CHURCH LAW IN MODERNITY

Natural law has long been considered the traditional source of Roman Catholic canon law. However, new scholarship is critical of this approach as it portrays the Catholic Church as static, ahistorical, and insensitive to cultural change. In its attempt to stem the massive loss of effectiveness being experienced by canon law, the church has to reconsider its theory of legal foundation, especially its natural law theory. *Church Law in Modernity* analyses the criticism levelled at the church and puts forward solutions for reconciling church law with modernity by revealing the historical and cultural authenticity of all law, and revising the processes of law making. In a modern church, there is no way of thinking of the law without the participation of the faithful in legislation. Judith Hahn therefore proposes a reformed legislative process for the church in the hope of reconciling the natural law origins of church law with a new, modern theology.

Judith Hahn is a Catholic theologian and Professor of Canon Law at the Faculty of Catholic Theology of Ruhr University Bochum. In 2015 and 2016, she was a Fellow at the Käte Hamburger Center "Law as Culture", University of Bonn, and she has published extensively on legal theory, law and religion, and Church and State.

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Church Law in Modernity

TOWARD A THEORY OF CANON LAW BETWEEN NATURE AND CULTURE

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Preface and Acknowledgements

Recent European debates on the validity of law have seen natural law play a minor and often difficult role. Some legal schools, particularly of the civil law tradition, are even proclaiming the end of natural law. Nevertheless, the idea of a natural normativity, which is no longer fully convincing in the secular debates in any case, remains present in the discourses on religious law; yet it also faces problems here. While natural law continues to play a central function in many religious legal orders, it also represents a frequent source of dissonance. In the legal order of the Catholic Church, for instance, many faithful no longer concur with the legislator's understanding of nature. This disagreement challenges the acceptance of law based on a natural normativity, and this loss of acceptance results in the loss of effectiveness of the law. At the same time, the loss of effectiveness gives rise to questions of validity.

This study takes up the discourse on the critical status of natural law within the Catholic Church and asks how the legal theory of canon law might develop in reaction to the dissonances respecting the effectiveness and validity of ecclesiastical law. The question of natural law serves as a starting point for examining the preconditions underlying the foundation of canon law in the context of modernity and modern theology. However, any reader expecting a study that links itself closely to the recent philosophical debates on natural law (and especially to writings celebrating a revival of natural law) might be disappointed. As I am endeavouring to make a particular contribution to the foundation of canon law, this study does not espouse 'New Natural Law', even though it considers current approaches to philosophical natural law. I was reminded to pay due consideration to this vast field, particularly in Anglo-American legal philosophy, by Robert Ombres OP of Blackfriars Hall, Oxford, whose proficiency as a canon lawyer and legal scholar includes not only the

church's tradition of natural law but also the discourses of secular law and legal philosophy.

Instead of incorporating this study into these discourses, however, I prefer to focus on the way in which canon law must develop in order for it to have a future, since ecclesiastical law is at present rapidly losing its relevance, predominantly in the churches of the West. While this phenomenon is related to questions of legal validity, a study on the validity of canon law under the conditions of modernity cannot be undertaken without taking legal sociology into account. And indeed, the present study was significantly moulded by the sociological context in which I began writing it, as the first draft was written in the winter of 2015–2016, which I spent as a fellow at the Käte Hamburger Center 'Law as Culture' in Bonn. The centre, which focusses on law from the perspective of the humanities, is a lively learning community uniting scholars from different backgrounds including law, cultural studies, and sociology. Not all scholars to whom I owe important influences can be named here. Yet I would like to explicitly mention the directors, the legal scholar Nina Dethloff and the legal sociologist Werner Gephart, who provided a dynamic atmosphere for discussing the phenomena of law and religion in their tension between normativity and facticity. From the team of scientific coordinators, I would like to mention the legal scholar Raja Sakrani, whose research on Jewish, Christian, and Muslim *convivencia* in medieval Spain inspired me to take on a comparatist perspective with regard to the laws of the Religions of the Book, and the sociologist Daniel Witte, whose expertise on the sociological classics motivated me to read more in this field. I am also very grateful to the centre's research professor Marta Bucholc, a sociologist, legal scholar, and philosopher, whose valuable comments were indispensable for my work, as was the support of my co-fellows, especially Daniela Bifulco, a legal scholar of Seconda Università degli Studi di Napoli, and Sabine N. Meyer, assistant professor for American studies at the University of Osnabrück.

With regard to the future, any reflections on the foundation of canon law must provide validity arguments that convince the members of an increasingly pluralist church. Connected with this is the question regarding the extent to which the difference between religious validity theories and secular arguments can be allowed to grow before the religious approach becomes implausible for the community members, and how big the differences must be to give credit to the specific religious dignity of religious law. Since society's plurality presents legal theorists of secular and religious law with a common problem, they share a good number of questions, even though their answers might differ to some degree. Christian natural law is being challenged by plurality, as is Jewish and Islamic legal theory, although each religion is pursuing its own

solutions. So it is helpful and necessary to consider how Jewish and Islamic legal thinkers refer to the tension of plurality and universality in the field of the law. I came across David Novak's important groundwork on Jewish natural law thanks to Iveta Leitane who, as a scholar of Jewish philosophy, is also an expert on the philosophical debates on Jewish law. Although the Christian, Jewish, and Islamic natural law traditions differ significantly, similar questions exist in all three Abrahamic religions. This is clearly shown by Anver M. Emon, Matthew Levering, and David Novak, who published *Natural Law: A Jewish, Christian, and Islamic Trialogue* in 2014. Their book emphasises that natural law is a normative idea that might play a major role in a dialogue between the Religions of the Book. As normativity and law in the Abrahamic religions will be not only a key question of interreligious dialogue in the coming years but also a focal point in the debates between religion and the state, natural law as a universalistic normativity of religious and secular legal thought might be a good beginning for discussing the common grounds of legal understanding.

Nevertheless, the potential of natural law to further interreligious dialogue cannot conceal that nature – as a reason or basis for the validity of law – faces huge challenges, as does the neo-Scholastic natural law of Catholic legal thought in particular. In modernity, the idea of universality has to be carefully detached from its premodern link, which understands natural law as ahistorical. Instead, universalistic arguments have to embrace the finding that each law is cultural and particular. The observation by systematic theologian Judith Gruber – "A theology after the Cultural Turn is challenged to think of a model of universality on the basis of epistemological particularity"[1] – also understands canon law foundation as having to connect the idea of legal universality with the particularity of law. This is not only a desideratum of cultural studies, but a theological mission, as culturality and particularity are theologically

[1] Gruber, *Theologie nach dem Cultural Turn*, Stuttgart, Kohlhammer, 2013, 12; original: "Eine Theologie nach dem Cultural Turn ist dazu herausgefordert, ein Modell von Denkbarkeit von Universalität auf der Basis epistemologischer Partikularität zu entwerfen."

A general remark on the use of non-English direct citations in my study: whenever I quote directly from non-English texts, I translate the quotes and insert my English translations into the main text, placing the original texts in the footnotes. I am not fully convinced that this is a respectful way of dealing with other authors' writings, but in doing so I have tried my best to give their thoughts the impact that they deserve by letting the authors 'speak' for themselves from time to time (even though in an English translation done by me). I am aware of the problem that translating always changes the meaning of texts. The translator is always a traitor: this motto was just recently discussed convincingly by Terrence W. Tilley in his book *Inventing Catholic Tradition*, Eugene, OR, Wipf & Stock, 2011, 9–10. I sincerely hope that none of the non-English authors feels betrayed, misunderstood, or misquoted by my translations.

relevant. The theological dignity of the Christian faithful who form the church – the people of God – as embodied in the local churches and their cultures, requires a focus on nature as well as on culture as a validity reason of law. But accepting culture as a validity reason of law is not unproblematic, as the phenomenon of cultural difference is ecclesiologically hard to digest in Catholic legal thought. To protect the unity of faith, the foundation of canon law depends on a legal unity. Questions regarding the validity of canon law must therefore reflect the tension between the church's plurality and its unity, between local differences and a universal normativity.

Writing a book takes a considerable amount of time. This rare privilege was granted to me by the German Federal Ministry of Education and Research, which financed a substitute professor during my time at the Käte Hamburger Center 'Law as Culture' in the winter of 2015–2016, and by the German Research Foundation (Deutsche Forschungsgemeinschaft), which financed my research leave the following winter to enable me to finish this study. I am grateful to my colleague Bernd Dennemarck, who stood in for me in Bochum during both periods.

Time is one precondition for writing a monograph, but so is inspiration. I have already mentioned the team at the Käte Hamburger Center, which provided a creative multidisciplinary atmosphere and a productive environment for my initial thoughts about the culturality of canon law. In addition, another context has to be named which served as creative space when working on the study. As a member of the Faculty of Catholic Theology at Ruhr University, Bochum, I am blessed with being part of a unique college of theological scholars. I am grateful to my colleagues with whom I may always discuss my ideas and who encourage and welcome even bold steps in theological research. My gratitude likewise includes the team of my chair. First of all I want to thank Andrea Hartwig, who is a great help in all matters of organisation and administration. I also want to thank Catherina Uhlmann, who supported my work.

Regarding support, I am most grateful to Robert John Murphy, who undertook the arduous task of carefully proofreading my manuscript, and to Gary S. Hauk, who meticulously copyedited it. Their patient and kind way of dealing with my text was most helpful and instructive for me and considerably improved my writing. I also want to thank John Berger, Senior Editor at Cambridge University Press, and the staff at Cambridge University Press for their excellent support, in particular Danielle Menz, Becky Jackaman, Sri Hari Kumar Sugumaran and Ami Naramor. I owe particular thanks to John Witte, Jr. for considering my book for the Law and Christianity series.

I undertook part of the reading and writing in an environment which became very dear to me, although it will always remain special and

intimidating. As an Academic Visitor at the Faculty of Theology and Religion, Oxford, in summer 2016, I spent many hours in the Bodleian Libraries (for me one of the most beautiful places to do research and, especially during the summertime, frequented by scholars from all over the world). Part of the text was written in the house of the Foster family, where I was living during my time in Oxford. Every reader who is appalled by my study's constant references to nature in a normative way might be helped by acquiring a copy of Charles Foster's book *Being a Beast* (London, Profile Books, 2016). The author is a legal scholar, ethicist, and veterinary surgeon. I can recommend his thoughts on nature and culture as a healthy antidote to all approaches and attempts to limit nature in an anthropocentric way.

That nature and culture are two sources of normativity that permeate the small social entities in which we live is certainly part of our experience residing in social entities we call families. I am very grateful to my mum and my dad (whom I subjected to basically any fight about normative matters when growing up), and to Claudia, Mirjam, and Thomas. In being my family, they, probably without being aware of it, might be one reason why I started to think about nature and culture and their normative implications.