise their personal affairs. However, the legal subjects' inclination to abide by civil law is naturally less strong than abiding by criminal and regulatory laws. In church we may observe pretty much the same effect. It is interesting, in any case, to take note of the legal subjects' declining inclination to make use of the opportunities provided to them by canon law, particularly in local churches of the northern hemisphere. Evidence for instance shows that the reception of sacraments as institutions to which canon law provides Catholics with regular access has declined significantly in the northern churches since the middle of the twentieth century. The church members are for example less inclined to marry in church today than they were in the 1960s.[14] They are now clearly far less inclined to rely on an ecclesiastical institution to bring order to their private affairs. Bearing in mind Stefanie Eifler's observation that making use of legal opportunities often connects with the wish to avoid conflict, one might also presume that legal subjects in many churches of the global North perceive of the opportunities provided to them by canon law as being ever less capable of preventing or solving any of their conflicts. In Germany a few decades ago, Catholic couples who wanted to live together were expected to marry in church to legitimise their relationship; however, among German Catholics today, even among staunch Catholics, it hardly raises an eyebrow anymore if couples refrain from entering a canonical marriage. In other local churches, in contrast, where fellow Catholics expect couples to live in Christian marriages, the numbers of Catholic marriages are naturally higher, hence ecclesiastical marriage law is more effective.

Norms which allow for direct state action should in principle be very effective, as Eugen Ehrlich maintains.[15] However, as he finds, a lack of "measures taken by the state for supervision and enforcement"[16] frequently compromise their effectiveness too. Ehrlich also points to "the unwillingness, the weakness, or the incapacity of the authorities"[17] to take action. Christoph Möllers observes the same phenomenon, but interprets it in a slightly different light. He challenges the notion that the state is in fact either unable or unwilling to abide by its own laws, by saying that state authorities frequently remain intentionally inactive in order to save economic and normative costs which would occur from attempting to prosecute each and every offence.[18] Ehrlich observes that, in contrast to legal norms which allow for direct state action, compliance with procedural law is generally lower. While procedural law stipulates the authorities' path of decision making, its application does not merely depend on the authorities but, in civil cases, also on the private parties. Yet

[13] See Eifler (2010, p. 96).

[14] For the United States see D'Antonio et al. (2007, pp. 57–58).

[15] See Ehrlich (1936, p. 371).

[16] Ehrlich (1936, p. 372).

[17] Ehrlich (1936, p. 372).

[18] See Möllers (2020, p. 245).

private parties are less likely to initiate legal action and only occasionally make use of the judicial or administrative channels made available to them by the state or another authority.[19] The issue of compliance with procedural law is thus completely different with regard to penal procedural law in comparison to civil procedural law. As civil procedures always require legal subjects to avail themselves voluntarily of the possibilities made available to them by the law, civil procedural norms are always less effective than penal procedural norms. The church also presents a differentiated picture in this regard. Canon law empowers ecclesiastical authorities to intervene directly in some matters. In penal cases or other cases which are related to the public good of the church or the salvation of souls, for instance, ecclesiastical tribunals proceed with the investigation of these matters *ex officio* after proceedings have been initiated (see canon 1452 §1 CIC/1983). However, one party must first undertake the initiation of the proceedings in accordance with the principle of party operation. In civil disputes, this must be done by a litigant. In criminal proceedings, a local ordinary initiates the proceedings and hands them over to the promoter of justice who is then to present a *libellus* of accusation to the tribunal and who acts as the prosecuting party *ex officio* in the proceedings (see canon 1721 CIC/1983). Yet, as I said, this only happens if the local ordinary decides, after the conclusion of the preliminary enquiry, to initiate a judicial procedure (see canon 1718 CIC/1983). Undoubtedly, it is at least partly due to this procedural hurdle that the prosecution of penal cases in church often fails to take place even though canonical norms exist which allow the authority direct action. Particularly with regard to the sex abuse cases, many church members and the general public have criticised the fact that the church had widely failed for decades to prosecute abuse cases even though the law allowed for it to do so.[20] Most certainly, whilst this should not be blamed merely on the procedural hurdle of local ordinaries who have to initiate procedures, it did not help with efficiently prosecuting these cases either. In recent years, it is worth noting, the church has made some changes in this regard which attempt to stimulate the prosecution of abuse cases. Since 2016, the legislator has threatened to remove diocesan bishops and others who preside over other ecclesiastical communities from office if they fail to exercise due diligence in the prosecution of abuse cases.[21] It would require empirical clarification to examine whether this new law increases the effectiveness of ecclesiastical penal procedural law in the abuse cases. However, it is not out of the question that this threat has in fact improved the effectiveness of ecclesiastical procedural law and has encouraged bishops and other ecclesiastical authorities to take action whenever they become cognisant of an abuse case, as canon law prescribes (see canon 1717 §1 CIC/1983).

Apart from cases of sexual abuse, ecclesiastical prosecution is rather reluctant to take action with regard to other offences according to canonical penal law and to

[19] See Ehrlich (1936, p. 368).

[20] See D'Antonio et al. (2007, pp. 68–75); Hahn et al. (2013, pp. 127–135).

[21] See Francis (2016, article 1 §3). *Acta Apostolicae Sedis*, *108*, 716.

initiate ecclesiastical procedures. Whilst ecclesiastical penal law criminalises manifold offences in church, prosecution is nowadays a rarity. Penal proceedings often fail in the first instance because the ordinaries lack the knowledge of a legal violation to initiate legal action. Here, the lack of an obligation to report one's knowledge of a criminal offence, which used to be influential in canon law in former times (see canon 1935 CIC/1917), becomes apparent. This obligation was dropped from the Code in order to accommodate the conciliar desire to decriminalise ecclesiastical life. In addition, the relationship between church and state is probably a contributory factor in the widespread withdrawal of the church from penal prosecution, insofar as the church in most countries may rely upon the state with regard to running a functioning penal system that defends order, peace, and freedom in society, and therefore, unlike in the premodern era, no longer views these functions as its own task. With regard to procedural law, however, this gives rise to the rather peculiar situation that whilst there is a sophisticated ecclesiastical penal law and concomitant penal procedural law, this law is for the most part gradually becoming mere law on paper due to its lack of use. Examining what consequences this peculiar fact—that large chunks of canon law, namely penal law and penal procedural law, are becoming mere law in books—are likely to have for the whole body of canon law would merit a study of its own. I will not follow up on this question in my book, but find it well worth examining what it does to a whole body of law when a significant part of the law becomes dead letter.

In church, the general reluctance to take civil matters to court is even more pronounced than in secular legal life. Party litigation over civil disputes is extremely rare.[22] One reason for this seems to be that legal subjects are largely oblivious to the fact that they can refer civil matters to ecclesiastical tribunals. Adding to this is certainly that ecclesiastical litigation is relatively unpragmatic nowadays. Ecclesiastical tribunals lack the coercive power to oblige the opposing party to participate in the proceedings. If the opposing party does not participate voluntarily, the chances for judicial fact-finding are not good. Moreover, ecclesiastical tribunals lack coercive power to enforce their rulings over reluctant defeated parties, whereas secular courts are more likely to succeed in obtaining justice for the successful party where necessary despite the resistance of the defeated party. Due to this, it seems reasonable for Catholic parties to prefer secular civil courts for the resolution of private disputes. However, in a similar vein—as I stated with regard to penal procedural law which is not fully dead due to the cases of sexual abuse of minors prosecuted by ecclesiastical tribunals—we also have to find that the ordinary contentious trial as the regular procedure for ecclesiastical civil litigations is still law in action (see canons 1501–1655 CIC/1983). This is due to the fact that canonical procedural law also applies the ecclesiastical norms on the ordinary contentious trial in marriage annulment procedures (see canon 1691 §3 CIC/1983). Today, ecclesiastical tribunals deal almost exclusively with marriage annulment proceedings. This has the peculiar

[22] Statistics of matters heard before the Roman Rota are provided by Neudecker (2013, pp. 292–293, 623–626).

effect that the norms on the ordinary contentious trial are living procedural law in the annulment proceedings, whilst they are law on paper for the most part in the practically extinct canonical civil procedures. In the churches of the northern hemisphere, the numbers of marriage annulment cases are also in decline. This is no doubt because their marital affairs, if they live in a canonically valid or invalid marriage, are no longer as important to Catholics as they once were. In Germany, marital affairs have retained some importance for church employees due to the continuing threat of dismissal if Catholics remarry after divorce. The current situation, in any case, has become less tense for employees than it used to be. However, even at present, the basic law of ecclesiastical employment in Germany, the so-called "Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse"—which one might roughly translate as "Basic Order of Ecclesiastical Ministry by Employment Contracts"—still states that entering a mere civil marriage without also entering a valid canonical marriage is grounds for dismissal for Catholic employees (see article 5 sect. 2 no. 2 lit. c and d). The usual situations which the legislator has in mind are church employees' civil remarriage after divorce as well as gay marriage. These result in the dismissal of personnel in pastoral and catechetical ministry and others who require for their work an episcopal admission to preach and teach. For the majority of church employees dismissal is only a realistic threat if their remarriage after divorce or their gay marriage may cause scandal in the workplace or potentially damage the reputation of the church. Some divorced church employees therefore take it upon themselves to undergo marriage nullity procedures. The numbers are dwindling though, at least in the northern local churches.

6.1.3 Ratios of Effectiveness

Discussing the effectiveness of legal norms—for example based on levels of compliance, as above—is a complex task. So far, I have merely stated that legal norms usually have some kind of effect, without citing any unit of measurement, a scale, so to speak, which makes it possible to measure the actual effectiveness of legal norms. Whether it is possible and meaningful to draw up a scale of effectiveness for legal norms in any case remains a controversial question in the sociology of law. One approach the empirical sociology of law uses to measure the effectiveness of legal norms is to calculate a ratio of their effectiveness and ineffectiveness. How one may do this and what it tells us is, however, a matter of critical debate. After all, assessing the effectiveness of commands, for instance, means not only quantifying the number of cases in which breaches of law occur, which might be somehow measurable or at least projectable with the help of the numbers of detected breaches of law, but also quantifying the number of cases in which the legal subjects abide by a legal norm. Hubert Rottleuthner and Margret Rottleuthner-Lutter point out the difficulty of attempting this kind of quantification by asking, "how many times was I tempted

today to (refrain from) murdering someone?"[23] Sociologist Karl-Dieter Opp observes that compliance and non-compliance with a law is also a matter of opportunity insofar as the frequency of occasions on which individuals may actually abide by a law is also influential for the quantification of compliance.[24] Determining the ineffectiveness of a command, on the other hand, requires recording the number of times legal subjects break a law. While there are usually statistics on how often legal subjects are caught acting unlawfully, the actual number of breaches of law remains shrouded in darkness. Quantifying the effectiveness and ineffectiveness of legal norms is therefore often infeasible. The question also arises as to what information any such quantification provides about the effectiveness of law. Rottleuthner and Rottleuthner-Lutter cite two reasons why quantifying the effectiveness and ineffectiveness of legal norms may prove to be of little relevance for assessing legal practice and the capacity of the law to shape the social. First of all, they doubt that compliance with a legal norm can be equated with its effectiveness. After all, laws are not simply about compliance, they are also about the goals associated with their compliance. Rottleuthner and Rottleuthner-Lutter understand a legal norm to be effective when the legal subjects' compliance serves to fulfil the purposes which the legislator pursues with a law.[25] In some cases, the legal subjects fulfil the purpose of a law by abiding by a legal norm and—as in the case of the prohibition of murder—by not murdering anyone. Similarly, in the case of the canonical obligation to confess grave sins at least annually (see canon 989 CIC/1983), the purpose of the legal norm is directly achieved when church members receive the sacrament of confession at least once a year. However, as this example might also help to show, many legal norms pursue goals which they do not contain in themselves. It is evident that the obligation to confess grave sins at least annually is less about shoving Catholics into the confessional every twelve months and more about encouraging them to establish a spiritual practice of seeking reconciliation with God and the church on a regular basis. Admittedly, it is a matter of discussion whether a legal obligation is the right method for accomplishing this, a query, in any case, which I will not pursue at this point. Nevertheless, the example might help to show that legal norms often aim at goals or pursue purposes which reach far beyond what the law can actually command. The ecclesiastical legislator, who legislated that marriages are not valid in cases of abduction (see canon 1089 CIC/1983) was not so much seeking to reduce the number of abductions for the purpose of marriage, but was rather striving to promote the inner freedom of the spouses, which legislation itself cannot enjoin. In a similar vein, Rottleuthner and Rottleuthner-Lutter emphasise that the legislator cannot direct individuals to improve the situation in the labour market, as a direct obligation would only be

[23] Original quote, "wie häufig war ich heute in der Situation, jemanden (nicht) zu ermorden?", Rottleuthner and Rottleuthner-Lutter (2010, p. 22).

[24] See Opp (2010, p. 58).

[25] See Rottleuthner and Rottleuthner-Lutter (2010, p. 23).

appellative.[26] Yet the legislator can create laws which indirectly support an improvement, for instance by issuing laws on protection against unlawful dismissal. According to Rottleuthner and Rottleuthner-Lutter, it follows from this that determining the effectiveness of a particular legal norm is less about its ratio of compliance, and more about the ratio in which this legal norm, directly or indirectly, has an actual influence on the social reality.[27] However, this kind of effectiveness is difficult to nigh on impossible to measure empirically. It is virtually impossible to measure whether the ecclesiastical legislator has succeeded in any way in increasing the number of valid ecclesiastical marriages through the many norms of marriage law that are aimed at ensuring the inner freedom of those entering into marriage. While this has undoubtedly helped to increase the number of marriages that can in principle be annulled, it remains unclear whether the legislator can in fact influence the actual goal at all, namely that spouses contract a marriage based on their free decision to do so.

A second reason why Rottleuthner and Rottleuthner-Lutter are sceptical about whether quantification is helpful in determining the effectiveness of legal norms is that quantity does not seem to be the right measure of effectiveness for all types of legal norms. While it is of interest how often legal subjects obey prohibitions or abide by legal commands, this approach seems strangely misguided with respect to those norms which offer the legal subjects institutional frames for organising their social affairs. It is first of all difficult to measure these actions in terms of quantity. To quantify the effectiveness of norms which allow legal subjects a legal organisation of their affairs, it is necessary to quantify the degree to which legal subjects make use of the possibilities presented to them by the law. Klaus Röhl observes accordingly that the effectiveness of law is not merely about many abiding by the law but also about many taking advantage of the possibilities which the law offers to them.[28] Determining the ineffectiveness of these norms, on the contrary, means determining the extent to which legal subjects do *not* make use of their legal options.[29] In most cases, this is a considerably more complex undertaking. Whilst it might be possible to determine how often church members request the sacrament of the anointing of the sick in accordance with sacramental law (see canon 1006 CIC/1983),[30] it is impossible to determine the extent to which they do not do so, even though canon law offers them this possibility. Moreover, even if this kind of quantification were to succeed, Rottleuthner and Rottleuthner-Lutter believe it would not constitute a reliable basis for drawing conclusions about the true effectiveness of the law. After all, law which presents opportunities is not usually

[26] See Rottleuthner and Rottleuthner-Lutter (2010, p. 23).

[27] See Rottleuthner and Rottleuthner-Lutter (2010, pp. 24–25).

[28] See Röhl, Rechtssoziologie (1987, p. 250).

[29] See Rottleuthner and Rottleuthner-Lutter (2010, pp. 20).

[30] However, these data are not reflected in many church statistics, as William D'Antonio, James Davidson, Dean Hoge, and Mary Gautier lament in their study *American Catholics Today*: see D'Antonio et al. (2007, p. 55).

designed to maximise the use of the legal options it provides. Rottleuthner and Rottleuthner-Lutter explain this by referring to examples such as contracts or last wills to note that it is not the intention of the legislator to maximise the number of contracts or last wills. Instead of providing for a maximum quantity, the legislator is more concerned about providing the legal subjects with potential structures for ordering the social which they are free to use or not.[31] So while it is significant for the effectiveness of these laws that some individuals indeed make use of the opportunities provided by them, the aim is not to attain some kind of maximum use. For canon law, this observation is of interest in a number of ways, not least with regard to the norms of sacramental law, which provide the church members with rights to receive the sacraments. In assessing the effectiveness of these norms, it is certainly relevant that there are Catholics who do receive the sacraments and thus take advantage of the legal options that the law offers to them. However, measuring the effectiveness of these norms by the frequency with which Catholics receive the anointing of the sick or enter into a canonical marriage seems rather pointless. Nevertheless, when musing about numbers it is still of interest to study the rise or decline of quantities, such as of Catholics receiving the sacraments over a certain period of time, in order to draw conclusions from comparative observations. For instance, evidence shows that the reception of the sacrament of penance in the churches of the northern hemisphere has declined significantly since the middle of the twentieth century. Likewise, empirical evidence shows that Catholics from these churches are less inclined to enter into canonical marriages today than they were in the 1960s.[32] Whilst this decline in sacramental practice does not fundamentally inhibit the effectiveness of sacramental law, as sacramental law continues to influence sacramental life even in the churches where its options are realised to a lesser extent, it is evident that the effectiveness of the law has declined. Hence, as noted by Rottleuthner and Rottleuthner-Lutter, quantification is not always an appropriate benchmark for measuring legal effectiveness per se. However, quantitative observations may nevertheless be a useful stimulus for sociological consideration, as changing numbers may point at the fact that legal communities are undergoing a process of change.

6.1.4 Cultural Idiosyncrasies

The above example shows that the intensity with which legal subjects make use of legal opportunities also depends on social and cultural factors.[33] It is evident that the Catholic reality in many churches is changing, and with it the readiness to use legal options provided by canon law. The sociology of law examines this and similar

[31] See Rottleuthner and Rottleuthner-Lutter (2010, p. 28).

[32] For the USA see D'Antonio et al. (2007, pp. 57–58).

[33] Eg Shapiro (1981, pp. 14–15); Röhl (1987, pp. 491–492); Rehbinder (2014, p. 145).

observations by studying the connection between legal effectiveness and culture. Klaus Röhl, for instance, observes that culture influences whether people tend to use the law to settle conflicts or not. He assumes that legal subjects' readiness to turn to the law and take legal action is rooted in their local approaches to dealing with conflicts.[34] Röhl finds that individuals raised in individualistic and less community-orientated cultures and in competitive societies are more likely to take legal action. He also assumes that more bureaucratised societies foster this effect as a more depersonalised adjudication decreases the legal subjects' reluctance to go public with their legal cases.[35] Thomas Raiser points to the Germans' litigiousness.[36] He ascribes this phenomenon to the fact that access to the judicial system in Germany is relatively uncomplicated and inexpensive, and that the courts work professionally and effectively. However, Raiser also understands the Germans' inclination to take legal action to be a result of their mentality. In his fellow Germans he identifies a mentality that understands conflict resolution primarily as the duty of the state. Therefore it seems quite natural to take individual conflicts to court. Yet whilst going to court seems relatively easy in Germany and many other countries, and can even have a playful and competitive character, legal subjects elsewhere may frown upon this practice. Many Asian cultures, especially those influenced by Confucianism, prefer extra-judicial mediation to settle disputes peacefully and without disturbing social harmony in the long term. In Japan, as Röhl notes, society would find it questionable to turn to the courts. Individuals who do so would prove themselves to be incapable of resolving conflicts by other means. This has consequences not only for the effectiveness of procedural norms, but also for the fundamental status of law in Japanese society. As law is not a preferred medium for solving conflicts and is held in lower esteem than in most occidental countries, many conflicts which the occidental mentality typically identifies as legal conflicts, as Röhl notes, are not even recognised as potential legal conflicts in Japan, but are instead treated as social conflicts to be solved extra-judicially by social means.[37] Most interestingly, we may discover similar phenomena in church. There seems to be little inclination among Catholics to settle ecclesiastical matters with the help of canonical procedures. This also applies to churches in those countries which have a strong affinity for the law and are traditionally open to litigation, such as Germany. However, this litigiousness evidently does not generally carry over to the church and its law. German Catholics show no particular tendency to engage ecclesiastical tribunals in conflicts arising in church. This might result from the particular Christian tradition. After all, the church can look back on a longstanding and even biblical tradition of extra-judicial conflict resolution, to which I have already referred in sect. 3.2.7. In dealing with conflicts in the early Christian churches, Paul recommended extra-judicial dispute settlement to the Christian community of Corinth as the

[34] See Röhl (1987, p. 491).

[35] See Röhl (1987, p. 492).

[36] See Raiser (2007, p. 340).

[37] See Röhl (1987, pp. 491–492).

Christian model of conflict resolution. Rather than relying on pagan adjudication, the "court before the unrighteous" (1 Corinthians 6:1), Paul encouraged the Corinthians to settle conflicts amicably or to submit them to the judgment of other community members. It is conceivable that this tendency to favour extra-legal and extra-judicial solutions has influenced the church's culture of conflict resolution to the present day.[38] However, this non-inclination to turn to the law to settle conflicts may also have other and less Christian reasons. I have already referred in sect. 3.2 to Johannes Grabmeier's attempt to contest a decision of his then-diocesan bishop by taking legal recourse to the Roman Curia. With Grabmeier's example in mind, one might suspect that many German Catholics avoid bringing their cases before ecclesiastical tribunals to avoid frustration, as they do not expect much of ecclesiastical procedures. For Grabmeier, the congregation's refusal to even hear him supported his view that the decision about the bishop winning and him losing the case had already been made before the procedure started. If many Catholics likewise perceive of ecclesiastical procedures as partial and do not expect them to work professionally and effectively, this might explain why even Catholics who tend towards litigiousness for cultural reasons hesitate to take legal action in church. This assumption certainly requires further empirical study. Yet if it proves to be true, this finding, from the perspective of the sociology of canon law, alludes to the fact that legal norms which depend on the legal subjects' decision to become effective tend to lose their effectiveness whenever the legal subjects have reason to suspect that the law does not serve their purposes, as it is in fact ineffective for changing their social reality. While some canonical norms reproduce their effectiveness quasi-automatically, such as constitutional norms which automatically reproduce the hierarchical structure of the church independently of most legal subjects' individual decision, others do not. Their effectiveness depends on the legal subjects' decision to abide by them and to make use of the opportunities provided by them. However, when the legal subjects do not trust these laws to actually help them to realise opportunities and tend instead to anticipate disappointment, they will be inclined to refrain from relying on that law. Laws which the legal subjects suspect of being ineffective eventually also become ineffective whenever their effectiveness depends on the legal subjects' decision to make use of legal opportunities.

6.1.5 Intercultural Challenges

One pressing question, especially in the sociology of canon law, is the degree to which intercultural differences in understanding law influence globally applicable canon law. As a law that spans the entire Catholic world, universal canon law must accommodate the fact that its legal subjects have different attitudes towards the law based on their various cultural backgrounds. Globalisation has exacerbated this

[38] See Hahn (2017, pp. 473–479).

problem. While canonical conflicts of a cultural nature were largely inner-European controversies in the premodern era, today's tensions and differences have taken on a truly global character. Surprisingly, there are but few voices in the church and among canonists that seem truly aware of this problem. One exception is John Huels, who points out that the European cultural thumbprint of canon law is problematic for non-European Catholics and hard to digest in non-European local churches.[39] In the non-European churches, canon law confronts legal subjects with Central European legal thought which is in many respects foreign to them or even irritating. For example, the common law traditions of the Anglo-American legal sphere frequently struggle with the statutory character of law in the European civil law tradition, to which canon law belongs, as Huels observes, "Catholics living in a society with a common law tradition and a literalistic attitude towards interpretation and observance of law often have difficulty comprehending the canonical system and sometimes experience canon law more as a source of conflict rather than as a source of unity in the community."[40] These issues which make communication between common and civil law traditions difficult are all the more serious when western law collides with non-western legal cultures. These cultural differences can even result in a negative attitude towards the law itself, something demonstrated by the example of Asian cultures mentioned above. In cultures impacted by Confucianism, for example, the fact that Confucianism does not esteem the law as a social regulator of great value may also have a knock-on effect for canon law. It is therefore extremely difficult or even impossible to defend the claim of canon law to essentially serve the public good of the church and the salvation of souls in local churches that consider the law to be a deficient medium of organising and controlling the social. For canon law, this is not merely a sociological problem, it is also an ecclesiological one. It is therefore a matter of considerable interest for canon law scholars to study how global canon law deals with these cultural differences when claiming validity in diverse local settings.

6.2 Conditions of Compliance

Whilst it is enlightening to study phenomena of compliance and non-compliance with laws, it is of specific interest for the sociology of law to examine the *reasons* why individuals or groups are willing to abide by the law. Opinions among sociologists of law differ on this subject. However, they do agree that there are several factors which stimulate compliance. These include a legal community's customs and habits, the legal subjects' social and moral beliefs, and the probability and severity of sanctions imposed in response to breaches of law. These aspects crystallise into three motives, which sociologists of law often refer to as the motive triad of legal

[39] See Huels (1987, p. 260).

[40] Huels (1987, p. 274).

compliance. These are fear of sanctions, identification with the group in which legal norms are in operation, and internalisation of norms based on their acceptance. Manfred Rehbinder emphasises that the motives driving people to abide by the law vary from case to case. They depend on the content of a norm, the legal subjects' legal knowledge, their personality structure—for instance on whether someone tends to be motivated by the threat of sanction or not—, on the degree to which the legal subjects internalise norms, and on their legal ethos.[41] Hence, in addition to these widely accepted motivators for conformity, namely the fear of sanction, identification with the legal community, and the internalisation of legal norms, Rehbinder introduces further subjective factors that influence the motivators which are likely to have a persuasive effect on each person in each case, namely knowledge of the law, personality structure, and legal ethos. The reasons why people abide by the law lie in the interplay between these diverse factors. They form a complex bundle of incentives inducing compliant or non-compliant behaviour. In textbooks of legal sociology, these various factors frequently appear in three clusters which sociologists of law present as influential for legal compliance, namely knowledge of the law, the probability of rewards or sanctions, and the attitudes towards the law present in a legal community. These three clusters cover practices of legal socialisation, identification, and internalisation. Sociologists of law believe these diverse motives explain legal subjects' compliance with the law. However, these factors also help to explain legal subjects' non-compliance. This is of particular interest to the sociology of canon law, since these factors might help to identify why canon law is currently suffering from such a serious loss of effectiveness, at least with regard to those legal norms which depend on the legal subjects' decision to abide by them, as I explained in the previous section.

6.2.1 Knowledge of the Law

The sociology of law devotes some attention to the question of whether and in what sense it is necessary to know the law in order to abide by it. Scholars broadly agree that low levels of knowledge of legal norms are indeed a threat to compliance.[42] More controversial, however, is deciding the quantity and the kind of knowledge needed to promote compliance. While sociologists of law consider the legal subjects' basic knowledge of the law to be an essential condition for their compliance, scholars disagree on how to define the precise connection between knowledge and compliance. Karl-Dieter Opp, for example, believes there is a direct gradual correspondence between knowledge and compliance. He is convinced that individuals are more inclined to abide by a law the more familiar they are with it.[43] His approach

[41] See Rehbinder (2014, pp. 119–120).
[42] Eg Rehbinder (2014, p. 120).
[43] See Opp (2010, p. 36).

was taken up and modified by Andreas Diekmann. He challenged Opp's gradualist notion by saying that, under certain conditions, even those who are not in possession of detailed knowledge about a legal norm are no less likely to conform to it than those who are better informed. Diekmann refers to cases in which individuals mistakenly consider a certain behaviour to be prohibited. These individuals, who consider a wider range of behaviour to be illegal than a norm actually prohibits and thus have an inaccurate knowledge of the legal norm, are no more inclined to violate the norm than individuals who are precisely informed about the content of the norm. In consequence, it is not in all cases crucial to possess a thorough knowledge of laws in order to ensure their observance. The key point, as Diekmann observes, is that legal subjects do not consider behaviour to be legal when it is not. Accordingly, we should only consider the possession of a rudimentary knowledge of the law to be relevant for the effectiveness of the law if legal subjects erroneously think an action is legal even though it is illegal, but not if they believe an action to be illegal when it is actually legal.[44] Whereas gradualist "the more informed ... the more effective" constructions fail to generally explain the connection between knowledge of the law and compliance with the law, Diekmann's modified approach leaves no doubt that knowledge of the law, even though not necessarily precise knowledge, is indeed a prerequisite for compliant behaviour. From the perspective of the sociology of law, this raises an additional question about the consequences of the legal subjects' declining knowledge of the law in complex contemporary legal systems. After all, in an increasingly complex legal world in which the law is growing in quantity and complexity, we may hardly expect legal subjects to know much of the law.[45] Even legal professionals frequently prove to be well-informed only in those legal fields in which they are experts, while they often have a rudimentary knowledge of the law in other fields. In view of the finding that we may not expect most legal subjects to have much knowledge of the law, it seems reasonable to ask if it is realistic to expect their legal compliance. The sociology of law takes a differentiated view of this. Clearly, whilst it is necessary to somehow know legal norms in order to abide by them, it is frequently not essential to know them *as law*. This is because the content of legal norms often overlaps with other norms, such as social or moral norms. In this light, Klaus Röhl explains that although legal subjects often have a rather meagre knowledge of legal norms, including those relevant to everyday life, they are generally well-informed about what is illegal, because social or moral norms often disapprove of behaviour which is also illegal. Röhl therefore finds that most individuals know at least the basic gist of the law quite well, even though they rarely know the precise content of individual regulations.[46] It is evident, in any case, how much the legal subjects' knowledge of the law varies with respect to the different legal fields. In this vein, Thomas Raiser observes that most individuals are rather well-informed about the basic regulations of penal law, which he thinks is mostly due to the fact that penal

[44] See Diekmann (1980, p. 39).

[45] See Luhmann (2014, p. 195); Röhl (1987, p. 259).

[46] See Röhl (1987, p. 265).

law is regularly closely aligned with moral norms common in a society.[47] Legal subjects also frequently have a rough knowledge of constitutional law, even though more on a general and structural level. Very few legal subjects have a detailed knowledge of individual constitutional norms, but many have a basic political education, to which they owe some knowledge of basic rights, the rule of law, or the rules according to which political institutions operate. The media also play a key role in communicating this content. They also often succeed in disseminating knowledge about single legal regulations. Media coverage and public debates also draw the legal subjects' attention to highly conflictive regulations such as the death penalty, abortion, or inheritance tax.[48] Regarding civil law, many legal subjects are well-informed in areas of law that have a strong impact on their everyday lives, such as contract law, tenancy law, or labour law; in other areas of civil law, their levels of knowledge are frequently low. Knowledge about procedural law or administrative law tends to be quite weak, says Raiser. Few individuals are well-informed about how legislation, adjudication, and administration work and have only a rough idea of the organisational structure, duties, and functioning of legal institutions.

If we transfer these observations to canon law, a similar picture emerges. Whilst it is fair to assume that Catholics generally know little about canonical norms, their levels of knowledge vary depending on the legal matter in question. I will try to sketch a short overview by relying on my own experiences in discussing my lectures and talks with students of theology, academic colleagues, and interested Catholics who frequently reveal rather frankly that they know little of canon law—and sometimes are nevertheless rather surprised to discover what they do in fact know. This is the case because many active Catholics know the content of many legal norms through their everyday practice or local conventions. Constitutional issues, for instance, such as the division of church members into laity and clergy and issues of authority deriving from this fundamental division, are part of their everyday knowledge about the way in which the church functions. Practising Catholics are familiar with many regulations on the sacraments, even though they take their knowledge rather from doctrine or practice than from legal norms. As a consequence, many Catholics probably know more about ecclesiastical constitutional and sacramental law, and probably also about the law on the teaching function of the church, than they think they do. However, the situation is different when it comes to the content of canonical norms which are not commonly reflected in doctrinal, moral, or social norms. Most Catholics, for instance, have a rather meagre knowledge of ecclesiastical property law, penal law, or procedural law. Whilst there seems to be barely any knowledge of ecclesiastical procedural law among practising Catholics, they often know some half-truths of ecclesiastical penal law. From my canon law classes I get the impression that there is a widespread view among theology students that the church universally punishes all kinds of transgressions by excommunication. Most students seem to believe, for instance, that anyone who

[47] See Raiser (2007, pp. 324–325).

[48] See Raiser (2007, p. 325).

remarries after divorce incurs an excommunication. They define excommunication frequently as the "exclusion from church." These examples show that many Catholics do have some knowledge of penal matters. However, this knowledge is frequently imprecise. Similar observations apply to other legal matters. Most Catholics in Germany only became aware of the existence of ecclesiastical property law after the scandal in the Diocese of Limburg, where the so-called "Bishop of Bling" spent several million euros renovating his bishop's residence. Until then, little was known about ecclesiastical property law—including among those responsible for overseeing the bishop's activities by applying the very same law. Saying this, I do not want to suggest that there were not also equally deliberate and thus well-informed breaches of ecclesiastical property law in the course of the Limburg affair. However, it also seems clear that some breaches of law were indeed caused by a lack of information among the members of those bodies that should have been performing a supervisory function. I say this less as an apology and more as a simple statement of fact, that some committee members only demonstrated an awareness of the norms of ecclesiastical asset management *after* the events had taken place. In this sense, one might say that at least one good thing resulted from the Limburg scandal, namely that it served as an involuntary campaign to educate the German bishops, vicars general, cathedral chapters, and administrators of ecclesiastical goods about the basic principles of ecclesiastical property law. It remains to be seen whether the improved knowledge of property law will have a positive effect on legal compliance in the future. According to the sociology of law, this is possible but not certain. As discussed, some knowledge about the law is indeed a precondition for legal compliance, so that better-quality information may in fact increase the chances of legal compliance. Yet at the same time information does not guarantee an increase in compliance. In this vein Manfred Rehbinder stresses that even the best knowledge of law is useless unless the legal subjects are in fact willing to abide by it.[49] In addition, as Andreas Diekmann emphasises, legal knowledge is not only a driving force behind compliant behaviour, but may in some cases also motivate breaches of law. Diekmann namely observes that some crimes actually require a specialist knowledge of the law to successfully break the law.[50] He cites the example of economic crimes, which are often committed by offenders with a particularly sound knowledge of business and tax law. He gives the example of tax fraud where those committing tax evasion are frequently very well-informed and typically know tax law better than the average taxpayer. Diekmann therefore concludes that knowledge of the law might be a precondition for abiding by the law, but in some cases it is also a precondition for sophisticated legal infringements.

[49] See Rehbinder (2014, p. 121).

[50] See Diekmann (1980, p. 40).

6.2.2 Compliance and Sanctions

A further motive for compliance with the law is the degree to which one might expect to be rewarded or sanctioned for complying with or breaking the law. In the search for a viable concept of law in Sect. 2.1, I already mentioned the fact that, in line with Niklas Luhmann, I do not understand sanctions as being part of the concept of law, but as being part of the expectations connected with the law. According to Luhmann, law is less about the legal subjects' actual behaviour than about their expectations of legal norms. Yet because legal norms are counterfactual behavioural expectations, they continue to exist even when they are not fulfilled.[51] Hence, it does not fundamentally undermine the law as law if legal subjects occasionally disappoint these expectations by breaking the law. Luhmann observes, "one does not want to do without the expectation of a solid, well-trodden ground, even if one slips once!"[52] Occasional disappointments deriving from the fact that individuals fail to abide by the law even though we expect them to abide by it do not unmake our expectations that the law will generally provide us with solid and well-trodden paths of behaviour. For law, this also means that its enforcement is not as key as one might assume. Even if the authorities fail to consistently enforce legal norms, these norms keep their inherent structure of expectations. It does not harm the character of law as law that the law enforcement authorities do not enforce compliance or impose negative sanctions in each and every case. Permanent enforcement is neither desirable nor necessary, as Luhmann observes. On the contrary, a legal order that seeks the comprehensive enforcement of its legal norms would only confront itself with its own dysfunctionality, as Luhmann maintains, noting, "If the function of law were defined by the enforcement of a prescribed action or a failure to act through coercive power and sanctions, the actual administration of justice would be constantly, even predominantly, concerned with its own inefficiency."[53] A legal system must therefore turn a blind eye to the fact that legal subjects sometimes fail to abide by its norms. It cannot invest all its energy in enforcing the law. However, one should bear in mind that while occasional disappointments are inconsequential for the law, repeated and permanent disappointments can have a deleterious effect, because they can damage the structure of legal expectations as expectations, as Luhmann notes,

> Certainty of expectation is also at risk when conduct, which conforms to expectations supported by law, cannot be assured and when there is not even the slightest chance that expectation can be fulfilled. Law cannot always say: you are right, but unfortunately we cannot help you. Law must at least be able to offer substitutes (punishment, damages, etc.) and to enforce them.[54]

[51] Eg Luhmann (1986, p. 22).
[52] Luhmann (2014, p. 25).
[53] Luhmann (2004, p. 164).
[54] Luhmann (2004, p. 164).

In order not to undermine the certainty of expectation which legal subjects associate with the law, it is therefore necessary for measures to be in place that react to the continuous disappointment of expectations. These measures must make clear to anyone engaging in illegal behaviour that they should at least expect to be sanctioned. Karl Llewellyn expresses this figuratively, suggesting that law must prove to be a matter which from time to time shows its "teeth," noting, "The 'legal' has to do with ways and standards which will prevail in the pinch of challenge, with rights and the acquisition of rights which have teeth, with liberties and powers whose exercise can be made to stand up under attack."[55] To avoid becoming toothless, the law must sometimes rely on the authorities to enforce its compliance or sanction non-compliance.[56] Hence, Eugen Ehrlich's thesis about the effectiveness of state law—"The effectiveness of the law of the state is in direct ratio to the force which the state provides for its enforcement, and in inverse ratio to the resistance which the state must overcome"[57]—shows that legal effectiveness is also a matter of overcoming resistance to the law as well as overcoming attempts to evade the imposition of substitutes for legal compliance, such as repressive or restitutive sanctions.[58] Sanctions are therefore important for the law which must defend its structure of expectation. And they are important for the legal community in which these expectations exist. Manfred Rehbinder pays particular attention to this relevance of sanctions for the legal community.[59] It is this group in which breaches of law may cause irritation, because they may lead to cognitive dissonance among the group members.[60] There are three potential responses to this. The first reaction is to take the disappointment of expectation caused by the breach of law as an opportunity to stop having the expectation. The legal norm then becomes ineffective. The second reaction is to ignore the breaches of law or to relativise their significance. This reaction also tends to weaken the effectiveness of legal norms. The third reaction is to take both the law and the breaches of law seriously. However, it then seems necessary to react to the groups' disappointed expectations by compensating for any feelings of aggression towards the guilty party by participating in or witnessing the imposition of sanctions.[61] This option may not only settle the social conflict between the group and the offender, but may also strengthen the sense of solidarity within the group. For this reason, sanctions not only serve to reinforce legal norms and to remind the group of their binding nature, but also reinforce the social forces which integrate legal communities.

[55] Llewellyn (1940, p. 1364).

[56] See also Aubert (1952, pp. 263–271, particularly 270).

[57] Ehrlich (1936, pp. 372–373).

[58] On the differentiation between repressive and restitutive sanctions see Durkheim (1960, p. 69).

[59] See Rehbinder (2014, pp. 102–103).

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

[61] See Rehbinder (2014, p. 103).

6.2.3 *Limited Sanctions in Church*

The sociology of canon law therefore has to face the fact that the effectiveness of canon law depends to some degree on either its ability to overcome the resistance that exists among the ecclesiastical legal subjects towards abiding by the law, or to sanction their non-compliance. However, as an institution which has largely lost its powers of coercion in plural and secular modernity, the church in most countries of the world has very limited options for enforcing its law and few options for punishing non-compliance. The church itself can only exert limited pressure on its members. It lacks a sophisticated Weberian apparatus of coercion. External support is also rare. Nowadays, the state hardly ever helps the church to enforce its law, as it used to do in the past. Some church-state regulations are an exception. The church tax in Germany, for instance, is regularly collected by the state's tax administration, which might also apply coercion to enforce tax collection or punish delinquent tax payers. Here the church can indeed still rely on state support. However, this is an exception. In other cases, the possibility of the church to effectively enforce compliance with the law or sanction its members for non-compliance depends to a great degree on the type of norms concerned, and, above all, on the legal subjects' level of personal dependence on the church as an institution. Whether ecclesiastical authorities are successful in enforcing their legal subjects' behaviour is nowadays first and foremost dependent on the respective church members' personal or contractual connection to the church as an institution. Canonist Urs Brosi observes that church authorities today have only a limited range of opportunities for law enforcement at their command and can only enforce those legal subjects' compliance or sanction their non-compliance effectively whom the authority may remove from an ecclesiastical office or dismiss from their position in church.[62] In this sense, the disciplinary law of clerics, religious, and other ecclesiastical officeholders remains widely effective. In this light, Simon Hecke plausibly points to the intense discussion in canonical circles about whether the church's increasingly ineffective penal law, which is widely failing to sanction ordinary church members, would not be better transformed into a purely disciplinary law pertaining to ecclesiastical officeholders and those which are closely connected with the church as an institution, such as the clergy and the members of religious orders.[63] Also affected by ecclesiastical sanctions are church employees who are subject to ecclesiastical employment law, as well as those Catholics who engage in the teaching function of the church and require their ordinary's permission to preach and teach. Catholics who are thus dependent on the church as an institution are therefore more susceptible to the sanctions of canon law than church members who are largely independent of the institution. For the latter group, it is not merely difficult to move them to act in a way as prescribed by the law, as Eugen Ehrlich observed,[64] but these Catholics also by

[62] See Brosi (2013, p. 19); see also Hecke (2017, p. 52).
[63] See Hecke (2017, p. 108).
[64] See Ehrlich (1936, pp. 371–372).

and large no longer feel that canon law applies to them at all. This is not least because the church is unable to establish a consistent connection between breaches of law and sanctions. Whilst the church certainly has the option of sanctioning Catholics, for instance by withdrawing ecclesiastical rights, its scope for doing so is practically limited. One example of a practical limitation to sanctioning church members in Germany consists of increasing levels of anonymity in the large German parishes. It is virtually impossible, for instance, to effectively enforce the key ecclesiastical sanction of exclusion from the sacraments such as from receiving communion, which is one consequence of excommunication (see canon 1331 §1 CIC/1983), if the ministers of sacraments do not know the receivers of the sacraments personally and, consequently, cannot know whether they are in fact subject to this punishment. It is therefore becoming increasingly difficult to enforce ecclesiastical sanctions such as the exclusion from receiving communion in large and vibrant city parishes where ecclesiastical personnel hardly know those attending the church services.[65] Here the church is faced with the fact noted by Niklas Luhmann that "compulsion can only be established if those who control it learn about law infringements".[66] This problem is probably the most significant challenge for legal coercion in church.

Adding to this challenge is that many sanctions in church function merely on the basis of personal belief and the offenders' cooperation, insofar as ecclesiastical authorities frequently depend on the punished individuals freely accepting their sanction and deciding to act according to it. Canon 1352 § 2 CIC/1983 helps to see this. The legal norm directs that offenders may fully or partly pause their observance of a certain penalty—concretely a non-declared *latae sententiae* penalty—if they reside in a certain place where their penalty is not notorious, to avoid creating scandal or damaging their reputation. This shows quite clearly that the legal norm understands the offenders themselves to be responsible for assessing whether it is wise to "self-execute" a penalty under certain circumstances, or if doing so would bring about more social harm than good, in which case they should suspend their observance of the penalty. In church, key punishments such as censures exist to motivate the legal subjects to change their behaviour and to refrain from unlawful action not least by appealing to their conscience. Hence, the execution of these sanctions is often conscience-bound, too. Sociologist Donald Barrett, in 1960, spoke of "the certainty and immediacy of effective sanctions" in church, particularly owing to the fact that canonical penal law addresses the legal subjects' conscience. Barrett found,

> The Code provides for penalties latae sententiae; conscience and the sense of guilt in a member of the Church are stressed; the ever recurrent threat of hell, the ultimate punishment, and the recognition that God demands justice as well as love make the Code's sanctions certain. The immediacy in meaning of such sanctions is guaranteed by the voluntary character of memberships in the Church and the necessary submission thereby to its laws.[67]

[65] See Brosi (2013, p. 19).

[66] Luhmann (2014, p. 207).

[67] Barrett (1960, p. 113).

From today's point of view, we may wonder if Barrett's analysis is still applicable. His observation that voluntary membership ensures the legal subjects' submission to canon law seems particularly worthy of discussion. In Sect. 6.3 I will return to the question of whether we may indeed speak of voluntary membership in church and whether ecclesiastical membership necessarily involves church members submitting to ecclesiastical law as a condition of their membership. However, from today's point of view we may also question Barrett's observation that ecclesiastical sanctions succeed in revealing their meaning to church members today, something which Barrett took for granted in 1960. Urs Brosi, in his 2013 textbook on canon law, certainly adopted a different stance when he observed that ecclesiastical penal law was having increasing difficulties creating meaning among modern-day Catholics. Brosi notes,

> For people who believe that receiving the sacraments on a regular basis and being in community with the church is necessary to reach eternal salvation, the ecclesiastical sanctions are effective. But as this belief is decreasing in the modern contexts of the West, the canonical penalties are losing their relevance and hence their power to enforce canon law. Whoever has distanced themselves from the church without fearing for her or his salvation no longer even notice these sanctions anymore.[68]

From this observation one may draw the conclusion that sanctions which rely on the punished Catholics to execute their sanctions themselves today broadly fail to work effectively when those concerned do not freely accept their duty to act in accordance with their sanction.

6.2.4 Cost-Benefit Considerations

As strategies for enforcing the law or sanctions become increasingly unlikely in church, we may come to find that canon law is gradually losing its "teeth," to borrow Karl Llewellyn's image. This makes its observance increasingly improbable, whenever observing the law depends on the legal subjects' decision. This is because, following a key premise in the sociology of law, sanctions are a key motivator of legal compliance. Karl-Dieter Opp consequently assumes that the likelihood of legal infringements decreases in line with the strictness of sanctions.[69] What he means, in any case, are not the actual sanctions—which, as one might note with Luhmann are mostly absent anyway, because the authorities have other things to do than worry

[68] Original quote, "Für Menschen, die daran glauben, dass der regelmäßige Empfang der Sakramente und die Gemeinschaft mit der Kirche notwendig sind, um das ewige Heil zu erlangen, verfügen die kirchlichen Sanktionen über Wirksamkeit. Da diese Überzeugung aber im modernen westlichen Lebenskontext am Schwinden ist, verlieren die kanonischen Strafen zunehmend an Bedeutung und damit an Kraft, um das kirchliche Recht durchzusetzen. Wer sich ohne Angst um sein Seelenheil von der Kirche entfernt hat, spürt die gegen ihn ausgesprochenen Sanktionen gar nicht mehr", Brosi (2013, p. 19).

[69] See Opp (2010, p. 36).

about sanctioning lawbreakers—,[70] but the expected sanctions. Legal compliance therefore depends to a notable degree on a legal subject's subjective assessment of the probability of being sanctioned, as well as on their subjective assessment of the sanction as such, namely whether they assess it to be intimidating or fairly unproblematic. Andreas Diekmann observes that there are some empirical grounds for believing that the probability of a sanction is more significant for legal compliance than its potential severity.[71] In a legal system such as canon law, in which the probability of sanctions, as explained above, is low for most church members, there is therefore a rather high probability that legal subjects do not feel particularly induced to abide by the law. However, in practice things might be a little more complicated, as shown by sociological observations on compliance and sanction. One theory on the relationship between compliance and sanction that has received some attention in the sociology of law is a model formulated by Karl-Dieter Opp and further developed by Andreas Diekmann. In his initial work, Opp identified four criteria as essential for compliance with legal norms: the degree to which a person is informed about the law; the degree of what Opp calls "normative variance" ("normative Abweichung"), by which he means the degree to which an individual assesses norms competing with legal norms as binding; the degree of expected negative sanctions for non-compliance with the law; and the degree of expected positive sanctions for compliance with the law.[72] Diekmann augmented and refined these criteria, noting that compliance with the law could also have negative consequences, while non-compliance could have positive effects.[73] In addition, Diekmann also focused on actual opportunities for breaking the law. The more often legally relevant situations arise, he notes, the more frequently legal subjects have a chance to break the law and in fact tend to break it, following the principle that "an open door may tempt a saint." Also of importance are criteria such as the inclination of third parties to report a crime, the clearance rate, and the social stigmatisation of offenders in a given legal community. Taking this model as his point of departure, Diekmann developed a theory for empirically testing legal subjects' willingness to comply with norms. His theory assumes that the inclination of legal subjects to abide by the law depends on their personal assessment of *utility*. Whether legal subjects abide by a law or not depends much on the net benefit accruing to lawbreakers from their breach of law.[74] Here, Diekmann also factors into his observations that there are not only negative but also positive sanctions, rewards for abiding by a legal norm as well as advantages accruing from disregarding it. Every taxpayer who commits tax fraud saves money, and every parking offender saves time finding a parking spot.[75] Diekmann, thus, calculates the "profit" accruing to lawbreakers from breaches of

[70] See Luhmann (2004, p. 164).
[71] See Diekmann (1980, p. 144).
[72] See Opp (2010, pp. 36–38).
[73] See Diekmann (1980, p. 41).
[74] See Diekmann (1980, p. 88).
[75] See Diekmann (1980, p. 40).

law by taking the positive sanctions for the breach of law and subtracting the negative sanctions which might apply for it. He factors the positive sanctions for compliance as "costs" which do not apply in the case of breaking the law. By taking the profit and subtracting the costs, he calculates the net benefit of breaking the law. Diekmann's model shows if and when it might be "worthwhile" to break the law. It demonstrates that in deciding whether to abide by or break the law, it is not only—as simpler theories assume—a matter of whether the negative sanctions for a breach of law are high or low,[76] but that we must take a complex bundle of factors into account. By studying the various positive and negative effects which are probable when abiding by or breaking a law, we may for instance find that similar to low negative sanctions, low costs—that is a mere minor loss of positive sanctions that compliance would bring—might have a negative impact on compliance economics. If one benefits greatly from breaking the law, but risks only minor losses from negative sanctions and forfeits only a few advantages that compliance might bring, this results in a clear net benefit from breaking the law.

6.2.5 The Law and Competing Norms

For many legal norms, this net benefit is significant, as Diekmann notes. For example, tax evasion and fare evasion may both be worthwhile undertakings from an economic point of view. Using the example of fare evasion, Diekmann calculated—at the time of his study in the 1970s—that in most German cities the probability of being caught without a ticket and having to face the threat of negative sanctions was extremely low. Diekmann therefore concluded, "Any rationally thinking 'homo economicus' should be a fare-dodger!"[77] Nevertheless, after having studied his empirical data, he found that the violation rates were surprisingly low. The fact that individuals were obviously not overly inclined to dodge the fare, as Diekmann analysed, could either be due to the fact that individuals considered the risk of being caught to be greater than it actually was, or that their moral attitude was also a factor. In his study, Diekmann concluded that morality is evidently more important for the observance of legal norms than the economic ratio of a cost-benefit analysis.[78] Based on this conclusion, he formulated the thesis that compliance with the law and moral beliefs correlate gradually: legally compliant behaviour is more likely if the law reflects the legal subjects' moral beliefs. In a similar vein, Karl-Dieter Opp sees it as a prerequisite for compliance with laws that they do not differ too greatly from the group's everyday normativities. An important factor in explaining the phenomenon of non-compliance is therefore *normative variance*,

[76] See Diekmann (1980, p. 18).

[77] Original quote, "Der rational denkende 'homo öconomicus' müßte also schwarz fahren!", Diekmann (1980, p. 73).

[78] See Diekmann (1980, p. 133).

that is the degree to which an individual understands norms other than legal norms as binding which may compete with legal norms for compliance. These other norms that compete with legal norms for compliance are primarily non-legal social and moral norms that are considered binding within a social group. Personal beliefs, such as one's own judgment of conscience, can also produce norms that are incompatible with a law. In legally plural social spaces, competing norms might also include rival laws from other legal systems, for example when state law comes into conflict with religious law. Opp understands the degree of normative variance between our everyday normativities and legal norms as most influential on legal compliance. The greater the degree of normative variance, the lower the chance that legal subjects will abide by the law.[79] The conflicting norms then become the yardstick for the law. They represent alternative conceptions of what is good and what is just. These beliefs form the basis of the legal subjects' evaluation of the law. Whether law is considered legitimate by a group depends on how well it correlates with the ideas of the good and the just prevalent in this group. The more closely the law is related to these ideas, the more legitimate it appears in the legal subjects' eyes. The more clearly it diverges from them, the less likely it is that the legal subjects will accept the law and, in consequence, the less likely it becomes that they will abide by it.

The sociology of law examines the legal subjects' attitudes towards the law within the field of research on *Knowledge and Opinion about Law*. Empirical methods tend to yield the best insights.[80] So far, there have been no such studies on canon law. However, this has not prevented canonists from recording their impressions regarding the attitudes of Catholics towards canon law, as shown by Ladislas Orsy's observation about the increasingly fragile reputation of canon law after the Second Vatican Council.[81] Indeed, this seems to be its core problem in the churches of the northern hemisphere, as evidenced by a number of comments from colleagues who describe the attitude of church members towards canon law as distant. Canonist John P. Beal, for instance, speaks of an "experience of the remoteness of canon law from the everyday life of the faithful".[82] John J. Coughlin refers to phenomena of anomie in church, which he traces back to the "antinomian absence of the proper appreciation of canon law".[83] Werner Böckenförde describes many Catholics' increasingly distanced stance towards the law as the result of alienation between different groups in church. According to him, this process of alienation is not only between the average church members and canon law, but also between the legal subjects and the legislator, as Böckenförde impressively illustrates, noting,

[79] See Opp (2010, p. 36).

[80] One "classic" of German-language empirical KOL research is the empirical study undertaken by Theo Rasehorn in 1970 entitled *Zur Einstellung der Unterschicht zum Rechtswesen* [*On the Attitude of the Lower Classes to the Legal System*]: see Rasehorn (1975).

[81] See Orsy (1992, p. 97).

[82] Beal (2011, p. 136).

[83] Coughlin (2011, p. 65).

> There is a huge gap between the demands of Rome and the practice in the pastoral field of the church. This gap exists between the priests and the laity, between the bishop and his priests, partially also between the pope and the bishops. People say, 'Fulda is far away, Cologne is far away, Rome is even farther away.' Many clerics and lay people feel conscience-bound to refuse the demands of Rome; and many bishops tolerate this, as long as it does not appear in the newspaper and no one files a complaint about it.[84]

Patricia Goler's comment that canon law is largely meaningless among black Catholics in the United States because they view it as an instrument of a white church and as a law that exclusively favours whites is a further statement about the widespread perception of law among the legal subjects of canon law.[85] The problem of normative variance therefore seems to be particularly serious in church. Alternative judgments of conscience, affective distance, and a lack of identification with canon law are critical issues which impede compliance with canon law. This observation merits an in-depth analysis in the following sections.

6.2.6 Socialisation and Internalisation

The members of a group regularly abide by the group's laws because they identify with the group and the normative beliefs shared by its members. This is in fact an integration mechanism: those who adopt the group's beliefs become members of that group. This happens through the appropriation and internalisation of norms approved by the group. This internalisation process is a phenomenon of socialisation and therefore academically falls under the umbrella of socialisation theory and social psychology. June Tapp is one social psychologist who has specifically worked on the question of legal socialisation as a process of adaptation to social beliefs about the law which members of legal communities appropriate through internalisation. She transferred Lawrence Kohlberg's model of moral development to the field of law and, together with Kohlberg, developed it into a model of legal socialisation.[86] Tapp and Kohlberg identify three different levels of individual orientations with regard to the law, which they understand as phases in legal subjects' legal socialisation. Individuals frequently pass through these phases in the course of their socialisation, although not all individuals reach the final level. As in Kohlberg's model of moral development, the first level in an individual's attitude towards the law is

[84] Original quote, "Es tut sich eine Kluft auf zwischen dem von Rom Geforderten und dem, was in der Seelsorge praktisch geschieht. Diese Kluft ist erfahrbar bei Priestern und Laien, auch zwischen dem Diözesanbischof und seinen Priestern, zum Teil auch zwischen dem Papst und den Bischöfen. Es heißt: 'Fulda ist weit, Köln ist weit, Rom ist noch weiter'. Viele Kleriker und viele Laien fühlen sich im Gewissen verpflichtet, die Ausführung römischer Befehle zu verweigern, und viele Diözesanbischöfe tolerieren das, solange es nicht in der Zeitung steht oder zu Beschwerden kommt", Böckenförde (2006, p. 147).

[85] See Goler (1972, p. 295).

[86] See Tapp and Kohlberg (1971, pp. 65–91).

characterised as pre-conventional, which is determined in the first stage by a fear of being sanctioned in the case of non-compliant behaviour. This stage is usually followed by a hedonistic stage, in which compliance with the law is associated with an expectation of reward. This roughly corresponds to the legal judgment of children of kindergarten and early primary school age. On the second, conventional level of legal socialisation, individuals observe the law, first, because they expect and receive social praise for doing so, and second, because they consider it a social requirement to submit to the authority's commands. These stages become well developed among children of later primary school age and teenagers. The tendency for children to conform to norms results, among other things, from the fear of their peers' negative judgment of norm violation. If a group accepts a legal norm, anyone who violates it must fear social disapproval upon violating that norm. According to sociologists working on the question of deterrence in punishment theories, this fear of the anticipated social consequences of breaking the law is a far greater deterrent than the threat of legal punishment itself. Stefanie Eifler notes in this vein that social disapproval and the expectation of personal shame are a more effective means for preventing crime than formal punishment.[87] This is especially the case when individuals may expect disapproval from others whose opinion they hold in particularly high regard.[88] On the third, post-conventional, level, which can (but does not necessarily) develop from young adulthood onwards, legal subjects move beyond the idea of authority. For Tapp and Kohlberg, the first stage of this level consists of individuals developing an awareness of the grounding of law in social contract and of the related significance of the constitutional order and its relevance for social stability and progress. At the second stage of the post-conventional level, legal subjects tend to observe the law if they find it to be legitimate, insofar as it proves to be an expression of a just order in a moral sense. In this stage, the reason for the legal subjects' conformity to the law lies in their personal recognition of the law—an ideal mode of action of the law, as Manfred Rehbinder notes.[89] According to Eifler, assessing whether a legal norm is legitimate or not is more important for legal subjects in the second stage of level three than the threat of punishment for breaking the law, as she observes, "Laws are primarily followed because the actors are convinced of the legitimacy and binding force of legal norms and not because they fear sanctions."[90]

[87] See Eifler (2010, p. 101).

[88] See Opp (2010, p. 58).

[89] See Rehbinder (2014, p. 119).

[90] Original quote, "Gesetze werden also in erster Linie befolgt, weil Akteure von der Legitimität und Verbindlichkeit rechtlicher Normen überzeugt sind, und nicht, weil sie eine Bestrafung fürchten", Eifler (2010, p. 100).

6.2.7 Canon Law and Non-Compliance

The levels of legal socialisation in the Tapp-Kohlberg model describe reasons why legal subjects abide by the law. These include the fear of punishment, the prospect of reward, social standing and the fear of the group's disapproval, an understanding of the purpose of the law, and recognition of the legitimacy of the law. At the same time, these motives also reflect the reasons why legal subjects do *not* abide by the law. At the first level of legal socialisation, non-compliance becomes likely if the legal subjects can expect neither punishment nor reward. At the second level, we may expect widespread non-compliance when there is no prospect of the legal subjects receiving praise for compliant behaviour and no threat of social condemnation for non-compliance. At the third level, non-compliance becomes likely when legal subjects are convinced that legal norms are illegitimate. If the law appears illegitimate to them, they will find breaking the law to be justified, and, under certain circumstances, even to be a step required to oppose unjust laws. Bearing these observations in mind, we may ask what these levels mean for canon law. The legal subjects of canon law are Catholics from the age of seven upwards who are in possession of the "efficient use of reason" (canon 11 CIC/1983). Hence, canon law potentially addresses individuals at all stages of legal socialisation. Its observance therefore depends on all of the aforementioned reasons: fear of punishment, the prospect of reward or social recognition, fear of disapproval, an understanding of the purpose of canon law, and the acknowledgement of the legitimacy of the law. If these negative or positive expectations of canon law are missing, it becomes unlikely that the ecclesiastical legal subjects will abide by canon law. I already pointed out that it is rather and increasingly unlikely that ecclesiastical legal subjects may expect to be negatively sanctioned when breaking canon law. The ecclesiastical authorities have only limited options for the imposition of sanctions. As sanctioning requires the authorities' knowledge of a crime and their decision to take action, the threshold for church authorities to punish their legal subjects is frequently too high, with the exception of those crimes such as the sexual abuse of minors which have massive public repercussions. One has to note though that canon law provides the instrument of so-called *latae sententiae* penalties which befall the lawbreaker ipso facto upon committing certain crimes (see canon 1318 CIC/1983). These kinds of penalties apply for offences such as heresy, apostasy, and schism (see canon 1364 §1 CIC/1983), the desecration of the consecrated species (canon 1382 §1 CIC/1983), and abortion (see canon 1397 §2 CIC/1983), and result in a *latae sententiae* excommunication. Clerics entering a civil marriage incur a *latae sententiae* suspension (see canon 1394 §1 CIC/1983). Yet one should note that canon law also directs that offenders are not bound by a *latae sententiae* penalty if they were unaware without any personal fault upon committing their offence that a penalty was attached to it (see canon 1324 §3 in conjunction with §1 no. 9 CIC/1983). Bearing in mind the widespread lack of knowledge of canon law, one may ask in which cases *latae sententiae* penalties are in fact incurred in church if we can take it as given that most Catholics' lack of legal knowledge can hardly be considered to result from personal

fault. Whilst probably close to all active Catholics know that the Catholic Church regards abortion as sinful, the vast majority is guiltlessly unaware of the fact that the church also regards it as a crime. Hence, the vast majority of Catholics procuring an abortion do not incur the punishment due to their guiltless lack of knowing about the penalty attached to abortion. This shows that *latae sententiae* punishments, as effective as they may seem at first sight, are upon greater scrutiny rather ineffective in most cases. As hardly any Catholics have personal fault from not knowing of the *latae sententiae* sanctions attached to some ecclesiastical crimes, they do not incur them in the first place. Those who have personal fault in not knowing of the penalty, incur it, but do not know it... Hence, in discussing possible compliance with *latae sententiae* punishments, we have to focus merely on the small group of those Catholics who commit a crime and know of the penalty attached, so that they incur it and also know that they have incurred it; lecturers in canonical penal law at this point in their lectures usually make the joke that this in fact merely applies to canon lawyers. However, whilst canonically educated legal subjects cannot avoid incurring *latae sententiae* punishments upon committing crimes to which these penalties apply, they are frequently free to simply ignore the punishment and also to ignore the consequences connected with them, such as the restriction of the right to receive the sacraments in cases of a *latae sententiae* excommunication (see canon 1331 CIC/1983). As external pressure such as legal enforcement or social condemnation is usually missing or even impossible—in those cases in which no other person knows of the penalty—, it is highly unlikely that these ecclesiastical legal subjects abide by canon law and submit to their penalty. Only a small number of offenders might do so and submit to the penalty, based on their personal belief that they deserve the punishment. Hence, recalling Tapp's and Kohlberg's reasons why legal subjects abide by the law, we may come to find that it is highly unlikely that Catholics abide by canon law due to fear of punishment. Adding to the widespread ineffectiveness of negative sanctions in church, legal subjects may not expect too many positive sanctions for abiding by the law either. One may indeed wonder what the rewards actually are for abiding by canon law. Donald Barrett sums up, "membership in the Mystical Body, participation and communication with other members, security in a life with meaning beyond immediate gratification."[91] However, one may ask how many contemporary Catholics feel they are endowed with these goods because they observe *the law,* and how many feel deprived of these goods if they break ecclesiastical law. As abiding by or breaking the law does not influence church membership and frequently does not even diminish the rights that Catholics enjoy in church, it is difficult to connect Barrett's "rewards" with legal compliance. Hence, Barrett's list reveals that there are hardly any direct advantages to observing canon law. Church members at the first level of legal socialisation thus have little incentive to observe canon law whenever they have the choice to do so or to refrain from abiding by the law. A similar finding applies to the conventional level of legal socialisation, at least in most local churches of the northern hemisphere.

[91] Barrett (1960, p. 113).

Conventional conformity to norms depends on praise or disapproval by the group and by the group's relevant authorities. Conversely, if a group holds the law in low esteem, observance becomes unlikely. Legal subjects tend to ignore laws when nobody, including the relevant authorities, expects their compliance. This applies to many canonical norms. Often neither those third parties who are important to the church members nor ecclesiastical "authority figures" expect others to comply with ecclesiastical laws. We might call to mind by way of example the obligation to receive confession at least once a year (see canon 989 CIC/1983). Hardly any Catholics in my culture face the expectation to observe this legal norm, not even by the ecclesiastical pastoral staff. Hence, nobody may expect the observance of this law to find someone's praise nor non-observance to meet with disapproval. Those who go to confession annually will receive little praise from fellow Catholics for doing so. And hardly anyone will disapprove of their non-observance of the obligation to confess if they do not do so. Consequently, neither feelings of shame nor guilt will arise in those who violate the legal obligation if they—like the majority of practising Catholics in northern countries—do not comply with their annual duty to go to confession. This has a detrimental effect on many legal subjects' inclination to abide by the law. Simon Hecke goes one step further. He actually finds that "deviation from the canonical norm is the 'general norm'".[92] Although it is doubtful whether this is universally true, it is certainly the case for many legal norms, including the obligation to go to confession. The social norm in German parishes, for instance, is to refrain from going to confession, because confession is widely connected with religious trauma. Many members of the post-war generation of Catholics who were still obliged to go to confession regularly frequently experienced this as highly traumatic,[93] often connected with spiritual abuse and abuse of power, and sometimes even with sexual abuse. There is therefore a maximum degree of normative variance between canon 989 CIC/1983 and the widespread belief among German Catholics that it is advisable to avoid going to confession. Consequently, compliance with this legal norm among German Catholics is most unlikely. If this high degree of normative variance is the norm, then there is nobody who confronts legal subjects who break the law with any consequences. Instead, those who comply with it become the ones more likely to have to explain their actions. In German parishes, in any case, those Catholics who actually follow the legal obligation of annual confession are more likely to raise fellow Catholics' eyebrows than those who refrain from doing so. A similar finding emerges at the post-conventional level of legal socialisation. Legal subjects at this level will predominantly disregard canon law if the law deviates from their normative beliefs, because they assess the law to be unjust whenever it departs from internalised moral or social norms. One example of this is the widespread practice in Germany of distributing communion without further ado to Protestant partners in mixed confessional marriages during a Catholic

[92] Original quote, "Abweichung von einer kirchenrechtlichen Norm 'allgemeine Norm' ist", Hecke (2017, p. 47).

[93] See Moser (1976).

Eucharist, which is common even in congregations which know about the confessional status of these non-Catholic Christians. This is because most ministers of communion as well as local parish members do not consider the restrictive legal regulation of canon law (see canon 844 §4 CIC/1983) to be just and therefore feel justified in breaking it or even obliged to do so.

6.2.8 Structures of Normative Variance

The ways in which many Catholics approach confession or communion are two examples of how a significant normative variance between legal norms on the one hand and moral or social norms on the other hand may weaken compliance with the law. Of course, every legal system has its own comparable examples. However, normative variance is of particular interest to the sociology of canon law, primarily because it is not only a widespread phenomenon in church, but also because of its structural dimension. Insofar as canon law has fundamentally and consistently distanced itself from social beliefs about a whole range of issues prevailing in many local churches, it is fair to think of normative variance as having become structurally solidified with regard to many normative issues. On the one hand this is because canon law has decoupled itself from the contemporary understanding of state law, and on the other hand because global canon law only has a rather tenuous relationship with the local churches. Both of these arguments merit some further explanation, which I will give in the following. First, to no small degree, normative variance between canon law and other norms essential to many Catholics is due to the premodern structure of canon law. This premodern structure contradicts the way in which ecclesiastical legal subjects who are simultaneously citizens of modern democratic constitutional states conceive of the law in general. Canon law therefore finds itself increasingly confronted by Catholics claiming the freedoms they associate with secular state law in church, too. Many church members want the church to grant them similar freedom rights to those they enjoy in liberal society and the secular state: freedom of conscience, freedom of speech, and a wide range of participation rights.[94] The fact that canon law operates at a lower standard of freedom rights compared to contemporary liberal orders creates a high degree of normative variance between canon law and state law. This makes compliance with canon law structurally improbable. Second, compliance with canon law is also marked by cultural dissonances. These create a distance between ecclesiastical laws and locally effective norms of the social. As early as the 1970s, as I already mentioned, Patricia Goler questioned whether, from the perspective of black American Catholics, canon law as "white law" could claim binding force for black Catholics. She observed, "With each advance of black self-consciousness, there comes a corresponding sense that the laws and authorities are white laws and

[94] Eg Beal (2011, pp. 140–141); Essen (2013, p. 217).

white authorities and that they are not legitimate for black people."[95] According to Goler, the non-observance of Roman canon law by black Catholics in the United States is due to the fact that the relevant legal and cultural norms are largely incompatible. It would no doubt be possible to find similar incompatibilities in relation to other Catholic groups and cultures. In the global church, it is particularly problematic that canon law has a global claim to validity, but demands compliance locally. In the local churches, in any case, canon law as the evident result of central European legal thought clashes with local beliefs about the law, especially in the non-European churches.[96] This frequently results in high degrees of normative variance. However, and most surprisingly, canon law studies has devoted relatively little thought to this issue so far. Simon Hecke remarks that one may identify the Second Vatican Council as the historical context in which the church started to recognise that modern societies are complex and that having a global church permeating through complex societies makes things even more difficult. Whilst the church in the meantime has learnt to conceive of itself as a global church, Hecke finds, it has yet to learn to understand its law as global law.[97] So far, it has only done so insofar as canon law claims global validity for all Catholics worldwide. Yet, thus far, the legislator seems to have given little thought to the fact that it is theoretically insufficient and also detrimental for the effectiveness of global canon law if the Roman legislator merely transplants legal norms grown in a European civil-law context into the local churches all over the globe.

6.2.9 Choice of Law and Forum Shopping

This is not without consequence for the effectiveness of canon law. The normative variance between canon law and competing norms which Catholics have internalised make the observance of canon law highly improbable. Church members who are unconvinced by canon law are in fact encouraged to break the law because they need not fear punishment most of the time, but more importantly, neither do they need to fear any disapproval from fellow Catholics for doing so. Yet there is a further motive which legal scholar Jacques Vanderlinden identified by examining how contemporary legal subjects experience freedom and pluralism. He found that many legal subjects of today no longer feel they are a subject at the mercy of a legislator, but have become self-confident citizens of a global world who can therefore at least to some degree decide to which legal system they subject themselves. Vanderlinden notes, "The essential pluralist point is that the individual is not just the anonymous object of State law, but also the autonomous subject who chooses between the

[95] Goler (1972, p. 295).
[96] See Huels (1987, p. 260).
[97] See Hecke (2017, p. 109).

various laws of the social networks to which he belongs."[98] Those who make full use of the plurality of modern-day global life are no longer inevitably destined to follow a certain law. Instead, their experience of the law is very much more malleable. The widespread practice in private international law of choosing between several jurisdictions, known as "forum shopping," is an example of how global legal pluralism enables legal subjects to choose their preferred laws.[99] Legal systems of non-state origin, which Jean Carbonnier calls "sub-law",[100] such as contract law, transnational law, or canon law, are particularly vulnerable to selection by the legal subjects. The latter in particular, due to its paucity of coercion, is especially dependent on its legal subjects' decision to comply with it or not. Nowadays, however, legal subjects usually take this decision of their own free will on the basis of their belief in a justice system. Compliance with canon law therefore increasingly ties in with whether its legal subjects accept it as legitimate law or not. Jürgen Habermas notes, "The *de facto validity* of legal norms is determined by the degree to which such norms are acted on or implemented, and thus by the extent to which one can actually expect the addressees to accept them."[101] This verdict, quite evidently, applies to canon law, too.

However, contrary to what Carbonnier's "sub-law" implies, it is not necessarily the case that legal subjects will routinely choose state law over other laws whenever they find themselves addressed by various and competing legal claims. A study from Israel may serve as an illustration. As part of their survey for the *Israeli Democracy Index 2016*, Ella Heller, Chanan Cohen, Dana Bublil, and Fadi Omar asked their Jewish interviewees how they would react in the event of a conflict between Halacha—that is Jewish religious law—, and state law, specifically a state judicial decision.[102] Only 28% of the respondents preferred Halacha to secular law, while 64% preferred state law. Here, it is of course necessary to differentiate between religious groups. While 97% of ultra-Orthodox respondents gave priority to the Halacha, only 6% of secular Jews did so. The responses of other groups—religious Zionists, traditional religious, and traditional non-religious groups—were between these values. In the middle of the spectrum, the response of traditional religious respondents was fairly well balanced: 40% voted for the primacy of religious law, 44% for secular state law. This result is certainly noteworthy as it suggests that the middle ground of Jewish-Israeli society is undecided on the primacy of religious or secular law. The interviewers also asked Arab Israelis whether they would rather follow their own religious law or state law in the event of a conflict. Here, 48% preferred religious law, with only 44% preferring state law—a result that might be rooted in the problematic political situation of Arab Israelis in Israel. This shows that Israeli law has problems of legitimacy in the Arab population, and that Arab Israelis

[98] Vanderlinden (2002, p. 180); see also Tamanaha (2008, pp. 375, 385).

[99] See Tamanaha (2008, p. 389); Seinecke (2015, pp. 37–40).

[100] Original quote, "Unterrecht", Carbonnier (1974, p. 137).

[101] Habermas (1996, pp. 29–30).

[102] See Heller et al. (2016, pp. 83–85).

are more likely to recognise religious law. However, these results vary with regard to the religious orientation of the interviewees. While Muslim respondents overwhelmingly preferred religious law (56%), Christian (62%) and Druze respondents (56%) were mostly in favour of secular law. The more religious the respondents considered themselves to be, the more likely they were to say they would abide by religious law in the event of a conflict between religious and secular law. These data are as interesting for the general sociology of law as they are for the sociology of religious law. For the sociology of religious law, they point to the relationship between an individual's religious belief and their readiness to follow religious law; thus, the *Israeli Democracy Index* shows a gradual correlation between individual piety and individual inclination to abide by religious law. It would be interesting to ask if one can make broader generalisations based on this observation. We may in fact ask if highly devout Catholics are more willing to abide by canon law than active but less devout church members. A separate empirical study would be necessary to draw reliable conclusions in this regard in order to examine whether there are more general correlations between individual piety and personal readiness to abide by religious law which also apply to Catholics. However, besides this finding, the observation based on the *Israeli Democracy Index 2016* shows that legal pluralism does not necessarily decide whether legal subjects will choose to follow state law whenever conflicts between state law and religious law arise. In fact, the findings underline the observation that in conflicts between competing legal orders, the type of law likely to win the argument is that which the legal subjects regard as being more legitimate. This result points strongly to the relevance of legitimacy with regard to legal compliance, a conclusion of key significance for canon law.

6.3 Effectiveness and Validity

In summary, we can say the following about the ecclesiastical legal subjects' compliance with canon law: neither with respect to the legal subjects' knowledge of the law nor with respect to the likelihood of sanctions nor with respect to many Catholics' ideas of legitimacy is canon law currently in a position to make its observance highly likely, at least in those cases in which abiding by the law depends on the legal subjects' individual decision. Whilst many legal norms, such as the norms of constitutional law, are fairly effective as they reproduce ecclesiastical structures by way of a quasi-automatism, those legal norms which depend on the legal subjects' decision to abide by the law are in tendency rather ineffective. Their observance is unlikely and becoming ever more improbable, the more the legal subjects' legal knowledge decreases, the more constrained the church authorities' range of sanctions becomes, and the greater the normative variance between canon law and the everyday norms as internalised by Catholic individuals and groups become. As modernity progresses, canon law successively fails to be a normative medium for influencing the legal subjects' behaviour and their social reality.

6.3.1 Non-institutionalised Law

In his recent book on the legal formation and structure of canon law, however, Simon Hecke states that this problem makes the mere question of legal effectiveness pale into insignificance. The issue is about far more, as Hecke finds, namely the *institutionalisation* of canon law and therefore about processes of stabilisation and restabilisation, which attribute the law with binding force in the first place. In light of the current conditions, Hecke doubts whether canon law can still succeed in institutionalising itself and thus create a binding force which binds all Catholics. He observes that there is continuing public discourse inside and outside the church about the divergences between behavioural expectations maintained by ecclesiastical doctrine and canon law, and the church members' concrete behaviour. This continuous criticism, as Hecke finds, massively obstructs the institutionalisation of canon law among the ordinary church members—the non-ordained Catholics and those who are not ecclesiastical officeholders.[103] These ordinary Catholics, as Hecke finds, no longer contribute to the institutionalisation of canon law. The processes of stabilisation and restabilisation of canon law, which give the law its binding force, take place far from their reality. Canonical norms are of minor or no significance for them; they do not accept the roles which the law ascribes to them; and they pay minor or no attention to the status functions deriving from the law. The law, even when it exists in fact and is formally in force, is therefore based on a claim to have binding force which, for many Catholics, is completely meaningless. However, one may wonder what the consequences are that arise from this finding. Hecke believes it necessary to rethink who still belongs to the core carrier group ("Trägergruppe") of canon law, as the group of Catholics upon whose shoulders the law primarily rests. Hecke also refers to these pillars of canon law as those agents who institutionalise canon law.[104] They form the group which stabilises and restabilises the law. This group has changed considerably and irreversibly in the modern era. Whilst in the premodern *res publica Christiana*, society as a whole could be regarded as the carrier of canon law, we might attribute this function today merely to active members of the Catholic Church.[105] Canon law itself acknowledges this reduction. Canon 11 CIC/1983 states in this respect that mere ecclesiastical laws are exclusively binding for Catholics, that is those who were baptised in the Catholic Church or received into it. Canonical theory, however, still envisages a somewhat broader circle of obligation for norms founded in divine law: according to ecclesiastical doctrine, divine law binds all human beings where natural law is concerned, and all Christians regardless of their confession where the law of revelation is concerned. Yet it is evident that today the church is incapable of practically imposing its legal norms upon legal subjects outside the Catholic Church. Hence, the carrier group upon which canon law rests consists merely of Catholic Christians. However,

[103] See Hecke (2017, p. 45).
[104] See Hecke (2017, p. 47).
[105] See Hecke (2017, pp. 40–41, 58).

according to Hecke, this general claim is also increasingly difficult to defend sociologically. He suggests instead that we make a distinction between those Catholics who are part of the church hierarchy and ecclesiastical officeholders, and those ordinary Catholics who are not. The latter group, as Hecke sees it, may be subjects of canon law, but they do not in fact belong to the carrier group of canon law anymore.[106] From the perspective of organisation theory, this is an oddity that requires some explanation. Hecke gives an explanation with reference to Niklas Luhmann's studies on the church as an *atypical* organisation. One typical characteristic of organisations is that they set the conditions for their own membership. Individuals or groups can only belong to an organisation if they submit to its membership conditions. And only those who accept these conditions can remain in the organisation. Jürgen Habermas similarly emphasises that "membership must rest on an (at least tacit) act of agreement on the member's part."[107] Those who no longer accept the membership conditions can leave the organisation; and the organisation expels those members who refuse to accept its membership conditions. These bilateral membership decisions are a constitutive feature of organisations. The church, however, functions differently. Luhmann explored this point in greatest depth in his book *Funktion der Religion* [*Function of Religion*]. The church does not allow its members to decide whether to stay or leave the church, because it assesses membership according to the principle "once a Catholic, always a Catholic" ("*semel catholicus semper catholicus*"). For this reason, formal church membership does not really tell us anything about whether the church members in fact *want* to belong to the church.[108] Church membership therefore also says little about the church members' willingness to submit to the conditions of church membership. For Luhmann, this means that belonging to the church is not specified. What he means by this is that ecclesiastical authorities are not in the position to connect their decisions with the church members' decisions.[109] Consequently, atypical with regard to the general functioning of organisations, ecclesiastical authorities' decisions are often not very relevant for ordinary church members. Luhmann uses doctrinal teachings by way of illustration by noting that the ecclesiastical magisterium is widely unsuccessful in generally connecting their doctrinal teaching with the church members' decisions. Whilst both doctrine and individual decisions may be expressions of the Catholic faith, the connection between official doctrine and personal faith is rather vague. It is not therefore possible to conclude with any certainty from the church members' behaviour whether they accept the magisterium's teaching or not. Ultimately, it remains largely unclear what significance doctrinal statements have for Catholics as members of the church as an organisation. Luhmann goes on to explain that the church has sought to counter this disconnect between the ecclesiastical authorities and the ordinary church members by dividing

[106] See Hecke (2017, p. 47).
[107] Habermas (1996, pp. 124–125).
[108] See Luhmann (1977, p. 294).
[109] See Luhmann (1977, p. 295).

the church into different groups of church members. The church distinguishes between roles for the ordained and ecclesiastical officeholders on the one hand, and roles for its ordinary members on the other hand.[110] In the case of ordinary members, one also has to make a further distinction between those Catholics who are purely formal members of the church as an organisation and merely show their membership, for example, by paying church taxes—Luhmann has the German situation in mind—, and the active church members.[111] Simon Hecke now applies this division of church members into classes to the carrier group shouldering canon law, as he finds that we may not expect ordinary Catholics at one remove from the church to provide any constitutive support for canon law.[112] However, as Hecke goes on to observe, we might not even expect this from the active members either. Instead, this task falls essentially to the church hierarchy and ecclesiastical officeholders. Other church members make virtually no contribution anymore to the institutionalisation of canon law. While the legislator creates laws which he sees as binding for all Catholics, these laws are no longer generally institutionalised with regard to those to whom they pertain. From a sociological point of view, this has direct consequences for the validity claim of canon law. Sociologically, one may argue that canon law can in fact no longer be regarded as law which is binding for the whole church, since it lacks general institutionalisation. It only acquires legal form through and for those members of the hierarchy and for ecclesiastical officeholders. One may therefore argue that contrary to what the law generally claims, canon law in the present day is merely what Hecke calls "Amtskirchenrecht," a law which is institutionalised merely by the official church and merely binds members of the official church. However, as I have said, canon law still claims validity for all the baptised who formally belong to the Catholic Church and it also claims to bind all the baptised regardless of their confession through the law of revelation and all human beings irrespective of baptism through natural law. In doing so, canon law claims a reach which is far greater than what can be justified sociologically. Hecke finds this claim to be rather unrealistic. To illustrate his point, he conjures the vivid picture of the church cultivating a phantom pain, by observing that canon law has created a phantom validity claim, noting,

> In modern society, the carrier group of canon law will soon merely consist of the members of the Catholic Church; today … [it consists] merely of the members of the 'narrower' or 'professional organisation of church ministry'. The reactions of the church to this development have certain similarities with consecutive symptoms of losing a limb or amputation in human beings, so-called 'phantom pains' or 'phantom limbs'. On the one hand, the church acts as if it still senses pain in 'body parts' which are already gone and are not really part of the 'body' anymore (the major 'part' of the non-members); on the other hand, [the church acts, addition by the author] as if it assumes that certain 'body parts' for supporting canon

[110] See Luhmann (1977, p. 299).

[111] See Luhmann (1977, p. 300).

[112] See Hecke (2017, pp. 45, 59).

law are still there which have in fact also been lost … (the major part of the 'ordinary' church members).[113]

6.3.2 Validity Through Reception

This finding is rather alarming for current canon law theory, which strongly relies on the idea that the church as a whole is a unity, not only as a communion of faith, but also as a legal community. Canon law theory believes that canon law is dependent on that community, both for the formation of the law and for its continuation. Canonical theory expresses this in its distinct theory of *receptio legis*, which emphasises the need for the ecclesiastical community's affirmative response to the creation of norms, not merely for reasons related to the effectiveness of the law, but also for its validity. Although ecclesiastical legislators may validly enact ecclesiastical laws without the legal subjects' participation, their act of promulgation must be complemented by the legal subjects' reception of law for the law to come into being and to remain the valid law of the church. If reception is fully missing, the law lacks validity. Canonists love to refer to the example of the Apostolic Constitution *Veterum sapientia* on the Promotion of the Study of Latin when explaining this effect. John XXIII promulgated this law in 1962 to increase the use of Latin in theological education.[114] The constitution advised all lecturers in theology to teach the main theological disciplines in Latin and to use Latin textbooks for their instruction. The constitution even ordered the gradual replacement of any lecturers who could not manage to adjust to Latin teaching. Canonist Bertram Griffin laconically remarks with respect to the effects of that papal law, "A few professors tried this for about a week and then gave up."[115] The Catholic universities and theological faculties never made any efforts to enforce the law or replace those who did not abide by it. So *Veterum sapientia* became one example of a papal law that was not received by its addressees, as it was ignored by nearly all theological scholars and had next to no effect on theological training. Those scholars who were used to teaching in Latin continued to do so; those who had never used Latin in their classes before did not take up the practice. Hence, the law did not change a single legal subject's

[113] Original quote, "Die Trägergruppe des kanonischen Rechts umfasst in der modernen Gesellschaft bald nur noch die Mitglieder der katholischen Kirche; heute … sogar nur noch die Mitglieder der sog. 'engeren' bzw. 'beruflichen Organisation kirchlicher Arbeit'. Die Reaktionen der Kirche auf diese Entwicklung weisen gewisse Ähnlichkeiten zu Folgeerscheinungen des Verlusts bzw. der Amputation von Gliedmaßen beim Menschen, nämlich sog. 'Phantomschmerzen' bzw. 'Phantomglieder', auf: So handelt die Kirche zum einen so, als empfinde sie Schmerz noch in 'Körperteilen', die bereits abgetrennt und eigentlich nicht mehr zu ihrem 'Körper' zu zählen sind (der große 'Teil' der Nichtmitglieder); zum anderen so, als gehe sie davon aus, dass bestimmte, zur Unterstützung des kanonischen Rechts faktisch ebenso verlorene 'Körperteile' noch vorhanden sind … (der große 'Teil' der 'einfachen' Kirchenmitglieder)", Hecke (2017, p. 102).

[114] *Acta Apostolicae Sedis, 54*, 129–135; on this issue also Müller (1978, pp. 5–6).

[115] Griffin (1984, p. 25).

behaviour. We may therefore consider it to have been fully ineffective and consequently may assume that it never entered into force in the first place, although it was correctly enacted in a formal sense.

Canonists do however discuss whether there is truly an invalidating effect on the law connected with non-reception. Some voices disagree with the relevance of the legal subjects' acceptance of a law for its validity.[116] After all, canon 7 CIC/1983 only cites the act of promulgation as being constitutive of legal validity by regulating, "A law is established when it is promulgated." The canon evidently makes no reference to the legal subjects' response to a law in the context of its emergence. Adding to this observation is that the Code explicitly directs how the community has to respond to laws which a legislator lawfully enacts, as the law itself obliges Catholics to abide by legal norms. Canon 212 §1 CIC/1983 commands that the church members must "follow with Christian obedience those things which the sacred pastors, inasmuch as they represent Christ, declare as teachers of the faith or establish as rulers of the church." As the law belongs to those matters which ecclesiastical legislators "establish as rulers of the church," Catholics are obliged to abide by the law obediently as part of their Christian duties. Their response to a lawful command is therefore fairly restrained, as it includes merely their obedience and does not accommodate individual decisions on the acceptance or non-acceptance of laws.[117] Other canonists, however, leave little doubt that the legal community's reception of a law is important for the validity of the law,[118] although clarification is necessary to identify the point at which this begins. One may doubt that the general non-observance of a law results in its immediate invalidity, as this reading is indeed incompatible with canon 7 CIC/1983, which only mentions the act of promulgation as essential for the emergence of a law. For this reason, Ladislas Orsy distinguishes between the mere legal validity of a law, which it acquires as the result of a correct legislative act, and its *existential* validity, which the law receives upon the legal subjects' acceptance and reception of the law. For Orsy, this existential validity is of crucial importance for the law because, as he finds, "No matter how valid the law can be legally, if it is rejected existentially it will not shape the life of the community."[119] Since its impact on the social is of essential importance for laws, Orsy introduces the idea of vitality into the concept of law. According to Orsy, only law which is vital insofar as it influences the social practice of the church deserves to be called "law." Norms which are mere law on paper lack their existential validity and will therefore eventually fail to be regarded as law. Canonist Hubert Müller draws a similar conclusion when noting that the legal community's acceptance might not be relevant for the emergence of a law, but that it most certainly is for the

[116] Eg Lüdecke and Bier (2012, pp. 25, 30).

[117] See Lüdecke and Bier (2012, pp. 30, 79).

[118] Eg Müller (1978, pp. 10–11); Orsy (1980, p. 42); Demel (2010, p. 260).

[119] Orsy (1980, p. 44); see also Orsy (1984, p. 68).

continued existence of a law.[120] If a legal community does not receive a law, this law ultimately faces desuetude. It is destined to lapse into obsolescence.

We may understand these theoretical observations on the necessity of *receptio legis* for the law to become vital as seamlessly connecting with the sociological observation that at present, canon law is borne merely by the official church as a carrier group and is only institutionalised with regard to that group. What Orsy and others theoretically note with regard to the legal community refusing to lend the law its vitality finds its sociological expression in the widespread non-institutionalisation of canon law among most Catholics. One may deal with this finding in two ways. One may either change the theory of canon law to limit its scope to the smaller group of Catholics representing the official church and serving as the carrier group of canon law. Or one may reform the law in a way that increases the probability of it receiving more wide-ranging support from ordinary church members. Whatever happens in the future, the current situation is a phantom situation, as Simon Hecke has described it. It presents a globally valid Catholic canon law with all pomp and circumstance, but widely fails to ensure the effectiveness of this law among ordinary members of the Catholic Church. Canon law thus threatens to become largely "zombie law," a term used by constitutional scholars to describe laws which have become unenforceable but nevertheless maintain a shadow existence as law in books.[121] In cases in which its reception is at stake and dependent on the acceptance of the ordinary Catholics, canon law tends to be dead letter which fails to shape the life of the church and to impact the social reality of ordinary church members.

Bibliography

Aubert, V. (1952). White collar crime and social structure. *American Journal of Sociology, 58*, 263–271.

Barrett, D. N. (1960). Penal values in canonical and sociological theory. *The American Catholic Sociological Review, 21*, 98–116.

Beal, J. P. (2011). Something there is that Doesn't love a law: Canon law and its discontents. In M. J. Lacey & F. Oakley (Eds.), *The crisis of authority in Catholic modernity* (pp. 135–154). Oxford University Press.

Böckenförde, W. (2006). Zur gegenwärtigen Lage in der römisch-katholischen Kirche: Kirchenrechtliche Anmerkungen. In N. Lüdecke & G. Bier (Eds.), *Freiheit und Gerechtigkeit in der Kirche. Gedenkschrift für Werner Böckenförde* (Forschungen zur Kirchenrechtswissenschaft 37, pp. 143–158). Echter.

Brosi, U. (2013). *Recht, Strukturen, Freiräume: Kirchenrecht* (Studiengang Theologie 9, überarbeitet und mit einem Beitrag zum deutschen Staatskirchenrecht ergänzt von I. Kreusch). Theologischer Verlag Zürich.

Carbonnier, J. (1974). *Rechtssoziologie* (Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung 31). Duncker & Humblot.

[120] See Müller (1978, p. 8).

[121] Eg Wasserman (2021).

Coughlin, J. J. (2011). *Canon law: A comparative study with Anglo-American legal theory*. Oxford University Press.

D'Antonio, W. V., Davidson, J. D., Hoge, D. R., & Gautier, M. L. (2007). *American Catholics today: New realities of their faith and their church*. Rowman and Littlefield.

Demel, S. (2010). *Handbuch Kirchenrecht: Grundbegriffe für Studium und Praxis*. Herder.

Diekmann, A. (1980). *Die Befolgung von Gesetzen: Empirische Untersuchungen zu einer rechtssoziologischen Theorie* (Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung 47). Duncker & Humblot.

Durkheim, É. (1960). *The division of labor in society* [1893] (G. Simpson, Trans.) The Free Press.

Ehrlich, E. (1936). *Fundamental principles of the sociology of law* (W. L. Moll, Trans., with an introduction by R. Pound). The Harvard University Press.

Eifler, S. (2010). Die Definition der Situation und die Befolgung oder Inanspruchnahme von Gesetzen. In G. Wagner (Ed.), *Kraft Gesetz: Beiträge zur rechtssoziologischen Effektivitätsforschung* (pp. 91–117). Springer.

Essen, G. (2013). Nachholende Selbstmodernisierung? Katholische Kirche und politische Öffentlichkeit. *Theologie der Gegenwart, 56*, 208–220.

Festinger, L. (1957). *A theory of cognitive dissonance*. Stanford University Press.

Francis. (2016). Apostolic Letter issued *Motu proprio Come una madre amorevole*, 4 June 2016. *Acta Apostolicae Sedis, 108*, 715–717.

Geiger, T. (1964). *Vorstudien zu einer Soziologie des Rechts* (mit einer Einleitung und internationalen Bibliographie zur Rechtssoziologie von P. Trappe). Luchterhand.

Goler, P. A. (1972). Must canon law be color blind? *Catholic Lawyer, 18*, 293–299.

Griffin, B. F. (1984). Introduction to the jargon of canon law. *The Jurist, 44*, 19–27.

Habermas, J. (1996). *Between facts and norms: Contributions to a discourse theory of law and democracy* (W. Rehg, Trans.). The MIT Press.

Hahn, J. (2017). *Das kirchliche Richteramt: Rechtsgestalt, Theorie und Theologie* (Beihefte zum Münsterischen Kommentar 74). Wingen.

Hahn, J., Schüller, T., & Wode, C. (2013). *Kirchenrecht in den Medien*. UVK.

Hecke, S. (2017). *Kanonisches Recht: Zur Rechtsbildung und Rechtsstruktur des römisch-katholischen Kirchenrechts*. Springer.

Heller, E., Cohen, C., Bublil, D., & Omar, F. (2016). *The Israeli democracy index 2016* (K. Gold, Trans.). The Israel Democracy Institute.

Huels, J. M. (1987). Interpreting canon law in diverse cultures. *The Jurist, 47*, 249–293.

John XXIII. (1962). Apostolic constitution *Veterum sapientia* on the promotion of the study of Latin, 22 February 1962. *Acta Apostolicae Sedis, 54*, 129–135.

Llewellyn, K. N. (1940). The normative, the legal, and the law jobs: The problem of juristic method. *Yale Law Journal, 49*, 1355–1400.

Lüdecke, N., & Bier, G. (2012). *Das römisch-katholische Kirchenrecht: Eine Einführung* (unter Mitarbeit von B. S. Anuth). Kohlhammer.

Luhmann, N. (1977). *Funktion der Religion*. Suhrkamp.

Luhmann, N. (1986). *Die soziologische Beobachtung des Rechts*. Suhrkamp.

Luhmann, N. (2004). *Law as a social system* (Oxford socio-legal studies, F. Kastner, R. Nobles, D. Schiff & R. Ziegert, Eds., K. A. Ziegert, Trans.). Oxford University Press.

Luhmann, N. (2014). *A sociological theory of law* (M. Albrow, Ed., E. King-Utz & M. Albrow, Trans.). Routledge.

Mezey, N. (2001). Law as culture. *Yale Journal of Law & the Humanities, 13*, 35–67.

Möllers, C. (2020). *The possibility of norms: Social practice beyond morals and causes*. Oxford University Press.

Moser, T. (1976). *Gottesvergiftung*. Suhrkamp.

Müller, H. (1978). *Das Gesetz in der Kirche "zwischen" amtlichem Anspruch und konkretem Vollzug: Annahme und Ablehnung universalkirchlicher Gesetze als Anfrage an die Kirchenrechtswissenschaft*. Minerva.

Neudecker, G. (2013). *Ius sequitur vitam—Der Dienst der Kirchengerichte an der Lebendigkeit des Rechts: Zugleich ein Beitrag zur Vergleichung des kanonischen und staatlichen Rechtssystems* (Tübinger Kirchenrechtliche Studien 13). LIT.

Opp, K.-D. (2010). Wann befolgt man Gesetze? Entwicklung und Probleme einer Theorie. In G. Wagner (Ed.), *Kraft Gesetz: Beiträge zur rechtssoziologischen Effektivitätsforschung* (pp. 35–63). Springer.

Orsy, L. M. (1980). The interpreter and his art. *The Jurist, 40*, 27–56.

Orsy, L. M. (1984). Reception and non-reception of law: A canonical and theological consideration. *Canon Law Society of America Proceedings, 46*, 66–70.

Orsy, L. M. (1992). *Theology and canon law: New horizons for legislation and interpretation*. Liturgical Press.

Raiser, T. (2007). *Grundlagen der Rechtssoziologie* (4th ed.). UTB.

Rasehorn, T. (1975). Zur Einstellung der Unterschicht zum Rechtswesen. In E. Blankenburg (Ed.), *Empirische Rechtssoziologie* (pp. 103–115). Piper.

Rehbinder, M. (2014). *Rechtssoziologie: Ein Studienbuch* (8th ed.). C. H. Beck.

Röhl, K. F. (1987). *Rechtssoziologie: Ein Lehrbuch*. Heymann.

Rottleuthner, H., & Rottleuthner-Lutter, M. (2010). Effektivität von Recht: Der Beitrag der Rechtssoziologie. In G. Wagner (Ed.), *Kraft Gesetz: Beiträge zur rechtssoziologischen Effektivitätsforschung* (pp. 13–34). Springer.

Seinecke, R. (2015). *Das Recht des Rechtspluralismus* (Grundlagen der Rechtswissenschaft 29). Mohr Siebeck.

Shapiro, M. (1981). *Courts: A comparative and political analysis*. The University of Chicago Press.

Tamanaha, B. Z. (2008). Understanding legal pluralism: Past to present, local to global. *Sydney Law Review, 30*, 375–411.

Tapp, J. L., & Kohlberg, L. (1971). Developing senses of law and legal justice. *Journal of Social Issues, 27*, 65–91.

Vanderlinden, J. (2002). Religious Laws as Systems of law. In A. Huxley (Ed.), *Religion, law and tradition: Comparative studies in religious law* (pp. 165–182). Routledge.

Verband der Diözesen Deutschlands. (2015). Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse, 27 April 2015. Retrieved June 22, 2021, from www.dbk.de/fileadmin/redaktion/diverse_downloads/VDD/Grundordnung_GO-30-04-2015_final.pdf

Wagner, G. (2010). Kraft Gesetz: Überlegungen zur Kausalität von Rechtsnormen. In G. Wagner (Ed.), *Kraft Gesetz: Beiträge zur rechtssoziologischen Effektivitätsforschung* (pp. 145–159). Springer.

Wasserman, H. (2021). Zombie Laws. In *Florida International University legal studies research paper no. 21-02*. Retrieved 24 October 24, 2021, from https://ssrn.com/abstract=3778122