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**CANON LAW AND LEGAL CULTURE**
**AT THE CENTENARY OF THE 1917 CODEX IURIS CANONICI**

# An Ecumenical Perspective on Canonical Culture and Other Juridical Christian Cultures: Orthodoxy, Anglicanism, Protestantism

## Introduction

Among the many striking differences between Roman Catholic and Protestant ecclesiastical law is the lack in the latter of a codification which would be comparable to the codices of 1917 and 1983. Such a codification would possess a cohesive, encompassing property with the capacity to systematise Protestant ecclesiastical law, currently contained within numerous different sets of rules, to endow it with a distinctive form, and to enable those approaching it to gain a sense of its 'big picture'. Protestant ecclesiastical law, however, has thus far been without such a systematisation, and, to exacerbate the situation, is known for its fragmentation into numerous specific, partial systems without the benefit of an overarching structure. Swedish, Danish, Norwegian and Icelandic ecclesiastical law are each entirely autonomous. Germany, meanwhile, does not even have one single standard Protestant ecclesiastical law system; instead, each of the twenty regional churches which comprise the Protestant Church in Germany (in German the *Evangelische Kirche in Deutschland*, EKD) have their own independent law. The existence of the various denominations and free churches born from the Reformation only goes to amplify this effect of fragmentation; again, each of these churches is an autonomous institution possessed of its own, more or less distinctive legal order. The result is a plethora of 'Protestant' legal systems whose underlying conceptions of ecclesiastical law differ fundamentally, in many cases, from those of their fellow Protestant churches. I must therefore confess that my task here, in presenting the 'Protestant view' on canonical culture, is an essentially impossible endeavour. I will therefore restrict myself to discussing the German Protestant view and further qualify this perspective by limiting it to the view of the Lutheran Reformation and of the German Lutheran regional churches which emerged from it.

A further justification for this limitation of this presentation's scope might appear in the particular historical and theological significance of Luther's Reformation, which was, so to speak, the source of the reform movements that followed it, and in the anniversary we are celebrating this year of the Reformation's catalytic event, Luther's

famous nailing of his 95 theses on the door of the *Schloßkirche* in Wittenberg. Another, similarly resonant flashpoint of the period was Luther's incineration, on 10 December 1520 at Wittenberg's *Elstertor* gate, of 'all of the books of the Pope: the decree, the decretals, the *Sextus*, the Clementines and the Extravagentes", that is, the books of Catholic canon law. It is a particularly acute irony of history that, despite this act, pre-codification canon law continues to be subsidiarily applicable in specific cases in Protestant – but not Catholic – ecclesiastical law. This is indicative of the fact that Luther's rejection of canon law did not always inspire complete assent in the Protestant legal specialists of his and subsequent eras. That said, one of the effects of the Reformation was undoubtedly the relegation of ecclesiastical law to a much more relative status than previously.

To this day, conceptions of ecclesiastical law remain one of the unresolved issues burdening ecumenical endeavours. It is an irrefutable fact that the Protestant idea of ecclesiastical law – irrespective of the applicability or otherwise of canon law in the Protestant church – is fundamentally different from that held by the Roman Catholic Church. Indeed, Christian Grethlein's introduction to Protestant ecclesiastical law refers to canon law as the key point of contention between the Roman Catholic and the Protestant churches (22). It is a point affirmed in the discussion paper 'The Protestant View on the Communion of Churches: Considerations on Regulated Coexistence and Cooperation among Churches of Different Denominations' (*Kirchengemeinschaft nach evangelischem Verständnis. Ein Votum zum geordneten Miteinander bekenntnisverschiedener Kirchen*), issued by the EKD in 2001:

> … We additionally note in this context that the [perceived] necessity of the office of St Peter and the form it takes, and thus the claim of the Pope to supreme authority over the Christian Church, the [Roman Catholic Church's] understanding of the apostolic succession, the barring of women from ordained office, and, not least, the status of canon law in the Roman Catholic Church are matters with which a Protestant view must disagree.

The context of ecclesiastical legal issues becomes very apparent at this juncture; it is evidently closely linked to ideas of ecclesiastical office and, going beyond this, to ecclesiology in general. I will seek in what follows to concisely provide a Lutheran perspective on the notions behind, and purposes of, Protestant ecclesiastical law, on the basis of key Lutheran Confessions, specifically the relevant passages of the *Confes-*

*sio Augustana* of 1530, which were themselves part of the theological controversies of the Reformation period. I will then go on to make some brief remarks on the tradition of canon law in the German Protestant churches up to 1918 and on the significance of the Codex of 1917 from a Protestant point of view. To conclude, I will point to issues of joint interest – despite all differences on fundamentals – to theoreticians and practitioners of canon law and Protestant ecclesiastical law alike, which may thus be of productive use to ecumenical debate.

## The Protestant conception of ecclesiastical law

Article 28 of the *Confessio Augustana*, headed 'Of the Power of the Bishops' (*de potestate ecclesiastica*), lays down the fundamental elements of the Protestant church's idea of itself and its mission, its powers, and its law. The core from which it proceeds is the power of the keys as described in Matthew 16, 18/19 and 18, 18, or the power of the bishops, to which it is considered synonymous. The powers thus summarised are the power to proclaim the Gospel, to forgive or retain sins, and to confer and administer the sacraments. The power of the church, then, consists in proclaiming the Word, administering the sacraments and holding the power of the keys, and becomes active *sine vi[,] sed verbo*, that is, through the Word alone, without the intervention of human force.

In the Protestant view, proclaiming the Word, administering the sacraments and holding the power of the keys are not offices restricted to an exclusive circle of specific individuals; rather, all Christians are empowered to these acts. However, the *public* exercise of the office of preaching, public teaching, and the conferment of the sacraments are incumbent upon specific bearers of office, who must have been formally called to their task in accordance with the church's regulations (CA 14). In other words, nobody is to publicly teach or preach in the church or confer the sacrament *nisi rite vocatus*. This 'orderly calling' or 'vocation', this office of public proclamation of the Word and conferment of the sacraments, is 'the' ecclesiastical office per se. It is not divided within itself; that is, bishops and priests or pastors are bearers of the same office.

No legal power of leadership extending beyond this office is linked necessarily, or *iure divino*, to it or to its associated powers of teaching, preaching and conferment of the sacraments. Article 28 of the *Confessio Augustana*, referencing the concept of *potestas iurisdictionis*, the authority to pronounce judgment, assigns it to the office of

bishop. Protestant tradition regards this office as nothing other than the power to forgive sins, to cast out teachings which stand in contradiction to the Gospel, and to punish other public sins by the imposition of anathema: in other words, the power of the keys. This power, like the office of proclamation of the Word, is exercised *sine vi humana[,] sed verbo*, that is, through the Word alone and not through the exercise of human power. In this sense, Philipp Melanchthon, the author of the *Confessio Augustana*, thus classes anathema, or the exclusion of an individual from the Eucharist, as part of this proclamation *sine vi, sed verbo*. This interpretation retains the notion that the exercise of the power of the keys is a means of spiritual, not juridical leadership of the church. Indeed, no powers of juridically defined authority can be derived from the spiritual office, that of proclamation.

This does not mean that the church cannot have leadership in law, nor does it suggest that holders of sacral office are prohibited from simultaneously possessing juridical authority. It does signify that such latter powers are not of their spiritual office. To follow the example given in Article 28 of the *Confessio Augustana*, bishops may, alongside their sacred office encompassing the *potestas iurisdictionis*, the power of the keys, hold a 'second power to pronounce judgment'; yet such power is conferred 'by human law and not because Christ had added these things to their office'. There is a reference here, in line with the law of the time, to episcopal jurisdiction over matters such as marriage and church property.

This said, the ecclesiology of the Reformation does provide for the establishment of an episcopal office endowed with particular authority or for ecclesiastical legislation to regulate such an office. We repeatedly find emphasis of the point that the leading figures of the Reformation had no wish to completely overturn the order and hierarchy of the church. It is the case, however, that authority over matters beyond the office of proclaiming the Word and administering the sacraments is based not in any divine right, but rather in human law. Such authority may be desired and established for the sake of keeping good order, but it may not claim to draw its associated power from God's command or any other form of *ius divinum*. If we turn to ordination as an example, we see in the tenth of the Smalcald Articles the following consideration: 'If the bishops would be true bishops [would rightly discharge their office], and would devote themselves to the Church and the Gospel, it might be granted to them for the sake of love and unity, but not from necessity, to ordain and confirm us and our preachers....'. This is accompanied by an insistence on the principle that the confer-

ment of ordination is a right pertaining to all priests, indeed to the whole Church, and not an office reserved to bishops *ius divinum*. Likewise, the power to set ecclesiastical laws is not to be considered exclusive to a hierarchical office of the Church.

Further, the leading voices of the Reformation speak out robustly against any practice of introducing, by force of ecclesiastical authority, additional ceremonies or regulations while asserting that adherence to them is required for access to salvation. The examples they cite include stipulations on diet and fasting, feast days, and various sets of rules relating to the servants of the Church; these are matters we would today likewise consider as falling within the remit of ecclesiastical authority. Again, this does not mean that the Church is prohibited from setting regulations to govern itself. Indeed, Protestant ecclesiology provides for conferment of the authority to do so upon the episcopate. However, there is a caveat attached: This is the simple mode of interpreting church statutes (or traditions, HdW), namely, that we understand them not as necessary services, and nevertheless, for the sake of avoiding offenses, we should observe them in the proper place‘.

Accordingly, then, we might summarise the Lutheran Reformation’s conception of ecclesiastical authority as follows: The Church’s power and authority, as conferred by divine ordinance, consists in the proclamation of the Gospel, the forgiveness or retention of sins, and the conferment and administration of the sacraments. This is the spiritual authority of the Church, exercised through the Word alone and without agency of human power. The public exercise of the office of preaching, and the administration of the sacraments – which is per se public – are contingent upon an orderly calling, reception of which, however, is fundamentally the right of the whole Church.

These fundamental principles do not preclude the assignation of specific powers and duties going beyond these core components of ecclesiastical office to particular organs or holders of office within the Church. The conferment of such authority, however, has the sole purpose of upholding good order for the sake of peace within the Church and is based in human law only. Such authority, further, is by no means exclusive to bishops or to holders of clerical office more generally. In addition to this, regulations issued by human hand must not be permitted to weigh upon the consciences of the faithful. Their function, again, is solely to keep good order, not to aid

in any progress towards salvation. A strict differentiation is to be observed between this ‘external’ ecclesiastical authority and the Church’s spiritual authority.

This way of conceiving of ecclesiastical authority allows the Church considerable scope for constituting itself as a legal body. The fact that the foundational structures of ‘external’ ecclesiastical power are not *iure divino* places them at the disposal of human power and permits, subject, of course, to theological admissibility, their creation and formation in accordance with considerations of practicability. External’ ecclesiastical authority is not contingent upon ordination and is not restricted to a clerical class; both such limitations are foreign to Protestant principles.

These provisions limit the scope of ecclesiastical law in Protestant denominations. Its norms and principles regulate the Church’s forms of organisation, the order of its offices and the behaviour of Christians within the Church and in matters ecclesiastical, for the sake of peace and good order and the “avoidance of offenses”. If we disregard the relationship of ecclesiastical law to the Church and its offices, this is not different in principle from the function accorded to the secular law of states.

Derivation of this limitation on the action of ecclesiastical law issues both from the Church’s concept of its office and its authority and, importantly, from the very idea of ‘the Church’, as formulated in CA 7: ‘And to the true unity of the Church it is enough to agree concerning the doctrine of the Gospel and the administration of the Sacraments. Nor is it necessary that human traditions, that is, rites or ceremonies, instituted by men, should be everywhere alike‘. In reference to this latter point, we might add that it is not necessary for the same order and structure of offices, the same constitution of church bodies, the same legislation to be in place everywhere. The Church has no constitution prescribed to it *iure divino*; indeed, the Church is not of necessity a hierarchical or episcopal institution, but likewise not of necessity synodal or congregationalist. The only element decreed essential is the existence of the office of proclamation of the Word, whose public exercise necessitates orderly calling. It is entirely possible and legitimate to define the existence of the office of preaching as thus prescribed and therefore as divinely ordered, that is, *ius divinum*, in Protestant ecclesiology. This does not alter the fact that the legal regulation of this office in its detail remains a matter for human legislation.

## The canonistic tradition of Protestant ecclesiastical law

In spite of Luther's fundamental repudiation of canon law, the Reformation's rejection of its ecclesiological basis, and the redefinition of Protestant ecclesiastical law through the ecclesiastical regulations passed in the names of regional sovereigns, canon law retained its role in the churches that emerged from the Reformation. The legal specialists of the Protestant churches did not follow Luther's rejection of canon law, which by its status as part of common law, independently of its origin in church hierarchy, was the reigning law of the land and provided answers to a range of practical questions. At least in this respect, then, it was not dispensable with. Protestant ecclesiastical law thus continued, as it evolved, to make reference and recourse to canon law.

This said, it did not do so without restrictions or reservations. Many canonical stipulations, pertaining to areas such as the regulations governing ecclesiastical offices, were incompatible with principles of the Reformation or required adaptation to these. In other words, canon law was only applicable inasfar as it did not contradict Protestant teachings, a principle stated explicitly in some Protestant ecclesiastical regulations. An example appears in the *Consistorial Instruction* for Pomerania of 1569: 'Yet when such a case [is] founded [neither] in Holy Scripture, nor in the order of our church [*unsre kirchen-ordnung*], so shall [judgment] be pronounced in accordance with their *canonibus*, as long as those are *praeter* [pronouncing it], et non contra jus divinum, [and] also not against the order of our church, natural law or righteous and respectable morals.'. (…). The expression *'* the order of our church*'* indicates that this is an order issued on the authority of the regional sovereign. This in turn indicates that in the territories which fostered Protestantism after the Reformation, canon law received a new basis for its validity, making it applicable not through its own authority nor via that of the Pope, but rather through the command of a sovereign.

In this way, canon law underwent a double modification: of its content via adaptation to the tenets of the Reformation, and of the provenance of its authority, transforming it from papal to princely law. John Witte has termed this process ´the Protestant conversion of canon law`; as we can see here, it was, so to speak, a dual conversion.

The probably most significant summary of Protestant ecclesiastical law issued in the early modern period bears impressive witness to the canonical roots and traditions of

this law, beginning with its title: it is the *Jus Ecclesiasticum Protestantium* of the ecclesiastical law scholar and pioneer of general constitutional law, Justus Henning Böhmer of Halle, published in five volumes between 1714 and 1737. This work models its survey of Protestant ecclesiastical law on the basis of, and in line with the systems developed in, the papal decretals, a fact evident in its full title: '*Ius ecclesiasticum protestantium usum hodiernum iuris canonici iuxta* seriem *decretalium ostendens et ipsis rerum argumentis illustrans'* (Protestant Ecclesiastical Law, Showing the Modern Use of Canon Law in accordance with the Order of the Decretals and Illustrating [it] with Arguments from that Matter). As well as representing a key moment in Protestant ecclesiastical law, it signifies its basis in canon law and effectively justifies us in speaking of what we might describe as Protestant canon law.

## The CIC of 1917: the end of an era

This tradition continued into the twentieth century, not coming to an end until the advent of the Codex Iuris Canonici (CIC) of 1917. The First Vatican Council's emphatic assertion of supreme papal authority deepened the fundamental theological and ecclesiological chasm between Roman Catholic and Protestant jurisprudence. The replacement of the canon law formerly in force by the Codex severed most of the connections, which had until then been held by virtue of tradition and of content, between the two legal spheres. The CIC thus represents the end of an era, not only from the Roman Catholic, but also from the Protestant point of view, a fact as evident to its contemporaries in the early twentieth century as to us today. The Protestant legal historian Ulrich Stutz puts it very plainly indeed in his 1918 book *Der Geist des Codex Iuris Canonici* (The Spirit of the CIC), lamenting the 'burgeoning of what for the most part is very dry, dull and empty statute-based jurisprudence' he perceives as having sprung up due to the Codex (p. 168). In so doing, however, he expresses the hope that it may in future be replaced by a 'blossoming of the history of ecclesiastical law as an adjunct and supplement to Catholic codification and Protestant systematisation' (p. 172). That his hope was not entirely in vain is apparent in the fact that, to this day, there are several Protestants among those scholars who have made significant achievements in historical canon law. Peter Landau and his pupil Andreas Thier, who is continuing the tradition in Zürich, are prominent examples.

Ulrich Stutz called the CIC of 1917 the 'most significant event in the history of ecclesiastical law for centuries' and foretold it an impact which 'might possibly last centu-

ries' (p. VI). As we know, this prediction has not proved accurate. Stutz's discussion speaks eloquently of his great respect for canon law in general and the Codex authors' achievement of systematisation in particular. This notwithstanding, Stutz is emphatically critical, from a Protestant perspective, of specific regulations contained in the Codex; foremost among them are those dealing with laypeople and people of other faiths. We would barely have expected other of him in light of the profound theological differences.

At the time of the introduction of the Codex Iuris Canonici of 1983, a well-known Protestant legal specialist, Axel von Campenhausen, denounced these determinations of the CIC 1917 as 'rather embarrassing' due, for instance, to their depiction of 'Protestant Christians as Catholics […] who had been excommunicated for heresy' (*Gesammelte Schriften*, p. 49). We should note here for context that von Campenhausen is neither one of the many Protestants who hold an attitude of suspicion to statutes per se, nor is he unsympathetic to the Catholic Church.

## Ongoing differences, shared questions

From a Protestant point of view, the Second Vatican Council and its result in ecclesiastical law terms, the Codex of 1983, represent significant progress from the CIC of 1917, specifically with reference to its provisions on non-Catholics and the validity of ecclesiastical law in other denominations. This does not mean, however, that the fundamental differences in Protestant and Roman Catholic conceptions of ecclesiastical law have been erased. Their continued existence makes it difficult to imagine any rapprochement that might lead to the emergence of an ecumenical ecclesiastical law or juridical culture. Indeed, in light of the extent and significance of canon law, it would be presumptuous of a legal specialist from the Protestant side to present to this forum any suggestion for a reconsideration of the principles upon which canon law rests to the end of their adaptation to the Protestant view of things.

Notwithstanding these fundamental divergences, however, there is a range of subjects on which Protestant ecclesiastical and Roman Catholic canonical jurisprudence might usefully engage in closer dialogue. One of them is their respective conceptions of *ius divinum*; a discussion on this might consider what exactly the canon law of the Roman Catholic Church means when it defines particular forms of ecclesiastical organisation as prescribed *iure divino*, and what distinguishes these notions from the

idea, well established in Protestant ecclesiastical law, of the prescribed necessity characterising ecclesiastical office. Another approach to such a discussion of foundational principles, and one which in my view has yet to be explored to its full extent, is the churches' understanding as *communio*. A Protestant point of view might wish to enquire whether the emphasis on *communio* is only something of a euphemism for the dominance of hierarchy or whether it points to more fundamental ecclesiological insights which might reveal convergences with a Protestant sensibility of what 'the church' is.

Protestant ecclesiastical law as it stands finds itself repeatedly tasked, particularly by Protestant theologians, with engagement with issues which appear to me not to belong exclusively to a Protestant context, but which could just as well be, and indeed, as far as I am aware, are being, discussed in the context of the Catholic Church. One example is the matter of human rights in the church. I am not calling for a direct and unquestioning translation of the secular notion of human rights into the church context. Instead, I believe that the idea of human rights requires adaptation and translation into the terms of the Church, its particularities, and its calling. I wish to point out at this juncture that the former chair of the EKD's Council, Wolfgang Huber, attempted to reconstruct the concept of human rights for the Church and deliver a rationale for this endeavour, from which evolved a separate catalogue of fundamental rights for the church context.

Christian Grethlein, a Protestant and a practical theologian, has called for a general redirection of ecclesiastical law to adapt it to today's means of communication. In his view, it is no longer authority, but authenticity that provides the decisive moment in communication about and of religion, and it is not the correctness of religious teachings, whose assurance is incumbent upon the church and its laws, but its 'relevance' that is key. 'Relevance', in this context, is defined as that which attracts the attention of the individual (p. 218).

We might protest at this point that such radical critique loses sight of the many auxiliary tasks which are regulated under ecclesiastical law – frequently bureaucratic in nature, yet nonetheless necessary for the communication of the Gospel. Such duties might include the administration of church buildings or the funding of pastors. Considering this, we might justifiably accuse this critique of stemming from unrealistic, indeed romantic notions of the purposes of ecclesiastical jurisprudence.

Nevertheless, Grethlein and others do direct our attention to weak points in ecclesiastical law and to justified grievances. Ecclesiastical law is a closed book to many, and many consider its very existence as unnecessary. However, such weaknesses and issues may not pertain to Protestantism alone. Authority versus authenticity, bureaucracy versus communication, accuracy versus relevance, human rights in the church context, these all seem to me to be issues and demands that likewise impact the Roman Catholic Church and its canon law. Debating issues such as these, irrespective of all ongoing differences in fundamentals, may give rise to possibilities of communication between the ecclesiastical law of the Protestants and the canon law followed by Catholics.