Chapter 7
Conclusion

Abstract In modernity, it has become ever more difficult to claim that the church as a whole, as the community of all Christian faithful, is responsible for institutionalising canon law. Many church members widely ignore the law. They disregard the roles attributed to them by the law. Status functions as provided by the law have become meaningless to them. From the perspective of the sociology of canon law, these observations support the finding that the ordinary members of the church no longer contribute to institutionalising canon law. Instead, it has become the ecclesiastical hierarchy who mainly serve as "carrier group" of the law. Canon law is therefore slowly developing into mere law of the "official church." Despite this sociological finding, it continues to claim validity with regard to other members of the church, too, even though these members—in a sociological sense—have stopped being carriers of the law. This claim is somewhat dangerous as it contributes to destabilising canon law and confers on it some characteristics of "phantom law" or "zombie law."

Keywords Institutionalisation · Loss of effectiveness · Loss of validity · Carrier groups · Law of the official church · Phantom law · Zombie law

7.1 A Short Outlook

From a sociological perspective, there is little more to say in a basic study such as my book, if one does not venture beyond the descriptive approach represented by a sociology of law in a narrower sense. However, for a sociological jurisprudence of canon law, which seeks sociological insights with the aim of improving canon law, my conclusion does mark the starting point at which further work might commence. In itself, my study does not seek to pursue such a programme despite it being, as I noted at the outset, a genuine task of canon law studies to confront the legal reality of the church with sociological findings and use them as the basis for normative considerations. It is only in taking this additional step towards a sociological jurisprudence of canon law that the sociology of canon law can bond with theology to tackle the ecclesiological challenges of canon law. Only here does it seek to identify what kind of law the church actually requires, and whether the Catholic

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Church sees itself as a community embracing all Catholics not merely as a community of faith but also as an institution endowed with its own law. This work follows on seamlessly from the discussion about legal effectiveness and legal validity in which I engaged towards the end of my study, as the tension between facticity and validity of canon law has major repercussions for ecclesiology. After all, canon law bases its broad validity claim on ecclesiology. In this light, it is of dramatic importance for the church if the validity claim of canon law proves sociologically unattainable as modernity progresses. If it is true that canon law is essential for the earthly church, as the Second Vatican Council at least implied in number 8 of its Dogmatic Constitution *Lumen gentium*—which canonists traditionally cite to find that the concrete earthly church requires a legal frame—then the transformation of canon law into a phantom law or zombie law is not only a problem of legal effectiveness, it is also an ecclesiological challenge. A church which defines itself as being founded on a dysfunctional phantom law eventually runs the risk of becoming a phantom church. Viewed in this light, the fundamental connection between church and canon law is ecclesiologically treacherous. The legal nature of the church, if postulated as a necessity, does not permit the reduction of canon law to a purely organisational law that is only functionally binding for members of the hierarchy and ecclesiastical officeholders. Thinkers who accept the argument traditionally drawn from *Lumen gentium* that the church must have a legal form must view these socio-legal findings with alarm. For the sociological jurisprudence of canon law, which is devoted to the improvement of canon law, this observation means pursuing legal reforms that serve the re-institutionalisation of canon law as the law of the *whole* church. If, on the other hand, as one might also propose, the church can get by with having a law which merely serves the official church as a frame of organisational regulation, it must revise the ecclesiological legal theory traditionally based on *Lumen gentium* number 8. This would necessitate abandoning the link between legal theory and ecclesiology in favour of a more functional view of canon law. A development like this would not necessarily lead to the detheologisation of canon law, but it would necessitate correcting the broad validity claim of canon law as grounded in ecclesiology. However, my study does not delve any deeper into these matters. It is merely a still image which depicts the state of canon law as it is now. How and whether the church may heal the gap between the validity and facticity of its law is a wide-ranging topic, sizeable enough to fill another book. This topic will most likely occupy canonists intensively in the years to come.

7.2 A Summary in Theses

7.2.1 A Sociology of Canon Law

Canon Law Studies as Theology

1. My study understands canon law studies as a theological discipline. Its task is to interpret the church as an institution in its legal constitution as the earthly realisation of the heavenly church. Canon law studies is practical theology because it studies the legal structure of the church as the practical embodiment of the heavenly church.

Theology with Legal Methodology

2. Canon law studies inter alia uses legal methods to study canon law. As legal exegesis, it works with hermeneutical and linguistic methods. As legal dogma, theory, and philosophy, it analyses the reasoning behind law, its principles, and relation to justice. As legal history, canon law studies works historically. In the sociology of canon law, it develops sociological theories and uses theoretical and empirical methods of social research, taken from general sociology, the sociology of law, and the sociology of religion.

Theoretical and Empirical Sociologies

3. Sociology studies the law theoretically and empirically. In order to benefit from the findings of the sociology of law as empirical science, the sociology of canon law must overcome the Neo-Scholastic hostility towards empirical research that still permeates theology and canon law today.

Law as Doctrine, Law as Practice

4. Like all sociologies of law, the sociology of canon law must mediate between sociological ("law as practice") and normative doctrinal approaches to law ("law as doctrine"). To achieve this, it requires canonists trained in dogma—in a legal and theological sense—*and* sociology.

Orthodoxy and Orthopraxy

5. Insofar as the practice of the church has a theological relevance, canon law studies has to mediate between ecclesiastical doctrine and practice. Modern canonical thought must consider both orthodoxy and orthopraxy not only to understand the law as ecclesiastical practice but also to connect it convincingly with ecclesiastical doctrine.

Descriptive and Normative Sociologies

6. One may study the reality of canon law using a descriptive approach (*sociology of law* in a narrower sense). A descriptive approach to the sociology of canon law documents and analyses the reality of canon law. As *sociological jurisprudence*, the sociology of law also pursues normative goals. The sociological jurisprudence of canon law uses its findings as the basis for normative considerations about how to improve canon law.

Theoretical Approach of this Study

7. My study adheres to the descriptive paradigm of the sociology of law. It develops an interpretive theory of the sociology of canon law. To achieve this, my study refers to existing socio-legal theories. It examines these theories to identify how they contribute to understanding canon law. I verify whether my theoretical approach does indeed reflect the reality of canon law by drawing on empirical findings from the sociology of law and the sociology of religion.

7.2.2 Law Through the Lens of Sociology

Law and Social Reality

8. The sociology of law studies groups and their law. It studies the influence of law on the social reality of communities and societies and the influence of their social life on the law.

Monistic and Pluralist Sociologies of Law

9. Monistic approaches devote their attention solely to state law, because the state dominates the field of law in modernity. Pluralist approaches to law also accept other groups, such as confederations of states, contracting parties, or religious communities, as producers of law. A pluralist understanding of law is therefore well-suited to approaching religious law such as canon law.

The Problem of Panjurism

10. However, pluralist approaches are susceptible to some arbitrariness because they do not consistently succeed in differentiating between law and non-legal norms which influence the social ("panjurism"). Pluralist thinkers must therefore define clearly which norms they mean when they speak of "law."

Law as a Coercive Order

11. Max Weber stressed the coercive character of law. Current sociology of law only partially accepts his premise. Everyday legal life demonstrates that law

generally forms an often invisible basis for social interaction, functioning for the most part without being challenged and largely without coercion.

Low-Level Coercion of Canon Law

12. Canon law is particularly notable for its low level of coercion. The church has no policing function, and can only rely on the coercive power of the state in very rare cases. One might even argue that a low level of coercion is a theological necessity: because canon law supports the faith—and faith is by definition a free act—canon law must refrain from constraining the legal subjects' freedom substantially.

Law as Behavioural Expectation

13. Niklas Luhmann understands law as communication based on the binary codification "legal"/ "illegal." Law is formed through the institutionalisation of expectations regarding "legal" behaviour. Luhmann, thus, does not define "law" as a mechanism for controlling behaviour but as norms generating expectations with regard to "legal" behaviour. These expectations are counterfactual insofar as individuals maintain them even in cases in which they are disappointed.

Law as Institutionally Bound Doctrine

14. One may link Luhmann's approach to approaches that understand law as institutionally bound doctrine. While all social norms have doctrinal features, the law relies on institutions to provide doctrinal consistency and to provide legal subjects with the justiciability of its norms: institutionalised legal procedures determine what is lawful, thereby providing the legal subjects with decisions regarding what is lawful and (re)producing doctrine. Based on these observations, we may define law as follows: Law is a knowledge system which produces justiciable norms endowed with the option of institutional contestation.

Dominance of State Law

15. Contemporary individuals associate the concept of law primarily with state law. When studying non-state law, the sociology of law is therefore highly interested in the relationship between this law and state law. The sociology of law often studies non-state law through comparison with state law. Canon law also acquires clearer definition through this comparison. However, this is merely a matter of methodology, not of legal theory, as canon law is grounded in the church, not in the state.

7.2.3 *Functions of the Law*

Order and Conflict Theories of the Law

16. Order theories of the law understand law as a power for organising the social: law assigns authority and defines roles; assigns rights and duties to the legal subjects; offers them institutional frameworks to legally organise their social affairs; stabilises exchange relations; and provides instruments for systematic conflict resolution. Canon law fulfils these functions for the church. Unlike order theories, conflict theories see the primary function of the law in its merit to avoid and solve conflict.

Primacy of the Ordering Function

17. The potential of the law so solve conflict comes to light when there is conflict over the law and its power to create order. One may therefore find the ordering function of the law to be its primary function. Law creates order—and does so in a number of ways, inter alia by avoiding and solving conflict.

Law and Conflict

18. Nevertheless, "law and conflict" is an independent field in the sociology of law. It studies various features of legal conflict management: legal counselling, the working of bodies for the administration of justice, and institutional conflict resolution through mediation, arbitration, and adjudication.

Counselling, Police, Conflict Resolution

19. Like secular law, canon law is a specialist field, the understanding of which requires expertise conveyed to the legal subjects in the form of legal counselling. The church does not possess a police force to enforce ecclesiastical decisions; this begs the question whether and under what conditions canon law can be effective without the support of a law enforcement agency. The focus of ecclesiastical justice research is on extrajudicial and judicial conflict resolution such as mediation, arbitration, and adjudication.

Adjudication in Conflict

20. Adjudication plays an important role in modern legal systems as a key instrument of conflict resolution. Yet judicial systems face a problem of legitimacy. This is because judicial decisions create "winners" and "losers," which does not necessarily defuse conflicts and can even exacerbate them. To counter this problem, adjudication frequently resorts to mechanisms of mediation, which promise to have a pacifying effect.

Amicable Settlements

21. One may discover the same strategy in ecclesiastical procedural law. The legislator prefers amicable settlements and peaceful conflict resolution over adjudication. Ecclesiastical penal law maintains that ordinaries are to initiate penal proceedings only if fraternal correction, warning, or other pastoral measures have proven ineffective for the purposes of sufficiently restoring justice, reforming the offender, and repairing the scandal (see canon 1341 CIC/1983).

Misuse of Amicability

22. However, when courts or law enforcement authorities attempt to find amicable solutions by referring to mediation elements and proposing extrajudicial settlements, they may end up suppressing conflicts rather than resolving them. In the abuse scandal of the church, it has become clear that many ecclesiastical authorities misused "amicability" to refrain from rigorously prosecuting offenders.

Clerical Justice and Male Justice

23. Judicial research also challenges ecclesiastical adjudication on its specific version of class justice. Whilst the sociology of law has traditionally focused on class justice as a social issue, the sociology of canon law has to address the problem of "clerical justice" as a justice system based on mostly clerical judges, insofar as canon law restricts the service of laypeople as ecclesiastical judges. As clerical justice, canonical adjudication is also predominately male justice.

7.2.4 Law and Legal Validity

Law Born of Power, Power Born of Law

24. Modern law is positive law. It comes into force by virtue of decision. This raises the question of power in a dialectical sense for the sociology of law: as power generated through law and as law generated through power. The sociology of canon law must analyse the power of canon law and of those who generate the law. These debates have been evolving slowly, as ecclesiastical authorities tend to hamper debates about power in church by veiling power in the terminology of "service."

Changeability of Positive Law

25. The fact that positive law applies by virtue of decision indicates that it is changeable. This characteristic of law also applies to positive canon law. Some voices have raised the objection that so-called "divine law" is unchangeable. However, since the divine will only transforms into legal norms through

human legislation, these norms are also changeable—not arbitrarily, but in accordance with the current state of theological knowledge about how God's will expresses itself in history.

Change and Legal Learning

26. Frequent and recurring breaches of law are an opportunity to consider changes to the law. Breaches of law can therefore initiate legal learning. Nevertheless, legal learning can be problematic, as legal change can destabilise legal orders. The challenge is to change legal norms in a way which allows the legal subjects to adjust their former expectations of the law and redirect them to the new legal norms with as little disappointment as possible.

Consistency and Destabilisation

27. Changes to fundamental canonical norms can destabilise the ecclesiastical order. Consistency can ensure stability. One may therefore see the low level of flexibility in canon law as a strategy for maintaining stability in the ecclesiastical order. From the perspective of the sociology of law, however, one has to note that refusing to reform the law can both stabilise and destabilise, especially in cases in which legal stagnation creates problems of legitimacy.

7.2.5 Validity and Legitimacy

Legitimacy as Acceptance

28. The law draws its legitimacy from its legal subjects' recognition, their acknowledgement, or acceptance of the law as a legitimate source of social order. The same applies to canon law. The sociology of canon law observes that the recognition of canon law is often in dispute.

Acceptance Issues of Validity Reasons

29. Problems of recognition often relate to the validity reasons of law, as one may demonstrate with regard to laws rooted in revelation and nature. Revelation and nature are unsuited as the basis for legal validity in secular and pluralist groups. As the church also becomes increasingly pluralised, the magisterium's findings about which norms derive from revelation and nature are no longer self-evident to many church members.

Power as a Source of Validity

30. Revelation and nature as validity reasons of law in pluralist groups frequently morph into "power" arguments in order to decide which of their interpretations should become legally binding. Hence, revelation and nature can continue to

serve as validity reasons of modern law if they draw on power to determine what God's will is for humanity and what is right according to nature. However, there is still a problem of recognition. Modern legal subjects recognise power only in the form of legitimate authority, as shown in Max Weber's reflections on charismatic, traditional, and legal authority.

The Rule of Law and Social Contract

31. As the modern age progresses, it is primarily legal authority that is acceptable. Legitimate power must be restricted and controlled by the law. The legal subjects tend to accept legal authority because law provides them with a rational framework within which to pursue their own interests. The idea that the recognition of authority can be in one's own interests links Weber's theory with the theory of the social contract. No longer is it the content of common beliefs that serves as the basis of law; it is the general consensus that it is in one's own interests to forego some personal freedom and submit to a common order.

Law Through Consensus

32. Consensus theories are a recent variant of contractual theories. Jürgen Habermas alludes to consensus as reached in rational discourse as the basis for the validity of law. Legal norms that prove to be broadly acceptable in a discourse free from domination are worthy of recognition based on the presumption of their correctness. Habermas sees the crux of consensus theory not in the achievement of a de facto consensus, but in the fact that consensus is conceivable. With regard to law, it is therefore important to ensure that conditions are in place for the emergence of law that legal subjects can rationally accept.

Fictitious Consensus

33. However, as the modern age progresses, consensus about the law is becoming increasingly unlikely. Law is a specialist field that exists at one remove from the legal subjects' everyday reality, placing consensus out of reach. In order to establish acceptance of the law, consensus is replaced by a rhetoric of consensus, which conceals the lack of consensus. This strategy can be convincing as long as it is not contradicted by fundamental dissent. Dissent is a major problem for canon law, because there is evident dissent in many legal matters, such as celibacy, the exclusion of women from ordination, or the lays' limited share in ecclesiastical governance.

Legitimation Through Procedures

34. Fictitious consensus about the law is generated through procedures such as legislation and application of the law that meet the demands of the rule of law. However, this creates a problem of recognition, especially in the case of obviously contingent majority decisions on the law. Yet the legal subjects

tend to accept majority decisions despite their obvious contingency if decision making has expectable results and provides opportunities for participation.

Participation Through Representation

35. In complex societies or communities, participation usually takes place through representation. The recognition of a majority decision then depends on whether the decision-making body is considered a legitimate representative body for those for whom the body makes the decisions. This is problematic for the church because, as a consequence of its hierarchical organisation, members of the clergy are those primarily involved in the creation and application of canon law. The extensive non-participation of the laity undermines the recognition of canon law.

The Canonical Rule of Law

36. In addition, from the point of view of recognition, it proves to be problematic that the church fails to grant the rule of law as rigorously as is common in other constitutional legal systems. This problem is not sufficiently remedied simply by pointing out that the church is not a constitutional state. Whilst this is true, it does not change the fact that church members expect comparable standards from the church and its law.

Legal Protection and Control of Power

37. At present, canon law fails to guarantee thorough legal protection. Fundamental rights in church do not enjoy the level of protection to which citizens of liberal states are accustomed. Church authorities are confronted to a lesser extent with instruments for the containment of power. The pope is not even bound by the law. Conditional decision-making programmes, such as legislation, do not have a reliable legal basis and are difficult to understand and impossible to control. One may suspect growing anti-juridism to have its roots in many Catholics' view that in church, illegitimate power produces law and illegitimate law produces power.

7.2.6 The Effectiveness of the Law

Compliance and Sanctions

38. Law is effective when it leaves its mark on the social reality of a legal community. Legal norms are effective when the legal subjects abide by them or when their non-compliance is sanctioned.

Different Types of Compliance

39. It is important, in any case, to differentiate between different types of norms. Compliance is different depending on whether norms are commands, prohibitions, permissions, exemptions, authorisation rules, or procedural norms. Whilst prohibitions, for instance, strive for maximum compliance, quantity does not play a significant role with regard to norms which provide legal subjects with institutional mechanisms for legally organising their social affairs.

High Effectiveness

40. The effectiveness of canon law is high whenever canonical norms reproduce their effectiveness quasi-automatically. This is for instance the case with most constitutional norms which automatically reproduce the hierarchical structure of the church largely independently of ecclesiastical legal subjects' individual decisions whether to support this effect of the law or not.

Low Effectiveness

41. The effectiveness of canonical norms is low whenever abiding by the law depends on the legal subjects' decision. The legal subjects often ignore prohibitions or commands. Only rarely does this result in the imposition of negative sanctions. Legal subjects are choosing to use norms which provide them with institutional mechanisms for legally organising their affairs ever less frequently. Procedural norms are in use in the marriage annulment and penal cases treating sexual abuse of minors, but are mere law on paper in most other cases.

Conditions for Legal Compliance

42. In order to understand the reasons why many canonical norms prove to have a low degree of effectiveness, it is necessary to examine the conditions for legal compliance. The sociology of law identifies a host of factors, including the legal subjects' knowledge of the law, their expectation of sanctions, and their ideas of legitimacy with regard to the law.

Knowledge of the Law

43. It is not necessary to know the law *as law* for it to be effective. But it is necessary for legal subjects to have a rudimentary familiarity with its content. Many active church members know some basic regulations of canon law, particularly from constitutional law, sacramental law, and the law on the teaching function of the church, mostly from everyday practice. However, they are largely oblivious to other norms, such as property law, most criminal law, and procedural law.

Negative Sanctions

44. No law can be enforced consistently, canon law being no exception. Hence, legal claims often remain unfulfilled. However, there must be a chance for

negative sanctions to act as substitutes for the fulfilment of claims in the event of a breach of law, so that the legal community's disappointment does not translate into lowered expectations with regard to the law.

Limited Sanctions in Church

45. The church has no coercive apparatus to enforce compliance with the law or to effectively subject most of its members to negative sanctions. In most Catholic groups, pressure to abide by canon law is low. Ecclesiastical authorities often fail to notice breaches of canon law or are reluctant to impose sanctions. When they do impose sanctions, this often only affects legal subjects bound to the church through ordination, membership in a religious order, or employment.

Compliance Based on Recognition

46. The sociology of law observes that compliance with the law depends to a large extent on the legal subjects' recognition of the law. Beliefs that a regulation is justified are often more important for its observance than cost-benefit calculations about whether to abide by or break the law.

Normative Variance

47. It is therefore a problem affecting the effectiveness of law when legal norms come into conflict with other norms recognised by the legal subjects ("normative variance"), such as competing legal, social, or moral norms. Many ecclesiastical legal subjects tend to experience a considerable degree of normative variance between canon law and other norms of key value for them, including norms of secular law, because canon law does not adhere to the constitutional standards which legal subjects are used to as citizens of contemporary democratic orders.

7.2.7 Effectiveness and Validity

Law of the Official Church

48. From the perspective of the sociology of canon law, most ordinary church members no longer contribute to the institutionalisation of canon law. Instead, it is merely the clergy and ecclesiastical officeholders that serve as the carrier group of canon law today. Canon law—formerly the law of all church members—has transformed into being a mere "*Amtskirchenrecht*," as Simon Hecke observes, a mere law of the "official church."

Phantom Validity Claims

49. As a consequence, as Hecke points out, current canon law works with a phantom validity claim. It claims validity for legal subjects who, from a sociological point

of view, are no longer part of its carrier group. With regard to those groups where non-institutionalised law claims validity, canon law becomes phantom law or zombie law.

Starting Point for Further Studies

50. This poses an ecclesiological problem, namely whether canon law is essential for the earthly church, as the Dogmatic Constitution *Lumen gentium* number 8 insinuates. If one regards the law as essential for the church, a church which is no longer integrated by phantom law threatens to become a phantom church. Further studies which transcend the descriptive approach of the sociology of law and follow the normative aims of a sociological jurisprudence of canon law might investigate whether this is in fact the case and whether this state of affairs can be changed.