

## Introduction

The Catholic sacraments maintain a close bond with the law. This connection is clearly discernible from my scholarly perspective. As a canonist, my research scrutinises the point at which legal studies and theology intersect. The subjects of my research revolve around legal issues, albeit of a law which mostly serves religious functions. I analyse a legal order, in my case the law of the Roman Catholic Church, which organises the life of a religious group. But besides being concerned about the social order of the church, the law also claims to be relevant for the faithful's salvation. Compliance with the law, as Catholic tradition maintains, is crucial for the faith, as the law is supposed to guide the faithful in their pursuit of a life in accordance with ecclesiastical doctrine and discipline. Canon law, in that respect, is a delicate law; it claims to connect the social order with the order of grace. This becomes most evident where the sacraments are concerned. The sacraments are sacred symbols which signify and effectuate grace, and, at the same time, play no small role in organising the social life of the church. However, in the past century, sacramentality, once considered to be a typical Catholic obsession, has increasingly attracted attention in debates of anthropological, ethnological, and legal scholarship. Many scholars from various backgrounds, influenced by speech act theory, have discovered that the phenomena they study exhibit characteristics similar to religious sacraments, having found that many rituals of a religious, social, or legal nature change human realities through their performance, similarly to how the sacraments constitute their effects. By uttering the right words and performing the acts required to achieve a specific effect, a new reality comes into being: 'magically' is the word most legal scholars use to describe these effects in legal contexts. The law

performs magic in several respects, as examples show: The installation of citizens into office according to a prescribed procedure turns them into state officials; marriage vows correctly uttered in front of a state official make two individuals spouses; a judge sentencing a defendant makes her or him a convict, regardless of her or his actual guilt; a court declaring a missing person deceased renders this person dead in the eyes of the law, regardless of whether she or he is physically dead or alive. Canonist William Daniel seems to sense exactly that magical quality of judicial decision making when noting, '[l]egislative power is very specific in that it creates, *ex nihilo* as it were, a norm that is binding within and throughout the community'.<sup>1</sup> The power to create norms which are binding on the community, and which seem to appear out of nothing merely by the judge using the right spell, exhibits some similarities with the functioning of religious sacraments. In baptism, individuals acquire church membership when a priest utters the baptismal formula and washes them with water. The sacrament of penance brings about the forgiveness of sins when a priest utters the proper words, whenever the necessary conditions are fulfilled. A couple become spouses by exchanging their consent within the canonical form of marriage or another accepted procedure. An ordinand receives the power of orders through the rite of ordination.

These examples communicate two messages. First, one may note that the law operates in a similar way to the sacraments. It signifies and effectuates a new reality whenever an authorised individual utters certain words and performs certain gestures. This gives reason to assume that the law has a sacramental functioning. Second and conversely, the sacraments evidently rely on the law or similar normativities – on legal rules, defined procedures, and established conventions – to achieve their designated effects. Religious scholar James Ware observes this interdependency of the sacraments and the law when noting that the effect of sacramental acting requires its celebrants to abide by the correct formalities. Ware notes that, '[s]ince the form of worship determines how the worship fulfils its functions, the form of the liturgy is crucial to the realization of the ends of worship: Consequently, the proper uses or misuses of liturgy's form is not a trivial matter in the life of a religious community'.<sup>2</sup> Ware suggests that the law is an instrument for ensuring that the liturgy is conducted in

<sup>1</sup> Daniel, 'Juridic Acts in Book VII of the *Codex Iuris Canonici*', *Studia Canonica* 40 (2006), 440.

<sup>2</sup> Ware, 'Legislating Religious Rituals', in Lindgren and Knaak, eds., *Ritual and Semiotics*, New York, Peter Lang, 1997, 172.

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the proper way. He writes: ‘Legislative control is one way in which a community can assure that liturgies are properly enacted and properly used.’<sup>3</sup>

THREE PROPOSITIONS

Quite interestingly, Ware notices a double twist when it comes to the relationship between the sacraments and the law when he observes that religious rites make use of the law to ensure that the right procedures are followed, while at the same time observing that the law also acts ritually. Ware notes that ‘legislative processes are themselves symbolic operations which are ritually bound’.<sup>4</sup> Bearing this interrelationship in mind, I contend that there is a twofold interdependency between the law and sacraments, which one could term the ‘sacramentality of the law’ and the ‘legality of the sacraments’.<sup>5</sup> The law makes use of sacramentality to achieve some of its designated effects. It draws upon what one might call a ‘sacramental’ functioning to create legal persons and institutions and to endow them with statuses, rights, obligations, and duties. Conversely, sacraments make use of the law to achieve their designated effects. They require the correct procedure, the right formula, the conventional gestures, and the authorised minister to become effective – requirements which are established, organised, and controlled by a communities’ rules and regulations. In the Catholic Church, this regulative function is fulfilled by liturgical norms and canon law. These observations support two of the three propositions which I will follow up in my study. My first proposition is that the law makes use of sacramentality to effect changes in legal status: by making or unmaking legal persons and institutions, by defining the legal statuses of persons or things, by assigning individuals or groups with competencies, rights, and duties, or by imposing sanctions on them. By spelling out what derives from this observation I want to flesh out canonist Peter Huizing’s remark that ‘the institutional order of the Church’ has ‘sacramental roots’.<sup>6</sup> My second proposition is that the church – and similarly many other religions – makes use of the law to give community members access to grace in the sacraments. When studying the sacraments and the law of the Catholic Church, the sacramentality of

<sup>3</sup> Ibid.

<sup>4</sup> Ibid., 172–173.

<sup>5</sup> For a broader understanding of the term ‘legality’, used in a wider sense here as it is in the traditional legal debates, see also Olson, *From Law and Literature to Legality and Affect*, Oxford, Oxford University Press, 2022.

<sup>6</sup> Huizing, ‘Reflections on the System of Canon Law’, *The Jurist* 42 (1982), 247.

the law in itself transpires to have a double twist, as the church not only regulates its sacraments with the help of the law but also builds upon the sacramentality of the law to give its members access to legal institutions, statuses, rights, and duties – as do all legal communities. However, in some cases the church does this *through* the Catholic sacraments. As a consequence, the sacramentality of the law, its performative power, unfolds itself within the sacraments, which serve not solely as spiritual symbols conveying grace to their receivers but also as legal symbols creating membership relations, appropriating members with ecclesiastical statuses, and endowing them with duties and rights. Consequently, some of the sacraments as celebrated in the church carry a double meaning, serving as religious and legal symbols at one and the same time. Baptism washes away sin but also makes a person a member of the church, assigning her or him with membership duties and rights. Ordination signifies entering spiritually into the church's service, but it also endows the ordained with power, integrates them into church hierarchy, and assigns them with the duties and rights of the clergy. Marriage is a source of grace for baptised spouses, but it also binds them together in a legal tie endowed with certain marital duties and rights. Within the sacraments, the church therefore avails itself of the law to give its members access to the spiritual good of grace. Yet it also avails itself of the sacraments to grant its members access to grace *and* to legal effects. For me as a canonist, studying the concept of sacramentality from a theological and legal perspective has both sides to it. It invites us to examine the sacramentality of the law and the legality of the sacraments, and also to study how the sacraments employ the law to constitute spiritual effects. Most interestingly, this twist has largely failed to attract the attention of scholars so far. Art historian Heike Schlie touched upon this connection when noting that famous authors, such as historian Paolo Prodi and philosopher Giorgio Agamben, when writing about the sacrament of the oath, pointed at the religious roots of legal acts, but paid no direct attention to the legal dimension of religious action.<sup>7</sup> Schlie acknowledges that establishing a complete picture of the link between the law and the sacraments requires studying the 'sacro-legal nature of the Christian sacrament itself'.<sup>8</sup> My study seeks to shed

<sup>7</sup> See Prodi, *Der Eid in der europäischen Verfassungsgeschichte*, Munich, Stiftung Historisches Kolleg, 1992; Prodi, ed., *Glaube und Eid*, Munich, R. Oldenbourg Verlag, 1993; Agamben, *The Sacrament of Language*, Cambridge, Polity Press, 2010.

<sup>8</sup> Original quote, 'das sakralrechtliche Wesen des christlichen Sakraments selbst', Schlie, 'Vollzug durch das Bild', in Ertz, Schlie, and Weidner, *Sakramentale Repräsentation*, Munich, Wilhelm Fink Verlag, 2012, 142.

more light on exactly this sacro-legal or juridico-religious dimension of sacramentality, in devoting some thought not only to the general question of how the law makes use of sacramental performativity, but also to the question of how Catholicity makes use of the law to regulate those acts with which it conveys not only spiritual effects but also legal effects to its members. This double twist of the sacraments' functioning in the Catholic Church supports my third proposition: Within the sacraments, the church makes use of sacramentality to give its members access to grace and to the law by endowing the receivers with the spiritual good of grace while making them legal persons, defining their legal status as church members, and assigning them with competencies, duties, and rights. Some sacraments are not merely symbols of grace. They are sacro-legal symbols that simultaneously signify and effectuate spiritual and legal realities.

#### JURIDIFYING SACRAMENTS?

Having said that, I have to mention – particularly for those readers with a background in canon law – that although I am profoundly interested in improving my understanding of how religio-legal symbols function, I do not wish to suggest that the Christian sacraments be understood *as* legal acts. Some canonists propose this coincidence of sacramental and juridic acts. In the 1970s, canonist Wilhelm Bertrams most notably irritated many theologians with his insistence that the sacraments are in fact juridic acts. For Bertrams, the sacraments as external signs are legal signs, which effectuate grace as an internal effect.<sup>9</sup> He explains his view by referring to ecclesiology, as he understands the church to be a sacrament in line with the teaching of the Second Vatican Council.<sup>10</sup> The church as a sacrament in its earthly existence is a legal institution.<sup>11</sup> Its legal structure, for Bertrams, is a medium for conveying grace, as the legal church is the way in which the Church of the Spirit actually becomes

<sup>9</sup> See Bertrams, 'Die Bedeutung des 2. Vatikanischen Konzils für das Kirchenrecht', *Österreichisches Archiv für Kirchenrecht* 23 (1972), 129.

<sup>10</sup> See Second Vatican Council, 'Constitution *Sacrosanctum concilium*', 4 December 1963, nos. 5, 26, *Acta Apostolicae Sedis* 56 (1964), 99, 107; 'Dogmatic Constitution *Lumen gentium*', 21 November 1964, nos. 1, 9, 48, *Acta Apostolicae Sedis* 57 (1965), 5, 14, 53; 'Pastoral Constitution *Gaudium et spes*', 7 December 1965, nos. 42, 45, *Acta Apostolicae Sedis* 58 (1966), 1061, 1065–1066; 'Decree *Ad gentes*', 7 December 1965, nos. 1, 5, *Acta Apostolicae Sedis* 58 (1966), 947, 951–952.

<sup>11</sup> Peter Huizing, rather surprisingly, presents a similar argument of convergence, see Huizing, 'Reflections on the System of Canon Law', *The Jurist* 42 (1982), 247.

real in this world. Bertrams calls this link the ‘pneumatological-legal unity’<sup>12</sup> of the church. He argues that the same unity applies to the single sacraments. Consequently, he understands the sacraments as legal institutions which protect, safeguard, and secure the conveyance of grace. Bertrams draws this conclusion from studying the Council of Trent’s teaching on the sacraments and their functioning *ex opere operato*. Similarly to legal acts, which are considered valid whenever all conditions for their validity are fulfilled, Trent considered the sacraments as valid *through the sacramental act performed*, whenever all relevant conditions are given. Bertrams consequently concludes that there is no major difference between legal and sacramental acts. Some contemporary canonists agree with him. Norbert Lüdecke and Georg Bier, for instance, understand the administering of the sacraments as a special case of legal acts.<sup>13</sup> They come to this conclusion by studying the legislator’s requirements on juridic acts, as found in canon law. The legislator asserts for juridic acts in general that their validity requires a qualified person and ‘those things which essentially constitute the act itself as well as the formalities and requirements imposed by law for the validity of the act’ (canon 124 §1 CIC/1983). The legislator goes on to regulate that ‘a juridic act placed correctly with respect to its external elements is presumed valid’ (§2). That is apparently very close to what Trent taught on the sacraments. No wonder Bertrams’s thesis has current reverents and reappears now and then in the canonical debates on the sacraments. Canonist Éric Besson, for instance, devoted his doctoral thesis to proving that all seven sacraments have a juridical dimension.<sup>14</sup> His keen interest in finding juridical effects in all of the sacraments led to some peculiar results, such as his understanding of one of the juridical effects of the Eucharist to be the recognition of the validity of the presiding priest’s ordination.<sup>15</sup> One may find this a little daring, to say the least. Accordingly, canonist John Huels has raised some doubts about this proposal, noting that it is hard to comprehend this effect as one

<sup>12</sup> Original quote, ‘pneumatisch-rechtliche Einheit’, Bertrams, ‘Die Bedeutung des 2. Vatikanischen Konzils für das Kirchenrecht’, *Österreichisches Archiv für Kirchenrecht* 23 (1972), 153.

<sup>13</sup> See Lüdecke and Bier, *Das römisch-katholische Kirchenrecht*, Stuttgart, Kohlhammer, 2012, 152.

<sup>14</sup> See Besson, *La dimension juridique des sacrements*, Rome, Editrice Pontificia Università Gregoriana, 2004.

<sup>15</sup> See *ibid.*, 261.

effect of the sacramental act itself.<sup>16</sup> Other canonists are equally hesitant to equate the law with the sacraments. Helmuth Pree, for instance, in his definition of juridic acts, sets them apart from liturgical acts, noting that ‘the term “juridic act” has to be distinguished from: ... Liturgical acts; for example, rites which are to be observed in celebrating liturgical acts according to canon 2’.<sup>17</sup> Pree does not explicitly state that sacramental acts are not juridic acts. However, as one may understand those liturgical acts to which canon 2 CIC/1983 relates as including those ritual acts to be performed when celebrating the sacraments, he implicitly suggests keeping juridic acts and sacramental acts apart. Huels also dismisses the comparison of legal and sacramental acts with the argument that juridic acts are acts of the human will, as they require an individual person’s or a collegial body’s will, while the sacraments are not based on human will alone but are acts of the whole church.<sup>18</sup> So sacraments, according to Huels, are not juridic acts, although some of them have legal effects.<sup>19</sup> I agree with Huels’s conclusion. However, I do not find his argument fully convincing. While Huels is certainly right to emphasise that sacraments are acts of the whole church, I doubt that juridic acts are not. He remarks: ‘Liturgical acts cannot be equated with an act of the will of any single minister.’<sup>20</sup> I agree and would like to add that this applies to juridic acts as well. A single person’s or collegial body’s act of the will takes effect only as a juridic act if that act is embedded in a legal system which defines the act and attributes to it its legal effectiveness. There is no installation into ecclesiastical office, no election of abbesses, no granting of a permission without the church as a legal community providing these human acts of will with their legal effects. Ecclesiastical legal actions draw their power from the church, too, just like the sacraments. Or to put it more generally: All sacraments, both the religious and the legal ones, receive their performative power from institutions. It is their institutional frame from which they draw their effects, as I study more profoundly in Chapter 4 of this book. This familiarity between juridic and sacramental acts becomes even more evident when discussing

<sup>16</sup> See Huels, ‘Review on Besson, La dimension juridique des sacrements’, *Studia Canonica* 39 (2005), 377.

<sup>17</sup> Pree, ‘On Juridic Acts and Liability in Canon Law’, *The Jurist* 58 (1998), 47.

<sup>18</sup> See Huels, *Liturgy and Law*, Montréal, Wilson & Lafleur, 2006, 74.

<sup>19</sup> See Huels, ‘A Juridical Notion of Sacramentals’, *Studia Canonica* 38 (2004), 367; Huels, ‘Acts with a Juridic Effect in the Canons of Marriage’, *Studia Canonica* 49 (2015), 309–314.

<sup>20</sup> Huels, *Liturgy and Law*, Montréal, Wilson & Lafleur, 2006, 74.

Huels's five categories for classifying juridic acts.<sup>21</sup> Juridic acts, as Huels stipulates, are human acts of will, manifesting the acting person's intention. In canon law, the absence of human will renders a legal action void. The legislator formulates a favour of law in favour of a juridic act performed properly by regulating that '[a] juridic act placed correctly with respect to its external elements is presumed valid' (canon 124 §2 CIC/1983). However, should the intention to act prove to be missing, the juridic act is void. This also applies to the Catholic sacraments, as I intend to demonstrate in Sections 4.3.14–16. Some further similarities between juridic and sacramental acts become apparent with regard to the other characteristics of juridic acts. Juridic acts, as Huels goes on to define, require a person to be capable of placing the act. That is most certainly also true for the sacraments. Juridic acts must manifest themselves externally. Sacraments must do this too. They are sensible signs, as are juridic acts. Juridic acts, as Huels also states, 'must be lawfully placed',<sup>22</sup> that is they must accord to the requirements of the law to meet their effect – just like sacraments. Juridic acts constitute juridic effects which are recognised as such in the legal realm. In the same vein, sacraments constitute spiritual effects recognised in the religious realm. Consequently, as I contend, we cannot find the difference between the sacraments and the law in these characteristics. Yet we may locate it somewhat deeper, in the DNA of the sacraments and of the law. Systematic theologian and canonist Michael Böhnke has argued in this direction.<sup>23</sup> He acknowledges that legal and sacramental acts might look fairly similar, but he warns that understanding the sacraments *as* legal actions misapprehends them profoundly. According to Böhnke, the juridified view of the sacraments, which the church developed following Anselm of Canterbury's juridical view of justification, distorts their real character as symbols of grace freely given by God through the Spirit. Their legalistic interpretation, in Böhnke's view, also stands in the way of reaching an ecumenical agreement on the sacraments, as it was precisely the juridified approach to the sacraments which the Protestant Reformers opposed. Some canonists react to these and similar protests against a juridifying view of the sacraments by acknowledging that sacraments are not juridic acts, while noting timidly that both kinds of acts look very similar.<sup>24</sup> I agree

<sup>21</sup> See *ibid.*, 74–75.

<sup>22</sup> *Ibid.*, 75.

<sup>23</sup> See Böhnke, *Kirche in der Glaubenskrise*, Freiburg im Breisgau, Herder, 2013, 177, 189–190.

<sup>24</sup> E.g. just recently Neumann, 'Recht und Ritual', *Liturgisches Jahrbuch* 68 (2018), 119–122.



with both observations. First, I agree that the sacraments as symbols of grace are not subcategories of legal actions. Rituals signifying and effectuating grace are religious performances. However, second, I argue that it is no coincidence that the sacraments resemble juridic acts. This is because they function in a similar way, as I show by referring to speech act theory. And, I wish to add, in some cases they actually *are* juridic acts, too. Some sacraments serve as religious symbols and as legal symbols simultaneously.

#### SACRAMENTAL RITUALS

To elucidate this, I refer to the category of *ritual* to understand the sacraments better.<sup>25</sup> Most interestingly, canonist Thomas Neumann recently pointed out that it helps to perceive Catholic liturgies as rituals.<sup>26</sup> While canonists, when alluding to the sacraments in the light of the arts and social studies, tend to apprehend the sacraments as *celebrations*,<sup>27</sup> Neumann refers to the category of ritual to avoid interpreting the liturgy through a legal lens. For him, ritual is an alternative way of assessing the liturgy without falling into the trap of comparing it with juridic acts. I agree and disagree. While Neumann is certainly right that ritual is a key category for developing an adequate understanding of Christian worship, he fails to see that ritual does not exclude discovering the juridical aspects of the liturgy, as ritual is not an exclusively religious category but is also applicable to the law. So instead of asking if the sacraments are legal entities or if they are better understood as rituals, I opt for an understanding of them *as rituals*, as it is precisely as rituals that we may understand them as carrying spiritual *and* legal effects. This is because as rituals, sacraments naturally carry *different* meanings and, in doing so, are capable of serving different functions. Scholar of Jewish liturgy Lawrence Hoffman has pointed out that rituals provide individuals and communities with meaning in at least four areas as they

<sup>25</sup> For approaches which perceive the Catholic liturgies and sacramental celebrations as rituals e.g. Lawler, 'Christian Rituals', *Horizons* 7 (1980), 7–35; Flanagan, *Sociology and Liturgy*, New York, St. Martin's Press, 1991, 234–257; Odenthal, *Liturgie als Ritual*, Stuttgart, Kohlhammer, 2002; Odenthal, *Rituelle Erfahrung*, Stuttgart, Kohlhammer, 2019; for a Protestant perspective e.g. Graupner, *Der Gottesdienst als Ritual*, Göttingen, Vandenhoeck & Ruprecht, 2019.

<sup>26</sup> See Neumann, 'Recht und Ritual', *Liturgisches Jahrbuch* 68 (2018), 122–126.

<sup>27</sup> E.g. Lüdecke, 'Feiern nach Kirchenrecht', *Jahrbuch für Biblische Theologie* 18 (2003), 395–456.

produce private, official, public, and normative meaning.<sup>28</sup> In doing so, they may also serve different functions, as they may have effects pertaining to the individual or to the whole community; effects which are more random and spontaneous or those which a community officially agrees upon; effects which concord with the official understanding of a ritual and those which compete with it; effects which create normative webs which bind the individual or the community, privately or publicly. In discussing the Catholic sacraments with regard to their meaning in church, we are mostly concerned with their public meaning with its repercussions in ecclesiastical cultures. Here, one may learn from ethnologist Clifford Geertz about how symbols connect with the construction of public meaning and, in doing so, contribute to that system of meaning we refer to as ‘culture’.<sup>29</sup> Geertz speaks of symbols when referring to those ‘tangible formulations of notions, abstractions from experience fixed in perceptible forms, concrete embodiments of ideas, attitudes, judgments, longings, or beliefs’.<sup>30</sup> Symbols can take on very different forms, as Geertz observes, noting ‘significant symbols – words for the most part but also gestures, drawings, musical sounds, mechanical devices like clocks, or natural objects like jewels – anything, in fact, that is disengaged from its mere actuality and used to impose meaning upon experience’.<sup>31</sup> In taking on these diverse forms, symbols form ‘culture patterns, that is, systems or complexes of symbols’.<sup>32</sup> Employed in ritual, these symbolic patterns help to bring together the factual and the normative world, as Geertz states, noting: ‘In a ritual, the world as lived and the world as imagined, fused under the agency of a single set of symbolic forms, turn out to be the same world.’<sup>33</sup> The Catholic sacraments as rituals drawing on words, gestures, sounds, and ritual objects do precisely that. As part of the Catholic culture they form patterns and provide a frame to which the celebrating community may refer to derive meaning from it. They refer to symbolic patterns which represent a world full of grace. Through ritual, however, this symbolic world is merged with the factual world.

<sup>28</sup> See Hoffman, ‘How Ritual Means’, *Studia Liturgica* 23 (1993), 78–97.

<sup>29</sup> See Geertz, ‘Thick Description’, in Geertz, *The Interpretation of Cultures*, New York, Basic Books, 1973, particularly 12–13.

<sup>30</sup> Geertz, ‘Religion as a Cultural System’, in Geertz, *The Interpretation of Cultures*, New York, Basic Books, 1973, 91.

<sup>31</sup> Geertz, ‘The Impact of the Concept of Culture on the Concept of Man’, in Geertz, *The Interpretation of Cultures*, New York, Basic Books, 1973, 45.

<sup>32</sup> Geertz, ‘Religion as a Cultural System’, in Geertz, *The Interpretation of Cultures*, New York, Basic Books, 1973, 92.

<sup>33</sup> *Ibid.*, 112.